VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

NATIONAL RIFLE ASSOCIATION OF AMERICA,	)	
Plaintiff,	)	
v.	)	**Case No. CL19001757**
	)	**CL19002067**
ACKERMAN MCQUEEN, INC.,	)	
and	)	
MERCURY GROUP, INC.,	)	
Defendants.	)	

DEFENDANTS' MOTION TO COMPEL THE PRODUCTION OF DOCUMENTS FROM THIRD-PARTY FORENSIC RISK ALLIANCE

Defendants Ackerman McQueen, Inc. and Mercury Group, Inc. (collectively "AMc"), through undersigned counsel and pursuant to Rule 4:12(a), hereby move for an order compelling third-party Forensic Risk Alliance ("FRA") to produce all documents over which the National Rifle Association of America ("NRA") has asserted privilege.

The NRA has alleged that AMc refused to provide the NRA with certain records which the NRA was allegedly entitled to examine pursuant the parties' contract (referred to by both parties as the "Services Agreement"). FRA is a third-party auditor that the NRA hired for the purpose of reviewing AMc's records. In order to counter the NRA's claim, AMc issued a subpoena on FRA requesting all documents related to its record examination. The NRA, however, prevented AMc from obtaining the vast majority of the documents requested by claiming that the documents were subject to "privilege." It is AMc's position that the NRA's assertion of privilege cannot justify withholding these documents because the NRA placed FRA's record examination directly at issue. By alleging that AMc "failed or refused" to allow the NRA to examine certain records, the NRA

waived its assertion of privilege. Anything less than a waiver in these circumstances would insulate the NRA's only claim from full and open discovery. Basic principles of fairness forbid such a maneuver. "[P]arties should not be permitted to use [a] privilege as both a shield, preventing the admission of evidence, and as a sword to mislead the finder of fact by allowing evidence that would be impeached by the privileged information if it had not been suppressed." *Walton v. Mid-Atl. Spine Specialists, P.C.*, 280 Va. 113, 130 (2010).

RELEVANT FACTS

The Services Agreement that governs the contractual relationship between the parties contains an examination clause which permits the NRA, "upon reasonable notice, to examine AMc and Mercury's files . . . with respect to matters covered under the Services Agreement." Am. Compl. ¶ 15. In January 2019, "the NRA retained a third-party forensic accounting firm to interface with AMc" and perform the record examination function. That forensic accounting firm was Forensic Risk Analysis. *Id.* at ¶ 20. AMc agreed to FRA's review of its records and the NRA's general counsel responded that the "NRA appreciates Ackerman's offer of compliance with the records examination clause of the parties' Services Agreement[.]" (Steve Hart Email, January 16, 2019, attached hereto as Exhibit No. 1). FRA's review took place over nine days in February 2019 and involved a team of FRA employees. *See* Counterclaim ¶ 33. At no time during or after the review has FRA ever claimed that AMc withheld any of requested records. *See id.* at ¶ 34. To the contrary, FRA's project manager told AMc's CFO: "Thank you for all of the assistance that you and your team have provided while we are on-site, it is greatly appreciated." (Winkler Email, February 6, 2019, attached hereto as Exhibit No. 2). While initially AMc asked that FRA hold its questions until the end of the review, *Id.*, AMc worked with FRA throughout the

examination process to answer FRA's questions and assist with the review. (Winkler Emails, February 12-13, 2019, attached hereto as Exhibit No. 3).

Two months later, on April 12, 2019, the NRA filed a one count complaint against AMc for breach of contract. The Complaint alleged that starting in 2018 that "the NRA sought information from AMc pursuant to the Records Examination Clause on a ***common-interest basis*** to advance the parties mutual interests in connection with an ongoing lawsuit," but that AMc was "evasive and hostile[.]" Am. Compl. ¶ 19 (emphasis added). The Complaint goes on to contend that as a result, in January 2019, "the NRA retained a third-party forensic accounting firm to interface with AMc" and perform the record examination function. *Id.* at ¶ 20. But, according to the NRA, AMc "breached the Records-Examination Clause of the Services Agreement" by "repeatedly fail[ing] or refus[ing] to permit the NRA to examine specified categories[.]" *Id.* at ¶ 34. AMc has vigorously denied this claim and contends that it fully complied with the records examination clause in large part, by allowing FRA to examine AMc's books and records..

In order to obtain relevant information to rebut the NRA's allegation, AMc issued a subpoena for documents on FRA. (FRA Subpoenas, attached hereto as Exhibit No. 4). Specifically, AMc sought the records related to FRA's examination and noticed the deposition of FRA's corporate designee so that AMc could confirm its compliance with the Services Agreement through FRA's review of its books and records.. *Id.* Initially, FRA indicated that it planned to comply with the subpoena, interposed no objections, and agreed to appear for a deposition. (*See* Mike Trahar email July 25, 2019, attached hereto as Exhibit No. 5). Three weeks later, however, FRA reversed course. It lodged objections in conjunction with the NRA, withheld critical documents, and filed a motion to prevent the deposition. (FRA and NRA Objections attached hereto as Exhibit No. 6). The privilege log indicated that the bulk of the roughly 1600 documents

the FRA refused to provide were withheld on the basis of work product privilege, with a much smaller subset also withheld as attorney-client privileged. (FRA Privilege Log, copy to be provided to the Court as Exhibit No. 7). At the deposition of the FRA corporate designee, the NRA repeatedly invoked privilege and instructed FRA's corporate designee not to answer questions related to: (1) FRA's communications with the NRA, (2) FRA's examination process of AMc's books and records, (3) FRA's methods of analysis, and (4) FRA's conclusions and findings from its audit of AMc. The documents withheld appear to fall into these categories as well. Through previous conferences, and at the deposition itself, both the NRA and FRA explained that it viewed these areas of inquiry as privileged and would not change position.[1]

ARGUMENT

I. The NRA Waived Its Attorney-Client Privilege and Work-Product Protection by Putting FRA's Examination of AMc's Books and Records at Issue.

For the reasons set forth below, AMc requests this Court to issue an order compelling FRA to produce all materials related to FRA's examination of AMc's books and records. The documents requested should be produced because, as a result of the allegations made in its Complaint against AMc, the NRA waived any privilege by placing FRA's examination directly at issue in this lawsuit.

A. Applicable Legal Principles

In Virginia, "the scope of discovery shall extend only to matters which are relevant to the issues in the proceeding and which are not privileged[.]" Va. Sup. Ct. Rule 4:1(b)(6)(i). This

[1] While this motion seeks to compel FRA to produce documents, FRA has indicated that it is withholding the documents in deference to the NRA's assertion of privilege. To the extent FRA has communications between its own attorneys and FRA employees, AMc clarifies that it does not seek these documents.

"privilege attaches to communications of the client made to the attorney's agents, including accountants, when such agent's services are indispensable to the attorney's effective representation of the client." *Commonwealth v. Edwards*, 235 Va. 499, 509 (1988). However, "[t]he privilege may be expressly waived by the client, or a waiver may be implied from the client's conduct." *Walton,* 280 Va. at 122. The same holds true for the closely related work-product doctrine. Any "interviews, statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs" prepared by opposing counsel "with an eye toward litigation," *Hickman v. Taylor*, 329 U.S. 495, 511 (1970), may be subject to waiver, *RML Corp. v. Assurance Co. of Am.*, 60 Va. Cir. 269 (2002).

Determining whether such a waiver has occurred requires a court to consider, among other things:

> [W]hether the party asserting the claim of privilege or protection for the communication has used its unavailability for misleading or otherwise improper or overreaching purposes in the litigation, making it unfair to allow the party to invoke confidentiality under the circumstances.

Walton, 280 Va. at 127.[2] Indeed, "parties should not be permitted to use [a] privilege as both a shield, preventing the admission of evidence, and as a sword to mislead the finder of fact by allowing evidence that would be impeached by the privileged information if it had not been suppressed." *Id.* at 130; *see also E.I. Dupont de Nemours & Co. v. Kolon Indus., Inc.*, 269 F.R.D. 600, 608 (E.D. Va. 2010) ("Selective disclosure occurs . . . when a party reveals one beneficial communication but fails to reveal another, less helpful, communication on the same matter. The same principles apply to the waiver of work product protection.") (citations omitted). Waiver

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[2] Additionally, to the extent applicable, "the following factors are to be included in the court's consideration: (1) the reasonableness of the precautions to prevent inadvertent disclosures, (2) the time taken to rectify the error, (3) the scope of the discovery, [and] (4) the extent of the disclosure[.]" *Walton,* 280 Va. at 127.

under such circumstances serves basic principles of fairness and appears in variety of contexts, ranging from expert reports to pleadings. *See Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC*, 314 F.R.D. 85, 89-90 (S.D.N.Y. 2016) (holding that the plaintiff waived privilege with respect to an economic analysis "prepared for the purpose of litigation" because it "used the report to sustain its causes of action . . . [thereby] inject[ing] the contents of a privileged communication into the litigation") (citation omitted).

In *Columbia Data Prod., Inc. v. Autonomy Corp.*, 2012 WL 6212898 (D. Mass. Dec. 12, 2012) the court found waiver in a circumstance strikingly similar to this case. The parties, two commercial entities bound by a licensing agreement, disputed the accuracy of the defendant's record keeping. *Id.* at *1, attached hereto as Exhibit No. 8. As a result, prior to commencing litigation, the plaintiff exercised its contractual right to have an "independent accounting firm to conduct an audit[.]" *Id.* at *5. The plaintiff never stated that the audit was made in anticipation of litigation, but rather represented that it was done for the "sole purpose of exercising its audit rights[.]" *Id.* at *8. Months later, the plaintiff filed suit, alleging that after "a detailed review of the records made available by Defendants . . . [the auditors] determined the estimated royalties due [to plaintiff] to be in excess of $23 million." *Id.* at *9.

During discovery the plaintiff refused to provide its communications with auditors and audit drafts, claiming both attorney-client privilege and work-product protection. *Id.* at *10. The District Court rejected the privilege assertion, holding that the plaintiff "put the audit report, the audit process, and [the auditor's] status as an independent auditor directly at issue in this litigation. Under such circumstances, full disclosure is only fair." *Id.* at *18. It further reasoned that waiver was appropriate because:

> It is only fair that if [the defendant] is to be judged based, at least in part, on its response to [the auditor's] assessment of how royalties were to be computed and

> the amounts consequently found to be due, that [the defendant] be allowed to explore the circumstances surrounding [the auditor's] engagement, the information available to [the auditor], the basis for [the auditor's] understanding of [the defendant's] obligation, and the manner of its performance of the audit, among other things.

Id. Thus, the plaintiff could not "use [the auditor's] status and work as an independent auditor as a 'sword' against the defendants, while relying on the attorney-client privilege and the work product doctrine as a 'shield' to prevent disclosure of related materials." *Id.*

B. Analysis of this Case

In this case, the NRA attempts the same improper maneuver as described above by wielding the audit report as a sword in its Complaint, yet raising privilege to shield it against basic discovery. The NRA does so by premising its Complaint on the allegation that AMc "failed or refused to permit the NRA to examine specified categories" of information requested by FRA, but then asserting privilege in order to prevent AMc from seeking relevant evidence to prove whether this occurred. Am. Compl. ¶ 34. Such a tactic undermines the entire litigation process. Shielding the central focus of a claim from discovery amounts to elevating a mere complaint allegation to established fact. AMc cannot disprove what it cannot investigate through discovery.

Moreover, the maneuver is profoundly unfair. If AMc "is to be judged based, at least in part, on its response to [FRA's] assessment" it is only fair that AMc "be allowed to explore the circumstances surrounding [FRA's] engagement, the information available to [FRA], the basis for [FRA's] understanding of [the defendant's] obligation, and the manner of its performance of the audit, among other things." *Columbia Data Prod., Inc.*, 2012 WL 6212898 at *18. From the very start of this case, AMc has sought to do precisely that, both in defending against the breach claim and in pursuing its own counterclaims. This strategy depends on establishing that the examination was not an independent review, but instead a pretextual scheme designed to manufacture a basis

to sue AMc. Thus, just the as the defendant in *Columbia Data Prod., Inc.* had a right to explore the nuances of the relationship between the auditor and plaintiff, so too does AMc in this case. *See also Graff v. Haverhill N. Coke Co.*, 2012 WL 5495514, at *17 (S.D. Ohio Nov. 13, 2012) (waiver of audit drafts claimed to be work product because the party "placed the subject matter of the audit at issue" in its answer). The NRA has waived any assertion of privilege over FRA's documents. *See Navajo Nation v. Peabody Holding Co., Inc.*, 255 F.R.D. 37, 44 (D.D.C. 2009) ("[A] party may not claim privilege over material that they place at issue in litigation.").

The unfairness of the NRA's assertion of privilege is exacerbated by its own inconsistent positions. On the one hand, it alleges that "the NRA sought information from AMc pursuant to the Records Examination Clause on a ***common-interest basis***," thus suggesting a joint endeavor. Am. Compl. ¶ 19 (emphasis added). Yet, on the other hand, it now invokes privileges only applicable in the absence of such a joint endeavor. The NRA cannot cast itself as attempting to conduct an examination for the parties' common interest, and then recast itself in an adversarial posture in order to preclude AMc from discovering the results of that same examination. Such actions not only underscore waiver, but also suggest the absence of any privilege at all. *See Columbia Data Prod., Inc.*, 2012 WL 6212898 at *12 (holding that the plaintiff had no work-product privilege because the plaintiff "invok[ed] its right to conduct an audit under ... the License Agreement" and "never suggested to the defendants that [the auditor] had been retained ... in anticipation of litigation.").

II. Alternatively, Documents Related to FRA's Audit are Discoverable Pursuant to Rule 4:1.

To the extent the NRA claims work product protection over materials related to FRA's record examination of AMc, AMc requests that the Court nonetheless order production because these materials are necessary to resolve the questions placed in issue by the Complaint and AMc

cannot otherwise obtain the information contained in those materials. Virginia Supreme Court Rule 4:1 states that a party may obtain discovery of material prepared in anticipation of litigation by the other party's representative, "only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Va. Sup. Ct. R. 4:1(b)(3). Thus, "[t]he materials covered by the Rule are discoverable even if made in anticipation of litigation if (1) they are relevant to the subject matter of the litigation, (2) the requesting party can show substantial need of them, and (3) their substantial equivalent cannot be obtained without undue hardship." *Covington v. Calvin,* 40 Va. Cir. 489, 491 (Spotsylvania 1996); *see also State Farm v. Perrigan,* 102 F.R.D. 235, 237 (W.D.Va.1984) (relying upon *Virginia Electric & Power Co. v. Sun Shipbuilding & Dry Dock Co.,*68 F.R.D. 397, 410 (E.D.Va.1975)) (noting the burden of overcoming work product protection, by proving "substantial need" and "undue hardship" is on the party seeking the materials).

Substantial need is based on "1) whether the information is an essential element in the requesting party's case, and 2) whether the party requesting discovery can obtain the facts from an alternate source." *Fletcher v. Union Pacific R.R. Co.,* 194 F.R.D. 666, 671 (S.D.Cal.2000) (*quoting* 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 26.70[5][c], at 26-221 to 26-222 (3d ed.1999)). The undue hardship prong focuses on the burden obtaining the information from an alternate source would impose on the party requesting discovery. *Fletcher,* 194 F.R.D. at 671. "The extent to which a party needs information contained in an opponent's work product depends, in large part, on whether the work product is unique." *In re Int'l Sys. & Controls Corp. Sec. Litig.,* 693 F.2d 1235, 1240 (5th Cir.1982).

AMc's substantial need for production of documents relating to FRA's record examination is obvious. The NRA alleges that AMc failed to fully cooperate with FRA's examination requests. Indeed, the very gravamen of the lawsuit is FRA's record examination of AMc and the materials relating to that audit are thus essential to answering the central question raised by the NRA's Complaint. If AMc is to defend itself from claims that it did not cooperate with the examination requests, it is axiomatic that it be allowed access to materials relating to that examination. AMc has made numerous attempts to discover the information contained in the withheld materials but has been rebuffed at every turn. The FRA and NRA are the only entities with access to these materials. Thus, this Court should order production pursuant Rule 4:1.

CONCLUSION

Accordingly, for the reasons set forth above, the Court should grant Defendants' Motion to Compel and order FRA to produce the approximately 1600 documents on its privilege log over which the over which the NRA has asserted privilege.

Respectfully submitted,

ACKERMAN MCQUEEN, INC. and
MERCURY GROUP, INC.
By Counsel

Dated: October 1, 2019

Respectfully submitted,

[redacted]

David H. Dickieson (VA Bar #31768)
David Schertler (Admitted *pro hac vice*)
Joseph A. Gonzalez (Admitted *pro hac vice*)
SCHERTLER & ONORATO, LLP
901 New York Avenue, NW, Suite 500

Washington, DC 20001
Telephone: 202-628-4199
Facsimile: 202-628-4177
ddickieson@schertlerlaw.com

MEET AND CONFER CERTIFICATION

I hereby certify that I met and conferred with counsel for both FRA and the NRA with respect to the subject matter of this motion. Additionally, during the course of deposing FRA's corporate designee, the NRA maintained its assertion of privilege.

[redacted]

David H. Dickieson

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on October 1, 2019, on the following counsel for via email addressed to:

James W. Hundley
Robert H. Cox
BRIGLIA HUNDLEY, PC
1921 Gallows Road, Suite 750
Tysons Corner, VA 22182
jhundley@brigliahundley.com
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Ada Fernandez Johnson
Debvoise & Plimpton LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
afjohnson@debevoise.com

[redacted]

David H. Dickieson

EXHIBIT 1

I will join whatever call you and Frazer can set up.

Sent from my iPad

On Jan 17, 2019, at 4:33 PM, Ryan, Stephen <SRyan@mwe.com> wrote:

> Steve,
>
> If the scope of the examination is the same as the September meeting, AMc can be prepared with limited notice. If the scope goes beyond the September meeting, a sample listing of materials needs to be provided to AMc with at least a week's notice to ensure we have an opportunity to (1) efficiently segregate the key materials sought in the visit; and (2) make sure we have the correct personnel to support you. Additional days may be necessary depending on the size of the sample/pull. AMc is willing to have phone discussions to determine a reasonable scope and timeline.
>
> Steve Ryan
>
> STEPHEN M. RYAN
> PARTNER
> **McDermott Will & Emery LLP** The McDermott Building, 500 North Capitol Street, NW, Washington, DC 2(
> **Tel** +1 202 756 8333 | **Fax** +1 202 756 8087
> sryan@mwe.com
> **Biography | Website | vCard | Twitter | LinkedIn | Blog**
>
> ---
>
> **From:** jshart@stevehartesq.com [mailto:jshart@stevehartesq.com]
> **Sent:** Wednesday, January 16, 2019 3:20 PM
> **To:** Ryan, Stephen
> **Cc:** john.frazer@nrahq.org
> **Subject:** NRA review of records
>
> At this time we have not yet identified an accounting firm to assist us but will alert you as soon as possible. How much notice will your client need?
>
> Thanks,
>
> Steve

January 16, 2019

Via E-Mail

Stephen Ryan

McDermott, Will & Emery
500 North Capitol Street, NW
Washington, DC 20001-1531
sryan@mwe.com

Re: AMc and NRA

Dear Stephen:

On behalf of the National Rifle Association of America (the "NRA"), I write in response to your letter dated January 10, 2019. Please copy John Frazer on any additional communications. He will be supervising the review of records going forward and therefore best able to address concerns.

