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; CL19002886

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL SUPPLEMENTAL RESPONSES TO PLAINTIFF'S INTERROGATORIES TO DEFENDANTS AND MOTION FOR SANCTIONS

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Pursuant to Virginia Supreme Court Rules 4:12(a) and 4:12(d), the National Rifle Association of America (the "NRA") hereby moves, through the undersigned counsel, for an order compelling Defendants Ackerman McQueen, Inc. and Mercury Group, Inc. (together, "AMc") to fully respond to the seventeen Interrogatories discussed below and, where appropriate, impose sanctions. As shown below, the AMc's responses flagrantly disregard Virginia Supreme Court Rule 4:8(f) and reflect a pattern of incomplete responses, not to mention meritless and evasive objections. The Court should grant the Motion to Compel and award the NRA sanctions.

I. FACTUAL BACKGROUND

AMc responded to the NRA's First and Second Sets of Interrogatories on July 25, 2019 and September 10, 2019. *See* Exs. A-B. On December 16, 2019, the NRA wrote AMc requesting it provide supplemental responses to eleven interrogatories from the NRA's Second Set of Interrogatories. *See* Ex. C. On December 30, the NRA wrote and requested supplemental responses to all six interrogatories from the First Set of Interrogatories. *See* Ex. D. On December 26, AMc responded to the NRA's letter on the Second Set of Interrogatories, raising a host of objections not previously raised and including some additional information for a handful of responses. *See* Ex. E. That letter was not verified by the person who supplemented AMc's answers. *Id.* AMc did not respond to the NRA's letter of December 30. On January 6, 2020 the parties held a conference of counsel but could not reach resolution over these disputes

II. ARGUMENT

Discovery is liberally allowed when the "information sought appears reasonably calculated to lead to the discovery of admissible evidence," even though it might be "inadmissible at trial." Va. Sup. Ct. R. 4:1(b)(1).

As a default rule, interrogatories "shall be answered separately and fully in writing under oath." Va. Sup. Ct. R. Rule 4:8(d). An exception to this general rule places strict conditions on its use. Va. Sup. Ct. R. Rule 4:8(f). *Only* "[1] where the answer to an interrogatory may be derived or ascertained from business records . . . of the party upon whom the interrogatory has been served" *and* "[2] the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served," *then* "[3] it is a sufficient answer to such interrogatory to *specify the records from which the answer may be derived or ascertained.*" *Id.* (emphasis added).

In addition, the Rules authorize contention interrogatories as a mechanism to better understand the legal and factual bases of a party's claims and defenses. Va. Sup. Ct. R. 4:8(e) ("An Interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact"); Craig, "New Virginia Rules for Deposition and Discovery," 53 Va. L. Rev. 1819, 1833 (changes to Rule 4:8 "afford[ed] litigants the opportunity to question each other as to the facts and to clarify the issues prior to trial" and that "Rule 4:8's federal equivalent" was "Rule 33").[1]

Importantly, Virginia courts do not countenance general or conclusory objections lacking in specificity. *Hirsh v. CSP Nova, LLC*, 98 Va. Cir. 286, 2018 WL 6795103, at *6 (Va. Cir. Ct.) (conclusory burden objection for producing ESI overruled because the party "failed to explain precisely how production" would be "intrusive"); Va. Sup. Ct. R. 4:8(d) (requiring that "the *reasons* for objection shall be stated") (emphasis added); *Causey v. Balog*, 162 F.3d 795, 801 (4th Cir. 1998) (disregarding "conclusory" allegations in answers to interrogatories and limiting inquiry

[1] *See also Gray v. White*, 1 Va. Cir. 104, 1970 WL 117714, *1 (Va. Cir. Ct.) ("Virginia Rule 4:8(f) is identical to Rule 33 of the Federal Rules of Civil Procedure.").

to "sufficiently detailed" assertions). Applying these well-settled principals of Virginia law, the Court should grant the Motion to Compel as demonstrated below.

A. Defendants' Responses To Plaintiff's Second Set Of Interrogatories Widely Misuse Virginia Supreme Court Rule 4:8(f) And Need To Be Supplemented

On their face, AMc's responses to the Second Set of Interrogatories reveal a widespread and pervasive misuse of the Rule 4:8(f) exception. Interrogatories Nos. 11, 15-17, 19, 21, 23, 25, 27, and 30, which rely on Rule 4:8(f), fail to make an even meager attempt to meet the third requirement of the exception. AMc fails to actually "specify the records from which the answer may be derived or ascertained." *Id.* Rather, they treat as talismans the mantra that "pursuant to Virginia Supreme Court Rule 4:8(f), Defendants will produce business records." Ex. B. at 11, 16-24, 26-27. In light of the flagrant violations of Rule 4:8(f), the Court should grant the Motion to Compel and order AMc to comply with the actual requirements of the rule forthwith. *See Dawson, L.C. v. Loudon Cty. Supervisors*, 59 Va. Cir. 517, 2001 WL 34008780, at *10 (Va. Cir. Ct.) (rejecting use of 4:8(f) as non-compliant); *Graske v. Auto-Owners Ins. Co.*, 647 F. Supp. 2d 1105, 1109-10 (D. Neb. 2009) (answer deficient under analog Rule 33(d) when the party made a short reference to 7,000 pages of documents "not accompanied by any indices or other tool to guide the plaintiffs to the responsive documents"); *McKinney/Pearl Rest. Part., L.P. v. Met. Life. Ins. Co.*, 3:14-cv-2498-B, 2016 WL 2997744, *10 (N.D. Tex. May 25, 2016) ("[P]ointing Defendants generally to document productions and expert reports does not properly invoke Rule 33(d)"; rather, a party must "point to a specific document, by name or bates number" and provide the requested details). In addition, AMc's total refusal to provide a responsive and non-evasive answer for eleven interrogatories justifies the Court to sanction AMc and hold that all subsequent objections are waived and award the NRA's reasonable attorney's fees and costs for bringing this motion. Va. Sup. Ct. R. 4:12(a)(3), (d) (imposing sanctions if party completely fails to respond).

B. Defendants' Objections To Specific Interrogatories Are Meritless And Responses Deficient And In Need To Be Supplemented

Beyond the abject failure with Rule 4:8(f), Defendants attempt to thwart the NRA's right to discoverable information by interposing objections totally lacking in merit and attempting to raise new objections that they waived. As such, the Court should grant the Motion to Compel and order supplemental and full responses to Interrogatories Nos. 11, 15-19, 20-21, 23, 25, 27, and 30.

Interrogatory No. 11. Among the NRA's central contentions is that AMc leaked confidential financial information about the NRA to the press and other media outlets.[2] Therefore, Interrogatory No. 11 requests AMc identify communications between AMc employees and representatives and the press or other media outlets. Ex. B at 13. AMc did not object or respond to this Interrogatory as written. Instead, it provided an entirely non-responsive recitation of its defenses. *Id.* The legal consequence is clear. The response is "evasive" and an "incomplete answer" to "be treated as a failure to answer." Va. Sup. Ct. R 12(a)(3).[3] This disregard for the Rules empowers this Court to hold that AMc waived the right to objections. Rule 4:12(d) ("If a party . . . fails . . . to serve answers or objections to interrogatories," the trial court may use its discretion to "make such orders in regard to the failure as are just."); *Jayne H. Lee, Inc. v. Flagstaff Indus. Corp.*, 173 F.R.D. 651, 653 (D. Md. 1997) (a party who puts forward "tardy or evasive/incomplete answers," as here, can "lose[] the right to object to the interrogatories").

Thus, AMc's attempt to raise in its letter of December 26, 2019 overbreadth and burden objections for the first time is without merit because they were waived. *Compare* Ex. B at 13 (initial response without *any* objections) *with* Ex. E at 2 (letter); *Essex Ins. Co. v. Neely*, 236 F.R.D.

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[2] Plaintiffs' Compl. and Jury Demand, dated May 22, 2019, at Prelim. Stat. and ¶¶ 15-44.

[3] And to accommodate Defendants' claimed objections, during the meet-and-confer process on January 6, 2020, the NRA limited the relevant time period to January 1, 2018 to the present,

287, 290 (N.D. W. Va. 2006) (failure to timely object to interrogatories constituted waiver). Furthermore, AMc cannot supplement its previous "answers" through a procedurally improper unsworn letter with *no* "signature" for the "person" "making" the updated "answers." Ex. B. at "Verification"; Va. Sup. Ct. R. 12:8(D).[4] In addition, AMc cannot raise the objections for the first time months after their initial non-responses. Rules 4:12(a)(3); Fed. R. Civ. P. 33(b)(4); *Stone v. Bowyer*, 2 Va. Cir. 360, 1973 WL 165718, at *1 (Va. Cir. Ct.) (holding party could not supplement where the initial response contained "no objections to the form or content of the interrogatories" and stated that he alone would testify); *Neely*, 236 F.R.D. at 290 (failure to timely object constituted waiver of subsequent attempt). Nor does pointing the NRA to an entire volume of an AMc document production of 8,484 pages satisfy the specificity for Rule 4:8(f). *See Graske*, 647 F. Supp. 2d. at 1109-1110 (7,000 pages document dump without "any indices or other tool to guide the plaintiffs to the responsive documents" violated Rule 33(d)). AMc performs a range of service, some of which are totally unrelated to communication with the press and media, *see* Jackson Rep., dated Jan. 7, 2020, at ¶¶ 16-32 & Ex. F at § I.B.-E, and given the serious relevance of the information, the liberal rules of discovery compel the conclusion that the Court should order AMc to supplement and fully respond. *See Hirsh*, 98 Va. Cir. 286, at *4 (granting motion to compel post-trial because the records sought were "vital" and "directly relevant to Plaintiff's theories of liability"); *Davis v. McLaughlin*, 46 Va. Cir. 224, 1998 WL 34170511, *1 (Va. Cir. Ct.).

Interrogatory No. 15. Another theory of liability in this case concerns whether AMc engaged in billing improprieties for, *inter alia*, so-called "NRA-Dedicated Personnel," meaning individuals who were supposed to spend all or a substantial amount of their time working on the

[4] While the new "objections" were "signed by the attorney making them," i.e., outside counsel for AMc, those individuals do not verify the supplemental response.

NRA account. Ex. F at § XI.F. Across the various types of services provided, the NRA effectively agreed to pay for the total compensation of such personnel given their supposed dedication to the NRA account. *Id.* at §§ I, II. The NRA has reason to believe that allegedly NRA-Dedicated Personnel were improperly directed by AMc leadership to spend substantial amounts of their time on other projects, yet AMc invoiced the NRA for the full amount of their salary, thereby breaching the contract and their fiduciary duties. First Am. Compl., dated April 24, 2019, at ¶¶ 18, 27; Ex. G (AMc client remarking after the filing of the NRA's lawsuits: "I bet Ackerman is in trouble on this one" because AMc "[was] allocating full salary to these employees [to the NRA] that may have been working on our accounts"). Obviously, Interrogatory No. 15 seeks information reasonably calculated to lead to the discovery of admissible evidence when asking AMc to "[i]dentify the name, professional title and salary for each of the NRA-Dedicated Personnel . . . all contracts between AMc and each such person, and the amount of time that each such person dedicated to any NRA project, and to any non-NRA project, during the period January 1, 2018, to present." Ex. B at 16-17; *see Hirsh*, 98 Va. Cir. 286, at *4.

In response, AMc does not dispute the relevance of the bulk of the sought-after information. Ex. B at 16-17. Rather, in its answer AMc does not lodge any traditional objections with specificity, but instead opted for word games and evasive non-responses that fall within the ambit of Rule 4:12(a)(3). *Id.* (treating such answers as a failure to respond). Implicitly conceding its relevance, AMc promised at least some of the sought-after information at some unspecified point in time in the future and rested on its non-compliant Rule 4:8(f) statement. Ex. B at 16-17 (committing to produce "lists of AMc employees dedicated to NRA work projects, their time records, and other pertinent information sought in the request"). That alone was improper. *Causey*, 162 F.3d at 801 (requiring interrogatory have "sufficiently detailed accusations" to

comply with the Rules); *Jayne H. Lee*, 173 F.R.D. at 655 (giving "the vague assurance that the requested documents will be produced" was improper).

Of course, it was only *after* the NRA sent its December 16 letter did AMc attach to its unsworn letter a "List of Ackerman Employees that Worked on the NRA Account." Ex. E at 3, Ex. A thereto. However, nowhere was the further information sought and that AMc was obliged to provide). During the January 6 conference of counsel, counsel for AMc assured counsel for the NRA that a complete response to Interrogatory No. 15 would be forthcoming as part of an expert report. Unsurprisingly, the sole expert report fell short. AMc's expert continued the pattern of obfuscation, including in Exhibit 5 to his report, which merely purports to identify "employee[s]" who received severance amounts allegedly because of the termination of the Services Agreements. Jackson Rep., dated Jan. 7, 2020, at Ex. 5 thereto. Yet for a third time, the deficiencies are manifest: the list contains no confirmation that any of the individuals are in fact NRA-Dedicated-Personnel; it does not indicate if further personnel still remain at AMc or left AMc in before the severance package; and it does not provide all of the sought-after information.

This is not a fair or efficient method of conducting discovery. The Court should reject AMc's gamesmanship and evasive tactics. Va. Sup. Ct Rule 4:12(a)(3) ("For purposes of this subdivision an evasive or incomplete answer is treated as a failure to answer");.*Jayne H. Lee*, 173 F.R.D at 653 (holding that a responding party that provides "tardy or evasive/incomplete answers," as here, can "lose[] the right to object to the interrogatories"); In light of the history of broken promises and pernicious gamesmanship, not to mention the continued absence of a complete substantive response, this Court should sanction AMc by waiving its right to raise any objection to this Interrogatory and order a full and complete response. *See* Rules 4:12(a)(3), (d); *Heller v. City of Dallas*, 303 F.R.D. 466, 482 (N.D. Tex. 2014) (awarding sanctions where, as here, a pattern

of evasive responses existed, explaining that the current answer "was not justified to a degree that could satisfy a reasonable person—that is, reasonable people could not differ as to the appropriateness of the response").

Moreover, AMc's half-hearted claim that salary information for NRA-Dedicated Personnel is not "relevant" lacks merit. Ex. B at 16. AMc's position is directly contradicted by Exhibit 5 of the Jackson Report, which includes salary information, and the Protective Order entered in the case protects against disclosure. Accordingly, the Court should order that AMc comply with Rule 4:8(f) or otherwise provide a complete response to the Interrogatory. *Davis*, 1998 WL 34170511, at *1.

Interrogatory No. 16. This Interrogatory seeks for 2017-2018 the identification of the "expenses incurred on behalf of the NRA" and "all documents which support that claim." Ex. B. at 17. One of the principal disputes at issue is whether AMc appropriately and truthfully billed the NRA for the services in the contract, including the six categories identified in AMc's expert designation. Jackson Rep. at ¶¶ 16-26. Defendants raised no objections in their written responses and included only the bare-bones, insufficient statement that "pursuant to Virginia Court Rule 4:8(f), Defendants will produce business records." Ex. B at 17. On this basis alone, the Court should order AMc to provide a compliant Rule 4:8(f) response. *See* Va. Sup. Ct Rule 4:12(a)(3); *Causey*, 162 F.3d at 801 (interrogatory must have "sufficiently detailed accusations" to avoid the granting of a motion to compel)

In their letter of December 26, AMc for the first time raise overbreadth and burden objections, but these are waived for failure to timely raise them in the initial written responses. *See Stone*, 2 Va. Cir. 360; *Jayne H. Lee*, 173 F.R.D at 653 (a responding party that provides "tardy or evasive/incomplete answers," as here, can "lose[] the right to object to the interrogatories"). In

any event, AMc suggests that all problems have been solved because it recently produced the documents provided to Forensic Risk Analysis ("FRA")— a forensic consulting firm brought in by NRA as part of its financial inquiry of AMC before the relationship was terminated and for a limited purpose—a small portion of the overall suite of services provide by AMc and billed to the NRA. Ex. F at §§ I, II.[5] For example, the inquiry did not concern how AMc substantiated its determination of the "fair market value" for its advertising and creative services. Ex. F at § 1.B. The remaining services in the contract for which the NRA was billed and for which AMc was obligated to provide backup information have nothing to do with FRA and remain hotly contested by the parties. The Motion to Compel should be granted in full. *See Davis*, 1998 WL 34170511, at *1; *Hirsh*, 98 Va. Cir. 286, at *4.

Interrogatory No. 17. The NRA contends AMc breached its fiduciary duty by failing to disclose viewership metrics—particularly unique viewers—for the NRATV digital platform. *See* Plaintiffs' Compl. and Jury Demand at ¶¶ 16, 47. Accordingly, Interrogatory No. 17 requests that AMc "identify the available NRATV analytics which [AMc] claim[s] [it] provided to Wayne LaPierre or Todd Grable" of the NRA and "documents evidencing the available NRATV analytics and their transmission," as well as information on specific viewership analytics. Ex. B at 17-18.

In response, AMc essentially relies on its "commitment" to produce responsive documents, which as discussed above is per se deficient. Rules 4:8(f), 4:12(a)(3); *Jayne H. Lee*, 173 F.R.D. at 655. AMc also objects that it has provided the NRA with this information "repeatedly." Ex. B. at 18. However, AMc's objection has no merit as it, and not the NRA, is the party that managed and

[5] The FRA inquiry was limited to (1) out-of-pocket expenses charged from 2016-2018; (2) media buys on behalf of the NRA in 2015-2016; and (3) AMc-NRA budgets for 2015-2018. Using the six types of services identified in the contract and Mr. Jackson's expert report the FRA inquiry concerned only one of the six (i.e., media buys). Ex. F at §§ I, II; Jackson Rep. at ¶¶ 16-26.

operated the NRATV platform on a daily basis and, therefore, , is in possession of the information and is best situated to provide it in a usable manner. *Graske*, 647 F. Supp. 2d at 1109 (finding defendant provided insufficient response because "Defendant is certainly more familiar with its own business records than the plaintiffs"). The NRA does have the breadth of sought-after information compared to AMc.

In its unsworn December 26 letter, AMc attempts to rectify this error and identifies 350 pages of presentations containing NRATV viewership analytics. However, AMc, cannot claim it responded fully to the Interrogatory. For example, AMc has presentations from at least 2017-2018 that were not in the limited set produced, and its counsel admitted in the January 6 conference that more NRATV related documents were slated for production in the future. For these reasons, the Court should grant the Motion to Compel.

Interrogatory No. 18. AMc has not fully respond to this contention interrogatory issued pursuant to Virginia Supreme Court Rule 4:8(e). *See* Ex. B at 18. In an attempt to resolve the dispute, the NRA in its December 16 letter narrowed this Interrogatory to the identification of "facts, documents, and communications" underlying the "affirmative defenses" that AMc intends "to present at trail." Ex C. at 3. Such contention interrogatories constitute a common discovery tool and, in light of the liberal scope of discovery and the narrowed scope of the Interrogatory, it is more than reasonable for the NRA to want to seek to understand AMc's defensive contentions and the factual bases in support thereof. *See Bosworth v. Vornado Realty L.P.*, 84 Va. Cir. 353, 2012 WL 7850907, *2 (Va. Cir. Ct.) ("Defendants in this case requested the factual basis for Plaintiff's claim of lost income, and for documentary evidence to support it. The Court holds that these requests are within the scope of Virginia's discovery rules."); *Janey v. Westmoreland County*, No.01-113, 2002 WL 32986664, at * 1 (Va. Cir. Ct.) (allowing motion to compel

responses to interrogatory seeking the "documents supporting" the opposing party's denials to requests for admissions); *Davis*, 1998 WL 34170511, *1 (rejecting burden objection to interrogatory seeking '"evidence and facts upon which the [opponent's] denial was based").

AMc has no response to the NRA's good faith reduction of the scope of Interrogatory in the unsworn supplement found in its December 26 correspondence. Ex. E at 6-7. Instead, they rely on a handful of inapposite cases involving contention interrogatories seeking literally "every fact" or "all facts" that were found overbroad and unduly burdensome. *Id.* However, the Interrogatory at issue contains no such verbiage, nor does the NRA seek each and every fact, no matter how immaterial, about the bases for AMc's trial defenses. *See* Ex. B. at 18. Finally, AMc's burden protestations ring hollow when it has refused to provide *any* information or rudimentary facts that would allow the Court to assess the actual burden imposed. *Heller*, 303 F.R.D. at 483 ("The prohibition against general [or blanket] objections to discovery requests has been long establish"; instead, the "responding party has the obligation to explain and support its objections") (internal quotations and citations omitted); *accord* Va. Sup. Ct. R. 4:8(d) (the response must state the "reasons" for the objection). For all these reasons, the Court should grant the Motion to Compel.

Interrogatory No. 19. A significant legal and factual issue in the case is whether AMc sufficiently complied with its obligation under Books-and-Records clause of the Services Agreement. *See* Am. Compl., dated April 24, 2019, at ¶¶ 17-37. Therefore, the NRA propounded a contention interrogatory seeking identification of the "facts, documents, and communications" concerning AMc's contention that "AMc has complied with every authorized demand for examination of its documents." Ex. B at 18-19 (quoting AMc pleadings). AMc fails to provide any substantive or responsive information in its initial written response. Va. Sup. Ct. R. 12(a)(3);

Jayne H. Lee, 173 F.R.D. at 656 (finding waiver where, as here, there was a "total failure to respond").

The improper attempt to do so in its flawed December 26 letter should therefore be disregarded and the Motion to Compel granted based on either the letter's deficiencies, Rule 4:8(d), or waiver of objections, Va. Sup. Ct. R. 12(a)(3), (d); *Jayne H. Lee*, 173 F.R.D. at 656. In any event, implicitly conceding it has not fully responded to the Interrogatory, AMc retreats to its default position that it has produced FRA documents, blinding itself to the fact that it remains obligated to answer the contention interrogatory fully, *Parcon Const., Inc. v. Mercure Dulles, Inc.*, Chancery No. 13343, 1992 WL 884801, at *1 (Circuit Court, Loudon 1992) (granting motion to compel and informing responding party it "will not be able to avoid response because it feels like [requesting party's] discovery constitute 'contention interrogatories'"), including identification of the sought-after information within its own possession, custody, or control, and information received from the NRA or other third parties in discovery.[6] *Ashghari-Kamrani*, 2016 WL 11642670, at *2 ("Simply because [the requesting party] may have access to the information in no way indicates how requiring the [responding party] to produce information is burdensome.") (relying on *Evergreen Trading LLC ex rel. Nussdorf*, 80 Fed. Cl. 122, 136 n.20 (2007) (collecting cases)). The Court should therefore grant the Motion to Compel as to Interrogatory No. 19 and impose sanctions for AMc's repeated totally non-responsive and evasive answers. Va. Sup. Ct. R. 12(a)(3), (d); *Heller*, 303 F.R.D. at 482 (sanctions warranted where, as here, a pattern of evasive responses has occurred and the current answer "was not justified to a degree that could satisfy a

[6] Contrary to the Supreme Court of Virginia, AMc criticizes the NRA as "obstructionist" for its entirely appropriate, reasonable, and (mostly) successful effort at protecting the privileged and/or work-product FRA documents." *Compare* Ex. E at 3 *with Walton v. Mid-Atlantic Spine Specialists*, 280 Va. 113, 130 (2010) (holding policy dictates that the "salutary purpose of the attorney-client privilege" outweighs whether "the privilege may unfairly become an obstacle to the truth").

reasonable person—that is, reasonable people could not differ as to the appropriateness of the response").

Interrogatory No. 21. Once again, the NRA seeks information about the basis for AMc's contentions: this time, AMc's contention about the NRA's motive for demanding access to the Oliver North contract. Ex. B at 19. In their unsworn and inoperative December 26 letter that should be *per se* disregarded, *see* Rule 4:8(d), AMc appears to take the position that because some of the information might be within the possession of the NRA it is absolved of answering the contention interrogatory and detailing the factual basis for its claim. *Compare* Ex. E at 20 *with Ashghari-Kamrani*, 2016 WL 11642670, at *2. *See also VNA Plus, Inc. v. Apria Health. Grp., Inc.*, Civ. A. 98-2138, 1999 WL 386949, *6 (D. Kan. Jun. 8, 1999) ("Asking for information already within the possession of the party seeking the discovery does not of itself make the interrogatory unduly burdensome or oppressive."). In any event, AMc's evasive objection collapses on the plain language of the Interrogatory, which encompasses identification of "facts, documents, and communications" *within the possession of AMc.* Ex. B. at 19-20. AMc's evasive and obstructionist objections should be overruled, and the Court should compel complete and full responses that identify the factual basis for AMc's allegation, regardless of the source of the information or if another party possesses it. *See* Rule 4:8(e); *accord Nussdorf*, 80 Fed. Cl. at 136 n.20.

Interrogatory No. 23. This contention interrogatory seeks the factual basis for allegations made by AMc's concerning the NRA's intent. Ex. B at 21 (contending that NRA's actions "have been taken with the strategic intention of injuring AMc's business, its reputation, and its business expectancies"). As before, AMc raises its unfounded objection to providing a full response predicated on the production of FRA documents should be rejected for the same reasons discussed

earlier with respect to Interrogatory Nos 18, 19, 21, 23, and 25. Ex. E at 4. Accordingly, the Court should disregard the AMc' improper objection and order AMc to provide a full and complete response. *See* Rule 4:12(a)(3) (prohibition against incomplete and evasive answers).

Interrogatory No. 25. In response to another contention interrogatory, *see* Rule 4:8(d), AMc refuses to provide any responsive information whatsoever concerning the factual bases for its own allegations about the Brewer law firm and the purposed competition between the firm and AMc in public relations services. Ex. B at 22-23. The non-responsive, evasive, and incomplete answer to the Interrogatory should "be treated as a failure to answer" at all, *see* Rule 4:12(a)(3), especially its legally improper promise "to produce business records" at some unspecified in the future. *Jayne H. Lee*, 173 F.R.D. at 655 (providing that "the vague assurance that the requested documents will be produced" was improper).

Most notably, AMc again adopts the same legally flawed logic in both its written response and December 26 letter: that it does not need to fully respond to a contention interrogatory when some the requested information is within the possession of its party opponent. Ex. B at 22-23; Ex. E at 4. As explained before in the context of Interrogatories No. 21, 23, 25, and others, the law does not recognize the proposition that the obligation to state the factual bases for one's legal contentions can be avoided because some relevant information might also be in the hands of a party opponent. *See Ashghari-Kamrani*, 2016 WL 11642670, at *2; *Evergreen Trading*, 80 Fed. Cl. at 136 n.20. Moreover, just like Interrogatory No. 21, AMc's objection falters on the plain language of the Interrogatory encompasses "facts, documents, and communications" *within the possession of AMc* or other non-parties. Ex. B at 22. As before, the Court should compel complete and full responses that identify the factual bases for the relevant allegation regardless of the source of the information or if another party possesses it. Given the pattern of evasive and flawed answers

devoid of any legal basis, the Court should also give serious consideration to imposing sanctions. Va. Sup. Ct. R. 12(a)(3), (d); *Heller*, 303 F.R.D. at 482 (sanctions warranted where, as here, a pattern of evasive responses has occurred and the operative response "was not justified to a degree that could satisfy a reasonable person—that is, reasonable people could not differ as to the appropriateness of the response").

Interrogatory No. 27. Interrogatory No. 27 is one more contention interrogatory that asks AMc to "identify" the factual bases for its allegations in its Counterclaim that the NRA's financial inquiry "was successfully completed," that "AMc had provided all requested documents in its possession, and no further documents were needed," and that "AMc provided NRA auditors with access to all matters requested." Ex. B. at 23.

AMc's first claim misapprehends the nature of a contention interrogatory and is nothing short of baseless. *See* Ex. B. at 24. AMc ignores its straightforward obligation to identify the factual bases relevant to its allegations, notwithstanding the requesting party has possession of some of the relevant information. *See Ashghari-Kamrani*, 2016 WL 11642670, at *2. The law does not allow a contention interrogatory to be circumvented because information relevant to a party's allegation might be in both the party's hands *and* the hands of the party's opponent. *VNA Plus*, 1999 WL 386949, at *6. And, *as before*, the Interrogatory on its face reasonably sweeps in information *within the possession of AMc* or other non-parties, making AMc's objection even more obstructionist and devoid of merit, yet like before warranting sanctions. Rules 4:12(a)(3), (d).

AMc shift gears in its December 26 letter to complain about their perennial boogeyman. This time, it remarkably claims that the FRA documents that the Court correctly determined were

outside the scope of discovery render it impossible to answer the Interrogatory. Ex. E at 4, 7-8.[7] But the law provides no such relief, *see supra* at pp. 11-16 and authorities discussed therein, and AMc cites no authorities in support of its position. Indeed, there is no dispute that AMc knows which documents it sent to FRA and that it participated in the inquiry. AMc is more than capable to respond using those documents, contemporaneous communications, and according to its response, FRA deposition testimony (regardless if the NRA has some portion of the FDA document). *Cf. Parcon Const.*, 1992 WL 884801, at *1 (a responding party "will not be able to avoid response because it feels like [requesting party's] discovery constitute 'contention interrogatories'").[8] For all these reasons the Court should grant the Motion to Compel and give increased consideration to imposing monetary sanctions as a penalty for AMc's pattern of obstructionist behavior in answering contention interrogatories. *Heller*, 303 F.R.D. at 482 (awarding sanctions for repeated non-compliance).

Interrogatory No. 30. AMc *again* fails to grapple with the basic rules for answering contention interrogatories, as exemplified by its responses to Interrogatory Nos. 17-19, 21, 23, 25, and 27. *See* Ex. B at 26-27. Once again, Defendants refuse to provide a complete and substantive response under the mistaken belief that a party is excused from responding if the information underlying the allegation is in the hands of both that party and its adversary. ***That is not the law.*** *See supra* at pp. 11-17. Remarkably, AMc doubles down in their unsworn and procedurally improper December 26, 2019 letter that should be disregarded. Ex. E at 4; Rule 4:8(d) (requiring

[7] The notion that the NRA was improperly "blocking" AMc when it did not to turn over privileged and opinion work product smacks of an inappropriate negative inference. Ex. E at 8; *see, e.g.*, *Lipton Realty, Inc. v. St. Louis Hous. Auth.*, 705 S.W.2d 565, 570-71 (Mo. Ct. App. 1986) (refusing to draw a negative inference and reasoning that the attorney-client privilege barred the testimony).
[8] The witness identified in the response did not adopt AMc's characterization of the word "cooperating," but instead noted AMc "provided information in response to our request."

supplemental answer to be sworn under oath and signed "by the person making them").[9] Accordingly, the Court should grant the Motion to Compel. In addition, AMc's baseless and objections to multiple contention interrogatories and repeated attempts to obstruct the flow of discoverable information through evasive and incomplete/non-responsive answers to those and other interrogatories (see, e.g., Interrogatory No. 15), ample grounds exist for the Court to sanction AMc by deeming all of its objections waived and imposing a significant penalty to deter future malfeasance. See Rule 4:12(a)(3), (d); *Heller*, 303 F.R.D. at 482.

C. The Court Should Compel AMc To Provide Full And Complete Responses To The First Set Of Interrogatories

AMc's principal objection spanning the First Set of Interrogatories is that all six are "irrelevant" and no longer seek facts reasonably calculated to lead to the discovery of admissible evidence because the NRA defeated AMc's motion for a preliminary injunction. *See* Ex. A at 2.

There is no basis for law or fact for this objection. The NRA has not located a Virginia court sustaining, much less discussing, such an objection or rule of discovery. Consistent with the above, AMc did not cite any authority to support a "preliminary injunction loss objection" in its written responses, nor did it offer any reasons or rationale for the objection. *Id.*; Rule 4:8(d); This Court should find AMc's "preliminary injunction loss" objection evasive, incomplete, conclusory and disregard all such objections to the First Set of Interrogatories and impose sanctions for the completely non-responsive objection. Rules 4:12(a)(3), (d); *Heller*, 303 F.R.D. at 482 (awarding where, as here, the responding party was provided a chance to cure its interrogatory response, but elected to rest on answers that "reflected a lack of reasonable inquiry and that was not substantially

[9] AMc's half-hearted attempt to comply with Rule 4:8(f) with a single sentence should be rejected out of hand." Ex. E at 4; *see supra* at pp. 3-4 (discussing reliance on documents).

justified"); *Ashghari-Kamrani*, 2016 WL 11642670, at *2 ("Generalized, boilerplate objections . . . are highly disfavored in the Fourth Circuit.").

Interrogatory No. 1. This Interrogatory concerns the same dispute addressed above in connection with Interrogatory No. 15 from the Second Set of Interrogatories: AMc's refusal to fully provide the information requested concerning "NRA-Dedicated-Personnel." *Supra* at pp. 6-9. Instead of responding fully, AMc muses about its theories of harm and interposes a generalized burden objection lacking in specificity. Ex. A at 2. The Court should overrule the objection and grant the Motion to Compel. Va. Sup. Ct. R 4:12(a)(3) ("an evasive or incomplete answer is to be treated as a failure to answer"), Rule 4:8(d) (an answer must state the "reasons" for the objection); *Ashghari-Kamrani*, 2016 WL 11642670, at *2.

Interrogatory Nos. 3-5. The Interrogatories are relevant to whether the alleged damages suffered by AMc, as set forth in their Amended Counterclaim, were caused by to the NRA. Ex. A at 3-4. For instance, Interrogatories Nos. 3 and 5 seek information about the efforts AMc took to mitigate damages allegedly attributable to the NRA's alleged breach of the contract. *Id.* Mitigation of damages has been defense to a breach of contract claim since time immemorial *Monahan v. Obici Med. Mgmt. Servs., Inc.*, 271 Va. 621, 633 (2006). In addition, the NRA propounded Interrogatory No. 4 to obtain information calculated to lead to discoverable evidence about AMc's allegations of reputational harm. Ex. A at 4. Defendants assert this precise type of harm in its Amended Counterclaims. Am. Countercl., dated Oct. 1, 2019, at ¶¶ 117-120. AMc also interposes conclusory burden objections for all three Interrogatories. It is axiomatic that such generalized objections lack merit. *Ashghari-Kamrani*, 2016 WL 11642670, at *2; *Heller*, 303 F.R.D. at 483; Rule 4:8(d). For this reason, the Court should grant the Motion to Compel.

Interrogatory No. 2. The NRA seeks information on the annual salaries of the directors and senior officers of AMc. The requested information is relevant to motive and whether they had a financial incentive to commit fraud, breach their fiduciary duties, or otherwise steal from the NRA to increase their wealth and or to maintain the lifestyle they amply enjoyed. *Turnage v. Clarity Serv., Inc.*, 3:14CV760, 2015 WL 5092695, at *2 (E.D. Va. 2015) (overruling interrogatory objection and compelling "produc[ion] of certain information related to net worth").

AMc raises several objections. None overcome the need for the sought-after information. First, to accommodate AMc's time-period objection, the NRA no longer seeks information for 2004-2005. Second, contrary to AMc, no legal basis exists to refuse to produce the requested information of a former employee if the information is within AMc's possession. *See* Va. Sup. Ct. R. Rule 4:1(b)(1). Third, no material harm or risk of disclosure exists due to the Protective Order the Court entered. Finally, AMc's conclusory burden objection lack specificity and merit, as explained before. *See supra* at pp. 18-19. The Court should grant the Motion to Compel.

Interrogatory No. 6. Here, the NRA seeks information concerning communications between AMc and its employees and press or media outlets. In other words, the Interrogatory raises the same dispute as Interrogatory No. 1 from the Second Set of Interrogatories, addressed above. *Supra* at pp. 18-19. For all the same reasons, the Court should grant the Motion to Compel.

III. CONCLUSION

For all the above reasons, the Court should grant the Motion to Compel in full.

WHEREFORE, Plaintiff, by counsel, respectfully requests that this Court enter an order

1. Compelling AMc to respond fully, without objection, to the Interrogatories identified herein within ten (10) days of entry of the order.
2. For an award of attorneys' fees and costs incurred. *See* Va. Sup. Ct. R. 4:12(a)(4) & (d).
3. For any other further relief this Court deems just and necessary.

Dated: January 14, 2020

Respectfully submitted,

NATIONAL RIFLE ASSOCIATION
OF AMERICA
By counsel

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2020, I caused the foregoing Plaintiff's Motion to Compel Supplemental Responses to Plaintiff's Interrogatories to Defendants and Motion for Sanctions to be served via electronic mail and first-class mail upon:

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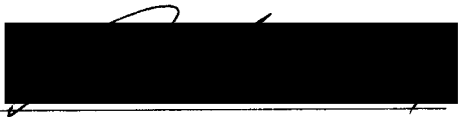

James W. Hundley (VSB No. 30723)
Robert H. Cox (VSB No. 33118)

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

NATIONAL RIFLE ASSOCIATION OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case Nos. CL19001757;
	)	CL19002067
ACKERMAN MCQUEEN, INC.,	)	
	)	
and	)	
	)	
MERCURY GROUP, INC.	)	
	)	
Defendants.	)	

DEFENDANTS' OBJECTIONS AND RESPONSES TO PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENTS REGARDING DEFENDANTS' MOTION FOR PRELIMINARY INJUNCTION

Defendants Ackerman McQueen, Inc. ("AMc") and Mercury Group, Inc. ("Mercury Group") (collectively "Defendants"), by counsel and pursuant to Rule 4:9 of the Rules of the Supreme Court of Virginia (the "Rules"), hereby submit the following Responses and Objections to Plaintiff the National Rifle Association of America's ("NRA") Request for Production of Documents Regarding Defendants' Motion for Preliminary Injunction filed in the above-caption action (the "Lawsuit"). These Responses are based on information currently available to Defendants. Defendants reserve the right to amend, supplement or correct their responses in accordance with the Virginia Rules of the Supreme Court.

GENERAL OBJECTIONS

1. The General Objections (collectively, the "Objections") set forth below apply to the Requests generally and to each Definition, Instruction and specific Request and, unless

EXHIBIT A

otherwise stated, shall have the same force and effect as if set forth in full in response to each Definition, Instruction and specific Request. Any objection to a Definition or Instruction shall also apply equally to any other Definition, Instruction or Request that incorporates that Definition or Instruction. Any undertaking to search for or provide information or documents in response to any specific Request remains subject to these objections. The fact that an objection is not listed herein does not constitute a waiver of that objection or otherwise preclude Defendants from raising that objection at a later time.

2. These Responses, while based on a diligent search to date by Defendants (which is ongoing), reflect only the current state of the knowledge, understanding and belief of Defendants with respect to the matters addressed in the Requests. These Responses are given without prejudice to the right of Defendants to use or rely on at any time, including at any hearing or at trial, subsequently discovered information or information omitted from these Responses as a result of mistake, error, oversight or inadvertence.

3. Defendants object to the Requests on the grounds that by Plaintiff's own admission they "regard[] Defendant Ackerman's Motion for Preliminary Injunction," which the Court denied. After further discussion with counsel for Plaintiff, Defendants have agreed to treat these Requests as if they were issued with respect to the actual Lawsuit, but doing so does not cure the fact that many of the Requests seek information solely relevant to the denied motion for preliminary injunction and not relevant to the Lawsuit.

4. Defendants object to the Requests to the extent that they are vague and ambiguous, overly broad, unduly burdensome, lacking in particularity, unreasonable or seek the discovery of information that is neither relevant to the claims or defenses of any party to, nor proportional to the needs of, the Lawsuit, as well as to the extent that the Requests are unduly burdensome because

they impose a significant burden, expense and inconvenience on Defendants that outweighs the likely benefit of the Requests. In the event that Defendants agree to conduct a reasonable search for documents in response to any of the Requests, Defendants do not concede that any of the Requests seek information or documents that are relevant to the claims, defenses or subject matter, or are proportional to the needs, of the Lawsuit.

5. Any agreement by Defendants to produce documents is made without waiver of any Objections and is not intended to constitute a representation that any such responsive documents exist, but only that Defendants will produce those responsive documents that do exist, are in Defendants' possession, custody or control, are found in a reasonable search, are not subject to applicable privileges (including the attorney-client privilege), do not constitute trial preparation or other work product materials, and are otherwise within the scope of discovery.

6. Irrespective of whether Defendants produce documents or provide information in response to the Requests, Defendants reserve the right (but do not assume the obligation) to: (i) revise, amend, correct, supplement, clarify or modify the content of the Response in accordance with the applicable rules and court orders; (ii) provide additional responsive information and documents in the future; (iii) object to further discovery in the Lawsuit, including discovery relating to the subject matter of documents produced; (iv) use or rely upon any information and documents produced in the Lawsuit in any hearing, proceeding or trial; (v) use or rely upon subsequently discovered information or information omitted from this Response as a result of mistake, error, oversight or inadvertence in any hearing, proceeding or trial; and (vi) challenge the authenticity or admissibility of any information or documents in any hearing, proceeding or trial.

7. Defendants object to the Requests as overbroad and unduly burdensome to the extent that they purport to require the production of "all" or "any" documents where a subset of documents would be sufficient to provide the pertinent information.

8. Defendants object to the Requests to the extent that they purport to require anything beyond a reasonable, good faith search for responsive documents within Defendants' immediate possession, custody or control.

9. Defendants object to the Requests to the extent that they call for the production of information protected by the attorney-client privilege, the attorney work product doctrine or any other applicable privilege, doctrine, immunity, law or rule protecting information from disclosure. Specific Objections on the ground of privilege are provided herein for emphasis and clarity only, and the absence of a specific Objection should not be interpreted as indicating that Defendants do not object to a Request on the basis of any applicable privilege, doctrine, immunity, law or rule protecting information from disclosure. Any inadvertent disclosure of such material is not intended to be, nor shall in any way be construed as, a waiver of any attorney client privilege, work product doctrine, or any other applicable privilege, doctrine, law or rule protecting information from disclosure.

10. Defendants object to the Requests to the extent that they purport to require Defendants to: (i) produce documents that are not in Defendants' possession, custody or control; (ii) create, generate, compile or develop documents that do not currently exist and/or are not currently in Defendants' possession, custody or control; (iii) produce documents that are available from a more comprehensive, more convenient, more efficient, less burdensome or less expensive source than Defendants or through a more convenient, more efficient, less burdensome or less expensive means than the Requests; (iv) produce documents that are public, equally available to

or already in the possession, custody or control of Plaintiff or of third persons or entities, including Plaintiffs' agents, attorneys or other representatives; (v) produce documents that are in the possession, custody or control of a third party or documents that are otherwise not in the possession, custody or control of Defendants; (vi) produce information regarding documents that have been lost, discarded or destroyed; or (vii) discern or inquire about the governance of entities that are unaffiliated with Defendants. Subject to the Objections, in responding to the Requests, Defendants will produce only documents in their possession, custody or control as of the date of the Response.

11. Defendants object to the Requests to the extent that they define the applicable time period for all Requests as beginning January 1, 2015. For many Requests the time period before January 1, 2018 is either not relevant, overly broad, or disproportionately burdensome given that the expense and inconvenience on Defendants outweighs any benefit of a response to the Requests.

12. Defendants objects to the Requests to the extent that: (i) they are unduly burdensome because they would impose expense and inconvenience on Defendants significantly disproportionate to any likelihood of discovering relevant information not already produced in the Lawsuit; and (ii) they purport to require Defendants to conduct anything beyond a reasonable and diligent search of readily-accessible files, where responsive documents reasonably would be expected to be found.

13. Defendants object to the Requests to the extent that they purport to seek the production of information or documents that reflect trade secrets, or information that is confidential, proprietary, commercially sensitive or competitively significant, or personal information relating to Defendants, its affiliates, employees and/or clients, customers or counterparties, or information that is subject to other protective orders, non-disclosure agreements

or other confidentiality undertakings. Defendants further object to producing proprietary information to Plaintiff's lawyers who have a public relations unit within the law firm that directly competes with Defendants and who have no right to view Defendants' proprietary information.

14. Defendants object to the Instructions and Definitions to the extent that they are inconsistent with the above objections and seek to impose search obligations beyond those set forth in the Rules of the Supreme Court of Virginia. For clarity's sake, this objection includes, but is not limited to, Plaintiff's definition of "affiliated entity." Defendants' search for documents will be confined to the records in the possession, custody or control of AMc, Mercury Group, and any employee or agent directly controlled by either and likely to have responsive documents.

SPECIFIC OJECTIONS AND RESPONSES

Request for Production No. 1:

All documents that refer or relate to any lines of credit issued to Ackerman and/or Mercury.

RESPONSE:

Defendants object to the Request on the grounds that the documents requested are not relevant to the subject matter of the Lawsuit, but rather only relevant to AMc's Motion for Preliminary Injunction, which was denied. Defendants further object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as "all documents that refer or relate to lines of credit" potentially implicate large and diffuse classes of documents that are not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the Request is intended to harass and oppress Defendants by fishing into categories of financial information not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the Request seeks proprietary information by Plaintiff's law firm, the Brewer law firm, which actively competes with Defendants on public relations projects and will misuse the documents. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Request for Production No. 2:

All documents that refer or relate to amounts transferred or paid to any of Ackerman's or Mercury's members, managers, owners or any Affiliated Entities, from January 1, 2015 to the present.

RESPONSE:

Defendants object to the Request on the grounds that the documents requested are not relevant to the subject matter of the Lawsuit, and not even relevant to AMc's Motion for Preliminary Injunction, which was denied. Defendants further object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as "all documents that refer or relate to amounts transferred or paid" to the classes of individuals identified potentially implicate large and diffuse classes of documents that are not relevant to the subject matter of the Lawsuit. Defendants object that the request is intended to harass and oppress Defendants and their high-level personnel by fishing into personal financial matters. Defendants further object on the grounds that the Request seeks proprietary information by Plaintiff's law firm, the Brewer law firm, which actively competes with Defendants on public relations projects and will misuse the documents. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Request for Production No. 3:

All documents that refer or relate to any capital calls that Ackerman and/or Mercury have made or considered during the period from January 1, 2015 to present.

RESPONSE:

Defendants object to the Request on the grounds that the documents requested are not relevant to the subject matter of the Lawsuit, but rather only relevant to AMc's Motion for Preliminary Injunction, which was denied. Defendants further object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as "all documents that refer or relate to" amounts transferred or paid to the classes of individuals identified potentially implicate large and diffuse classes of documents that are not relevant to the subject matter of the Lawsuit. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Subject to the foregoing objections and the General Objections, Defendants have no documents responsive to this request.

Request for Production No. 4:

Documents sufficient to show all sources, and uses, of cash on hand for each of Ackerman, Mercury and each Affiliated Entity.

RESPONSE:

Defendants object to the Request on the grounds that the documents requested are not relevant to the subject matter of the Lawsuit, but rather only marginally relevant to AMc's Motion for Preliminary Injunction, which was denied. Defendants further object to this Request on the

grounds that it is overbroad, unduly burdensome, and vague, as documents that would "show all sources, and uses, of cash" potentially implicate large and diffuse classes of documents that are not relevant to the subject matter of the Lawsuit. Defendants further object to this Request on the grounds that the term "affiliated entity" is vague, overbroad, unreasonable, and seeks to impose discovery obligations beyond those required by the Rules. Defendants further object on the grounds that the Request is intended to harass and oppress Defendants by fishing into categories of financial information not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the Request seeks proprietary information by Plaintiff's law firm, the Brewer law firm, which actively competes with Defendants on public relations projects and will misuse the documents. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Request for Production No. 5:

All financial statements for each of Ackerman, Mercury and any Affiliated Entity, including all versions of such statements, for the current fiscal quarter and the preceding fiscal quarter including, without limitation, all balance sheets, income statements, cash flow statements and/or statements of stockholder equity.

RESPONSE:

Defendants object to the Request on the grounds that the documents requested are not relevant to the subject matter of the Lawsuit, but rather only relevant to AMc's Motion for Preliminary Injunction, which was denied. Defendants further object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the financial documents requested

potentially implicate large and diffuse classes of documents that are not relevant to the subject matter of the Lawsuit. Defendants further object to this Request on the grounds that the term "affiliated entity" is vague, overbroad, unreasonable, and seeks to impose discovery obligations beyond those required by the Rules. Defendants further object on the grounds that the Request is intended to harass and oppress Defendants by fishing into categories of financial information not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the Request seeks proprietary information by Plaintiff's law firm, the Brewer law firm, which actively competes with Defendants on public relations projects and will misuse the documents. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Subject to the foregoing objections and the General Objections, and following a reasonable search, Defendants shall produce non objectionable, responsive documents relevant to Defendants' damages set forth in the counterclaims after a binding protective order has been issued to protect the confidential and proprietary nature of the documents.

Request for Production No. 6:

All documents from January 1, 2015 to the present that relate or refer to the financial condition of any of Ackerman, Mercury or any Affiliated Entity, including but not limited to financial statements, income statements, balance sheets, budgets, cost analyses, and cash flow statements and statements of stockholder equity.

RESPONSE:

Defendants object to the Request on the grounds that the bulk of the documents requested are not relevant to the subject matter of the Lawsuit, but rather only relevant to AMc's Motion for Preliminary Injunction, which was denied. Defendants further object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the financial documents requested could potentially implicate large and diffuse classes of documents that are not relevant to the subject matter of the Lawsuit. Defendants further object to this Request on the grounds that the term "affiliated entity" is vague, overbroad, unreasonable, and seeks to impose discovery obligations beyond those required by the Rules. Defendants further object on the grounds that the Request is intended to harass and oppress Defendants by fishing into categories of financial information not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the Request seeks proprietary information by Plaintiff's law firm, the Brewer law firm, which actively competes with Defendants on public relations projects and will misuse the documents. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Subject to the foregoing objections and the General Objections, and following a reasonable search, Defendants shall produce non-objectionable, responsive documents relevant to

Defendants' damages set forth in the counterclaims after a protective order has been issued to protect the confidential and proprietary nature of the documents.

Request for Production No. 7:

All documents that refer or relate to an effort by Ackerman, Mercury or an Affiliated Entity to incur debt or borrow money between January 1, 2015, and the present.

RESPONSE:

Defendants object to the Request on the grounds that the documents requested are not relevant to the subject matter of the Lawsuit, but rather only relevant to AMc's Motion for Preliminary Injunction, which was denied. Defendants further object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the debt-related documents requested could potentially implicate large and diffuse classes of documents that are not relevant to the subject matter of the Lawsuit. Defendants further object to this Request on the grounds that the term "affiliated entity" is vague, overbroad, unreasonable, and seeks to impose discovery obligations beyond those required by the Rules. Defendants further object on the grounds that the requested time period primarily encompasses a period of time not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the Request is intended to harass and oppress Defendants by fishing into categories of financial information not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the Request seeks proprietary information by Plaintiff's law firm, the Brewer law firm, which actively competes with Defendants on public relations projects and will misuse the documents. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the

attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Request for Production No. 8:

All documents that refer or relate to direct or indirect communication, during the period August 1, 2018 to the present, between Ackerman, Mercury or any Affiliated Entity on the one hand, and a media outlet (including any reporter, contributor, editor, executive, content-producer or representative thereof) on the other, regarding the NRA, including all documents provided to such person(s).

RESPONSE:

Defendants object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested could potentially implicate large and diffuse classes of routine communications that are not relevant to the subject matter of the Lawsuit. Numerous employees of the Defendants, as part of their official duties, routinely (and sometimes daily) communicated with the media about the NRA in order to advance the interests and objectives of the NRA. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Subject to the foregoing objections and the General Objections, and following a reasonable search, Defendants shall produce non-objectionable, responsive documents after a protective order has been issued to protect the confidential and proprietary nature of the documents.

Request for Production No. 9:

All documents that refer or relate to direct or indirect communication, during the period August 1, 2018 to the present, between Ackerman, Mercury or any Affiliated Entity on the one hand, and any representative of or content-producer for the New York Times, the Wall Street Journal, The Daily Beast or Rolling Stone, on the other hand, that refers or relates to the NRA, including all documents provided to such person(s).

RESPONSE:

Defendants object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested could potentially implicate large and diffuse classes of routine communications that are not relevant to the subject matter of the Lawsuit. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Subject to the foregoing objections and the General Objections, and following a reasonable search, Defendants shall produce non objectionable, responsive documents after a protective order has been issued to protect the confidential and proprietary nature of the documents.

Request for Production No. 10:

Any and all "non-cancellable contracts entered into between you and third parties for the benefit of the NRA," as described in Section XI.E. of the 2017 Services Agreement.

RESPONSE:

Defendants object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested potentially implicate large classes of documents that are not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the requested time period primarily encompasses a period of time not relevant to the subject matter of the Lawsuit. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Subject to the foregoing objections and the General Objections, and following a reasonable search, Defendants shall produce non objectionable, responsive documents relevant to Defendants' damages set forth in the counterclaims after a protective order has been issued to protect the confidential and proprietary nature of the documents.

Request for Production No. 11:

Any and all documents referring or relating to NRA approval of any budget for the years 2016 through 2018, including any such budget which Ackerman or Mercury claims that the NRA approved.

RESPONSE:

Defendants object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested potentially implicate documents that are not relevant to the subject matter of the Lawsuit. Defendants further object to this Request on the grounds that its premise evinces a fundamental misunderstanding about how Defendants interacted with the NRA with respect to budget matters, which in turn renders this Request flawed. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Subject to the foregoing objections and the General Objections, and following a reasonable search, Defendants shall produce non objectionable, responsive documents after a protective order has been issued to protect the confidential and proprietary nature of the documents.

Request for Production No. 12:

Documents sufficient to identify all NRA-Dedicated Personnel (as defined in Paragraph 14 of the NRA's Complaint) as of June 19, 2019, and all projects or accounts on which each individual worked, and the amount or percentage of time dedicated to each such project or account.

RESPONSE:

Defendants object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested potentially implicate large and diffuse classes of documents that are not relevant to the subject matter of the Lawsuit. Defendants further object to this Request on the grounds that its premise evinces a fundamental misunderstanding about how Defendants' employees memorialize their work activities and how work flow is managed, which in turn renders this request overbroad, unduly burdensome, and flawed. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Subject to the foregoing objections and the General Objections, and following a reasonable search, Defendants shall produce non-objectionable responsive documents after a protective order has been issued to protect the confidential and proprietary nature of the documents.

Request for Production No. 13:

Documents sufficient to show each of the costs invoiced to the NRA or the NRA Foundation between January 1, 2018 and April 1, 2019, which costs were incurred by reason of the production of American Heroes, and whether such costs were billed to the NRA, the NRA Foundation, or both entities.

RESPONSE:

Defendants object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested potentially implicate large and diffuse classes of documents not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the Request is intended to harass and oppress Defendants by fishing into categories of financial information not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the Request seeks proprietary information by Plaintiff's law firm, the Brewer law firm, which actively competes with Defendants on public relations projects and will misuse the documents. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Subject to the foregoing objections and the General Objections, and following a reasonable search, Defendants shall produce non objectionable, responsive documents after a protective order has been issued to protect the confidential and proprietary nature of the documents.

Request for Production No. 14:

Documents sufficient to show each of the costs invoiced to the NRA or the NRA Foundation between January 1, 2018 and April 1, 2019, which costs were incurred by reason of compensation or perquisites provided to Col. North or North-Related Persons, and whether such costs were billed to the NRA, the NRA Foundation or both entities.

RESPONSE:

Defendants object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested potentially implicate large and diffuse classes of documents not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the Request is intended to harass and oppress Defendants by fishing into categories of financial information not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the Request seeks proprietary information by Plaintiff's law firm, the Brewer law firm, which actively competes with Defendants on public relations projects and will misuse the documents. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Subject to the foregoing objections and the General Objections, and following a reasonable search, Defendants shall produce non objectionable, responsive documents after a protective order has been issued to protect the confidential and proprietary nature of the documents.

Request for Production No. 15:

All documents that refer or relate to Col. North's availability to film American Heroes.

RESPONSE:

Defendants object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested potentially implicate large and diffuse classes of documents not relevant to the subject matter of the Lawsuit. Defendants further object to this Request on the grounds that the term "availability" is vague in this context and therefore renders the Request particularly overbroad and unduly burdensome, which is further exacerbated by the terms "refer or relate to." Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Subject to the foregoing objections and the General Objections, and following a reasonable search, Defendants shall produce non objectionable, responsive documents after a protective order has been issued to protect the confidential and proprietary nature of the documents.

Request for Production No. 16:

All documents that refer or relate to modification to the American Heroes production schedule during the period May 1, 2018 to the present, and the reason(s) for any such modification(s).

RESPONSE:

Defendants object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested potentially implicate large and diffuse classes of documents not relevant to the subject matter of the Lawsuit. Defendants further object to this Request on the grounds that the term "modification" is vague in this context and therefore renders the Request particularly overbroad and unduly burdensome, which is further exacerbated by the terms "refer or relate to." Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Subject to the foregoing objections and the General Objections, and following a reasonable search, Defendants shall produce non objectionable, responsive documents after a protective order has been issued to protect the confidential and proprietary nature of the documents.

Request for Production No. 17:

All documents that relate or refer to documentation to support all bills and invoices that Ackerman and/or Mercury contend have not been paid, including without limitation documentation of the person(s) who performed the work in the invoices, the date(s) the work was performed by each person, the nature of the work performed, and the particular output that resulted, as required by Sections VIII and XI.E of the Services Agreement.

RESPONSE:

Defendants object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested potentially implicate large and diffuse classes of documents not relevant to the subject matter of the Lawsuit. A request for "[a]ll documents that relate or refer" in this context is near boundless. Defendants further object to this Request on the grounds that its premise evinces a fundamental misunderstanding about how Defendants' employees memorialize their work activities and how work flow is managed, which in turn renders this request overbroad, unduly burdensome, and flawed. Defendants further object on the grounds that the Request is intended to harass and oppress Defendants by fishing into categories of financial information not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the Request seeks proprietary information by Plaintiff's law firm, the Brewer law firm, which actively competes with Defendants on public relations projects and will misuse the documents. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Subject to the foregoing objections and the General Objections, and following a reasonable search, Defendants shall produce non objectionable, responsive documents after a protective order has been issued to protect the confidential and proprietary nature of the documents.

Request for Production No. 18:

All documents requested of you in correspondence issued by NRA designee Andrew Arulanandam, to Bill Winkler, on June 5 and June 25, 2019 to the extent that you still contend that the invoices referenced therein have not been paid.

RESPONSE:

Defendants object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested potentially implicate large and diffuse classes of documents not relevant to the subject matter of the Lawsuit. The letters referenced contain multiple requests, many of which are subject to their own objections on an individual basis. Plaintiff cannot through one Request force Defendants to respond to multiple Requests, made in two different correspondences. Defendants further object to this Request on the grounds that its premise evinces a fundamental misunderstanding about how Defendants' employees memorialize their work activities and how work flow is managed, which in turn renders this request overbroad, unduly burdensome, and flawed. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Request for Production No. 19:

All documents that relate or refer to time records and day logs for all employees who worked on NRA matters.

RESPONSE:

Defendants object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested potentially implicate large and diffuse classes of documents not relevant to the subject matter of the Lawsuit. A request for "[a]ll documents that relate or refer" in this context is near boundless. Defendants further object to this Request on the grounds that its premise evinces a fundamental misunderstanding about how Defendants' employees memorialize their work activities and how work flow is managed, which in turn renders this request overbroad, unduly burdensome, and flawed. Defendants further object on the grounds that the Request is intended to harass and oppress Defendants by fishing into categories of financial information not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the Request seeks proprietary information by Plaintiff's law firm, the Brewer law firm, which actively competes with Defendants on public relations projects and will misuse the documents. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Subject to the foregoing objections and the General Objections, and following a reasonable search, Defendants shall produce non objectionable, responsive documents after a protective order has been issued to protect the confidential and proprietary nature of the documents.

Request for Production No. 20:

Documents sufficient to identify each member of Defendants' workforce who has worked on the Chickasaw Nation account, and the NRA account, at any time between January 1, 2015 and the present, and the amount billed to Chickasaw Nation, and the amount billed to the NRA, for each such worker's services.

RESPONSE:

Defendants object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested potentially implicate large and diffuse classes of documents not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the requested time period primarily encompasses a period of time not relevant to the subject matter of the Lawsuit. By the NRA's own admission, no concerns arose with respect to AMc billing until late 2018. Defendants further object to this Request on the grounds that its premise evinces a fundamental misunderstanding about how Defendants' employees memorialize their work activities and how work flow is managed, which in turn renders this request overbroad, unduly burdensome, and flawed. Defendants further object on the grounds that the Request is intended to harass and oppress Defendants by fishing into categories of financial information not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the Request seeks proprietary information by Plaintiff's law firm, the Brewer law firm, which actively competes with Defendants on public relations projects and will misuse the documents. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Request for Production No. 21:

Documents sufficient to identify each member of Defendants' workforce who has worked on the Integris account, and the NRA account, at any time between January 1, 2015 and the present, and the amount billed to Integris, and the amount billed to the NRA, in connection with each such worker's services.

RESPONSE:

Defendants object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested potentially implicate large and diffuse classes of documents not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the requested time period primarily encompasses a period of time not relevant to the subject matter of the Lawsuit and not reasonably calculated to lead to the discovery of admissible evidence. By the NRA's own admission, no concerns arose with respect to AMc billing until late 2018. Defendants further object to this Request on the grounds that its premise evinces a fundamental misunderstanding about how Defendants' employees memorialize their work activities and how work flow is managed, which in turn renders this request overbroad, unduly burdensome, and flawed. Defendants further object on the grounds that the Request is intended to harass and oppress Defendants by fishing into categories of financial information not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the Request seeks proprietary information by Plaintiff's law firm, the Brewer law firm, which actively competes with Defendants on public relations projects and will misuse the documents. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Request for Production No. 22:

All documents that relate or refer to Ackerman's or Mercury's gross revenues derived from their work for the NRA.

RESPONSE:

Defendants object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested potentially implicate large and diffuse classes of documents not relevant to the subject matter of the Lawsuit. A request for "[a]ll documents that relate or refer" in this context is near boundless. Defendants further object on the grounds that the Request is intended to harass and oppress Defendants by fishing into categories of financial information not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the Request seeks proprietary information by Plaintiff's law firm, the Brewer law firm, which actively competes with Defendants on public relations projects and will misuse the documents. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Subject to the foregoing objections and the General Objections, and following a reasonable search, Defendants shall produce non objectionable, responsive documents after a protective order has been issued to protect the confidential and proprietary nature of the documents.

Request for Production No. 23:

Documents sufficient to show Ackerman's gross revenues from each of its clients other than the NRA, and documents sufficient to show Mercury's gross revenues from each of its clients other than the NRA.

RESPONSE:

Defendants object to the Request on the grounds that the documents requested are not relevant to the subject matter of the Lawsuit, but rather only relevant to AMc's Motion for Preliminary Injunction, which was denied. Defendants further object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested potentially implicate large and diffuse classes of documents not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the Request is intended to harass and oppress Defendants by fishing into categories of financial information not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the Request seeks proprietary information by Plaintiff's law firm, the Brewer law firm, which actively competes with Defendants on public relations projects and will misuse the documents. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Request for Production No. 24:

All documents that relate or refer to a reduction in employees at Ackerman or Mercury, including but not limited to downsizing, layoffs, and terminations.

RESPONSE:

Defendants object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested potentially implicate large and diffuse classes of documents not relevant to the subject matter of the Lawsuit. A request for "[a]ll documents that relate or refer" in this context is near boundless. Defendants further object on the grounds that the default time period of January 1, 2015 to the present primarily encompasses a period not relevant to the subject matter of the Lawsuit and not reasonably calculated to lead to the discovery of admissible evidence. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Subject to the foregoing objections and the General Objections, and following a reasonable search, Defendants shall produce non objectionable, responsive documents after a protective order has been issued to protect the confidential and proprietary nature of the document.

Request for Production No. 25:

All documents that relate or refer to negotiation of the Amendment to the Services Agreement.

RESPONSE:

Defendants object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested potentially implicate large and diffuse classes of documents not relevant to the subject matter of the Lawsuit. A request for "[a]ll documents that relate or refer" in this context is vague and therefore potentially boundless. Defendants further object on the grounds that the default time period of January 1, 2015 to the present primarily encompasses a period not relevant to the subject matter of the Lawsuit and not reasonably calculated to lead to the discovery of admissible evidence. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Subject to the foregoing objections and the General Objections, and following a reasonable search, Defendants shall produce non objectionable, responsive documents after a protective order has been issued to protect the confidential and proprietary nature of the documents.

Request for Production No. 26:

All documents that relate or refer to "a cascade of negative effects on AMc's goodwill," including but not limited to documents identifying "[p]rospective clients [who] have expressed fears about engaging with AMc and [who] have taken their business to competitors" and "AMc's most valuable employees [who] have already begun to pursue other employment" as alleged on page nine (9) of your Motion for Preliminary Injunction.

RESPONSE:

Defendants object to the Request on the grounds that the documents requested are not relevant to the subject matter involved in the Lawsuit, but rather are only relevant to AMc's Motion for Preliminary Injunction, which was denied. Defendants further object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested potentially implicate large and diffuse classes of documents not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the Request is intended to harass and oppress Defendants by fishing into categories of financial information not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the Request seeks proprietary information by Plaintiff's law firm, the Brewer law firm, which actively competes with Defendants on public relations projects and will misuse the documents. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Request for Production No. 27:

All documents that relate or refer to the "substantial financial damage" or irreparable harm that Ackerman will suffer immediately, or has already suffered, as alleged in pages six through nine (6-9) of Ackerman's Motion for Preliminary Injunction.

RESPONSE:

Defendants object to the Request on the grounds that the bulk of the documents requested are not relevant to the subject matter involved in the Lawsuit, but rather only relevant to AMc's Motion for Preliminary Injunction, which was denied. Defendants further object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested potentially implicate large and diffuse classes of documents not relevant to the subject matter of the Lawsuit. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Subject to the foregoing objections and the General Objections, and following a reasonable search, Defendants shall produce non objectionable, responsive documents relevant to Defendants' damages set forth in the counterclaims after a protective order has been issued to protect the confidential and proprietary nature of the documents.

Request for Production No. 28:

All documents that relate or refer to any failure by the NRA to pay any invoice from Ackerman or Mercury within 30 days of the date of the invoice.

RESPONSE:

Defendants object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested potentially implicate large and diffuse classes of documents not relevant to the subject matter of the Lawsuit. A request for "[a]ll documents that relate or refer" in this context is vague and therefore potentially boundless. Defendants further object on the grounds that the default time period of January 1, 2015 to the present primarily encompasses a period not relevant to the subject matter of the Lawsuit. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Subject to the foregoing objections and the General Objections, and following a reasonable search, Defendants shall produce non objectionable, responsive documents after a protective order has been issued to protect the confidential and proprietary nature of the documents.

Request for Production No. 29:

All documents that relate or refer to any question, inquiry, complaint, or dispute by the NRA with respect to any invoice from Ackerman or Mercury.

RESPONSE:

Defendants object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested potentially implicate large and diffuse classes of documents not relevant to the subject matter of the Lawsuit. A request for "[a]ll documents that relate or refer" in this context is vague and therefore potentially boundless. Defendants further object on the grounds that the default time period of January 1, 2015 to the present primarily encompasses a period not relevant to the subject matter of the Lawsuit. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Subject to the foregoing objections and the General Objections, and following a reasonable search, Defendants shall produce non objectionable, responsive documents after a protective order has been issued to protect the confidential and proprietary nature of the documents.

Request for Production No. 30:

Documents sufficient to identify each officer, manager or employee of Ackerman or Mercury who has left Ackerman or Mercury's employment since May 1, 2019, the date of termination, and the reason(s) for termination.

RESPONSE:

Defendants object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested potentially implicate large and diffuse classes of documents not relevant to the subject matter of the Lawsuit. Defendants further object on the grounds that the Request encompasses employees who have left for reasons not relevant to the subject matter of the Lawsuit. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Subject to the foregoing objections and the General Objections, and following a reasonable search, Defendants shall produce non-objectionable, responsive documents after a protective order has been issued to protect the confidential and proprietary nature of the documents.

Request for Production No. 31:

Documents sufficient to identify the salary expenses and overhead costs referenced in Paragraph 26 of the Winkler Declaration, on a monthly basis, descriptions of each such expense or cost, the monthly sum paid by the NRA which Defendants utilize to "cover" the "majority" of those expenses and costs (see Winkler Decl., ¶ 26), and the source or sources from which payment for the remainder of those expenses and costs are drawn.

RESPONSE:

Defendants object to this Request on the grounds that the documents requested are not sufficiently relevant to the subject matter of the Lawsuit, but rather only marginally relevant to AMc's Motion for Preliminary Injunction, which was denied. Defendants further object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested potentially implicate large and diffuse classes of documents not relevant to the subject matter of the Lawsuit. Defendants object that the request has multiple unrelated parts and is therefore not the description of a category of documents, but vague descriptions of multiple categories. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Request for Production No. 32:

Any and all documents referring or relating to the alleged approvals by the NRA of any of the "annualized fees," referenced in Paragraph 27 of the Winkler Declaration.

RESPONSE:

Defendants object to this Request on the grounds that it is overbroad, unduly burdensome, and vague, as the documents requested potentially implicate large and diffuse classes of documents not relevant to the subject matter of the Lawsuit. A request for "[a]ny and all documents relating or referring" in this context is vague and therefore potentially boundless. Defendants further object to this Request to the extent it calls for the production of documents or information protected by the attorney-client privilege, the work-product doctrine, the common interest doctrine, and/or any other privilege or immunity from disclosure.

Subject to the foregoing objections and the General Objections, and following a reasonable search, Defendants shall produce non objectionable, responsive documents after a protective order has been issued to protect the confidential and proprietary nature of the documents.

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

Dated: July 25, 2019

Respectfully submitted,

[redacted]

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Defendants' Responses to Plaintiff's Document Requests to Defendants Regarding Defendants' Motion for Preliminary Injunction was served on July 25, 2019, on the following counsel for Plaintiff by agreement via email:

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Admitted Pro Hac Vice

[redacted]

David H. Dickieson

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.**	**Cases No. CL19001757**

DEFENDANTS' RESPONSES TO PLAINTIFF'S SECOND SET OF INTERROGATORIES

Defendants Ackerman McQueen, Inc. and Mercury Group, Inc. (hereafter collectively "Defendants" or "AMc") hereby respond to the second set of interrogatories issued by the National Rifle Association (the "NRA"), in accordance with Virginia Supreme Court Rule 4:8.

