MEALEY'S™ LITIGATION REPORT

Discovery

September 2009 Volume 6, Issue #12

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3rd Circuit Vacates Discovery Sanction Order, Does Not Remand Due To Settlement

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Judge Adopts Recommendation To Dismiss Discrimination Suit As A Discovery Sanction

CHARLOTTE, N.C. — A federal judge in North Carolina on Sept. 8 adopted a magistrate judge's recommendation to dismiss a woman's employment discrimination lawsuit as a sanction for her willful failure to comply with court-ordered discovery. **SEE PAGE 7.**

Ordering Plaintiffs To Pay Fees Would Be 'Draconian,' Federal Judge Says

HARRISBURG, Pa. — Plaintiffs in a lawsuit involving alleged violation of the Sherman Act that have already had their claims precluded and that are facing an adverse inference jury instruction as sanction for the destruction of a computer containing relevant e-mails should not be ordered to pay counsel fees and expenses because granting the motion could lead to a "draconian result," a federal judge ruled Aug. 21 in denying the defendants' request for additional sanctions. **SEE PAGE 8.**

Failure To Timely Rectify Inadvertent Disclosures Results In Privilege Waiver

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Submission Of Handout Provided During Presentation Did Not Waive Privilege

TAMPA, Fla. — A defendant company's production of a handout that was provided to employees who attended a training presentation regarding the proper use of e-mail conducted by its outside counsel did not waive privilege over communications pertaining to the presentation because the submission of the handout did not place the presentation at issue, a federal magistrate judge in Florida ruled Aug. 25. **SEE PAGE 11.**

Magistrate Judge Unable To Determine Waiver Due To General Privilege Assertion

WEST PALM BEACH, Fla. — A federal magistrate judge in Florida on Aug. 31 denied without prejudice a motion seeking the return of inadvertently produced privileged documents filed by a plaintiff company in a patent infringement suit because the company's submission of the documents for an *in camera* review did not include a privilege log detailing why the materials were protected. **SEE PAGE 12.**

Panel Refuses To Vacate Discovery Order Related To Insured's Bad Faith Claim

CINCINNATI — A malpractice insurer has not satisfied the heavy burden required to justify a writ of *mandamus* to vacate a lower court's discovery order, the Sixth Circuit U.S. Court of Appeals held Aug. 24, rejecting the insurer's contention that the lower court was "clearly erroneous" in finding that the requested documents related to an insured's bad faith claim are not protected by the federal work product doctrine and Ohio's attorney-client privilege. **SEE PAGE 13.**

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Wiping of BlackBerries Prompts Magistrate Judge To Impose Adverse Inference

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(**Order in Section C.** Document #68-090918-018R.)

U.S. Magistrate Judge Elizabeth A. Jenkins of the Middle District of Florida held that although the BlackBerries used by individual defendants Norman Brody, James Sherouse and Kevin Smith, each of whom worked for plaintiff company Southeastern Mechanical Services Inc. (SMS) before going to work for Thermal Engineering Construction Services Inc. (TEI), one of SMS's direct competitors, were synchronized with TEI's server, some e-mails indicated that the individual defendants often used their personal e-mail accounts to communicate with workers at TEI and co-defendant Babcock Power Services.

"Such e-mails [from the personal e-mail accounts] would not be stored on the company's server," Magistrate Judge Jenkins said. "In addition, text messages, calendar items, and call logs on the BlackBerries were not saved on the company's server and produced to SMS."

According to SMS's third amended complaint, Brody, Sherouse and Smith worked for the company as members of its core sales team but left in May 2008 to work for TEI, one of its competitors. SMS claims that the defendants created a business plan to compete with SMS using its proprietary information and that they took trade secrets, deleted files from SMS's computer system and solicited SMS customers to take their business to TEI.

Synchronized To Server

In late May 2008, each of the individual defendants purchased a BlackBerry and was reimbursed for his purchase of the device. On June 3 and 4, 2008, the devices were synchronized with their TEI e-mail accounts so that all e-mails sent or received from the e-mail account on the device would also reside on the company's server and be subject to the company's normal backup and archiving process. Laptop computers issued to the individual defendants were configured similarly.

On June 6, 2008, SMS sent a demand letter to TEI alleging unauthorized access and use of the company's confidential information and trade secrets. Shortly thereafter, the individual defendants' TEI e-mail accounts were frozen and they were ordered to return their laptops and BlackBerries. After the materials were returned, they were given to Jon Kessler, a forensic computer expert from Esquire Litigation Services, for inspection. Kessler found no data on the BlackBerries and concluded that the information was not manually deleted, but wiped by the user. Lacey Walker, TEI's forensic expert, also reviewed the BlackBerries and agreed that the lack of data could have been caused only by a "hard reset" wipe or bad password reset.

As a result of this information, SMS moved for spoliation sanctions in the form of default judgment or an adverse inference jury instruction. The defendants opposed the motion, arguing that any e-mails that would have been on the devices were already produced because they were stored on TEI's server.

Magistrate Judge Jenkins held that based on the information provided by the forensic experts, it is highly probable that the individual defendants intentionally deleted information from the devices.

"Although Individual Defendants' BlackBerries were activated in late May 2008 and were used during the first few weeks of their employment, there were no e-mails, calendar entries, text messages, or phone records on their BlackBerries," Magistrate Judge Jenkins concluded. "SMS' expert stated that the configuration of data on Individual Defendants' BlackBerries was not similar to that of a new BlackBerry acquired from the factory or a BlackBerry that had been used exclusively for phone calls. Given the fact that Individual Defendants frequently used their BlackBerries, it is improbable that there was no data on the BlackBerries reflecting communications between Individual Defendants and TEI employees, Babcock employees, current customers or potential customers."

Counsel

Amanda S. Thompson, David Long-Daniels, Lindsey Camp Edelmann, Peter N. Hall and Todd D. Wozniak of Greenberg Traurig in Atlanta and Richard C. McCrea of Greenberg Traurig in Tampa represent SMS.

Sara Marie Hammett and Thomas T. Steele of Steele + Hale in Tampa represent Brody, Sherouse and Smith. Babcock and TEI are represented by Scott Green, Christopher Galanek and Matthew J. Pearce of Bryan Cave Powell Goldstein in Atlanta and Richard George Salazar of Fowler White Boggs in Tampa. ■

11th Circuit Upholds Dismissal Of Woman's Tainted Peanut Butter Case

ATLANTA — A panel of the 11th Circuit U.S. Court of Appeals on Sept. 14 affirmed the dismissal of a woman's claims against a peanut butter manufacturer accused of sickening hundreds of people with its tainted product, agreeing that the plaintiff failed to adhere to the trial court's orders (Bertha Dinkens v. ConAgra Foods Inc., No. 08-16245, 11th Cir.; 2009 U.S. App. LEXIS 20416).

(**Unpublished opinion available.** Document #84-091005-017Z.)

Bertha Dinkens sued ConAgra Foods Inc. in the U.S. District Court for the Western District of New York following a massive nationwide product recall of Salmonella-tainted peanut butter. Dinkens' suit was transferred to the Northern District of Georgia along with hundreds of other similar actions arising out of ConAgra's 2007 peanut butter recall for consolidated pretrial proceedings (In re: ConAgra Peanut Butter Products Liability Litigation, No. 07-1845, N.D. Ga.).

Dinkens did not file a timely objection to the transfer, and the case was officially transferred April 22, 2008.

Claims Dismissed

Judge Thomas Trash first dismissed Dinkins' claim for breach of the implied warranty of fitness on the grounds that the claim was not properly pleaded and on Oct. 9, 2008, dismissed the rest of Dinkens' claims for failing to comply with discovery orders.

Dinkens appealed, seeking review the trial court's decisions for abuse of discretion. She argued that her failure to respond to pleadings and orders in the case should have been excused because she was not served with those documents.

In its *per curiam* opinion, the 11th Circuit panel concluded that Dinkens' attorney failed to participate in the court proceedings or keep in contact with plaintiffs' liaison counsel and that it "will not reward his failure to prosecute his client's lawsuit with another opportunity to pursue her claims." The panel affirmed the trial court decision to dismiss Dinkens' lawsuit with prejudice.

Court Access

"Dinkens's lawyer received CM/ECF access (including the ability to access the pleadings and orders already filed in the case and electronic notification of document filings as they were made) on September 17, 2008, thirteen days before the district court issued its first order regarding the dismissal of Dinkens's complaint," it concluded. "Despite having that access, he filed no response to ConAgra's pending motion to dismiss his client's case for failure to comply with the court's order to compel production of discovery. Neither did he take any action in response to the court's order of September 30, 2008, acting on that motion. Only after the court entered its October 9, 2008 order dismissing Dinkens's lawsuit did her lawyer react — by filing a motion for reconsideration."

The panel consisted of Judges Ed Carnes, Charles R. Wilson and Emmett Ripley Cox.

Dinkens is represented by Louis Rosado of Louis Rosado & Associates in Buffalo, N.Y. ConAgra is represented by Andrew G. Phillips of McGuire Woods in Atlanta. ■

3rd Circuit Vacates Discovery Sanction Order, Does Not Remand Due To Settlement

PHILADELPHIA — The Third Circuit U.S. Court of Appeals on Sept. 1 vacated two sanction orders involving discovery violations by defendants in a Racketeer Influenced and Corrupt Organizations Act case but declined to remand because the parties have settled the matter (Natalie M. Grider, M.D., et al. v. Keystone Health Plan Central Inc., et al., No. 08-3073, 3rd Cir.; 2009 U.S. App. LEXIS 19642).

(**Opinion in Section E.** Document #31-090916-001Z.)

Discovery Problems

In October 2001, Natalie M. Grider, M.D., and Kutztown Family Medicine filed a class action lawsuit in the Philadelphia County Court of Common Pleas against Keystone Health Plan Central, Highmark and Capital Blue Cross and Joseph Pfister, John S. Brouse and James M. Mead as each of the company's chief executive officers. The case was removed to the U.S. District Court for the Eastern District of Pennsylvania. The plaintiffs alleged that Keystone's claims handling practices violated RICO and Pennsylvania's "prompt pay" statute.

Although the case was filed in 2001, discovery did not begin until 2003, and the parties agreed that "the spirit of the discovery disputes was hostile."

The plaintiffs served five sets of discovery requests "directed to all defendants." Highmark, Keystone and Capital responded to each request but interposed general objections to many of the requests. Also, each defendant responded with specific objections to some of the plaintiffs' individual requests.

The court issued five orders related to discovery orders. Two of those orders — a March 30, 2006, order and a Sept. 28, 2007, order — were appealed to the Third Circuit.

The appeals came after the parties reached settlements in February 2008.

District Court Orders

In the March 2006 order, Judge James Knoll Gardner affirmed a magistrate's report that the defendants continually filed highly confidential documents in the public record without placing them under seal but that the plaintiffs did not meet the standard required for injunctive relief. The magistrate had concluded that sanctioning the defendants' counsel was not an appropriate remedy for failure to comply with the order and instead the appropriate remedy was to admonish the defendants' counsel to follow all terms of the protective order. Judge Gardner disagreed that the admonishment was not a sanction.

In the September 2007 order, Judge Gardner held that all of the defendants violated Federal Rules of Civil Procedure 26(g)(2)(A) and (B) and 37(c)(1) and that the law firm defendants and individual attorneys violated 28 U.S. Code Section 1927 and Local Rule 83.6.1 of the Rules of Civil Procedure of the U.S. District Court for the Eastern District of Pennsylvania (See 10/17/07, Page 21).

Judge Gardner found, however, that there was no proper basis to impose any sanctions. He ordered the defendants to pay the plaintiffs their "reasonable attorneys' fees" and costs related to the two motions, but the parties settled the underlying suit before the court could rule on a fee petition, so the sanctions were never quantified and reduced to monetary amounts.

September 2007 Order

Judge Dolores K. Sloviter wrote for the appeals court that it would not displace Judge Gardner's findings of fact as related to the September 2007 order because the findings have support in the record and, thus, are not clearly erroneous. Judges Thomas L. Ambro and Kent A. Jordan concurred.

However, the appeals court said it would vacate the sanctions order because it contained several significant legal errors, including that Judge Gardner failed to analyze the "substantial justification" standard as required.

Ordinarily, the case would be remanded to allow the District Court to apply the "substantial justification" standard to sanctions under Rules 26(g) and 37(c)(1) and to undertake a more specific and individualized analysis under Section 1927 and Local Rule 83.6.1, but because the parties have settled the matter of attorney fees, there is no reason to remand, the appeals court said.

March 2006 Order

The appeals court also vacated the March 2006 order, holding that Judge Gardner's ruling that the magistrate's admonishment was a sanction was not a sound exercise of his discretion.

Judge Gardner based his decision on Langer v. Monarch Life Ins. Co. (966 F.2d 786, 811 [3rd Cir. 1992]), but Langer does not hold that an admonishment is always a sanction, it said.

Again, however, there is no need to remand, the appeals court said.

Louis C. Bechtel and Conrad O'Brien of Gellman & Rohn in Philadelphia, Joseph A. O'Keefe of O'Keefe & Sher in Kutztown, Pa., Francis J. Farina of Devon, Pa., and Kenneth A. Jacobsen of Jacobsen Law Offices in Wallingford, Pa., represent the plaintiffs.

Malcom J. Gross of Gross, McGinley, LaBarre & Eaton in Allentown, Pa., and Kathleen T. Sooy, Clifton S. Elgarten and Tracy A. Roman of Crowell & Moring in Washington, D.C., represent Keystone, Capital, Mead and Pfister. Daniel I. Booker, Donna M. Doblick and James C. Martin of Reed Smith in Pittsburgh and Sandra A. Girifalco of Stradley, Ronon, Stevens & Young in Philadelphia represent Highmark and Brouse.

(Additional document available. **September 2007 opinion.** Document #43-071004-009Z.) ■

Judge Adopts Recommendation To Dismiss Discrimination Suit As A Discovery Sanction

CHARLOTTE, N.C. — A federal judge in North Carolina on Sept. 8 adopted a magistrate judge's recommendation to dismiss a woman's employment discrimination lawsuit as a sanction for her willful failure to comply with court-ordered discovery (Kimberly N. Lynch v. Novant Medical Group Inc., d/b/a Presbyterian Regional Healthcare Corp., No. 08cv340, W.D. N.C.; 2009 U.S. Dist. LEXIS 81478).

(**Opinion in Section A.** Document #68-090918-005Z.)

U.S. Judge Martin Reidinger of the Western District of North Carolina noted that Kimberly Lynch was warned about the risk of sanctions for failure to comply with discovery requests from her former employer, Novant Medical Group, d/b/a Presbyterian Regional Healthcare Group, when Magistrate Judge Carl Horn III granted her counsel's request to withdraw from the case on Feb. 12.

Written Communications Demanded

Lynch sued her former employer on July 18, 2008, seeking damages and injunctive relief based on the company's alleged violation of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967. Her counsel moved for withdrawal from the case on Feb. 5. Under the court's case management order, the parties were to exchange initial disclosures by Feb. 23 and complete discovery by Sept. 30.

The defendant company provided Lynch with its first set of interrogatories and request for production of documents on Feb. 23. Lynch requested an extension to respond to the requests on March 23 so she could hire an attorney, and on April 15, the defendant filed a motion to compel. The plaintiff did not respond to the motion. Magistrate Judge David S. Cayer granted Novant Medical Group's motion on May 5 and instructed Lynch to provide complete discovery responses by May 31 and to schedule her deposition no later than June 15. The magistrate judge also warned Lynch that she could face sanctions if she failed to comply with the order.

On May 31, Lynch provided the defendant with her first set of interrogatories and requests for production. On June 10, the company called the plaintiff to inform her that the responses were inadequate. Lynch responded that she did not have to provide any further information, requested that counsel for the defendant no longer call her and demanded that any further questions be directed to her in writing. The plaintiff did not respond to any of the defendant's subsequent written requests for information, which prompted the company to move for sanctions on June 19. Magistrate Judge Cayer recommended dismissing Lynch's case as a sanction for her failure to comply with court-ordered discovery on July 13, and Lynch objected to his report and recommendation on July 24.

(**Motion for sanctions available.** Document #68-090918-006M. **Opposition brief available.** Document #68-090918-007B. **Reply brief available.** Document #68-090918-008B. **Report and recommendation available.** Document #68-090918-009X. **Objection available.** Document #68-090918-010B.)

Sanctions Warranted

Judge Reidinger noted that Lynch did not specifically object to any of Magistrate Judge Cayer's findings or recommendations. As a result, the judge reviewed the record to determine whether dismissal sanctions were truly warranted and concurred with the magistrate judge that Lynch's behavior was willful and warranted the imposition of dismissal sanctions.

"Although she has been warned explicitly that failure to comply with the Orders of this Court would result in the imposition of sanctions and possibly the dismissal of this lawsuit, Plaintiff has engaged in a pattern of noncompliance with the Court's Orders," Judge Reidinger wrote. "She has failed to provide her Initial Disclosures to Defendant, despite being ordered twice to do so. She failed to respond timely to the Defendant's discovery requests and had to be compelled to respond. The discovery responses that she finally did serve were unresponsive and wholly inadequate. Additionally, she has steadfastly refused to comply with the most basic discovery requests by asserting frivolous arguments that have no basis in law or fact."

Lynch is *pro se*. Patrick E. Kelly and Kathleen K. Lucchesi of Johnston Allison & Hord represent Novant. All are in Charlotte. ■

Ordering Plaintiffs To Pay Fees Would Be 'Draconian,' Federal Judge Says

HARRISBURG, Pa. — Plaintiffs in a lawsuit involving alleged violation of the Sherman Act that have already had their claims precluded and that are facing an adverse inference jury instruction as sanction for the destruction of a computer containing relevant e-mails should not be ordered to pay counsel fees and expenses because granting the motion could lead to a "draconian result," a federal judge ruled Aug. 21 in denying the defendants' request for additional sanctions (<u>Nancy C. Kvitka, et al. v. The Puffin Company, et al.</u>, No. 06-CV-0858, M.D. Pa.; 2009 U.S. Dist. LEXIS 74425; See March 2009, Page 4).

(**Memorandum available.** Document #68-090918-001Z.)

U.S. Judge Sylvia Rambo of the Middle District of

Pennsylvania explained that defendants and counter-claimants The Puffin Co., Joyce Kekatos and Keith Kaonis knew as early as Nov. 18 that plaintiffs Nancy Kvitka and Nikel Enterprises Inc. violated Federal Rule of Civil Procedure 11 by allowing the destruction of the computer and tampering with hard copies of relevant e-mails but chose to file a motion for partial summary judgment based on spoliation of evidence rather than a motion for sanctions. On Feb. 13, the court granted the motion for partial summary judgment and dismissed the plaintiffs' claims, imposed an adverse inference jury instruction and precluded the plaintiffs from arguing that anyone tampered with paper copies of the e-mails.

Kvitka and Nikel Enterprises purchase and sell antique French and German bisque-headed dolls made during the late 19th and early 20th centuries. Puffin publishes Antique Doll Monthly, the only publication in the United States specializing in antique bisque dolls, and the plaintiffs were regular contributors and advertisers in the publication until 2005, when an alleged campaign of "character assassination" resulted in Puffin's decision to terminate the plaintiffs' right to advertise. Kaonis is the publication's advertising and creative director, and Kekatos is a purchaser and seller of antique dolls.

In response to Puffin's letter to Kvitka regarding the decision to terminate her right to advertise, it explained that "this entire thing has to do with some e-mails." The plaintiffs initially threatened suit in August 2005, and Puffin responded that it had received several written complaints from dealers and collectors regarding Kvitka and that it had in its possession 15 pages of e-mails written by her that disparaged other dealers. The company also warned her to preserve all related e-mails on her laptop computer.

2 Lawsuits

In January 2006, the plaintiffs initiated an action in Pennsylvania's Dauphin County Court of Common Pleas. During discovery in that action, the plaintiffs requested that the defendants produce the written complaints and related e-mails. The e-mails were produced Feb. 28, 2006. Around that time, Kvitka began complaining of having problems with her laptop. Chuck Tressler, Kvitka's computer technician, did not examine the computer but instructed her to purchase a new laptop. Kvitka received the new laptop on March 7, 2006, and later discarded her old laptop without transferring any of the information to the new laptop. When the state court judge asked Kvitka about the whereabouts of e-mails on her computer, Kvitka did not inform the judge that she threw out the computer and opted instead to discontinue the action.

In her April 25, 2006, federal court complaint, Kvitka alleges that the defendants conspired against her in violation of the Sherman Act. On Jan. 14, 2008, the defendants moved to inspect Kvitka's new laptop, and the plaintiff produced only a few responsive e-mails. When asked during her deposition how she located the documents, Kvitka's answer was evasive. In response to the plaintiff's deposition, the defendants moved for partial summary judgment based on spoliation of evidence. The defendants asserted that the loss of the e-mails on Kvitka's old laptop was prejudicial to their claims and that the plaintiff should be sanctioned based on her willful conduct.

In her ruling granting the defendants' motion for partial summary judgment, Judge Rambo rejected Kvitka's argument that her decision to throw away the laptop was innocent and a routine effort to maintain her business.

Further Sanctions Unnecessary

However, the judge concluded that granting the defendants' motion for sanctions was unnecessary because the plaintiffs have already faced severe sanctions.

(**Motion for sanctions available.** Document #68-090918-002M. **Opposition brief available.** Document #68-090918-003B. **Sur-reply available.** Document #68-090918-004B.)

"In the instant case, Plaintiffs have suffered a severe sanction by preclusion of their claims," Judge Rambo wrote. "They may suffer further from a possible verdict against them on Defendants' counterclaims. The request for counsel fees and expenses under Rule 11 amounts to Defendants being given a second bite of the apple, and to grant such a motion would lead to a draconian result."

Robert S. Mirin of the Law Offices of Robert S. Mirin is counsel for the plaintiffs. Jeffrey T. McGuire of Caldwell & Kearns represents Puffin and Kaonis. Bruce Jay Grossman is counsel for Kekatos. All are located in Harrisburg. ■

Failure To Timely Rectify Inadvertent Disclosures Results In Privilege Waiver

CAMDEN, N.J. — The U.S. government waived privilege over 161 of 214 documents it inadvertently produced during discovery in a case involving a company's alleged violation of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) after a federal magistrate judge found that the government failed to take reasonable steps to rectify its error after it was initially alerted to its disclosure of privileged documents (United States of America v. Sensient Colors Inc., No. 07-1275, D. N.J.; 2009 U.S. Dist. LEXIS 81951).

(**Opinion in Section D.** Document #68-090918-019Z.)

After oral arguments and an *in camera* review of the documents, U.S. Magistrate Judge Joel Schneider of the District of New Jersey concluded that the United States, which brought the case on behalf of the Environmental Protection Agency against Sensient Colors Inc. and its predecessors, the Warner-Jenkinson Co. and H. Kohnstamm & Co. Inc., acted reasonably after it was first alerted in August 2008 of its inadvertent disclosure of 53 documents by resolving the issue only eight business days later. But the magistrate judge ruled that the plaintiff did not take reasonable actions to rectify subsequent errors

"After September 10, 2008, there is no question plaintiff was on notice of problems," Magistrate Judge Schneider said. "It therefore should have taken prompt and diligent steps to re-assess its document production."

Document Production

The government says in its March 2007 lawsuit against Sensient that the company and its predecessors are responsible for the contamination of the General Color Site in Camden and that Sensient is liable to reimburse the EPA for the more than $16 million the agency spent to respond to the release or threatened release of hazardous substances at the site. According to the complaint, Sensient and its predecessors manufactured inorganic and organic pigments and dyes at the site from 1922 until 1988.

During discovery, the plaintiff produced approximately 45,000 documents, totaling 135,000 pages on six different occasions between May 14, 2008, and Feb. 12, 2009. On Aug. 28, the defendants returned 81 documents it believed were privileged. On Sept. 10, 2008, the plaintiff advised the defendants that 80 of the 81 documents were privileged and were inadvertently produced. On Oct. 23, the defendant identified and returned another 89 documents it believed were privileged. On Nov. 21, the plaintiff submitted a supplemental privilege log claiming that most of the inadvertently produced documents were privileged. Subsequently, the plaintiff acknowledged that it inadvertently produced an exhibit during the deposition of former EPA employee Anthony Cancro and that it inadvertently produced another 100 documents since March 2009.

The defendants moved to compel production of the inadvertently produced documents on April 9, arguing that the plaintiff waived any privilege over the materials. The plaintiff opposed the motion, claiming that the parties' stipulated discovery plan precluded a privilege waiver for inadvertent production. Briefing on the motion was filed under seal. Magistrate Judge Schneider found that the discovery plan did not contain such an agreement.

"Plaintiff and Sensient are represented by sophisticated counsel," Magistrate Judge Schneider said. "If they intended a 'clawback' provision this would have been specifically mentioned. The most sensible construction of the parties' Discovery Plan is that the inadvertent production of a document 'in and of itself' does not waive privilege. In other words, the parties agreed not to subject themselves to the harsh rule that mere inadvertent production results in a waiver."

Some Reasonable Steps Taken

In determining if the government waived privilege over the documents through inadvertent production, Magistrate Judge Schneider focused on whether the plaintiff took reasonable steps to prevent the disclosure and if the government promptly took steps to rectify the error. The magistrate judge concluded that the government took reasonable steps to prevent disclosure through its use of the computer application Equivio and its review process. In addition, Magistrate Judge Schneider pointed out that the government produced approximately 45,000 documents.

"Plaintiff's production was made in the midst of a commendable effort to employ a sophisticated computer program to conduct its privilege review," Magistrate Judge Schneider said. "Unfortunately, mistakes occurred. Plaintiff should not be unduly punished for occasional mistakes that occurred while it started to use new software to organize and sort its documents. Plaintiff also invested substantial resources to prevent an inadvertent production. In addition to its computer program, plaintiff employed twelve professionals to conduct its review who were trained on privilege issues."

Moreover, the magistrate held that the government promptly rectified its error after initially being informed by the defendants about an inadvertent disclosure of documents. However, the plaintiff did not take reasonable precautions to rectify errors that were later brought to its attention.

Finally, Magistrate Judge Schneider held that documents the government used to search for potentially responsible parties (PRP) should not be disclosed because the plaintiff did not place the documents "at issue."

Counsel

David L. Weigert of the Environmental Enforcement Section of the Department of Justice and Bradford Thomas McClane and Keith Taketo Tashima of the U.S. Department of Justice, all in Washington, D.C., represent the United States.

Michael A. Bogdonoff, Evan Wainhouse Davis, John M. Ix and Sarah D. Schlossberg of Dechert in Philadelphia represent Sensient and its predecessors. Glenn Anthony Harris of Ballard Spahr Andrews & Ingersoll in Voorhees, N.J., represents third-party defendants Kohnstamm Inc. and Avtar Singh. Robert J. Hagerty and Stephen J. Alexander of Capehart & Scatchard in Mount Laurel, N.J., represent third-party defendant St. Joseph's Carpenter Society Properties Inc. Third-party defendants American Premier Underwriters Inc. and United Railroad Corp. are represented by Stephen M. Orlofsky of Blank Rome in Princeton, N.J., Rachel Sydney Wolfe of Blank Rome in Philadelphia and Scott E. Coburn of Blank Rome in Cherry Hill, N.J. ■

Submission Of Handout Provided During Presentation Did Not Waive Privilege

TAMPA, Fla. — A defendant company's production of a handout that was provided to employees who attended a training presentation regarding the proper use of e-mail conducted by its outside counsel did not waive privilege over communications pertaining to the presentation because the submission of the handout did not place the presentation at issue, a federal magistrate judge in Florida ruled Aug. 25 (Southeastern Mechanical Services Inc. v. Norman Brody, et al., No. 08-CV-1151-T-30EAJ, M.D. Fla.; 2009 U.S. Dist. LEXIS 80834).

(**Order in Section B.** Document #68-090918-015R.)

U.S. Magistrate Judge Elizabeth A. Jenkins of the Middle District of Florida explained that the attorney-client privilege was not implicitly waived when defendants Thermal Engineering Construction Services Inc. (TEI) and Babcock Power Services Inc. submitted the handout along with the affidavit of Bryan Cave attorney Scott Green, who was a presenter during the program, in opposition to plaintiff Southeastern Mechanical Services Inc.'s (SMS) motion for sanctions based on spoliation because the handout and the affidavit only generally described the contents of the presentation.

"Although SMS alleges that legal advice provided by TEI's outside counsel on the proper use of e-mail by TEI employees is relevant to discovery requests and this litigation, relevance provides no justification for ignoring the attorney-client privilege," Magistrate Judge Jenkins said.

SMS sued TEI, Babcock, Norman Brody, James Sherouse and Kevin Smith, alleging that the defendants violated the Computer Fraud and Abuse Act. According to its third amended complaint, Brody, Sherouse and Smith each worked for the company as members of its core sales team but left in May 2008 to work for TEI, one of its competitors. SMS claims that the defendants created a business plan to compete with SMS using its proprietary information and that they took trade secrets, deleted files from SMS's computer system and solicited SMS customers to take their business to TEI.

