

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

-----X

FOX NEWS NETWORK, LLC,

Index No. _____

Plaintiff,

v.

ABBY GROSSBERG,

Defendant.

-----X

**MEMORANDUM OF LAW IN
SUPPORT OF EMERGENCY
APPLICATION FOR TRO AND
PRELIMINARY INJUNCTION**

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Fox News Network, LLC (“Fox News”), by and through its attorneys, Baker McKenzie LLC, respectfully submits this Memorandum of Law in support of its emergency application for a temporary restraining order and a preliminary injunction pursuant to [CPLR § 6301 et seq.](#) prohibiting Abby Grossberg (“Defendant”) and her counsel from disclosing Fox News’ privileged information, including in any public filing. If Ms. Grossberg and her counsel are not enjoined, Fox News will suffer immediate irreparable harm and, therefore, Fox News asks that the Court issue the requested injunctive relief.

PRELIMINARY STATEMENT AND FACTUAL BACKGROUND

Ms. Grossberg intends to file publicly privileged and confidential information belonging to Fox News without Fox News’ consent, which gives rise to this request for emergency relief. The information that is the subject of this request relates to a lawsuit filed against Fox News by a third party (the “Unrelated Lawsuit”). Defendant has never been a party to the Unrelated Lawsuit. However, in that lawsuit, Ms. Grossberg, who first worked for Fox News on a weekend morning show, served as a fact witness because of her role as a Fox News employee. Ms. Grossberg was deposed in the Unrelated Lawsuit in the Fall of 2022.

Before her deposition, Ms. Grossberg met with inside and outside counsel for Fox News on at least three separate occasions to provide Fox News’ attorneys with information to assist in their provision of legal advice to Fox News and their defense of the case, as well as to prepare for Ms. Grossberg’s deposition. (Affidavit of Paul Salvaty in Support of Emergency Application For TRO and Preliminary Injunction (“Salvaty Aff.”) ¶ 5.) These sessions were aimed at further developing a legal strategy and defense to the claims alleged against Fox News in the Unrelated Lawsuit and ultimately providing Fox News with legal advice. (*Id.* ¶ 6.) During these sessions, Defendant and Fox News’ attorneys discussed a variety of topics relating to case strategy as well

as topics specific to Defendant's deposition. At no time, did Fox News' inside or outside attorneys represent Ms. Grossberg in her individual capacity. (*Id.* ¶ 7.) In fact, from the outset and periodically throughout these meetings, Fox News' attorneys explicitly advised Ms. Grossberg that they represented Fox News and not her in her individual capacity. (*Id.* ¶ 7.) They also explained that the sessions were subject to the attorney-client privilege and must be kept confidential. (*Id.* ¶ 7.)

Shortly before her deposition, Ms. Grossberg joined a weekday show as Head of Booking. Unlike her prior role, which aired for one hour a week on a weekend morning, the new show airs 5-days a week in prime time and covers a wide range of topics requiring a diverse set of guests. Unfortunately, Ms. Grossberg quickly proved unable to perform adequately in her larger role on the new show. Although management of the new show supported Ms. Grossberg and took steps to help her improve her performance, she continued to fall short of expectations. As a result, in early January 2023, management, in consultation with Fox News Human Resources, issued Ms. Grossberg a written warning, formally putting her on notice that she was failing to meet the requirements of her position. Ms. Grossberg's immediate response was to raise for the first time what proved to be unmeritorious complaints that she was subjected to discrimination in the workplace.

Five months after her deposition, on February 17, 2023, Parisi G. Filippatos, Esq. wrote to Fox News' senior management on behalf of Ms. Grossberg, threatening to assert employment-based discrimination and retaliation claims on behalf of Ms. Grossberg against Fox News. The letter did not stop there, however. (Affirmation of Krissy Katzenstein in Support of Emergency Application For TRO and Preliminary Injunction ("Katzenstein Aff.") ¶ 6.) In a transparent attempt to gain leverage over Fox News in connection with her employment claims, it went on to

describe the meetings Ms. Grossberg had with Fox News' attorneys in the Unrelated Lawsuit, making it clear that Ms. Grossberg had divulged Fox News' attorney-client privileged information to her attorney without Fox News' consent. (*Id.*)

