KMK LEGAL UPDATE SEMINAR

Wednesday, December 12, 2012
12:15 p.m. - 5:15 p.m.

Presented by:

KMK Law

Regency South Foyer
Hyatt Regency Cincinnati
151 West 5th Street
Cincinnati, Ohio 45202

Table of Contents

KMK LEGAL UPDATE SEMINAR

Wednesday, December 12, 2012

AGENDA

12:15 p.m. – 12:30 p.m.	Registration and Introduction – *Gary P. Kreider*
12:30 p.m. – 1:30 p.m.	Professionalism – What the #$*#& Were You Thinking? – *Bill Keating, Jr., Paul D. Dorger and Daniel P. Utt*
1:30 p.m. – 2:30 p.m.	Tax Questions of Current Interest – *Gary P. Kreider, James H. Brun, Laura M. Hughes and Mark E. Sims*
2:30 p.m. – 3:00 p.m.	Substance Abuse – *Scott R. Mote, Executive Director, Ohio Lawyers Assistance Program*
3:00 p.m. – 3:15 p.m.	Break
3:15 p.m. – 4:15 p.m.	Current Ethics Matters – *Mark J. Chumley, Richard L. Creighton, James R. Matthews and F. Mark Reuter*
4:15 p.m. – 5:15 p.m.	10 Recent Decisions Every In-House Lawyer Should Know – *Joseph M. Callow, Jr.*

CONTINUING LEGAL EDUCATION CREDIT:

Ohio:
Seminar is approved for 4.5 hours (including 1.00 hour of ethics, 1.00 hour of professionalism, and .50 hour of substance abuse).

Indiana:
Seminar is approved for 4.5 hours (including 2.5 hour of ethics).

Kentucky:
Seminar is approved for 4.5 hours (including 2.0 hours of ethics).

Other States:
If you need credit in another state, please note that on the reverse side.

FEE: None

LOCATION:
Regency South Foyer
Hyatt Regency Cincinnati
151 West 5th Street
Cincinnati, Ohio 45202

INQUIRIES:
Sharon Hauenschild
shauenschild@kmklaw.com
(513) 579-6411

KMK Keating Muething & Klekamp PLL

Paul D. Dorger

PARTNER

Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
TEL: (513) 579-6940
FAX: (513) 579-6457
pdorger@kmklaw.com

PRACTICE AREAS

Healthcare Team

Employment Law Litigation

Employment Practices & Procedures

Labor Law Compliance

Labor / Management Relations

Workers' Compensation

BAR & COURT ADMISSIONS

Ohio

Kentucky

U.S. District Court, Southern District of Ohio

U.S. Court of Appeals, Sixth Circuit

EDUCATION

J.D., University of Cincinnati College of Law, 1992; Law Review

B.A., University of Notre Dame, 1987

Paul Dorger's practice is concentrated on:

- Employment practices and litigation
- Trade secrets law
- Executive and physician employment arrangements
- Traditional labor law (contract negotiation, grievances, and unfair labor practice charges)
- Government regulatory compliance (OSHA, Department of Labor, workers' compensation)
- General representation of privately held businesses

Paul is a member of KMK's Board of Directors and previously served as the Labor & Employment Practice Group Leader.

AWARDS & RECOGNITIONS

- Listed in *The Best Lawyers in America*
- Named to *Ohio Super Lawyers*, 2008-2012
- Named to *Ohio Rising Stars*, 2005, 2006

NEWS

- Keating Muething & Klekamp Is Named the Top-Listed Law Firm in Ohio and Cincinnati in Numerous Areas of Law by The Best Lawyers in America 2013
- 48 Keating Muething & Klekamp Attorneys Recognized in 2012 Ohio Super Lawyers and Ohio Rising Stars
- Keating Muething & Klekamp Is the Top-Listed Law Firm in Ohio and in Cincinnati in a Number of Areas According to The Best Lawyers in America 2012
- Keating Muething & Klekamp only law firm ranked #1 in Cincinnati in Corporate Law, Land Use and Zoning Law, and Municipal Law by The Best Lawyers in America 2011

KMK Keating Muething & Klekamp PLL

Paul D. Dorger (Continued)

SPEAKING ENGAGEMENTS

- KMK Legal Update Seminar, Hyatt Regency Cincinnati, Regency South Foyer, December 12, 2012
- The Impact of President Obama's Second Term on Businesses, Schiff Conference Center, Cintas Center, Xavier University, November 28, 2012
- EEOC Update and Investigation, March 7, 2012
- FLSA Lawsuit and Audits, August 18, 2011
- Labor & Employment Management Roundtable: Protecting Your Company Against Expensive Wage and Hour Lawsuits and Audits, Keating Muething & Klekamp, Spring 2011
- Should our Independent Contractors be Employees?, March 2, 2011
- Managing the Injured Employers: Workers' Compensation Overview and Other Leave Laws, Greater Cincinnati Human Resources Association, August 19, 2010
- EEO Investigations, Minefield for HR Professionals, Employers's Resource Association, August 17, 2010

PUBLICATIONS

- Legal Alert: Court Awards Double Damages for Employer's Failure to Inform Employee How FMLA Leave Is Calculated, February 16, 2012
- Legal Alert: Ohio's New Military Family Leave Law Takes Effect on July 2, 2010, June 29, 2010
- Legal Alert: New Posting Requirements for Federal Contractors and Subcontractors, June 16, 2010
- Legal Alert: Victory for Employers - Intentional Tort Statute Constitutional, March 24, 2010

PROFESSIONAL AND COMMUNITY INVOLVEMENT

- St. Ursula Academy High School, Board of Trustees
- Catholic Charities of Southwestern Ohio, Past-President of the Board of Trustees
- St. Vincent DePaul Society
- Certified Public Accountant, 1989 (former)
- Ohio State and Cincinnati Bar Associations

KMK Keating Muething & Klekamp PLL

Daniel P. Utt

PARTNER

Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
TEL: (513) 579-6564
FAX: (513) 579-6457
dutt@kmklaw.com

PRACTICE AREAS

Bond & Public Finance

Business Consulting Services

Business Planning & Formation

Construction & Development

Economic Development

Environmental

Government Affairs

Healthcare Team

Land Use & Zoning

Real Estate Financing

Real Estate Sales, Acquisitions & Leasing

Real Estate Taxation

Site Selection

Title Insurance

BAR & COURT ADMISSIONS

Ohio

U.S. District Court, Southern District of Ohio

EDUCATION

J.D., University of Dayton School of Law, *summa cum laude*, Executive Editor of Law Review, 1986

B.S., Business Administration, Bowling Green State University, 1983

For more than 25 years, Dan Utt has helped real estate owners, developers, investors, landlords, tenants and lenders navigate the issues and considerations associated with real estate and general business law matters. Dan has significant experience with a broad range of real estate transactions, including the following:

- Residential, retail, commercial, and mixed-use developments
- Office, commercial and industrial building projects
- Acquisition, development and loan transactions for senior living and multi-family communities
- Representation of sellers, purchasers, borrowers and lenders in commercial real estate transactions
- Office, commercial and shopping center development and lease transactions
- Zoning and land-use planning matters
- Environmental matters relevant to real estate transactions
- Representation of general contractors and builders
- Organization of corporations, partnerships and limited liability companies for a variety of transactions
- IRC 1031 Transactions and Exchanges

Dan is a licensed title insurance agent and is an authorized agent for Riverbend Commercial Title Agency. Riverbend Commercial Title Agency is an authorized agent for Chicago Title Insurance Company, First American Title Insurance Company, Old Republic National Title Insurance Company and Commonwealth Land Title Insurance Company. Through Riverbend Commercial Title Agency, the firm provides title insurance policies for purchasers and lenders and provides closing and escrow services.

AWARDS & RECOGNITIONS

- AV® Preeminent™ Peer Review Rated by Martindale-Hubbell for more than 10 years
- Listed in *The Best Lawyers in America*
- Named to *Ohio Super Lawyers*

KMK Keating Muething & Klekamp PLL

Daniel P. Utt (Continued)

- Selected as a Top Rated Lawyer in Construction Law by *American Lawyer* and *Corporate Counsel*

NEWS

- Keating Muething & Klekamp Is Named the Top-Listed Law Firm in Ohio and Cincinnati in Numerous Areas of Law by The Best Lawyers in America 2013
- Keating Muething & Klekamp Is the Top-Listed Law Firm in Ohio and in Cincinnati in a Number of Areas According to The Best Lawyers in America 2012

SPEAKING ENGAGEMENTS

- KMK Legal Update Seminar, Hyatt Regency Cincinnati, Regency South Foyer, December 12, 2012

PROFESSIONAL AND COMMUNITY INVOLVEMENT

- Cincinnati Bar Association
- Ohio Land Title Association
- Ohio Bar Association
- Actively involved as a board member and coach for youth football and girls' lacrosse organizations in Mariemont and Southern Ohio

KMK Keating Muething & Klekamp PLL

Bill Keating, Jr.

PARTNER

Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
TEL: (513) 579-6435
FAX: (513) 579-6457
wkeating@kmklaw.com

PRACTICE AREAS

Healthcare Team

Business Planning & Formation

Mergers & Acquisitions

Business Consulting Services

Estate & Succession Planning

Estate & Trust Administration

Designing & Implementing Executive Compensation Plans & Arrangements

Title Insurance

Real Estate Sales, Acquisitions & Leasing

Business Taxation

Evolving Media & Technology Team

BAR & COURT ADMISSIONS

Ohio

U.S. District Court, Southern District of Ohio

U.S. Supreme Court

U.S. Tax Court

EDUCATION

J.D., University of Cincinnati College of Law, 1979

M.B.A., University of Cincinnati, 1976

B.B.A., University of Cincinnati, 1976

Bill Keating practices in the business representation & transactions practice group. He practices primarily in the area of corporate and business law representing publicly traded and privately held businesses and also practices in business succession planning, executive compensation and estate and tax planning. Bill has lectured on estate and business succession planning. He also serves in a general counsel capacity to small and medium size clients who do not have in-house counsel.

AWARDS & RECOGNITIONS

- AV® Preeminent™ Peer Review Rated, Martindale-Hubbell
- Listed in *The Best Lawyers in America*
- Named to *Ohio Super Lawyers*
- Distinguished Service Award, University of Cincinnati College of Business, 2011
- FIVE STAR Wealth Manager, *Cincinnati* Magazine
- Leadership Cincinnati, Class XIX
- Friars Award, Cincinnati Friars Club, 2009
- Telly Award for Pioneers of Women's Sports Video, 2009
- Telly Award for Why We Swim Video, 2010
- Greater Cincinnati Northern Kentucky Women's Sports Association Special Recognition Award for Contribution to Women's Sports, 2010
- Jefferson Award Finalist, 2007
- Big East Conference Honor for outstanding contribution to girls and women in sports
- CSPN Amateur Sports Event of Year (sold out XU-UC women's basketball game)
- Jimmy Nippert Award, Outstanding Graduating Student-Athlete
- University of Cincinnati Athletic Hall of Fame
- St. Xavier High School Athletic Hall of Fame

KMK Keating Muething & Klekamp PLL

Bill Keating, Jr. (Continued)

NEWS

- Keating Muething & Klekamp Is Named the Top-Listed Law Firm in Ohio and Cincinnati in Numerous Areas of Law by The Best Lawyers in America 2013
- 48 Keating Muething & Klekamp Attorneys Recognized in 2012 Ohio Super Lawyers and Ohio Rising Stars
- Keating Muething & Klekamp Is the Top-Listed Law Firm in Ohio and in Cincinnati in a Number of Areas According to The Best Lawyers in America 2012
- Keating Muething & Klekamp Advises Multi-Color Corporation in Connection With Its $356 Million Acquisition of York Label Group
- Keating Muething & Klekamp only law firm ranked #1 in Cincinnati in Corporate Law, Land Use and Zoning Law, and Municipal Law by The Best Lawyers in America 2011
- KMK Partner Bill Keating, Jr. Honored at Friars Club 37th Annual Dinner

SPEAKING ENGAGEMENTS

- KMK Legal Update Seminar, Hyatt Regency Cincinnati, Regency South Foyer, December 12, 2012

PUBLICATIONS

- Business Succession Planning: The Impact of a Shareholder Agreement, January 12, 2002
- "No Will? No Problem! Your Spouse and Children Will Split Your Estate," *The Family Business Report*, 1998
- "The Shareholder Agreement: Oops, I Didn't Know That!," *The Family Business Report*, 1997

MENTIONED & QUOTED

- INC Research to Acquire Kendle International for $15.25 per Share in Cash, *Bloomberg Businessweek [www.investing.businessweek.com]*, May 5, 2011
- Bill Keating, Jr. Interview on CET's Business Beat, February 18, 2011

PROFESSIONAL AND COMMUNITY INVOLVEMENT

- University of Cincinnati, Board of Trustees, 1981-1990
- University of Cincinnati Center for Entrepreneurship, Advisory Board, 2004-present (Vice Chair)
- University of Cincinnati, College of Business, Board of Corporate Advisors, 1992-2005; 2008-present (Chair, 2012-present)
- Magnified Giving, Board of Trustees, Vice Chair (2012-present)
- St. Ursula Academy, Board of Trustees, 1998-2004
- St. Xavier High School, Board of Trustees, 1998-2004
- TechSolve, Inc., Board of Directors, 1983-1985
- University of Cincinnati School of Law, Board of Visitors, 1992-1997
- XU-UC Celebration of the Pioneers of Women's Sports. Chaired effort to sell out XU-UC Women's Crosstown Shootout basketball games and to honor the pioneers of women's sports by awarding them varsity letters
- The Harmony Project

KMK Keating Muething & Klekamp PLL

Bill Keating, Jr. (Continued)

- The Commercial Club, 2005-present
- Pro-Seniors, Inc., Board of Trustees, 1995-1998
- "C" Club, Board of Trustees, 1979-2000, 2006-2008; President, 1981, 2006-2008
- Cincinnati 2012, Board of Trustees, 1996-2001; Executive Committee
- March of Dimes Birth Defects Foundation, Board of Trustees, 1996-1999
- Greater Cincinnati Sports Corporation, Board of Trustees, (Chair, 1998-2001; Member, 1996-present)
- Girls on the Run, Board of Trustees, 2000-2004
- Ohio State Bar Association, Member, Corporate Tax and Estate Planning Sections
- Cincinnati Bar Association
- Ohio Land Title Association
- College Swimming Officials Association, 2002-present (NCAA Division I Women's Swim Championship, 2005-2008; 2011)
- Southwest Ohio Swimming Officials Association, 1998-present

INDEPENDENCE OF COUNSEL

Discussion Guide

American Bar Association
Center for Professional Responsibility

The videotape that accompanies this discussion guide was produced by:
The American Bar Association
Special Coordinating Committee on Professionalism
Center for Professional Responsibility
and the
Division for Professional Education
in cooperation with the
ABA Section of Tort and Insurance Practice
and the
ABA Section of Litigation

The Warning

A. FOCUS

An engineer at a metal manufacturer tells one of the company's in-house lawyers that an alloy being shipped to North Dakota, for use in construction of a bridge, cannot withstand sub-zero temperatures.

B. ISSUES PRESENTED

1. **Organization as Client**
   What duty does an in-house lawyer have to act on the advice and/or requests of an organizational employee?

2. **Lawyer as Advisor**
   What duty does a lawyer have to render unsolicited advice to a client?

C. DISCUSSION

1. **Organization as Client**
   Model Rule 1.13(a) states, "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents." Comment [1] to Rule 1.13 states that, "Officers, directors, employees and shareholders are the constituents of the corporate organizational client."

   - In the vignette the engineer had already approached his supervisor about the alloy before speaking to the lawyer. The supervisor had told the engineer that it was none of his business. Does the lawyer have a duty to investigate the claims of a nonsupervisory employee? Why or why not? What difference, if any, would it make if the employee had not already approached his own supervisor? What difference, if any, does the nature of the allegation make? What are the expectations of the organizational client?

2. **Lawyer as Advisor**
   Comment [5] to Rule 2.1 states that, "a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give

advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest."

In the vignette, there is the possibility of substantial adverse legal consequences to the organization if the engineer's information is correct. However, this engineer has not been a reliable source of information in the past. Should the lawyer take this fact into consideration when determining whether or not to act on the information? Why or why not?

- Assume that the lawyer is not involved with contracts for the North Dakota bridge. How would this affect his duty to advise the organization of the potential problem? What are the expectations of the organizational client?

- Assume that the law is such that there is little possibility of adverse legal consequences to the organization. Should the lawyer still initiate an investigation? Why or why not? What are society's expectations?

The Model Rules "allow lawyers to rely on non-legal considerations when advising a client and encourage counsel to remind the client of the moral, ethical and practical consequences of an intended action." [ABA/BNA *Lawyers' Manual on Professional Conduct*, 31:707 (3-18-98)].

D. SCRIPT

Lawyer: I'm one of four members of the legal staff in a fairly large, regional, metal manufacturing company. It's a career job; great benefits, bonus incentives, less demanding and more comfortable than a major firm. I like the job, but right now I'm facing a crisis that makes me wish I'd flunked the bar. It all started when a friend of mine from the engineering department of the company came into my office.

* * *

Lawyer: Hi, Mike. What brings you over to the legal section?

Engineer: Actually, I was looking for you. Got a minute?

Lawyer: That's about all I have, but come in. What's up?

Engineer: You're working on the contracts for the North Dakota bridge work, right?

Lawyer: That's right. It's a done deal from my end. The contracts are all signed and the first shipment is on its way out the door.

Engineer: There's a big problem.

Lawyer: What?

Engineer: The alloys won't support over any period of time.

Lawyer: You mean we changed it?

Engineer: No, it's the same.

Lawyer: Then I'm afraid I don't follow you. It meets standards and it meets the specs. We've been using it for years without any problems.

Engineer: Right, right. But, Tom, we've never used it in the North. If my calculations are right, sub-zero temperatures will make it brittle. After three years, five years tops, it won't be strong enough for a person to walk across, let alone a truck.

Lawyer: Are you saying the specs from the North Dakota engineers are wrong?

Engineer: As far as I can tell, we're selling them what they ordered, but they don't know it won't work.

Lawyer: Mike, have you put any of this in writing?

Engineer: Just my calculations. No memo or anything. I could if it would help.

Lawyer: No. No, not just now. Do you remember when I first started here and you came to me about the ventilation system in the plant, how it was emitting poisonous gases? We had it checked out by those experts and it was fine, a "model system" they called it.

Engineer: I'm right about this. My calculations are sound, Tom.

Lawyer: Why is it that there's a whole engineering department that's responsible for testing, designing, on and on, and this information comes from you to me?

Engineer: No one thought to check it. They all just do what they're told. No one told anyone in engineering to think.

Lawyer: Did you talk to your boss about this?

Engineer: Sure. He told me it wasn't any of my business and sort of implied that if I made waves, I'd be history. That's why I've come to you.

Lawyer: Let me see what I can do.

E. SELECTED RESOURCES FOR ADDITIONAL STUDY

Gunz & Gunz, *The Lawyer's Response to Organizational Professional Conflict: An Empirical Study of the Ethical Decision-Making of In-House Counsel*, 39 AM. BUS. L.J. 241 (2002).

Moore, *Conflicts of Interest for In-House Counsel: Issues Emerging From the Expanding Role of The Attorney-Employee*, 39 S. TEX. L. REV. 497 (1998).

Mulroy & Muñoz, *The Internal Corporate Investigation*, 1 DEPAUL BUS. & COM. L.J. 49 (2002).

Park, *Ethical Challenges: The Dual Role of Attorney-Employee as Inside Corporate Counsel*, 22 HAMLINE L. REV. 783 (1999).

Russell, *Keeping The Wheels on the Wagon: Observations on Issues of Legal Ethics for Lawyers Representing Business Organizations*, 3 WYO. L. REV. 513 (2003).

Weaver, *Ethical Dilemmas of Corporate Counsel: A Structural and Contextual Analysis*, 46 EMORY L.J. 1023 (1997).

The Report

A. FOCUS

The lawyer presents the engineer's concerns to the organization's general counsel, requesting the counsel to approach the company president with the issue. The general counsel is resistant to the suggestion.

B. ISSUE PRESENTED

1. Scope of Representation
What duty does an in-house lawyer have to question organizational decisions?

What is the proper procedure for questioning an organizational decision?

C. DISCUSSION

1. Scope of Representation
Comment [3] to Model Rule 1.13 states that, "Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. [H]owever, . . . when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization."

- In the vignette, there is no indication of any violation of the law by an organizational constituent. Is it therefore improper for the lawyer to become involved with the engineer's concerns about the alloy? Why or why not?

  Model Rule 1.4(b) states, "a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

- Assume that this lawyer had not handled the contracts for the North Dakota bridge, that this lawyer's responsibilities were in a totally distinct area of the law. Would the lawyer still have some duty to communicate? Why or why not? What would the organization's expectations be?

- After reporting to the general counsel, does the lawyer have any further obligation to the organization? "Increasingly, . . . corporations are being charged in criminal indictments with injuring or killing employees or third parties as a result of the company's maintenance of

an unsafe workplace, use of defective equipment, or marketing of an unsafe product." [ABA/BNA *Lawyers' Manual on Professional Conduct*, 91:2413 (12-20-00)].

"Thus, as a part of evaluating the ethical options available or required if the client cannot be dissuaded from engaging in or continuing the wrongful conduct, even in those jurisdictions with the strictest limits on disclosure of confidential information lawyers who represent corporations should consider whether the client's misconduct could cause imminent bodily injury or death." [ABA/BNA *Lawyers' Manual on Professional Conduct*, 91:2413 (12-20-00)].

- Given the general counsel's reluctant attitude, does the lawyer have an obligation to ensure that the engineer's concerns are passed on to a person with decision-making authority over such matters? Why or why not? What is the general counsel's duty in regard to passing on the information? Assume that the general counsel is also an executive vice president of the organization. What, if any, difference does this make in regard to his duties?

- Assume that the sale to a public project of construction materials known to be defective for their intended use is a violation of the law. What further action should the lawyer take?

  Model Rule 1.13 states that if such a violation of law reasonably might be imputed to the organization and is likely to result in substantial injury to the organization, "the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law."

- Does the lawyer in the vignette have sufficient knowledge to take such steps? Why or why not? If not, what duty does the lawyer have to investigate the engineer's claims? What are the shareholders' expectations?

- Assume that internal procedures are ineffectual. Should the lawyer go public with the information? Why or why not?

Model Rule 1.6(b)(1) would allow the revelation of information "relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm." Disclosure is merely permissible, not mandatory.

- What is the lawyer's final alternative?

Model Rule 1.16(b)(4) states that a lawyer may withdraw from representation if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." Unfortunately, in the case of in-house counsel this means terminating employment, not just losing a client.

D. SCRIPT

Lawyer: Well, a product of Mike's overactive imagination or a real hazard? One way or the other I knew I had to follow up on it. I didn't want to appear to be an alarmist, but I also felt it was sufficient to be an executive decision. So I took it to my supervisor.

* * *

Lawyer: George, can I see you?

Supervisor: Sure, Tom, come on in. What's on your mind?

Lawyer: It's the North Dakota bridge work.

Supervisor: You have the contracts back, don't you?

Lawyer: Sure do.

Supervisor: Good. Good work. You know, this could be the start of something really big for this company. First the engineers come up with this miracle alloy. And I'll tell you, that stuff saved this company's butt. Now our marketing people finally get a breakthrough up North. I don't know what took them so long, but I think we'll have a lot more of those contracts all across the country. So what's up?

Lawyer: Well, it's about the alloy. You know, it's never been used in a sub-zero environment. Apparently some of the people in engineering are concerned about its strength and endurance in those conditions.

Supervisor: Is this the guy who thought poison gases were oozing out of the ventilation system? Know how much that little hunch cost this company?

Lawyer: It's, ah, it's hard to put a price on peace of mind, though, isn't it? All I was thinking, George, was that you could talk to Mr. Anderson, to get authorization for engineering to test it out further, before the shipment goes out.

Supervisor: So, you're asking me to go to the company's president, tell him that some high-strung engineer is speculating that our miracle alloy, which we've used for years, won't hold up and that we should stop a shipment, a breakthrough sale that's out the door?

Lawyer: I prefer to think of it in terms of seeking authority to determine whether our metal may have a latent defect which could cause a casualty, not only jeopardizing human life, but possibly resulting in liability serious enough to blow this company into Chapter Nine quicker than you can say "the bridge is out."

E. SELECTED RESOURCES FOR ADDITIONAL STUDY

Blakley, *To Squeal or Not to Squeal: Ethical Obligations of Officers of the Court in Possession of Information of Public Interest*, 34 CUMB. L. REV. 65 (2003).

Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859 (2003).

Gunz & Gunz, *The Lawyer's Response to Organizational Professional Conflict: An Empirical Study of the Ethical Decision-Making of In-House Counsel*, 39 AM. BUS. L.J. 241 (2002).

McCauley, *Corporate Responsibility and the Regulation of Corporate Lawyers*, 3 RICH. J. GLOBAL L. & BUS. 15 (2003).

Mulroy & Muñoz, *The Internal Corporate Investigation*, 1 DEPAUL BUS. & COM. L.J. 49 (2002).

Park, *Ethical Challenges: The Dual Role of Attorney-Employee as Inside Corporate Counsel*, 22 HAMLINE L. REV. 783 (1999).

Russell, *Keeping The Wheels on the Wagon: Observations on Issues of Legal Ethics for Lawyers Representing Business Organizations*, 3 WYO. L. REV. 513 (2003).

Comment, *An Analysis of the Troubling Issues Surrounding In-House Counsel and the Attorney-Client Privilege*, 23 HAMLINE L. REV. 289 (1999).

Dodging Discovery

A. FOCUS

The company delivered the alloy, the engineer resigned, the bridge collapsed, and lawsuits were filed against the company. The supervising lawyer decides that the engineer's notes and comments will not be included in the responses to discovery.

B. ISSUE PRESENTED

1. **Ethical Obligations of a Subordinate Lawyer**
   What are the ethical obligations of a subordinate lawyer vis-à-vis his supervisor's directions when those directions may be unethical?

C. DISCUSSION

1. **Ethical Obligations of a Subordinate Lawyer**
   Model Rule 5.2 states that, "(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person. (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."

- In the vignette, the supervisory lawyer is directing preparation of discovery responses, which omit mention of the engineer's notes and comments.

  Model Rule 3.4 states that, "A lawyer shall not: (a) unlawfully… conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act; …(d) in pretrial procedure,…fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."

- Assume that the engineer's work product is subject to discovery and the supervisory lawyer conceals it. What are the subordinate lawyer's obligations?

  Model Rule 8.3(a) states that, "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."

- Should the lawyer go through organizational channels before reporting his supervisor to the disciplinary body? Why or why not?

- Assume that the subordinate lawyers deal strictly with contracts and is relatively unfamiliar with the rules governing discovery. Without more information he isn't sure whether the supervisor is asking him to act improperly. Does the subordinate have a duty to investigate in order to make this determination? Why or why not?

- Assume that the supervisor threatens to fire the lawyer unless he prepares the discovery responses in accordance with the supervisor's directions. What, if any, effect does this have on the lawyer's obligations?

  "A subordinate lawyer remains liable for his or her own misconduct even if the conduct was directed by a supervisor or resulted from fear or loss of employment." [ABA/BNA *Lawyers' Manual on Professional Conduct,* 91:104 (8-18-99)] Presumably this includes the misconduct of not reporting another's misconduct.

- Assume that the supervisory lawyer handles the discovery responses himself but the subordinate lawyer handles the trial. What obligation does the lawyer have to the tribunal?

  Model Rule 3.3 states that, (b) "A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal and (c) the duties stated in paragraph . . . (b) . . . apply even if compliance requires disclosure of information otherwise protected by Rule 1.6."

D. SCRIPT

Lawyer: Well, that was four year ago. Mike was right. So right, in fact, they changed the alloy for future orders. But when he found out they shipped that one out, he left the company. The North Dakota bridge collapsed at the end of its second winter. And, of course, we're being sued. The good news is that no one was hurt. The bad news is that we have to show that we didn't have knowledge of its limitations before the shipment was made. So now we're going through the discovery.

* * *

Supervisor: Okay, lay it out. Tell me what we've got here.

Lawyer: Engineering had no formal sub-zero testing prior to the shipment. They initiated it later for the purpose of qualifying for more restrictive specs.

Supervisor: What about Mike's work?

Lawyer: They all say that he never brought it up before the shipment.

Supervisor: Which is inconsistent with what he told you at the time, right?

Lawyer: Right.

Supervisor: We don't have a current address on him. You don't know where he's at, do you?

Lawyer: No.

Supervisor: Good. What about the computer log?

Lawyer: Okay. Mike made entries which substantiate the limitations before the shipment, you know, when he talked to me about it. But the log times are all weekends or after hours.

Supervisor: In other words, outside of the scope of his employment.

Lawyer: Exactly, it was all independent research. Then the question is whether or not you followed up with Mr. Anderson.

E. SELECTED RESOURCES FOR ADDITIONAL STUDY

Fox, *Save Us From Ourselves*, 50 RUTGERS L. REV. 2189 (1998).

Harris, *Taking the Entity Theory Seriously: Lawyer Liability for Failure to Prevent Harm to Organizational Clients Through Disclosure of Constituent Wrongdoing*, 11 GEO. J. LEGAL ETHICS 597 (1998).

Keatinge, *The Floggings Will Continue Until Morale Improves: The Supervising Attorney and His or Her Firm*, 39 S. TEX. L. REV. 279 (1998).

Rice, *The Superior Orders Defense in Legal Ethics: Sending the Wrong Message to Young Lawyers*, 32 WAKE FOREST L. REV. 887 (1997).

Richmond, *Subordinate Lawyers and Insubordinate Duties*, 105 W.VA. L. REV. 449 (2003).

Simon, *Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57 (2003).

He's B-a-a-a-ck

A. FOCUS

After learning of the lawsuits, the engineer calls the lawyer for assurance that his information has been submitted in the discovery. When the lawyer hedges, the engineer indicates that he will clear his own name by turning his research over to the opposing parties.

B. ISSUES PRESENTED

1. **Organization as Client**
   What obligations does a lawyer have to a corporate client's current and former constituents?

2. **Confidentiality**
   How do the rules of confidentiality apply to corporate clients?

C. DISCUSSION

1. **Organization as Client**
   - Assume that the engineer is still an employee of the corporation. What is the duty of the lawyer to advise the engineer of his rights?

     Model Rule 1.13(f) states that, "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."

   - What are the possible ramifications of not so advising the constituent?

     "[C]ounsel must avoid establishing an attorney-client relationship with the employee or letting the employee believe that counsel is his lawyer. If a lawyer fails to clarify her role as counsel only for the organization and the employee reasonably believes that the lawyer represents the employee, the employee may assert the privilege personally with respect to his own communications, thus preventing the corporation from preserving or waiving the privilege." [ABA/BNA *Lawyers' Manual on Professional Conduct*, 91:2206 (7-19-00)]

- Should the lawyer be talking to a former employee about the lawsuits? Why or why not? What obligations of the lawyer attach to the conversation?

  Model Rule 4.3 states that, "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."

- How should the lawyer respond to the engineer's questions regarding discovery and the lawyer's actions?

  Model Rule 4.1 states that, "[i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person...." On the other hand, the lawyer is also bound by his duty of confidentiality under Rule 1.6.

2. Confidentiality

- Should the engineer's first conversation with the lawyer be considered privileged?

  Upjohn Co. v U.S., 449 U.S. 383 (1981), established the general rule for determining what corporate communications were protected by the lawyer-client privilege. It rejected the previously used control group test and adopted a case-by-case analysis, which extends the lawyer-client privilege "to communications from employees who control the operations of a corporation or who act on the requested legal advice." The communications in question "must have been considered confidential when made and have been kept confidential thereafter." [ABA/BNA *Lawyers' Manual on Professional Conduct,* 91:2203 (7-19-00)]

- What effect does the lawyer's position as in-house counsel have on the issue of privilege?

  If the consultation is for the purpose of giving legal rather than business advice, then the privilege still exists. However, communications with in-house counsel may be open to more scrutiny by the courts. [ABA/BNA *Lawyers' Manual on Professional Conduct,* 91:2209 (7-19-00)]

D. SCRIPT

Lawyer: George told me he didn't remember whether he talked to Mr. Anderson or not. He made some excuses and danced around the issue. Anyway, he signed off on the interrogatories, which neither reflected the conversation nor made an exception. But today I got a call from the engineer, Mike. Seems he had heard about the bridge collapse and the suits.

* * *

Lawyer: (on phone):

Mike, it's not true that I didn't do anything. I took the issue to my supervisor right after we talked. I asked him to take it to the company president for further research.

Engineer: (on phone):

But that shipment still went out. It was a hazard and you knew it.

Lawyer: I did what I could do. It was out of my hands.

Engineer: You could have stopped it.

Lawyer: What did you want me to do, take it to the board of directors? It seems the best thing to do now is let justice prevail and see how the suit is determined. Maybe it'll be good for the company to get its wrist slapped, you know, make 'em think about these things a little more in the future.

Engineer: I want them to know I tried to stop it. You gave North Dakota my research, didn't you? They're entitled to that information, aren't they?

Lawyer: I'm not sure of everything that went out. It was quite a pile and I'm not the only one working on it, Mike.

Engineer: Tom, if you can't guarantee they got my research, I'll send them copies. The company made a bad error in judgment here. I'm not saying it was your fault, but it's common knowledge that I worked on that alloy and I've got to clear my name.

E. SELECTED RESOURCES FOR ADDITIONAL STUDY

Becker, *Discovery of Information and Documents From a Litigant's Former Employees: Synergy and Synthesis of Civil Rules, Ethical Standards, Privilege Doctrines, and Common Law Principles*, 81 NEB. L. REV. 868 (2003).

Brown, *The Dilemma of Corporate Counsel Faced With Client Misconduct: Disclosure of Client Confidences or Constructive Discharge* 44 BUFF. L. REV. 777 (1996).

Gunz & Gunz, *The Lawyer's Response to Organizational Professional Conflict: An Empirical Study of the Ethical Decision-Making of In-House Counsel*, 39 AM. BUS. L.J. 241 (2002).

Harris, *Taking the Entity Theory Seriously: Lawyer Liability for Failure to Prevent Harm to Organizational Clients Through Disclosure of Constituent Wrongdoing*, 11 GEO. J. LEGAL ETHICS 597 (1998).

Park, *Ethical Challenges: The Dual Role of Attorney-Employee as Inside Corporate Counsel*, 22 HAMLINE L. REV. 783 (1999).

Comment, *An Analysis of the Troubling Issues Surrounding In-House Counsel and the Attorney-Client Privilege*, 23 HAMLINE L. REV. 289 (1999).

OHIO RULES OF PROFESSIONAL CONDUCT

Effective February 1, 2007

The Supreme Court of Ohio adopted the Ohio Rules of Professional Conduct, effective February 1, 2007. These rules supersede and replace the Ohio Code of Professional Responsibility to govern the conduct of Ohio lawyers occurring on or after February 1, 2007. See the Form of Citation, Effective Date, and Application provision that follows the rules for more information regarding application of the Rules of Professional Conduct and the former Code of Professional Responsibility.

Background

In March 2003, Chief Justice Thomas J. Moyer appointed the Supreme Court Task Force on Rules of Professional Conduct to conduct a thorough review of Ohio's lawyer discipline code and recommend revisions. The recommendations were to include whether Ohio should adopt new disciplinary rules based on the Model Rules of Professional Conduct promulgated by the American Bar Association. During the ensuing two and one-half years, the Task Force voted to recommend adoption of the ABA Model Rules and proceeded to review and discuss each rule. Preliminary drafts of each proposed rules were published for comment by the Task Force in January, July, and November 2004. After reviewing the public comments, the Task Force prepared and presented its report and recommendations regarding adoption of the Ohio Rules of Professional Conduct to the Supreme Court in the Summer of 2005.

The Supreme Court published the Task Force report and recommendations for 90 days of public comment in November 2005. The Task Force reconvened in the Spring of 2006 to review and discuss the public comments and prepare additional revisions to the proposed rules. In June and July 2006, the Court considered the public comments and the additional recommendations from the Task Force. The Court revised the Task Force recommendations and adopted the new Ohio Rules of Professional Conduct, effective February 1, 2007, following a six-month implementation period recommended by the Task Force.

Published Rules

The Ohio Rules of Professional Conduct are published in final form. Readers who wish to see the changes made in the proposed rules that were published for comment in November 2005 may consult the "Additional Resources" noted below.

Portions of some rules and comments are designated as [RESERVED]. See, *e.g.,* Rule 1.2(b). This designation indicates that the Supreme Court did not adopt a particular provision that appears in the ABA Model Rules of Professional Conduct. The designation [RESERVED] allows the Ohio Rules to correspond, as closely as possible, to the format, lettering, and numbering of the ABA Model Rules.

The Supreme Court did not adopt four Model Rules [Rules 3.2, 6.3, 6.4, and 7.6] and has deferred consideration of Model Rule 6.1. Please see the Note that accompanies each rule. Model Rule 2.2 was repealed by the American Bar Association in 2002, thus that rule number is reserved for future use in the Ohio Rules of Professional Conduct.

Each adopted rule contains four parts: (1) the text of the rule; (2) a comment; (3) a comparison of the Ohio rule to the former Ohio Code of Professional Responsibility; and (4) a comparison of the Ohio rule to the ABA Model Rules of Professional Conduct. Please see Scope at [14]-[21] for more information regarding the rules and comments. The comparisons that follow each rule have been prepared by the Task Force on Rules of Professional Conduct. Although the Supreme Court used these comparisons during its consideration of the proposed rules, the comparisons are not adopted by the Court and are not a part of the Ohio Rules of Professional Conduct. As such, they represent the views of the Task Force on Rules of Professional Conduct and not necessarily those of the Supreme Court.

Correlation Tables

Following the Ohio Rules of Professional Conduct are two tables that illustrate the manner in which individual rules correspond to provisions of the Ohio Code of Professional Responsibility.

RULE 1.4: COMMUNICATION

(a) A lawyer shall do all of the following:

(1) promptly inform the client of any decision or circumstance with respect to which the client's *informed consent* is required by these rules;

(2) *reasonably* consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client *reasonably* informed about the status of the matter;

(4) comply as soon as practicable with *reasonable* requests for information from the client;

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer *knows* that the client expects assistance not permitted by the Ohio Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent *reasonably* necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(1) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(2) A lawyer who is involved in the division of fees pursuant to Rule 1.5(e) shall inform the client as required by division (c) of this rule before the client is asked to agree to the division of fees.

(3) The notice required by division (c) of this rule shall not apply to either of the following:

(i) A lawyer who is employed by a governmental entity and renders services pursuant to that employment;

(ii) A lawyer who renders legal services to an entity that employs the lawyer as in-house counsel.

NOTICE TO CLIENT

Pursuant to Rule 1.4 of the Ohio Rules of Professional Conduct, I am required to notify you that I do not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

_____
Attorney's Signature

CLIENT ACKNOWLEDGEMENT

I acknowledge receipt of the notice required by Rule 1.4 of the Ohio Rules of Professional Conduct that [insert attorney's name] does not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

_____
Client's Signature

_____
Date

Comment

[1] Reasonable communication between the lawyer and the client is necessary for the client to participate effectively in the representation.

Communicating with Client

[2] If these rules require that a particular decision about the representation be made by the client, division (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Division (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations, depending on both the importance of the action under consideration and the feasibility of consulting with the client, this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the

lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, division (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation and the fees and costs incurred to date.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, division (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that

information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Professional Liability Insurance

[8] Although it is in the best interest of the lawyer and the client that the lawyer maintain professional liability insurance or another form of adequate financial responsibility, it is not required in any circumstance other than when the lawyer practices as part of a legal professional association, corporation, legal clinic, limited liability company, or limited liability partnership.

[9] The client may not be aware that maintaining professional liability insurance is not mandatory and may well assume that the practice of law requires that some minimum financial responsibility be carried in the event of malpractice. Therefore, a lawyer who does not maintain certain minimum professional liability insurance shall promptly inform a prospective client or client.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.4(a) states the minimum required communication between attorney and client. This is a change from the aspirational nature of EC 7-8. Rule 1.4(a)(1) corresponds to several sentences in EC 7-8 and EC 9-2. Rules 1.4(a)(2) and (3) correspond to several sentences in EC 7-8. Rule 1.4(a)(4) explicitly states what is implied in EC 7-8 and EC 9-2. Rule 1.4(a)(5) states a new requirement that does not correspond to any DR or EC.

Rule 1.4(b) corresponds to several sentences in EC 7-8 and EC 9-2.

Rule 1.4(c) adopts the existing language in DR 1-104.

Comparison to ABA Model Rules of Professional Conduct

Rules 1.4(a)(1) through (a)(5) are the same as the Model Rule provisions except for division (a)(4), which is altered to require compliance with client requests "as soon as practicable" rather than "promptly."

Rule 1.4(b) is the same as the Model Rule provision.

Rule 1.4(c) does not have a counterpart in the Model Rules. The provision mirrors DR 1-104, adopted effective July 1, 2001. DR 1-104 provides the public with additional information and protection from attorneys who do not carry malpractice insurance. Ohio is one of only a few states that have adopted a similar provision, and this requirement is retained in the rules.

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives *informed consent*, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (c) of this rule.

(b) A lawyer may reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer *reasonably believes* necessary for any of the following purposes:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the commission of a crime by the client or other person;

(3) to mitigate *substantial* injury to the financial interests or property of another that has resulted from the client's commission of an *illegal* or *fraudulent* act, in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding, including any disciplinary matter, concerning the lawyer's representation of the client;

(6) to comply with other law or a court order.

(c) A lawyer shall reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer *reasonably believes* necessary to comply with Rule 3.3 or 4.1.

Comment

[1] This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the

representation. See Rule 1.0(f) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Ohio Rules of Professional Conduct or other law. See also Scope.

[4] Division (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Permitting lawyers to reveal information relating to the representation of clients may create a chilling effect on the client-lawyer relationship, and discourage clients from revealing confidential information to their lawyers at a time when the clients should be making a full disclosure. Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Division (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to

occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Division (b)(2) recognizes the traditional "future crime" exception, which permits lawyers to reveal the information necessary to prevent the commission of the crime by a client or a third party.

[8] Division (b)(3) addresses the situation in which the lawyer does not learn of the illegal or fraudulent act of a client until after the client has used the lawyer's services to further it. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct [see Rule 4.1], there will be situations in which the loss suffered by the affected person can be mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to mitigate or recoup their losses. Division (b)(3) does not apply when a person is accused of or has committed an illegal or fraudulent act and thereafter employs a lawyer for representation concerning that conduct. In addition, division (b)(3) does not apply to a lawyer who has been engaged by an organizational client to investigate an alleged violation of law by the client or a constituent of the client.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, division (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Ohio Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in the conduct of a client or a former client or other misconduct of the lawyer involving representation of the client or a former client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. Such a charge can arise in a civil, criminal, disciplinary, or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Division (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by division (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this rule and requires disclosure, division (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

[13] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, division (b)(6) permits the lawyer to comply with the court's order.

[14] Division (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. A disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable. Before making a disclosure under division (b)(1), (2), or (3), a lawyer for an organization should ordinarily bring the issue of taking suitable action to higher authority within the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

[15] Division (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in divisions (b)(1) through (b)(6). In exercising the discretion conferred by this rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by division (b) does not violate this rule. Disclosure may be required, however, by other rules. Some rules require disclosure only if such disclosure would be permitted by division (b). See Rules 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this rule.

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other

persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1, and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this rule.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Comparison to former Ohio Code of Professional Responsibility

Rule 1.6 replaces Canon 4 (A Lawyer Should Preserve the Confidences and Secrets of a Client), including DR 4-101 (Preservation of Confidences and Secrets of a Client) and ECs 4-1 to 4-6 of the Ohio Code of Professional Responsibility.

Rule 1.6(a) generally corresponds to DR 4-101(A) by protecting the confidences and secrets of a client under the rubric of "information relating to the representation." To clarify that this includes privileged information, the rule is amended to add the phrase, "including information protected by the attorney-client privilege under applicable law." Rule 1.6(a) also corresponds to DR 4-101(B) by prohibiting the lawyer from revealing such information. Use of client information is governed by Rule 1.8(b).

Rule 1.6(a) further corresponds to DR 4-101(C)(1) by exempting disclosures where the client gives "informed consent," including situations where disclosure is "impliedly authorized" by the client's informed consent.

Rule 1.6(b) addresses the exceptions to confidentiality and generally corresponds to DR 4-101(C)(2) to (4). Rule 1.6(b)(1) is new and has no comparable Code provision. Rule 1.6(b)(2) is the future crime exception and corresponds to DR 4-101(C)(3), with the addition of "or other person" from the Model Rule. Rule 1.6(b)(3) expands on the provisions of DR 7-102(B)(1) by permitting disclosure of information related to the representation of a client, including privileged information, to mitigate substantial injury to the financial interests or property of another that has been caused by the client's illegal or fraudulent act and the client has used the lawyer's services to further the commission of the illegal or fraudulent act.

Rule 1.6(b)(4) is new, and codifies the common practice of lawyers to consult with other lawyers about compliance with these rules. Rule 1.6(b)(5) tracks DR 4-101(C)(4), adding "any disciplinary matter" to clarify the rule's application in that situation. Rule 1.6(b)(6) is the same as DR 4-101(C)(2).

Rule 1.6(c) makes explicit that other rules create mandatory rather than discretionary disclosure duties. For example, Rules 3.3 and 4.1 correspond to DR 7-102(B), which requires disclosure of client fraud in certain circumstances.

Comparison to ABA Model Rules of Professional Conduct

The additions to Rule 1.6(a) are intended to clarify that "information relating to the representation" includes information protected by the attorney-client privilege.

The exceptions to confidentiality in Rule 1.6(b) generally track those found in the Model Rule, although two of Ohio's exceptions [Rules 1.6(b)(2) and (3)] permit more disclosure than the Model Rule allows.

Rule 1.6(b)(1) is the same as the Model Rule and reflects the policy that threatened death or serious bodily harm, regardless of criminality, create the occasion for a lawyer's discretionary disclosure. Nineteen jurisdictions have such a provision.

Rule 1.6(b)(2) differs from the Model Rule by maintaining the traditional formulation of the future crime exception currently found in DR 4-101(C)(3), rather than the future crime/fraud provision in Model Rule 1.6(b)(2) that is tied to "substantial injury to the financial interests of another." Twenty-two jurisdictions, including Ohio, opt for this stand-alone future crime exception. This exception is retained because it mirrors the public policy embodied in the criminal law.

Rule 1.6(b)(3) differs from Model Rule 1.6(b)(3) in two ways: it deletes the words "prevent" and "rectify;" and it allows for disclosure to mitigate the effects of the client's commission of an illegal (as opposed to criminal) or fraudulent act. The prevention of fraud is deleted from Rule 1.6(b)(3) because it is addressed in Rule 4.1(b). The extension of "criminal" to "illegal" is consistent with the use of the term "illegal" in Rules 1.2(d), 1.16(b), 4.1(b), and 8.4(b), but it is not found in either the Model Rule or Ohio disciplinary rules as an exception to confidentiality. Only two jurisdictions have included illegal conduct as justification for disclosure in Rule 1.6.

Rule 1.6(b)(4) is similar to the Model Rule.

Rule 1.6(b)(5) adds "disciplinary matter" to clarify the application of the exception.

Rule 1.6(c) is substantially the same as Model Rule 1.6(b)(6), except that it clarifies the mandatory disclosure required by other rules.

RULE 1.13: ORGANIZATION AS CLIENT

(a) A lawyer employed or retained by an organization represents the organization acting through its constituents. A lawyer employed or retained by an organization owes allegiance to the organization and not to any constituent or other person connected with the organization. The constituents of an organization include its owners and its duly authorized officers, directors, trustees, and employees.

(b) If a lawyer for an organization *knows* or *reasonably should know* that its constituent's action, intended action, or refusal to act (1) violates a legal obligation to the organization, or (2) is a violation of law that *reasonably* might be imputed to the organization and that is likely to result in *substantial* injury to the organization, then the lawyer shall proceed as is necessary in the best interest of the organization. When it is necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer shall refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law.

(c) The discretion or duty of a lawyer for an organization to reveal information relating to the representation outside the organization is governed by Rule 1.6(b) and (c).

(d) In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer *knows* or *reasonably should know* that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7. If the organization's *written* consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization, other than the individual who is to be represented, or by the shareholders.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders, and other constituents. "Other constituents" as used in this rule and comment means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations. The duties defined in this rule apply equally to unincorporated associations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the lawyer must keep the

communication confidential as to persons other than the organizational client as required by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may disclose to the organizational client a communication related to the representation that a constituent made to the lawyer, but the lawyer may not disclose such information to others except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.

[3] Division (b) explains when a lawyer may have an obligation to report "up the ladder" within an organization as part of discharging the lawyer's duty to communicate with the organizational client. When constituents of the organization make decisions for it, their decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Division (b) makes clear, however, that when the lawyer knows or reasonably should know that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is a violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(g), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining whether "up-the-ladder" reporting is required under division (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. In some circumstances, referral to a higher authority may be unnecessary; for example, if the circumstances involve a constituent's innocent misunderstanding of the law and subsequent acceptance of the lawyer's advice. In contrast, if a constituent persists in conduct contrary to the lawyer's advice, or if the matter is of sufficient seriousness and importance or urgency to the organization, whether or not the lawyer has not communicated with the constituent, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interests of the organization.

[5] Division (b) also makes clear that, if warranted by the circumstances, a lawyer must refer a matter to the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] Division (c) makes clear that a lawyer for an organization has the same discretion and obligation to reveal information relating to the representation to persons outside the client as any other lawyer, as provided in Rule 1.6(b) and (c) (which incorporates Rules 3.3 and 4.1 by reference). As stated in Comment [14] to Rule 1.6, where practicable, before revealing information, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. Even where such consultation is not practicable, the lawyer should consider whether giving notice to a higher authority within the organization of the lawyer's intent to disclose confidential information pursuant to Rule 1.6(b) or Rule 1.6(c) would advance or interfere with the purpose of the disclosure.

[7] [RESERVED]

[8] [RESERVED]

Government Agency

[9] The duty to "report up the ladder" defined in this rule also applies to lawyers for governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these rules. See Scope [18]. In addition, the duties of lawyers employed by the government or lawyers in military service may be defined by statute and regulation. Under this rule, if the lawyer's client is one branch of government, the public, or the government as a whole, the lawyer must consider what is in the best interests of that client when the lawyer becomes aware of an agent's wrongful action or inaction, as defined by the rule, and must disclose the information to an appropriate official. See Scope.

Clarifying the Lawyer's Role

[10] There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization, of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to ensure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

[11] Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Dual Representation

[12] Division (e) recognizes that a lawyer for an organization may also represent one or more constituents of an organization, if the conditions of Rule 1.7 are satisfied.

Derivative Actions

[13] Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

[14] The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, Rule 1.7 governs who should represent the directors and the organization.

Comparison to former Ohio Code of Professional Responsibility

Ohio has no Disciplinary Rule directly addressing the responsibility of a lawyer for an organization. However, Rule 1.13 draws substantially upon EC 5-19.

Comparison to ABA Model Rules of Professional Conduct

Rule 1.13 more closely resembles the substance of Model Rule 1.13 as it existed prior to its last revision by the ABA in August 2003. Specifically, Rule 1.13 identifies to whom a lawyer for an organization owes loyalty and requires that a lawyer for an organization effectively communicate to the organization concerning matters of material risk to the organization of which the lawyer becomes aware. Rule 1.13 does not include a provision of Model Rule 1.13 that imposes a "whistle-blowing" requirement upon lawyers for organizations.

Rule 1.13 alters Model Rule 1.13 in the following respects:

- Rule 1.13(a) is augmented to define the term "constituent" and to add the principle of EC 5-19 to the black letter rule.

- The rule and comment have been edited for greater simplicity and clarity. Among the changes are reconciliation of the apparent contradiction in Model Rule 1.13(b) between the direction to "proceed as reasonably necessary," which leaves the approach to the lawyer's discretion, and the mandatory direction to report to higher authority.

- The special "reporting out" requirement of Model Rule 1.13(c) has been stricken. Instead, a lawyer for an organization has the same "reporting out" discretion or duty as other lawyers have under Rule 1.6(b) and (c). Model Rule 1.13(d) and Comments [6] and [7] are unnecessary in light of its revision of Rule 1.13(b).

- Model Rule 1.13(e) is deleted. That provision requires that a lawyer who has quit or been discharged because of "reporting up" or "reporting out" make sure that the governing board knows of the lawyer's withdrawal or termination. Such a provision seems out of place in a code of ethics.

The comments to Rule 1.13 are revised to reflect changes to the rule.

RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not do any of the following:

(a) unlawfully obstruct another party's access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) *knowingly* disobey an obligation under the rules of a *tribunal*, except for an open refusal based on a good faith assertion that no valid obligation exists;

(d) in pretrial procedure, intentionally or habitually make a frivolous motion or discovery request or fail to make *reasonably* diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not *reasonably believe* is relevant or that will not be supported by admissible evidence or by a good-faith belief that such evidence may exist, assert personal *knowledge* of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused;

(f) [RESERVED]

(g) advise or cause a person to hide or to leave the jurisdiction of a *tribunal* for the purpose of becoming unavailable as a witness.

Comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like. However, a lawyer representing an organization, in accordance with law, may request an employee of the client to refrain from giving information to another party. See Rule 4.2, Comment [7].

[2] Division (a) applies to all evidence, whether testimonial, physical, or documentary. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed, or destroyed, or if the testimony of a person with knowledge is unavailable, incomplete, or false. Applicable law in many jurisdictions makes it an offense to destroy material for the purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying

evidence is also generally a criminal offense. A lawyer is permitted to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, the lawyer is required to turn the evidence over to the police or other prosecuting authority, depending on the circumstances. Applicable law also prohibits the use of force, intimidation, or deception to delay, hinder, or prevent a person from attending or testifying in a proceeding.

[3] With regard to division (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. It is improper to pay an occurrence witness any fee for testifying and it is improper to pay an expert witness a contingent fee.

[3A] Division (e) does not prohibit a lawyer from arguing, based on the lawyer's analysis of the evidence, for any position or conclusion with respect to matters referenced in that division.

[4] [RESERVED]

Comparison to former Ohio Code of Professional Responsibility

DR 7-102, DR 7-106(C), DR 7-109, and EC 7-24, 7-25, 7-26, 7-27 and 7-28 address the scope of Rule 3.4.

Comparison to ABA Model Rules of Professional Conduct

Rule 3.4 is revised to add a "good-faith belief" provision consistent with the holding in *State v. Gillard* (1988), 40 Ohio St.3d 226. Model Rule 3.4(f) is deleted because its provisions are inconsistent with a lawyer's obligations under Ohio law, and the corresponding Comment [4] also is removed. Division (g) is inserted to incorporate Ohio DR 7-109(B).

RULE 8.3: REPORTING PROFESSIONAL MISCONDUCT

(a) A lawyer who possesses unprivileged knowledge of a violation of the Ohio Rules of Professional Conduct that raises a question as to any lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform a disciplinary authority empowered to investigate or act upon such a violation.

(b) A lawyer who possesses unprivileged knowledge that a judge has committed a violation of the Ohio Rules of Professional Conduct or applicable rules of judicial conduct shall inform the appropriate authority.

(c) Any information obtained by a member of a committee or subcommittee of a bar association, or by a member, employee, or agent of a nonprofit corporation established by a bar association, designed to assist lawyers with substance abuse or mental health problems, provided the information was obtained while the member, employee, or agent was performing duties as a member, employee, or agent of the committee, subcommittee, or nonprofit corporation, shall be privileged for all purposes under this rule.

Comment

[1] Self-regulation of the legal profession requires that a member of the profession initiate disciplinary investigation when the lawyer knows of a violation of the Ohio Rules of Professional Conduct involving that lawyer or another lawyer. A lawyer has a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve the disclosure of privileged information. However, a lawyer should encourage a client to consent to disclosure where it would not substantially prejudice the client's interests.

[3] [RESERVED]

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship. See Rule 1.6.

[5] Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of divisions (a) and (b) of this rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public.

Comparison to former Ohio Code of Professional Responsibility

Rule 8.3 is comparable to DR 1-103 but differs in two respects. First, Rule 8.3 does not contain the strict reporting requirement of DR 1-103. DR 1-103 requires a lawyer to report all misconduct of which the lawyer has unprivileged knowledge. Rule 8.3 requires a lawyer to report misconduct only when the lawyer possesses unprivileged knowledge that raises a question as to any lawyer's honesty, trustworthiness, or fitness in other respects. Second, Rule 8.3 requires a lawyer to self-report.