Training Presentation

In spring 2008, Babcock asked Green and Christopher Galanek, another attorney at Bryan Cave, to prepare a legal training program to instruct employees of Babcock and its subsidiaries on the importance of clear and concise communications in their business dealings. During 2008, the two attorneys presented the training program on 20 occasions to employees of Babcock and its affiliates, including TEI.

On June 6, 2008, SMS sent a letter to TEI, alleging unauthorized use and access of its confidential and proprietary information. On June 12, Green and Galanek gave two training presentations to TEI employees in Duncan, S.C. SMS learned of the presentations during the Nov. 12 deposition of Norman Brody, who explained that the presentations did not address the disputes raised in the underlying case.

On March 30, SMS moved for sanctions based on the defendants' alleged wiping and deleting of Brody's, Sherouse's and Smith's e-mails and argued that the training presentation was part of the defendants' attempt to hide their spoliation of evidence. In opposition to the motion, the defendants submitted Green's affidavit and the handout. On May 15, SMS moved for an order compelling the defendants to produce all documents pertaining to the training presentation, arguing that production of the handout waived any privilege over the materials.

(**Motion available.** Document #68-090918-016M. **Opposition brief available.** Document #68-090918-017B.)

No Waiver

The defendants opposed the motion, arguing that the handout was submitted only to demonstrate that the training presentation was irrelevant to the litigation and spoliation at issue. Magistrate Judge Jenkins pointed out that though waiver by implication can occur when a client places the attorney-client relationship at issue, such was not the case here.

"The record does not demonstrate that TEI implicitly waived the attorney-client privilege by filing Green's affidavit and the handout in the public record," Magistrate Judge Jenkins said. "These documents do not reveal the substance of any protected communications during the presentations."

Amanda S. Thompson, David Long-Daniels, Lindsey Camp Edelmann, Peter N. Hall and Todd D. Wozniak of Greenberg Traurig in Atlanta and Richard C. McCrea of Greenberg Traurig in Tampa are counsel for SMS.

Sara Marie Hammett and Thomas T. Steele of Steele + Hale in Tampa represent Brody, Sherouse and Smith. Babcock and TEI are represented by Green, Galanek and Matthew J. Pearce of Bryan Cave Powell Goldstein in Atlanta and Richard George Salazar of Fowler White Boggs in Tampa. ■

Magistrate Judge Unable To Determine Waiver Due To General Privilege Assertion

WEST PALM BEACH, Fla. — A federal magistrate judge in Florida on Aug. 31 denied without prejudice a motion seeking the return of inadvertently produced privileged documents filed by a plaintiff company in a patent infringement suit because the company's submission of the documents for an *in camera* review did not include a privilege log detailing why the materials were protected (Armor Screen Corp. v. Storm Catcher Inc., No. 07-81091-Civ, S.D. Fla.; 2009 U.S. Dist. LEXIS 83655).

(**Order available.** Document #68-090918-020R.)

U.S. Magistrate Judge Ann E. Vitunac of the Southern District of Florida concluded that Armor Screen Corp. failed to satisfy its burden of providing sufficient information for the court to evaluate whether the documents, which included an e-mails and letters from its president to its counsel in a prior case, were protected by the attorney-client privilege.

"Plaintiff's blanket and general assertion of attorney-client privilege in its Motion lacks sufficient detail to satisfy its burden of proving the existence of the privilege over each document submitted for *in camera* inspection," Magistrate Judge Vitunac said. "Moreover, the communication of factual information, such as reports containing a litigation's status, fee agreements, and retainer agreements are not generally protected by the attorney-client privilege."

Privilege Log Required

Armor Screen filed a patent infringement suit against Storm Catcher Inc. in November 2007. During discovery, the plaintiff company claims that it inadvertently produced privileged documents and on April 17, 2009, moved for the return of the documents and for sanctions. Storm Catcher says in its April 28 response brief that the documents are not privileged.

(**Motion available.** Document #68-090918-021M. **Opposition brief available.** Document #68-090918-022B. **Reply brief available.** Document #68-090918-023B.)

In attempting to show that the documents are privileged, Armor Screen submitted them for an *in camera* review without a privilege log explaining the documents' contents and why they are protected by the attorney-client privilege.

"In the absence of such information, the Court cannot reach the issues of inadvertent disclosure and waiver raised by the parties," Magistrate Judge Vitunac concluded.

Counsel

Jeremy Dutra and John A. Burlingame of Squire Sanders & Dempsey in Washington, D.C., and Robert C.L. Vaughn and Javier Asis Lopez of Squire Sanders & Dempsey in Miami represent Armor Screen.

Storm Catcher is represented by Andrew William Ransom, Benjamin Michael Hanrahan, John Fulton Jr., Oliver Alan Ruiz, Raquel Aurora Regalado-Herrera and David Andrew Gast of Malloy & Malloy in Miami and Clifford Lawrence Rostin of Kaplan Zeena in Miami. ■

Panel Refuses To Vacate Discovery Order Related To Insured's Bad Faith Claim

CINCINNATI — A malpractice insurer has not satisfied the heavy burden required to justify a writ of *mandamus* to vacate a lower court's discovery order, the Sixth Circuit U.S. Court of Appeals held Aug. 24, rejecting the insurer's contention that the lower court was "clearly erroneous" in finding that the requested documents related to an insured's bad faith claim are not protected by the federal work product doctrine and Ohio's attorney-client privilege (In re: Professionals Direct Insurance Co., No. 08-4440, 6th Cir.; 2009 U.S. App. LEXIS 18966).

(**Opinion available.** Document #13-090903-003Z.)

In 2001, Illinois National Insurance Co. retained the law firm Wiles, Boyle, Burkholder & Bringardner Co. to defend a suit against an employee of one of its insureds. A jury verdict of $8,531,488 in damages was entered against Illinois National.

Wiles moved for judgment notwithstanding the verdict or, alternatively, for a new trial, which the trial court denied as untimely. Wiles appealed the trial court's decision to the Ohio Court of Appeals and the Ohio Supreme Court.

While the Ohio Supreme Court's decision was pending, Wiles applied to renew its malpractice insurance policy with Professionals Direct Insurance Co in 2003. On Aug. 18, 2004, the Ohio Supreme Court unanimously affirmed the trial court's ruling.

Potential Malpractice

In September 2004, Wiles notified Professionals Direct of Illinois National's potential malpractice claim against it. Illinois National settled the underlying claim and offered to settle its potential malpractice action for $5 million. Professionals

Direct represented its insured in the settlement negotiations.

Professionals Direct filed a declaratory judgment action against Wiles in the U.S. District Court for the Southern District of Ohio, asserting that the policy excluded coverage because Wiles failed to give notice of the potential claim before the policy's expiration date or in its renewal application.

Wiles counterclaimed against Professionals Direct for breach of contract and bad faith, seeking damages and attorney fees. The insurer moved to dismiss the counterclaim, which the District Court denied.

Discovery Order

Professionals Direct refused Wiles' request to produce a number of documents from its coverage file related to the bad faith claim, asserting that they were protected by the federal work product doctrine and Ohio's attorney-client privilege. A magistrate judge ordered that the insurer disclose many of the documents it claimed to be privileged.

Professionals Direct filed objections to the discovery order, a motion to certify questions relating to the discovery order to the Ohio Supreme Court, a motion to bifurcate proceedings for the declaratory judgment and the counterclaim and a motion to stay production of the documents. The District Court denied each of the insurer's motions.

Professionals Direct petitioned the Sixth Circuit for a writ of *mandamus* to vacate the discovery order issued by the District Court.

Work Product Doctrine

The panel found that Professionals Direct has not shown any legal error in the magistrate judge's discussion of the federal work product doctrine.

"Nor has it shown clear error in the magistrate's application of the work-product doctrine to the documents at issue or in the factual findings on which that application was premised. The magistrate only ordered Professionals Direct to produce documents he found that were prepared 'because of' the coverage decision rather than anticipated litigation or were prepared prior to the time Professionals Direct could reasonably anticipate litigation. On its face, this is a reasonable application of the work-product doctrine, and Professionals Direct has not produced evidence to make us conclude otherwise," the panel said.

The panel added that although aspects of the magistrate's discovery order may not be beyond question, Professionals Direct has failed to demonstrate that it is "clearly erroneous as a matter of law," citing John B. v. Goetz (531 F.3d 448, 457 ([6th Cir. 2008]; See July 2008, Page 5).

Boone V. Vanliner

The panel rejected Professionals Direct's contention that the magistrate judge committed clear error in failing to apply Ohio's testimonial privilege statute.

Citing Boone v. Vanliner (744 N.E.2d 154 [Ohio 2001]), the panel further dismissed the insurer's contention that the magistrate judge erred in the application of Ohio's common law of attorney-client privilege.

"Professionals Direct argues that the magistrate committed clear error by failing to analyze each of the disputed documents individually to determine whether they contained evidence of bad faith and were thus 'unworthy of protection.' But Ohio courts have read Boone more broadly than Professionals Direct claims," the panel noted.

'May Cast Light'

The panel cited Garg v. State Auto. Mut. Ins. Co. (800 N.E.2d 757 [Ohio Ct. App. 2003]), which interpreted Boone to require the disclosure of all documents that "may cast light" on whether the insurer acted in bad faith.

"While Professionals Direct is correct to point out that some Ohio courts have applied Boone more narrowly, this is insufficient to show that the magistrate's application of Boone was 'clearly erroneous as a matter of law,'" the panel said.

The panel concluded that Professionals Direct has failed to demonstrate that any of the merits factors in the five-factor test under John B. weigh in its favor, denying its motion for writ of *mandamus*.

Judge Boyce F. Martin Jr. wrote the opinion, which was joined by Senior Judge Richard F. Suhrheinrich and Judge Helene N. White.

Kevin Robert McDermott of Schottenstein, Zox & Dunn in Columbus, Ohio, represents Professionals Direct. James E. Arnold of James E. Arnold & Associates in Columbus represents the respondent. ■

Order Allowing Ex Parte Physician Interviews In Amiodarone Case Vacated

RENO, Nev. — A Nevada federal judge on Aug. 27 filed an order vacating a ruling by a magistrate judge that would allow the defendant in a products liability case involving an anti-arrhythmic drug to conduct *ex parte* informal interviews with the decedent's treating physicians (Iris Parker v. Upsher-Smith Laboratories, Inc., et al., No. 3:06-CV-518-ECR-VPC, D. Nev.).

(**Order available.** Document #52-090917-008Z.)

Iris Parker sued Upsher-Smith Laboratories Inc. in the U.S. District Court for the District of Nevada, alleging that her husband, Arthur L. Parker, died as a result of ingesting amiodarone.

Patient-Physician Privilege

Parker sought review of a Feb. 3 order by the Magistrate Judge Valerie P. Cooke, who concluded that Parker had waived any physician-patient privilege as to the decedent's treating physicians because her lawsuit put the decedent's medical condition at issue, pursuant to Nevada Revised Statute Section 49.245.

(**Magistrate judge's order available.** Document #52-090917-016R.)

"To address plaintiff's concern that such interviews might be so broad as to include highly personal, irrelevant matters having nothing to do with the issues giving rise to the complaint, defendant's counsel represents to the Court that defendant has no interest in discussing matters that are superfluous to the proceeding," the magistrate said.

Sanctions

On Feb. 18, Magistrate Judge Cooke issued a second order sanctioning Parker's counsel $4,000 for sending faxes to the decedent's treating physicians alerting them of the order regarding *ex parte* interviews.

(**Sanctions order available.** Document #52-090917-020R.)

Parker then filed a request for review of the ruling, filed an objection to the sanctions order and requested a stay of sanctions pending the decision on her objection.

(**Plaintiffs request for review available.** Document #52-090917-015B.)

"It is Plaintiff's position that the language of NRS [Nevada Revised Statutes] 49.245(3) limits waiver of the physician patient privilege only to written medical or hospital records," Parker said.

She argued based on its legislative history that the statute's purpose is "to limit waiver of the physician-patient privilege to written medical and hospital records and to preclude defense counsel from having ex parte communications with a plaintiff's treating physicians."

Legislative History

Judge Edward C. Reed agreed with Parker's argument and said her "interpretation of the statute makes sense for the purpose of deciding the present issue on the limited basis required here. It is a fair reading of the legislative history that the intent of the amendment was to bar the ex parte interviews sought by Defendant here and to require such information to be probed by Defendant through normal discovery channels such as depositions. Depositions also strike the Court as a more fair way to obtain information with both parties present on the record and the ability of the opposing counsel to object to inappropriate or improper questions."

He also concluded that the Health Insurance Portability and Accountability Act (HIPAA) does not preempt the state law provisions in this case because HIPAA expressly states that it does not supersede state law that offers more stringent protection.

"Thus, although HIPAA may not prohibit the ex parte communications at issue in the present case, Nevada state law does. Nevada law is more stringent than the privacy protection afforded by HIPAA, and Nevada law controls. The provisions of HIPAA therefore do not affect our conclusions above," Judge Reed said.

No Error

However, Judge Reed ruled that the magistrate judge did not err in assigning sanctions to Parker's counsel.

"Our order, vacating the Magistrate Judge's order . . . that permitted the ex parte interviews, does not mean that the imposition of the sanctions by the Magistrate Judge was improper. The conduct of Plaintiff's counsel was in violation of the order. And even though we are now vacating the interview order . . . this does not relieve counsel of the obligation they had to follow the then effective un-vacated order of the Magistrate Judge. The imposition of the sanctions was not clearly erroneous or contrary to law," Judge Reed said.

Parker is represented by Brett K. South and Jonathan J. Whitehead of Rands, South & Gardner in Reno.

Upsher-Smith is represented by Steven E. Guinn of Laxalt & Nomura in Reno and Mark C. Hegarty and Adam R. Moore of Shook, Hardy & Bacon in Kansas City, Mo.

(Additional documents available: **Opposition.** Document #52-090917-018B. **Reply.** Document #52-090917-019B. **Defendants' brief regarding scope of interviews.** Document #52-090917-017B.) ■

Company Says Attempts To Resolve Disputes Prior To Motions Were Unsuccessful

WASHINGTON, D.C. — A South Dakota-based company involved in a breach of contract dispute in federal court in the District of Columbia says in a Sept. 14 opposition brief that its motions to compel and quash a subpoena served on its phone service provider should not be stricken because its attempts to meet and confer with counsel for the plaintiff company about the discovery disputes were unsuccessful (Covad Communications Company v. Revonet Inc., No. 06-1892, D. D.C.).

(**Opposition brief available.** Document #68-090918-011B. **Motion available.** Document #68-090918-012M.)

Revonet Inc. acknowledges that while the court is weary of discovery disputes in this case, the defendant company did all that it could to ask Covad Communications Co. to comply with its discovery request before filing its motions to compel and to quash.

Covad Communications sued Revonet in November 2006, alleging that the defendant company breached a confidentiality agreement by impermissibly accessing and selling proprietary information, trade secrets and customer information while contracted to conduct marketing efforts to identify businesses suitable for Covad Communications' Voice over Internet Protocol Services (VoIPS). According to Covad Communications, Revonet used the information to enhance its own database of potential customers and sold information to some of its customers, who are Covad Communications' direct competitors.

Compel, Quash, Strike Motions

On Aug. 21, the defendant company filed a motion to quash a subpoena served on its phone service provider SDN Communications, seeking all documents containing or relating to all calls from 26 identified phone lines and the assignment of information from those lines from June 1, 2004, to Dec. 31, 2006. On Aug. 24, Revonet filed a motion to compel Covad Communications' to produce information it had not submitted pursuant to a September 2008 court order.

(**Motion to quash available.** Document #68-090918-013M. **Motion to compel available.** Document #68-090918-014M.)

Covad Communications moved to strike the motions on Aug. 29, arguing that the briefs were filed in violation of Local Civil Rule 7(m), which required defense counsel to discuss the anticipated motion with plaintiffs' counsel to determine whether there is any opposition to the relief sought. The plaintiff company says that had defense counsel attempted to contact its attorneys before filing the motion to compel, the information could have been produced.

In addition, Covad Communications contends that the motion to quash the subpoena should be stricken because the U.S. District Court for the District of Columbia does not have the power to quash the subpoena because it was issued by the District of South Dakota, where Revonet has its major operations center. Moreover, Covad Communications argues that Revonet has made no showing of extraordinary circumstances justifying relief.

Meet And Confer

Revonet counters that the plaintiff company's argument regarding the failure to meet the meet-and-confer requirement is "disingenuous and legally unpersuasive."

"Revonet in no way failed to satisfy its meet-and-confer obligations," the company says. "Local Rule 7(m) does not contemplate a violation when a non-moving counsel ignores requests to confer, nor does it require a movant to initiate multiple unanswered phone calls or show up at the door of opposing counsel, hat in hand, in hopes he will discuss the matter."

Irrelevant Information Sought

The defendant company further argues that it has standing to bring its motion to quash because the information sought by the subpoena is irrelevant and could potentially harm Revonet's other customers.

"Moreover, Revonet disagrees with Covad's argument that the disclosure of such confidential commercial information, well outside the parameters of the Court's scheduling order, is not an 'extraordinary circumstance' based on 'specific facts,'" the company says. "Covad's subpoena is not designed to illicit the relevant documents called for in Revonet's Rule 26 disclosures as being possible documents supportive of Revonet's defense. The subpoena is far broader than that. Rather, the subpoena is designed to annoy, embarrass, and cause Revonet undue burden and expense. Such pernicious motives, when couched in an overbroad subpoena demanding all records relating to Revonet held by a third party, constitute 'good cause' to seek a protective order under Federal Rule [of Civil Procedure] 26(c)."

Andrew M. Klein of Klein Law Group is counsel for Covad Communications. Carol Elder Bruce and LaShon Kell of Bracewell & Giuliani represent Revonet. All are in Washington. ■

5th Circuit Affirms Denial Of Request To Use Discovery In Arbitration

NEW ORLEANS — The Fifth Circuit U.S. Court of Appeals on Aug. 6 affirmed a district court's ruling granting reconsideration and vacating an order granting an *ex parte* application to obtain discovery to be used in a private international arbitration in relation to disputes over a contract to construct a power plant and provide power in El Salvador (El Paso Corporation v. La Comision Ejecutiva Hidroelectrica Del Rio Lempa, et al., No. 08-20771, 5th Cir.; 2009 U.S. App. LEXIS 17596).

(**Opinion available.** Document #05-090825-031Z.)

La Comision Ejecutiva Hidroelectrica Del Rio Lempa (CEL) sued El Paso Corp. in the U.S. District Court for the Western District of Texas, seeking discovery from El Paso for use in a private international arbitration in Geneva.

The arbitration arose from a dispute between CEL and Nejapa Power Co., a state-owned utility company in El Salvador. Nejapa contracted to construct a power plant and to provide power to CEL for 20 years. El Paso is a company related to Nejapa.

Swiss Arbitration

The arbitration is being conducted pursuant to the United Nations Commission on International Trade Law arbitration rules and governed by El Salvadoran substantive law. The tribunal rejected CEL's request for broad discovery and issued an order limiting document production. The tribunal established a time for serving document requests and issuing rulings on any objections. CEL filed *ex parte* 28 U.S. Code Section 1782 applications in the U.S. District Court for the District of Delaware and the U.S. District Court for the Southern District of Texas to obtain production of documents and depositions.

Both courts granted CEL's *ex parte* Section 1782 applications. CEL issued document production requests to El Paso and Robert Hart, a legal representative of El Paso's. El Paso, Hart, Nejapa and the tribunal were unaware of CEL's Section 1782 applications and moved the Texas District Court for protection and reconsideration, arguing that CEL made misrepresentations in its application that failed to apprise the District Court of opinions issued by the Second and Fifth Circuits on that issue.

The tribunal issued an order noting that it was receptive to CEL's discovery efforts. The Texas District Court granted the motion for reconsideration. The court treated the motions for consideration as a Rule 60(b) motion pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure for relief from a judgment, vacated its *ex parte* order and quashed discovery requests.

Motion To Dismiss

CEL moved for expedited appeal, which was denied by the Fifth Circuit. The evidentiary hearing in the arbitration ended, and the tribunal closed the evidence. El Paso moved to dismiss CEL's appeal as moot.

El Paso argued that because the evidentiary hearing concluded in the arbitration and the tribunal closed evidence, the discovery that CEL sought with its Section 1782 application could not be used in the arbitration. In Republic of Kazakhstan v. Biedermann International (168 F.3d 880 [5th Cir. 1999]), the appeals court said it held "that a 'tribunal' within the meaning of § 1782 did not include a private international arbitral tribunal, and thus § 1782 did not apply to discovery sought for use in such a tribunal." The appeals court said the Texas District Court relied on the decision in Biedermann. CEL argued that Biedermann no longer applied, considering the U.S. Supreme Court's ruling in Intel Corp. v. Advanced Micro Devices, Inc. (542 U.S. 241, 258, 124 S. Ct. 2466, 159 L. Ed. 2d 355 [2004]).

Moot

The appeals court said that none of the concerns raised in Biedermann on the application of Section 1782 to private international arbitrations were considered in Intel. In Biedermann, the appeals court said it noted that Section 1782 authorized broader discovery than what was authorized for domestic arbitrations under the Federal Arbitration Act Section 7.

The appeals court said it also noted that "empowering parties in international arbitrations to seek ancillary discovery through federal courts could destroy arbitration's principal advantage as 'a speedy, economical, and effective means of dispute resolution' if the parties 'succumb to fighting over burdensome discovery requests far from the place of arbitration.'" The appeals court said none of these issues or private arbitration was raised in Intel.

"Because '[w]e cannot overrule the decision of a prior panel unless such overruling is *unequivocally* directed by controlling Supreme Court precedent,' we remain bound by our holding in Biedermann. Therefore the district court did not abuse its discretion in granting El Paso's Rule 60(b) motion," the appeals court said.

The appeals court denied El Paso's motion to dismiss the appeal as moot and affirmed the District Court's decision to grant the Rule60(b) motion.

The case was heard by Judges W. Eugene Davis, Priscilla R. Owen and Catharina Haynes.

Counsel

CEL is represented by David Michael Orta and Mara Vanessa Senn of Arnold & Porter in Washington, D.C., and Andrew Lee Pickens and Angus Joseph Dodson of Gibbs & Bruns in Houston.

Hart is represented by Paul Joseph Dobrowski and Charles Gerard Harrison of Dobrowski & Associates in Houston.

El Paso is represented by Adam P. Schiffer in Houston and Basil Paul Nichols of El Paso Energy Corp in Houston.

Nejapa is represented by Joy M. Soloway, Charles Mark Baker, Kevin Michael O'Gorman and Andrew Paul Price of Fulbright & Jaworski in Houston. ■

Documents Related To Defense In Environmental Suit Are Discoverable

SEATTLE — Because documents related to an insured's representation in an underlying environmental contamination suit are crucial to an insurer's defense in a coverage action, the attorney-client privilege and the work product doctrine do not apply to bar discovery of the documents, a Washington federal judge said Aug. 18 (Bank of America v. Travelers Indemnity Co., et al., No. C07-0322RSL, W.D. Wash.; 2009 U.S. Dist. LEXIS 81780).

(**Opinion available.** Document #03-090916-004Z.)

In October 2004, Safeway Inc. sued a number of adjacent land owners for environmental contamination discovered on its property. Bank of America was sued as trustee for the Jurgensen Living Trust, which owned the property.

Bank of America retained the law firm of Davis Wright Tremaine (DWT) as defense counsel in the environmental litigation, despite the fact that DWT represented two of the Bank of America's co-defendants, ConocoPhillips and ChevronTexaco, in unrelated matters. Bank of America signed a waiver of conflicts of interest acknowledging that DWT could not assert any cross-claims against the oil companies regarding the contamination on Safeway's property.

Coverage Suit

Bank of America eventually settled the environmental litigation with Safeway for $633,333 and filed this suit in the U.S. District Court for the Western District of Washington against some of its insurers to recover the settlement payment plus attorney fees of more than $1 million.

A week after filing the coverage suit, Bank of America notified Wausau Underwriters Insurance Co. and Nationwide Indemnity Co. (collectively, Wausau) of Safeway's environmental contamination claim and requested coverage under its insurance policy. Bank of America then named Wausau as a third-party defendant.

Wausau filed a cross-claim for declaratory relief against Bank of America, arguing that it has no duty to indemnify the bank because it had breached the notice provision of the insurance contract.

Wausau moved to compel Bank of America to produce documents relating to Bank of America's defense in the environmental contamination suit and to supplement its disclosures.

Wausau argued that DWT's inability to file cross-claims against the oil companies in the underlying suit damaged Bank of America's litigation position. Wausau claimed that discovery regarding why decisions were made in the underlying environmental litigation will show that it was prejudiced by the bank's late notice because counsel of its choice would have and could have performed better.

Protected Documents

Bank of America opposed the motion, arguing that the documents related to the underlying suit are protected by the attorney-client privilege and/or work product doctrine and that it has no duty to supplement its initial disclosures because Mary C. Jurgensen now controls any remaining rights under the Wausau policy.

Judge Robert S. Lasnik granted Wausau's motion in part, determining that Bank of America waived the attorney-client privilege when it tendered its claim for coverage to Wausau. The judge explained that "the affirmative act was the catalyst which placed the Bank's late notice and the prejudice arising therefrom at issue."

The judge said that Wausau has evidence of "extra-legal impediments and specific litigation tactics" that could reasonably lead to one to question DWT's representation.

"Determining whether Wausau's counsel would have performed better will involve an evaluation of attorney-client decisions throughout the environmental contamination litigation — how the litigation strategy was developed, whether certain defenses were considered, and what impact DWT's loyalties to the oil companies had. Thus, the privilege must yield if Wausau is to have access to information that is vital to its coverage defense," the judge said.

In addition, the judge said the materials withheld under the work product doctrine are discoverable because the documents are critical to Wausau's defense and are unavailable from other sources.

Supplemental Disclosures

However, the judge denied the portion of Wausau's motion seeking supplemental disclosures on the computation of damages.

"Neither the Bank nor Mrs. Jurgensen has asserted a claim against Wausau in this litigation. Although they apparently intend to contest Wausau's request for a declaration of no coverage under the insurance policy, they have not asked for affirmative relief of any kind against the insurer. Thus, a computation of damages is unnecessary, given the absence of any claim on which damages could be awarded," the judge concluded.

Gregory L. Harper, Todd Christopher Hayes and Charles K. Davis of Harper Hayes in Seattle represent Bank of America. Bryan M. Barber and Valarie Hastings Jonas of the Barber Law Group in San Francisco, Patrick N. Rothwell of Davis Rothwell Earle & Xochihua in Seattle and William G. Earle of the firm's Portland, Ore., office represent Wausau. ■

Digitek MDL Magistrate Judge Allows Targeted Discovery By Defendants

CHARLESTON, W.Va. — The federal magistrate judge in the Digitek multidistrict litigation in a West Virginia federal court ruled Aug. 26 that the plaintiffs' objections for the defendants' first set of admission for 39 plaintiffs are insufficient and ordered the plaintiffs to serve answers within 20 days of the order (In Re: Digitek Products Liability Litigation, MDL No. 1968, No. 08-md-1968, S.D. W.Va., Charleston).

(**Pretrial Order No. 39 available.** Document #52-090917-001Z.)

Fifty-eight Digitek product liability cases alleging that defendants Actavis Totowa LLC, Actavis Inc. and Actavis Elizabeth LLC released Digitek tablets containing double the appropriate dosage to the public in 2008 were transferred to a multidistrict litigation assigned to Chief U.S. Judge Joseph R. Goodwin of the Southern District of West Virginia on Aug. 13. The plaintiffs allege that the tablets can cause digitalis toxicity in patients with renal failure. This condition can cause nausea, vomiting, dizziness, low blood pressure, cardiac instability, bradycardia and death.

Judge Goodwin issued Pretrial Order (PTO) No. 16 on March 9, which established case management procedures and deadlines.

Short Requests

On July 14, the defendants moved under Federal Rule of Civil Procedure 36(a)(6) for the court to determine the sufficiency of the plaintiffs' master objections to the defendants' first request for admission to various plaintiffs.

"Defendants submitted three short requests for admission targeted at [Federal Rules of Civil Procedure] Rule 11 issues. Plaintiffs objected, claiming that the requests: 1) are not permitted under PTO #16; 2) do not bear on liability or damages issues; and 3) seek attorney-client or work product privileged information," the defendants say.

The plaintiffs filed a response in opposition on July 30. They argue that the individual case discovery the defendants are seeking is prohibited by PTO No. 16.

Rule 11

Magistrate Judge Mary E. Stanley issued PTO No. 39 in which she denied the plaintiffs' objections and held that Rule 11 does not apply to the defendants' requests.

"The plaintiffs are correct that Plaintiff Fact Sheets are considered discovery responses according to the order. Their argument is premature, however, because the defendants have not yet filed a Rule 11 motion for sanctions. Even so, the plaintiffs again miss the point of the defendants' requests. The defendants are not attempting to discover whether the plaintiffs committed sanctionable conduct in their Plaintiff Fact Sheets. Instead, they are trying to gather information as to whether there were appropriate Rule 11 prefiling investigations," Magistrate Judge Stanley said.

