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U. S. DISTRICT COURT
EASTERN MICHIGAN

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

WENDY KUBIK, MICHELLE DeTOMASO,
RITA DILLON, JANE DOE #1, JANE DOE #2,
JANE DOE #3, JUDITH FLENNA, ELAINE
KOLODZIEJ, PAMELA LINDSTROM,
PAULINE MANIACI, MARY RICHARDSON,
JOAN RITCH, JANICE SANDORA,
MICHELE BOULTON, SUSAN SCHMALTZ,
JUDY SPRADLEY, ELEANOR TAYLOR,
BEVERLY THOMAS, JUDITH THORNTON,
MARY JO VAN TIEM, RENEE WILLITS,
REBECCA DITCH, SARAH AGUINAGA,
JOAN RAHILL, LISA HADDIX, BARBARA
STEWART, PAT BOLONE, BONNIE
BOUSSON, DONNA VAUGHN, MARJORIE
HARDER, CHRISTINA DIEM, KATHY
DIEM, OSUIL MAYO, CHRISTINE EWALD,
PAM ROGERS, BARBARA ARNOLD,
GEORGINA GHAZAWI, PEGGY
PRYZBYLSKI, JANET BOTT, STEPHANIE
HARBIN, DEBORAH PRESLEY, and
THERESA GOULD, Michigan residents,

Case Number: 03-CV-73350-DT

JUDGE PAUL D. BORMAN
UNITED STATES DISTRICT COURT

Plaintiffs,

v.

WILLIE GARY, TRICIA HOFFLER, ROBERT
PARENTI, SEKOU GARY, and GARY,
WILLIAMS, PARENTI, FINNEY, LEWIS,
McMANUS, WATSON, & SPERANDO, P.C.,
Florida residents,

Defendants.

**ORDER
GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR
SANCTIONS AGAINST DEFENDANTS,
DENYING IN ITS ENTIRETY DEFENDANTS' MOTION FOR SANCTIONS
AGAINST PLAINTIFFS AND THEIR COUNSEL**

Now before the Court are Plaintiffs' Motion for Sanctions and Other Relief Against Defendants for Their Willful Violation of Federal Rule of Civil Procedure 34, and Defendants' Motion for Sanctions Pursuant to Federal Rule of Civil Procedure 11 against Plaintiffs and Plaintiffs' counsel. The Court heard oral argument on October 22, 2004.

Having considered the entire record, the Court, for the reasons that follow:

- 1) GRANTS Plaintiffs' sanctions-motion to the extent that it seeks Defendants' reimbursement to Plaintiffs, pursuant to Federal Rule of Civil Procedure 37(c)(1), of the reasonable costs and attorneys' fees incurred in Plaintiff counsels' trip to Florida for document-inspection under Federal Rule of Civil Procedure 34(b);
- 2) GRANTS Plaintiffs' sanctions-motion to the extent that it seeks Defendants' reimbursement to Plaintiffs, pursuant to Federal Rule of Civil Procedure 37(c)(1), of the reasonable costs and attorney's fees incurred in preparing and arguing that motion;
- 3) DENIES Plaintiffs' sanctions-motion to the extent that it seeks an entry of default judgment against Defendants pursuant to Federal Rule of Civil Procedure 37(c)(1) and (b)(2)(C);
- 4) DENIES Plaintiffs' sanctions-motion to the extent that it seeks relief that is moot; and
- 5) DENIES Defendants' sanctions-motion against Plaintiffs and their counsel under Federal Rule of Civil Procedure 11(b)(3) in its entirety.

I. FACTS

On September 3, 2003, Plaintiffs filed this lawsuit against Defendants, their former attorneys, alleging, among other claims, legal malpractice based upon Defendants' representation of Plaintiffs in a prior lawsuit against Company A and Company B.¹ The factual thrust of

¹In that prior lawsuit, each of the Plaintiffs, employees of Company B, executed a Confidential Settlement Agreement and Complete Release (the "Settlement Agreements"), each of which imposes monetary sanctions on the disclosure of any files or records from that action and precludes each Plaintiff from discussing the terms of her settlement. Use of the designations "Company A" and "Company B" in lieu of the companies' real names is to help preserve the

Plaintiffs' Second-Amended Complaint, the operative complaint for purposes of the parties' motions, is that Defendants and Company A and/or Company B entered into a secret agreement whereby Defendants were to receive \$51.5 million in exchange for Plaintiffs permanently dropping their claims against both Company A and Company B and for Defendants agreeing never again to pursue any litigation against Company A or Company B, and that Plaintiffs, whom Defendants never told of this agreement, never received any of the \$51.5 million that Defendants, in fact, received.² (2nd Am. Compl. ¶¶ 57, 58, 61)

Grounded in Defendants' alleged willful violation of Federal Rule of Civil Procedure 34, Plaintiffs' motion for sanctions and for other relief against Defendants rests upon the following facts, which Defendants do not expressly dispute. On November 26, 2003, Plaintiffs served Defendants with a Request for Production of Documents, per Federal Rule of Civil Procedure 34(b) ("Plaintiffs' Rule-34(b) request").³ Contrary to Rule 34(b), Defendants never served a written response to Plaintiff's request, let alone within thirty days of that response as Rule 34(b)

confidentiality of the outcome of that action.

Defendant Gary, Williams, Parenti, Finney, Lewis, McManus, Watson & Sperando, P.C. ("the Gary firm") represented Plaintiffs along with co-counsel Rundell and Nolan, P.C.

²While each of the Settlement Agreements contains a provision indicating that Company A agreed to pay Defendants a certain dollar amount to implement corrective programs within Company A on a world-wide basis in an attempt to improve working conditions, that dollar amount was not \$51.5 million. (Ex. J at 11.)

³In that request, Plaintiffs sought, for inspection and photocopying, the production of any documents that are in the possession, custody, or control of Defendants' attorney that: 1) regard Plaintiffs as former clients of Defendants; 2) that evidence any money that Defendants received from Company A or from Company B from 2000 to the present, along with all form 1099s and W-2s that Defendants received from those companies during that time; 3) are agreements, deals, or contracts that Defendants entered into with Company A or any Company-A-affiliated entity and/or with Company B or any Company-B-affiliated entity from 2000 to the present. (Ex. B)

requires. Rather, on December 2, 2003, Defendants' counsel notified Plaintiffs' counsel that the requested documents would be made available at Defendants' offices in Florida for inspection and/or copying at a mutually-convenient date and time. Defendants' counsel subsequently indicated that there were approximately fifty boxes of such materials.

