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Katherine M. Keefe
Clerk of the Circuit Court

IN THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS

PAUL DULBERG,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. 17 LA 377
	)	
THE LAW OFFICES OF THOMAS J. POPOVICH, P.C., and HANS MAST,	)	
	)	
Defendants.	)	

DEFENDANTS THE LAW OFFICES OF THOMAS J. POPOVICH, P.C. AND HANS MAST'S RESPONSE TO PLAINTIFF'S 2nd AMENDED MOTION TO EXCLUDE THE DEPOSITION OF HANS MAST

Defendants The Law Offices of Thomas J. Popovich, P.C. and Hans Mast (collectively "Popovich"), by and through their attorneys, Karbal, Cohen, Economou, Silk & Dunne, LLC, and for their Response to Plaintiff's 2nd Amended Motion to Exclude the deposition of Hans Mast, state as follows:

1) Plaintiff Paul Dulberg ("Dulberg") is improperly requesting a drastic remedy that amounts to the equivalent of a severe discovery sanction against defendants due to Dulberg's perceived irregularity regarding an exhibit sticker in connection with a party deposition he caused to be taken, and by a court reporter he retained. Defendants had nothing to do with the "irregularity" and should not be further prejudiced by issues. Simply put, he seeks relief for his own alleged violation of the rules.

2) The court heard argument on this matter on November 4, 2022. Defendants had not filed any written response at that time, and Dulberg late file his 2nd Amended Motion to Exclude Mast's deposition. Defendants hereby adopt their arguments contained in the transcript

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from the 11-4-22 hearing (Exhibit A) and submit this additional response in opposition to Plaintiff's motion.

3) The instant motion is the latest costly litigated matter made necessary by Dulberg's multiple substitutions of counsel. His current (now third) attorney entered his appearance on October 23, 2020. The deposition at issue was taken by Dulberg's second attorney on June 25, 2020. Dulberg's original Motion to Exclude the Hans Mast deposition was filed by his third attorney on October 12, 2022, just 11 (eleven) days shy of the second anniversary of his appearance in the case.

4) Dulberg improperly seeks to exclude a discovery deposition apparently because he does not like the result—he apparently does not like the testimony that was elicited or the performance of his counsel. In this and related proceedings, he has caused communications between himself and his prior counsel to be produced. These documents include deposition questions he proposed to his then counsel in advance of the Mast deposition. Dulberg is now asking for a "do-over" because Mast's testimony was apparently not satisfactory to him. Whatever disputes Dulberg may have with his prior counsel in this instant case, he should not be allowed a second bite at the apple as a result of those disputes. He attempts to mischaracterize a minor discrepancy with one exhibit to the deposition, and difficulties with defendant's wi-fi connection during the zoom deposition (which were overcome), as warranting the exclusion of the deposition. This is absurd.

5) As an initial matter, Dulberg asserts that Mast's deposition was taken in violation of Illinois Supreme Court Rule 206 h (2), and other orders entered in response to the COVID-19 pandemic. But he should be required to take a position as to who committed the alleged violation(s). In his 2nd Amended Motion, he vaguely asserts "violations."

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6) Paul Dulberg personally observed the discovery deposition of Hans Mast taken remotely (by Zoom) on June 25, 2020. If he had an objections to alleged irregularities with the deposition, he had ample time to bring such issues to the attention of his counsel, Julia Williams, and to his current counsel who appeared on his behalf on October 23, 2020.

7) Illinois Supreme Court Rule 211 governs this issue. Rule 211 (c) (2) reads as follows: "Objections to the form of a question or answer, errors and irregularities occurring at the oral examination in the manner or taking of the deposition, in the oath or affirmation, or in the conduct of any person, and errors and irregularities of any kind which might be corrected if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition."

8) Rule 211 (D) provides: "Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after the defect is, or with due diligence might have been, ascertained.

9) Dulberg did not object or raise his objections with reasonable promptness, under any analysis. He was present for Mast's deposition 2.5 years ago, and his counsel had years to bring a motion. Instead, he seeks to prejudice defendants by waiting until fact discovery is closed and he faces summary disposition. Defendant's submit that even if the court found his objections to be timely, that the court find that any irregularities ("violations") were 1) caused solely by Dulberg or his agents, 2) that any irregularities were harmless, 3) that any alleged irregularity simply be given its weight by the finder of fact (if as to any fact issue), 4) that no

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remedy be ordered in Dulberg's favor, and 5) the court weigh any remedy in favor of defendants it sees fit to order under Rule 201 (c)(1)(2) and (3).