The NRA appreciates Ackerman's offer of compliance with the records-examination clause of the parties' Services Agreement, and especially appreciates Ackerman's willingness to provide copies of documents—which we expect will facilitate our review. Feel free to comment regarding the categories of documents discussed below:

Out-of-pocket expenses. It is the NRA's understanding that a full set of out-of-pocket expense records for the past three years was previously gathered for the NRA in connection with the Brewer firm's September 17-18 audit. The NRA wishes to complete the review of these materials which the prior audit commenced. We are happy to discuss this category of documents further, if helpful.

Information about Ackerman's employees. The NRA does not seek personal financial information pertaining to Ackerman's employees. To the extent that such information incidentally occurs in records the NRA requested, the NRA consents to Ackerman's proposed redactions. Notwithstanding any of the foregoing, consistent with Sarah Rogers' prior letter to Jay Madrid, the NRA seeks

access to records sufficient to identify names of individuals whose work is being billed to the NRA [1]. The related party review is significant for all NRA vendors.

Third-party media buys. If the volume of information relating to third-party media buys makes mustering such documents difficult, the NRA is willing in the first instance to limit its request to media buys occurring during 2015-2016.

Our recent discussions have been productive, so I will not derail them by addressing the contentions in Jay Madrid's letter of January 4, 2019. The NRA has the right to choose its own counsel. That said, if it will facilitate Ackerman's compliance with the Services Agreement, the NRA's John Frazer will deploy and supervise other professionals to interface with Ackerman in connection with this effort.

Please let me know when you are available to meet to discuss any concerns further with John and me. There is some timing sensitivity.

S

incerely,

S

teve Hart

[1] The NRA is willing to make an exception for *de minimis*, clerical or administrative functions performed on a sporadic or one-off basis. For example, at this time, the NRA does not request that Ackerman identify every administrative assistant who has fetched coffee or made photocopies in

connection with NRA-related projects. However, at a minimum, the NRA requests records sufficient to identify any individual whom Ackerman has a reasonable, good-faith basis to believe: (i) performed work on NRA-related projects for which corresponding, invoiced charges exceed $10,000 in any one-year period; and/or (ii) performed work on NRA-related projects while simultaneously a "related party" of the NRA—*e.g.*, a director, officer, or a family member of the foregoing.

EXHIBIT 2

Message

From: Jessica Bradley [/O=FORENSICRISK/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=JESSICA BRADLEYCDF]
Sent: 2/6/2019 10:45:30 PM
To: Bill Winkler [bill-winkler@am.com]
Subject: RE: Follow-Up Questions

Bill - Thank you for accommodating our request, much appreciated.

-Jessica

From: Bill Winkler [mailto:bill-winkler@am.com]
Sent: Wednesday, February 6, 2019 4:53 PM
To: Jessica Bradley <JBradley@forensicrisk.com>
Subject: RE: Follow-Up Questions

Jessica

Thank you for your email with your list of follow-up questions. As you know, we had originally planned for this process to only last a day. Though we can accommodate your team through Thursday, we will not be able to have the room available for Friday. We would hope that you can be finished by end of day Thursday.

In reference to your follow-up list, we will answer the questions in writing, after all questions as a result of your audit are received.

In the meantime, we wanted to remind you that no copying, scanning or photographing of any documents that we supplied to you is permitted. Additionally, verbatim copying of any of the materials provided to you is not permitted, including, but not limited to, our list of employees who have worked on NRA projects during the periods requested. To do so would be a violation of their rights to privacy.

Thank you
Bill

Bill Winkler
Chief Financial Officer

ACKERMAN McQUEEN
1601 Northwest Expressway, Suite 1100
Oklahoma City, OK 73118 | (405) 843-7777
bill-winkler@am.com | www.am.com

From: Jessica Bradley <JBradley@forensicrisk.com>
Sent: Wednesday, February 06, 2019 1:28 PM
To: Bill Winkler <bill-winkler@am.com>
Subject: Follow-Up Questions

Mr. Winkler –

Thank you for all of the assistance that you and your team have provided while we are on-site, it is greatly appreciated. Pursuant to our conversation yesterday, please find below some follow-up questions related to the media

buy and budget documentation that has been provided. We touched on some of these topics during our first day on-site but want to ensure we fully understand the process and thus have included additional questions below. I was unsure who to cc on this email so please feel free to forward to whoever is appropriate. If it is easier to discuss these questions in person or over the phone (as opposed to written responses), we are happy to do so – whatever is most convenient.

1) We understand that, in some instance, prepayments are determined based on (1) conversation and (2) orders/estimates. Can you confirm our understanding is correct? To the extent that there are any orders/estimates to support a prepayment, could we please obtain a copy to better understand how the prepayment amounts are determined?
2) We understand that once a prepayment is made, an order is sent to the station detailing out the specifics of the commercials, etc. that are to be run. Would it be possible to obtain copies of these orders for the media buys provided?
3) Why are prepayments necessary for media buys as opposed to paying after the services have been performed? Is this due to a contractual relationship with the TV stations?
4) We understand that, for example, there are two adjustments for NRA 2015 Media (Invoices 146779 and 146767). Could you please provide support and an explanation for how those amounts were determined?
5) We understand that an amount of $2,622.98 was moved to 2017 from the NRA 2015 Media bucket. Could you please explain how this amount was calculated/how it was determined it need to be moved to 2017?
6) On the annual budgets provided, what category do Media Buys correspond to?
7) How do you define 'Media Buys'? Is there a certain project code or other unique identifier in the ERP that identifies Media Buys?
8) We noted some invoices, such as invoice 122889 for 2015 Freestyle Network, were not provided in the Media Buys box. Is this type of transaction not considered a 'media buy'?
9) Why are agency commissions subtracted from the TV station invoices?
10) We understand that a media reconciliation is performed by Ackerman. We further understand that the reconciliation is performed between the order/schedule and the actual broadcasts (per the TV station). Please confirm (1) that our understand is correct and (2) how does Ackerman obtain comfort that the actual broadcasts (per the TV station) actually occurred?
11) For the budgets provided, can you please explain what unique identifier(s) are used to aggregate the actuals from the prior year?
12) How are the budget categories determined?

Additionally, while we are working as quickly as possible, I wanted to see if it would be possible for us to be on-site at the HBC offices tomorrow and potentially Friday as we will need additional time to complete our review. We recognize that this is an inconvenience so we appreciate your patience as we work diligently to complete our review.

Thank you!

Jessica Bradley
Director

FRA 20 YEARS

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Washington, DC 20037

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Office: +1 (202) 627-6580
Mobile: +1 (610) 533-6933

www.forensicrisk.com

EXHIBIT 3

Message

From: Bill Winkler [bill-winkler@am.com]
Sent: 2/13/2019 7:43:38 PM
To: Jessica Bradley [/O=FORENSICRISK/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=Jessica Bradleycdf]
Subject: FW: per our discussion

Bill Winkler
Chief Financial Officer

ACKERMAN McQUEEN
1601 Northwest Expressway, Suite 1100
Oklahoma City, OK 73118 | (405) 843-7777
bill-winkler@am.com | www.am.com

From: Kelsey Gosdin <Kelsey-Gosdin@am.com>

Yes – they are the same.

From: Jessica Bradley <JBradley@forensicrisk.com>
Sent: Wednesday, February 13, 2019 1:33 PM
To: Bill Winkler <bill-winkler@am.com>
Cc: Lacey (Duffy) Cremer <lacey-cremer@am.com>
Subject: RE: per our discussion

Thanks Bill. Is the estimate referenced in the explanation attached to your email the same as the buy detail report that was provided today? If not, what is the difference between the estimate and the buy detail report?

From: Bill Winkler [mailto:bill-winkler@am.com]
Sent: Wednesday, February 13, 2019 12:13 PM
To: Jessica Bradley <JBradley@forensicrisk.com>
Cc: Lacey (Duffy) Cremer <lacey-cremer@am.com>
Subject: per our discussion

Jessica – attached is the explanation of order vs. estimate. In short – order is term Fox uses for tracking, estimate is what AMc uses for tracking

Bill Winkler
Chief Financial Officer

ACKERMAN McQUEEN
1601 Northwest Expressway, Suite 1100
Oklahoma City, OK 73118 | (405) 843-7777
bill-winkler@am.com | www.am.com

Message

From: Jessica Bradley [/O=FORENSICRISK/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=JESSICA BRADLEYCDF]
Sent: 2/13/2019 8:03:28 PM
To: Bill Winkler [bill-winkler@am.com]
CC: betts.gina@dorsey.com
Subject: RE: Audit

Hi Bill and Gina –

Thank you for the explanations this morning. Please see below for some additional follow-up questions/requests.

1. Does Ackerman send the traffic instructions to NRA to review? Does the NRA approve the traffic instructions and if so, is the approval in writing or over the phone?

2. For the following invoices, can you please provide (1) rate cards, (2) orders/buy detail reports (same documentation provided today) and (3) the match reports from Strata? If the traffic instructions include NRA approval, could you please provide those as well? We recognize, based on our discussions, that the documentation may be voluminous. Would it be possible to estimate how long it will take to pull this documentation? We are happy to review on a rolling basis.

   133661
   134776 (orders/detail buy reports already provided)
   137286
   140874
   141020
   129895
   133361
   138208
   128112

3. The contract states "NRA will pay AMc 15% commission of the gross media expenditure, or a 17.65% mark-up of the net media billing, for all media researched, planned, placed and administered by AMc on NRA's behalf." We only see 15% commission for the media buy invoices provided. In what instances would the 17.65% mark-up be applied?

As always, thank you for your continued assistance!

-Jessica

From: Jessica Bradley
Sent: Tuesday, February 12, 2019 11:28 PM
To: 'Bill Winkler' <bill-winkler@am.com>
Cc: betts.gina@dorsey.com
Subject: RE: Audit

Hi Bill and Gina –

Thanks for your assistance today! Would it be possible to get the supporting documentation (media buy orders) tomorrow for the invoice that was discussed today (invoice #134776 for $247,943.30)? I anticipate that we will have additional questions once we receive the documentation so if possible, it would be great to run through them with you at your convenience.

EXHIBIT 4

SUBPOENA FOR WITNESS (CIVIL) – ATTORNEY ISSUED

Commonwealth of Virginia
VA. CODE §§ 8.01-407; 16.1-265; Supreme Court Rules 1:4, 4:5

Case No. CL19001757

9:30 am
HEARING DATE AND TIME

Circuit Court for City of Alexandria Court
520 King Street, Alexandria, VA 22314
ADDRESS OF COURT

National Rifle Association of America v./*In re:* Ackerman McQueen, Inc. and Mercury Group, Inc.

TO THE PERSON AUTHORIZED BY LAW TO SERVE THIS PROCESS:
You are commanded to summon

Corporate Designee for Forensic Risk Alliance [See Attachment A for examination topics]
NAME

2550 M Street, N.W.
STREET ADDRESS

Washington, D.C. D.C. 20037
CITY STATE ZIP

TO the person summoned: You are commanded to appear

[ ] in the Court

[X] at Schertler & Onorato LLP, 901 New York Avenue, Suite 500, Washington, D.C. 20001
ADDRESS (DEPOSITION USE IN CIRCUIT COURT ONLY)

on August 5, 2019 at 9:30 am to testify in the above-named case.

This subpoena is issued by the attorney for and on behalf of

Ackerman McQueen, Inc. and Mercury Group, Inc.
PARTY NAME

David Dickieson
NAME OF ATTORNEY

31768
VIRGINIA STATE BAR NUMBER

901 New York Avenue, Suite 500
OFFICE ADDRESS

(202) 628-4199
TELEPHONE NUMBER OF ATTORNEY

Washington, D.C. 20001
OFFICE ADDRESS

(202) 628-4177
FACSIMILE NUMBER OF ATTORNEY

July 15, 2019
DATE ISSUED

David H. Dickieson [redacted]
SIGNATURE OF ATTORNEY

Notice to Recipient: See page two for further information.

RETURN OF SERVICE (see page two of this form)

TO the person summoned:
If you are served with this subpoena less than 5 calendar days before your appearance is required, the court may, after considering all of the circumstances, refuse to enforce the subpoena for lack of adequate notice. If you are served less than 5 calendar days before your appearance is required and you are a judicial officer generally incompetent to testify pursuant to § 19.2-271, this subpoena has no legal force or effect. If you are served with this subpoena less than 5 calendar days before your appearance is required, you may wish to contact the attorney who issued this subpoena and the clerk of the court.

[X] This SUBPOENA FOR WITNESS is being served by a private process server who must provide proof of service in accordance with Va. Code § 8.01-325.

TO the person authorized to serve this process: Upon execution, the return of this process shall be made to the clerk of court.

NAME: .....

ADDRESS: .....

.....

[ ] PERSONAL SERVICE | Tel. No. .....

Being unable to make personal service, a copy was delivered in the following manner:

[ ] Delivered to a person found in charge of usual place of business or employment during business hours and giving information of its purport.

[ ] Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above:

.....

.....

[ ] Posted on front door or such other door as appears to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)

[ ] not found | ....., Sheriff

..... By ....., Deputy Sheriff
DATE

CERTIFICATE OF COUNSEL

I, David Dickieson, counsel for AMc and Mercury Group, hereby certify that a copy of the foregoing subpoena for witness was by email
DELIVERY METHOD
to Robert Cox, counsel of record for the NRA,
on the 15th day of July, 2019.

[redacted]
SIGNATURE OF ATTORNEY

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

NATIONAL RIFLE ASSOCIATION OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CL190001757
	)	
ACKERMAN MCQUEEN, INC.,	)	
	)	
and	)	
	)	
MERCURY GROUP, INC.	)	
	)	
Defendants.	)	

ATTACHMENT A
To the Subpoena to Testify at a Deposition in this Action

DEFINITIONS

1. "NRA" or "Plaintiff" shall mean plaintiff The National Rifle Association of America and its officers, directors, agents, contract employees, affiliates, and others acting on its behalf.

2. "AMc" or "Defendant AMc" shall mean defendant Ackerman McQueen, Inc. and its officers, directors, agents and others acting on its behalf.

3. "Mercury Group" or "Defendant Mercury Group" shall mean defendant Mercury Group, Inc., and its officers, directors, agents and others acting on its behalf.

4. "Defendants" shall mean both defendants Ackerman McQueen, Inc. and Mercury Group, Inc., collectively, and their officers, directors, agents and others acting on their behalf.

5. "FRA" or "you" shall mean nonparty Forensic Risk Alliance and its officers, directors, agents, contract employees, affiliates, and others acting on its behalf.

6. "Review" shall mean any auditing activity, accounting investigation, forensic analysis, or similar evaluation performed by FRA.

7. "Document" shall be synonymous in meaning and equal in scope to the usage of this term in Rule 4:9(a) and shall include electronically stored information ("ESI") as defined therein. A draft or non-identical copy is a separate Document within the meaning of this term. Documents shall include electronic media of any kind, whether in an audio, visual or electronic (computer) media, and whether or not such an item has been erased or not, however it has been produced or reproduced, whether it is draft or final, in your actual or constructive possession, custody, or control, in original or reproduced format. Documents shall include (but are not limited to): letters, correspondence, notes, films, transcripts, telegrams, teletype messages, contracts and agreements, proposals, licenses, memoranda, recordings, microfilm, microfiche, books, newspapers, magazines, advertisements, periodicals, bulletins, circulars, pamphlets, statements, notices, notes (including interoffice memoranda, notations on other documents, jottings, diary entries, desk calendar entries, expense accounts, recorded recollections, dictations and any other form of notation of events or intentions), minutes and resolutions (including all attachments and exhibits thereto), agendas, expressions or statements of policy, attendance lists, reports, rules, regulations, directions, communications, interoffice communications, intraoffice communications, financial statements, tax returns, ledgers, books of account, proposals, prospectuses, offers, orders, receipts, invoices, analyses, audits, working papers, computations, projections, tabulations, financial records, blueprints, plans, writings, drawings, graphs, charts, spreadsheets, photographs, phonograph records, tapes and compact discs (whether storing audio, video, or computer data), other data compilations from which information may be obtained (whether translation is required or not), desk calendars, appointment books, diaries, time sheets, logs, movies, films, recordings,

electronic mail, internet or intranet communications, reports and/or summaries of negotiations, proposals, computer punch cards or material similar to any of the foregoing, however denominated by you.

8. "Electronically Stored Information" or "ESI" means and refers to computer-generated information or data, of any kind, stored on computers, file servers, disks, tape or other devices or media, whether real, virtual or cloud based. "Metadata" means and refers to data about data, including, without limitation, information embedded in a native file or other data that is not ordinarily viewable or printable from the application that generated, edited, or modified such native file which describes the characteristics, origins, usage and validity of the electronic file as well as information generated automatically by the operation of a computer or other information technology system when a native file is created, modified, transmitted, deleted or otherwise manipulated by a user of such system.

9. "Communication" means the transmittal of any information, in the form of facts, ideas, inquiries, or otherwise, in any form, including, without limitation, personal conversations, telephone conversations, letters, meetings, memoranda, electronic mail exchanges, telegraphic and telex Communications or transmittals of Documents. The term "Communication" is not limited to internal Communications but includes Communications between you and third parties and Communications between or among third parties.

10. "Refer to" or "referring to" means discussing, regarding, consisting of, constituting, reflecting, referencing, showing, identifying, describing, analyzing, naming, mentioning, supporting, negating or contradicting.

11. "Relating to" means containing, showing, or referring to in any way, directly or indirectly, and is meant to include, those subjects underlying, supporting, refuting, or discussing

the subject matter of the request. It also includes documents that are or were attached or appended to the responsive documents.

12. "Review" means for purposes of this Notice, any audit, research, or examination of the records and procedures undertaken in the course of FRA's business.