Comparison to ABA Model Rules of Professional Conduct

Rule 8.3 is revised to comport more closely to DR 1-103. Division (a) is rewritten to require the self-reporting of disciplinary violations. In addition, the provisions of divisions (a) and (b) are broadened to require reporting of (1) any violation by a lawyer that raises a question regarding the lawyer's honesty, trustworthiness, or fitness, and (2) any ethical violation by a judge. In both provisions, language is included to limit the reporting requirement to circumstances where a lawyer's knowledge of a reportable violation is unprivileged.

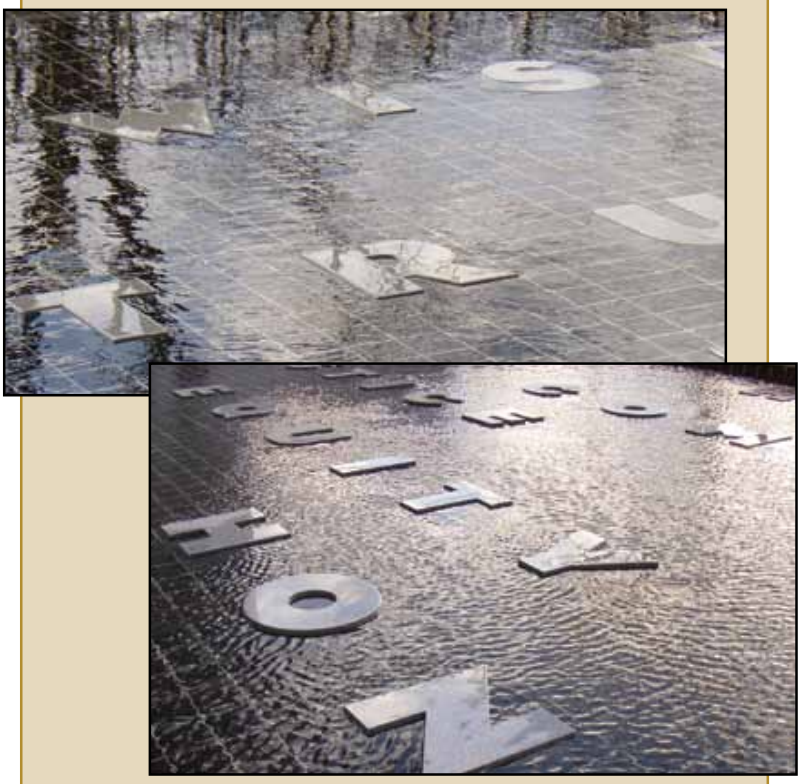
Division (c), which deals with confidentiality of information regarding lawyers and judges participating in lawyers' assistance programs, has been strengthened to reflect Ohio's position that such information is not only confidential, but "shall be privileged for all purposes" under DR 1-103(C). The substance of DR 1-103(C) has been inserted in place of Model Rule 8.3(c).

In light of the substantive changes made in divisions (a) and (b), Comment [3] is no longer applicable and is stricken. Further, due to the substantive changes made to confidentiality of information regarding lawyers and judges participating in lawyers' assistance programs, the last sentence in Comment [5] has been stricken.

THE SUPREME COURT *of* OHIO

Professional Ideals

for Ohio Lawyers and Judges



On the cover:
Detail of the north reflecting pool, Thomas J. Moyer Ohio Judicial Center
(See p. 17 for more information.)

THE SUPREME COURT *of* OHIO

Professional Ideals
for Ohio Lawyers and Judges

Published by
THE SUPREME COURT *of* OHIO
Commission on Professionalism
614.387.9327
www.supremecourt.ohio.gov
Reprinted February 2012

The Supreme Court *of* Ohio

MAUREEN O'CONNOR
Chief Justice

PAUL E. PFEIFER
EVELYN LUNDBERG STRATTON
TERRENCE O'DONNELL
JUDITH ANN LANZINGER
ROBERT R. CUPP
YVETTE McGEE BROWN
Justices

TABLE OF CONTENTS

INTRODUCTION

The following pages contain *A Lawyer's Creed*, *A Lawyer's Aspirational Ideals* and *A Judicial Creed*, which were adopted by the Supreme Court of Ohio upon recommendation by the Supreme Court Commission on Professionalism. These statements encapsulate the ideals of professionalism for lawyers and judges.

Included in the professionalism ideals for lawyers and judges are integrity, the achievement and maintenance of competence, a commitment to a life of service and the quest for justice for all. Professionalism requires lawyers and judges to remain mindful that their primary obligations are to the institutions of law and the betterment of society, rather than to the interests of their clients or themselves.

Also included in these materials is the Supreme Court *Statement Regarding the Provision of pro bono Legal Services by Ohio Lawyers,* which speaks to a lawyer's obligations to ensure equal access to justice and to serve the public good.

THE SUPREME COURT OF OHIO COMMISSION ON PROFESSIONALISM

The Supreme Court of Ohio created the Commission on Professionalism in September 1992. As stated in Gov. Bar R. XV, the commission's purpose is to promote professionalism among attorneys admitted to the practice of law in Ohio. The commission aspires to advance the highest standards of integrity and honor among members of the profession.

The 15-member commission includes five judges and two lay members appointed by the Supreme Court, six attorneys appointed by the Ohio Metropolitan Bar Association Consortium and Ohio State Bar Association, and two law school administrators or faculty. The duties of the commission include:

- Monitoring and coordinating professionalism efforts and activities in Ohio courts, bar associations and law schools, and in jurisdictions outside Ohio
- Promoting and sponsoring state and local activities that emphasize and enhance professionalism
- Developing educational materials and other information for use by judicial organizations, bar associations, law schools and other entities
- Assisting in the development of law school orientation programs and curricula, new lawyer training and continuing education programs
- Making recommendations to the Supreme Court, judicial organizations, bar associations, law schools and other entities on methods for enhancing professionalism.

Visit www.supremecourt.ohio.gov for more information.

from the
STATEMENT ON PROFESSIONALISM

. . .As professionals we need to strive to meet lofty goals and ideals in order to achieve the highest standards of a learned profession. To this end, the Court issues A Lawyer's Creed *and* A Lawyer's Aspirational Ideals*, which have been adopted and recommended for the Court's issuance by the Supreme Court Commission on Professionalism. In so doing, it is not the Court's intention to regulate or to provide additional bases for discipline, but rather to facilitate the promotion of professionalism among Ohio's lawyers, judges and legal educators. It is the Court's hope that these individuals, their professional associations, law firms and educational institutions will utilize the creed and the aspirational ideals as guidelines for this purpose.*

Issued by the Supreme Court of Ohio
February 3, 1997

A LAWYER'S CREED

TO MY CLIENTS, I offer loyalty, confidentiality, competence, diligence and my best judgment. I shall represent you as I should want to be represented and be worthy of your trust. I shall counsel you with respect to alternative methods to resolve disputes. I shall endeavor to achieve your lawful objectives as expeditiously and economically as possible.

TO THE OPPOSING PARTIES and THEIR COUNSEL, I offer fairness, integrity and civility. I shall not knowingly make misleading or untrue statements of fact or law. I shall endeavor to consult with and cooperate with you in scheduling meetings, depositions and hearings. I shall avoid excessive and abusive discovery. I shall attempt to resolve differences and, if we fail, I shall strive to make our dispute a dignified one.

TO THE COURTS and OTHER TRIBUNALS, and TO THOSE WHO ASSIST THEM, I offer respect, candor and courtesy. Where consistent with my client's interests, I shall communicate with opposing counsel in an effort to avoid or resolve litigation. I shall attempt to agree with other counsel on a voluntary exchange of information and on a plan for discovery. I shall do honor to the search for justice.

TO MY COLLEAGUES in the practice of law, I offer concern for your reputation and well-being. I shall extend to you the same courtesy, respect, candor and dignity that I expect to be extended to me.

TO THE PROFESSION, I offer assistance in keeping it a calling in the spirit of public service, and in promoting its understanding and an appreciation for it by the public. I recognize that my actions and demeanor reflect upon our system of justice and our profession, and I shall conduct myself accordingly.

TO THE PUBLIC and our SYSTEM OF JUSTICE, I offer service. I shall devote some of my time and skills to community, governmental and other activities that promote the common good. I shall strive to improve the law and our legal system and to make the law and our legal system available to all.

A LAWYER'S ASPIRATIONAL IDEALS

AS TO CLIENTS, I shall aspire:

a) To expeditious and economical achievement of all client objectives.

b) To fully informed client decision-making. I should:

   1) Counsel clients about all forms of dispute resolution

   2) Counsel clients about the value of cooperation as a means towards the productive resolution of disputes

   3) Maintain the sympathetic detachment that permits objective and independent advice to clients

   4) Communicate promptly and clearly with clients, and

   5) Reach clear agreements with clients concerning the nature of the representation.

c) To fair and equitable fee agreements. I should:

   1) Discuss alternative methods of charging fees with all clients

   2) Offer fee arrangements that reflect the true value of the services rendered

   3) Reach agreements respecting fees with clients as early in the relationship as possible

   4) Determine the amount of fees by consideration of many factors and not just time spent, and

5) Provide written agreements as to all fee arrangements.

d) To comply with the obligations of confidentiality and the avoidance of conflicting loyalties in a manner designed to achieve fidelity to clients.

e) To achieve and maintain a high level of competence in my field or fields of practice.

AS TO OPPOSING PARTIES and THEIR COUNSEL, I shall aspire:

a) To cooperate with opposing counsel in a manner consistent with the competent representation of my client. I should:

1) Notify opposing counsel in a timely fashion of any canceled appearance

2) Grant reasonable requests for extensions or scheduling changes, and

3) Consult with opposing counsel in the scheduling of appearances, meetings and depositions.

b) To treat opposing counsel in a manner consistent with his or her professional obligations and consistent with the dignity of the search for justice. I should:

1) Not serve motions or pleadings in such a manner or at such a time as to preclude opportunity for a competent response

2) Be courteous and civil in all communications

3) Respond promptly to all requests by opposing counsel

4) Avoid rudeness and other acts of disrespect in all meetings, including depositions and negotiations

5) Prepare documents that accurately reflect the agreement of all parties, and

6) Clearly identify all changes made in documents submitted by opposing counsel for review.

AS TO THE COURTS and OTHER TRIBUNALS, and TO THOSE WHO ASSIST THEM, I shall aspire:

a) To represent my clients in a manner consistent with the proper functioning of a fair, efficient and humane system of justice. I should:

1) Avoid nonessential litigation and nonessential pleading in litigation

2) Explore the possibilities of settlement of all litigated matters

3) Seek noncoerced agreement between the parties on procedural and discovery matters

4) Avoid all delays not dictated by competent representation of a client

5) Prevent misuses of court time by verifying the availability of key participants for scheduled appearances before the court and by being punctual, and

6) Advise clients about the obligations of civility, courtesy, fairness, cooperation and other proper behavior expected of those who use our system of justice.

b) To model for others the respect due to our courts. I should:

1) Act with complete honesty

2) Know court rules and procedures

3) Give appropriate deference to court rulings

4) Avoid undue familiarity with members of the judiciary

5) Avoid unfounded, unsubstantiated, or unjustified public criticism of members of the judiciary

6) Show respect by attire and demeanor

7) Assist the judiciary in determining the applicable law, and

8) Give recognition to the judiciary's obligations of informed and impartial decision-making.

AS TO MY COLLEAGUES IN THE PRACTICE OF LAW, I shall aspire:

a) To recognize and develop a professional interdependence for the benefit of our clients and the legal system

b) To defend you against unjust criticism, and

c) To offer you assistance with your personal and professional needs.

AS TO OUR PROFESSION, I shall aspire:

a) To improve the practice of law. I should:

   1) Assist in continuing legal education efforts

   2) Assist in organized bar activities

   3) Assist law schools in the education of our future lawyers, and

   4) Assist the judiciary in achieving objectives of *A Lawyer's Creed* and these aspirational ideals.

b) To promote the understanding of and an appreciation for our profession by the public. I should:

   1) Use appropriate opportunities, publicly and privately, to comment upon the roles of lawyers in society and government, as well as in our system of justice, and

   2) Conduct myself always with an awareness that my actions and demeanor reflect upon our profession.

c) To devote some of my time and skills to community, governmental and other activities that promote the common good.

AS TO THE PUBLIC and OUR SYSTEM OF JUSTICE, I shall aspire:

a) To consider the effect of my conduct on the image of our system of justice, including the effect of advertising methods.

b) To help provide the pro bono representation that is necessary to make our system of justice available to all.

c) To support organizations that provide pro bono representation to indigent clients.

d) To promote equality for all persons.

e) To improve our laws and legal system, by for example:

    1) Serving as a public official

    2) Assisting in the education of the public concerning our laws and the legal system

    3) Commenting publicly upon our laws

    4) Using other appropriate methods of effecting positive change in our laws and the legal system.

STATEMENT REGARDING THE PROVISION OF PRO BONO LEGAL SERVICES BY OHIO LAWYERS

Each day, Ohioans require legal assistance to secure basic needs such as housing, education, employment, health care, and personal and family safety. Many persons of limited means are unable to afford such assistance, and legal aid programs must concentrate limited resources on those matters where the needs are most critical. The result is that many Ohioans who are facing significant legal problems do not have access to affordable legal services. These persons are forced to confront landlord-tenant issues, have questions involving employment rights, or seek protection against domestic violence without the assistance of a legal advocate.

In 1997, this Court issued a *Statement on Professionalism* that recognizes each lawyer's obligation to engage in activities that promote the common good, including the provision of and support for pro bono representation to indigent clients. In 2007, in the *Preamble to the Ohio Rules of Professional Conduct*, the Court reemphasized the importance of this obligation by stating:

> A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for those who because of economic or social barriers cannot afford or secure legal counsel.

Lawyers, law firms, bar associations, and legal services organizations, such as the Ohio Legal Assistance Foundation, have done and continue to do much to address unmet civil legal needs through the organization of, support for, and participation in pro bono legal services programs. Although these programs have increased both in number and scope in recent years, there remains an urgent need for more pro bono services.

This Court strongly encourages each Ohio lawyer to ensure access to justice for all Ohioans by participating in pro bono activities. There are pro bono programs available throughout Ohio that are sponsored by bar associations, legal aid programs, churches and civic associations. Many programs offer a variety of free legal services, while others concentrate on specific legal needs. Lawyers also may choose to participate in programs that focus on the needs of specific individuals such as senior citizens, the disabled, families of military personnel or immigrants. The Web site www.ohioprobono.org contains a complete, searchable listing of pro bono programs and opportunities in Ohio. A lawyer may fulfill this professional commitment by providing legal counsel to charitable organizations that may not be able to afford to pay for legal services or by making a financial contribution to an organization that provides legal services to persons of limited means.

This Court strongly encourages each Ohio lawyer to ensure access to justice for all Ohioans …

The Court recognizes that many Ohio lawyers honor their professional commitment by regularly providing pro bono legal services or financial support to pro bono programs. Moreover, the Court encourages lawyers to respond to this call by seeking to engage in new or additional pro bono opportunities. To document the efforts and commitment of the legal profession to ensure equal access to justice, the Court, in conjunction with the Ohio Legal Assistance Foundation, will develop a means by which Ohio lawyers may report voluntarily and anonymously their pro bono activities and financial support for legal aid programs. The information regarding pro bono efforts will not only underscore the commitment of the legal profession to serving the public good but also will serve as a constant reminder to the bar of the importance of pro bono service.

Issued by the Supreme Court of Ohio
September 20, 2007

Visit www.ohioprobono.org for more information.

from the
STATEMENT ON JUDICIAL PROFESSIONALISM

. . .In recognition of the unique standards of professionalism required of a judge or a lawyer acting in a judicial capacity, the Court issues A Judicial Creed *upon the recommendation of the Supreme Court Commission on Professionalism. It is the Court's goal by adopting this creed to remind every judge and every lawyer acting in a judicial capacity of the high standards expected of each by the public whom they serve.*

Issued by the Supreme Court of Ohio
July 9, 2001

A JUDICIAL CREED

For the purpose of publicly stating my beliefs, convictions and aspirations as a member of the judiciary or as a lawyer acting in a judicial capacity in the state of Ohio:

I RE-AFFIRM my oath of office and acknowledge my obligations under the Canons of Judicial Ethics.

I RECOGNIZE my role as a guardian of our system of jurisprudence dedicated to equal justice under law for all persons.

I BELIEVE that my role requires scholarship, diligence, personal integrity and a dedication to the attainment of justice.

I KNOW that I must not only be fair but also give the appearance of being fair.

I RECOGNIZE that the dignity of my office requires the highest level of judicial demeanor.

I WILL treat all persons, including litigants, lawyers, witnesses, jurors, judicial colleagues and court staff with dignity and courtesy and insist that others do likewise.

I WILL strive to conduct my judicial responsibilities and obligations in a timely manner and will be respectful of others' time and schedules.

I WILL aspire every day to make the court I serve a model of justice and truth.

WORDS OF JUSTICE

North Reflecting Pool
Thomas J. Moyer Ohio Judicial Center

In December 2006, a work of art depicting 10 words of justice was installed in the north reflecting pool at the Ohio Judicial Center. The artwork is featured on the cover of this publication.

The words, carved from granite, are:

WISDOM
INTEGRITY
PEACE
TRUTH
JUSTICE
HONOR
REASON
EQUITY
COMPASSION
HONESTY.

The words stand as reminder of the fundamental principles of justice and of the mission of the judicial branch.

Funding for the project by Columbus artist Malcolm Cochran was provided by an Ohio State Bar Foundation grant.

The Supreme Court *of* Ohio

Commission on Professionalism
65 South Front Street
Columbus, Ohio 43215-3431
614.387.9327

WHAT THE #$*#& WERE YOU THINKING?

Bill Keating, Jr.

1. Exception to the Rule
2. Hero to Your Client
3. Competition
4. Playing God
5. Win the Battle, Lose the War
6. Always be Mean Tomorrow
7. Making “Your” Case
8. Be More Aggressive
9. Client Doesn’t Get it Done
10. Court Vision
11. Tree Hugger Theory
12. GTAC—Diversity of Thought/Collective Wisdom
13. Reviews
14. Malice vs. Stupidity
15. Martha Stewart
16. Accurate, But Not True

KMK Keating Muething & Klekamp PLL

Gary P. Kreider

PARTNER

Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
TEL: (513) 579-6411
FAX: (513) 579-6457
gkreider@kmklaw.com

PRACTICE AREAS

Healthcare Team

Securities Regulation Compliance

Public Offerings

Private Placements

Mergers & Acquisitions

Business Planning & Formation

BAR & COURT ADMISSIONS

Ohio

U.S. District Court, Southern District of Ohio

U.S. Supreme Court

EDUCATION

J.D., University of Cincinnati College of Law, 1964

M.A., University of Cincinnati, 1961

B.A., University of Cincinnati, 1960; with honors

Gary Kreider concentrates his practice in the areas of securities regulation compliance, public offerings, private offerings, mergers and acquisitions and business planning and formation. He has been an Adjunct Professor in securities regulation since 1977 at the University of Cincinnati College of Law and is immediate past Chairman of the Corporation Law Committee of the Ohio State Bar Association.

Gary lectures at various legal education conferences on securities, mergers and acquisitions and corporate law issues and is the author of published works on securities and corporate law. He has served as an arbitrator for the National Association of Securities Dealers, Inc., and is frequently called as an expert witness in corporate and securities cases.

REPRESENTATIVE MATTERS

- Handled IPOs for companies such as Cintas Corporation, Comair, Inc., Duramed Pharmaceuticals, Meridian Bioscience, Inc., LSI Industries Inc., Multi-Color Corporation, Exide Corp., Durakon Industries, Inc., Kendle International Inc. and Provident Financial Group, Inc.
- Numerous other public offerings for IPO clients and others such as American Financial Group, Chiquita Brands International, Inc, Standard Register, Meritage Hospitality Group Inc. and Hemagen Diagnostics, Inc.
- Experience in going private transactions
- Representation of clients in hostile proxy contests

AWARDS & RECOGNITIONS

- AV® Preeminent™ Peer Review Rated, Martindale-Hubbell
- Listed in *Chambers USA: America's Leading Business Lawyers*, 2004-2012 (1 of 26 Corporate/M&A attorneys selected in Ohio)
- Named to *Ohio Super Lawyers*, 2004-2011
- Named one of the Top 100 Lawyers in Ohio, *Cincinnati Magazine*, 2004, 2008

KMK Keating Muething & Klekamp PLL

Gary P. Kreider (Continued)

- *Chambers USA America's Leading Business Lawyers*, 2010-2011 contained this statement: "Gary Kreider attracts clients with his '*phenomenal judgment.*' His practice focuses on public company transactional and regulatory advice."
- Listed in *The Best Lawyers in America*, since 1991

NEWS

- Keating Muething & Klekamp Is Named the Top-Listed Law Firm in Ohio and Cincinnati in Numerous Areas of Law by The Best Lawyers in America 2013
- Keating Muething & Klekamp Named a 2012 Leading Law Firm by Chambers USA
- Keating Muething & Klekamp Is the Top-Listed Law Firm in Ohio and in Cincinnati in a Number of Areas According to The Best Lawyers in America 2012
- Keating Muething & Klekamp Named a 2011 Leading Law Firm by Chambers USA
- Keating Muething & Klekamp only law firm ranked #1 in Cincinnati in Corporate Law, Land Use and Zoning Law, and Municipal Law by The Best Lawyers in America 2011

SPEAKING ENGAGEMENTS

- KMK Legal Update Seminar, Hyatt Regency Cincinnati, Regency South Foyer, December 12, 2012

PUBLICATIONS

- Legal Alert: JOBS Act Relaxes Rules for Raising Capital, April 2, 2012
- ISS Announces GRId 2.0 and Publishes 2012 Pay-for-Performance Whitepaper, December 21, 2011
- Securities and Exchange Commission Adopts Say-on-Pay, January 27, 2011
- Legal Alert: Securities and Exchange Commission Adopts Proxy Access, August 27, 2010
- Financial Reform Act Triggers Significant New Executive Compensation Requirements, July 21, 2010
- U.S. Senate Passes Consumer Financial Protection Act of 2010, June 2, 2010
- SEC Approves Proxy Disclosure Enhancements, December 17, 2009
- Effective and Pending Initiatives for the Upcoming Proxy Season, October 28, 2009
- Legal Alert: SEC Approves NYSE Proposal on Broker Discretionary Voting, July 7, 2009
- Legal Alert: 2009 SEC and Other Initiatives Under Consideration, June 1, 2009
- 2009 Executive Compensation Issues and Disclosures Recent Developments in Advance Notice Provisions Reminder About E-Proxy, January 6, 2009
- Significant 2006 Amendments to Ohio Business Organization Statutes, *Corporation by Aspen Publishers*, October 9, 2006
- Anti-Fraud Dilemma: Defining Materiality, July 30, 2004

PROFESSIONAL AND COMMUNITY INVOLVEMENT

- American Bar Association, Chairman, Securities Subcommittee on Real Estate Syndications and Condominiums, 1977-1979
- Cincinnati Bar Association, Executive Committee, 1969-1971

KMK Keating Muething & Klekamp PLL

Gary P. Kreider (Continued)

- Ohio State Bar Association, Chairman, Corporation Law Committee, 2003-2004
- Cincinnati Public Radio, Director
- LSI Industries Inc., Director
- Meridian Bioscience, Inc., Director
- New Richmond Ohio Board of Education, former President

KMK Keating Muething & Klekamp PLL

James H. Brun

PARTNER

Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
TEL: (513) 579-6585
FAX: (513) 579-6457
jbrun@kmklaw.com

PRACTICE AREAS

Estate & Trust Administration

Personal Tax Services

Estate & Succession Planning

BAR & COURT ADMISSIONS

Ohio

EDUCATION

J.D., University of Cincinnati College of Law, 1976; Order of the Coif, Articles Editor of the University Law Review

B.A., St. Joseph's College, 1973; *summa cum laude*

Jim Brun focuses his practice on estate planning as well as probate and trust administration. Prior to joining Keating Muething & Klekamp, he was a partner with a large Cincinnati law firm where he practiced for more than 21 years, concentrating his practice in the estate planning and personal tax areas. Jim served as a law clerk to the Honorable George H. Palmer, Judge of the Court of Appeals for the First Appellate District of Ohio from 1976-1978.

AWARDS & RECOGNITIONS

- AV® Preeminent™ Peer Review Rated, Martindale-Hubbell

SPEAKING ENGAGEMENTS

- KMK Legal Update Seminar, Hyatt Regency Cincinnati, Regency South Foyer, December 12, 2012

PROFESSIONAL AND COMMUNITY INVOLVEMENT

- Cincinnati Bar Association
- Cincinnati Estate Planning Council
- Ohio State Bar Association
- Children's House, Board Member
- Cincinnati Dreams Come True, Advisor

KMK Keating Muething & Klekamp PLL

Laura M. Hughes

ASSOCIATE

Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
TEL: (513) 562-1451
FAX: (513) 579-6457
lhughes@kmklaw.com

PRACTICE AREAS

Business Planning & Formation

Business Taxation

Mergers & Acquisitions

Business Consulting Services

Mass Tort Settlement Trusts

HIPAA Privacy and Security Compliance

Employee Benefits & Executive Compensation

Healthcare Team

BAR & COURT ADMISSIONS

Ohio

EDUCATION

J.D., University of Cincinnati College of Law, 2007; *summa cum laude*

B.A., Xavier University, 2003; *magna cum laude*

Laura Hughes practices in the firm's business representation and transactions practice group. She represents privately-held and publicly-held companies on a variety of business transactions, including entity formation, manufacturing and distribution, mergers and acquisitions, joint ventures, and corporate governance. She also advises clients on federal, state, and local tax issues relating to choice of entity, tax-exempt organizations, compensation, financing, mergers, acquisitions, corporate reorganizations, sales and use tax, and other business transactions. In addition, Laura regularly advises trustees of mass tort and bankruptcy settlement trusts on issues relating to trust administration.

SPEAKING ENGAGEMENTS

- KMK Legal Update Seminar, Hyatt Regency Cincinnati, Regency South Foyer, December 12, 2012

PUBLICATIONS

- Legal Alert: IRS Rules on Treatment of Dividends Under Section 162(m), July 9, 2012
- Legal Alert: Supreme Court Upholds Health Care Reform Law, July 5, 2012
- Legal Alert: Ensuring Compliance With the Medicare Secondary Payer Act Reporting Requirements, September 2010
- Legal Alert: New Qualifying Therapeutic Discovery Project Credit Will Benefit Biotech Companies, April 7, 2010
- Federal Hire Act Provides New Tax Benefits for Hiring Unemployed Workers, March 2010
- Legal Alert: American Recovery and Reinvestment Act, March 2, 2009

PROFESSIONAL AND COMMUNITY INVOLVEMENT

- Cincinnati Bar Association, Southwestern Ohio Tax Institute Planning Committee (2007-2011), Women Lawyers Committee, Young Lawyers Committee
- American Bar Association
- United Way, Emerging Leaders' Society

KMK Keating Muething & Klekamp PLL

Laura M. Hughes (Continued)

- Wills for Heroes, Volunteer

KMK Keating Muething & Klekamp PLL

Mark E. Sims

PARTNER

Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
TEL: (513) 579-6966
FAX: (513) 579-6457
msims@kmklaw.com

PRACTICE AREAS

Healthcare Team

Business Planning & Formation

Business Taxation

Mergers & Acquisitions

Private Equity / Venture Capital

Real Estate Taxation

Estate & Succession Planning

Personal Tax Services

BAR & COURT ADMISSIONS

Ohio

Florida

U.S. Claims Court

U.S. Tax Court

EDUCATION

J.D., University of Cincinnati College of Law, 1980

LL.M. Taxation, University of Florida Law School, 1981

B.B.A., University of Cincinnati, 1977

Mark Sims practices in the business representation & transactions practice group and works primarily in the federal income tax, business planning and healthcare areas. Mark's federal tax practice involves individual, corporate, S corporation and partnership tax planning, including executive compensation and like kind exchanges. He advises clients regarding the tax aspects of mergers and acquisitions. Mark also represents clients on matters before the IRS and state tax agencies. Additionally, he has significant experience focusing on tax issues related to the formation and operation of tax exempt organizations.

Mark serves in a general counsel role for a number of closely held businesses and represents purchasers and sellers of businesses and business interests. His healthcare practice concentrates on business and tax issues facing healthcare providers, including representing physician groups in structuring and selling medical practices. Mark also has extensive experience drafting, reviewing and negotiating physician employment agreements.

Mark has been an adjunct professor at the University of Cincinnati College of Law and speaks frequently on tax and healthcare related issues.

AWARDS & RECOGNITIONS

- AV® Preeminent™ Peer Review Rated, Martindale-Hubbell
- Named to *Ohio Super Lawyers*
- Listed in *The Best Lawyers in America,* 10+ years

NEWS

- Keating Muething & Klekamp Is Named the Top-Listed Law Firm in Ohio and Cincinnati in Numerous Areas of Law by The Best Lawyers in America 2013
- 48 Keating Muething & Klekamp Attorneys Recognized in 2012 Ohio Super Lawyers and Ohio Rising Stars
- Keating Muething & Klekamp Is the Top-Listed Law Firm in Ohio and in Cincinnati in a Number of Areas According to The Best Lawyers in America 2012

KMK Keating Muething & Klekamp PLL

Mark E. Sims (Continued)

- Keating Muething & Klekamp only law firm ranked #1 in Cincinnati in Corporate Law, Land Use and Zoning Law, and Municipal Law by The Best Lawyers in America 2011

SPEAKING ENGAGEMENTS

- KMK Legal Update Seminar, Hyatt Regency Cincinnati, Regency South Foyer, December 12, 2012
- Healthcare Executives Roundtable, February 16, 2011

PUBLICATIONS

- Legal Alert: IRS Rules on Treatment of Dividends Under Section 162(m), July 9, 2012
- Legal Alert: Supreme Court Upholds Health Care Reform Law, July 5, 2012
- IRS Issues Proposed Regulations Under Code Section 162(m), July 13, 2011
- Legal Alert: New Qualifying Therapeutic Discovery Project Credit Will Benefit Biotech Companies, April 7, 2010

MENTIONED & QUOTED

- INC Research to Acquire Kendle International for $15.25 per Share in Cash, *Bloomberg Businessweek [www.investing.businessweek.com]*, May 5, 2011
- Therapeutic discovery tax credit = help for small bio companies, *Medcity News*, April 9, 2010

PROFESSIONAL AND COMMUNITY INVOLVEMENT

- American Bar Association, Tax Section
- Ohio State Bar Association, Federal Taxation Specialty Board
- Cincinnati Bar Association, Tax and Health Care Sections, Past President of Tax Section
- Hamilton County Development Company, Board Member and Past President
- Hamilton County Business Center, Advisory Board
- Keep Cincinnati Beautiful, Board Member and Past President
- Christ the King Parish, Finance Commission

KMK LEGAL UPDATE SEMINAR

Tax Questions of Current Interest

The premise of these discussions is that tax rates are going up and many deductions or advantages are going to go down or disappear. I think this is a safe assumption, given the electoral results, the permanence of the Affordable Care Act "Obamacare," the fiscal cliff and looming deficits. I believe it is also safe to assume that changes will take place as of January 1, 2013, i.e., that the Bush tax cuts will expire in whole or in part.

High income individuals will face higher Medicare taxes in 2013 as a result of Obamacare. Starting in 2013 there is a two-bracket graduated Medicare tax system with a higher rate of 2.35% on wages in excess of $200,000 for single taxpayers and $250,000 for married couples filing jointly (the $250,000 bracket applying to their combined wages).

In addition, Obamacare extended the reach of Medicare taxes beyond wages by creating a second "Unearned Income Medicare Contribution" tax. A tax of 3.8% will be imposed on the lesser of:

(1) the excess of adjusted gross income (modified by increasing it for excluded foreign earned income) over a threshold amount ($250,000 for married couples filing joint, $125,000 for a married individual filing separately and $200,000 for single individuals); or

(2) such person's net investment income.

We have two general areas of discussion today, namely, to explain the changes and steps that could be taken in the remaining days of 2012 to mitigate these changes. As our format, I will have the easy job of asking questions of each of our three panelists, who are Jim Brun, Laura Hughes and Mark Sims. I will then ask the other panelists for any comments on their answers and also invite comments and questions on the subject matter at hand from the audience. I hope you participate.

1. These matters are occasioned by the so-called "fiscal cliff." The cliff was designed by Congress two years ago during the debt limit stand-off. Briefly, it provides that unless Congress acts otherwise, the Bush tax cuts will expire and there will be a 10% across-the-board cut in all federal spending with certain limited exceptions, such as Medicaid. This will occur January 1, 2013 unless action is taken by Congress. This matter is becoming an increasingly hot issue in the press and other commentary.

2. What are the automatic tax increases that are scheduled to take effect on January 1, 2013?

2.1. Expiration of Bush tax cuts;

2.2. Obamacare taxes.

3. Severe increases will occur in income tax rates. Individuals will lose the lowest 10% rate, and that income will be roughly merged into the next highest bracket of 15%. Income in the current 25%, 28%, 33% and 35% brackets will be taxed at rates of 28%, 31%, 36% and 39.6%.

3.1. How would this change affect the Ohio income tax?

3.2. Normally we say to accelerate deductions and postpone income. Does this suggests the reverse?

4. The tax on dividends will increase from 15% to 18.8% as a result of Obamacare. It could rise as high as 43.4% if dividends are taxed as ordinary income.

4.1. For closely-held businesses does a special dividend make sense?

4.2. How would a special dividend be financed?

5. Capital gains rates would increase from their present 15% to as much as 23.8%. There is a lot of talk about capping them at 20%. What strategies are available here?

5.1. Redemptions of stock.

5.2. Take gains in 2012 and postpone losses to 2013?

5.3. What about installment sales?

5.4. What about short sales?

5.5. How does the "wash sale" rule apply?

5.6. What's the last tax date you can sell properties in 2012?

6. The AMT "patch" would also expire. In 2011 the AMT exemption was set at $74,450 for married taxpayers filing joint and $48,450 for single taxpayers. Without Congressional intervention the AMT exemptions will drop to $45,000 and $33,750 in 2012. The exemption phases out for taxpayers above certain AMTI thresholds - $150,000 for married taxpayers filing joint and $112,500 for single taxpayers.. What strategies are available here?

7. A lot of talk is heard about higher rates for couples earning over $250,000 and individuals earning over $200,000. Does it make sense to go to separate tax returns? Does the marriage penalty return?

8. What should be done if you hold non-qualified stock options that are in the money?

9. If earnings from investments begin to be taxed at rates higher than ordinary income, what alternatives are available?

9.1. Municipal bonds?

9.2. Roth IRAs?

9.3. Variable annuities and life insurance?

10. What happens to estate tax rates? The 2010 Tax Relief Act changed the maximum rate to 35%. Without any further change, the 55% maximum rate returns in 2013.

10.1. Is basis still to be adjusted to date of death value?

10.2. What happens to the basis of capital assets held by a person who dies in 2012 and pays no estate tax?

11. The 2012 exemption from estate tax is $5.12 million of assets. The exemption would drop to $1 million. What happens to state tax exemptions?

12. Would it make sense for me to move my residency from Ohio to Kentucky or Florida to minimize state taxes?

12.1. What is required to make that move?

12.2. Is there a danger of being taxed by both states?

13. What about gift taxes? How much can be given away during one's lifetime, both now and after the expected changes in the law? What can be done now to take advantage of present comparatively high exemption amounts?

14. What is portability and what may happen to it?

15. Is there any movement on life insurance trusts?

16. What happens to "bonus depreciation" of business equipment? (In 2012 a maximum of $139,000 of qualifying property could be deducted but is phased out when purchases exceed $560,000. The amount that can be deducted decreases to $25,000 in 2013, reduced when purchases exceed $200,000.)

17. Will there be decreases in Section 179 expensing for small businesses?

18. What about the R&D tax credit?

19. Can any of the effects of the fiscal cliff be reversed later and made retroactive?

4657995.3

12/7/2012

KMK Keating Muething & Klekamp PLL

Tax Questions of Current Interest

KMK Legal Update Seminar
December 12, 2012

KMK Keating Muething & Klekamp PLL

The Fiscal Cliff

- Combination of the following:
  - Expiration of a variety of tax cuts and extenders, including the Bush era tax cuts
  - Across-the-board federal spending cuts ("sequestration")
- Additional taxes under the Affordable Care Act are also scheduled to begin in 2013
  - 3.8% Medicare contribution tax
  - 0.9% Hospital Insurance tax

KMK Keating Muething & Klekamp PLL

The Fiscal Cliff: Bush Tax Cuts

- Tax cuts were passed using a Senate procedure called "reconciliation"
  - Majority vote, instead of supermajority
  - Not allowed for any bill that affects budget deficits beyond a 10-year window
  - Mandatory "sunset" provision in 2010
- Schedule of Bush era tax cuts:
  - 2001: Marginal tax rates, marriage penalty, and estate tax
  - 2003: Capital gains rates and dividend rates
  - 2010: Extension through 2012

KMK Keating Muething & Klekamp PLL

The Fiscal Cliff: Individual Income

- Marginal Tax Rates
  - 2012: lowest tax rate of 10%, highest tax rate of 35%
  - 2013: lowest tax rate of 15%, highest tax rate of 39.6%
- Capital Gains
  - 2012: 15%
  - 2013: 20% + 3.8%
- Qualified Dividends
  - 2012: 15%
  - 2013: ordinary income rates + 3.8% (max 43.4%)

KMK Keating Muething & Klekamp PLL

Affordable Care Act: Medicare Contribution Tax

- New 3.8% Medicare contribution tax in 2013
  - For taxpayers with modified adjusted gross income ("MAGI") in excess of the threshold amount ($200,000/$250,000), the 3.8% tax is imposed on the lesser of:
    - net investment income, or
    - excess of modified adjusted gross income over the threshold amount
  - Many estates and trusts are also subject to a 3.8% tax on the lesser of:
    - undistributed net investment income, or
    - the excess of AGI over the dollar amount at which the highest income tax bracket applicable to an estate or trust begins ($11,650 for 2012)

KMK Keating Muething & Klekamp PLL

Affordable Care Act: Medicare Contribution Tax

- Examples:
  - In 2013, joint filers have MAGI of $225,000 and net investment income of $50,000. No Medicare contribution tax imposed.
  - In 2013, joint filers have net investment income of $100,000 and MAGI of $300,000. Medicare contribution tax imposed on $50,000 ($300,000-$250,000), equal to $1,900 (3.8% x $50,000)
  - In 2013, joint filers have net investment income of $100,000 and MAGI of $500,000. Medicare contribution tax imposed on $100,000, equal to $3,800 (3.8% x $100,000)

KMK Keating Muething & Klekamp PLL

Affordable Care Act: Medicare Contribution Tax

- Net Investment Income: the excess of the following types of income over any deductions properly allocable to such income:
  - Gross income from rents, royalties, interest, annuities, and dividends
  - Gross income derived from a trade or business that is a passive activity or from a business of trading in financial investments or commodities
  - Net gain (to the extent taken into account in computing taxable income) from the disposition of investment property
- Net investment income does *NOT* include:
  - Tax-exempt interest
  - Gain from the sale of a principal residence (to the extent excluded from income)
  - Distributions from retirement plans
  - Amounts subject to self-employment tax

KMK Keating Muething & Klekamp PLL

Affordable Care Act: 0.9% Hospital Insurance Tax

- Additional 0.9% Hospital Insurance tax
  - Imposed on all wages in excess of $200,000/$250,000
    - Imposed only on employees, not employers
    - Imposed on the combined wages of the employee and employee's spouse
    - Withheld by employer on wages in excess of threshold; employee responsible for paying any additional tax
  - Similar tax imposed on self-employment income

KMK Keating Muething & Klekamp PLL

Affordable Care Act: 0.9% Hospital Insurance Tax

	2010	2011-2012	2013	2013 (over threshold)
Employee Share:				
Social Security	6.20%	4.20%*	6.20%	--
Medicare	1.45%	1.45%	1.45%	2.35%
Subtotal:	7.65%	5.65%	7.65%	2.35%
Employer Share:				
Social Security	6.20%	6.20%	6.20%	--
Medicare	1.45%	1.45%	1.45%	1.45%
Subtotal:	7.65%	7.65%	7.65%	1.45%

* 2% payroll tax holiday, scheduled to expire in 2012

KMK Keating Muething & Klekamp PLL

Individual Income Tax Rate Changes

	2012 Top Marginal Income Tax Rates	2013 Top Marginal Income Tax Rates	2013 Additional Payroll/ Medicare Taxes	2013 Top Combined Marginal Rate
Wages (including 1.45% payroll tax)	**36.45%**	41.05%	0.9%	**41.95%**
Capital Gain	**15%**	20%	3.8%	**23.8%**
Qualified Dividends	**15%**	39.6%	3.8%	**43.4%**
Interest, rents, royalties, etc.	**35%**	39.6%	3.8%	**43.4%**

KMK Keating Muething & Klekamp PLL

The Fiscal Cliff: Estate Tax

A. Changes in Exemption Amounts

1. Current estate/gift/generation-skipping transfer tax exemption amounts are $5,120,000 per person ($10,240,000 for a married couple).

` 2. As of 1/1/2013, the estate and gift tax exemption amounts will be $1,000,000 per person ($2,000,000 for a married couple). The generation-skipping transfer tax exemption amount will be an estimated $1,400,000 ($1,000,000 adjusted for inflation).

KMK Keating Muething & Klekamp PLL

The Fiscal Cliff: Estate Tax

B. Changes in Tax Rates

1. All taxable transfers currently are taxed at a maximum rate of 35%.

2. As of 1/1/2013, the maximum tax rate will be 55%, with a 5% "surtax" on large estates.

C. "Portability" of Exemptions Between Spouses Is Eliminated

D. The good news: Repeal of Ohio Estate Tax effective 1/1/2013

SCOTT R. MOTE, ESQ.
Executive Director
Ohio Lawyers Assistance Program, Inc.

Scott R. Mote, Esq., is Executive Director of the Ohio Lawyers Assistance Program, Inc. (OLAP), an Ohio nonprofit incorporated in 1991, and granted IRC 501(c)(3) status by the IRS in 1992. A recovering alcoholic since January 7, 1985, Scott began volunteering with the Ohio State Bar Association's (OSBA) Lawyers Assistance Committee (LAC) in September 1985. He has been involved with the LAC/OLAP for over 27 years, serving as OLAP's first Associate Director beginning in 1995, and becoming Executive Director in March 1999, upon the death of William X. Haase, Esq., the first Executive Director.

OLAP is a "broadbrush program" (alcohol/drugs and mental illness), serving over 40,000 Ohio lawyers and judges, and over 6,000 law students in Ohio's nine law schools. OLAP evolved from the 12th Step work of the LAC (started in 1979), becoming broadbrush in 2002. OLAP is supported by The Supreme Court of Ohio, the Ohio State Bar Association, and Ohio Bar Liability Insurance Company (affiliate of the OSBA).

Scott has made over 500 presentations to lawyers, judges and law students, including the annual conventions of the OSBA, the Ohio Judicial Conference, the Oho Ethics Commission, the American Bar Association Commission on Lawyer Assistance Programs (ABA CoLAP), the National Organization of Bar Counsel, and the Association of Professional Responsibility Lawyers. He has facilitated over 130 interventions, and oversees four other chemical dependency and mental health professionals. Statistically, OLAP opens a new file nearly every day across the state.

Scott is a Commissioner on the American Bar Association's Commission on Lawyer Assistance Programs, appointed by ABA President Stephen N. Zack in August 2010, reappointed by ABA President William T. Robinson in August 2011, and reappointed by ABA President Laurel G. Bellows in August 2012.

The OSBA presented Scott the Ohio Bar Medal, its highest award for service to the profession, in 2006. In 2010 the OSBA presented him the Eugene R. Weir Award for Ethics and Professionalism. In 2005 the Columbus Bar Association presented him its Award of Merit for service to the profession.

Prior to making OLAP a fulltime endeavor in June 2007, Scott was a general practice lawyer and civil litigator for over 25 years, the last 18 as a founding partner of Harris, McClellan, Binau & Cox PLL, Columbus.

Education: B.A. cum laude, Wright State University, 1972; M.A., University of Dayton, 1973; J.D., Capital University Law School, 1977. Admitted to practice: Ohio, 1977; U.S. District Court, S.D. Ohio, 1977; Florida, 1978; U.S. District Court, N.D. Ohio, 1978; United States Supreme Court, 1987.

Professional: American Bar Association (Health Law Section; Legal Education & Admissions to the Bar Section); Commissioner, ABA Commission on Lawyer Assistance Programs (2010-present); Ohio State Bar Association (Council of Delegates, District 7; Estate Planning, Trust & Probate Law Section); Columbus Bar Association (Admissions (Chair 1994-96) & Probate Committees); The Florida Bar (Out-of-State Practitioners Division); Ohio State Bar Foundation (Life Fellow); Columbus Bar Foundation; Central Ohio Association for Justice; Central Ohio Association of Criminal Defense Lawyers; Federalist Society.

Hobbies/Avocations: Golf, hunting, trap, skeet and sporting clays shooting, fishing, reading and observing the arts.

Scott married Gretchen Koehler Mote, an attorney, on October 15, 1977. Their daughter, Elizabeth, was admitted to the Ohio bar in November, 2010, and practices in Columbus.

SUBSTANCE ABUSE, CHEMICAL DEPENDENCY AND MENTAL HEALTH CONCERNS IN THE LEGAL PROFESSION

OHIO LAWYERS ASSISTANCE PROGRAM, INC.

SCOTT R. MOTE, J.D.
Executive Director

PAUL A. CAIMI, J.D., LCDC-III, ICADC
Associate Director

PATRICK J. GARRY, J.D.
Associate Director

STEPHANIE S. KRZNARICH, MSW, LISW-S, LCDC-III
Clinical Director

MEGAN R. SNYDER, MSW, LISW
Clinical Associate

Funded By:

The Supreme Court of Ohio
Ohio State Bar Association
Ohio Bar Liability Company

SUBSTANCE ABUSE, CHEMICAL DEPENDENCY & MENTAL HEALTH CONCERNS IN THE LEGAL PROFESSION

Ohio's integrated program:

The legal profession's response to substance abuse, chemical dependency and mental health concerns in Ohio

I. The Organization

The Ohio Lawyers Assistance Program, Inc. (OLAP)

II. The Three Components

Education
Advice and Intervention Assistance
Treatment and After-Care Support

III. Key Rules and Statutes

Gov. Rule I, Section 3(E)(2)--One hour of instruction to sit for bar examination

Gov. Rule X, Section 3(A)--CLE Requirements

Professional Cond. Rule 8.3(c)—Confidentiality

Judicial Cond. Rule 2.14—Disability & Impairment/Confidentiality

R.C. Section 2305.28--Qualified Immunity for Intervention Participant

Gov. Rule V, Section 9(B)--Monitoring

IV. Funding and Other Support

The Supreme Court of Ohio
The Ohio State Bar Association
Ohio Bar Liability Insurance Company (OBLIC)

SCOTT R. MOTE, J.D.
Executive Director
Ohio Lawyers Assistance Program, Inc.
1650 Lakeshore Drive, Suite 375
Columbus, Ohio 43204-4991
800-348-4343
614-586-0621
614-586-0633 (Fax)
smote@ohiolap.org
www.ohiolap.org

B.A. cum laude, Wright State University 1972; M.A., University of Dayton 1973; J.D., Capital University Law School 1977. Admitted to practice: Ohio, 1977; U.S. District Court, S.D. Ohio, 1977; Florida, 1978; U.S. District Court, N.D. Ohio, 1978; United States Supreme Court, 1987. Professional Memberships: Ohio State Bar Association (Council of Delegates, District 7; Estate Planning, Trust & Probate Law Section); Columbus Bar Association (Admissions (Chair 1994-96); Probate Committees); The Florida Bar (Out-of-State Practitioners Division); Ohio State Bar Foundation; Columbus Bar Foundation; Central Ohio Association for Justice; Central Ohio Association of Criminal Defense Lawyers; Commissioner, American Bar Association Commission on Lawyer Assistance Programs (2010-present). Mr. Mote was presented the 2005 Award of Merit for service to the profession by the Columbus Bar Association, and the 2006 Ohio Bar Medal by the Ohio State Bar Association, its highest award, for service to the profession. In 2010 the Ohio State Bar Association presented him the Eugene R. Weir Award for Ethics and Professionalism . Hobbies/Avocations: Golf, hunting, fishing, trap, skeet & sporting clays shooting, reading & observing the arts. Mr. Mote is Executive Director of the Ohio Lawyers Assistance Program, Inc. (OLAP), which was formed by the Lawyers Assistance Committee of the Ohio State Bar Association.

PAUL A. CAIMI, J.D.,LCDC-lll, ICADC
Associate Director
Ohio Lawyers Assistance Program, Inc.
46 Chagrin Plaza, Suite 106
Cleveland, Ohio 44022
800-618-8606
440-338-4463
440-338-1151 (Fax)
pcaimi@ohiolap.org

A.B., Psychology, Harvard College 1982; J.D., Boston University School of Law 1986. Admitted to practice: Ohio, 1986; U.S. District Court, N.D. Ohio, 1987; U.S. Court of Appeals, 6th Cir., 1992; United States Supreme Court, 1992. Certified Chemical Dependency Counselor (LCDC-III, Ohio). Professional Memberships: Ohio State Bar Association, Cleveland Bar Association (Lawyers Assistance Committee). Mr. Caimi is Associate Director of the Ohio Lawyers Assistance Program, Inc. (OLAP).

****

PATRICK J. GARRY, J.D.
Associate Director
Ohio Lawyers Assistance Program, Inc.
1019 Main Street, Suite 100
Cincinnati, Ohio 45202
513-623-9853
513-381-1255 (Fax)
pgarry@ohiolap.org

B.A. History, Boston College, 1986; J.D., University of Cincinnati, 1991. Admitted to practice in Ohio, 1991; U.S. District Court, S.D. Ohio, 1992. Professional Memberships: Ohio State Bar Association; Cincinnati Bar Association. Mr. Garry is Associate Director of the Oho Lawyers Assistance Program, Inc. (OLAP). He maintains a law practice concentrating on criminal defense.

STEPHANIE S. KRZNARICH, MSW, LISW-S, LCDC-III, ICADC
Clinical Director
Ohio Lawyers Assistance Program, Inc.
1650 Lake Shore Drive, Suite 375
Columbus, Ohio 43204-4991
800-348-4343
614-586-0621
614-586-0633 (Fax)
skrznarich@ohiolap.org

B.S. Social Work, The Ohio State University, 1994; M.S. Social Work, The Ohio State University, 1997; Bethany Theological Seminary, Graduate Courses, 1994-1996. Licensed Independent Social Worker-Supervisor (LISW-S), Ohio, 2001. Licensed Chemical Dependency Counselor (LCDC-III), Ohio, 2008. Professional Experience: Research positions at The Ohio State University in both the College of Social Work and the College of Psychiatric Nursing; Clinical Social Worker/Mental Health Therapist at Harding Hospital and The Ohio State University Hospitals East (older adult psychiatric units); Chemical Dependency Counselor, Talbot Hall, at The Ohio State University Hospitals East and Parkside Behavioral Healthcare Center (detox, inpatient and outpatient levels of care), Chemical Dependency Counselor and Driver Intervention Facilitator at The Wellness Center; Clinical Counselor at multiple Nursing Homes in Columbus, Ohio and the surrounding area; Mental Health Therapist/Drug and Alcohol Counselor at three Community Mental Health Centers in Columbus, Ohio; Facilitator of Driver Intervention Programs for The Wellness Group, and private practice.

****

MEGAN R. SNYDER, MSW, LISW
Clinical Associate
Ohio Lawyers Assistance Program, Inc.
1650 Lake Shore Drive, Suite 375
Columbus, Ohio 43204-4991
800-348-4343
614-586-0621
614-586-0633 (Fax)
mrobertson@ohiolap.org

B.A. Psychology, State University of New York at Albany, 1995; Master of Social Work, New York University, 2000. Licensed Independent Social Worker, Ohio, 2008. Professional Experience: Medical Social Worker at Beth Abraham Health Services, specialized in psychosocial assessments and discharge planning, Bronx, New York; Social Worker and Regional Social Work Mentor at VistaCare Hospice, developed and conducted company-wide trainings surrounding issues of death and dying, Columbus, Ohio; Development Associate at the Columbus Jewish Federation, assisted with the annual campaign, Columbus, Ohio.

KMK Keating Muething & Klekamp PLL

F. Mark Reuter

PARTNER

Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
TEL: (513) 579-6469
FAX: (513) 579-6457
freuter@kmklaw.com

PRACTICE AREAS

Securities Regulation Compliance

Mergers & Acquisitions

Private Placements

Public Offerings

Private Equity / Venture Capital

Designing & Implementing Executive Compensation Plans & Arrangements

BAR & COURT ADMISSIONS

Ohio

EDUCATION

J.D., University of Notre Dame Law School, 1996; *cum laude*

B.A., University of Notre Dame, 1992; *magna cum laude*

Mark Reuter advocates for business clients in transactions, proceedings and conflicts governed by federal and state securities regulations. A partner in the firm's business representation and transactions group, Mark applies his experience in securities regulatory matters for the benefit of both publicly traded and privately owned clients in strategic transactions, executive compensation and equity arrangements, corporate governance, reporting, and regulatory proceedings. Mark regularly advises management, boards and their committees, and other stakeholders in mergers and acquisitions, public offerings, follow-on equity offerings, investment grade and convertible debt offerings, private placements, proxy solicitations, corporate governance issues, issues arising under the Dodd-Frank Act, the Sarbanes-Oxley Act, state corporate law, listed company obligations and corporate investigations.

Mark represents American Financial Group, Inc., AtriCure, Inc., Fifth Third Bancorp, Hemagen Diagnostics, Inc., Infinity Property and Casualty Corporation, LSI Industries Inc., Meridian Bioscience, Inc., and Multi-Color Corporation.

