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CAUSE NO. 2020-46985

MARK CANFORA, ET AL	§	**IN THE DISTRICT COURT**
Plaintiffs	§	
	§	
V.	§	**HARRIS COUNTY, TEXAS**
	§	
BRENT W. COON, PC d/b/a	§	
BRENT COON & ASSOCIATES, ET AL.	§	
Defendants	§	**234th JUDICIAL DISTRICT**

PLAINTIFFS' RESPONSE TO THE BCA DEFENDANTS' MOTION FOR CONTEMPT, TO SHOW CAUSE, AND TO COMPEL, AND PLAINTIFF'S REQUEST TO VACATE SHOW CAUSE ORDER OR ALTERNATIVE REQUEST FOR EMERGENCY HEARING

TO THE HONORABLE LAUREN REEDER:

Plaintiffs Mark Canfora, James Glick, Russell Lengacher, Luke Martin, and Nelson Mast and file this, their Response to Defendants Brent Coon, Brent Coon & Associates, Eric Newell, Robert Schwartz, John Thomas, Lori Slocum, and Mary Cathryne Caraway Jacob's ("the BCA Defendants") First Amended Motion for Contempt, to Show Cause, and to Compel (the "Motion"), and Plaintiffs' Request to Vacate Show Cause Order or Alternative Request for Emergency Hearing, and would respectfully show as follows:

SUMMARY

The Motion is frivolous and should be denied, without requiring out-of-state parties to personally appear at a show cause hearing. Defendants have failed to demonstrate that Plaintiffs or their counsel violated any Court order or otherwise committed any sanctionable conduct. Plaintiffs moved for protection three times after Defendants bombarded Plaintiffs with three separate sets of improper discovery

requests. The Court denied Plaintiffs' motions for protection but held that Plaintiffs could respond with individual objections or claims of privilege. Plaintiffs timely responded to each set of discovery with individual objections and claims of privilege, and to some requests declined to provide an answer pending a ruling on the objections and privilege assertions. Although the Court ordered Defendants to meet and confer prior to filing a motion to compel, Defendants did not. Instead, they filed the instant Motion and obtained an *ex parte* show cause order that requires the five Plaintiffs, four of which are elderly, and their three lawyers to appear in-person to show why the Motion should be denied. But the Court does not need a show cause hearing to justify denial of the Motion. The Motion fails on its face to demonstrate a violation of any Court order. Therefore, the Motion should be denied, and the Show Cause Order should be vacated. And because the presence of Plaintiffs is unnecessary, the Court should grant Plaintiffs an emergency hearing on Plaintiffs' request to vacate the Show Cause Order.

BACKGROUND

This is a legal malpractice case arising out of the BP Deepwater Horizon explosion. Plaintiffs allege their underlying BP oil spill claims were lost because Defendants failed to comply with the MDL court's pretrial orders.[1] Plaintiffs also sued Defendants for breach of fiduciary duty because Defendants (1) required Plaintiffs to pay expenses associated with the litigation when Defendants were contractually obligated to pay for the expenses, (2) entered into a new agreement with Plaintiffs to

[1] Plaintiffs' Amended Petition, at ¶¶ 22, 52, 54-56.

pay litigation expenses during the existence of an attorney-client relationship without adequate and proper disclosure, and (3) engaged in inherent and un-waivable conflicts of interest.[2]

The BCA Defendants served Plaintiffs with their First Set of Written Discovery, consisting of approximately 1,934 separate requests, most of which were grossly improper and objectionable. To prevent undue burden, and consistent with the Texas Rules of Civil Procedure, Plaintiffs filed their First Motion for Protection on May 3, 2021, arguing that the discovery requests "bear no relevancy to this case or seek documents and information that is clearly privileged."[3] At the hearing on the First Motion for Protection, the Court indicated that it would deny outright protection but Plaintiffs are not barred from asserting objections, stating:

> if I deny this motion for protection…you're going to have to at least respond to this discovery and object. And we can [then] have a hearing on all those objections…[4]

Consistent with the Court's statements at the June 7, 2021 hearing, the Court denied the First Motion for Protection, but did not hold that Plaintiffs waived the ability to make objections.[5] The Court also did not specify any date by which Plaintiffs' objections or responses to the First Set of Discovery were due.[6]

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[2] Plaintiffs' Amended Petition, at ¶ 58.

[3] *See* Plaintiffs' Motion for Protection, filed May 3, 2021.

[4] Exhibit 1, June 7, 2021 Hearing Transcript, at 22-23.

[5] Exhibit 2, June 23, 2021 Order.

[6] Exhibit 2, June 23, 2021 Order.

Meanwhile, the BCA Defendants served their Second Set of Written Discovery to the Investor Plaintiffs.[7] This new set of discovery to the Investor Plaintiffs consisted of 768 requests for admission. Because much of that discovery too was objectionable, bore no relationship to the case, or sought information that was clearly privileged, the Investor Plaintiffs filed a Second Motion for Protection.[8] The BCA Defendants did not immediately respond to or set the Second Motion for Protection for hearing.

Subsequently, the BCA Defendants served their Third Set of Written Discovery which consisted of another 136 interrogatories to the Canfora Plaintiffs,[9] and 620 interrogatories to the Investor Plaintiffs. This prompted Plaintiffs to file a Third Motion for Protection, noting that the "onslaught" of improper written discovery requests had then reached 3,322 requests and urged the Court to grant protection to stop the insanity.[10] The BCA Defendants did not immediately respond to or set the Third Motion for Protection for hearing.

On August 20, 2021, the BCA Defendants filed their First Motion to Compel, which sought to compel Plaintiffs to respond to the First Set of Written Discovery.[11] That motion contained many statements that were proven false in Plaintiffs'

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[7] The "Investor Plaintiffs" refers to James Glick, Russell Lengacher, Luke Martin, and Nelson Mast.

[8] *See* Second Motion for Protection, filed May 24, 2021.

[9] The "Canfora Plaintiffs" refers to Mark Canfora and Mark Canfora Investments, LLC.

[10] *See* Plaintiffs' Third Motion for Protection, filed with the Court on June 24, 2021.

[11] *See* BCA Defendants' Motion to Compel Discovery Responses Post June 23, 2021, Order Denying Protection from Written Discovery, filed on August 20, 2021.

response.[12] The BCA Defendants also acknowledged that the motion to compel would be "rendered moot" if responses were served before the hearing,[13] and Plaintiffs served their responses to the First Set of Written Discovery on August 25, 2021,[14] before the hearing. Nonetheless, the BCA Defendants went forward with the hearing.

On September 13, 2021, the Court granted the motion and ordered Plaintiffs to produce responsive documents "by 14 days" from the date of the order.[15] However, the Court struck out language in the order that stated Plaintiffs failed to timely serve discovery responses, and also denied the BCA Defendants' request for attorney's fees.[16] Plaintiffs complied with that order and produced any documents responsive to the First Set of Written Discovery.

On November 19, 2021, the BCA Defendants filed their Second Motion to Compel and Response to Plaintiffs' Second and Third Motions for Protection.[17] Plaintiffs filed a response to that motion, demonstrating that the discovery at issue was unduly burdensome, disproportionate to this case, and objectionable because it

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[12] *See* Plaintiffs' Response to BCA Defendants Motion to Compel Discovery Responses, Motion for Sanctions, and Request for Costs and Plaintiffs' Motion for Sanctions and Request for Costs, filed September 12, 2021.

[13] Plaintiffs' Response to BCA Defendants Motion to Compel Discovery Responses, Motion for Sanctions, and Request for Costs and Plaintiffs' Motion for Sanctions and Request for Costs, filed September 12, 2021, at Exhibit 5.

[14] Plaintiffs' Response to BCA Defendants Motion to Compel Discovery Responses, Motion for Sanctions, and Request for Costs and Plaintiffs' Motion for Sanctions and Request for Costs, filed September 12, 2021, at Exhibit 6.

[15] Exhibit 3, September 13, 2021 Order.

[16] Exhibit 3, September 13, 2021 Order.

[17] See BCA Defendants' Second Motion to Compel Discovery Responses and Response to Plaintiffs' Second and Third Motions for Protection from Written Discovery, filed November 19, 2021.

was as a whole overbroad or sought irrelevant and privileged information.[18] At the hearing, the Court again indicated that it would deny protection but allow Plaintiffs to make any appropriate objections:

> I understand that's the basis of your motion for protection in order to get Court intervention to prevent you from having to respond. But it seems to me like we're missing a step, which is where you would have to actually make your objections, and then have a good faith meet and confer about those objections.[19]

Consistent with the Court's on-the-record statements, on December 14, 2021, the Court denied Plaintiffs' Second and third Motions for Protection and ordered Plaintiffs to respond to the discovery at issue in those motions by January 7, 2022.[20] Pointedly, the Court made clear that Plaintiffs' objections were not waived: "the Court does not find that Plaintiffs have waived objections to the written discovery."[21] The Court also ordered the "parties to hold a good faith meet and confer related to the written discovery before the Court will hear a motion to rule on any objections or motions to compel."[22]

On December 22, 2021, Plaintiffs' counsel requested an extension of the January 7, 2022 deadline, and the BCA Defendants agree to extend the deadline to January 21, 2022.[23] Plaintiffs timely served their objections and responses to the BCA

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[18] *See* Plaintiffs' Response to Defendants' Motion to Compel, filed November 23, 2021.

[19] Exhibit 4, November 29, 2021 Hearing Transcript, at p. 33.

[20] Exhibit 5, December 14, 2021 Order.

[21] Exhibit 5, December 14, 2021 Order.

[22] Exhibit 5, December 14, 2021 Order.

[23] *See* Motion, at p. 2.

Defendants' discovery requests.[24] Consistent with this Court's on-the-record instructions and orders, Plaintiffs made their objections and claims of privilege to the voluminous improper discovery requests.[25]

Despite the Court's order that the parties "hold a good faith meet and confer" concerning Plaintiffs' objections and responses, the BCA Defendants never contacted Plaintiffs' counsel to discuss their complaints.[26]

Instead, on February 16, 2022, the BCA Defendants filed their Motion to Hold Plaintiffs and Plaintiffs' Counsel in Contempt and Impose Sanctions for Resisting Discovery. Defendants amended that motion May 20, 2022 and submitted a proposed Order to Appear and Show Cause to the Court. Three days later, without notice to Plaintiffs or hearing, the Court entered the Order to Appear and Show Cause which requires all five out-of-state Plaintiffs and their three counsel of record to appear in-person in front of the Court at 2:00 pm on July 11, 2022 "to determine whether the relief requested in th[e] motion should be granted."[27]

For the reasons stated herein, the First Amended Motion to Hold Plaintiffs and Plaintiffs' Counsel in Contempt and Impose Sanctions for Resisting Discovery ("the Motion") should be in all things denied. Because the Motion can be easily denied without the need for Plaintiffs to travel state lines to personally appear for the

[24] *See* Motion, at Exhibits A-C.

[25] *See* Motion, at Exhibits A-C.

[26] Exhibit 6, Declaration of Nicholas R. Pierce.

[27] *See* Order to Appear and Show Cause, signed on May 23, 2022.

hearing, the Order to Appear and Show Cause should be vacated. Plaintiffs therefore request an emergency hearing on the Motion to take place prior to July 11, 2022.

ARGUMENT IN RESPONSE

A. Ironically, the Motion claiming contempt was filed in violation of this Court's order requiring the parties to meet and confer – for that reason alone, the Motion should be denied.

This Court clearly and unambiguously ordered the "parties to hold a good faith meet and confer related to the written discovery before the Court will hear a motion to rule on any objections or motions to compel."[28] Counsel for the BCA Defendants, Robert Schwartz, claims in his certificate of conference that parties did in fact confer.[29] However, no meet and confer ever took place.[30] Plaintiffs' counsel and Robert Schwartz have previously discussed Plaintiffs' Responses and Objections to Coon Defendants' First Set of Written Discovery, but counsel has never discussed Plaintiffs' Responses and Objections to Defendants' Second and Third Sets of Written Discovery.[31]

By filing the Motion before holding a good faith meet and confer, the BCA Defendants have violated this Court's order and the rules of civil procedure. *See* TEX. R. CIV. P. 191.2 (requiring that parties make a good faith effort to confer and resolve discovery matters prior to filing motions and requests for hearings and seeking the

[28] Exhibit 5, December 14, 2021 Order.

[29] Motion, at 10.

[30] Exhibit 6, Declaration of Nicholas Pierce.

[31] Exhibit 6, Declaration of Nicholas Pierce.

trial court's assistance). For this reason alone, the Court can deny the Motion without requiring all five Plaintiffs and all three of their counsel to appear in-person to "show cause."

B. The Motion should be denied because Plaintiffs are not in contempt of any order and no sanctionable conduct has occurred.

The BCA Defendants argue that Plaintiffs have "refused" to abide by the Court's orders because, although Plaintiffs answered the written discovery, many responses were only objections and Plaintiffs "decline[d] to respond pending a ruling on th[o]se objections."[32] But Plaintiffs have the right to object and decline to respond to facially improper discovery requests or decline to respond to requests seeking privileged information. *See* TEX. R. CIV. P. 193.2(b), at cmt. 2 ("a party may object to a request for 'all documents relevant to the lawsuit' as overly broad and not in compliance with the rule requiring specific requests for documents and **refuse to comply with it entirely**.") (emphasis added), *id.* ("A party may also object to a request for a litigation file on the ground that it is overly broad and may assert that on its face the request seeks only materials protected by privilege."). The Court never ruled on Plaintiffs' objections and claims of privilege asserted to each improper discovery request, nor was it going to absent "a good faith meet and confer" which has never occurred.

[32] Motion, at ¶ 1.

To the extent Defendants suggest that filing the Motions for Protection somehow waived Plaintiffs' objections,[33] that would be contrary to this Court's order finding no waiver had occurred,[34] and the Texas Rules of Civil Procedure. *See* TEX. R. CIV. P. 192.6(a) ("a motion [for protection] does not waive the objection or assertion of privilege"); *In re Stagner*, No. 01-18-00758-CV, 2020 Tex. App. LEXIS 630, at *8 n.5 (Tex. App.—Houston [1st Dist.] Jan. 23, 2020, no pet.) (mem. op.) (concluding objecting party "did not waive any objections by filing a motion for protection and to quash rather than by serving written objections").

Defendants also complain that in unidentified interrogatory responses, Plaintiffs referred Defendants to their pleadings or disclosure responses "instead of answering [the] [i]nterrogatories under oath."[35] Of course, Defendants do not identify any of the interrogatory responses that they take issue with. But even a cursory review of the interrogatory responses demonstrates that Plaintiffs only refer Defendants to their petition "for further details" after answering the interrogatories.[36] Regardless, there is nothing improper about referring a party to records containing the information sought. *See* TEX. R. CIV. P. 197.2(c) (allowing responding party to "answer the interrogatory by specifying and, if applicable, producing the records or compilation, abstract or summary of the records" from which

[33] *See* Motion, at ¶ 9.

[34] Exhibit 4, December 14, 2021 Order.

[35] Motion, at ¶ 5.

[36] *See, e.g.*, Motion, at Exhibit B, at pp. 6-7, 16-17, 19, 24-25, 27, 32-34, 37, 40-41, 43, 47-48, 50, 56-57, 59; Motion, at Exhibit C, at p. 7-8, 16-17, 19, 25-26, 28, 31, 32, 34, 39, 40, 42, 46-47, 49, 53-54, 56, 57.

"the answer to an interrogatory may be derived or ascertained"). And Defendants' contention that Plaintiffs failed to answer some unidentified interrogatories under oath is without merit because most of the interrogatories sought information about "legal contentions" for which Plaintiffs were not required to verify. *See* TEX. R. CIV. P. 197.2(d).

Defendants contend that "by failing and refusing to follow the Court's Orders, Plaintiffs and Plaintiffs' counsel are laughing at the Court."[37] But Plaintiffs have not refused to follow any orders of the Court, nor have they ever "laughed" at this Court's authority, like Defendants' suggest.[38] There is no order prohibiting Plaintiffs from answering the individual written discovery requests with objections. To the contrary, the Court indicated during the hearings and in its orders that Plaintiffs objections **were not waived**, and Plaintiffs could answer with individual objections which would be taken up with the Court after a meet and confer:

- **June 7, 2021 hearing**: "[I]f I deny this motion for protection … you're going to have to at least respond to this discovery **and object**. And we can [then] have a hearing on all those objections…"[39]
- **June 23, 2021 Order**: stating simply that the First Motion for Protection was denied, but not stating Plaintiffs could not object.

[37] Motion, at ¶ 6.

[38] Defendants cite no evidence for the statement that Plaintiffs' counsel allegedly laughed during argument before this Court, and statements of counsel in pleadings are not evidence. Conversely, Plaintiffs attach the declaration from their counsel swearing that, to the extent any laughter occurred, it was due to Defendants' amusing position during the hearing or comments made by opposing counsel, and not done in any disrespect to this Court's authority. *See* Exhibit 6, Declaration of Nicholas Pierce.

[39] Exhibit 1, June 7, 2021 Hearing Transcript, at 22-23 (emphasis added).

- **September 13, 2021 Order**: stating simply that Plaintiffs must produce responsive documents "by 14 days" from the date of the order,[40] which did occur, and to which Defendants do not complain.[41]
- **December 14, 2021 Order**: requiring Plaintiffs to respond to the written discovery and stating, "the Court does not find that Plaintiffs have waived objections to the written discovery" and indicating that a "motion to rule on any objections or motions to compel" would only be heard after "the parties hold a good faith meet and confer[.]"[42]

Plaintiffs followed this Court's instructions, and their counsel spent more than one hundred hours answering the discovery requests and asserting individual objections.[43] Now, Defendants do not want to deal with the discovery on an individualized basis through a legitimate meet and confer. Instead, they filed their Motion, making the global argument that Plaintiffs' objections are improper. Defendants got themselves into this mess with the numerosity of the requests and now they do not want to deal with the consequences. As the adage goes, be careful about what you ask for because you just might get it.

As Defendants acknowledge, "[c]ontempt is strong medicine" and "should be used only as a last resort."[44] *In re Reece*, 341 S.W.3d 360, 364 (Tex. 2011). Here, there

[40] Exhibit 3, September 13, 2021 Order.

[41] Exhibit 6, Declaration of Nicholas Pierce.

[42] Exhibit 4, December 14, 2021 Order.

[43] Exhibit 6, Declaration of Nicholas Pierce.

[44] Motion, at ¶ 6.

is absolutely no basis to hold Plaintiffs or their counsel in contempt because they have violated no order of this Court. Defendants' statements to the contrary are without evidentiary support and are themselves frivolous and warrant sanctions.

C. Defendants' Motion to Compel should be denied because it contains false statements of fact and erroneous contentions of law.

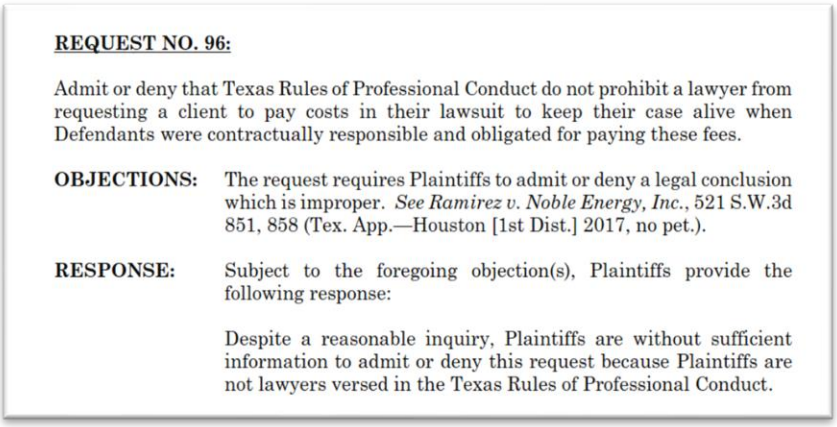
Defendants invite this Court to overrule every single objection and claim of privilege asserted to the thousands of discovery requests by arguing that they have propounded only "written discovery of matters not privileged and relevant to the subject matter of the allegations in the lawsuit brought against them."[45] That statement is demonstrated false by the discovery requests themselves, which seek information about communications between Plaintiffs and their counsel in this case, which is clearly privileged.[46]

Defendants complain that "not one of the hundreds of objections made state specifically the legal or factual basis for the objection and the extent to which the party is refusing compliance as required by [Rule] 193.2(a)."[47] That is also not true. Here is just one example:

[45] Motion, at ¶ 8.

[46] Motion, at Exhibit A, at Nos. 23-27.

[47] Motion, at ¶ 9.



REQUEST NO. 96:

Admit or deny that Texas Rules of Professional Conduct do not prohibit a lawyer from requesting a client to pay costs in their lawsuit to keep their case alive when Defendants were contractually responsible and obligated for paying these fees.

OBJECTIONS: The request requires Plaintiffs to admit or deny a legal conclusion which is improper. *See Ramirez v. Noble Energy, Inc.*, 521 S.W.3d 851, 858 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

RESPONSE: Subject to the foregoing objection(s), Plaintiffs provide the following response:

Despite a reasonable inquiry, Plaintiffs are without sufficient information to admit or deny this request because Plaintiffs are not lawyers versed in the Texas Rules of Professional Conduct.

Mot. at Exhibit A, p. 36. Although this single example proves false Defendants' statement that "not one" of the objections complied with Rule 193.2(a), a review of the discovery responses demonstrates that in virtually every instance Plaintiffs complied with that rule by stating the factual and legal basis for the objection, and either answered subject to those objections or stated that they declined to respond pending a ruling on the objections.[48]

Defendants argue that "[t]he rules do not state that the responding party can make objections and not answer or respond to the discovery as Plaintiffs have done."[49] Actually, the rules do allow a party to object to certain requests as impermissibly overbroad or calling for privileged information, and "refuse to comply with [them] entirely." TEX. R. CIV. P. 193.2(b), at cmt. 2. Rule 193 "imposes a duty upon parties to make a complete response to written discovery based upon all information reasonably available, **subject to objections and privileges**." TEX. R. CIV. P. 193 cmt. 1 (emphasis added). Plaintiffs complied with the rules, and answered the discovery

[48] *See* Motion, at Exhibits A, B and C.

[49] *See* Motion, at ¶ 10.

requests subject to their objections if possible, but otherwise properly "decline[d] to respond pending a ruling on [the] objections."

Defendants complain that Plaintiffs asserted objections and refused to admit or deny each request.[50] That is inaccurate. For example, Plaintiffs admitted or denied multiple requests without objection:

REQUEST NO. 1

Admit or deny that YOU signed a contract for D. Miller & Associates, PLLC in the BP Oil Spill

RESPONSE: Admit.

REQUEST NO. 2

Admit or deny that YOU signed a Consent to associate for Brent W. Coon, PC d/b/a Brent Coon & Associates in the BP Oil Spill Litigation.

RESPONSE: Admit.

Mot. at Exhibit A, p. 4. In others, Plaintiffs admitted or denied subject to their objections:

REQUEST NO. 3

Admit or deny that YOUR complaints against Eric Newell, John R. Thomas, Lori K. Slocum, Robert A. Schwartz, and Mary Cathryne Caraway Jacob are in their capacity as attorneys working for Brent W. Coon, PC d/b/a Brent Coon & Associates.

OBJECTIONS: The request requires Plaintiffs to admit or deny a legal conclusion which is improper. *See Ramirez v. Noble Energy, Inc.*, 521 S.W.3d 851, 858 (Tex. App.—Houston [1st Dist.] 2017, no pet.).

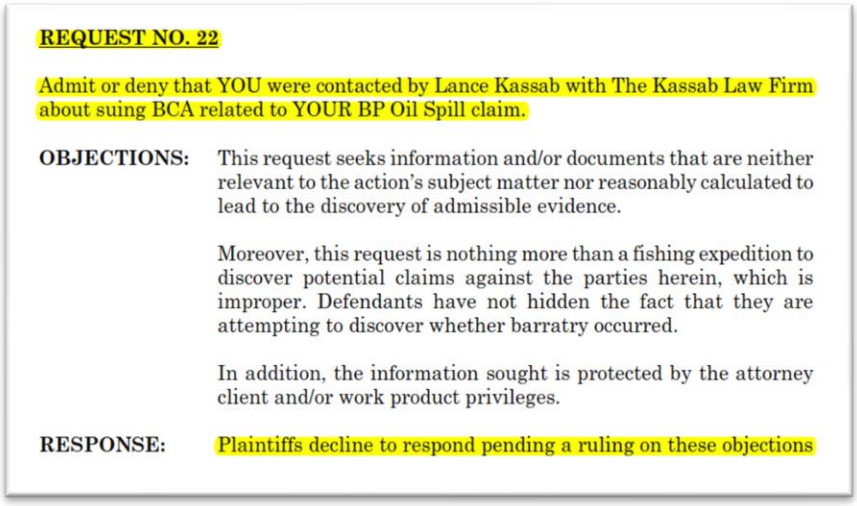
RESPONSE: Subject to the foregoing objection(s), Plaintiffs provide the following response:

Despite a reasonable inquiry, Plaintiffs are without sufficient information to admit or deny this request because Plaintiffs are not lawyers and do not know if the specified attorneys were "in their capacity as attorneys working for Brent W. Coon, PC d/b/a Brent Coon & Associates."

That said, Plaintiffs admit that they believe each of the named lawyers were lawyers at Brent W. Coon, PC d/b/a Brent Coon & Associates when they were working as the Plaintiffs' lawyers.

[50] Motion, at ¶ 11.

Mot. at Exhibit A, p. 4. It just depended on the specific discovery request. Only on some occasions did Plaintiffs refuse to provide a response subject to their objections. For instance, when the request sought clearly privileged information:



REQUEST NO. 22

Admit or deny that YOU were contacted by Lance Kassab with The Kassab Law Firm about suing BCA related to YOUR BP Oil Spill claim.

OBJECTIONS: This request seeks information and/or documents that are neither relevant to the action's subject matter nor reasonably calculated to lead to the discovery of admissible evidence.

Moreover, this request is nothing more than a fishing expedition to discover potential claims against the parties herein, which is improper. Defendants have not hidden the fact that they are attempting to discover whether barratry occurred.

In addition, the information sought is protected by the attorney client and/or work product privileges.

RESPONSE: Plaintiffs decline to respond pending a ruling on these objections

Mot. at Exhibit A, at p. 9. And again, the rules permit Plaintiffs to decline to answer any request which "seeks only materials protected by privilege." TEX. R. CIV. P. 193 cmt. 2.

D. Plaintiffs' objections and claims of privilege to the discovery are not frivolous and should be sustained.

The Court should outright deny Defendants' Motion to Compel because Defendants have refused to confer with Plaintiffs, and because it is global and nonspecific. The Motion to Compel should also be denied on the merits because Plaintiffs' objections are proper and should be sustained. Plaintiffs cannot possibly justify each objection to the thousands of discovery requests in this briefing, but they will do so as to each specific request at the hearing. However, Plaintiffs direct the Court to the following categories of requests, which are improper.

1. Several requests improperly fish for information to support new claims.[51]

Discovery may not be used as a fishing expedition to investigate new claims rather than to support existing ones. *In re Am. Optical Corp.*, 988 S.W.2d 711, 713 (Tex. 1998); *In re Sears, Roebuck & Co.*, 123 S.W.3d 573, 578 (Tex. App. – Houston [14th Dist.] 2003, orig. proceeding). Here, several of the requests seek irrelevant information about whether Canfora formed an entity named BP Oil Spill Malpractice, LLC to locate former clients of Defendants to sue them for malpractice. There are also numerous requests to the Investor Plaintiffs relating to whether they were encouraged by Canfora to bring this lawsuit and their communications with Canfora regarding the same. Defendants also requested information relating to whether the Plaintiffs hired BP Oil Spill Malpractice to investigate their potential claims against Coon Defendants, whether Canfora encouraged other persons to file suit, or whether Canfora was to receive any fee from their recovery. This discovery is an improper fishing expedition into potential new claims and should be denied.

Defendants may argue that this information is relevant to one of their counterclaims against Canfora, which alleges that Canfora tortiously interfered with their contracts with the Investors. But the discovery does not even seek information relevant to that claim. Even if Canfora induced the Investor Plaintiffs to sue the Coon

[51] *See* Motion, at Exhibit A – Investor Plaintiffs' Objections and Responses to Coon Defendants' Second Set of Discovery, e.g., Nos. 16, 18-21, 28-31, and 50-71; at Exhibit C – Investor Plaintiffs' Objections and Responses to Coon Defendants' Third Set of Written Discovery, e.g., BCA Nos. 15-16, Thomas Nos. 8-10 and 13-16, Slocum Nos. 8-10 and 13, Schwartz Nos. 8-10, Coon Nos. 8-10, Newell Nos. 8-10, Jacob Nos. 8-10; at Exhibit B – Canfora Plaintiffs' Objections and Responses to Coon Defendants' Third Set of Written Discovery, e.g., BCA Nos. 16-18, Thomas Nos. 8-10 and 13-14, Slocum Nos. 8-10, Schwartz Nos. 8-10, Coon Nos. 8-10, Newell Nos. 8-10, Jacob Nos. 8-10.

Defendants for malpractice, the Investor Plaintiffs had every right to do so. "Merely inducing a contract obligor to do what it has a right to do is not actionable interference" as a matter of law. *ACS Inv'rs v. McLaughlin*, 943 S.W.2d 426, 430 (Tex. 1997). Therefore, discovery relating to BP Oil Spill Malpractice and its communications with the Investor Plaintiffs relating to filing suit against Defendants for malpractice is not relevant to any pending claim.

2. Several requests improperly seek privileged or confidential information.[52]

The scope of discovery includes only information "that is not privileged and is relevant to the subject matter of the pending action[.]" TEX. R. CIV. P.192.3(a). It is axiomatic that communications between lawyer and client are privileged and not subject to discovery. See TEX. R. EVID. 503(a)(5), (b)(1). In fact, communications between a lawyer and client "concerning the litigation in which the discovery is requested" are presumptively privileged and exempt from the privilege log requirement. *See* TEX. R. CIV. P. 193.3(c)(2).

Here, Defendants improperly seek discovery on communications between the Plaintiffs and their counsel relating to their BP Oil Spill claim. Defendants seek discovery on whether the Plaintiffs initiated contact with their counsel in this case, and brazenly asks the Plaintiffs to admit facts about their counsel's communications

[52] *See* Motion, at Exhibit A – Investor Plaintiffs' Objections and Responses to Coon Defendants' Second Set of Discovery, e.g., Nos. 17-28, 60 and 68; at Exhibit C – Investor Plaintiffs' Objections and Responses to Coon Defendants' Third Set of Written Discovery, e.g., Thomas Nos. 8-10, Slocum Nos. 8-10 and 13-14, Schwartz Nos. 8-10 and 15-16, Coon Nos. 8-10, Newell Nos. 8-10, Jacob Nos. 8-10; at Exhibit B – Canfora Plaintiffs' Objections and Responses to Coon Defendants' Third Set of Written Discovery, e.g., Thomas Nos. 8-10, Slocum Nos. 8-10 and 16-19, Schwartz Nos. 8-10, Coon Nos. 8-10, Newell Nos. 8-10, Jacob Nos. 8-10.

with them. Likewise, Defendants broadly request information relating to or evidencing the Plaintiffs being contacted by their counsel about suing Defendants. Not only is this information privileged, but it is also irrelevant to the pending litigation. Plaintiffs' communications with their counsel in this case about suing Defendants is not relevant to Plaintiffs' claims, nor is it relevant to any counterclaim or defense.

Instead, Defendants have openly admitted to the Court that it seeks the information to discover whether Plaintiffs' counsel solicited clients in violation of the rules or laws governing barratry.[53] But even if some sort of improper solicitation did occur (and it did not), the criminal barratry statute does not give rise to a private right of action in favor of opposing counsel. *See Moiel v. Sandlin*, 571 S.W.2d 567, 571 (Tex. Civ. App.—Corpus Christi 1978, no writ) ("The offense of barratry as defined in the penal code is a public remedy and not a private one."). And while there is a civil statute that creates a private right of action against those who commit barratry, only those who are improperly solicited have standing to sue, not opposing counsel. *See* TEX. GOV'T CODE § 82.0651. The discovery is simply irrelevant to any pending claims.

3. Several requests ask for information to support a request for sanctions.[54]

Several of Defendants' discovery requests asked Plaintiffs to admit or deny whether statements in the petition (1) were made based on personal knowledge, (2)

[53] *See* Exhibit 4, November 29, 2021 Transcript, at 22.

[54] *See* Motion, at Exhibit A– Investor Plaintiffs' Objections and Responses to Coon Defendants' Second Set of Discovery, e.g., Nos. 104, 118, 122, 126, 130, 132, 134, 136, 138, 142, 146, 148, 151, 155, 159, 163, 167, 170, 174, 184, and 189.

were made with a good-faith basis in law or fact, (3) have evidentiary support, or (4) are warranted by existing law or a nonfrivolous argument for the extension or modification of existing law. Defendants also served several requests seeking any and all documents and information that relate to or evidence whether Plaintiffs' claims or contentions in their petition have evidentiary support or are likely to have evidentiary support. But "[d]iscovery undertaken with the purpose of finding an issue, rather than in support of an issue already raised by the pleadings, would constitute an impermissible 'fishing expedition'" *In re Allstate Fire & Cas. Ins. Co*., 617 S.W.3d 635, 643 (Tex. App.—Houston [14th Dist.] 2021, orig. proceeding). Here, the purpose of Defendant's requests is to find an issue on which basis they can file a motion for sanctions (as opposed to discovering information about issues raised in the pleadings). Those requests are improper as a matter of law.

4. Several requests ask purely legal issues and call for legal conclusions from laypersons.[55]

Other requests ask Plaintiffs about propositions of law, including whether the Texas Disciplinary Rules of Professional Conduct prohibit the Kassab Law Firm from having its contract for representation require a client to pay arbitration costs, whether the BCA Defendants violated various Texas Disciplinary Rules of Professional Conduct, whether legal authority exists for particular propositions, whether Defendants was negligent, grossly negligent, committed a breach of contract or breach of fiduciary duty, whether the statute of limitations applies to certain

[55] *See* Motion, at Exhibit A – Investor Plaintiffs' Objections and Responses to Coon Defendants' Second Set of Discovery, e.g., Nos. 91-99, 101-102, 108-110, 143, 171, and 175-180.

claims, or whether Canfora or MCI is in breach of the release agreement. Such requests are clearly improper because they ask Plaintiffs, non-lawyers, to state information not within their personal knowledge, or formulate a legal conclusion for which they are not experts.

E. Defendants' request for monetary sanctions should be denied.

Defendants attempt to recover an unspecified amount in sanctions under Rule 215.[56] Rule 215.1(d) provides that, "[i]f the motion [to compel] is granted, the court shall, after opportunity for hearing, require a party of deponent whose conduct necessitated the motion…to pay, at such time as ordered by the court, the moving party the reasonable expenses incurred in obtaining the order, including attorney fees…" TEX. R. CIV. R. 215(1)(d). But the Court should deny the motion to compel because it was filed prior to any meet and confer in violation of this Court's order, is unspecific, and fails to articulate any actual, legitimate deficiencies with Plaintiffs' discovery responses. With the motion to compel properly denied, the Court should award Plaintiffs reasonable attorney's fees and costs. *See id.* ("If the motion is denied, the court may, after opportunity for hearing, require the moving party or attorney advising such motion to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees").

REQUEST TO VACATE ORDER TO APPEAR AND SHOW CAUSE AND REQUEST FOR EMERGENCY HEARING

There can be no contempt unless a clear and unambiguous violation of a court's order has occurred. *In re Coppock*, 277 S.W.3d 417, 418 (Tex, 2009). Defendants

[56] Motion, at ¶ 18.

should be required to provide clear and unambiguous proof that Plaintiffs and Plaintiffs' counsel have in fact violated a court order **before** the five out-of-state Plaintiffs and their three counsel are ordered to appear in-person before the Court.

Plaintiffs Russell Lengacher, Martin Luke, Nelson Mast, James Glick, and Mark Canfora are elderly laypersons with no knowledge of the Court's previous orders, and they reside outside the state of Texas. Glick is 89 years old and resides in Dalton, Ohio; Lengacher is 82 years old and resides in Wooster, Ohio; Canfora is 64 years old and resides in Panama City Beach, Florida; Mast is 59 years old and resides in Strasburg, Ohio; and Luke is 47 years old and resides in Antwerp, New York. Requiring Plaintiffs to incur substantial costs – including flights, hotels, rental cars, and meals – and health risks given their age – such as COVID-19 – to somehow explain to the Court how they have not in fact violated Court orders **before** Defendants have shown even one violation of a Court order puts the cart before the horse and is nothing more than another effort to harass and annoy Plaintiffs in retaliation for filing this lawsuit.

Accordingly, Plaintiffs ask the Court to vacate the Order to Appear and Show Cause. Alternatively, Plaintiffs request an emergency hearing on the Motion that takes place without Plaintiffs so the Court can make a preliminary consideration of the Motion to determine if a show cause hearing is necessary.

CONCLUSION & PRAYER

For the reasons set forth herein, Plaintiffs ask the Court to deny Defendants' First Amended Motion for Contempt, To Show Cause, and to Compel and to grant

Plaintiffs' Request to Vacate the Order to Appear and Show Cause or, alternatively, Request for Emergency Hearing.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing instrument has been forwarded to all known parties and/or counsel of record pursuant to the Texas Rules of Civil Procedure on this, the 22nd of June, 2022.

NICHOLAS R. PIERCE

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