PROPOSED TENTATIVE

On October 26, 2021, plaintiff Los Olivos Coffee, LLC, filed a complaint against defendants Lowell Lash and Terry Lash for fraud, intentional interference with future economic advantage, and rescission. Briefly, it is alleged that in April 2016, defendants sold to plaintiff a business named "Corner House Coffee LLC," along with its assets (furniture, fixtures, and equipment), as detailed in an asset purchase agreement. It is alleged that defendants deliberately concealed permits, which placed limitations on the business imposed by the County of Santa Barbara, and plaintiff did not discover the "concealments" until 2020. Additionally it is alleged that defendants deliberately interfered with plaintiff's business by informing plaintiff that he could not sell certain items, and by refusing to comply with its obligations under the lease "to redo floors," which impacted plaintiff's business. Defendants filed a joint answer on February 23, 2022. Jury trial is scheduled for January 13, 2025.

On July 12, 2024, plaintiff filed a motion to quash a deposition subpoena for business records, served directly on third-party witness Mr. Michael Sandford, requesting nine categories of documents. Mr. Sandford is an attorney, and he was involved in the April 2016 transaction between the parties, and, apparently after the April 2016 transaction was consummated, represented plaintiff and plaintiff's owner, Mr. Ronald Alex, in various matters, including complications/disagreements arising from the April 2016 transaction. Plaintiff invokes the attorney-client privilege and work product doctrine, asking the court to quash all categories identified in the subpoena. Defendants have filed opposition. Plaintiff filed a reply on July 31, 2024. All briefing has been read.

In order to understand and frame the issues before the court, the court will detail the factual and procedure background, including the arguments advanced by the parties (Section A); outline the relevant legal principles that frame the issues (Section B); and then analyze the merits of the arguments advanced (Section C). The court will then summarize its conclusions and apply them to what generally should and should not be disclosed with regard to the nine categories of documents at issue in the business subpoena. (Section D). The court will conclude with a brief discussion of defendant's request for monetary sanctions. (Section E).

A) Factual and Procedural Background, and Arguments Advanced by the Parties

As relevant for our purposes, on June 27, 2024, defendants issued and served a deposition subpoena for production of business records on the custodian of records at the Law Offices of Michael Sandford, 307 E Carrillo St, Suite C, Santa Barbara. The subpoena required the

custodian of records, on July 23, 2024, to deliver nine categories of documents, as follows: 1) the contents of all your files pertaining to the "Asset Purchase Agreement," the "Lease," and/or the "Transaction"; 2) the entire file pertaining to Mr. Sandford's representation of plaintiff (Including Ron Alex) in any capacity that relates to or arises out of the transaction; 3) all documents and communications that relate to any advice or assistance provided to plaintiff (including Ron Alex) that relates to due diligence performed in advance of the closing of the asset purchase agreement; 4) all documents and communications that relate to any advice or assistance provided to plaintiff (including Ron Alex) that relates to due diligence performed in advance of the execution of the lease; 5) all documents and communications that relate to any disputes between plaintiff and defendants relating to or arising out of the transaction; 6) all documents and communications that relate to any disputes between plaintiff and defendants relating to or arising out of the business including, but not limited to, the permitted uses of the business or premises and the lease; 7) all documents and communications that relate to any advice or assistance that you provided to plaintiff (including Ron Alex) in any capacity regarding or arising out of the transaction; 8) all documents that you obtained from any local or state governmental entity or public agency that relates to the business or premises, including but no limited to, permitting records, zoning records, health department records, land use records, water and sewage records, alleged of sustained complaints/violations, among others; and 9) all communications between you and any local or state government entity or public agency that relates to the business premises.[1] The deposition subpoena is attached as Exhibit 1 to defendant's motion.

Mr. Sandford did not comply with the deposition subpoena, as detailed in his declaration (attached as Exhibit 2 to the motion to quash), as plaintiff on July 12, 2024, filed the present motion to quash the business records subpoena, which stayed the deposition. Mr. Sandford explains in his attached declaration that he has reviewed the subpoena, and declares that in "the 2016 sale of assets transaction, which is the part of the subject matter of this action, at the joint request of Ron Alex and Lowell Lash, I prepared and drafted the 'Asset Purchase Agreement' (hereafter Agreement) for the parties. The essential terms of the Agreement were negotiated between Mr. Lash and Mr. Alex and were communicated to me. I did not participate in the negotiation [of] the essential terms of the Agreement." Mr. Sandford makes it clear that he "did not represent either Ronald M. Alex or Mr. and Mrs. Lash, or either their respective limited liability companies involved in the transaction, as clients. I had previously represented Mr. Alex

[1] The deposition subpoena also contains definitions, inter alia, of the words "action" (meaning this lawsuit); "asset purchase agreement" (referencing the agreement between plaintiff and "Corner House Coffee" owned by defendants); the term "business" (referencing "Corner House Coffee");and the term " lease' (meaning the commercial lease agreement between Los Olivos Investments, LLC and plaintiff). It defines "transaction" as the sale of "Corner House Coffee" and certain assets to plaintiff from defendants. It is clear, given the definitions at issue, that the deposition subpoena is limited to all documents and communications in Mr. Sandford's possession that involve the April 2016 transaction, as well as anything involving the "Corner House Coffee/Cafe" business or the premises located at 2902 San Marcos Avenue, Suite A, Los Olivos.

