UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ROBERTO MATA,

Plaintiff,

22-cv-1461 (PKC)

-against-

OPINION AND ORDER
ON SANCTIONS

AVIANCA, INC.,

Defendant.
----------x

CASTEL, U.S.D.J.

In researching and drafting court submissions, good lawyers appropriately obtain assistance from junior lawyers, law students, contract lawyers, legal encyclopedias and databases such as Westlaw and LexisNexis. Technological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance. But existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings. Rule 11, Fed. R. Civ. P. Peter LoDuca, Steven A. Schwartz and the law firm of Levidow, Levidow & Oberman P.C. (the "Levidow Firm") (collectively, "Respondents") abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question.

Many harms flow from the submission of fake opinions.[1] The opposing party wastes time and money in exposing the deception. The Court's time is taken from other

[1] The potential mischief is demonstrated by an innocent mistake made by counsel for Mr. Schwartz and the Levidow Firm, which counsel promptly caught and corrected on its own. In the initial version of the brief in response to the Orders to Show Cause submitted to the Court, it included three of the fake cases in its Table of Authorities. (ECF 45.)

important endeavors. The client may be deprived of arguments based on authentic judicial precedents. There is potential harm to the reputation of judges and courts whose names are falsely invoked as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession and the American judicial system. And a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity.

The narrative leading to sanctions against Respondents includes the filing of the March 1, 2023 submission that first cited the fake cases. But if the matter had ended with Respondents coming clean about their actions shortly after they received the defendant's March 15 brief questioning the existence of the cases, or after they reviewed the Court's Orders of April 11 and 12 requiring production of the cases, the record now would look quite different. Instead, the individual Respondents doubled down and did not begin to dribble out the truth until May 25, after the Court issued an Order to Show Cause why one of the individual Respondents ought not be sanctioned.

For reasons explained and considering the conduct of each individual Respondent separately, the Court finds bad faith on the part of the individual Respondents based upon acts of conscious avoidance and false and misleading statements to the Court. (See, e.g., Findings of Fact ¶¶ 17, 20, 22-23, 40-41, 43, 46-47 and Conclusions of Law ¶¶ 21, 23-24.) Sanctions will therefore be imposed on the individual Respondents. Rule 11(c)(1) also provides that "[a]bsent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its . . . associate, or employee." Because the Court finds no exceptional circumstances, sanctions will be jointly imposed on the Levidow Firm. The sanctions are "limited to what

suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Rule 11(c)(4).

Set forth below are this Court's Findings of Fact and Conclusions of Law following the hearing of June 8, 2023.

FINDINGS OF FACT

1. Roberto Mata commenced this action on or about February 2, 2022, when he filed a Verified Complaint in the Supreme Court of the State of New York, New York County, asserting that he was injured when a metal serving cart struck his left knee during a flight from El Salvador to John F. Kennedy Airport. (ECF 1.) Avianca removed the action to federal court on February 22, 2022, asserting federal question jurisdiction under the Convention for the Unification of Certain Rules Relating to International Carriage by Air, Done at Montreal, Canada, on 28 May 1999, reprinted in S. Treaty Doc. 106-45 (1999) (the "Montreal Convention"). (ECF 1.)

2. Steven A. Schwartz of the Levidow Firm had been the attorney listed on the state court complaint. But upon removal from state court to this Court, Peter LoDuca of the Levidow Firm filed a notice of appearance on behalf of Mata on March 31, 2022. (ECF 8.) Mr. Schwartz is not admitted to practice in this District. Mr. LoDuca has explained that because Mr. Schwartz is not admitted, Mr. LoDuca filed the notice of appearance while Mr. Schwartz continued to perform all substantive legal work. (LoDuca May 25 Aff't ¶¶ 3-4 (ECF 32); Schwartz May 25 Aff't ¶ 4 (ECF 32-1).)

3. On January 13, 2023, Avianca filed a motion to dismiss urging that Mata's claims are time-barred under the Montreal Convention. (ECF 16.)

4. On January 18, 2023, a letter signed by Mr. Schwartz and filed by Mr. LoDuca requested a one-month extension to respond to the motion, from February 3, 2023, to March 3, 2023. (ECF 19.) The letter stated that "the undersigned will be out of the office for a previously planned vacation" and cited a need for "extra time to properly respond to the extensive motion papers filed by the defendant." (Id.) The Court granted the request. (ECF 20.)

5. On March 1, 2023, Mr. LoDuca filed an "Affirmation in Opposition" to the motion to dismiss (the "Affirmation in Opposition").[2] (ECF 21.) The Affirmation in Opposition cited and quoted from purported judicial decisions that were said to be published in the Federal Reporter, the Federal Supplement and Westlaw. (Id.) Above Mr. LoDuca's signature line, the Affirmation in Opposition states, "I declare under penalty of perjury that the foregoing is true and correct." (Id.)

6. Although Mr. LoDuca signed the Affirmation in Opposition and filed it on ECF, he was not its author. (Tr. 8-9.) It was researched and written by Mr. Schwartz. (Tr. 8.) Mr. LoDuca reviewed the affirmation for style, stating, "I was basically looking for a flow, make sure there was nothing untoward or no large grammatical errors." (Tr. 9.) Before executing the Affirmation, Mr. LoDuca did not review any judicial authorities cited in his affirmation. (Tr. 9.) There is no claim or evidence that he made any inquiry of Mr. Schwartz as to the nature and extent of his research or whether he had found contrary precedent. Mr. LoDuca simply relied on a belief that work produced by Mr. Schwartz, a colleague of more than twenty-five years, would be reliable. (LoDuca May 25 Aff't ¶¶ 6-7.) There was no claim made by any Respondent in response to the Court's Orders to Show Cause that Mr. Schwartz had prior experience with the

[2] Plaintiff's opposition was submitted as an "affirmation" and not a memorandum of law. The Local Civil Rules of this District require that "the cases and other authorities relied upon" in opposition to a motion be set forth in a memorandum of law. Local Civil Rule 7.1(a)(2), 7.1(b). An affirmation is a creature of New York state practice that is akin to a declaration under penalty of perjury. Compare N.Y. C.P.L.R. 2106 with 28 U.S.C. § 1746.

Montreal Convention or bankruptcy stays. Mr. Schwartz has stated that "my practice has always been exclusively in state court . . . ." (Schwartz June 6 Decl. ¶ 6.) Respondents' memorandum of law asserts that Mr. Schwartz attempted "to research a federal bankruptcy issue with which he was completely unfamiliar." (ECF 49 at 21.)

7. Avianca filed a five-page reply memorandum on March 15, 2023. (ECF 24.) It included the following statement: "Although Plaintiff ostensibly cites to a variety of cases in opposition to this motion, the undersigned has been unable to locate most of the case law cited in Plaintiff's Affirmation in Opposition, and the few cases which the undersigned has been able to locate do not stand for the propositions for which they are cited." (ECF 24 at 1.) It impliedly asserted that certain cases cited in the Affirmation in Opposition were non-existent: "Plaintiff does not dispute that this action is governed by the Montreal Convention, and Plaintiff has not cited any existing authority holding that the Bankruptcy Code tolls the two-year limitations period or that New York law supplies the relevant statute of limitations." (ECF 24 at 1; emphasis added.) It then detailed by name and citation seven purported "decisions" that Avianca's counsel could not locate, and set them apart with quotation marks to distinguish a non-existent case from a real one, even if cited for a proposition for which it did not stand. (ECF 24.)

8. Despite the serious nature of Avianca's allegations, no Respondent sought to withdraw the March 1 Affirmation or provide any explanation to the Court of how it could possibly be that a case purportedly in the Federal Reporter or Federal Supplement could not be found.

9. The Court conducted its own search for the cited cases but was unable to locate multiple authorities cited in the Affirmation in Opposition.

10. Mr. LoDuca testified at the June 8 sanctions hearing that he received Avianca's reply submission and did not read it before he forwarded it to Mr. Schwartz. (Tr. 10.) Mr. Schwartz did not alert Mr. LoDuca to the contents of the reply. (Tr. 12.)

11. As it was later revealed, Mr. Schwartz had used ChatGPT, which fabricated the cited cases. Mr. Schwartz testified at the sanctions hearing that when he reviewed the reply memo, he was "operating under the false perception that this website [i.e., ChatGPT] could not possibly be fabricating cases on its own." (Tr. at 31.) He stated, "I just was not thinking that the case could be fabricated, so I was not looking at it from that point of view." (Tr. at 35.) "My reaction was, ChatGPT is finding that case somewhere. Maybe it's unpublished. Maybe it was appealed. Maybe access is difficult to get. I just never thought it could be made up." (Tr. at 33.)

12. Mr. Schwartz also testified at the hearing that he knew that there were free sites available on the internet where a known case citation to a reported decision could be entered and the decision displayed. (Tr. 23-24, 28-29.) He admitted that he entered the citation to "Varghese" but could not find it:

> THE COURT: Did you say, well they gave me part of Varghese, let me look at the full Varghese decision?
>
> MR. SCHWARTZ: I did.
>
> THE COURT: And what did you find when you went to look up the full Varghese decision?
>
> MR. SCHWARTZ: I couldn't find it.
>
> THE COURT: And yet you cited it in the brief to me.
>
> MR. SCHWARTZ: I did, again, operating under the false assumption and disbelief that this website could produce completely fabricated cases. And if I knew that, I obviously never would have submitted these cases.

(Tr. 28.)[3]

13. On April 11, 2023, the Court issued an Order directing Mr. LoDuca to file an affidavit by April 18, 2023[4] that annexed copies of the following decisions cited in the Affirmation in Opposition: Varghese v. China Southern Airlines Co., Ltd., 925 F.3d 1339 (11th Cir. 2019); Shaboon v. Egyptair, 2013 IL App (1st) 111279-U (Ill. App. Ct. 2013); Peterson v. Iran Air, 905 F. Supp. 2d 121 (D.D.C. 2012); Martinez v. Delta Airlines, Inc., 2019 WL 4639462 (Tex. App. Sept. 25, 2019); Estate of Durden v. KLM Royal Dutch Airlines, 2017 WL 2418825 (Ga. Ct. App. June 5, 2017); Ehrlich v. American Airlines, Inc., 360 N.J. Super. 360 (App. Div. 2003); Miller v. United Airlines, Inc., 174 F.3d 366, 371-72 (2d Cir. 1999); and In re Air Crash Disaster Near New Orleans, LA, 821 F.2d 1147, 1165 (5th Cir. 1987). (ECF 25.) The Order stated: "Failure to comply will result in dismissal of the action pursuant to Rule 41(b), Fed. R. Civ. P." (ECF 25.)

14. On April 12, 2023, the Court issued an Order that directed Mr. LoDuca to annex an additional decision, which was cited in the Affirmation in Opposition as Zicherman v. Korean Air Lines Co., Ltd., 516 F.3d 1237, 1254 (11th Cir. 2008). (ECF 27.)

15. Mr. Schwartz understood the import of the Orders of April 11 and 12 requiring the production of the actual cases: "I thought the Court searched for the cases [and] could not find them . . . ." (Tr. 36.)

16. Mr. LoDuca requested an extension of time to respond to April 25, 2023. (ECF 26.) The letter stated: "This extension is being requested as the undersigned is currently

[3] Mr. Schwartz's testimony appears to acknowledge that he knew that "Varghese" could not be found before the March 1 Affirmation was filed citing the fake case. His answer also could refer to the April 25 Affidavit submitting the actual cases. Either way, he knew before making a submission to the Court that the full text of "Varghese" could not be found but kept silent.

[4] The Court's Order directed the filing to be made by April 18, 2022, not 2023.

out of the office on vacation and will be returning April 18, 2023." (Id.) Mr. LoDuca signed the letter and filed it on ECF. (Id.)

17. Mr. LoDuca's statement was false and he knew it to be false at the time he made the statement. Under questioning by the Court at the sanctions hearing, Mr. LoDuca admitted that he was not out of the office on vacation. (Tr. 13-14, 19.) Mr. LoDuca testified that "[m]y intent of the letter was because Mr. Schwartz was away, but I was aware of what was in the letter when I signed it. . . . I just attempted to get Mr. Schwartz the additional time he needed because he was out of the office at the time." (Tr. 44.) The Court finds that Mr. LoDuca made a knowingly false statement to the Court that he was "out of the office on vacation" in a successful effort to induce the Court to grant him an extension of time. (ECF 28.) The lie had the intended effect of concealing Mr. Schwartz's role in preparing the March 1 Affirmation and the April 25 Affidavit and concealing Mr. LoDuca's lack of meaningful role in confirming the truth of the statements in his affidavit. This is evidence of the subjective bad faith of Mr. LoDuca.

18. Mr. LoDuca executed and filed an affidavit on April 25, 2023 (the "April 25 Affidavit") that annexed what were purported to be copies or excerpts of all but one of the decisions required by the Orders of April 11 and 12. Mr. LoDuca stated "[t]hat I was unable to locate the case of Zicherman v. Korean Air Lines Co., Ltd., 516 F.3d 1237 (11th Cir. 2008) which was cited by the Court in Varghese." (ECF 29.)

19. The April 25 Affidavit stated that the purported decisions it annexed "may not be inclusive of the entire opinions but only what is made available by online database." (Id. ¶ 4.) It did not identify any "online database" by name. It also stated "[t]hat the opinion in

Shaboon v. Egyptair 2013 IL App (1st) 111279-U (Ill. App. Ct. 2013) is an unpublished opinion." (Id. ¶ 5.)

20. In fact, Mr. LoDuca did not author the April 25 Affidavit, had no role in its preparation and no knowledge of whether the statements therein were true. Mr. Schwartz was the attorney who drafted the April 25 Affidavit and compiled its exhibits. (Tr. 38.)

21. At the sanctions hearing, Mr. Schwartz testified that he prepared Mr. LoDuca's affidavit, walked it into "his office" twenty feet away, and "[h]e looked it over, and he signed it." (Tr. 41.)[5] There is no evidence that Mr. LoDuca asked a single question. Mr. LoDuca had not been provided with a draft of the affidavit before he signed it. Mr. LoDuca knew that Mr. Schwartz did not practice in federal court and, in response to the Order to Show Cause, he has never contended that Mr. Schwartz had experience with the Montreal Convention or bankruptcy stays. Indeed, at the sanctions hearing, Mr. Schwartz testified that he thought a citation in the form "F.3d" meant "federal district, third department." (Tr. 33.)[6]

22. Facially, the April 25 Affidavit did not comply with the Court's Orders of April 11 and 12 because it did not attach the full text of any of the "cases" that are now admitted to be fake. It attached only excerpts of the "cases." And the April 25 Affidavit recited that one "case," "Zicherman v. Korean Air Lines Co., Ltd., 516 F.3d 1237 (11th Cir. 2008)", notably with a citation to the Federal Reporter, could not be found. (ECF 29.) No explanation was offered.

23. Regarding the Court's Orders of April 11 and 12 requiring an affidavit from Mr. LoDuca, Mr. LoDuca testified, "Me, I didn't do anything other than turn over to Mr.

[5] The declaration of Mr. Schwartz claimed that the April 25 Affidavit was executed in his own office, not Mr. LoDuca's office. (Schwartz June 6 Dec. ¶ 27 ("Mr. LoDuca then came into my office and signed the affidavit in front of me . . . .").)

[6] The Court finds this claim from a lawyer who has practiced in the litigation arena for approximately 30 years to be not credible and was contradicted by his later testimony. (See Tr. 34 ("THE COURT: And F.3d is the third edition of the Federal Reporter, correct? MR. SCHWARTZ: Right.").)

Schwartz to locate the cases that [the Court] had requested." (Tr. 13.) He testified that he read the April 25 Affidavit and "saw the cases that were attached to it. Mr. Schwartz had assured me that this was what he could find with respect to the cases. And I submitted it to the Court." (Tr. 14.) Mr. LoDuca had observed that the "cases" annexed to his April 25 Affidavit were not being submitted in their entirety, and explained that "I understood that was the best that Mr. Schwartz could find at the time based on the search that he or – the database that he had available to him." (Tr. 15.) Mr. LoDuca testified that it "never crossed my mind" that the cases were bogus. (Tr. 16.)

24. The Court reviewed the purported decisions annexed to the April 25 Affidavit, which have some traits that are superficially consistent with actual judicial decisions. The Court need not describe every deficiency contained in the fake decisions annexed to the April 25 Affidavit. It makes the following exemplar findings as to the three "decisions" that were purported to be issued by federal courts.

25. The "Varghese" decision is presented as being issued by a panel of judges on the United States Court of Appeals for the Eleventh Circuit that consisted of Judges Adalberto Jordan, Robin S. Rosenbaum and Patrick Higginbotham,[7] with the decision authored by Judge Jordan. (ECF 29-1.) It bears the docket number 18-13694. (Id.) "Varghese" discusses the Montreal Convention's limitations period and the purported tolling effects of the automatic federal bankruptcy stay, 11 U.S.C. § 362(a). (ECF 29-1.)

26. The Clerk of the United States Court of Appeals for the Eleventh Circuit has confirmed that the decision is not an authentic ruling of the Court and that no party by the name of "Vargese" or "Varghese" has been party to a proceeding in the Court since the

[7] Judge Higginbotham is a Senior Judge of the United States Court of Appeals for the Fifth Circuit, not the Eleventh Circuit. Judges Jordan and Rosenbaum sit on the Eleventh Circuit.

institution of its electronic case filing system in 2010. A copy of the fake "Varghese" opinion is attached as Appendix A.

27. The "Varghese" decision shows stylistic and reasoning flaws that do not generally appear in decisions issued by United States Courts of Appeals. Its legal analysis is gibberish. It references a claim for the wrongful death of George Scaria Varghese brought by Susan Varghese. (Id.) It then describes the claims of a plaintiff named Anish Varghese who, due to airline overbooking, was denied boarding on a flight from Bangkok to New York that had a layover in Guangzhou, China. (Id.) The summary of the case's procedural history is difficult to follow and borders on nonsensical, including an abrupt mention of arbitration and a reference to plaintiff's decision to file for Chapter 7 bankruptcy as a tactical response to the district court's dismissal of his complaint. (Id.) Without explanation, "Varghese" later references the plaintiff's Chapter 13 bankruptcy proceeding. (Id.) The "Varghese" defendant is also said to have filed for bankruptcy protection in China, also triggering a stay of proceedings. (Id.) Quotation marks are often unpaired. The "Varghese" decision abruptly ends without a conclusion.

28. The "Varghese" decision bears the docket number 18-13694, which is associated with the case George Cornea v. U.S. Attorney General, et al. The Federal Reporter citation for "Varghese" is associated with J.D. v Azar, 925 F.3d 1291 (D.C. Cir. 2019).

29. The "Varghese" decision includes internal citations and quotes from decisions that are themselves non-existent:

a. It cites to "Holliday v. Atl. Capital Corp., 738 F.2d 1153 (11th Cir. 1984)", which does not exist. The case appearing at that citation is Gibbs v. Maxwell House, 738 F.2d 1153 (11th Cir. 1984).

b. It cites to "Gen. Wire Spring Co. v. O'Neal Steel, Inc., 556 F.2d 713, 716 (5th Cir. 1977)", which does not exist. The case appearing at that citation is United States v. Clerkley, 556 F.2d 709 (4th Cir. 1977).

c. It cites to "Hyatt v. N. Cent. Airlines, 92 F.3d 1074 (11th Cir. 1996)", which does not exist. There are two brief orders appearing at 92 F.3d 1074 issued by the Eleventh Circuit in other cases.

d. It cites to "Zaunbrecher v. Transocean Offshore Deepwater Drilling, Inc., 772 F.3d 1278, 1283 (11th Cir. 2014)", which does not exist. The case appearing at that citation is Witt v. Metropolitan Life Ins. Co., 772 F.3d 1269 (11th Cir. 2014).

e. It cites to "Zicherman v. Korean Air Lines Co., 516 F.3d 1237, 1254 (11th Cir. 2008)", which does not exist as cited. A Supreme Court decision with the same name, Zicherman v. Korean Air Lines Co., 516 U.S. 217 (1996), held that the Warsaw Convention does not permit a plaintiff to recover damages for loss of society resulting from the death of a relative, and did not discuss the federal bankruptcy stay. The Federal Reporter citation for "Zicherman" is for Miccosukee Tribe v. United States, 516 F.3d 1235 (11th Cir. 2008).

f. It cites to "In re BDC 56 LLC, 330 B.R. 466, 471 (Bankr. D.N.H. 2005)", which does not exist as cited. A Second Circuit decision with the same name, In re BDC 56 LLC, 330 F.3d 111 (2d Cir. 2003), did not discuss the federal bankruptcy stay. The case appearing at the Bankruptcy Reporter

citation is In re 652 West 160th LLC, 330 B.R. 455 (Bankr. S.D.N.Y. 2005).

g. Other "decisions" cited in "Varghese" have correct names and citations but do not contain the language quoted or support the propositions for which they are offered. In re Rimstat, Ltd., 212 F.3d 1039 (7th Cir. 2000), is a decision relating to Rule 11 sanctions for attorney misconduct and does not discuss the federal bankruptcy stay. In re PPI Enterprises (U.S.), Inc., 324 F.3d 197 (3d Cir. 2003), does not discuss the federal bankruptcy stay, and is incorrectly identified as an opinion of the Second Circuit. Begier v. I.R.S., 496 U.S. 53 (1990), does not discuss the federal bankruptcy stay, and addresses whether a trustee in bankruptcy may recover certain payments made by the debtor to the Internal Revenue Service. Kaiser Steel Corp. v. W. S. Ranch Co., 391 U.S. 593 (1968) (per curiam), does not discuss the federal bankruptcy stay, and held that a federal proceeding should have been stayed pending the outcome of New Mexico state court proceedings relating to the interpretation of the state constitution. El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng, 525 U.S. 155 (1999), does not contain the quoted language discussing the purpose of the Montreal Convention. In re Gandy, 299 F.3d 489 (5th Cir. 2002), affirmed a bankruptcy court's denial of a motion to compel arbitration.

30. The April 25 Affidavit annexes a decision identified as "Miller v. United Airlines, Inc., 174 F.3d 366 (2d Cir. 1999)." (ECF 29-7.) As submitted, the "Miller" decision seems to be an excerpt from a longer decision and consists only of two introductory paragraphs.

(Id.) It bears the docket number 98-7926, and purports to be written by Judge Barrington D. Parker of the Second Circuit, with Judges Joseph McLaughlin and Dennis Jacobs also on the panel. (Id.) It abruptly ends with the phrase "Section 11 of the Bankruptcy Act of 1898". (Id.)

31. "Miller" purports to apply the Warsaw Convention to a claim arising out of the real and tragic 1991 crash of United Airlines Flight 585, which was a domestic flight from Denver to Colorado Springs.[8] "Miller" references a Chapter 11 bankruptcy petition filed by United Airlines on December 4, 1992. (Id.) There is no public record of any United Airlines bankruptcy proceeding in or around that time.[9] (Id.) "Miller" identifies Alberto R. Gonzales, purportedly from the law firm of Curtis, Mallet-Prevost, Colt & Mosle LLP, as one of the attorneys for the defendant. (Id.) Alberto R. Gonzales is the name of the former United States Attorney General, who served from 2005 to 2007.[10]

32. The "Miller" decision does not exist. Second Circuit docket number 98-7926 is associated with the case Vitale v. First Fidelity, which was assigned to a panel consisting of Judges Richard Cardamone, Amalya Kearse and Chester Straub. The Federal Reporter citation for "Miller" is to Greenleaf v. Garlock, Inc., 174 F.3d 352 (3d Cir. 1999).

33. The April 25 Affidavit also annexes a decision identified as "Petersen v. Iran Air, 905 F. Supp. 2d 121 (D.D.C. 2012)", which bears an additional citation to 2012 U.S. Dist. LEXIS 17409. (ECF 29-3.) It is identified as a decision by Judge Reggie B. Walton and has the docket number 10-0542. (Id.) "Petersen" appears to confuse the District of Columbia

[8] See National Transportation Safety Board, "Aircraft Accident Report: Uncontrolled Descent and Collision With Terrain, United Airlines Flight 585," https://www.ntsb.gov/investigations/AccidentReports/Reports/AAR0101.pdf (last accessed June 21, 2023).

[9] It appears that United Airlines filed for Chapter 11 bankruptcy protection in 2002. See Edward Wong, "Airline Shock Waves: The Overview; Bankruptcy Case Is Filed by United," N.Y. Times, Dec. 10, 2002, Sec. A p. 1, https://www.nytimes.com/2002/12/10/business/airline-shock-waves-the-overview-bankruptcy-case-is-filed-by-united.html (last accessed June 21, 2023).

[10] See, e.g., https://georgewbush-whitehouse.archives.gov/government/gonzales-bio html (last accessed June 21, 2023).

with the state of Washington. (Id. ("Therefore, Petersen's argument that the state courts of Washington have concurrent jurisdiction is unavailing.").) As support for its legal conclusion, "Petersen" cites itself as precedent: "'Therefore, the Court has concurrent jurisdiction with any other court that may have jurisdiction under applicable law, including any foreign court.' (Petersen v. Iran Air, 905 F. Supp. 2d 121, 126 (D.D.C. 2012))". (ECF 29-3.)

34. The "Petersen" decision does not exist. Docket number 10-cv-542 (D.D.C.) is associated with the case Cummins-Allison Corp. v. Kappos, which was before Judge Ellen S. Huvelle. The Federal Supplement citation is to United States v. ISS Marine Services, 905 F. Supp. 2d 121 (D.D.C. 2012), a decision by Judge Beryl A. Howell. The Lexis citation is to United States v. Baker, 2012 U.S. Dist. LEXIS 17409 (W.D. Mich. Feb. 13, 2012), in which Judge Janet T. Neff adopted the Report and Recommendation of a Magistrate Judge.

35. The "Shaboon", "Martinez" and "Durden" decisions contain similar deficiencies.

36. Respondents have now acknowledged that the "Varghese", "Miller", "Petersen", "Shaboon", "Martinez" and "Durden" decisions were generated by ChatGPT and do not exist. (See, e.g., ECF 32, 32-1.)

37. Mr. Schwartz has endeavored to explain why he turned to ChatGPT for legal research. The Levidow Firm primarily practices in New York state courts. (Schwartz June 6 Decl. ¶ 10; Tr. 45.) It uses a legal research service called Fastcase and does not maintain Westlaw or LexisNexis accounts. (Tr. 22-23.) When Mr. Schwartz began to research the Montreal Convention, the firm's Fastcase account had limited access to federal cases. (Schwartz June 6 Decl. ¶ 12; Tr. 24.) "And it had occurred to me that I heard about this new site which I assumed -- I falsely assumed was like a super search engine called ChatGPT, and that's what I

used." (Tr. 24; see also Schwartz June 6 Decl. ¶ 15.) Mr. Schwartz had not previously used ChatGPT and became aware of it through press reports and conversations with family members. (Schwartz June 6 Decl. ¶ 14.)

38. Mr. Schwartz testified that he began by querying ChatGPT for broad legal guidance and then narrowed his questions to cases that supported the argument that the federal bankruptcy stay tolled the limitations period for a claim under the Montreal Convention. (Tr. 25-27.) ChatGPT generated summaries or excerpts but not full "opinions." (Tr. 27 & ECF 46-1; Schwartz June 6 Decl. ¶ 19.)

39. The June 6 Schwartz Declaration annexes the history of Mr. Schwartz's prompts to ChatGPT and the chatbot's responses. (ECF 46-1.) His first prompt stated, "argue that the statute of limitations is tolled by bankruptcy of defendant pursuant to montreal convention". (Id. at 2.) ChatGPT responded with broad descriptions of the Montreal Convention, statutes of limitations and the federal bankruptcy stay, advised that "[t]he answer to this question depends on the laws of the country in which the lawsuit is filed"[11] and then stated that the statute of limitations under the Montreal Convention is tolled by a bankruptcy filing. (Id. at 2-3.) ChatGPT did not cite case law to support these statements. Mr. Schwartz then entered various prompts that caused ChatGPT to generate descriptions of fake cases, including "provide case law in support that statute of limitations is tolled by bankruptcy of defendant under montreal convention", "show me specific holdings in federal cases where the statute of limitations was tolled due to bankruptcy of the airline", "show me more cases" and "give me some cases where te [sic] montreal convention allowed tolling of the statute of limitations due to bankruptcy". (Id.

