UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Christian S. Strong, *et al.*,

Plaintiffs,

v. **Case No.: 1:03-cv-0383**

U-Haul Co. of Massachusetts, Inc., *et al.*, **Judge Michael H. Watson**

Defendants.

OPINION AND ORDER

This matter is before the Court on Plaintiffs' and Defendants' Objections to Magistrate Judge Hogan's October 18, 2007 Report and Recommendation (Docs. 524 and 525). The Objections have been fully briefed and are ripe for review. For the reasons that follow, the Court adopts Magistrate Judge Hogan's Report and Recommendation in its entirety.

I. BACKGROUND

On February 12, 2007, the Court referred the issue of sanctions to Magistrate Judge Hogan with the specific direction to issue a report and recommendation addressing: (1) whether defendants have engaged in sanctionable conduct at any time during this litigation, including but not limited to conduct during discovery and both trials, and (2) what sanctions, if any, should be imposed. Magistrate Judge Hogan conducted a hearing on the aforementioned issues on August 24, 2007. Magistrate Judge Hogan then issued his Report and Recommendation on October 18, 2007 recommending that

Defendants' attorneys be sanctioned for their presentation of the distracted driver/turn around to get a soda defense at the first trial, and for their intentional misrepresentations to the Court in seeking the withdrawal of Fulbright & Jaworski from this case and for the continued participation of Fulbright & Jaworski after the Court granted it leave to withdraw as counsel.

The Court finds that the procedural and factual background of this case is sufficiently set forth in Magistrate Judge Hogan's Report and Recommendation and is incorporated as if fully rewritten herein.

II. STANDARD OF REVIEW

A ruling on sanctions is deemed a claim which may be referred to a magistrate judge not for disposition, but only for a report and recommendation subject to de novo review by the district judge. *Massey v. City of Ferndale*, 7 F.3d 506, 509-10 (6th Cir. 1993). Hence, when objections to a magistrate judge's report and recommendation on sanctions are filed, the district judge "must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3); *see also* 28 U.S.C. §636(a)(1) and (b)(1)(B). General objections are insufficient to preserve any issues for review; "[a] general objection to the entirety of the magistrate's report has the same effects as would a failure to object." *Howard v. Secretary of Health and Human Services*, 932 F.2d 505, 509 (6th Cir. 1991).

III. AUTHORITY TO IMPOSE SANCTIONS

The Court's inherent and statutory authority to impose sanctions is well-

established. The applicable statutory provisions include 28 U.S.C. § 1927, 18 U.S.C. § 401, Fed. R. Civ. P. 11, and Fed. R. Civ. P. 37. In addition, under the Court's inherent authority to impose sanctions, the Court may "assess attorney's fees against counsel who willfully abuse judicial processes or who otherwise act in bad faith." *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 646 (6th Cir. 2006).

Title 28 U.S.C. § 1927 provides:

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

The standard for imposition of sanctions under section 1927 is an objective one and the Court need not make a finding of subjective bad faith before assessing monetary sanctions under section 1927. *Salkil v. Mount Sterling Twp. Police Dept.*, 458 F.3d 520, 532 (6th Cir. 2006). "[S]anctions are warranted when an attorney objectively 'falls short of the obligations owed by a member of the bar to the court and which, as a result, causes additional expense to the opposing party.'" *Red Carpet Studios*, 465 F.3d at 646 (*quoting Ruben v. Warren City Sch.*, 825 F.3d 977, 984 (6th Cir. 1987). In contrast to sanctions imposed pursuant to the Court's inherent power, sanctions under section 1927 "require a showing of something less than subjective bad faith, but something more than negligence or incompetence." *Red Carpet Studios*, 465 F.3d at 646; *see also Jones v. Continental Corp.*, 789 F.2d 1225, 1230 (6th Cir. 1986) ("we hold that 28 U.S.C. § 1927 authorizes a court to assess fees against an attorney for 'unreasonable and vexatious' multiplication of litigation despite the absence of any conscious impropriety").

Sanctions imposed under section 1927 are intended "to deter dilatory litigation practices and to punish aggressive tactics that far exceed zealous advocacy." *Red Carpet Studios*, 465 F.3d at 646. "Thus, an attorney is sanctionable when he intentionally abuses the judicial process or knowingly disregards the risk that his actions will needlessly multiply proceedings." *Id.* at 646. Where an attorney "not guilty of conscious impropriety 'intentionally . . . [pursues] a claim that lacks possible legal or factual basis,'" then counsel has engaged in sanctionable conduct. *Ridder v. City of Springfield*, 109 F.3d 288, 298 (6th Cir. 1997) (*quoting Jones v. Continental Corp.*, 789 F.2d 1225, 1230 (6th Cir. 1986)).

Sanctions may also be imposed pursuant to the criminal contempt statute, 18 U.S.C. § 401. The statute provides that the Court may punish, by fine and/or imprisonment, "[d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." 18 U.S.C. § 401(3). "[T]he act of disobedience or resistance must be 'a deliberate or intended violation, as distinguished from an accidental, inadvertent or negligent violation.'" *In re Smothers*, 322 F.3d 438, 442 (6th Cir. 2003). Such disobedience or resistance may be inferred from conduct disclosing "a reckless disregard for his professional duty." *Id.* Under this provision, plaintiffs must prove beyond a reasonable doubt that defendants violated a clear and unambiguous court order. *Smothers*, 322 F.3d at 442.

"[T]he imposition of inherent power sanctions requires a finding of bad faith" or conduct tantamount to bad faith. *First Bank of Marietta v. Hartford Underwriters Ins. Co.*, 307 F.3d 501, 519 (6th Cir. 2002) (*citing Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980)). A finding of "bad faith" is a factual determination and the Court must "[m]ake actual findings of fact

that demonstrate that the claims advanced were meritless, that counsel knew or should have known that the claims were meritless, and that the claims were filed for an improper purpose." *First Bank of Marietta*, 307 F.3d at 519, 521.

