UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ADVANTOR SYSTEMS CORPORATION,
a Florida corporation,

Plaintiff,

v. Case No. 6:14-cv-533-Orl-31DAB

DRS TECHNICAL SERVICES, INC., a Maryland corporation,

Defendant.
_____/

PLAINTIFF'S MOTION TO COMPEL DEFENDANT TO ANSWER INTERROGATORY NUMBER 12 AND PRODUCE CERTAIN DOCUMENTS RESPONSIVE TO PLAINTIFF'S SECOND REQUEST FOR PRODUCTION

Plaintiff Advantor Systems Corporation ("Advantor"), pursuant to Fed. R. Civ. P. 37, moves to compel Defendant DRS Technical Services, Inc. ("DRS") to answer Advantor's Interrogatory No. 12 and to produce certain documents responsive to Advantor's Second Request for Production. In support of this motion, Advantor states as follows:

INTRODUCTION

This case involves DRS' unlawful breach of a nondisclosure and "no-hire" agreement and its tortious interference with Advantor's confidentiality and non-compete agreements with several of its employees. Some of the relevant issues in discovery in this case include DRS' intentional bad-faith spoliation of relevant evidence, DRS' project revenues and profits related to its hiring of Advantor's employees, and the financial condition of DRS.

Advantor sought discovery from DRS concerning these issues. DRS has objected to Advantor's discovery requests based on a litany of boilerplate objections. DRS' objections are without merit. This Court should overrule DRS' objections and compel DRS to answer the discovery requests and produce responsive documents.

BACKGROUND

In the summer of 2013, DRS teamed up with Advantor—one of only three security systems certified by the Air Force Major Commands—to provide installation and maintenance services as a subcontractor on an Air Force electronic security system project known as SPAWAR ESS. DRS entered into a Nondisclosure Agreement (the "NDA") with Advantor as part of this venture in July 2013. (Doc. 32, ¶¶ 7–8; Doc. 32-1.) DRS insisted that the parties utilize DRS' standard Nondisclosure Agreement form. The NDA prohibited the unauthorized use by DRS of Advantor's proprietary information, required DRS to protect Advantor's proprietary information, and required DRS, upon Advantor's request, to return and certify the destruction of Advantor's proprietary information. (Doc. 32-1, ¶¶ 2, 4, 8, 14.)

Advantor's intrusion detection systems ("IDS")—also known as annunciators—were already in place on several of the Air Force bases under the SPAWAR ESS project, and the Government required the applicable personnel on this project to be certified to perform annunciator maintenance. (Doc. 32, ¶ 14.) Advantor provides specialized and proprietary IDS training for this certification and had the requisite certified personnel at several applicable Air Force bases to perform the work on this project. DRS did not have this training and personnel; DRS recognized this fact and the importance of having

Advantor as a strategic partner in its team approach to do the work, as reflected in the SPAWAR ESS proposal submitted to the Government in September 2013.[1] (*Id.* ¶¶ 7, 14.)

Following the award of the SPAWAR ESS project, DRS wrongfully excluded Advantor from the project. DRS brazenly told Advantor in October 2013 that it would instead "self-perform" on the project by using recently recruited and hired Advantor employees. (*Id.* ¶ 15.) Indeed, DRS sought to hire, and did hire, at least three of Advantor's employees, including Greg Larson ("Larson"), John Ellfeldt ("Ellfeldt"), and Axel Alvarez ("Alvarez"), for the project in violation of the no-hire provision of the NDA. (*Id.* ¶¶ 25–33, 37, 39.) That contractual obligation provided, in pertinent part, that "[t]he Parties agree that, during the term of this Agreement and for a one (1) year period thereafter, neither Party shall knowingly or actively seek to hire any employee of the other Party." (Doc. 32-1, ¶ 15).

As further damage to Advantor, Larson (one of the employees that DRS poached from Advantor) provided Advantor's proprietary information to at least two DRS employees, and DRS refused to appropriately return or certify the destruction of Advantor's proprietary data—again, in violation of the NDA. (Doc. 32, ¶¶ 39, 41.) Larson was a Senior Field Trainer for Advantor's certified IDS systems, with access to Advantor's proprietary information. (*Id.* ¶¶ 18, 20.)

