

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JAYME GORDON,

Plaintiff,

v.

DREAMWORKS ANIMATION SKG, INC.,
DREAMWORKS ANIMATION LLC, and
PARAMOUNT PICTURES, CORP.,

Defendants.

C.A. No. 1:11-cv-10255-JLT

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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I. PRELIMINARY STATEMENT

On October 18, 2011, counsel for Plaintiff, Jayme Gordon moved this Court for a protective order pursuant to Fed. R. Civ. P. 26(c), to protect Mr. Gordon, his family, friends and neighbors from further harassment by Defendants' private investigators.¹ Mr. Gordon's memorandum of law in support of that motion brought to the Court's attention disturbing accounts of harassment and intimidation conducted by the agents of defense counsel.²

On October 19, 2011, upon consideration of Mr. Gordon's motion, this Court ordered that Defendants may not depose Mr. Gordon until after a hearing on Mr. Gordon's motion before the Court.³ Despite the Court's Order, Defendants filed a motion seeking a dismissal of Mr. Gordon's copyright infringement case, due to the postponement of Mr. Gordon's deposition by Mr. Gordon's counsel.⁴

We respectfully submit that Defendants' motion for a dismissal is moot in light of the Court's Order. Nevertheless, Mr. Gordon files this memorandum of law opposing Defendants' motion for a dismissal because the postponement of his deposition was necessitated by Defendants' harassment and intimidation of Mr. Gordon, his family, and his neighbors. Mr. Gordon also addresses Defendants' wide ranging factual misstatements that form the basis of their motion to dismiss.

¹ Dkt. No. 34.

² *Id.*

³ Dkt. No. 35.

⁴ Dkt. No. 36.

II. DEFENDANTS' MISREPRESENTATIONS

In their memorandum of law, Defendants make numerous misrepresentations to the Court.

At the outset we address Defendants' contention that the scheduling of Mr. Gordon's deposition "over 60 days after he was served with the notice of deposition" was an orchestrated maneuver to delay. Br. p. 8.⁵ Defendants noticed the deposition of Mr. Gordon for September 22, 2011. Co-lead counsel in this case, Juanita Brooks, who will defend Mr. Gordon in his deposition, was on trial from September 20, 2011 through October 12, 2011 in the case of *Broadcom v. Emulex*, in the Central District of California, before the Honorable James Selna.⁶ Mr. Gordon's deposition was scheduled accordingly.

A. Defendants' Misstatements Concerning Discovery

Defendants' Misstatement #1: Mr. Gordon "didn't try to register for copyright until 2008 and 2011, after he was aware of Kung Fu Panda." Br. p. 2.

Truth: Mr. Gordon, in fact, obtained his first copyright registration in 2000 — eight years before the release of Defendants' infringing film and before Defendants even began working on the film — for many of the works comprising Gordon's Union of Super Animals, including his infringed works titled "Super Duck Super Duck," "The Mighty 3," and "Jayme Gordon's Panda Power," which is a component of "Gordon's Kung Fu Panda Power Work," as that term was defined and used in Mr. Gordon's Amended Complaint.⁷ A true and correct copy of Gordon's

⁵ Defendants' Memorandum of Law in Support of Their Motion to Dismiss (referred to herein as "Br.").

⁶ Case No. CV 09-1058-JVS; *see* Declaration of Kristen McCallion ("McCallion Decl.,") Ex. A.

⁷ Dkt. No. 18.

United States Copyright Registration Certificate No. TX 867-275 issued by the United States Copyright Office on January 4, 2000 was annexed to the Amended Complaint as Exhibit A.⁸

Further, the timing of Mr. Gordon's 2008 and 2011 copyright registrations is irrelevant since, as Defendants well know, certain of Mr. Gordon's 2011 copyright registrations are for works that Mr. Gordon created in the early 1990s. Defendants' counsel personally inspected the drawings and sketches created by Mr. Gordon in the 1990s that are the subject of his copyright registrations acquired in 2011. Since a copyright registration is not a prerequisite for copyright ownership, only a prerequisite for filing suit,⁹ it is common for copyright plaintiffs to register their works after learning of infringement in preparation for a lawsuit.