[11] In fact, courts have generally held that the Montreal Convention seeks to create uniformity in the limitations periods enforced across its signatory countries. See, e.g., Ireland v. AMR Corp., 20 F. Supp. 3d 341, 347 (E.D.N.Y. 2014) (citing Fishman v. Delta Air Lines, Inc., 132 F.3d 138, 144 (2d Cir. 1998)).

at 2, 10, 11.) When directed to "provide case law", "show me specific holdings", "show me more cases" and "give me some cases", the chatbot complied by making them up.

40. At the time that he prepared the Affirmation in Opposition, Mr. Schwartz did not have the full text of any "decision" generated by ChatGPT. (Tr. 27.) He cited and quoted only from excerpts generated by the chatbot. (Tr. 27.)

41. In his affidavit filed on May 25, Mr. Schwartz stated that he relied on ChatGPT "to supplement the legal research performed." (ECF 32-1 ¶ 6; emphasis added).) He also stated that he "greatly regrets having utilized generative artificial intelligence to supplement the legal research performed herein . . . ." (Id. ¶ 13; emphasis added.) But at the hearing, Mr. Schwartz acknowledged that ChatGPT was not used to "supplement" his research:

> THE COURT: Let me ask you, did you do any other research in opposition to the motion to dismiss other than through ChatGPT?
>
> MR. SCHWARTZ: Other than initially going to Fastcase and failing there, no.
>
> THE COURT: You found nothing on Fastcase.
>
> MR. SCHWARTZ: Fastcase was insufficient as to being able to access, so, no, I did not.
>
> THE COURT: You did not find anything on Fastcase?
>
> MR. SCHWARTZ: No.
>
> THE COURT: In your declaration in response to the order to show cause, didn't you tell me that you used ChatGPT to supplement your research?
>
> MR. SCHWARTZ: Yes.
>
> THE COURT: Well, what research was it supplementing?
>
> MR. SCHWARTZ: Well, I had gone to Fastcase, and I was able to authenticate two of the cases through Fastcase that ChatGPT had given me. That was it.

> THE COURT: But ChatGPT was not supplementing your research. It was your research, correct?
>
> MR. SCHWARTZ: Correct. It became my last resort. So I guess that's correct.

(Tr. 37-38.) Mr. Schwartz's statement in his May 25 affidavit that ChatGPT "supplemented" his research was a misleading attempt to mitigate his actions by creating the false impression that he had done other, meaningful research on the issue and did not rely exclusive on an AI chatbot, when, in truth and in fact, it was the only source of his substantive arguments.[12] These misleading statements support the Court's finding of subjective bad faith.

42. Following receipt of the April 25 Affirmation, the Court issued an Order dated May 4, 2023 directing Mr. LoDuca to show cause why he ought not be sanctioned pursuant to: (1) Rule 11(b)(2) & (c), Fed. R. Civ. P., (2) 28 U.S.C. § 1927, and (3) the inherent power of the Court, for (A) citing non-existent cases to the Court in his Affirmation in Opposition, and (B) submitting to the Court annexed to April 25 Affidavit copies of non-existent judicial opinions. (ECF 31.) It directed Mr. LoDuca to file a written response and scheduled a show-cause hearing for 12 p.m. on June 8, 2023. (Id.) Mr. LoDuca submitted an affidavit in response, which also annexed an affidavit from Mr. Schwartz. (ECF 32, 32-1.)

43. Mr. Schwartz made the highly dubious claim that, before he saw the first Order to Show Cause of May 4, he "still could not fathom that ChatGPT could produce multiple fictitious cases . . . ." (Schwartz June 6 Decl. ¶ 30.) He states that when he read the Order of May 4, "I realized that I must have made a serious error and that there must be a major flaw with

[12] Cf. Lewis Carroll, Alice's Adventures in Wonderland, 79 (Puffin Books ed. 2015) (1865):
"Take some more tea," the March Hare said to Alice, very earnestly.
"I've had nothing yet," Alice replied in an offended tone, "so I can't take more."
"You mean you can't take *less*," said the Hatter: "it's very easy to take *more* than nothing."

the search aspects of the ChatGPT program." (Schwartz June 6 Decl. ¶ 29.) The Court rejects Mr. Schwartz's claim because (a) he acknowledges reading Avianca's brief claiming that the cases did not exist and could not be found (Tr. 31-33); (b) concluded that the Court could not locate the cases when he read the April 11 and 12 Orders (Tr. 36-37); (c) had looked for "Varghese" and could not find it (Tr. 28); and (d) had been "unable to locate" "Zicherman" after the Court ordered its submission (Apr. 25 Aff't ¶ 3).

44. The Schwartz Affidavit of May 25 contained the first acknowledgement from any Respondent that the Affirmation in Opposition cited to and quoted from bogus cases generated by ChatGPT. (ECF 32-1.)

45. The Schwartz Affidavit of May 25 included screenshots taken from a smartphone in which Mr. Schwartz questioned ChatGPT about the reliability of its work (e.g., "Is Varghese a real case" and "Are the other cases you provided fake"). (ECF 32-1.) ChatGPT responded that it had supplied "real" authorities that could be found through Westlaw, LexisNexis and the Federal Reporter. (Id.) The screenshots are annexed as Appendix B to this Opinion and Order.

46. When those screenshots were submitted as exhibits to Mr. Schwartz's affidavit of May 25, he stated: "[T]he citations and opinions in question were provided by Chat GPT which also provided its legal source and assured the reliability of its content. Excerpts from the queries presented and responses provided are attached hereto." (Schwartz May 25 Aff't ¶ 8.) This is an assertion by Mr. Schwartz that he was misled by ChatGPT into believing that it had provided him with actual judicial decisions. While no date is given for the queries, the declaration strongly suggested that he questioned whether "Varghese" was "real" prior to either the March 1 Affirmation in Opposition or the April 25 Affidavit.

47. But Mr. Schwartz's declaration of June 6 offers a different explanation and interpretation, and asserts that those same ChatGPT answers confirmed his by-then-growing suspicions that the chatbot had been responding "without regard for the truth of the answers it was providing":

> Before the First OSC, however, I still could not fathom that ChatGPT could produce multiple fictitious cases, all of which had various indicia of reliability such as case captions, the names of the judges from the correct locations, and detailed fact patterns and legal analysis that sounded authentic. The First OSC caused me to have doubts. As a result, I asked ChatGPT directly whether one of the cases it cited, "*Varghese v. China Southern Airlines Co. Ltd*., 925 F.3d 1339 (11th Cir. 2009)," was a real case. Based on what I was beginning to realize about ChatGPT, I highly suspected that it was not. However, ChatGPT again responded that Varghese "does indeed exist" and even told me that it was available on Westlaw and LexisNexis, contrary to what the Court and defendant's counsel were saying. <u>This confirmed my suspicion that ChatGPT was not providing accurate information and was instead simply responding to language prompts without regard for the truth of the answers it was providing.</u> However, by this time the cases had already been cited in our opposition papers and provided to the Court.

(Schwartz June 6 Decl. ¶ 30; emphasis added.) These shifting and contradictory explanations, submitted even after the Court raised the possibility of Rule 11 sanctions, undermine the credibility of Mr. Schwartz and support a finding of subjective bad faith.

48. On May 26, 2023, the Court issued a supplemental Order directing Mr. Schwartz to show cause at the June 8 hearing why he ought not be sanctioned pursuant to Rule 11(b)(2) and (c), 28 U.S.C. § 1927 and the Court's inherent powers for aiding and causing the citation of non-existent cases in the Affirmation in Opposition, the submission of non-existent judicial opinions annexed to the April 25 Affidavit and the use of a false and fraudulent notarization in the April 25 Affidavit. (ECF 31.) The same Order directed the Levidow Firm to also show cause why it ought not be sanctioned and directed Mr. LoDuca to show cause why he

ought not be sanctioned for the use of a false or fraudulent notarization in the April 25 Affidavit. (Id.) The Order also directed the Respondents to file written responses. (Id.)

49. Counsel thereafter filed notices of appearance on behalf of Mr. Schwartz and the Levidow Firm, and, separately, on behalf of Mr. LoDuca. (ECF 34-36, 39-40.) Messrs. LoDuca and Schwartz filed supplemental declarations on June 6. (ECF 44-1, 46.) Thomas R. Corvino, who describes himself as the sole equity partner of the Levidow Firm, also filed a declaration. (ECF 47.)

50. On June 8, 2023, the Court held a sanctions hearing on the Order to Show Cause and the supplemental Order to Show Cause. After being placed under oath, Messrs. LoDuca and Schwartz responded to questioning from the Court and delivered prepared statements in which they expressed their remorse. Mr. Corvino, a member of the Levidow Firm, also delivered a statement.

51. At no time has any Respondent written to this Court seeking to withdraw the March 1 Affirmation in Opposition or advise the Court that it may no longer rely upon it.

CONCLUSIONS OF LAW

1. Rule 11(b)(2) states: "By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law . . . ."

2. "Under Rule 11, a court may sanction an attorney for, among other things, misrepresenting facts or making frivolous legal arguments." Muhammad v. Walmart Stores East, L.P., 732 F.3d 104, 108 (2d Cir. 2013) (per curiam).

3. A legal argument may be sanctioned as frivolous when it amounts to an "'abuse of the adversary system . . . .'" Salovaara v. Eckert, 222 F.3d 19, 34 (2d Cir. 2000) (quoting Mareno v. Rowe, 910 F.2d 1043, 1047 (2d Cir. 1990)). "Merely incorrect legal statements are not sanctionable under Rule 11(b)(2)." Storey v. Cello Holdings, L.L.C., 347 F.3d 370, 391 (2d Cir. 2003). "The fact that a legal theory is a long-shot does not necessarily mean it is sanctionable." Fishoff v. Coty Inc., 634 F.3d 647, 654 (2d Cir. 2011). A legal contention is frivolous because it has "no chance of success" and there "is no reasonable argument to extend, modify or reverse the law as it stands." Id. (quotation marks omitted).

4. An attorney violates Rule 11(b)(2) if existing caselaw unambiguously forecloses a legal argument. See Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd., 682 F.3d 170, 178 (2d Cir. 2012) (affirming Rule 11(b)(2) sanction for frivolous claims where plaintiff's trademark claims "clearly lacked foundation") (per curiam); Simon DeBartolo Grp., L.P. v. Richard E. Jacobs Grp., Inc., 186 F.3d 157, 176 (2d Cir. 1999) (affirming Rule 11(b)(2) sanction where no authority supported plaintiff's theory of liability under SEC Rule 10b-13).

5. The filing of papers "without taking the necessary care in their preparation" is an "abuse of the judicial system" that is subject to Rule 11 sanction. Cooter & Gell v. Hartmax Corp., 496 U.S. 384, 398 (1990). Rule 11 creates an "incentive to stop, think and investigate more carefully before serving and filing papers." Id. (quotation marks omitted). "Rule 11 'explicitly and unambiguously imposes an affirmative duty on each attorney to conduct

a reasonable inquiry into the viability of a pleading before it is signed.'" AJ Energy LLC v. Woori Bank, 829 Fed. App'x 533, 535 (2d Cir. 2020) (summary order) (quoting Gutierrez v. Fox, 141 F.3d 425, 427 (2d Cir. 1998)).

6. Rule 3.3(a)(1) of the New York Rules of Professional Conduct, 22 N.Y.C.R.R. § 1200.0, states: "A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer . . . ." A lawyer may make a false statement of law where he "liberally us[ed] ellipses" in order to "change" or "misrepresent" a court's holding. United States v. Fernandez, 516 Fed. App'x 34, 36 & n.2 (2d Cir. 2013) (admonishing but not sanctioning attorney for his "editorial license" and noting his affirmative obligation to correct false statements of law) (summary order); see also United States v. Salameh, 1993 WL 168568, at *2-3 & n.1 (S.D.N.Y. May 18, 1993) (admonishing but not sanctioning attorney for failing to disclose that the sole decision cited in support of a legal argument was vacated on appeal) (Duffy, J.).

7. It is a crime to knowingly forge the signature of a United States judge or the seal of a federal court. 18 U.S.C. § 505.[13] Writing for the panel, then-Judge Sotomayor explained that "[section] 505 is concerned . . . with protecting the integrity of a government function – namely, federal judicial proceedings." United States v. Reich, 479 F.3d 179, 188 (2d Cir. 2007). "When an individual forges a judge's signature in order to pass off a false document

[13] The statute states: "Whoever forges the signature of any judge, register, or other officer of any court of the United States, or of any Territory thereof, or forges or counterfeits the seal of any such court, or knowingly concurs in using any such forged or counterfeit signature or seal, for the purpose of authenticating any proceeding or document, or tenders in evidence any such proceeding or document with a false or counterfeit signature of any such judge, register, or other officer, or a false or counterfeit seal of the court, subscribed or attached thereto, knowing such signature or seal to be false or counterfeit, shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 505.

as an authentic one issued by the courts of the United States, such conduct implicates the interests protected by § 505 whether or not the actor intends to deprive another of money or property." Id. Reich affirmed the jury's guilty verdict against an attorney-defendant who drafted and circulated a forged Order that was purported to be signed by a magistrate judge, which prompted his adversary to withdraw an application pending before the Second Circuit. Id. at 182-83, 189-90; see also United States v. Davalos, 2008 WL 4642109 (S.D.N.Y. Oct. 20, 2008) (sentencing defendant to 15 months' imprisonment for the use of counterfeit Orders containing forged signatures of Second Circuit judges) (Sweet, J.).

8. The fake opinions cited and submitted by Respondents do not include any signature or seal, and the Court therefore concludes that Respondents did not violate section 505. The Court notes, however, that the citation and submission of fake opinions raises similar concerns to those described in Reich.

9. The Court has described Respondents' submission of fake cases as an unprecedented circumstance. (ECF 31 at 1.) A fake opinion is not "existing law" and citation to a fake opinion does not provide a non-frivolous ground for extending, modifying, or reversing existing law, or for establishing new law.[14] An attempt to persuade a court or oppose an adversary by relying on fake opinions is an abuse of the adversary system. Salovaara, 222 F.3d at 34.

10. An attorney's compliance with Rule 11(b)(2) is not assessed solely at the moment that the paper is submitted. The 1993 amendments to Rule 11 added language that certifies an attorney's Rule 11 obligation continues when "later advocating" a legal contention

[14] To the extent that the Affirmation in Opposition cited existing authorities, those decisions did not support the propositions for which they were offered, with the exception of Ashcroft v. Iqbal, 556 U.S. 662 (2009), and, in part, Doe v. United States, 419 F.3d 1058 (9th Cir. 2005).

first made in a written filing covered by the Rule. Thus, "a litigant's obligations with respect to the contents of these papers are not measured solely as of the time they are filed with or submitted to the court, but include reaffirming to the court and advocating positions contained in those pleadings and motions after learning that they cease to have any merit." Rule 11, advisory committee's note to 1993 amendment. The failure to correct a prior statement in a pending motion is the later advocacy of that statement and is subject to sanctions. Galin v. Hamada, 283 F. Supp. 3d 189, 202 (S.D.N.Y. 2017) ("[A] court may impose sanctions on a party for refusing to withdraw an allegation or claim even after it is shown to be inaccurate.") (Furman, J.) (internal quotation marks, alterations, and citation omitted); Bressler v. Liebman, 1997 WL 466553, at *8 (S.D.N.Y. Aug. 14, 1997) (an attorney was potentially liable under Rule 11 when he "continued to press the claims . . . in conferences after information provided by opposing counsel and analysis by the court indicated the questionable merit of those claims.") (Preska, J.).

11. Rule 11(c)(3) states: "On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b)." "If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee." Rule 11(c)(1).

12. Any Rule 11 sanction should be "made with restraint" because in exercising sanctions powers, a trial court may be acting "as accuser, fact finder and sentencing judge." Storey v. Cello Holdings, L.L.C., 347 F.3d 370, 387 (2d Cir. 2003) (quotation marks and citations omitted). Sanctions should not be imposed "for minor, inconsequential violations of the

standards prescribed by subdivision (b)." Rule 11, advisory committee's note to 1993 amendment.

13. Mr. Schwartz is not admitted to practice in this District and did not file a notice of appearance. However, Rule 11(c)(1) permits a court to "impose an appropriate sanction on any attorney . . . that violated the rule or is responsible for the violation." The Court has authority to impose an appropriate sanction on Mr. Schwartz for a Rule 11 violation.

14. When, as here, a court considers whether to impose sanctions sua sponte, it "is akin to the court's inherent power of contempt," and, "like contempt, sua sponte sanctions in those circumstances should issue only upon a finding of subjective bad faith." Muhammad, 732 F.3d at 108. By contrast, where an adversary initiates sanctions proceedings under Rule 11(c)(2), the attorney may take advantage of that Rule's 21-day safe harbor provision and withdraw or correct the challenged filing, in which case sanctions may issue if the attorney's statement was objectively unreasonable. Muhammad, 732 F.3d at 108; In re Pennie & Edmonds LLP, 323 F.3d 86, 90 (2d Cir. 2003). Subjective bad faith is "a heightened mens rea standard" that is intended to permit zealous advocacy while deterring improper submissions. Id. at 91.

15. A finding of bad faith is also required for a court to sanction an attorney pursuant to its inherent power. See, e.g., United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO, 948 F.2d 1338, 1345 (2d Cir. 1991). "Because of their very potency, inherent powers must be exercised with restraint and discretion. A primary aspect of that discretion is the ability to fashion an appropriate sanction for conduct which abuses the judicial process." Chambers v. NASCO, Inc., 501 U.S. 32, 44-45 (1991) (internal citation omitted).

16. "[B]ad faith may be inferred where the action is completely without merit." In re 60 E. 80th St. Equities, Inc., 218 F.3d 109, 116 (2d Cir. 2000). Any notice or warning provided to the attorney is relevant to a finding of bad faith. See id. ("Here, not only were the claims meritless, but [appellant] was warned of their frivolity by the Bankruptcy Court before he filed the appeal to the District Court.").

17. The Second Circuit has most often discussed subjective bad faith in the context of false factual statements and not unwarranted or frivolous legal arguments. Subjective bad faith includes the knowing and intentional submission of a false statement of fact. See, e.g., Rankin v. City of Niagara Falls, Dep't of Public Works, 569 Fed. App'x 25 (2d Cir. 2014) (affirming Rule 11 sanctions on attorney who obtained extensions by falsely claiming that the submission of a "substantive" summary judgment filing had been delayed by heavy workload) (summary order). An attorney acts in subjective bad faith by offering "essential" facts that explicitly or impliedly "run contrary to statements" that the attorney made on behalf of the same client in other proceedings. Revellino & Byzcek, LLP v. Port Authority of N.Y. & N.J., 682 Fed. App'x 73, 75-76 (2d Cir. 2017) (affirming Rule 11 sanctions where allegations in a federal civil rights complaint misleadingly omitted key facts asserted by the same attorney on behalf of the same client in a related state criminal proceeding) (summary order).

18. An assertion may be made in subjective bad faith even when it was based in confusion. United States ex rel. Hayes v. Allstate Ins. Co., 686 Fed. App'x 23, 28 (2d Cir. 2017) ("[C]onfusion about corporate complexities would not justify falsely purporting to have personal knowledge as to more than sixty defendants' involvement in wrongdoing.") (summary order). A false statement of knowledge can constitute subjective bad faith where the speaker "'knew that he had no such knowledge . . . .'" Id. at 27 (quoting United States ex rel. Hayes v.

Allstate Ins. Co., 2014 WL 10748104, at *6 (W.D.N.Y. Oct. 16, 2014), R & R adopted, 2016 WL 463732 (W.D.N.Y. Feb. 8, 2016)).

19. "Evidence that would satisfy the knowledge standard in a criminal case ought to be sufficient in a sanctions motion and, thus, knowledge may be proven by circumstantial evidence and conscious avoidance may be the equivalent of knowledge." Cardona v. Mohabir, 2014 WL 1804793, at *3 (S.D.N.Y. May 6, 2014) (citing United States v. Svoboda, 347 F.3d 471, 477-79 (2d Cir. 2003)); accord Estevez v. Berkeley College, 2022 WL 17177971, at *1 (S.D.N.Y. Nov. 23, 2022) ("[R]equisite actual knowledge may be demonstrated by circumstantial evidence and inferred from conscious avoidance.") (Seibel, J.) (quotation marks omitted). The conscious avoidance test is met when a person "consciously avoided learning [a] fact while aware of a high probability of its existence, unless the factfinder is persuaded that the [person] actually believed the contrary." United States v. Finkelstein, 229 F.3d 90, 95 (2d Cir. 2000) (internal citations omitted). "The rationale for imputing knowledge in such circumstances is that one who deliberately avoided knowing the wrongful nature of his conduct is as culpable as one who knew." Id. It requires more than being "merely negligent, foolish or mistaken," and the person must be "aware of a high probability of the fact in dispute and consciously avoided confirming that fact." Svoboda, 347 F.3d at 481-82 (quotation marks and brackets omitted).

20. Respondents point to the Report and Recommendation of Magistrate Judge Freeman, as adopted by Judge McMahon, in Braun ex rel. Advanced Battery Techs., Inc. v. Zhiguo Fu, 2015 WL 4389893, at *19 (S.D.N.Y. July 10, 2015), which declined to sanction a law firm associate who drafted and signed a complaint that falsely alleged that the plaintiff in a shareholder derivative suit was a shareholder of the nominal defendant. That attorney acted in

reliance on the plaintiff's signed verification of the complaint, partner communications with the plaintiff, and contents of law firm files that appeared to contain false information. Id. at *5-6, 19. Braun concluded that this attorney did not act with subjective bad faith by innocently relying on the mistruths of others. Id. at *19. There is no suggestion in Braun that this attorney had a reason to know or suspect that he was relying on falsehoods or misinformation.

21. Here, Respondents advocated for the fake cases and legal arguments contained in the Affirmation in Opposition after being informed by their adversary's submission that their citations were non-existent and could not be found. (Findings of Fact ¶¶ 7, 11.) Mr. Schwartz understood that the Court had not been able to locate the fake cases. (Findings of Fact ¶ 15.) Mr. LoDuca, the only attorney of record, consciously avoided learning the facts by neither reading the Avianca submission when received nor after receiving the Court's Orders of April 11 and 12. Respondents' circumstances are not similar to those of the attorney in Braun.

22. "In considering Rule 11 sanctions, the knowledge and conduct of each respondent lawyer must be separately assessed and principles of imputation of knowledge do not apply." Weddington v. Sentry Indus., Inc., 2020 WL 264431, at *7 (S.D.N.Y. Jan. 17, 2020).

23. The Court concludes that Mr. LoDuca acted with subjective bad faith in violating Rule 11 in the following respects:

a. Mr. LoDuca violated Rule 11 in not reading a single case cited in his March 1 Affirmation in Opposition and taking no other steps on his own to check whether any aspect of the assertions of law were warranted by existing law. An inadequate or inattentive "inquiry" may be unreasonable under the circumstances. But signing and filing that affirmation after making no "inquiry" was an act of subjective bad faith. This is especially so because he knew of Mr. Schwartz's lack of familiarity with federal law, the Montreal Convention and

bankruptcy stays, and the limitations of research tools made available by the law firm with which he and Mr. Schwartz were associated.

b. Mr. LoDuca violated Rule 11 in swearing to the truth of the April 25 Affidavit with no basis for doing so. While an inadequate inquiry may not suggest bad faith, the absence of any inquiry supports a finding of bad faith. Mr. Schwartz walked into his office, presented him with an affidavit that he had never seen in draft form, and Mr. LoDuca read it and signed it under oath. A cursory review of his own affidavit would have revealed that (1) "Zicherman v. Korean Air Lines Co., Ltd., 516 F.3d 1237 (11th Cir. 2008)" could not be found, (2) many of the cases were excerpts and not full cases and (3) reading only the opening passages of, for example, "Varghese", would have revealed that it was internally inconsistent and nonsensical.

c. Further, the Court directed Mr. LoDuca to submit the April 25 Affidavit and Mr. LoDuca lied to the Court when seeking an extension, claiming that he, Mr. LoDuca, was going on vacation when, in truth and in fact, Mr. Schwartz, the true author of the April 25 Affidavit, was the one going on vacation. This is evidence of Mr. LoDuca's bad faith.

24. The Court concludes that Mr. Schwartz acted with subjective bad faith in violating Rule 11 in the following respects:

a. Mr. Schwartz violated Rule 11 in connection with the April 25 Affidavit because, as he testified at the hearing, when he looked for "Varghese" he "couldn't find it," yet did not reveal this in the April 25 Affidavit. He also offered no explanation for his inability to find "Zicherman". Poor and sloppy research would merely have been objectively unreasonable. But Mr. Schwartz was aware of facts that alerted him to the high probability that "Varghese" and "Zicherman" did not exist and consciously avoided confirming that fact.

b. Mr. Schwartz's subjective bad faith is further supported by the untruthful assertion that ChatGPT was merely a "supplement" to his research, his conflicting accounts about his queries to ChatGPT as to whether "Varghese" is a "real" case, and the failure to disclose reliance on ChatGPT in the April 25 Affidavit.

25. The Levidow Firm is jointly and severally liable for the Rule 11(b)(2) violations of Mr. LoDuca and Mr. Schwartz. Rule 11(c)(1) provides that "[a]bsent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee." The Levidow Firm has not pointed to exceptional circumstances that warrant a departure from Rule 11(c)(1). Mr. Corvino has acknowledged responsibility, identified remedial measures taken by the Levidow Firm, including an expanded Fastcase subscription and CLE programming, and expressed his regret for Respondents' submissions. (Corvino Decl. ¶¶ 10-15; Tr. 44-47.)

26. The Court declines to separately impose any sanction pursuant to 28 U.S.C. § 1927, which provides for a sanction against any attorney "who so multiplies the proceedings in any case unreasonably and vexatiously . . . ." "By its terms, § 1927 looks to unreasonable and vexatious multiplications of proceedings; and it imposes an obligation on attorneys throughout the entire litigation to avoid dilatory tactics. The purpose of this statute is to deter unnecessary delays in litigation." Int'l Bhd. of Teamsters, 948 F.2d at 1345 (internal citations and quotation marks omitted). Respondents' reliance on fakes cases has caused several harms but dilatory tactics and delay were not among them.

27. Each of the Respondents is sanctioned under Rule 11 and, alternatively, under the inherent power of this Court.

28. A Rule 11 sanction should advance both specific and general deterrence. Cooter & Gell, 496 U.S. at 404. "A sanction imposed under [Rule 11] must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." Rule 11(c)(4). "The court has available a variety of possible sanctions to impose for violations, such as striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities (or, in the case of government attorneys, to the Attorney General, Inspector General, or agency head), etc." Rule 11, advisory committee's note to 1993 amendment.

29. "'[B]ecause the purpose of imposing Rule 11 sanctions is deterrence, a court should impose the least severe sanctions necessary to achieve the goal.'" (RC) 2 Pharma Connect, LLC v. Mission Pharmacal Co., 2023 WL 112552, at *3 (S.D.N.Y. Jan. 4, 2023) (Liman, J.) (quoting Schottenstein v. Schottenstein, 2005 WL 912017, at *2 (S.D.N.Y. Apr. 18, 2005)). "[T]he Court has 'wide discretion' to craft an appropriate sanction, and may consider the effects on the parties and the full knowledge of the relevant facts gained during the sanctions hearing." Heaston v. City of New York, 2022 WL 182069, at *9 (E.D.N.Y. Jan. 20, 2022) (Chen, J.) (quoting Oliveri v. Thompson, 803 F.2d 1265, 1280 (2d Cir. 1986)).

