

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-81004-CIV-MARRA/JOHNSON

DANIEL S. ROSENBAUM,  
Plaintiff/Counter-Defendant

v.

BECKER & POLIAKOFF, P.A.  
Defendant/Counter-Plaintiff

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BECKER & POLIAKOFF, P.A.  
Counter-Plaintiff/Defendant,

v.

DANIEL S. ROSENBAUM,  
Counter-Defendant/Plaintiff,

and

KATZMAN, GARFINKEL & ROSENBAUM, LLP,  
Additional Party Counter-Defendant.

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**PLAINTIFF/COUNTER-DEFENDANT, DANIEL S. ROSENBAUM'S, MOTION TO  
COMPEL DOCUMENTS IN RESPONSE TO PLAINTIFF/COUNTER-DEFENDANT,  
DANIEL S. ROSENBAUM'S FIRST REQUEST FOR PRODUCTION TO  
DEFENDANT/COUNTER-PLAINTIFF, BECKER & POLIAKOFF, P.A. AND  
INCORPORATED MEMORANDUM OF LAW**

Plaintiff/Counter-Defendant, DANIEL S. ROSENBAUM ("Rosenbaum"), pursuant to Rule 37, *Federal Rules of Civil Procedure* and Rule 7 of the Local Rules, moves this Court for entry of an Order compelling Defendant/Counter-Plaintiff, BECKER & POLIAKOFF, P.A. ("B&P"), to produce the documents sought in Rosenbaum's First Request for Production.

### INTRODUCTION

On September 11, 2008, Rosenbaum filed a Complaint for B&P's breach of Rosenbaum's Employment and Deferred Compensation Agreement. (D.E. 1). Thereafter, the Court granted B&P's motion to file its Second Amended Answer, Affirmative Defenses, and Counterclaims against Rosenbaum, Katzman Garfinkel Rosenbaum, LLP. (D.E. 30)<sup>1</sup>. B&P raised five affirmative defenses and brought counterclaims against Rosenbaum: Breach of fiduciary duty (Count I), tortious interference with business and/or contractual relations (Count III), breach of contract (Count IV), and declaratory judgment (Count V). (D.E. 32). B&P made the following allegations as part of its counterclaims:

Rosenbaum (in concert with his new law firm) deliberately and repeatedly harmed B&P's relationships with its existing clients and employees by, *inter alia*:

- (a) prematurely unilaterally contacting B&P clients to advise them of his departure from the firm and to solicit their business;
- (b) providing disparaging information to B&P's clients and the general public for the purpose of inducing clients to shift their legal representation to his new law firm—the Katzman Firm—and by continuing to solicit clients even after they had declined to shift their representation from B&P.
- (c) removing client files from B&P's West Palm Beach office, and leaving no records of deadlines and scheduled case activities and causing his subordinate attorneys and support staff to do the same, and taking all paper calendars with him and refusing to provide copies to B&P.;
- (d) filing improper and misleading appearances on behalf of B&P clients in pending litigation matters;
- (e) resigning from B&P without giving any prior notice to B&P and soliciting virtually the entire group of attorneys and support staff from B&P's West Palm Beach office to likewise resign *en masse* from B&P and join him at the Katzman Firm without giving any prior notice to B&P; and
- (f) causing members of his staff and subordinate attorneys to solicit B&P employees to improperly and illicitly down-load and supply confidential client and proprietary information to the new law firm.

(D.E. 32, pp. 6-7).

B&P's damages include, *inter alia*, its lost revenues and profits from those clients which were improperly solicited and diverted by Rosenbaum and the Katzman Firm . . . . Additionally, by virtue of Rosenbaum's and the Katzman Firm's orchestrated mass resignation of virtually the entire West Palm Beach office, B&P experienced a sharp decline in attorney revenues for its West Palm Office.

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<sup>1</sup> On July 22, 2009, Rosenbaum moved to dismiss Counts III, IV, and V, which motion is currently pending before this Court. (D.E. 36)

Further, in the wake of the abrupt departure of Rosenbaum and his subordinate attorneys (and their respective support staff), B&P was forced to incur significant expenses to stabilize its West Palm Beach office. Among other things, it transferred employees from its other offices to: (a) service the firm's West Palm Beach clients, (b) locate files which Rosenbaum and his subordinate attorneys and staff had concealed, and (c) attempt to recreate calendars which Rosenbaum and his subordinate attorneys and staff had deleted from the firm's computer system. B&P expended significant monies in employee overtime and attorney recruitment fees related to its efforts to stabilize the West Palm Beach office in the wake of Rosenbaum's abrupt departure.

(D.E. 32, pp. 21-22) B&P also claims "compensatory damages, consequential damages, and special damages for lost profits . . . [and] punitive damages." (D.E., pp. 29-30). B&P amended its Rule 26 Initial Disclosures, attached as "**Exhibit A**", to specify:

. . . B&P provides the following good-faith estimates of each category of damages it claims:

- a. Lost revenues: \$3,232,878
- b. Overhead paid for West Palm Beach coverage: \$421,956.17
- c. Payment/Wages for temporary personnel: \$41,145.10
- d. Living expenses for West Palm Beach coverage: (i) rentals: \$26,000; (ii) meals: \$6,447.22
- e. Travel expenses for West Palm Beach coverage: \$23,919.95
- f. Non-billable time recorded by attorneys fixing up and piecing back together the West Palm Beach office: \$239,956.50
- g. Miscellaneous damages (includes, but is not limited to, lost contingent fees owed to B&P on cases/files taken by Plaintiff/Counter-Defendant Daniel S. Rosenbaum): unknown at this time[.]