AWARDS & RECOGNITIONS

- AV® Preeminent™ Peer Review Rated, Martindale-Hubbell
- Listed in *The Best Lawyers in America*
- Named to *Ohio Super Lawyers*, 2012
- Named to *Ohio Rising Stars*, 2005-2011
- Cincinnati Academy of Leadership for Lawyers, Class VII (2003), Fellow

NEWS

- Keating Muething & Klekamp Is Named the Top-Listed Law Firm in Ohio and Cincinnati in Numerous Areas of Law by The Best Lawyers in America 2013
- 48 Keating Muething & Klekamp Attorneys Recognized in 2012 Ohio Super Lawyers and Ohio Rising Stars
- Keating Muething & Klekamp Is the Top-Listed Law Firm in Ohio and in Cincinnati in a Number of Areas According to The Best Lawyers in America 2012

KMK Keating Muething & Klekamp PLL

F. Mark Reuter (Continued)

- Keating Muething & Klekamp Advises Multi-Color Corporation in Connection With Its $356 Million Acquisition of York Label Group
- Keating Muething & Klekamp only law firm ranked #1 in Cincinnati in Corporate Law, Land Use and Zoning Law, and Municipal Law by The Best Lawyers in America 2011

SPEAKING ENGAGEMENTS

- KMK Legal Update Seminar, Hyatt Regency Cincinnati, Regency South Foyer, December 12, 2012
- Securities Law Update, Cincinnati Bar Association, November 12, 2009
- Key Issues Facing Boards of Directors: Challenges of Securities Regulation, Risk Management & Liability, Directors Roundtable, August 19, 2009
- Professional Responsibilities of Securities Lawyers, University of Cincinnati College of Law, Aprill 22, 2009 (panelist)
- Considerations for Public Companies Weathering the Current Market Downturn, Cincinnati Bar Association, March 12, 2009
- Corporate Investigations: The Developing Rule of In-House Counsel, Keating Muething & Klekamp Seminar, December 12, 2007
- The Nuts and Bolts of Drafting and Negotiating the Acquisition Agreement, National Business Institute, August 22, 2007

PUBLICATIONS

- Nasdaq and NYSE Propose Rules on Compensation Committee and Adviser Independence, October 2, 2012
- Legal Alert: FASB Removes Loss Contingency Disclosure Project from Agenda, July 10, 2012
- Legal Alert: JOBS Act Relaxes Rules for Raising Capital, April 2, 2012
- ISS Announces GRId 2.0 and Publishes 2012 Pay-for-Performance Whitepaper, December 21, 2011
- Securities and Exchange Commission Adopts Say-on-Pay, January 27, 2011
- Legal Alert: Securities and Exchange Commission Adopts Proxy Access, August 27, 2010
- Financial Reform Act Triggers Significant New Executive Compensation Requirements, July 21, 2010
- U.S. Senate Passes Consumer Financial Protection Act of 2010, June 2, 2010
- Keeping Current: Securities, *Business Law Today*, January 2010
- SEC Approves Proxy Disclosure Enhancements, December 17, 2009
- Effective and Pending Initiatives for the Upcoming Proxy Season, October 28, 2009
- Comment Letter to Securities and Exchange Commission on Proposal on Proxy Access, August 17, 2009
- Legal Alert: SEC Approves NYSE Proposal on Broker Discretionary Voting, July 7, 2009
- Legal Alert: 2009 SEC and Other Initiatives Under Consideration, June 1, 2009
- 2009 Executive Compensation Issues and Disclosures Recent Developments in Advance Notice Provisions Reminder About E-Proxy, January 6, 2009
- The Bylaw Groundswell: Advance Notice Provisions in the Wake of CSX, *November 2008 Insights; The Corporate & Securities Law Advisor, Volume 22 Number 11*, December 15, 2008
- Annual Report to the Commission - Form 10-K, *Securities Law Techniques*, November 2008

KMK Keating Muething & Klekamp PLL

F. Mark Reuter (Continued)

- Registration Under the Exchange Act, *Securities Law Techniques*, November 2008
- Loopholes Provide Activist Securityholders Unfair Advantages in Takeover Contests; How Targets Can Fight Back, *Corporation by Aspen Publishers, August 1, 2008, Lexis Nexis Corporate and Securities Webcenter for Expert Commentaries*, July 25, 2008
- Perils of Ambiguous Advance Notice Provisions, *Lexis Nexis Corporate and Securities Webcenter for Expert Commentaries*, July 25, 2008
- Comments to the Financial Accounting Standards Board on proposed amendments to FASB Statement No. 5, July 30, 2008
- Significant 2006 Amendments to Ohio Business Organization Statutes, *Corporation by Aspen Publishers*, October 9, 2006

MENTIONED & QUOTED

- INC Research Agrees to Acquire Kendle International for $232 Million, *CorporateLiveWire.com*, June 6, 2011
- INC Research to Acquire Kendle International for $15.25 per Share in Cash, *Bloomberg Businessweek [www.investing.businessweek.com]*, May 5, 2011
- E-Proxy Disclosures: Do Tinkered Rules Let Institutions Rule?, *Westlaw Business Currents*, February 11, 2010
- Panel: SEC Proposals Overreaction to Financial Crisis, *Cincinnati Business Courier*, August 21, 2009
- Some Top Cincinnati Executives Put Money Where Mouth Is by Buying Own Firms' Stock, *Cincinnati Business Courier*, March 6, 2009, *Cincinnati Business Courier*
- The Pulse, *Mergers & Acquisitions*, November 2008, *Mergers & Acquisitions*
- Counsel Wins Battle in War Over Accounting, *The National Law Journal*, October 13, 2008, *The National Law Journal*

PROFESSIONAL AND COMMUNITY INVOLVEMENT

- Bannockburn Securities, Advisory Board
- Cincinnati Bar Association, Ethics & Professional Responsibility Committee
- Ohio State Bar Association, Corporation Law Committee
- Summit Country Day School, Board of Trustees

KMK Keating Muething & Klekamp PLL

James R. Matthews

PARTNER

Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
TEL: (513) 579-6507
FAX: (513) 579-6457
jmatthews@kmklaw.com

PRACTICE AREAS

Insurance Coverage & Litigation

Personal Injury / Wrongful Death

BAR & COURT ADMISSIONS

Ohio

Arizona

U.S. District Court, Southern District of Ohio

U.S. District Court, District of Arizona

U.S. Court of Appeals, Ninth Circuit

U.S. Court of Appeals, Sixth Circuit

U.S. Supreme Court

EDUCATION

J.D., University of Cincinnati College of Law, 1985; Order of the Coif, University of Cincinnati Law Review, 1984-1985

B.A., University of Cincinnati, 1982; *summa cum laude*

Jim Matthews' practice is concentrated in the area of litigation with a focus on the analysis and litigation of insurance policy coverage issues. He helps clients resolve disputes between policy holders and insurers over coverage provided by a variety of different types of insurance policies including commercial and business policies, director and officer liability policies, professional liability policies, automobile policies, disability policies, medical insurance policies and life insurance policies. These disputes range from personal, individual policy claims to large business policies covering mass tort liabilities or commercial liabilities. Jim's practice also includes review and analysis of policies and coverages before any claims or suits are filed to help clients decide whether they are adequately protected and have the right coverages before the problems arise.

AWARDS & RECOGNITIONS

- AV® Preeminent™ Peer Review Rated, Martindale-Hubbell
- Listed in *The Best Lawyers in America*
- Named to *Ohio Super Lawyers*, 2010-2012

NEWS

- Keating Muething & Klekamp Is Named the Top-Listed Law Firm in Ohio and Cincinnati in Numerous Areas of Law by The Best Lawyers in America 2013
- 48 Keating Muething & Klekamp Attorneys Recognized in 2012 Ohio Super Lawyers and Ohio Rising Stars

SPEAKING ENGAGEMENTS

- KMK Legal Update Seminar, Hyatt Regency Cincinnati, Regency South Foyer, December 12, 2012
- Anatomy of a D&O Claim, April 22, 2008
- Directors & Officers Insurance Seminar: "Dispelling the Myths", Keating Muething & Klekamp, October 4, 2007
- Insurance Coverage, National Business Institute, 1997

KMK Keating Muething & Klekamp PLL

James R. Matthews (Continued)

PROFESSIONAL AND COMMUNITY INVOLVEMENT

- Cincinnati Bar Association
- Ohio State Bar Association
- State Bar of Arizona
- Colerain Township, Juvenile Court Referee
- White Oak Christian Church, Legal Advisor

KMK Keating Muething & Klekamp PLL

Richard L. Creighton, Jr.

PARTNER

Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
TEL: (513) 579-6513
FAX: (513) 579-6457
rcreighton@kmklaw.com

PRACTICE AREAS

Antitrust

Class Action Litigation

Product Liability

Personal Injury / Wrongful Death

Appellate Law

Aviation Litigation

Arbitration & Mediation

Commercial & Securities Litigation

Intellectual Property Litigation

Evolving Media & Technology Team

BAR & COURT ADMISSIONS

Ohio

U.S. District Court, Southern District of Ohio

U.S. Court of Appeals, Sixth Circuit

U.S. District Court, Eastern District of Kentucky

U.S. Supreme Court

EDUCATION

J.D., St. Louis University School of Law, 1973; Editorial Board of Law Review, *cum laude*

B.A., Xavier University, 1970; *cum laude*

Rich Creighton is a trial attorney. His practice is concentrated in general civil litigation, with particular emphasis on complex business, antitrust and tort litigation, including class actions. In recent years, he has served as lead class counsel in several class action cases, including antitrust price-fixing cases.

In the business law arena, he has successfully represented a wide variety of clients in contract and/or fraud cases. Rich is also recognized for his experience in counseling clients and serving as trial counsel in matters involving libel, invasion of privacy and other First Amendment issues. A licensed instrument rated private pilot, he has successfully represented numerous clients in aviation related matters, including aviation crash cases and administrative proceedings before the Federal Aviation Administration. Prior to joining Keating Muething & Klekamp PLL, he served as a law clerk to the Honorable John W. Peck, United States Court of Appeals for the Sixth Circuit.

AWARDS & RECOGNITIONS

- Listed in *The Best Lawyers in America*
- AV® Preeminent™ Peer Review Rated, Martindale-Hubbell
- Named *Cincy Leading Lawyer*, 2005-2008

NEWS

- Keating Muething & Klekamp Is Named the Top-Listed Law Firm in Ohio and Cincinnati in Numerous Areas of Law by The Best Lawyers in America 2013
- KMK Attorney Richard Creighton Helps Secure $46.5 Million in International Antitrust Class Action Case Settlements

SPEAKING ENGAGEMENTS

- Understanding the Legalities of Social Media: Protecting Yourself & Your Company, October 27, 2009

KMK Keating Muething & Klekamp PLL

Richard L. Creighton, Jr. (Continued)

PUBLICATIONS

- Client Alert: KMK Forms Evolving Media & Technology Team to Help Clients Navigate Social Media's Legal and Business Challenges, May 4, 2010

MENTIONED & QUOTED

- KMK Forms Social Media Team, *Business Courier of Cincinnati*, May 4, 2010
- Home City Ice Tries to Move On from $9M Antitrust Fine, *Business Courier of Cincinnati*, March 19, 2010

PROFESSIONAL AND COMMUNITY INVOLVEMENT

- Aircraft Owners and Pilots Association
- American Bar Association
- Cincinnati Bar Association, Grievance Committee
- Federal Bar Association
- Lawyer-Pilots Bar Association
- Ohio State Bar Association
- Potter Stewart American Inn of Court
- American Bonanza Society, Member
- Cincinnati Athletic Club, President (2010) and Member of the Board of Trustees
- Experimental Aircraft Association, Member
- LifeLine Pilots, Volunteer Pilot

KMK Keating Muething & Klekamp PLL

Mark J. Chumley

PARTNER

Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
TEL: (513) 579-6563
FAX: (513) 579-6457
mchumley@kmklaw.com

PRACTICE AREAS

Labor Law Compliance

Labor / Management Relations

Employment Practices & Procedures

Employment Law Litigation

Evolving Media & Technology Team

BAR & COURT ADMISSIONS

Ohio

U.S. District Court, Southern District of Ohio

U.S. Court of Appeals, Sixth Circuit

U.S. Court of Appeals, Fifth Circuit

EDUCATION

J.D., University of Cincinnati College of Law, 1996; Order of the Coif

B.A., University of Michigan, 1989

Mark Chumley's practice is concentrated in labor and employment law. He has experience representing management in all aspects of labor and employment law. He has handled numerous cases before state and federal courts and state and federal civil rights agencies, including claims involving allegations of sexual harassment, race, age, gender and disability discrimination, wrongful discharge, FMLA and wage-hour claims and various common law claims. He also represents employers in labor arbitration, and is experienced in litigating the enforceability of arbitration agreements.

In addition to litigating employment claims, Mark is actively involved in advising clients on employee handbooks, policies and practices designed to avoid employment claims and minimize liability. He also advises clients on matters such as employee discipline, discharge, investigations of allegations of harassment, discrimination and employee misconduct, and issues arising from the use of e-mail and the internet. Mark serves as co-leader of the firm's multi-disciplinary Evolving Media & Technology Team.

AWARDS & RECOGNITIONS

- OSBA Certified Specialist in Labor & Employment Law
- Named to *Ohio Super Lawyers*, 2010
- Named to *Ohio Rising Star*, 2005, 2006

NEWS

- Keating Muething & Klekamp Attorney Mark J. Chumley OSBA Certified Specialist in Labor & Employment Law

SPEAKING ENGAGEMENTS

- How to Handle & to Respond to an EEOC Complaint Investigation, Employers Resourse Association Legal Breakfast Briefing, October 18, 2011
- Labor Law, Politics & Economics: Unraveling the Issues in the Boeing/NLRB Unfair Labor Practice Litigation, Cincinnati Bar Association, August 25, 2011

KMK Keating Muething & Klekamp PLL

Mark J. Chumley (Continued)

- Labor & Employment Management Roundtable: Protecting Your Company Against Expensive Wage and Hour Lawsuits and Audits, Keating Muething & Klekamp, Spring 2011
- Where Is This Wave Taking Us? An Update on Social Media, The American Institute of Architects, Cincinnati Chapter, August 12, 2010
- Where Is This Wave Taking Us? An Update on Social Media, July 20, 2010
- Where Is This Wave Taking Us?, GE Aviation Learning Centre, GE Aviation Employees and General Invitees, May 7, 2010

PUBLICATIONS

- Legal Alert: Court Awards Double Damages for Employer's Failure to Inform Employee How FMLA Leave Is Calculated, February 16, 2012
- Legal Alert: Ohio's New Military Family Leave Law Takes Effect on July 2, 2010, June 29, 2010
- Legal Alert: New Posting Requirements for Federal Contractors and Subcontractors, June 16, 2010
- Client Alert: KMK Forms Evolving Media & Technology Team to Help Clients Navigate Social Media's Legal and Business Challenges, May 4, 2010
- Legal Alert: Victory for Employers - Intentional Tort Statute Constitutional, March 24, 2010
- Legal Alert: The Americans with Disabilities Act Amendments Act of 2008, September 29, 2008
- E-mail – When to Retain and When to Purge, January 11, 2002
- "With E-Mail, Out of Sight Not Always Out of Mind," *Cincinnati Business Courier*, Vol. 19, No. 28 (November 1, 2002)
- "Discharging Employees - A Step-By-Step Guide for Ohio Employers," *The Ohio Labor Letter* Vol. IV, No. 3 (March 1999) (co-author)
- "Are Employers Liable for Retaliatory Harassment by Coworkers," *Personnel Law Update* Vol. 13, No. 6 (June 1998)

MENTIONED & QUOTED

- KMK Forms Social Media Team, *Business Courier of Cincinnati*, May 4, 2010

PROFESSIONAL AND COMMUNITY INVOLVEMENT

- Cincinnati Bar Association
- Ohio State Bar Association
- University of Cincinnati, Adjunct Professor of Employment Law

KMK Keating Muething & Klekamp PLL

MISTAKES AND ETHICS

December 12, 2012

Mark J. Chumley
Richard L. Creighton
James R. Matthews
F. Mark Reuter

KMK Keating Muething & Klekamp PLL

Ohio Rules of Professional Conduct

2

KMK Keating Muething & Klekamp PLL

RULE 1.1: COMPETENCE

- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation *reasonably* necessary for the representation.

3

KMK Keating Muething & Klekamp PLL

RULE 1.3: DILIGENCE

- A lawyer shall act with *reasonable* diligence and promptness in representing a client.

4

KMK Keating Muething & Klekamp PLL

RULE 1.4: COMMUNICATION

(a) A lawyer shall do all of the following:

(1) promptly inform the client of any decision or circumstance with respect to which the client's *informed consent* is required by these rules;

(2) *reasonably* consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client *reasonably* informed about the status of the matter;

(4) comply as soon as practicable with *reasonable* requests for information from the client;

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer *knows* that the client expects assistance not permitted by the Ohio Rules of Professional Conduct or other law.

5

KMK Keating Muething & Klekamp PLL

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:

(1) the representation of that client will be directly adverse to another current client;

(2) there is a *substantial* risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.

(b) A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule, unless all of the following apply:

(1) the lawyer will be able to provide competent and diligent representation to each affected client;

(2) each affected client gives *informed consent, confirmed in writing*;

(3) the representation is not precluded by division (c) of this rule.

(c) Even if each affected client consents, the lawyer shall not accept or continue the representation if either of the following applies:

(1) the representation is prohibited by law;

(2) the representation would involve the assertion of a claim by one client against another client represented by the lawyer in the same proceeding.

6

KMK Keating Muething & Klekamp PLL

RULE 5.1: RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

(a) [RESERVED]

(b) [RESERVED]

(c) A lawyer shall be responsible for another lawyer's violation of the Ohio Rules of Professional Conduct if either of the following applies:

(1) the lawyer orders or, with *knowledge* of the specific conduct, ratifies the conduct involved;

(2) the lawyer is a *partner* or has comparable managerial authority in the *law firm* or government agency in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and *knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take *reasonable* remedial action.

7

KMK Keating Muething & Klekamp PLL

RULE 5.2: RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Ohio Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Ohio Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's *reasonable* resolution of a question of professional duty.

8

KMK Keating Muething & Klekamp PLL

RULE 5.3: RESPONSIBILITES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed by, retained by, or associated with a lawyer, all of the following apply:

(a) a lawyer who individually or together with the other lawyers possesses managerial authority in a *law firm* or government agency shall make *reasonable* efforts to ensure that the *firm* or government agency has in effect measures giving *reasonable* assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make *reasonable* efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer;

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Ohio Rules of Professional Conduct if engaged in a by a lawyer if either of the following applies:

(1) the lawyer orders or, with the *knowledge* of the specific conduct, ratifies the conduct involved;

(2) the lawyer has managerial authority in the *law firm* or government agency in which the person is employed, or has direct supervisory authority over the person, and *knows* of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

9

KMK Keating Muething & Klekamp PLL

Our Vignette

- Fred Jackson, an experienced patent lawyer, joined Walker & Racine about a year ago and brought along his best patent client, Incinder Industries.
- Recently, Fred learned that the firm had missed a foreign patent filing deadline for Incinder.
- Because a foreign associate was involved and the firm leaders Fred needed to consult were busy it took more than six weeks to figure out why the deadline was missed, to determine that it could not be fixed and to decide what to do.

10

KMK Keating Muething & Klekamp PLL

Our Vignette

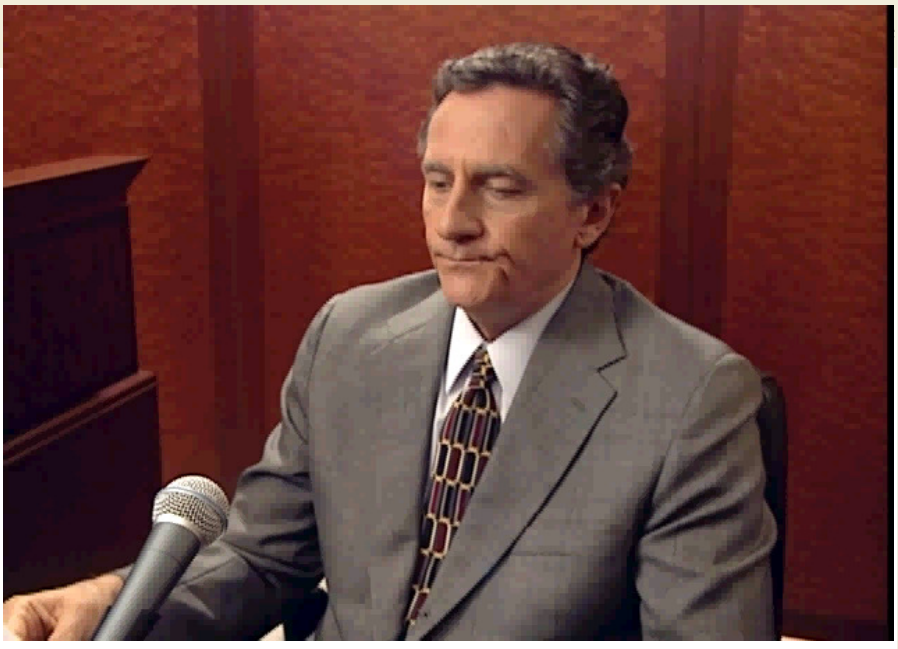
- When Fred finally told Incinder the client didn't take the news well. It filed a legal malpractice claim against Fred and his firm.
- Incinder claimed that Fred was negligent in failing to obtain patent protection in India for its incinerator technology and that Fred and his firm breached their fiduciary duty to Incinder by trying to cover up their mistake. It hired experts to testify that the missed deadline would cost Incinder tens of millions of dollars.
- At trial, Fred's testimony described the steps he had taken after discovering the missed deadline.
- What Fred didn't anticipate was how a skillful plaintiff's malpractice lawyer during cross examination could make his actions appear negligent or worse to a jury of non-lawyers.

11

KMK Keating Muething & Klekamp PLL

- What are Fred's duties?
- How does Fred's firm's prior work inform potential remedial actions?

13



KMK Keating Muething & Klekamp PLL

- What are Fred's duties to supervise attorneys, staff and systems?

15

KMK Keating Muething & Klekamp PLL

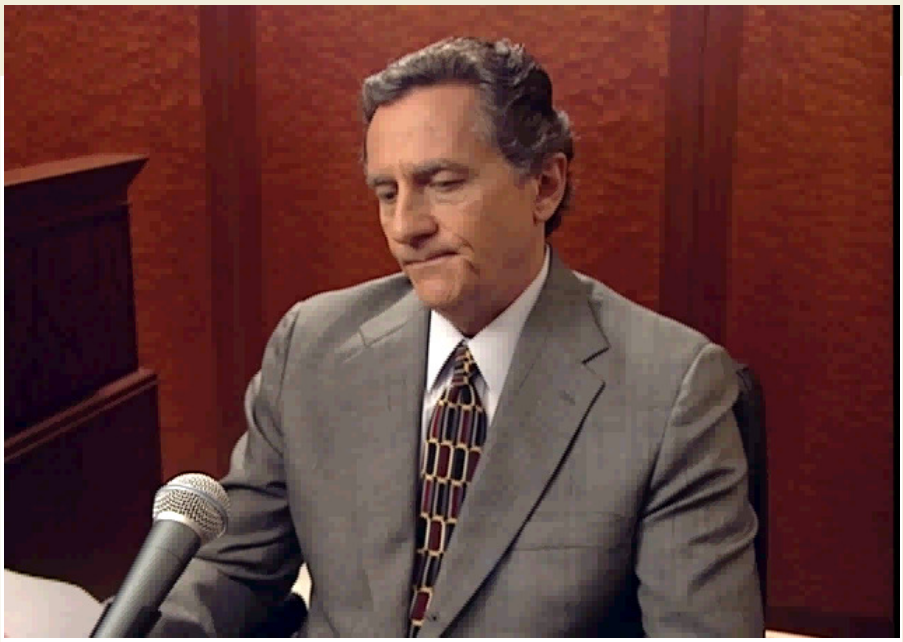
- What considerations relate to potential remedial actions?

17

KMK Keating Muething & Klekamp PLL

- Was Fred's innocent delay an intentional dereliction of his duty of candor?

19



KMK Keating Muething & Klekamp PLL

- What are Fred's duties of candor with respect to "not so big" mistakes?

21


KMK
Keating Muething & Klekamp PLL
Nothing in this presentation is intended to be legal advice. Please consult with counsel
of your choice with regards to any specific questions you may have.
© 2012 Keating Muething & Klekamp PLL. All Rights Reserved

KMK Keating Muething & Klekamp PLL

Joseph M. Callow, Jr.

PARTNER

Keating Muething & Klekamp PLL
One East Fourth Street
Suite 1400
Cincinnati, OH 45202
TEL: (513) 579-6419
FAX: (513) 579-6457
jcallow@kmklaw.com

The most difficult task as in-house counsel is locating and retaining an attorney that combines expertise, aggressiveness, responsiveness, cost effectiveness, and one who can communicate effectively with various levels of management. Joe and his complex litigation team possess all of those qualities and more when faced with retaining a firm and litigation team to best serve your organization. -- Chris Griffin, Griffin Industries, Inc.

PRACTICE AREAS

Antitrust

ERISA Litigation Defense Team

Class Action Litigation

Commercial & Securities Litigation

Intellectual Property Litigation

False Claims Act & Qui Tam Litigation

Financial Services Litigation

Product Liability

Mass Tort

Joe Callow helps clients manage litigation risk and litigation costs. When litigation arises, he handles cases on a national, regional, and local basis.

Joe primarily works on class action and complex litigation and also helps coordinate and manage litigation matters for clients. He has experience primarily in securities, ERISA, antitrust and general corporate and business litigation as well as in copyright infringement and intellectual property litigation; False Claims Act and qui tam litigation; product liability/tort litigation; and constitutional law.

Joe has represented Cincom Systems, Inc., Fifth Third Bank, Griffin Industries, LSI Industries, and other clients in litigation matters and has also represented Great American Advisors, Fifth Third Securities, Inc., and other clients in FINRA and AAA securities arbitrations.

REPRESENTATIVE MATTERS

- Local 295 et al. v. Fifth Third Bancorp, et al., and Dudenhoeffer, et al v. Fifth Third Bancorp, et al., Cons. Case No. 1:08-cv-421 (S.D. Ohio) (currently defending client in consolidated securities and ERISA "stock drop" class action litigation); see 2010 U.S. Dist. Lexis 131967 (Nov. 24, 2010) (granting Defendants' motion to dismiss ERISA claims); 731 F. Supp. 2d 689 (Aug. 10, 2010) (granting in part and denying in part Defendants' motion to dismiss)
- In re Processed Egg Products Antitrust Litig., Case No. 2:08-md-02002 (MDL No. 2002) (E.D. Pa.) (currently defending client in antitrust class action litigation)
- LaWarre v. Fifth Third Bank and Fifth Third Securities, Inc., Case No. A0909076 (Hamilton County) (obtained summary judgment on all claim assets related to investment losses)
- Green, et al. v. Griffin Industries, Inc., et al., Civ. Action No. 03CVS5048382F (State of Georgia, Fulton Cty., Sup. Ct.) (defended client in tort class action litigation)
- Cincom Systems, Inc. v. Novelis Corp., 581 F.3d 431 (6th Cir. Sept. 25, 2009) (affirming district court decision finding Novelis Corp. infringed Cincom's copyrighted materials)

KMK Keating Muething & Klekamp PLL

Joseph M. Callow, Jr. (Continued)

BAR & COURT ADMISSIONS

Ohio

U.S. District Court, Southern District of Ohio

U.S. District Court, Northern District of Ohio

U.S. Court of Appeals, Sixth Circuit

EDUCATION

J.D., University of Cincinnati College of Law, 1993; Order of the Coif; Law Review, Member 1991-1992 and Lead Article Editor, 1992-1993; Student Bar Association President, 1992-1993

B.A., Miami University, 1990; *cum laude*; college forensics; student government; peer advisor, Sigma Tau Gamma Fraternity

- Shirk et al. v. Fifth Third Bancorp et al., 2009 U.S. Dist. Lexis 90775 (S.D. Ohio Sept. 30, 2009) (summary judgment granted on ERISA excessive fees class action litigation); 71 Fed. R. Serv. 3d (Callaghan) 1199, 44 Employee Benefits Cas. (BNA) 2936 (Jan. 29, 2009) (summary judgment granted on ERISA "stock drop" class action litigation)
- Segal v. Fifth Third Bank N.A., 581 F. 3d 305 (6th Cir. 2009) (dismissal of class action complaint affirmed based on SLUSA preemption)
- National Union Fire Ins. Co. v. Wuerth, et al., 2009 Ohio 3901 (S.D. Ohio July 29, 2009) (answering certified question from Sixth Circuit Court of Appeals)
- Exhaust Unlimited et al. v. Cintas Corp. et al., 223 F.R.D. 506 (S.D. Ill. 2004); 326 F. Supp. 2d 928 (S.D. Ill. 2004) (defended client in antitrust class action litigation; defeated class certification)

AWARDS & RECOGNITIONS

- Named the "Cincinnati *Best Lawyers'* Antitrust Litigation Lawyer of the Year," 2012
- Listed in *The Best Lawyers in America*
- Named to *Ohio Super Lawyers*
- AV® Preeminent™ Peer Review Rated, Martindale-Hubbell
- Cincinnati Academy of Leadership for Lawyers (CALL), Class XI

NEWS

- Keating Muething & Klekamp Is Named the Top-Listed Law Firm in Ohio and Cincinnati in Numerous Areas of Law by The Best Lawyers in America 2013
- 48 Keating Muething & Klekamp Attorneys Recognized in 2012 Ohio Super Lawyers and Ohio Rising Stars
- Four Keating Muething & Klekamp Attorneys Named Best Lawyers' 2012 Lawyers of the Year
- Keating Muething & Klekamp Is the Top-Listed Law Firm in Ohio and in Cincinnati in a Number of Areas According to The Best Lawyers in America 2012
- Keating Muething & Klekamp only law firm ranked #1 in Cincinnati in Corporate Law, Land Use and Zoning Law, and Municipal Law by The Best Lawyers in America 2011
- KMK Wins Appellate Court Decision that Will Impact Treatment of IP Rights in Software License Agreements

SPEAKING ENGAGEMENTS

- KMK Legal Update Seminar, Hyatt Regency Cincinnati, Regency South Foyer, December 12, 2012

KMK Keating Muething & Klekamp PLL

Joseph M. Callow, Jr. (Continued)

- Ten Recent Decisions Every In-house Lawyer Should Know, 2010
- Emails – A Litigator's Best Friend and Worst Enemy on a Hard Drive Near You, 2010, 2008
- E-Discovery, 2007, 2006, 2005, 2004
- Fifty Minutes on Class Actions, 2007
- Taking and Defending Depositions, 2004

PUBLICATIONS

- 10 Ways to Reduce Litigation Costs, *The CBA Report*, January 2, 2008
- The Class Action Fairness Act of 2005: Overview and Analysis, *The Federal B*ar Vol. 52, May 2005
- An Overview of the Class Action Fairness Act of 2005, *The CBA Report*, May 2005
- Cut-Throat Competition in the Friendly Skies:, *Alaska Airlines v. United Airlines*, 948 f.2d 536 (9th Cir. 1991), cert. denied, 112 S. Ct. 1603, 61 U. Cin. L. Rev. 681
- In Search of Library Horror Stories: an Examination of Research Critical to Public Address Events in Forensics, *National Forensic Journal*, Vol. 8:1, Spring 1990

MENTIONED & QUOTED

- Class Suit Alleging Bank Breached Duties Is Barred by SLUSA, Sixth Circuit Decides, *BNA Class Action Litigation Report*, November 13, 2009
- Court Tosses Fifth Third Workers' Fees Claim Filed Shortly After Limitations Period Expired, *BNA Pension and Benefits Daily*, October 6, 2009
- Employer Stock: Fifth Third's Retention of Employer Stock Wasn't a Fiduciary Breach, Court Decides, *BNA Pension and Benefits Daily*, March 3, 2009

PROFESSIONAL AND COMMUNITY INVOLVEMENT

- American Bar Association
- Federal Bar Association
- Ohio State Bar Association
- Cincinnati Bar Association
- Seven Hills Middle School, Athletic Booster

12/10/2012

KMK | Keating Muething & Klekamp PLL

TEN RECENT DECISIONS EVERY IN-HOUSE LAWYER SHOULD KNOW

December 2012

Joseph M. Callow, Jr.
(513) 579-6419
jcallow@kmklaw.com

KMK | Keating Muething & Klekamp PLL

1. *Behrend v. Comcast Corp*., No. 11-864, 2012 U.S. LEXIS 4754 (June 25, 2012).

- Revisiting *Wal-mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).
- In *Dukes*, the Supreme Court clarified that "rigorous analysis" will "entail some overlap with the merits of the plaintiff's underlying claim" and confirmed that the district court must consider the merits of the claims in deciding class certification even if the plaintiff will be required to prove the same proposition of law at trial.
- The issue in *Comcast*: "[w]hether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."

KMK | Keating Muething & Klekamp PLL

1. *Behrend v. Comcast Corp*., No. 11-864, 2012 U.S. LEXIS 4754 (June 25, 2012).

- *In re Zurn Pex Plumbing Products Liab. Litig*., 644 F.3d 604 8th Cir. 2011), *reh'g denied*, 2011 U.S. App. Lexis 26271 (8th Cir. 2011) (allowing a focused *Daubert* analysis to scrutinize the reliability of expert testimony).
- *Ellis v. Costco*, 657 F.3d 970 (9th Cir. 2011) (applying full *Daubert* analysis in class certification proceeding.).
- *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802 (7th Cir. 2012) (court should have ruled on plaintiffs' Daubert motion before deciding the class certification issue because of the importance of the expert testimony on the issue).

KMK | Keating Muething & Klekamp PLL

1. *Behrend v. Comcast Corp*., No. 11-864, 2012 U.S. LEXIS 4754 (June 25, 2012).

- *Mazza v. American Honda*, 666 F.3d 581 (9th Cir. 2012) (reversing district court's certification of national class action).
- *McReynolds v. Merrill Lynch*, 672 F.3d 482 (7th Cir. 2012) (overrules district court denial of class certification; finds issues of liability can be certified even if damages are individualized).
- *Agne v. Papa John's Int'l, Inc*., 2012 U.S. LEXIS Dist. 162088 (W.D. Wash. Nov. 9, 2012) (certification of national class related to unsolicited text messaging).

KMK | Keating Muething & Klekamp PLL

1. *Behrend v. Comcast Corp*., No. 11-864, 2012 U.S. LEXIS 4754 (June 25, 2012).

Two additional cases to watch:

Amgen, Inc. v. Connecticut Retirement Plans & Trust Funds, S. Ct. Case No. 11-1085 (appeal from 660 F.3d 1170 (9th Cir. 2011)) (argued Nov. 5, 2012) ("Whether, in a misrepresentation case under SEC rule 10b-5, the district court must require proof of materiality before certifying a plaintiff case based on the fraud-on-the-market theory" and "[w]hether, in such a case, the district court must allow the defendants to present evidence rebutting the applicability of the fraud-on-the-market theory before certifying a plaintiff class based on that theory.").

Ross v. RBS Citizens, S.Ct. Case No. 12-165 (appeal from 667 F.3d 900 (7th Cir. 2012) (awaiting decision on petition for certiorari)(discussing commonality post-*Dukes*).

KMK | Keating Muething & Klekamp PLL

1. *Behrend v. Comcast Corp*., No. 11-864, 2012 U.S. LEXIS 4754 (June 25, 2012).

- *Young v. Nationwide Mut. Ins. Co*., 2012 U.S. App. Lexis 18625 (6th Cir. Sept. 5, 2012) (Stranch, J.)(affirming class certification post-*Dukes*).

- *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig*., 678 F.3d 409 (6th Cir. 2012) (Stranch, J.)(affirming class certification post-*Dukes*).

KMK | Keating Muething & Klekamp PLL

2. *Genesis Healthcare Corp. v. Symczyk*, No. 11-1059, 2012 U.S. LEXIS 4744 (June 25, 2012).

- The pick off.
- "Whether a case becomes moot, and beyond the judicial power of Article III, when the lone plaintiff receives an offer from the defendants to satisfy all of the plaintiff's claims."
- FLSA case which may also have class action implications. *Symczyk*, 656 F.3d 189, 194 (3d Cir. 2011) ("[E]xpedient adoption of Rule 23 terminology with no mooring on the statutory text of [FLSA] may have injected a measure of confusion into the wider body of FLSA jurisprudence.").

KMK | Keating Muething & Klekamp PLL

2. *Genesis Healthcare Corp. v. Symczyk*, No. 11-1059, 2012 U.S. LEXIS 4744 (June 25, 2012).

- *Damasco v. Clearwire Corp*., 662 F.3d 891 (7th Cir. 2011) (settlement offer of full statutory damages, made pursuant to state law and not FRCP 68, moots case and required dismissal, even though the plaintiff filed a class action complaint and had not moved for class certification).
- *Zinni v. ER Solutions, Inc*., 692 F.3d 1162 (11th Cir. 2012) (settlement offer for full amount of statutory damages did not moot class action claims).
- *Hrivnak v. NCO Portfolio Mgmt,* 723 F. Supp. 2d 1020 (N.D. Ohio 2010), issue certified to Sixth Circuit on interlocutory appeal, 2010 U.S. Dist. Lexis 135426 (N.D. Ohio Dec. 26, 2010). Sixth Circuit oral argument was June 8, 2012.

KMK | Keating Muething & Klekamp PLL

3. *Standard Fire Ins. Co. v. Knowles*, 2011 U.S. Dist. LEXIS 139077, *cert. granted*, No. 11-1450, 2012 U.S. LEXIS 5088 (August 31, 2012).

- CAFA jurisdiction
- Can a purported lead plaintiffs' stipulation or allegation that he/she will seek less than $5 million in damages bind absent class members and defeat CAFA removal?
- Potential follow up to *Smith v. Bayer Corp*., 131 S. Ct. 2368 (2011)

KMK | Keating Muething & Klekamp PLL

4. & 5. *Da Silva Moore,* 2012 U.S. Dist. LEXIS 23350 (S.D.N.Y. Feb. 24, 2012) and *Chin v. Port Auth. of N.Y. & N. J.*, 685 F.3d 135 (2d Cir. July 10, 2012).

- Welcome to the world of TAR.
  - *Da Silva Moore v. Publicis Groupe & MSC Group,* 2012 U.S. Dist. LEXIS 23350 (S.D.N.Y. Feb. 24, 2012).
  - *Global Aerospace Inc., et al, v. Landow Aviation, L.P. dba Dulles,* No. CL 61040, 2012 Va. Cir. LEXIS 50 (Apr. 23, 2012).
  - *Kleen Products v. Packaging Corp. of America*, No. 10-C-5711 (N.D. Ill.)
  - *In Re: Actos (Pioglitazone) Products Liability Litigation* , MDL Docket No. 6:11-MD-2299 (W.D. Lou.)
  - *EORHB, Inc., et al. v. HOA Holdings, Inc., et al.*, No. 7409-VCL, Del. Ch. Oct. 15, 2012).
  - *National Day Laborer Organizing Network et al. v. United States Immigration and Customs Enforcement Agency, et al.*, No. 10-3488, 2012 U.S. Dist. LEXIS 97863 (S.D.N.Y. July 13, 2012).

KMK | Keating Muething & Klekamp PLL

6. *EEOC v. Original Honeybaked Ham Co. of Georgia, Inc.*, Case No. 11-cv-02560-MSK-MEH, 2012 U.S. Dist. LEXIS 160285 (D. Colo. Nov. 7, 2012)

- Discoverability of text messages, social media accounts and emails
- "If all of this information was contained on pages filed in the "Everything About Me" folder, it would need to be produced. Should the outcome be different because it is on one's Facebook account? There is a strong argument that storing such information on Facebook and making it accessible to others presents an even stronger case for production, at least as it concerns any privacy objection. It was the claimants (or at least some of them) who, by their own volition, created relevant communications and shared them with others."

KMK | Keating Muething & Klekamp PLL

6. *EEOC v. Original Honeybaked Ham Co. of Georgia, Inc.*, Case No. 11-cv-02560-MSK-MEH, 2012 U.S. Dist. LEXIS 160285 (D. Colo. Nov. 7, 2012)

- The court ordered that the plaintiff-intervenor and the class members shall produce to the special master:

  (1) any cell phone used to send or receive text messages from January 1, 2009 to the present;

  (2) all necessary information to access any social media websites used by such person for the time period January 1, 2009 to present; and

  (3) all necessary information to access any email account or web blog or similar/related electronically accessed internet or remote location used for communicating with others or posting communications or pictures, during the time period January 1, 2009 to present.

KMK | Keating Muething & Klekamp PLL

7. *Boeynaems v. LA Fitness Int'l, LLC*, Case No. 10-2326, 11-2644, 2012 U.S. Dist. LEXIS 115272 (E.D. Pa. Aug. 16, 2012).

- ESI cost sharing / asymmetrical discovery
- Extensive survey of cases and articles discussing ESI cost sharing/cost shifting
- The metaphor of a "discovery fence" – "The facts that are within the discovery fence are discoverable, and relevant materials should be produced; the facts that are outside the fence are not discoverable and documents or information need not be produced in discovery."

KMK | Keating Muething & Klekamp PLL

7. *Boeynaems v. LA Fitness Int'l, LLC*, Case No. 10-2326, 11-2644, 2012 U.S. Dist. LEXIS 115272 (E.D. Pa. Aug. 16, 2012).

- "The Court concludes that where (1) class certification is pending and (2) the plaintiffs have asked for very extensive discovery, compliance with which will be very expensive, that absent compelling equitable circumstances to the contrary, the plaintiffs should pay for the discovery they seek. If the plaintiffs have the confidence in their contention that the Court should certify the class, then the plaintiffs should have no objection to making an investment. Where the burden of discovery expense is almost entirely on the defendant, principally because the plaintiffs seek class certification, then the plaintiffs should share the costs."

KMK | Keating Muething & Klekamp PLL

8. *Acordia of Ohio LLC v. Fishel*, 2012 Ohio 4648 (Ohio Oct. 11, 2012) (*Fishel II*) and 2012 Ohio 2297 (Ohio May 24, 2012 (*Fishel I*).

- Enforceability of Noncompete Agreements in Ohio after a merger
- *Fishel I* (4-3 decision) – merged company was precluded from enforcing its predecessor's non-compete agreements because agreements did not contain language regarding successor corporations and because the predecessor company "ceased to exist" after the merger.

KMK | Keating Muething & Klekamp PLL

8. *Acordia of Ohio LLC v. Fishel*, No. 2011-0163, 2012 Ohio 4648 (Ohio Oct. 11, 2012) (*Fishel II*) and No. 2011-0163, 2012 Ohio 2297 (Ohio May 24, 2012 (*Fishel I*).

- *Fishel II* (6-1 decision) – *Fishel I* was reversed; the court misread its precedent; a company is not erased from existence following a merger but is absorbed such that the surviving company can enforce the noncompete agreement "as if the resulting company had stepped into the shoes of the absorbed company."

KMK | Keating Muething & Klekamp PLL

9. *DeVries Dairy LLC v. White Eagle Cooperative Ass'n Inc.*, 132 Ohio St. 3d 516 (Aug. 28, 2012).

- Certified question from district court: "Under the applicable circumstances, does Ohio recognize a cause of action for tortious acts in concert under the Restatement (2d) of Torts, 876?
- Answer – "negative."

KMK | Keating Muething & Klekamp PLL

10. There's always one…

?

KMK | Keating Muething & Klekamp PLL

Questions?

Joseph M. Callow, Jr.
(513) 579-6419
jcallow@kmklaw.com

Analysis
As of: Dec 10, 2012

Comcast Corporation, et al., Petitioners v. Caroline Behrend, et al.

No. 11-864.

SUPREME COURT OF THE UNITED STATES

183 L. Ed. 2d 673*; *2012 U.S. LEXIS 4754*; *80 U.S.L.W. 3707

June 25, 2012, Decided

SUBSEQUENT HISTORY: Motion granted by *Comcast Corp. v. Behrend, 184 L. Ed. 2d 14, 2012 U.S. LEXIS 7580 (U.S., 2012)*

PRIOR HISTORY: *Behrend v. Comcast Corp., 655 F.3d 182, 2011 U.S. App. LEXIS 17524 (3d Cir. Pa., 2011)*

JUDGES: [**1] Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan.

OPINION

[*673] Petition for writ of certiorari to the United States Court of Appeals [*674] for the Third Circuit granted limited to the following question: "Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."

Caution
As of: Dec 10, 2012

Genesis HealthCare Corporation, et al., Petitioners v. Laura Symczyk.

No. 11-1059.

SUPREME COURT OF THE UNITED STATES

183 L. Ed. 2d 674*; *2012 U.S. LEXIS 4744*; *80 U.S.L.W. 3707

June 25, 2012, Decided

SUBSEQUENT HISTORY: US Supreme Court certiorari granted by *Genesis HealthCare Corp. v. Symczyk, 2012 U.S. LEXIS 8712 (U.S., Nov. 13, 2012)*

PRIOR HISTORY: *Symczyk v. Genesis Healthcare Corp., 656 F.3d 189, 2011 U.S. App. LEXIS 18114 (3d Cir. Pa., 2011)*

JUDGES: [*1] Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan.

OPINION

Motion of Chamber of Commerce of the United States of America, et al. for leave to file a brief as amici curiae granted. Motion of DRI - The Voice of the Defense Bar for leave to file a brief as amicus curiae granted. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit granted.

Caution
As of: Dec 10, 2012

GREG KNOWLES, Individually and as Class Representative on Behalf of all Similarly Situated Persons within the State of Arkansas, PLAINTIFF v. THE STANDARD FIRE INSURANCE COMPANY, DEFENDANT

No. 4:11-cv-04044

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, TEXARKANA DIVISION

2011 U.S. Dist. LEXIS 139077

December 2, 2011, Decided
December 2, 2011, Filed

SUBSEQUENT HISTORY: Petition granted by *Std. Fire Ins. Co. v. Knowles, 2012 U.S. LEXIS 5088 (U.S., Aug. 31, 2012)*

CASE SUMMARY:

OVERVIEW: The court found that plaintiff has shown to a legal certainty that the aggregate damages claimed on behalf of the putative class shall in good faith not exceed the state court's jurisdictional limitation of $5,000,000. As the master of his complaint, plaintiff could choose what claims to bring and what claims to leave out. Defendant failed to cite any authority which stated that a plaintiff could not seek to recover damages for a period of time shorter than the statute of limitations provides. Nor was the court persuaded that plaintiff's temporal limitation on recovery evidenced his bad faith.

OUTCOME: The motion to remand was granted.

LexisNexis(R) Headnotes

Civil Procedure > Removal > Basis > Diversity of Citizenship

[HN1] When analyzing the propriety of removal of a case to federal court, the removing party has the burden of showing that jurisdiction in the federal courts is proper and the requisite amount in controversy has been met. Federal courts must strictly construe the federal removal statute and resolve any ambiguities about federal jurisdiction in favor of remand.

Civil Procedure > Class Actions > Class Action Fairness Act

[HN2] The Class Action Fairness Act of 2005 (CAFA) operates to grant federal district courts original jurisdiction over class actions where there is diversity of citizenship between the plaintiff and defendant and when the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs. *28 U.S.C.S. §*

1332(d)(2). The claims of the potential class members must be aggregated to determine whether the jurisdictional minimum has been met. *§ 1332(d)(6)*. The guiding principal courts follow in establishing whether or not removal is proper is that the plaintiff is the master of his complaint, even in class action cases. Therefore, in determining the amount in controversy, a court looks first to the complaint. If a plaintiff does not desire to try his case in the federal court, he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove.

Civil Procedure > Removal > Basis > Diversity of Citizenship

[HN3] Generally, the sum claimed by the plaintiff controls if the claim is apparently made in good faith.

Civil Procedure > Removal > Basis > Diversity of Citizenship
Civil Procedure > Removal > Postremoval Remands > Jurisdictional Defects

[HN4] To defeat remand, a defendant has the burden of showing by a preponderance of the evidence that the amount in controversy exceeds the federal court's minimum threshold for jurisdiction, which is $5 million in the aggregate. The court must engage in a "fact intensive" inquiry to determine whether the preponderance of the evidence standard has been met. Mere speculation or conjecture on the part of the defendant as to the amount in controversy will not be sufficient to meet the preponderance standard.

Civil Procedure > Removal > Basis > Diversity of Citizenship
Civil Procedure > Class Actions > Class Action Fairness Act

[HN5] Once the preponderance standard is met and the defendant establishes enough detail to meet the jurisdictional requirement for the amount in controversy, the court turns its attention to the plaintiff, who must establish "to a legal certainty" that his claim is actually under the $5 million threshold. Any doubt as to federal jurisdiction must be resolved in favor of remand.

Contracts Law > Contract Conditions & Provisions > General Overview

[HN6] The law in the Fifth Circuit is clear that a binding stipulation sworn by a plaintiff in a purported class action will bar removal from state court if the stipulation limits damages to the state jurisdictional minimum.

Civil Procedure > Removal > Basis > Diversity of Citizenship
Contracts Law > Contract Conditions & Provisions > General Overview

[HN7] *Ark. Code Ann. § 16-63-211(b)* states that a declaration is binding on the plaintiff with respect to the amount in controversy unless the plaintiff subsequently amends the complaint to pray for damages in an amount which exceeds the jurisdictional limits of the court.

COUNSEL: [*1] For Greg Knowles, Individually and as Class Representative on Behalf of all Similarly Situated Persons, Plaintiff: Brad E. Seidel, LEAD ATTORNEY, Nix, Patterson & Roach, L.L.P., Daingerfield, TX; D. Matt Keil, LEAD ATTORNEY, Attorney at Law, Texarkana, AR; John C. Goodson, LEAD ATTORNEY, Keil & Goodson, Texarkana, AR; Christopher R. Johnson, Nix Patterson Roach, Austin, TX; Michael B Angelovich, Nix, Patterson & Roach, LLP, Austin, TX.

For Standard Fire Insurance Company, The, Defendant: Lyn Peeples Pruitt, LEAD ATTORNEY, Mitchell, Williams, Selig, Gates & Woodyard, Little Rock, AR.

JUDGES: P.K. HOLMES, III, UNITED STATES DISTRICT JUDGE.

OPINION BY: P.K. HOLMES, III

OPINION

MEMORANDUM OPINION AND ORDER

Currently before the Court are Plaintiff's Motion to Remand and supporting Memorandum of Law (Docs. 6-7) and Defendant's Response (Doc. 9). Plaintiff disputes the existence of diversity jurisdiction in this case, as he contends that the amount in controversy does not exceed the sum or value of $5,000,000, pursuant to the jurisdictional requirements described in the Class Action Fairness Act of 2005 ("CAFA"), *28 U.S.C. § 1332 (d)*. For the reasons reflected herein, Plaintiff's Motion to Remand (Doc. 6) is **GRANTED**, and [*2] this case is remanded to the Circuit Court of Miller County,

Arkansas.

I. Background

On April 13, 2011, Plaintiff Greg Knowles filed a putative class action complaint in the Circuit Court of Miller County, Arkansas, against Defendant The Standard Fire Insurance Company alleging breach of contract due to Defendant's underpayment of claims for loss or damage to real property made pursuant to certain homeowners insurance policies. *See* Doc. 2, ¶ 32. Plaintiff's home was damaged by hail on or about March 10, 2010, and thereafter, Plaintiff requested payment from Defendant for this damage. Plaintiff alleges that under the homeowners policy of insurance issued by Defendant, Plaintiff and others similarly situated were entitled to be fully reimbursed for such loss or damage but were not fully reimbursed. Specifically, Plaintiff asserts that Defendant failed to pay for charges reasonably associated with retaining the services of a general contractor to repair or replace damaged property. These charges, known as general contractors' overhead and profit ("GCOP"), comprise an extra 20% fee routinely assessed by contractors when repairing damaged property. *Id.* at ¶¶ 1-4. According to Plaintiff, Defendant [*3] fraudulently concealed its obligation to pay GCOP charges and forced Plaintiff to bear this cost and suffer the ensuing damage. *Id.* at ¶¶ 33-45. The purported class of persons injured by Defendant's alleged breach of contract for failure to pay GCOP on homeowners insurance contracts includes "hundreds, and possibly thousands, of individuals geographically dispersed across Arkansas. . ." *Id.* at ¶ 26.

Defendant removed this case to federal court on May 18, 2011, arguing that Plaintiff fraudulently framed the definition of the purported class in order to limit recovery to two years, rather than the five years available under the applicable statute of limitations. Defendant also asserted that although Plaintiff signed a stipulation limiting his and the purported class's recovery, Plaintiff's counsel failed to sign a stipulation that they would not seek or accept an award of attorneys' fees that would allow the total amount in controversy to exceed state court jurisdictional limits. Moreover, Defendant maintained that Plaintiff lacked the authority to place a limit on recovery that would bind the other class members.

On June 6, 2011, Plaintiff moved to remand the case back to state court, [*4] citing in support of his motion his binding stipulation executed prior to removal, which expressly limited his and the class's recovery to within state jurisdictional limits. Plaintiff also asserted that as master of his Complaint, he had the right to limit his claims so as to bring this action in the forum of his choice. *See* Doc. 7, pp. 5-6.

II. Legal Standard

[HN1] When analyzing the propriety of removal of a case to federal court, the removing party has the burden of showing that jurisdiction in the federal courts is proper and the requisite amount in controversy has been met. *Hatridge v. Aetna Cas. & Sur. Co., 415 F.2d 809, 814 (8th Cir. 1969)*. Federal courts must strictly construe the federal removal statute and resolve any ambiguities about federal jurisdiction in favor of remand. *Transit Casualty Co. v. Certain Underwriters at Lloyd's of London, 119 F.3d 619, 625 (8th Cir. 1997)*.

[HN2] CAFA operates to grant federal district courts original jurisdiction over class actions where there is diversity of citizenship between the plaintiff and defendant and when "the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." *28 U.S.C. § 1332 (d)(2)*. The claims [*5] of the potential class members must be aggregated to determine whether the jurisdictional minimum has been met. *28 U.S.C. § 1332 (d)(6)*. The guiding principal courts follow in establishing whether or not removal is proper is that the plaintiff is the master of his complaint, even in class action cases. *Bell v. Hershey Co., 557 F.3d 953, 956 (8th Cir. 2009)*. Therefore, in determining the amount in controversy, a court looks first to the complaint. "If [a plaintiff] does not desire to try his case in the federal court, he may resort to the expedient of suing for less than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove." *St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 294, 58 S. Ct. 586, 82 L. Ed. 845 (1938)*.

[HN3] Generally, "the sum claimed by the plaintiff controls if the claim is apparently made in good faith." *Id. at 289*. Although Plaintiff in the instant case does not claim to be owed a specific dollar amount in damages, he does impose a limitation on the amount he and the purported class may recover. In his Complaint, Plaintiff states that "neither Plaintiff's nor any individual Class Member's claim is equal to or greater than seventy-five thousand [*6] dollars ($75,000), inclusive of costs and attorneys fees, individually or on behalf of any Class Member. . . Moreover, the total aggregate damages of the

Plaintiff and all Class Members, inclusive of costs and attorneys' fees, are less than five million dollars ($5,000,000), and the Plaintiff and Class stipulate they will seek to recover total aggregate damages of less than five million dollars ($5,000,000)." Doc. 2, ¶11.

Exhibit A attached to the Complaint is a "Sworn and Binding Stipulation," signed by Plaintiff, affirming that he will not at any time during the pendency of the case "seek damages for myself or any other individual class member in excess of $75,000 (inclusive of costs and attorneys' fees) or seek damages for the class as alleged in the complaint to which this stipulation is attached in excess of $5,000,000 in the aggregate (inclusive of costs and attorneys' fees)." *Id.* at p. 16.

[HN4] To defeat remand, a defendant has the burden of showing by a preponderance of the evidence that the amount in controversy exceeds the federal court's minimum threshold for jurisdiction, which is $5 million in the aggregate. *In re Minn. Mut. Life Ins. Co. Sales Practices Litig., 346 F.3d 830, 834 (8th Cir. 2003)*. [*7] The Court must engage in a "fact intensive" inquiry to determine whether the preponderance of the evidence standard has been met. *Bell, 557 F.3d at 959*. Mere speculation or conjecture on the part of the defendant as to the amount in controversy will not be sufficient to meet the preponderance standard. *See, e.g., Thomas v. Southern Pioneer Life Ins. Co., 2009 U.S. Dist. LEXIS 122141, 2009 WL 4894695, *2 (E.D. Ark. Dec. 11, 2009)*; *Nowak v. Innovative Aftermarket Sys., 2007 U.S. Dist. LEXIS 62360, 2007 WL 2454118 (E.D. Mo. Aug. 23, 2007)*.

[HN5] Once the preponderance standard is met and the defendant establishes enough detail to meet the jurisdictional requirement for the amount in controversy, the court turns its attention to the plaintiff, who must establish "to a legal certainty" that his claim is actually under the $5 million threshold. *Bell, 557 F.3d at 956* (*citing St. Paul Mercury, 303 U.S. at 290*). Any doubt as to federal jurisdiction must be resolved in favor of remand. *In re Prempro Prods. Liab. Litig., 591 F.3d 613, 620 (8th Cir. 2010)*.

III. Discussion

A. Defendant's Legal Burden: Preponderance of the Evidence

Defendant has presented evidence to the Court that the class as defined in Plaintiff's Complaint has an actual amount in controversy [*8] of slightly over $5 million (*see* Doc. 9-9). [1] Defendant arrives at that figure by calculating the GCOP at 20% of the total damages purportedly owed to class members over the course of two years. This GCOP total for the proposed class is $3,054,961. *See* Doc. 1, ¶ 17. Added to that are a 12% statutory penalty for breach of contract and an award of attorneys' fees amounting to 40% of the presumed recovery, plus pre-judgment interest. Defendant arrives at the 40% figure on attorneys' fees by referencing a similar case in which the Arkansas Court of Appeals calculated an attorney fee award in an insurance case using 40% of the damages awarded. *See* Doc. 9, pp. 9-10. When Defendant's projection for the cost of Plaintiff's attorneys' fees is added in, this brings the total award up to $5,024,150, which exceeds the statutory maximum for state court jurisdiction by $24,150.

1 Defendant submitted alternate sets of data to the Court: one for a class spanning two years of recovery, and one for a class spanning five years of recovery. As explained in further detail below, the Court finds that Plaintiff has the right to limit the class to a two-year period of recovery for purposes of calculating damages. [*9] Accordingly, the data referred to in the Court's discussion pertains to the two-year period set forth in Plaintiff's Complaint.

The affidavit of Brian N. Harton, Director of Product Management for Defendant, attests that the damages total submitted, excluding the penalty and attorneys' fees, is true and correct. Doc. 9-9. Overall, considering the briefing and evidence before the Court, Defendant's calculations do not appear to be mere speculation or conjecture. Moreover, Plaintiff has failed to counter Defendant's estimates with evidence or argument. Therefore, the Court considers Defendant to have satisfied its initial burden of proving by a preponderance of the evidence that the actual amount in controversy reaches, if not exceeds, the federal court's minimum threshold for jurisdiction pursuant to CAFA.

B. Plaintiff's Legal Burden: Legal Certainty

Now that Defendant has met its burden of proof, the burden shifts to Plaintiff to prove to a legal certainty that his claim falls under the $5 million threshold for remand to state court. The question is whether a plaintiff may meet his burden of proof by stipulating at the time the

complaint is filed that he will not seek more than the federal [*10] jurisdictional minimum for himself and the putative class. Even though the *Bell* court did not specifically reference the legal certainty burden, it did conclude that a clear stipulation would meet the requirements for defeating removal. It follows, therefore, that if a stipulation is legally binding and made in good faith, it can satisfy the plaintiff's legal certainty burden and defeat removal. *Bell, 557 F.3d at 956*; *see also Tuberville v. New Balance Athletic Shoe, Inc., 2011 U.S. Dist. LEXIS 45894, 2011 WL 1527716, *3 (W.D. Ark., April 21, 2011)*.

