

5 F.R.D. 83  
(Cite as: 5 F.R.D. 83)

## C

District Court, E. D. Pennsylvania.

CALLEN

v.

PENNSYLVANIA R. CO.

Civ. A. No. 4763.

Jan. 25, 1946.

Action for negligence by Rudy E. Callen against the Pennsylvania Railroad Company. On plaintiff's motion for production of documents.

Motion denied.

West Headnotes

### [1] Federal Civil Procedure 170A 1618

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things

170AX(E)4 Proceedings

170Ak1615 Motion and Proceedings

Thereon

170Ak1618 k. Designation of Document or Thing and Contents Thereof. [Most Cited Cases](#)

(Formerly 106k351)

A motion for production of copies of all hospital, doctor, clinical and X-ray reports received by defendant from all sources, including those received from physicians in certain city, pertaining to plaintiff, was denied for want of particularity. [Fed.Rules Civ.Proc. rule 34, 28 U.S.C.A.](#)

### [2] Federal Civil Procedure 170A 1618

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things

170AX(E)4 Proceedings

170Ak1615 Motion and Proceedings

Thereon

170Ak1618 k. Designation of Document or Thing and Contents Thereof. [Most Cited Cases](#)

(Formerly 106k351)

Documents which moving party desires to be produced should be designated with reasonable particularity, and a request for all documents in possession of another party relating to a particular matter is not sufficiently specific. [Fed.Rules Civ.Proc. rule 34, 28 U.S.C.A.](#)

\*83 B. N. Richter, of Philadelphia, Pa., for plaintiff.

Philip Price, of Philadelphia, Pa., for defendant.

BARD, District Judge.

This is a motion by plaintiff for the production of certain medical reports under [Rule 34 of the Federal Rules of Civil Procedure, 28 U.S.C.A.](#) following section 723c. The action was brought to recover damages for injuries to plaintiff allegedly caused by defendant's negligence.

Plaintiff moved for the production of 'copies of all hospital, doctor, clinical, and X-ray reports received by the defendant from any and all sources, including those received from physicians in Toledo, Ohio, pertaining to the plaintiff.'

[1] Defendant objects to the motion on the ground, inter alia, that the motion fails to designate the documents sought with particularity and is otherwise vague and indefinite. I think defendant's objection is well taken.

\*84 [2] It is an essential element of a motion to produce documents that those documents which the moving party desires to be produced be designated with reasonable particularity. [Peltz v. Carolina Bagging Co., D.C.S.D.N.Y., 1 F.R.D. 443](#); [Vendola Corporation v. Hershey Chocolate Corporation, D.C.S.D.N.Y., 1 F.R.D. 359](#); [United Mercantile](#)

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[Agencies v. Silver Fleet Motor Express, Inc., D.C.W.D.Ky., 1 F.R.D. 709](#). A request for all documents in the possession of defendant relating to a particular matter is not sufficiently specific to come within the requirement. [Vendola Corporation v. Hershey Chocolate Corporation, supra](#). Unless this requirement is satisfied, a judge granting the motion to produce and the party against whom the order is directed will be unable to ascertain when the order has been fulfilled. Plaintiff is subjected to no undue hardship by this provision. [Rules 26 and 33 of the Federal Rules of Civil Procedure, 28 U.S.C.A.](#) following section 723c, provide means enabling plaintiff to obtain adequate information to identify the documents desired. [Clark v. Chase Nat. Bank of City of New York, D.C.S.D.N. Y., 2 F.R.D. 94](#).

Plaintiff's motion for production of documents is denied.

E.D.Pa., 1946  
Callen v. Pennsylvania R. Co.  
5 F.R.D. 83

END OF DOCUMENT

Not Reported in F.Supp.2d, 2005 WL 758257 (D.Or.)  
(Cite as: 2005 WL 758257 (D.Or.))



Only the Westlaw citation is currently available.

United States District Court,  
D. Oregon.  
DRYWALL SYSTEMS INT'L, INC., a Washington  
corporation, Plaintiff,  
v.  
POLYFORM, INC., an Oregon corporation, and  
Patrick E. Kohls, Defendants.  
**No. Civ.04-6230-HO.**

March 31, 2005.

#### ORDER

HOGAN, J.

\*1 Plaintiff filed a motion to compel production of certain documents and responses to certain interrogatories.<sup>FN1</sup> Plaintiff seeks to compel information regarding “drywall materials,” and financial statements and tax returns for defendant Polyform, Inc. (Polyform).

**FN1.** The production requests subject to plaintiff's motion are numbers 2, 4, 6, 7, 8, 10, 11, 12, 13, 14, 17, 18, 28, 31, 33, 35, 40, 44, 50, 51, and 53 of plaintiff's first request for production of documents. The interrogatories subject to plaintiff's motion are numbers 1, 2, 5, 6, and 7 of plaintiff's first interrogatories.

#### *Discussion*

The complaint alleges, *inter alia*, (1) Polyform manufactured products for plaintiff, a manufacturer and marketer of prefinished drywall products; (2) defendants advertised and sold prefinished drywall products (including products manufactured for, and rejected by plaintiff) using plaintiff's NO COAT® and ULTRAFLEX® marks, (3) the products mar-

keted and sold by defendants using plaintiff's marks were not plaintiff's products and were defective, and (4) plaintiff did not consent to defendants' sale of products or use of its marks. Complaint, ¶¶ 6, 7, 10, 12-16.

Drywall materials are defined as,

non-metal prefinished drywall trim in the nature of high impact plastic and paper laminates formed in an angle or which can be formed into an angle to put on inside or outside corners of walls and ceilings, including but not limited to NO COAT®, ULTRAFLEX®, and any other product that competes with or can be used for the same or similar purposes as NO COAT® and ULTRAFLEX®.

Hough Decl., Ex. A at 5, 51-52. In its responses, Polyform expressly interpreted drywall materials to refer only to the materials it made for plaintiff. *See e.g.* Ex. A at 25, 63. Plaintiff argues that it needs to know whether defendants have product so similar to plaintiff's product that it could be confused for plaintiff's product in the marketplace, and what trademarks defendants have used to market such product. Pl's Memo. at 4. Defendants respond that plaintiff seeks irrelevant information, because liability on plaintiff's claims is premised upon the allegation that defendants used plaintiff's marks. Information regarding products not marketed under plaintiff's marks is not relevant, defendants contend, as plaintiffs chose not to assert claims of “trade dress” and “product configuration.”

Defendants appear mostly correct that plaintiff's theory of liability depends on defendants' use of plaintiff's marks. Plaintiff's breach of contract claim may not depend upon defendants' use of plaintiff's marks. The answer does not affect the relevancy analysis, however. There is no allegation that defendants sold defective product—that is, product rejected by plaintiff—other than under plaintiff's registered marks. Complaint ¶¶ 13, 48. The produc-

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tion requests and interrogatories at issue are therefore overinclusive. Plaintiff's claims, however, are not limited to products manufactured by Polyform for plaintiff, as Polyform seems to contend. Plaintiff's motion to compel is therefore granted to the extent the production requests and interrogatories at issue seek information regarding products [FN2](#) advertised, marketed or sold by defendants using plaintiff's NO COAT® and ULTRAFLEX® marks.

[FN2](#). As used in this order, "products," means things produced. *See* Merriam Webster's Collegiate Dictionary 930 (10<sup>th</sup> ed.1996). The court is not using the definition of product contained within plaintiff's First Requests for Production or First Interrogatories.

\*2 Plaintiff also seeks all of Polyform's financial statements and tax returns. Ex. A at 43-44. Plaintiff argues that Polyform's financial statements and tax returns are relevant to determine statutory damages or an infringer's profits under [15 U.S.C. § 1117](#). Defendants responded to plaintiff's production requests by stating they would produce non-privileged documents responsive to the request for financial statements, and that they have no non-privileged documents responsive to the request for tax returns. *Id.* Defendants now contend that Polyform's general financial statements and tax returns do not contain information relevant to the issue of profits from alleged trademark infringement. To obtain recovery of defendants' profits, plaintiff must prove defendants' sales. [15 U.S.C. § 1117](#). The court does not expect that a company's financial statements and tax returns would contain evidence of sales of products sold using certain marks, or that the information would be sufficiently specific to be relevant to plaintiff's calculation of damages.

### *Conclusion*

Based on the foregoing, plaintiff's motion to compel production of documents and responses to inter-

rogatories [# 19] is granted to the extent that defendants must respond to the production requests and interrogatories at issue, to the extent they are able, with non-privileged, responsive documents and information regarding products advertised, marketed or sold by defendants using the NO COAT® and ULTRAFLEX® marks.

IT IS SO ORDERED.

D.Or.,2005.

Drywall Systems Int'l, Inc. v. Polyform, Inc.  
 Not Reported in F.Supp.2d, 2005 WL 758257  
 (D.Or.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2008 WL 2026131 (E.D.Mich.)  
(Cite as: **2008 WL 2026131 (E.D.Mich.)**)

## H

Only the Westlaw citation is currently available.

United States District Court,  
E.D. Michigan,  
Southern Division.  
VISTEON CORP., Plaintiff,  
v.

NATIONAL UNION FIRE INS. CO. OF PITTS-  
BURGH, PA., Defendant.  
**Civil Action No. 07-12250.**

May 12, 2008.

Todd R. Mendel, Barris, Sott, Detroit, MI, Nader R. Boulos, Kirkland & Ellis, Chicago, IL, for Plaintiff.

Harvey R. Heller, Jennifer M. Grieco, Julie C. Mayer, Steven M. Wolock, Maddin, Hauser, Southfield, MI, for Defendant.

***OPINION AND ORDER GRANTING IN PART  
AND DENYING IN PART PLAINTIFF'S MO-  
TION TO COMPEL DISCOVERY (DOCKET  
NOS. 50, 53)***

MONA K. MAJZOUB, United States Magistrate Judge.

\*1 This matter comes before the Court on Plaintiff Visteon's Motion to Compel Discovery filed under seal on March 7, 2008. (Docket nos. 50, 53). Defendant filed a Brief in Opposition to Visteon's Motion to Compel Discovery under seal on March 25, 2008. (Docket no. 69). Plaintiff filed a Reply Brief in Support of Plaintiff Visteon's Motion to Compel Discovery under seal on April 9, 2008. (Docket no. 83). The parties filed a Joint Statement of Resolved and Unresolved Issues on April 16, 2008. (Docket no. 86). The motion was referred to the undersigned for decision. (Docket no. 54). The Court heard oral argument on the matters on April 25, 2008. The motion is now ready for ruling.

## 1. Facts

Plaintiff Visteon Corp. claims that Defendant National Union Insurance Co. owes it coverage based on two insurance contracts with respect to a settlement that it entered into in 2002 with 42 female employees of Plaintiff. Defendant denied coverage based on several grounds.

Under the present scheduling order all discovery was to be completed by February 29, 2008, and the deadline for filing motions was March 15, 2008. (Docket no. 47). Plaintiff served its Second Request for the Production of Documents and a Notice of Corporate Representative Deposition on Defendant on December 21, 2007. (Docket nos. 50, 53). After an agreed extension, Defendant served its Responses to both on January 24, 2008. Plaintiff brings this Motion to compel Defendant to produce certain responsive documents and compel the deposition of Defendant's corporate representative. The parties have resolved some of the issues and the only issues remaining are Request for Production Nos. 11, 12 and 14 and the corporate representative testimony. (Docket no. 86).

## 2. Standard

Rule 26(b) (1), Fed.R.Civ.P., allows discovery of any matter not privileged that is relevant to a claim or defense of a party. Relevant information need not be admissible if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. Fed.R.Civ.P. 26(b)(1). Rule 37(a)(3)(B), Fed.R.Civ.P., allows a party to move for an order compelling a response to a Fed.R.Civ.P. 34 Request for Production of Documents and a Fed.R.Civ.P. 30(b)(6) designation of a corporate representative.

## 3. Analysis

### A. Request for Production Nos. 11, 12, and 14

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Request for Production No. 11 seeks documents relating to employment discrimination claims against other AIG insureds settled between January 1, 2000 and December 31, 2002 and resulting in a settlement of \$3 million or more. Request for Production No. 12 seeks documents relating to the same class of claims resulting in a judgment of \$3 million or more within the same time frame. Both requests seek documents showing (i) the amount of the settlement [or judgment], (ii) the number of claimants, (iii) the allocation of the settlement [or judgment] amount to different claimants, claims, theories of relief and/or attorneys' fees, and (iv) the insurer's participation in the settlement negotiations, if any.

\*2 Defendant argues that these requests are irrelevant, overly broad and burdensome and may be protected work product and/or subject to the attorney-client privilege. Defendant argues that Plaintiff's requests for information about other settlements and judgments are not reasonably calculated to lead to the discovery of admissible evidence and amount to a fishing expedition and relies on caselaw where discovery of information related to other policy-holders was denied as irrelevant. Plaintiff provides contrary case law allowing such discovery when it is relevant.

The reasonableness of the underlying settlement was put at issue in this case when Defendant raised it as an affirmative defense. (Docket no. 48). Further, Defendant's expert references other settlements and judgments in its opinion regarding the reasonableness of the underlying settlement. Plaintiff limited its request to settlements and judgments similar in amount, timeframe and type of claim and argues that such matters are relevant to the claims and defenses in this action. Defendants' counsel testified that AIG on behalf of Defendant National Union made the decision not to cover the underlying settlement. Therefore, Plaintiff's request for documents relating to AIG's insureds is not irrelevant. To the extent the documents may be subject to privilege, Plaintiff concedes that Defendant may provide a privilege log. [Fed.R.Civ.P. 26\(b\) \(5\)](#).

The Court finds that the information sought in Request Nos. 11 and 12 is relevant and reasonably calculated to lead to the discovery of admissible evidence.

Defendant objects that these requests are "enormously" burdensome. Defendants argue that retrieving the requested information will take several people several days and once the responsive settlements are located, confidentiality provisions would obligate the AIG to notify the parties to the settlement of the request. (Def.'s Br. in Opposition to Pl.'s Mot. to Compel Discovery at pp. 12-13, Docket no. 69, under seal). Defendants provide the affidavit of the Director of AIG's Domestic Claims in support of this argument. (*Id.* at Ex. 3 ¶¶ 8, 9, Docket no. 69).

The Court must limit the extent of discovery otherwise allowed by these 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 litigation, and the importance of the proposed discovery in resolving the issues. [Fed.R.Civ.P. 26\(b\)\(2\)\(C\)](#). As set forth above, the issue of the reasonableness of the underlying settlement is relevant and important to both the claims and defenses; the proposed discovery in Request for Production Nos. 11 and 12 is important to resolving the issue of the reasonableness of the settlement and this weighs heavily in favor of allowing the discovery. Weighing Defendant's assertion that it would take several people several days to produce the documents at issue and the additional inconvenience of dealing with any potential confidentiality issues against the issues at stake including the amount of the underlying settlement, the parties' resources and the needs of the case, the Court does not find that this burden is unreasonable. The Court will order Defendant to produce documents responsive to Request for Production Nos. 11 and 12.

\*3 Request for Production No. 14 seeks all documents concerning the settlements of employment

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discrimination claims in Shoney's Inc.'s 1992-1993 settlement of discrimination litigation and State Farm Insurance Company's 1992 settlement of discrimination litigation. Defendant objects that the request is unduly burdensome, overbroad, irrelevant and seeks information that is publicly available, protected work product and/or subject to the attorney-client privilege. The Court finds that Request for Production No. 14 seeking "all documents" is overbroad, not defined with the reasonable particularity required by [Fed.R.Civ.P. 34](#) and is not narrowly tailored in scope or time to seek relevant information or information reasonably calculated to lead to the discovery of admissible evidence. [Fed.R.Civ.P. 26\(b\)](#). The Court will deny Plaintiff's Motion to Compel as to Request for Production No. 14.

#### **B. Notice of Corporate Representative Deposition**

[Fed.R.Civ.P. 30\(b\)\(6\)](#) allows a party to name as a deponent a corporation and describe with reasonable particularity the matters on which the examination is requested. The named organization must designate one or more officers, directors, managing agents or other persons who consent to testify on its behalf and may set forth, for each person designated, the matters on which the person will testify. [Fed.R.Civ.P. 30\(b\)\(6\)](#). The parties agree that the topics described in Plaintiff's Notice of Corporate Representative Deposition correspond with the Second Request for Production of Documents. Each party relies on its objections and arguments set forth with respect to the Document Requests. Notice of Corporate Representative Deposition Item Nos. 1, 2 and 4 correspond with Document Requests 11, 12 and 14.

The parties do not dispute that Defendant timely responded to Plaintiff's discovery requests and served an Objection to Notice of Corporate Representative Deposition. Plaintiff noticed this deposition prior to the close of discovery and brought its motion to compel prior to the motion deadline. For the reasons

set forth with respect to Request for Production Nos. 11 and 12, above, the Court will order Defendant to produce a corporate representative to testify on the undisputed issues in Plaintiff's Notice of Corporate Representative Deposition and the subjects included in Deposition Item Nos. 1 and 2 (corresponding to Request for Production Nos. 11 and 12, above).

**IT IS THEREFORE ORDERED** that Plaintiff's Motion to Compel Discovery is GRANTED in part as set forth above and Defendant will serve responses and produce documents responsive to Request for Production Nos. 11 and 12 on or before June 2, 2008.

**IT IS FURTHER ORDERED** that Defendant will designate on or before May 19, 2008 one or more corporate representatives to testify on or before June 16, 2008 on the matters set forth in Deposition Item Nos. 1 and 2 [Request for Production Nos. 11 and 12] and the remaining undisputed Deposition Items.

**\*4 IT IS FURTHER ORDERED** that Plaintiff's Motion to Compel as to Request for Production No. 14 is **DENIED**.

#### **NOTICE TO THE PARTIES**

Pursuant to [Fed.R.Civ.P. 72\(a\)](#), the parties have a period of ten days from the date of this Order within which to file any written appeal to the District Judge as may be permissible under [28 U.S.C. 636\(b\)\(1\)](#).

E.D.Mich.,2008.

Visteon Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.

Not Reported in F.Supp.2d, 2008 WL 2026131 (E.D.Mich.)

END OF DOCUMENT

239 F.R.D. 62  
(Cite as: 239 F.R.D. 62)



United States District Court,  
D. Connecticut.  
PITNEY BOWES, INC.  
v.  
KERN INTERNATIONAL, INC.  
No. 3:05 CV 1455(JBA).

Nov. 30, 2006.

**Background:** Suit was brought alleging infringement of patent for a dual collating machine. Plaintiff filed a motion to compel production of certain technical drawings and for sanctions.

**Holding:** The District Court, [Margolis](#), United States Magistrate Judge, held that technical drawings related to accused machines, which were in the possession or custody of defendant subsidiary's foreign parent, were not in the "control" of subsidiary.

Motion granted in part and denied in part.

West Headnotes

**[1] Patents 291** 292.3(2)

291 Patents

291XII Infringement

291XII(C) Suits in Equity

291k292 Discovery

291k292.3 Production of Documents and Things

291k292.3(2) k. Subject matter.

**Most Cited Cases**

Technical drawings related to defendant's accused machines were relevant for discovery purposes in patent infringement action. [Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A.](#)

**[2] Federal Civil Procedure 170A** 1574

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things

170AX(E)2 Subject Matter in General

170Ak1574 k. Existence, possession, custody, control and location. [Most Cited Cases](#)

For discovery purposes, a party "controls" documents that it has the right, authority, or ability to obtain upon demand. [Fed.Rules Civ.Proc.Rule 34, 28 U.S.C.A.](#)

**[3] Federal Civil Procedure 170A** 1619

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things

170AX(E)4 Proceedings

170Ak1615 Motion and Proceedings Thereon

170Ak1619 k. Possession, custody and control. [Most Cited Cases](#)

Party seeking discovery has burden to establish that the documents are in opposing party's "control." [Fed.Rules Civ.Proc.Rule 34, 28 U.S.C.A.](#)

**[4] Patents 291** 292.3(2)

291 Patents

291XII Infringement

291XII(C) Suits in Equity

291k292 Discovery

291k292.3 Production of Documents and Things

291k292.3(2) k. Subject matter.

**Most Cited Cases**

Technical drawings related to accused machines, which were in the possession or custody of defendant subsidiary's foreign parent, were not in the "control" of subsidiary, which was also parent's exclusive U.S. distributor, and therefore were not subject to discovery in patent infringement action where there was no evidence that those documents were necessary to the business of subsidiary or that the requested documents were produced in the nor-



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mal course of its business; however, to the extent that subsidiary intended to rely upon any of those documents in its defense, it would be required to produce copies. [Fed.Rules Civ.Proc.Rule 34, 28 U.S.C.A.](#)

## Patents 291 328(2)

### 291 Patents

291XIII Decisions on the Validity, Construction, and Infringement of Particular Patents

291k328 Patents Enumerated

291k328(2) k. Original utility. Most Cited

#### Cases

5,083,769. Cited.

\*63 David J. Silvia, John Gerard Stretton, Scott D. Wofsy, Edwards Angell Palmer & Dodge, LLP, Stamford, CT, for Plaintiff.

Christopher J. Renk, Erik S. Maurer, Matthew P. Becker, Theodore L. Field, Banner & Witcoff, Ltd., Chicago, IL, James F. Dedonato, McCarter & English, Hartford, CT, for Defendant.