10) In response to Dulberg's argument at paragraph A3.3 of his 2nd Amended Motion to Exclude relating to his exhibit 16 (Email from defendant's counsel George K. Flynn) Dulberg takes the position that there was no discussion of any errors or irregularities in the "just concluded deposition." That is exactly right. Dulberg's counsel did not raise any issues or objections in response to the email. She was apparently satisfied with the outcome, despite some minor technical difficulties during the deposition. She never voiced any suggestion that an additional session of Hans Mast's deposition was necessary or requested. Flynn didn't make any mention of it because any technical difficulties seemed inconsequential.

11) Dulberg's motion at page 11 begins to purportedly outline violations of the rules, but again without explicitly identifying who violated any such rule. Nor is there any analysis or conclusion reached--only a litany of facts, chronology, and innuendos. No basis for any remedy is discussed or analyzed.

12) Of concern is a statement on page 19 of Dulberg's motion in which he argues that Mast had insisted that the decision in the *Tilschner v. Spangler* case was the reason Dulberg would not prevail in the underlying case against the McGuire's. The statement is inexplicably made "on information and belief." This is unacceptable. Dulberg has made no such disclosure in fact discovery (now closed) about this very specific discussion between Mast and himself regarding the Tilschner case. If Dulberg believes he has disclosed it, he should be required to identify where in his answers and amended answers to discovery or his deposition he has identified such discussion with this amount of specificity. Defendants submit that no such disclosure exists.

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WHEREFORE Defendants The Law Offices of Thomas J. Popovich, P.C. and Hans Mast, respectfully request that this Court enter an Order denying Plaintiff's 2nd Amended Motion to Exclude Mast's deposition, and for any further relief this court deems fair and proper.

Respectfully submitted,

/s/ *George K. Flynn*

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STATE OF ILLINOIS)
)
COUNTY OF McHENRY)

IN THE TWENTY-SECOND JUDICIAL CIRCUIT

McHENRY COUNTY, ILLINOIS

PAUL DULBERG, Plaintiff, vs. THE LAW OFFICES OF THOMAS POPOVICH, et al., Defendants.	No. 17 LA 377

ELECTRONICALLY RECORDED REPORT OF PROCEEDINGS had in the above-entitled cause before the Honorable THOMAS A. MEYER, Judge of said Court of McHenry County, Illinois, on the 4th day of November, 2022, at the McHenry County Government Center, Woodstock, Illinois.

APPEARANCES:

LAW OFFICE OF ALPHONSE A. TALARICO, by
MR. ALPHONSE A. TALARICO (via Zoom),

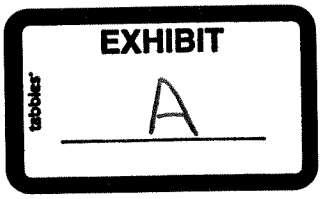
On behalf of the Plaintiff,

KARBAL COHEN ECONOMOU SILK DUNNE, LLC, by
MR. GEORGE K. FLYNN (via Zoom),

On behalf of the Defendants.

ALSO PRESENT:

MR. EDWARD CLINTON (via Zoom)
MS. JULIA C. WILLIAMS (via Zoom)



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THE COURT: All right. If everybody could identify themselves, starting with plaintiff's counsel, then defendant.

MR. TALARICO: Good morning, your Honor. Good morning, Counsel. I am Alphonse Talarico for the plaintiff, Paul Dulberg.

THE COURT: Okay. Defense.

MR. FLYNN: Good morning, your Honor. George Flynn on behalf of the defendants, the Popovich firm and Hans Mast.

THE COURT: Okay. Mr. Clinton.

MR. CLINTON: Good morning, your Honor. Ed Clinton, former counsel to Mr. Dulberg.

THE COURT: All right. And --

MS. WILLIAMS: Good morning, your Honor. Julia -- Julia Williams on behalf of -- former counsel to Mr. Dulberg.

THE COURT: Okay. And for the record, we have Mr. Dulberg on screen.

In any event, plaintiff's counsel, where do you want to start?

MR. TALARICO: Judge, I would guess that Mr. Clinton and Ms. Williams' motion to vacate would be the beginning. I filed a rule pursuant to

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your last -- the transcript -- your last order said if there's something else that comes up.