She also rejected the plaintiffs' argument that the requests violate Rule 36.

Specifically Aimed

"The court finds that the requests are specifically aimed at discovering information relevant to the defendants' defense. If the plaintiffs in the thirty-nine identified cases in fact failed to comply with Rule 11, serious issues arise as to the merits of those plaintiffs' claims. The defendants would be able to use the information gathered from the requests to support a defense that the claims lack evidentiary basis. Thus, the information sought by the defendants is within the scope of discoverable material under Rule 26(b)(1). The defendants' requests for admission therefore comply with Rule 36," Magistrate Judge Stanley said.

She held that the plaintiffs have failed to meet their burden in showing that the information targeted by the requests is protected by the attorney-client privilege and/or the work product doctrine because they did not submit a privilege log or proffer any reason the privileges might apply.

"The defendants' requests for admission are sufficiently and narrowly tailored to reveal whether the plaintiffs were in possession of the relevant records at the time suit was initiated. The requests will not cause the plaintiffs any undue burden or hardship as the information necessary to answer the requests should be readily ascertainable. The requests are concise, simple, and straight forward; it is not likely the discovery requests will result in protracted satellite litigation. The requests are the most efficient method of developing a record. With the answers, the defendants should be able to determine if further sanction or summary judgment motions are appropriate," the magistrate said.

Originally Negotiated

The plaintiffs argue in their objection brief, filed Sept. 10, that Magistrate Judge Stanley's ruling "expands the scope of PTO # 22 far beyond what the parties had originally negotiated."

(**Plaintiffs' objections available.** Document #52-090917-004B.)

"PTO #39, as written, creates uncertainty and ambiguity regarding the [parties'] rights and obligations under PTO #16; certainly this Honorable Court did not intend to allow Defendants to serve additional case specific discovery that is not mentioned in PTO # 16, while prohibiting Plaintiffs from serving any additional discovery on the Defendants, yet seemingly, this is exactly what has been sanctioned by the court in PTO # 39," the plaintiffs say.

They argue that Magistrate Judge Stanley erroneously interpreted Section R of PTO #22 to permit the parties to serve discovery requests outside the discovery periods for trial groups established in PTO #16.

Exhaustively Negotiated

"Section R was never meant by the parties to grant additional rights or expand discovery. Co-lead Counsel for the PSC and Defendants exhaustively negotiated the conduct of discovery terms before submitting a proposal to the Court. [Defendants] originally proposed an agreement that dealt only with coordination with other state litigation and deposition guidelines. After some discussions, Plaintiffs submitted a revision that included the section that is now Section R. This Section was intended as a 'Savings Clause' so that nothing in the order would replace or supersede any rights previously granted, specifically the discovery schedule as outlined in PTO # 16," the plaintiffs say.

They argue that the section was "not intended to expand the scope of discovery, or overrule any previous orders and certainly does not grant the parties any further rights."

"By finding that Section R of PTO # 22 allows discovery by both parties in all non-trial cases, the obvious and immediate impact of PTO # 39 as ordered by Stanley is that all Plaintiffs will propound discovery with vigor equal to Defendants. The carefully designed structure laid out in PTO # 16 for the efficient process of this litigation will be subverted," the plaintiffs say.

Carl N. Frankovitch of Frankovitch, Anetakis, Conatonio & Simon in Weirton, W.Va., Fred Thompson III of Motley Rice in Mount Pleasant, S.C., and Harry F. Bell Jr. of Bell & Bands in Charleston are co-lead counsel for the plaintiffs. Richard A. Dean and Matthew P. Moriarty of Tucker Ellis and West in Cleveland and Madeleine M. McDonough and Harvey L. Kaplan of Shook, Hardy and Bacon in Kansas City, Mo., are co-lead counsel for the defendants. Rebecca A. Betts of Allen, Guthrie & Thomas in Charleston is the defendants' liaison counsel. ■

Briefly

[Editor's note: The following briefs were taken from Mealey publications covering heart drugs and devices, hormone replacement therapy and silica. For more information, call 1-800-MEALEYS (1-800-632-5397).]

Digitek Defendants Seeking Lone Pine Case Management Order In MDL

CHARLESTON, W.Va. — The defendants in the federal Digitek multidistrict litigation in a West Virginia federal court on Sept. 10 moved for a Lone Pine case management order, arguing that recent responses to requests for admission show that in many cases, the plaintiffs do not have documented evidence of injury caused by the defendants' products (In Re: Digitek Products Liability Litigation, MDL No. 1968, No. 08-md-1968, S.D. W.Va., Charleston).

Fifty-eight Digitek product liability cases alleging that defendants Actavis Totowa LLC, Actavis Inc. and Actavis Elizabeth LLC released Digitek tablets containing double the appropriate dosage to the public in 2008 were transferred to an MDL assigned to Chief U.S. Judge Joseph R. Goodwin of the Southern District of West Virginia on Aug. 13. The plaintiffs allege that the tablets can cause digitalis toxicity in patients with renal failure. This condition can cause nausea, vomiting, dizziness, low blood pressure, cardiac instability, bradycardia and death.

Judge Goodwin issued Pretrial Order (PTO) No. 16 on March 9, which established case management procedures and deadlines.

On Aug. 26, Magistrate Judge Mary E. Stanley issued PTO No. 39, in which she denied the plaintiffs' objections to the defendants' requests for admission. The defendants sought "targeted discovery" of 39 plaintiffs in order to inquire what records they had in their possession at the time of filing suit (See related story in this issue).

The defendants say in their motion that the responses to these requests for admission are now being served pursuant to that order.

"As a baseline, each Plaintiff must prove that he or she received too much digoxin and became toxic. Nonetheless, responses to Requests for Admission served by various Plaintiffs have revealed that many Plaintiffs' counsel had no medical records in their possession when they filed suit that established high digoxin levels. In even more cases (likely over a majority) there is simply no evidence of digoxin toxicity reflected by the medical records collected to date by a third party collection service since the inception of the lawsuit," the defendants say.

"Indeed . . . many of the cases reflect obvious, unrelated alternative causes for the injuries or deaths alleged by plaintiffs. Many cases show serum digoxin levels that are squarely within the therapeutic level and exactly what a medical professional would hope to see given the use of a conforming product. Other cases reveal no injury whatsoever. None reflect digoxin toxicity," the defendants say.

As a result, the defendants are seeking a Lone Pine order (pursuant to Lore v. Lone Pine, No. L 33606-85, N.J. Super; 1986 N.J. Super. LEXIS 1626), under which each plaintiff must submit an "affidavit from a medical expert in each case establishing that there is medical evidence of digoxin toxicity."

"*Lone Pine* orders are consistent with the purpose of MDL consolidation to enhance the efficiency and consistency of the pretrial phase of the pending cases consolidated into the MDL," the defendants say.

(**Motion for Lone Pine order.** Document #52-090917-005M. **Response.** Document #52-

090917-006B. **Exhibit.** Document #52-090917-007B.) ■

Current Discovery Process Is Efficient, NuvaRing Makers Tell MDL Court

ST. LOUIS — An order compelling the manufacturers of NuvaRing to provide documents to the plaintiffs every 30 days is unnecessary, the contraceptive makers say in a Sept. 8 response brief filed in the NuvaRing products liability multidistrict litigation court in the U.S. District Court for the Eastern District of Missouri, because every effort is being made to efficiently and quickly produce the voluminous amount of documents the plaintiffs are requesting (In re: NuvaRing Products Liability Litigation, MDL No. 1964, Case No. 08-md-1964, E.D. Mo.; See related story in this issue).

NuvaRing makers Organon Pharmaceuticals, Organon International Inc. and Schering-Plough Corp. say in their brief that in the days before the plaintiffs filed their motion to compel, plaintiffs' counsel was given a timeline for the production of requested custodial files through November.

In their Aug. 21 motion, the plaintiffs, who allegedly suffered thromboembotic injuries as result of using NuvaRing, request that the companies be required to produce a minimum number of documents every 30 days. According to the plaintiffs, the defendants have handed over only 84,031 pages of documents since the creation of the MDL in August 2008 and prior to the creation of the MDL, the companies produced 385,240 pages of documents in a single case.

"Plaintiffs' incessant focus on the number of pages produced is nothing more than a red herring," the companies say. "It fails to acknowledge that the number of documents processed and reviewed is far larger than the number produced; the output is not necessarily an indicator of the amount of work and time required for the review process."

The companies further argue that the plaintiffs have not established that they are entitled to discovery because it has yet to be decided if the claims in their master complaint have been pleaded with the specificity required by Federal Rule of Civil Procedure 9 or the U.S. Supreme Court's rulings in Bell Atlantic v. Twombly (550 U.S. 544 [2007]) and Ashcroft v. Iqbal (129 S. Ct. 1937, 1949 [2009]).

"The primary reason for denying Plaintiffs' motion to compel is that it is unwarranted: Plaintiffs have not demonstrated good cause for altering the agreed-upon discovery parameters and timetable," the manufacturers conclude. "Plaintiffs have not so much as alleged that Defendants have done anything to deliberately slow this process, nor have they made any informed, concrete suggestion, based in the practical realities of electronic document production, as to how Defendants might accelerate the process. Plaintiffs complain about delay, but have failed to demonstrate any."

(**Opposition brief.** Document #76-090911-009B.) ■

Plaintiffs In NuvaRing MDL Ask For Accelerated Document Production

ST. LOUIS — Plaintiffs in the NuvaRing products liability multidistrict litigation say in an Aug. 24 motion to compel that the manufacturers should be required to produce a minimum number of documents every 30 days because the defendant companies' current system of producing documents is "simply not workable" and has resulted in significant delay in the process of conducting other discovery (In re: NuvaRing Products Liability Litigation, MDL 1964, Case No. 08-md-1964, E.D. Mo.).

The plaintiffs, who claim that they suffered thromboembotic injuries as result of using the NuvaRing contraceptive, anticipate that production could reach five million pages of documents and that since the MDL was created in August 2008, defendants Organon Pharmaceuticals, Organon International Inc. and Schering-Plough Corp., have handed over only 84,031 pages of documents. Prior to the creation of the MDL, the companies produced 385,240 pages of documents in a single case, the plaintiffs say.

"The snail's pace at which Defendants are producing documents significantly delays the disposition of this litigation," the plaintiffs say. "The timing of the document production has been discussed at length between Plaintiffs' counsel and Defendants' counsel, yet Defendants' counsel has not agreed to accelerate the production."

The plaintiffs argue that the manufacturers should be ordered to produce a specified number of pages every 30 days in order to avoid a last-minute dump of documents on Nov. 30, when the defendants agreed to be finished producing documents. Moreover, the plaintiffs point out that the production of documents has slowed tremendously and that the defendants have not produced any documents since the July 21 status conference.

"Continuing the document production at this pace, without requiring Defendants to both accelerate the timetable for producing documents as well as the number of minimum pages, significantly delays the ultimate conclusion of this litigation because Defendants undoubtedly have millions of pages of documents which remain to be produced," the plaintiffs argue. "Based on recent experience by many members of Plaintiffs' Executive Committee in the Ortho Evra Litigation, Johnson & Johnson produced in excess of 10 million pages of documents. Although Defendants' counsel has been unable to provide Plaintiffs' counsel with any sort of range of the number of pages that will be produced from the 26 custodial files the Defendants have identified, there is no question that Defendants have millions of pages of documents yet to produce."

(**Motion available.** Document #76-090911-002M.) ■

Respirator Maker Cries Foul Over Document Disclosure In Insurance Fraud Case

HOUSTON — An insurance carrier failed to honor its agreements to protect the privilege rights of a respirator manufacturer it insures when it disclosed unredacted documents in connection with a federal prosecution of a silica attorney for insurance fraud, the manufacturer argues in an Aug. 12 motion objecting to the disclosure (United States v. Warren Todd Hoeffner, et al., No. 4:07cr0263, S.D. Texas; See December 2008, Page 24).

Warren Todd Hoeffner of Hoeffner & Bilek in Houston was indicted in June 2007 in the U.S. District Court for the Southern District of Texas, along with two former claims adjusters with The Hartford Financial Services Group, Rachel Rossow and John Prestage, for allegedly conspiring to skim millions of dollars in bribes and kickbacks from settlements of suits filed by Hoeffner against The Hartford's insureds.

Hoeffner and his co-defendants, all of whom deny the charges, face a variety of conspiracy, wire and mail fraud and other charges in connection with the scheme.

Mine Safety Appliances Co. (MSA), a Hartford insured, filed a motion objecting to the public disclosure by The Hartford of unredacted documents it says are privileged and confidential.

According to MSA, which is not a party to the case, it became involved against its wishes when it learned that The Hartford disclosed the documents during pretrial proceedings. The documents include letters between MSA, its counsel and its insurers that contain privileged information and attorney work product as well as attachments detailing the specific terms of settlement agreements, MSA says. In addition, it argues, some of the information contained in the documents at issue pertains to cases unrelated to Hoeffner and contains MSA product information, coverage details, corporate information and defense strategies and theories.

Further, MSA complains, counsel for The Hartford initially notified MSA that additional documents should be protected from further disclosure and maintained as confidential but reneged on an earlier agreement to make all efforts to assert privilege rights and keep the disclosed documents confidential during a pretrial hearing to avoid prejudice.

"Although MSA's Texas counsel did not assert its Objections at the time the various documents were subpoenaed, it promptly came forth to assert its Objections and seek the Court's protection as soon as it learned of the privileged and confidential nature of the disclosures made by its insurer in this case," MSA says. "Had MSA's Texas counsel known about the disclosures sooner and that Hartford did not intend to make all efforts to assert its privileges, it would have rightfully asserted its attorney-client and work product privilege at the same time that Hartford and the various insurance companies involved in this case made their initial objections to the production of documents. Furthermore, MSA's Texas counsel does not seek to delay the administration of justice by the objections made in this case, but rather it seeks to protect itself from any further undue prejudice and harm."

(**Motion to object to disclosure.** Document #62-090828-005B.) ■

Documents

LYNCH v. NOVANT MEDICAL GROUP, OPINION

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL CASE NO. 3:08cv340

KIMBERLY N. LYNCH,	)	
Plaintiff,	)	
vs.	)	**<u>MEMORANDUM OF DECISION AND ORDER</u>**
NOVANT MEDICAL GROUP, INC., d/b/a PRESBYTERIAN REGIONAL HEALTHCARE CORPORATION,	)	
Defendant.	)	

THIS MATTER is before the Court on Defendant's Motion for Sanctions Pursuant to Rule 37(b)(2) [Doc. 18] and the Magistrate Judge's Memorandum and Recommendation and Order issued in relation thereto [Doc. 23], filed on July 13, 2009, recommending that the Plaintiff's Complaint [Doc. 1] be dismissed with prejudice pursuant to Rule 37(b)(2) of the Federal Rules of Civil Procedure. For the reasons that follow, the Court adopts the Magistrate Judge's Recommendation, and this case is hereby dismissed with prejudice.

I. PROCEDURAL BACKGROUND

On July 18, 2008, the Plaintiff Kimberly N. Lynch filed her Complaint against the Defendant Novant Medical Group, Inc. d/b/a Presbyterian Regional Healthcare Corporation, seeking damages and injunctive relief for discrimination based on the Plaintiff's race and age in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e <u>et seq.</u> and the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 <u>et seq.</u> [Doc. 1]. At that time, the Plaintiff was represented by counsel. The Defendant filed its Answer on December 24, 2008. [Doc. 6]. On January 12, 2009, the Court entered an Pretrial Order and Case Management Plan, directing the parties to exchange initial disclosures by February 23, 2009 and to complete discovery in this case by September 30, 2009. [Doc. 9].

On February 5, 2009, counsel moved to withdraw from further representation of the Plaintiff. [Doc. 10]. At a pretrial conference on February 12, 2009, the Honorable Carl Horn, III, the Magistrate Judge to whom this case was then referred, granted counsel's motion to withdraw. In a subsequent written Order, Judge Horn warned the Plaintiff as follows:

> The Plaintiff is advised and cautioned that regardless of whether or when she retains new counsel, she will be expected and required to conduct discovery, respond to discovery requests from the Defendant, and generally carry out any other duties and responsibilities related to this litigation with all diligence, including complying with the Local Rules, the Federal Rules of Civil Procedure, the Pretrial Order and Case Management Plan, and other Orders of the Court, on or before the expiration of the appropriate deadlines.

[Doc 13 at 1-2].

As directed by the Pretrial Order and Case Management Plan, the Defendant served its Initial Disclosures on the Plaintiff on February 23, 2009. [Doc. 15-3]. At the same time, the Defendant served the Plaintiff with its First Set of Interrogatories and Request for Production of Documents. [Doc. 15-2]. In correspondence accompanying the Defendant's disclosures and discovery requests, the Defendant's counsel requested that the Plaintiff provide her initial disclosures and advise counsel of dates that she would be available for a deposition. [Doc. 15-4]. The Plaintiff did not respond to the Defendant's discovery or to counsel's correspondence. Instead, she filed a handwritten pleading on March 23, 2009, which the Clerk docketed as a "Pro Se Motion for Extension of Time," seeking to delay the scheduling of her deposition so that she could hire an attorney. [Doc. 14]. On April 15, 2009, the Defendant filed a Motion to Compel the Plaintiff to produce her initial disclosures, to respond to the written discovery, and to respond to the Defendant's request to take her deposition. [Doc. 15]. The Plaintiff did not respond to the Defendant's motion.

On May 5, 2009, the Honorable David S. Cayer, United States Magistrate Judge, entered an Order addressing the parties' pending motions. Noting that the Plaintiff effectively had delayed her deposition for at least sixty days through her unwillingness to communicate with defense counsel and to otherwise comply with her discovery obligations, the Magistrate Judge denied the Plaintiff's request to delay her deposition any further. [Doc. 16 at 2-3]. The Magistrate Judge then granted the Defendant's motion to compel, ordering as follows:

> a. Plaintiff shall serve complete responses to the Defendant's First Set of Interrogatories and Request for Production of Documents and her Initial Disclosures on or before May 31, 2009.
>
> b. Plaintiff shall appear for her deposition at a mutually agreed date, time and place on or before June 15, 2009, provided that if the parties are unable to agree as to a date, time and/or place, the deposition shall be conducted at the date, time, and place noticed by Defendant.

[Id. at 4]. The Magistrate Judge further admonished the Plaintiff as follows:

> [T]he Court specifically warns Plaintiff that any further failure to respond to Defendant's discovery requests or serve her Initial Disclosures, to appear for her deposition, to otherwise respond to Defendant's

> reasonable discovery requests, or to comply with this Court's Orders, the Local Rules, or the Rules of Civil Procedure will result in the imposition of sanctions. **Sanctions can include Plaintiff being required to pay Defendant's costs, including reasonable attorney's fees, and may also include dismissal of this lawsuit with prejudice**.

[Id.] (emphasis in original).

The Plaintiff did not produce her Initial Disclosures to the Defendant as ordered, but she did serve the Defendant with responses to the First Set of Interrogatories and Requests for Production of Documents by May 31, 2009. In a telephone conversation with the Plaintiff on June 10, 2009, the Defendant's counsel informed the Plaintiff that her discovery responses were not adequate, and that her deposition could not be scheduled until she had provided complete responses to these discovery requests, as was previously ordered. The Defendant asserts that the Plaintiff responded that she did not have to provide any further answer to these discovery requests than she had already provided. The Defendant further asserts that the Plaintiff also stated that she had been advised by a "Private at-law Natural Persons Legal Team" not to speak to defense counsel over the telephone and that any questions that counsel had should be directed to her in writing. [Doc. 18 at 3].

After this telephone conversation, defense counsel sent the Plaintiff a letter requesting that the Plaintiff provide complete discovery responses by June 17, 2009, or the Defendant would file a motion seeking sanctions for her failure to comply with the Court's Orders and the Federal Rules of Civil Procedure. [Id. at 4]. The Plaintiff did not respond to counsel's letter. Instead, on June 15, 2009, the Plaintiff filed a handwritten pleading, which the Clerk docketed as a "Motion to Amend/Correct Answers to First Set of Interrogatories and Request for Production of Documents," seeking an extension of time to "re-answer the questions [the Defendant's] attorney are [sic] asking for." [Doc. 17 at 1].

The Defendant filed a Motion for Sanctions Pursuant to Rule 37(b)(2) on June 19, 2009. [Doc. 18]. On June 22, 2009, the Plaintiff filed with the Court her amended responses to the Defendant's discovery requests. [Doc. 20]. On June 24, 2009, the Plaintiff filed a Response to the Defendant's Motion for Sanctions, asserting that she now had provided complete responses to the Defendant's discovery requests. [Doc. 21].

Pursuant to the standing Orders of this Court, both the Plaintiff's "Motion to Amend" and the Defendant's Motion for Sanctions were referred to Judge Cayer for disposition or recommendation as to disposition, as may be appropriate. On July 13, 2009, Judge Cayer entered a Memorandum and Recommendation and Order [Doc. 23], finding that the Plaintiff had failed to comply with the Court's prior Order to provide her Initial Disclosures and to provide complete responses to the Defendant's discovery requests, and that the Plaintiff's actions had prejudiced the Defendant and caused it to incur unnecessary costs and expenses. [Id. at 5-7]. Finding that the Plaintiff had "give[n] no indication that any amount of remonstrance, warning, or lesser sanction, or even for that matter self interest, will be effective to dislodge her from the untenable position that she, rather than the Court, is the final authority governing her conduct in this litigation," Judge Cayer denied the Plaintiff's Motion to Amend and recommended that the Defendant's Motion for Sanctions be granted and that the Plaintiff's Complaint be dismissed with prejudice. [Id. at 7].

The Plaintiff timely filed Objections to the Magistrate Judge's Recommendation on July 24, 2009. [Doc. 24].[1] The Defendant has not filed any response to the Plaintiff's Objections, and the time for filing such a response has now passed. Accordingly, this matter is now ripe for disposition.

[1]The Plaintiff's Objections originally were filed as a notice of appeal to the Fourth Circuit, but this appeal was later dismissed as improvidently docketed. [Doc. 29].

II. STANDARD OF REVIEW

The Court "shall make a de novo determination of those portions of the report or specific proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). Such objection must be made "with sufficient specificity so as reasonably to alert the district court of the true ground for the objection." United States v. Midgette, 478 F.3d 616, 622 (4th Cir.), cert. denied, 551 U.S. 1157, 127 S.Ct. 3032, 168 L.Ed.2d 749 (2007). The Court is not required to review, under a de novo or any other standard, the factual or legal conclusions of the magistrate judge to which no proper objections have been raised. See Thomas v. Arn, 474 U.S. 140, 150, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985).

III. ANALYSIS

In her Written Objections, the Plaintiff does not specifically object to any of the Magistrate Judge's proposed findings or recommendations. As such, a de novo review of the Memorandum and Recommendation is not warranted in this case. In light of the fact that the Magistrate Judge has recommended dismissal of the Plaintiff's Complaint, and because dismissal is such a drastic sanction, the Court will nonetheless, out of an abundance of caution, proceed

to review the record as a whole in order to determine whether such a drastic sanction is truly warranted in this case.

Rule 37 of the Federal Rules of Civil Procedure provides that "[i]f a party . . . fails to obey an order to provide or permit discovery, . . . the court where the action is pending may issue further just orders," including an order "dismissing the action or proceeding in whole or in part." See Fed. R. Civ. P. 37(b)(2)(A)(iv). The Court has broad discretion to impose sanctions on a party who fails to comply with the Court's discovery orders. Hathcock v. Navistar Int'l Transp. Corp., 53 F.3d 36, 40 (4th Cir. 1995). When the sanction to be imposed is dismissal of an action, however, "the range of discretion is more narrow than when a court imposes less severe sanctions." Id. (internal quotation marks and citation omitted).

In Mutual Federal Savings & Loan Ass'n v. Richards & Associates, Inc., 872 F.2d 88 (4th Cir. 1989), the Fourth Circuit established four factors for the Court to consider before dismissing an action as a sanction:

> (1) whether the noncomplying party acted in bad faith;
>
> (2) the amount of prejudice [her] noncompliance caused [her] adversary, which necessarily includes an inquiry into the materiality of the evidence [she] failed to produce;

> (3) the need for deterrence of the particular sort of noncompliance; and
>
> (4) the effectiveness of less drastic sanctions.

Id. at 92 (citing Wilson v. Volkswagen of Am., Inc., 561 F.2d 494, 503-06 (4th Cir. 1977)). "Such an evaluation will insure that only the most flagrant case, where the party's noncompliance represents bad faith and callous disregard for the authority of the district court and the Rules, will result in the extreme sanction of dismissal or judgment by default." Id. In addition to consideration of the Mutual Federal factors, the Fourth Circuit also requires that an adequate advance warning have been given to the noncompliant party before an action is dismissed as a discovery sanction. See Hathcock, 53 F.3d at 40.

With respect to the first Mutual Federal factor, the Court finds and concludes that the Plaintiff has engaged in bad faith conduct in this case. The Plaintiff was explicitly warned following the withdrawal of her counsel that, regardless of whether or when she retained new counsel, she would be expected and required to respond to the Defendant's discovery requests in compliance with the Federal Rules of Civil Procedure and to comply with all Orders of this Court. [Doc. 13 at 1-2]. Despite this explicit warning, the Plaintiff failed to provide her Initial Disclosures to the Defendant by the deadline set forth in the Court's Pretrial Order and Case Management Plan.

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[See Doc. 9 at 2 (requiring initial disclosures to be exchanged on or before February 23, 2009)]. The Plaintiff further failed to respond to the Defendant's written discovery requests, thus necessitating the filing of a motion to compel. The Plaintiff did not respond to this motion. The Court granted the motion to compel and ordered the Plaintiff to provide her Initial Disclosures and complete responses to the Defendant's discovery requests by May 31, 2009. [Doc. 16]. The Plaintiff, however, failed to comply with the Court's Order. She did not provide her Initial Disclosures to the Defendant by the deadline given, and although she did serve the Defendant with responses to its discovery requests, her responses were wholly inadequate. The Plaintiff refused to provide any information regarding persons having knowledge of her case, including the healthcare providers who had provided her with medical treatment for her claimed emotional distress, the expert witnesses whom she intended to call at trial, and persons to whom she reported the Defendant's alleged discriminatory practices, stating as follows:

> I have collaborated with several agencies both public and private, medical and or otherwise, for the support of my lawsuit, in which they have pledged support. With respect to my lawsuit and the confidence they have in favor of my case. Those of which I have pledged to stay liberties of revealing their personal information until they are called upon for that said support, <u>for fear of possible threats, duress, or</u>

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> <u>coercion from parties involved in my lawsuit and or otherwise. Therefore there will be restraint.</u>

[Doc. 17 at 3-4] (emphasis in original).

In response to the Defendant's interrogatories regarding the facts and evidence in support of her specific claims, the Plaintiff simply referred to her employment record and to a document entitled "My Story," which she indicates is attached to her responses but was not attached to the copy of the responses filed with the Court. [Id. at 4]. The Plaintiff also refused to provide any information regarding her specific claims for damages, stating in response to each interrogatory regarding that subject matter: "All evidence to support this response will be at this time in restraint." [Id. at 5-6]. Additionally, the Plaintiff's interrogatory responses were not verified.

The Plaintiff also refused to comply with the Defendant's requests for production of the Plaintiff's EEOC file, her medical records from January 2007 to the present, her tax returns for 2005 to the present, and other documents, notes, and correspondence related to the Plaintiff's claims in this action. Id. at 20-23]. As to each of these requests, the Plaintiff responded as follows:

> This is evidence related to the Lawsuit filed, due to the integrity of the item its [sic] evidence. The performance that of which must be presented in a court of law for evaluation of authenticity, therefore it

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> must be restrained not to incriminate the suit itself
> with duress.

[Id. at 6-8].

The Plaintiff's decision to hold relevant and discoverable information "in restraint" is unsupported by the Federal Rules of Civil Procedure. Under the Federal Rules of Civil Procedure, a party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Id. A party from whom discovery is sought may move to limit or preclude discovery where the discovery sought is unreasonably cumulative or duplicative; the party seeking the discovery already has had ample opportunity to obtain the discovery; or the burden or expense of the requested discovery outweighs its likely benefit. Fed. R. Civ. P. 26(b)(2)(C). A party may also seek a protective order with respect to the requested discovery to protect the party from annoyance, embarrassment, oppression, or undue burden or expense. Fed. R. Civ. P. 26(c)(1). In the present case, the Defendant's interrogatories and requests seek information that is relevant to the Plaintiff's claims. The Plaintiff does not identify any privilege that is applicable to this information, nor has she identified any proper basis under

either Fed. R. Civ. P. 26(b)(2)(C) or Fed. R. Civ. P. 26(c)(1) to limit or preclude this discovery. The Plaintiff's withholding of this discoverable information from the Defendant is therefore improper.

When contacted by the Defendant's counsel regarding the adequacy of her responses, the Plaintiff not only refused to supplement her responses but also refused to speak with counsel over the telephone, insisting that any further communications be conducted solely in writing. When counsel then communicated with her letter, however, the Plaintiff did not respond.

