UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION Plaintiff, v. McGINN, SMITH & CO, INC., McGINN, SMITH ADVISORS, LLC, McGINN, SMITH CAPITAL HOLDINGS CORP., FIRST ADVISORY INCOME NOTES, LLC, FIRST EXCELSIOR INCOME NOTES, LLC, THIRD ALBANY INCOME NOTES, LLC TIMOTHY M. MCGINN, DAVID L. SMITH, LYNN A. SMITH, DAVID M. WOJESKI, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04, GEOFFREY R. SMITH, LAUREN T. SMITH, and NANCY MCGINN, Defendants, LYNN A. SMITH, and NANCY MCGINN, Relief Defendants, and DAVID M. WOJESKI, Trustee of the David L. and Lynn A. Smith Irrevocable Trust U/A 8/04/04, Intervenor.	1:10 CV 457 GLS/DRH

MEMORANDUM OF LAW OF NON-PARTY THOMAS J. URBELIS IN OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS

Dated: March 21, 2011

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PRELIMINARY STATEMENT

Thomas J. Urbelis, a non-party who appeared for deposition in this matter on June 1, 2010, respectfully submits this memorandum of law, along with an accompanying affidavit, in opposition to the motion for sanctions filed by the plaintiff Securities and Exchange Commission ("SEC"). The SEC's motion for sanctions, while meritless, provides Mr. Urbelis with an opportunity he has not been given to date – to correct the record concerning erroneous information provided to this Court about Mr. Urbelis's deposition testimony and about his conduct in this matter. As will be shown herein, Mr. Urbelis:

- Responded in good faith and on short notice to the SEC's request that he send the SEC documents relating to a Trust of which he no longer was the Trustee;
- Appeared for deposition, far from his home and at his own expense, on three days' notice, and testified truthfully in response to every question put to him during the deposition; and
- Subsequently produced additional documents located at his home after being prompted by the SEC's request that he look for a specific type of document.

In response, the SEC's attorneys: (1) have made misleading and inaccurate statements about Mr. Urbelis; (2) have moved for sanctions against him on the basis of a subpoena which the SEC knew was invalid; and (3) repeatedly have attempted to lump Mr. Urbelis in with the defendants to this action and those attorneys who have filed appearances in this case. In particular, in its motion for sanctions, the SEC baldly asserts, without citing to any supporting evidence, that Mr. Urbelis was a participant in a "scheme" designed to unfreeze the assets of the Trust so that monies could be parceled out to various stakeholders.

As set forth below, nothing could be further from the truth. Mr. Urbelis never obtained a penny from the Trust, and his financial interests are not aligned with those of David or Lynn Smith, the Smith children, the current Trustee, or the attorneys representing those individuals and entities. For that reason, Mr. Urbelis has not sought and does not seek reconsideration of the Court's November 22, 2010 Order freezing the assets of the Trust. Mr. Urbelis simply seeks to correct the record with respect to the Court's findings concerning his conduct, as those findings were based on misleading and inaccurate information provided by the SEC.

The SEC's actions have caused grievous harm to Mr. Urbelis's otherwise unblemished reputation, built up over 30 years of practice. There is utterly no legal or factual basis for any award of sanctions against Mr. Urbelis. Further, Mr. Urbelis respectfully requests that the Court amend its November 22, 2010 decision in conformity with the facts set forth below and in Mr. Urbelis's detailed affidavit.

I. FACTUAL AND PROCEDURAL BACKGROUND

The following factual recounting is based on the record to date[1] and on Mr. Urbelis's detailed affidavit ("Urbelis Aff."). To conserve the Court's time and resources, Mr. Urbelis will not repeat here all of the facts set forth in his affidavit, but he respectfully urges the Court to read the affidavit in its entirety.

Mr. Urbelis has practiced law since 1978 and concentrates his practice in the representation of municipalities. (Id. at ¶ 1). He was a childhood friend of defendant David Smith, and over the years, he invested funds with various McGinn Smith entities.

[1] Mr. Urbelis is not a party to this case, nor has he appeared as counsel for any party. His knowledge as to what has happened in the case to date is based largely on pleadings accessible on the federal court PACER system.

(Id. at ¶¶ 4, 5). In or about August, 2004, Mr. Urbelis agreed to serve as the Trustee of a trust that Mr. Smith was setting up for the benefit of his children. (Id. at ¶ 6). Mr. Smith thereafter sent Mr. Urbelis a copy of the Declaration of Trust for the David L. Smith and Lynn A. Smith Irrevocable Trust (the "Trust"). (Id. at ¶ 8). At some point in time, Mr. Urbelis also received a copy of the Private Annuity Agreement ("PAA") that has become a focus in this case. Mr. Urbelis does not remember when or how he received the PAA, nor does he recall any discussions he had with David Smith concerning the PAA when he first received it. (Id. at ¶¶ 10-11).

Mr. Urbelis served as trustee of the Trust without compensation for a little more than five-and-a-half years. (Id. at ¶ 13). He never made a distribution from the Trust to either beneficiary, Lauren or Geoff Smith, nor did either ever ask him for a distribution. (Id.) During his tenure as Trustee, Mr. Urbelis does not recall ever reviewing the terms of the PAA, or discussing with anyone the annuity payments referenced in the PAA. (Id. at ¶¶ 11-12).

On or about April 21, 2010, Mr. Urbelis read newspaper accounts about the filing of this lawsuit against McGinn Smith. He immediately resigned as Trustee of the Trust, believing that his interests as a potentially impacted investor were in conflict with his fiduciary duties as Trustee to the Smiths' children. (Id. at ¶ 15).

In mid-May, 2010, Mr. Urbelis was contacted by Attorney Jill Dunn, who identified herself as counsel for the successor trustee, David Wojeski. Mr. Urbelis had never met or communicated with Ms. Dunn or Mr. Wojeski before this call. Ms. Dunn asked Mr. Urbelis to send her copies of his file relating to the Trust, and he did so. The package Mr. Urbelis sent to Ms. Dunn did not include the PAA, because it was not in his

file for the Trust, and Mr. Urbelis did not then recall the PAA or that he had a copy of it. (Id. at ¶¶ 16-18).

On Friday, May 28, 2010, on the eve of the Memorial Day weekend, Mr. Urbelis received a telephone call from the SEC's counsel. The SEC's attorneys asked Mr. Urbelis to appear for deposition the following week, and to provide the SEC with copies of any documents he had relating to the Trust. Mr. Urbelis agreed to appear for deposition in Albany on the following business day, June 1, 2010, and to provide the SEC with a copy of the documents he previously had provided to Ms. Dunn. The SEC did not say anything about serving Mr. Urbelis with a subpoena. (Id. at ¶¶ 19-21).

After this telephone call ended, Attorney Lara Mehraban e-mailed a purported subpoena to Mr. Urbelis, with an attached schedule of documents.[2] Mr. Urbelis sent a reply e-mail to Ms. Mehraban, indicating that per their prior discussion, he would not have time prior to the deposition to locate any documents other than those he had sent to Ms. Dunn. Ms. Mehraban acknowledged in a reply e-mail that she understood that Mr. Urbelis would be sending only what he already had sent to Ms. Dunn. (Id. at ¶¶ 22-23).

Mr. Urbelis appeared for deposition in Albany on June 1, 2010. He did not retain an attorney to represent him at the deposition.[3] The SEC's counsel asked very few substantive questions about the Trust. As set forth in more detail in Mr. Urbelis's affidavit, Mr. Urbelis truthfully answered each question put to him. (Id. at ¶¶ 26-27, Exhibit E). At the conclusion of the deposition, Mr. Urbelis asked Attorney David

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[2] As detailed below, this "subpoena" was invalid, because it required Mr. Urbelis to appear and produce documents at a place more than 100 miles from his home and place of business. Fed. R. Civ. P. 45(b)(2)(B).

[3] The stenographer erroneously indicated that Ms. Dunn was representing Mr. Urbelis at the deposition. Mr. Urbelis corrected this error in his errata sheet. A complete copy of Mr. Urbelis's deposition transcript and errata sheet are attached to Mr. Urbelis's affidavit as Exhibit E.

Stoelting if the SEC would need him at the June 9, 2010 hearing. Mr. Stoelting replied that Mr. Urbelis's testimony at the hearing would not be necessary, and he further stated that the SEC could not subpoena him anyway. (Id. at ¶ 28).

On Friday, July 23, 2010, Mr. Urbelis received another telephone call from the SEC's counsel. The SEC's counsel asked Mr. Urbelis whether he knew anything about the terms of a private annuity agreement relating to the Trust. Mr. Urbelis responded that he had a vague recollection of the terms of such an agreement, and he agreed to look further for it. Over the following weekend, Mr. Urbelis conducted a further search at his home, and located the PAA, mixed in with a copy of a 1989 life insurance trust that had been established for David Smith and of which Mr. Urbelis also was the Trustee. (Id. at ¶¶ 40-41). On Monday, July 26, 2010, Mr. Urbelis sent the PAA to the SEC by overnight mail. On July 27, 2010, having been reminded of the life insurance trust, he resigned as trustee of that trust. On July 28, 2010, Mr. Urbelis sent a copy of his resignation letter, along with documents relating to the life insurance trust, to the SEC. (Id. at ¶ 42-43).

After Mr. Urbelis sent the PAA to the SEC, the SEC's counsel contacted Mr. Urbelis to ask him why he had not previously sent it. Mr. Urbelis truthfully responded that he had not realized he had it, that the PAA had been mis-filed at his home with a copy of the life insurance trust, and that he had not recalled the existence of the PAA until the telephone call from the SEC on July 23, 2010. (Id. at ¶ 44).

The SEC then moved for reconsideration of the Court's July 7, 2010 order lifting the freeze on the Trust's assets. (Doc. No. 103). As detailed in Mr. Urbelis's affidavit, and as discussed in Section II below, the SEC made a number of misleading statements regarding Mr. Urbelis's conduct in the papers it filed in connection with its motion for

reconsideration. (See Urbelis Aff., ¶¶ 33-39). Mr. Wojeski, Lynn Smith, Lauren Smith and Geoffrey Smith filed briefs and affidavits in opposition to the motion for reconsideration. (Doc. Nos. 133, 134, 135, 146, 147, 148 and 149). Mr. Urbelis did not draft or review any of the briefs or affidavits before they were filed. (Urbelis Aff., ¶ 52).

This Court scheduled an evidentiary hearing on the SEC's motion for reconsideration for November 16, 2010. Per the Court's Order of October 7, 2010 (Doc. No. 150), the only issues for hearing were: (1) whether the PAA was in effect, because it apparently never was signed by Mr. Urbelis; and (2) what was said during a July 22, 2010 telephone conversation between the SEC's counsel and Ms. Dunn.[4] At the November 16, 2010 hearing, as described in Mr. Urbelis's affidavit, Mr. Stoelting offered misleading testimony as to what Mr. Urbelis had said during his deposition. (Urbelis Aff., ¶¶ 48 - 51).

On November 22, 2010, the Court issued a Memorandum of Decision and Order granting the SEC's motion for reconsideration, and on reconsideration, granting the SEC's motion for entry of an injunction as to the Trust. (Doc. No. 194). In its Memorandum, the Court made a number of factual errors that appear to have informed its decision, including a statement that the SEC had served a subpoena on Mr. Urbelis "as the then Trustee of the Trust" (Memorandum at p. 7), a statement that Mr. Urbelis had actual knowledge of the PAA "by virtue of having signed it" (id.), and a statement that

[4] As the Court will recall, the SEC's attorneys claimed in affidavits filed with the Court that the first notice to the SEC of the possible existence of the annuity agreement was provided by Ms. Dunn, who allegedly said during the July 22, 2010 telephone call that no gift tax was due on the assets transferred to the Trust, because there was a private annuity agreement. At the November 16, 2010 hearing, however, David Stoelting, one of the SEC's attorneys, acknowledged that a copy of the PAA had been located among the papers seized by federal investigators. (Urbelis Aff., Exhibit G, pp. 44-45). Federal investigators did not initially provide a copy of the PAA to the SEC, but did locate and turn over the PAA in October 2010 when the SEC requested that they conduct a further search. (Id.). This sequence of events obviously parallels what occurred with Mr. Urbelis.

Ms. Dunn represented Mr. Urbelis in responding to the subpoena and at his deposition (id. at p. 18). Mr. Urbelis respectfully submits that these factual errors, in conjunction with the SEC's misleading and inaccurate representations to the Court, led the Court to reach the erroneous conclusion that Mr. Urbelis made a conscious decision not to advise the SEC about the PAA.

On January 31, 2011, relying on the Court's November 22, 2010 Memorandum, the SEC moved for the entry of sanctions against Lynn Smith, Mr. Wojeski, Ms. Dunn, and Mr. Urbelis. In its supporting papers, the SEC continued to make misleading statements about Mr. Urbelis, and carelessly characterized his financial interests as aligned with those who benefited from the Court's decision lifting the restraining order on the Trust assets. (See, e.g., SEC's Memorandum, p. 1; Urbelis Aff., ¶¶ 53-54).

These statements are simply untrue as they pertain to Mr. Urbelis. He is not a beneficiary of the Trust, he has never received a single dollar from the Trust, and by the time of his deposition, he had resigned as Trustee. Therefore, as of June 2010, he did not have any financial interest in lifting the freeze on the Trust's assets.

With this factual backdrop, Urbelis now considers the various theories advanced by the SEC in support of its sanctions request.

II. ARGUMENT

A. The SEC Cannot Seek An Award of Sanctions Against Mr. Urbelis On The Basis of A Subpoena That The SEC Knew Was Unenforceable.

Rule 45 authorizes a party to issue a subpoena to a non-party requiring the production of documents. Fed. R. Civ. P. 45(a). Rule 45(e), however, which authorizes a court to exercise contempt power in the case of an unexcused failure to comply with a

subpoena, specifically provides that a nonparty's failure to comply with a subpoena "**must** be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the [100-mile limit] of Rule 45(c)(3)(A)(ii)." Fed. R. Civ. P. 45(e)(emphasis added). This Court has held that a non-party has no obligation to respond to a subpoena that requires testimony or production outside the 100-mile limit. Insinga v. DaimlerChrysler Corp., 2008 WL 202701 (N.D.N.Y. 2008)[5] (refusing to enforce subpoena, even where non-party had responded to subpoena in part, because subpoena plainly violated 100-mile limit and Rule 45(e) required non-party to be excused from compliance as a matter of law).

Other courts similarly have held that a non-party has no obligation to respond to a facially invalid subpoena, even where no objection to the subpoena was timely raised. See, e.g., Estate of Ungar v. Palestinian Auth., 451 F. Supp. 2d 607, 611 (S.D.N.Y. 2006) (court could not hold non-party in contempt for failing to obey subpoena that violated 100-mile limit, even though no motion to quash had been filed); U.S. Bancorp Equip. Finance, Inc. v. Babylon Transit, Inc., 270 F.R.D. 136, 139 (E.D.N.Y. 2010) (denying motion to compel compliance with facially invalid subpoena, even though no motion to quash had been filed); In re Byrd, Inc. v. Smith, 927 F.2d 1135, 1137-38 (10th Cir. 1991).