### RULING ON PLAINTIFF'S MOTION TO COMPEL AND FOR SANCTIONS

MARGOLIS, United States Magistrate Judge.

Plaintiff Pitney Bowes, Inc. commenced this litigation on September 15, 2005 against defendant Kern International, Inc. ["KII"], alleging patent infringement of [United States Letters Patent No. 5,083,769](#), entitled "Dual Collating Machine" ["769 Patent"]. (Dkt.# 1). On April 28, 2006, defendant filed its Answer, Affirmative Defenses and Counterclaims (Dkt.# 41), to which plaintiff filed its Answer and Reply on May 18, 2006. (Dkts.#43-44).

On August 16, 2006, plaintiff filed the pending Motion to Compel Production of Certain Technical Drawings and for Sanctions and brief and affidavit in support. <sup>FN1</sup> (Dkts.#53-55). Defendant filed its brief in opposition on September 11, 2006 <sup>FN2</sup> (Dkt.# 57), and plaintiff filed its reply brief four-

teen days later. <sup>FN3</sup> (Dkt.# 58). On October 3, 2006, United States District Judge Janet Bond Arterton referred this case to this Magistrate Judge for purposes of supervising discovery. (Dkt.# 59). On November 14, 2006, this Magistrate Judge filed an Order (Dkt.# 66), requiring certain documents designated as "confidential" by defendant be submitted to the Magistrate Judge for her *in camera* review; such documents were received on November 21, 2006 ["Confidential Documents"].

FN1. Attached to plaintiff's brief in support (Dkt.# 54) are the following ten exhibits: copy of Plaintiff's Second Request for Production of Documents and Things (11-51), dated March 1, 2006 (Exh. A); affidavit of David J. Silva, sworn to August 16, 2006 (Exh. B; *see also* Dkt. # 55); copy of defendant's Answer and Counterclaims, dated April 28, 2006 (Exh. C); copy of defendant's Corporate Disclosure Statement, dated October 21, 2005 (Exh. D); copy of Declaration of Thomas Brock in Support of Kern's Motion to Dismiss or Transfer, sworn to November 10, 2005 (Exh. E); copies of correspondence between counsel, dated August 2 & 7, 2006 (Exhs.F-G); copy of Company Lookup Reports, printed November 8, 2002 (Exh. H); and copies of correspondence between the parties, dated November 18, 2002 & December 16, 2002 (Exhs.I-J).

FN2. Attached to defendant's brief in opposition is a Declaration of Thomas Brock, sworn to September 11, 2006 ["Brock Decl."] (Dkt.# 57-2); copies of case law; copies of nine photographs; and copy of e-mail correspondence, dated August 10, 2006 ["Brock Decl. Exh. 1"].

FN3. Attached to plaintiff's reply brief is a copy of the '769 Patent (Exh. A) and copies of promotional literature for the Kern 971 and 970 Single Sheet Feeder and photographs (Exh. B).

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Under the latest scheduling order, all fact discovery is to be completed by November 30, 2006 and all expert discovery is to be completed by July 20, 2007. (Dkts.#63-64).<sup>FN4</sup>

**FN4.** Yesterday, plaintiff filed a Motion for Modification of Scheduling Order (Dkt.# 67), to expand the scope of discovery and to extend the deadline for the completion of expert discovery until August 20, 2007.

\***64** For the reasons stated below, plaintiff's Motion to Compel and for Sanctions (Dkt.# 53) is *granted in limited part and denied in large part*.

### I. PROCEDURAL BACKGROUND

On March 1, 2006, plaintiff served its Second Set of Production Requests on defendant. (*See* Dkt. # 54, Exh. A). In Production Request No. 11, plaintiff seeks:

[a]ll documents and things concerning or otherwise relating to the design, development, construction and manufacture of any and all input modules or other document mail finishing equipment sold, distributed, leased, rented or offered for sale by Kern that includes or otherwise incorporates a double-deck collator or double-deck grouping station, including without limitation, the Kern 970 Single Sheet Feeder and/or the Kern 971 Single Sheet Feeder.

Defendant provided responsive documents but did not include a "complete set of design, construction and manufacturing drawings for the Kern 970 Single Sheet Feeder and the Kern 971 Single Sheet Feeder." (Dkt. # 54, at 3-4). On July 27, 2006, pursuant to a request under **FED.R.CIV.P. 34**, plaintiff's litigation counsel, its in-house counsel, and its expert witness inspected the K970 and K971 modules at defendant's premises in Columbus, Ohio. (Dkt. # 54, at 4; Dkt. # 57, at 2). Defendant's employees operated the modules and plaintiff was permitted to manipulate the machines so that a

complete inspection could be made. (Dkt. # 57, at 2-3). Additionally, plaintiff digitally photographed and videotaped the entire inspection with the assistance of a professional photographer. (*Id.* at 3 & Exh. B). According to plaintiff, during this visit, plaintiff's counsel "reiterated [their] request to counsel for KII that KII produce a complete set of design, construction and manufacturing drawings for the accused devices." (Dkt. # 54, at 4). Defense counsel informed plaintiff that the drawings were in the possession of Kern AG ["KAG"], KII's foreign parent (*Id.* at 1, 4). In a letter dated August 2, 2006, plaintiff's counsel again renewed their request that KII supplement its response to Production Request No. 11 (*see* Dkt. # 54, Exh. F), to which KII responded five days later that it does not have control over the technical drawings and KAG has not provided technical drawings that KII previously requested. (*See id.*, Exh. G).

### II. DISCUSSION

In this pending Motion, plaintiff seeks an order compelling defendant to comply with Production Request No. 11 of Plaintiff's Second Request for Production of Documents and Things (11-51), with respect to certain technical drawings. (Dkts.#53-54). Both parties agree that the "critical" issue before the Court is whether defendant KII has "control" over the documents sought, within the meaning of **Rule 34**, in that such documents are now in the possession of its foreign parent, KAG. (*See* Dkt. # 54, at 5; Dkt. # 57, at 2, 7-8).

Plaintiff contends that the term "control" is construed broadly under **Rule 34** and it is the "nature of the relationship" between the party over which the court has jurisdiction and the non-party with possession of the documents that will determine whether production should be ordered. (Dkt. # 54, at 5-6). Plaintiff posits that there is a "close corporate relationship between KII and KAG" (*id.* at 7-8); KII is the exclusive U.S. distributor and a service agent for KAG's products (*id.* at 8-9); and KAG is the true stakeholder of this lawsuit (*id.* at 10-11). Fur-

ther, plaintiff argues that because KAG has been willing to provide documents to KII in support of its defense of this lawsuit, but is not willing to provide documents responsive to plaintiff's requests, KII should be precluded from using the documents provided by KAG in support of its defense. (*Id.* at 11). Finally, plaintiff seeks monetary sanctions against defendant. (*Id.* at 12).

Defendant objects to the production of these technical drawings on two grounds: first, the allegations in this lawsuit will be decided by comparing the claims of plaintiff's asserted patent against defendant's K970 and K971 machines it inspected, and not against technical drawings; and second, defendant does not have "control" of the documents \*65 plaintiff seeks because they are possessed by defendant's parent corporation, KAG, and KAG refuses to provide them to defendant in the ordinary course of business. (Dkt. # 57, at 1-6). Specifically, defendant contends that the manufacturing and construction documents are not "crucial documents" necessary for resolving plaintiff's claims of infringement as infringement is determined by comparing a properly construed patent against the accused device. (*Id.* at 6-7). Moreover, whether a subsidiary has "control" over documents possessed by a parent or a related corporation is a very fact specific inquiry and defendant does not have "control" over the KAG technical documents that plaintiff seeks because it has no right or ability to access the documents in the ordinary course of business; defendant's and KAG's actual business structures and operations refute plaintiff's claim that KII and KAG have a "close corporate relationship"; the fact that KII is a sales and service agent subsidiary for its parent company does not automatically establish "control"; and whether KAG is the "true stakeholder of the lawsuit" does not establish control. (*Id.* at 8-15). Additionally, defendant counters that sanctions are not warranted as its objection is "substantially justified" in light of the factually specific issue of determining whether a subsidiary has "control" over documents. (*Id.* at 15).

In response to defendant's objection, plaintiff argues that the complexity of the accused devices did not permit a complete review of their internal structure during the equipment inspection since "many of the internal structural features ... could not be clearly viewed, photographed, videotaped or studied by [plaintiff]." (Dkt. # 58, at 3). Plaintiff asserts that Ulrich Kern <sup>FN5</sup> and KAG participate in the day to day operations of KII, thus evidencing the close relationship between KII and KAG (*id.* at 3-6), and defendant's concerns over the confidentiality of these documents should be alleviated by the protective order entered by this Court on February 8, 2006. (*Id.* at 6). Moreover, plaintiff reiterates that KAG has provided technical documents to KII for its defense but will not provide these requested documents; KII is indeed in control of these documents; and KII should be precluded from using documents provided by KAG in support of its defense. (*Id.* at 6-10).

FN5. Ulrich Kern is an owner of KAG, a corporate officer of both KII and KAG, and is the "owner, chairman [and] CEO of all the ... Kern companies." (Dkt. # 54, at 7 & Exh. H).

#### A. RELEVANCE

As stated above, defendant disputes plaintiff's argument that the technical design, manufacturing, and construction drawings for the K970 and K971 are "crucial documents," in that in patent cases, infringement is determined by comparing a properly construed patent claim against the accused device. (Dkt. # 57, at 6-7).

[1] "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." FED.R.CIV.P. 26(b)(1). Relevance "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct.

2380, 57 L.Ed.2d 253 (1978) (citation omitted). The party receiving a request must not only produce information which is admissible as evidence, but also information which “appears reasonably calculated to lead to the discovery of admissible evidence.” *Martin v. Valley Nat'l Bank of Arizona*, 140 F.R.D. 291, 300 (S.D.N.Y.1991) (citations omitted). “Reasonably calculated” in Rule 26 means “any possibility that the information sought may be relevant to the subject matter of the action.” *Morse/Diesel, Inc. v. Fidelity & Deposit Co. of Maryland*, 122 F.R.D. 447, 449 (S.D.N.Y.1988) (citations & internal quotation marks omitted). Thus, to the extent that plaintiff seeks to obtain technical drawings related to defendant's accused machines, those requests are relevant and while defendant urges that plaintiff had an ample opportunity to inspect, photograph and videotape the accused K970 and K971 products, defendant does not dispute the relevance of the technical drawings. ( See Dkt. # 58, at 1; Dkt. # 57, at 2-3). “Indeed, the technical specifications in drawings related to \*66 [defendant's machines]-the accused devices at issue in the case-[are] not only directly and highly relevant, but indeed are critical to the infringement claims asserted in the case.” *Cornell Research Found., Inc. v. Hewlett Packard Co.*, 223 F.R.D. 55, 74 (N.D.N.Y.2003).

#### B. DEFENDANT'S “CONTROL” OVER THE REQUESTED DOCUMENTS

[2][3] Rule 34 of the Federal Rules of Civil Procedure reads, in relevant part:

(a) **Scope.** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs ...), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom

the request is served .....

#### (b) Procedure.

...

A party who produces documents for inspection shall produce them as they are kept in the usual course of business

(c) **Persons Not Parties.** A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45.

The word “control” under Rule 34 is “broadly construed” such that a “party controls documents that it has the right, authority, or ability to obtain upon demand.” *Scott v. Arex, Inc.*, 124 F.R.D. 39, 41 (D.Conn.1989) (citations omitted). It is plaintiff's burden to establish that the documents are in defendant's “control.” See *Glaxo Inc. v. Boehringer Ingelheim Corp.*, 40 U.S.P.Q.2d 1848, 1850 (D.Conn.1996). The determination of whether defendant KII has “control” over the documents sought by plaintiff is a “very fact specific” inquiry. *Playboy Entm't Group, Inc. v. U.S.*, No. CIV. A. 96-94-JJF, 1997 WL 873550, at \*3 (D.Del. Dec.11, 1997). While “the particular *form* of the corporate relationship does not govern whether a party controls documents,” *Afros S.P.A. v. Krauss-Maffei Corp.*, 113 F.R.D. 127, 131 (D.Del.1986)(emphasis in original), the “nature of the transactional relationship between the subsidiary and parent ... is pivotal.” *Addamax Corp. v. Open Software Found., Inc.*, 148 F.R.D. 462, 467 (D.Mass.1993).

Within the Second Circuit, courts “go beyond defining ‘control’ as the *legal right* of the [requested] party to obtain the documents and include an inquiry into the *practical ability* of the [requested] party to obtain these documents.” *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 233 F.R.D. 143, 145 (D.Del.2005)(emphasis in original) (citation omitted). In this case, the fact that the documents are held in a foreign country by a

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nonparty does not bar their discovery, although discovery “permitted to be obtained from nonparties may be more limited in some circumstances.” *Ad-damax*, 148 F.R.D. at 468 (multiple citations omitted).

Specifically, where the litigating corporation is the subsidiary and the parent corporation is in possession of the requested documents, courts have found control to exist on the following *alternate* grounds:

- 1) the alter ego doctrine which warrant[s] “piercing the corporate veil”; <sup>FN6</sup>

FN6. Rule 34(a) “does not require plaintiff to demonstrate an alter ego relationship in order to show” that KII “controls” the requested documents that are possessed by KAG. *Camden Iron & Metal, Inc. v. Marubeni Am. Corp.*, 138 F.R.D. 438, 442 (D.N.J.1991).

The “tests for determining whether a corporate entity is the alter ego or a ‘mere department’ of another, are distinct from the issue of whether a parent has legal or practical access to its subsidiary’s documents.” *In re Ski Train Fire of November 11, 2000 Kaprun Austria*, No. MDL 1428(SAS), 2006 WL 1328259, at \*6 (S.D.N.Y. May 16, 2006)

- 2) the subsidiary was an agent of the parent in the transaction giving rise to the lawsuit;

- 3) the relationship is such that the agent-sub-sidiary can secure documents of the principal-parent to meet its own business needs and documents helpful for use in litigation;

\*67 4) there is access to documents when the need arises in the ordinary course of business; and

- 5) subsidiary was marketer and servicer of par-

ent’s product ... in the United States.

*Camden Iron & Metal, Inc. v. Marubeni Am. Corp.*, 138 F.R.D. 438, 441-42 (D.N.J.1991) (citation omitted & footnote added).<sup>FN7</sup> Thus, “in parent/subsidiary situations, the determination of control turns upon whether the intracorporate relationship establishes some legal right, authority *or* ability to obtain the requested documents on demand.” *Id.* at 442 (emphasis in original). Moreover, courts consider “the degree of ownership and control exercised by the parent over the subsidiary, a showing that the two entities operated as one, demonstrated access to documents in the ordinary course of business, and an agency relationship.” *Id.*

FN7. The second test is not relevant here.

#### 1. FIRST AND FIFTH TESTS OF CAMDEN IRON & METAL DECISION

[4] KII is a wholly owned subsidiary of KAG and operates as the exclusive seller of KAG products in the United States. (Dkt. # 54, at 7 & Exh. H). According to plaintiff, there is a “close corporate relationship between KII and KAG”; the owner of KAG, Ulrich Kern, is also a corporate officer of KII; and KII and KAG “work together closely in marketing activities conducted in the United States.” (Dkt. # 53, at 7-8; Dkt. # 58, at 4-5).

In response, defendant asserts that KII and KAG maintain separate corporate operations, and that although Ulrich Kern is the owner, President, and CEO of both companies, neither he nor any other employee serves as a member of both companies’ management teams or executive boards. (Dkt. # 57, at 4, 11-12; *compare* Dkt. # 54, Exh. H). Defendant also points out that while KAG creates marketing materials for all of its distributors, KII is responsible for purchasing the materials from KAG if it so desires. (Dkt. # 57, at 11). Defendant has characterized plaintiff’s arguments as “not supported by evidence or law.” (Dkt. # 57, at 10-11).

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In *United States Int'l Trade Comm. v. ASAT, Inc.*, 411 F.3d 245, 255 (D.D.C.2005), the D.C. Court of Appeals acknowledged that it would be “impracticable” to hold that “all wholly owned subsidiaries engaged in sales and servicing” were “controlling their parent company's documents.” 411 F.3d at 255. Rather, “there must be a nexus between the [documents sought] and [the party's] relationship with its parent companies, taking into account, among other things, [the party's] business responsibilities.” *Id.*

In looking at the first and fifth tests in the *Camden Iron & Metal* decision, which focus on the corporate interrelationship between the parent and subsidiary, there is no overlap between executives of KII and KAG, with the exception of Ulrich Kern (Dkt.# 54, Exh. H), and the North American Management Team at KII does not include any employees of KAG. (Dkt. # 57, Brock Decl., ¶¶ 11-12). KII does not distribute KAG equipment solely, but also distributes equipment and software manufactured by at least five other companies; similarly, KAG relies on independent dealerships other than KII, in Germany, England, France, Spain and Russia. (*Id.*, ¶¶ 8, 14). Moreover, Thomas Brock, KII's Secretary General, General Manager and Vice President, avers that KII has never produced, manufactured or distributed any of the products accused of infringement with the expectation that they would be used in Connecticut. (Dkt.# 54, Exh. E, ¶ 10). Rather, KII purchases mail finishing machines, including the K970 and K971, from KAG and resells them to KII customers in the United States, and KII provides its North American customers with routine service and upkeep on the KAG machines it sells. (Dkt. # 57, Brock Decl., ¶¶ 17, 20). Additionally, according to Brock, all of KAG's research and development occurs in Switzerland, and KAG manufactures and assembles the K970 and K971, and all of the other modular machine components that can be used with a K970 or K971, in Switzerland. (*Id.*, ¶¶ 6-7). Brock also has averred that KII attends trade shows for the United States market, and that KAG only participates\*68 with KII in a trade show

held every four years in Chicago because that trade shows “draws an international audience.” (*Id.*, ¶ 19). Defendant's arguments are supported by the Confidential Documents submitted for this Magistrate Judge's *in camera* review. (See Dkt. # 66).<sup>FN8</sup> Thus, these two tests weigh in favor of defendant's position.

FN8. See, e.g., Tab 1; Tab 3; Tab 5; Tab 6; Tab 7; Tab 8; Tab 11; Tab 13; and Tab 14.

## 2. THIRD AND FOURTH TESTS OF CAMDEN IRON & METAL DECISION

The parties do not dispute that the documents sought are not in KII's possession or custody but rather are in the possession or custody of KAG. The third and fourth tests of the *Camden Iron & Metal* decision focus upon access to the parent corporation's documents by the defendant-subsiary. Here, plaintiff asserts that upon request, KII has received documents from KAG including technical drawings, for use in support of KII's defense to this patent infringement suit, and in response to customer inquiries. (Dkt. # 54, at 9-10, 11; Dkt. # 58, at 6-7, 9-10). Plaintiff further contends that KII has already produced four sheets of technical drawings created by KAG in response to plaintiff's production requests, and that KAG has attached a technical drawing via email, to be provided to a U.S. customer of KII. (*Id.*)

Thomas Brock, however, avers that to the contrary, KII purchases operator's manuals and parts catalogs relating to the KAG machines it sells, so that KII can perform routine maintenance services to its customers that purchase KAG machines; only if a customer has a part that is not listed in a KAG parts manual, will KAG provide a part number, and sometimes a drawing to KII, so that the KII technicians can identify the part again. (Dkt. # 57, Brock Decl., ¶¶ 21-23). According to Brock, KAG has “always refused to provide KII” with “technical construction drawings” because “such drawings are critical to KAG's research, development, and manu-

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facture of KAG machines, and disclosing them to subsidiaries and distributors who do not need them to carry out their business operations would unnecessarily risk the core of KAG's business." (*Id.*, ¶¶ 25-26; *see* Dkt. # 57, at 5, 9-10). The Confidential Documents reviewed *in camera* support Brock's affidavit.<sup>FN9</sup>

FN9. *See, e.g.*, Tab 9, Tab 10, Tab 12, and Tab 15.

Further, defendant KII urges this Court to reject plaintiff's argument that "because [KAG] has provided some drawings to KII ... during the ordinary course of business" that it has access to the documents sought in this Motion. (Dkt. # 57, at 10, n. 4). Defendant is correct that the fact that KAG may share "some documents during the ordinary course of business is insufficient to deem [defendant] as having control over the documents underlying the patents at issue." ASAT, 411 F.3d at 255 (citation omitted). Additionally, KAG has made clear that the design, manufacture, or construction drawings of KAG machines are "very sensitive and confidential [and][i]t has never been and will never be the policy of [KAG] to provide such documents and information[ ] for [its] subsidiaries and distributors." (Dkt. # 57, Brock Decl., Exh. 1). According to plaintiff, as the "exclusive U.S. distributor and a service agent for KAG equipment," KII works with KAG equipment everyday "and it is unimaginable that KII would not have access to these documents and the ability to obtain them for its usual business activities." (Dkt. # 54, at 9). Defendant in this case, like the defendant in *Cooper Indus., Inc. v. British Aerospace, Inc.*, 102 F.R.D. 918, 919 (S.D.N.Y.1984), sells and services the products to which the documents relate. However, in that case, the court noted that documents presumed to be in a subsidiary's control are those documents and records that a corporation "requires" in the normal course of its business. *Id.* at 920, n. 2.