Although the Plaintiff eventually submitted amended responses to the Defendant's discovery requests, her responses were still wholly inadequate and not in compliance with the Federal Rules of Civil Procedure. In her amended responses, which are also unverified, the Plaintiff continues to refuse to produce any medical records or provide any information regarding her medical providers, asserting that the Defendant "has access to all my medical records" and therefore such information is available through "a more convenient source." [Doc. 20 at 3]. While the Plaintiff appears to believe that the Defendant has access to all of her medical records by virtue of its status as a medical group, there is nothing in the record that would reasonably justify this belief. In fact, the Defendant specifically has denied having access to any

such records. The Plaintiff's refusal to produce this discoverable information is simply without any factual or legal support.[2]

The Plaintiff also continues to refuse to identify persons with knowledge of her claims, including expert witnesses and fact witnesses, and refuses to provide documents and other information regarding her claims, asserting that such information is "privileged." [Id. at 3-9]. As the Plaintiff subsequently explains in her Response to the Defendant's Motion for Sanctions, it is the Plaintiff's position that any information that she possesses regarding her case is protected by the attorney-client privilege as she is acting as her own attorney in this matter. [Doc. 21 at 6]. This argument is frivolous and has no support in the law. The attorney-client privilege protects only confidential communications between a party and her attorney. See In re Allen, 106 F.3d 582, 600 (4th Cir. 1997). There is no basis in the law for the Plaintiff to claim this privilege merely because she is proceeding *pro se* in this matter.

[2] In her Objections to the Memorandum and Recommendation, the Plaintiff indicates that she is now willing to produce the requested medical records "since the defendant claims they [sic] have no access to my medical records," but she notes that "the fact remains that they [the Defendant] are my 'Doctors' and they are NOVANT MEDICAL GROUP, INC." [Doc. 24 at 2-3]. By this statement, the Plaintiff appears to contend that the Defendant, who is the Plaintiff's former employer, also provided her medical care – even after her termination. It also appears that the Plaintiff continues to maintain her frivolous argument that the Defendant is somehow privy to all of her medical records, even those records maintained by other healthcare providers, simply by virtue of its status as a medical group.

Moreover, even if the Plaintiff were represented by counsel, such substantive information would not become privileged simply because she communicated it to her attorney.

The Defendant has not propounded any discovery request which calls for the Plaintiff to divulge any privileged communication that she may have had with her former counsel or which otherwise calls for the disclosure of privileged information. Thus, the attorney-client privilege is simply not applicable in this case, and it was improper for the Plaintiff to assert the privilege to justify withholding relevant discovery from the Defendant.

The Plaintiff appears to argue that she is not required to respond further to the Defendant's interrogatories and requests for production as she believes they were propounded with the intent to harass, annoy, embarrass, oppress, or cause undue burden or expense to her. [See Doc. 21 at 14; Doc. 24 at 3]. Again, the Plaintiff makes an entirely frivolous argument. The Defendant's discovery requests seek the most basic information regarding the facts underlying the Plaintiff's claims: they ask the Plaintiff to provide details regarding the facts supporting her claims for discrimination and retaliation and for the identities of persons with knowledge of her allegations. The Defendant's requests also seek basic information regarding the Plaintiff's

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educational background, her participation in prior criminal or civil actions, and a detailed accounting of her alleged damages. These discovery requests are clearly relevant to the claims alleged by the Plaintiff and are reasonably calculated to lead to the discovery of admissible evidence. See Fed. R. Civ. P. 26(b)(1). There is nothing to suggest that these interrogatories were propounded with the intent to harass, annoy, embarrass, oppress or otherwise burden the Plaintiff.

The Plaintiff further claims that many of the Defendant's requests are "cumulative and duplicative." [Doc. 20 at 3-8]. This argument, too, is without merit. "A claim that a discovery request should be disallowed on grounds that it is duplicative is proper when the objecting party can show that 'all documentary material from which the interrogatory answer may be conveniently obtained has been previously provided.'" Cappetta v. GC Services Ltd. P'ship, No. 3:08CV288, 2008 WL 5377934, at *5 (E.D. Va. Dec. 24, 2008) (quoting In re Folding Carton Antitrust Litig., 83 F.R.D 260, 264-65 (N.D. Ill. 1979)). To date, the Plaintiff has produced only two documents to the Defendant: a list of businesses to which she has applied for employment since her termination, and a handwritten narrative entitled "My Story." As neither of these documents has been included in the record, they cannot be

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reviewed by the Court. It would be highly unlikely, however, that these two documents alone adequately address all of the subject matters covered by the Defendant's discovery requests.

While the Plaintiff indicates in her Objections to the Memorandum and Recommendation that she is willing to "abide by the Civil Rules, Laws, and Procedures of the court," [Doc. 24 at 3], the Plaintiff's conduct to date belies this assertion. Although she has been warned explicitly that failure to comply with the Orders of this Court would result in the imposition of sanctions and possibly the dismissal of this lawsuit, the Plaintiff has engaged in a pattern of noncompliance with the Court's Orders. See Mutual Federal, 872 F.2d at 93 (finding defendants acted in bad faith by engaging in "a pattern of indifference and disrespect to the authority of the court"). She has failed to provide her Initial Disclosures to the Defendant, despite being ordered twice to do so. She failed to respond timely to the Defendant's discovery requests and had to be compelled to respond. The discovery responses that she finally did serve were unresponsive and wholly inadequate. Additionally, she has steadfastly refused to comply with the most basic discovery requests by asserting frivolous arguments that have no basis in law or fact. For these

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reasons, the Court concludes that the Plaintiff's conduct has been willful and in bad faith.

The Court further finds and concludes that the Plaintiff's willful non-compliance has resulted in prejudice to the Defendant. This matter is scheduled for trial during the Court's February 2010 term. The discovery deadline is September 30, 2009 and is quickly approaching. To date, however, the Defendant has not been able to obtain any meaningful discovery from the Plaintiff. Without the Plaintiff's discovery responses and initial disclosures, the Defendant has been unable to prepare a defense, take depositions or otherwise prepare for trial. Additionally, the Defendant has incurred unnecessary and avoidable costs in the form of attorney's fees for the preparation of the Motion to Compel and the Motion for Sanctions.

Next, the Court finds and concludes that the need for deterrence warrants the imposition of a strong sanction in this case. The Federal Rules of Civil Procedure are designed to ensure "the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. This goal is thwarted when a party feels free to disregard the Rules and the Orders of the Court. A *pro se* litigant, like any other litigant who appears before the Court, has the obligation to obey the Court's Orders and to participate in

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discovery. "*Pro se* litigants must understand that they are not completely immune to sanctions simply because they lack counsel." Ray v. Ingles Markets, Inc., No. CIV. 1:01CV263, 2002 WL 663908, at *3 (W.D.N.C. Apr. 22, 2002) (citing Ballard v. Carlson, 882 F.2d 93, 95 (4th Cir. 1989)). To ignore the Plaintiff's noncompliance in this case "would encourage other litigants to flirt with similar misconduct." Mutual Federal, 872 F.2d at 93.

Finally, the Court concludes that there is no reason to believe that a less drastic sanction would be effective in this case. The Plaintiff has been warned explicitly that failure to comply with the Orders of this Court and with the Rules of Civil Procedure would result in sanctions. [Doc. 16 at 4]. Despite this explicit warning, and despite having ample opportunity to comply with the Court's Orders, the Plaintiff has insisted on a course of obstreperous behavior, refusing to answer the Defendant's reasonable discovery requests and asserting frivolous arguments. The Plaintiff's noncompliance effectively has stalled this litigation now for six months. For all of these reasons, the Court concludes that the imposition of the severe sanction of dismissal with prejudice is warranted in this case.

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IV. CONCLUSION

After a careful review of the Magistrate Judge's Recommendation, the Court finds that the proposed findings of fact are supported by the record and that the proposed conclusions of law are consistent with current case law. Accordingly, the Court hereby accepts the Magistrate Judge's Recommendation [Doc. 23] that the Defendant's Motion for Sanctions Pursuant to Rule 37(b)(2) [Doc. 18] be granted and that the Plaintiff's Complaint be dismissed with prejudice.

IT IS, THEREFORE, ORDERED that the Defendant's Motion for Sanctions Pursuant to Rule 37(b)(2) [Doc. 18] is **GRANTED**, and the Plaintiff's Complaint is hereby **DISMISSED WITH PREJUDICE**.

A Judgment consistent with this Order shall be entered simultaneously herewith.

IT IS SO ORDERED.

Signed: September 4, 2009

Martin Reidinger
United States District Judge

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SMS v. BRODY, ORDER

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SOUTHEASTERN MECHANICAL SERVICES, INC.,

Plaintiff,

vs. **Case No.: 8:08-CV-1151-T-30EAJ**

NORMAN BRODY, et al.,

Defendants.
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ORDER

Before the court are Plaintiff's **Motion to Compel Production of Documents** (Dkt. 316) and Defendant **Thermal Engineering Construction Services, Inc.'s Response to Plaintiff's Motion to Compel Production of Documents** (Dkt. 323).

Plaintiff Southeastern Mechanical Services, Inc. ("SMS") seeks an order compelling the production of documents relating to training presentations Defendant Thermal Engineering Construction Services, Inc. ("TEI") conducted in 2008.[1] Defendant claims such communications are protected by the attorney-client privilege. Plaintiff asserts that Defendant waived any attorney-client privilege relating to the training presentations when it publicly disclosed an affidavit discussing the training program and a handout from a training presentation.

Background

In the spring of 2008, Babcock Power, Inc. ("Babcock") requested that its outside counsel, Bryan Cave Powell Goldstein ("Bryan Cave"), prepare a legal training program to instruct employees of Babcock and its various subsidiaries on the importance of clear and concise communications in their business dealings (Dkt. 323, Ex. A, at ¶ 2). Scott Green ("Green") and Christopher Galanek ("Galanek"), attorneys at Bryan Cave, developed the legal training program (Id. at ¶ 3). During 2008, Green and Galanek presented the training program on twenty occasions to employees of Babcock and its affiliates, including TEI employees (Id. at ¶¶ 4, 7).

On June 6, 2008, SMS sent a demand letter to TEI alleging unauthorized access and use of SMS's confidential and proprietary information (Dkt. 316, Ex.1).

On June 12, 2008, Green and Galanek gave two training presentations to TEI employees in Duncan, South Carolina (Dkt. 323, Ex. A, at ¶ 5).

SMS first learned of the training presentations during the deposition of Defendant Norm Brody ("Brody") on November 12, 2008. Brody testified that Green and Galanek made a presentation regarding the importance of e-mails and "what you put into e-mails" (Dkt. 316, Ex. 2, Brody Depo. at p. 75). Brody stated that the presentation did not address the disputes raised in this case (Id. at p.76). When SMS counsel asked what Brody remembered about the presentation, TEI counsel objected to further questioning on the basis of the attorney-client privilege as to those communications (Id. at pp. 77-78).

On March 30, 2009, SMS filed a motion for spoliation sanctions against Defendants (Dkt. 269) alleging that Defendants should be sanctioned for wiping and deleting information, including e-mails, from the laptops and BlackBerries of Brody, Jimmy Sherouse ("Sherouse"), and Kevin Smith ("Smith") ("Individual Defendants") (Id.). SMS further contended that, as part of Defendants' attempt to hide their spoliation of evidence, Individual Defendants met with Galanek who later "...instructed Individual Defendants, [Dale] Naughton, and a few other TEI employees regarding the proper use of e-mails and what should not be put in e-mails" (Dkt. 282 at 3)

In response to SMS's spoliation motion, TEI argued that the training programs conducted by TEI's outside counsel have no relevance to the spoliation issue or to the claims and defenses asserted in this case (Dkt. 292). To support its position, TEI filed Green's affidavit, which provides the following description of the training program:

> In the spring of 2008, I was asked by our client Babcock Power Inc. to prepare a training program for the purposes of instructing the employees of Babcock Power Inc. and its various subsidiaries on the importance of clear, concise and precise communications in their business dealings. This training program was an interactive training program in which vignettes were used to demonstrate the importance of clear and precise communications when dealing with customers, vendors, and subcontractors and other employees of the Company, and the difficulties that may be created from vague, ambiguous or confusing communications.

(Dkt. 323, Ex. A, at ¶ 2). Green states that, during the presentations, neither he nor Galanek had any discussions with Individual Defendants and that the disputes in this case were not discussed with any TEI employees (Id. at ¶ 6). According to Green's second affidavit, the presentations to TEI employees were scheduled on or before May 1, 2008 (Dkt. 323, Ex. B, at ¶ 3).[2] The presentations were not in response to SMS's June 6, 2008 demand letter or in response to any of SMS's claims or allegations in this case (Id.).

A handout entitled "Business Communications For The Litigation Wary" was provided at the presentations (Dkt. 323, Ex. A at ¶ 8). The handout provides that "in all business communications," an employee should "strive to be . . . clear, precise, factual, accurate and professional" (Dkt. 323-2 at 7). The handout instructs an employee to avoid "ambiguity, emotion,

[1] Specifically, SMS seeks all documents relating to: (1) any meetings, presentations, or programs given by TEI's outside counsel to any Babcock entity in the past two years, (2) any handouts given to Babcock employees at the presentations, (3) any rosters or lists of names of employees who attended the twenty training sessions, and (4) any calendars or notes showing the dates of the presentations (Dkt. 323, Ex. D).

[2] TEI filed a second affidavit by Green in response to SMS's motion to compel (Dkt. 323, Ex. B).

argumentative tone, sarcasm, inaccuracies, finger pointing, and overly self critical comments" in drafting business communications (Id.). When preparing business communications, the handout advises an employee to consider: (1) the audience for the communication, (2) the recipient and the author of the communication, (3) the marking and identification of the communication, (4) whether counsel should be included or copied on the communication, (5) the retention and maintenance of the communication, (6) whether the communication should be verbal or written, (7) whether the communication is fact or opinion based, and (8) whether the communication involves a current or likely dispute (Id.).

Discussion

SMS asserts that TEI waived any attorney-client privilege protection for communications relating to the training presentations conducted by TEI's outside counsel. Specifically, SMS argues that by filing Green's affidavit and the handout in response to SMS's claims for spoliation sanctions, Defendant waived the privilege relating to such communications. SMS suggests that TEI is selectively disclosing privileged information to defend against SMS's spoliation claims while insisting upon protection of the privilege relating to those communications.

TEI responds that it provided only a general description of the training presentations to demonstrate that the presentations are irrelevant to this litigation and the spoliation issue. TEI contends it is not seeking to use the attorney-client privilege as both a "sword" and a "shield." Furthermore, TEI asserts that SMS has failed to demonstrate any prejudice from TEI's nondisclosure of confidential communications. Finally, TEI argues that SMS's motion should be denied as untimely.

The attorney-client privilege belongs solely to the client and the client may waive it

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expressly or implicitly. Cox v. Adm'r U.S. Steel & Carnegie, 17 F.3d 1386, 1417 (11th Cir. 1994), cert. denied, 513 U.S. 1110 (1995) (quotations and citations omitted). The doctrine of waiver by implication reflects the position that the attorney-client privilege was intended as a shield, not as a sword. Id. Therefore, a party may not use the privilege to prejudice his opponent's case or to disclose some selected communications for self-serving purposes. Id.

Waiver by implication may occur when a client places the attorney-client relationship directly at issue or when a client asserts reliance on an attorney's advice as an element of a claim or defense. Id. at 1418. A party "waives the privilege if it injects into the case an issue that in fairness requires an examination of otherwise protected communications." Id. at 1419. Although waiver by implication often occurs when a defendant raises an affirmative defense, the defendant need not raise an affirmative defense to inject a new issue into the case. Id. However, "[t]o waive the attorney-client privilege . . . a defendant must do more than merely deny a plaintiff's allegations. The holder must inject a new factual or legal issue into the case." Id.(quoting Lorenz v. Valley Forge Ins., 815 F.2d 1095, 1098 (7th Cir. 1987)); see In re Hillsborough Holdings Corp., 176 B.R. 223, 241 (M.D. Fla. 1994) (merely making allegations in pleadings is insufficient to constitute an "at issue" waiver). Moreover, a waiver of the privilege will generally not be found unless the party attacking the privilege has been prejudiced. Cox, 17 F.3d at 1417-18; Conkling v. Turner, 883 F.2d 431, 434 (5th Cir. 1989) (the attorney-client privilege is waived where a litigant places privileged information in issue for his own benefit and it would be manifestly unfair to the opposing party to allow the privilege to protect against disclosure).

The record does not demonstrate that TEI implicitly waived the attorney-client privilege by filing Green's affidavit and the handout in the public record. These documents do not reveal the

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substance of any protected communications during the training presentations. Pursuant to Fed. R. Civ. P. 26(b)(5)(ii), Green's affidavit generally describes the purpose, the participants, and the format of the legal training program conducted by TEI's outside counsel. Likewise, the handout contains general principles for drafting business communications.

There is no indication that reliance on advice of counsel is an affirmative defense in this case. Also, Green's affidavit and the handout were offered to show that the training program for TEI employees was planned prior to SMS's June 6, 2008 demand letter and that, during the presentations, TEI's outside counsel did not meet or have any conversations with Individual Defendants or TEI employees regarding the claims and defenses asserted in this case. TEI merely denied SMS's allegation that Individual Defendants attended the training presentations and met with Galanek in an attempt to hide their spoliation of evidence. Although SMS alleges that legal advice provided by TEI's outside counsel on the proper use of e-mail by TEI employees is relevant to discovery requests and this litigation, relevance provides no justification for ignoring the attorney-client privilege. Cox, 17 F.3d at 1418 (courts cannot justify finding a waiver of privileged information simply to provide the opposing party with helpful or relevant information). Accordingly, Plaintiff's **Motion to Compel Production of Documents** (Dkt. 316) is **DENIED**.

DONE and **ORDERED** in Tampa, Florida on this 25th day of August , 2009.

Elizabeth A. Jenkins
ELIZABETH A JENKINS
United States Magistrate Judge

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SMS v. BRODY, ORDER

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

SOUTHEASTERN MECHANICAL SERVICES, INC.,

Plaintiff,

vs. Case No.: 8:08-CV-1151-T-30EAJ

NORMAN BRODY, et al.,

Defendants.
_______________________________/

ORDER

Before the court are **Plaintiff's Motion for Sanctions Due to Spoliation of Evidence and for Order to Show Cause or, in the Alternative, to Amend the Complaint** (Dkt. 269), **Plaintiff's Supplement to its Motion for Sanctions Due to Spoliation of Evidence** (Dkt. 282), **Defendants Theodore Maliszewski's, Thermal Engineering Construction Service's Inc.'s, and Babcock Power Services, Inc.'s Response to Plaintiff's Motion for Sanctions Due to Spoliation of Evidence** (Dkt. 292), **Defendants Norman Brody, Jimmy Sherouse, and Kevin Smith's Opposition to Plaintiff's Motion for Sanctions Due to Spoliation of Evidence** (Dkt. 293), and **Plaintiff's Second Supplement to its Motion for Sanctions Due to Spoliation of Evidence** (Hearing Ex. 1).[1] A hearing has been held on the motion.

Southeastern Mechanical Services, Inc. ("SMS") seeks spoliation sanctions asserting that the laptops and BlackBerries issued by Thermal Engineering Construction Services, Inc. ("TEI ") to Defendants Norman Brody ("Brody"), Jimmy Sherouse ("Sherouse"), and Kevin Smith ("Smith") ("Individual Defendants") were completely wiped of any data. SMS asserts that Defendants acted in bad faith in destroying crucial evidence that they had a duty to preserve (Dkt. 269 at 8-12).[2] Alternatively, SMS requests an opportunity to amend its Third Amended Complaint to add a cause of action against Babcock Power, Inc. ("BPI")[3] for spoliation of evidence (Id. at 17).

SMS argues that striking Defendants' answer and entering a default judgment is the only sanction that will cure the prejudice caused by Defendants' wrongful actions (Id. at 16). In the alternative, SMS requests a ruling that: (1) Individual Defendants' laptops and BlackBerries contained trade secrets and other confidential information belonging to SMS, (2) the remaining Defendants were aware of this fact, and (3) Defendants used SMS's confidential information to compete with SMS (Id.). At a minimum, SMS asserts that the court should allow it to submit evidence pertaining to Defendants' intentional deletion of evidence and instruct the jury that it may draw an adverse inference against Defendants regarding the destroyed evidence (Id.).[4] SMS also seeks fees and costs incurred in determining whether the evidence was destroyed and in bringing this motion.

Defendants respond that no evidence has been destroyed because all the data on Individual Defendants' laptops and BlackBerries was preserved on BPI's servers (Dkt. 292 at 1). Even assuming that some e-mails were deleted, Defendants argue that hard copies of those e-mails were produced to SMS from BPI's server and, therefore, it is irrelevant whether any information was deleted from these computer devices (Id. at 7). Because all the data was ultimately produced to SMS, Defendants argue that spoliation sanctions are inappropriate. Furthermore, TEI, Babcock Power Services, Inc., and Theodore Maliszewski ("Corporate Defendants") contend that there is no evidence to demonstrate that they were involved in the alleged intentional destruction of this evidence (Id. at 2).

I. Factual Background

Sherouse and Smith purchased BlackBerries for use during their employment with TEI and they were reimbursed for the costs of these devices (Dkt. 292, Ex. B ¶ 2, Ex. C ¶ 2). Sherouse purchased his BlackBerry on May 29, 2008 or May 30, 2008 (Dkt. 269, Ex. A, Sherouse Depo. at 81). Smith purchased his BlackBerry no later than May 28, 2009 (Dkt. 282, Ex. C). Brody used his personal BlackBerry during his employment with TEI and was reimbursed for the cost of the BlackBerry (Dkt. 292, Ex. A ¶ 2).[5]

On May 28, 2008, Smith's BlackBerry was added to TEI's BlackBerry Enterprise Server, which activated his TEI e-mail account (Dkt. 282, Ex. C). On May 29, 2008, Brody completed and returned a BlackBerry Wireless Email Access Form to TEI, which activated his TEI e-mail account (Id.).

[1] During the hearing, the court granted Plaintiff's unopposed request to supplement the record with depositions of the parties' expert witnesses (Dkt. 324 at 28).

[2] In addition to seeking spoliation sanctions against Defendants for the destruction of the evidence, SMS argues that Defendants should be held in contempt of the court's June 13, 2008 order because they willfully destroyed key evidence relating to SMS's claims (Dkt. 269 at 6). Although SMS charges Defendants with contempt, there is no detailed argument regarding that issue. Instead, SMS's briefs focus on the charge of spoliation. The standards for contempt and spoliation are different. A finding of civil contempt must be based on "clear and convincing evidence" that a court order was violated. Jove Eng'g, Inc. v. IRS, 92 F.3d 1539, 1545 (11th Cir. 1996). This standard is more exacting than the preponderance of the evidence standard, but does not require proof beyond a reasonable doubt. Id. Accordingly, because SMS has failed to develop fully its contempt argument, this sanction request should be filed as a separate motion.

[3] BPI is a parent company of TEI.

[4] If the court finds that Defendants did not delete the evidence from the computer devices, and that an employee of BPI deleted the information, SMS seeks leave to amend its amended complaint to add a count of spoliation against BPI (Dkt. 269 at 17).

[5] During the hearing on this motion, Brody's counsel confirmed that Brody brought his personal BlackBerry when he started work for TEI (Dkt. 324 at 59).

On June 3 and June 4, 2008, Individual Defendants' BlackBerries were synchronized to their TEI e-mail accounts (Dkt. 292, Ex. D ¶ 7). As a result of the synchronization, "all emails sent or received from the blackberry devices and the individual's TEI email account would also reside on the company's server and be subject to the company's normal backup and archiving process" (Id.).

Smith received his TEI-issued laptop on or about May 29, 2008 (Dkt. 292, Ex. B ¶ 2). Brody and Sherouse were issued laptop computers by TEI on or about June 3, 2008 (Dkt. 292, Ex. A ¶ 2, C ¶ 2). On or about June 4, 2008, the laptops were configured "so that the users' email would reside on the server as opposed to on the hard drive of the individual laptop" (Dkt. 292, Ex. D ¶ 4). The laptops were configured so that "no email files would reside on the individual laptops. Instead, all email files would have been stored and preserved on a company server" (Id. at ¶ 6).

On June 6, 2008, TEI received a copy of SMS's demand letter alleging Defendants' unauthorized access and use of SMS' confidential information and trade secrets (Dkt. 324 at 31). At the request of BPI's legal department, the databases for the TEI e-mails accounts of Brody, Sherouse, and Smith were copied and preserved on or about June 10, 2008 (Dkt. 292, Ex. E ¶ 3).

Pursuant to the court's June 13, 2008 Temporary Restraining Order, Defendants were directed to return all SMS information and property to SMS (Dkt. 11 at 2). Further, the court ordered Defendants to preserve all computer files, data, documents, or similar information on their computers until further notice by the court (Id. at 3). The court also restrained Defendants from destroying any and all information and documents potentially relevant to Plaintiff's claims (Id.).

On June 14, 2008, Sherouse was served a copy of the Temporary Restraining Order (Dkt. 292, Ex. C ¶ 2). On June 16, 2008, Brody and Smith were served copies of the Temporary Restraining Order (Dkt. 292, Ex. A ¶ 2 and B ¶ 2).

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Individual Defendants were placed on administrative leave on June 17, 2008 after TEI received notice of the lawsuit and the court's Temporary Restraining Order (Dkt. 292, Ex. G, at ¶ 6). Prior to June 17, 2008, Individual Defendants used their laptop computers and/or BlackBerries for e-mail and telephone service. (Dkt. 292, Ex. I; Dkt. 269-2, Ex. A; Dkt. 282, Exs. B and C).

On June 17, 2008, Michael McInerny ("McInerny"), Associate General Counsel of BPI, instructed Individual Defendants to return their laptops and BlackBerries to Robert Barrett ("Barrett"), BPI's Chief Information Officer, by Federal Express (Dkt. 292, Ex. G ¶ 7). Sherouse returned his laptop and BlackBerry to Barrett on June 16, 2008 (Dkt. 292, Ex. C ¶ 2). Brody and Smith returned their computer devices to Barrett on June 17, 2008 (Dkt. 292, Ex. A and B).

Also on June 17, 2008, the TEI e-mail accounts of Individual Defendants were frozen and their passwords were locked, preventing their access to BPI's system (Dkt. 292, Ex. E, ¶¶ 4 and 5). All the data in Individual Defendants' e-mail folders was backed up and copied on that same day (Id. at ¶ 5). The copies of the e-mail folders contained the Individual Defendants' entire e-mail folders with respect to their TEI e-mail accounts (Id.). Once Individual Defendants were locked out of the system as of June 17, 2008, they could neither send nor receive e-mails from or to their TEI e-mail addresses using their laptops and BlackBerries (Id.).

Barrett noted that all e-mails sent from or received by the BlackBerries, "once synchronized" with TEI's Lotus Notes e-mail application, were stored on the company server (Id. at ¶11). Furthermore, e-mails sent from or received by Individual Defendants from their laptops were stored and preserved on the company server (Id. at ¶ 12).[6]

[6] Defendants produced hard copies of the e-mails and documents sent or received from Individual Defendants laptops and BlackBerries that were stored on the company's server (Dkt. 292, Ex. I). These documents are relevant to Plaintiff's claims.

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On or about June 19, 2008, Barrett received Individual Defendants' laptops and BlackBerries. (Dkt. 292, Ex. E, ¶¶ 6-8). Barrett stored the laptops and BlackBerries in a locked cabinet until they were packaged and delivered to Esquire Litigation Services ("ELS") for a forensic examination (Dkt. 292, Ex. E, ¶¶ 9-13). Thereafter, ELS gave the computer equipment to SMS's forensic computer expert, Jon Kessler ("Kessler") (Dkt 269-3, Ex. B).

Kessler performed a forensic examination of Individual Defendants' laptops and BlackBerries (Dkt. 269, Ex. B). Kessler determined the laptops did not contain any e-mail files (Dkt. 269, Ex. B at 9). In reference to the BlackBerries, Kessler concluded that the devices contained no data, including e-mails, text messages, calendar items, telephone records, contacts, attachments, or applications (Id. at 8; Hearing Ex. 1, Kessler Depo. at 169).[7] Kessler opined that the information stored on the BlackBerries was not manually deleted (Dkt. 269, Ex. B at 9). Kessler testified that the BlackBerries "were not consistent with the never-used state, and they were not consistent with the only used for phone calls state" (Hearing Ex. 1, Kessler Depo. at 166).[8]

Kessler opined there were two possible explanations for the lack of data on the BlackBerries: (1) the user performed a data "wipe" or "hard reset" or (2) the user entered an incorrect password ten consecutive times (Dkt. 269, Ex. B at 9; Hearing Ex. 1, Kessler Depo. at 197). A data "wipe"

[7] Kessler testified that memory images of the BlackBerries were created using Paraben Device Seizure software (Hearing Ex. 1, Kessler Depo. at 130). The process used to create the memory images ensured that the data on the BlackBerries was not contaminated or altered (Id. at 53-54). The Paraben software creates a complete forensic image of a BlackBerry, including lists of telephone calls, text messages, calendar items, e-mails, contact lists, memos, applications, and deleted items (Hearing Ex. 1, Kessler Depo. at 52-54).

