

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

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

DANIEL S. ROSENBAUM,

Plaintiff,

vs.

BECKER & POLIAKOFF, P.A.

Defendant.

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BECKER & POLIAKOFF, P.A.,

Counter-Plaintiff

vs.

DANIEL S. ROSENBAUM, and  
KATZMAN GARFINKEL ROSENBAUM, LLP,

Counter-Defendants,

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**PLAINTIFF/COUNTER-DEFENDANT DANIEL S. ROSENBAUM'S RESPONSE TO  
BECKER & POLIAKOFF, P.A.'S MOTION FOR PROTECTIVE ORDER IN  
CONNECTION WITH ROSENBAUM'S FIRST REQUEST FOR PRODUCTION**

Plaintiff/Counter-Defendant, Daniel S. Rosenbaum ("Rosenbaum"), pursuant to Southern District of Florida Local Rule 7.1, hereby files this Response to Becker & Poliakoff P.A.'s ("B&P's") Motion for Protective Order in Connection with Rosenbaum's First Request for Production, and states as follows:

**MEMORANDUM OF LAW**

B&P bears the burden of establishing that good cause exists to support the imposition of a protective order in this case. Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1313 (11th Cir. 2001); Johnson v. Gmeinder, 191 F.R.D. 638, 642 (D.Kan. 2000) ("It is well settled that the party seeking a protective order has the burden to demonstrate good cause to support the protective order."); Culligan v. Yamaha Motor Corp., 110 F.R.D. 122, 125 (S.D.N.Y.

1986)(“The party seeking a protective order has the burden of proof.”). “The party requesting a protective order must make a specific demonstration of facts in support of the request as opposed to conclusory or speculative statements about the need for a protective order and the harm which will result without one.” Baratta v. Homeland Housewares, LLC, 242 F.R.D. 641, 642 (S.D.Fla. 2007). For the reasons set forth below, B&P’s Motion for Protective Order should be denied because it fails to establish good cause for the entry of a protective order under the facts and circumstances of this case.

**Request No. 1: Client Communications**

Pursuant to Rule 26(b)(1), “parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party and/or that is calculated to lead to the discovery of admissible evidence.” Since B&P’s counterclaims raise issues concerning the staffing of B&P’s West Palm Beach office, the departing staff, and the circumstances of their departure, Rosenbaum is clearly entitled to discovery regarding this topic. Although B&P raises an “overbroad” objection to the discovery requested by Rosenbaum, it fails to explain exactly how Rosenbaum’s discovery request is overly broad. B&P’s Motion for Protective Order does not provide any evidence to suggest that Rosenbaum’s discovery request is “overbroad,” nor does it cite any authority to support its argument on this point. Thus, B&P’s blanket “overbroad” objection should be overruled because it is legally insufficient. Panola Land Buyers Assoc. v. Shuman, 762 F.2d 1550 (11<sup>th</sup> Cir. 1985); Josephs v. Harris Corp., 677 F.2d 985, 992 (3d Cir. 1982) (the mere statement by a party that the discovery sought is overly broad, burdensome, oppressive, vague or irrelevant is “not adequate to voice a successful objection.”); Roesberg v. John-Manville Corp., 85 F.R.D. 292 (E.D. Pa. 1980) (party resisting discovery must affirmatively demonstrate why each discovery request is overly broad).

B&P claims that it would be unduly burdensome to produce the documents requested by Rosenbaum. “A party asserting undue burden must present an affidavit or other evidentiary proof of the time or expense involved in responding to the discovery request.” In re Urethane Antitrust Litigation, 2009 WL 2485391, \*4 (D.Kan. 2009). B&P’s assertions that there could be thousands of responsive communications, and that B&P’s record-keeping system requires it to expend effort to produce such communications, does not prove that an undue burden would be imposed by complying with Rosenbaum’s discovery request. Williams v. Board of County

Comm'rs of Unified Government of Wyandotte County, 2000 WL 1475873, \*1 (D.Kan. 2000)(“Simply put, mere assertions that their record-keeping system requires them to contact all employees of the Unified Government in order to gather the documents requested, and that the request covers 1,800 Internal Affairs complaints, are insufficient to demonstrate undue burden.”).