In this case, defendant urges that the requested documents are confidential and are not required by KII in its ordinary course of business and, in the ab-

sence of these technical drawings, KII has still been able to sell and service KAG equipment. (Dkt. # 57, at 14). Moreover, as discussed above, Thomas Brock avers that while KII has received documents \*69 and photographs identifying part numbers for key parts of KAG machines and providing detailed instructions on how to operate the machines for routine maintenance, KII has requested various technical construction drawings from KAG to assist in servicing KII customers and KAG has "always refused to provide KII such drawings" because "such drawings are critical to KAG's research, development, and manufacture of KAG machines, and disclosing them to subsidiaries and distributors who do not need them to carry out their business operations would unnecessarily risk the core of KAG's business." (Dkt. # 57, Brock Decl., ¶¶ 21-22, 25-26).

In light of the foregoing, plaintiff has not satisfied its burden of establishing that the documents are in the "control" of KII, as plaintiff has not offered evidence that these documents are necessary to the business of KII or that the requested documents are produced in the normal course of its business. *See Glaxo*, 40 U.S.P.Q.2d at 1850. Because plaintiff has not demonstrated defendant's "ability to easily obtain [the requested documents, specifically, the technical design, manufacture, or construction drawings,] when it [is] in their interest to do so," this factor does not weigh in favor of production of these documents from KAG. *Addamax*, 148 F.R.D. at 466 (citation omitted); *see also Afros S.P.A.*, 113 F.R.D. at 132 (when a parent has provided documents to a subsidiary at the request of the subsidiary, it demonstrates that the requested items are within the subsidiary's reach and the intercorporate relationship balances in favor of finding that the subsidiary has control of the requested documents). Therefore, these two tests of the *Camden Iron & Metal* decision also indicate that KII did not have control over KAG's technical drawings.

C. TRUE STAKEHOLDER OF LAWSUIT

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Lastly, plaintiff posits that KAG is the true stakeholder of this lawsuit as “[n]otably, a response to [plaintiff’s] letter [informing defendant of the infringement,] was not sent by KII, but ... was sent by KAG,” and when the parties attempted to resolve this dispute prior to commencing legal action, it was KAG that was involved. (Dkt. # 54, at 10-11 & Exh. J). According to defendant, whether KAG is the true stakeholder of this lawsuit does not establish control as such contention includes the “assum[ption] that KII will buy additional K970 or K971 units from [KAG] between now and the date the patent-in-suit expires.” (Dkt. # 57, at 14).

“If a non-party will directly receive the benefit of an award, then it is unjust that it can frustrate the discovery process and the complete resolution of the issues by refusing to furnish documents in its possession.” *Afros S.P.A.*, 113 F.R.D. at 131. However, because this factor, “along with others must be weighed in determining control for purposes of Rule 34,” *id.*, this factor, alone, does not establish KII’s control over the documents possessed by KAG.

#### D. PRECLUSION

In addition to compelling KII to disclose the requested documents, plaintiff seeks an order precluding defendant from using the documents provided by KAG in support of its defense of this lawsuit. (Dkt. # 54, at 11). To the extent that defendant KII intends to rely upon any of these KAG documents in defense of this lawsuit, it shall produce copies, if it has not done so already, subject to the Protective Order, *on or before December 8, 2006*.<sup>FN10</sup>

**FN10.** Plaintiff also seeks an award of sanctions to cover the reasonable expenses incurred in making its motion, including attorney’s costs and fees. (Dkt. # 54, at 12). In light of the conclusion reached in this ruling, this request is *denied*.

#### III. CONCLUSION

For the reasons stated above, plaintiff’s Motion to Compel and for Sanctions (Dkt.# 54) is *granted to the limited extent set forth in Section II.D supra and denied to the extent set forth in Sections II.B & C supra*.

This is not a Recommended Ruling but a Ruling on discovery, the standard of review of which is specified in 28 U.S.C. § 636; FED.R.CIV.P. 6(a), 6(e) & 72; and Rule 72.2 of the Local Rules for United States Magistrate \*70 Judges. As such, it is an order of the Court unless reversed or modified by the District Judge upon timely made objection.

Because this ruling is subject to review, see 28 U.S.C. § 636(b) (**written objections to ruling must be filed within ten days after service of same**); FED.R.CIV.P. 6(a), 6(e) & 72; Rule 72.2 of the Local Rules for United States Magistrate Judges, United States District Court for the District of Connecticut; *Small v. Secretary of H & HS*, 892 F.2d 15, 16 (2d Cir.1989) (**failure to file timely objection to Magistrate Judge’s recommended ruling may preclude further appeal to Second Circuit**), the Confidential Documents shall remain in this Magistrate Judge’s Chambers unless and until requested by Judge Arterton, and when appropriate, will be returned to defense counsel.

D.Conn.,2006.  
 Pitney Bowes, Inc. v. Kern Intern., Inc.  
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END OF DOCUMENT



Not Reported in F.Supp.2d, 2002 WL 31385832 (S.D.N.Y.)  
(Cite as: **2002 WL 31385832 (S.D.N.Y.)**)

**H**

Only the Westlaw citation is currently available.

United States District Court,  
S.D. New York.  
Sharon KORMENDI, Plaintiff,

v.

COMPUTER ASSOCIATES INTERNATIONAL,  
INC., Defendant.  
**No. 02Civ.2996(LAK)(DFE).**

Oct. 21, 2002.

Laid off employee brought action alleging that availability of severance pay in connection with layoff had been determined in gender-discriminatory manner. Ruling on discovery disputes, the District Court, [Douglas F. Eaton](#), United States Magistrate Judge, held that: (1) plaintiff was entitled to discover layoff terms of 12 named men and 7 named women, and (2) plaintiff was entitled to discover only those EEOC reporting documents which employer maintained for facilities at which plaintiff had worked.

Ordered accordingly.

## West Headnotes

**[1] Federal Civil Procedure 170A 1591**

**170A** Federal Civil Procedure

**170AX** Depositions and Discovery

**170AX(E)** Discovery and Production of Documents and Other Tangible Things

**170AX(E)3** Particular Subject Matters

**170Ak1591** k. Employment, Records

Of. [Most Cited Cases](#)

Former employee, alleging that availability of severance pay for laid off employees had been determined in gender-discriminatory manner, was entitled to discover documents showing layoff terms of 12 named men and 7 named women.

**[2] Federal Civil Procedure 170A 1591**

**170A** Federal Civil Procedure

**170AX** Depositions and Discovery

**170AX(E)** Discovery and Production of Documents and Other Tangible Things

**170AX(E)3** Particular Subject Matters

**170Ak1591** k. Employment, Records

Of. [Most Cited Cases](#)

Former employee, alleging that availability of severance pay for laid off employees had been determined in gender-discriminatory manner, was entitled to discover only those Equal Employment Opportunity Commission (EEOC) reporting documents which employer maintained for facilities at which employee had worked.

*MEMORANDUM AND ORDER*

**EATON**, Magistrate J.

\*1 I am responding to the October 17 joint letter from Mr. Ranni and from Mr. O'Brien of Nixon Peabody's Garden City office. (I direct Mr. O'Brien to advise me, Judge Kaplan, the Clerk of the Court and Mr. Ranni whether all future mailings in this case should be sent to the Garden City office.)

In the joint letter, defendant asks me to reconsider and clarify certain paragraphs of my September 20 Memorandum and Order (the "Order"). I have reconsidered them, and I now issue the following rulings.

[1] Plaintiff's Document Requests # 6 and # 7 sought all documents relating to compensation and benefits for 12 named men and 7 named women. I narrowed this information to "an affidavit stating how many weeks of pay were given in severance for each person listed." Severance pay was the topic of a New York Times article in March 2001, which is annexed at the end of the exhibits to the October 17 joint letter. Computer Associates fired plaintiff in January 2001, allegedly for poor performance. The Times article reports "Bob Gordon, a company spokesman," as saying that, in January 2001, the

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company terminated about 316 employees and, because of poor performance, about 240 of them did not receive severance pay. The Times explains: "The company's employee handbook says workers will receive two weeks of severance pay for each year they have worked for the company unless they are fired for poor performance." According to the Times, Henry Crouse, a former regional vice president, says that, in January 2001, the company's Human Resources Department directed him to lay off employees by means of false claims of poor performance, so they would be denied severance pay. If this is true, the company's motivation may have been solely a dishonest attempt to save money. But plaintiff alleges that there may have been an additional motivation-- to use false claims of poor performance as a pretext for gender discrimination. I think plaintiff is entitled to learn the severance pay given to the 7 named women and to compare it to the severance pay given to those of the 12 named men who have left the company. If the defendant claims that plaintiff's samples do not provide a meaningful comparison, defendant is free to provide further samples. One comparison that might be meaningful would be the percentages of women in (a) the 240 persons denied severance pay in January 2001, (b) the 76 persons granted severance pay in January 2001, and (c) the persons (like plaintiff) who were denied severance pay in January 2001 but were later offered it. Such information would be more easily sought in a Rule 30(b)(6) deposition rather than in documents requests. On reconsideration, I will limit Document Requests # 6 and # 7 to those of the 19 named persons who left the company during the period from 1/1/97 through 9/30/02. Therefore, I modify my rulings as follows:

*Document Request # 6:* By 10/31/02, defendant shall provide an affidavit stating how many weeks of pay were given in severance for each of the 12 named men who left the company during the period from 1/1/97 through 9/30/02.

*\*2 Document Request # 7:* By 10/31/02, defendant shall provide (a) all of the requested documents

pertaining to plaintiff; and (b) an affidavit stating how many weeks of pay were given in severance for each of the 7 named women who left the company during the period from 1/1/97 through 9/30/02. If plaintiff desires information relating to compensation, salary increases, insurance plans, etc. as to the named individuals, plaintiff must contact each of them to see if they are willing to sign authorizations so that she may obtain this information.

With respect to Document Requests # 2, # 6 and # 17 "(a)," plaintiff now wishes to add a 13th man, Kurt Seibert. I will permit Mr. Ranni to add Kurt Seibert to those Requests and to the affidavit he is preparing pursuant to the second paragraph of my September 20 order.

[2] Document Requests # 10 and # 29 concern the defendant's documents maintained pursuant to EEOC reporting requirements. Defendant writes that the EEOC requires it to file EEO-1 reports for each of its 85 facilities throughout the United States, but that plaintiff worked only at the headquarters in Islandia, New York and at the New York City facility. Plaintiff wants demographic information concerning the entire company. On reconsideration, my rulings are:

*Document Request # 10:* By 10/31/02, defendant shall provide documents maintained pursuant to EEOC reporting requirements for the period from 1/1/99 through 12/31/01 for its facilities in Islandia and New York City. Also by 10/31/02, defendant shall provide an affidavit listing the number of women and the number of men employed by the defendant nationwide as of the same or comparable dates in 1999, 2000, and 2001.

*Document Request # 29:* By 10/31/02, defendant shall provide its EEO-1 reports for the period from 1/1/99 through 12/31/01 for its facilities in Islandia and New York City.

Document Requests # 17 "(b)" and # 22 sought documents concerning discrimination complaints

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by the 7 named women. More recently, plaintiff has sought to add an 8th person, Bruce Hegg, who is the husband of one of the women; he was fired recently, allegedly in retaliation for complaining about discrimination against his wife. I will allow plaintiff to add his name, even though it appears that plaintiff herself did not complain about discrimination before she was fired. My September 20 Order limited Request # 17 “(b)” to the period from 1/1/99 through 12/31/01 but did not specify any time limit for Request # 22. In the October 17 joint letter, defendant points out that Ms. Burckle left the company in 1986, and I agree that is too remote in time. On the other hand, I find that the information about Mr. Hegg and about the other women (including those terminated in 1997 and 1998) is relevant to the subject matter of this action and appears reasonably calculated to lead to the discovery of admissible evidence. See Rule 26(b)(1). Therefore, I modify my rulings as follows:

**\*3 Document Request # 17 “(b)”:** This request shall be deemed to include Bruce Hegg. By 10/31/02, defendant shall provide all of the requested documents for the period from 1/1/97 through 9/30/02.

*Document Request # 22:* This request shall be deemed to include Bruce Hegg. By 10/31/02, defendant shall provide all of the requested documents for the period from 1/1/97 through 9/30/02.

With respect to Requests # 17 “(b)” and # 22, defendant may provide an affidavit with respect to any complaint that was settled pursuant to a signed confidentiality agreement, in which case the affidavit shall provide the name of the complainant, the date of his or her first complaint (whether written or not), the date of any Charge of Discrimination filed with the EEOC or similar state or local agency, the date on which the complaint was settled, the date on which the confidentiality agreement was signed, the text of the confidentiality language, and the caption, court and index number of any lawsuit.

As to Document Request # 31, my September 20 Order said: “By 10/18/02, defendant shall provide all e-mail messages mentioning plaintiff for the period from 1/1/00 through 1/31/01, excluding any communications between defendant and its attorneys. Plaintiff must pay the cost of the e-mail search.” In the October 17 joint letter, defendant says it “has no method to locate and reconstruct e-mails mentioning plaintiff for the listed period, and its document retention policy calls for employees to retain e-mails for a period of only thirty (30) days. In any event, CA already has sought to collect e-mails from those persons who were involved in plaintiff’s termination, and has produced those that exist.” Plaintiff is free to ask for the names of those persons, and to suggest others who might have saved relevant e-mails. Plaintiff has little incentive to demand expensive searches, since plaintiff must pay the cost of the e-mail search. In the October 17 joint letter, plaintiff writes, prematurely: “Should Defendant be unable to produce these records, Plaintiff should be entitled to Defendant being precluded from raising these documents in evidence in the future as well as a missing evidence charge.” If defendant should seek to offer testimony describing the contents of a destroyed e-mail, plaintiff would then have a ripe controversy and could then apply to Judge Kaplan for whatever relief she seeks.

S.D.N.Y., 2002.

Kormendi v. Computer Associates Intern., Inc.

Not Reported in F.Supp.2d, 2002 WL 31385832 (S.D.N.Y.)

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237 F.R.D. 561, 66 Fed.R.Serv.3d 508  
(Cite as: 237 F.R.D. 561)

## H

United States District Court,  
D. Maryland.  
STEELE SOFTWARE SYSTEMS, CORPORA-  
TION, Plaintiff/Judgment Debtor  
v.  
DATAQUICK INFORMATION SYSTEMS, IN-  
CORPORATED, Defendant/Judgment Creditor.  
**Civil Action No. JFM-05-2017.**

Oct. 3, 2006.

**Background:** Judgment creditor sought discovery in aid of collection of its judgment against debtor and its successor corporation.

**Holding:** On creditor's motion to compel, the District Court, [Grimm](#), United States Magistrate Judge, held that corporate judgment debtor had control over documents in possession of nonparty corporate relatives.

Motion granted.

West Headnotes

### [1] Federal Civil Procedure 170A 1574

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things

170AX(E)2 Subject Matter in General

170Ak1574 k. Existence, Possession, Custody, Control and Location. **Most Cited Cases** A district court may order the production, for discovery purposes, of documents in the possession of a related nonparty entity, if those documents are under the custody or control of a party to the litigation. [Fed.Rules Civ.Proc.Rule 34\(a\)](#), 28 U.S.C.A.

### [2] Federal Civil Procedure 170A 1574

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things

170AX(E)2 Subject Matter in General

170Ak1574 k. Existence, Possession, Custody, Control and Location. **Most Cited Cases** "Control," for purposes of district court's authority to order the production, for discovery purposes, of documents in the possession of a related nonparty entity if those documents are under the custody or control of a party to the litigation, means a party's legal right, authority, or practical ability to obtain the materials sought on demand. [Fed.Rules Civ.Proc.Rule 34\(a\)](#), 28 U.S.C.A.

### [3] Federal Civil Procedure 170A 1574

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things

170AX(E)2 Subject Matter in General

170Ak1574 k. Existence, Possession, Custody, Control and Location. **Most Cited Cases** Factors relevant to determining whether a party has control over documents that are in possession of related nonparty, so that district court may order production of the documents during discovery, are: (1) corporate structure of party/nonparty; (2) nonparty's connection to transaction at issue in the litigation; (3) degree that nonparty will benefit from outcome of the case; (4) whether the related entities exchange documents in ordinary course of business; and (5) whether nonparty has participated in the litigation. [Fed.Rules Civ.Proc.Rule 34\(a\)](#), 28 U.S.C.A.

### [4] Federal Civil Procedure 170A 1574

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things

170AX(E)2 Subject Matter in General

[170Ak1574](#) k. Existence, Possession, Custody, Control and Location. [Most Cited Cases](#) Common relationships between party and its related nonparty entity are particularly important to determination whether party has control over documents in possession of related nonparty, so that district court may order production of the documents during discovery, and critical factors include the ownership of nonparty, any overlap of directors, officers, and employees, and financial relationship between the two entities. [Fed.Rules Civ.Proc.Rule 34\(a\)](#), 28 U.S.C.A.

**[5] Federal Civil Procedure 170A**  **1619**

170A Federal Civil Procedure

[170AX](#) Depositions and Discovery

[170AX\(E\)](#) Discovery and Production of Documents and Other Tangible Things

[170AX\(E\)4](#) Proceedings

[170Ak1615](#) Motion and Proceedings

Thereon

[170Ak1619](#) k. Possession, Custody and Control. [Most Cited Cases](#)

Because burden of proof rests with party seeking production of documents in discovery, unsubstantiated assertion that party has control over documents in possession of related nonparty, so that district court may order production of documents, generally does not suffice, but the burden may shift when party from whom production is sought fails to respond to assertions of control when given opportunity to do so. [Fed.Rules Civ.Proc.Rule 34\(a\)](#), 28 U.S.C.A.

**[6] Federal Civil Procedure 170A**  **2713**

170A Federal Civil Procedure

[170AXVIII](#) Execution

[170Ak2707](#) Supplementary Proceedings

[170Ak2713](#) k. Examinations. [Most Cited Cases](#)

Corporate judgment debtor had control over documents in possession of nonparty corporate relatives, and thus, district court had authority to order production of such documents, in judgment creditor's

proceeding seeking discovery in aid of collection of judgment; nonparty entities shared common ownership, officers, and legal counsel with debtor, nonparties were closely related to debtor, e.g., debtor's web site identified nonparties as affiliates of debtor, and nonparties operated from same location as debtor. [Fed.Rules Civ.Proc.Rule 34\(a\)](#), 28 U.S.C.A.

**[7] Federal Civil Procedure 170A**  **2713**

170A Federal Civil Procedure

[170AXVIII](#) Execution

[170Ak2707](#) Supplementary Proceedings

[170Ak2713](#) k. Examinations. [Most Cited Cases](#)

Even assuming judgment creditor had not established that corporate judgment debtor had control over documents in possession of nonparty corporate relatives, so that district court had authority to order production of such documents in judgment creditor's proceeding seeking discovery in aid of collection of judgment, debtor failed to sufficiently respond to creditor's assertions of control when given opportunity to do so, and thus, burden of proof shifted to debtor; debtor presented no facts or case law that would militate against finding of control when it had the chance to do so, and instead made conclusory assertion that creditor had failed to provide authority to support the proposition that a document request served on a single party creates a legal obligation to produce documents upon other entities who are not parties to the proceeding. [Fed.Rules Civ.Proc.Rule 34\(a\)](#), 28 U.S.C.A.

\*562 Michael John Collins, Thomas and Libowitz PA, Baltimore, MD, for Plaintiff/Judgment Debtor.

[Beverly Johnson](#), Dorsey and Whitney LLP, Irvine, CA, [James E. Gray](#), [Jason Charles Rose](#), [Stephen Edward Marshall](#), Venable LLP, Baltimore, MD, for Defendant/Judgment Creditor.

**MEMORANDUM OPINION**

[GRIMM](#), United States Magistrate Judge.

This case has been referred to me to preside over garnishment proceedings, Paper No. 60, which arise from the efforts of DataQuick Information Systems, Inc. (“DataQuick”) to collect on a judgment issued in its favor against Steele Software Systems Corp. (“Steele Software”) and its successor corporation, Three S Delaware, Inc. (“Three S”).<sup>FN1</sup> After receiving judgment in its favor, DataQuick commenced discovery to obtain information that would allow it to satisfy the judgment. This Memorandum supplements the ruling that I issued from the bench during a telephone hearing held on August 31, 2006, which disposed of Paper Nos. 79, 96 and 112. At issue is the scope of DataQuick’s Rule 34 document requests; specifically, whether the reach of Rule 34 extends to documents in the physical possession of Steele’s corporate affiliates.

**FN1.** Except where otherwise noted, Steele Software and Three S are collectively referred to herein as “Steele.”

### Background

Steele initiated this action in an attempt to vacate an arbitration award that had been entered against it in DataQuick’s favor. Paper No. 1. Things did not work out as Steele had planned, and on January 17, 2006, this Court enforced the arbitration award and entered judgment for monetary damages as well as injunctive relief against Steele Software and its affiliates in the amount of \$ 6,174,185.64. Paper No. 37. Soon thereafter, in January 2006, Steele Software merged with Three S, with Three S being the surviving corporation.<sup>FN2</sup> Paper No. 58, Exs. 2 & 3.