Larson resigned from Advantor on November 10, 2013, without any notice, per

[1] The Court compelled DRS to produce the part of its proposal and draft proposals addressing staffing on the SPAWAR ESS project in its September 29, 2014 Order. (Doc. 39.) On October 21, 2014, DRS produced its SPAWAR ESS proposal, but in heavily redacted form, and has yet to produce its draft proposals in compliance with the Order.

DRS' instructions. (*Id.* ¶ 26; Doc. 40-3, ¶ 10.) Larson was steered by DRS' recruiter, Vanessa Morrison, to DRS' program manager, Joseph Coen, who was coordinating the SPAWAR ESS project. Coen described DRS' hiring of Larson as a "gold mine" and stated that DRS badly wanted to hire Larson because of his Advantor knowledge and experience. (Doc. 40-3, ¶ 7.) DRS told Larson to resign from his employment with Advantor in secret because of his access to Advantor's documentation and with the intent that such information would be shared with DRS. (*Id.* ¶ 10.) Documents recently produced by DRS further show that DRS, during its recruitment of Larson, viewed it as extremely important that Larson be treated favorably and that special attention be paid to him to get him employed quickly since he was critical to DRS' ability to support Advantor systems. (*See* DRS' Contested Motion to Seal[2], Doc. 46, referring to email bates numbered DRS 2264-2271.) In addition, DRS described Larson during its recruitment as a senior Advantor technical employee instrumental to DRS' support of the Advantor sites on the SPAWAR ESS project. (*See* DRS' Contested Motion to Seal, Doc. 46, referring to email bates numbered DRS 2541-2542.) Notably, these comments by DRS were made on October 23 and 25, 2013—almost three weeks before Larson resigned from Advantor and a few weeks after Larson began sending proprietary Advantor information to DRS. For example, in documents recently produced by DRS, Larson sent Coen an IDS training presentation on

[2] DRS has improperly designated certain emails that it produced to Advantor as "Confidential." Advantor opposes these designations. Under the parties' Stipulated Confidentiality Agreement, DRS has filed a motion to seal, and Advantor will file an opposition to the Motion to Seal. For purposes of this motion to compel, Advantor cites to the documents that are the subject of the Motion to Seal by their appropriate bates numbers.

October 6, 2013 and told her that he had removed the Advantor logo from the presentations even though he was unsure about the legal implications of doing so. (*See* DRS' Contested Motion to Seal, Doc. 46, referring to email bates numbered DRS 3793.)

Following Larson's resignation from Advantor and Advantor learning that he went to work for DRS, Advantor, through its counsel, sent a demand letter and preservation notice to DRS on November 22, 2013. (Doc. 40-2, p. 6.) Advantor's November 22 letter, among other things: (i) advised DRS that Larson had been provided Advantor's proprietary information in connection with his job duties; (ii) expressed its concern that DRS had hired Larson because of the Advantor information to which he had access and to help DRS "self-perform" on the SPAWAR ESS project; (iii) demanded that DRS terminate Larson; (iv) demanded that DRS "take all steps to preserve (without alteration), and return to Advantor all confidential and/or proprietary information of Advantor, including without limitation, all documents (including any electronically stored information or other data generated by and/or stored on DRS' computers and other storage media), in DRS' possession, custody, or control"; and (v) referenced its claims under the NDA and attached the NDA and Larson's non-compete agreement. (*Id.* at 2–3.) Advantor also sent a demand letter to Larson on that date. DRS advised Larson "not to worry" about the demand letter and stated that DRS, given its large size compared to Advantor, would be able to "blow Advantor away." (Doc. 40-3, ¶ 9.)

Nevertheless, realizing its inevitable exposure, DRS terminated Larson in December 2013, following its receipt of the November 22, 2013 demand and preservation notice by Advantor (Doc. 32, ¶ 41)—but not before Larson shared proprietary Advantor

information with DRS that was important to DRS' ability to support the SPAWAR ESS project. For example, documents recently produced by DRS show that Larson sent DRS detailed information about the concepts in Advantor's systems on December 2, 2013. Larson's supervisor at DRS told Larson the next day that he liked the information on Advantor equipment and to share the Advantor information with several other DRS employees, including former Advantor employees Alvarez and Ellfeldt." (*See* DRS' Contested Motion to Seal, Doc. 46, referring to email bates numbered DRS 1336-1341.)