B&P's alleged damages, excluding item (g), total \$3,966,302.94.

On August 25, 2009, Rosenbaum served his First Request for Production to B&P, a copy of which is attached hereto as "**Exhibit B**". On September 24, 2009, B&P served its response to Rosenbaum's discovery request, attached hereto as "**Exhibit C**", objecting to all but one request (and even production of those documents was conditional), and withholding production of all responsive documents. **Rosenbaum has contemporaneously filed his affidavit in support of this Motion which sets forth facts to support the documents requested.**

#### MEMORANDUM OF LAW

#### B&P's Objections to Rosenbaum's Request for Production

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1. Every communication received from, or sent to, any client or property manager for a client of Becker & Poliakoff since August 4, 2008, that relates in any way, in whole or in part, to the staffing of the West Palm Beach office, the departing staff, and/or the circumstances surrounding the departure of the departing staff.

RESPONSE: Objection; overly broad, vague and unduly burdensome. B&P, in the normal course of its business, did not maintain a separate file or separate out each and every communication it sent to or received from its clients in connection with the staffing of the West Palm Beach office, the departing staff, and/or circumstances surrounding the departure of the departing staff. It is quite possible and conceivable there could be thousands of communications between B&P and its clients relating to the subject matter sought in this Request and to retrieve each and every communication sought herein would cause B&P to expend immeasurable time and resources. Furthermore, it is virtually impossible for the B&P information technology department to perform a search of all communications between B&P and its clients relating to the information sought in this Request. B&P also objects to this Request to the extent that it seeks attorney-client and/or work-product privileged information.

ANALYSIS: The requested documents for this approximate one year time period are relevant to B&P's counterclaim allegations that Rosenbaum prematurely unilaterally contacted "B&P's clients" to solicit their business and the allegations that Rosenbaum provided disparaging information to B&P clients and continued to solicit them after they had declined to shift their representation. The request seeks documents that will show that B&P contacted the clients before Rosenbaum and what B&P told those clients and what the clients told B&P. The requested documents will also show why some clients chose to leave B&P and what B&P said and did in response that may have caused their own "damages". The responses will also show admissions against interest by B&P. For example, on August 7, 2008, Gary Poliakoff wrote B&P clients, stating "that we have made some major personnel changes in our West Palm Beach office". He also wrote that "Ken and I are working hard to personally communicate with as many of you as possible...to explain the changes that have been made" and that "(w)e will continue to update you as we move forward". A copy of this letter is attached as "**Exhibit D**". On August 13, 2008, Poliakoff wrote presumably the same people, falsely stating that "(L)ast week, a small group of lawyers left our firm, suddenly and without notice. There was no falling out, no dispute, no demands, no complaints from these lawyers. While no one is surprised by people acting in their own self-interest, . . .". These are just a few of the highly relevant communications sought. B&P states that there could be thousands of responsive documents and that to produce the documents would require a lot of time and resources. Notably, these form

letters have document numbers on them and not only would there be a hard copy in every client file, but there had to be a list, in the computer or otherwise, to address these form letters. B&P knows the names of all attorneys and staff who made these contacts and to the extent there were electronic communications that were not printed out and put in the physical files, they can easily be retrieved from the computers of these attorneys and staff as shown by “**Exhibit E**”. B&P claims over \$4,000,000.00 in damages, yet resists producing critical communications for the approximate one year period showing what was said and done by B&P and the clients that are the subject of B&P’s claims and damages. Discovery requests in every case require a significant amount of time for response. Belfleur v. Salman Maint. Serv. Inc., No. 07-20219-CIV, 2007 WL 2608668, at \* 6 (S.D. Fla. Sept. 5, 2007) (“[T]he fact that the corporate Defendant would have to produce approximately 4,000 documents does not, standing alone, establish an undue burden.”).

B&P also claims the requested records are protected by the attorney-client and/or work-product privilege. However, B&P has failed to provide any privilege log or otherwise sufficiently identify and describe the nature of the specific documents that are being withheld. Local Rule 26.1(G)(3)(b) provides that the attorney asserting the privilege “shall identify the nature of the privilege which is being claimed” and provide:

- (A) For documents: (1) the type of document; (2) general subject matter of the document; (3) the date of the document; (4) such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author of the document, the addressee of the document, and where not apparent, the relationship of the author and addressee to each other . . . .

