IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

EARLY BIRD CAR WASH, INC., MR. BIRD'S CUSTOM CAR WASH EQUIPMENT, LLC, and MICHAEL J. EARLY,	:	NO. CV-2021-00448
Plaintiffs,	:	
vs.	:	
	:	CIVIL ACTION - LAW
DEAN PIERMATTEI and RHOADS & SINON, LLP,	:	
Defendants.	:	Motions for Sanctions

OPINION AND ORDER

This matter came before the Court on both October 29, 2024, and on February 12, 2025, on Plaintiffs' Supplemental Motion for Sanctions and to Extend Discovery Deadline, filed August 30, 2024, and Defendants' Countermotion for Sanctions, filed September 24, 2024. Counsel for all parties appeared, along with a representative of the Plaintiffs.

BACKGROUND:

Although the Complaint was filed on May 17, 2021, this matter has been mired in contentious discovery. Discovery disputes culminated in the Opinion and Order of the Honorable Eric R. Linhardt dated September 18, 2023, and a subsequent deficiency letter from Plaintiff's counsel to Defendants dated September 25, 2023. The discovery dispute continued, and the parties sought further judicial intervention. That resulted in the scholarly twenty-one (21) page Opinion and Order of the Honorable Eric R. Linhardt filed May 13, 2024. Thereafter, Plaintiffs' counsel sent to the Defendants another deficiency letter dated June 18, 2024. The Opinion and Order of May 13, 2024, notwithstanding, the parties have filed the Motions referenced above, together with extensive briefs.

After the hearing conducted on October 29, 2024, the Court entered its Opinion and Order dated and filed on October 31, 2024. In that Order, this Court observed that Plaintiffs' claims of legal malpractice are directed against a defunct law firm, and that Plaintiffs seek electronic discovery from long-decommissioned computer file servers. The Court speculated that at least some material sought by the Plaintiffs has been lost to the passage of time.

In the Order of October 31, 2024, the Court directed that, on or before November 15, 2024, Plaintiff's counsel was to identify to Defendant's counsel particular documents sought, particular interrogatory questions served but not yet answered, and particular areas of inquiry for which a deposition of an authorized representative of Defendant was to occur. The Order further directed Defendant's counsel to respond on or before December 20, 2024, providing documents and providing answers to interrogatories, unless the responses were subject to privilege. The Order further directed Defendant's counsel to provide the name and professional address of each witness who is in a position to provide a material answer to each area of inquiry.

The Order of October 31, 2024, directed the parties to cooperate in good faith in an effort to complete discovery on or before January 31, 2025, and scheduled an evidentiary hearing on the cross-motions for sanctions for 9:00 a.m. on February 12, 2025, limited to the claims of the parties for sanctions.

On February 12, 2025, Plaintiffs introduced the testimony of Phillip J. Binotto, Esquire. Further, Plaintiffs introduced Exhibits 1 and 2 in support of Plaintiffs' Supplemental Motion for Sanctions. Attorney Binotto has extensive experience in law office management (Notes of Testimony, hereinafter N.T. 8-9). He credibly testified that his examination of law firm hourly rates conducted in connection with litigation in the Western District of Pennsylvania led him to conclude that "rates are all over the - - all over the place. It depends on the size of the law firm and the complexity of the case." (N.T. 15-17).

Attorney Binotto further testified that, for associate attorneys that are between two and five years, the average hourly rates are between $300 and $400 per hour. For senior attorneys and mid-level partners, with approximately ten years of experience, the rates are between $400 and $600. For partners with twenty years of experience, the rates are between $500 and $800 per hour. (N.T. 17). Attorney Binotto testified that he regarded this litigation as a complex matter (N.T. 18). Attorney Binotto testified that the billing rates charged by Plaintiff's counsel in this matter as reflected in Plaintiff's Exhibit P-2 reflect billing rates "between 20 and 25 percent lower than what I believe the market is in Pittsburgh." (N.T.18).