1. Plaintiff's Stipulation

[HN6] The law in this circuit is clear that a binding stipulation sworn by a plaintiff in a purported class action will bar removal from state court if the stipulation limits damages to the state jurisdictional minimum. *Bell, 557 F.3d at 958*, *citing De Aguilar v. Boeing Co., 47 F.3d 1404, 1412 (5th Cir. 1995)* ("In order to ensure that any attempt to remove would have been unsuccessful, [plaintiff] Bell could have included a binding stipulation with his petition stating that he would not seek damages greater than the jurisdictional minimum upon remand"). Various federal courts in Arkansas, including this one, have remanded several purported class [*11] actions to state court using the guideline set forth in *Bell* regarding the effect of a plaintiff's binding stipulation. *See, e.g., Thompson v. Apple, Inc., 2011 U.S. Dist. LEXIS 73861, 2011 WL 2671312 (W.D. Ark. July 8, 2011)*; *Tomlinson v. Skechers U.S.A., Inc., Case No. 5:11-CV-05042-JLH, 2011 U.S. Dist. LEXIS 142862 (W.D. Ark. May 25, 2011)*; *Murphy v. Reebok Int'l, Ltd., 2011 U.S. Dist. LEXIS 46983, 2011 WL 1559234 (E.D. Ark. April 22, 2011)*; *Tuberville v. New Balance Athletic Shoe, Inc., 2011 U.S. Dist. LEXIS 45894, 2011 WL 1527716 (W.D. Ark. April 21, 2011)*.

Defendant claims that Plaintiff's sworn stipulation is invalid for two reasons. First, Defendant contends that the wording of the stipulation telegraphs Plaintiff's desire to circumvent CAFA and receive an award in excess of the $5 million threshold. Plaintiff's stipulation states that he "will not. . . seek" damages in excess of $5 million in the aggregate. This language does not adequately bind Plaintiff, according to Defendant, because Plaintiff has not "refused to accept" a damage award in excess of the maximum. Defendant fears that Plaintiff's choice of the word "seek" is intentionally made in order to leave open the door for a larger award than the maximum allowed in state court. Defendant cites no authority to support its view that [*12] Plaintiff's promise not to "seek" an award over jurisdictional limits is unenforceable, but "refusing to accept" such an award would be binding. Magic words or blood oaths are not required in order to make a sworn stipulation binding. The Court finds Plaintiff's sworn stipulation is sufficient and meets the standard suggested by the Eighth Circuit in *Bell* to effectively bar removal. Plaintiff would also be judicially estopped from asserting a claim in state court for attempting to recover more than the amount contemplated in the stipulation. *See Thompson, 2011 U.S. Dist. LEXIS 73861, 2011 WL 2671312 at *3*, *citing Dupwe v. Wallace, 355 Ark. 521, 140 S.W. 3d 464, 467 (Ark. 2004)*; *see also Tuberville, 2011 U.S. Dist. LEXIS 45894, 2011 WL 1527716 at *4*.

The second argument Defendant makes regarding the stipulation has to do with attorneys' fees. Defendant contends that because Plaintiff's counsel did not sign the stipulation, this means that the attorneys' fees and costs in this case will not be limited by the stipulation and may exceed the statutory maximum of $5 million. Essentially, Defendant makes the argument that, despite Plaintiff's sworn stipulation to the contrary, Plaintiff's counsel intends to abuse CAFA's intent by exceeding the jurisdictional minimum [*13] after remand and seeking a large fee award. Defendant cites to examples of other class action lawsuits involving Plaintiff's counsel in which counsel received large attorneys' fee awards, ostensibly to show that large fee awards in other cases will translate to a large fee award in the case at bar. Despite Defendant's arguments, however, the Court finds that Plaintiff's sworn stipulation is sufficient to limit the total award, including the award for attorneys' fees. The stipulation is explicitly "inclusive of costs and attorneys' fees," and the same limitation is present in the text of the Complaint.

The overarching argument Defendant submits is that the Court should completely disregard Plaintiff's self-imposed limitations in his Complaint and attached stipulation, and instead calculate the amount in controversy based on the possibility that Plaintiff could amend his Complaint in the future to increase the amount of recovery sought. Speculation as to Plaintiff's future actions cannot vest this Court with jurisdiction where it otherwise has none at the time of removal. If a court could base its jurisdiction solely upon the possibility of a future amendment by a plaintiff, any case [*14] filed in

state court would be susceptible to removal no matter how the plaintiff stated his claims.

The Arkansas legislature has addressed this very issue in passing a statute this year that codifies *Bell* and explicitly allows a plaintiff to file a binding stipulation "with respect to the amount in controversy" in order to establish subject matter jurisdiction. *See Ark. Code Ann. § 16-63-221 (a)*. Defendant reads a portion of this statute to "[provide] an avenue for plaintiffs to attempt to evade their initial stipulations about the amount in controversy." Doc. 9, p. 24. The Court disagrees with Defendant's characterization of the statute and finds that it merely preserves a plaintiff's option to amend the Complaint in the future. *See* [HN7] *Ark. Code Ann. § 16-63-211 (b)* ("A Declaration. . .is binding on the Plaintiff with respect to the amount in controversy unless the Plaintiff subsequently amends the complaint to pray for damages in an amount which exceeds the jurisdictional limits of the Court . . .").

Defendant's concern about Plaintiff's future amendment of the Complaint is of no moment. If Plaintiff were to amend his Complaint after remand, disclaiming his sworn stipulation and seeking [*15] instead an amount in excess of the jurisdictional maximum, it follows that Defendant would have the right to remove again, should removal be justified. It is no longer the rule that CAFA cases must be removed within a year. Now they may be removed at any time, assuming they are removable. *28 U.S.C. § 1453 (b)*; s*ee e.g. Bartnikowski v. NVR Inc., 307 Fed. Appx 730, 739 (4th Cir. 2009)* ("a CAFA defendant who cannot meet his burden for removal at the early stages of litigation may still have recourse to the federal courts later, as Congress has eliminated the one-year time limit on CAFA removal actions"); *Lowdermilk v. U.S. Bank Nat'l Assoc., 479 F.3d 994, 1002-03 (9th Cir. 2007)* ("CAFA mitigates some of the potential for abuse [by plaintiffs] by eliminating the one-year removal limitation"). In short, Defendant's fear regarding Plaintiff's plans for the future of this litigation cannot drive the Court's decision on remanding the case, considering Plaintiff's legal and binding stipulation limiting the dollar amount of aggregate recovery.

2. Due Process Concerns for the Class

Defendant believes Plaintiff has exhibited bad faith in seeking to limit the as-yet-unknown class members to damages [*16] over a two-year period, rather than the full five years of damages potentially recoverable under the statute of limitations. *See* Doc. 9, p. 13. As the master of his complaint, Plaintiff may choose what claims to bring and what claims to leave out. "[A] removing defendant can't make the plaintiff's claim for him; as master of the case, the plaintiff may limit his claims (either substantive or financial) to keep the amount in controversy below the threshold." *Brill v. Countrywide Home Loans, Inc., 427 F.3d 446, 449 (7th Cir. 2005)*. Defendant fails to cite any authority which states that a plaintiff may not seek to recover damages for a period of time shorter than the statute of limitations provides. Nor is the Court persuaded that Plaintiff's temporal limitation on recovery evidences his bad faith.

Defendant cites to the case of *Bass v. Carmax Auto Superstores, Inc., 2008 U.S. Dist. LEXIS 11180, 2008 WL 441962 (W.D. Mo., Feb. 14, 2008)*, for the proposition that a class plaintiff has no right to limit recovery for a class without court approval. However, the *Bass* case was decided before *Bell*, and the holding in *Bass* contradicts both the plain language and the spirit of the Eighth Circuit's holding in *Bell.* Furthermore, [*17] putative class members may simply opt out of the class and pursue their own remedies if they feel that the limitations placed on the class by Plaintiff are too restrictive. *See Murphy, 2011 U.S. Dist. LEXIS 46983, 2011 WL 1559234 at *3* (". . . the plaintiffs in state court who choose not to opt out of the class must live with it," *quoting Morgan v. Gay, 471 F.3d 469, 477-78 (3rd Cir. 2006)*, *cert. denied*, *552 U.S. 940, 128 S. Ct. 66, 169 L. Ed. 2d 243 (2007))*.

III. Conclusion

The Court finds that Plaintiff has shown to a legal certainty that the aggregate damages claimed on behalf of the putative class shall in good faith not exceed the state court's jurisdictional limitation of $5,000,000. Accordingly, Plaintiff's Motion to Remand (Doc. 6) is hereby **GRANTED.** This case shall be remanded forthwith to the Circuit Court of Miller County, Arkansas.

IT IS SO ORDERED this 2nd day of December, 2011.

/s/ P. K. Holmes, III

P.K. HOLMES, III

UNITED STATES DISTRICT JUDGE

Analysis
As of: Dec 10, 2012

The Standard Fire Insurance Company, Petitioner v. Greg Knowles.

No. 11-1450.

SUPREME COURT OF THE UNITED STATES

183 L. Ed. 2d 730*; *2012 U.S. LEXIS 5088*; *81 U.S.L.W. 3089

August 31, 2012, Decided

PRIOR HISTORY: *Knowles v. Std. Fire Ins. Co., 2011 U.S. Dist. LEXIS 139077 (W.D. Ark., Dec. 2, 2011)*

JUDGES: [*1] Roberts, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan.

OPINION

Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit granted.

Positive
As of: Dec 10, 2012

MONIQUE DA SILVA MOORE, et al., Plaintiffs, -against- PUBLICIS GROUPE & MSL GROUP, Defendants.

11 Civ. 1279 (ALC) (AJP)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2012 U.S. Dist. LEXIS 23350*; *18 Wage & Hour Cas. 2d (BNA) 1479

February 24, 2012, Decided
February 24, 2012, Filed

SUBSEQUENT HISTORY: Adopted by, Objection overruled by *Moore v. Publicis Groupe SA, 2012 U.S. Dist. LEXIS 58742 (S.D.N.Y., Apr. 25, 2012)*

PRIOR HISTORY: *Moore v. Publicis Groupe SA, 2012 U.S. Dist. LEXIS 19857 (S.D.N.Y., Feb. 14, 2012)*

DISPOSITION: Computer-assisted review was judicially-approved for use in appropriate cases.

CASE SUMMARY:

OVERVIEW: In a gender discrimination case, the parties' agreed protocol for predictive coding to find to find electronically-stored information in a discovery context was approved. While plaintiffs' objections to the magistrate's rulings were pending, he commented on the use of predictive coding during discovery. The acceptance of the predictive coding protocol was not contrary to *Fed. R. Evid. 702* and Daubert as they dealt with the trial court's role as gatekeeper to exclude unreliable expert testimony from being submitted to the jury at trial, not the production of documents during discovery.

OUTCOME: Computer-assisted review was judicially-approved for use in appropriate cases.

LexisNexis(R) Headnotes

Civil Procedure > Discovery > Disclosures > Mandatory Disclosures

[HN1] The certification required by *Fed. R. Civ. P. 26(g)(1)* applies with respect to a disclosure. *Rule 26(g)(1)(A)*. That is a term of art, referring to the mandatory initial disclosures required by *Rule 26(a)(1)*. Since the *Rule 26(a)(1)* disclosure is information (witnesses, exhibits) that the disclosing party may use to support its claims or defenses, and failure to provide such information leads to virtually automatic preclusion, *Fed. R Civ. P. 37(c)(1)*, it is appropriate for the *Rule 26(g)(1)(A)* certification to require disclosures be

"complete and correct." *Rule 26(g)(1)(B)* is the provision that applies to discovery responses. It does not call for certification that the discovery response is "complete," but rather incorporates the *Rule 26(b)(2)(C)* proportionality principle. Thus, *Rule 26(g)(1)(A)* has absolutely nothing to do with a defendant's obligations to respond to the plaintiffs' discovery requests.

Civil Procedure > Discovery > Disclosures > General Overview
[HN2] See *Fed. R. Civ. P. 26(g)(1)*.

Evidence > Scientific Evidence > Daubert Standard
Evidence > Testimony > Experts > Admissibility
Evidence > Testimony > Experts > Daubert Standard
[HN3] *Fed. R. Evid. 702* and the United States Supreme Court's Daubert decision deal with the trial court's role as gatekeeper to exclude unreliable expert testimony from being submitted to the jury at trial. It is a rule for admissibility of evidence at trial.

Civil Procedure > Discovery > Disclosures > General Overview
Evidence > Scientific Evidence > Daubert Standard
Evidence > Testimony > Experts > Admissibility
Evidence > Testimony > Experts > Daubert Standard
[HN4] *Fed. R. Evid. 702* and Daubert simply are not applicable to how documents are searched for and found in discovery.

Civil Procedure > General Overview
Civil Procedure > Discovery > Electronic Discovery > General Overview
[HN5] While computer-assisted review is not perfect, the Federal Rules of Civil Procedure do not require perfection. Courts and litigants must be cognizant of the aim of *Fed. R. Civ. P. 1*, to secure the just, speedy, and inexpensive determination of lawsuits. *Rule 1*. That goal is further reinforced by the proportionality doctrine set forth in *Fed. R. Civ. P. 26(b)(2)(C)*.

Civil Procedure > Discovery > Disclosures > General Overview
[HN6] See *Fed. R. Civ. P. 26(b)(2)(C)*.

Civil Procedure > General Overview
Civil Procedure > Discovery > Disclosures > General Overview
Civil Procedure > Discovery > Electronic Discovery > General Overview
[HN7] Computer-assisted review is an available tool and should be seriously considered for use in large-data-volume cases where it may save the producing party (or both parties) significant amounts of legal fees in document review. As with keywords or any other technological solution to ediscovery, counsel must design an appropriate process, including use of available technology, with appropriate quality control testing, to review and produce relevant ESI while adhering to *Fed. R. Civ. P. 1* and *Rule 26(b)(2)(C)* proportionality. Computer-assisted review now can be considered judicially-approved for use in appropriate cases.

COUNSEL: [*1] For Monique Da Silva Moore, on behalf of herself and all others similarly situated, Plaintiff: Jeremy Heisler, LEAD ATTORNEY, Sanford, Wittels & Heisler, LLP, New York, NY; David W. Sanford, PRO HAC VICE, Sanford, Wittels & Heisler, LLP (DC), Washington, DC; Deepika Bains, Steven Lance Wittels, Sanford Wittels & Heisler, LLP, New York, NY; Janette Lynn Wipper, PRO HAC VICE, SANFORD WITTELS & HEISLER, LLP (San Francisco, San Francisco, CA; Siham Nurhussein, Clifford Chance US, LLP (NYC), New York, NY.

For Maryellen O'Donohue, on behalf of herself and all others similarly situated, Laurie Mayers, on behalf of herself and all others similarly situated, Heather Pierce on behalf of herself and all others similarly situated, Katherine Wilkinson, on behalf of herself and all others similarly situated, Plaintiffs: Jeremy Heisler, LEAD ATTORNEY, Sanford, Wittels & Heisler, LLP, New York, NY; David W. Sanford, PRO HAC VICE, Sanford, Wittels & Heisler, LLP (DC), Washington, DC; Deepika Bains, Steven Lance Wittels, Sanford Wittels & Heisler, LLP, New York, NY; Janette Lynn Wipper, PRO HAC VICE, SANFORD WITTELS & HEISLER, LLP (San Francisco, San Francisco, CA.

For Publicis Groupe, Defendant: Melissa [*2] Ruth Kelly, LEAD ATTORNEY, Morgan, Lewis & Bockius LLP (New York), New York, NY; Paul Clayton Evans, PRO HAC VICE, Morgan Lewis & Bockius, LLP (PA), Philadelphia, PA; Paul Clayton Evans, Morgan, Lewis & Bockius LLP, Philadelphia, PA.

For MSL Group, Defendant: Noel P. Tripp, Paul J. Siegel, LEAD ATTORNEYS, Jeffrey W. Brecher, Jackson Lewis LLP(Melville N.Y.), Melville, NY; Brett Michael Anders, Jackson Lewis LLP(NJ), Morristown, NJ; Victoria Woodin Chavey, Jackson Lewis LLP, Hartford, CT.

JUDGES: Andrew J. Peck, United States Magistrate Judge.

OPINION BY: Andrew J. Peck

OPINION

OPINION AND ORDER

ANDREW J. PECK, United States Magistrate Judge:

In my article Search, Forward: Will manual document review and keyword searches be replaced by computer-assisted coding?, I wrote:

> To my knowledge, no reported case (federal or state) has ruled on the use of computer-assisted coding. While anecdotally it appears that some lawyers are using predictive coding technology, it also appears that many lawyers (and their clients) are waiting for a judicial decision approving of computer-assisted review.
>
> Perhaps they are looking for an opinion concluding that: "It is the opinion of this court that the use of predictive coding is a proper [*3] and acceptable means of conducting searches under the Federal Rules of Civil Procedure, and furthermore that the software provided for this purpose by [insert name of your favorite vendor] is the software of choice in this court." If so, it will be a long wait.
>
> . . . .
>
> Until there is a judicial opinion approving (or even critiquing) the use of predictive coding, counsel will just have to rely on this article as a sign of judicial approval. In my opinion, computer-assisted coding should be used in those cases where it will help "secure the just, speedy, and inexpensive" (*Fed. R. Civ. P. 1*) determination of cases in our e-discovery world.

Andrew Peck, Search, Forward, L. Tech. News, Oct. 2011, at 25, 29. This judicial opinion now recognizes that computer-assisted review is an acceptable way to search for relevant ESI in appropriate cases.[1]

> 1 To correct the many blogs about this case, initiated by a press release from plaintiffs' vendor -- [*4] the Court did not order the parties to use predictive coding. The parties had agreed to defendants' use of it, but had disputes over the scope and implementation, which the Court ruled on, thus accepting the use of computer-assisted review in this lawsuit.

CASE BACKGROUND

In this action, five female named plaintiffs are suing defendant Publicis Groupe, "one of the world's 'big four' advertising conglomerates," and its United States public relations subsidiary, defendant MSL Group. (See Dkt. No. 4: Am. Compl. ¶¶ 1, 5, 26-32.) Plaintiffs allege that defendants have a "glass ceiling" that limits women to entry level positions, and that there is "systemic, company-wide gender discrimination against female PR employees like Plaintiffs." (Am. Compl. ¶¶ 4-6, 8.) Plaintiffs allege that the gender discrimination includes

> (a) paying Plaintiffs and other female PR employees less than similarly-situated male employees; (b) failing to promote or advance Plaintiffs and other female PR employees at the same rate as similarly-situated male employees; and (c) carrying out discriminatory terminations, demotions and/or job reassignments of female PR employees when the company reorganized its PR practice [*5] beginning in 2008 . . . .

(Am. Compl. ¶ 8.)

Plaintiffs assert claims for gender discrimination under Title VII (and under similar New York State and New York City laws) (Am. Compl. ¶¶ 204-25), pregnancy discrimination under Title VII and related

violations of the Family and Medical Leave Act (Am. Compl. ¶¶ 239-71), as well as violations of the Equal Pay Act and Fair Labor Standards Act (and the similar New York Labor Law) (Am. Compl. ¶¶ 226-38).

The complaint seeks to bring the Equal Pay Act/FLSA claims as a "collective action" (i.e., opt-in) on behalf of all "current, former, and future female PR employees" employed by defendants in the United States "at any time during the applicable liability period" (Am. Compl. ¶¶ 179-80, 190-203), and as a class action on the gender and pregnancy discrimination claims and on the New York Labor Law pay claim (Am. Compl. ¶¶ 171-98). Plaintiffs, however, have not yet moved for collective action or class certification at this time.

Defendant MSL denies the allegations in the complaint and has asserted various affirmative defenses. (See generally Dkt. No. 19: MSL Answer.) Defendant Publicis is challenging the Court's jurisdiction over it, and the parties [*6] have until March 12, 2012 to conduct jurisdictional discovery. (See Dkt. No. 44: 10/12/11 Order.)

COMPUTER-ASSISTED REVIEW EXPLAINED

My Search, Forward article explained my understanding of computer-assisted review, as follows:

> By computer-assisted coding, I mean tools (different vendors use different names) that use sophisticated algorithms to enable the computer to determine relevance, based on interaction with (i.e., training by) a human reviewer.
>
> Unlike manual review, where the review is done by the most junior staff, computer-assisted coding involves a senior partner (or [small] team) who review and code a "seed set" of documents. The computer identifies properties of those documents that it uses to code other documents. As the senior reviewer continues to code more sample documents, the computer predicts the reviewer's coding. (Or, the computer codes some documents and asks the senior reviewer for feedback.)
>
> When the system's predictions and the reviewer's coding sufficiently coincide, the system has learned enough to make confident predictions for the remaining documents. Typically, the senior lawyer (or team) needs to review only a few thousand documents to train the computer.
>
> Some [*7] systems produce a simple yes/no as to relevance, while others give a relevance score (say, on a 0 to 100 basis) that counsel can use to prioritize review. For example, a score above 50 may produce 97% of the relevant documents, but constitutes only 20% of the entire document set.
>
> Counsel may decide, after sampling and quality control tests, that documents with a score of below 15 are so highly likely to be irrelevant that no further human review is necessary. Counsel can also decide the cost-benefit of manual review of the documents with scores of 15-50.

Andrew Peck, Search, Forward, L. Tech. News, Oct. 2011, at 25, 29.[2]

> 2 From a different perspective, every person who uses email uses predictive coding, even if they do not realize it. The "spam filter" is an example of predictive coding.

My article further explained my belief that Daubert would not apply to the results of using predictive coding, but that in any challenge to its use, this Judge would be interested in both the process used and the results:

> [I]f the use of predictive coding is challenged in a case before me, I will want to know what was done and why that produced defensible results. I may be less interested in the science [*8] behind the "black box" of the vendor's software than in whether it produced responsive documents with reasonably high recall and high precision.
>
> That may mean allowing the requesting party to see the documents that were used to train the computer-assisted

> coding system. (Counsel would not be required to explain why they coded documents as responsive or non-responsive, just what the coding was.) Proof of a valid "process," including quality control testing, also will be important.
>
> . . . .
>
> Of course, the best approach to the use of computer-assisted coding is to follow the Sedona Cooperation Proclamation model. Advise opposing counsel that you plan to use computer-assisted coding and seek agreement; if you cannot, consider whether to abandon predictive coding for that case or go to the court for advance approval.

Id.

THE ESI DISPUTES IN THIS CASE AND THEIR RESOLUTION

After several discovery conferences and rulings by Judge Sullivan (the then-assigned District Judge), he referred the case to me for general pretrial supervision. (Dkt. No. 48: 11/28/11 Referral Order.) At my first discovery conference with the parties, both parties' counsel mentioned that they had been discussing an "electronic [*9] discovery protocol," and MSL's counsel stated that an open issue was "plaintiff's reluctance to utilize predictive coding to try to cull down the" approximately three million electronic documents from the agreed-upon custodians. (Dkt. No. 51: 12/2/11 Conf. Tr. at 7-8.)[3] Plaintiffs' counsel clarified that MSL had "over simplified [plaintiffs'] stance on predictive coding," i.e., that it was not opposed but had "multiple concerns . . . on the way in which [MSL] plan to employ predictive coding" and plaintiffs wanted "clarification." (12/2/11 Conf. Tr. at 21.)

> 3 When defense counsel mentioned the disagreement about predictive coding, I stated that: "You must have thought you died and went to Heaven when this was referred to me," to which MSL's counsel responded: "Yes, your Honor. Well, I'm just thankful that, you know, we have a person familiar with the predictive coding concept." (12/2/11 Conf. Tr. at 8-9.)

The Court did not rule but offered the parties the following advice:

> Now, if you want any more advice, for better or for worse on the ESI plan and whether predictive coding should be used, . . . I will say right now, what should not be a surprise, I wrote an article in the October Law [*10] Technology News called Search Forward, which says predictive coding should be used in the appropriate case.
>
> Is this the appropriate case for it? You all talk about it some more. And if you can't figure it out, you are going to get back in front of me. Key words, certainly unless they are well done and tested, are not overly useful. Key words along with predictive coding and other methodology, can be very instructive.
>
> I'm also saying to the defendants who may, from the comment before, have read my article. If you do predictive coding, you are going to have to give your seed set, including the seed documents marked as nonresponsive to the plaintiff's counsel so they can say, well, of course you are not getting any [relevant] documents, you're not appropriately training the computer.

(12/2/11 Conf. Tr. at 20-21.) The December 2, 2011 conference adjourned with the parties agreeing to further discuss the ESI protocol. (12/2/11 Conf. Tr. at 34-35.)

The ESI issue was next discussed at a conference on January 4, 2012. (Dkt. No. 71: 1/4/12 Conf. Tr.) Plaintiffs' ESI consultant conceded that plaintiffs "have not taken issue with the use of predictive coding or, frankly, with the confidence levels [*11] that they [MSL] have proposed . . . ." (1/4/12 Conf. Tr. at 51.) Rather, plaintiffs took issue with MSL's proposal that after the computer was fully trained and the results generated, MSL wanted to only review and produce the top 40,000 documents, which it estimated would cost $200,000 (at $5 per document). (1/4/12 Conf. Tr. at 47-48, 51.) The Court rejected MSL's 40,000 documents proposal as a

"pig in a poke." (1/4/12 Conf. Tr. at 51-52.) The Court explained that "where [the] line will be drawn [as to review and production] is going to depend on what the statistics show for the results," since "[p]roportionality requires consideration of results as well as costs. And if stopping at 40,000 is going to leave a tremendous number of likely highly responsive documents unproduced, [MSL's proposed cutoff] doesn't work." (1/4/12 Conf. Tr. at 51-52; see also id. at 57-58; Dkt. No. 88: 2/8/12 Conf. Tr. at 84.) The parties agreed to further discuss and finalize the ESI protocol by late January 2012, with a conference held on February 8, 2012. (1/4/12 Conf. Tr. at 60-66; see 2/8/12 Conf. Tr.)

Custodians

The first issue regarding the ESI protocol involved the selection of which custodians' emails [*12] would be searched. MSL agreed to thirty custodians for a "first phase." (Dkt. No. 88: 2/8/12 Conf. Tr. at 23-24.) MSL's custodian list included the president and other members of MSL's "executive team," most of its HR staff and a number of managing directors. (2/8/12 Conf. Tr. at 24.)

Plaintiffs sought to include as additional custodians seven male "comparators," explaining that the comparators' emails were needed in order to find information about their job duties and how their duties compared to plaintiffs' job duties. (2/8/12 Conf. Tr. at 25-27.) Plaintiffs gave an example of the men being given greater "client contact" or having better job assignments. (2/8/12 Conf. Tr. at 28-30.) The Court held that the search of the comparators' emails would be so different from that of the other custodians that the comparators should not be included in the emails subjected to predictive coding review. (2/8/12 Conf. Tr. at 28, 30.) As a fallback position, plaintiffs proposed to "treat the comparators as a separate search," but the Court found that plaintiffs could not describe in any meaningful way how they would search the comparators' emails, even as a separate search. (2/8/12 Conf. Tr. at 30-31.) [*13] Since the plaintiffs likely could develop the information needed through depositions of the comparators, the Court ruled that the comparators' emails would not be included in phase one. (2/8/12 Conf. Tr. at 31.)

Plaintiffs also sought to include MSL's CEO, Olivier Fleuriot, located in France and whose emails were mostly written in French. (2/8/12 Conf. Tr. at 32-34.) The Court concluded that because his emails with the New York based executive staff would be gathered from those custodians, and Fleuriot's emails stored in France likely would be covered by the French privacy and blocking laws,[4] Fleuriot should not be included as a first-phase custodian. (2/8/12 Conf. Tr. at 35.)

> 4 See, e.g., *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for the S.D. of Iowa, 482 U.S. 522, 107 S. Ct. 2542, 96 L. Ed. 2d 461 (1987)*; see also The Sedona Conference, International Principles on Discovery, Disclosure & Data Protection (2011), available at http://www.thesedonaconference.org/dltForm?did=IntlPrinciples2011.pdf.

Plaintiffs sought to include certain managing directors from MSL offices at which no named plaintiff worked. (2/8/12 Conf. Tr. at 36-37.) The Court ruled that since plaintiffs had not yet moved [*14] for collective action status or class certification, until the motions were made and granted, discovery would be limited to offices (and managing directors) where the named plaintiffs had worked. (2/8/12 Conf. Tr. at 37-39.)

The final issue raised by plaintiffs related to the phasing of custodians and the discovery cutoff dates. MSL proposed finishing phase-one discovery completely before considering what to do about a second phase. (See 2/8/12 Conf. Tr. at 36.) Plaintiffs expressed concern that there would not be time for two separate phases, essentially seeking to move the phase-two custodians back into phase one. (2/8/12 Conf. Tr. at 35-36.) The Court found MSL's separate phase approach to be more sensible and noted that if necessary, the Court would extend the discovery cutoff to allow the parties to pursue discovery in phases. (2/8/12 Conf. Tr. at 36, 50.)

Sources of ESI

The parties agreed on certain ESI sources, including the "EMC SourceOne [Email] Archive," the "PeopleSoft" human resources information management system and certain other sources including certain HR "shared" folders. (See Dkt. No. 88: 2/8/12 Conf. Tr. at 44-45, 50-51.) As to other "shared" folders, neither side [*15] was able to explain whether the folders merely contained forms and templates or collaborative working documents; the Court therefore left those shared folders for phase two unless the parties promptly provided information about likely contents. (2/8/12 Conf. Tr. at 47-48.)

The Court noted that because the named plaintiffs worked for MSL, plaintiffs should have some idea what additional ESI sources, if any, likely had relevant information; since the Court needed to consider proportionality pursuant to *Rule 26(b)(2)(C)*, plaintiffs needed to provide more information to the Court than they were doing if they wanted to add additional data sources into phase one. (2/8/12 Conf. Tr. at 49-50.) The Court also noted that where plaintiffs were getting factual information from one source (e.g., pay information, promotions, etc.), "there has to be a limit to redundancy" to comply with *Rule 26(b)(2)(C)*. (2/8/12 Conf. Tr. at 54.)[5]

5 The Court also suggested that the best way to resolve issues about what information might be found in a certain source is for MSL to show plaintiffs a sample printout from that source. (2/8/12 Conf. Tr. at 55-56.)

The Predictive Coding Protocol

The parties agreed to use a [*16] 95% confidence level (plus or minus two percent) to create a random sample of the entire email collection; that sample of 2,399 documents will be reviewed to determine relevant (and not relevant) documents for a "seed set" to use to train the predictive coding software. (Dkt. No. 88: 2/8/12 Conf. Tr. at 59-61.) An area of disagreement was that MSL reviewed the 2,399 documents before the parties agreed to add two additional concept groups (i.e., issue tags). (2/8/12 Conf. Tr. at 62.) MSL suggested that since it had agreed to provide all 2,399 documents (and MSL's coding of them) to plaintiffs for their review, plaintiffs can code them for the new issue tags, and MSL will incorporate that coding into the system. (2/8/12 Conf. Tr. at 64.) Plaintiffs' vendor agreed to that approach. (2/8/12 Conf. Tr. at 64.)

To further create the seed set to train the predictive coding software, MSL coded certain documents through "judgmental sampling." (2/8/12 Conf. Tr. at 64.) The remainder of the seed set was created by MSL reviewing "keyword" searches with Boolean connectors (such as "training and Da Silva Moore," or "promotion and Da Silva Moore") and coding the top fifty hits from those searches. [*17] (2/8/12 Conf. Tr. at 64-66, 72.) MSL agreed to provide all those documents (except privileged ones) to plaintiffs for plaintiffs to review MSL's relevance coding. (2/8/12 Conf. Tr. at 66.) In addition, plaintiffs provided MSL with certain other keywords, and MSL used the same process with plaintiffs' keywords as with the MSL keywords, reviewing and coding an additional 4,000 documents. (2/8/12 Conf. Tr. at 68-69, 71.) All of this review to create the seed set was done by senior attorneys (not paralegals, staff attorneys or junior associates). (2/8/12 Conf. Tr. at 92-93.) MSL reconfirmed that "[a]ll of the documents that are reviewed as a function of the seed set, whether [they] are ultimately coded relevant or irrelevant, aside from privilege, will be turned over to" plaintiffs. (2/8/12 Conf. Tr. at 73.)

The next area of discussion was the iterative rounds to stabilize the training of the software. MSL's vendor's predictive coding software ranks documents on a score of 100 to zero, i.e., from most likely relevant to least likely relevant. (2/8/12 Conf. Tr. at 70.) MSL proposed using seven iterative rounds; in each round they would review at least 500 documents from different concept [*18] clusters to see if the computer is returning new relevant documents. (2/8/12 Conf. Tr. at 73-74.) After the seventh round, to determine if the computer is well trained and stable, MSL would review a random sample (of 2,399 documents) from the discards (i.e., documents coded as non-relevant) to make sure the documents determined by the software to not be relevant do not, in fact, contain highly-relevant documents. (2/8/12 Conf. Tr. at 74-75.) For each of the seven rounds and the final quality-check random sample, MSL agreed that it would show plaintiffs all the documents it looked at including those deemed not relevant (except for privileged documents). (2/8/12 Conf. Tr. at 76.)

Plaintiffs' vendor noted that "we don't at this point agree that this is going to work. This is new technology and it has to be proven out." (2/8/12 Conf. Tr. at 75.) Plaintiffs' vendor agreed, in general, that computer-assisted review works, and works better than most alternatives. (2/8/12 Conf. Tr. at 76.) Indeed, plaintiffs' vendor noted that "it is fair to say [that] we are big proponents of it." (2/8/12 Conf. Tr. at 76.) The Court reminded the parties that computer-assisted review "works better than most [*19] of the alternatives, if not all of the [present] alternatives. So the idea is not to make this perfect, it's not going to be perfect. The idea is to make it significantly better than the alternatives without nearly as much cost." (2/8/12 Conf. Tr. at 76.)

The Court accepted MSL's proposal for the seven iterative reviews, but with the following caveat:

> But if you get to the seventh round and [plaintiffs] are saying that the computer is still doing weird things, it's not stabilized, etc., we need to do another round or two, either you will agree to that or you will both come in with the appropriate QC information and everything else and [may be ordered to] do another round or two or five or 500 or whatever it takes to stabilize the system.

(2/8/12 Conf. Tr. at 76-77; see also id. at 83-84, 88.)

On February 17, 2012, the parties submitted their "final" ESI Protocol which the Court "so ordered." (Dkt. No. 92: 2/17/12 ESI Protocol & Order.)[6] Because this is the first Opinion dealing with predictive coding, the Court annexes hereto as an Exhibit the provisions of the ESI Protocol dealing with the predictive coding search methodology.

6 Plaintiffs included a paragraph noting its objection to the [*20] ESI Protocol, as follows:

> Plaintiffs object to this ESI Protocol in its entirety. Plaintiffs submitted their own proposed ESI Protocol to the Court, but it was largely rejected. The Court then ordered the parties to submit a joint ESI Protocol reflecting the Court's rulings. Accordingly, Plaintiffs jointly submit this ESI Protocol with MSL, but reserve the right to object to its use in this case.

(ESI Protocol ¶ J.1 at p. 22.)

OBSERVATIONS ON PLAINTIFF'S OBJECTIONS TO THE COURT'S RULINGS

On February 22, 2012, plaintiffs filed objections to the Court's February 8, 2012 rulings. (Dkt. No. 93: Pls. *Rule 72(a)* Objections; see also Dkt. No. 94: Nurhussein Aff.; Dkt. No. 95: Neale Aff.) While those objections are before District Judge Carter, a few comments are in order.

Plaintiffs' Reliance on Rule 26(g)(1)(A) is Erroneous

Plaintiffs' objections to my February 8, 2012 rulings assert that my acceptance of MSL's predictive coding approach "provides unlawful 'cover' for MSL's counsel, who has a duty under *FRCP 26(g)* to 'certify' that their client's document production is 'complete' and 'correct' as of the time it was made. *FRCP 26(g)(1)(A)*." (Dkt. No. 93: Pls. *Rule 72(a)* Objections at 8 n.7; accord, [*21] id. at 2.) In large-data cases like this, involving over three million emails, no lawyer using any search method could honestly certify that its production is "complete" -- but more importantly, *Rule 26(g)(1)* does not require that. Plaintiffs simply misread *Rule 26(g)(1)*. [HN1] The certification required by *Rule 26(g)(1)* applies "with respect to a disclosure." *Fed. R. Civ. P. 26(g)(1)(A)* (emphasis added). That is a term of art, referring to the mandatory initial disclosures required by *Rule 26(a)(1)*. Since the *Rule 26(a)(1)* disclosure is information (witnesses, exhibits) that "the disclosing party may use to support its claims or defenses," and failure to provide such information leads to virtually automatic preclusion, see *Fed. R Civ. P. 37(c)(1)*, it is appropriate for the *Rule 26(g)(1)(A)* certification to require disclosures be "complete and correct."

Rule 26(g)(1)(B) is the provision that applies to discovery responses. It does not call for certification that the discovery response is "complete," but rather incorporates the *Rule 26(b)(2)(C)* proportionality principle. Thus, *Rule 26(g)(1)(A)* has absolutely nothing to do with MSL's obligations to respond to plaintiffs' discovery requests. [*22] Plaintiffs' argument is based on a misunderstanding of *Rule 26(g)(1)*.[7]

7 *Rule 26(g)(1)* provides:

> (g) [HN2] Signing Disclosures and Discovery Requests, Responses, and Objections.
>
> (1) *Signature Required; Effect of Signature*. Every disclosure under *Rule 26(a)(1)* or *(a)(3)* and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name . . . . By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

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

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

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

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

(iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues [*23] at stake in the action.

Fed. R. Civ. P. 26(g)(1) (emphasis added).

Rule 702 and Daubert Are Not Applicable to Discovery Search Methods

Plaintiffs' objections also argue that my acceptance of MSL's predictive coding protocol "is contrary to *Federal Rule of Evidence 702*" and "violates the gatekeeping function underlying *Rule 702*." (Dkt. No. 93: Pls. *Rule 72(a)* Objections at 2-3; accord, id. at 10-12.)[8]

> 8 As part of this argument, plaintiffs complain that although both parties' experts (i.e., vendors) spoke at the discovery conferences, they were not sworn in. (Pls. *Rule 72(a)* Objections at 12: "To his credit, the Magistrate [Judge] did ask the parties to bring [to the conference] the ESI experts they had hired to advise them regarding the creation of an ESI protocol. These experts, however, were never sworn in, and thus the statements they made in court at the hearings were not sworn testimony made under penalty of perjury.") Plaintiffs never asked the Court to have the experts testify to their qualifications or be sworn in.

[HN3] *Federal Rule of Evidence 702* and the Supreme Court's Daubert decision[9] deal with the trial court's role as gatekeeper to exclude unreliable expert testimony from being [*24] submitted to the jury at trial. See also Advisory Comm. Notes to *Fed. R. Evid. 702*. It is a rule for admissibility of evidence at trial.

> 9 *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*.

If MSL sought to have its expert testify at trial and introduce the results of its ESI protocol into evidence, Daubert and *Rule 702* would apply. Here, in contrast, the tens of thousands of emails that will be produced in discovery are not being offered into evidence at trial as the result of a scientific process or otherwise. The admissibility of specific emails at trial will depend upon each email itself (for example, whether it is hearsay, or a business record or party admission), not how it was found during discovery.

[HN4] *Rule 702* and Daubert simply are not applicable to how documents are searched for and found in discovery.

Plaintiffs' Reliability Concerns Are, At Best, Premature

Finally, plaintiffs' objections assert that "MSL's method lacks the necessary standards for assessing whether its results are accurate; in other words, there is no way to be certain if MSL's method is reliable." (Dkt. No. 93: Pls. *Rule 72(a)* Objections at 13-18.) Plaintiffs' concerns may be appropriate [*25] for resolution during or after the process (which the Court will be closely supervising), but are premature now. For example, plaintiffs complain that "MSL's method fails to include an agreed-upon standard of relevance that is transparent and accessible to all parties. . . . Without this standard, there is a high-likelihood of delay as the parties resolve disputes with regard to individual documents on a case-by-case basis." (Id. at 14.) Relevance is determined by plaintiffs' document demands. As statistics show, perhaps only 5% of the disagreement among reviewers comes from close questions of relevance, as opposed to reviewer error. (See page 18 n.11 below.) The issue regarding relevance standards might be significant if MSL's proposal was not totally transparent. Here, however, plaintiffs will see how MSL has coded every email used in the seed set (both relevant and not relevant), and the Court is available to quickly resolve any issues.

Plaintiffs complain they cannot determine if "MSL's method actually works" because MSL does not describe how many relevant documents are permitted to be located in the final random sample of documents the software deemed irrelevant. (Pls. *Rule 72(a)* [*26] Objections at 15-16.) Plaintiffs argue that "without any decision about this made in advance, the Court is simply kicking the can down the road." (Id. at 16.) In order to determine proportionality, it is necessary to have more information than the parties (or the Court) now has, including how many relevant documents will be produced and at what cost to MSL. Will the case remain limited to the named plaintiffs, or will plaintiffs seek and obtain collective action and/or class action certification? In the final sample of documents deemed irrelevant, are any relevant documents found that are "hot," "smoking gun" documents (i.e., highly relevant)? Or are the only relevant documents more of the same thing? One hot document may require the software to be re-trained (or some other

search method employed), while several documents that really do not add anything to the case might not matter. These types of questions are better decided "down the road," when real information is available to the parties and the Court.

FURTHER ANALYSIS AND LESSONS FOR THE FUTURE

The decision to allow computer-assisted review in this case was relatively easy -- the parties agreed to its use (although disagreed about [*27] how best to implement such review). The Court recognizes that computer-assisted review is not a magic, Staples-Easy-Button, solution appropriate for all cases. The technology exists and should be used where appropriate, but it is not a case of machine replacing humans: it is the process used and the interaction of man and machine that the courts needs to examine.

The objective of review in ediscovery is to identify as many relevant documents as possible, while reviewing as few non-relevant documents as possible. Recall is the fraction of relevant documents identified during a review; precision is the fraction of identified documents that are relevant. Thus, recall is a measure of completeness, while precision is a measure of accuracy or correctness. The goal is for the review method to result in higher recall and higher precision than another review method, at a cost proportionate to the "value" of the case. See, e.g., Maura R. Grossman & Gordon V. Cormack, Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review, Rich. J.L.& Tech., Spring 2011, at 8-9, available at http://jolt.richmond.edu/v17i3/article11 .pdf.

The slightly more [*28] difficult case would be where the producing party wants to use computer-assisted review and the requesting party objects.[10] The question to ask in that situation is what methodology would the requesting party suggest instead? Linear manual review is simply too expensive where, as here, there are over three million emails to review. Moreover, while some lawyers still consider manual review to be the "gold standard," that is a myth, as statistics clearly show that computerized searches are at least as accurate, if not more so, than manual review. Herb Roitblatt, Anne Kershaw, and Patrick Oot of the Electronic Discovery Institute conducted an empirical assessment to "answer the question of whether there was a benefit to engaging in a traditional human review or whether computer systems could be relied on to produce comparable results," and concluded that "[o]n every measure, the performance of the two computer systems was at least as accurate (measured against the original review) as that of human re-review." Herbert L. Roitblatt, Anne Kershaw & Patrick Oot, Document Categorization in Legal Electronic Discovery: Computer Classification vs. Manual Review, 61 J. Am. Soc'y for Info. Sci. [*29] & Tech. 70, 79 (2010).[11]

10 The tougher question, raised in Klein Prods. LLC v. Packaging Corp. of Am. before Magistrate Judge Nan Nolan in Chicago, is whether the Court, at plaintiffs' request, should order the defendant to use computer-assisted review to respond to plaintiffs' document requests.

11 The Roitblatt, Kershaw, Oot article noted that "[t]he level of agreement among human reviewers is not strikingly high," around 70-75%. They identify two sources for this variability: fatigue ("A document that they [the reviewers] might have categorized as responsive when they were more attentive might then be categorized [when the reviewer is distracted or fatigued] as non-responsive or vice versa."), and differences in "strategic judgment." Id. at 77-78. Another study found that responsiveness "is fairly well defined, and that disagreements among assessors are largely attributable to human error," with only 5% of reviewer disagreement attributable to borderline or questionable issues as to relevance. Maura R. Grossman & Gordon V. Cormack, Inconsistent Assessment of Responsiveness in E-Discovery: Difference of Opinion or Human Error? 9 (DESI IV: 2011 ICAIL Workshop on Setting Standards for [*30] Searching Elec. Stored Info. in Discovery, Research Paper), *available at* http://www.umiacs.umd.edu/~oard/desi4/papers/grossman3.pdf.

Likewise, Wachtell, Lipton, Rosen & Katz litigation counsel Maura Grossman and University of Waterloo professor Gordon Cormack, studied data from the Text Retrieval Conference Legal Track (TREC) and concluded that: "[T]he myth that exhaustive manual review is the most effective -- and therefore the most defensible -- approach to document review is strongly refuted. Technology-assisted review can (and does) yield more accurate results than exhaustive manual review, with

much lower effort." Maura R. Grossman & Gordon V. Cormack, Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review, Rich. J.L.& Tech., Spring 2011, at 48.[12] The technology-assisted reviews in the Grossman-Cormack article also demonstrated significant cost savings over manual review: "The technology-assisted reviews require, on average, human review of only 1.9% of the documents, a fifty-fold savings over exhaustive manual review." Id. at 43.

> 12 Grossman and Cormack also note that "not [*31] all technology-assisted reviews . . . are created equal" and that future studies will be needed to "address which technology-assisted review process(es) will improve most on manual review." Id.

Because of the volume of ESI, lawyers frequently have turned to keyword searches to cull email (or other ESI) down to a more manageable volume for further manual review. Keywords have a place in production of ESI -- indeed, the parties here used keyword searches (with Boolean connectors) to find documents for the expanded seed set to train the predictive coding software. In too many cases, however, the way lawyers choose keywords is the equivalent of the child's game of "Go Fish."[13] The requesting party guesses which keywords might produce evidence to support its case without having much, if any, knowledge of the responding party's "cards" (i.e., the terminology used by the responding party's custodians). Indeed, the responding party's counsel often does not know what is in its own client's "cards."

> 13 See Ralph C. Losey, "Child's Game of 'Go Fish' is a Poor Model for e-Discovery Search," in Adventures in Electronic Discovery 209-10 (2011).

Another problem with keywords is that they often are over-inclusive, [*32] that is, they find responsive documents but also large numbers of irrelevant documents. In this case, for example, a keyword search for "training" resulted in 165,208 hits; Da Silva Moore's name resulted in 201,179 hits; "bonus" resulted in 40,756 hits; "compensation" resulted in 55,602 hits; and "diversity" resulted in 38,315 hits. (Dkt. No. 92: 2/17/12 ESI Protocol Ex. A.) If MSL had to manually review all of the keyword hits, many of which would not be relevant (i.e., would be false positives), it would be quite costly.

Moreover, keyword searches usually are not very effective. In 1985, scholars David Blair and M. Maron collected 40,000 documents from a Bay Area Rapid Transit accident, and instructed experienced attorney and paralegal searchers to use keywords and other review techniques to retrieve at least 75% of the documents relevant to 51 document requests. David L. Blair & M. E. Maron, An Evaluation of Retrieval Effectiveness for a Full-Text Document-Retrieval System, 28 Comm. ACM 289 (1985). Searchers believed they met the goals, but their average recall was just 20%. Id. This result has been replicated in the TREC Legal Track studies over the past few years.

Judicial decisions [*33] have criticized specific keyword searches. Important early decisions in this area came from two of the leading judicial scholars in ediscovery, Magistrate Judges John Facciola (District of Columbia) and Paul Grimm (Maryland). See *United States v. O'Keefe, 537 F. Supp. 2d 14, 24 (D.D.C. 2008)* (Facciola, M.J.); *Equity Analytics, LLC v. Lundin, 248 F.R.D. 331, 333 (D.D.C. 2008)* (Facciola, M.J.); *Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 260, 262 (D. Md. 2008)* (Grimm, M.J.). I followed their lead with Willaim A. Gross Construction Associates, Inc., when I wrote:

> This Opinion should serve as a wake-up call to the Bar in this District about the need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or "keywords" to be used to produce emails or other electronically stored information ("ESI").
>
> . . . .
>
> Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI. Moreover, where counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI's custodians as to [*34] the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of "false

> positives." It is time that the Bar -- even those lawyers who did not come of age in the computer era -- understand this.

William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. 134, 134, 136 (S.D.N.Y. 2009) (Peck, M.J.).

Computer-assisted review appears to be better than the available alternatives, and thus should be used in appropriate cases. [HN5] While this Court recognizes that computer-assisted review is not perfect, the Federal Rules of Civil Procedure do not require perfection. See, e.g., *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., 685 F. Supp. 2d 456, 461 (S.D.N.Y. 2010)*. Courts and litigants must be cognizant of the aim of *Rule 1*, to "secure the just, speedy, and inexpensive determination" of lawsuits. *Fed. R. Civ. P. 1*. That goal is further reinforced by the proportionality doctrine set forth in *Rule 26(b)(2)(C)*, which provides that:

> [HN6] On [*35] motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
>
> > (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
> >
> > (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
> >
> > (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2)(C).

In this case, the Court determined that the use of predictive coding was appropriate considering: (1) the parties' agreement, (2) the vast amount of ESI to be reviewed (over three million documents), (3) the superiority of computer-assisted review to the available alternatives (i.e., linear manual review or keyword searches), (4) the need for cost effectiveness and proportionality under *Rule 26(b)(2)(C)*, and (5) the transparent process proposed by [*36] MSL.

This Court was one of the early signatories to The Sedona Conference Cooperation Proclamation, and has stated that "the best solution in the entire area of electronic discovery is cooperation among counsel. This Court strongly endorses The Sedona Conference Proclamation (available at www.TheSedonaConference.org)." *William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co., 256 F.R.D. at 136*. An important aspect of cooperation is transparency in the discovery process. MSL's transparency in its proposed ESI search protocol made it easier for the Court to approve the use of predictive coding. As discussed above on page 10, MSL confirmed that "[a]ll of the documents that are reviewed as a function of the seed set, whether [they] are ultimately coded relevant or irrelevant, aside from privilege, will be turned over to" plaintiffs. (Dkt. No. 88: 2/8/12 Conf. Tr. at 73; see also 2/17/12 ESI Protocol at 14: "MSL will provide Plaintiffs' counsel with all of the non-privileged documents and will provide, to the extent applicable, the issue tag(s) coded for each document . . . . If necessary, counsel will meet and confer to attempt to resolve any disagreements regarding the coding [*37] applied to the documents in the seed set.") While not all experienced ESI counsel believe it necessary to be as transparent as MSL was willing to be, such transparency allows the opposing counsel (and the Court) to be more comfortable with computer-assisted review, reducing fears about the so-called "black box" of the technology.[14] This Court highly recommends that counsel in future cases be willing to at least discuss, if not agree to, such transparency in the computer-assisted review process.

14 It also avoids the GIGO problem, i.e., garbage in, garbage out.

Several other lessons for the future can be derived from the Court's resolution of the ESI discovery disputes in this case.

First, it is unlikely that courts will be able to determine or approve a party's proposal as to when review and production can stop until the computer-assisted review software has been trained and the results are quality control verified. Only at that point can the parties and the Court see where there is a clear drop off from highly relevant to marginally relevant to not likely to be relevant documents. While cost is a factor under *Rule 26(b)(2)(C)*, it cannot be considered in isolation from the results of the [*38] predictive coding process and the amount at issue in the litigation.

Second, staging of discovery by starting with the most likely to be relevant sources (including custodians), without prejudice to the requesting party seeking more after conclusion of that first stage review, is a way to control discovery costs. If staging requires a longer discovery period, most judges should be willing to grant such an extension. (This Judge runs a self-proclaimed "rocket docket," but informed the parties here of the Court's willingness to extend the discovery cutoff if necessary to allow the staging of custodians and other ESI sources.)

Third, in many cases requesting counsel's client has knowledge of the producing party's records, either because of an employment relationship as here or because of other dealings between the parties (e.g., contractual or other business relationships). It is surprising that in many cases counsel do not appear to have sought and utilized their client's knowledge about the opposing party's custodians and document sources. Similarly, counsel for the producing party often is not sufficiently knowledgeable about their own client's custodians and business terminology. Another [*39] way to phrase cooperation is "strategic proactive disclosure of information," i.e., if you are knowledgeable about and tell the other side who your key custodians are and how you propose to search for the requested documents, opposing counsel and the Court are more apt to agree to your approach (at least as phase one without prejudice).

Fourth, the Court found it very helpful that the parties' ediscovery vendors were present and spoke at the court hearings where the ESI Protocol was discussed. (At ediscovery programs, this is sometimes jokingly referred to as "bring your geek to court day.") Even where as here counsel is very familiar with ESI issues, it is very helpful to have the parties' ediscovery vendors (or in-house IT personnel or in-house ediscovery counsel) present at court conferences where ESI issues are being discussed. It also is important for the vendors and/or knowledgeable counsel to be able to explain complicated ediscovery concepts in ways that make it easily understandable to judges who may not be tech-savvy.

CONCLUSION

This Opinion appears to be the first in which a Court has approved of the use of computer-assisted review. That does not mean computer-assisted review [*40] must be used in all cases, or that the exact ESI protocol approved here will be appropriate in all future cases that utilize computer-assisted review. Nor does this Opinion endorse any vendor (the Court was very careful not to mention the names of the parties' vendors in the body of this Opinion, although it is revealed in the attached ESI Protocol), nor any particular computer-assisted review tool. What the Bar should take away from this Opinion is that [HN7] computer-assisted review is an available tool and should be seriously considered for use in large-data-volume cases where it may save the producing party (or both parties) significant amounts of legal fees in document review. Counsel no longer have to worry about being the "first" or "guinea pig" for judicial acceptance of computer-assisted review. As with keywords or any other technological solution to ediscovery, counsel must design an appropriate process, including use of available technology, with appropriate quality control testing, to review and produce relevant ESI while adhering to *Rule 1* and *Rule 26(b)(2)(C)* proportionality. Computer-assisted review now can be considered judicially-approved for use in appropriate cases.

SO [*41] ORDERED.

Dated: New York, New York

February 24, 2012

/s/ Andrew J. Peck

Andrew J. Peck

United States Magistrate Judge

EXHIBIT

PARTIES' PROPOSED PROTOCOL RELATING TO THE PRODUCTION OF ELECTRONICALLY STORED INFORMATION ("ESI")

A. Scope

1. General. The procedures and protocols outlined herein govern the production of electronically stored information ("ESI") by MSLGROUP Americas, Inc. ("MSL") during the pendency of this litigation. The parties to this protocol will take reasonable steps to comply with this agreed-upon protocol for the production of documents and information existing in electronic format. Nothing in this protocol will be interpreted to require disclosure of documents or information protected from disclosure by the attorney-client privilege, work-product product doctrine or any other applicable privilege or immunity. It is Plaintiffs' position that nothing in this protocol will be interpreted to waive Plaintiffs' right to object to this protocol as portions of it were mandated by the Court over Plaintiffs' objections, including Plaintiffs' objections to the predictive coding methodology proposed by MSL.

2. Limitations and No-Waiver. This protocol provides a general framework for [*42] the production of ESI on a going forward basis. The Parties and their attorneys do not intend by this protocol to waive their rights to the attorney work-product privilege, except as specifically required herein, and any such waiver shall be strictly and narrowly construed and shall not extend to other matters or information not specifically described herein. All Parties preserve their attorney client privileges and other privileges and there is no intent by the protocol, or the production of documents pursuant to the protocol, to in any way waive or weaken these privileges. All documents produced hereunder are fully protected and covered by the Parties' confidentiality and clawback agreements and orders of the Court effectuating same.

3. Relevant Time Period. January 1, 2008 through February 24, 2011 for all non-email ESI relating to topics besides pay discrimination and for all e-mails. January 1, 2005 through February 24, 2011 for all non-e-mail ESI relating to pay discrimination for New York Plaintiffs.

B. ESI Preservation

1. MSL has issued litigation notices to designated employees on February 10, 2010, March 14, 2011 and June 9, 2011.

C. Sources

1. The Parties have identified the [*43] following sources of potentially discoverable ESI at MSL. Phase I sources will be addressed first, and Phase II sources will be addressed after Phase I source searches are complete. Sources marked as "N/A" will not be searched by the Parties.