The Committee Notes to Rule 26(b)(5) states that “[to] withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.” Failure to provide a privilege log at the time the written discovery response is due may constitute a waiver of the privilege. See generally Knights Armament Co. v. Optical Sys. Tech. Inc., No. 6:07-cv-1323-Orl-22KRS, 2009 WL 331608, at \*6 (M.D. Fla. 2009); Universal City Dev. Partners v. Ride & Show Eng’g., 230 F.R.D. 688, 696-98 (M.D. Fla. 2005); TIG Ins. Corp. of America v. Johnson, 799 So. 2d 339 (Fla. Dist. Ct. App. 2001) (in making determination that insurer had waived privilege as to its claims file, the court analyzed waiver under the Federal Rules of Civil Procedure). Waiver is appropriate when the Court cannot evaluate from the objection whether each of the withheld documents is privileged.

Universal City Dev. Partners, 230 F.R.D. at 696. Without a privilege log or proper description of the information being withheld by B&P, there is simply no way for Rosenbaum or the Court, to properly evaluate whether any of the withheld information is truly privileged.

Moreover, by putting these matters at issue and seeking damages, B&P may not now claim privilege for the documents requested. See, e.g., Stern v. O'Quinn, 253 F.R.D. 663, 677 (S.D. Fla. 2008) (“[I]t is simply not fair to allow a party to wield the work-product protection as a sword to cut out the heart of an opposing party's case while simultaneously brandishing it as a shield from disclosure of any Achilles heels.”); GAB Business Servs., Inc. v. Syndicate 627, 809 F.2d 755, 762 (11th Cir. 1987) (explaining “shield and sword doctrine” in context of attorney-client privilege). Although B&P's counsel claimed that he would try to resolve B&P's objections by providing a privilege log, no such privilege log has ever been provided as of this late date. Moreover, B&P has never stated when it will provide Rosenbaum with a privilege log. See Certification of Compliance with Local Rules, infra.

2. All payroll records for all employees of Becker & Poliakoff, P.A. from August 4, 2008 to the date of your response to this Request for Production, including salary information for each individual employee, and records of all overtime work performed or expenses incurred, to the date of your response to this Request for Production.

RESPONSE: Objection, overly broad, vague, unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. B&P employs hundreds of employees. This Request is especially overly broad, irrelevant and vague in that it seeks records for each and every employee regardless of whether or not a particular employee staffed or assisted in restaffing B&P's West Palm Beach office after Rosenbaum and several attorneys and staff left the West Palm Beach office for Katzman Garfinkel Rosenbaum. This Request is further objectionable because it seeks personal and confidential and proprietary information pertaining to B&P and its employees which is beyond the scope of this action. Finally, this Request is further objectionable because Rosenbaum and Katzman Garfinkel Rosenbaum are competitors of B&P and could use the requested documents in a manner detrimental to the business and operation of B&P. There is no reasonable basis for production of all of the documents sought by Rosenbaum.

ANALYSIS: Once again an approximate one-year time frame is involved for this request. Federal Rule of Civil Procedure 26(b)(1) states that “[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable

matter.” B&P alleges that it sustained \$4 million in damages by Rosenbaum’s actions, including lost profits, lost revenues, overhead expenses, wages for personnel and non-billable time of attorneys putting the West Palm Beach office back together, expenses of transferring employees from other offices and significant monies in employee overtime. (D.E. 32, pp. 21-22). To determine the fact of and amount of these alleged damages from August 4, 2008, it will be necessary to look at the entire operations of B&P to see whether these losses were the result of B&P’s mismanagement, the bad economy, lack of productivity from poor morale, wasteful expenditures, attorneys working on uncollectible client matters, how much the firm spent on salaries and myriad other considerations related to law firm operations. Some of these considerations are specifically discussed in Rosenbaum’s Affidavit. Lost profits and revenues cannot be isolated to an analysis of only the West Palm Beach office. This is because the general expenses of the B&P firm operations are allocated to each attorney and their profitability depends in great part on the amount of the general firm expense allocation. For example, B&P charges \$160,000 per attorney for general expenses of the entire firm (such as IT, Accounting, Marketing Personnel Development, Human Resources and the like). Similarly, the Orlando office may have had less hours billed in Orlando from attorneys being sent to West Palm, but those attorneys may have billed higher rates or worked on more profitable cases, thus showing the Orlando office to be more profitable, effectively transferring the profit from West Palm Beach to Orlando. They also may have been paid more compensation from West Palm Beach. Thus, how much the firm spends on employee salaries is directly related to B&P’s lost profit claim since employee compensation at B&P, according to Alan Becker’s quote in the May, 2008 ABA Journal, makes up 70% of law firm expenses. In other words, the determination of lost profit requires an analysis of B&P’s entire operations since there are millions of dollars of expenses in the equation of West Palm Beach profit and loss that are not specific to the West Palm Beach office. This request also seeks information about how much expense B&P had attributed to its employees, and how much overtime was paid to staff employees by B&P and whether those amounts were reasonable and customary or were they inflated because B&P paid the employees more money to keep working there in an undesirable workplace.

B&P’s objection based on confidentiality of its employees’ records is also unavailing. The Florida Supreme Court has concluded that there is no “third-party standing for nonpublic

employers involved in requests for production of personnel records to assert their employees' privacy rights in those records." Alterra Healthcare Corp. v. Estate of Shelley, 827 So. 2d 936, 944 (Fla. 2002). B&P also objects based on the parties being competitors. Once again, B&P cannot seek millions of dollars in damages and then assert that because it chose to sue a competitor relevant information needed to defend the claim is not discoverable. Finally, all payroll records at B&P are kept on the computer and can be easily provided.