Beginning on December 2, 2003, Plaintiffs' counsel repeatedly asked Defendants' counsel about scheduling the mutually-convenient date for the document-inspection in Florida. Throughout December and early January, Defendants' counsel rejected every date that Plaintiffs proposed on the ground that Defendants were unavailable. This led to the following e-mail communication, on January 7, 2004, from Attorney Jay Schwartz ("Schwartz"), Plaintiffs' counsel, to Attorney Timothy Wittlinger ("Wittlinger"), Defendants' counsel, who responded on January 9, 2004. Their e-mail exchange was, in part, as follows:

Plaintiffs' counsel: [M]y office has been trying to schedule a time to go to the Gary Firm in Florida to inspect my clients' files, since early December. At one point or another, we have basically asked for any weekend in January. The response we have continually received from your office is that these dates are not convenient for the Gary Firm as no one is available. Regardless of my skepticism to this reply, the Gary Firm is the client in this case, not the attorneys. For inspection purposes, all we obviously need is for someone to put us in a room with the boxes of documents and, if they so choose, baby-sit us (as you previously aptly characterized it). Although I can appreciate your client wishing to save money by not having to pay your firm to fly down to Florida for such a simple task which they can obviously handle themselves, they may have no alternative if they are just too busy and no one is available. I suggest two alternatives: (1) provide me with a weekend in January when I can inspect these files in Florida in the presence of either someone from the Gary Firm or someone from Clark Hill, or (2) have the boxes delivered to your office in Detroit and we can inspect them there. I know Lyn from my office called you yesterday and asked for weekends

in January and February, but my concern is that much of the discovery in this case will necessarily need to be placed on hold until after this inspection occurs.

Defendants' counsel: I can't quarrel with your comments about document inspection. Pursuant to your secretary's request, I have requested dates in Feb. I suggest we select one of those dates (which I don't have yet) and proceed.

(Pls.' Br. Sanctions, Ex. C) On January 13, 2004, Attorneys Schwartz, Plaintiffs' counsel, and Wittlinger, Defendants' counsel, exchanged the following e-mail communication:

Defendants' counsel: How's Feb[.] 14-15 for document inspection? I don't have confirmation of that date yet, but if it's OK with you, I will push it with my client.

Plaintiffs' counsel: Any other weekend in February would be preferable, but if this is the only one available, we'll take it.

(Pls.' Br. Sanctions, Ex. D) On January 20, 2004, they exchanged the following e-mail communication:

Plaintiffs' counsel: Any weekend confirmed yet for our review of the files?

Defendants' counsel: I'm working on it. There were closed yesterday due to the holiday. I will call again today.

(Ex. E).

On January 21, 2004, Defendants' counsel left a voice message for Plaintiffs' counsel that Defendants' only available time for Plaintiffs' document-inspection was the weekend of January 30, 2004, the weekend of the Super Bowl. Plaintiffs' counsel immediately called Defendants' counsel to accept and to inquire into the specific dates and times that the files would be made available. In addition to leaving a voice mail message on January 21, 2004, Attorney Schwartz sent the following e-mail communication on January 22, 2004:

Just to repeat the phone message [that] I left yesterday, I need to know as soon as possible the access we will have to the Gary Firm records. I would like to think [that] this is not an issue but[,] given the delay in even getting potential dates, I am leaving nothing to chance.

Since we are less than 10 days away, flights are limited. There are some Friday a.m. flights provided [that] I can have access Friday afternoon and evening. There are no other flights between early Friday a.m. and late Friday p.m. so[,] if that can't be done, I will need access to the records as early Saturday a.m. as possible.

Please let me know the access that will be provided as soon as possible so that I can make the necessary arrangements. I currently have depositions scheduled in another case that Friday which will have to be altered as well.

(Pls.' Br. Sanctions, Ex. F) Responding by phone less than an hour later, Wittlinger stated that the records would be made available for inspection at the Gary Firm in Florida on Friday, January 30, 2004, from 1:00 p.m. to 7:00 p.m. and all day Saturday, January 31, 2004. Wittlinger opined that 1 ½ days should be sufficient time to complete the inspection of the documents, of which there were fifty boxes. Wittlinger indicated that either he or his co-counsel, Reginald Turner, would fly from Michigan to Florida to attend the inspection. In addition, Wittlinger asked Schwartz to provide, in Florida, a draft response to Defendants' First Set of Interrogatories. Schwartz agreed to this request.

With the dates and times confirmed, Plaintiffs' counsel made the necessary arrangements to inspect the documents. Specifically, Schwartz along with Michigan trial attorneys Gerald Wigod ("Wigod"), Lawrence Falzon ("Falzon"), and Deborah Fordee ("Fordee") cleared their calendars from Friday, January 30, 2004, through Sunday, February 1, 2004, purchased airfare from Michigan to Florida, reserved rental cars, secured lodgings, and hired a Florida copy company located near Defendants' offices. (Pls.' Br. Sanctions Ex. H, I)

On Friday, January 30, 2004, the four attorneys arrived in Florida at 12:45 p.m, and arrived at Defendants' offices at 2:00 p.m., along with two representatives from the copy company. At 2:15 p.m., Wittlinger escorted the attorneys into a conference room. After asking for and writing down each of the attorney's names, Wittlinger asked for Plaintiffs' draft answers to Defendants' First Set of Interrogatories, with which Plaintiffs' counsel provided him. (Pls.' Br. Sanctions, Ex. G). Explaining that he needed to show the draft to Defendants, Wittlinger left the conference room, and did not return until 3:35 p.m. or approximately eighty minutes later even though Plaintiffs' draft response contains only 10 questions and answers. Returning to the conference room with Defendants Hoffler and Parenti, Wittlinger apologized for the delay, explaining that he and Defendants had been "cogitating on the draft answers to interrogatories for awhile." He then stated that he and Defendants believed that Plaintiffs' draft answers to Defendants' interrogatories were done in bad faith, underscoring that interrogatory 2(h) was taken verbatim from Federal Rule of Civil Procedure 11. Wittlinger then advised Plaintiffs that Defendants were not going to permit Plaintiffs to conduct the document-inspection because Plaintiffs' complaint and their draft answers to Defendants' interrogatories violated Federal Rule of Civil Procedure 11.

In response, Jay Schwartz requested that the document-inspection proceed for the following reasons: 1) Plaintiffs' draft answers were 100% accurate; 2) if Defendants had any issues with the draft answers, their remedy was to file a motion with the Court, not to bar otherwise-permissible discovery; 3) a party's alleged failure to respond to interrogatories does not discharge the other party's duty to comply with the Federal Rules of Civil Procedure; 4) Federal Rule of Civil Procedure 11(b) does not apply to discovery responses; and 5) Plaintiffs'

counsel had gone to great lengths and significant expense to come to Florida on this pre-arranged date and time to inspect the documents. Wittlinger refused Schwartz' request to proceed with the document-inspection.

Upon being asked by Falzon, Wittlinger acknowledged that he was representing Defendants and that Defendants were Plaintiffs' former attorneys in the underlying action from which the current lawsuit arises. Falzon then advised Wittlinger that, as Plaintiffs' current attorney, he wanted to inspect their files that Defendants had in their possession, per Plaintiffs' Rule-34(b) request. Wittlinger first replied that he recalled a recent Michigan Court of Appeals' decision holding that clients' files are the property of the law firm. Falzon emphasized that he simply wished to inspect Plaintiffs' files, not take possession of them. Wittlinger then stated that each Plaintiff, upon signing a waiver, could come to Florida to inspect her individual file, but that Plaintiffs' counsel was not entitled to inspect those files. Upon Falzon's protests that such actions violated Michigan law and the Michigan Rules of Professional Conduct, Defendant Hofferl intervened, calling the meeting to an end and instructing Plaintiffs' counsel to leave the office immediately. Plaintiffs' counsel did so without inspecting a single document.

