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 JAYME GORDON'S REPLY MEMORANDUM OF LAW IN SUPPORT OF HIS EMERGENCY MOTION FOR PROTECTIVE ORDER AND SANCTIONS

I. PRELIMINARY STATEMENT

Mr. Shope proclaims in his declaration that "[t]here was no intent to harass or harm Mr. Gordon, but only to seek the truth as it bears on this case." Shope Decl., ¶17. Due to the amendment of ALM GL ch. 268, § 13B (2011) in November 2010 to encompass both deliberate acts, and those done with reckless disregard in civil cases, defense counsels' purported intention is irrelevant. What is relevant is that Defendants' investigators' overt tactics resulted in Mr. Gordon feeling scared, distracted and harassed.

On October 18, 2011, counsel for Plaintiff 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 and intimidation by Defendants' private investigators.[1] Defendants' counsel replied to that motion, feigning ignorance of the illegal and unethical methods employed by the private investigation firm they hired – Marcum LLP. Defendants do not even acknowledge the other two investigation firms they hired (JC Lane and Associates of Boston, MA and Thomas Dale and Associates of El Segundo, CA) to conduct their nationwide "background check" of Mr. Gordon. Neither do Defendants answer the inquiries that are material to Plaintiff's motion. Specifically, how can (i) loud and incessant knocking on the doors of tenants who reside in the locked apartment buildings of Mr. Gordon and Mr. Gordon's mother; (ii) following Mr. Gordon in his car on repeated occasions; (iii) questioning individuals in Mr. Gordon's gym, and individuals who have not seen Mr. Gordon in decades, uncover any information that bears on this copyright infringement case? Rather, Defendants utilized Mr. Gordon's emergency request for Court protection to submit briefs filled with mischaracterizations of what they allege to be the merits of Mr. Gordon's case and disparage Mr. Gordon personally.

[1] Dkt. No. 34.

In their papers, Defendants concoct a myriad of factual presumptions to justify their harassment of Mr. Gordon and his family. But stripping away all of their misstatements, what has become abundantly clear is that Defendants do not deny that their agents followed Mr. Gordon and his family, gained entry into his locked apartment building and interrogated his neighbors (including an unaccompanied minor), questioned former employers, friends and acquaintances of Mr. Gordon's from California to Boston and did so while misrepresenting the purpose of their inquiries. What has also become abundantly clear is that Defendants are now attempting to divert the Court's attention away from this harassment and unethical behavior by making misrepresentations of fact about Mr. Gordon and his counsel.

At the outset, we address Defendants' assertion that "Plaintiff has failed to establish the existence of even a single improper act by anyone, or even to present an affidavit or other evidence of such an act." Opp. p. 1; *see also id*., pp. 14-15. As detailed in Plaintiff's opposition to Defendants' motion to dismiss, when Plaintiff first raised these issues with Defendants on October 14, there was no mention of postponing Mr. Gordon's deposition, which was then scheduled for October 19. Plaintiff was simply trying to get to the bottom of the extent of these activities and to receive assurances from the Defendants that *all* such activities would cease immediately.[2] It was only after Defendants' noncommittal response was received on October 17, wherein defense counsel refused to disclose the extent of these activities and reserved the right to take any action they "deemed" appropriate in representing their clients, did it become imperative to seek a protective order from the Court before allowing Mr. Gordon's deposition to go forward. Hence, Mr. Gordon's original motion was filed as an *emergency* motion on October 18, the day before his scheduled deposition. Since that time Plaintiff has submitted declarations under oath

[2] Oct. 18, 2011 Declaration of Kristen McCallion, Ex. A. [Dkt. No. 34-2.]

supporting all of the allegations contained in the original emergency motion, namely, those of Mr. Gordon, three of Mr. Gordon's neighbors, and Mr. Gordon's friend, Derek Tuttle.[3] We also refer the Court to the Declaration of Joe Martinez, an acquaintance of Mr. Gordon, filed herewith. Mr. Martinez's declaration evidences Defendants' subterfuge: having not seen Mr. Gordon for many years, Mr. Martinez was misled by Defendants' investigators to believe that he was speaking to a woman seeking references for Mr. Gordon's prospective employer rather than an investigator working for Defendants to gather evidence for a pending lawsuit.[4]

As Mr. Gordon's friends and acquaintances have come forward, it is clear that Defendants' investigation into Mr. Gordon's personal life is ongoing,[5] and that counsels' repeated assertions that their "observation of Mr. Gordon" and "conversations with neighbors"[6] concluded weeks ago are designed only to mislead the Court.