Shortly thereafter, Mr. Filippatos provided Fox News with a draft complaint that he said he intended to file on behalf of Ms. Grossberg, captioned in the New York Supreme Court. (*Id.* ¶ 7.) Expanding on his earlier letter, the draft complaint details over 6 pages the meetings between Ms. Grossberg and inside and outside counsel for Fox News, going so far as to include alleged quotations attributed to Fox News' lawyers and Ms. Grossberg during those meetings. (*Id.*) As a Fox News' employee, Ms. Grossberg was an agent of the Company acting as such during those meetings and the communications during those meetings are subject to the attorney-client privilege held by Fox News. Furthermore, the Unrelated Lawsuit is in active litigation and the information from those meetings is also subject to the work-product doctrine and protected as material prepared for trial.

On March 10, 2023, counsel for Fox News sent Ms. Grossberg's counsel a letter, putting Ms. Grossberg on notice that portions of her draft complaint contain Fox News' privileged and confidential information and demanding that Ms. Grossberg not disclose any such information, including in any complaint that she intends to file against Fox News. (*Id.* ¶ 8.) On March 13, 2023, Ms. Grossberg's counsel informed counsel for Fox News that she does not believe the information is privileged and intends to file publicly a complaint containing this information. (*Id.* ¶ 9.) On March 18, 2023, Ms. Grossberg's counsel again reiterated that Ms. Grossberg does not view the communications between herself and Fox News' counsel as protected by Fox News' attorney client privilege. (*Id.* ¶ 10.) On March 20, 2023, counsel for Defendant provided Fox News with two draft complaints, one captioned for filing in the Southern District of New York,

which is a revised version of the original draft complaint, and the second captioned for filing in the Superior Court for the State of Delaware. Both draft complaints continue to include Fox News' privileged information. Therefore, Fox News files this motion to seek injunctive relief prohibiting Ms. Grossberg and her attorney from publicly disclosing information related to its meetings with Ms. Grossberg.

ARGUMENT

I. Legal Standard for Issuance of a Temporary Restraining Order and a Preliminary Injunction.

A movant is entitled to preliminary injunctive relief under New York Civil Practice Law and Rules ("CPLR") § 6301 when a party "threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the [moving party's] rights respecting the subject of the action, and tending to render the judgment ineffectual . . ." [CPLR § 6301](#). Movants requesting a preliminary injunction "must show a likelihood of success on the merits, the possibility of irreparable harm in the absence of a preliminary injunction, and that the balance of equities favors the movant." [Wilder v. Fresenius Med. Care Holdings, Inc.](#), 175 A.D.3d 406, 409 (N.Y. App. Div. 2019). Furthermore, should this court find that the movant does not meet the burden for a preliminary injunction on the briefing, "[a] temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had." [Id. at 408](#). Here, Ms. Grossberg's threatened disclosure of Fox News' privileged information meets the standard for granting injunctive relief.

II. Fox is Likely to Succeed on the Merits.

To establish the first requirement of a preliminary injunction, "all that must be shown is the likelihood of success" and "conclusive proof is not required." [Ying Fung Moy v. Hoho Umeki](#),

[10 A.D.3d 604, 605 \(N.Y. App. Div. 2004\)](#). For this reason, if there are questions of fact for trial, a court may still grant an injunction from the facts presented, even if in dispute. *Id.* As described above, Ms. Grossberg participated in meetings with in-house and outside counsel for Fox News in preparation for her deposition in the Unrelated Lawsuit due to her employment with Fox News. Ms. Grossberg was acting in her role as an employee of Fox News during the preparation sessions. The attorneys present were solely representing Fox News and not Ms. Grossberg. The purpose of these meetings was to further develop a legal strategy and defense to the claims alleged against Fox News and ultimately to provide Fox News with legal advice, as well as to prepare Ms. Grossberg for her deposition. These communications are protected by the attorney-client privilege, by the attorney work-product doctrine, and as materials prepared for trial, entitling Fox News to an order maintaining the confidentiality of these communications.