in several unrelated matters and disclosed such to Mr. Lash. Mr. Lash did not want to have an attorney represent him or his limited liability company in the transaction, so they both agreed, in writing, to waive any conflict that I might have and agreed that I could act as a 'scrivener' only for any Agreement they negotiated outside my presence and without my involvement." That is, Mr. Sandford's involvement was "to draft a purchase agreement based on terms previously negotiated between the parties, without my involvement in any of the negotiations. The essential terms were communicated to me by the parties for the preparation of the Agreement. That document was the only document covered by the waiver of any conflict. After the execution of the Agreement, I did represent Mr. Alex and Los Olivos Coffee LLC in various other unrelated matters."[2]

Mr. Sandford indicates that as "all documents involving written or noting verbal communications between Ronald Alex, as the client and me, as an attorney, I assert the attorney/client privilege for such communications." Notwithstanding this invocation, Mr. Sandford makes it crystal clear in paragraph 9 of his declaration that in response to the deposition subpoena, ". . . I conducted a thorough and diligent [search] for documents and records involved in the 2016 purchase transaction and those described in the [deposition subpoena]. I searched my office and in my firm's closed client files which are in 'off-site' hard storage in two outside storage locations. After this thorough and diligent search, I was not able to locate any hard copy or electronic files or documents for the 2016 purchase transaction which happened approximately eight years ago. I was not able to locate any other documents relating to issues between Los Olivos Coffee LLC and the Lashes thereafter or any of the other documents described in the [deposition subpoena]. Such records may have been destroyed in accordance with or firm['s] destruction practice for destruction of closed client case files not picked up by or delivered to a firm client. Insofar as said transaction files might have been picked up by Ronald Alex or Lowell Lash, which I do not recall happening, such would contain my work product in drafts and notes and I do not believe that such are discoverable." Mr. Sandford goes on in paragraph 11 (which should be paragraph 10): "I am not able to produce any non-privileged records or documents described in the [deposition subpoena], nor am I capable of providing a list of 'privileged documents,' since I have not been able to locate any of the documents requested by the [deposition subpoena]. I am not withholding any files, records, or documents requested in the [deposition subpoena] for the 2016 purchase and sale transaction between the parties."

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[2] Attached as Exhibit E to plaintiff's opposition is the consummated agreement at issue in this lawsuit, entitled the "Agreement and Purchase and Sale of Assets" along with a Schedule 1 (detailing "Corner House Coffee 's Furniture, Fixtures, Equipment and Assets," and Schedule 2 (detailing the percent payments by buyer to seller). The transaction was actually consummated on April 19, 2016, when defendant Lowell Lash signed the agreement (with Mr. Alex signing the agreement on April 18, 2016). Mr. Lash was managing member of Corner House Coffee, LLC, the seller, while Mr. Alex was the managing member of the Los Olivos Coffee, LLC, the buyer.

Plaintiff asks the court to quash the entirety of the deposition subpoena (at least so it appears). Rather than point to any particular document or documents, however, plaintiff vaguely but globally contends that Mr. Sandford's files involving the "Asset Purchase Agreement" are absolutely protected by the work product privilege pursuant to Code of Civil Procedure section 2018.010, subdivision (a), as it contains his impressions, conclusions, opinions or legal research or theories. Plaintiff also vaguely (but also globally) seems to rely on the attorney client privilege contained in Evidence Code section 954, arguing that Mr. Sandford's files contain confidential communications; that is, according to plaintiff, defendants "now seek all of the communications and work product after the execution of [the Asset Purchase Agreement]," and the conflict waiver signed does not govern such disclosure. No privilege log has been provided as to any particular document or any individual written communication.

On July 25, 2024, defendants filed opposition. Attached to the opposition are two declarations – one from Mr. Lash, and one from attorney Kaylen Kadotani, along with Exhibits A to E. Defendants contend initially that Mr. Sandford could not have an attorney-client relationship with plaintiff involving post-April 2016 events because, according to defendants, 1) the parties "retained" Mr. Sandford to assist in preparing the asset purchase agreement in connection with the transaction in the first place, and because defendants did not waive any conflict, it was improper for Mr. Sandford to represent plaintiff/Mr. Alex at any time involving the transaction, meaning any invocation of the attorney-client relationship is improper; and 2) based on the letter agreement in Exhibit A attached to the opposition, signed by the parties, it was "defendants' understanding" that Mr. Sandford "had not and would not separately represent either side of the Transaction in any matter relating to or arising out of the Transaction, including any future disputes that might arise between the parties from the Transaction." In support defendants rely on the letter agreement, and Mr. Lash's declaration about its meaning.[3]

Defendants place the following gloss on these arguments. According to defendants, even if the letter agreement attached as Exhibit A did not explicitly prohibit Mr. Sandford's representation in post-transactions matters, Mr. Sandford "would still be prohibited from taking on [any post-transaction] representation because the relevant facts nevertheless demonstrate that the joint representation of the parties [at the time of the transaction] establishes an attorney-client relationship." That is (according to defendants), despite the letter agreement's limitations (i.e., making Mr. Sandford only a "scrivener"), Mr. Sandford did in fact during the transaction represent both plaintiff and defendants, because "his role was actually far more involved. Mr.

[3] In paragraph 5 of his declaration, Mr. Lash contends that "based on the Letter Agreement [and two particular provisions, located at page 2 and page 4 of the letter agreement] it was my understanding that Mr. Sandford had not and would not separately represent either side of the Transaction in any manner relating to or arising out of the Transaction, including any future disputes that might arise between the parties from the Transaction." In paragraph 6 of his declaration, Mr. Lash declares that despite the "scrivener" designation, Mr. Sandford "also provided essential guidance with respect to the formation of the agreement and supplied overwhelming majority of its terms. . . ."