**FN2.** The merger filings state in pertinent part that “Steele Software” no longer exists, but that Three S would be subject to all of the Steele Software debts and obligations. Paper No. 58, Ex. 4.

After the judgment was entered, DataQuick commenced discovery to aid in its enforcement of the

judgment. On March 8, 2006, DataQuick served its first request for the production of documents on Steele. (Mot. to Compel at 3). Consistent with common practice, DataQuick’s request for the production of documents contained a “Definitions” section. In it, the term “you” was broadly defined as,

Steele Software Systems Corp., its affiliates, subsidiaries, parents, officers, directors, agents, employees, shareholders, attorneys, predecessors and successors, including Scott Steele, Meneta Steele, SteeleSoft, Inc., SteeleSoft Management, LLC, Three S Delaware, Inc., 3S/RealServ, Inc., and Iautomortgage Corp.

(Resp. at 3). The document requests also sought 29 categories of documents, the substance of which are not relevant to the limited subject matter of this supplemental written opinion.

**\*563** Steele’s responses were due on April 7, 2006. On April 6, 2006, Steele Software requested an extension of time to respond.<sup>FN3</sup> (Mot. to Compel at 3). DataQuick agreed to a limited extension under certain conditions, namely, that Steele Software file written responses to the document requests by April 10, 2006, and that responsive documents themselves be produced on a rolling basis between April 10, 2006 and April 24, 2006. *Id.*

**FN3.** At this point in the proceedings there was some confusion over who was representing Steele Software. The initial request for an extension of time was made by an attorney at Whiteford, Taylor & Preston, LLP (“Whiteford”), who had not entered his appearance on Steele’s behalf. A second request for an extension was filed by Thomas & Libowitz, PA, Steele’s counsel of record. Separate written responses to DataQuick’s requests for the production of documents were ultimately filed by each law firm. (Mot. to Compel at 3-5).

Steele did file written responses as agreed. Predictably, the responses contained numerous objections

to DataQuick's requests. For the limited purposes of this discussion, we are concerned only with Steele's general objection to the scope of the document requests. Specifically, Steele objected to DataQuick's definition of the term "you." Steele claimed that DataQuick's definition of this term was overly broad to the extent that Steele would be required to produce documents held by related corporate entities that were not parties to the litigation. (*See* Resp. at 3-4).

Steele failed to produce most of the documents requested, although it did turn over approximately seventy-five (75) documents to DataQuick, most of which related to the corporate formation of Three S Delaware, Inc., the successor corporation that had merged with Steele Software Systems after the entry of judgment against Steele Software. (Mot. to Compel at 5). On April 26, 2006, further document production was stayed when Steele filed a petition for bankruptcy in the United States Bankruptcy Court for the District of Delaware. Paper No. 61. [FN4](#)

[FN4](#). The bankruptcy ultimately was withdrawn by Steele during a hearing at which the presiding bankruptcy judge commented that the filing of the proceeding in Delaware, instead of Maryland, was an obvious attempt to forum shop.

When Steele emerged from bankruptcy in late June 2006, DataQuick immediately resumed its efforts to obtain documents from Steele pursuant to its document requests. (Mot. to Compel at 6-7). In response to DataQuick's efforts, Whiteford, which now represented Steele in these proceedings, informed DataQuick that Steele was not in a position to produce documents until the end of August. By this time, the documents were more than sixty (60) days overdue. (Resp. at 2).

DataQuick filed a motion to compel under Rule 37 seeking the production of the documents sought by its initial requests. Paper No. 79. With regard to the scope of the document requests, DataQuick argued

that documents in the possession of the other Steele entities identified in its definition of "you" were within Steele's actual or constructive possession, custody or control, and therefore should be produced pursuant to [Rule 34](#). (Mot. to Compel at 18). Steele argued that it should not be required to produce documents that are in the physical possession of other nonparty Steele-related entities because DataQuick's document requests were served only upon Steele Software and, moreover, were not within Steele Software's custody or control. (Resp. at 3-4). A telephone hearing was held on the motion on August 31, 2006, at which time I issued my rulings on this and other matters raised in DataQuick's motion to compel. However, because the reach of [Rule 34\(a\)](#) to nonparties has not been addressed recently by this Court or the Fourth Circuit, I have decided to publish a written memorandum and opinion further explaining my ruling, with the hope that it may be of assistance to the bench and the bar in resolving similar disputes in the future.

### Discussion

[Rule 34 of the Federal Rules of Civil Procedure](#) governs the production of documents and tangible things in civil discovery. [FED. R. CIV. P. 34. Rule 34\(a\)](#) permits a party to serve on any other *party* a request for the production of documents or things \*564 within that *party's* "possession, custody or control." [Fed.R.Civ.P. 34\(a\)](#) (emphasis added). With regard to non-parties, [Rule 34\(c\)](#) contemplates that they may be required to produce documents through the use of a subpoena issued under Rule 45. The issue before me is whether a party should be required to produce documents that are within its "control" for the purposes of [Rule 34\(a\)](#), but that are in the physical possession of another entity that is not a party. This issue necessarily turns on whether a party has "control" of the documents at issue for the purposes of [Rule 34\(a\)](#). Although the rule itself does not directly address this issue, the case law has filled in the gaps.

[\[1\]\[2\]](#) It is well established that a district court may

order the production of documents in the possession of a related nonparty entity under [Rule 34\(a\)](#) if those documents are under the custody or control of a party to the litigation. *See, e.g., Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 204, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958); *Evenflo Co., Inc. v. Hantec Agents Limited*, 2006 WL 1580221 (S.D. Ohio 2006); *Uniden America Corp. v. Ericsson, Inc.*, 181 F.R.D. 302, 305 (M.D.N.C.1998); *Hubbard v. Rubbermaid*, 78 F.R.D. 631, 637 (D.Md.1978). “ ‘Control’ has been construed broadly by the courts as the legal right, authority, or practical ability to obtain the materials sought on demand.” *SEC v. Credit Bancorp, Ltd.*, 194 F.R.D. 469, 471 (S.D.N.Y.2000) (citations omitted) (applying the interpretation of control under [Rule 34](#) to a Rule 45 subpoena). This Court ordered [Rule 34](#) production by a nonparty in *Hubbard v. Rubbermaid*, an employment case in which the defendant was ordered to produce documents in the possession of two wholly owned nonparty subsidiaries. In ordering the production, Judge Blair observed that “[t]he crucial factor is that the documents must be in the custody or under the control of a party to the case.” 78 F.R.D. at 637. The specific form of the corporate relative involved does not matter, *i.e.*, whether it is a parent, sister, or subsidiary corporation. Courts are able to disregard corporate form to prevent, among other things, “misleading actions whereby corporations try to hide documents or make discovery of them difficult.” *Uniden*, 181 F.R.D. at 306.

[3] Several factors are relevant to determining whether a party has control over documents that are in the possession of a related nonparty for the purpose of [Rule 34](#). In *Afros S.P.A. v. Krauss-Maffei Corporation*, 113 F.R.D. 127, 130 (D.Del.1986), the court identified three: (1) the corporate structure of the party/nonparty, (2) the nonparty's connection to the transaction at issue in the litigation, and (3) the degree that the nonparty will benefit from the outcome of the case. *Id.* at 331. Other relevant factors include whether the related entities ex-

change documents in the ordinary course of business, and whether the nonparty has participated in the litigation. *Uniden*, 181 F.R.D. at 306.

[4] Common relationships between a party and its related nonparty entity are particularly important to the determination of control. Critical factors here include the ownership of the nonparty, any overlap of directors, officers, and employees, and the financial relationship between the two entities. *Afros S.P.A.*, 113 F.R.D. at 130. Control has been found where the party and its related nonparty affiliate are owned by the same individual. For example, in *Perini America, Inc. v. Paper Converting Machine Co.*, the court found that a party and its nonparty parent company were alter egos of the same owner, who served as the president and chief operating officer of the subsidiary and the president of its nonparty parent corporation. 559 F.Supp. 552 (E.D.Wis.1983). The related companies also shared a common member on their board of directors. *Id.* Likewise, in *Evenflo*, the court ordered the production of documents in the possession of related companies owned by the party's father. 2006 WL 1580221 at \*3-4. Common control of documents is also found where related entities share management. For example, in *Uniden*, the court found evidence of control where the executive vice president of the litigating parent corporation reported to the subsidiary's general manager and vice president, who was regarded as his boss. 181 F.R.D. at 307.

\*565 Other factors may be equally important depending on the facts and circumstances of a particular case. For example, in *Afros S.P.A.*, the court stressed the relationship of the parent corporation to the underlying litigation because the parent had assigned the patents at issue to its litigating subsidiary. 113 F.R.D. at 132. The fact that the corporate relatives shared documents on a regular basis was considered in *Uniden*, as was the fact that the nonparty parent had a direct interest in the outcome of the litigation. 181 F.R.D. at 307.

[5] Documents in the possession of a nonparty are not automatically subject to discovery under [Rule](#)



34 simply because the nonparty has a corporate relationship to a party to the litigation. Ordinarily, a party seeking the production of documents from a nonparty must provide specific facts demonstrating that some or all of the foregoing factors of control are present. *Cotracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 655, 663 (D.Kan.1999). See also *Uniden*, 181 F.R.D. at 307 (“if the factors are present, then an inference of control is found.”). Because the burden of proof rests with that party seeking production, therefore “[a]n unsubstantiated assertion [of control] generally does not suffice.” *Id.* The burden may shift, however, when the party from whom production is sought fails to respond to assertions of control when given the opportunity to do so. *Cotracom*, 189 F.R.D. at 663.

[6] In this case, it is clear that documents in the possession of the Steele entities identified in DataQuick's definition of “you” are under the practical control of Steele and its owner, Scott Steele. First, the Steele entities share common ownership. Scott Steele is the owner (directly and indirectly), sole shareholder, and president of all Steele entities except for 3 S/Realserv, Inc., whose president and owner is his seventy-four (74) year old mother, Meneta Steele. Meneta Steele was also the corporate secretary of Steele Software and now holds the same position with its successor, Three S Delaware, Inc. She is represented by the same counsel that represents Steele in the instant case.

Steele's corporate entities also are closely related. In December 2004 SteeleSoft, Inc. entered into a stock exchange agreement with Steele Software. In January 2004, Three S merged with Steele Software, assuming all of its debts. SteeleSoft is the parent and sole shareholder of Three S, and Scott Steele is the sole shareholder in SteeleSoft. SteeleSoft's website identifies 3S/RealServ, Inc. as a “SteeleSoft company,” and iautomortgage corporation as an “affiliate of SteeleSoft.” The interrelation between these entities is obvious, a fact that Judge Motz acknowledged by granting injunctive relief against, not only Steele Software, but “Steele Soft-

ware and all affiliated entities” in his January 17, 2006 Order. Paper No. 37. Finally, the practical burden on Steele of producing these documents will be minimal. The documents should be readily available to Steele considering that all Steele companies are operated out of the same location.

[7] DataQuick has asserted more than enough facts to show the requisite degree of control by Steele. Even if it had not, however, Steele presented no facts or case law that would militate against a finding of control when it had the chance to do so. Although DataQuick asserted many of the above described facts regarding the relationship between Steele and the other nonparty entities in its Motion to Compel, Steele's response was to argue, in a conclusory fashion, that “DataQuick has failed to provide authority to support the proposition that a document request served on a single party creates a legal obligation to produce documents upon other entities who are not parties to the proceeding.” (Resp. at 4). Steele chose not to particularize the reasons why this argument would preclude its production of documents by, for example, citing any case law or setting forth any facts that would demonstrate that the documents requested were not under its possession, custody or control. This response was inadequate.

For the foregoing reasons, I find that DataQuick has produced more than enough evidence to demonstrate that Steele has control over documents in the possession of the corporate relatives identified by DataQuick. Therefore, as I already ruled during the \*566 August 31, 2006 hearing, DataQuick's Motion to Compel is GRANTED. Steele's document production shall include responsive documents in the possession of the Scott Steele, Meneta Steele, SteeleSoft, Inc., Steele Soft Management, LLC, Three S Delaware, Inc., 3S/RealServ, Inc., and iautomortgage Corp.

D.Md.,2006.

Steele Software Systems, Corp. v. DataQuick Information Systems, Inc.

237 F.R.D. 561, 66 Fed.R.Serv.3d 508

237 F.R.D. 561, 66 Fed.R.Serv.3d 508  
(Cite as: 237 F.R.D. 561)

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225 F.R.D. 538  
 (Cite as: 225 F.R.D. 538)

## H

United States District Court,  
 N.D. Texas,  
 Dallas Division.  
 Garrett SCHWAB, Plaintiff,  
 v.  
 WYNDHAM INTERNATIONAL, INC., et al., De-  
 fendants.  
 No. 3-04-CV-1748-L.

Jan. 21, 2005.

**Background:** Plaintiff bringing gender discrimina-  
 tion and retaliation claim under Title VII moved to  
 compel entry to defendant's premises for inspection  
 and photographing.

**Holding:** The District Court, [Kaplan](#), United States  
 Magistrate Judge, held that request was too broad.  
 Motion denied.

West Headnotes

### [1] Federal Civil Procedure 170A 1581

#### 170A Federal Civil Procedure

##### 170AX Depositions and Discovery

170AX(E) Discovery and Production of Doc-  
 uments and Other Tangible Things

##### 170AX(E)3 Particular Subject Matters

##### 170Ak1581 k. In General. Most Cited

#### Cases

Request for premises inspection, made by claimant  
 bringing Title VII discrimination and retaliation  
 claim, was overly broad; it applied to a work area  
 embracing 152,000 square feet of office space and  
 housing 22 departments, most having nothing to do  
 with present case, and containing many sensitive  
 and confidential files. Civil Rights Act of 1964, §  
 701 et seq., 42 U.S.C.A. § 2000e et seq.; [Fed.Rules  
 Civ.Proc.Rule 34](#), 28 U.S.C.A.

\*538 [Robert J. Wiley](#), Law Office of Rob Wiley,  
 Dallas, TX, for Plaintiff.

[Bryant S. McFall](#), Ogletree, Deakins, Nash, Smoak  
 & Stewart, Dallas, TX, for Defendants.

### ORDER

[KAPLAN](#), United States Magistrate Judge.

Plaintiff Garrett Schwab has filed a motion to com-  
 pel entry upon premises for inspection and photo-  
 graphing in this gender discrimination and retali-  
 ation case brought under Title VII of the Civil  
 Rights Act of 1964, as amended, 42 U.S.C. § 2000e  
 , *et seq.* According to plaintiff, it is necessary to in-  
 spect and photograph his former worksite, the fifth  
 and sixth floors of Wyndham's corporate headquar-  
 ters in Dallas, Texas, "so that he and his counsel  
 can gain an understanding of the layout of the of-  
 fice and the nature and method in which the dis-  
 criminatory and retaliatory acts occurred." (Plf.  
 Mot. at 1, ¶ 2). The parties have briefed their re-  
 spective arguments in support and opposition to the  
 motion in a joint status report filed on January 20,  
 2005, and this matter is ripe for determination.

[Fed.R.Civ.P. 34](#) authorizes a party to serve on any  
 other party a request:

to permit entry upon designated land or other  
 property in the possession or control of the party  
 upon whom the request is served for the purpose  
 of inspection and measuring, surveying, photo-  
 graphing, testing, or sampling the property or any  
 designated object or operation thereon, within the  
 scope of Rule 26(b).

[FED. R. CIV. P. 34\(a\)](#). Such a request must set  
 forth the property to be inspected and \*539 "specify  
 a reasonable time, place, and manner of making the  
 inspection and performing the related acts." [FED.  
 R. CIV. P. 34\(b\)](#).

Plaintiff appears to seek unrestricted access to the  
 fifth and sixth floors of Wyndham's corporate

225 F.R.D. 538

(Cite as: 225 F.R.D. 538)

headquarters. These floors consist of nearly 152,000 square feet of office space housing approximately 22 departments. (Jt. Stat. Rep.App. at 001, ¶ 3). Plaintiff worked in only one of those departments-Sales. Thus, the discovery request is overly broad on its face. The evidence submitted by defendant further shows that many of the departments plaintiff wants to inspect and photograph maintain confidential and proprietary information, such as customer account information, employee records, tax information, financial reports, payroll records, sales and marketing plans, revenue goals, and investor profiles. (*See id.* at 002-02, ¶ 6). Plaintiff wholly fails to address this issue in the joint status report. Finally, plaintiff has not articulated, much less proved, a need for inspecting and photographing the premises. He alleges only that “an inspection is likely to reveal facts who would or could have witnessed the offensive acts, how the acts occurred, the motivation of the offending party, the reasonable impact the offensive acts would have imposed on Plaintiff in his work environment, and related matters.” (Jt. Stat. Rep. at 2, ¶ E(1)). Such general and conclusory assertions do not justify unrestricted access to Wyndham's corporate headquarters. *See Belcher v. Bassett Furniture Industries, Inc.*, 588 F.2d 904, 908-09 (4th Cir.1978) (holding that district court abused its discretion in granting plaintiff's expert unrestricted access to roam through five plants where discrimination allegedly occurred).

For these reasons, plaintiff's motion to compel entry upon premises for inspection and photographing is denied.

SO ORDERED.

N.D.Tex.,2005.

Schwab v. Wyndham Intern., Inc.

225 F.R.D. 538

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229 F.R.D. 506, 62 Fed.R.Serv.3d 817  
(Cite as: **229 F.R.D. 506**)



United States District Court,  
D. Maryland.  
Dino BROCCOLI, et al., Plaintiffs,

v.

ECHOSTAR COMMUNICATIONS CORPORA-  
TION, et al., Defendants.  
**No. CIV. AMD 03-3447.**

Aug. 4, 2005.

**Background:** Following trial of employment discrimination case before jury, resulting in judgment for employee on claims for breach of contract and violation of Maryland Wage Payment and Collection Act, for employer on employee's principal claims under Title VII for sexual harassment and retaliation, and for employer and individual defendant on state law claim for tortious interference with prospective economic advantage, employee moved for award of attorney fees in respect to wage payment claim as authorized by state law and employer filed bill of costs based on assertion it was "prevailing party" under applicable federal civil rule.

**Holdings:** The District Court, [Davis, J.](#), held that:

- (1) sanctions against employer for gross spoliation of evidence were warranted in light of its failure to preserve e-mail and documents in manner contrary to its normal retention policy despite being placed on notice of potential litigation;
- (2) amount of fees requested by employee as sanction for failure to make required disclosures was excessive, both as to hourly rates and number of hours, and would be reduced;
- (3) employee would be awarded reasonable attorney fees under Maryland Wage Payment and Collection Act;
- (4) in that regard, although hourly rates requested was reasonable, number of hours expended on some tasks was excessive and would be reduced;
- (5) inconsistent verdict, combined with inextricable

nexus between tortious interference and retaliation claims, divested employer of prevailing party status for purposes of cost award under federal rules; and (6) though jury's verdict was compromise, it was not so irrational or contrary to weight of evidence as to justify new trial.

Motion granted in part and denied in part.

West Headnotes

**[1] Federal Civil Procedure 170A** **1551**

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things

170AX(E)1 In General

170Ak1551 k. In General. **Most Cited**

**Cases**

Party has duty to preserve evidence when party is placed on notice that evidence is relevant to litigation or when party should have known that evidence may be relevant to future litigation.

**[2] Federal Civil Procedure 170A** **1551**

170A Federal Civil Procedure

170AX Depositions and Discovery

170AX(E) Discovery and Production of Documents and Other Tangible Things

170AX(E)1 In General

170Ak1551 k. In General. **Most Cited**

**Cases**

Duty to preserve encompasses any documents or tangible items authored or made by individuals likely to have discoverable information that disclosing party may use to support its claims or defenses; any information relevant to claims or defenses of any party, or which is relevant to subject matter involved in litigation, is covered by duty to preserve.

**[3] Federal Civil Procedure 170A** **1551**

170A Federal Civil Procedure

**170AX** Depositions and Discovery

**170AX(E)** Discovery and Production of Documents and Other Tangible Things

**170AX(E)1** In General

**170Ak1551** k. In General. **Most Cited**

**Cases**

Document retention policies, which are created in part to keep certain information from getting into hands of others are common in business and it is not wrongful for manager or company to instruct its employees to comply with valid document retention policy under normal circumstances; however, once party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a “litigation hold” to ensure the preservation of relevant documents.

**[4] Federal Civil Procedure 170A**  **1636.1**

**170A** Federal Civil Procedure

**170AX** Depositions and Discovery

**170AX(E)** Discovery and Production of Documents and Other Tangible Things

**170AX(E)5** Compliance; Failure to Comply

**170Ak1636** Failure to Comply; Sanctions

**170Ak1636.1** k. In General. **Most**

**Cited Cases**

Failure to preserve documents and records, once duty to do so has been triggered, raises issue of “spoliation of evidence”; “spoliation” refers to destruction or material alteration of evidence or failure to preserve the property for another's use as evidence in pending or reasonably foreseeable litigation.