Rather than preserve Larson's DRS computer, as directed by Advantor just a few weeks before his termination, DRS instead "reconfigured, wiped, and re-assigned [the computer] to another employee when Larson's employment ended in December 2013." (Doc. 40-4, p. 3.) Advantor then confronted DRS regarding this improper "wipe." (*Id.*) After confronting it with this spoliation issue, DRS retracted its statement that the computer had been "wiped" and instead represented that the computer had been "reformatted and . . . a new operating systems was installed as per DRS' standard procedures." (Doc. 40-5, p. 2.) Nevertheless, it is undisputed that relevant Advantor-related files were stored on Larson's DRS computer and that, as a result of DRS' spoliation by reformatting, the files have been destroyed. (Doc. 40-9, ¶¶ 9–10.) Advantor has filed a motion for sanctions against DRS for this intentional bad-faith spoliation of relevant evidence, which is pending. (Doc. 40.)

DRS was very interested in hiring other people with Advantor information—not just Larson. (Doc. 40-3, ¶¶ 5, 8.) DRS, through Coen, also specifically mentioned to Larson that DRS was targeting Alvarez and Ellfeldt. (*Id.* ¶ 8.) In its unlawful recruitment

and hiring of Alvarez and Ellfeldt, DRS also classified both of them as top-rated "A+" candidates in DRS' priority ranking of ESS candidates. (Doc. 32, ¶ 46.) Alvarez and Ellfeldt were, respectively, an ESS administrator and Lead Installer for Advantor during their employment. They worked closely in the field with Advantor's certified IDS systems, and, like Larson, had access to Advantor's proprietary information and a non-competition agreement with Advantor. (*Id.* ¶¶ 17, 19.) In a separate lawsuit that Advantor has filed against Ellfeldt, Ellfeldt testified that he kept at least two (highly proprietary) training manuals relating to Advantor's IDS product after going to work for DRS. (Doc. 28-4, pp. 18:4–10, 24:18–22.) While DRS claims to have since moved Ellfeldt to another project in or about March 2014, Alvarez, by DRS' own admission in discovery, is still working on the SPAWAR ESS (also referred to as IBDSS) project for DRS. (*See* Ex. 2, DRS' Answer to Interrogatory No. 9.)

On March 18, 2014, following its exclusion of Advantor as a subcontractor on the SPAWAR ESS project, DRS issued its notice of termination of the NDA. (Doc. 32, ¶ 48.) On August 15, 2014, Advantor filed its amended complaint against DRS. (Doc. 32.) In the amended complaint, Advantor has brought a count against DRS for breach of contract under Virginia law, which governs the NDA. (*Id.* ¶¶ 50–55.) Advantor seeks damages for its lost profits and DRS' unjust enrichment and disgorgement. (*Id.* ¶ 54.) Advantor has also brought three counts for tortious interference with contract under Florida law, (*see id.* ¶¶ 14–18), and seeks damages, including special and punitive damages. (*Id.* ¶¶ 60, 61, 66, 67, 72, 73.)

ARGUMENT & INCORPORATED MEMORANDUM OF LAW

Against this backdrop comes this motion to compel. Advantor served its Second Set of Interrogatories and Second Request for Production of Documents on DRS on July 22, 2014. Copies of the Second Set of Interrogatories and Second Request for Production are attached as Exhibit 1. DRS served its answers to the Second Set of Interrogatories and response to the Second Request for Production of Documents on August 25, 2014. Copies of DRS' answers and response are attached as Exhibit 2.

The specific discovery requests and responses at issue in the instant motion[3] are as follows:

I. Interrogatory No. 12

INTERROGATORY NO. 12:

> Identify the persons at DRS who were involved with the reformatting and reassignment of Larson's DRS computer and to whom at DRS the statement that Larson's DRS computer had been "wiped" is attributed.

DRS'S RESPONSE TO INTERROGATORY NO. 12:

> Defendant objects to this Interrogatory on the grounds that it is overbroad, vague and seeks information protected by the attorney-client and/or work product privileges. Subject to and notwithstanding these objections, Defendant states that the following individual was involved with the reformatting and reassignment of Larson's DRS computer:
>
> Jose Torrico
> Help Desk Technician

[3] Advantor reserves the right to raise other necessary discovery motions concerning DRS' responses and objections to Advantor's discovery requests not addressed herein. For example, despite request, DRS has not produced a notarized verification for its amended answer to Interrogatory No. 11, or for its answers to Advantor's second set of interrogatories.

