UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Paul Stepnes, *et al*,

Plaintiffs,

v.

Peter Ritschel, *et al*,

Defendants.

Civil Case No. 08-cv-5296 (ADM/JJK)

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISQUALIFY COUNSEL AND FOR OTHER NON-DISPOSITIVE RELIEF: *FILED UNDER SEAL CURRENT ATTORNEY EYES ONLY* AMENDED JANUARY 26, 2010[1]

INTRODUCTION

1. Plaintiffs seek to disqualify the attorneys for CBS-defendants. This includes both law firms that represent those defendants. This includes a motion to revoke the pro hac vice admissions of the Levine Sullivan firm lawyers: Michael Sullivan, Jeanette Bead, and Chad Bowman.
2. Plaintiffs seeks additional non-dispositive relief:
    - for return to Plaintiff of all versions of the Hard-Drives in the possession or control of CBS-defendants or their agents;
    - for the destruction of all versions of the Hard-Drives on any computer, server (or similar) at the law firms, the clients, or any of their agents (including the vendor(s) that bate-stamped documents);

[1] For ease of reference, the Court and opposing counsel will be provided with a version that shows additions in **bold**.

- this request includes a request to order the return of the "key documents" file created by Leita Walker, Esq.

Plaintiffs further seek an order that explicitly requires defense counsel to obtain all versions that they have provided to anyone outside their law firms (clients, services, etc.), and to ensure that all electronic data has been deleted. Plaintiff asks this Court to appoint a Special Master to ensure that this has been accomplished. Plaintiffs ask that the CBS-defendants pay for the Special Magistrate, and that the Special Magistrate prepare a report to this Court.

Plaintiffs further request that they be awarded their attorney fees and expenses related to the Hard-Drive issue. Plaintiffs seek permission o file attorney-fee affidavits with this court for its consideration. However, Plaintiffs propose that the City of Minneapolis be responsible for attorney fees and costs for the first segment of time related to the Hard-Drive issue (its discovery, initial motions, etc.), and that the CBS-defendants be responsible for the latter segment (motions required, review of key documents and Leita Walker disks, etc.).

Finally, Plaintiffs request that the Special Magistrate oversee the forwarding of attorney materials to new counsel for CBS-defendants. This would include ensuring that no depositions, notes, motions, or other documents or data that are tainted by the Hard-Drive data, are delivered to new counsel.

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Plaintiffs are **not** moving to disqualify James A. Moore, attorney for the City-defendants. He came on board after the discovery of this Hard-Drive issue, and Plaintiffs understand that he has been careful not to review any such materials.

FACTUAL STATEMENT

This Court is well-apprised of this issue.

The Record

To the extent necessary, Plaintiffs cite by reference in this motion, the Record they established in motions filed for the **September 24, 2009** hearing, the **November 5, 2009** hearing, and the **December 18, 2009** hearing. Plaintiff also references the Record filed with this Court to support the dispositive motion to strike Sgt. Ritschel's Answer (this includes the depositions of Officers Hanson and Ritschel). Plaintiff also cite as part of this Record, the transcripts of the **September 24, 2009** hearing (filed with December motion), and the **December 18, 2009** hearing (Clark Decl. Exh. 1).

Brief background

It is undisputed that, pursuant to Paul Stepnes' civil action filed in the Fourth Judicial District, Minnesota State court System, on **June 2, 2008**, the Honorable Charles A. Porter issued a verbal order that Minneapolis Police should not look at the Hard-Drives seized from Paul Stepnes, until that court had had an opportunity to review them for attorney-client privileged materials.

Unbeknownst to Stepnes, in fall 2008,

Police examined the Hard-Drives;

- Officer Hanson segregated emails between Jill Clark and Paul Stepnes with full knowledge that Clark was attorney for Stepnes;
- Officer Hanson had Officer Ritschel up to the Crime Lab to view emails, and according to Hanson, they discussed "legal advices" that Clark made to Stepnes; and
- Officer Hanson produced a disk "report" which he called the Forensic Disk, and which had been referred to in this litigation as the Forensic Report.

(See depositions of Ritschel and Hanson).

In **May, 2009**, Attorney Clark and Attorney Lathrop exchanged emails. Attorney Lathrop, having been informed the same by Sgt. Ritschel,[2] stated:

> Judge Porter reviewed the hard drive in camera, then gave approval to have it examine by the forensic examiner. Judge Porter was reviewing to see if there was any privileged information before releasing it to be examined.

(Exh. 15(c) to Clark 2/10/09 Decl.). It is now well-accepted in this litigation that this statement was <u>false</u>. Despite all of the warnings from Plaintiff counsel (who had no reason to doubt Attorney Lathrop, yet also felt that she should continue to assert the privilege), on **June 12, 2009**, Sara Lathrop of the City Attorney's Office, served amended document disclosures, notifying the parties that this disk was being

[2] Sgt. Ritschel denied at his October 5, 2009 deposition that he had told this to Lathrop, but Lathrop's near-contemporaneous, and off-guard internal (Exh. 15) belies this statement of Ritschel (see Ritschel dep. P. 21-22). Given the other matters that Ritschel made false statements about to this Court, Plaintiffs have credited Ms. Lathrop's version of events, that Ritschel, indeed, told her that Judge Porter had authorized the Hard-Drive review.

produced, but qualifying the production by stating that the folders containing emails between Stepnes and attorney Jill Clark were not being "produced."

> Please note that this report purports to contain a folder of emails to or from Attorney Jill Clark. While these emails, upon information and belief, do not contain privileged information, counsel for these Defendants has not reviewed these folders or their contents and does not contend that these emails are evidence in this case.

(Exh. 16 to Clark 9/10/09 Decl., p. 2). A few minutes after receiving the amended disclosures, Attorney Clark sent an email stating:

> …Paul Stepnes asserts that evidence at this time suggests that police improperly handled emails between Paul Stepnes and his attorney(s) (Jill Clark, and perhaps others) that were resident on seized laptop(s), that the City/MPD made no provision for attorney-client privilege. **Paul Stepnes asserts an attorney-client privilege to all emails between him and any of his attorneys (including but not limited to Jill Clark), and this privilege will be maintained until such time as the emails in question in the recent supplemental 26(a)(1) from the City-defendants are reviewed and a decision is made with regard to that privilege**.

(Exh. 16(b) to Clark 9/10/09 Decl. (emphasis added)). All counsel in this case were copied on that email.

Despite being on notice of the attorney-client privilege issue, Leita Walker of the Faegre & Benson firm, and one of the attorneys for CBS defendants, went to the City Attorney's Office on **June 23, 2009**, and **June 29, 2009**, copies filed, and reviewed data. (Walker Decl.).

On **August 31, 2009**, Plaintiffs became aware that Judge Porter had *not* cleared the Hard-Drives for examination, and on **September 1, 2009**, Plaintiffs

began their multi-faceted, multiple-prong attempt to remedy the breach. (*See* September 10, 2009 filings).

On **September 24, 2009**, this Court held oral argument on Plaintiffs' motion for spoliation sanctions, and a motion seeking guidance regarding the then-just-emerging Hard-Drive issue. (Clark 10/22/09 Decl. ¶10).