The Magistrate Judge concluded and the Court agrees that sanctions are not appropriate in this case pursuant to Rule 11 of the Federal Rules of Civil Procedure. In fact, Plaintiffs admit they have not moved for sanctions pursuant to Rule 11 because of the strict filing and notice requirements imposed by the rule. *See* Fed. R. Civ. P. 11(c)(1)(A). Despite the Court's authority to impose Rule 11 sanctions on its own motion, the Court declines to do so here and prefers to consider sanctions under the provisions set forth above.

IV. DISCUSSION

Magistrate Judge Hogan's Report and Recommendation identified seven potentially sanctionable categories of conduct which occurred during either the first or second trial. They are as follows: (1) the causes and consequences of the first mistrial; (2) the spoliation of evidence in this case and other cases; (3) the participation by Fulbright & Jaworski after withdrawal; (4) the failure to cooperate in discovery; (5) the disregard of the Court's rulings and lack of respect for the Court; (6) the presentation of the "distracted driver" defense; and (7) the failure to produce discovery concerning the Henschen axles and associated misrepresentations. Magistrate Judge Hogan's Report and Recommendation recommends that Defendants' attorneys be sanctioned for their presentation of the distracted driver/turn around to get a soda defense at the first trial, and for their intentional misrepresentation to the court in seeking the withdrawal of Fulbright & Jaworski from this matter and for the continued participation of Fulbright & Jaworski after withdrawal as counsel.

Defendants object to the Magistrate's recommendation of sanctions for the two events described above. Plaintiffs object to not being awarded sanctions for the remaining categories. The Court will therefore conduct a de novo review of each of the categories as set forth in the Report and Recommendation.

1. The Causes and Consequences to Plaintiffs of the First Mistrial

On December 1, 2005, after more than two weeks of trial, the Court declared a mistrial. The Court ultimately determined that "Plaintiffs would be denied a fair and impartial trial if permitted to continue, as a limiting instruction for the jury to disregard the argument, statements, and actions by Defendants' counsel would not be sufficient to overcome the prejudicial effect." (Doc. 265 at 1). The Court identified two precipitating events in declaring the mistrial: (1) the repeated references by defense counsel to a "Ford Explorer" as the towing vehicle in violation of the Court's ruling; and (2) the "distracted driver defense" which suggested that Ms. Swegles, the driver of the tow vehicle, reached over the seat for a soda without any evidentiary support for such argument.

The Magistrate Judge correctly concluded that it was not his job to revisit the issue of whether the declaration of a mistrial was appropriate, but rather, whether the conduct that formed the basis for the mistrial warrants an award of sanctions. Plaintiffs object to the Magistrate Judge's conclusion that sanctions are not warranted for the Ford Explorer references and Defendants object to the issuance of sanctions for presenting the distracted driver defense. The Court will address each in turn.

a. The Ford Explorer references

The Report and Recommendation sets forth in detail the basis for the Court's two pre-trial rulings with respect to the Ford Explorer evidence, as well as the testimony

that prompted the Court to declare after opening statements, "I think we pushed the envelope on the Ford Explorer references, and I don't want to hear it again. (Tr. 11/15/05 at 77). The testimony following this instruction is also included in the Report and Recommendation, which prompted the Court to issue a second and third instruction not to use the term Ford Explorer.

The Magistrate Judge reviewed all the testimony and concluded that the use of the term Ford Explorer by defense counsel five times following opening statements was not intentional. Further, defense counsel's use of the term was not so numerous in the context of an eleven-day trial to conclude the counsel was recklessly pursuing a claim that lacked possible legal or factual basis.

The Court has reviewed the testimony in detail and agrees with the conclusions reached in the Report and Recommendation. There can be no sanctions awarded for references to the Ford Explorer prior to and during opening statements because Plaintiffs, Defendants, and even the Court used the term Ford Explorer. Following opening statements, the Court made it clear that the parties were prohibited from referring to the towing vehicle as the Ford Explorer. While the Court expressed its concern with the continued references to the Ford Explorer following opening statements, up through declaring the mistrial, after reviewing the testimony again, the Court agrees that defense counsel's references to the Ford Explorer were not so numerous to warrant sanctions.

b. The "Distracted Driver" / Turning around to get a Coke defense

The precipitating question was asked by defense counsel Frank Jones on November 30, 2005, during the cross-examination of Plaintiffs' expert Dr. Allen Eberhardt. While performing a gesture of "reaching around," he asked the witness

whether the failure of the trailing arm "happened all of a sudden out there on the highway at the same time that Mindy Swegles reached back to get a Coke from the person [Brian Hunzicker] in the back seat?" (Tr. 11/30/05 177-178). Plaintiffs immediately objected, arguing there was absolutely no testimonial or other evidence that Ms. Swegles had "turned around" or that she had in any way diverted her attention from driving. After discussion outside the jury's presence regarding this issue, the parties agreed that there was absolutely no evidence in the record to support the question or gesture by Defendants' counsel. Specifically, defense counsel Mr. Adams stated, "As Mr. Jones said, he misspoke, and there is nothing in the record that says that." (Tr. 11/30/05 at 184).