(Ex. 2.)

Interrogatory No. 12 is not overbroad or vague as it clearly requests DRS to identify all persons involved with the reformatting and reassignment of Larson's DRS computer and to identify the persons at DRS who made the initial representation that the Larson computer was "wiped." Moreover, this information is relevant to DRS' intentional bad-faith spoliation of Larson's DRS computer. (*See* Doc. 40.)

In addition, the identity of the persons to whom the "wiped" statement is attributed is reasonably calculated to lead to the discovery of admissible evidence. On June 9, 2014, DRS' counsel emailed Advantor's counsel: "[a]s to the computer that was assigned to Greg Larson, pursuant to Defendants' normal policies and procedures, it was reconfigured, **wiped**, and re-assigned to another employee when Larson's employment ended in December 2013, well before this lawsuit was filed." (Doc. 40-4, p. 3 (emphasis added).) Not surprisingly, DRS, after being confronted on this spoliation issue, backpedaled and stated that the Larson computer was not "wiped," but was reformatted, re-assigned, and that a new operating system was installed on it. (Doc. 40-5, p. 2.) Following the parties' forensic examination of the computer, Advantor is seeking an adverse inference against DRS based on DRS' spoliation of the Larson computer. (Doc. 40.) The persons who made and are responsible for the initial representation that the Larson DRS computer was "wiped" is relevant to the issue of DRS' bad-faith spoliation of evidence.

Finally, the identity of all persons—not just one person identified by DRS "subject to objections"—who were involved with the reformatting and reassignment of Larson's DRS computer and the initial statement to Advantor that the Larson computer was "wiped"

is not protected by the attorney-client or work-product privilege. The mere identity of the persons at DRS involved with these events is not an attorney-client privileged communication. *See Burden v. Church of Scientology of Ca.*, 526 F. Supp. 44, 46 (M.D. Fla. 1981) (holding that the attorney-client privilege did not protect client's identity). In addition, the initial representation that the computer was "wiped" was not made in anticipation of litigation. *See Berlinger v. Wells Fargo, N.A.*, No. 2:11-cv-459-FtM-29CM, 2014 WL 4417826, at *1 n.4 (M.D. Fla. Sept. 8, 2014) (declining to address an assertion of work-product privilege when the defendant made no attempt to show that the documents were prepared in anticipation of litigation). Accordingly, the identity of the persons to whom the statement is attributed is not protected by the work-product privilege.

II. Requests to Produce

REQUEST TO PRODUCE NO. 5:

All documents evidencing DRS' revenue, profit and costs resulting from the hiring of Larson, Ellfeldt, and/or Alvarez.

DRS'S RESPONSE TO REQUEST TO PRODUCE NO. 5:

Defendant objects to this Request on the grounds that it is overbroad, vague, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. The request is not limited in time or project. Finally, it seek highly confidential and proprietary information, potentially including trade secrets and U.S. classified documents. The only program involving any Advantor products that Larson, Ellfeldt or Larson have performed work on is the IBDSS Program. Defendant's profit or loss resulting from Larson, Ellfeldt or Alvarez working on the IBDSS Program is completely irrelevant to Plaintiff's alleged damages in this case. In breach of contract claims, plaintiffs are typically only entitled to their actual damages. Here, Plaintiff's actual damages are not Defendant's profits on the IBDSS project because Plaintiff was not a bidder to the contract and was not even eligible to bid for the contract. In other words, regardless of whether Defendant hired these three (3) individuals, Plaintiff would have never received the profits of the IBDSS Program.

REQUEST TO PRODUCE NO. 6:

All documents evidencing DRS' billings for work performed by Larson, Ellfeldt, and/or Alvarez. These documents include, but are not limited to, billing statements and invoices for these individuals and apply whether or not DRS has received payment for such work.