Defendants generally object to the unduly burdensome nature of the interrogatories and note that several of the interrogatories would be better addressed in deposition testimony or through the production of documents. Pursuant to Virginia Supreme Court Rule 4:8(f), where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to

EXHIBIT
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such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. Finally, Defendants incorporate, where applicable, their General Objections stated in Document Request Responses dated September 4, 2019.

OBJECTIONS AND RESPONSES TO PLAINTIFF'S INTERROGATORIES

INTERROGATORY NO. 7:

Identify by name and contact information each person whom you believe has or may have knowledge of the facts and circumstances that are the subject matter of your Counterclaim.

Response: Pursuant to Virginia Court Rule 4:8(f), Defendants will produce business records that will identify the scores of persons who has knowledge of individual facts and circumstances and such records will provide the context of their knowledge. Notwithstanding such production of documents, the following persons have knowledge of the facts and circumstances of items included in the Defendant's Counterclaim:

1. Revan McQueen -- CEO of AMc
2. Melanie Montgomery – EVP of AMc
3. Lacey Duffy Cremer – EVP of AMc
4. Bill Winkler – CFO of AMc
5. Brandon Winkler – Chief Accounting Officer of AMc
6. John Popp – furloughed AMc employee
7. Tony Makris – President, Mercury Group
8. Nader Tavangar – EVP, Managing Director of Mercury Group

9. Oliver North – NRA Board Member
10. Dana Loesch – AMc employee
11. Wayne LaPierre – NRA EVP and CEO
12. Andrew Arulanandam – NRA employee
13. Emily Cummins – former NRA employee
14. Millie Hallow – NRA employee
15. Steve Hart – Former NRA in-house counsel
16. Craig Spray – NRA Treasurer
17. Tyler Schropp – Director, NRA Office of Advancement
18. Rick Tedrick – CFO, NRA Foundation
19. Travis Carter – Brewer Firm employee
20. Josh Powell – NRA Chief of Staff
21. Lisa Supernaugh – Executive Operations at NRA
22. Wilson Phillips – Former NRA Treasurer
23. Forensic Risk Alliance
24. William Brewer
25. Persons identified by the NRA as having knowledge of the dispute

Defendants are continuing to pursue discovery to determine whether other persons have relevant knowledge of the issues alleged in the dispute.

INTERROGATORY NO. 8:

With respect to each person identified in response to Interrogatory No. 7, that is an AMc employee or agent, describe specifically that person's knowledge of the facts and circumstances of the subject matter of the Counterclaim and that person's basis for that knowledge.

Response: Defendants object to this interrogatory to the extent that it is unduly burdensome to attempt to capture all of the relevant information that is possessed by the various potential witnesses in this dispute. Defendants also object to the extent that this interrogatory seeks information protected by the attorney client privilege and the attorney work product privilege. Notwithstanding such objections, and pursuant to Virginia Court Rule 4:8(f), Defendants will produce business records that will identify the scores of persons who has knowledge of individual facts and circumstances and such records will provide the context of their knowledge. Notwithstanding such objections and production of documents, the following persons with general relevant knowledge are identified below:

NAME	KNOWLEDGE	BASIS
Revan McQueen	General knowledge of all allegations in the Counterclaim.	CEO of Ackerman McQueen with oversight over the relationship with the NRA.
Bill Winkler	General knowledge of all financial allegations in the Counterclaim	Chief Financial Officer of Ackerman McQueen with oversight over the financial relationship with the NRA.
Brandon Winkler	General knowledge of all financial allegations in the Counterclaim	Chief Accounting Officer of Ackerman McQueen with oversight over the financial relationship with the NRA.
Melanie Montgomery	General knowledge of all allegations in the Counterclaim	Executive Vice President and Relationship Manager with over 35 years of experience working with the NRA as a client of AMc
Lacey Duffy Cremer	General knowledge of all allegations in the Counterclaim	Executive Vice President and Relationship Manager with over 12 years of experience working with the NRA as a client of AMc

Nader Tavangar	General knowledge of all allegations in the Counterclaim	Managing Director of Mercury Group with oversight of the NRA account
Tony Makris	General knowledge of allegations in the Counterclaim relating to the relationship with the NRA and Wayne LaPierre	Close personal ties with Wayne LaPierre and a long history of working with the NRA.
Oliver North	Knowledge of AMc's contract and of the NRA board's failure to exercise oversight	Former NRATV host and former NRA President
Dana Loesch	Knowledge of her contract terms and the NRATV issues	Former NRATV host
John Popp	Knowledge of the Brewer law firm disclosing information on his laptop computer	Furloughed AMc employee

INTERROGATORY NO. 9:

With respect to each person identified in response to Interrogatory No. 7, that is not an AMc employee or agent, describe specifically that person's knowledge of the facts and circumstances of the subject matter of the Counterclaim and that person's basis for that knowledge.

Response: Defendants object to this interrogatory to the extent that it is unduly burdensome to attempt to capture all of the relevant information that is possessed by the various potential witnesses in this dispute. Defendants also object to the extent that this interrogatory seeks information protected by the attorney client privilege and the attorney work product privilege. Notwithstanding such objections, and pursuant to Virginia Court Rule 4:8(f), Defendants will produce business records that will identify the scores of persons who has knowledge of individual facts and circumstances and such records will provide the context of their knowledge. Defendants also object to this interrogatory on the grounds that it requests

information that is uniquely within Plaintiff's control with respect to NRA employees and former employees.

Notwithstanding such objections and production of documents, the following persons with general relevant knowledge are identified below:

NAME	KNOWLEDGE	BASIS
Wayne LaPierre	General knowledge of all allegations in the Counterclaim	CEOof the NRA responsible for the relationship with AMc
Steve Hart	General knowledge of the NRA's practices and past history with AMc	Former counsel to the NRA
Millie Hallow	Knowledge of Wayne LaPierre's actions and his use of notepads and the effort to remove Oliver North as president of the NRA	NRA employee who works with Wayne LaPierre
Andrew Arulanandam	Knowledge of the NRA media relations and the NRA's request for information from AMc. Knowledge of Wayne LaPierre's actions.	NRA employee
Craig Spray	General Knowledge of NRA's payment of AMc invoices. Knowledge of all 2019 invoices/budgets/billing schedules.	NRA Treasurer
Rick Tedrick	Knowledge of AMc invoices	NRA employee
Lisa Supernaugh	Knowledge of AMc invoices and the fall of 2018 invoice review	NRA employee
William Brewer	Knowledge of Public Relations work done for the NRA and general knowledge of NRA strategies	Brewer, Attorneys and Counselors
Travis Carter	Knowledge of NRA public relations work and the disclosure of powerpoint data to AMc employee.	Brewer, Attorneys and Counselors

Josh Powell	Knowledge of the NRA/AMc relationship.	NRA Chief of Staff

INTERROGATORY NO. 10:

Identify and describe in detail the factual and legal bases for your contention that the NRA breached the Services Agreement, and identify every term of the Services Agreement that you contend the NRA has breached and the manner in which you contend the NRA has breached that term(s) and the date(s) of the alleged breach(es).

Response: Pursuant to Virginia Court Rule 4:8(f), Defendants will produce business records that will reveal the facts and circumstances of the breaches and place such information into context. Notwithstanding such document production, the Defendants summarize the factual and legal bases for the NRA breaches as follows:

Amendment No. 1 to Services Agreement requires the NRA to make timely payments in response to invoices received from AMc. The Amendment states: NRA acknowledges that its failure to pay such an invoice within 30 days will cause substantial financial damage to AMc. Accordingly, if at any time NRA fails to timely pay the invoice, NRA agrees that it shall post a $3,000,000 letter of credit (the "LOC") for the benefit of AMc. The LOC shall continue in existence for the term of the Agreement and shall be maintained at $3,00,000 at all times."

The NRA has failed to make timely payments of AMc's invoices. Specifically, the NRA failed to pay the following fee service invoices within the 30-day time period required by the Services Agreement:

Invoice 158196 for $451,201.63 dated June 1, 2018
Invoice 158197 for $894,075.80 dated June 1, 2018
Invoice 158198 for $299,297.00 dated June 1, 2018
Invoice 158174 for $190,443.00 dated June 1, 2018
Invoice 159037 for $190,443.00 dated July 1, 2018
Invoice 159056 for $451,201.63 dated July 1, 2018

Invoice 159057 for $894,075.80 dated July 1, 2018
Invoice 159058 for $299,297.00 dated July 1, 2018

NRA failed to post the $3 million LOC despite the multiple late payments.

Following the NRA's First Lawsuit, the NRA continued to request services from AMc, but has failed and refused to pay the monthly invoices submitted by AMc.

On Tuesday, April 30th, 2019, Nader Tavangar, EVP/Managing Director of Mercury Group (an AMc subsidiary) sent the May Monthly Fee invoices (dated May 1, 2019) to NRA (Treasurer Craig Spray, Rick Tedrick, Lisa Supernaugh, and Duane Reno) via email, as per normal course of business. Craig Spray is the NRA Treasurer with responsibility for receiving and paying the AMc invoices. The invoices that were dated May 1, 2019 and emailed on April 30 contained eight invoices to NRA totaling $1,696,466.95 and three invoices to NRA Foundation totaling $375,000

These eleven invoices are accurately summarized in the chart below:

Invoice Number	Job Number	Job Title	Invoice Amount
NRA			
166339	19-MG/NR-001	Strategic Management	$258,613.17
166340	19-NR-001	Talent Fee	$680,355.45
166341	19-NR-002	NRATV Programming C4	$185,416.67
166342	19-NR-003	Monthly Video Support C4	$104,166.67
166343	19-NR-004	Support Staff Fee	$200,702.50
166344	19-NR-005	Online/Digital Management Fee	$107,212.50
166345	19-NR-006	Business Intelligence/Data Resources/Analytics	$35,416.66
166346	19-NRAF-002	A1F 8/19 ISSUE	$124,583.33
Total			**$1,696,466.95**
NRA Foundation			
166347	19-NRF-001	NRATV Programming C3	$250,000.00
166348	19-NRF-002	Monthly Video Support C3	$62,500.00
166349	19-NRF-003	FSP Production Ongoing C3	$62,500.00
Total			**$375,000.00**

These monthly, annualized fee invoices are sent every month per the approved 2019 budget. Per the AMc and NRA Services Agreement, Section 3, Paragraph E provides the following relevant requirements:

> "All sums payable to AMc under this Services Agreement shall be payable to AMc's corporate headquarters in Oklahoma City, Oklahoma within 30 days of the invoice date ... NRA shall notify AMc of any questions concerning any invoices within 10 business days after receipt."

Consistent with the NRA's practice in all prior months of the year, AMc did not receive any questions or concerns regarding such invoices during the 10 business days following the NRA's receipt of the invoices.

The NRA failed to pay the eight invoices issued to it on May 1, 2019 within the required 30-day time period. As of June 3, 2019, AMc had not received payment from the NRA for the $1,696,466.95 in monthly fee invoices. On June 3, 2019, AMc's Chief Financial Officer, William Winkler personally called and emailed NRA Treasurer Craig Spray regarding this missed payment. Mr. Spray did not return the email message or call.

On the afternoon of June 3, 2019, Melanie Montgomery, EVP/Management Supervisor at AMc, called Mr. Spray leaving a detailed voicemail reminding him the past due invoices covered May fees which were never questioned. Mr. Spray did not return her call.

On June 4, 2019, AMc's Chief Financial Officer sent by email a letter addressing the now past due invoices and demanded that the NRA pay the $1,696,466.95 and post the $3 million Letter of Credit, as required under the Services Agreement.

On June 5th, 2019, AMc received a letter from NRA's designee, Andrew Arulanandam, with a copy to Wayne LaPierre, Craig Spray and John Frazer stating that the NRA declines to post the Letter of Credit. This was an express breach of the Services Agreement.

Rather than pay the invoices or post a Letter of Credit, the NRA began a series of evasive correspondences wherein they sought to belatedly request additional and irrelevant information about the invoices, long after the ten-day period for questioning the invoices had expired. The NRA's questions regarding the invoices were evasive and illogical as the NRA already had much of the information that they were requesting and the invoices are in many respects merely a one twelfth portion of an annual amount that was previously budgeted and approved by the NRA.

The NRA's failure to pay these invoices is contrary to the unambiguous terms of the Services Agreement and represents another breach of the Agreement.

The Services Agreement expressly provides for a remedy to avoid a substantial harm to AMc in the event that the NRA is delinquent in paying AMc's invoices. Per the AMc and NRA Services Agreement, Section 2, Paragraph E, provides the following relevant requirement:

> "NRA acknowledges that its failure to pay such an invoice within 30 days will cause substantial financial damage to AMc. Accordingly, if at any time NRA fails to timely pay the invoice, NRA agrees that it shall post a $3,000,000 letter of credit for the benefit of AMc..."

The NRA has failed to comply with the contract requirement that it "shall" post a $3,000,000 LOC for the benefit of AMc in the event that it is late on a single payment of fees.

Section V, Billing and Payment, contains the following Subsection E:

> "All sums payable to AMC under this Services Agreement shall be payable at AMc's corporate headquarters in Oklahoma City, Oklahoma within 30 days of the invoice date. Any amounts not received by AMc within 60 days from the date of the invoice shall bear interest at the rate of 1.0 percent per month from the date of the invoice until paid."

In addition to the late payment of fees listed, *supra*, NRA routinely was substantially late with respect to reimbursing AMc for other expenses. For example, NRA took 133 days to pay for the cost of CG Magazine '18, Issue 5 invoiced for $269,000. NRA also delayed 133 days

before paying $90,000 for Website Unification. NRA was late in paying at least 80 separate invoices issued by AMc during the second half of 2018.

Pursuant to the terms of Section V, E, NRA owes AMc interest at the rate of 1 percent per month on all late paid invoices. Despite the contractual requirement to pay interest, NRA has failed to pay any such interest and such failure is a material breach of the Services Agreement.

Based on the contractual rate of 1 percent per month, the NRA owes AMc an amount in excess of $38,000 in unpaid interest that it has failed to pay. NRA's failure to pay this interest is another breach of the Services Agreement.

Under the Services Agreement, if "NRA fails to diligently and in good faith perform any of its obligations" the Agreement may be terminated. The NRA has failed to perform its payment obligations with diligence and good faith. The NRA breached its payment obligations under the Services Agreement long before any alleged breach by AMc articulated by the NRA in its Amended Complaint.

Under Virginia law, every contract contains an implied covenant of good faith and fair dealing. Va. Code § 8.1A-304.

Pursuant to the Services Agreement Section IV, "Confidentiality" and Section VIII, "Examination of Records", Agreement, the governing contract imposes confidentiality restrictions on AMc and allows NRA to review the books and records of AMc. The Services Agreement does not provide clear guidance on how the NRA must treat AMc's confidential proprietary information that it receives from AMc under the Examination of Records" clause.

A good faith reading of the Services Agreement does not authorize the NRA to disclose AMc proprietary and confidential information that it gains from the Examination of Records clause. The NRA used its contractual rights under the Services Agreement to gain proprietary

information about AMc's business, including information about its contract with Lt. Col. Oliver North. The NRA had no right or entitlement to use or divulge AMc's confidential information to third parties for the purpose of harming AMc. The NRA's actions relating to the misuse of AMc's proprietary and confidential information is a breach of the NRA's implied covenant of good faith and fair dealing. The NRA compounded its bad faith and unfair dealing by requiring that AMc remain silent in the aftermath of the false and misleading statements made about its contract with Oliver North.

The NRA has also taken steps to interfere with AMc's ability to wind down the Services Agreement during the 90-day termination period following AMc's notice of termination pursuant to Section XI, B of the Services Agreement. Instead of negotiating "in good faith" the termination fees that are owed by the NRA under Section XI, F of the Services Agreement, the NRA has ceased making payments for invoices that are now past due. By failing to make payments on past due invoices, the NRA knew that AMc could not continue to provide the multi-million-dollar services required during the 90-day termination period triggered by AMc's notice of termination issued on May 29, 2019.

The NRA's deliberate interference with AMc's performance under the Services Agreement is a breach of the good faith and fair dealing obligation underlying this contract under Virginia law.

The NRA has also failed to pay for the return of its property and it has failed to indemnify AMc for costs and expenses AMc has incurred in responding to government investigations of the NRA. These two breaches will be addressed in a Supplemental and Amended Counterclaim to be filed by AMc. AMc continues to pursue discovery to determine

the full scope of the NRA's failures to abide by the Services Agreement and will supplement this interrogatory as needed.

INTERROGATORY NO. 11:

Identify all communications between any employee, representative, agent, or director of AMc and representatives of any press and/or media organizations with respect to the events alleged in the Counterclaim and the Complaint. Your response should include the date of the communication, who made the communication, to whom it was made, how it was made, and the content of the communication(s).

Response: Pursuant to Virginia Court Rule 4:8(f), Defendants will produce business records that will reveal the facts and circumstances of communications with media organizations and place such information into context. Notwithstanding such document production, Defendants note that they had responsibilities as a public relations firm and as a crisis management team to communicate with the media to perform its obligations under the Services Agreement. Further, Defendants deny that they breached any duty of confidentiality or improperly disclosed information to the media. Defendants will supplement this response as needed if additional responsive information is found during discovery.

INTERROGATORY NO. 12

Identify all communications between any employee, representative, agent, or director of AMc and representatives of any governmental agency or authority with respect to the events alleged in the Counterclaim and the Complaint. Your response should include the date of the

communication, who made the communication, to whom it was made, how it was made, and the content of the communication.

Response: Pursuant to Virginia Court Rule 4:8(f), Defendants will produce business records that will reveal the facts and circumstances of communications with government officials and place such information into context. Notwithstanding such document production, Defendants note that they have been approached by representatives of Congress and representatives from the New York Attorney General Office concerning investigations of the NRA. Defendants have passed the written communications to NRA counsel and obtained consent for any documents produced to the government officials. AMc will produce an invoice issued to the NRA for indemnification for the time and effort spent responding to government investigations of the NRA.

INTERROGATORY NO. 13

Identify any expert witness that you intend to have testify at trial in this case or in any related case, specifying the background and experience of the witness, the sum and substance of his/her testimony, the grounds for any opinion to be presented, the documents relied on by the expert, and any scholarly publications or prior expert testimony previously provided by the witness.

Response: Defendant objects on the grounds that this interrogatory is premature. The deadline for naming expert witnesses is not yet due. AMc objects to the extent that this interrogatory seeks information that is outside of the allowed scope of expert discovery allowed under the Rules of this Court. Notwithstanding such objections, Defendants will supplement this response and provide expert information at the appropriate time.

INTERROGATORY NO. 14:

Identify the factual basis for the amount of your alleged damages, including how you calculate your damages and the categories of your damages.

Response: Pursuant to Virginia Court Rule 4:8(f), Defendants will produce business records that will reveal the facts and circumstances of all of the damages and place such information into context.

Notwithstanding such document production, Defendant has outlined its damages in their Counterclaims and incorporate those representations herein. Those damages may be summarized as follows:

ELEMENT OF DAMAGE	NATURE	AMOUNT
Invoiced services	Services provided under the Services Agreement that have not been paid	Invoices produced pursuant to Virginia Court Rule 4:8(f).
Severance payment	The Services Agreement requires the parties to negotiate in good faith to determine the appropriate severance payment to be made to AMc upon termination of the Services Agreement	To be determined following good faith negotiations.
Severance payment for fixed price contracts.	The Services Agreement requires NRA to cover the cost of fixed contracts that AMc incurred in providing services to the NRA – including contracts with Oliver North and with Dana Loesch.	To be determined.
Late payments of invoices	Since 2018, the NRA has been late in paying invoices and AMc is entitled to contract allowed interest on the amounts unpaid while they were outstanding.	$38,000

Indemnification under the Services Agreement	The Services Agreement requires the NRA to indemnify AMc for expenses incurred by AMc in responding to government inquiries.	To be determined, as the amount continues to grow.
Cost of Returning NRA property	The Services Agreement requires the NRA to pay in advance the cost of AMc for the return of NRA property accumulated during the 38 years of service.	To be determined, as AMc continues to evaluate those costs.
Tort damages for Abuse of Process	AMc is entitled to recover its damages resulting from the NRA's abuse of process. This amount is fluid and increasing and will include attorney fees incurred in responding to the abusive actions of the NRA.	To be determined at trial.
Additional damages	AMc continues to investigate damages it has incurred and will supplement this response as needed.	To be determined.

INTERROGATORY NO. 15:

Identify the name, professional title and salary for each of the NRA-Dedicated Personnel (as defined in Paragraph 14 of the NRA's Complaint), all contracts between AMc and each such person, and the amount of time that each such person dedicated to any NRA project, and to any non-NRA project, during the period January 1, 2018 to present.

Response: Defendants object to this Interrogatory on the grounds that it seeks personnel records of non-parties, e.g., employment contracts, that are not relevant to the litigation and are unduly oppressive. Defendants also object on the grounds that the NRA dispatched its auditors to collect this information from AMc and transcribed a list of this information contrary to the terms of the Services Agreement, and thus, this information is already in the possession of the

NRA. Notwithstanding such objections, and pursuant to Virginia Court Rule 4:8(f), Defendants will produce business records that will reveal the information requested in Interrogatory 15, including lists of AMc employees dedicated to NRA work projects, their time records and other pertinent information sought in this request.

INTERROGATORY NO. 16:

Identify the total sum of the "substantial amount of reimbursements to AMc," which AMc claims was paid by NRA to AMc in each of 2017 and 2018, for expenses incurred on behalf of the NRA, and all documents which support that claim, averred in Defendants' Answer to Paragraph 13 of the NRA's Complaint, in Defendant's Answer, Plea in Bar and Counterclaim.

Response: Pursuant to Virginia Court Rule 4:8(f), Defendants will produce business records that will reveal the facts and circumstances of the reimbursements to AMc and expenses incurred on behalf of the NRA and place such information into context.

INTERROGATORY NO. 17:

Identify the "available NRATV analytics" which you claim you provided to Wayne LaPierre or Todd Grable (see Paragraph 40 on page 32 of Defendant's Answer, Plea in Bar and Counterclaim), all documents evidencing the available NRATV analytics and their transmission of the information to LaPierre or Grable, and the date(s) on which such analytics were provided, including but not limited to the dates on which you informed LaPierre or Grable of the most visited web pages, number of unique viewers, peak hours for traffic, number of registered users, viewership metrics and clickthrough rates associated with any NRATV platform(s).

Response: Pursuant to Virginia Court Rule 4:8(f), Defendants will produce business records that will reveal the facts and circumstances of all of the NRATV analytics and place such information into context. Defendants note an objection that they have provided NRATV analytics to the NRA repeatedly and the NRA has such data and this interrogatory is intended to harass and mislead by seeking such information and implying that the NRA does not possess it.

INTERROGATORY NO. 18:

Identify the facts, documents and communications that refer, relate to or support each of your affirmative defenses.

Response: Defendants object to this interrogatory as vague and unduly burdensome. Its attempt to group multiple subject matters into a single vague interrogatory that sweeps in documents that relate to broad legal and factual subjects is a task disproportionate to the benefit of engaging in such exercise. Defendant's counsel is willing to meet and confer with Plaintiff's counsel to formulate a more targeted and concise interrogatory that meets the needs of the Plaintiff.

INTERROGATORY NO. 19:

Identify the facts, documents and communications that refer, relate to or support your allegations that "AMc has complied with every authorized demand for examination of its documents," set forth in Paragraph 22 on page 29 of your Answer, Plea in Bar, and Counterclaim.

Response: Pursuant to Virginia Court Rule 4:8(f), Defendants will produce business records that will reveal the facts and circumstances of the requests for examination of documents

pursuant to the terms of the Services Agreement. Notwithstanding such document production, the Defendants note that the NRA has provided a compilation of the persons who requested documents from AMc and none of the persons listed were authorized to make such a request under the Services Agreement.

INTERROGATORY NO. 20:

Identify the facts, documents and communications that refer, relate to or support your allegations that Wayne "LaPierre has at all times been privy to all relevant information that the NRA in its Lawsuit now claims AMc is withholding," set forth in Paragraph 36 on page 31 of your Answer, Plea in Bar, and Counterclaim.

Response: Pursuant to Virginia Court Rule 4:8(f), Defendants will produce business records that will reveal the facts and circumstances of the requests for examination of documents pursuant to the terms of the Services Agreement. Notwithstanding such document production, the Defendants note that the NRA's Amended Complaint acknowledged that the NRA possessed the North Contract on the day that it filed suit claiming that it did not have the North Contract.

INTERROGATORY NO. 21:

Identify the facts, documents and communications that refer, relate to or support your allegations that "The NRA's demand for the North Contract documents is a pretext to harm AMc's reputation and an attempt to provide an unfounded basis for terminating the NRA's contractual obligations to AMc under the Services Agreement," set forth in Paragraph 38 on page 32 of your Answer, Plea in Bar, and Counterclaim.

Response: Pursuant to Virginia Court Rule 4:8(f), Defendants will produce business records that will reveal the facts and circumstances demonstrating Wayne LaPierre's knowledge of the North Contract and his negotiation of the North Contract. Such documents prove that there was no reason to sue for the turnover of North's Contract since the NRA already had such information. With the benefit of hindsight after five months of litigation, the pleadings in this case and the actions by the NRA to terminate the NRA's contractual obligations to AMc support our allegations that the North contract was a mere pretext for the ulterior goal of terminating the AMc Services Agreement.

INTERROGATORY NO. 22:

Identify the facts, documents and communications that refer, relate to or support your allegations that "The article [New York Times dated March 11, 2019] misrepresented the facts and disparaged AMc," set forth in Paragraph 48 on page 33 of your Answer, Plea in Bar, and Counterclaim.

Response: Defendants will produce a copy of the March 11, 2019 article in the New York Times that contains over a dozen references to AMc and includes a picture of the AMc office building and a highly pejorative screenshot of an NRATV segment. The article contains numerous quotes from NRA attorney William Brewer who obviously worked with the New York Times reporter to focus the article in a way to falsely blame AMc for the NRA's difficulties and missteps. The article falsely implied that AMc was solely responsible for the content of NRATV when the NRA knows that it has oversight and approval over all content on NRATV.

INTERROGATORY NO. 23:

Identify the facts, documents and communications that refer, relate to or support your allegations that "NRA's actions described herein, including the filing of the Complaint and Amended Complaint seeking documents that it has already examined or had access to examine when properly requested, have been taken with the strategic intention of injuring AMc's business, its reputation, and its business expectancies," set forth in Paragraph 55 on page 34 of your Answer, Plea in Bar, and Counterclaim.

Response: Defendants incorporate its responses to Interrogatories 10, 14, 28 and 29. Pursuant to Virginia Court Rule 4:8(f), Defendants will produce business records that will reveal the facts and circumstances demonstrating Wayne LaPierre's knowledge of the North Contract and his negotiation of the North Contract. Defendants will also produce a compilation of press clippings that include articles that repeat the false and defamatory information that the NRA has been spreading through litigation and through NRA press contacts. Defendants have already provided NRA with the Services Agreement that provides the guidelines for properly requesting documents. Defendants are continuing to pursue discovery into the intentions of the NRA but presently, Defendants have been informed that the plan to terminate AMc's Services Agreement crystalized before the Fall 2018 NRA Board Meeting and that the NRA's actions from that point forward were designed to harm AMc and to create a reason for terminating the Services Agreement for cause.

INTERROGATORY NO. 24:

Identify the facts, documents and communications that refer, relate to or support your allegations that "[t]he NRA's failure to make these eight fee payments within the contractually required 30-

day period after the invoice date caused substantial damage to AMc," set forth in Paragraph 63 on page 36 of your Answer, Plea in Bar, and Counterclaim.

Response: Defendants have identified that the loss of use of such funds was disruptive to their cash flow and have quantified the appropriate remedy under the Services Agreement to equal $38,000 of interest that must be paid with respect to the invoices in 2018 that were late paid. Defendants have since identified other invoices for 2019 that are still unpaid that are continuing to accrue interest and continuing to cause substantial damage to AMc.

INTERROGATORY NO. 25:

Identify the facts, documents and communications that refer, relate to or support your allegations that "[t]he NRA provided AMc's proprietary information to AMc's competitor Brewer knowing that Bill Brewer intended to use it for his competitive advantage against AMc and also to disclose or leak that proprietary information to the New York Times and provide statements to the New York Times critical of AMc," set forth in Paragraph 79 on pages 38 and 39 of your Answer, Plea in Bar, and Counterclaim.

Response: Defendants object to this interrogatory on the grounds that much of the information sought by the question is uniquely within the possession of the NRA. Pursuant to Virginia Court Rule 4:8(f), Defendants will produce business records that will reveal Mr. Brewer's role of crisis manager on behalf of the NRA – a role previously handled by AMc. Notwithstanding such document production, the Defendants note that the NRA has refused to provide information concerning the work that Brewer's law firm is doing for the NRA and resisted all attempts by NRA board members to audit the activities of the Brewer law firm. This

topic is anticipated to be the subject of ongoing discovery efforts and this response will be supplemented as needed.

INTERROGATORY NO. 26:

Identify the facts, documents and communications that refer, relate to or support your allegations that "[t]he breaches that occurred have caused AMc to incur damages, the amount of which are not yet fully calculated," set forth in Paragraph 86 on page 40 of your Answer, Plea in Bar, and Counterclaim.

Response: Defendants incorporate by reference their responses to Interrogatories Nos 10, 14. Specifically, damages continue to accrue as the NRA continues its bad actions and abuse of process. Additional damages accrue through the NRA's failure to pay invoices.

INTERROGATORY NO. 27:

Identify the facts, documents and communications that refer, relate to or support your allegations that "[t]he team of auditors, upon concluding their audit, informed AMc's representatives that the audit was successfully completed, AMc had provided all requested documents in its possession, and no further documents were needed," set forth in the second sentence in Paragraph 89 on page 40 of your Answer, Plea in Bar, and Counterclaim, and your allegations "that AMc provided NRA auditors with access to all matters requested by the auditors during the various audits of AMc," set forth on page 12 of your Answer, Plea in Bar, and Counterclaim.

Response: Defendants object to this interrogatory on the grounds that much of the information sought by the question is uniquely within the possession of the NRA. The NRA has asserted some sort of attorney-client privilege to block the disclosure of the auditor's notes

and findings during the 2019 audit. Pursuant to Virginia Court Rule 4:8(f), Defendants will produce business records that will reveal the facts and circumstances of the requests for examination of documents pursuant to the terms of the Services Agreement. Notwithstanding such document production, the Defendants note that the Forensic Risk Alliance auditors spent 9 days at the offices of AMc's accountants and left after they said they had reviewed everything that they needed. Bill Winkler will testify to support AMc's full cooperation with the FRA auditors in 2019, including his verbal conversations with Jessica Bradley, Director of FRA and the individual with FRA, who managed the audit process, of full compliance upon termination of the audit.

INTERROGATORY NO. 28:

Identify the facts, documents and communications that refer, relate to or support your allegations that the "NRA's Executive Vice President and long-time leader Wayne LaPierre ("LaPierre"), enabled by his chosen attorney, William Brewer of Brewer, Attorneys & Counselors ("Brewer") has set the NRA on a course to eliminate AMc as the primary public relations vendor to the NRA," set forth in Paragraphs 11 and 12, on pages 26 and 27 of your Answer, Plea in Bar, and Counterclaim, and your allegation that "LaPierre and Brewer have combined to steer much of AMc's work and revenue to entities controlled by Brewer, including a public relations unit inside Brewer's law firm," set forth in Paragraph 11 on page 26 of your Answer, Plea in Bar, and Counterclaim.

Response: Defendants state that it is public knowledge that NRA's Executive Vice President and long-time leader is Wayne LaPierre. It is also widely reported in the press that Wayne LaPierre has selected William Brewer of Brewer, Attorneys & Counselors to serve as counsel to the NRA. The Brewer Law Firm has confirmed that relationship by having its equity partner, Michael Collins serve as *pro hac vice* counsel in this case and in other litigation on

behalf of the NRA. It is also public knowledge disseminated on the Brewer law firm web site that the Brewer firm has a public relations unit and that the unit handles public relations and crisis management for firm clients. AMc also provided public relations and crisis management for the NRA. Beginning in 2018, Attorney William Brewer began to handle press relations and crisis management for the NRA, first in conjunction with or in addition to the work of AMc. Sometime in the summer of 2018, the NRA formulated a plan to sever the relationship with AMc. AMc will provide documentation showing that this plan crystallized prior to the fall NRA board meeting in 2018.

AMc sought discovery relating to the public relations work that the Brewer law firm and its public relations unit has done for the NRA, but the NRA has refused to provide such information. Such discovery will demonstrate the progress that the Brewer law firm has made in taking over the public relations and crisis management work that was previously performed by AMc. This interrogatory response will be supplemented following the NRA's compliance with AMc's discovery requests for Brewer-related information.

INTERROGATORY NO. 29:

Identify the facts, documents and communications that refer, relate to or support your allegations that the NRA's alleged true "purpose" or "intention" in initiating this Action is to terminate the Services Agreement without penalty, as set forth in Paragraphs 57 and 59 on page 35 of your Answer, Plea in Bar, and Counterclaim; the last full paragraph on page 3 and continuing on 4 of your Answer, Plea in Bar, and Counterclaim; and Paragraph 96 on page 42 of your Answer, Plea in Bar, and Counterclaim.

Response: Defendants are engaged in discovery and will supplement this response as new information is obtained. To date, Defendants note that the NRA's pleadings speak for themselves and the actions of the NRA provide the outline of their true intentions to terminate the Services Agreement and not pay the severance fee. Defendants filed a frivolous action seeking the Oliver North contract one day after they received the Oliver North Contract. Defendants followed up that frivolous lawsuit with another lawsuit seeking to blame AMc for leaks to the press only to use that second law suit as a vehicle to take depositions of the NRA's own members and directors to try to find out who the alleged leaker was. By blaming AMc for a breach of fiduciary duty for which there is not yet any scintilla of evidence, NRA was able to cast doubt on the working relationship with AMc. The NRA then supplemented its law suits with a resolute refusal to pay any of the invoices issued by AMc during the summer of 2019 thereby putting AMc into financial jeopardy. To remain a viable business, AMc was forced to give notice of a 90 day termination of the Services Agreement and began the effort to try to negotiate a severance payment as required under the Services Agreement. The NRA refused to negotiate and instead issued a directive to terminate the Services Agreement immediately and assert that no further payments would be made, thereby confirming that its intent all along was to terminate the Services Agreement and not pay the severance fee required under the Termination clause of the Services Agreement.

INTERROGATORY NO. 30:

Identify the facts, documents and communications that refer, relate to or support your allegations that the NRA's purported "ulterior" or "improper" "motive" or "purpose" for initiating this

Action and for amending its Complaint, as set forth in Paragraphs 92-93 and 95-98 on pages 41-42 of your Answer, Plea in Bar, and Counterclaim, is to injure the reputations of AMc and North.

Response: See response to Interrogatories Nos. 21, 28, 29. Pursuant to Virginia Court Rule 4:8(f), Defendants will produce business records that will shed light on the NRA's motives, specifically the motives of Wayne LaPierre and William Brewer. Notwithstanding such document production, Defendants are pursuing discovery and plan to obtain documents from the litigation that NRA filed against Oliver North to gain further evidence of NRA's efforts – and specifically Wayne LaPierre's efforts to tarnish the reputation of Oliver North to preserve his own reputation.

VERIFICATION

I do by declare under penalty of perjury that the foregoing answers to interrogatories are true and correct to the best of my knowledge.

ACKERMAN McQUEEN, INC.,
MERCURY GROUP, INC.

[redacted]

September 10, 2019

By: Melanie Montgomery
Title: EVP, Managing Director

September 10, 2019

AS TO OBJECTIONS
By counsel

[redacted]

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CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2019, I caused the foregoing Response to Plaintiff's Interrogatories to Defendants to be served via electronic mail upon:

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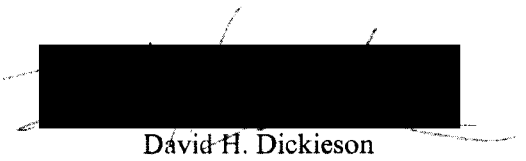

David H. Dickieson

December 16, 2019

VIA EMAIL

David Dickieson, Esq.
Schertler & Onorato, LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005

Re: *National Rifle Association of America v. Ackerman McQueen, Inc., et al.*, Consolidated Case No. CL19001757, CL19002067, CL19002886 (Alex. Cir. Ct.)

Dear Counsel:

I write concerning in the above-entitled consolidated litigation and, specifically, Defendant Ackerman McQueen, Inc. and Mercury Group, Inc.'s ("Defendants") responses to Plaintiff the National Rifle Association of America's Second Set of Interrogatories, provided on September 10, 2019. It is clear from the face of the Interrogatory responses that most, if not all, of the response are deficient, non-responsive, or otherwise non-compliant with relevant rules of civil procedure in Virginia. In particular, the NRA identifies below eleven interrogatories which are deficient in some material respect and the corresponding reason(s). Accordingly, the NRA requests that Defendants provide supplemental responses to these Interrogatories within seven days of receipt of this letter. We are available to meet-and-confer about this letter in the interim period as appropriate.

I. Defendants' Responses to Plaintiff's Second Set of Interrogatories

A. The Endemic Rule 4:8(f) Problem

A review of your Interrogatory responses demonstrates a widespread and pervasive misuse of Rule 4:8(f) that must be immediately corrected. Rule 4:8(f) provides for a limited exception the general rule that an interrogatory "shall be answered separately and fully," Rule 4:8(d), and places strict conditions under which a party can avail itself of the exception. *Only* "[1] where the answer to an interrogatory may be derived or ascertained from business records . . . of the party upon whom the interrogatory has been served" *and* "[2] the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served," *then* "[3] it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford the party serving the interrogatory a reasonable opportunity to examine, audit, and inspect such records and to make copies, compilations, abstracts or summaries." *See* Rule 4:8(f).

The vast majority of your clients' answers to the NRA's Second Set of Interrogatories that purport to rely on Rule 4:8(f) clearly fail the third requirement of the exception. That is, the

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responses do not "specify the records from which the answer [to the Interrogatory] may be derived or ascertained," through, for instance, citation or reference various documents' Bates numbers. *Id.*

For example, in at least the responses to Interrogatory Nos. 10-12, 14-17, 19-21, 23, 25-27, and 30, Defendants simply invoke the mantra "that Pursuant to Virginia Court Rule 48:8(f), Defendants will produce business records," without mentioning, much less complying with, their obligation to "specify the records from which the answer may be derived or ascertained." Such an answer is plainly insufficient to meet the limited exception of Rule 4:8(f).

Accordingly, the NRA requests that Defendants supplement their answers to the Interrogatories identified in the above paragraph within seven days of receipt of this letter and, should they wish to rely on Rule 4:8(f), in that supplemental answer identify with specificity (e.g., by Bates number) the documents that Defendants contend (1) contain information from which a full and complete answer to the Interrogatory may be ascertained or denied and (2) for which the burden "of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served them." While the NRA has concerns that, due their very nature, certain Interrogatories identified above cannot be fully answered through reliance on Rule 4:8(f), the NRA believes the most efficient path forward would be for the NRA to review Defendants' supplemental responses, which will provide the NRA the ability to truly understand if the documents specified under Rule 4:8(f) do fully answer the Interrogatory and whether additional meet and confers might be warranted. After all, Defendants are in a far superior position than the NRA to understand if their own documents that they seek to rely on under Rule 4:8(f) will meet the requirement of that exception's first element.

B. Miscellaneous Objections Lacking Merit

Interrogatory No. 15

Defendants' bases to objecting to Interrogatory No. 15 have no merit. It is beyond dispute that the issue of whether NRA-Dedicated Personnel—whose salaries were billed to the NRA and who were supposed to work solely on the NRA account—in fact worked on the account of other AMc clients was one of the animating issues behind the NRA's Books-and-Records Request and associated breach of contract claim. Indeed, the NRA contends that AMc and its senior officers and employees knowingly placed NRA-Dedicated Personnel on other accounts, while still charging the NRA 100% of their salaries and *also* charging additional sums of money to their other client, and that Defendants' desire to avoid discovery of this practice was one of the motivations factors behind AMc acting so unreasonably in responding to the NRA's Books-and-Records Request. The Interrogatory's request for information on the salary of such persons bears directly on the nature of AMc's double-billing scheme and the injury suffered by the NRA. We demand that Defendants include such information as part of their supplemental response.

Interrogatory No. 17

It is clear that Defendants stated commitment to "produce business records that will reveal the facts and circumstances of all NRATV analytics and place such information in context" will not suffice to "fully" answer the Interrogatory as required by the rules. Rule 4:8(d). Beyond that information, Interrogatory No. 17 *also* seeks information concerning "the most visited web pages, number of unique views, peak hours for traffic, number of registered users, viewership metrics, and clickthrough rates associated with NRATV platforms."

Your purported objection that Defendants "have provided NRATV analytics repeatedly" to the NRA has no merit. Defendants are ultimately the parties that hold such information within their possession, custody, and control and are best situated to provide it in an efficient and usable manner, as they managed and operated the NRATV platform and programming on a daily basis. In addition, the NRA presently does not have, in documentary form or otherwise, all of the precise information concerning NRATV identified in the Interrogatory and/or maintained by Defendants.

Finally, there is no factual basis to contend that the Interrogatory is intended to harass or mislead, nor does has the NRA imply that Defendants lack such information in the Interrogatory. We demand that Defendants include the detailed information quoted above and found in the Interrogatory itself as part of their supplemental response.

Interrogatory No. 18

Interrogatory 18 requests that Defendants "identify the facts, documents, and communications that refer, relate to or support each of your affirmative defenses." Defendants object principally on burden grounds; however, such an argument cannot be sustained when Defendants have refused to provide *any* information on even the most basic factual matters, they contend support the affirmative defenses and theories they intend to rely on at trial. Accordingly, the NRA demands that Defendants supplement their response to Interrogatory No. 18 and identify the facts, documents, and communications that refer, relate to or support each of the affirmative defenses that Defendants intend to present at trial.

Interrogatory No. 27

Defendants quasi undue-burden objection that the information that the NRA wishes to know is already within its possession is meritless. Although some of the information may be in the possession of the NRA, the purpose of the Interrogatory is to understand what, if any, related information *is within the possession of AMc.*

In sum, for the reasons discuss above, the NRA requests that Defendants supplement their responses to Interrogatories 10-12, 14-21, 23, 25-27, and 30 within seven days of receipt of this

letter. The NRA sends this letter without prejudice to its right to raise other deficiencies and complaints reflected in Defendants' responses to any other Interrogatory.

Sincerely,

[redacted]

Jason McKenney

cc: David Schertler, Esq.
Joseph Gonzalez, Esq.
Michael J. Collins, Esq.
Robert Collins, Esq.
Jim Hundley, Esq.

SCHERTLER & ONORATO, L.L.P.

December 26, 2019

Via Email

Jason McKenney, Esq.
Brewer Attorneys & Counselors
1717 Main Street
Suite 5900
Dallas, Texas 75201

Re: *NRA v. AMc, et al.* – Response to McKenney Letter

Dear Mr. McKenney,

We write in response to your letter dated December 16, 2019, in which you assert that AMc's interrogatory responses are deficient. While your letter contains a number of vague assertions, *e.g.*, "most, if not all, of the response [*sic*] are deficient," please note that our response only addresses those purported concerns that you have identified with sufficient particularity. We cannot address what you have failed explain. Moreover, to the extent that you have at least listed a particular interrogatory response, your frequent decision to entirely avoid addressing both the substance of the request and the response necessarily also avoids addressing the sufficiency of AMc's responses. This tactic compounds the difficulty in responding to your letter. Accordingly, while we have done our best to address the document requests you have listed, we believe we would benefit from an actual explanation beyond the listing provided. We are available to discuss.

I. The Fifteen Interrogatories Listed.

A. The Endemic Problems with the NRA's Interrogatories.

In your letter you list fifteen interrogatory responses that purportedly fail to meet Rule 4:8(f)'s requirement that a party may respond to an interrogatory by "specif[ing] the records from which the answer may be derived[.]" Your assertion suffers from two overarching flaws.

First, the bulk of the fifteen interrogatories you listed are overbroad and/or unduly burdensome. For example, Interrogatory No. 20 asks AMc to "[i]dentify, the facts, documents and communications that refer, relate to or support" AMc's position that Mr. LaPierre has been privy to the information requested in lawsuit No.1. The burden of identifying "facts, documents, and communications" with respect to any topic is by itself substantial, and is increased even more by adding to each category the expanders "refer, relate [] or support." However, assigning this expansive scope to the multitude of information identified in the NRA's lawsuit renders it fatally overbroad and unduly burdensome. The NRA allegedly sought "files, books, and records" generated in the context of a contract worth tens of millions of dollars, involving dozens of NRA dedicated employees, and pursuant to a multi-decade relationship.

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AMc cannot meet this onerous burden. And the law makes clear that it is under no requirement to do so. *See Williams v. Sprint/United Mgmt. Co.*, 235 F.R.D. 494, 502 (D. Kan. 2006) ("[T]he court will find interrogatories overly broad and unduly burdensome to the extent that they ask for 'every fact' which supports identified allegations or defenses."); *FootBalance Sys. Inc. v. Zero Gravity Inside, Inc.*, 2018 WL 722834, at *2 (S.D. Cal. Feb. 5, 2018) ("While contention interrogatories are permitted, they are often overly broad and unduly burdensome when they require a party to state 'every fact' or 'all facts' supporting identified allegations or defenses.") (citation omitted); *Quality Office Furnishings, Inc. v. Allsteel, Inc.*, 2018 WL 7076747, at *12 (S.D. Iowa Sept. 26, 2018) (same).

Second, your decision to avoid addressing both the substance of the requests and the responses allows you to disregard that your argument falters when applied to an actual request. For example, Interrogatory No. 19 seeks the "facts, documents, and communications" relating to AMc's compliance with the NRA's examination requests. As you well know, AMc subpoenaed records from FRA to prove this very point. However, the NRA asserted privilege over the 1700 documents that would confirm as much. AMc cannot produce what the NRA has prevented a third-party from providing. This exposes a related shortcoming that has become even more apparent through discovery. Many of the requests at issue seek information that is primarily in the possession of the NRA or a third-party.

B. The Interrogatories Listed.

Although you have failed to explain with particularity why the fifteen interrogatory responses you have identified are deficient beyond the alleged failure to comply with Rule 4:8(f), we have reviewed each request for sufficiency and below provided our position. We are available to discuss these responses in more detail and, if necessary, will supplement our responses in accordance with our continued document review.

Interrogatory No. 10: Interrogatory No. 10 provides a detailed response spanning five pages that references specific emails, invoices, and other documents that support the response. The invoice descriptions include invoice number, job number, job title and amounts owed down to the penny. The emails include the date, the sender and recipient(s), and the specific invoice subject. This satisfies Rule 4:8(f)'s requirement that a party must "specify the records from which the answer may be derived[.]" Finally, AMc notes that its expert report will provide and reference information within the scope of this request.

Interrogatory No. 11: Expanding this request to include alleged events that relate to the Complaint and the Counterclaim renders it overbroad and unduly burdensome. In particular, and as stated in the response, AMc regularly communicates with members of the press. However, notwithstanding these objections, AMc has previously indicated to the NRA that AMc Vol. 4 has numerous documents responsive to this interrogatory. This satisfies its discovery obligations and AMc will continue to supplement, if necessary. AMc is willing to discuss a scope limitation for this interrogatory which will allow AMc to identify specific pages.

Interrogatory No. 12: The NRA disregards that AMc's response to this interrogatory states that "Defendants have passed the written communications to NRA counsel and obtained consent

for any documents produced to government officials." As counsel is aware, AMc has also previously made the NRA aware of certain communications to the government.

Interrogatory No. 14: AMc invoked Rule 4:8(f) with respect to the "invoiced services" category of documents. AMc identified those invoices by their invoice number and amount owed in its pleadings. Moreover, AMc has sent those invoices directly to the NRA and discussed them in related correspondence addressed to the Brewer firm or its proxy Andrew Arulanandam. This satisfies Rule 4:8(f)'s requirement that a party must "specify the records from which the answer may be derived[.]"

Interrogatory No. 15: This interrogatory request is unduly burdensome and relies on flawed premises, which are explained in greater detail *infra*. In any event, AMc directs the NRA to AMc documents 001476 – 2426.

Interrogatory No. 16: This request is unduly burdensome and overbroad. As the NRA already knows, during 2017 and 2018, the NRA (and in particular Wayne LaPierre) passed numerous payments through AMc, for which the NRA reimbursed AMc. Even Forensic Risk Alliance, which performed a nine-day audit, only requested to review samples of back up invoices due to the volume. Such invoices will be included in Vol. 6 of AMc's forthcoming document production. This satisfies Rule 4:8(f)'s requirement that a party must "specify the records from which the answer may be derived[.]"

Interrogatory No. 17: This request is unduly burdensome and overbroad because it omits that the pleading paragraph referenced states that on "at least ten different occasions ... LaPierre and Grable were provided with information[.]" Notwithstanding the NRA's omission, AMc has produced NRATV analytic documents. These are AMc 002640-002990. AMc will continue to supplement.

Interrogatory No. 19: As explained above, the NRA's own obstructionist approach has prevented AMc from obtaining from FRA communications which AMc believes will memorialize AMc's cooperation with FRA. At the time AMc generated this response it was not aware that the NRA would take this approach. As of the date of this letter, the NRA has still failed to produce relevant documents that it has been ordered to produce. Notwithstanding this failure, FRA's third party production contains communications regarding AMc's compliance. Additionally, AMc will be producing documents that relate to the FRA review.

Interrogatory No. 20: As explained above, this request is overly broad and unduly burdensome. However, AMc will be making a production of the documents provided to FRA.

Interrogatory No. 21: The NRA's failure to analyze the substance of AMc's response exposes the problem with this approach. The nature of the allegation referenced in the interrogatory indicates that the information requested is uniquely in the possession of the NRA and its agents because the NRA is the entity responsible for the pretext. Moreover, upon information and belief, the documents responsive to this interrogatory are primarily in the possession of Brewer Attorneys and Counselors, not AMc. Once the Brewer firm makes its

production in response to a forthcoming subpoena, AMc will identify the material documents for the NRA.

Interrogatory No. 23: As discussed above with regard to Interrogatory 19, the NRA's own obstructionist approach has prevented AMc from obtaining from FRA communications which AMc believes will memorialize AMc's cooperation with FRA. Additionally, will produce articles that repeat the false and defamatory language that the NRA has spread.

Interrogatory No. 25: The documents and communications requested in this interrogatory, just as with Interrogatory No. 21, are primarily within the possession of Brewer Attorneys and Counselors, not AMc. Once the Brewer firm makes its production in response to a forthcoming subpoena, AMc will identify the material documents for the NRA.

Interrogatory No. 26: The NRA's request, as formulated, is overly broad and unduly burdensome. The burden of identifying "facts, documents, and communications" with respect to any topic is by itself substantial, and is increased even more by adding to each category the expanders "refer, relate [] or support." However, the response does specifically incorporate the response for document request No. 10, which substantially overlaps with this request. Interrogatory No. 10 provides a detailed response spanning five pages that references specific emails, invoices, and other documents that support the response. This satisfies Rule 4:8(f)'s requirement that a party must "specify the records from which the answer may be derived[.]" Finally, AMc notes that its expert report will provide and reference information within the scope of this request.

Interrogatory No. 27: AMc incorporates its response above with respect to Interrogatory No. 19.

Interrogatory No. 30: The NRA has disregarded that AMc's response to Interrogatory No. 30 incorporates by reference its responses to Interrogatories 21, 28, and 29. These responses provide the information requested by the NRA. Moreover, upon information and belief, the documents responsive to this interrogatory are primarily in the possession of Brewer Attorneys and Counselors, not AMc. Once the Brewer firm makes its production in response to a forthcoming subpoena, AMc will identify the material documents for the NRA. Finally, as stated in its response, some the information requested was in the possession of Oliver North, whom AMc just deposed. AMc directs the NRA to his deposition for responsive information.

II. Specific Responses to Interrogatories 15, 17, 18, and 27.

Your December 16, 2019 letter raised specific objections to AMc's responses to Interrogatories 15, 17, 18 and 27. Although the NRA's specific objections provide somewhat greater explanations for your objections, those explanations are flawed and misstate the relevant responses. Notwithstanding such flawed analysis, AMc will provide a formal update and supplement of its responses as briefly outlined below:

INTERROGATORY NO. 15:

Identify the name, professional title and salary for each of the NRA-Dedicated Personnel (as defined in Paragraph 14 of the NRA's Complaint), all contracts between AMc and each such person, and the amount of time that each such person dedicated to any NRA project, and to any non-NRA project, during the period January 1, 2018 to present.

AMc's Prior Response: Defendants object to this Interrogatory on the grounds that it seeks personnel records of non-parties, e.g., employment contracts, that are not relevant to the litigation and are unduly oppressive. Defendants also object on the grounds that the NRA dispatched its auditors to collect this information from AMc and transcribed a list of this information contrary to the terms of the Services Agreement, and thus, this information is already in the possession of the NRA. Notwithstanding such objections, and pursuant to Virginia Court Rule 4:8(f), Defendants will produce business records that will reveal the information requested in Interrogatory 15, including lists of AMc employees dedicated to NRA work projects, their time records and other pertinent information sought in this request.

Supplemental Response: Defendants stand on their objections to Interrogatory 15. This interrogatory requests that AMc perform a hypothetical audit on itself to respond to the flawed question. The premise of Interrogatory 15 that AMc bills its clients on a manhour basis is false, as AMc does not bill the NRA by the manhour and thus double billing of manhours is not possible. This issue was a subject of the Forensic Risk Alliance examination of AMc's financial records over nine days in February and March of 2019. The FRA examination already provided the NRA with much of the information requested in this interrogatory, yet, to date, the NRA has blocked the release of much of FRA's analysis.

AMc acknowledged in its initial Response that it would produce documents that reveal information requested in the interrogatory. Attached as Exhibit A is the FRA transcription of personnel documents provided to FRA on February 5, 2019 by AMc's Chief Accounting Officer Brandon Winkler. Exhibit A provides substantially all of the pertinent information requested in Interrogatory 15 and it is already in the possession of the NRA. Exhibit A was provided to AMc's counsel by NRA's counsel prior to the Deposition of Mr. Ferrate on July 8, 2019. The materials provided to FRA that allowed it to produce Exhibit A have also been produced this week to the NRA attorneys.

To the extent that the NRA continues to request the minute details of compensation and time records for each of the more than 250 employees dedicated to NRA projects on the premise that a compilation of manhours in time records is somehow relevant, such a request is oppressive, invasive and the value of the information is disproportionate to the effort required to assemble the information.

Notwithstanding such objections, AMc anticipates that in addition to the documents already produced, it will be providing expert analysis that will include information about the compensation of various NRA-dedicated employees who are impacted by the termination of the Services Agreement. Such information will be used to calculate the termination fee required under the Services Agreement. Such expert analysis is not yet completed, but when it is completed it will be provided to the NRA.

INTERROGATORY NO. 17:

Identify the "available NRATV analytics" which you claim you provided to Wayne LaPierre or Todd Grable (see Paragraph 40 on page 32 of Defendant's Answer, Plea in Bar and Counterclaim), all documents evidencing the available NRATV analytics and their transmission of the information to LaPierre or Grable, and the date(s) on which such analytics were provided, including but not limited to the dates on which you informed LaPierre or Grable of the most visited web pages, number of unique viewers, peak hours for traffic, number of registered users, viewership metrics and clickthrough rates associated with any NRATV platform(s).

AMc's Prior Response: Pursuant to Virginia Court Rule 4:8(f), Defendants will produce business records that will reveal the facts and circumstances of all of the NRATV analytics and place such information into context. Defendants note an objection that they have provided NRATV analytics to the NRA repeatedly and the NRA has such data and this interrogatory is intended to harass and mislead by seeking such information and implying that the NRA does not possess it.

Supplemental Response: The specific "available NRATV analytics" sought in this interrogatory have been produced to the NRA. In fact, AMc has produced substantially more NRATV Analytics during its rolling document production. These analytics are identified as AMc documents 002640-002990. AMc will continue to supplement its document production on this topic. In addition, Wayne LaPierre has testified that he received numerous briefings where NRATV analytics were provided. Discovery is continuing with respect to the records of AMc employees involved in such briefings of Wayne LaPierre and Todd Grable and the specific dates of presentations of NRATV analytics. AMc will continue to supplement its response as needed. Various email messages relating to NRATV analytics and the presentations of those analytics are being produced and will continue to be produced in the AMc's rolling document production.

INTERROGATORY NO. 18:

Identify the facts, documents and communications that refer, relate to or support each of your affirmative defenses.

AMc's Prior Response: Defendants object to this interrogatory as vague and unduly burdensome. Its attempt to group multiple subject matters into a single vague interrogatory that sweeps in documents that relate to broad legal and factual subjects is a task disproportionate to the benefit of engaging in such exercise. Defendants' counsel is willing to meet and confer with Plaintiff's counsel to formulate a more targeted and concise interrogatory that meets the needs of the Plaintiff.

Supplemental Response: On September 10, 2019, Defendants' counsel stated a willingness to meet and confer about the overbreadth of this interrogatory and AMc' objections to the interrogatory. Plaintiff waited over three months to make any complaint about the Defendants' interrogatory response and AMc's objections. Now, Plaintiff has demanded immediate supplementation without addressing the substance of Defendants' objections.

Just as it would be improper to lodge a single interrogatory request that demanded all facts, documents and communications that relate to every allegation in the Complaint, it is improper and unduly burdensome to lodge a single interrogatory request that demands all facts, documents and

communications that relate to each of the affirmative defenses. *See Williams v. Sprint/United Mgmt. Co.*, 235 F.R.D. 494, 502 (D. Kan. 2006) ("[T]he court will find interrogatories overly broad and unduly burdensome to the extent that they ask for 'every fact' which supports identified allegations or defenses."); *FootBalance Sys. Inc. v. Zero Gravity Inside, Inc.*, 2018 WL 722834, at *2 (S.D. Cal. Feb. 5, 2018) ("While contention interrogatories are permitted, they are often overly broad and unduly burdensome when they require a party to state 'every fact' or 'all facts' supporting identified allegations or defenses.") (citation omitted); *Quality Office Furnishings, Inc. v. Allsteel, Inc.*, 2018 WL 7076747, at *12 (S.D. Iowa Sept. 26, 2018) (same). Indeed, it is even more improper to seek everything relating to affirmative defenses because such a request sweeps in legal theories, work product, privileged information and materials.

The Virginia Rules recognize that interrogatories can be abused by litigants and therefore the Rules impose a limit of 30 interrogatories to ensure that a party is not unduly burdened with responding to interrogatories. This limit of 30 interrogatories cannot be sidestepped by simply providing omnibus and vague requests that cover numerous separate and distinct issues and topics. If a litigant seeks a response relating to an affirmative defense, it can take discovery relating to that affirmative defense.[1] In addition, Defendants believe that Plaintiff has ready and equal access to each of the legal theories that support these affirmative defenses and Defendants' counsel has no obligation to share its attorney work product prior to trial. If Plaintiff now disagrees, Plaintiff's counsel may request a meet and confer session to discuss these six distinct topics.

INTERROGATORY NO. 27:

> Identify the facts, documents and communications that refer, relate to or support your allegations that "[t]he team of auditors, upon concluding their audit, informed AMc's representatives that the audit was successfully completed, AMc had provided all requested documents in its possession, and no further documents were needed," set forth in the second sentence in Paragraph 89 on page 40 of your Answer, Plea in Bar, and Counterclaim, and your allegations "that AMc provided NRA auditors with access to all matters requested by the auditors during the various audits of AMc," set forth on page 12 of your Answer, Plea in Bar, and Counterclaim.

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[1] AMc provided the following sweeping and multiple Affirmative Defenses – all of which the NRA seeks to lump into a single vague interrogatory:

> AFFIRMATIVE DEFENSES
>
> 1. The Amended Complaint fails to state a claim upon which relief may be granted.
> 2. Plaintiff is estopped from seeking specific performance.
> 3. Plaintiff has waived any right to the specific performance it has requested.
> 4. Defendants plead the affirmative defense of "satisfaction" of the relief requested by the Plaintiff
> 5. Plaintiff is barred from any equitable relief based on the doctrine of "unclean hands."
> 6. Plaintiffs prior breach of contract negates Plaintiffs claim for breach of contract against Defendants.

AMc's Prior Response: Defendants object to this interrogatory on the grounds that much of the information sought by the question is uniquely within the possession of the NRA. The NRA has asserted some sort of attorney-client privilege to block the disclosure of the auditor's notes and findings during the 2019 audit. Pursuant to Virginia Court Rule 4:8(f), Defendants will produce business records that will reveal the facts and circumstances of the requests for examination of documents pursuant to the terms of the Services Agreement. Notwithstanding such document production, the Defendants note that the Forensic Risk Alliance auditors spent 9 days at the offices of AMc's accountants and left after they said they had reviewed everything that they needed. Bill Winkler will testify to support AMc's full cooperation with the FRA auditors in 2019, including his verbal conversations with Jessica Bradley, Director of FRA and the individual with FRA, who managed the audit process, of full compliance upon termination of the audit.

Supplemental Response: Plaintiff admits that "Although some of the information may be in the possession of the NRA, the purpose of the Interrogatory is to understand what, if any, related information is within the possession of AMc." This response from NRA ignores the language of the objection that the information is "*uniquely* within the possession of the NRA." (Emphasis added.) AMc seeks to receive FRA's *complete* supplemental production of FRA documents and then AMc will be in a position to provide more comprehensive information concerning the FRA examination. But to date, the NRA has blocked AMc's access to much of the FRA documentation. We remain willing to meet and confer about the FRA audit, but as the NRA knows, subsequent to the September 10 response to this interrogatory, Defendants' counsel took the deposition of a designee of FRA and the following testimony was just one of the admissions adduced under oath, relating to compliments received by AMc during the examination process:

> Q: The first sentence of her message to Mr. Winkler is: "Thank you for all the assistance that you and your team have provided while we are on site. It is greatly appreciated." Were you aware that they were cooperating with the request by your team?
>
> A: And, again, with the word cooperation, they provided information in response to our request.

Trahar Dep. at 65:20 – 66:2.

We are available to discuss these supplemental responses at a mutually convenient date and time.