[8] In layman's terms, Kessler apparently meant that the data on Individual Defendants' BlackBerries was different from the data found on a new Blackberry acquired from the factory and different from a Blackberry used only for telephone calls (Hearing Ex. 1, Kessler Depo. at 66-68, 166).

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or "hard reset" requires a user to enter the "security options" menu and select "Wipe Handheld" (Hearing Ex. 1, Kessler Depo. at 88). To accomplish a bad password reset, the user must enter the BlackBerry password incorrectly ten times (Id.). With each consecutive invalid password input, the user must enter the word "BlackBerry" and, at the prompt, confirm that the BlackBerry will be wiped (Id). Kessler stated it would be very difficult to accidently wipe a BlackBerry of data (Id.).

TEI's forensic expert, Lacey Walker ("Walker"), also examined the three laptops and BlackBerries belonging to Individual Defendants. Walker concluded that he would not expect to see e-mail files residing on the laptops because the users' e-mail was setup to reside on the server (Dkt. 292, Ex. F ¶ 9).

Walker's examination did not reveal any data on Individual Defendants' BlackBerries (Hearing Ex. 1, Walker Depo. at 74-75). However, Walker determined that each of the devices contained a Subscriber Identity Module, or "SIM" card (Dkt. 292, Ex. F ¶ 10). A "SIM" card contains information about a phone's service and can also contain information such as text messages and address contacts (Id.). SIM cards do not, however, contain any records of e-mails (Hearing Ex. 1, Walker Depo. at 142). On Brody's BlackBerry, the SIM card contained 208 contacts and five text messages (Hearing Ex. 1, Walker Depo. at 298-300). The text messages dated from May 22, 2007 to January 28, 2008 (Id. at 299). On Smith's BlackBerry, the SIM card contained 66 contacts and no text messages (Id. at 13-15, 298-300). The SIM card on Sherouse's BlackBerry contained neither contacts nor text messages (Id. at 13).

Walker agreed with Kessler's determination that the BlackBerries could have been wiped of data by either initiating a "hard reset" wipe or a bad password reset (Dkt. 292, Ex. F ¶ 11). In addition, Walker hypothesized two other possible explanations for the lack of e-mails on the

BlackBerries: (1) a remote wipe initiated from the BlackBerry server by the third-party administrator and (2) an inadvertent deletion by Kessler during his examination of these devices (Id.).[9] Walker testified that a "hard reset" wipe, a bad password reset, and a remote wipe would result from intentional actions (Hearing Ex. 1, Walker Depo. at 265-69).

II. Discussion

Spoliation is the intentional destruction of evidence or the significant and meaningful alteration of a document or instrument. Green Leaf Nursery v. E.I. DuPont de Nemours & Co., 341 F. 3d 1292, 1308 (11th Cir. 2003). Federal law governs the imposition of sanctions for spoliation of evidence because spoliation sanctions constitute an evidentiary matter. Flury v. Daimler Chrysler Corp., 427 F.3d 939, 944 (11th Cir. 2005).

Although federal law controls spoliation sanctions, the Eleventh Circuit has not set forth specific guidelines on the imposition of such sanctions. Thus, courts may look to state law principles for guidance so long as the principles are consistent with federal spoliation principles. Id. Under Florida law, spoliation is established when the party seeking sanctions proves that: (1) the evidence existed at one time, (2) the alleged spoliator had a duty to preserve the evidence, and (3) the evidence was crucial to the movant's prima facie case or defense. Golden Yachts, Inc. v. Hall, 920 So. 2d 777, 781 (Fla. 4th DCA 2006). In addition to these factors, sanctions for spoliation are appropriate only when there is evidence of bad faith and lesser sanctions will not suffice. Flury, 427 F.3d at 944 (spoliation sanction of dismissal requires showing of bad faith). Mere negligence

[9] In his deposition, Kessler agreed that the third-party administrator of the BlackBerry server could perform a remote wipe and delete information from the device (Hearing Ex.1, Kessler Depo. at 232-34). Kessler denied that he manipulated or imported any information to the forensic images of Individual Defendants' BlackBerries (Hearing Ex.1, Kessler Depo. at 184).

in losing or destroying records is not enough for an adverse inference instruction. Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997) (adverse inference from party's failure to preserve evidence must be predicated on bad faith).

Here, it is clear that evidence existed at one time and that there was a duty to produce this evidence. It is undisputed that Individual Defendants used their laptops and BlackBerries and that no e-mails, call logs, or calendar items from these devices were produced. For instance, the TEI e-mail accounts for Smith and Brody were activated on their BlackBerries on May 18, 2008 and May 29, 2008. However, Individual Defendants' TEI e-mail accounts were not synchronized with the company server until June 3 and June 4, 2008. Also, telephone records, text messages, and calendar items were deleted from Individual Defendants' BlackBerries. Defendants concede that they had a duty to preserve data on these computer devices. Accordingly, the disputed issues are whether Defendants destroyed crucial evidence and whether Defendants acted in bad faith in destroying crucial evidence.

In spoliation cases, courts must not hold the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed evidence because doing so allows the spoliators to profit from the destruction of evidence. Kronisch v. United States, 150 F.3d 112, 128 (2d Cir. 1998). However, it should not be inferred that missing evidence was unfavorable unless the circumstances surrounding the evidence's absence indicate bad faith. Bashir, 119 F.3d at 931 (court "will not infer that the missing speed tape contained evidence unfavorable to appellees unless circumstances surrounding the tape's absence indicate bad faith, e.g., that appellees tampered with the evidence"); see also Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 109 (2d Cir. 2002) (bad faith alone is sufficient circumstantial evidence from which a fact finder can conclude that missing evidence was unfavorable to the spoliator). The substantial and complete nature of the destruction of evidence by the spoliator justifies a finding that the destroyed evidence prejudiced a plaintiff. E*Trade Sec., LLC v. Deutsche Bank AG, 230 F.R.D. 582, 592 (D. Minn. 2005); see also In re Krause, 367 B.R. 740, 749 (Bankr. D. Kan. 2007) (spoliation found where debtor used security program to permanently wipe or purge files on hard drive after court ordered him to turn over computer).

In this case, the circumstances surrounding the destruction of data from Individual BlackBerries indicate bad faith.[10] The Individual Defendants had both the motive and the opportunity to wipe the BlackBerries of data. Despite the denials by Individual Defendants that they deleted any information, e-mails, text messages, call logs, or memory from their BlackBerries, their assertions are not credible. The forensic computer experts agree that three of the four possible explanations for the "wiped" state of the BlackBerries can only be attributed to deliberate and intentional actions. TEI's suggestion that SMS's expert could have inadvertently deleted the data is not plausible. Kessler testified that he used appropriate procedures and software to prevent any contamination of the BlackBerries.

The wiping of all e-mails, calendar items, text messages, and telephone records from the BlackBerries further supports a finding that SMS was prejudiced by the destruction of this evidence. Although Individual Defendants' BlackBerries were activated in late May 2008 and were used during the first few weeks of their employment, there were no e-mails, calendar entries, text

[10] In reference to the absence of e-mails on Individual Defendants' laptops, there is a reasonable explanation for the lack of e-mails sent or received from the Individual Defendants' TEI e-mail accounts. The laptops were configured so that the e-mails from the user's TEI e-mail accounts would reside on the server as opposed to the hard drive of the laptop. SMS concedes this point.

messages, or telephone records on their BlackBerries. SMS's expert stated that the configuration of data on Individual Defendants' BlackBerries was not similar to that of a new BlackBerry acquired from the factory or a BlackBerry that had been used exclusively for telephone calls. Given the fact that Individual Defendants frequently used their BlackBerries, it is improbable that there was no data on the BlackBerries reflecting communications between Individual Defendants and TEI employees, Babcock employees, current customers, or potential customers. Likewise, it is suspicious that there are no e-mails, text messages, calendar entries, or records of telephone calls from Smith to Brody or Sherouse on the BlackBerries, despite the fact that Brody and Sherouse reported to Smith.

The lack of e-mail on Brody's BlackBerry is especially troubling. Indeed, Brody testified that he used his BlackBerry for sending and receiving e-mails at TEI for approximately a month.[11] When asked if he had any other source of communication with TEI other than his BlackBerry, Brody answered no. Brody brought with him to TEI his Blackberry containing text messages dating back to May 22, 2007 and 208 contacts. In fact, on May 20, 2008, while still employed by SMS, Brody sent an e-mail from his BlackBerry using his personal e-mail account to confirm his employment with TEI. Despite Brody's use of his personal BlackBerry for over a year, there are no e-mails, text messages, calendar entries, or call logs on this device.[12]

Moreover, this is not the first instance of the deletion of data from computers used by Brody and Sherouse. In connection with the preliminary injunction motion, the court found that Brody's

[11] In his affidavit, Brody states that he did not send or receive e-mails on his BlackBerry using his TEI e-mail account (Dkt. 292, Ex. A, ¶ 2). However, as the hard copies of the e-mails reveal, Brody, Sherouse, and Smith also had personal and Babcock Power e-mail accounts (Dkt. 292, Ex. I).

[12] Although the SIM card on Brody's BlackBerry contained five text messages dating from May 2007 to January 2008, there were no text messages on Brody's BlackBerry.

explanation for the deletion of all of his e-mails and address book files from his SMS computer was not credible (Dkt. 87 at 13, n. 9). Similarly, Sherouse used a software program to remove all data from his SMS laptop before returning it to SMS. Sherouse's testimony that he permanently deleted all information from his laptop because there were personal files on the computer was not credible (Id. at 13, n. 10).

Defendants assert that any e-mails deleted on the BlackBerries were synchronized with the company's server and were produced to SMS. However, the BlackBerries of Smith and Brody were activated on May 28, 2008 and May 29, 2009 but were not synchronized with the company server until June 3 and June 4, 2008. Thus, for six or seven days, all e-mails Smith and Brody sent or received using their TEI e-mail accounts were not saved on to the company server (unless another TEI or Babcock employee was copied on the e-mail).

The hard copies of e-mails produced by Defendants reveal that Individual Defendants used their personal e-mails accounts to communicate with TEI and Babcock employees. Such e-mails would not be stored on to the company's server. In addition, text messages, calendar items, and call logs on the BlackBerries were not saved on the company's server and produced to SMS. As to BlackBerries of Smith and Sherouse, any e-mails from personal e-mail accounts saved on the BlackBerries, text messages, calendar items, or call logs during a period of approximately three weeks (i.e., from the date of purchase of the BlackBerries in late May 2008 through the date they returned the BlackBerries to TEI on June 16, 2008 and June 17, 2008) were wiped. Because Brody used his personal BlackBerry while employed at both SMS and TEI, the wiping of his BlackBerry may have deleted more than three weeks of relevant data. Brody interviewed with SMS on February 10, 2008 (Dkt. 87 at 7, ¶ 22) and while he was still working for SMS, he secretly negotiated with

Defendants to start a new competitive business (Dkt. 87 at 19). Accordingly, when Brody's BlackBerry was wiped, any saved e-mails from his personal e-mail account, telephone records, text messages, and calendar entries dating from February 2008 to June 17, 2008 on his BlackBerry were deleted. Thus, the circumstances justify a finding that the missing evidence would have been unfavorable to Individual Defendants.[13]

III. Sanctions

A district court has "broad discretion" to impose sanctions. Flury, 427 F.3d at 944. Sanctions for spoliation of evidence "are intended to prevent unfair prejudice to litigants and to insure the integrity of the discovery process." Id. Because dismissal represents the most severe sanction available, it should only be exercised where there is a showing of bad faith and where lesser sanctions will not suffice. Id.

As a result of the wiping of Individual Defendants' BlackBerries, spoliation sanctions against Individual Defendants are warranted. Although SMS seeks sanctions in the form of a default judgment against Defendants, a lesser sanction – an adverse inference instruction – is the most appropriate sanction based on the present record. Therefore, subject to the trial court's discretion, SMS is entitled to an appropriate adverse inference jury instruction regarding Individual Defendants' failure to preserve data on their BlackBerries that would have been advantageous to SMS and disadvantageous to Individual Defendants.

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[13] Because spoliation is an act of concealment and deception, it can be difficult to determine all of the facts related to the destruction of evidence, including the identity of the spoliator. However, their possession of the devices, coupled with the delay in turning them over to TEI after receipt of service of the Temporary Restraining Order, gave the Individual Defendants the opportunity to erase data. The court finds that Individual Defendants were responsible for the intentional wiping of the BlackBerries. The record is insufficient to demonstrate that either Corporate Defendants or BPI directed or condoned Individual Defendants' conduct.

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Accordingly, and upon consideration, it is **ORDERED and ADJUDGED** that:

(1) **Plaintiff's Motion for Sanctions Due to Spoliation of Evidence and for Order to Show Cause or, in the Alternative, to Amend the Complaint** (Dkt. 269) is **GRANTED IN PART and DENIED IN PART** as set forth above.

DONE AND ORDERED in Tampa, Florida on this 31st day of August 2009.

ELIZABETH A JENKINS
United States Magistrate Judge

14

U.S. v. SENSIENT, OPINION

[Doc. No. 143]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

UNITED STATES OF AMERICA, Plaintiff, v. SENSIENT COLORS, INC., Defendant.	Civil No. 07-1275(JHR/JS)

O P I N I O N

This Opinion addresses whether plaintiff waived its privilege and work-product objections to documents it inadvertently produced. The Court will also decide whether plaintiff must produce its documents regarding its search for potentially responsible parties ("PRPs"), and whether Cancro Exhibit 10 is privileged. This matter is before the Court on defendant Sensient Colors, Inc.'s "Motion to Compel Production of Documents from Plaintiff United States." [Doc. No. 143]. The Court received plaintiff's opposition [Doc. No. 149] and Sensient's reply [Doc. No. 152], and conducted oral argument. The Court also reviewed in camera the documents in question and plaintiff's confidential June 25, 2009 submission. For the reasons to be discussed defendant's motion is GRANTED in part and DENIED in part.

Background

The background facts of the case have already been set forth and will not be repeated in detail herein. See U.S. v. Sensient Colors, Inc., ___ F. Supp. 2d ___, 2009 WL 2222798 (D.N.J. 2009). Only the facts relevant to the present discovery dispute will be summarized.

Plaintiff produced approximately 45,000 documents (135,000 pages) to defendants on six (6) different days between May 14, 2008 and February 12, 2009. Michele (Dusty) Strong Decl. ¶3.[1] These documents comprised 450 boxes.[2] On August 29, 2008, defendant returned 81 documents it deemed privileged. On September 10, 2008, plaintiff advised defendant that 80 of the 81 documents were privileged and were inadvertently produced. On October 23, 2008, defendant identified and returned another 89 privileged documents. Plaintiff produced a supplemental privilege log on November 21, 2008 claiming that most of the inadvertently produced documents were subject to attorney-client or work product protection.

At the deposition of former EPA employee Anthony Cancro on December 11, 2008, plaintiff claimed that Exhibit Cancro-10 was

[1]The majority of the documents were produced on May 14, 2008 (15,800 documents), June 6, 2008 (15,600 documents), and July 9, 2008 (8,200 documents). Id.

[2] Defendant claims that before it reviewed the documents it shared them with its insurance counsel in a related insurance coverage case. Coverage counsel then sent the documents to his adversaries. Brief at 2, Doc. No. 144.

privileged. At the deposition of former EPA employee Richard Salkie on December 12, 2008, plaintiff claimed that Exhibit Salkie-10 was privileged.[3] Plaintiff also claimed these documents were inadvertently produced. On March 18, 2009, plaintiff identified another document as inadvertently produced. Plaintiff confirmed this document was inadvertently produced on March 23, 2009.

In its April 27, 2009 response to Sensient's motion plaintiff wrote that it acquired a new computer application ("Equivio") and it commenced a "re-review of its entire 47,000 document database." Brief at 9 n. 3, Doc. No. 149. Plaintiff also wrote that it would "promptly notify Defendant of any additional inadvertently disclosed privileged information identified through this process." Id. In June 2009, plaintiff identified 91 more inadvertently produced documents. On July 20, 2009, in response to defendant's July 8, 2009 letter, plaintiff identified three additional inadvertently produced documents. Doc. No. 195 at 3-4, 7-8. On August 6, 2009, plaintiff identified six more inadvertently produced documents. On August 7, 2009, plaintiff's counsel finally represented to the Court that its privilege review was completed.

Plaintiff claims that it reviewed 47,000 documents for relevancy, responsiveness, "and for privilege and other applicable protections." Brief at 2. After its review plaintiff produced

[3]Plaintiff has withdrawn its privilege assertion with respect to Salkie-10.

45,000 documents. Plaintiff claims that in designing and implementing its privilege review and production of documents and privilege logs, it relied upon the Discovery Plan it negotiated with defendant. Id. at 2-3. The Discovery Plan addressed, inter alia, waiver and inadvertent production issues.

The Declarations of Michele (Dusty) Strong (Litigation Support Manager and Coordinator with the Office of Litigation Support, Executive Office, Environment and Natural Resources Division, United States Department of Justice) and David L. Weigert, Esquire (plaintiff's litigation counsel) describe the steps plaintiff took to perform its privilege review. Plaintiff relied upon twelve attorneys and paralegals from the U.S. Department of Justice and EPA to perform its review. Strong Decl. ¶4. Plaintiff conducted "an entirely electronic privilege review without the use of hard-copy documents or forms." Id. at ¶5. Plaintiff prepared a database of relevant fields of each of its documents which was accessible by the EPA in New York and the Department of Justice in Washington. Id. ¶¶7, 10, 11. Plaintiff also conducted oral and written training for all attorney and paralegal privilege reviewers. Weigert Decl. ¶2. Plaintiff claims that after its preliminary review but prior to its production it performed computer assisted QA/QC measures to minimize mistakes. Strong Decl. ¶¶12 - 18.

In total, plaintiff has identified 214 inadvertently produced

documents: (1) 53 documents identified in defendant's August 29, 2008 letter and confirmed in plaintiff's September 10, 2008 letter, (2) 61 documents identified in defendant's October 23, 2008 letter and confirmed in plaintiff's November 21, 2008 letter, (3) 91 documents identified in June 2009 (including Cancro-10), (4) 3 documents identified in plaintiff's July 20, 2009 letter, and (5) 6 documents identified in plaintiff's August 6, 2009 letter.

Discussion

Joint Discovery Plan

Plaintiff argues the parties' "Joint Rule 26(f) Report, Proposed Discovery Plan, and [Proposed] Order" ("Discovery Plan") [Doc. No. 144-8], precludes a privilege waiver.[4] This argument is rejected. Nowhere in the Discovery Plan does it mention that the parties are excused form the requirements of Federal Rule of Evidence 502(b), or the principles enunciated in Ciga-Geigy Corp.

[4]Paragraph III.A (page 16) states:

Non-waiver: By exchanging documents or information with each other, the Parties do not waive any privilege, confidentiality or other protection from production that otherwise applies to such documents or information.

Paragraph VI. (page 12) states:

The Parties agree that the inadvertent production of privileged documents or information (including ESI) shall not, in and of itself, waive any privilege that would otherwise attach to the document or information produced.

v. Sandoz Ltd., 916 F. Supp. 404 (D.N.J. 1996).[5] The Court agrees with Sensient (Reply Brief at 4, Doc. No. 152), that paragraph VI of the Discovery Plan would be superfluous if the non-waiver provision was intended to protect the disclosure of all privileged documents under any circumstance.

Plaintiff and Sensient are represented by sophisticated counsel. If they intended to implement a "clawback" provision this would have been specifically mentioned.[6] The most sensible construction of the parties' Discovery Plan is that the inadvertent production of a document "in and of itself" does not waive a privilege. In other words, the parties agreed not to subject themselves to the harsh rule that a mere inadvertent production

[5] The Ciba-Geigy analysis was followed in other New Jersey cases. See, e.g., Maldonado v. New Jersey ex rel. Administrative Office of the Courts-Probation Division, 225 F.R.D. 120, 128-29 (D.N.J. 204); Jamie Fine Chemicals, Inc. v. Hi-Tech Pharmcal Co., C.A. NO. 00-3545 (AET), 2006 WL 2403941, at *2 (D.N.J. Aug. 18, 2006); Bensel v. Airline Pilots Ass'n, 248 F.R.D. 177 (D.N.J. 2008).

[6] "Clawback" agreements essentially "undo" a document production. A clawback arrangement involves the return of documents without waiver irrespective of the care taken by the disclosing party. Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 290 (S.D.N.Y. 2003). They are specifically mentioned in the 2006 Advisory Committee Note to Fed. R. Civ. P. 26(f) as a way to reduce discovery costs and delays and to minimize the risk of waiver: "On other occasions, parties enter agreements--sometimes called 'clawback agreements'--that production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under these circumstances.... In most circumstances, a party who receives information under such an arrangement cannot assert [waiver]...."

results in a waiver. See Carter v. Gibbs, 909 F.2d 1450, 1451 (Fed. Cir. 1990); In re Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989). The Court agrees with defendant that the parties intended to incorporate the "flexible" standard (discussion infra), to determine if a waiver occurred. This is supported by Koch Materials Co. v. Shore Slurry Seal, Inc., 208 F.R.D. 109, 118 (D.N.J. 2002), wherein it noted that courts do not favor broad disclosure provisions similar to the interpretation plaintiff advocates:

> Courts generally frown upon "blanket" disclosure provisions as contrary to relevant jurisprudence.... In particular, the court observes that such blanket provisions, essentially immunizing attorneys from negligent handling of documents, could lead to sloppy attorney review and improper disclosure which could jeopardize clients' cases. Moreover, where the interpretation of the provision remains hotly disputed, ..., broad construction is ill advised.

See also Ciba-Geigy, 916 F. Supp. at 412. Since the Court finds that the parties' Discovery Plan does not preclude a waiver of the attorney-client privilege or work-product protection, the Court will address whether a waiver occurred.

Federal Rule of Evidence 502(b)

The inadvertent production issue before the Court is controlled by Fed. R. Evid. 502(b). This Rule was recently amended and reads:

Rule 502. Attorney Client Privilege and Work Product;

Limitations on Waiver

> (b) Inadvertent disclosure.--When made in a Federal proceeding or to a Federal Office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:
>
> (1) the disclosure is inadvertent;
> (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
> (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

The 2008 amendment to FRE 502 states that the amendment applies to matters pending on September 19, 2008, "insofar as is just and practicable." Act of Sept. 19, 2008, Pub. L. No. 110-322, §1(c), 122 Stat. 3537, 3538. This action was pending on September 19, 2008, and the Court finds no justifiable reason not to apply FRE 502(b). Accord Peterson v. Bernardi, C.A. No. 07-2723 (RMB/JS), 2009 WL 2243988, at *2 (D.N.J. July 24, 2009).

When deciding whether inadvertently produced documents should be returned a two-step analysis must be done. First, it must be determined if the documents in question are privileged.[7] It is axiomatic that FRE 502 does not apply unless privileged or otherwise protected documents are produced. Peterson, at *2 (citing Heriot v. Byrne, No. 08 C 2272, 2009 WL 742769 (N.D. Ill.

[7]Except as to Cancro-10 defendant does not contest that plaintiff's inadvertently produced documents are privileged or otherwise protected from discovery.

March 20, 2009)). Second, if privileged documents are produced then a waiver does not occur unless the three elements of FRE 502(b) are satisfied: (1) the disclosure must be inadvertent, (2) the holder of the privilege or protection took reasonable steps to prevent the disclosure, and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Fed. R. Civ. P. 26(b)(5)(B). Plaintiff, the disclosing party, has the burden to prove that the elements of FRE 502(b) have been met. Peterson, at *2; Heriot, at *11; Relion, Inc. v. Hydra Fuel Cell Corp., C.A. No. CV06-607-HU, 2008 WL 5122828, at *3 (D. Or. Dec. 4, 2008). See also Ciba-Geigy, 916 F. Supp. at 412. FRE 502(b) opts for a middle ground approach to determine if an inadvertent disclosure operates as a waiver. See Explanatory Note to FRE 502(b)(revised November 28, 2007);[8] Preferred Care Partners Holding Crop v. Humana, Inc., No. 08-20404-CIV, 2009 WL 982449, at *4 (S. D. Fla. April 9, 2009) (the intermediate approach and the Rule 502(b) analysis are substantially similar). This is essentially

[8]The Note discusses a "multi-factor test for determining whether inadvertent disclosure is a waiver." These factors include the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. Other factors are the number of documents to be reviewed and the time constraints for production. Id. No one factor is dispositive. "The rule ... is really a set of non-determinative guidelines that vary from case to case" and is designed to be "flexible." Id.

the same approach used in Ciba-Geigy. 916 F. Supp. at 411. Under the Ciba-Geigy analysis at least five factors are analyzed to determine if a waiver occurred: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the document production, (2) the number of inadvertent disclosures, (3) the extent of the disclosures, (4) any delay and measures taken to rectify the disclosure, and (5) whether the overriding interests of justice would or would not be served by relieving the party of its error. Id.

Plaintiff's inadvertent production fits into three groups: (1) documents identified by plaintiff on September 10, 2008, (2) documents identified in plaintiff's November 21, 2008 letter, and (3) documents identified by plaintiff on June 25, 2008 or later. The Court's analysis of defendant's motion will separately address these three groups.

(1) Documents Identified in September 10, 2008 Letter

The first group of documents to address are the documents plaintiff identified on September 10, 2008. As to these documents the discussion regarding Rule 502(b)(1) and (2) overlap and will be addressed together. The Court does not question that plaintiff's document production was inadvertent in the sense that it was not intended. However, plaintiff's subjective intent is not

controlling. All inadvertent disclosures are by definition unintentional. Ciba-Geigy, 916 F. Supp. at 411. To determine if plaintiff's production was inadvertent the Court must look at a multitude of factors, including whether plaintiff took reasonable precautions to prevent errors. Based upon the totality of the circumstances the Court finds that plaintiff satisfies the requirements of FRE 502(b)(1) and (2).

The first noteworthy point is that plaintiff's document production was substantial. Plaintiff reviewed 47,000 documents and produced 45,000 documents. Given this volume mistakes were bound to occur. Heriot, 2009 WL 742769, at *11 (citations omitted)("where discovery is extensive, mistakes are inevitable....)" Further, out of the 45,000 produced documents only a total of 214 are at issue. Relatively speaking this is not a large number. In addition, except as to Cancro-10, plaintiff did not erroneously produce the same document on multiple occasions. Compare Ciga-Geigy, 916 F. Supp. at 412-13. In addition, with some exceptions, after reviewing the inadvertently produced documents the Court does not agree with defendant that the privileged information was self-evident.[9]

[9]In addition to reviewing the documents for privilege and work product protection, plaintiff also reviewed the documents for private information pursuant to the Privacy Act of 1974,

As to FRE 502(b)(2), plaintiff has presented substantial evidence that it took reasonable steps to prevent an inadvertent production. Plaintiff's production was made in the midst of a commendable effort to employ a sophisticated computer program to conduct its privilege review. Unfortunately, mistakes occurred. Plaintiff should not be unduly punished for occasional mistakes that occurred while it started to use new software to organize and sort its documents. Plaintiff also invested substantial resources to prevent an inadvertent production. In addition to its computer program, plaintiff employed twelve professionals to conduct its review who were trained on privilege issues. Plaintiff also performed QA/QC to: (1) ensure completeness of the review, (2) minimize false negatives, i.e., designations of privileged information as non-privileged, and (3) minimize false positives, i.e., designations of discoverable information as privileged. Strong Decl. ¶15. Thus, the Court finds that plaintiff satisfied the requirements of FRE 502(b)(1) and (2).

The last element plaintiff must satisfy to prevent a waiver is to demonstrate that it took reasonable steps to rectify its error. FRE 502(b)(3). The Court finds this occurred. Prior to August 29,

5 U.S.C. §552a and confidential business information under 40 C.F.R. §§2.201-2.311.

2008 plaintiff had no reason to suspect that its document production was problematic. Sensient notified plaintiff about its error on August 29, 2008. On September 10, 2008, only eight work days later, plaintiff confirmed its error and notified defendant that Rule 26 (b)(5)(B) should be followed. The Court finds that these actions were timely and reasonable.

Defendant's arguments as to the plaintiff's September 10, 2008 identification are not persuasive. The Court does not agree that, "[t]he Government cannot sustain its burden to prove the reasonableness of precautions taken without an explanation of why the errors occurred." Reply Brief at 6, Doc. No. 152. FRE 502(b) requires plaintiff to demonstrate that it took reasonable precautions to prevent an error, which it has done. Although a reasonable explanation for its error would be helpful to know, this is not a <u>sine qua non</u> to establish that an inadvertent production within the meaning of FRE 502(b) occurred. Further, the Court rejects defendant's argument that it should essentially discount the fact that plaintiff produced 45,000 documents and only consider that plaintiff produced approximately 1600 (defendant's estimate) to 4000 (plaintiff's estimate) e-mails or memoranda. All of plaintiff's documents had to be reviewed for privilege, not just e-

mails and memoranda.[10] Also, the Court is satisfied that plaintiff employed diligent efforts and safeguards when it set up and used its analytical software. Albeit, since defendant did not review plaintiff's June 25, 2009 <u>in camera</u> letter, defendant does not have detailed first-hand knowledge of plaintiff's confidential protocol.