The Ninth Circuit's decision in Byrd is particularly illuminating. In that case, a mortgagee sought an order compelling the enforcement of two subpoenas issued to a debtor's appraiser. The bankruptcy court declined to enforce either subpoena, because both subpoenas had not been timely served, and one subpoena violated the 100-mile limit. On the debtor's subsequent motion, the bankruptcy court awarded sanctions

[5] All unreported decisions are contained in Exhibit 1, attached hereto, in the order in which they appear herein.

against the party that sought enforcement of the subpoenas. The sanctions award was upheld by the district court and the 9th Circuit. In upholding the sanctions award, the 9th Circuit held that the issuing party could not reasonably have believed that the subpoenas were valid when issued, and therefore its filings seeking enforcement of the subpoena violated the requirements of Rule 11. 927 F.2d at 1138.[6]

In this case, as in Byrd, the SEC clearly knew that the "subpoena" it served on Mr. Urbelis was invalid. As noted above, David Stoelting, the SEC's lead attorney in this matter, acknowledged at Mr. Urbelis's deposition that the SEC could not subpoena Mr. Urbelis into the June 9th hearing. Further, when Ms. Mehraban e-mailed the purported subpoena to Mr. Urbelis on May 28, 2010, she included a complete copy of Rule 45, containing the above-quoted language. Finally, in her declaration in support of the SEC's motion for sanctions, Ms. Mehraban attests that Mr. Stoelting has been a trial attorney for over 18 years, and that she has over 10 years of trial experience. Surely, these two lawyers, with combined trial experience in excess of 28 years, cannot seriously dispute that they issued a subpoena to Mr. Urbelis that they knew was invalid.[7]

Thus, as in Byrd, it is really the SEC that should be sanctioned, for now seeking an award of sanctions against Mr. Urbelis on the basis of his purported non-compliance with a deposition subpoena *duces tecum* that they knew was invalid. Shockingly, the SEC has never mentioned to this Court that the subpoena issued to Mr. Urbelis was

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[6] See also Spencer v. Steinman, 179 F.R.D. 484, 489 (E.D. Pa. 1998) ("misuse of the subpoena power is not limited to the harm it inflicts upon the parties, it also compromises the integrity of the court's processes ... [and] public confidence in the integrity of the judicial process is eroded."); Coleman-Hill v. Governor Mifflin School Dist., C.A. No. 09-CV-5525 (E.D. Pa. November 4, 2010) ("[a]ttorneys must understand the high degree of trust that is imposed upon them, and must conduct themselves with the utmost care when using the Court's subpoena power.").

[7] Ms. Mehraban's October 29, 2010 e-mail to Mr. Urbelis, advising him that the law had changed as of July 22, 2010 to provide the SEC with nationwide service of process, constitutes further evidence that the SEC knew that its earlier subpoena to Mr. Urbelis was invalid. (Urbelis Aff., ¶ 47, Exhibit H).

facially invalid. Instead, as detailed above, the SEC repeatedly has misled this Court into believing that it issued a valid document and deposition subpoena to Mr. Urbelis. See, e.g., SEC's Memorandum of Law in Support of Motion for Sanctions, pp. 5, 17 ("Urbelis ... failed to produce the Annuity Agreement in a timely manner although he received a subpoena calling for its production.").[8]

Regardless of whether this Court decides to impose sanctions on the SEC, however, this Court cannot and should not impose sanctions on Mr. Urbelis for his alleged non-compliance with a facially invalid subpoena. As a matter of law, Mr. Urbelis had no duty to produce documents to the SEC at any time. This Court, therefore, cannot sanction Mr. Urbelis for producing the PAA to the SEC on a later date than was specified in the invalid subpoena.

As set forth below, moreover, Mr. Urbelis at all times attempted in good faith to cooperate with the SEC's requests for information, and testified truthfully in response to all of the questions propounded to him at his deposition. His conduct therefore is not sanctionable in any respect.

B. There Is No Factual or Legal Basis for Imposition of Sanctions on Mr. Urbelis Pursuant To This Court's Inherent Authority to Sanction Bad Faith Litigation Conduct.

The United States Supreme Court has held that "'the power to punish for contempt is inherent in all courts.'" Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (quoting Ex parte Robinson, 19 Wall. 505, 510, 22 L. Ed. 205 (1874). The power reaches

[8] At a minimum, the SEC's attorneys have violated their duty of candor to this Court. See N.Y. Rule of Prof. Conduct 3.3 (2010). The purpose of Rule 3.3 is to uphold the "integrity of the adjudicative process." Id. at cmt. 2. A lawyer must ensure that "the tribunal is not misled by false statements of law or fact or by evidence that the lawyer knows to be false." Id. "[A]n assertion purporting to be based on the lawyer's own knowledge, as in an affidavit or declaration by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry." Id. at cmt. 3.

both conduct inside and outside the courtroom, because the concern giving rise to the contempt power is "disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial." Young v. United States, 481 U.S. 787, 798 (1987).

Because a court's inherent power to impose sanctions "is shielded from direct democratic controls, [it] must be exercised with restraint and discretion." Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980). Sanctionable conduct must be proven by clear and convincing evidence, and where sanctions in the form of attorneys' fees are sought, the district court must make particularized findings of bad faith. See id. at 766 (remanding case to trial court because it had not made finding of bad faith necessary to imposition of sanctions under court's inherent power); DLC Mgmt. Corp. v. Town of Hyde Park, 163 F.3d 124, 136 (2d Cir. 1998); Zlotnick v. Hubbard, 572 F. Supp. 2d 258, 272 (N.D.N.Y 2008) (bad faith finding is necessary for imposition of sanctions under court's inherent power and under 28 U.S.C. § 1927).

With respect to a non-party, moreover, the test is even more stringent. Non-parties ordinarily cannot be sanctioned absent violation of a specific court order. See Amerisource Corp. v. RX USA Int.'l, Inc., 2010 WL 2730748 (E.D.N.Y. 2010); Continental Ins. Co. v. Atlantic Cas. Ins. Co., 2008 WL 3852046 (S.D.N.Y. 2008). Courts have carved out limited exceptions to this rule, but none of those exceptions are applicable here. See, e.g., Amerisource, 2010 WL 2730748, at *5-6 (permitting imposition of sanctions on corporate defendant's principal, where testimonial evidence showed that principal was the individual responsible for fabricating evidence and managed litigation at every step); Helmac Products Corp. v. Roth (Plastics) Corp., 150

F.R.D. 563, 568 (E.D. Mich. 1993) (sanctioning corporate defendant's CEO, where CEO ordered destruction of documents and directed all activities in litigation).

In Helmac, the court held that a federal district court could impose sanctions on a non-party not subject to court order under its "inherent power to sanction" only if: (1) the non-party had a substantial interest in the outcome of the litigation; and (2) substantially participated in the proceedings in which he interfered. 150 F.R.D. at 568. The court held that this test would be consistent with the United States Supreme Court's guidance in Chambers, supra, because it would "effectively limit the scope of the court's inherent power to sanction to those individuals who were either (1) parties, (2) subject to a court order, or (3) real parties in interest." Id.[9]

In this case, there is no competent record evidence establishing that Mr. Urbelis willfully or deliberately concealed the PAA from the SEC. To the contrary, the evidence demonstrates that when the SEC first contacted Mr. Urbelis, he immediately agreed to send documents to the SEC and to appear for deposition at a place far from his home. When he appeared for deposition, he readily answered all of the questions put to him. Further, when the SEC specifically asked Mr. Urbelis whether he knew anything about the terms of an annuity agreement, Mr. Urbelis readily answered that he had a vague recollection of the terms of such an agreement, and agreed to conduct a further search for

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[9] In its brief, the SEC erroneously cites Chambers v. NASCO, Inc., 501 U.S. 32 (1991) as standing for the proposition that a federal court can exercise its "inherent powers" to sanction non-parties as well as parties without drawing any distinction between the two. Chambers does not stand for this proposition. All of the individuals and entities sanctioned by the trial court in Chambers were parties, or attorneys for parties. NASCO, Inc. v. Calcasieu Television and Radio, Inc., 124 F.R.D. 120 (1989). In the footnote relied upon by the SEC, the Supreme Court was simply noting that several of those parties had not appealed from the lower court's decision awarding sanctions, and thus were not "parties to the action in this Court." 501 U.S. at 41, n. 5. The SEC evidently did not bother to read the cited lower court decision.

it. He then promptly conducted a further search, and upon locating the PAA, sent it to the SEC and to the successor trustee.

The SEC repeatedly has attempted to turn this innocuous sequence of events into something worthy of sanctions through two essential misrepresentations to this Court:

> (1) that it served a subpoena on Mr. Urbelis that expressly called for production of the PAA, and that Mr. Urbelis intentionally omitted the PAA from documents he produced in response to the subpoena; and
>
> (2) that Mr. Urbelis testified at his deposition that the Smiths had no present or future interest in the Trust or its assets.

As set forth above and in Mr. Urbelis's affidavit, both of these contentions are untrue. First, the SEC's purported subpoena was not valid or enforceable, because it required Mr. Urbelis to produce documents and to appear at a place more than 100 miles from his home and office. See Fed. R. Civ. P. 45(b)(2). Further, the SEC inexplicably never informed this Court that it agreed to proceed with Mr. Urbelis's deposition on the express understanding that Mr. Urbelis would send only a copy of what he already had sent to Ms. Dunn, because he would not have time to conduct a further search for documents relating to the Trust. (Urbelis Aff., ¶¶ 22-23, Exhibit D). The SEC also has never advised this Court that Mr. Urbelis had a logical explanation for his failure to discover the PAA during his first searches for documents relating to the Trust – namely, the fact that Mr. Urbelis had mis-filed the PAA in a stack of loose paperwork at his house. (Urbelis Aff., ¶ 41).

The SEC also has misrepresented Mr. Urbelis's deposition testimony. Mr. Urbelis never testified that the Smiths had no current or future interest in the Trust, for the very simple reason that Mr. Urbelis was never asked any questions at his deposition

about the source of the Trust's assets or the Smith's interests in those assets.[10] (Urbelis Aff., ¶¶ 35-37, 50-51).

Beyond these misrepresentations, the SEC also has made entirely unsupported claims that Mr. Urbelis participated in a "scheme" to conceal the PAA from the SEC, along with others who had "an interest in the Trust" and "a clear financial motive to misrepresent the nature of the Trust," in order to "persuade the Court to unfreeze $3.5 million." (SEC's Memorandum of Law, p. 1). There is absolutely no evidence of such a "scheme," and certainly no evidence that Mr. Urbelis participated in it. As set forth in Mr. Urbelis's affidavit, on the date he received the first call from the SEC, he was no longer the Trustee of the Trust. (Urbelis Aff., ¶ 19). He had no prior relationship with Ms. Dunn or Mr. Wojeski, the successor Trustee, and did not participate in any way in the drafting of the papers filed by the Trust in order to intervene in the case and to lift the freeze on the Trust's assets. (Id. at ¶¶ 16-17). Mr. Urbelis did not discuss his anticipated deposition testimony with anyone before he appeared for the June 1st deposition. (Id. at ¶ 24). He had no conversations with anyone about concealing or attempting to conceal the PAA from the SEC or any other investigating authority. (Id. at ¶ 25).

Further, it is undisputed that Mr. Urbelis has never received one penny of compensation from the Trust, that he did not receive any distributions from the Trust after the restraining order was lifted, and that he has no future interest in the Trust's

[10] At the November 16, 2010 hearing, Mr. Stoelting testified that the SEC had asked "Mrs. Smith, the trustee, and numerous other witnesses why the trust was created, what its purpose was, whether or not the Smiths had any continuing interests in the assets of the trust, who owned the assets that were transferred to the trust. We asked all of those questions and did not – no one ever responded about an annuity agreement." (Urbelis Aff., Exhibit G, pp. 40-41). While the SEC may have posed these questions to other witnesses, the SEC did not ask Mr. Urbelis any of these questions. Thus, Mr. Stoelting's hearing testimony was misleading and inaccurate as it pertained to Mr. Urbelis's deposition testimony.

assets. (Id. at ¶ 54). Under these circumstances, the SEC cannot credibly point to any "clear financial motive" for Mr. Urbelis to conceal the PAA from the SEC.

The SEC may contend that Mr. Urbelis could not have forgotten about the PAA, because "one of his responsibilities as trustee was to ensure that there were sufficient assets in the Trust to enable it to fulfill its obligation to make millions of dollars in payments to David and Lynn Smith beginning in 2015." (SEC's Memorandum, p. 5). The SEC is simply wrong on this point, which misrepresents the express language of the Trust documents, and ignores the expert opinions provided to this Court. The Declaration of Trust provides the Trustee with unfettered discretion to terminate the Trust at any time, and to make whatever distributions to the beneficiaries the Trustee deems appropriate. (Opinion of David L. Evans, Doc. No. 134, Ex. A). Under New York trust law, moreover, while Mr. Urbelis had a fiduciary duty to the beneficiaries of the Trust (the Smith children), the PAA imposed no corresponding duty on Mr. Urbelis to the Smiths. (Id.) In fact, the PAA expressly states that the annuity payments referenced in the agreement are not guaranteed and cannot be secured by liens against the assets of the Trust. (Doc. No. 103-3).

The language of the Trust documents is consistent with what Mr. Urbelis told the SEC on the telephone and at deposition, and with Mr. Urbelis's sworn statements in the accompanying affidavit. Mr. Urbelis testified at deposition that he viewed his duty as running to the beneficiaries of the Trust, the Smith children. (Urbelis Aff., ¶ 38). Mr. Urbelis has no recollection of ever reviewing the terms of the PAA, or discussing it with anyone, during his tenure as Trustee. (Id. at ¶¶ 10-11). Further, Mr. Urbelis never did any calculations to confirm that there were sufficient funds in the Trust to make any

annuity payments due to the Smiths, and never formed the belief that it was his role to ensure that there were assets in the Trust sufficient to make those payments. (Id. at ¶ 12).[11] Because Mr. Urbelis never had any occasion to consult the PAA, which likely was sent to him over six years ago, and because the PAA was not filed with other Trust papers in Mr. Urbelis's office, Mr. Urbelis's statement that he did not recall the PAA when Ms. Dunn and then the SEC contacted him to ask for copies of the Trust papers is entirely credible.

In contrast, there is no competent evidence demonstrating that Mr. Urbelis deliberately concealed the PAA , or that Mr. Urbelis participated in a scheme with others designed to conceal the PAA. This Court therefore cannot hold that the SEC has met its burden of proving, by clear and convincing evidence, that Mr. Urbelis acted in bad faith. See Roadway, 447 U.S. at 766. Nor has the SEC shown that Mr. Urbelis, a non-party, violated a specific court order or that he had such a substantial interest in the outcome of the proceedings that he should be deemed a "real party in interest." See Helmac, 150 F.R.D. at 568.

As an initial matter, the SEC does not even contend that Mr. Urbelis violated a specific court order, likely because the SEC knows that the subpoena it sent to Mr. Urbelis was invalid and unenforceable. The Second Circuit also has held that a subpoena, while it is a legal instrument, "is not of the same order as an order issued by a judicial officer in the resolution of a specific dispute." Daval Steel Products v. M/V

[11] In this respect, the Trust had approximately $4 million in assets throughout the time Mr. Urbelis served as Trustee. (Urbelis Aff., ¶ 9). According to the SEC's calculations, that amount would have been woefully insufficient to make the $10 million in annuity payments that the SEC now contends Mr. Urbelis was obligated to make. Further, if the SEC's reading of the trust documents is correct, the current Trustee ran afoul of the PAA when he made distributions from the Trust in July 2010, as those distributions further impaired the Trust's ability to make the annuity payments.

Fakredine, 951 F.2d 1357, 1364-65 (2d. Cir. 1991) (vacating sanctions imposed upon party for failure to comply with deposition subpoena, where no order had issued directing such compliance and there had been no judicial scrutiny of discovery request). Here, of course, the SEC had no reason to seek a court order compelling Mr. Urbelis to comply with its purported subpoena, because Mr. Urbelis cooperated with all of the SEC's requests for information.

There also is no evidence that Mr. Urbelis has such a substantial interest in the outcome of these proceedings that he should be deemed a "real party in interest," subjecting him to sanctions even in the absence of a violation of a court order. As set forth above, Mr. Urbelis has no financial interest in the Trust or its assets.

