UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

JOSEPH BRADFIELD and PATRICIA BRADFIELD,

Plaintiffs,

vs.

MID-CONTINENT CASUALTY COMPANY,

Defendant.
_____/

Case No: 5:13-cv-222-WTH-PRL

MID-CONTINENT'S MOTION FOR A FORENSIC EXAMINATION, TO COMPEL THE PRODUCTION OF THE UNPRODUCED DOCUMENTS AND FOR SANCTIONS BECAUSE OF SPOLIATION

Pursuant to Local Rule 3.01, Mid-Continent Casualty Company ("Mid-Continent") requests this Court order the Bradfields' counsel to produce for a forensic inspection his personal and law firms' computers to look for the documents he first claimed in May of 2014 were destroyed by a computer virus in September of 2013, to produce the documents he wrote in May of 2014 that he preserved, to produce the HOA fee information on the Bradfields' May and June of 2014 exhibit lists and sanctions because of spoliation to the extent any unproduced responsive documents no longer exist. For the reasons stated below, the Court should grant Mid-Continent's motion.[1]

[1] The parties have telephonically conferred twice about the relief requested in this motion. During the first telephone call the Bradfields' counsel stated a computer virus destroyed the electronic versions of the unproduced documents and he allegedly does not have hard copies. Between the first and the second phone call the Bradfields' counsel conveyed in writing that for the past twenty-eight years he has been preserving everything listed in Mid-Continent's litigation hold letter, which means he preserved his hard drives, servers and hard copies of electronically transmitted documents. However, he will not produce those documents or permit Mid-Continent to hire an individual to attempt to recover information on his computers. During the second telephone call the Bradfields' counsel would still not agree to produce additional documents and stated he would only answer Mid-Continent's questions regarding the alleged computer virus as a response to a motion to compel. Since May 6, 2014, the Bradfields' counsel has claimed he would produce the HOA documents but has failed to do so.

INTRODUCTION

Throughout this litigation Mr. Jordan, who is the Bradfields' counsel, has obstructed Mid-Continent's attempts to obtain discovery regarding his clients' damages and documents transmitted between his law firm and the law firm of Mr. Milgrim, who is the attorney that represented Horgo Signature Homes and Winfree Homes. When Mid-Continent filed its first Motion to Compel Mr. Jordan represented to the Court in January of 2014 that he had produced all responsive documents. After realizing Mid-Continent received over 1,000 pages of settlement drafts and correspondence from Mr. Milgrim, Mr. Jordan then claimed he inadvertently omitted those documents from his privilege log and he would not authenticate them because he did not produce them.

After this Court's April 21, 2014, Order denied the Bradfields' Motion for a Protective Order Mr. Jordan asserted those same documents were destroyed by a computer virus in September of 2013 and his firm allegedly had no documents dated before November 20, 2013. Upon receiving Mid-Continent's May 1, 2014, letter which said the Bradfields would be liable for spoliation, Mr. Jordan then contended that for the past twenty-eight years his firm has been preserving its files and he testified under oath at his June 30, 2014, deposition that in November of 2013 he had emails from October of 2012 to October of 2013. Despite those representations, he has not produced the documents and will not agree to the parties jointly selecting a forensic engineer to retrieve them.

FACTUAL BACKGROUND

A. The Representations Made By The Bradfields' Counsel Before This Court Held The Mediation Privilege And Work Product Privilege Did Not Apply

This Motion to Compel stems from Mid-Continent's First Request for Production and the continuously conflicting representations Mr. Jordan has made about responsive documents he acknowledges not producing. On August 30, 2013, Mid-Continent served its First Request for Production. *See* Mid-Continent's First Request For Production, attached as Exhibit "A." Pursuant

to Federal Rule of Civil Procedure 34, the Bradfields were required to produce the responsive documents and a privilege log by October 3, 2013. Between August 30, 2013, which is when Mid-Continent served the discovery request, and November 6, 2013, which is the date the Bradfields untimely began producing documents, Mr. Jordan, his secretary and his paralegal collectively communicated with Mid-Continent almost thirty times via email. *See e.g.* emails sent by Mr. Jordan's law firm to Mid-Continent's counsel between August 30, 2013, and prior to their production on November 6, 2013, attached as Exhibit "B." Not one of those emails mentioned a computer virus, problems with Mr. Jordan's server, responsive electronic documents they failed to preserve as hard copies, or any other type of problem that would result in the destruction of responsive documents. Nor did the Bradfields use any other method during that time period to convey a computer virus destroyed responsive documents. The Bradfields' production on November 6, 2013, of a small quantity of emails dated between October of 2012 and March of 2013, also calls into doubt the existence of a computer virus in September of 2013 destroying Mr. Jordan's emails. *See* a log Mid-Continent created of emails the Bradfields produced on November 6, 2013, and the emails listed on that log, attached as Composite Exhibit "C."

After Mid-Continent received the Bradfields' untimely production of documents Mid-Continent inquired if Mr. Jordan intended to comply with the Federal Rules of Civil Procedure's requirement that they produce a privilege log. Mr. Jordan never responded by contending a computer virus destroyed responsive documents. He instead simply produced a privilege log six weeks after the deadline.[2] The list, which is dated November 13, 2013, contains emails that are

[2] On December 18, 2013, Mid-Continent moved to compel the Bradfields to provide a privilege log that complied with the Federal Rules of Civil Procedure. *See* [D.E. 40]. The parties have never resolved their dispute about whether the Bradfields' privilege log complies with the Federal Rules of Civil Procedure. However, because the Bradfields never filed a response to that motion, the Court was unsure if the absence of a response meant the parties resolved their dispute. Based solely on that reason, the Court denied that motion without prejudice. *See* [D.E. 46].

dated between March 20, 2012 and November 22, 2013.[3] *See* the Bradfields' privilege log, attached as Exhibit "D." None of the emails are communications transmitted between Mr. Jordan and Mr. Milgrim. The following day the Bradfields produced three emails that were transmitted on January 9, 2013, between Mr. Jordan and an attorney who was not Mr. Milgrim about a separate lawsuit Mr. Jordan filed. *See* the January 9, 2013, emails attached as Composite Exhibit "E." When the Bradfields produced those three emails they never stated a computer virus destroyed other responsive documents. Nor did the Bradfields claim they failed to preserve responsive documents.

