

**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

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.”

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

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.

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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1 STATE OF ILLINOIS }
2 COUNTY OF McHENRY }

3 IN THE TWENTY-SECOND JUDICIAL CIRCUIT

4 McHENRY COUNTY, ILLINOIS

5 PAUL DULBERG,

6 Plaintiff,

7 vs.

No. 17 LA 377

8 THE LAW OFFICES OF THOMAS
9 POPOVICH, et al.,

Defendants.

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

16 APPEARANCES:

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

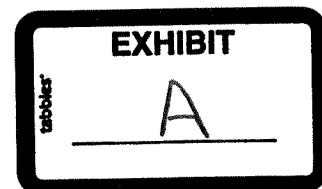
On behalf of the Plaintiff,

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

On behalf of the Defendants.

21 ALSO PRESENT:

22 MR. EDWARD CLINTON (via Zoom)
23 MS. JULIA C. WILLIAMS (via Zoom)
24



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

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

7 THE COURT: Okay. Defense.

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

11 THE COURT: Okay. Mr. Clinton.

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

14 THE COURT: All right. And --

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

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

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

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

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

3 I did file a rule after I read their motion
4 to vacate. Historically, or chronologically, I
5 think maybe that's the starting point.

6 (Indiscernible) you held them in contempt and --

7 THE COURT: I did?

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

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

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

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

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

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

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

23 THE COURT: All right.

24 MR. TALARICO: My mistake.

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

5 MS. WILLIAMS: Would you like me to --

6 MR. CLINTON: Yeah, go ahead.

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

10 THE COURT: Yeah.

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

15 So we are (indiscernible) --

16 THE COURT: Thank you.

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

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

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

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

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

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

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

24 MS. WILLIAMS: The work product -- product

1 privilege -- I mean, we can --
2 MR. CLINTON: We can give them.
3 MS. WILLIAMS: We can give that.
4 MR. CLINTON: We're not going to give you a hard
5 time about that.
6 MS. WILLIAMS: We'll waive that and give those
7 to Mr. Dulberg.
8 THE COURT: Because I'm --
9 MS. WILLIAMS: (Indiscernible.)
10 THE COURT: -- starting from the premise, at
11 least based on the order, that Mr. Dulberg is,
12 through counsel, waiving any attorney/client
13 privilege. And, yeah, if we get into the issue --
14 my problem is if it's work product, arguably,
15 Mr. Dulberg is entitled to those documents, and if
16 he chooses to disclose them, that's up to him. But
17 I'm not -- unless there's something else I'm
18 missing, if Mr. Clinton or -- is it Ms. Williams?
19 MR. CLINTON: (Indiscernible.)
20 THE COURT: Is it Ms. Williams?
21 MS. WILLIAMS: Yes.
22 MR. CLINTON: And we'll turn them over today.
23 MS. WILLIAMS: We'll turn them over today.
24 THE COURT: Okay. Mr. Talarico.

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

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

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

12 THE COURT: All right. So --

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

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

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

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

1 subpoena served upon Mr. Clinton and Ms. Williams.

2 THE COURT: Okay. And that includes work
3 product?

4 MR. TALARICO: Yes, it does.

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

7 Mr. Clinton or Ms. Williams, comment?

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

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

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

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

16 THE COURT: Yeah, you did.

17 MS. WILLIAMS: -- today.

18 THE COURT: All right. I do have that.

19 MS. WILLIAMS: (Indiscernible).

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

24 That being said, Mr. Talarico, does that

1 satisfy your concerns or interest?