Sincerely,

/s/ *David H. Dickieson*
David H. Dickieson

cc: Michael Collins, Robert Cox, and Jim Hundley

List of Ackerman Employees that Worked on NRA Account

Source: Transcription of document physically provided to FRA on 2/5/2019 by Brandon Winkler

First Name	Last Name	Position*	2015	2016	2017	2018
Syed	Aamir Naqib	SVP / Development	X	X		X
Victor	Aboytes	UI Designer	X	X	X	X
George	Abraham			X	X	X
Mark	Ackerman	VP / Account Supervisor	X	X	X	X
Ray	Ackerman	Founding Partner				X
Michael	Aitken	VP / Video Production	X	X	X	X
Travis	Almand	Senior Interactive Developer	X			
John	Almendarez	Director of Photography / Editor	X	X	X	
Daveren	Anthony		X	X		
Javid	Arain	EVP / Chief Analytics Officer	X			
Nicole	Artzer	Lead Editor and Post Production Supervisor	X	X	X	
Mark	Asbury	Media Asset Manager	X	X	X	X
Kale	Atterberry	Art Director		X	X	X
Rodney	Autaubo	Senior Producer		X	X	X
Dennis	Azato	VP / Director of Photography / Producer	X	X	X	X
Ariana	Azimi	VP / Office of the CEO	X	X	X	X
Ed	Bailey	Producer	X	X	X	X
Kevin	Barrett	Senior Animation Art Director	X	X	X	X
Andrew	Beasley		X			
Adam	Beatty			X		
Charles M.	Berthelot	Senior Director				X
Christopher	Bigbie	Director / Creative Director / FX Director		X	X	X
David	Bizzaro		X	X		
Alexandra	Bohannon	Copywriter				X
Rachel	Bonilla	Producer				X
Jeff	Breuer		X	X	X	
Erin	Brinkworth	Associate Producer	X	X	X	
Joshua	Burg		X	X	X	X
Brad	Burris	Driver/Trafic Assistant / Production Assistant	X			
David	Burwinkel	Interactive Creative Director	X		X	X
Joe	Busch	Director of Photography / Editor	X	X	X	X
Jason	Bushore	Senior Audio Producer	X	X	X	X
Andrew	Butler	Associate Producer				X
Chester	Campbell	VP / Digital Development	X	X	X	
Stephen	Campbell	Windows Server Admiistrator	X	X	X	X
Nicole	Capossela	Senior Vice President		X	X	X
Clary	Carey	Corporate Archives Manager		X	X	X
Kaitlin	Carroll	Broadcast Tech / Cam & Co Asst. Producer		X	X	X
Jon	Carter	Senior Associate Political Strategy	X	X	X	X
Kristin	Cassidy	Strategic Project Manager / Video producer / Account Management	X	X		
David W.	Casteel Jr.	QA Engineer		X	X	X
Austin	Chappell	Media Strategist			X	
Justin	Charles	Technical Director / AV Specialist	X	X	X	X
Josh	Chesnut			X	X	X
Mark	Chesnut	SVP / Editorial Services	X	X	X	X
Scott	Chidester	Senior Interactive Developer	X	X	X	X
Ericca	Christy	Executive Producer		X	X	X
Benson	Coleman	Key Grip	X	X	X	X
Ruth	Collett	Video Production Specialist / Video Editor	X	X		
Alan	Corey	Senior Digital Producer	X			
Ian	Counihan	Broadcast/Production Intern / Traffic Manager		X	X	X
Walt	Cox	Camera Operator / Editor			X	X
David	Crabtree	Media Strategist and Traffic Assistant	X	X		
Lacey	Cremer	SAME AS LACEY DUFFY-Married to Mauricio Cremer (VP of Creative Services)	X	X	X	X
Clint	Crowder	Interactive Producer / Senior Digital Producer	X			
Dane	Cupp	Senior Developer		X	X	
Trevor	Dahlkemper	Operations Manager	X	X	X	X
Joseph	D'Amato	Assistant Camera / Assistant Editor		X	X	
Gail	Daniels	Associate Creative Director / Special Projects		X	X	X
Brian	Darley	EVP / Digital Producers	X	X	X	X
Preston	Darley	SVP User Experience & Design		X	X	X
Katie	Daugherty	Senior Buyer	X	X	X	X
Annie	Davenport	Strategist				X
Collin	Davis	SVP / Development Operations	X	X	X	X
Jesse	Davison	SVP / Associate Creative Director	X	X	X	X
Rebecca	Deakin	Editor	X	X	X	X
Brian	Defever	Media Asset Manager	X	X	X	X
Mike	Dennehy	EVP / Corporate Technology	X	X	X	X
Erin	Dester	Communications Specialist	X			

EXHIBIT
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List of Ackerman Employees that Worked on NRA Account

Source: Transcription of document physically provided to FRA on 2/5/2019 by Brandon Winkler

First Name	Last Name	Position*	2015	2016	2017	2018
Wes	Dewitte	Audio Engineer	X	X	X	X
Laura Jean	Digan		X	X	X	X
Bethany	Dillinger	Account Executive / Media Strategy			X	
Claire	Douthitt	Creative Services - Digital Asset Manager	X			
Sherri	Duran	SVP / Creative Director	X	X	X	X
Jennifer	Duval			X	X	
Cam	Edwards	Host, Cam & Co	X	X	X	X
Tiffany	Eitzmann	Copywriter	X	X	X	
Lael	Erickson	EVP / Creative Director	X	X	X	X
Lane	Faglie	Art Director		X	X	X
Hillary	Farrell	Vice-Chairman of the Board	X			
Peter	Farrell	Chief Experience Officer	X	X	X	X
Bill	Floyd	Senior Business Intelligence Analyst / Developer				X
Justan	Floyd	VP / Senior cinematographer	X	X		
Hannah	Foster	Video Editor				X
Sean	Foster	Videographer / Editor				X
Riley	Fowler	Associate Producer				X
Caitlin	Fraser		X	X		
Alyssa	Fuller	Account Coordinator (Grandchild of Ray Ackerman)	X			
Alexandra	Gaines	Account Service Intern	X			
Mike	Galloway	Senior Art Director	X	X	X	X
Caitlyn	Gamble	Art Director	X	X	X	
Anjali	Gandhi	Senior Manager - Integrated Analytics and Strategy	X			
Oscar	Garcia	UI Designer	X	X	X	X
Justin	Geiger	Broadcast Technology / Editor	X	X	X	X
Billy	Godwin		X			
Allison	Goldapp	Media Strategist	X			
Kelsey	Gosdin	Senior Strategist, Audience Engagement	X	X	X	X
Cameron	Gray	Executive Producer / Host / Reporter -- NRANews	X	X	X	X
Praxx	Gray	Interactive Developer	X	X	X	X
Jesse	Greenberg	Chief Strategy Officer		X		
Danielle	Gregory	Executive Assistant	X		X	
Kari	Griffith	Traffic Director	X	X	X	X
Ashley	Hackler	VP / Office of the Co-CEO	X	X	X	X
Jessica	Hale	Associate Director - Analytics / Director, Business Intelligence	X	X		
Terry	Hale	Manager of Data Science	X	X		
Brandon	Harn	Associate Creative Director	X	X	X	X
Amy	Hearn	VP / Executive Producer	X	X	X	X
Faith	Helmerich (Miller)	Proofreader / Account Executive	X	X		
Tim	Herr	Copywriter / Editor	X	X	X	X
Allie	Hill	Senior Art Director	X			
Mitch	Hill		X			
Montgomery	Hill	Account Services	X	X		
Josh	Himes	Time-lapse Cinematographer	X	X	X	X
Anna Marie	Hoffman	Media Strategist	X	X		
Magon	Hoffman (Mayhall)	Producer		X		
Hayley	Holmes	Account Executive	X	X	X	X
James	Hugo	Senior Designer	X			
Josh	Hunter	Web Developer	X		X	X
Shea	Hussey	Freelance Photographer				X
Collins	Idehen	NRATV Host	X	X	X	X
Michael	Ives	SVP / Corporate Director of Photography	X	X	X	X
Durriya	Jamali	Interactive Developer	X	X		
Marla	James	Creative Assistant	X			
Carly	Jimeson	Account Executive		X	X	X
Debby	Johnson	EVP / Strategy & Planning	X	X	X	
Garrett	Johnson	VP Account Service	X			
Rachel	Johnson	Data Analyst	X	X	X	
Andrew	Jordan	VP, Director of Digital Media Planning and Buying / Audience Engagement	X	X		
Don	Juntunen	SVP / Music and Recording Services	X	X	X	X
Shahada	Kari	Production Assistant			X	X
Tim	Katzenmeier	Camera Operator / Edit Assist	X	X	X	X
Justin	Kelly	Archival Assistant		X		
Troy	Kelly	Interactive Designer	X	X	X	X
Becky	King	EVP / Creative Director	X			
James	Kirk	Art Director	X	X	X	
Kelsey	Kirk	Assistant Print Production Manager	X			
Patrick	Kobler	Associate Creativer Director		X		
Michael	Kreuz	Broadcast / AV Tech	X			

List of Ackerman Employees that Worked on NRA Account

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First Name	Last Name	Position*	2015	2016	2017	2018
Scott	Kubes	Post-Production Manager	X	X	X	X
Ryan	Lacy	Camera Operator / Grip	X	X	X	X
Alyssa	Lair	Digital Network Manager	X	X		
Daren	Lasorte	SVP / Account Service	X	X	X	X
Lisa	Lavelle	Proofreader	X	X	X	X
Micah	Leon	Camera Operator / Editor	X		X	
Nicole	Levin	Senior Content Manager	X	X	X	X
Rodney	Lipe	President / Director of Client Services	X	X	X	X
Mieshia	Little			X		
Dana	Loesch	Spokesperson for NRA / Host of TheBlaze TV				X
Becky	Long	Associate Creative Director / Producer	X	X		
Lydia	Longoria	Strategist			X	X
Danny	Lyon	Videographer / Editor	X	X	X	X
Jessica	Lytle	Creative Services Manager	X	X	X	
Tony	Makris	Consultant and President of Mercury Group	X	X	X	X
Howie	Mapson	Digital Asset Manager	X	X		
Grace	Marcum	Executive Assistant		X	X	
Henry	Martin	Chief Creative Officer	X	X	X	X
Nancy	Martin	Executive Producer	X	X	X	X
Blake	McCarty	Camera Operator / Editor		X	X	X
Patrick	McCarty	Traffic Director			X	X
Meg	McElhaney	Director of Project Management		X	X	X
Corey	McKenzie	Quality Assurance Engineer	X	X		
Joshua	McNear	Digital Asset Technician / Assistant Editor			X	X
Angus	McQueen	Co-Chief Executive Officer	X	X	X	X
Katie	McQueen	EVP / Management Supervisor	X	X	X	
Revan	McQueen	Chief Executive Officer	X	X	X	X
Aaron	Miller	Integrated Digital Analytics and Strategy Intern / Business Intelligence Strategist	X			
Jon	Minson	EVP / Creative Director	X	X	X	X
Guy	Mitchell	Executive Producer				X
David	Monaco	Video Editor		X		
Melanie	Montgomery	EVP / Management Supervisor	X	X	X	X
Kyle	Morgan	Technical Director	X	X	X	X
Jake	Morris	Publications Manager / Senior Digital Content Manager	X	X		
Branden	Morrow	Digital Analyst and Strategist	X			
Brad	Nash	VP, Marketing Strategy				X
Holly	Nault	Senior UX / UI Designer		X		
Edward	Ned	Technology Manager		X	X	X
Davod	Nematpour		X			
Kramer	Newsom	Creative Executive Assistant	X			
John	Nicholas	EVP / Director of Digital Technologies	X	X		
Oliver	North	President of NRA				X
Jeanne	Oden	SVP / Digital Knowledge Manager	X	X	X	X
Tucker	Oden	Associate Creative Director	X	X	X	
Jennifer	Overholt	Freelance Developer		X		
Hoit	Pagano	Art Director	X			
Lyman	Page	Art Director	X	X	X	
Caroline	Palumbo	Producer		X	X	X
Darren	Parker	Photographer	X	X	X	
Derek	Parker	Director of Media Asset Management	X	X	X	X
Trisha	Parker	EVP / Strategy & Media	X	X	X	
Bruce	Parks	EVP / Creative Director	X	X	X	X
James	Parsons	Camera Operator / Showrunner	X	X	X	X
Matt	Patterson	Key Grip / Best Boy	X	X	X	X
Tammy	Payne	SVP / Creative Director	X		X	X
Mary Beth	Pearson	Copywriter	X	X		
Nicolai	Perkins	Video Productions Manager			X	
Tyler	Petersen	VP / Director of Episodic Programming	X	X	X	X
Michael	Poddubnyy	Software QA Engineer		X	X	
John	Popp	Executive Producer	X	X	X	X
Jillian	Powell	Strategist, Audience Engagement			X	X
Bill	Powers	EVP / Public Relations	X	X	X	X
Kelly	Powers	Strategist	X	X		
Eric	Price	Producer	X	X		
Nathan	Raglin	Director of Photography / Colorist	X	X	X	X
Alex	Refl	Senior Developer		X	X	
Tom	Richardson	EVP / Director of Digital Technologies	X	X	X	X
Christina	Rivera		X	X	X	X
Ashley	Root		X	X	X	X

List of Ackerman Employees that Worked on NRA Account

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First Name	Last Name	Position*	2015	2016	2017	2018
Joshua	Ross	Media Asset Manager	X	X	X	X
Julie	Ross	VP / Executive Producer		X		
Ed	Russell	Associate Creative Director	X	X	X	
Emily	Russell	Copywriter / Digital Social Media Strategist		X	X	
Charlie	Ryan	Digital Episodic Video Editor				X
Trevor	Schirf		X	X	X	
David	Scott			X		X
Grant	Seoane	QA Engineer			X	X
Ali	Shadfar	Technology Architect	X	X	X	X
Ginny	Simone	Host, Ginny Simone Reporting	X	X	X	X
Denise	Sinisi	Executive Producer		X	X	X
Chase	Smallwood	Video Prodution Specialist	X	X		
Paige	Smith	Assistant Art Director	X	X		
Pam	Smith	Senior Buyer		X		
Carla	Sparks	Senior Media Buyer	X	X	X	
Scott	Spengler	Post Production / Finishing	X	X	X	X
Grant	Spofford	EVP / Digital Producers	X	X	X	X
Joshua	Stewart	Senior Developer		X	X	X
Grant	Stinchfield	Anchor, NRATV				X
Christopher	Strong	Senior Interactive Developer	X	X	X	X
Ben	Sullivan	Digital Producer		X		
George	Szucs Jr.	Executive Producer				X
Mark	Tait					X
Nadar	Tavangar	EVP / Managing Director	X	X	X	X
Christopher	Thigpen	Senior Digital Producer	X	X	X	
Ben	Thomas	Technical Director		X	X	X
Abygail	Thompson	Digital Producer			X	X
Elizabeth	Torres	Photographer	X	X	X	X
Shree	Tripathi	Operations Manager / Content Manager			X	X
Alan	Turner		X	X	X	
Caile	Turner	Creative Services Manager	X	X	X	X
Clay	Turner	EVP / Creative Director / Managing Director Colorado Springs	X	X	X	X
Carly	Twisselman	Host/Personality of NRATV		X	X	
Jordan	Underwood	Production Manager	X	X	X	X
David	Valinski					X
Eric	Van Horn	Account Executive		X	X	X
Alex	Varney	Producer				X
Patrick	Vaughn	Assistant Editor	X	X	X	X
Sebastian	Voicu	Senior Platforms Architect		X	X	X
Laura	Wade	Media Strategist	X			
Stephen	Walters	Director of Photography / Colorist	X	X	X	X
Eric	Wang	Senior Associate of Strategy		X	X	X
Monique	Warfield	Assistant Executive				X
Carl	Warner	EVP / Creative Director		X	X	X
Stephanie	West	Assistant to the President	X	X	X	X
Jace	Whatcott	Media Strategist				X
Jared	White		X	X		
Cate	Whitley	Producer / Content Manager	X			
Brent	Whitsett	Art Director	X	X	X	X
Dean	Wilhite	Senior Art Director	X	X	X	X
Colter	Willhoite	Video Editor	X	X		
Dalain	Williams	Senior Web Application Developer	X			
Jason	Wilson	Camera Operator / Time-lapse cinematographer / Editor	X	X	X	X
Reed	Wilson	Director / Broadcasting Tehnology		X	X	X
Bill	Winkler	Chief Financial Officer			X	
Ryan	Winkler Herr	Associate Creative Director / Special Projects	X	X	X	X
Frank	Winn	Editorial Writer	X	X	X	X
Becky	Wint	Media Strategist	X	X		
Brandon	Witt	Associate Creative Director / Director of Animation	X	X	X	X
Amber	Wolff	Editor / Copywriter	X	X	X	X
Bill	Womble					X
Shad	Wyckoff	Director of Photography / Steadi-Cam-Drone Operator		X	X	X
Stephen	Wymer	Editor / Steadicam Operator	X	X	X	X
Carley	Yates	Account Coordinator	X	X	X	
Matt	Yavuzcan	Head of Experience and Architecture		X		
Mike	Young	EVP / Strategy & Investment	X	X	X	
Alex	Zimmerman	Operations Manager				X

*This information was added by FRA; it was not included on the original submission from Brandon Winkler.

SERVICES AGREEMENT

THIS AGREEMENT, made this 30th day of April, 2017, by and between the National Rifle Association of America (hereinafter referred to as "**NRA**"), A New York Not-For-Profit Corporation, located at 11250 Waples Mill Road, Fairfax, Virginia 22030, and Ackerman McQueen, Inc., an Oklahoma corporation, and its wholly owned subsidiary, Mercury Group Inc., an Oklahoma corporation, (hereinafter collectively referred to as "**AMc**"), whose principal office is located in Oklahoma at 1100 The Tower, 1601 N.W. Expressway, Oklahoma City, Oklahoma 73118.

W I T N E S S E T H :

WHEREAS, AMc is in the business of providing comprehensive communications services including public relations, crisis management, strategic marketing, advertising and creative, as well as owned media and internet services, and warrants and represents that it possesses the capability, necessary personnel, political strength, equipment and other related items to perform such services; and,

WHEREAS, NRA is a Membership Organization and desires to retain AMc as a nonexclusive source for services described herein for NRA upon the terms and conditions hereinafter set forth.

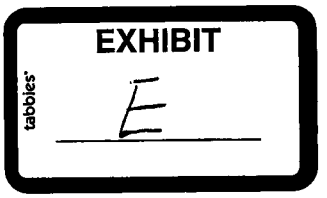
NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the parties hereto agree as follows:

I. SERVICES

A. Public Relations/Crisis Management /Strategic Marketing Services

Services include a combination of generating earned media, responsive public relations, crisis management and strategic thinking to promote a positive image of the NRA as described below:

- Public relations advice and counsel, including crisis management.
- Ongoing media relations -- solicitation and placement of features in national, regional and local media; liaison with print and broadcast news media on a daily basis for unsolicited inquiries; ongoing media training for NRA officials; Editorial Board meetings; features for outdoor publications.
- Specialized public relations writing services (news releases, columns, editorials), and distribution of same as required (e.g. via wire service or individual contact).
- Research and information retrieval as necessary for NRA issues management at NRA's request and approval.
- Coordination, scheduling and on-site assistance when necessary for NRA officials' speeches and personal appearances.



- Coordination with internal NRA public relations staff in the Executive Office, General Operations and Institute for Legislative Action.

- Development of proactive earned media in national and regional media as it relates to NRA officials' appearances at special events (i.e. National Gun Shows, YHEC, Annual Meetings, etc.).

- Coordination and scheduling appearances for NRA officials and commentators: including on-site assistance (where necessary).

- Develop, produce, and place op-ed pieces for national and regional media coinciding with Special Events and NRA Officials' appearances.

- Advise and counsel with NRA Officials on strategic issues to provoke public debate and frame NRA's point-of-view for the general public.

- Speechwriting services (pivotal speeches for major events are discussed in "Advertising/Creative Services" Section).

- Management of Talent/Spokespersons for NRATV.

- Production and staffing for NRATV.

B. <u>Advertising/Creative Services</u>

The services described below (with the exception of "Media Planning and Placement" which is addressed separately as a subcategory of this Section) will be provided to NRA on a project ("**<u>Job</u>**") basis based on the fair market value of the work as determined by NRA and AMc. When reasonable time is available, cost estimates will be submitted for approval by NRA prior to the initiation of the Job.

- Speechwriting services for NRA dignitaries to be delivered at major events (includes background research, interviews with NRA Officials/Speaker, drafts and rehearsals if appropriate).

- Conceive, copywrite, design and produce local, regional, and national print and broadcast advertising and other appropriate forms of communication to present NRA's message.

- Original photography services and film processing (on location and/or in AMc's photo studio).

- Audio/Visual and Event Management services (i.e. Annual Meetings).

- Video Taping, Editing and Production.

- Music composition and arrangement and audio production.

- Primary Research services (quantitative and qualitative).

C. Media Planning and Placement Services

Detail of AMc's compensation for Media Services are provided in the "Compensation" Section. Services rendered for such are:

- With NRA's approval, plan and order by written contract or insertion order the print space, radio and television time, or other media to be used for advertising, always endeavoring to secure the best available rates. AMc shall remain solely liable for payment, to the extent NRA has paid AMc.
- Incorporate the advertising in the required form and forward it to media with proper instructions for fulfillment of the contract or insertion order.
- Diligently check and verify broadcasts, insertions, displays, or other means used to carry the message to ensure proper fulfillment of all media purchases made by AMc on NRA's behalf.
- For direct response paid media advertising (i.e. Infomercial), provide ongoing analysis and ROI to determine most effective media markets, dayparts, and stations on a time sensitive basis for redirection or concentration of funds as evaluation indicates.
- Carefully audit invoices and make timely payment to media and suppliers for space and time purchased by AMc on NRA's behalf.

D. Owned Media Services

- Full-time online broadcasting services for NRATV.
- Support services for NRATV provided by AMc Interactive include daily creation of graphics, flash animation for daily stories and synchronization to audio/video.
- Ongoing technical support service, unification, and advice for NRAHQ site (e.g. Answer to questions on service provider issues and simple "how-tos"). Application development or re-working requiring complex execution to be estimated on a project basis for NRA approval in advance of work performance.
- Full time marketing services to promote NRATV as well as on-site promotion of NRA programs, activities, and current events.
- Production of America's First Freedom Magazine.

E. Digital Systems Operations Support

- Technology consulting including third party solutions, cloud consulting and reviewing IS efforts.
- Reliability engineering and monitoring including performance monitoring, emergency response and overall efficiency.

- Resource and capacity planning for large scale hardware and software migration initiatives.

- System and database administration, maintenance, updating, monitoring and troubleshooting.

II. COMPENSATION

A. Public Relations/Political Strategy/Strategic Marketing Services

1. During the term of this Agreement, for ongoing Public Relations, Political Strategy and Strategic Marketing, NRA will pay AMc a fee as mutually agreed upon each year.

B. Advertising/Creative/Media Planning and Placement Services

1. During the term of this Agreement, for ongoing study of NRA's business, including account service, creative development and other support functions in connection with the day-to-day administration and operation of NRA's account, 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.

2. For collateral advertising services and products purchased on NRA's behalf from external suppliers (such as separations, engravings, typography, printing, etc.), by a 15% commission if offered, or a 17.65% mark-up of net billing. Estimates of the cost of external services and products are prepared, when reasonable time is available, for approval in advance and are subject to no more than a +/-10% variance provided AMc is authorized to proceed with production within thirty (30) days of the date the estimate is presented. Client changes in job specifications usually will result in the preparation and submission of a revised estimate; however, NRA agrees to assume financial responsibility for all changes specified by NRA then executed by AMc with NRA's knowledge.

3. For art concepts, design layout, photography and film processing, copywriting, music composition and arrangement, audio and video production, etc., by cost quotations submitted for approval in advance, when reasonable time is available, or at the comprehensive art, storyboard, demo music, etc. stage. These quotations are based on the fair market value of the work as determined by AMc, and take into consideration, among other things, the hourly rates of the personnel assigned to the project and the required to complete the job. Written estimates are subject to no more than a +/- 10% variance provided they are approved by NRA and AMc is expressly authorized to proceed with production within thirty (30) days of the date the estimate is presented. Client changes in job specifications will

usually result in a revised estimate; however, NRA agrees to assume financial responsibility for all changes specified by NRA , then executed by AMc with NRA's knowledge.

C. **Owned Media and Internet Services**

During the term of this agreement. AMc will provide owned media and online broadcasting and website management, hosting and creation of NRATV, as well as full time marketing services. NRA will pay AMc a fee as mutually agreed upon each year.

D. **Digital Systems Operations Support**

During the term of this agreement, AMc will provide digital systems operations support. NRA will pay AMc a fee as mutually agreed upon each year.

E. **Other Projects**

If AMc undertakes, at NRA's request, additional or special assignments, not included within the services described in this project, the charges made by AMc will be agreed-upon in advance whenever possible. If no specific agreement was made, AMc will charge NRA a fair market price for the work performed.

III. BILLING AND PAYMENT

A. Mailing and express charges, long distance telephone calls, photocopies, deliveries, sales taxes and reasonable out-of-town travel including transportation, meals and lodging, etc. on NRA's express behalf, shall be billed at AMc's cost. All out of town travel expenses shall require prior written approval in accordance with written procedures established by the NRA Executive Vice President or his designee. Payment of travel expenses not approved in advance may result in denial of reimbursement. Expenses not listed above shall be considered to be normal business expenses of AMc and not billable to NRA unless specifically authorized in writing by the NRA Executive Vice president or his designee.

B. All sales, use and similar taxes and all import, export and foreign taxes imposed by all applicable governmental authorities shall be billed to NRA at the amount imposed by such governmental authorities. AMc shall not be obligated to contest the applicability of any such taxes to the transactions performed pursuant to this Services Agreement.

C. Fees shall be billed on or before the 5th of each month. This billing shall include costs specified in paragraph III A.

D. Special assignments not included in this Agreement which cannot reasonably be included under the monthly fee must be approved in accordance with written procedures established by the NRA Executive Vice President or his designee, and the charges made by AMc shall be agreed upon in advance, where reasonable,

otherwise such charges shall be not greater than the usual and customary charges for such services or expenses in the industry.

E. All sums payable to AMc under this Services Agreement shall be payable at AMc's corporate headquarters in Oklahoma City, Oklahoma within 30 days of the invoice date. Any amounts not received by AMc within 60 days from the date of the invoice shall bear interest at the rate of 1.0% per month from the date of the invoice until paid. NRA shall notify AMc of any questions concerning any invoices within 10 business days after receipt.

IV. CONFIDENTIALITY

A. **AMc**

1. AMc shall not disclose, directly or indirectly, to any third party any NRA membership data or mailing lists, any materials or information relating thereto, or any other data, materials or information coming to the knowledge of AMc, supplied to AMc by NRA, or otherwise made known to AMc as a result of AMc's providing Services (hereinafter collectively, referred to as the "**Confidential Information**"), without the prior express written permission of NRA. This Services Agreement shall control AMc's providing fulfillment services to NRA.

2. AMc shall not make or cause to have made any copies of any NRA Confidential Information without the prior express written authorization of NRA.

3. AMc may use such Confidential Information only for the limited purpose of providing its Services to NRA.

4. AMc may disclose such Confidential Information to AMc's employees but only to the extent necessary to provide its Services. AMc warrants and agrees to prevent disclosure of Confidential Information by its employees, agents, successors, assigns and subcontractors.

B. AMc, its employees and agents, shall comply with any and all security arrangements imposed by NRA respecting access to Confidential Information.

C. AMc acknowledges NRA's exclusive right, title and interest in the Confidential Information, and shall not at any time do or cause to be done any act or thing contesting or in any way impairing or tending to impair any part of such right, title or interest.

D. AMc shall cease and desist from any and all use of the Confidential Information, and AMc shall promptly return to NRA, in a manner satisfactory to NRA, any and all Confidential Information, upon the earlier to occur of the following: the completion or termination of the Services Agreement.

V. INDEMNIFICATION/INSURANCE

A. AMc

1. AMc agrees to indemnify, defend and hold harmless NRA from and against any loss, liability and expenses including attorney's fees which NRA shall become obligated to pay in respect to: (a) materials prepared by AMc on behalf of NRA which gives rise to any claims pertaining to libel, slander, defamation, infringement of copyright, title or slogan, or privacy or invasion of rights of privacy; or (b) the public relations services and related activities of any person engaged by AMc as a spokesperson in connection with NRA and its purposes, objectives and activities ("**Spokesperson**") pursuant to the direction or supervision of AMc. Insurance coverage for the foregoing indemnification obligations shall be maintained by AMc.

2. NRA agrees to give AMc prompt notice of such claims and to permit AMc, through AMc's insurance carrier and/or counsel of AMc's choice, to control the defense or settlement thereof. However, NRA reserves the right to participate in the defense of any such claim through NRA's own counsel and at NRA's own expense.

3. AMc shall take reasonable precautions to safeguard NRA's property entrusted to AMc's custody or control, but in the absence of negligence on AMc's part or willful disregard of NRA's property rights, AMc shall not be held responsible for any loss, damage, destruction, or unauthorized use by others of any such property.

4. AMc shall not be liable to NRA by reason of default of suppliers of materials and services, owners of media, or other persons not AMc employees or contractors unless supplier(s) is under control of AMc or AMc should have reasonably anticipated default.

B. NRA

1. NRA agrees to indemnify, defend and hold harmless AMc, and its directors, officers, employees, agents, contractors and representatives (collectively, the "**AMc Indemnified Parties**," such directors, officers, employees, agents, contractors and representatives being hereby deemed third party beneficiaries of this indemnity provision), from and against any and all claims, demands, causes of action, suits, liabilities, losses, damages settlements, judgments, and expenses (including attorney's fees), arising from (1) any data, materials, or service performance claims furnished to any AMc Indemnified Party by NRA, or approved by NRA, from which a AMc Indemnified Party prepared any publicity materials or public relations materials, or which were used by a AMc Indemnified Party in the production of advertising which was approved by NRA; (2) any claim, action or proceeding by any person(s), entity(ies), the United States of

America, any state(s), county(ies), or municipality(ies), or any department, agency, board, bureau, commission, attorney general, or other instrumentality(ies) or political subdivision(s) of any of the foregoing, seeking (a) damages (whether actual, exemplary, or both), reimbursement or other compensation for any alleged injury(ies), death(s), or private or public losses, damages or costs related to one or more incidents of violence committed with firearms, or (b) an injunction or other equitable relief with respect to the activities of a AMc Indemnified Party performed on behalf of NRA pursuant to this Agreement or otherwise requested or approved by NRA; or (3) the public relations services and related activities of any Spokesperson pursuant to the direction or supervision of NRA. Insurance coverage for the foregoing indemnification obligations shall be maintained by NRA.

2. AMc agrees to give NRA prompt notice of any matter covered by NRA's indemnity set forth above and to permit NRA, through NRA's insurance carrier and/or counsel of NRA's choice, to control the defense or settlement thereof. However, AMc and the other AMc Indemnified Parties reserve the right to participate in the defense of any such claim through the AMc Indemnified Parties' own counsel and at the AMc Indemnified Parties' own expense.

C. NRA shall reserve the right, in NRA's best interest, to modify, reject, cancel, or stop any and all plans, schedule, and work in progress. In such event AMc shall immediately take proper and responsible action to carry out such instruction; NRA, however, agrees to assume AMc's liability for agreed upon commitments and to reimburse AMc for losses AMc may derive therefrom, and to pay AMc for all internal and external expenses incurred on NRA's behalf with NRA's authorization and to pay AMc charges relating thereto in accordance with the provisions of this Services Agreement.

VI. OWNERSHIP OF PRODUCTS

All creative works developed by AMc in fulfilling its obligations under this Services Agreement shall constitute works made for hire, and shall be the property of NRA. In the event that such works should not be "works made for hire," as such works are defined at 17 U.S.C. § 101, then AMc transfers and assigns to NRA the ownership of all copyright in such works. In the event that AMc should employ a subcontractor, AMc shall arrange for the transfer of such intellectual property to NRA. All other, and further, intellectual property and mailing lists, under any definition, whether common law or statutory, created or developed by AMc in fulfilling its obligations under this Services Agreement, are NRA's sole and exclusive property, and AMc does hereby assign all right, title and interest in same to NRA to the extent that AMc has such rights to assign and transfer. In no event shall AMc be deemed to be assigning or transferring greater rights than it has acquired from any supplier or contractor from who it may have acquired certain elements of the material prepared for NRA.

VII. NO COMPETITION

For the duration of this Service Agreement, AMc shall not represent any other entity in public relations services directly competitive with NRA without NRA's prior written approval.

VIII. EXAMINATION OF RECORDS

During the term of this Services Agreement, AMc authorizes NRA, upon reasonable notice, to examine AMc and Mercury's files, books, and records, with respect to matters covered under this Services Agreement.

IX. AUTHORIZED CONTACTS

AMc is authorized to act upon written communications received from the NRA Executive Vice President or his designee. He or his designee are the only persons within NRA who have the actual authority to issue such communications.

X. MISCELLANEOUS

A. Severability. If any provision of this Services Agreement shall be held to be void or unenforceable for any reason, the remaining terms and provisions hereof shall not be affected thereby.

B. Binding Effect; Agents. The provisions of this Services Agreement shall inure to the benefit of and bind the heirs, legal representatives, successors and assigns of the parties hereto. In performing the Services described above and in taking any action necessarily incident thereto, AMc may utilize the services of AMc's employees and/or such agents or independent contractors approved by NRA as AMc deems appropriate.

C. Section Headings. Section headings contained in this Services Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation thereof.

D. Integrated Agreement. This Services Agreement, together with any Exhibits hereto, constitute the entire agreement between NRA and AMc relating to the matters covered by this Services Agreement at the time of its signing. This Services Agreement supersedes all prior agreements, including letter agreements and memoranda of understanding.

E. Survival. The terms, covenants, and conditions of Section IV and Section V shall survive the termination or expiration of this Services Agreement.

XI. TERMINATION

A. This Services Agreement shall become effective upon the execution hereof.

B. This Services Agreement shall continue in full force and effect for an initial period of eight (8) months ending 12-31-2017. After the initial period of eight (8) months, NRA or AMc may at their sole and exclusive discretion, terminate this Services Agreement, without any cause whatsoever, upon ninety (90) days written notice. Without such written notice, it is the intention of the parties that the Services Agreement will automatically renew. Any written notice to cancel this Contract shall be effective ninety (90) days from the date the Party giving notice to cancel tenders such written notice to the other Party. In the event of said termination, all further obligations of each party to perform shall cease, except as otherwise specifically provided in this Services Agreement. In said case NRA shall, pursuant to Section III, reimburse AMc for expenses incurred on NRA's behalf up to the date of termination.

C. This Services Agreement may be terminated by NRA immediately upon written notice if: (1) AMc fails to diligently and in good faith perform any of its obligations contemplated hereunder; (2) AMc breaches any term, promise or covenant hereunder; (3) AMc files for bankruptcy; (4) there occurs any assignment for the benefit of creditors or the placement of any of AMc's assets in the hands of a trustee or receiver; (5) AMc becomes insolvent or bankrupt; (6) AMc is dissolved. If NRA so terminates this Services Agreement, NRA shall have no obligation to make payments except that NRA shall, pursuant to Section III, reimburse AMc for expenses incurred up to the date of said notice of termination.

D. This Services Agreement may be terminated by AMc immediately upon written notice if (1) NRA fails to diligently and in good faith perform any of its obligations contemplated hereunder; (2) NRA breaches any term, promise or covenant hereunder; (3) NRA files for bankruptcy; (4) there occurs any assignment for the benefit of creditors or the placement of any of NRA's assets in the hands of a trustee or receiver; (5) NRA becomes insolvent or bankrupt; or, (6) NRA is dissolved.

E. Upon the expiration or termination of this Services Agreement, AMc shall immediately return to NRA, to such place and in such manner as NRA may specify, any and all of NRA's property, materials, documents, Confidential Information, etc., that may be in AMc's possession. All charges for accumulating said materials shall be approved and paid in advance of receipt by the NRA. For all non-cancellable contracts entered into between AMc and third parties for the benefit of the NRA (herein "**AMc-Third Party NRA Contracts**"), the NRA agrees to pay AMc upon such expiration or termination the balance of the compensation payable under such AMc-Third Party NRA Contracts as of the date of expiration or termination so that AMc can fulfill its obligations under said Contracts after expiration or termination. If any AMc-Third Party NRA Contract(s) are cancelable upon payment of a fee and the NRA requests that such Contract(s) be cancelled, the NRA agrees to pay AMc the cancellation fees payable under such Contracts as a condition of AMc cancelling such Contract(s).

F. In consideration of the dedication of a substantial number of personnel and resources to provide the services under this Agreement (and the necessity to

maintain such staffing levels and resource allocations to enable AMc to continue to provide such services upon any renewals hereof), the NRA agrees to pay AMc a fair and equitable termination fee to compensate it for the inevitable severances and other reasonable costs incurred in conjunction with such expiration or termination. Such termination fees shall be negotiated in good faith by the parties and paid to AMc no later than the last day of this Agreement.

G. The terms, covenants, and conditions of Section IV and Section V shall survive the termination or expiration of this Services Agreement.

XII. GOVERNING LAW AND CONSENT TO JURISDICTION, VENUE, AND SERVICE

A. This Services Agreement and any disputes arising thereunder shall be governed by and construed solely under the laws of the Commonwealth of Virginia, or, if applicable by federal law.

B. AMc consents and agrees that all legal proceedings relating to the subject matter of this Services Agreement shall be maintained exclusively in courts sitting within the City of Alexandria or the County or Fairfax, Commonwealth of Virginia, and AMc hereby consents and agrees that jurisdiction and venue for such proceedings shall lie exclusively with such courts. AMc furthermore consents to the exercise of personal jurisdiction by said courts over AMc.

IN WITNESS WHEREOF, and intending to be legally bound hereby, and further intending to bind their employees, agents, successors and assigns, the parties have executed this Services Agreement the day and date above written.

National Rifle Association (NRA)

[redacted]

Allan D. Cors, President

Print Name/Title

Ackerman McQueen, Inc.

[redacted]

Melanie Montgomery EVP

Print Name/Title

December 30, 2019

VIA EMAIL

David Dickieson, Esq.
Schertler & Onorato, LLP
725 Twelfth Street, N.W.
Washington, D.C. 20005

Re: *National Rifle Association of America v. Ackerman McQueen, Inc., et al.*,
Consolidated Case No. CL19001757, CL19002067, CL19002886 (Alex. Cir. Ct.)

Dear Counsel:

I write regarding the above-entitled consolidated litigation and Defendant Ackerman McQueen, Inc. and Defendant Mercury Group, Inc.'s ("Defendants") insufficient responses to Plaintiff National Rifle Association of America's First Set of Interrogatories, served on July 25, 2019. It is clear from the face of the Interrogatory responses that all six of them are deficient, non-responsive, or otherwise non-compliant with relevant rules of civil procedure, and we explain the basis for our reasoning for each Interrogatory. Accordingly, the NRA requests that Defendants provide supplemental responses to these Interrogatories within seven days of receipt of this letter. We are available to meet-and-confer about this letter in the interim period as appropriate.

1. **The Global Objection Based On Defendants Losing Their Own Preliminary Injunction Motion Has No Basis In Law Or Fact**

The six interrogatories propounded in the First Set of Interrogatories have not lost their relevance to this case because, as AMc contends, the Court denied Defendants' Motion Preliminary Injunction. We are aware no such objection or rule of Virginia law. Nor do you cite to any such authority.

The Interrogatories are relevant most, if not all, of the NRA's Interrogatories directly pertain—and in fact bear a striking resemblance—to the alleged injuries and damages allegedly suffered by AMc due the alleged breach of the Services Agreement on the part of the NRA. *Compare* Winkler Decl. in Support of Preliminary Injunction *with* Defendants' Amended Counterclaim at Count I and paragraphs included therein. The NRA is entitled to propound Interrogatories on the subject of AMc's alleged damages and by other theories of recovery. In light of the above, there is no legal or factual merit to this objection, and it must be withdrawn as frivolous as to all of your objections.

2. Specific Interrogatories

Interrogatory No. 1

Interrogatory 1 requests information on the identity of the individuals employed by Defendants who were "essentially [a] virtual employee of the NRA." This is manifestly relevant given that one of the NRA's central allegations is that the NRA double billed such employees ("NRA Dedicated Employees") to the NRA and for their work on other clients.

It is unclear whether the first two sentence of AMc's response was meant to be a response or an objection. In the former case, such an objection has no basis law and is without merit. Defendants next interpose their flawed objection based on their preliminary injunction loss, which is frivolous for the reasons discussed above. Accordingly, please provide a supplemental response by the deadline set forth in this letter.

Interrogatory No. 2

The requested information on the salaries of a limited number of AMC executives is relevant to their motive to commit fraud, fiduciary duties, and other violate other legal obligations in order to maintain or grow a particular lifestyle they bragged about and enjoyed (and would not want to lose). The information is also relevant to the damages of the Association.

Defendants interpose a number of objections. First, they repeat the preliminary injunction loss objection, which should be withdrawn. As an accommodation to the time period objection and for purposes of resolving this particular dispute, the NRA would be willing to accept AMc providing the requested information from January 2006 to the present. The objection that the compensation information of former employees or former agents has no legal merit; the requested information must be provided for those who meet the Interrogatory's precise definition if within the possession, custody, or control of the Defendants. In addition, there is no material harm from producing financial data under a protective order agreed-upon by the parties and entered by the Court that ensures confidentiality in the event the information is so designated. It is beyond doubt that the Interrogatory is relevant, valid, and the objections can be resolved or addressed. Accordingly, the supplement must be provided by the deadline set forth in this letter.

Interrogatory No. 3

The requested information relating to the mitigation of damages is relevant on its face, as made clear by the language of the actual Interrogatory. The purpose of this Interrogatory is to obtain information on whether AMc engaged in mitigation of damages efforts upon the alleged failure to post a line of credit on the part of NRA. To state the obvious: for hundreds of years the common law has allowed mitigation of damages is a defense to a breach of contract and the NRA is allowed discovery as to whether the defense might be available here

AMc's conclusory burden objection, without substantiation, lacks merit, as does Defendant's repeated mantra (and objection) that its preliminary injunction loss somehow turned the substance of the Interrogatory irrelevant. Accordingly, please provide a complete and full response to this Interrogatory by the deadline set forth herein.

Interrogatory No. 4

Information concerning the loss of an actual or potential customer as a result of alleged conduct by the NRA is relevant to the reputational harm AMc seeks to recover as damages in its abuse of process claim. Amended Counterclaims ¶ 117 ("AMc's reputation was harm."), ¶¶ 138-39 (discussing allegedly defamatory claims, such as certain individuals being extortionists, that supposedly harmed AMc by implication).

Defendants conclusory burden objection, without substantiation, is meritless, as is its repeated objection based on its preliminary injunction loss, for all the reasons discussed above. Accordingly, provide a complete and full response to this Interrogatory by the deadline set forth herein.

Interrogatory No. 5

The information requested information goes to AMc's allegation of mitigation of damages. Which vendors got paid first, while others deferred is precisely the type of information relevant to whether AMc's in fact mitigated its damages in some part.

AMc's conclusory burden objection, containing no substantiation, is meritless. So too with the often-repeated preliminary injunction loss objection, for the same reasons as before. Accordingly, provide a complete and full response to this Interrogatory by the deadline set forth herein.

Interrogatory No. 6

The requested information concerning leaks and/or potential leaks of NRA confidential information by Defendants to the media goes to the core of the NRA's claim that AMc breached the confidentiality clause in the Services Agreement and its fiduciary duties, among other things, thereby harming the NRA. The information provided by this Interrogatory could very well yield highly relevant evidence of leaks and potentials on the part of AMc, including the facilitation of leaks.

Against this backdrop, AMc's various objections do not withstand scrutiny. AMc's claim of undue burden and overbreadth downplay the highly degree of relevancy of the information sought by this Interrogatory. In addition, an Interrogatory is likely the most suitable discovery device to obtain such information in an efficient and comprehensive matter. Finally, the preliminary injunction objection fails just like all the times before.

Sincerely,

[redacted]

Jason McKenney

cc: David Schertler, Esq.
Joseph Gonzalez, Esq.
Michael J. Collins, Esq.
Robert Collins, Esq.
Jim Hundley, Esq.

647 F.Supp.2d 1105
United States District Court, D. Nebraska.

Leland GRASKE and Leslie Graske, Plaintiffs,
v.
AUTO–OWNERS INSURANCE COMPANY, Defendant.

No. 8:08CV407.
|
Aug. 13, 2009.

Synopsis

Background: Insured brought bad faith action against homeowners insurer for breach of contract and breach of fiduciary duty, alleging insurer failed to sufficiently investigate claims against insured in underlying personal injury action brought by passenger in insured's boat and to settle the claims for the policy limits. Insured moved to compel insurer to provide more detailed responses to his interrogatories and request for production of documents. Insurer moved to compel insured to supplement and/or fully respond to its interrogatories and request for production of documents and for leave to amend its second amended answer to allege the affirmative defenses of contributory negligence and advice of counsel.

Holdings: The District Court, Lyle E. Strom, Senior District Judge, held that:

[1] insurer's responses were not sufficiently detailed;

[2] under Nebraska law, as predicted by the District Court, any contributory negligence on the part of insured was not an affirmative defense to insured's claims against insurer; and

[3] insurer's alleged good-faith reliance on the advice of counsel was insufficient by itself to act as an affirmative defense to insured's claims.

Plaintiff's motion granted in part and denied in part; defendant's motion to compel granted in part and denied in part; defendant's motion for leave to file amended answer denied.

West Headnotes (5)

[1] **Federal Civil Procedure**
Sufficiency; supplementation of answers

Federal Civil Procedure
Sufficiency of compliance

Insurer's responses to insured's interrogatories and request for production of documents in bad faith action were not sufficiently detailed to comply with rules requiring a responding party to provide guidance as to how to locate responsive documents, even though documents were bates-stamped, scanned onto disc, and divided into seven files, where insurer produced nearly 7,000 pages of documents, in response to interrogatories it simply directed insured to one or more of the files of documents, and in response to request for production it indicated that all 7,000 pages were responsive to each request. Fed.Rules Civ.Proc.Rules 33(d), 34, 28 U.S.C.A.

14 Cases that cite this headnote

[2] **Federal Civil Procedure**
Sufficiency; supplementation of answers

Federal Civil Procedure
Sufficiency of compliance

The same rules that apply to producing documents under the rule permitting a party to respond to interrogatories by producing business records are generally applicable to producing documents under the rule governing requests for production of documents. Fed.Rules Civ.Proc.Rules 33(d), 34, 28 U.S.C.A.

11 Cases that cite this headnote

[3] **Insurance**
Insured's conduct as defense

Insurance
Duty to settle within or pay policy limits

Insurance
Investigations and inspections

Under Nebraska law, as predicted by the district court, any contributory negligence on the part of insured was not an affirmative defense to insured's bad-faith claims against homeowners insurer for breach of contract and breach of fiduciary duty based on the insurer's alleged failure to sufficiently investigate claims against the insured in underlying litigation and to settle them for policy limits, since negligence was not the standard applicable to insured's claims.

[4] **Torts**
Contributory fault in general

Contributory negligence is not an affirmative defense to intentional torts under Nebraska law.

[5] **Insurance**
Duty to settle within or pay policy limits

Insurance
Investigations and inspections

Under Nebraska law, as predicted by the district court, homeowners insurer's alleged good-faith reliance on the advice of counsel was insufficient by itself to act as an affirmative defense to insured's bad-faith claims for breach of contract and breach of fiduciary duty based on the insurer's alleged failure to sufficiently investigate claims against the insured in underlying litigation and to settle them for policy limits.

2 Cases that cite this headnote

Attorneys and Law Firms

***1106** David A. Yudelson, Michael C. Cox, Koley, Jessen Law Firm, Omaha, NE, for Plaintiffs.

Angela J. Miller, Daniel P. Chesire, Lamson, Dugan Law Firm, Omaha, NE, for Defendant.

MEMORANDUM AND ORDER

LYLE E. STROM, Senior District Judge.

This matter is before the Court on defendant's motion to compel (Filing No. *39*), plaintiffs' motion to compel discovery responses (Filing No. *42*), and defendant's motion for leave to file second amended answer (Filing No. *54*). Upon review of the parties' briefs and evidentiary submissions, and the applicable law, the Court finds that defendant's motion to compel ***1107** should be granted in part and denied in part, plaintiffs' motion to compel should be granted in part and denied in part, and defendant's motion for leave to file a second amended answer should be denied.

BACKGROUND

The facts giving rise to this action began in October of 2003 when a boat owned and operated by Leland Graske was involved in an accident in the Cayman Islands (Filing No. *1*, ¶¶ 9–10). One of the passengers in the boat, Daniel Doyle, sustained serious injuries as a result of the accident (*id.*, ¶¶ 10, 12). According to the complaint, the accident was caused by the failure of a negligently repaired steering cable on the boat, but the circumstances of the accident implicated some liability on the part of Mr. Graske (*id.*, ¶¶ 11, 19).

Mr. Graske notified defendant of the accident, and it acknowledged that the accident was covered under plaintiffs' homeowners insurance policy (*id.*, ¶ 13). The complaint alleges Mr. Doyle offered to settle his claims against Mr. Graske for the policy limits, which was $300,000 (*id.*, ¶¶ 17, 21). Settlement did not occur, and Mr. Doyle filed a negligence action against Mr. Graske in Nebraska state court on December 20, 2004 (*id.*, ¶ 23). The action was removed to this Court, and following a trial to the Court, judgement was entered against Mr. Graske in the amount of $3,988,153 (*id.*, ¶¶ 23, 31).

Thereafter, plaintiffs asserted this bad faith action against the defendant. The complaint asserts two causes of action: (1) breach of contract, and (2) breach of fiduciary duty. Both claims are generally based on defendant's failure to sufficiently investigate Mr. Doyle's claims in the underlying litigation and settle the claims for the policy limits.

DISCUSSION1. DEFENDANT'S MOTION TO COMPEL (Filing No. *39*)

Defendant seeks an order compelling plaintiffs to supplement and/or fully respond to defendant's first set of interrogatories 1 and 3–12 (*see* Filing No. *41*, ex. B) and defendant's first request for production of documents 5 and 6 (*see id.*, ex. C). Plaintiffs objected to each of these discovery

requests as seeking information protected by the attorney-client privilege, spousal privilege, and/or work product doctrine (*see id.*, exs. B, C). Plaintiffs also objected to some of the discovery requests at issue on additional grounds. Defendant's brief only addresses the validity of plaintiffs' privilege objections, arguing that the information sought is not privileged, or alternatively, that plaintiffs have waived the asserted privileges by placing such information "at issue" in this litigation. The Court has reviewed the discovery requests, plaintiffs' responses, and all of the objections asserted and makes the following findings.

Plaintiffs sufficiently answered interrogatories 1, 3, 10, 11, and 12. The Court will not compel any further response to interrogatory 4–7 or request for production No. 5. Plaintiffs must respond fully to interrogatories 8 and 9 and request for production No. 6. To the extent plaintiffs have not fully responded to interrogatories 8 and 9 and/or have not produced all documents responsive to request for production No. 6, plaintiffs shall provide supplemental responses to the interrogatories and documents responsive to the request for production.

Based on the foregoing, defendant's motion to compel will be granted in part and denied in part. To the extent plaintiffs have not fully responded to interrogatories 8 and 9, plaintiffs shall serve supplemental responses to such interrogatories on or ***1108** before August 21, 2009. To the extent plaintiffs have not produced all documents responsive to request for production No. 6, plaintiffs shall produce the responsive documents on or before August 21, 2009. Defendant's motion to compel will be denied in all other respects.

2. PLAINTIFFS' MOTION TO COMPEL (Filing No. *42*)

[1] Plaintiffs move for an order compelling defendant to provide more detailed responses to plaintiffs' first set of interrogatories 3, 6, 7, 13, 14, 15 (*See* Filing No. *44*–3, ex. B) and plaintiffs' first set of request for production of documents 17–26 (*See* Filing No.*44*–4, ex. C). Defendant invoked Rule 33(d) to respond to the interrogatories and produced documents in response to the requests for production. Plaintiffs claim the responses are deficient because defendant produced thousands of pages of documents without sufficiently specifying which documents were responsive to each discovery request. Defendant argues its responses were proper because the burden to locate the relevant documents among the documents produced is substantially the same for either party.

Federal Rule of Civil Procedure 33(d) permits a party to respond to interrogatories by producing documents when certain requirements are satisfied.[1] If a party responds to interrogatories pursuant to Rule 33(d), it must specify the documents from which the responses to the interrogatories can be derived in sufficient detail to enable the interrogating party to locate the documents as readily as the responding party could. Fed.R.Civ.P. 33(d). It is not sufficient for a responding party to simply direct the interrogating party to a mass of business records. *Id.* Advisory Committee Notes (1980 Amendment); *see also* *In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 320, 326 (N.D.Ill.2005). Courts have found that when voluminous documents are produced under Rule 33(d), they must be accompanied by indices to guide the interrogating party to the responsive documents. *O'Connor v. Boeing N. Am., Inc.*, 185 F.R.D. 272, 278 (C.D.Cal.1999).

[2] Federal Rule of Civil Procedure 34 governs requests for production of documents. Rule 34(b)(2)(E)(i) permits a responding party to produce documents in the manner that they are kept in the usual course of business; however, the same rules that apply to producing documents under Rule 33(d) are generally applicable to Rule 34. *See, e.g.*, *Unlimited Resources Inc. v. Deployed Resources, LLC*, No. 3:07–cv–961–J–12MCR, 2009 WL 1563489 (M.D.Fla. June 3, 2009).

In this case, the Court finds that defendant's responses are insufficient. Defendant produced nearly 7000 pages of documents in response to plaintiffs' discovery requests, and although the documents were divided into seven files, the documents were not accompanied by any indices or other tool to guide plaintiffs to the responsive documents. In response to the interrogatories at issue, defendant simply directed plaintiff to one or more of the files of documents, and in response to the requests ***1109** for production at issue, defendant indicated that all 7000 pages of documents were responsive to each request. Such responses are deficient. Defendant is certainly more familiar with its own business records than are the plaintiffs, and because it has not provided plaintiffs sufficient guidance as to how to locate the responsive documents, the burden to find the responsive documents is not substantially the same on both parties. *See* *O'Connor*, 185 F.R.D. at 278. Defendant's claims that the documents are sufficiently organized because they are bates-stamped and scanned into a CD–ROM are unavailing. Defendant did not refer to specific

bates numbers when it responded to the discovery requests at issue, and the fact that the documents can be electronically searched by key term is not sufficient to discharge defendant's duty to sufficiently identify the location of the relevant documents.

Defendant is ordered to provide more detailed responses to plaintiffs' first set of interrogatories 6, 7, 13, 14, 15 and plaintiffs' first set of request for production of documents 17–26.[2] Defendant shall serve its supplemental responses on plaintiffs on or before August 21, 2009.

3. DEFENDANT'S MOTION FOR LEAVE TO AMEND ITS SECONDED AMENDED ANSWER (Filing No. *54*)

Defendant moves for leave to amend its second amended answer to allege the affirmative defenses of contributory negligence and advice of counsel. The Court does not find that these are viable affirmative defenses to the claims asserted in the complaint, and therefore, defendant's request for leave to amend will be denied. *See Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 755 (8th Cir.2006)(stating "... denial of leave to amend may be justified when the amendment is futile.").

[3] Nebraska has not yet recognized either defense in a bad faith action, and the Court declines to do so in this case. Foremost, it is unlikely that the Nebraska Supreme Court would permit a defendant to assert the affirmative defense of contributory negligence in an action such as this because negligence is not the standard that applies to plaintiffs' claims.

[4] Neb.Rev.Stat. § 25–21,185.07[3] states the civil actions to which contributory negligence is a defense. The Nebraska Supreme Court recently analyzed § 25–21,185.07 and related statutes to determine whether contributory negligence could be asserted in a strict liability action. *See Shipler v. Gen. Motors Corp.*, 271 Neb. 194, 710 N.W.2d 807 (2006). In finding that it could not, the court found that the contributory negligence statutes were intended to permit the contributory negligence of a plaintiff to be compared to the negligence of other persons against whom recovery is sought. *See id.* at 218–19, 710 N.W.2d at 830–31. Because negligence is not the standard applicable to the claims ***1110** asserted in this case, it follows that defendant should not be able to assert plaintiffs' negligence as an affirmative defense. Further, the Nebraska Supreme Court has referred to the tort of bad faith as an intentional tort, *see Ihm v. Crawford & Co.*, 254 Neb. 818, 821, 580 N.W.2d 115, 118 (1998), and contributory negligence is not an affirmative defense to intentional torts under Nebraska law. *Shipler*, 271 Neb. at 210, 710 N.W.2d at 825. Thus, it is unlikely that Nebraska would adopt the affirmative defense of contributory negligence in a third-party bad faith action.

[5] In addition, the Court does not find that advice of counsel is a valid affirmative defense in this case. While good faith reliance on the advice of counsel may be relevant in this case, such evidence is insufficient by itself to act as an affirmative defense to plaintiffs' claims. *See Hamilton Mut. Ins. Co. of Cincinnati v. Buttery*, 220 S.W.3d 287, 294 (Ky.Ct.App.2007). Defendant's request for leave to amend the second amended answer will be denied. Accordingly,

IT IS ORDERED:

1) Defendant's motion to compel (Filing No. *39*) will be granted in part and denied in part. To the extent plaintiffs have not fully responded to interrogatory 8 and 9, plaintiffs shall serve supplemental responses to such interrogatories on or before August 21, 2009. To the extent plaintiffs have not produced all documents responsive to request for production No. 6, plaintiffs shall produce the responsive documents on or before August 21, 2009. Defendant's motion to compel will be denied in all other respects.

2) Plaintiffs' motion to compel discovery responses (Filing No. *42*) is granted in part and denied in part. Defendant shall serve supplemental responses to plaintiffs' first set of interrogatories 6, 7, 13, 14, 15 and plaintiffs' first set of requests for production 17–26 on or before August 21, 2009. Plaintiffs' motion to compel is denied in all other respects.

3) Defendant's motion for leave to file a second amended answer (Filing No. *54*) is denied.

All Citations

647 F.Supp.2d 1105

Footnotes

1 Federal Rule of Civil Procedure 33(d) provides:

> If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:
>
> (1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and
>
> (2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

2 The Court sustains defendant's objection to interrogatory No. 3, and therefore, will not compel a supplemental response to this interrogatory.

3 Neb.Rev.Stat. § 25–21,185.07 provides:

> Sections 25–21,185.07 to 25–21,185.12 shall apply to all civil actions to which contributory negligence may be, pursuant to law, a defense that accrue on or after February 8, 1992, for damages arising out of injury to or death of a person or harm to property regardless of the theory of liability. Actions accruing prior to February 8, 1992, shall be governed by the laws in effect immediately prior to such date. Nothing in sections 25–21,185.07 to 25–21,185.12 shall be construed to limit wrongful death claims brought pursuant to sections 30–809 and 30–810, but such claims shall be subject to sections 25–21,185.07 to 25–21,185.12.

End of Document

303 F.R.D. 466
United States District Court,
N.D. Texas,
Dallas Division.

Paul HELLER, et al., Plaintiffs,
v.
CITY OF DALLAS, Defendant.

No. 3:13–cv–4000–P.
|
Signed Nov. 12, 2014.

Synopsis

Background: Individuals who regularly engaged in political protests brought action challenging city ordinance which prohibited "display" of "signs" "within seventy-five feet" of "a highway" under the First Amendment. Individuals moved to compel discovery responses and for sanctions in the form of attorneys' fees.

Holdings: The District Court, David L. Horan, United States Magistrate Judge, held that:

[1] response by city's counsel to legitimate interrogatory warranted sanction;

[2] general objections to discovery requests did not warrant sanctions for improper certification;

[3] certification of city's undue burden and overbreadth objections to document requests warranted sanction; and

[4] city was required to pay individuals' attorneys' fees in connection with opposing city's vague, ambiguous, overbreadth, and undue burden objections.

Motions granted in part and denied in part.

West Headnotes (22)

[1] **Federal Civil Procedure**
Depositions and Discovery

Counsel have an obligation, as officers of the court, to assist in the discovery process by making diligent, good-faith responses to legitimate discovery requests. Fed.Rules Civ.Proc.Rule 26(g), 28 U.S.C.A.

5 Cases that cite this headnote

[2] **Federal Civil Procedure**
Depositions and Discovery

Even if the client directs counsel to respond to discovery requests in a certain manner, counsel has the ultimate obligation to ensure that the responses and objections are well grounded in fact and law. Fed.Rules Civ.Proc.Rule 26(g)(1), 28 U.S.C.A.

2 Cases that cite this headnote

[3] **Federal Civil Procedure**
Failure to respond; sanctions

When invoking rule governing signing disclosures and discovery requests as a basis for sanctions, the district court must specify which discovery certification was sanctionable. Fed.Rules Civ.Proc.Rule 26(g), 28 U.S.C.A.

1 Cases that cite this headnote

[4] **Federal Civil Procedure**
Failure to respond; sanctions

Sanctions under rule providing that if motion to compel was granted, the court must, after giving an opportunity to be heard, require party whose conduct necessitated motion, party or attorney advising that conduct, or both, to pay movant's reasonable expenses incurred in making motion, including attorney's fees, were not warranted in individuals' action challenging city ordinance which prohibited "display" of "signs" "within seventy-five feet" of "a highway" under First Amendment, where sanctions would be duplicative and redundant of attorney fees individuals sought under rule governing sanction for improper certification. U.S.C.A. Const.Amend. 1; Fed.Rules Civ.Proc.Rules 26(g)(3), 37(a)(5)(A), 28 U.S.C.A.

3 Cases that cite this headnote

[5] **Federal Civil Procedure**
Failure to respond; sanctions

Sanctions available under rule governing failure to obey discovery order are appropriate where there is willful disobedience or gross indifference but not where failure to comply was outside the party's control. Fed.Rules Civ.Proc.Rule 37(b), 28 U.S.C.A.

2 Cases that cite this headnote

[6] **Federal Civil Procedure**
Failure to Answer; Sanctions

Response by city's counsel to interrogatory in individuals' action challenging city ordinance which prohibited "display" of "signs" "within seventy-five feet" of "a highway" under First Amendment, seeking identity of all persons providing information used to respond to interrogatories was not justified, as would warrant sanction under rule governing sanction for improper certification; interrogatory was legitimate, standard interrogatory, and city's objections and counsel's explanation provided no legitimate or substantially justified basis for refusing to fully answer it, and city answered interrogatory to unilaterally deny information in order to keep names of potential witnesses from counsel based on unsubstantiated concern that, if given a complete answer to interrogatory, they could start requesting depositions that would end up being abusive in nature. U.S.C.A. Const.Amend. 1; Fed.Rules Civ.Proc.Rule 26(g)(1, 3), 28 U.S.C.A.

1 Cases that cite this headnote

[7] **Federal Civil Procedure**
Failure to Comply; Sanctions

Counsel's certification of response to request for production in individuals' action challenging city ordinance which prohibited "display" of "signs" "within seventy-five feet" of "a highway" under First Amendment, which included general objections to discovery requests to the extent that they exceeded or conflicted with the scope of permissible discovery, did not warrant sanctions for improper certification, although grounds for general objections were not stated with specificity. U.S.C.A. Const.Amend. 1; Fed.Rules Civ.Proc.Rules 26(g)(3), 33(c), 28 U.S.C.A.

2 Cases that cite this headnote

[8] **Federal Civil Procedure**
Grounds and Objections

Federal Civil Procedure
Proceedings to obtain

Objections to discovery must be made with specificity, and the responding party has the obligation to explain and support its objections. Fed.Rules Civ.Proc.Rule 34(b)(2)(B), 28 U.S.C.A.

18 Cases that cite this headnote

[9] **Federal Civil Procedure**
Failure to Comply; Sanctions

Privileged Communications and Confidentiality
Objections; claim of privilege

Counsel's certification of objections to request for production in individuals' action challenging city ordinance which prohibited "display" of "signs" "within seventy-five feet" of "a highway" under First Amendment, which included objections to discovery requests to extent request sought privileged work product or attorney-client communications, did not warrant sanctions for improper certification, where counsel provided privilege log. U.S.C.A. Const.Amend. 1; Fed.Rules Civ.Proc.Rule 26(g)(3), 28 U.S.C.A.

1 Cases that cite this headnote

[10] **Federal Civil Procedure**
Objections and grounds for refusal

Federal Civil Procedure
Sufficiency; supplementation of answers

Federal Civil Procedure
Objections and Grounds for Refusal

Federal Civil Procedure

Sufficiency of compliance

A party served with written discovery must fully answer each interrogatory or document request to the full extent that it is not objectionable and affirmatively explain what portion of an interrogatory or document request is objectionable and why, affirmatively explain what portion of the interrogatory or document request is not objectionable and the subject of the answer or response, and affirmatively explain whether any responsive information or documents have been withheld. Fed.Rules Civ.Proc.Rule 33, 28 U.S.C.A.

24 Cases that cite this headnote

[11] **Federal Civil Procedure**

Objections and Grounds for Refusal

Privileged Communications and Confidentiality

Objections; claim of privilege

Privileged Communications and Confidentiality

Privilege logs

A party may properly raise and preserve an objection to request for production of documents in response to a specific document request or interrogatory by objecting "to the extent" that the request seeks privileged materials or work product, so long as the responding party also provides the information required by rule governing provision of privilege log. Fed.Rules Civ.Proc.Rules 26(b)(5)(A), 33, 28 U.S.C.A.

25 Cases that cite this headnote

[12] **Federal Civil Procedure**

Failure to Answer; Sanctions

Federal Civil Procedure

Failure to Comply; Sanctions

Sanctions were not warranted under rule governing sanctions for improper certification, in individuals' action challenging city ordinance which prohibited "display" of "signs" "within seventy-five feet" of "a highway" under First Amendment, for city's inclusion in responses to interrogatories and document requests that city's responses were "subject to and without waiving its general and specific objections," where at time that counsel certified responses, they were not so clearly objectively unreasonable under existing law as to find that counsel's certification was not substantially justified. U.S.C.A. Const.Amend. 1; Fed.Rules Civ.Proc.Rule 26(g)(1), 28 U.S.C.A.

3 Cases that cite this headnote

[13] **Federal Civil Procedure**

Sufficiency; supplementation of answers

Federal Civil Procedure

Sufficiency of compliance

Outside of the privilege and work product context, responding to a document request or interrogatory "subject to" and "without waiving" objections is not consistent with the Federal Rules or warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law. Fed.Rules Civ.Proc.Rules 33(b)(3), 34(b)(2)(B), 28 U.S.C.A.

41 Cases that cite this headnote

[14] **Federal Civil Procedure**

Failure to respond; sanctions

Federal Civil Procedure

Sufficiency of compliance

A party cannot refuse to produce a requested document or information simply because it is relevant to a claim or defense on which the producing party believes that it will prevail. Fed.Rules Civ.Proc.Rule 34(b)(2)(B), 28 U.S.C.A.

9 Cases that cite this headnote

[15] **Federal Civil Procedure**

Failure to Comply; Sanctions

Failure of city's counsel to provide information about burden involved in responding to discovery requests in making undue burden and overbreadth objections to document requests in individuals' action challenging city ordinance which prohibited "display" of "signs" "within

seventy-five feet" of "a highway" under First Amendment violated rule governing certification of responses, as would warrant imposition of sanction. U.S.C.A. Const.Amend. 1; Fed.Rules Civ.Proc.Rule 26(g)(3), 28 U.S.C.A.

1 Cases that cite this headnote

[16] **Federal Civil Procedure**
Objections and grounds for refusal

Federal Civil Procedure
Objections and Grounds for Refusal

A party resisting discovery must show specifically how each interrogatory or document request is overly broad, unduly burdensome, or oppressive; this requires the party resisting discovery to show how the requested discovery was overly broad, unduly burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden. Fed.Rules Civ.Proc.Rule 26(g), 28 U.S.C.A.

44 Cases that cite this headnote

[17] **Federal Civil Procedure**
Failure to Comply; Sanctions

Counsel's certification of objections to document requests as vague and ambiguous in individuals' action challenging city ordinance which prohibited "display" of "signs" "within seventy-five feet" of "a highway" under First Amendment was not substantially justified, as would warrant imposition of sanction, where requests were not so vague or ambiguous as to be incapable of reasonable interpretation and to prohibit responses. U.S.C.A. Const.Amend. 1; Fed.Rules Civ.Proc.Rules 26(g)(1, 3), 28 U.S.C.A.

2 Cases that cite this headnote

[18] **Federal Civil Procedure**
Grounds and Objections

Federal Civil Procedure
Proceedings to obtain

The party objecting to discovery as vague or ambiguous has the burden to show such vagueness or ambiguity; a party objecting on these grounds must explain the specific and particular way in which a request is vague. Fed.Rules Civ.Proc.Rules 33(b)(3), 34(b)(2)(B), 28 U.S.C.A.

5 Cases that cite this headnote

[19] **Federal Civil Procedure**
Answers; Failure to Answer

A party responding to discovery should exercise reason and common sense to attribute ordinary definitions to terms and phrases utilized in interrogatories; if necessary to clarify its answers, the responding party may include any reasonable definition of the term or phrase at issue. Fed.Rules Civ.Proc.Rules 33, 34(b)(2)(B), 28 U.S.C.A.

2 Cases that cite this headnote

[20] **Federal Civil Procedure**
Grounds and Objections

If a party believes that the discovery request is vague, that party should attempt to obtain clarification prior to objecting on this ground. Fed.Rules Civ.Proc.Rules 33, 34(b)(2)(B), 28 U.S.C.A.

2 Cases that cite this headnote

[21] **Federal Civil Procedure**
Answers; Failure to Answer

City's objections to interrogatories based on assertion that subject was more appropriately addressed by way of deposition testimony in individuals' action challenging city ordinance which prohibited "display" of "signs" "within seventy-five feet" of "a highway" under First Amendment did not violate rule governing certification of responses, as required for imposition of sanctions under rule governing certification. U.S.C.A. Const.Amend. 1; Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A.

[22] **Federal Civil Procedure**
Payment of expenses

As sanction for violations of rule governing certification of responses to discovery requests, city was required to pay individuals, jointly and severally, their attorneys' fees in connection with opposing city's vague, ambiguous, overbreadth, and undue burden objections to individuals' first set of requests for production in individuals' action challenging city ordinance which prohibited "display" of "signs" "within seventy-five feet" of "a highway" under First Amendment. U.S.C.A. Const.Amend. 1; Fed.Rules Civ.Proc.Rule 26(g)(3), 28 U.S.C.A.

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER ON DISCOVERY SANCTIONS

DAVID L. HORAN, United States Magistrate Judge.

Plaintiffs Paul Heller, Diane Baker, Mavis Belisle, Deborah Beltran, Leslie Harris, and Gary Staurd ("Plaintiffs") have filed a Motion to Compel Compliance with Court's Previous Order Compelling Discovery and Renewed Request for Sanctions Under Fed.R.Civ.P. 26(g), *see* Dkt. No. 42, which United States District Judge Jorge A. Solis has referred to the undersigned magistrate judge for determination, *see* Dkt. No. 44. During a July 17, 2014 hearing on Plaintiffs' Motion to Compel Discovery Responses and Request for Sanctions Under Fed.R.Civ.P. 26(g) [Dkt. No. 23], the Court previously granted in part and denied in part Plaintiffs' Motion to Compel Discovery Responses [Dkt. No. 23], after Judge Solis referred that motion along with its accompanying Request for Sanctions Under Fed.R.Civ.P. 26(g) [Dkt. No. 23] for determination. *See* Dkt. No. 25; Dkt. No. 37; Dkt. No. 45. Plaintiffs' latest motion [Dkt. No. 42] renews their request for Federal Rule of Civil Procedure 26(g)(3) sanctions, which remains pending on Plaintiffs' prior motion [Dkt. No. 23]. In an October 2, 2014 Order on Motion to Compel Compliance with Court's Previous Order Compelling Discovery [Dkt. No. 46], the Court previously granted in part and denied in part Plaintiffs' Motion to Compel Compliance with Court's Previous Order Compelling Discovery [Dkt. No. 42] and deferred ruling on Plaintiffs' requests discovery sanctions [Dkt. Nos. 23 & 42]. *See* Dkt. No. 46.

The Court will now address the matter of discovery sanctions, if any, to be imposed under Federal Rules of Civil Procedure 26(g)(3) or 37 on Plaintiffs' Motion to Compel Discovery Responses and Request for Sanctions Under Fed.R.Civ.P. 26(g) [Dkt. No. 23] and Plaintiffs' Motion to Compel Compliance with Court's Previous Order Compelling Discovery ***470** and Renewed Request for Sanctions Under Fed.R.Civ.P. 26(g) [Dkt. No. 42].

For the reasons and to the extent explained below, Plaintiffs' requests for sanctions [Dkt. Nos. 23 & 42] are GRANTED in part and DENIED in part.

Background

Plaintiffs served Defendant City of Dallas with two sets of requests for production of documents and one set of interrogatories. *See* Dkt. Nos. 24–1; Dkt. No. 24–4; Dkt. No. 24–5. Defendant timely served its responses and objections to Plaintiffs' First Set of Requests for Production but served its responses and objections to Plaintiffs' Second Set of Requests for Production and Plaintiffs' First Set of Requests for Interrogatories to Defendant City of Dallas seven days late. *See* Dkt. No. 33 at 3.

Plaintiffs then filed their Motion to Compel Discovery Responses and Request for Sanctions Under Fed.R.Civ.P. 26(g). *See* Dkt. No. 23. In that motion, based on their assertion of "Defendant's counsel's repeated bad-faith behavior—including a refusal to withdraw all out-of-time objections excepting those relating to attorney-client privilege and the work product doctrine (an offer Plaintiffs made to avoid filing this Motion to Compel), and continual assertion of invalid privilege claims—Plaintiffs ... seek their attorneys' fees in being required to pursue" their Motion to Compel Discovery Responses and Request for Sanctions Under Fed.R.Civ.P. 26(g) [Dkt. No. 23] and an order "granting all reasonable and necessary attorneys' fees related to this Motion pursuant to Rule 26(g)." Dkt. No. 24 at 1, 21; *see also* Dkt. No. 23 at 2. More specifically, "[b]ecause Plaintiffs believe that Defendant's conduct was and is intentional and is not substantially justified—surely, they knew that their failure

to provide timely discovery responses waived all objections without court intervention and proof of good cause and that a lack of justifiable privilege prevents the global assertion of privilege—Plaintiffs seek as a sanction attorneys' fees for all time Plaintiff's counsel spent on drafting this discovery, evaluating Defendant's responses, preparing two Motions to Compel, participating in two conferences regarding a Motion to Compel and numerous internal conference among Plaintiffs' counsel." Dkt. No. 24 at 20.

Defendant offered the following written response:

> Plaintiffs have no cause to seek sanctions over the discovery produced in this case. As entailed in this response, the City's objections and responses have been appropriate, reasonable, and made in good faith. Where the City has objected to certain requests as unduly burdensome, it has explained in writing and through multiple verbal conferences its reason for those objections. Where the City has asserted a privilege, it has explained in writing, through its privilege log, and through multiple verbal conferences its reasons for asserting those privileges.
>
> The City has, in fact, produced more than 70 items, including DVDs, multiple large-scale maps, and documents relating to the Original Ordinance that are, arguably, protected by the legislative privilege but not the work product doctrine. Its counsel have spent hours in at least three conferences with Plaintiffs to resolve their differences regarding discovery. The City agreed before Plaintiffs filed their motion that it would continue to produce relevant documents as they are made available. The City intends to do so with the recently pulled statistical data relating to highway crashes within the City. The City also informed Plaintiffs that additional large-scale maps consisting of aerial photographs of the highways enumerated by the Ordinance are still being created through a labor-intensive process, and will be produced as those become available.
>
> With respect to interrogatory responses that Plaintiffs find lacking, the City contends the interrogatory is either improper, or improper at this time, absent any depositions of the City's witnesses.
>
> In support of Plaintiffs' request for sanctions, Plaintiffs have included as an exhibit an email string between its counsel and the City's attorneys in which the City attorney suggests that Professor Penrose ask one of her law students to research the question posed to him. The City agrees the email ***471** could have been more diplomatically worded to state the City's counsel's objection to performing legal research at Plaintiff's counsel's behest. However, the City's conduct in responding to the discovery in this case, including participating in multiple conferences with Plaintiffs' counsel over many hours, indicates the City's good-faith efforts to address the parties' differences regarding discovery. That the parties disagree over the discovery produced thus far is not cause for issuing sanctions. The City's attorneys have also felt frustrated in its dealings with three separate Plaintiffs' counsel, none of whom practice together or in the same office, and who seemed to assert different positions over various issues. Yet, the City has not accused them of acting in bad faith. Reasonable attorneys should be able to disagree without disparaging the opposing counsel.

Dkt. No. 33 at 12–14 (footnote omitted). Defendant contends that, "[i]n short, Plaintiffs have not shown any intentional or egregious conduct that would warrant the imposition of any sanctions against the City." *Id.* at 14.