In response to Plaintiffs motion, which clearly identified materials from the Hard-Drives as attorney-client privileged, the CBS-defendants filed motion papers on **September 17, 2009**. Leita Walker's Declaration (Docket 52) stated, among inter alia:

> I understood that my review of the city Defendants' supplemental rule 26 Disclosures that the Forensic Report contained one or more folders of emails that might have disclosed attorney-client privileged communications (the "potentially privileged email folders") which my co-counsel and I determined we would not review. Thus, I understood on June 23 that I would not access the potentially privileged email folders during my review. (Par. 3). I did not review these folders. (Par. 7).
>
> The folder titles "Forensic Examination Report" contained three subfolders titled as follows: (1) "Mbox (emai) Messages; (2) "Converted Mbox Messages," and (3) "Evidence Verification Reports." (Par. 5). ...I opened the subfolder titled "Mbox (email) Messages" and reviewed the first few pages to determine the nature of its contents. ... I decided that I would not review this folder. (Par. 6).
>
> I then reviewed the contents of the subfolder titled "Converted Mbox Messages." (Par. 6).
>
> In the course of the review, I created a folder on my laptop computer titled "CD- Report – Key Docs," win which I placed copies of documents that appeared to be related to this lawsuit. (Par. 9).
>
> On June 29, 2009, I sent two CDs to my co-counsel [at Levine Sullivan]. One CD contained a copy of the Forensic Report CD (except those documents in

> the potentially privileged email folders); the other contained the "key documents" I had identified during the review. I also sent the "key documents" to [Levine Sullivan] in a "zip file" on June 26…. (Par. 11).
>
> I now understand that Plaintiffs are claiming that attorney-client privileged communications resided in other parts of the Forensic Report. I was not aware of this when I reviewed certain documents in the Forensic Report. (Par. 13). I do not ***recall*** seeing the names of other attorneys, **other than Jill Clark**, identified in Plaintiffs' memorandum. (Par. 14, emphasis added).
>
> I do recall reviewing a May 2008 email from Paul Simonson…. (Par. 15).

(Walker Decl. Docket 52).

CBS-defendants' Memorandum of Law dropped footnote 12, which stated in pertinent part:

> In responding to Plaintiffs' Motion, CBS attorneys have recently reviewed a paper copy of the "key documents" file and determined that it contains three email communications between Stepnes and persons identified in his motion papers as his attorney.
>
> Two email between Stepnes and Clark….
>
> The third email between Stepnes and Attorney Faris….

(Clark 10/22/09 Decl. Exh. C). This disclosure was chilling to Plaintiffs: despite being unequivocably *on notice* that the Hard-Drives contained attorney-client privileged communications, the CBS attorneys intentionally reviewed emails *between Paul Stepnes and Jill Clark,* and between Stepnes and Attorney Faris – whose email signature was clearly from a law office.[3] (Clark 10/22/09 Dec. ¶11).

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[3] Paul Stepnes' 9/10/09 affidavit (filed again with this motion), ¶ 4 at p. 7 noted that Priscilla Lord Faris' email signature was:

> Very truly yours,
> Priscilla Lord Faris

Plaintiff counsel raised this issue at the **September 24** hearing. (*See* Tr. p. 29, Clark Decl. Exh. D).

> …Levine Sullivan in a footnote that it dropped … in its memorandum says that apparently even after this motion was filed, your Honor, the Levine Sullivan firm reviewed product from the forensic report, specifically reviewed e-mails between Paul Stepnes and Jill Clark and specifically reviewed an email between Paul Stepnes and Priscilla Faris, and are now taking the position that they are not attorney-client privileged.

Plaintiff counsel went on:

> [a]fter representing to me and then to the Court that they weren't going to review the forensic report disk they'd received from Ms. Lathrop pending this motion,[4] they apparently, mincing words, reviewed *paper* copies, specifically on notice now that Priscilla Faris is Mr. Stepnes' attorney, reviewed a email between Priscilla Faris and Mr. Stepnes.

(Id. at p. 30 (emphasis added)). And,

> …one of the most disturbing things that we have encountered in this is this notion that somehow that the Defendants are entitled to first review of information before me, and then make an *argument* to me about whether they are privileged. This to us seems entirely backwards.

Id. at p. 30-31.

The Court, in speaking with Michael Sullivan of Levine Sullivan (counsel for CBS), engaged in the following colloquy:

[4] See CBS' admission to this statement, at 9/24/09 Tr. p. 52 (Clark Decl. **Exh. D**).

> THE COURT: You have saved some place the converted M box messages file? Is that one that a person can now look at to verify your statement that there were no attorney-client privileged material in the M box messages file?
>
> MR. SULLIVAN: I believe so, your Honor….

(*Id.* at p. 51). The Court continued,

> THE COURT: The other thing that you have in addition to having the entire converted M box messages file, then you also have from that, you have what were chosen by Ms. Walker as key documents from that file?
>
> MR. SULLIVAN: Precisely, your Honor. And that stack of material, just so the Court knows, is about yea thick (indicating). … I've reviewed that folder.
>
> THE COURT: Well, she laid eyes on the rest of the converted M box messages file because she went through that to create the key docs from that file.
>
> MR. SULLIVAN: That's what I'm saying.
>
> …

Mr. Sullivan went on to explain why he had reviewed product from the forensic report even after Plaintiffs had filed their motion.

> MR. SULLIVAN: …since I had already reviewed the key documents folder, all right, and I didn't see any privileged materials in there, I thought it was incumbent upon me to go back and do another review and I did that.
>
> …
>
> MR. SULLIVAN: My point is, under any construction of the attorney-client privilege of which I am familiar, these aren't privileged communications. …
>
> THE COURT: That is the problem we have here. What you're telling me is that you, you know, after all of this, you're telling me that Ms. Walker goes through these documents. She finds a document that clearly is a communication between an attorney and Mr. Stepnes. She takes it out of the large range of documents. Maybe she makes the decision that she decides that it's not privileged, who knows, and she segregates it out, sends it to your

> firm, and all of this goes on without the Plaintiff ever having a chance to protect the attorney-client privilege.

(*Id*. at p. 54, 56-7). The Court concluded with the comment,

> THE COURT: …I may require that all of these documents and disks and whatever format contains the data that contains these documents, including not only the attorney-client privilege but everything else, be turned over to Ms. Clark and then she can go through and decide what needs to be reproduced as being relevant and proper in discovery in this litigation. But I'm going to hold off on that until I hear what Ritchel and Hanson have to say to get a better handle on this. **But obviously in the meantime, I certainly don't want to hear that there has been any review of any of the attorney-client privileged materials that are contained in any of those documents, data, etcetera.**

(Id. at p. 63-64 (emphasis added)).

Following the **September 24 hearing**, Plaintiff counsel attempted to obtain the 'key documents' file from CBS counsel. CBS refused. Plaintiffs were required to bring 2 motions to obtain the "key docs" files that CBS had already told the Court it would provide.

The December 18, 2009 hearing

Starting at page 5 of the Transcript of the **December 18, 2009** hearing, the Court went through, step by step, its understanding of the chronology. Plaintiffs will not repeat it here, except as elaborated on, below.

Attorney Clark informed the Court:

> And now that we have the key documents file, your Honor, we can tell that out of approximately 50,000 pages, she got about 35,000 pages into it. So we doubt that it was a brief review.

(12/18/09 Tr. p. 7). The detailed explanation of this is as follows (see Clark Decl. ¶2):

- The very first document in the "key docs" is an email dated 28 April 2008, from Suzanne Kramer to Paul Stepnes. That email is *not* a converted email. That email contains the "computer code" that Leita Walker stated that she found difficult to review in the Mbox.

- Attorney Clark has spent numerous hours reviewing the data-dump from the unconverted Mbox folders, and has ported that unconverted data into word documents, for ease of key-word searching.