Accordingly, since plaintiff satisfied its burden of establishing that the three elements of FRE 502(b) have been met, the Court finds that plaintiff did not waive its attorney-client privilege and work-product protection regarding the documents identified in its September 10, 2008 letter.[11]

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[10]Plaintiff represents that the categories of documents it reviewed include: draft and final, signed and unsigned, clean and annotated versions of reports, analyses, memoranda, notes, minutes, opinions, determinations, consent orders, unilateral orders, agreements, spreadsheets, databases, photographs, statements of work, cost estimates, invoices, cost summaries, letters, e-mail, and other correspondence. Strong Decl. ¶23. Plaintiff claims that it found examples of privileged or otherwise protected documents in "virtually every one of these categories." <u>Id</u>. at ¶24.

[11]Defendant's other arguments are also not persuasive. The Court assumes that the twelve attorneys and paralegals who conducted plaintiff's privilege review were competent. The Court declines to require plaintiff to identify the specific qualifications of each reviewer. Plaintiff has already represented that it "assigned only trained and experienced attorneys and paralegals." Weigert Decl. ¶6. Further, the interests of justice do not support waiver as to this group of documents. It appears that plaintiff's implementation of a new computer application was largely to blame for the errors that occurred. This is not unexpected. The use of sophisticated analytical software should be encouraged. Obviously, however, given plaintiff's experience thus far, future errors will not be treated generously.

(2) <u>Documents Identified in November 21, 2008 Letter</u>

The second group of documents to address are those identified in plaintiff's November 21, 2008 letter. For the reasons already discussed the Court finds that plaintiff satisfied Rule 502(b)(1) and (2).[12] However, the Court finds that plaintiff did not take reasonable precautions to rectify its error. Therefore, since plaintiff did not satisfy its burden under Rule 502(b)(3), it waived its privilege and work product objections as to this category of documents.

After plaintiff received defendant's August 29,2008 letter it was on notice that something was amiss with its document production and privilege review. Defendant's letter should have spurred plaintiff to promptly re-assess its procedures and re-check its production. Nevertheless, plaintiff waited until November 21,

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[12]Although the result is the same, there are some differences in the Rule 502(b)(1) analysis between the first and the second and third groups of documents. The interests of justice do not weigh in plaintiff's favor with regard to the inadvertently produced documents identified after November 21, 2008. By this date plaintiff had an adequate opportunity to correct its error. If a party is on notice of an error in its document production it should not wait for its adversary to discover its error and then claim protection under FRE 502(b). Further, as noted, these documents were fully disclosed to the lawyers in defendant's related insurance coverage litigation. While it is not impossible to retrieve plaintiff's documents, this substantial effort is not compelled by the interests of justice when plaintiff did not act diligently to rectify its error.

2008, three months after it received defendant's August 29, 2008 letter, to confirm its error. In addition, it appears that plaintiff did not even know about its error until it received Defendant's October 23, 2008 letter. If defendant was able to discover an error by October 23, 2008, there is no reason plaintiff could not have done the same thing. Indeed, plaintiff had a greater motivation than did defendant to conduct a thorough privilege review after plaintiff confirmed its mistakes on September 10, 2008.[13]

Surprisingly, even after plaintiff received defendant's October 23, 2008 letter it waited approximately one more month to confirm its error. In view of the notice plaintiff received of the deficiencies in its privilege review, and its failure to diligently re-assess its document production and procedures for privilege

[13]There is a glaring omission in plaintiff's submissions. Plaintiff's Declarations provide no meaningful details regarding the steps it took immediately after August 29, 2008, the date of defendant's first letter identifying inadvertently produced privileged documents, to rectify its error. Plaintiff merely states that "[s]hortly after receiving defendant's October 23, 2009 letter ..., the United States began to re-review the 89 documents for privilege." Weigert Decl. ¶9. Plaintiff's Declarations are silent on what it did immediately after it received plaintiff's August 29, 2008 letter to assure the accuracy of its complete document production, not just the documents defendant identified. It was not until April 27, 2009 that plaintiff represented to the Court that it was reviewing its entire document production. Brief at 9, n.3. Plaintiff did not represent to the Court that its review was completed until August 7, 2009.

review, the Court finds that plaintiff did not take reasonable steps to rectify the error it eventually confirmed in its November 21, 2008 letter.

After September 10, 2008, there is no question plaintiff was on notice of problems. It therefore should have taken prompt and diligent steps to re-assess its document production. <u>See</u> Note to FRE 502(b)(3)("The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently"). <u>See</u> <u>also</u> <u>Preferred Care Partners Holding Corp.</u>, 2009 WL 982449, at *14. ("In light of the fact that Humana was aware that it inadvertently produced a number of documents which it believed to contain privileged information, Humana had an obligation ... to ensure that no additional privileged documents were divulged").

The fact that plaintiff confirmed on September 10, 2008, that 80 documents were inadvertently produced was an obvious indication that other privileged documents may have been produced in error. If plaintiff had taken reasonable steps to rectify its error it would have discovered the documents identified in its November 21,

2008 letter soon after September 10, 2008. Instead, defendant alerted plaintiff to more inadvertent productions on October 23, 2008. In addition, plaintiff could not give defendant and the Court assurances that its privilege review was complete until August 7, 2009, approximately ten months after it received notice of potential problems.

In this context it is noteworthy that plaintiff only produced approximately 1600-4000 e-mails and memoranda, many of which were authored by or sent to DOJ or EPA attorneys. Many of the inadvertently produced documents came from this subset of documents. If plaintiff had taken reasonable steps after August 29, 2008 to rectify its error it would have immediately zeroed in on this category of documents. If this was done, and given the modest subset of documents to review, plaintiff would have been promptly alerted to the mistakes eventually confirmed in its November 21, 2008 letter. The record is plain that defendant did not act reasonably and diligently to correct its error. Therefore, plaintiff waived its privilege and work product protection regarding the documents identified in its November 21, 2008 letter. <u>Accord</u> <u>Preferred Care Partners Holding Corp. v. Humana, Inc.</u>, <u>supra</u> (holding that defendant did not take reasonable steps to rectify its error when it failed to take action two months after being notified of an inadvertent production).

(3) Post-June 25, 2009 Identifications

For the reasons already discussed the Court finds that plaintiff satisfied Rule 502(b)(1) and (2) with regard to its post-June 25, 2009 identifications. However, plaintiff does not satisfy Rule 502(b)(3). The Court has already determined that plaintiff did not take reasonable steps to rectify its error when it waited until November 21, 2008 to confirm its error. This being the case, errors confirmed on June 25, 2009 or later are also late. Defendant's August 28, 2008 letter put plaintiff on notice that it should have re-analyzed its document production for errors. Plaintiff did not take reasonable steps to correct its mistake by waiting approximately ten months to confirm its error. Therefore, plaintiff waived its attorney client privilege and work product protection regarding the documents identified in its post-June 25, 2009 letters.

PRP Search Documents

Defendant requests plaintiff's documents regarding its search for potentially responsible parties ("PRP"). Defendant argues plaintiff waived its attorney-client privilege and work product protection for these documents because plaintiff placed the nature, timing and adequacy of its PRP search at issue in the case when

"the EPA claimed entitlement to exceed the 12-month and $2 million limits established by CERCLA and the National Contingency Plan." Brief at 20. Defendant argues that a waiver occurred when plaintiff stated in its Action Memos that, inter alia, "Assistance will not otherwise be provided on a timely basis." Defendant also argues, "by certifying the administrative record, the Government put at issue the accuracy of that record, which included numerous Action Memos that attest to the fact that removal of the hazardous substances in accordance with the NCP was appropriate because assistance would otherwise not be provided on a timely basis (i.e., there were not PRP's willing and about to conduct the remediation)." Reply Brief at 15.

The "at issue" doctrine applies where a "party has asserted a claim or defense that he intends to prove by use of the privileged materials." Pittston Co. v. Allianz Ins. Co., 143 F.R.D. 66, 71 (D.N.J. 1992); North River Ins. v. Philadelphia Reinsurance Corp., 797 F. Supp. 363, 370 (D.N.J. 1992). When these circumstances are present the attorney-client privilege should yield upon a showing of: (1) a legitimate need to reach the evidence sought to be shielded, (2) relevance and materiality of that evidence to the issue before the court, and (3) a fair preponderance of the evidence by the party asserting the privilege including all

reasonable inferences that the information cannot be obtained from a less intrusive source. Pittston Co., 143 F.R.D. at 71 (citations and quotations omitted). An important factor in this determination is that the party seeking the protection must have injected the communication into the action. Id.

Here, plaintiff did not interject its PRP search into the case. Instead, defendant is pursuing a defense that the plaintiff's PRP search was inadequate. This is not a case where plaintiff "made the decision and [took] ... the affirmative step in the litigation to place the advice of the attorney [or work product] in issue." Rhone-Poulenc Rorer Inc. v. Hone Indemnity Company, et al., 32 F.3d 851, 863 (3rd. Cir. 1994). See also Resolution Trust Corp. v. Mass. Mutual Life Ins. Co., 200 F.R.D. 183, 192 (W.D.N.Y. 2001)(citation omitted)("[i]t cannot be possible for [a defendant] to justify breaching [a plaintiff's] privilege by reason of its owns pleading of an affirmative defense. That would give an adversary who is a skilled pleader the ability to render the privilege a nullity"). Thus, plaintiff did not place its PRP search "at issue" so as to waive its objections to producing its PRP search documents.

The Rhone-Poulenc decision is instructive. In that case the plaintiff filed an insurance coverage complaint regarding HIV claims from blood product. Defendants requested plaintiff to produce privileged documents regarding the evaluations of its potential liability to consumers that were prepared before the coverage was purchased. Defendants argued the documents were relevant to their defense concerning whether the plaintiff expected or intended the claims for which it sought coverage. After the District Judge affirmed the Magistrate Judge's finding that plaintiff waived its privilege by putting its state of mind at issue, the Third Circuit issued a writ of mandamus directing the lower court to vacate its order. The court reasoned, in part, that the plaintiff did not attempt to prove its claim or defense by disclosing or describing an attorney client communication. Rhone-Poulenc, 32 F.3d at 863. Similarly, in this case plaintiff is not attempting to prove its case by relying on the privileged documents defendant is requesting. Although the requested documents are arguably relevant, this is not determinative as to whether they must be produced. Relevance is not the standard for determining whether privileged information should be produced, "even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue." Id. at 864.

The decision in Harding v. Dana Transport, Inc., 914 F. Supp.

1084 (D.N.J. 1996), is not controlling. In that case the court ordered the defendant to produce its attorney's investigation of a sexual harassment claim. What happened in Harding is that although the defendant relied upon the attorney's report as a defense, it did not want to produce its contents. Nevertheless, defendant still argued that the report helped insulate it from liability. In this case, plaintiff did not raise the issue of its PRP search as part of its claim or defense. Nor is the PRP search an element of plaintiff's prima facie case. In Harding the defendant relied upon the attorney's work product as a defense to liability. 914 F.Supp. at 1096. Fairness, therefore, demanded that the report be produced. Id. Here, fairness does not dictate that all of plaintiff's PRP documents be produced because defendant, not plaintiff, interjected the issue into the case.

To be sure, however, all of plaintiff's PRP documents may not be immune from discovery. Facts are not protected from discovery. Rhone-Poulenc,32 F.3d at 864. Further a "litigant cannot shield from discovery the knowledge it possessed by claiming it has been communicated to a lawyer, nor can a litigant refuse to disclose facts simply because that information came from a lawyer." Id. If defendant tailors its discovery, rather than asking for all PRP search documents, it may be able to obtain some of the discovery it

seeks. However, that issue remains for another day. The Court simply rules that since plaintiff did not put its PRP search documents "at issue" it did not waive its attorney client privilege and work product protection that attached to the documents. Nevertheless, if the documents or portions thereof are otherwise discoverable they must be produced.

Cancro Exhibit-10

Cancro Exhibit-10 is a March 13, 2003 (10:48 a.m.) e-mail from George Pavlou, then Director of EPA's Region II Emergency and Remedial Response Division, to an EPA attorney (Deborah Mellott, Esquire), with copies to two other EPA attorneys. In the e-mail Pavlou asks Mellott to call a prospective purchaser of the General Color Site. Plaintiff claims the e-mail is protected by the attorney-client privilege. The Court disagrees.

The burden of establishing that a document is privileged is on the party asserting the privilege. Torres v. Kuzniasz, 936 F.Supp. 1201, 1208 (D.N.J. 1996). The attorney-client privilege protects communications when: (1) the asserted holder of the privilege is or sought to become a client, (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer, (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (I) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and (d) not for the purpose of committing a crime or tort, and (4) the privilege has been (a) claimed and (b) not waived by the client. The attorney-client privilege does not apply merely because a statement was made to an attorney. Nor does the privilege apply simply because it conveys advice that is legal in nature. HPD Laboratories, Inc. v. Clorox Company, 202 F.R.D. 410, 414 (D.N.J. 2001). Instead, the privilege applies "only [to] those disclosures - necessary to obtain informed legal advice - which might not have been made absent the privilege." Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1424 (3d Cir. 1991).

The Court finds that plaintiff has not satisfied its burden of proving that Cancro-10 is privileged. As noted, merely because three attorneys were copied on Pavlou's e-mail is not determinative. Further, except for the conclusory statements in plaintiff's brief [Doc. No. 149 at 27-29], there is no evidence that Pavlou was seeking an opinion on law or legal advice. This is not apparent form the face of the e-mail and plaintiff has not supplied any supporting affidavits. It appears that Cancro-10 is

simply an e-mail from Pavlou to three attorneys regarding EPA business. The e-mail is not a communication requesting or giving an opinion on law or legal advice.

Accordingly, since Cancro-10 is not privileged it must be produced.[14]

Conclusion

For all the foregoing reasons plaintiff's Motion to Compel is GRANTED in part and DENIED in part. The Court finds that plaintiff did not waive its privilege and work product protection regarding the documents identified in its September 10, 2008 letter. Defendant's motion is DENIED at to these documents. However, the Court finds that plaintiff waived its privilege and work product protection regarding the documents identified in its November 21, 2008 and post-June 25, 2009 letters. The Court GRANTS defendant's motion as to these documents and Orders these documents to be produced. Further, the Court finds that defendant's request for all of plaintiff's PRP search documents is DENIED. In addition, defendant's request for the production of Cancro Exhibit-10 is GRANTED.

[14]Even if Cancro-10 is privileged, it still must be produced. Plaintiff did not claim the document was privileged until Cancro's deposition on December 11, 2008. For the reasons already discussed, plaintiff waived its privilege regarding the document because it cannot satisfy the requirement of FRE 502(b)(3).

An accompanying Order will be entered memorializing the rulings in this Opinion.

s/Joel Schneider
JOEL SCHNEIDER
United States Magistrate Judge

Dated: September 9, 2009

GRIDER v. KEYSTONE, OPINION

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-3073

NATALIE M. GRIDER, M.D.;
KUTZTOWN FAMILY MEDICINE, P.C.

v.

KEYSTONE HEALTH PLAN CENTRAL, INC.;
HIGHMARK, INC.; JOHN S. BROUSE;
CAPITAL BLUE CROSS; JAMES M. MEAD;
JOSEPH PFISTER

Capital Blue Cross;
Keystone Health Plan Central, Inc.,
Appellants

No. 08-3074

NATALIE M. GRIDER, M.D.;
KUTZTOWN FAMILY MEDICINE, P.C.

v.

KEYSTONE HEALTH PLAN CENTRAL, INC.;
HIGHMARK, INC.; JOHN S. BROUSE;
CAPITAL BLUE CROSS; JAMES M. MEAD;
JOSEPH PFISTER

Highmark, Inc.,
Appellant

No. 08-3075

NATALIE M. GRIDER, M.D.;
KUTZTOWN FAMILY MEDICINE, P.C.

v.

KEYSTONE HEALTH PLAN CENTRAL, INC.;
HIGHMARK, INC.; JOHN S. BROUSE;
CAPITAL BLUE CROSS; JAMES M. MEAD;
JOSEPH PFISTER

Hangley Aronchick Segal & Pudlin;
John S. Summers,
Appellants
(Pursuant to Fed.R.App.P. 12(a))

No. 08-3076

NATALIE M. GRIDER, M.D.;
KUTZTOWN FAMILY MEDICINE, P.C.

v.

KEYSTONE HEALTH PLAN CENTRAL, INC.;
HIGHMARK, INC.; JOHN S. BROUSE;
CAPITAL BLUE CROSS; JAMES M. MEAD;
JOSEPH PFISTER

Stevens & Lee; Daniel B. Huyett;
Jeffrey D. Bukowski
Appellants
(Pursuant to Fed.R.App.P. 12(a))

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No. 08-3077

NATALIE M. GRIDER, M.D.;
KUTZTOWN FAMILY MEDICINE, P.C.

v.

KEYSTONE HEALTH PLAN CENTRAL, INC.;
HIGHMARK, INC.; JOHN S. BROUSE;
CAPITAL BLUE CROSS; JAMES M. MEAD;
JOSEPH PFISTER

Stradley, Ronon, Stevens & Young;
Sandra A. Girifalco
Appellants
(Pursuant to Fed.R.App.P. 12(a))

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 2-01-cv-05641)
District Judge: Honorable James Knoll Gardner

Argued July 9, 2009

Before: SLOVITER, AMBRO, and JORDAN, Circuit Judges.

(Filed: September 1, 2009)

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OPINION OF THE COURT

SLOVITER, Circuit Judge.

The promulgation of the Federal Rules of Civil Procedure ushered in a new era of federal litigation, directed to the goal of securing "the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. It would be reasonable to expect, in light of all the applicable rules and governing precedents, that experienced attorneys, especially those who have handled major litigation, would be able to proceed through the discovery and pretrial stages with a conciliatory attitude and a minimum of obstruction, and that, under the guiding hand of the district court, the path to ultimate disposition would be a relatively smooth one. The record of the case before us shows exactly the opposite. The parties were unable to reach agreement on even minor matters and the discovery was noncompliant, delayed, or protracted, leading to the District Court's entry of the sanction orders that are the subject of these appeals. We conclude, without enthusiasm, that none of the players is without responsibility for the unfortunate state of affairs that developed, but we view with particular concern the lawyers' attitude and conduct toward the district judge who, if given more cooperation, would undoubtedly have been able to preside more effectively.

I.

Factual Background

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Keystone Health Plan Central, Inc., ("Keystone"), Capital Blue Cross ("Capital"), and Highmark Inc., ("Highmark"), together with three law firms that represented them in the class action law suit in the District Court, Hangley Aronchick Segal & Pudin, and its partner John S. Summers, and Stevens & Lee, P.C., its partners Jeffrey D. Bukowski and Daniel B. Huyett, and Stradley, Ronon, Stevens & Young, LLP, and its partner, Sandra A. Girifalco, appeal two District Court orders imposing sanctions and the order denying the motion to vacate.

Natalie M. Grider, M.D., and her medical practice, Kutztown Family Medicine, P.C., filed the class action underlying this appeal on October 5, 2001, in Pennsylvania state court on behalf of a state-wide class of doctors and medical practices ("Plaintiffs") that were medical "providers with the Keystone health maintenance organization." *Grider v. Keystone Health Plan Central, Inc.*, 500 F.3d 322, 324 (3d Cir. 2007). Plaintiffs alleged that Keystone failed to pay, or underpaid, Plaintiffs for medical services provided to Keystone's policyholders, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, and Pennsylvania's "prompt pay" statute, 40 Pa. Cons. Stat. Ann. § 991.2101 *et seq*. *Grider*, 500 F.3d at 323. Plaintiffs also named as Defendants Capital and Highmark, each of which owned 50% of Keystone when the suit was filed, but now a wholly-owned subsidiary of Capital.[1] Defendants removed the case to the United States District Court for the Eastern District of Pennsylvania on November 7, 2001.

The firm Hangley, Aronchick, Segal & Pudin and attorney Summers (together, "Hangley") represented Keystone from October 2003 to July 2006. The firm Stradley, Ronon, Stevens & Young LLP and attorney Girifalco (together,

[1] Three officers of the corporate Defendants, James M. Mead (Capital), John S. Brouse (Highmark), and Joseph Pfister (Keystone), were also named as Defendants, but were not sanctioned and are not parties to this appeal.

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"Stradley") represented Highmark from January 2004 until at least July 24, 2007. The firm Stevens & Lee, P.C., and attorneys Bukowski and Huyett (together, "Stevens & Lee") represented Capital in these proceedings until October 3, 2006.

A. Discovery

Discovery began in 2003 and ended five years later with the parties' settlement in February 2008. The process involved District Judge James Knoll Gardner, Magistrate Judge Arnold C. Rapoport, and Special Discovery Master Karolyn Vreeland Blume. Defendants moved to dismiss the complaint on January 23, 2002. On December 19, 2002, the case was transferred to the Honorable James Knoll Gardner, who granted in part, and denied in part, the motion on September 18, 2003. It appears that the plaintiffs made no discovery requests during that time, filing their first such request (which was related to class certification) in September 2003. Defendants entered into a joint-defense agreement sometime between October and the end of December 2003 and, as the District Court found, Summers (representing Keystone) "took the lead in defending this case on behalf of all defendants and their counsel," App. at 75, a statement Stradley denies.

Between 2003 and 2005, proceedings and conferences concerning discovery and other matters were held before Magistrate Judge Arnold C. Rapoport, to whom the District Court delegated such matters. Plaintiffs served five sets of discovery requests "directed to all defendants," App. at 8977, seeking information regarding subjects such as "capitation, provider reimbursement, complaints by providers about reimbursement and information concerning the elements that would be required to be proved for class certification." App. at 75.[2] Highmark estimates that the total number of requests it alone received (counting subparts) was over 422.

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[2] "A 'capitation' is 'an annual fee paid a doctor or medical group for each patient enrolled in a health plan.'" App. at 66 n.17 (quoting Webster's Third New Int'l Dictionary 332 (1968)).

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Highmark, Keystone and Capital responded to each request. They interposed general objections to many of Plaintiffs' discovery requests. Those objections included that Plaintiffs sought privileged or confidential material, that the requests were vague and/or overly broad, and that Plaintiffs sought documents not in Defendants' possession or whose production would impose on Defendants undue burden or expense.

In addition to these general objections, each Defendant responded with specific objections to some of Plaintiffs' individual requests, such as objections on the same grounds as the general objections described above or on the ground that it had already responded to such a request in an earlier response. In addition, Defendants raised objections to the "definitions and instructions," claiming that Plaintiffs' use of terms in their requests was vague - such as using "the term 'Defendant' . . . without specifying to which defendant they are referring." App. at 7281. Defendants assert that they produced documents despite these objections.[3] Defendants' responses span from December 2003 to November 2004.

As provided in Federal Rule of Civil Procedure 16, Judge Gardner held a status conference in January 2004 and at that time set discovery deadlines. The bickering among the parties ensured that the deadlines would not be met. Although the parties conferred frequently about discovery issues, the principal issues were not resolved. Plaintiffs requested that Defendants withdraw their general objections and Defendants repeatedly declined to do so. In addition, Keystone denied having the claims data, which was critical discovery information, requested by Plaintiffs or the ability to obtain such data from Synertech, its

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[3] For example, Highmark claims that it "produced hundreds of thousands of documents, and responded to dozens of interrogatories." Highmark Br. at 11. Although Highmark cites a span of appendix pages to support its position, those pages are its responses to document requests/interrogatories and do not make clear that it sent documents or how many it sent.

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claims processor and a subsidiary of Keystone. Highmark advised Plaintiffs that it did not have Keystone's claims processing documents because it did not itself process such claims. Similarly, Highmark and Capital claimed not to possess documents related to audits of Keystone, but both parties eventually produced such documents at the last minute or late, years after plaintiffs' initial requests and not until after the appointment of the Special Discovery Master.

As all parties admit, the spirit of the discovery disputes was hostile. At the very least, it lacked the civility and professionalism one expects from such experienced attorneys. Plaintiffs filed a total of twelve motions for sanctions and/or contempt, seeking to sanction all Defendants and all their attorneys, as well as two non-parties and their counsel. Magistrate Judge Rapoport denied the five requests for sanctions or contempt before him.[4] Only two of Judge Gardner's subsequent rulings on the sanctions requests are the subjects of this appeal.

On April 26, 2004, Judge Gardner extended the original discovery deadlines of March 1, 2004, for class discovery and August 2, 2004, for all other discovery, to June 25, 2004, for class discovery and January 3, 2005, for all other discovery. In addition, "because of the inability of the parties to resolve any of their discovery disputes without intervention, [Judge Gardner] placed this matter into civil suspense [on August 5, 2004,] but required the parties to continue the discovery process." App. at 63. During this period, he required discovery and document production to continue to move forward. For all practical purposes, it did not, and instead the parties reached a discovery stalemate. Judge Gardner described the parties' behavior during the civil suspense period as follows: "From late 2004 into the summer of 2005 the parties continued their incessant motion

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[4] Apart from those appealed here, the remaining sanctions motions were never ruled on by the District Court, and were withdrawn by court order in connection with the subsequent settlement.

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practice and exhibited a complete inability to agree on even the most basic matters." App. at 63. On September 26, 2005, Judge Gardner ordered the case removed from civil suspense and set new discovery deadlines.

In the meantime, on July 26, 2005, Judge Rapoport granted "Plaintiffs' Combined Motion to Strike Defendants' 'General' and Other Objections," App. at 804, with the explanation that "[t]his Court notes that the parties have entered into a Stipulated Protective Order which protects their interests." App. at 804 n.1 (listing the extensive general objections to be stricken). Defendants petitioned Judge Gardner for reconsideration of that order and, on November 2, 2005, Judge Gardner granted in part and denied in part those petitions for reconsideration. He stated, "[W]e decline to specifically address all of defendants' contentions because we conclude that the Stipulated Protective Order entered into between the parties may be a legal basis to strike some, but is not a legal basis to strike all, of defendants objections. Accordingly, to that extent, we agree with defendants that Judge Rapoport's Order is clearly erroneous and contrary to law." App. at 1123 n.1. The Court then ordered that the "defendants' general objections to plaintiffs' interrogatories and requests for productions of documents are referred to the Special Discovery Master." App. at 1124.[5]

At the beginning of the civil suspense period, Plaintiffs filed a request for the appointment of a special discovery master to help move discovery along. In late summer of 2004, Judge Gardner ordered all parties to brief whether a Special Master should be appointed to oversee discovery. The parties did so promptly and, on August 25, 2005, the Court entered an order appointing Karolyn Vreeland Blume as Special Discovery

[5] Inexplicably, Judge Gardner, in his subsequent September 28, 2007 Sanctions Order, stated that Judge Rapoport granted plaintiffs' motion to strike, but he did not note that he had previously found that at least part of that order was "clearly erroneous and contrary to law." *See* App. at 82.

Master. Under the direction of Blume, including weekly meetings and intensive monitoring, discovery began to run more smoothly. On December 5, 2005, the Special Discovery Master wrote in an email to the parties: "It was not my intent to blame any party for the discovery delays that have occurred in this case. As I have stated on multiple occasions, the system has failed this case, and we are all trying to get it back on track at the eleventh hour. When you look at what has been accomplished due to everyone's diligent efforts in the last six weeks, it is truly amazing." App. at 10089. Over the next two years, however, she changed her view of the parties' cooperation. *See* p. 15 *infra*.

The parties disagree as to the cause of the improvement in the discovery process. Appellants attribute this improvement to Special Discovery Master Blume's new focus on Defendants' specific objections because, as Stradley argues, she "instructed Plaintiffs to provide a 'High Priority List' of those documents sought from Defendants that were most important to Plaintiffs' case," and to withdraw "220 of their pending discovery requests," and because the Special Discovery Master "concluded, just as Highmark had maintained all along, that Highmark had no obligation to produce the claims data Plaintiffs sought." Stradley Br. at 18-19. That was because Highmark did not have custody and control of the data when discovery requests were made.

In contrast, Appellees suggest that the improvement in document production was due to the "discovery" of "recently located" responsive documents that Defendants had previously denied existed or had failed to produce for more than a year. Appellees' Br. at 9-10. Appellees assert that "after the coincidental rash of 'recent discovery' by all Appellants of long sought after documents that coincided with the appointment [of] the Special Discovery Master, Appellants, and all of them, began to utilize a tactic of last minute, piecemeal, late production of discovery material, all of which was designed to frustrate and encumber the ability of the class action Plaintiffs to properly conduct discovery and prosecute their claims." Appellees' Br. at 10. To this effect, Special Discovery Master Blume noted the

following on February 1, 2006: "Although document production has been ongoing, *tens of thousands of pages were produced yesterday*, the final day of [class] discovery." App. at 6800 (emphasis added). Moreover, the Special Discovery Master took the general objections "off the table," App. 10329, requiring that Defendants assert only specific objections, and noted that the "general objections filed by [D]efendants were a major barrier to discovery." App. at 7806.