3. All payroll records reflecting the compensation, including salary and bonuses, of Marni Becker n/k/a Marni Becker-Avin, from the date of hire to the date of your response to this Request for Production.

RESPONSE: Objection, irrelevant, harassing and not reasonably calculated to lead to the discovery of admissible evidence. There are no allegations in either the underlying Complaint and the Counterclaims which support production of the requested documents or records. Ms. Becker, n/k/a Ms. Becker-Avin is B&P's professional development director, based in Fort Lauderdale. She does not have an office in West Palm Beach. This Request is further objectionable because it seeks personal and confidential information pertaining to B&P and one of its employees which is beyond the scope of this action. There is no nexus between Ms. Becker-Avin and her position with B&P and this litigation.

ANALYSIS: The documents sought in this Request are relevant to B&P's allegations that Rosenbaum made "scurrilous comments" that B&P was mismanaged. D.E. p. 19. Rosenbaum's defenses include mismanagement, morale problems and wasteful expenditures of firm monies caused by the preferential treatment of Marni Becker and Keith Poliakoff, the children of Alan Becker and Gary Poliakoff. Marni Becker was highly compensated and given significant preferential treatment in her position of "Professional Development Director", a position created for her by Becker. She was given very significant funding for her position and department, to the chagrin of many, at the expense of substantial firm resources and employee morale. See also Analysis to Request No. 2 above regarding B&P's employee confidentiality objection.

4. All payroll records reflecting the compensation, including salary and bonuses, of Keith Poliakoff, from the date of hire to the date of your response to this Request for Production.

RESPONSE: Objection; irrelevant, harassing and not reasonably calculated to lead to discovery of admissible evidence. There are no allegations in either the underlying Complaint or the Counterclaims which support production of the requested documents or records. Mr. Poliakoff is a land-use attorney and B&P shareholder based in B&P's Fort Lauderdale office. He does not have an office in West Palm Beach. This Request is further objectionable because it

seeks personal and confidential information pertaining to B&P and one of its employees which is beyond the scope of this action. There is no nexus between Mr. Poliakoff and his position with B&P and this litigation.

ANALYSIS: The same analysis to Request No. 3 for Marni Becker applies to the payroll records of Keith Poliakoff, who received above-market compensation, and preferential treatment and which caused morale problems that contributed to the departure of staff and attorneys. Keith Poliakoff, as a relatively young lawyer, (in his sixth or seventh year of law practice) was making \$350,000.00 in annual compensation plus a \$100,000 bonus at 2007 year-end. This amount of compensation proves favoritism, mismanagement and was a contributing cause for employees to leave B&P. It also relates to B&P's claimed disparagement of firm management. D.E. 32, p. 19. See also Analysis to Request No. 3 above, regarding the remaining objections raised by B&P.

6. All billing records for every timekeeping employee, including attorneys and paralegals, for the past three (3) years from the date of your response to this Request for Production.

RESPONSE: Objection; overly broad, vague, unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. B&P employs hundreds of employees – some 120 attorneys and approximately 30 billing paralegals. This request is especially overly broad, irrelevant and vague in that it seeks records for each and every employees regardless of whether or not a particular employee staffed or assisted in re-staffing B&P's West Palm Beach office after Rosenbaum and several attorneys and staff left the West Palm Beach office for Katzman Garfinkel and Rosenbaum. The Request is also overly broad because it seeks billing records for the past three years which is an unreasonable timeframe. This Request is further objectionable because it seeks confidential financial information pertaining to the business B&P which is beyond the scope of this action. This Request is further objectionable because Rosenbaum and Katzman Garfinkel and Rosenbaum are competitors of B&P and could use the requested documents in a manner detrimental to the business and operation of B&P. There is no reasonable basis for production of all of the documents sought by Rosenbaum. B&P further objects to this Request to the extent that it seeks attorney-client privileged information.

ANALYSIS: The billing records are relevant to B&P's allegations that Rosenbaum was telling "some clients that B&P was experiencing financial difficulties in order to induce them to shift their legal representation" (D.E. 32, p. 19), the mismanagement issues as well as to determine whether B&P lost revenues and profits as they claim. Rosenbaum needs the financial records of the lawyers and paralegals, not their time records depicting entries of work for clients, to determine their productivity and to compare them to the expenses to show that B&P was

mismanaged and that poor morale, the bad economy, the Joe Mancilla malpractice problem and other B&P problems were the cause. The billing records for the past three years are necessary to establish a baseline against which the billing for the time period when B&P allegedly lost revenues and profits. Rosenbaum needs to analyze the entire business operation, including all B&P offices, and the expense allocations per attorney and billing timekeepers, and the effect of all of the other problems discussed in Rosenbaum's Affidavit, to prove that B&P was mismanaged and that any revenues or profits lost were the result of factors other than Rosenbaum. The records of the West Palm Beach office alone will not provide a meaningful assessment because the expenses of the entire firm is used by B&P to allocate general expense per attorney and paralegal. B&P allocated general overhead, ie, \$160,000, per attorney, and the other expenses of the entire firm, to all offices. The allocation of these general expenses is discussed in greater detail in Rosenbaum's Affidavit.