Sandford did not just memorialize the asset purchase agreement based on the instructions from the parties. Rather. . . , the parties provided just a few of the terms of the tentative sale agreement and Mr. Sandford supplied the overwhelming majority of the terms, conditions, and other provisions in the 25-page written agreement. . . . To characterize Mr. Sandford's role as a mere 'scrivener' is a gross mischaracterization and is clearly being advanced by Plaintiff out of desperation." Because defendants had an attorney-client relationship with Mr. Sandford contemporaneously with the plaintiff, amounting to a joint representation during the representation, "Mr. Sandford was barred by the California Rules of Professional Conduct from representing Plaintiff separately in connection with the post-Transaction disputes identified above, unless Mr. Sandford first obtained an informed written consent, which never occurred. Absent a valid attorney-client relationship, no privilege applies to the documents exchanged between Plaintiff and Mr. Sandford."

Defendants argue alternatively that even if the subject records were privileged, plaintiff has "waived its right to assert it by voluntarily disclosing communications with Mr. Sandford." Specifically, plaintiff "voluntarily disclosed emails between Mr. Alex and Mr. Sandford that relate to post-Transaction disputes between Plaintiff and Defendants, as reflected in the emails in Exhibits C.

Finally, but certainly not insignificantly, defendants attempt to address the import of Mr. Sandford's declaration (detailed above) to the effect that he was not able to locate any documents in his possession that were responsive to the business subpoena declaration. Defendants argue: "As an initial matter, these statements do not impact the legal issues that are being litigated in this motion." In an attempt to divorce the factual context in which the issues arises from the import of the legal question itself, defendants contend that the question before the court "is whether the subject documents and communications are protected from disclosure by the attorney client privilege or work product doctrine, nor whether any responsive records can be located or whether Mr. Sanford has fulfilled his obligations in response to the subpoena. Assuming the court rules on this specific issue in Defendants' favor, then Mr. Sandford will be required to fully respond to the subpoena."

B) Legal Background

A number of disparate legal principles frame how the court will resolve the issues raised by the parties.

A contract must be interpreted so as to give effect to the mutual intent of the parties. (Civ. Code § 1636.) The terms of a contract are determined by objective rather than by subjective criteria. The question is what the parties' objective manifestations of agreement or objective expressions of intent would lead a reasonable person to believe. (See, e.g., *Meyer v. Benko* (1976) 55 Cal.App.3d 937, 942–943; *Winograd v. American Broadcasting Co.* (1998) 68

Cal.App.4th 624, 632; *Tufeld Corporation v. Beverly Hills Gateway, L.P.* (2022) 86 Cal.App.5th 12, 30 [a fundamental rule of contract formation and interpretation is that the terms of a contract are determined by the parties' objective manifestations of consent].) The court will apply these rules when interpreting the agreements at issue.

The party claiming the attorney-client privilege or work product protection (that would be plaintiff, as evidenced by the motion to quash) has the burden of establishing the preliminary facts necessary to support their exercise, i.e., a communication made in the course of an attorney-client relationship. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.) Once that party establishes the facts necessary to support a prima facie claim of privilege, the communication is presumed to have been made in confidence and the opponent has the burden of proof to establish the communication was not confidential or that the privilege does not for other reasons apply. (*Ibid.*) The question of whether an attorney-client relationship exists is one of law, although when the evidence is conflicting, the factual basis for the determination must be determined before the legal question is addressed. (*Wood v. Superior Court of San Diego County* (2020) 46 Cal.App.4th 562, 580.) It is clear under existing precedent that the attorney client relationship does not exist "whenever a person speaks with a lawyer about a legal matter." (*Id*. at p. 581.) ". . . To be a client for purposes of the privilege, a person must "consult [] a lawyer for the purpose of retaining the lawyer or securing legal service or advice from him [or her] in his [or her] professional capacity . . . ." (Evid. Code, § 951.) In *People v. Gionis* (1995) 9 Cal.4th 1196, our high court considered whether the attorney-client privilege covered statements made by defendant to a lawyer after the lawyer expressly told defendant he would not represent him. (*Id.* at p. 1209.) Although the Supreme Court in *Gionis* did not announce "a bright-line rule that *any* communication made after an attorney's refusal of representation is unprivileged as a matter of law," it was nonetheless persuaded "that a person could have no reasonable expectation of being represented by an attorney after the attorney's explicit refusal to undertake representation. [Citation.] Moreover, evidence of an attorney's express refusal of representation may give rise to a reasonable inference that, in continuing to speak to the attorney, the person is not thereafter consulting with the attorney for advice 'in his professional capacity.' " (*Id.* at p. 1211, italics in original; *Wood, supra*, at p. 813 [the fact the DFEH has consistently disclosed representation strongly weighs against finding of an attorney-client relationship here]; see also *Costco*, *supra*, 47 Cal.4th 725, 733; *id.* at p. 735 ["privilege is not applicable when the attorney acts merely as a negotiator for the client or is providing business advice"].)