DRS'S RESPONSE TO REQUEST TO PRODUCE NO. 6:

Defendant objects to this Request on the grounds that it is overbroad, vague, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. The request is not limited in time or project. Finally, it seek highly confidential and proprietary information, potentially including trade secrets and U.S. classified documents. The only program involving any Advantor products that Larson, Ellfeldt or Larson have performed work on is the IBDSS Program. Defendant's billings or revenue resulting from Larson, Ellfeldt or Alvarez working on the IBDSS Program is completely irrelevant to Plaintiff's alleged damages in this case. In breach of contract claims, plaintiffs are typically only entitled to their actual damages. Here, Plaintiff's actual damages are not Defendant's profits on the IBDSS project because Plaintiff was not a bidder to the contract and was not even eligible to bid for the contract. In other words, regardless of whether Defendant hired these three (3) individuals, Plaintiff would have never received the profits of the IBDSS Program.

REQUEST TO PRODUCE NO. 7:

All documents evidencing the hours or amount of time spent on projects at DRS (if such time has not been billed by DRS) by Larson, Ellfeldt, and/or Alvarez.

DRS'S RESPONSE TO REQUEST TO PRODUCE NO. 7:

Defendant objects to this Request on the grounds that it is overbroad, vague, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. The request is not limited in time or project. Finally, it seek highly confidential and proprietary information, potentially including trade secrets. The only program involving any Advantor products that Larson, Ellfeldt or Larson have performed work on is the IBDSS Program. Defendant's billings or revenue resulting from Larson, Ellfeldt or Alvarez working on the IBDSS Program is completely irrelevant to Plaintiff's alleged damages in this case. In breach of contract claims, plaintiffs are typically only entitled to their actual damages. Here, Plaintiff's actual damages are not Defendant's profits on the IBDSS project because Plaintiff was not a bidder to the contract and was not even eligible to bid for the contract. In other words, regardless of whether

Defendant hired these three (3) individuals, Plaintiff would have never received the profits of the IBDSS Program.

REQUEST TO PRODUCE NO. 8:

All documents evidencing DRS' revenue, profit, and costs on the SPAWAR ESS project.

DRS'S RESPONSE TO REQUEST TO PRODUCE NO. 8:

Defendant objects to this Request on the grounds that it is overbroad, vague, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. The request is not limited in time or project. Finally, it seek highly confidential and proprietary information, potentially including trade secrets. The only program involving any Advantor products that Larson, Ellfeldt or Larson have performed work on is the IBDSS Program. Defendant's revenue, profits or costs on the IBDSS Program is completely irrelevant to Plaintiff's alleged damages in this case. In breach of contract claims, plaintiffs are typically only entitled to their actual damages. Here, Plaintiff's actual damages are not Defendant's profits on the IBDSS project because Plaintiff was not a bidder to the contract and was not even eligible to bid for the contract. In other words, regardless of whether Defendant hired these three (3) individuals, Plaintiff would have never received the profits of the IBDSS Program.

REQUEST TO PRODUCE NO. 9:

All documents evidencing DRS' revenue, profit, and costs on projects involving ESS and IDS work.

DRS'S RESPONSE TO REQUEST TO PRODUCE NO. 9:

Defendant objects to this Request on the grounds that it is overbroad, vague, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. The request is not limited in time or project. Finally, it seek highly confidential and proprietary information, potentially including trade secrets and U.S. classified documents. The only program involving any Advantor products that Larson, Ellfeldt or Larson have performed work on is the IBDSS Program. Defendant's revenue, profits or costs on the IBDSS Program is completely irrelevant to Plaintiff's alleged damages in this case. In breach of contract claims, plaintiffs are typically only entitled to their actual damages. Here, Plaintiff's actual damages are not Defendant's profits on the IBDSS project because Plaintiff was not a bidder to the contract and was not even eligible to bid for the contract. In other words, regardless of whether

> Defendant hired these three (3) individuals, Plaintiff would have never received the profits of the IBDSS Program.
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> **REQUEST TO PRODUCE NO. 10:**
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> All documents evidencing DRS' payment of compensation and/or remuneration to Larson, Ellfeldt, and/or Alvarez.
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> **DRS'S RESPONSE REQUEST TO PRODUCE NO. 10:**
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> Defendant objects to this Request on the grounds that it is overbroad, vague, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. The request is not limited in time or project. Finally, any responsive documents would be completely irrelevant to the issues and alleged damages in this case. Subject to and notwithstanding these objections, see documents produced in request to Request No. 7 of Plaintiff's First Request for Production of Documents.