In declaring a mistrial on December 1, 2005, the Court stated:

> I've poured through the record. The only three people that know what happened have been deposed. Ms. Swegles does not recall, Mr. Strong was asleep, and the record clearly establishes that Ms. Swegles asked for a diet soda and that Mr. Hunzicker turned around to reach over the back seat to retrieve a soda. There is no evidence in this record that Ms. Swegles, the driver, reached over any seat at any time, and to build a defense on that basis and to hire an expert to come into this court and try and tell this jury that that's what happened is stretching circumstantial evidence and inferences beyond their stretching point.
> The triggering event, it seems, is the questioning of Dr. Eberhardt by Mr. Jones and what I recall as a motion that took place simultaneously with the asking of the question about Ms. Strong reaching for a soda, which drew an objection from plaintiffs' counsel and a subsequent motion for a mistrial, which, admittedly, was subsequently retracted by Mr. Taliaferro. Nevertheless, the Court indicated that I was not taking it off the table.
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> . . .
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> They've heard the defendants' theory that Ms. Swegles was a distracted driver, when the only evidence that I am aware of is going to come in from this Mr. Holcomb, who was hired by the defense to come in and give his opinion. He wasn't there. The people that were there, it seems to me that a fair reading of deposition testimony and – a fair reading of deposition testimony in Dr. Lowe's case, a fair reading of the deposition testimony in plaintiffs', does not establish, even circumstantially, anything other than a guess that Ms. Swegles was a distracted driver.

(Doc. 511; Tr. 12/1/05 at 4:17-5:3, 5:4-11, 6:19-7:4).

The Magistrate Judge held that Defendants' attorneys' pursuit of the distracted driver/reach behind the seat to get a soda defense during the first trial resulted in the "unreasonable and vexatious multiplication of litigation despite the absence of any conscious impropriety. *Jones*, 789 F.2d at 1230, and therefore warrants sanctions under 28 U.S.C. § 1927.

Defendants argue that the presentation of the distracted driver defense at the first trial does not justify sanctions. Defendants argue that this theory of the case has been clear since before the trial began. They further state that both the Court and Plaintiffs received written notice of this defense in the joint pretrial order. Therefore, Defendants argue that they were justified in presenting this defense and were neither reckless nor frivolous.

Despite admitting to the Court after asking the question and using the reaching gesture, that there was no evidence to support such a gesture, Defendants argue in their objections that there was ample evidence to support their position on the driver's actions. The Court, however, does not find that such ample evidence exists. The admissions cited by Defendants do not establish that Ms. Swegles actually turned around, nor does the theory by any of the experts or the so called common sense notice theory. Defendants appear to be grasping at anything to attempt to avoid sanctions, but there simply is no evidence to justify physically gesturing a turn around when asking a question.

The Court agrees with the findings in the Report and Recommendation that defense counsel's "conduct was clearly reckless as there was no evidentiary basis from which a reasonable inference could be made that Ms. Swegles reached behind the seat

at the moment of the accident. To state as a factual premise that she did so while gesturing in the same manner is, when viewed objectively, pursuing a defense that is without any evidentiary basis and frivolous." (R & R at 21). The Court finds that sanctions are appropriate based on defense counsel's frivolous actions. "[W]hen an attorney knows or *reasonably should know* that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims, a trial court does not err by assessing fees attributable to such actions against the attorney." *In re Ruben*, 825 F.2d 977, 984 (6th Cir. 1987) (emphasis in original). The question and gesture by Defendants' counsel was the precipitating event that led to the mistrial in this case, therefore, Defendants' actions were "unreasonably and vexatiously" multiplying the proceedings. *See* 28 U.S.C. § 1927. Therefore, pursuant to 28 U.S.C. § 1927 and this Court's inherent authority, the Court hereby orders Defendants to pay all of Plaintiffs' attorneys fees and costs associated with the eleven day proceeding that resulted in a mistrial.

2. The Spoliation of Evidence in this and other cases

The Report and Recommendation sets forth the history with respect to the spoliation of evidence findings in this case. The Court previously held that "[i]t is undisputed that the tires and rims disappeared while they were in defendants' custody and control. Spoliation has occurred." (Doc. 396 at 5). The Court did find that "defendants' spoliation of the tires and rims was negligent" and not intentional. (Doc. 396 at 9). Based on this finding, the Court limited the presentation of testimony or evidence contradicting Plaintiffs' expert witness Dr. Eberhardt's findings, specifically, excluding "any assertion or implication . . . that the tire abrasion on the accident trailer found by Dr. Allen Eberhardt was present around the entire circumference of the tire or

any portion beyond that found by Dr. Eberhardt." (Doc. 396 at 10).

During Defendants' closing argument, Mr. Schmidt stated the following:

> MR. SCHMIDT: . . . We don't know if that tire scraped there. We don't know what caused that tire scrape. . . . Where is the physical evidence to support this made-up scuff mark out on the highway and locking up and, gee it was scraping and it was pushing the trailer. It is not there ladies and gentlemen.

(Tr. 2/5/07 at 121-122). The Court then interrupted the closing argument and, outside of the presence of the jury, stated:

> THE COURT: I don't know if you intended to just blow right past the Court's ruling, but I think that you have waded yourself into a spoliation instruction at this point with all the discussions about the tires and the, we don't know whether this could have been scraped on roadway as it got hauled off by the tow truck. There is no evidence of that, and you know it. The Court is going to give the spoliation instruction.

(Tr. 2/5/07 at 123).

In addition to the two sanctions imposed by the Court, Plaintiffs sought additional sanctions asserting that the spoliation of the tire evidence was intentional and that this is just another example of U-Haul's pattern and practice of spoliating evidence in cases it is defending. The Magistrate Judge, however, refused to revisit the prior factual and legal rulings of the Court and declined to consider the four other cases cited by Plaintiffs in support of their pattern and practice argument. Therefore, the Magistrate Judge considered only whether, accepting the Court's findings, additional sanctions are warranted. The Magistrate Judge concluded that additional sanctions on the issue of spoliation of evidence are not warranted.