These records are also relevant to the claims of B&P as to how much time was actually incurred by the attorneys and staff who were sent to the West Palm Beach office and are needed to show how much profit was allegedly lost, since B&P claims lost profits. A time period of three years is necessary to determining the attorneys' and paralegals' average productivity, including when the economy was not bad, to determine whether the cause of the alleged lost profits and lost revenues was attributable to factors other than Rosenbaum. All of these records existed when Rosenbaum worked at B&P. These records are readily available on the B&P computer and can be generated in reports very quickly by B&P staff. Moreover, B&P is highly computerized and has, according to B&P, one of the most sophisticated computer systems of law firms in Florida. These records are kept by B&P in the normal course of business and are made available to B&P management in the normal course of business.

7. All expense reports submitted to you by any employee, officer or agent of Becker & Poliakoff, P.A. for the past four (4) years from the date of your response to this Request for Production.

RESPONSE: Objection; overly broad, vague, unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. B&P employs hundreds of employees. This request is especially overly broad, irrelevant and vague in that it seeks records for each and every employee regardless of whether or not a particular employee staffed or assisted in re-staffing B&P's West Palm Beach office after Rosenbaum and several attorneys and staff left the West Palm Beach office for Katzman Garfinkel and Rosenbaum. This Request is further objectionable because it seeks personal and confidential information pertaining to B&P

and its employees which is beyond the scope of this action. There is no reasonable basis for production of all of the documents sought by Rosenbaum.

ANALYSIS: The documents sought in this Request are relevant to B&P's allegations that Rosenbaum made "scurrilous comments" that B&P was mismanaged, as well as B&P's lost profit claim. D.E. p. 19. Expense reports of previous years of every employee (three years before Rosenbaum left and one year after Rosenbaum left) are relevant to show B&P's customary expenses and are expected to show a large increase in 2007 and 2008 for travel and entertainment, especially by the attorneys on the Management Committee. The members of the Management Committee received special privileges and treatment, especially as it related to travel with their spouses, thereby wasting large amounts of firm money. The amounts are so large that Alan Becker refused to follow firm policy by submitting monthly expense reports and instead submitted only one annual report to avoid closer review and analysis of his expenses. This resulted in losses of significant firm profit and mismanagement. Further, Rosenbaum's defenses include preferential treatment of Marni Becker and Keith Poliakoff by B&P, and thus, the relevant expense reports are those requested, not just those belonging to employees who assisted in West Palm Beach. See also Analysis to Request No. 1 above regarding B&P's "vague," "overbroad," and "unduly burdensome" objections; Analysis to Request No. 2 above regarding B&P's employee confidentiality objection.

8. All tax returns, Department of Revenue filings, and all internal financial records of income and expenses, of Becker & Poliakoff, P.A., for the past five (5) years from the date of your response to this Request for Production.

RESPONSE: Objection; overly broad, vague, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. Furthermore, B&P objects to this Request in that it is confusing: B&P is unclear what is meant by "all internal financial records of income and expenses." This Request is overly broad and irrelevant in that it seeks documents for a period of five years which is an unreasonable timeframe. Moreover, B&P objects to this Request to the extent it seeks attorney-client privileged information. This Request is further objectionable because it seeks confidential financial information pertaining to B&P and its employees which is beyond the scope of this action. Finally, this Request is further objectionable because Rosenbaum and Katzman Garfinkel and Rosenbaum are competitors of B&P and could use the requested documents in a manner detrimental to the business and operation of B&P.

Notwithstanding and without waiving these objections, after the entry of a confidentiality order by the Court respecting, *inter alia*, nondisclosure and non-dissemination of these documents, pursuant to Fed.R.Civ.P. 34, Rosenbaum may review B&P's tax returns at the

offices of the undersigned at a mutually convenient time or, upon Rosenbaum's request, the documents will be sent to a copy service for the documents to be copied.

ANALYSIS: See Analysis to Request No. 7 above regarding B&P's objections; see also Analysis to Request No. 1 above regarding B&P's objection based on attorney-client privilege; Analysis to Request No. 2 above regarding B&P's objection based on the parties being alleged competitors. B&P's tax returns are relevant to its damages claim of over \$4 million dollars of lost revenues, profits and the like. The tax returns and other required governmental filings are necessary to show the income, expenses and profits that B&P has had for the past five years (four years before Rosenbaum left and the year that Rosenbaum left), the taxes it has been paying, and deductions it has been claiming, all of which are pertinent to B&P's lost revenues and lost profits allegations. It will be necessary to compare B&P's 2008 profits or losses with the previous years to understand whether and to what extent there truly were lost profits and the other damages claimed. B&P has routinely disclosed its revenues and profits, including profits per attorney, to the Daily Business Review and discussed them in newspaper articles, so there is no need for confidentiality. The Affidavit of Rosenbaum addresses this in more detail. However, if the Court deems otherwise, Rosenbaum offers to keep them confidential but available for unrestricted use in this litigation.

9. All notes, minutes and other records of meetings of the Management Committee for the past three (3) years from the date of your response to this Request for Production.