In sum, there is no factual or legal basis for an award of sanctions against Mr. Urbelis under this Court's "inherent power to sanction," because the SEC has not demonstrated by clear and convincing evidence that he acted in bad faith, that he failed to comply with a specific court order, or that he is a "real party in interest" in these proceedings.

C. There Is No Factual or Legal Basis for Imposition of Sanctions on Mr. Urbelis Pursuant To 28 U.S.C. § 1927.

Section 1927 provides:

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

28 U.S.C. § 1927. The Second Circuit has held that the imposition of sanctions pursuant to this provision is "highly unusual and requires a clear showing of bad faith." West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079, 1092 (2d Cir. 1971). An award of

sanctions under this provision is proper "when the attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay." Oliveri v. Thompson, 803 F.2d 1265, 1273 (2d Cir. 1986) (reversing award of sanctions against attorney who pursued wrongful arrest and excessive force claims against police department, where the trial court's findings did not meet the "high degree of specificity" required for an award under § 1927).

A court's power to award sanctions under § 1927 typically is exercised to punish dilatory tactics on the part of lawyers who have appeared as counsel of record in an action. See, e.g., Oliveri, 803 F.2d at 1273 ("§ 1927 applies a uniform standard for the imposition of sanctions, whether the person against whom fees are assessed represented the plaintiff or the defendant"); Gollomp v. Spitzer, 568 F.3d 355, 369-70 (2d Cir. 2009) (affirming award of § 1927 sanctions against plaintiff's counsel for filing and continuing to maintain frivolous claims); In re 60 East 30th Street Equities, Inc., 218 F.3d 109, 116 (2d Cir. 2000) (affirming award of § 1927 sanctions against debtors' counsel for maintaining frivolous appeal); cf. Matta v. May, 118 F.3d 410, 414 (5th Cir. 1997) (reversing award of § 1927 sanctions against plaintiff, even though plaintiff happened to be an attorney, because plaintiff was represented by counsel). This is consistent with the purpose of the statutory provision, which is to deter attorneys from causing proceedings to be drawn out unnecessarily by advancing legal positions that have no merit. See Eisemann v. Greene, M.D., 204 F.3d 393, 396 (2d. Cir. 2000) (court may impose sanctions under § 1927 if it finds clear evidence that claims were "entirely without color" and "motivated by improper purposes such as harassment or delay.").

Applying these principles to the instant case, there is no legal or factual basis for an award of sanctions against Mr. Urbelis under 28 U.S.C. § 1927. Mr. Urbelis is indeed an attorney, but his role in this case had nothing to do with his status as an attorney. The SEC contacted Mr. Urbelis because he was the former trustee of the Trust. He sent documents to the SEC, and appeared for deposition, in that capacity. He never filed an appearance for himself, or for anyone else, in this proceeding. He never advanced any positions in this matter, on his own behalf, or on behalf of a client, and the SEC does not contend that he did. At worst, the SEC contends that in his capacity as a witness, he delayed in disclosing the existence of the PAA. The SEC has not cited, and Mr. Urbelis has not located, any court decisions imposing sanctions under § 1927 in these circumstances.

Further, as set forth above, there is no competent evidence demonstrating that Mr. Urbelis willfully failed to send the PAA to the SEC, or that Mr. Urbelis participated in a scheme with others designed to conceal the PAA from the SEC. In fact, all of the evidence leads to a contrary conclusion.

In mid-May, 2010, prior to any contact with the SEC, Mr. Urbelis was asked to send all of his documents relating to the Trust to the successor Trustee. If Mr. Urbelis had then recalled that the PAA was in existence, he certainly would have sent it to the successor Trustee, because how else could the alleged grand scheme to transfer millions of dollars to the Smiths have been effected? It is undisputed, however, that Mr. Urbelis did not send the PAA to the successor Trustee, and that Mr. Urbelis had no discussions with the successor Trustee or his counsel about the PAA, for the very simple reason that Mr. Urbelis did not then recall it.

Mr. Urbelis then made extraordinary efforts to appear at a deposition in Albany, at his own expense and during a family medical crisis, even though he was under no legal obligation to appear because no enforceable subpoena had been served on him. At the deposition, he was never asked any questions that were likely to jog his memory about the existence of the PAA. In fact, as set forth in Mr. Urbelis's affidavit, he was asked very few substantive questions about the Trust at all.

After his deposition, Mr. Urbelis made further searches of his files to locate documents relating to the Trust, and sent the SEC what he was able to find. Further, when the SEC specifically asked him whether he remembered anything about an annuity agreement, he readily replied that he had a vague recollection of the terms of such an agreement, and agreed to look further for it. He ultimately located the PAA at his home, where it had been mis-filed. He promptly sent the PAA to the SEC.

This is simply not a record of unreasonable and vexatious conduct that would justify a finding of bad faith and an award of sanctions, under either this Court's "inherent power" to award sanctions or under 28 U.S.C. § 1927. This Court should therefore deny the SEC's motion as it pertains to Mr. Urbelis.

D. The SEC's Motion Also Must be Denied Because The SEC Did Not Submit Contemporaneous Time Records To Substantiate Its Request for An Award Of Fees.

The Second Circuit requires that "all applications for attorney's fees be supported by contemporaneous records." Scott v. City of New York, 626 F.3d 130, 132 (2d Cir. 2010) (citing New York State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136); see also Lewis v. Coughlin, 801 F.2d 570, 577 (2d Cir. 1986) ("In Carey . . . we stated flatly that any attorney 'who applies for court-ordered compensation in this Circuit

. . . must document the application with contemporaneous time records'"). Indeed, "***no*** attorneys' fees [can] be collected if a fee application [is] not adequately documented" by contemporaneous time records. Lewis v. Coughlin, 801 F.2d at 577 (emphasis in original). To comply with the contemporaneous time records mandate, attorneys seeking fees must submit time records that "specify, for each attorney, the date, the hours expended, and the nature of the work done." Scott, 626 F.3d at 1148.

In Scott, the Second Circuit held that the contemporaneous records requirement is a "strict rule from which attorneys may deviate only in the rarest of cases." Id. at 133. Examples of the "rare circumstances where an award of fees might be warranted even in the total absence of contemporaneous records" include those in which "the records were consumed by fire or rendered irretrievable by a computer malfunction before counsel had an opportunity to prepare his application." Id. at 134 (noting that "the circumstances justifying such an exception would have to be found by the awarding court and laid out in sufficient detail to permit review of the justification on appeal").

The contemporaneous time records mandate applies whether the application for fees is "submitted by profit-making or non-profit lawyers." Scott, 626 F.3d at 133 (quoting Carey, 711 F.2d at 1154); see also United States v. Romelien, 2006 WL 721312, *2 (E.D.N.Y. 2006)(court was "precluded from awarding attorney's fees using the lodestar method" because "the government has not submitted contemporaneous time records"); N.L.R.B. v. A.G.F. Sports Ltd., 1994 WL 507779 (E.D.N.Y. 1994)("It is undisputed that an application for attorney's fees in this Circuit must be supported by contemporaneous time records."); see also Adams v. New York State Ed. Dept., 630 F.

Supp. 2d 333 (S.D.N.Y. 2009) (reviewing detailed time entries submitted by the State Department of Education).

Here, the SEC did not submit contemporaneous time records that "specify, for each attorney, the date, the hours expended, and the nature of the work done." Instead, it submitted "each attorney's *estimate* of the amount of hours spent" on the case during various time periods dating back to July 7, 2010. (Mehraban Declaration, ¶ 8). For example, the SEC submits a chart that indicates that between July 7, 2010, and July 22, 2010, three attorneys spent a total of 61 hours working on the case. In a separate section, the SEC provides a list of tasks that were worked on during this same time period. The SEC does not specify, however, which attorney worked on which tasks, or how much time was spent working on any particular task.

Because the SEC has not provided contemporaneous time records to substantiate the amount of fees that it claims to be due in connection with the alleged sanctionable conduct, and has admitted that it did not keep such time records, the SEC's motion for sanctions must be denied.

E. This Court May Not Hold Mr. Urbelis Jointly and Severally Liable for Costs and Attorneys' Fees Incurred By The SEC As A Result Of Other Individuals' Conduct.

As set forth above, there is no factual or legal basis for any award of sanctions against Mr. Urbelis. Even if such a basis existed, moreover, there is no evidence suggesting that Mr. Urbelis should be held jointly and severally liable for any sanctions awarded against Lynn Smith, David Wojeski, and Jill Dunn (or any other party or attorney sanctioned by this Court). The SEC cites to three cases in its brief as standing for the proposition that this Court may hold all of these individuals jointly and severally

liable for the costs purportedly incurred by the SEC between July 7, 2010 and January 3, 2011. In each of those cases, however, the court imposed joint and several liability on an attorney of record in the case and his or her client, for conduct that represented a "coordinated effort" to commence and/or maintain a frivolous lawsuit. See Calloway v. Marvel Entertainment Group, 9 F.3d 237, 239 (2d Cir. 2003) (appropriate to impose joint and several liability on attorney and client for sanctions resulting from "coordinated effort" to pursue claim that had no factual basis); Reichmann v. Neumann, 553 F. Supp. 2d 307, 327-28 (S.D.N.Y. 2008) (awarding sanctions on joint and several basis against attorney and his client, where attorney assisted client in pursuing frivolous claim); Warshay v. Guinness PLC, 750 F. Supp. 628 (S.D.N.Y. 1990) (same).

Here, the SEC has not established that there was any coordinated plan to conceal the PAA between or among Mr. Urbelis and any of the other individuals the SEC seeks to sanction. Thus, there is no basis on which to impose liability on Mr. Urbelis, jointly and severally, for any fees or costs that the SEC contends it incurred as a result of the misconduct of others. In particular, the SEC's summary of the activities undertaken by it between July 7, 2010 and January 3, 2011, had little to nothing to do with Mr. Urbelis.

Further, the SEC seeks to recover for costs and expenses that likely would have been incurred even if the SEC had learned about the PAA prior to the June 9, 2010 hearing. In particular, the SEC should not be permitted to recover: (1) the costs and legal fees related to its retention of a tax expert and the SEC's communications and consultations with that expert;[12] or (2) the costs and legal fees incurred in connection with the authentication of the PAA. In this respect, the Trust certainly would have disputed

[12] The SEC has provided no supporting documents regarding the fees purportedly charged by its tax expert, Brit Geiger, who did not testify at the November 16th hearing or even submit a report.

(as the Trust continued to do even after the PAA was delivered to the SEC) that the PAA had any bearing on the issue of whether the Trust's assets should remain subject to the asset freeze. Thus, the SEC would have had to carry out these same legal tasks even if Mr. Urbelis had located and sent the PAA to the SEC prior to his June 1, 2010 deposition. Mr. Urbelis therefore should not be responsible for these costs and attorneys' fees under any set of circumstances.

III. CONCLUSION

As set forth above and in Mr. Urbelis's detailed affidavit, Mr. Urbelis's conduct in connection with this matter was far from sanctionable, and in fact represented an effort by Mr. Urbelis to cooperate fully with all of the SEC's requests for information. There also is no legal basis on which to impose sanctions against Mr. Urbelis, a non-party to this case, because he did not act in bad faith or in violation of any court order, he has no financial interest in the outcome of these proceedings, and he did not render services to himself or to anyone else as an attorney in this matter.

For these reasons, Mr. Urbelis respectfully requests that the Court deny the SEC's motion for sanctions as it pertains to him. Mr. Urbelis further requests that the Court, after considering the facts set forth in Mr. Urbelis's affidavit, amend the comments made about Mr. Urbelis in its November 22, 2010 decision.

Dated: March 21, 2011

Respectfully submitted,

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EXHIBIT 1

2008 WL 202701
Only the Westlaw citation is currently available.
United States District Court,
N.D. New York.

Marion INSINGA, Plaintiff,
v.
DAIMLERCHRYSLER CORPORATION, Defendant.

Civ. Action No. 3:06-CV-1305 (DEP). Jan. 23, 2008.

Attorneys and Law Firms

Coughlin, Gerhart Law Firm, Peter H. Bouman, Esq., Rachel A. Abbott, Esq., of Counsel, Binghamton, NY, for Plaintiff.

Webster, Szanyi Law Firm, Jeremy A. Colby, Esq., Thomas S. Lane, Esq., of Counsel, Thomas S. Lane, Esq., Buffalo, NY, for Defendant.

Opinion

DECISION AND ORDER

DAVID E. PEEBLES, United States Magistrate Judge.

*1 Currently pending before the court in connection with this action is a motion by defendant DaimlerChrysler Corporation ("DaimlerChrysler") for an order compelling compliance with a subpoena issued to GEICO Insurance ("GEICO"), a non-party, seeking the production of certain specified documents. Dkt. No. 21. Plaintiff takes no position regarding the motion, and GEICO, which according to defendant's moving papers was served with the motion, has submitted no opposition. [1] Because I find that on their face, defendant's moving papers fail to establish its entitlement to the relief sought, I am denying its motion, without prejudice.

1 While the failure to oppose a motion is ordinarily considered as consent by the non-moving party to the granting of the relief sought, the court's local rules nonetheless require that before the requested relief is awarded, the court review the motion for facial sufficiency. *See* N.D.N.Y.L.R. 7.1(b)(3); *see also McCall v. Pataki*, 232 F.3d 321, 322-23 (2d Cir.2000); *Allen v. Comprehensive Analytical Group, Inc.*, 140 F.Supp.2d 229, 231-32 (N.D.N.Y.2000) (Scullin, C.J.); *Leach v. Dufrain*, 103 F.Supp.2d 542, 545-46 (N.D.N.Y.2000) (Kahn, J.).

I. *BACKGROUND*

Plaintiff Marion Insinga commenced this action on October 26, 2006, asserting diversity of citizenship as a basis for the court's subject matter jurisdiction, pursuant to 28 U.S.C. § 1332. Dkt. No. 1. Plaintiff's claims stem from an accident occurring in June of 2006 and involving a 1999 Jeep Grand Cherokee allegedly manufactured by DaimlerChrysler. *Id.* Plaintiff's complaint asserts state law claims sounding in strict liability and negligence, alleging that the accident was the result of an inherently defective condition and that the defendant failed to use reasonable care in the design, manufacture and marketing of the subject vehicle. *Id.*

On July 2, 2007, defendant's counsel issued a subpoena from the Northern District of New York to GEICO requiring the production of various documents related to an insurance claim filed by Marion and/or James Insinga concerning the accident at issue in this case. *See* Colby Decl. (Dkt. No. 21) Exh. A. Under the terms of that subpoena, production of the documents sought was to occur in Buffalo, New York, at the offices of defendant's counsel. *See id.* According to an affidavit of service

accompanying defendant's motion, the subpoena was served upon a person identified as a managing agent of a GEICO office located in Woodbury, Nassau County, New York on July 10, 2007. *Id.*

In response to the subpoena GEICO produced certain documents, consisting principally of medical documentation, but failed to include among the materials produced a no-fault insurance file alleged by the defendant to exist within GEICO's possession, custody or control. Colby Decl. (Dkt. No. 21) ¶ 4. Defendant's counsel therefore followed the document production with a series of letters, dated September 11, 2007, October 25, 2007 and December 3, 2007, to GEICO pointing out this deficiency in production and specifically requesting the production of additional documents allegedly maintained by GEICO concerning the matter. Colby Decl. (Dkt. No. 21) ¶ 4 and Exh. B. According to defendant's counsel, GEICO has neither produced the requested documents, nor has it responded to those letters. [2]

2 There is no indication in counsel's letter as to whether any efforts were made to contact GEICO personnel by telephone for the purpose of discussing the matter and ascertaining the basis for any objection to producing the requested, additional file materials, if indeed they exist. Such efforts could arguably have been required pursuant to the letter, if not the spirit, of Rule 37 of the Federal Rules of Civil Procedure and this court's local rules. *See* N.D.N.Y.L.R. 7.1(d).