Plaintiffs object to this conclusion and argue that sanctions are appropriate because (1) U-Haul has engaged in a pattern and practice of spoliating crucial physical evidence in other cases; and (2) Defendants attempted to capitalize on the spoliation of

tire evidence at trial.

With respect to Plaintiffs' pattern and practice argument, the Court has reviewed the cases cited by Plaintiffs, including the most recent case of *Koloszar v. U-Haul*, Case No. 1500-cv-2411032 (Cal. Kern Cty.). Plaintiffs argue that many more cases exist and that Defendants have refused to provide any information as to the number of times they have been accused of such misconduct in the past. Regardless of Plaintiffs' speculation, their argument is lacking sufficient evidence to justify an award of sanctions, e.g. the number of cases U-Haul has defended, for engaging in a pattern and practice of intentional spoliation of evidence. The Court does find it concerning that Defendants were represented by the same counsel in *Kolszar* and that it also involved the spoliation of critical tire evidence. The Court is mindful of Plaintiffs' argument that there is no economic incentive for Defendants to pursue more diligent protection of evidence, but does not find that any monetary sanctions are appropriate in this case. The Court finds that the two sanctions previously imposed adequately address the negligent spoliation of the tire evidence in this case.

Plaintiffs also argue they are entitled to monetary sanctions based on Defendants' attempts to capitalize on the spoliation of evidence. Again, the Court has expressed its concern on this issue during the trial and believes that any potential harm to Plaintiffs was resolved with the spoliation instruction given to the jury. Therefore, no monetary sanctions are appropriate for the spoliation of the tire evidence.

3. The Participation by Fulbright & Jaworski after Withdrawal

This issue first arose after the Court's January 5, 2006 Order awarding sanctions to Plaintiffs and further directing that there would be no change of trial counsel for either side (Doc. 265). Despite the Order, Defendants filed motions to withdraw Fulbright &

Jaworski as counsel and to admit pro hac vice counsel from Quarles & Brady LLP based on "a divergence of interests as between Defendants and Fulbright & Jaworski LLP" caused by the sanctions order (Doc. 269 at 2; Docs. 271, 272). In an effort to resolve the conflict and prevent any delay in the retrial of this case, the Court vacated, in part, the sanctions order. The Court stated that "[c]urrent trial counsel have worked on this case from its inception. They are familiar not only with the evidence and law pertaining to this case, but also with the Court's trial procedures." (Doc. 317).

On December 14, 2006, three weeks before the retrial, Defendants again moved to withdraw Fulbright & Jaworski as counsel, asserting that they believed a change of counsel would provide "more harmonious representation" based on "defendants' perception that the Court is hostile toward defendants' current counsel in that the defendants believe that the Court has implicitly and explicitly questioned the candor of Fulbright & Jaworski as evidenced by the Court's order directing the production of all correspondence between the defendants and its counsel. However, the decision is grounded primarily on defendants' desire to have the counsel of its choice represent it in further proceedings in this case." (Doc. 379 at 1-2). Defendants also renewed their motion for admission pro hac vice of Quarles & Brady LLP.

The Court held a telephone conference on the pending motions on December 21, 2006. Based on Attorney Patrick Schmidt's assurances that new counsel would not delay the trial, the Court granted Defendants' motions.

The Report and Recommendation details the testimony that was given during the trial regarding Fulbright & Jaworski's continued participation in the trial, including, but not limited to, Mr. Adams presence in Cincinnati and preparation of witnesses and a Fulbright & Jaworski legal assistant assisting with documents in the courtroom during

trial. The Court was shocked to learn of this continued participation considering the briefing and discussions regarding the purported conflict between U-Haul and Fulbright & Jaworski.[1] The Court in its referral order to the Magistrate sought an independent review of the record to determine "whether defendants have engaged in sanctionable conduct." (Doc. 477 at 1). The Magistrate Judge ultimately concluded that "defendants' attorneys should be sanctioned and required to pay plaintiffs their reasonable expenses and attorneys' fees in (1) responding to defendants' December 14, 2006 motions to withdraw (Doc. 379) and for leave to appear pro hac vice (Docs. 380, 381); and (2) attending and preparing for that portion of the December 21, 2006 Telephonic Conference devoted to considering defendants' motions." (R & R at 34).

Defendants object to the Magistrate Judge's recommendation that sanctions be imposed for "intentional misrepresentations to the Court" on the following grounds: (1) there is no evidence that Defendants intentionally misrepresented the nature of the conflict of interest between U-Haul and Fulbright & Jaworski; (2) Mr. Schmidt's representation that Mr. Eagen would assist with trial preparation did not infer or imply that Fulbright & Jaworski would not also provide support; (3) there is no distinction between, or limitation upon, the types of support that a withdrawing firm must provide its client under the Ohio Code of Professional Responsibility; and (4) Defendants had no notice that the Court's granting of Fulbright & Jaworski's motion to withdraw was also a prohibition on any further involvement by Fulbright & Jaworski in the case.

Plaintiffs agree with the Magistrate's conclusion and recommendation, but

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[1] The Court has reviewed all the testimony given on this issue and believes that the Report and Recommendation sets forth a good illustration of the testimony at issue and does not need repeated for purposes of this Order. But the Court is mindful that the Court of Appeals will review the cold, dry record, and it is difficult to convey in the record the level of brazenness and arrogance on the part Defendants' counsel in making the aforementioned misrepresentations to the Court.

request additional sanctions, in addition to those awarded, to fully compensate them.

a. No evidence of intentional misrepresentation

Defendants argue that at the very least, their conduct was a misunderstanding, not bad faith. While Defendants admit there was a conflict, they assert that there is nothing about this conflict that would have precluded Fulbright & Jaworski from providing support to Defendants outside the courtroom. Further, Defendants assert that to the extent there was any confusion, it was entirely unintentional and inadvertent. (Defs' Objections at 15).