II. DEFENDANTS' MISREPRESENTATIONS

As in Plaintiff's opposition to Defendants' motion to dismiss, Mr. Gordon again addresses Defendants' wide ranging factual misstatements that form the basis of their opposition to Mr. Gordon's emergency motion for a protective order.

Defendants' Misstatement: "[A] cessation of the observation of Plaintiff – is completely moot because, as Plaintiff's counsel was specifically informed before the present motion was filed, the observation of Plaintiff concluded weeks before the date scheduled for his deposition." Opp. p. 5; *see also id*., p. 11.

[3] Dkt. Nos. 42, 43, 44, 45, and 48.
[4] Nov. 3, 2011 Declaration of Joe Martinez, ¶5; *see also* Nov. 2, 2011 Declaration Jayme Gordon, ¶ 13 ("Gordon Decl."). [Dkt. No. 42.]
[5] *See* Gordon Decl., ¶¶ 10, 12, 13. [Dkt. No. 42.]
[6] Shope Decl., ¶ 18 and Oct. 18, 2011 Declaration of Kristen McCallion, Ex. D. [Dkt. No. 34-5.]

Truth: This is perhaps the single most material misrepresentation made by Defendants to the Court. Undoubtedly aware that Defendants' investigators continue to work per defense counsels' request, Mr. Shope criticizes Plaintiff's counsel for postponing Mr. Gordon's deposition "after being advised in writing that observation of Mr. Gordon had concluded weeks earlier." Shope Decl., ¶ 18. What Mr. Shope fails to acknowledge, however, is that the investigation of Mr. Gordon continued well into October and, in all likelihood, is still active. The continuing acts of Defendants' investigators, as set forth in the Declarations of Mr. Gordon and Mr. Martinez, belie Mr. Zavin's and Mr. Shope's misrepresentations.[7]

Defendants' Misstatement: Mr. Shope's sworn testimony that "I am. . . very surprised to read in the plaintiff's motion (p. 5) the (unsworn) assertion that the attorneys at Fish & Richardson have "never encountered" surveillance of a party or interviews of a party's neighbors "in an intellectual property case." Shope Decl., ¶ 4.

Truth: Ms. Brooks, and Mr. Madera, co-lead counsel for Mr. Gordon, actually wrote that they had been practicing law "for nearly seventy years and have never encountered these tactics in an intellectual property case."[8] Mr. Shope's deliberate mischaracterization of Fish & Richardson's statement is representative of Defendants' sweeping array of misstatements. On a related note, Defendants purposely misconstrue Mr. Gordon's motion to be based on the hiring of investigators by Defendants.[9] It is not the mere hiring of investigators that is the problem. Rather, it is the *tactics* utilized by Defendants' three teams of nationwide investigators that is the

[7] *See* Gordon Decl., ¶¶ 10, 12, 13. [Dkt. No. 42.]; Nov. 3, 2011 Declaration of Joe Martinez ("Martinez Decl").

[8] Oct. 18, 2011 Declaration of Kristen McCallion, Ex. E. [Dkt. No. 34-6.] *See also*, Pl's Memorandum of Law in Support of His Emergency Motion for a Protective Order and Sanctions, p.5 (cited by Mr. Shope in support of his misstatement, Shope Decl., ¶4). [Dkt No. 34.]

[9] *See* Opp. p. 14, where Defendants say that "Plaintiff also asserts that the hiring of a private investigation firm by Defendants' attorneys violated Mass. R. Prof. 4.4."

issue. These tactics include (i) loud and incessant knocking on the doors of tenants who reside in the locked apartment buildings of Mr. Gordon and Mr. Gordon's mother; (ii) following Mr. Gordon in his car on repeated occasions; and (iii) questioning individuals in Mr. Gordon's gym, Mr. Gordon's friends, and individuals who have not seen Mr. Gordon in decades under false pretenses. Ms. Brooks and Mr. Madera were referring to these illegal and unethical "tactics" in their letter.

Defendants' Misstatement: "Plaintiff's counsel eventually admitted that Plaintiff destroyed all of the electronic evidence that relates to his allegedly infringed works entitled either "Kung Fu Panda Power" or "Five Fists of Fury" and that he discarded his computer and all of his computer files after he created electronic documents and images that are the heart of his lawsuit, after he was aware of Kung Fu Panda, and after he registered his own supposedly infringed works with the Copyright Office in 2008 and 2011." Opp. pp. 3-4.