A. New York Privilege Law Applies.

“New York courts routinely apply the law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding when deciding privilege issues.” *People v. Greenberg*, 50 A.D.3d 195, 198 (N.Y. App. Div. 2008); *Askari v. McDermott, Will & Emery, LLP*, 179 A.D.3d 127, 153 (N.Y. App. Div. 2019) (“In a situation where documents are sought, New York will apply the law of the forum where the evidence will be introduced at trial or the location of the proceeding seeking discovery of those documents.”). Applying this standard, New York privilege law applies in this matter.

Ms. Grossberg has threatened to file publicly her alleged communications during meetings between Fox News’ lawyers in New York state court. Her draft complaint lists the County of New York, Supreme Court of the State of New York in its case caption. As such, the place of the trial where this evidence would be presented is New York. Any discovery proceeding pertaining to

these meetings would be a part of Ms. Grossberg's threatened lawsuit and would likewise be in New York. In short, there is no question that New York privilege law applies to this Motion. *See JP Morgan Chase & Co. v Indian Harbor Ins. Co.*, 98 A.D.3d 18, 25 (N.Y. App. Div. 2012) ("The motion court correctly applied New York law in deciding the discovery motion. The law of the place where the evidence in question will be introduced at trial or the location of the discovery proceeding is applied when deciding privilege issues.").

B. The Meetings Between Fox News' Lawyers and Ms. Grossberg Fall Squarely Within The Attorney-Client Privilege.

Under New York law, "[t]he attorney-client privilege shields from disclosure any confidential communications between an attorney and his or her client made for the purpose of obtaining or facilitating legal advice in the course of a professional relationship." *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 623 (2016) (citing CPLR § 4503(a)(1)). "Corporations, as any other clients, may avail themselves of the attorney-client privilege for confidential communications with attorneys relating to their legal matters,' whether that attorney is in-house or outside counsel." *Frank v. Morgans Hotel Group Mgt. LLC*, 66 Misc. 3d 770, 772 (N.Y. Dist. Ct. 2020) (quoting *Rossi v. Blue Cross & Blue Shield*, 73 N.Y.2d 588, 592 (1989)). Therefore, the privilege "applies to communications 'between a corporation's employees and the corporation's in-house' or outside counsel 'for the purpose of providing legal advice to the corporation.'" *Id.* (quoting *Stock v. Schnader Harrison Segal & Lewis LLP*, 142 A.D.3d 210, 216 (N.Y. App. Div. 2020)).¹

¹ Importantly, New York courts hold that absent an explicit agreement, the corporations' counsel represents only the corporation. *Fisher v. Hauman*, No. 654717/2021, 2021 N.Y. Misc. LEXIS 5924, *10 (N.Y. Dist. Ct. Nov. 15, 2021); see *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 562 (2009) ("It is well settled that a corporation's attorney represents the corporate entity, not its shareholders or employees."); see *Talvy v American Red Cross in Greater N.Y.*, 205 A.D.2d 143, 149 (N.Y. App. Div. 1994) ("Unless the parties have expressly agreed otherwise in the circumstances of a particular matter, a lawyer for a corporation represents the corporation, not its employees.").

New York courts hold that meetings between entity defendants' employees and entity defendants' attorneys, including those undertaken to prepare an employee for her deposition, are privileged. See [*Radovic v. City of New York*, 168 Misc. 2d 58 \(N.Y. Dist. Ct. 1996\)](#). *Radovic* is on-point. There, New York City employees filed a negligence action against the City and 49 other defendants. [*Radovic*, 168 Misc. 2d at 59](#). The City's lawyer had witness trial preparation sessions with City employees. [*Id.*](#) The court found that the plaintiff was allowed to ask the witnesses, who were current or former City employees, whether they met with City attorneys and for how long they met. [*Id.* at 61](#). However, the court explained that the plaintiff could not ask the witnesses to disclose any of the substance of those meetings, since the attorney-client privilege applies to confidential communications between current and former City employees and the City's lawyers which were made in preparation for a trial at which the City is a party. [*Id.*](#) The court explained that the City, just like a corporation, was a legal creation which acts through its employees at all levels, and just like a corporation's counsel or an individual client's counsel, attorneys for municipalities need the same opportunity for a privileged "open dialogue" in preparing their employee witnesses for trial. [*Id.* at 60](#).