At the July 17, 2014 hearing, Defendant's counsel argued that counsel believes that, "through the exercise that [the Court has] had to engage in today of going through each and every single one of these requests for production and the interrogatories, [the Court] would agree that [Defendant's counsel] firmly believe that our objections were in fact valid, that we stood by many of our objections, and in the attempts that we made to converse with them, both in person as well as by telephone, we had no fewer than three long conferences about these discovery disputes." Dkt. No. 45 at 136. Defendant's counsel further argued that

> we have spent hours in a good faith attempt to resolve some of these issues, some of these questions. And as you heard them say, [Plaintiffs' counsel have] withdrawn some of them with respect to communications that we contend are protected by the attorney-client privilege. You know, they so said, all right, well, we don't need any of those. To the extent it's work product protected, they said, all right, fine, you know, we don't need any of those, but we still want these other things. And so—and at each turn, what we've been met with is, if you're not going to produce it to us, then we want you to stipulate that you have no such evidence.
>
> If what they wanted us to—was to put in writing that because we can't produce the documents, we can't produce the actual accident reports, that we're supposed to enter into a stipulation that we have no such evidence, which

> is a much broader use of the word, we weren't willing to stipulate to that, you know. And to say that because—and they did in fact demand several times that because we were late in our responses that we had to withdraw our objection. And if given the choice between withdrawing our objection and having the Court resolve them, then yes, our answer was in fact we were not willing to withdraw the objections. We believed we had good cause.
>
> ....
>
> But you know, to say that in absence of that, you need to waive all your objections, or in absence of that, you need to stipulate that you have no such evidence, or in absence, you know, that—or that you need to go through this exercise of pulling all 9,000 accident reports from the last—from 2012. We weren't able to reach an agreement on that, and I don't believe that that's a showing of bad faith of any kind, that that's a—that this is a case where reasonable attorneys agree, and we've been very disappointed to be labeled as something other than a reasonable attorney when we've made extraordinary efforts in this case to try to address these concerns, to try to address these issues.

Id. at 137, 139. Defendant's counsel further argued that "the fact that this hearing took this long, the fact that the Court sustained, in fact, some of our objections, shows that these were complex, difficult, interwoven issues on what discovery we could or could not provide" and that, "in a situation like this, we simply believe that these sanctions are inappropriate, when—are inappropriate to show that we did not—we failed to act in good faith, to show that we somehow acted in bad faith because we disagreed with the Plaintiffs ***472** on the positions that we were taking with respect to this discovery." *Id.* at 139.

At a July 17, 2014 hearing, the Court denied Plaintiffs' Motion to Compel Discovery Responses [Dkt. No. 23] insofar as it sought a ruling that all of Defendant's non-privilege-based objections to Plaintiffs' Second Set of Requests for Production and Plaintiffs' First Set of Requests for Interrogatories to Defendant City of Dallas were waived due to their tardy service on Plaintiffs. *See* Dkt. No. 45 at 130–31. The Court also, on the record, during and at the end of the lengthy hearing, granted Plaintiffs' Motion to Compel Discovery Responses [Dkt. No. 23] as to most of the discovery requests at issue and overruled most, but not all, of Defendant's objections that it pressed in response to the discovery requests where agreement could not be reached with counsel at the hearing as to an adequate response to each request still at issue. *See* Dkt. No. 37; Dkt. No. 45 at 130–31, 139–40. The Court deferred ruling on, and took under advisement, Plaintiffs' request for sanctions. *See* Dkt. No. 37.

In a Supplemental Brief Supporting Request for Sanctions Under Fed.R.Civ.P. 26(g) [Dkt. No. 40], which the Court partially granted Plaintiffs leave to file, *see* Dkt. No. 41, Plaintiffs contend that Defendant has failed to comply with the Court's July 17, 2014 order granting Plaintiffs' Motion to Compel Discovery Responses [Dkt. No. 23] and compelling discovery and that Defendant has failed to conduct a complete search for documents responsive to Plaintiffs' requests for production. On that basis, Plaintiffs urge the Court to grant the sanctions mandated by Rule 26(g)(3) because Defendant has no "substantial justification" for its continued refusal to respond to Plaintiffs' discovery requests. *See* Dkt. No. 40 at 5–6.

Plaintiffs also filed a Renewed Request for Sanctions Under Fed.R.Civ.P. 26(g) [Dkt. No. 42] that asserts that, because "Defendant failed to comply with Judge Horan's initial Order compelling discovery, and [for] the further reason that an incomplete search or attempts to respond to discovery were made by Defendant," the Court should grant "the mandatory sanctions under Fed.R.Civ.P. 26(g)(3) as Defendant has no 'substantial justification' for its continued refusal to respond to Plaintiffs' discovery requests" and should grant "sanctions against Defendant for failing to comply with Judge Horan's Order Compelling Discovery no later than August 18, 2014." Dkt. No. 42 at 7. "Plaintiffs seek all reasonable attorneys' fees in preparing their original Motion to Compel, in attending the Motion to Compel hearing and in further preparing" their Motion to Compel Compliance with Court's Previous Order Compelling Discovery and Renewed Request for Sanctions Under Fed.R.Civ.P. 26(g) [Dkt. No. 42] and assert that, "[b]ut for Defendant's continuing refusal to simply answer basic discovery, Plaintiffs could be moving forward with their plans—expressed to Defendant—to file either a preliminary injunction or Motion for Summary Judgment," such that Defendant's alleged "stalling tactics merit the strongest statement that refusal to comply with a federal Court's Order is unacceptable." *Id.* at 7–8.

In Defendant's Consolidated Response to Plaintiffs' Supplemental Briefing Supporting Request for Sanctions and Motion to Compel Compliance with Court's Previous Order Compelling Discovery and Renewed Request for Sanctions Under Fed.R.Civ.P. 26(g) [Dkt. No. 43], Defendant responded to Plaintiffs' requests for sanctions:

> Plaintiffs have no cause to seek sanctions over the discovery produced in this case. As entailed in the City's prior written response, as well as during the [July 17, 2014] Discovery Hearing, the City's objections and responses have been appropriate, reasonable, and made in good faith. Where the City has objected to certain requests as unduly burdensome, it has explained in writing and through multiple verbal conferences its reason for those objections. Where the City has asserted a privilege, it has explained in writing, through its privilege log, and through multiple verbal conferences its reasons for asserting those privileges.
>
> At this point, the City has produced more than 286 items, including DVDs, multiple large-scale maps, as well as documents relating to the Original Ordinance ***473** that are, arguably, protected by the legislative privilege but not the work product doctrine. The City is unsure which of Plaintiffs' counsel has reviewed all of the production, or whether all three attorneys have actually conferred with each other before filing the supplemental brief and second motion to compel. As the City has previously stated, the City's attorneys have been frustrated in its dealings with three separate Plaintiffs' counsel, none of whom practice together or in the same office, and who seemed to assert different positions over various issues. For example, the City left one set of large-scale maps in the care and custody of one of the Plaintiffs' attorneys during Plaintiffs' depositions. During Chief Brown's deposition, another of Plaintiffs' attorneys accused the City of failing to ever produce such maps and had to be corrected by co-counsel.
>
> The City believes no sanctions are justified when it is Plaintiffs' counsel who have behaved so disappointingly in their dealings with the City by accusing the City of bad conduct at every turn, often without verifying the facts or without a reasonable conference with the City. Indicative of their manner, the City finds it offensive that they have complained to this Court that Chief Brown's deposition started 25 minutes late (ECF 42 at 5) when they were the ones responsible for most of the delay. Plaintiffs brought a PowerPoint presentation requiring a projector and computer connection in the deposition room without giving any prior notice to the City that they needed such equipment and technical assistance to connect the devices and conduct the deposition. The City had to call Dallas Police officers familiar with the conference room's equipment to assist with the set-up, which was done quickly and courteously. Later in the afternoon, because Plaintiffs wanted to use a map as an exhibit they had not prepared, the City's legal assistant helped to pull the map from the internet, then saved it to a memory stick so it could be projected and used, and also given to the court reporter as an exhibit. In short, the City is frustrated that it must defend its conduct at every turn because Plaintiffs have misconstrued even minor details in their effort to besmirch the City when the City has, in fact, made numerous efforts to accommodate Plaintiffs in a courteous and professional manner whenever possible.

Dkt. No. 43 at 10–12. Defendant contends that, "[u]nder such circumstances, Plaintiffs have not shown any conduct on the part of the City that would warrant the imposition of any sanctions against the City." *Id.* at 12.

In an October 2, 2014 Order on Motion to Compel Compliance with Court's Previous Order Compelling Discovery [Dkt. No. 46], the Court granted in part and denied in part Plaintiffs' Motion to Compel Compliance with Court's Previous Order Compelling Discovery [Dkt. No. 42], requiring that Defendant serve supplemental answers to Plaintiffs' Interrogatory Nos. 1 and 14, and deferred ruling on Plaintiffs' Request for Sanctions Under Fed.R.Civ.P. 26(g) [Dkt. No. 23] and Plaintiffs' Renewed Request for Sanctions Under Fed.R.Civ.P. 26(g) [Dkt. No. 42]. *See* Dkt. No. 46. The Court also explained that it would address the matter of discovery sanctions, if any, to be imposed under Federal Rules of Civil Procedure 26(g) or 37 in a separate order to follow. *See* Dkt. No. 46 at 1.

In a Supplemental Response to Plaintiffs' Motion to Compel Compliance with Court's Previous Order Compelling Discovery and Renewed Request for Sanctions Under Fed.R.Civ.P. 26(g) [Dkt. No. 47], Defendant reported to the Court that "[t]he City has fully complied with the Court's orders regarding each of the discovery requests addressed by the Court's July 17, 2014 hearing, as well as by the Court's Order of Oct. 2, 2014 (ECF doc 46)," and that, "[s]pecifically, the City has provided Plaintiffs with supplemental responses to Interrogatories 1 and 14." Dkt. No. 47 at 1; *see also* Dkt. No. 47–1. Defendant also "respectfully request[ed] that the Court deny Plaintiffs' first and second motion for sanctions in all respects." Dkt. No. 47 at 3.

Legal Standards and Analysis*Federal Rules of Civil Procedure governing discovery responses and objections*

Federal Rule of Civil Procedure 33 governs answers and objections to interrogatories and provides:

*474 (a) In General.

(1) Number. Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with [Federal Rule of Civil Procedure] 26(b)(2).

(2) Scope. An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

(b) Answers and Objections.

(1) Responding Party. The interrogatories must be answered:

(A) by the party to whom they are directed; or

(B) if that party is a public or private corporation, a partnership, an association, or a governmental agency, by any officer or agent, who must furnish the information available to the party.

(2) Time to Respond. The responding party must serve its answers and any objections within 30 days after being served with the interrogatories. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(3) Answering Each Interrogatory. Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(4) Objections. The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.

(5) Signature. The person who makes the answers must sign them, and the attorney who objects must sign any objections.

(c) Use. An answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence.

FED. R. CIV. P. 33(a)-(c).

Federal Rule of Civil Procedure 34 governs responses and objections to requests for production of documents, electronically stored information, and tangible things and provides:

(a) In General. A party may serve on any other party a request within the scope of [Federal Rule of Civil Procedure] 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) Contents of the Request. The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) Responses and Objections.

*475 (A) Time to Respond. The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may

be stipulated to under Rule 29 or be ordered by the court.

(B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.

(C) Objections. An objection to part of a request must specify the part and permit inspection of the rest.

(D) Responding to a Request for Production of Electronically Stored Information. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use.

(E) Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

FED. R. CIV. P. 34(a)-(b).

Federal Rule of Civil Procedure 26(b) addresses withholding of documents based on a privilege or attorney work product protection and provides:

(b) Discovery Scope and Limits.

....

(5) Claiming Privilege or Protecting Trial–Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

FED. R. CIV. P. 26(b)(5)(A).

Federal Rules of Civil Procedure governing discovery sanctions Federal Rule of Civil Procedure 26(g)(3)

Against the backdrop of these rules, Federal Rule of Civil Procedure 26(g), added in 1983, provides:

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

(i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, ***476** modifying, or reversing existing law, or for establishing new law;

(ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

> (2) Failure to Sign. Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.
>
> (3) Sanction for Improper Certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

FED. R. CIV. P. 26(g).

Plaintiffs seek mandatory sanctions against Defendant under Rule 26(g)(3)—in the form of an award of Plaintiffs' reasonable and necessary attorneys' fees—on the basis that Defendant has no "substantial justification" for its continued refusal to respond to Plaintiffs' discovery requests. *See* Dkt. No. 23 at 2; Dkt. No. 24 at 1, 21; Dkt. No. 40 at 5–6; Dkt. No. 42 at 7–8.

[1] Counsel have "an obligation, as officers of the court, to assist in the discovery process by making diligent, good-faith responses to legitimate discovery requests." *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles,* 894 F.2d 1482, 1486 (5th Cir.1990). The United States Court of Appeals for the Fifth Circuit has further commended the Texas Lawyers' Creed's command that an attorney "will not resist discovery requests which are not objectionable" and "will not make objections ... for the purpose of delaying or obstructing the discovery process," and the Court of Appeals observed that "the spirit of the Federal Rules of Civil Procedure is served by adherence to similar principles of professionalism and civility." *Id.* (internal quotation marks omitted).

More specifically, "Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37." Fed.R.Civ.P. 26(g) advisory committee's note (1983). Rule 26(g) specifically "requires that parties make a reasonable inquiry before conducting or opposing discovery." *Smith v. Our Lady of the Lake Hosp., Inc.,* 960 F.2d 439, 448 (5th Cir.1992). Rule 26(g) "provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection" and whether it is consistent with the Federal Rules of Civil Procedure and "grounded on a theory that is reasonable under the precedents or a good faith belief as to what should be the law." Fed.R.Civ.P. 26(g) advisory committee's note (1983). "This standard is heavily dependent on the circumstances of each case." *Id.*

"Although the certification duty requires the lawyer to pause and consider the reasonableness of his request, response, or objection, it is not meant to discourage or restrict necessary and legitimate discovery. The rule simply requires that the attorney make a reasonable inquiry into the factual basis of his response, request, or objection." *Id.* " 'The duty to make a 'reasonable inquiry' is satisfied if the investigation undertaken by the attorney and the conclusions drawn therefrom are reasonable under the circumstances. It is an objective standard similar to the one imposed by [Federal Rule of Civil Procedure] 11.... Ultimately what is reasonable is a matter for the court to decide on the totality of the circumstances.' " *Chapman & Cole v. Itel Container Int'l B.V.,* 865 F.2d 676, 686 (5th Cir.1989) (quoting Fed.R.Civ.P. 26(g) advisory committee's note (1983)).

A Rule 26(g)(1) "certification speaks as of the time it is made." Fed.R.Civ.P. 26(g) advisory ***477** committee's note (1983). The Court therefore "should avoid taking the benefit of hindsight and instead focus on whether, at the time it was signed, the [request, response, or objection] was well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." *Sheets v. Yamaha Motors Corp., U.S.A.,* 891 F.2d 533, 536 (5th Cir.1990) (applying FED. R. CIV. P. 11).

[2] The courts are "well aware of counsel's obligations to act as an advocate for his/her client and to use legal procedure for the fullest benefit of the client. Those obligations, however, must be tempered against counsel's duty not to abuse legal procedure. Thus, even if the client directs counsel to respond to discovery requests in a certain manner, counsel has the ultimate obligation to ensure that the responses and objections are well grounded in fact and law." *McCoo v. Denny's, Inc.,* 192 F.R.D. 675, 697–98 (D.Kan.2000) (citations omitted); *see also Bordelon Marine, Inc. v. F/V KENNY BOY,* Civ. A. Nos. 09–3209 & 09–6221, 2011 WL 164636, at *6 (E.D.La. Jan. 19, 2011) ("While the Court recognizes that counsel need to be zealous advocates for their clients, zealousness has its bounds...."); *Dondi Properties Corp. v. Commerce*

Savings & Loan Ass'n, 121 F.R.D. 284, 288 (N.D.Tex.1988) ("(F) A client has no right to demand that counsel abuse the opposite party or indulge in offensive conduct.... (H) A lawyer should not use any form of discovery, or the scheduling of discovery, as a means of harassing opposing counsel or counsel's client.").

Rule 26(g) was enacted "to eliminate one of the most prevalent of all discovery abuses: kneejerk discovery requests served without consideration of cost or burden to the responding party." *Mancia v. Mayflower Textile Services. Co.*, 253 F.R.D. 354, 358 (D.Md.2008). It was also enacted "to bring an end to the equally abusive practice of objecting to discovery requests reflexively—but not reflectively—and without a factual basis." *Id.* Rule 26(g) "and its commentary are starkly clear: an objection to requested discovery may not be made until after a lawyer has paused and consider[ed] whether, based on a reasonable inquiry, there is a factual basis [for the] ... objection." *Id.* (internal quotation marks omitted).

Rule 26(g) is thus "designed to curb discovery abuse by explicitly encouraging the imposition of sanctions." Fed.R.Civ.P. 26(g) advisory committee's note (1983). "Because of the asserted reluctance to impose sanctions on attorneys who abuse the discovery rules, Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it." *Id.* (citations omitted).

But, even if an attorney violates Rule 26(g)(1), a court may not—on a party's motion or *sua sponte*—impose Rule 26(g)(3) sanctions unless the certification violated Rule 26(g)(1) "without substantial justification." FED. R. CIV. P. 26(g)(3). The United States Supreme Court has defined "substantially justified" to mean "justified in substance or in the main—that is, justified to a degree that could satisfy a reasonable person."

Pierce v. Underwood, 487 U.S. 552, 565, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988). "Substantial justification" entails a "reasonable basis in both law and fact," such that "there is a genuine dispute ... or if reasonable people could differ [as to the appropriateness of the contested action]." *Id.* (internal quotation marks omitted); *accord De Angelis v. City of El Paso*, 265 Fed.Appx. 390, 398 (5th Cir.2008).

[3] Where Rule 26(g)(3) requires the Court to impose an appropriate sanction, "[t]he nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances." Fed.R.Civ.P. 26(g) advisory committee's note (1983). Although Rule 26(g)(3) sanctions are mandatory, Rule 26(g)(3)'s "mandate ... extends only to *whether* a court must impose sanctions, not to *which* sanction it must impose."

Chambers v. NASCO, Inc., 501 U.S. 32, 51, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (emphasis in original). But, "[w]hen invoking Rule 26(g) as a basis for sanctions, the district court must specify which discovery certification was sanctionable." *Ibarra v. Baker*, 338 Fed.Appx. 457, 470 (5th Cir.2009).

***478** *Federal Rule of Civil Procedure 37(a)(5)*

Plaintiffs have not expressly invoked Federal Rule of Civil Procedure 37(a)(5)(A). This rule provides that, if a motion to compel is granted, "the court must, after giving an opportunity to be heard, require the party ... whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees," except that "the court must not order this payment if: (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust." FED. R. CIV. P. 37(a)(5)(A).

[4] The Court finds that any sanctions to be awarded under Rule 37(a)(5)(A) would be duplicative and redundant of those that Plaintiffs expressly seek under Rule 26(g)(3). *Cf. DIRECTV, Inc. v. Puccinelli*, 224 F.R.D. 677, 694 (D.Kan.2004) ("The Court is already imposing sanctions against Plaintiff and in favor of both Defendants under Rule 37(a)(4). Thus, any award of sanctions under Rule 26(g) would be duplicative and unnecessary."). The Court further finds—after considering all of the relevant circumstances, the extent of the parties' conference in advance of Plaintiffs' filing their Motion to Compel Compliance with Court's Previous Order Compelling Discovery and Renewed Request for Sanctions Under Fed.R.Civ.P. 26(g) [Dkt. No. 42], and the extent to which Defendant's positions in connection with Plaintiffs' Motion to Compel Discovery Responses [Dkt. No. 23] and Plaintiffs' Motion to Compel Compliance with Court's Previous Order Compelling Discovery [Dkt. No. 42] were either accepted or resolved by agreement at the July 17, 2014 hearing or were at least substantially justified—that no award of reasonable expenses that the Court would award under Rule 37(a)(5)(A) would be any different than the sanctions that the Court is awarding below under Rule 26(g)(3).

Federal Rule of Civil Procedure 37(b)

Plaintiffs' Motion to Compel Compliance with Court's Previous Order Compelling Discovery and Renewed Request for Sanctions Under Fed.R.Civ.P. 26(g) [Dkt. No. 42] also seeks "sanctions against Defendant for failing to comply with Judge Horan's Order Compelling Discovery no later than August 18, 2014." Dkt. No. 42 at 7. Federal Rule of Civil Procedure 37(b) provides that, "[i]f a party ... fails to obey an order to provide or permit discovery ... the court where the action is pending may issue further just orders," including, among other sanctions, directing that matters embraced in the order or other designated facts be taken as true; prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; striking pleadings in whole or in part; staying further proceedings until the order is obeyed; dismissing the action or proceeding in whole or in part; rendering a default judgment against the disobedient party; or treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination. FED. R. CIV. P. 37(b)(2)(A).

[5] Sanctions available under Rule 37(b) are appropriate where there is willful disobedience or gross indifference but not where failure to comply was outside the party's control.

See Dorsey v. Academy Moving & Storage, Inc., 423 F.2d 858, 860 (5th Cir.1970).

Plaintiffs' requests for Rule 26(g) sanctions

Plaintiffs contend that Rule 26(g) sanctions are appropriate and required because of Defendant's refusal to respond to Plaintiffs' requests for production and interrogatories based on various objections or outright refusals to respond.

The Court will address each of the possible factual bases for finding that Defendant's responses and objections (1)(a) were not consistent with the Federal Rules of Civil Procedure and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law or (b) were interposed for ***479** any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation and (2) were signed by Defendant's counsel in violation of Rule 26(g)(1) without substantial justification.

Interrogatory No. 1 and other matters raised in Plaintiffs' second motion to compel

[6] Plaintiffs' Interrogatory No. 1 asked Defendant to "[p]lease identify all persons providing information used to respond to these Interrogatories, setting forth with respect to each such person the Interrogatory response to which he or she is directly responded," Dkt. No. 24–4 at 2. In response, Defendant objected "to the extent [this Interrogatory] seeks premature disclosure of expert opinion, as the City has not determined at this time which individuals may serve as consulting or testifying expert witnesses" and "to the extent [this Interrogatory] seeks privileged work product, attorney-client communications, and/or information protected by the legislative privilege." *Id.* at 2–3. Defendant then provided this response: "Subject to and without waiving its general and specific objections, these responses include, the public discussions held by members of the Dallas City Council, where noted, as well as the police chiefs or other personnel who spoke before the Council at its meetings. Additionally, these responses were prepared by each of the undersigned counsel in this case." *Id.* at 3.

The Court already addressed Defendant's response to Plaintiffs' Interrogatory No. 1 in the Court's October 2, 2014 Order on Motion to Compel Compliance with Court's Previous Order Compelling Discovery [Dkt. No. 46]:

> This latest motion raises several specific requests for production or interrogatories that the Court addressed in ruling on Plaintiffs' Motion to Compel Discovery Responses [Dkt. No. 23] and as to which Plaintiffs assert Defendant City of Dallas has not complied with its obligations under this Court's order and the Federal Rules of Civil Procedure.
>
> As to Plaintiffs' Interrogatory No. 1, during the July 17, 2014 hearing on Plaintiffs' Motion to Compel Discovery Responses [Dkt. No. 23], the Court ordered Defendant to serve a complete answer to this interrogatory.... Specifically, during the hearing, the Court, Plaintiffs' counsel, and Defendant's counsel had the following exchange:
>
> > THE COURT: All right. Interrogatory # 1. They've responded to this, right? I mean,—
> >
> > [PLAINTIFFS' COUNSEL]: Well, yes and no. I mean, where are the names of the people that helped get this information? Because in order to determine who it is we should depose, who it is that might be able to explain to us their interest in the distinction between a handheld sign or a person wearing a costume and a

> flashing billboard that you can see from about a half-mile away, we need to know who to talk to. And the initial disclosures give us four names, and I'm not sure if all four of those testified during the TRO, but there's—there's no names. And I can say, in 21 years of litigating, I've never had someone or a party not respond to identifying the persons that helped respond to the interrogatories. Here, it says that's privileged work product, attorney-client communication, and protected by the legislative privilege. How do we get the witness names?
>
> THE COURT [to Defendant's counsel]: .... Why aren't you turning over the names of who you've talked to get —pull together the interrogatories? I mean, I certainly understand it was you and [co-counsel] who ultimately put them together. That's the way things go. But you obviously didn't generate the information yourself, so—
>
> [DEFENDANT'S COUNSEL]: We—I mean, when I contact a department for information and help in responding, they in turn then contact however many other people that they need to contact in order to respond to me to give me an answer. And so, in that sense, I think I was being protective in not wanting to generate a list of, you know, 30 names, each of whom that they can start requesting depositions of that, you know, we just feel would be, you know, end up being abusive ***480** in nature. But I am perfectly willing—
>
> THE COURT: I think you'd—
>
> [DEFENDANT'S COUNSEL]:—to supplement—you know, to say that—
>
> THE COURT: I think you'd better supplement and do it. I mean, that's not your prerogative to avoid that. It's a legitimate interrogatory response. So, I'm going to order the City to supplement with the names of the individuals who provided information in response to these interrogatories.....

Dkt. No. 45 at 102–03.

After the hearing, Defendant reports that its counsel, based on counsel's notes, did not believe that the Court had ordered Defendant to provide a supplemental response. *See* Dkt. No. 43 at 3. But Defendant's response contends that the responsive, supplemental information has been provided in any event because [Defendant's counsel] and Assistant Chief of Police Mike Genovesi have now verified the interrogatory responses. *See id.* at 3–4; Dkt. No. 40–1 at 16–17 of 18.

The Court disagrees with that position. Those verifications explain that Defendant's interrogatory answers "are based upon ... information obtained from other employees of the City of Dallas." Dkt. No. 40–1 at 16–17 of 18. And, during the July 17, 2014 hearing, Defendant's counsel likewise explained that, when compiling Defendant's interrogatory answers, "when I contact a department for information and help in responding, they in turn then contact however many other people that they need to contact in order to respond to me to give me an answer." Dkt. No. 45 at 102–03.

Plaintiffs' Interrogatory No. 1—to which the Court ordered Defendant to supplement its answer "with the names of the individuals who provided information in response to these interrogatories," *id.* at 103—asks Defendant to "identify all persons providing information used to respond to these Interrogatories, setting forth with respect to each such person the Interrogatory response to which he or she is directly responded," Dkt. No. 24–4 at 2. The verifications of Defendant's interrogatories answers do not provide that information. The Court ORDERS Defendant to supplement its answer to Plaintiffs' Interrogatory No. 1 with all of the information that the interrogatory requests by **October 14, 2014.**

Dkt. No. 46 at 1–4. In response to this order, Defendant further supplemented its response to Interrogatory No. 1 and appears to have provided in its answer the names of the individuals who provided information in response to Plaintiffs' interrogatories. *See* Dkt. No. 47 at 1; Dkt. No. 47–1 at 2–5 of 9.

Defendant's original answer to Interrogatory No. 1 was not consistent with the Federal Rules of Civil Procedure, and counsel's certification of the answer violated the governing discovery rules and therefore violated Rule 26(g)(1) without substantial justification. At the July 17, 2014 hearing, Defendant's counsel did not assert that a response was not required because this interrogatory "seeks privileged work product, attorney-client communications, and/or information protected by the legislative privilege." Dkt. No. 24–4 at 2–3; Dkt. No. 45 at 102–03. And, notwithstanding Defendant's objection focused on possible expert witnesses, Interrogatory No. 1, by its own terms, does not seek the identity of any consulting or testifying expert witnesses that Defendant may seek to use in the future. *See* Dkt. No. 24–4 at 2–3. But those contingent objections—and

the invalid general objections discussed below—are the only objections that Defendant raised to this interrogatory. *See id.* Defendant then gave only a very general answer —"[s]ubject to and without waiving its general and specific objections" (again, a topic discussed below)—that did not "identify all persons providing information used to respond to these Interrogatories, setting forth with respect to each such person the Interrogatory response to which he or she is directly responded." *Id.* Defendant's counsel then explained at the hearing that Defendant served this answer because Defendant, through its counsel, "was being protective in not wanting to generate a list of, you know, 30 names, each of whom that they can start requesting depositions of that, you know, we ***481** just feel would be, you know, end up being abusive in nature." Dkt. No. 45 at 103. And, as the Court's October 2, 2014 Order on Motion to Compel Compliance with Court's Previous Order Compelling Discovery explained, Defendant then failed to fully supplement the answer as required by the Court's July 17, 2014 order [Dkt. No. 37]. *See* Dkt. No. 46 at 1–4.

Defendant opposes Plaintiffs' sanctions requests by arguing that, "[w]ith respect to interrogatory responses that Plaintiffs find lacking, the City contends the interrogatory is either improper, or improper at this time, absent any depositions of the City's witnesses." Dkt. No. 33 at 13. The Court disagrees with that position. Interrogatory No. 1 is a legitimate, rather standard interrogatory, and Defendant's objections and Defendant's counsel's explanation provide no legitimate or substantially justified basis for refusing to fully answer it. Had Defendant's counsel paused and considered whether, based on a reasonable inquiry, there is a factual or legal basis for the objections and incomplete answer that Defendant provided, Defendant's counsel could not have concluded that there was.

See *Mancia,* 253 F.R.D. at 358.

The Court is constrained to find that Defendant's certification of Defendant's objections and original answer to Interrogatory No. 1 violated Rule 26(g)(1) because Defendant's objections and answer were not consistent with the Federal Rules or warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law and were interposed for an improper purpose. The record makes clear that Defendant answered as it did to unilaterally deny Plaintiffs information in order to—without properly seeking a Federal Rule of Civil Procedure 26(c) protective order or other Court intervention—keep the names of potential witnesses from Plaintiffs' counsel based on an unsubstantiated concern that, if given a complete answer to this interrogatory, "they can start requesting depositions [that would] end up being abusive in nature." Dkt. No. 45 at 103.

Defendant argues that, "[t]o the extent that Plaintiffs believe the City has not appropriately responded to the Court's orders from [the July 17, 2014] hearing, Plaintiffs have not conducted a conference with the City in accordance with Local Rule 7.1, requiring the attorneys to first confer," and "Plaintiffs also did not confer with the City prior to filing their Motion to Compel Compliance with Court's Previous Order (ECF 42)," such that "any supplemental or renewed request for sanctions lacks a good faith effort to cooperate with the City, and has no further support than what Plaintiffs have already presented to the Court in its original motion and during the July 17th Discovery Hearing." Dkt. No. 43 at 2. Although the conference requirement for discovery disputes and filing discovery motions is critically important, *see Brown v. Bridges,* No. 3:12–cv–4947–P, 2014 WL 2777373, at *1 (N.D.Tex. June 19, 2014), the Court disagrees that, under all of the circumstances, any further prefiling conference as to Interrogatory No. 1 was required here, *see* Dkt. No. 42 at 3; Dkt. No. 43 at 3–4.

Defendant's counsel's certification of Defendant's answer and objections to Interrogatory No. 1, *see* Dkt. No. 24–4 at 2–3, 15–16, violated Rule 26(g)(1) in a manner that reflected a lack of reasonable inquiry and that was not substantially justified. The Court finds that Defendant's response to Interrogatory No. 1 was not justified to a degree that could satisfy a reasonable person—that is, reasonable people could not differ as to the appropriateness of the response as described above.

See *Hobley v. Burge,* No. 03 C 3678, 2003 WL 22359520, *1 (N.D.Ill. Oct. 15, 2003). This requires the Court to impose an appropriate sanction under Rule 26(g)(3).

As to Plaintiffs' request for sanctions for Defendant's violating the Court's July 17, 2014 order, this is a close call where Defendant's counsel were responsible for understanding the Court's July 17, 2014 order and seeking clarification if necessary. *See* Dkt. No. 45 at 130 ("[M]y order is going to be short, since this has all been on the record. But I don't know how accessible this recording will be, so I hope everyone has taken notes. If you haven't, if anyone has any questions about my ruling on any of [Plaintiffs' discovery requests], now would be the ***482** time to ask."). But, without intending to excuse Defendant's failure to comply with the Court's discovery order, the Court does not find the willful disobedience or gross indifference that would merit sanctions under Rule 37(b) as to Defendant's response to

Plaintiffs' Interrogatory No. 1 beyond the sanctions that the Court will impose under Rule 26(g)(3).

And, where the Court has already largely denied Plaintiffs' Motion to Compel Compliance with Court's Previous Order Compelling Discovery [Dkt. No. 42] other than as to Plaintiffs' Interrogatory No. 1 and Interrogatory No. 14, the Court finds no basis for Rule 26(g) or Rule 37(b) sanctions as to the other matters raised in that motion. The record before the Court does not support a finding that Defendant's responses to, and its position regarding any requested supplementation as to, Interrogatory No. 14 and Plaintiffs' Second Set of Requests for Production Nos. 6, 7, 8, and 9, as well as Plaintiffs' renewed request to have Defendant search for any citations under the Original and Revised Ordinances and any traffic accidents, meet the standards for Rule 26(g)(3) or Rule 37(b) sanctions.

Defendant's general and boilerplate objections

[7] Defendant's Response to Plaintiffs' First Set of Requests for Production includes a preliminary section entitled "General Objections," which states:

> 1. The City objects to the definitions, instructions, and other statements contained in Plaintiffs' First Set of Requests for Production (the "Requests") to the extent they exceed and/or conflict with the nature and scope of discovery permitted under the FEDERAL RULES OF CIVIL PROCEDURE and any other federal law.
>
> 2. The City objects to the terms "Defendant," "you," and "your," and "yours" as used in Plaintiffs' Requests in that they include attorneys and purport to seek information that is exempt from discovery under the work product and attorney/client privileges and protections.
>
> 3. It is assumed these Requests are not asking for documents that would be privileged and/or protected as work product and/or attorney-client communications. Nonetheless, such information, if any, will be withheld to the extent that they are protected from discovery by such privileges.
>
> 4. Nothing contained in any response shall be deemed to be an admission or waiver by The City as to the relevancy, materiality, authenticity, or admissibility of any document.
>
> 5. The City incorporates these objections by reference in its responses to the Requests below as if fully set forth therein.
>
> 6. The City reserves the right to amend and supplement any responses.

Dkt. No. 24–1 at 1–2. Defendant's Response to Plaintiffs' Second Set of Requests for Production begin with the same "General Objections" section. *See* Dkt. No. 24–5 at 1–2. And Defendant's Objections and Response to Plaintiffs' First Set of Interrogatories to Defendant City of Dallas similarly begins with the following "General Objections" section:

> The City's responses are subject to, qualified by, and limited by the following General Objections, which apply to each specific interrogatory as if incorporated and set forth in full in response to each:
>
> 1. The City objects to Plaintiff's interrogatories, definitions, and instructions to the extent they exceed or seek to impose discovery obligations on the City that exceed and conflict with the nature and scope of discovery permitted under the FEDERAL RULES OF CIVIL PROCEDURE and any other federal law, including but not limited to asking the City to prematurely marshall its evidence in preparation for trial.
>
> 2. The City objects to Plaintiff's interrogatories, definitions, and instructions to the extent they seek disclosure [of] matters protected by attorney-client privilege, work product doctrine, legislative privilege, or other exemptions or privileges recognized, among other things, by applicable law and/or rules of evidence and civil procedure.
>
> ***483** 4. The City makes no admissions of any nature, and no admissions may be implied by, or inferred from, these objections and responses. Nothing contained in any response shall be deemed to be an admission, concession, or waiver by the City as to the relevance, materiality, or admissibility of any information provided in response to Plaintiffs' discovery requests.
>
> 5. These general objections apply to each interrogatory response. Where the City cites certain general objections in response to a particular interrogatory, it does so because the objections are especially applicable. The citation of general objections should not be construed as a waiver of any other general objection falling within the interrogatory.

Dkt. No. 24–4 at 1–2.

Plaintiffs assert that these general, generic objections violate the Federal Rules and are invalid. The Court agrees.

[8] The "prohibition against general [or blanket] objections to discovery requests has been long established." *Hall v. La.*, Civ. A. No. 12–657–BAJ–RLB, 2014 WL 2560579, at *1 (M.D.La. June 6, 2014). Rule 33(b)(4) requires that "grounds for an objection to an interrogatory shall be stated with specificity." FED. R. CIV. P. 33(b)(4). And Rule 34(b) requires that a response to a request for production of documents, electronically stored information, and tangible things "must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons." FED. R. CIV. P. 34(b)(2)(B). In short, "[o]bjections to discovery must be made with specificity, and the responding party has the obligation to explain and support its objections." *Cartel Asset Mgmt. v. Ocwen Fin. Corp.*, No. 01–cv–01644–REB–CBS, 2010 WL 502721, at *10 (D.Colo. Feb. 8, 2010).

Another court has put the matter at hand well: "General objections such as the ones asserted by [Defendant] are meaningless and constitute a waste of time for opposing counsel and the court. In the face of such objections, it is impossible to know whether information has been withheld and, if so, why. This is particularly true in cases like this where multiple 'general objections' are incorporated into many of the responses with no attempt to show the application of each objection to the particular request." *Weems v. Hodnett*, No. 10–cv–1452, 2011 WL 3100554, at *1 (W.D.La. July 25, 2011).

In that case, the court determined that "Plaintiff's general objections violate the letter and spirit of Rule 26(g). Plaintiff made no attempt to explain the applicability of the general objections to the discovery requests. In every response, Plaintiff asserted a general objection for privileged or proprietary information, yet Plaintiff does not explain (in a privileged document log or otherwise) what, if any, information was withheld." *Id.* at *2. And another court has persuasively explained:

> This Court has on several occasions "disapproved [of] the practice of asserting a general objection 'to the extent' it may apply to particular requests for discovery." This Court has characterized these types of objections as "worthless for anything beyond delay of the discovery." Such objections are considered mere "hypothetical or contingent possibilities," where the objecting party makes " 'no meaningful effort to show the application of any such theoretical objection' to any request for discovery." Thus, this Court has deemed such "ostensible" objections waived, or declined to consider them as objections.
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> *Sonnino v. Univ. of Kan. Hosp. Auth.*, 221 F.R.D. 661, 666–67 (D.Kan.2004) (footnotes and citations omitted).

So-called boilerplate or unsupported objections—even when asserted in response to a specific discovery request and not as part of a general list of generic objections preceding any responses to specific discovery requests—are likewise improper and ineffective and may rise (or fall) to the level of what the Fifth Circuit has described as "an all-too-common example of the sort of 'Rambo tactics' that have brought disrepute upon attorneys and the legal system." *McLeod*, 894 F.2d at 1484–86 (holding that simply objecting to requests as "overly broad, burdensome, oppressive and irrelevant," without ***484** showing "specifically how each [request] is not relevant or how each question is overly broad, burdensome or oppressive," is inadequate to "voice a successful objection"); *see also Anderson v. Caldwell Cty. Sheriff's Office*, No. 1:09cv423, 2011 WL 2414140, at *3 (W.D.N.C. June 10, 2011) ("Moreover, there is no provision in the Federal Rules that allows a party to assert objections simply to preserve them. Instead, the Federal Rules require that objections be specific."); *Mancia*, 253 F.R.D. at 358 (noting that, despite Rule 26(g), "boilerplate objections that a request for discovery is 'overboard and unduly burdensome, and not reasonably calculated to lead to the discovery of material admissible in evidence,' persist despite a litany of decisions from courts, including this one, that such objections are improper unless based on particularized facts" (citation omitted)).

Another court has observed that "[the] failure to particularize [overbreadth, undue burden, and relevance] objections as required leads to one of two conclusions: either the [responding parties] lacked a factual basis to make the objections that they did, which would violate Rule 26(g), or they complied with Rule 26(g), made a reasonable inquiry before answering and discovered facts that would support a legitimate objection, but they were waived for failure to specify them as required." *Mancia*, 253 F.R.D. at 364.

In this case, Defendant, in its responses to each of Plaintiffs' sets of document requests and their Interrogatories, raised a

list of "General Objections" before any addressing specific discovery requests and purported to incorporate by reference all of those objections into every response to every discovery request. *See* Dkt. No. 24–1 at 1–2; Dkt. No. 24–4 at 1–2; Dkt. No. 24–5 at 1–2. At the July 17, 2014 hearing, however, Defendant's counsel did not attempt to rely on those "General Objections." *See* Dkt. No. at 17, 69.

Counsel should cease and desist from raising these free-standing and purportedly universally applicable "general objections" in responding to discovery requests. Deploying these general objections in this manner is, for the reasons explained above, inconsistent with the Federal Rules and is not warranted by existing law.

As to the particular general objections that Defendant raised in this case, the objection to all requests to the extent that they exceed or conflict with the scope of permissible discovery is an off-the-shelf and decidedly non-specific objection that gains the responding party nothing without tying it to a particular discovery request and explaining precisely how that request exceeds or conflicts with the scope of permissible discovery. And the Court agrees with Plaintiffs' counsel that disavowing interrogatory responses as "admissions of any nature," Dkt. No. 24–4 at 2, flies in the face of Rule 33(c)'s provision that "[a]n answer to an interrogatory may be used to the extent allowed by the Federal Rules of Evidence." FED. R. CIV. P. 33(c). Finally, any statement reserving the "right" to supplement discovery responses "merely reflects an already existing duty, pursuant to Fed.R.Civ.P. 26(e)." *Zapata v. IBP, Inc.*, Civ. A. No. 93–2366–EEO, 1995 WL 293931, at *1 (D.Kan. May 10, 1995).

Nevertheless, the existing legal authority is not entirely consistent across the federal courts and has not always been clear as to the propriety of raising these kinds of general objections and has been rather limited within this circuit. *See, e.g., Hager v. Graham,* 267 F.R.D. 486, 492 (N.D.W.Va.2010); *Grider v. Keystone Health Plan Central, Inc.*, 580 F.3d 119, 139–40 (3d Cir.2009).

Accordingly, under the particular circumstances here, the Court finds that no sanction is warranted or required under Rule 26(g)(3) based on Defendant's counsel's certifying the general objections to Plaintiffs' discovery requests. *See* Dkt. No. 24–1 at 1–2; Dkt. No. 24–4 at 1–2; Dkt. No. 24–5 at 1–2. The Court will address below Defendant's boilerplate objections asserted in response to Plaintiffs' specific discovery requests.

Defendant's privilege and work product objections

[9] In addition to its "General Objections" addressing privilege and work product protection, Defendant also raised the following objection to many of the document requests in Plaintiffs' First Set of Requests for ***485** Production: "The City further objects to this request to the extent this request seeks privileged work product or attorney-client communications." Dkt. No. 24–1 at 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18. And Defendant objected to many of Plaintiffs' Interrogatories and the documents requests in Plaintiffs' Second Set of Requests for Production "to the extent that [a request] seeks privileged work product, attorney-client communications, and/or information protected by the legislative privilege." *E.g.*, Dkt. No. 24–4 at 3, 5, 6; Dkt. No. 24–5 at 2–3, 4–5.

Here, then, Defendant did not rely entirely on a general privilege and work product objection stated once in its "General Objections" as if it is applicable to every discovery request—Defendant also raised "to the extent" objections as to privilege and work product protection in its responses to specific interrogatories and document requests. But, while the matter may be worse if a privilege and work product objection is raised only as a general objection, objecting, without more, to a particular interrogatory or document request only "to the extent" that it seeks privileged or work product material and then responding "subject to and without waiving" that contingent objection still leaves the requesting party wondering if there are any responsive documents being withheld as privileged or attorney work product.

And that was the case here, where Plaintiffs' original motion to compel sought an order "requiring full responses to each and every Request for Production and Interrogatory, even if such response simply reveals that no documents exist." Dkt. No. 24 at 21. Plaintiffs' counsel complained that Defendant's responses to document requests subject to objections, including privilege objections, left them wondering if any responsive documents existed in Defendant's possession, custody, or control and were being withheld. Much of the Court's discussions with Defendant's counsel at the July 17, 2014 hearing then involved confirming whether Defendant was withholding from production to Plaintiffs any documents responsive to specific document requests based on Defendant's objections. *See, e.g.*, Dkt. No. 45 at 17–18, 19,

20, 21, 26, 27–28, 31–32, 33, 49–50, 54, 57–60, 62–63, 69–70.

[10] The Court believes that the following is a correct statement of how to properly respond to discovery requests:

- A party served with written discovery must fully answer each interrogatory or document request to the full extent that it is not objectionable and affirmatively explain what portion of an interrogatory or document request is objectionable and why, affirmatively explain what portion of the interrogatory or document request is not objectionable and the subject of the answer or response, and affirmatively explain whether any responsive information or documents have been withheld.

- "In responding to [Rule 34] discovery requests, a reasonable inquiry must be made, and if no responsive documents or tangible things exist, FED. R. CIV. P. 26(g)(1), the responding party should so state with sufficient specificity to allow the Court to determine whether the party made a reasonable inquiry and exercised due diligence." *Atcherley v. Clark*, No. 1:12cv00225 LJO DLB (PC), 2014 WL 4660842, at *1 (E.D.Cal. Sept. 17, 2014) (citation omitted); *accord Kennedy v. Baldwin*, No. 2:11–cv–604–DN–EJF, 2014 WL 549529, at *2 (D.Utah Feb. 11, 2014) ("If no other responsive documents exist, [the responding party should have stated as much in its response.") (citing case holding that it is improper to assert boilerplate objections to discovery requests when there are no documents responsive to the request); *Cartel*, 2010 WL 502721, at *14 ("It is well-settled that a responding party's obligations under Rule 34 do not extend to non-existent materials.") (citing cases regarding Rule 34's not requiring a responding party to create new or nonexistent documents).

- "If responsive documents do exist but the responsive party claims lack of possession, control, or custody, the party must so state with sufficient specificity to allow the Court (1) to conclude that the responses were made after a case-specific evaluation and (2) to evaluate the merit of that response." ***486** *Atcherley*, 2014 WL 4660842, at *1 (citation omitted); *accord XL Specialty Ins. Co. v. Bollinger Shipyards, Inc.*, Civ. A. No. 12–2071, 2014 WL 2155242, at *2 (E.D.La. May 22, 2014) ("A party need not produce documents or tangible things that are not ... within its control. In the face of a denial by a party that it has possession, custody or control of documents, the [requesting] party must make an adequate showing to overcome this assertion." (internal quotation marks and citations omitted)); *Gray v. Faulkner*, 148 F.R.D. 220, 223 (N.D.Ind.1992) ("With respect to Request Nos. 33 and 34, Mr. Gray apparently does not believe defendants' claims that the documentation requested in these items is non-existent or as minimal as defendants have indicated. The fact that a party may disbelieve or disagree with a response to a discovery request, however, is not a recognized ground for compelling discovery, absent some indication beyond mere suspicion that the response is incomplete or incorrect. Should it later appear that requested information was not revealed or was deliberately concealed, a responding party or attorney would be subject to appropriate sanctions.").

- To comply with the requirements to support withholding any responsive document or information as privileged or protected work product, a privilege log or equivalent document complying with Federal Rule of Civil Procedure 26(b)(5)(A)'s requirements must be produced for any documents, communications, or other materials withheld from production on the grounds of attorney-client privilege, work product, or other privilege, immunity, or protection. *See* FED. R. CIV. P. 26(b)(5); *see also In re Santa Fe Int'l Corp.*, 272 F.3d 705, 710 (5th Cir.2001) (holding that the "party asserting a privilege exemption from discovery bears the burden of demonstrating its applicability").

[11] Accordingly, a party may properly raise and preserve an objection to production of documents in response to a specific document request or interrogatory by objecting "to the extent" that the requests seeks privileged materials or work product, so long as the responding party also provides the information required by Rule 26(b)(5)(A).

After considering all of the particular circumstances here, the Court finds that no sanction is warranted or required under Rule 26(g)(3) based on Defendant's counsel's certifying the privilege and work product objections to Plaintiffs' discovery requests and later serving a privilege log. *See* Dkt. No. 24–1; Dkt. No. 24–4; Dkt. No. 24–5.

Defendant's responses made "subject to and without waiving" its objections

[12] Defendant responded to almost all of Plaintiffs' document requests and interrogatories "[s]ubject to and without waiving its general and specific objections." Dkt. No. 24–1; Dkt. No. 24–4; Dkt. No. 24–5. Plaintiffs do

not explicitly raise this manner of responding as a basis for sanctions, and the Court, like many other judges, "recognizes that it has become common practice among many practitioners to respond to discovery requests by asserting objections and then answering 'subject to' or 'without waiving' their objections." *Sprint Communications Co., L.P. v. Comcast Cable Communications, LLC*, Nos. 11–2684–JWL, 11–2685–JWL, & 11–2686–JWL, 2014 WL 545544, at *2 (D.Kan. Feb. 11, 2014).

But, while not a basis for sanctions in this instance, this practice should not escape comment and is inextricably intertwined with the related practice of raising boilerplate objections without the specificity that the Federal Rules require and about which Plaintiffs do complain. The practice of asserting objections and then answering "subject to" and/or "without waiving" the objections—like the practice of including a stand-alone list of general or blanket objections that precede any responses to specific discovery requests—may have developed as a reflexive habit passed on from one attorney to another without any attorney giving serious thought or reflection as to what this manner of responding means or could hope to accomplish as to a particular discovery request.

Having reflected on it, the Court agrees with judges in this circuit and other jurisdictions that the practice of responding to interrogatories and documents requests "subject ***487** to" and/or "without waiving" objections is "manifestly confusing (at best) and misleading (at worse), and has no basis at all in the Federal Rules of Civil Procedure." *Id.* (internal quotation marks omitted). As another court has observed, when a party "respond[s] to [a] discovery request, subject to or without waiving such objection," "[s]uch objection and answer ... leaves the requesting [p]arty uncertain as to whether the question has actually been fully answered or whether only a portion of the question has been answered." *Consumer Electronics Ass'n v. Compras & Buys Magazine, Inc.*, No. 08–21085–CIV, 2008 WL 4327253, at *3 (S.D.Fla. Sept. 18, 2008); *accord Rowell v. NCO Fin. Sys., Inc.*, No. 13–2514–CM, 2014 WL 2154422, at *1 (D.Kan. May 22, 2014) ("As evidenced by the parties' briefs, such practice leaves the requesting party uncertain as to whether the question has been fully answered or whether only a portion of the question has been answered." (internal quotation marks omitted)); *Tomlinson v. Combined Underwriters Life Ins. Co.*, No. 08–CV–259–TCK–FHM, 2008 WL 4601578, at *1 (N.D.Okla. Oct. 16, 2008) ("Furthermore, when discovery responses are provided 'subject to' boilerplate objections without regard to the applicability of those objections, it is unclear whether the discovery request has received a complete response."). And this manner of responding to a document request or interrogatory leaves the requesting party guessing and wondering as to the scope of the documents or information that will be provided as responsive will be.

[13] The Court concludes that, outside of the privilege and work product context as discussed above, responding to a document request or interrogatory "subject to" and "without waiving" objections is not consistent with the Federal Rules or warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law. The governing Federal Rules themselves prohibit—and make clear the problem with—this practice. Rule 33(b)(3) requires that the responding party must answer each interrogatory "to the extent it is not objected to." FED. R. CIV. P. 33(b)(3). Similarly, Rule 34(b)(2)(B) requires that a response to a document request "must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons," and Rule 34(b)(2)(C) requires that "[a]n objection to part of a [document] request must specify the part and permit inspection of the rest." FED. R. CIV. P. 34(b)(2)(B), (C). Rule 34(b) "is structured in this way so that, in combination with [Rule 26(g)(1)], both the requesting party and the court may be assured that *all* responsive, non-privileged materials are being produced, except to the extent a valid objection has been made." *Evans v. United Fire & Cas. Ins. Co.*, Civ. A. No. 06–6783, 2007 WL 2323363, at *2 (E.D.La. Aug. 9, 2007) (emphasis in original). Rule 33(b)(3) does the same for interrogatory responses.

Accordingly, a responding party has a duty to respond to or answer a discovery request to the extent that it is not objectionable. As discussed above, the Federal Rules dictate that a responding party must describe what portions of the interrogatory or document request it is, and what portions it is not, answering or responding to based on its objections and why. But if the request is truly objectionable—that is, the information or documents sought are not properly discoverable under the Federal Rules—the responding party should stand on an objection so far as it goes.

Otherwise, as a general matter, if an objection does not preclude or prevent a response or answer, at least in part, the objection is improper and should not be made. To make such an objection in the face of these considerations is to engage in the "abusive practice of objecting to discovery requests

reflexively—but not reflectively—and without a factual [or legal] basis" that Rule 26(g) was enacted to stop. *Mancia*, 253 F.R.D. at 358.

If a responding party makes such an objection but answers or responds "subject to" and "without waiving" the objection, "[s]uch objection and answer preserves nothing and serves only to waste the time and resources of both the Parties and the Court." *Consumer Electronics*, 2008 WL 4327253, at *3. Some of the reasons for this have been explained by another court:

> ***488** [I]f an objection to a discovery request is raised, and then the question is answered "subject to" or "without waiving" the objection, this court is reluctant to sustain the objection. Although this seems to be an increasingly common approach to discovery, it raises a fairly straightforward question: if a party objects to a question or request but then answers, has the objection been waived despite the claimed reservation of the objection? This court cannot logically conclude that the objection survives the answer. First, the rules do not on their face give a party that option. Rule 33, relating to interrogatories, states: "Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath." Fed.R.Civ.P. 33(b)(3) (emphasis added). Similarly, Rule 34(b)(2), relating to RFPs, provides that a responding party shall state in writing what documents will be produced, and that if objection is made to part of the request, the objection must specify the part and permit inspection of the rest. Rule 36(a), relating to requests for admission, contains substantially the same language. Thus, a responding party is given only two choices: to answer or to object. Objecting but answering subject to the objection is not one of the allowed choices.

Mann v. Island Resorts Dev., Inc., No. 3:08cv297/RS/EMT, 2009 WL 6409113, at *3 (N.D.Fla. Feb. 21, 2009). The court further explained that,

> [s]econd, although the practice is common, the only reported decision this court has found that directly addresses the question is *Meese v. Eaton Mfg. Co.*, 35 F.R.D. 162, 166 (N.D.Ohio 1964), which held that "[w]henever an answer accompanies an objection, the objection is deemed waived, and the answer, if responsive, stands." *See also*, Wright, Miller & Marcus, Federal Practice and Procedure: Civil § 2173: "A voluntary answer to an interrogatory is also a waiver of the objection."

Id. Finally, the court observed that,

> [t]hird, answering subject to an objection lacks any rational basis. There is either a sustainable objection to a question or request or there is not. What this response really says is that counsel does not know for sure whether the objection is sustainable, that it probably is not, but thinks it is wise to cover all bets anyway, just in case. In this court, however, no objections are "reserved" under the rules; they are either raised or they are waived.

Id.; *see also Sherwin–Williams Co. v. JB Collision Servs., Inc.*, Nos. 13–CV–1946–LAB (WVG) & 13–CV–1947–LAB (WVG), 2014 WL 3388871, at *2–*3 (S.D.Cal. July 9, 2014); *Estridge v. Target Corp.*, No. 11–61490–CIV, 2012 WL 527051, at *2 (S.D.Fla. Feb. 16, 2012).

Accordingly, for example, if part or all of an interrogatory is allegedly vague and ambiguous, the responding party, to comply with the Federal Rules, must, if possible, explain its understanding of the allegedly vague and ambiguous terms or phrases and explicitly state that its answer is based on that understanding. *See generally Cartel*, 2010 WL 502721, at *10; *McCoo*, 192 F.R.D. at 694. If an entire interrogatory or document request is truly so vague and ambiguous that the responding party cannot understand its meaning and what information it seeks, the party should stand on its objection and provide no answer at all or promise no production of responsive documents on the ground that the responding party simply cannot do so based on the discovery request's wording. But making an objection to a request as vague and ambiguous, without more, and then fully answering the interrogatory or promising production of all documents responsive to the request "subject to" the vagueness and ambiguity objection betrays that the objection was made reflexively and without a factual basis.

A similar analysis applies to an objection to a request as being overbroad in its scope or as imposing an undue burden on the responding party to answer or respond.

If a discovery request is overbroad, the responding party must, to comply with Rule 33 or Rule 34, explain the extent to which it is overbroad and answer or respond to the extent that it is not—and explain the scope of what the responding party is answering or responding to. *See* *Consumer Electronics*, 2008 WL 4327253, at *2 ("If there is an ***489** objection based upon an unduly broad scope, such as time frame or geographic location, discovery should be provided as to those matters within the scope which is not disputed. For example, if discovery is sought nationwide for a ten-year period, and the responding party objects on the grounds that only a five-year period limited to activities in the state of Florida is appropriate, the responding party shall provide responsive discovery falling within the five-year period as to the State of Florida."). Similarly, if answering or responding to a discovery request would impose an undue burden, the responding party must, as discussed below, properly substantiate that assertion and then should only answer or respond to the part or extent, if any, of the request that would not involve an undue burden. *See generally Cartel*, 2010 WL 502721, at *15 ("The discovery process necessarily imposes burdens on a responding party.... The question, however, is whether the discovery unduly burdens ...." (internal quotation marks and citation omitted)). But again, fully responding to or answering —or, without further explanation, responding to or answering "subject to" objections—an allegedly overbroad or unduly burdensome discovery request simply reflects a problem with those objections and not with the request itself. *See generally* *Aikens v. Deluxe Fin. Servs., Inc.*, 217 F.R.D. 533, 538–39 (D.Kan.2003).

Another related practice is a party's making an objection that is not directed to the discovery of the information or documents under Federal Rule of Civil Procedure 26(b) but rather to the information's or document's admissibility at trial or on summary judgment. The United States Supreme Court has recognized that the discovery rules "are to be accorded a broad and liberal treatment." *Hickman v. Taylor*, 329 U.S. 495, 507–508, 67 S.Ct. 385, 91 L.Ed. 451 (1947). Rule 26(b) allows a party to obtain discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense." FED. R. CIV. P. 26(b)(1). The information sought need not be admissible at trial "if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* That a requested document or information will not be admissible or relevant to the merits of a claim or defense is not a proper objection to discovery of the document or information under the Federal Rules if the discovery request is reasonably calculated to lead to the discovery of admissible evidence. *See* *McLeod*, 894 F.2d at 1484–85.

[14] Similarly, a party cannot refuse to produce a requested document or information simply because it is relevant to a claim or defense on which the producing party believes that it will prevail. *See Third Pentacle, LLC v. Interactive Life Forms, LLC*, No. 3:10cv00238, 2012 WL 27473, at *3 (S.D.Ohio Jan. 5, 2012) (even if a party "presently holds a strong belief in the merits of [the party's] litigation positions, [the party's] strong belief—whether ultimately justified or not—provides no basis for avoiding [the party's] discovery obligations created by the Federal Rules of Civil Procedure").

Correspondingly, producing a document or information that falls within Rule 26(b)'s broad scope does not waive or affect, at trial or on summary judgment, an objection to the document's or information's admissibility, including based on relevance, under the Federal Rules of Evidence or Federal Rule of Civil Procedure 56. Neither does production affect or undermine the responding party's position on the merits of the claim or defense as to which, under the Rule 26(b)'s broad standard, the document or information is discoverable.

Accordingly, if a discovery request otherwise complies with Rule 26(b)'s standards for what is discoverable, there is no reason or need to raise an objection to a discovery request based on the merits of a claim or defense or to the requested document's or information's ultimate relevance or admissibility at trial or on summary judgment and to then respond or answer to the request "subject to" that objection. But, if all or part of a discovery request seeks documents or information not even reasonably calculated to lead to the discovery of admissible evidence, the responding party should make a specific objection explaining how and to what extent the requested documents or information are not relevant and discoverable under the Rule 26(b) standard and stand on that objection as ***490** to the portion of the request that is so objectionable while specifically describing the portion, if any, of the request to which the responding party is answering or producing documents. *See* *McLeod*, 894 F.2d at 1485.

In light of the relative sparsity of case law in this circuit on responding to discovery requests "subject to" and "without waiving" objections and of Plaintiffs' not raising this as a ground for sanctions, the Court finds that Rule

26(g)(3) sanctions are not warranted in this instance for Defendant's responding to many of the discovery requests "[s]ubject to and without waiving its general and specific objections." *See* Dkt. No. 24–1; Dkt. No. 24–4; Dkt. No. 24–5. These responses subject to objections were not, at the time that Defendant's counsel certified the responses, so clearly objectively unreasonable under existing law in this jurisdiction as to find that Defendant's counsel's Rule 26(g)(1) certification was not substantially justified at that time. But counsel are warned that that may not be true going forward.

Defendant's undue burden and overbreadth objections

[15] As the Court noted above, Defendant raised undue burden and overbreadth objections to many of Plaintiffs' document requests and interrogatories. *See* Dkt. No. 24–1; Dkt. No. 24–4; Dkt. No. 24–5. Plaintiffs report that, in response to their First Set of Requests for Production, "Defendant interposed the ... overbroad ... objection in 32 instances—raising this objection to every Request excepting Request Nos. 15, 16 and 25"—and "interposed the unduly burdensome objection in 31 instances, to every Request excepting Request Nos. 1, 15, 16 and 25." Dkt. No. 24 at 5–6. Defendant's undue burden and overbreadth objections in response to Plaintiffs' Second Set of Requests for Production and Plaintiffs' First Set of Requests for Interrogatories to Defendant City of Dallas, *see* Dkt. No. 24–4; Dkt. No. 24–5, often provided some, minimal explanation for the objection. But Defendant did not do so for the same objections raised to almost every document request in Plaintiffs' First Set of Requests for Production, *see* Dkt. No. 24–1.

By the time of Defendant's response to Plaintiffs' Motion to Compel Discovery Responses and Request for Sanctions Under Fed.R.Civ.P. 26(g) [Dkt. No. 23] and then the July 17, 2014 hearing on that motion, Defendant did not press any overbreadth or undue burden objection to most requests, including most of the objected-to documents requests in Plaintiffs' First Set of Requests for Production, other than the undue burden objections to Plaintiffs' First Set of Requests for Production Nos. 6, 7, and 8. *See* Dkt. No. 33; Dkt. No. 45. And, as the Court observed at the July 17, 2014 hearing, as to those discovery requests on which Defendant relied on an undue burden and overbreadth objection, Defendant produced no actual evidence to support their undue burden or overbreadth objections, *see* Dkt. No. 45 at 33, 99—at least not until Defendant filed its Supplemental Response to Plaintiffs' Motion to Compel Compliance with Court's Previous Order Compelling Discovery And Renewed Request for Sanctions Under Fed.R.Civ.P. 26(g) [Dkt. No. 47] on October 15, 2014, *see* Dkt. No. 47–2.

[16] A party resisting discovery must show specifically how each interrogatory or document request is overly broad, unduly burdensome, or oppressive. *See McLeod,* 894 F.2d at 1485. This requires the party resisting discovery to show how the requested discovery was overly broad, unduly burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden. *See Merrill v. Waffle House, Inc.*, 227 F.R.D. 475, 477 (N.D.Tex.2005); *accord S.E.C. v. Brady,* 238 F.R.D. 429, 437–38 (N.D.Tex.2006). Failing to do so, as a general matter, makes such an unsupported objection nothing more than unsustainable boilerplate. *See McLeod,* 894 F.2d at 1484–86; *Merrill,* 227 F.R.D. at 477. And another court has observed that "[i]t would be difficult to dispute the notion that the very act of making such boilerplate objections is *prima facie* evidence of a Rule 26(g) violation, because if the lawyer had paused, made a reasonable inquiry, and discovered facts that demonstrated the burdensomeness or excessive cost of the discovery request, he or she should have disclosed them in the objection, as both Rule 33 and 34 responses must state ***491** objections with particularity, on pain of waiver."

Mancia, 253 F.R.D. at 359.

Defendant opposes Plaintiffs' sanctions requests by arguing that, "[w]here the City has objected to certain requests as unduly burdensome and overly broad, it has explained in writing and through multiple verbal conferences its reason for those objections." Dkt. No. 33 at 12; *see also* Dkt. No. 43 at 10. For the reasons explained above, the Court cannot and does not accept that position. As to almost every discovery request that Defendant objected was unduly burdensome and overbroad, particularly in Plaintiffs' First Set of Requests for Production, the Court adopts the findings and conclusions of another court faced with similar objections: "Despite this District's well established authority on the level of detail needed to support an undue burden objection, [Defendant] did not submit an affidavit or otherwise attempt to describe how the discovery requests were unduly burdensome in terms of time, expense, or procedure. In short, [Defendant] provided the Court with no information about the burden involved in responding to these discovery requests." *Presbyterian Manors, Inc. v. Simplexgrinnel, L.P.*, No. 09–2656–KHV, 2010 WL 4942110, at *2 (D.Kan. Nov. 30, 2010).

The circumstances here lead the Court to find that Defendant's undue burden and overbreadth objections, at least in response to most of the requests in Plaintiffs' First Set of Requests for Production, were simply boilerplate objections made without Defendant's counsel's pausing and considering whether, based on a reasonable inquiry, there is a factual basis for an objection. Although Defendant's response briefs and arguments at the hearing provided some factual detail applicable to the undue burden objections to a few document requests in Plaintiffs' First Set of Requests for Production—specifically, Plaintiffs' First Set of Requests for Production Nos. 6, 7, and 8—Defendant has never offered any factual support for its undue burden and overbreadth objections to most of the requests in Plaintiffs' First Set of Requests for Production. And, as such, there is no basis to find that Defendant's undue burden and overbreadth objections to most of the document requests in Plaintiffs' First Set of Requests for Production—other than the undue burden objections to Plaintiffs' First Set of Requests for Production Nos. 6, 7, and 8—was substantially justified. "On the contrary, [Defendant's] reliance on what amounted to a boilerplate objection was not reasonable." *Id.*

The Court finds that Defendant's counsel's certification of Defendant's undue burden and overbreadth objections to the document requests in Plaintiffs' First Set of Requests for Production, other than Defendant's undue burden objections to Plaintiffs' First Set of Requests for Production Nos. 6, 7, and 8, *see* Dkt. No. 24–1, violated Rule 26(g)(1) in a manner that reflected a lack of reasonable inquiry and that was not substantially justified. This requires the Court to impose an appropriate sanction under Rule 26(g)(3).

Defendant's objections to Plaintiffs' discovery requests as vague and ambiguous

[17] Defendant objected to most of Plaintiffs' document requests as vague and ambiguous. *See* Dkt. No. 24–1; Dkt. No. 24–5. Plaintiffs report that, in response to their First Set of Requests for Production, "Defendant interposed the vague ... and ambiguous objection in 32 instances—raising this objection to every Request excepting Request Nos. 15, 16 and 25." Dkt. No. 24 at 5.

[18] **[19]** "The party objecting to discovery as vague or ambiguous has the burden to show such vagueness or ambiguity." *McCoo*, 192 F.R.D. at 694. "A party objecting on these grounds must explain the specific and particular way in which a request is vague." *Consumer Electronics*, 2008 WL 4327253, at *2. The responding party "should exercise reason and common sense to attribute ordinary definitions to terms and phrases utilized in interrogatories. If necessary to clarify its answers, the responding party may include any reasonable definition of the term or phrase at issue."

McCoo, 192 F.R.D. at 694 (internal quotation marks and citations omitted); *accord* *Cartel*, 2010 WL 502721, at *10 ("Discovery requests must be given a reasonable construction, and a responding party is not permitted to conjure up ambiguity where there is none.").

***492** **[20]** Further, "[i]f a party believes that the request is vague, that party [should] attempt to obtain clarification prior to objecting on this ground." *Consumer Electronics*, 2008 WL 4327253, at *2; *accord Tomlinson*, 2008 WL 4601578, at *1 ("In addition, because objections to the wording of a discovery request are usually resolved by phone calls or meetings between counsel, the objection that a discovery request is vague or ambiguous calls into question whether the required meet and confer was conducted in good faith."); *see generally* *Dondi*, 121 F.R.D. at 289–90 ("Local Rule 5.1(a) implicitly recognizes that in general the rules dealing with discovery in federal cases are to be self-executing. The purpose of the conference requirement is to promote a frank exchange between counsel to resolve issues by agreement or to at least narrow and focus the matters in controversy before judicial resolution is sought. With increased frequency I observe instances in which discovery disputes are resolved by the affected parties after a hearing has been set—sometimes within minutes before the hearing is to commence. If disputes can be resolved after motions have been filed, it follows that in all but the most extraordinary circumstances, they could have been resolved in the course of Rule 5.1(a) conferences."); *MMAR Group, Inc. v. Dow Jones & Co., Inc.*, 187 F.R.D. 282, 290 (S.D.Tex.1999) (noting "this Court's practice to encourage parties to cooperate at every stage of the pretrial discovery process and to make liberal, voluntary productions of evidence and other tangible items that may lead to the discovery of evidence"); *Alvarez v. Wallace*, 107 F.R.D. 658, 659 (W.D.Tex.1985) ("With respect to the discovery process, [c]ooperation among counsel is not only helpful, but required, and the court has a duty to insure that cooperation is forthcoming." (internal quotation marks omitted)).

Defendant's vague and ambiguous objections in response to Plaintiffs' Second Set of Requests for Production, *see* Dkt. No. 24–5, often provided some, minimal explanation

for the objection. But Defendant failed to do so as to the same objections raised to almost every document request in Plaintiffs' First Set of Requests for Production. *See* Dkt. No. 24–1. And, by the time of Defendant's response to Plaintiffs' Motion to Compel Discovery Responses and Request for Sanctions Under Fed.R.Civ.P. 26(g) [Dkt. No. 23] and then the July 17, 2014 hearing on that motion, Defendant did not rely on any vague or ambiguous objections except as to a few discovery requests. *See* Dkt. No. 33; Dkt. No. 45 at 18, 19, 124–25.

The Court has reviewed Plaintiffs' objected-to document requests. Overwhelmingly, they are not vague and ambiguous and certainly are not so vague or ambiguous as to be incapable of reasonable interpretation and to prohibit Plaintiffs' responses. At least as to Defendant's vague and ambiguous objections to most of the requests in Plaintiffs' First Set of Requests for Production, Defendant's objections included no explanation for the specific and particular way in which a particular request's wording was vague or ambiguous, and the circumstances here lead the Court to find that Defendant's vague and ambiguous objections, at least in response to the requests in Plaintiffs' First Set of Requests for Production, were made without Defendant's counsel's pausing and considering whether, based on a reasonable inquiry, there is a factual basis for an objection. And, based on a review of the many document requests in Plaintiffs' First Set of Requests for Production to which these objections were raised, the Court finds that these were simply boilerplate objections for which there was no substantial justification.