RESPONSE: Objection; overly broad, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. This Request is especially overly broad in that it seeks numerous documents over a lengthy and unreasonable timeframe without specifying how the documents sought relate, in any way, to the underlying Complaint or the Counterclaims. This Request is further objectionable because Rosenbaum and Katzman Garfinkel and Rosenbaum are competitors of B&P and could use the requested documents in a manner detrimental to the business and operation of B&P. There are no allegations in either the underlying Complaint or the Counterclaims which support the production of all of the requested documents.

ANALYSIS: The documents sought in this Request are relevant to B&P's allegations that Rosenbaum provided disparaging information about B&P. Specifically, B&P claims that Rosenbaum made "scurrilous comments" that B&P was mismanaged. D.E. p. 19. On January 4, 2006, a new form of governance commenced at B&P, the "Management Committee". The Management Committee documents for the past three years are relevant to show the

management decisions that B&P made, and thus, establish the truth of Rosenbaum's statement about B&P's management. They will also reflect what actions management took to address the problems B&P had, some of which are discussed in Rosenbaum's Affidavit. They will also show how management dealt with the departure of the attorneys and staff and show that B&P's actions contributed to its own losses. Moreover, B&P again attempts to shift the burden to Rosenbaum to show relevance, where B&P, as the party resisting discovery, bears the burden of proving its irrelevance objection. See, e.g., Puccinelli, 224 F.R.D. at 688-89. See Analysis to Request No. 1 above regarding B&P's "overbroad" objections; see also Analysis to Request No. 8 above regarding B&P's unrecognized objection based on the parties being alleged competitors.

10. All communications among members of the Management Committee, which may have included others as well, for the past three (3) years from the date of your response to this Request for Production.

RESPONSE: Objection; overly broad, vague, irrelevant, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. This Request is especially overly broad in that it seeks numerous documents over a lengthy and unreasonable timeframe without specifying how the documents sought relate, in any way, to the underlying Complaint or the Counterclaims. There are no allegations in either the underlying Complaint or the Counterclaims which support the production of the requested documents. This Request is further objectionable because Rosenbaum and Katzman Garfinkel and Rosenbaum are competitors of B&P and could use the requested documents in a manner detrimental to the business and operation of B&P. Furthermore, this Request is especially unduly burdensome (and likewise overly broad) in that it will require B&P to expend immeasurable time and resource to search through its computer system for the requested communication.

ANALYSIS: The few emails attached to Rosenbaum's Affidavit alone show how relevant these communications are to the issues in this case, especially mismanagement and claimed lost profits and revenues. For example, B&P claims that Rosenbaum made "scurrilous comments" that B&P was mismanaged. Thus, the Management Committee documents for the past three years are relevant to show that B&P was poorly managed and to establish the truth of Rosenbaum's statement about B&P's management. They will also reflect what actions management took to mitigate its alleged losses and what losses, if any, occurred after Rosenbaum's departure. Finally, they will also show how management dealt with the departure of the attorneys and reveal that B&P's own actions contributed to its losses. See Analysis to Request No. 1 above regarding B&P's "vague," "overbroad," and "unduly burdensome" objections; see also Analysis of Request No. 9 above regarding B&P's irrelevance objection and

B&P shifting the burden regarding the relevance objection; Analysis to Request No. 8 above regarding B&P's unrecognized objection based on the parties being alleged competitors.

11. All records of payments made by you to Sherri Poliakoff, or any business affiliated with Sherri Poliakoff, for the past five (5) years.

RESPONSE: Objection; irrelevant, harassing and not reasonably calculated to lead to discovery of admissible evidence. There are no allegations in either the underlying Complaint or the Counterclaims which support the production of the requested documents or records. The claims at issue herein focus solely on Rosenbaum's departure from B&P, which occurred in August 2008. The requested discovery bears no nexus to such claims. Sherri Poliakoff is not, not has she ever been, an employee of B&P.

ANALYSIS: The requested records of payments to Sherri Poliakoff, the wife of Gary Poliakoff, another Managing Shareholder, are relevant to the allegations regarding firm mismanagement and the use of firm money for large payments to the family members of Managing Shareholders at B&P. The records are relevant because they show that Mrs. Poliakoff received preferential financial treatment as the "firm's decorator". Because the discovery request aims to gather information relevant to the instant case and is not harassing, B&P's objections should be overruled. See generally Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 353 (1978).

12. All records of payments made by you for, and all communications relating to, office or other furnishings for the past five (5) years, from any furniture store or outlet, including but not limited to the approximate \$30,000 purchase for furniture for Alan Becker's office in 2007 and/or 2008 from a furniture store in which Alan Becker or his relatives had an ownership interest of any kind.

RESPONSE: Objection; irrelevant, harassing and not reasonably calculated to lead to discovery of admissible evidence. There are no allegations in either the underlying Complaint or the Counterclaims which support the production of the requested documents or records. The claims at issue herein focus solely on Rosenbaum's departure from B&P which occurred in August 2008. The requested discovery bears no nexus to such claims.