**[5] Federal Civil Procedure 170A**  **1636.1**

**170A** Federal Civil Procedure

**170AX** Depositions and Discovery

**170AX(E)** Discovery and Production of Documents and Other Tangible Things

**170AX(E)5** Compliance; Failure to Comply

**170Ak1636** Failure to Comply; Sanc-

tions

**170Ak1636.1** k. In General. **Most**

**Cited Cases**

Sanctions against employer for gross spoliation of evidence were warranted in light of its failure to preserve e-mail and documents in manner contrary to its normal retention policy despite being placed on notice of potential litigation arising out of employee's allegations of sexual harassment and retaliation; employer, a large public corporation, acted in bad faith in failing to suspend its email and data destruction policy or to preserve essential personnel documents in order to fulfill its duty to preserve relevant documentation for purposes of potential litigation, and its bad faith actions prejudiced employee in his attempts to litigate his claims and measurably increased costs for him to do so.

**[6] Federal Civil Procedure 170A**  **1278**

**170A** Federal Civil Procedure

**170AX** Depositions and Discovery

**170AX(A)** In General

**170Ak1278** k. Failure to Respond; Sanctions. **Most Cited Cases**

**Federal Civil Procedure 170A**  **2737.4**

**170A** Federal Civil Procedure

**170AXIX** Fees and Costs

**170Ak2737** Attorneys' Fees

**170Ak2737.4** k. Amount and Elements.

**Most Cited Cases**

The lodestar method is the appropriate starting point for court's initial estimate of reasonable attorney fees, whether pursuant to fee-shifting statutes or Rule 37 sanctions. **Fed.Rules Civ.Proc.Rule 37, 28 U.S.C.A.**

**[7] Federal Civil Procedure 170A**  **1278**

**170A** Federal Civil Procedure

**170AX** Depositions and Discovery

**170AX(A)** In General

**170Ak1278** k. Failure to Respond; Sanctions. **Most Cited Cases**

Amount of fees requested by employment discrimination plaintiff as sanction for employer's failure to make required disclosures was excessive, both as to hourly rates and number of hours, and would be reduced; hourly rates exceeded local guidelines and would be reduced by \$25 for mid-level associate and by \$45 for senior partner, guidelines limited compensation for client, third party and intra-office meetings for more than one lawyer, and hours of work incurred by associate for, e.g., drafting and editing motion for sanctions were excessive given nature of those tasks. [Fed.Rules Civ.Proc.Rules 26\(a\), 37\(a\)\(4\)\(A\), 28 U.S.C.A.](#)

#### [8] Labor and Employment 231H 2204

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(A) In General

231Hk2192 Actions

231Hk2204 k. Costs and Attorney

Fees. **Most Cited Cases**

Employee would be awarded reasonable attorney fees under Maryland Wage Payment and Collection Act, in light of jury's finding that employer's withholding of his wages was not the result of a bona fide dispute; Maryland legislature intended for courts to apply their discretion liberally in awarding fees under that provision. [West's Ann.Md.Code, Labor and Employment, § 3-507.1\(b\).](#)

#### [9] Labor and Employment 231H 2204

231H Labor and Employment

231HXIII Wages and Hours

231HXIII(A) In General

231Hk2192 Actions

231Hk2204 k. Costs and Attorney

Fees. **Most Cited Cases**

Although hourly rates for award of attorney fees under Maryland Wage Payment and Collection Act were reasonable, number of hours expended on some tasks was excessive and would be reduced accordingly; e.g., both associate and partner did not need to participate in conference call or meeting with client and both bill time for task, and award

would be limited to time expended by more senior counsel in such tasks. [Md.Rule 16-812, Rules of Prof.Conduct, Rule 1.5; West's Ann.Md.Code, Labor and Employment, § 3-507.1\(b\).](#)

#### [10] Federal Civil Procedure 170A 2727

170A Federal Civil Procedure

170AXIX Fees and Costs

170Ak2726 Result of Litigation

170Ak2727 k. Prevailing Party. **Most**

**Cited Cases**

To be deemed "prevailing party" entitled to costs other than attorney fees, plaintiff must prevail on any significant claim affording some of the relief sought; moreover, relief cannot be merely declaratory or procedural, but must reach underlying merits of claim and affect behavior of defendants towards plaintiff. [Fed.Rules Civ.Proc.Rule 54\(d\)\(1\), 28 U.S.C.A.](#)

#### [11] Federal Civil Procedure 170A 2727

170A Federal Civil Procedure

170AXIX Fees and Costs

170Ak2726 Result of Litigation

170Ak2727 k. Prevailing Party. **Most**

**Cited Cases**

Determination of "prevailing party" status for purposes of cost award is approached using the same legal standards used for purposes of awarding attorney fees in civil rights fee-shifting statutes. [Fed.Rules Civ.Proc.Rule 54\(d\), 28 U.S.C.A.](#)

#### [12] Civil Rights 78 1584

78 Civil Rights

78IV Remedies Under Federal Employment Discrimination Statutes

78k1584 k. Costs. **Most Cited Cases**

Employer was not "prevailing party" entitled to cost award under federal rules; verdict for employer on Title VII retaliation claim was inconsistent with verdict for employee on state law claim for tortious interference with economic advantage and inconsistency, combined with inextricable nexus between

tortious interference and retaliation claims, divested employer of prevailing party status. [Fed.Rules Civ.Proc.Rule 54\(d\)\(1\)](#), 28 U.S.C.A.; Civil Rights Act of 1964, § 704(a), as amended, 42 U.S.C.A. § 2000e-3(a).

**[13] Federal Civil Procedure 170A** 2339

170A Federal Civil Procedure

170AXVI New Trial

170AXVI(B) Grounds

170Ak2338 Verdict or Findings Contrary to Law or Evidence

170Ak2339 k. Weight of Evidence.

**Most Cited Cases**

Although jury's inconsistent verdict for employer on Title VII retaliation claim and for employee on state law tortious interference with prospective economic advantage claim was a compromise, it was not so irrational or contrary to weight of evidence as to justify new trial.


**[14] Federal Civil Procedure 170A** 2727

170A Federal Civil Procedure

170AXIX Fees and Costs

170Ak2726 Result of Litigation

170Ak2727 k. Prevailing Party. **Most Cited Cases**

**Federal Civil Procedure 170A** 2742.1

170A Federal Civil Procedure

170AXIX Fees and Costs

170Ak2742 Taxation

170Ak2742.1 k. In General. **Most Cited Cases**

Award of costs to prevailing party is matter firmly within discretion of trial court; however, court's departure from normal practice of awarding costs must be accompanied by articulated good reason for doing so. [Fed.Rules Civ.Proc.Rule 54\(d\)](#), 28 U.S.C.A.

**[15] Federal Civil Procedure 170A** 2727

170A Federal Civil Procedure

170AXIX Fees and Costs

170Ak2726 Result of Litigation

170Ak2727 k. Prevailing Party. **Most Cited Cases**

**Federal Civil Procedure 170A** 2742.1

170A Federal Civil Procedure

170AXIX Fees and Costs

170Ak2742 Taxation

170Ak2742.1 k. In General. **Most Cited Cases**

Losing party's inability to pay will suffice to justify denying costs to prevailing party, and if losing party is of such modest means that it would be unjust or inequitable to enforce cost award against him, then court acts within its discretion to deny costs to prevailing party; however, in order to benefit from this exception, losing party must provide sufficient documentation establishing his inability to pay costs. [Fed.Rules Civ.Proc.Rule 54\(d\)\(1\)](#), 28 U.S.C.A.

\*508 [Jerald J. Oppel](#), [Carla N. Bailey](#), Ober Kaler Grimes and Shriver, Baltimore, MD, for Plaintiffs.

[Elena D. Marcuss](#), [Robert Ross Niccolini](#), McGuireWoods LLP, Baltimore, MD, for Defendants.

MEMORANDUM OPINION

DAVIS, District Judge.

This employment discrimination case was tried before a jury beginning on March 14, \*509 2005, and on March 30, 2005, judgment was entered on the jury's verdict in the amount of \$9668.64 in favor of plaintiff, Dino Broccoli ("Broccoli"),<sup>FNI</sup> on claims for breach of contract and violation of the Maryland Wage Payment and Collection Act ("wage payment claim"), MD. CODE ANN., LAB. & EMPL. §§ 3-501, *et seq.* At the same time, judgment was entered in favor of defendants Echostar Communications Corporation and Dish Network Corporation (collectively referred to as "Echostar") as to claims



for sexual harassment and retaliation asserted pursuant to Title VII of the Civil Rights Act of 1964. Finally, judgment was entered in favor of Echostar and defendant Stacie Andersen (“Andersen”) as to the state law claim for tortious interference with prospective economic advantage.

**FN1.** Andrew Sklar, the trustee handling Broccoli’s bankruptcy, intervened as an additional plaintiff and authorized Broccoli’s counsel to protect the interests of the bankruptcy estate, but he took no active part in the litigation.

Broccoli has filed a motion for an award of attorney’s fees in respect to the wage payment claim as authorized by state law. *See* MD. CODE ANN., LAB. & EMPL. § 3-507.1 (authorizing an award of reasonable counsel fees and costs if an employer is found to have withheld wages in violation of section 3-507.1 and not as a result of a bona fide dispute). Also, Echostar has filed a bill of costs based on its assertion that it is a “prevailing party” under Fed.R.Civ.P. 54(d)(1) (“[C]osts other than attorney’s fees shall be allowed as a matter of course to the prevailing party unless the court otherwise directs.”), to which Broccoli has timely objected. In this Memorandum Opinion, the court shall rule on these two matters. In addition, the court shall articulate its reasoning for its earlier order granting in part Broccoli’s motion for sanctions and shall, concomitantly, determine the amount of fees and costs to be awarded to plaintiff pursuant to Fed.R.Civ.P. 37.

I.

A.

Plaintiff’s principal claims in this case were based on allegations of sexual harassment and retaliation under Title VII. Several state law claims also survived summary judgment. In sum, plaintiff alleged that a Baltimore-based human resources adminis-

trator for Echostar, defendant Andersen, engaged in a series of inappropriate, sexually-charged behaviors, and related questioning and badgering of him, in the course of his employment, thereby creating a hostile work environment, and that, in retaliation for his rebuffs to her, Andersen orchestrated the termination of his employment under the guise of an organizational realignment and reduction in force. Furthermore, even after his termination, plaintiff asserted, Andersen provided false and defamatory employment references to his would-be employers, thus burdening his efforts to obtain employment, and thereby further violating Title VII’s anti-retaliation and non-discrimination proscriptions. Echostar and Andersen denied all of plaintiff’s allegations and mounted a determined and vigorous defense to all of plaintiff’s claims.

During discovery, on September 9, 2004, Broccoli filed a motion for sanctions against Echostar, alleging that Echostar had culpably failed to preserve critical records and documents relevant to several claims and defenses in the case and was guilty of spoliation of evidence.<sup>FN2</sup> On January 8, 2005, in ruling on the motion for sanctions, the court issued an order granting the motion in part, noting that it was “clear beyond reasonable dispute that [Echostar] ha[d] been guilty of gross spoliation of evidence.” Consequently, at trial, the court imposed certain limits on Echostar’s ability to present evidence that \*510 plaintiff’s termination of employment was based on a “corporate reorganization” and that plaintiff’s termination was for a “legitimate non-discriminatory/non-retaliatory reason,” and specifically, the court granted Broccoli’s request for an “adverse inference” instruction based on spoliation of evidence. The court deferred a full explication of its ruling until after trial, as well as any determination as to Broccoli’s request for fees and costs for Echostar’s discovery violations.

**FN2.** Echostar failed to preserve: (1) employment-related documents relevant to Broccoli and his termination in November 2001; (2) corporate records relating to the

alleged dissolution of the “regional teams” that, according to Echostar, resulted in Broccoli's termination as part of a bona fide reduction in force; (3) correspondence by corporate decision makers pertaining to Broccoli's termination; and (4) emails and other electronic communications exchanged during Broccoli's employment and termination. This failure to preserve documents occurred despite Broccoli's written complaint, submitted to Echostar at the time of his termination, that he was unfairly treated by the human resources department. Indisputably, Echostar should have reasonably anticipated that litigation would follow Broccoli's termination and it should have preserved all relevant documents.

#### B.

[1][2] A party has a duty to preserve evidence when the party is placed on notice that the evidence is relevant to litigation or when the party should have known that the evidence may be relevant to future litigation. *Silvestri v. General Motors Corp.*, 271 F.3d 583, 591 (4th Cir.2001); *Thompson v. HUD*, 219 F.R.D. 93, 100 (D.Md.2003). The duty to preserve encompasses any documents or tangible items authored or made by individuals likely to have discoverable information that the disclosing party may use to support its claims or defenses. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217-18 (S.D.N.Y.2003). Any information relevant to the claims or defenses of any party, or which is relevant to the subject matter involved in the litigation, is covered by the duty to preserve. *Id.*

[3] “ ‘Document retention policies’, which are created in part to keep certain information from getting into the hands of others ... are common in business.” *Arthur Andersen, LLP v. United States*, 544 U.S. 696, ---, 125 S.Ct. 2129, 2135, 161 L.Ed.2d 1008 (2005). It is not wrongful for a manager or company to instruct its employees to comply with a

valid document retention policy under normal circumstances. *Id.* at --- - ---, 125 S.Ct. at 2134-35. However, “[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.” *Thompson*, 219 F.R.D. at 100 (quoting *Zubulake*, 220 F.R.D. at 218).

[4] A failure to preserve documents and records, once the duty to do so has been triggered, raises the issue of spoliation of evidence. Spoliation refers to the destruction or material alteration of evidence or the failure to preserve the property for another's use as evidence in pending or reasonably foreseeable litigation. *Silvestri*, 271 F.3d at 590. A court has discretion to impose sanctions for “the purpose of leveling the evidentiary playing field and for the purpose of sanctioning the improper conduct.” *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir.1995) (authorizing a court to permit a jury to draw adverse inferences from a party's failure to present evidence, the loss of evidence, or the destruction of evidence). The court should, therefore, take into account the blameworthiness of the offending party and the prejudice suffered by the opposing party. See *Anderson v. National R.R. Passenger Corp.*, 866 F.Supp. 937, 945 (E.D.Va.1994), *aff'd*, 74 F.3d 1230 (4th Cir.1996).

#### C.

Under Echostar's extraordinary email/document retention policy, the email system automatically sends all items in a user's “sent items” folder over seven days old to the user's “deleted items” folder, and all items in a user's “deleted items” folder over 14 days old are then automatically purged from the user's “deleted items” folder. The user's purged emails are not recorded or stored in any back up files. Thus, when 21-day-old emails are purged, they are forever unretrievable. The electronic files, including the contents of all folders, sub-folders, and all email folders, of former employees are also completely deleted 30 days after the employee

leaves Echostar. Again, under normal circumstances, such a policy may be a risky but arguably defensible business practice undeserving of sanctions.

However, the evidence in this case amply supports the finding that Echostar was placed on notice of potential litigation arising out of plaintiff's allegations of sexual harassment and retaliation as early as January 2001. Beginning in January 2001, Broccoli informed two of his supervisors at Echostar, Chip Paulson and Larry Goldman (as each testified on deposition and at trial), both **\*511** orally and via email, of Andersen's sexually harassing behavior. Paulson and Goldman testified that Broccoli made numerous complaints to them regarding Andersen's inappropriate behavior throughout 2001 and that they subsequently relayed, verbally and via email, the complaints to their superiors at Echostar. Moreover, Broccoli testified that he had an in-person meeting with Andersen's supervisor, Tammy Fornelius, the Regional Human Resources Manager, in July 2001, during which he specifically complained of Andersen's continued harassing behavior. Broccoli testified that Fornelius responded by advising him not to put his complaint in writing and allow her to take care of the matter informally.

Although Fornelius denied she ever had a communication with Broccoli regarding allegations of sexual harassment committed by Andersen, Fornelius's denials ring particularly hollow. On November 28, 2001, the day of his involuntary termination, Broccoli memorialized in writing his belief that his termination was due, in part, to his expressed complaints of Andersen's harassing behavior. **FN3** Broccoli testified that he hand-delivered this complaint to Andersen shortly after he learned of his termination and Andersen admitted the truth of this testimony. She further testified that she forwarded Broccoli's complaint to her supervisors in upper management. *However, no one in upper management recalls ever having seen this complaint prior to this litigation.* In short, the evidence of a regular policy at Echostar of "deep-sixing" nettlesome doc-

uments and records (and of management's efforts to avoid their creation in the first instance) is overwhelming. **FN4**

**FN3.** Broccoli's November 28, 2001, complaint stated: "I believe this is unfair treatment with several positions available for me in the North East Region, to release me without offering me one of these open positions to stay with this company is truly poor judgment and mistreatment by Upper Management. I really believe that this also has to do with Echostar owing me over \$6,000.00 in incentives not paid to me and the Disrespect [sic] shown to me by Echostar's Human Resource Dept. over the last 11 months." *Pl. Tr. Exh. 121.*

**FN4.**

"The use of the phrase 'deep-six' does not suggest a lawful or benign explanation for the Commission's action. That phrase has been a part of naval parlance as a synonym for burial at sea for a very long time. It moved landward and acquired more general notoriety when it became part of the Watergate folklore after it was revealed that John Ehrlichman had suggested to John Dean that he 'deep-six' a number of sensitive documents to keep them from investigators."

*American Ass'n of Retired Persons v. E.E.O.C.*, 655 F.Supp. 228, 234 n. 15 (D.D.C.1987), *rev'd*, 823 F.2d 600 (D.C.Cir.1987).

Finally, Broccoli's girlfriend, Dr. Grace Kim, sent a letter on December 20, 2001, via email, to executives at Echostar alleging that Broccoli's termination was the product of discriminatory conduct by Andersen. In February 2002, Broccoli filed an employment discrimination complaint with the Equal Employment Opportunity Commission ("EEOC"), after which the EEOC conducted an investigation.

Echostar claims that it had no knowledge of Broccoli's complaints until it received Dr. Kim's letter dated December 20, 2001, and thus was under no obligation prior to that date to preserve documents in a manner contrary to their normal document retention policy. This line of defense fails. First, there is ample evidence to support the finding that Broccoli informed Echostar, via verbal and email communications with his direct supervisors Paulson and Goldman, of Andersen's potentially illegal behavior as early as January 2001. Therefore, Echostar was on actual notice at that time of the need to preserve all documentation relevant to Broccoli's complaints, including emails and personnel files. *See Zubulake, 220 F.R.D. at 217* (identifying the document preservation trigger date when plaintiff's grievances were communicated to her supervisors). Defendants were greatly aided in their impeachment of Broccoli's former supervisors, and Broccoli thereby suffered palpable prejudice, owing to the absence of any kind of "paper trail" covering Broccoli's interactions with his supervisors and co-workers.

Moreover, Echostar plainly had a duty to preserve employment and termination documents when its management learned of Broccoli's potential Title VII claim that could result in litigation. Yet, the discovery \*512 process revealed that Broccoli's personnel file did not even include his performance evaluations, which his supervisors, Paulson and Goldman, testified they had conducted and documented. Nor did Echostar produce any substantial documentation of the alleged regional team dissolution that it asserted resulted in Broccoli's termination. And, Echostar failed to produce Fornelius' investigative file containing her notes from her meeting and conversations with Broccoli and his managers.

In short, none of the emails exchanged between Broccoli, Broccoli's supervisors, and Echostar's upper management regarding his complaints against Andersen were preserved. Moreover, Echostar admits that it never issued a company-wide instruction regarding the suspension of any data destruc-

tion policy even after Broccoli's November 2001 disputed termination and Dr. Kim's accusatory letter received in December 2001. Echostar did not even bother to save Broccoli's emails of the 30 days prior to his termination upon receiving Broccoli's November 28, 2001, written complaint and Dr. Kim's December 20, 2001, letter.

[5] Given Echostar's status as a large public corporation with ample financial resources and personnel management know-how, the court finds it indefensible that such basic personnel procedures and related documentation were lacking. Even more than before trial, it is now "clear beyond reasonable dispute that [Echostar] ha[d] been guilty of gross spoliation of evidence." Echostar clearly acted in bad faith in its failure to suspend its email and data destruction policy or preserve essential personnel documents in order to fulfill its duty to preserve the relevant documentation for purposes of potential litigation. These bad faith actions prejudiced Broccoli in his attempts to litigate his claims and measurably increased the costs for him to do so. <sup>FN5</sup>

FN5. For example, Broccoli did not have access to any inappropriate emails allegedly sent by Andersen, Goldman's emails to his superiors relaying Broccoli's complaints, Goldman's negative evaluation of Andersen, copies of human resources reports, agendas, and notes concerning harassment policies, and any documents relating to the alleged regional restructuring.

For the reasons set forth above, the court granted Broccoli's motion for sanctions and included an adverse spoliation of evidence instruction in the jury instructions.

D.