30. The Court has considered the specific circumstances of this case. The Levidow Firm has arranged for outside counsel to conduct a mandatory Continuing Legal Education program on technological competence and artificial intelligence programs. (Corvino

Decl. ¶ 14.) The Levidow Firm also intends to hold mandatory training for all lawyers and staff on notarization practices. (Corvino Decl. ¶ 15.) Imposing a sanction of further and additional mandatory education would be redundant.

31. Counsel for Avianca has not sought the reimbursement of attorneys' fees or expenses. Ordering the payment of opposing counsel's fees and expenses is not warranted.

32. In considering the need for specific deterrence, the Court has weighed the significant publicity generated by Respondents' actions. (See, e.g., Alger Decl. Ex. E.) The Court credits the sincerity of Respondents when they described their embarrassment and remorse. The fake cases were not submitted for any respondent's financial gain and were not done out of personal animus. Respondents do not have a history of disciplinary violations and there is a low likelihood that they will repeat the actions described herein.

33. There is a salutary purpose of placing the most directly affected persons on notice of Respondents' conduct. The Court will require Respondents to inform their client and the judges whose names were wrongfully invoked of the sanctions imposed. The Court will not require an apology from Respondents because a compelled apology is not a sincere apology. Any decision to apologize is left to Respondents.

34. An attorney may be required to pay a fine, or, in the words of Rule 11, a "penalty," to advance the interests of deterrence and not as punishment or compensation. See, e.g., Universitas Education, LLC v. Nova Grp., Inc., 784 F.3d 99, 103-04 (2d Cir. 2015). The Court concludes that a penalty of $5,000 paid into the Registry of the Court is sufficient but not more than necessary to advance the goals of specific and general deterrence.

CONCLUSION

The Court Orders the following sanctions pursuant to Rule 11, or, alternatively, its inherent authority:

a. Within 14 days of this Order, Respondents shall send via first-class mail a letter individually addressed to plaintiff Roberto Mata that identifies and attaches this Opinion and Order, a transcript of the hearing of June 8, 2023 and a copy of the April 25 Affirmation, including its exhibits.

b. Within 14 days of this Order, Respondents shall send via first-class mail a letter individually addressed to each judge falsely identified as the author of the fake "Varghese", "Shaboon", "Petersen", "Martinez", "Durden" and "Miller" opinions. The letter shall identify and attach this Opinion and Order, a transcript of the hearing of June 8, 2023 and a copy of the April 25 Affirmation, including the fake "opinion" attributed to the recipient judge.

c. Within 14 days of this Opinion and Order, respondents shall file with this Court copies of the letters sent in compliance with (a) and (b).

d. A penalty of $5,000 is jointly and severally imposed on Respondents and shall be paid into the Registry of this Court within 14 days of this Opinion and Order.

SO ORDERED.

P. Kevin Castel
United States District Judge

Dated: New York, New York
June 22, 2023

Appendix A

United States Court of Appeals,

Eleventh Circuit.

Susan Varghese, individually and as personal representative of the Estate of George Scaria Varghese, deceased,

Plaintiff-Appellant,

v.

China Southern Airlines Co Ltd,

Defendant-Appellee.

No. 18-13694

Before JORDAN, ROSENBAUM, and HIGGINBOTHAM, * Circuit Judges.

JORDAN, Circuit Judge:

Susan Varghese, individually and as personal representative of the Estate of George Scaria Varghese, deceased, appeals the district court's dismissal of her wrongful death claim against China Southern Airlines Co. Ltd. ("China Southern") under the Montreal Convention. Because the statute of limitations was tolled by the automatic stay of bankruptcy proceedings and the complaint was timely filed, we reverse and remand for further proceedings.

Factual background:

Anish Varghese ("Varghese"), a resident of Florida, purchased a round-trip airline ticket from China Southern Airlines Co Ltd ("China Southern") to travel from New York to Bangkok with a layover in Guangzhou, China. On the return leg of his journey, Varghese checked in at Bangkok for his flight to Guangzhou but was denied boarding due to overbooking. China Southern rebooked him on a later flight, which caused him to miss his connecting flight back to New York. As a resu lt, Varghese was forced to purchase a new ticket to return home and incurred additional expenses.

Varghese filed a lawsuit against China Southern in the United States District Court for the Southern District of Florida, alleging breach of

contract, breach of the implied covenant of good faith and fair dealing, and violation of the Montreal Convention. China Southern moved to dismiss the complaint, arguing that the court lacked subject matter jurisdiction because Varghese's claims were preempted by the Montreal Convention and that Varghese failed to exhaust his administrative remedies with the Chinese aviation authorities. While the motion to dismiss was pending, China Southern filed for bankruptcy in China, which triggered an automatic stay of all proceedings against it. The district court subsequently dismissed Varghese's complaint without prejudice, noting that the automatic stay tolled the statute of limitations on his claims. Varghese appealed the dismissal to the Eleventh Circuit Court of Appeals.

"In response to the district court's dismissal of Varghese's complaint, Varghese filed a Chapter 7 bankruptcy petition. The bankruptcy court issued an automatic stay, which enjoined China Southern from continuing with the arbitration proceedings. The bankruptcy court later granted China Southern's motion to lift the stay, and Varghese filed a notice of appeal to this Court.

The automatic stay provision of the bankruptcy code "operates as an injunction against the continuation of any action against the debtor." In re Rimsat, Ltd., 212 F.3d 1039, 1044 (7th Cir. 2000) (citing 11 U.S.C. § 362(a)(1)). Although the automatic stay provision does not specifically mention arbitration proceedings, the Eleventh Circuit has held that it applies to arbitration. See, e.g., Holliday v. Atl. Capital Corp., 738 F.2d 1153, 1154 (11th Cir. 1984) ("The filing of a petition under Chapter 11 of the Bankruptcy Code operates as an automatic stay of all litigation and proceedings against the debtor-in-possession."); Gen. Wire Spring Co. v. O'Neal Steel, Inc., 556 F.2d 713, 716 (5th Cir. 1977) ("The automatic stay of bankruptcy operates to prevent a creditor from continuing to arbitrate claims against the bankrupt."). In determining whether the automatic stay applies, the focus is on "the character of the proceeding, rather than the identity of the parties."

In re PPI Enters. (U.S.), Inc., 324 F.3d 197, 204 (2d Cir. 2003). Here, the arbitration proceedings against Varghese were proceedings "against the debtor," and the automatic stay applied."

"China Southern contends that the district court erred in ruling that the filing of Varghese's Chapter 13 petition tolled the two-year limitations period under the Montreal Convention. We review a district court's determination that a limitations period was tolled for abuse of discretion. Hyatt v. N. Cent. Airlines, Inc., 92 F.3d 1074, 1077 (11th Cir. 1996).

China Southern argues that the Chapter 13 filing could not toll the Montreal Convention's limitations period because Varghese did not file a claim in bankruptcy. But, as the district court noted, the Eleventh Circuit has not yet addressed this issue, and the weight of authority from other circuits suggests that a debtor need not file a claim in bankruptcy to benefit from the automatic stay. See, e.g., In re Gandy, 299 F.3d 489,495 (5th Cir. 2002); In re BDC 56 LLC, 330 B.R. 466, 471 (Bankr. D.N.H. 2005).

Moreover, the district court found that the automatic stay provision in Varghese's Chapter 13 petition tolled the limitations period under the Montreal Convention. We agree.

The Supreme Court has held that an automatic stay of a legal proceeding under the Bankruptcy Code tolls the limitations period applicable to the stayed proceeding. See, e.g., Begier v. IRS, 496 U.S. 53, 59-60, 110 S.Ct. 2258, 110 L.Ed.2d 46 (1990). The Montreal Convention's limitations period is a "period of prescription," rather than a "statute of limitations." See Zaunbrecher v. Transocean Offshore Deepwater Drilling, Inc., 772 F.3d 1278, 1283 (11th Cir. 2014). But the difference between a "period of prescription" and a "statute of limitations" does not affect the automatic stay's tolling effect. See id. at 1283 n.3. Therefore, we hold that the filing of Varghese's Chapter 13 petition tolled the Montreal Convention's two-year limitations period, which did not begin to ↓ run until the automatic stay was lifted."

Appellants argue that the district court erred in dismissing their claims as untimely. They assert that the limitations period under the Montreal Convention was tolled during the pendency of the Bankruptcy Court proceedings. We agree.

The Bankruptcy Code provides that the filing of a bankruptcy petition operates as a stay of proceedings against the debtor that were or could have been commenced before the bankruptcy case was filed. 11 U.S.C. § 362(a). The tolling effect of the automatic stay on a statute of limitations is generally a matter of federal law. See Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593, 598, 88 S.Ct. 1753, 20 L.Ed.2d 835 (1968). We have previously held that the automatic stay provisions of the Bankruptcy Code may toll the statute of limitations under the Warsaw 'V Convention, which is the precursor to the Montreal Convention. See Zicherman v. Korean Air Lines Co., Ltd., 516 F.3d 1237, 1254 (11th Cir. 2008).

We see no reason why the same rule should not apply under the Montreal Convention. Congress enacted the Montreal Convention to 'modernize and unify the Warsaw Convention system by establishing new and uniform rules governing the international carriage of persons, baggage, and cargo.' El Al

Israel Airlines, Ltd. v. Tseng, 525 U.S. 155, 161, 119 S.Ct. 662, 142 L.Ed.2d 576 (1999). In doing so, Congress sought to provide passengers with greater certainty and predictability in the event of an accident. Id. at 166, 119 S.Ct. 662. Allowing the tolling of the limitations period during the pendency of bankruptcy proceedings furthers this goal by ensuring that passengers have a meaningful opportunity to bring their claims for compensation."

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

JACQUELYN "JACKIE" LACEY, et al.,

Plaintiffs,

v.

STATE FARM GENERAL INSURANCE CO.,

Defendant.

Case No. CV 24-5205 FMO (MAAx)

ORDER OF SPECIAL MASTER IMPOSING NON-MONETARY SANCTIONS AND AWARDING COSTS

FRCP 53

SUMMARY OF RULING

1. The attorneys representing Plaintiff in this civil action submitted briefs to the Special Master[1] that contained bogus AI-generated research. After additional proceedings and considerable thought, I conclude that an award combining litigation sanctions against Plaintiff and financial payments from the lawyers and law firms is appropriate to address this misconduct.

[1] Hon. Michael R. Wilner, former United States Magistrate Judge for the Central District of California.

2. I also conclude that additional financial or disciplinary sanctions against the individual attorneys are not warranted. This was a collective debacle, and is properly resolved without further jeopardy.

RELEVANT PROCEDURAL AND FACTUAL BACKGROUND

Discovery Proceedings Before the Special Master

3. In January 2025, the Court appointed me as Special Master in this insurance-related civil action. Central to the reason for my appointment was an ongoing dispute between the parties regarding the insurer's assertion of various privileges in discovery. (Docket # 70, 73.)

4. After handling intervening legal issues, I met with the parties in early April to discuss the insurer's privilege invocations. The parties provided me with detailed letter briefs regarding the discovery issue in advance of the meeting. When we met, the parties agreed to provide supplemental briefing on a discrete issue regarding the propriety of in camera review of some of the disputed documents.

The Briefs with AI Research

5. As recounted in detail in orders I issued on April 15 and 20 (attached to the Appendix to this order), Plaintiff's supplemental brief contained numerous false, inaccurate, and misleading legal citations and quotations. According to my after-the-fact review – and supported by the candid declarations of Plaintiff's lawyers – approximately nine of the 27 legal citations in the ten-page brief were incorrect in some way. At least two of the authorities cited do not exist at all. Additionally, several quotations attributed to the cited judicial opinions were phony and did not accurately represent those materials.[2] The lawyers' declarations ultimately made clear

[2] Some "pincites" were not correctly reported. While this could certainly impede research and review, I consider those errors to be at the mild end of the AI hallucination spectrum.

that the source of this problem was the inappropriate use of, and reliance on, AI tools.

6. Here's an abbreviated summary of the events. Plaintiff is represented by a large team of attorneys at two law firms (a lawyer moved from the Ellis George firm to K&L Gates during the course of the state court litigation underlying the insurance coverage action; the representation in the present case is shared between the two firms).[3] The lawyers admit that Mr. Copeland, an attorney at Ellis George, used various AI tools to generate an "outline" for the supplemental brief. That document contained the problematic legal research.

7. Mr. Copeland sent the outline to lawyers at K&L Gates. They incorporated the material into the brief. No attorney or staff member at either firm apparently cite-checked or otherwise reviewed that research before filing the brief with the Special Master. Based on the sworn statements of all involved (which I have no reason to doubt), the attorneys at K&L Gates didn't know that Mr. Copeland used AI to prepare the outline; nor did they ask him.

8. A further wrinkle. During my initial review of Plaintiff's brief, I was unable to confirm the accuracy of two of the authorities that the lawyers cited. I emailed the lawyers shortly after receiving the brief to have them address this anomaly. Later that day, K&L Gates re-submitted the brief without the two incorrect citations – but with the remaining AI-generated problems in the body of the text.[4] An associate attorney sent me an innocuous

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[3] Although it's necessary to identify some parties involved here, I decline to name-and-shame all of the lawyers in this order. They know who they are, and don't need further notoriety here.

[4] Copies of the Original Brief and the Revised Brief (identified as Versions 1 and 3 in my initial OSC) are attached in the Appendix. I've marked the bogus citations in both briefs in red. I noted that there was an intervening iteration of the brief submitted to me that contained the bogus AI research and an odd (continued. . .)

e-mail thanking me for catching the two errors that were "inadvertently included" in the brief, and confirming that the citations in the Revised Brief had been "addressed and updated."

9. I didn't discover that Plaintiff's lawyers used AI – and re-submitted the brief with considerably more made-up citations and quotations beyond the two initial errors – until I issued a later OSC soliciting a more detailed explanation. The lawyers' sworn statements and subsequent submission of the actual AI-generated "outline" made clear the series of events that led to the false filings. The declarations also included profuse apologies and honest admissions of fault.

10. I subsequently set the matter for a hearing on the OSC. My April 20 order gave the parties notice of the specific types of sanctions and fee-shifting awards that I was considering based on Federal Rule of Civil Procedure 11 and 37, along with my inherent (and Court-delegated) authority. Plaintiff's lawyers responded to the OSC and addressed me during our recent hearing. I also received a submission from the defense estimating the cost of the preparation of their brief on the privilege issue. This order follows.

RELEVANT LEGAL AUTHORITY

11. The district court's order appointing me as Special Master authorized me to "take all appropriate measures to perform the assigned duties fairly and efficiently." I possess the Court's authority to "regulate all proceedings" before me pursuant to the Federal Rules of Civil Procedure. This expressly includes the ability to impose "any noncontempt sanction provided by Rule 37" or other authority. (Docket # 70.)

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typographical error in one of the challenged citations. I don't understand the significance of that additional submission, but I don't believe that it adds much to the sanctions analysis.

12. Rule 11(b) states, in relevant part, that when an attorney presents "a pleading, written motion, or other paper" to a court, the attorney "certifies that to the best of that person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances [that the] legal contentions are warranted by existing law." Rule 11(c)(3-4) states that a court may impose a sanction "limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." That may include "nonmonetary directives" or "an order directing payment [ ] of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation."

13. Rule 37(a)(5)(B) states that a court "must, after giving an opportunity to be heard, require [ ] the attorney filing [an unsuccessful discovery] motion [ ] to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees." Litigation-related sanctions (for disobeying a court's discovery order, but generally applicable to other circumstances) may include prohibiting a party from "supporting or opposing designated claims or defenses" or "striking pleadings in whole or in part." Fed. R. Civ. 37(b)(2)(A)(ii-iii).

14. Separate and apart from sanctions based on these rules, a court has the inherent authority to levy sanctions against a party or attorney for, inter alia, acting in "bad faith" or for otherwise "willfully abus[ing] judicial processes." Roadway Express, Inc. v. Piper, 447 U.S. 752, 766 (1980). Sanctions based on a federal court's inherent authority are "both broader and narrower than other means of imposing sanctions" because they encompass "a full range of litigation abuses." Chambers v. NASCO, Inc., 501 U.S. 32, 46-47 (1991).

15. The Ninth Circuit has concluded that such sanctions "are available if the court specifically finds bad faith or conduct tantamount to bad faith" by an attorney. Fink v. Gomez, 239 F.3d 989, 994 (9th Cir. 2001); Rocha v. Fiedler, 2025 WL 1219007 at *1 (9th Cir. Apr. 28, 2025) (same standard under Fed. R. Bankr. P. 9011); Arrowhead Capital Finance, Ltd. v. Picturepro, LLC, 2023 WL 109722 at *2 (9th Cir. Jan. 5, 2023) (same; affirming discovery sanction award). The "tantamount to bad faith" standard includes "a variety of types of willful actions, including recklessness when combined with an additional factor such as frivolousness, harassment, or an improper purpose." Fink, 239 F.3d at 994.

16. With greater frequency, courts are now regularly evaluating the conduct of lawyers and pro se litigants who improperly use AI in submissions to judges. Whether that conduct supports the imposition of various types of sanctions requires a fact- and circumstance-specific analysis. See, e.g., United States v. Hayes, ___ F.Supp.3d ___, 2025 WL 235531 at *10-15 (E.D. Cal. Jan 17, 2025) (sanctioning criminal defense lawyer for using AI; when questioned by the court, the lawyer's response about the source of inaccurate legal citations "was not accurate and was misleading"); Saxena v. Martinez-Hernandez, 2025 WL 1194003 at *2 and n.5 (D. Nev. April 23, 2025) ("Saxena's use of AI generated cases – and his subsequent refusal to accept responsibility for doing so – is just another example of Saxena's abusive litigation tactics, and further explains why the court issued case-terminating sanctions") (collecting cases); United States v. Cohen, 724 F.Supp.3d 251, 254, 259 (S.D.N.Y 2024) (declining to find bad faith where defense lawyer voluntarily disclosed that she "had been 'unable to verify'" false citations in colleague's brief and lawyer acknowledged that he "would have withdrawn the [fake] citations immediately if given the opportunity").

ANALYSIS

17. I conclude that the lawyers involved in filing the Original and Revised Briefs collectively acted in a manner that was tantamount to bad faith. Fink, 239 F.3d at 994. The initial, undisclosed use of AI products to generate the first draft of the brief was flat-out wrong. Even with recent advances, no reasonably competent attorney should out-source research and writing to this technology – particularly without any attempt to verify the accuracy of that material. And sending that material to other lawyers without disclosing its sketchy AI origins realistically put those professionals in harm's way. Mr. Copeland candidly admitted that this is what happened, and is unreservedly remorseful about it.

18. Yet, the conduct of the lawyers at K&L Gates is also deeply troubling. They failed to check the validity of the research sent to them. As a result, the fake information found its way into the Original Brief that I read. That's bad. But, when I contacted them and let them know about my concerns regarding a portion of their research, the lawyers' solution was to excise the phony material and submit the Revised Brief – still containing a half-dozen AI errors. Further, even though the lawyers were on notice of a significant problem with the legal research (as flagged by the brief's recipient: the Special Master), there was no disclosure to me about the use of AI. Instead, the e-mail transmitting the new brief merely suggested an inadvertent production error, not improper reliance on technology. Translation: they had the information and the chance to fix this problem, but didn't take it. Cohen, 724 F.Supp.3d at 259.

19. I therefore conclude that (a) the initial undisclosed use of AI, (b) the failure to cite-check the Original Brief, and (perhaps most egregiously), (c) the re-submission of the defective Revised Brief without adequate

disclosure of the use of AI, taken together, demonstrate reckless conduct with the improper purpose of trying to influence my analysis of the disputed privilege issues. The Ellis George and K&L Gates firms had adequate opportunities – before and after their error had been brought to their attention – to stop this from happening. Their failure to do so justifies measured sanctions under these circumstances.

20. Those sanctions are as follows. I have struck, and decline to consider, any of the supplemental briefs that Plaintiff submitted on the privilege issue. From this, I decline to award any of the discovery relief (augmenting a privilege log, ordering production of materials, or requiring in camera review of items) that Plaintiff sought in the proceedings that led up to the bogus briefs. I conclude that these non-monetary sanctions will suffice to "deter repetition of the conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(4). If the undisclosed use of AI and the submission of fake law causes a client to lose a motion or case, lawyers will undoubtedly be deterred from going down that pointless route.[5]

21. The district judge's order appointing me initially required Defendant to pay the costs of the Special Master. However, that order expressly authorized me to shift fees when I deemed appropriate. (Docket # 70 at ¶ 7.) It's certainly appropriate here. I've calculated that the fees for dealing with this issue (reviewing the various iterations of the defective briefs, issuing various orders and reviewing the responses, conducting the OSC hearing, and issuing this sanctions order) were approximately $26,100 (including service fees from the provider). Because

[5] At our recent hearing, Mr. Copeland movingly asserted that neither he nor his colleagues would engage in similar conduct in the future; exposure of these events was therefore sufficient to deter them from doing this again. I completely agree. But under the Rule, I also have to consider the goal of deterring other members of the legal community. In my estimation, more is required.

Defendant advanced those fees to JAMS, Ellis George and K&L Gates are jointly and severally directed to pay that sum to the defense in reimbursement within 30 days.

22. I also gave serious consideration to ordering Plaintiff's lawyers to compensate the defense for time that Defendant's lawyers spent on their supplemental brief. A shift of fees to the winning party in a discovery motion is authorized and commonplace under Federal Rule of Civil Procedure 37(a)(5), and falls well within the inherent authority of the court to deter this conduct by others in the future. I also easily conclude that Plaintiff's lawyers were not "substantially justified" in using false information in advancing their legal positions on the privilege issue. (Fed. R. Civ. P. 37(a)(5)(B).)

23. However, the amount of fees that the defense attested to (at my request, not theirs) for preparing the brief and attending the recent hearing approached $25,000. I don't have any reason to dispute that sum, but I don't believe that full compensation for the briefing process – one that the defense somewhat eagerly agreed to – isn't necessary for deterrence purposes. In an exercise of discretion, I direct Plaintiff's lawyers to pay the defense a total of $5,000 for fees incurred here.[6]

24. My sanction notice informed the parties that I planned to order the lawyers to inform Plaintiff personally about the substance and outcome of

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[6] I note, but don't ascribe any weight to, Plaintiff's argument that Defendant wasn't prejudiced by the AI debacle because the parties submitted their briefs at the same time. Given the deterrence-based motivation of this sanction order, the serendipity of simultaneous v. sequential briefing is of limited relevance to my consideration of this point.

I'm also not swayed by the observation (in my original OSC, and echoed in Plaintiff's response brief) that, as it turned out, the AI hallucinations weren't too far off the mark in their recitations of the substantive law. That's a pretty weak no-harm, no-foul defense of the conduct here.

this issue. The lawyers told me at the hearing that they already disclosed this information to their client; that's sufficient for me. I recognize that Mrs. Lacey is clearly not at fault for the AI debacle, but will bear this outcome as a consequence of her lawyers' actions. She will not, however, be financially responsible for the monetary awards described in this order. Those will fall solely on the lawyers and their firms.

25. In a further exercise of discretion, I decline to order any sanction or penalty against any of the individual lawyers involved here. In their declarations and during our recent hearing, their admissions of responsibility have been full, fair, and sincere. I also accept their real and profuse apologies. Justice would not be served by piling on them for their mistakes.

CONCLUSION

A final note. Directly put, Plaintiff's use of AI affirmatively misled me. I read their brief, was persuaded (or at least intrigued) by the authorities that they cited, and looked up the decisions to learn more about them – only to find that they didn't exist. That's scary. It almost led to the scarier outcome (from my perspective) of including those bogus materials in a judicial order. Strong deterrence is needed to make sure that attorneys don't succumb to this easy shortcut.

For these reasons, Plaintiff's supplemental briefs are struck, and no further discovery relief will be granted on the disputed privilege issue. Additionally, Plaintiff's law firms are ordered (jointly and severally) to pay compensation to the defense in the aggregate amount of $31,100.

Dated: May 5, 2025

/s/ Judge Wilner

HON. MICHAEL R. WILNER
U.S. MAGISTRATE JUDGE (RET.)
SPECIAL MASTER

APPENDIX OF MATERIALS

1. Special Master's Order to Show Cause re: Sanctions (April 15, 2025).

2. Special Master's Notice of Intended Sanctions and Fee Orders (April 20, 2025).

3. Plaintiff's Brief in Support of Obtaining Relevant, Non-Privileged Documents from Defendant (Original Brief, as marked by Special Master) (filed April 14, 2025).

4. Plaintiff's Brief in Support of Obtaining Relevant, Non-Privileged Documents from Defendant (Revised Brief, as marked by Special Master) (filed April 14, 2025).

5. E-mail transmitting Revised Brief to Special Master (April 14, 2025).

6. Declaration of Trent Copeland (filed April 18, 2025) plus a version of the AI outline sent to K&L Gates (referenced in declaration, received separately).

7. Declaration of Ryan Keech (filed April 18, 2025).

8. Declaration of Keian Vahedy (filed April 18, 2025).

9. Plaintiff's Response to Special Master's Notice of Intended Sanctions and Fee Orders.

Appendix 1

JAMS CASE REFERENCE NO. 1210040394

USDC CASE NO. CV 24-5205 FMO (MAAx) (C.D. Cal.)

Jacqueline "Jackie" Lacey, et al.,

Plaintiff,

v.

State Farm General Insurance Co.,

Defendant.

ORDER TO SHOW CAUSE RE: SANCTIONS

1. The district court appointed me as Special Master in this action in January 2025. (Docket # 70, 71.) The Court's appointment order specifically authorized me to "impose on a party any noncontempt sanction provided by Rule 37 or 45, and may recommend [to the district court] a contempt sanction against a party and sanctions against a nonparty." (Docket # 70 at ¶ 3 (quoting Fed. R. Civ. P. 53(c)(2)).)

2. Plaintiff's lawyers are ordered to show cause why the Special Master should not impose sanctions based on the following:

3. Version 1 of Plaintiff's supplemental brief. I conducted a hearing on a discovery issue on April 7, 2025. During that hearing, I directed the parties to submit supplemental briefing on a disputed privilege issue.

4. I received Plaintiff's supplemental brief (Version 1) at approximately noon on Monday, April 14.[1] During my review of Version 1 of Plaintiff's brief, I went onto Westlaw to read several of the judicial decisions cited or quoted in the pleading.

5. The problem: I couldn't verify aspects of what Plaintiff's lawyers put into the brief. Specifically, Plaintiff's lawyers included what they presented as a lengthy quotation from a decision (National Steel Products) that appeared to

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[1] I also received a supplemental brief from Defendant. That submission is not relevant to this OSC.

strongly support their position on the privilege issue. The passage from Version 1 is reproduced in full:

> Rather, these internal notes reference the adjusters' recommendations, pending activities, and discussion with other State Farm claims representatives regarding the Lacey's insurance claim. *National Steel Products Co. v. Superior Court*, 164 Cal.App.3d 476, 489 (1985) ("Internal memoranda or claims file materials, although they may discuss legal theories, litigation tactics or potential liability, are not privileged unless they are written by or at the direction of counsel and prepared for the purpose of transmitting information to counsel for legal advice.")

Version 1 at 7.

6. I reviewed the online version of the appellate decision in National Steel Products. The text quoted in Plaintiff's brief does not exist in that opinion.

7. Additionally, Plaintiff's lawyers cited to another judicial decision that, again, appeared to strongly support their litigation position:

> California courts are especially skeptical of overbroad privilege assertions in bad faith insurance litigation, where the insurer's claims conduct is directly at issue. *See*, *Booth v. Allstate Ins. Co.*, 198 Cal.App.3d 1357, 1366 (1989) ("An insurer cannot assert privilege to shield evidence of bad faith.")