The Magistrate Judge recognized the fallacy of Defendants' attempt to distinguish between in-court proceedings and behind the scenes resource support by Fulbright & Jaworski. The Magistrate Judged stated, "[f]or defendants to assert in their motions that Judge Watson would abuse his discretion to "compel" defendants to continue using Fulbright & Jaworski as their lawyers, then to turn around and utilize the services of Fulbright & Jaworski after convincing the court that such withdrawal was warranted because of a conflict of interest constitutes an intentional misrepresentation to the Court." (R & R at 33).

The Court agrees with the Magistrate Judge's conclusions. The Court likewise rejects Defendants' attempt to categorize the misrepresentations to the Court as unintentional. Defendants' new counsel, Quarles & Brady, fought vigorously to have Fulbright & Jaworski removed as counsel, even going so far as to argue that not allowing their withdrawal would be an abuse of discretion. It is implicit in the rulings by this Court, ultimately agreeing to the withdrawal of Fulbright & Jaworski, that U-Haul lost confidence in their ability to adequately represent them based on the conduct of its lawyers and the potential for sanctions.

Defendants also argue that Mr. Schmidt's representation that Mr. Eagen would assist with trial preparation did not infer or imply that Fulbright and Jaworski would not also provide support. The Magistrate Judge concluded and the Court agrees that "[a]n intentional omission of this fact is nevertheless a misrepresentation to the Court." (R & R at 33). No where in Defendants briefs or discussions with the Court was there any mention that Mr. Adams and Fulbright & Jaworski were going to participate behind the scenes or be a resource to new counsel. There is no question that Defendants intentionally left this information out because it would have undermined their arguments that there was a conflict of interest between U-Haul and Fulbright & Jaworski. Nor is the Court persuaded by Defendants' argument in their objections that Fulbright & Jaworski was still counsel of record until the first day of trial. Regardless of when the Order was officially entered, Mr. Schmidt made it clear to the Court that he was taking over representation of U-Haul and he would be prepared for trial with no reference whatsoever to the assistance of Fulbright & Jaworski.

b. The Ohio Code of Professional Responsibility requires the withdrawing firm to provide support

Defendants argue that the Ohio Code of Professional Responsibility required the continued representation by Fulbright & Jaworski and therefore sanctions are not appropriate. Defendants cite EC 2-31 which provides: "when he justifiably withdraws, a lawyer should protect the welfare of his client by . . . cooperating with counsel subsequently employed and otherwise endeavoring to minimize the possibility of harm." (Defs' Objections at 17). Further, Defendants claim that "the type of conflict they asserted was not a conflict of interest arising from divided loyalties, but a conflict arising from the perception that Fulbright & Jaworski could not effectively represent defendants

in the courtroom, in light of Plaintiffs' incessant attacks and the Court's questioning of counsel's candor." (Doc. 513 at 13-14).

Regardless of Defendants attempt to characterize their actions to the Court now, that does not resolve the fact that omissions and misrepresentations were made to the Court during the discussion regarding the motion to withdraw. The Court does not find Defendants' attempt to distinguish the conflict persuasive. Defendants represented to the Court an irreconcilable conflict so severe that it could not be resolved short of removal of Fulbright & Jaworski. Those representations to the Court are not consistent with Defendants' current arguments. Defendants want the Court to find that they had an ethical obligation to continue assisting the client indefinitely despite the ban against an attorney's continued representation once a conflict develops. They cannot have it both ways. There is no question that Defendants' misrepresentations and omissions were intentional and justify sanctions.

Finally, Defendants argue that there is nothing in the record to suggest that Defendants had notice that Fulbright & Jaworski's transitional support would be forbidden after being permitted to withdraw from the case. The Court does not believe that any formal instruction was necessary, it is implicit in granting a motion to withdraw based on a conflict. *See* DR 2-110 and DR 5-101.

Based on the aforementioned, the Court agrees with the Magistrate Judge's recommendation of sanctions for Defendants' attorneys' conduct in violation of 28 U.S.C. § 1927 and under the Court's inherent power. Defendants' attorneys are required to pay Plaintiffs their reasonable expenses and attorneys' fees in (1) responding to Defendants' December 14, 2006 motions to withdraw (Doc. 379) and for leave to appear pro hac vice (Docs. 380, 381); and (2) attending and preparing for that

portion of the December 21, 2006 Telephonic Conference devoted to considering Defendants' motions.

4. The Failure to Cooperate in Discovery, including the Failure to Produce Discovery Concerning Henschen Axles and Associated Misrepresentations

Plaintiffs seek sanctions based on Defendants' alleged obstructionist discovery tactics and associated misconduct. Plaintiffs raise three specific issues: (1) Defendants' alleged refusal to allow Plaintiffs and their experts to perform scientific testing of the accident trailer, even when ordered to do so by the Court; (2) Defendants' alleged failure to provide relevant axle repair and replacement information and records; and (3) Defendants' alleged failure to provide Plaintiffs with relevant accident statistics.

a. Request for scientific testing of the accident trailer

Plaintiffs requested to have their expert section and analyze the metal of the accident trailer's axle trailing arm and those of an exemplar trailer to determine whether fatigue cracking of the welds and/or metal of the axle had caused the trailing arm to deform. Defendants objected to this request. Plaintiffs then filed a motion to compel production of the accident and exemplar trailers for inspection and metallurgic testing (Doc. 36). The Court held a telephone conference and granted Plaintiffs' motion (Doc. 41).