II. *DISCUSSION*

Rule 45 of the Federal Rules of Civil Procedure authorizes the issuance of a subpoena commanding a party or non-party, *inter alia,* to produce documents. [3] Fed.R.Civ.P. 45(a); *see Murphy v. Bd. of Educ. of Rochester City Sch. Dist.,* 196 F.R.D. 220, 22-23 (W.D.N.Y.2000). That rule requires that the subpoena be issued out of the court where production is to occur. Fed.R.Civ.P. 45(a)(2)(C); *see McNerney v. Archer Daniels Midland Co.,* 164 F.R.D. 584, 588 (W.D.N.Y.1995). Since the required production in this instance was designated to occur in Buffalo, the subpoena should have been issued out of the Western District of New York, rather than this court, thus providing at least a technical basis for denying defendant's motion. [4]

3 Rule 45 was amended, effective on December 1, 2007-after the issuance of the subject subpoena but before the filing of defendant's motion seeking its enforcement. The recent amendments, however, are primarily stylistic and do not materially affect the analysis to be applied in connection with defendant's motion. *See* Fed.R.Civ.P. 45, Advisory Committee Notes (2007). In my decision, I have cited to the material provisions of Rule 45 as it existed at the time of issuance of the subpoena in issue.

4 Service of the disputed subpoena in Woodbury, New York, whether issued out of this court or the Western District, would be proper in light of New York's statutory authorization of statewide service. Fed.R.Civ.P. 45(b)(2); *see* N.Y. Civil Practice Law and Rules § 2303; *see also Glass v. Coughlin,* No. 91 Civ. 0193, 1991 WL 102619, at *3 (S.D.N.Y. May 29, 1991).

*2 In addition to this relatively modest procedural defect, there is yet another, more compelling reason for denying defendant's motion in this instance. Rule 45(c)(3)(A)(ii) provides that a court may quash or modify a subpoena which "requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person ...." *See Romano v. Banc of America Ins. Servs.,* --- F.Supp.2d ----, 2007 WL 4443845, at *5 (E.D.N.Y. Dec. 17, 2007). Rule 45(e), which authorizes a court to exercise contempt power in the case of an unexcused failure to comply with a lawfully issued subpoena, provides that "adequate cause for failure to obey [a Rule 45 subpoena] exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A)." Fed.R.Civ.P. 45(e); *see S.E.C. v. Kinmes,* No. M18-304, 1996 WL 734892, at *8 (S.D.N.Y. Dec. 24, 1996).

When evaluated under this framework, the subpoena issued by the defendant in this case is plainly unenforceable, since it purports to require GEICO, the subpoenaed non-party, to produce the requested documents in Buffalo, New York-a location which is more than one hundred miles from the office at which it was served. And, since in its motion the defendant has failed to offer proof that GEICO regularly transacts business in person at a closer location which would fall within the one hundred mile radius prescribed under Rule 45, it has therefore failed to establish entitlement to an order enforcing the subpoena.

III. *SUMMARY AND ORDER*

For various reasons which are procedural only, and do not bear upon the merits of the document production request contained within it, I am denying defendant's motion to compel non-party GEICO's compliance with the Rule 45 subpoena issued in this case by DaimlerChrysler. That denial, however, is without prejudice. In making this ruling the court does not by any means suggest that unilateral noncompliance with a Rule 45 subpoena, particularly without explanation, is to be condoned. The court also notes that once a proper subpoena is reissued-and permission is hereby granted for defendant's issuance of such a subpoena, notwithstanding the expiration of the fact discovery deadline in this case-any refusal by GEICO to comply with the mandates of that subpoena by producing available, non-privileged documents relevant to the claims and defenses in this case existing within its possession, custody or control without justification, and without following the procedures outlined in Rule 45 of the Federal Rules of Civil Procedure for registering objections, will undoubtedly be dealt with by this or any other court of competent jurisdiction harshly, and could subject GEICO, as well as any attorney counseling noncompliance for improper reasons, to potentially severe sanctions. [5]

5 The governing provisions of the rule require that a party served with a proper Rule 45 subpoena requesting the production of documents, and who objects to the required production, must interpose written objections detailing the grounds for resisting the subpoena. Fed.R.Civ.P. 45(c)(2)(B). The rule goes on to prescribe the mechanism for having the objections interposed by the subpoenaed party aired and decided by a court of competent jurisdiction. Fed.R.Civ.P. 45(c)(2)(B)(i).

*3 Based upon the foregoing, it is hereby

ORDERED, that defendant's motion to compel compliance by nonparty GEICO Insurance (Dkt. No. 21) with a subpoena issued in July of 2007 be and hereby is DENIED, without prejudice; and it is further

ORDERED, that the clerk of the court is instructed to forward copies of this decision and order to counsel for the parties to this action, electronically, and additionally to GEICO Insurance, addressed to the attention of Kathy Cross at 750 Woodbury Road, Woodbury, New York, 11797, by regular mail.

End of Document

2010 WL 4400033
United States District Court,
E.D. Pennsylvania.

Andrea COLEMAN-HILL, Plaintiff,
v.
GOVERNOR MIFFLIN SCHOOL DISTRICT, Defendant.

Civil Action No. 09-cv-5525. Nov. 4, 2010.

Synopsis

Background: Employee brought Title VII action against school district, alleging racial discrimination. District moved for discovery sanctions.

Holdings: The District Court, Lynne A. Sitarski, United States Magistrate Judge, held that:
1 preclusion of documents provided by district's technology director directly to employee's attorney would not issue as discovery sanction;
2 sanction requiring affidavit by attorney as to document identity would issue;
3 award of attorney's fees would issue as sanction; and
4 admonishment of attorney would issue as sanction.

Motion granted in part and denied in part.

Attorneys and Law Firms

Robin J. Gray, Reading, PA, for Plaintiff.

Ellis H. Katz, Jonathan P. Riba, Sweet Stevens Tucker & Katz LLP, New Britain, PA, for Defendant.

Opinion

MEMORANDUM AND ORDER

LYNNE A. SITARSKI, United States Magistrate Judge.

*1 Presently before the Court is Defendant Governor Mifflin School District's Motion for Sanctions Pursuant to Federal Rule of Civil Procedure 45 (Doc. No. 15). Plaintiff Andrea Coleman-Hill has opposed this motion (Doc. No. 17). The Court held oral argument on October 8, 2010. [1]

Defendant's Motion for Sanctions arises out of the conduct of Plaintiff's counsel, Robin J. Gray, Esq. As will be detailed herein, in her zeal to build her client's case, Ms. Gray circumvented the Rules of Civil Procedure, and resorted to "self-help" in order to resolve a perceived deficiency in Defendant's discovery responses. Perhaps most disturbingly, Ms. Gray did so because she presumed that the Court was without authority and/or inclination to enforce the Rules of Civil Procedure to rectify perceived deficiencies in Defendant's discovery response.

*2 As more fully set forth herein, Defendant's Motion for Sanctions is **GRANTED IN PART** and **DENIED IN PART.**

I. *FACTS*

The underlying action involves alleged racial discrimination against Plaintiff Andrea Coleman-Hill ("Plaintiff") by her employer, Defendant Governor Mifflin School District ("the District"). Plaintiff alleges that the District's superintendent, Dr. Mary T. Weiss, violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Pennsylvania Human Relations Act, 43 P.S. § 951 *et seq.*, by mistreating Plaintiff on account of her race.

In the course of discovery, Ms. Gray served Requests for Production of Documents on the District's counsel, Jonathan P. Riba, Esq., and conducted depositions. The Document Requests directed to Defendant were pursued in an unorthodox fashion. At least some of the Document Requests were set forth in a letter dated July 21, 2010. In that letter, Ms. Gray requested "[a]ny and all information, correspondence, emails, phone messages from Dr. Weiss to individual members of the Board regarding my client form [sic] the start of her employ with the school District until the present." (Pl.'s Am. Answer to Def.'s Mot. Sanctions Ex. D, at 2). Mr. Riba timely responded. (Def.'s Mot. Sanctions Ex. B, at 8). It is this response that Plaintiff later, and unilaterally, determined to be deficient.

Thereafter, on August 16, 2010, Ms. Gray deposed Ms. Rachel Dombrowski, who served as the District's Director of Technology. Because of her position, Ms. Dombrowski had access to all documents that are stored on the District's computer systems, even archived documents. During the deposition, it became evident that Ms. Dombrowski is no fan of Dr. Weiss. Ms. Dombrowski testified to her negative opinion of Dr. Weiss, calling her "racist." (Def.'s Mot. ¶ 3).

At some point in time after Ms. Dombrowski's deposition, Ms. Gray determined that "[t]he information given to Plaintiff by Defendant [in response to the Request for Production of Documents] did not add up." (Pl's Br. in Resp. to Def.'s Mot. Sanctions 8). Thus, on August 24, 2010, Ms. Gray served a subpoena duces tecum on Ms. Dombrowski, requesting "any and all emails from the email archives of Dr. Mary T. Weiss' Governor Mifflin email box regarding emails to and from the school board, the music program issue and any other emails regarding Andrea Coleman-Hill." (Def.'s Mot. Ex. A, at 4).

The subpoena served was improper and/or deficient, in multiple respects. First, the subpoena was directed to an employee of the District, and sought production of the District's documents. The Federal Rules of Civil Procedure direct that an opposing party's documents should be obtained through a properly served Request for Production of Documents, served on counsel of record for the party.

Second, although the subpoena ostensibly was served to address the presumed withholding of documents that Plaintiff "knew" to exist, it went further than the Request for Production of Documents. The Request sought communications between the Board and Dr. Weiss relating to Ms. Coleman-Hill. The Dombrowski subpoena goes further, and seeks email communications "regarding emails to and from the school board [and] the music program issue." (Def.'s Mot. Ex. A, at 4).

*3 Finally, Ms. Gray failed to properly fill out the subpoena by neglecting to specify a date and time for the production of the requested documents, and merely wrote "See Attached" on the form. (Def.'s Mot. Ex. A, at 2). In a letter accompanying the subpoena, Ms. Gray asked for production "at [Ms. Dombrowski's] earliest convenience." (Def.'s Mot. Ex. A, at 1). According to Ms. Gray, she served the subpoena on Ms. Dombrowski and on Mr. Riba, simultaneously, via first class mail. Thus, Mr. Riba did not get prior notice of the subpoena, and thus had no opportunity to lodge objections. By the time Mr. Riba objected to the subpoena on August 27, 2010 (Def.'s Mot. Ex. D), Ms. Dombrowski had already provided voluminous documents to Ms. Gray, including at least three attorney-client privileged documents. [2]

On September 8, 2010, the District filed the instant motion for sanctions for Ms. Gray's inappropriate use of a subpoena. Defendant seeks sanctions as follows: exclusion of the documents provided by Ms. Dombrowski directly to Ms. Gray; admonishment of Ms. Gray to comply with the Federal Rules of Civil Procedure; an affidavit by Ms. Gray that all documents provided by Ms. Dombrowski have been furnished to defense counsel; and payment of defense counsel fees associated with the instant motion.

At oral argument, Ms. Gray conceded that a motion to compel was appropriate for addressing the District's perceived failure to comply with her Requests for Production of Documents. Nevertheless, Ms. Gray did not file a motion to compel, asserting that she presumed that the District would continue to be non-compliant with its discovery obligations. Most disturbingly, Ms. Gray stated that she presumed that this Court was without the power and/or the inclination to compel the District's compliance. [3]

II. *LEGAL STANDARDS*

A. Proper Use of Subpoena Power.

Under Federal Rule of Civil Procedure 45, a party may obtain documents from a nonparty through a subpoena duces tecum. In addition to other information, the subpoena must set forth "a specified time and place" for the production of documents. Fed.R.Civ.P. 45(a)(1)(A)(iii). Further, "[i]f the subpoena commands the production of documents, electronically stored information, or tangible things ... then before it is served, a notice must be served on each party." Fed.R.Civ.P. 45(b)(1).

1 2 A party issuing a subpoena to a non-party for the production of documents during discovery must provide prior notice to all parties to the litigation. *Id.; Spencer v. Steinman,* 179 F.R.D. 484, 487 (E.D.Pa.1998), *order vacated in part,* No. 96-CV-1792, 1999 WL 33957391 (E.D.Pa. Feb.26, 1999). The term "prior notice" means notice prior to service of the subpoena on the non-party, rather than prior to document production. *McCurdy v. Wedgewood Capital Mgmt. Co.,* No. 97-4304, 1998 WL 964185, at *6 (E.D.Pa. Nov.16, 1998) (citing *Biocore Med. Technologies, Inc. v. Khosrowshahi,* 181 F.R.D. 660, 666 (D.Kan.1998)). The purpose of prior notice is to afford other parties an opportunity to object to the production or inspection and to obtain the materials at the same time as the party who served the subpoena. *McCurdy,* 1998 WL 964185, at *6 (citing Fed.R.Civ.P. 45, Notes of Advisory Committee on 1991 Amendments, and *Seewald v. IIS Intelligent Information Sys., Ltd.,* No. 93-4252, 1996 WL 612497, at *4 (E.D.N.Y. Oct.16, 1996)).

*4 As compared to other discovery tools, subpoenas present unique issues, because they invoke the Court's power:

> The risks attached to the misuse of the subpoena power are great. Under this delegation, an attorney is licensed to access, through a non-party with no interest to object, the most personal and sensitive information about a party. By failing to receive prior notice of the information sought from the non-party, a party is deprived of its greatest safeguard under the Rule, i.e., the ability to object to the release of the information prior to its disclosure. Therefore, the loss of the opportunity to object prior to the release of the information caused injury to [the defendant]. Moreover, misuse of the subpoena power is not limited to the harm it inflicts upon the parties, it also compromises the integrity of the court's process. When the power is misused, public confidence in the integrity of the judicial process is eroded. Therefore, the failure to provide prior notice to [the defendant] of the subpoenas cause[s] injury to the public.

McCurdy, 1998 WL 964185, at *7 (citing *Spencer,* 179 F.R.D. at 489).

B. Enforcing Compliance with Rules of Civil Procedure.

3 "It is well-established that the scope and conduct of discovery are within the sound discretion of the trial court." *Guinan v. A.I. duPont Hosp. for Children,* No. 08-228, 2008 WL 938874, at *1 (E.D.Pa. Apr.7, 2008) (quoting *Marroquin-Manriquez v. INS,* 699 F.2d 129, 134 (3d Cir.1983)). Courts have the inherent authority to ensure that parties abide by the Federal Rules of Civil Procedure, protect the integrity of the judicial system, and prevent abuse of the judicial process. *Mid-Atlantic Constructors Inc. v. Stone & Webster Constr., Inc.,* 231 F.R.D. 465, 467 (E.D.Pa.2005) (quoting *Spencer,* 1999 WL 33957391, at *4). Through the ability to sanction, courts may "impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Spencer,* 179 F.R.D. at 487 (quoting *Chambers v. NASCO, Inc.,* 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)).

4 "Sanctions must, of course, be proportionate to the violation." *Mid-Atlantic Constructors,* 231 F.R.D. at 467 (holding that admonishment of counsel and the payment of attorney's fees for an intentional, bad faith violation of the subpoena power was proportionate). In determining which sanctions are appropriate, courts consider the resulting prejudice, the need for deterrence, and the furtherance of policy objectives. *Id.*

5 Many sanctions (e.g. admonishment and compelling a party to file an affidavit) are liberally ordered by the court. Where a party's conduct goes beyond a "mere violation" of a discovery obligation, courts can impose additional, more severe sanctions. For instance, courts may impose attorney's fees as a sanction if the party acted "in bad faith, vexatiously, wantonly or for oppressive reasons." *Spencer,* 1999 WL 33957391, at *1-2 (quoting *Chambers,* 501 U.S. at 45-46, 111 S.Ct. 2123).