MATTERS FOR EXAMINATION

Pursuant to Rule 4:5(b)(6) of the Rules of the Supreme Court of Virginia FRA "shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf," as to the following matters:

1. Any audit, review or examination of Defendants' records performed or undertaken by FRA, including, but not limited to, the review performed by FRA in February 2019.

2. All of the steps, processes, methods of analysis, and similar undertakings performed by FRA during its review of Defendants. This area of inquiry includes FRA's reasons for taking the steps that it did.

3. What classes of documents FRA reviewed during its review of Defendants.

4. The identities and titles of the specific FRA employees and agents who performed the review of Defendants.

5. The specific roles each FRA employee or agent performed during the review of Defendants and generally what each FRA employee or agent did during the review.

6. The conclusions and determinations made by FRA about Defendants and the basis for those conclusions and determinations. This area of inquiry includes any observations either memorialized in written findings or orally conveyed.

7. Any documents produced by FRA which refer to or relate to Defendants.

8. Any documents provided to FRA by the NRA which refer to or relate to Defendants.

9. Any reports or presentations that relate to Defendants.

10. Specifically how FRA created any documents that contained compilations of Defendant's data or information.

11. Specifically how FRA created Defendant related documents by using transcription.

12. FRA's understanding of the parameters and objectives of its review of Defendants.

13. The initial engagement by the NRA to perform a review of Defendants, including the identities of those involved.

14. FRA's communications with Defendants.

15. FRA's communications with the NRA about Defendants.

16. FRA's relationship with the NRA.

17. Any work that FRA has performed relating to the NRA's compliance with IRS nonprofit requirements.

18. Any work that FRA has performed relating to NRA's compliance with New York State requirements for not for profit entities registered in that state.

SUBPOENA DUCES TECUM (CIVIL) – ATTORNEY ISSUED VA CODE §§ 8.01-413, 16.1-89, 16.1-265; Commonwealth of Virginia Supreme Court Rules 1:4, 4:9

Case No.: CL19001757

HEARING DATE AND TIME

Circuit Court for City of Alexandria Court

520 King Street, Alexandria, VA 22314
COURT ADDRESS

National Rifle Association of America v./*In re:* Ackerman McQueen, Inc. and Mercury Group, Inc.

TO THE PERSON AUTHORIZED BY LAW TO SERVE THIS PROCESS:

You are commanded to summon

Corporate Designee for Forensic Risk Alliance
NAME

2550 M Street, N.W.
STREET ADDRESS

Washington, D.C. D.C. 20037
CITY STATE ZIP

TO the person summoned: You are commanded to make available the documents and tangible things designated and described below:

See Attachment A requesting the documents, electronically stored information, or designated tangible things (including writings, drawings, graphs, charts, photographs, and other data or data compilations stored in any medium from which information can be obtained, translated, if necessary, by the respondent into reasonably usable form) designated and described in said request. Va. Rule 4:9A(b).

at Schertler & Onorato, LLP, 901 New York Ave., N.W. Suite 500, D.C. at July 31, 2019
LOCATION DATE AND TIME

to permit such party or someone acting in his or her behalf to inspect and copy, test or sample such tangible things in your possession, custody or control.

This Subpoena Duces Tecum is issued by the attorney for and on behalf of

Ackerman McQueen, Inc. and Mercury Group, Inc.
PARTY NAME

David Dickieson
NAME OF ATTORNEY

31768
VIRGINIA STATE BAR NUMBER

901 New York Avenue, Suite 500
OFFICE ADDRESS

(202) 628-4199
TELEPHONE NUMBER OF ATTORNEY

Washington, D.C. 20001
OFFICE ADDRESS

(202) 628-4177
FACSIMILE NUMBER OF ATTORNEY

July 15, 2019
DATE ISSUED

David H. Dickieson [redacted]
SIGNATURE OF ATTORNEY

Notice to Recipient: See page two for further information.

RETURN OF SERVICE (see page two of this form)

TO the person summoned:

If you are served with this subpoena less than 14 days prior to the date that compliance with this subpoena is required, you may object by notifying the party who issued the subpoena of your objection in writing and describing the basis of your objection in that writing.

☒ **This SUBPOENA DUCES TECUM is being served by a private process server who must provide proof of service in accordance with Va. Code § 8.01-325.**

TO the person authorized to serve this process: Upon execution, the return of this process shall be made to the clerk of court.

NAME: .....

ADDRESS: .....

.....

☐ PERSONAL SERVICE | Tel. No. .....

Being unable to make personal service, a copy was delivered in the following manner:

☐ Delivered to family member (not temporary sojourner or guest) age 16 or older at usual place of abode of party named above after giving information of its purport. List name, age of recipient, and relation of recipient to party named above:

.....

☐ Posted on front door or such other door as appear to be the main entrance of usual place of abode, address listed above. (Other authorized recipient not found.)

☐ NOT FOUND ....., Sheriff

..... by ....., Deputy Sheriff

DATE

CERTIFICATE OF COUNSEL

I, David Dickieson, counsel for AMc and Mercury Group, hereby certify that a copy of the foregoing subpoena duces tecum was by email (DELIVERY METHOD) to Robert Cox, counsel of record for the NRA, on the 15th day of July, 2019.

[redacted]

SIGNATURE OF ATTORNEY

NOTICE: Upon receipt of the subpoenaed documents, the requesting party must, if requested, provide true and full copies of those documents to any other party or to the attorney for any other party, provided the other party or attorney for the other party pays the reasonable cost of copying or reproducing those documents. This does not apply when the subpoenaed documents are returnable to and maintained by the clerk of the court in which the action is pending. Va. Code § 8.01-417

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

NATIONAL RIFLE ASSOCIATION OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CL190001757
	)	
ACKERMAN MCQUEEN, INC.,	)	
	)	
and	)	
	)	
MERCURY GROUP, INC.	)	
	)	
Defendants.	)	

ATTACHMENT A
To the Subpoena to Produce Documents, Electronically Stored Information, and Records Pursuant to Rule 4:9A of the Rules of the Supreme Court of Virginia

DEFINITIONS

1. "NRA" or "Plaintiff" shall mean plaintiff The National Rifle Association of America and its officers, directors, agents, contract employees, affiliates, and others acting on its behalf.

2. "AMc" or "Defendant AMc" shall mean defendant Ackerman McQueen, Inc. and its officers, directors, agents and others acting on its behalf.

3. "Mercury Group" or "Defendant Mercury Group" shall mean defendant Mercury Group, Inc., and its officers, directors, agents and others acting on its behalf.

4. "Defendants" shall mean both defendants Ackerman McQueen, Inc. and Mercury Group, Inc., collectively, and their officers, directors, agents and others acting on their behalf. "Review" shall mean any auditing activity, accounting investigation, or similar evaluation performed by FRA.

5. "FRA" or "you" shall mean nonparty Forensic Risk Alliance and its officers, directors, agents, contract employees, affiliates, and others acting on its behalf.

6. "Review" shall mean any auditing activity, accounting investigation, forensic analysis, or similar evaluation performed by FRA.

7. "Document" shall be synonymous in meaning and equal in scope to the usage of this term in Rule 4:9(a) and shall include electronically stored information ("ESI") as defined therein. A draft or non-identical copy is a separate Document within the meaning of this term. Documents shall include electronic media of any kind, whether in an audio, visual or electronic (computer) media, and whether or not such an item has been erased or not, however it has been produced or reproduced, whether it is draft or final, in your actual or constructive possession, custody, or control, in original or reproduced format. Documents shall include (but are not limited to): letters, correspondence, notes, films, transcripts, telegrams, teletype messages, contracts and agreements, proposals, licenses, memoranda, recordings, microfilm, microfiche, books, newspapers, magazines, advertisements, periodicals, bulletins, circulars, pamphlets, statements, notices, notes (including interoffice memoranda, notations on other documents, jottings, diary entries, desk calendar entries, expense accounts, recorded recollections, dictations and any other form of notation of events or intentions), minutes and resolutions (including all attachments and exhibits thereto), agendas, expressions or statements of policy, attendance lists, reports, rules, regulations, directions, communications, interoffice communications, intraoffice communications, financial statements, tax returns, ledgers, books of account, proposals, prospectuses, offers, orders, receipts, invoices, analyses, audits, working papers, computations, projections, tabulations, financial records, blueprints, plans, writings, drawings, graphs, charts, spreadsheets, photographs, phonograph records, tapes and compact discs (whether storing audio, video, or computer data),

other data compilations from which information may be obtained (whether translation is required or not), desk calendars, appointment books, diaries, time sheets, logs, movies, films, recordings, electronic mail, internet or intranet communications, reports and/or summaries of negotiations, proposals, computer punch cards or material similar to any of the foregoing, however denominated by you.

8. "Electronically Stored Information" or "ESI" means and refers to computer-generated information or data, of any kind, stored on computers, file servers, disks, tape or other devices or media, whether real, virtual or cloud based. "Metadata" means and refers to data about data, including, without limitation, information embedded in a native file or other data that is not ordinarily viewable or printable from the application that generated, edited, or modified such native file which describes the characteristics, origins, usage and validity of the electronic file as well as information generated automatically by the operation of a computer or other information technology system when a native file is created, modified, transmitted, deleted or otherwise manipulated by a user of such system.

9. "Communication" means the transmittal of any information, in the form of facts, ideas, inquiries, or otherwise, in any form, including, without limitation, personal conversations, telephone conversations, letters, meetings, memoranda, electronic mail exchanges, telegraphic and telex Communications or transmittals of Documents. The term "Communication" is not limited to internal Communications but includes Communications between you and third parties and Communications between or among third parties.

10. "Refer to" or "referring to" means discussing, regarding, consisting of, constituting, reflecting, referencing, showing, identifying, describing, analyzing, naming, mentioning, supporting, negating or contradicting.

11. "Relating to" means containing, showing, or referring to in any way, directly or indirectly, and is meant to include, those subjects underlying, supporting, refuting, or discussing the subject matter of the request. It also includes documents that are or were attached or appended to the responsive documents.

INSTRUCTIONS

1. This subpoena requires you to produce all responsive documents that are within your possession, custody or control including, without limitation, documents of predecessors, successors, parents, subsidiaries, divisions, affiliates, directors, officers, managing agents, employees, attorneys, accountants, or other representatives.

2. You are to produce the requested documents in the form that they are kept in the ordinary course of business and/or in the same order within each file in which they are located prior to production. The file folders, boxes, binders, or other containers in which such documents are found are also requested to be produced intact, including the title, labels, or other description of each file folder, binder, or container.

3. Except for spreadsheets and charts, responsive electronically stored information ("ESI") should be produced in single-page tagged image file format ("tiff"), along with metadata produced in text format linked to the associated files. Spreadsheets and charts should be produced in tiff format with a link to the native file. ESI in tiff formation should be accompanied by a Concordance load file (.dat) with an Opticon cross-reference file (.opt or .log).

4. You shall produce the original of each document or if the original is not in Your custody, then a copy thereof. Additionally, all non-identical copies which differ from the original or from the other copies produced for any reason, including, but not limited to, the making of notes thereon shall also be produced.

5. Any document request shall be deemed to include any and all transmittal sheets, cover letters, routing lists, exhibits, enclosures, attachments, and other documents to which the responsive document is clipped, stapled, electronically appended, or otherwise attached, and/or any file folder in which the document was maintained.

6. If production of a document, or any portion of any document, is withheld pursuant to a claim of privilege, immunity or protection, You shall provide a written privilege log. Whenever a document is not produced in full or is produced in redacted form, so indicate on the document and state with particularity the reason or reasons it is not being produced in full. Furthermore, please describe to the best of Your knowledge, information and with as much particularity as possible, those portions of the document which are not being produced.

7. This subpoena shall be deemed continuing so as to require supplemental production should You or Your counsel obtain or identify further responsive documents between your initial presentation of documents and the time of trial.

REQUESTED DOCUMENTS

Pursuant to Rule 4:9A of the Rules of the Supreme Court of Virginia, and in accordance with the Definitions and Instructions set forth above, Defendants AMc and Mercury Group, request production of the following:

1. All documents that refer or relate to Defendants.

2. All documents that refer or relate to the FRA's review of Defendants.

3. All communications with Defendants.

4. All communications that refer or relate to Defendants.

5. All communications with the NRA that refer or relate to Defendants.

6. All documents created, composed, or generated during or after the review of Defendants.

7. All notes or compilations of data that refer or relate to Defendants. This request includes, but is not limited to, (a) notes that were taken by FRA during the course of its review and (b) summaries of those notes that were subsequently generated.

8. All documents related to the NRA's retention of FRA to perform the review of Defendants.

9. All documents relating to Defendants that were created via transcription.

10. All documents and materials relied upon during the review of Defendants.

11. All documents which contain analysis or evaluation of Defendants.

12. All written guidelines, procedures, and policies relied upon by FRA during its review of Defendants.

13. All presentations, memoranda, reports and written findings that refer or relate to Defendants.

14. All documents obtained by FRA from Defendants during its review of Defendants.

15. All documents that refer or relate to the objectives and parameters of FRA's review of Defendants.

16. All documents that relate to NRA's efforts to comply with IRS requirements for nonprofit entities.

17. All documents that relate to NRA's efforts to comply with the requirements under New York State law governing not for profit entities registered in New York State.

18. All documents that relate to expenses of Wayne LaPierre that were paid for or reimbursed by the NRA.

19. All documents that relate to the issue of potential termination or severance fees that would be payable to Defendants upon termination of the NRA/AMc Services Agreement.

EXHIBIT 5

Joseph Gonzalez

From: Michael Trahar <MTrahar@forensicrisk.com>
Sent: Thursday, July 25, 2019 8:52 PM
To: Joseph Gonzalez
Cc: David Schertler; David H. Dickieson
Subject: RE: FRA Subpoenas - NRA v. Ackerman McQueen, Inc., et al

Great, thanks gentlemen.

From: Joseph Gonzalez [mailto:JGonzalez@schertlerlaw.com]
Sent: Thursday, July 25, 2019 8:34 PM
To: Michael Trahar <MTrahar@forensicrisk.com>
Cc: David Schertler <DSchertler@schertlerlaw.com>; David H. Dickieson <DDickieson@schertlerlaw.com>
Subject: FRA Subpoenas - NRA v. Ackerman McQueen, Inc., et al

Mike,

Thank you for the conversation regarding scheduling yesterday. As we discussed, we consent to FRA's request to extend the response date to the subpoena for documents, thereby making the new response date August 15, 2019. In terms of the deposition date, we also consent to your request to move the date to the last two weeks of August. We are presently crystalizing our deposition schedule and anticipate getting back to you with specific suggested dates next week. If you have any questions for me in the interim, please let me know.

Best,

Joseph

JOSEPH A. GONZALEZ
Senior Associate | Schertler & Onorato, LLP
901 New York Avenue, N.W.
Suite 500
Washington, DC 20001
jgonzalez@schertlerlaw.com
202.628-4199 | www.schertlerlaw.com

EXHIBIT 6

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

NATIONAL RIFLE ASSOCIATION OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**Case No. CL190001757**
ACKERMAN MCQUEEN, INC.	)	
	)	
and	)	
	)	
MERCURY GROUP, INC.	)	
	)	
Defendants.	)	

FORENSIC RISK ALLIANCE'S RESPONSES AND OJECTIONS TO THIRD PARTY SUBPOENA

Third-Party Forensic Risk Alliance ("FRA") hereby responds and objects, pursuant to Rule 4:9A of the Rules of the Supreme Court of Virginia, to defendants Ackerman McQueen, Inc. and Mercury Group, Inc.'s ("Defendants") third-party subpoena, dated July 15, 2019 (the "Third-Party Subpoena").

GENERAL OBJECTIONS

1. FRA objects to the Third-Party Subpoena to the extent it seeks discovery of information not relevant to the issues in this action or reasonably calculated to lead to the discovery of evidence admissible in this action.

2. FRA objects to the Third-Party Subpoena to the extent it purports to impose burdens other than or beyond those imposed by the Rules of the Supreme Court of Virginia.

3. FRA objects to the Third-Party Subpoena to the extent it calls for disclosure of information or documents protected by the attorney-client privilege, work product doctrine, or any other applicable privileges or protections against discovery ("Privileged Information"). FRA specifically reserves the right to demand the return of any documents containing Privileged Information that inadvertently may be produced during discovery. Any inadvertent disclosure of Privileged Information is not intended, and should not be construed, to constitute a waiver.

4. FRA objects to the Third-Party Subpoena to the extent it is unduly burdensome, overly broad, vague and/or ambiguous.

5. FRA objects to the Third-Party Subpoena to the extent it is unreasonably cumulative and/or duplicative.

6. FRA objects to the Third-Party Subpoena to the extent that it calls for production of documents or information already in the possession, custody or control of Defendants or Plaintiff in this action, and/or outside FRA's possession, custody or control.

7. FRA objects to the Third-Party Subpoena to the extent that it calls for production of confidential commercial information.

8. FRA's objections and responses to the Third-Party Subpoena do not constitute, and shall not be interpreted as, FRA's agreement with, or admission as to the truth or accuracy of, any legal or factual characterizations or allegations stated or implied in any of Defendants' specific requests.

9. In responding to the Third-Party Subpoena, the phrase "FRA will produce" does not mean that responsive documents necessarily exist. Following a diligent search of files in its

possession, custody or control that reasonably relate to the specific requests contained herein, FRA will produce responsive documents, should any such documents exists, subject to the objections set forth here. By producing documents, FRA does not concede the relevance of such documents.

10. FRA's failure to object to any specific request on a particular ground or grounds shall not be construed as a waiver of the right to object on any additional ground(s). FRA reserves the right to amend and/or supplement its objections and responses.

OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

1. FRA objects to the Third-Party Subpoena's Definitions to the extent that they are vague, ambiguous, overbroad, unduly burdensome and are not reasonably calculated to lead to the discovery of admissible evidence relevant to any party's claims or defense.

2. FRA objects to the "Definitions" and "Instructions" and to each individual request to the extent they call for the production of documents that are cumulative or duplicative. Where a document is responsive to more than one request, FRA will produce such document only once.

3. FRA objects to the definition of "FRA" or "you" to the extent that it refers to people or entities other than FRA employees, on the grounds that such interpretation would render the Requests overbroad and unduly burdensome, would call for information or documents that are neither relevant to any party's claim or defense nor reasonably calculated to lead to the discovery of admissible evidence.

4. FRA objects to the definition of "Review" on the grounds that it is vague, ambiguous, overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence relevant to any party's claims or defenses.

5. FRA objects to the definition of "Document" on the grounds that it is vague, ambiguous, overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence relevant to any party's claims or defense. FRA further objects to the definition to the extent that it purports to impose burdens or obligations other than, or beyond, those imposed by the Rules of the Supreme Court of Virginia.