- The Kramer email described above appears in the largest of the 3 unconverted Mbox files, which Plaintiffs call "papa bear." Out of the approximately 50,000 pages in that largest files, the Kramer email appeared at approximately page 35,000 out of 50,000 (of the version that Clark was reviewing – in word doc format).

- It took Client Stepnes about 12 hours to review those files. (Stepnes 9/10/09 Aff. ¶3a).

- Plaintiffs highly question whether Ms. Walker could have located this file without having spent at least some time browsing in the papa bear file.

- Further, Plaintiffs highly question that the Mbox unconverted messages were not "user-friendly" enough for defense counsel, since one of their key documents is indeed, in this format.

Plaintiffs view the Leita Walker Declaration as self-serving. The CBS-defendants knew that Stepnes was focusing on attorney-client-privileged emails in that largest (unconverted) Mbox file for that motion hearing (see 9/10/09 Stepnes Affidavit, re-filed with this motion). And the Declaration of Walker conveniently contends that that file was not reviewed.

Finally, following the **December 18, 2009** hearing (and this Court's order), CBS-defendants overnighted 2 disks to Plaintiff counsel summarized as:

1) A copy of what Leita Walker copied onto her laptop in June 2009; and
2) An electronic copy of the "key documents" file that Leita Walker copied from the Forensic Report and sent to the Levine Sullivan firm in Washington.

(Clark 1/10 Decl. ¶2; *see also* Leita Walker Affidavit Docket 52).

Attorney Clark also told the Court on 12/18/09:

> I can also tell the Court that I have now myself opened up every single converted e-mail and there are a number of communications between Mr. Stepnes and his attorneys, including even attorneys we weren't aware of when we filed our first motion.

(12/18/09 Tr. p. 20-1). The detailed version of this follows:

Attorney Clark spent numerous hours opening up and reviewing each email in the *converted* email folders of the Forensic Report disk. Two important conclusions emerged from this review:

1. The converted emails that Ms. Walker admits to having reviewed, included numerous emails between Stepnes and the following attorneys:
    a. **Priscilla Faris**: There is an email string dated March 28, 2008, in which Paul Stepnes is sending his ideas for the contest to his attorney, who was already representing him in litigation relating to one of his

properties. Upon review, attorney-client privilege is claimed for this document. Stepnes was seeking advice from his current attorney. This email string is important because it contains specific information about what Stepnes was thinking, considering, and seeking legal advice on, *regarding activity that CBS is scrutinizing in this lawsuit*, namely, the timeframe just before Stepnes went public with the contest that launched in May 2008. It is clear from depositions already taken in this matter, that CBS is focusing on this timeframe, and on what Stepnes was thinking, doing, and seeking advice about (see discussions of Simonson emails, below). Further, when police executed a search warrant at Irving House on May 29, 2008, they seized some evidence that *when combined with the email in question*, CBS could use to claim that Stepnes engaged in criminal conduct.[5] This CBS could fashion as a complete defense to the defamation claim. The emails from Attorney Faris are clearly marked with her law firm signature (see above). This belies Leita Walker's claim that she did not "recall" viewing emails from any attorneys other than Jill Clark. Not only did Leita Walker view this email string, she included one of these emails in the "key docs" file that she sent to the Levine Sullivan firm on June 26, 2009. Indeed, now that Plaintiff counsel has the electronic version of the "key

55 Of course, Stepnes denies any such allegation. He is merely saying that CBS could make it *look* like he had engaged in criminal conduct.

docs" file – it is known that Ms. Walker not only viewed those emails, but that she saved one of them on **June 26, 2009, at 9:07 a.m.** (Clark Decl. Exh. 2, see re line at left margin "Question"). That "key docs" file was, as admitted by Mr. Sullivan in the 9/24/09 hearing, and by both Mr. Borger and Mr. Sullivan at the 12/18/09 hearing, reviewed by CBS attorneys in this case. Further, it was referenced by CBS' Memorandum filed 9/17/09, in its footnote, *and* discussed by Mr. Sullivan at the 9/24/09 hearing. These emails were reviewed, and re-reviewed, and re-reviewed.

b. **Eve Borenstein**: there is an email string dated March 17-18, 2008, that manifests in approximately 6-7 "files" and in which Paul Stepnes is seeking legal representation from Attorney Borenstein. The emails are clearly marked at the bottom as a "law office" (see Exhs. 5a and 5b, to Officer Hanson deposition for the full signature). These emails are important, and Stepnes has been prejudiced by CBS attorney review of them because: they discuss content that is being actively litigated in this case, and which surrounds a "foundation" that the WCCO 7-15-08 broadcast discussed. CBS has gained an advantage from knowing this information because it will assist them in taking Stepnes' deposition, it will assist them in preparing legal argument against Stepnes in this

case and related to the "foundation." ***No one notified Plaintiff counsel to inform her that these emails from a law firm had been viewed.***[6]

c. **Paul Simonson**: There are numerous emails to and from Paul Simonson. Paul Stepnes has indicated that he believed that his emails with Paul Simonson were privileged. (Stepnes 9/10/09 Aff. ¶3c). The client's subjective intent is relevant to the determination of privilege.[7] These emails are important, because they are advice about the legality of the contest that Stepnes launched in May 2008. With those emails, CBS could argue that Stepnes *knew* that the contest was illegal and/or criminal. This, CBS could parlay into a complete defense to Stepnes' defamation claim. Paul Stepnes never had the opportunity to claim the privilege for these emails.[8] CBS claimed privilege for certain email(s), and following the September 24, 2009 hearing, that privilege was upheld. Stepnes was prevented from such a process. Leita Walked admitted that she recalled seeing emails from Simonson, and as shown

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[6] Although CBS will undoubtedly argue that at the time they thought Judge Porter had reviewed the Hard-Drives, by this point in Leita Walker's review surely she realized how large a data-file this was, and that even a well-meaning Judge could have *inadvertently* missed certain emails in the review. This would be similar to receiving a large discovery production from counsel. Both ethics rules and the rules of civil procedure (discussed below) require attorneys to *notify opposing counsel that potentially privileged content has been encountered*. This was not done here. (Clark Decl. 1/12/10).

[7] See *U.S. v. Evans*, 113 F.3d 1457, 1465 (7th Cir. 1997), and courts look to circumstantial evidence and the context. Here, Stepnes immediately filed a TRO seeking to protect the confidentiality of his emails with various attorneys, including Simonson. Simonson *is* an attorney, but no longer holds a license, and Stepnes has affied that he believed his conversations were privileged.

[8] Of course, Stepnes claimed privilege for the entire Hard-Drives, both in the state action, and to counsel in this case, as noted above and in other filings referenced above.

by Clark Decl. Exh. 2,[9] she copied one of those emails to her "key docs" file on **June 23, 2009 at 2:57 p.m.** (see re line on left – "got your voicemail"), then went back to copy a second email on **June 26, 2009 at 8:56 a.m.** *It is unclear where she copied this email from on June 26 – if she was not at the MCAO.* Interestingly, Sara Lathrop indicated that when she encountered these emails, she called the Supreme Court to inquire whether he was a licensed attorney. (Lathrop Decl. filed with September 2009 motions). Why the Supreme Court and not Plaintiff counsel? ***No one notified Plaintiff counsel to tell her these emails were being encountered.*** As with other documents in the "key documents" file CBS attorneys admit to viewing them.

2. Although Leita Walker does not admit to viewing other attorney emails, the amount of time she spent in the Forensic Report, the copies she made, the timing of her work (see discussion of metadata, below), and her other conduct, all suggest that she *did*, indeed, review other attorney documents.