The metallurgic testing was performed in December 2004 at Defendants' experts' facility. During the testing, Defendants objected to "further" sectioning of the trailing arm contending that such action would destroy key evidence and prejudice them at trial by making it "virtually impossible for the jury to accurately visualize the bend in the trailing arm relative to the axle." (Doc. 68 at 4). Plaintiffs' expert disagreed with

Defendants' conclusions and Plaintiffs filed a motion to complete ordered inspection and for sanctions. (Docs. 61, 62). The Court granted Plaintiffs' request for further testing concluding that "the probative value of permitting Plaintiffs to further section the accident unit trailing arm in question outweighs any prejudice to Defendants." (Doc. 77 at 2).

Plaintiffs argue that Defendants' objection to the testing was baseless and that Defendants' conduct is indicative of a pattern of discovery misconduct warranting sanctions. The Court, however, in ruling on this discovery dispute, denied Plaintiffs' motion for sanctions and held that "Defendants' objection to the further sectioning was substantially justified and the circumstances make an award of expenses unjust." (Doc. 77 at 3).

Plaintiffs again ask the Court to issue sanctions for Defendants' objections to the testing, asserting that such objections are "part of a general pattern of conduct that U-Haul pursues in an improper effort to frustrate discovery of key physical evidence in product liability cases." (Doc. 510 at 96). Plaintiffs reference the following cases in support of their allegations of a pattern and practice: *Sternberg v. U-Haul Co. of Arizona*, Case No. D-0101-CV-2004-00300 (N.M. Dist. 1 2004) and *Figueroa v. U-Haul International, Inc., et al.*, Case No. BC259810 (Cal. Sup. Ct. 2003).

The Court has reviewed the aforementioned cases, but remains primarily concerned with Defendants' conduct in the case at bar. The Magistrate Judge concluded and the Court agrees that "[t]he unique facts of those cases do not alter Judge Watson's findings that defendants' position in this case was substantially justified or show a 'pattern of discovery abuses on the part of U-Haul.'" (R & R at 36). Plaintiffs have failed to establish that Defendants have a continued pattern and practice of

frustrating the discovery process and specifically that discovery of the physical evidence in this case, and therefore, sanctions are not warranted.

b. Requests for Henschen axle repair and replacement information and records and relevant accident statistics involving U-Haul trailers

Plaintiffs assert that Defendants should be sanctioned for their failure to produce information on the repair and replacement of Henschen axles on U-Haul trailers and for their refusal to provide Plaintiffs with information concerning the number of accidents involving U-Haul trailers that incorporated the Henschen axles.

The Report and Recommendation describes in detail the discovery Plaintiffs sought and Defendants' responses. The Court has reviewed this information extensively, but finds it would be redundant to include it again in this Order. The discovery requests illustrate Defendants' refusal to provide Plaintiffs with the requested information. These issues were addressed by the Court first in Plaintiffs' motion in limine before the first trial and again in Defendants' motion in limine prior to the retrial.

Plaintiffs in their motion in limine sought to exclude any evidence or testimony regarding prior trailer accidents or damage or lack thereof based on Defendants' alleged "repeated refusal to provide Plaintiffs with any discovery related to these issues. . .." (Doc. 198). Plaintiffs' motion was denied as the Court concluded that "all of those issues can be handled on cross-examination." (Doc. 501, Ex. 45).

This discovery dispute was again raised in Defendants' motion in limine seeking to limit Plaintiffs' cross-examination of U-Haul's witnesses on U-Haul's failure to provide discovery in other cases. The Court held that "plaintiff[s] may introduce the challenged evidence if, and only if, defendants argue or submit evidence that no similar accident has ever occurred with a U-Haul trailer." (Doc. 393 at 11).

Over the course of the discussion regarding these discovery requests, the Court expressed concern as to whether Plaintiffs' had all necessary information to which they were entitled, and ultimately the Court ordered Defendants to produce *in camera* "[a]ll repair, replacement and maintenance records from the Knoxville Tennessee U-Haul facility from November 18, 2002 through July 30, 2004." In response, Defendants provided some 9,500 pages of documents. (Doc. 509 at 143).

Plaintiffs seek sanctions based on Defendants' alleged discovery abuses with respect to the requests for the aforementioned information. Plaintiffs point out that Defendants represented that they could not produce the repair and maintenance records, but when ordered by the Court, Defendants produced several boxes of documents. Defendants assert that not only were Plaintiffs' requests irrelevant and overbroad, but also that Plaintiffs are precluded from challenging Defendants' discovery objections post-trial because Plaintiffs failed to file a timely motion to compel discovery.

The Magistrate Judge concluded that Plaintiffs waived any challenge to Defendants' objections post-trial by failing to file a motion to compel. The Court reluctantly agrees. There is no question that Plaintiffs filed motions to compel in other situations that they felt warranted sanctions, but did not do so with respect to this dispute. Defendants did not claim that "none can be produced," or "that the information simply was not available," or "that it was impossible to provide the information." (Doc. 510 at 130, 139, 143). If that were the case, then filing a motion to compel would have been a futile act. That was not the case, however, as Defendants objected to producing the requested information on the grounds of, *inter alia*, overbreadth, burden, and relevancy.

The Court agrees with the Magistrate Judge's conclusion that Plaintiffs' failure to

file a motion to compel waives any post-trial challenge to Defendants' conduct in this instance. *See United States v. One 1987 BMW 325*, 985 F.2d 655, 661 (1st Cir. 1993); *see also Pandrol USA, LP and Pandrol Limited v. Airboss Railway Products, Inc.*, 320 F.3d 1354, 1369 (Fed. Cir. 2003); *Brandt v. Vulcan, Inc.*, 30 F.3d 752, 756 (7th Cir. 1994).[2]

The Magistrate Judge also limited the review to Defendants' conduct in this case and declined to consider Plaintiffs' citations to other cases where U-Haul was sanctioned for discovery abuses. The Court again has reviewed Plaintiffs' objections and has also considered the other cases cited by Plaintiffs. As set forth above, however, the Court's concern is with Defendants' actions in the case at bar. In sum, the Court holds that sanctions are not warranted in this instance.

