

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JANET JENKINS, et al.,)	
Plaintiffs)	
)	
v.)	Docket No. 2:12-cv-184
)	
KENNETH L. MILLER, et al.,)	
Defendants)	

DEFENDANT RESPONSE UNLIMITED, INC.'S OPPOSITION TO PLAINTIFF'S
MOTION TO COMPEL AND MOTION FOR SANCTIONS DATED APRIL 17, 2014

Defendant, Response Unlimited, Inc. ("RUL"), by its attorneys, Gravel & Shea PC, responds to Plaintiff's Motions to Compel and for Sanctions dated April 17, 2014, as follows:

Argument

Plaintiff's motions are based on both procedural and substantive claims that do not provide a basis for relief. Plaintiff has once again failed to comply with Local Rules 7(a)(7) and 26(d) requiring a meet and confer in advance of non-dispositive motions, and has made the unfounded claim that RUL's response to discovery was both untimely and lacked substance. Had Plaintiff complied with the Local Rules, her misunderstanding may have been corrected, and the motions could have been substantially limited, if not avoided altogether.

I. PLAINTIFF HAS REPEATEDLY FAILED TO COMPLY WITH LOCAL RULES 7 AND 26(d).¹

Plaintiff failed to provide in her motion a certification in compliance with Local Rule 7(a)(7), which requires a “party filing a non-dispositive motion [to] certify that the party has made a good faith attempt to obtain the opposing party’s agreement to the requested relief.” *See Contino v. United States*, 535 F.3d 124, 126 (2d Cir. 2008) (“Local rules have the force of law, as long as they do not conflict with a rule prescribed by the Supreme Court, Congress, or the Constitution.”); *see also Norton-Griffiths v. Wells Fargo Home Mortg.*, 2011 WL 884456, at *5 (D. Vt. Mar. 11, 2011) (refusing to excuse a violation of the Local Rules and explaining that the “requirement” of Local Rule 7(a)(7) “is not a meaningless gesture [because it] allows the parties through the consent process to narrow the scope of any dispute regarding the proposed amendments prior to seeking judicial involvement regarding the same”). This Court very recently denied a motion for sanctions partly because plaintiff failed to meet and confer before filing the motion. Order at 3 in *Drake v. Allergan, Inc.*, Docket No. 2:13-cv-234-wks, (D. Vt. April 14, 2014). As will be made clear below, a meet and confer in this instance would have served to clear up apparent misunderstandings on Plaintiff’s part, and could have avoided or at least substantially narrowed the motion. Counsel for RUL stands ready to work with Plaintiff.

II. RUL’S DISCOVERY RESPONSES WERE TIMELY.

Plaintiff boldly asserts on the first page of her motion:

On April 10, 2014 – beyond the 14-day deadline set by the Court, thereby wasting the limited time the Court set for jurisdictional discovery – RUL finally provided a purported response to the Court’s order.

¹ While Defendant did not raise the issue at the time, Plaintiff similarly failed to comply with the local rules when she filed her first motion to compel on December 20, 2013.

The statement is not accurate, and underscores the appropriate emphasis this Court places on civility among counsel. As indicated by the e-mail exchange between Defendant's counsel and Plaintiff's counsel, attached hereto as Exhibit A, counsel was given an extension until April 11, 2014 within which to file RUL's responses, which were filed a day *early* on April 10.²

III. THE COURT SHOULD ENTER A PROTECTIVE ORDER AS TO RUL.

The coordination of parallel civil and criminal proceedings raises constitutional concerns, particularly where a civil investigation is used to gather evidence for a criminal proceeding. *See United States v. Kordel*, 397 U.S. 1, 11-12 (1969) (identifying as a circumstance “that might suggest the unconstitutionality” of a criminal proceeding a case “where the Government has brought a civil action solely to obtain evidence for its criminal prosecution”). While merely sharing unsolicited information obtained in a civil case is not an abuse of process, the Second Circuit has explained that it “may be ‘improper for the Government to institute a civil action to generate discovery for a criminal case.’” *Doctor's Assocs. v. Weible*, 92 F.3d 108, 116 (2d Cir. 1996) (quoting *United States v. Tison*, 780 F.2d 1569, 1573 (11th Cir. 1986)). This “rule exists to prevent the government from ‘availing itself of [the more liberal] civil discovery devices to obtain evidence for subsequent criminal prosecution.’” *Id.* (quoting *United States v. Parrott*, 248 F. Supp. 196, 202 (D.D.C. 1965) (alteration in original)).