II. ANALYSIS

A. Plaintiffs' Motion for Sanctions

Plaintiffs' motion for sanctions against Defendants raises the issue of whether Defendants willfully violated Federal Rule of Civil Procedure 34 such as to warrant sanctions against them under Federal Rule of Civil Procedure 37. Plaintiffs contend that Defendants violated Rule 34(b) by failing to file a written response to Plaintiffs' Rule-34(b) request and by refusing to produce such documents after verbally agreeing to make them available.

Federal Rule of Civil Procedure 34(b) states, in relevant part:

The party upon whom the request is served shall serve a written response within 30 days of the service of the request. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response shall state, with respect to each item or category [of items to be inspected], that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for the objection shall be stated The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Rather than filing a written response to Plaintiffs' Rule-34(b) request, which Plaintiffs served on November 26, 2003, Defendants' counsel, on December 2, 2003, verbally agreed to make the requested documents available for inspection, and subsequently agreed to Plaintiffs' inspection of those documents at Defendants' offices in Florida on January 30th and 31st of 2004. However, when Plaintiffs' counsel arrived at Defendants' offices on the agreed-upon date and at the agreed-upon time, Defendants refused to make the requested documents available for inspection.

Plaintiffs' motion for sanctions, filed on February 17, 2004, seeks, among other things, an order compelling Defendants to file immediately a written response to Plaintiffs' Rule-34(b) request and to produce and to make available for Plaintiffs' inspection and/or copying the requested documents at the Detroit, Michigan, office of Defendants' counsel at their own cost. However, subsequent to that motion, Defendants filed a written response to Plaintiffs' Rule-34(b) request on March 16, 2004, and also made available for inspection, on April 20, 2004, the documents subject to Plaintiffs' Rule-34(b) request at defense counsels' Detroit office at their own cost. (See Defs.' Resp., Ex. 1) Thus, Plaintiffs' motion, to the extent that it seeks to compel Defendants' compliance with the above requests, is, indeed, moot.

However, Plaintiffs' sanctions-motion seeks additional relief. It seeks Defendants' reimbursement to Plaintiffs of the costs and fees that Plaintiffs' counsel incurred in traveling to Defendants' offices in Florida in January of 2004 to inspect Plaintiffs' Rule-34(b) documents due to Defendants' failure to disclose such documents at that time. (Pls. Br. Sanctions, Ex. H, I) Plaintiffs' sanctions-motion also seeks Defendants' reimbursement to Plaintiffs of the reasonable expenses and attorneys' fees that Plaintiffs incurred in filing and arguing their present motion. Lastly, it seeks an entry of default against Defendants due to their egregious conduct.

Where a party, "without substantial justification[,] fails to disclose information required by Rule 26(a) or 26(e)(1),"⁴ Federal Rule of Civil Procedure 37(c)(1) provides:

[T]he court, on motion and after affording an opportunity to be heard, may impose . . . appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the following authorized under Rule 37(b)(2)(A), (B), (C)

Rule 37(b)(2)(C) provides, among other things, for an order "dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party."

Defendants, in essence, contend that their non-disclosure or production of Plaintiffs' Rule-34(b) documents in Florida was substantially justified based upon Plaintiffs' response to a discovery request by Defendants, specifically, Defendants' First Interrogatories ("Defendants' interrogatories"), which Defendants served upon Plaintiffs on November 18, 2003. In particular, Defendants assert that they were justified in refusing to permit Plaintiffs to inspect their Rule-34(b) documents in Florida on the following two distinct grounds: 1) the parties previously agreed that such inspection would be contingent upon Defendants' receipt of Plaintiffs' accurate

⁴Rule 26(a)(5) provides for the "production of documents . . . or permission to enter upon land or other property under Rule 34 . . . for inspection and other purposes."

and complete “draft”⁵ answers to Defendants’ interrogatories, answers which were due on December 18, 2003, and, yet, such answers were neither complete nor accurate such that they violated that agreement; and 2) Plaintiffs’ “draft” answers reflect that Plaintiffs violated Federal Rule of Civil Procedure 11(b) when they filed their second-amended complaint.⁶

Defendants’ interrogatories sought from Plaintiffs the identification of Company A and Company B, of all persons related to the payment and receipt of the \$51.5 million, of all persons having knowledge of the \$51.5 million payment, and of all documents relating to and/or referencing the \$51.5 million payment. (Defs. Br. Sanctions, Ex. 2) They also sought from Plaintiffs an answer about whether Plaintiffs would produce copies of any documents relating to and/or referencing the \$51.5 million payment, and summaries of the purpose of the \$51.5 million payment and all steps that Plaintiffs or their counsel took before filing Plaintiffs’ Second-Amended Complaint “to establish reasonable facts supporting the[ir] allegations relating to the payment of the \$51.5 million.” (*Id.*) Thus, the thrust of those interrogatories was to seek the evidentiary basis underlying Plaintiffs’ factual allegation in their second-amended complaint that Defendants and Company A and/or Company B, without Plaintiffs’ knowledge, entered into an agreement whereby Defendants, and Defendants alone, received \$51.5 million in exchange for

⁵Given the confidentiality order in the underlying matter and, consequently, the need, for purposes of proceeding in the current litigation, for a protective order, which had not yet issued, Defendants contend that the parties agreed that Plaintiffs would provide “draft” answers to Defendants’ interrogatories or answers that would be unsigned and unverified pending entry of the protective order, but that would, otherwise, be accurate and complete. (Defs. Mem. Sanctions at 2 n.5).

⁶Contrary to Plaintiffs’ characterization, Defendants’ contention, as least for purposes of their response to Plaintiffs’ motion, is that the filing of Plaintiffs’ complaint violated Rule 11(b)(3), as evidenced by their interrogatory answers, rather than that those answers themselves violated Rule 11(b)(3).

Plaintiffs permanently dropping their claims against Company A and Company B and for Defendants agreeing never again to pursue any litigation against such companies. (2nd Am. Compl. ¶¶ 57, 58, 61) In other words, Defendants' interrogatories were to ensure that Plaintiffs complied with Rule 11(b)(3) when they filed their second-amended complaint.⁷

In their "draft" answers, Plaintiffs stated that they did not know the identities of any individuals related to the payment and/or receipt of the \$51.5 million or the date or form of the \$51.5 million payment. However, they identified Defendants, Curtis and Yvonne Rundell, Deborah Nolan, and Jane Does #2 and #3 as currently having knowledge about the \$51.5 million payment. (Pls.' Ex. G) As to the identity of all documents relating to or referencing the \$51.5 million payment and as to whether Plaintiffs would produce them without a formal request, Plaintiffs answered that they would produce those documents upon the entry of the protective order. (*Id.*)

As noted above, Defendants' first purported justification for their refusal to permit Plaintiffs to inspect their Rule-34(b) documents in Florida is that Plaintiffs' "draft" answers to Defendants' interrogatories breached the parties' prior agreement that such answers be accurate and complete so as to entitle Plaintiffs to such document-inspection. Where a party upon whom an interrogatory was served pursuant to Federal Rule of Civil Procedure 33 objects to or fails to

⁷Federal Rule of Civil Procedure 11(b)(3) provides, in part:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . [that] the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

answer such interrogatory, Rule 33 provides that the submitting party's remedy is to move for a court order. Moreover, Rule 37, which governs the failure to disclose discovery or to cooperate in it, affords a party the right to apply for an order compelling such disclosure or discovery. Defendants can cite no Federal Rule of Civil Procedure that supports their contention that they had the unilateral right to deprive Plaintiffs of discovery to which Rule 34 otherwise entitled them on the ground that Defendants subjectively believed that Plaintiffs had improperly responded to Defendants' request for discovery.⁸ Consequently, Defendants allege that the parties agreed that Plaintiffs' inspection of the Rule-34(b) documents would be contingent upon their submission of adequate "draft" answers to Defendants' interrogatories, and, thus, that the parties contracted around the Federal Rules of Civil Procedure. Even assuming that Plaintiffs had, in fact, entered into an agreement whereby they, for no apparent consideration, consented to condition their right to inspect the documents that Rule 34(b) would have otherwise freely entitled them to inspect--the existence of which agreement Plaintiffs persuasively deny and which strains credulity--Plaintiffs' "draft" answers to Defendants' interrogatories were neither materially inaccurate nor incomplete so as to breach that agreement.