After Mid-Continent moved to compel production, the Bradfields produced in January of 2014 twenty-six emails dated between March of 2013 and October of 2013. *See* log Mid-Continent created of those emails and the emails attached as Composite Exhibit "F." Immediately after that production Mr. Jordan represented to the Court that he produced all responsive documents and never mentioned that a computer virus destroyed other responsive documents. Nor did the Bradfields' response state they failed to create hard copies of unproduced electronic communications. *See* [D.E. 45, Page 13]. Despite his representations to this Court, when his February 25, 2014, deposition commenced he moved for a protective order and asserted Mr. Milgrim had produced to Mid-Continent settlement drafts and correspondence transmitted between Mr. Milgrim and Mr. Jordan that Mr. Jordan had not produced to Mid- Continent. *See* [D.E. 47, Pages 1-2].

At his deposition Mr. Jordan even discussed his computer system but never once mentioned that he had any computer viruses, experienced server problems or failed to preserve hard copies of documents that were electronically created, transmitted or received. Mr. Jordan instead discussed how documents are indexed by his computer system and conveyed he wasn't sure if his computer

[3] If the Bradfields' three emails dated November 22, 2013, contain typos then the emails on the privilege log are dated between March 20, 2012, and March 11, 2013

system would show when changes were made to a draft of the settlement agreement before the parties executed the final version in March of 2013. *See* Page 88, ln. 15 through Page 89, ln. 16 of the February 25, 2014, Deposition of Edward Jordan, attached as Exhibit "G." Logic dictates that if a computer virus in September of 2013 had destroyed settlement agreements and emails, Mr. Jordan would have revealed that information instead of providing the answer that he gave.

During his deposition Mr. Jordan testified the Motion for a Protective Order concerned documents inadvertently not listed on the Bradfields' privilege log that were transmitted between Mr. Jordan and Mr. Milgrim. *See* Exhibit G, Page 66, ln. 1-5 and Page 79, ln. 6-14. That testimony likewise implies he had possession of the documents when he prepared the November of 2013 privilege log. However, when presented with specific documents he would not confirm he received or sent them. For instance, Exhibit 67 was a letter on his own stationary and contained his signature. But, Mr. Jordan stated that because Exhibit 67 did not have his firm's bates number be would not authenticate it as being a genuine document and he didn't know how Mid-Continent obtained it because he didn't produce it. *See* Exhibit G, Page 61, ln. 9 through Page 62, ln. 17. *See also* Exhibit 67 of the Parties' Deposition Exhibits, attached as Exhibit "H." Mid-Continent experienced a similar situation when it presented other exhibits to Mr. Jordan. *See* Exhibit G, Page 66, ln. 17 through Page 67, ln. 16. *See also* Exhibit 70 of the Parties' Deposition Exhibits, attached as Exhibit "I."

B. The Impact Of This Court's April 21, 2014, Ruling On Representations Made By The Bradfields' Counsel

After this Court ruled on April 21, 2014, that the mediation and work product privileges did not apply to communications between Mr. Milgrim and Mr. Jordan, Mid-Continent sent multiple communications to Mr. Jordan asking him to produce the documents he testified under oath in February of 2014 that he withheld from disclosure because he erroneously believed they were

protected from disclosure by the mediation and work product privileges. Since Mr. Jordan did not agree to produce the documents the parties telephonically conferred about this issue on April 30, 2014, pursuant to Local Rule 3.01. During that telephone call he revealed for the first time that a computer virus in September 2013 allegedly destroyed the documents even though he testified in February that he inadvertently neglected to list them on his November of 2013 privilege log. *See* the April 30, 2014, email from R. Kammer to E. Jordan, attached as Exhibit "Z."

Thereafter, on May 1, 2014, Mid-Continent sent a litigation hold letter to Mr. Jordan asking him to preserve, amongst other items: (1) "all electronically stored information related to this litigation," (2) "all e-mails, both sent and received, whether internally or externally; all word-processed files, including drafts and revisions; all spreadsheets, including drafts and revisions; all databases; all CAD (computer-aided design) files, including drafts and revisions" and (3) "computers or any other electronic equipment or accessories capable of storing data in any way related to this litigation, including but not limited to zip drives, flash drives, backup drives, floppy disks, cell phones, personal digital assistants, smart phones, memory cards, iphones or any other electronic storage device" *See* the May 1, 2014, letter from M. Gillinov to E. Jordan, attached as Exhibit "J"

Four days after Mid-Continent emailed its litigation hold letter Mr. Jordan responded that as a result of the computer virus his firm did not have any emails predating November 20, 2013, and that he also did not have electronic or hard copies backups predating that date. *See* the May 5, 2014, letter from E. Jordan to M. Gillinov and R. Kammer, attached as Exhibit "K." However, a mere two days later in a letter attached as Exhibit L, Mr. Jordan claimed that in the ordinary course of business his firm preserves for seven years "hard copies of all files" and utilizes "significant procedures for protecting its files . . . and the integrity of its systems." As a result of those unspecified procedures, Mr. Jordan represented that for the past twenty-eight years it had been

preserving all of the information mentioned in Mid-Continent's letter. Based on Mr. Jordan's representations that he had done everything requested in Mid-Continent's letter for the past twenty-eight years, he confirmed he had preserved his firms' hard drives, memory cards, servers, and all electronic and hard copies of all emails, letters and faxes he received regarding the underlying action.