Of course, Plaintiffs have not been able to depose defense counsel, to learn who Leita Walker talked to, or the work patterns of other attorneys with which to draw circumstantial conclusions. (Clark 1/12/10 Decl. ¶2).

[9] This is a window capture of the meta-data from the "key docs" electronic disk received from CBS following the 12/18/09 hearing.

Not only have CBS attorneys saved the "key docs" file and reviewed it, they have retained it (even after numerous requests that they return is – see Plaintiffs' filings for 12/18/09 hearing), and they have fought to keep it. They have even threatened that if full discovery production was not made by Stepnes from the Hard-Drives by a date of their choice, that they *would go forward and use the key docs file.* (See detailed discussion of this in Plaintiffs' December 4, 2009 Memorandum, **p. 14, 20, Exh. K-i**.) They threatened this even **though** they knew that this matter was being actively litigated in this Court. The desperateness with which CBS attorneys attempt to hold onto the "key docs" file should alert this Court as to the importance of the privileged emails therein. CBS *really wants* those documents; Stepnes believes that herein, he has indicated why.

It should also be noted that in the deposition of Pete Girard, CBS attorney Sullivan mentioned a Simonson email in a manner that showed that CBS will use the email against Stepnes in this litigation. (Clark Decl. ¶3).

The dinner party emails

There is another set of emails that should be discussed, even though they are not attorney-client privileged. As this Court is aware, CBS could not "locate" the video of the interview of Stepnes and Attorney Clark on July 15, 2008 (this was briefed in the spoliation motion). It is still an open issue whether Attorney Clark will therefore become a "necessary" witness at trial. Or, even if she does not actually

testify on the witness stand, CBS would definitely benefit from being able to taint Attorney Clark in this case. Leita Walker's "key docs" file also saved 2 emails about a dinner party that Attorney Clark had had at her house. Those emails, dated December 26, 2007 (with re line "Quatamala" saved by Walker on June 26, at 9:02 a.m.), and March 28, 2008 (with re line "our get together" also saved June 26, 9:02 a.m.), have nothing to do with this case, and would not have been produced in discovery. They were not requested, and they are not relevant. CBS *only have these because of the violation of Judge Porter's order.* CBS was on notice that there were potentially-privileged emails between Stepnes and Attorney Clark. And the emails to/from Clark were sent with a signature warning that the emails might contain "privileged communications." CBS *had no idea* whether all of these people were Clark's clients. ***No one notified Plaintiff counsel that these emails had been located***.

Further, in one of the emails Clark states, "I'm glad we did not talk 'work' and just had fun." Plaintiffs believe that this harmless comment about a purely social event, will be claimed by CBS to be evidenced that Attorney Clark was somehow involved in the contest venture, and thereby attempt to taint her in the eyes of the jury. This would allow CBS to gain an advantage from the missing video footage, and use the ill-gotten gains from the violation of Judge Porter's order, to try to taint Attorney Clark. Perhaps other, totally uninvolved, and innocent people who merely came to a dinner party, would be dragged into this case and tainted by CBS.

Of course, numerous other totally uninvolved people had their identities and emails disclosed in the Forensic Report. Sara Lathrop made a list of names from the Forensic Report, and then asked about those people in the deposition of D.E. (Stepnes Aff. ¶8-11). Those names were only obtained because of the violation of Judge Porter's order. Even though not privileged, those emails would not have been produced in discovery (they were not requested and they are not relevant) people should not have to have their names dragged into this matter.

Papa bear, Momma bear, and baby bear

First Paul Stepnes, and then Attorney Clark spent numerous hours reviewing emails in the large (unconverted) Mbox files. Despite Attorney Borger's comments to the contrary at the 12/18/09 hearing, Attorney Clark has confirmed that these 3 large files were copied onto Leita Walker's laptop, and sent to the Levine Sullivan firm in Washington. After hours of review, Clark cannot see any difference between the (unconverted) Mbox files from the original Forensic Report, and those on the Walker laptop/copied to Levine Sullivan (Clark Decl. Exh. 5).

Further, with all due respect, Plaintiffs now highly doubt Ms. Walker's declaration that she spent about 6 hours reviewing the Forensic Report. First, when one views the dates/times that the files and folders were saved, it shows numerous hours, on June 23, 26 and 29. (See Exhs. 2 – 7, further discussed below). If someone were merely copying, they would just save everything within a few minutes.

Second, it is clear from the metadata from her laptop version of the Forensic Report, that:

- She says she went to the Minneapolis City Attorney's Office (MCAO) on June 2**3**, 2009, and we can tell from the electronic metadata from the "key docs" file that she reviewed the Forensic Report and copied numerous files to her "key docs." (See Exh. 2 to Clark Decl.).
- Ms. Walker stated she returned to the MCAO on June 2**6** to complete her review. And it is true, some of the files in her 'key docs' folder were saved on that date (Clark Exh. 2, Exh. 6-7) as were the files in Evidence Verification Reports (Exh. 3). However, many, many files and folders are shown as being last modified on June 29, 2009. These include folders: Converted Mbox Messages; Evidence Verification Reports; and Mbox (email) files (these are the unconverted emails). (Clark Decl. Exh. 4). Inside the "Mbox (email) files, the large unconverted email files are shown as "modified 6/26/09. (Clark Decl. Exh. 5). It is unclear when the files were saved, and if they were "modified." Plaintiffs have not been able to ask Ms. Walker this. Perhaps she copied the files onto her laptop, then copied them into a different part of her laptop on June 2**6**.
- But certainly it appears, that even after Leita Walker had emailed the "key docs" file to the Levine Sullivan firm, she went back to copy additional

files/folders at the MCAO. Why would she go back for the unconverted emails – if no one intended ever to look at or use them?

In response to a subpoena to a Mr. Mihm in this case (a third party witness), CBS firm Levine Sullivan printed out thousands of pages of emails, bate-stamped them and delivered them to Plaintiff counsel. Plaintiffs find it difficult to believe that that would be done with those emails, and not with the unconverted email found in paper bear, momma bear, and baby bear. All we know is that *after* Stepnes alerted the Court about the numerous privileged emails in the large, unconverted files, CBS counsel have stated that they didn't look at it.

Plaintiff counsel has spent numerous hours reviewing the over 50,000 pages of emails in the 3 large unconverted email files. They contain:

a. **Emails to/from Attorney Ralph Mitchell**, who represented Stepnes in several litigation matters (a bankruptcy filing, and a foreclosure by action regarding the Irving House – the subject of the contest and this litigation). Further, the CBS defendants have demanded in discovery, that Stepnes identify all civil lawsuits that he was involved in, showing their interest in the bankruptcy action, and foreclosure by action case regarding Irving House. CBS even made a motion to compel those documents. The Court ordered production, and Stepnes complied by listing numerous items of litigation, as well as providing numerous documents. Further, CBS has subpoean'd

documents from Americana Bank (which held the first mortgage on the Irving House), and around 2,000 pages were served on Plaintiff counsel. Clearly, CBS is interested in the litigation surrounding Irving House and Plaintiff's other properties and they are intent on making those matters a part of this case. The emails with Attorney Mitchell are clearly for the purpose of legal advice and the conducting of ongoing litigation. Further, more than one of those emails is strategic in nature – mapping out the upside and downside of certain litigation maneuvers. Mitchell also provides legal advice to Stepnes, spanning many matters, which were strategic, and which relates directly to Irving House. Further, those emails contain information that CBS could use to try to make it look like Paul Stepnes had a bad reputation. CBS has made it clear that they intend to reduce damages by telling the jury that Stepnes had a bad reputation *before* he was defamed by the WCCO broadcast. These emails could be used for this purpose. (Again, Stepnes does not admit that that is a face, merely that aggressive opposing counsel could try to make it look that way.).