Version 1 at 10.

8. I was unable to locate this judicial decision online. I tried inputting the citation that Plaintiff provided. I also searched for it using the case caption in the brief.[2] The decision does not appear to exist.

9. I sent an e-mail to the lawyers via JAMS Access later that day. My e-mail (sent at around 4 pm PT on April 14) was primarily intended to set up another hearing on the discovery issue. Additionally, I asked Plaintiff's lawyers to check the accuracy of the National Steel Products and Booth citations. I expressly told the lawyers that I was unable to locate the items as stated in their brief.

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[2] I used a Boolean search (ti(booth and allstate))in the California and 9th Circuit jurisdictional databases on Westlaw. No result found.

10. **Version 2**. At roughly the same time, Plaintiff's lawyers filed an amended version of their supplemental brief (Version 2). An e-mail from an administrative assistant at the Ellis George firm informed me that the only change to Version 2 of the brief was "cosmetic to correct the placement of the screenshots" of certain disputed documents that were copied in the filing.

11. Despite that statement, there was a curious change to the National Steel Products parenthetical quotation. The purported text from the decision was fundamentally the same. However, the end of the quotation had garbled typing added to it: "[ ] prepared for the purpose of transmitting information **Page dfsadf**for legal advice." Version 2 at 7 (emphasis added). The Booth citation was unmodified.

12. **Version 3**. Plaintiff's lawyers filed a third version of the supplemental brief with JAMS at approximately 6 pm PT that same day (Version 3). Version 3 did not contain the quoted language from the National Steel Products decision as quoted above. Instead, it contained a parenthetical summation with the same internal pin cite. The parenthetical read: "(Privilege is strictly construed because it suppresses relevant facts which may be necessary for a just decision.)" Version 3 at 7.

13. My review of the National Steel Products opinion showed that this language actually was a direct quotation from the text of the appellate decision. However, it appears in a different portion of the decision (Cal. App. edition page 483, not page 489) than as cited in the brief.

14. The reference to the Booth decision was omitted from Version 3 of the brief. Instead, the same sentence of the brief ("California courts are especially skeptical. . .") is supported by a different citation.[3] Version 3 at 10.

15. I also received an e-mail from Mr. Vahedy, an associate at the K&L Gates firm. That e-mail stated that the Version 3 brief:

> addresses the issues raised in [my] 4:06 pm e-mail. Specifically, references to National and Booth were inadvertently included prior to filing. These cites have since been addressed and updated within our respective papers.

16. **OSC**. I'm not satisfied by that explanation. Based on the materials I reviewed on Monday, Plaintiff's lawyers may have presented falsified research on an issue of such significance (the dispute over privilege assertions) that it led to my

[3] That decision – State Farm Mutual Auto Ins. Co. v. Lee, 13 P.3d 1169, 1183 (Ariz. 2000) – is a ruling of the Arizona Supreme Court that may (in part) have relied on California law.

appointment as Special Master. I'm also concerned that a brief (Version 2) that allegedly was amended for "cosmetic" reasons contained a bizarre modification in one of the problematic sections.

17. Therefore, Plaintiff's lawyers are ordered to show cause why I should not impose sanctions (or recommend that the district judge impose sanctions) on them for this conduct. Plaintiff's lawyers may discharge this OSC by filing a sworn declaration attesting in adequate detail about the circumstances by which the erroneous National Steel Products and Booth materials made their way into Versions 1 and 2 of the brief. I specifically want to know which lawyers / staff members at the firms representing Plaintiff were responsible for this conduct. I also want a statement from a competent lawyer explaining whether or not any AI product was utilized in the preparation of the brief.

18. I also will require Mr. Copeland or Mr. Keech to personally review every citation and quotation in Version 1 of the brief. One of these lawyers will attest to the accuracy of those materials or inform me of any other problems in the supplemental brief that I didn't catch.

19. Plaintiff's lawyers will file these declarations with me via JAMS Access by or before noon on Friday, April 18. Note that, until I resolve this issue, neither this order nor the declarations of counsel should be filed on the federal court docket. Consistent with paragraph 7 of the appointment order, the parties are informed that I may consider cost-shifting of my fees regarding this situation.

Dated: April 15, 2025

/s/ Judge Wilner

Hon. Michael R. Wilner (Ret.)
Special Master

Appendix 2

JAMS CASE REFERENCE NO. 1210040394

USDC CASE NO. CV 24-5205 FMO (MAAx) (C.D. Cal.)

Jacquelyn "Jackie" Lacey and
Jacquelyn Lacey, Trustee for D and J Lacey Trust,

Plaintiff,

v.

State Farm General Insurance Co.,

Defendant.

NOTICE OF INTENDED SANCTIONS AND FEE ORDERS
FRCP 11, 37

1. The district court's order appointing me as Special Master authorizes me to "take all appropriate measures to perform the assigned duties fairly and efficiently." I possess the Court's authority to "regulate all proceedings" before me pursuant to the Federal Rules of Civil Procedure. This includes the ability to impose "any noncontempt sanction provided by Rule 37" or other authority. (Docket # 70.)

* * *

2. The candid declarations received from Plaintiff's lawyers in recent days reveal three uncontestable conclusions about their recent legal submissions:

a. Mr. Copeland used several AI tools to outline Plaintiff's supplemental brief on the disputed privilege issues. Those tools resulted in the use of fake or inaccurate legal authorities in that brief.

b. Neither the Ellis George nor the K&L Gates law firms properly checked the legitimacy of those authorities before filing the brief on the Court's docket or with me.

c. The scope of the inaccurate authorities was considerably higher than that described in my April 15 OSC order. The declarations

of Plaintiff's lawyers identified nine problematic citations (out of approximately 27 cited authorities in the brief), including a reference to a second non-existent judicial decision (Davis).

3. I accept the sincerity of the apologies in the lawyer's declarations regarding this conduct. I also accept Mr. Copeland's admission of responsibility for initiating this affair. Further, I note the contentions in the lawyers' submissions that, although they presented false legal authorities to me, the basic principles advanced in the brief (a privilege assertion cannot be used as a sword and a shield, etc.) are likely legitimate.

4. Nevertheless, justice requires a swift, certain, and measured response. It's simply unfathomable for me to consider that attorneys of this caliber would blithely outsource their legal research in such a haphazard and amateurish manner. The bogus filing caused me to have considerable doubts about the accuracy of all of factual and legal contentions that Plaintiff's lawyers advanced in this action – whether attributable to an AI foul-up or not.

5. Further, the lawyers' actions resulted in real expenses to Defendant. The reason for the supplemental briefing was because of Plaintiff's request that I order production of additional materials from the defense, a revised privilege log, and potentially in camera review of those documents. That request, in turn, caused Defendant: (a) to incur attorney's fees in preparing the defense supplemental brief; and (b) to bear the special master's fees for those proceedings pursuant to the original appointment order.

* * *

6. Therefore, consistent with the provisions of Federal Rules of Civil Procedure 11[1] and 37[2] and the Court's appointment order, I provide notice that I am likely to impose the following non-monetary sanctions and fee shifting awards:

---

[1] Rule 11(b) states, in relevant part, that when an attorney presents "a pleading, written motion, or other paper" to a court, the attorney "certifies that to the best of that person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances [that the] legal contentions are warranted by existing law." Rule 11(c)(3-4) states that a court may impose a sanction "limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." That may include "nonmonetary directives" or "an order directing payment [ ] of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation."

[2] Rule 37(a)(5)(B) states that a court "must, after giving an opportunity to be heard, require [ ] the attorney filing [an unsuccessful discovery] motion [ ] to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees." Litigation-related sanctions (for disobeying a court's

a. Striking all three versions of Plaintiff's supplemental brief filed on April 14, 2025.

b. Denying – on the merits, and for lack of support – Plaintiff's request for additional discovery relief as set forth in the Plaintiff's letter of April 4, 2025.

c. Ordering the Ellis George and K&L Gates firms jointly and severally to pay reasonable attorney's fees that Defendant incurred in the preparation and filing of its supplemental brief (filed April 14).

d. Ordering the Ellis George and K&L Gates firms jointly and severally to pay the special master fees incurred that relate to the receipt of the bogus briefs and the OSC proceedings.

e. Requiring Mr. Copeland to communicate in writing to Ms. Lacey about the substance and outcome of these proceedings.

7. Defense counsel are directed to file a short declaration with JAMS listing the fees charged to their client as discussed in ¶ 5.c above. Please submit that by noon on April 23. I'll separately get a rough calculation of the special master fees per ¶ 5.d.

8. Pursuant to Federal Rules of Civil Procedure 11(c)(1) and 37(a)(5)(B), Plaintiff and her lawyers will have the opportunity to respond to this notice. That response (NTE five pages – no AI to be used), if any, will be due by 4 p.m. on Friday, April 25. I'll set the matter for a video hearing on Tuesday, April 29, 2025 at 10:30 a.m (PT).

9. If Plaintiff's lawyers do not intend to challenge this tentative outcome, they may promptly inform my case manager. I'll relieve them of the filing obligation and will vacate the video hearing.[3]

---

discovery order, but generally applicable to other circumstances) may include prohibiting a party from "supporting or opposing designated claims or defenses" or "striking pleadings in whole or in part." Fed. R. Civ. 37(b)(2)(A)(ii-iii).

[3] I note that I have long been of the opinion that a fee award under Rule 37 should not be considered a personal sanction on an attorney that is potentially reportable to the State Bar of California pursuant to Business and Professions Code section 6068(o)(3). C.f. Medina v. United Parcel Service, No. C-06-791 JW PVT, 2007 WL 2123699 (N.D. Cal. 2007) (state statute "exempts" discovery-related proceedings from self-reporting obligation).

* * *

10. The parties are informed that I personally advised District Judge Olguin on April 18 about the nature of these proceedings and the substance of the lawyers' declarations. (Docket # 70 at ¶ 3.)

Dated: April 20, 2025

/s/ Judge Wilner

Hon. Michael R. Wilner (Ret.)
Special Master

Appendix 3

ELLIS GEORGE LLP
Eric M. George (SBN 166403)
egeorge@ellisgeorge.com
Trent Copeland (SBN 136890)
tcopeland@ellisgeorge.com
2121 Avenue of the Stars, 30th Floor
Los Angeles, California 90067
Telephone: (310) 274-7100
Facsimile: (310) 275-5697

K&L GATES LLP
Ryan Q. Keech (SBN 280306)
Ryan.Keech@klgates.com
Kevin S. Asfour (SBN 228993)
Kevin.Asfour@klgates.com
Keian Vahedy (SBN 316708)
Keian.Vahedy@klgates.com
10100 Santa Monica Blvd., 8th Floor
Los Angeles, California 90067
Telephone: (310) 552-5000
Facsimile: (310) 552-5001

Attorneys for Plaintiff Jacquelyn "Jackie" Lacey (in her individual capacity and as trustee of the D and J Lacey Family Trust)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JACQUELYN "JACKIE" LACEY, in her individual capacity; and JACQUELYN "JACKIE" LACEY as trustee of the D and J Lacey Family Trust dated November 23, 2016,

Plaintiff,

v.

STATE FARM GENERAL INSURANCE COMPANY, an Illinois corporation, and DOES 1-50, inclusive,

Defendant.

Case No. 2:24-cv-05205-FMO-MAA

Judge: Hon. Fernando M. Olguin

PLAINTIFF JACQUELYN "JACKIE" LACEY'S BRIEF IN SUPPORT OF OBTAINING RELEVANT, NON-PRIVILEGED DOCUMENTS FROM DEFENDANT STATE FARM GENERAL INSURANCE COMPANY

Pursuant to the Special Master's instructions on April 7, 2025, Plaintiff Jacquelyn Lacey, individually, and as trustee of the D and J. Lacey Family Trust Dated November 23, 2016 ("Plaintiff") submits this brief to further address defendant State Farm General Insurance Company's ("State Farm") unjustified withholding of relevant, non-privileged documents and communications in its privilege log.

I. PRELIMINARY STATEMENT

This motion presents a focused and practical request: that the Court exercise its authority under California Evidence Code § 915(a) and (b) to conduct an in camera review of a discrete set of documents for which Defendant State Farm asserts attorney-client privilege or work product protection, despite lacking a sufficient factual or legal basis for doing so. The essential issue before the Court is whether State Farm may shield from discovery internal claims handling communications – many involving no attorneys, and created in the ordinary course of business – based solely on generalized and repetitive assertions of privilege that fail to meet the threshold burden required by law.

At the center of this case is a fundamental question: Did State Farm act in bad faith when it denied or delayed coverage for the Laceys' claim? That inquiry necessarily turns on the conduct and state of mind of the decision-makers—specifically, State Farm's claims adjusters—whose internal communications and reasoning during the claims process are directly at issue. Yet State Farm now seeks to withhold precisely those communications through boilerplate assertions of privilege, despite failing to demonstrate that any recognized legal privilege in fact applies.

Plaintiff challenges only a narrow subset of the documents identified in State Farm's privilege log—specifically, those highlighted in red and green in Exhibit B to Plaintiff's April 4, 2025 Letter Brief to the Special Master. The red entries concern communications between claims representatives made during the ordinary course of claims handling, while the green entries reflect internal discussions about purported

"opinions" of outside counsel, though it is unclear whether those opinions were ever formally requested or provided as legal advice. Crucially, many of these documents were created at or near key decision points—when the claim was first tendered, when coverage was denied, and when it was later accepted under a reservation of rights—making them highly relevant to the bad faith analysis.

State Farm's privilege log does not provide individualized or substantive justifications for withholding these documents. Instead, it relies on uniform, cut-and-paste assertions that offer no meaningful detail on the nature or context of the communications. This lack of specificity precludes both Plaintiff and the Court from evaluating the legitimacy of the privilege claims. Moreover, State Farm has already selectively disclosed portions of the same communications, raising serious concerns about waiver and fairness.

Evidence Code § 915(b) is tailored for precisely this type of discovery dispute. Where, as here, a prima facie showing has been made that the claimed privilege may not apply, and the proponent has failed to substantiate its claim, the Court is expressly authorized to conduct an in camera review to resolve the issue. This mechanism is not only appropriate but necessary to safeguard the integrity of the discovery process, particularly where withheld documents go to the heart of the case.

Plaintiff's request is modest, narrowly tailored, and consistent with both statutory authority and principles of fairness. A limited in camera review of these selected documents (or a subset of these challenged documents) will allow the Court to determine whether State Farm's privilege claims are valid or merely an attempt to shield relevant, discoverable evidence. Because these documents bear directly on the conduct and state of mind of the claims personnel whose decisions are central to the bad faith claim, Plaintiff respectfully requests that the Court grant the request for in camera review pursuant to Evidence Code § 915(a) and (b).

II. LEGAL STANDARD

Under California Evidence Code section 915(a), when a party claims that a communication is privileged, the court may conduct an *in camera* review to determine whether that claim is valid, especially where there is a dispute or uncertainty regarding the scope or waiver of the privilege.[1] *People v. Superior Court*, 25 Cal.4th 703, 725 (2001) ("A trial court has broad discretion to review materials *in camera* to determine whether a claimed privilege applies."); *see also Costco Wholesale Corp. v. Superior Court*, 47 Cal.4th 725, 739 (2009) (Court did not preclude *in camera* review entirely. It suggested that *in camera* review may be proper when there's a sufficient showing that the privilege may not apply — *e.g.*, because of waiver, third-party involvement, or a lack of legal content.)

As the Ninth Circuit has counseled, it is not the purpose of the attorney-client privilege "to permit an attorney to conduct his client's business affairs in secret." *Matter of Fischel,* 557 F.2d 209, 211 (9th Cir. 1977). Therefore, caution should be taken to apply the privilege strictly to ensure that "[a]n attorney's involvement in, or recommendation of, a transaction does not place a cloak of secrecy around all the incidents of such a transaction." *Id.* at 212. Countless authorities make clear that "a litigant cannot cloak business information in privilege by involving an attorney in the communication of business matters."

III. STATE FARM IS WITHHOLDING RELEVANT, NON-PRIVILEGED DOCUMENTS WITHIN ITS PRIVILEGE LOG

A. State Farm Cannot Make a *Prima Facie* Showing That the "Dominant Purpose" For Its Redacted/ Withheld Documents Is For Legal Advice.

[1] While section 915 would preclude reviewing the billing records in their entirety, to the extent they disclose privileged information, it does not preclude the review of redacted versions. *Lincoln General Ins. Co. v. Ryan Mercaldo LLP*, No. 13 CV 2192-W (DHB), 2015 WL 12672143 at *5 (S.D. Cal. July 31, 2015) (ordering that plaintiff reduce amount of redactions to billing records to "provide more information about the general nature of the services performed without revealing privileged communications, or attorney thought processes.")

California law requires that a party asserting the attorney-client privilege bears the burden of establishing the preliminary facts necessary to support its application. *Costco*, *supra*, 47 Cal.4th at 733; *Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal.App.4th 110, 119 (1997). As the party seeking to withhold responsive documents based on the attorney-client privilege or work product doctrine, State Farm must show why Plaintiff's request for production and/or *in camera* review should not be granted. *Mancini v. Ins. Corp.,* Case No. 07-cv-1750-L(NLS), 2009 WL 1765295, at *1 (S.D. Cal. June 18, 2009).

The California Supreme Court in *Costco* held that the "proper procedure" to determine whether the attorney-client privilege applies is to consider "the dominant purpose of the relationship" rather than the dominant purpose of a particular communication. *Costco, supra,* 47 Cal.4th at 734 (**"If... the dominant purpose of the relationship was not that of attorney and client, the communications would not be subject to the attorney-client privilege and therefore would generally be discoverable."**) *Id.* at 740 (emphasis added).

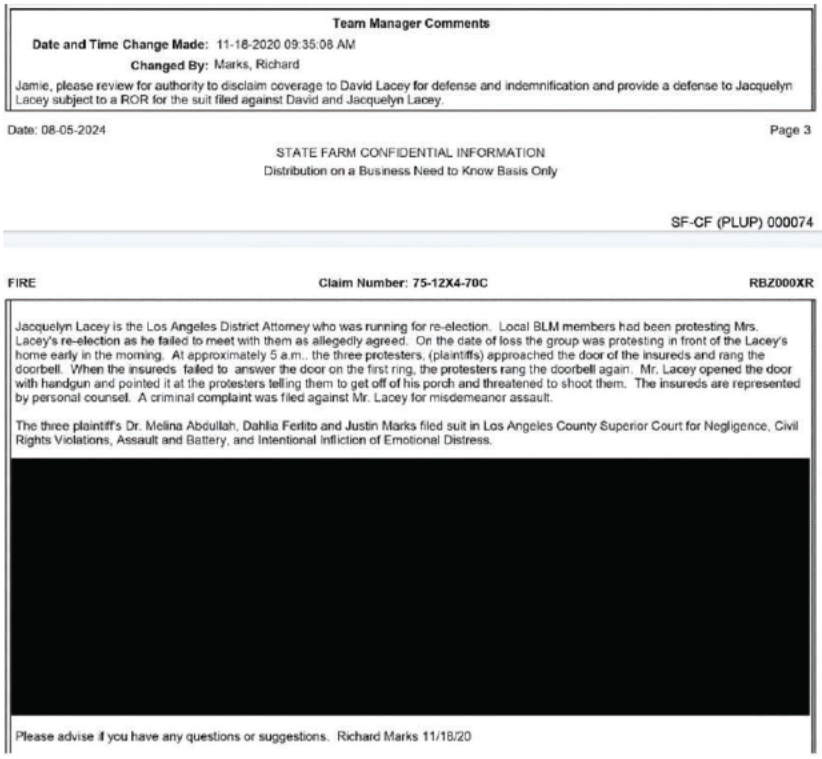
As explained by *Ivy Hotel San Diego, LLC v. Houston Casualty Co.*, Case No. 10-cv-2183-L, 2011 WL 4914941 (S.D. Cal. Oct. 17, 2011), in the context of a bad faith case, "[t]he attorney-client privilege would not be applicable if [the insurance company's] dominant purpose was to have [the law firm] provide business advice or act as an claims adjuster." *Id.* at *4; *Aetna Cas. & Surety Co. v. Superior Court*, 153 Cal.App.3d 467, 476 (1984) ("Where the evidence sought is directly at issue… a party should not be allowed to use privilege as both a sword and a shield."); *Zurich American Ins. Co. v. Superior Court*, 155 Cal.App.4th 1485, 1503 (2007) ("Communications by corporate employees that are not made at the direction of counsel or for the purpose of legal advice are not privileged."

State Farm cannot meet its burden here, as its counsel's factual assertions are not sufficient to establish State Farm's privilege case. *See, e.g., League of California Cities v. Superior Court,* 241 Cal.App.4th 976, 991 (2015) (upholding trial court's

finding that litigation attorney's representations were insufficient to establish privilege and applicability of Evidence Code section 915). It is not enough to claim that as long as an attorney provides any legal advice, that *per se* turns "the dominant purpose" of the relationship into one of attorney-client rather than adjuster-insurance corporation. This argument is untenable because it ignores *Costco*'s instruction to evaluate the purpose of the relationship as a whole. Indeed, in *Costco*, the communication at issue was made directly to legal counsel for the purpose of obtaining legal advice. In contrast, many of the communications at issue here do not involve legal counsel, and were exchanged between claims adjusters discussing routine claim handling activities. These communications are business-oriented, not legal in nature, and do not fall within the scope of the attorney-client privilege. Additionally, other communications were originated from a claims adjuster/handler and were sent directly to "State Farm Claim File" without any indication of how, when or where an attorney communication was involved. *Costco*, *supra*, 47 Cal.4th at 739 ("The privilege... applies only when the client intends to seek legal advice and the communication is made for that purpose.")

Many courts have explained that while the attorney might be retained to both adjust a claim and provide legal advice, the question of whether the communications are privileged hinges on what purpose predominated. *See, e.g., Cason v. Federated Life Ins. Co.*, Case No. C-10-0792 EMC, 2011 WL 1807427, 2 (N.D. Cal. May 11, 2011). Because the test is a holistic one, a few needles of legal advice amongst a haystack of claims adjusting does not turn a predominantly claims adjusting relationship into an attorney-client relationship. There are also multiple district court cases in which parties have been ordered to produce communications after a finding that the dominant purpose under the *Costco* analysis was not attorney-client. *See, e.g., Syncora Guarantee Inc. v. EMC Mortg. Corp.*, Case No. MC 13-80037 SI, 2013 WL 2552360, *3 (N.D. Cal. Jun. 10, 2013) (finding that "dominant purpose" of relationship under *Costco* was not that of attorney-client, ordering production).

Suffice to say, the dominant purpose of State Farm's redacted and withheld communications is to seek business advice and discuss claims handling functions, not legal advice. See *Costco*, *supra*, 47 Cal.4th at 735; *Davis v. City of Santa Ana*, 51 Cal.App.5th 1094, 1115 (2020). Its privilege log identifies 519 redactions and documents, each uniformly withheld as: "legal communications, oversight, opinions and strategy involving litigation counsel." Approximately 44 entries (color-coded as green) and 248 entries (color-coded as red) are claims file notes created by and between State Farm's claims representatives in the ordinary course of business. And as argued before the Special Master, these entries do not comport with the description. State Farm fails to identify even a single attorney that was either (a) the author or contributor of the "privileged" documents; or (b) a party to an allegedly confidential communication with State Farm. And the examples of this are both



Team Manager Comments

Date and Time Change Made: 11-18-2020 09:35:08 AM

Changed By: Marks, Richard

Jamie, please review for authority to disclaim coverage to David Lacey for defense and indemnification and provide a defense to Jacquelyn Lacey subject to a ROR for the suit filed against David and Jacquelyn Lacey.

Date: 08-05-2024 Page 3

STATE FARM CONFIDENTIAL INFORMATION
Distribution on a Business Need to Know Basis Only

SF-CF (PLUP) 000074

FIRE Claim Number: 75-12X4-70C RBZ000XR

Jacquelyn Lacey is the Los Angeles District Attorney who was running for re-election. Local BLM members had been protesting Mrs. Lacey's re-election as he failed to meet with them as allegedly agreed. On the date of loss the group was protesting in front of the Lacey's home early in the morning. At approximately 5 a.m., the three protesters, (plaintiffs) approached the door of the insureds and rang the doorbell. When the insureds failed to answer the door on the first ring, the protesters rang the doorbell again. Mr. Lacey opened the door with handgun and pointed it at the protesters telling them to get off of his porch and threatened to shoot them. The insureds are represented by personal counsel. A criminal complaint was filed against Mr. Lacey for misdemeanor assault.

The three plaintiff's Dr. Melina Abdullah, Dahlia Ferlito and Justin Marks filed suit in Los Angeles County Superior Court for Negligence, Civil Rights Violations, Assault and Battery, and Intentional Infliction of Emotional Distress.

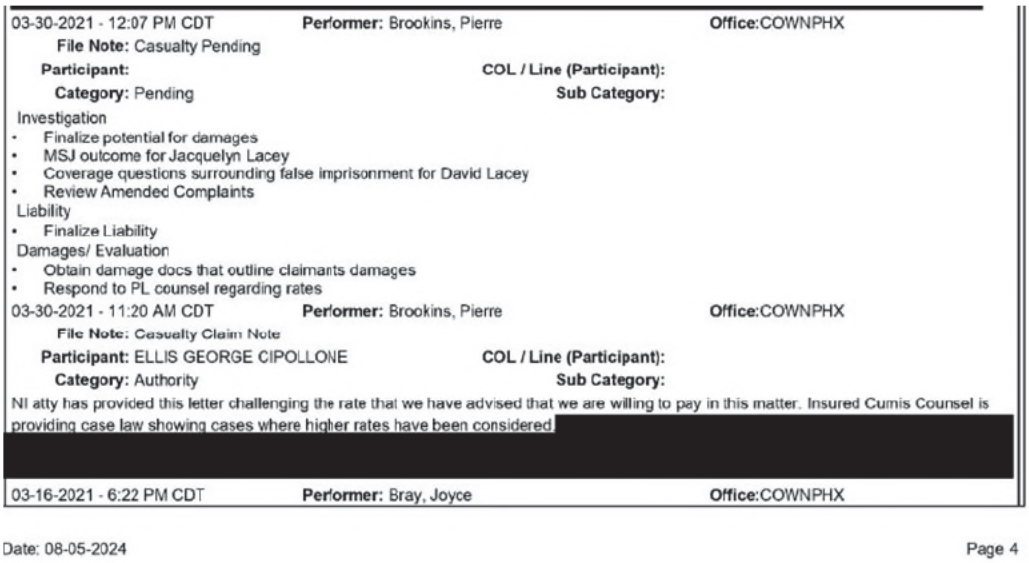
[redacted]

Please advise if you have any questions or suggestions. Richard Marks 11/18/20

expansive and egregious.