Despite this representation, in a June 3, 2014, telephone call, Mr. Jordan stated he would not produce additional documents. When discussing the electronic versions that were allegedly destroyed by a virus, Mid-Continent suggested that since Mr. Jordan's May 7, 2014, letter represented he retained the hard drivers and servers, the parties attempt to obtain the electronic copies by using the framework employed the Southern District of Florida in *Wynmoor Community Council, Inc.* v. *QBE Ins. Corp.*, 280 F.R.D. 681,685 (S.D. Fla. 2012). In accordance with that court's order, Mid-Continent suggested (1) the parties mutually select a forensic expert to retrieve documents and the search terms the expert would use, (2) Mid-Continent would pay for the expert's services unless it was determined Mr. Jordan or any of his staff engaged in discovery violations, (3) the expert would sign a confidentiality agreement to not disclose information to third parties and (4) if Mr. Jordan believed any documents the expert retrieved were privileged then Mr. Jordan would put them on a privilege log.

Although Mr. Jordan stated he preserved his firm's file regarding the underlying action, and he does not dispute Mid-Continent is entitled to the underlying action's non-privileged documents that are responsive to Mid-Continent's First Request for Production, he rejected all of Mid-Continent's suggestions and refused to provide any alternative means to retrieve the electronic copies because he claimed an unspecified company during an unrevealed time period already used unnamed methods to retrieve information. When Mid-Continent inquired what company attempted to retrieve the information, what actions were taken by the company and when those actions

occurred, Mr. Jordan stated he would only reveal that information if Mid-Continent filed the instant motion to compel.

A few weeks later, on June 30, 2014, Mid-Continent deposed Mr. Jordan and he testified that when he prepared the November 13, 2013, privilege log he had copies of the log's documents, which are sixty emails transmitted between his firm and the Bradfields and predate the alleged computer virus. *See* Page 114, ln. 24 through Page 115, ln. 2 of the June 30, 2014, Deposition of Edward Jordan, attached as Exhibit "M." He did not explain how he was able to place those documents on a privilege log when he previously contended the alleged September of 2013 virus destroyed documents dated prior to November 20, 2013. Nor did he explain how he was able to produce in November of 2013 and January of 2014 other emails but the more than 1,000 documents that were the subject of his firm's Motion for a Protective Order were not preserved as hard copies and were destroyed by the alleged virus.

In addition to confirming his firm preserved the sixty emails on his privilege log, Mr. Jordan also discussed during his deposition the Bradfields' homeowner association fees ("HOA fees"). Shortly before the May 6, 2014, conference regarding trial exhibits Mr. Jordan advised for the first time that even though his clients have never produced any documents to Mid-Continent substantiating or listing their HOA fees, their trial exhibit list would contain HOA fees. During the conference, which took place in the copy room of Mr. Jordan's law firm, Mid-Continent's counsel volunteered to go to the Kinkos one mile away to copy exhibits. Mr. Jordan instead advised he would mail Mid-Continent copies. When Mid-Continent received that package the enclosed index mentioned the HOA fees but said that exhibit was "not included." *See* Number 113 on Page One of the Bradfields' Index Sent With Their Trial Exhibits, attached as Exhibit "N." When their June 1, 2014, version of the pretrial statement still listed the HOA fees as an exhibit, Mid-Continent sent multiple emails asking for a copy of the HOA fees since they had never been produced. *See* the June

2, 2014, email from M. Gillinov to E. Jordan, attached as Exhibit "O" and the Trial Exhibit List, at Page 7, attached as Exhibit "P." By June 17, 2014, the Bradfields' law firm had still not produced the HOA fees but Mr. Jordan's office wrote Mid-Continent that he still intended to use the HOA fees as a trial exhibit. *See* the June 17, 2014, email from A. Murray to E. Jordan and M. Gillinov, attached as Exh. "Q."

Despite not producing the HOA fees to Mid-Continent, during his June 30, 2014, deposition Mr. Jordan testified that as of December 5, 2012 he had his clients "HOA fees that they were paying." Exhibit M, Page 174, ln. 4-12. He further testified that Mr. Swidler used the information about the HOA fees when preparing the estimate that was relied on when the parties entered into the consent judgment. *See* Exhibit M, Page 175, ln. 4-16.

Even though the Bradfields never produced the HOA fees to Mid-Continent and they intend to use those fees as a trial exhibit, on July 7, 2014, the Bradfields informed this Court that they produced to Mid-Continent on May 6, 2014, "all of Plaintiffs' trial documents" [D.E. I15, Page I]. Upon seeing that representation, Mid-Continent requested Mr. Jordan produce those HOA fee documents before Mid-Continent deposed the Bradfields on July 9, 2014. The Bradfields did not comply with that request and on July 18, 2014, Mr. Jordan claimed to not have the documents despite his testimony, his intent to use them at trial and their purported relevance to this litigation. *See* Exhibit P, Page 1. As of the filing of this Motion, they have still not been produced.

MEMORANDUM OF LAW

A. The Bradfields' Representations About Unproduced Documents Are Not Reliable

As discussed above, Mid-Continent served a request for production in August of 2013. When the deposition of Mr. Jordan, the Bradfields' counsel, occurred in February of 2014, he announced for the first time that the more than 1,000 pages of documents produced by Mr. Milgrim were inadvertently not included on the Bradfields' November of 2013, privilege log and he moved

for a protective order regarding those items. Although he testified about his computer during that deposition, he never mentioned that a computer virus in the Fall of 2013 destroyed the documents he claimed were inadvertently omitted. In fact, he did not mention the alleged computer virus until immediately after this Court's April of 2014, Order denied his motion for a protective order. At that point in time he stated his firm had no emails predating November 20, 2013, even though in November of 2013 and January of 2014 he produced other emails predating November 20, 2013, and his November of 2013 privilege log exclusively listed emails that were created between 2012 and October of 2013. When Mid-Continent suggested the parties select a third-party forensic engineer to examine his hard drive for responsive documents he rejected that suggestion and claimed a technician from an unspecified company had already attempted to repair the server on an unspecified date using unspecified methods. Based on the timing of Mr. Jordan's representations and his inconsistent statements, his contention that a computer virus destroyed the electronic communications transmitted between his firm and Mr. Milgrim's firm should be investigated by a forensic engineer jointly selected by the parties to inspect the hard drives to determine whether a computer virus occurred, when it occurred, what steps were taken to store or print electronic documents before and after the alleged virus and whether any documents are currently retrievable.