6. FRA objects to the definition of "Electronically Stored Information" or "ESI" to the extent that it purports to impose burdens or obligations other than, or beyond, those imposed by the Rules of the Supreme Court of Virginia or any other applicable rules.

7. FRA objects to the definition of "Communication" on the grounds that it is vague, ambiguous, overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence relevant to any party's claims or defense. FRA further objects to the definition to the extent that it purports to impose burdens or obligations other than, or beyond, those imposed by the Rules of the Supreme Court of Virginia.

8. FRA objects to the definition of "Refer to" or "referring to" or "relating to" on the grounds that these terms are vague, ambiguous, overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence relevant to any party's claims or defense. FRA further objects to the definitions to the extent that it purports to impose burdens or obligations other than, or beyond, those imposed by the Rules of the Supreme Court of Virginia.

SPECIFIC OBJECTIONS

Request No. 1: All documents that refer or relate to Defendants.

Response to Request No. 1:

FRA objects to this request as overbroad, unduly burdensome, oppressive, ambiguous, and vague. FRA further objects to this request on the ground that it seeks documents and information that are already in the possession, custody, or control of a party to this action or are obtainable from another source that is more convenient, less burdensome and less expensive. FRA further objects to this request to the extent it calls for the production of documents and information that may be protected by the work product, attorney-client, or other applicable privilege.

Subject to the foregoing general and specific objections and reserving all rights and defenses, FRA will produce any responsive non-privileged documents in its possession, custody, or control.

Request No. 2: All documents that refer or relate to FRA's review of Defendants.

Response to Request No. 2:

FRA objects to this request as overbroad, unduly burdensome, oppressive, ambiguous, and vague. FRA further objects to this request on the ground that it seeks documents and information that are already in the possession, custody, or control of a party to this action or are obtainable from another source that is more convenient, less burdensome and less expensive. FRA further objects to this request to the extent it calls for the production of documents and information that may be protected by the work product, attorney-client, or other applicable privilege. FRA further objects to this request as being duplicative of Request No. 1.

Subject to the foregoing general and specific objections and reserving all rights and defenses, FRA will produce any responsive non-privileged documents in its possession, custody, or control.

Request No. 3: All communications with Defendants.

Response to Request No. 3:

FRA objects to this request as overbroad, unduly burdensome, oppressive, ambiguous, and vague. FRA further objects to this request on the ground that it seeks documents and information that are already in the possession, custody, or control of a party to this action or are obtainable from another source that is more convenient, less burdensome and less expensive. FRA further objects to this request to the extent it calls for the production of documents and information that may be protected by the work product, attorney-client, or other applicable privilege. FRA further objects to this request as being duplicative of Request Nos. 1 and 2.

Subject to the foregoing general and specific objections and reserving all rights and defenses, FRA will produce any responsive non-privileged documents in its possession, custody, or control.

Request No. 4: All communications that refer or relate to Defendants.

Response to Request No. 4:

FRA objects to this request as overbroad, unduly burdensome, oppressive, ambiguous, and vague. FRA further objects to this request on the ground that it seeks documents and information that are already in the possession, custody, or control of a party to this action or are obtainable from another source that is more convenient, less burdensome and less expensive. FRA further objects to this request to the extent it calls for the production of documents and

information that may be protected by the work product, attorney-client, or other applicable privilege. FRA further objects to this request as being duplicative of Request Nos. 1, 2 and 3.

Subject to the foregoing general and specific objections and reserving all rights and defenses, FRA will produce any responsive non-privileged documents in its possession, custody, or control.

Request No. 5: All communications with the NRA that refer or relate to Defendants.

Response to Request No. 5:

FRA objects to this request as overbroad, unduly burdensome, oppressive, ambiguous, and vague. FRA further objects to this request to the extent it calls for the production of documents and information that may be protected by the work product, attorney-client, or other applicable privilege. FRA further objects to this request on the ground that it seeks documents and information that are already in the possession, custody, or control of a party to this action or are obtainable from another source that is more convenient, less burdensome and less expensive. FRA further objects to this request as being duplicative of Request Nos. 1-4.

Subject to the foregoing general and specific objections and reserving all rights and defenses, FRA will produce any responsive non-privileged documents in its possession, custody, or control.

Request No. 6: All documents created, composed, or generated during or after the review of Defendants.

Response to Request No. 6:

FRA objects to this request as overbroad, unduly burdensome, oppressive, ambiguous, and vague. FRA further objects to this request on the ground that it seeks documents and information that are already in the possession, custody, or control of a party to this action or are

obtainable from another source that is more convenient, less burdensome and less expensive. FRA further objects to this request to the extent it calls for the production of documents and information that may be protected by the work product, attorney-client, or other applicable privilege. FRA further objects to this request as being duplicative of Request Nos. 1 -5.

Subject to the foregoing general and specific objections and reserving all rights and defenses, FRA will produce any responsive non-privileged documents in its possession, custody, or control.

Request No. 7: All notes or compilations of data that refer or relate to Defendants. This request includes, but is not limited to, (a) notes that were taken by FRA during the course of its review and (b) summaries of those notes that were subsequently generated.

Response to Request No. 7:

FRA objects to this request as overbroad, unduly burdensome, oppressive, ambiguous, and vague. FRA further objects to this request on the ground that it seeks documents and information that are already in the possession, custody, or control of a party to this action or are obtainable from another source that is more convenient, less burdensome and less expensive. FRA further objects to this request to the extent it calls for the production of documents and information that may be protected by the work product, attorney-client, or other applicable privilege. FRA further objects to the phrase "compilations of data" on the grounds that it is vague, ambiguous, overbroad, and unduly burdensome. FRA further objects to the definition to the extent that it purports to impose burdens or obligations other than, or beyond, those imposed by the Rules of the Supreme Court of Virginia.

FRA further objects to this request as being duplicative of Request Nos. 1-6.

Subject to the foregoing general and specific objections and reserving all rights and defenses, FRA will produce any responsive non-privileged documents in its possession, custody, or control.

Request No. 8: All documents related to the NRA's retention of FRA to perform the review of Defendants.

Response to Request No. 8:

FRA objects to this request as overbroad, unduly burdensome, oppressive, ambiguous, and vague. FRA further objects to this request on the ground that it seeks documents and information that are already in the possession, custody, or control of a party to this action or are obtainable from another source that is more convenient, less burdensome and less expensive. FRA further objects to this request to the extent it calls for the production of documents and information that may be protected by the work product, attorney-client, or other applicable privilege.

Subject to the foregoing general and specific objections and reserving all rights and defenses, FRA will produce any responsive non-privileged documents in its possession, custody, or control.

Request No. 9: All documents relating to Defendants that were created via transcription.

Response to Request No. 9:

FRA objects to this request as overbroad, unduly burdensome, oppressive, ambiguous, and vague. FRA further objects to this request on the ground that it seeks documents and information that are already in the possession, custody, or control of a party to this action or are

obtainable from another source that is more convenient, less burdensome and less expensive. FRA further objects to this request to the extent it calls for the production of documents and information that may be protected by the work product, attorney-client, or other applicable privilege. FRA further objects to the phrase "via transcription" on the grounds that it is vague, ambiguous, overbroad, and unduly burdensome. FRA further objects to this request as being duplicative of Request Nos. 1-7.

Subject to the foregoing general and specific objections and reserving all rights and defenses, FRA will produce any responsive non-privileged documents in its possession, custody, or control.

Request No. 10: All documents and materials relied upon during the review of Defendants.

Response to Request No. 10:

FRA objects to this request as overbroad, unduly burdensome, oppressive, ambiguous, and vague. FRA further objects to this request on the ground that it seeks documents and information that are already in the possession, custody, or control of a party to this action or are obtainable from another source that is more convenient, less burdensome and less expensive. FRA further objects to this request to the extent it calls for the production of documents and information that may be protected by the work product, attorney-client, or other applicable privilege. FRA further objects to this request as being duplicative of Request Nos. 1-7 and 9.

Subject to the foregoing general and specific objections and reserving all rights and defenses, FRA will produce any responsive non-privileged documents in its possession, custody, or control.

Request No. 11: All documents which contain analysis or evaluation of Defendants.

Response to Request No. 11:

FRA objects to this request as overbroad, unduly burdensome, oppressive, ambiguous, and vague. FRA further objects to this request on the ground that it seeks documents and information that are already in the possession, custody, or control of a party to this action or are obtainable from another source that is more convenient, less burdensome and less expensive. FRA further objects to this request to the extent it calls for the production of documents and information that may be protected by the work product, attorney-client, or other applicable privilege. FRA further objects to this request as being duplicative of Request Nos. 1-7 and 9-10.

Subject to the foregoing general and specific objections and reserving all rights and defenses, FRA will produce any responsive non-privileged documents in its possession, custody, or control.

Request No. 12: All written guidelines, procedures, and policies relied upon by FRA during its review of Defendants.

Response to Request No. 12:

FRA objects to this request as overbroad, unduly burdensome, oppressive, ambiguous, and vague. FRA further objects to this request on the ground that it seeks documents and information that are already in the possession, custody, or control of a party to this action or are obtainable from another source that is more convenient, less burdensome and less expensive. FRA further objects to this request to the extent it calls for the production of documents and information that may be protected by the work product, attorney-client, or other applicable privilege. FRA further objects to this request as being duplicative of Request Nos. 1-7 and 9-11.

Subject to the foregoing general and specific objections and reserving all rights and defenses, FRA will produce any responsive non-privileged documents in its possession, custody, or control.

Request No. 13: All presentations, memoranda, reports and written findings that refer or relate to Defendants.

Response to Request No. 13:

FRA objects to this request as overbroad, unduly burdensome, oppressive, ambiguous, and vague. FRA further objects to this request on the ground that it seeks documents and information that are already in the possession, custody, or control of a party to this action or are obtainable from another source that is more convenient, less burdensome and less expensive. FRA further objects to this request to the extent it calls for the production of documents and information that may be protected by the work product, attorney-client, or other applicable privilege. FRA further objects to this request as being duplicative of Request Nos. 1-7 and 9-12.

Subject to the foregoing general and specific objections and reserving all rights and defenses, FRA will produce any responsive non-privileged documents in its possession, custody, or control.

Request No. 14: All documents obtained by FRA from Defendants during its review of Defendants.

Response to Request No. 14:

FRA objects to this request as overbroad, unduly burdensome, oppressive, ambiguous, and vague. FRA further objects to this request on the ground that it seeks documents and information that are already in the possession, custody, or control of a party to this action or are obtainable from another source that is more convenient, less burdensome and less expensive. FRA further objects to this request to the extent it calls for the production of documents and information that may be protected by the work product, attorney-client, or other applicable privilege. FRA further objects to this request as being duplicative of Request Nos. 1-7 and 9-13.

Subject to the foregoing general and specific objections and reserving all rights and

defenses, FRA will produce any responsive non-privileged documents in its possession, custody, or control.

Request No. 15: All documents that refer to or relate to the objectives and parameters of FRA's review of Defendants.

Response to Request No 15:

FRA objects to this request as overbroad, unduly burdensome, oppressive, ambiguous, and vague. FRA further objects to this request on the ground that it seeks documents and information that are already in the possession, custody, or control of a party to this action or are obtainable from another source that is more convenient, less burdensome and less expensive. FRA further objects to this request to the extent it calls for the production of documents and information that may be protected by the work product, attorney-client, or other applicable privilege. FRA further objects to the phrase "objectives and parameters" on the grounds that it is vague, ambiguous, overbroad, and unduly burdensome. FRA further objects to this request as being duplicative of Request Nos. 1-7 and 9-14.

Subject to the foregoing general and specific objections and reserving all rights and defenses, FRA will produce any responsive non-privileged documents in its possession, custody, or control.

Request No. 16: All documents that relate to NRA's efforts to comply with IRS requirements for nonprofit entities.

Response to Request No. 16:

FRA objects to this request as overbroad, unduly burdensome, oppressive, ambiguous, and vague. FRA further objects to this request on the ground that it seeks documents and information that are already in the possession, custody, or control of a party to this action or are obtainable from another source that is more convenient, less burdensome and less expensive.

FRA further objects to this request to the extent it calls for the production of documents and information that may be protected by the work product, attorney-client, or other applicable privilege.

Subject to the foregoing general and specific objections and reserving all rights and defenses, FRA states that it does not have any responsive non-privileged documents in its possession, custody, or control.

Request No. 17: All documents that relate to NRA's efforts to comply with requirements under New York State law governing not for profit entities in New York State.

Response to Request No. 17:

FRA objects to this request as overbroad, unduly burdensome, oppressive, ambiguous, and vague. FRA further objects to this request on the ground that it seeks documents and information that are already in the possession, custody, or control of a party to this action or are obtainable from another source that is more convenient, less burdensome and less expensive. FRA further objects to this request to the extent it calls for the production of documents and information that may be protected by the work product, attorney-client, or other applicable privilege. FRA further objects to this request as being duplicative of Request No. 16.

Subject to the foregoing general and specific objections and reserving all rights and defenses, FRA states that it does not have any responsive non-privileged documents in its possession, custody, or control.

Request No. 18: All documents that relate to expenses of Wayne LaPierre that were paid for or reimbursed by the NRA.

Response to Request No. 18:

FRA objects to this request as overbroad, unduly burdensome, oppressive, ambiguous, and vague. FRA further objects to this request on the ground that it seeks documents and information that are already in the possession, custody, or control of a party to this action or are obtainable from another source that is more convenient, less burdensome and less expensive. FRA further objects to this request to the extent it calls for the production of documents and information that may be protected by the work product, attorney-client, or other applicable privilege.

Subject to the foregoing general and specific objections and reserving all rights and defenses, FRA will produce any responsive non-privileged documents in its possession, custody, or control.

Request No. 19: All documents that relate to the issue of potential termination or severance fees that would be payable to Defendants upon termination of the NRA/AMc Services Agreement.

Response to Request No. 19:

FRA objects to this request as overbroad, unduly burdensome, oppressive, ambiguous, and vague. FRA further objects to this request on the ground that it seeks documents and information that are already in the possession, custody, or control of a party to this action or are obtainable from another source that is more convenient, less burdensome and less expensive. FRA further objects to this request to the extent it calls for the production of documents and information that may be protected by the work product, attorney-client, or other applicable privilege.

Subject to the foregoing general and specific objections and reserving all rights and

defenses, FRA states that it does not have any responsive non-privileged documents in its possession, custody, or control.

Dated: August 29, 2019

/s/ Ada Fernandez Johnson

Ada Fernandez Johnson (VA Bar No. 427451)
Kara Novaco Brockmeyer
Debevoise & Plimpton LLP
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 383-8000 (phone)

Counsel for Forensic Risk Alliance

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2019 a true and correct copy of Forensic Risk Alliance's Responses and Objections to the Third-Party Subpoena were served by first-class mail and electronic mail on:

David H. Dickieson, Esq.
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VIRGINIA:

IN THE CIRCUIT COURT OF
THE CITY OF ALEXANDRIA

NATIONAL RIFLE ASSOCIATION OF AMERICA, **Plaintiff,** **v.** **ACKERMAN MCQUEEN, INC.** *and* **MERCURY GROUP, INC.** **Defendants.**	**Case No. CL19001757** **CL19002067**

RESPONSES AND OBJECTIONS OF NATIONAL RIFLE ASSOCIATION OF AMERICA TO DEFENDANTS ACKERMAN MCQUEEN, INC. AND MERCURY GROUP, INC.'S SUBPOENA DUCES TECUM TO NON-PARTY FORENSIC RISK ALLIANCE

Plaintiff the National Rifle Association of America (the "NRA") submits the following Responses and Objections to Defendant Ackerman McQueen, Inc. and Mercury Group, Inc.'s subpoena duces tecum to Non-Party Forensic Risk Alliance ("FRA"). These responses are based on information currently available to the NRA. The NRA reserves the right to amend, supplement or correct its responses in accordance with the Rules of the Supreme Court of Virginia.

I. GENERAL OBJECTIONS

The General Objections set forth below apply to each of the numbered requests (the "Requests") set forth in the subpoena duces tecum, whether or not specifically stated in response to each Request.

1. The NRA's responses to any Request, or the production of any document in response to any Request, is not, and shall not be deemed or construed as, a waiver of any privilege, right, or objection on the part of NRA with respect to any such document or information. Nothing herein shall be interpreted to waive any privilege, right or objection available to the NRA.

2. In the event that FRA inadvertently produces a privileged document or document exempt from discovery, such production is not, and shall not be deemed or construed as a waiver of any privilege, right or objection on the part of the NRA, and the NRA reserve its rights to demand the return of any such document.

3. The NRA objects to the Requests to the extent that the Requests seek information which is privileged, exempt, or protected from disclosure by the attorney-client privilege, the attorney work-product doctrine, or any other applicable statutory or common law privilege, prohibition, limitation, immunity, or exemption from discovery or any combination of the preceding. Nothing contained in these Responses is intended to be, or should in any way be deemed as, a waiver of the attorney-client privilege, attorney work product doctrine, or any other applicable privilege, immunity, prohibition, limitation, or exemption.

4. The NRA objects to the Requests to the extent they require production of documents not in FRA's possession, custody, or control, or require FRA to make unreasonable inquiries of persons or other entities. In addition, the NRA objects to the Requests to the extent that defendants Ackerman McQueen, Inc. and Mercury Group, Inc. ("AMc") already has the requested documents within its possession, custody, or control.

5. The failure to make a specific objection to a particular individual Request is not, and shall not be construed as, an admission that responsive information exists. Likewise, any statement or other indication herein that NRA will produce any documents or make them available

for inspection and copying in response to an individual Request does not mean that NRA, in fact, has any such documents or that any such document exists, but instead reflects an intention, subject to and without waiving any objections, to conduct a reasonably diligent search for responsive documents in FRA's possession, custody, or control.

6. The NRA objects to the Requests, and to the "Instructions" which accompany them, on the grounds that they seek to impose obligations not imposed by law and subject FRA to unreasonable burden and expense.

7. These responses are not intended to waive, and do not constitute a waiver of, any objections which the NRA may have as to the admissibility, authenticity, or relevance of the information provided. For all information provided in response to the Requests, the NRA reserves all objections regarding the competency, relevance, materiality, or admissibility of any such information as evidence in any subsequent proceeding in, or trial of, this or any other action.

8. In providing its Responses and Objections to the Requests, the NRA reserves and does not waive: (a) any objections as to the vagueness, ambiguity, or other infirmity in the form of the Requests and any objections based on the undue burden imposed by the Requests; (b) any rights to object on any grounds to the use of any of the responses, documents, or their subject matter, in any subsequent proceedings; and (c) any rights to object on any ground to any further discovery requests involving or relating to the subject matter of the Requests.