On cross-examination, Attorney Binotto conceded that he did not appear to offer any opinion as to whether Defendants reasonably responded to discovery requests in a timely manner, nor did he review any electronic material secured from Defendants' computer servers, nor did he offer any opinion regarding whether boxes of documents identified by Attorney Stephanie DiVittore at her deposition had been produced. (N.T. 22-23). Attorney Binotto testified that he "read almost every entry" of the billing statements of Plaintiffs' counsel, and that "they relate to discovery and efforts to obtain discovery." Attorney Binotto was directed at an entry in a billing statement on March 10, 2023, and asked whether he considered the activity listed as "Revised second set of requests for admissions directed to Dean Piermattei" as being an activity "charged in the everyday course of discovery? Is that an entry that would be charged by an attorney in the everyday course of discovery?" Attorney Binotto responded "I would - -I would think so, yes. It deals with the requests of admissions, which to me, is part of discovery under the rules." (N.T. 24-25). Defendant's counsel then asked Attorney Binotto whether the line items in Plaintiff's Exhibits totaling $196,000 "relate solely to the charges incurred after alleged deficiencies in the discovery, alleged improper conduct in discovery, or would some of these entries at least be charged again, in the ordinary course of discovery by everyday lawyers?" Attorney Binotto responded that "My understanding is that these - - these entries these time entries represent everything pertaining to discovery, whether it be in the ordinary course or whether it be to try to correct deficiencies or obtain sanctions in the extraordinary course." (N.T. 25).

On examination by the Court, the Court inquired "I believe it is your testimony that you were not tasked to analyze whether legal efforts were as a result of a violation of a court discovery order or for any other reason. Did I get that right?" To which Attorney Binotto responded "Yes, Your Honor." At the conclusion of Attorney Binotto's testimony, the Court received oral argument on scheduling issues, and entered its Order of February 12, 2025, continuing the hearing to a later date and time.

The Court conducted the continued hearing on May 12, 2025. At that hearing Plaintiffs introduced an amended Exhibit 2 as P-2A (N.T. 6). Plaintiff introduced the testimony of Mark A. Sabados, Esquire. Attorney Sabados identified P-2A as billing statements for the period of

February 2023 to April 2025 (N.T. 8). Attorney Sabados testified that the fees reflected in Exhibit P-2A total $232,234.50, and that, with regard to the activities reflected in P-2A, he regarded all of them as "related to any work done regarding Defendants' not producing discovery or not fully answering discovery." (N.T. 10-11).

In response to questioning by the Court, Attorney Sabados testified that his examination of P-2A was not to identify activities related to seeking complete answers to discovery as opposed to seeking compliance with a discovery order (N.T. 12). In response to a statement by the Court to the effect that the activities reflected in P-2A appear to involve both seeking complete answers to discovery and seeking compliance with a discovery order, Attorney Sabados answered "I think you're right." (N.T. 14). Thereafter, Plaintiff rested (N.T. 15).

Defendants introduced the testimony of Peter Mansmann, Esquire, who identified himself as the chief executive officer of Precise, Inc. Mansmann testified that he has experience in hundreds of matters involving discovery efforts (N.T. 18). He testified that the law firm of Rhoads & Sinon had ceased doing business, and decommissioned its computer server in approximately 2018. The server was sent to Iron Mountain Storage for safekeeping (N.T. 18-19). A representative of Rhoads & Sinon arranged to have the server shipped to the law firm of Barley Snyder for examination. Based upon the age of the server, Mansmann determined that it would not be possible to recover data from the server at that site. He located a document from CTI stored with the server, which contained instructions for turning the server on (N.T.20).

With that document, Mansmann confirmed that the server was shut down in February of 2019 (N.T. 21). Mansmann testified that the server was moved to Pittsburgh from Barley Snyder. Thereafter, Precise, Inc., experienced difficulty getting the server to turn back on. For that reason, they consulted several other vendors, without success (N.T. 23-25). Through continued efforts, Precise, Inc., was able to secure access to emails on the server. Through a search of emails containing key words, Precise, Inc., was able to identify and download 514 documents, comprising the aggregate of 2,500 pages of material (N.T. 26-30).

Mansmann testified that he worked with both an attorney for Defendants and an attorney for Plaintiff, Dave Weber, Esquire, to establish an electronically stored information

(ESI) protocol. They conducted several meetings over many months and arrived at an ESI protocol (N.T. 32-33). Searches conducted under the ESI protocol resulted in the identification of 489 documents. In total, approximately 30,000 documents were reviewed or filtered (N.T. 35). Of the total 30,000 documents reviewed or filtered, 9,000 were identified as unlikely to be responsive to Plaintiffs' requests. Precise, Inc., continued to keep the downloaded data available to meet any additional search requests from Plaintiffs' counsel. Total billing to the Defendants from Precise, Inc., on this project was approximately $92,500 (N.T. 38).