On another occasion, Judge Gardner remarked that "[w]hile February 1, 2006 was the deadline established by the court for the completion of class discovery in this matter, . . . [d]ocuments offered and received into evidence at the class certification hearings included those produced on the evening of Friday, March 3, 2006 when defense counsel forwarded to plaintiffs' counsel computer disks containing thousands of pages of information regarding claims submissions." App. at 65 n.16.

From March 6 to 10, 2006, Judge Gardner held a class certification hearing, officially closing the record on March 10, 2006. On December 20, 2006, he certified a class in this action, certified several factual and legal issues, and approved Dr. Grider as the sole class representative.

B. The March 30, 2006 Order[6]

On July 20, 2005, shortly before the case was removed from civil suspense, Magistrate Judge Rapoport issued an order stating that "Defendants' Counsel are admonished for their violations of the Stipulated Protective Order," for placing highly confidential material in the public record that should have been kept under seal. App. at 803. He further ordered that "*all counsel* are directed to strictly adhere to the terms of the Protective Order, and if counsel for any party fails to comply with this Order and violates [that order], other counsel may

[6] The order was dated March 29, 2006, but filed March 30, which explains why some parties refer to the date of this order as March 29, 2006.

apply to the Court for imposition of appropriate sanctions." App. at 803 (emphasis in original). However, Magistrate Judge Rapoport did not explain the basis for his order until after Defendants petitioned Judge Gardner for reconsideration of the order, and the latter "remanded this matter to . . . Magistrate Judge Arnold C. Rapoport to permit him the opportunity to file a Memorandum stating his reasons in support of his July 20, 2005 Order admonishing defendants." App. at 27.

Accordingly, in an order dated March 27, 2006, Magistrate Judge Rapoport noted that Plaintiffs had moved for an injunction against Defendants to prevent them from continuing to file highly confidential documents in the public record without placing them under seal. Defendants argued that the issue was moot because they "took prompt and appropriate remedial action in isolated instances when inadvertent disclosure of a protected document was made." App. at 1937-38.

Magistrate Judge Rapoport ruled "that Plaintiffs did not meet the standard required for injunctive relief" and that "sanctioning Defendants' counsel was not an appropriate remedy for failure to comply with the . . . Protective Order, particularly because counsel had already remedied any failure to comply with [that order]." App. at 1938 (footnote omitted). Instead, "the appropriate remedy was simply to admonish, or caution, Defendants' counsel, and also to warn *all* counsel that the terms of the Stipulated Protective Order should be followed. This Court [i.e., the Magistrate Judge] did not consider the admonition to be a sanction." App. at 1938-1939 (emphasis in original) (footnote omitted). In so concluding, Magistrate Judge Rapoport observed that *Black's Law Dictionary* defines a "sanction" as a "'[p]enalty or other mechanism of enforcement used to provide incentives for obedience with the law'" and defines "admonish" as "'[t]o caution or advise. To counsel against wrong practices, or to warn against danger of an offense.'" App. at 1938 nn.2-3 (quoting *Black's Law Dictionary* 1341, 48 (6th ed. 1990)).

In light of Magistrate Judge Rapoport's explanation, Judge Gardner then denied Defendants' joint petition for

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reconsideration, affirming Magistrate Judge Rapoport's order on March 30, 2006 (the "March 30, 2006 Order"). In his Memorandum, Judge Gardner found that Magistrate Judge Rapoport's ruling was neither clearly erroneous nor contrary to law,[7] but expressly "disagree[d] with Judge Rapoport's conclusion that an admonishment is not a sanction." App. at 39. The March 30, 2006 Order is one of the three orders appealed.[8]

C. The September 28, 2007 Sanctions Order

The day before Judge Gardner ruled on two of the sanctions motions filed by Plaintiffs in March and December 2006, Special Discovery Master Blume imposed sanctions for violations of Federal Rules of Civil Procedure 26(g)(3) and 37 on Capital, Keystone, and Crowel & Moring (the law firm that took over representation of Keystone from Hangley) and its partners Michael Martinez and Daniel Campbell. *Grider v. Keystone Health Plan Cent., Inc.*, No. 2001-CV-05641, 2007 WL 2874423 (E.D. Pa. Sept. 27, 2007). She concluded:

> Respondents have violated numerous provisions of Rules 37 and 26(g) . . . by repeatedly interposing general, boilerplate objections to plaintiffs' document requests and ignoring numerous Orders of the Court, including those of Judge Gardner and Judge Rapoport and the directives of the Master, and by repeating those objections in their [later responses]. Defendants' failure to comply with the

[7] A district court "may reconsider any pretrial matter . . . where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A).

[8] Between March 30, 2006, and the next sanctions order at issue, the September 28, 2007 order, the District Court entered an order on January 19, 2007 enjoining Highmark and Capital from settling the Grider claims as part of the multidistrict litigation pending in the United States District Court for the Southern District of Florida (MDL No. 1334). This court reversed, finding that the District Court had abused its discretion. *See Grider v. Keystone Health Plan Cent., Inc.*, 500 F.3d 322 (3d Cir. 2007).

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> discovery process should not be viewed in isolation but within the larger context of their other obstructionist tactics which manifest a similar contempt of the discovery obligations by these same parties.

Id. at *10. Special Discovery Master Blume's sanctions order is not before this court.

The following day, by order dated September 28, 2007, Judge Gardner issued the principal order before us (the "September 28, 2007 Sanctions Order"). That order followed nine days of hearings on the sanctions motions, at which Plaintiffs presented ten witnesses and 161 exhibits, and Defendants and their counsel (combined) presented six witnesses and 145 exhibits. *See* App. at 55-56. After the hearing, Judge Gardner's clerk requested that Plaintiffs submit certain "timeline charts . . .[,] which, due to time constraints, plaintiffs were unable to use during closing argument" at the sanctions hearing. App. at 23222. Plaintiffs submitted the charts and underlying documents to the court, with copies to counsel for all Appellants. Thereafter, the District Court allowed Plaintiffs and Defendants to file post-hearing findings of fact.

In support of the September 28, 2007 Sanctions Order, Judge Gardner issued a 77-page opinion, including 93 numbered paragraphs containing findings of facts. *Grider v. Keystone Health Plan Cent., Inc.*, No. 2001-CV-05641, 2007 WL 2874408 (E.D. Pa Sept. 28, 2007). Because many of the findings of fact are discussed in depth hereafter, we only briefly summarize Judge Gardner's conclusions here:

> (1) All Appellants violated Rules 26(g)(2)(A) and (B) of the Federal Rules of Civil Procedure.
>
> (2) All Appellants violated Rule 37(c)(1).[9]

[9] The Court's opinion is ambiguous on this point. The "Conclusions of Law" section, which summarizes the sanctions ordered, stated that only the Party-Appellants violated that rule.

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(3) The law firm defendants and the individual attorneys violated 28 U.S.C. § 1927 and Local Rule 83.6.1 of the Rules of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania.

However, Judge Gardner found there was not a proper basis to impose any sanctions (1) for violations of court orders;[10] (2) pursuant to other sections of Rule 37 of the Rules of Federal Civil Procedure or; (3) pursuant to the Court's inherent power to sanction.

Judge Gardner ordered Appellants to pay the Grider plaintiffs (1) for their "reasonable attorneys' fees" and costs related to the two motions for sanctions, (2) "for all sums paid by plaintiffs as fees to [the] Special Discovery Master," and (3) for their "reasonable attorneys' fees and costs" relating to proceedings before the Special Discovery Master. App. at 46. The Court ordered the plaintiffs to file a petition for the attorneys' fees and costs incurred and, in the meantime, determined that the sanctioned parties and counsel "shall each pay the following percentages:"

1. Keystone - 25%
2. Capital - 25%
3. John S. Summers, and "the law firm of Hangley," jointly and severally - 25%
4. Highmark - 10%

However, the order imposed sanctions under Rule 37(c)(1) against all Appellants, and in the body of the opinion Judge Gardner concluded "that all defendants . . ., together with their respective counsel, . . . are each subject to sanctions pursuant to Rule 37(c)." App. at 116-17.

[10] The Court explained that there was not a proper basis to impose sanctions against any of the Appellants for civil contempt for violations of any court orders because "plaintiffs have failed to prove by clear and convincing evidence that defendants have violated any court Order for which relief could be granted." App. at 118.

5. Sandra A. Girifalco, and the law firm of Stradley, jointly and severally - 10%
6. Daniel Huyett, Jeffrey Bukowski, and the law firm of Stevens & Lee, jointly and severally - 5%

App. at 46-47.

Each of the sanctioned parties petitioned this court for a writ of mandamus seeking an order requiring the District Court to vacate the sanctions. This court denied the petitions in a one-paragraph order.[11]

On October 30, 2007, Plaintiffs filed their fee petition seeking payment by Defendants of a fee of $3,244,612.50 (the "collective lodestar of [Plaintiffs] . . . (that is, each [counsel's] total time multiplied by his current hourly rate")), and collective costs of $238,361.17. App. at 18557. However, because the parties settled the underlying class action before the District Court ruled on the fee petition, the sanctions were never quantified and reduced to monetary amounts.

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[11] The order states:

In *Kerr v. United States District Court for the Northern District of California*, 426 U.S. 394 U.S. 304 (1976), the Supreme Court instructed that the conditions for issuing a writ of mandamus include that "the party seeking issuance of the writ have no other adequate means to attain the relief he desires" and that the "right to issuance of the writ is clear and indisputable." *Id.* at 403 (internal quotation marks and citations omitted). In our view, it is not clear and indisputable from the record before us that the petitioners have a right to the relief requested. *See Cunningham v. Hamilton County, Ohio,* 527 U.S. 198, 205-206 (1999). Accordingly, it is hereby ORDERED that the foregoing petitions for mandamus are DENIED.

App. at 23234.

D. Settlement of the Underlying Litigation

Plaintiffs and Highmark entered into a settlement agreement on February 11, 2008, which provided for Highmark to pay stipulated amounts to the class members and attorneys' fees of up to $3,450,000. In return, Plaintiffs agreed to "expressly waive, release, and disclaim any right to the monetary component of any sanctions award that may be entered against [Highmark] or [its] current or former attorneys in the *Grider* Action." App. at 23332. Plaintiffs also agreed not to oppose Highmark's forthcoming motion "to vacate [the] Court's sanctions opinion and Order (dated September 28, 2007)." App. at 23334.

On March 12, 2008, Plaintiffs and Capital and Keystone (by this time, a wholly owned subsidiary of Capital) entered into a similar settlement agreement, which provided for Capital and Keystone to pay $7 million in attorneys' fees. In exchange, Plaintiffs agreed to "waive, release and forever discharge the amount of any sanctions awarded against Capital and Keystone and their current and former counsel by the Court." App. at 23549. Plaintiffs also agreed not to oppose Capital and Keystone's forthcoming motion to vacate the September 28, 2007 Sanctions Order.

The District Court subsequently approved both settlements, ordered Defendants to pay the attorneys' fees agreed upon in the settlement agreements, and issued orders dismissing with prejudice all claims against Highmark, Keystone, and Capital.

Keystone, Capital, and Highmark, joined by Hangley and Stevens & Lee, moved, unopposed, to vacate the September 28, 2007 Sanctions Order. Stradley did not join those motions and did not file a separate motion. On June 25, 2008, Judge Gardner denied that motion.

All of the sanctioned parties filed notices of appeal. The law firms Hangley, Stevens & Lee, and Stradley, appeal the March 30, 2006 Order (Judge Gardner affirming Judge

Rapoport's July 20, 2005 order and determining it was a sanction, not an admonition). All Appellants appeal the September 28, 2007 Sanctions Order. All Appellants, except Stradley, appeal the June 25, 2008 order denying Capital, Keystone, and Highmark's motions to vacate the September 28, 2007 Sanctions Order.

II.

Jurisdiction

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331.[12] Appellees argue that we lack jurisdiction over this appeal on the grounds of finality and mootness. For the reasons set forth here, we reject both arguments and exercise jurisdiction under 28 U.S.C. § 1291.

A. Finality

Appellees contend that the orders appealed are not final because the District Court did not quantify the dollar amount of the sanctions. In response, Appellants argue that the orders on appeal became final on June 13, 2008, when the District Court entered orders approving the underlying settlements and dismissing all claims against all Defendants. The Appellants have the better argument.

"Ordinarily the proceedings in a district court must be final as to . . . all causes of action and parties for a court of appeals to have jurisdiction over an appeal under 28 U.S.C. § 1291." *Morton Int'l, Inc. v. A. E. Staley Mfg. Co.,* 460 F.3d 470, 476 (3d Cir. 2006). "The classic definition of a 'final decision' is one that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Id.* (quoting *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quotation omitted)). Moreover, "[t]he general rule is that 'a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated.'" *Quackenbush,* 517 U.S. at 712 (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994)); *see also Morton,* 460 F.3d at 476 ("[O]nce all claims against all parties have been dismissed a prior order will become final for purposes of appeal under 28 U.S.C. § 1291.").

This court considered the issue of finality in the context of an appeal of a sanction order in *Napier v. Thirty or More Unidentified Federal Agents, Employees or Officers,* 855 F.2d 1080 (3d Cir. 1988), where the court had entered an order imposing sanctions and a later order quantifying the dollar amount of the sanctions. We held that a final, appealable order was the one fixing the amount of the sanctions award. *Id.* at 1083; *see also Cunningham v. Hamilton County, Ohio*, 527 U.S. 198 (1999) (holding that sanctions order not final and appealable where proceedings below were still ongoing); *Lazorko v. Pennsylvania Hosp.*, 237 F.3d 242 (3d Cir. 2000) (holding that sanctions order was not final and appealable until entry of order determining sanctions amount); *In re Jeannette Corp.*, 832 F.2d 43 (3d Cir. 1987) (same).

The rule in *Napier* speaks to a different scenario than the one presented here. In *Napier*, we stated that the appeal of the sanctions order would have been premature because it could be brought later in the course of proceedings after entry of an order quantifying the dollar amount of the sanctions. This rule is in keeping with the finality requirement, which is intended to avoid piecemeal appeals. In the appeal before us, the District Court had already rendered a final order by June 13, 2008, by dismissing all claims. As a result, the finality concern that undergirds *Napier* is simply not implicated here.

Instead, we are guided by *Perkins v. General Motors Corp.*, in which a sister court of appeals held that it had jurisdiction over the appeal of a sanctions order even though the district court "never determined the monetary value of the sanctions." 965 F.2d 597, 599 (8th Cir. 1992). In *Perkins*, the district court "levied sanctions against [the plaintiff and her attorney] for various abuses during trial and discovery." *Id.* at 598. However, before the district court could quantify the amount of the sanctions, "the parties settled the underlying case [and, as] part of the settlement agreement, [the defendant] joined [the plaintiff and her attorney] in moving the court to lift the sanction order." *Id.* The court declined to do so. *Id.* The plaintiff and her attorney appealed, *id.* at 599, and the respondent (the district court judge, as the Defendant did not participate in the appeal) argued that the court of appeals lacked jurisdiction because there "ha[d] been no final appealable order," *id.* & n.3.

The Court of Appeals for the Eighth Circuit agreed that the initial sanction order was not final and appealable at the time it was issued, but held that the subsequent order denying the motion to lift the sanction order "made final the [earlier] sanction order." *Id.* at 599. The court reasoned as follows:

> While the district court did not assess a monetary penalty, [the defendant] informed the district court that it had agreed as part of the settlement not to collect any monetary sanctions. Therefore, it was reasonable for the district court to issue the sanction order without monetary penalty. The failure of the district court to go through the motions of assessing a dollar amount to penalties [the defendant] had agreed not to pursue does not prevent the sanction order from becoming final. The finality requirement should be given a "practical rather than a technical construction." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375 (1981).

Id. at 599-600. In addition, the court reasoned that "compelling policy reasons" supported a holding that it had jurisdiction over such appeals:

[12] Although Appellees have nothing of monetary value at issue, their brief explains that they are participating in this appeal "in an effort to vindicate the law of discovery and its orderly and professional processes, and to defend a district judge with the courage to make good and hard judgments and rulings no matter what their popularity." Appellees' Br. at 27-28. In doing so, they also seek to sustain Judge Gardner's orders.

> If an attorney is unable to appeal a sanction order after the underlying case has been settled, the attorney is left with no avenue of challenging the sanction order. The law encourages parties to settle disputes. An attorney must be free to settle cases when settlement is in the client's best interest. The refusal to grant jurisdiction over an appeal of sanctions after the underlying suit has been settled thrusts a personal conflict upon the attorney-by settling a case in the client's interest he may have to forfeit a personal right to appeal the sanctions levied against him.

Id. at 600; *see also Ritchie v. United States*, 451 F.3d 1019, 1022 (9th Cir. 2006) (Although the district court did not quantify the sanctions order, the court of appeals had jurisdiction because the party seeking sanctions had "expressly waived his right to monetary sanctions . . . , leaving nothing for the district court to decide.").

We agree with the reasoning of the Eighth Circuit in *Perkins* and hold that the District Court's order of June 13, 2008, which dismissed all claims against all parties with prejudice, rendered final the orders appealed here because it "'end[ed] the litigation on the merits and le[ft] nothing for the court to do but execute the judgment.'" *Quackenbush*, 517 U.S. at 712 (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).[13]

B. Mootness

Appellees also argue that the settlement of the underlying class action mooted these appeals because "the attorney's fees agreed upon in [the] settlement [agreements] . . . covered any monetary awards that might be (but never were) quantified and awarded pursuant to the Sanction Order and Opinion."

[13] We are aware of no binding authority instructing that a final judgment of dismissal that results from a court-approved settlement should be treated any differently than any other final judgment for the purpose of rendering earlier, interlocutory orders final and appealable.

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Appellees' Br. at 37. Therefore, the settlements "and the yet to be quantified sanctions amounts formed a complete settlement of the case [and] . . . any issue currently before this Court involving that sanctions decision is moot." Appellees' Br. at 37 (emphasis omitted). Appellants respond that the settlements did not moot the appeals because the Appellants experienced (and continue to experience) reputational harm.

This court's precedent supports Appellants' position. In *In re Surrick*, 338 F.3d 224, 229-230 (3d Cir. 2003), an attorney appealed a suspension order imposed on him during disciplinary proceedings. However, the term of his suspension expired before he appealed, suggesting that the case might be moot. This court disagreed, holding that the Appellant's claim fit within the following exception to the mootness doctrine: a court will hear an otherwise moot appeal where "the trial court's order will have possible collateral consequences," *id.* at 230 (internal quotations omitted), and the relevant collateral consequence there was "the continuing stigma resulting from his suspension," *id.* Similarly, in *Bowers v. Nat'l Collegiate Athletic Ass'n,* 475 F.3d 524, 542-43 (3d Cir. 2007), this court held that an attorney had standing to appeal a non-quantified sanction order because "a public reprimand carries with it the formal censure of the court and may, in many cases, have more of an adverse effect upon an attorney than a minimal monetary sanction." *Id.* at 543. Although *Bowers* was about standing, rather than mootness, it demonstrates that we have considered reputational harm to be a cognizable injury when determining whether the appeal of a sanctions order is justiciable.[14]

On a related issue, in *Perkins* the court rejected the argument that "since [the defendant] ha[d] agreed not to collect monetary sanctions, there is no longer an adversarial relationship

[14] The court further noted that "[o]nly the Seventh Circuit has clearly held that a public reprimand not accompanied by a monetary sanction is non-appealable." *Bowers,* 475 F.3d at 543 (citing *Clark Equip. Co. v. Lift Parts Mfg. Co., Inc.*, 972 F.2d 817, 820 (7th Cir. 1992)).

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and the sanction order is moot." 965 F.2d at 600. The court reasoned: "Appellants are entitled to bargain with adversaries to drop a motion for sanctions, but they cannot unilaterally bargain away the court's discretion in imposing sanctions and the public's interest in ensuring compliance with the rules of procedure." *Id.* We are aware of no binding precedent that contradicts these cases or otherwise requires a holding that this case is moot.

Accordingly, we conclude that the doctrines of finality and mootness do not deprive this court of jurisdiction over this appeal.[15]

III.

Standard of Review

"The decision to impose sanctions for discovery violations and any determination as to what sanctions are appropriate are matters generally entrusted to the discretion of the district court," and "therefore [this court] review[s] a district court's decision to impose . . . sanctions for abuse of discretion." *Bowers,* 475 F.3d at 538. "While this standard of review is deferential, a district court abuses its discretion in imposing sanctions when it 'base[s] its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.'" *Id.* (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405

[15] Appellees also argue that we lack jurisdiction because this court previously rejected Appellants' mandamus petitions with respect to the September 28, 2007 Sanctions Order. In denying Appellants' petitions, this court determined that the extraordinary remedy of mandamus was not appropriate; it did not determine whether the Court's Sanctions Order was an abuse of discretion or violated Appellants' due process rights - the issues now before this court concerning that order. *See, e.g.*, Capital/Keystone Reply Br. at 11. Moreover, in deciding the mandamus petitions, this court did not consider the other two orders now before us. *See, e.g.,* App. 14425 (Capital/Keystone Mandamus Petition).

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(1990)).

IV.

Discussion

A. The September 28, 2007 Sanctions Order

1. Factual Challenges

In Judge Gardner's opinion supporting his September 28, 2007 Sanctions Order, he concluded that the corporate Defendants and their counsel (i.e., all of the Appellants) "engaged in a course of conduct which makes it clear that they have not been forthcoming with the most important information in this case," App. at 91, by (1) "interpos[ing] . . . legally deficient general objections for the improper purpose of delaying discovery in this case and to increase the costs to plaintiffs of bringing this case to trial," App. at 97, (2) failing to make a good faith effort to locate and produce documents requested by Plaintiffs, *see* App. at 100-02, (3) failing timely to produce and supplement discovery, *see* App. at 109-116, and (4) "act[ing] in bad faith in order to multiply these proceedings," App. at 125. Appellants challenge the factual bases of these conclusions as clearly erroneous.

a. Factual Findings

Judge Gardner's lengthy and detailed set of factual findings served as the foundation for imposing sanctions. He found that "counsel for all defendants refused to withdraw the 'general objections'[16] contained in all of their respective

[16] None of the parties defines "general objections," but the Philadelphia Bar Association, which filed an amicus brief in support of Appellants, provided the following explanation:

> "General objections," as that term is commonly understood and used herein, refers to objections that a party responding

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responses to plaintiffs' discovery requests." App. at 82. Later in the opinion, Judge Gardner also found that when claiming privilege as a general objection, "no defendant included a privilege log with their responses . . . until directed to do so by the court." App. at 98. In addition, he found that all Defendants, through their counsel, denied the existence of documents that Plaintiffs had sought throughout discovery, but later announced that they had found many of those documents at, or soon after, the first meeting with Special Discovery Master Blume on October 20, 2005. Specifically, Judge Gardner found that: Girifalco, on behalf of Highmark, "announced that she had 'recently located' audit and other documents which counsel had repeatedly denied existed," App. at 83; Hangley, on behalf of Keystone, "also announced that Keystone had also 'recently located' 24 boxes of material responsive to plaintiffs' discovery requests," App. at 83; and Stevens & Lee, on behalf of Capital, "announced the 'discovery' of up to 60 boxes of recently located audit workpapers that counsel had previously denied existed, and which documents were represented to the [Special Discovery Master] one week earlier as having been destroyed," App. at 83.

Similarly, Judge Gardner found that Keystone - despite its persistent claims to the contrary - had the ability to obtain and/or generate claims data through its internal Comprehensive

> to discovery asserts as applicable to multiple individual requests set forth in, for example, a given set of interrogatories or document production requests. "General objections" sometimes appear in response to equally "general" features of the discovery requests themselves, such as general or blanket instructions as to the time period applicable to all requests, the way in which terms are defined for purposes of all requests, etc. A party might make a "general objection," for example, to producing electronically stored information that is "not reasonably accessible because of undue burden or cost." *See* Fed. R. Civ. P. 26(b)(2)(A).

Amicus Br. at 4 n.2.

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Analytical Health Reporting System ("CAHRS") "in the routine course of business," App. at 77, or to retrieve such data from Synertech through their Administrative Services Agreement ("ASA"), which entitled Keystone "to obtain routine and regular reports from Synertech created from the data that Synertech stored," App. at 76. Moreover, Judge Gardner pointed out that, in December 2005, "Keystone produced 50,937 documents including Synertech Systems Request Forms which had been previously withheld from plaintiffs . . . [in] boxes of documents labeled 'Withheld Synertech Documents.'" App. at 84.

Judge Gardner also noted numerous instances of other last minute or late document production, including the following: (1) "[l]ate in the evening after normal business hours the night prior to [depositions related to claims data], counsel for Keystone forwarded hundreds of documents which previously had been requested by plaintiffs, App. at 84; (2) "[t]ens of thousands of documents were produced by defendants collectively . . . the day before the end of class discovery," App. at 85; (3) on "the last day of class discovery, Capital produced [certain] documents after repeatedly denying that it had any such documents," App. at 85; and (4) after the deadline for class discovery production had passed, Highmark "produced 4,356 pages of documents," some of which had been "previously produced by Highmark to defendants' joint expert," and "included [certain documents], of which Highmark and its counsel previously had denied possession," App. at 85.

In addition, Judge Gardner found that Summers refused to produce underlying materials that supported his "Declarations which affirmatively represented to the court that [certain of] plaintiffs' allegations . . . lacked any factual basis . . . [and] were 'without merit,'" App. at 78, claiming that the documents were, alternately, "lay opinion," App. at 79, that they consisted of "expert disclosure," App. at 79, and later that they "were protected by the attorney-client privilege and work product doctrine," App. at 80, but nontheless "refused to list the declarant materials on a privilege log," App. at 82. Judge Gardner also concluded that Highmark and Girifalco falsely represented that Highmark had searched for (and not found)

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audit documents. Judge Gardner based this conclusion on the fact that Girifalco had certified in written discovery responses in 2004 that "a reasonable investigation was completed and that Highmark was not in possession of any audit documents," but in a November 2005 letter "stated that Highmark had not even looked for any documents which were subject to an objection." App. at 101.

Appellants challenge many of Judge Gardner's factual findings as clearly erroneous, contending that there was no factual basis in the record for the imposition of sanctions. *See, e.g.*, Tr. of Oral Argument at 6-7, *Grider v. Keystone Health Plan Cent., Inc.*, Nos. 08-3073, 08-3074, 08-3075, 08-3076, 08-3077 (3d Cir. July 9, 2009) (counsel for Hangley, arguing on behalf of all Appellants, stated, "It is my position . . . that on this record there is not a basis for sanctions" and "there is not a foundation in the record for the judge's findings"). We disagree. Having examined the voluminous record in this case and compared it to the sanctions opinion, we conclude that Judge Gardner's factual findings have support in the record and are, therefore, not clearly erroneous. We will not disturb any of Judge Gardner's factual findings,[17] with one immaterial exception.[18]

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[17] A number of the Appellants argue that these factual findings were not the product of Judge Gardner's independent judgment because his findings very closely resembled Plaintiffs' Proposed Findings of Fact and that, therefore, the District Court's reliance on Plaintiffs' version of events constituted a due process violation. *See, e.g.*, Hangley Br. at 41. We reject this argument because, as the Supreme Court has held, "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 572 (1985).

[18] We cannot sustain Judge Gardner's finding that the general objections were dismissed or stricken. In fact, although Magistrate Judge Rapoport dismissed the general objections, Judge Gardner vacated that decision. *See* App. at 1123 n.1. The Special Discovery Master took the general objection "off the table" in order to focus on the specific objections, but as Anthony J. Bocchino, arguing on behalf of Appellees, conceded at oral argument: "the parties agreed to proceed as if they did not exist." Tr. of Oral Argument at 70. Nonetheless, we deem this erroneous finding to be immaterial because Judge Gardner's conclusion that Appellants misused general objections was not dependant on his finding that they had been dismissed.

b. Credibility Determinations

Judge Gardner based the conclusions he drew from these factual findings, in part, on adverse credibility determinations. Having observed the parties and their attorneys in the course of proceedings for almost six years and having observed the attorneys as witnesses during the nine-day sanctions hearing, Judge Gardner stated at the beginning of his sanctions order: "Initially, I do not believe the testimony of Attorneys Summers, Girifalco, Huyett and Bukowski that they did nothing to frustrate discovery in this case. Rather, I conclude that there was a concerted effort to frustrate plaintiffs' attempts at obtaining relevant discovery." App. at 97. Elsewhere in the opinion, Judge Gardner added:

> [R]egarding the credibility of Attorneys Girifalco and Summers, I found both to be evasive in their responses to many of the questions posed at the sanctions hearings by plaintiff's counsel. However, the demeanor and body language of both witnesses changed dramatically when questioned by their own counsel. Although, . . . it is not unusual for a witnesses' [sic] demeanor to change when subject to adverse questioning, the degree to which these witnesses' demeanor changed was so striking that it left me with the feeling that they both were hiding significant information and were not completely candid about their activities in this matter.

App. at 92-93. In addition, Judge Gardner reiterated that counsel for Highmark and Keystone "announced [at the first meeting with Special Discovery Master Blume] that they had just recently located responsive documents to long-sought-after discovery," App. at 97, and that later "Huyett announced that Capital had also just located up to 60 boxes of material," App. at 97.