9. The NRA objects to the Requests to the extent that they call for the production or disclosure of "Confidential Information" as that term is defined in Section IV.A. of the Services Agreement between the NRA and AMc, dated April 30, 2017 (as modified on May 6, 2018) (the "Services Agreement").[1] Nothing in these Responses and Objections is intended to be, or should

[1] Confidential Information is defined by the Services Agreement to include "any NRA membership data or mailing lists, any materials or information relating thereto, or any other data, materials or information coming to the

in any way be deemed, a waiver of the protections afforded to Confidential Information pursuant to the Services Agreement, which FRA is neither authorized to waive nor capable of doing so.

10. The NRA reserves the right to supplement and amend its Responses and Objections due to, among other things, discovery of additional facts and materials and other developments or proceedings in this action.

11. The NRA objects to each Request as overly broad and unduly burdensome to the extent that it seeks "All Documents" and/or "All Communications" relating to a given subject matter.

12. All of the NRA's objections to the Requests shall be deemed to be continuing and are hereby incorporated into each of the responses to the specific Requests set forth below.

13. The NRA objects to the Definitions and Instructions to the extent that they seek to impose obligations greater than those imposed or authorized by the Virginia Rules of the Supreme Court and any other applicable laws, orders, rulings or pronouncements of the Court. The NRA further objects to the terms "FRA," "Plaintiff," "you," and "your" because they are overbroad and unduly burdensome. The inclusion of "agents," "contract employees," "affiliates," and "others acting on [FRA's] behalf" renders each Request overbroad and would require FRA to seek documents outside of its possession, custody or control. Accordingly, these responses to the Requests will define the terms "FRA," "Plaintiff," "you," and "your" to mean Forensic Risk Alliance and any of its officers, directors, or employees.

II. SPECIFIC OBJECTIONS AND RESPONSES

REQUEST FOR PRODUCTION NO. 1:

All documents the refer or relate to Defendants.

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knowledge of AMc, supplied to AMc by NRA, or otherwise made known to AMc as a result of AMc's providing Services" to the NRA.

RESPONSE:

The NRA objects to this Request on the grounds that it is overbroad, unduly burdensome, and fails to describe with reasonable particularity the documents requested because it generally seeks "all documents," absent any subject-matter limitation. The NRA also objects to this Request to the extent it seeks Confidential Information as that term is defined by the Services Agreement; the disclosure of Confidential Information does not, and shall not be deemed to, waive the protections afforded such information pursuant to the Services Agreement. Additionally, the NRA objects to this Request to the extent it seeks documents and information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable exemption, immunity, or privilege from discovery.

REQUEST FOR PRODUCTION NO. 2:

All documents that refer or relate to FRA's review of Defendants.

RESPONSE:

The NRA objects to this Request on the grounds that it is overbroad, unduly burdensome, and fails to describe with reasonable particularity the documents requested because it generally seeks "all documents." In addition, the NRA objects to this Request as vague and ambiguous to the extent that it seeks documents pertaining to FRA's "review of Defendants." The NRA also objects to this Request as duplicative of Request No. 1. Moreover, the NRA objects to this Request to the extent it seeks Confidential Information as that term is defined by the Services Agreement; the disclosure of Confidential Information does not, and shall not be deemed to, waive the protections afforded such information pursuant to the Services Agreement. Additionally, the NRA objects to this Request to the extent it seeks documents and information protected from disclosure

by the attorney-client privilege, the work product doctrine, or any other applicable exemption, immunity, or privilege from discovery.

REQUEST FOR PRODUCTION NO. 3:

All communications with Defendants.

RESPONSE:

The NRA objects to this Request on the grounds that it is overbroad, unduly burdensome, and fails to describe with reasonable particularity the documents requested because it generally seeks "all documents," without limitation as to subject-matter. The NRA also objects to this Request as unduly burdensome on the basis that Defendants themselves are already in possession of all communications between FRA and Defendants. Defendants' Request to non-party FRA, to collect and produce those communications which Defendants already possess, borders on harassment and bad-faith gamesmanship; Defendants lack any basis for shifting to non-party FRA the burden of reviewing documents to identify those that were issued between FRA and Defendants. In addition, the NRA objects to this Request to the extent it seeks Confidential Information as that term is defined by the Services Agreement; the disclosure of Confidential Information does not, and shall not be deemed to, waive the protections afforded such information pursuant to the Services Agreement. Additionally, the NRA objects to this Request to the extent it seeks documents and information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable exemption, immunity, or privilege from discovery.

REQUEST FOR PRODUCTION NO. 4:

All communications that refer or relate to Defendants.

RESPONSE:

The NRA objects to this Request on the grounds that it is overbroad, unduly burdensome, and fails to describe with reasonable particularity the documents requested because it generally seeks "all documents" that incidentally mention or refer to Defendants. The NRA also objects to this Request to the extent that it is duplicative of Request No. 1. In addition, the NRA objects to this Request to the extent it seeks Confidential Information as that term is defined by the Services Agreement; the disclosure of Confidential Information does not, and shall not be deemed to, waive the protections afforded such information pursuant to the Services Agreement. Additionally, the NRA objects to this Request to the extent it seeks documents and information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable exemption, immunity, or privilege from discovery.

REQUEST FOR PRODUCTION NO. 5:

All communications with the NRA that refer or relate to Defendants.

RESPONSE:

The NRA objects to this Request on the grounds that it is overbroad, unduly burdensome, and fails to describe with reasonable particularity the documents requested because it generally seeks "all documents," without limitation as to subject-matter. Moreover, the NRA objects to this Request as duplicative of Request Nos. 1 and 4. The NRA objects to this Request to the extent it seeks Confidential Information as that term is defined by the Services Agreement; the disclosure of Confidential Information does not, and shall not be deemed to, waive the protections afforded such information pursuant to the Services Agreement. Additionally, the NRA objects to this Request to the extent it seeks documents and information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable exemption, immunity, or privilege from discovery.

REQUEST FOR PRODUCTION NO. 6:

All documents created, composed, or generated during or after the review of Defendants.

RESPONSE:

The NRA objects to this Request on the grounds that it is overbroad, unduly burdensome, and fails to describe with reasonable particularity the documents requested because it generally seeks "all documents," in apparent disregard of FRA's duty to protect the information entrusted to it by hundreds (or thousands) of clients for whom it has performed services in the preceding six months. In addition, the NRA objects to this Request as vague and ambiguous to the extent that it seeks documents pertaining to FRA's "review of Defendants." The NRA also objects to this Request to the extent it seeks Confidential Information as that term is defined by the Services Agreement; the disclosure of Confidential Information does not, and shall not be deemed to, waive the protections afforded such information pursuant to the Services Agreement. Additionally, the NRA objects to this Request to the extent it seeks documents and information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable exemption, immunity, or privilege from discovery.

REQUEST FOR PRODUCTION NO. 7:

All notes or compilations of data that refer or relate to Defendants. This request includes, but is not limited to, (a) notes that were taken by FRA during the course of its review and (b) summaries of those notes that were subsequently generated.

RESPONSE:

The NRA objects to this Request on the grounds that it is overbroad, unduly burdensome, and fails to describe with reasonable particularity the documents requested because it generally

seeks "all notes or compilations of data." In addition, the NRA objects to this Request to the extent it seeks Confidential Information as that term is defined by the Services Agreement; the disclosure of Confidential Information does not, and shall not be deemed to, waive the protections afforded such information pursuant to the Services Agreement. Additionally, the NRA objects to this Request to the extent it seeks documents and information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable exemption, immunity, or privilege from discovery.

REQUEST FOR PRODUCTION NO. 8:

All documents related to the NRA's retention of FRA to perform the review of Defendants.

RESPONSE:

The NRA objects to this Request on the grounds that it is overbroad, unduly burdensome, and fails to describe with reasonable particularity the documents requested because it generally seeks "all documents." In addition, the NRA objects to this Request as vague and ambiguous to the extent that it seeks documents pertaining to FRA's "review of Defendants." The NRA also objects to this Request to the extent it seeks Confidential Information as that term is defined by the Services Agreement; the disclosure of Confidential Information does not, and shall not be deemed to, waive the protections afforded such information pursuant to the Services Agreement. Additionally, the NRA objects to this Request to the extent it seeks documents and information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable exemption, immunity, or privilege from discovery.

REQUEST FOR PRODUCTION NO. 9:

All documents relating to Defendants that were created via transcription.

RESPONSE:

The NRA objects to this Request on the grounds that it is overbroad, unduly burdensome, and fails to describe with reasonable particularity the documents requested because it generally seeks "all documents." In addition, the NRA objects to this Request as duplicative of Request Nos. 1, 2, 6 and 7. The NRA also objects to this Request to the extent it seeks Confidential Information as that term is defined by the Services Agreement; the disclosure of Confidential Information does not, and shall not be deemed to, waive the protections afforded such information pursuant to the Services Agreement. Additionally, the NRA objects to this Request to the extent it seeks documents and information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable exemption, immunity, or privilege from discovery.

REQUEST FOR PRODUCTION NO. 10:

All documents and materials relied upon during the review of Defendants.

RESPONSE:

The NRA objects to this Request on the grounds that it is overbroad, unduly burdensome, and fails to describe with reasonable particularity the documents requested because it generally seeks "all documents and materials." In addition, the NRA objects to this Request as vague and ambiguous to the extent that it seeks documents pertaining to FRA's "review of Defendants." The NRA also objects to this Request to the extent it seeks Confidential Information as that term is defined by the Services Agreement; the disclosure of Confidential Information does not, and shall not be deemed to, waive the protections afforded such information pursuant to the Services Agreement. Additionally, the NRA objects to this Request to the extent it seeks documents and information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable exemption, immunity, or privilege from discovery.

REQUEST FOR PRODUCTION NO. 11:

All documents which contain analysis or evaluation of Defendants.

RESPONSE:

The NRA objects to this Request on the grounds that it is overbroad, unduly burdensome, and fails to describe with reasonable particularity the documents requested because it generally seeks "all documents." In addition, the NRA objects to this Request as vague and ambiguous to the extent that it seeks documents pertaining to FRA's "review of Defendants." The NRA also objects to this Request to the extent it seeks Confidential Information as that term is defined by the Services Agreement; the disclosure of Confidential Information does not, and shall not be deemed to, waive the protections afforded such information pursuant to the Services Agreement. Additionally, the NRA objects to this Request to the extent it seeks documents and information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable exemption, immunity, or privilege from discovery.

REQUEST FOR PRODUCTION NO. 12:

All written guidelines, procedures, and policies relied upon by FRA during its review of Defendants.

RESPONSE:

The NRA objects to this Request on the grounds that it is overbroad, unduly burdensome, and fails to describe with reasonable particularity the documents requested because it generally seeks "all documents." In addition, the NRA objects to this Request as vague and ambiguous to the extent that it seeks documents pertaining to FRA's "review of Defendants." The NRA also objects to this Request as duplicative of Request No. 10. Additionally, the NRA also objects to this Request to the extent it seeks Confidential Information as that term is defined by the Services

Agreement; the disclosure of Confidential Information does not, and shall not be deemed to, waive the protections afforded such information pursuant to the Services Agreement. The NRA objects to this Request to the extent it seeks documents and information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable exemption, immunity, or privilege from discovery.

REQUEST FOR PRODUCTION NO. 13:

All presentations, memoranda, reports and written figures that refer or relate to Defendants.

RESPONSE:

The NRA objects to this Request on the grounds that it is overbroad, unduly burdensome, and fails to describe with reasonable particularity the documents requested because it generally seeks "all documents." In addition, the NRA objects to this Request as vague and ambiguous to the extent that the Request fails to provide any definition or description for the term "written figures." The NRA also objects to this Request to the extent it seeks Confidential Information as that term is defined by the Services Agreement; the disclosure of Confidential Information does not, and shall not be deemed to, waive the protections afforded such information pursuant to the Services Agreement. Additionally, the NRA objects to this Request to the extent it seeks documents and information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable exemption, immunity, or privilege from discovery.

REQUEST FOR PRODUCTION NO. 14:

All documents obtained by FRA from Defendants during its review of Defendants.

RESPONSE:

The NRA objects to this Request on the grounds that it is overbroad, unduly burdensome, and fails to describe with reasonable particularity the documents requested because it generally

seeks "all documents." In addition, the NRA objects to this Request as unduly burdensome on the basis that Defendants themselves are already in possession of all documents which it furnished to FRA. Defendants' Request to non-party FRA, to collect and produce those documents which Defendants already possess, borders on harassment and bad-faith gamesmanship; Defendants lack any basis for shifting to non-party FRA the burden of identifying Defendants' own documents. FRA also objects to this Request as vague and ambiguous to the extent that it seeks documents pertaining to FRA's "review of Defendants." The NRA also objects to this Request to the extent it seeks Confidential Information as that term is defined by the Services Agreement; the disclosure of Confidential Information does not, and shall not be deemed to, waive the protections afforded such information pursuant to the Services Agreement. Additionally, the NRA objects to this Request to the extent it seeks documents and information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable exemption, immunity, or privilege from discovery.

REQUEST FOR PRODUCTION NO. 15:

All documents the refer or relate to the objectives and parameters of FRA's review of Defendants.

RESPONSE:

The NRA objects to this Request on the grounds that it is overbroad, unduly burdensome, and fails to describe with reasonable particularity the documents requested because it generally seeks "all documents," which refer or relate to objectives and parameters of FRA's review, without limitation as to the source of such objectives and parameters. The parameters of FRA's review were set in part by Defendants, on the basis of the information and materials that it did or did not make available to FRA, and the guidelines it communicated to FRA. The NRA also objects to this

Request as vague and ambiguous to the extent that it seeks documents pertaining to FRA's "review of Defendants." In addition, the NRA also objects to this Request to the extent it seeks Confidential Information as that term is defined by the Services Agreement; the disclosure of Confidential Information does not, and shall not be deemed to, waive the protections afforded such information pursuant to the Services Agreement. Additionally, the NRA objects to this Request to the extent it seeks documents and information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable exemption, immunity, or privilege from discovery.

REQUEST FOR PRODUCTION NO. 16:

All documents that refer or relate to NRA's efforts to comply with IRS requirements for nonprofit entities.

RESPONSE:

The NRA objects to this Request on the grounds that it is overbroad, unduly burdensome, and fails to describe with reasonable particularity the documents requested because it generally seeks "all documents" that may refer or relate to a subject about which FRA lacks the information or insight required to make an assessment as to responsiveness. The NRA further objects to this Request to the extent that it seeks documents, information, analyses or conclusions outside the scope of FRA's engagement. The NRA also objects to this Request to the extent it seeks Confidential Information as that term is defined by the Services Agreement; the disclosure of Confidential Information does not, and shall not be deemed to, waive the protections afforded such information pursuant to the Services Agreement. Additionally, the NRA objects to this Request to the extent it seeks documents and information protected from disclosure by the attorney-client

privilege, the work product doctrine, or any other applicable exemption, immunity, or privilege from discovery.

REQUEST FOR PRODUCTION NO. 17:

All documents that relate to NRA's efforts to comply with the requirements under New York State law governing nonprofit entities registered in New York State.

RESPONSE:

The NRA objects to this Request on the grounds that it is overbroad, unduly burdensome, and fails to describe with reasonable particularity the documents requested because it generally seeks "all documents." The NRA further objects to this Request to the extent that it seeks documents, information, analyses or conclusions outside the scope of FRA's engagement. The NRA also objects to this Request to the extent it seeks Confidential Information as that term is defined by the Services Agreement; the disclosure of Confidential Information does not, and shall not be deemed to, waive the protections afforded such information pursuant to the Services Agreement. Additionally, the NRA objects to this Request to the extent it seeks documents and information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable exemption, immunity, or privilege from discovery.

REQUEST FOR PRODUCTION NO. 18:

All documents that relate to expenses of Wayne LaPierre that were paid for or reimbursed by the NRA.

RESPONSE:

The NRA objects to this Request on the grounds that it is overbroad, unduly burdensome, and fails to describe with reasonable particularity the documents requested because it generally seeks "all documents," including documents which are already in the possession of AMc. The

NRA also objects to this Request because it seeks documents that are irrelevant to the claims or defenses at issue in this litigation, and the documents it seeks are unlikely to lead to the discovery of admissible evidence. The NRA further objects to this Request to the extent that it seeks documents, information, analyses or conclusions outside the scope of FRA's engagement. In addition, the NRA objects to this Request to the extent it seeks Confidential Information as that term is defined by the Services Agreement; the disclosure of Confidential Information does not, and shall not be deemed to, waive the protections afforded such information pursuant to the Services Agreement. Additionally, the NRA objects to this Request to the extent it seeks documents and information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable exemption, immunity, or privilege from discovery.

REQUEST FOR PRODUCTION NO. 19:

All documents that relate to the issue of potential termination or severance fees that would be payable to Defendants upon termination of the NRA/AMc Services Agreement.

RESPONSE:

The NRA objects to this Request on the grounds that it is overbroad, unduly burdensome, and fails to describe with reasonable particularity the documents requested because it generally seeks "all documents." The NRA further objects to this Request to the extent that it seeks documents, information, analyses or conclusions outside the scope of FRA's engagement. The NRA also objects to this Request to the extent it seeks Confidential Information as that term is defined by the Services Agreement; the disclosure of Confidential Information does not, and shall not be deemed to, waive the protections afforded such information pursuant to the Services Agreement. Additionally, the NRA objects to this Request to the extent it seeks documents and

information protected from disclosure by the attorney-client privilege, the work product doctrine, or any other applicable exemption, immunity, or privilege from discovery.

Dated: August 29, 2019

Respectfully submitted,

NATIONAL RIFLE ASSOCIATION OF AMERICA
By counsel

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2019, I caused the foregoing Responses and Objections to Defendants Subpoena Duces Tecum to be served via electronic mail and first-class mail upon:

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EXHIBIT 7

EXHIBIT 8

2012 WL 6212898
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United States District
Court, D. Massachusetts.

COLUMBIA DATA
PRODUCTS, INC., Plaintiff,
v.
AUTONOMY CORPORATION
LIMITED, et al., Defendants.

Civil Action No. 11–12077–NMG.
|
Dec. 12, 2012.

Attorneys and Law Firms

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MEMORANDUM OF DECISION AND ORDER ON DEFENDANT'S MOTION TO COMPEL AND ON PLAINTIFF'S MOTION TO STRIKE

DEIN, United States Magistrate Judge.