	Data Source	Description	Phase
a	EMC SourceOne		I
	Archive	Archiving System used to capture and	
		store all incoming and outbound e-mails	
		and selected instant message	
		conversations saved through IBM Sametime	
		(see below).	
b	Lotus Notes	Active corporate system that provides	N/A
	E-mail	e-mail communication and calendaring	
		functions.	
c	GroupWise	Legacy corporate system that provided	N/A
	E-mail	e-mail communication and calendarin,	

		functions.	
d	IBM Sametime	Lotus Notes Instant Messaging and collaboration application.	N/A
e	Home Directories	Personal network storage locations on the file server(s) dedicated to individual users. (With the exception of 2 home directories for which MSL will collect and analyze the data to determine the level of duplication as compared to the EMC SourceOne Archive. The parties will meet and confer regarding the selection of the two custodians.)	II
f	Shared Folders	Shared network storage locations on the file server(s) that are accessible by individual users, groups of users or entire departments. (With the exception of the following Human Resources shared folders which will be in Phase I: Corporate HR, North America HR and New York HR.)	II
g	Database Servers	Backend databases (e.g. Oracle, SQL, MySQL) used to store information for front end applications or other purposes.	N/A
h	Halogen Software	Performance management program provided by Halogen to conduct performance evaluations.	I
i	Noovoo	Corporate Intranet site.	II
j	Corporate Feedback	E-mail addresses that employees may utilize to provide the company with comments, suggestions and overall feedback.	I
k	Hyperion Financial Management ("HFM")	Oracle application that offers global financial consolidation, reporting and analysis.	N/A

l	Vurv/Taleo	Talent recruitment software.	II
m	ServiceNow	Help Desk application used to track employee computer related requests.	N/A
n	PeopleSoft	Human resources information management system.	I
o	PRISM	PeopleSoft component used for time and billing management.	I
p	Portal	A project based portal provided through Oracle/BEA Systems.	II
q	Desktops/Laptops	Fixed and portable computers provided to employees to perform work related activities. (With the exception of 2 desktop/laptop hard drives for which MSL will collect and analyze the data to determine the level of duplication as compared to the EMC SourceOne Archive. The parties will meet and confer regarding the selection of the two custodians.)	II
r	Publicis Benefits Connection	Web based site that maintains information about employee benefits and related information.	II
s	GEARS	Employee expense reporting system.	II
t	MS&L City	Former corporate Intranet.	N/A
u	Adium	Application which aggregates instant messages.	N/A
y	Pidgin	Application which aggregates instant message.	N/A
w	IBM Lotus Traveler and MobileIron	Mobile device synchronization and security system.	N/A
y	Mobile Communication Devices	Portable PDAs, smart phones, tablets used for communication.	N/A
z	Yammer	Social media and collaboration portal.	N/A
aa	SalesForce.com	Web-based customer relationship management application.	N/A

bb	Removable Storage Devices	Portable storage media, external hard drives, thumb drives, etc. used to store copies of work related ESI.	N/A

a. [*44] EMC SourceOne - MSL uses SourceOne, an EMC e-mail archiving system that captures and stores all e-mail messages that pass through the corporate e-mail system. In addition, if a user chooses to save an instant messaging chat conversation from IBM Sametime (referenced below), that too would be archived in SourceOne. Defendant MSL also acknowledges that calendar items are regularly ingested into the SourceOne system. The parties have agreed that this data source will be handled as outlined in section E below.

b. Lotus Notes E-mail - MSL currently maintains multiple Lotus Notes Domino servers in various data centers around the world. All e-mail communication and calendar items are journaled in real time to the EMC SourceOne archive. The parties have agreed to not collect any information from this data source at this time.

c. GroupWise E-mail -- Prior to the implementation of the Lotus Notes environment, GroupWise was used for all e-mail and calendar functionality. Before the decommissioning of the GroupWise servers, MSL created backup tapes of all servers that housed the GroupWise e-mail databases. The parties have agreed to not collect any information from this data source at this time.

d. [*45] IBM Sametime -- MSL provides custodians with the ability to have real time chat conversations via the IBM Sametime application that is part of the Lotus Notes suite of products.

e. Home Directories -- Custodians with corporate network access at MSL also have a dedicated and secured network storage location where they are able to save files. MSL will collect the home directory data for 2 custodians and analyze the data to determine the level of duplication of documents in this data source against the data contained in the EMC SourceOne archive for the same custodians. (The parties will meet and confer regarding the selection of the two custodians.) The results of the analysis will be provided to Plaintiffs so that a determination can be made by the parties as to whether MSL will include this data source in its production of ESI to Plaintiffs. If so, the parties will attempt to reach an agreement as to the approach used to collect, review and produce responsive and non-privileged documents.

f. Shared Folders -- Individual employees, groups of employees and entire departments at MSL are given access to shared network storage locations to save and share files. As it relates to the Human Resources [*46] related shared folders (i.e., North America HR Drive (10.2 GB), Corporate HR Drive (440 MB), NY HR Drive (1.9 GB), Chicago HR Drive (1.16 GB), Boston HR Drive (43.3 MB), and Atlanta HR Drive (6.64 GB)), MSL will judgmentally review and produce responsive and non-privileged documents from the North America HR Drive, Corporate HR Drive, and NY HR Drive. MSL will produce to Plaintiffs general information regarding the content of other Shared Folders. The parties will meet and confer regarding the information gathered concerning the other Shared Folders and discuss whether any additional Shared Folders should be moved to Phase I.

g. Database Servers -- MSL has indicated that it does not utilize any database servers, other than those that pertain to the sources outlined above in C, which are likely to contain information relevant to Plaintiffs' claims.

h. Halogen Software -- MSL [*47] utilizes a third party product, Halogen, for performance management and employee evaluations. The parties will meet and confer in order to exchange additional information and attempt to reach an agreement as to the scope of data and the approach used to collect, review and produce responsive and non-privileged documents.

i. Noovoo -- MSL maintains a corporate Intranet site called "Noovoo" where employees are able to access Company-related information. MSL will provide Plaintiffs with any employment-related policies maintained within Noovoo.

j. Corporate Feedback -- MSL has maintained various e-mail addresses that employees may utilize to provide the company with comments, suggestions and overall feedback. These e-mail addresses include "powerofone@mslworldwide.com",

"poweroftheindividual@mslworldwide.com", "townhall@mslworldwide.com" and "whatsonyourmind@mslworldwide.com". The parties have agreed that all responsive and non-privileged ESI will be produced from these e-mail accounts and any other e-mail accounts that fall under this category of information. At present, MSL intends to manually review the contents of each of these e-mail accounts. However, if after collecting the contents [*48] of each of the e-mail accounts MSL determines that a manual review would be impractical, the parties will meet and confer as to the approach used to collect, review and produce responsive and non-privileged documents.

k. Hyperion Financial Management ("HFM") -- MSL uses an Oracle application called HFM that offers global financial consolidation, reporting and analysis capabilities.

l. Vurv/Taleo -- [*49] Since approximately 2006, MSL used an application known as Vury as its talent recruitment software. As of August 31, 2011, as a result of Vury being purchased by Taleo, MSL has been using a similar application by Taleo as its talent recruitment software. The application, which is accessed through MSL's public website, allows users to search for open positions as well as input information about themselves. To the extent Plaintiffs contend they were denied any specific positions, they will identify same and the Parties will meet and confer to discuss what, if any, information exists within Vurv/Taleo regarding the identified position. If information exists in Vurv/Taleo or another source regarding these positions, MSL will produce this information, to the extent such information is discoverable.

m. ServiceNow -- MSL utilizes ServiceNow as its Help Desk application. This system covers a wide variety of requests by employees for computer-related assistance (e.g., troubleshoot incidents, install software, etc.).

n. PeopleSoft -- MSL utilizes PeopleSoft, an Oracle-based software product, to record employee data such as date of hire, date of termination, promotions, salary increases, transfers, [*50] etc. MSL has produced data from this source and will consider producing additional data in response to a specific inquiry from Plaintiffs.

o. PRISM -- MSL utilizes PRISM for tracking time and billing. It is used primarily to track an employee's billable time. MSL will consider producing additional data in response to a specific inquiry from Plaintiffs.

p. Portal -- MSL maintains a portal provided through Oracle/BEA Systems. The portal is web-based and is used for light workflow activities (such as reviewing draft documents).

q. Desktops/Laptops -- MSL provided employees with desktop and/or laptop computers to assist in work related activities. MSL will collect the desktop/laptop hard drive data for 2 custodians and analyze the data to determine the level of duplication of documents in this data source against the data contained in the EMC SourceOne archive for the same custodians. (The parties will meet and confer regarding the selection of the two custodians.) The results of the analysis will be provided to Plaintiffs so that a determination can be made by the parties as to whether MSL will include this data source in its production of ESI to Plaintiffs. If so, the Parties will attempt [*51] to reach an agreement as to the approach used to collect, review and produce responsive and non-privileged documents.

r. Publicis Benefits Connection -- Plaintiffs understand that MSL provides employees with access to a centralized web based site that provides access to corporate benefits information and other related content.

s. GEARS -- MSL maintains a centralized web-based expense tracking and reporting system called "GEARS" where users are able to enter expenses and generate reports.

t. MS&L City -- MSL maintained a corporate web-based Intranet prior to migrating to Noovoo.

u. Adium -- This is a free and open source instant messaging client for Mac OS X users.

v. Pidgin -- Pidgin is a chat program which lets users log into accounts on multiple chat networks simultaneously. However, the data resides with a third party messaging provider (e.g. AIM, Yahoo!, Google Talk, MSN Messenger, etc.).

w. IBM Lotus Traveler and MobileIron -- MSL maintains these systems for e-mail device sync and security features for employees' mobile devices, including Blackberry devices, iPhones, iPads, Android phones, and Android tablets.

x. Mobile Communication Devices - MSL provides mobile devices and/or connectivity [*52] including Blackberry devices, iPhones, iPads, Android phones, and Android tablets to designated employees.

y. Yammer -- This is an instant messaging application hosted externally, used for approximately one year in or around 2008 through 2009.

z. SalesForce.com -- This is a web-based customer relationship management application but it was not widely used.

aa. Removable Storage Devices -- MSL does not restrict authorized employees from using removable storage devices.

D. Custodians

1. The Parties agree that MSL will search the e-mail accounts of the following individuals as they exist on MSL's EMC SourceOne archive. (Except where a date range is noted, the custodian's entire e-mail account was collected from the archive.)

	Custodian Name	**Title**
1.	Lund, Wendy	Executive VP of Global Client
		and Business Development
2.	Fite, Vicki	Managing Director, MSL Los Angeles
3.	Wilson, Renee	President, NE Region,
		Managing Director NY
4.	Brennan, Nancy (1/1/08 to 5/31/08)	SVP/Director Corporate Branding
5.	Lilien (Lillien, Kashanian), Tara	SVP, North America Human Resources
6.	Miller, Peter	Executive Vice President, CFO
7.	Masini, Rita	Chief Talent Officer
8.	Tsokanos, Jim	President of the Americas
9.	Da Silva Moore, Monique	Director Healthcare Practice, Global
10.	O'Kane, Jeanine (2/8/10 to 2/24/11)	Director of Healthcare North America
11.	Perlman, Carol	Senior VP
12.	Mayers, Laurie	SVP MS&L Digital
13.	Wilkinson, Kate	Account Executive
14.	Curran, Joel (5/1/08 to 5/31/10)	Managing Director MSL Chicago
15.	Shapiro, Maury	North American CFO
16.	Baskin, Rob (1/1/08 to 12/31/08)	Managing Director
17.	Pierce, Heather	VP
18.	Branam, Jud (1/1/08 to 1/31/10)	Managing Director, MS&L Digital
19.	McDonough, Jenni (1/1/08	VP, Director of Human Resources
	to 12/31/08)	
20.	Hannaford, Donald (1/1/08 to 3/1/08)	Managing Director
21.	On, Bill (1/1/08 to 2/24/11)	Managing Director
22.	Dhillon, Neil (9/8/08 to 5/31/10)	Managing Director MSL Washington DC

23.	Hubbard, Zaneta	Account Supervisor
24.	Morgan, Valerie (1/1/08 to 2/24/11)	HR Director
25.	Daversa, Kristin (1/1/08 to 2/24/11)	HR Director
26.	Vosk, Lindsey (1/1/08 to 2/24/11)	HR Manager
27.	Carberry, Joe (1/1/08 to 2/24/11)	President, Western Region
28.	Sheffield, Julie (1/1/08 to 2/24/11)	HR/Recruiting Associate
29.	MaryEllen O'Donohue	SVP (2010)
30.	Hass, Mark	CEO (former)
31.	Morsman, Michael	Managing Director, Ann Arbor (former)

E. [*53] Search Methodology[1]

1 As noted in Paragraphs A(1) and J of this Protocol, Plaintiffs object to the predictive coding methodology proposed by MSL.

1. General. The Parties have discussed the methodologies or protocols for the search and review of ESI collected from the EMC SourceOne archive and the following is a summary of the Parties' agreement on the use of Predictive Coding. This section relates solely to the EMC SourceOne data source (hereinafter referred to as the "e-mail collection").

2. General Overview of Predictive Coding Process. MSL will utilize the Axcelerate software by Recommind to search and review the e-mail collection for production in this case.

The process begins with Jackson Lewis attorneys developing an understanding of the entire e-mail collection while identifying a small number of documents, the initial seed set, that is representative of the categories to be reviewed and coded (relevance, privilege, issue-relation). It is the step when the first seed sets are generated which is done by use of search and analytical tools, including keyword, Boolean and concept search, concept grouping, and, as needed, up to 40 other automatically populated filters available within [*54] the Axcelerate system. This assists in the attorneys' identification of probative documents for each category to be reviewed and coded.

Plaintiffs' counsel will be provided with preliminary results of MSL's hit counts using keyword searches to create a high priority relevant seed set, and will be invited to contribute their own proposed keywords. Thereafter, Plaintiffs' counsel will be provided with the non-privileged keyword hits -- both from MSL's keyword list and Plaintiffs' keyword list -- which were reviewed and coded by MSL. Plaintiffs' counsel will review the documents produced and promptly provide defense counsel with their own evaluation of the initial coding applied to the documents, including identification of any documents it believes were incorrectly coded. To the extent the parties disagree regarding the coding of a particular document, they will meet and confer in an effort to resolve the dispute prior to contacting the Court for resolution. The irrelevant documents so produced shall be promptly returned after review and analysis by Plaintiffs' counsel and/or resolution of any disputes by the Court.

The seed sets are then used to begin the Predictive Coding process. Each [*55] seed set of documents is applied to its relevant category and starts the software "training" process. The software uses each seed set to identify and prioritize all substantively similar documents over the complete corpus of the e-mail collection. The attorneys then review and code a judgmental sample of at least 500 of the "computer suggested" documents to ensure their proper categorization and to further calibrate the system by recoding documents into their proper categories. Axcelerate learns from the new corrected coding and the Predictive Coding process is repeated.

Attorneys representing MSL will have access to the entire e-mail collection to be searched and will lead the computer training, but they will obtain input from Plaintiffs' counsel during the iterative seed selection and quality control processes and will share the information

used to craft the search protocol as further described herein. All non-privileged documents reviewed by MSL during each round of the iterative process (i.e., both documents coded as relevant and irrelevant) will be produced to Plaintiffs' counsel during the iterative seed set selection process. Plaintiffs' counsel will review the documents produced [*56] and promptly provide defense counsel with its own evaluation of the initial coding applied to the documents, including identification of any documents it believes were incorrectly coded. To the extent the Parties disagree regarding the coding of a particular document, they will meet and confer in an effort to resolve the dispute prior to contacting the Court for resolution. Again, the irrelevant documents so produced shall be promptly returned after review and analysis by Plaintiffs' counsel and/or resolution of any disputes by the Court.

At the conclusion of the iterative review process, all document predicted by Axcelerate to be relevant will be manually reviewed for production. However, depending on the number of documents returned, the relevancy rating of those documents, and the costs incurred during the development of the seed set and iterative reviews, MSL reserves the right to seek appropriate relief from the Court prior to commencing the final manual review.

The accuracy of the search processes, both the systems' functions and the attorney judgments to train the computer, will be tested and quality controlled by both judgmental and statistical sampling. In statistical sampling, [*57] a small set of documents is randomly selected from the total corpus of the documents to be tested. The small set is then reviewed and an error rate calculated therefrom. The error rates can then be reliably projected on the total corpus, having a margin of error directly related to the sample size.

3. Issue Tags. The parties agree that, to the extent applicable, as part of the seed set training described above, as well as during the iterative review process, all documents categorized as relevant and not privileged, to the extent applicable, also shall be coded with one or more of the following agreed-upon issue tags:

a. Reorganization.

b. Promotion/Assignments.

c. Work/Life Balance.

d. Termination.

e. Compensation.

f. Maternity/Pregnancy.

g. Complaints/HR.

h. Publicis Groupe/Jurisdiction.

This issue coding will take place during the initial random sample, creation of the seed set and initial and iterative training (see paragraphs 4, 5 and 6 below). This input shall be provided to Plaintiffs' counsel along with the initial document productions. Plaintiffs' counsel shall promptly report any disagreements on classification, and the parties shall discuss these issues in good faith, so that the seed [*58] set training may be improved accordingly. This issue-tagging and disclosure shall take place during the described collaborative seed set training process. The disclosures here made by MSL on its issue coding are not required in the final production set.

4. Initial Random Sample. Using the Axcelerate software to generate a random sample of the entire corpus of documents uploaded to the Axcelerate search and review platform, MSL's attorneys will conduct a review of the random sample for relevance and to develop a baseline for calculating recall and precision. To the extent applicable, any relevant documents also will be coded with one or more of the issue tags referenced in paragraph E.3 above. The random sample consists of 2,399 documents, which represents a 95% confidence level with a confidence estimation of plus or minus 2%. The Parties agree to utilize the random sample generated prior to the finalization of this protocol. However, during Plaintiffs' counsel's review of the random sample, they may advise as to whether they believe any of the documents should be coded with one or more of the subsequently added issue codes (i.e., Complaints/HR and Publicis Groupe/Jurisdiction) and [*59] will, as discussed above, indicate any disagreement with MSL's classifications.

5. Seed Set.

a. Defendant MSL. To create the initial seed set of documents that will be used to "train" the Axcelerate software as described generally above, MSL primarily utilized keywords listed on Exhibits A and B to this protocol, but also utilized other judgmental analysis and

search techniques designed to locate highly relevant documents, including the Boolean, concept search and other features of Axcelerate. Given the volume of hits for each keyword (Exhibit A), MSL reviewed a sampling of the hits and coded them for relevance as well as for the following eight preliminary issues: (i) Reorganization; (ii) Promotion; (iii) Work/Life Balance; (iv) Termination; (v) Compensation; and (vi) Maternity. Specifically, except for key words that were proper names, MSL performed several searches within each set of key word hits and reviewed a sample of the hits. The Axcelerate software ranked the hits in order of relevance based on the software's analytical capabilities and the documents were reviewed in decreasing order of relevance (i.e., each review of the sample of supplemental searches started with the highest [*60] ranked documents). Exhibit B identifies the supplemental searches conducted, the number of hits, the number of documents reviewed, the number of documents coded as potentially responsive and general comments regarding the results. In addition, to the extent applicable, documents coded as responsive also were coded with one or more issue tags. MSL will repeat the process outlined above and will include the newly defined issues and newly added custodians. MSL will provide Plaintiffs' counsel with all of the non-privileged documents and will provide, to the extent applicable, the issue tag(s) coded for each document, as described above. Plaintiffs' counsel shall promptly review and provide notice as to any documents with which they disagree where they do not understand the coding. If necessary, counsel will meet and confer to attempt to resolve any disagreements regarding the coding applied to the documents in this seed set.

b. Plaintiffs. To help create the initial seed set of documents that will be used to "train" the Axcelerate software, Plaintiffs provided a list of potential key words to MSL. MSL provided Plaintiffs with a hit list for their proposed key words. This process was repeated [*61] twice with the hit list for Plaintiffs' most recent set of keywords attached as Exhibit C. MSL will review 4,000 randomly sampled documents from Plaintiffs' supplemental list of key words to be coded for relevance and issue tags. MSL will provide Plaintiffs' counsel with all non-privileged documents and will provide, to the extent applicable, the issue tag(s) coded for each document. Plaintiffs' counsel shall promptly review and provide notice as to any documents with which they disagree with or where they do not understand the coding. If necessary, the Parties' counsel will meet and confer to attempt to resolve any disagreements regarding the coding applied to the documents in this seed set.

c. Judgmental Sampling. In addition to the above, a number of targeted searches were conducted by MSL in an effort to locate documents responsive to several of Plaintiffs' specific discovery requests. Approximately 578 documents have already been coded as responsive and produced to Plaintiffs. In addition, several judgmental searches were conducted which resulted in approximately 300 documents initially being coded as responsive and several thousand additional documents coded as irrelevant. The [*62] documents coded as relevant and non-privileged also will be reviewed by Plaintiffs' counsel and, subject to their feedback, included in the seed set. An explanation shall be provided by MSL's attorneys for the basis of the bulk tagging of irrelevant documents (primarily electronic periodicals and newsletters that were excluded in the same manner as spam junk mail is excluded). The explanation shall include the types of documents bulk tagged as irrelevant as well as the process used to identify those types of documents and other similar documents that were bulk tagged as irrelevant.

6. Initial And Iterative Training. Following the creation of the first seed set, the Axcelerate software will review the entire data set to identify other potentially relevant documents. MSL will then review and tag a judgmental based sample, consisting of a minimum of 500 documents, including all documents ranked as *highly relevant* or *hot*, of the new "Computer Suggested" documents, which were suggested by the Axcelerate software. MSL's attorneys shall act in consultation with the Axcelerate software experts to make a reasonable, good faith effort to select documents in the judgmental sample that will serve [*63] to enhance and increase the accuracy of the predictive coding functions. The results of this first iteration, both the documents newly coded as relevant and not relevant for particular issue code or codes, will be provided to Plaintiffs' counsel for review and comment. (All documents produced by the parties herein to each other, including, without limitation, these small seed set development productions, shall be made under the Confidentiality Stipulation in this matter as well as any clawback agreement that shall be reduced to an order acceptable to the Court. Any documents marked as irrelevant shall be returned to counsel for MSL at the conclusion of the iterative training phase, unless the relevancy of any documents are disputed, in which case

they may be submitted to the Court for review.)

Upon completion of the initial review, and any related meet and confer sessions and agreed upon coding corrections, the Axcelerate software will be run again over the entire data set for suggestions on other potentially relevant documents following the same procedures as the first iteration. The purpose of this second and any subsequent iterations of the Predictive Coding process will be to further [*64] refine and improve the accuracy of the predictions on relevance and various other codes. The results of the second iteration shall be reviewed and new coding shared with Plaintiffs' counsel as described for the first iteration. This process shall be repeated five more times, for a total of seven iterations, unless the change in the total number of relevant documents predicted by the system as a result of a new iteration, as compared to the last iteration, is less than five percent (5%), and no new documents are found that are predicted to be *hot* (aka *highly relevant*), at which point MSL shall have the discretion to stop the iterative process and begin the final review as next described. If more than 40,000 documents are returned in the final iteration, then MSL reserves the right to apply to the Court for relief and limitations in its review obligations hereunder. Plaintiffs reserve the right, at all times, to challenge the accuracy and reliability of the predictive coding process and the right to apply to the Court for a review of the process.

7. Final Search and Production. All of the documents predicted to be relevant in the final iteration described in paragraph six above will be [*65] reviewed by MSL, unless it applies to the court for relief hereunder. All documents found by MSL's review to be relevant and non-privileged documents will be promptly produced to Plaintiffs. If more than 40,000 documents are included in the final iteration, then MSL reserves its right to seek payment from Plaintiffs for all reasonable costs and fees MSL incurred related to the attorney review and production of more 40,000 documents.

8. Quality Control by Random Sample of Irrelevant Documents. In addition, at the conclusion of this search protocol development process described above, and before the final search and production described in Paragraph 7 above, MSL will review a random sample of 2,399 documents contained in the remainder of the database that were excluded as irrelevant. The results of this review, both the documents coded as relevant and not relevant, but not privileged, will be provided to Plaintiffs' counsel for review. (Any documents initially coded as "not relevant" will be provided subject to the Confidentiality Stipulation and any clawback agreements entered in this matter will be returned to counsel for MSL within 60 days of their production.) The purpose for this [*66] review is to allow calculation of the approximate degree of recall and precision of the search and review process used. If Plaintiffs object to the proposed review based on the random sample quality control results, or any other valid objection, they shall provide MSL with written notice thereof within five days of the receipt of the random sample. The parties shall then meet and confer in good faith to resolve any difficulties, and failing that shall apply to the Court for relief. MSL shall not be required to proceed with the final search and review described in Paragraph 7 above unless and until objections raised by Plaintiffs have been adjudicated by the Court or resolved by written agreement of the Parties.

F. Costs

1. MSL proposes to limit the costs of its final review and production of responsive ESI from the MSL email collection to an additional $200,000, above and beyond the approximately $350,000 it has already paid or is anticipated to pay in e-discovery related activities as previously described and disclosed to Plaintiffs.

2. Plaintiffs agree to bear all of the costs associated with their compliance with the terms of this protocol and with the receipt and review of ESI produced [*67] hereunder including the costs associated with its ESI experts at DOAR Litigation Consulting who will be involved with Plaintiffs in all aspects of this ESI protocol. Plaintiffs propose that MSL bear all of the costs associated with its obligations under the terms of this protocol and do not agree to limit the amount of information subject to the review and production of ESI by MSL.

G. Format of Production For Documents Produced From Axcelerate

1. TIFF/Native File Format Production. Documents will be produced as single-page TIFF images with corresponding multi-page text and necessary load files. The load files will include an image load file as well as a metadata (.DAT) file with the metadata fields identified on Exhibit D. Defendant MSL will produce spreadsheets (.xls files) and PowerPoint presentations (.ppt files) in

native form as well as any documents that cannot be converted to TIFF format (e.g., audio or video files, such as mp3s, ways, megs, etc.). In addition, for any redacted documents that are produced, the documents' metadata fields will be redacted where required. For the production of ESI from non-email sources, the parties will meet and confer to attempt to reach an agreement [*68] of the format of production.

2. Appearance. Subject to appropriate redaction, each document's electronic image will convey the same information and image as the original document. Documents that present imaging or formatting problems will be promptly identified and the parties will meet and confer in an attempt to resolve the problems.

3. Document Numbering. Each page of a produced document will have a legible, unique page identifier "Bates Number" electronically "burned" onto the image at a location that does not obliterate, conceal or interfere with any information from the source document. The Bates Number for each page of each document will be created so as to identify the producing party and the document number. In the case of materials redacted in accordance with applicable law or confidential materials contemplated in any Confidentiality Stipulation entered into by the parties, a designation may be "burned" onto the document's image at a location that does not obliterate or obscure any information from the source document.

4. Production Media. The producing party will produce documents on readily accessible, computer or electronic media as the parties may hereafter agree upon, [*69] including CD-ROM, DVD, external hard drive (with standard PC compatible interface), (the "Production Media"). Each piece of Production Media will be assigned a production number or other unique identifying label corresponding to the date of the production of documents on the Production Media (e.g., "Defendant MSL Production April 1, 2012") as well as the sequence of the material in that production (e.g. "-001", "-002"). For example, if the production comprises document images on three DVDs, the producing party may label each DVD in the following manner "Defendant MSL Production April 1, 2012", "Defendant MSL Production April 1, 2012-002", "Defendant MSL Production April 1, 2012-003." Additional information that will be identified on the physical Production Media includes: (1) text referencing that it was produced in *da Silva Moore v. Publicis Groupe SA, et al*.; and (2) the Bates Number range of the materials contained on the Production Media. Further, any replacement Production Media will cross-reference the original Production Media and clearly identify that it is a replacement and cross-reference the Bates Number range that is being replaced.

5. Write Protection and Preservation. [*70] All computer media that is capable of write-protection should be write-protected before production.

6. Inadvertent Disclosures. The terms of the Parties' Clawback Agreement and Court Order shall apply to this protocol.

7. Duplicate Production Not Required. A party producing data in electronic form need not produce the same document in paper format.

H. Timing.

I. To the extent a timeframe is not specifically outlined herein, the parties will use their reasonable efforts to produce ESI in a timely manner consistent with the Court's discovery schedule.

2. The parties will produce ESI on a rolling basis.

I. General Provisions.

1. Any practice or procedure set forth herein may be varied by agreement of the parties, and first will be confirmed in writing, where such variance is deemed appropriate to facilitate the timely and economical exchange of electronic data.

2. Should any party subsequently determine it cannot in good faith proceed as required by this protocol, the parties will meet and confer to resolve any dispute before seeking Court intervention.

3. The Parties agree that e-discovery will be conducted in phases and, at the conclusion of the search process described in Section E above, the [*71] Parties will meet and confer regarding whether further searches of additional custodians and/or the Phase II sources is warranted and/or reasonable. If agreement cannot be reached, either party may seek relief from the Court.

J. Plaintiffs' Objection

1. Plaintiffs object to this ESI Protocol in its entirety. Plaintiffs submitted their own proposed ES! Protocol to

the Court, but it was largely rejected. The Court then ordered the parties to submit a joint ES! Protocol reflecting the Court's rulings. Accordingly, Plaintiffs jointly submit this ESI Protocol with MSL, but reserve the right to object to its use in this case.

This protocol may be executed in counterparts. Each counterpart, when so executed, will be deemed and original, and will constitute the same instrument.

By:

JANETTE WIPPER, ESQ.

DEEPIKA BAINS, ESQ.

SIHAM NURHUSSEIN, ESQ.

SANFORD WITTELS & HEISLER, LLP

Attorneys for Plaintiffs and Class

555 Montgomery Street, Ste. 1206

San Francisco, CA 94111

Telephone: (415) 391-6900

Date: , 2012

By:

BRETT M. ANDERS, ESQ.

VICTORIA WOODIN CHAVEY, ESQ.

JEFFREY W. BRECHER, ESQ.

JACKSON LEWIS LLP

Attorneys for Defendant MSLGROUP

58 South Service Road, Suite 410

Melville, NY 11747

Telephone: (631) [*72] 247-0404

Date: , 2012

1 of 5 DOCUMENTS

Caution
As of: Dec 10, 2012

HOWARD CHIN, RICHARD WONG, SANRIT BOONCOME, MICHAEL CHUNG, Plaintiffs-Appellees-Cross-Appellants, THE PORT AUTHORITY POLICE ASIAN JADE SOCIETY OF NEW YORK & NEW JERSEY INC., CHRISTIAN ENG, NICHOLAS YUM, ALAN LEW, DAVID LIM, GEORGE MARTINEZ, STANLEY CHIN, MILTON FONG, Plaintiffs-Appellees, -v.- THE PORT AUTHORITY OF NEW YORK & NEW JERSEY, Defendant-Appellant-Cross-Appellee.

Nos. 10-1904-cv(L), 10-2031-cv(XAP)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

685 F.3d 135*; *2012 U.S. App. LEXIS 14088*; *115 Fair Empl. Prac. Cas. (BNA) 720*; *95 Empl. Prac. Dec. (CCH) P44,555

October 17, 2011, Argued
July 10, 2012, Decided

PRIOR HISTORY: [**1]

Defendant-appellant the Port Authority of New York and New Jersey, Inc. ("Port Authority") and plaintiff-appellants Howard Chin, Richard Wong, Sanrit Booncome, and Michael Chung appeal from a judgment of the United States District Court for the Southern District of New York (Miriam Goldman Cedarbaum, Judge) holding, after a jury trial, that the Port Authority violated Title VII of the Civil Rights Act of 1964 by failing to promote seven plaintiffs, and awarding plaintiffs-appellees Christian Eng, Nicholas Yum, Alan Lew, David Lim, George Martinez, Stanley Chin, and Milton Fong back pay, compensatory damages, and equitable relief. We conclude that the pattern-orpractice method of proving liability was not available to plaintiffs in this private, nonclass action and so REVERSE as to the submission of this theory of liability to the jury. We also REVERSE with respect to the district court's determination that pursuant to the plaintiffs' disparate impact theory, the "continuing violation" doctrine permitted the award of damages and equitable relief in connection with conduct predating the statute of limitations. We therefore VACATE the back pay awards to Eng, Lew, Stanley Chin, and Fong; [**2] VACATE the jury's compensatory damage awards with respect to Eng, Yum, Lew, Lim, Martinez, Stanley Chin, and Fong; VACATE the retroactive promotion of Lew; VACATE the salary and pension adjustments for Lew, Stanley Chin, and Fong; and REMAND to the district court for a new trial on damages as to these plaintiffs and for reconsideration of the equitable relief afforded to them to the extent such relief was premised on failures to promote occurring outside the statute of limitations. With respect to all other issues raised by the parties on appeal, we

AFFIRM.

Port Auth. Police Asian Jade Soc'y of N.Y. & N.J., Inc. v. Port Auth. of N.Y. & N.J., 601 F. Supp. 2d 566, 2009 U.S. Dist. LEXIS 24841 (S.D.N.Y., 2009)

Port Auth. Police Asian Jade Soc'y of N.Y. & N.J., Inc. v. Port Auth. of N.Y. & N.J., 681 F. Supp. 2d 456, 2010 U.S. Dist. LEXIS 2900 (S.D.N.Y., 2010)

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant employer appealed from the United States District Court for the Southern District of New York, which, after a jury trial, held that the employer violated Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*, by failing to promote seven plaintiff Asian American employees, and awarding those seven employees back pay, compensatory damages, and equitable relief. Unsuccessful employees cross-appealed.

OVERVIEW: On appeal, the employer argued: (1) that evidence predating the onset of the statute of limitations should not have been admitted; (2) that the evidence was insufficient to support the jury's verdict with respect to each of the plaintiffs' theories; and (3) that the damages and equitable relief were premised on time-barred claims and were otherwise excessive. With regard to the plaintiffs' individual disparate treatment allegations, the court held that the district court properly admitted background evidence predating the onset of the limitations period and that there was sufficient evidence for a reasonable juror to conclude that the employer discriminated against the seven prevailing plaintiffs within the limitations period. The court ruled that the district court erred in: (1) submitting the pattern-or-practice disparate treatment theory to the jury in the private, non-class action; and (2) concluding that the "continuing violation" doctrine applied to the employee's disparate impact theory so that the jury could award back pay and compensatory damages for harms predating the onset of the statute of limitations.

OUTCOME: The court vacated the back pay for four of the plaintiffs, as well as the injunctive relief for three of the same plaintiffs, and also vacated the award of compensatory damages for all seven prevailing plaintiffs. The case was remanded for a new trial on damages as to all seven prevailing plaintiffs and for reconsideration of equitable relief. As to the cross-appeal and other issues on appeal, the judgment was affirmed.

LexisNexis(R) Headnotes

Labor & Employment Law > Discrimination > Disparate Treatment > Exhaustion of Remedies
Labor & Employment Law > U.S. Equal Employment Opportunity Commission > Exhaustion of Remedies > Right to Sue Letters

[HN1] Ordinarily, a "right to sue" letter must be issued by the EEOC. However, where the respondent to a discrimination charge under Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*, is a governmental agency and the EEOC has not dismissed the charge, the Attorney General is responsible for issuing the right-to-sue letter. *29 C.F.R. § 1601.28(d)*.

Evidence > Testimony > Experts > Admissibility

[HN2] *Fed. R. Evid. 702* provides: A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview
Civil Procedure > Judgments > Relief From Judgment > Motions for New Trials
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
Civil Procedure > Appeals > Standards of Review > De Novo Review

[HN3] A motion for a new trial should be granted when, in the opinion of the district court, the jury has reached a seriously erroneous result or the verdict is a miscarriage of justice. The district court's denial of a *Fed. R. Civ. P. 59* motion for a new trial is reviewed for abuse of discretion. A district court has abused its discretion if it has (1) based its ruling on an erroneous view of the law, (2) made a clearly erroneous assessment of the evidence,

or (3) rendered a decision that cannot be located within the range of permissible decisions. The United States Court of Appeals for the Second Circuit reviews the denial of a motion for judgment as a matter of law de novo. Whether conducting review de novo or under a less sweeping standard, the Second Circuit must disregard all errors and defects if there is no likelihood that the error or defect affected the outcome of the case.

Labor & Employment Law > Discrimination > Disparate Treatment > Exhaustion of Remedies
Labor & Employment Law > U.S. Equal Employment Opportunity Commission > Exhaustion of Remedies > Filing of Charges
[HN4] As a prerequisite to filing suit under Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*, a private plaintiff must first file a timely charge with the EEOC. *42 U.S.C.S. § 2000e-5(e)(1)*, *(f)(1)*.

Civil Procedure > Appeals > Standards of Review > General Overview
Civil Procedure > Appeals > Standards of Review > Fact & Law Issues
[HN5] The United States Court of Appeals for the Second Circuit is not bound by parties' effective stipulations on questions of law.

Labor & Employment Law > Discrimination > Disparate Treatment > Employment Practices > Pattern or Practice
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > Coverage & Definitions > General Overview
[HN6] The phrase "pattern or practice" appears only once in Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*--in a section that authorizes the government to pursue injunctive relief against an employer engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by the statute. *42 U.S.C.S. § 2000e-6*. Notwithstanding the U.S. Supreme Court's recognition in International Brotherhood of Teamsters v. United States that this language was not intended as a term of art, and the words reflect only their usual meaning, the phrase is often used in a technical sense to refer either to this unique form of liability available in government actions under *§ 2000e-6*, or to the burden-shifting framework set out in Teamsters and available both to the government in *§ 2000e-6* litigation and to class-action plaintiffs in private actions alleging discrimination.

Labor & Employment Law > Discrimination > Disparate Treatment > Employment Practices > Adverse Employment Actions > General Overview
Labor & Employment Law > Discrimination > Disparate Treatment > Employment Practices > Pattern or Practice
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burdens of Proof
Labor & Employment Law > Discrimination > Disparate Treatment > Remedies
[HN7] The building blocks of liability pursuant to *42 U.S.C.S. § 2000e-6*--which provides for prospective injunctive relief where the government establishes that an employer is engaged in a pattern or practice of resistance to the full enjoyment of rights secured by Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*--differ from those that provide the foundation for typical, private-party Title VII litigation. To establish an employer's liability for discrimination in violation of Title VII, a private plaintiff ordinarily must show that an employer took an adverse employment action against him or her because of his or her race, or on account of another protected ground. In *§ 2000e-6* litigation, by contrast, the government need not demonstrate specific losses to specific individuals to establish that injunctive relief is appropriate. The government must prove more than the mere occurrence of isolated or accidental or sporadic discriminatory acts: it must prove that unlawful discrimination was the company's standard operating procedure. Once established, however, a court's finding of a pattern or practice justifies an award of prospective relief even absent proof of losses to specific individuals.

Labor & Employment Law > Discrimination > Disparate Treatment > Employment Practices > Pattern or Practice
[HN8] A pattern or practice case is not a separate and free-standing cause of action, but is really merely another method by which disparate treatment can be shown.

Labor & Employment Law > Discrimination > Disparate Treatment > Employment Practices > Pattern or Practice
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burdens of Proof

Labor & Employment Law > Discrimination > Disparate Treatment > Remedies

[HN9] Unlike in a typical individual disparate treatment suit, a plaintiff's burden under the pattern-or-practice method requires the plaintiff to prove only the existence of a discriminatory policy rather than all elements of a prima facie case of discrimination--but under the pattern-or-practice method, only prospective relief is available, unless the plaintiffs offer additional proof.

Evidence > Procedural Considerations > Burdens of Proof > Ultimate Burden of Persuasion
Labor & Employment Law > Discrimination > Disparate Treatment > Employment Practices > Pattern or Practice
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burdens of Proof

[HN10] In the context of disparate-treatment, private nonclass litigation, the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. To be sure, proof that an employer engaged in a pattern or practice of discrimination may be of substantial help in demonstrating an employer's liability in the individual case. But such proof cannot relieve the plaintiff of the need to establish each element of his or her claim.

Labor & Employment Law > Discrimination > Disparate Treatment > Employment Practices > Pattern or Practice
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > General Overview

[HN11] All circuits to consider the question have held that the pattern-or-practice method of proof is not available to private, nonclass plaintiffs.

Labor & Employment Law > Discrimination > Disparate Impact > Proof > General Overview
Labor & Employment Law > Discrimination > Disparate Treatment > Employment Practices > Pattern or Practice
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > General Overview

[HN12] The pattern-or-practice method of proof is not available to nonclass, private discrimination plaintiffs. Evidence of an employer's general practice of discrimination may be highly relevant to an individual disparate treatment or to a disparate impact claim. Outside the class context, however, private plaintiffs may not invoke the Teamsters method of proof as an independent and distinct method of establishing liability.

Labor & Employment Law > Discrimination > Disparate Treatment > Employment Practices > Adverse Employment Actions > General Overview
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Statistical Evidence
Labor & Employment Law > Discrimination > Disparate Treatment > Statutes of Limitations
Labor & Employment Law > Discrimination > Retaliation > General Overview

[HN13] So long as at least one alleged adverse employment action occurred within the applicable filing period, evidence of an earlier alleged retaliatory act may constitute relevant background evidence in support of that timely claim. Such background evidence may be considered to assess liability on the timely alleged act. In particular, statistical studies may include data from outside the statute of limitations to prove timely discriminatory acts.

Civil Procedure > Appeals > Standards of Review > General Overview
Evidence > Procedural Considerations > Weight & Sufficiency

[HN14] In reviewing the sufficiency of the evidence in support of a jury's verdict, the United States Court of Appeals for the Second Circuit examines the evidence in the light most favorable to the party in whose favor the jury decided, drawing all reasonable inferences in the winning party's favor. The Second Circuit will overturn the plaintiffs' verdict only if there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or such an overwhelming amount of evidence in favor of the defendant that reasonable and fair minded men could not arrive at a verdict against the defendant.

Civil Procedure > Trials > Judgment as Matter of Law > General Overview
Labor & Employment Law > Discrimination > Disparate Treatment > General Overview
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Burden Shifting
Labor & Employment Law > Discrimination >

Disparate Treatment > Proof > Burdens of Proof

[HN15] With respect to an individual disparate treatment claim under Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*, whether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law. A plaintiff establishes a prima facie case by showing (1) that he belonged to a protected class; (2) that he was qualified for the position he held; (3) that he suffered an adverse employment action; and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent. An employer may then rebut this prima facie case by offering a legitimate, nondiscriminatory business reason for its conduct. A plaintiff ultimately prevails if he proves that the defendant's employment decision was based in whole or in part on intentional discrimination.

Labor & Employment Law > Discrimination > Disparate Impact > Proof > Burden Shifting
Labor & Employment Law > Discrimination > Disparate Impact > Proof > Burdens of Proof
Labor & Employment Law > Discrimination > Disparate Impact > Proof > Statistical Evidence

[HN16] To prevail under the disparate impact theory of liability, a plaintiff must show that the employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin. *42 U.S.C.S. § 2000e-2(k)(1)(A)(i)*. This requires a plaintiff to (1) identify a specific employment practice or policy; (2) demonstrate that a disparity exists; and (3) establish a causal relationship between the two. The statistics must reveal that the disparity is substantial or significant, and must be of a kind and degree sufficient to reveal a causal relationship between the challenged practice and the disparity. To rebut a plaintiff's statistics, a defendant may introduce evidence showing that either no statistically significant disparity in fact exists or the challenged practice did not cause the disparity.

Labor & Employment Law > Discrimination > Disparate Impact > Proof > Burdens of Proof
Labor & Employment Law > Discrimination > Disparate Impact > Remedies

[HN17] If the trier of fact determines that the plaintiffs have established a disparate impact violation of Title VII of the Civil Rights Act of 1964, each person seeking individual relief such as back pay and compensatory damages need only show that he or she suffered an adverse employment decision and therefore was a potential victim of the proved discrimination. After such a showing, the employer bears the burden of persuading the trier of fact that its decision was made for lawful reasons; otherwise, the employee is entitled to individualized relief, which may include back pay, front pay, and compensatory damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, or other nonpecuniary losses. *42 U.S.C.S. § 1981a(b)(3)*.

Labor & Employment Law > Discrimination > Disparate Impact > Proof > Statistical Evidence
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Statistical Evidence

[HN18] In the context of an action under Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*, a district court errs by "downgrading" statistical studies on the ground that they relied in part on pre-statute of limitations data.

Labor & Employment Law > Discrimination > Disparate Impact > Proof > Statistical Evidence
Labor & Employment Law > Discrimination > Racial Discrimination > Proof > Statistical Evidence

[HN19] Plaintiffs must identify the correct population for analysis. In the typical disparate impact case the proper population for analysis is the applicant pool or the eligible labor pool. In the context of promotions, the appropriate comparison is customarily between the racial composition of candidates seeking to be promoted and the racial composition of those actually promoted, at least so long as the relevant data are available.

Labor & Employment Law > Discrimination > Disparate Impact > Proof > Statistical Evidence
Labor & Employment Law > Discrimination > Disparate Treatment > Proof > Statistical Evidence

[HN20] It is true that the United States Court of Appeals for the Second Circuit has looked to whether the plaintiff can show a statistically significant disparity of two standard deviations, which (in a normal distribution) requires statistical significance at approximately the 5-percent level. However, there is no minimum statistical

threshold requiring a mandatory finding that a plaintiff has demonstrated a violation of Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.* Courts should take a case-by-case approach in judging the significance or substantiality of disparities, one that considers not only statistics but also all the surrounding facts and circumstances.

Labor & Employment Law > Discrimination > Racial Discrimination > Proof > Burdens of Proof > Employee Burdens
Labor & Employment Law > Discrimination > Racial Discrimination > Proof > Statistical Evidence
[HN21] To make out a disparate impact claim (or, more generally, to rely on statistical evidence), a plaintiff must identify a specific discriminatory employment practice. Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*, however, expressly provides that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice. *42 U.S.C.S. § 2000e-2(k)(1)(B)(i)*. Whether a particular decisionmaking process is capable of separation for analysis largely turns on the details of the specific process and its implementation in a given case.

Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > Statutes of Limitations > Continuing Violations
Labor & Employment Law > U.S. Equal Employment Opportunity Commission > Exhaustion of Remedies > Filing of Charges
Labor & Employment Law > U.S. Equal Employment Opportunity Commission > Time Limitations > Continuing Violations
[HN22] It has been the law of the Second Circuit that under the continuing violation exception to the Title VII of the Civil Rights Act of 1964 limitations period, if a plaintiff under Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*, files an EEOC charge that is timely as to any incident of discrimination in furtherance of an ongoing policy of discrimination, all claims of acts of discrimination under that policy will be timely even if they would be untimely standing alone.

Labor & Employment Law > Discrimination > Disparate Treatment > Employment Practices > Adverse Employment Actions > General Overview
Labor & Employment Law > Discrimination > Disparate Treatment > Employment Practices > Adverse Employment Actions > Demotions & Promotions
Labor & Employment Law > Discrimination > Disparate Treatment > Statutes of Limitations
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > Statutes of Limitations > General Overview
[HN23] An employer's failure to promote is by its very nature a discrete act. Discrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify. Moreover, each discrete act necessarily constitutes a separate actionable unlawful employment practice--unlike the incidents that comprise a hostile work environment claim, which may not be individually actionable. Both the employer and the aggrieved party may therefore rely on the clear and predictable statute of limitations when contemplating prospective litigation regarding failures to promote or other discrete acts.

Labor & Employment Law > Discrimination > Disparate Impact > Proof > Burdens of Proof
Labor & Employment Law > Discrimination > Disparate Treatment > Employment Practices > Adverse Employment Actions > Demotions & Promotions
Labor & Employment Law > Discrimination > Disparate Treatment > Statutes of Limitations
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > Coverage & Definitions > General Overview
Labor & Employment Law > Discrimination > Title VII of the Civil Rights Act of 1964 > Statutes of Limitations > General Overview
[HN24] Every failure to promote is a discrete act that potentially gives rise to a freestanding claim under Title VII of the Civil Rights Act of 1964, *42 U.S.C.S. § 2000e et seq.*, with its own filing deadline. Discrete acts of this sort, which fall outside the limitations period, cannot be brought within it, even when undertaken pursuant to a general policy that results in other discrete acts occurring within the limitations period. This is the conclusion of every circuit to consider the question after National Railroad Passenger Corp. v. Morgan. Each of the Second Circuit's sister circuits has held that an allegation of an ongoing discriminatory policy does not extend the statute of limitations where the individual effects of the policy that give rise to the claim are merely discrete acts. This conclusion is not altered by the fact that the plaintiffs

employ the disparate impact method of proof. To prevail on a disparate impact claim, a plaintiff must demonstrate that a respondent uses a particular employment practice that causes a disparate impact. *42 U.S.C.S. § 2000e-2(k)(1)(A)(i)*.

Civil Procedure > Remedies > Damages > General Overview
Civil Procedure > Appeals > Remands
Labor & Employment Law > Discrimination > Disparate Treatment > Remedies
Labor & Employment Law > Discrimination > Disparate Treatment > Statutes of Limitations
[HN25] In the context of a discrimination action, when it is not possible to ascertain what portions of the compensatory and punitive damages awards were attributable to claims that were time-barred, the damages awards must be vacated and remanded for a new trial on damages.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion
Civil Procedure > Appeals > Standards of Review > Reversible Errors
Evidence > Procedural Considerations > Rulings on Evidence
Evidence > Testimony > Experts > Admissibility
[HN26] Expert testimony is admissible if it (a) will help the trier of fact to understand the evidence or to determine a fact in issue, so long as (b) the testimony is based upon sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case. *Fed. R. Evid. 702*. A district court's exclusion of expert testimony is reviewed for abuse of discretion, and a decision to admit or exclude expert scientific testimony is not an abuse of discretion unless it is manifestly erroneous. Further, an erroneous evidentiary ruling warrants a new trial only when a substantial right of a party is affected, as when a jury's judgment would be swayed in a material fashion by the error.

Civil Procedure > Judicial Officers > Judges > Discretion
Civil Procedure > Trials > Jury Trials > Jury Instructions > Requests for Instructions
Evidence > Procedural Considerations > Burdens of Proof > Allocation
Evidence > Relevance > Spoliation
[HN27] A party seeking an adverse inference instruction based on the destruction of evidence must establish (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense. If these elements are established, a district court may, at its discretion, grant an adverse inference jury instruction insofar as such a sanction would serve the threefold purpose of (1) deterring parties from destroying evidence; (2) placing the risk of an erroneous evaluation of the content of the destroyed evidence on the party responsible for its destruction; and (3) restoring the party harmed by the loss of evidence helpful to its case to where the party would have been in the absence of spoliation. Review of a district court's decision on a motion for discovery sanctions is limited to abuse of discretion, which includes errors of law and clearly erroneous assessments of evidence. Absent a showing of prejudice, the jury's verdict should not be disturbed.

Civil Procedure > Judicial Officers > Judges > Discretion
Civil Procedure > Discovery > Misconduct
Civil Procedure > Trials > Jury Trials > Jury Instructions > General Overview
Evidence > Relevance > Spoliation
[HN28] The United States Court of Appeals for the Second Circuit rejects the notion that a failure to institute a "litigation hold" constitutes gross negligence per se. Rather, the better approach is to consider the failure to adopt good preservation practices as one factor in the determination of whether discovery sanctions should issue. Moreover, a finding of gross negligence merely permits, rather than requires, a district court to give an adverse inference instruction. A case-by-case approach to the failure to produce relevant evidence, at the discretion of the district court, is appropriate.

COUNSEL: KAREN R. KING (Susanna M. Buergel, on the briefs), Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, New York, for Plaintiffs-Appellees-Cross-Appellants and Plaintiffs-Appellees.

KATHLEEN GILL MILLER (Milton H. Pachter & James M. Begley, on the briefs), Port Authority of New York and New Jersey, New York, New York, for Defendant-Appellant-Cross-Appellee.

JUDGES: Before: MCLAUGHLIN, CABRANES, and LIVINGSTON, Circuit Judges.

OPINION BY: LIVINGSTON

OPINION

[*140] LIVINGSTON, *Circuit Judge*:

Plaintiffs-appellees, eleven Asian Americans currently or formerly employed as police officers by the Port Authority of New York and New Jersey ("Port Authority"), sued the Port Authority [**3] under Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.*, alleging that they were passed over for promotions because of their race. The plaintiffs asserted three theories of liability for discrimination: individual disparate treatment, pattern-or-practice disparate treatment, and disparate impact. After a nine-day trial, a unanimous jury found the Port Authority liable for discrimination against seven of the plaintiffs under all three theories and awarded back pay and compensatory damages [*141] to each of those seven plaintiffs. The district court (Miriam Goldman Cedarbaum, *Judge*) also granted equitable relief to certain of the prevailing plaintiffs in the form of retroactive promotions, seniority benefits, and salary and pension adjustments corresponding with the hypothetical promotion dates that the jury apparently selected as a basis for calculating these plaintiffs' back pay awards.

On appeal, the Port Authority argues: (1) that evidence predating the onset of the statute of limitations should not have been admitted; (2) that the evidence was insufficient to support the jury's verdict with respect to each of the plaintiffs' theories; and (3) that the damages and equitable [**4] relief were premised on time-barred claims and were otherwise excessive. With regard to the plaintiffs' individual disparate treatment allegations, we hold that the district court properly admitted background evidence predating the onset of the limitations period and that there was sufficient evidence for a reasonable juror to conclude that the Port Authority discriminated against the seven prevailing plaintiffs within the limitations period. The district court erred, however, in: (1) submitting the pattern-or-practice disparate treatment theory to the jury in this private, nonclass action; and (2) concluding that the "continuing violation" doctrine applied to the plaintiffs' disparate impact theory so that the jury could award back pay and compensatory damages for harms predating the onset of the statute of limitations. We therefore vacate the back pay for four of the plaintiffs, whose awards correspond with hypothetical promotion dates beyond the limitations period, as well as the injunctive relief for three of the same plaintiffs, and we also vacate the award of compensatory damages for all seven prevailing plaintiffs. We remand for a new trial on damages as to all seven prevailing [**5] plaintiffs and for reconsideration of equitable relief to the extent such relief was premised on failures to promote occurring outside the limitations period.

The four plaintiffs who did not prevail at trial cross-appeal, arguing that the district court erred by excluding expert testimony from an industrial psychologist. One of these plaintiffs, cross-appellant Howard Chin, further argues that the district court erred in denying the plaintiffs' motion for sanctions in the form of an adverse inference instruction due to the Port Authority's destruction of promotion records. Finding no abuse of discretion in the district court's determinations as to these matters, we affirm.

BACKGROUND

The Port Authority is a bi-state transportation agency whose facilities are policed by its Public Safety Department. The eleven plaintiffs-appellees in this case are Asian Americans who were employed by that department as police officers. Christian Eng was hired in 1977, David Lim in 1980, Richard Wong in 1983, Milton Fong in 1985, Howard Chin and Alan Lew in 1987, Stanley Chin in 1988, George Martinez and Nicholas Yum in 1993, and Michael Chung and Sanrit Booncome in 1999. All of the plaintiffs were members [**6] of the Port Authority Police Asian Jade Society of New York & New Jersey Inc. ("Asian Jade Society"), a nonprofit organization comprised of Port Authority police officers of Asian or Pacific Islander origin, whose stated goal is to "promot[e] understanding, friendship and cooperation among members of the Port Authority police department."

I. The Port Authority Police Department's Promotion Process

During the period relevant to this case, entry-level

police officers in the Port Authority's [*142] police department could be promoted to the rank of Sergeant, the first level in a hierarchy of supervisory positions (followed by Lieutenant, Captain, Inspector, Chief, and finally Superintendent of Police). To become eligible for promotion to Sergeant, a police officer was required (among other requirements) to pass an examination, which would place him on an "eligibility list" for a period of time. When such a list expired, the officer would have to pass the examination again to be placed on the new list. Three lists were in effect during the period relevant to this case: the 1996 List, the 1999 List, and the 2002 List.[1] These lists were "horizontal," which meant that the lists did not rank the officers, [**7] but merely established eligibility for promotion.

> 1 The 1996 List was in effect from August 1996 through August 1999, and included 178 officers, 7 of whom were Asian. Twenty-three officers were promoted from the 1996 List, none of whom was Asian. The 1999 List was in effect from August 1999 through August 2002, and included 220 officers, 10 of whom were Asian. Fifty-five officers were promoted from the 1999 List, 2 of whom were Asian (both of whom were promoted in December 2001). The 2002 List was in effect from August 2002 through the date the complaint was filed (April 15, 2005), and included 352 officers, 16 of whom were Asian. As of April 15, 2005, when the complaint in this case was filed, 45 officers had been promoted from the 2002 List, 1 of whom was Asian.

Each Port Authority facility's commanding officer (generally a Captain) was periodically asked to recommend eligible officers for promotion, at their discretion. The Port Authority did not dictate any criteria for recommendation. Moreover, commanding officers were free to make recommendation decisions themselves, solicit input from the police officers' direct supervisors (generally Sergeants and Lieutenants), or delegate the [**8] responsibility entirely to the direct supervisors. A promotion folder was prepared for each recommended officer, which included a performance evaluation by a supervisor, a photograph of the officer, and his record of absences, commendations, awards, and disciplinary history.