Defendants' Misstatement #2: "Plaintiff's counsel provided inconsistent answers and ultimately asserted that Plaintiff threw away the computer that he used to create the electronic art and story files, and destroyed all of these electronic files shortly before he filed this lawsuit." Br. p. 2; *see also* Br. p. 7.

Truth: At no time did Mr. Gordon's counsel state that Mr. Gordon "threw away the computer that he used to create the electronic art and story files, and destroyed all of these electronic files shortly before he filed this lawsuit." The Zavin Declaration provides the Court with only a portion of the communications exchanged between counsel. What Defendants failed to tell the Court was that on August 30, 2011, Fish & Richardson advised defense counsel at Foley Hoag LLP that "Mr. Gordon used a computer in 2008 to prepare his 2008 copyright filing.

⁸ Am. Cmplnt. ¶¶ 63-4, Exs. A and B. (Dkt. Nos. 18, 18-1, 18-2.)

⁹ 17 U.S.C. §§ 102 and 411(b).

That computer later stopped functioning and was discarded. To the best of his recollection, Mr. Gordon did not save these files.”¹⁰

Again on October 6, 2011, Fish & Richardson explained to defense counsel that “while Mr. Madera noted [on a prior telephone call] that Mr. Gordon has computers, Mr. Madera also noted that these computers were recently purchased by Mr. Gordon and do not contain any files relevant to this litigation. For this reason, we do not understand the basis for Defendants’ reiteration of their request for a forensic examination of Mr. Gordon’s computers, and we do not intend to produce them for forensic examination.”¹¹

The baselessness of Defendants’ contention that Fish & Richardson stated that Mr. Gordon “destroyed all of these electronic files shortly before he filed this lawsuit” is evidenced by Mr. Gordon’s production of over 5,000 electronic files comprised of, to use Defendants’ language, his “electronic art and story files.”¹² Further, on September 1, 2011, Fish & Richardson explained to defense counsel at Loeb & Loeb LLP that “relevant electronic files in Mr. Gordon’s possession are copies of files that were previously on Mr. Gordon’s websites, many of which were deposited with the U.S. Copyright Office on a zip disc in connection with Mr. Gordon’s 2000 copyright registration. All of these files have been produced in their native form.”¹³

Defendants’ Misstatement #3: “Gordon’s lawyers then disclosed that Gordon had destroyed all of his electronic art files which were created in connection with his cartoon characters, characters that he had been working on for over a decade, and had displayed on the internet.” Br. p. 3, n.3.

¹⁰ McCallion Decl., ¶ 3 and Ex. B.

¹¹ *Id.*, ¶ 4 and Ex. C.

¹² *Id.*, ¶ 6.

¹³ *Id.*, ¶ 5 and Ex. D.

Truth: The basis for this particular misstatement is unfathomable. As indicated above, Mr. Gordon produced over 5,000 electronic files in their native format, which specifically include Mr. Gordon's "electronic art files" depicting his illustrated characters and stories that he "had displayed on the internet." Mr. Gordon's electronic files were produced on June 27, 2011, in accordance with this Court's automatic disclosure requirements, and we have advised defense counsel of Mr. Gordon's production of these electronic files no less than three times. Most recently, in a letter dated October 6, 2011, Fish & Richardson explained to defense counsel that:

"[a]s we advised you during our September 9 telephonic meet and confer, based on our present knowledge, it is our understanding that Mr. Gordon has produced all electronic images and files in his possession that are relevant to this case. Defendants' understanding that Mr. Gordon has produced only the discs that were deposited with the Copyright Office is incorrect. We refer you to JG 1692-1693, which identify thousands of native files of Mr. Gordon's prior website material."¹⁴

Defendants' Misstatement #4: Files created on "Microsoft Photoshop" by Mr. Gordon "have not been produced" and "none of Plaintiffs' electronic files containing his artwork or stories were turned over in this lawsuit." Br. p. 6, n.4

Truth: The basis for this particular misstatement is likewise unfathomable. As noted above, Mr. Gordon produced over 5,000 electronic files in their native format, which specifically include Mr. Gordon's "electronic files containing his artwork [and] stories," many of which were created using Photoshop.