[6] If a party fails to make disclosures as required by Rule 26(a), Rule 37 permits a party to file a motion for sanctions. Fed.R.Civ.P. 37(a)(2). If the motion for sanctions is granted, the court may require

the non-moving party to pay the moving party's reasonable costs and attorney's fees incurred in making the motion. Fed.R.Civ.P. 37(a)(4)(A). Appendix B of the Local Rules of the United States District Court for the District of Maryland provides guidelines for determining reasonable attorney's fees in civil rights and discrimination cases. LOCAL RULES FOR U.S. DISTRICT OF MARYLAND, APPENDIX B. (identifying the lodestar method as the appropriate means of calculating attorney's fees); see *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (identifying the lodestar method as the appropriate method of calculating attorney's fees in civil rights fee-shifting cases). The lodestar method is the appropriate starting point for a court's initial estimate of reasonable attorneys fees, whether pursuant to fee-shifting statutes or Rule 37 sanctions. See *Blanchard v. Bergeron*, 489 U.S. 87, 94, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989) (“the initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate”) (quoting *Blum v. Stenson*, 465 U.S. 886, 888, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984)); Fed.R.Civ.P.37(A)(4)(A) (“the court shall ... require the [non-moving] party ... to pay to the moving party the *reasonable* expenses incurred in making the motion, including attorney's fees”) (emphasis added).

Based on the court's findings on the merits of the motion for sanctions and in accordance with Rule 37, the court shall grant Broccoli's motion for reasonable costs and attorneys' fees. Broccoli has requested \$26,109.50, based on a total of 123.6 hours completed by Carla Bailey, Esq. (a mid-level associate), \*513 Jerald Oppel, Esq. (a senior partner), and two paralegals.

[7] The court finds the requested amount to be excessive. First, the hourly rates exceed the local guidelines. Therefore, Bailey's hourly rate shall be reduced from the proposed \$195 per hour to \$170 per hour for a lawyer admitted to the bar for less

than five years.<sup>FN6</sup> Oppel's hourly rates shall be reduced from the proposed \$320 per hour to \$275 per hour for a lawyer admitted to the bar for more than eight years. The paralegals' hourly rates shall be reduced from the proposed \$100 and \$115 per hour to \$90 per hour.

FN6. Broccoli's motion did not specify Bailey's years of experience and vaguely identified her as a mid-level associate.

The court also finds the total number of 123.6 hours to be excessive. Specifically, Broccoli has requested compensation for client, third party, and intra-office meetings for both Bailey and Oppel. The guidelines limit compensation for such activities to only one lawyer and in the case of intra-office conferences, the time may be charged at the rate of the more senior lawyer. LOCAL RULES FOR U.S. DISTRICT OF MARYLAND, APPENDIX B(2). Accordingly, the court shall decrease Bailey's proposed hours by 14 hours and paralegal Banister's hours by 1.7 hours. The court also finds the hours of work incurred by Bailey for some tasks to be unreasonably excessive given the nature of the tasks.<sup>FN7</sup>

Therefore, a further decrease in Bailey's proposed hours (i.e., by 23.7 hours) is appropriate. After modifying the hourly rates and hours expended to reflect the appropriate hourly rates for what the court deems to be reasonable hours expended, the court shall award Broccoli \$16,097 as a reasonable sanction for a total of 84.2 hours of time incurred by plaintiff in counsels' reasonable efforts to overcome the effects of Echostar's discovery violations and spoliation of evidence. The court's award is based on 21.4 hour for Oppel, 57 hours for Bailey, and 5.8 hours for paralegals (Fowler, 4.5 hours; Bannister, 1.3 hours).

FN7. For example, Bailey's time charged for drafting and editing the motion for sanctions totaled more than 33 hours, which the court finds to be unreasonably high.

## II.

### A.

[8] As previously mentioned, on March 30, 2005, judgment was entered in favor of Broccoli on his breach of contract and wage payment claims in the amount of \$9668.64, which constituted a trebling of actual damages based on the jury's finding that Echostar's withholding of Broccoli's wages was not a result of a *bona fide* dispute. The Maryland Wage Payments and Collection Act authorizes the court to exercise its discretion in awarding reasonable attorney's fees and costs under such circumstances. The act states, in pertinent part: "If, in an action under [the Act], a court finds that an employer withheld the wage of an employee in violation of [the Act] and not as a result of a *bona fide* dispute, the court may award the employee an amount not exceeding 3 times the wage, and reasonable counsel fees and other costs." MD. COD. ANN., LAB. & EMPL. § 3-507.1(b). Moreover, the Maryland Legislature intended that courts should apply their discretion liberally in favor of awarding fees. *Friolo v. Frankel*, 373 Md. 501, 515, 819 A.2d 354 (2003). Accordingly, the court shall grant Broccoli an award of reasonable attorney's fees; plaintiff did not seek costs.

### B.

Determining the number of reasonable hours and the reasonable hourly rate for an award of attorney's fees under state law is guided by the lodestar approach and Rule 1.5 of the Maryland Rules of Professional Conduct. *Friolo*, 373 Md. at 504-05, 519, 819 A.2d 354. The Maryland Rules of Professional Conduct offers a list of factors to be considered in determining the reasonableness of a fee including, but not limited to: (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; and (2) the fee customarily charged in the locality for similar legal services.\*514 MD. RULES

## PROF. COND. RULE 1.5 (2005).

[9] Broccoli has requested \$30,957 in attorney's fees arising out of the litigation for his wage payment claim. Broccoli's request is based on 47.6 hours of work by Oppel, at the rate of \$275 per hour, and 105.1 hours of work by Bailey, at the rate of \$170 per hour. The court accepts the hourly rates for the respective attorneys as reasonable hourly rates for a claim of this nature.<sup>FN8</sup> However, the court finds the number of hours expended on some tasks to be excessive. For example, there were numerous instances in which both lawyers participated in a conference call or meeting with a client and each billed time for the task. The court will limit the award to the time expended by the more senior counsel, i.e., Oppel, in joint tasks. Moreover, the court finds that counsels' hours for some tasks are unreasonably high given the nature of the tasks.

FN8. Broccoli based his hourly rates on Appendix B of the Rules of the U.S. District Court for the District of Maryland. Notably, these rates are a guide for federal claims, and thus are not as strictly applicable to state law claims litigated in federal court. Nonetheless, the suggested rates may be referred to as a guide for determining reasonable hourly rates for state law claims.

After carefully reviewing the billing chart submitted by plaintiff, the court finds that a reasonable award of \$21,212.50 is warranted: 68 hours of work by Bailey at the rate of \$170 per hour and 35.1 hours of work by Oppel at the rate of \$275 per hour.

## III.

### A.

Federal Rule 54(d)(1) provides: "Except when express provision therefor is made either in a statute

of the United States or in these rules, costs other than attorney's fees shall be allowed as a matter of course to the prevailing party unless the court otherwise directs." "The rule is generally thought a vestige of the English 'loser pays' rule ... insofar as the main objection to the English rule is that calculating a reasonable attorney's fee is difficult and cumbersome, it falls away when the calculation is limited to the items taxable as costs." *Anderson v. Griffin*, 397 F.3d 515, 522 (7th Cir.2005).

A prerequisite for an award of costs is a determination by the court that the moving party is a prevailing party. Much of the case law articulating the applicable legal standards for a determination of prevailing party status concerns civil rights fee-shifting statutes as they apply to attorney's fees. See, e.g., *Hensley*, 461 U.S. at 433, 103 S.Ct. 1933 (requiring that a party succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit in order to be awarded attorneys fees as a civil rights prevailing party); *Farrar v. Hobby*, 506 U.S. 103, 109-12, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) (concluding that an award of nominal damages confers prevailing party status on the plaintiff, and in order to receive attorney's fees the plaintiff (1) must obtain at least some relief on the merits of his claim, and thus obtain an enforceable judgment against the defendant from whom fees are sought and (2) "the actual relief on the merits of his claim materially alters the legal relationship between the parties modifying the defendant's behavior in a way that directly benefits the plaintiff"); *Farrar*, 506 U.S. at 121, 113 S.Ct. 566 (O'Connor, J., concurring) (identifying the indicia of success as: (1) the extent of relief obtained in comparison to the relief sought; (2) the significance of the legal issue on which the plaintiff prevailed; and (3) the public purpose served by the plaintiff's successful claims); *Mercer v. Duke University*, 401 F.3d 199, 203 (4th Cir.2005) (concluding that the award of nominal damages suffices to make the plaintiff a prevailing party within the meaning of section 1988(b) so long as the actual relief on the merits materially alters the legal rela-

tionship between the parties to the direct benefit of the plaintiff) (citing *Farrar*, 506 U.S. at 111-12, 113 S.Ct. 566).

[10] To be deemed a prevailing party, a plaintiff must prevail on "any significant claim affording some of the relief sought." *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989) (rejecting the law in some circuits that plaintiff must prevail on \*515 the "central issue" and achieve the "primary relief sought"). Moreover, the relief cannot be merely declaratory or procedural, but must reach the underlying merits of the claim and "affect[ ] the behavior of the defendants towards the plaintiff." *Hewitt v. Helms*, 482 U.S. 755, 761, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987).

[11] In their Rule 54(d) analyses, courts approach the determination of prevailing party status using the same legal standards used for purposes of awarding attorney's fees in civil rights fee-shifting statutes. *Tunison v. Continental Airlines Corp.*, 162 F.3d 1187, 1189-90 (D.C.Cir.1998) (concluding that the prevailing party determination is generally the same for purposes of attorneys' fees or costs by pointing out that attorneys' fees under § 1988 are awarded "as part of the costs," and thus suggesting that the prevailing party standard for § 1988 and 54(d) are the same) (citing *Farrar v. Hobby*, 506 U.S. 103, 119, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) (O'Connor, J., concurring)); see also *Manildra Milling Corp. v. Ogilvie Mills, Inc.*, 76 F.3d 1178, 1180 n. 1 (Fed.Cir.1996) ("[T]he meaning of prevailing party is the same in either context."); *Studiengesellschaft Kohle mbH v. Eastman Kodak Co.*, 713 F.2d 128, 132 (5th Cir.1983) (§ 1988 case has applicability in a Rule 54(d) case because both require a determination of who is the prevailing party); *Johnson v. City of Aiken*, 278 F.3d 333, 339 (4th Cir.2002) ("Because the § 1988 award included reimbursements for costs taxable under 28 U.S.C.A. § 1920 and Federal Rule of Civil Procedure 54(d)," the determination that appellees were the prevailing party for purposes of § 1988 also ap-

plied for purposes of [Rule 54\(d\)](#)).

The above cases discuss the issue of prevailing party status in the context of a plaintiff seeking attorney's fees and costs pursuant to [42 U.S.C. § 1988](#) and/or [Rule 54\(d\)](#) after having been awarded only nominal damages, as opposed to a larger requested pecuniary award, or having succeeded on some of the federal claims, as opposed to all of them. In contrast, the instant case involves the defendant seeking costs based on the jury's finding in favor of Echostar on the Title VII sexual harassment and retaliation claims as well as the tortious interference with prospective advantage claim.<sup>FN9</sup> The plaintiff succeeded only on his state law wage claim and common law breach of contract claim.

**FN9.** On April 13, 2005, Echostar timely filed a bill of costs in the amount of \$16,104.40 pursuant to [Rule 54\(d\)\(1\)](#). The bill of costs consisted of \$12,056.40 incurred for depositions of eleven witnesses and \$4,048 incurred for trial exhibits.

#### B.

[12] Facially, it appears that Echostar succeeded on all of the federal claims and three out of the five claims submitted to the jury. To the contrary, however, when the jury's verdict is analyzed in depth, based partly on the completed verdict form, the verdict is facially inconsistent with respect to the Title VII retaliation claim and the tortious interference with economic advantage claim. In any event, for the reasons stated below, the court concludes that Echostar is not in fact a prevailing party.

On the one hand, the jury found that none of the elements for a Title VII sexual harassment or retaliation claim were met. On the other hand, the jury found that defendant Andersen<sup>FN10</sup> “improperly, intentionally, and willfully interfered with Mr. Broccoli's prospective economic advantage with Dr. Grace Kim by giving false and detrimental em-

ployment references[,] [t]hat defendants' acts were calculated to cause damage to the prospective advantage of Mr. Broccoli[, and] [t]hat defendants acted with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of defendants.” See Verdict Form, Doc. 96 at 6; see *Robinson v. Shell*, 519 U.S. 337, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (defining “employees” as used in § 704(a) of Title VII to include former employees for purposes of alleged retaliatory post-employment actions). However, because the jury did not find any actual injury to Broccoli as a result of Andersen's\*516 false negative employment reference, it returned a verdict in favor of Echostar and Andersen on the tortious interference claim.<sup>FN11</sup> Consequently, Broccoli prevailed *in substance* on the tortious interference claim despite the facially unfavorable jury verdict.

**FN10.** For purposes of this case, there is no dispute that Echostar was Andersen's principal and that all of the acts and omissions of Andersen are attributable to Echostar. They were represented by the same counsel and are in absolute privity.

**FN11.** Broccoli did not request an instruction on nominal damages in connection to the tortious interference claim, thus a finding of nominal damages was not a verdict available to the jury.

Such a finding on the tortious interference claim clearly contradicts the results on the Title VII retaliation claim. Broccoli testified at trial that he complained to Andersen's supervisor, Tammy Fornelius, in the summer of 2001 of Andersen's alleged sexual harassment. Broccoli was terminated in late November 2001. The record shows that Echostar and Andersen were put on notice as early as December 2001 of potential litigation ensuing from Broccoli's sexual harassment and retaliation complaints. See *Pl. Exhs. 127, 128* (Dr. Kim's December 20, 2001 letter to Echostar's upper management describing Broccoli's basis for believing he was sexually harassed and retaliated against by Stacie



Andersen).

Dr. Kim testified that several months after Broccoli's termination in November 2001, i.e., in May 2002, she telephoned Echostar to obtain an employment reference as to Broccoli, motivated in part by Broccoli's continued inability to obtain new employment. She was referred to and spoke to Andersen, who orally gave her a negative false employment reference. The jury credited Dr. Kim's testimony in this regard and rejected Andersen's denials that such a conversation ever occurred. The only rational explanation of the jury's finding is that this evidence is probative of both Andersen's tortious and retaliatory animus. Defendants did not provide any evidence at trial supporting an alternative explanation for the animus held by Andersen towards Broccoli and its manifestation through the negative employment reference. (Andersen's negative employment reference also occurred subsequent to the commencement of the EEOC investigation into Broccoli's complaints; accordingly, Andersen had a stronger motive to retaliate against Broccoli than she did at the time Broccoli was terminated.) Based on these facts, the court concludes that the jury's inconsistent verdict with respect to the retaliation and tortious interference claims was aberrational and very likely was a result of a jury compromise.

Consequently, the inconsistent verdict, combined with the inextricable nexus between the tortious interference and retaliation claims (e.g., the only motive supported by the evidence for Andersen's tortious interference is retaliation against Broccoli's for exercising his rights under Title VII) divests Echostar of the status of prevailing party for purposes of [Rule 54\(d\)](#). Thus, costs will not be awarded to Echostar.

[13] The court is constrained to observe that, although it finds that the jury's verdict was a compromise for purposes of determining whether Echostar is a prevailing party under [Rule 54](#), the jury's verdict was not so irrational or contrary to the weight of the evidence as to justify a new trial. Indeed, the court has previously denied Broccoli's

motion for a new trial. Jury compromises are a common phenomena within our legal system that rarely provide a basis for ordering a new trial. See [United States v. Powell](#), 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984) (upholding the validity of inconsistent verdicts in the criminal context); [City of Los Angeles v. Heller](#), 475 U.S. 796, 805-06, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986) (J. Stevens, dissenting) (“a court retains the authority, even in a civil case, to allow an apparently inconsistent verdict to stand”).

C.

[14] Even if the court were to find Echostar the prevailing party, which it does not, Broccoli is of sufficiently modest means to justify an exception to an award of costs pursuant to [Rule 54\(d\)](#). The award of costs to the prevailing party is a matter firmly within the discretion of the trial court. However, a court's departure from the normal practice of awarding costs must be accompanied by an articulated good reason for doing so. [Oak Hall Cap and Gown Co., Inc. v. Old Dominion Freight Line, Inc.](#), 899 F.2d 291, 296 (4th Cir.1990); see also \*517 [Cherry v. Champion Int'l Corp.](#), 186 F.3d 442, 446 (4th Cir.1999).

[15] The losing party's inability to pay will suffice to justify denying costs. [Cherry](#), 186 F.3d at 446 (listing misconduct by the prevailing party worthy of penalty, the limited value of the prevailing party's victory, the closeness and difficulty of the issues decided, and the losing party's inability to pay as permissible justifications for a district court's denial of costs to the prevailing party). Therefore, if the losing party is of such modest means that it would be unjust or inequitable to enforce [Rule 54\(d\)\(1\)](#) against him, then the court acts within its discretion to deny costs to the prevailing party. *Id.* at 447. In order to benefit from this exception to [Rule 54](#), however, the losing party must provide sufficient documentation establishing his inability to pay costs. [Wyne v. Medo Industries, Inc.](#), 329 F.Supp.2d 584, 588 (D.Md.2004) (citing

*Chapman v. Al Transp.*, 229 F.3d 1012, 1039 (11th Cir.2000); *McGuigan v. CAE Link Corp.*, 155 F.R.D. 31, 35 (N.D.N.Y.1994)).

Broccoli's opposition brief and exhibits provide adequate documentation to support his inability to pay Echostar's costs of \$16,104.40.<sup>FN12</sup> Broccoli's total income in 2004 was \$3627.07 earned from his current part time job at a department store that pays an hourly wage of \$7.50. Prior to Broccoli's obtaining employment at Kohl's in the summer 2004, he was unemployed since his termination from Echostar in November 2001, with the exception of two jobs held for brief periods of time. Broccoli does not own or have an interest in any real property or any valuable personal property such as a motor vehicle, furniture, old coins, or jewelry. Broccoli does not own or have an interest in any bank or savings and loan accounts. Broccoli does not own or have an interest in any securities or any accounts with stockbrokers, stock brokerage firms, mutual fund companies, commodity brokers, or commodity brokerage firms. Therefore, Broccoli is clearly of sufficiently modest means to justify this court's denial of Echostar's bill of costs in the entirety.<sup>FN13</sup>

**FN12.** Echostar has requested that the trustee in bankruptcy, who intervened, be liable for costs if Broccoli is found unable to pay. The request is denied. Echostar has not cited any law making a trustee liable for costs. Sklar has no interest in the case and was made a party at the insistence of Echostar.

**FN13.** Broccoli, now acting pro se, has filed a notice of appeal and has sought a waiver of the filing fee for the appeal. The court is of the view that while Broccoli's impecuniousness exonerates him from responsibility for paying costs under [Rule 54](#), he is plainly able to pay the filing fee for his appeal. Accordingly, his request to proceed on appeal in forma pauperis shall be denied.

#### IV.

On the basis of the findings and conclusions set forth above, Broccoli's motion for attorney's fees and costs in connection with his wage payment claim and his motion for sanctions are granted in part and denied in part, and his objection to Echostar's bill of costs is sustained. Judgment shall be entered in favor of Broccoli for \$21,212.50 for attorneys fees associated with the wage payment claim and \$16,097 for attorney's fees associated with the motion for sanctions, or a total of \$37,309.50. An Order follows.

D.Md.,2005.

Broccoli v. Echostar Communications Corp.

229 F.R.D. 506, 62 Fed.R.Serv.3d 817

END OF DOCUMENT

53 Cal.App.4th 216, 61 Cal.Rptr.2d 567, 97 Cal. Daily Op. Serv. 1618, 97 Daily Journal D.A.R. 3023  
(Cite as: 53 Cal.App.4th 216, 61 Cal.Rptr.2d 567)



Court of Appeal, Fourth District, Division 3, California.

CALCOR SPACE FACILITY, INC., Petitioner,  
v.

The SUPERIOR COURT of Orange County, Respondent;

THIEM INDUSTRIES, INC., et al., Real Parties in Interest.

**No. G020021.**

Feb. 28, 1997.

As Modified March 7, 1997.

Review Denied May 28, 1997.

In action against contractor, subcontractor served subpoena on nonparty competitor that entered agreement to supply gun mounts to contractor, following termination of supply agreement between contractor and subcontractor, in which subcontractor sought production of broad categories of documents and other materials relating to gun mounts. The Superior Court, Orange County, No. 749355, [H. Warren Siegel, J.](#), granted subcontractor's motion to compel discovery and denied competitor's motion for protective order except as to proprietary information. On competitor's petition for writ of mandate/prohibition, the Court of Appeal, [Rylaarsdam, J.](#), held that: (1) requests which were not reasonably particular, due, in part, to pages of definitions and instructions included with requests, created undue burden upon competitor, and (2) subcontractor failed to show that documents were reasonably calculated to lead to discovery of admissible evidence.

Writ granted.

West Headnotes

**[1] Pretrial Procedure 307A** 24

307A Pretrial Procedure

307AII Depositions and Discovery

307AII(A) Discovery in General

307Ak24 k. Discovery Methods and Procedure. [Most Cited Cases](#)

Courts must insist discovery devices be used as tools to facilitate litigation rather than as weapons to wage litigation; these tools should be well calibrated, and lancet is to be preferred over sledge hammer.