b. **Emails to/from Attorney Priscilla Faris**. Attorney Faris' firm represented Paul Stepnes in a piece of litigation involving a *different* property on Irving Avenue. Those emails discuss strategy, about matters that CBS is clearly interested in (see above). Further, they contain information that CBS could use to try to make it *look* like Paul Stepnes had a bad reputation before the

July 2008 WCCO broadcast. These are in *addition* to the emails to/from Faris that are discussed above, and contained in the "key docs."

c. **Emails to/from Attorney Jill Clark**. In the large email files, emails go back to the timeframe when Attorney Jill Clark represented Paul Stepnes in a prior case he had filed against Minneapolis Police. That litigation is obviously of interest to CBS. Indeed, Plaintiff counsel is of the opinion that CBS devised its "relevant timeframe" to be able to get that prior lawsuit somehow into evidence. The emails were clearly for the purpose of legal advice, and in conducting ongoing litigation. CBS (and the City) would gain an advantage from the information that they learned in the emails, to the extent that they would be able to learn the unguarded thoughts of Stepnes and his attorney, about that litigation. Further, those email(s) discussed settlement strategy, a strategy that could be used against Stepnes in settlement discussions in this case. Further, there were emails in which Stepnes sought the legal advice of Attorney Clark (but were not part of the 2005 litigation), which could benefit the defendants in this case. Topics included people and issues that are a part of this litigation.

(Clark Decl. ¶4). Now that Plaintiffs have the electronic disk of the Forensic Report from the CBS attorneys (from Walker's laptop), we can tell that by November, 2008, the date that Hanson met with Ritschel and according to him probably *looked* at those emails in November (Hanson dep. 21-22, 26-27), Hanson had already saved

numerous "converted" emails. (*See, e.g.*, Clark Decl. Exh. 8; this exhibit shows emails saved by Hanson November 17, although there are numerous emails saved November 18 as well).

Hanson already admitted that he talked to Ritschel about content of emails between Stepnes and Clark that were 'legal advice." Clark cannot tell whether Hanson was referring to the 2005 case, the post-arrest case(s) of Stepnes, or both. The "Jill Clark" folders do contain the emails between Clark and Stepnes after Stepnes was arrested on May 28, 2008, and (obviously) before the laptops were seized on May 29, 2008. These emails are the beginnings of legal conversations regarding Stepnes, his potential lawsuit against Ritschel, etc. There are only a few. They are important in this context because the content could be used against both Stepnes, and if Clark is a witness, against Clark. *Not* because either of those 2 have done anything wrong, but creative, aggressive counsel could try to make it look that way. (This is *not* a reference to any type of crime-fraud exception – they would not fit that category at all, and Plaintiffs do not mean to imply that with the last sentence.)

This factual discussion must end with the overall comment about *how hard* the CBS attorneys tried to keep Plaintiffs from obtaining the *electronic* data that they finally obtained following the 12/18/09 hearing.

Other than the copies ordered by the Court, CBS has never returned any data from the Hard-Drives. (Clark Decl. ¶5).

Since filing motion papers on January 12, 2010, I have had time to peruse the disk of pdf's that Faegre & Benson produced prior to the 12/18/09 hearing (and discussed at that hearing). I have *not* had time to open each pdf (this would be time-intensive, as previously discussed), but I have spot-checked those files.

The first, and most alarming thing about those pdf's, is that they were <u>run through an email converter program</u>. Leita Walker's Declaration stated at ¶6 that the "subfolder titles 'Mbox (email) Messages'... while readable, were not 'user-friendly' because the content was not formatted and included text akin to computer code." It certainly appears that someone on the CBS team instructed that the email data from that large Mbox (which was 'unconverted' in the Hanson Forensic Report) should be formatted so that it would be easier to read. So someone (the service?) ran it through an email converter (similar to what Hanson did for the "converted" emails in the Forensic Report). Why would someone make these easier to read if they were not going to read them? Of course, Plaintiffs do not know when this conversion occurred. It could have occurred before September 1, 2009, when Stepnes "rang the bell."

I don't recall anyone from the CBS team informing me that the unconverted emails had been converted. That was important information that I would have wanted to have. And as counsel for Stepnes, I would have asked who did that, when, and why?

The conversation process clearly worked better on some of the emails than others. Some still contain computer code. Some present just like an email in an inbox as received. (And some look worse having been sent through a converter, than as they appeared 'unconverted' by Hanson.)

I can also report that when I compared the large files in Hanson's Forensic Report, with the pdf's on the disk provided by Faegre & Benson, the process of *conversion* greatly reduced the number of pages, because the computer code was in the background, formatting the document, rather than being "spelled out."

This is important, because it accounts for the differences in numbers of pages from the Hanson-version Forensic Report unconverted files (which I ported into Microsoft word documents to be able to search them), and the pdf-based disk provided by Faegre & Benson. Note that at 12/18/09 Tr. at p. 28, ln. 10, Mr. Borger made the claim that Leita Walker "didn't copy everything there." At page 30 of the same transcript, Mr. Borger calls was Leita Walker copied a "9,000 pages sub-set." (Line 20-21).

From my review, the only files that Ms. Walker did *not* copy from Hanson's Forensic Report, are the 2 "Jill Clark" files:

- **Noted Inbox Messages (from Jill Clark); and**
- **Noted Sent messages (to Jill Clark)**

<u>All other folders and files appear to be on her "CD Report" disk</u> (produced to Plaintiffs just before Christmas 2009).

Note that from Clark Decl. Exh. 5, we can tell that Walker copied the *large* unconverted email files, containing the following kilobytes:

0001-0000.htm 65,296 KB

0002-0000.htm 5,946 KB

0003-0000.htm 114 KB

These are large, .htm files, and not *portions* of those files. The kilobyte size of the largest file on the Walker disk is about the same size as the largest file in the Hanson Forensic Report. The entire files appear to be on the Walker disk. Stated another way, it is now clear to Clark that the Court was accurate in its statements at page 31 of the 12/18/09 Tr.

These file sizes look to be the same file size as the "unconverted" email files that Plaintiffs call paper bear, momma bear, and baby bear. I have spot-

checked the newly-converted-bate-stamped-provided-by-Faegre/Benson emails, and have located emails to/from the following Attorneys:

Jill Clark, Esq.

Ralph Mitchell, Esq.

Priscilla Faris, Esq.

The emails do not appear to be in the same order as in the Hanson files. But the emails seem to all be there. If the Court desires it, Plaintiffs will provide the bates numbers for these. Plaintiffs have not done this to date, because it seemed that would send CBS counsel rushing to the disk to open, read and argue from them.

ARGUMENT

I. ATTORNEYS FOR CBS-DEFENDANTS SHOULD BE DISQUALIFIED.

A. This Court has Authority to Disqualify the Attorneys.

The Supreme Court has held that "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged." *Fisher v. United States*, 425 U.S. 391, 403, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1971). "[T]he purpose of the attorney-client privilege is to encourage 'full and frank communication between attorneys and their clients.'" *Westinghouse v. Republic of the Philippines, 951 F.2d 1414, 1423 (3d Cir. 1991)*. It gives the client the ***right*** to object to the disclosure of any privileged communications made during the relationship. *United States v. Inigo*, 925 F.2d 641, 656 (3d Cir. 1991). Stepnes was obviously denied that right, here.