Truth: At no time did Mr. Gordon's counsel "admit" anything of the sort. The basis for Defendants' statement is unfathomable.

Defendants' Misstatement: "Plaintiff's counsel asserted. . . that all relevant electronic files had been destroyed by Gordon, presumably after his 2008 and/or 2011 copyright registrations, when he was already planning on making a claim against Defendants. Grossman Aff., ¶ 12." Opp. pp. 7-8.

Truth: Again, the basis for Defendants' statement is unfathomable, given Mr. Gordon's production of over 5,000 electronic files.

Defendants' Misstatement: Mr. Grossman's sworn testimony that "[o]n August 15, 2011, Kristen McCallion, Plaintiff's counsel, agreed to make Plaintiff's computers and electronic files available for forensic examination." Grossman Decl., ¶ 10; *see also* Opp. p. 8.

Truth. As can be seen by Fish & Richardson P.C.'s letter dated August 15, which is annexed to Mr. Grossman's declaration as Exhibit C,[10] Mr. Gordon agreed "to make accessible for forensic examination and imaging, the electronic media and files that Mr. Gordon has located after a reasonable and diligent search." Nowhere does this letter state or imply that Mr. Gordon was making a computer accessible for forensic examination. As explained to defense counsel, Mr. Gordon agreed to provide to Defendants a disc obtained from the United States Copyright Office, which is a direct copy of Mr. Gordon's electronic submission to the Copyright Office in 1999, so that it could be tested by forensic computer experts. Defendants never tested the disc.

Defendants' Misstatement: "Mr. Gordon had previously falsely stated the date of creation" for the works comprising his 2008 copyright registration. Shope Decl., ¶ 8; *see also* Opp. p. 3

Truth: As can be seen by the corrected copyright registration attached to Mr. Shope's Declaration as Exhibit A,[11] Mr. Gordon explained to the Copyright Office that "constituent parts of the work were completed by 1999" but that he "engaged in acts of authorship through 2008." This means that "constituent parts" of the works that were registered by Mr. Gordon with the U.S. Copyright Office in 2008 had been "completed by 1999." Defendants have no idea what parts of Mr. Gordon's works were completed in 1999 yet they brazenly assert that Mr. Gordon "falsely stated" this date.

Defendants' Misstatement: "Plaintiff has deceptively altered the image of Kung Fu Panda that was included in the complaint and this motion." Opp. p. 9.

Truth: Page 10 of Defendants' opposition memo depicts an image found on the Internet and page 9 depicts the same image without the background characters. Defendants' giant panda

[10] Dkt. No. 41-3.
[11] Dkt. No. 40-1.

and red panda appear to be a mere duplication of Mr. Gordon's giant panda and red panda, and this is clear regardless of whether the background characters are included in Defendants' image.

III. ARGUMENT

A. The Tactics Employed By Defendants' Agents Are Illegal and Unethical

Defendants claim that their investigation "was intended solely to determine whether the Plaintiff had a history of fraud, and to attempt to verify the truth (or lack thereof) of various allegations in the complaint." Opp. p. 4. A purported "history of fraud" could have been conducted, and indeed was conducted, by a simple check of public records. Mr. Shope in fact relies on "public records" to attest to various allegations about Mr. Gordon, yet he fails to support his allegations with copies of the public records upon which he relies.[12] Also, it is inconceivable how asking Mr. Gordon's neighbors if they know Mr. Gordon, or if they have seen him around, and questioning individuals, who Mr. Gordon has not seen in decades, would "verify the truth" of the allegations in the complaint.

Defendants further claim that their investigators' tactics were reasonable because "the individuals that were interviewed did so voluntarily. . ." Opp. p. 4. However, the minor child who was questioned by Defendants' investigators certainly did not answer questions with the consent of his parents.[13] As for the adults who were questioned by Defendants investigators, they "did so voluntarily" because they had been misled as to the true purpose of the interview.[14]

On page 15 of their opposition, Defendants' rely upon Mass R. Prof. C. 1.3, which provides that "a lawyer should represent a client zealously within the bounds of the law." That is

[12] Shope Decl., ¶12. [Dkt. No. 40.]; *see also* Opp. p. 11.
[13] *See* Oct. 28, 2011 Declaration of Virgina Alfonso. [Dkt. No. 43.]
[14] *See* Gordon Decl., ¶¶ 10, 12, 13; Oct. 27, 2011 Declaration of Lisa Dominguez; Oct. 28, 2011 Declaration of Cherlande Lubin; Oct. 28, 2011 Declaration of Derek Tuttle. [Dkt. Nos. 42, 44, 45, 48.] *See also* Martinez Decl.

the exact same rule that Mr. Shope's former partner at Foley Hoag relied on to justify his actions; the Massachusetts Supreme Court's response was:

> 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).