*5 6 "[T]he exclusion of critical evidence is an 'extreme' sanction, not normally to be imposed absent a showing of willful deception or 'flagrant disregard' of a court order by the proponent of the evidence." *Quinn v. Consol. Freightways Corp. of Del.,* 283 F.3d 572, 576 (3d Cir.2002) (quoting *Meyers v. Pennypack Woods Home Ownership Ass'n,* 559 F.2d 894 (3d Cir.1977)).

In employment cases such as this one, exclusion of critical evidence is viewed as an even more extreme sanction. Both the Supreme Court and the Third Circuit have observed that plaintiffs face "proof problems" in employment discrimination cases. *See U.S. Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 716, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983) (acknowledging that "[a]ll courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult ... [and that] [t]here will seldom be eyewitness testimony as to the employer's mental processes" which the plaintiff can use to show discriminatory conduct); *Josey v. John R. Hollingsworth Corp.,* 996 F.2d 632, 638 (3d Cir.1993) (acknowledging that there is seldom direct "smoking gun" evidence of discrimination). This has prompted a "judicial inhospitability to blanket evidentiary exclusions in discrimination cases," in this and other circuits. *Quinn,* 283 F.3d at 578 (citing *Glass v. Phila. Elec. Co.,* 34 F.3d 188, 195 (3d Cir.1994)).

> In considering whether the exclusion of evidence is an appropriate sanction for failure to comply with discovery duties, we must consider four factors: (1) the prejudice or surprise of the party against whom the excluded evidence would have been admitted; (2) the ability of the party to cure that prejudice; (3) the extent to which allowing the evidence would disrupt the orderly and efficient trial of the case or other cases in the court; and (4) bad faith or wilfulness in failing to comply with a court order or discovery obligation.

Nicholas v. Pa. State Univ., 227 F.3d 133, 148 (3d Cir.2000) (quoting *Konstantopoulos v. Westvaco Corp.,* 112 F.3d 710, 719 (3d Cir.1997)). Courts should also consider the importance of the excluded evidence in making its decision. *Quinn,* 283 F.3d at 577.

III. *DISCUSSION*

A. Ms. Gray's Misconduct

Ms. Gray failed to properly notify the District of her intent to serve the subpoena. The subpoena was served contemporaneously on Ms. Dombrowski and Mr. Riba, thus making it impossible to timely object before admittedly privileged documents were furnished.

Moreover, Ms. Gray mishandled discovery by not completely filling out the subpoena to Ms. Dombrowski. Ms. Gray failed to specify a time and place for production, and instead sought production "at your earliest convenience." The Court is troubled by Ms. Gray's admission that this violation of Rule 45 apparently was not a one-time mistake; rather, Ms. Gray readily admitted that she routinely fills out all subpoenas in this manner. [4] An attorney's lack of knowledge regarding the proper use of a common discovery device certainly does not excuse non-compliance with the rules.

*6 Further complicating matters is that Ms. Dombrowski apparently did not keep a record of precisely what documents were provided to Ms. Gray. As noted, Ms. Gray represents that she received 182 pages of documents from Ms. Dombrowski on

August 31, 2010. Thereafter, Ms. Dombrowski endeavored to "re-create" her search at Mr. Riba's request, and provided Mr. Riba with 284 pages of documents on September 2, 2010.

During oral argument, Ms. Gray argued that proceeding in this fashion was justified because she needed to build her case, and because she had already requested the documents at issue via prior requests for production. [5] Ms. Gray also admitted that she did not think that filing a motion to compel against the District would help, presuming that the Court could not (or would not) address the situation. There is simply no excuse for engaging in self-help and flouting the Federal Rules of Civil Procedure to obtain discovery. There is no basis for Plaintiff's supposition that this Court is without the will or the power to rectify any gamesmanship on Defendant's part.

Moreover, Ms. Gray's misconduct is even more egregious because she invoked-and misused-subpoena power. As noted above, subpoenas represent the delegation of authority to attorneys. The abuse of subpoena power is most dangerous because it threatens to erode public confidence in the judicial system. Attorneys must understand the high degree of trust that is imposed upon them, and must conduct themselves with the utmost care when using the Court's subpoena power. *McCurdy,* 1998 WL 964185, at *7 (citing *Spencer,* 179 F.R.D. at 489).

B. Appropriate Sanctions

As noted above, Defendant asks the Court to impose various sanctions on Plaintiff: exclusion of the documents provided by Ms. Dombrowski directly to Ms. Gray; admonishment of Ms. Gray to comply with the Federal Rules of Civil Procedure; an affidavit by Ms. Gray that all documents provided by Ms. Dombrowski have been furnished to defense counsel; and payment of defense counsel fees associated with the instant motion.

1. Preclusion

7 The Third Circuit has articulated a test that must be applied in determining whether preclusion of evidence is an appropriate discovery sanction. The Third Circuit made it clear that preclusion of evidence is an extreme sanction, even more so in the context of Title VII employment cases. I am, of course, constrained to follow this precedent.

Ms. Gray obtained admittedly privileged documents because of her violations of the subpoena rule. Obviously, Ms. Gray shall be precluded from using any privileged or protected documents at trial. Ms. Gray shall immediately return all copies of all such documents to Mr. Riba.

Concerning the non-privileged documents gained through improper means, applying the Third Circuit's test, I must consider: (1) the prejudice or surprise of the party against whom the excluded evidence would have been admitted; (2) the ability of the party to cure that prejudice; (3) the extent to which allowing the evidence would disrupt the orderly and efficient trial of the case or other cases in the court; and (4) bad faith or wilfulness in failing to comply with a court order or discovery obligation.

*7 The fourth factor is satisfied in the present case, as a seasoned lawyer such as Ms. Gray cannot plausibly maintain that she is unaware of the proper use of discovery tools. Surely, Ms. Gray understands that court process must be used in a fashion that preserves the integrity of court process. Ms. Gray has offered no basis for her lack of faith that this Court could have-and would have-addressed any discovery violations on Defendant's part.

As to the first three factors, the record as developed to date does not support a conclusion that Defendant has been prejudiced, or that any such prejudice cannot be cured. Similarly, there is no basis for concluding that Ms. Gray's conduct has disrupted the orderly and efficient trial of this case. However, there still is some confusion as to exactly what documents were improperly provided to Ms. Gray by Ms. Dombrowski (the remedy to address this situation is discussed in the next section).

With the exception of the privileged documents previously identified, Defendant's request for blanket preclusion of all documents obtained from Ms. Dombrowski must be denied, but is denied without prejudice. Should additional information

develop that suggests that Defendant has suffered incurable prejudice, or that the misuse of the subpoena has derailed the orderly resolution of this case in some specific fashion, Defendant may renew its motion to preclude any specific documents on this basis.

2. Bates Stamping Documents and Preparing an Affidavit

8 As noted, Ms. Gray's conduct has created unnecessary confusion, because Ms. Dombrowski produced two different sets of documents to Ms. Gray and Mr. Riba. Ms. Gray is hereby ordered to Bates stamp the documents received from Ms. Dombrowski and provide a copy of the Bates stamped documents to the District. Ms. Gray shall prepare an affidavit setting forth the Bates ranges of the documents, and shall attest that the documents so identified are a complete set of all documents produced by Ms. Dombrowski. Ms. Gray shall also attest that all privileged documents (including copies thereof) have been returned to the District.

The Bates stamped documents and the affidavit shall be provided within seven days of this Order.

3. Attorney's Fees

9 A court may award fees and costs where a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions,* 278 F.3d 175, 181 (3d Cir.2002) (citing *Chambers,* 501 U.S. at 45-46, 111 S.Ct. 2123). Ms. Gray knew the proper method for acquiring the desired discovery was through requests for production. Ms. Gray admits that she knew that a motion to compel was the proper channel for remedying any perceived deficiency in the District's document production. She nevertheless used improper channels to gain information that had not been requested via proper discovery, and did so without providing proper notice to the District.

Under these circumstances, I easily conclude that Ms. Gray acted in bad faith, and oppressively. *Spencer,* 1999 WL 33957391, at *1-2 (quoting *Chambers,* 501 U.S. at 45-46, 111 S.Ct. 2123). Ms. Gray forced the District to file a motion to alert the Court to the misuse and abuse of subpoena power, and to prevent such conduct in the future. Defense counsel was required to do some investigation to learn what had happened, and to try to do "damage control." Defense counsel prepared and filed a motion, and appeared for oral argument on that motion. All of these activities cost the District counsel fees, and all due solely to Ms. Gray's abuse of subpoena power.

***8** In addition, Ms. Gray admitted that she routinely fills out subpoenas incompletely/ inappropriately. An award of monetary sanctions will hopefully deter Ms. Gray from doing so in the future. Therefore, the imposition of attorney's fees is appropriate. Defendant's counsel is instructed to submit a fee petition, setting forth an itemization of attorneys fees incurred in addressing Ms. Gray's discovery violation. Plaintiff's counsel, Robin J. Gray, Esq., shall pay a reasonable amount of attorney's fees, costs, and expenses that were incurred in filing this motion.

4. Admonishment.

10 The Court's dismay with the current situation is amply expressed above, and so will not be further repeated here. Ms. Gray is specifically admonished to refrain from utilizing subpoenas to obtain documents from her adversary. Ms. Gray is specifically admonished to serve copies of any subpoenas on her adversary, before serving same on third parties, so that her adversaries have the opportunity to lodge objections. Ms. Gray is specifically admonished to fill out subpoenas fully and appropriately, so that the responding party and opposing counsel are both informed as to the appropriate time and manner of responding to same.

Finally, Ms. Gray is specifically admonished to refrain from self-help tactics to cure perceived deficiencies in her adversary's discovery responses. Ms. Gray is reminded that this Court can, and will, enforce the Rules of Civil Procedure.

IV. CONCLUSION

For the foregoing reasons, Defendant Governor Mifflin School District's Motion for Sanctions is **GRANTED IN PART and DENIED IN PART.**

An appropriate Order follows.

ORDER

AND NOW, this *4TH* day of November, 2010, upon consideration of Defendant Governor Mifflin School District's Motion for Sanctions (Doc. No. 15); and Plaintiff Andrea Coleman-Hill's response thereto (Doc. No. 17); and the Court having heard Oral Argument;

It is hereby **ORDERED** that Defendant's Motion is **GRANTED IN PART** and **DENIED IN PART** as follows:

1. The request to preclude all evidence produced by Ms. Rachel Dombrowski to Robin J. Gray, Esq., is GRANTED IN PART and DENIED IN PART. Plaintiff is precluded from using any privileged or protected documents in any fashion. However, Defendant's request for blanket preclusion of all documents obtained from Ms. Dombrowski is denied without prejudice to Defendant's right to renew this Motion, or to file a motion in limine, if specific prejudice can be identified.

2. The request for attorney's fees, costs, and expenses is GRANTED. Plaintiff's counsel, Robin J. Gray, Esq., shall pay a reasonable amount of attorney's fees, costs, and expenses that were incurred in filing this Motion. Defendant's counsel is instructed to submit an appropriate Fee Petition, setting forth an itemization of his claim for attorney's fees, costs, and expenses.

3. The request for an affidavit by Robin J. Gray, Esq., is GRANTED. Ms. Gray shall provide an affidavit to Defendant's counsel within seven (7) days (a) attesting that all privileged documents have been returned to the Defendant's counsel; (b) stating that all documents produced by Ms. Dombrowski to Ms. Gray have been identified and furnished to Defendant's counsel, and (c) setting forth the Bates ranges of the documents provided.

4. The request for admonishment is GRANTED. The Court admonishes Robin J. Gray, Esq., that her continued failure to abide by the Federal Rules of Civil Procedure by (a) engaging in self-help for perceived discovery violations, (b) serving incomplete subpoenas lacking the requested times and dates for production, and (c) misusing a discovery tool intended for non-parties will not be tolerated and may be the basis for future sanctions.

5. It is further ORDERED that Ms. Gray shall return any documents that are admittedly privileged to Defendant's counsel, and shall provide to Defendant's counsel a Bates stamped copy of all documents sent by Ms. Dombrowski within seven (7) days.

1 This motion was referred to me for disposition by Judge C. Darnell Jones by Order dated September 17, 2010. (Doc. No. 18).

2 There is a dispute regarding how many documents Ms. Dombrowski provided to Ms. Gray. When Mr. Riba asked Ms. Gray to forward all of the documents that Ms. Dombrowski provided, Ms. Gray furnished 182 pages. (Def.'s Mot. ¶ 14). However, when Mr. Riba asked Ms. Dombrowski to forward all of the documents that she provided, Ms. Dombrowski sent 284 pages. (Def.'s Mot. ¶ 17).

3 Ms. Gray claims to have personal knowledge that the District engages in spoliation of evidence. Ms. Gray provided no evidentiary support for this accusation, and only brought it to the Court's attention in attempting to justify her own misconduct

4 Ms. Gray filled out a subpoena to another witness in this case, Mr. Jim Watts, in the same manner. (Def.'s Mot. Ex. C).

5 As previously noted, the Court is unconvinced by this argument. Comparing Plaintiff's July 21 Request for documents to Ms. Dombrowski's subpoena, a clear difference regarding the extent of requested discovery emerges. The July 21 Request sought information "from Dr. Weiss to individual members of the Board." (Pl.'s Am. Answer Ex. D, at 2). However, the subpoena asked

for Dr. Weiss's email archives that were "to and from the school board, the music program issue and any other emails regarding Andrea Coleman-Hill." (Def.'s Mot. Ex. A, at 4).

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United States District Court,
E.D. New York.

AMERISOURCE CORPORATION, Plaintiff,
v.
RX USA INTERNATIONAL INC., Parsons Medical Center Pharmacy Inc., and Parsons Medical Center Pharmacy Inc. (II), Defendants.

No. 02-CV-2514 (JMA). July 6, 2010.

Attorneys and Law Firms

Craig D. Mills, Buchanan Ingersoll, & Rooney PC, Philadelphia, PA, for Plaintiff.

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Opinion

MEMORANDUM & ORDER

AZRACK, J., United States Magistrate Judge.

*1 Now before the Court is a motion for sanctions by plaintiff Amerisource Corporation ("Amerisource") against the corporate defendants (collectively "RxUSA") and their nonparty principal Robert Drucker ("Drucker"). Amerisource alleges that Drucker fabricated evidence, gave false and misleading testimony, and failed to correct discovery responses throughout the course of the parties' nine-year, multi-million-dollar litigation alleging breach of contract, business torts, and antitrust violations. The parties briefed the issues and the Court received evidence and testimony at a hearing held on September 21, 2009. For the reasons discussed below, plaintiff's motion is granted and the Court sanctions RxUSA and Drucker, jointly and severally, in the amount of $50,000 payable to Amerisource and an additional $50,000 payable to the Clerk of this Court.

I. *BACKGROUND & FINDINGS OF FACT*

Familiarity with the facts is presumed. Only the facts proven at the hearing and necessary to the resolution of this motion shall be recounted here.

A. *The Underlying Litigation*

RxUSA began purchasing inventory for its wholesale and retail pharmacies from Amerisource in the summer of 1999. After a few months, a heated price dispute arose and each party claimed that the other owed it several hundred thousand dollars. Despite their efforts, including an exchange of demand letters through attorneys, the parties were unable to resolve the dispute and the above-captioned action ensued.

Amerisource sued in June 2001, alleging breach of contract based on RxUSA's failure to pay past due invoices totaling over $275,000. RxUSA promptly counterclaimed for breach of contract, alleging that Amerisource had overcharged RxUSA and failed to honor various verbal discounts promised by Amerisource sales representative Wilfredo LaFontaine ("LaFontaine"). RxUSA claimed that Amerisource owed it over $400,000 under the contract and raised several additional related tort and

antitrust counterclaims for over $60 million in damages. Aside from the antitrust claims, which were dismissed on summary judgment, the key to the parties' dispute was price; whoever prevailed on price would prevail overall. Amerisource asserted that the negotiated contract price was WAC-0% on all products, whereas RxUSA agreed that WAC-0% was the base price, but claimed that the contract included several additional verbal discounts. RxUSA's largest claimed discount was a WAC-15% discount on insulin products, which would have resulted in a savings to RxUSA of several hundred thousand dollars.