2 MR. TALARICO: It does.

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

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

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

13 MS. WILLIAMS: Yes.

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

15 MS. WILLIAMS: (Indiscernible.)

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

19 MR. CLINTON: Of course.

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

21 MR. CLINTON: We do.

22 MS. WILLIAMS: We do.

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

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

3 THE COURT: Yeah. What is your question?

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

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

10 MR. TALARICO: That is my understanding.

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

13 MR. CLINTON: Yes, your Honor.

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

16 MR. TALARICO: We waived privilege.

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

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

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

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

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

9 THE COURT: No.

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

12 THE COURT: Exactly.

13 MR. TALARICO: Yes.

14 THE COURT: Okay. Does that cover --

15 MR. FLYNN: Thank you, Judge.

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

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

21 MR. CLINTON: Thank you, Judge.

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

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

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

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

5 MR. CLINTON: Thank you, Judge.

6 MS. WILLIAMS: Thank you very much.

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

9 THE COURT: All right. Moving on.

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

12 MR. FLYNN: That's already been --

13 THE COURT: Yeah, I do see that.

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

19 THE COURT: I apologize.

20 MR. FLYNN: That's okay.

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

23 MR. TALARICO: I don't.

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

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

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

5 THE COURT: All right. Thank you.

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

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

11 MR. FLYNN: Thank you.

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

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

18 Mr. Flynn, I'll let you speak.

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

20 THE COURT: And for the record --

21 MR. FLYNN: -- not say that.

22 THE COURT: -- he implied.

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

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

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

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

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

1 THE COURT: In this case?

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

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

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

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

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

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

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

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

24 So we noticed it up for a remote

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

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

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

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

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

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

8 THE COURT: Okay. What was Exhibit 12 again?

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

13 THE COURT: All right. These would have --

14 MS. WILLIAMS: -- copies of case law.

15 THE COURT: All right.

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

19 THE COURT: Okay.

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

24 THE COURT: Yes.

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

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

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

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

20 MR. TALARICO: It is.

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

1 believe was produced in the subpoena.

2 So whatever that exhibit was is -- is what
3 I would have used. So I know there was, like, a
4 Laravo case or -- I remember the first case was like
5 Laravo or Lavajo, L-A-V-A-J-0, or something like
6 that.

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

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

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

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

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

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

2 THE COURT: Okay. Mr. Flynn, anything?

3 MR. FLYNN: Yes, Judge. So, again, this -- this
4 213(f)(3) report that was just produced --

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

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

8 THE COURT: Okay. Sorry.

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

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

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

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

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

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

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

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

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

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

24 MR. TALARICO: What impact is that it was not

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

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

8 THE COURT: I'm sorry? Have what?

9 MR. TALARICO: Consulted.

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

14 MR. TALARICO: I am.

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

17 MR. TALARICO: And I will.

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

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

24 MR. TALARICO: (Indiscernible.)

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

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

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

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

10 MR. TALARICO: I'm aware.

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

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

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

1 with the ARDC.

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

5 MR. TALARICO: I have no need for them.

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

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

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

23 MR. CLINTON: I think we can stay.

24 THE COURT: All right. I was giving you the

1 option to leave, if you wanted.

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

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

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

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

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

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

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

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

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

16 MR. FLYNN: I don't either.

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

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

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

1 doubtful that I would need to file it.

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

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

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

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

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

15 MR. TALARICO: (Indiscernible.)

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

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

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

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

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

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

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

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

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

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

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

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

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

12 MR. TALARICO: No.

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

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

23 MR. TALARICO: I will.

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

1 you on the 28th.

2 THE CLERK: What time?

3 MR. FLYNN: Thank you Mr. Clinton and

4 Ms. Williams for your time.

5 MR. TALARICO: Thank you, your Honor.

6 THE CLERK: What time on the --

7 THE COURT: You know what? Hang on. Hang on.

8 Make it 9:15, not 8:45. At 9:15.

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

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

11 MR. TALARICO: Thank you, Judge.

12 MR. FLYNN: You know, Judge, we talked last time

13 about my knee replacement. Is there any way we

14 could bump that back one more week?

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

16 MR. FLYNN: Although, I hope for a speedy

17 recovery. The surgery is on the 17th and --

18 THE COURT: Sure. Sure. If you want to come --

19 what's the next week? December 5th?

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

21 work.

22 THE COURT: All right. Good luck.

23 MR. FLYNN: Thank you.

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

1 MR. TALARICO: Your Honor, what --
2 THE COURT: Yes?
3 MR. TALARICO: December 5th?
4 THE COURT: Yeah.
5 MR. TALARICO: Thank you, your Honor.
6 THE COURT: All right. Thank you.
7 Disconnecting.
8 (Which were all the proceedings
9 had in the above-entitled cause
10 this date.)
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STATE OF ILLINOIS)
) SS:
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.

Kathleen Strombach
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