When a responding party objects to the production of documents the responding party must (1) "[i]dentify with particularity any document, tangible thing, land, or electronically stored information falling within any category of item in the demand to which an objection is being made"; and (2) "[s]et forth clearly the extent of, and the specific ground for, the objection. If an objection is based on a claim of privilege, the particular privilege invoked shall be stated." (Code Civ. Proc., § 2031.240, subd. (b); *Catalina Island Yacht Club v. Superior Court* (2015) 242 Cal.App.4th 1116, 1125.) Privilege logs have long been used by practitioners to list and describe

items to be protected, and pursuant to Code of Civil Procedures section 2031.240, subdivision (c)(1) and (2), if an objection is based on a claim of attorney-client privilege or protected work product, "the response shall provide sufficient factual information for other parties to evaluate the merits of that claim, including, if necessary, a privilege log." In this subdivision, the Legislature declared the "intent of the Legislature to codify the concept of privilege log as that term is used in California case law."[4] Failing to serve a privilege log does not amount a waiver of any privilege or protection, however. (*Catalina Island Yacht Club, supra,* 242 Cal.App.4th at p. 1116, 1126, 1127 [trial court does not have authority to order the objection waived even if there is a failure to provide a privilege log].) That being said, if the response fails to provide sufficient information to allow the trial court to rule on the merits of the privilege or protected work product doctrine objections, the court may order a responding party to provide further responses by serving a privilege log, and in ordering a further response, the trial court may impose monetary sanctions on the responding party if that party lacked substantial justification for providing its deficient response. (*Id*. at pp. 1127-1128.)

Finally, California courts decide only justiciable controversies. The concept of justiciability is a tenet of common law jurisprudence and embodies the principle that courts will not entertain an action that is not founded on an actual controversy, which involves the intertwined criteria of ripeness and standing. A controversy is "ripe" when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made." But "ripeness is not a static state" (*Consumer Cause, Inc. v. Johnson & Johnson* (2005) 132 Cal.App.4th 1175, 1183), and a case that presents a true controversy at its inception becomes moot " 'if before decision it has, through act of the parties or other cause, occurring after the commencement of the action, lost that essential character' " (*Wilson v. L.A. County Civil Service Com.* (1952) 112 Cal.App.2d 450, 453.) The ripeness element of the doctrine of justiciability is intended to prevent courts from issuing purely advisory opinions. It is "primarily bottomed on the recognition that judicial decision-making is best conducted in the ***context of an actual set of facts*** so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy." (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573, emphasis added.) As a general matter, there is "little to recommend an attempted adjudication of the propriety of unpropounded discovery. [] [T]his is because in the typical suit, no one can know that he is a

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[4] **"**A privilege log must identify with particularity each document the responding party claims is protected from disclosure by a privilege and provide sufficient factual information for the propounding party and court to evaluate whether the claim has merit." (*Catalina, supra,* 242 Cal.App.4th at p. 1130citing Code Civ. Proc., § 2031.240, subds. (b) & (c); *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 130.) That is, to be sufficient, a privilege log should ordinarily spell out (1) "the identity and capacity of all individuals who authored, sent, or received each allegedly privileged document," (2) "the document's date," (3) "a brief description of the document and its contents or subject matter sufficient to determine whether the privilege applies," and (4) "the precise privilege or protection asserted." (*Catalina Island*, supra, at p. 1130.)

target of discovery, or the tenor of such discovery, until it is actually propounded. This flows from the fact that discovery is ordinarily served without leave of court. [] . . ." (*O'Grady v Superior Court* (2006) 139 Cal.App.4th 1423, 1253-1454.)

C) Merits

With these legal principles in mind, the court makes the following conclusions.

Initially, the court rejects plaintiff's claim, made in reply, that it should reject defendant's opposition because it was late. True, defendant was required to submit opposition nine court days before the hearing, and excluding the day of the hearing, it had to be submitted by July 24, 2024; the opposition was submitted on July 25, 2024. As plaintiff has not shown any prejudice, the court will excuse the tardy filing and consider the opposition.

Further, the court rejects defendants' claim that it is irrelevant to the present inquiry (i.e., the motion to quash) that Mr. Sandford, for both privileged and/or nonprivileged documents concerning the "2016 purchase transactions" was "not able to locate any documents relating to issues between [the parties], ***thereafter or any other documents described in the [business subpoena]***.. . . ." ***If*** it is true that Mr. Sandford has ***no*** documents that are responsive to any way to the nine categories of documents requested in the subpoena, any ruling on the existence, impact, scope and/or import of the attorney-client relationship at issue would be premature and thus unripe for resolution. The court should not be seen making legal rulings unmoored to relevant facts, for such a ruling would be advisory only. The problem, however, is that Mr. Sandford's declaration is decidedly unclear about what files exist and what documents he possesses. For example, Mr. Sandford declares that the deposition subpoena "requests production of documents involving Ronald M. Alex ***in other matters related*** to Los Olivos Coffee, LLC, not only the 2016 transaction as described in the [business subpoena]." This suggests that he does possess information that may be responsive to the deposition subpoena, for he may possess documents generated during his representation of plaintiff and Mr. Alex in post-transactions matters. This ambiguity requires the court to address the merits of critical issues raised by the parties.

On the merits, plaintiff's motion to quash is facially deficient, for plaintiff has failed to identify *specific documents*, with an accompanying privilege log as required by statute (see, e.g., fn. 4, *ante*), which requires specific documents/communications to be identified as privileged. Plaintiff instead asks the court for global resolution, untethered to specific documents/communications, claiming essentially that all documents possessed and communications made by Mr. Sandford as an attorney are confidential and/or protected work doctrine simply because the documents/communications are in his possession. That is not the rule. Obtaining sufficient information – including a description of the documents in a privilege log as detailed in footnote 4, *ante*– is critical because "not all communications with an attorney

are privileged. Instead, the attorney-client privilege attaches only to confidential communication made in the course of or for the purpose of facilitating the attorney client relationship. (*Catalina, supra,* 242 Cal.App.4th at p. 1129, fn. 5.) "For example, the privilege is not applicable when the attorney acts merely as a negotiator for the client or is providing business advice [citation]; in that case, the relationship between the parties to the communication is not one of attorney-client." (*Costco*, *supra*, 47 Cal.4th at p. 735; see also *Behunin v. Superior Court* (2017) 9 Cal.App.5th 833, 843 [explaining the statutory definition of "confidential communication" pursuant to Evid Code, 952, as condition precedent to invocation of privilege].)