The action concluded in a complete success for Amerisource. RxUSA's antitrust and defamation counterclaims were dismissed or withdrawn before trial and the contract and tort claims that proceeded to trial were all decided in favor of Amerisource. After a bench trial on the contract claims, the Court found, among other things, that the parties' contract did not include a WAC-15% insulin discount and awarded Amerisource over $1.8 million in damages, prejudgment interest, and contractual attorneys' fees and costs.

B. *The Fabricated Emails*

*2 Amerisource seeks sanctions against Drucker and RxUSA for creating and using four fake emails [1] to support their WAC-15% insulin discount claim. The fake emails were created by inserting WAC-15% language into authentic emails that had actually been exchanged between Drucker and LaFontaine in October and November 1999. The authentic emails had almost no probative value. However, as altered they provided the sole written corroboration of RxUSA's most valuable factual claim. Drucker denies creating the altered emails and asserts that he did not know they were fabricated when he relied upon them during discovery and motion practice and when he verified their authenticity at depositions. He admits that he eventually realized they were fake in March 2004, but he did not inform Amerisource or the Court because he believed he had no obligation to do so. Hr'g Tr. 189, 193.

1 Unless otherwise indicated, the word "emails" as used in this Opinion refers to a physical document rather than electronic data.

C. *RxUSA's Use of the Fabricated Emails*

The altered emails first appeared one year before Amerisource commenced this action. On May 23, 2000, former Amerisource counsel Robin London-Zeitz ("London-Zeitz") of Frey Patrakis Deeb & Blum ("FPD & B") mailed a letter to Drucker regarding RxUSA's past due accounts. Drucker instructed his then-attorney, Leonard Spielberg ("Spielberg"), to draft a response based on information and documents that Drucker would provide. Hr'g Tr. 22-23, 25, 28, 34-35. Versions of the altered emails bearing Drucker's fax header indicate that Drucker faxed the altered emails, along with other documents, to Spielberg at 11:35 a.m. on May 26, 2000. Hr'g Ex. 1. The Drucker fax header versions also bear an "rxusal" insignia in the upper left corner, which, according to Amerisource's computer forensics expert, indicates that they were printed from a computer on the RxUSA network. *Id.;* Hr'g Tr. 83-86.

Upon receiving the documents from Drucker, Spielberg drafted a demand letter stating that RxUSA had "a net credit balance as against" Amerisource and that "a summary statement" and "a copy of one e-mail substantiating [RxUSA's] claim" were enclosed. Hr'g Ex. 1. In actuality, the letter enclosed two charts and five emails, including all four of the altered emails. Spielberg mailed the demand letter and altered emails to London-Zeitz via regular mail. London-Zeitz received the letter and all enclosures bearing the Drucker fax header on May 30, 2000. Pl.'s Renewed Motion for Sanctions Ex. H ("Pl.Mot."). She faxed everything to Amerisource credit manager Debra Wertz ("Wertz") on June 7, 2000 and filed away her copies. *Id.* at Ex. I; Aff. of Michelle C. Fullam, Jan. 14, 2009, ¶ 7 ("Pl.Mot.Ex.K"); Hr'g Tr. 61-63.

The versions of the altered emails that Wertz received via fax from London-Zeitz were stamped at the bottom with an FPD & B fax header indicating that they were faxed from FPD & B to Amerisource at 4:00 PM on June 7, 2000. Pl. Mot. Ex. I. These versions do not bear Drucker's fax header. Amerisource speculates that when London-Zeitz faxed the documents she received from Spielberg to Wertz, the fax machine cut the Drucker fax header off the top and added the FPD & B fax header to the bottom. Pl. Mot. 6. Amerisource then produced the FPD & B fax header versions during initial discovery while the Drucker

fax header versions remained filed away in FPD & B's archives until 2009, when Amerisource asked FPD & B to retrieve them for the trial. Pl. Mot. Ex. K ¶ 4-6; Hr'g Tr. 61-63.

*3 The altered emails made their next significant appearance in 2002 when Amerisource moved for partial summary judgment. To defeat the motion, RxUSA argued that there were material factual disputes regarding price and submitted a sworn affidavit from Drucker dated August 22, 2002. Pl. Mot. Ex. L. In the affidavit, Drucker cited WAC-15% language from one of the altered emails and attached as an exhibit the FPD & B fax header version of that email, as produced by Amerisource. *Id.* ¶ 37. On February 22, 2005, the Honorable Dora L. Irizarry, the then-presiding District Judge, denied summary judgment because RxUSA "offered specific evidence including: (1) an affidavit from [d]efendants' president explaining the common industry practice regarding pricing and (2) correspondence between plaintiff and [d]efendant and between plaintiff and plaintiff's sales representative, which, if found credible, suggest that plaintiff did in fact promise [d]efendants certain discounts." Pl. Mot. Ex. M at 2-3.

On March 27, 2003, RxUSA relied on the altered emails again. In response to an interrogatory requesting all facts evidencing RxUSA's claimed discounts, RxUSA's stated that LaFontaine had confirmed the agreement orally and by email and cited all four altered emails. Drucker verified and signed this response. Pl. Mot. Ex. N at 5. In response to a demand for all documents supporting the claim, RxUSA produced multiple versions of all four altered emails. Pl. Mot. 8. Among these was a version that bears a Paperport stamp dated May 26, 2000. *Id.;* Pl. Mot. Ex. D. Drucker testified that the Paperport stamp indicates that Drucker had possession of the document and scanned it into his computer using the Paperport software on the date indicated. Hr'g Tr. 142. The Paperport versions are also marked with the rxusal insignia. They do not bear Drucker's fax header.

RxUSA's March 2003 production of the altered emails was not a remarkable event by itself because Amerisource already received the altered versions by fax from FPD & B in June 2000. However, RxUSA also made its first and only production of the authentic emails at the same time. Pl. Mot. Ex. B, E-G. As noted above, but for the WAC-15% language, the authentic and altered emails were identical in every way, including the time stamp indicating the date and time the email was sent or received. Since, as the parties agree, it is impossible for the same email account to send two different emails to the same address at the same exact time, Amerisource realized that something was amiss.

Amerisource confronted Drucker with the anomaly at his first deposition on February 23, 2004. Amerisource's counsel presented Drucker with the authentic and altered versions of one of the four emails. After Drucker verified both as authentic, Amerisource counsel asked him to explain how two emails sent at the same time could have such different text. Drucker speculated that perhaps he had sent one email within the same minute as the other. Pl. Mot. Ex. P. During a second deposition conducted eight days later on March 2, 2004, Amerisource presented Drucker with another altered email. Drucker confirmed that he received the altered email from LaFontaine. Counsel then presented Drucker with the authentic version of that same email and asked Drucker to explain the anomaly. This time, Drucker stated that he could not explain why the emails were different. Pl. Mot. Ex. Q.

*4 Drucker testified that it was at this moment in March 2004 that he first realized that the altered emails were fabricated. Hr'g Tr. 168-74. However, he did not share the revelation with Amerisource or the Court until several years later. When asked at the hearing what he did upon realizing that evidence had been fabricated, Drucker stated "I am sure I spoke to-would have spoken to my attorney...." *Id.* at 168. He took no other action to rectify the situation. *Id.* at 176-78.

In September 2006, Amerisource moved for summary judgment a second time and challenged the authenticity of the four altered emails in its supporting brief. Pl. Mot. Ex. R at 11-12. RxUSA ignored the allegation and made no mention of the altered emails in its opposing papers. Pl. Mot. Ex. S. On September 20, 2007, Judge Irizarry denied the motion on other grounds. Ex. T at 11-14. The case was later transferred to the undersigned on consent of all parties and trial was set for September 8, 2008.

On August 28, 2008, the parties filed a joint pre-trial order in which RxUSA designated three of the four altered emails as trial exhibits. Ex. U(B) However, five days before trial, a dispute arose over the propriety of a different RxUSA trial exhibit, Exhibit OO. The Court adjourned the trial to January 26, 2009 and permitted Amerisource to conduct supplemental electronic discovery to investigate the authenticity of Exhibit OO and re-depose Drucker.

After collecting a vast amount of computer data, which uncovered no electronic trace of the four altered emails, Amerisource deposed Drucker a final time on January 8, 2009. At that deposition, Drucker testified for the first time that the altered emails were fabricated. Pl. Mot. Ex. A at 388-89, 399-400. However, he denied creating them and speculated that London-Zeitz may have created them back in 2000 after she received them in the mail from Spielberg. *Id.* at 398. [2] Thereafter, RxUSA withdrew the altered emails from its list of trial exhibits and did not rely upon them at trial. Pl. Mot. Ex. Y. During the trial, Drucker testified under oath that he did not create the altered emails and had no knowledge of who did. Trial Tr. 190-98.

2 The January 2009 deposition pages attached as Exhibit A to Plaintiff's Renewed Motion for Sanctions do not include page 398 of the transcript. However Amerisource submitted the entire deposition transcript to the Court in connection with its original sanctions motions, which was filed under seal on January 15, 2009. The Court was therefore able to review the relevant sections of the transcription despite the inadvertent omission.

II. *DISCUSSION*

Amerisource seeks sanctions against RxUSA and Drucker, jointly and severally, pursuant to both the Court's inherent power and Federal Rule of Civil Procedure 37. It seeks an award of $2,798,032 .11, its entire cost of litigation, for the "nine-year odyssey" that Drucker and RxUSA "created and kept alive by the sham documents that Drucker forged in May 2000." Drucker and RxUSA acknowledge that the emails containing WAC-15% language are fake, but deny creating or knowingly using the false evidence. They further assert that sanctions are not warranted because there is no "nexus between the alleged modification of documents and any legal fees or costs incurred by [Amerisource] in this case" and that the "fees and costs incurred by Amerisource would have been incurred whether or not the subject documents existed."

A. *The Court's Inherent Power to Sanction*

*5 By their very creation, courts are vested with the inherent power to sanction parties who abuse the judicial process or perpetrate fraud upon the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). A fraud on the court occurs "when a party lies to the court and his adversary intentionally, repeatedly, and about issues that are central to the truth-finding process" in an attempt to "hinder the fact finder's fair adjudication of the case and his adversary's defense of the action." *McMunn v. Mem'l Sloan-Kettering Cancer Ctr.*, 191 F.Supp.2d 440, 445 (S.D.N.Y.2002) (*quoting Skywark v. Isaacson*, No. 96-CV-2815, 1999 WL 1489038, at *14 (S.D.N.Y. Oct.14, 1999). Several courts have found that the repeated submission of fabricated evidence constitutes a fraud on the court. *See, e.g., Jung v. Neschis*, No. 01-CV-6993, 2009 WL 762835, at *15 (S.D.N.Y. Mar. 23, 2009); *Hargrove v. Riley*, No. 04-CV-4587, 2007 WL 389003, at *11 (E.D.N.Y. Jan.31, 2007); *Shangold v. Walt Disney Co.*, No. 03-CV-9522, 2006 WL 71672, at *3 (S.D.N.Y. Jan. 12, 2006); *Scholastic, Inc. v. Stouffer*, 221 F.Supp.2d 425, 439 (S.D.N.Y.2002); *McMunn*, 191 F.Supp. at 446.

The Court's inherent power to sanction litigation misconduct is potent. *Chambers*, 501 U.S. at 44; *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 136 (2d Cir.1998). It reaches conduct both before the court and beyond the court's confines and authorizes the court to fashion sanctions as severe as dismissing claims and imposing attorneys' fees for the entire cost of the litigation. *Chambers*, 501 U.S. at 56-57; *Hargrove*, 2007 WL 389003, at *11 ("If a party commits a fraud on the court, the court has the inherent power to do whatever is reasonably necessary to deter abuse of the judicial process.") (*citing Shangold*, 2006 WL 71672, at *4). "Because of their very potency, inherent powers must be exercised with restraint and discretion." *Chambers*, 501 U.S. 44 *(citing Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980)). Sanctionable conduct must be proven by clear and convincing evidence and the district court must make a specific finding of bad faith. *DLC Mgmt. Corp.*, 163 F.3d at 136 (*citing United States v. Int'l Bhd. of Teamsters*, 948 F.2d 1338, 1345 (2d Cir.1991)). The court must also make specific factual findings and identify the particular misconduct it deems sanctionable. *See MacDraw, Inc. v. CIT Group Equip. Fin., Inc.*, 73 F.3d 1253, 1262 (2d Cir.1996) (finding that when imposing sanctions pursuant to Rule 11 and 28 U.S.C. § 1927, a court "must do so with care, specificity, and attention to the sources of its power"); *Int'l Bhd. of Teamsters*, 948 F.2d at 1346; *Oliveri v. Thompson*, 803 F.2d 1265, 1272 (2d Cir.1986). [3]

3 Amerisource also requests sanctions pursuant to Federal Rule of Civil Procedure 37 for Drucker's failure to correct discovery responses and deposition testimony after March 2004, the date Drucker claims he first realized the altered emails were fabricated. Rule 37 authorizes courts to sanction parties who fail to correct materially inaccurate discovery disclosures and responses required by Rule 26(e). Fed.R.Civ.P. 37(c). However, because the Court finds, for the reasons discussed below, that Drucker created the documents and knew they were false when he relied upon them prior to March 2004, the misconduct at issue here is broader than a Rule 37 violation. Accordingly, the Court's inherent power is a more appropriate basis for sanctions. *Chambers,* 501 U.S. at 50 (holding that if the court determines in its "informed discretion" that bad-faith conduct cannot be adequately sanctioned under a rules or statute, "the court may safely rely on its inherent power").

B. *Authority to Sanction a Nonparty*

The Court's power to sanction parties appearing before it, such as RxUSA, is well-settled. *Chambers,* 504 U.S. at 32; *Cerruti 1881 S.A. v. Cerruti Inc.,* 169 F.R.D. 573, 582-83 (S.D.N.Y.1996). As a nonparty, Drucker ordinarily would not be subject to sanctions absent violation of a specific court order. *See Cont'l Ins. Co. v. Atl. Cas. Ins. Co.,* No. 07-CV-3635, 2008 WL 3852046, at *2 (S.D.N .Y. Aug. 13, 2008). However, as the majority shareholder, chief executive, and only person affiliated with RxUSA to have a substantive role in this litigation, Drucker is RxUSA. He managed the litigation on RxUSA's behalf and represented RxUSA at every step. RxUSA acted only through him and RxUSA does not dispute that Drucker's conduct is attributable to RxUSA.