I. *INTRODUCTION*

***1** The plaintiff, Columbia Data Products, Inc. ("CDP"), has brought this action against Autonomy Corporation Limited ("Autonomy") and its predecessors, Iron Mountain Incorporated and Iron Mountain Information Management, Inc. (collectively, "Iron Mountain"),[1] alleging that the defendants wrongfully copied and shipped CDP's computer software, breached the terms of the parties' software license agreement, and engaged in various misrepresentations aimed at covering up their improper conduct. Prior to filing its lawsuit, CDP exercised its right under the parties' license agreement to have an independent accounting firm perform an audit of the defendants' books and records in order to determine the extent to which the defendants had failed to pay royalty fees due to CDP for the alleged misuse of its software. The audit was performed by the outside accounting firm of PriceWaterhouseCoopers LLC ("PWC"), which concluded that the defendants owed CDP in excess of $23 million in unpaid royalty fees. By its claims in this action, CDP is seeking, *inter alia,* at least $23 million in actual damages based on the results of PWC's audit. CDP is also alleging, based in part on information gained by PWC during the audit, that Iron Mountain has engaged in unfair and deceptive acts and practices by "covering up" the alleged misuse of its software. The defendants are challenging the completeness and validity of the audit, as well as CDP's claim that PWC was acting as an "independent" auditor at the time it performed its work.

The matter is presently before the court on the "Defendant's Motion to Compel Production of Documents" (Docket No. 28), by which Autonomy is seeking an order compelling the plaintiff to produce documents that relate to PWC's audit and are responsive to Autonomy's first set of requests for the production

of documents. According to Autonomy, the documents at issue include drafts of PWC's audit report, emails among PWC and CDP personnel regarding the audit, and emails among CDP's own employees concerning the audit.[2] The plaintiff claims that the disputed materials have been properly withheld pursuant to the work product doctrine and the attorney-client privilege. As described below, this court finds that the plaintiff has failed to establish that the documents at issue constitute work product or are privileged. Moreover, assuming, *arguendo,* that the materials are somehow protected from discovery, the plaintiff has failed to prove that any such protections have not been waived. Accordingly, and for all the reasons described herein, Autonomy's motion to compel is ALLOWED.

Also pending before the court is the plaintiff's "Motion to Strike Affidavit of David A. Frischling" (Docket No. 34), by which CDP is seeking an order striking the Affidavit of Iron Mountain's Corporate Counsel, David A. Frischling ("Frischling"), which was submitted by the defendants in support of Autonomy's motion to compel. CDP contends that this court should strike the Affidavit and award CDP attorney's fees and costs incurred in connection with the preparation of the motion because the defendants failed to disclose Frischling as a witness in its initial disclosure or in any supplemental disclosures. For the reasons described below, this court finds that the defendants have not violated their disclosure obligations and that no such sanctions are warranted. Therefore, the plaintiff's motion to strike Frischling's Affidavit is DENIED.

II. *SCOPE OF THE RECORD —MOTION TO STRIKE*

*2 Before addressing the merits of the dispute, it is necessary to determine the scope of the record. In support of its motion to compel, Autonomy has submitted the Affidavit of David A. Frischling, the Corporate Counsel and Manager, Intellectual Property and Technology, for defendant Iron Mountain, Incorporated. Therein, Frischling recounts certain of his pre-litigation communications with representatives of CDP regarding the parties' efforts to resolve their dispute over royalties allegedly owed to CDP and concerning CDP's selection of PWC to perform an audit of the defendants' books and records. He also describes a Non–Disclosure Agreement that PWC entered into with Iron Mountain prior to performing its auditing work. CDP has moved to strike Frischling's Affidavit, and for an award of attorney's fees and costs incurred in connection with the preparation of the motion, on the grounds that the defendants failed to disclose Frischling as a potential witness in their initial disclosures under Fed.R.Civ.P. 26(a)(1)(A), or in a supplemental disclosure pursuant to Fed.R.Civ.P. 26(e)(1). CDP contends that such relief is particularly appropriate because the defendants represented that Frischling had no personal knowledge regarding the dispute, when in fact his Affidavit allegedly reveals that he has relevant personal knowledge. However, CDP has not established that the defendants' failure to disclose Frischling as a witness, either initially or by way of a supplemental disclosure, violated their obligations under the applicable rules. Moreover, even assuming the defendants'

conduct did constitute a violation, CDP has not shown that it merits the sanctions urged by CDP in its motion to strike.

Duty to Disclose Witnesses

Pursuant to Rule 26(a)(1)(A), a party is required to disclose witnesses that "the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." Similarly, under Rule 26(e), a party is required to supplement its disclosures "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing[.]" As explained in the Advisory Committee Notes to Rule 26, "[a] party is no longer obligated to disclose witnesses or documents, whether favorable or unfavorable, that it does not intend to use." Fed.R.Civ.P. 26, Advisory Comm. Notes, 2000 Amendment. Moreover, "[t]he disclosure obligation applies to 'claims and defenses,' and therefore requires a party to disclose information it may use to support its denial or rebuttal of the allegations, claim, or defense of another party." *Id.* Accordingly, even if an individual has personal knowledge of facts relevant to the parties' claims and defenses, a party is not obligated to disclose the individual if the party does not intend to use the individual to support its claims or defenses. *See, e.g., Gomas v. City of New York,* No. 07–CV–4179 (ARR), 2009 WL 962701, at *2 (E.D.N.Y. Apr.8, 2009) (unpub.op.) (noting that issue for purposes of automatic disclosure rule is not whether information is discoverable, but whether a party may use it to support its claims or defenses); *Ruddell v. Weakley County Sheriff's Dep't,* No. 1:07–cv–01159–JGB–egb, 2009 WL 7355081, at *1 (W.D.Tenn. May 22, 2009) (unpub.op.) ("The plain language of the Rule makes clear that the disclosing party must only disclose materials if *that party* intends to use the materials to support its claims or defenses").

***3** In the instant case, the defendants insist that they have no intention of using Frischling as a witness to support their defenses, and that they conveyed that intention to the plaintiff. (*See* Def. Opp. to Mot. to Strike (Docket No. 42) at 2, 10). They also assert that their reliance on Frischling's testimony to support their motion to compel discovery of withheld documents does not alter the fact that they do not intend to use him as a witness to support their defense. (*See id.* at 10). Moreover, the defendants argue that even if their use of Frischling in connection with the parties' discovery dispute potentially triggered an obligation to supplement their initial disclosures, Frischling's identity and the information contained in his Affidavit already were known to the plaintiff, and, therefore, the defendants were not required to formally disclose him pursuant to Rule 26(e). (*Id.*). This court finds all of these arguments persuasive.

As an initial matter, this court has no reason to question the defendants' representation that they did not intend to use Frischling as a witness to support their defense of this action. It does not appear that he had personal knowledge of facts regarding the parties' principal claims or defenses, or that the relevant information could not be introduced at trial through other witnesses. Consequently, it does not appear

at this juncture that the defendants will need to rely on Frischling's testimony in order to argue the merits of the dispute or to present their defense at trial. Accordingly, there was no obligation to include Frischling in the defendants' initial disclosures even if he did have personal knowledge of the claims and defenses at issue in the litigation.

It is undisputed that Frischling does not have personal knowledge about the facts relating to the defendants' alleged wrongful copying and shipment of CDP's software, all of which allegedly occurred before Frischling joined Iron Mountain and are at the heart of the plaintiff's claims. (*See* Pl. Reply (Docket No. 62) at 2–3). Although the plaintiff argues that Frischling may have personal knowledge about events which transpired in early 2010, while he was in-house counsel of Iron Mountain, and which are relevant to the defendants' "unlawful scheme to cover up their misconduct" which forms the basis of plaintiff's 93A claim (*id.* at 3 (emphasis omitted)), Frischling is not named in the complaint as having participated in any such wrongful conduct. (*See* Compl. ¶¶ 47–59). Moreover, to the extent that the 93A claim is based on alleged misrepresentations about what software was shipped or to whom, there is no evidence that Frischling either made such misrepresentations or had personal knowledge about the veracity of any such statements. Furthermore, even if, as CDP argues, Frischling has knowledge of facts relating to the defendants' defenses, such as details of the parties' communications about the PWC audit and their efforts to resolve their royalty dispute, there is no indication that this renders Frischling a necessary witness or that the defendants cannot rely on the testimony of others to establish the relevant facts.[3] In short, this court has no reason to challenge the defendants' entirely plausible representation that they did not intend to call their counsel as a witness at trial.

***4** Furthermore, there is no question that Frischling was known to CDP even before this lawsuit was filed. Not only was CDP a party to the pre-litigation communications described by Frischling in his Affidavit, but CDP also listed Frischling as a witness in its own Rule 26(a)(1) disclosure statement. (*See* Frischling Aff. ¶¶ 3, 4, 6 and Ex. B thereto; Aff. of Jason B. Baim in Support of Opp. to Pl. Mot. to Strike (Docket No. 44), Ex. 1 ¶ A(14)). Thus, to the extent the defendants' decision to use Frischling's testimony to support their motion to compel made him a person whom the defendants "may use to support [their] claims or defenses," his identity had "otherwise been made known" to the plaintiff and he was not required to be named in a supplemental disclosure under Rule 26(e).

Requested Relief

Even assuming the defendants' failure to disclose Frischling did amount to a violation of Rule 26, CDP has not shown that such conduct would justify its requested relief. CDP is seeking to strike Frischling's Affidavit pursuant to Fed.R.Civ.P. 37(c)(1). That Rule provides in relevant part that "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or

is harmless." Fed.R.Civ.P. 37(c)(1). Thus, Rule 37 establishes "a self executing sanction which enforces the disclosures required under [Rule 26(a)]." *BASF Corp. v. Sublime Restorations, Inc.*, —— F.Supp.2d ——, 2012 WL 3059374, at *3 (D.Mass. July 26, 2012) (quoting *Acadia Ins. Co. v. Cunningham,* 771 F.Supp.2d 172, 175 (D.Mass.2011)). "Unless the failure to disclose is substantially justified or harmless, the failure to disclose triggers the imposition of sanctions under Rule 37(c)(1)." *Id.* (quotations and citations omitted).

Here, any disclosure violation resulting from the defendants' failure to list Frischling as a potential witness was harmless. "The Advisory Committee Notes to the 1993 Amendments to Rule 37(c) 'suggest a fairly limited concept of harmless.' " *Id.* (quoting *Gagnon v. Teledyne Princeton, Inc.*, 437 F.3d 188, 197 (1st Cir.2006)) (internal quotations omitted). However, because CDP communicated with Frischling about the subjects described in his Affidavit, and listed Frischling as a witness in its own disclosure statement, "the circumstances in the case at bar 'fall squarely within the reach of at least one of the illustrative examples, to wit, a potential witness known to all parties.' " *Id.* (quoting *Acadia Ins. Co.*, 771 F.Supp.2d at 177) (additional quotations and citation omitted). Accordingly, even if the defendants had failed to comply with their disclosure obligations, their conduct would not warrant the severe sanctions urged by the plaintiff in its motion to strike. CDP's motion is therefore DENIED, and the evidence set forth in Frischling's Affidavit is incorporated into the following Statement of Facts. [4]

III. *STATEMENT OF FACTS*

The License Agreement

***5** Plaintiff CDP develops, markets, distributes and supports computer software products. (Welsh Aff. ¶ 2). The CDP product at issue in this case enables computers and servers to back up "open files" in real time. (*Id.*). "Open files" are files that are in use and are being changed by users. (*Id.*). Because such files would not be backed up without the use of CDP's open file backup software, CDP's product is critical to users. (*Id.*).

CDP maintains all rights and interest in the federally registered copyrights covering its open file backup software, and it has licensed its software to some of the largest computer companies in the world. (*Id.*). In March 2005, CDP entered into an OEM Partner Agreement ("License Agreement") with Iron Mountain's predecessor, Connected Corporation ("Connected"), pursuant to which CDP granted Connected (and Iron Mountain as Connected's successor) a license to integrate, market, and distribute CDP's open file backup software in the manner and to the extent set forth in the Agreement. (*See* Pl.Ex. A ¶¶ 1–4). Significantly, pursuant to the License Agreement, the parties agreed that Iron Mountain would pay CDP a royalty of 10% of the net revenue received for each Iron Mountain server product listed on Exhibit B to the Agreement, and a royalty of 10% of the monthly net revenue generated for each maintenance, service, or subscription contract Iron Mountain received for those

server products. (*Id.* at Ex. A ¶ 8(a)-(b)). They also agreed that CDP would have the right to retain an independent accounting firm to conduct an audit of Iron Mountain's books and records as follows:

> [Iron Mountain] shall prepare and maintain detailed books and records, in accordance with generally accepted accounting practices and procedures consistently applied, relative to all licensing and sublicensing of the PRODUCT, the Documentation, and OS Ports. Such books and records shall be reviewed not more frequently than once during each twelve (12) month period. Representatives of the auditing firm shall protect the confidentiality of [Iron Mountain's] information and abide by [Iron Mountain's] reasonable security regulations while on [Iron Mountain's] premises. In the event CDP auditors determine that [Iron Mountain] has underreported or underpaid royalty fees due to CDP, [Iron Mountain] shall immediately pay such underpaid amount to CDP. *If the underpayment is more than 5% for three consecutive calendar quarters, [Iron Mountain] shall also pay all costs of performing the audit.* Failure to promptly pay any undisputed fees constitutes grounds for termination of this AGREEMENT by CDP. *For a minimum of two (2) years after the end of each year (including after termination of this AGREEMENT), CDP will have the right to have a recognized independent accounting firm conduct an audit of such books and records from time to time.* This audit shall be conducted at CDP's expense, during [Iron Mountain's] normal business[.]

***6** (*Id.* at Ex. A ¶ 8(e)) (emphasis added). Autonomy's motion to compel arises out of PWC's performance of a royalty audit pursuant to this provision of the License Agreement, after which PWC determined that the defendants owed CDP over $23 million in underpaid royalty fees and were responsible for all costs incurred in performing the audit.

The Parties' Dispute Over Royalty Payments

In 2008, CDP determined that it had not received any royalty payments under the License Agreement, and it began making efforts to obtain royalty information from Iron

Mountain. (Pl.Ex. B). In August 2008, Iron Mountain advised CDP that, to the best of its knowledge, the Connected server product which had incorporated CDP's software had not been a success, and that Iron Mountain was using "LiveVault," another server which incorporated CDP's software, as its primary server product. (*See* Welsh Aff. ¶ 4; Pl.Ex. B). Iron Mountain also advised CDP that only a handful of Connected Server products had been shipped, although the exact number was unknown. (*Id.*). According to CDP, the plaintiff relied on these statements, and believed that either there were no royalties to report under the License Agreement or any royalties relating to the License Agreement were reported to CDP in Iron Mountain's LiveVault royalty reports. (Welsh Aff. ¶ 4).

CDP claims that in the spring of 2010, it discovered from the defendants' own documents that, in contrast the defendant's prior representations, Iron Mountain had shipped Connected server products containing CDP software. (*Id.* ¶ 5). It also claims that at about the same time, CDP learned of facts indicating that the defendants had been secretly integrating CDP's software into products that were not authorized under the terms of the License Agreement. (*Id.* ¶ 8). After CDP confronted the defendants regarding these claims, the parties entered into negotiations aimed at reaching a settlement agreement addressing the issue of royalty payments. (*See, e.g.,* Pl.Exs. C, E, G, K, O, P). As the parties' settlement communications demonstrate, both parties understood that in the event no settlement could be reached, litigation was likely to follow. (*See, e.g.,* Welsh Aff. ¶¶ 14–15, 17–18; Pl.Ex. K ¶¶ 11, 15; Pl.Ex. N at 1).

By late 2010, it became increasingly clear that the parties had very different views on how royalties were intended to be calculated under the License Agreement, and on the amount of royalties, if any, that were due to CDP from Iron Mountain.[5] (*See, e.g.,* Frischling Aff. ¶¶ 3–4; Pl.Ex. N). Also by that time, CDP believed that litigation with the defendants was a real possibility. (Welsh Aff. ¶ 10). Accordingly, the plaintiff sought legal assistance from its outside counsel, and it retained litigation counsel from Greenberg Traurig, LLP, the firm that is representing CDP in the present action. (*Id.*). However, it appears that CDP did not advise Iron Mountain that litigation counsel was involved in any way with these efforts to resolve the dispute over royalty payments. (Frischling Aff. ¶ 6).

PWC's Performance of the Royalty Audit

*7 By February 2011, CDP concluded that the parties had reached an impasse regarding the royalty issue, and it decided to exercise its right under the License Agreement to conduct an audit of the defendants' books and records. (Welsh Aff. ¶ 12). According to CDP, it never would have pursued an audit if it had not believed that there was a real possibility of litigation, and that an audit was necessary to "give CDP the full story" with respect to Iron Mountain's use of its software. (*Id.* ¶ 13). Consequently, unbeknownst to Iron Mountain, on February 25, 2011, counsel from Greenberg Traurig, acting on behalf of CDP, entered into an engagement letter with PWC whereby PWC agreed to perform certain services "to assist [Greenberg Traurig] in connection with

[its] giving legal advice to [CDP]." (*Id.* ¶ 12; Pl.Ex. I at 1). The letter, which is addressed to Greenberg Traurig and signed by PWC, described the scope of the services that PWC would provide as follows:

> You and your Client are engaging us to provide the following services (the "Services"):
>
> You have engaged us to perform certain procedures in order to analyze and quantify software license fees payable to you by Iron Mountain ("IRM"), in respect to CDP's open file handler tool deployed in IRM's Connected Backup product.
>
> We will perform the Services in accordance with the Standards for Consulting Services established by the American Institute of Certified Public Accountants ("AICPA"). *Accordingly, we will provide no opinion, attestation or other form of assurance with respect to our work or the information upon which our work is based.* The procedures we will be performing under this Agreement will not constitute an examination or a review in accordance with generally accepted auditing standards or attestation standards. We will not audit or otherwise verify the information supplied to us in connection with any engagement under this Agreement, from whatever source, except as may be specified in this Agreement.
>
> *The Services do not include the provision of legal advice and PwC makes no representations regarding questions of legal interpretation.* Client should consult with its attorneys with respect to any legal matters or items that require legal interpretation, under federal, state or other type of law or regulation.

(Pl.Ex. I at 1 (emphasis added)). Thus, although, as detailed below, PWC ultimately was retained to provide expert testimony on behalf of CDP in this action, as of February 2011, when PWC agreed to perform a royalty audit on behalf of CDP, it expressly declined to render any opinions or assurances with respect to its work, or to provide legal advice to CDP.