Officers recommended in this way were typically considered by the Chiefs' Board, in which the Chiefs would collectively decide which officers to recommend to the Superintendent. The Chiefs' Board did not operate under any written guidelines, and from 1996 through September 2001, took no minutes or notes. Each Chief would vote regarding each recommended officer, and any officer who received a majority of votes from the Chiefs' Board would then be recommended to the Superintendent. This step in the process was not always necessary to promotion, however; for example, Acting Superintendent Joseph Morris did not use the Chiefs' Board at all during his tenure from September 2001 through April 2002.

The ultimate decision to promote an officer to Sergeant belonged solely to the Superintendent. In fact, the Superintendent occasionally promoted officers whom the Chiefs' Board had declined to recommend ahead of those recommended [**9] by the Board.

As of January 31, 2001, no Asian American had ever been promoted to Sergeant.

II. Procedural History

On January 31, 2001, the Asian Jade Society filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") on behalf of its members, claiming that the Port Authority had denied Asian American police officers promotions because of their race. On August 29, 2003, the EEOC determined that there was reasonable cause to believe the [*143] Port Authority had violated Title VII, and on January 25, 2005, the Department of Justice issued a right-to-sue letter to the Asian Jade Society.[2] The eleven plaintiffs in this case filed suit on April 15, 2005, alleging that the Port Authority had discriminated against Asian Americans in making promotions to Sergeant.

> 2 [HN1] Ordinarily, a "right to sue" letter must be issued by the EEOC. However, where the respondent to a Title VII discrimination charge is a governmental agency and the EEOC has not dismissed the charge, the Attorney General is responsible for issuing the right-to-sue letter. *See 29 C.F.R. § 1601.28(d)*.

During discovery, the plaintiffs learned that the Port Authority had not implemented a document retention policy [**10] and that, as a result, at least thirty-two promotion folders used to make promotion decisions between August 1999 and August 2002 had been

destroyed. The plaintiffs moved for sanctions, seeking an adverse inference against the Port Authority for spoliation. The district court denied the motion, reasoning that the plaintiffs had ample alternative evidence regarding the relative qualifications of the plaintiffs and that the Port Authority's destruction of the documents was "negligent, but not grossly so." *Port Auth. Police Asian Jade Soc'y of N.Y. & N.J. Inc. v. Port Auth. of N.Y. & N.J. (Port Auth. I), 601 F. Supp. 2d 566, 570 (S.D.N.Y. 2009)*.

On the eve of trial, the district court granted the Port Authority's motion to exclude testimony from one of the plaintiffs' expert witnesses: Dr. Kathleen Lundquist, an industrial psychologist who specializes in analyzing the reliability and validity of employee-selection procedures. Dr. Lundquist had prepared a report opining on the effectiveness of the Port Authority's promotion process, on whether it included safeguards to prevent bias and discrimination, and on the comparative qualifications of the plaintiffs relative to the qualifications [**11] of the officers who had been promoted. Citing *Rule 702 of the Federal Rules of Evidence*,[3] the district court concluded that Dr. Lundquist's testimony "would not assist the trier of fact" and was therefore excluded.

3 [HN2] *Federal Rule of Evidence 702* provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

The nine-day trial began on March 11, 2009, and included testimony from twenty-two fact witnesses and four expert witnesses. All eleven of the plaintiffs testified regarding their personal backgrounds, education, experiences as police officers, attendance and disciplinary records, awards and commendations, and performance evaluations. Six Chiefs, one former Superintendent, the Superintendent at the time of trial, and [**12] three other Port Authority managers testified regarding the Port Authority's promotion procedure. Each side also presented a statistical expert and a damages expert.

Most relevant to this appeal, the plaintiffs' statistical expert, Dr. Christopher Cavanagh, presented two analyses that, in his view, demonstrated a high probability that Asian Americans had been discriminated against in the Port Authority's promotion process. In his first study, Cavanagh compared the percentage of white police officers who held a supervisory position (out of all white police officers) with [*144] the percentage of Asian Americans who held a supervisory position (out of all Asian American police officers) from 1996 through 2004. For each year, he used a Fisher Exact Test to calculate the likelihood that the difference between Asian American and white representation at the supervisory level (as compared to the representation of these groups at the non-supervisory level) was due to chance.[4] From 1996 through 2000, the likelihood that the disparities were due to chance was about two percent or less; from 2001 through 2004, the likelihoods that the disparities were due to chance were between about five and eleven [**13] percent.

4 The Fisher Exact Test is a statistical significance test named for its author, R.A. Fisher. *See generally* R.A. Fisher, *On the Interpretation of [Chi-Squared] from Contingency Tables, and the Calculation of P*, 85 J. Royal Stat. Soc'y 87 (1922).

Cavanagh's second analysis compared the promotion rate for whites who were on the eligible lists to the promotion rate for Asian Americans who were on the eligible lists over the period from August 1996 through January 31, 2001 (the date on which the EEOC charge was filed). Of the 259 white officers on the lists over this period, 36 were promoted; of the 12 Asian Americans on the lists, none were promoted. Using the Fisher Exact Test, Cavanagh calculated that the likelihood this disparity would occur due to chance was about thirteen percent.

The district court instructed the jury regarding three

theories of discrimination: (1) disparate impact; (2) pattern-or-practice disparate treatment; and (3) individual disparate treatment. After two-and-a-half days of deliberation, the jury returned a unanimous verdict, finding that seven of the eleven plaintiffs--Christian Eng, Milton Fong, Alan Lew, Stanley Chin, Nicholas Yum, George Martinez, and [**14] David Lim--had proven all three of their theories of liability, and awarding more than $1.6 million in total to those seven plaintiffs. The back pay awards corresponded precisely to certain hypothetical promotion dates suggested by the plaintiffs' damages expert.[5]

> 5 Four plaintiffs' back pay awards corresponded to hypothetical promotion dates of October 31, 1999: Christian Eng was awarded $35,445 in back pay and $250,000 in compensatory damages; Milton Fong was awarded $83,924 in back pay and $100,000 in compensatory damages; Alan Lew was awarded $189,859 in back pay and $75,000 in compensatory damages; and Stanley Chin was awarded $116,636 in back pay and $100,000 in compensatory damages. Three plaintiffs' back pay awards corresponded to hypothetical promotion dates of September 30, 2002: Nicholas Yum was awarded $141,663 in back pay and $15,000 in compensatory damages; George Martinez was awarded $145,861 in back pay and $15,000 in compensatory damages; and David Lim was awarded $119,234 in back pay and $250,000 in compensatory damages.

On the plaintiffs' motion, the district court also granted the seven prevailing plaintiffs equitable relief, including salary adjustments for pension [**15] purposes for Milton Fong, Stanley Chin, Alan Lew, George Martinez, Nicholas Yum, and David Lim, and retroactive promotions for Alan Lew, George Martinez, and Nicholas Yum. The hypothetical dates the district court used were October 31, 1999, for Fong, Chin, and Lew, and September 30, 2002, for Martinez, Yum, and Lim--corresponding with the hypothetical dates the jury apparently used as a basis for computing back pay. The court also ordered the Port Authority to take certain specific actions to prevent future violations.

The Port Authority filed a motion pursuant to *Rules 50* and *59 of the Federal Rules of Civil Procedure* to set aside the jury's verdict or, alternatively, for a new [*145] trial and for remittitur. The Port Authority argued that: (1) the district court improperly admitted evidence pertaining to events prior to the onset of the statute of limitations period; (2) the jury was improperly instructed to consider events outside the limitations period for purposes of establishing liability; (3) there was insufficient evidence to find the Port Authority liable under any of the plaintiffs' three theories; (4) the jury instructions were erroneous and confusing with respect to the statute [**16] of limitations; and (5) the jury's damages included time-barred claims and were otherwise excessive.

The district court denied the Port Authority's motion in its entirety. *See Port Auth. Police Asian Jade Soc'y of N.Y. & N.J. Inc. v. Port Auth. of N.Y. & N.J. (Port Auth. II), 681 F. Supp. 2d 456 (S.D.N.Y. 2010)*. As pertinent to this appeal, the district court first held that background evidence from beyond the statute of limitations is admissible in support of a timely claim. *See id. at 462*. Next, the court concluded that the plaintiffs' individual disparate treatment claims were premised on "discrete acts" and thus that the Port Authority could be liable only for those acts within the statute of limitations. *See id at 463*. The court concluded that the plaintiffs' disparate impact and pattern-or-practice disparate treatment theories of liability, however, were premised on the existence of an "ongoing discriminatory policy," and thus were subject to the "continuing violations" doctrine, so that the plaintiffs could recover for untimely discrete acts so long as they were the product of a discriminatory policy that continued into the statute-of-limitations period. *See id. at 463-66*. Third, [**17] the district court held that although Cavanagh's statistical evidence did not reach the conventional five-percent level of statistical significance, *see Smith v. Xerox Corp., 196 F.3d 358, 366 (2d Cir. 1999)* (noting that statistical significance at the five-percent level is generally "sufficient to warrant an inference of discrimination"), the jury had before it other evidence of discrimination sufficient to find for the plaintiffs on each of the theories of liability. *See Port Auth. II, 681 F. Supp. 2d at 468-69*. Finally, the district court declined to remit the jury's compensatory damages awards because other judges had upheld similar awards and because the awards did not "shock the judicial conscience." *Id. at 470*.

The Port Authority appeals, and argues before this Court that it is entitled to a new trial with respect to the seven prevailing plaintiffs because: (1) evidence predating the onset of the limitations period should not

have been admitted; (2) the evidence at trial was insufficient to support the jury's verdict with respect to each of the plaintiffs' theories; and (3) the damages and equitable relief are premised on time-barred claims and are otherwise excessive.

The four [**18] plaintiffs who did not prevail at trial--Howard Chin, Richard Wong, Sanrit Booncome, and Michael Chung--cross-appeal, and argue here that they are entitled to a new trial because the district court erred by excluding Lundquist's testimony. Howard Chin further argues that he is entitled to a new trial because the district court improperly denied the plaintiffs an adverse inference instruction despite the Port Authority's destruction of promotion records.

DISCUSSION

The plaintiffs argue that they are entitled to damages for injuries that occurred before the onset of the statute of limitations period because the "continuing violations" doctrine applies to two of their three theories of liability--pattern-or-practice disparate treatment and disparate impact. [*146] We dispose of half of this argument at the outset of this opinion by holding that no such pattern-or-practice theory of liability is available to the private, non-class plaintiffs in this case. We next consider and affirm the district court's judgment with respect to the plaintiffs' two remaining theories of liability--individual disparate treatment and disparate impact--by holding that background evidence from outside the limitations period [**19] was admissible and that the evidence presented at trial was sufficient to sustain the jury's findings of liability on both theories. We then conclude, however, that the "continuing violations" doctrine does not apply to either theory in this case, and therefore vacate and remand for reconsideration of the damages and equitable relief granted by the district court to the prevailing plaintiffs whose awards correspond (or may correspond) to hypothetical promotion dates preceding the onset of the limitations period. Finally, we consider the plaintiffs' cross-appeal, and hold that the district court did not abuse its discretion by excluding Lundquist's testimony or by denying the plaintiffs an adverse inference instruction.

[HN3] "A motion for a new trial should be granted when, in the opinion of the district court, 'the jury has reached a seriously erroneous result or . . . the verdict is a miscarriage of justice.'" *Song v. Ives Labs., Inc., 957 F.2d 1041, 1047 (2d Cir. 1992)* (quoting and altering *Smith v. Lightning Bolt Prods., Inc., 861 F.2d 363, 370 (2d Cir. 1988))*. "The district court's denial of a *Rule 59* motion for a new trial is reviewed for abuse of discretion." *Manganiello v. City of New York, 612 F.3d 149, 165 (2d Cir. 2010)*. [**20] "A district court has abused its discretion if it has (1) 'based its ruling on an erroneous view of the law,' (2) made 'a clearly erroneous assessment of the evidence,' or (3) 'rendered a decision that cannot be located within the range of permissible decisions.'" *Id*. (quoting *Sims v. Blot, 534 F.3d 117, 132 (2d Cir. 2008))*. We review the denial of a motion for judgment as a matter of law *de novo. Lore v. City of Syracuse, 670 F.3d 127, 150 (2d Cir. 2012)*. "[W]hether conducting review *de novo* or under a less sweeping standard, we must disregard all errors and defects . . . . if there is no likelihood that the error or defect affected the outcome of the case." *Id*. (internal quotation marks omitted).

[HN4] As a prerequisite to filing suit under Title VII, a private plaintiff must first file a timely charge with the EEOC. *See 42 U.S.C. § 2000e-5(e)(1)*, *(f)(1)*. Both parties agree that in this case, the plaintiffs' charge was due "within one hundred and eighty days after the alleged unlawful employment practice occurred." *42 U.S.C. § 2000e-5(e)(1)*. Accordingly, because the EEOC charge in this case was filed on January 31, 2001, only an unlawful employment practice that "occurred" after August [**21] 2, 2000, may give rise to liability.[6]

> 6 Although the district court and the parties appear to agree that 180 days prior to January 31, 2001 is August 3, 2000, by this Court's calculation the correct date is August 4, 2000, which would mean that only an unlawful employment practice that occurred after August 3, 2000 may give rise to liability. But because the one-day difference is not material to this appeal, we refer to August 2, 2000, as the relevant date throughout this opinion. *See Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393, 102 S. Ct. 1127, 71 L. Ed. 2d 234 (1982)* ("[F]iling a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling.").

I. The Pattern-or-Practice Method of Proof

As an initial matter, we address the question whether the method of proof described [*147] in *International*

Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1997), and known as the "*Teamsters*" or "pattern-or-practice" method, was available to the nonclass private plaintiffs in this case.[7] We conclude that it was not and that the judgment as to pattern or practice must for [**22] this reason be reversed. We emphasize, however, that evidence that the Port Authority engaged in a pattern or practice of discrimination--in the ordinary sense of those words, rather than in the technical sense describing a theory of liability for discrimination--remains relevant in assessing whether the plaintiffs proved discrimination using the individual disparate treatment and disparate impact methods of proof.

> 7 The parties did not address this issue before the district court and do not raise it on appeal. Nonetheless, [HN5] we are not bound by parties' effective stipulations on questions of law, *see U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 446-48, 113 S. Ct. 2173, 124 L. Ed. 2d 402 (1993)*, and in this case we exercise our discretion to consider this issue in order to provide guidance in a complicated area.

[HN6] The phrase "pattern or practice" appears only once in Title VII--in a section that authorizes the government to pursue injunctive relief against an employer "engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by" the statute. *42 U.S.C. § 2000e-6*. Notwithstanding the Supreme Court's recognition in *Teamsters* that this language "was not intended [**23] as a term of art, and the words reflect only their usual meaning," *Teamsters, 431 U.S. at 336 n.16*, the phrase is often used in a technical sense to refer either to this unique form of liability available in government actions under *§ 2000e-6*, *see, e.g., EEOC v. Shell Oil Co., 466 U.S. 54, 67-68 n.19, 70, 80, 104 S. Ct. 1621, 80 L. Ed. 2d 41 (1984)*, or to the burden-shifting framework set out in *Teamsters* and available both to the government in § 2000e-6 litigation and to class-action plaintiffs in private actions alleging discrimination, *see, e.g., Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2552 n.7, 180 L. Ed. 2d 374 (2011)*.

We begin with *§ 2000e-6*. [HN7] The building blocks of liability pursuant to this provision--which provides for prospective injunctive relief where the government establishes that an employer is engaged in a "pattern or practice of resistance to the full enjoyment" of rights secured by Title VII--differ from those that provide the foundation for typical, private-party Title VII litigation. To establish an employer's liability for discrimination in violation of Title VII, a private plaintiff ordinarily must show that an employer took an adverse employment action *against him or her* because of his or her race, or on account [**24] of another protected ground. *See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*; *Aulicino v. N.Y. City Dep't of Homeless Servs., 580 F.3d 73, 80 (2d Cir. 2009)*. In § 2000e-6 litigation, by contrast, the government need not demonstrate specific losses to specific individuals to establish that injunctive relief is appropriate. The government must "prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts": it must prove that unlawful discrimination "was the company's standard operating procedure." *Teamsters, 431 U.S. at 336*. Once established, however, "a court's finding of a pattern or practice justifies an award of prospective relief" even absent proof of losses to specific individuals. *Id. at 361*.

The parties here use the term "pattern or practice" to refer not to an element of a [*148] § 2000e-6 claim, but to the method of proof that the Supreme Court endorsed in *Teamsters* for the adjudication of such claims. This method of proof, however, originated in the class action context, in *Franks v. Bowman Transportation Co., 424 U.S. 747, 96 S. Ct. 1251, 47 L. Ed. 2d 444 (1976)*. The Supreme Court in *Franks* determined that once the private plaintiffs in the class action there "carried [**25] their burden of demonstrating the existence of a discriminatory hiring pattern and practice by the [employer] . . ., the burden [was] upon [the employer] to prove that individuals who reappl[ied] were not in fact victims of previous hiring discrimination." *Id. at 772*. The Court in *Franks* used the phrase "pattern and practice" to refer to the common question of fact (whether the employer had engaged in a practice of discriminatory hiring) to be litigated by class plaintiffs, and apparently viewed its holding as no more than an application of *McDonnell Douglas*' burden-shifting framework in the class-action context. *See Franks, 424 U.S. at 773* (citing *McDonnell Douglas, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668*).

The *Teamsters* Court thereafter determined that the *Franks* burden-shifting framework for certain class actions should also apply to government "pattern or practice" suits brought under *§ 2000e-6*:

> Although not all class actions will necessarily follow the *Franks* model, the nature of a *[§ 2000e-6*] pattern-or-practice suit brings it squarely within our holding in *Franks*. The plaintiff in a pattern-or-practice action is the Government, and its initial burden is to demonstrate that unlawful discrimination has been [**26] a regular procedure or policy followed by an employer or group of employers. At the initial, "liability" stage of a pattern-or-practice suit the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. . . .
>
> . . . .
>
> When the Government seeks individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief. The petitioners' contention in this case is that if the Government has not, in the course of proving a pattern or practice, already brought forth specific evidence that each individual was discriminatorily denied an employment opportunity, it must carry that burden at the second, "remedial" stage of trial. That basic contention was rejected in the *Franks* case. . . .
>
> The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy. The Government need only show that an alleged individual discriminatee unsuccessfully [**27] applied for a job and therefore was a potential victim of the proved discrimination. As in *Franks*, the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons.

Teamsters, 431 U.S. at 360-62 (internal citation and footnotes omitted). Since *Teamsters*, this burden-shifting framework has been known as the "*Teamsters* method of proof" or the "pattern-or-practice method." *See, e.g., Celestine v. Petroleos de Venezuella SA, 266 F.3d 343, 355 (5th Cir. 2001)* ([HN8] "A pattern or practice case is not a separate and free-standing cause of action . . . , but is really merely another method by which disparate [*149] treatment can be shown." (internal quotation marks omitted)); *Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 760 (4th Cir. 1998)* ("The courts of appeals have . . . permitted pattern or practice class action suits using the *Teamsters* method of proof."), *vacated on other grounds*, *527 U.S. 1031, 119 S. Ct. 2388, 144 L. Ed. 2d 790 (1999)*.[8] In sum,[HN9] unlike in a typical individual disparate treatment suit, "a plaintiff's burden under the pattern-or-practice method requires the plaintiff to prove only the existence of a discriminatory policy rather than all [**28] elements of a prima facie case of discrimination"--but "under the pattern-or-practice method, only prospective relief [is] available, unless the plaintiffs offer[] additional proof." *Semsroth v. City of Wichita, 304 F. App'x 707, 716 (10th Cir. 2008)* (describing the reasoning in *Lowery, 158 F.3d at 761*).

> 8 Although the *Teamsters* framework is not a freestanding cause of action, courts--including the Supreme Court--sometimes loosely refer to the *Teamsters* method of proof as a "pattern-or-practice claim." *See, e.g., Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115 n.9, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)* ("We have no occasion here to consider the timely filing question with respect to 'pattern-or-practice' claims brought by private litigants as none are at issue here.").

Permitting private plaintiffs to use the pattern-or-practice method of proof outside the class action context would require us to extend this method beyond its current application. This we decline to do. Such an extension would allow nonclass private plaintiffs who have shown a pattern or practice of discrimination (but have not made out a disparate impact claim) to shift the burden to employers to prove that they did not discriminate against a particular [**29] individual. But this would conflict with the Supreme Court's oft-repeated holding [HN10] in the context of disparate-treatment,

private nonclass litigation that "[t]he ultimate burden of pursuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)*. To be sure, proof that an employer engaged in a pattern or practice of discrimination may be of substantial help in demonstrating an employer's liability in the individual case. But such proof cannot relieve the plaintiff of the need to establish each element of his or her claim.

We note that the district court in this case did not instruct the jury that a finding of a pattern or practice of discrimination shifted the burden of persuasion. Rather, the verdict sheet instructed the jury that each individual plaintiff was required to prove by a preponderance of the evidence that he was discriminated against as part of the pattern or practice. This instruction only underscores, however, why there was no need for the jury to make a specific finding regarding a pattern or practice of discrimination in this private, [**30] nonclass suit, as opposed to determining directly whether each individual plaintiff had been intentionally discriminated against. Where, as here, there are only individual, nonclass disparate-treatment claims, a district court need not and should not instruct the jury that a common pattern of discrimination is an element of liability.

For these reasons, [HN11] all of our sister circuits to consider the question have held that the pattern-or-practice method of proof is not available to private, nonclass plaintiffs. *See Semsroth v. City of Wichita, 304 F. App'x 707, 715 (10th Cir. 2008)*; *Davis v. Coca-Cola Bottling Co. Consol., 516 F.3d 955, 967-69 (11th Cir. 2008)*; *Bacon v. Honda of Am. Mfg., 370 F.3d 565, 575 (6th Cir. 2004)*; *Celestine v. Petroleos de Venezuella SA, 266 F.3d 343, 355-56 (5th Cir. 2001)*; *Gilty v. Vill. of Oak Park, 919 F.2d 1247, 1252* [*150] *(7th Cir. 1990)*; *Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 761 (4th Cir. 1998)*, *vacated on other grounds*, *527 U.S. 1031, 119 S. Ct. 2388, 144 L. Ed. 2d 790 (1999)*; *see also Schuler v. PricewaterhouseCoopers, LLP, 739 F. Supp. 2d 1, 6 n.2 (D.D.C. 2010)* ("Courts in every other Circuit that has touched on this issue have indicated that an individual plaintiff cannot maintain [**31] a pattern and practice claim.") (collecting cases); 1 Lex Larson et al., *Employment Discrimination* § 8.01[3], at 8-13 (2d ed. 2011) ("[C]ourts have refused to permit individuals to use the pattern or practice proof structure for claims of individual discrimination . . . ."). We have suggested as much, albeit in dicta. *See Brown v. Coach Stores, Inc., 163 F.3d 706, 711 (2d Cir. 1998)*.

For the foregoing reasons, we now hold that [HN12] the pattern-or-practice method of proof is not available to nonclass, private plaintiffs in cases such as the one before us. Evidence of an employer's general practice of discrimination may be highly relevant to an individual disparate treatment or to a disparate impact claim. Outside the class context, however, private plaintiffs may not invoke the *Teamsters* method of proof as an independent and distinct method of establishing liability. The district court erred in submitting this method of proof to the jury as a basis on which it could hold the Port Authority liable.

II. Admissibility and Sufficiency of Evidence

A. Admissibility of Evidence from Outside the Limitations Period

Turning to the plaintiffs' individual disparate treatment and disparate impact claims, [**32] the Port Authority argues that the district court improperly admitted evidence of events prior to August 2, 2000, for purposes of liability and damages. It is well established, however, that [HN13] so long as at least "one alleged adverse employment action . . . occurred within the applicable filing period[,] . . . evidence of an earlier alleged retaliatory act may constitute relevant 'background evidence in support of [that] timely claim.'" *Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 176 (2d Cir. 2005)* (quoting and altering *Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)*). Such background evidence "may be considered to assess liability on the timely alleged act." *Id. at 177*; *see also Petrosino v. Bell Atl., 385 F.3d 210, 220 (2d Cir. 2004)* (applying this rule in the failure-to-promote context). In particular, we have noted that statistical studies may include data from outside the statute of limitations to prove timely discriminatory acts. *See Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590, 604 n.5 (2d Cir. 1986)*.[9] Title VII's statute of limitations therefore did not prohibit admission of the plaintiffs' evidence of discrimination before August 2, 2000.

9 To be clear, the [**33] district court retains discretion to determine whether evidence predating the onset of the statute of limitations period should be admitted under any applicable

rule of evidence. *See Jute, 420 F.3d at 177 n.7*; *Malarkey v. Texaco, Inc., 983 F.2d 1204, 1211 (2d Cir. 1993)*.

B. Sufficiency of the Evidence

The Port Authority next argues that the plaintiffs' evidence of individual disparate treatment and disparate impact was insufficient as a matter of law, and that the district court therefore abused its discretion in declining to set aside the verdict. [HN14] "In reviewing the sufficiency of the evidence in support of a jury's verdict, we [*151] examine the evidence in the light most favorable to the party in whose favor the jury decided, drawing all reasonable inferences in the winning party's favor." *Gronowski v. Spencer, 424 F.3d 285, 291 (2d Cir. 2005)*. We will overturn the verdict here "only if there is 'such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or such an overwhelming amount of evidence in favor of the [Port Authority] that reasonable and fair minded men could not arrive at a verdict against [**34] [the Port Authority].'" *Id. at 292* (quoting *LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 429 (2d Cir. 1995))* (some internal quotation marks omitted).

[HN15] With respect to a Title VII individual disparate treatment claim, "[w]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148-49, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000)*. A plaintiff establishes a prima facie case by showing "(1) that he belonged to a protected class; (2) that he was qualified for the position he held; (3) that he suffered an adverse employment action; and (4) that the adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent." *Feingold v. New York, 366 F.3d 138, 152 (2d Cir. 2004)*. An employer may then rebut this prima facie case by offering a legitimate, nondiscriminatory business reason for its conduct. *See id*. A plaintiff [**35] ultimately prevails if he proves that the defendant's employment decision was based in whole or in part on intentional discrimination. *See id*.

[HN16] To prevail under the disparate impact theory of liability, a plaintiff must show that the employer "uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." *42 U.S.C. § 2000e-2(k)(1)(A)(i)*. This requires a plaintiff to (1) "identify a specific employment practice" or policy, *Malave v. Potter, 320 F.3d 321, 326 (2d Cir. 2003)*; "(2) demonstrate that a disparity exists; and (3) establish a causal relationship between the two." *Robinson v. Metro-North Commuter R.R. Co., 267 F.3d 147, 160 (2d Cir. 2001)*. "The statistics must reveal that the disparity is substantial or significant," and "must be of a kind and degree sufficient to reveal a causal relationship between the challenged practice and the disparity." *Id*. (internal quotation marks omitted). To rebut a plaintiff's statistics, a defendant may introduce evidence showing that "either no statistically significant disparity in fact exists or the challenged practice did not cause the disparity." *Id. at 161*.

[HN17] If the trier of [**36] fact determines that the plaintiffs have established a disparate impact violation of Title VII, each person seeking individual relief such as back pay and compensatory damages "need only show that he or she suffered an adverse employment decision 'and therefore was a potential victim of the proved discrimination.'" *Id. at 159* (quoting *Teamsters, 431 U.S. at 362*) (alteration omitted); *see id. at 161-62*. After such a showing, the employer bears the burden of persuading the trier of fact that its decision was made for lawful reasons; otherwise, the employee is entitled to individualized relief, which may include back pay, front pay, and compensatory damages for [*152] "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, [or] other nonpecuniary losses." *42 U.S.C. § 1981a(b)(3)*; *see Robinson, 267 F.3d at 159-60*.

The Port Authority challenges three aspects of the plaintiffs' evidence. First, the Port Authority argues that the plaintiffs' statistical evidence was fatally flawed and that without it the plaintiffs lack sufficient evidence to prove a disparate impact. Second, the Port Authority contends that the plaintiffs did not show that the multiple-step promotion [**37] process was "not capable of separation for analysis," *42 U.S.C. § 2000e-2(k)(1)(B)(i)*, and therefore the plaintiffs were required but failed to identify the specific promotion practice that caused a disparate impact. Third, the Port Authority contends that the plaintiffs' anecdotal evidence of intentional discrimination consists of nothing more

than personal affronts outside of the promotion context, and therefore that the plaintiffs' individual disparate treatment claims must fail for lack of evidence that any discrimination was intentional.

We disagree with all three of the Port Authority's arguments and hold that the plaintiffs introduced sufficient evidence to support the jury's verdict as to plaintiffs' disparate impact and individual disparate treatment claims.

1. Statistical Evidence

The Port Authority argues first that the statistical evidence presented by Dr. Cavanagh, the plaintiffs' expert witness, was insufficient to prove their disparate impact claim because Dr. Cavanagh's analyses impermissibly (1) relied on data predating the onset of the statute of limitations, (2) did not focus on the relevant pool of candidates eligible for promotion, and (3) failed to establish statistical [**38] significance. We address each of these contentions in turn.

First, the Port Authority is incorrect in asserting that Dr. Cavanagh's statistics were flawed because they relied in part on data predating the onset of the statute of limitations period. In *Bazemore v. Friday, 478 U.S. 385, 106 S. Ct. 3000, 92 L. Ed. 2d 315 (1986)*, the Supreme Court stated that evidence predating the 1972 enactment of Title VII was not only admissible but, "to the extent that proof is required to establish discrimination with respect to salary disparities created after 1972, evidence of pre-Act discrimination is quite probative." *Id. at 402 n.13* (internal citation omitted). Moreover, we have made clear that [HN18] a district court errs by "downgrading" statistical studies on the ground that they "relied in part on pre-statute of limitations data." *Rossini, 798 F.2d at 604 n.5*.

The Port Authority next argues that Dr. Cavanagh's year-end demographic statistics were not sufficient to show a disparate impact because they simply compared the percentage of Asian Americans in supervisory positions with the percentage of Asian American officers, rather than looking to the relevant pool for promotion (*i.e.*, the percentage of Asian Americans on the eligible [**39] lists). On this point, we agree.

As we have said, [HN19] "plaintiffs must identify the correct population for analysis. In the typical disparate impact case the proper population for analysis is the applicant pool or the *eligible* labor pool." *Smith v. Xerox Corp., 196 F.3d 358, 368 (2d Cir. 1999)* (emphasis added), *overruled on other grounds by Meacham v. Knolls Atomic Power Lab., 461 F.3d 134, 140 (2d Cir. 2006)*. "In the context of promotions, we have held that the appropriate comparison is customarily between the [racial] composition of candidates *seeking to be promoted* and the [racial] composition of those actually promoted," at least so long [*153] as the relevant data are available. *Malave, 320 F.3d at 326* (emphasis added). The plaintiffs in this case did not allege that the eligibility test was discriminatory; rather, they alleged that discrimination entered the process at the discretionary stage after the eligible lists had already been drawn up. The relevant population for analysis, then, includes only those officers on the eligible lists. Dr. Cavanagh's year-end demographic analyses include *all* officers, and therefore do not meet the statistical standards prescribed by law.

Putting aside these [**40] demographic analyses, then, we are left with Dr. Cavanagh's statistical analysis comparing the percentage of Asian Americans on the eligibility lists with the percentage of Asian Americans promoted from 1996 to January 31, 2001 (the date that the EEOC complaint was filed). None of the 12 Asians on the eligible lists were promoted during this period, in contrast to 36 out of 259 whites; according to Dr. Cavanagh's calculations, this difference would occur due to chance "a bit under 13 percent" of the time. The Port Authority argues that a due-to-chance figure of 13 percent is not statistically significant because "it is generally accepted that statistical significance is at a 5% level or less."

[HN20] It is true that "we have . . . looked to whether the plaintiff can show a statistically significant disparity of two standard deviations," which (in a normal distribution) requires statistical significance at approximately the 5-percent level. *Xerox, 196 F.3d at 365*. However, we have also said that "[t]here is no minimum statistical threshold requiring a mandatory finding that a plaintiff has demonstrated a violation of Title VII. Courts should take a 'case-by-case approach' in judging the significance [**41] or substantiality of disparities, one that considers not only statistics but also all the surrounding facts and circumstances." *Waisome v. Port Auth. of N.Y. & N.J., 948 F.2d 1370, 1376 (2d Cir. 1991)* (quoting *Ottaviani v. State Univ. of N.Y. at New Paltz, 875 F.2d 365, 372-73 (2d Cir. 1991)*; *see also Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 995*

n.3, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988) ("[W]e have not suggested that any particular number of 'standard deviations' can determine whether a plaintiff has made out a prima facie case in the complex area of employment discrimination. . . ."); *accord Xerox, 196 F.3d at 366*.

In many (perhaps most) cases, if there is a 13-percent likelihood that a disparity resulted from chance, it will not qualify as statistically significant. In this case, the plaintiffs offered other evidence that reasonable jurors could have relied upon to find that an 87-percent likelihood that the disparity was not due to chance qualified as significant. First, *no* Asian Americans were promoted during the relevant period; requiring a statistical showing of 95-percent confidence would make it mathematically impossible to rely upon statistics in a case like this one, in which the relevant population [**42] included so few Asian Americans. *See Waisome, 948 F.2d at 1379* ("[T]he lack of statistical significance in the ultimate promotion reflects only the small sample size."). Second, as the Port Authority acknowledges, the plaintiffs presented a substantial amount of evidence that reasonable jurors could have relied on to conclude that the plaintiffs were more qualified than some of the white officers who were promoted, including comparing length of service, attendance records, and disciplinary histories. In the context of this case, it would not be unreasonable for a juror to find Dr. Cavanagh's statistics significant despite only being significant at the 13-percent level.

Finally, despite the Port Authority's argument to the contrary, Dr. Cavanagh's [*154] choice to limit his time frame to the period from 1996 through January 2001 (rather than, as defendant's expert did, extending the analysis into 2005) was not unreasonable. The plaintiffs' theory was that the Port Authority's failures to promote them caused a disparate impact through 2001, when the EEOC charge in this case was filed. Dr. Cavanagh's selected time frame was directly relevant to answering this question.

2. [**43] *Specific Employment Practice*

The Port Authority next argues that there was insufficient evidence to support the plaintiffs' disparate impact claim on the ground that plaintiffs either failed to identify a *specific* promotion practice resulting in a disparate impact on Asian Americans or failed to show that the Port Authority's promotion process could not be separated into component parts for analysis. According to the Port Authority, the promotion process involved three separate steps--recommendation by a commanding officer, approval by the Chiefs' Board, and selection by the Superintendent--and these steps were wholly capable of being separated from each other for the purpose of statistical analysis. For the following reasons, we disagree.

[HN21] To make out a disparate impact claim (or, more generally, to rely on statistical evidence), a plaintiff must identify a specific discriminatory employment practice. *See Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2555-56, 180 L. Ed. 2d 374 (2011)* ("[R]espondents have identified no 'specific employment practice' . . . . Merely showing that Wal-Mart's policy of discretion has produced an overall sex-based disparity does not suffice."); *Watson, 487 U.S. at 994* ("Especially [**44] in cases where an employer combines subjective criteria with the use of more rigid standardized rules or tests, the plaintiff is in our view responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."). Title VII, however, expressly provides that "if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice." *42 U.S.C. § 2000e-2(k)(1)(B)(i)*. Whether a particular decisionmaking process is capable of separation for analysis largely turns on the details of the specific process and its implementation in a given case. *See McClain v. Lufkin Indus., 519 F.3d 264, 278 (5th Cir. 2008)*; *cf. Meacham v. Knolls Atomic Power Lab., 381 F.3d 56, 74 (2d Cir. 2004)*, *vacated on other grounds*, *544 U.S. 957, 125 S. Ct. 1731, 161 L. Ed. 2d 596 (2005)*.

Here, the evidence amply demonstrated that recommendation by the Chief's Board could not be separated from the rest of the promotion process for the purpose of statistical analysis. Such recommendation was neither necessary nor sufficient for [**45] promotion, and the weight it carried in the process was both unclear and variable. For example, two candidates who were not recommended by the Chiefs' Board in January 2003 were nonetheless promoted by the Superintendent later that month, even as others who received unanimous recommendations from the Chiefs were not promoted for a year, or two years. Another Superintendent did not bother to use the Chiefs' Board at all. Recommendation

by the Chiefs' Board was therefore not capable of separation from the rest of the promotion process.

The commanding officers' recommendations were similarly inseparable from the Superintendent's ultimate decisions regarding promotions because they [*155] played an indeterminate role in the integrated promotion process. For example, former Chief Thomas Farrell testified that he occasionally would ask for performance evaluations of everyone on the eligible list--not just those who were recommended by commanding officers--while other testimony indicated that commanding officers' recommendations were often important in the promotion process. We therefore agree with the district court that these "steps" in the promotion process were not capable of separation for analysis. [**46] *See Port Auth. II, 681 F. Supp. 2d at 464*. Accordingly, the decisionmaking process involved in promotions to Sergeant was properly analyzed as one employment practice.

3. Proof of Intent

The Port Authority next argues that it was entitled to judgment as a matter of law on the plaintiffs' individual disparate treatment claims because many of the plaintiffs' anecdotes of intentional discrimination were merely "situations involving personal affront as opposed to examples of overt racism," and moreover, that "[n]one of the specific instances relied upon by plaintiffs took place in the context of promotion." Appellants' Reply Br. at 17. Even if we were to accept the Port Authority's characterization of these accounts of discrimination, however, the plaintiffs also provided evidence that they were better qualified for promotion than several white officers who were promoted instead. In conjunction with the plaintiffs' statistical evidence, we conclude that this anecdotal evidence of intent was sufficient for a reasonable jury to conclude that the Port Authority intentionally discriminated against the plaintiffs by failing to promote them.

III. Damages and the Statute of Limitations

The Port Authority [**47] argues, finally, that it was improperly assessed back pay and compensatory damages for harms that were suffered by the plaintiffs prior to August 2, 2000. The district court disagreed because it believed that the "continuing violation" doctrine applied in the context of plaintiffs' disparate impact allegations so that damages could properly be awarded for failures to promote that occurred outside the limitations period.[10] We agree with the Port Authority and hold that the continuing violation doctrine does not apply to plaintiffs' disparate impact proof. As a result, we further conclude: (1) that the back pay awards to Eng, Lew, Stanley Chin, and Fong must be vacated, as well as the retroactive promotion of Lew and the salary and pension adjustments for Lew, Stanley Chin, and Fong; and (2) that the jury's compensatory damage awards with regard to all seven prevailing plaintiffs must also be vacated. We remand to the district court for a new trial on damages and for reconsideration of equitable relief to the extent such relief was premised on failures to promote occurring outside the limitations period.

> 10 The district court reached a similar conclusion with regard to plaintiffs' pattern-or-practice [**48] allegations but, for the reasons already stated, *see supra* Part I, we have concluded that this theory of liability was not properly submitted to the jury.

A. The Continuing Violation Doctrine

[HN22] It has been the law of this Circuit that "[u]nder the continuing violation exception to the Title VII limitations period, if a Title VII plaintiff files an EEOC charge that is timely as to any incident of discrimination in furtherance of an ongoing policy of discrimination, all claims of acts of discrimination under that policy will be timely [*156] even if they would be untimely standing alone." *Lambert v. Genesee Hosp., 10 F.3d 46, 53 (2d Cir. 1993)*, *abrogated on other grounds by Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1329-30, 179 L. Ed. 2d 379 (2011)*; *see also Patterson v. Cnty. of Oneida, 375 F.3d 206, 220 (2d Cir. 2004)*; *Fitzgerald v. Henderson, 251 F.3d 345, 359 (2d Cir. 2001)*; *Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 713 (2d Cir. 1996)*; *Cornwell v. Robinson, 23 F.3d 694, 703-04 (2d Cir. 1994)*. Applying this principle, the district court in this case concluded that the Port Authority could be liable, and assessed damages, for discriminatory failures to promote outside the statute [**49] of limitations because, pursuant to the plaintiffs' disparate impact theory, those failures to promote were the product of an ongoing discriminatory policy that continued after August 2, 2000, thus triggering the continuing-violation doctrine. *See Port Auth. II, 681 F. Supp. 2d at 463*.

* * *

The Port Authority argues that the continuing-violation doctrine does not apply in this case because (1) the plaintiffs did not identify a specific, ongoing discriminatory policy or custom; and (2) under the Supreme Court's decision in *National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)*, failures to promote are "discrete acts" of discrimination and thus do not implicate the continuing-violation doctrine. Because we agree with the Port Authority's second argument, we do not address the first.

In *Morgan*, the Supreme Court unanimously rejected the Ninth Circuit's view that a series or pattern of "related discrete acts" could constitute one continuous "unlawful employment practice" for purposes of the statute of limitations. *Id. at 111*. Rather, the Court held that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges. [**50] Each discrete discriminatory act starts a new clock for filing charges alleging that act." *Id. at 113*. By a divided vote, however, the *Morgan* Court distinguished such discrete acts from an allegedly hostile work environment, which it held could be a continuing violation because its "very nature involves repeated conduct." *Id. at 115*. "Such claims are based on the cumulative effect of individual acts," the Court wrote, noting that "a single act of harassment may not be actionable on its own." *Id*.

The plaintiffs argue that *Morgan's* analysis of "discrete acts" cannot apply to disparate impact claims because such claims--like hostile work environment claims--are "necessarily based on the cumulative effect of a particular practice over time." Appellees' Br. at 28. It is true that *Morgan* involved only an individual disparate treatment claim premised on a series of related discrete acts, and therefore did not directly address whether the continuing-violation doctrine applies where an ongoing discriminatory policy results in discrete discriminatory acts both before and after the limitation date. *See Morgan, 536 U.S. at 107* (noting in passing that in the Ninth Circuit, *pre-Morgan*, another type [**51] of continuing violation could be established by showing "a systematic policy or practice of discrimination that operated, in part, within the limitations period," but neither endorsing nor repudiating that category of continuing violations); *id. at 115 n.9* ("We have no occasion here to consider the timely filing question with respect to 'pattern-or-practice' claims brought by private litigants as none are at issue here."). *Morgan's* reasoning, however, demonstrates [*157] that a plaintiff may recover for a failure to promote--regardless whether it was caused by an ongoing discriminatory policy--only if he files an EEOC charge within 180 or 300 days of that decision.[11]

> 11 As *Morgan* notes, the 300-day limitations period, inapplicable here, applies in those states that have "an entity with the authority to grant or seek relief with respect to the alleged unlawful practice" and where an employee initially files a grievance with that entity. *536 U.S. at 109*.

Morgan established that [HN23] an employer's failure to promote is by its very nature a discrete act. "Discrete acts such as termination, *failure to promote*, denial of transfer, or refusal to hire are easy to identify," the Court wrote. *Id. at 114* (emphasis [**52] added); *see also Forsyth v. Fed'n Emp't & Guidance Serv., 409 F.3d 565, 572 (2d Cir. 2005)*, *abrogated on other grounds by Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 127 S. Ct. 2162, 167 L. Ed. 2d 982 (2007)*. Moreover, each discrete act necessarily "constitutes a separate actionable 'unlawful employment practice,'" *Morgan, 536 U.S. at 114*--unlike the incidents that comprise a hostile work environment claim, which may not be individually actionable, *id. at 115*. Both the employer and the aggrieved party may therefore rely on the clear and predictable statute of limitations when contemplating prospective litigation regarding failures to promote or other discrete acts. As Justice Ginsburg has explained:

> A worker knows immediately if she is denied a promotion or transfer, if she is fired or refused employment. And promotions, transfers, hirings, and firings are generally public events, known to co-workers. When an employer makes a decision of such open and definitive character, an employee can immediately seek out an explanation and evaluate it for pretext.

Ledbetter, 550 U.S. at 649 (Ginsburg, J., dissenting). Accordingly, under *Morgan*, [HN24] every failure to promote is a discrete act that potentially gives rise to a freestanding [**53] Title VII claim with its own filing deadline.

Discrete acts of this sort, which fall outside the limitations period, cannot be brought within it, even when undertaken pursuant to a general policy that results in other discrete acts occurring within the limitations period. This is the conclusion of every circuit to consider the question after *Morgan*. Each of our sister circuits has held that an allegation of an ongoing discriminatory policy does not extend the statute of limitations where the individual effects of the policy that give rise to the claim are merely discrete acts. *See, e.g., Williams v. Giant Food Inc., 370 F.3d 423, 429 (4th Cir. 2004)* ("Nor does [the plaintiff's] allegation of a 20-year 'pattern or practice' of discrimination extend the applicable limitations periods."); *Davidson v. Am. Online, Inc., 337 F.3d 1179, 1185-86 (10th Cir. 2003)* (holding that claims cannot be premised on an untimely discrete act "even if the discrete act was part of a company-wide or systemic policy"); *cf. Tademe v. St. Cloud State Univ., 328 F.3d 982, 988 (8th Cir. 2003)* ("Although [the plaintiff] argues that the district court failed to consider that he was asserting a pattern-or-practice [**54] of discrimination, *Morgan* makes clear that the failure to promote, refusal to hire, and termination are generally considered separate violations."); *Lyons v. England, 307 F.3d 1092, 1107 & n.8 (9th Cir. 2002)* (holding that an individual plaintiff's "assertion that this series of discrete acts flows from a company-wide, or systemic, discriminatory practice will not succeed in establishing the employer's liability for acts occurring outside the limitations [*158] period," but distinguishing and declining to address class-wide pattern-or-practice claims).

This conclusion is not altered by the fact that the plaintiffs employ the disparate impact method of proof. To prevail on a disparate impact claim, a plaintiff must "demonstrate[] that a respondent *uses a particular employment practice that causes a disparate impact*." *42 U.S.C. § 2000e-2(k)(1)(A)(i)* (emphasis added). In *Lewis v. City of Chicago, 130 S. Ct. 2191, 2197-99, 176 L. Ed. 2d 967 (2010)*, the Supreme Court interpreted this language to mean that every "use" of an employment practice that causes a disparate impact is a separate actionable violation of Title VII with its own 180-or 300-day statute-of-limitations clock. *See id. at 2197-99*. Accordingly, under [**55] *Lewis* and *Morgan*, each time the Port Authority failed to promote one of the plaintiffs, that plaintiff had 180 days to challenge the decision.

In an attempt to distinguish *Morgan*, the plaintiffs argue that they "challenge *the process* by which the Port Authority made promotion decisions, rather than any specific promotion decision." Appellees' Br. at 29. But this argument hurts rather than helps them. In *Lewis*, the Supreme Court considered the case of an allegedly discriminatory examination used by the City of Chicago to make hiring decisions. The examination's scores and the City's plan to hire based on certain cutoff scores were announced outside the limitations period, but the actual hiring occurred within the limitations period. *See Lewis, 130 S. Ct. at 2195-96*. The Supreme Court explained that although "[i]t may be true that the City's . . . decision to adopt the cutoff score (and to create a list of the applicants above it) gave rise to a freestanding disparate-impact claim[,] [i]f that is so, the City is correct that since no timely charge was filed attacking it, the City is now entitled to treat that past act as lawful." *Id. at 2198-99* (citation and internal quotation marks omitted). [**56] If the process by which the Port Authority promoted police officers from its eligibility lists did not materially change within the limitations period, as the plaintiffs claim, then the Port Authority is entitled to treat the process as lawful. *See id. at 2199*. The process itself therefore cannot be challenged; rather, only specific failures to promote that occurred within the limitations period are actionable.

B. Damages & Equitable Relief

The district court properly instructed the jury regarding the statute of limitations for plaintiffs' individual disparate treatment claims, and the jury indicated on the verdict sheet its express findings that the Port Authority made discriminatory decisions not to promote Eng, Fong, Lew, Stanley Chin, Yum, Martinez, and Lim "after August 2, 2000." Pursuant to the district court's conclusion that the continuing violation doctrine was applicable to plaintiffs' disparate impact proof, however, the jury was permitted to assess damages for failures to promote occurring outside the limitations period.[12] With this in mind, [*159] we turn to the Port Authority's claim that the damages and equitable awards here were premised on time-barred claims and were otherwise [**57] excessive.

> 12 We note that the jury was not properly instructed regarding the statute of limitations as it applied to the plaintiffs' disparate impact proof. "To find disparate impact," the district court instructed the jury, "you are not required to consider whether the Port Authority intended to

> discriminate, but whether the Port Authority's promotion practices were the cause of a disparity, if any, after August 2, 2000." When the jury asked for clarification regarding the timing, the district court told them simply, "There has to be an effect after August 2, 2000." This phrasing suggests that the jury could find disparate impact liability where the Port Authority used an employment practice only outside the limitations period that resulted in a disparate effect that then *passively persisted* into the limitations period. *Lewis*, however, makes clear that a disparate impact claim requires plaintiffs to plead and prove that defendants, within the limitations period, *used* an employment practice that had a disparate impact. *130 S. Ct. at 2197-99*. In other words, the *cause*--not merely the effect--must occur within the limitations period. The district court's instruction was therefore erroneous. [**58] The Port Authority, however, does not challenge the jury's liability finding on this basis, but simply the award of damages and equitable relief for harms occurring before August 2, 2000. Accordingly, we deem the error waived. *See Norton v. Sam's Club, 145 F.3d 114, 117 (2d Cir. 1998)*.

1. Back Pay

The jury's back-pay awards correspond precisely to certain calculations of the plaintiffs' damages expert, such that both parties and the district court agreed below that the jury found that four of the prevailing plaintiffs (Eng, Lew, Stanley Chin, and Fong) would have been promoted on October 31, 1999, and the other three (Yum, Lim, and Martinez) would have been promoted on September 30, 2002.

The Port Authority argues first that the jury could not award back pay to multiple plaintiffs dating back to the same date when fewer than that number of plaintiffs were actually promoted on that date. It points out that there were only three promotions on October 31, 1999, but the jury awarded back pay to four plaintiffs corresponding to a failure to promote on that date. Likewise, there were only two promotions on September 30, 2002, but the jury awarded back pay to three plaintiffs extending back [**59] to that date. The Port Authority urges that the back pay awards for this reason "suffer from a fundamental error of law" and must be vacated. Appellants' Br. at 46.

We disagree. Although in many circumstances an employer may have only a fixed, limited number of possible promotion slots such that relief would be limited accordingly, *see Dougherty v. Barry, 869 F.2d 605, 614-15, 276 U.S. App. D.C. 167 (D.C. Cir. 1989)* (R.B. Ginsburg, J.), that is not the case here. The plaintiffs presented evidence that the Port Authority could and did create new Sergeant-level vacancies. For example, during cross-examination, Chief Farrell conceded that the Superintendent occasionally would not specify the number of new Sergeants he was looking for, and that from time to time the Port Authority created new Sergeant-level vacancies based on staffing needs. A reasonable jury could therefore have concluded that the Port Authority could have promoted three officers rather than two on September 30, 2002, and four officers rather than three on October 31, 1999.

Nevertheless, the back pay awards to Christian Eng, Alan Lew, Stanley Chin, and Milton Fong were improper because they were premised on a hypothetical promotion date outside [**60] the statute of limitations. As explained earlier, *see supra* section III.A, the district court should have instructed the jury that the Port Authority could be liable only for discriminatory failures to promote after August 2, 2000, and that individual remedies were limited accordingly. We therefore vacate the back pay awards to these four plaintiffs and remand to the district court for determination of their proper back-pay awards.

2. Compensatory Damages

The Port Authority next argues that the jury's compensatory damages awards were based on discriminatory acts [*160] that predated the onset of the statute of limitations period. The plaintiffs do not contest this allegation, but rather embrace it, and defend the awards solely on the basis of the continuing violation theory. *See* Appellees' Br. at 48 ("The compensatory damages awards correlate to each Plaintiff's seniority on the job--and thus, the duration of each Plaintiff's distress--awarding $250,000 to the two Plaintiffs who each had more than twenty-nine years on the job, $100,000 and $75,000 to the three Plaintiffs who had between twenty and twenty-five years on the job, and $15,000 to the two Plaintiffs who had sixteen years on the job."). [**61] "[HN25] When '[i]t is not possible to ascertain what portions of the compensatory and punitive damages awards were attributable' to claims that were

time-barred, the damages awards must be vacated" and remanded for a new trial on damages. *Annis v. Cnty. of Westchester, 136 F.3d 239, 248 (2d Cir. 1998)* (quoting *Rush v. Scott Specialty Gases, Inc., 113 F.3d 476, 485 (3d Cir. 1997))*. Because the jury may have included time-barred claims with respect to each of the plaintiffs, we vacate all seven prevailing plaintiffs' compensatory damages awards and remand for a new trial on damages. On remand, the district court should instruct the jury to award damages only for injuries stemming from a discriminatory failure to promote after August 2, 2000.

3. Equitable Relief

The Port Authority next argues that the district court's equitable relief of retroactive promotions and salary and pension adjustments should have been granted only *pro rata* under the theory that only a limited number of promotions were available on each day. *See Dougherty, 869 F.2d at 614-15*. But this argument fails with respect to equitable relief for the same reason it fails regarding back pay, *see supra* section III.B.1; on the evidence [**62] presented, a reasonable jury could have concluded that the Port Authority could promote more officers on a given date than it chose to.

The equitable relief should not, however, have extended retroactive promotions or salary or pension adjustments beyond the limitations period. The district court's award of salary and pension adjustments for Milton Fong, Stanley Chin, and Alan Lew, as well as the retroactive promotion of Alan Lew, must be vacated and remanded for reconsideration because the award of such equitable relief was premised on a hypothetical promotion date of October 31, 1999. On remand, the district court should determine the date, after August 2, 2000, that each of these three plaintiffs would have been promoted absent discrimination and may grant appropriate equitable relief accordingly.

IV. Exclusion of Lundquist's Expert Testimony

We now turn to the cross-appeal. The four cross-appealing plaintiffs argue that the district court erred in excluding the expert testimony of Dr. Lundquist, who would have testified that the Port Authority's promotion procedure was so unstructured and subjective that it fell below professional standards, and who would have compared the qualifications [**63] of the plaintiffs with those of the officers who were actually promoted. [HN26] Expert testimony is admissible if it "(a) will help the trier of fact to understand the evidence or to determine a fact in issue," so long as "(b) the testimony is based upon sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." *Fed. R. Evid. 702*. A district court's exclusion of expert testimony is reviewed for abuse of discretion, and "[a] decision to admit or exclude expert scientific testimony [*161] is not an abuse of discretion unless it is 'manifestly erroneous.'" *Amorgianos v. Nat'l R.R. Passenger Corp., 303 F.3d 256, 265 (2d Cir. 2002)* (quoting *McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1042 (2d Cir. 1995))*. "Further, an erroneous evidentiary ruling warrants a new trial only when 'a substantial right of a party is affected,' as when 'a jury's judgment would be swayed in a material fashion by the error.'" *Lore v. City of Syracuse, 670 F.3d 127, 155 (2d Cir. 2012)* (quoting *Arlio v. Lively, 474 F.3d 46, 51 (2d Cir. 2007))*.

The district court did not abuse its discretion in concluding [**64] that it lacked evidence that Dr. Lundquist's testimony was based on established principles and methods and that, in any event, her testimony would not have provided assistance to the trier of fact beyond that afforded by the arguments of counsel, as required by *Rule 702*. On appeal, the plaintiffs argue that the district court failed to acknowledge the portion of Dr. Lundquist's testimony that compared the qualifications of the plaintiffs with those of the white officers who were promoted instead. But Dr. Lundquist's analysis as to the comparative qualifications of the plaintiffs was both brief and simple, relying mostly on various officers' years of experience, commendations, discipline, and absences. For each of the four plaintiffs who did not prevail, Dr. Lundquist merely summed up their qualifications in a few sentences and then compared each of them to two officers who were promoted instead but whose record suggested that they may have been less qualified. For example, she compared both Michael Chung and Sanrit Booncome to a promoted officer named Gary Griffith, whom she described only as having "sixty-seven absences in 2000 alone."

The district court did not abuse its discretion [**65] in concluding that expert analysis was not required to help the jury understand such evidence. Indeed, the plaintiffs' attorneys made the same points in argument that were made in Dr. Lundquist's report. Chung and Booncome's qualifications were established in detail

while they were on the stand, and their attorney brought out Gary Griffith's relative lack of experience and his significant number of absences through questioning of a former Superintendent. The plaintiffs' attorneys, moreover, emphasized throughout the trial the relative qualifications of the plaintiffs when compared with officers who were promoted. At the trial's conclusion, the plaintiffs' summation detailed the qualifications of each of the plaintiffs in almost exactly the same way as Dr. Lundquist's testimony would have, including occasionally comparing a plaintiff with someone who had been promoted. The district court therefore did not abuse its discretion in determining that Dr. Lundquist's testimony was not relevant expert testimony that would help the jury understand the facts at issue.

V. Sanctions for Spoliation

Finally, cross-appealing plaintiff Howard Chin argues that the district court erred in denying the [**66] plaintiffs' motion requesting an adverse inference instruction due to the Port Authority's destruction of the promotion folders used to make promotions off of the 1999 eligible list.[13] *See Port Auth. I, 601 F. Supp. 2d 566 (S.D.N.Y. 2009)*. The Port Authority does not dispute that, upon receiving notice of the filing of plaintiffs' EEOC charge in February 2001, it had an obligation to preserve the promotion folders yet failed to do so. It argues, however, that the district court did not abuse its discretion in denying an adverse inference instruction. We agree.