**[2] Pretrial Procedure 307A** 23

307A Pretrial Procedure

307AII Depositions and Discovery

307AII(A) Discovery in General

307Ak23 k. Persons Subject. [Most Cited Cases](#)

Where party seeks to discover categories of items, categories must be reasonably particularized from standpoint of party who is subjected to burden of producing materials. [West's Ann.Cal.C.C.P. §§ 2020, 2031.](#)

**[3] Pretrial Procedure 307A** 403

307A Pretrial Procedure

307AII Depositions and Discovery

307AII(E) Production of Documents and Things and Entry on Land

307AII(E)4 Proceedings

307Ak403 k. Request, Notice, or Motion and Response or Objection. [Most Cited Cases](#)

Subcontractor's request for production of categories of documents from nonparty competitor, in action against contractor, was not made with reasonable particularity and was unduly burdensome as to competitor; although subcontractor provided detailed description of categories together with pages of "definitions" and "instructions," request was essentially blanket demand for anything competitor might have relating to gun mounts, which were subject of agreement between subcontractor and contractor and later agreement between competitor and contractor. [West's Ann.Cal.C.C.P. § 2020\(d\).](#)

**[4] Pretrial Procedure 307A** 354

53 Cal.App.4th 216, 61 Cal.Rptr.2d 567, 97 Cal. Daily Op. Serv. 1618, 97 Daily Journal D.A.R. 3023  
(Cite as: 53 Cal.App.4th 216, 61 Cal.Rptr.2d 567)

### 307A Pretrial Procedure

#### 307AII Depositions and Discovery

307AII(E) Production of Documents and Things and Entry on Land

#### 307AII(E)2 Subject Matter in General

307Ak354 k. Existence, Possession, Custody, Control, and Location. **Most Cited Cases**  
Use of discovery procedures as devices to determine whether certain documents exist places great burden on responding party, burden which should generally be borne by party seeking discovery. *West's Ann.Cal.C.C.P.* §§ 2020, 2031.

### [5] Pretrial Procedure 307A 178

### 307A Pretrial Procedure

#### 307AII Depositions and Discovery

#### 307AII(C) Discovery Depositions

#### 307AII(C)4 Scope of Examination

307Ak178 k. Documents or Tangible Things, Examination Involving. **Most Cited Cases**  
While need for preliminary deposition to ascertain existence of documents may be raised as bar to needed deposition of same person after documents have been examined, trial courts should be liberal in permitting such second deposition upon showing that earlier deposition was made necessary by party's refusal to cooperate in agreeing to less formal discovery procedures.

### [6] Pretrial Procedure 307A 11

### 307A Pretrial Procedure

#### 307AII Depositions and Discovery

#### 307AII(A) Discovery in General

#### 307Ak11 k. Control by Court in General.

#### **Most Cited Cases**

Because of potential for promiscuous discovery imposing great burdens, even though ultimately probative value of discovered material may be questionable, trial judges must carefully weigh cost, time, expense and disruption of normal business resulting from order compelling discovery against probative value of material which might be disclosed if discovery is ordered.

### [7] Pretrial Procedure 307A 331

### 307A Pretrial Procedure

#### 307AII Depositions and Discovery

307AII(E) Production of Documents and Things and Entry on Land

#### 307AII(E)1 In General

307Ak331 k. Availability in General; Nature and Scope of Remedy. **Most Cited Cases**  
Statutory prohibition on discovery which is "unduly burdensome" should be employed to greatly limit scope of external definitions and instructions affecting requests for production of documents. *West's Ann.Cal.C.C.P.* §§ 2019(b)(2), 2020, 2031.

### [8] Pretrial Procedure 307A 24

### 307A Pretrial Procedure

#### 307AII Depositions and Discovery

#### 307AII(A) Discovery in General

307Ak24 k. Discovery Methods and Procedure. **Most Cited Cases**

Burden rests upon party seeking discovery to provide specific factual evidence from which court may determine that matter sought is either itself admissible in evidence or appears reasonably calculated to lead to discovery of admissible evidence. *West's Ann.Cal.C.C.P.* §§ 2017(a), 2031(l).

### [9] Pretrial Procedure 307A 407

### 307A Pretrial Procedure

#### 307AII Depositions and Discovery

307AII(E) Production of Documents and Things and Entry on Land

#### 307AII(E)4 Proceedings

#### 307Ak404 Affidavits and Showing

307Ak407 k. Relevancy and Materiality. **Most Cited Cases**

Party seeking production of documents from non-party failed to show that documents were reasonably calculated to lead to discovery of admissible evidence, as party's only documents offered as justification for request were unverified, and, even if unverified documents could be considered as evidence, justifications were mere generalities. *West's*

Ann.Cal.C.C.P. §§ 2017(a), 2020.

## FACTS

### [10] Pretrial Procedure 307A 23

#### 307A Pretrial Procedure

##### 307AII Depositions and Discovery

##### 307AII(A) Discovery in General

##### 307Ak23 k. Persons Subject. Most Cited

#### Cases

As between parties to litigation and nonparties, burden of discovery should be placed on latter only if former do not possess material sought to be discovered, although exception may exist where showing is made that material obtained from party is unreliable and may be subject to impeachment by material in possession of nonparty.

**\*\*568 \*218** Heller, Ehrman, White & McAuliffe, Jon L. Rewinski, Kindel & Anderson, and Elena R. Baca, Los Angeles, for Petitioner.

No appearance for Respondent The Superior Court of Orange County.

**\*\*569 RYLAARSDAM**, Associate Justice.

We hold a subpoena under [Code of Civil Procedure section 2020, subdivision \(d\)](#) (all further statutory references are to the Code of Civil Procedure) must describe the documents to be produced with reasonable particularity. Generalized demands, insupportable by evidence showing at least the potential evidentiary value of the information sought, are not permitted. When responding to a motion for a protective order, the party seeking such discovery must supply evidence demonstrating a reasonable relationship between the materials sought to be produced and the issues **\*219** involved in the case. We therefore issue a writ of mandate directing the trial court to vacate orders compelling a nonparty to produce materials in response to a subpoena describing generalized broad categories of materials rather than specific documents or, at least, categories of documents or materials which are reasonably particularized in relation to the manner in which the producing party maintains such records.

Delco Systems Operations contracted with Rockwell International to supply Trainable Gun Mount Systems (gun mounts). Delco, in turn, contracted with Thiem Industries, Inc. to produce some of these gun mounts. The contracts required the gun mounts be manufactured in accordance with designated specifications. The marriage between Delco and Thiem was not a happy one. Delco claimed Thiem failed to meet the specifications and ultimately refused to accept the gun mounts. Instead Delco contracted with Calcor Space Facility, Inc. to supply the mounts. Not surprisingly, litigation resulted.

Thiem sued Delco on various theories, in essence contending Delco failed to adequately coordinate and manage the project and failed to provide Thiem with adequate and timely engineering information. Delco's cross-complaint followed. It also asserted various theories, contending Thiem failed to meet the specifications and otherwise delivered defective gun mounts.

In the course of the litigation, Thiem served a subpoena under [section 2020](#) on Calcor's custodian of records demanding Calcor, a nonparty and Thiem's competitor, to, in effect, produce all materials in its possession relating to gun mounts, going back nearly ten years. The subpoena fails to identify any specific document but merely describes broad categories of documents and other materials. The categories of materials to be produced are described in an attachment to the subpoena which runs some 12 pages, including almost 3 pages of "definitions" and another 3 pages of "instructions." Typical of the scope of the demand is the so-called definition of "documents" and "writings," which itself runs almost a page and which includes such items as "business records, orders, invoices, statements, bills, books of account, ledgers, books, circulars, brochures, advertisements, bulletins, instructions, minutes, diaries, calendars, logs, schedules, drawings, photographs, charts, statistical, accounting, and financial statements, workpapers, notebooks,

data sheets and every tangible thing produced by handwriting, typewriting, printing, ... and all such data or information stored on computer-related media, ...”

As examples of the categories of material demanded, we quote the first four of thirty-two requests: “*REQUEST NO. 1.* [¶] The Gun Mounts, including \*220 but not limited to documents relating to the design, modification, engineering manufacture, testing, rejection, revision, modification, or acceptance of the Gun Mounts or any subassemblies or components manufactured in connection with the Gun Mount Project. [¶] *REQUEST NO. 2.* [¶] All purchase orders, amendments to purchase orders, engineering change orders, drawings, specifications, invoices, rejection reports, accident reports and Material Review Board (‘MRB’) authorization reports relating to the Gun Mounts or the Gun Mount Project. [¶] *REQUEST NO. 3.* [¶] All requests for quotation (‘RFQ’) or requests for proposal (‘RFP’) in connection with the Gun Mounts or the Gun Mount Project. [¶] *REQUEST NO. 4.* [¶] All bid materials, including but not limited to cost estimates, labor estimates, and production time estimates prepared for and submitted by Calcor in connection with the Gun Mount Project.” As noted, each of these 32 “requests” is expanded\*\*570 by 6 pages of “definitions” and “instructions.” Although facially detailed and particularized, the demand, in effect, is very simple. It orders Calcor to produce everything in its possession which has anything to do with gun mounts (including the gun mount assemblies themselves).

Calcor filed a motion for a protective order contending the subpoena was unreasonably burdensome and overly broad for service on a nonparty, sought confidential and proprietary information and was not limited to materials relevant to the subject matter of the suit between Delco and Thiem. Peter Webber, Calcor's Vice President, stated in a declaration his corporation had three contracts with Delco for gun mounts, only one of which related to the mounts which were the subject of the controversy

between the parties to the litigation. He also declared that there were thousands of documents fitting the categories described in the subpoena and that these documents were kept in various departments of the company. Webber stated “to respond to the Subpoena, Calcor would have to review the correspondence and general files in all of its departments,” and this project “would take two people a minimum of two and one-half to three weeks of full-time effort.” In addition, the declaration states: “The Calcor documents which describe Calcor's methodology all indicate that the documents and the information contained in the documents is considered company confidential.”

Thiem countered with a motion to compel Calcor to comply with the subpoena. No evidence contradicting Mr. Webber's declaration was submitted. In their points and authorities which, of course, are not evidence, Thiem's counsel justified compelling production of the subpoenaed materials as follows: “Following Delco's improper rejection of Thiem's work, Delco hired Calcor, at a vastly increased price, to construct another set of gun mounts. The plans, drawings, and specifications used by Calcor were substantially different from those used for the Thiem project, and indeed \*221 incorporated a large number of changes previously suggested by Thiem but rejected at the time by Delco.... These engineering changes and modifications, as implemented by Calcor, highlight Delco's mismanagement of the Thiem project as well as the manifest design defects in Delco's drawings which allegedly rendered the gun mounts unsuitable for the Air Force's purposes.... Delco, for its part, has asserted that Thiem is responsible to cover the costs incurred by Delco in connection with its having to hire Calcor. There is thus an obvious issue as to why Calcor was hired and as to what necessitated the immense increase in costs associated with the gun mount project.”

The trial court essentially denied Calcor's motion and granted Thiem's motion. Following our issuance of the alternative writ herein, the court modi-

fied its order, limiting the categories of materials to be produced, requiring Calcor to serve a log of documents as to which a privilege was asserted and providing for a protective order covering documents containing proprietary information. Petitioner objected to dismissal of the writ following this modification of the trial court's order and we proceeded to hear the matter.

## DISCUSSION

Calcor's contentions that the requirement it produce the materials is unduly burdensome and that the bulk of the materials requested lack relevancy (even under the expansive discovery test) are well taken. Whether served on a party or a nonparty, the procedure here used to compel production of documents and other materials represents an outrageous abuse of the discovery system, and exemplifies the misuses to which the discovery statutes are prone absent judicial consideration for the great burdens which may be imposed on parties and nonparties alike.

[1] Some time ago, this court recognized the potential for such abuse in *Mannino v. Superior Court* (1983) 142 Cal.App.3d 776, 191 Cal.Rptr. 163, when we noted “We are also aware the discovery process is subject to frequent abuse and, like a cancerous growth, can destroy a meritorious cause or defense....” (*Id.* at p. 778, 191 Cal.Rptr. 163.) Our observations of the day to day practice of law lead us to conclude this cancer is spreading and judges must become more aggressive in curbing these abuses. Courts must insist discovery devices be used as tools \*\*571 to facilitate litigation rather than as weapons to wage litigation. These tools should be well calibrated; the lancet is to be preferred over the sledge hammer.

*The Unreasonable Burden Sought to be Imposed on Calcor*

[2] Both sections 2020 (dealing with inspection demands on nonparties) and 2031 (dealing with in-

spection demands on parties) require records sought to \*222 be produced be designated “either by specifically describing each individual item or by reasonably particularizing each category of item.” (§§ 2020, subd. (d)(1), 2031, subd. (c)(1).) Obviously the demanding party cannot specifically describe an individual item without first ascertaining its existence. Since the above-quoted phrase must be read as a whole, there is no reason to conclude the same requirement should not generally be applied where categories of items are sought to be produced. The requirement the demanding party “*reasonably* particularize each category of item” reinforces such a reading. The “reasonably” in the statute implies a requirement such categories be reasonably particularized from the standpoint of the party who is subjected to the burden of producing the materials. Any other interpretation places too great a burden on the party on whom the demand is made.

[3] Although facially Thiem's detailed description of categories, combined with the three pages of “definitions” and another three pages of “instructions” would seem to satisfy a requirement of “particularity,” it is, in effect, a blanket demand and hardly constitutes “reasonable” particularity. As noted, Thiem's 12-page demand might as well be condensed into a single sentence: Produce everything in your possession which in any way relates to gun mounts. There is no indication the “categories” bear any relationship to the manner in which Calcor maintains its records. The burden is sought to be imposed on Calcor to search its extensive files, at many locations, to see what it can find to fit Thiem's definitions, instructions and categories.

[4] A practice has arisen to use the procedures of sections 2020 and 2031 as devices to determine whether documents exist. This places a great burden on the responding party, a burden which should generally be borne by the party seeking the discovery. We do not intend to suggest this use of the procedure to compel document production is always improper. However, particularly when dealing with

an entity which is not even a party to the litigation, the court should attempt to structure discovery in a manner which is least burdensome to such an entity.

We recognize that, in some cases, a requirement that preliminary discovery be conducted to ascertain the existence of documents or categories of documents may itself impose additional burdens. To the extent such burdens rest on parties seeking the discovery, since they may have to take preliminary depositions of records custodians or, in the case of parties, serve interrogatories, we deem the burden is properly placed where it belongs. To the extent this could further burden the party from whom such discovery is sought, such a party can avoid the burden by agreeing to supply the information in a less formal manner.

[5] We also recognize that, if the parties fail to agree to an informal method for identifying records, the need for a preliminary deposition may be raised \*223 as a bar to a needed deposition of the same person after the records have been examined. However, trial courts should be liberal in permitting such a second deposition upon a showing the earlier deposition was made necessary by the party's refusal to cooperate in agreeing to less formal procedures.

[6] Because of the potential for promiscuous discovery imposing great burdens, even though ultimately the probative value of the discovered material may be questionable, trial judges must carefully weigh the cost, time, expense and disruption of normal business resulting from an order compelling the discovery against the probative value of the material which might be disclosed if the discovery is ordered. A carelessly drafted discovery order may result in cost and inconvenience far outweighing the potential usefulness of the material ordered to be produced. Because of the difficulty in drawing \*\*572 clear lines as to what is and what is not proper, this danger is particularly great with respect to orders requiring the production of materials.

[7] Thiem's employment of six pages of "definitions" and "instructions" is particularly obnoxious. This, in effect, turns each of the 32 requests into a complicated "category" described in more than 6 pages. With respect to interrogatories, a similar practice is expressly prohibited by section 2030 subdivision (c)(5), which requires "[e]ach interrogatory shall be full and complete in and of itself" and, except for Judicial Council form interrogatories under section 2033.5, "[n]o preface or instruction shall be included with a set of interrogatories...." The statute does not expressly prohibit the practice of expanding on categories with respect to requests for production in this manner. However, the prohibition on discovery which is "unduly burdensome" (§ 2019(b)(2)), if not providing a blanket prohibition for a limited use of some incorporation of external definitions, should be employed to greatly limit the scope of this practice. In this case, the grossly excessive use of "definitions" and "instructions," in and of itself, makes the subpoena unduly burdensome.

*No Proof the Materials Sought Were Reasonably Calculated to Lead to the Discovery of Admissible Evidence*

[8] Although the scope of civil discovery is broad, it is not limitless. Section 2017, subdivision (a) provides matters are subject to discovery "if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence." The burden rests upon the party seeking the discovery to provide evidence from which the court may determine these conditions are met. Section 2031, subdivision (l), which applies to document production requests served on a party, requires a \*224 party seeking to compel such production to "set forth specific facts showing good cause justifying the discovery sought by the inspection demand...." (Emphasis added.) Section 2020, the statute at issue contains no such specific requirement. However, since both sections are part of a single statutory scheme, and since it is unlikely the Legislature intended to place greater burdens on



a nonparty than on a party to the litigation, we read a similar requirement into the latter section.

[9] In law and motion practice, factual evidence is supplied to the court by way of declarations. Thiem provided argument but no evidence at all to permit the court to conclude the material sought was “admissible in evidence or appear [ed] reasonably calculated to lead to the discovery of admissible evidence.” The only justification for the request is contained in Thiem’s “Statement Pursuant to Rule 335(a)” and in a document entitled “Combined Opposition to Calcor Space Facility, Inc.’s Motion for Protective Order and Reply Brief in Support of Motion to Compel Calcor Space Facility, Inc. to Comply with Deposition Subpoena for Production of Business Documents.” Neither document is verified, and thus they do not constitute evidence.

Even were we to ignore that the statements purporting to justify an order compelling Calcor to produce its documents and other materials are unverified, they still fail. There is an absence of specific facts relating to each category of materials sought to be produced; the justifications offered for the production are mere generalities. The very vice of the subpoena’s promiscuity is well illustrated by Thiem’s inability to provide focused, fact-specific justifications for its demands. The noted generality of the subpoena’s definitions, instructions and categories which merely add up to a demand Calcor produce everything in its possession having anything to do with gun mounts, precludes Thiem from demonstrating any particular item or category in fact constitutes or contains matter which “is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence.” (§ 2017, subd. (a).) The purported justification for imposing this great burden on Calcor necessarily suffers from the same generality as the subpoena itself.

Although appellate courts have frequently stated “fishing expeditions” are permissible in discovery, there is a limit. As noted in **\*\*573***Gonzalez v. Superior Court* (1995) 33 Cal.App.4th 1539, 39 Cal.Rptr.2d 896, “These rules are applied liberally

in favor of discovery (*Colonial Life & Accident Ins. Co. v. Superior Court* (1982) 31 Cal.3d 785, 790, 183 Cal.Rptr. 810, 647 P.2d 86 [citation] ), and (contrary to popular belief), fishing expeditions *are* permissible in some cases.” (*Id.* at p. 1546, 39 Cal.Rptr.2d 896.) However, early in the development of our discovery law our Supreme Court recognized the limits on such “fishing expeditions.” **\*225** In *Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 15 Cal.Rptr. 90, 364 P.2d 266, the seminal case in California civil discovery, the court gave examples of improper “fishing” which clearly apply here: “The method of ‘fishing’ may be, in a particular case, entirely improper (i.e., insufficient identification of the requested information to acquaint the other party with the nature of information desired, attempt to place the burden and cost of supplying information equally available to both solely upon the adversary, placing more burden upon the adversary than the value of the information warrants, etc.). Such improper methods of ‘fishing’ may be (and should be) controlled by the trial court under the powers granted to it by the statute.” (*Id.* at pp. 384-385, 15 Cal.Rptr. 90, 364 P.2d 266.) The concerns for avoiding undue burdens on the “adversary” in the litigation expressed in *Greyhound* apply with even more weight to a nonparty.

Had the *Greyhound* court been able to anticipate the tremendous burdens promiscuous discovery has placed on litigants and nonparties alike, it might well have taken a stronger stand against such “fishing.” *Greyhound*’s optimism in noting the then new discovery system would be “simple, convenient and inexpensive,” would “expedite litigation,” and “expedite and facilitate both preparation and trial,” has certainly proven to have been considerably off the mark. (*Id.* at p. 376, 15 Cal.Rptr. 90, 364 P.2d 266.)

[10] The issues in this litigation may essentially be reduced to the question whether Thiem’s work met Delco’s specifications. This may be determined without any reference to the contract between

53 Cal.App.4th 216, 61 Cal.Rptr.2d 567, 97 Cal. Daily Op. Serv. 1618, 97 Daily Journal D.A.R. 3023  
(Cite as: 53 Cal.App.4th 216, 61 Cal.Rptr.2d 567)

Delco and Calcor or the specifications which are part of that contract. Another issue which may exist is whether Delco may recover the excess of the cost of the gun mounts procured from Calcor as damages for “cover” under [California Uniform Commercial Code section 2712](#). (See *Gerwin v. Southeastern Cal. Assn. of Seventh Day Adventists* (1971) 14 Cal.App.3d 209, 217-218, 92 Cal.Rptr. 111.) If so, differences in specifications issued to Thiem and to Calcor may be relevant. However, discovery by Thiem from Delco should normally provide it with this evidence. As between parties to litigation and nonparties, the burden of discovery should be placed on the latter only if the former do not possess the material sought to be discovered. An exception to this may exist where a showing is made the material obtained from the party is unreliable and may be subject to impeachment by material in possession of the nonparty. Thiem has not even attempted to demonstrate why it cannot obtain the needed materials from Delco or why such materials might be unreliable.