Defendants present several arguments in support of their contention that Plaintiffs' "draft" answers to Defendants' interrogatories were neither accurate nor complete. First,

⁸Indeed, Plaintiffs contend that Rule 26(d) makes clear that a party must, nevertheless, comply with discovery regardless of whether the opposing party has sufficiently responded to his or her discovery requests. Federal Rule of Civil Procedure 26(d) provides:

Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay any other party's discovery.

Defendants contend that, while an answer states that Defendants, Curtis Rundell, Yvonne Rundell, Deborah Nolan, and Jane Does are the witnesses having knowledge of the \$51.5 million payment, Defendants, Deborah Nolan, and Curtis Rundell deny any such knowledge. (Pls.' Br. Sanctions, Ex. G). Yet, Defendants cannot rely upon evidence contradicting Plaintiffs' answer to establish that the answer is "inaccurate"; rather, any such contrary evidence simply shows the existence of genuine issues of material fact that further litigation should resolve.

Second, Defendants contend that, although Jane Does #2 and #3, whom the answer states have knowledge of the \$51.5 million payment, are Plaintiffs, Plaintiffs answered "unknown" as to Defendants' interrogatories seeking the identities of all persons related to the payment and/or the receipt of the \$51.5 million payment and seeking the date and form of that payment. (Pls.' Br. Sanctions, Ex. G) Yet, it is possible that Jane Does have knowledge of the \$51.5 million payment without knowing the date or form of that payment. Defendants have presented no evidence to demonstrate otherwise. To the extent that Defendants imply that Plaintiffs failed to identify the Jane Does as being "related to" the payment and/or receipt of the \$51.5 million payment, one could reasonably interpret "related to" as meaning having participated in or been involved in that payment and receipt, thereby excluding Jane Does by virtue of their mere knowledge of that payment. Given that Plaintiffs' very complaint alleges that Defendants received that payment from either Company A and/or Company B, one could reasonably construe Defendants' interrogatory to be directed at learning of the particular individuals alleged to have been involved in the payment or receipt of the \$51.5 million beyond Defendants and Company A

and/or Company B in general.⁹ There is no evidence demonstrating that Jane Does had such information. Moreover, to the extent that Plaintiffs failed to repeat, in their answer, that Company A and/or Company B and Defendants were related to the payment and receipt, respectively, of the \$51.5 million, any such failure was harmless. Defendants had more than sufficient notice of such an allegation. Indeed, another “draft” answer lists Defendants as having knowledge of the \$51.5 million payment. (*Id.*)

Third, as to their contention that Plaintiffs’ “draft” answers were incomplete, Defendants maintain that, at the time of their “draft” answers, on January 30, 2004, Plaintiffs knew of substantial evidence supporting their case, as their brief in response to Defendants’ motion for sanctions evidences, and, yet, Plaintiffs did not identify this evidence in those answers. For example, Defendants point out that Plaintiff Christie Trombley, as her affidavit dated February 29, 2004, indicates, alleges that Debra Nolan, her attorney in the underlying lawsuit, stated that Trombley knew that Defendants had received \$51 million, and argue that Plaintiffs should have supplied this information in their “draft” answers. (Defs.’ Supplemental Authority, Ex. 1) Yet, Plaintiffs did identify Debra Nolan as having knowledge of the \$51 million payment; Defendants simply asked for the identification of any such individual, not a summary of the basis of the Plaintiffs’ knowledge as to that individual’s knowledge.

Fourth, Defendants contend that, although Plaintiffs answered “unknown” to Defendants interrogatory seeking a summary of the purpose of the \$51.5 million payment, Patricia Harsen alleges, as her affidavit dated February 17, 2004, indicates, that, in September of 2002, Mr.

⁹Indeed, the interrogatories seek the identity of all “persons” related to the payment and receipt of the \$51.5 million such that the term person would reasonably exclude Company A, Company B, or the Gary Firm. (Defs. Br. Sanctions, Ex. 2)

Rundell told Harsen that “the \$51.5 million was money Willie [Gary] was to receive from . . . [Company B] for programs.” (*Id.*) However, Defendants’ interrogatory did not ask for a summary of any information that Plaintiffs had regarding such purpose, but rather a summary of that purpose according to Plaintiffs. Understandably, Plaintiffs opted not to ratify or to adopt as their own opinion Rundell’s potentially-spurious explanation for why Gary had received the payment. Indeed, the thrust of Plaintiffs’ complaint is that Defendants accepted that payment in exchange for insisting that Plaintiffs drop their claims against Company A and Company B and for agreeing never to represent another such plaintiff against Company A and Company B. (2nd Am. Compl. ¶¶ 57-61).

As to their second purported justification for refusing to permit Plaintiffs to inspect their Rule-34(b) documents in Florida, Defendants contend that Plaintiffs’ “draft” answers reflect that Plaintiffs violated Rule 11(b)(3) when they filed their second-amended complaint, and that, consequently, Defendants were justified in refusing to permit Plaintiffs to proceed with their Rule-34(b) document-inspection. However, because Plaintiffs did not violate Rule 11(b)(3) in filing that complaint, for the reasons addressed below regarding Defendants’ distinct motion for sanctions, Defendants’ contention must fail, even assuming that they would have had the right to refuse such inspection due to Plaintiffs’ alleged Rule 11 violation in the first instance.

As perhaps a third proffered justification for their actions, Defendants contend that Attorney Falzon, Plaintiffs’ counsel, “changed the purpose of the meeting in Florida by making a demand to review copies of Plaintiffs['] files.” (Defs.’ Resp. at 5). According to Defendants, because Plaintiffs’ original request for document-production was broader than just those files, Defendants would have had to do “additional reorganization and screening” such that they were

unable immediately to accede to Falzon's request. (*Id.*) Given that Plaintiffs' Rule-34(b) request seeks, among other documents, Plaintiffs' client-files from Defendants and that the meeting was to inspect all such requested documents, Plaintiffs did not "change" the purpose of that meeting by expressly insisting on inspecting, in particular, a portion of all of the requested documents. To the extent that Defendants contend that Plaintiffs, at the Florida inspection meeting, changed their minds and wished to inspect only those documents rather than all of the requested documents, such an argument is groundless. In any event, given that Defendants were not justified in denying Plaintiffs' entire request for documents, Defendants' claim that it was justified in denying a portion of that request likewise fails.