5. Disregard of the Court's Rulings and Lack of Respect for the Court

Plaintiffs also seek sanctions for three specific incidents in which Defendants failed to obey the Court's rulings. Those incidents include: (1) repeatedly seeking to introduce barred evidence regarding U-Haul's credit card receipt acknowledgment; (2) attempting to taint Plaintiffs' expert testimony by impermissibly referring to voir dire testimony during cross-examination; and (3) repeatedly attempting to introduce expert testimony that was beyond the matters disclosed in the experts' reports.

a. Credit card receipt evidence

During the retrial of this case, Plaintiffs sought to exclude any evidence of Plaintiffs' credit card receipt and the Court held: "The Court excludes evidence that Ms.

[2] The Magistrate Judge addresses why the Court should not impose sanctions based on the Court's inherent authority and the Court agrees, that the Federal Rules address the conduct Plaintiffs seek sanctions for here and therefore, turning to the Court's inherent power is not proper. *See Chambers*, 501 U.S. at 50 ("the Court ordinarily should rely on the Rules rather than inherent power. But if. . . neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power.").

Swegles signed the receipt because it is not probative of whether she received the instruction booklet containing the warning." (Doc. 396 at 2-3). Plaintiffs seek sanctions for Defendants' repeated efforts to introduce the credit card receipt as evidence that the user's guide was received. The Magistrate Judge concluded that Defendants did not violate the Court's order prohibiting evidence that Ms. Swegles signed the rental receipt. Rather, the record reflects that Defendants questioned two witnesses, John Sauer and William Daniels, about similar receipts containing the same acknowledgment of receipt of a "Trailer User Instructions" booklet. Plaintiffs promptly objected to these questions and the objections were sustained. Therefore, the jury did not hear any discussion, by any witness, regarding the credit card receipt evidence.

The Magistrate Judge raises an excellent question: does Defendants' attempt to introduce similar evidence through other witnesses constitute "vigorous advocacy or a back door attempt at circumventing Judge Watson's ruling[?]" (R & R at 46). Ultimately, the Magistrate Judge concluded that since the objections were sustained and the questionable evidence was never heard by the jury, Plaintiffs have failed to show any prejudice as a result of Defendants' questions.

Plaintiffs object, asserting that Defendants violated the Court's ruling which prohibited the proffer of any evidence of the credit card receipt. The Court was concerned that Defendants' questions to John Sauer and William Daniels were a back door attempt at circumventing the ruling and that is why the Court sustained Plaintiffs' objections. In the final analysis, the Court agrees with the Magistrate Judge's conclusion that there was no prejudice to Plaintiffs as a result of Defendants' questions and therefore Defendants' conduct in this instance is not sanctionable.

b. Reference to voir dire testimony

Plaintiffs seek sanctions for Defendants' questioning of Plaintiffs' expert witness, Dr. Eberhardt, concerning his voir dire testimony. Defendants sought to exclude Dr. Eberhardt's testimony prior to the retrial. The Court allowed Defendants to question Dr. Eberhardt outside the presence of the jury regarding certain testing. Then, in the presence of the jury, Defendants' attorney asked Dr. Eberhardt:

> Q: All right. Sir, do you recall that last Friday that the reason we started at 10 instead of 9, and the jury was in the back was - -
>
> MR. POSEY: Objection, your honor.
>
> Q: - - was because I was asking you questions about the details of that demonstration, right, sir?
>
> THE COURT: Sustained. There is a reason that we do things out of the hearing of the jury. So that you don't come in here and suggest things to them during cross examination. So, I will sustain the objection and instruct the jury to disregard the question.

(Tr. 1/16/07 at 80).

Defendants asserted that the question was aimed at impeaching Dr. Eberhardt's credibility based on prior testimony. Plaintiffs did not address or dispute Defendants' assertion, nor do they do so in their objections to the Report and Recommendation. While the Court may have sustained Plaintiffs' objection regarding Defendants' questioning, there is nothing more that suggests Defendants' conduct is sanctionable. Again, the Magistrate Judge concluded that Plaintiffs were not prejudiced by Defendants' conduct, and the Court agrees. Therefore, sanctions are not warranted for Defendants' conduct in this instance.

c. Scope of expert testimony

Plaintiffs argue that Defendants sought to solicit testimony from their experts

beyond the scope of their designated topics of testimony despite a ruling by the Court that limited the scope of expert testimony to those matters disclosed in their filed expert reports. Plaintiffs cite to one instance during trial on January 26, 2007 and three instances during trial on January 29, 2007. Defendants, in response, cite to three instances where Plaintiffs attempted to expand the scope of their experts' testimony, during trial on January 16, 17, and 23, 2007.

The Magistrate Judge held that whether expert witness testimony was properly admitted or precluded was a matter for the Court of Appeals and therefore did not reexamine the Court's rulings on both Plaintiffs' and Defendants' objections. Further, the Magistrate held that sanctions were not warranted. The Court agrees. The record shows that both sides fought hard to elicit the most favorable testimony from all their expert witnesses. However, Plaintiffs have not demonstrated that there was any willful abuse of the judicial process in Defendants' questioning of their expert witnesses. Therefore, sanctions are not warranted with respect to the questioning of the expert witnesses.

6. The Presentation of the "Distracted Driver" Defense

The Magistrate Judge concluded that this issue is moot as Plaintiffs did not seek sanctions based on the "distracted driver" defense at the retrial of this case. Therefore, no recommendation for sanctions was made on this issue. Neither party has objected with respect to this issue and there is no need for review by the Court.