Examining Mr. Jordan's statements regarding other topics also shows that Mid-Continent should be entitled to hire an independent computer forensic engineer to examine his servers and hard drives. The majority of his inconsistent statements may stem from the Middle District Court Florida holding the duty to indemnify depends upon actual coverage is determined by the "facts extant *at the time the settlement was reached.*" *Trovillion Const. & Development, Inc. v. Mid-Continent Cas.,* Co., No. 6:12-cv-914-0rl-37TBS, 2014 WL 201678, *7 (M.D. Fla. Jan. 17, 2014) (quoting this Court's decision in *Travelers Indem. Co. of Ill.* v. *Royal Oak Enters., Inc.;* 344 F. Supp. 2d 1358, 1366 (M.D. Fla. 2004)). In light of that holding, the Bradfields responded to

Mid-Continent's Motion for Summary Judgment Regarding Winfree Homes by arguing the settlement agreement, which is incorporated into the consent judgment, is purportedly reasonable because the parties to those agreements relied on Mr. Swindler's estimate and that estimate was created by combining portions of estimates prepared by Cecil Clark of Derelle, Inc., Allan Lougheed of the Lougheed Resource Group and Hidalgo Rangel of Southlake Irrigation. *See* [D.E. 71, Page 12, ¶I]. To support that illusion, the Bradfields' counsel made numerous statements to this Court *and* under oath about when those estimates were created and whether those estimates were at the February 21, 2013, mediation that were simply wrong.

1. The Misrepresentations About Hidalgo Rangel's December 12, 2013, Estimate

On January 10, 2014, Mr. Jordan served a supplemental expert disclosure, which is attached as Exhibit "S." The expert disclosure consisted of an itemized estimate that was created by Southlake Irrigation on December 12, 2013. *See* Exhibit S, Pages 4 and 5. In order to learn more about the December 12, 2013, estimate, Mid-Continent deposed Hidalgo Rangel of Southlake Irrigation on January 16, 2014. During his deposition Mr. Rangel testified that he is the owner of Southlake Irrigation and was being represented at the deposition by the Bradfields' counsel. *See* Page 2 and Page 10, ln. 1-3 and Page 38, ln. 1-4 of the Deposition of Hidalgo Rangel, attached as Exhibit "T." After Mid Continent marked as Exhibit "A" the December 12, 2013, invoice Mr. Rangel testified he created Exhibit A on December 12, 2013, and it was an estimate for $37,058. *See* Exhibit T, Page 10, ln. 9-18 and Page 1l, ln. 21 through Page 12, ln. 3. *See also* the December 12, 2013, estimate marked during the deposition as Exhibit "A" and attached to as Exhibit "AA." According to Mr. Rangel, the December 12, 2013, $37,058 estimate is the sole estimate he prepared regarding the Bradfields' residence. *See* Exhibit T, Page 12, ln. 13-15.

On February 3, 2014, Mr. Jordan again served Mr. Rangel's December 12, 2013, estimate and included with the estimate a report that was signed by Mr. Rangel. *See* the Bradfields' February 3, 2014, Notice of Serving Supplemental Documents, attached as Exhibit "U." The report, states Mr. Rangel prepared the estimate for $37,058 on December 12, 2013, after visiting the Bradfields' house that same day and obtaining prices based on what he saw during his visit. *See* Exhibit U, Pages 3 and 4. In light of Mr. Rangel's testimony, the estimate's date and the report's representations, it is undeniable Mr. Rangel prepared Southlake Irrigation's $37,058 estimate on December 12, 2013.

Despite representing Mr. Rangel during his deposition, and serving Mr. Rangel's December 12, 2013, estimate on two separate occasions, during Mr. Jordan's own deposition he was asked what documents he had as of December 5, 2012, that supported his argument that the Bradfields' alleged damages would approach the limits of Mid-Continents insurance policy. *See* Exhibit M, Page 173, ln. 12-15. In response, Mr. Jordan stated one of the documents he had as of December 5, 2012, was Southlake Irrigation's $37,058 estimate. *See generally* Exhibit M, Page 177, ln. 10-19, Page 180, ln. 1-11, Page 182, ln. 12-22. Of course, Mr. Jordan could not explain how he could have in 2012 an estimate prepared in December of 2013.

Mr. Jordan then stated the Southlake Irrigation estimate for $37,058 was part of Mr. Swidler's presentation at the February 21, 2013, mediation. *See* Exhibit M, Page 182, ln. 23 through Page 183, ln. 4. Mr. Jordan did not stop there. He then testified that before the February 21, 2013, mediation he "was fully conversant with all of the estimates that we had received from Lougheed, Swindler, the moving, Derelle, and irrigation." Exhibit M, Page 191, ln. 7-22. Mr. Jordan never explained how he could have been fully conversant of the December 12, 2013 estimate during the February 21, 2013, mediation or how Mr. Swidler could have used the estimate as part of his mediation presentation when Mr. Rangel's estimate was created nine months after the mediation.

2. The Misrepresentations Regarding Mr. Lougheed's May 3, 2013 Estimate

Just as Mr. Rangel testified when he prepared his estimate, Mr. Lougheed also discussed when he prepared the Lougheed Resource Group's estimate. *See* Page 32, ln. 5-7 of the Deposition of Allan Lougheed, attached as Exhibit "V." Mr. Lougheed stated after reviewing the bills sent by the Lougheed Resource Group to Mr. Jordan, that he prepared his estimate on May 3, 2013, which was three months after the mediation and two months after the Bradfields entered into the settlement agreement and consent judgment. *See* Exhibit V, Page 32, ln. 8-15. *See also* the May 11, 2013, and October 8, 2012, invoices from the Lougheed Resource Group to Edward P. Jordan, attached as Exhibit "W."