Defendants' counsel inquired of Mansman whether he saw anything that suggested that any data formerly on the server was destroyed. Mansmann testified that he did not, but testified "Keeping in mind that we were only able to access half the server, the emails . . . I did not see any issue of the spoiled documents on the server that we didn't access or search (N.T. 40). Defendants' counsel inquired whether earlier retrieval of the server would have mitigated or eliminated any of the technical difficulties that your team encountered during the recovery and restoration process. Mansmann testified "There's no way of knowing whether or not collecting and accessing the servers earlier would have made a difference or not"(N.T. 41-42).

On cross-examination Mansmann was asked whether inaction by the Defendants caused a loss of information that was stored on the server, to which he answered "It's my opinion we would have no way of knowing whether that had was a factor or not." (N.T. 58-59).

In response to questioning by the Court, Mansmann testified that the server was comprised of two "head units" and that one of the head units would not power up. He testified that the servers were decommissioned in February of 2019, and that there is no way to tell whether an earlier effort to turn them on would have succeeded (N.T. 63). He explained that part of the reason Precise, Inc., sought outside help with restoring the units was their concern that "it's possible we could completely corrupt these and that's it" (N.T. 64).

Plaintiff called Brett Creasy in rebuttal. Creasy testified that he is the president of Bit-By-Bit, and its director of digital forensics, a company involved in digital forensics discovery and cyber security (N.T. 66). He was told that the Defendants were put on notice of Plaintiffs' claim in May of 2020 (N.T. 69). Creasy testified that the procedure undertaken by Precise, Inc., as explained in Mansmann's testimony, "seemed reasonable to me." N.T. 72. "I would

say, I mean that there's no way of knowing for sure the pinpoint cause of what caused ESI to be non-recoverable, but based on what Precise described at least their process seemed reasonable to me" (N.T. 72). In response to a question as to whether an earlier effort to retrieve data would have been more successful, Creasy testified "There's no way to know for sure but, again, back to my earlier point, the earlier you take action, the better." N.T. 74). On cross-examination, Creasy testified "Without a time machine, no one would know for sure. The earlier is always better, I would say. But unless you actually attempt it you won't know what the results are." (N.T. 74). Upon further questioning by the Court, Creasy testified "I go back to my earlier is better. My expectation would be if you tried it years earlier then you would have had a higher likelihood of success. Beyond that there's no way to really know for certain." (N.T. 75).

ISSUES PRESENTED:

1. WHETHER PLAINTIFFS ARE ENTITLED TO THE ENTRY OF AN ORDER FOR SANCTIONS AGAINST THE DEFENDANTS RELATED TO THE SPOLIATION OF EVIDENCE.

2. WHETHER PLAINTIFFS ARE ENTITLED TO THE ENTRY OF AN ORDER FOR SANCTIONS AGAINST THE DEFENDANTS PURSUANT TO PA.R.C.P. 4019(G)(1), AS A RESULT OF A CLAIMED FAILURE OF THE DEFENDANTS TO PRODUCE DOCUMENTS AS REQUIRED BY THE OPINION AND ORDER OF THE HONORABLE ERIC R. LINHARDT, FILED MAY 13, 2024.

3. WHETHER DEFENDANTS ARE ENTITLED TO THE ENTRY OF AN ORDER FOR SANCTIONS AGAINST THE PLAINTIFFS FOR SUMS PAID TO PRECISE, INC., OR PURSUANT TO 42 PA.C.S.A. SECTION 2503(7).

RESPONSES TO ISSUES PRESENTED:

1. PLAINTIFFS ARE NOT ENTITLED TO THE ENTRY OF AN ORDER FOR SANCTIONS AGAINST THE DEFENDANTS RELATED TO THE SPOLIATION OF EVIDENCE.

2. PLAINTIFFS ARE NOT ENTITLED TO THE ENTRY OF AN ORDER FOR SANCTIONS AGAINST THE DEFENDANTS PURSUANT TO PA.R.C.P. 4019(G)(1), BUT ARE GRANTED LEAVE OF COURT TO SEEK SANCTIONS PURSUANT TO 42 PA.C.S.A. SECTION 2503(7), BY PETITION FILED WITHIN THIRTY (30) DAYS AFTER ENTRY OF A FINAL ORDER ON THE MERITS OF THIS LITIGATION.