As such, Defendant's counsel's certification of Defendant's vague and ambiguous objections to the document requests in Plaintiffs' First Set of Requests for Production, *see* Dkt. No. 24–1, violated Rule 26(g)(1) in a manner that reflected a lack of reasonable inquiry and that was not substantially justified. This requires the Court to impose an appropriate sanction under Rule 26(g)(3).

Defendant's objections to interrogatories as better addressed by deposition testimony

[21] Defendant objected to several of Plaintiff's Interrogatories on the basis that the subject matter would be "more appropriately addressed by way of deposition testimony." *E.g.*, Dkt. No. 24–4 at 5, 11, 12, 13, 15. Plaintiffs contend that these are not proper ***493** objections based on Federal Rule of Civil Procedure 26. *See* Dkt. No. 24 at 10.

Rule 26(d) provides that "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order," and that, once discovery is authorized by rule, stipulation, or court order or because the parties have conferred as Rule 26(f) required, "[u]nless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice: (A) methods of discovery may be used in any sequence; and (B) discovery by one party does not require any other party to delay its discovery." FED. R. CIV. P. 26(d)(1)-(2).

Rule 26(d) generally governs the sequencing of discovery unless the Court enters a protective order under Rule 26(c) or another order governing the sequence of conducting discovery under Federal Rule of Civil Procedure 16(b) or 26(d) or the parties make a stipulation under Federal Rule of Civil Procedure 29. Absent a court order providing otherwise or a binding stipulation, Rule 26(d)(2)(A) generally dictates that Plaintiffs may seek information through an interrogatory even if Defendant believes the subject matter would be better explored through a deposition. *Cf. Southern Filter Media, LLC v. Halter*, Civ. A. No. 13–116–JJB–RLB, 2014 WL 715727, at *3 (M.D.La. Feb. 21, 2014); *Archie v. Frank Cockrell Body Shop, Inc.*, Civ. A. No. 12–0046–CG–M, 2012 WL 4211080, at *2 n. 2 (S.D.Ala. Sept. 17, 2012) ("A litigant may not treat a set of interrogatories like an a la carte menu and determine for itself which requests to honor and which to ignore.").

But, while, as a general matter, under Rule 26, a party may seek discovery through any permitted method in any sequence, as the Court noted at the July 17, 2014 hearing, "there's certainly case law where there are some kinds of contention interrogatories where courts have felt that, in their discretion, they could say it ought to be a deposition instead, like a 30(b)(6) deposition." Dkt. No. 45 at 107; *see also, e.g., IBP, Inc. v. Mercantile Bank of Topeka*, 179 F.R.D. 316, 321 (D.Kan.1998) (sustaining objections to contention interrogatories where "[o]ther discovery procedures, such as depositions and production of documents, better address whatever need there be for [any] kind of [requested] secondary detail").

In light of that authority, the Court cannot say that Defendant's objections based on its assertion that a subject is "more appropriately addressed by way of deposition testimony"

were made in violation of Rule 26(g)(1) or, even if they were, were not substantially justified. Accordingly, under the particular circumstances here, the Court finds that no sanction is warranted or required under Rule 26(g)(3) based on Defendant's counsel's certifying these objections to Plaintiffs' First Set of Interrogatories to Defendant City of Dallas. *See* Dkt. No. 24–4.

An appropriate sanction

[22] Plaintiffs' counsel observed at the July 17, 2014 hearing that counsel understands that "the Court is very loath to impose sanctions on attorneys" and that "sanctions are a very difficult thing for judges to determine whether to employ." Dkt. 45 at 133–34, 135. In fact, the Court takes no pleasure in imposing sanctions on, or making an example of, any attorney or litigant. But neither will the Court—nor can or should it—ignore what is clearly presented to it where "Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it." Fed.R.Civ.P. 26(g) advisory committee's note (1983). And, as another court has aptly observed, "[t]he costs associated with adversarial conduct in discovery have become a serious burden not only on the parties but on this Court as well." *Gipson v. Sw. Bell Tel. Co.*, Civ. A. No. 08–2017–EFM–DJW, 2009 WL 790203, at *21 (D.Kan. Mar. 24, 2009), *obj. granted in part & denied in part on other grounds*, 2009 WL 4157948 (D.Kan. Nov. 23, 2009).

The undersigned practiced civil litigation, had substantial experience with propounding and responding to discovery requests, and understands well the difficulties and challenges involved in both. But that experience only serves to make the Court hopeful that ***494** this opinion will assist counsel conducting discovery in this case and others going forward.

As explained above, "Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37," and "Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions." Fed.R.Civ.P. 26(g) advisory committee's note (1983). Accordingly, it is generally no defense to a Rule 26(g)(3) sanctions request to assert that many litigants and their counsel are similarly conducting themselves in discovery. Rather, that simply highlights the need to call this conduct out when it is presented and to provide a deterrent through a sanction, as the Federal Rules mandate here.

In sum, the Court finds that Defendant's counsel certified objections and an incomplete answer to Plaintiffs' Interrogatory No. 1 and certified Defendant's undue burden, overbreadth, vague, and ambiguous objections to most of the document requests in Plaintiffs' First Set of Requests for Production, *see* Dkt. No. 24–1 at 20–21; Dkt. No. 24–4 at 15–16, and, for the reasons explained above, those certifications (other than as to the undue burden objections to Plaintiffs' First Set of Requests for Production Nos. 6, 7, and 8) violated Rule 26(g)(1) in a manner that reflected a lack of reasonable inquiry and that was not substantially justified. Those Rule 26(g) violations require the Court to impose an appropriate sanction under Rule 26(g)(3).

In the face of Rule 26(g)'s purposes and mandates, Defendant opposes Plaintiffs' sanctions requests because the fact "[t]hat the parties disagree over the discovery produced thus far is not cause for issuing sanctions"; because Defendant's "attorneys have also felt frustrated in its dealings with three separate Plaintiffs' counsel, none of whom practice together or in the same office, and who seemed to assert different positions over various issues, but "the City has not accused them of acting in bad faith"; because "[r]easonable attorneys should be able to disagree without disparaging the opposing counsel"; and because "Plaintiffs have not shown any intentional or egregious conduct that would warrant the imposition of any sanctions against the City"; and because "Plaintiffs have not shown any conduct on the part of the City that would warrant the imposition of any sanctions against the City." Dkt. No. 33 at 14; Dkt. No. 43 at 12.

The Court cannot agree. The facts that Defendant's counsel is frustrated with Plaintiffs' counsel, that some of Defendant's objections to some of Plaintiffs' discovery requests were sustained, and that some of the discovery disputes in this case may be characterized as reasonable disagreements between counsel do not change or undermine the Court's finding that Defendant's counsel's certifications of certain discovery responses and objections, as described above, were made, at the least, apparently without the required reasonable inquiry and violated Rule 26(g)(1) without substantial justification. And that finding requires that the Court "must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both." FED. R. CIV. P. 26(g)(3).

Here, because this Court has not previously warned counsel that Rule 26(g) will be more rigorously enforced, and to deter future violations by any counsel in this case, the Court finds that the sanction should be imposed on the party and not

the specific attorney or attorneys who signed the discovery responses and objections.

The Court, in an exercise of its discretion in light of the particular circumstances in this case, will sanction Defendant City of Dallas by requiring it to pay Plaintiffs Paul Heller, Diane Baker, Mavis Belisle, Deborah Beltran, Leslie Harris, and Gary Staurd, jointly and severally, their reasonable attorneys' fees incurred in connection with opposing Defendant's vague, ambiguous, overbreadth, and undue burden objections to Plaintiffs' First Set of Requests for Production (other than Defendant's undue burden objections to Plaintiffs' First Set of Requests for Production Nos. 6, 7, and 8) and seeking full responses to Plaintiffs' discovery requests in Plaintiffs' First Set of Requests for Production in the face of those objections and in ***495** connection with seeking a complete answer to Plaintiffs' Interrogatory No. 1. This award of fees includes the attorneys' fees incurred in evaluating (including in conferences among Plaintiffs' counsel) these particular objections and responses and, as to these particular objections and responses, in preparing Plaintiffs' motions to compel, participating in conferences with Defendant's counsel, and preparing for and participating in the July 17, 2014 hearing. But the award does not include any fees that Plaintiffs incurred prior to Defendant's serving its objections and responses, including in connection with Plaintiffs' counsel's preparing and propounding the document requests and interrogatories.

Further, as part of the Rule 26(g)(3) sanctions, the Court will order Defendant City of Dallas to require that every attorney who represents the City of Dallas in litigation in federal court receive and review a copy of this Memorandum Opinion and Order on Discovery Sanctions.

The Court also endorses another court's observation in resolving a Rule 26(g) sanctions matter: "To avoid further and more substantial sanctions, the Court strongly encourages counsel, when conducting further discovery in this case, to pause and consider the reasonableness of their discovery requests, responses, or objections before serving them and to take all steps necessary to ensure that the requests and responses comply with Rule 26(g) standards. The Court will not hesitate to impose substantial Rule 26(g) sanctions"—including on the signing attorney—"if it finds further violations of the Rule." *Anderson v. United Parcel Service, Inc.*, Civ. A. No. 09–2526–KHV–DJW, 2010 WL 4822564, at *14 (D.Kan. Nov. 22, 2010).

Conclusion

Plaintiffs' requests for sanctions [Dkt. Nos. 23 & 42] are GRANTED in part and DENIED in part.

The Court, under Federal Rule of Civil Procedure 26(g)(3), imposes the following sanctions on Defendant City of Dallas:

1. Defendant City of Dallas must pay Plaintiffs Paul Heller, Diane Baker, Mavis Belisle, Deborah Beltran, Leslie Harris, and Gary Staurd, jointly and severally, their reasonable attorneys' fees incurred (as described above) in connection with opposing Defendant's vague, ambiguous, overbreadth, and undue burden objections to Plaintiffs' First Set of Requests for Production (other than Defendant's undue burden objections to Plaintiffs' First Set of Requests for Production Nos. 6, 7, and 8) and seeking full responses to Plaintiffs' discovery requests in Plaintiffs' First Set of Requests for Production in the face of those objections and in connection with seeking a complete answer to Plaintiffs' Interrogatory No. 1; and

2. Defendant City of Dallas is ordered to require that every attorney who represents the City of Dallas in litigation in federal court receive and review a copy of this Memorandum Opinion and Order on Discovery Sanctions.

Plaintiffs may file an application for their reasonable attorneys' fees as described above. But Local Civil Rule 7.1 requires that parties confer before filing an application for attorneys' fees. Plaintiffs' counsel and Defendant's counsel are therefore directed to meet face-to-face and confer about the reasonable amount of these attorneys' fees awarded as Rule 26(g)(3) sanction. This face-to-face requirement is not satisfied by a telephonic conference. Any attorney refusing to appear for this meeting or to confer as directed in this Memorandum Opinion and Order on Discovery Sanctions will be subject to sanctions. By no later than **December 10, 2014,** the parties must file a joint status report notifying the Court of the results of the conference. If all disputed issues as to the amount of fees to be awarded to Plaintiffs have been resolved, Plaintiffs must also send an agreed proposed order to the Court at Horan_Orders@txnd.uscourts.gov.

If the parties do not reach an agreement as to the amount of fees to be awarded to Plaintiffs, Plaintiffs may, by no later than **December 17, 2014,** file an application for attorneys' fees that is accompanied by supporting evidence establishing the amount of the attorneys' fees (as described above) to be awarded as Rule 26(g)(3) sanction. The fee application

must be supported by documentation ***496** evidencing the "lodestar" calculation, including affidavits and billing records, and citations to relevant authorities and shall set forth the number of hours expended in connection with the recoverable attorneys' fees described above as well as the reasonable rate(s) requested. *See Tollett v. City of Kemah*, 285 F.3d 357, 367 (5th Cir.2002) (using the "lodestar" method to award attorney's fees under Rule 37). If an application is filed, Defendant may file a response by **January 16, 2015,** and Plaintiffs may file a reply by **February 2, 2015.**

Plaintiffs' Request for Sanctions Under Fed.R.Civ.P. 26(g) [Dkt. No. 23] and Plaintiffs' Renewed Request for Sanctions Under Fed.R.Civ.P. 26(g) [Dkt. No. 42] are otherwise denied.

SO ORDERED.

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United States District Court,
N.D. Texas, Dallas Division.

McKinney/Pearl Restaurant Partners, L.P., Plaintiff,
v.
Metropolitan Life Insurance Company, CBRE, Inc., and MCPP 2100 McKinney, LLC, Defendants.

No. 3:14-cv-2498-B
|
Signed 05/25/2016

MEMORANDUM OPINION AND ORDER

DAVID L. HORAN, UNITED STATES MAGISTRATE JUDGE

***1** Defendants Metropolitan Life Insurance Company ("MetLife"), CBRE, Inc. ("CBRE"), and MCPP 2100 McKinney, LLC ("MCPP"; collectively, with MetLife and CBRE, "Defendants") have filed a Second Motion to Compel [Dkt. No. 143] ("Defendants' Second MTC"), seeking an order under Federal Rule of Civil Procedure 37(a) to require Plaintiff McKinney/Pearl Restaurant Partners, L.P. d/b/a Sambuca ("Plaintiff" or "Sambuca") to (1) produce documents improperly withheld as privileged; (2) produce documents relating to appraisals and valuations in response to certain document requests; and (3) provide complete answers to certain interrogatories.

United States District Judge Jane J. Boyle referred Defendants' Second MTC to the undersigned United States magistrate judge for determination. *See* Dkt. No. 145.

Plaintiff filed a response, *see* Dkt. No. 174, and Defendants filed a reply, *see* Dkt. No. 182.

Plaintiff also filed its Second Motion to Compel and to Enforce Compliance with the Court's Prior Order on First Motion to Compel [Dkt. No. 150] ("Plaintiff's Second MTC"), seeking an order under Federal Rules of Civil Procedure 37(a) and 37(b) requiring Defendants to produce documents improperly withheld as privileged and/or attorney work product and enforcing the Court's previous order on Plaintiff's first Motion to Compel, with which Plaintiffs assert that Defendants have failed and/or refused to comply.

Judge Boyle referred Plaintiff's Second MTC to the undersigned for determination. *See* Dkt. No. 152.

Defendants filed a response, *see* Dkt. No. 172, and Plaintiff filed a reply, *see* Dkt. No. 181.

The Court heard oral argument on these motions on May 23, 2016. *See* Dkt. No. 186.

For the reasons and to the extent explained below, the Court GRANTS in part and DENIES in part Defendants' Second Motion to Compel [Dkt. No. 143] and GRANTS in part and DENIES in part Plaintiff's Second Motion to Compel and to Enforce Compliance with the Court's Prior Order on First Motion to Compel [Dkt. No. 150]. [1]

Background

The Court has previously summarized the background and allegations in this case based on Plaintiff's Third Amended Complaint, which will be recounted only in part here. *See* Dkt. No. 25 at 2-6.

Plaintiff "brings this action against Defendants based on MetLife's alleged deliberate and ongoing failure to fulfill its obligations under a commercial lease agreement and Defendants' repeated misrepresentations in furtherance of their scheme to drive Sambuca out of the leased premises, resulting in repeated and continuing injury to Sambuca." *Id.* at 2 (internal quotation marks omitted). Plaintiff "is a Texas limited partnership operating a restaurant at 2120 McKinney Avenue in Dallas, Texas. On October 6, 2003, Sambuca entered into a lease agreement (the 'Lease') with 2100 Partners, L.P. for a space of approximately 9,000 square feet located at 2120 McKinney Avenue in Dallas, Texas (the 'Leased Premises'). The Lease was for a ten-year term and provided for two five-year renewal options. Sambuca avers that '[s]hortly after entering the Lease, 2100 Partners, L.P. sold the Leased Premises to MetLife, who assumed the 'Landlord' obligations under the Lease. Sambuca explains that MetLife contracted with CBRE to serve as property manager of the Leased Premises." *Id.* (citations and internal quotation marks omitted).

***2** Plaintiff "asserts that MetLife has refused to remedy the flawed and shifting structure in spite of its obligations under the Lease. Sambuca further maintains that both Defendants actively hid information from Sambuca and made repeated

representations and assurances that the structural issues would be addressed, knowing that Sambuca would rely on these representations. Additionally, Sambuca alleges that it has been the target of a concerted and wrongful attempt by Defendants to drive it out of the Leased Premises through purposeful delay and deception." *Id.* at 4-5 (citations and internal quotation marks omitted). "Accordingly, Sambuca asserts the following causes of action against Defendants: (1) breach of contract; (2) repudiation or anticipatory breach of contract; (3) breach of the warranty of quiet enjoyment; (4) fraud; (5) negligent misrepresentation; (6) civil conspiracy; and (7) aiding and abetting. Additionally, Sambuca demands: (1) specific performance; (2) declaratory judgment; and (3) rescission of the Lease renewal. Sambuca specifies that it seeks compensatory and exemplary damages, as well as attorneys' fees, costs, and interest." *Id.* at 5 (citations omitted).

Plaintiff has also explained that, on December 8, 2015, it discovered that the ownership of the Leased Premises (together with the neighboring office tower) had changed and that MetLife no longer owned the property, when MetLife sold and transferred its interest in the Leased Premises to MCPP. Plaintiff has since, with the Court's leave, filed a Fourth Amended Complaint to add MCPP as a defendant. *See* Dkt. Nos. 117, 119, & 120.

In support of their Second MTC, Defendants assert that, "[n]otwithstanding Sambuca's claim that Defendants have cost the restaurant millions of dollars, Sambuca refuses to produce documents relating to valuations and appraisals of the restaurant holding company and its affiliates" and "also refuses to answer basic interrogatories and seeks to shield discoverable communications between non-attorneys with an untenable privilege claim." Dkt. No. 143 at 1. Defendants ask the Court to order Sambuca to produce the documents that it has improperly withheld as privileged, where Defendants assert that Sambuca has withheld almost 200 non-attorney documents and communications merely because they relate to the subject matter of the litigation; overrule Sambuca's objections to MetLife's First Requests for Production ("RFP") No. 15, Second RFP No. 6, and Fourth RFP Nos. 9 and 10 and order Sambuca to produce responsive documents; overrule Sambuca's objections to MetLife's First Interrogatories Nos. 12 and 15 and CBRE's First Interrogatories Nos. 1 and 3-8 and order Sambuca to fully answer each of the interrogatories; and order Sambuca to pay Defendants' costs and attorneys' fees incurred in bringing Defendants' Second MTC.

In response, Plaintiff reports that, "[i]n an effort to avoid further dispute, Sambuca has produced the valuation-related documents and is withdrawing some privilege assertions and producing those documents." Dkt. No. 174 at 1 (footnote omitted). Plaintiff otherwise responds that, "[a]s for the remaining disputed documents, the work-product doctrine protects these documents because they were created by Sambuca in anticipation of litigation"; that "Sambuca did not waive the attorney-client privilege by sharing communications with 'third parties' because those 'third parties' were client representatives within the scope of the attorney-client privilege"; and that "Sambuca's interrogatory responses and objections are sufficient and complete." *Id.* at 1-2.

In reply, Defendants report that, after reviewing the additional information that Plaintiff provided in support of its privilege claims, Defendants are withdrawing their objections to Plaintiff's privilege claims as to certain documents. *See* Dkt. No. 182 at 1 n.2. Defendants otherwise reply that Sambuca has failed to establish that the documents still at issue were created in anticipation of litigation; that Sambuca improperly claims attorney-client privilege under the "common interest" doctrine for documents that it shared with third parties; and that Sambuca still refuses to provide complete answers to Defendants' interrogatories.

***3** In its Second MTC, Plaintiff asserts that Defendants are improperly withholding hundreds of documents based on conclusory assertions of privilege and have failed and/or refused to comply with the Court's January 8, 2016 Memorandum Opinion and Order [Dkt. No. 100], granting in part and denying in part Plaintiff's first Motion to Compel [Dkt. No. 77]. Plaintiff explains that "Defendants have recently, near the very end of the discovery period, produced nearly twelve thousand pages of documents that the Court previously compelled, and did so only after Sambuca painstakingly provided Defendants with particular examples of categories of documents that were missing from Defendants' previous document productions." Dkt. No. 150 at 1. According to Plaintiff, "[t]his provides a striking illustration of the gross deficiencies in Defendants' document production generally, and in Defendants' efforts, or lack thereof, to comply with this Court's Order in particular," and Plaintiff therefore "further requests that the Court enter an Order requiring Defendants to immediately and fully comply with the Court's prior Order." *Id.* at 1-2.

Defendants respond that Plaintiff only filed its Second MTC in retaliation for Defendants' filing their Second MTC and that, in doing so, Plaintiff is challenging nearly 800 documents on Defendants' privilege logs. Defendants report that, while they limited their Second MTC to documents claimed as work product despite the absence of any attorney listed as a recipient of the documents, Sambuca challenged every document on Defendants' privilege log, outside of a handful of emails that were sent to or received by Defendants' outside trial counsel. Defendants further contend that they "had already agreed to the only relief Sambuca ever requested in conferring on privilege issues –namely, to supplement their privilege logs with additional details" – and that, "[h]ad Sambuca waited to see Defendants' supplemental privilege logs instead of filing a retaliatory Motion to Compel, Sambuca would have seen that virtually every document it challenges is a communication with Defendants' in-house or outside counsel providing legal advice relating to the subject matter of this litigation." Dkt. No. 172 at 1.

Defendant also respond that the Court should reject Plaintiff's request seeking a copy of Defendants' real estate management accounting system as well as an order for Defendants to produce some unspecified additional documents that Sambuca speculates may exist. According to Defendants, Sambuca never requested and is not entitled to Defendants' complete accounting system; Defendants have already produced responsive documents and electronically stored information ("ESI") from this system; and Sambuca is not entitled to an order compelling Defendants to conduct some unspecified additional document collection or production, where, contrary to Sambuca's accusations, Defendants have fully complied with the Court's prior order and produced all responsive documents.

Defendants ask the Court to deny Plaintiff's Second MTC and order Sambuca to pay Defendants' costs and attorneys' fees incurred in responding to Plaintiff's Second MTC.

Plaintiff replies that it did not raise its concerns with Defendants' privilege logs in retaliation, but, rather, Sambuca's counsel has repeatedly advised Defendants' counsel that their privilege logs with respect to in-house counsel and other internal communications was devoid of information sufficient to allow Sambuca to evaluate the privilege claims. According to Plaintiff, Defendants' declarations submitted in support of its privilege and work-product claims do not establish that the challenged documents are protected work product or attorney-client privileged communications, and Defendants cannot use in-house counsel to hide communications that would otherwise be discoverable. Plaintiff further contends that Defendants did not comply with this Court's January 8, 2016 Memorandum Opinion and Order [Dkt. No. 100], which compelled Defendants to produce certain responsive documents by January 29, 2016, and that "the fact that Defendants failed to even search for the nearly twelve thousand pages of documents responsive to both Sambuca's requests and this Court's Order shows that Defendants' position in the Response is tenuous at best." Dkt. No. 181 at 3.

Legal Standards

***4** Federal Rule of Civil Procedure 37(a) governs motions to compel discovery responses. Rule 37(a)(3)(B) provides that a party seeking discovery may move for an order compelling production against another party when the latter has failed to produce documents requested under Federal Rule of Civil Procedure 34 or to answer interrogatories under Federal Rule of Civil Procedure 33. *See* FED. R. CIV. P. 37(a)(3)(B)(iii)-(iv).

The party resisting discovery must show specifically how each discovery request is not relevant or otherwise objectionable. *See McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990). In response to a Rule 34 request, "[f]or each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons." FED. R. CIV. P. 34(b)(2)(B). "An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest." FED. R. CIV. P. 34(b)(2)(C). And, in response to an interrogatory under Rule 33, "[e]ach interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath"; "[t]he grounds for objecting to an interrogatory must be stated with specificity"; and "[a]ny ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure." FED. R. CIV. P. 33(b)(3)-(4).

A party resisting discovery must show how the requested discovery was overly broad, burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden. *See Merrill v. Waffle House, Inc.*, 227 F.R.D. 475, 477 (N.D. Tex. 2005); *see also S.E.C. v. Brady*, 238 F.R.D. 429, 437 (N.D. Tex. 2006) ("A party asserting undue

burden typically must present an affidavit or other evidentiary proof of the time or expense involved in responding to the discovery request."). And the "party asserting a privilege exemption from discovery bears the burden of demonstrating its applicability." *In re Santa Fe Int'l Corp.*, 272 F.3d 705, 710 (5th Cir. 2001).

A party who has objected to a discovery request must, in response to a motion to compel, urge and argue in support of his objection to a request, and, if he does not, he waives the objection. *See Dolquist v. Heartland Presbytery*, 221 F.R.D. 564, 568 (D. Kan. 2004); *Cotracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 655, 662 (D. Kan. 1999).

The Court has previously explained the standards governing the parties' claims of attorney-client privilege in this diversity case:

> This Court sitting in this diversity case applies the Texas attorney-client privilege. Under Texas law, the elements of the attorney-client privilege are: (1) a confidential communication; (2) made for the purpose of facilitating the rendition of professional legal services; (3) between or amongst the client, lawyer, and their representatives; and (4) the privilege has not been waived. The burden is on the party asserting the privilege to demonstrate how each document satisfies these elements. A general allegation of privilege is insufficient to meet this burden. Instead, the proponent must provide sufficient facts by way of detailed affidavits or other evidence to enable the court to determine whether the privilege exists. Although a privilege log and an *in camera* review of documents may assist the court in conducting its analysis, a party asserting the privilege still must provide "a detailed description of the materials in dispute and state specific and precise reasons for their claim of protection from disclosure." In fact, "resort to *in camera* review is appropriate only *after* the burdened party has submitted detailed affidavits and other evidence to the extent possible."

***5** *Curlee v. United Parcel Serv., Inc. (Ohio)*, No. 3:13-cv-344-P, 2014 WL 4262036, at *4 (N.D. Tex. Aug. 29, 2014) (citations omitted).

The Texas Supreme Court has recognized that privileges "represent society's desire to protect certain relationships." *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1983). "It is the rule in Texas that the protections afforded by a privilege are waived by voluntary disclosure of the privileged documents." *Jordan v. Court of Appeals for Fourth Supreme Judicial Dist.*, 701 S.W.2d 644, 649 (Tex. 1985). More specifically,

> [u]nder Texas law, the attorney-client privilege prohibits disclosure of confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. Tex. R. Evid. 503(b)(1). The privilege can be claimed by the client, or by the attorney on the client's behalf. TEX. R. EVID. 503(c). Generally, the voluntary disclosure of privileged communications to a third party results in a waiver of the privilege. TEX. R. EVID. 511. There is an exception to this rule, however, found in Tex. R. Evid. 503(b)(1)(C). This exception protects
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> > confidential communications made for the purpose of facilitating the rendition of professional legal services...by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein.
>
> TEX. R. EVID. 503(b)(1)(C).

Klein v. Fed. Ins. Co., No. 7:03-cv-102-D, 2014 WL 3408355, at *8-*9 (N.D. Tex. July 14, 2014)(footnotes omitted). "Although it is sometimes referred to as the 'joint defense' privilege, *see In re XL Specialty Ins. Co.*, 373 S.W.3d 46, 50-51 (Tex. 2012), Tex. R. Evid. 503(b)(1)(C) does not create an independent privilege, but rather an exception to the general rule that no attorney-client privilege attaches to communications that are made in the presence of or disclosed to a third party." *Id.* at *8 n.19 (internal quotation marks omitted). In *In re XL Specialty Insurance Co.*, 373 S.W.3d 46 (Tex. 2012), the Texas Supreme Court made clear that Texas law on the so-called common-interest or joint-defense doctrine "requires that the communications be made in the context of a pending action," provides that "no commonality of interest exists absent actual litigation," and, accordingly, provides that the exception to the general rule under Texas law "is not a 'common interest' privilege that extends beyond litigation" and is not "a 'joint defense' privilege, as it applies not just to defendants but to any parties to a pending action." 373 S.W.3d at 51-52 (footnotes omitted). Rather, "Rule 503(b)(1)(C)'s privilege is more appropriately termed an 'allied litigant' privilege," "protects communications made between a client, or the client's lawyer, to another party's

lawyer, not to the other party itself," and "applies only when the parties have separate counsel." *Id.* at 52-53.

Texas Rule of Evidence 503(d)(5) sets forth the joint-client exception to the attorney-client privilege. The rule states that "the privilege does not apply if the communication (1) is offered in an action between clients who retained or consulted the same lawyer; (2) was made by any of the clients to the lawyer; and (3) is relevant to a matter of common interest between the clients." TEX. R. EVID. 503(d)(5). "Thus, the rule contemplates that when a communication relevant to a common matter between two clients is requested in discovery, the attorney-client privilege remains intact as to each client unless the suit is between the joint clients." *In re Unitrin Cty. Mut. Ins. Co.*, No. 03-10-00384-CV, 2010 WL 2867326, at *3 (Tex. App. – Austin, July 22, 2010, orig. proceeding).

*6 Likewise, the following standards govern the parties' assertions of work-product protection over certain documents:

> [T]he issue of whether documents are exempt from discovery under the attorney work product doctrine is governed by federal law in diversity cases because work product is not a substantive privilege within the meaning of Federal Rule of Civil Procedure 501. The federal work product doctrine, as codified by Federal Rule of Civil Procedure 26(b)(3), provides for the qualified protection of documents and tangible things prepared by or for a party or that party's representative "in anticipation of litigation or for trial." A document need not be generated in the course of an ongoing lawsuit in order to qualify for work product protection. But "the primary motivating purpose" behind the creation of the document must be to aid in possible future litigation. As the advisory committee notes to Rule 26(b)(3) make clear, "[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided by this subdivision."
>
> Among the factors relevant to determining the primary motivation for creating a document are " +'the retention of counsel and his involvement in the generation of the document and whether it was a routine practice to prepare that type of document or whether the document was instead prepared in response to a particular circumstance.' +" If the document would have been created without regard to whether litigation was expected to ensue, it was made in the ordinary course of business and not in anticipation of litigation.
>
> Like all privileges, the work product doctrine must be strictly construed. The burden is on the party who seeks work product protection to show that the materials at issue were prepared by its representative in anticipation of litigation or for trial. A general allegation of work product protection is insufficient to meet this burden. Instead, " +'a clear showing must be made which sets forth the items or categories objected to and the reasons for that objection.' +" The proponent must provide sufficient facts by way of detailed affidavits or other evidence to enable the court to determine whether the documents constitute work product. Although a privilege log and an *in camera* review of documents may assist the court in conducting its analysis, a party asserting the work product exemption still must provide "a detailed description of the materials in dispute and state specific and precise reasons for their claim of protection from disclosure." In fact, " +'resort to *in camera* review is appropriate only *after* the burdened party has submitted detailed affidavits and other evidence to the extent possible.' +"

Orchestrate HR, Inc. v. Trombetta, No. 3:13-cv-2110-P, 2014 WL 884742, at *2 (N.D. Tex. Feb. 27, 2014) (citations omitted).

"If a party meets its burden and proves that the materials sought warrant work product protection, the party seeking discovery must prove why those materials should still be produced." *Brady*, 238 F.R.D. at 443. Rule 26(b)(3) instructs the court to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." FED. R. CIV. P. 26(b)(3). A party may only obtain discovery of documents prepared in anticipation of litigation or for trial upon showing that the party seeking discovery has (1) substantial need of the materials to prepare for his or her case and (2) that the party cannot obtain the substantial equivalent of the materials by other means without undue hardship. *See id.* And the work-product rule accords "special protection to work-product revealing the attorney's mental processes." *Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981). As such, "if the materials sought are opinion work-product then a court may compel discovery only if the party seeking the materials demonstrates a compelling need for the information." *Brady*, 238 F.R.D. at 443; *accord S.E.C.*

v. Cuban, No. 3:08-cv-2050-D, 2012 WL 456532, at *2 & n.3 (N.D. Tex. Feb. 10, 2012).

*7 The work-product doctrine is very different from the attorney-client privilege with regard to possible waiver. Although the attorney-client privilege exists to protect the confidential communications between an attorney and client and, thus, is generally waived by disclosure of confidential communications to third parties, the work product protection exists to "promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of an opponent." *Shields v. Sturm, Ruger & Co.*, 864 F.2d 379, 382 (5th Cir. 1989). "Therefore, the mere voluntary disclosure to a third person is insufficient in itself to waive the work product privilege." *Id.* Such a disclosure only waives the work product privilege if it is given to adversaries or is "treated in a manner that substantially increases the likelihood that an adversary will come into possession of the material." *Advance Technology Incubator, Inc. v. Sharp Corp.*, 2009 WL 4432569, at *2 (E.D. Tex. 2009) (citing *Ferko v. NASCAR*, 219 F.R.D. 396, 400-01 (E.D. Tex. 2003)); *Brady*, 238 F.R.D. at 444)). And, "[u]nlike the attorney-client privilege, the burden of proving waiver of work product immunity falls on the party asserting waiver." *Brady*, 238 F.R.D. at 444.

Federal Rules of Civil Procedure Rules 26(b) and 26(c) have been amended, effective December 1, 2015. Rule 26(b)(1) now provides that, "[u]nless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable." FED. R. CIV. P. 26(b)(1).

The amendments to Rules 26 and 34 govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, in all proceedings then pending. The Court finds that applying the standards of Rules 26 and 34, as amended, to Defendants' Second MTC and Plaintiff's Second MTC is both just and practicable.

Further, for the reasons the Court has recently explained, the Court concludes that the amendments to Rule 26 do not alter the burdens imposed on the party resisting discovery discussed above. *See Carr v. State Farm Mutual Automobile Insurance Company*, 312 F.R.D. 459, 463-69 (N.D. Tex. 2015). Rather, just as was the case before the December 1, 2015 amendments, under Rules 26(b)(1) and 26(b)(2)(C)(iii), a court can – and must – limit proposed discovery that it determines is not proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit –and the court must do so even in the absence of a motion. *See Crosby v. La. Health Serv. & Indem. Co.*, 647 F.3d 258, 264 (5th Cir. 2011). Thus, as amended, Rule 26(b)(2)(C) provides that, "[o]n motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1)." FED. R. CIV. P. 26(b)(2)(C).

But a party seeking to resist discovery on these grounds still bears the burden of making a specific objection and showing that the discovery fails the proportionality calculation mandated by Rule 26(b) by coming forward with specific information to address – insofar as that information is available to it – the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

*8 The party seeking discovery, to prevail on a motion to compel, may well need to make its own showing of many or all of the proportionality factors, including the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, and the importance of the discovery in resolving the issues, in opposition to the resisting party's showing.

And the party seeking discovery is required to comply with Rule 26(b)(1)'s proportionality limits on discovery requests; is subject to Rule 26(g)(1)'s requirement to certify "that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:...(B) with respect to a discovery request..., it is: (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law; (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action"; and faces Rule 26(g)(3) sanctions "[i]f a certification violates this rule without substantial justification." FED. R. CIV. P. 26(g)(1)(B), 26(g)(3); *see generally Heller v. City of Dallas*, 303 F.R.D. 466, 475-77, 493-95 (N.D. Tex. 2014).

But the amendments to Rule 26(b) do not alter the basic allocation of the burden on the party resisting discovery to – in order to successfully resist a motion to compel – specifically object and show that the requested discovery does not fall within Rule 26(b)(1)'s scope of relevance (as now amended) or that a discovery request would impose an undue burden or expense or is otherwise objectionable. *See McLeod*, 894 F.2d at 1485; *Heller*, 303 F.R.D. at 483-93.

Federal Rule of Civil Procedure 37(a)(5)(A) provides that, if a motion to compel is granted, or if the requested discovery is provided after the motion was filed, "the court must, after giving an opportunity to be heard, require the party...whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees," except that "the court must not order this payment if: (I) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust." FED. R. CIV. P. 37(a)(5)(A).

Federal Rule of Civil Procedure 37(a)(5)(B)-(C) further provides in pertinent part that, "[i]f the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party...who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees," "[b]ut the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust," and that, "[i]f the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion." FED. R. CIV. P. 37(a)(5)(B)-(C).

***9** Federal Rule of Civil Procedure 37(b)(2)(A) provides that, "[i]f a party...fails to obey an order to provide or permit discovery...the court where the action is pending may issue further just orders," including, among other sanctions, directing that matters embraced in the order or other designated facts be taken as true, prohibiting the disobedient party from introducing designated matters in evidence, and/or staying further proceedings until the order is obeyed. FED. R. CIV. P. 37(b)(2)(A)(i)-(vi). Sanctions available under Rule 37(b) are appropriate where there is willful disobedience or gross indifference but not where failure to comply was outside the party's control. *See Dorsey v. Acad. Moving & Storage, Inc.*, 423 F.2d 858, 860 (5th Cir. 1970). Rule 37(b)(2)(C) further requires that, "[i]nstead of or in addition to the orders [described under Rule 37(b)(2)(A)], the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." FED. R. CIV. P. 37(b)(2)(C).

AnalysisI. Defendants' Second MTCA. MetLife's Second Requests for Production ("RFP") No. 6; MetLife's First RFP No. 15; MetLife's Fourth RFP Nos. 9 & 10

In its response to Defendants' Second MTC, Plaintiff represents that it produced all the documents about which Defendants complain and thus withdraws its objections to these requests, and, at oral argument, Plaintiff's counsel assured the Court and Defendants' counsel that Plaintiff has produced all non-privileged documents responsive to MetLife's Second RFP No. 6; MetLife's First RFP No. 15; and MetLife's Fourth RFP Nos. 9 and 10 and is not withholding any documents based on any distinction between Sambuca and Restaurant Expert Management, Inc. ("REM, Inc."), an affiliated management company of Sambuca. Accordingly, the Court DENIES Defendants' Second MTC as moot as to these document requests, subject to Plaintiff's ongoing

supplementation obligations under Federal Rule of Civil Procedure 26(e).

B. MetLife's First Set of Interrogatories No. 12
This interrogatory asks Plaintiff to identify the details of each false and deceptive representation or statement that Plaintiff alleges in its complaint. Plaintiff objects that it cannot answer more fully than it already has to the best of its ability because of the nature of the "string-along" fraud that Plaintiff alleges.

The Court determines that this is not an impermissible request to require Plaintiff to marshal its evidence for trial and overrules Plaintiff's objections to this interrogatory. At the end of discovery, in a case in which Plaintiff alleges that Defendants made false and deceptive representations and statements, this is a reasonable request. To the extent that it has not already done so, Plaintiff must amend its answer to identify the requested details of any allegedly false and deceptive affirmative representation or statement on which Plaintiff will rely in support of its claims against Defendants. Any amended answer may rely in part on Federal Rule of Civil Procedure 33(d), as Plaintiff already has, so long as Plaintiff only points to specific documents, by name or bates number.

C. MetLife's First Set of Interrogatories No. 15
Plaintiff's has objected on vagueness grounds and then answered Interrogatory No. 15 by pointing Defendants to documents produced and expert reports served in this case. In doing so, Plaintiff relies on Rule 33(d), which provides that, "[i]f the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by: (1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and (2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries." FED. R. CIV. P. 33(d). Thus, in relying on Rule 33(d) in an interrogatory answer, Plaintiff must specify the information that Defendants should review in sufficient detail to enable Defendants to locate and identify the information in the documents as readily as Plaintiff could.

***10** The Court determines that Plaintiff's pointing Defendants generally to document productions and expert reports does not properly invoke Rule 33(d). Plaintiff will be required to amend its answer to point to specific documents, by name or bates number, and to explain its reasonable understanding of what constitutes a "test, survey, or evaluation" as to which the interrogatory is asking. If tests, surveys, or evaluations are performed on a regular basis, Plaintiff's response should specify the time frame in which the testing or evaluations are performed – and by whom – with reasonable detail. Except as provided above, the Court overrules Plaintiff's objections to Interrogatory No. 15.

D. CBRE's First Set of Interrogatories No. 1
Plaintiff's answer to Interrogatory No. 1 explains why Plaintiff may not have the information that the interrogatory asks for but does not straightforwardly state that Plaintiff does not possess the identifying information that Defendants seek. Plaintiff must amend its answer to provide any responsive information that it has or to clearly state that it has no responsive information. The Court overrules Plaintiff's objections to this interrogatory.

E. CBRE's First Set of Interrogatories Nos. 3-7
For the reasons explained above as to MetLife's First Set of Interrogatories No. 15, the Court determines that Plaintiff's pointing Defendants generally to document productions and expert reports does not properly invoke Rule 33(d), and Plaintiff will be required to amend its answers to Interrogatory Nos. 3, 4, 5, 6, and 7 to point to specific documents, by name or bates number, that, in Plaintiff's view, form the basis for Plaintiff's denial of the requests for admission at issue. The Court determines that these are not impermissible requests to require Plaintiff to marshal its evidence for trial and overrules Plaintiff's objections to these interrogatories.

F. CBRE's First Set of Interrogatories No. 8
The Court overrules Plaintiff's objections to Interrogatory No. 8, which, under the circumstances of the case and in light of Plaintiff's claims, reasonably asks Plaintiff to identify "each notice [it provided]...under the terms of the Lease." The Court determines that Plaintiff's pointing Defendants generally to document productions – including "voluminous produced communications between Sambuca and Defendants" – does not properly invoke Rule 33(d), and Plaintiff will be required to amend its answer to point to specific documents, by name or bates number, that, in Plaintiff's view, constitute a "notice

by Sambuca provided to MetLife or CBRE under the terms of the Lease." This should at least include any such notice on which Plaintiff may rely in support of any claim or defense in this case.

G. Challenges to Claims of Work Product

As an initial matter, the Court notes that it declines to find any claim by Plaintiff or Defendants of privilege or work-product protection waived based on allegedly insufficient privilege logs under Federal Rule of Civil Procedure 26(b)(5). Rather, the Court gave the parties the opportunity to fully support their claims of privilege and work product in response to the pending motions to compel and will assess the claims based on the parties' evidence filed in support of their responses.

Defendants challenge two categories of documents on Plaintiff's privilege log: certain entries asserting work-product protection over documents that were not prepared by or for an attorney preparing for litigation (Category 1), and certain entries in which Plaintiff claims attorney-client privilege and work-product protection for documents that it shared with third parties (Category 2).

As to Category 1, the Court need not make a determination – in light of Plaintiff's withdrawing its claim of work-product protection or Defendants' withdrawing their challenge to that claim – as to Documents 7, 13, 19, 25, 27-28, 33-34, 40, 53-54, 60, 108, 124-128, 136, 141, 152-153, 157-160, and 162-164.

***11** The Court has carefully reviewed the Affidavit of Kim Forsythe [Dkt. No. 175] as to the remaining privilege log entries in dispute and determines that, for many of the reasons discussed in Defendants' reply in support of their Second MTC, Plaintiff has failed to meet its burden to establish that the primary motivating purpose behind the creation of the following Category 1 documents was to aid in possible future or ongoing litigation or that the documents otherwise were prepared by Plaintiff's representative in anticipation of litigation as required for work-product protection: Documents 1, 3-6, 8-12, 14-18, 22-24, 26, 29-32 35-38, 41-52, 55-56, 58-59, 61-63, 65-96, 99, 104-107, 109-112, 114, 119-120, 122-123, 129-132, 134-135, 140, 142-151, 154-156, and 161. *See* Dkt. No. 144 at 5-9. Accordingly, the Court GRANTS Defendants' motion to compel production of these documents.

But the Court also determines that Plaintiff has met its burden to establish that the following Category 1 documents were prepared by its representative in anticipation of litigation and/or are otherwise privileged: Documents 2, 20-21, 39, 57, 64, 97-98, 100-103, 113, 115-118, 121, 133, 137-139, and 165. *See id.* Accordingly, the Court DENIES Defendants' motion to compel production of these documents.

H. Challenges to Claims of Attorney-Client Privilege

Defendants challenge Plaintiff's claim of attorney-client privilege as to 23 documents consisting of communications with Plaintiff's counsel on which Steve Lieberman was included. (Plaintiff has withdrawn its privilege objections as to, and will produce, Document 24 in Category 2.)

In response, Plaintiff explains that Mr. Lieberman is a minority owner of Sambuca; that Sambuca's discussions with Mr. Lieberman were in his capacity as an owner of Sambuca; that Mr. Lieberman is also CEO of The Retail Connection, and certain of The Retail Connection employees were included on some of the communications as indicated in the Affidavit of Kim Forsythe; and that, to the extent these employees were included on privileged communications, they were acting at the direction of Mr. Lieberman as agents in his capacity as minority owner of Sambuca. Plaintiff asserts that, in his capacity as owner, Mr. Lieberman is entitled to attorney-client privilege, and his agents are entitled to the same.

Plaintiff relies on Texas Rule of Evidence 503(b), which extends the attorney-client privilege to communications between the client's lawyer and the client's representative. Under Rule 503(b), "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made to facilitate the rendition of professional legal services to the client: (A) between the client or the client's representative and the client's lawyer or the lawyer's representative; (B) between the client's lawyer and the lawyer's representative; (C) by the client, the client's representative, the client's lawyer, or the lawyer's representative to a lawyer representing another party in a pending action or that lawyer's representative, if the communications concern a matter of common interest in the pending action; (D) between the client's representatives or between the client and the client's representative; or (E) among lawyers and their representatives representing the same client." TEX. R. EVID. 503(b)(1).

Texas Rule of Evidence 503(a)(2) defines a "representative of the client" as "(A) a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client, or (B) any other person who, for the purpose of effectuating legal representation for

the client, makes or receives a confidential communication while acting in the scope of employment for the client." TEX. R. EVID. 503(a)(2). "Although the attorney-client privilege extends to communications between 'representatives of the client,' a party invoking the privilege must show that each person privy to the communication: (1) had the authority to obtain professional legal services on behalf of the client; (2) had authority to act on legal advice rendered to the client; or (3) made or received the confidential communication while acting within the scope of his employment for the purpose of effectuating legal representation to the client." *Navigant Consulting, Inc. v. Wilkinson*, 220 F.R.D. 467, 475 (N.D. Tex. 2004).

***12** The Court determines that, through the Affidavit of Kim Forsythe [Dkt. No. 175], Plaintiff has sufficiently established that Mr. Lieberman and his employees were making or receiving the confidential communications at issue with Plaintiff's counsel while acting in the scope of employment with – or, in this case, minority ownership of – Plaintiff (or as agents of the minority owner) for the purpose of effectuating legal representation to Plaintiff. This conclusion is not undermined by Plaintiff also having retained The Retail Connection and Mr. Lieberman to negotiate on Plaintiff's behalf with Defendants. *See* Dkt. No. 144 at 213-214. Mr. Lieberman's serving as Plaintiff's agent in any negotiation does not preclude his making or receiving confidential communications while acting within the scope of his role as minority owner for the purpose of effectuating legal representation to Plaintiff, even in connection with the same negotiations.

Accordingly, Plaintiff need not (as it does not) attempt to rely on any common-interest or allied-litigant doctrine, and the Court determines that the attorney-client privilege as to Documents 1-23 in Category 2, *see* Dkt. No. 144 at 10, has not been waived. The Court therefore DENIES Defendants' motion to compel production of these documents.

II. Plaintiff's Second MTCA. Compliance with Prior Order on Plaintiff's First Motion to Compel

After carefully considering the parties' briefing, evidence, and oral argument, the Court determines that Plaintiff has not demonstrated that Defendants are currently out of compliance with the Court's January 8, 2016 Memorandum Opinion and Order [Dkt. No. 100], granting in part and denying in part Plaintiff's first Motion to Compel [Dkt. No. 77]. Defendants have assured the Court that they have produced all responsive documents and ESI, including from MetLife's proprietary real estate management accounting software, Management Records Incorporated ("MRI"). The Court determines that there is no basis for any order requiring additional production from the MRI system based on the Court's prior order on Plaintiff's first Motion to Compel. Accordingly, the Court DENIES Plaintiffs' Motion to Enforce Compliance with the Court's Prior Order on First Motion to Compel, subject to Defendants' ongoing supplementation obligations under Rule 26(e), including as to any document production required by the Court's January 8, 2016 Memorandum Opinion and Order [Dkt. No. 100].

B. Challenges to Claims of Work Product and Attorney-Client Privilege

Plaintiff challenges dozens of documents as to which Defendants assert work-product protection because, Plaintiff alleges, they were not prepared by or for a party or that party's representative in anticipation of litigation or for trial. Plaintiff also challenges dozens of documents as to which Defendants assert attorney-client privilege because, Plaintiff alleges, they were not made for the purposes of facilitating the rendition of professional legal services.

In response, Defendants filed and rely on the Declaration of Frederique Beky; the Declaration of Kari Whitley Delamore; the Declaration of Richard L. Flaten, Jr.; the Declaration of Steven Karp; the Declaration of J. Kenneth Kopf; the Declaration of Melissa M. McNeel; the Declaration of Robin Nichol Norvell; and the Declaration of Melayne Packer. *See* Dkt. No. 173. Defendants also withdrew their privilege and/or work-product claims as to certain challenged documents. *See* Dkt. No. 172 at 5 n.7.

The Court determines that, insofar as documents involve communications between MetLife's in-house attorneys and employees of CBRE, Defendants have established that any privilege or work-product protection is not waived because CBRE acts as MetLife's agent in managing the Sambuca building and because CBRE and MetLife qualify as joint clients.

The Court also determines, after carefully reviewing the briefing and Defendants' evidence, that Defendants have met their burden to establish that the challenged documents on their privilege logs, *see* Dkt. No. 151 at App. 1-41, are properly withheld based on work-product protection and/or the attorney-client privilege with the following exceptions as to which the Court determines that Defendants have not

met their burden and which Defendants will be required to disclose: MetLife's Supplemental Privilege Log, Documents 13, 15, 24, 5412, 5630, 9656, 10244, 10519, 501172, 501173, 501335, 501842, 501872, 501883, 501887, 502924, 503013, 503082, 503084, 503085, 503468, 503469, 503470, 503471, 503473, 503474, 503476, 503489, 503490, 503492, 503493, 503497, 503503, 503507, 503510, 503600, 503601, 503841, 503849, 503859, 503875, 503886, 503894, 503896, 503900, 503903, 600889, 601721, 601908, 602183, 603472, 603988, 604108, 606172, 606261, 606338, 606339, 606340, 606913, 606914, 606916, 606917, 606920, 606921, 606922, 606956, 606957, 606967, 606971, 606973, 606974, 607126, 607127, 607203, 607498, 607503, 607513, 607531, 607542, 607747, 607789, 607793, 900031, 900035, 900040, and 900117 and CBRE's Supplemental Privilege Log, Documents 35, 36, 669, 673, 675, 706, 711, 729, 730, 734, 738, 1031, 1034, 1035, 1038, 1039, 1121, 1299, 1311, 1312, 1389, 1390, 1400, 1472, 1519, 1619, 1621, 1624, 1625, 1654, 1661, 1662, 1693, 1695, 1698, 1701, 1702, 1704, 1714, 1715, 1716, 1717, 1718, 1733, 1735, 3271, 5613, 6330, 6916, 6918, 6921, 6925, 6940, 6943, 6946, 7111, 9609, 9611, 16190, 16191, 100013, 100014, and 100015.

***13** The Court therefore GRANTS Plaintiff's motion to compel production of the documents listed above and otherwise DENIES Plaintiff's Second MTC.

Plaintiff takes particular issue with documents that include or are authored by MetLife's Associate General Counsel Steven Karp, noting that communications with an in-house counsel are not automatically presumed privileged or protected and that it is particularly difficult to determine the primary purpose of communications involving in-house counsel, who often have responsibilities that extend beyond the mere rendering of legal advice and involve acting as a business adviser. The Court has taken account of the extent to which Defendants' evidence establishes the role Mr. Karp played in connection with a particular document in making the determinations reflected above.

III. Requests for Award of Expenses

Under Federal Rules of Civil Procedure 37(a)(5) and 37(b), the Court determines that, under all of the circumstances presented here, Plaintiff and Defendants should bear their own expenses, including attorneys' fees, in connection with Defendants' Second MTC and Plaintiff's Second MTC.

Conclusion

For the reasons and to the extent explained above, the Court GRANTS in part and DENIES in part Defendants' Second Motion to Compel [Dkt. No. 143] and GRANTS in part and DENIES in part Plaintiff's Second Motion to Compel and to Enforce Compliance with the Court's Prior Order on First Motion to Compel [Dkt. No. 150].

All amended or supplemental interrogatory answers and document productions required by this order must be served on the opposing party's counsel by **June 3, 2016**.

SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2016 WL 2997744

Footnotes

1 Under § 205(a)(5) of the E-Government Act of 2002 and the definition of "written opinion" adopted by the Judicial Conference of the United States, this is a "written opinion[+] issued by the court" because it "sets forth a reasoned explanation for [the] court's decision." It has been written, however, primarily for the parties, to decide issues presented in this case, and not for publication in an official reporter, and should be understood accordingly.

1999 WL 386949
Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

VNA PLUS, INC., Plaintiff,
v.
APRIA HEALTHCARE GROUP, INC., et al., Defendants.

No. Civ.A. 98–2138–KHV.
|
June 8, 1999.

MEMORANDUM AND ORDER

RUSHFELT, Magistrate J.

***1** The court has under consideration Plaintiff's Motion to Compel Production of Documents and Answers to Interrogatories (doc. 69) and Plaintiff's Motion for Sanctions (doc. 73). Defendants oppose both motions.

Motion to Compel

Pursuant to Fed.R.Civ.P. 37(a)(2)(B), plaintiff seeks an order to compel defendants Apria Healthcare Group, Inc. and Apria Healthcare, Inc. to fully answer its First Set of Interrogatories and produce a privilege log and all documents responsive to Requests 20, 24, 41, and 42 of its First Request for Production of Documents. Pursuant to Fed.R.Civ.P. 37(a)(4)(A), plaintiff seeks reimbursement of all expenses incurred in connection with the motion to compel. Defendants oppose the motion on its merits. They also suggest plaintiff has failed to comply with the conference requirements of Fed.R.Civ.P. 37 and D.Kan. Rule 37.2.

A. Conference Requirements

Fed.R.Civ.P. 37(a)(2)(B) directs movants to include with a motion to compel a certification that they have "in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action." D.Kan. Rule 37.2 states in pertinent part that "[e]very certification required by Fed.R.Civ.P. 26(c) and 37 ... related to the efforts of the parties to resolve discovery or disclosure disputes shall describe the steps taken by all counsel to resolve the issues in dispute." These requirements encourage parties to satisfactorily resolve their discovery disputes prior to resorting to judicial intervention. *Nave v. Artex Mfg., Inc.*, No. Civ.A. 96–2002–EEO, 1997 WL 195913, at * 1 (D.Kan. Apr. 16, 1997). "Failure to confer or attempt to confer may result in unnecessary motions. When the court must resolve a dispute that the parties themselves could have resolved, it must needlessly expend resources that it could better utilize elsewhere." *Pulsecard, Inc. v. Discover Card Servs., Inc.*, 168 F.R.D. 295, 302 (D.Kan.1996).

Plaintiff has certified compliance with D.Kan. Rule 37.2. (*See* Certificate of Compliance with Local Rule 37.2, attached as Ex. C to Pl.'s Mot. Compel, doc. 69.) Counsel for plaintiff certified "that a good faith effort was made with defendants' counsel to confer regarding defendants' failure to adequately answer interrogatories, supply a privilege log, and produce discoverable documents." (*Id.*) The certification identifies only two steps taken to resolve the dispute: mailing a "golden rule" letter and a subsequent oral attempt to convince defendants to meet the requests of that letter. (*Id.* ¶¶ 3 and 5.)

By reply brief plaintiff sets forth additional steps taken to resolve the dispute prior to seeking judicial intervention. It states that, prior to its demand letter, it "made numerous attempts to reach an understanding with [defendants] concerning its [sic] response to discovery requests." (Reply to Defs.' Brief in Opp'n [hereinafter Reply], doc. 92, at 2.) It claims that, "[d]uring multiple conversations and phone calls, the parties discussed 'what [plaintiff] was seeking, what [defendants] w[ere] reasonably capable of producing, and what specific issues could not be resolved without judicial intervention.' " (*Id.*) It also claims to have tried to persuade defendants to respond to its motion to compel. (*Id.*) It states:

> ***2** After [defendants] failed to adequately respond to interrogatories due on March 26, 1999, counsel for [plaintiff] spoke to [defense] counsel on April 2, 1999, informing him that [plaintiff] had prepared a motion to compel and giving him two weeks to respond. At this time, Defendants' counsel did not complain that [plaintiff] had failed to confer in good faith, made no offer to produce the information requested, and made no claim that it misunderstood [plaintiff's] position so as to necessitate further discussion of the issue. This matter would not have been brought to this Court's attention had [defendants] responded in good faith at this time.
>
> When [plaintiff] received no response on April 15, it waited another week before contacting [defendants] on April 22 to once again request compliance with discovery. During this conversation, counsel for [plaintiff] explicitly

> reminded [defendants] that he had not received a response to the pending motion to compel. *See* Letter of William D. Beil, counsel for [plaintiff], dated April 22, 1999, attached as Exhibit A) [sic]. Again, [defendants] did not claim [plaintiff] had failed to confer in good faith nor did it communicate any desire whatsoever to pursue further discussions of the issue. In fact, [defendants] did not respond in any manner to [plaintiff's] efforts to resolve this dispute until it forced [plaintiff] to bring the matter to this Court's attention on April 28.

(*Id.* at 2–3.)

Defendants claim plaintiff "did nothing more than send a letter to counsel demanding that certain discovery be provided within one week and identifying the letter as its 'good faith attempt to meet and confer.' " (Defs.' Brief in Opp'n, doc. 81, at 1.) They contend they promptly notified plaintiff that the letter did not satisfy its obligation to meet and confer in good faith. They remember no subsequent oral discussions regarding the dispute before the motion to compel. They state that, "at best, counsel for [plaintiff] reiterated its demand that [they] comply with the terms of the letter." (*Id.* at 2.) They assert that, "[n]o discussion took place concerning what [plaintiff] was actually seeking, what [defendants] we[re] reasonably capable of producing, and what specific issues could not be resolved without judicial intervention." (*Id.*)

One letter between counsel which addresses the discovery dispute does not satisfy the duty to confer. *Pulsecard, Inc. v. Discover Card Servs., Inc.*, 168 F.R.D. 295, 302 (D.Kan.1996). "A 'reasonable effort to confer' means more than mailing a letter to opposing counsel." *Porter v. Brancato*, No. Civ.A. 96–2208–KHV, 1997 WL 150050, at * 1 (D.Kan. Feb. 24, 1997). One letter demanding discovery to be produced within a week, in conjunction with a subsequent demand for compliance with that letter, also fails to satisfy the duty to confer. "A 'reasonable effort to confer' normally 'requires that counsel converse, confer, compare views, consult and deliberate.' " *Augustine v. Adams*, No. Civ.A. 95–2489–GTV, 1997 WL 260016, at * 2 (D.Kan. May 8, 1997) (quoting *Porter*, 1997 WL 150050, at * 1). The steps set forth in the certificate of compliance reveal no reasonable effort to confer.

***3** In its reply brief, plaintiff mostly sets forth efforts to confer which occurred after it filed the motion to compel. The court does not regard those efforts as compliance with Fed.R.Civ.P. 37 and D .Kan. Rule 37.2. The moving party must make a reasonable effort to resolve the dispute before filing the motion. *Ballou v. University of Kan. Med. Ctr.*, 159 F.R.D. 558, 560 (D.Kan.1994). Efforts to confer after the filing of a motion do not satisfy the conference requirements of the Federal Rules of Civil Procedure or the Rules of Practice of the United States District Court for the District of Kansas.

Plaintiff also states in the reply brief, however, that it made a number of attempts to resolve the present dispute prior to its demand letter. It also claims that the parties often discussed the discovery dispute prior to its filing the motion to compel. Although plaintiff should have identified these efforts in its certificate of compliance, the court will generally consider all identified efforts to confer when determining whether a party has satisfied its duty to confer. When a party certifies compliance with conference requirements, whether by a separate document or within the motion and supporting memoranda, it should set forth with particularity the steps taken to resolve the dispute. *See Miller v. Brungardt*, No. Civ.A. 94–2518–GTV, 1996 WL 146725, at * 2 (D.Kan. Mar. 28, 1996). Using general terms to describe the process does not suffice. *Id.*

The general assertions of plaintiff contrast with those of defendants. Although plaintiff might have described the process more specifically, the court will not overrule the motion for its lack in this regard. The motion and memoranda demonstrate some efforts to confer. Whether the efforts are reasonable depends in large part on whether the court accepts the assertions of plaintiff or those of defendants. The court need not decide the issue here. Were it to find inadequate efforts to confer, it would exercise its discretion to consider the motion on its merits. Trial is less than a month away. It would unduly prejudice plaintiff not to resolve the motion on its merits at this late date. In such circumstances the court appropriately waives strict compliance with the conference requirements. *Pulsecard, Inc. v. Discover Card Servs., Inc.*, 168 F.R.D. 295, 302 (D.Kan.1996).

B. General Objection to Temporal Scope of Interrogatories

The court next addresses the merits of the motion to compel. Plaintiff first wants the court to overrule a general objection to the temporal scope of its interrogatories. It defined the relevant time period for the requested information as January 1, 1994, to the present. Defendants object that the definition is overly broad and encompasses information that is neither admissible nor calculated to lead to the

discovery of admissible evidence. They limited their answers to Interrogatories 2, 3, 4, 5, 8, 9, 19, 22, 23, and 24 to the time period beginning in the summer of 1994 and ending August 11, 1997. They now suggest that their answers, except for Interrogatories 2 and 19, would remain the same had they used the temporal scope suggested by plaintiff. The court construes the suggestion as abandonment of the objection. To avoid dispute, furthermore, defendants agree to answer Interrogatory 2 for the suggested time period, although they do not concede relevance of responsive information except for the period initially answered. Defendants shall, therefore, supplement their answers to Interrogatories 2, 3, 4, 5, 8, 9, 22, 23, and 24 under oath and clarify that the answers are not subject to objections about the temporal scope of the interrogatories. The remaining general objection to the temporal scope remains only as to Interrogatory 19.

***4** The court will address the alleged deficiencies of the answers to Interrogatories 3, 4, 5, 6(a), 8, 9, 10, 11, 12, 13, 15, 18, 19, and 24:

C. Interrogatory 3

Interrogatory 3 asks defendants to identify employees who were "directly responsible" for ensuring that billing and collection were performed in accordance with applicable rules and regulations. Defendants object that the phrase "directly responsible" is vague and ambiguous. They identified those employees who had "primary responsibility" so as to avoid the confusion that might result were the phrase "directly responsible" interpreted to mean anyone whose job description might include training or education. The court overrules the objection. "Primary responsibility" does not equate to "directly responsible." The latter phrase does not appear vague or ambiguous. The fear of confusion appears unwarranted. Employees "directly responsible" should include those who have a specific responsibility as part of their job to ensure that billing and collection were performed in accordance with applicable rules and regulations. The phrase does not cover those employees who merely train or educate others about billing and collection. Such persons are not "directly" responsible for compliance with rules and regulations. Defendants shall fully answer the Interrogatory 3.

D. Interrogatories 4 and 5

Interrogatories 4 and 5 seek information about representatives of defendants who were responsible for training. Interrogatory 4(b) asks defendants to identify documents provided during any training session identified in Interrogatory 4(a). Defendants object that the interrogatories are vague and ambiguous as to the meaning of the phrase "responsible for training" and the term "training." Notwithstanding the objections, defendants identified four individuals. They contend that they fully answered the interrogatories. They suggest that they adequately explain the ambiguity in response to the interrogatories. The court does not find Interrogatories 4 or 5 vague or ambiguous. Defendants shall fully answer them.

Defendants also initially objected that Interrogatory 4(b) had already been "asked and answered." Notwithstanding that objection, they stated that they were unaware of any "training materials" currently available which had not already been produced. In response to the motion they withdraw that objection. They maintain that their answer is sufficient. The court finds the answer insufficient. The interrogatory does not limit itself to "training materials." It asks defendants to "[i]dentify any documents provided by Apria to any VNA plus customer service representative in connection with any training session identified in response to subparagraph 4(a)." That defendants may have already produced documents does not excuse them from identifying the documents. They shall fully answer Interrogatory 4(b).

E. Interrogatory 6(a)

Plaintiff also wants defendants to fully answer Interrogatory 6(a). In response to the motion defendants rely only upon an objection of irrelevance. They raised no such objection in response to the specific interrogatory. In their "General Objections", however, they set forth the following paragraph:

> ***5** 5. Defendant[s'] responses to plaintiff's Interrogatories are submitted to, without waiver of, and intending to fully reserve:
>
> a. All questions as to competency, relevancy, materiality, privilege and admissibility as evidence for any purpose of any of the responses given, or the materials produced, or the subject matter thereof;
>
> b. The right to object to any other subsequent or pending discovery involving or relating to the same subject matter, including objections based on relevancy for discovery purposes; and
>
> c. The right at any time to revise, correct, modify, amend or supplement any of the responses set forth herein.

The court accords no weight to these blanket reservations. It regards them as essentially worthless and without legitimate purpose or effect. The court finds no authority for reserving objections. Parties have a duty either to answer discovery or object to it. Providing discovery, furthermore, does not waive objections as to admissibility at trial. The Federal Rules of Civil Procedure provide the means to revise, correct, modify, amend, or supplement responses to discovery. *See* Fed.R.Civ.P. 26(e). By not asserting an objection of irrelevancy specifically against Interrogatory 6(a), defendants have waived the objection. They shall fully answer the interrogatory.

F. Interrogatories 8 and 9

Interrogatories 8 and 9 seek identification of documents. In response to the motion defendants assert that they have produced documents containing the answers to the interrogatories. They further assert they will provide Bates numbers for the produced documents. They purport to invoke Fed.R.Civ.P. 33(d). "Under the guise of Fed.R.Civ.P. 33(d) defendants may not simply refer generically to past or future production of documents. They must identify in their answers to the interrogatories specifically which documents contain the answer. Otherwise they must completely answer the interrogatories without referring to the documents." *Pulsecard, Inc. v. Discover Card Servs., Inc.*, 168 F.R.D. 295, 305 (D.Kan.1996). Accordingly, defendants shall fully answer Interrogatories 8 and 9. If they rely upon Rule 33(d), they shall fully comply with its requirements. This includes identifying the documents from which plaintiff may obtain the answers as readily as could defendants. Providing the Bates numbers of produced documents appears sufficient to adequately identify the produced documents.

G. Interrogatory 10

Interrogatory 10 seeks the identity of certain persons and documents. Defendants agree to supplement their answer with respect to identifying persons. They also agree to identify by Bates numbers all previously produced documents for which the interrogatory seeks identification. They assert no objection to the interrogatory in response to the motion. They have thus abandoned whatever objections they had previously asserted. They shall supplement their answer to identify all persons and documents sought to be identified by the interrogatory. They may not limit their identification to documents previously produced, unless they have already produced every document sought to be identified by the interrogatory.

H. Interrogatory 11

***6** Interrogatory 11 seeks the identification of alleged "false and misleading" statements or representations made by plaintiff to patients of the parties. Defendants assert that they have provided the best information presently available. Such an answer hedges. It suggests defendants have provided less than a fully responsive answer. Unavailability of the best information may reflect nothing more than their own failure to look for it. For instance, they reveal in answer to Interrogatory 11(d) that "[t]he individuals and examples identified in [response to Interrogatory 11] are illustrative only, and represent examples of situations...." Defendants shall fully answer Interrogatory 11. If they have answered to the best of their ability and knowledge, then they shall state so under oath. They should also comply, of course, with supplementation requirements of Fed.R.Civ.P. 26(e).

I. Interrogatory 12

Interrogatory 12 seeks the identification of defamatory statements made by plaintiff to third parties about defendants. Defendants assert no objection against the interrogatory. They contend that they have provided the best information presently available. They attempt to supplement their answer in response to the motion. That does not suffice. The response to the motion does not equal supplementation to the interrogatory. It should be under oath as required by Fed.R.Civ.P. 33(b)(1). Defendants shall fully answer Interrogatory 12.

J. Interrogatory 13

Interrogatory 13 asks defendants to "[i]dentify each instance in which [plaintiff] 'supplied incomplete and/or inaccurate order-intake information,' (Apria Counterclaim ¶ 33), that resulted in [defendants] being 'unable to collect all the fees for the home health care products and related services form [sic] Medicare, Medicaid and third-party payors.' (*Id.*)." Defendants object that the interrogatory is burdensome and oppressive in seeking information already in the possession of plaintiff and was propounded only for harassment. Notwithstanding their objections, defendants identified "representative examples of the specific types of misinformation." In response to the motion they reassert their objections.

Asking for information already within the possession of the party seeking the discovery does not of itself make the interrogatory unduly burdensome or oppressive. In this instance plaintiff seeks information about paragraph 33 of defendants' counterclaim. Plaintiff has a right to discover facts known by defendants to support their counterclaim. Such right, of course, has limits. This court has found that an interrogatory which seeks "all facts" supporting allegations within one paragraph of a complaint is overly broad and unduly burdensome on its face. *See Hiskett v. Wal–Mart Stores, Inc.*, 180 F.R.D. 403, 405 (D.Kan.1998). It also holds true whether the interrogator seeks "all facts" supporting the allegations or "each instance" of the alleged misconduct. "Interrogatories should not require the answering party to provide a narrative account of its case." *Id.* at 404.

*7 The court finds Interrogatory 13 unduly burdensome on its face. Defendants, nevertheless, have a duty to answer "to the extent the interrogatory is not objectionable." Fed.R.Civ.P. 33(b)(1). They shall, therefore, identify the principal or material instances of the misconduct alleged in paragraph 33 of their Counterclaim. The court finds Interrogatory 13 not objectionable to that extent. *See Hiskett*, 180 F.R.D. at 405. Defendants have identified specific, representative examples of misinformation requiring adjustments. The court cannot tell from those examples whether defendants have identified all principal or material instances responsive to Interrogatory 13. If they constitute all principal or material instances of the misconduct, then defendants shall so state under oath.