Despite Mr. Lougheed testifying he created the Lougheed Resource Group estimate in May of 2013, Mr. Jordan gave the following testimony during his own deposition:

> Q. Between December 13, 2013, and February 21, 2013, did you-- did you personally review the Lough-- the Derellee estimate?
>
> ***
>
> A. The answer would be, prior to the mediation I was fully conversant with all the estimates that we had received from Lougheed, Swidler, the moving Derellee and irrigations.
>
> Q. So I want to make sure your testimony is clear. As of February 21, you had the Lougheed-- as of February 21, 2013, you had the Lougheed estimate?
>
> A. **Oh, yes.**

Exhibit M, Page 191, ln. 7 through Page 192, ln. 1 (emphasis added).

Continuing, Mr. Jordan even testified that before the February 21, 2013, mediation he knew Mr. Swidler had combined Mr. Lougheed's estimate (prepared in 2013) into Mr. Swidler's own 2012 estimate. *See* Exhibit M, Page 259, ln. 22 through Page 260, ln. 18.

3. The Misrepresentations Regarding Mr. Clark's Estimate

By way of background, on December 23, 2014, Mid-Continent filed a Motion to Compel and Motion for Sanctions pertaining to the Derelle estimate. *See* (D.E. 42, Page 12]. The Bradfields' counsel responded to Mid-Continent's motion on January 6, 2014, by making the following representation to this Court:

> Regarding the Derelle estimate referenced in Paragraph No. 18 of Defendant's motion, Plaintiffs **were never in possession of the same until the week of December 9, 2013 . . . the existence of the Derelle estimate was first learned of when counsel prepared the expert disclosures.**

[D.E. 45, Pages 5 and 6]. (emphasis added).

When Mr. Jordan testified on June 30, 2014, he completely contradicted the representation he made to the Court on January 6, 2014, about the Derelle estimate. Mr. Jordan now testified under oath that prior to the mediation he was fully conversant with all the estimates including the Derelle estimate. Exhibit M, Page 191, ln. 19-22. Mr. Jordan even stated that he was "quite certain" that at the mediation either he or Mr. Swidler had the Derelle estimate. *See* Exhibit M, Page 192, ln. 3-7. He also provided the following additional testimony about the Derelle estimate:

> Q. Did Mr. Swidler's presentation include the Lougheed estimate?
> A. I-- I'm not certain that it did, so I don't know.
> Q. Did it include the Derellee report or estimate?
> A. I'm not sure if it did or did not. But **I know that that was part of the mediation presentation that he had for the backup material.**

Exhibit M, Page 192, ln. 20 through Page 193, ln. 4 (emphasis added). The fundamental problem with this testimony is that he previously represented to this Court on January 5, 2014, that it was not until this Court's December of 2013 expert disclosure deadline that he first learned Derelle Inc. had prepared an estimate. It is impossible for both Mr. Jordan's testimony under oath and his representation to this Court to be accurate.

Once again providing testimony that contradicts what he told the Court in Docket Entry 45, Mr. Jordan testified on June 30, 2014 that before the February 21, 2013, mediation he knew Mr. Swidler calculated Mr. Swidler's estimate, which almost equals the amount of the consent judgment, by including some of Mr. Clark's numbers from Mr. Clark's $486,464.50 estimate. *See* Exhibit M, Page 259, ln. 22 through Page 260, ln. 18. But, since Mr. Jordan represented to this Court in January of 2014 that he had no knowledge of the $486.464.50 estimate until December of 2013, he could not have known as of February 21, 2013, that Mr. Swidler relied on the estimate in 2012.

Mr. Jordan's inconsistent sworn testimony about Mr. Clark did not stop there. For example, during Mr. Jordan's deposition the following discussion occurred:

> Q. Okay. I don't care what you knew after you -- after you listened to Swidler. As of the date of the mediation, did you know how he arrived at the HVAC figure.
>
> A. I don't know if I knew the exact number for the HVAC, except that **I knew that I had the Derelle and the Lougheed reports available** if there was a line item question.
>
> ***
>
> Q. And by having them available, you had the Lougheed and Derellee available on February 21, 2013, correct?
>
> A **At the mediation conference, yes.**

Exhibit M, Page 194, ln. 4-17 (emphasis added).

The problem with this testimony is that Mr. Clark prepared one report in this case and it is dated January 30, 2014. *See* the January 30, 2014, Report of Cecil Clark, of Derelle, Inc., attached as Exhibit "X." It is consequently impossible for Mr. Jordan to have either been aware of or had Mr. Clark's report at the February 2013, mediation. Nor could anyone have relied on that report when entering into the settlement agreement and consent judgment.

This history certainly justifies Mid-Continent's request to hire an independent forensic engineer to examine the electronic equipment the Bradfields' counsel stated on May 7, 2014, was

preserved. Any contrary statement by Mr. Jordan or his staff that the records are now somehow destroyed should be tested.

B. The Bradfields' Counsel Had A Duty To Preserve Electronic Documents

"[B]ecause no one has an exclusive insight into truth, the [judicial] process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions-all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition." *Silvestri v. General Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001). "To preserve the integrity of the judicial process and maintain confidence in the process, it is indispensable that the parties present the fact finder with truthful, accurate, and relevant facts." *Taylor v. Mitre Corp.*, No. I :11-cv-1247, 2012 WL 5473715 (E.D. Va. Sept. 10, 2012). "[W]hile deposition testimony is one form of evidence available to a party, it is not always the best form of evidence in any given case. At worst, deponents may be motivated to conceal evidence of their wrongful conduct. At best, memories fade." *Northington v. H&M Intern.*, No. 08-CV-6297, 2011WL 663055, *20 (N.D. Ill. Jan. 12, 2011). Accordingly, "[l]itigants owe an uncompromising duty to preserve what they know or reasonably should know will be relevant evidence in a pending lawsuit even though no formal discovery requests have been made and no order to preserve evidence has been entered." *United Factory Furniture Corp. v. Altenvilz,* No. 2:12-cv-00059-KJD-VCF, 2012 WL 1155741, at *3 (D. Nev. Apr. 6, 2012) (internal quotations omitted).