Here, the statements made during the meetings between Fox News' lawyers and Ms. Grossberg are "confidential communications between an attorney and [Fox News] made for the purpose of obtaining or facilitating legal advice in the course of a professional relationship." [*Ambac Assur. Corp.*, 27 N.Y.3d at 623](#). Those meetings were undertaken to allow Fox News' lawyers to obtain information needed to provide legal advice to Fox News and prepare Ms. Grossberg for her deposition in the Unrelated Lawsuit, in which Ms. Grossberg is not a party. (Salvaty Aff. ¶ 6.) The Fox News lawyers were representing Fox News' interests as a defendant in the Unrelated Lawsuit during those meetings by facilitating legal advice to an agent of Fox

News as legal representatives for Fox News. Further, these meetings were to develop a legal strategy and defense to the claims alleged against Fox News in the Unrelated Lawsuit and ultimately to provide Fox News with legal advice. (*Id.*) “The privilege thus applies to communications ‘between [Ms. Grossberg] and [Fox News]’ in-house’ or outside counsel ‘for the purpose of providing legal advice to [Fox News].” [Frank, 66 Misc. 3d at 772](#) (quoting [Stock, 142 A.D.3d at 216](#)). Fox News’ attorneys need the opportunity for a privileged “open dialogue” in preparing Fox’s employee for her deposition. [Radovic, 168 Misc. 2d at 60](#).

Furthermore, New York courts will issue preliminary injunctions when a party seeks to prevent the disclosure of its privileged communications by its adverse party in their filings. *See Board of Director of Windsor Owners Corp. v. Platt*, No. 155985/14, 2014 N.Y. Misc. LEXIS 3890, at *5-7 (N.Y. Dist. Ct. Aug. 22, 2014) (issuing a preliminary injunction against an individual litigant prohibiting disclosure of privilege communications owned by a corporation, where it was shown the litigant disclosed privileged communications in “statements made in her papers in the initial action . . .”). Just like in *Platt*, Ms. Grossberg is attempting to disclose Fox News’ privileged communications in her initial action papers, and a preliminary injunction is necessary to prevent the disclosure of those communications. *See Platt*, 2014 N.Y. Misc. LEXIS 3890, at *5-7.

C. **The Work Product Doctrine also Shields the Contents of the Meetings Between Fox News’ Lawyers and Ms. Grossberg from Disclosure.**

In addition to the attorney client privilege, New York courts and [CPLR § 3101](#) set forth that attorney’s work product and trial preparation materials are protected from discovery. [Beller v. William Penn Life Ins. Co. of N.Y.](#), 15 Misc. 3d 350, 353-354 (N.Y. Dist. Ct. 2007). The attorney-work product doctrine includes “materials prepared by an attorney, acting as an attorney, which contain his analysis and trial strategy.” [New York State Joint Commn. on Pub. Ethics v. Campaign for One N.Y., Inc.](#), 53 Misc. 3d 983, 995 (N.Y. Dist. Ct. 2016). The party claiming

work-product and materials prepared for trial protection bears the burden of proving it, and the protection is limited to the communications in question, not to the underlying facts. [*Beller*, 15 Misc. 3d at 354](#). Protected work includes oral as well as written communication. *Id.* When non-privileged information is included in an otherwise privileged lawyer's communications (including work product), the "communication does not destroy the immunity it otherwise would have." *Id.*

In [*Beller*](#), the defense counsel argued that a witness was not required to answer questions in a deposition concerning conversations between the defense counsel and witness based on the attorney work-product doctrine and as materials prepared for trial. [*Id.* at 351](#). The court explained that the witness' own communications with defense counsel were not by themselves protected, but that defense counsel's communications reflecting the theory of the case were protected. [*Id.* at 354](#). The Court determined that absolute immunity could apply to the entire conversation because the interfacing of counsel's attorney work product with otherwise discoverable facts (the witness's communications) were inextricably intertwined with counsel's thought processes. *Id.* Therefore, the defense counsel's conversations with the witness, and the witnesses' conversations with the lawyer, could be subject to the attorney work product doctrine and as materials prepared for litigation. *Id.*