(Ex. 2.)

Request Nos. 5–10 are not overbroad or unduly burdensome. They only seek documents, as noted in the discovery instructions, that cover the period from 2013 (when the poaching in this case began) to the present. (*See* Ex. 1, p. 3, Advantor's Second Request for Production.) Moreover, they are not vague as they clearly seek documents evidencing DRS' revenues, profits, costs, and billings resulting from DRS' hire of Larson, Ellfeldt, and/or Alvarez and DRS' revenues and profits involving the SPAWAR ESS project and DRS' ESS and IDS work.

These documents are reasonably calculated to lead to discovery of admissible evidence. The documents will show the revenues, profits, and costs that DRS gained or saved by virtue of excluding Advantor from the SPAWAR ESS project and by breaching the NDA and tortiously interfering with Advantor's confidentiality and non-compete agreements with Larson, Ellfeldt, and Alvarez. As an initial matter, these documents are

relevant to Advantor's claim for unjust enrichment and disgorgement damages under Virginia law on its breach of contract claim.[4] *See Eden Hannon & Co. v. Sumitomo Trust & Banking Co.*, 914 F.2d 556, 564 (4th Cir. 1990) (holding that disgorgement of a defendant's profits obtained as a result of its breach of a nondisclosure agreement was a proper remedy under Virginia law). Paragraphs 54 and 55 of the amended complaint properly and explicitly seek unjust enrichment and disgorgement damages as part of Advantor's breach of NDA claim. (Doc. 32, ¶¶ 54–55.)

In addition to this legal basis under Virginia law under which Advantor may seek disgorgement, this Court also has previously noted in a different discovery dispute concerning DRS' SPAWAR ESS proposal and award that Advantor's "damages (if any) would be limited to the portion of the Project which Advantor arguably would have performed." (Doc. 39, p. 10.) This discovery dispute more squarely concerns what DRS actually billed and made as a result of its unlawful acts, as opposed to what it proposed or the ceiling award that it received from the Government on the project. Therefore, these financial requests seeking documents showing what DRS billed, paid, and made on Larson, Alvarez, and Ellfeldt and the SPAWAR and other ESS and IDS projects are appropriate and well within Advantor's rights to seek on the issue of damages. Moreover, internal correspondence recently produced by DRS already includes an acknowledgment that DRS saved a substantial amount bidding on the SPAWAR ESS project by excluding Advantor

[4] The parties' NDA is governed by Virginia law. (Doc. 32-1, ¶ 18.) Accordingly, Advantor's breach of contract claim against DRS is governed by Virginia law.

as a subcontractor.[5] (*See* DRS 2101-2102.) The Court should compel DRS to produce those financial documents related to DRS' admitted substantial savings gained by excluding Advantor.

It also is important to note that the NDA's no-hire provision prohibits DRS from proactively recruiting and hiring Advantor's employees regardless of whether DRS ultimately has the employee work on the SPAWAR/IBDSS program. Accordingly, DRS should be compelled to produce these responsive documents related to all projects that Larson, Ellfeldt, or Alvarez worked on at DRS. The parties also have a Stipulated Confidentiality Agreement in place, with an Attorneys' Eyes Only designation, to address any confidentiality concern that DRS has with producing these financial documents. Nevertheless, with a February 9, 2015 expert report deadline on the horizon, Advantor will need these discoverable financial documents to fully assess and prove its damages in this case.

Furthermore, Request Nos. 8–10 seek documents that concern DRS' financial condition and net worth—topics relevant to Advantor's punitive damage claims. As a court in this District has acknowledged, "[i]n most cases, financial discovery is not appropriate until after judgment. When punitive damages are sought, however, a defendant's financial condition becomes relevant." *Soliday v. 7-Eleven, Inc.*, No. 2:09-cv-807-FtM-29SPC, 2010 WL 4537903, at *2 (M.D. Fla. Nov. 3, 2010). "When pleading punitive damages, a

[5] In this internal correspondence, DRS management also expressed its belief that this substantial savings is more important to DRS than the perceived weakness of DRS not including Advantor. (*See* DRS' Contested Motion to Seal, Doc. 46, referring to email bates numbered DRS 2101-2102.)