"The duty to preserve documents in the face of pending litigation is not a passive obligation. Rather, it must be discharged actively." *Danis v. USN Communications, Inc.*, No. 98 C 7482, 2000 WL 1694325, at *32 (N.D. Ill. Oct. 23, 2000). "This includes preserving electronically stored information that would otherwise be automatically deleted and may extend to personal and home computers and other devices." *Fluke Electronics Corp. v. CorDEX Instruments, Inc.*, No., Cl2-2082JLR, 2013 WL 566949 (W.D. Wash. Feb. 13, 2013). "Deleted computer files, whether e-

mails or otherwise, are likewise discoverable." *Bank of Mongolia v. M & P Global Financial Services, Inc.*, 258 F.R.D. 514, 519 (S.D. Fla. 2009).

Mr. Jordan's May 7, 2014, letter contends he preserved everything on Mid-Continent's May 1, 2014, letter, but he has failed to produce the more than 1,000 pages of electronic communications that he testified on February 25, 2014, were inadvertently omitted from his privilege log and this Court held on April 21 , 2014, were not privileged. Although Mr. Jordan contends Mid-Continent should just rely on what Mr. Milgrim produced, Mr. Milgrim admitted under oath during his June 30, 2014, deposition that he may have failed to produce to Mid-Continent all of the non-privileged documents he received from Mr. Jordan. *See* Page 153, ln. 11 through Page 154, ln. 7 of the Deposition of Edward Milgrim, attached as Exhibit "Y." Moreover, the Bradfields' are parties to this lawsuit so they were obligated to preserve all relevant documents and to produce all responsive non-privileged documents. In addition, even if Mr. Milgrim had produced to Mid-Continent all of the documents he received from Mr. Jordan, Mr. Jordan stated he could not authenticate Mr. Milgrim's production because it did not have Mr. Jordan's bates numbers. The Bradfields' failure to preserve their electronic communications has consequently prejudiced Mid-Continent's ability to prepare its defense as these emails, for example, pertain to the discussions leading up to the consent judgment.

C. Spoliation Occurred If The Bradfields' Counsel Failed To Preserve Documents

"[W]here a party has engaged in egregious discovery misconduct, that party is not entitled to parse its claims for varying degrees of contamination." *Anz Advanced Technologies v. Bush Hog, LLC*, 09-00228, 2011 WL 814663, *11 (S.D. Ala. Jan. 26, 2011). When the misconduct "goes to the heart of the triable issues in the case and which concurrently affects the orderly administration of justice and the dignity of the courts, the defendants need not quantify their harm or prejudice [and] parties engaged in misconduct can't be permitted to say 'oops, you've caught me,' and

thereafter be allowed to continue to play the game." *Dotson v. Bravo,* 202 F.R.D. 559, 573 (N.D. Ill. 2001). *Cf Zocaras v. Castro,* 465 F.3d 479, 484 (11th Cir. 2006) (stating Rule 41(b) "expressly authorizes the involuntary dismissal of a claim for plaintiff's failure to abide by . . . the Federal Rules of Civil Procedure."); *Carlucci v. Piper Aircraft Corp.,* 102 F.R.D. 472, 488 (S.D. Fla. 1984), *aff'd in part, rev'd in part,* 775 F.2d 1440 (11th Cir.1985) (entering default for obstructing discovery and making misrepresentations to the court). In addition, "'fault'-as opposed to bad faith-may form a sufficient basis for sanctions." *Northington v. H & M Intern.,* No. 08-CV-6297, 2011 WL 663055, * 13 (N.D. Ill. Jan. 12, 2011) (quoting *Marrocco v. General Motors Corp.,* 966 F.2d 220, 224 (7th Cir. 1992)). "'Fault' does not speak to the noncomplying party's disposition, but describes only the reasonableness of the conduct-or lack thereof-- that eventually resulted in the violation." *Northington,* 2011 WL 663055 at * 13 (quoting *Marrocco,* 966 F.2d at 224). "Fault may be evidenced by negligent actions or a flagrant disregard of the duty to preserve potentially relevant evidence." *Northington,* 2011 WL 663055 *13. When spoliation occurs it is "impossible for this Court to ensure that the most relevant facts were being presented and for Defendant to be sure they were presenting their strongest defense. In fact, it would be impossible for this Court to conclude that the trier of fact were being presented the truth." *Pacific Coast Marine Windshields Ltd. v. Malibu Boats, LLC,* 33, 2012 WL 10817204, *10 (M.D. Fla. Nov. 30, 2012) (quoting *Taylor v. Mitre Corp.,* 11-cv-01247, 2012 WL 5473715 at *9 (E.D. Va. Sept. 10, 2012)). Spoliation is established when "(l) the missing evidence existed at one time; (2) the alleged spoliator had a duty to preserve the evidence; and, (3) the evidence was crucial to the movant being able to prove its prima facie case or defense." *U.S. E.E.O.C. v. Suntrust Bank,* No. 8:12-cv-1325-T-33MAP, 2014 WL 1364982, *5 (M.D. Fla. April 7, 2014). The Middle District has already held spoliation occurs when a party fails to preserve information on computers and emails. *See e.g. Simon Property Group, Inc. v. Lauria,* 2012 WL 6859404, *7 (M.D. Fla. Dec. 13, 2012) (holding spoliation occurs

when a party gets rid of a laptop that has relevant emails); *Pacific Coast Marine Windshields Ltd v. Malibu Boats, LLC,* No. 6:12- cv-33, 2012 WL 10817204, *11 (M.D. Fla. Nov. 30, 2012) (holding that when files and emails on a laptop were destroyed before the Court ordered the hard drive's production, the party was prohibited from testifying about those emails, jpegs and files).