A motion to disqualify counsel is the proper method for a party-litigant to bring the issues of breach of attorney-client privilege/ethical duties to the attention of the Court. *Musicus v. Westinghouse Elec. Corp.*, 621 F.2d 742, 744 (5th Cir. 1980). A plaintiff counsel has standing to bring a motion to disqualify defense counsel for violations of ethical rules involving the attorney-client privilege. *Kevlik v. Goldstein*, 724 F.2d 844, 847 (1st Cir. 1984).

> In matters concerning the supervision of members of its bar, "the finding of the district court will be upset only upon a showing that abuse of discretion has taken place." "Moreover, in the disqualification situation, any doubt is to be resolved in favor of disqualification."

Coffelt v. Shell, 577 F.2d 30, 32 (8th Cir. 1978) (citations omitted).

The authority of federal courts to disqualify attorneys derives from their inherent power to preserve the integrity of the adversary process, emphasizing the need to maintain the highest standards of the profession. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991).

In a civil case, there are two competing interests, choice of counsel and protection of attorney-client privileged communications. The Courts lean toward protection of the privileged communication, unless it is voluntarily waived. *Kevlin*, 724 F.2d at 850. See also *Grahams Service Inc. v. Teamsters Local 975*, 700 F.2d 420, 423 (8th Cir. 1982), holding that there are 3 factors to be considered:

(1) The client's interest in being represented by counsel of its choice;

(2) The opposing party's interest in a trial free from prejudice due to disclosures of confidential information; and

(3) The public's interest in scrupulous administration of justice.

Of course, many of these cases arise when a former client claims conflict of interest. Those cases can be helpful, here, however, since the issue underlying the conflict is that the attorney for which disqualification is sought, is alleged to be privy to confidential/privileged information. See, e.g., *Bd. Of Ed. Of City of New York v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979) (disqualification may be warranted where the attorney is in a position to use privileged information). *See also*, *County of*

Los Angeles v. Superior Court, 271 Cal. Rptr. 698 (Cal. Ct. App. 1990) (the disqualification principle has also been extended to permit disqualification of an attorney who obtained information protected by the attorney work product privilege).

Motions to disqualify have been decided based on state law. *In re County of Los Angeles*, 223 F.3d 990, 995 (9th Cir. 2000). But see *Galam v. Carmel (In re Larry's Apt.)*, 249 F.3d 832, 838 (9th Cir. 2001) ("The federal courts must be in control of their own proceedings and of the parties before them, and it is almost apodictic that federal sanction law is the body of law to be considered in that regard").

If a district court relies on its inherent power for disqualification, it must merely cite the state ethics rules, or Model ABA Rule. *Herrmann v. GutterGuard, Inc.* 199 Fed. Appx. 745, 752 (11th Cir. 2006). Support has been found in Model Canons 4, 5 and 9 (appearance of impropriety) (see *Nyquist* at 1247). "With no [state] rules directly on point, the Court may look to the Model Code. Canon 9 of the Model Code holds that a lawyer should avoid even the appearance of professional impropriety.' The Ninth Circuit has considered and decided that Canon 9 alone is a sufficient ground for disqualification." *Cargill 2, infra* at 30-31.

Judge Frank cited[10] to Minnesota Rule of Professional Conduct 4.4,[11] which is applicable by analogy here. Further, Plaintiffs assert that Fed.R.Civ.P. 26(b)(5)(B)

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[10] In *Arnold v. Cargill*, 01-cv-2086 [Docket 380].

[11] Minn.R.Prof.Cond. 4.4(b) reads, "A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was

provides an additional basis (see below). See also discussion of California *Cargill* case, below.

A decision to disqualify counsel must be based on a factual inquiry conducted in a manner allowing appellate review, but an evidentiary hearing is not necessarily required. *General Mill Supply Co. v. SCA Servs*., 697 F.2d 704, 710 (6th Cir. 1982).

B. <u>Rules Promulgated to Assist in these Situations</u>.

Recently, Fed.R.Evid. 502 and Fed.R.Civ.P. 26(b)(5)(B)[12] were recently passed to assist district courts with *inadvertent* disclosure of privileged materials. Those are not quite on point, because in this situation:

- The entire disclosure was made in violation of a Court Order (this case bears some resemblance to *G. next friend of k. v. State of Hawaii*, 2009 U.S. Dist. LEXIS 48214, *3 (D. Ha. 2009), where the documents ended up in a party-attorney hands amid allegations that they were illegally

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inadvertently sent shall promptly notify the sender. Here, no one ever notified Plaintiff counsel, although, clearly, numerous emails with an attorney email signature were reviewed.

[12] Fed. R. Civ. P. 26(b)(5)(B) requires that,

> If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. **After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved**; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

obtained. There, the Court ordered them returned under 26(b)(5)(B));[13]

- The disclosure was *not* made by Plaintiff counsel, but instead was made by the City, to CBS counsel.

No one has ever seriously questioned whether the disclosure was *inadvertent*, so that body of law does not help us much.[14] However, cases interpreting 26(b)(5)(B) apply the "claw-back" provision without time-consuming decisions about whether the data inadvertently disclosed is privileged. The analysis seems to be: if the disclosing party is asking for it back – give it back. *See, e.g., R&N Automative, Inc. v. Travelers Casualty Ins. Co. of Am.,* 2009 U.S. Dist. LEXIS 112269 (M.D. Pa. 2009); *Stillmunkes v. Gibaudan Flavors Corp.*, 2009 U.S. Dist. LEXIS 51518 (N.D. Ia. 2009); *Coffeyville Resources Refining & Marketing*, 2009 U.S. Dist. LEXIS 85208 (D. Kan. 2009). This makes sense, since the Rule was adopted, in part, to ease the burden on the district courts.

It should be noted that courts are finding *violations* of Fed.R.Civ.P. 26(b)(5)(B). *See, e.g.*, *Fuller v. Interview, Inc.*, 74 Fed.R.Serv. 3d (Callahan), 2009 U.S.

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[13] From Stepnes' 9/09 Memorandum: First, it is axiomatic that someone should never gain an *advantage* from violating a court order. Second, a party has an "interest in a trial free from even the *risk* that confidential information has been unfairly used against it." (Emphasis in original.) (Order of the Honorable Donovan W. Frank in *Arnold v. Cargill*, 01-cv-2086). See also, Coleman v. American Red Cross, 979 F.2d 1135 (6th Cir. 1992) ("In some, perhaps most, circumstances, a district court also may properly enjoin a party from using the fruits of a discovery violation in another proceeding") from that argument.

[14] Since the promulgation of Fed.R.Civ.P. 26(b)(5)(B), district courts have discussed what of the "old" case law applies in light of the new rule. That discussion is time-consuming, and Plaintiffs believe not worth discussing here.

Dist. LEXIS 93157 (S.D.N.Y. 2009). That case can also be analogized to the present one because:

- The party that had the documents/data held onto them for *ten months*, which the Court commented on; and
- The documents were not produced in the litigation,[15] but in a paragraph arbitration proceeding.

Fuller at *4. The *Fuller* Court found the privilege had not been waived, and remarked on an "overreaching issue of fairness and protection of an appropriate privilege…." The Fuller Court also remarked that the one losing control of the documents cannot heard to claim "prejudice." *Id*. at *23-24. The documents were ordered returned. Here, of course, despite being on notice before June 2009, but *clearly* on notice by September 1, 2009, the CBS attorneys have continued to hold onto the disks/data and have refused to return/destroy them. Then, they re-re-reviewed them, and tried to use that review to their advantage in the various motions before this Court.