Defendants' Misstatement #5: "Mr. Gordon destroyed all of the electronic files relating to this lawsuit that were maintained on his computer." Br. p. 7.

¹⁴ *Id.*, ¶ 4 and Ex. C.

Truth: This allegation is also baseless. There is no plausible way in which Defendants' can honestly believe these assertions, given Mr. Gordon's production of over 5,000 electronic files relating to this lawsuit.

As noted, Mr. Gordon's counsel advised Defendants' counsel that the computer Mr. Gordon used to create his 2008 copyright filing was discarded after it stopped working. In light of Mr. Gordon's production of over 5,000 electronic files to Defendants, and Fish & Richardson's repeated explanations to defense counsel about what these 5,000 electronic files are, and why Mr. Gordon no longer has the computer he used in 2008, there is no good faith basis for Defendants' repeated misrepresentations to the Court.

B. Defendants' Misleading Character Assassination of Mr. Gordon

In addition to all of the misrepresentations about statements of Mr. Gordon's counsel contained in Defendants' motion, Defendants have also distorted the true facts of Mr. Gordon's background. In a transparent attempt to justify their repeated harassment of Mr. Gordon, his family, friends and even acquaintances, Defendants state that Mr. Gordon "appears to have a criminal record, and has had a restraining order entered against him." Br. p. 3, n. 3. Defendants repeat this allegation at page 6 of their brief and add that Mr. Gordon "... has no apparent employment, although he has received proceeds from suits claiming injury to his person and property." Br. p. 6.

Mr. Gordon was born and raised in South Boston and Dorchester. His record is comprised of two offenses dating back many years ago in Dorchester District Court.¹⁵ Neither of

¹⁵ For privacy reasons, we do not submit Mr. Gordon's record with this memorandum. We can provide Mr. Gordon's CORI record to the Court under separate cover.

these offenses involved any type of fraud, deceit or false statement. Mr. Gordon’s “proceeds from suits” are monies received by Mr. Gordon and his wife when a “bobcat” construction vehicle damaged their car, and monies received by Mr. Gordon for a job-related injury.

What Defendants fail to tell the Court, but what they undoubtedly discovered during their nationwide “background check” of Mr. Gordon, is that in 1993 Mr. Gordon’s sister was brutally murdered by her husband in front of their small child.¹⁶ A simple Internet search reveals that Mr. Gordon and his family were allowed to hug and kiss goodbye the lifeless body of Mr. Gordon’s sister as she was removed from her home with a butcher knife still protruding from her chest.¹⁷ That same article discusses how when Mr. Gordon saw his sister’s murderer at his arraignment and saw the picture of his sister which his mother had brought to court, Mr. Gordon snapped and accosted his sister’s murderer in the courtroom.¹⁸ Although Mr. Gordon was originally arrested for this incident and restrained from attending further court proceedings, he was later released on his own recognizance and allowed to attend court by the trial judge.¹⁹ The murderer is now doing life without parole.²⁰ But the trauma to Mr. Gordon and his family did not end there. Three years later, the murderer’s family attempted to gain custody of the little boy who had witnessed his mother’s murder, so that they could take him to visit his father in prison.²¹ Another newspaper article, which is also easily discovered by a simple Internet search, details those events.²²

¹⁶ *Id.*, ¶ 7 and Ex. E.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

One of the things that makes Defendants actions in this case so egregious is that the “David” referred to in this article as the little boy suffering from post-traumatic stress disorder, who slept under his bed for months after the murder of his mother, is the same David who is now eighteen years old and wrote the letter produced to Defendants about his “Uncle Jayme’s artwork.”²³ He is the same David who is still being cared for by Mr. Gordon’s mother in the locked apartment building where Defendants’ investigators gained entry and repeatedly and intrusively knocked on neighbors’ doors.