13 Howard Chin is the only one of the four cross-appealing plaintiffs who claims to have lost relevant evidence due to the Port Authority's destruction of the promotion folders.

[*162] [HN27] "[A] party seeking an adverse inference instruction based on the destruction of evidence must establish (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." [**67] *Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 107 (2d Cir. 2002)* (internal quotation marks omitted). If these elements are established, a district court may, at its discretion, grant an adverse inference jury instruction insofar as such a sanction would "serve[] [the] threefold purpose of (1) deterring parties from destroying evidence; (2) placing the risk of an erroneous evaluation of the content of the destroyed evidence on the party responsible for its destruction; and (3) restoring the party harmed by the loss of evidence helpful to its case to where the party would have been in the absence of spoliation." *Byrnie v. Town of Cromwell, 243 F.3d 93, 107 (2d Cir. 2001)*. Our review of a district court's decision on a motion for discovery sanctions is limited to abuse of discretion, which includes errors of law and clearly erroneous assessments of evidence. *See Residential Funding Corp., 306 F.3d at 107*. "[A]bsent a showing of prejudice, the jury's verdict should not be disturbed." *Id. at 112*.

Howard Chin argues that the Port Authority's failure even to issue a litigation hold regarding the promotion folders at any point between 2001 and 2007 amounted to gross, rather [**68] than simple, negligence. [HN28] We reject the notion that a failure to institute a "litigation hold" constitutes gross negligence *per se. Contra Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC, 685 F. Supp. 2d 456, 464-65 (S.D.N.Y. 2010)*. Rather, we agree that "the better approach is to consider [the failure to adopt good preservation practices] as one factor" in the determination of whether discovery sanctions should issue. *Orbit Comm'ns, Inc. v. Numerex Corp., 271 F.R.D. 429, 441 (S.D.N.Y. 2010)*. Moreover, as the district court recognized, *see Port Auth. I, 601 F. Supp. 2d at 570*, a finding of gross negligence merely permits, rather than requires, a district court to give an adverse inference instruction. *See Residential Funding Corp., 306 F.3d at 109*; *Byrnie, 243 F.3d at 108*. Even if we assume *arguendo* both that the Port Authority was grossly negligent and that the documents here were "relevant," we have repeatedly held that a "case-by-case approach to the failure to produce relevant evidence," at the discretion of the district court, is appropriate. *Residential Funding Corp., 306 F.3d at 108* (quoting *Reilly v. Natwest Mkts. Grp., 181 F.3d 253, 267 (2d Cir. 1999))*. [**69] In this case, the district court concluded that an adverse inference instruction was inappropriate in light of the limited role of the destroyed folders in the promotion process and the plaintiffs' ample evidence regarding their relative qualifications when compared with the officers who were actually promoted. *See Port Auth. I, 601 F. Supp. 2d at 570-71*. At trial, Howard Chin was able to establish his service record and honors, and Chief Charles Torres testified that Howard Chin was very smart and a good employee. Under these circumstances,

the district court did not abuse its discretion in concluding that an adverse inference instruction was inappropriate.

CONCLUSION

For the foregoing reasons, we affirm the district court's conclusion that the Port Authority is liable to Christian Eng, Nicholas Yum, Alan Lew, David Lim, George Martinez, Stanley Chin, and Milton Fong under both the individual disparate treatment [*163] and disparate impact theories. We also affirm the denial of individual relief to Howard Chin, Richard Wong, Sanrit Booncome, and Michael Chung. Because the district court erred in applying the continuing-violation exception to the plaintiffs' claims, however, we: (1) vacate [**70] the jury's back pay awards with respect to Christian Eng, Alan Lew, Stanley Chin, and Milton Fong; (2) vacate the jury's compensatory damage awards with respect to Christian Eng, Nicholas Yum, Alan Lew, David Lim, George Martinez, Stanley Chin, and Milton Fong; (3) vacate the retroactive promotion of Alan Lew; and (4) vacate the salary and pension adjustments for Alan Lew, Stanley Chin, and Milton Fong. We remand all of these remedies issues to the district court for a new trial solely on damages and for the reconsideration of equitable relief. On remand, individual relief should be awarded only insofar as it corresponds to discriminatory failures to promote committed after August 2, 2000.

Analysis
As of: Dec 10, 2012

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, WENDY CABRERA, Intervenor Plaintiff, v. THE ORIGINAL HONEYBAKED HAM COMPANY OF GEORGIA, INC., Defendant.

Civil Action No. 11-cv-02560-MSK-MEH

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

2012 U.S. Dist. LEXIS 160285

November 7, 2012, Decided
November 7, 2012, Filed

PRIOR HISTORY: *EEOC v. Original Honeybaked Ham Co. of Ga., 2012 U.S. Dist. LEXIS 150037 (D. Colo., Oct. 18, 2012)*

COUNSEL: [*1] For Equal Employment Opportunity Commission, Plaintiff: Iris Halpern, Sean William Ratliff, William Earl Moench, U.S. Equal Employment Opportunity Commission-Denver, Denver, CO.

For Wendy J. Cabrera, Intervenor Plaintiff: Kent Edward Eichstadt, McCurdy & Eichstadt, PC, Centennial, CO.

For Original Honeybaked Ham Company of Georgia, Inc., The, Defendant: Angelo Spinola, Benson Edward Pope, Littler Mendelson, PC-Atlanta, Atlanta, GA; Danielle L. Kitson, Katherine S. Dix, Littler Mendelson, PC-Denver, Denver, CO.

For Lisa K. Jager, Interested Party: Adrienne Martha Tranel, Bachus & Schanker, LLC, Denver, CO.

For James Joseph Jackman, Interested Party: Josh Adam Marks, LEAD ATTORNEY, Berg Hill Greenleaf & Ruscitti, LLP, Boulder, CO.

JUDGES: Michael E. Hegarty, United States Magistrate Judge.

OPINION BY: Michael E. Hegarty

OPINION

ORDER ON MOTION TO COMPEL

Michael E. Hegarty, United States Magistrate Judge.

Before the Court is Defendant HBH's Motion to Compel under *Fed. R. Civ. P. 37* [filed September 6, 2012; docket #177 (sealed docket #172)]. The motion is referred to this Court for disposition. (Docket #173.) The matter is fully briefed, and on November 6, 2012, the Court held oral argument. For the reasons that follow,

[*2] the Court **grants in part** and **denies in part** Defendant's motion.

I. Background

Plaintiff Equal Employment Opportunity Commission (EEOC) brings claims of sexual harassment and hostile environment and retaliation under *Title VII* of the Civil Rights Act of 1964, as amended, alleging Defendant subjected a class of female employees (between 20 and 22 persons) to sexual harassment and retaliated against such employees when they complained about the harassment.

In the present motion, Defendant seeks numerous categories of documents designed to examine the class members' damages -- emotional and financial -- as well as documents going to the credibility and bias of the class members. I will address each category below. I need to emphasize that it is my job to ensure production of documents that may lead to the discovery of admissible evidence. I am not determining what is admissible at trial. In addition, Defendant spends significant time addressing what the EEOC has and has not produced. As the EEOC demonstrates in its response brief, some of Defendant's representations in this regard are not accurate. Because of this, and because Defendant's requests are a significant (albeit, as I explain below, [*3] in certain respects justifiable) intrusion into the class member's semi-private lives, and because the whole area of social media presents thorny and novel issues with which courts are only now coming to grips, I will not determine this motion or any sanctions based on what should or should not have been provided prior to this Order, nor will I apportion fault in failing to produce documents or information prior to this Order.

II. Analysis

A. Full Unredacted Social Media Content, Text Messages, Etc.

Many of the class members have utilized electronic media to communicate -- with one another or with their respective insider groups -- information about their employment with/separation from Defendant HBH, this lawsuit, their then-contemporaneous emotional state, and other topics and content that Defendant contends may be admissible in this action. As a general matter, I view this content logically as though each class member had a file folder titled "Everything About Me," which they have voluntarily shared with others. If there are documents in this folder that contain information that is relevant or may lead to the discovery of admissible evidence relating to this lawsuit, the presumption [*4] is that it should be produced. The fact that it exists in cyberspace on an electronic device is a logistical and, perhaps, financial problem, but not a circumstance that removes the information from accessibility by a party opponent in litigation.

To set the playing field, the relief the class members are seeking varies from claimant to claimant but includes (1) back pay; (2) emotional damages[1]; and (3) front pay or reinstatement. The cumulative exposure to the Defendant is most definitely well into the low-to-mid seven-figure range. This is important to note when addressing whether the potential cost of producing the discovery is commensurate with the dollar amount at issue.

> 1 One item in the record references Plaintiff-Intervenor's hope to recover $400,000, which, given the facts of the case, would consist mostly of compensatory damages.

There is no question the Defendant has established that the documents it seeks contain discoverable information. Defendant has shown, for example, that Plaintiff-Intervenor Cabrera posted on her Facebook account statements that discuss her financial expectations in this lawsuit[2]; a photograph of herself wearing a shirt with the word "CUNT" in large letters [*5] written across the front (a term that she alleges was used pejoratively against her, also alleging that such use offended her)[3]; musings about her emotional state in having lost a beloved pet as well as having suffered a broken relationship[4]; other writings addressing her positive outlook on how her life was post-termination[5]; her self-described sexual aggressiveness[6]; statements about actions she engaged in as a supervisor with Defendant (including terminating a woman who is a class member in this case); sexually amorous communications with other class members[7]; her post-termination employment and income opportunities and financial condition; and other information. I view each of these categories as potentially relevant in this lawsuit. If all of this information was contained on pages filed in the "Everything About Me" folder, it would need to be produced. Should the outcome be different because it is on one's Facebook account? There is a strong argument

that storing such information on Facebook and making it accessible to others presents an even stronger case for production, at least as it concerns any privacy objection. It was the claimants (or at least some of them) who, by their [*6] own volition, created relevant communications and shared them with others.

2 *Marcic v. Reinauer Transp. Cos., 397 F.3d 120, 125 (2d Cir. 2005)* (financial motive relevant).
3 *Meritor Savings Bank v. Vinson, 477 U.S. 57, 68, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986)* (in sexual harassment case, totality of circumstances including plaintiff's own conduct is potentially relevant).
4 *Thorsen v. County of Nassau, 722 F. Supp. 2d 277, 293 (E.D.N.Y. 2010)* (discussing impact of non-work related stressors in analyzing award of compensatory damages).
5 *Id.*
6 *Fed. R. Evid. 412(b)(2)* addresses admissibility of this type of evidence, an analysis that Judge Krieger may have to utilize.
7 *Id.*

The EEOC raises a valid objection concerning the vagueness of the Defendant's discovery requests, especially insofar as they allegedly seek text messages. Defendant counters that the broad definition of "document" used in the requests is sufficient to cover texts and the other material sought here. I do not believe the proper remedy in this instance is to deny the document request and require Defendant to draft a new one. Defendant's definition of "document" is sufficient to cover text messages, and I believe it would the best course to allow the discovery discussed [*7] below.

Given the fact that Defendant has already obtained one affected former employee's Facebook pages, and that those pages contain a significant variety of relevant information, and further, that other employees posted relevant comments on this Facebook account, I agree that each class member's social media content should be produced, albeit *in camera* in the first instance. I do not believe this is the proverbial fishing expedition; these waters have already been tested, and they show that further effort will likely be fruitful. However, I am appreciative of privacy concerns and am not sold on all of Defendant's alleged areas of relevant information, particularly regarding expressions of positive attitude about this or that. Therefore, I will establish a process designed to gather only discoverable information. To accomplish this, I will utilize a forensic expert as a special master as needed. Plaintiff-Intervenor and the class members shall provide the following directly and confidentially to the special master:

> 1. Any cell phone used to send or receive text messages from January 1, 2009 to the present;
>
> 2. All necessary information to access any social media websites used by such [*8] person for the time period January 1, 2009 to present;
>
> 3. All necessary information to access any email account or web blog or similar/related electronically accessed internet or remote location used for communicating with others or posting communications or pictures, during the time period January 1, 2009 to present.

The parties will collaborate to create (1) a questionnaire to be given to the Claimants with the intent of identifying all such potential sources of discoverable information; and (2) instructions to be given to the Special Master defining the parameters of the information he will collect. These should be provided to the Court no later than **November 14, 2012**. If there are areas of dispute, the parties should provide to the Court a copy of each document, each of which should clearly distinguish between agreed-upon language and disputed language. As to the disputed language, the parties should footnote each area of dispute and briefly state their respective positions. I will review the material, make any necessary decisions, and return the questionnaire by **November 16, 2012**, with the hope that the questionnaire will be given to the Claimants and the requested information returned [*9] no later than **November 30, 2012**, at which time the Special Master may begin his work.

The Court will receive in hard copy all information yielded by this process, review the information *in camera* and require the production to Defendant of only that information which the Court determines is legally relevant under the applicable rules. The Court will then deliver relevant material to the EEOC, which shall conduct a privilege review, designate the material as

appropriate under the Protective Order in this case, then deliver the nonprivileged material to defense counsel along with a privilege log containing any withheld information. All irrelevant material will also be returned to the EEOC. I will provide the EEOC an opportunity to make a record of objections to the material I determine to be relevant.

The cost of forensic evaluation will be borne equally by the Plaintiff/Claimants and the Defendant. I previously considered having the Defendant bear the cost of this effort; however, I do not believe this is consistent with the Federal Rules of Civil Procedure. The information ordered to be produced is discoverable -- information which, if it exists, was created by the Claimants. In the event, [*10] as the EEOC believes, this effort produces little or no relevant information, I may, upon motion, revisit this allocation and relieve the Plaintiff/Claimants of monetary responsibility.

B. Income Information

In a Title VII case, a plaintiff's financial and income information can be relevant. *E.g., Myers v. Central Florida Investments, Inc., 592 F.3d 1201, 1213 (11th Cir. 2010)*. This includes tax return information, *e.g., Hunter v. General Motors Corp., 149 F. App'x 368, 373 (6th Cir. 2005)* ("Because Hunter knew that he had received a substantial salary during the relevant tax year, yet failed to claim such a taxable source of income, the return did indeed reflect upon the plaintiff's truthfulness and was, therefore, admissible at trial."), and unemployment benefits, *Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1555 (10th Cir. 1988)* ("The decision whether to offset unemployment compensation is within the trial court's discretion."). Obviously, a calculation of back pay utilizes subsequent income as a potential mitigation.

Here, Defendant seeks a wide range of financial information to include "bank records" and "promissory notes," as well as records of government assistance. I believe [*11] this is overbroad, at least at this time. I do not believe a Title VII plaintiff's overall financial condition is relevant. What is relevant for a separated employee (whether by termination or constructive discharge) is income information. I believe tax returns, unemployment compensation, and all information concerning income derived from labor are relevant and subject to discovery. Thus, for each class member and the Plaintiff-Intervenor who seeks to recover back pay in this action, such information for the time period after separation from Defendant should be produced. At the oral argument, Defendant renewed its request that I require production of bank records due to deficiencies in the EEOC's efforts to collect relevant financial information. However, it was clear to me that the interactive process between the EEOC and the Defendant in attempting to obtain this information has not been exhausted. Therefore, the denial of bank record information is without prejudice in the event Defendant establishes at a later date that the EEOC's efforts to obtain income information has been inadequate.

C. Information Concerning Prior Legal Proceedings

Defendant seeks information concerning any [*12] other legal proceedings in which a class member or Plaintiff-Intervenor has been involved. Information regarding other lawsuits is at least potentially relevant, *Vance v. Union Planters Corp., 209 F.3d 438, 445 (5th Cir. 2000)*; *Gastineau v. Fleet Mortg. Corp., 137 F.3d 490 (7th Cir. 1998)*, and should be produced. I do not believe this information should be subject to any time limit. In my experience, disclosure of all prior legal proceedings of any kind are typical at the beginning of any deposition. I see no reason why the same cannot be accomplished through written discovery. Like all other information that I am ordering to be produced here, it will be up to Judge Krieger to decide whether it is admitted at trial. In the event the EEOC believes *all* responsive information has been produced, it should so affirmatively state in a response to Defendant.

D. Reopening of Cabrera Deposition

Defendant has provided a sufficient ground, on the basis of subsequently acquired evidence, to take an additional two hours of Ms. Cabrera's deposition. The parties shall arrange the deposition at their convenience.

Accordingly, the Court **GRANTS IN PART** and **DENIES IN PART** the Defendant HBH's Motion to Compel [*13] under *Fed. R. Civ. P. 37* [filed September 6, 2012; docket #177 (sealed docket #172)] as set forth herein. In the event the parties believe that a status conference is necessary to clarify or implement this Order, they are directed to contact my chambers for an immediate setting.

Dated at Denver, Colorado, this 7th day of November, 2012.

BY THE COURT:

/s/ Michael E. Hegarty

Michael E. Hegarty

United States Magistrate Judge

Analysis
As of: Dec 10, 2012

ELISABETH BOEYNAEMS, et al. v. LA FITNESS INTERNATIONAL, LLC; JOSHUA VAUGHN v. LA FITNESS INTERNATIONAL, LLC

CIVIL ACTION NO. 10-2326,CIVIL ACTION NO. 11-2644

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2012 U.S. Dist. LEXIS 115272

August 16, 2012, Decided
August 16, 2012, Filed

PRIOR HISTORY: *Boeynaems v. La Fitness Int'l, LLC, 2011 U.S. Dist. LEXIS 103611 (E.D. Pa., Sept. 12, 2011)*

COUNSEL: [*1] For KENNETH J. SILVER (2:10-cv-02326), Plaintiff: SHERRIE R. SAVETT, BERGER & MONTAGUE, PC, PHILADELPHIA, PA.

For JOSHUA VAUGHN (2:10-cv-02326), Plaintiff: CHRIS A. BARKER, BARKER RODEMS & COOK, PA, TAMPA, FL; MICHAEL T. FANTINI, BERGER AND MONTAGUE, P.C., PHILA, PA.

For JUSTIN P. BRONZELL, LORI C. BOHN, SHARON N. LOCKETT (2:10-cv-02326), Plaintiffs: ERIC LECHTZIN, BERGER & MONTAGUE, P.C., PHILADELPHIA, PA.

For L.A. FITNESS INTERNATIONAL, LLC (2:10-cv-02326), Defendant: JOHN G. PAPIANOU, LEAD ATTORNEY, MONTGOMERY MCCRACKEN WALKER RHOADS LLP, PHILADELPHIA, PA; JASON M. FRANK, PRO HAC VICE, EAGAN O'MALLEY & AVENATTI LLP, NEWPORT BEACH, CA.

For JOSHUA VAUGHN, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED (2:11-cv-02644), Plaintiff: CHRIS A. BARKER, BARKER RODEMS & COOK, PA, TAMPA, FL; ERIC LECHTZIN, MICHAEL T. FANTINI, SHERRIE R. SAVETT, BERGER AND MONTAGUE, P.C., PHILADELPHIA, PA.

For L.A. FITNESS INTERNATIONAL, LLC (2:11-cv-02644), Defendant: JASON M. FRANK, PRO HAC VICE, EAGAN O'MALLEY & AVENATTI LLP, NEWPORT BEACH, CA; JOHN G. PAPIANOU, MONTGOMERY MCCRACKEN WALKER RHOADS LLP, PHILADELPHIA, PA.

JUDGES: MICHAEL M. BAYLSON, Chief United States District Judge.

OPINION BY: MICHAEL M. BAYLSON

OPINION

MEMORANDUM RE: [*2] **DISCOVERY "FENCE" AND COST ALLOCATION**

Baylson, J.

I. Introduction

Substantial disputes about the scope of discovery, and sharing the costs of discovery, before a determination is made whether this case should be certified as a class action, have divided the parties. The disputes are substantial and the cost of the discovery requested by Plaintiffs is considerable. This issue, where Defendant's financial exposure will drastically increase if a class is certified, appears to be one of first impression.

Plaintiffs in these cases signed contracts to become members of a health/fitness organization and allege that they thereafter encountered deception and breaches concerning their desire to terminate their membership. [1] Plaintiffs filed a consolidated class action Complaint on October 18, 2011 (ECF No. 35). The claims contained in the most recent Complaint are as follows:

> 1 After the first case was started in 2010, and the second case was filed in 2011, Defendant filed extensive Rule 12 Motions in both cases, raising a number of issues. In a lengthy Opinion dated September 12, 2011 (ECF No. 33, *Boeynaems v. LA Fitness Int'l, LLC, 2011 U.S. Dist. LEXIS 103611, 2011 WL 4048512*) the Court granted, in part, Defendant's Motion [*3] to Dismiss and also consolidated the two cases because they make basically similar claims.

1. All plaintiffs -- Kenneth J. Silver, Joshua Vaughn, Lori Bohn, Sharon N. Lockett, and Justin P. Bronzell -- claiming for breach of contract.

2. Plaintiff Joshua Vaughn, claiming for violations of the Florida Deceptive and Unfair Trade Practices Act.

3. Plaintiff Lori Bohn, claiming for violations of the Washington consumer Protection Act.

II. Summary of the Case Management Conferences

As a result of various filings by the parties, the Court ascertained that this case warranted active discovery management. The Court has consistently ruled that the parties must focus on appropriate discovery so that they could proceed to a hearing, following Plaintiffs' anticipated Motion for Class Determination, as envisioned by *In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305 (3d Cir. 2008)*. [2] Four separate discovery conferences have taken place since January 2012, as follows:

> 2 The Court referred counsel to two other cases where the Court held two-day evidentiary hearings on Rule 23 Motions as an indication of how the undersigned interprets the duties of a District Court under Hydrogen Peroxide.

1. January 31, [*4] 2012 (Order of February 1, 2012 (ECF No. 47)) -- The parties had been unable to agree on a discovery plan, and the Court authorized the initiation of discovery on both class action and merits, and directed that discovery should focus on the claims of the named plaintiffs, who are proposed class representatives, and merits issues that may be relevant as part of the class action determination. In addition, the Court directed that discovery should be initiated and completed promptly with respect to Defendant's corporate documents that set forth policies and practices that apply to the issues in the case and Plaintiffs' claims. The Court allowed depositions of corporate officers and employees after documents were produced, and set some deadlines, which proved to be unduly optimistic and were later vacated.

2. April 25, 2012 (Order of April 26, 2012, (ECF No. 51)) -- The Court made a number of suggestions about having cost effective discovery focusing on class action issues, but also considering merits to the extent they may be relevant on the class action certification. Following this conference, the parties agreed on a Stipulated Protective Order protecting confidential information. (ECF [*5] No. 48)

3. May 8, 2012 (Order of May 10, 2012 (ECF No. 57)) -- The filings of the parties, including a Motion to Compel of May 4, 2012 by Plaintiffs (ECF No. 52), revealed significant differences between the parties and a further discovery conference was held. The Court considered the arguments of the parties concerning discovery, but did not make any specific rulings, noting that Defendant was continuing production of papers, documents and electronically-stored information ("ESI"). Plaintiffs had also noticed Rule 30(b)(6) depositions, concerning the contents and location of Defendant's ESI and paper documents.

4. May 22, 2012 -- A further evidentiary hearing regarding discovery disputes was held on May 22, 2012, which is described in more detail below. Another conference was scheduled for June 28, 2012. However, the parties notified the Court by letter dated May 29, 2012, that they had reached agreement concerning their discovery disputes; accordingly, the Court entered an Order on May 30, 2012 (ECF No. 61), denying Plaintiffs' Motion to Compel as moot.

A pretrial conference had been set for June 28, 2012, but counsel requested it be postponed until the end of July.

Despite the discovery [*6] conferences and the parties' having stated that they had reached agreement, Plaintiffs submitted a letter to the Court on July 31, 2012 reporting that many of the same issues raised in the Motion to Compel of May 4, 2012 remained unresolved. Also on July 31, 2012, Defendant denied the allegations in Plaintiffs' letter and requested time to submit a more complete response, which Defendant submitted on August 7, 2012 (ECF #66). Plaintiffs filed a reply on August 8, 2012 (ECF #67). The dialogue back and forth between counsel is similar to a Verdian opera scene where a tenor and a bass boast of their qualities to compete to win over the fair princess.

II. Creating a Discovery "Fence"

Discovery need not be perfect, but discovery must be fair. In determining the boundaries of appropriate discovery in any case where the scope of discovery is subject to disputes, I have found it useful to adopt, as both a metaphor and a guide to determine what discovery is appropriate, a "discovery fence." The facts that are within the discovery fence are discoverable, and relevant materials should be produced; the facts that are outside the fence are not discoverable and documents or information need not be [*7] produced in discovery.

There are two other consequences of adopting a discovery fence. First, the "fence" itself must be a "flexible fence." A judge should always be willing to reexamine the contours of the fence depending on new facts that are uncovered, unforseen discovery expenses, or the judge's changing perception about what is fair. The "fence" can bulge or contract as case-specific circumstances require. Counsel should not hesitate in bringing to the Court new facts warranting a change in the fence.

Secondly, not all fact gathering must come from the opposing party. Each party can and should always conduct its own investigation of matters inside and outside the "fence," the results of which may warrant a change to the fence boundaries.

III. Discovery in a Putative Class Action -- Economic Aspects

As the Third Circuit noted in Hydrogen Peroxide, the concept of treating a civil action as a class action dramatically changes the strategies and economic considerations of the parties and their counsel. In an ordinary civil action, involving named parties against named defendants, there is usually a well-defined range of economic consequences. However, a class action, if allowed by the [*8] Court, dramatically increases the economic pressure on the defendant.

In a class action, particularly when damages are sought under *Rule 23(b)(3)*, the defendant must defend against the class as the Court has defined it. If there is a class in this case, it will most likely number in the thousands or tens of thousands people -- anyone who joined an LA Fitness Club and later cancelled or sought to cancel their membership. Thus, instead of facing the five named plaintiffs, bringing the case at the present time, Defendant will face exposure to a multitude. The damages sought, if the case goes to trial, would be more difficult to estimate and could be many millions of dollars.

Much has been written in the legal literature about the effect of the 1966 revisions to *Fed. R. Civ. P. 23* in this context. The thrust of recent appellate holdings on class actions has been to put significant limits on their scope. Any observer of class action jurisprudence over the last fifty years knows that courts have become much more exacting and demanding that class certification will be fair to a defendant. Compare *Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)*, with *Wal-Mart Stores, Inc. v. Dukes, U.S. ,131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*. [*9] Courts must also recognize that there have been many instances, as a result of securities fraud, product defects, or conspiracies that involve price-fixing under the antitrust laws, e.g., where many thousands of people have been significantly damaged. In these cases, class actions have proven an efficient method of transferring unlawfully obtained wealth from the offenders to the victims with generous fee awards to class counsel.

IV. Asymmetrical Discovery

Another important aspect of this case is that the discovery is asymmetrical. In other words, Plaintiffs, consumers who were members of LA Fitness for brief periods and allege that they had difficulty cancelling their memberships, number only five. If the class action is denied, perhaps another small group of individuals will intervene to join them as named parties. Even in aggregate, these individuals have very few documents. Perhaps they have kept a copy of their membership contract, or copies of correspondence with LA Fitness.

On the other hand, Defendant LA Fitness has millions of documents and millions of items of electronically stored information ("ESI"). Thus, the cost of production of these documents is a significant factor in [*10] the defense of the litigation.

Since Plaintiffs have authorized their counsel to seek a class action, the scope of discovery from Defendant is greatly enlarged. To some extent, discovery is necessary for the parties to advocate, and for the Court to determine, whether a class is appropriate under *Rule 23*. The scope of discovery, on the merits, will be even further enlarged. Virtually all of this discovery will be directed to Defendant.

Both sides legitimately want to limit their own costs of pretrial discovery. Defendant wants to limit its production of information as much as possible under the applicable rules, in part to save costs, but also, candidly, to provide Plaintiffs with as little material as possible from which to find evidence for use at trial (or in settlement negotiations).

Plaintiffs naturally want to limit their own costs of discovery, and will not voluntarily assume responsibility for the costs of Defendant producing Defendant's documents.

Professor Coffee wrote about problems posed by asymmetrical discovery in 1987, as follows:

> Asymmetric litigation stakes necessitate that the plaintiffs' attorneys, as independent entrepreneurs, minimize costs, while defense attorneys [*11] can persuade their own clients to litigate according to a more luxurious style. Closely related to this first scenario is a second: defendants may exploit asymmetric stakes by increasing the ante while the plaintiffs respond by engaging in low cost, 'feigned' litigation that can give the action the appearance of being frivolous. Even if defendants cannot force plaintiffs to match them dollar for dollar, they still may be able to demonstrate that protracted litigation is unprofitable for the plaintiffs because the eventual fee recovery will neither cover the plaintiffs' attorneys' opportunity costs nor compensate them for the risk associated with their contingent fee. A third possibility is that plaintiffs' attorneys can diversify their risks by managing a portfolio of individual actions; their tactics may then make sense if their hope is either to identify from among this portfolio a risk averse defendant who will settle generously or to discover a 'smoking gun' that changes the litigation odds in plaintiffs' favor after only a limited search. Finally, there remains the original possibility that a litigation cost differential may sometimes enable plaintiffs' attorneys to engage in [*12] practices that resemble extortion.
>
> At bottom, the tradeoff between the asymmetric stakes and cost differential effects is indeterminate.

John C. Coffee, The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, *54 U. CHI. L. REV. 877, 893 (1987)*.

This Court does not in any way suggest that counsel is acting otherwise than in the interests of their clients, but economic motivation and fairness are relevant factors in determining cost shifting of disputed discovery burdens.

The fact that Defendant has more documents than Plaintiffs does not necessarily mean that Defendant's production should be limited. However, as in this case, where the cost of producing documents is very significant, the Court has the power to allocate the cost of discovery, and doing so is fair. If Plaintiffs' counsel has confidence in the merits of its case, they should not

object to making an investment in the cost of securing documents from Defendant and sharing costs with Defendant. [3]

> 3 Although these costs may not necessarily be taxable against Defendant in the event of a successful trial, see *Race Tires Am. v. Hoosier Racing Tire Corp.,674 F.3d 158 (3d Cir. 2012)*, [*13] this Court would likely allow Plaintiffs' counsel's out-of-pocket costs to be deductible from any award to a class, assuming a class was certified.

In this case Plaintiffs are represented by the very successful and well regarded Philadelphia firm of Berger & Montague, which has had outstanding successes for many years in prosecuting class actions, winning hundreds of millions of dollars for their clients, and undoubtedly and deservedly, substantial fees for themselves. If the Berger & Montague firm believes that this case is meritorious, it has the financial ability to make the investment in discovery, to the extent the Court finds that cost sharing is otherwise appropriate. [4]

> 4 In the absence of a putative class action, where a party or counsel is unable to afford assuming the other party's costs of discovery, cost shifting may not be appropriate.

V. Allocating the Cost of Discovery Before a Decision on Class Certification.

The rules for discovery, and some case law, have long allowed a trial judge to shift the cost of pretrial discovery. In Oppenheimer Fund, Inc. v. Sanders, the Supreme Court stated:

> [u]nder th[e] [discovery] rules, the presumption is that the responding party must bear [*14] the expense of complying with discovery requests, but he may invoke the district court's discretion under *Rule 26(c)* to grant orders protecting him from 'undue burden or expense' in doing so, including orders conditioning discovery on the requesting party's payment of the costs of discovery.

437 U.S. 340, 358, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978) (emphasis added). [5]

5 *Rule 26(b)(2)(C)(iii)* sets out the standard for what constitutes an "undue burden":

> [T]he court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rules if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Despite this broad authorization of cost shifting by the Supreme Court over thirty years ago, very few Courts took advantage of this authority before the advent of ESI. Indeed, the impact of ESI on the issue of cost shifting is clear from the civil discovery rules themselves--their only specific mention of cost shifting is found in *Rule 26(b)(2)(B)*, titled "Specific [*15] Limitations on [ESI]":

> A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of *Rule 26(b)(2)(C)*. The court may specify conditions for the discovery.

Although by its terms this rule is limited to ESI, courts are permitted to apply similar cost allocations in cases involving extensive production of paper discovery.

Many reported decisions apply standards for requiring that the requesting party share discovery costs. Recently, most of these cases involve ESI.. The leading opinion is undoubtedly Judge Scheindlin's *Zubulake v.*

UBS Warburg LLC ("Zubulake I"), 217 F.R.D. 309 (S.D.N.Y. 2003), where she enunciated a seven-factor test that should govern decisions about cost allocation. Those factors are:

> 1. The degree to which the request [*16] for information is designed to discover germane information;
>
> 2. The availability of the same information from different sources;
>
> 3. The cost of production as compared to the amount in controversy;
>
> 4. The cost of production as compared to the resources of each party;
>
> 5. The parties' relative abilities to control discovery costs and their incentives to control costs;
>
> 6. The degree of importance of the issues being decided in the litigation; and
>
> 7. The relative benefits to each of the parties in obtaining the information at issue.

Id. at 322.

Shifting the cost burdens of discovery, both for ESI and paper discovery, is no longer rare. Still, no decision has been found specifically addressed to allocation of costs as part of a substantial discovery dispute prior to the class certification decision. In this case, at least some of the discovery is relevant to whether a class should be certified, particularly given the searching inquiry required by *Hydrogen Peroxide*.

One instructive case involving ESI is *Clean Harbors Envtl. Servs., Inc. v. ESIS, Inc., No. 09 C 3789, 2011 U.S. Dist. LEXIS 53212, 2011 WL 1897213 (N.D. Ill. May 17, 2011)* (Cox, Mag. J.). In this case, the plaintiff filed a motion, after completion of discovery, seeking [*17] to shift to the defendants approximately $91,000 in discovery costs that resulted from the plaintiff having produced ESI stored on backup tapes. In order to produce the ESI, the plaintiff needed to physically pull backup tapes from an offsite facility, load those tapes onto its system to extract certain data, and then retain a third party vendor to process, search, filter, or otherwise access 166 gigabytes of data. *2011 U.S. Dist. LEXIS 53212, [WL] at *2*. Among other things, the court explained that in cases involving cost shifting, an important consideration is whether the records in question are stored in an accessible or inaccessible format -- the process required to access the plaintiff's ESI stored on backups tapes was sufficiently cumbersome to render it inaccessible. *2011 U.S. Dist. LEXIS 53212, [WL] at *2* (citing *Zubulake v. UBS Warburg LLC ("Zubulake II"), 216 F.R.D. 280, 291 (S.D.N.Y. 2003))*. For this and other reasons -- including (1) the parties' similar financial footings, (2) the unquestionable relevance of the discovery sought, (3) that the discovery was needed by all parties, and (4) that neither the plaintiff nor the defendants had failed to control costs -- the court deemed cost shifting appropriate, ordering that the plaintiff [*18] and the defendants share the discovery costs equally. *2011 U.S. Dist. LEXIS 53212, [WL] at *3-5*.

Several recent cases have applied cost-sharing to non-ESI discovery. In *Simms v. Ctr. for Corr. Health & Policy Studies, 272 F.R.D. 36 (D.D.C. 2011)*, Chief Judge Royce C. Lamberth endorsed shifting a plaintiff's discovery costs to the defendant, albeit in a minor amount. Citing *Oppenheimer Fund, Inc., 437 U.S. at 358*; *Peskoff v. Faber, 251 F.R.D. 59, 61 (D.D.C. 2008)*, and *Fed. R. Civ. P. 34(a)* advisory committee's note, Judge Lamberth held that because the plaintiff established that she lacked the financial resources to pay $300 in copying costs necessary to comply with the defendant's discovery requests, she had overcome the presumption that she was responsible for those costs and satisfied her discovery burden by making the requested documents available for inspection and copying at the defendant's expense. *Id. at 40-41*.

Am. Int'l Specialty Lines Ins. Co. v. NWI-I, Inc., 240 F.R.D. 401 (N.D. Ill. 2007) (Mason, Mag. J.), involved a motion by the plaintiff to compel the defendants to review for relevance more than 19,000 boxes of paper documents. The discovery scenario facing the court was that (1) the defendants had [*19] limited financial resources, (2) the dispute covered only a narrow set of issues for which broad discovery would not ordinarily be necessary, and (3) any effective review would necessarily be overbroad because targeting likely relevant documents was impossible, as the only insight into the contents of the documents was a demonstrably unhelpful index. [6] *Id. at 409-410*.

> 6 The plaintiff had established that the index either lacked or had inaccurate descriptions of the contents of at least 2,000 boxes of documents. *Id. at 409-10*.

The court ultimately denied the plaintiff's motion to compel the defendants to review all the documents, holding instead that it was appropriate to require the plaintiff and the defendants to share the review costs equally:

> After considering the foregoing factors and the particular circumstances present here, this Court finds that it would be unduly burdensome and expensive to require the [defendants] to review all of the . . . documents in order to produce only those documents that are responsive to plaintiff's requests. Accordingly, plaintiff's request for such an order is denied. Nevertheless, this Court finds that plaintiff is entitled to discover whether the [*20] . . . documents contain relevant information. Furthermore, we find that it would be equally burdensome, expensive and unfair if we permitted defendants to rest on their "keys to the warehouse" method of responding to plaintiff's discovery requests. We cannot allow defendants to merely offer plaintiff access to the . . . documents because doing so shifts the undue burden entirely to the plaintiff. Therefore, in light of the resources of the parties, the limited issues in this case and the fact that there are more than 19,000 boxes of documents in storage, we find it appropriate to place some limits on discovery related to the . . . documents..
>
> Based on the foregoing, this Court orders the parties to work together to create a discovery plan with respect to the . . . documents. The parties must take into consideration the following: (1) from this point forward, all fees and costs associated with discovery related to the . . . documents will be shared equally between plaintiff and the defendants; (2) the 1,778 boxes with no labels or labels that do not sufficiently describe their contents should be reviewed to determine whether the boxes contain any relevant information; and (3) the parties [*21] should agree upon what additional discovery related to the . . . documents is necessary, if any, and how long it will take to complete that discovery. By requiring the parties to share the cost, this Court encourages the parties to come up with a discovery plan that is both time and cost efficient.

Id. at 412-13 (citation and footnotes omitted).

In *Foreclosure Mgmt. Co. v. Asset Mgmt. Holdings, LLC, Civil Action No. 07-2388-DJW, 2008 U.S. Dist. LEXIS 72513, 2008 WL 3822773 (D. Kan. Aug. 13, 2008)*, Asset Management Holdings, LLC ("Asset Management") sought an order compelling Foreclosure Management Co. ("FMC") to produce certain documents. FMC argued, among other things, that production presented an undue burden and, therefore, that production either should not be ordered at all, or, if ordered, be accompanied by a requirement that Asset Management share costs. Responding to FMC's arguments, the court stated:

> The Court finds that FMC has failed to adequately support its undue burden objection. As a preliminary matter, FMC fails to provide the Court with any evidence showing the expenditure of time, effort or money that would be necessary to produce the requested documents. While FMC has provided an "estimate" that [*22] it would likely take 2,000 hours to search its storage facilities, locate the appropriate files, and search the invoices, this explanation is not detailed enough to convince the Court that such a search would result in the expenditure of great labor, great expense, or considerable hardship to FMC. Even assuming arguendo that FMC had submitted evidence to demonstrate such a burden or hardship, FMC has failed to establish that the burden or hardship would be undue and disproportionate to the benefits Asset Management would gain from the document production. As discussed above, the Court finds the requested [documents]

> to be directly relevant and important to establishing Asset Management's defenses and counterclaims. Thus, the Court declines to deny the Motion to Compel based on undue burden.
>
> The Court will now consider FMC's request that the cost of producing these documents be shifted to Asset Management. Under the discovery rules, the presumption is that the responding party must bear the expense of complying with discovery requests. Notwithstanding this presumption, a court has discretion under *Rule 26(c)* to condition discovery on the requesting party's payment of the costs of the [*23] discovery. In making such a determination, courts often consider the factors set forth in *Rule 26(b)(2)(C)(iii)*, which are whether "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."
>
> Taking into consideration these factors, the Court finds that it would be appropriate to apportion the costs of this discovery equally between FMC and Asset Management. The parties are directed to confer to determine the most cost efficient method for production of these documents.

*2008 U.S. Dist. LEXIS 72513, [WL] at *7* (quotations and citations omitted).

In *Schweinfurth v. Motorola, Inc., No. 1:05CV0024, 2008 U.S. Dist. LEXIS 82772, 2008 WL 4449081 (N.D. Ohio Sept. 30, 2008)*, a class action, the court ordered the plaintiffs to pay half of the discovery costs because the plaintiffs' requested discovery, though relevant, (1) was huge in size and scope, (2) did not pertain to the defendant's products that were the subject of the named plaintiffs' claims, and (3) would not necessarily provide material admissible at trial.

Cost shifting was also [*24] recently applied to discovery of ESI in this jurisdiction in *Universal Del., Inc. v. Comdata Corp., Civil Action No. 07-1078, 2010 U.S. Dist. LEXIS 32158, 2010 WL 1381225 (E.D. Pa. Mar. 31, 2010)* (Perkin, Mag. J.).

This Court has applied cost allocation in at least one other case. In IP Venture, Inc. v. Sony Elecs., No. 09-497 (D. Del.), the plaintiff was an investor in lawsuits asserting that various patents had been improperly obtained and should be declared invalid. The plaintiff itself manufactured nothing and had no business other than its investments in these lawsuits. The defendant Sony, as most would recognize, is a multi-billion dollar, multi-national corporation with thousands of inventions and millions of documents. Because of the asymmetrical discovery in the case, the Court informed the parties that it was likely to impose on the plaintiff at least some portion of the expenses associated with its extensive discovery requests. Order of June 21, 2010 (ECF No. 48). Perhaps lacking some confidence in either its economic ability to sustain this burden or in the merits of the claim, the plaintiff promptly settled the case. [7]

> 7 This Court also notes the fairly extensive commentary in the legal literature on [*25] cost allocation for discovery, particularly where it is asymmetrical. Articles on the topic include (but are not limited to):
>
> 1. Martin H. Redish & Colleen McNamara, Back to the Future: Discovery Cost Allocation and Modern Procedural Theory, *79 GEO. WASH. L. REV. 773 (2011)* (questioning the usual practice of requiring a producing party to bear the expenses associated with its opponent's discovery requests because, inter alia, it creates a litigation subsidy that enriches the requesting party);
> 2. Laura E. Ellsworth & Robert Pass, Cost Shifting in Electronic Discovery, 5 SEDONA CONF. J. 125 (2004) (discussing *Fed. R. Civ. P. 26(b)(2)* and *34(b)*, along with significant federal judicial treatment of cost shifting with respect to ESI discovery);
> 3. Edward Pekarek, The Shifting Tide of ESI Discovery Cost

Allocation, 1899 PLI/CORP 405 (2011) (discussing various state and federal provisions concerning ESI discovery cost shifting); and

4. Vlad Vainberg, When Should Discovery Come with a Bill? Assessing Cost Shifting for Electronic Discovery, *158 U. PA. L. REV. 1523 (2010)* (discussing the weaknesses and strengths of the various multifactor tests for cost shifting and describing recent trends in [*26] judicial orders involving cost shifting)

A number of treatises also address cost allocation for discovery, including (but not limited to):

1. BARBARA J. ROTHSTEIN, RONALD J. HEDGES & ELIZAETH C. WIGGINS, FEDERAL JUDICIAL CENTER, MANAGING DISCOVERY OF ELECTRONIC INFORMATION: A POCKET GUIDE FOR JUDGES 17-20 (2d ed. 2012);

2. RICHARD L. MARCUS, EDWARD F. SHERMAN & HOWARD M. ERICHSON, COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE 510-27 (5th ed. 2010); and

3. STEVEN S. GENSLER, FEDERAL RULES OF CIVIL PROCEDURE: RULES AND COMMENTARY 520, 526-28 (2008).

VI. Plaintiffs' Motion to Compel filed May 4, 2012.

In this motion, Plaintiffs sought production of documents in two ESI categories:

1. "Member notes" (the LA Fitness term for electronic data reflecting internal discussions and actions pertaining to LA members) relating to customer complaints which were generated in five states over the course of a sampling of 60 months designated by Plaintiffs, and

2. E-mails to and from five individuals who created or implemented Defendant's cancellation procedures and from two individuals who Defendant identified as having direct responsibility over handling cancellations (who were identified [*27] by name).

Plaintiffs had also asserted that Defendant should bear all costs associated with Plaintiffs review of Defendant's paper documents located at the Iron Mountain facility in California. Defendant had previously advised that paper documents relating to membership issues were stored at Iron Mountain. A "litigation hold" had been put on these documents so that they were not being destroyed, as they would have been in the absence of this litigation. Plaintiffs suggested that Defendant be required to continue the litigation hold and incur expenses pertaining to facilitating the inspection of the documents at the Iron Mountain facility.

Defendant's response (ECF # 4) details the parties' various negotiations prior to Plaintiff filing the Motion to Compel. The Court's notes of the conference held on May 22, 2012, indicate that the parties had reached some agreements. First, certain depositions had already been taken of corporate representatives, which gave Plaintiffs further details about the type of documents that Defendant generated and how they were maintained. Second, Plaintiffs had already inspected some of the documents at the Iron Mountain facility in California. Third, the parties [*28] had a tentative agreement that the Members Notes ESI would be reviewed by Defendant for members in five states over a 30 month period, although there were some disputes as to details. Fourth, Defendant would preserve the documents at Iron Mountain.

As the Court recalls, the major issues left open after the May 22, 2012 conference were (1) cost allocation, (2) production of internal memoranda by LA Fitness officers and employees, and (3) certain details concerning the production of ESI.

At the hearing on May 22, 2012, the Court made only one ruling: Plaintiffs would not be required to pay for Defendant's counsel to review Defendant's Member Notes prior to production. This is not a case in which there is likely to be any privileged documents in the material requested, because the Member Notes are basically complaints from consumers. Indeed, not only is

it highly unlikely that privileged materials will be contained in the Member Notes, but Plaintiffs have agreed to return to Defendant any documents that they come across that are Privileged, and not to use them in the litigation.

VII. Discovery Disputes Still Pending

Plaintiffs' letter brief of July 31, 2012 lists in detail Plaintiffs' document [*29] requests to which Plaintiffs contend that Defendant has not fully complied. Generally, Plaintiffs' requests fall within the following basic categories:

1. A variety of internal memoranda and correspondence relating to Defendant's policies and practices regarding cancellations -- including whether Defendant required members to use pre-printed forms for cancellations, whether customers were informed of such, and whether customer cancellations were processed at the local club level prior to January 1, 2012.

2. Documents related to Defendant's responses to consumer complaints referred by the Better Business Bureau and other state consumer protection agencies.

3. Interrogatory responses regarding the identities of Defendant's managers who were directly involved in handling customers' cancellation notices and complaints.

4. Interrogatory responses regarding Defendant's explanations for the reasons that many cancellations notices were not processed.

5. Privilege logs for all documents withheld on grounds of privilege.

Defendant's initial response details the amount of discovery which it has already provided, apparently at its own expense. Defendant notes that it reviewed thousands of E-mails itself, [*30] rather than negotiate a narrowing of the search terms. In total, Defendant asserts that it has reviewed (1) over 500,000 Member Notes from five states for 30 months looking for certain terms, (2) over 1,000 boxes of cancellation requests, of which Plaintiffs reviewed only 70 boxes, (3) over 19,000 pages of documents, and (4) an electronic search of over 32,000 E-mails, maintained by five custodians. Defendant contends that relatively few tidbits of relevant information have been found as a result of this very extensive and expensive search.

Defendant also responds to specific requests and asserts that Plaintiffs' demands are burdensome and not relevant to the issues in the case, particularly given that Plaintiffs have already secured a great deal of discovery, but the Court has not yet certified a class. Contrary to Plaintiffs, Defendant asserts it has conducted a reasonable search for documents relating to its policies and practices regarding the handling of cancellation notices.

Concerning Plaintiffs' second request for documents, served after the May 22, 2012 conference, Defendant contends that this new demand for additional documents is totally improper and unduly burdensome. Plaintiffs [*31] repeat their request for documents relating to whether Defendant processed member cancellations at the local club level prior to January 1, 2012, and Defendant objects to this request as overbroad and unreasonable, particularly on the class action issue. Defendant's response raises other disputes as well.

In Defendant's estimate of costs, filed May 21, 2012 (ECF # 58), Defendant estimated the cost to review 60 months of Members Notes ESI at approximately $360,000. Assuming that the number of months has been reduced to 30, this is still a very elaborate and expensive undertaking, particularly, if as Defendant has represented, a sampling of these Member Notes has exhibited only an extremely small proportion with any evidence probative of Plaintiffs' claims.

In addition, Defendant asserted that it will cost $219,000 to perform the search and production of E-mails from the active accounts from the seven custodians requested by Plaintiffs.

Lastly, Defendant notes that the Iron Mountain storage costs are $300 per month for over 1,000 boxes of documents, consisting primarily of cancellation notices. Defendant would like to be relieved of this expense by either destroying the documents or having [*32] Plaintiffs undertake the cost of maintaining them.

The parties' latest submissions to the Court, dated July 31, August 7 and August 8, 2012, are to some extent advocacy for their arguments on the merits, and lack complete symmetry in their discussion of Plaintiffs' requests and Defendant's objections.

Plaintiffs' reply dated August 8, 2012, asserts that there was an agreement between the parties on May 25, 2012 which "is in full force and effect and is being

carried out." However, the only agreement of which this Court is aware is reflected in a June 26, 2012 letter from counsel that "LA Fitness will produce Member Notes for 30 months across five states as well as E-mails of five custodians." Notably, Plaintiffs' opening letter-brief, dated July 31, 2012, and Defendant's response dated August 7, 2012, make no reference to a May 25, 2012 agreement.

Plaintiffs' August 8, 2012 reply brief concentrates heavily on Defendants' failure to produce "internal memoranda" and correspondence on various topics. Defendant asserts that large amounts of internal memoranda have already been produced on relevant topics. Plaintiffs, however, contend that they are entitled to "all [*33] responsive internal documents." The Court disagrees with this sweeping characterization of a defendant's obligations in a case of this nature, prior to class action certification. Concerning the sampling of executives' e-mails, Defendant also claims burdensomeness, but the Court believes that these files, as limited by the parties' agreement, are potentially germane, and are of the type generally produced in commercial litigation. It also appears that this search, as limited by agreement, may have already been completed.

Regarding the Member Notes ESI, Defendant contends that there is a substantial difference between the parties about the appropriate scope of review. This dispute has been the subject of much back-and-forth negotiating between the parties. Defendant makes a convincing showing that the huge volume of boxes of materials stored in Iron Mountain contain disproportionately few relevant documents, and in any event, whatever germane nuggets of information they may contain, Plaintiffs should bear the entire costs of production inspection, and preservation.

The exchange of correspondence between the parties also reflects disagreement regarding what Defendant has or has not been [*34] produced. The Court cannot resolve these issues through an exchange of correspondence. The parties should meet with each other in the same conference room for however long is necessary to determine to what extent Defendant has searched for and/or produced documents. If necessary, depositions may be appropriate of additional LA Fitness custodians with knowledge about the existence and location of documents related to the class action issue. The Court notes that three such depositions have already taken place.

VIII. The Court's Rulings on Discovery and Cost Shifting Issues

Based on the legal discussion above and extensive review of the parties positions, the Court mandates cost allocation as fair and appropriate. The Court concludes that where (1) class certification is pending, and (2) the plaintiffs have asked for very extensive discovery, compliance with which will be very expensive, that absent compelling equitable circumstances to the contrary, the plaintiffs should pay for the discovery they seek. If the plaintiffs have confidence in their contention that the Court should certify the class, then the plaintiffs should have no objection to making an investment. Where the burden of [*35] discovery expense is almost entirely on the defendant, principally because the plaintiffs seek class certification, then the plaintiffs should share the costs.

Plaintiffs seek to represent a very extensive class, and if, as Plaintiffs anticipate, their class action motion is granted, this case will suddenly turn from a routine case to a major financial exposure for Defendant. The *Hydrogen Peroxide* decision and its progeny require that the Court make a very detailed analysis as to whether Plaintiffs can meet their Rule 23 burdens. Plaintiffs have already amassed, mostly at Defendant's expense, a very large set of documents that may be probative as to the class action issue.

The Court is persuaded, it appearing that Defendant has borne all of the costs of complying with Plaintiffs' discovery to date, that the cost burdens must now shift to Plaintiffs, if Plaintiffs believe that they need additional discovery. In other words, given the large amount of information Defendant has already provided, Plaintiffs need to assess the value of additional discovery for their class action motion. If Plaintiffs conclude that additional discovery is not only relevant, but important to proving that a class [*36] should be certified, then Plaintiffs should pay for that additional discovery from this date forward, at least until the class action determination is made.

The Court is firmly of the view that discovery burdens should not force either party to succumb to a settlement that is based on the cost of litigation rather than the merits of the case.

Therefore, the Court will require Plaintiffs forthwith to detail to Defendant the additional documents they have requested, but contend have not yet been produced and are desired before their class action motion is filed. Plaintiffs' list should be specific as to what searching of ESI, or hard documents, is required. Defendant shall respond to Plaintiffs' request within fourteen (14) days, summarizing Defendant's internal costs for providing this information. These costs may include the appropriately allocated salaries of individuals employed by Defendant who participate in supplying the information which Plaintiffs request, including managers, in-house counsel, paralegals, computer technicians and others involved in the retrieval and production of Defendant's ESI. Within seven (7) days of receiving this information, Plaintiffs shall advise Defendant [*37] if they are willing to make the payment requested by Defendant. If so, the requisite amount shall be paid to Defendant promptly and before Defendant initiates production. The Court reserves the right to make an allocation of these costs depending upon the outcome of the class action motion and/or the merits of the case.

The Court will hold a further pretrial conference on September 20, 2012, when the Court will set a date for completion of class action discovery, the filing of a motion for class certification, a briefing schedule, and a hearing date.

If either party requests any depositions before the next pretrial conference, that are reasonably related to the class action discovery issues, those requests shall be honored and each party shall bear its own costs for counsel and transcripts.

Returning to the "discovery fence" metaphor, and in making a determination of what facts are inside and outside the fence, the Court recognizes that Plaintiffs will need to show "predominance" of common issues as an important part of their burden in meeting the *Hydrogen Peroxide* standard for class certification. In particular, Plaintiffs will need to establish that "'proof of the essential elements [*38] of the[ir] cause[s] of action'" will not require "individual treatment" of each plaintiff's claims. *Hydrogen Peroxide, 552 F. 3d at 311* (quoting *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F. 3d 154, 172 (3d Cir. 2001))*. As the Third Circuit explained in *Sullivan v. DB Invs., Inc., 667 F. 3d 273, 299 (3d Cir. 2011)* (en banc), the Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes, ___ U.S. ___, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011)*, requires Plaintiffs to establish that "common questions generate common answers 'apt to drive the resolution of the litigation'"--in other words, that Plaintiffs show "a common course of conduct in which the defendant engaged with respect to each individual." (quoting *Dukes, 131 S. Ct. at 2551*). Thus, under Dukes, the most relevant discovery at this stage of the case is that which will illuminate the extent to which Defendant's membership cancellation policies and practices are set and followed nationally; Plaintiffs must show either that individual managers have no discretion or that there is a "common mode of exercising discretion that pervades the entire company." *Dukes, 131 S. Ct. at 2553-55*.

A. Accordingly, the Court concludes that the [*39] following are inside the fence, but with Plaintiffs paying the cost:

1. Corporate documents stating Defendant's practices and policies applicable to joining LA Fitness and cancellation of memberships.

2. A reasonable sample of Members Notes (but it appears that these have already been produced as part of Defendant's ESI).

3. Documents reflecting Defendant's use of preprinted forms, and whether this practice was uniform throughout the United States.

4. Corporate documents stating corporate policy and practice as to how managers or employees should respond to requests for cancellations.

5. Corporate documents concerning discretion of local managers or employees to vary from corporate policies.

6. Documents stored at Iron Mountain.

7. Additional ESI related to categories 1 - 4.

B. The Court further concludes that the following are outside the fence, not iscoverable at this stage of the case, even if Plaintiffs offered to pay costs:

1. Any requests characterized by Plaintiffs as a demand for production of "all" documents of a general category (but Defendant should produce "all" documents where the categorization is specific).

2. Requests targeted at determining whether decisions are made at any [*40] particular level of managers.

3. Internal memoranda other than as described above.

4. Defendant's response to consumer complaints, including Chambers of Commerce, Better Business Bureau.

5. Documents relating to how individual cancellation notices are processed.

IX. Conclusion

The Court expects communication between counsel to proceed in accordance with the foregoing memorandum, and for counsel to propose a joint, or separate, scheduling proposal before the next pre-trial conference.

An appropriate Order follows.