Stepnes moves to require that all versions of the disks/data be returned to Plaintiff counsel. He seeks a ruling that CBS has violated Fed.R.Civ.P. 26(b)(5)(B).

[15] Obviously, the City produced the Forensic Disk to CBS in this litigation. However, the state court proceedings are obviously also involved in the analysis of this situation.

The Middle District of Florida also criticized holding onto, and using the data that had already been requested to be returned. *See*, *Johnson v. Stein Mart, Inc.*, 2009 U.S. Dist. LEXIS, *10-11 (M.D. Fla. 2009):

> Plaintiff's counsel received inadvertently disclosed privileged emails from Defendant in the course of discovery. Defendant's counsel timely requested return of the inadvertently disclosed items. Plaintiff's counsel did not return the emails, but rather chose to insert selected content from certain emails into Plaintiff's filings with this Court. The undersigned conducted a thorough review and analysis of all items claimed as privileged and submitted to the Court *in camera,* including the inadvertently disclosed emails, and determined each item listed in Defendant's privilege logs was in fact either privileged in nature or was not discoverable. Conduct of Plaintiff's counsel in refusing to return the inadvertently disclosed emails and choosing instead to repeat select portions of those emails in Plaintiff's filings with the Court on the public record was found to be worthy of reprimand.

Plaintiffs hope to save this Court the lengthy review of the entire Forensic Report (as the above district court was required to do). *See also Rico v. Mitsubishi Motors Corporation*, 68 Cal .Rptr. 758 (Sup. Ct. Ca. 2007). In that case, upon finding the inadvertently produced document, the attorney not only failed to notify defense counsel, but gave copies of the document to co-counsel and the plaintiffs' expert witnesses, and used the document in deposing the defendant's expert. *Id*. at 813.

In *Rico*, the California Supreme Court explored the duties owed by an attorney w ho receives privileged documents through inadvertence to opposing counsel and held that a lawyer may not read the documents more closely than is necessary to ascertain that they are privileged. Once it becomes apparent that the documents are privileged, an attorney must promptly notify the opposing counsel and try to resolve the situation. An attorney who fails to meet this standard of professional conduct

and makes full use of the privileged documents, causing irreversible damage to opposing counsel, may be disqualified. In the case at bar, the emails that Stepnes would have claimed privilege for, were used in depositions, and in motions during these special proceedings. The (as detailed as possible to retain the privilege) discussion of *how* the defendants can gain an advantage from the privileged emails shows that the damage is irreversible here. Paul Stepnes is yet to be deposed. How, possibly, could Attorney Sullivan wipe from his mind what he already knows, and has already used in a prior deposition, regarding Simonson's email to Stepnes? Or Stepnes' email to Priscilla Faris that he discussed in a public filing and openly in Court? Further, Plaintiff believes that circumstantial evidence suggests that CBS attorneys or their staff has gone far deeper into the Hard-Drive emails (see factual discussion). Even if this cannot be proven, the *risk* is simply too great that this information will be used to gain an advantage for CBS, and to the detriment of Stepnes.

See also *Cars R US Sales and Rental, Inc. v. Ford Motor Co.*, 2009 U.S. Dist. LEXIS 51478 (N.D. Ill. 2009). When the Court learned that in response to an attempt to claw back, that Ford Motor Co. had attached the document in a public filing, it admonished, "Defendant's counsel are experienced litigators and know better than to proceed in this manner. Under appropriate circumstances, the court could disqualify counsel for this type of conduct." *Id*. at *3-4.

C. **This Situation Warrants Disqualification.**

As noted above, through no fault of Stepnes (who took swift measures to protect his privilege following seizure of the computers), the CBS attorneys now have emails back and forth between Stepnes and numerous of his attorneys. Indeed, everything they have from the Hard-Drives (their entire "key docs" file) is a product of the violation of Judge Porter's Order.[16]

See *Cargill Incorporated v. Budine,* 1007 Dist. LEXIS 48405 (E.D. Ca. 2007) ("Cargill 2")[17], a case that could be very helpful in analyzing this matter.

In that case, as here, Plaintiffs argued that the continued representation of the defense counsel

(1) gives rise to the appearance of impropriety;

(2) violates confidentiality orders;

(3) violates privileged information; and

(4) assaults the integrity of these judicial proceedings.

That Court considered it to be its duty to "guard against the inadvertent use of confidential information." *Cargill 2* at *32. Much like our case,

> Progressive defendants assert that they were not privy to any privileged information. This assertion is undermined by Budine's high position in Cargill and his repeated interaction and discussions with Cargill's counsel in defense

[16] It is now undisputed that the City violated Judge Porter's order. See Judge Porter's October 2009 Order in which he indicates the City acknowledged same.

[17] "Cargill 1" is the case that Judge Frank decided, in the District of Minnesota, and which Plaintiffs cited and attached with their September 2009 briefing.

> of Burford. This gives rise to, at the very least, a presumption that Budine participated in privileged communications. See *Elliott v. McFarland Unified School Dist.,* 165 Cal. App. 3d 562, 568-69, 211 Cal. Rptr. 802.

Cargill 2 at *32.

Here, the assertion by CBS attorneys that they were not privy to any privileged information and *only* viewed the "key doc" file, in the words of the Cargill 2 Court, "[g]iven their 'undeniable interest in preserving any tactical advantage they may have garnered,' these assertions are unavailing."

CBS self-serving (and indeed, ever-changing)[18] version of what they saw and did not see is undermined by: i) Leita Walker going *back* to the MCAO to obtain copies of the *entire* folders containing converted and unconverted emails, *after* she had already prepared the "key docs" file; ii) the way that Levine Sullivan deal with other large disk productions (printing them all out); and iii) CBS' continued holding onto, copying, bate-stamping[19] and *referencing* data from the Hard-Drives during these special proceedings.

As the Cargill 2 Court stated, "Self-serving protestations of counsel do not help assuage the fears of … the Court that" the confidential information was revealed. *Cargill 2* at *35.

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[18] Note that the Leita Walker affidavits has been otherwise described by senior CBS counsel (see, e.g., 12/18/09 Tr., Attorney Borger's comments, when he was hoping to prevent Plaintiff counsel from getting the electronic versions of what Leita Walker copied).

[19] See papers filed December 4, 2009 for discussion of the copying and bate-stamping.

As the *Cargill 2* Court also pointed out, allowing the defense attorneys to continue, puts them in a situation where *they* get to decide what is confidential and privileged. *Id*. That is much like here, where Stepnes lost his right to object to the use of his privilege, and, instead, CBS attorneys have been the ones to review documents, and then *decide for themselves* what they think they can review, re-review, and argue from.

Cargill argued that defense attorneys would gain an advantage "by gaining access to privileged and confidential information not normally available to them through normal discovery means and using it against Cargill." *Id*. at 37. The Court held that the defense attorneys did have access to such information. Further, the Cargill 2 Court held that there was a danger of continuing adverse effect, quoting *Chronometrics*, "such information as [the attorney] may have learned…cannot be unlearned…As counsel, the attorney would have the improperly obtained facts instantly available in his mind in questioning witnesses, making and responding to objections and addressing the court and jury." Plaintiffs cannot say it better.