With respect to all Appellants, Judge Gardner continued:

> Defense counsel all testified that they attempted to work with plaintiffs. However, this assertion is belied by an apparent lack of discovery that was produced for the nearly one year that this case was in civil suspense from August 5, 2004 until the first meeting with Special Discovery Master Blume on October 20, 2005. (As noted above, the Order placing this case in civil suspense clearly directed the parties to continue discovery while the case was in suspense.)

App. at 97.

Nearly all Appellants challenge Judge Gardner's credibility determinations.[19] We review credibility determinations, like other factual findings, under a clearly erroneous standard. *See Cooter & Gell*, 496 U.S. at 400 ("'Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses'" (quoting Fed. R. Civ. P. 52(a) (1985))).[20] Appellants argue that Judge Gardner did not have a sufficient factual basis for finding that the attorneys lacked credibility. *See, e.g.*, Stevens & Lee Br. at 50.

We disagree. Judge Gardner invested the time and effort to hold a lengthy hearing and closely observe the witnesses. He was entitled to find that the attorneys' testimony was not

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[19] All Appellants except Keystone and Capital challenge Judge Gardner's credibility determinations.

[20] *Cooter & Gell* cited with approval the Rule 52(a) standard of review for a district court's findings in a case involving Rule 11 sanctions, a context that is analogous to the instant case.

credible, "for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson*, 470 U.S. at 575 (citation omitted). In addition, Judge Gardner was in the best position to determine whether the attorneys' testimony at the sanctions hearing was credible in light of their actions in the almost six years of proceedings before him. We conclude that Judge Gardner's credibility determinations were within his province as the finder of fact and were not clearly erroneous.

Appellants also challenge the weight that Judge Gardner gave these credibility determinations, arguing that credibility determinations supplanted affirmative evidence of wrongdoing. Appellants are correct that "discredited testimony is not considered a sufficient basis for drawing a contrary conclusion." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984) (citation omitted); *see also Eckenrode v. Pa. R.R. Co.*, 164 F.2d 996, 999 n.8 (3d Cir. 1947) ("[A] belief that testimony is false will not support an affirmative finding that the reverse of that testimony is true."). Similarly, as Highmark observes, "a court may not 'insulate [its] findings from review by denominating them credibility determinations.'" Highmark Br. at 39 (alteration added) (quoting *Anderson*, 470 U.S. at 575).

Highmark argues that the "district court's 'findings' violate these principles" because "[t]here is no direct evidence supporting . . . a finding that Highmark 'hid' documents behind its general objections . . . . Similarly, the fact that Highmark produced documents after the SDM was appointed does not establish that Highmark had been 'hiding' documents before that time." Highmark Br. at 40. "Nothing about this sequence of events even suggests, much less establishes, that Highmark had been hiding behind its general objections . . . ." Highmark Br. at 40-41 (citing App. at 692, 10403, 10404). Stradley, Stevens & Lee, and Hangley echo this same argument. *See* Stradley Br. at 44-47; Stevens & Lee Br. at 50; Hangley Br. at 46-48.

We reject Appellants' arguments that Judge Gardner used his adverse credibility determinations to compensate for an

absence of affirmative evidence or to insulate his factual findings from review by this court. Judge Gardner's conclusion that the attorneys impeded discovery was not based solely on his determination that their testimony to the contrary was incredible. Instead, years of observing the conduct of the Defendants and their counsel supplied Judge Gardner with ample affirmative evidence from which he could infer that Appellants "engaged in a course of conduct which makes it clear that they have not been forthcoming with the most important information in this case." App. at 91. For instance, having compared the pace and volume of Defendants' production before and after the appointment of Special Discovery Master Blume, Judge Gardner was entitled to draw the inference that the later rash of "discovery" of "recently-located" documents was not coincidence and that, instead, Appellants had been withholding documents behind their general objections. This was a permissible inference in light of the sequence of events. *See Anderson*, 470 U.S. at 574 ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). Moreover, such a conclusion would be permissible even if Judge Gardner had not found incredible the attorneys' testimony that they did nothing to frustrate discovery. Judge Gardner was entitled to credit his own first-hand observations of the Appellants' conduct over the attorneys' self-serving testimony about this same conduct. Again, Judge Gardner's factual conclusions were within his province as the finder of fact and warrant our deference under the highly deferential standard of review. Given our scope of review, we cannot disturb the trial court's adverse credibility findings.

2. Legal Challenges

Although we do not disturb Judge Gardner's factual findings, we will vacate the September 28, 2007 Sanctions Order because there are several significant legal errors. *See Cooter & Gell*, 496 U.S. at 402 ("'If [the Court of Appeals] believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment.'" (alteration in original) (quoting *Icicle Seafoods, Inc. v. Worthington*, 475 U.S.

709, 714 (1986))).

a. Rule 26(g)

Judge Gardner sanctioned all Appellants under the following version of Rule 26(g),[21] which provided, as relevant here:

> (2) Every . . . objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name . . . . The signature of the attorney . . . constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:
>
> (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
>
> (B) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and . . .
>
> (3) *If without substantial justification a certification is made in violation of the rule*, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the . . . objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

Fed. R. Civ. P. 26(g)(2)(3) (2000) (emphasis added). Judge Gardner held that all Appellants violated these rules by interposing general objections and by failing to make a good faith effort to locate certain documents. We are compelled to reverse the imposition of sanctions under Rule 26(g) because Judge Gardner failed to analyze the "substantial justification" standard expressly articulated in the Rule.

[21] Rule 26(g) was amended, without change to its substance, effective Dec. 1, 2007.

Rule 26(g) provides that an attorney will be sanctioned for noncompliance with that rule "[i]f without *substantial justification* a certification is made in violation of the rule." Fed. R. Civ. P. 26(g)(3) (emphasis added) (2000). There is nothing in Judge Gardner's opinion that discusses or expressly considers the contours of this standard or explains the ways in which Appellants' legal positions were not substantially justified. This standard is entirely absent in the opinion.

For instance, Judge Gardner found improper Keystone's general objection "to the production of a privilege log regarding documents prepared or created after [its] current counsel were retained." App. at 98. However, Judge Gardner never explained the legal basis for his conclusion that such an objection was improper.[22] Likewise, the opinion noted "[o]ther examples of improper general objections," citing discovery responses from all three corporate Defendants. The legitimacy of a general objection turns on the objection and its context. The Federal Rules do not prohibit general objections, but if the general objection is interposed in an attempt to insulate from discovery a large quantity of material that includes otherwise discoverable material when only some of the material may be protectible, the objection is inconsistent with the aim of discovery and may well be the subject of sanction. *See generally* 7 James Wm. Moore *et al.*, Moore's Federal Practice § 33.171 (Matthew Bender 3d ed.). The opinion accompanying the September 28 Order did not

[22] Although we agree with Amicus that a rule requiring creation of an ongoing log of all post-complaint privileged communications would have a chilling effect on the attorney-client relationship, we do not read the District Court's opinion as stating such a rule. We underscore that a privilege log may not be required for communications with counsel that take place after the filing of a law suit. *See* James W. Quinn, Mindy J. Spector & John P. Mastando III, Responding to Document Requests, 2 Bus. & Com. Litig. Fed. Cts. § 21:41 (Robert L. Haig, ed., 2d ed. 2006) ("[I]n most litigations, counsel will agree to omit from the privilege log documents created by outside or in-house counsel after the litigation has commenced.")

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explain why the general objections in this case were improper. Nor did the Court explain why these general objections were not "substantially justified," an explanation required by the language of the Rule.

We offer no opinion as to whether the "substantial justification" standard was met in this case.[23] It may be that if the Court had applied the "substantial justification" standard, it would still have concluded that sanctions were appropriate. However, on this record, it is also entirely possible that it could have found that some of Appellants' positions were indeed substantially justified.

For instance, Hangley argues that Keystone's position was substantially justified on the claims data issue because it "objected on the basis of 'possession custody or control' as to Synertech data." Hangley Br. at 58. It contends that, under its agreement with Synertech, Keystone had a right to the raw data

[23] This court has not addressed the "substantial justification" standard, but we note that in *Tolerico v. Home Depot*, Chief Judge Vanaskie, of the United States District Court for the Middle District of Pennsylvania, stated:

> "Substantial justification" for the failure to make a required disclosure has been regarded as justification to a degree that could satisfy a reasonable person that parties could differ as to whether the party was required to comply with the disclosure request. The test of substantial justification is satisfied if there exists a genuine dispute concerning compliance.

205 F.R.D. 169, 175-76 (M.D. Pa. 2002) (internal citation and quotations omitted); *see also* 6 Moore's Federal Practice, § 26.154 [2][a] ("An objective standard is applied in determining whether sanctions are to be applied under Rule 26(g). . . . [T]he issue is whether the attorney or party who signed the certification conducted a reasonable inquiry into the facts supporting the disclosure or discovery document.").

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held by Synertech, but not the data reports that Plaintiffs actually sought. Hangley Br. at 57-58. The language of the agreement could be read to support either position. Hangley notes that the agreement states that "all information generated under and/or contained in the [system] pertaining to Keystone Central shall also be and remain property of Keystone," App. at 9416, but the agreement also "confers [upon Keystone] no incidents of ownership, interest in title or any other proprietary interest whatsoever in the system or any parts thereof, *including, without limitation, any product, work product or otherwise* resulting from this Agreement," App. at 9416 (emphasis added). Keystone also might have been substantially justified in taking the position that, for the purposes of discovery, it did not have an obligation to generate data compilations that were not already in existence. We offer no opinion as to whether Hangley or Keystone would have prevailed with these arguments, but note them to underscore the significance of applying the "substantial justification" standard before imposing Rule 26(g) sanctions.

The failure to apply the applicable legal standard was reversible error and the sanctions under Rule 26(g) cannot be sustained.

b. Rule 37(c)(1)

Judge Gardner also sanctioned all Appellants under Rule 37(c)(1), which provides:

> A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not . . . permitted to use as evidence . . . any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions [such as] . . . requiring payment of reasonable expenses, including attorney's fees.

Fed. R. Civ. P. 37(c)(1) (2000).

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As a preliminary matter, it is unclear from the opinion whether the District Court intended to sanction both the parties and their counsel under Rule 37(c)(1). As noted, *supra* note 9, at one point in the opinion Judge Gardner listed only the Defendants as sanctioned under this rule, but elsewhere he also included their attorneys. To the extent that the Order sanctioned the attorneys and law firms under Rule 37(c)(1), it was legal error.

Although we have not before had occasion to address the applicable scope of Rule 37(e)(1) sanctions, the Second and Seventh Circuits have expressly declined to sanction attorneys under this rule. In *Apex Oil Co. v. Belcher Co. of N.Y., Inc.*, 855 F.2d 1009, 1014 (2d Cir. 1988), the court stated that, "[b]y its express terms, Rule 37(c) applies only to a party." In addition, the *Apex* court continued, "we must infer from the other subsections of Rule 37 expressly providing for the imposition of sanctions against a party's attorney that the drafters intended to omit attorneys from the coverage of subsection (c)." *Id.* In reaching the same conclusion in *Maynard v. Nygren*, 332 F.3d 462 (7th Cir. 2003), the Seventh Circuit noted that the "Fed.R.Civ.P. 37(c) advisory committee's note to the 1970 amendment [to Rule 37(c)] requires 'that *the party* improperly refusing the admission pay the expenses of the other side in making the necessary proof at trial.'" *Id.* at 470 (emphasis added). Moreover, the Wright & Miller treatise, citing *Apex*, also states that Rule 37 does not permit sanctions against the party's attorney and includes no authority to the contrary. 8A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2990. We find the reasoning of the Second and Seventh Circuits persuasive and hold that Rule 37(c)(1) does not permit sanctions against counsel. Accordingly, we will vacate all Rule 37(c)(1) sanctions against the Attorney Appellants.

As for the sanctions under 37(c)(1) imposed against the parties here, we conclude that the sanctions cannot stand for the same reasons that we discussed with respect to the sanctions under Rule 26(g). Rule 37(c)(1) is similar to Rule 26(g) in that it expressly includes the "substantial justification" standard; a district court may impose sanctions where "[a] party that without

substantial justification fails to disclose information required by" certain enumerated subsections of Rule 26. Fed. R. Civ. P. 37(c)(1) (2000) (emphasis added). Because Judge Gardner did not discuss or analyze the "substantial justification" standard in imposing sanctions under Rule 37(c)(1), we will vacate all sanctions under this rule against the corporate Appellants.[24]

c. 28 U.S.C. § 1927 and Local Rule 83.6.1

The other basis for the September 28 Sanctions Order as to the attorney Appellants was that they violated 28 U.S.C. § 1927 and Rule 83.6.1 of the Local Rules of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania. 28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

We have held that "sanctions may not be imposed under § 1927 absent a finding that counsel's conduct resulted from bad faith, rather than misunderstanding, bad judgment, or well-intentioned zeal." *LaSalle Nat'l Bank v. First Connecticut Holding Group, L.L.C. XXIII*, 287 F.3d 279, 289 (3d Cir. 2002) (citations omitted). As such, "under § 1927, an attorney's 'conduct must be of an egregious nature, stamped by bad faith that is violative of recognized standards in the conduct of litigation.'" *Id.* (quoting *Baker Indus. Inc. v. Cerberus, Ltd.*, 764 F.2d 204, 208 (3d Cir. 1985)).

Local Rule 83.6.1, "Expedition of Court Business," provides, in relevant part:

> (b) No attorney shall, without just cause, . . . present to the court vexatious motions or vexatious opposition to motions or shall fail to prepare for presentation to the court, or shall otherwise so multiply the proceedings in a case as to increase unreasonably and vexatiously the costs thereof.
> (c) Any attorney who fails to comply with . . . (b) may be disciplined as the court shall deem just.

In imposing sanctions pursuant to 28 U.S.C. § 1927 and Local Rule 83.6.1, Judge Gardner incorporated certain of his factual findings. *See* App. at 123 ("I have extensively outlined [Summers'] conduct on this case above and incorporate it here."); *see also* App. at 125 ("I adopt all the findings and conclusions about [Girifalco's] specific conduct discussed above in this Opinion.") In addition, Judge Gardner made specific findings that each attorney acted in bad faith. He stated that Summers "engaged in a course of conduct which constituted bad faith in this matter," App. at 123, and Girifalco, "[w]hile her conduct was not as egregious as that of Attorney Summers, . . . did her fair share of impeding discovery . . . and acted in bad faith in order to multiply these proceedings." App. at 125. Although Judge Gardner noted that Huyett and Bukowsi were "the least culpable of the defense counsel in this case, they still helped to multiply these proceedings by their insistence on maintaining their general objections, their initial failure to provide privilege logs required by the Rules, and by delaying this case and not actively moving discovery along during the period of civil suspense." App. at 125.

Apparently with respect to all the attorneys (because no particular attorney was specified), Judge Gardner provided additional bases for his finding of bad faith. First, he noted that the "numerous motions filed in this matter [requesting reconsideration of Judge Rapoport's orders] and the conduct of

[24] In addition, Judge Gardner erred as a matter of law insofar as he concluded that Capital was responsible for Keystone's production after Spring 2004 when it bought out Highmark. *See* App. at 116. We are aware of no authority for the proposition that a parent corporation, simply by virtue of ownership, may be held responsible for its subsidiary's alleged discovery violations.

counsel in their arguments to the court provide significant evidence of their bad faith." App. at 126. Second, he noted that "defendants have either appealed or disregarded almost every directive and recommendation issued by" the Special Discovery Master. App. at 126. Third, Judge Gardner stated that "[c]ounsel have all feigned misunderstanding of terms such as 'disengagement,' 'downcoding' and 'bundling.'" App. at 126. Fourth, Judge Gardner noted that "there are numerous instances . . . where defendants, through their counsel, took inconsistent positions on matters in this litigation to suit their tactical purposes at the moment." App. at 126.[25]

Considering the opinion as a whole, there were sufficient findings of fact upon which Judge Gardner could have concluded that Summers, Girifalco, Huyett and Bukowski acted in bad faith in multiplying the proceedings in violation of 28 U.S.C. § 1927 and Local Rule 83.6.1. However, in the section of the opinion in which Judge Gardner actually discussed the imposition of sanctions on these grounds, he did so with such little specificity that we cannot affirm.

On the issue of the lack of specificity, Stradley argues that Judge Gardner "painted Defendants and their attorneys and law firms with a broad brush, indiscriminately lumping them together in a manner that rendered it impossible to determine who was responsible for what." Stradley Br. at 53. With respect to imposition of sanctions under 28 U.S.C. § 1927 and Local Rule 83.6.1 for multiplying the proceedings, Stradley accurately points out (1) that it appealed only two of Magistrate Rapoport's rulings; (2) that it only appealed five of the Special Discovery Master's rulings; and (3) that Judge Gardner provided no evidence that Stradley "feigned misunderstanding of any the terms such as 'disengagement,' 'downcoding' and 'bundling.'" App. at 126.

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[25] As an example, Judge Gardner explained that the Defendants altered their arguments with respect to whether the Florida MDL proceeding was relevant to their case depending on their needs at various points in the litigation.

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Similarly, Stevens & Lee denies engaging in "incessant motion practice," pointing out that it sought reconsideration of only two of Judge Rapoport's rulings (and noting that it prevailed on eleven of the fifteen discovery motions before the Magistrate Judge). Stevens & Lee notes that Judge Gardner "failed to identify *any* single motion or appeal filed by any defendant that did not comply with the rules, was filed in bad faith, or lacked merit." Stevens & Lee Br. at 26 (emphasis in original). Stevens & Lee argues that good faith filing of motions is not sanctionable and that, under 28 U.S.C. § 636(b)(1), it had the right to appeal Judge Rapoport's decisions to Judge Gardner.

Likewise, Highmark states: "One of the most troubling aspects of the court's opinion in support of the sanctions order is the degree and extent to which it paints with a broad brush, indiscriminately referring to 'defendants,' rather than to any specific defendant. The opinion groups the Defendants together, thereby obscuring who supposedly was responsible for what alleged misconduct." Highmark Br. at 30; *see also* Stradley Br. at 53 (listing findings from Judge Gardner's opinion that refers to "defendants" without specifying responsibility for individual conduct).

In *Martin v. Brown*, 63 F.3d 1252 (3d Cir. 1995), we considered a sanction order that provided, "Penalties will now be imposed for the continued shenanigans of the parties and their counsel, who have been repeatedly warned that the court would take such action." *Id.* at 1264 n.17. On appeal, we held that the breadth of the sanctions order violated due process: "This scatter-gun approach is unfair to Bender. It also makes our task of deciding whether the district court acted consistently with a sound exercise of discretion impossible on the record now before us." *Id.* at 1264. We stated that if the district court wished to pursue sanctions against Bender, "[i]t should relate each sanction to some aspect of Bender's conduct and explain how that conduct comes within the authority it relies on to impose it. Any sanctions imposed against Bender should also be imposed solely because of her own improper conduct without considering the conduct of the parties or any other attorney." *Id.* at 1265.

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The sanctions here were imposed with greater specificity than those before us in *Martin* and we do not find a due process violation here as we did there. Nonetheless, we cannot affirm the order because of the vague use of the terms "defendants" without describing individual sanctionable conduct and the general lack of factual specificity that marks the section of the opinion discussing sanctions under 28 U.S.C. § 1927 and Local Rule 83.6.1.

Unfortunately, this lack of specificity is a pervasive characteristic of Judge Gardner's opinion. For example, in allocating the percentage of responsibility of each Appellant, Judge Gardner held Stevens & Lee responsible for paying 5% of Plaintiffs' costs incurred in filing the sanctions motion and participating in proceedings before Special Discovery Master Blume, as well as *all* fees Plaintiffs paid to Blume. However, Stevens & Lee ceased representing Capital in October 2006, well before many of those costs and fees were incurred. Because the monetary aspect of the sanctions is not an issue before us, we need not determine whether that percentage was reasonable. However, we note that the sanctions for Stevens & Lee should have been cabined to the time-frame in which it represented Capital.

The mere fact that Defendants had entered into a joint-defense agreement did not support imputation of the actions of one party's attorney to another party or its attorney. Although the court may have permissibly concluded that the Defendants engaged in a concerted effort to impede discovery, in specifically outlining the bases for each legal ground for sanctions the Court was required to describe the sanctionable conduct of each with such specificity as to ensure that one Defendant was not sanctioned for the acts of another. On occasion, the Court delineated sanctionable behavior with appropriate specificity and individualization. For example, in the findings of fact section of the opinion, Judge Gardner found that, under the ASA, Keystone could obtain claims data from Synertech in the regular course of business, but that Keystone "routinely denied not only the existence of the Synertech data, but also their ability to comply with plaintiffs' discovery

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requests." App. at 76. In addition, Judge Gardner found that claims data was "available to Keystone and in its possession and control" as early as fall 2003 and that Keystone also had the ability to generate claims data through its internal CAHRS system. App. at 77. Later, in the discussion section, Judge Gardner imposed sanctions under 26(g) for this conduct, describing it again with specificity. Nevertheless, as noted above, sanctions on this ground must still be vacated because Judge Gardner failed to consider whether Keystone was substantially justified in taking the positions that it did.

As stated above, the imposition of sanctions requires an individualized analysis that was not consistently employed here - and certainly was not employed with respect to sanctions under 28 U.S.C. § 1927 and Local Rule 83.6.1. It is evident from the record that Judge Gardner was frustrated with Appellants' conduct and, having reviewed the record, we believe that this frustration was warranted. We also acknowledge that this was a situation in which it was sometimes difficult to pin-point individual instances of sanctionable behavior (though we recognize that this was partly because the Judge viewed the Defendants' overall course of conduct). Although Judge Gardner did not abuse his discretion in determining that sanctions were warranted against all counsel under 28 U.S.C. 1927 and Local Rule 83.6.1, it was an abuse of discretion to impose sanctions pursuant to those rules without undertaking an individualized analysis. Where attorneys' reputations (and, therefore, their livelihood and ability to practice their chosen profession) are at stake, we require a judge to analyze the sanctionable conduct with greater specificity than Judge Gardner did in this case in imposing sanctions under 28 U.S.C. § 1927 and Local Rule 83.6.1.

In sum, although we do not displace Judge Gardner's findings of fact, we will vacate all sanctions against all Appellants.[26] Ordinarily, we would remand the case to the

[26] Because we have concluded that all sanctions will be vacated, we need not reach Appellants' due process arguments.

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District Court to allow it to apply the "substantial justification" standard to sanctions under Rules 26(g) and 37(c)(1) and to undertake a more specific and individualized analysis under 28 U.S.C. § 1927 and Local Rule 83.6.1. However, in this situation, where the parties have settled the matter of the attorneys' fees, there is no reason to remand. It is time the tumult in the legal community caused by this case came to an end.

B. The March 30, 2006 Order on Judge Rapoport's Admonishment

The other sanctions order that generated substantial concern is Judge Gardner's March 30, 2006 order which is challenged by Hangley, Stradley, and Stevens & Lee. In that order, Judge Gardner affirmed the order of Magistrate Judge Rapoport dated July 20, 2005, holding that Judge Rapoport's "admonishment" of counsel was "neither clearly erroneous nor contrary to law." App. at 41. Notwithstanding that Magistrate Judge Rapoport expressly stated that he "did not consider the admonition to be a sanction," App. at 1939, Judge Gardner "conclude[d] that [the admonishment] was a sanction." App. at 41.[27]

It is unusual, if not inappropriate as we note hereafter, for one judge to recharacterize the action of another judge. Judge Gardner's conclusion was based primarily on *Langer v. Monarch Life Ins. Co.*, 966 F.2d 786, 811 (3d Cir. 1992). In *Langer*, defendant Presbyterian Medical Center had filed procedurally improper cross-claims, failed to withdraw them and caused default judgment to be entered without notice to opposing counsel. *Id.* at 810. The district court determined that this "conduct 'prima facie' called for Rule 11 sanctions," and criticized that party for "'questionable' conduct[, but] . . . declined to order sanctions." *Id.* at 793. The opposing party had

[27] A district court may modify or set aside a magistrate judge's pretrial order if it is "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); *see also* Fed. R. Civ. P. 72(a).

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requested sanctions in the form of attorneys' fees, but the district court concluded that "[b]ecause [the opposing party's] expenses were not 'reasonable expenses incurred because of the filing,' it is not entitled to attorney fees under Rule 11." *Id.* at 809.

On appeal from the district court's failure to impose a sanction, this court held that the "district court found a Rule 11 violation, but thought that the sanction that [the opposing party] requested was inappropriate, and satisfied itself with a reprimand." *Id.* We noted, "While the record is not entirely clear on this point, we believe that the district court did sanction Presbyterian's counsel with a reprimand for its unprofessional conduct. Reprimands are an appropriate sanction in some cases." *Id.* at 811. We discussed the types of sanctions that might be appropriate for a Rule 11 violation, stating that "'[w]hat is "appropriate" may be a warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to the circumstances.'" *Id.*(quoting *Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 878 (5th Cir. 1988) (en banc)). Based on this language, Judge Gardner concluded, "[i]f a 'warm friendly discussion on the record' could constitute a possible sanction, then an admonishment . . . would certainly constitute a sanction." App. at 40.

Stradley argues persuasively that Judge Gardner's determination was based on a misreading of *Langer*. Its brief states, "*Langer* holds that, *if* sanctions are warranted, *then* a reprimand can constitute such a sanction. *Langer* does not hold, however, that the converse is also true - namely, that if a party is reprimanded, then that party *has been sanctioned*." Stradley Br. at 60 (emphasis in original). We agree.

The situation in *Langer* differed significantly from that before us. At the time of that case, the imposition of sanctions was mandatory once the judge determined that a Rule 11

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violation had occurred. *Id.* at 810.[28] This court stated (possibly because a sanction for violation of Rule 11 was mandatory) that "[a]lthough the district court's opinion nominally 'decline[d] to order sanctions in this case,' . . . the district court's opinion merely denied Monarch's request for a particular type of sanction." *Id.* at 811 n.29 (alterations added).

On this basis, we agree with Stradley that *Langer* does not hold that an admonishment is always a sanction and, therefore, Judge Rapoport did not err in stating that his admonishment was not a sanction. We believe it was inconsistent for Judge Gardner to have stated, on the one hand, that Magistrate Judge Rapoport's decision was neither erroneous nor contrary to law and, on the other hand, to have overturned one of Judge Rapoport's legal conclusions.

Moreover, as we held in *Snow Machines, Inc. v. Hedeo, Inc.*, "it is simply improper for one judge to . . . conclude that another judge did not intend to order what []he in fact ordered." 838 F.2d 718, 727 (3d Cir. 1988). In *Snow Machines*, the district court sanctioned a party for submitting to it an order signed by a magistrate judge, determining that the magistrate's signature of the order was "an unintentional error." *Id.* at 727. In reversing, we observed:

> Recognizing a power in one judge to conclude that another judge did not intend to do what she in fact did is fraught with danger. It opens a gaping hole in the carefully constructed legal principles governing standards of appellate review. A district judge may only set aside an order of a magistrate concerning a nondispositive matter where the order has been shown to be clearly erroneous or contrary to law. If the district court may simply conclude that the magistrate did not really intend to enter the order which she did, this limitation on the reviewing power is illusory.

Id. 727-28 (citations omitted).

For these reasons, we conclude that Judge Gardner's ruling that Judge Rapoport's admonishment was a sanction was not a sound exercise of his discretion. We will accordingly vacate the March 30, 2006 Order.

V.

Conclusion

This case does not show the judicial system at its best, and all members of this panel have been judges long enough to know that it is not representative of the usual level of litigation in the federal courts. As we noted above, in light of the settlement we see no basis to remand. If there were a need to remand, we would not hesitate to send this case back to Judge Gardner, as we are satisfied that he would certainly be able to preside impartially and decide the issues we have identified as requiring further analysis and decision. We deem Appellants' suggestions to the contrary to be unfounded and wholly inappropriate.

Because we have not delved into the merits of the dispute, we are unaware of the reasons why tensions ran higher than usual in this case. We recognize that all counsel were devoted to their clients' interests but devotion does not require stridency, and we anticipate no repetition from the counsel involved.

For the reasons set forth, we will leave intact Judge Gardner's factual findings and credibility determinations, but we will vacate both the March 30, 2006 and September 28, 2007 Sanctions Orders.

[28] Effective December 1, 1993, after we decided *Langer*, Rule 11 was amended such that "the imposition of sanctions for a Rule 11 violation is discretionary rather than mandatory." *Knipe v. Skinner*, 19 F.3d 72, 78 (2d Cir. 1994).

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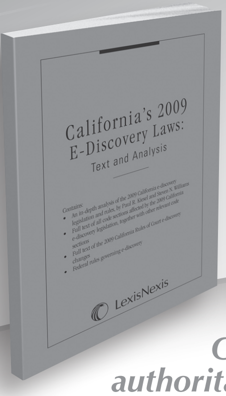

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- **Compare applicable state and federal rules** by reviewing federal e-discovery provisions.

ABOUT THE AUTHORS

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