Put another way, specifics, not generalities, are required, as plaintiff in this context has the burden to provide preliminary facts justifying application of the attorney-client privilege and protected work doctrine to specific disclosures, through a privilege log. (*Costco, supra,* 47 Cal.4th at p. 733; see *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 911-912 [a party asserting both attorney client privilege and work product protection must prove the preliminary facts to show the privilege/protection applies].) As noted by our high court in *Coito v. Superior Court* (2012) 54 Cal.4th 480, courts begin with the general rule that a discovery response should be answered; however, when the objector indicates that answering or disclosing will reveal a privileged communication, the objector must make a preliminary or foundational showing that the answer reveals the privilege. "Upon such a showing, the trial court should then determine, by making an in camera inspection if necessary," and if appropriate, whether the privilege applies].) (*Id*. at p. 502.) This showing has not been made.

Even with this deficiency, the court must nevertheless address arguments advanced by defendants in opposition in order to frame the issues and allow future resolution. As noted, defendants contend that no attorney-client privilege or work product protection is available to any documents/communications in Mr. Sandford's possession because, in defendants' view, 1) the parties jointly retained Mr. Sandford in his professional capacity as an attorney in connection with the asset purchase agreement (i.e., the consummated transaction in April 2016), despite the letter agreement in Exhibit A of defendant's opposition; and in any event; and 2) despite the letter agreement, Mr. Sandford's *conduct* in the transaction showed he nevertheless represented both parties during the transaction that was consummated on April 19, 2016. The argument seems to be that because there ***was*** an attorney-client relationship between the parties and Mr. Sandford as to the April 2016 transaction, and because Mr. Sandford did not obtain a waiver of any conflict thereafter for future purposes, it was improper for Mr. Sandford to represent plaintiff in matters after the April transaction, but involving disputes about the transaction, meaning all documents in Mr. Sandford's possession must be disclosed, as no attorney client relationship could exist as a matter of law. These arguments are underscored, according to defendants, by the fact the letter agreement itself precluded Mr. Sandford from representing plaintiff at any time ***after*** the April 2016 transaction unless defendants waived any protection, a waiver which was never given.

The court rejects defendants' contention that Mr. Sandford had an attorney-client relationship with any party (i.e., sufficient to trigger protection under the attorney client privilege or work product protection) before or during the April 2016 transaction (i.e., sale of the assets at issue in this lawsuit (in association with the consummation of the asset purchase agreement)). The letter agreement authored by Mr. Sandford, and sent to and signed by both parties on April 5, 2016, attached as Exhibit A to Kaylen Kadotani's declaration, ***could not be clearer about the topic*** – Mr., Sandford was ***not*** representing any party in his professional capacity as an attorney as to the negotiations, sale, and/or consummation of the asset purchase agreement. The letter agreement clearly indicates that Mr. Sandford was hired only as a "scrivener" in order to draft and create documents required for the sale of the personal property assets of Corner House Coffee, LLC to Los Olivos Coffee, LLC. For this purpose the letter agreement reads in relevant part as follows: "Attorneys have not been separately retained for this matter by either party hereto and have not participated in the negotiation for the provisions, terms, and conditions of the purchase agreement and related documents. Attorneys have not represented, and are not representing, any party named herein as a client in such negotiations and discussions. The participation of Attorneys in this transaction is, and has been, limited to preparation of the purchase agreement and related documents for the parties based on the terms and provisions negotiated by and agreed upon between the parties by themselves and thereafter communicated to Attorneys. Each party hereto specifically acknowledges and agrees that (a) neither of them have obtained or relied on any advice or counsel of Attorneys in the captioned transaction (b) Attorneys have not provided or given any party hereto any advice regarding the tax effects or consequences arising or resulting from the captioned transaction or the purchase and sale of the assets which are subject of the referenced transaction and (c) each party has been advised by Attorneys that they should seek the advice of their own independent accountant or other professional regarding the tax effects and consequences arising or resulting from the referenced transaction." Lest there be any doubt, in the "Consent to Limited Representation/Waiver of Conflict of Interest" portion of the letter agreement, the parties acknowledged the "limited role of Attorneys [including Mr. Sandford] in the subject transaction" and each party has acknowledged the "limited roles of Attorneys in the subject transaction . . . ."

The law provides guidance in this situation. "Significantly, a communication is not privileged, even though it may involve a legal matter, if it has no relation to any professional relationship of the attorney with the client. [Citation.] Moreover, it is not enough that the client seek advice from an attorney; such advice must be sought from the attorney 'in his professional capacity.' ([Evid. Code,] § 951.)" (*Gionis, supra,* 9 Cal.4th at p. 1210; *League of California Cities v. Superior Court* (2015) 241 Cal.App.4th 976, 989; see also W*ood, supra,* 46 Cal.App.5th at p. 576.) Our high court's observations appear particularly apt in the present context: "Although we are not convinced that the Evidence Code in California requires the adoption of a bright-line rule that any communication made after an attorney's refusal of representation is unprivileged as a matter of law, nonetheless we are persuaded that a person could have no reasonable expectation of being represented by an attorney after the attorney's explicit refusal to

undertake representation." (*Gionis, supra*, 9 Cal.4th at p. 1211.) Defendants could have had *no reasonable expectation* (based on the objective test per *Gionis*) that Mr. Sandford would represent them as an attorney after they were expressly told in no uncertain terms that Mr. Sandford was not representing anyone in the transaction in his professional capacity.