I did file a rule after I read their motion to vacate. Historically, or chronologically, I think maybe that's the starting point. (Indiscernible) you held them in contempt and --

THE COURT: I did?

MR. TALARICO: -- here we are. You did.

THE COURT: When did I hold them in contempt? I'm looking at --

MR. TALARICO: I think so. The last order.

THE COURT: Okay. I'm looking at October 17th. He must appear. Yeah, I don't see an explicit finding of contempt, at least in the October 17th order. Was --

MR. TALARICO: I thought -- with all due respect, Judge, if I can find the order, I think the first sentence says you grant my motion.

THE COURT: Plaintiff's motion to compel is granted as --

MR. TALARICO: Oh, I'm sorry. Compel. Forgive me.

THE COURT: All right.

MR. TALARICO: My mistake.

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THE COURT: In any event, I read the motion to vacate and I -- are you -- and this is directed at Mr. Clinton -- are you concerned about the order to produce, or something else?

MS. WILLIAMS: Would you like me to --

MR. CLINTON: Yeah, go ahead.

MS. WILLIAMS: Your Honor, we're not concerned about producing. We're -- Mr. Dulberg is entitled to these documents, even without a subpoena.

THE COURT: Yeah.

MS. WILLIAMS: So the production is not our concern. It's the portion of the order that insinuates that we weren't try -- not complying with the subpoena when we were rightfully doing so.

So we are (indiscernible) --

THE COURT: Thank you.

MS. WILLIAMS: So that's what we're concerned about.

THE COURT: All right. I'll vacate that because -- yeah, I don't see that as critical.

So to the extent that you're concerned, any suggestion in the order of October 17th suggesting or implying that you had failed to cooperate, I will vacate. I saw from your motion to vacate you were

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contesting that issue, and I'm not going to go down that path to find out who's right, ultimately, because it doesn't make any difference, at least to me.

So all I care about is the production of the documents. And am I correct that -- my reading of your response indicated that you've produced the documents. Is that -- was that accurate?

MS. WILLIAMS: Yes, your Honor. So we have produced nonconfidential documents to both -- at this point, we've now produced to both counsels of record in this case, plaintiff's counsel and defendant's counsel. The only thing that has not been produced to defendant's counsel is the communication between our firm and Mr. Dulberg, which was produced to plaintiff's counsel. And then there are, I want to say, about 13 pages of e-mails that were internal work product communications within our office that have not been produced to any -- anyone.

THE COURT: Um, why would you -- and here's, I guess, my confusion. Why would you withhold those from Mr. Dulberg? And I --

MS. WILLIAMS: The work product -- product

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privilege -- I mean, we can --

MR. CLINTON: We can give them.

MS. WILLIAMS: We can give that.

MR. CLINTON: We're not going to give you a hard time about that.

MS. WILLIAMS: We'll waive that and give those to Mr. Dulberg.

THE COURT: Because I'm --

MS. WILLIAMS: (Indiscernible.)

THE COURT: -- starting from the premise, at least based on the order, that Mr. Dulberg is, through counsel, waiving any attorney/client privilege. And, yeah, if we get into the issue -- my problem is if it's work product, arguably, Mr. Dulberg is entitled to those documents, and if he chooses to disclose them, that's up to him. But I'm not -- unless there's something else I'm missing, if Mr. Clinton or -- is it Ms. Williams?

MR. CLINTON: (Indiscernible.)

THE COURT: Is it Ms. Williams?

MS. WILLIAMS: Yes.

MR. CLINTON: And we'll turn them over today.

MS. WILLIAMS: We'll turn them over today.

THE COURT: Okay. Mr. Talarico.

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MR. TALARICO: Judge, your last order included a limited waiver. It's not waiver for all things. It's waiver -- waiver for the responses to the subpoena.

THE COURT: Yeah. Okay. But are you saying that that should or should not include work product? I don't have a problem either way, but, really, it's your call.

MR. TALARICO: Judge, I believe work product and -- and attorney/client privilege, yes. He's including all of that --

THE COURT: All right. So --

MR. TALARICO: -- in response to the subpoena.

THE COURT: -- you want -- and I'm not trying to box you in, but I just want to understand.

You want them to produce the entire file, including their work product, and you are waiving any claim of privilege related to work -- to attorney/client insofar as those records are concerned. Is that accurate, or did I miss something?