For example, State Farm's privilege log contains voluminous copy-and-paste entries stating, "redaction of claim note reflecting legal communications, oversight, opinions, and strategy involving coverage counsel," withheld as "ACP, AWP." But

upon review of the documents themselves, the authors identified are claims adjusters,



03-30-2021 - 12:07 PM CDT **Performer:** Brookins, Pierre **Office:**COWNPHX
File Note: Casualty Pending
Participant: **COL / Line (Participant):**
Category: Pending **Sub Category:**
Investigation
- Finalize potential for damages
- MSJ outcome for Jacquelyn Lacey
- Coverage questions surrounding false imprisonment for David Lacey
- Review Amended Complaints

Liability
- Finalize Liability

Damages/ Evaluation
- Obtain damage docs that outline claimants damages
- Respond to PL counsel regarding rates

03-30-2021 - 11:20 AM CDT **Performer:** Brookins, Pierre **Office:**COWNPHX
File Note: Casualty Claim Note
Participant: ELLIS GEORGE CIPOLLONE **COL / Line (Participant):**
Category: Authority **Sub Category:**
NI atty has provided this letter challenging the rate that we have advised that we are willing to pay in this matter. Insured Cumis Counsel is providing case law showing cases where higher rates have been considered [redacted]

03-16-2021 - 6:22 PM CDT **Performer:** Bray, Joyce **Office:**COWNPHX

Date: 08-05-2024 Page 4

not lawyers (*e.g.*, Richard Marks, Pierre Brookins, Jamie Johnson, and Stacey Allman). The communications are internal, identifying the recipients of the communications as "State Farm Claim File," rather than a person. See *e.g.*, SF-CF-(PLUP) 000074-75:

See also, SF-CF (PLUP) 000028:

Each of the above examples, *albeit limited given the page limits*, are claims file notes entered by claims adjusters assigned to handle the Lacey's claim file in the regular course of their business, none of which are addressed to counsel for legal opinions, nor are they attorney-work product. Rather, these internal notes reference the adjusters' recommendations, pending activities, and discussion with other State Farm claims representatives regarding the Lacey's insurance claim. *National Steel Products Co. v. Superior Court*, 164 Cal.App.3d 476, 489 (1985) ("Internal memoranda or claims file materials, although they may discuss legal theories, litigation tactics or potential liability, are not privileged unless they are written by or at the direction of counsel and prepared for the purpose of transmitting information to counsel for legal advice.")

What *Costco* also reaffirmed is the long-standing principle that "a client cannot protect unprivileged information from discovery by transmitting it to an attorney."

Costco, supra, 47 Cal.4th at 735. Indeed, "[b]ecause an in-house lawyer often has other functions in addition to providing legal advice, the lawyer's role on a particular occasion will not be self-evident as it usually is in the case of outside counsel." *Minebea Co., Ltd. v. Papst,* 228 F.R.D. 13, 21 (D.D.C. 2005). Accordingly, "courts impose a higher burden on in-house counsel to 'clearly demonstrate' that advice was given in a legal capacity." *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B,* 230 F.R.D. 398, 411 n.20 (D. Md. 2005) (citation omitted).

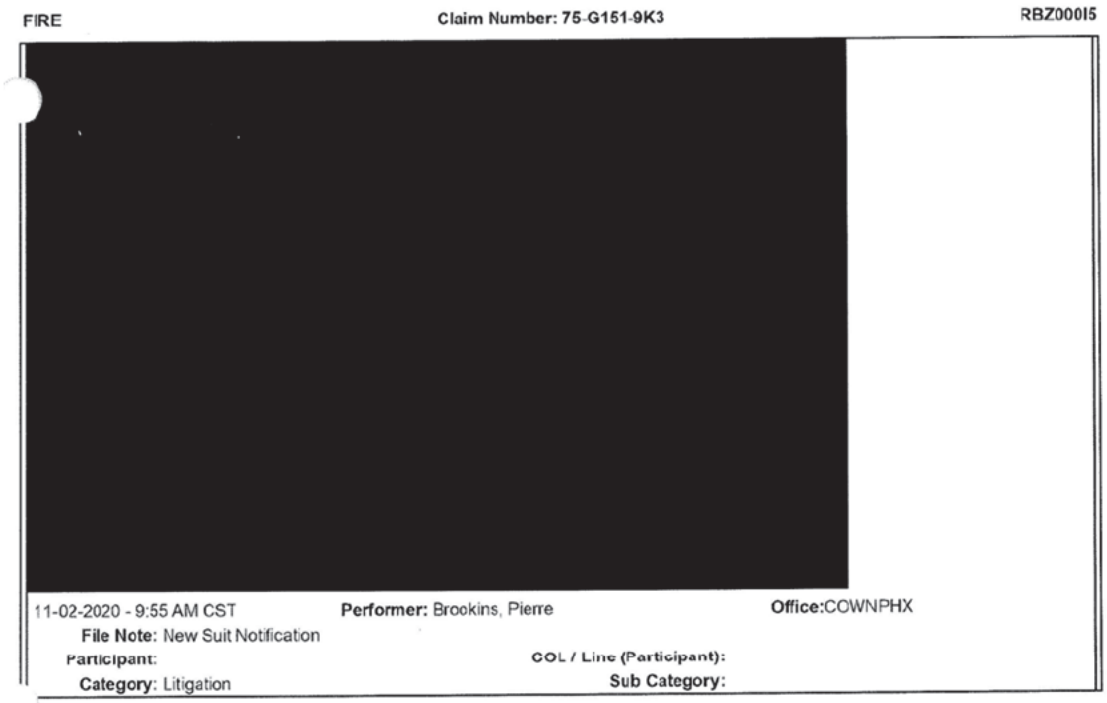
And the principle applies equally here with regard to State farm's coverage counsel. To justify withholding communications with coverage counsel, the "lawyer's role as a lawyer must be primary to her participation" in the communication. *In re Vioxx Prods. Liability Litig.,* 501 F. Supp. 2d 789, 798 (E.D. La. 2007). Communications with in-house counsel are not privileged to the extent they "would have been made because of a business purpose," regardless of whether there may have been a "perceived additional interest in securing legal advice." *McCaugherty v. Siffermann,* 132 F.R.D. 234, 238 (N.D. Cal. 1990). *See also, e.g.*, *Upjohn Co. v. U.S.*, 449 U.S. 383, 395-96 (1981) (ACP only protects communications from client to attorney, and not disclosure of underlying facts). Based on the foregoing, *Plaintiff has made* a factual showing that State Farm's claims file notes may not be privileged.

B. *In Camera* Review Is Warranted Because the Claims Adjusters' Conduct Is the Core of the Bad Faith Claim and Cannot Be Shielded.

This case turns on what State Farm's claims personnel did, when they did it, and why. The internal communications reflect the evaluative process that led to State Farm's decisions regarding its initial denial of coverage to David Lacey. Indeed, State Farm seeks to withhold from disclosure even the very first entry into its claims file titled "**New Suit Notification**." This communication has been entirely redacted and reflects the entry as having been made into the file by a claims representative – without reference to an attorney (or even a communication with an attorney)

whatsoever. The wholesale redaction reflected in SF-CF (HO) 000110 is a further illustration of this point:.

SF-CF (HO) 000110



In sum, to allow State Farm to hide those very communications would defeat the truth-seeking purpose of discovery in bad faith litigation. *Lipton v. Superior Court*, 48 Cal.App.4th 1599, 1619 (1996) ("A party may not use the privilege as both a sword and a shield.")

Courts frequently conduct *in camera* review of communications in appropriate circumstances. *See, e.g., Minebea Co., Ltd. v. Papst,* 228 F.R.D. 13, 21 (D.D.C. 2005) (ordering communications produced after *in camera* review: "Because an in-house lawyer often has other functions in addition to providing legal advice, the lawyer's role on a particular occasion will not be self-evident."). Here, review is imperative given the lack of integrity of State Farm's privilege log more generally.

First, the issue remains that the description for every entry in State Farm's privilege log is nearly the same: "Redaction of claim note reflecting legal communications, oversight, opinions and strategy involving litigation counsel."

These kinds of inaccuracies alone can justify *in camera* review. *See,* e.g, *Hohider v. United Parcel Service, Inc.,* 257 F.R.D. 80, 84 (W.D. Pa. 2009) (*in camera* review is justified where "doubts" are present regarding the assertions and descriptions in a privilege log).

Second, with regard to communications between State Farm's claims representatives and coverage counsel, there is also no basis to withhold unless such communications include the request or receipt of "legal advice." Communications reflecting or containing coverage counsel's "impressions" or opinions of litigation counsel and/or litigation counsels' strategy are not privileged. California courts are especially skeptical of overbroad privilege assertions in bad faith insurance litigation, where the insurer's claims conduct is directly at issue. *See,* *Booth v. Allstate Ins. Co.*, 198 Cal.App.3d 1357, 1366 (1989) ("An insurer cannot assert privilege to shield evidence of bad faith.")

Here, State Farm has not provided sufficient information for Plaintiff to even evaluate whether its coverage counsel was engaged in anything other than "claims investigation activities." Indeed, it is hard to imagine what legal advice, if any, State Farm could be seeking day after day for the entirety of its claim handling. There is no basis for redacting claims representative documents, especially where this bad faith action challenges State Farm's "oversight, opinions and strategy," all of which prejudiced Plaintiff in the underlying matter. See *Nei v. Travelers Home and Marine Ins. Co.*, 326 F.R.D. 652 (2018) holding that attorney-client privilege does not apply when an attorney acts as a claims adjuster, supervisor, or investigation monitor rather than a legal advisor).

IV. CONCLUSION

For the foregoing reasons, the Special Master should order those red and green color-colored entries from State Farm's privilege log be submitted to the Special Master for *in camera* review and, if appropriate based on such review, order them produced to Plaintiff.

Dated: April 14, 2025

Respectfully Submitted,

ELLIS GEORGE LLP

By: /s/ Trent Copeland
Eric M. George
Trent Copeland

Attorneys for Plaintiffs
Jacquelyn "Jackie" Lacey and
Jacquelyn "Jackie" Lacey as trustee
of the D and J. Lacey Family Trust
Dated November 23, 2016

Appendix 4

ELLIS GEORGE LLP
Eric M. George (SBN 166403)
egeorge@ellisgeorge.com
Trent Copeland (SBN 136890)
tcopeland@ellisgeorge.com
2121 Avenue of the Stars, 30th Floor
Los Angeles, California 90067
Telephone: (310) 274-7100
Facsimile: (310) 275-5697

K&L GATES LLP
Ryan Q. Keech (SBN 280306)
Ryan.Keech@klgates.com
Kevin S. Asfour (SBN 228993)
Kevin.Asfour@klgates.com
Keian Vahedy (SBN 316708)
Keian.Vahedy@klgates.com
10100 Santa Monica Blvd., 8th Floor
Los Angeles, California 90067
Telephone: (310) 552-5000
Facsimile: (310) 552-5001

Attorneys for Plaintiff Jacquelyn "Jackie" Lacey (in her individual capacity and as trustee of the D and J Lacey Family Trust)

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CENTRAL DISTRICT OF CALIFORNIA

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Plaintiff,

v.

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Defendant.

Case No. 2:24-cv-05205-FMO-MAA

Judge: Hon. Fernando M. Olguin

PLAINTIFF JACQUELYN "JACKIE" LACEY'S SECOND AMENDED BRIEF IN SUPPORT OF OBTAINING RELEVANT, NON-PRIVILEGED DOCUMENTS FROM DEFENDANT STATE FARM GENERAL INSURANCE COMPANY

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State Farm's privilege log does not provide individualized or substantive justifications for withholding these documents. Instead, it relies on uniform, cut-and-paste assertions that offer no meaningful detail on the nature or context of the communications. This lack of specificity precludes both Plaintiff and the Court from evaluating the legitimacy of the privilege claims. Moreover, State Farm has already selectively disclosed portions of the same communications, raising serious concerns about waiver and fairness.

Evidence Code § 915(b) is tailored for precisely this type of discovery dispute. Where, as here, a prima facie showing has been made that the claimed privilege may not apply, and the proponent has failed to substantiate its claim, the Court is expressly authorized to conduct an in camera review to resolve the issue. This mechanism is not only appropriate but necessary to safeguard the integrity of the discovery process, particularly where withheld documents go to the heart of the case.

Plaintiff's request is modest, narrowly tailored, and consistent with both statutory authority and principles of fairness. A limited in camera review of these selected documents (or a subset of these challenged documents) will allow the Court to determine whether State Farm's privilege claims are valid or merely an attempt to shield relevant, discoverable evidence. Because these documents bear directly on the conduct and state of mind of the claims personnel whose decisions are central to the bad faith claim, Plaintiff respectfully requests that the Court grant the request for in camera review pursuant to Evidence Code § 915(a) and (b).

II. LEGAL STANDARD

Under California Evidence Code section 915(a), when a party claims that a communication is privileged, the court may conduct an *in camera* review to determine whether that claim is valid, especially where there is a dispute or uncertainty regarding the scope or waiver of the privilege.[1] *People v. Superior Court*, 25 Cal.4th 703, 725 (2001) ("A trial court has broad discretion to review materials *in camera* to determine whether a claimed privilege applies."); *see also Costco Wholesale Corp. v. Superior Court*, 47 Cal.4th 725, 739 (2009) (Court did not preclude *in camera* review entirely. It suggested that *in camera* review may be proper when there's a sufficient showing that the privilege may not apply — *e.g.*, because of waiver, third-party involvement, or a lack of legal content.)

As the Ninth Circuit has counseled, it is not the purpose of the attorney-client privilege "to permit an attorney to conduct his client's business affairs in secret." *Matter of Fischel,* 557 F.2d 209, 211 (9th Cir. 1977). Therefore, caution should be taken to apply the privilege strictly to ensure that "[a]n attorney's involvement in, or recommendation of, a transaction does not place a cloak of secrecy around all the incidents of such a transaction." *Id.* at 212. Countless authorities make clear that "a litigant cannot cloak business information in privilege by involving an attorney in the communication of business matters."

III. STATE FARM IS WITHHOLDING RELEVANT, NON-PRIVILEGED DOCUMENTS WITHIN ITS PRIVILEGE LOG

A. State Farm Cannot Make a *Prima Facie* Showing That the "Dominant Purpose" For Its Redacted/ Withheld Documents Is For Legal Advice.

California law requires that a party asserting the attorney-client privilege bears the burden of establishing the preliminary facts necessary to support its application.

[1] While section 915 would preclude reviewing the billing records in their entirety, to the extent they disclose privileged information, it does not preclude the review of redacted versions. *Lincoln General Ins. Co. v. Ryan Mercaldo LLP*, No. 13 CV 2192-W (DHB), 2015 WL 12672143 at *5 (S.D. Cal. July 31, 2015) (ordering that plaintiff reduce amount of redactions to billing records to "provide more information about the general nature of the services performed without revealing privileged communications, or attorney thought processes.")

Costco, *supra*, 47 Cal.4th at 733; *Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal.App.4th 110, 119 (1997). As the party seeking to withhold responsive documents based on the attorney-client privilege or work product doctrine, State Farm must show why Plaintiff's request for production and/or *in camera* review should not be granted. *Mancini v. Ins. Corp.,* Case No. 07-cv-1750-L(NLS), 2009 WL 1765295, at *1 (S.D. Cal. June 18, 2009).

The California Supreme Court in *Costco* held that the "proper procedure" to determine whether the attorney-client privilege applies is to consider "the dominant purpose of the relationship" rather than the dominant purpose of a particular communication. *Costco, supra,* 47 Cal.4th at 734 (**"If... the dominant purpose of the relationship was not that of attorney and client, the communications would not be subject to the attorney-client privilege and therefore would generally be discoverable."**) *Id.* at 740 (emphasis added).

As explained by *Ivy Hotel San Diego, LLC v. Houston Casualty Co.*, Case No. 10-cv-2183-L, 2011 WL 4914941 (S.D. Cal. Oct. 17, 2011), in the context of a bad faith case, "[t]he attorney-client privilege would not be applicable if [the insurance company's] dominant purpose was to have [the law firm] provide business advice or act as an claims adjuster." *Id.* at *4; *Aetna Cas. & Surety Co. v. Superior Court*, 153 Cal.App.3d 467, 476 (1984) ("Where the evidence sought is directly at issue… a party should not be allowed to use privilege as both a sword and a shield."); *Zurich American Ins. Co. v. Superior Court*, 155 Cal.App.4th 1485, 1503 (2007) ("Communications by corporate employees that are not made at the direction of counsel or for the purpose of legal advice are not privileged.")

State Farm cannot meet its burden here, as its counsel's factual assertions are not sufficient to establish State Farm's privilege case. *See, e.g., League of California Cities v. Superior Court,* 241 Cal.App.4th 976, 991 (2015) (upholding trial court's finding that litigation attorney's representations were insufficient to establish privilege and applicability of Evidence Code section 915). It is not enough to claim

that as long as an attorney provides any legal advice, that *per se* turns "the dominant purpose" of the relationship into one of attorney-client rather than adjuster-insurance corporation. This argument is untenable because it ignores *Costco*'s instruction to evaluate the purpose of the relationship as a whole. Indeed, in *Costco*, the communication at issue was made directly to legal counsel for the purpose of obtaining legal advice. In contrast, many of the communications at issue here do not involve legal counsel, and were exchanged between claims adjusters discussing routine claim handling activities. These communications are business-oriented, not legal in nature, and do not fall within the scope of the attorney-client privilege. Additionally, other communications were originated from a claims adjuster/handler and were sent directly to "State Farm Claim File" without any indication of how, when or where an attorney communication was involved. *Costco*, *supra*, 47 Cal.4th at 739 ("The privilege... applies only when the client intends to seek legal advice and the communication is made for that purpose.")

Many courts have explained that while the attorney might be retained to both adjust a claim and provide legal advice, the question of whether the communications are privileged hinges on what purpose predominated. *See, e.g., Cason v. Federated Life Ins. Co.*, Case No. C-10-0792 EMC, 2011 WL 1807427, 2 (N.D. Cal. May 11, 2011). Because the test is a holistic one, a few needles of legal advice amongst a haystack of claims adjusting does not turn a predominantly claims adjusting relationship into an attorney-client relationship. There are also multiple district court cases in which parties have been ordered to produce communications after a finding that the dominant purpose under the *Costco* analysis was not attorney-client. *See, e.g., Syncora Guarantee Inc. v. EMC Mortg. Corp.*, Case No. MC 13-80037 SI, 2013 WL 2552360, *3 (N.D. Cal. Jun. 10, 2013) (finding that "dominant purpose" of relationship under *Costco* was not that of attorney-client, ordering production).

Suffice to say, the dominant purpose of State Farm's redacted and withheld communications is to seek business advice and discuss claims handling functions,

not legal advice. See *Costco*, *supra*, 47 Cal.4th at 735; *Davis v. City of Santa Ana*, 51 Cal.App.5th 1094, 1115 (2020). Its privilege log identifies 519 redactions and documents, each uniformly withheld as: "legal communications, oversight, opinions and strategy involving litigation counsel." Approximately 44 entries (color-coded as green) and 248 entries (color-coded as red) are claims file notes created by and between State Farm's claims representatives in the ordinary course of business. And as argued before the Special Master, these entries do not comport with the description. State Farm fails to identify even a single attorney that was either (a) the author or contributor of the "privileged" documents; or (b) a party to an allegedly confidential communication with State Farm. And the examples of this are both expansive and egregious.

For example, State Farm's privilege log contains voluminous copy-and-paste entries stating, "redaction of claim note reflecting legal communications, oversight, opinions, and strategy involving coverage counsel," withheld as "ACP, AWP." But upon review of the documents themselves, the authors identified are claims adjusters, not lawyers (*e.g.*, Richard Marks, Pierre Brookins, Jamie Johnson, and Stacey Allman). The communications are internal, identifying the recipients of the communications as "State Farm Claim File," rather than a person. See *e.g.*, SF-CF-(PLUP) 000074-75:

Team Manager Comments

Date and Time Change Made: 11-18-2020 09:35:08 AM

Changed By: Marks, Richard

Jamie, please review for authority to disclaim coverage to David Lacey for defense and indemnification and provide a defense to Jacquelyn Lacey subject to a ROR for the suit filed against David and Jacquelyn Lacey.

Date: 08-05-2024 Page 3

STATE FARM CONFIDENTIAL INFORMATION
Distribution on a Business Need to Know Basis Only

SF-CF (PLUP) 000074

FIRE **Claim Number: 75-12X4-70C** **RBZ000XR**

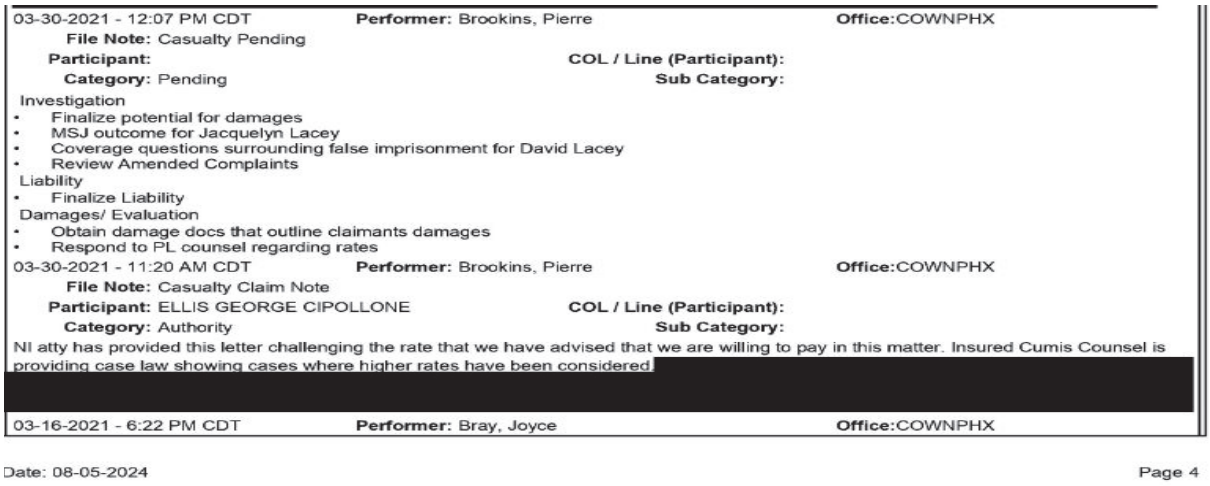
Jacquelyn Lacey is the Los Angeles District Attorney who was running for re-election. Local BLM members had been protesting Mrs. Lacey's re-election as he failed to meet with them as allegedly agreed. On the date of loss the group was protesting in front of the Lacey's home early in the morning. At approximately 5 a.m., the three protesters, (plaintiffs) approached the door of the insureds and rang the doorbell. When the insureds failed to answer the door on the first ring, the protesters rang the doorbell again. Mr. Lacey opened the door with handgun and pointed it at the protesters telling them to get off of his porch and threatened to shoot them. The insureds are represented by personal counsel. A criminal complaint was filed against Mr. Lacey for misdemeanor assault.


The three plaintiff's Dr. Melina Abdullah, Dahlia Ferlito and Justin Marks filed suit in Los Angeles County Superior Court for Negligence, Civil Rights Violations, Assault and Battery, and Intentional Infliction of Emotional Distress.

[redacted]

Please advise if you have any questions or suggestions. Richard Marks 11/18/20

See also, SF-CF (PLUP) 000028:


03-30-2021 - 12:07 PM CDT **Performer:** Brookins, Pierre **Office:**COWNPHX
File Note: Casualty Pending
Participant: **COL / Line (Participant):**
Category: Pending **Sub Category:**
Investigation
- Finalize potential for damages
- MSJ outcome for Jacquelyn Lacey
- Coverage questions surrounding false imprisonment for David Lacey
- Review Amended Complaints

Liability
- Finalize Liability

Damages/ Evaluation
- Obtain damage docs that outline claimants damages
- Respond to PL counsel regarding rates

03-30-2021 - 11:20 AM CDT **Performer:** Brookins, Pierre **Office:**COWNPHX
File Note: Casualty Claim Note
Participant: ELLIS GEORGE CIPOLLONE **COL / Line (Participant):**
Category: Authority **Sub Category:**
NI atty has provided this letter challenging the rate that we have advised that we are willing to pay in this matter. Insured Cumis Counsel is providing case law showing cases where higher rates have been considered.

[redacted]

03-16-2021 - 6:22 PM CDT **Performer:** Bray, Joyce **Office:**COWNPHX

Date: 08-05-2024 Page 4

Each of the above examples, *albeit limited given the page limits*, are claims file notes entered by claims adjusters assigned to handle the Lacey's claim file in the regular course of their business, none of which are addressed to counsel for legal opinions, nor are they attorney-work product. Rather, these internal notes reference the adjusters' recommendations, pending activities, and discussion with other State Farm claims representatives regarding the Lacey's insurance claim. *National Steel Products Co. v. Superior Court*, 164 Cal.App.3d 476, 489 (1985) (Privilege is strictly construed because it suppresses relevant facts which may be necessary for a just decision.)

What *Costco* also reaffirmed is the long-standing principle that "a client cannot protect unprivileged information from discovery by transmitting it to an attorney." *Costco, supra,* 47 Cal.4th at 735. Indeed, "[b]ecause an in-house lawyer often has

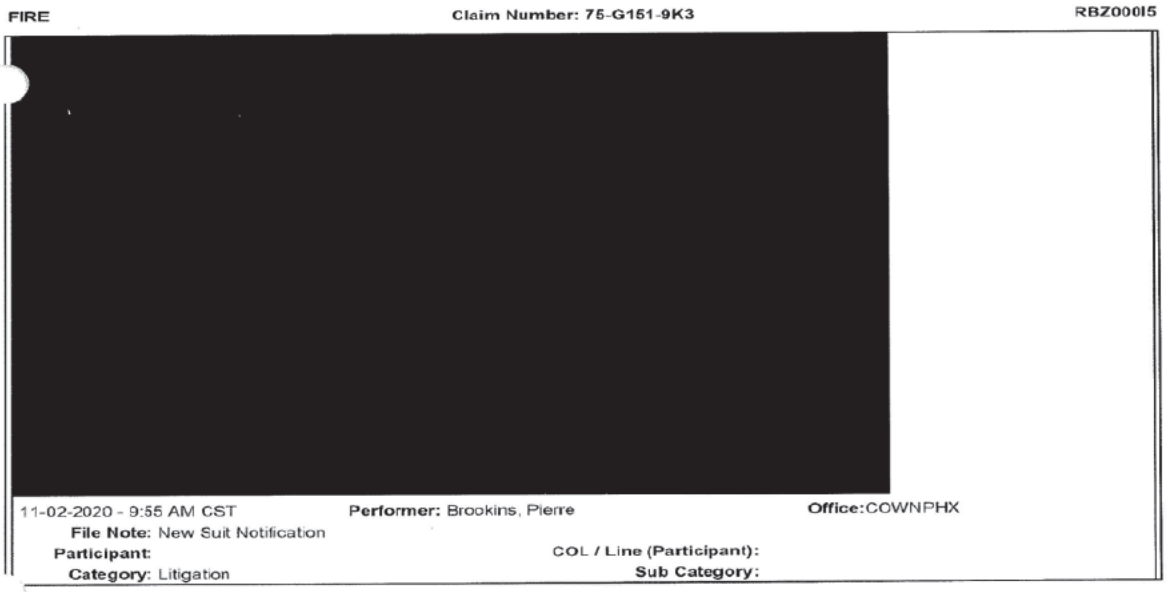
other functions in addition to providing legal advice, the lawyer's role on a particular occasion will not be self-evident as it usually is in the case of outside counsel." *Minebea Co., Ltd. v. Papst,* 228 F.R.D. 13, 21 (D.D.C. 2005). Accordingly, "courts impose a higher burden on in-house counsel to 'clearly demonstrate' that advice was given in a legal capacity." *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B,* 230 F.R.D. 398, 411 n.20 (D. Md. 2005) (citation omitted).

And the principle applies equally here with regard to State farm's coverage counsel. To justify withholding communications with coverage counsel, the "lawyer's role as a lawyer must be primary to her participation" in the communication. *In re Vioxx Prods. Liability Litig.,* 501 F. Supp. 2d 789, 798 (E.D. La. 2007). Communications with in-house counsel are not privileged to the extent they "would have been made because of a business purpose," regardless of whether there may have been a "perceived additional interest in securing legal advice." *McCaugherty v. Siffermann,* 132 F.R.D. 234, 238 (N.D. Cal. 1990). *See also, e.g.*, *Upjohn Co. v. U.S.*, 449 U.S. 383, 395-96 (1981) (ACP only protects communications from client to attorney, and not disclosure of underlying facts). Based on the foregoing, *Plaintiff has made* a factual showing that State Farm's claims file notes may not be privileged.