CDP took no steps to inform Iron Mountain that PWC had been retained by litigation counsel, or that it was involved in any capacity other than as an independent auditor pursuant to the parties' agreements. Thus, on March 18, 2011, CDP, through its business lawyer who had been involved in discussions to date, informed Iron Mountain that, pursuant to the rights granted to it in the License Agreement, "CDP has chosen PricewaterhouseCoopers to perform an audit of Iron Mountain's books and records relating to all licensing and sublicensing of CDP's products." (Pl.Ex. J). The contact person was identified as an in-house counsel, not litigation counsel. (*Id.*). CDP also acknowledged the sensitivity of the audit, and worked with Iron Mountain to draft a NonDisclosure Agreement ("NDA") that would maintain the confidentiality of the information provided to PWC by Iron Mountain. (*See* Frischling Aff. ¶¶ 4–5; Def. Ex. B). The NDA, which was executed by Iron Mountain and PWC in April 2011, explained that CDP wished to exercise its rights under the License Agreement to examine Iron Mountain's books and records relative to the licensing and sublicensing of CDP's software, and that CDP had engaged PWC "to conduct an audit of Iron Mountain pursuant to Section 8(e)

of the [License Agreement]." (Def. Ex. C at 1). Additionally, pursuant to the NDA, PWC agreed to maintain as confidential information all of the information provided to it by Iron Mountain in the course of the audit process, and expressly covenanted that it would use the confidential information "solely for the purposes of exercising CDP's audit rights under the [License Agreement]." (*Id.; see also* Frischling Aff. ¶ 5).

***8** At all times before and during the PWC audit, PWC was described to Iron Mountain as an "independent" auditor that had been retained by CDP for the sole purpose of exercising its audit rights under the terms of the License Agreement. (Frischling Aff. ¶ 6). Neither CDP nor PWC ever advised Iron Mountain that PWC had been retained by plaintiff's counsel, and they never informed Iron Mountain that PWC had been retained to provide expert advice in anticipation of litigation or to provide expert testimony during any such litigation. (*Id.*). According to Iron Mountain's in-house counsel, he relied on the representations of PWC's independence when he arranged for PWC to have access to sensitive financial information and to conduct interviews of Iron Mountain personnel. (*Id.*). The defendants claim that Iron Mountain never would have allowed PWC to conduct the audit in the manner that it did if Iron Mountain had been advised that PWC had been retained by CDP's litigation counsel or was acting as an expert for anticipated litigation. (*Id.*).

PWC conducted the royalty audit pursuant to the License Agreement and the NDA during the time period from February through June 2011. (*See* Def. Ex. D at 1). However, as PWC explained in a letter to Autonomy dated July 22, 2011, the auditors were unable to complete the work because they required additional information from the defendants. (*See* Def. Ex. D at 1–2). Nevertheless, on August 12, 2011, PWC issued an interim report to CDP based on the facts that had been gathered to date. (*See id.* at 2; Def. Ex. E). As described in its cover letter to CDP enclosing the interim report, PWC determined that Iron Mountain had included CDP software in products that were not authorized under the terms of the License Agreement, and that it owed CDP royalties of over $23 million. (Def. Ex. E at 1). It also determined that Iron Mountain's underpayment of royalties was sufficiently extensive to trigger its obligation to reimburse CDP for costs related to PWC's performance of the audit. (*Id.*).

PWC also specified in its cover letter that its report "and all PwC deliverables are intended solely for the management and Board of Directors of CDP for their internal use and benefit[,]" and could not be discussed with or disclosed to third parties without PWC's prior consent. (*Id.* at 2). PWC did agree that CDP personnel could *"discuss"* the contents of the report with the defendants, but it did not authorize CDP to distribute the report to the defendants unless written releases of PWC had been received from them first. (*Id.* (emphasis in original)). Notwithstanding these restrictions, CDP's counsel provided a copy of the draft report to Autonomy on October 10, 2011 "[t]o facilitate [the parties'] efforts to resolve the issues that have been raised concerning amounts due to [CDP]." (Pl.Ex. R at 1). However, the parties were not able to resolve those issues, and this litigation ensued.

Events Leading to the Present Discovery Dispute

***9** CDP filed its complaint in this action on November 23, 2011. Therein, CDP has asserted claims against the defendants for copyright infringement, breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair and deceptive trade practices pursuant to Mass. Gen. Laws ch. 93A. (Compl. (Docket No. 1) at Counts I–IV). In its breach of contract claim, CDP asserts that it "exercised its right under the License Agreement to audit Defendants' books and records" and that it "retained the independent accounting firm of [PWC] to perform the royalty audit of Defendants' records." (*Id.* ¶¶ 29–30). CDP further alleges that "[a]fter a detailed review of the records made available by Defendants and interviews of Iron Mountain personnel, PWC determined the estimated royalties due to be in excess of $23 million." (*Id* . ¶ 31). Thus, in addition to seeking "Defendants' payment of all costs of performing the audit as provided for in the License Agreement[,]" (*id.* ¶ 35), CDP is seeking actual damages of at least $23 million. (*See id.* at 11). In addition to relying on PWC's independent audit of Iron Mountain's books and its interviews with Iron Mountain's employees in connection with its breach of contract claim, CDP also relies on "Price Waterhouse's interview with Bob Mulcahey, Defendants' Director of Engineering" in connection with its contention that the defendants have violated Mass. Gen. Laws ch. 93A. (*Id.* ¶ 54). Similarly, in its initial disclosure statement provided under Fed.R.Civ.P. 26(a) (1), CDP characterized PWC as an "independent" auditor that had conducted a royalty audit pursuant to the parties' License Agreement, and it identified "[d]ocuments concerning royalty audit performed by PWC" among the documents that it may use to support its claims in this action. (*See* Def. Ex. G at 17–18). Thus, in the early stages of this litigation, CDP consistently maintained that the audit was conducted by PWC, an independent auditor, pursuant to the Licensing Agreement, and has relied on the information gathered by the "independent auditor" to support its claims.

PWC's status changed in June 2012, when Greenberg Traurig, acting on its own behalf and as counsel for CDP, retained PWC as a testifying expert in this case. (*See* Def. Ex. Q). Specifically, in a June 5, 2012 letter from PWC to Greenberg Traurig, PWC agreed to update its interim audit report so that it could be used for expert witness testimony in this matter. (*Id.*). It also agreed to create a rebuttal expert report, and to provide expert witness deposition and trial testimony. (*Id.*). As detailed below, CDP has since taken the position that it should not be required to produce any documents regarding the royalty audit beyond the materials specified in Fed.R.Civ.P. 26(b)(4) relating to discovery involving expert witnesses. [6] (*See* Pl. Supp. Ex. C at 1–2; Pl. Opp. Mem. (Docket No. 45) at 9–10, 17–20).

***10** On June 18, 2012, CDP served its response to Autonomy's First Set of Requests for Production of Documents. (*See* Pl. Supp. Exs. A & B). Therein, CDP objected to requests seeking documents underlying and relating to the royalty audit, and declined to produce any documents responsive to those requests other than the PWC audit report

and communications between PWC and the defendants. (*See* Pl. Supp. Ex. B at 20–21). The parties subsequently engaged in a meet and confer process, and CDP ultimately agreed to produce additional documents, but with certain limitations. (*See* Def. Exs. K–N). Specifically, CDP informed the defendants that PWC was expected to testify as CDP's expert witness, and that, in accordance with Fed.R.Civ.P. 26(b)(4), CDP would produce communications regarding PWC's compensation; communications identifying facts or data provided to PWC by counsel; communications identifying assumptions provided to PWC by counsel; communications between PWC and Defendants; and the PWC royalty audit. (Def. Ex. N at 1–2). However, CDP asserted that under Rule 26(b)(4), it was not obligated to produce drafts of PWC's report (presumably beyond the draft already produced) or any communications between PWC and CDP's counsel other than those specified in the Rule. (*Id.*). Because the plaintiff refused to comply with the defendants' requests for additional documents relating to the PWC audit, Autonomy filed the instant motion to compel. (*See* Baim Aff. ¶¶ 15–16).

Additional factual details relevant to this court's analysis are described below where appropriate.

IV. *ANALYSIS*

By its motion, Autonomy is seeking an order compelling CDP to produce documents that are responsive to its First Set of Requests for the Production of Documents and relate to the royalty audit performed by PWC pursuant to the parties' License Agreement. As described by Autonomy, the disputed documents consist of drafts of PWC's interim audit report, emails between PWC and CDP relating to the audit, and emails among CDP's own employees concerning the audit .[7] (Def. Mem. (Docket No. 29) at 10). The defendants argue that the disputed documents are discoverable because the privileges asserted by the plaintiff pursuant to Fed.R.Civ.P. 26 do not apply, and even if they did, they were waived by CDP's decision to place PWC's audit at issue in the litigation and by its voluntary disclosure of the interim audit report to the defendants.

CDP originally took the position that PWC was its expert, and, therefore, that its discovery obligations were limited to those required by Fed.R.Civ.P. 26(b)(4). (Def.Ex. N). While CDP now contends that it "does *not* take the position that PWC Materials are protected from disclosure pursuant to Rule 26(b)(4)," it does contend that the materials are nevertheless shielded from discovery under the attorney-client privilege and under the work product doctrine pursuant to Fed.R.Civ.P. 26(b)(3). (Pl. Opp. Mem. at 10–11 (emphasis in original)). It further contends that no waiver has occurred, and in any event, fairness concerns dictate that any waiver should not require disclosure beyond what already has been produced to the defendants.

***11** "The party invoking a recognized privilege has the burden of establishing, not only the existence of that privilege, but also that the established privilege was not waived." *Cavallaro v. United States,* 153 F.Supp.2d 52, 56 (D.Mass.2001), *aff'd* 284 F.3d 236 (1st Cir.2002). Similarly, "[t]he party seeking

work product protection has the burden of establishing its applicability." *In re Grand Jury Subpoena,* 220 F.R.D. 130, 141 (D.Mass.2004). As detailed below, this court finds that the plaintiff has not met its burden of showing that the work product doctrine or the attorney-client privilege applies to the challenged documents. This court further concludes that even if CDP could show that the documents warranted protection in the first instance, any such protection has been impliedly waived.

A. *Application of the Work Product Doctrine*

CDP first contends that the disputed materials are protected from discovery under the work product doctrine. The work product doctrine, which was first articulated by the Supreme Court in *Hickman v. Taylor,* 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), and was partially codified in Fed.R.Civ.P. 23(b)(3), "protects against disclosure of materials that a party, her attorney, or her representative prepares in anticipation of litigation[.]" *In re Grand Jury Subpoena,* 220 F.R.D. at 141. Thus, "[t]he work product doctrine preserves a 'zone of privacy' in which a party, his attorney, and in many cases his non-attorney 'representative' can prepare for litigation, 'free from unnecessary intrusion by his adversaries.' " *Id.* (quoting *United States v. Adlman,* 134 F.3d 1194, 1196 (2d Cir.1998)).

In the instant case, CDP argues that the materials at issue were prepared in anticipation of litigation as required under the work product doctrine due to the fact that they "were prepared because of the prospect of litigation." (Pl. Opp. Mem. at 13). While CDP acknowledges that PWC conducted its audit pursuant to the parties' License Agreement, it asserts that this does not matter since the audit also was performed in anticipation of litigation against the defendants. (*See id.* at 13–14). Based on the First Circuit's most recent articulation of the test for determining whether documents are prepared in anticipation of litigation, this court concludes that CDP has not shown that the materials relating to the PWC audit fall within the scope of the work product doctrine.

In support of its arguments, CDP relies on the First Circuit's decision in *Maine v. United States Dep't of the Interior,* 298 F.3d 60 (1st Cir.2002). There the First Circuit, in interpreting the phrase "in anticipation of litigation" adopted the standard applied by a number of other circuits holding that documents serving both a business purpose and a litigation purpose may be protected as work product "if, 'in light of the nature of the document and the factual situation in the particular case, the document can be fairly said to have been prepared or obtained *because of* the prospect of litigation.' " *Maine,* 298 F.3d at 68 (quoting *United States v. Adlman,* 134 F.3d 1194, 1202 (2d Cir.1998)) (emphasis in original). The court explained that under this test, no protection would attach to " 'documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation[,]' " even if the documents would "aid in the preparation of litigation." *Id.* at 70 (quoting *Adlman,* 134 F.3d at 1202). On the other hand, documents prepared for both a business purpose and "because of" existing or expected litigation, would warrant protection under the work product rule. *See id.* at 68.

***12** More recently, the First Circuit, in an *en banc* opinion, adopted a narrower test which asks whether the documents or materials at issue were "prepared *for use* in possible litigation[.]" *United States v. Textron Inc. & Subsidiaries,* 577 F.3d 21, 27 (1st Cir.2009) (en banc) (emphasis in original). *See also id.* at 32 (Torruella, J., dissenting) (explaining majority's abandonment of the "because of" test articulated in *Maine* in favor of a narrow, "prepared for" test). As the First Circuit reasoned in that case:

> From the outset, the focus of work product protection has been on materials prepared for use in litigation, whether the litigation was underway or merely anticipated. Thus, *Hickman v. Taylor* addressed "the extent to which a party may inquire into oral and written statements of witnesses, or other information, secured by an adverse party's counsel *in the course of preparation for possible litigation* after a claim has arisen." 329 U.S. at 497, 67 S.Ct. 385, 91 L.Ed. 451 (emphasis added). Similarly, the English privilege, invoked by *Hickman v. Taylor,* privileged "documents which are called into existence for *the purpose—but not necessarily the sole purpose—of assisting the deponent or his legal advisers in any actual or anticipated litigation." Id.* at 510 n. 9, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (emphasis added) (internal quotation marks omitted).
>
> The phrase used in the codified rule —"prepared in anticipation of litigation or for trial" did not, in the reference to anticipation, mean prepared for some purpose other than litigation: it meant only that the work might be done *for* litigation but *in advance of* its institution. The English precedent, doubtless the source of the language of Rule 26, specified the purpose "of assisting the deponent or his legal advisers in any actual or anticipated litigation ...."

Id. at 29 (emphasis in original). Thus, the court concluded,

> [i]t is not enough to trigger work product protection that the *subject matter* of a document relates to a subject that might conceivably be litigated. Rather, as the Supreme Court explained, "the literal language of [Rule 26(b)(3)] protects materials *prepared for* any litigation or trial as long as they were prepared by or for a party to the subsequent litigation."

Id. (quoting *Fed. Trade Comm'n v. Grolier Inc.,* 462 U.S. 19, 25, 103 S.Ct. 2209, 76 L.Ed. 387 (1983)) (emphasis in original).

The record before this court does not support a determination that PWC's audit materials were prepared for litigation. The evidence shows that PWC was engaged, pursuant to the License Agreement, in order to "give CDP the full story" regarding Iron Mountain's use of its software. (Welsh Aff. ¶ 13). Accordingly, CDP notified Iron Mountain that it was invoking its right to conduct an audit under Section 8(e) of the License Agreement, and it repeatedly described PWC to Iron Mountain as an "independent" auditor that was retained for the sole purpose of exercising CDP's rights under the parties' contractual agreement. (*See* Frischling Aff. ¶¶ 5–6; Pl.Ex. J; Def. Ex. C at 1). CDP never suggested to the defendants that PWC had been retained to provide expert

advice in anticipation of litigation. (Frischling Aff. ¶ 6). Had it done so, Iron Mountain would not have given PWC access to its sensitive financial information or allowed it to interview its employees. (*Id.*). Thus, CDP's own communications belie any conclusion that the audit was performed for the purpose of litigation.

***13** CDP's representations to Iron Mountain regarding the nature of PWC's engagement were consistent with the scope of services described in PWC's engagement letter. Therein, PWC expressly agreed to perform procedures aimed at analyzing and quantifying royalty fees. (*See* Pl.Ex. I at 1). However, it specifically declined to provide any opinions, attestations or assurances, and disclaimed any suggestion that its work included legal advice. (*Id.*). It was only in 2012, when the parties were engaged in the ongoing litigation, that PWC agreed to update its interim report so that it could be used as expert opinion. (*See* Def. Ex. Q). These facts show that PWC's work was aimed at uncovering facts regarding royalties owed to CDP under the License Agreement. They do not indicate, or even suggest, that it was conducted for use in a future lawsuit.

Indeed, the record demonstrates that the audit report and communications relating to the audit were intended only for CDP's internal use, and not for the purpose of litigation. Under the NDA, PWC agreed to maintain the confidentiality of all information provided to it by Iron Mountain, and to use such information "solely for the purposes of exercising CDP's audit rights under the [License Agreement]." (Def. Ex. C at 1). Additionally, PWC expressly stated when it delivered the draft audit report that the report and all PWC deliverables were intended solely for the internal use and benefit of CDP's management and Board of Directors. (Def. Ex. E at 2). Such evidence is entirely inconsistent with the notion that the PWC materials were prepared for litigation or for use at trial.

Even assuming the "because of" standard articulated by the First Circuit in *Maine* were to apply here, the plaintiff has not shown that the work product doctrine would shield the disputed documents from discovery. As described above, "the 'because of' standard does not protect from disclosure 'documents ... that would have been created in essentially similar form irrespective of the litigation.' " *Maine,* 298 F.3d at 70 (quoting *Aldman,* 134 F.3d at 1202). Although CDP may have believed that litigation was a real possibility, and its decision to retain litigation counsel stemmed from that belief, the record demonstrates that the audit was conducted to determine how much, if anything, Iron Mountain owed under the License Agreement, not for litigation purposes. CDP's need to understand the "full story" regarding Iron Mountain's use of its software, the repeated representations before and after the complaint was filed that the audit was performed for purposes of exercising CDP's rights under the License Agreement, the promises of confidentiality, and counsel's disclosure of the interim report to Autonomy to facilitate the parties' further efforts to resolve their dispute over royalty payments, indicate that the audit would have occurred, and the disputed materials would have been generated, in the same manner under any circumstances. Accordingly, the plaintiff has not shown

that the disputed documents are subject to protection under the work product doctrine under either the *Maine* or *Textron* standards.

B. *Application of the Attorney–Client Privilege*

***14** The plaintiff argues that the attorney-client privilege also warrants the denial of Autonomy's motion to compel. However, CDP has not established that the privilege applies or that it has not been waived.

The Attorney–Client Privilege—In General

The attorney-client privilege "protects only those communications that are confidential and are made for the purpose of seeking or receiving legal advice." *In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corp.),* 348 F.3d 16, 22 (1st Cir.2003). The essential elements of the privilege are as follows:

> (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Cavallaro v. United States, 284 F.3d 236, 245 (1st Cir.2002). Although "[t]he attorneyclient privilege is well-established[,]" it "must be narrowly construed because it comes with substantial costs and stands as an obstacle of sorts to the search for truth." *In re Keeper of the Records,* 348 F.3d at 22.