*6 Accordingly, though Drucker did not violate a specific Court order, the Court has the inherent power to sanction him for his litigation misconduct. *See Elec. Workers Pension Trust Fund of Local Union 58, IBEW v. Gary's Elec.,* 340 F.3d 373, 383 (6th Cir.2003) (holding that "if a corporate officer avoids a court's order to the corporation by failing to take action or attempt compliance," the officer may be punished for contempt and "it is fully appropriate to impose judicial sanctions on the nonparty corporate officer.' ") (*quoting Wilson v. U.S.,* 221 U.S. 361, 376, 31 S.Ct. 538, 55 L.Ed. 771 (1911); *citing U.S. v. United Mine Workers of America,* 330 U.S. 258, 303-4, 67 S.Ct. 677, 91 L.Ed. 884 (1947)); *see also Manez v. Bridgestone Firestone North American Tire,* LLC, 533 F.3d 578, 585 (7th Cir.2008) ("No matter who allegedly commits a fraud on the court-a party, an attorney, or a nonparty witness-the court has the inherent power to conduct proceedings to investigate that allegation and, if it is proven, to punish that conduct."); *David v. Hooker, Ltd.,* 560 F.2d 412, 420-21 (9th Cir.1977) (affirming district court's order requiring corporate defendant's sole nonparty officer to pay plaintiff's expenses resulting from corporate defendant's failure to answer interrogatories); *Thomas Am. Corp. v. Fitzgerald,* 175 F.R.D. 462, 464, 466-67 (S.D.N.Y.) (1997) (ordering corporate plaintiff's former CEO to pay a fine pursuant to Rule 11 for filing a declaration that contained a factual misstatement); *Jung,* 2009 WL 762835, at *15 (sanctioning the nonparty husband and father of plaintiffs, who managed and funded the litigation on his family's behalf, for tampering with audio tapes in evidence); *Helmac Products Corp. v. Roth (Plastics) Corp.,* 150 F.R.D. 563, 564-68 (E.D.Mi.1993) (holding that the court has the inherent power to sanction a nonparty that is not subject to court order if the nonparty had a substantial interest in the outcome of the litigation and substantially participated in the proceedings).

C. *Sanctionable Conduct*

Drucker and RxUSA admit that the altered emails were fabricated and that RxUSA used them to advance their claims in the various ways identified by Amerisource. However, they deny creating the emails and assert that their reliance on them was an innocent mistake. Specifically, Drucker claims that he had no reason to questions these four documents out of the thousands produced in the case because they were consistent with his recollection regarding the WAC-15% discount and his correspondence with Amerisource personnel.

Amerisource has proven by clear and convincing evidence that Drucker created the altered emails. Drucker was one of only a small handful of people who had motive and access to the relevant email accounts and his fax header, the Paperport stamp, and the rxusal insignia all identify him as the culprit. There is no other logical conclusion consistent with the evidence. However, the evidence does not clearly and convincingly establish that when Drucker created the altered emails, he intended to manipulate this litigation or commit a fraud upon this Court. Amerisource did not present evidence that Drucker knew or should have known

a lawsuit would be filed the following year or that he anticipated using the altered documents to influence any litigation. Based on the record before the Court, it is equally probable that Drucker altered the emails in the hopes of dissuading Amerisource from filing a lawsuit and duping it into giving him the discounts or creating a compromise agreement.

*7 Drucker's creation of the altered emails is nevertheless a critical fact because it proves that he and RxUSA acted in bad faith when they used the emails to support their claims and testified to their authenticity. As their creator, Drucker knew all along that the altered emails were fake, and he cannot now credibly claim that his repeated reliance on them was innocent. *See, e.g., Stouffer*, 221 F.Supp.2d at 442 (holding that defendant's "knowing submission" of evidence containing a misrepresentation was a fraud upon the court); *Furminator, Inc. v. Kim Laube & Co., Inc.*, No. 4:08-CV-367, 2009 WL 5176562, at *3 (E.D.Mo. Dec.21, 2009) (finding that defendant's creation and use of fabricated evidence could not have been "made in error because the evidence suggests that Defendant attempted to avoid answering questions about the fabricated evidence and did nothing to correct the obviously false statements"). Moreover, contrary to RxUSA's assertions, the actual effect of the altered emails on the litigation is not relevant to whether the conduct is sanctionable. Drucker clearly acted in bad faith with the intent to manipulate this litigation and interfere with the Court's fair adjudication of the matter. Accordingly, his production of and testimony regarding the altered emails is sanctionable as a fraud upon the court.

D. *Appropriate Sanctions*

It is well-settled that courts may sanction litigation misconduct by ordering the offending party to pay the opposing party's attorneys' fees. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975); *Oliveri*, 803 F.2d at 1272; *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129, 94 S.Ct. 2157, 40 L.Ed.2d 703 (1974). Such awards are intended to compensate the other party for additional expense caused by the offending party's misconduct. Chambers, 501 U.S. at 56. Amerisource requests the entirety of its litigation expenses, which total nearly $2.8 million. However, not all of Amerisource's fees were caused by RxUSA's fraud .[4] Evidence independent of the altered emails perpetuated the case and Amerisource has not shown by clear and convincing evidence that the altered emails lengthened the litigation. In denying summary judgment the first time, Judge Irizarry identified Drucker's affidavit regarding industry pricing standards and correspondence between Drucker and Amerisource management as further evidence supporting RxUSA's claims. The altered emails did not factor into Judge Irizarry's second summary judgment ruling. Moreover, the testimony of Drucker and LaFontaine alone, if credited, would have been a sufficient basis for a defense verdict. Amerisource also failed to demonstrate how the altered emails caused it to change its discovery, settlement, or litigation strategy, or incur expenses that it would have otherwise forgone.

4 Additionally, Amerisource has already been awarded a substantial portion of its fees as the prevailing party on the underlying contract claim.

The only exception is the obvious added expense of investigating the emails and pursuing sanctions. Amerisource expended $273,376.11 in pursuit of sanctions. Pl.'s Post-Hr'g Br. 13. However, much of this activity was unnecessary and did nothing to advance the inquiry. The expert computer discovery yielded little evidence of misconduct.[5] Other than the expert's hearing testimony, which explained the significance of the rxusal insignia and identified how the The renewed motion for sanctions, which was much more modest, yet nevertheless successful in proving misconduct, made only a cursory mention of the expert discovery and completely abandoned the attack on Exhibit OO. alteration was likely achieved, Amerisource's use of experts was superfluous. Amerisource proved Drucker's creation and use of the emails by ordinary evidence and logic. Thus, neither Amerisource's litigation costs nor its sanctions expenses provide an appropriate measure for sanctions.

5 The low value of the expert discovery is underscored by the difference between Amerisource's initial and renewed motions for sanctions. The initial motion, which seems to have been hastily filed without much forethought or leave of the Court, was over five hundred pages long, overflowed with minimally probative circumstantial forensic evidence, and primarily focused on the authenticity of Exhibit OO.

*8 Nevertheless, it is prudent to compensate litigants who are vigilant in exposing litigation fraud. Moreover, Drucker's conduct was a flagrant abuse of the judicial system and the Court is compelled not only to punish and deter such conduct but to vindicate itself. Accordingly, for the intentional bad faith reliance on fabricated evidence throughout the course of this litigation, the Court sanctions RxUSA and Drucker in the amount of $50,000 payable to Amerisource and an additional $50,000 payable to the Clerk of this Court.

III. *CONCLUSION*

For the foregoing reasons, Amerisource's motion for sanctions is GRANTED and RxUSA and Drucker together are ORDERED to pay $50,000 to Amerisource and $50,000 to the Clerk of this Court. RxUSA and Drucker shall be held jointly and severally liable for the burden of these sanctions.

SO ORDERED.

End of Document

2008 WL 3852046
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

CONTINENTAL INSURANCE COMPANY, Plaintiff,
v.
ATLANTIC CASUALTY INSURANCE COMPANY, Defendant.

No. 07 Civ. 3635(DC). Aug. 13, 2008.

Opinion

MEMORANDUM & ORDER

CHIN, District Judge.

*1 In this action, plaintiff Continental Insurance Company ("Continental Insurance") seeks to recover from defendant Atlantic Casualty Insurance Company ("Atlantic Casualty") amounts that it paid under a homeowners insurance policy for a claim relating to a fire at a residence. Continental Insurance previously brought an action against nonparty Wodraska Brothers, Inc. ("Wodraska Brothers"), alleging that it negligently installed the roof of the residence, causing the fire and the resulting damage. Continental Insurance obtained default judgement against Wodraska Brothers, and now seeks to recover the amount of that judgment from Atlantic Casualty under a liability insurance contract between Atlantic Casualty and Wodraska Brothers.

Atlantic Casualty now moves for the Court to hold nonparty Wodraska Brothers in contempt pursuant to Fed.R.Civ.P. 45(e). For the reasons below, the motion is granted.

BACKGROUND

On March 18, 2008, Nixon Peabody LLP ("Nixon Peabody"), counsel for Atlantic Casualty, issued a subpoena to Wodraska Brothers on behalf of its client, commanding Wodraska Brothers to appear at Nixon Peabody's Manhattan offices on May 1, 2008 for a deposition. (Drewniak Aff. Ex. A). The subpoena, together with a $45 witness fee, was served on Wodraska Brothers at its place of business in New Rochelle, New York, on March 19, 2008. (*Id.* ¶ 4, Ex. B). The woman who accepted service on Wodraska Brothers's behalf refused to give her name, but identified herself as an "employee" of the company. (*Id.* Ex. B).

On both April 9 and 10, 2008, Nixon Peabody telephoned Wodraska Brothers to inquire whether someone would be appearing for the May 1, 2008 deposition. (*Id.* ¶ 5). Nixon Peabody was unable to reach anyone who could answer the question. (*Id.*). On April 10, 2008, Erik Drewniak, Esq., of Nixon Peabody wrote a letter to Wodraska Brothers inquiring whether it would appear at the deposition, and offering to reschedule the deposition if the proposed date was inconvenient. (*Id.* Ex. C).

On April 29, 2008, Drewniak again attempted to contact Wodraska Brothers by telephone to determine if someone would appear for the deposition. (*Id.* ¶ 6). No one answered the telephone, so Drewniak left a voice mail reminding them of the subpoena and deposition. (*Id.*). No one from Wodraska Brothers ever responded to the telephone calls, voice mail, or letter. (*Id.*).

On May 1, 2008, Wodraska Brothers failed to appear for the deposition at Nixon Peabody's Manhattan office. (*Id.* ¶ 7). No one from Wodraska Brothers contacted Nixon Peabody to explain the failure to appear or for any other reason. (*Id.* ¶ 8).

On June 16, 2008, Atlantic Casualty filed the instant motion for contempt against Wodraska Brothers pursuant to Fed.R.Civ.P. 45(e), requesting that the Court issue an order requiring Wodraska Brothers to comply with the subpoena. On July 17, 2008, I ordered Wodraska Brothers to either comply with the March 18, 2008 subpoena or respond to Atlantic Casualty's motion for contempt by July 27, 2008. The order provided that if Wodraska Brothers failed to comply with the subpoena or respond to the motion that the motion would be granted and I would hold Wodraska Brothers in contempt.

*2 To date, Wodraska Brothers has not complied with the subpoena or responded to Atlantic Casualty's motion for contempt, in defiance of my order.

DISCUSSION

Fed.R.Civ.P. 45(e) gives district courts the power to hold a nonparty in civil contempt if that nonparty, "having been served, fails without adequate excuse to obey the subpoena." Fed.R.Civ.P. 45(e); *see Daval Steel Prods. v. M/V Fakredine,* 951 F.2d 1357, 1364 (2d Cir.1991). Rule 45(e) provides the only authority in the Federal Rules of Civil Procedure for imposition of sanctions against a nonparty for failure to comply with a subpoena. *See Application of Sumar,* 123 F.R.D. 467, 473 (S.D.N.Y.1988). To impose sanctions on a nonparty, however, the violation of a court order is also generally required. *See, e.g., PaineWebber Inc. v. Acstar Ins. Co.,* 211 F.R.D. 247, 249 (S.D.N.Y.2002) (nonparty's failure to comply first with subpoena and then subsequent court order resulted in sanctions); *Cruz v. Meachum,* 159 F.R.D. 366, 368 (D.Conn.1994) (requiring a court order compelling discovery before sanctions could be imposed under Rule 45).

Here, Wodraska Brothers, despite being properly served, (1) failed to obey the subpoena by attending the deposition, (2) failed to oppose defendant's motion for contempt, (3) failed to comply with this Court's July 17, 2008 order, and (4) did not make a motion to quash or modify the subpoena. [1] Despite Nixon Peabody's repeated attempts to contact Wodraska Brothers, Wodraska Brothers has been completely unresponsive, ignoring what is required of it under the law. By failing to comply with the subpoena and defying my order, Wodraska Brothers has shown an utter disregard for the judicial process. Furthermore, Wodraska Brothers's violation of this Court's order provides grounds for imposing sanctions. *See Sumar,* 123 F .R.D. at 473 (when nonparty fails to object or comply with subpoena it may be held in contempt and sanctions may be imposed under Rule 45(e)).

1 Rule 45(e) provides that a nonparty's failure to obey a subpoena may be excused if the subpoena purports to require that nonparty to attend or produce at a place more than 100 miles from where the nonparty resides, is employed, or regularly transacts business in person. It appears that Wodraska Brothers has no grounds for arguing that this exception applies, as its place of business is located in New Rochelle, New York, which is less than 100 miles from Nixon Peabody's Manhattan Office.

Accordingly, Atlantic Casualty's motion for contempt and for sanctions is granted. Atlantic Casualty shall submit a proposed order holding Wodraska Brothers in contempt and awarding sanctions; Atlantic Casualty shall set forth its actual costs incurred in its efforts to secure Wodraska Brothers's deposition by August 20, 2008, with an affidavit explaining its calculation.

SO ORDERED.

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2006 WL 721312
Only the Westlaw citation is currently available.
United States District Court,
E.D. New York.

UNITED STATES OF AMERICA, Plaintiff,
v.
Felix J. ROMELIEN, Defendant.

No. 05-CV-1341 DRH/JO. March 16, 2006.

Attorneys and Law Firms

Michael T. Sucher, Esq., Brooklyn, NY, for Plaintiff.

Opinion

ORDER

HURLEY, District Judge:

*1 On September 12, 2005, this Court granted Plaintiff's motion for an entry of default judgment against the Defendant in the above-captioned case, and referred the case to U.S. Magistrate Judge James Orenstein, pursuant to 28 U.S.C. § 636(b)(3), for a report and recommendation as to damages and attorney's fees. On February 16, 2006, Judge Orenstein issued a Report and Recommendation that Plaintiff be awarded $2,492.15 in loan principal, $2,130.57 in interest, $924.54 in attorney's fees, and $295.00 in costs, for a total judgment of $5,842.26. More than ten days have elapsed since Judge Orenstein issued his Report and Recommendation, and neither party has filed any objections to it.

Pursuant to 28 U.S.C. § 636(b) and Fed.R.Civ.P. 72, this Court has reviewed the Report and Recommendation for clear error, and finding none, now concurs in both its reasoning and its result. Accordingly, this Court adopts the February 16, 2006 Report and Recommendation of Judge Orenstein as if set forth herein. Upon entry of judgment, the Clerk of the Court is directed to close this case.

SO ORDERED.

REPORT AND RECOMMENDATION

JAMES ORENSTEIN, Magistrate Judge:

Plaintiff United States of America (the "government") seeks an award of damages against Felix J. Romelien ("Romelien") for his default on a student loan. *See* Docket Entry ("DE") 1 (Complaint). As a result of Romelien's failure to answer the Complaint, the Clerk noted his default, DE 6, and the Honorable Denis R. Hurley, United States District Judge, referred the matter to me for a Report and Recommendation as to the appropriate amount of damages, attorneys' fees, and costs that the government should recover. DE 8. I now make that report and, for the reasons explained below, recommend that judgment be entered in favor of the government in the amount of $5,842.26, consisting of $4,622.72 in damages and $1,219.54 in attorneys' fees and costs.

I. *Background*

A. *Romelien's Default*

The government filed its Complaint on March 11, 2005, DE 1, and subsequently served that pleading on Romelien on April 21, 2005. DE 3. Romelien's deadline for filing an answer to the Complaint was May 11, 2005. After that deadline had passed without any response from Romelien, the government moved for a default judgment. DE 4. The Clerk noted Romelien's default on August 30, 2005, and the matter was referred to me on September 12, 2005. Endorsed Order on DE 4.