In sum, because Defendants have not presented any substantial justification for their failure to disclose Plaintiffs' Rule-34(b) documents to Plaintiffs' counsel during their agreed-upon trip to Florida in January of 2004, the Court, therefore, orders Defendants to reimburse Plaintiffs for the costs and attorneys' fees incurred in the making of that trip, and to reimburse Plaintiffs for the costs and attorney's fees in drafting and arguing their present motion for sanctions. As to the latter reimbursement, Plaintiffs' Bill of Particulars demonstrates that Schwartz, Plaintiffs' counsel, expended 10.7 hours in preparing and arguing Plaintiffs' sanctions-motion. At a reasonable rate of \$250 per hour, (*see* Pls. Br. Sanctions, Ex. L), Schwartz' attorney fees equal \$2,675. The Court, therefore, orders that Defendants reimburse Plaintiffs the \$2,675 that Plaintiffs incurred in the preparation and argument of their present motion.

As to the former reimbursement, Defendants contend that the \$23,320.16 total that Plaintiffs seek for such costs and expenses is high given that counsel stayed at a condominium that one of the attorney's owned and, thus, did not incur any hotel costs. However, the Court

notes that the total figure submitted by Plaintiffs does *not* include any such lodging costs.

Defendants further assert that, while four of Plaintiffs' counsel appeared for the document-inspection in Florida, only two such attorneys appeared for the document inspection in Michigan, which they completed in one day on April 20, 2004. Thus, Defendants seemingly contend that they should be responsible for only two of the attorneys' Florida-related costs and expenses. Plaintiffs assert, however, that, on December 2, 2003, Defendants' counsel indicated to Plaintiffs' counsel that Plaintiffs' requested documents comprised approximately fifty boxes. Yet, on February 16, 2004, before the second inspection attempt, this time in Detroit, an e-mail from Wittlinger to Schwartz and Falzon "clarif[ied]" that now there were only "16 banker boxes of documents, 12 of . . . [which were] copies of the files [that Plaintiffs' counsel had] . . . already seen at Rundell's office," and that the "other 4 . . . [were] Gary, Williams, Parenti files." (Def's. Resp. Ex. 1) Thus, this "clarification" from Defendants as to the size and nature of the requested documents explains Plaintiffs' adjustment of their staffing required to carry out their second inspection attempt.

The Court does take issue with some of the hourly rates that Plaintiff used in calculating the attorneys' fees incurred in traveling to Florida. Plaintiffs calculated those fees by multiplying each of the four attorney's respective, purportedly-reasonable hourly rates by sixteen hours, representing each attorney's lost time for eight-hours days on January 30th and 31st of 2004. Plaintiffs attributed to Attorneys Wigod, Falzon, Schwartz, and Fordree hourly rates in the amount of \$500, \$400, \$250, and \$200, respectively. (Ex. J-M). However, the Court finds that the reasonable hourly rate for both Attorneys Wigod and Falzon is \$250, the reasonable rate for Attorney Schwartz. Accordingly, the Court orders Defendants to reimburse Plaintiffs for the

reasonable costs and attorneys' fees unnecessarily incurred in the trip to Florida, which total \$16,920.16 based upon \$1,593.60 in air fare, \$126.56 for rental cars, and \$15,200, rather than \$21,600, in reasonable attorneys' fees.

Plaintiffs' sanctions-motion also requests that the Court sanction Defendants for their egregious conduct by entering a default judgment against them. As Plaintiffs point out, Defendants engaged in the following reprehensible conduct. They initially played games for two months regarding available dates for Plaintiffs' document-inspection, claiming that no one was available for the inspection despite Defendants' firm employing 130 individuals and Defendants having employed an 100-attorney law firm. As Defendants cursorily concede, "[s]ome difficulty was encountered in scheduling a date for th[e] production" of Plaintiffs' Rule-34(b) documents. After finally agreeing upon a date, time, and location such that four of Plaintiffs' counsel cleared their calendars for two days and traveled to Florida, Defendants arbitrarily and unilaterally refused to make any documents available for Plaintiffs' inspection. They "cogitated" about their decision to violate Rules 34 and 37 for over an hour and, yet, could only justify such violations by alleging Plaintiffs' violations of Rule 11(b)(3), allegations which are groundless. While the Court agrees that Defendants' conduct was, indeed, egregious, it, nevertheless, finds, in its discretion, that such conduct was not so egregious as to warrant an entry of default judgment against them, and, thus, DENIES Plaintiffs' motion for sanctions to the extent that it requests that the Court do so. The Court does, however, serve notice that it will be scrutinizing all future conduct to assure that the parties follow the court rules and the civility principles adopted by this Court.

B. Defendants' Motion for Sanctions

Defendants' motion for sanctions surrounds the issue of whether Plaintiffs' counsel, before filing their second-amended complaint against Defendants, failed reasonably to inquire into the evidentiary basis of one of the factual allegations underlying Plaintiffs' claims so as to violate Federal Rule of Civil Procedure 11(b)(3) and to warrant the Court sanctioning Plaintiffs' counsel, along with Plaintiffs themselves, pursuant to Rule 11(c).¹⁰ As to their particular requests for sanctions, Defendant ask that the Court: 1) strike Plaintiffs' complaint with prejudice; and 2) award Defendants monetary sanctions for the attorneys fees incurred in answering Plaintiffs' complaint, in preparing and serving initial discovery materials, in preparing for a pre-trial conference pursuant to Rule 16(a), in preparing and serving the instant motion for Rule 11 sanctions, and, if necessary, for preparing and serving a motion for summary judgment

¹⁰To the extent that Defendants also argue that Plaintiffs' "draft" answers to Defendants' interrogatories violate Rule 11(b), such an argument fails as Rule 11(d) provides that the "[s]ubdivisions (a) through (c) of . . . [Rule 11] do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37." As plaintiffs aptly observe, if Defendants truly have concerns with such answers, Defendants' remedy was to file a motion to compel proper responses or to depose the Plaintiffs whom the answers identified as having knowledge of the \$51.5 million payment; however, Defendants never availed or attempted to avail themselves of these remedies. (Pls.' Resp. at 1)

In addition, Defendants also contend that Plaintiffs' motion seeking costs and fees in their "abortive attempt to inspect" their Rule-34(b) documents in Florida violates Rule 11(b). Defendants assert that Plaintiffs, as former clients of Defendants, were entitled, under Michigan's ethics rules, to inspect their client-files in Defendants' possession, and that their new attorneys also had that right of inspection upon their execution of a waiver, pursuant to the Settlement Agreements. According to Defendants, rather than exercising that right before the institution of this litigation, Plaintiffs filed suit against Defendants and requested their files through their Rule-34(b) request for document-production. Defendants also assert that, although the requested documents consisted of 16 banker boxes, 12 of which Plaintiffs and their counsel had already inspected at Rundell's offices, Plaintiffs expended \$23,360 in costs in their "abortive attempt to inspect" them pursuant to Rule 34. (Defs. Mem. Sanctions at 8). However, after finding that Plaintiffs' claim for such relief, per their motion for sanctions, is meritorious under Rule 37, as discussed above, the Court, likewise, finds that Defendants' contention that this motion violates Rule 11(b) is groundless.

based upon the undisputed fact that Defendants never received \$51.5 million from Company A for any purpose.