Courts in other jurisdictions have also held sanctions for spoliation are appropriate in situations like the one before this Court. For instance, in *Northington v. H&M Intern* a lawsuit was filed in 2008 and the following year a computer either crashed or had a virus that resulted in the hard drive being discarded. *See Northington,* 2011 WL 663055 *9. It was not until November and December of 2009 that the defendant instructed employees "to take all necessary steps to preserve all documents." *Id.* Thereafter, in 2010, the defendant changed email providers and failed to save or print the emails contained in the original email account. *See id.* at * 10.

During the litigation the defendant repeatedly stated it produced all responsive documents in its possession. *See id.* at *12. However, the court held the evidence "overwhelming demonstrate[d] that defendant was grossly negligent in its attempts to secure relevant documents" and its unreasonable and insufficient actions breached its duty to preserve evidence. *See id* at 16 at 18. The court consequently held the defendant was at fault for spoliation. *See id.* at *19. Based on the record, the magistrate recommended that the defendant be barred from asserting a defense as to liability, the defendant be prohibited at trial from arguing the absence of certain damaging communications was evidence the communications did not exist and that the defendant reimburse the plaintiff for the plaintiff's attorneys fees in preparing the discovery motion and related submissions. *See id.* at 21-22. *See also Teague v. Target Corp.,* 06-CV-191, 2007 WL 1041191 (W.D.N.C. Apr. 4, 2007) (holding an adverse jury instruction was appropriate when the plaintiff failed to preserve electronic records and discarded a computer after it "crashed").

The facts before this Court are similar to those in *Northington*. Until the Bradfields realized Mid-Continent had obtained more than 1,000 pages of documents from Mr. Milgrim, the Bradfields acted as though those documents had never existed and their counsel informed this Court in January of 2014 that they produced all responsive documents. The Bradfields did not say when responding to Mid-Continent's first Motion to Compel that unproduced documents were inadvertently destroyed by a computer virus. Nor did the Bradfields say when responding to Mid-Continent's first Motion to Compel that over a thousand documents were not put on a privilege log. Mr. Jordan instead waited until four months after the October 3, 2014, deadline and announced during his deposition that he simply forgot to put that voluminous quantity of documents on a privilege log and he could not authenticate Mr. Milgrim's production because they did not have the Bradfields' bates numbers. *See* Exhibit G, Page 36, ln. 2-18. In order for the documents to have been inadvertently omitted from the November 2013, privilege log, either electronic or hard copies had to have existed when the Bradfields placed sixty other emails on their privilege log.

Despite the documents previously existing, after this Court held the mediation and work product privileges did not apply Mr. Jordan then announced that a computer virus had destroyed his copies in September of 2013. Moreover, despite his duty to preserve the documents, and contrary to his statement that for the past twenty-eight years he has been preserving documents and in fact printed and produced other emails predating November of 2013, between himself and an attorney in a lawsuit filed against an entity called Pride USA, he expected Mid-Continent to simply accept that he never printed hard copies of this voluminous quantity of documents that he moved for a protective order regarding and that they were destroyed by a computer virus in September of 2013. Thus, to the extent the Bradfields do not have hard copies or electronic copies of these documents spoliation has occurred.

D. Mid-Continent Should Be Permitted To Hire A Forensic Engineer To Examine The Hard Drives Of The Bradfields' Counsel

In light of the current state of technology, courts require the party who allegedly had a computer crash or virus to have the computer inspected by a forensic engineer. "A forensic image, otherwise known as a 'mirror image' will 'replicate bit for bit sector for sector, all allocated and unallocated space, including slack space, on a computer hard drive.'" *Bennett v. lvfartin,* 928 N.E.2d 763, 773 (Ohio App. 2009). When completed, the mirror image will "contain[] all the information in the computer, including embedded, residual, and deleted data." *Ferron v. Search Cactus, L.L.C.*, No. 2:06-CY-327, 2008 WL 1902499, *3, fn. 5 (S.D. Ohio April 28, 2008).

For example, in *U&l Corp. v. Advanced Medical Design, Inc.*, 251 F.R.D. 667 (M.D. Fla. 2008) the plaintiff sued the defendant for breach of contract, account stated, open account, and unjust enrichment. *See U&I Corp.,* 251 F.R.D. at 669. More than thirty days after the plaintiffs deadline to respond to the defendant's request for production, the plaintiff finally responded and produced around 500 pages. *See id.* That response, like the Bradfields', did not inform the defendant that electronic files were unobtainable because of a computer problem. *See id.* at 671.

Like Mid-Continent, the defendant moved to compel production of documents and a privilege log. *See id.* In response to a court order, the plaintiff eventually produced approximately 3,100 pages. *See id.* However, like the Bradfields, the plaintiff waited until after the court issued its discovery order to mention alleged computer problems. *See id.* at 671. According to the plaintiff, it could not produce emails because of a computer error. *See U & I Corp.,* 251 F.R.D. at 669-71. Just like the Bradfields' recent assertion, the plaintiffs also asserted it had no hard copies of the missing electronic documents. *See id.* at 770.

The defendant subsequently sought sanctions for the plaintiff's failure to produce responsive documents in a timely manner, refusal to produce all responsive documents and violation of prior

court orders. *See id.* at 668. When ruling on the defendant's motion the court rejected the plaintiff's assertion that the volume of documents it produced showed good faith. *See id.* at 675. Since the plaintiff filed the complaint, the court said its counsel had "the responsibility to take affirmative steps to ensure that all sources of discoverable information were identified, searched, and reviewed so that complete and timely responses to discovery requests could be provided." *ld.* at 676. The court also stated "[t]he dubious practice of producing e-mails without attachments in federal discovery has not gone unnoticed by other courts." *ld.* at 675 n.14. Additional examples of the plaintiff's misconduct which are similar to the Bradfields' included

> U&I's delay in advising AMD concerning the "unloadable" 2004 e-mails and U&I's failure to provide attachments to e-mails. While U&I knew as early as January 2005 that the 2004 e-mails were "unloadable" because of a failure with its hard drives, U&I neglected to inform AMD of this fact when it *initially* responded to AMD's document request. Instead, U&I waited until AMD filed a motion to compel and then advised AMD and the court that these e-mails were unrecoverable. Similarly, by neglecting to produce the attachments to e-mails, U&I further postponed the production of documents. Given the discovery deadline of December 10, 2007, U&I's actions may have benefitted U&I by limiting the time available to review the belatedly produced documents and to depose witnesses regarding these documents.