plaintiff must merely comply with the Federal Rule of Civil Procedure 8(a)(3), which requires a concise statement identifying the remedies and the parties against whom relief is sought." *Gallina v. Commerce & Indus. Ins.*, No. 8:06-cv-1529-T-27EAJ, 2008 WL 3895918, at *1 (M.D. Fla. Apr. 15, 2008) (citation and internal quotation marks omitted). The amended complaint properly seeks punitive damages against DRS for its tortious interference with Advantor's confidentiality and non-compete agreements with Larson, Ellfeldt, and Alvarez. (Doc. 32, ¶¶ 60, 61, 66, 67, 72, 73.) Thus, documents evidencing DRS' financial condition and net worth are relevant to Advantor's claim for punitive damages.

DRS may argue that it is not required to produce financial documents until Advantor first makes an evidentiary showing establishing Advantor's entitlement to punitive damages under Florida Statutes § 768.72. The U.S. Court of Appeals for the Eleventh Circuit has held that the pleading rules established in Rule 8(a)(3) preempt § 768.72's requirement that a plaintiff must obtain leave of court before including a prayer for punitive damages. *See Cohen v. Office Depot, Inc.*, 184 F.3d 1292, 1299 (11th Cir. 1999), *rev'd in part on other grounds on rehearing*, 204 F.3d 1069, 1072 (11th Cir. 2000). However, it has not yet decided whether the statute's discovery component—requiring a showing of a reasonable basis in the evidence for an award of punitive damages before a party is entitled to discover financial worth information—applies in federal cases; there appears to be a split of authority on this issue:

> Federal courts analyzing the applicability of § 768.72 in cases involving state law claims have come to differing conclusions regarding a plaintiff's obligation to make an evidentiary showing prior to the permission of punitive damages discovery. While some cases, such as *Haaf*, state that a plaintiff must "proffer

> some evidence to support the punitive damages claim," [*Haaf v. Flagler Constr. Equip., LLC*, No. 10-62321-CIV,] 2011 WL 1871159, at *2 [(S.D. Fla. May 16, 2011)], other cases, such as *Ward v. Estaleiro Itajai S/A*, 541 F. Supp. 2d 1344, 1359 (S.D. Fla. 2008), conclude that § 768.72 "is a pleading statute that has no effect on discovery practice in federal court."

Hite v. Hill Dermaceuticals, Inc., No. 8:12-cv-2277-T-33AEP, 2013 WL 6799334, at *4 (M.D. Fla. Dec. 23, 2013).

Here, regardless of which standard applies, Advantor is entitled to punitive damages discovery because it has properly pled a claim for punitive damages **and** has made a preliminary evidentiary showing that it is entitled to punitive damages. As to the evidentiary showing, Advantor has filed the declaration of Greg Larson, one of the employees that DRS unlawfully poached from Advantor. (Doc. 40-3.) The declaration makes clear that DRS acted maliciously and in a willful and wanton manner toward Advantor:

1. DRS first contacted Larson regarding DRS' interest in hiring him—an act that is explicitly prohibited under the NDA. (*Id.* ¶ 2.)

2. DRS told Larson that he was a "gold mine" and that DRS wanted to hire him "badly" because of his Advantor knowledge and experience. (*Id.* ¶ 7.)

3. DRS told Larson "not to worry" about his non-compete agreement with Advantor, stating that it was just a "scare tactic," and that DRS's legal would handle the matter for him. Incredibly, DRS told Larson that because of DRS's size compared to Advantor's size, DRS legal would be able to "blow Advantor away." (*Id.* ¶ 9.)

4. DRS instructed Larson to resign from Advantor with no notice. DRS instructed Larson to resign this way because of Larson's access to Advantor documentation and with the intent and understanding that such information would be shared with DRS. DRS instructed Larson not to dispose of Advantor information and that it was fine to have Advantor information at Larson's house and to be careful not to bring it on the Air Force base. (*Id.* ¶ 10.)

5. DRS instructed Larson to delete all DRS information and communications from Larson's Advantor computer prior to his resignation. (*Id.* ¶ 11.)

6. DRS spoke unfavorably of Jeff Whirley at Advantor and expressed ill will toward Advantor on at least two occasions during the October–November 2013 period. (*Id.* ¶ 14.)