B&P routinely files the correspondence its sends to, and receives from, its clients in a physical client file. Affidavit of Peter C. Mollengarden, filed herewith (“Mollengarden Affidavit”). Since all correspondence is routinely placed into the physical files, it would not be unduly burdensome for B&P to review its physical client files for letters or communications involving the staffing of the West Palm Beach office, the departing staff, or the circumstances surrounding the departure of the departing staff. Such correspondence is placed in B&P’s physical client files pursuant to its normal operating procedures. Mollengarden Affidavit. These documents can easily be copied and provided to Rosenbaum pursuant to his request. Since B&P’s argument focuses solely on its IT department and the production of emails and electronically stored data, the Court should find that Rosenbaum is entitled to discovery of the documents contained in B&P’s physical client files.

B&P admits that it can produce some responsive e-mails to clients, property managers, or other representatives by conducting a search of its system. (D.E. 74, p.8). Nevertheless, B&P argues that it should not be required to do so because there are some responsive e-mails that may not be captured by this search. The fact that B&P may not recapture every e-mail in a search does not mean that B&P can avoid producing any of the communications sought by Rosenbaum. B&P does not cite any authority holding that a party is entitled to a blanket protective order when it clearly has the capability of producing some, if not all, of the responsive documents. Furthermore, B&P does not explain why it would be unduly burdensome to have its IT department, or the individual e-mail users themselves, to search for and obtain the requested documents. B&P does not offer any evidence to prove that conducting “such limited searches would be costly, time-consuming and unduly burdensome.” Accordingly, B&P’s request for a protective order regarding the requested communications should be denied.

***Request No. 2: Payroll Records of All Employees***

B&P claims Rosenbaum's request for payroll records is "overly broad, unduly burdensome and irrelevant." (D.E. 74, p.9). B&P's assertion that production of such information would impose an "undue burden" is simply untrue. For example, the payroll records and salary information for all B&P employees is readily accessible through B&P's Ultipro payroll system.<sup>1</sup> B&P's accounting department, who are no doubt experts in the use of Ultipro, could easily compile the requested documents for every B&P employee in a matter of minutes. Since B&P's Motion to Compel does not provide any evidence proving that the production of the payroll records of all B&P employees would impose an "undue burden," B&P's argument on this point must fail.<sup>2</sup>

B&P also claims the documents sought by Rosenbaum are irrelevant, yet B&P does not adequately demonstrate why such information is irrelevant. B&P's blanket objections on grounds of relevance are legally insufficient. See Panola Land Buyers Assoc., 762 F.2d 1550; Josephs, 677 F.2d at 992 (the mere statement by a party that the discovery sought is overly broad, burdensome, oppressive, vague or irrelevant is "not adequate to voice a successful objection."). Moreover, in determining the relevancy of a discovery request, "[c]ourts are required to accord discovery a broad and liberal scope in order to provide parties with information essential to the proper litigation of all relevant facts, to eliminate surprise and to promote settlement. ... Where there is a doubt over relevancy, the court should still permit discovery." Coker v. Duke & Co., 177 F.R.D. 682, 684 (M.D. Ala. 1998); Tate v. U.S. Postal Serv., 2007 WL 521848, \*2 (S.D. Fla. 2007) ("[D]iscovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought has no possible bearing on the claims and defenses of the parties or otherwise on the subject matter of the action."). Notwithstanding the facial inadequacy of B&P's objection, Rosenbaum provides below a brief statement of the grounds underlying the request to establish its relevancy.

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<sup>1</sup> In fact, B&P requires all of its new hires undergo extensive training on the Ultipro payroll system and also provides the new employees with accompanying instructional literature. A copy of such literature is attached as *Exhibit A*.

<sup>2</sup> B&P's contention that Rosenbaum's request is overly broad should also be rejected because B&P does not offer any proof to establish such a claim. Furthermore, as discussed below, B&P's entire operation must be analyzed in order to ascertain the causes of the damages that were purportedly the result of by Rosenbaum's actions.

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, which was previously filed with the Court. (D.E. 79).

B&P's purported 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). The actual expenses may be more or less, so that information is needed to determine lost profits for B&P. 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. After all, B&P's revenues are about \$55 million to \$60 million per year. Accordingly, B&P's assertion that Rosenbaum's request seeks irrelevant documents is without merit.

Of equal importance is the fact that B&P is claiming damages against Rosenbaum for the alleged actions of B&P Ft. Lauderdale attorney Stuart Zoberg, who never worked in the B&P West Palm Beach office. (Counterclaim at Paragraphs 26, 36). B&P alleges that Attorney Zoberg caused damages to the Ft. Lauderdale office of B&P, through, among other things, interfering with clients of B&P's Ft. Lauderdale office who were then lost and/or interfered with, and B&P information was downloaded by Zoberg in Fort Lauderdale. (Counterclaim at Paragraph 36). B&P seeks to hold Rosenbaum responsible for the actions of Zoberg. (Counterclaim at Paragraphs 26, 36, 43, 47). Thus, B&P cannot possibly try to limit discovery to its West Palm Beach office given these allegations.