3. DEFENDANTS ARE NOT YET ENTITLED TO THE ENRY OF AN ORDER FOR SANCTIONS AGAINST THE PLAINTIFFS FOR SUMS PAID TO PRECISE, INC., OR PURSUANT TO 42 PA.C.S.A. SECTION 2503(7), BUT ARE GRANTED LEAVE OF COURT TO SEEK SANCTIONS PURSUANT TO 42 PA.C.S.A. SECTION 2503(7), BY PETITION FILED WITHIN THIRTY (30) DAYS AFTER ENTRY OF A FINAL ORDER ON THE MERITS OF THIS LITIGATION.

DISCUSSION:

Applicable Law Regarding Spoliation of Evidence:

Our Superior Court conducted a thorough review of our law on the issue of spoliation of electronically stored evidence in the matter of *PTSI, Inc., v. Haley*, 2013 PA.Super. 130, 71 A.3d 304 (2013), and set forth the following:

> "Spoliation of evidence" is the non-preservation or significant alteration of evidence for pending or future litigation. When a party to a suit has been charged with spoliating evidence in that suit (sometimes called "first-party spoliation"), we have allowed trial courts to exercise their discretion to impose a range of sanctions against the spoliator. *See Schroeder v. Commonwealth, Department of Transportation,* 551 Pa. 243, 710 A.2d 23, 27 (1998).
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> *Pyeritz v. Commonwealth of Pennsylvania,* 613 Pa. 80, 88–89, 32 A.3d 687, 692 (2011) (footnotes and citation omitted).
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> [Spoliation] sanctions arise out of "the common sense observation that a party who has notice that evidence is relevant to litigation and who proceeds to destroy evidence is more likely to have been threatened by that evidence than is a party in the same position who does not destroy the evidence." *Mount Olivet* [*Tabernacle Church v. Edwin L. Wiegand Division*], 781 A.2d [1263], at 1269 (Pa.Super.2001) (quoting *Nation—Wide Check Corp. v. Forest Hills Distributors, Inc.,* 692 F.2d 214, 218 (1st Cir.1982)).
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> * * *
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> To determine the appropriate sanction for spoliation, the trial court must weigh three factors: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the

offending party is seriously at fault, will serve to deter such conduct by others in the future. *Mount Olivet,* 781 A.2d at 1269–70 (quoting *Schmid v. Milwaukee Elec. Tool Corp.,* 13 F.3d 76, 79 (3d Cir.1994)).

In this context, evaluation of the first prong, "the fault of the party who altered or destroyed the evidence," requires consideration of two components, the extent of the offending party's duty or responsibility to preserve the relevant evidence, and the presence or absence of bad faith. *See Mt. Olivet,* 781 A.2d at 1270. The duty prong, in turn, is established where: "(1) the plaintiff knows that litigation against the defendants is pending or likely; and (2) it is foreseeable that discarding the evidence would be prejudicial to the defendants." *Creazzo v. Medtronic, Inc.,* 903 A.2d 24, 29 (Pa.Super.2006) (original brackets omitted).

The 2012 Explanatory Comment preceding Pa.R.C.P. 4009.1, effective August 1, 2012, provides, in relevant part, as follows: As with all other discovery, electronically stored information is governed by a proportionality standard in order that discovery obligations are consistent with the just, speedy and inexpensive determination and resolution of litigation disputes. The proportionality standard requires the court, within the framework of the purpose of discovery of giving each party the opportunity to prepare its case, to consider: (i) the nature and scope of the litigation, including the importance and complexity of the issues and the amounts at stake; (ii) the relevance of electronically stored information and its importance to the court's adjudication in the given case; (iii) the cost, burden and delay that may be imposed on the parties to deal with electronically stored information; (iv) the ease of producing electronically stored information and whether substantially similar information is available with less burden; and (v) any other factors relevant under the circumstances.

Pa.R.C.P.2012 Explanatory Comment—Electronically Stored Information, *B. Proportionality Standard* (emphasis supplied).

Here, the trial court rendered its analysis using the proportionality standard:
In Pennsylvania, as with all discovery, the discovery of electronically stored information (e-discovery) is governed by a proportionality standard, which this Court has followed.[3] FN3. The Explanatory Comment—Electronically Stored Information to the Amendments of Rules 4009.1, 4009.11, 4009.12, 4009.21, 4009.23, and 4011 of the Pennsylvania Rules of Civil Procedure, which becomes effective August 1, 2012, restates the proportionality standard that this Court applied in the context of discovery of electronically stored information at issue to the circumstances of this case.