ANALYSIS: The requested documents are relevant to the allegations regarding firm mismanagement. See also Analysis to Request No. 11 above. Specifically, Alan Becker's relatives had a furniture company from which Mr. Becker purchased approximately \$30,000 of furniture for his office, using firm money, immediately before the furniture store filed for bankruptcy. This wasteful and lavish expense was unnecessary and unreasonable, was to benefit the Becker family, and wasted firm money. Furthermore, B&P's expenditures on furnishings

before and after Rosenbaum left are highly relevant to B&P's "lost profits" claim because any such purchases would substantially impact the Firm's profitability, or "bottom line."

13. All communications sent by or to any Becker & Poliakoff, P.A. employee from August 4, 2008, relating in any way to the departing staff or staffing level or needs of the West Palm Beach office, to the date of your response to this Request for Production.

RESPONSE: Objection; overly broad, vague and unduly burdensome. B&P, in the normal course of its business, did not maintain a separate file or separate out each and every communication it sent to or received from its employees in connection with the departing staff or staffing level or needs staffing of the West Palm Beach office. It is quite probably and conceivable there could be thousands of communications between B&P and its employees relating to the subject matter sought in this Request and to retrieve each and every communication sought herein would cause B&P to expend immeasurable time and resources. Furthermore, it is virtually impossible for the B&P information technology department to perform a search of all communications between B&P and its employees relating to the information sought in this Request. This Request is also especially overly broad as phrased, i.e., "relating in any way to the staff or staffing level or needs of the West Palm Beach office." Finally, B&P objects to this Request to the extent it seeks work-product privileged information.

ANALYSIS: See Analysis to Request No. 1 above regarding B&P's objections based on "overly broad," "vague," "unduly burdensome," and "work-product privilege."

14. All communications sent by or to any Becker & Poliakoff, P.A. employee from August 4, 2008, to the present relating in any way to the operation of the West Palm Beach office, to the date of your response to this Request for Production.

RESPONSE: Objection; overly broad, vague and unduly burdensome. B&P, in the normal course of its business, did not maintain a separate file or separate out each and every communication it sent to or received from its employees in connection with the operation of the West Palm Beach office. It is quite probable and conceivable there could be thousands of communications between B&P and its employees relating to the subject matter sought in this Request and to retrieve each and every communication sought herein would cause B&P to expend immeasurable time and resources. Furthermore, it is virtually impossible for the B&P information technology department to perform a search of all communications between B&P and its employees relating to the information sought in this Request. This Request is also especially overly broad as phrased, i.e., "relating in any way to operation of the West Palm Beach office." Finally, B&P objects to this Request to the extent it seeks work-product privileged information.

ANALYSIS: See Analysis to Request No. 1 above regarding B&P's objections based on "overly broad," "vague," "unduly burdensome," and "work-product privilege."

15. All communications sent by or to any Becker & Poliakoff, P.A. employee from May 1, 2008, regarding the 12% pay deferral, to the date of your response to this Request for Production.

RESPONSE: Objection; overly broad, vague, irrelevant and unduly burdensome. B&P, in the normal course of its business, did not maintain a separate file or separate out each and every communication it sent to or received from its employees in connection with the 12% pay deferral. Furthermore, it is virtually impossible for the B&P information technology department to perform a search of all communications between B&P and its employees relating to the information sought in this Request. This Request is also particularly overly broad in that it seeks communications from or to every B&P employee concerning the 12% pay deferral. Finally, this Request is especially irrelevant in that the information sought in this Request does not relate in any way to the allegations in the underlying Complaint or the Counterclaims.

ANALYSIS: The requested information is relevant to the allegation regarding firm mismanagement. For example, the information sought will refute B&P's allegation that it was Rosenbaum, and not B&P's implementation of its 12% pay deferral, that caused the "subordinate attorneys" and other staff to leave B&P. The firm itself, through a Management Committee member, disseminated to the firm comments by Becker to the Daily Business Review about the "12% pay deferral", as discussed in Rosenbaum's Affidavit. See Analysis to Request No. 1 above regarding B&P's objections based on "overly broad," "vague," and "unduly burdensome."

16. Full and unedited presentations by Perry Adair and any other persons at the 2008 and/or 2009 B&P Retreats or at other Becker & Poliakoff, P.A.'s gatherings or meetings of any kind.

RESPONSE: Objection; irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. The information sought in this Request does not relate in any way to the allegations in the underlying Complaint or the Counterclaims. The claims at issue herein focus solely on Rosenbaum's departure from B&P, which occurred in August 2008. The requested discovery bears no nexus to such claims. Notwithstanding and without waiving this objection, B&P does not record the presentations by Perry Adair.

ANALYSIS: B&P's statement that it does not record the Perry Adair presentations is unresponsive and incomplete because the presentations are, at a minimum, saved as a PowerPoint file and previous Perry Adair presentations have been shown in the past on numerous occasions in the presence of Rosenbaum. The Perry Adair (called "kudomeister") presentations are shown at many firm meetings and retreats. Further, the requested information is relevant to show how B&P truly perceived the departure of Rosenbaum and the West Palm Beach attorneys and staff, and to the extent the departures were of genuine concern to B&P or were the subjects of jokes by B&P management and attorneys, and the events that actually

occurred. Therefore, B&P should be compelled to provide a complete response and produce the PowerPoint files.