B. *In Camera* Review Is Warranted Because the Claims Adjusters' Conduct Is the Core of the Bad Faith Claim and Cannot Be Shielded.

This case turns on what State Farm's claims personnel did, when they did it, and why. The internal communications reflect the evaluative process that led to State Farm's decisions regarding its initial denial of coverage to David Lacey. Indeed, State Farm seeks to withhold from disclosure even the very first entry into its claims file titled "**New Suit Notification**." This communication has been entirely redacted and reflects the entry as having been made into the file by a claims representative – without reference to an attorney (or even a communication with an attorney) whatsoever. The wholesale redaction reflected in SF-CF (HO) 000110 is a further

illustration of this point:. *See* SF-CF (HO) 000110



In sum, to allow State Farm to hide those very communications would defeat the truth-seeking purpose of discovery in bad faith litigation. *Lipton v. Superior Court*, 48 Cal.App.4th 1599, 1619 (1996) ("A party may not use the privilege as both a sword and a shield.")

Courts frequently conduct *in camera* review of communications in appropriate circumstances. *See, e.g., Minebea Co., Ltd. v. Papst,* 228 F.R.D. 13, 21 (D.D.C. 2005) (ordering communications produced after *in camera* review: "Because an in-house lawyer often has other functions in addition to providing legal advice, the lawyer's role on a particular occasion will not be self-evident."). Here, review is imperative given the lack of integrity of State Farm's privilege log more generally.

First, the issue remains that the description for every entry in State Farm's privilege log is nearly the same: "Redaction of claim note reflecting legal communications, oversight, opinions and strategy involving litigation counsel." These kinds of inaccuracies alone can justify *in camera* review. *See,* e.g, *Hohider v. United Parcel Service, Inc.,* 257 F.R.D. 80, 84 (W.D. Pa. 2009) (*in camera* review is justified where "doubts" are present regarding the assertions and descriptions in a privilege log).

Second, with regard to communications between State Farm's claims representatives and coverage counsel, there is also no basis to withhold unless such communications include the request or receipt of "legal advice." Communications reflecting or containing coverage counsel's "impressions" or opinions of litigation counsel and/or litigation counsels' strategy are not privileged. California courts are especially skeptical of overbroad privilege assertions in bad faith insurance litigation, where the insurer's claims conduct is directly at issue. *See*, *State Farm Mut. Auto. Ins. Co. v. Lee*, 13 P.3d 1169, 1183 (2000) ("But a litigant cannot with one hand wield the sword—asserting as a defense that, as the law requires, it made a reasonable investigation into the state of the law and in good faith drew conclusions from that investigation—and with the other hand raise the shield—using the privilege to keep the jury from finding out what its employees actually did, learned in, and gained from that investigation.")

Here, State Farm has not provided sufficient information for Plaintiff to even evaluate whether its coverage counsel was engaged in anything other than "claims investigation activities." Indeed, it is hard to imagine what legal advice, if any, State Farm could be seeking day after day for the entirety of its claim handling. There is no basis for redacting claims representative documents, especially where this bad faith action challenges State Farm's "oversight, opinions and strategy," all of which prejudiced Plaintiff in the underlying matter. See *Nei v. Travelers Home and Marine Ins. Co.*, 326 F.R.D. 652 (2018) (holding that attorney-client privilege does not apply when an attorney acts as a claims adjuster, supervisor, or investigation monitor rather than a legal advisor).

IV. CONCLUSION

For the foregoing reasons, the Special Master should order those red and green color-colored entries from State Farm's privilege log be submitted to the Special Master for *in camera* review and, if appropriate based on such review, order them produced to Plaintiff.

Dated: April 14, 2025

Respectfully Submitted,

ELLIS GEORGE LLP

By: /s/ Trent Copeland
Eric M. George
Trent Copeland

Attorneys for Plaintiffs
Jacquelyn "Jackie" Lacey and
Jacquelyn "Jackie" Lacey as trustee
of the D and J. Lacey Family Trust
Dated November 23, 2016

Appendix 5

Michael Wilner

From: Vahedy, Keian <Keian.Vahedy@klgates.com>
Sent: Monday, April 14, 2025 6:37 PM
To: Stephanie Barraza; Michael Wilner
Cc: Keech, Ryan Q.; Trent Copeland; Asfour, Kevin; Kathleen McCormick; Jennifer Hoffman; Andre Cronthall; Eric M. George; Andrea Warren
Subject: Lacey, Jacquelyn, et al. vs. State Farm General Insurance Company - JAMS#1210040394

Good Afternoon Judge Wilner,

Plaintiff has submitted a Second Amended Brief in support of Obtaining Relevant Non-Privileged Documents from Defendant State Farm General Insurance Company. This version addresses the issues raised in your 4:06pm email. Specifically, references to *National* and *Booth* were inadvertently included prior to filing. These cites have since been addressed and updated within our respective papers.

We thank you for raising these issues.

K&L GATES

Keian Vahedy
K&L Gates LLP
1 Park Plaza
Twelfth Floor
Irvine, CA 92614
Phone: 949 623-3579
Keian.Vahedy@klgates.com
www.klgates.com

Appendix 6

ELLIS GEORGE LLP
Trent Copeland (State Bar No. 136890)
tcopeland@ellisgeorge.com
2121 Avenue of the Stars, 30th Floor
Los Angeles, California 90067
Telephone: (310) 274-7100
Facsimile: (310) 275-5697

K&L GATES LLP
Ryan Q. Keech (State Bar No. 280306)
Ryan.Keech@klgates.com
Kevin S. Asfour (State Bar No. 228993)
Kevin.Asfour@klgates.com
Keian Vahedy (State Bar No. 316708)
Keian.Vahedy@klgates.com
10100 Santa Monica Blvd., 8th Floor
Los Angeles, CA 90067
Telephone: (310) 552-5000
Facsimile: (310) 552-5001

Attorneys for Plaintiff JACQUELYN "JACKIE" LACEY, in her individual capacity; and JACQUELYN "JACKIE" LACEY as trustee of the D and J Lacey Family Trust dated November 23, 2016

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JACQUELYN "JACKIE" LACEY, in her individual capacity; and JACQUELYN "JACKIE" LACEY as trustee of the D and J Lacey Family Trust dated November 23, 2016,

Plaintiffs,

vs.

STATE FARM GENERAL INSURANCE COMPANY, an Illinois corporation, and DOES 1-50, inclusive,

Defendants.

Case No. 2:24-cv-05205-FMO-MAA

DECLARATION OF TRENT COPELAND IN RESPONSE TO SPECIAL MASTER'S ORDER TO SHOW CAUSE RE SANCTIONS

[Assigned to the Hon. Fernando M. Olguin, Courtroom 6D]

Complaint filed: July 4, 2020

DECLARATION OF TRENT COPELAND

I, Trent Copeland, declare and state as follows:

1. I am an attorney at law, duly admitted to practice before this Court and all courts of the State of California. I am a partner with Ellis George LLP, counsel of record for Plaintiffs Jacquelyn "Jackie" Lacey and Jacquelyn "Jackie" Lacey as trustee of the D and J. Lacey Family Trust Dated November 23, 2016 (collectively, "Plaintiffs") in this matter.

2. I submit this Declaration pursuant to the Special Master's April 15, 2025, Order to Show Cause re: Sanctions (the "OSC"). I have personal knowledge of all the matters set forth herein, and could and would testify competently thereto if called upon to do so.

3. This problem began with me—full stop – in my failure to advise my colleagues that a preliminary outline I forwarded to them had relied, in part, on the use of generative AI capabilities found in CoCounsel and Westlaw Precision and Google Gemini. To the extent my colleagues were tasked with the primary responsibility for research and drafting of the memorandum, they did so in reliance—at least initially—on my preliminary outline and notes I had provided several days earlier.

4. Since I was engaged in preparing for a trial scheduled to start April 14, 2025, I was unable to produce a more comprehensive work product, so I emailed my notes and high-level thoughts in outline format. I did so because I wanted to assure our drafting team had the benefit of my preliminary thoughts and a general roadmap before beginning their research and writing. I believe I initially used CoCounsel, which I had recently been exposed to through a firm training, as well as Westlaw's AI tool to undertake research. I also briefly conducted internet research using Gemini, Google's AI product, for information and cases related to insurance companies defending against bad faith claims. I compiled a significant number of notes which I believed (1) accurately reflected current law, and (2) had been

faithfully transcribed based on the sources I reviewed. It is unclear to me whether there was human error in my transcription of that research, or whether one of the research tools I utilized returned some erroneous information.

5. On April 9, 2025, I circulated to my colleagues Ryan Keech and Keian Vahedy some of my notes along with a bullet-point outline of the legal arguments I hoped the team would address as they prepared the memorandum. By April 11, 2025, it was my understanding the K&L Gates team, along with an associate from Ellis George, had commenced drafting the memorandum. I understand they engaged in their own legal research and writing to bring the brief to near-final form. It is clear that they relied on the accuracy of some of the case citations included in my initial outline, while also adding themselves the vast majority of the case authority to the brief. In hindsight, there is no question I should have taken more care to first check the accuracy of these citations before sending or explicitly request my colleagues to do so before including any material from my preliminary outline in the final version of the brief.

6. In reviewing versions 1 through 3 of the draft, it is apparent that no one confirmed the accuracy of some of citations pulled from my preliminary outline. Compounding matters, prior to the filing of version 2, my legal assistant noticed that we were working off of multiple drafts—none of which, we later realized, had been thoroughly checked. Further, I cannot say with certainty how the parenthetical for *National Steel* changed between versions 1 and 2, but I suspect the switch resulted from uploading a different version that included the correct citation. In our haste to meet the filing deadline, we failed to (1) ensure that the correct and final document had been uploaded, and (2) conduct a thorough citation check of the cases submitted to the Court—both of which should have occurred and which I assumed had been completed.

7. In short, our process broke down at several levels across both firms. And as the most senior lawyer on our collective team — whether cite-checking was

my responsibility or not — I accept responsibility for (1) not alerting my colleagues with respect to the tools I utilized in conducting the initial research; and (2) failing to conduct cite-checking myself or to specifically request that the brief be properly reviewed for citation errors; and (3) not adequately supervising the cite-checking process. I am both deeply apologetic and embarrassed by this error. As for the "bizarre" modification the Court referenced in version 2, I am informed this was the result of a typographical error compounded by a technical glitch during the upload process by my assistant. Not at any time was there a deliberate effort to deceive or falsify the state of the law, nor did we.

8. Importantly, even before this event, I had reviewed and was familiar with the State Bar's ethical guidance on the responsible use of generative AI in the practice of law. This guidance emphasized that while lawyers may use generative AI, our ethical obligations apply in the same way as with any other technology. Specifically, on July 24, 2024, the State Bar stated in its guidance order that "The State Bar recognizes that generative AI systems are not without risks. COPRAC's Practical Guidance, the State Bar's interim AI Guidelines, and other work we are doing to responsibly support the exploration of AI internally and within the legal profession balance opportunity against the risks of bias, inaccuracy, incompleteness, and falsehood that could undermine the benefits that generative AI will create." Additionally, I also understood that while the use of AI does not violate Business and Professions Code 6068(e)(2), my ethical duties included double-checking the source accuracy. Because I was aware of this guidance, I should have been more mindful and cautious about the risks, and I should have informed my team of my use of AI so that we could collectively mitigate any errors that might result, even from its good-faith use. I fell short in that regard and that will never happen again.

9. Following the Special Master's instructions, I have personally reviewed each and every citation and quotation - and compared these findings with my colleagues - to be certain that we have found any possible issues with the citations,

including even the misplacement of a parenthetical. The below constitutes a list of items, including typographical errors, that we believe should be brought to the Special Master's attention – irrespective of whether these errors are associated with the use of AI, or not:

a. **Page 3 of Dkt. 98**:

i. *People v. Superior Court*, 25 Cal.4th 703, 725 (2001) ("A trial court has broad discretion to review materials in camera to determine whether a claimed privilege applies.").–.there should be no quotes in the parenthetical, which should refer to n. 7.

b. **Page 4 of Dkt. 98**:

i. *Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal.App.4th 110, 119 (1997) – the pincite should be page 123, not 119.

ii. *Aetna Cas. & Surety Co. v. Superior Court*, 153 Cal.App.3d 467, 476 (1984) ("Where the evidence sought is directly at issue… a party should not be allowed to use privilege as both a sword and a shield.") – non-existent quote; however, this case exists and the quote states a generally correct proposition of law.

iii. *Zurich American Ins. Co. v. Superior Court*, 155 Cal.App.4th 1485, 1503 (2007) ("Communications by corporate employees that are not made at the direction of counsel or for the purpose of legal advice are not privileged.") – the pincite should be 1504 and state: "otherwise routine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is 'copied in' on correspondence or memoranda".

c. **Page 5 of Dkt. 98**:

i. *Costco, supra*, 47 Cal.4th at 739 – should not have quotes

within the parentheticals.

d. **Page 6 of Dkt. 98**:

i. *Davis v. City of Santa Ana*, 51 Cal.App.5th 1094, 1115 (2020)– inaccurate citation to a case that appears not to exist and should be removed and not relied upon.

ii. *National Steel Products Co. v. Superior Court*, 164 Cal.App.3d 476, 489 (1985) ("Internal memoranda or claims file materials, although they may discuss legal theories, litigation tactics or potential liability, are not privileged unless they are written by or at the direction of counsel and prepared for the purpose of transmitting information to counsel for legal advice.") – the pincite should be 477, should not have quotes, and the parenthetical should be revised to reflect that privilege is strictly construed because it suppresses relevant facts which may be necessary for a just decision.

e. **Page 9 of Dkt. 98**:

i. *Lipton v. Superior Court*, 48 Cal.App.4th 1599, 1619 (1996) ("A party may not use the privilege as both a sword and a shield.") – inaccurate quote; quote from this case should be "The party claiming the privilege has the burden to show that the communication sought to be suppressed falls within the terms of the claimed privilege." *See D. I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, 729.

f. **Page 10 of Dkt. 98**:

i. *Booth v. Allstate Ins. Co*., 198 Cal.App.3d 1357, 1366 (1989) ("An insurer cannot assert privilege to shield evidence of bad faith.") – inaccurate quote to a case that appears not to exist but is a correct proposition of law. *See, e.g., Zurich Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 137 A.2d 401, 402 (1st Dep't 1988) ("Where it is alleged

that the insurer has breached that duty to its insured, the insurer may not use the attorney-client or work product privilege as a shield to prevent disclosure which is relevant to the insured's bad faith action"); *Boone v. Vanliner Ins. Co.*, 9 Ohio St. 3d 209, 213-14 (2001) ("in an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney client communications related to the issue of coverage that were created prior to the denial of coverage.").

ii. *Nei v. Travelers Home and Marine Ins. Co.*, 326 F.R.D. 652 (2018) (holding that attorney-client privilege does not apply when an attorney acts as a claims adjuster, supervisor, or investigation monitor rather than a legal advisor) – pincites should be 658.

Executed this 18th day of April, 2025, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Trent Copeland

Trent Copeland

From:	Trent Copeland
Sent:	Wednesday, April 9, 2025 3:18 PM
To:	Vahedy, Keian; Keech, Ryan Q.
Cc:	Vahedy, Keian; Kathleen McCormick
Subject:	Outline of Memorandum of Points and Authorities re In Camera Review / Lacey v. State Farm

Keian / Ryan: I have fleshed out an outline for the memorandum of points and authorities Judge Wilner requested on the issue of an in camera review. This is not intended to be a guide, but rather my best effort to save craft where I think the argument needs to go and to provide the research that I think best assists our argument.

Primary Argument: State Farm Has Not Made a Prima Facie Showing That the Dominant Purpose of the Redacted Communications Is Attorney-Client Privileged

I. INTRODUCTION

The court is faced with a dilemma. Most of the documents and communications between State Farm claims representatives do not appear to be facially privileged. Nor does State Farm's privilege log – which largely provides identical cut/paste assertions of privilege for virtually hundreds of communications – give enough detail to allow the court (or Plaintiffs) to properly and fairly assess the basis for these claims of privilege. Although the court cannot simply accept a blanket assertion of privilege, nor can it require disclosure without proper foundation, the court may, upon a prima facie showing that the privilege may not apply to certain documents or that the privilege has potentially been waived, conduct an in camera review of a targeted subset of the disputed documents to determine whether the attorney-client privilege has been properly invoked. This limited review is appropriate and authorized under California Evidence Code Section 915(b) and where the proponent of the privilege (State Farm) has failed to meet its burden through non-substantive means, such as a privilege log or declaration.

Plaintiff provides this memorandum of points and authorities in support of the Court conducting an in camera review of documents State Farm has redacted (or withheld). The basis for Plaintiffs position is that State Farm's claims of privilege with respect to these documents is facially not apparent, despite having already partially disclosed portions of the same communications and State Farm failed to meet its burden affirmatively establishing that the privilege applies. These withheld materials consist of (1) internal communications between claims handlers/representative and consist of documents authored by or exchanged between State Farm's claims adjusters—not legal counsel—during the investigation and handling of Plaintiff's insurance claim; (2) communications between claims handlers regarding "opinions" of outside counsel and (3) documents created by claims handlers/representatives made in the ordinary course of business as those documents were sent directly to "State Farm Claim File."

As this court is well aware, this case centers on whether State Farm acted in bad faith in denying or delaying coverage. The conduct and state of mind of the State Farm's decision-makers—its claims adjusters—are at the very heart of the dispute. Yet State Farm now seeks to shield those very communications through unsupported assertions of privilege, despite the fact that:

- No attorneys are included in the majority of the withheld communications;
- The communications appear to concern ordinary claims handling business, not legal advice;
- Partial disclosures have already occurred, waiving any applicable privilege.

Plaintiff requests that the Court exercise its authority under Evidence Code § 915(a) and § 915(b) to conduct an in camera review to determine whether any of the withheld materials are properly subject to privilege.

II. LEGAL STANDARD

Under California Evidence Code § 915(a), when a party claims that a communication is privileged, the court may conduct an in camera review to determine whether that claim is valid, especially where there is a dispute or uncertainty regarding the scope or waiver of the privilege.

People v. Superior Court (Laff) (2001) 25 Cal.4th 703, 725:
"A trial court has broad discretion to review materials in camera to determine whether a claimed privilege applies."

California Evidence Code § 912(a) provides that a party waives the privilege if they disclose a significant part of the communication or consent to its disclosure.

McKesson HBOC, Inc. v. Superior Court (2004) 115 Cal.App.4th 1229, 1239:
"Disclosure of a significant part of the communication constitutes waiver."

Costco Wholesale Corp. v. Superior Court (2009) 47 Cal.4th 725:

Court did not preclude in camera review entirely. It suggested that in camera review may be proper when there's a sufficient showing that the privilege may not apply — e.g., because of waiver, third-party involvement, or a lack of legal content – which clearly exists here.

III. ARGUMENT

I. Prima Facie Showing Requires Proof of Dominant Purpose Being Legal Advice

Under California law, a party asserting the attorney-client privilege bears the burden of establishing the preliminary facts necessary to support its application. (See *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733; *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 119.)

The "dominant purpose" test governs whether communications involving in-house counsel or other dual-purpose actors (e.g., claims representatives) are privileged. The dominant purpose of the communication must be to seek or provide **legal advice**, not business advice or claims handling functions. (See *Costco*, supra, 47 Cal.4th at p. 735; *Davis v. City of Santa Ana* (2020) 51 Cal.App.5th 1094, 1115.)

In the federal context, courts follow a similar dominant purpose test. (See *United States v. Graf* (9th Cir. 2010) 610 F.3d 1148, 1156.)

A. Defendant Has Waived Any Privilege by Disclosing Portions of the Communications

State Farm has produced selected portions of internal claims file communications between claims personnel, while simultaneously withholding other parts of the same communications. This selective disclosure constitutes a waiver of privilege under Evidence Code § 912(a). (*We will attach screenshots as exemplars of some of the most offending redactions)

The law does not permit a party to produce only favorable excerpts of communications and withhold the rest as privileged. Waiver is not partial—it applies to the **entire communication and subject matter.**

Southern Cal. Gas Co. v. Public Utilities Com. (1990) 50 Cal.3d 31, 46:
"Voluntary disclosure waives the privilege for all other communications on the same subject matter."

B. Costco Does Not Apply to Routine Business Communications Between Claims Adjusters

State Farm will undoubtedly attempt to invoke *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725 to bar in camera review. That case held that courts may not review facially privileged communications between counsel and client to determine their dominant purpose. But Costco is inapplicable here for a two important reasons:

First, in *Costco*, the communication at issue was made directly to legal counsel for the purpose of obtaining legal advice. In contrast, the communications at issue here involve no legal counsel, and were exchanged between claims adjusters discussing routine claim handling activities. These communications are business-oriented, not legal in nature, and do not fall within the scope of the attorney-client privilege. Additionally, other communications were originated from a claims adjuster/handler and were sent directly to "State Farm Claim File" without any indication of how, when or where an attorney communication was involved.

Costco, 47 Cal.4th at 739:
"The privilege... applies only when the client intends to seek legal advice and the communication is made for that purpose."

Further, applying *Costco* to prevent review of communications not even involving attorneys would lead to an improper expansion of the attorney-client privilege, effectively allowing insurers to cloak all internal conduct in secrecy, even when legal advice was neither sought nor given.

In bad faith cases, courts must guard against this misuse of privilege:

Aetna Cas. & Surety Co. v. Superior Court (1984) 153 Cal.App.3d 467, 476:
"Where the evidence sought is directly at issue... a party should not be allowed to use privilege as both a sword and a shield."

Second, Costco did not categorically preclude in camera review entirely. The Court suggested that in camera review may be proper when there is a sufficient showing that the privilege may not apply – which Plaintiffs have demonstrated.

"We emphasize that the court may not order disclosure of the content of the communication to determine whether the communication is privileged. However, the court may order in camera review where **there is a factual showing that the communication may not be privileged** — for example, because it was not made in the course of the attorney-client relationship or because it was disclosed to third parties."

— *Costco*, 47 Cal.4th at 739–740 (emphasis added)

Thus, *Costco* is distinguishable and should not control this case.

C. Communications Between Claims Adjusters Are Not Privileged if Not Made for Legal Advice

Even absent waiver, communications between non-attorney employees—such as claims handlers/adjusters—do not fall within the scope of the attorney-client privilege unless the dominant purpose was to secure legal advice. Internal discussions regarding claim status, liability, coverage evaluation, or recommendations are all ordinary business communications, and not protected.

Zurich American Ins. Co. v. Superior Court (2007) 155 Cal.App.4th 1485, 1503:
"Communications by corporate employees that are not made at the direction of counsel or for the purpose of legal advice are not privileged."

- "**Internal memoranda or claims file materials**, although they may discuss legal theories, litigation tactics or potential liability, **are not privileged unless they are written by or at the direction of counsel** and prepared

for the purpose of transmitting information to counsel for legal advice." - *National Steel Products Co. v. Superior Court*, 164 Cal.App.3d 476, 489 (emphasis added)

Here, State Farm has not shown that any of the withheld claims handlers/adjuster communications were made for legal advice or under the direction of counsel. Absent such a showing, the privilege also does not apply.

D. The Claims Adjusters' Conduct Is the Core of the Bad Faith Claim and Cannot Be Shielded

This case turns on what State Farms' claims personnel did, when they did it, and why. The internal communications reflect the evaluative process that led to State Farm's decisions regarding its initial denial of coverage to David Lacey. To allow State Farm to hide those very communications would defeat the truth-seeking purpose of discovery in bad faith litigation.

Lipton v. Superior Court (1996) 48 Cal.App.4th 1599, 1619:
"A party may not use the privilege as both a sword and a shield."

Plaintiff is entitled to understand what motivated the denial of the claim relating to David Lacey, what was considered or disregarded, and whether Defendant acted unreasonably or with improper intent. That evidence lies squarely in the communications now being withheld.

Core Arguments:

- State Farm has waived any applicable privilege through partial disclosure;
- State Farm has not established – as a threshold matter – that the communications between claims handlers has as its "**dominant purpose**" seeking legal advice
- The communications are not protected under *Costco* or the attorney-client privilege;
- The documents were created during the ordinary course of claims handling;
- And the conduct of the adjusters is central to the bad faith claims.

E. In Bad Faith Cases, Courts Scrutinize Privilege Assertions to Prevent Shielding of Claims Handling Conduct

California courts are especially skeptical of overbroad privilege assertions in bad faith insurance litigation, where the insurer's claims conduct is directly at issue. (See *Booth v. Allstate Ins. Co.* (1989) 198 Cal.App.3d 1357, 1366 ["An insurer cannot assert privilege to shield evidence of bad faith"].)

Even if some communications do involve legal counsel, if they were made in the ordinary course of claims investigation or involve coverage decisions, courts may find the dominant purpose was business-related and deny privilege. (*Handgards, Inc. v. Johnson & Johnson* (N.D. Cal. 1976) 413 F. Supp. 926, 929.)

Trent Copeland | Partner
ELLIS GEORGE LLP
2121 Avenue of the Stars, 30th Floor
Los Angeles, California 90067
Main 310.274.7100 | Fax 310.275.5697
tcopeland@ellisgeorge.com
www.ellisgeorge.com

Appendix 7

ELLIS GEORGE LLP
Eric M. George (SBN 166403)
egeorge@ellisgeorge.com
Trent Copeland (SBN 136890)
tcopeland@ellisgeorge.com
2121 Avenue of the Stars, 30th Floor
Los Angeles, California 90067
Telephone: (310) 274-7100
Facsimile: (310) 275-5697

K&L GATES LLP
Ryan Q. Keech (SBN 280306)
Ryan.Keech@klgates.com
Kevin S. Asfour (SBN 228993)
Kevin.Asfour@klgates.com
Keian Vahedy (SBN 316708)
Keian.Vahedy@klgates.com
10100 Santa Monica Blvd., 8th Floor
Los Angeles, California 90067
Telephone: (310) 552-5000
Facsimile: (310) 552-5001

Attorneys for Plaintiff JACQUELYN "JACKIE" LACEY, in her individual capacity; and JACQUELYN "JACKIE" LACEY as trustee of the D and J Lacey Family Trust dated November 23, 2016

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

JACQUELYN "JACKIE" LACEY, in her individual capacity; and JACQUELYN "JACKIE" LACEY as trustee of the D and J Lacey Family Trust dated November 23, 2016,

Plaintiffs,

vs.

STATE FARM GENERAL INSURANCE COMPANY, an Illinois corporation, and DOES 1-50, inclusive,

Defendants.

Case No. 2:24-cv-05205-FMO-MAA

Judge: Fernando M. Olguin

DECLARATION OF RYAN Q. KEECH IN RESPONSE TO THE SPECIAL MASTER'S ORDER TO SHOW CAUSE RE: SANCTIONS

DECLARATION OF RYAN Q. KEECH

I, Ryan Q. Keech, declare as follows:

1. I am an attorney licensed to practice law in this court and all courts of the State of California. I am a partner at the law firm of K&L Gates LLP, attorneys of record for Plaintiffs Jacquelyn "Jackie" Lacey and Jacquelyn "Jackie" Lacey as trustee of the D and J. Lacey Family Trust Dated November 23, 2016 (collectively, "Plaintiff"), in this action.

2. I submit this Declaration pursuant to the Special Master's April 15, 2025 Order to Show Cause re: Sanctions (the "OSC"). I have personal knowledge of each of the matters set forth herein, and would testify competently thereto if called upon to do so.

3. To begin, I have the utmost faith in and respect for the professional conduct and integrity of Mr. Copeland and his firm – with whom I have had the great privilege of working and from whom I have had the great privilege of learning as a partner and as co-counsel for years. His and their professionalism and ethics are beyond reproach.