III. MR. GORDON’S COUNSEL WERE JUSTIFIED IN POSTPONING HIS DEPOSITION BECAUSE DEFENDANTS SUCCEEDED IN HARASSING AND INTIMIDATING HIM

As discussed above, Defendants did not need to conduct the nationwide investigation they have done in this case to discover Mr. Gordon’s Achilles Heel. They undoubtedly discovered that within the first few minutes of searching on the Internet. They discovered that Mr. Gordon has a very strong protective instinct when it comes to his family, and rightfully so. There was only one reason for Defendants’ agents to conduct overt surveillance of Mr. Gordon and his family — to cause him to become distressed and fearful for his and his family’s safety. There was only one reason for Defendants’ agents to gain entry into Mr. Gordon’s locked apartment building and interrogate his neighbors—to cause Mr. Gordon and his family to feel unsafe in their own home.

The harassing acts of Defendants have seriously alarmed and annoyed Mr. Gordon and his family. As a result of these acts, Mr. Gordon, his wife, his son, his mother and his nephew,

²³ This letter was produced to Defendants’ by Mr. Gordon on June 27, 2011, in accordance with this Court’s automatic disclosure requirements.

have suffered and are suffering substantial emotional distress. Their emotional state is understandable, given the tactics of Defendants' pack of investigators. As a result, until this Court has had an opportunity to rule on Plaintiff's motion for a protective order, the postponement of Mr. Gordon's deposition was not only justified, but absolutely necessary.

A. The Techniques Utilized By Defendants' Agents Were Inappropriate, Improper and Clearly Designed To Intimidate

As detailed in Plaintiff's Emergency Motion for a Protective Order and Sanctions, Defendants' agents have engaged in a campaign to intimidate and harass Mr. Gordon and his family. Defendants do not deny that they engaged in overt surveillance of Mr. Gordon, nor do they deny that they obtained entry into Mr. Gordon's locked apartment building and interrogated his neighbors about him. In fact, by claiming that they have ceased such activities as of October 2, Defendants have thereby admitted that such activities took place. Further, to this day, Defendants have not denied that they gained entrance into Mr. Gordon's mother's locked apartment building where she lives with Mr. Gordon's nephew David, and banged repeatedly on the doors of their neighbors. There has been absolutely no explanation given by Defendants as to how any of these activities could serve a legitimate purpose.²⁴

When Plaintiff's counsel first complained of these activities to Defendants' counsel there was no mention of postponing Mr. Gordon's deposition. Rather, Mr. Gordon, through his

²⁴ The only cases Plaintiff's counsel could find where surveillance of a plaintiff was found to be permissible were cases where the plaintiff had an alleged disability resulting from an injury and even those cases did not involve harassment of the plaintiff's neighbors. See, e.g., *DiGirolamo v. D.P. Anderson & Associates, Inc.* 10 Mass. L. Rep. 137 (1999) wherein the court held: "In examining these questions, let me begin by acknowledging that it is perfectly appropriate for a private investigator to conduct a visual surveillance of a person who has applied for workers' compensation benefits in order to guard against the possibility of a fraudulent or inflated claim."

counsel, was only seeking to get to the bottom of the extent of this campaign of harassment and to receive assurances from Defendants that these activities would cease.²⁵ Instead of providing any information or assurances Defendants simply replied that “Mr. Gordon should hardly be surprised that he is being investigated in connection with this claim.”²⁶ Defendants further stated that “DreamWorks reserves the right to take any action it deems appropriate to defend itself from Mr. Gordon’s spurious claims, so long as such action is neither illegal nor improper.”²⁷ However, what Defendants’ fail to recognize is that it isn’t within their power to “deem” actions appropriate or inappropriate, nor is it within their power to determine whether their actions are legal or proper. Those determinations are reserved for this Court and this Court alone.