> To begin, we consider the nature and scope of the litigation, including the importance and complexity of the issues and the amounts at stake. This legal dispute was brought by a large established multi-location personal fitness training business attempting to derail a small start-up competing business. We find that the amounts at stake involved [sic] are relatively minor and that the level of importance and complexity of the issues concerning the electronically stored information do not weigh in favor of granting any discovery sanction.
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> Furthermore, this trial Court never concluded, as [PTSI] complains on appeal, that [PTSI] is not entitled to a spoliation inference or other sanction simply because [PTSI] cannot now specifically show the content that [Haley and Piroli] destroyed. People regularly delete electronically stored information and other things every day that are not evidence relevant to pending or foreseeable litigation even though the content cannot be specifically shown. The doctrine of spoliation only applies to the improper intentional destruction of evidence that could be relevant to the case. Here, there has been no showing that the innocent clean-up of personal electronic devices to allow them to function was unusual, unreasonable or improper under the circumstances.

PTSI, Inc., v. Haley, 2013 PA.Super. 130, 71 A.3d 304, 315-317 (2013).

In this matter, because Plaintiffs' claim that Defendants failed to provide timely and complete responses to discovery, the Court must consider whether Plaintiffs have demonstrated any prejudice as a result of the alleged failure. See, *Tri-State Asphalt Corporation v. Department of Transportation*, 875 A.2d 1199, 1202-03 (Pa.Cmwlth. 2005); *A-1 Discount Company v. Nardi,* 735 A.2d 121,124 (Pa.Super. 1999); accord, non-precedential decision, *Wilson v. Erie Insurance Group*, 2019 WL 2093298 (Pa.Super. 2019).

The Facts of this Matter Regarding Alleged Spoliation of Evidence:

While Plaintiffs did not file their Complaint until May 14, 2021, they claim notice to the Defendants by letter as early as May 7, 2020. The Court finds that the Rhoads & Sinon,LLP server was shut down in February of 2019. Thus, any potential effort by Rhoads & Sinon, LLP to recover electronic discovery information from its decommissioned server as a result of that notice would have occurred no sooner than fifteen (15) months after the server was decommissioned. While Plaintiffs' expert testified that "sooner is better," neither he nor Defendants' expert could offer any opinion to a reasonable degree of certainty as to whether an

earlier effort to recover data from the decommissioned server would have been more successful. Further, Plaintiffs made no showing that any of the data lost from the server when it was restored would have been material to this litigation. Thus, the Court has no evidence upon which to base a finding that Defendants had any notice of this litigation before the server was decommissioned, and little evidence upon which to base a finding that an earlier effort to recover electronic discovery information from the decommissioned server would have been more successful, and no evidence upon which to base a finding that Defendants intentionally did anything that resulted in a loss of data, and no evidence upon which to base a finding that the data lost from the server would have been material to this litigation. Because the Court lacks sufficient evidence upon which to base a finding on any of the prongs considered in *PTSI, Inc., v. Haley*, 2013 PA.Super. 130, 71 A.3d 304 (2013), Plaintiffs' Motion for Sanctions related to alleged spoliation of evidence shall be denied.

The American Rule of Attorney Fees:

In the matter of *Sutch v. Roxborough Memorial Hospital*, 2016 PA.Super. 126, 142 A.3d 38, 69 (Pa.Super. 2016), our Superior Court observed that:

> "Pennsylvania generally adheres to the American Rule, under which a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties, or some other established exception." *Samuel–Bassett v. Kia Motors America, Inc.,* 613 Pa. 371, 464, 34 A.3d 1, 57 (2011). Pennsylvania courts can award counsel fees to the prevailing party but only "when authorized by statute or rule of court, upon agreement of the parties, or pursuant to some other recognized case law exception." *Olympus Corp. v. Canady,* 962 A.2d 671, 677 (Pa.Super.2008).