Next, the *Cargill 2* Court went on to note have similar cases have resulted in disqualification. Id. at *40-41. Finally, that Court concluded:

> It is undisputed that the Progressive defendant's right to counsel of their choice is important. However, in similar situations, that right has yielded to considerations of ethics and the integrity of the judicial process. See *Hull v. Celanese Corp.,* 513 F.2d 568 (2d Cir. 1975). The "potential for unfair discovery of information through private consultation rather than through normal discovery procedures threatens the integrity of the trial process."

Id. at *43-44. Of course, Plaintiffs also point the Court to Judge Frank's decision in *Cargill 1*.

There, the failure of plaintiff counsel to notify defense attorneys that the documents were potentially privileged, was considered a sufficient basis to disqualify them. Of course, Judge Frank, much like what the *Cargill 2* Court did, discredited the plaintiff attorneys' version of events, when they stated that some un-named and un-locatable Clerk copied the documents. Note that Judge Frank held that Cargill was entitled to a trial free from even the "risk" that the other side had privileged data.

Here, CBS refuses even to state which law firm personnel worked on the project, who bate-stamped the key documents, etc. What CBS has stated, for the reason set forth in much detail in the Factual Statement above, are, with all due respect, questionable. Why did Leita Walker return to MCAO to copy *all* of the email files – if the law firms were only going to look at the "key docs?" It just doesn't make sense.

Finally, we must end where we began: the violation of Judge Porter's order. In many analyses, the issue is whether it would be fair to the *receiving* party, to be disqualified when it was their opposing counsel who inadvertently disclosed privileged documents. Here, it all starts with the violation of Judge Porter's order. Plaintiff worked diligently to protect his privilege, and was entitled to rely on the fact that the City of Minneapolis would follow that order.

CBS knows all of that, knows that Judge Porter did *not* review the emails, has been notified by Plaintiff counsel of the privilege, and has received requests to return the data. Their continued use of, and refusal to return the disks/data should all weigh in favor of disqualification.

The CBS attorneys have said a number of times that only Leita Walker reviewed Hard-Drive emails other than the "key docs." However, in the Eighth Circuit, there is an irrebuttable presumption that the privileged confidences are shared by all members of the firm. *See, e.g., State of Arkansas v. Dean Foods Products Co., Inc.,* 605 F.2d 380 (8th Cir.1979), overruled on other grounds, *In re Multi-Piece Rim Prods. Liab. Litig*., 612 F.2d 377. Although sometimes Chinese walls and sophisticated screening devices can result in disqualification of less than the entire firm, where sensitive content is concerned, screening may not be enough. *ProBatter Sports, LLC v. Joyner Techs., Inc.*, 2006 U.S. Dist. LEXIS 74219, *14 (N.D. Ia. 2006). Plaintiffs contend that by analogy, the entire Faegre firm must be disqualified, and not just Leita Walker.

Further, in this case, it is clear that there was no Chinese wall between Walker and Borger. It is also presumed that the Faegre firm lawyers spoke regularly with Sullivan firm lawyers, about the case. There is certainly reason to believe that on June 26, 2009, following Walker's review of the Forensic

Report at the MCAO, that Walker spoke with Jeannette Bead just before emailing her the zip file.

II. COURT HAS THE AUTHORITY TO REVOKE *PRO HAC VICE* ADMISSION.

In addition to the law cited above, Plaintiff notes that this Court has the authority to revoke the *pro hac vice* admissions for: Michael Sullivan, Jeanette Bead, and Chad Bowman. They are not admitted to this Court, but rather sought this Court's permission to practice before it. See Local Rule 83.5. **(These attorneys were admitted *pro hac vice* by text orders dated: 2/26/09; 4/20/09; and 9/1/09)**.

Plaintiffs were unable to locate any Eighth Circuit case on point. An Eleventh Circuit case has held that the due process standard is "notice and opportunity to be heard." *Kirkland v. National Mortgage Network, Inc.*, 884 F.2d 1367 (11th Cir. 1989). However, note that since 1989, federal courts have increasing used this revocation as a way to control foreign lawyers practicing before them. ***See, e.g., In re Hake*, 2009 FED. App. 0567N (6th Cir.) (district court revoked *pro hac vice* admission for lead counsel who repeatedly clashed with the district judge; Sixth Circuit upheld the revocation).**

Plaintiffs seek this as additional/alternative relief, and believe after research that such revocation is not immediately appealable.

See *Systemic Formulas, Inc. v. Kim*, 2009 U.S. Dist. LEXIS (D. Utah 2009), where an attorney's *pro hac vice* admission was revoked for violating a protective order and making false statements to the Court.

In Minnesota, the ethics Rules is Minn.R.Prof.Cond. 3.3(a)(1), candor to the tribunal. A lawyer shall now knowingly make a false statement of fact…to a tribunal, or fail to correct a false statement of material fact…previously made to the tribunal by the lawyer.

III. OTHER RELIEF IS SOUGHT.

Plaintiffs also request the following relief:

- for return to Plaintiff of all versions of the Hard-Drives in the possession or control of CBS-defendants or their agents (**this means collecting all versions, from anything they have given them to**);
- for the destruction of all versions of the Hard-Drives on any computer, server (or similar) at the law firms, the clients, or any of their agents (including the vendor(s) that bate-stamped documents);
- this request includes a request to order the return of the "key documents" file created by Leita Walker, Esq.

Then, enjoin any further use of *any* information obtained or gleaned from the hard-drives. *Cf.*, Coleman v. American Red Cross, 979 F.2d 1135 (6th Cir. 1992) ("In some, perhaps most, circumstances, a district court also may properly enjoin a party from using the fruits of a discovery violation in another proceeding"). Plaintiff will

respond to normal discovery by new counsel (or if disqualification motion is denied, to the current CBS counsel, but CBS will *not* be heard to argue *from the content they learned through violation of the court order* that certain emails should be produced in discovery).

Plaintiffs further seek an order that explicitly requires defense counsel to obtain all versions that they have provided to anyone outside their law firms (clients, services, etc.), and to ensure that all electronic data has been deleted. Plaintiff asks this Court to appoint a Special Magistrate to ensure that this has been accomplished. Plaintiffs ask that the CBS-defendants pay for the Special Magistrate, and that the Special Magistrate prepare a report to this Court.

Plaintiffs further request that they be awarded their attorney fees and expenses related to the Hard-Drive issue. *See, e.g.*, *Rodriques-Monguio v. The Ohio State University*, 2009 U.S. Dist. LEXIS 51955 (S.D. Ohio 2009) (ordering return of the documents and attorney fees). Plaintiffs seek permission to file attorney-fee affidavits with this court for its consideration.[20] However, Plaintiffs propose that the City of Minneapolis be responsible for attorney fees and costs for the first segment of time related to the Hard-Drive issue (its discovery, initial motions, etc.), and that the CBS-defendants be responsible for the latter segment (motions required, review of key documents and Leita Walker disks, etc.).

[2020] Judge Porter has now issued an order for partial payment of attorney fees associated with the state action. Plaintiffs will provide a copy of that order with their attorney fee affidavits and explain what has been compensated and what has not. (Clark Decl. ¶7).

Finally, Plaintiffs request that the Special **Master** oversee the forwarding of attorney materials to new counsel for CBS-defendants. This would include ensuring that no depositions, notes, motions, or other documents or data that are tainted by the Hard-Drive data, are delivered to new counsel.

Plaintiff no longer agrees that a neutral could retain one each disk. The time for that is passed.

CONCLUSION

For all of the stated reasons, and those discussed in their September, November and December 2009 filings, Plaintiffs seek the above-requested relief.

Amended Date: January 26, 2010 **ATTORNEYS FOR PLAINTIFFS**

s/jillclark

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