In order to assist this Court in making this determination, Plaintiff has attached to this opposition declarations from Mr. Gordon, his neighbors, and his friend Derek Tuttle. These declarations detail the lengths to which Defendants have been willing to go in their campaign to intimidate Mr. Gordon and his family and to mislead his friends and acquaintances. To illustrate:

Mr. Gordon at first began noticing cars parked outside his apartment building for “hours at a time.”²⁸ This escalated to Mr. Gordon being “pursued” in his car on at least two occasions.²⁹ After one of these pursuits, Defendants’ investigator drove to Mr. Gordon’s apartment where Mr. Gordon’s young son was home alone — knowing that Mr. and Mrs. Gordon were not at home.³⁰ Upon realizing this, Mr. Gordon’s reaction was that this man was going to harm his son.³¹ The

²⁵ Declaration of Kristen McCallion dated October 18, 2011, Ex. A.

²⁶ *Id.*, Ex. B.

²⁷ *Id.*

²⁸ Declaration of Jayme Gordon dated November 2, 2011 (the “Gordon Decl.”), ¶ 3.

²⁹ *Id.*, ¶¶ 4, 8.

³⁰ *Id.*, ¶ 8.

³¹ *Id.*, ¶ 8.

investigators' following Mr. Gordon surveyed not only the apartment building where he lived, but a new house into which his family intended to move.³² Defendants' investigators gained entry not only into Mr. Gordon's locked apartment building, but into the locked apartment building of his mother and nephew.³³ At both locations, Defendants' investigators knocked on tenants' doors and asked questions about Mr. Gordon in a manner that suggested that Mr. Gordon had done something wrong.³⁴ The intrusion into the apartment building of Mr. Gordon's mother distressed Mr. Gordon's nephew.³⁵ Defendants' investigators also contacted individuals, on both the east and west coasts, who Mr. Gordon had not seen in over fifteen years, asking questions about Mr. Gordon's prior employment and his "personal life."³⁶

In particular, Defendants' agents went to the home of a former employer of Mr. Gordon who had moved to Burbank, California. The investigator identified himself as being from Thomas Dale and Associates,³⁷ asked questions about Mr. Gordon's employment from twenty years ago, but once again did not disclose the true purpose of the inquiry.³⁸ It was only after Mr. Allen "googled" Mr. Gordon's name did Mr. Allen surmise that the investigator was calling on behalf of DreamWorks.³⁹

In addition, because Defendants' investigators did not disclose that they were working for Defendants, and implied that they were conducting a background history on Mr. Gordon's

³² *Id.*, ¶ 8.

³³ *Id.*, ¶¶ 5, 7, 9.

³⁴ *Id.*, ¶ 5; *see also* Declaration of Lisa Dominguez, dated October 27, 2011, Declaration of Cherlande Lubin, dated October 28, 2011, and Declaration of Virginia Alfonso, dated October 28, 2011.

³⁵ Gordon Decl., ¶ 9.

³⁶ *Id.*, ¶¶ 10, 12, 13 and Exs. A and B.

³⁷ Thomas Dale and Associates is identified on their web-site as "A global investigative and security firm offering an expansive array of services and capabilities, with over 300 experts employed worldwide."

³⁸ Gordon Decl., ¶ 10 and Ex. A.

³⁹ *Id.*

behalf, three of Mr. Gordon's old acquaintances were led to believe that they were helping Mr. Gordon by answering the investigators' questions.⁴⁰ One of Mr. Gordon's acquaintances, Kurt Schatzl, was in fact so misled that he referred the investigator to other people that knew Mr. Gordon and who could provide additional information, such as Joe Martinez.⁴¹ Attached to Mr. Gordon's declaration is an e-mail received by Mr. Martinez from a Rose Ryan of Marcum LLP entitled "Background History," stating that she had been referred to Mr. Martinez by Mr. Schatzl.⁴² Defendants' investigators even went as far as questioning people in Mr. Gordon's gym.⁴³

At least two of Mr. Gordon's neighbors were questioned about Mr. Gordon by two women.⁴⁴ These two women, who had somehow gained entry into Mr. Gordon's locked apartment building, showed Mr. Gordon's neighbors a photograph of a man, and asked them if they had seen that man around and whether they knew him.⁴⁵ Both of these neighbors were left with the impression that Mr. Gordon, the man in the photograph, had "done something wrong."⁴⁶

Two women investigators also questioned the minor son of a third neighbor of Mr. Gordon.⁴⁷ This neighbor told Mr. Gordon that her son, who was not accompanied by an adult at the time, was shown a photograph of a man, and was asked if he had seen this man around and

⁴⁰ Gordon Decl., ¶ 13 and Ex. B.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*, ¶ 12.