Although B&P claims that the information Rosenbaum seeks is a "trade secret" the law is clear that "there is no absolute privilege that immunizes trade secrets and similar confidential information in discovery." Preferred Care Partners Holding Corp. v. Humana, Inc., 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, no protective order should be granted. 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). B&P cannot seek damages for lost clients and at the same time not disclose who the clients are.

Finally, B&P claims that Rosenbaum's discovery request violates the privacy rights of its employees. The law is clear, however, that an employer (like B&P) lacks standing to deny a discovery request by asserting the constitutional right to privacy of its employees. Alterra Healthcare Corp. v. Estate of Shelley, 827 So. 2d 936 (Fla. 2002). Moreover, B&P put at issue its own employees. Thus, B&P's argument on this point is without merit.

***Request No. 3: Payroll Records of Marni Becker-Avin***

Since B&P's argument on this issue incorporated its response to Request No. 2, Rosenbaum will also adopt and incorporate his response to Request No. 2 as if it were fully set forth herein. Contrary to B&P's assertions, Ms. Becker-Avin's compensation is highly relevant in this case. For example, Rosenbaum's defenses to B&P's counterclaims include mismanagement, morale problems and wasteful expenditures of firm monies caused by the preferential treatment of Marni Becker-Avin and Keith Poliakoff, the children of Alan Becker and Gary Poliakoff. Marni Becker-Avin was highly compensated and given significant preferential treatment in her position of "Professional Development Director," a position created for her by Alan Becker. She was given very significant funding for her position and department at the expense of substantial firm resources and employee morale. This is more specifically addressed in the Affidavit of Rosenbaum. Thus, B&P's request for a protective order should be denied because 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. 32, p. 19).

***Request No. 4: Payroll Records of Keith Poliakoff***

Since B&P's argument on this issue incorporated its response to Request No. 3, Rosenbaum will also adopt and incorporate his response to Request No. 3 as if it were fully set forth herein. Keith Poliakoff's compensation is highly relevant in this case because Rosenbaum's defenses to B&P's counterclaims include mismanagement, morale problems and wasteful expenditures of firm monies caused by the preferential treatment of Marni Becker-Avin and Keith Poliakoff, the children of Alan Becker and Gary Poliakoff. Keith Poliakoff was highly compensated and given significant preferential treatment in his position despite his lack of experience. Whether B&P mismanaged its affairs by paying Keith Poliakoff far beyond the market rate for an attorney with his experience is clearly relevant to Rosenbaum's defenses to B&P's counterclaims.

***Request No. 6: Billing Records of B&P Employees***

Since B&P's argument on this point adopts its response to Request No. 2, Rosenbaum will also adopt and incorporate his response to Request No. 2 as if it were fully set forth herein. B&P argues that Rosenbaum's request for billing records is unduly burdensome because it seeks records from all of B&P's time-keeping employees for the past three years. Such information is

and revenues cannot be isolated to an analysis of only the West Palm Beach office for a limited period of time. 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 and the actual expenses and revenues.

The billing records of all time-keeping employees for a three year period are necessary to analyze whether B&P suffered any damage as a result of Rosenbaum's actions. In order to determine whether B&P was truly damaged, Rosenbaum must look at the entire operations of B&P over a period of time 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. Without the requested information, Rosenbaum will not be able to evaluate the viability of B&P's claims. Accordingly, the Court should reject B&P's argument on this point. Rosenbaum is not seeking the actual itemized invoices depicting attorneys' services sent to B&P's clients.

***Request No. 7: Expense Reports of All Time-Keeping B&P Employees***

Since B&P's argument on this point adopts its response to Request No. 2, Rosenbaum will also adopt and incorporate his response to Request No. 2 as if it were fully set forth herein. Rosenbaum would point out, however, that discovery requests of this type are common in employment cases. Moore v. Nat'l Ass'n of Sec. Dealers, Inc., 762 F.2d 1093, 1094 (D.C. Cir. 1985)(plaintiff reviewed more than four hundred personnel files of current and former employees). B&P also argues that Rosenbaum's request for all expense reports for time-keeping employees for a four-year time period is unduly burdensome. B&P does not, however, explain why producing the requested documents would be unduly burdensome. Although B&P clearly has records of the expense reports submitted by its time-keeping employees, it refuses to produce these records to Rosenbaum. Rosenbaum Affidavit. Since B&P fails to provide any evidence as to how much it would actually cost to produce these documents, its "undue burden" argument must fail.