Put another way, “the Government may not bring a parallel civil proceeding and avail itself of civil discovery devices to obtain evidence for subsequent criminal prosecution.” *United States v. Parrott*, 248 F. Supp. 196, 202 (D.D.C. 1965); accord *United States v. Scrushy*, 366 F.

² Surprisingly, the attorney responsible for the motion was copied on the exchange, so an explanation of not having been informed by other counsel cannot excuse the accusation in this instance.

Supp. 2d 1134, 1137-38 (N.D. Ala. 2005). In the context of parallel proceedings, the Second Circuit has explained that “all parties — those who invoke the Fifth Amendment and those who oppose them — should be afforded every reasonable opportunity to litigate a civil case fully” and that the “exercise of Fifth Amendment should not be made unnecessarily costly.” *United States v. 4003-4005 5th Ave.*, 55 F.3d 78, 84 (2d Cir. 1995). To accommodate the potentially competing interests posed in this context, courts “have explored a range of approaches,” including among others, “the entry of a protective order prohibiting the use of the civil litigant’s responses in any criminal proceeding in that district” and “a stay of discovery or the civil action until parallel criminal proceedings have run their course.” *Id.* at 84, n. 6 (quotations and citations omitted).

The Second Circuit has repeatedly endorsed the use of protective orders in the context of parallel actions. In *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979), the Court rejected an attempt by the Government to set aside a protective order entered into in a civil action, observing that “the Government as investigator has awesome powers which render unnecessary its exploitation of the fruits of private litigation.” *Id.* In *Martindell*, the Second Circuit held that protective orders entered in civil cases are enforceable against government agencies absent “a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need.” *Id.* at 296. The Second Circuit has since interpreted *Martindell* broadly, applying its procedure and standards in the context of both state and federal grand jury proceedings. See *In re Grand Jury Subpoena Deuces Tecum*, 945 F.2d 1221, 1223-26 (2d Cir. 1991).

Here, counsel for RUL asked counsel for Plaintiff whether Plaintiff would consent to the entry of a protective order restricting the use of any documents provided to this action only. Ex. B. A few days later, a grand jury subpoena was issued to RUL by the United States Attorney’s

Office for the District of Vermont. The subpoena is dated April 29, 2014, the same day that counsel for RUL e-mailed a draft protective order to Plaintiff. Ex. B.

While RUL has no knowledge as to whether the timing of the two events is related, the current existence of directly overlapping civil and criminal discovery requires the Court to “explore the feasibility and fairness of accommodations” such as a stay of this action or the entry of a protective order. *4003-4005 5th Ave.*, 55 F.3d at 83, n. 4. Entry of a protective order would be particularly appropriate under the well-established *Martindell* line of cases.

IV. RUL HAS PROVIDED RESPONSES TO THE DISCOVERY SOUGHT.

Plaintiff’s arguments on the merits also fail. Plaintiff first complains that RUL did not provide the names of the persons that participated in “communications between Philip Zodhates and RUL employees regarding Lisa Miller, Isabella Miller-Jenkins, and/or Janet Jenkins.” Plaintiff’s complaint is without merit. First, Plaintiff herself defined the terms “Identify” and “Describe” in her instructions for the interrogatories. Plaintiff did not ask that RUL “Identify” the people in the conversation. Instead, Plaintiff asked that RUL “Describe” the communication. Plaintiff’s definition of “Describe” does not include any request that RUL provide the identity of the participants of the communications. Certainly, RUL cannot be blamed for failing to provide information that Plaintiff did not request.