This conclusion does not change based on defendants' efforts to demonstrate, despite the import of the letter agreement above, that an attorney-client relationship was nevertheless established because Mr. Sandford "did not just retype the parties agreement as a 'scrivener.' Rather, Mr. Sandford also provided essential guidance with respect to the formation of the agreement and supplied the majority of its terms . . ." (See Opp., at p. 5, relying on Mr. Lash's declaration at ¶¶ 6, and 7.) Again, *Gionis* is controlling. "Moreover, evidence of an attorney's express refusal of representation may give rise to a reasonable inference that, ***in continuing to speak to any attorney***, ***the person is not thereafter consulting with the attorney for advice 'in his professional capacity***.'" (*Gionis, supra*, 9 Cal.4th at p. 1211, emphasis added.) While the court agrees with Mr. Lash's observation in his declaration that Mr. Sandford may have been more than a "scrivener," the evidence presented fails to show that Mr. Lash (or Mr. Alex) could have reasonably expected that Mr. Sandford was acting *in his professional capacity as an attorney* despite any continuing consultations. The evidence before the court shows at best that while Mr. Sandford was consulted, he was not consulted ***in his professional capacity as an attorney***, which is the critical test. (*Wood, supra*, 46 Cal.App.5th at p. 582 [the fact the attorney has consistently disclosed presentation strongly weights against the finding of an attorney-client relationship].)

Nor is the court persuaded by defendants' claim that defendants could reasonably think the letter agreement itself precluded Mr. Sandford from representing plaintiff/Mr. Alex in a post-transaction setting, even should disputes about the transaction arise thereafter.[5] Defendants' contention rests on two provisions contained in the latter agreement, noted above in Section (A) of this order, and Mr. Lash's conclusory contention in paragraph 5 of his declaration, based on the letter agreement, that "it was my understanding that Mr. Sandford had not and would not separately represent either side of the Transaction in any matter relating to or arising out of the Transaction, including any future disputes that might arise between the parties from the Transaction." The letter agreement, however, when viewed objectively, does not support Mr. Lash's subjective interpretation.

First, the letter agreement makes it clear that Mr. Sandford and Mr. Alex had a prior attorney-client relationship ***before*** the sale of the business at issue. The letter advises that Mr.

[5] The court wishes to make it clear that it is not addressing the wisdom of Mr. Sandford's representation in this context, or the ethics involved. The court is focused solely on the legal arguments raised by the parties, and whether there is anything in the letter agreement that would preclude Mr. Sandford from acting in his professional capacity as an attorney after the consummation of the April 2016 transaction.

Sandford "previously assisted and represented Mr. Ronald Alex and members of his family in various legal and business matters," although he never appeared "of record in any judicial proceedings for Ronald M. Alex or Los Olivos Coffee, LLC as parties to any legal action." This is suggestive that Mr. Sandford represented Mr. Alex with regard to his business enterprise Los Olivos Coffee, Inc., in the past.

Perhaps more significantly, the language in the letter agreement does not necessarily show defendants could ***objectively*** think Mr. Sandford was precluded from representing Mr. Alex in the future (even if about post transactions problems). As noted, defendants points to two provisions of the letter agreement to support this claim, as follows: "Except as disclosed herein, Attorneys have not represented, and ***are not representing***, any of the entities named herein or any of the persons named herein, as individuals, ***in this matter***"; and Mr. Sandford "***is not representing*** any of the undersigned as individual clients ***in the referenced transaction*** or in any other matter relating to the subject matter ***of this consent***." (Emphasis added.)

First, the terms "in this matter" and "in the referenced transaction" are used frequently in the letter agreement. The letter agreement indicates 1) that Mr. Sandford has "not been separately retained ***for this matter*** . . . ."; 2) that the parties are advised that Mr. Sandford involvement "***in this transaction*** is limited"; 3) that the parties acknowledge Mr. Sandford's "limited involvement" "***in the subject transaction***"; and 4) that the "referenced transaction" means the sale "of the personal property assets of Corner House Coffee, LLC to Los Olivos Coffee, LLC." These highlighted terms, both individually and collectively, put a durational limit on Mr. Sandford's limited involvement – suggesting a more robust representation was not precluded after consummation of the transaction itself.

This durational limitation interpretation is supported by use of the present continuous tense (or present progressive tense). The letter agreement indicates that Mr. Sandford or other attorneys either "***is not representing***" or "***are not representing***" any of the parties here or any of the persons named herein, as individuals "in this matter"; the highlighted language reflects the present continuous tense, which is intended to describe something *that is taking place at the present moment, happening now, at the moment.* (https://dictionary.cambridge.org/grammar/british-grammar/present-continuous-i-am-working ["We use the present continuous to talk about events which are in progress at the moment of speaking"]; https://www.thesaurus.com/e/grammar/present-continuous-tense/ ["We often use the present continuous tense to refer to temporary states or actions'].) The language involving the durational limitations, coupled with the use of the present continuous tense, does not suggest the letter agreement was intended to preclude Mr. Sandford from representing either party in the future, after the 2016 April transaction was consummated, but only now, at the moment – limited to the April 2016 transaction itself.