4. As described herein, Mr. Copeland and Mr. Vahedy have been primarily responsible for the briefing associated with the privilege issue addressed by the Court on April 7, 2025. I had limited involvement in the preparation and did not sign, file or provide final approval of the contents of any of the three versions of the brief addressed in the OSC prior to filing.

5. However, I understand and take seriously the critical importance of accuracy in case citations in order for the process to function and know that my colleagues and co-counsel have a similar view. I apologize that these versions of the brief contained the inaccuracies initially identified by the Special Master, apologize further that I did not personally catch and correct those inaccuracies, and respectfully request, because – as discussed herein and as confirmed by the declarations of my

colleagues – these inaccuracies were inadvertent and the subject of an honest miscommunication, the OSC be discharged.

6. After the Court's April 7, 2025 hearing, I discussed the Special Master's request for briefing regarding the in-camera review procedures with Mr. Vahedy. I provided initial guidance on what I thought the brief should contain. Mr. Vahedy offered to prepare the draft of the brief, and I agreed.

7. Two days later, on April 9, 2025, I was copied on an email from Mr. Copeland to me and to Mr. Vahedy, providing what appeared to be a detailed outline of the brief. I recall that the outline contained a number of case citations. Mr. Copeland re-forwarded that outline on April 10, 2025. Mr. Copeland did not indicate where those citations came from and I did not independently verify those citations. Given our long experience working with Mr. Copeland and his firm and our utmost respect for his and his firm's professional integrity – which respect, once again, continues – I did not doubt the accuracy of any of those citations.

8. On the afternoon of Friday, April 11, 2025, Mr. Vahedy copied me on his transmission to Mr. Copeland and his associate, Ms. Carpenter, of what I understood to be an initial draft of the requested brief. I had not received a draft of this brief prior to Friday.

9. While I knew that Mr. Copeland was taking the lead on this issue, I reviewed that draft on the morning of Saturday, April 12, 2025 and provided high-level comments aimed at ensuring that we were making a properly-tailored request and citing appropriately illustrative factual examples. I did not conduct a cite-by-cite review of the document. Mr. Copeland provided additional comments and instructed Mr. Vahedy and Ms. Carpenter to provide a revised draft. I understand that Mr. Vahedy worked with Mr. Copeland and Ms. Carpenter to address these comments throughout the day on April 12, 2025 and circulated a revised version of the brief late in the morning of April 13, 2025.

10. Early in the afternoon of April 13, 2025, Mr. Copeland confirmed that the revisions were appropriate and that he and his firm would take responsibility for finalizing, filing and submission to the Court. After Mr. Copeland provided that confirmation, later that same afternoon, I made a high-level suggestion for Mr. Copeland to consider incorporating relating to the brief's introduction. I presumed, but did not specifically confirm, that the finalization, filing and submission process would include an appropriately robust proof and cite-checking procedure.

11. I did not participate in finalizing or filing this brief and did not sign off on its contents. I did not hear anything relating to the brief until approximately noon on April 14, 2025, when I learned that Mr. Copeland's firm was experiencing formatting and submission issues with the JAMS system that were creating difficulty with meeting the Court's noon deadline and that the initial filed version of the brief was not able to correct all of those issues. A subsequent version of the brief was filed that, I understand, corrected some of those issues. I had no involvement in these filings.

12. After the Special Master sent his message to the parties on April 14, 2025 identifying apparent issues with two decisions in the brief, Mr. Copeland sent two messages to me and to Mr. Vahedy identifying replacement parentheticals and citations for the *Boone* and *National Steel* decisions identified in the Special Master's email. Mr. Copeland promptly filed a corrected brief, which I again did not review and sign, and Mr. Vahedy sent an explanatory email to the Special Master explaining the inadvertent inclusion of these two citations. While it was obvious by this point that whatever cite check had been performed had issues, I was confident that the issue was most likely limited to the issues identified by the Court, caught by my colleagues and, even then, most likely had been caused by the formatting and submission difficulties described above that had earlier come to my attention.

13. I can confirm that none of our firm's work on this brief involved our use of AI. In providing that confirmation, I do not mean to suggest that there is anything

wrong with the appropriate use of AI: indeed, I understand that numerous profession-specific AI tools are becoming available – including Co-Counsel and Westlaw AI – which clients are increasingly demanding that counsel develop familiarity with in order to better align with their business focus, legal needs and market reality. What I do mean to say is that our firm has developed policies and procedures governing access to profession-specific AI tools, including Co-Counsel, and has decided to block access to these tools absent, *inter alia*, tool-specific training developed for use at our firm. Neither I nor Mr. Vahedy have such access. We did not have such access at the time of the preparation and filing of these briefs.

14. However, in light of the OSC, I came to the conclusion that the citation issue was broader than I had initially believed was the case when I reviewed the Court's April 14, 2025 correspondence. Accordingly, while Mr. Copeland was conducting his own check, I personally conducted a check of each of the citations in the brief in order to catch whatever issues may have escaped the Special Master's review.

15. After having conducted this check, I have determined that while most citations in the brief stand for the propositions for which they are cited, and the remainder of the citations largely involve familiar and supportable legal propositions present in other cases, the following citations should be changed. I apologize once again that, regardless of my and our level of involvement, I did not catch this issue prior to the filing of the brief:

a. Page 3 of Dkt. 98:

i. *People v. Superior Court*, 25 Cal.4th 703, 725 (2001) ("A trial court has broad discretion to review materials in camera to determine whether a claimed privilege applies.") – there should be no quotes in the parenthetical, which should refer to n. 7.

b. Page 4 of Dkt. 98:

i. *Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal.App.4th 110, 119 (1997) – the pincite should be page 123, not 119.

ii. *Aetna Cas. & Surety Co. v. Superior Court*, 153 Cal.App.3d 467, 476 (1984) ("Where the evidence sought is directly at issue… a party should not be allowed to use privilege as both a sword and a shield.") – inaccurate quote; however, this case exists and this is generally a correct proposition of law.

iii. *Zurich American Ins. Co. v. Superior Court*, 155 Cal.App.4th 1485, 1503 (2007) ("Communications by corporate employees that are not made at the direction of counsel or for the purpose of legal advice are not privileged.") – the pincite should be 1504 and state: "otherwise routine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is 'copied in' on correspondence or memoranda."

c. Page 5 of Dkt. 98:

i. *Costco, supra*, 47 Cal.4th at 739 – should not have quotes within the parentheticals.

d. Page 6 of Dkt. 98:

i. *Davis v. City of Santa Ana*, 51 Cal.App.5th 1094, 1115 (2020) – inaccurate citation to a case that I have not been able to find and should thus be removed.

ii. *National Steel Products Co. v. Superior Court*, 164 Cal.App.3d 476, 489 (1985) ("Internal memoranda or

claims file materials, although they may discuss legal theories, litigation tactics or potential liability, are not privileged unless they are written by or at the direction of counsel and prepared for the purpose of transmitting information to counsel for legal advice.") – the pincite should be 477 and the parenthetical should be revised to reflect that privilege is strictly construed because it suppresses relevant facts which may be necessary for a just decision.

e. Page 9 of Dkt. 98:

i. *Lipton v. Superior Court*, 48 Cal.App.4th 1599, 1619 (1996) ("A party may not use the privilege as both a sword and a shield.") – inaccurate quote; however, this case exists and this is a correct proposition of law.

f. Page 10 of Dkt. 98:

i. *Booth v. Allstate Ins. Co.*, 198 Cal.App.3d 1357, 1366 (1989) ("An insurer cannot assert privilege to shield evidence of bad faith.") – inaccurate quote to a case that appears not to exist, but is a holding made by other courts: *See, e.g., Zurich Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 137 A.2d 401, 402 (1st Dep't 1988) ("Where it is alleged that the insurer has breached that duty to its insured, the insurer may not use the attorney-client or work product privilege as a shield to prevent disclosure which is relevant to the insured's bad faith action"); *Boone v. Vanliner Ins. Co.*, 9 Ohio St. 3d 209, 213-14 (2001) ("in an action alleging bad faith denial of insurance coverage, the insured is entitled to discover

claims file materials containing attorney client communications related to the issue of coverage that were created prior to the denial of coverage.").

ii. *Nei v. Travelers Home and Marine Ins. Co.*, 326 F.R.D. 652 (2018) (holding that attorney-client privilege does not apply when an attorney acts as a claims adjuster, supervisor, or investigation monitor rather than a legal advisor) – pincite should be 658.

I declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct.

Executed this 18th day of April 2025, in Los Angeles, California.

/s/ Ryan Q. Keech
Ryan Q. Keech

Appendix 8

ELLIS GEORGE LLP
Eric M. George (SBN 166403)
egeorge@ellisgeorge.com
Trent Copeland (SBN 136890)
tcopeland@ellisgeorge.com
2121 Avenue of the Stars, 30th Floor
Los Angeles, California 90067
Telephone: (310) 274-7100
Facsimile: (310) 275-5697

K&L GATES LLP
Ryan Q. Keech (SBN 280306)
Ryan.Keech@klgates.com
Kevin S. Asfour (SBN 228993)
Kevin.Asfour@klgates.com
Keian Vahedy (SBN 316708)
Keian.Vahedy@klgates.com
10100 Santa Monica Blvd., 8th Floor
Los Angeles, California 90067
Telephone: (310) 552-5000
Facsimile: (310) 552-5001

Attorneys for Plaintiff JACQUELYN "JACKIE" LACEY, in her individual capacity; and JACQUELYN "JACKIE" LACEY as trustee of the D and J Lacey Family Trust dated November 23, 2016

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

JACQUELYN "JACKIE" LACEY, in her individual capacity; and JACQUELYN "JACKIE" LACEY as trustee of the D and J Lacey Family Trust dated November 23, 2016,

Plaintiffs,

vs.

STATE FARM GENERAL INSURANCE COMPANY, an Illinois corporation, and DOES 1-50, inclusive,

Defendants.

Case No. 2:24-cv-05205-FMO-MAA

Judge: Fernando M. Olguin

DECLARATION OF KEIAN VAHEDY IN RESPONSE TO THE SPECIAL MASTER'S ORDER TO SHOW CAUSE RE: SANCTIONS

DECLARATION OF KEIAN VAHEDY

I, Keian Vahedy, declare as follows:

1. I am an attorney licensed to practice law in this Court and Associate at the law firm of K&L Gates LLP, attorneys of record for Plaintiffs Jacquelyn "Jackie" Lacey and Jacquelyn "Jackie" Lacey as trustee of the D and J. Lacey Family Trust Dated November 23, 2016 (collectively, "Plaintiff"), in this action. I have personal knowledge of each of the matters set forth herein, and would testify competently thereto if called upon to do so.

2. I submit this Declaration pursuant to the Special Master's Order to Show Cause re: Sanctions, explaining my role in assisting with preparing Plaintiff's supplemental brief regarding defendant State Farm General Insurance Company's ("State Farm") privilege log.

3. While I did not finalize the brief for filing, I sincerely apologize for the evident errors in the citations provided within Plaintiff's brief submitted on April 14, 2025 ("Brief"). The inaccuracies contained therein were inadvertent and a result of honest miscommunication. I should have caught these errors beforehand and apologize for not more actively checking all sources contained within Plaintiff's Brief. I take seriously the critical importance of accuracy in case citations in order for the Special Master and the Court to meaningfully do their jobs, and I know that my colleagues share the same view. I believed that the research submitted to me when I worked on drafting the brief was accurate and that the cases were properly cited. I had no information suggesting that any of the citations may have come from artificial intelligence and had no involvement in finalizing or submitting the document for filing. But it is still no excuse. As the associate tasked with drafting Plaintiff's Brief, I should have made sure to cite-check not only the cases I provided, but also the cases that originated from Mr. Copeland's outline.

4. To begin: I and Mr. Copeland have been primarily responsible for the briefing associated with the privilege issue addressed by the Court on April 7, 2025.

After the Court's April 7, 2025 hearing, I spoke with Mr. Keech, who provided me with an update regarding the hearing and initial guidance as to what the brief should contain. I offered to prepare the draft of the brief, and he agreed.

5. On April 9, 2025, I and Mr. Keech received an email from Mr. Copeland, providing what appeared to be a detailed outline of the brief. This brief contained a number of case citations. Mr. Copeland re-forwarded that outline on April 10, 2025. While Mr. Copeland did not indicate where those citations came from, having previously worked at Ellis George LLP and understanding the high quality and standards that the firm and Mr. Copeland uphold in their practice, I relied on this outline when drafting the brief believing that its sources were true, accurate, and already cite checked. I separately conducted legal research exclusively on Westlaw: reviewing additional cases, secondary sources, and published trial documents, each of which I relied upon to lay foundation and draft Plaintiff's Brief. With respect to the cases I found on Westlaw, I made sure to verify that these cases were valid and stood for the proposition for which they were cited.

6. I submitted a draft of the brief on Friday, April 11, 2025 to Mr. Copeland and his associate Ms. Carpenter, copying Mr. Keech. Mr. Keech provided high-level comments on Saturday, April 12, 2025, which was followed by Mr. Copeland providing additional comments to me and to Ms. Carpenter. Throughout the day on April 12, 2025 I worked with Mr. Copeland and Ms. Carpenter to address these comments. I circulated a revised version of the brief on the morning of April 13, 2025.

7. On April 13, 2025, Mr. Copeland informed me that the revisions were appropriate and that he and his firm would take responsibility for finalizing, filing and submission to the Court. I offered to provide assistance in this regard, though did not hear anything relating to the brief until approximately noon on April 14, 2025, when I learned that Mr. Copeland's firm was experiencing formatting and submission issues with the JAMS system that were creating difficulty with meeting the Court's deadline.

I assumed, again, that the citations provided to me on April 9 and 10 were accurate for the propositions they represented.

8. After the Court sent its message to the parties on April 14, 2025 identifying apparent issues with two decisions in the brief, Mr. Copeland sent two messages to me and to Mr. Keech identifying replacement parentheticals and citations for the *Boone* and *National Steel* decisions identified in the Special Master's email to the parties. I confirmed the accuracy of those parentheticals and prepared an email for submission to the Special Master, which I then sent in close proximity to the filing of the further revised brief.

9. After the Court issued its OSC, I personally conducted a full cite check of the brief that was filed with the Court in order to catch whatever issues may have escaped review.

10. At no point did I use or knowingly rely on any artificial intelligence tool or program to assist in drafting any version of this Brief. I do not have access to Co-Counsel at our firm. I have never used artificial intelligence, or any artificial intelligence program, with respect to my legal research or any law and motion practice in my career, nor is or would it be my practice to do so.

11. I confirm personally conducting a citation-by-citation check of the citations in the brief in order to catch whatever issues may have escaped the Special Master's review. I confirm that most citations in the brief stand for the propositions for which they are cited. However, I also confirm finding that the following citations should be noted as follows and apologize again for not catching these issues sooner:

a. Page 3 of Dkt. 98:

i. *People v. Superior Court*, 25 Cal.4th 703, 725 (2001) ("A trial court has broad discretion to review materials in camera to determine whether a claimed privilege applies.") – there should be no quotes in the parenthetical which should refer to n. 7.

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i. *Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal.App.4th 110, 119 (1997) – the pincite should be page 123, not 119.

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iii. *Zurich American Ins. Co. v. Superior Court*, 155 Cal.App.4th 1485, 1503 (2007) ("Communications by corporate employees that are not made at the direction of counsel or for the purpose of legal advice are not privileged.") – the pincite should be 1504 and state: "otherwise routine, non-privileged communications between corporate officers or employees transacting the general business of the company do not attain privileged status solely because in-house or outside counsel is 'copied in' on correspondence or memoranda"

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e. Page 9 of Dkt. 98:

i. *Lipton v. Superior Court*, 48 Cal.App.4th 1599, 1619 (1996) ("A party may not use the privilege as both a sword and a shield.") – inaccurate express quote; however, this case exists and this is a correct proposition of law.

f. Page 10 of Dkt. 98:

i. *Booth v. Allstate Ins. Co.*, 198 Cal.App.3d 1357, 1366 (1989) ("An insurer cannot assert privilege to shield evidence of bad faith.") – inaccurate quote to a case that appears not to exist, but is a correct proposition of law. *See, e.g., Zurich Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 137 A.2d 401, 402 (1st Dep't 1988) ("Where it is alleged that the insurer has breached that duty to its insured, the insurer may not use the attorney-client or work product privilege as a shield to prevent disclosure which is relevant to the insured's bad faith action");

Boone v. Vanliner Ins. Co., 9 Ohio St. 3d 209, 213-14 (2001) ("in an action alleging bad faith denial of insurance coverage, the insured is entitled to discover claims file materials containing attorney client communications related to the issue of coverage that were created prior to the denial of coverage.").

ii. *Nei v. Travelers Home and Marine Ins. Co.*, 326 F.R.D. 652 (2018) (holding that attorney-client privilege does not apply when an attorney acts as a claims adjuster, supervisor, or investigation monitor rather than a legal advisor) – pincite should be 658.

I declare under penalty of perjury, under the laws of the United States of America, that the foregoing is true and correct.

Executed this 18th day of April 2025, in Irvine, California.

/s/ Keian Vahedy
Keian Vahedy

Appendix 9

ELLIS GEORGE LLP
Eric M. George (SBN 166403)
egeorge@ellisgeorge.com
Trent Copeland (SBN 136890)
tcopeland@ellisgeorge.com
2121 Avenue of the Stars, 30th Floor
Los Angeles, California 90067
Telephone: (310) 274-7100
Facsimile: (310) 275-5697

K&L GATES LLP
Ryan Q. Keech (SBN 280306)
Ryan.Keech@klgates.com
Kevin S. Asfour (SBN 228993)
Kevin.Asfour@klgates.com
Keian Vahedy (SBN 316708)
Keian.Vahedy@klgates.com
10100 Santa Monica Blvd., 8th Floor
Los Angeles, California 90067
Telephone: (310) 552-5000
Facsimile: (310) 552-5001

Attorneys for Plaintiff JACQUELYN "JACKIE" LACEY, in her individual capacity; and JACQUELYN "JACKIE" LACEY as trustee of the D and J Lacey Family Trust dated November 23, 2016

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

JACQUELYN "JACKIE" LACEY, in her individual capacity; and JACQUELYN "JACKIE" LACEY as trustee of the D and J Lacey Family Trust dated November 23, 2016,

Plaintiffs,

vs.

STATE FARM GENERAL INSURANCE COMPANY, an Illinois corporation, and DOES 1-50, inclusive,

Defendants.

Case No. 2:24-cv-05205-FMO-MAA

Judge Fernando M. Olguin

JAMS Case No. 1210040394
Proceeding before Special Master Hon. Michael R. Wilner (Ret.)

PLAINTIFF'S RESPONSE TO SPECIAL MASTER'S NOTICE OF INTENDED SANCTIONS AND FEE ORDERS

Date: April 29, 2025
Time: 10:00 a.m.
Place: Remote via Zoom

Plaintiff and her counsel, Ellis George LLP and K&L Gates LLP, hereby respond to the Special Master's April 20, 2025 Notice pursuant to Paragraph 8 thereof and its five-page limitation. This submission consists of three discrete components: **Section I**, submitted jointly by Plaintiff, Ellis George, and K&L Gates; **Section II**, by K&L Gates alone; and **Section III**, by Ellis George alone.

I. JOINT SUBMISSION (BY PLAINTIFF AND BOTH FIRMS)

A. Introduction

As reflected in the declarations already submitted,[1] Plaintiff humbly acknowledges, apologizes for, and takes full responsibility for the erroneous AI-generated citations that were inadvertently included in its briefing filed with the Special Master on April 14, 2025. This has never happened before in this case (nor in any other matter handled by these attorneys) and it will never happen again. Respectfully, however, most of the contemplated sanctions referenced in the Notice are unsupported by the facts and controlling legal principles, disproportionate to the circumstances at hand, and run counter to the ends of justice, as detailed below.

B. Plaintiff's Use of Erroneous AI-Generated Material Was Inadvertent, Promptly Disclosed, and Cured Without Causing Any Prejudice

Given limited space, and the Special Master's familiarity with the facts from the submitted declarations, Plaintiff will not provide a comprehensive discussion of the facts here, but summarizes the following points germane to the arguments:

- Following the OSC, Plaintiff's counsel candidly disclosed that limited portions of the Supplemental Brief were initially drafted with the aid of generative artificial intelligence ("AI"), in an effort to explore time-saving methods during a period of constrained resources. Upon internal review, counsel acknowledged all of the case authority that had been AI-generated, and additionally identified and disclosed other inconsistencies, including pin cite errors and misplacement of parentheticals. Plaintiff's counsel specifically requested the Court not to rely upon the two nonexistent cases.

[1] *See* Declarations of Trent Copeland ("Copeland Decl."), Ryan Keech ("Keech Decl.") and Keian Vahedy ("Vahedy Decl."), all submitted April 18, 2025.

There is no indication whatsoever that any of Plaintiff's counsel ever acted with malice, an intent to deceive, or bad faith of any kind.

- Despite the above citation issues, Plaintiff's Supplemental Brief did not present any incorrect or non-existent proposition of law. Rather, Plaintiff's arguments stem from established legal principles supported by valid precedent. Thus, the brief did not advance a frivolous legal position.

- Defendant did not rely upon, suffer any prejudice, or incur any expense due to the incorrect citations. Indeed, such would be impossible, logically and temporally, since per the Special Master's orders, each side **concurrently** submitted their Supplemental Brief on April 14, 2025. In other words, Defendant's submission was *not* filed in response to Plaintiff's submission, nor did the Special Master's orders permit either side to file a "reply" brief in response to the Supplemental Briefs.

C. <u>The Contemplated Sanctions Are Not Appropriate Under the Law</u>

The Ninth Circuit has long held that "[i]n determining the validity of any judicial sanction, we must first consider the underlying authority for the court's action." *Zambrano v. City of Tustin*, 885 F.2d 1473, 1476 (9th Cir. 1989). "For a sanction to be validly imposed, the conduct in question must be sanctionable under the authority relied on." *Id.* at 1476-77 (citations omitted). Here, the Notice identifies three sources of authority for imposing sanctions: (i) the Court's inherent authority to "regulate all proceedings" before it; (ii) FRCP 11; and (iii) FRCP 37.

To impose sanctions under the Court's **inherent authority**, the target "must have 'engaged in bad faith or willful disobedience of a court's order.'" *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001); *see also U.S. v. Stoneberger*, 805 F.2d 1391, 1393 (9th Cir. 1986) ("A specific finding of bad faith...must 'precede any sanction under the court's inherent powers.'") (citations omitted). As detailed above, there is no bad faith here, and thus sanctions under the Court's inherent powers are not appropriate. *See, e.g., United States v. Cohen*, 724 F. Supp. 3d 251, 258 (S.D.N.Y. 2024) (declining to impose sanctions upon attorney for mistaken inclusion of erroneous AI material in brief, holding that "the Court cannot find that

it was done in bad faith"); ***compare*** *Unites States v. Hayes*, --- F. Supp. 3d. ---, 2025 WL 235531, at *9 (E.D. Cal. 2025) (issuing sanctions against attorney who *declined* to admit use of AI and persisted in asserting the validity of non-existent cases despite opposition that expressly raised fictitious case concerns); *Mata v. Avianca*, 678 F. Supp. 3d 443, 466 (S.D.N.Y. 2023).

Likewise, for **Rule 11**: where, as here, the proposed sanction is imposed *sua sponte*, a finding of bad faith is a prerequisite. *See, e.g., United National Ins. Co. v. R&D Latex Corp.*, 242 F.3d 1102, 1116 (9th Cir. 2001) ("*sua sponte* sanctions 'will ordinarily be imposed only in situations that are *akin to a contempt of court*'"); *see also Cohen*, 724 F. Supp. 3d at 258 ("*sua sponte* [Rule 11] sanctions should only issue upon a finding of subjective bad faith"). Again, there is no bad faith here.[2]

Turning to **Rule 37**: The specific prongs of the Rule cited in the Notice are Rule 37(a)(5)(B) (award of attorney's fees) and Rule 37(b)(2)(A)(ii-iii) (prohibiting a party from "supporting or opposing designated claims or defenses" and "striking pleadings in whole or in part"). Starting with the latter (Rule 37(b)(2)(A)(ii-iii)): by their own terms, those provisions have no applicability here. To impose any sanction under Rule 37(b)(2)(A), the Court must find that a party has "fail[ed] to obey an order to provide or permit discovery." Fed. R. Civ. P. 37(b)(2)(A). Here, nothing of the sort is even alleged to have occurred, and thus there is no basis for the contemplated sanction of striking Plaintiff's Supplemental Brief wholesale. By extension, then, the automatic denial of the underlying motion due to the contemplated striking of Plaintiff's brief is likewise inappropriate. Further, the Notice's contemplated sanction of ordering Plaintiff's counsel "to pay reasonable attorney's fees that Defendant incurred in the preparation of its supplemental brief

[2] Moreover, a Rule 11 sanction imposed *sua sponte* can **never** include a payment of attorney's fees to the opposing party, given the provision in Rule 11(c)(4) that fee awards are only available "if imposed *on motion*." Fed. R. Civ. P. 11(c)(4) (emphasis added); *see also Barber v. Miller*, 146 F.3d 707, 711 (9th Cir. 1998); *Nuwesra v. Merrill Lynch, Fenner & Smith, Inc.*, 174 F.3d 87, 94 (2nd Cir. 1999).

(filed April 14)" is, respectfully, not appropriate: First, Defendant's Supplemental Brief was filed *concurrently* with Plaintiff's Supplemental Brief. Thus, any fees expended in its preparation could not have resulted from any mistaken citations in Plaintiff's Supplemental Brief. Second, any attorney's fee award under Rule 37(a)(5)(B) requires that the movant have lost the motion; as noted above, the striking of Plaintiff's brief is not permitted under these circumstances, and thus the motion should not automatically be denied. Third, even if the Court denies the motion on its merits, Rule 37(a)(5)(B) provides that "the court must not order this payment if the motion was substantially justified." And here, Plaintiff respectfully submits that, if nothing else, the motion was substantially justified.

Finally, even when considering AI hallucination matters in isolation (separate and apart from the foregoing legal impediments), Plaintiff respectfully notes that the proposed sanctions discussed above do not comport with the principle that "any sanction imposed must be proportionate to the offense and commensurate with principles of restraint." *Zambrano*, 885 F.2d at 1480. Here, given the candor of Plaintiff's counsel, the fundamental correctness of the legal arguments advanced, the lack of any bad faith, and the lack of prejudice, Plaintiff respectfully submits that imposing sanctions that substantively impact the case—including the striking of briefing and denial of the motion—would unfairly penalize Plaintiff and her case. *See, e.g., id.* at 1476 (cautioning against penalizing litigants for inadvertent transgressions by counsel).

D. CONCLUSION

Plaintiff respectfully submits that the contemplated sanctions set forth in Paragraph 6(a), 6(b), and 6(c) of the Notice are not appropriate. That said, Plaintiff's counsel reiterates their acknowledgement of the errors that occurred here and their sincere apologies, and stipulate to the contemplated sanctions set forth in Paragraph 6(d) (apportionment to Plaintiffs' counsel of Special Master fees relating to correction of the foregoing errors and these OSC proceedings) and Paragraph 6(e)

(written disclosures to Plaintiff).

II. SUBMISSION BY K&L GATES, ONLY

K&L Gates briefly notes the following additional facts and mitigating factors specific to it and its lawyers. K&L Gates has strict policies and prohibitions on the use of generative AI tools, and indeed blocks its attorneys from accessing such tools absent, *inter alia*, tool-specific training. (*See* Keech Decl., ¶ 13; Vahedy Decl., ¶ 10.) None of the K&L Gates attorneys who worked on the subject brief used any AI tools; had access to any AI tools; or had any awareness that an Ellis George attorney had used such tools in connection with the subject brief, until after the Special Master's inquiries. (*See* Keech Decl., ¶ 13; Vahedy Decl., ¶ 10; *see also* Copeland Decl., ¶ 3.) K&L Gates further notes that it had no reason to doubt the accuracy of the citations provided by its trusted co-counsel, and that it did not sign or file the subject brief. (*See* Keech Decl., ¶¶ 3-7; Vahedy Decl., ¶¶ 3-5.) *see also Braun ex rel Advanced Battery Techs., Inc. v. Zhiguo Fu*, 2015 WL 4389893, at *19 (S.D.N.Y. Jul. 10, 2015) (declining to impose sanctions where no evidence that anybody at firm had actual knowledge that pleading contained false allegation). No sanctions against K&L Gates are appropriate in this situation.