Federal Rule of Civil Procedure 11(b)(3) provides, in part:

By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney . . . is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances . . . [that] the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.

Moreover, Rule 11 imposes sanctions upon an attorney where "a reasonable inquiry would have disclosed that the pleading, motion, or other paper was not well-grounded in fact." *Mann v. G & G Mfg., Inc.*, 900 F.2d 953 (6th Cir. 1990). The test for the imposition of Rule 11 sanctions in the Sixth Circuit is whether the individual's conduct was reasonable under the circumstances. *Century Prods. Inc. v. Sutter*, 837 F.2d 247, 253 (6th Cir. 1988). In making this determination, a court should "avoid using the wisdom of hindsight and should test the signor's conduct by inquiring what was [objectively] reasonable to believe at the time [that] the pleading, motion, or other paper was submitted" under all of the circumstances. *Id.* at 251 (internal quotations marks omitted). A showing of good faith does not necessarily satisfy this objective standard of reasonableness. *Mann*, 900 F.2d at 958. As the Sixth Circuit has recognized,

What constitutes a reasonable inquiry may depend upon such factors as the time available to the signor for investigation; whether the signor had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether the signor depended on forwarding counsel or another member of the bar.

Century Prods., 837 F.2d at 250-51.

Defendants contend that Plaintiffs violated Rule 11(b)(3) by presenting in their second-amended complaint, without any evidentiary support, their factual allegation that Defendants and Company A and/or Company B, without Plaintiffs' knowledge, entered into an agreement whereby Defendants, and Defendants alone, received \$51.5 million in exchange for Plaintiffs permanently dropping their claims against Company A and Company B and for Defendants agreeing never again to pursue any litigation against such companies ("the secret-agreement allegation"). (2nd Am. Compl. ¶¶ 57, 58, 61) According to Defendants, a reasonable inquiry at the time that Plaintiffs filed their second-amended complaint, filed on November 5, 2003, would have demonstrated that this secret-agreement allegation lacks the requisite evidentiary basis. Defendants also claim that Plaintiffs attempted to comply with Rule 11(b)(3) and to provide the necessary evidentiary support through extensive discovery.

Defendants raise varied arguments in support of their claim. First, Defendants point out that Plaintiffs objected on the ground of "attorney/client privilege" to Defendants' interrogatory seeking a summary of all steps that Plaintiffs or their counsel took, before filing Plaintiffs' complaint, to establish reasonable facts supporting the secret-agreement allegation. However, asserting a reasonable objection to an interrogatory on the ground that it requests privileged information is not an admission that no such information exists or that Plaintiffs or their counsel made no such reasonable inquiry. Second, Defendants assert that Plaintiffs' "draft" responses to Defendants' interrogatories reflect the lack of evidence underlying the secret-agreement allegation in Plaintiffs' complaint. Specifically, Defendants note that, while one of Plaintiffs' answers states that Plaintiffs Jane Does have knowledge of the \$51.5 million payment, their other answers state "unknown" as to Defendants' interrogatories seeking the identities of all persons

related to the payment and/or the receipt of the \$51.5 million and seeking the date and form of that payment. However, as discussed previously, it is possible for Plaintiffs to have known, in general terms, of the \$51.5 million payment from Company A and/or Company B to Defendants without knowing the form or date of that payment or the specific individuals related to the actual making or receiving of such payment.

Third, Defendants maintain that Plaintiffs' secret-agreement allegation is "illogical" and "border[s] on the absurd" because "Defendants would have had no useful purpose in documenting any such sum received from Company A and/or Company B if it was in fact a bribe to Defendants." (Defs. Mem. Sanctions at 8). Yet, this argument does not reveal a lack of supporting evidence but, rather, simply impugns the plausibility or credibility of that evidence. On a related note, Defendants point out that, in their formal answers to Defendants' interrogatories, which have now been filed, 36 Plaintiffs state that they have no knowledge of any \$51.5 million payment to Defendants while two of the Plaintiffs, Patricia Harsen and Kristie Trombley, state that they obtained such knowledge from Curtis Rundell, Yvonne Rundell, and Debra Nolan.¹¹ (Defs.' Supplemental Authority, Ex. 1) As Defendants note, however, in their

¹¹Specifically, in Harsen's answer, she states that she was only told that Company B was related to the payment of the \$51.5 million and that Defendants were related to the receipt of that payment--i.e. that Company B paid Defendants \$51.5 million--and states that Defendants, Curtis Rundell, Yvonne Rundell, Debra Nolan, Kristie Trombley, herself, and her husband have knowledge of that \$51.5 million payment. (Defs.' Supplemental Authority, Ex. 1) Harsen also states that all documents relating to or referencing the \$51.5 million payment will be made available, perhaps suggesting that such documents exist. (*Id.*) In Trombley's answer, she too states that she was only told that Company B was related to the payment of the \$51.5 million and that Defendants were related to the receipt of that payment--i.e. that Company B paid Defendants \$51.5 million--, and that Defendants, Debra Nolan, Patricia Harsen, and herself have knowledge of that payment. (*Id.*) Unlike Harsen, Trombley states that she is not in possession of any documents referencing the \$51.5 million payment. (*Id.*)

answers to Defendants' Deposition Upon Written Question, Curtis Rundell, Yvonne Rundell, and Debra Nolan deny any knowledge of the secret-agreement allegation. (*Id.*, Ex. 2) Yet, Defendants' presentation of evidence that contradicts Plaintiffs' proffered evidence underlying their complaint's secret-agreement allegation does not establish that such allegation lacks any basis in fact, but, rather, simply demonstrates the existence of genuine issues of material fact regarding that allegation that further litigation must resolve. *See Smith v. Our Lady of the Lake Hosp., Inc.*, 960 F.2d 439, 446 (5th Cir. 1992).

In response, Plaintiffs contend that they did not violate Rule 11(b)(3) when they filed their second-amended complaint containing the secret-agreement allegation for several reasons. First, Plaintiffs contend that, at the time that they filed that complaint on November 5, 2003, they possessed sufficient evidence to support their secret-agreement allegation.¹²

¹²Plaintiffs also make the following factual allegations in their response, without expressly stating when they learned of the evidence giving rise to such allegations:

- 1) While Rundell & Nolan, P.C. hired the Gary firm as co-counsel in the underlying cases of Plaintiffs Taylor, Trombley, Harsen, and Battaglia, these Plaintiffs were never informed of the agreement that Rundell and Nolan and the Gary firm reached regarding their division of attorney fees (Pls.' Resp. at 2);
- 2) Defendants Gary, Hoffer, and Sekou Gary of the Gary firm practiced law in Michigan for 7 months without being licensed to do so and without obtaining *pro hac vice* admittance because they intended to launch a scheme to settle the claims pre-trial (*Id.* at 3);
- 3) Defendants schemed to pressure Company A and Company B to settle quickly by increasing their potential exposure through the addition of many more plaintiffs, threats of negative media exposure, and the inclusion of allegations of race discrimination (*Id.*);
- 4) Defendants minimally communicated with Plaintiffs between the time that Plaintiffs hired Rundell & Nolan in the Spring of 2002 and August 2002 when the settlement was announced (*Id.* at 4);
- 5) The Gary firm sent a demand letter for \$86 million on Plaintiffs' behalf to Company A and Company B (*Id.* at 5);
- 6) Defendants canceled a scheduled press conference in Detroit, Michigan, on May 15, 2002, upon signing, on that same day, a confidentiality agreement with Company A (*Id.* at 4n.4);