#### *The Contentions Regarding Trade Secrets*

In light of our determination we need not consider Calcor's contentions concerning trade secrets. While Thiem and Calcor are business competitors, \*226 we do not base our decision herein on that relationship. However, we note that courts should be particularly sensitive to the potential for creating an unfair commercial advantage to a party seeking discovery of materials such as are involved here.

#### DISPOSITION

Let a writ of mandate issue directing the trial court to vacate its order compelling Calcor to produce documents, to serve a privilege log and to serve responses. This order is without prejudice to Thiem serving Calcor with a proper subpoena duces tecum under [section 2020](#) and without prejudice to Calcor subsequently contesting the propriety of such subpoena. The alternative writ is discharged and this

court's stay order is dissolved. Thiem shall pay Calcor's costs.

[SILLS](#), P.J., and [CROSBY](#), J. concur.

Cal.App. 4 Dist., 1997.

Calcor Space Facility, Inc. v. Superior Court  
53 Cal.App.4th 216, 61 Cal.Rptr.2d 567, 97 Cal.  
Daily Op. Serv. 1618, 97 Daily Journal D.A.R.  
3023

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(Cite as: **2007 WL 1593211 (E.D.N.Y.)**)

**H**

Only the Westlaw citation is currently available.

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

Robert EHRlich, 100 Roslyn Avenue LLC and  
Sea Cliff Coffee Company, Inc., Plaintiffs,

v.

THE INCORPORATED VILLAGE OF SEA  
CLIFF, Eileen Kreib, individually and as Mayor of  
the Village of Sea Cliff and as former Village  
Trustee, Claudia Moyné, individually and as former  
Mayor of the Village of Sea Cliff, Richard A.  
Siegel, individually and as Village Attorney for the  
Village of Sea Cliff, The Board of Trustees for the  
Incorporated Village of Sea Cliff, Paul Marchese,  
Peter Hayes, Robert Haim, and Elena Villafane, in-  
dividually and constituting the Board of Trustees,  
The Zoning Board of Appeals of the Incorporated  
Village of Sea Cliff, George Bevad, Thomas Pow-  
ell, John Brady, Dina Epstein, James O'Donnell and  
Patricia Harrigan, individually and constituting  
present and former members of the Board of Zon-  
ing Appeals, the Planning Board for the Incorpor-  
ated Village of Sea Cliff, John D. Nagy, Fred Eder,  
Gerard Izzo, Norman Parsons, and Laurie Martone,  
constituting the current members of the Planning  
Board, and David Derienzis and Jeffrey Mongno,  
individually and as current and former Building In-  
spectors for the Incorporated Village of Sea Cliff,  
Defendants.

**No. CV 04-4025(LDW)(AKT).**

May 31, 2007.

Cynthia A. Kouril, Robert L. Folks & Associates,  
LLP, Melville, NY, for Plaintiffs.

[Mark S. Mulholland](#), Ruskin Moscou Faltischek,  
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Mineola, NY, [Stanley A. Camhi](#), Jaspan, Schlesing-  
er & Hoffman, LLP, Garden City, NY, [Michael L.  
Cirrito](#), White, Cirrito & Nally, LLP, Hempstead,  
NY, for Defendants.

**ORDER**

[A. KATHLEEN TOMLINSON](#), Magistrate Judge.

**I. PRELIMINARY STATEMENT**

\*1 Before the Court is Plaintiffs' motion pursuant to  
[Fed.R.Civ.P. 26, 34](#) and [37\(a\)](#) to compel the inspec-  
tion of the property located at 66 Altamont Avenue  
(the "Altamont property") pursuant to the "Notice  
to Enter Upon Land" served upon Defendant Vil-  
lage of Sea Cliff on February 3, 2007. Defendant  
Village of Sea Cliff has opposed the motion.

Having considered the parties' respective submis-  
sions, the oral arguments heard before me and the  
applicable law, I am DENYING Plaintiffs' motion  
for the reasons set forth below.

**II. BACKGROUND**

On February 1, 2007, Plaintiffs served a non-party  
subpoena upon the owner of 34 Woodbridge Lane,  
Sea Cliff, New York and also served Defendant  
Village of Sea Cliff with a Notice to Enter Upon  
Land, scheduling the inspection of the Altamont  
property for February 12, 2007. On February 8,  
2007, Defendant Village of Sea Cliff moved by let-  
ter motion [DE 94] to quash Plaintiffs' non-party  
subpoena seeking to inspect the property located at  
34 Woodbridge Lane. Defense counsel argued that  
the inspection was irrelevant to the issues raised in  
this litigation and was untimely because it could not  
be completed within the February 15 discovery  
deadline. Plaintiffs' counsel opposes that motion,  
arguing that because the property was owned by a  
non-party, Defendant lacked standing to quash the

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subpoena. With respect to the Altamont property, defense counsel has objected to Plaintiffs' notice, thereby "putting the burden on plaintiffs to move for an order compelling us to permit entry." [DE 94]

After hearing oral argument from both sides, I denied Defendant's motion to quash as to the 34 Woodbridge Lane property because "parties typically are deemed to lack standing to quash subpoenas issued to non-parties under Rule 45 absent a claim of privilege or some proprietary or personal interest in the subpoenaed matter." *Tummino v. Von Eschenbach*, No. 05-CV-366, 2006 U.S. Dist. LEXIS, at \* 12 (E.D.N.Y. Nov. 6, 2006). Since the 34 Woodbridge Lane property is owned by a third-party who has apparently consented to the inspection, and the Village Defendant has made no showing of privilege or any proprietary or personal interest in the subpoenaed matter, I found that the Village lacked the requisite standing sufficient to quash the subpoena.

However, insofar as the Altamont property is owned by the Village of Sea Cliff, it appears that the Defendant Village has standing to challenge this inspection. At the February 8, 2007 conference, Plaintiffs' counsel stated that she would move to compel with respect to the notice to inspect the Altamont property, but raised concern over the February 15, 2007 discovery deadline. Specifically, Plaintiffs' counsel stated that she was planning to have experts examine the 34 Woodbridge Lane property immediately. According to Plaintiffs, however, the cost would be far greater if Plaintiffs were required to inspect the 34 Woodbridge Lane property and the Altamont Avenue property separately. Plaintiffs' counsel stated that the inspection dates for the 34 Woodbridge Lane property were scheduled for February 12 and 13. I informed the parties during the February 8 conference that Plaintiffs had not explained the relevancy of either inspection to the underlying claims and defenses asserted in this case. Nonetheless, I granted Plaintiffs' requests for an extension of time beyond February

15, 2007, solely for the purpose of completing the inspection of both properties should counsel's motion to compel be granted. I further advised Plaintiffs' counsel that "if Plaintiffs choose to incur costs for proceeding with inspection and testing, then they are hereby warned that they do so at their own peril." [DE 95]

\*2 Plaintiffs now move pursuant to [Rules 26, 34 and 37\(a\) of the Federal Rules of Civil Procedure](#) to compel the inspection of the Altamont property pursuant to the Notice to Enter Upon Land served upon Defendant Village of Sea Cliff on February 3, 2007.<sup>FN1</sup>

<sup>FN1</sup>. Plaintiffs unilaterally shortened the notice period from that provided for in the Federal Rules.

### III. STANDARD OF REVIEW

A motion to compel is entrusted to the sound discretion of the district court. *American Sav. Bank, FSB v. UBS Paine Webber, Inc.*, (*In re Fitch, Inc.*), 330 F.3d 104, 108 (2d Cir.2003); *United States v. Sanders*, 211 F.3d 711, 720 (2d Cir.2000). The Second Circuit has noted that a "trial court enjoys wide discretion in its handling of pre-trial discovery, and its rulings with regard to discovery are reversed only upon a clear showing of an abuse of discretion." *DG Creditor Corp. v. Dabah*, (*In re DG Acquisition Corp.*), 151 F.3d 75, 79 (2d Cir.1998) (citing *Cruden v. Bank of N.Y.*, 957 F.2d 961, 972 (2d Cir.1992)). A district court is considered to have abused its discretion "if it bases its ruling on a mistaken application of the law or a clearly erroneous finding of fact." *Milanesi v. Rus-tOleum Corp.*, 244 F.3d 104, 110 (2d Cir.2001).

Fed.R.Civ.P. 34(a)(2), provides that:

Any party may serve any other party a request to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection, measuring, surveying, photographing,

testing or sampling the property or any designated object or operation thereon, within the scope of [Rule 26\(b\)](#).

[Fed.R.Civ.P. 34\(a\)\(2\)](#). Such a request must set forth the property to be inspected and “specify a reasonable time, place, and manner of making the inspection and performing the related acts.” [Fed.R.Civ.P. 34\(b\)](#). The Second Circuit has held that with regard to a [Rule 34](#) inspection, “the degree to which the proposed inspection will aid in the search for truth must be balanced against the burdens and dangers created by the inspection.” *New York Assoc. for Retarded Children v. Carey*, 706 F.2d 956, 961 (2d Cir.1983). “Granting or denying a request under [rule 34](#) is a matter within the trial court's discretion, and it will be reversed only if the action taken was improvident and affected substantial rights.” *Tiedman v. American Pigment Corp.*, 253 F.2d 803, 808 (4th Cir.1958). Courts have repeatedly held that the scope of a [Rule 34](#) request is governed by [Rule 26\(b\)](#). See, e.g., *Belcher v. Bassett Furniture Indus., Inc.*, 588 F.2d 904, 907 (4th Cir.1978); *Macort v. Goodwill Indus.-Manasota, Inc.*, 220 F.R.D. 377, 379 (M.D.Fla.2003). [Fed.R.Civ.P. 26\(b\)](#) describes the scope of, and limitations on, discovery in civil litigation. It provides as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party.... For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by [Rule 26\(b\)\(2\)\(i\), \(ii\), and \(iii\)](#).

\*[3 Fed.R.Civ.P. 26\(b\)](#). “Relevance” under the Rule “has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on any issue that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 57

[L.Ed.2d 253](#) (1978); *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 882 F.2d 682, 687 (2d Cir.1989) (“The broad scope of discovery delimited by the Federal Rules of Civil Procedure is designed to achieve disclosure of all the evidence relevant to the merits of a controversy.”)

#### IV. DISCUSSION

This is an action brought primarily under [42 U.S.C. § 1983](#) involving allegations of religious discrimination against the Village of Sea Cliff and various officials and trustees of the Village. Plaintiffs allege that due to Plaintiff Ehrlich's Jewish faith, the business located at 100 Roslyn Avenue has undergone a biased and more arduous process to obtain the zoning approvals and permits than other similarly situated Sea Cliff businesses. In their Second Amended Complaint, Plaintiffs combine ten (10) causes of action seeking injunctive, declaratory and monetary relief. The claims for monetary relief include alleged violations of: (1) [42 U.S.C. § 1983](#) based upon disparate treatment of Plaintiffs, because of Plaintiff Ehrlich's religious beliefs, compared to other similarly situated property owners; (2) substantive due process rights under [§ 1983](#) relating to infringement of Plaintiff Ehrlich's property rights; (3) [§ 1985](#) based on an alleged conspiracy to deprive Plaintiff Ehrlich of his right to equal protection under the New York State and federal Constitutions and [§ 1986](#) for the purported failure of defendants to prevent or correct the pattern and practice of discriminatory conduct toward Plaintiff. With regard to declaratory relief, Plaintiffs seek a declaration that (4) the restrictive covenant at issue regarding cooking on the premises is extinguished; (5) the statutory scheme and conditions imposed by the Village, its Trustees, the ZBA and Planning Board are unconstitutional and ultra vires; (6) Defendants have deprived Plaintiffs of the economic viability of the property, constituting an illegal regulatory “taking” in violation of [§ 1983](#); (7) the positive declaration issued by the Village of Sea Cliff Planning Board finding that a DEIS was required was invalid and compelling Defendants to issue a

negative declaration without conditions; (8) Chapter 60 of the Village Code is void and illegal as a matter of law; (9) Condition # 1 of the Conditioned Negative Declaration requiring Plaintiffs to agree to never apply for an alcoholic beverage license is void, invalid and improper as matter of law; and (10) the December 6, 2004 decision is modified to eliminate all conditions on the use of Plaintiffs' property and directing Defendants to issue Plaintiffs a Certificate of Occupancy.

Plaintiffs argue that they should be permitted to inspect the Altamont property because the inspection is not only germane but is encompassed under the broad definition of "relevance." Plaintiffs argue that such inspection is needed to demonstrate that the Village of Sea Cliff treated Plaintiffs' property differently from other similarly situated properties. Additionally, Plaintiffs assert that the proposed inspection of the Altamont property

\*4 involves little inconvenience to defendant and no out of pocket costs to defendant at all. Plaintiff plans on using a 2 step process: first, a non-invasive subsoil imaging to identify buried items and map subsoil conditions followed by the taking of "core samples" which do not change the soil conditions or create scares upon the land.

Pltffs.' Mem. at 2. According to Plaintiffs' counsel, the Altamont property and the 34 Woodbridge Lane property "were both allegedly illegal dumping sites." *Id.* Counsel goes on to state that the testimony of Defendants Krieb and Marchese shows they knew that the Altamont site was contaminated yet took no steps to prepare an EIS or to contain or prevent the spread of contaminants caused by the construction activities which would disturb the contaminated soil and create pollution of the air and nearby water; yet the defendants forced plaintiff to perform a full bore DEIS complete with six month traffic study and noise study in order to achieve a permit allowing longer hours of operation and the "installation" of a toaster oven. In addition to showing the jury that plaintiffs were treated differently than similarly

situated properties, i.e., other food establishments, plaintiffs are entitled to show how the Village not only abused its powers under SEQRA to discriminate against plaintiffs, but also ignored its obligation under SEQRA even when the resulting risk of environmental harm and outspread contamination was great. This provides context which highlights the maliciousness of defendant's conduct toward plaintiffs.

*See id.* at 2-3.

In opposing the motion, Defendants argue that the Altamont property is wholly irrelevant to the claims and defenses brought in this action and improperly asserted for Equal Protection purposes because the Altamont property is not a "similarly situated" business. [DE 103] Defendants also maintain, *ipse dixit*, that Plaintiffs are improperly seeking to obtain information concerning the Altamont property for reasons other than the instant litigation. No information presented to me in these motion papers has provided concrete support for that conclusion and I decline to engage in speculation and conjecture on this issue.

"The Equal Protection Clause requires that the government treat all similarly situated people alike." [Harlem Assocs. v. Inc. Vill. of Mineola](#), 273 F.3d 494, 499 (2d Cir.2001). "To prevail on a selective treatment claim, a plaintiff must demonstrate that (1) he was treated differently from other similarly-situated individuals; and (2) the differential treatment was based on "impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." " [Skehan v. Vill. of Mamaroneck](#), 465 F.3d 96, 110 (2d Cir.2006) (citing [LaTrieste Rest. & Cabaret v. Vill. of Port Chester](#), 40 F.3d 587, 590 (2d Cir.1994)).

In establishing the similarly situated element, the Second Circuit has cautioned that "the level of similarity between plaintiffs and the persons *with whom they compare themselves must be extremely high.*" [Neilson v. D'Angelis](#), 409 F.3d 100, 104 (2d

Cir.2005) (emphasis supplied). “In order to succeed, the [plaintiffs] must demonstrate that they were treated differently than someone who is *prima facie* identical in all relevant respects.” *Id.* at 104 (citing *Purze v. Vill. of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir.2002)). To ascertain whether similar circumstances are “*prima facie* identical,” the Second Circuit requires a plaintiff to satisfy a two-prong test, namely, that “(1) no rational person could regard the circumstances of the plaintiff to differ from those of the comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy, and (2) the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendant acted on the basis of a mistake.” *Neilson*, 409 F.3d at 105. I find that the property located at 100 Roslyn Avenue is sufficiently dissimilar to the Altamont property to warrant denial of Plaintiffs' motion to compel. In demonstrating that the Altamont property and Plaintiffs' properties are not similarly situated, Defendant points to several key differences which I find persuasive, particularly with regard to application of the Second Circuit's two-part analysis. For example, Defendant points out that (1) the Altamont property is publicly owned while Plaintiffs' property is privately owned; (2) the Altamont property houses a garage while Plaintiffs' property is a restaurant; (3) the conduct in question regarding the Altamont property concerned removal of “fly ash,” a potential environmental problem, whereas Plaintiffs' applications concerning the subject property encompass a variety of zoning issues associated with operating a permanent restaurant; (4) Plaintiffs' property is proximate to certain historic structures, a characteristic not shared by the Altamont property; (5) the SEQRA determination for the Altamont property was made by the Board of Trustees whereas the SEQRA determination for Plaintiffs' property was made by the Planning Board; (6) there was no restrictive covenant associated with the Altamont property while a restrictive covenant was clearly part of Plaintiffs' ownership interest in the coffee shop property giving rise to this litigation. [DE 103]

\*5 Based upon these key differences, it cannot be said with a degree of certainty that “no rational person could regard the circumstances of the plaintiff to differ from those of the comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy” or that the similarity in circumstances and difference in treatment are sufficient to exclude the possibility that the defendant acted on the basis of a mistake. Therefore, since the Altamont property is not one “similarly situated” to Plaintiffs' property, there is no legitimate, relevant basis to undertake the requested inspection.

Plaintiffs nonetheless urge that inspection is appropriate because the information obtained from such inspection, from Plaintiffs' perspective, is relevant here. Prior to 1970, “good cause” was a prerequisite to any discovery order under Rule 34. *See McKesson Corp. v. Islamic Republic of Iran*, 185 F.R.D. 70, 75 (D.D.C.1999); *Minnesota Mining & Mfg. Co. v. Nippon Carbide Indus. Co.*, 171 F.R.D. 246, 248 (D.Minn.1997). However, following the 1970 amendments to the Federal Rules, the good cause requirement was eliminated. *See* Notes of the Advisory Committee (1970), *Fed.R.Civ.P.* 34. As amended, a party's request comes within the coverage of Rule 34 “if the proposed entry and inspection are within the scope of Rule 26(b).” *Minnesota Mining & Mfg. Co.*, 171 F.R.D. at 248 (citing *Cuno, Inc. v. Pall Corp.*, 116 F.R.D. 279, 281 (E.D.N.Y.1987)). “Inspection is permitted, and indeed anticipated by Rule 34(a), to be governed by the scope of Rule 26(b).” *Cuno, Inc.*, 116 F.R.D. at 281. In *Cuno*, a patent infringement action, Magistrate Judge Jordan granted plaintiff's motion to compel an inspection of defendant's business and allowed plaintiff the opportunity “to inspect, observe, videotape, and photograph the claimed infringing process.” *Id.* at 280. In support of his holding, Judge Jordan noted since the 1970 amendments to the Federal Rules a showing of need is not a prerequisite for an order to compel inspection. *Id.* Rather, “only a showing of relevance is necessary.” *Id.* at 281.

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Plaintiffs' demonstration of "relevance" as reflected in their letter motion is not compelling. Any relevance of the desired inspection to the substance and merits of the claims as stated in this case is marginal at best. From my review of the claims themselves and the arguments of counsel, I find this request to be far afield from the crux of this case and not one contemplated or supported by my prior decision to permit discovery to be re-opened for limited purposes in this matter. Absent a showing of relevance, courts have repeatedly denied requests to inspect property pursuant to [Fed.R.Civ.P. 34](#). *See, e.g., Belcher*, 588 F.2d at 908 ("Neither rule 34 nor rule 26, the general discovery rule, permits blanket discovery upon bare skeletal request when confronted with an objection ... Some degree of need must be shown. In most cases, this need is demonstrated by simply showing the relevancy of the desired discovery to this cause of action."); *Macort*, 220 F.R.D. at 379 (limiting plaintiffs' Rule 34 inspection in ADA case to those specific barriers of access enumerated in the complaint and denying plaintiffs' request to determine whether there are mobility-related barriers on defendant's property); *Schwab v. Wyndham Int'l, Inc.*, 225 F.R.D. 538, (N.D.Tex.2005) (denying a Rule 34 motion to compel entry upon premises for inspection since "plaintiff has not articulated, much less proved, a need for inspecting and photographing the premises" and because "general and conclusory assertions do not justify unrestricted access to Wyndham's corporate headquarters."); *Teer v. Law Eng'g and Envtl. Serv., Inc.*, 176 F.R.D. 206 (E.D.N.C.1997) (denying Rule 34 motion to compel entry noting that "whether to permit entry upon land involves a balancing of degree to which the proposed inspection will aid in the search for truth against the burdens and dangers created by the inspection.")

\*6 Under the rubric of [Rule 26\(b\)](#) the Court has the authority, and the inclination, to confine discovery to those claims and defenses asserted in the pleadings so that the actual scope of discovery is determined according to the reasonable needs of the action. *See* Notes of the Advisory Committee (2000),

[Fed.R.Civ.P. 26](#). Based upon the facts presented on this motion, Plaintiffs have not demonstrated how an inspection of the Altamont property is necessary or relevant to any of their claims. I therefore decline to grant the motion.

## V. CONCLUSION

Accordingly, Plaintiffs' motion to compel entry and inspection upon the Altamont property is hereby DENIED.

## SO ORDERED.

E.D.N.Y., 2007.

Ehrlich v. Incorporated Village of Sea Cliff

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