The information sought by Rosenbaum is necessary because, as discussed in the Response to No. 2 above, B&P's purported lost profits and revenues cannot be isolated to an analysis of only the West Palm Beach office for a limited period of time. 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 and the actual revenues received and expenses incurred. Furthermore, the expenses of all B&P employees must be analyzed over a period of time in order for Rosenbaum to ascertain whether B&P truly experienced an increase of employee expenses after August 4, 2008. Accordingly, the Court should reject B&P's argument on this point.

***Request No.8: All Tax Returns and Internal Financial Records of B&P***

B&P contends that its tax returns are considered confidential and should not be subject to discovery. (D.E. 74, p.17). The Court should reject B&P's argument because tax returns and other financial information do not enjoy a special privilege from disclosure. Credit Life Ins. Co. v. Uniworld Ins. Co., 94 F.R.D. 113 (S.D.Ohio 1982); Shearson Lehman Hutton, Inc. v. Lambros, 135 F.R.D. 195, 198 (M.D.Fla. 1990)(granting motion to compel tax returns in case where they were relevant to the claims raised); Weiner v. Bache Halsey Stuart, Inc., 76 F.R.D. 624, 627 (S.D.Fla. 1977)(Court ordered plaintiffs to provide tax returns requested in discovery).

B&P claims that the relevance of its tax records and financial statements is "tenuous at best." Such an assertion is absurd because B&P's counterclaims seek damages for the purported "lost revenues and profits" allegedly caused by Rosenbaum's actions. (D.E. 32, p.21). In order to determine whether B&P actually experienced "lost revenues and profits," Rosenbaum must be able to review B&P's tax returns and financial documents. In fact, these documents may reveal that B&P did not experience any "lost revenues and profits" due to Rosenbaum's departure.<sup>3</sup> Since the information requested by Rosenbaum is directly related to B&P's claim for lost profits and revenues, the Court should compel B&P to provide the documents requested. Fin. Bus. Equipment Solutions, Inc. v. Quality Data Sys., Inc., 2008 WL 4663277, \*1 (S.D.Fla. 2008)(ordering party to produce its tax return and other financial documents); Sherman St. Assocs., LLC v. JTH Tax, Inc., 2006 WL 3422576, \*2-3 (D.Conn. 2006)(finding financial documents-including tax returns for approximately a five year period-relevant to showing

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<sup>3</sup> Although B&P's Motion for Protective Order suggests that B&P's damages are limited only to the West Palm Beach office, nothing in B&P's counterclaims states that the damages it seeks are limited only "to the West Palm Beach office of B&P." To the contrary, as explained above, B&P seeks damages against Rosenbaum from the alleged actions of B&P Ft. Lauderdale Attorney Zoberg. Even so, as explained, lost profits of the West Palm Beach office cannot be determined without a financial analysis of the entire B&P firm since it is one entity.

undercapitalization and to defending plaintiff's lost profits claim and compelling their production).

Contrary to B&P's suggestion, there is no other way of obtaining the necessary information other than the documents themselves. A sworn statement from B&P, or one of its agents, regarding its financial information is not a viable option because such a statement would not be trustworthy nor necessarily accurate or complete. B&P's assertion that the information Rosenbaum seeks can be obtained by B&P's limited production of documents from the West Palm Beach office is flawed because B&P's counterclaims seek lost revenues and profits for the entire firm, not just one office. Again, B&P's purported lost profits and revenues cannot be isolated to an analysis of only the West Palm Beach office for a limited period of time. If B&P did not want to produce all of its tax returns and financial documents, it should not have raised claims seeking recovery of lost revenues and profits.