The communications during the meetings between Fox News' lawyers and Ms. Grossberg are "materials prepared by an attorney, acting as an attorney, which contain [their] analysis and trial strategy." [*Campaign for One N.Y., Inc.*, 53 Misc. 3d at 995](#). Fox News' in-house and outside counsel met with Ms. Grossberg to gather information and discuss case strategy in advance of trial and to prepare Ms. Grossberg for her deposition. (Salvaty Aff. ¶ 6.) This is textbook legal analysis and strategy. The Fox News attorneys were acting in their professional capacity during the sessions. Ms. Grossberg's communications on their own may not be protected as work product

and materials prepared for trial (although they are covered by the attorney-client privilege as set forth above), but “[t]he interfacing of [Fox]’s attorney[s]’ work product (mental impressions and legal theories) with what otherwise would be ‘facts’ from [Ms. Grossberg] could provide ‘absolute immunity’ to said facts if they were inextricably intertwined.” [Beller, 15 Misc. 3d at 354](#). And here, the communications are inextricably intertwined because every statement Ms. Grossberg made was either in response to a Fox News attorney or informed a Fox News attorney’s response to her statements. Either way, Ms. Grossberg’s statements cannot be untangled from the Fox News attorneys’ mental impressions and legal theories.

Therefore, the meetings between Fox News’ attorney and Ms. Grossberg are protected by the attorney-client privilege, by the work product doctrine and as trial preparation materials and Fox News has “show[n] a likelihood of success on the merits . . .” [Wilder, 175 A.D.3d at 409](#).

III. Defendant Will Suffer Irreparable Harm Absent An Injunction.

“Irreparable injury has been defined as ‘that which cannot be repaired, restored, or adequately compensated in money, or where the compensation cannot be safely measured.’” [Bisca v. Bisca, 108 Misc. 2d 227, 231 \(N.Y. Dist. Ct. 1981\)](#) (quoting DeFuniak, Handbook of Modern Equity [2d ed], p 32.) The movant must demonstrate “that a real threat of irreparable injury exists by factual determination.” [Id.](#) Furthermore, “[a] preliminary injunction may be granted in any action where it appears that the [party] threatens or is about to do . . . an act in violation of the plaintiff’s rights . . .” [N.Y. CPLR § 6301](#). The intent of the attorney-client privilege is “to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice” and “[o]pen dialogue between attorney and client is ‘deemed essential to effective representation.’” [Project Veritas v. New York Times Co., 161 N.Y.S.3d 700, 709 \(N.Y. Dist. Ct. 2021\)](#) (quoting [Upjohn Co.](#)

[*v. United States*, 449 U.S. 383, 389 \(1981\)](#) and [*Spectrum Sys. Intl. Corp. v. Chem. Bank*, 78 N.Y.2d 371, 377 \(1991\)](#)). Additionally, the work product doctrine is based on the “generally recognized policy that for an attorney to properly represent a client, the lawyer [must] be allowed to ‘assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue needless interference.’” [*Charter One Bank, F.S.B. v. Midtown Rochester, L.L.C.*, 191 Misc. 2d, 154, 159 \(N.Y. Dist. Ct. 2002\)](#) (quoting [*Hickman v. Taylor*, 329 U.S. 495, 511 \(2002\)](#)).

Here, Fox News faces immediate and irreparable injury because if its attorney-client privileged information and attorney work product are disclosed, without its consent, through a public filing, it cannot be withdrawn in any meaningful way. The threat of losing necessary rights such as the attorney-client privilege and work product protection is immediate and clearly irreparable. The bell cannot be un-rung -- once the information is in the public domain, it is known, and no amount of money can compensate for Fox News for its loss. Fox News’ right to maintain the information as confidential and protected is gone forever. Therefore, Fox News will suffer immediate and irreparable injury.