MR. TALARICO: Again, your Honor, Mr. Dulberg is specifically waiving the attorney/client -- client privilege for documents that are in response to the

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subpoena served upon Mr. Clinton and Ms. Williams.

THE COURT: Okay. And that includes work product?

MR. TALARICO: Yes, it does.

THE COURT: All right. Problem -- I think, problem solved.

Mr. Clinton or Ms. Williams, comment?

MR. CLINTON: We have no problem with that at all.

MS. WILLIAMS: I think we're (indiscernible).

THE COURT: Okay. So how quickly can you turn those over?

MS. WILLIAMS: We've already produced them to your Honor, so we have them. So I will -- I can e-mail them to both counsel --

THE COURT: Yeah, you did.

MS. WILLIAMS: -- today.

THE COURT: All right. I do have that.

MS. WILLIAMS: (Indiscernible).

THE COURT: But I didn't really make a point of looking through them too much, so -- because I'm not ruling on privilege, so it was not necessary for me to see the internal workings of the file.

That being said, Mr. Talarico, does that

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satisfy your concerns or interest?

MR. TALARICO: It does.

THE COURT: All right. And now -- so are you -- do you have any objection to my vacating any orders to compel or orders of compliance against Mr. Clinton and Ms. Williams?

MR. TALARICO: No, your Honor. That's the appropriate move.

THE COURT: I'm going to ask that Mr. Clinton and Ms. Williams send in the order memorializing the -- that. If you can send it in to this e-mail -- you can take --

MS. WILLIAMS: Yes.

MR. CLINTON: Thank you. We will do that.

MS. WILLIAMS: (Indiscernible.)

THE COURT: And be sure to copy Mr. Talarico and Mr. Flynn, if you have both of their e-mail addresses.

MR. CLINTON: Of course.

THE COURT: Do you have Mr. Flynn's?

MR. CLINTON: We do.

MS. WILLIAMS: We do.

THE COURT: All right. I see Mr. Flynn raising his pen. Yes.

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MR. FLYNN: (Indiscernible) next question, Judge.

THE COURT: Yeah. What is your question?

MR. FLYNN: Okay. My understanding, then, is that these documents that are being produced that were previously withheld are being produced to all parties in this case.

THE COURT: I'm going to shift that to Mr. Talarico. Is that your understanding?

MR. TALARICO: That is my understanding.

THE COURT: Okay. Does that satisfy your concerns, Mr. Clinton and Ms. Williams?

MR. CLINTON: Yes, your Honor.

MS. WILLIAMS: Yes, your Honor. If the client is waiving --

MR. TALARICO: We waived privilege.

MS. WILLIAMS: -- (indiscernible) to produce to -- we will produce in compliance with the subpoena, and we will submit those both to Mr. Talarico and Mr. Flynn at the same time.

THE COURT: All right. For purposes of clarity, what I am understanding just transpired is that plaintiff's current attorney, Mr. Talarico, has waived the attorney/client privilege and any claim

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of work product with respect to your file, and further, granted you permission to issue copies of that subpoena response to defense counsel, Mr. Flynn, at the same time.

Any -- if there's anything incorrect with what I said, tell me.

MR. TALARICO: If you're saying that I'm -- that Mr. Dulberg is waiving all attorney/client --

THE COURT: No.

MR. TALARICO: -- privilege -- just -- just in response to the subpoena, that's all.

THE COURT: Exactly.

MR. TALARICO: Yes.

THE COURT: Okay. Does that cover --

MR. FLYNN: Thank you, Judge.

THE COURT: All right. So send in your order and I -- I will vacate any order directed against you, because we're resolved, and as soon as I see it I will sign the order.

MS. WILLIAMS: Thank you very much, your Honor.

MR. CLINTON: Thank you, Judge.

THE COURT: Okay. And you know what? Are you in our e-mail system? Did they have to sign up --

MS. WILLIAMS: I believe we are, your Honor,

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because we were parties to the -- we were counsel in the case, so we should be.

THE COURT: Yeah. Forgive me. Okay. Then no problem. I'll sign it whenever it shows up.

MR. CLINTON: Thank you, Judge.

MS. WILLIAMS: Thank you very much.

(WHEREUPON, Mr. Clinton and Ms. Williams disconnect.)

THE COURT: All right. Moving on.

Mr. Flynn, we have your motion for summary judgment; am I correct?

MR. FLYNN: That's already been --

THE COURT: Yeah, I do see that.