III. SUBMISSION BY ELLIS GEORGE, ONLY

Ellis George notes the following mitigating factors specific to its lawyer, Trent Copeland: Mr. Copeland used generative AI tools specifically designed for legal professionals when providing his colleagues with his initial thoughts in outline. When doing so, he specifically indicated that they were "not intended to be a guide" but rather an overview of the potential arguments. (*See* Copeland Decl., ¶¶ 4-8.) Because Mr. Copeland was not tasked with primary responsibility for drafting the brief, he assumed that case authority would be cite-checked by those who were responsible for its drafting. Mr. Copeland acknowledges that, in hindsight, he should have alerted the primary draftsman of his initial use of AI to assure proper cite checking prior to submission.

Respectfully submitted,

ELLIS GEORGE LLP
Eric M. George
Trent Copeland

Date: April 25, 2025

By: s/ Trent Copeland
Trent Copeland

Attorneys for Plaintiff Jacquelyn "Jackie" Lacey in all capacities

Respectfully submitted,

K&L GATES LLP
Ryan Q. Keech
Kevin S. Asfour
Keian Vahedy

Date: April 25, 2025

By: s/ Kevin S. Asfour
Kevin S. Asfour

Attorneys for Plaintiff Jacquelyn "Jackie" Lacey in all capacities

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 304

JAIME ARGELIO AMAYA QUINTEROS, an individua, on his own behalf and on behalf of all others similarly situated, Plaintiff, v. HARBOR DISTRIBUTING, LLC, a Delaware limited liability company; et al., Defendants.	Case No. CGC-24-620226 ORDER RE SANCTIONS

On July 8, 2025, the Court issued an Order to Show Cause re Sanctions in this case. The Order was issued with regard to Plaintiff's brief in opposition to Defendants' motion to stay pending resolution of related class action, filed June 27, 2025. Having considered the declarations filed by Plaintiff's counsel in response to the Order to Show Cause, and the arguments of counsel presented at a hearing on July 11, 2025, the Court hereby enters its Order sanctioning Plaintiff's counsel and granting other related relief.

BACKGROUND

This wage and hour action was filed on December 2, 2024, and was amended on February 3, 2025 to add a representative claim under the Private Attorneys General Act, Lab. Code § 2699 *et seq.* (PAGA). On June 13, 2024, Plaintiff's counsel had filed a substantially similar class action and representative PAGA action, *Ascensao v. Harbor Distributing, LLC, et al.*, Los Angeles County Superior Court Case

No. 24STCV14911. Both cases are filed on behalf of Defendants' current and former California non-exempt employees for a period of four years prior to the filing of the complaint, and both cases assert class and PAGA claims for violations of Labor Code provisions governing overtime, minimum wage, meal periods, failure to maintain records and provide accurate wage statements, failure to allow inspection of records, failure to pay wages due at termination, and derivative claims under the UCL. They are substantially similar: nine of the ten wage and hour claims Plaintiff asserts in this action are already asserted in *Ascensao*, based on the same factual allegations, and the two actions seek the same relief and penalties for those claims; the putative class and aggrieved employees are subsumed within *Ascensao*; and they are brought by the same law firm.

Defendants moved to stay the instant action pursuant to the doctrine of exclusive concurrent jurisdiction, arguing that the instant class and representative action is an "overlapping, duplicate, copycat action" of the earlier action pending in Los Angeles Superior Court. The motion was based on the doctrine of exclusive concurrent jurisdiction and the Court's inherent authority to manage its docket to avoid multiplicity of suits, duplication of judicial resources, and the risk of inconsistent judgments. In opposition to the motion, Plaintiff made a single argument: that in order for the doctrine of exclusive concurrent jurisdiction to apply, "[t]he actions must be 'substantially identical' in parties, causes of action, and rights asserted." (Opposition, 5; *id.* at 7 ["this doctrine is reserved for situations where two actions present substantially identical parties, causes of action, and rights asserted—not merely similar legal theories or overlapping defendants."]; *id.* at 9 ["California law is clear: the exclusive concurrent jurisdiction doctrine applies only when both actions are substantially identical in all key respects—not merely similar."].)

Plaintiff's argument was groundless. California law is clear that the ***opposite*** is true: the actions need ***not*** be "substantially identical" for the doctrine to apply. Thus, in *Shaw v. Superior Court* (2022) 78 Cal.App.5th 245, which held that the doctrine of exclusive concurrent jurisdiction applies to representative actions brought under PAGA, the court quoted with approval authority so holding:

> Although the rule of exclusive concurrent jurisdiction is similar in effect to the statutory plea in abatement, it has been interpreted and applied more expansively, and therefore may apply where the narrow grounds for a statutory plea in abatement do not exist. Unlike the statutory plea in abatement, the rule of exclusive concurrent jurisdiction does not require absolute identity of

> parties, causes of action or remedies sought in the initial and subsequent actions. If the court exercising original jurisdiction has the power to bring before it all the necessary parties, the fact that the parties in the second action are not identical does not preclude application of the rule. Moreover, the remedies sought in the separate actions need not be precisely the same so long as the court exercising original jurisdiction has the power to litigate all the issues and grant all the relief to which any of the parties might be entitled under the pleadings.

(*Id.* at 256 (cleaned up), quoting *People ex rel. Garamendi v. Autoplan, Inc.* (1993) 20 Cal.App.4th 760, 770; accord, *Franklin & Franklin v. 7-Eleven Owners* (2000) 85 Cal.App.5th 1168, 1175 ["In keeping with both the practical nature of the rule, and the historically flexible remedial powers of equity, exactitude was not required. That the parties in the two actions are not entirely identical and that the remedies sought by the two actions are not precisely the same is not controlling."]; *Plant Insulation Co. v. Fibreboard Corp.* (1990) 224 Cal.App.3d 781, 788 [collecting authorities].)

As set forth in the Court's Order to Show Cause, in an apparent attempt to avoid this adverse authority, Plaintiff's brief cited to inaccurate case citations, fabricated quotations, and seriously misrepresented controlling authority.

First, Plaintiff's brief repeatedly referred to *Shaw*, which is squarely on point, but with a different, inaccurate citation: "(2020) 51 Cal.App.5th 543." The brief also repeatedly cited a second case, *Rilcoff v. Superior Court* "(2021) 66 Cal.App.5th 1102." (Opposition, 7, 10, 11, 12, 13, 14, 16, 18.) **Neither citation is accurate or even exists**: *Shaw* is actually reported at *Shaw v. Superior Court* (2022) 78 Cal.App.5th 245, while *Rilcoff* was decided nearly eight decades earlier than Plaintiff represented: *Rilcoff v. Superior Court* (**1942**) 50 Cal.App.2d 503.

Second, Plaintiff repeatedly misrepresented the holdings of these and other cases. Thus, Plaintiff miscited both the facts and holding of *Shaw*, which the Court found controlling as to Defendant's motion. Plaintiff characterized *Shaw* as holding that the doctrine of exclusive concurrent jurisdiction is "inapplicable where factual circumstances and claims differ." (Opposition, 7.) And Plaintiff asserted that in *Shaw*, "the court denied a stay where the parties and issues were not identical, emphasizing that the doctrine of exclusive concurrent jurisdiction is not triggered by mere similarity." (*Id.* at 15.) But contrary to Plaintiff's argument, *Shaw* did **not** "deny" a stay; rather, it **upheld** the trial court's grant of a stay. (*Shaw*, 78 Cal.App.5th at 251 ["the trial court denied petitioners' motion to lift the stay, concluding that the stay was warranted under the doctrine of exclusive concurrent jurisdiction. In this writ of mandate

proceeding, we find that the trial court did not err in applying the exclusive concurrent jurisdiction rule to this dispute."].) Nor did *Shaw* hold that the exclusive concurrent jurisdiction doctrine is "inapplicable" where the cases are not identical; to the contrary, it quoted with approval authority holding that "[u]nlike the statutory plea [in] abatement, the rule of exclusive concurrent jurisdiction does not require absolute identity of parties, causes of action or remedies sought in the initial and subsequent actions." (*Id.* at 256, quoting *People ex rel. Garamendi*. 20 Cal.App.4th at 770.)

Similar blatant misrepresentations appear throughout the brief. For example, Plaintiff argued that in *Franklin & Franklin v. 7-Eleven Owners* (2000) 85 Cal.App.4th 1168, the court "expressly stated that a stay was appropriate only because the actions were 'virtually identical in all material respects.'" (Opposition, 14.) Not only does the quoted phrase not appear in that opinion, the court's actual holding was the exact opposite: "In keeping with both the practical nature of the rule, and the historically flexible remedial powers of equity, exactitude was not required. That the parties in the two actions are not entirely identical and that the remedies sought by the two actions are not precisely the same is not controlling." (85 Cal.App.4th at 1175 (cleaned up).) Similarly, Plaintiff mischaracterized *Simmons v. Superior Court* (1950) 96 Cal.App.2d 119 as holding that a "stay [was] denied where parties and issues were not identical." (Opposition, 7.) In fact, *Simmons* held exactly the opposite. (See *Simmons*, 96 Cal.App.2d at 125 ["We think it manifest that respondent court abused its discretion in not staying, as a matter of comity, further proceedings in the California action until the final determination of the Texas action."].) Unfortunately, these are not the only examples of authorities that were misrepresented in the brief.

Third, the brief contains no fewer than **eight** fabricated quotations from California cases cited by Plaintiff. For example, it quoted the *Shaw* court as follows: "the public interest in the enforcement of labor laws and the protection of employees' rights outweighs the risk of inconsistent judgments where the actions are not truly duplicative." (Opposition, 15.) **No such quotation appears in *Shaw*, or for that matter in any other reported California case.** To the contrary, *Shaw* expressed the opposite view. (See *Shaw*, 78 Cal.App.5th at 262 ["The trial court could reasonably conclude that the policies giving rise to the exclusive concurrent jurisdiction rule were not outweighed by those that drove PAGA's enactment."].) **Literally every other purported quotation in the brief, purportedly from five different cases, is**

similarly fictitious. (See Opposition, 10, 11, 14, 15.)

On July 8, 2025, after Defendants' motion to stay was fully briefed, the Court issued a written tentative ruling granting that motion. Rather than contest the tentative ruling, Plaintiff stipulated to it, and the Court adopted its tentative ruling granting the motion to stay. On July 11, 2025, the Court held a hearing on the Order to Show Cause.

RESPONSE TO THE ORDER TO SHOW CAUSE

In response to the Order to Show Cause, counsel of record, attorneys at the Lipeles Law Group, filed declarations in which they sought to disclaim any responsibility for the inaccurate citations, fabricated quotations, and misrepresentations of controlling authority. Each of those attorneys—Kevin A. Lipeles, Thomas H. Schelly, and Jasmine J. Badawi—pointed the finger at James V. Sansone, a contract attorney they had retained to prepare the opposition brief, whose name does not appear on the brief. (Lipeles Decl. ¶ 6; Schelly Decl. ¶ 5; Badawi Decl. ¶ 5.) Counsel of record asserted that they began working with Mr. Sansone in April 2024 and have worked with him for over a year. (Lipeles Decl. ¶ 6.) Mr. Lipeles avers that "[i]nitially, Mr. Schelly and I reviewed his work" and found it to be "solid and good quality work product." (*Id.*; see also Schelly Decl. ¶ 5 ["Initially, I, along with Kevin Lipeles, reviewed [Mr. Sansone's] work product, which I found to be of good, if not high quality."].) Both Mr. Lipeles and Mr. Schelly assert that they "instructed our staff attorneys to review his (as well as our other contract attorneys') work." (Lipeles Decl. ¶ 6; Schelly Decl. ¶ 5.) Ms. Badawi, whom Messrs. Lipeles and Schelly identify as the "handling attorney" responsible for this case, stated that she reviewed the draft opposition prepared by Mr. Sansone, and that she "had no reason to question the integrity of the work product," nor to believe that "the citations were inaccurate, misapplied or that the Opposition included unsupported arguments." (Badawi Decl. ¶¶ 7-8.) However, Ms. Badawi did not indicate what her "review" consisted of, and in particular whether she read (or was even familiar with) any of the cited cases.

Mr. Schelly asserted that when he received the Court's Order to Show Cause, he forwarded it to Mr. Sansone and asked him what happened. (Schelly Decl. ¶ 6.) He said Mr. Sansone informed him that he "uses Lexis AI to check his briefs." (*Id.*) He further informed Mr. Schelly "that he re-ran the brief and

again Lexis confirmed every citation was a valid citation. However, he elaborated that he had been experiencing 'issues' with Lexis." (*Id.* ¶ 7.) Mr. Sansone prepared a declaration and provided it by email to Mr. Schelly, who had it printed out on the case caption and sent it back to Mr. Sansone for signature. Mr. Schelly acknowledged that he did not ask Mr. Sansone about any of the statements in the declaration.

Mr. Sansone stated in his declaration that he prepared the brief using Lexis and Lexis Protégé, and that after finalizing it, he used the Lexis Citation Check function "to verify the accuracy, validity, and treatment of all cited legal authorities." (Sansone Decl. ¶¶ 2, 4.) He asserts that Lexis Citation Check is "engineered to detect both false citations and altered or fabricated quotations when authorities are entered into the cite-checking interface." (*Id.* ¶ 5.) He further asserts that the citation check "confirmed that all authorities included in the motion were accurately cited." (*Id.* ¶ 6.) Mr. Sansone did not detail any "issues" he had reportedly experienced using Lexis; to the contrary, he asserted he has "never experienced citation issues of the nature raised in the Court's OSC." (*Id.* ¶ 3.)

Mr. Sansone insists he brings a "high level of diligence" to all his filings; that he "did not use generative AI tools such as ChatGPT or any similar tool to draft, generate, or summarize case law in the motion," and that his legal writing is "grounded in personal legal research and analysis, and [he] take[s] pride in upholding the highest ethical standards in [his] written work." (Sansone Decl. ¶ 8.) He asserts that he applied his "longstanding diligence to ensure that the legal content presented to the Court was accurate and ethically sound." (*Id.* ¶ 10.) He also claims to have been "surprised and deeply concerned" by the Court's assertion that the brief contains non-existent citations and fabricated quotations. (*Id.* ¶ 7.)

Remarkably, **Mr. Sansone did not acknowledge that the brief contains any errors at all**. Critically, he did not explain why the brief contains multiple inaccurate citations to two key cases. In fact, although Mr. Sansone attached to his declaration a printout of the citation check he apparently ran, it does not even list *Shaw* or *Rilcoff*, although each of those cases is cited no fewer than seven times in the brief. Mr. Sansone offered no explanation for why he apparently neglected to cite-check those cases. Nor did he make any effort to explain how it is that no fewer than eight fabricated quotations from five different cases found their way into the brief.

In view of these glaring omissions, the Court finds Mr. Sansone's written testimony entirely

lacking in credibility. Unless Mr. Sansone deliberately and intentionally fabricated the inaccurate citations and fictitious quotations in the brief with the intent to mislead the Court and opposing counsel, the only reasonable conclusion the Court can reach is that they were created by the use of a generative artificial intelligence (AI) tool. Mr. Sansone's contrary representations to the Court, under penalty of perjury, are incredible on their face.

Mr. Schelly and Ms. Badawi appeared in person at the hearing on the Order to Show Cause, while Mr. Lipeles appeared remotely by Zoom. Messrs. Lipeles and Schelly are partners in the Lipeles Law Group, while Ms. Badawi is a fourth-year associate with the firm. While counsel apologized for the misrepresentations and invented quotations in their brief, their responses to the Court's questions were, to put it mildly, disturbing.

Mr. Lipeles was unable to answer the Court's question about why his firm had filed duplicative actions in Los Angeles and San Francisco, and suggested that maybe they weren't aware that they had filed the prior lawsuit. He then suggested that the reason they had opposed Defendants' motion to stay was that they were never told it was a duplicative complaint, or that they didn't realize that it was their firm that had filed the first complaint. Both responses were false. In the joint case management conference filed by the parties more than two months before Defendants' motion to stay was filed, Defendants specifically referred to *Ascensao* as "an overlapping putative class action and representative PAGA action, filed by Plaintiff's counsel in the instant action." (Joint Case Management Conference Statement (filed Apr. 8, 2025), 5.)[1] Likewise, Ms. Badawi told the Court that although she had personally signed the *Ascensao* complaint, she had not drafted it, and initially was unaware that her firm had filed it.

Ms. Badawi indicated that once she realized that her firm had filed the first complaint, Mr. Lipeles indicated that they should meet to discuss how to respond to Defendants' motion to stay. However, no such meeting was held. Indeed, Mr. Lipeles candidly admitted that he never read the motion and apparently never realized that the prior action had been filed by his own firm. Nonetheless, Mr. Lipeles directed Ms. Badawi to assign the matter to James V. Sansone, a contract attorney whom the firm had

[1] Following the hearing, Mr. Schelly submitted an unauthorized declaration to the Court attempting to explain why the firm had filed duplicative actions. Suffice it to say that the declaration contained further falsehoods.

utilized in the past. Neither Mr. Lipeles nor Ms. Badawi ever gave Mr. Sansone any direction with respect to whether to oppose the motion (or, if so, on what grounds). Mr. Schelly indicated that he expected Mr. Sansone, whom he regarded as "of counsel" to the firm, to tell the firm if a motion can't or shouldn't be opposed.

Neither Mr. Lipeles nor Mr. Schelly reviewed the draft brief after Mr. Sansone prepared it. Instead, they left that task to Ms. Badawi, who read it for the "flow" of the brief, to make sure that it did not contain any grammatical or spacing errors, that it looked complete and finalized, and that the argument "made sense." She did not read any of the cases cited in the brief. Ms. Badawi acknowledged she was aware that in order for the doctrine of exclusive concurrent jurisdiction to apply, California law does not require that the two overlapping actions be identical. However, she could not explain why she did not correct that position, which was the central argument made in the brief. She acknowledged at the hearing that in hindsight, she should not have signed her name to the brief, and "should have known better."

DISCUSSION

The conduct of ***all*** Plaintiff's counsel involved in this action, including both Plaintiff's counsel of record who filed and signed the brief in question and the contract attorney who prepared it, falls far short of their professional and ethical obligations, and warrants substantial sanctions.

Counsel's conduct in utilizing generative AI to prepare a brief without checking whether it contains accurate case quotations and citations is indisputably improper.[2] As has been widely reported, numerous courts across the country in the last several years have strongly criticized lawyers' careless use of generative AI to file briefs that contain "fake" citations and quotations. "Submitting fictitious cases and quotations to the court degrades or impugns the integrity of the Court and interferes with the administration of justice." (*United States v. Hayes* (E.D. Cal. 2025) 763 F.Supp.3d 1054, 1064.) As one court explained in a leading case on the subject,

> In researching and drafting court submissions, good lawyers appropriately obtain assistance from junior attorneys, law students, contract lawyers, legal encyclopedias and databases such as

[2] Needless to say, if counsel instead deliberately fabricated case quotations and miscited cases rather than relying on generative AI to do so, that would be even worse. Either way, counsel engaged in serious misconduct.

> Westlaw and LexisNexis. Technological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance. But existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings. [Respondents] abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question.
>
> Many harms flow from the submission of fake opinions. The opposing party wastes time and money in exposing the deception. The Court's time is taken from other important endeavors. The client may be deprived of arguments based on authentic judicial precedents. There is potential harm to the reputation of judges and courts whose names are falsely invoked as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession and the American judicial system. And a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity.

(*Mata v. Avianca, Inc.* (S.D.N.Y. 2023) 678 F.Supp.3d 443, 448 (cleaned up); see also, e.g., *Park v. Kim* (2d Cir. 2024) 91 F.4th 610, 615 ["A fake opinion is not 'existing law' and citation to a fake opinion does not provide a non-frivolous ground for extending, modifying, or reversing existing law, or for establishing new law. An attempt to persuade a court or oppose an adversary by relying on fake opinions is an abuse of the adversary system." (cleaned up)].)[3]

Blind reliance on generative AI to prepare a court filing, without evaluating and checking its output, violates lawyers' professional and ethical obligations, including their duty of candor to the Court. (*United States v. Hayes,* 763 F.Supp.3d at 1064 [submitting fictitious cases and quotations to the court "violates California Rules of Professional Conduct 3.1(a)(2), 3.3(a)(1), and 3.3(a)(2)]; see Bus. & Prof. Code § 6068(d) [duty of attorney "never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law"]; Cal. Rules of Prof. Conduct, rules 3.1(a)(2), 3.3(a)(1), 3.3(a)(2) ["A lawyer shall not present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law"; "A lawyer shall not knowingly make a false statement of fact or law to a tribunal"; "A lawyer shall not . . . knowingly misquote to a tribunal the language of a book, statute, decision or other authority."].) Further, as both the American Bar Association and the State Bar of California have warned, it also violates a lawyer's duty of competence, which requires that lawyers review and evaluate the output produced by generative AI before submitting it to a court. (ABA Form. Opn. 2024-512, Generative

[3] The misuse of generative AI in the legal profession is widespread. See "England's High Court Warns Lawyers to Stop Citing Fake A.I.-Generated Cases," *The New York Times* (June 6, 2025).

Artificial Intelligence (July 29, 2024); State Bar of California, Standing Committee on Professional Responsibility and Conduct, "Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law," available at www.calbar.ca.gov.)

Here, Mr. Sansone's conduct is particularly blameworthy because not only did he evidently utilize generative AI to prepare the brief in question, he denied under oath having done so. His conduct is comparable to (or even worse than) that of the responsible attorneys in *Mata*, who initially did not "come clean" about their actions after the court questioned the existence of the fake cases, but instead "doubled down and did not begin to dribble out the truth" until after the court issued an order to show cause re sanctions. (678 F.Supp.3d at 449.) In *Mata*, the attorneys ultimately admitted that they had submitted fake cases and quotations, and expressed remorse and apologized to the court. In contrast, Mr. Sansone boldly asserts that he "did not use generative AI tools such as ChatGPT or any similar tool to draft, generate, or summarize case law in the motion," and that his legal writing is "grounded in personal legal research and analysis." (Sansone Decl. ¶ 8.) "The Court finds this response inadequate and not credible. Though [Mr. Sansone] admits that he drafted his filing with the fictitious case[s] and quotation[s], he fails to explain where or how he found or created the fictitious case[s] and quotation[s]." (*United States v. Hayes*, 763 F.Supp.3d at 1065.) In any event, the Court "need not make any finding as to whether [Mr. Sansone] actually used generative AI to draft any portion" of the brief, including the fictitious cases and quotations. "Citing nonexistent case law or misrepresenting the holdings of a case is making a false statement to a court. It does not matter if [generative AI] told you so." (*Id.* at 1066-1067 (cleaned up).)

Plaintiff's counsel of record are not absolved of responsibility merely because they outsourced preparation of the brief to Mr. Sansone. By filing a brief with the court, an attorney certifies that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," "[t]he claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." (Code Civ. Proc. § 128.7(b)(2).) Counsel of record's names appeared on the brief, and one of them signed it. Thus, as counsel acknowledged at the hearing, they bear ultimate responsibility for the accuracy and reliability of the brief. They are therefore responsible for the

misrepresentations of authority and fake case quotations it contained.[4]

Notably, the undisputed facts regarding the Lipeles Law Group's conduct here are remarkably similar to those in *Mata*. Here, as in that case, the lawyer who signed the opposition containing the fake citations quotations "was not its author," which was researched and written by a different attorney; here, as there, the signing attorney "reviewed the [brief] for style, stating, 'I was basically looking for a flow, make sure there was nothing untoward or no large grammatical errors'"; here, as there, the signing attorney "did not review any judicial authorities cited" in the brief; and here, as there, "[t]here is no claim or evidence that [the signing attorney] made any inquiry of [the author] as to the nature and extent of his research or whether he had found contrary precedent," but instead "simply relied on a belief that the work produced" by the author "would be reliable." (678 F.Supp.3d at 450.) And here, exactly as in *Mata*, there is "no evidence" that Mr. Schelly asked Mr. Sansone "a single question" about his false declaration (*id.*);[5] in that declaration, as discussed above, he denied that he had used generative AI to prepare the brief but failed to provide any explanation for the fake cases and numerous fake quotations. The *Mata* court found it appropriate to sanction all responsible counsel. (*Id.* at 465-466.) So too here.

Finally, the Court finds that Plaintiff's counsel of record essentially abdicated their duty of competence to their client as well as their duty to the Court. "[E]ven when work on a case is performed by an experienced attorney, competent representation still requires knowing enough about the subject matter to be able to judge the quality of the attorney's work." (*Cole v. Patricia A. Meyer & Assocs., APC* (2012) 206 Cal.App.4th 1095, 1100, 1115-1116 [counsel of record for plaintiffs could not avoid liability for malicious prosecution merely by showing that they took a passive role in the case as "standby counsel" who would try the case in the event it went to trial and relied on lead counsel's assessment of probable cause; counsel of record had "a duty of care to their clients that encompassed both a knowledge of the law and an obligation of diligent research and informed judgment" (cleaned up)].) Yet Plaintiff's

[4] That conclusion is also supported by the Rules of Professional Conduct, which provide that a lawyer having "direct supervisory authority" over another lawyer (whether or not a member or employee of the same law firm) must make "reasonable efforts to ensure that the other lawyer complies" with the Rules and the State Bar Act. (Cal. Rules of Prof. Conduct, rule 5.1(b).) An attorney must also supervise contract or temporary lawyers hired to provide legal services to the attorney's clients. (Cal. State Bar Form. Opn. 2004-165 (construing former rule).)

[5] Ms. Badawi attempted to question Mr. Sansone. However, he evaded her attempts to contact him.

counsel of record never undertook to determine whether Defendants' motion to stay was meritorious, never made any independent determination whether to oppose the motion, never gave Mr. Sansone any direction in that regard, and did not adequately review his work.

The Court finds that the conduct described above constitutes serious violations of Section 128.7(b) as well as of counsel's ethical and professional obligations under the Rules of Professional Conduct. This finding applies both to Mr. Sansone, who prepared the brief, and to Plaintiff's counsel of record, who filed it with the Court and, pursuant to Section 128.7, thereby certified that it was "warranted by existing law." The Court further finds that the conduct warrants substantial sanctions and other relief, which it finds is necessary to deter repetition of this conduct or comparable conduct by others similarly situated.

ORDER AND CONCLUSION

For the foregoing reasons, the Court hereby orders as follows:

1. Lipeles Law Group, APC and attorneys Kevin A. Lipeles, Thomas H. Schelly, and Jasmine J. Badawi, jointly and severally, shall pay monetary sanctions in the amount of $5,000 to Defendants and $1,000 payable into the Court. Such sanctions shall be paid within ten days of entry of this Order.

2. Plaintiff's counsel shall serve a copy of this Order on their client in this case, and shall file a proof of service with the Court.

3. Plaintiff's counsel shall serve a copy of this Order on the Superior Court Judge in Los Angeles County presiding over the *Ascensao* action within 10 days of entry of this Order, and shall file a proof of service with this Court.

4. Plaintiff's counsel shall serve a copy of this Order on any Judge of this Court before whom they appear in any action pending or filed in this Court within one year from the date of entry of this Order.

IT IS SO ORDERED.

Dated: July ___, 2025

Ethan P. Schulman
Judge of the Superior Court