K. Interrogatory 15

Interrogatory 15 asks defendants to "[i]dentify each item of 'confidential or proprietary business information' that [they] contend [plaintiff] removed, misappropriated, or failed to keep confidential." Defendants answer that "the confidential and proprietary business information that was misappropriated by [plaintiff] includes the following: Apria's Policies and Procedures Manuals; Apria's Customer List for the region served by its Lenexa, Kansas Office; patient files." In response to the motion they contend their answer is sufficient. Plaintiff suggests that defendants have not appropriately identified the customer list and patient files. It wants the documents identified "by Bates number or otherwise."

Defendants' identification of "patient files" and its "Customer List" appears sufficient to answer the interrogatory. The interrogatory does not require identification by Bates number or any other specific form of identification. Despite their identification of the listed items, the court also finds the answer to the interrogatory incomplete. Defendants answer that the alleged misappropriated information "includes" the identified items. The term "includes" usually connotes a non-exhaustive list. The answer thus appears incomplete. In addition the answer identifies only alleged misappropriated information. The interrogatory, however, also asks for information that plaintiff allegedly removed or failed to keep confidential. While "misappropriated" information may encompass information "removed or failed to keep confidential," defendants should clarify their answer to remove any ambiguity as to whether they also identify information that they allege plaintiff "removed or failed to keep confidential." Defendants shall fully answer the interrogatory. They shall clarify whether they have listed all information that they allegedly misappropriated, removed, or failed to keep confidential.

L. Interrogatory 18(c)

Plaintiff wants defendants to supplement Interrogatory 18(c), because defendants incorporated its response to Interrogatory 11 into their response. Parties may incorporate an answer to one interrogatory into the answer to another. Nothing in the Federal Rules of Civil Procedure or the Rules of Practice of the United States District Court for the District of Kansas prohibits such practice. That an answer to one interrogatory incorporates an answer to another does not of itself necessitate supplementation. In this instance, however, defendants incorporate their entire response to Interrogatory 11 into their response to Interrogatory 18(c). They thus incorporate not only the answer to Interrogatory 11, but also the objections. The court has overruled objections to Interrogatory 11 and compelled defendants to supplement their answer to it. Accordingly, defendants shall supplement Interrogatory 18(c).

M. Interrogatory 19

*8 Interrogatory 19 asks defendants to "[i]dentify each patient complaint received by [their] Lenexa branch during the relevant time period." Defendants have agreed to identify the Bates numbers for complaints regarding patients of plaintiff. They also agree to identify complaints relating to billing practices at their Lenexa branch. They maintain that service-related complaints and those which do not involve patients of plaintiff are irrelevant. As mentioned earlier, they also maintain that the temporal scope of the interrogatory is

overly broad in that it seeks information irrelevant to this action.

Plaintiff alleges breach of contract, breach of fiduciary duty, fraud, negligent misrepresentation, tortious interference with contract or business expectancies, negligence, conversion, and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), [redacted] 18 U.S.C. §§ 1961– 1968. (Second Am. Compl., doc. 41.) It alleges that it began discussing a business relationship with Homedco, Inc. (Homedco) in the summer of 1994, which culminated in three written agreements on or about January 1, 1995. (*Id.* ¶¶ 10–12.) Two of these agreements, a Billing and Collection Contract and a Discount Agreement, are at issue in this case. (*Id.* ¶ 12.) Plaintiff alleges that, as a result of the Discount Agreement, it and Homedco "were associated in a legitimate relationship for the primary purpose of providing home health care products and related services to patients." (*Id.* ¶ 14.) It alleges that, as a result of the Billing and Collection Contract, it and Homedco "were associated in a business relationship wherein [it] reposed trust and confidence in Homedco to carry out its responsibilities regarding billing and collection services, and customer service, in accordance with all applicable federal and state laws, rules, and regulations." (*Id.* ¶ 15.) In July 1995, Homedco merged with another entity to form defendant Apria Group. (*Id.* ¶ 16.)

Plaintiff alleges violations of RICO from January 1995 through August 11, 1997. (*Id.* ¶¶ 17–26.) It alleges that defendants "devised a fraudulent scheme or artifice with the specific intent to defraud Medicare, Medicaid, and other third-party payor insurance companies by submitting false claims for benefits, and with the specific intent to defraud [plaintiff] by manipulating and falsifying charges for products sold or rented in connection with the Discount agreement." (*Id.* ¶ 21.) It alleges fraud beginning on September 9, 1994. (*Id.* ¶ 41.)

Plaintiff alleges that it relied upon defendants, as its fiduciary, to perform billing and collection services and customer service in accordance with applicable laws and regulations. (*Id.* ¶ 34.) It further alleges that defendants violated their fiduciary duties. (*Id.* ¶ 37.) It alleges that defendants breached the contracts and agreements between the parties. (*Id.* ¶ 27–31.)

Plaintiff suggests that all patient complaints regarding the billing and collection practices of defendants are relevant to the issue of notice to defendants. Interrogatory 19 appears relevant for that purpose. The temporal scope of the interrogatory, furthermore, appears reasonable. Complaints for the period prior to the relationship between the parties may indeed reveal information relating to the notice defendants had about their billing and collection practices. Complaints submitted after the relationship between the parties ended in August 1997 also appear relevant. Although made after the ending of the relationship, they may indeed relate to the time-period of the relationship between the parties. For instance, a patient may have experienced difficulties with billing or collection practices in July 1997, but may not complain until months later. Such complaint would be relevant to alleged RICO violations. Service-related complaints appear relevant to the claimed breach of fiduciary duty. They may also have relevancy to the alleged breach of contract. Defendants shall fully answer Interrogatory 19. They may rely upon Fed.R.Civ.P. 33(d), if they satisfy all of its requirements, including proper identification of the documents.

N. Interrogatory 24

*9 Interrogatory 24 seeks information about billing for products or services allegedly rendered to a patient after his or her death or after equipment had been picked up. Defendants state they are aware of no instances during the life of the contract between the parties in which they issued a bill after date of death or date of pick up without an appropriate adjustment having been made. They directed plaintiff to monthly reports which show every adjustment made for billing after date of death or date of pick up. They assert no objection to the interrogatory in response to the motion. They have thus abandoned whatever objections they asserted against the interrogatory. They shall fully answer the interrogatory. If they wish to rely upon Fed.R.Civ.P. 33(d) to produce business records *in lieu* of answering, they shall affirmatively make such election in response to the interrogatory and comply with all requirements of the rule.

O. Other Interrogatories

Plaintiff purportedly seeks an order to compel defendants to fully answer all of its First Set of Interrogatories. It provides no argument or basis, however, for compelling further answers to any interrogatories other than those discussed above. Defendants, furthermore, do not address any other interrogatories. The court will thus compel no further answers to interrogatories.

P. Production of Documents and Privilege Log

Plaintiff also wants defendants to provide a privilege log in accordance with Fed.R.Civ.P. 26(b)(5) and produce all non-privileged documents responsive to Requests 20, 24, 41, and 42. Request 20 seeks production of audit-related documents. Defendants assert they have produced all non-privileged documents. The court cannot compel what parties do not have. Plaintiff, furthermore, only seeks production of non-privileged documents. The court will compel no further production in response to Request 20.

Request 24 seeks documents relating to a tape-recorded conversation reported in an issue of Home Health Line. It also seeks production of the tape itself. In response to the motion defendants claim to have no tape recording responsive to the request. They assert no objection to the request in response to the motion. They have, therefore, abandoned their previously asserted objections. They shall produce all non-privileged documents responsive to Request 24. Defendants do not assert that they possess or control no responsive documents. They need not produce, of course, a non-existent tape recording.

Requests 41 and 42 seek information regarding financial incentive programs in which employees of defendants may have participated. Defendants object that such information is irrelevant. The requests appear reasonably calculated to lead to the discovery of admissible evidence. They may provide evidence that employees of defendants had a bias or motivation to engage in the alleged fraudulent billing scheme. Defendants shall produce all non-privileged documents responsive to Requests 41 and 42.

***10** Plaintiff also wants defendants to produce a privilege log in accordance with Fed.R.Civ.P. 26(b)(5). Defendants suggest that they have "voluntarily provided" such a log to plaintiff. They should have provided the information required by Rule 26(b)(5) when they withheld documents from discovery. If they have not already done so, they shall provide a privilege log.

Motion for Sanctions

The court next addresses Plaintiff's Motion for Sanctions (doc. 73). Pursuant to Fed.R.Civ.P. 37(d), plaintiff seeks an order to strike all or part of the counterclaim of defendants for their failure to designate a Fed.R.Civ.P. 30(b)(6) deponent. Defendants oppose the motion.

Plaintiff served notice for a Rule 30(b)(6) deposition of defendants for March 29, 1999. (*See* Notice of Dep., attached as Ex. A to Motion for Sanctions, doc. 73.) Prior to the scheduled date the parties agreed to postpone the deposition. Plaintiff insists that the postponement was conditioned upon defendants' producing a representative for deposition before April 30, 1999. It contends they refused to designate a deponent before that date, despite an alleged agreement to proceed the week of April 19, 1999. Defendants deny any agreement to proceed the week of April 19.

The court finds no sanctionable conduct by defendants. The parties agreed to postpone the deposition. The record before the court reveals no clear agreement to continue it to a date certain. The court declines to enforce an informal agreement which the parties dispute. They could have entered into a written stipulation in accordance with Fed.R.Civ.P. 29 to proceed with the deposition on a date certain. In the absence of a stipulation or an undisputed, unambiguous agreement to proceed on a specific date, the court finds that plaintiff has not carried its burden to show conduct which justifies sanctions.

Plaintiff also could have formally served another notice for the deposition. It chose not to do so. It suggests it would have been futile to do so, as defendants would have moved for a protective order or failed to appear. The failure to appear in that event would likely have been sanctionable. Speculating that an opposing party may seek protection pursuant to Fed.R.Civ.P. 26(c), furthermore, does not render a procedure futile or provide adequate reason to disregard it. Rule 26(c) provides parties the right to seek protection against improper discovery. The possibility that an opponent may exercise that right is insufficient reason of itself to disregard the specific procedures provided by the Federal Rules of Civil Procedure.

Plaintiff suggests that the court not construe Fed.R.Civ.P. 30 and 37 to require it to formally re-notice the deposition, as such construction would be contrary to Fed.R.Civ.P. 1. Rule 1 directs that the court construe and administer the Federal Rules of Civil Procedure "to secure the just, speedy, and inexpensive determination of every action." The court recognizes the applicability of Rule 1 to this dispute. Its applicability, however, does not help plaintiff. Fed.R.Civ.P. 37(d) provides for sanctions against a party failing to appear for a deposition "after being served with proper notice." Defendants had proper notice of a deposition scheduled for March 29, 1999. The parties agreed to take the deposition at a later date. The record before the court does not warrant a finding that defendants had proper notice of any other date for the deposition. The Federal Rules of Civil Procedure do not absolutely require another notice for the deposition. Parties may instead enter into a written stipulation as provided by

Fed.R.Civ.P. 29. They may informally agree to a certain date. Inherent in the latter alternative, however, is the risk that sanctions will not be available for a failure to appear. Such construction of Rule 37(d) does not contradict or ignore Rule 1.

Conclusion

***11** For the foregoing reasons, the court sustains in part and overrules in part Plaintiff's Motion to Compel Production of Documents and Answers to Interrogatories (doc. 69) and overrules in its entirety Plaintiff's Motion for Sanctions (doc. 73). On or before June 21, 1999, defendant shall answer Interrogatories 2, 3, 4, 5, 6(a), 8, 9, 10, 11, 12, 13, 15, 18(c), 19, 22, 23, and 24 and produce a privilege log and all non-privileged documents responsive to Requests 24, 41, and 42, as set forth herein. Such production shall take place at the offices of counsel for plaintiff located at One Petticoat Lane Bldg., 1010 Walnut St., Ste. 400, Kansas City, Missouri or at any other location agreed upon by the parties.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 1999 WL 386949

End of Document

80 Fed.Cl. 122
United States Court of Federal Claims.

EVERGREEN TRADING, LLC, by and through Glen NUSSDORF and Claudine Strum on behalf of GN Investments, LLC, A Partner Other than the Tax Matters Partner, Plaintiffs,
v.
The UNITED STATES, Defendant.

No. 06–123T.
|
Dec. 21, 2007.

Synopsis
Background: Partnership and taxpayers brought suit against the United States challenging Final Partnership Administrative Adjustment (FPAA) which determined that plaintiffs' income tax returns improperly reported the tax treatment of a series of transactions, and that various penalties applied to resulting underpayments of tax. Defendant moved to compel production of documents.

Holdings: The United States Court of Federal Claims, Allegra, J., held that:

[1] correspondence between one or more of plaintiffs or their counsel and accountant which predated agency agreement between plaintiff's counsel and accountant was not privileged under attorney-client privilege or tax practitioner's privilege;

[2] work product doctrine applied to communications between one or more plaintiffs, accountant, and plaintiff's counsel after accountant and counsel entered into agency agreement; and

[3] common interest doctrine pursuant to which the attorney-client privilege is not waived for communications between parties with common legal interest applied to certain communications.

Motion granted in part and denied in part.

West Headnotes (28)

[1] **Privileged Communications and Confidentiality**
Privilege logs

While an inadequate privilege log may be the basis for disallowing a privilege, such a finding is in the nature of a sanction and, at least in the first instance, should be weighed in terms of the intent of the party producing the defective log and against the harm caused by disclosure of what might otherwise be privileged documents.

RCFC, Rule 26(b)(5), 28 U.S.C.A.

3 Cases that cite this headnote

[2] **Privileged Communications and Confidentiality**
Waiver of privilege

Just because a party discloses an attorney-client communication covering one aspect of its case does not mean that it has waived the attorney-client privilege as to communications involving the rest.

[3] **Privileged Communications and Confidentiality**
Waiver of privilege

Because a taxpayer has revealed otherwise protected attorney-client communications regarding one aspect of the tax planning that went into a transaction does not necessarily mean that it has waived the attorney-client privilege as to all aspects of that planning.

[4] **Privileged Communications and Confidentiality**
Professional Character of Employment or Transaction

The preparation of tax returns is an accounting service, not the provision of legal advice, and documents used in both preparing tax returns and

litigation are not protected by the attorney-client privilege.

1 Cases that cite this headnote

[5] **Privileged Communications and Confidentiality**

Waiver of privilege

Where a party relies on or discloses the advice of counsel concerning the tax consequences of a transaction, it waives the attorney-client privilege not only as to the disclosed information, but also as to the details underlying that information.

1 Cases that cite this headnote

[6] **United States**

Work product

For the work-product rule to apply, litigation need not already have commenced or be imminent; rather, litigation must merely be a real possibility at the time the documents in question are prepared. RCFC, Rule 26(b)(3), 28 U.S.C.A.

4 Cases that cite this headnote

[7] **United States**

Work product

Documents should be deemed prepared for litigation and within the scope of the work-product rule 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. RCFC, Rule 26(b)(3), 28 U.S.C.A.

3 Cases that cite this headnote

[8] **United States**

Work product

Only disclosing material in a way inconsistent with keeping it from an adversary waives work product protection. RCFC, Rule 26(b)(3), 28 U.S.C.A.

3 Cases that cite this headnote

[9] **United States**

Work product

An individual or entity may not disclose documents to a federal government agency that is a potential adversary in litigation and then assert the work product privilege in seeking to protect the disclosure of the same documents in litigation involving that or another federal agency. RCFC, Rule 26(b)(3), 28 U.S.C.A.

1 Cases that cite this headnote

[10] **Privileged Communications and Confidentiality**

Professional Character of Employment or Transaction

The attorney-client privilege does not apply where an attorney is acting as a tax return preparer.

1 Cases that cite this headnote

[11] **United States**

Discovery, Subpoenas, and Compelling Production of Evidence

Unless burdensomeness is demonstrated, the fact that a discovery request may lead to the discovery of documents already possessed does not necessarily bar that discovery.

6 Cases that cite this headnote

[12] **United States**

Work product

Plaintiffs would be permitted to redact numbers from any documents ordered produced, as numbering system constituted work product where it could reveal aspects of counsel's understanding of case, for which defendant made no showing of necessity.

[13] **United States**

Evidence and Affidavits

Even if documents, which contained absolutely no factual or legal content and merely identified the sender, the recipient, the list of documents transferred to the Internal Revenue Service (IRS) and the date of the transfer, were protected by work-produce doctrine because documents revealed the date that plaintiffs' counsel first obtained the documents, plaintiffs waived the privilege where essence of the identifying information in question was provided to defendant in their privilege logs. RCFC, Rule 26(b)(3), 28 U.S.C.A.

2 Cases that cite this headnote

[14] **Privileged Communications and Confidentiality**

Documents and records in general

United States

Work product

To the extent that cover letters and memoranda associated with subsequent transmission of documents provided by plaintiffs to the Internal Revenue Service (IRS) to other parties revealed instructions of plaintiffs' counsel or contained other legal or factual analysis, they were protected by either the attorney-client privilege or the work product doctrine. RCFC, Rule 26(b)(3), 28 U.S.C.A.

5 Cases that cite this headnote

[15] **Privileged Communications and Confidentiality**

Waiver of privilege

United States

Evidence and Affidavits

Taxpayers' submission of documents to the Internal Revenue Service (IRS) during audit of their returns waived any privileges which might have been associated with the documents.

1 Cases that cite this headnote

[16] **Privileged Communications and Confidentiality**

Effect of delivery of nonprivileged materials to attorney; preexisting documents

Documents do not acquire protection under the attorney-client privilege merely because they were transferred from client to attorney.

1 Cases that cite this headnote

[17] **United States**

Work product

The work product doctrine does not shield from discovery documents created by third parties. RCFC, Rule 26(b)(3), 28 U.S.C.A.

4 Cases that cite this headnote

[18] **Privileged Communications and Confidentiality**

Accountants and auditors

Attorney-client privilege can protect communications between a client and his accountant, or the accountant and the client's attorney.

5 Cases that cite this headnote

[19] **Privileged Communications and Confidentiality**

Accountants and auditors

An attorney, merely by placing an accountant on her payroll, does not, by such action alone, render communications between the attorney's client and the accountant privileged under the attorney-client privilege; rather, the privilege protects such communications when the accountant's role is to clarify communications between attorney and client, or when he acts as a translator or interpreter of client communications.

11 Cases that cite this headnote

[20] **Privileged Communications and Confidentiality**

Accountants and auditors

A communication between an attorney and an accountant does not become shielded by the attorney-client privilege simply because the communication proves important to the attorney's ability to represent the client.

1 Cases that cite this headnote

[21] **Privileged Communications and Confidentiality**

Accountants and auditors

For the attorney-client privilege to attach to client's communication with an accountant, the communication must be made for the purpose of obtaining legal advice; if 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.

3 Cases that cite this headnote

[22] **Privileged Communications and Confidentiality**

Accountants and auditors

Where an accountant is acting as the client's agent, communications by the accountant to the attorney are equivalent to communications being made by the client to the attorney and hence are potentially covered by the attorney-client privilege.

2 Cases that cite this headnote

[23] **Internal Revenue**

Work product privilege; tax practitioner privilege

Privileged Communications and Confidentiality

Accountants and auditors

Correspondence between one or more of plaintiffs or their counsel and accountant which predated agency agreement between plaintiff's counsel and accountant was not privileged under attorney-client privilege or tax practitioner's privilege, where accountant was not performing role of an interpreter on behalf of the plaintiffs, so as to invoke *Kovel* rule, and the communications were not related to accountant's provision of tax advice. 26 U.S.C.A. § 7525.

2 Cases that cite this headnote

[24] **United States**

Work product

Work product doctrine applied to communications between one or more plaintiffs, accountant, and plaintiff's counsel after accountant and counsel entered into agency agreement.

[25] **Internal Revenue**

Work product privilege; tax practitioner privilege

Privileged Communications and Confidentiality

Accountants and auditors

United States

Work product

Documents containing communications between accountants who worked for taxpayers and their investment advisers, various accountants working simultaneously for taxpayers and their family business, and accountant hired by their counsel and the Internal Revenue Service (IRS), were not protected by attorney-client privilege, work product doctrine, or tax practitioner's privilege, absent indication that any of the affected parties were acting in concert with plaintiffs' counsel or any other protected individual for the purpose of facilitating legal advice. 26 U.S.C.A. § 7525; RCFC, Rule 26(b)(3), 28 U.S.C.A.

6 Cases that cite this headnote

[26] **Privileged Communications and Confidentiality**

Common interest doctrine; joint clients or joint defense

Under the "common interest doctrine," a waiver of the attorney-client privilege does not occur if the client or its representative is communicating

with attorneys representing individuals or an entity with shared legal interests.

3 Cases that cite this headnote

[27] **Privileged Communications and Confidentiality**

Common interest doctrine; joint clients or joint defense

Common interest doctrine pursuant to which the attorney-client privilege is not waived for communications between parties with common legal interest applied to communications between counsel for taxpayers' business and their counsel in tax litigation, and between taxpayers and law firm representing accounting firm in case involving similar transactions to those at issue in taxpayers' refund suit.

2 Cases that cite this headnote

[28] **United States**

Discovery, Subpoenas, and Compelling Production of Evidence

Documents containing references to taxpayers and taxable years not in issue in tax refund case were relevant and subject to production, considering that unrelated taxpayers were involved in the same or similarly structured transactions as plaintiffs, and that events in other taxable years could impact the treatment of tax items in years directly before the Court of Federal Claims, particularly given penalties at issue and potential defenses thereto.

5 Cases that cite this headnote

Attorneys and Law Firms

*124 David DeCoursey Aughtry, Chamberlain, Hrdlicka, White, Williams & Martin, Atlanta, GA, for plaintiffs.

Stuart Joel Bassin, Tax Division, United States Department of Justice, Washington, D.C., with whom was Assistant Attorney General Eileen J. O'Connor, for defendant.

*125 **ORDER**

ALLEGRA, Judge.

Balancing the interpenetrating factors involved in the assertion of privileges in our federal judicial system is a subtle and complicated process. The necessity for judicial accommodation between the intersecting pursuit of truth and the protection of confidences, though often expressed in terms of rules of certainty and simplicity, is often applied in a fashion that is neither certain nor simple. Frequently, striking that balance requires a court to make close, factually-intensive distinctions, particularly in the area of federal income taxation, in which business planning, tax return preparation and legal advice tend to coalesce. This case is no exception.

In this federal income tax partnership proceeding, pending before the court is defendant's motion to compel the production of documents responsive to one of its requests for production. Plaintiffs claim, *inter alia,* that the subject documents are privileged. Following an *en camera* review of the document in question, and for the reasons that follow, the court **GRANTS,** in part, and **DENIES,** in part, this motion.

I. BACKGROUND

Although relatively unimportant in deciding the discovery issues before the court, a brief recitation of the underlying facts of this case aids in setting the context for the decision.

The plaintiffs in this partnership proceeding are Evergreen Trading, LLC (Evergreen), and Glenn Nussdorf and Claudia Strum on behalf of GN Investments, LLC (collectively, the "plaintiffs"). In a Notice of Final Partnership Administrative Adjustment (FPAA), dated September 26, 2005, the Internal Revenue Service (IRS) determined that plaintiffs' tax returns improperly reported the tax treatment of a series of transactions, and, consequently, that various penalties applied to the resulting underpayments of tax. On February 21, 2006, plaintiffs filed a complaint in this court challenging these determinations. In particular, they averred that the IRS erred in asserting various of the accuracy-related penalties authorized by section 6662 of the Internal Revenue Code of 1986 (the Code) (26 U.S.C.). Following the filing of an answer, the court, on June 27, 2006, established a discovery schedule for the case, the completion date of which was eventually extended to April 2, 2007.

During discovery, defendant served plaintiffs with two sets of document requests. In response to the first, plaintiffs

produced about 225 documents totaling about 1100 pages, each numbered in the lower corner with the prefix "NS." On December 15, 2006, defendant served a second set of requests, which included Request No. 31: "Please provide all documents bearing the 'NS' prefix which have yet to be provided to the United States in the course of this litigation, including but not limited to pages NS [listing numbers]." In response, plaintiffs produced a handful of documents and a list of objections, including, *inter alia,* an objection that some of the sought-after documents were protected by the work product privilege. Plaintiffs, however, did not provide a privilege log with this production.

On April 12, 2007, defendant filed a motion to compel the production of the remaining "NS" documents. It argued that any privilege-based objections were waived when plaintiffs failed timely to provide the privilege log required by RCFC 26(b)(5).[1] On April 27, 2007, plaintiffs served defendant with a disk containing some of the documents sought by Request No. 31. Plaintiffs asserted privilege over the remainder of the NS documents, and provided a privilege log for those documents. On April 30, 2007, plaintiffs responded to defendant's motion to compel, asserting various objections including overbreadth, relevancy, attorney-client privilege, ***126** and work product privilege. In a May 14, 2007, reply, defendant argued that plaintiff's objections were procedurally defective, that plaintiff had not established that any documents contain protected work product, and that plaintiff's overbreadth claims were "specious." This reply included a portion of plaintiff's privilege log as an exhibit.

[1] On May 24, 2007, the court ordered plaintiffs to file a more detailed privilege log that specifically described the nature of the claimed privileges and provided other categories of identifying information about the documents.[2] On June 7, 2007, plaintiffs filed their revised privilege log. The court determined that this log still did not contain enough information to enable it to determine the validity of the objections asserted by plaintiffs. Accordingly, on June 28, 2007, the court ordered plaintiffs to submit for *en camera* review a copy of each of the documents listed in its revised privilege log.[3] Plaintiffs submitted disks containing these documents on August 3, 2007.

II. DISCUSSION

Pursuant to RCFC 37, defendant seeks an order compelling plaintiffs to turn over a range of documents that, in varying degrees, relate to the issues in this matter.

The Federal Circuit has instructed that "[q]uestions of the scope and conduct of discovery are, of course, committed to the discretion of the trial court." *Florsheim Shoe Co. v. United States,* 744 F.2d 787, 797 (Fed.Cir.1984). In deciding either to compel or quash discovery, this court must balance potentially conflicting goals. It " 'must be careful not to deprive a party of discovery that is reasonably necessary to afford a fair opportunity to develop and prepare the case.' "

Heat & Control Inc. v. Hester Indus., Inc., 785 F.2d 1017, 1024 (Fed.Cir.1986) (quoting Fed.R.Civ.P. 26(b)(1) advisory comm. notes (1983)); *see also Epstein v. MCA, Inc.,* 54 F.3d 1422, 1423 (9th Cir.1995). As the Supreme Court once famously indicated, "[n]o longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case." *Hickman v. Taylor,* 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947). On the other hand, the Court in *Hickman* cautioned that "discovery, like all matters of procedure, has ultimate and necessary boundaries ... [L]imitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege." *Id.* at 507–08, 67 S.Ct. 385;*see also* *Vons Cos. v. United States,* 51 Fed.Cl. 1, 5 (2001); *Planning Research Corp. v. United States,* 4 Cl.Ct. 283, 296 (1983). Encapsulating these considerations, RCFC 26(b)(1), like its Federal rules counterpart, provides that a party may obtain discovery of any matter that: (i) is "not privileged," and (ii) "is relevant to the claim or defense of any party." *See also* *In re EchoStar Comm. Corp.,* 448 F.3d 1294, 1300 (Fed.Cir.2006); *Vons,* 51 Fed.Cl. at 5.

Plaintiffs assert that the materials requested, but not yet produced, are, indeed, privileged, invoking, alternatively, and in combination, the attorney-client privilege, the work product doctrine and the privilege statutorily-afforded ***127** by section 7525 of the Code. Seeking to strike the delicate balance between production and privilege described above, the court must confront issues involving the proper scope of these privileges in the context of communications that occurred along a continuum that began with tax planning, continued through an IRS administrative proceeding, and ultimately ended in this tax litigation. That these questions are important and recurring is apparent from the host of sources discussing them.[4] Nonetheless, as will be seen, many of the issues presented here are matters of first impression in this circuit. Before turning to the consideration of the specific

issues presented by the documents that this court has reviewed *en camera*, it is helpful to describe some first principles that ultimately will guide the court in resolving whether those documents are privileged.

A. Three Privileges: Attorney–Client, Work Product and Section 7525.

Like the panels of a triptych, each of the privileges at issue bears some relation to the others. To illustrate this, we begin with the attorney-client and work product privileges.

The symbiotic relationship between the attorney-client and work product privileges stems from shared pragmatic and systemic justifications and is reflected in principles common to both. Under Rule 501 of the Federal Rules of Evidence, both privileges are "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Both also stand in tension with the desire to avoid suppressing probative evidence and, for that reason, have been narrowly construed —extended only as far as needed to effectuate their utilitarian purposes. *See, e.g., Univ. of Pa. v. EEOC*, 493 U.S. 182, 189, 110 S.Ct. 577, 107 L.Ed.2d 571 (1990); *Baldrige v. Shapiro*, 455 U.S. 345, 360, 102 S.Ct. 1103, 71 L.Ed.2d 199 (1982); *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976); *see generally Ullmann v. United States*, 350 U.S. 422, 438–40, 76 S.Ct. 497, 507, 100 L.Ed. 511 (1956) (Frankfurter, J.) ("Once the reason for the privilege ceases, the privilege ceases."). This "narrow tailoring" principle resonates especially in the context of tax disputes, amplified by the "congressional policy choice in favor of disclosure of all information relevant to a legitimate IRS inquiry." *United States v. Arthur Young & Co.*, 465 U.S. 805, 816, 104 S.Ct. 1495, 79 L.Ed.2d 826 (1984); *see also Cavallaro v. United States*, 284 F.3d 236, 245–46 (1st Cir.2002); *United States v. Textron*, 507 F.Supp.2d 138, 146 (D.R.I.2007). Lastly, parties claiming the benefit of either privilege bear the burden of establishing all the essential elements thereof,[5] a burden that is not "discharged by mere conclusory or *ipse dixit* assertions." *In re Bonanno*, 344 F.2d 830, 833 (2d Cir.1965).

Yet while the attorney-client and work product privileges are similar and often invoked with respect to the same documents, they diverge in critical regards. And, as will be seen, it is the differences between these privileges that serve ultimately to inform the scope of the third privilege at issue here, that codified in section 7525 of the Code.

1. The Attorney–Client Privilege.

The attorney-client privilege has its roots ***128** in Roman law,[6] making it one of the oldest recognized privileges for confidential communications. *United States v. Zolin*, 491 U.S. 554, 562, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989); *Upjohn Co. v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981); *see also Hunt v. Blackburn*, 128 U.S. 464, 470, 9 S.Ct. 125, 32 L.Ed. 488 (1888). It "protects the confidentiality of communications between attorney and client made for the purpose of obtaining legal advice." *Genentech, Inc. v. U.S. Intern. Trade Com'n*, 122 F.3d 1409, 1415 (Fed.Cir.1997); *see also EchoStar*, 448 F.3d at 1299; *Am. Standard Inc. v. Pfizer, Inc.*, 828 F.2d 734, 745 (Fed.Cir.1987). The privilege thus encourages "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice." *Upjohn*, 449 U.S. at 389, 101 S.Ct. 677;*see also Swidler & Berlin v. United States*, 524 U.S. 399, 403, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998); *Hunt*, 128 U.S. at 470, 9 S.Ct. 125 (privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

The classic Wigmorean definition of the privilege, which has been adopted in numerous cases, asserts that—

> [w]here legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

8 John Henry Wigmore, Evidence in Trials at Common Law § 2292 (McNaughton rev.1961). Breaking this definition into its component parts, courts have held that "in order for the attorney-client privilege to attach, the communication in question must be made: (1) in confidence; (2) in connection with the provision of legal services; (3) to an attorney; and (4) in the context of an attorney-client relationship." *BDO Seidman*, 492 F.3d at 815;*see also United States v. Bisanti*, 414 F.3d 168, 171 (1st Cir.2005); *In re Sealed Case*, 737 F.2d 94, 98–99 (D.C.Cir.1984); *Deseret Mgmt. Corp. v. United States*, 76 Fed.Cl. 88, 90 (2007).[7]

[2] **[3]** Waivers of the privilege "come in various sizes and shapes," *In re Keeper of Records (XYZ Corp.)*, 348 F.3d 16, 22 (1st Cir.2003), but often derive from conduct or words that negate one or more of the elements of the privilege. *See* ***129** *Carter v. Gibbs*, 909 F.2d 1450, 1451 (Fed.Cir.1990). Thus, for example, the voluntary disclosure of privileged communications to third parties (who are neither agents of the attorney nor the client) belies the notion that the communications are made in confidence and generally destroys the privilege. *Id.*; *see also Genentech*, 122 F.3d at 1415. Along these lines, it is generally stated that if a party waives the privilege as to a particular communication, it also is deemed to waive the privilege as to all communications involving the same subject matter.[8] But, as the Federal Circuit has cautioned, this rule must not be too liberally invoked lest it swallow the privilege. For one thing, courts have distinguished between situations in which the waiver occurred knowingly and in court, for example, through the invocation of a defense, versus situations in which the waiver arose inadvertently in an extrajudicial setting.[9] In addition, courts applying this rule have been careful not to define the "subject matter" of communications too broadly. In this regard, the Federal Circuit has advised—"[t]here is no bright line test for determining what constitutes the subject matter of a waiver, rather courts weigh the circumstances of the disclosure, the nature of the legal advice sought and the prejudice to the parties of permitting or prohibiting further disclosures." *Fort James*, 412 F.3d at 1349–50;*see also In re Seagate Tech.*, 497 F.3d at 1372; *In re Keeper of the Records (XYZ Corp.)*, 348 F.3d at 23; *In re Grand Jury Proceedings October 12, 1995*, 78 F.3d 251, 255–56 (6th Cir.1996).[10] Hence, just because a party discloses a communication covering one aspect of its case does not mean that it has waived the privilege as to communications involving the rest. It follows, *a fortiori*, that because a taxpayer has revealed otherwise protected communications regarding one aspect of the tax planning that went into a transaction does not necessarily mean that it has waived the privilege as to all aspects of that planning.

[4] **[5]** Reflecting a somewhat different slant, some commentators have asserted that the attorney-client privilege offers little in the way of protection to tax planning advice. *See, e.g., Beale*, 25 Va. Tax. Rev. at 634–35. There is some support for this view. For example, it has long been held that the preparation of tax returns is an accounting service, not the provision of legal advice, and that documents used in both preparing tax returns and litigation are not privileged. *See, e.g., United States v. Frederick*, 182 F.3d 496, 500–01 (7th Cir.1999), *cert. denied*, ***130** 528 U.S. 1154, 120 S.Ct. 1157, 145 L.Ed.2d 1070 (2000); *see also United States v. Bornstein*, 977 F.2d 112, 116 (4th Cir.1992); *United States v. Davis*, 636 F.2d 1028, 1043 (5th Cir.), *cert. denied*,454 U.S. 862, 102 S.Ct. 320, 70 L.Ed.2d 162 (1981). Further, as a corollary to the rule described above, it is generally recognized that where a party relies on or discloses the advice of counsel concerning the tax consequences of a transaction, it waives the attorney-client privilege not only as to the disclosed information, but also as to the details underlying that information. Thus, in *In re Pioneer Hi-Bred Int'l*, 238 F.3d 1370 (Fed.Cir.2001), the Federal Circuit, applying Eighth Circuit law, held that a putative patent licensee's disclosure of and reliance on the advice of counsel concerning the tax consequences of a merger waived the licensee's attorney-client privilege with respect to documents forming the basis for the advice. Commenting on documents received from two law firms concerning the tax consequences of a merger, the court held that "[t]he disclosure of that advice and reliance on that advice waived the attorney-client privilege with respect to all documents which formed the basis for the advice, all documents considered by counsel in rendering that advice, and all reasonably contemporaneous documents reflecting discussions by counsel or others concerning that advice." *Id.* at 1374–75;*see also In re G–I Holdings, Inc.*, 218 F.R.D. 428, 431–32 (2003) (holding that for this rule to apply, "the asserting party [must] put the protected information at issue by making it relevant to the case").

But, this is a far cry from saying that every communication from an attorney to his or her client is discoverable so

long as it relates in any fashion to the preparation of a return. Cases holding that communications occurring during tax preparation are unprotected generally involve taxpayers asserting a defense or taking some other public position directly based upon its reliance upon counsel. In those cases, the courts have been hesitant to allow a taxpayer to use "the advice he received as both a sword, by waiving privilege to favorable advice, and a shield, by asserting privilege to unfavorable advice." *EchoStar*, 448 F.3d at 1303;*see also* *Fort James Corp.*, 412 F.3d at 1349. But, where there is no direct and public reliance on counsel's advice, the "sword and shield" analogy fails and communications offering tax advice or discussing tax planning have been held to be "legal" communications protected by the attorney-client privilege. Thus, for example, the Seventh Circuit held that where representation during an audit consists of "merely verifying the accuracy of a return," it is unprotected, but that if that communication instead "deal[s] with issues of statutory interpretation or case law" being raised in the context of the audit, "the lawyer is doing lawyer's work and the attorney-client privilege may attach." *Frederick*, 182 F.3d at 502. [11] These rulings, which recognize that preparing a return is not all a matter of mechanics and mathematics, serve to effectuate one of the main purposes of the privilege, that is, to encourage clients to ***131** "make well-informed legal decisions and conform [their] activities to the law." *EchoStar*, 448 F.3d at 1300–01. Even though tax planning holds the potential for mischief, on balance, seeking such advice serves the public's interest in making it more likely than not that the tax law will be followed. [12] In short, what was said by the Federal Circuit in *In re Regents of University of California*, 101 F.3d 1386, 1390–91 (Fed.Cir.1996), surely holds true for tax matters—"[p]ersons seek legal advice and assistance in order to meet legal requirements and to plan their conduct; such steps serve the public interest in achieving compliance with law and facilitating the administration of justice, and indeed may avert litigation." *See also* *Upjohn*, 449 U.S. at 389, 101 S.Ct. 677; *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1037 (2d Cir.1984). [13]

2. Work Product Doctrine.

Compared to its ancient relative, the work product doctrine is a mere babe, having been born 60 years ago in the Supreme Court's seminal decision in *Hickman*. There, Justice Murphy, writing on behalf of the majority, rejected "an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties." 329 U.S. at 510, 67 S.Ct. 385. Noting that "it is essential that a lawyer work with a certain degree of privacy," he reasoned that if discovery of the material sought were permitted "much of what is now put down in writing would remain unwritten." *Id.* at 510–11, 67 S.Ct. 385. "An attorney's thoughts, heretofore inviolate, would not be his own," Justice Murphy stated—

> Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Id. at 511, 67 S.Ct. 385. [14] The "strong public policy" underlying this doctrine has been repeatedly reaffirmed by the Supreme Court. *See, e.g.*, *Upjohn Co.*, 449 U.S. at 398, 101 S.Ct. 677; *United States v. Nobles*, 422 U.S. 225, 236–40, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975), and has found a home in Federal Rule of Civil Procedure 26(b)(3). That rule states that documents "prepared in anticipation of litigation or for trial" are discoverable only upon a showing of "substantial need" for the materials and "undue hardship" if they are not produced. *See also*RCFC 26(b)(3). Even where this showing has been made, however, the rule provides that the court "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Id.*; *see also* *U.S. v. Adlman*, 134 F.3d 1194, 1197 (2d Cir.1998). [15]

***132** **[6]** Critically, "[r]ule 26(b)(3) does not in so many words address the temporal scope of the work product immunity," *Fed. Trade Comm'n. v. Grolier, Inc.*, 462 U.S. 19, 25, 103 S.Ct. 2209, 76 L.Ed.2d 387 (1983), that is, *inter alia*, it does not precisely define when the privilege attaches. Nonetheless, some dimensions of this timing question are reasonably well honed. For example, it is

well-recognized that for the rule to apply, litigation need not already have commenced or be imminent; rather, litigation must merely be a real possibility at the time the documents in question are prepared. *See, e.g., AAB Joint Venture v. United States*, 75 Fed.Cl. 432, 445 (2007); *Energy Capital Corp. v. United States*, 45 Fed.Cl. 481, 485 (2000); *see also Senate of Puerto Rico v. U.S. Dept. of Justice*, 823 F.2d 574, 586 n. 42 (D.C.Cir.1987). For this purpose, litigation has been understood to include proceedings before administrative tribunals if they are adversarial in nature. *See Southern Union Co. v. Southwest Gas Corp.*, 205 F.R.D. 542, 549 (D.Ariz.2002); *United States v. Am. Telephone & Telegraph Co.*, 86 F.R.D. 603, 627 (D.D.C.1979). Finally, the drafters of the rule plainly stated that "[m]aterials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not under the qualified immunity provided for by this subdivision." *See*Rule 26(b)(3) advisory comm. notes (1970); *see also Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 138 (3d Cir.2000); *United States v. KPMG, LLP*, 237 F.Supp.2d 35, 41 (D.D.C.2002).

[7] There is considerably less agreement as to when litigation is "anticipated" for purposes of the rule. While courts have applied various formulations, *see* Kayle, *supra*, at 529, two tests have emerged from the pack. Under the "primary purpose" test employed by the Fifth Circuit, as well as some district courts, documents are viewed as being prepared in anticipation of litigation "as long as the primary motivating purpose behind the creation of a document was to aid in possible future litigation." *El Paso*, 682 F.2d at 542;*see also In re Kaiser Aluminum and Chemical Co.*, 214 F.3d 586, 593 (5th Cir.2000). On the other hand, several circuits have employed a simple causation test under which the relevant inquiry, though seemingly trite, is whether a given document was prepared or obtained "because of" the prospect for litigation. *See Maine v. Dept. of the Interior*, 298 F.3d 60, 68 (1st Cir.2002) (adopting this test and holding that "we must conclude that in the instant case it was error to require the [Department of Interior] to demonstrate that the withheld documents were created primarily for litigation purposes in order to claim the work-product privilege"); *Adlman*, 134 F.3d at 1202 (documents should be deemed prepared for litigation and within the scope of the Rule 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") (emphasis in original); *see also Textron*, 507 F.Supp.2d at 149–50; Wright, Miller & Marcus, 8 Federal Practice & Procedure § 2024, at 343 (1994).

In the court's view, the latter test—the "because of" test—which enjoys wide support in the circuits, [16] seems preferable for several reasons. First, it more closely tracks the ***133** language of the rule, which says nothing of whether a document is produced "primarily" for litigation, but rather is triggered so long as anticipating litigation was one of the purposes for which the document was prepared. [17] Moreover, as has been observed by the Second Circuit, "[f]raming the inquiry as whether the primary or exclusive purpose of the document was to assist in litigation threatens to deny protection to documents that implicate key concerns underlying the work-product doctrine." *Adlman*, 134 F.3d at 1199. Indeed, such an approach could unreasonably deny the protection to "dual purpose" documents generated in making the decision whether to enter into a transaction based upon tax litigation concerns, even though such documents could reveal an attorney's litigating strategies and assessment of legal vulnerabilities—precisely the type of discovery that the Supreme Court refused to permit in *Hickman*. *See Adlman*, 134 F.3d at 1199; *In re Grand Jury Subpoena*, 357 F.3d at 908; *Delaney, Migdail & Young, Chartered v. IRS*, 826 F.2d 124, 127 (D.C.Cir.1987). Finally, this relatively straightforward causation test does not depend unduly upon a party's subjective intent. Rather, to meet this test, a party must "have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable." *In re Sealed Case*, 146 F.3d at 884;*see also Roxworthy*, 457 F.3d at 594. Accordingly, as most other courts have held, this court finds that the "because of" test is the proper way to determine whether a document was prepared "in anticipation of litigation" and thus is eligible for protection under RCFC 26(b)(3).

[8] [9] Finally, there is, again, the matter of waiver. As noted by the court in *Textron*, "[s]ince the work product privilege serves a purpose different from the attorney-client or tax practitioner privileges, the kind of conduct that waives the privilege also differs." 507 F.Supp.2d at 152–53. The purpose of the attorney-client privilege is to

guarantee confidentiality between attorney and client—a purpose that is inconsistent with the notion of disclosing the same information to most third parties. But, the work product doctrine is designed only to prevent a potential adversary from gaining an unfair advantage. As such, "only disclosing material in a way inconsistent with keeping it from an adversary waives the work product protection." *United States v. Mass. Inst. of Tech. (MIT)*, 129 F.3d 681, 687 (1st Cir.1997); *see also* *Lawrence E. Jaffe Pension Plan v. Household Int'l Inc.*, 237 F.R.D. 176, 183 (N.D.Ill.2006) (privilege may be waived by disclosure to third parties " 'in a manner which substantially increases the opportunity for potential adversaries to obtain the information' ") (quoting *Vardon Golf Co. v. Karsten Mfg. Corp.*, 213 F.R.D. 528, 534 (N.D.Ill.2003)). This means, in particular, that an individual or entity may not disclose documents to a Federal government agency that is a potential adversary in litigation and then assert the work product privilege in seeking to protect the disclosure of the same documents in litigation involving that or another Federal agency. *See, e.g., United States v. Bisanti*, 414 F.3d 168, 172 (1st Cir.2005); *MIT*, 129 F.3d at 683 (documents disclosed to the Defense Contract Audit Agency not protected by work product doctrine in subsequent IRS summons enforcement action); *see also* *Westinghouse Elec. Corp. v. Rep. of Philippines*, 951 F.2d 1414, 1426–27 (3d Cir.1991).

3. The Tax Practitioner Privilege in 26 U.S.C. § 7525.

Plaintiffs further invoke the tax practitioner privilege contained in 26 U.S.C. § 7525, a provision of relatively-recent vintage that must be examined through the prism of the privileges discussed above.

Prior to 1998, the Supreme Court repeatedly held that "no confidential accountant-client privilege exists under federal law." *Couch v. United States*, 409 U.S. 322, 335, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973); *see also* ***134** *United States v. Arthur Young & Co.*, 465 U.S. 805, 817, 104 S.Ct. 1495, 79 L.Ed.2d 826 (1984); *Couch v. United States*, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548 (1973). In 1998, however, Congress enacted section 7525 of the Code, Internal Revenue Service Restructuring and Reform Act of 1998 (the 1998 Act), Pub.L. No. 105–206, § 3411(a), 112 Stat. 685, 750 (1998), which provides:

> With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.

26 U.S.C. § 7525(a)(1). This provision may be asserted in "any noncriminal tax proceeding in Federal court brought by or against the United States." *Id.* at § 7525(a)(2). The term "federal authorized tax practitioner" is defined as "any individual who is authorized under Federal law to practice before the Internal Revenue Service," to the extent that practice is regulated under 31 U.S.C. § 330. *Id.* at § 7525(a)(3)(A). The latter reference includes accountants and enrolled agents authorized to practice before the IRS. Protected "tax advice" means "advice given by an individual with respect to a matter which is within the scope of the individual's authority to practice" as a federally authorized tax practitioner. *Id.* at § 7525(a)(3)(B). Tracking the general approach in this area, several cases have held that "tax advice" does not include communications regarding "tax return preparation." *See, e.g.,* *United States v. BDO Seidman*, 337 F.3d 802, 810 (7th Cir.2003); *Frederick*, 182 F.3d at 502.

[10] "Because the scope of the tax practitioner-client privilege depends on the scope of the common law protections of confidential attorney-client communications," *BDO Seidman*, 337 F.3d at 810, the exact parameters of this statutory privilege are not expressly defined by its language. The legislative history of section 7525 aids in mapping the contours of this privilege. For one thing, that history reveals that the attorney-client privilege does not apply where an attorney is acting as a return preparer. In this regard, the House Conference Committee Report summarized current law thusly—

> It does not apply in situations where the attorney is acting in other capacities. Thus, a taxpayer may not claim the benefits of the attorney-client privilege simply by hiring an attorney to perform some other function. For example, if an attorney is retained to prepare a tax return, the attorney-client privilege will not automatically apply to communications and documents generated in the course of preparing the return.

H.R. Conf. Rep. 105–599, at 267 (1998). Further describing current law, this report continued—"The privilege of confidentiality also does not apply where the communication is made for further communication to third parties. For example, information that is communicated to an attorney for inclusion in a tax return is not privileged because it is communicated for the purpose of disclosure." *Id.* The report then made clear that the statute extends the attorney-client privilege to other tax practitioners, principally accountants, with all the limitations historically associated with that doctrine. *See id.* at 268. "For example," the report noted, "if a taxpayer or federally authorized tax practitioner discloses to a third party the substance of a communication protected by the privilege, the privilege for that communication and any related communications is considered to be waived to the same extent and in the same manner as the privilege would be waived if the disclosure related to an attorney-client communication." *Id.*

This same history leaves little doubt that, while section 7525 affords a limited form of the attorney-client privilege to tax practitioners, it does not likewise extend the work product doctrine. The latter extension more arguably would have been the case had the bill, as originally proposed in the House, been enacted. Thus, as introduced, House Bill 2676 provided:

> In any noncriminal proceeding before the [IRS], the taxpayer shall be entitled to the same common law protections of confidentiality with respect to tax advice furnished ***135** by any qualified individual as the taxpayer would have if such individual were an attorney.

H.R. 2676, 105th Cong., § 341 (Oct. 21, 1997). But, the Senate Finance Committee significantly ratcheted this language down, constraining it so that the section 7525 privilege would apply only to "communications." H.R. 2676 (Apr. 22, 1998) (as reported by the Senate Finance Comm. with an amendment). The accompanying report confirms that the modified bill extended to tax practitioners only a form of the attorney-client privilege. *See also*S. Rep. 105–174, at 70 (1998) ("The provision extends the present law attorney-client privilege of confidentiality to tax advice that is furnished to a client-taxpayer ... by any individual who is authorized under Federal law to practice before the IRS."); *id.* (provision extends the "right to privileged communications"). And, it was this more limited version of the statute that was adopted by the Conference Committee and became law, thereby belying any notion that lurking within the privilege established by section 7525 is some extension of the work product doctrine. *See*H. Conf. Rep. 105–599, at 268 (1998) ("[t]his provision relates only to matters of privileged communications."). This history, in short, reveals that the word "communications" in the statute is no idle term, a view that has led virtually every court to consider the issue to conclude that section 7525 "does not protect work product."

Frederick, 182 F.3d at 502.[18] This court likewise so concludes.

Because the privilege established by section 7525 is largely coterminous with the attorney-client privilege, waivers of the former privilege occur on the same terms as would apply to the latter. *See* *Textron, Inc.*, 507 F.Supp.2d at 151; *United States v. Arthur Andersen, LLP*, 273 F.Supp.2d 955, 958 (N.D.Ill.2003); *see also* *BDO Seidman*, 337 F.3d at 810 ("the § 7525 privilege is no broader than that of the attorney-client privilege").

B. Application of Privilege to Particular Categories of Documents.

With this background, the court now turns to the results of its *en camera* review of the documents in question. Those documents can be broken down in various ways, for example, in terms of the identifying features of the communications

or documents involved, or, perhaps, in terms of the privilege being invoked. The following segments address issues particularly raised by what the court views as logical subsets of these documents—though more specific than the preliminary issues addressed above, these discussions, nonetheless, are cross-cutting, in that they, at times, apply to more than one category of documents. To further guide the parties, the accompanying Chart A more specifically summarizes the results of the court's *en camera* review of the individual documents and cross-references the discussions herein, as relevant. [19]

1. Documents previously provided to the IRS and the State of New York.

[11] a. Plaintiffs object to releasing anew documents that they claim were already submitted to the IRS during the audit of their returns. But, this objection comes largely sans citation to rule or other authority. To be sure, Federal Rule of Evidence 403 provides that relevant evidence may be excluded it is cumulative, but this rule governs the admittance of evidence at trial and not discovery. *See United States v. Rosario–Peralta,* 175 F.3d 48, 55 n. 4 (1st Cir.1999). RCFC 26(b), of course, limits discovery to matters that are "relevant" to the claim or defense of any party and permits ***136** the court to limit discovery if it determines that "the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." But, unless burdensomeness is demonstrated, the fact that a discovery request may lead to the discovery of documents already possessed does not necessarily bar that discovery. [20] That is because "[t]he purpose of the discovery rules is not only to elicit unknown facts, but also to narrow and define the issues, and for this purpose it is often necessary to use discovery about known facts." 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice & Procedure § 2014 (1994); *see also Cook,* 161 F.R.D. at 105. Indeed, in this case, as in others, there remains the possibility that discovery will reveal versions of documents different from those already in possession. That said, the number of document pages involved here is relatively small and plaintiffs have not—and, indeed, could not—support a claim that the production of these documents would be either expensive or burdensome. Accordingly, they have not shown that any of these documents should be excluded in their entirety because assertedly they were previously provided to the IRS. [21]

Yet, as plaintiffs hint, various cases hold that the work product doctrine may shield from discovery documents created by third-parties "where a request is made for documents already in the possession of the requesting party, with the precise goal of learning what the opposing attorney's thinking or strategy may be." *Matter of Grand Jury Subpoenas,* 959 F.2d at 1166. This rule is often traced to *Sporck v. Peil,* 759 F.2d 312, 316 (3d Cir.1985), *cert. denied,*474 U.S. 903, 106 S.Ct. 232, 88 L.Ed.2d 230 (1985), where the Third Circuit found that "the selection and compilation of documents by counsel in this case in this case in preparation for pretrial discovery falls within the highly-protected category of opinion work product." Though not universally accepted, the *Sporck* rule has been applied in a number of circuits. *See In re Grand Jury Subpoenas,* 318 F.3d 379, 385 (2d Cir.2003); *Gould Inc. v. Mitsui Mining & Smelting Co., Ltd.,* 825 F.2d 676 (2d Cir.1987); *cf. In re San Juan DuPont Hotel Fire Lit.,* 859 F.2d 1007, 1018 (1st Cir.1988). This exception to the normal production of documents, however, is "narrow" and requires a showing of "a real, rather than speculative, concern that the thought processes of [ ] counsel in relation to pending or anticipated litigation would be exposed." *Gould,* 825 F.2d at 680;*see also Hunter's Ridge Golf Co., Inc. v. Georgia–Pacific Corp.,* 233 F.R.D. 678, 681 (M.D.Fla.2006). No such showing has been made by plaintiffs here—either in their *en camera* submissions or in responding to defendant's motion —at least to the extent that would protect entire documents.

***137** **[12]** b. However, plaintiffs' arguments in this regard are more compelling as to certain aspects or features of the documents *sub judice.* For example, they object to producing the documents in question because they contain a supposedly unique, sequential numbering system that plaintiffs' counsel asserts it employed in organizing the documents in question. Of course, plaintiffs have already produced a host of documents that contain such "NS" numbers; it was, in fact, that production that teased defendant into requesting the documents corresponding to the pages that were omitted. Nonetheless, the court agrees that the numbering system itself could reveal aspects of plaintiffs' counsel's understanding of the case and thus constitutes work product for which defendant has made no showing whatsoever of necessity. Other cases have reached similar conclusions and have

barred the production of documents that were organized in a particular fashion by an opposing counsel.[22] Accordingly, the court will permit plaintiffs to redact those numbers from any documents ordered produced herein.[23]

[13] [14] c. Within this general category, it is also appropriate to distinguish between documents that were, at some point, provided to the IRS and certain transmittal letters and memoranda associated with the subsequent transmission of those documents to other parties. The latter documents, which were not provided to the IRS, fall into two broad categories. Some contain absolutely no factual or legal content and merely identify the sender, the recipient, the list of documents transferred (with varying specificity) and the date of the transfer. Arguably, these bare-bone documents are protected by the work product doctrine as they serve only to reveal the date that plaintiffs' counsel first obtained the documents. *See Beinin v. Center for Study Popular Culture*, 2007 WL 832962, at *3 (N.D.Cal. Mar.16, 2007). But, even if this were true, plaintiffs have waived their privilege in this regard as the essence of the identifying information in question was provided to defendant in their privilege logs. *Cf. id* at *6 (holding that a party was not required to list the dates that documents were transmitted to counsel in its privilege log because "the information is akin to a cover letter that might have accompanied a document collection in the pre-email era, and it is therefore part of the work product to which Beinin is not entitled."). To the extent that the cover letters and memoranda reveal the instructions of plaintiffs' counsel or contain other legal or factual analysis, they, under the analysis mapped out above, are undoubtedly protected by either the attorney-client privilege or the work product doctrine and should not be produced.[24]

d. But, the court hastens to add that the same conclusion does not obtain as to the documents that were attached to these transmittals. ***138** As was well explained by one district court—

> stapling one privileged document to a non-privileged document does not cloak the non-privileged material with protection from discovery. Therefore, to the extent that privileged fax or other cover sheets are attached to non-privileged documents that fall into other enumerated categories, the non-privileged documents must be produced.

In re Gabapentin Patent Lit., 214 F.R.D. 178, 187 (D.N.J.2003); *see also* *McCook Metals, LLC v. Alcoa, Inc.*, 192 F.R.D. 242, 254 (N.D.Ill.2000) (non-privileged letter to third party attached to privileged document was not privileged); *Sneider v. Kimberly–Clark Corp.*, 91 F.R.D. 1, 4 (N.D.Ill.1980) ("Attachments which do not, by their content, fall within the realm of the privilege cannot become privileged by merely attaching them to a communication with the attorney."). These cases simply reflect a corollary to the broader rule that a "pre-existing document which could have been obtained by court process from the client when he was in possession may also be obtained from the attorney by similar process following transfer by the client in order to obtain more informed legal advice." *Fisher*, 425 U.S. at 403–04, 96 S.Ct. 1569.

[15] e. At the risk of carting coal to Newcastle, one final observation is in order: Plaintiffs seemingly overlook the most obvious implication of their assertion that most of these documents were already provided to the IRS—that is, that the release of those documents to their adversary waived any privileges that otherwise might be associated with those documents. *See Bradley v. Comm'r of Internal Revenue*, 209 Fed.Appx. 40 (2d Cir.2006) (attorney-client privilege waived where taxpayer "had disclosed those documents to his accountant, who subsequently disclosed the documents to the IRS during an audit"); *see also* *MIT*, 129 F.3d at 684–86 (disclosure to government audit agency waived privilege with respect to documents sought by IRS); *Comprehensive Habilitation Servs., Inc. v. Commerce Funding Corp.*, 240 F.R.D. 78, 86 (S.D.N.Y.2006) (documents disclosed to the IRS were not privileged under the work product doctrine; disclosure inconsistent with maintaining secrecy against opponents). The same conclusion—that the attorney client and work product privileges were waived—applies as to documents that plaintiffs previously provided to the State of New York's Department of Taxation. *See Unocal Corp. v. United States*, 2005 WL 3736952, at *3 (N.D.Cal. Dec.23, 2005) ("[t]he protections vis-a-vis disclosure to the IRS in this matter were waived by the production to the State of California"). Therefore, even assuming *arguendo* that somewhere hidden in these documents are nuggets of

confidential information, it remains that those documents are not entitled to protection from discovery here.

2. Documents provided by plaintiffs to their counsel and vice-versa.

Plaintiffs also seek to protect a variety of communications that they sent to their various attorneys and vice-versa. As to these documents, it is, at the outset, again important to distinguish between the communications themselves and pre-existing documents attached to those communications.

[16] **[17]** a. This is an opportune point to reemphasize that, under the attorney-client privilege, it is the communication itself that is protected—"[t]he privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Upjohn*, 449 U.S. at 395–95, 101 S.Ct. 677;*see also PaineWebber Group, Inc. v. Zinsmeyer Trusts Partnership*, 187 F.3d 988, 994 (8th Cir.1999). Put differently, " '[t]he client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporate a statement of such fact into his communication to his attorney.' " *Upjohn*, 449 U.S. at 396, 101 S.Ct. 677 (quoting *Philadelphia v. Westinghouse Elec. Corp.* 205 F.Supp. 830, 831 (E.D.Pa.1962)). Thus, as discussed above, documents do not acquire protection under the attorney-client privilege merely because they were transferred from client to attorney. *See Fisher*, 425 U.S. at 403–04, 96 S.Ct. 1569;*Grant v. United* ***139** *States*, 227 U.S. 74, 79–80, 33 S.Ct. 190, 57 L.Ed. 423 (1913).[25] Likewise, the work product doctrine does not shield from discovery documents created by third parties. *See Nobles*, 422 U.S. at 238–39 & n. 13, 95 S.Ct. 2160; *Matter of Grand Jury Subpoenas Dated Oct. 22, 1991, and Nov. 1, 1991*, 959 F.2d 1158, 1166 (2d Cir.1992).[26]

b. As to a few documents that themselves represent communications between plaintiffs and their counsel, another issue is lurking—whether plaintiffs have waived their privileges as to all or some of these documents by relying upon the advice of counsel or other tax professionals. In this regard, it is critical that plaintiffs' complaint challenges the imposition of various "accuracy-related penalties" under section 6662(a) of the Code. It avers that those penalties were imposed, in part, based upon section 6662(b) of the Code, which imposes a penalty to the portion of any underpayment which is attributable to "[n]egligence or disregard of rules or regulations," or "any substantial understatement of income." 26 U.S.C. § 6662(b)(1), (2).

Counsel's advice clearly could play a role in whether either penalty is sustained. Regarding the negligence penalty in section 6662(b)(1), section 6662(c) states that—

> For purposes of this section, the term "negligence" includes any failure to make a reasonable attempt to comply with the provisions of this title, and the term "disregard" includes any careless, reckless or intentional disregard.

26 U.S.C. § 6662(c). The decisional law makes clear that good faith reliance upon the advice of counsel or a qualified accountant may negate a finding that taxpayer acted negligently or in disregard of rules or regulations.[27] Good faith reliance upon the advice of counsel or a qualified accountant also could play a role in reducing the understatement that may trigger the substantial understatement penalty in section 6662(b)(2). In this regard, section 6662(d)(1)(B) reduces the understatement by the portion attributable to "the tax treatment of any item by the taxpayer if there is or was substantial authority for such treatment." Furthermore, section 6664(c)(1) of the Code, which plaintiffs invoke in their complaint, provides that "[no] penalty shall be imposed ... with respect to any portion of an underpayment if it ***140** is shown that there was a reasonable cause for such portion and ... the taxpayer acted in good faith with respect to such portion." *See Green v. Comm'r of Internal Revenue*, 507 F.3d 857, 871–72 (5th Cir.2007). Certainly, advice from counsel or a qualified accountant could establish that there was "substantial authority" or "reasonable cause" for the treatment of an item on a return or, at the least, that the taxpayer acted in "good faith." *See*26 C.F.R. § 1.6664–4(b)(1) ("Reliance on ... professional advice ... constitutes reasonable cause and good faith if, under all the circumstances, such reliance was reasonable and the taxpayer acted in good faith."); *id.* at § 1.6664–4(c) (reliance on tax advice is reasonable if the taxpayer provided the adviser

with necessary and accurate information and if the taxpayer demonstrates actual, good faith reliance on the adviser's judgment). Various cases, indeed, have predicated findings in this regard upon the totality of the nature and content of the communications that occurred between the taxpayer and its advisers. [28]

Providing thoughtful guidance on this point, the Tax Court has held that the attorney-client privilege is impliedly waived where a taxpayer "affirmatively raise[s] a claim that can only be effectively disproven through discovery of attorney-client communications." *Bernardo v. Comm'r of Internal Revenue*, 104 T.C. 677, 691, 1995 WL 366003 (1995); *see also* *Johnston v. Comm'r of Internal Revenue*, 119 T.C. 27, 36, 2002 WL 1821682 (2002). Here, plaintiffs' complaint suggests that they intend to rely upon the professional advice that they received in seeking to overturn various of the penalties asserted by the IRS. Thus, plaintiffs aver that Evergreen filed its 1999 tax return "in reliance on qualified tax professionals who were in possession of all pertinent facts," and that they "believed when the experts opined that the position taken was more likely than not the correct position." They further aver that Evergreen and its partners employed "well-qualified advisors" to evaluate the proper tax treatment of the items at issue and that Mr. Nussdorf, in particular, "secured tax opinions" from his "respected tax advisors" who informed him that the tax treatment was more likely than not correct. Moreover, plaintiffs explicitly allege that there was "substantial authority" for the treatment of all items on Evergreen's 1999 return and that each partner had a "reasonable basis" for believing the treatment of each item was proper. Nonetheless, these references fall short of an explicit invocation of a reliance upon counsel defense and plaintiffs have not formally invoked such a defense in any of their other filings to date. To clarify this matter, the court shall require the production of certain documents unless by the specified date of production, plaintiffs expressly disavow any reliance-upon-counsel defenses to the accuracy penalties at issue.

3. Communications to and from accountants.

Another category of documents here are those in which an accountant is either the sender or the recipient. Plaintiffs assert that many of these documents are privileged because they were provided to its counsel by various accountants who either were hired by their counsel or otherwise were aiding their counsel in providing plaintiffs with legal advice. Although plaintiffs do not directly cite this case in support of their privilege claims, it would appear that their theory hinges heavily on Judge Friendly's opinion in *United* ***141** *States v. Kovel*, 296 F.2d 918 (2d Cir.1961)—indeed, several of the documents at issue specifically invoke that case in footers.

[18] a. In *Kovel*, the Second Circuit held that the attorney-client privilege can protect communications between a client and his accountant, or the accountant and the client's attorney. Recognizing that an accountant can play a role analogous to an interpreter, the court reasoned that "the complexities of modern existence prevent attorneys from effectively handling clients' affairs without help of others," the attorney-client "privilege must include all the persons who act as the attorney's agents." 296 F.2d at 921 (quoting 8 Wigmore, § 2301, at 583). By way of further rationale, *Kovel* explained that "the presence of an accountant, whether hired by the lawyer or by the client, while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege" when "the accountant is necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit." *Id.* at 922. Although never adopted by the Federal Circuit, this *Kovel* rule, as well as various corollaries thereto, enjoy wide support in a majority of the circuits. [29]

[19] **[20]** **[21]** b. This rule, however, has limits. For one thing, subsequent decisions in the Second Circuit and elsewhere make clear that "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." *Cavallaro*, 284 F.3d at 247;*see also* *Gurtner*, 474 F.2d at 299. Rather, *Kovel* applies only "when the accountant's role is to clarify communications between attorney and client"—when he, in other words, acts "as a translator or interpreter of client communications." *United States v. Ackert*, 169 F.3d 136, 139 (2d Cir.1999); *see also* *United States v. Adlman*, 68 F.3d 1495, 1499–1500 (2d Cir.1995) (hereinafter "*Adlman I*"). In particular, a communication between an attorney and an accountant does not become shielded by the attorney-client privilege simply because "the communication proves important to the attorney's ability to represent the client." *Ackert*, 169 F.3d at 139;*see also* *Hickman*, 329 U.S. at 508, 67 S.Ct. 385. Further, in *Kovel*, the Second Circuit made clear that for

the privilege to attach, the communication must be made "for the purpose of obtaining legal advice," adding that "[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." *Kovel*, 296 F.2d at 922;*see also* *Cavallaro*, 284 F.3d at 247; *Adlman I*, 68 F.3d at 1500; *United States v. Brown*, 478 F.2d 1038, 1040 (7th Cir.1973); *In re G–I Holdings, Inc.*, 218 F.R.D. at 434–35; *United States v. ChevronTexaco Corp.*, 241 F.Supp.2d 1065, 1072 (N.D.Cal.2002) ("*Kovel* explicitly excludes the broader scenario in which the accountant is enlisted merely to give her own *advice* about the client's situation." (Emphasis in original)).

[22] c. It bears further noting that *Kovel* and most of its progeny deal only with the situation where an accountant was acting as an attorney's agent and not where an accountant is acting as the client's agent. *See* *Kovel*, 296 F.2d at 922 n. 4; *In re Grand Jury Proceedings Under Seal v. U.S.*, 947 F.2d 1188, 1191 (4th Cir.1991). In the latter situation, communications by the accountant to the attorney are viewed as equivalent to communications being made by the client to the attorney and hence are potentially covered by the attorney-client privilege. *See, e.g., id.* However, that conclusion does not necessarily shield such documents from discovery. If the documents are unprotected by privilege in the hands of the accountant or if the privilege is somehow waived other than by the communication from the accountant to the client's attorney, the documents may, ***142** nonetheless be discoverable. *See Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 2007 WL 2122440, at *4 (D.Kan. Jul.20, 2007) (*Kovel* did not protect accountant's compilation of records that were subsequently provided to attorney); ■ *In re Hyde*, 222 B.R. 214, 220 (Bankr.S.D.N.Y.1998), *rev'd on other grounds*,235 B.R. 539 (S.D.N.Y.1999), *aff'd*,205 F.3d 1323 (2d Cir.2000) ("Neither *Kovel* nor any other case permits a party to hide unprivileged documents by given them to his attorney or forensic accountant."); *see also ECDC Environ. v. N.Y. Marine and Gen. Ins. Co.*, 1998 WL 614478, at *8 (S.D.N.Y. Jun.4, 1998) (underlying factual information cannot be protected under extension of *Kovel*). The latter rule, of course, mirrors the rule that applies to attorneys—a party simply cannot prevent the disclosure of papers that would otherwise be discoverable by the simple expedience of transferring them to either an attorney or an accountant.

[23] d. Various communications in this category involve correspondence between one or more of plaintiffs or their counsel and one of plaintiffs' accountant, Lawrence H. Cohen. On August 18, 2004, Mr. Cohen was hired by plaintiffs' counsel to perform accounting services with respect to Mr. Nussdorf and Ms. Strum, including analyses of their records and the possible preparation of tax returns for them. The agreement designated Mr. Cohen as an agent of plaintiffs' counsel for these purposes. Some of the correspondence between plaintiffs and Mr. Cohen, as well as between Mr. Cohen and plaintiffs' counsel, predates this agency agreement. In none of this correspondence does it appear that Mr. Cohen is performing the role of an interpreter on behalf of the plaintiffs, so as to invoke the *Kovel* rule. Nor does it appear that these communications meet the requirements of section 7525 as they were not related to Mr. Cohen's provision of tax advice. Instead, this correspondence generally serves only to accompany various documents relating to plaintiffs' investments in the transactions at issue and otherwise to their 1999 and 2000 taxable years. Accordingly, no portion of these document packages appears to be privileged.