MR. FLYNN: Yeah. The briefing schedules are set on that. There, actually, was another motion that relates to Ms. Williams and this Exhibit 12 from the Hans Mast deposition. I was kind of hoping that she might stay on the line there.

THE COURT: I apologize.

MR. FLYNN: That's okay.

THE COURT: I -- you know, Mr. Talarico, can you call them back? If you have their number.

MR. TALARICO: I don't.

THE COURT: Or, Mr. Flynn, if you've got their

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number, one of you. Because, yeah, I screwed up there.

MR. FLYNN: I'll see if I can. I think I've got a number here.

THE COURT: All right. Thank you.

MR. FLYNN: Judge, I was able to reach Mr. Clinton and Ms. Williams. I think they're going to log back on.

THE COURT: All right. As soon as I see them, I'll let them in.

MR. FLYNN: Thank you.

(WHEREUPON, Mr. Clinton and Ms. Williams reconnect.)

THE COURT: There he is. All right. I apologize. Mr. Flynn pointed out that I was dumb, and I let you go before we resolved one other question.

Mr. Flynn, I'll let you speak.

MR. FLYNN: And for the record, I did --

THE COURT: And for the record --

MR. FLYNN: -- not say that.

THE COURT: -- he implied.

So, Mr. Clinton -- Mr. Flynn, you had a question for Mr. Clinton.

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MR. FLYNN: Well, for Ms. Williams. It's not necessarily a question, but I think that this next motion -- there's a motion to exclude the Hans Mast deposition. Ms. Williams was involved in that, noticed the deposition, took the deposition, was involved in the communications with the court reporter.

So I thought that if she could and would be willing to explain what happened. And, you know, it's my position that there's nothing nefarious about this deposition. It was taken at the beginning of the pandemic when lawyers were still trying to figure out how to use the Zoom deposition method. All objections to that manner were waived by both parties. The deposition was, again, noticed by the plaintiff, Mr. Dulberg's agents. The court reporter was hired by the plaintiff, his agents.

THE COURT: But your question for Ms. Williams is?

MR. FLYNN: If she could explain what happened with Exhibit 12. I think I know what -- and, again, there's been a 213(f)(3) opinion that was just disclosed a day or two ago. I think it's improper because --

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THE COURT: In this case?

MR. FLYNN: (Indiscernible). In this case.

THE COURT: Oh, I don't (indiscernible).

MR. FLYNN: It was a document examiner who was identified by the plaintiff.

THE COURT: But that's a different issue, so I'm going to cut you off.

MR. FLYNN: No, it's not a different issue.

THE COURT: I want to cut -- I want to cut to what my one question is.

Ms. Williams, what can you tell us about Exhibit 12?

MS. WILLIAMS: So -- so my understanding -- as I recall, yes, it was the beginning of the pandemic. We had Mr. Mast's deposition, I believe, scheduled, I want to say, for March, and we canceled it because it was March 2020, right when everything was -- was starting, and it was canceled due to COVID concerns. And -- and so we -- we opted to utilize the -- the court's -- I think it was the Illinois Supreme Court that came out with the rules as to -- and I could be incorrect, it could be each county court, but that said you could do Zoom depositions.

So we noticed it up for a remote

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deposition, and we utilized a court reporter. I can't remember the court reporter's name. There are several e-mails about this with Mr. -- Mr. Flynn that -- that have been produced pursuant to the subpoena that we received. And my recollection is is that we took that deposition, and there were several difficulties with Mr. Mast's internet connection, and so we had come on and off, but we did get through the deposition.

Mr. Flynn had -- I had produced to Mr. Flynn, prior to the deposition, all of the exhibits that I believed we would use. And then I also, during the deposition, uploaded them into the court reporting system so that the court reporter would have them and mark them.

As to Exhibit 12, we had uploaded it into the system. I don't know that Mr. Mast could actually see those, so he may have used the paper copies that Mr. Flynn had.

And then after the deposition, the court reporter notified me that Exhibit 12, specifically, was -- they couldn't read it, and we needed to get them a copy. I believe there's e-mails to that effect, as well. If I'm recalling correctly, a

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number of the pages were blank. It was a larger exhibit. I want to say it was around 27 pages, I think, or 25 pages.

So sometime after the deposition, we -- we did provide the exhibit that was utilized in the deposition to the court reporter, and at that time they marked it and sent it back to everyone.

THE COURT: Okay. What was Exhibit 12 again?