Second, as the documents that Plaintiff attached to her Motion for Sanctions attest, Plaintiff can identify both RUL employees that received at least some of these communications and the substance of those communications. Plaintiff’s refusal to consent to entry of a protective order, coupled with the almost contemporaneous grand jury subpoena issued to RUL, raise the serious constitutional concern that any further productions made by RUL would be an end run around the rule “prevent[ing] the government from ‘availing itself of [the more liberal] civil

discovery devices to obtain evidence for subsequent criminal prosecution.” *Doctor’s Assocs.*, 92 F.3d at 116 (quoting *Parrott*, 248 F.Supp. at 202).

Plaintiff next complains that RUL’s answer to Interrogatory No. 16 is insufficient because the interrogatory response did not reflect “the personal knowledge of all relevant individuals, which would include Zodhiates, Victoria Hyden, and Matt LaPorta, who answered the interrogatories on behalf of RUL.” (Mot. at 3). Contrary to Plaintiff’s argument, a corporation’s knowledge is limited to the knowledge of its agents acting within the scope of their authority. Information obtained outside the scope of an agent’s authority is not imputed to the corporation. “The general rule is that knowledge acquired or possessed by an officer or agent of a corporation otherwise than in the course of his employment, or in relation to a matter which is not within the scope of his authority, is not notice to the corporation.” William Meade Fletcher & Morton S. Wolf, *Cyclopedia on the Law of Private Corporations* §793 (Perm Ed. 1975); *see also Hill v. State*, 487 S.W.2d 624, 631 (Ark. 1972) (“But a corporation is not affected by notice to, or knowledge of, an officer, agent or employee unless the notice or knowledge comes to him while he is acting in the course of his employment and the matter comes within the scope of his authority.”); *Poole v. Newark Trust Co.*, 8 A.2d 10 (Del. 1939) *quoting* Mechem on Agency, 2d Ed. § 1844, p. 1427 (“[N]otice to a president of a corporation is notice to the corporation only when it concerns something which falls within the scope of his authority, or concerning which he acts as agent with the knowledge in his mind. Notice or knowledge coming to him in his private or unofficial capacity concerning matters in which he does not act as agent for the corporation, is not imputed to it.”)

As RUL argued in its first opposition to the motion to compel at pages 3 through 5 and which RUL incorporates here, the conduct alleged in the Complaint, intentional kidnapping,

cannot be done by an agent with the actual authority of the principal. *See, e.g. Tell v. Roman Catholic Bishops of Diocese*, 2010 Del. Super. LEXIS 162, *34 n. 61 (collecting cases); *Tichenor v. Roman Catholic Church*, 32 F.3d 953 (5th Cir. 1994) (holding that priest's sexual misconduct could not be a basis for asserting personal jurisdiction over church based on agency theory); *Kennedy v. Roman Catholic Diocese*, 921 F. Supp. 231 (D. Vt. 1996) (priest's sexual misconduct was not within the scope of agency). Any illegal action done purportedly on behalf of a Delaware corporation is absolutely void. *Kerbs v. California Eastern Airways, Inc.*, 1952 Del. LEXIS 87, *6 (Del. 1952). Likewise, because illegal acts are absolutely void, they cannot be subsequently be ratified. *In re Mesa Ltd. Partnership Preferred Unitholders Litig.*, 1991 Del. Ch. LEXIS 214, *20.

The cases that Plaintiff cites are not to the contrary because each case involved an agent acting within the scope of his or her authority. *Weddington v. Consolidated Rail Corp.*, 101 F.R.D. 71, 74 (N.D. Ind. 1984) involved a train collision. Consolidated Rail sought to avoid discovery about the speed of the crash by referring plaintiff to the crew members for answers. In *Weddington*, there was no question that the information sought was within the scope of the authority of the crew member, and therefore, the corporation had an obligation to collect the information. *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1208 (8th Cir. 1973) involved a contractual dispute over the manufacturing of the F-111 airplane. *Id.* There was no question or discussion about whether the actions of the officers were within the scope of their authority because the civil lawsuit concerned the very commercial contract that formed the basis of the relationship between Selb and General Dynamics. *Weddington* and *Selb* simply do not address the situation here because there was no discussion of employee actions outside the scope of employment.