Three additional points bolster this interpretation. First, what defendants are essentially arguing is that the letter agreement amounted to a future limitation on either party's right to choose Mr. Sandford as counsel in the future, which amounts to a future disqualification of Mr. Sandford. No doubt trial courts in civil cases have the power to order disqualification of an attorney, but that power requires "a cautious balancing" of competing interests – weighing the combined effect of a party's right to choose counsel of choice, an attorney's interest in representing a client, and any tactical abuse underlying a disqualification proceeding against the fundamental principle that the fair resolution of disputes within our adversary system requires vigorous representation by parties by independent counsel unencumbered by conflicts. (*William H. Raley Co. v. Superior Court* (1983) 149 Cal.App.3d 1042, 1048; see also *Mills Land & Water Co. v. Golden West (*1986) 186 Cal.App.3d 116, 126.) To predicate a waiver of a fundamental right to counsel of choice on such amorphous and tenuous language as that contained in the letter agreement fails to acknowledge the fundamental right of civil litigants to choose the counsel they want.

A second point reinforces this. The court would not hesitate to conclude that Mr. Sandford was barred from representing plaintiff/Mr. Alex after the transaction at issue had been consummated (i.e., he would be disqualified) *if* there was evidence that he simultaneously represented both parties here with adverse interests. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 284.) But as noted above, there is no evidence -- and thus no indication -- that Mr. Sandford was representing the two parties before or during the consummation of the asset purchase agreement in April 2016, or that Mr. Sandford came into possession of confidential information during that time that would harm defendants if he represented plaintiff after the transaction was consummated. Indeed, mere knowledge of how a general business practice works or what litigation philosophy is adopted (as would have been gleaned from his interaction with the parties in April 2016) is an insufficient basis for a court to disqualify counsel -- and thus, preclude a party's choice of counsel. (*Banning Ranch Conservancy v. Superior Cour*t (2011) 193 Cal.App.4th 903, 918.).

And the third point punctuates the inquiry. It is important not to lose sight of the forest for the trees here. Defendants are essentially asking the court to allow wholesale disclosure of all communications between plaintiff (through Mr. Alex) and Mr. Sandford, even though Mr. Alex may have at times reasonably believed that Mr. Sandford was acting as his attorney of record, as noted above. When a client engages the services of a lawyer in a given piece of business, the client is entitled to feel that, until that business is finally disposed of in some manner, he has the undivided loyalty of the one upon whom he looks as his advocate. (*Flatt, supra*, 9 Cal.4th at p. 286.) Under the circumstances, it would seem to give defendants an undue advantage to allow them to peek into the otherwise privileged/protected communications between plaintiff and Mr. Sandford, when there has been no violation of any right of representation, determination of any conflict of interest, disclosure of any privileged information,

or an infringement of any duty of loyalty, involving defendants. The remedy defendants seek -- *wholesale disclosure* -- is not justified by alleged predicate violations claimed. Defendants have not presented evidence that the fairness or integrity of the proceeding before the court is in any meaningful way compromised, or that they will suffer any prejudice, should the court recognize an attorney-client relationship in post-April 2016 transactions. (See *People v. Jones* (2001) 33 Cal.4th 234, 240.) On the circumstances presented, equity favors recognition of an attorney-client relationship.

For these reasons, the court finds the letter agreement did not preclude Mr. Sandford from representing plaintiff after the April 2016 transaction was consummated.

Finally, defendants argue conclusorily (in two one sentence paragraphs on p. 12 of the opposition) that even if some of the records in Mr. Sandford's possession are privileged (and the argument seems to be directed at Mr. Sandford's post-transaction representations of plaintiff), any privilege was waived because plaintiff disclosed a privileged communication during discovery – contained in Exhibit C of the opposition, which consists of "emails between Mr. Alex and Mr. Sandford that relate to the post-Transaction disputes between [the] parties'." Exhibit C is a single page email, dated April 30, 2021, from Mr. Sandford to Mr. Alex, with a "CC" to Deborah Sczudio and a letter attachment with enclosures (a draft letter).[6] Defendants rely on Evidence Code section 912, which provides that a waiver requires "a significant part of the communication," meaning the mere disclosure of the existence of an attorney client relationship does not reveal a significant part of the communication and does not constitute a waiver. (*Fish v. Superior Court* (2019) 42 Cal.App.5th 811, 818.) "What constitutes a significant part of the communication is a matter of judicial interpretation; however, the scope of the waiver should be determined primarily by reference to the purpose of the privilege." (*Transamerica Title Ins. Co. v. Superior Court* (1987) 188 Cal.App.3d 1047; *Fish, supra*, at p. 819.) The attorney-client privilege may be waived, but only by the holder of the privilege, which is the client. (*DP Phan, LLC v. Cheadle* (2016) 246 Cal.App.4th 653, 668.) The attorney is the holder of the work product protection. (*Citizens for Ceres, supra*, 217 Cal.App.4th at p. 911.)

The waiver rule has no application to any part of any file in which Mr. Sandford can claim the work product privilege, as there is no indication, as the holder of that privilege, he waived it. As for the attorney-client privilege, which is held by Mr. Alex and plaintiff, once there are preliminary facts to show an attorney-client relationship with Mr. Sandford, with an appropriate invocation of the privilege, the burden shifts to the opponent to establish waiver. (*DP Phan, LLC, supra*, at pp. 256-600.) The court is not told much about the emails in Exhibit C and how they were disclosed, notably whether any disclosures were inadvertent, and whether the email disclosures constitute a significant portion of the communication. The court in reality can

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[6] The email instruction by Mr. Sandford, addressed to Mr. Alex, reads as follows: "Final of letter with enclosures to attorney for your review and signature. Please review for any changes. If ok, you will need to print it out, sign, scan all pages and send to attorney via email and US Mail (a hard copy) to her. Please send a copy of the signed letter with enclosures to Lash and give me a copy Monday while I am putting."

only make such a determination in the context of a privilege log, after plaintiff in the first instance identifies which documents/communications are protected, and which are not.