MS. WILLIAMS: It was a series of cases. I don't know that -- I just can't recall what all was asked about it, but I know there were -- it was -- it was --

THE COURT: All right. These would have --

MS. WILLIAMS: -- copies of case law.

THE COURT: All right.

MR. FLYNN: They were photocopies of the old books, Judge, cases that were contained in Mast's file.

THE COURT: Okay.

MR. FLYNN: And he was -- you know, they have -- they're, obviously, not complete because they -- placed on a printer, appeared like we used to do in the old days.

THE COURT: Yes.

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MR. FLYNN: So the issue now, though, is that the plaintiff knew --

THE COURT: Hang on. Before -- before we get into argument, Mr. Talarico, is there anything -- any questions you have, since we have Ms. Williams here?

MR. TALARICO: Yes. Was the Tilsner case included in -- in the blank Exhibit 12 you sent to U.S. Legal, Barbara Schmidt? And was -- when you discussed with Mr. Flynn the failure of his -- or Mr. Mast's internet, didn't he say, I can't see these, I can only see their first one (indiscernible), which was the Lagano (phonetic) case? And wasn't there continued discussion by Mr. Flynn that he didn't -- he didn't produce all of the documents you sent on -- in hardcopy because he wanted to save paper?

MS. WILLIAMS: So that's -- I guess that's a lot of questions. So what --

MR. TALARICO: It is.

MS. WILLIAMS: What -- what -- I cannot recall what cases were included and weren't included at this point. There -- there was an e-mail to Mr. Flynn with the exhibit that is attached that I

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believe was produced in the subpoena.

So whatever that exhibit was is -- is what I would have used. So I know there was, like, a Laravo case or -- I remember the first case was like Laravo or Lavajo, L-A-V-A-J-O, or something like that.

But right now, off the top of my head, I don't remember what other cases were included.

MR. TALARICO: I'm talking about -- Judge, if I might, please? Excuse me. I'm sorry, Ms. Williams.

There was -- what the reporter had was blank. What Mr. Flynn's client said was, I see the Lagano (phonetic) one. So the Exhibit 12 that was sent, like, a week or two after the deposition had Lagano, Troy, and the same exact Lagano case, and it did not have the Tilsner case involved, and the Tilsner case was very important. So it was an exact duplication of one case and a second case.

But this is -- Judge, it's not just the Exhibit 12. The entire deposition --

THE COURT: Well, are you asking a question about Exhibit 12? Because if we're done asking questions, I'm gonna let her go.

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MR. TALARICO: Okay. Yep. I'm done.

THE COURT: Okay. Mr. Flynn, anything?

MR. FLYNN: Yes, Judge. So, again, this -- this 213(f)(3) report that was just produced --

THE COURT: Well, do we need the Clinton -- Mr. Clinton and Ms. Williams for this?

MR. FLYNN: Yes. I'm getting there.

THE COURT: Okay. Sorry.

MR. FLYNN: So if you can just indulge me for a moment.

So the expert document reviewer is of the opinion that the exhibit sticker on Exhibit 12 did not come from the same batch as the other exhibit stickers.

The defense's position is, so what? You know, these kind of things happen, I'm sure, with the court reporter, and if it was marked later because it was not sent in until later, that makes perfect sense.

But this is -- this is -- the argument that's being made is that -- and there's no other conclusion, it's just that it didn't come from the same batch. So, again, it's the so-what position on our part.

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But because it's being used to exclude the deposition, it's our position that the deposition was fine -- finally concluded to the satisfaction of plaintiff's counsel, that there was never any indication that they needed a follow-up deposition or a supplemental deposition or a Session 2.

So in our view, any objection to that deposition has been waived. And, again, there was nothing nefarious. Ms. Williams was nothing but professional and courteous during her tenure in this case.

This motion -- this conspiracy that's been presented and caused the defendant to be caught in the crossfire between the plaintiff and his former attorney is through no fault of theirs, and should not continue.

THE COURT: All right. Mr. Talarico, you can respond.

MR. TALARICO: Two points, Judge. First of all, what's very obvious -- the label on Exhibit 12 doesn't even have the deponent's name spelled right.

THE COURT: Okay. But what does -- what impact does that have?

MR. TALARICO: What impact is that it was not

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done at the same time by the same people. It was never produced in time.