IV. The Balance of Equities Favors Entry of an Injunction.

“When balancing the equities, a court must determine whether ‘the . . . irreparable injury to be sustained by the [one party] is more burdensome to it than the harm caused to [the other party] through imposition of the injunction.’” [*H.D. Smith Wholesale Drug Co. v. Mittelmark*, 33 Misc. 3d 1227\(A\) \(N.Y. Dist. Ct. 2011\)](#) (quoting [*Poling Transp. Corp. v. A & P Tanker Corp.*, 84 A.D.2d 796, 797 \(N.Y. App. Div. 1981\)](#)).

The irreparable injury to Fox News is severe. Should no injunctive relief be granted, it would allow Ms. Grossberg to violate Fox News’ legal privileges, risking the irreversible loss of

those privileges. If the information is placed in the public domain, Fox News would be disadvantaged in the Unrelated Lawsuit at the hands of Ms. Grossberg by having its privileged litigation discussions and strategies laid bare to its adversary, and to any future adversaries. Such inequity is obvious on its face. Ms. Grossberg simply cannot be permitted to disadvantage Fox News in a separate – and any subsequent – litigation. No amount of monetary value can be placed on these privileges. Further, allowing Ms. Grossberg to disregard entirely the fundamental concept of attorney-client privilege could chill Fox News' ability to have candid conversations with its employees in the future. Indeed, both Fox News and its employees could have legitimate concerns about their ability to protect privileged conversations if Ms. Grossberg is permitted to dispense with confidentiality on her own whim, which in turn could impact all parties' desire to speak with full candor in the future.

By contrast, granting injunctive relief prohibiting disclosure of Fox News' privileged information is a minor burden to Ms. Grossberg. She can file her complaint under seal. She can file her complaint without the privileged material and then ask the Court in her threatened lawsuit to rule on the discoverability and admissibility of such information as discovery is conducted in her case. Fox News is requesting only that this information not be disclosed in a public filing at Ms. Grossberg's whim. In any event, these statements make up a small portion of Ms. Grossberg's allegations in the draft complaint, bear no or little viable relationship to the claims she asserts, and the public filing of these statements is greatly adverse to Fox News in that lawsuit. Considering all of this, the balance of equities weighs squarely in favor of Fox News.

V. Alternatively, Fox Has Met Its Burden for a TRO Pending a Preliminary Injunction Hearing.

Should this court find that Fox News has not met the burden for a preliminary injunction on the briefing alone, "[a] temporary restraining order may be granted pending a hearing for a

preliminary injunction where it appears immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.” [Wilder, 175 A.D.3d 408-09](#).

For the reasons set forth above, it is clear that immediate and irreparable injury, loss or damage will result unless Ms. Grossberg is restrained before a preliminary injunction hearing. Disclosure of the information relating to the Fox News’ lawyers meetings with Ms Grossberg is protected by the attorney-client privilege, by the work product doctrine, and as materials prepared for trial. Disclosure in a public filing will, for all practical purposes, eviscerate that privilege, constituting irreparable injury that could not be remedied. Therefore, Fox News has met its burden for a temporary restraining order.

CONCLUSION

WHEREFORE, Fox News respectfully requests that this Court grant its emergency application for a temporary restraining order and a preliminary injunction pursuant to [CPLR § 6301 et seq.](#) prohibiting Ms. Grossberg and her counsel from disclosing Fox News’ privileged information in any public filing. Alternatively, Fox News requests this Court grant any relief it deems justified.

Dated: March 20, 2023

Respectfully submitted,

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ATTORNEY CERTIFICATION PURSUANT TO 22 NYCRR 202.8-b

I, Paul C. Evans, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that this Memorandum of Law complies with the word count limit set forth in Section 202.8-b of the Uniform Civil Rules for the Supreme Court & the County Court (22 NYCRR 202.8-b) because it contains 4,166 words, excluding the parts of the memorandum exempted by Section 202.8-b. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum.

Dated: March 20, 2023
New York, New York

/s/Paul C. Evans
Paul C. Evans