- 7) While the initial confidentiality agreement provided, among other things, that the Gary firm would not solicit or accept any new clients who were employees of Company A or Company B for the purpose of pursuing good-faith negotiations and settlement with Company A for the specified period, and that Company A would offer a certain amount of money towards global settlement of all claims that the Gary firm threatened, a second executed confidentiality agreement extended the time frame for negotiations and increased the monetary offer (*Id.*);
- 8) On June 13, 2002, Rundell & Nolan sent to Plaintiffs a mass mailing that mentioned the executed confidentiality agreement for the purpose of pursuing settlement discussions, that referenced the inability of Plaintiffs' counsel to meet with or accept any new clients regarding Plaintiffs' claims, but that failed to disclose Company A's global settlement offer (*Id.* at 5; Ex. 11);
- 9) Again on July 17, 2002, Rundell & Nolan sent to all Plaintiffs a second mass mailing that discussed the settlement negotiations, but that, once again, failed to disclose Company A's global settlement offer (*Id.* at 5; Ex. 1);
- 10) The Gary firm settled Plaintiffs' claims on July 26, 2004, and signed an agreement memorializing that settlement on July 31, 2004 (*Id.* at 5n.10);
- 11) In August of 2002, Plaintiffs' counsel summoned each of the Plaintiffs to Rundell & Nolan's office for an urgent meeting, each of which was scheduled in a short interval. (*Id.* at 6) During those meetings, at least one meeting of which each Defendant participated in, each Plaintiff learned of only the amount of money that she would receive from the settlement individually, but none learned of the total or collective amount of the settlements to all Plaintiffs. (*Id.*) Defendants informed Plaintiffs that Defendants could not reveal the percentages that their individual awards comprised in relation to the total settlement or what other Plaintiffs were individually offered (*Id.*);
- 12) Plaintiffs were cajoled into accepting their offers through a variety of comments, such as: A) the deal is contingent upon everyone accepting and, if Plaintiff did not accept, no Plaintiff would receive any money; B) the offer is more than any Plaintiff has ever received for that type of claim; C) If Plaintiff does not accept, Plaintiff's counsel will withdraw from further representation such that Plaintiff would have to retain another lawyer; D) If Plaintiff chooses to retain other counsel, Plaintiff must pay Plaintiff's counsel for the work already performed such that, by the time that new counsel is paid for his or her work, no settlement money would remain; E) Plaintiff does not have a good case and would likely lose at trial; F) Every other Plaintiff is happy with her offer such that Plaintiff should be too; G) Because of the statute of limitations, this offer is the most that Plaintiff can receive; and H) This offer is the most that Plaintiff will ever receive such that she should "take it or leave it" (*Id.*);
- 13) The following week, Defendants instructed each Plaintiff to return to Rundell & Nolan's office to sign a forty-page Settlement Agreement with Company A. (*Id.* at 6-7) During these "signing" meetings, which lasted approximately fifteen minutes, Defendants never reviewed the agreements with any Plaintiff, Defendants prohibited Plaintiffs from leaving the office with the agreements or from seeking independent counsel's advice (*Id.*);

Plaintiffs present the following evidence in support. In September of 2002, Plaintiff Harsen discovered a two-page spreadsheet entitled “[Company A] Discrimination Settlement—42 Claimants using \$10,000,000.00,” which was dated August 1, 2002, in a box of personal documents that she had reclaimed from Rundell & Nolan. (Pls.’ Resp., Exs. K & L). The spreadsheet, prepared by Sofia McGuire, an outside consultant that Defendants retained and that signed each Plaintiff’s settlement agreement, indicates that its figures are “based upon actual settlement.” (*Id.*, Ex. K) The spreadsheet indicates the following as the settlement’s “[t]otal [p]ackage [d]eal”: 1) a gross settlement to Plaintiffs in the amount of \$10 million; 2) that Defendants received \$3,309,771.55 as a 1/3rd contingency fee on that \$10 million such that the net settlement to Plaintiffs was \$6,619,543.11; 3) that Defendants received, as “legal fees,” an additional \$6 million for “programs”; 4) an expenditure of \$51.5 million for “[p]rogrammatic [r]elief”; and 5) a grand total of \$67,684,478.45. (*Id.*) Neither Defendants nor Plaintiffs’ settlement agreements advised Plaintiffs of the \$51.5 million payment to Defendants. (*See id.*, Ex. J) Moreover, upon inadvertently discovering the spreadsheet, Plaintiff Harsen immediately informed Curt Rundell, who stated that, if Company A, Company B, or Willie Gary knew that Harsen had “their case[-]closed files, with all that information, . . . [Harsen] could find [her]self in a body bag.” (*Id.*, Ex. L) After Harsen’s husband asked Rundell what the \$51.5 million was

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- 14) Upon signing the Settlement Agreements, Plaintiffs only knew of their individual settlement amounts; they did not know that Defendants had reached a \$16 million global settlement with Company A on July 31, 2004; that Defendants had taken \$6 million off the top of that settlement; that Defendants had then taken another \$3.3 million from the remaining \$10 million as their 1/3rd contingency fee before dividing the remainder among Plaintiffs; that Defendants decided amongst themselves how to divide the remainder between Plaintiffs; and that Defendants had received another \$51.5 million as part of that settlement package (*Id.* at 7).

for upon handing Rundell the spreadsheet the following day, Rundell replied that “the \$51.5 million was money Willie [Gary] was to receive from . . . [Company B] for programs.” (*Id.*) When questioned whether this was legal, Rundell stated that “Willie [Gary] is doing things that no other attorney has thought of doing and[,] believe me, he has himself covered.” (*Id.*)

In early 2003, after Plaintiff Trombley had accepted her settlement, she sought help from Debra Nolan, who had worked on Plaintiff’s case through Rundell & Nolan before joining the Gary firm, about Company B’s challenge to certain bills and claims of Trombley, such as an unpaid hospital bill. (*Id.*, Ex. M) When Nolan refused to assist Trombley on the ground that it would violate the settlement agreement, Trombley accused Nolan of simply taking \$6 million and running.¹³ (*Id.*) According to Trombley, Nolan replied that Trombley knows that it was not \$6 million that was received, but, rather, that it was \$51.5 million. (*Id.*)

Plaintiffs also contend that, before filing their second-amended complaint on November 5, 2003, Plaintiffs possessed additional evidence that corroborated Harsen’s and Trombley’s accounts of Rundell’s and Nolan’s knowledge of the \$51.5 million payment to Defendants. Much of this evidence, which follows, raised suspicions in Plaintiffs’ minds as to the nature and execution of the settlement agreement. Defendants structured the settlement so that Company A and/or Company B transferred the \$16 million directly to them so that Defendants could determine, withhold, and submit each Plaintiff’s tax obligations on her behalf, and then mail the individual net payment to each Plaintiff via a check drawn on Defendants’ account. (Pls.’ Resp., Ex. N) Plaintiffs contend that Defendants did this to prevent outsiders—and, in fact,

¹³The settlement agreements advised Plaintiffs that Company A was to pay Defendants \$6 million for their assistance in implementing throughout Company A programmatic relief designed to resolve Company A’s issues with workplace diversity. (*See* Pls.’ Resp., Ex. J at 11.)