Finally, B&P asks that if the Court requires B&P to provide these relevant documents that it limit production to two years prior to Rosenbaum's departure. Due to the difficult economic situation that has manifested itself in the United States over the past few years, imposing such a limitation would hamper Rosenbaum's ability to analyze whether B&P's purported lost profits and revenues were due to the economic downturn (as opposed to any of his actions). Accordingly, B&P's attempt to restrict the time period for Rosenbaum's discovery request should be rejected.<sup>4</sup>

***Request No. 9: All Notes, Minutes and Records of Management Committee Meetings***

B&P claims, without citing any authority, that the notes, minutes and records of its Management Committee Meetings are protected from discovery because they purportedly contain "highly sensitive confidential information pertaining to the business operations of B&P." (D.E. 74, p.21). The law is clear, however, that there is "no absolute privilege for trade secrets and similar confidential information." Exxon Chemical Patents, Inc. v. Lubrizol Corp., 131 F.R.D. 668, 671 (S.D.Tex. 1990). B&P, as the party seeking protection, "bear[s] the burden of proving 'good cause' by demonstrating a factual basis of potential harm." Ares-Serono, Inc. v. Organon Int'l B.V., 151 F.R.D. 215, 219 (D.Mass. 1993). "A finding of good cause must be

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<sup>4</sup> Rosenbaum does not object to entering a confidentiality order (1) limiting disclosure of this information to Rosenbaum, KGR, experts and the like and (2) limiting its use to the current litigation.

based on a particular factual demonstration of potential harm, not on conclusory statements.” Anderson v. Cryovac, Inc., 805 F.2d 1, 7 (1<sup>st</sup> Cir. 1986). Since B&P’s argument is based solely on conclusory statements, its request for a protective order should be denied.

B&P argues that the relevancy of the Management Committee’s documents is “tenuous at best.” (D.E. 74, p.22). Such an argument must fail because Rosenbaum’s defenses to B&P’s counterclaims include mismanagement, morale problems and wasteful expenditures of firm monies. The discovery of the Management Committee documents is necessary for Rosenbaum to prove his “mismanagement” defense, to ascertain whether B&P actually suffered any losses from Rosenbaum’s actions, and determine what the Management Committee decided to do and did in response. Thus, the Court should reject B&P’s request for a protective order regarding the Management Committee documents.

Finally, B&P asks that if the Court requires B&P to provide these relevant documents that it limit production to two years prior to Rosenbaum’s departure. Due to the difficult economic situation that has manifested itself in the United States over the past two years, imposing such a limitation would hamper Rosenbaum’s ability to analyze whether B&P’s purported lost profits and revenues were due to the economic downturn and mismanagement (as opposed to any of his actions). B&P also requests that the discovery request be limited to those records specifically mentioning B&P’s West Palm Beach office. The Court should reject such a limitation because it would effectively preclude Rosenbaum from proving his mismanagement defense. For example, if the Management Committee implemented a course of action involving B&P’s Fort Lauderdale office that caused the Firm to lose millions of dollars, such evidence would be highly relevant. B&P, however, asks this Court to enter an order precluding Rosenbaum from discovering such information.

B&P’s West Palm Beach office is not an island. Rather, it is merely one part of a statewide Firm that contributes to the entity as a whole. Limiting the production of Management Committee documents regarding one particular office will not reflect the true condition of the entire Firm. Since the Management Committee documents mentioning the West Palm Beach

office would only tell a small part of the Firm's overall story, the Court should reject B&P's attempt to restrict the scope and the time period for Rosenbaum's discovery request.<sup>5</sup>

***Request No.10: All Communications Among B&P Management Committee Members***

Since B&P's argument on this point adopts its response to Request No. 9, Rosenbaum will also adopt and incorporate his response to Request No. 9 as if it were fully set forth herein. B&P also claims that Rosenbaum's request is overly broad and compliance with the request would be unduly burdensome. Although B&P raises an "overbroad" objection to the discovery requested by Rosenbaum, it does not explain exactly how Rosenbaum's discovery request is overly broad. Since B&P's Motion for Protective Order does not provide any evidence to suggest that Rosenbaum's discovery request is "overbroad," B&P's blanket "overbroad" claim should be denied because it is legally insufficient. Panola Land Buyers Assoc., 762 F.2d 1550.

B&P also claims that production of all communications between members of its Management Committee would be unduly burdensome. However, B&P does not explain exactly why it would be unduly burdensome to produce all memos, letters, etc. that constitute communications among B&P's Management Committee. B&P speculates that there could be thousands of such communications, but does not present any evidence of the cost involved in complying with the discovery request. There are only seven (7) members of the Management Committee with a total of only eight (8) different attorneys that have held positions on the Management Committee since it was created on January 4, 2006.<sup>6</sup>

"A party asserting undue burden must present an affidavit or other evidentiary proof of the time or expense involved in responding to the discovery request." In re Urethane Antitrust Litigation, 2009 WL 2485391, \*4 (D.Kan. 2009). B&P's assertions that there could be thousands of responsive communications, and that B&P's record-keeping system requires it to expend effort to produce such communications, does not prove that an undue burden would be imposed by complying with Rosenbaum's discovery request. Williams v. Board of County Comm'rs of Unified Government of Wyandotte County, 2000 WL 1475873, \*1 (D.Kan.