ORDER

AND NOW, this 16th day of August, 2012, for the reasons stated in the foregoing Memorandum, Plaintiffs' Motion to Compel (ECF #52) is **GRANTED** in part and **DENIED** in part.

1. Plaintiffs shall promptly communicate to Defendant what additional discovery they still reasonably need prior to the class certification hearing, limited to requests already made in this litigation.

2. Within fourteen (14) days, Defendant shall respond giving an accurate estimate of Defendant's internal costs, as described in the foregoing Memorandum of searching for and providing this information to Plaintiffs.

3. Within seven (7) days, Plaintiffs shall advise Defendant whether they are willing to advance the [*41] costs and if so, shall pay the amount specified by the Defendant to Defendant.

4. Assuming the appropriate amounts are paid, Defendant shall provide the requested information as promptly as possible, but within thirty (30) days.

5. Defendant shall promptly answer all outstanding interrogatories asking for identification of officers and managers, limited to those with supervisory responsibility concerning the issues in this case.

6. Defendant shall promptly produce a privilege log of documents that Defendant has reviewed and are responsive to Plaintiffs' requests for discovery, but have been withheld from production on grounds of privilege, in whole or in part, as required by *Rule 26(b)(5)*.

7. The Court will have a pretrial conference on September 20, 2012 at 2 p.m. for resolution of any problems arising under this Order, or further rulings, and to set a final schedule for class action determination. Each counsel may submit a list of topics for discussion, limited to three pages, sent to chambers two days prior to the conference.

BY THE COURT:

/s/ Michael M. Baylson

MICHAEL M. BAYLSON, U.S.D.C.J.

Analysis
As of: Dec 10, 2012

ACORDIA OF OHIO, L.L.C., APPELLANT, v. FISHEL ET AL., APPELLEES.

No. 2011-0163

SUPREME COURT OF OHIO

2012 Ohio 4648*; *2012 Ohio LEXIS 2454*; *162 Lab. Cas. (CCH) P61,294

July 10, 2012, Submitted
October 11, 2012, Decided

NOTICE:

THIS SLIP OPINION IS SUBJECT TO FORMAL REVISION BEFORE IT IS PUBLISHED IN AN ADVANCE SHEET OF THE OHIO OFFICIAL REPORTS.

PRIOR HISTORY: [**1]

APPEAL from the Court of Appeals for Hamilton County, No. C-1000071, *2010 Ohio 6235*.
Acordia of Ohio, L.L.C. v. Fishel, 2012 Ohio 2297, 2012 Ohio LEXIS 1360 (Ohio, May 24, 2012)
Acordia of Ohio, LLC v. Fishel, 2010 Ohio 6235, 2010 Ohio App. LEXIS 5224 (Ohio Ct. App., Hamilton County, Dec. 17, 2010)

DISPOSITION: Judgment reversed and cause remanded.

HEADNOTES

On reconsideration--Acordia has the right to enforce noncompete agreements as if it had stepped into the shoes of the contracting companies--Judgment reversed, and cause remanded.

COUNSEL: Katz, Teller, Brant & Hild, James F. McCarthy III, and Laura Hinegardner, for appellant.

Denlinger, Rosenthal & Greenberg, L.P.A., and Mark E. Lutz, for appellees.

Taft Stettinius & Hollister, L.L.P., W. Stuart Dornette, John B. Nalbandian, and Ryan M. Bednarczuk, urging reconsideration for amici curiae Ohio Chamber of Commerce and Ohio Chemistry Technology Council.

Beckman Weil Shepardson, L.L.C., and Peter L. Cassady, urging reconsideration for amici curiae USI Holdings Corporation and USI Midwest, Inc.

Keating Muething & Klekamp and Robert E. Coletti, urging reconsideration for amicus curiae Cintas Corporation.

Michelle Lafferty, urging reconsideration for amicus curiae Hyland Group, Inc.

Manley Burke, L.P.A., and Timothy Burke, urging reconsideration for amici curiae Sean K. Mangan and John A. Barrett Jr.

JUDGES: LANZINGER, J. O'CONNOR, C.J., and LUNDBERG STRATTON, O'DONNELL, CUPP, and MCGEE BROWN, JJ., concur. PFEIFER, J., dissents.

OPINION BY: LANZINGER

OPINION

ON MOTION FOR RECONSIDERATION.

LANZINGER, J.

[*P1] This matter is before us on a motion for reconsideration filed by appellant, Acordia of Ohio, [**2] L.L.C. ("the L.L.C.") and supported by amici curiae, Ohio Chamber of Commerce, Ohio Chemistry Technology Council, USI Holdings Corporation, USI Midwest, Inc., Hylant Group, Inc., Cintas Corporation, and professors Sean K. Mangan and John A. Barrett Jr. A memorandum in opposition was filed by appellees Michael Fishel, Janice Freytag, Mark Taber, Sheila Diefenbach (collectively, "the employees"), Neace Lukens Insurance Agency, L.L.C., Neace & Associates Insurance Agency of Ohio, Inc., and Joseph T. Lukens. We granted the motion for reconsideration. *Acordia of Ohio, L.L.C. v. Fishel, 132 Ohio St.3d 1485, 2012 Ohio 3334, 971 N.E.2d 962* .

[*P2] In *Acordia of Ohio, L.L.C. v. Fishel, Ohio St.3d , 2012 Ohio 2297, N.E.2d* ("*Acordia I*"), this court affirmed the judgment of the court of appeals. The lead opinion concluded that while the employees' noncompete agreements transferred by operation of law following merger with the L.L.C., the language found in those agreements precluded the L.L.C. from enforcing them as if it had stepped into the shoes of the original contracting employer. *Id. at ¶ 14, 19*.

[*P3] After reviewing the memoranda presented to the court on reconsideration, we have determined [**3] that portions of the lead opinion in *Acordia I* should be clarified. We reassert that in accordance with *R.C. 1701.82(A)(3)*, all assets and property, including employment contracts and agreements, and every interest in the assets and property of each constituent entity transfer through operation of law to the resulting company postmerger. We clarify the lead opinion by noting that certain language was, upon further consideration, erroneous. As a result, we now reverse the judgment of the court of appeals and remand the cause to the trial court so that it may determine whether the noncompete agreements are enforceable against the employees.

I. Our Decision Is Limited to the Context of Noncompete Agreements

[*P4] At the outset, we wish to emphasize that both the lead opinion in *Acordia I* and our decision today are limited in scope. In its motion for reconsideration, the L.L.C. worries that *Acordia I* may affect not only noncompetition agreements, but all other contracts transferred as a result of a merger. This is not the case. The proposition of law we accepted for review in this case stated:

> Pursuant to Ohio's merger statutes, agreements between employees and employers that contain restrictive [**4] covenants are assets of the constituent company that transfer automatically by operation of law in a statutory merger from the constituent company to the surviving company and are enforceable by the surviving company according to the agreements' original terms as if the surviving company were a party to the original agreements.

Acordia of Ohio, L.L.C. v. Fishel, 128 Ohio St.3d 1458, 2011 Ohio 1829, 945 N.E.2d 522. Our review of this case was thus limited to the narrow legal issues of whether noncompete agreements transferred by operation of law to the surviving company and whether the surviving company could enforce the agreements as if it had stepped into the shoes of the original contracting company. Both the lead opinion in *Acordia I* and our decision today are based upon considerations unique to noncompete agreements in the context of a merger and apply only to this narrow vein of cases. Nothing in either opinion should be construed as addressing the effect of a merger on any other company contracts.

II. The Noncompete Agreements Transfer by Operation of Law

[*P5] The lead opinion in *Acordia I* clearly stated that noncompete agreements transfer automatically to the surviving company by operation [**5] of law. The lead opinion specifically provided, "We emphasize that in accordance with *R.C. 1701.82(A)(3)*, the surviving

company possesses all assets and property and every interest in the assets and property of each constituent entity, including employment contracts and agreements." *Acordia I, Ohio St.3d , 2012 Ohio 2297, N.E.2d , at ¶ 14*. We reemphasize this principle today. Ohio merger law remains undisturbed, and employee noncompete agreements transfer to the surviving company after a merger has been completed pursuant to *R.C. 1701.82(A)(3)*.

III. Portions of the Lead Opinion in *Accordia I Were* Erroneous

[*P6] After reviewing the parties' memoranda and giving further consideration to this case, we conclude that portions of the lead opinion in *Acordia I* require correction. Specifically, a portion of analysis found in *Acordia I*'s lead opinion was based upon a misreading of language from a previous case that "a merger involves the absorption of one company by another, the latter retaining its own name and identity, and acquiring the assets, liabilities, franchises and powers of the former. Of necessity, the absorbed company ceases to exist as a separate business entity." *Morris v. Invest. Life Ins. Co., 27 Ohio St.2d 26, 31, 272 N.E.2d 105 (1971)*. [**6] Based on this language, the lead opinion in *Acordia I* concluded that the companies with which the employees had signed noncompete agreements ceased to exist following the merger. *Acordia I at ¶ 12*. The lead opinion further reasoned that because the noncompete agreements do not state that they can be assigned or will carry over to the contracting company's successors, the agreements' specific language indicated that the contracting parties intended that the noncompete agreements would operate only between themselves--i.e., the employee and the specific employer. *Id.*

[*P7] Upon further consideration, we now recognize that the lead opinion's reading of *Morris* was incomplete. While *Morris* does state that the absorbed company ceases to exist as a *separate* business entity, the opinion does not state that the absorbed company is completely erased from existence. Instead, the absorbed company becomes a part of the resulting company following merger. The merged company has the ability to enforce noncompete agreements as if the resulting company had stepped into the shoes of the absorbed company. It follows that omission of any "successors or assigns" language in the employees' noncompete agreements [**7] in this case does not prevent the L.L.C. from enforcing the noncompete agreements.

[*P8] Based on the foregoing clarification, we note that any language in the lead opinion in *Acordia I* stating that the L.L.C. was unable to enforce the employees' noncompete agreements as if it had stepped into the original contracting company's shoes or that the agreements were required to contain "successors and assigns" language for the L.L.C. to have the power to enforce the agreements was erroneous.

IV. The Reasonableness of the Noncompete Agreements

[*P9] While we now hold that the L.L.C. may enforce the noncompete agreements as if it had stepped into each original contracting company's shoes, we agree with Justice Cupp's assertion in his dissent in *Acordia I* that even though the agreements transfer to the L.L.C. by operation of law, the transfer does not "foreclose appropriate relief to the parties to the noncompete agreement under traditional principles of law that regulate and govern noncompete agreements." *Acordia I, Ohio St.3d , 2012 Ohio 2297, N.E.2d , at ¶ 36* (Cupp, J., dissenting). In other words, the employees still may challenge the continued validity of the noncompete agreements based [**8] on whether the agreements are reasonable and whether the numerous mergers in this case created additional obligations or duties so that the agreements should not be enforced on their original terms. *Id. at ¶ 39* (Cupp, J. dissenting).

[*P10] We have held that "[a] covenant not to compete which imposes unreasonable restrictions upon an employee will be enforced to the extent necessary to protect an employer's legitimate interests." *Raimonde v. Van Vlerah, 42 Ohio St.2d 21, 325 N.E.2d 544 (1975)*, paragraph one of the syllabus. Furthermore, "[a] covenant restraining an employee from competing with his former employer upon termination of employment is reasonable if the restraint is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public." *Id., paragraph two of the syllabus*. In determining the reasonableness of a noncompete agreement, we have stated that courts must determine whether the restraints and resultant hardships on the employee exceed what is reasonable to protect the employer's legitimate business interests. *Rogers v. Runfola & Assoc., Inc., 57 Ohio St.3d 5, 8, 565 N.E.2d 540 (1991)*.

[*P11] Therefore, [**9] while we hold today that the L.L.C. has the right to enforce the employees' noncompete agreements as if it had stepped into the shoes of the original contracting companies, we recognize that whether the noncompete agreements are reasonable remains an open question. Because the lower courts have not ruled on the reasonableness of the noncompete agreements, we will not address that issue in this decision, and we now remand the case to the trial court so that it may consider the issue.

V. Conclusion

[*P12] Recognizing that both the lead opinion in *Acordia I* and our opinion today apply only in the limited context of employee noncompete agreements, we reassert that employee noncompete agreements transfer by operation of law to the surviving company after merger. The language in *Acordia I* stating that the L.L.C. could not enforce the employees' noncompete agreements as if it had stepped into the original contracting company's shoes or that the agreements must contain "successors and assigns" language in order for the L.L.C. to enforce the agreements was erroneous. We hold that the L.L.C. may enforce the noncompete agreements as if it had stepped into the shoes of the original contracting companies, [**10] provided that the noncompete agreements are reasonable under the circumstances of this case. We accordingly reverse the judgment of the court of appeals and remand this cause to the trial court so that it may determine the reasonableness of the noncompete agreements.

Judgment reversed and cause remanded.

O'CONNOR, C.J., and LUNDBERG STRATTON, O'DONNELL, CUPP, and MCGEE BROWN, JJ., concur.

PFEIFER, J., dissents.

CONCUR BY: O'DONNELL

CONCUR

O'DONNELL, J., CONCURRING.

[*P13] I concur with the majority's decision to reconsider this matter. A noncompete agreement existing between an employee and a constituent entity is an asset of that entity and, in a statutory merger, transfers by operation of law to the surviving entity and is enforceable by the surviving entity as if it were a signatory to the original agreement. As a result of a series of successive corporate mergers, Acordia of Ohio, L.L.C., acquired the noncompete agreements at issue in this case by operation of law, along with the ability to enforce them without regard to assignment. The reasonableness of those agreements is not at issue before this court.

[*P14] Accordingly, I concur in the judgment to reverse the judgment of the court of appeals and to remand [**11] this matter for further proceedings.

A Noncompete Agreement is an Asset that Passes by Operation of Law

[*P15] *R.C. 1701.82(A)(3)* states, "The surviving or new entity possesses all assets and property of every description, and every interest in the assets and property, wherever located, and the rights, privileges, immunities, powers, franchises, and authority * * * of each constituent entity, and * * * all obligations belonging to or due to each constituent entity" without reversion or impairment. *R.C. 1705.39*, which pertains to mergers between corporations or partnerships and limited liability companies, confers the same vestments on the surviving entity.

[*P16] *R.C. 1701.82(A)(1)* states that a constituent entity ceases to exist as a separate business in a merger; but that statute also provides several exceptions to this general rule, including when "a conveyance, assignment, transfer, deed, or other instrument or act is necessary to vest property or rights" in a surviving entity. In those instances, "the existence of the constituent entities and the authority of their respective officers, directors, general partners, or other authorized representatives is continued notwithstanding the merger or [**12] consolidation." *Id.; compare R.C. 1705.39(A)(1)* (contains similar exceptions).

[*P17] *R.C. 1701.82* and *1705.39*, by their operation, vest all the assets and obligations of a constituent entity in the surviving entity without reversion or impairment. When we examined the effect of *R.C. 1701.82* in the context of a stock purchase agreement entered into by a constituent entity, we held that a properly executed contract is binding on the surviving entity "in a merger unless the agreement explicitly sets forth that in the event of a merger, the obligations of the constituent corporation cease to exist". *ASA Architects, Inc. v. Schlegel, 75 Ohio St.3d 666, 1996*

Ohio 427, 665 N.E.2d 1083 (1996), syllabus. In that case, the agreement made no provision for what would happen in the event of a merger, the surviving entity in the merger assumed full responsibility for all obligations of the constituent entity, and the parties did not enter into a new agreement following the merger. *Id. at 673*. Based on those factors, we determined that the contractual obligations of the constituent entity flowed, *by operation of law*, to the surviving entity. *Id.* [**13] These same considerations are present here and compel a similar conclusion.

[*P18] More than 180 years ago, we recognized that contracts are subordinate to statutes, and the latter "may regulate them, prescribe their form, their effect, and the mode of their discharge, and every contract is supposed to be made with reference to those laws." *Smith v. Pasons, 1 OHIO 236, 238-239 (1823)*. And almost 100 years ago, we construed railroad-consolidation statutes that contained language similar to that in *R.C. 1701.82* and determined that in a merger, "the consolidated company merely steps into the shoes of the constituent companies." *Marfield v. Cincinnati, D. & T. Traction Co., 111 Ohio St. 139, 161-164, 2 Ohio Law Abs. 438, 144 N.E. 689 (1924)*. The appellate court's determination that the terms of the agreements preclude Acordia of Ohio, L.L.C., from their enforcement thus runs counter to our century-old precedent.

[*P19] We applied this analysis more recently, rejecting the argument that a change in corporate structure invalidated noncompete agreements originally entered into by the constituent entity. *Rogers v. Runfola & Assoc., Inc., 57 Ohio St.3d 5, 7, 565 N.E.2d 540 (1991)*. There, the employees signed noncompete agreements [**14] while working for a sole proprietorship, which subsequently changed its business structure to that of a corporation, during their tenure of employment. *Id.* In determining that the noncompete agreements were valid and could be enforced by the newly incorporated business, which had acquired all the assets and liabilities of the sole proprietorship, we were guided in our analysis by the fact that "[o]nly the legal structure of the business changed, not the business itself," *id.*, and that the change in corporate structure did not place additional burdens on the "duties or daily operations" of the employees. *Id. at 9*. This is the same circumstance that we confront in this case.

[*P20] Here, Acordia of Ohio, L.L.C., acquired the noncompete agreements from Wells Fargo, which in turn had acquired them through a series of corporate mergers. Those mergers, which began with Frederick Rauh & Company, did not affect the nature of the business -- the sale of insurance securities; thus, the mergers changed only the corporate structure of the business operation. Similarly, there is no evidence or claim in this record that additional employment duties or obligations resulted from these mergers. Thus, *Rogers* [**15] supports the conclusion that Acordia of Ohio, L.L.C., is entitled to enforce the agreements it acquired in the merger that passed to it by operation of law.

[*P21] Other courts construing similar statutes have reached this same result. For example, in *Corporate Express Office Prods., Inc. v. Phillips*, the Supreme Court of Florida held that a surviving entity in a "merger assumes the right to enforce a noncompete agreement entered into with an employee of the merged corporation by operation of law, and no assignment is necessary * * * because in a merger, the two corporations in essence unite into a single corporate existence." *847 So.2d 406, 414 (Fla.2003)*. And in *AON Consulting, Inc. v. Midlands Fin. Benefits, Inc.*, the Supreme Court of Nebraska reached the same result when it construed a Maryland statute, concluding that a surviving entity could enforce a noncompete agreement acquired in a merger because it was an asset that passed by operation of law, and no assignment was necessary. *275 Neb. 642, 650-652, 748 N.W.2d 626 (Neb.2008)*. *See also Natl. Instrument, L.L.C. v. Braithwaite*, Md.Cir.Ct.No. 24-C-06-004840, 2006 WL 2405831, *3 (June 5, 2006), (identifying cases in which courts construed [**16] merger statutes that vested in surviving entities the assets of a constituent entity without further act or deed, and which held that surviving entities could enforce noncompete agreements because they were business assets that passed by operation of law and not by assignment).

Conclusion

[*P22] Pursuant to *R.C. 1701.82* and *1705.39*, statutes governing mergers in Ohio, assets pass to a surviving entity by operation of law. It has been understood for more than a century that contracts are subordinate to statutes and that the latter also determine the effect of merger contracts and their mode of discharge. The agreements here automatically vested in Acordia of Ohio, L.L.C., without reversion or impairment, because they are assets that passed by

operation of law, and Acordia of Ohio, L.L.C., can enforce the noncompete agreements as if it were a signatory to them. Because the surviving entity in a merger acquires the right to enforce a noncompete agreement entered into by a constituent entity by operation of law, neither assignment nor consent is necessary to effectuate that result.

[*P23] In my view, it is not necessary to direct the trial court to determine the reasonableness of the noncompete agreements; [**17] although a trial court has the obligation to review a noncompete agreement for reasonableness, that issue has not been presented as a proposition of law, nor is it otherwise briefed or at issue before the court. Accordingly, I concur in the judgment to reverse the judgment of the court of appeals and to remand this matter for further proceedings consistent with this opinion.

LUNDBERG STRATTON, J., concurs in the foregoing opinion.

DISSENT BY: PFEIFER

DISSENT

PFEIFER, J., DISSENTING.

[*P24] This case has been properly decided three separate times. The trial court had it right, the court of appeals had it right, and this court had it right the first time. I did not vote to accept jurisdiction, did not vote to reconsider the case, and remain convinced that this court should not have accepted jurisdiction or granted reconsideration. Even though I believe that this case is being incorrectly decided, the good news is that, on remand, the lower courts are likely to reach the same sensible conclusions that they reached when they first encountered this case.

[*P25] The common law and judicial policy have long disfavored noncompete agreements. Starting with *Dyer's Case*, Y.B. 2 Henry 5, fol. 5, pl. 26 (C.P.1414), noncompete agreements [**18] were prohibited. Since the early 18th century, however, many jurisdictions have allowed noncompete agreements to be enforced when they are reasonable. *Mitchel v. Reynolds*, 1 P.Wms. 181, 24 Eng.Rep. 347 (Q.B.1711); Harlan M. Blake, *Employee Agreements Not to Compete*, 73 Harv.L.Rev. 625, 630 (1960). The Supreme Court of the United States stated:

> It is a well-settled rule of law that an agreement in general restraint of trade is illegal and void; but an agreement which operates merely in partial restraint of trade is good, provided it be not unreasonable and there be a consideration to support it. In order that it may not be unreasonable, the restraint imposed must not be larger than is required for the necessary protection of the party with whom the contract is made.

Oregon Steam Navigation Co. v. Winsor, 87 U.S. 64, 66-67, 22 L. Ed. 315 (1873).

[*P26] Noncompete agreements remain in disfavor and tend to be strictly construed against the employer. *Columbia Ribbon & Carbon Mfg. Co., Inc. v. A--1--A Corp., 42 N.Y.2d 496, 499, 398 N.Y.S.2d 1004, 369 N.E.2d 4 (1977)*; *Grant v. Carotek, Inc., 737 F.2d 410, 411-412 (4th Cir.1984)* (applying Virginia law). "In Minnesota, employment noncompete agreements [**19] 'are looked upon with disfavor, cautiously considered, and carefully scrutinized.' " *Kallok v. Medtronic, Inc., 573 N.W.2d 356, 361 (Minn.1998)*, quoting *Bennett v. Storz Broadcasting, 270 Minn. 525, 533, 134 N.W.2d 892 (1965)*. In certain respects, noncompete agreements are similar to indentured servitude. See Blake at 632 (common law disfavor of noncompete agreements was aimed at preventing employers from violating the underlying precepts of the apprenticeship system). In most respects, noncompete agreements are inimical to the free enterprise system.

[*P27] The policy considerations that affect whether a particular noncompete agreement is reasonable and enforceable are explained by Michael J. Garrison and John T. Wendt:

> As a matter of public policy, courts have traditionally looked upon agreements not to compete with disfavor. Such restrictions on employees were prohibited under the early English common law; however, over time, the common law prohibition against noncompete agreements loosened. The courts recognized that such agreements can be legitimate if they serve business

interests other than the restriction of free trade. Thus, agreements not to compete ancillary to an employment relationship [**20] have been permitted, subject to a reasonableness requirement.

The common law reasonableness approach is an attempt to balance the conflicting interests of employers and employees as well as the societal interests in open and fair competition. Employers have a legitimate interest in preventing unfair competition through the misappropriation of business assets by former employees. On the other hand, employees have a countervailing interest in their own mobility and marketability. Society has interests in maintaining free and fair competition and in fostering a marketplace environment that encourages new ventures and innovation. There is a complementary public interest in preventing employers from using their superior bargaining position to unduly restrict labor markets. Given these competing interests, the common law approach allows employee noncompete agreements but imposes significant limits on restrictive covenants to assure that they are not overly burdensome to employees and harmful to the marketplace.

Under the common law approach, the employer must demonstrate a legitimate commercial reason for any agreement not to compete to ensure that the agreement is not a naked attempt to restrict [**21] free competition. Merely preventing competition from a former employee is not a sufficient justification for a noncompete agreement, even if the employee received training or acquired knowledge of a particular trade during his employment. Employees are entitled to use the general skills and knowledge acquired during their employment in competition with their former employer. An employer must demonstrate "special circumstances" that make the agreement necessary to prevent some form of unfair competition.

> Traditionally, the courts recognized two primary interests as legitimate justifications for a noncompete agreement: the employer's interests in protecting the goodwill of the business and in protecting its trade secrets.

(Footnotes omitted.) Garrison & Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, *45 Am.Bus.L.J. 107, 114-116 (2008)*.

[*P28] In Ohio, " '[a] covenant not to compete which imposes reasonable restrictions upon an employee will be enforced to the extent necessary to protect an employer's legitimate interests. * * * [Such a] covenant "is reasonable if the restraint is no greater than is required for the protection of the [**22] employer, does not impose undue hardship on the employee, and is not injurious to the public.' " *Rogers v. Runfola & Assoc., Inc., 57 Ohio St.3d 5, 6, 565 N.E.2d 540 (1991)*, quoting *Raimonde v. Van Vlerah, 42 Ohio St.2d 21, 325 N.E.2d 544*, paragraphs one and two of the syllabus.

[*P29] In this case, the noncompete agreement is an undue infringement on free enterprise. The agreement unfairly protects the employer from competition from its former employees. The employer's trade secrets and customer list are already legitimately protected; the noncompete agreement does not protect them further. The principal purposes undergirding the enforcement of a noncompete agreement, both generally and in Ohio, are not applicable. Under the circumstances of this case, I conclude that the noncompete agreement is unreasonable and, therefore, that it should not be enforced. I would so conclude now, based on the record before us, without remanding the case.

[*P30] In *Dyer's Case*, Y.B.2 Henry 5, fol.5, pl. 26, the court concluded that the noncompete agreement "is void because the condition is against the common law, and by God, if the plaintiff were present he should rot in gaeol till he paid a fine to the King." That [**23] was justice.

Warning
As of: Dec 10, 2012

ACORDIA OF OHIO, L.L.C., APPELLANT, v. FISHEL ET AL., APPELLEES.

No. 2011-0163

SUPREME COURT OF OHIO

2012 Ohio 2297*; *2012 Ohio LEXIS 1360

November 15, 2011, Submitted
May 24, 2012, Decided

NOTICE:

THIS SLIP OPINION IS SUBJECT TO FORMAL REVISION BEFORE IT IS PUBLISHED IN AN ADVANCE SHEET OF THE OHIO OFFICIAL REPORTS.

SUBSEQUENT HISTORY: Reconsideration granted by *Acordia of Ohio, L.L.C. v. Fishel, 132 Ohio St. 3d 1485, 2012 Ohio 3334, 971 N.E.2d 962, 2012 Ohio LEXIS 1917 (2012)*
Different results reached on reconsideration by, Remanded by *Acordia of Ohio, L.L.C. v. Fishel, 2012 Ohio 4648, 2012 Ohio LEXIS 2454 (Ohio, Oct. 11, 2012)*

PRIOR HISTORY: [**1]
APPEAL from the Court of Appeals for Hamilton County, No. C-1000071, *2010 Ohio 6235*.
Acordia of Ohio, LLC v. Fishel, 2010 Ohio 6235, 2010 Ohio App. LEXIS 5224 (Ohio Ct. App., Hamilton County, Dec. 17, 2010)

DISPOSITION: Judgment affirmed.

HEADNOTES

Mergers--Transferability of contracts with employees not to compete--Judgment affirmed.

COUNSEL: Katz, Teller, Brant & Hild, James F. McCarthy III, and Laura Hinegardner, for appellant.

Denlinger, Rosenthal & Greenberg, L.P.A., Mark E. Lutz, and Michael P. Majba, for appellees.

Taft Stettinius & Hollister, L.L.P., W. Stuart Dornette, John B. Nalbandian, and Ryan M. Bednarczuk, urging reversal for amici curiae Ohio Chamber of Commerce and Ohio Chemistry Technology Council.

Beckman Weil Shepardson, L.L.C., and Peter L. Cassady, urging reversal for USI Holdings Corp. and USI Midwest, Inc.

Benesch, Friedlander, Coplan & Aronoff, L.L.P., and Jennifer Turk, urging reversal for Willis of Ohio, Inc.

Hylant Group, Inc., and Michelle Lafferty, urging reversal for Hylant Group, Inc.

Jones Day, Robert P. Ducatman, and Meredith M. Wilkes, urging reversal for amicus curiae PNC Financial

Services Group, Inc.

Fortney & Klingshirn, and Neil Klingshirn; and Gregory Gordillo, urging affirmance for amicus curiae Ohio Employment Lawyers' Association.

JUDGES: LANZINGER, J. O'CONNOR, C.J., and MCGEE BROWN, JJ., concur. PFEIFER, J., concurs in judgment only. LUNDBERG STRATTON, O'DONNELL and CUPP, JJ., dissent.

OPINION BY: LANZINGER

OPINION

LANZINGER, [**2] **J.**

[*P1] In this appeal, we are asked to consider whether the ability to enforce an employee's noncompete agreement transfers by operation of law to the surviving company when the company that was the original party to the agreement merges with another company. We hold that in this case, the language of the agreement dictates that the surviving company cannot enforce the agreement after the merger as if it had stepped into the shoes of the original company.

I. Facts

A. Background

[*P2] As a condition of their employment with the insurance-services company that eventually became known as Acordia of Ohio, Inc. ("Acordia, Inc."), [1] appellees Michael Fishel, Janice Freytag, Mark Taber, and Sheila Diefenbach (collectively, "the employees") entered into noncompete agreements by which they agreed to forgo competition with Acordia, Inc. for two years after termination of their employment there. Fishel's noncompetition agreement, for example, provides:

> In consideration of my employment and its continuation *by Frederick Rauh & Company (hereinafter, Company)* I hereby covenant as follows:
>
> A. For a period of two years following termination of employment with *the company* for any reason, I will not directly, indirectly, [**3] or through association with others solicit, write, accept or in any other manner perform any services relating to insurance business, insurance policies, or related insurance services for any of the following;
>
> (1) Any individual or entity for whom the company has written, accepted, or in any other manner performed any services relating to insurance business, insurance policies, or related insurance services at any time *while I was employed by the Company;*
>
> (2) Any individual or entity whose name was provided me as a prospective client at any time *while I was employed by the Company.*

> B. For a period of two years *following termination of employment with the company*, I will not encourage nay [sic] other employees of the company, directly, indirectly, or through association with others to leave *the Company's employment.*

(Emphasis added.) It is significant that this agreement of noncompetition does not contain language that extends to other employers, such as the company's "successors or assigns." The other employees signed nearly identical noncompetition agreements, the only differences consisting of formatting changes, the substitution of company names, and the dates. All agreements at issue [**4] were signed between 1993 and 2000.

> 1 Initially known as Frederick Rauh & Company, Acordia, Inc. underwent a number of mergers, acquisitions, and reorganizations between 1993 and 2001. Appellant will be referred to as "the L.L.C."

[*P3] Frederick Rauh & Company became known as Acordia of Cincinnati, Inc. after its acquisition by Acordia, Inc. in 1994. Fishel began his employment with Frederick Rauh in 1993. Freytag and Taber began employment with Acordia of Cincinnati, Inc. before it merged with other Ohio companies to become Acordia of Ohio, Inc. in 1997. Diefenbach signed her noncompete agreement with the successor company, Acordia, Inc., in July 2000.

[*P4] Wells Fargo acquired Acordia, Inc. in May 2001. As part of this acquisition, the employees were required to complete several standard forms, including an acquisition-employment application, a United States Department of Justice employment-eligibility-verification form, a background-investigation authorization form, and a new-hire team-member acknowledgment form.

[*P5] Seven months later, Acordia, Inc. underwent a merger with the appellant, Acordia of Ohio, L.L.C. ("the L.L.C."). Following the merger, only appellant remained. The employees continued [**5] to work for the L.L.C. until August 2005, when they began employment with appellee Neace Lukens Insurance Agency, L.L.C. ("Neace Lukens"). They soon used their contacts to recruit multiple customer accounts from the L.L.C. to Neace Lukens. Within six months, 19 customers had transferred $1 million in revenue to Neace Lukens from the LLC.

B. The Lawsuit

[*P6] The L.L.C. filed suit for injunctive relief and money damages in September 2005 against the employees, Neace Lukens, Neace and Associates Insurance Agency of Ohio, Inc., and Joseph Lukens, all appellees. The complaint claimed that the employees had violated their two-year noncompete agreement and would misappropriate the L.L.C.'s trade secrets. After reviewing the evidence presented at preliminary-injunction hearings, the trial court denied the L.L.C.'s motion for a preliminary injunction. The First District Court of Appeals affirmed the trial court's decision, holding in part that a preliminary injunction was unwarranted because Acordia, Inc. and the employees did not intend to make the noncompete agreements assignable to successors such as the L.L.C. *Acordia of Ohio, L.L.C. v. Fishel*, 1st Dist. No. C-060292 (May 9, 2007). The trial [**6] court granted the employees' motion for summary judgment, and the L.L.C. appealed, arguing in part that the noncompete agreements signed by the employees had transferred to the L.L.C.

[*P7] The court of appeals affirmed the trial court's decision to grant summary judgment in favor of the employees. *Acordia of Ohio, L.L.C. v. Fishel, 1st Dist. No. C-100071, 2010 Ohio 6235*. The court explained that while noncompete agreements transfer from the predecessor company to the successor company by matter of law after a merger, the employees' noncompete agreements pertained only to the specific companies with which they had originally been employed. *Id. at ¶ 13-20*. Because the previous iterations of Acordia, Inc. had been merged out of existence more than two years before the employees left the LLC, the court of appeals concluded that the agreements had expired when the employees left and that the L.L.C. had no right to enforce them. *Id. at ¶ 17-18*.

[*P8] The L.L.C. appealed, and we accepted its proposition of law that states, "Pursuant to Ohio's merger statutes, agreements between employees and employers that contain restrictive covenants are assets of the constituent company that transfer automatically [**7] by

operation of law in a statutory merger from the constituent company to the surviving company and are enforceable by the surviving company according to the agreements' original terms as if the surviving company were a party to the original agreements." *Acordia of Ohio, L.L.C. v. Fishel, 128 Ohio St.3d 1458, 2011 Ohio 1829, 945 N.E.2d 522*. We reject that proposition and affirm the judgment of the court of appeals.

II. Legal Analysis

[*P9] The pivotal question is whether the noncompete agreements apply only to the original contracting employer or whether after the merger, the L.L.C. may enforce the noncompete agreements as if it had stepped into the shoes of those original contracting employers.

A. The Contract Assets

[*P10] *R.C. 1701.82* provides that a company's assets transfer to the new company after a merger:

> (A) When a merger or consolidation becomes effective, all of the following apply:
>
> * * *
>
> (3) The surviving or new entity possesses all assets and property of every description, and every interest in the assets and property, wherever located, and the rights, privileges, immunities, powers, franchises, and authority, of a public as well as of a private nature, of each constituent entity * * *.

Because [**8] the statute specifies that the new company takes over all the previous company's assets and property postmerger, it is clear that employee contracts transfer to the resulting company. In this case, the employees' contracts came under the control of the L.L.C. after it merged with Acordia, Inc.

[*P11] Nevertheless, although the L.L.C. assumed control of the employees' contracts after the merger, we agree with the First District Court of Appeals that the L.L.C. may not enforce the noncompete agreements as if the L.L.C. had stepped into the shoes of the company that originally contracted with the employees. Appellant's proposed outcome would require a rewriting of the agreements. By their terms, the noncompete agreements are between only the employees and the companies that hired them.

[*P12] We have previously explained that when a merger between two companies occurs, one of those companies ceases to exist: "[A] merger involves the absorption of one company by another, the latter retaining its own name and identity, and acquiring the assets, liabilities, franchises and powers of the former. Of necessity, the absorbed company ceases to exist as a separate business entity." *Morris v. Invest. Life Ins. Co., 27 Ohio St.2d 26, 31, 272 N.E.2d 105 (1971)*. [**9] After the L.L.C. absorbed Acordia, Inc., the companies with which the employees agreed to avoid competition had ceased to exist. Because the noncompete agreements do not state that they can be assigned or will carry over to successors, the named parties intended the agreements to operate only between themselves--the employees and the specific employer. While the employment agreements transferred to the L.L.C. by operation of law pursuant to *R.C. 1701.82*, the wording within those agreements prevents the L.L.C. from enforcing a noncompetition period as if it were the original company with which the employees agreed not to compete. The L.L.C. acquired only the ability to prevent the employees from competing two years after their employment terminated with the specific company named in the agreements.

[*P13] We hold that noncompete agreements that are transferred as a matter of law by a merger between companies are enforceable according to their terms.

B. Ohio merger law remains undisturbed

[*P14] The L.L.C. argues that a decision in favor of the appellees-employees would disturb the principle of corporate continuity established in merger law that constituent companies continue postmerger as a unified [**10] company vested with the identical contracts of the merged companies. Our decision, however, rests firmly within this framework. We emphasize that in accordance with *R.C. 1701.82(A)(3)*, the surviving company possesses all assets and property and every interest in the assets and property of each constituent entity, including employment contracts and agreements.

[*P15] When contracts pass to the surviving company following merger, the surviving company obtains the same bargain agreed to by the preceding

company, nothing more. Our decision today honors the noncompete agreement obtained by the employees' original employers. The L.L.C. argues that as the surviving company, it needs these agreements because they protect the goodwill and proprietary information obtained in the merger; however, extending these agreements would run counter to their plain language, which specifies that they apply only to "the Company" with which the employees agreed to avoid competing, not the company's successors. The L.L.C. could have protected its goodwill and proprietary information by requiring that the employees sign a new noncompete agreement as a condition of their continued at-will employment, similar to the [**11] way in which Wells Fargo required them to complete a number of employment forms as a condition of continued employment when it acquired Acordia, Inc.

[*P16] The L.L.C. also argues that we should follow the decisions of other jurisdictions. Our decision in this case, however, is premised upon our application of Ohio law to the particular agreement in this case. Our analysis of Ohio law and the noncompete agreements leads to the conclusion that although the employees' noncompete agreements transferred automatically by operation of law to the L.L.C. following the merger, the merger did not alter the language of the agreements, and the noncompete agreements provided only that the employees would avoid competition during the two years following their termination from "the company" as defined by their respective noncompete agreements.

C. The employees did not violate the noncompete agreements

[*P17] Because the noncompete agreements transferred to the L.L.C. upon completion of the merger, the L.L.C. obtained the right to enforce the agreements as written. In other words, the employees were unable to compete with the L.L.C. for the two years following their termination from the "company" with which they [**12] each had signed their respective noncompete agreements.

[*P18] In this case, the termination, or complete severance of the employer-employee relationship, occurred when the company with which the employee agreed not to compete ceased to exist, an event triggered by merger. The triggering event for Fishel, Freytag, and Taber occurred when Acordia of Cincinnati, Inc. merged with other Ohio companies to become Acordia of Ohio, Inc. in December 1997. Consequently, their noncompete periods expired in December 1999. The triggering event for Diefenbach occurred when Acordia of Ohio, Inc. merged with the L.L.C. in December 2001. Her noncompete period accordingly expired in December 2003. Because the employees' noncompete periods had all expired before their resignations from the L.L.C. and subsequent employment with Neace Lukens, the L.L.C. had no legal right to enforce the noncompete agreements against the employees.

III. Conclusion

[*P19] The noncompete agreements between the employees and their original employers specified that they applied only to the specific companies that had originally hired each employee. Because the agreements made no provision for the continuation of the agreement upon any acquisition [**13] of the original company by another company, the agreements are not enforceable by the L.L.C. according to the agreements' original terms past the two-year noncompete period agreed to by the employees and their original employers. We accordingly hold that the trial court properly granted summary judgment in favor of the employees.

Judgment affirmed.

O'CONNOR, C.J., and MCGEE BROWN, JJ., concur.

PFEIFER, J., concurs in judgment only.

LUNDBERG STRATTON, O'DONNELL and CUPP, JJ., dissent.

DISSENT BY: O'DONNELL; CUPP

DISSENT

O'DONNELL, J., dissenting.

[*P20] Respectfully, I dissent.

[*P21] A noncompete agreement existing between an employee and a constituent entity is an asset of that entity and, in a statutory merger, transfers by operation of law to the surviving entity and is enforceable by the surviving entity as if it were a signatory to the original agreement. As a result of a series of successive corporate mergers, Acordia of Ohio, L.L.C, acquired the noncompete agreements at issue in this case by operation of law, along with the ability to enforce them without regard to assignment.

[*P22] Accordingly, I would reverse the judgment of the court of appeals.

The Lead Opinion

[*P23] In my view, the lead decision does not conform with state [**14] statutes governing corporate mergers, and it departs from century-old precedent holding that a successor entity steps into the shoes of an acquired entity and any predecessor entities, and thereby acquires the right to enforce agreements in its capacity as a successor entity.

[*P24] In this case, the lead opinion concludes that Acordia of Ohio, L.L.C., cannot enforce the noncompete agreements it acquired by merger as if it had stepped into the shoes of the original corporate entities. The lead opinion interprets the silence in these agreements regarding assignability or successorship as evidence that the parties intended the agreements to operate only between the employee and the corporate employer that was a party to the agreement, and not any successor entities. While acknowledging that these agreements transferred by operation of law pursuant to *R.C. 1701.82*, the lead opinion concludes that "the wording within those agreements" precludes Acordia of Ohio, L.L.C., from enforcing the agreements as if it were one of the original contracting parties. The lead opinion explains that the merger did not change the language of the agreements by expanding its scope to include surviving entities; [**15] thus, it concludes, Acordia of Ohio, L.L.C., can enforce the agreements only according to their terms, which enjoined each employee from competing for two years after his or her employment terminated with the specific corporate employer that was a party to the agreement. This analysis, I submit, is faulty.

A Noncompete Agreement is an Asset that Passes by Operation of Law

[*P25] *R.C. 1701.82(A)(3)* states, "The surviving or new entity possesses all assets and property of every description, and every interest in the assets and property, wherever located, and the rights, privileges, immunities, powers, franchises, and authority * * * of each constituent entity, and * * * all obligations belonging to or due to each constituent entity" without reversion or impairment. *R.C. 1705.39*, which pertains to mergers between corporations or partnerships and limited liability companies, confers the same vestments on the surviving entity.

[*P26] It is true that *R.C. 1701.82(A)(1)* states that a constituent entity ceases to exist as a separate business in a merger, but that statute also provides several exceptions to this general rule, including when "a conveyance, assignment, transfer, deed, or other instrument or [**16] act is necessary to vest property or rights" in a surviving entity. In those instances, "the existence of the constituent entities and the authority of their respective officers, directors, general partners, or other authorized representatives is continued notwithstanding the merger or consolidation." *Id.; compare R.C. 1705.39(A)(1)* (contains similar exceptions).

[*P27] *R.C. 1701.82* and *1705.39*, by their operation, vest all the assets and obligations of a constituent entity in the surviving entity without reversion or impairment. When we examined the effect of *R.C. 1701.82* in the context of a stock purchase agreement entered into by a constituent entity, we held that a properly executed contract is binding on the surviving entity "in a merger unless the agreement explicitly sets forth that in the event of a merger, the obligations of the constituent corporation cease to exist." *ASA Architects, Inc. v. Schlegel, 75 Ohio St.3d 666, 1996 Ohio 427, 665 N.E.2d 1083 (1996), syllabus*. In that case, the agreement made no provision for what would happen in the event of a merger, the surviving entity in the merger assumed full responsibility for all obligations of the constituent entity, and the parties did not enter [**17] into a new agreement following the merger. *Id. at 673*. Based on those factors, we determined that the contractual obligations of the constituent entity flowed, *by operation of law*, to the surviving entity. *Id.* These same considerations are present here and compel a similar conclusion.

[*P28] The lead opinion correctly concludes that contract principles dictate that agreements must be enforced according to their terms; however, it ignores the fact that the entity entitled to enforce those agreements is determined by statute. *See R.C. 1701.82* and *1705.39*.

[*P29] More than 180 years ago, we recognized that contracts are subordinate to statutes, and the latter "may regulate them, prescribe their form, their effect, and the mode of their discharge, and every contract is supposed to be made with reference to those laws." *Smith v. Parsons, 1 Ohio 236, 238-239 (1823)*. And almost 100 years ago, we construed railroad-consolidation statutes

that contained language similar to that in *R.C. 1701.82* and determined that in a merger, "the consolidated company merely steps into the shoes of the constituent companies." *Marfield v. Cincinnati, D. & T. Traction Co., 111 Ohio St. 139, 161-164, 2 Ohio Law Abs. 438, 144 N.E. 689 (1924)*. The [**18] determination of the lead opinion that the terms of the agreements preclude Acordia of Ohio, L.L.C., from their enforcement runs counter to our century-old precedent.

[*P30] We applied this analysis more recently, rejecting the argument that a change in corporate structure invalidated noncompete agreements originally entered into by the constituent entity. *Rogers v. Runfola & Assoc., Inc., 57 Ohio St.3d 5, 7, 565 N.E.2d 540 (1991)*. There, the employees signed noncompete agreements while working for a sole proprietorship, which subsequently changed its business structure to that of a corporation, during their tenure of employment. *Id.* In determining that the noncompete agreements were valid and could be enforced by the newly incorporated business, which had acquired all the assets and liabilities of the sole proprietorship, we were guided in our analysis by the fact that "[o]nly the legal structure of the business changed, not the business itself," *id.*, and that the change in corporate structure did not place additional burdens on the "duties or daily operations" of the employees. *Id.* This is the same circumstance that we confront in this case.

[*P31] Here, Acordia of Ohio, L.L.C., acquired the [**19] noncompete agreements from Wells Fargo, which in turn had acquired them through a series of corporate mergers. Those mergers, which began with Frederick Rauh & Company, did not affect the nature of the business--the sale of insurance securities; thus, the mergers changed only the corporate structure of the business operation. Similarly, there is no evidence or claim in this record that additional employment duties or obligations resulted from these mergers. Thus, *Rogers* supports the conclusion that Acordia of Ohio, L.L.C., is entitled to enforce the agreements it acquired in the merger that passed to it by operation of law.

[*P32] In addition to this court, other courts construing similar statutes have rejected the conclusion reached by the lead opinion. For example, in *Corporate Express Office Prods., Inc. v. Phillips*, the Supreme Court of Florida held that a surviving entity in a "merger assumes the right to enforce a noncompete agreement entered into with an employee of the merged corporation by operation of law, and no assignment is necessary * * * because in a merger, the two corporations in essence unite into a single corporate existence." *847 So.2d 406, 414 (Fla.2003)*. And in *AON Consulting,* [**20] *Inc. v. Midlands Fin. Benefits, Inc.*, the Supreme Court of Nebraska reached the same result when it construed a Maryland statute, concluding that a surviving entity could enforce a noncompete agreement acquired in a merger because it was an asset that passed by operation of law, and no assignment was necessary. *275 Neb. 642, 650-652, 748 N.W.2d 626 (2008)*. *See also Natl. Instrument, LLC v. Braithwaite, Md.Cir.Ct.No. 24-C-06-004840, 2006 Md. Cir. Ct. LEXIS 12, 2006 WL 2405831, *3 (June 5, 2006)*, (identifying cases in which courts construed merger statutes that vested in surviving entities the assets of a constituent entity without further act or deed, and which held that surviving entities could enforce noncompete agreements because they were business assets that passed by operation of law and not by assignment).

Conclusion

[*P33] Pursuant to *R.C. 1701.82* and *1705.39*, the primary statutes governing mergers in Ohio, assets pass to a surviving entity by operation of law. It has been understood for more than a century that contracts are subordinate to statutes and that the latter also determine the effect of merger contracts and their mode of discharge. The agreements here automatically vested in Acordia of Ohio, L.L.C., [**21] without reversion or impairment, because they are assets that passed by operation of law, and Acordia of Ohio, L.L.C., can enforce the noncompete agreements as if it were a signatory to them.

[*P34] For these reasons, I would reverse the judgment of the court of appeals and hold that the surviving entity in a merger acquires the right to enforce a noncompete agreement entered into by a constituent entity by operation of law, and that neither assignment nor consent is necessary to effectuate that result.

LUNDBERG STRATTON and CUPP, JJ., concur in the foregoing dissenting opinion.

CUPP, J., dissenting.

[*P35] I join Justice O'Donnell's dissent, which cogently explains why the noncompete agreements in this case transferred by operation of law to appellant, Acordia

of Ohio, L.L.C., through the series of mergers. Therefore, I agree that the judgment of the court of appeals should be reversed.

[*P36] The determination that the agreements transferred by operation of law pursuant to the statute through the several mergers, however, does not definitively resolve the separate and distinct question of whether the agreements are ultimately enforceable. The transfer by operation of law does not, in my view, foreclose [**22] appropriate relief to the parties to the noncompete agreement under traditional principles of law that regulate and govern noncompete agreements.

[*P37] During the progress of this case in the lower courts, it appears that there was insufficient appreciation of the legal distinction between the issue of transfer and the issue of the agreements' enforceability after transfer. As a result, there has been no specific and discrete inquiry thus far into the agreements' enforceability. Thus, if the transfer of the noncompete agreements by operation of law were appropriately recognized by our decision today, then this matter would properly be remanded for additional proceedings that could explore the enforceability of the subject agreements under the principles that govern such agreements.

[*P38] As the lead opinion explains, at ¶ 2, the noncompete agreements at issue in this case were signed between 1993 and 2000. The pertinent series of mergers and acquisitions started in 1994, when Frederick Rauh and Company, a single-office insurance agency in Cincinnati, was acquired by Acordia of Ohio, Inc. ("Acordia, Inc.") and concluded when Acordia, Inc. merged with Acordia of Ohio, L.L.C., effective late in 2001. [**23] When these employees resigned from Acordia of Ohio, L.L.C. in 2005, their employer had grown to have multiple offices, with 5,000 to 6,000 customers in the Cincinnati office alone. The changes that occurred over the years and other factors in this record would seem to be relevant to the issue of the enforceability of these agreements.

[*P39] The proceedings on remand would likely encompass those matters normally focused on when noncompete agreements are challenged, such as whether the agreements are reasonable and whether the employees incurred additional obligations or duties as the mergers occurred so that the agreements should not be enforced on their original terms. *See, e.g., Lake Land Emp. Group of Akron, L.L.C. v. Columber, 101 Ohio St.3d 242, 2004 Ohio 786, 804 N.E.2d 27, ¶ 9* (noncompete agreements are enforceable if they contain reasonable geographical and temporal restrictions); *Raimonde v. Van Vlerah, 42 Ohio St.2d 21, 325 N.E.2d 544 (1975), paragraphs one and two of the syllabus* (a noncompete agreement that "imposes unreasonable restrictions upon an employee will be enforced to the extent necessary to protect an employer's legitimate interests"; a noncompete agreement "is reasonable [**24] if the restraint is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public").

[*P40] Consequently, the issue of the enforceability of the noncompete agreements postmerger, an inquiry independent from the determination of their transfer by operation of law, remains to be explored.

[*P41] The judgment of the court of appeals should be reversed, and this cause should be remanded for further proceedings.

LUNDBERG STRATTON, J., concurs in the foregoing dissenting opinion.

Positive
As of: Dec 10, 2012

DEVRIES DAIRY, L.L.C. v. WHITE EAGLE COOPERATIVE ASSOCIATION, INC., ET AL.

No. 2011-1995

SUPREME COURT OF OHIO

132 Ohio St. 3d 516*; *2012 Ohio 3828*; *974 N.E.2d 1194*; *2012 Ohio LEXIS 2019

July 10, 2012, Submitted
August 28, 2012, Decided

PRIOR HISTORY:

ON ORDER from the United States District Court for the Northern District of Ohio, Western Division, Certifying a Question of State Law, No. 3:09cv207.
DeVries Dairy, LLC v. White Eagle Coop. Ass'n, 2011 U.S. Dist. LEXIS 83478 (N.D. Ohio, July 29, 2011)

HEADNOTES

Restatement 2d of Torts, Section 876--Tortious acts in concert--Certified question of state law answered in the negative.

COUNSEL: The Miltner Law Firm, L.L.C., and Ryan K. Miltner; and Shumaker, Loop & Kendrick, L.L.P., David Wicklund, and John N. MacKay, for petitioner, DeVries Dairy, L.L.C.

Kerger & Hartman, L.L.C., and Richard Kerger; and Helfrey, Neiers & Jones, P.C., and Philip C. Graham, for respondents T.C. Jacoby & Co., Inc., and Dairy Support, Inc.

Eastman & Smith, Ltd., Jeffrey M. Stopar, John M. Carey, and Jared J. Lefevre, for respondent White Eagle Cooperative Association, Inc.

Amer Cunningham Co., L.P.A., and Thomas R. Houlihan, for amicus curiae, Ohio Association for Justice, in support of petitioner.

JUDGES: O'CONNOR, C.J., and LUNDBERG STRATTON, O'DONNELL, LANZINGER, CUPP, and MCGEE BROWN, JJ., concur. PFEIFER, J., dissents.

OPINION

[*516] [***1194] [**P1] On November 28, 2011, the United States District Court for the Northern District of Ohio, Western Division, certified the following question of state law to this court: "Under the applicable circumstances, does Ohio recognize a cause of [*517] action for tortious acts in concert under the *Restatement (2d) of Torts, § 876*?" *131 Ohio St. 3d 1436, 2012 Ohio 331, 960 N.E.2d 986*. On July 10, 2012, we heard oral argument in this case.

[**P2] The certified question is answered in the negative. This court has never recognized a claim under 4 *Restatement 2d of Torts, Section 876* (1979), and we

decline to do so under the circumstances of this case.

O'CONNOR, C.J., and LUNDBERG STRATTON, O'DONNELL, LANZINGER, CUPP, and MCGEE BROWN, JJ., concur.

PFEIFER, J., dissents.

DISSENT BY: PFEIFER

DISSENT

PFEIFER, J., dissenting.

[**P3] Pursuant to S.Ct.Prac.R. 18.6, we have accepted a question certified by the United States District Court for the Northern District of Ohio, Western Division. The question asks: "Under the applicable [***1195] circumstances, does Ohio recognize a cause of action for tortious acts in concert under the *Restatement (2d) of Torts, §876*?"

[**P4] Today, without opinion, the court answers the certified question in the negative. To the contrary, it seems clear that Ohio does recognize a cause of action for tortious acts in concert.

[**P5] In *Great Cent. Ins. Co. v. Tobias, 37 Ohio St.3d 127, 130, 524 N.E.2d 168 (1988)*, this court stated, "[A]ppellee argues, and the court of appeals held, that appellant could be liable on a concert of action theory as set forth within *Section 876(b) of the Restatement of the Law 2d, Torts, 315*." This court did not state that Ohio does not recognize a cause of action for tortious acts in concert. Instead, it stated that the tort "has application only when the principal actor's behavior amounts to tortious conduct," which, under the circumstances of that case, it did not. *Id. at 131*.

[**P6] In *Pierce v. Bishop, 4th Dist. No. 10CA6, 2011 Ohio 371, ¶ 26*, the court of appeals stated that 4 *Restatement of the Law 2d, Torts, Section 876* (1979), the restatement section that addresses tortious acts in concert, has been cited by this court, though "not expressly adopted." That is a good summary of the current situation.

[**P7] In my opinion, a common-law tort can apply in Ohio even if this court has not expressly recognized it. We need look no further than *Tobias* to prove this point. Even though we did not expressly recognize the tort in that case, we analyzed the facts of the case in relation to the elements of the tort and concluded that the elements had not been satisfied. *Tobias, 37 Ohio St.3d 127, 131, 524* [*518] *N.E.2d 168*. Though it does not include an express recognition of a cause of action for tortious acts in concert, *Tobias* is an example of de facto recognition.

[**P8] In *Pierce*, the court of appeals engaged in a similar, though more extensive, analysis before concluding that the elements of the cause of action of tortious acts in concert had not been established. *Pierce, 2011 Ohio 371, ¶ 26-35*. In *Boyd v. Lincoln Elec. Co., 179 Ohio App.3d 559, 2008 Ohio 6143, 902 N.E.2d 1023, ¶ 62 (8th Dist)*, the court of appeals declined to address the plaintiff's claim that the defendants had acted in concert in committing a tort. But the court's reason for declining to address the claim was not that Ohio did not recognize the tort, but that the plaintiff had abandoned the claim. In *Schuerger v. Clevenger, 8th Dist. No. 85128, 2005 Ohio 5333, ¶ 14-15*, the court stated that the defendant's act was "not substantial encouragement to permit liability based upon a concert of action theory."

[**P9] It seems clear from the case law that courts in Ohio have treated the common-law tort of tortious acts in concert as described in 4 *Restatement, Section 876* as if it is part of the law of Ohio. That no plaintiff has presented sufficient facts to establish liability for tortious acts in concert does not mean that Ohio courts have not recognized the tort.

[**P10] The district court is not asking us whether the facts of this case are sufficient to establish liability. It is asking us whether, if the facts are sufficient, a defendant can be held liable for tortious acts in concert. I would answer the question in the affirmative. Therefore, I dissent.