Pa.R.C.P. 4019(g)(1):

> Rule 4009(g)(1) of the Pennsylvania Rules of Civil Procedure provides that:
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> Except as otherwise provided in these rules, if following the refusal, objection or failure of a party or person to comply with any provision of this chapter, the court, after opportunity for hearing, enters an order compelling compliance and the order is not obeyed, the court on a subsequent motion for sanctions may, if the motion is granted, require the party or deponent whose conduct necessitated the motions or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses, including attorney's fees, incurred in obtaining the order of compliance and the order for sanctions, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

In the matter of *Jerry Pitell Company v. Penn State Construction Company*, 277 Pa.Super. 575, 419 A.2d 1299, Lycoming County Judge (later President Judge) Thomas Raup imposed sanctions pursuant to Pa.R.C.P. 4019. Our Superior Court reversed, observing that:

> As a general rule, although sanctions under Rule 4019 lie largely within the discretion of the court, sanctions should not be imposed absent willful disregard or disobedience of an order of court or an obligation expressly stated in the rules. *Pompa v. Hojancki,* 445 Pa. 42, 281 A.2d 886 (1971); *Lapp v. Titus,* 224 Pa.Super 150, 302 A.2d 366 (Pa.Super. 1973).

Plaintiffs' Claim for Sanctions Pursuant to Rule 4019(g)(1):

The Court has reviewed the Opinion and Order of Judge Linhardt dated September 18, 2023, and his scholarly twenty-one (21) page Opinion and Order of May 13, 2024. In the Order of September 18, 2023, Judge Linhardt denied Defendants' Motion to Determine the Sufficiency of Plaintiff Michael J. Early's Answer and Objections to Defendant's First Request for Admissions; and granted in part and denied in part Plaintiffs' Motion to Compel Answers to Plaintiffs' First Set of Interrogatories and Request for Admissions; and granted in part and denied in part Plaintiffs' Motion to Compel Answers to Plaintiffs' Second Set of Discovery Requests; and granted in part and denied in part Plaintiffs' Motion to Reconvene the deposition of Stephanie DiVittore. In footnote 70, Judge Linhardt specifically declined to award

attorney's fees. In the Order of May 13, 2024, Judge Linhardt denied each any every claim for relief by either party.

In support of Plaintiffs Supplemental Motion for Sanctions and to Extend Discovery Deadline, filed August 30, 2024, Plaintiffs introduced testimony that Plaintiffs have invested attorney time in this matter related to discovery, in the amount of $232,234.50. What was lacking was evidence upon which the Court could base a finding that the professional fees were invested in seeking compliance with either of the two (2) discovery Orders imposed by Judge Linhardt, as distinguished from discovery efforts in general. At the continued hearing conducted on May 12, 2025, Plaintiffs introduced the testimony of Mark A. Sabados, Esquire. Attorney Sabados identified P-2A, as billing statements for the period of February 2023 to April 2025 (N.T. 8). Attorney Sabados testified that the fees reflected in Exhibit P-2A total $232,234.50, and that, with regard to the activities reflected in P-2A, he regarded all of them as "related to any work done regarding Defendants' not producing discovery or not fully answering discovery." (N.T. 10-11). In response to questioning by the Court, Attorney Sabados testified that his examination of P-2A was not to identify activities related to seeking complete answers to discovery as opposing to seeking compliance with a discovery order (N.T. 12). In response to a statement by the Court to the effect that the activities reflected in P-2A appear to involve both seeking complete answers to discovery and seeking compliance with a discovery order, Attorney Sabados answered "I think you're right." (N.T. 14).

Rule 4019(g)(1) expressly states that, "if following the refusal, objection or failure of a party or person to comply with any provision of this chapter, the court, after opportunity for hearing, enters an order compelling compliance and the order is not obeyed", "that the court, on a subsequent motion for sanctions, may, if the motion is granted, require the party or deponent whose conduct necessitated the motions or the party or attorney advising such conduct, or both of them to pay the moving party the reasonable expenses, including attorney's fees, incurred in obtaining the order of compliance and the order for sanctions. Thus, the plain language of the Rule suggests a process of several steps, including: (1) failure to provide discovery consistent with Chapter 4000; (2) a motion to compel with hearing; (3) an order compelling compliance; (4) failure to comply with order; (5) subsequent motion for sanctions. It is obvious that

Plaintiffs have invested very significant professional time in discovery efforts. It is not clear, based upon this record, whether any professional time was invested in seeking compliance with discovery orders, as opposed to simply seeking answers to discovery. For that reason, Plaintiffs' Motion for Sanctions pursuant to Rule 4009(g)(1) will be denied.

The Court notes that Pa.R.C.P. 4019(g)(2) permits an award of fees for the successful defense of a claim under 4019(g)(1), "unless the Court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust." Further, the Court notes the extensive efforts by Plaintiffs to secure complete answers to discovery. With regard to the first deposition of Stephanie DiVittore, Judge Linhardt observed that:

> Defendants interrupted the testimony on more than three quarters of the pages of the transcript by interposing objections, instructing the witness not to answer questions, and otherwise providing commentary on questions and exhibits. Effectively and clearly intentionally, this prevented counsel from pursuing his line of inquiry and the deposition from taking its natural course.