⁴⁴ Declaration of Lisa Dominguez, dated October 27, 2011 and Declaration of Cherlande Lubin, dated October 28, 2011.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Declaration of Virginia Alfonso, dated October 28, 2011.

whether he knew him. This boy was also left with the impression that Mr. Gordon had “done something wrong.”⁴⁸

Defendants’ agents used a different ruse with friends and acquaintances of Mr. Gordon’s. Mr. Tuttle, a friend of Mr. Gordon, was called by a woman seeking a “character reference” for Mr. Gordon.⁴⁹ Mr. Tuttle was “misled” as to the identity of the caller; he was led to believe that the woman on the phone was calling on Jayme Gordon’s behalf (and assumed it was Mr. Gordon’s counsel), because she acted like she was “sympathetic to Mr. Gordon’s claims against Defendants,” and “never told [Mr. Tuttle] that she was calling for DreamWorks.”⁵⁰

B. Defendants’ Actions Have Violated Numerous Statutes and Sections of The Code of Professional Conduct

Defendants, in their Motion to Dismiss, allege that because they believe Mr. Gordon’s lawsuit, “has all the appearances of a scam” they “conducted a routine background investigation including, but not limited to, any criminal record, his prior lawsuits and his past and current employment.” But there is nothing “routine” about gaining entry into a locked apartment building and interrogating neighbors. There is nothing routine about hiring at least three different companies⁵¹ to question what appears to be anyone and everyone who ever knew Mr. Gordon. Defendants further claim that the investigation involved “minimal legal and non-intrusive observation of” Mr. Gordon. But there is nothing “minimal and non-intrusive” about the

⁴⁸ *Id.*

⁴⁹ Declaration of Derek Tuttle, dated October 28, 2011.

⁵⁰ *Id.*

⁵¹ The three investigation firms that have been identified to date are Marcum LLP, JC Lane and Associates and Thomas Dale and Associates

surveillance that was conducted so overtly that Mr. Gordon was acutely aware that he and his family were the subject of surveillance and had to follow one of the investigators in his car in order to obtain his license plate number.⁵² Defendants sum up by arguing that “There is nothing illegal or improper about this investigation.” Once again, Defendants are wrong.

For example, Rule 4.3 of the Massachusetts Rules of Professional Conduct requires that “[i]n 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.” Mass. R. Prof. C., Rule 4.3. It is no defense that counsel hired agents to conduct the investigation and that it was the agents who implied that they were disinterested. As the Supreme Judicial Court of Massachusetts held in *In re Crossen*, 450 Mass. 533, 561 (Mass. 2008) “A lawyer's obligations of good faith to the tribunal and to others would mean little if the lawyer could use surrogates to achieve by deceit and falsehood that which he himself could not do.”⁵³ There can be no doubt that the agents who contacted Mr. Tuttle, Mr. Martinez, Mr. Schatzl and Ms. McCall not only implied that they were disinterested, but implied that they were actually calling on behalf of Mr. Gordon. Such actions clearly violate Rule 4.3.

⁵² A video taken by Mr. Gordon of the incident, where Mr. Gordon identifies the person in the Silver Lexus as “one of the people who has been harassing me” was submitted with to Plaintiff’s emergency motion. The license plate number of that car came back to a Jim Lane, who does security and investigations under the name JC Lane and Associates.

⁵³ Mr. Crossen is a Massachusetts attorney whose disbarment was upheld in 2008 by the Supreme Judicial Court of Massachusetts in *In re Crossen*. He is a former partner at Foley Hoag, the same firm that acts as defense counsel to DreamWorks.