Plaintiffs—from scrutinizing the settlement.

According to Plaintiffs, Defendants informed Plaintiffs that Company B had nothing to do with the settlement agreements. (Pls.' Resp. at 9.) Yet, almost all of the Plaintiffs were employees of Company B, received pay checks and W-2s from Company B, and all of Plaintiffs' claims were against Company B based upon their employment there. (*Id.*) Moreover, that Company B was not dismissed from Plaintiffs' pending lawsuits before the settlement suggests that Plaintiffs did, in fact, have viable claims against Company B. (*Id.* at 10.) In addition, Plaintiff Taylor's lawsuit against and only against Company B was on the eve of trial when she settled with *Company A* and dismissed her case with prejudice against Company B. (*Id.*) Furthermore, Plaintiffs' check stubs for their individual settlements that they received from Defendants indicate that they were drawn from the trust account of Company B, as a client. (*Id.*, Ex. N) Also, in the settlement agreement, Plaintiffs provide a broad release from liability to Company B, which is not a signatory to that agreement, suggesting that Company B must have given some consideration for this benefit. (*Id.* at 9.) Also in that settlement agreement, Defendants agreed not to sue Company B on behalf of any past, present, or future employee, this detriment to Defendants themselves suggesting that they received some consideration for incurring it. (*Id.* at 10.)

Second, Plaintiffs contend that they had made a reasonable inquiry into the evidence supporting their secret-agreement allegation in their second-amended complaint before filing that complaint such that they did not violate Rule 11(b)(3) in so filing it. (Pls.' Resp. at 10.) Plaintiffs' counsel had consulted with all 42 Plaintiffs, had obtained all relevant documents in their possession, and had obtained ethics experts to testify that Defendants' receipt of the \$6

million and their conduct during their representation of Plaintiffs breached their standard of care. (*Id.*) On February 7, 2003, Plaintiffs' counsel requested Defendants' client-file for Plaintiff Kubik. (*Id.*) Defendants failed to forward that file, however. (*Id.* at 10-11.)

Plaintiffs also assert that this inquiry into the evidence underlying their secret-agreement allegation was objectively reasonable under the circumstances given that much of that evidence was in Defendants' exclusive possession due to the very nature of those allegations—that Defendants had engaged in a conspiracy to defraud Plaintiffs and did so by miring in secrecy, confidentiality, and duress the settlement agreements by which they perpetrated that fraud. *See Smith*, 960 F.2d at 446-47. Per their forty-page settlement agreements, Plaintiffs could not reveal any of the details involved in the underlying matter without jeopardizing their settlements. (Pls.' Resp., Ex. J) Defendants made sure that Plaintiffs never saw the settlement draft that Company A and/or Company B paid Defendants by paying each Plaintiff their net recovery via a check drawn on Defendants' account. (*Id.*, Ex. N) Defendants also prevented Plaintiffs from engaging any outside counsel or accountants in the review of their settlements by, as to counsel, informing them that they could not do so and, as to accountants, by handling Plaintiffs' tax liabilities themselves to avoid the need for any such outside assistance. (*Id.* at 17.)

According to Plaintiffs, if, before filing their second-amended complaint, Plaintiffs did not conduct a thorough investigation into the evidence underlying the secret-agreement allegation, they failed to do so, if at all, precisely because Defendants intentionally schemed to stymie such an investigation. For example, while Plaintiffs' counsel requested Defendants' client-file for Plaintiff Kubik, whose maiden name was Curdie, on February 7, 2003, Defendants not only failed to forward that file, but did so intentionally to thwart Plaintiff's investigation of

the facts surrounding her settlement. (*Id.* at 11.) Evidencing this, an internal e-mail communication, dated February 19, 2003, between Defendant Hoffler and Maryann Diaz, provides, in part:

Diaz: [Y]ou forwarded a letter from an attorney, Jay Schwartz[,] requesting a copy of Ms. Curdie's file and said to take care of this if not already done.

Do you really want to forward a complete copy of her file to him including the settlement[?]

Hoffler: I have not spoken to him at all. I would suggest that you call him and sniff him out. [S]he may be trying to sue us. We can let him know that we do not have authorization to release the settlement statement and do not want to be in violation, etc. [T]he reality is that he can sign the confidentiality agreement and get around this but let him do the work to determine that. I spoke to Wendy [Curdie] a while ago about her matter and told her I'd review it and get back to her. I then received this note from her atty.

(*Id.*, Ex. O) Moreover, when Schwartz requested Plaintiff Kubik's file from Defendants, he received a "tongue-lash[ing]" for even knowing about the settlement on the ground that Kubik should not have told him anything about it. (*Id.* at 17)

For all of the compelling reasons that Plaintiffs have set forth, as recited above, the Court finds that Plaintiffs' counsel did not fail reasonably to inquire into the evidentiary basis of the secret-agreement allegation contained in Plaintiffs' second-amended complaint before filing that complaint. Accordingly, the Court finds that neither Plaintiffs nor their counsel violated Rule 11(b)(3) with the filing of Plaintiffs' second-amended complaint, and, thus, denies Defendants' motion for Rule 11 sanctions against Plaintiffs and their counsel.

III. SUMMARY

For the foregoing reasons, the Court:

- 1) GRANTS Plaintiffs' sanctions-motion to the extent that it seeks Defendants' reimbursement to Plaintiffs, pursuant to Federal Rule of Civil Procedure 37(c)(1), of the reasonable costs and attorneys' fees incurred in Plaintiffs' counsel's trip to Florida for document-inspection under Federal Rule of Civil Procedure 34(b), and, accordingly, ORDERS Defendants to reimburse Plaintiffs \$16,920.16, of which \$1,593.60 is for air fare, \$126.56 is for rental cars, and \$15,200 is for reasonable attorneys' fees;
- 2) GRANTS Plaintiffs' sanctions-motion to the extent that it seeks Defendants' reimbursement to Plaintiffs, pursuant to Federal Rule of Civil Procedure 37(c)(1), of the reasonable costs and attorney's fees incurred in preparing and arguing that motion, and, accordingly, ORDERS Defendants to reimburse Plaintiffs \$2,675;
- 3) DENIES Plaintiffs' sanctions-motion to the extent that it seeks an entry of default judgment against Defendants pursuant to Federal Rule of Civil Procedure 37(c)(1) and (b)(2)(C);
- 4) DENIES Plaintiffs' sanctions-motion to the extent that it seeks relief that is moot; and
- 5) DENIES in its entirety Defendants' sanctions-motion against Plaintiffs and their counsel under Federal Rule of Civil Procedure 11(c) for their alleged violation of Rule 11(b)(3).

SO ORDERED.



PAUL D. BORMAN

UNITED STATES DISTRICT JUDGE

Dated: NOV 3 2004

Detroit, Michigan