D) Summary of Court's Conclusions, How They Apply to the Nine Categories Contained In the Deposition Subpoena, and What Should Occur Next

In summary, the court concludes that Mr. Sandford's declaration is sufficiently ambiguous as to what documents/communications he possesses or does not possess to require the court to address some of the critical issues presented by the parties.

In this regard, the court concludes that plaintiff's motion to quash is deficient, as plaintiff has failed to provide a privilege log (and thus failed to present any preliminary facts to support an attorney client relationship in order to invoke the attorney-client privilege and work product production). Specifics, not generalities, are required, and a privilege log will have to be submitted if the motion to quash is to go forward on the merits.

Further, the court rejects defendants' claims that there was an attorney-client relationship between Mr. Sandford and the parties (notably the defendants) with regard to the consummation of the asset purchase agreement in April 2016, either based on the letter agreement or based on the fact the parties continued to speak to Mr. Sandford despite the clear import of the letter agreement.

The court also rejects defendants' claim that the language of the letter agreement precluded plaintiff from seeking Mr. Sandford's professional representation as an attorney after the asset purchase agreement was consummated, underscored by the fact that 1) defendants are in reality asking the court to disqualify Mr. Sandford, impacting a party's right to a counsel of choice, which should not be predicated on such tenuous contractual language as here; 2) there is no conflict involving Mr. Lash, as Mr. Sandford did not have an attorney-client relationship with him in Mr. Sandford's professional capacity as an attorney at any time; and in the end 3) notions of fundamental fairness suggest the court should protect any attorney-client relationship between Mr. Sandford and Mr. Alex, if one exists, for to do so would not prejudice defendants (for in doing the opposite defendants would appear to receive an undue advantage).

Further, assuming for the sake of argument that there is an attorney-client relationship between Mr. Sandford and plaintiff that arose after the consummation of the asset purchase agreement, the court finds there was no waiver of work-product protections, should they exist, as Mr. Sandford holds the privilege, and there is no indication he intentionally waived them. As for the attorney-client privilege, the court will have to see the preliminary fact determinations made by plaintiff in a privilege log, applied to specific documents, before it can determine whether the attorney-client privilege was waived, meaning any determination about waiver at this time is premature.

In the end, this means that everything in Mr. Sandford's possession (***if*** there is anything in his possession) that involved the consummation of the asset purchase agreement itself is not

privileged or protected, and should be disclosed; and if an attorney-client relationship existed between plaintiff and Mr. Sandford *after* the consummation of the asset purchase agreement, plaintiff will have to provide a privilege log, and present preliminary facts about the attorney-client relationship, and identify any specific documents/communications that are protected by a specific privilege, based on the rules noted above, with defendants being afforded the opportunity to contest each invocation, including claims of waiver, on a document by document basis.

These conclusions apply to each of the nine categories in the deposition subpoena as follows:

- To the extent the first through ninth categories in the subpoena implicate all communications involving the asset purchase agreement and Mr. Sandford's nonattorney work (i.e., work not involving his professional capacity as an attorney), the communications/files/documents are not subject to an attorney/client, work product protections. ***If*** Mr. Sandford has these communications, files, or documents, they should be disclosed.
- To the extent the first through ninth categories in the business subpoena implicate an attorney-client relationship between Mr. Sandford and plaintiff that existed ***after*** the consummation of the asset purchase agreement, plaintiff has the opportunity to invoke the attorney-client and work product privilege, *but only if a privilege log is submitted*. The privilege log must indicate: 1) when Mr. Sandford represented plaintiff after the consummated transaction of April 19, 2016; 2) the scope and reason for the representation; 3) any particular documents/communications that should not be disclosed, including the document's date, the identity and capacity of all individuals who authored, sent or received each privileged document/communication; 4) a brief description of the document and its contents or subject matter sufficient to determine if the privilege applies; and 5) what privilege is invoked (i.e. , the attorney client privilege per Evidence Code section 954, the absolute work product privilege pursuant Code of Civil Procedure section 2018.030(a)), or the qualified work product privilege per Code of Civil Procedure section 2018.030(b)). Defendants can then file opposition challenging the invocation, including waiver, and a reply can be submitted.
- The court will therefore continue the motion to quash, set a new hearing date, with a new briefing schedule, with these directives in mind. The parties should come prepared to discuss at the August 7 hearing how long it will take to craft and submit a privilege log, and how long it will take defendants to oppose, and how long it will take plaintiff's to submit a reply. All documents must be submitted within a reasonable time before the new hearing date in order to give the court a meaningful time for review, including the ability (*if appropriate*) to review the documents *in camera*. Of course, if the parties, given the court's rulings today, can resolve the

discovery disputes ***without*** further court intervention, all the better, and no doubt that is strongly encouraged. The parties should come to the hearing prepared to discuss.

- The parties are directed to appear either personally or by Zoom.

E) Monetary Sanctions

Defendants ask for monetary sanctions against plaintiff because, in defendants' view, the motion was made in bad faith and without substantial justification. The court will not make such a determination at this time, for it would be premature. Suffice it to say, however, that while the motion as presented is deficient, as it has failed to provide a privilege log, to the extent the court has determined that there was no attorney-client relationship between Mr. Lash and Mr. Sandford at any time, and that the letter agreement is an insufficient basis to preclude Mr. Sandford's representation of plaintiff in matters arising after the consummation of the asset purchase agreement (even involving the transaction at issue), it seems unlikely the court will determine the motion was made in bad faith and/or without substantial justification.