Plaintiff next complains about the answer to Interrogatory No. 22 because she asserts that Phillip Zodiates was in the car and therefore RUL must know who else was in the car. This reasoning is mistaken. Even assuming for the sake of argument that Mr. Zodiates was in the car, an unproven allegation, there is no basis to impute his knowledge to RUL. As discussed above, activities in which employees engage on their own time are not known to their employers, nor should they be. The rule suggested by Plaintiff would create an enormous invasion into the privacy of employees everywhere as corporations would be required to ask each employee about everything they know regardless of where they learned it. The Rules of Civil Procedure do not sweep so broadly.

Plaintiff also suggests a variety of sanctions, including that the Court order a Rule 30(b)(6) deposition. Plaintiff's suggestion of sanctions is unwarranted and untimely because Plaintiff has made no effort to discuss them with RUL and has refused thus far to pursue the type of accommodations the Second Circuit has indicated courts "must explore the feasibility and fairness of" when Fifth Amendment concerns are raised by parallel actions. *4003-4005 5th Ave.*, 55 F.3d at 83, n. 4. To the contrary, Plaintiff, without noticing such a deposition, suggests that the Court order a 30(b)(6) deposition with Mr. Zodiates as the corporate representative, further heightening the need to explore accommodations to address the constitutional concerns raised by the ongoing parallel actions. *See Volmar Distribs. v. N.Y. Post Co.*, 152 F.R.D. 36, 41 (S.D.N.Y. Dec. 14, 1993) (staying discovery as to both corporate and individual defendants where the plaintiffs specifically sought to designate as a 30(b)(6) witness an individual who had indicated he would invoke his Fifth Amendment privilege).

There is no need to order a Rule 30(b)(6) deposition. Plaintiff has not noticed such a deposition and the power to designate a representative will not belong with Plaintiff if she does.

Rather, Rule 30(b)(6) provides that after receiving the notice, the company “must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf. . . .” *See also Sanders v. Circle K Corp.*, 137 F.R.D. 292 (D. Ariz. 1991) (holding that it was inappropriate to force company to designate a corporate representative with interests adverse to the corporation).

Conclusion

The Court should deny the motion to compel and direct the parties to meet and confer.

Dated: Burlington, Vermont
May 5, 2014

/s/ Matthew B. Byrne

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Matthew B. Byrne, Esq.
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For Defendant Response Unlimited, Inc.

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF VERMONT

JANET JENKINS, et al.,)	
Plaintiffs)	
)	
v.)	Docket No. 2:12-cv-184
)	
KENNETH L. MILLER, et al.,)	
Defendants)	

CERTIFICATE OF SERVICE

I, Matthew B. Byrne, Esq., attorney for Defendant, Response Unlimited, Inc., certify that, on May 5, 2014, I served Defendant Response Unlimited, Inc.'s Opposition to Plaintiff's Motion to Compel and Motion for Sanctions Dated April 17, 2014, through the CM/ECF system on Robert G. Cain, Esq., rcain@pfclaw.com; Thomas E. McCormick, Esq., tem@mc-fitz.com; Frank H. Langrock, Esq., flangrock@langrock.com; Brooks G. McArthur, Esq., bmcarthur@jarvismcarthur.com; Joshua M. Autry, Esq., jmautry@dennisboylelaw.com; Ritchie E. Berger, Esq., rberger@dinse.com; Lisa B. Shelkrot, Esq., lshelkrot@langrock.com; Sarah Star, Esq., srs@sarahstarlaw.com; Sophie E. Zdatny, Esq., szdatny@dinse.com; Peggy J. Schmitz, Esq., schmitz@ccj.com; Steven J. Shrock, Esq., shrock@ccj.com; Norman C. Smith, Esq., nc.smith@myfairpoint.net; and Michael J. DePrimo, Esq., michaeldeprimo@gmail.com.

Dated: Burlington, Vermont
May 5, 2014

/s/ Matthew B. Byrne
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For Defendant Response Unlimited, Inc.

Exhibit A

From: Sarah Star <srs@sarahstarlaw.com>
Sent: Friday, April 04, 2014 12:38 PM
To: Robert B. Hemley
Cc: 'Katherine B. Kramer'; 'Frank Langrock'
Subject: RE: Jenkins v. Miller et al

Yes, that is fine.

From: Robert B. Hemley [<mailto:rhemley@gravelshea.com>]
Sent: Friday, April 04, 2014 12:26 PM
To: 'Sarah Star'
Cc: Katherine B. Kramer; 'Frank Langrock'
Subject: RE: Jenkins v. Miller et al

Thank you for the reminder. Between a trial I had in Feb/March and preparing for the next one, I have overlooked this deadline. Let me see if I can get them by the end of next week. Would that be okay?

Robert B. Hemley | *Shareholder*
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From: Sarah Star [<mailto:srs@sarahstarlaw.com>]
Sent: Friday, April 04, 2014 12:24 PM
To: Robert B. Hemley
Cc: Katherine B. Kramer; 'Frank Langrock'
Subject: Jenkins v. Miller et al

Dear Bob,
I had calculated that RUL's discovery responses were due this week. Can you please let me know when we can expect them?
Thanks,

Sarah

Sarah R. Star, Esq.
Attorney and Counselor at Law
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Fax: (802) 419-3600

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Exhibit B

From: Robert B. Hemley
Sent: Tuesday, April 29, 2014 5:53 PM
To: 'kkramer@langrock.com'
Cc: Matthew B. Byrne; David A. Boyd
Subject: Jenkins v Miller, et. al.
Attachments: DOCS-#894960-v2-Confidentiality Agreement.DOCX

Categories: Saved to DM

Katie,

I am following up on our telephone conference of late last week in which I asked you to consider a confidentiality/protective order in connection with the discovery you are seeking.

Attached is a draft confidentiality agreement along the lines we discussed. The Second Circuit has previously explained that similar orders entered into by agreement under Rule 26 serve a vital function in encouraging full disclosure of all evidence in civil cases where parallel criminal proceedings may also be possible. *See Martindell v. International Tel. & Tel. Co.*, 594 F.2d 291, 295-96 (1979). Indeed, in *Martindell*, the Second Circuit held that protective orders entered in civil cases are enforceable against government agencies absent "a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need." *Id.* at 296. The Second Circuit has since interpreted *Martindell* broadly, applying its procedure and standards in the context of both state and federal grand jury proceedings. *See In re Grand Jury Subpoena Deuces Tecum*, 945 F.2d 1221, 1223-26 (2d Cir. 1991).

Please let me know at your earliest convenience if the Plaintiff is agreeable to such an agreement/order. I will be happy to discuss this with you further, but will be on trial next week and unavailable. You can discuss the matter with Matt Byrne or David Boyd in my absence. In the meantime, I appreciate your keeping confidential any materials that have previously been produced.

Regards,

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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JANET JENKINS, et al.,)	
Plaintiffss)	
)	
v.)	Docket No. 2:12-cv-184
)	
KENNETH L. MILLER, et al.,)	
Defendants)	

CONFIDENTIALITY AGREEMENT AND ORDER

WHEREAS, Plaintiffs and Defendant Response Unlimited, Inc. (“RUL”), wish to expedite the flow of discovery material, facilitate the prompt resolution of disputes over confidentiality, adequately protect material entitled to protection, and ensure that protection is afforded to material so entitled, the following procedures shall govern.

1. Non-Disclosure of Confidential Documents and Information. Except with the prior written consent of RUL, or as hereinafter provided under this Order, no identified confidential documents or information may be disclosed to any person. An identified confidential document is any document designated with a stamp including the word “CONFIDENTIAL.” Confidential information is information designated as confidential by a party to this agreement. RUL may designate information in deposition testimony as confidential information by stating on the record at the deposition that the information is confidential or by advising the opposing party within 14 days after receipt of the transcript that the information is confidential.