"In contrast to the attorney-client privilege, 'no confidential accountant-client privilege exists under federal law.' "[8] *Cavallaro,* 284 F.3d at 246. Therefore, "accountant-client communications are privileged [only] if they meet the traditional requirements of the attorney-client privilege." *Id.*

As described above, the documents at issue consist of drafts of PWC's audit, emails among PWC and CDP regarding the audit, and emails among CDP's own employees concerning the audit. CDP has not attempted to explain how emails among CDP's employees meet any of the elements of the attorney-client privilege. (*See* Pl. Mem. at 15–16). Therefore, it has not met its burden of showing that such documents are protected. With respect to the remaining materials, CDP argues that the privilege applies because PWC was retained by CDP's litigation counsel, Greenberg Traurig, to assist them in rendering legal advice to CDP. (*Id.*). For the reasons that follow, this argument too lacks merit.

Disclosures to Third Parties

Generally, the attorney-client privilege applies only to communications between an attorney and the client, and the disclosure of such

communications to a third-party undermines the confidentiality of the communications or waives the privilege. *See Cavallaro,* 284 F.3d at 246. "An exception to this general rule exists for third parties employed to assist a lawyer in rendering legal advice." *Id.* at 247. However, "an attorney, merely by placing an accountant on her payroll, does not, by this action alone, render communications between the attorney's client and the accountant privileged." *Id.* at 247. Rather, in order for the exception to apply, three separate elements must be met. *See Dahl v. Bain Capital Partners,* 714 F.Supp.2d 225, 227–28 (D.Mass.2010).

***15** The first element that must be satisfied in order for the exception to apply is that "the third-party communications must be 'necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit.' " *Id.* (quoting *Cavallaro,* 284 F.3d at 247–48) (additional citation omitted). This " 'necessity' element means more than just useful and convenient ... The involvement of the third party must be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications." *Id.* It is not enough that "the communication proves important to the attorney's ability to represent the client." *United States v. Ackert,* 169 F.3d 136, 139 (2d Cir.1999) (rejecting extension of attorney-client privilege to conversations between client's counsel and an independent investment banker despite assumption that "those conversations significantly assisted the attorney in giving his client legal advice about its tax situation").

The second element necessary for the exception to apply is that the third party must play "an interpretive role. In other words, the third party's communication must serve to translate information between the client and the attorney." *Dahl,* 714 F.Supp.2d at 228, and cases cited. The exception does not apply where the lawyer merely obtains information from the third party in order to give advice to the client. *See Ackert,* 169 F.3d at 139 (finding that exception did not apply where attorney sought out third party for information regarding proposed transaction and its tax consequences, but did not rely on third party to "translate or interpret information given to [attorney] by his client").

The third and final element necessary to bring a third party's communications within the scope of the attorney-client privilege is that "the third party's communication must be made for the purpose of rendering legal advice, rather than business advice." *Dahl,* 714 F.Supp.2d at 228. In the case of an accountant, "[i]f what is sought is not legal advice but only accounting service ..., or if the advice sought is the accountant's rather than the lawyer's, no privilege exists." *Cavallaro,* 284 F.3d at 247 (quoting *United States v. Kovel,* 296 F.2d 918, 922 (2d Cir.1961)).

The evidence in the instant case does not meet the relevant test. The only evidence that CDP points to is the February 25, 2011 engagement letter from PWC to Greenberg Traurig. (*See* Pl. Opp. Mem. at 15–16). While the letter indicates that PWC agreed to perform services intended to assist counsel with its provision of legal advice to CDP, neither the letter nor any other evidence set forth in the

record suggests that PWC "was necessary, or at least highly useful, in facilitating the legal advice" or that Greenberg Traurig was relying on PWC to translate or interpret information between the lawyers and CDP. *See Dahl,* 714 F.Supp.2d at 229. As described in the engagement letter, PWC specifically declined to provide legal advice or to assist with legal matters. (*See* Pl.Ex. I at 1). Rather, its stated role was limited "to analyz[ing] and quantif[ing] software license fees payable to [CDP] by Iron Mountain [.]" (*Id.*). Nothing in the materials submitted by either of the parties undermines that description. Therefore, PWC's function "was not to put information gained from [plaintiff] into usable form for [its] attorneys to render legal advice, but rather, to collect information not obtainable directly from [plaintiff]." *Occidental Chem. Corp. v. OHM Remediation Servs. Corp.,* 175 F.R.D. 431, 433 (W.D.N.Y.1997).

***16** The record further demonstrates that PWC "acted to provide accounting advice rather than to assist [Greenberg Traurig] in providing legal advice." *Cavallaro,* 284 F.3d at 248–49. PWC's role was described repeatedly to Iron Mountain as that of an independent auditor whose sole purpose was to conduct a royalty audit pursuant to the parties' License Agreement. (*See* Frischling Aff. ¶ 6; Def. Ex. C at 1). There is no dispute that PWC fulfilled that role by conducting the royalty audit and delivering an audit report to CDP. (Def.Ex. E). What is missing, however, is any evidence that PWC participated in, much less facilitated or translated, the lawyers' provision of legal advice to their client. Thus, PWC was not retained for the purpose of rendering legal advice.

The plaintiff argues that "[i]n the highly technical computer software field, PWC's assistance has been critical in [Greenberg Traurig] understanding how, exactly, Defendants had deceived CDP, and the extent of the harm caused by Defendants." (Pl. Opp. Mem. at 16). However, the plaintiff has not presented any supporting evidence or pointed to any facts showing that PWC played an interpretive role between Greenberg Traurig and CDP. The fact that PWC's auditing work may have aided CDP's counsel in its ability to advise the plaintiff does not shield the audit related materials from discovery under the attorney-client privilege. *See Ackert,* 169 F.3d at 139 ("a communication between an attorney and a third party does not become shielded by the attorney-client privilege solely because the communication proves important to the attorney's ability to represent the client").

C. *Implied Waiver*

Autonomy contends that even if the plaintiff could show that the work product doctrine or the attorney-client privilege applies in the first instance, any such protections were impliedly waived by CDP's decision to place PWC's audit work and its "independence" directly at issue in the case, and by CDP's conduct in voluntarily disclosing a copy of the interim audit report to the defendants. (Def. Mem. at 15–20). In light of this court's conclusion that the requested information is not protected from disclosure, the issue of waiver does not need to be reached. However, given the fact that it has been extensively briefed by the parties, the issue of waiver will be addressed. As described below, the question of whether CDP's actions should result in a waiver of any privilege or work

product protection is premised on issues of fairness. This court concludes that in the event the protections relied on by the plaintiff were to apply, fairness concerns would nevertheless warrant the disclosure of the disputed materials.

The Applicable Standard

A waiver occurs when a document otherwise privileged or protected as work product is disclosed to an adversary. *See In re Keeper of Records,* 348 F.3d at 23 (finding it "crystal clear that any previously privileged information actually revealed [to third parties] lost any veneer of privilege"); *In re Lernout & Hauspie Sec. Litig.,* 222 F.R.D. 29, 35 (D.Mass.2004) (explaining that "waiver ... occurs when a document otherwise protected as work product is shared with an adversary"). Similarly, waiver may be found "when a party takes a position in a case that places at issue the very information sought to be protected from disclosure[.]" *Coastline Terminals of Connecticut, Inc. v. United States Steel Corp.,* 221 F.R.D. 14, 17 (D.Conn.2003) (discussing waiver of work product). *See also Savoy v. Richard A. Carrier Trucking, Inc. .,* 178 F.R.D. 346, 350 (D.Mass.1998) (explaining that a party waives the attorney-client privilege where, through an affirmative act such as filing suit, the party "put the protected information at issue by making it relevant to the case" and "application of the privilege would have denied the opposing party access to information vital to [its] defense"). There is no dispute in this matter that CDP waived any protection over PWC's interim audit report by disclosing the report to the defendants. Nor can there be any dispute that CDP put the audit report directly at issue in the litigation by relying on data and interviews conducted by PWC in support of its breach of contract and 93A claims, by seeking over $23 million in damages based on the conclusions reached by PWC in that report, and by seeking to hold the defendants liable for the cost of the audit pursuant to the terms of the Licensing Agreement. At issue is whether CDP's conduct resulted in an implied waiver of all documents and communications relating to PWC's audit.

***17** Although the First Circuit has yet to clarify the scope of implied waivers, it has instructed that "[s]uch waivers are almost invariably premised on fairness concerns." In *re Keeper of Records,* 348 F.3d at 24. Thus, as the court stated in *In re Keeper of Records,*

> "the courts have identified a common denominator in waiver by implication: in each case, the party asserting the privilege placed protected information in issue for personal benefit through some affirmative act, and the court found that to allow the privilege to protect against disclosure of that information" would have been unfair to the opposing party.

Id. (quoting Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 503.41[1]) (punctuation omitted)). The court also cited an advice of counsel defense as "a paradigmatic example" of the role of fairness in the waiver analysis:

> [w]hen such a defense is raised, the pleader puts the nature of its lawyer's advice squarely in issue,

> and, thus, communications embodying the subject matter of the advice typically lose protection. Implying a subject matter waiver in such a case ensures fairness because it disables litigants from using the attorney-client privilege as both a sword and a shield. Were the law otherwise, the client could selectively disclose fragments helpful to its cause, entomb other (unhelpful) fragments, and in that way kidnap the truth-seeking process.

Id. (internal citation omittted).

The First Circuit emphasized, however, that there is a distinction between extrajudicial disclosures of otherwise privileged communications and disclosures made during an ongoing litigation, noting that "[v]irtually every reported instance of an implied waiver extending to an entire subject matter involves a judicial disclosure, that is, a disclosure made in the course of a judicial proceeding." *Id.* Accordingly, it held that the extrajudicial disclosure of otherwise protected materials "not thereafter used by the client to gain adversarial advantage in judicial proceedings, cannot work an implied waiver of all confidential communications on the same subject matter." *Id.* On the other hand, "if confidential information is revealed in an extrajudicial context and later reused in a judicial setting, the circumstances of the initial disclosure will not immunize the client against a claim of waiver." *Id.* at 25.

The same concerns for fairness that underlie the waiver of attorney-client privileged communications are equally applicable to waiver of work product information. *See In re Polymedica Corp. Sec. Litig.,* 235 F.R.D. 28, 32 (D.Mass.2006) ("The Supreme Court relied on the same concern for fairness when it applied subject-matter waiver to the work-product doctrine"). Accordingly, a subject matter waiver of work product material is appropriate where a party is attempting to use otherwise protected information as "both a sword and a shield" in order to gain an unfair tactical advantage over the opposing party.[9] *See In re Keeper of Records,* 348 F.3d at 24.

Application of Fairness Principles to the Instant Case

***18** This court finds that the circumstances of this case present one of those situations in which fairness requires further disclosure of information related to the PWC audit. Here, CDP did not simply make an extrajudicial disclosure of PWC's interim audit report to the defendants in an effort to resolve the parties' differences regarding the royalty payments. Rather, CDP has put the audit report, the audit process, and PWC's status as an independent auditor directly at issue in this litigation. Under such circumstances, full disclosure is only fair.

Without belaboring the point, based on the record before this court, CDP affirmatively represented to Iron Mountain that CDP had hired PWC and that PWC was to serve as

the independent auditor under the Licensing Agreement. It further appears that CDP affirmatively withheld from Iron Mountain the fact that PWC had been retained by litigation counsel. Iron Mountain would not have given PWC the access it did if it had known that PWC had been engaged by litigation counsel or that PWC was gathering information that CDP might subsequently attempt to use at trial. Nevertheless, CDP has claimed that, based on PWC's "review of records made available by Defendants and interviews of Iron Mountain personnel," $23 million is due on its breach of contract claim.

CDP also claims that Iron Mountain's conduct throughout the parties' dispute concerning royalties, including statements given to PWC during the audit, are very relevant to CDP's 93A claim.[10] Under such circumstances, fairness requires that the defendants be allowed to explore the full panoply of information available to PWC for its "independent" audit. It is only fair that if Iron Mountain is to be judged based, at least in part, on its response to PWC's assessment of how royalties were to be computed and the amounts consequently found to be due, that Iron Mountain be allowed to explore the circumstances surrounding PWC's engagement, the information available to PWC, the basis for PWC's understanding of Iron Mountain's obligation, and the manner of its performance of the audit, among other things. In fairness, CDP cannot use PWC's status and work as an independent auditor as a "sword" against the defendants, while relying on the attorney-client privilege and the work product doctrine as a "shield" to prevent disclosure of related materials.

While the plaintiff agrees that fairness concerns control the extent of any waiver, it argues that any possible harm to the defendants has been eliminated by CDP's production of all of the materials called for under Fed. R. Civ. 26(b)(4) governing discovery involving testifying experts. (Pl. Opp. Mem. at 17–19). In particular, the plaintiff argues that because the defendants have received all of the documents that are discoverable under the rules for testifying experts, "Defendants have everything necessary to test the basis of the audit report prepared in anticipation of litigation by PWC, an independent expert." (*Id.*).

***19** CDP's argument is unpersuasive. As an initial matter, it is undisputed that PWC had not been retained as an expert witness at the time it performed the audit or at any time prior to the litigation. CDP concedes as much by arguing that it is not relying on Fed.R.Civ.P. 26(b)(4) as a basis for withholding the challenged documents. (*See id.* at 10–11). Furthermore, this court does not agree, as the plaintiff asserts, that "the disclosure obligations set forth in Rule 26(b)(4) inform the fairness considerations that determine whether there has been an implied waiver[.]" (*Id.*). There is a significant difference between presenting a witness as an expert employed by a party to render opinions on behalf of that party and hiring a witness as an independent, outside auditor retained to uncover the truth about a matter over which the parties are having a dispute. While there may be policy reasons for limiting disclosure in the case of an expert engaged for trial, there is no such policy basis for limiting the disclosure of information in the case of an accounting firm that was

supposed to be unbiased and independent, and whose work was to be shared by the parties outside the setting of a courtroom battle. The fact that CDP has made the disclosures required by Fed.R.Civ.P. 26(b)(4) does not negate its obligation to make a full disclosure of information which predates PWC's retention as an expert in this litigation.

V. *ORDER*

For all the reasons described above, the plaintiff's "Motion to Strike Affidavit of David A. Frischling" (Docket No. 34) is DENIED and the "Defendant's Motion to Compel Production of Documents" (Docket No. 28) is ALLOWED. The documents shall be produced within 21 days of this Order, unless otherwise agreed by the parties.

All Citations

Not Reported in F.Supp.2d, 2012 WL 6212898

Footnotes

1 CDP originally named as defendants Autonomy Corporation PLC., Iron Mountain, Inc., Iron Mountain Information Management, Inc., and Connected Corp. However, pursuant to an Assented–To Motion to Correct Party Names and Caption, the defendants' names have since been changed to reflect the appropriate entities.

2 The defendants are not seeking documents following PWC's retention as an expert in this case.

3 To the extent the defendants have asserted defenses based on the parties' settlement negotiations, it does not appear at this stage that Frischling's testimony is necessary to that defense. As an initial matter, the question whether CDP's claims should be stricken because they are based on confidential or privileged settlement communications raises legal issues that can be addressed without resorting to fact witness testimony. Furthermore, there is nothing in the record indicating that any facts relating to these defenses could not be established through the testimony of CDP's own witnesses or through means other than the use of Iron Mountain's in-house counsel. In any event, as described *infra,* even if the defendants should have disclosed Frischling as a percipient witness under Rule 26(a) or (e), any failure to do so was harmless and does not warrant a ruling striking the Affidavit from the record.

4 The facts are derived from the following materials submitted by the parties in connection with Autonomy's motion to compel: (1) the Affidavit of David A. Frischling in Support of Motion to Compel Production of Documents (Docket No. 31) ("Frischling Aff."); (2) the Affidavit of Jason B. Baim in Support of Motion to Compel Production of Documents (Docket No. 32) ("Baim Aff."); (3) the exhibits attached to the Affidavits of David A. Frischling and Jason B. Baim (Docket Nos. 31 and 32), and to the Supplemental Affidavit of Jason B. Baim in Support of Motion to Compel Production of Documents (Docket No. 61) ("Def.Ex. ___"); (4) the Affidavit of Alan Welsh in Support of Opposition to Motion to Compel Production of Documents (Docket No. 47) ("Welsh Aff.") and the exhibits attached thereto (Docket No. 54) ("Pl.Ex. ___"); and (5) the Affidavit of Zachary C. Kleinsasser in Support of Opposition to Motion to Compel Production of Documents (Docket No. 48) ("Kleinsasser Aff.") and the exhibits attached thereto ("Pl.Supp.Ex. ___").

5 Because the substance of the parties' dispute over royalties is not germane to the instant discovery motion, it has not been described herein.

6 Fed.R.Civ.P. 26(b)(4) was amended in 2010 "to provide work-product protection against discovery regarding draft expert disclosures or reports and—with three specific exceptions—communications between expert witnesses and counsel." Fed.R.Civ.P. 26, Advisory Comm. Notes, 2010 Amendment.

7 This court understands that Autonomy is not seeking communications between CDP and its counsel concerning the audit. It is also not seeking information created after June 5, 2012, when PWC was retained as an expert, beyond that required by Fed.R.Civ.P. 26(b)(4).

8 Pursuant to 26 U.S.C. § 7525, Congress created a limited privilege for accountant-client communications. *Cavallaro,* 284 F.3d at 246 n. 5. However, that privilege only relates to tax advice, and it applies only in noncriminal tax matters before the Internal Revenue Service and in noncriminal tax proceedings brought in Federal court by or against the United States. *See* 26 U.S.C. § 7525. Consequently, it is not applicable here.

9 As both parties acknowledge, the concept that implied waivers of the attorney-client privilege and work product doctrine should be grounded in fairness has been codified in Rule 502 of the Federal Rules of Evidence. That Rule provides that a disclosure of attorney-client privileged or work product materials in a federal proceeding results in a waiver of undisclosed communications and information if "(1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together." Fed.R.Evid. 502(a). As the Advisory Committee Notes to Rule 502 explain, "a subject matter waiver (of either privilege or work product) is reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary." Fed.R.Civ.P. 502 Advisory Comm. Notes, 2011 Amendment. Therefore, fairness controls the question of waiver under Rule 502(a).

10 In connection with its motion to strike, CDP argued that the 93A claim was a significant part of its complaint. Thus, CDP is relying on PWC not only for its mathematical analysis, but also for the information it learned through interviews with Iron Mountain employees.

End of Document