Defendants actions in this case also violated Rule 4.4, titled “Respect For Rights Of Third Persons,” provides that “[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person” Mass. R. Prof. C., Rule 4.4. When applying Rule 4.4, a court must determine whether the lawyer’s conduct served some legitimate purpose other than those that are prohibited. *In the Matter of the Discipline of an Attorney*, 442 Mass. 660, 668, 670 (2004). Defendants have offered no legitimate purpose behind the surveillance of Mr. Gordon and his family, nor have they offered any legitimate purpose behind entering locked apartment buildings and interrogating neighbors.

Moreover, Defendants’ actions also violate Rule 8.4 of the Massachusetts Rules of Professional Conduct which provides that “[i]t is professional misconduct for a lawyer to: . . . (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;. . . (d) engage in conduct that is prejudicial to the administration of justice.” Mass. R. Prof. C., Rule 8.4. Per Rule 8.4, for purposes of analyzing whether the Rules of Professional Conduct have been violated, it does not matter whether the lawyer employs an agent, such as an investigator, to engage in the ruse. Consequently, a lawyer’s investigator or other agent also may not use deception to obtain information. *See id*; Rule 5.3(c) (“a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved). Together, Rules 8.4 and 5.3 require lawyers to properly oversee non-lawyers working on their behalf to ensure that the rules of professional conduct are maintained. That clearly did not happen here.

As noted in Mr. Gordon's motion for a protective order, Defendants' acts of harassment and intimidation, through their agents, violate Massachusetts' witness intimidation law, ALM GL ch. 268, § 13B (2011). This statute was amended in November 2010 to apply not only to criminal cases but to civil cases and was also amended to include not only deliberate acts, but those done with reckless disregard. Defendants admit in their motion to dismiss that the investigation was commenced "in anticipation of Plaintiff's deposition." It does not matter whether the Defendants intended that the activities of their agents harass and intimidate Mr. Gordon or whether they acted with reckless disregard, the investigators' heavy-handed tactics resulted in Mr. Gordon being fearful, distracted and harassed. It was as a direct result of those activities that the deposition of Mr. Gordon could not go forward as planned. The continuance of Mr. Gordon's deposition, in addition to counsel for Mr. Gordon having to file an emergency Motion for a Protective Order and counsel for Mr. Gordon having to respond to this Motion to Dismiss have all been "prejudicial to the administration of justice." It is unfortunate that Defendants' counsel in this case did not take to heart what the Supreme Judicial Court of Massachusetts held regarding the activities of their former law partner:

We begin with the elementary observation that "an attorney is not free to [do] anything and everything imaginable . . . under the pretext of protecting his client's right to a fair trial and fair representation." *United States v. Cooper*, 872 F. 2d 1, 3 (1st Cir. 1989). "[A]n attorney's ethical duty to advance the interest of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct . . ." *Nix v. Whiteside*, 475 U.S. 157, 168, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986). "The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice." *Matter of Snyder*, 472 U.S. 634, 644-645, 105 S. Ct. 2874, 86 L. Ed. 2d 504 (1985). "Where [the duty to uphold the integrity of the justice system] is in seeming conflict with the client's interest in zealous representation, the latter's interest must yield. Were we to condone any action to the contrary, the integrity of the judicial process would be vitiated." *Matter of Neitlich*, 413 Mass. 416, 423, 597 N.E.2d 425 (1992). The duty of zealous advocacy does not extend to

engaging in conduct intended to harm the orderly administration of justice, or the public's perception of unbiased adjudication.

In re Crossen, 450 Mass. 533, 563 (Mass. 2008).

IV. CONCLUSION

For all of the reasons detailed above, it is respectfully submitted that Defendants' Motion to Dismiss should be denied and that the relief sought in Plaintiff's Motion for Sanctions and for a Protective Order, should be granted.

Dated: November 2, 2011

/s/ Juanita R. Brooks

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CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on this 2nd day of November, 2011.

/s/ Juanita R. Brooks _____

Juanita R. Brooks