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<sup>5</sup> Rosenbaum does not object to entering a confidentiality order (1) limiting disclosure of this information to Rosenbaum, KGR, experts and the like and (2) limiting its use to the current litigation.

<sup>6</sup> They are Gary Poliakoff, Alan Becker, Steve Lesser, Bernie Friedman, Gary Rosen, Joe Adams, Ken Direktor and Allen Levine.

2000)("Simply put, mere assertions that their record-keeping system requires them to contact all employees of the Unified Government in order to gather the documents requested, and that the request covers 1,800 Internal Affairs complaints, are insufficient to demonstrate undue burden."). B&P admits that it can produce all e-mails from the group designated as "MGMTCOMM," but contends it should not be required to do so because there are some e-mails that may not be captured by this search. The fact that B&P may not recapture every e-mail in a search does not mean that B&P can avoid producing any of the communications sought by Rosenbaum. Furthermore, B&P does not explain why it would be unduly burdensome to search the individual e-mails of the eight (8) members of the Management Committee since January 4, 2006 to obtain the requested documents. Accordingly, B&P's request for a protective order regarding the communications of the members of the Management Committee should be denied.

***Request No.11: All Records of Payments Made to Mr. Poliakoff's Wife***

B&P claims that this request "is designed to annoy and/or harass B&P." (D.E. 74, p.25). B&P does not, however, explain how this discovery request would harass or annoy B&P in any way. Requesting documents for the expenditures B&P made to an interior designer is not harassing or annoying in any way. Again, Rosenbaum's defenses to B&P's counterclaims include mismanagement, morale problems and wasteful expenditures of firm monies.

The amount of monies B&P spent on the services provided by Sherri Poliakoff over the years is clearly relevant to Rosenbaum's mismanagement and "wasteful expenditures" defenses. The records are relevant because they show that Mrs. Poliakoff received preferential financial treatment as the exclusive "firm 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).

***Request No.12: All Records of Payments Made for the Purchase of Furniture***

B&P claims that this request "is designed to annoy and/or harass B&P." (D.E. 74, p.26). B&P does not, however, explain how this discovery request would harass or annoy B&P in any way. Requesting documents for the expenditures B&P made for furniture is not harassing or annoying in any way. Again, Rosenbaum's defenses to B&P's counterclaims include mismanagement, morale problems and wasteful expenditures of firm monies.

The amount of money B&P paid to Alan Becker's relative's business immediately before it took bankruptcy, for Alan Becker's new office furniture, is clearly relevant to Rosenbaum's defense of mismanagement and "wasteful expenditures." The records of B&P's expenditures on this furniture are relevant because they show that B&P made "wasteful expenditures," and that it committed mismanagement. Because the discovery request aims to gather information relevant to the instant case and is not harassing, B&P's objections should be overruled. Oppenheimer Fund, Inc., 437 U.S. at 353.

***Request No.13: All Communications of B&P Employees Regarding Departing Staff***

B&P seeks a protective order and claims that Rosenbaum's request is overly broad and compliance with the request would be unduly burdensome. Although B&P raises an "overbroad" objection to the discovery requested by Rosenbaum, it does not explain exactly how Rosenbaum's discovery request is overly broad. Since B&P's Motion for Protective Order does not provide any evidence to suggest that Rosenbaum's discovery request is "overbroad," B&P's blanket "overbroad" claim should be denied because it is legally insufficient. Panola Land Buyers Assoc., 762 F.2d 1550.

"A party asserting undue burden must present an affidavit or other evidentiary proof of the time or expense involved in responding to the discovery request." In re Urethane Antitrust Litigation, 2009 WL 2485391, \*4 (D.Kan. 2009). B&P's assertions that there could be thousands of responsive communications, and that B&P's record-keeping system requires it to expend effort to produce such communications, does not prove that an undue burden would be imposed by complying with Rosenbaum's discovery request. Williams v. Board of County Comm'rs of Unified Government of Wyandotte County, 2000 WL 1475873, \*1 (D.Kan. 2000)("Simply put, mere assertions that their record-keeping system requires them to contact all employees of the Unified Government in order to gather the documents requested, and that the request covers 1,800 Internal Affairs complaints, are insufficient to demonstrate undue burden."). B&P admits that it can do searches of its e-mails, but contends it should not be required to do so because there are some e-mails that may not be captured by this search. The fact that B&P may not recapture every e-mail in a search does not mean that B&P can avoid producing any of the communications sought by Rosenbaum. Furthermore, B&P does not

explain why it would be unduly burdensome to search the individual e-mails to obtain the requested documents.