17. All B&P client lists for the years 2005 through and inclusive to the date of your response to this Request for Production.

RESPONSE: Objection; overly broad, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence. This Request is particularly overly broad in that it seeks all client lists for the past four years. Furthermore, the Request is irrelevant in that the documents sought do not in any way relate to the allegations in the underlying Complaint or the Counterclaims. Finally, B&P objects to this Request in that it seeks privileged proprietary information. This Request is further objectionable because Rosenbaum and Katzman Garfinkel and Rosenbaum are competitors of B&P and could use the requested documents in a manner detrimental to the business and operation of B&P.

ANALYSIS: The requested information is relevant to B&P's counterclaims that Rosenbaum improperly solicited B&P clients and the duration of their relationship with B&P with those clients that left, relates to damages. D.E. 32, pp. 14-18. See also Analysis to Request No. 1 regarding B&P's "overly broad" objection. Furthermore, B&P cannot avoid production by claiming that the documents amount to privileged proprietary information. As the Southern District Court recently emphasized, "there is no absolute privilege that immunizes trade secrets and similar confidential information in discovery." Preferred Care Partners Holding Corp. v. Humana, Inc., No. 08-20424-CIV, 2008 WL 4500258, at \*3 (S.D. Fla. Oct. 3, 2008) (quoting Empire of Carolina, Inc. v. Mackle, 108 F.R.D. 323, 326 (S.D. Fla. 1985)). The initial and heavy burden is on B&P to show that the information is confidential and that "disclosure will work a clearly defined and very serious injury." Id. at \*3 n.2 (quoting Empire of Carolina, 108 F.R.D. at 326) ("Once these requirements are met, the burden shifts to the other party to establish that . . . the information is relevant and necessary to the action . . . ." (omissions in original)). Because B&P failed to meet its initial burden, its objection based on privileged proprietary information should be overruled. In sum, all B&P's objections to this Request are unavailing and should not preclude discovery. See Shieh v. Ebershof, 15 F.3d 1089, \*1 (9<sup>th</sup> Cir. 1993)(trial court properly denied Shieh's protective order regarding his client list; Shieh argued, like B&P in this case, that he could not tell the defendants who his clients were because they were "stealing" his clients).

18. Any and all calendars, electronic or otherwise, for all of the departing staff.

RESPONSE: After the entry of a confidentiality order by Court respecting, *inter alia*, nondisclosure and non-dissemination of these documents, pursuant to Fed.R.Civ.P. 34, Rosenbaum may review the requested documents at the offices of the undersigned at a mutually convenient time or, upon Rosenbaum's request, the documents will be sent to a copy service for the documents to be copied.

ANALYSIS: See Analysis to Request No. 8 above regarding B&P improper shifting of burden, although it would seem unnecessary now, more than a year later. Rosenbaum agrees to keep the documents produced confidential and limited to this litigation.

19. All home addresses of all B&P employees, whether current or former, for the past three (3) years from the date of your response to this Request for Production.

RESPONSE: Objection; overly broad, irrelevant, harassing, and not reasonably calculated to lead to the discovery of admissible evidence. This Request is particularly overly broad in that it seeks addresses for all B&P employees for an unreasonable timeframe. Moreover, this Request is irrelevant in that, again, it seeks addresses for all B&P employees (both current and former). Moreover, this Request fails to specify any particular document(s) being sought and appears to request B&P to compile or prepare a list which is not kept in the normal course of business, in violation of Fed.R.Civ.P. 34. This request is further objectionable because it seeks personal and confidential information pertaining to B&P and its employees which is beyond the scope of this action. This Request is further objectionable because Rosenbaum and Katzman Garfinkel and Rosenbaum are competitors of B&P and could use the requested documents in a manner detrimental to the business and operation of B&P. Finally, B&P objects to this Request because the information sought does not relate in any way to the allegations contained in the underlying Complaint or the Counterclaim.

ANALYSIS: The requested information is relevant because it is needed to perfect service on and locate potential witnesses unknown to Rosenbaum. Furthermore, B&P obviously possesses documents or electronic information (e.g., Ultipro) from which it can easily obtain the home addresses of all B&P employees. See also Analysis to Request No. 1 and No. 11 regarding B&P's "overly broad" and "harassing" objections; Analysis to Request No. 2 regarding B&P's objection based on confidentiality of employee records and based on parties being alleged competitors.

**CERTIFICATION OF COMPLIANCE WITH  
LOCAL RULES 7.1(A)(3) AND 26.1(I) AND FED. R. CIV. P. 37 (a)(2)(B)**

Rosenbaum certifies that he has made reasonable efforts to confer with counsel for B&P by e-mails dated September 29 and September 30, 2009, attached as composite **Exhibit "F"**, in a good faith attempt to resolve and/or narrow the issues raised in this Motion, but has been unable to do so. Specifically, the documents that B&P's counsel offered to produce would constitute incomplete responses, as they would not allow Rosenbaum to prove the truth of the allegations that B&P was mismanaged and preclude discovery in relation to B&P's damages claim. Rosenbaum also certifies that B&P has not produced a single document.

Respectfully submitted,

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BY: \_\_\_\_\_  
DANIEL S. ROSENBAUM  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on October 23, 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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