7. Plaintiffs' Request for Sanctions based on Defendants' Alleged Misrepresentations to the Court

The Magistrate Judge further concluded that Plaintiffs' list of additional misrepresentations by Defendant was outside the scope of his review and therefore did

not consider Plaintiffs' arguments. Plaintiffs object to this conclusion. Plaintiffs assert that Defendants' misrepresentations regarding the purported "conflict" between Fulbright & Jaworski and U-Haul is just one example of Defendants' pervasive pattern and practice. Plaintiffs seek an award of sanctions for the following three additional actions: (1) Defendants repeatedly lied to avoid summary judgment on Plaintiffs' failure-to-warn claim; (2) Defendants lied to the jury by representing that Mr. Holcomb drew a key expert conclusion barred by the Court; and (3) Defendants lied to the Court about Plaintiffs' experts' opinions in order to gain relief from the sequestration order and, ultimately, lied in an effort to gain admission of Dr. Heydinger's belated demonstrative.

a. Defendants lied to avoid summary judgment on Plaintiffs' failure-to-warn claim

Plaintiffs are essentially asking the Court to reconsider its November 3, 2005 Opinion and Order on the parties' motions for summary judgment (Doc. 158) for the fourth time. Plaintiffs assert that to defeat the motion for summary judgment, Defendants simply lied about the evidence. Plaintiffs argue that the three key issues that were the basis for concluding there was a genuine issue of material fact were lies: the warning labels are depicted as they looked several years after the accident; that Ms. Swegles signed a receipt confirming receipt of the "Trailer User Instruction" booklet; and Defendants disputed whether the failure to warn was the proximate cause of the Plaintiffs' accident, yet admit in their own discovery responses that Swegles's "failure. . . to maintain control of her vehicle" and driving "in excess of U-Haul's recommended speed limit" were the proximate cause of the accident. (Defs' Responses and Objections to Mindy Swegles's First Set of Interrogatories at 6).

Defendants argue and the Court agrees that Plaintiffs' arguments have already

been presented to the Court on three separate occasions: Plaintiffs' Motion for Summary Judgment, Plaintiffs' Motion for Reconsideration, and Plaintiffs' Motion for a directed verdict (Docs. 87, 288, and 458). The Court therefore finds that these issues have been decided by the Court in at least three prior decisions and there is no need to reconsider those prior decisions. Accordingly, the Court finds that Defendants were defending against Plaintiffs' claims and that there were no sanctionable misrepresentations.

b. Defendants lied to the jury by representing that Mr. Holcomb drew a key expert conclusion barred by the Court

Plaintiffs assert that during closing argument, Defendants' counsel declared that Mr. Holcomb found that the wiggle, a distinctive yaw mark on the roadway, was caused by the movement of the tow vehicle off the road, which was a clear violation of the Court's ruling and a lie to the jury. Defendants argue that Plaintiffs objected to that portion of the closing argument, but the objection was overruled. Plaintiffs are again attempting to seek reconsideration of a prior ruling of the Court. The Court, however, concludes that this is not the proper forum to do so, but rather should raise this issue on appeal. Therefore, the Court does not find any misrepresentations by Defendants with respect to the wiggle discussion that are sanctionable.

c. Defendants lied to the Court about Plaintiffs' experts' opinions in order to gain relief from the sequestration order, and lied in an effort to gain admission of Dr. Heydinger's belated demonstrative

Plaintiffs argue that Defendants continuously misrepresented to the Court that Plaintiffs and their experts were changing their theories of liability as justification for release from the Court's sequestration order. Further, Plaintiffs argue that Defendants

lied in attempting to have Dr. Heydinger's demonstrative admitted.

The Court expressed concern to the parties regarding these issues during trial, but after careful review does not believe that such actions justify an award of sanctions. The Court was able to remedy the issues by reinstating the sequestration of witnesses and rejecting the admission of Dr. Heydinger's demonstrative. While the Court is concerned with Defendants' counsel's assertion that the demonstrative was prepared in response to Dr. Eberhardt's trial testimony, despite Dr. Heydinger's prior statement that he had begun preparing the demonstrative before trial, the Court does not find that such misrepresentation is sanctionable.

8. General Objections

Plaintiffs object that the sanctions recommended in the Report and Recommendation are insufficient. Specifically, Plaintiffs object that the Magistrate Judge did not award fees and costs associated with preparing and advancing the sanctions motions in this case. While the Court finds that the sanctions previously imposed are sufficient to address Defendants' conduct with respect to those specific incidents, the Court does agree that Plaintiffs should be compensated for the fees and costs associated with seeking the sanctions in this case. Accordingly, Plaintiffs are entitled to their attorneys' fees and costs incurred in preparing the motions for sanctions and participating in the August 24, 2007 hearing on the motion for sanctions.

IV. CONCLUSION

For the foregoing reasons, after de novo review, the Court **OVERRULES** the parties' objections to Magistrate Judge Hogan's Report and Recommendation. The Court adopts the October 18, 2007 Report and Recommendation of Magistrate Judge Hogan in its entirety.

Plaintiffs shall file itemized affidavits of fees and expenses regarding the following:

1. Attorneys' fees and expenses incurred for the eleven days of trial that resulted in a mistrial;
2. Attorneys' fees and expenses incurred in responding to Defendants' December 14, 2006 motions to withdraw (Doc. 379) and for leave to appear pro hac vice (Docs. 380 and 381);
3 Attorneys' fees and expenses incurred for preparing for and attending the portion of the December 21, 2006 Telephone Conference regarding Defendants' motions to withdraw and for leave to appear pro hac vice;
4. Attorneys' fees and expenses incurred in preparing the motion(s) for sanctions and participating in the August 24, 2007 hearing on the motion for sanctions.

IT IS SO ORDERED.

MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT