

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

MOHAMMAD HAMED, by his)	
authorized agent, WALEED HAMED,)	
)	
Plaintiffs,)	
)	
v.)	CIVIL NO. SX-12-CV-370
)	
FATHI YUSUF and UNITED CORPORATION,)	
)	
Defendants.)	
_____)	

**DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR
PROTECTIVE ORDER RELATED TO LIMITED DEPOSITIONS**

Defendants hereby file this response in opposition to Plaintiffs' January 14, 2013 "Memorandum in Support of [] Motion for a Protective Order" (the "MPO").

A. Plaintiffs' MPO is "Downright Frivolous."

Plaintiffs have created the unusual procedural posture of this action by, among other things, insisting *before the Rule 26(f) conference* on a (1) temporary restraining order; and (2) summary judgment on the primary relief requested in this action, *i.e.*, Count I of the First Amended Complaint. However, by attempting to thwart Defendants' ability to launch any meaningful defense of those motions, including through the limited depositions at issue, Plaintiffs now seek to use the Rule 26(f) conference as both a sword and a shield. Specifically, Plaintiffs argue in the MPO that, because the "Rule 26(f) scheduling conference has [not] taken place," then, according to Plaintiffs, "these depositions were improperly noticed" and are premature. (MPO at 1).

That argument is "downright frivolous." *McKinzy v. Norfolk S. R.R.*, 354 Fed. Appx. 371, 375 (10th Cir. 2009). Indeed, "[i]t goes without saying that *a plaintiff cannot be permitted to thwart his opponent's ability to launch a defense by filing a summary judgment motion before the Rule 26(f) conference and then*

insisting that discovery in advance of the conference is premature.” McKinzy v. Norfolk S. R.R., 354 Fed. Appx. 371, 375 (10th Cir. 2009) (emphasis added).

For the reasons addressed in greater detail in Defendants' January 17, 2013 Motion to Compel, which Defendants incorporate herein for purposes of this response brief, Plaintiffs' MPO should be denied – and Plaintiffs and the other deponents should be compelled to appear at the noticed depositions; or, alternatively, should be precluded from offering any testimony or evidence in this action until such time as they appear for meaningful depositions or are excused from doing so by court order.

B. Plaintiffs Do Not Made the Requisite Showings to Invade an Opposing Counsel's Work Product.

Separately, in the Third Circuit, “the selection and compilation of documents by counsel . . . in preparation for pretrial discovery fall within the highly-protected category of opinion work product.” *Sporck v. Peil*, 759 F.2d 312, 316 (3rd Cir. 1985), *cert. denied*, 474 U.S. 903 (1985). Indeed, “[s]uch material is accorded an almost absolute protection from discovery because any slight factual content that such items may have is generally outweighed by the adversary system’s interest in maintaining the privacy of an attorney’s thought processes and in ensuring that each side relies on its own wit in preparing their respective cases.” *Id.* (citing *Upjohn Co. v. United States*, 449 U.S. 383, 401 (1981); *In re Grand Jury Investigation*, 599 F.2d 1224, 1231 (3d Cir. 1979)). The *Sporck* court specifically held that defense counsel’s process of selecting certain documents in preparation for a deposition was attorney work product that was entitled to the “almost absolute protection from discovery” under Rule 26(b)(3) and the principles of *Hickman v. Taylor*, 329 U.S. 495 (1957). *Id.* at 315-316 (noting further that, “in selecting the documents that [defense counsel] thought relevant to [the] deposition, defense counsel engaged in proper and necessary preparation of his client’s case.”).

Prior to obtaining an opposing party's work product, as Plaintiffs attempt to do here, the party seeking the work product, at a minimum and among other showings, must "show[] that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3)(A)(ii); *see also Hickman*, 329 U.S. at 510 (rejecting "an attempt, without purported necessity or justification, to secure [work product] prepared or formed by an adverse party's counsel in the course of his legal duties."). In the present action, Plaintiffs do not – and cannot – show the requisite "substantial need" and "undue hardship" that would justify the disclosure of Defendants' counsels' work product. Plaintiffs do not even address these showings whatsoever. The reason is clear – Plaintiffs' request for Defendants to identify the documents that Defendants' attorneys deem relevant to the limited depositions in advance of the deposition is, as noted above, "downright frivolous" and plainly contrary to *Sporck*.

The only ostensible basis supporting Plaintiffs' such request is a desire for Defendants to help Plaintiffs "prepare[]" their case. (*See* Dec. 24, 2012 Letter (Ex. "4" to Jan. 17, 2013 Motion to Compel) at 2; Jan. 9, 2013 Letter (Ex. "7" to Jan. 17, 2013 Motion to Compel) at 2); *see also* MPO at 3 (noting that "plaintiff . . . and his sons" need the help and "the benefit of being able to review the documents they will be questioned about at the depositions"). However, having made their proverbial "bed," Plaintiffs must now sleep in it. *McKinzy*, 354 Fed. Appx. at 375 ("[i]t goes without saying that a plaintiff cannot be permitted to thwart his opponent's ability to launch a defense by filing a summary judgment motion before the Rule 26(f) conference and then insisting that discovery in advance of the conference is premature."); *see also Disability Rights Council of Greater Washington v. Washington Metro. Transit Auth.*, 242 F.R.D. 139, 144-45 (D.D.C. 2007) (finding that party seeking discovery of "compilation" of documents collected by opposing counsel from entire body of documents failed to show "substantial need" where the alleged hardship "is a hardship of [the

party]’s own making”) (noting also that “[n]ot being about to steal the [work] product of someone else’s labor is a lot of things, but a ‘hardship’ is not one of them”). The protection of Defendants’ counsels’ work product is especially critical in this action, as Plaintiffs have filed a summary judgment motion before the Rule 26(f) conference and, therefore, Defendants’ counsels’ mental impressions necessarily would be disclosed by the handing over of any selected materials in advance of the depositions. Likewise, until Plaintiffs turned the normal course of litigation on its head, again, by filing a premature summary judgment motion, Defendants had – and still have – a justifiable expectation that their counsels’ mental impressions and work product would remain private.¹

Conclusion

McKinzy squarely establishes that Plaintiffs’ arguments are “downright frivolous.” 354 Fed. Appx. at 375. Similarly, the Third Circuit’s decision in *Sporck* expressly provides that, “[b]ecause identification of the documents [to be used in a deposition] will reveal defense counsel’s selection process, and thus his mental impressions, . . . [any such identification] must be prevented to protect defense counsel’s work product.” 759 F.2d at 315. Defendants pray that this Court deny Plaintiffs’

¹ Plaintiffs’ reference to the “modern federal discovery rules” and argument that “trial by ambush has gone the way of copies of carbon paper” simply highlight their true intent of insisting upon an unusual course of litigation while, at the same time, using the lack of a Rule 26(f) conference as a delaying tactic. (MPO at 3 (citing *Smith v. J.I. Case Corp.*, 163 F.R.D. 229, 232 (E.D. Pa. 1995)). Indeed, no “modern” or other federal discovery rule permits an adversary to “steal” his opponent’s work product in a situation, as here, of the adversary’s “own making.” *McKinzy*, 354 Fed. Appx. at 375; *Disability Rights Council*, 242 F.R.D. at 144-45. The Third Circuit in fact vigorously protects such work product. *Sporck*, 759 F.2d at 316-17 (citing, among other authority, Fed. R. Civ. P. 26(b)(3)). Further, *Smith*, Plaintiffs’ case, involved the desired discovery of “psychiatric and psychological exams” in a products liability case and otherwise is irrelevant to Plaintiffs’ position. 163 F.R.D. at 232. If anything, *Smith* actually supports Defendants’ position, as the court therein frowned upon the use of discovery “as a delaying tactic,” *id.*, which is exactly what Plaintiffs are attempting to do here.

motion for protection in its entirety. Defendants pray also that, pursuant to Rule 26(c)(3), this Court award to Defendants their fees incurred in defending against Plaintiffs' frivolous motion.²

Respectfully submitted,



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January 18, 2013

CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2013, a true and accurate copy of the foregoing was forwarded via email to the following: *Joel H. Holt, Esq.*, 2132 Company St., St. Croix, VI 00820, holtvi@aol.com; and *Carl J. Hartmann III, Esq.*, 5000 Estate Coakley Bay, L-6, Christiansted, VI 00820, carl@carlhartmann.com.



Joseph A. DiRuzzo, III

² Defendants have made or are in the process of making arrangements for the limited depositions that have been noticed for January 23 and 24, 2013, including travel arrangements, lodging arrangements and court reporter arrangements. Accordingly, in addition to seeking their fees incurred in having to respond to the instant motion for protective order, Defendants reserve their right to seek sanctions against Plaintiffs, Plaintiffs' counsel and/or the other deponents for any failure to appear at the noticed depositions absent a court order excusing in advance their attendance, including, but not limited to, Defendants' reasonable expenses and attorneys' fees incurred in arranging the depositions.