B&P also claims that production of all communications sent by or to any B&P employee relating to the departing staff or staffing level or needs of the West Palm Beach office would be unduly burdensome. However, B&P does not explain exactly why it would be unduly burdensome to produce all memos, letters, etc. that constitute communications among B&P's Management Committee. B&P speculates that there could be thousands of such communications, but does not present any evidence of the cost involved in complying with the discovery request. In fact, B&P's Motion to Compel does not even address the production of the memos, letters, etc. that exist in its physical client files regarding this subject matter. Accordingly, B&P's request for a protective order on this matter should be denied.

***Request No.14: All Communications of B&P Employees Regarding West Palm Beach Office***

Since B&P's argument on this point adopts its response to Request No. 13, Rosenbaum will also adopt and incorporate his response to Request No. 13 as if it were fully set forth herein.

***Request No.15: All Communications Regarding the "12% Pay Deferral"***

B&P seeks a protective order and claims that Rosenbaum's request is overly broad and compliance with the request would be unduly burdensome. Although B&P raises an "overbroad" objection to the discovery requested by Rosenbaum, it does not explain exactly how Rosenbaum's discovery request is overly broad. Since B&P's Motion for Protective Order does not provide any evidence to suggest that Rosenbaum's discovery request is "overbroad," B&P's blanket "overbroad" claim should be denied because it is legally insufficient. Panola Land Buyers Assoc., 762 F.2d 1550.

"A party asserting undue burden must present an affidavit or other evidentiary proof of the time or expense involved in responding to the discovery request." In re Urethane Antitrust Litigation, 2009 WL 2485391, \*4 (D.Kan. 2009). B&P's assertions that there are over nine million emails in its computer system has no bearing upon Rosenbaum's request for production. B&P's "12% pay deferral policy" was not instituted until May of 2008, and B&P would only have to search emails for the past one and one-half years. B&P acknowledges that it can conduct searches of the emails of its individual users, and it would be an undue burden to require its email users to run a search for documents regarding the terms "pay deferral" or "12%." The fact

that B&P's record-keeping system requires it to expend effort to produce such communications does not prove that an undue burden would be imposed by complying with Rosenbaum's discovery request. Williams, 2000 WL 1475873 at \*1 ("Simply put, mere assertions that their record-keeping system requires them to contact all employees of the Unified Government in order to gather the documents requested, and that the request covers 1,800 Internal Affairs complaints, are insufficient to demonstrate undue burden.").

B&P admits that it can do searches of its e-mails, but contends it should not be required to do so because there are some e-mails that may not be captured by this search. The fact that B&P may not recapture every e-mail in a search does not mean that B&P can avoid producing any of the communications sought by Rosenbaum. Furthermore, B&P does not explain why it would be unduly burdensome to search the individual e-mails to obtain the requested documents.

B&P also claims that production of all communications sent by or to any B&P employee relating to the "12% pay deferral" would be unduly burdensome. However, B&P does not explain exactly why it would be unduly burdensome to produce all memos, letters, etc. that mention the "12% pay deferral policy." Although B&P claims that the information regarding the "12% pay deferral policy" is irrelevant, such information is highly relevant to Rosenbaum's defenses to B&P's counterclaims of mismanagement, morale problems and wasteful expenditures of firm monies. For example, B&P claims that Rosenbaum's actions caused the B&P attorneys in the West Palm Beach to resign *en masse*. (D.E. 32, p.7, 11, 21). The requested documents regarding B&P's "12% pay deferral policy," however, will demonstrate that it was B&P's mismanagement and the "12% pay deferral policy," among other things, not Rosenbaum's actions, that caused the attorneys in B&P's West Palm Beach office to resign. Since these documents are directly related to the counterclaims raised by B&P, the request for a protective order should be denied.