2. Permissible Disclosures. Confidential information or documents may be disclosed, summarized, described, characterized, or otherwise communicated only to the persons described in this paragraph. Plaintiffs may disclose confidential documents or information only to their counsel, and to employees of such counsel to the extent reasonably necessary to render professional services in this litigation. Any individual to whom disclosure is to be made other than Plaintiffs's counsel shall first execute a Declaration in the form of Attachment A to this Order, indicating that he or she has been informed of, and has acknowledged that he or she understands, this Confidentiality Agreement.

3. Use of Material. Persons obtaining access to confidential information or documents under this Order shall use the information only for preparation and trial of this matter and shall not use or disclose such information for any other purpose. Nor shall any such person inform others that confidential information has been produced. This Order shall not preclude the use of material or information that is in the public domain or has been developed independently by a person has not had access to confidential information or otherwise learned of confidential material or information through this action.

4. Subpoena or Request by Other Courts or Governmental Entities. If another court or governmental entity subpoenas or orders production of materials or information that the Plaintiffs has obtained under the confidentiality provisions of this Order, the Plaintiffs shall promptly notify counsel for Defendant RUL of the of the pendency of such subpoena or order. Plaintiffs shall also immediately inform the entity issuing compulsory process that some or all of the materials covered by the process are the subject of this Confidentiality Order and shall deliver a copy of this Confidentiality Order to the entity issuing such process. The parties to this agreement intend that the procedure set forth by the Second Circuit in *Martindell v. International*

Tel. & Tel. Corp., 594 F.2d 291 (2d Cir. 1979) and its progeny shall apply as appropriate to the resolution of compulsory process received relating to this Confidentiality Order. RUL shall bear the burden and expense of seeking to protect any such material from disclosure in response to compulsory process.

5. Challenge to Designation. Upon receipt of material designated as confidential, Plaintiffs may request in writing that RUL change the designation. RUL shall then have five business days to advise the Plaintiffs whether or not it will change the designation. If the parties are unable to reach agreement, the Plaintiffs may seek an order from the Court in this action to alter the confidential status of the designated material. Until any dispute over designation is ruled upon, the designation shall remain in force and effect and the information shall continue to be accorded the treatment required by this Confidentiality Order.

6. Filing. If filed in Court, confidential documents shall be filed under seal and shall remain sealed, so long as they retain their status as confidential documents.

7. Confidential Information at Hearings or Trial. Any party seeking to offer confidential documents or confidential information into evidence in any court hearing or trial shall give five days' advance notice to counsel for the party or other person that designated the information as confidential. Any party may move the Court for an order that the evidence be received in camera or under other conditions to prevent unnecessary disclosure. The Court will then determine whether the proffered evidence should continue to be treated as confidential information, and if so, what protection may be afforded to such information at the hearing or trial.

8. Non-Termination. The provisions of this Order shall not terminate at the conclusion of this action. Within 30 days after final conclusion of all aspects of this action,

confidential documents and all copies of same (other than exhibits of record) shall be returned to counsel for the producing party, or destroyed.

9. No Waiver. The inadvertent failure to designate any information as confidential information will not be deemed to waive a later claim as to its appropriate confidential nature, or to stop RUL from designating such information as confidential at a later date. RUL shall have 10 days from the date that this agreement is signed to designate any previously produced materials as confidential.

Dated: Burlington, Vermont
May 6, 2014

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For Plaintiffss

Dated: Middlebury, Vermont
_____, 2014

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For Defendants

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

JANET JENKINS, et al.,)	
Plaintiffss)	
)	
v.)	Docket No. 2:12-cv-184
)	
KENNETH L. MILLER, et al.,)	
Defendants)	

NONDISCLOSURE DECLARATION

I hereby acknowledge that I have read the attached Confidentiality Agreement and Order and agree to be bound by the terms thereof. I will keep confidential all documents and information provided to me pursuant to the Agreement and shall make no use thereof other than in connection with the above-captioned litigation. I will not retain copies, electronic or otherwise, of any documents subject to the Agreement, and after I have completed my testimony, will return or destroy such documents.

Date

Subscribed and sworn to before me this ____ day of _____, 2014.

Notary Public
My Commission Expires: 2/10/15