Secondarily, about Mr. Flynn's allegation of some type of conspiracy, if he wants to push that, I think I have evidence that, if necessary, that -- that Mr. Flynn and Ms. Williams have consulted at times.

THE COURT: I'm sorry? Have what?

MR. TALARICO: Consulted.

THE COURT: Okay. Frankly, Counsel, if you're suggesting that either one of them has engaged in unethical behavior, I'm sure you're aware of the Himmel decision, and --

MR. TALARICO: I am.

THE COURT: -- it's not something you can threaten; you have to do.

MR. TALARICO: And I will.

THE COURT: Don't make that threat and not follow through with it if, in fact, there's anything to it. You don't -- you don't have an option. And you put a burden on me, as well, when you start going down this road.

So you've got to make a decision, and --

MR. TALARICO: (Indiscernible.)

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THE COURT: -- I'm not going to hear -- I'm not going to hear suggestions of unethical behavior.

I mean, you're either going to pursue it or we're not even going to entertain that, so please continue.

MR. TALARICO: Well, Judge, I will -- I will not pursue it if Mr. Flynn (indiscernible) --

THE COURT: It's not an issue. You don't get to choose.

MR. TALARICO: I'm aware.

THE COURT: I'm not -- I'm not telling you that you have to do one thing or the other. But the Himmel decision removes discretion from the equation. You have to act, if you are aware.

So I'm not telling you that -- that you've got to file. You know what you have. But what I'm saying is, if you're going to make an argument suggesting that other attorneys engaged in unethical behavior, I'm not going to listen to it unless you're also making a -- making a complaint with the ARDC.

So I'm not interested in attorneys casting aspersions on each other and then not following through, if that makes sense. Following through

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with the ARDC.

That being said, what -- what is your response on the -- do we have to keep Ms. Williams and Mr. Clinton here? Does anybody else need them?

MR. TALARICO: I have no need for them.

MR. FLYNN: I don't. Just in closing, with respect to Ms. Williams, again, I was just provided these documents by Ms. Williams and/or her court reporter and then passed them along. I had nothing to do with -- with anything other than I did print out certain of the exhibits for ease of use at the deposition when I went to Hans Mast's office. And because I was working from home at the time, I printed a few of them out, not all of them, due to a limited amount of printer paper. And that is my total involvement in Exhibit 12.

THE COURT: Okay. Ms. Williams and Mr. Clinton, do you want to stay? You can, until we resolve the issue, since we're addressing you guys. What do you want to do?

MS. WILLIAMS: Your Honor, if you wish for us to stay, we're happy to stay.

MR. CLINTON: I think we can stay.

THE COURT: All right. I was giving you the

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option to leave, if you wanted.

All right. So, Mr. Talarico, we're moving on to your motion to -- to bar; am I correct?

MR. TALARICO: Yes, your Honor. Within the motion, I asked to amend the motion after I get the responses from Clinton and Williams. They may be appropriate to put into the motion. I filed a motion. The motion can be -- actually, Mr. Flynn just responded to the motion without responding -- without responding.

I don't know how you want to look at it. If that was his response, I'll file a reply to what he said. But I still -- I have asked, from the beginning, to be allowed to amend that motion once I find out what Mr. Clinton and Ms. Flynn have -- I'm sorry, Ms. Williams. Forgive me.

THE COURT: All right. Can you -- are you asking me for leave to supplement your motion?

MR. TALARICO: Not -- Judge -- yes. If you want me to make a determination now, yes.

THE COURT: All right. And we haven't proceeded to hearing.

Mr. Flynn, have you filed a response to the motion? I'm not seeing it.

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MR. FLYNN: Judge, I have not. And my -- my point is that there hasn't even been a prima facie showing of any prejudice to the plaintiff with respect to his deposition. For my client to again have to file a written response to a brief of this nature --

THE COURT: You don't really have -- I don't know that -- I mean, it's up to you as to whether or not you want to file a written response. I've heard your argument. Plaintiff -- more importantly, plaintiff's counsel has heard your argument, so there's -- there's not going to be any prejudice if he simply files his reply or if I allow amendment and then we proceed to hearing. I don't think it's that complicated an issue.

MR. FLYNN: I don't either.

THE COURT: So I don't know that we need further briefing.

What do you want to do, Mr. Flynn, because the ball will be in your court once he files his amendment.

MR. FLYNN: I'd like to examine whatever the amendment is and then, if necessary, request, I guess, what will be called a surreply. However, I'm

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doubtful that I would need to file it.