Defendants claim that they "have not located a single authority where conduct remotely related to that alleged by Gordon has given rise to sanctions for professional misconduct." Opp. p. 17. Apparently, they failed to come across *In re Crossen* and also overlooked *Mass. Inst. of Tech. v. ImClone Sys*., 490 F. Supp. 2d 119 (D. Mass. 2007), where Judge Stearns imposed sanctions on defense counsel, ordered that plaintiff be reimbursed for its fees and costs, and permitted plaintiff to offer evidence of the improper conduct of defense counsel at trial because "the actions of [defendant] through its attorney-agents prejudiced [plaintiff's] ability to prosecute the litigation by depriving it of the cooperation of the witness who as a principal inventor. . . and was arguably the person most knowledgeable about the validity of [plaintiff's] claims against [defendant]." *Id*., at 125. This is exactly what Defendants set out to do here — harass and intimidate Mr. Gordon, who is "arguably the person most knowledgeable" about his claims, so that he is unable to prepare for his deposition, hinder his ability to prosecute this litigation and attempt to make the process so onerous for Mr. Gordon that he will simply drop this suit.

B. Defendants' Cases Do Not Justify Their Agents' Illegal and Unethical Tactics

Defendants cite four right to privacy cases to support the purported legitimacy of their conduct. None of them apply to the facts here and even contain language that supports Plaintiff's arguments.[15]

Defendants rely on a right of privacy case, *DiGirolamo v. D.P. Anderson & Associates, Inc*., 10 Mass. L. Rep. 137, 1999 Mass. Super. LEXIS 190 (Mass. Super. 1999) (Gants, J.) to assert that "surveillance of [a] plaintiff [is] 'perfectly appropriate.'" Opp. p. 14. In this case, Jean DiGirolamo received workers' compensation benefits after breaking her leg while working as a skate guard at a Metropolitan District Commission rink. The Public Employment Retirement Administration retained a private investigative agency, defendant D.P. Anderson & Associates, to conduct a visual surveillance of Ms. DiGirolamo to determine whether she was mobile and physically active. What the Court actually stated was 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." *DiGirolamo*, ; 1999 Mass. Super. LEXIS 190, at *6 (emphasis added). This is not a workers' compensation case.

Defendants also rely on *Figured v. Paralegal Technical Services, Inc*., 231 N.J. Super. 251, 255-256, appeal dismissed, 121 N.J. 666 (1989) to assert that "conducting surveillance of litigant from [a] parked car in front of [her] house, staring at plaintiff as she drove by, and following her in public places was reasonable." Opp. p. 14. Again, *Figured* addresses the appropriateness of surveillance in an entirely different context, *i.e*., personal injury. In this right

[15] Defendants also cite to *Commonwealth v. Drumgoole*, 49 Mass. App. Ct. 87, 90, *rev. denied*, 432 Mass. 1101 (2000) and *Commonwealth v. Rivera*, 76 Mass. App. Ct. 530, 537 (Mass. App. Ct. 2010). These cases are witness intimidation cases where the court found that there *was* sufficient evidence to find witness intimidation pursuant to the Massachusetts' witness intimidation statute, ALM GL ch. 268, § 13B.

of privacy case, the plaintiff was in an automobile accident and claimed to have suffered physical, emotional and psychological injuries. The liability carrier for the other vehicle involved in the accident retained defendant Paralegal Technical Services to investigate plaintiff's injury claims. The court in *Figured* held that an individual "*who seeks to recover damages for alleged injuries* must expect that her claim will be investigated." *Id.*, at 258 (emphasis added.) But the court cautioned that even when surveillance is warranted to ascertain whether alleged physical injury has occurred, that surveillance "must be reasonably conducted and may not involve an intrusion into the privacy of the claimant which could be deemed highly offensive to a reasonable person…" *Id*. Mr. Gordon's case is not a personal injury case and the way in which Defendants have conducted their surveillance would be highly offensive to a reasonable person and was in fact highly offensive to Mr. Gordon.