B. *Romelien's Debt*

The Complaint alleged that Romelien "neglected and refused" to pay upon demand the balance due on a promissory note he executed for a student loan guaranteed by the United States Department of Education (the "Department"). DE 1 ¶ 4. The government attached to its Complaint a Certificate of Indebtedness, apparently prepared on the basis of information within the Department's records, that describes the procedural history of Romelien's loan as well as the amount due as of November 16, 1998. DE 1, Attachment ("Certificate"). According to the Certificate, Romelien executed a promissory note on May 29, 1990, securing $2,625.00 from Citibank at an interest rate of eight percent interest per annum. The loan was guaranteed by New York State's Higher Education Services Corporation ("HESC") and was subsequently reinsured by the Department pursuant to Title IV-B of the Higher Education Act of 1965. *See* 20 U.S.C. § 1071 *et seq.* Citibank demanded payment according to the terms of the promissory note and thereafter credited $265.27 to the outstanding principal owed.

*2 Romelien subsequently defaulted on the promissory note on May 13, 1993, and Citibank filed a claim on the guarantee with HESC, which then paid Citibank $2,360.73. After HESC tried without success to collect the debt, it obtained reimbursement from the Department pursuant to its reinsurance agreement and assigned the Department its rights under the promissory note. Since the assignment on March 22, 1995, the Department received $240.00 in offsets from various sources. After accounting for these payments, as of November 16, 1998, Romelien owed the government a total of $3,177.27, consisting of $2,492.15 in loan principal and $685.12 in interest. *See* DE 1, Certificate.

II. *Discussion*

A. *No Hearing Is Needed*

Upon the entry of default, a party concedes all well pleaded factual allegations, however, this concession does not extend to damages. *See* Fed.R.Civ.P. 8(d); *Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.*, 973 F.2d 155, 158 (2d Cir.1992) (citations omitted). A plaintiff must prove its damages if they are neither "susceptible of mathematical computation" nor liquidated as of the default. *Id.* (citations omitted); *see* Fed.R.Civ.P. 55(d)(2). To determine the appropriate amount of damages, courts have "the discretion to rely on detailed affidavits or documentary evidence in lieu of an evidentiary hearing." *DirecTV, Inc. v. Perrier*, 2004 WL 941641, *2 (W.D.N.Y. March 15, 2004) (citations omitted). "A hearing is not required as long as the court ensures that there is a basis for the damages awarded." *Id.* Because the government has submitted a sufficient affirmation and documentation in support of its motion, no hearing is required.

B. *Damages*

In support of its application for damages on Romelien's default the government submitted the Certificate and an affirmation sworn by attorney Michael T. Sucher. *See* DE 5-2 (Affirmation of Michael T. Sucher) ("Aff."). The government also submitted an affirmation attesting to the fact that, after investigation, it has determined that Romelien is not presently serving in the military and has not been called to such service. *See* DE 5-3.

The Certificate sufficiently supports an award of the loan principal in the amount of $2,492.15 and I therefore recommend awarding a sum of this amount. The Certificate also states that $685 .12 in interest was due as of November 16, 1998. From November 17, 1998 through February 17, 2006, another $1,445.45 in interest will have accrued at the loan's stated interest rate of eight percent per annum; therefore I recommend an award of $2,130.57 in interest.

C. *Attorneys' Fees And Costs*

Reasonable attorneys' fees are permitted for the collection of damages resulting from a default on a promissory note. *See* 20 U.S.C. § 1091a(b)(1) (requiring a student borrower who has defaulted to pay "reasonable collection costs"). A request for attorneys' fees must be supported by "contemporaneous time records that show 'for each attorney, the date, the hours expended, and the nature of the work done." ' *DirectTV v. Meinecke,* 2004 WL 1535578, at *4. (S.D.N.Y. July 9, 2004) (citing *New York Ass'n for Retarded Children. Inc. v. Carey,* 711 F.2d 1136, 1147 (2d Cir.1983)). However, in lieu of calculating attorneys' fees with the lodestar method, the court may award a percentage of the amount recovered. *See United States v. Vilnus,* WL 2005 WL 2175893, at *7 (E.D.N.Y. September 8, 2005); *see also Peoples Westchester Savings Bank v. Ganc,* 715 F.Supp. 611 (S.D.N.Y.1989) (awarding 10 percent of the face value of the promissory note); *National Commercial Bank and Trust Company v. Farina's Market, Inc.,* 95 Misc.2d 284, 286, 406 N.Y.S.2d 979 (N.Y.Sup.1978) (noting that awards of 20 percent of the amount recovered for attorneys' fees have been found reasonable).

*3 The government requests an amount in attorneys' fees equal to 20 percent of the total amount recovered. Aff. ¶ 6. In the alternative, the government requests $1,575 based on 4.5 hours of work at a rate of $350 per hour. Aff. ¶ 8. The fee request is based on reviewing the student loan collection file, attempting to correspond with Romelien, drafting the summons and complaint, drafting the motion for default, and filing the same. *Id.* However, the government has not submitted contemporaneous time records; therefore I am precluded from awarding attorneys' fees using the lodestar method. Nonetheless, I find an award of 20 percent of Romelien's total debt to the government to be a reasonable fee for the services rendered, as Judge Sifton so thoroughly explained in a recent similar case. *See Vilus,* 2005 WL 2175893, at *6-7 (finding attorneys' fees in the amount of 20 percent of the total debt to be reasonable on the ground that it is less than the 25 percent the Department charges for collection costs pursuant to 34 C.F.R. § 30.60(b)). I therefore recommend an award of $924.54 in attorneys' fees.

Finally, the government asks for $295 in costs which includes $250 in filing fees and $45 for service of process. *See* Aff. ¶ 10; *see also* DE 4-2, Attachment (Process Server Receipt). These costs are reasonable and have been sufficiently documented; I therefore recommend that they be reimbursed.

III. *Recommendation*

For the reasons set forth above, I respectfully recommend that the Court enter judgment awarding the government a total of $5,842.26, consisting of the following components:

$2,492.15 in loan principal;

$2,130.57 in interest;

$924.54 in attorneys' fees; and

$295.00 in costs.

IV. *Objections*

This Report and Recommendation will be electronically filed on the court's ECF system. Counsel for the government is directed to serve a copy of this Report and Recommendation on defendant Romelien and to file proof of service with the court. Any objection to this Report and Recommendation must be filed with the Clerk of the Court with a courtesy copy to me within 10 days of service. Failure to file objections within this period waives the right to appeal the District Court's Order. *See* 28 U.S.C. 636(b)(1); Fed.R.Civ.P. 72; *Beverly v. Walker,* 118 F.3d 900, (2d Cir.1997); *Savoie v. Merchants Bank,* 84 F.3d 52, 60 (2d Cir.1996).

SO ORDERED.

End of Document

1994 WL 507779
United States District Court, E.D. New York.

NATIONAL LABOR RELATIONS BOARD, Applicant,

v.

A.G.F. SPORTS LTD., B.J. Paper Products, Inc., Durlacher Co., Liberty House Trading, Corp., Lynch Novelty, Inc., Nova Clutch, Inc., Respondents.

No. MISC. 93-049 (CBA). June 22, 1994.

Attorneys and Law Firms

Elias Feuer, N.L.R.B., Region 29, Brooklyn, NY, for applicant.

Gary C. Cooke, Horowitz & Pollack, South Orange, NJ, for respondents.

Opinion

MEMORANDUM & ORDER

AMON, District Judge.

*1 By order dated March 30, 1993 this Court directed respondents A.G.F. Sports Ltd., B.J. Paper Products, Inc., Durlacher Co., Liberty House Trading, Corp., Lynch Novelty, Inc., and Nova Clutch, Inc. to produce voter eligibility lists, pursuant to a decision by the National Labor Relations Board (the "Board") calling for single employer elections at each of the respondent companies. In addition, the Court awarded attorney's fees and costs to the Board for its expenses in securing the lists. [1] Currently before the Court is the Board's application detailing those expenses and requesting reimbursement in a total amount of $10,981.59.

The customary measure for attorney's fee awards is the "lodestar" figure, derived by multiplying an hourly rate by the number of hours reasonably spent by prevailing counsel. *See United States v. Kirksey,* 639 F.Supp. 634, 638 (S.D.N.Y.1986). There is a " 'strong presumption' " that the lodestar figure represents the " 'reasonable' " fee. *City of Burlington v. Dague,* 112 S.Ct. 2638, 2641 (1992) (quoting *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 563 (1985)). In awarding fees, "judges may draw on their own experience as practitioners and on common sense," *Peter Fabrics, Inc. v. S.S. Hermes,* 765 F.2d 306, 320 (2d Cir.1985), by adjusting the lodestar figure " 'on the basis of frankly subjective factors,' " *Mautner v. Hirsch,* 831 F.Supp. 1058, 1063 (S.D.N.Y.1993) (quoting *In re Agent Orange Prods. Liab. Litig.,* 611 F.Supp. 1296, 1310 (E.D.N.Y.1985), ***modified on other grounds,*** 818 F.2d 216 (2d Cir.1987)). Reasonable attorney's fees may include reasonable charges for the work of non-attorneys employed in generating an attorney's work product. *See Missouri v. Jenkins by Agyei,* 491 U.S. 274, 285, 109 S.Ct. 2463, 2470 (1989); *United States Football League v. National Football League,* 887 F.2d 408, 416 (2d Cir.1989), ***cert. denied,*** 493 U.S. 1071, 110 S.Ct. 1116 (1990).

In support of its application, the Board has documented 63.45 hours of attorney time, 31.35 hours of non-attorney time, and $456.22 in miscellaneous expenses. *See* Decl. of Elias Feuer, Ex. C. The Board requests reimbursement of its attorneys' time at a rate of $150 per hour. [2] Although respondents assert that this figure is excessive as applied to claims for attorney's fees by government attorneys, it is established law in this Circuit that government attorneys may be reimbursed at the prevailing market rate. *See City of Detroit v. Grinnell,* 495 F.2d 448, 471 (2d Cir.1974); *see also Kirksey, supra,* 639 F.Supp. at 637 (holding that proper hourly rate for government attorney is the " 'amount to which an attorney of like skill in the area would typically be entitled for a given type of work on the basis of an hourly rate of compensation' ") (quoting *Grinnell,* 495 F.2d at 471). The Court is persuaded that an hourly rate of $150 is reasonable in this case. *See* Decl. of Arthur Z. Schwartz, ¶ 2.

*2 The Court also finds no basis for respondents' contention that the Board has supported its application with "mere summary statements and conclusions with regards to when the claimed services were performed." Aff. in Opp'n, at 2. It is undisputed that an application for attorney's fees in this Circuit must be supported by contemporaneous time records. *See New York State Ass'n for Retarded Children, Inc. v. Carey*, 711 F.2d 1136, 1147 (2d Cir.1983). The Board's motion includes typewritten, well-detailed contemporaneous time records of the work performed. *See* Notice of Mot., Ex. C. In reply to respondents' opposition, the Board has supplemented these records with handwritten notes that accurately match the typewritten records. *See* Applicant's Reply Memorandum, Exs. 2, 3, 4. These records adequately document for each attorney the date, the number of hours expended, and the nature of the work done. *See New York State Ass'n for Retarded Children, Inc.*, 711 F.2d at 1148.

Respondents' objections to particular portions of the Board's fee request are similarly without merit. Respondents argue that it was excessive for the Board to expend a total of sixteen attorney hours on the legal memorandum supporting the Board's motion to enforce its subpoenas of voter eligibility lists. Before preparing the memorandum, respondents suggest, the Board could have learned that respondents did not intend to enter any opposition to the motion, thereby obviating an extensive submission. Having failed to comply with the Board's subpoenas, however, respondents cannot now blame the Board for the plainly foreseeable consequences of their refusal to produce the lists. Given the complexity of this action against multiple employers, *see* Reply Mem. at 4, and this District's requirement of a legal memorandum in support of "any motion," *see* Joint Rules, United States District Courts for the Southern and Eastern Districts of New York, Civil Rule 3, the Court concludes that the Board's expenditure of time was reasonable under the circumstances.

The Court is similarly unpersuaded by respondents' arguments (1) that some of the work included in the Board's application occurred prior to respondents' non-compliance with the subpoenas, and (2) that some of the work done was administrative rather than legal and should therefore be reimbursed at a lower rate. As the Board notes, this Court's March 30, 1993 order was broadly phrased, awarding the Board reimbursement for all of its necessary expenses in securing voter eligibility lists from the several respondents, "including but not limited to attorney fees and expenses." *See supra* footnote 1. A Board field examiner's attendance at a conference with the parties on March 12, 1993 was sufficiently related to the Board's enforcement efforts to fall within the scope of the fee award. *See* Reply Mem., at 6-7. Moreover, respondents' cavil at the amount of time billed at a Board hearing on March 23, 1993, the deadline for production of the voter eligibility lists, is also without substance. Having failed to appear at that hearing, respondents can hardly complain that the Board undertook vigorous efforts to enforce its valid subpoenas. *See id.* at 7-8. Finally, respondents have failed to demonstrate why the Court should deem as merely "administrative" several additional hours billed by Board attorneys one day before the March 30, 1993 appearance before this Court. The Court finds that, in light of respondents' protracted refusal to comply with the subpoenas, these hours represent reasonable preparatory work in advance of that hearing.

*3 Accordingly, the Court hereby grants the Board's request for attorney's fees and costs in the amount of $9,081.59.[3] The Court also grants the Board's request, which was unopposed by respondents, for an additional award of $1,900.00 for the preparation of the Board's reply memorandum on the present motion. Pursuant to the terms of its settlement agreement with the Board, this case is hereby dismissed as against respondent Durlacher Co.

The specific liabilities of the five remaining respondents are as follows: Respondents A.G.F. Sports Ltd., B.J. Paper Products Ltd., Liberty House Trading Corp., Lynch Novelty, Inc., and Nova Clutch, Inc. shall be jointly and severally liable for the common costs and expenditures of the Board in the amount of $9,341.34.[4] Each of these respondents shall be primarily liable for a pro rata share of common costs and expenditures totalling $1,868.27. In addition, each of the five respondents shall individually reimburse the Board for costs and expenditures in the following amounts:

A.G.F. Sports Ltd.....	$525.00
B.J. Paper Products, Inc.....	$ 65.25
Liberty House Trading Corporation....	$600.00
Lynch Novelty, Inc....	$300.00
Nova Clutch, Inc.....	$150.00

The Clerk of the Court is hereby directed to close this case.

SO ORDERED.

1 The Court's March 30, 1993 order stated that respondents must:
[j]ointly and severally reimburse the Board for all common costs and expenditures incurred by the Board in its efforts to secure each of the individual voter eligibility lists, including but not limited to attorney fees and expenses incurred in connection with the preparation and processing of the Application herein, and in securing full compliance with the Order herein, and individually reimburse the Board for those costs and expenditures related to its efforts to secure compliance by individual Respondents. Said amounts will be determined by the Court based upon the submission of affidavits by the Applicant.
Order, March 30, 1993, at 3. Since that date, respondent Durlacher Co. has reached a settlement with the Board, which has withdrawn its fee request and now seeks to discontinue this action as against Durlacher.

2 The non-attorney time is calculated at different rates depending upon the duties of the employee and range from $17.46 to $44.71 per hour. *See* Feuer Decl., Ex. C. In its reply memorandum, the Board requests compensation for an additional 12.67 hours of attorney time expended in litigating the present motion. The total amount of the principal fee request, not including the time expended on this motion, is reduced by one-sixth to reflect the amount of the Board's fees attributable to respondent Durlacher Co. *See infra* footnote 3.

3 This figure reflects the Board's total costs and expenditures pertaining to this motion, less the pro rata share of common costs and expenditures attributable to respondent Durlacher Co. and the $65.25 in other expenses individually attributable to that respondent.

4 The figure for common costs and expenditures is derived by subtracting those expenses individually attributable to the five remaining respondents, as set forth in the schedule below, from the total award of $10,981.59.

Parallel Citations

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