THE COURT: Mr. Talarico, when can you file your -- your brief?

MR. TALARICO: Well, after I get and review the response from Ms. Williams and Mr. Clinton, two weeks.

THE COURT: Mr. Clinton, how quickly can you get him the documents? I know you said it earlier. You're on mute.

MR. CLINTON: My apology, again. We can get them to him today.

THE COURT: Okay. So I think two weeks from today, ultimately, is plenty of time. That would give plaintiff until --

MR. TALARICO: (Indiscernible.)

THE COURT: -- November 18th to file his amended response -- or amended motion. And then why don't we -- and then I'm out.

So I'll give plaintiff until the 21st and then we'll come back on November 28th, and then, Mr. Flynn, at that point, you can tell me what you want to do.

MR. FLYNN: Thank you, your Honor. And, again, I know -- I understand this is not on the table but

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it's a housekeeping issue with respect to this f(3) opinion. This (f)3 opinion, the document examiner was disclosed as a trial witness relative to this Exhibit 12. I don't think that's proper --

THE COURT: Yeah, I -- you know --

MR. FLYNN: And then he called it a mini trial but not trial.

THE COURT: The -- I -- I haven't seen the report, but if the expert is going to render opinions on case law, copies of case law that were allegedly tendered by former counsel to Mr. Dulberg, I don't see how that comes up in the trial of the matter.

MR. FLYNN: He's really only opining on the authenticity of the exhibit sticker and whether it came from the same batch as the other stickers in that deposition.

So it has nothing to do with the standard of care in this case or any --

THE COURT: I don't know. I'll let Mr. Talarico tell me otherwise. Not now, but I -- there's a couple of thresholds. I don't know. I haven't seen exactly what he says, and I -- I suspect we could even stipulate that the sticker is different without

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a whole lot of -- a whole lot of effort or prejudice to anybody. Because based on what you've told me, it likely is a different sticker because of the way the documents were transferred back and forth and the problem at the deposition.

That all being said, I'm -- I'm going to be -- frankly, Mr. Talarico, I'm going to be hard-pressed, but I need to see the report before I can say anything further, so I'll quit speculating.

Anything else that we've got to deal with today? No?

MR. TALARICO: No.

THE COURT: All right. Mr. Talarico or Mr. Flynn, can you send in the order memorializing what we're doing on your case? And then, of course, Mr. Clinton and Ms. Williams will send in the order that is vacating any -- any order compelling them to do anything.

MR. FLYNN: Judge, I actually have a meeting with a client in about ten minutes. If Mr. Talarico wouldn't mind preparing the order this time, I'd appreciate it.

MR. TALARICO: I will.

THE COURT: Okay. All right. Then we'll see

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you on the 28th.

THE CLERK: What time?

MR. FLYNN: Thank you Mr. Clinton and Ms. Williams for your time.

MR. TALARICO: Thank you, your Honor.

THE CLERK: What time on the --

THE COURT: You know what? Hang on. Hang on. Make it 9:15, not 8:45. At 9:15.

MR. FLYNN: I'm sorry. On what date again?

THE COURT: On November 28th at 9:15.

MR. TALARICO: Thank you, Judge.

MR. FLYNN: You know, Judge, we talked last time about my knee replacement. Is there any way we could bump that back one more week?

THE COURT: Wait. Yeah, I can do it the --

MR. FLYNN: Although, I hope for a speedy recovery. The surgery is on the 17th and --

THE COURT: Sure. Sure. If you want to come -- what's the next week? December 5th?

MR. FLYNN: I'm very hopeful that that will work.

THE COURT: All right. Good luck.

MR. FLYNN: Thank you.

THE COURT: All right. December 5th at 9:15.

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MR. TALARICO: Your Honor, what --
THE COURT: Yes?
MR. TALARICO: December 5th?
THE COURT: Yeah.
MR. TALARICO: Thank you, your Honor.
THE COURT: All right. Thank you.
Disconnecting.

(Which were all the proceedings had in the above-entitled cause this date.)

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COUNTY OF McHENRY)

I, KATHLEEN STROMBACH, an official Court Reporter for the Circuit Court of McHenry County, Twenty-Second Judicial Circuit of Illinois, transcribed the electronic recording of the proceeding in the above-entitled cause to the best of my ability and based on the quality of the recording, and I hereby certify the foregoing to be a true and accurate transcript of said electronic recording.

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