***Request No.17: All B&P Client Lists from 2005 Until Date of Production***

B&P seeks to avoid the production of its client lists by claiming that they are irrelevant and constitute a "trade secret" or "confidential or proprietary information of B&P." (D.E. 74, p.31). The requested information is relevant to B&P's counterclaims that Rosenbaum improperly solicited B&P clients and that his actions caused B&P damages. (D.E. 32, p.14-18). Discovery of B&P's client lists is necessary because it will allow Rosenbaum to (1) ascertain the

duration of the relationship between B&P and those clients that left, (2) investigate exactly why B&P's clients ended the relationship, and (3) explore the damages allegedly caused by Rosenbaum's actions.

B&P claims that Rosenbaum should not be given access to all of its client lists because B&P is seeking damages specifically related to B&P's West Palm Beach office, not the entire Firm<sup>7</sup>. (D.E. 74, p.32). Such an argument must be rejected because B&P counterclaim seeks to recover the Firm's lost profits and revenues, which implicates all of the Firm's offices. Furthermore, as discussed in the Response to Request No. 2 above, B&P's lost profits and revenues cannot be isolated to an analysis of only the West Palm Beach office 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 and actual expenses and revenues. It is possible that B&P's loss of profits and revenue is attributable to the defection of clients, mismanagement, the poor economy, or other factors that had nothing to do with Rosenbaum. In order to respond to B&P's counterclaims, Rosenbaum needs B&P's client lists to explore exactly which clients left B&P, when they left, and why they terminated the relationship.

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, 2008 WL 4500258 at \*3. 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. Because B&P failed to meet its initial burden, its request for a protective order on this matter is unavailing and should be rejected. Shieh, 15 F.3d 1089 at \*1.

***Request No.19: Home Addresses of All B&P Employees***

Since B&P's argument on this point references its response to Request No. 2, Rosenbaum will adopt and incorporate his response to B&P's argument regarding Request No. 2 as if it were fully set forth herein. B&P claims that Rosenbaum's discovery request violates the privacy

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<sup>7</sup> Notably, B&P includes as departing attorneys B&P, Ft. Lauderdale attorney Stuart Zoberg who came to work at the Ft. Lauderdale office of KGR. Zoberg never worked out of the West Palm Beach office of B&P.

rights of its employees. The law is clear, however, that a B&P lacks standing to deny a discovery request by asserting the constitutional right to privacy of its employees. Alterra Healthcare Corp., 827 So. 2d 936. The information sought by Rosenbaum is necessary in order to locate, or perfect service on, potential witnesses unknown to Rosenbaum. For example, a current or former employee in B&P's Human Resources or Accounting department in Fort Lauderdale may possess information showing that it was B&P's mismanagement and frivolous spending that caused the lost profits it is now seeking to recover from Rosenbaum. Rosenbaum's request for the addresses of all B&P employees is the most efficient and cost-effective way to obtain the information Rosenbaum needs to mount his defense. Therefore, B&P's argument on this point is without merit.

**CONCLUSION**

Based upon the foregoing arguments and authorities, Plaintiff respectfully requests the Court enter an order denying B&P's Motion for Protective Order.

Respectfully submitted,

DANIEL S. ROSENBAUM, Pro Se  
c/o Katzman Garfinkel Rosenbaum, LLP  
250 Australian Avenue South, Suite 500  
West Palm Beach, Florida 33401  
Telephone: (561) 653-2900  
Facsimile (561) 820-2542  
Email: [drosenbaum@kgrlawfirm.com](mailto:drosenbaum@kgrlawfirm.com)

By: s/ Daniel S. Rosenbaum  
DANIEL S. ROSENBAUM  
Florida Bar No. 306037

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on November 6, 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.

DANIEL S. ROSENBAUM, Pro Se  
c/o Katzman Garfinkel Rosenbaum, LLP  
250 Australian Avenue South, Suite 500  
West Palm Beach, Florida 33401  
Telephone: (561) 653-2900  
Facsimile (561) 820-2542  
Email: [drosenbaum@kgirlawfirm.com](mailto:drosenbaum@kgirlawfirm.com)

By: s/ Daniel S. Rosenbaum  
DANIEL S. ROSENBAUM  
Florida Bar No. 306037

***Service List:***

Maurice Garcia, Esquire  
Joel Shulman, Esquire  
GREENSPOON MARDER, P.A.  
Trade Centre South, Suite 700  
100 W. Cypress Creek Road  
Fort Lauderdale, FL 33309  
Counsel for Defendant

Edward A. Marod, Esquire  
Edward A. Marod, P.A.  
400 S. Australian Ave., Suite 750  
West Palm Beach, FL 33401  
Counsel for KGR

742683