Id. at 675.

In light of the unproduced documents' relevance and the plaintiff contending a computer problem prevented the production the court held the "burden and expense of the independent inspection of the hard drives is outweighed by the benefits of the proposed discovery." The court consequently stated the parties were required to select a third party to conduct samples of information contained on the hard drive for a limited date range, the examiner would determine if documents from that date range were deleted or transferred, the results would then be furnished to the plaintiff's counsel and if the plaintiff didn't object or move for a protective order the findings would then be given to the defendant. The costs would be born by the defendant but if the computer expert determined that plaintiff's counsel did not produce responsive documents or

responsive documents were deleted than the court would consider shifting some or all of the costs to the plaintiff. *See id.* at 676-77.

Similarly, in *Jensen v. Utah*, 247 F.R.D. 664 (D. Utah 2007), the defendant served a request to inspect the plaintiffs' computer, whose hard drive had allegedly crashed. *See Jensen*, 247 F.R.D. at 671. The plaintiffs objected to the request as invasive but agreed to allow inspection by a neutral third party mutually chosen by the parties. *See id.* When the parties could not agree on the inspection's scope the defendants moved to compel production. *See id.* at 672. The motion to compel asserted the inspection was necessary because the hard drive would show "documents relevant to the litigation, including emails, that were altered, deleted, or not timely produced." *Id.*

The court ordered the plaintiffs to produce the crashed hard drive and imposed the following restrictions on the inspection:

> Plaintiffs and Defendants shall mutually decide upon a third-party computer expert to examine the computer and crashed hard drive and to retrieve the data. The expert must sign a protective order to be agreed upon by the parties. The inspection shall be conducted in the presence of Plaintiffs' counsel only; Defendants and their counsel shall be excluded from the inspection and data retrieval process. The inspection shall cover materials from May 6, 2003, the date Plaintiffs were first informed the biopsy was malignant, to the present. Plaintiffs' counsel, in collaboration with the expert, shall produce responsive documents, including but not limited to e-mails, regarding the research conducted by Plaintiffs on Parker's diagnosis of Ewing Sarcoma, symptoms, and treatment options. For any documents claimed privileged or otherwise protected, Plaintiffs' counsel shall create and provide a privilege log.

Id. *See also Orrell v. Jvlotorcarparts of America, Inc.*, 06-CV-418, 2007 WL 4287750, *7-8 (W.D.N.C. Dec. 5, 2007) (granting the defendant's motion to compel a forensic examination of the plaintiff's hard drive because "[t]he fact that the Plaintiff's home computer allegedly 'crashed'-as opposed to having been 'wiped' as the work laptop was-in no way eliminates the Plaintiff's burden to do all she could under those circumstances to preserve evidence."); *Ferron v. Search Cactus, L.L.C.*, No. 2:06-CV-327, 2008 WL 1902499, at *2 (S.D. Ohio April 28, 2008) (allowing plaintiff's forensic computer expert to mirror image plaintiffs computer systems' hard drives based upon

plaintiff's failure to place sufficient litigation hold and failure to otherwise produce the relevant information); *Ameriwood Indus., Inc. v. Liberman,* No. 4:06CV524-DJS, 2006 WL 3825291 (E.D. Mo. Feb. 23, 2007) (allowing independent expert to obtain and search a mirror image of defendants' computer equipment upon plaintiff presenting evidence suggesting that defendants failed to produce responsive email).

Since Mr. Milgrim testified he may have received from Mr. Jordan additional unproduced documents, the quantity of documents the Bradfields failed to produce to Mid-Continent could be much larger than the HOA fees and the documents the Bradfields moved for a protective order regarding. Although Mr. Jordan claims an unidentified person from an unspecified company performed unspecified actions during an unstated time period to attempt to repair the server, evidence of same although requested was not produced, and under the facts and law Mid-Continent is entitled to have an independent forensic engineer review Mr. Jordan's hard drives or to the entry of an order entering sanctions based upon the spoliation of evidence.

E. The Bradfields Should Be Required To Produce Their HOA Fees

The Bradfields' theory of the case is that the settlement agreement is reasonable and includes an amount of money for their HOA fees and that all estimates substantiating their damages were created before the February 21, 2013, mediation. According to their counsel's sworn testimony, he had information regarding the HOA fees at the February 21, 2013, mediation. Yet over a year later, the Bradfields have never produced any documents regarding those fees even though the HOA fees are listed as an exhibit since May of 2014. Since information regarding their HOA fees, according to the Bradfields is unquestionably relevant, the Bradfields should have produced documents substantiating the fees in response to Mid-Continent's August 30, 2013 First

Request For Production. However, the Bradfields have never produced any documents regarding[4] their fees and instead represented to this Court in January of 2014 that they produced all responsive documents and then misrepresented to this Court in July of 2014 that they produced all of their trial exhibits. The Bradfields should either be required to produce documents regarding their HOA fees or the Court should enter an order precluding the Bradfields from introducing any testimony or evidence in their sur-reply or at trial regarding the HOA fees.

Respectfully submitted,

HINSHAW & CULBERTSON, LLP

/s/ MELISSA A. GILLINOV
Ronald L. Kammer
Florida Bar No. 360589
rkammer@hinshawlaw.com
Melissa A. Gillinov
Florida Bar No. 11892
mgillinov@hinshawlaw.com
2525 Ponce de Leon, Blvd., Fourth Floor
Miami, Florida 33134
Telephone: 305-358-7747
Facsimile: 305-577-1063
Counsel for Mid-Continent Casualty Company

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2014 I e-filed this document using the CM/ECF system. I further certify that I am unaware of any non CM/ECF participants.

/s/ MELISSA A. GILLINOV
Melissa A. Gillinov

[4] In requesting these documents, Mid-Continent is not suggesting that they are relevant.