Defendants also rely on *Forster v. Manchester*, 410 Pa. 192, 197-98 (1963), another right of privacy case, for the proposition that the "tailing" of Mr. Gordon was "not unreasonable" in light of a Massachusetts private investigator statute. Opp. p. 14. Again, the holding in this case is, on its face, wholly inapplicable. In *Forster*, the Court held that "*by making a claim for personal injuries*" a person "must expect reasonable inquiry and investigation to be made of her claim and to this extent her interest in privacy is circumscribed." *Id*. at 196-7 (emphasis added).

Lastly, Defendants cite to *Joyce v. SCA*, 1984 U.S. Dist. Lexis 21555 (D. Mass. 1984), another right of privacy action arising out of an injury resulting from an industrial accident, a workmen's compensation claim, and an investigation of that claim by an insurance company. Opp. p. 13. This case is consistent with the others described above: reasonable surveillance may be appropriate in a personal injury case. But this is not a personal injury case, and the illegal and unethical tactics of Defendants' investigators have not been reasonable or appropriate.

C. Defendants' Improper Tactics Are Not Confined To Their Agents

It is clear from the declarations attached to Mr. Gordon's opposition to Defendants' Motion to Dismiss, and the declaration of Mr. Martinez attached hereto, that Defendants' agents have engaged in a campaign of harassment and subterfuge against Mr. Gordon. However, this campaign did not begin with Defendants' private investigators. On March 29, 2011, counsel for the parties held a "meeting," prompted by Mr. Zavin, to discuss Mr. Gordon's claims. When proposing this meeting, Mr. Zavin specifically explained that it would *not* be a settlement conference:

> "We also suggested that it might be useful to have an early meeting with you and Greg (and your client if you wish), to explain to you the background of the creation of Kung Fu Panda, and show you some of the evidence regarding independent creation. As I told you in our conversation, the purpose of this meeting would not be to "settle" the case, since DreamWorks is not willing to pay anything on this claim. Rather, we would be willing to show you some of the evidence so that you and your client could consider whether this is a case that is worth pursuing, considering the time and expense that it will entail."[16]

At this meeting, defense counsel presented a Power Point presentation to Plaintiff's counsel. During the presentation, counsel for DreamWorks represented that their client had located only one reference to Mr. Gordon in their files. Counsel then displayed a PowerPoint slide that purported to depict a rejection letter sent from DreamWorks to Mr. Gordon in 1999. Counsel for DreamWorks underscored the fact that this purported rejection letter showed that Mr. Gordon's submission had been returned unread.

Plaintiff's counsel requested copies of the Power Point presentation to assist in the evaluation of how or whether to pursue the suit. DreamWorks agreed, subject to numerous conditions, including that the presentation could not be copied, disclosed to anyone other than Plaintiff and Plaintiff's counsel, and had to be returned to Ms. Huston at Foley Hoag at the

[16] November 10, 2011 Declaration of Kristen McCallion, Ex. A (emphasis added).

conclusion of the evaluation.[17] Despite Mr. Zavin's express qualification that the meeting was *not* a settlement conference, Ms. Huston invoked Federal Rule of Evidence 408 with respect to the Power Point shown at that meeting, claiming that "the PowerPoint is provided as part of settlement discussions subject to F.R.E. 408."[18] Fed. R. Evid. 408, however, is not designed to exclude factual evidence that is otherwise discoverable, such as the rejection letter purportedly represented in the Power Point.

After returning the Power Point to Ms. Huston, and reviewing the documents produced by DreamWorks, counsel for Plaintiff noticed that the alleged rejection letter to Mr. Gordon that had been displayed in the Power Point at the March 29 meeting had not been produced. Accordingly, on September 7, 2011, Mr. Gordon's counsel requested the production of the "letter sent by DreamWorks to Mr. Gordon dated October 15, 1999,"[19] and explained that:

> We were advised by your colleagues that DreamWorks had this letter in its possession; however, it does not appear to have been produced. If you believe it was produced, then provide the Bates number. If it was not produced, please confirm that it has not been destroyed and produce it.[20]

Despite Mr. Zavin's unequivocal position that the March 29 meeting was *not* a settlement meeting, his co-counsel, nearly six months after this meeting, described it as "a privileged settlement meeting"[21] and contradicted him in another significant way, claiming for the first time that Mr. Gordon's counsel:

> were specifically told that the letter had not been located, <u>but were shown an example of what the unsolicited rejection letter may have looked like</u> – and this example incorporated the electronic data which was recorded relating to the rejection and return of Mr. Gordon's submission. That record, along with a number of form letters. . . is being produced.[22]

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[17] *Id*., Ex. B.
[18] *Id.*
[19] *Id*., Ex C.
[20] *Id*.
[21] *Id*., Ex. D.
[22] *Id*. (emphasis added)

"That record" was later produced by DreamWorks. In particular, DreamWorks produced a screen shot which verifies that on October 14, 1999, a submission from Jayme Gordon to Jeffrey Katzenberg (the CEO of DreamWorks) was received.[23] The screen shot also shows that Mr. Gordon purportedly received form letter #8 in response.[24] However, form letter #8, which contains a clause stating that all materials are being returned unread, was *not* the rejection letter Mr. Gordon actually received.[25] Instead, the letter Mr. Gordon received makes no mention of returning his submission.[26] After DreamWorks' counsels' misrepresentations at the *non*-settlement meeting that DreamWorks had sent Mr. Gordon a rejection letter which stated that his submission was being returned unread, and after displaying a Power Point at this same meeting which purportedly contained this fictitious letter, now, in their opposition, Defendants rely *only* on the letter produced by Mr. Gordon for their new proposition that "no material was actually sent to DreamWorks" by Mr. Gordon. Opp. p. 6. Having failed in their mission to try to convince Mr. Gordon's counsel that DreamWorks had proof that Mr. Gordon's submission was returned unread, DreamWorks now reverses course and argues to this Court that there never was a submission at all.

DreamWorks should be ordered to produce the bogus PowerPoint immediately. The law is clear: Fed. R. Evid. 408 "is inapplicable if offered to show that a party made fraudulent statements in order to settle a litigation." *Potenza v. City of New York Dept. of Transp*., 2008 WL 346369, at *2 (E.D.N.Y. Feb. 6, 2008) *see also DeLuca v. Allied Domecq Quick Serv. Rests*., 2006 U.S. Dist. LEXIS 68328, at *4-5 (E.D.N.Y. Sept. 22, 2006) ("[I]t is well settled that

[23] *Id*., Ex. E.
[24] *Id*., Ex. F.
[25] *See* Nov. 1, 2011 Declaration of David Grossman, Ex. A. [Dkt. No. 41-1.]; and Oct. 19, 2011 Declaration of Jonathon Zavin, Ex. A. [Dkt. No. 38-1.]
[26] *Id*.

Rule 408 is inapplicable when the claim is based upon some wrong that was committed in the course of the settlement discussions."); *Uforma/Shelby Bus. Forms, Inc. v. NLRB*, 111 F.3d 1284 (6th Cir. 1997) (Rule 408 inapplicable when the claim is based upon a wrong that is committed during the course of settlement negotiations). Further, the Advisory Committee Notes to Rule 408 explain that "evidence, such as documents, is not rendered inadmissible merely because it is presented in the course of compromise negotiations if the evidence is otherwise discoverable. A party should not be able to immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation." Fed. R. Evid. 408, Advisory Committee's Note; *see also Phoenix Solutions, Inc. v. Wells Fargo Bank, N.A*., 254 F.R.D. 568, 584 (N.D. Ca. 2008) (ordering party to produce all documents).

The egregiousness of Defendants' actions thus far is crystal clear. First, they fabricated a letter they did not have, which they then used to try to persuade Mr. Gordon's counsel to voluntarily dismiss this case. After that didn't work, they noticed Mr. Gordon's deposition and then embarked on a campaign of deliberate and overt surveillance to send Mr. Gordon and his family the message that if he testified at his upcoming deposition, and ultimately pursues his case, he and his family will have to endure harassment, invasive observation, and intimidation.

IV. CONCLUSION

For the reasons explained above and in his prior memoranda of law, Mr. Gordon respectfully requests the Court to grant his motion and to issue an Order and sanctions as outlined in his memorandum supporting his emergency motion, which are necessary and appropriate to compensate Mr. Gordon for the harm caused by Defendants and their counsels' misconduct, to preserve the integrity of the Court and the judicial process, and to deter conduct such as that displayed by Defendants and their counsel.

Respectfully submitted,

FISH & RICHARDSON P.C.

Dated: November 10, 2011

/s/ Gregory A. Madera

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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 10th day of November, 2011.

/s/ Gregory A. Madera
Gregory A. Madera

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