[24] e. Other of the documents in question involve communications between one or more of plaintiffs, Mr. Cohen and plaintiff's counsel that occurred after the agency agreement took effect. Apart from *Kovel*, it would appear that any exchanges that occurred between Mr. Cohen and plaintiffs' counsel after the agreement took effect are potentially protected by the work product doctrine. This result proceeds directly from RCFC 26(b)(3), which extends the work product protection to materials prepared "by or for [the] party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." Indeed, in *Nobles*, the Supreme Court emphasized that the work product doctrine does not merely protect an attorney's thought processes because—

> attorneys must often rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.

422 U.S. at 238–39, 95 S.Ct. 2160;*see also* Wright, Miller & Marcus, *supra*, at § 2024 ("Under Rule 26(b)(3), it is clear that all documents and tangible things prepared by or for the attorney of the party from whom discovery is sought are within the qualified immunity given to work product ..."). Since this rule applies to materials produced for a party's attorney by an outside accountant,[30] it assuredly applies where that assistance is supplied by an agent hired by the same attorney, including an accountant. *See In re ContiCommodity Servs., Inc., Securities Litigation*, 123 F.R.D. 574, 577 (N.D.Ill.1988) ("To the extent, however, that [an accountant] was an agent of the customer's attorneys involved in an investigation for purposes of the district court suit, documents he prepared for that purpose are protected by the work product immunity."); *see also United States v. Bell*, 95–1 U.S.T.C. ¶ 50,006 (N.D.Cal.1994) (privileges would apply to reports prepared by accountant if retained by ***143** attorney as non-testifying expert); *cf.* *Cavallaro*, 284 F.3d at 248.

[25] f. Other types of documents that can be viewed as falling generally within this category include communications between: (i) other accountants who worked for the Mr. Nussdorf/Ms. Strum over time and their investment advisers (and between other representatives of plaintiffs and the same investment advisers); (ii) various accountants working simultaneously for Mr. Nussdorf/Ms. Strum and their family business, Quality King Distributors; and (iii) Mr. Cohen and the IRS, including, in particular, responses and supplemental responses to so-called "Information Document Requests" (IDRs) made by the IRS. As far as the court can see, none of these documents is protected by any of three privileges discussed herein. Nor is there any indication that any of the affected parties were acting in concert with plaintiffs' counsel or any other protected individual for the purpose of facilitating legal advice. Rather, each of these communications were made privy to one or more parties as to whom plaintiff could not expect confidentiality: their investment advisers,[31] accountants not involved in the provision of tax advice,[32] and the IRS itself.[33] Accordingly, plaintiff must produce these documents.

4. Communications between and among legal representatives: the Common Interest Rule.

[26] a. Others of the communications at issue involve contact between one or more of the plaintiffs or their representatives and attorneys other than their counsel in this case. As noted above, the disclosure of a document to a third party can effectuate a waiver of the attorney-client privilege and sometimes the work product privilege. Of course, no such waiver occurs if both parties to a communication represent the same client, albeit in different capacities. *See EEOC v. Texas Hydraulics, Inc.*, 246 F.R.D. 548, 554–55, 2007 WL 3355426, at *6 (E.D.Tenn.2007); *Buckner v. IRS*, 25 F.Supp.2d 893, 900 (N.D.Ind.1998); *In re FiberMark, Inc.*, 330 B.R. 480, 500 (Bankr.D.Vt.2005). Nor, as we will see, does a waiver occur if the client or its representative is communicating with attorneys representing individuals or an entity with shared legal interests. The latter concept, known as "common interest doctrine," "extends the attorney-client privilege to otherwise non-confidential communications in limited circumstances." *BDO Seidman*, 492 F.3d at 815. A few more words on this concept are warranted.

The "common interest doctrine" applies "where the parties undertake a joint effort with respect to a common legal interest," and is "limited strictly to those communications made to further an ongoing enterprise." *BDO Seidman*, 492 F.3d at 816;*see* *Genentech*, 122 F.3d at 1415; *United States v. Evans*, 113 F.3d 1457, 1467 (7th Cir.1997). Generally speaking, the scope of this doctrine ***144** is limited to a common legal interest to which the parties formed a common strategy. Communications covered by this doctrine can take several forms. For example, "the common interest doctrine applies when two or more parties consult or retain an attorney concerning a legal matter in which they share a common interest." *Hanson v. U.S. Agency for Intern. Dev.*, 372 F.3d 286, 292 (4th Cir.2004); *see also* *Cavallaro*, 284 F.3d at 249–50; *In re Lindsey*, 158 F.3d 1263, 1282 (D.C.Cir.1998); *B.F. Meyers & Co., Inc. v. United States*, 41 Fed.Cl. 729, 732 (1998). Similarly, the " 'privilege applies to communications made by the client or the client's lawyer to a lawyer representing another in a matter of common interest.' " *Cavallaro*, 284 F.3d at 249–50 (quoting 3 Weinstein's Federal Evidence, § 503.21[2] (2d ed.2002)); *see* *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir.1997) ("If two or more clients with a common interest in a litigated or a non-litigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged ... that relates

to the matter is privileged as against third persons.") (quoting what is now Restatement (Third) of the Law Governing Lawyers § 76(1)). In either instance, the communications are privileged as against third parties, whether or not there is actual litigation in progress. *See United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir.1996). [34]

[27] b. In the case *sub judice*, plaintiffs invoke the common interest doctrine as to communications between: (i) counsel for plaintiffs' business and their counsel in this litigation; and (ii) plaintiffs and a law firm representing BDO Seidman in a case involving similar transactions to those at issue. In the court's view, both sets of communications are protected by the common interest extension of the attorney-client privilege as they were designed to further a joint or common defense. Again, however, this ruling does not apply to the attachments to these communications, to the extent that those documents themselves are not privileged (*e.g.*, copies of tax returns, or communications received from the IRS).

C. Relevancy Objections.

Lastly, plaintiffs object to the production of various documents on the grounds that they involve taxpayers and taxable years not in issue in this case, making them, in plaintiffs' view, irrelevant to the subject matter involved in this case within the meaning of RCFC 26(b)(1). Consistent with the goal of promoting the "just and complete resolution of disputes," the Federal Circuit has stated, "[r]elevancy for purposes of Rule 26 is broadly construed." *Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422, 424 (Fed.Cir.1993); *see also Centurion Indus., Inc. v. Warren Steurer and Assocs.*, 665 F.2d 323, 326 (10th Cir.1981); *Jade Trading, LLC v. United States*, 65 Fed.Cl. 188, 191 (2005). Moreover, as RCFC 26(b)(1) further emphasizes, relevant information for purposes of discovery is information "reasonably calculated to lead to the discovery of admissible evidence." *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9th Cir.1992); *see also Eggleston v. Chicago Journeymen Plumbers' Local Union*, 657 F.2d 890, 903 (7th Cir.1981), *cert. denied*,455 U.S. 1017, 102 S.Ct. 1710, 72 L.Ed.2d 134 (1982); *JZ Buckingham Investments, LLC v. United States*, 78 Fed.Cl. 15, 19 (2007). Accordingly, in the context of a case such as this, all that is required to satisfy the relevancy requirement ***145** of RCFC 26(b)(1) is that the requested item may throw light upon the correctness or incorrectness of the taxpayers' returns and the IRS' assertion of penalties in reaction thereto.

[28] Plaintiffs' relevancy concerns are largely made *in vacuo*. The court's *en camera* review suggests that all of the documents that contain references to other taxpayers also contain references to plaintiffs, making those documents, as a whole, directly relevant to the case at hand. Plaintiffs have provided the court with no legal basis upon which to excise the names of the unrelated taxpayers from what otherwise are relevant documents, nor have any of those taxpayers appeared to object to the production of these documents. *See Howell v. City of New York*, 2007 WL 2815738, at *2 (E.D.N.Y. Sept.25, 2007) (refusing to allow a party "to selectively excise from otherwise discoverable documents those portions that they deem not to be relevant."); *Medtronic Sofamor Danek, Inc. v. Michelson*, 2002 WL 33003691, at *5 (W.D.Tenn. Jan.30, 2002) (noting that the Federal Rules of Civil Procedure recognize redaction only for privileged material). [35] Moreover, because the unrelated taxpayers plainly were involved in the same or similarly structured transactions as plaintiffs, it is far from clear that the facts concerning their participation are irrelevant here. Even less tenable are plaintiffs' objections predicated upon references in certain documents to their taxable years other than those directly at issue. Certainly, it is possible that events in those taxable years could impact the treatment of tax items in years directly before the court, particularly given the penalties at issue and the potential defenses thereto. *See generally, United States v. Doyle*, 2007 WL 2670057, at *6 (D.Kan. Sept.7, 2007); *Calamari v. United States*, 2003 WL 345852, at *5 (E.D.Mich. Jan.23, 2003). Despite various opportunities, plaintiffs have not shown otherwise. In sum, because the court concludes that, with one obvious exception, [36] the information sought is reasonably calculated to lead to the discovery of admissible evidence, it finds that plaintiffs' relevancy objections are not well taken.

III. CONCLUSION

This court need go no further. Based on the foregoing, ad as reflected in the attached Appendix A, the court finds as follows:

1. On or before January 11, 2008, the following documents (or the designated portions thereof) shall be produced by plaintiff to defendant: **2, 2a, 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2i, 2j, 2k, 3, 3a, 3b, 3c, 3d, 3e, 3f, 3g, 4, 5, 7a, 7b, 7c, 7d, 8a, 8b, 8c, 8d, 8e, 8f, 8g, 8h, 8i, 8j, 8k, 8l, 8m, 8n, 8o,**

8p, 8q, 8r, 8s, 8t, 8u, 8v, 8w, 8x, 8y, 8z, 8aa, 8bb, 8cc, 8dd, 8ee, 8ff, 8gg, 8hh, 8ii, 8jj, 8kk, 8ll, 8mm, 8nn, 8oo, 8pp, 8qq, 8rr, 8ss, 8tt, 8uu, 8vv, 10, 11a, 12 (second page through end), 12a, 13 (second e-mail through end), 15 (second e-mail through end); 17 (second e-mail through end), 19 (second e-mail through end), 22 (second e-mail on pages ending 8778 and 8814 and remainder), 23.1, 23.2, 23.4, 24 (second page through end), 26a, 26b, 26d, 26f, 27a, 28a, 28b, 28c, 28d, 29.1, 29.3, 29.4, 29.5, 29.5(e), 29.5(f), 29.5(h), 29.8, 29.9, 30, 31 (second page through end), 33a, 33b, 33c, 33d, 33e, 33f, 34, and 35 (second page through end). Plaintiff shall excise from these document the "NS" numbers that were contained on the versions of these documents produced for *en camera* review.

2. On or before January 11, 2008, the following documents (or the designated portions thereof) shall be produced by plaintiff to defendant unless on or before that date, plaintiff files with the court a document disavowing any intention to present any form of a reliance upon counsel defense in this case: **9 and 29.5(g).** Plaintiff shall excise ***146** from the documents produced the "NS" numbers that were contained on the versions of these documents produced for *en camera* review.

3. The following documents (or the designated portions thereof) are appropriately subject to one or more privileges and shall not be produced: **1, 6, 6a, 6b, 6c, 6d, 7, 8, 11, 12 (first page), 12b, 12 (first e-mail), 14, 15 (first e-mail), 16, 17 (first e-mail), 18, 19 (first-email), 20, 22 (first e-mail on NS pages ending 8778 and 8814), 23, 23.3, 23.5, 23.6, 23.7, 24 (first page), 25, 26, 26c, 26e, 27, 28, 29, 29.2, 29.5(a), 29.5(b), 29.5(c), 29.5(d), 29.6, 29.7, 31 (first page), 32, 33, and 35 (first page).**

4. Because neither party has fully prevailed herein, the court will not order the payment of reasonable expenses. *See*RCFC 26(a)(4).

5. On or before January 18, 2008, the parties shall file a joint status report indicating how this case should proceed, with a proposed schedule, as appropriate.

IT IS SO ORDERED.

APPENDIX A [37]

All Citations

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Footnotes

1 RCFC 26(b)(5) states the following regarding the content of privilege logs:

> When a party withholds information ... by claiming that it is privileged ... the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

2 While an inadequate privilege log may be the basis for disallowing a privilege, *see* *SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 476 (E.D.Pa.2005); *Potter v. United States,* 2002 WL 31409613, at *8 (S.D.Cal. July 26, 2002), such a finding is in the nature of a sanction and, at least in the first instance, should be weighed in terms of the intent of the party producing the defective log and against the harm caused by disclosure of what might otherwise be privileged documents. *See*Fed.R.Civ.P. 26(b)(5) advisory comm. notes (1993); *see also* *Burlington Northern & Santa Fe Ry. Co. v. U.S. Dist. Ct. for Montana,* 408 F.3d 1142, 1149 (9th Cir.2005) (rejecting a *per se* rule under which a privilege is deemed waived if a proper privilege log is not initially produced). As other courts have done, this court concluded that the best course was to obtain additional information from plaintiff. *See* *Smithkline Beecham Corp. v. Apotex Corp.*, 193 F.R.D. 530, 534 (N.D.Ill.2000). Indeed, even with a log that complied with the rule, the court found it necessary, in this complex matter, to request an *en camera* review of the subject documents.

3 The Supreme Court has recognized the important role that *en camera* inspection of disputed documents often plays in determining the existence of a privilege. *See* *United States v. Zolin,* 491 U.S. 554, 568–69, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989); *see also* *United States v. Nixon,* 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

4 *See* James M. Lynch, "War of the [Tax] Worlds: Privilege Versus Transparency," 759 PLI/Tax 77 (2007)War of the [Tax] Worlds: Privilege Versus Transparency," 759 PLI/Tax 77 (2007) ("Many members of the tax profession, clients, and Internal Revenue Service ... disagree about the current state of privilege and privacy in federal income tax matters."); Linda M. Beale, "Tax Advice Before the Return: the Case for Raising Standards and Denying Evidentiary Privileges," 25 Va. Tax Rev. 583 (2006) (hereinafter "Beale"); Richard Lavoie, "Making a List and Checking it Twice: Must Tax Attorneys Divulge Who's Naughty and Nice?," 38 U.C. Davis L.Rev. 141, 146–48 (2004); Lee A. Sheppard, "Confidentiality and Customer Relations," 99 Tax Notes 1303, 1304–06 (June 2, 2003); Bruce Kayle, "The Tax Adviser's Privilege in Transaction Matters: A Synopsis and a Suggestion," 54 Tax Law. 509 (2001) (hereinafter "Kayle").

5 *See* *In re Excel Innovations, Inc.*, 502 F.3d 1086, 1099 (9th Cir.2007); *United States v. BDO Seidman, LLP*, 492 F.3d 806, 821 (7th Cir.2007); *In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir.2000); *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136, 144 (2d Cir.), *cert. denied*,481 U.S. 1015, 107 S.Ct. 1891, 95 L.Ed.2d 498 (1987); *Christofferson v. United States*, 78 Fed.Cl. 810, 815 (2007).

6 *See*E. Cleary, McCormick on Evidence § 87 (2d edition 1972). As is recorded in his *In Verrem*, Cicero, while prosecuting the governor of Sicily for corruption and extortion in 70 B.C., could not call the governor's advocate as a witness as that would have violated confidences protected under Roman law. Referring to the advocate, Cicero observed "[i]s it not owing, not to the innocence of your client, but to the exception made by the law, I am prevented from summoning you as a witness on my side on this charge?" Marcus Tullius Cicero, "Second Oration Against Verres," Book Two (70 B.C.); *see also* Max Radin, "The Privilege of Confidential Communication Between Lawyer and Client," 16 Cal. L.Rev. 487 (1927). It was the same Cicero, of course, who once said that "[t]he first duty of a man is the seeking after and the investigation of truth."

7 Although it ultimately was not adopted, the rule describing the attorney-client privilege promulgated by the Supreme Court in 1972 as part of the Proposed Federal Rules of Evidence has been recognized "as a source of general guidance regarding federal common law principles." *In re Grand Jury Investigation*, 399 F.3d 527, 532 (2d Cir.2005); *see also* 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 503.02 (Joseph M. McLaughlin, ed., 2d ed.2006). Proposed Rule 503 was particularly instructive in summarizing the types of communications that may be subject to the privilege—

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client, (1) between himself or his representative and his lawyer or his lawyer's representative, or (2) between his lawyer and the lawyer's representative, or (3) by him or his lawyer to a lawyer representing another in a matter of common interest, or (4) between representatives of the client or between the client and a representative of the client, or (5) between lawyers representing the client.

See Proposed Fed.R.Evid. 503(b), 56 F.R.D. 183, 236 (1972); *see also* *BDO Seidman*, 492 F.3d at 814–15 (relying on this proposed rule).

8 *See, e.g.,* *In re Seagate Technology*, 497 F.3d 1360, 1372 (Fed.Cir.2007) (quoting *Fort James v. Solo Cup Co.*, 412 F.3d 1340, 1349 (Fed.Cir.2005)) ("The widely applied standard for determining the scope of a waiver ... is that the waiver applies to all other communications relating to the same subject matter."); *see also* *EchoStar*, 448 F.3d at 1299.

9 *See, e.g.,* *United States v. Jacobs*, 117 F.3d 82, 89–90 (2d Cir.1997) ("[T]he extrajudicial disclosure of a portion of an attorney-client conversation ... cannot in itself waive the privilege as to the rest of the conversation."); *Long–Term Capital Holdings v. United States*, 2002 WL 31934139, at *3 (D.Conn. Oct.30, 2002) (quoting *In re von Bulow*, 828 F.2d 94, 102 (2d Cir.1987) ("the rule that 'testimony as to part of a privileged communication, in fairness, requires production of the remainder' does not apply when the privilege-holder or his attorney makes extrajudicial disclosures that are not subsequently placed at issue during the litigation")).

10 One court described the following factors as being relevant in this context:

> Among the factors which appear to be pertinent in determining whether disclosed and undisclosed communications relate to the same subject matter are: 1) the general nature of the lawyer's assignment; 2) the extent to which the lawyer's activities in fulfilling that assignment are undifferentiated and unitary or are distinct and severable; 3) the extent to which the disclosed and undisclosed communications share, or do not share, a common nexus with a

distinct activity; 4) the circumstances in and purposes for which disclosure originally was made; 5) the circumstances in and purposes for which further disclosure is sought; 6) the risks to the interests protected by the privilege if further disclosure were to occur; and 7) the prejudice which might result if disclosure were not to occur.

United States v. Skeddle, 989 F.Supp. 917, 919 (N.D.Ohio 1997). Several courts have emphasized that, to fall under the scope of the subject-matter waiver rule, the other documents must "be directly related to the [disclosed subject]."

United States v. (Under Seal), 748 F.2d 871, 875 n. 7 (4th Cir.1984); *see also* *In re Grand Jury Proceedings,* 78 F.3d at 255–56; Jennifer A. Hardgrove, "Scope of Waiver of Attorney–Client Privilege: Articulating a Standard that Will Afford Guidance to Courts," 1998 U. Ill. 643, 662 (1998).

11 The Federal Circuit said much the same thing in *Pioneer Hi–Bred Int'l,* 238 F.3d at 1374:

A party does not forego the attorney-client privilege with respect to merger negotiations by disclosing the existence of the merger, the negotiations between the parties concerning the merger, or the property rights of the respective parties, and a waiver occurs only when a party relies on or discloses advice of counsel or other privileged information in connection with the merger.

See also *United States v. Abrahams,* 905 F.2d 1276, 1284 (9th Cir.1990), *overruled on other grounds,* *United States v. Jose,* 131 F.3d 1325 (9th Cir.1997) ("communications made to acquire legal advice about what to claim on tax returns may be privileged"); *United States v. El Paso Co.,* 682 F.2d 530, 539 (5th Cir.1982) ("we would be reluctant to hold that a lawyer's analysis of the soft spots in a tax return and his judgment on the outcome of the litigation on it are not legal advice"); *Textron,* 507 F.Supp.2d at 147 ("counsel's opinions regarding [return] items that might be challenged ... and assessment of ... prevailing in any ensuing litigation are protected by attorney-client privilege"); *United States v. ChevronTexaco Corp.,* 241 F.Supp.2d 1065, 1082 (N.D.Cal.2002) ("Determining the tax consequences of a particular transaction is rooted virtually entirely in the law. The advisor must analyze the tax code, IRS rulings, decisions of the Tax Court, etc. Communications offering tax advice or discussing tax planning or the tax consequences of alternative business strategies are 'legal' communications."); *Boca Investerings Ptshp. v. United States,* 31 F.Supp.2d 9, 12–13 (D.D.C.1998) (finding that portions of a memorandum were protected that communicate "the lawyer's opinion as to the technical soundness of the contemplated transactions").

12 Certainly, the public considerations underlying the attorney-client privilege apply to tax planning even if it is designed to reduce tax obligations. As was said in *Gregory v. Helvering,* 293 U.S. 465, 469, 55 S.Ct. 266, 79 L.Ed. 596 (1935): "[t]he legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted." *See also* *Knetsch v. United States,* 364 U.S. 361, 365, 81 S.Ct. 132, 5 L.Ed.2d 128 (1960); *Comm'r of Internal Revenue v. Newman,* 159 F.2d 848, 850–51 (2d Cir.1947) (Hand, J., dissenting) ("Over and over courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible.").

13 In this circuit, obvious parallels exist between the treatment of legal opinions rendered in support of tax positions and opinions rendered on the validity of patents. In the latter instance, both the Federal Circuit and its predecessor have made clear that the opinions may, in appropriate circumstances, receive protection under the attorney-client privilege. *See, e.g., Ledex, Inc. v. United States,* 172 U.S.P.Q. 538, 539 (Ct.Cl.1972); *Am. Standard Inc. v. Pfizer, Inc.,* 828 F.2d 734, 746 (Fed.Cir.1987); *see also* *Sperry v. Florida,* 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed.2d 428 (1963).

14 *See also* *In re Seagate Tech., LLC,* 497 F.3d 1360, 1374–75 (Fed.Cir.2007); *EchoStar,* 448 F.3d at 1301 (work product doctrine "encourages attorneys to write down their thoughts and opinions with the knowledge that their opponents will not rob them of the fruits of their labor"); *Genentech,* 122 F.3d at 1415.

15 In the words of the Federal Circuit, this rule "only allows discovery of 'factual' or 'non-opinion' work product and requires a court to protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative." *EchoStar,* 448 F.3d at 1302 (internal quotations omitted); *see also* *Seagate Technology,* 497 F.3d at 1374–75 ("Whereas factual work product can be discovered solely upon a showing of substantial need and undue hardship, mental process work product is afforded even greater, nearly absolute, protection."); *Deseret Mgmt.,* 76 Fed.Cl. at 93.

16 *See* *United States v. Roxworthy*, 457 F.3d 590, 599 (6th Cir.2006) (following *Maine* and *Adlman*); *In re Grand Jury Subpoena*, 357 F.3d 900, 907–08 (9th Cir.2004); *E.E.O.C. v. Lutheran Social Servs.*, 186 F.3d 959, 968 (D.C.Cir.1999); *Martin v. Bally's Park Hotel & Casino*, 983 F.2d 1252, 1260 (3d Cir.1993); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir.1992); *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir.), *cert. denied*,484 U.S. 917, 108 S.Ct. 268, 98 L.Ed.2d 225 (1987); *Binks Mfg. Co. v. Nat'l Presto Indus., Inc.*, 709 F.2d 1109, 1119 (7th Cir.1983); *ChevronTexaco Corp.*, 241 F.Supp.2d at 1082 ("[E]xcept where a document would have been generated in the normal course of business even if no litigation was anticipated, the work product doctrine can reach documents prepared 'because of litigation' even if they were prepared in connection with a business transaction or also served a business purpose.").

17 *See* *Adlman*, 134 F.3d at 1198 ("We believe that a requirement that documents be produced primarily or exclusively to assist in litigation in order to be protected is at odds with the text .... of the Rule."); *In re Grand Jury Subpoena*, 357 F.3d at 908 ("[t]he question of entitlement to work product protection cannot be decided simply by looking at one motive that contributed to a document's preparation" but rather requires consideration of the "circumstances surrounding the document's preparation").

18 *See also* *BDO Seidman, LLP*, 492 F.3d at 827 ("[t]he tax practitioner privilege protects those communications which would be privileged if made to an attorney"); *Bisanti*, 414 F.3d at 170 n. 1 (section 7525 "extends to communications that would be privileged were they between a taxpayer and an attorney"); *BDO Seidman*, 337 F.3d at 810 ("the § 7525 privilege is no broader than that of the attorney-client privilege"); *Doe v. Wachovia Corp.*, 268 F.Supp.2d 627, 637–638 (W.D.N.C.2003) (section 7525 "does not protect work product"); *KPMG, LLP*, 237 F.Supp.2d at 39.

19 In addition to the specific cross-references found in the chart, the court, in makings its rulings, also relies on the preceding general discussions of the three privileges at issue.

20 *See, e.g.*, *Burns v. Bank of America*, 2007 WL 1589437, at *15 n. 13 (S.D.N.Y. June 4, 2007); *VNA Plus, Inc. v. Apria Healthcare Group, Inc.*, 1999 WL 386949, *6 (D.Kan. Jun.8, 1999) ("Asking for information already within the possession of the party seeking the discovery does not of itself make the interrogatory unduly burdensome or oppressive."); *Cook v. Rockwell Int'l Corp.*, 161 F.R.D. 103, 105 (D.Colo.1995) ("The fact that the moving party is already in possession of documents it seeks to obtain by inspection, is not necessarily a sufficient reason for denying discovery."); *Ft. Washington Resources, Inc. v. Tannen*, 153 F.R.D. 78, 79 (E.D.Pa.1994) ("it is not a bar to the discovery of relevant material that the same material may be in the possession of the requesting party or obtainable from another source"). Some older cases hold that discovery of documents may not be obtained when the requester already possesses those documents. *See, e.g. Korman v. Shull*, 184 F.Supp. 928, 935 (D.C.Mich.1960). But those cases hinge on former Rule 34 of the Federal Rules of Civil Procedure, which permitted discovery only when "good cause" was shown therefor. That, of course, is no longer the case. Indeed, there is no indication here that the request for these documents, which was made in the context of seeking a broader set of documents, was in bad faith or intended to harass plaintiffs. *Cf.* *Hendler v. United States*, 952 F.2d 1364, 1380–81 (Fed.Cir.1991).

21 A few of the documents that were attached to various communications here were sent by the IRS to one or more of the plaintiffs. While the court sees little potential benefit in defendant obtaining these documents from plaintiffs, plaintiffs have offered no basis for protecting these documents and, accordingly, the court determines that they also should be produced.

22 *See* *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 144 (D.Del.1982) (barring production of binders which "contain[ed] a small percentage of the extensive documents reviewed by plaintiff's counsel"); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 74 F.R.D. 613, 616 (S.D.N.Y.1977) (barring the production of notebooks that represented "counsel's ordering of the facts"); *see also* *In re Atlantic Financial Mgmt. Secs. Lit.*, 121 F.R.D. 141, 143 (D.Mass.1988) ("An attorney's choice of material does, to some extent, reveal his or her view of what is important in the case."); *compare* *Washington Bancorporation v. Said*, 145 F.R.D. 274, 276 (D.D.C.1992) (refusing to apply this rule where 20,000 documents had been selected for scanning); *Hambarian v. Comm'r of Internal Revenue*, 118 T.C. 565, 571, 2002 WL

1300014 (2002) (refusing to apply this rule where 100,000 pages of documents were selected from a larger universe of documents).

23 The documents provided by plaintiffs to the court for *en camera* review include duplicates of certain documents that will be produced under the court's ruling. Because production of such duplicates would only serve to reveal the "NS" numbers assigned to them and because the court has held that such numbers are protected and need not be revealed, there is no reason whatsoever to order plaintiffs to produce these duplicates to defendant.

24 *See, e.g.,* *Lugosch v. Congel,* 2006 WL 931687, at *31 (N.D.N.Y. Mar.7, 2006); *BancBoston Financial Co. v. Gould,* 1988 WL 76888, at *2 (N.D.Ill. July 14, 1988); *see also Mordesovitch v. Westfield Ins. Co.,* 244 F.Supp.2d 636, 648 (S.D.W.Va.2003) (holding, under West Virginia law, that cover letter containing theories and opinions about litigation were protected under work product doctrine); *Valero Transmission, L.P. v. Dowd,* 960 S.W.2d 642, 645 (Tex.1997) (holding that cover letter from lawyer to client was privileged because it gave specific legal advice).

25 *See also* *United States v. Davis,* 636 F.2d 1028, 1041 (5th Cir.1981) ("[D]ocuments created outside the attorney-client relationship should not be held privileged in the hands of the attorney unless otherwise privileged in the hands of the client, lest the client immunize ... evidence merely by depositing it with his attorney."); *cert. denied,*454 U.S. 862, 102 S.Ct. 320, 70 L.Ed.2d 162 (1981); *Bouschor v. United States,* 316 F.2d 451, 457 (8th Cir.1963) ("The delivery of the papers to the attorney does not create the privilege when it did not theretofore exist."); *see also* Paul R. Price, Attorney–Client Privilege in the United States, § 5.1 (2d ed.2007); Paul R. Rice, "Attorney–Client Privilege: Continuing Confusion about Attorney Communications, Drafts, Pre-existing Documents, and the Source of the Facts Communicated," 48 Am. U.L.Rev. 967, 989–94 (1999) (surveying additional cases).

26 Some of the documents eventually obtained by plaintiffs' attorney in this case fall into this category. They involve communications between plaintiffs and non-legal officers in Evergreen and related businesses, as well as public documents. Under the circumstances presented, neither of these types of documents are privileged. *See, e.g.,* *Computer Network Corp. v. Spohler,* 95 F.R.D. 500, 502 (D.D.C.1982) (communication from one corporate officer to another was not privileged); *In re Grand Jury Subpoena Duces Tecum,* 391 F.Supp. 1029, 1034 (S.D.N.Y.1975) (same); *In re Grand Jury Proceedings 88–9(MIA),* 899 F.2d 1039, 1043 (11th Cir.1990) (public documents are not privileged); *United States v. Gasparik,* 141 F.Supp.2d 361, 369 (S.D.N.Y.2001) (same); *see generally* *Navigant Consulting, Inc. v. Wilkinson,* 220 F.R.D. 467, 477 (N.D.Tex.2004) (documents created for a business purpose are not protected even though the "information developed ... may be helpful in legal proceedings").

27 *See, e.g.,* *Shaw v. Comm'r of Internal Revenue,* 2002 WL 187515 (U.S.Tax Ct. Feb.6, 2002); *Schwalbach v. Comm'r of Internal Revenue,* 111 T.C. 215, 230–31, 1998 WL 567814 (1998); *Ewing v. Comm'r of Internal Revenue,* 91 T.C. 396, 423–24, 1988 WL 89128 (1988), *aff'd without published opinion,*940 F.2d 1534 (9th Cir.1991); *see also* *United States v. Boyle,* 469 U.S. 241, 250, 105 S.Ct. 687, 83 L.Ed.2d 622 (1985) (construing similar language in 26 U.S.C. § 6651(a)(1)). The Tax Court has held that to rely on this defense, the taxpayer must establish that: (i) the adviser has sufficient expertise to justify reliance; (ii) the taxpayer provided necessary and accurate information to the adviser, and (iii) the taxpayer actually relied in good faith upon the adviser's judgment. *See, e.g., Schwalbach,* 111 T.C. at 230–31;*Ellwest Stereo Theatres v. Comm'r of Internal Revenue,* 70 T.C.M. (CCH) 1655, 1660 (1995).

28 *See, e.g.,* *Green,* 507 F.3d at 871–72 (upholding the Tax Court's decision that section 6664(c)(1) did not apply where "although Green had assistance in preparing his return in 1997 and 1998, there was no evidence as to what Green told the preparer, what the preparer told Green, and whether or not Green's reliance on any advice from the preparer was reasonable."); *King v. Comm'r of Internal Revenue,* 2007 WL 3193173, at *3 (11th Cir. Oct.31, 2007) ("Reliance on a tax advisory is not reasonable, however, where the taxpayer has failed to adequately disclose all necessary information affecting the tax evaluation") (quoting *Ellwest Stereo,* 70 T.C.M. at 1660);*Thompson v. Comm'r of Internal Revenue,* 499 F.3d 129, 134 (2d Cir.2007) (most important factor in assessing the existence of reasonable cause is the extent of the taxpayer's effort to assess it proper tax liability); *Hansen v. Comm'r of Internal Revenue,* 471 F.3d 1021, 1029–30 (9th Cir.2006) (penalty upheld were taxpayer failed to consult independent tax advisor prior to investment); *Klamath Strategic Inv. Fund, LLC v. United States,* 472 F.Supp.2d 885, 900–01 (E.D.Tex.2007).

29 *See United States v. Bornstein*, 977 F.2d 112, 116–17 (4th Cir.1992); *United States v. El Paso Co.*, 682 F.2d 530, 541 (5th Cir.1982); *In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir.2000); *United States v. Cote*, 456 F.2d 142, 144 (8th Cir.1972); *United States v. Gurtner*, 474 F.2d 297, 299 (9th Cir.1973); *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1514–15 (D.C.Cir.1993); *First Fed. Sav. Bank of Hegewisch v. United States*, 55 Fed.Cl. 263, 266 (2003); *see also* *Pioneer Hi–Bred Int'l*, 238 F.3d at 1374 (Federal Circuit applying the privilege law of the Eighth Circuit in a patent case).

30 *See* *Black & Decker Corp. v. United States*, 219 F.R.D. 87, 91 (D.Md.2003); *McEwen v. Digitran Sys., Inc.*, 155 F.R.D. 678, 683 (D.Utah 1994); *see also* *Adlman*, 134 F.3d at 1204.

31 *See* *Ackert*, 169 F.3d at 139–40 (communication between an attorney and an investment-advisor about a client's prospective transaction was not privileged); *In re John Doe Corp.*, 675 F.2d 482, 488 (2d Cir.1982) (privilege was waived when inclusion of accountant in communications between client and legal counsel "was sparked by Accountant's responsibilities in conducting the audit, not by Doe Corp.'s seeking of legal advice requiring the aid of an accountant");

Urban Box Office Network, Inc. v. Interfase Mgrs., L.P., 2006 WL 1004472, at *4 (S.D.N.Y. Apr.18, 2006) ("simply because financial consultants are employed to assist a company in a restructuring transaction does not mean that their communications with the company's attorneys are privileged. What is relevant is whether their communications with the attorneys were made in confidence for the purpose of the client obtaining legal advice from its counsel"); *Export–Import Bank v. Asia Pulp & Paper Co. Ltd.*, 232 F.R.D. 103, 113 (S.D.N.Y.2005) (where advisor was "major participant in APP's financial affairs, not a mere interpreter" between the client and its counsel, attorney-client communications that included investment advisor were not privileged); *In re Consol. Lit. Concerning Int'l Harvester*, 666 F.Supp. 1148, 1157 (N.D.Ill.1987) ("the attorney-client communication disclosed to Lehman Brothers lost any privileged character they might have had"); *cf.* *Stafford Trading, Inc. v. Lovely*, 2007 WL 611252 (N.D.Il. Feb.22, 2007) (applying a principle to investment advisers akin to the *Kovel* rule).

32 *Couch*, 409 U.S. at 335, 93 S.Ct. 611 (there is no accountant-client privilege under federal law); *United States v. Davis*, 636 F.2d 1028, 1043 (5th Cir.1981).

33 *See* discussion, *infra*, Part II, 1.

34 In *Cavallaro*, the First Circuit analyzed the interaction between the common-interest doctrine and the rule enunciated in *Kovel* thusly—

> The common-interest doctrine prevents clients from waiving the attorney-client privilege when attorney-client communications are shared with a third person who has a common legal interest with respect to these communications, for instance, a co-defendant. The doctrine does not extend to prevent waiver when an accountant, not within the *Kovel* doctrine, is made privy to the attorney-client communications. In such an instance, the accountant does not share an interest in receiving legal advice from the lawyer and cannot logically be said to have an interest in common with the represented party or parties. Under *Kovel*, we know that when a client, a lawyer, and an accountant are present, the accountant's presence will destroy the privilege if the accountant is not "necessary, or at least highly useful, for the effective consultation between the client and the lawyer." 296 F.2d at 922.
>
> *Cavallaro*, 284 F.3d at 250.

35 Notably, there is no specific claim or indication that these materials include "return information" so as to implicate the anti-disclosure rules of section 6103 of the Code. *Cf.* [redacted] *Vons Cos.*, 51 Fed.Cl. at 16–17.

36 That exception is a bill for postage. The court perceives no possible reason why this document would be relevant to any issue in this case and thus declines to order its production.

37 At various points in this appendix, the court has no option but to refer to last four digits of relevant NS numbers in its ruling, because no other alternative is available for identifying particular pages of certain documents to be protected versus produced.

Lead Doc. No.	Date	Type of Document	Subject Matter	Privilege Grounds	Ruling
1	10/14/05	Letter	Representation, including representation relating to persons and entities and years other than those involved in this proceeding ("other taxpayers and other years")	I.R.C. § 7525 Attorney–Client; Work Product privileges.	Protect, II.B.3.e.
2	08/10/04	Letter with 11 attachments	Letter conveys information from CPA, in his role as hired assistant, to Counsel in preparation for litigation.	I.R.C. § 7525 Attorney–Client; Work Product privileges. Beyond scope of RCFC 26(b); Irrelevant; Pertains to other years; Includes information for clients other than those involved in this proceeding.	Produce, II.B.3.d.; II.C.
			Includes information relating to other taxpayers and other years.	Transmits documents already in possession of the Internal Revenue Service, and, subject to disclosure rules of IRC 6103(h)(4), is available to Defendant's counsel from his own client.	
2a	10/17/01	Facsimile	Other taxpayers and other years	I.R.C. § 7525 Attorney–Client; Work Product privileges. Beyond scope of RCFC 26(b); Irrelevant;	Produce, II.B.3.f.; II.C.

				Pertains to other years; Includes information for clients other than those involved in this proceeding. Documents already in possession of the Internal Revenue Service, and, subject to disclosure rules of IRC 6103(h)(4), available to Defendant's counsel from his own client.	
2b	9/25/01	Email	Other taxpayers and other years	*See* Privilege grounds stated in No. 2a, above.	Produce, II.B.3.f.; II.C.
2c	9/25/01	Email with attachment	Other taxpayers and other years	*See* Privilege grounds stated in No. 2a, above.	Produce, II.B.3.f.; II.C.
2d	11/26/01	Memo	Other taxpayers and other years	*See* Privilege grounds stated in No. 2a, above.	Produce, II.B.3.f.; II.C.
2e	10/22/01	Memo	Other taxpayers and other years	*See* Privilege grounds stated in No. 2a, above.	Produce, II.B.3.f., II.C.
2f	11/1/01	Email	Other taxpayers and other years	*See* Privilege grounds stated in No. 2a, above.	Produce, II.B.3.f.; II.C.
2g	4/9/02		Other years	*See* Privilege grounds stated in No. 2a, above.	Produce, II.B.3.f.; II.C.
2h	11/9/01–12/31/01		Other taxpayers and other years	*See* Privilege grounds stated in No. 2a, above.	Produce, II.B.3.f.; II.C.
2i	11/9/01–12/31/01		Other taxpayers and other years	*See* Privilege grounds stated in No. 2a, above.	Produce, II.B.3.f.; II.C.
2j	11/9/01–12/31/01		Other taxpayers and other years	*See* Privilege grounds stated	Produce, II.B.3.f.; II.C.

			in No. 2a, above.	
2k	11/9/01–12/31/01	Other taxpayers and other years	*See* Privilege grounds stated in No. 2a, above.	Produce, II.B.3.f.; II.C.
3	11/10/04	Letter is a conveyance of information by CPA in his role as hired assistant to Counsel in preparation for litigation.	I.R.C. § 7525 Work Product privileges.	Produce, II.B.1.c.; II.C.
		The attached documents to the CPA's letter relate to individual taxpayer information for taxable years beyond the taxable years ended December 31, 2000.	Beyond scope of RCFC 26(b); Irrelevant; Pertains to other years; Includes information for clients other than those involved in this proceeding.	
			Defendant or its client already possess all documents with the exception of the cover letter to the attached documents. The cover letter is privileged.	
			The underlying documents themselves are already in possession of the IRS. Therefore, the only information to be gleaned is when and the fact that undersigned counsel	

		received the specific documents. These matters are subject to the work product privilege, are irrelevant and not discoverable. Since the attached documents are already in possession of the Internal Revenue Service, subject to the disclosure rules of IRC 6103(h)(4), defense counsel may obtain them from his client.	
3a	Arlene Nussdorf's response to IDR 2.	*See* Privilege grounds stated in No. 3, above.	Produce, II.B.1.; II.C.
3b	Stephen and Alicia Nussdorf's response to IDR 1.	*See* Privilege grounds stated in No. 3, above.	Produce, II.B.1.; II.C.
3c	Arlene Nussdorf's first supplemental response to IDR 2.	*See* Privilege grounds stated in No. 3, above.	Produce, II.B.1.; II.C.
3d	Ruth Nussdorf's second supplemental response to IDR 2.	*See* Privilege grounds stated in No. 3, above.	Produce, II.B.1.; II.C.
3e	Arlene Nussdorf's second supplemental response to IDR 2.	*See* Privilege grounds stated in No. 3, above.	Produce, II.B.1.; II.C.
3f	Stephen and Alicia Nussdorf's first supplemental	*See* Privilege grounds stated in No. 3, above.	Produce, II.B.1.; II.C.

			response to IDR 1.		
3g			Glenn Nussdorf' and Claudine Strum's first supplemental response to IDR 4.	*See* Privilege grounds stated in No. 3, above.	Produce, II.B.1.; II.C.
4	01/28/05	Letter with attachments	Letter is a conveyance of information by CPA in his role as hired assistant to Counsel in preparation for litigation.	The cover letter is privileged by reason of I.R.C. § 7525 Attorney–Client; Work Product privileges.	Produce, II.B.1.; II.C.
			The document attached to the CPA's letter related to individual taxpayer information for the years ended December 31, 1999, and December 31, 2000 (supplemental response to IDRs).	The attachments are subject to the work product privilege.	
				The underlying documents are already in possession of the IRS and therefore, subject to the disclosure rules of IRC 6103(h)(4), Defendant's counsel may obtain them from his client. To the extent that Defendant's counsel requested them with specific document	

				requests, they have already been produced. Therefore, the only information to be gleaned from this production is when undersigned counsel received the specific documents and the fact that counsel received them. These matters are subject to work product privilege, are irrelevant and not discoverable.	
5	10/28/04	Letter	Letter is a conveyance of information by CPA in his role as hired assistant to Counsel in preparation for litigation. The documents attached to the CPA's letter relate to individual taxpayer information for the years ended December 31, 1999, and December 31, 2000 (response to IDRs).	The cover letter is privileged by reason of I.R.C. § 7525 Attorney–Client; Work Product privileges. The attachments are subject to the work product privilege. The underlying documents are already in possession of the IRS and therefore,	Produce, II.B.1.; II.C.

				subject to the disclosure rules of IRC 6103(h)(4), Defendant's counsel may obtain them from his client. To the extent that Defendant's counsel requested them with specific document requests, they have already been produced. Therefore, the only information to be gleaned from this production is when undersigned counsel received the specific documents and the fact that counsel received them. These matters are subject to work product privilege, are irrelevant and not discoverable.	
6	5/28/046	Letter with 4 attachments	Letter is conveyance of information by client (through general counsel) to counsel for Plaintiffs.	Attorney–Client; Work Product privileges.	Protect; II.B.4.
			The attached documents concern agreed orders and correspondence relating to	Beyond scope of RCFC 26(b); Irrelevant	

			privilege issues in litigation in District Court.		
6a	5/13/04	Letter with attachment	Litigation	*See* Privilege grounds stated in No. 6, above.	Protect, II.B.4.
6b	5/13/04	Letter with attachment	Litigation	*See* Privilege grounds stated in No. 6, above.	Protect, II.B.4.
6c	5/13/04	Letter with attachment	Litigation	*See* Privilege grounds stated in No. 6, above.	Protest, II.B.4.
6d	8/13/04	Letter with attachment	Litigation	*See* Privilege grounds stated in No. 6, above.	Protect, II.B.4.
7	6/22/04	Letter with 4 attachments	Letter is a conveyance of information by client (through general counsel) to Counsel for Plaintiffs.	The cover letter is privileged by reason of I.R.C. § 7525 Attorney–Client; Work Product privileges. The attachments are subject to the work product privilege. The underlying documents are already in possession of the IRS and therefore, subject to the disclosure rules of IRC 6103(h)(4), Defendant's counsel may obtain them from his client. To the extent that Defendant's counsel requested them with specific document requests, they have already been produced.	Protect, II.B.4.

				Therefore, the only information to be gleaned from this production is when undersigned counsel received the specific documents and the fact that counsel received them. These matters are subject to work product privilege, are irrelevant and not discoverable.	
7a	5/24/04	Letter	Announcement 2004–46	*See* Privilege grounds stated in No. 7, above.	Produce, II.B.1.a.; II.B.1.d.
7b	5/17/04	Letter	Announcement 2004–46	*See* Privilege grounds stated in No. 7, above.	Produce, II.B.1.a.; II.B.1.d.
7c	8/25/04	Cover Letter	Amended state returns 1999–2002	*See* Privilege grounds stated in No. 7, above.	Produce, II.B.1.a.; II.B.1.d.
7d			Amended state returns 1999–2000 for Arlene, Glenn, Stephen Nussdorf	*See* Privilege grounds stated in No. 7, above.	Produce, II.B.1.a.; II.B.1.d.
8	10/11/05	Letter with multiple attachments	Letter is a conveyance of information by CPA in his role as hired assistant to Counsel in preparation for litigation.	The cover letter is privileged by reason of I.R.C. § 7525 Attorney–Client; Work Product privileges.	Protect, II.B.3.e.
			The attached documents consist of documents consist of document s previously requested and provided to	The attachments are subject to the work product privilege.	

			IRS by client along with workpapers.		
				The underlying documents are already in possession of the IRS and therefore, subject to the disclosure rules of IRC 6103(h)(4), Defendant's counsel may obtain them from his client. To the extent that Defendant's counsel requested them with specific document requests, they have already been produced. Therefore, the only information to be gleaned from this production is when undersigned counsel received the specific documents and the fact that counsel received them. These matters are subject to work product privilege, are irrelevant and not discoverable.	
8a	No Date	Slip sheet	IRS Submissions	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.

8b	No Date	Slip sheet	IDRs and Other Correspondence	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8c		Misc. work papers, bank stmts., etc.	Bank statements, work papers, etc.	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8d	No Date	Slip sheet	Title page	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8e	12/1999	Spread sheet	Accounting	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8f	Multiple	Spread sheet	Accounting	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8g	12/31/99	Statement	Statement	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8h	3/02/00	E-mail	Calculations	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8i	No Date	Spread sheet	Accounting	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8j	No Date	List	Accounting	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8k	1/11/00	Spread sheet	Tax Schedule	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8l	1/11/00	Spread sheet	Loans	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8m	1/11/00	Spread sheet	Accounting	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8n	12/1999	Spread sheet	Accounting	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8o	Multiple	Spread sheet	Accounting	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8p	12/21/99	Statement	Statement	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8q	12/1999	Statement	Statement	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8r	12/1999	Statement	Activity Report	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8s	1/11/00	Spread Sheet	Tax Schedule	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.

8t	12/99	Statement	Calculations	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8u	1/12/00	Facsimile	Calculations	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8v	Multiple	Spread Sheet	Summary	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8w	1/11/00	Spread Sheet	Loans	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8x	12/31/99	Handwritten Note	Balance	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8y	9/9/03	Spread Sheet	Summary	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8z	1/11/00	Spread Sheet	Accounting	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8aa	1/02/01	Spread Sheet	Tax Schedule	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8bb	12/2000	Statement	Accounting	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8cc	12/30/99	Confirmation	Transaction	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8dd	12/13/99	Confirmation	Transaction	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8ee	12/13/99	Confirmation	Transaction	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8ff	12/13/99	Confirmation	Transaction	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8gg	12/13/99	Confirmation	Transaction	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8hh	12/21/99	Confirmation	Transaction	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8ii	01/18/00	Confirmation	Transaction	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8jj	12/31/00	Sheet	Balance Sheet and Notes	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8kk	01/2000–12/2000	Sheet	Comparisons	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.

8ll	12/31/00	Sheet	Balance sheet and Notes	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8mm	12/200	Sheet	Comparisons	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8nn	12/31/99	Sheet	Balance sheet and Notes	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8oo	12/1999	Sheet	Comparisons	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8pp	01/31/01	Letter	Redemption	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8qq	01/31/01	Letter	Withdrawal	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8rr	02/01/01	Letter	Withdrawal	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8ss	12/31/99	Financial Statement	Financial Statement for December 31, 1999	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8tt	12/31/00	Financial Statement	Financial Statement for December 31, 2000	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8uu	3/22/02	Return	1065 U.S. Partnership Return for Evergreen Trading, LLC for Tax year 1999	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
8vv	3/10/01	Return	1065 U.S. Partnership Return for Evergreen Trading, LLC for Tax year 2000	*See* Privilege grounds stated in No. 8, above.	Produce, II.B.1.
9	11/11/99	Facsimile cover with attachment	Legal impression/ advice noted by attorney and conveyed to client	Attorney-Client; Work product privileges.	Protect, II.B.4.
10	No Date	Note with attachment	Litigation	Attorney-Client; Work Product privileges.	Produce, II.B.2.a.
11	6/29/04	E-mail with attachments	The final e-mail is an internal communication between Counsel and	Attorney-Client; Work product privileges. The over breadth of Request	Protect, II.B.4.; II.B.3.e.

			his paralegal. The bottom portion of the e-mail is Counsel requesting information in preparation of litigation	31 is further revealed by counsel having to create a privilege log of internal in-house communications.	
11a	6/10/99	Attachment	Copy of pleading in another case		Produce, II.B.2.a.
12	7/22/04	E-mail	Letter from New York State Department of Taxation NS008706–NS008707 July 8, 2004 letter from Joseph F. Von Bevern of the New York State Department of Taxation to Glenn Nussdorf and Claudine Strum with cc: to Eric Hananel, CPA and Lawrence Cohen, CPA NS008708–NS008709 July 8, 2004 letter from Joseph F. Von Bevern of the New York State Department of Taxation to Arlene Nussdorf with cc: to Eric Hananel, CPA and Lawrence Cohen, CPA.	Attorney–Client Work Product privileges.	First page protect, II.B.4.; produce remaining pages, II.B.1.
12a	7/23/04	Letter with IDR	Letter Stating that federal tax return for December 31, 2001 has been selected for audit with	Document already in possession of Internal Revenue Service.	Produce, II.B.1.

			attached IDR Request # 1.		
12b		Duplicate of NS008710–NS008713	Duplicate of NS008710–NS008713	Duplicate of NS008710–NS008713	Protect, II.B.1.b.
13	7/22/04	E-mail	Email string to include e-mail from Fred Pignataro to Fred Paliani, Michael, Katz, Eric Hananel and Larry Cohen, then e-mail forward from Fred Paliani to Sam Linsky and then from Sam Linsky to Nicole Zalenski *NS008720–NS008723 is* a Duplicate of NS008710–NS008713	Attorney-client; work Product privileges.	Top email protect, II.B.4.; second email produce, II.B.3.d.; letter from IRS produce, II.B.1.
14			Duplicate of NS008718–NS–008713	Duplicate of NS008718–NS008723	Protect; II.B.1.b.
15	7/28/04	E-mail with attachments	E-mail string to include e-mail from Lawrence Cohen to David Aughtry and Sam Linsky and then from Sam Linsky to Nicole Zalenski NS008732–NS008735 *is a Duplicate of* NS008710–NS008713	Attorney–Client; Work Product privileges.	Top email protect, II.B.4.; bottom emails produce, II.A.1.; attachment produce II.B.1.
16			Duplicate of NS008730–NS008735	Duplicate of NS008730–NS008735	Protect, II.B.1.b.
17	7/29/07	E-mail	E-mail from Sam Linsky to Nicole Zalenski NS008743–	Attorney–Client; Work Product privileges.	top email protect, II.A.2., II.B.4.; bottom email produce, II.B.3.; attached letter produce, II.B.1.

			NS008746 Letter from Timothy J. Falk, Internal Revenue Agent, to Ruth Nussdorf stating that federal tax return for December 31, 2001 and 2002 has been selected for audit with attached IDR Request # 1		
18			*Duplicate of* NS008742–NS008746	*Duplicate of* NS008742–NS008746	Protect, II.B.1.b.
19	8/9/04	E-mail	E-mail from Sam Linsky to Nicole Zalenski	Attorney–Client; Work product privileges.	First page: top email (8752), II.A.2., II.B.4.; bottom email produce, II.B.3.
			NS008753–NS008764 Letters from Mike Kostelnick, Revenue Agent, to Glenn Nussdorf and Claudine Strum that their federal tax return is being examined, a follow up appointment for a meeting is scheduled for August 17, 2004 and with attached IDR Request # 1, # 2, & # 3.		Remainder (8753–8764) produce, II.B.1.
20			*Duplicates of* NS008752–NS008764	*Duplicates of* NS008752--NS008764	Protect, II.B.1.b.
21	Not listed in privilege log nor provided for *en camera* review				
22	8/24/04	E-mail	NS008814 e-mail string to include e-mail from Fred Pignataro	Attorney–Client; Work Product privileges.	First page (8778): top email protect, II.A.2., II.B.4.; bottom email

			to Fred Paliani, Michael Katz, Eric Hananel and Larry Cohen, and Sam Linsky then e-mail forward from Sam Linsky to Nicole Zalenski		produce, II.B.3. Remainder (8779–8813) produce, II.B.1.
			The attachments are two IDRs issued to Stephen and Alicia Nussdorf. IDR # 2 is found at NS008779–NS008798 and its duplicate is found at NS008815–NS008834. IDR # 1 is found at NS008799–NS008814 and its duplicate is found at NS008835–8848.		8814: top email protect, II.A.2., II.B.4.; bottom email produce, II.B.3. Remainder produce (8815–8850), II.B.1.
23			*Duplicate of* NS008710–NS008711	*Duplicate of* NS008710–NS008711	Protect, II.B.1.b.
23.1	9/15/04	IDR	IDR # 2–Examination of 2001–12 & 2002–12 Form 1040 Individual Income Tax Returns	Documents already in possession on Defendant.	Produce, II.B.1.
23.2	9/15/04	IDR	IDR # 3–Examination of 2001–12 & 2002–12 Form 1040 Individual Income Tax Returns	Documents already in possession on Defendant.	Produce, II.B.1.
23.3			*Duplicate of* NS008710–NS008713	*Duplicate of* NS008710–NS008713	Protect, II.B.1.b.
23.4	9/15/04	Letter	Letter stating that federal tax return for	Document already in possession of	Produce, II.B.1.

			December 31, 2001 and 2002 has been selected for audit	Internal Revenue Service.	
23.5			*Duplicate of* NS008851–NS008864	*Duplicate of* NS008851–NS008864	Protect, II.B.1.b.
23.6			*Duplicate of* NS008865–NS008885	*Duplicate of* NS008865–NS008885	Protect, II.B.1.b.
23.7			*Duplicate of* NS008710–NS008713	*Duplicate of* NS008710–NS008713	Protect, II.B.1.b.
24	10/14/04	Facsimile with attachment	NS008931–Cover facsimile with attached IDRs NS008932 letter from Mike Kostelnick dated October 6, 2004 to Glenn Nussdorf and Claudine Strum with IDRs # 4 & 5 NS008933–NS008946 is IDR # 4 NS008947–NS008966 is IDR # 5	Attorney–Client; Work Product privileges. With the exception of privileged cover facsimile, Defendant is in possession of documents.	First page protect II.B.3.e.; remainder produce, II.B.1.
25	12/24/04	Facsimile with attachment	NS008967–Cover facsimile with attached IDR NS008968–72 is IDR # A1 issued by R. Michael Williamson to Glenn Nussdorf & Claudine Strum	Attorney–Client; Work Product privileges. With the exception of privileged cover facsimile, Defendant is in possession of documents.	Protect, II.B.3.e.

26	3/30/05	Facsimile with attachments	Letter is a conveyance of information by CPA in his role as hired assistant to Counsel in preparation for litigation. The attached documents are broken into items 1, 1a, 2, 3, 4, and an IDR.	Attorney-Client; Work Product privileges.	Protect, II.B.3.e.
26a	12/12/03	Amendment to operating agreement	Item 1– Bates label NS008975–8980 is Amendment No. 2 to Operating Agreement of SN Investments 2001 LLC.	*See* Privilege grounds stated in No. 26, above.	Produce, II.B.1., II.B.2.a.
26b	12/12/03	E-mail with spreadsheet	Item 1a, bates labels NS08981–8983 is an e-mail exchanges between Lawrence H. Cohen, Certified Public Accountant and James Haber of the Diversified Group. The e-mail exchange occurred on December 12, 2003 and includes an attached spreadsheet.	*See* Privilege grounds stated in No. 26, above.	Produce, II.B.3.f.
26c			*Duplicates of* NS001905–NS001906 [Doc 2a]	*Duplicates of* NS001905–NS001906 [Doc 2a]	Protect, II.B.1.b.
26d	10/9/01	Agreement	Item 3, bates labeled NS008986 through	*See* Privilege grounds stated in No. 26, above.	Produce, II.B.1., II.B.2.a.

			NS008995, is a Consulting Agreement between BDO Seidman LLP and Glenn Nussdorf.		
26e			*Duplicates of* NS001907	*Duplicates of* NS001907	Protect, II.B.1.b.
26f	8/31/04	IDR	Item 5, bates labeled NS008997 through NS009010, is an Information Document Request # 1 issued by agent R. Michael Williamson upon Stephen & Alicia Nussdorf. Pertaining to taxable years 2001.	Document in possession of Defendant.	Produce, II.B.1.
27	3/31/05	Facsimile with attachment	Letter is a conveyance of information by CPA in his role as hired assistant to counsel in preparation for litigation.	Attorney-Client; Work Product privileges.	Protect, II.B.3.e.
27a	3/6/02	Letter	The attached are documents bates labeled NS009012–NS009014 which is a letter form Joseph A. Klausner of BDO Seidman, LLP to Glenn Nussdorf dated March 6, 2002 regarding "disclosure initiative" and bates labeled NS009015 through NS009018 BDO form	*See* Privilege grounds stated in No. 27, above.	Produce, II.A.3.

			letters unaddressed.		
28	4/1/05	Facsimile with attachments	Facsimile is a conveyance of information by CPA in his role as hired assistant to Counsel in preparation for litigation.	Attorney-Client; Work Product Privileges. Beyond the scope of RCFC 26(b); contains information that pertains to persons and entities that are irrelevant to the present matter.	Protect, II.B.3.e.
28a	3/27/02	Letter	The attached documents are bate labeled NS009020 through NS902. NS9020 is a March 27, 2002 letter from James Haber to Glenn Nussdorf regarding closing binders for transaction with cc's to Ira Akselrad, Esq., Joe Kalusner & Larry Cohen.	*See* Privilege grounds stated in No. 28, above.	Produce, II.B.3.f.
28b	2/22/02	Letter	NS9021 is a February 22, 2002 letter from James Haber to Ruth Nussdorf regarding closing binders for transaction with cc's to Ira Akselrad, Esq., Joe Klausner & Larry Cohen.	*See* Privilege grounds stated in No. 28, above.	Produce, II.B.3.f.
28c	3/27/02	Letter	NS9022 is a March 27, 2002 letter from James Haber to Ruth Nussdorf regarding closing binders for transaction with cc's to Ira Akselrad, Esq.,	*See* Privilege grounds stated in No. 28, above.	Produce, II.B.3.f.

			Joe Klausner & Larry Cohen.		
28d	4/9/02	Letter	NS9023 is an April 9, 2002 letter from James Haber to Ruth Nussdorf regarding closing binders for transaction with cc's to Ira Akselrad, Esq., Joe Klausner & Larry Cohen.	*See* Privilege grounds stated in No. 28, above.	Produce, II.B.3.f.
29			*Duplicate of* NS009019–NS009023	*Duplicate of* NS009019–NS009023	Protect, II.B.1.b.
29.1	4/5/02	Certificate of Facts	AN Investments LLC Certificate of Facts—unsigned-facts concern 2001 transaction	Beyond the scope of RCFC 26(b).	Produce, II.C.
29.2			*Duplicate of* NS009023	*Duplicate of* NS009023	Protect, II.B.1.b.
29.3	4/5/02	Certificate of Facts	SN Investments LLC Certificate of Facts unsigned-facts concern 2001 transaction	Beyond the scope of RCFC 26(b).	Produce, II.C.
29.4	3/27/02	Letter	Cover letter for closing binder of transaction.	Beyond the scope of RCFC 26(b).	Produce, II.C.
29.5	4/9/02	Facsimile with attachments	NS009025–Cover Facsimile sheet (with attachments)	Beyond the scope of RCFC 26(b).	Produce, II.C.
29.5(a)			*Duplicate of* NS009034	*Duplicate of* NS009034	Protect, II.B.1.b.
29.5(b)			*Duplicate of* NS009032–33	*Duplicate of* NS009032–33	Protect, II.B.1.b.
29.5(c)			*Duplicate of* NS009023	*Duplicate of* NS009023	Protect, II.B.1.b.
29.5(d)			*Duplicate of* NS009029–30	*Duplicate of* NS009029–30	Protect, II.B.1.b.
29.5(e)	4/9/02	Letter	NS009042– is an April 9, 2002 letter from James Haber to Glenn Nussdorf regarding tax	*See* Privilege grounds stated in No. 29.5, above.	Produce, II.C.

			opinion with cc to Larry Cohen.		
29.5(f)			NS009043–44 is an April 5, 2002 GN Investments LLC Certificate of Facts -unsigned-facts concern 2001 transaction.	*See* Privilege grounds stated in No. 29.5, above.	Produce, II.C.
29.5(g)	4/9/02	Letter	NS009045– is an April 9, 2002 letter from James Haber to Glenn Nussdorf regarding tax opinion with cc to Larry Cohen.	*See* Privilege grounds stated in No. 29.5, above.	Protect, II.B.1.b.
29.5(h)	4/5/02	Certificate of Facts	NS009046–47 is an April 5, 2002 RN Investments LLC Certificate of Facts -unsigned-facts concern 2001 transaction.	*See* Privilege grounds stated in No. 29.5, above.	Produce, II.C.
29.6			*Duplicates of* NS009042–NS009044	*Duplicates of* NS009042–NS009044	Protect, II.B.1.b.
29.7	4/2/05	Invoice	Bill to reset Chamberlain Hrdlicka mail meter	Irrelevant.	Protect, II.C.
29.8	9/26/05	FPAA	FPAA	Documents already in possession of Defendant	Produce, II.B.1.
29.9	9/26/05	Notice of Deficiency	Tax year Ended Dec. 31, 1999 and Dec. 31, 2000.	Documents already in possession of Defendant.	Produce, II.B.1.
30	Multiple	Additional attachments	Materials provided by CPA to counsel. The documents are a package of material that include individual amended state returns for the years 1999–2002 along	Attorney-client; Work Product privileges.	Produce, II.B.1.e.

				with related correspondence and U.S. Individual Tax Returns for 1999–2001. All of these documents are in possession of the New York State Department of Taxation and Finance and/ or the Internal Revenue Service.		
31	12/19/05	Facsimile		Cover sheet facsimile from client with attached documents received from the IRS.	The over breath of Request 31 is again revealed by counsel having to detail its internal system of managing documents. While the documents themselves are in possession of the IRS, when counsel received the documents or how counsel chose to organize the documents are the only thing that could be revealed by production. The IRS is not entitled to learn how, when or why counsel received documents from its client. Attorney–Client; Work Product privileges.	First page protect, II.A.1., II.B.4.; remainder of pages produce, II.B.1.

32			*Duplicates of* NS001904–NS001930	*Duplicates of* NS001904–NS001930	Protect, II.B.1.b.
33	8/10/04	Letter with attachments	Letter is a conveyance of information by CPA in his role as hired assistant to Counsel in preparation for litigation.	Attorney-Client; Work Product privileges. Irrelevant; beyond the scope of RCFC 26(b). The over breath of Request 31 is again revealed by counsel having to detail its internal system of managing documents. The "NS" Bates prefix is a prefix that the staff for the undersigned counsel assigned to documents without regard to relevancy, redundancy, work product, privilege, or, as revealed here, even documents remotely related to the current litigation.	Protect, II.B.2.
			The attachments are privileged agreements that include agreements that concern other taxpayers completely unrelated to the present litigation.		
33a			BDO/CHWWM/ Cuillo		Produce, II.B.3.
33b			BDO/CHWWM/ Gunther		Produce, II.B.3.
33c			BDO/CHWWM/		Produce, II.B.3.

			Arlene Nussdorf		
33d			BDO/CHWWM/ Glenn Nussdorf		Produce, II.B.3.
33e			BDO/CHWWM/ Ruth Nussdorf		Produce, II.B.3.
33f			BDO/CHWWM/ Stephen Nussdorf		Produce, II.B.3.
34	8/14/04	Attachments to letter labeled NS009922	Letter is a conveyance of information by CPA in his role as hired assistant to Counsel in preparation for litigation.	Attorney-Client; Work Product privileges. Beyond the scope of RCFC 26(b); contains information that pertains to persons and entities that are irrelevant to the present matter.	Produce, II.B.3., II.C.
			The attached documents to the CPA's letter are transactions documents for transactions that occurred beyond the taxable years ended December 31, 1999, and December 31, 2000. These documents are already in possession of the Internal Revenue Service, and therefore, subject to the disclosure rules of IRC 6103(h)(4), Defendant's counsel may obtain them from his client.		
35	12/29/05	Letter with attachments	Letter is a conveyance of information by CPA in his role as hired	Attorney-Client; Work Product privileges.	First page protect, II.B.3.; remainder produce, II.B.1.

	assistant to Counsel in preparation for litigation.	
	The attached documents, related to an audit beyond the tax year s in question in the present matter, are already in possession of the Internal Revenue Service, and therefore, subject to the disclosure rules of IRC 6103(h)(4), defendant's counsel may obtain them from his client.	The over breath of Request 31 is again revealed by counsel having to detail its internal system of managing documents. While the documents themselves are in possession of the IRS, when counsel received the documents or how counsel chose to organize the documents are the only thing that could be revealed by production. The IRS is not entitled to learn how, when or why counsel received documents from its client.

End of Document

involving denial of constitutional property rights can therefore be deferred, and should be deferred, for decision when that issue is presented." [161]

Although the Court dismissed the appeal, it is respectfully submitted that the Justices' failure to restrict their expression of opinion upon appellant's constitutional right specifically to the procedural question, their reservation of opinion contained in the passage last quoted, and their consideration of the substantive issues as support for the procedural conclusion may all combine to suggest to attorneys who do not read the decision carefully that the time limitations on appeals may be circumvented by alleging the denial of constitutional property rights.

NEW VIRGINIA RULES FOR DEPOSITION AND DISCOVERY

*Stuart L. Craig**

With only minor changes, the Supreme Court of Appeals has adopted for Virginia the Federal Rules of Civil Procedure relating to pretrial discovery.[1] The new rules, effective February 1, 1967, represent an attempt to provide uniform and liberal discovery procedures.

History

Since 1919 the Court has had statutory power to "prepare a system of rules of practice . . . to be used in all courts of record of this State, and put the same into effect." [2] Prior to 1954, however, no rules of court existed concerning pretrial depositions and discovery, although there were a few statutory provisions allowing limited discovery.[3] In January 1949 the Judicial Council of Virginia proposed adoption of a rule that

> [d]epositions taken pursuant to the provisions of a statute may be used for purposes of discovery. Parties and their agents may be required to

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[161] 207 Va. at 715, 152 S.E.2d at 284.

* Judge, Corporation Court of Danville. B.A., Dartmouth College, 1949; LL.B., University of Virginia, 1952.

1 VA. SUP. CT. APP. R. 4:1-12, which correspond to FED. R. CIV. P. 26-37. The new rules were promulgated on November 29, 1966, 207 Va. 641 (1966), and amended in part on June 14, 1967, effective September 1, 1967, 208 Va. 133 (1967).

2 VA. CODE ANN. § 8-1.1 (1957).

3 These provisions remain in force. VA. CODE ANN. §§ 8-304, -305 (1950) provide for depositions, and § 8-313 controls their use in actions at law. Section 8-317 permits the perpetuation of testimony, while §§ 8-320 to -323 govern interrogatories. The production of documents may be obtained under §§ 8-324 to -326, and § 8-327.1 provides for the production of photographs and maps.

> answer any relevant question the answer to which is not privileged and may be required to give the names and addresses of witnesses.[4]

The proposal failed in the face of considerable opposition.

But five years later rule 3:23(c) was passed, permitting discovery under a rule of court for the first time in the Commonwealth. Great control over the rule's application was vested in the trial judge:

> On motion of any party, the court, if satisfied by affidavit, testimony, inspection of the pleadings or otherwise that the moving party *should have* access to evidence or other information subject to the control of the adverse party or of a third person, *may* permit the taking of a deposition for discovery and *may* enter an order requiring the adverse party or such third person to attend at a time and place and before a notary or commissioner named in the order and answer questions relevant to subjects named in the order and to make available for inspection, copying or photographing any writing, chattel or real property described in the order.[5]

Rule 3:23(c) did more to confuse the bar and the judiciary than it did to fill the need for more liberal discovery practices. The word "may" in the provision was construed as giving the courts complete discretion to grant or deny discovery. Since trial judges adopted varied interpretations of the rule, some courts allowed liberal and extensive discovery while others permitted only the most limited inquiry.[6]

In an effort to promote uniformity the rule was amended, effective April 1961, to remove much of the trial court's discretion. Once the moving party established his good faith, the court was required to grant the discovery motion.[7] Yet the amendment did not accomplish its purpose. Trial courts

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[4] THE JUDICIAL COUNCIL FOR VIRGINIA, PROPOSED MODIFICATIONS OF PRACTICE AND PROCEDURE 21 (1949).