Within the Order of September 18, 2023, Judge Linhardt directed Defendants to find their decommissioned computer servers and locate relevant information. It is very difficult to understand why Defendant did not do so, without need of a Court Order. The Court finds that the failure of Defendants to provide full and complete responses to discovery, and the conduct of counsel for the Defendants at the first deposition of Stephanie DiVittore, are "other circumstances" which "make an award of expenses unjust" under Pa.R.C.P. 4019(g)(2).

42 PA.C.S.A. SECTION 2503(7):

Section 2503(7) of Pa.C.S.A. provides that "the following participants shall be entitled to a reasonable counsel fee as part of the taxable costs of the matter:

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(7) A participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of a matter."

Defendants' Counterclaim for Sanctions Pursuant to 42 Pa.C.S.A. Section 2503(7):

Defendants appear to suggest that they are entitled to an award of attorney's fees for complying with the Opinion and Order of the Honorable Eric R. Linhardt dated September 18, 2023. Their claim is not compelling. Judge Linhardt denied Defendants' Motion to Determine the Sufficiency of Plaintiff Michael J. Early's Answer and Objections to Defendant's First Request for Admissions; and granted in part and denied in part Plaintiffs' Motion to Compel Answers to Plaintiffs' First Set of Interrogatories and Request for Admissions,; and granted in part and denied in part Plaintiffs' Motion to Compel Answers to Plaintiffs' Second Set of Discovery Requests; and granted in part and denied in part Plaintiffs' Motion to Reconvene the deposition of Stephanie DiVittore.

Prior to the entry of Judge Linhardt's Order of September 18, 2023, Defendants' efforts to provide full and complete responses to Plaintiffs' discovery were inadequate. Since entry of that Order, Defendants have done far better. The deposition of Stephanie DiVittore was repeated, successfully. Defendants hired Precise, Inc. Its CEO, Peter Mansmann, gave detailed testimony regarding their efforts to recover electronically stored information (ESI) from the decommissioned server of Rhodes & Sinon. He testified to several meetings over many months in order to establish an ESI protocol (N.T. 32-33). Searches conducted under the ESI protocol resulted in the identification of 489 documents. In total, approximately 30,000 documents were reviewed or filtered (N.T. 35). Of the total 30,000 documents reviewed or filtered, 9,000 were identified as unlikely to be responsive to Plaintiffs' requests. Total billing to the Defendants from Precise, Inc., on this project was approximately $92,500 (N.T. 38).

The Court is in full agreement with the conclusion reached by Judge Loughran of the Court of Common Pleas of Westmoreland County in the matter of *Shevchik v. Zwergel*, 8 Pa. D.&C. 4th 66 (Westmoreland C.C.P. 1990), to the effect that "a claim pursuant to 42 Pa.C.S. Section 2503 is not properly raised at this time but should be raised at the conclusion of the underlying action, utilizing the record and history in the underlying action as a basis to support the claim." Therefore, the entry of this Opinion and Order will not prejudice either party from seeking relief pursuant to 42 Pa.C.S. Section 2503, by timely motion filed not later than thirty (30) days after conclusion of this matter by final order.

ORDER

And now, this 12th day of September, 2025, for the reasons more fully set forth above, it is Ordered and Directed as follows:

1. Plaintiffs' claim for sanctions for alleged spoliation of evidence asserted within Plaintiffs' Supplemental Motion for Sanctions and to Extend Discovery Deadline, filed August 30, 2024, is DENIED.
2. Plaintiffs' claim for sanctions for attorney's fees asserted within Plaintiffs' Supplemental Motion for Sanctions and to Extend Discovery Deadline, filed August 30, 2024, is DENIED.
3. Defendants' Countermotion for Sanctions, filed September 24, 2024, is DENIED.
4. Nothing set forth in this Order is intended to prejudice either party from seeking relief pursuant to 42 Pa.C.S. Section 2503, by timely motion filed not later than thirty (30) days after conclusion of this matter by final order. If either party files a timely motion, nothing set forth in this Opinion and Order will prejudice any such claim.

BY THE COURT,

William P. Carlucci, Judge

cc: Court Administrator
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