In addition to the Larson declaration, the record establishes that DRS intentionally and in bad faith spoliated Larson's DRS computer—even though Advantor sent DRS a pre-suit preservation letter demanding that DRS preserve Larson's DRS computer. (Doc. 40; Doc. 40-2, ¶ 4.) Moreover, DRS represented to Advantor that the Larson computer was "wiped," but then later retracted and stated that the computer was only reformatted and that a new operating system was installed on the machine. (Doc. 40-5, p. 1.) DRS's in-house counsel, Blake Guy, also told Advantor's counsel that DRS received eight native proprietary Advantor files from Larson. (Doc. 40-2, ¶ 6.) Advantor demanded that DRS delete the eight files and certify that there were no other proprietary Advantor documents remaining on DRS's computers and email servers. (*Id.* ¶ 9.) Despite this demand, DRS refused to return the native files, would not certify that it destroyed the files, and would not certify that the files that Larson "sent" to DRS are the extent of the Advantor proprietary information in DRS's possession. (*Id.* ¶ 10.) As of the date of this motion, DRS still has possession of these eight native proprietary Advantor files. And, DRS continued to employ Larson and receive and acknowledge the value of additional Advantor proprietary information from Larson through early December 2013 after receiving Advantor's November 22 demand letter. (*See, e.g.*, DRS' Contested Motion to Seal, Doc. 46, referring to email bates numbered DRS 1336-1341.)

Additionally, DRS confirmed "that Advantor [was] not to be contacted" during its unlawful recruitment of Larson, Alvarez, and Ellfeldt, as part of its damaging acts and plan to "self-perform" on the SPAWAR Project with former Advantor employees. (Doc. 32, ¶¶ 15, 36–37.) Furthermore, recent documents produced by DRS show that it knowingly and intentionally attempted to influence the Government with information to remove Advantor from the Air Force's Approved Equipment List after excluding Advantor from the SPAWAR ESS project by providing claimed information about Advantor's IDS equipment and information from Advantor's former employee, Alvarez. (*See* DRS' Contested Motion to Seal, Doc. 46, referring to email bates numbered DRS 2008-2012.)

These foregoing preliminary evidentiary facts establish Advantor's right to seek punitive damages against DRS. As such, Advantor is entitled to seek documents evidencing DRS' financial condition and net worth.

CONCLUSION

Advantor requests that this Court grant its motion and enter an Order overruling DRS' objections, compelling DRS to fully answer Interrogatory No. 12 and to produce all documents responsive to Request Nos. 5–10 of the Second Request for Production, and awarding Advantor its fees and costs incurred in having to bring this discovery motion.

LOCAL RULE 3.01(g) CERTIFICATE

Pursuant to Local Rule 3.01(g), counsel for Advantor certifies that on September 5, 2014, they conferred with counsel for DRS in a good faith effort to resolve the issues raised in the foregoing motion, and the parties are unable to agree on the resolution of the foregoing motion.

Respectfully submitted,

s/ Min K. Cho
Min K. Cho
Florida Bar No. 754331
min.cho@hklaw.com
Lauren Millcarek
Florida Bar No. 100317
lauren.millcarek@hklaw.com
HOLLAND & KNIGHT LLP
200 S. Orange Ave., Suite 2600
Orlando, FL 32801
Telephone: (407) 425-8500
Facsimile: (407) 244-5288

Brandon H. Elledge (*pro hac vice*)
brandon.elledge@hklaw.com
HOLLAND & KNIGHT LLP
1600 Tysons Blvd., Suite 700
Tysons Corner, VA 22102
Telephone: (703) 720-8015
Facsimile: (703) 720-8610

Attorneys for Plaintiff Advantor Systems Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 5, 2014, I electronically filed the foregoing using the Clerk's CM/ECF system, which will send a notice of electronic service to the following: Stephanie L. Adler-Paindiris, Esquire [*stephanie.adler-paindiris@jacksonlewis.com*] and Nicole A. Sbert, Esquire [*Sbertn@jacksonlewis.com*], Jackson Lewis PC, 390 N. Orange Avenue, Suite 1285, Orlando, Florida 32801.

s/ Min K. Cho
Min K. Cho
Florida Bar No. 754331