[5] Va. Sup. Ct. App. R. 3:23(c), 198 Va. cxiii (1956) (emphasis added).

[6] *See* 1964-1965 REP. OF THE JUDICIAL COUNCIL OF VA. TO THE GEN. ASSEMBLY AND SUP. CT. OF APP. OF VA. 12.

[7] On motion of any party, the court, if satisfied by affidavit, testimony, inspection of the pleadings or otherwise that the moving party *in good faith* desires access by way of discovery to evidence, the names and addresses of witnesses, or other information subject to the control of the adverse party or of a third person, *shall* permit the taking of a deposition for discovery and *shall* enter an order requiring the adverse party or such third person to attend at a time and place and before a notary or commissioner named in the order and to answer questions relevant to subjects named in the order and to make available for inspection, copying or photographing any writing, chattel or real property described in the order. The court shall deny the motion if it finds that granting the motion would unreasonably delay the case or impose unreasonable hardship or expense on the adverse party.

Va. Sup. Ct. App. R. 3:23(c), 202 Va. xxxix (1960) (emphasis added).

refused to allow broad discovery except in several metropolitan areas where the federal rules were used extensively. The continuing lack of uniformity led to the proposal that Virginia adopt the federal discovery rules.[8] In its 1964-1965 report to the General Assembly and to the Supreme Court of Appeals, the Judicial Council of Virginia stated:

> The conclusion of this committee is, therefore, that a very substantial majority of the Virginia Bar, particularly those lawyers engaged in active practice before the courts, desire a liberal use of the discovery procedures, the elimination of any requirement for court approval before discovery proceedings may be commenced, and the retention of adequate safeguards against the misuse of discovery for harassment and to prevent unreasonable hardship, expense or delay. The committee is of the opinion that the Federal Rules relating to all of the pretrial procedures fully accomplish each of those objectives desired by the Virginia Bar. The committee also believes that the established body of interpretative law relating to discovery under the Federal Rules will be more conducive to uniformity than the risk of another round of individual interpretations by the trial courts of a further modification of Rule 3:23(c).
>
> Accordingly, the committee strongly recommends that the Federal Rules of Civil Procedure relating to pre-trial procedures (Rules 26-37) be adopted in lieu of Rule 3:23(c) with such technical changes as are necessary to adapt them to the periods of time provided by the Virginia Rules of Court for performing specific acts and in other similar respects. The committee also recommends that the suggested provisions for pretrial procedures be incorporated in the Rules of Court as Part IV thereof, together with existing Rule 4:1, as modified, in order that they may apply in all proceedings, law, equity and statutory.[9]

The recommendations were accepted, immediately raising questions as to the scope of the new rules. Section 8-1.2 of the Virginia Code provides that rules of court, when adopted and amended, supersede all conflicting statutory provisions.[10] But application of the new rules to all proceedings would change established practices in divorce matters, aunulment suits, condemnation proceedings and petitions for habeas corpus.

Some explanation and relief were provided when the Supreme Court of Appeals amended the provisions, effective September 1, 1967, to provide that:

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8 *See, e.g.*, Emroch, *Should Virginia Adopt The Federal Rules of Discovery?*, 2 U. OF RICH. L. NOTES 187 (1966).

9 1964-1965 REP. OF THE JUDICIAL COUNCIL OF VA. TO THE GEN. ASSEMBLY AND SUP. CT. OF APP. OF VA. 12, 13.

10 With the exception of VA. CODE ANN. § 30-5 (1964).

> The Rnles in this Part Four shall apply only in civil cases in both actions at law and suits in equity, and they shall not apply in any proceeding for separate maintenance, divorce or annulment of marriage, for the exercise of the right of eminent domain, or for writs of habeas corpus or in the nature of coram nobis. Whenever in this Part Four the word "action" appears, it shall include a suit in equity.[11]

Thus the new procedures apply in any law or equity case where there is a trial or hearing before a court or jury. The traditional practices continue in equity cases where there is no issue out of chancery or hearing ore tenus.[12]

PURPOSE

Justice is more effective when adminiistered under simple and efficient rules of procedure which (1) encourage advance trial preparation, (2) eliminate the element of surprise, (3) facilitate the ascertainment of the truth, (4) reduce the expense of litigation, and (5) expedite the administration of justice. Several of these purposes were explicitly recognized by the Virginia Supreme Court of Appeals in *City of Portsmouth v. Cilumbrello*.[13] Trial tactics designed to keep your adversary guessing are no longer in vogne. Now a party may discover, prior to trial, evidence in the possession of his opponent or hostile third parties. Accordingly, he will be in a better position to evaluate his own claim or defense.[14] As the United States Supreme Court reasoned in *Hickman v. Taylor*:[15]

> Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it . . . .

It shonld be remembered that the "good faith" requirement is implicit in the use of the new procedures. Although good cause need only be shown to obtain a physical examination of a party[16] or the production of documents and things,[17] any discovery may be denied if it is not sought in good faith.[18]

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11 VA. SUP. CT. APP. R. 4:0, *as amended*, 208 Va. 133 (1967).

12 VA. SUP. CT. APP. R. 4:1(d)(3), *as amended*, 208 Va. 133 (1967).

13 204 Va. 11, 129 S.E.2d 31 (1963).

14 4 J. MOORE & B. GARFINKEL, FEDERAL PRACTICE ¶ 26.02(2) (2d ed. 1966) (hereinafter cited as MOORE); *see Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 944 (1960).

15 329 U.S. 495, 507 (1947).

16 VA. SUP. CT. APP. R. 4:10.

17 VA. SUP. CT. APP. R. 4:9.

18 The good faith requirement entered Virginia procedure by a 1961 amendment to

PROCEDURES UNDER THE NEW RULES

Virginia rules 4:1 through 4:12 are almost identical to their federal counterparts in wording, scope and application. Where there are significant differences, they will be noted. Because the Virginia provisions have been adopted only recently, there has been no opportunity for judicial interpretation of them, and thus the authorities cited are for the most part federal court interpretations of the corresponding federal rules. Although not necessarily binding, these decisions should be persuasive in controversies concerning the new Virginia procedures.

It is well to remember that as a rule court orders granting or denying discovery are not considered final or appealable,[19] though exceptions occur when there is a gross abuse of discretion. However, an order granting or denying a request for discovery before an action has been brought[20] may be considered final.[21]

Depositions Pending Action

After commencement of an action at law or a suit in equity, under rule 4:1 a party may take the testimony of any person, including another party, by deposition upon oral examination or written interrogatories. This may be done either for the purpose of discovery or for use as evidence. No leave of court is required unless the plaintiff wishes to take depositions within twenty-one days after the commencement of his action. The provisions of rule 4:1 are implemented by rule 4:3 governing persons before whom depositions may be taken, rule 4:4 concerning stipulations about the taking of depositions, rule 4:5 dealing with depositions upon oral examination as regards notice, oath, objections and record, rule 4:6 relating to depositions upon written interrogatories, and rule 4:7 regarding errors and

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Va. Sup. Ct. App. R. 3:23(c), 202 Va. xxxix (1960):

> The court shall deny the motion if it finds that granting the motion would unreasonably delay the case or impose unreasonable hardship or expense on the adverse party.

Similarly federal courts have the power to terminate or limit an examination under FED. R. CIV. P. 30(d) when it is shown that the inquiry is being conducted in bad faith, United States v. Andreadis, 234 F. Supp. 341, 345 (E.D.N.Y. 1964) (dictum), or that its only purpose is to annoy, embarrass or harass a party or witness, New Sanitary Towel Supply, Inc. v. Consolidated Laundries Corp., 24 F.R.D. 186 (S.D.N.Y. 1959); Maddox v. Wright, 11 F.R.D. 170 (D.D.C. 1951).

19 Cimijotti v. Paulsen, 323 F.2d 716 (8th Cir. 1963); English v. Cunningham, 282 F.2d 839 (D.C. Cir. 1960) (per curiam). In Tiedman v. American Pigment Corp., 253 F.2d 803 (4th Cir. 1958), the court held that the action of a trial court in granting or denying a request for discovery would be reversed only if it was improvident and affected substantial rights.

20 VA. SUP. CT. APP. R. 4:2.

21 Mosseller v. United States, 158 F.2d 380 (2d Cir. 1946); MOORE ¶ 27.16.

irregularities. Inquiries before trial when there is an opportunity for all sides to examine and cross-examine are considered depositions, whether taken orally or upon written interrogatories. However, the deposition upon oral examination is the more significant.

Depositions Upon Oral Examination

The deposition upon oral examination pursuant to rule 4:5 is a widely used method of discovery. For this reason, its procedures will be discussed in detail.

Notice.—Rule 4:5(a) requires that reasonable notice of the taking of a deposition be given in writing to every party to the action. The proper method of giving notice is not wholly clear. Although language in subsection (a) suggests that notice must be formally served on all parties, several statutory provisions in the Code indicate that formal service is not necessary. Thus in chancery matters Section 8-307 of the Code provides that notice to take a deposition need not be served in any particular manner and is sufficient if actually received a reasonable time before the deposition. And in actions at law, section 8-53 states that notice in writing which has reached its destination is sufficient although not served in any particular manner. It might be argued that these provisions conflict with rule 4:5(a) and, accordingly, have been superseded. But this conclusion is uncertain since it is not clear whether the rule requires formal service. The uncertainty as to the proper method of giving notice exemplifies not only the need for an amendment clarifying the requirements of the rule, but also the desirability of reviewing all Code provisions concerning discovery to determine whether they should be specifically repealed.

What about notice to counsel? Rule 1:14 provides that notice to take a deposition accepted by or served on counsel of record constitutes service. Again, there is an indication that technical service is necessary. Rules 2:17 and 3:15 provide that pleadings shall be served on counsel of record by delivering or mailing a copy. Although they do not apply here since pleadings are not at issue, there seems to be little justification for allowing notice of pleadings to be mailed to counsel while requiring that notice to take depositions be served by a sheriff or sergeant. Consideration should be given to amending rule 4:5(a) to provide for service by mail to counsel of record.[22]

[22] FED. R. CIV. P. 5(b) provides for service of deposition notices by mail to counsel of record:

> Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his

Five days' notice should be given if all interested parties are located within a reasonable area, with an allowance of two additional days if the notice is mailed.[23] The notice should specify the time and place of the examination[24] and also the name and address of each person to be examined. If the deponent's name is not known, there must be a general description sufficient to identify him or the class or group to which he belongs.[25] There is no need to state whether the purpose of the examination is for discovery or for use as evidence. Neither the name of the notary[26] nor the scope of the examination[27] need be stated.

The priority of examination is determined by the time of notice. Except under unusual circumstances, the party giving the first notice is entitled to the first examination. This priority may be established and maintained under rule 4:5(a).[28]

In the final analysis notice may present no serious problems in practice because under rule 4:7(a) all defects are waived unless prompt written objection is served upon the party giving notice. Moreover, pursuant to rules 2:21 and 3:19 a defendant in default is not entitled to notice. When the deposition of a nonresident is to be taken, the provisions of Section 8-311 of the Code should be consulted.[29]

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clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

23 Although this is the general rule, reasonable notice depends upon the circumstances and may differ from case to case. MOORE ¶ 30.03[2]. The following notices were held unreasonable: Kilian v. Stackpole Sons, 98 F. Supp. 500 (M.D. Pa. 1951) (in absence of any special need for haste, forty-eight hours notice for out-of-state depositions); Stover v. Universal Moulded Prods. Corp., 11 F.R.D. 90 (E.D. Pa. 1950) (two days notice by mail). FED. R. CIV. P. 6(e) provides that an additional three days notice shall be given if service is by mail.

24 The examinations should be scheduled during normal working hours, *see* Cities Serv. Oil Co. v. Celanese Corp., 14 F.R.D. 246 (D. Del. 1953), and should not be held on Sunday, Shenker v. United States, 25 F.R.D. 96 (E.D.N.Y. 1960).

25 *See* Shenker v. United States, 25 F.R.D. 96 (E.D.N.Y. 1960); Moore v. George A. Hormel & Co., 2 F.R.D. 430 (S.D.N.Y. 1942). Notice is insufficient if it names only agents, employees or servants having knowledge of the facts. Amato v. Barber S.S. Lines, Inc., 30 F.R.D. 69 (S.D.N.Y. 1962); Budget Dress Corp. v. Joint Bd. of Dress and Waistmakers' Union, 24 F.R.D. 506 (S.D.N.Y. 1959).

26 Zweiffer v. Sleco Laces, Inc., 11 F.R.D. 202 (S.D.N.Y. 1950).

27 United States *ex rel.* Edelstein v. Brussell Sewing Mach. Co., 3 F.R.D. 87 (S.D.N.Y. 1943); Madison v. Cobb, 29 F. Supp. 881 (M.D. Pa. 1939).

28 Wendkos v. ABC Consol. Corp., 38 F.R.D. 426 (E.D. Pa. 1965); Ginsberg v. Railway Express Agency, Inc., 6 F.R.D. 371 (S.D.N.Y. 1945).

29 VA. CODE ANN. § 8-311 (1957) provides:

[W]henever any party on whom a notice to take a deposition should be served is not a resident of this State, the service of such notice on the counsel of such

Subpoena.—The failure of nonparty witnesses to appear for the taking of a deposition could result in the notifying party's having to pay another party's reasonable expenses and attorney's fees under rule 4:5(g). Thus these witnesses should be subpoenaed under the authority of Sections 8-44 and 8-296 of the Code. Penalties are provided under section 8-302 for disregard of a subpoena. Should the deposition of a prisoner be required in a civil case, this may be arranged in accordance with section 8-300.1.

Parties need not be subpoenaed. There are sanctions under rule 4:12(d) which give ample protection should a party willfully fail to appear after being served with proper notice.[30] Should a party or witness attend, but refuse to be sworn or give testimony, under section 8-303 he can be committed to jail for a period not exceeding twelve months or until he testifies.

Place.—Depositions normally are taken where the action is pending. However, those of nonparty witnesses residing outside the State or at a considerable distance are taken at the witness' residence.[31] A plaintiff's deposition may be taken at the place he institutes suit even if he is a nonresident,[32] although the court retains discretion to change the place of examination if hardship, undue burden or uureasonable cost is demonstrated.[33] When the deponent is a nonresident, a check should be made to determine whether the jurisdiction in which he lives has adopted the Uniform Foreign Depositions Act set forth in Sections 8-316.1 to -316.3 of the Virginia Code.[34]

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party or on any one of such counsel, if there be more than one, shall have like effect as if it were served upon the party, provided the time between the service of notice and taking the deposition be sufficient for conveying by ordinary course of mail a letter from the place of service to the place of residence of the party, and a reply from that place back to the place of service, and then from the counsel to attend at the place of taking the deposition. In all cases when notice is served on counsel as aforesaid, the court, upon exception being taken, may determine whether, under all the circumstances the notice has been served in reasonable time, and admit or reject the deposition accordingly.

30 VA. SUP. CT. APP. R. 4:12(d) provides three sanctions: "strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against the party." *See* Bourne, Inc. v. Romero, 23 F.R.D. 292 (E.D. La. 1959); Loosley v. Stone, 15 F.R.D. 373 (S.D. Ill. 1954); Millinocket Theatre, Inc. v. Kurson, 35 F. Supp. 754 (D. Me. 1940); Ilsen, *Recent Cases and New Developments in Federal Practice and Procedure*, 16 ST. JOHN'S L. REV. 1, 25 (1941).

31 *See* Gitto v. Italia Societá Anonima Di Navigazione, Genova, 28 F. Supp. 309 (E.D.N.Y. 1939).

32 Seuthe v. Renwal Prods., Inc., 38 F.R.D. 323 (S.D.N.Y. 1965); Perry v. Edwards, 16 F.R.D. 131 (W.D. Mo. 1954) (dictum); *see* Solomon v. Teitelbaum, 9 F.R.D. 515 (E.D.N.Y. 1949).

33 Seuthe v. Renwal Prods., Inc., 38 F.R.D. 323 (S.D.N.Y. 1965); Zweifler v. Sleco Laces, Inc., 11 F.R.D. 202 (S.D.N.Y. 1950).

34 VA. CODE ANN. § 8-316.1 (Supp. 1966) provides:

Whenever any mandate, writ or commission is issued out of any court of record in any other state, territory, district or foreign jurisdiction, or whenever upon

It is permissible to take the deposition in the office of counsel for the moving party. But if there is strenuous objection to this convenient practice, the court may resort to neutral ground.[35] Whenever possible, counsel should agree both on the hour, date and place of the examination and on the appearance of the parties or witnesses without a summons, subpoena or actual service of notice.[36]

Before Whom?—Rule 4:3 governs persons before whom depositions may be taken. The language of subsection (a) corresponds with that in Section 8-304 of the Code, which deals with chancery causes and provides that in-state depositions may be taken before a justice of the peace, notary or commissioner in chancery. The requirements of subsection (b) follow those of Code Section 8-305, providing that out-of-state depositions may be taken before any justice of the peace, notary or other officer authorized to receive them in the state in which the witness happens to be, or before any commissioner appointed by the Governor of Virginia. Although rule 4:3 is similar to federal rule 28 in purpose, there is little actual resemblance, as the latter limits those who may take depositions to officers who can administer oaths and to persons appointed by the court in which the action is pending. As originally adopted, rule 4:3(e) did follow federal rule 28(c) in forbidding depositions before an employee or relative of any party or attorney,[37] but the 1967 amendments have repealed this subsection. Under rule 4:5(b), however, the court may still enter any order necessary to protect the parties from unfairness.

Stipulations.—Rule 4:4 permits stipulations for the taking of depositions. They may be taken before any person, at any time or place, upon any notice and in any manner, assuming agreement of the parties. A deposition received pursuant to stipulation may be used like any other deposition. Designed to facilitate the taking of depositions, the stipulation rule should promote simple and inexpensive pretrial discovery. To this end, customary waiver of the rule's requirements that the deponent sign the document and that the reporter transcribe and incorporate the stipulation in the deposition appear permissible.[38] Rule 4:4 differs from federal rule 29 in its provision that the written stipulation be returned with the deposition.

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notice or agreement it is required to take the testimony of a witness or witnesses in this State, witnesses may be compelled to appear and testify in the same manner and by the same process and proceeding as may be employed for the purpose of taking testimony in proceedings pending in this State.

35 Ginsberg v. Railway Express Agency, Inc., 6 F.R.D. 371 (S.D.N.Y. 1945); Havell v. Time, Inc., 1 F.R.D. 439 (S.D.N.Y. 1940). In these cases the examination was held in the courthouse.

36 Va. Sup. Ct. App. R. 4:4 provides for the use of stipulations. *See* Moore ¶ 29.02.

37 Va. Sup. Ct. App. R. 4:3(e), 207 Va. 640, 646 (1967); *see* Gale v. National Transp. Co., 7 F.R.D. 237 (S.D.N.Y. 1946) (notary an "associate" of plaintiff's attorney).

38 There seems to be no reason for counsel to vary this practice under the new rules.

Scope of Examination.—Rule 4:1(b) allows examination of a witness upon any matter, not privileged, which is relevant to the subject matter of the pending action. Relevancy, not competency, governs. Witnesses should answer all questions unless there is harassment, an invasion of privilege, or inquiry beyond the scope of the matters in controversy.[39] It is no longer a valid objection that the inquiry concerns a matter within the examiner's knowledge or that the evidence sought may be inadmissible at trial. Fishing expeditions are allowed if there is reasonable expectation of a catch.

Discovery may be made of the names of witnesses having knowledge of any relevant facts, but discovery of the names of witnesses who will be called to testify at the trial is generally not allowed,[40] and the names of expert witnesses who have no knowledge of the facts of the case usually need not be disclosed,[41] though this is not an absolute prohibition. Some courts have required that a party not only identify each person whom he expects to call as an expert but also state the subject matter upon which the expert will testify.[42]

A party's technical experts, employed to assist counsel in the preparation of the case and to give learned opinions, cannot be examined under rule 4:1(a) except at the instance of the party who employed them.[43] Thus in a personal injury action the deposition of a treating physician may be taken by any party, but the deposition of a physician whose first association with the case was his employment to evaluate the injuries and supply expert testimony can be taken only at the instance of the party who employed him.

The existence, description, nature, custody, condition and location of any specific documents or things may be discovered.[44] However, a party can-

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The use of stipulations is a convenience for all concerned. If the right to obtain the information is recognized, there is little to be gained by insisting upon formalities.

39 Amco Eng'r Co. v. Bud Radio, Inc., 38 F.R.D. 51 (N.D. Ohio 1965).

40 Griffin v. Memphis Sales & Mfg. Co., 38 F.R.D. 54 (N.D. Miss. 1965). *Contra*, Goldberg v. Ann-Vien, Inc., 29 F.R.D. 6 (N.D. Ga. 1961).

41 In Hickey v. United States, 18 F.R.D. 88 (E.D. Pa. 1952), the court refused to require the petitioner in a condemnation case to disclose the names of its appraisers.

42 Knighton v. Villian & Fassio e Compagnia Internazionale, 39 F.R.D. 11 (D. Md. 1965).

43 This prohibition was carried over into VA. SUP. CT. APP. R. 4:1(a) from Va. Sup. Ct. App. R. 3:23(b), 202 Va. xxxix (1960). It is not included in FED. R. CIV. P. 26(a), but appears consistent with prevailing practice and the weight of authority in federal courts. *See* Luey v. Sterling Drug, Inc., 240 F. Supp. 632 (W.D. Mich. 1965). *But cf.* Cooper v. Norfolk Redevelopment and Housing Authority, 197 Va. 653, 90 S.E.2d 788 (1956). Federal courts have, however, allowed a party's expert to be examined when good cause has been established. Annot., 86 A.L.R.2d 138, 150 (1962). The court in Henlopen Hotel Corp. v. Aetna Ins. Co., 33 F.R.D. 306 (D. Del. 1963), required even less, stating that a "minimal showing" in favor of examination would suffice. *See generally* Emroch, *Examination of The Adversary's Expert*, 1961 PERSONAL INJURY ANNUAL 727.

44 United States v. Becton, Dickinson & Co., 30 F.R.D. 132 (D.N.J. 1962); Supine v. Compagnie Nationale Air France, 21 F.R.D. 42 (E.D.N.Y. 1955).

not be required to reveal every item of evidence which he intends to introduce at trial.[45] Notice to take the deposition of a party or witness does not require the production of documents or objects at the time of the inquiry.[46] Production may be required only under rule 4:9 in the case of a party and through a subpoena duces tecum under Section 8-301 of the Code in the case of a nonparty.

Privileged matters are protected from discovery,[47] although rule 4:1(b) does not specify what testimony is privileged. Under Code Sections 8-289, -289.1 and -289.2, however, inquiry is barred as to communications between husband and wife, physicians and patients (except when mental or physical condition is in issue) and ministers and persons counseled or advised. An attorney and his client may claim a common-law privilege for their communications, and a deponent may assert his right against self-incrimination.[48]

Conduct of Examination.—Pursuant to rule 4:1(c) the examination of cross-examination of a deponent proceeds as it does at trial. Advance thought and planning for the deposition shonld be made, an outline of the anticipated inquiry prepared and steps taken to have all necessary documents produced for use during the examination. Witnesses may be separated for questioning.[49]

The oath is administered, and the testimony is taken stenographically and transcribed under rule 4:5(c) unless the parties agree otherwise. The noticing party examines first. Leading questions may be asked an adverse party or a hostile witness.[50] Should they be addressed to other witnesses, answers are permitted and may later be used for any purpose allowed under

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[45] In Magelssen v. Operative Plasterers Local No. 518, 32 F.R.D. 464 (W.D. Mo. 1963), the defendant served written interrogatories requesting that the plaintiff itemize and describe fully each and every item of documentary evidence in his possession and intended for use at trial. The court refused to permit the discovery.

[46] Shankman v. Northwest Air Lines, Inc., 18 F.R.D. 436 (S.D.N.Y. 1955); MOORE, ¶¶ 26.10[1], .20.

[47] *See* United States v. Reynolds, 345 U.S. 1 (1953); Wild v. Payson, 7 F.R.D. 495 (S.D.N.Y. 1946).

[48] Colton v. United States, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); *In re* House, 144 F. Supp. 95 (N.D. Cal. 1956).

[49] VA. CODE ANN. § 8-211.1 (Supp. 1966) provides for the separation of witnesses during the trial of every civil or criminal case. Although not expressly applicable to depositions, there is authority to justify an extension of this right to include separation during pretrial depositions. In Dunlap v. Reading Co., 30 F.R.D. 129 (E.D. Pa. 1962), the court treated the motion for sequestration as an application for an order for the protection of parties and witnesses under FED. R. CIV. P. 30(b), the counterpart of VA. SUP. CT. APP. R. 4:5(b).

[50] In Spray Prods., Inc. v. Strouse, Inc., 31 F.R.D. 211 (E.D. Pa. 1962), the court held that ordinary trial limitations on the scope of cross-examination were not grounds for a witness' refusing to answer questions during the taking of his deposition.

the rules, unless an objection is made at the time. Thus a party should attend all depositions for which notice is given by his adversary so that all necessary and timely objections can be made.[51]

At times it may be essential to take the depositions of adverse parties or hostile witnesses. However, this practice should be avoided if possible, since the deponent's testimony can be used at trial should he be unavailable to testify.[52] Examinations of friendly witnesses, on the other hand, may prove extremely useful in pretrial negotiations and may be necessary in order to perpetuate the deponent's testimony. Counsel should consider his party's testimony carefully to avoid errors, ambiguities or misunderstandings since a deposition can be used at trial by an adverse party regardless of the presence or absence of the deponent.[53]

Objections.—Objections to the admissibility of deposition evidence are controlled by rules 4:5(c) and 4:7(c), the latter enumerating challenges which must be stated at the taking of the deposition. Objections to the form of questions or answers are waived unless made at the taking. Those to the competency of a witness or the competency, relevancy or materiality of testimony, however, may be held until trial,[54] unless they rest on grounds which might be obviated or removed if raised at the time of the deposition.[55]

Rule 4:5(c) states that challenged evidence shall be taken subject to the objections. This could result on some occasions in a harmful and prejudicial disclosure of improper and inadmissible evidence. In such cases the witness may be instructed not to answer the particular question or line of questioning, and the examiner may proceed with the balance of his inquiry. Subsequently, he may apply for a court order under rule 4:12(a) compelling an answer. If the refusal to reply is then found to be without substantial justification, the deponent may be required to pay the reasonable costs and attorney's fees incurred in obtaining the court order. The better and safer practice, thus, is to have the deponent answer all questions, after necessary objections have been made, unless substantial harm or prejudice will result.[56]

Corrections.—Rule 4:5(e) requires that after the deposition has been

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[51] *See* Wong Ho v. Dulles, 261 F.2d 456 (9th Cir. 1958); Houser v. Snap-on Tools Corp., 202 F. Supp. 181 (D. Md. 1962); Elyria-Lorain Broadcasting Co. v. Lorain Journal Co., 298 F.2d 356 (6th Cir. 1961) (dictum).

[52] See the provisions of VA. SUP. CT. APP. R. 4:1(d) relating to the use of pretrial depositions.

[53] Community Counselling Serv., Inc. v. Reilly, 317 F.2d 239 (4th Cir. 1963); Pursche v. Atlas Scraper & Eng'r Co., 300 F.2d 467 (9th Cir. 1961), *cert. denied*, 371 U.S. 911 (1962).

[54] Detective Comics v. Fawcett Publications, 4 F.R.D. 237 (S.D.N.Y. 1944); *see* Johnson v. Nationwide Mut. Ins. Co., 276 F.2d 574 (4th Cir. 1960).

[55] Cordle v. Allied Chem. Corp., 309 F.2d 821 (6th Cir. 1962).

[56] Dellefield v. Blockdel Realty Co., 40 F. Supp. 212 (S.D.N.Y. 1941), *rev'd on other grounds*, 128 F.2d 85 (2d Cir. 1942).

transcribed, it must be submitted to the witness for examination. Failure to comply can result in suppression of the evidence.[57] This requirement, however, may be waived expressly or by conduct amounting to waiver.[58]

The witness may alter either the form or substance of his answers. All changes and the reasons for them are recorded. In practice, the notary transcribes both the original and the changed testimony and specifies whether the changes were made because of inaccurate reporting or the deponent's desire to alter his original response. Although changes may be made even for seemingly improper and inadequate reasons,[59] if a deponent substantially repudiates his original testimony, an additional examination may be allowed.[60]

Filing.—Rule 4:5(f) requires that the notary certify and seal the deposition and promptly file it with the court, sending it by registered mail. The party taking the deposition is required to give prompt notice of the filing to all other parties. Any party may insist that the deposition be transcribed and properly filed even if the examining party does not wish it done.[61] A party or the deponent may obtain a copy in accord with rule 1:10, which provides that any interested person may obtain a transcript of the proceedings or any part thereof upon the court's terms and conditions.

Costs.—The costs of taking and attending depositions are usually borne by the parties individually. Federal rule 30(b), the counterpart of Virginia rule 4:5(b), however, has been interpreted to permit a court to require a party to pay the costs before a deposition is taken, when the circumstances so warrant.[62] The federal rule has also been interpreted as allowing the court to tax as costs against the losing party all necessary and reasonable deposition expenses.[63] And subsection (d) of the Virginia rule provides that a judge, when granting or refusing an order to terminate or limit the taking of a deposition, may require either the party or the deponent to pay such costs as the judge deems reasonable.

Use at Trial.—The use at trial of a deposition, whether taken upon oral examination or written interrogatories, is governed by rule 4:1(d). While a party's statement may be used by an adverse party for any purpose, the

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57 Smith v. Insurance Co. of N. America, 30 F.R.D. 534 (M.D. Tenn. 1962); Porter v. Seas Shipping Co., 20 F.R.D. 108 (S.D.N.Y. 1956).

58 In Kawietzke v. Rarich, 198 F. Supp. 841 (E.D. Pa. 1961), the court held that the conduct of the parties, who knew of the defect for almost seven months but did not move to suppress, amounted to a waiver.

59 *See* De Seversky v. Republic Aviation Corp., 2 F.R.D. 113 (E.D.N.Y. 1941).

60 *See* Colin v. Thompson, 16 F.R.D. 194 (W.D. Mo. 1954); *cf.* Erstad v. Curtis Bay Towing Co., 28 F.R.D. 583 (D. Md. 1961).

61 Burke v. Central-Illinois Sec. Corp., 9 F.R.D. 426 (D. Del. 1949).

62 Clark v. Geiger, 31 F.R.D. 268 (E.D. Pa. 1962). Here the court required a party to pay the reasonable expenses and fees of his opponent's psychiatrist and the reasonable expenses of his attorney incurred in attending out-of state depositions.

63 Towe v. Sinclair Ref. Co., 188 F. Supp. 222 (D. Md. 1960) (dictum).

deposition of a witness who is present and available is admissible only to contradict or impeach him.[64] Rule 4:1(d)(3), like Section 8-313 of the Code, provides that the deposition of any witness may be used for any purpose if the court finds:

> 1, that the witness is dead; or 2, that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of this State, unless it appears that the absence of the witness was procured by the party offering the deposition; or 3, that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or 4, that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or 5, that the witness is a judge, or is a superintendent of a hospital for the insane more than 30 miles from the place of trial, or is physician, surgeon or dentist who, in the regular course of his profession treated or examined any party to the proceeding and whose office is more than 25 miles from the place of trial, or is in any public office or service the duties of which prevent his attending the court; or 6, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used; but on motion made before the commencement of the trial, the court may, for good cause shown, require any such witness to attend in person.[65]

These exceptions apply in any action at law, issue out of chancery or hearing ore tenus in equity.[66]

While only the most favorable portions of a deposition should be submitted in court, it is well to remember that under rule 4:1(d)(4), when only part is offered, an adverse party may require the introduction of other relevant sections, and any party may introduce any other parts. Thus an adversary may read omitted portions which he deems pertinent or necessary to his case.[67] The deposition should be read in the sequence and order taken, regardless of which party introduces it at the trial. And it is good practice to have one counsel "pose" the questions to a cocounsel or court attendant who sits in the witness chair and responds with the transcribed answers.

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[64] Community Counselling Serv., Inc. v. Reilly, 317 F.2d 239 (4th Cir. 1963); *cf.* G.E.J. Corp. v. Uranium Aire, Inc., 311 F.2d 749 (9th Cir. 1962).

[65] VA. SUP. CT. APP. R. 4:1(d)(3).

[66] *Id., as amended*, 208 Va. 133 (1967).

Keep in mind that Code § 8-309 prohibits the reading of any depositions in suits against infants, the insane and ex-service persons for whom a trustee has been appointed, unless the deposition was taken in the presence of the guardian *ad litem*.

[67] Westinghouse Elec. Corp. v. Wray Equip. Corp., 286 F.2d 491 (1st Cir.), *cert. denied*, 366 U.S. 929 (1961).

Depositions Upon Written Interrogatories

Instead of obtaining depositions by oral examination, they may be taken through written interrogatories pursuant to rule 4:6. The written interrogatories may be addressed to any party or witness and not just to an adverse party.[68] As the procedure is somewhat tedious and difficult, written interrogatories are generally avoided when the information can be obtained by oral examination or some other discovery process. The interrogatories must be served upon every party, with a notice giving the name and address of the deponent and the notary. Cross, redirect and recross interrogatories may then be served. The deposition cannot be considered complete or admitted into evidence until all questions are answered, whether on direct, cross, redirect or recross inquiry.[69] The evidence is taken, transcribed and filed in the same manner as depositions upon oral examination. Rule 4:6(d) provides that after the service of written interrogatories and prior to the taking of the testimony of the deponent, the court on a showing of good cause may order that the deposition be taken only upon oral examination.

Depositions Before Action or Pending Appeal

Rule 4:2 allows the perpetuation of testimony by deposition upon oral examination or written interrogatories both before action and pending appeal. Subsection (a) of the rule is similar to Sections 8-317 to -319 of the Code, which allow the perpetuation of testimony before suit or action by filing a petition with a commissioner in chancery.[70] The new rule appears to supersede these more cumbersome provisions. Also, subsection (b) of the rule appears to supersede Code Section 8-316, dealing with depositions after judgment or pending appeal.

In order to perpetuate testimony given prior to the bringing of an action, a verified petition must be filed and served upon each expected adverse party, showing that the petitioner expects to be party to an action but is presently unable to bring it or cause it to be brought. His expectation must be substantial and not vague or indefinite.[71] Rule 4:2 is not to be used to

[68] VA. SUP. CT. APP. R. 4:6(a).

[69] Lipscomb v. Groves, 187 F.2d 40 (3rd Cir. 1951). Only the witness' answers should be included. When one reporter added his own comments concerning the demeanor of the witness during the examination, they were stricken upon motion to suppress. Gill v. Stolow, 16 F.R.D. 9 (S.D.N.Y. 1954).

[70] A thorough discussion of the history and purpose of the proceeding to perpetuate testimony in Virginia may be found in Dale v. Fidelity & Cas. Co., 203 Va. 665, 127 S.E.2d 153 (1962).

[71] *In re* Ingersoll-Rand Co., 35 F.R.D. 122 (S.D.N.Y. 1964); *In re* Carson, 22 F.R.D. 64 (E.D. Ill. 1957). In *Carson* petitioner was unable to perpetuate the testimony of a witness when he alleged the witness' grave physical condition but failed to show why suit was then impossible.

discover whether a cause of action exists and, if so, against whom it should be brought.[72]

If allowed by court order, the deposition is taken upon oral examination or written interrogatories and becomes available for use in any action at law or suit in equity involving the same subject matter, in accordance with rule 4:1.

In addition to allowing depositions to perpetuate testimony, the court may require the production of documents or objects under rule 4:9 or the physical or mental examination of prospective parties under rule 4:10.

Interrogatories to Parties

Rule 4:8 governs written interrogatories addressed to parties.[73] Designed like all discovery procedures to eliminate surprise and promote the just disposition of cases by affording litigants an opportunity to question each other as to the facts and to clarify the issues prior to trial, the rule goes beyond what was previously possible under Code Sections 8-320 to -323.[74] Rule 4:8's federal equivalent, rule 33, has seen extensive use.

Interrogatories to parties are simple and effective. They may be served upon any adverse party without leave of court, although the plaintiff must delay his service until fourteen days after the action is brought or obtain leave of court. After the initial service, replies under oath must be returned within fourteen days. No cross interrogatories are authorized. There is no limit to the number of interrogatories, but they should not be used to harass an adversary.[75] In some jurisdictions local court rules limit the number to thirty, and their use is discouraged in all instances where they are burdensome or oppressive.[76] Rule 4:8 cannot be used to obtain the production

[72] *In re* Gurnsey, 223 F. Supp. 359 (D.D.C. 1963); *In re* Exstein, 3 F.R.D. 242 (S.D.N.Y. 1942). It is possible that the interrogatories may not be used to obtain information from an adversary's attorney.

[73] *See* United States v. Selby, 25 F.R.D. 12 (N.D. Ohio 1960). *But cf.* Steelman v. United States Fidelity & Guar. Co., 35 F.R.D. 120 (W.D. Mo. 1964).

[74] In Hornback v. State Highway Comm'r, 205 Va. 50, 53-54, 135 S.E.2d 136, 137-38 (1964), the Court discussed the purpose and scope of interrogatories under the Code.

[75] Mall Tool Co. v. Sterling Varnish Co., 11 F.R.D. 576 (W.D. Pa. 1951). In Gorsha v. Commercial Transp. Corp., 38 F.R.D. 188 (E.D. La. 1965), interrogatories calling for continuing answers were held improper under FED. R. CIV. P. 33, which is nearly identical to VA. SUP. CT. APP. R. 4:8.

[76] Cone Mills Corp. v. Joseph Bancroft & Sons Co., 33 F.R.D. 318 (D. Del. 1963); Riss & Co. v. Association of Am. R.R., 23 F.R.D. 211 (D.D.C. 1959). If objection is made that the inquiry is burdensome, hardship and inequity must be shown. The mere allegation will not suffice. Trabon Eng'r Corp. v. Eaton Mfg. Co., 37 F.R.D. 51 (N.D. Ohio 1964); Zatko v. Rogers Mfg. Co., 37 F.R.D. 29 (N.D. Ohio 1964). The following cases are illustrative of unduly burdensome interrogatories. Breeland v. Yale & Towne Mfg. Co., 26 F.R.D. 119 (E.D.N.Y. 1960); Brightwater Paper Co. v. Monadnock Paper Mills, 2 F.R.D. 547 (D. Mass. 1942).

of documents or things and is not a substitute for the showing of good cause required for production under rule 4:9.[77]

The scope of inquiry for interrogatories is governed by rule 4:1. The scope is that allowed in depositions—all matters relevant and not privileged are proper subjects.[78] Interrogatories may require a party to investigate facts, compile data or do research. The fact that effort and expense are involved is not a valid objection if the information sought is material and relevant.[79] However, a party will not be required to compile his adversary's evidence by answering voluminous interrogatories.[80] In the event that the scope and extent of the inquiry exceed reasonable limits, the court may issue the requisite protective orders.

As is the case with depositions, opinions[81] and conclusions[82] normally are not considered proper subjects of inquiry. Yet there exists a tendency to allow such discovery if the information sought would materially assist in obtaining or locating evidence or in narrowing the issues.[83] Interrogatories addressed to jurisdictional or venue matters[84] or, where relevant, to a party's employment and income in prior years[85] are examples of proper inquiry.

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77 Smith v. Central Linen Serv. Co., 39 F.R.D. 15 (D. Md. 1966); Webster Motor Car Co. v. Packard Motor Car Co., 16 F.R.D. 350 (D.D.C. 1954); Dellameo v. Great Lakes S.S. Co., 9 F.R.D. 30 (N.D Ohio 1949). A request to produce photographs in connection with written interrogatories was denied in Harris v. Marine Transp. Lines, Inc., 22 F.R.D. 484 (E.D.N.Y. 1958).

78 McNamara v. Erschen, 8 F.R.D 427 (D. Del. 1948); *cf.* Mitchell v. Roma, 265 F.2d 633 (3rd Cir. 1959).

79 Luey v. Sterling Drug, Inc., 240 F. Supp. 632 (W.D. Mich. 1965); McKeon v. Highway Truck Drivers Local 107, 28 F.R.D. 592 (D. Del. 1961); Harvey v. Eimco Corp., 28 F.R.D. 381 (E.D. Pa. 1961).

80 Courts will not require a party ro do legal research for his adversary, Kluchenac v. Oswald & Hess Co., 20 F.R.D. 87 (W.D. Pa. 1957), or to provide him with a summary of the evidence to be presented at the trial, Ritepoint Co. v. Secretary Pen Co., 94 F. Supp. 457 (D.N.J. 1950).

81 Fischer & Porter Co. v. Sheffield Corp., 31 F.R.D. 534 (D. Del. 1962); *cf.* Tytel v. Richardson-Merrell, Inc., 37 F.R.D. 351 (S.D.N.Y. 1965).

82 Textrol, Inc. v. D.C. Oviatt Co., 37 F.R.D. 27 (N.D. Ohio 1964); Payer, Hewitt & Co. v. Bellanca Corp., 26 F.R.D. 219 (D. Del. 1960). A distinction sometimes is made between inquiries seeking conclusions of fact and those seeking conclusions of law. The argument against disclosure is stronger where conclusions of law are the subject of the interrogatories. *See* Richards v. Maine Cent. R.R., 21 F.R.D. 590 (D. Me. 1957). *But see* Luey v. Sterling Drug, Inc., 240 F. Supp. 632 (W.D. Mich. 1965).

83 Meese v. Eaton Mfg. Co., 35 F.R.D. 162 (N.D. Ohio 1964); United States v. Renault, Inc., 27 F.R.D. 23 (S.D.N.Y. 1960); *accord*, Hartsfield v. Gulf Oil Corp., 29 F.R.D. 163 (E.D. Pa. 1962); United States v. Selby, 25 F.R.D. 12 (N.D. Ohio 1960).

84 Truck Drivers Local 696 v. Grosshans & Petersen, Inc., 209 F. Supp. 161 (D. Kan. 1962); General Indus. Co. v. Birmingham Sound Reproducers, Ltd., 26 F.R.D. 559 (E.D.N.Y. 1961).

85 Patton v. Southern Bell Tel. & Tel., 38 F.R.D. 428 (N.D. Ga. 1965); Griffin v. Memphis Sales & Mfg. Co., 38 F.R.D. 54 (N.D. Miss. 1965).

In certain areas, however, the permissible scope of written interrogatories is disputed. Some courts, for instance, permit questions as to the conduct upon which a party bases an allegation of negligence,[86] while others find such inquiry improper.[87] Similarily, attempts to discover a party's liability policy have been denied on the ground that such information is not relevant or material.[88] On the other hand, there is a strong trend among federal courts to permit a party to obtain this information.[89] The courts are agreed that the names of witnesses to an event may be discovered, including the names and addresses of those from whom statements have been procured.[90] But they refuse to permit discovery of an adverse party's intentions with respect to the preparation and development of his case.[91]

Discovery and Production of Documents and Things

Rule 4:9 governs the production and inspection of documents, papers, books, accounts, letters, photographs, objects or tangible things in the possession, custody or control of a party and provides for the entry upon his land or other property for the purpose of inspecting, measuring, surveying or photographing it or any object or operation on it. Discovery requires a court order, obtained on a showing of good cause.[92]

In contrast to Code Sections 8-324 and -325, which provide for the pro-

86 Prescan v. Aliquippa & S.R.R., 16 F.R.D. 272 (W.D. Pa. 1954); Forsythe v. Baltimore & O.R.R., 15 F.R.D. 191 (W.D. Pa. 1954).

87 Bailey v. General Sea Foods, Inc., 26 F. Supp. 391 (D. Mass. 1939); *cf.* Alston v. West, 340 F.2d 856 (7th Cir. 1965).

88 Roembke v. Wisdom, 22 F.R.D. 197 (S.D. Ill. 1958); Gallimore v. Dye, 21 F.R.D. 283 (E.D. Ill. 1958); *accord,* Cooper v. Stender, 30 F.R.D. 389 (E.D. Tenn. 1962); Hillman v. Penny, 29 F.R.D. 159 (E.D. Tenn. 1962).

89 Hodges v. Heap, 40 F.R.D. 314 (D.N.D. 1966); Hurley v. Schmid, 37 F.R.D. 1 (D. Ore. 1965); Hurt v. Cooper, 175 F. Supp. 712 (W.D. Ky. 1959); Ellis v. Gilbert, 429 P.2d 39 (Utah 1967); *accord,* Ash v. Farwell, 37 F.R.D. 553 (D. Kan. 1965); Novak v. Good Will Grange No. 127, 28 F.R.D. 394 (D. Conn. 1961); Johanek v. Aberle, 27 F.R.D. 272 (D. Mont. 1961). When an insurance company elects to file pleadings under the Virginia Uninsured Motorist Law, the company has been held an adverse party for the purposes of interrogatories addressed to it under FED. R. CIV. P. 33, the federal counterpart of VA. SUP. CT. APP. R. 4:8. Ivory v. Nichols, 34 F.R.D. 128 (E.D. Va. 1963).

90 Griffin v. Memphis Sales & Mfg. Co., 38 F.R.D. 54 (N.D. Miss. 1965); Klop v. United Fruit Co., 18 F.R.D. 310 (S.D.N.Y. 1955).

91 Uinta Oil Ref. Co. v. Continental Oil Co., 226 F. Supp. 495 (D. Utah 1964); Wedding v. Tallant Transfer Co., 37 F.R.D. 8 (N.D. Ohio 1963). See note 72 *supra* and accompanying text.

92 "Good cause" means more than mere relevancy to the subject matter. Guilford Nat'l Bank v. Southern Ry., 297 F.2d 921 (4th Cir. 1962); Alseike v. Miller, 196 Kan. 547, 412 P.2d 1007 (1966). However, the words have been construed liberally. It is sufficient to show that the requested production is necessary to enable the party to prepare his case, to facilitate the proof, or to aid in the progress of the litigation. Roebling v. Anderson, 257 F.2d 615 (D.C. Cir. 1958).

duction of books of account or other writings[93] in the possession of "an adverse party or claimant," rule 4:9 places the obligation of production on "any party." Under the Code an affidavit is filed with the clerk or a commissioner, who issues a summons requiring production, while rule 4:9 allows the court to issue a similar order upon motion of any party showing good cause and upon notice to all other parties. If production is not made within a reasonable time, the court may then require it under either the Code or the rules upon penalty of default judgment.

Since rule 4:9 applies to parties only, it cannot be employed to compel production by a nonparty witness or counsel.[94] Some federal courts, however, have required a defendant's insurance company to produce documents on the theory that the insurer was an actual party to the litigation as a result of its contractual responsibility to defend the action.[95]

Documents or objects to be produced must be identified or designated by category, subject matter, date or content, and with a reasonable degree of particularity.[96] An adverse party cannot be compelled to spread the contents of his files on the table for inspection.[97] The customary procedure is to determine by deposition the existence, description, nature, custody and location of desired evidence and then move for its production under rule 4:9.[98]

Privileged evidence will not be ordered produced. In addition to matters expressly protected, public policy affords some privilege to such areas as trade secrets,[99] grand jury proceedings,[100] governmental security matters[101] and the work product of an attorney.[102] These exclusionary rules are not

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93 The production of photographs and maps is permitted under VA. CODE ANN. § 8-327.1 (Supp. 1966).

94 Seven-Up Co. v. Get Up Corp., 30 F.R.D. 550 (N.D. Ohio 1962); Gulf Const. Co. v. St. Joe Paper Co., 24 F.R.D. 411 (S.D. Tex. 1959).

95 Wilson v. David, 21 F.R.D. 217 (W.D. Mich. 1957); Simper v. Trimble, 9 F.R.D. 598 (W.D. Mo. 1949).

96 Roebling v. Anderson, 257 F.2d 615 (D.C. Cir. 1958); United States v. American Optical Co., 37 F.R.D. 233 (E.D. Wis. 1965).

97 *See* International Commodities Corp. v. International Ore & Fertilizer Corp., 30 F.R.D. 58 (S.D.N.Y. 1961); Dean v. Superior Ct., 84 Ariz. 104, 324 P.2d 764 (1958).

98 Fitzmaurice v. Calmar S.S. Corp., 26 F.R.D. 172 (E.D. Pa. 1960); Dean v. Superior Ct., 84 Ariz. 104, 324 P.2d 764 (1958).

99 *See* Ray v. Allied Chem. Corp., 34 F.R.D. 456 (S.D.N.Y. 1964); United States v. National Steel Corp., 26 F.R.D. 603 (S.D. Tex. 1960).

100 United States v. American Optical Co., 37 F.R.D. 239 (E.D. Wis. 1965); Arlington Glass Co. v. Pittsburgh Plate Glass Co., 24 F.R.D. 50 (N.D. Ill. 1959).

101 United States v. Reynolds, 345 U.S. 1 (1953).

102 Hickman v. Taylor, 329 U.S. 495 (1947); *see Developments In The Law—Discovery*, 74 HARV. L. REV. 940, 1027-28 (1961). The work product doctrine is not a rule of absolute privilege. Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962); City of Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 483 (E.D. Pa. 1962). The *Westing-*

absolute, however, and disclosure may be required on a showing of good cause.[103]

The work product doctrine is particularly important as it prevents rule 4:9 from being utilized to discover an opposing counsel's trial strategy or preparation. Included within the doctrine's protection are the recollections, impressions, opinions, written memoranda, statements and notes gathered by an attorney in anticipation of trial.[104] Whether documents or writings in his hands are subject to discovery depends upon his part in their preparation. If he helped prepare them, they come within the work product exclusion. This holds true even as regards statements taken from prospective witnesses, unless exceptional circumstances are shown.[105] But a party may not avoid disclosure simply by placing documents, writings or statements in the hands of his counsel.[106]

Can statements taken by or on behalf of an adverse party prior to trial be obtained under rule 4:9? The courts have allowed a party to discover statements of prospective witnesses in the possession of an adverse party.[107] Statements taken by railroad agents[108] and by insurance adjusters have been ordered produced.[109]

Often a party wishes to discover the reports of experts employed by an opponent. Generally the opinions or conclusions of experts employed to

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house court commented:

> [I]t is very important to keep in mind the fact that the work product principle is not and cannot properly be described as a privilege. Some Courts have confused the situation by calling it a qualified privilege, but it is not a privilege at all; it is merely a requirement that very good cause be shown if the disclosure is made in the course of a lawyer's preparation of a case.

Id. at 485.

103 Allis-Chalmers Mfg. Co. v. City of Fort Pierce, 323 F.2d 233 (5th Cir. 1963).

104 Hickman v. Taylor, 329 U.S. 495 (1947); United States v. Anderson, 34 F.R.D. 518 (D. Colo. 1963).

105 Hanson v. Gartland S.S. Co., 34 F.R.D. 493 (N.D. Ohio 1964); *accord*, Diamond v. Mohawk Rubber Co., 33 F.R.D. 264 (D. Colo. 1963). In Koss v. American S.S. Co., 27 F.R.D. 511 (E.D. Mich. 1960), the court denied a motion to produce statements taken by counsel since the names and addresses of all known witnesses had been furnished and the witnesses were available to both parties.

106 Colton v. United States, 306 F.2d 633 (2d Cir. 1962), *cert. denied*, 371 U.S. 951 (1963); *see* E.I. duPont de Nemours & Co. v. Phillips Petroleum Co., 24 F.R.D. 416 (D. Del. 1959).

107 Johnson v. Ford, 35 F.R.D. 347 (D. Colo. 1964); Crowe v. Chesapeake & O. Ry., 29 F.R.D. 148 (E.D. Mich. 1961). In Roach v. Boston Tow Boat Co., 19 F.R.D. 267 (D. Mass. 1956), the court ordered production of statements of nonparty witnesses taken at or near the time of an occurrence as the witnesses had forgotten most of the details and needed to consult their statements to refresh their memories.

108 Brown v. New York, N.H. & H.R.R., 17 F.R.D. 324 (S.D.N.Y. 1955); Herbst v. Chicago, R.I. & P.R.R., 10 F.R.D. 14 (S.D. Iowa 1950).

109 Alseike v. Miller, 196 Kan. 547, 412 P.2d 1007 (1966).

investigate a malfunction or defect are unavailable,[110] as are the reports of medical experts employed solely to evaluate the injuries or to render an expert prognosis.[111] A party in a personal injury case, however, may move to obtain a plaintiff's hospital records and the medical reports of his treating physicians.[112] No physician-patient privilege exists under Section 8-289.1 of the Code in such cases, and rule 4:10, providing for the physical or mental examination of a party, does not restrict the acquisition of unprivileged medical reports and hospital records under rule 4:9. The two rules are cumulative rather than alternative means of discovery.[113]

Photographs taken by or on behalf of an adversary may be obtained.[114] Surveillance movies have been ordered produced even though they were made for an attorney for the purpose of impeachment.[115] Reports of repairs made after an accident or injury may be subject to discovery.[116]

What if the evidentiary matter desired is in the hands of a nonparty? Rule 4:9(b) provides that in such a case:

> Nothing in this Rule shall prevent any party from applying for and obtaining a subpoena duces tecum for the production of any book, writing or document in lieu of proceeding to obtain the same under this Rule.

Subsection (b) has no federal rule counterpart and was added to avoid any possible misunderstanding that the rule as a whole overrules or is a substitute for Code Section 8-301, which provides for use of a subpoena duces tecum to obtain books, writings and documents "in the possession of a person not a

110 Hoagland v. TVA, 34 F.R.D. 458 (E.D. Tenn. 1963); Maginnis v. Westinghouse Elec. Corp., 207 F. Supp. 739 (E.D. La. 1962); Lewis v. United Air Lines Transp. Corp., 32 F. Supp. 21 (W.D. Pa. 1940). However, some courts have permitted discovery of an expert's opinion. Bergstrom Paper Co. v. Continental Ins. Co., 7 F.R.D. 548 (E.D. Wis. 1947); *see* United States v. 300 Cans, Etc., of Black Raspberries, 7 F.R.D. 36 (N.D. Ohio 1946).

111 *See* Leszynski v. Russ, 29 F.R.D. 10 (D. Md. 1961); Currie v. Moore-McCormack Lines, Inc., 23 F.R.D. 660 (D. Mass. 1959).

112 The reports must be in the possession of or under the control of a party. Office records of physicians do not qualify under this test. Greene v. Sears, Roebuck & Co., 40 F.R.D. 14 (N.D. Ohio 1966).

113 Leszynski v. Russ, 29 F.R.D. 10 (D. Md. 1961).

114 McDonald v. Prowdley, 38 F.R.D. 1 (W.D. Mich. 1965); Scuderi v. Boston Ins. Co., 34 F.R.D. 463 (D. Del. 1964).

115 Zimmerman v. Superior Ct., 98 Ariz. 85, 402 P.2d 212 (1965); *see* Suezaki v. Superior Ct., 58 Cal. 2d 166, 373 P.2d 432, 23 Cal. Rptr. 368 (1962). *Zimmerman* held that surveillance movies do not constitute an attorney's work product. *Suezaki* held they were work product, but still allowed discovery and production. Both cases raise the question of the discovery of evidence for impeachment purposes. *See generally* Boldt v. Sanders, 261 Minn. 160, 111 N.W.2d 225 (1961).

116 Richards-Wilcox Mfg. Co. v. Young Spring & Wire Corp., 34 F.R.D. 212 (N.D. Ill. 1964); Stovall v. Gulf & S. Am. S.S. Co., 30 F.R.D. 152 (S.D. Tex. 1961).

party." Photographs and maps are included by section 8-327.1. Issuance of the subpoena is conditioned upon the preparation of a supporting affidavit, notice to all adverse parties,[117] and a court order compelling production at a specified time and place.

Although there is no specific requirement that good cause be shown, the affidavit should nonetheless set forth the need for production and indicate both that the documents are material and relevant and that the information is sought in good faith. The subpoena duces tecum is not limited to compelling witnesses to produce documentary evidence in court on the day of trial. A witness may be required to bring documents with him to a deposition and produce them during his examination. Strict penalties are provided by sections 8-302 and -303 for failure to produce after proper service.

Physical and Mental Examination of a Party

When a party's mental or physical condition is in controversy, his adversary, upon notice to all parties, may move for an order under rule 4:10 requiring that he submit to an examination. The order, made only on a showing of good cause, is within the court's discretion[118] and is not routinely given in automobile accident cases.[119] The rule provides for examination by one or more physicians and, when sufficient justification is shown, more than one examination by different specialists.[120] In each instance the order must specify the time, place, manner, conditions and scope of the examination and the name of the examiner.

Customarily the moving party suggests the name of the examining physician, who is then appointed by the court unless the party to be examined objects, stating reasonable grounds. As a rule the parties agree upon the examiner. If they cannot, the court makes the designation.[121] A party has no right to insist upon a particular doctor, and a woman cannot demand that she be examined only by a female physician.[122]

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117 The 1966 amendment to VA. CODE ANN. § 8-301 (1950) added the requirement "upon notice to the party adverse to the party requesting the same." In 1946 FED. R. CIV. P. 45 was amended to eliminate the need to obtain a court order for a subpoena duces tecum.

118 Schlagenhauf v. Holder, 379 U.S. 104 (1964); Coca Cola Bottling Co. v. Negron Torres, 255 F.2d 149 (1st Cir. 1958); Gitto v. Societá Anonima Di Navigazione, 27 F. Supp. 785 (E.D.N.Y. 1939).

119 *See* Schlagenhauf v. Holder, 379 U.S. 104 (1964).

120 In Marshall v. Peters, 31 F.R.D. 238 (S.D. Ohio 1962), the plaintiff alleged whiplash sprain and aggravation of a preexisting heart condition. The court required him to submit to separate examinations by an orthopedic specialist and a heart specialist.

121 Pierce v. Brovig, 16 F.R.D. 569 (S.D.N.Y. 1954); Leach v. Greif Bros. Cooperage, 2 F.R.D. 444 (S.D. Miss. 1942); Gitto v. Societá Anonima Di Navigazione, 27 F. Supp. 785 (E.D.N.Y. 1939).

122 Gale v. National Transp. Co., 7 F.R.D. 237 (S.D.N.Y. 1946).

A party has been held to have no right to the presence of his attorney during the examination and preliminary questioning by the doctor.[123] Upon request, however, a party has been permitted to have his own physician present during the examination.[124]

The extent of the permissible examination includes x-rays,[125] blood tests[126] and even procedures which could prove painful or disagreeable to the person examined.[127] There is some doubt, however, that a party must submit to tests or examinations which might result in dangerous or permanent consequences.

After the examination is completed, the physician does not have to file a written report with the court or furnish a copy to each party as was required by former rule 3:23(d). No report is supplied to the party examined unless he requests it, in which case rule 4:10(b) requires submission of a detailed written report setting forth the examiner's findings and conclusions.[128]

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123 Dziwanoski v. Ocean Carriers Corp., 26 F.R.D. 595 (D. Md. 1960). *Contra*, Sharff v. Superior Ct., 44 Cal. 2d 508, 282 P.2d 896 (1955) (doctor was of adversary's choosing). *See* Annot., 64 A.L.R.2d 494 (1959). In *Dziwanoski* the court stated:

> The presence of the lawyer for the party to be examined is not ordinarily either necessary or proper; it should be permitted only on application to the court showing good reason therefor. If the attorney desires to be present in order to control the examination, that would invade the province of the physician; if he desires his observations to be the basis of cross-examination or possible contradiction of the doctor, he is making himself in effect a witness, with the difficulties which are likely to arise when an attorney asks questions on cross-examination based upon his own observations, and the possibility that he may wish to take the stand and thereby disqualify himself from completing the trial as the attorney.

26 F.R.D. at 598.

124 Dziwanoski v. Ocean Carriers Corp., 26 F.R.D. 595 (D. Md. 1960). *See also* Mitchell v. Pure Oil Co., 20 F. Supp. 1021 (E.D.N.Y. 1937), decided under a section of the New York Civil Practice Act that is substantially the same as VA. SUP. CT. APP. R. 4:10.

125 Mitchell v. Pure Oil Co., 20 F. Supp. 1021 (E.D.N.Y. 1937); Disalvo v. American Brass Co., 20 F. Supp. 136 (W.D.N.Y. 1937).

126 Lee Wing Get v. Dulles, 18 F.R.D. 415 (E.D.N.Y. 1955); *see* Dulles v. Quan Yoke Fong, 237 F.2d 496 (9th Cir. 1956). VA. CODE ANN. § 8-329.1 (Supp. 1966) permits blood tests as evidence of paternity in divorce or support proceedings.

127 In Klein v. Yellow Cab Co., 7 F.R.D. 169 (N.D. Ohio 1945), the court permitted an examination of the plaintiff's pelvic area, including cystoscopy and pylegrams, over objection that the examination would be too painful and involved the probability of serious or painful consequences.

128 The report should be objective, complete and candid regardless of which party requested the examination. In Chastain v. Evennou, 35 F.R.D. 350, 353 (D. Utah 1964), the court stated:

> It is to be expected that physicians and others called upon to make written reports for use in connection with litigation, whether pending, contemplated or possible, will express their candid opinion or judgment with the idea that findings should be the same irrespective of the side to which the report is furnished.

After the examined party has requested and received the report, the examining party may request from the examined party reports of all past or future examinations relating to the same condition,[129] thus obviating the need to move for their production under rule 4:9. The fact that reports of medical experts are involved is not grounds for refusing to produce them. And if a party submits to an examination by agreement rather than under court order, he does not give his adversary the right to discover his medical reports in the absence of his request for a copy of the examiner's report. Under rule 4:10(b)(2) the party examined also waives his privilege when he requests and obtains a report of his examination. This provision, however, has little or no effect in Virginia, since there is no physician-patient privilege under Code Section 8-289.1 when the mental or physical condition of a party is in controversy.[130]

Requests for Admissions

Before resorting to costly depositions it could be advantageous to request that a party simply admit certain relevant facts. After an action is commenced, a party may serve upon any other party a written request under rule 4:11 for the admission of the genuineness of documents or the truth of matters of fact. No court order is required unless the plaintiff serves a request within fourteen days after the action is brought. The rule mirrors Code Section 8-111.1 with the exception that the latter requires leave of court if the plaintiff serves a request within ten days after bringing the action.

Rnle 4:11 seeks to eliminate the burden of proving undisputed facts, thereby expediting the trial[131] and facilitating just determinations of those matters which are in controversy.[132] Facts such as ownership, agency, em-

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129 Sher v. DeHaven, 199 F.2d 777 (D.C. Cir. 1952), *cert. denied*, 345 U.S. 936 (1953); Weir v. Simmons, 233 F. Supp. 657 (D. Neb. 1964). In Butts v. Sears, Roebuck & Co., 9 F.R.D. 58 (D.D.C. 1949), the party examined was required to supply only reports of medical examinations conducted at the examined party's request. The court refused to compel production of copies of hospital records or office records of attending physicians.

130 City of Portsmouth v. Cilumbrello, 204 Va. 11, 15, 129 S.E.2d 31, 34 (1963), held that there is no privilege in personal injury cases. The Court stated:

> The contents of such reports are not privileged, as otherwise might be true in the physician-patient relationship, because Code § 8-289.1, removes the privilege when the physical or mental condition of the patient is at issue, in any action, suit or proceeding. When the plaintiff filed his motion for judgment, seeking damages for personal injuries, and the extent of such injuries was questioned by the city, his physical condition was at issue in the action and he could not then refuse to divulge the contents of the medical report on the ground of privilege.

131 *See* Moosman v. Joseph P. Blitz, Inc., 358 F.2d 686 (2d Cir. 1966); Williams v. Marziano, 78 N.J. Super. 265, 188 A.2d 314 (L. Div. 1963).

132 DeRyder v. Metropolitan Life Ins. Co., 206 Va. 602, 145 S.E.2d 177 (1965) (dictum);

ployment, cause of death and document identity and authenticity may be established prior to trial by the use of the rule. But it cannot be used to require an adversary to prepare his opponent's proof, as it was not designed to require admissions covering the entire case and each anticipated item of evidence.[133] It applies only to the truth or falsity of facts which may be ascertained without undue trouble, burden or expense. Thus facts about which there is real dispute are not proper subjects.[134] Requests that a party admit that he was negligent or that his negligence was the sole cause of another's injuries are improper,[135] as are requests for admissions concerning legal opinions or conclusions. A request is also objectionable if it requires interpretation of a document or analysis of a given state of facts.[136]

The matters of fact or the genuineness of documents set forth in the request are deemed admitted unless the questioned party serves a timely, sworn denial or written objection,[137] though no admissions result from failure to reply to an improper request.[138] If a party desires at the trial stage to use an admission which resulted from the requestee's failure to act, he should be prepared to prove service of the written request and absence of a denial or objection.

The filing of a request to admit does not bind the requesting party to the truth of any facts admitted.[139] But when the party served with the request admits a fact or the genuineness of a document, he is thereby bound during the pending action, though not in other proceedings. The admission stands in the same relation to the pending case as sworn testimony[140] and may be the basis for a motion for summary judgment under rule 3:20.[141]

General Accident Fire & Life Assur. Corp. v. Cohen, 203 Va. 810, 127 S.E.2d 399 (1962) (dictum); *see* Champlin v. Oklahoma Furniture Mfg. Co., 324 F.2d 74 (10th Cir. 1963). *See also* Syracuse Broadcasting Corp. v. Newhouse, 271 F.2d 910 (2d Cir. 1959).

133 Peck v. Clesi, 37 F.R.D. 11 (N.D. Ohio 1963); Pittsburgh Hotels Ass'n v. Urban Redevelopment Authority, 29 F.R.D. 512 (W.D. Pa. 1962); Griffin v. Wilhelmsen, 24 F.R.D. 431 (E.D. Pa. 1959); *In re* Reinauer Oil Transp., Inc., 19 F.R.D. 5 (D. Mass. 1956); *see* DeRyder v. Metropolitan Life Ins. Co., 206 Va. 602, 145 S.E.2d 177 (1965) (dictum).

134 Kasar v. Miller Printing Mach. Co., 36 F.R.D. 200 (W.D. Pa. 1964); Wedding v. Tallant Transfer Co., 37 F.R.D. 8 (N.D. Ohio 1963).

135 Lehmann v. Harner, 31 F.R.D. 303 (D. Md. 1962).

136 Kasar v. Miller Printing Mach. Co., 36 F.R.D. 200 (W.D. Pa. 1964); Pittsburgh Hotels Ass'n v. Urban Redevelopment Authority, 29 F.R.D. 512 (W.D. Pa. 1962).

137 Mangan v. Broderick & Bascom Rope Co., 351 F.2d 24 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966); Goodman v. Neff, 251 F. Supp. 565 (E.D. Pa. 1966); Villarosa v. Massachusetts Trustees of E. Gas & Fuel Associates, 39 F.R.D. 337 (E.D. Pa. 1966).

138 General Accident Fire & Life Assur. Corp. v. Cohen, 203 Va. 810, 127 S.E.2d 399 (1962).

139 Champlin v. Oklahoma Furniture Mfg. Co., 324 F.2d 74 (10th Cir. 1963); MOORE ¶ 36.08.

140 Williams v. Howard Johnson's, Inc., 323 F.2d 102 (4th Cir. 1963); United States v. Lemons, 125 F. Supp. 686 (W.D. Ark. 1954).

141 Moosman v. Joseph P. Blitz, Inc., 358 F.2d 686 (2d Cir. 1966); Mahoney v. Mc-

Refusal To Make Discovery and Its Consequences

Sanctions are provided under rule 4:12 for refusal to cooperate when discovery is sought in good faith. Under subsection (c) refusal to admit the truth of matters of fact or the genuineness of documents, when requested under rule 4:11, risks only the cost of their proof. Thus if after a sworn denial is filed the party requesting the admissions then proves the matters in question, he may apply for an order requiring the other party to pay the reasonable expenses and attorney's fees incurred in establishing the facts.[142] Unless the court finds good reasons for the denial or that the admissions sought were of no substantial importance, the order requiring payment shall be made.

Under rule 4:12(a) the refusal of a party or witness to answer a question during oral examination can result in adjournment of the deposition. And even if it is continued as to other matters, the examiner, on giving reasonable notice to all persons affected, may apply to the court where the action is pending or to the court of the area in which the deposition is being taken for an order compelling an answer. If the court finds that the refusal to answer was without substantial justification, the deponent may be required to pay the reasonable expenses of the moving party, including attorney's fees.[143]

Under subsection (b)(1) a party or witness who refuses to be sworn or to answer after having been judicially directed to do so may be held in contempt of court. Such conduct could be considered disobedience or resistance to a lawful process or order of the court under Code Section 18.1-292. And under subsection (b)(2) a party who disobeys a court order requiring him to answer, to produce or to submit to a medical examination may suffer such consequences as the court deems just. The court, for instance, may order that certain facts be taken as established, forbid the party to support or oppose designated claims or defenses or introduce designated documents or things or medical evidence, strike the party's pleadings, stay further proceedings, dismiss the action, or grant default judgment. The sanctions apply regardless of whether the party's refusal was willful.[144]

Donald, 38 F.R.D. 161 (E.D. Pa. 1965). VA. SUP. CT. APP. R. 3:20 provides:

> Either party may make a motion for summary judgment at any time after the parties are at issue. If it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings, or, upon sustaining a motion to strike the evidence, that the moving party is entitled to judgment, the court shall enter judgment in his favor. Summary judgment shall not be entered if the amount of damages or any other material fact is genuinely in dispute.

142 United States v. Watchmakers of Switzerland Information Center, Inc., 25 F.R.D. 197 (S.D.N.Y. 1959); Rabjohn v. Minute Maid Corp., 25 F.R.D. 195 (S.D.N.Y. 1958).

143 Braziller v. Lind, 32 F.R.D. 367 (S.D.N.Y. 1963); Gibbs v. Blackwelder, 346 F.2d 943 (4th Cir. 1965) (dictum).

144 Independent Prods. Corp. v. Loew's, Inc., 30 F.R.D. 377 (S.D.N.Y. 1962) (dictum).