SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

A. ROBERT TANTLEFF, M.D. and
LENORE TANTLEFF,

Plaintiffs,

INDEX No. 15023/06

MOTION DATE: March 17, 2009
Motion Sequence # 003, 004

-against-

KESTENBAUM & MARK, RICHARD S.
KESTENBAUM and BERNARD S. MARK,

Defendants.

KESTENBAUM & MARK, RICHARD S.
KESTENBAUM and BERNARD S. MARK,

Third-Party Plaintiffs,

-against-

JAMES T. ASHE and MARCUM & KLIEGMAN, LLP,

Third-Party Defendants.

The following papers read on this motion:

Notice of Motion..... X
Notice of Cross-Motion..... X
Affirmation in Opposition..... XX
Reply Affirmation XX
Memorandum in Reply & Opposition..... X

This motion, by the defendants Kestenbaum & Mark, Richard S. Kestenbaum and Bernard S. Mark, for an order pursuant to CPLR 3124, 3126, compelling the plaintiffs to respond to stated discovery demands and/or for the imposition of sanctions, is **granted** to the extent indicated below; and a cross-motion, by the plaintiffs, A. Robert Tantleff, M.D., and Lenore Tantleff, for an order pursuant to CPLR 3103, sealing the record, is **denied**.

In July of 1997, the Internal Revenue Service ["IRS"] instituted a civil audit of certain tax returns filed by the plaintiffs, A. Robert Tantleff, M.D., Lenore Tantleff and nonparty A. Robert Tantleff, M.D.P.C.

According to the plaintiffs, the audits arose out of their relationship with one Franklin Boykoff, whom they had retained as their accountant and tax preparer. Boykoff was later the subject of a criminal tax investigation and was ultimately convicted in 2002 of tax fraud and related tax offenses (*see, **U.S. v. Boykoff***, 186 F.Supp.2d 347, *affd*, 67 Fed. Appx. 15, 2nd Cir. 2003).

The plaintiffs – who believed they were also the subject of a criminal investigation – later retained co-defendant Kestenbaum & Mark, Esqs., Bernard S. Mark and Richard S. Kestenbaum to represent them [collectively "Kestenbaum" or the "defendants"].

The plaintiffs further contend that Kestenbaum: (1) advised the plaintiffs to execute various consents to assessments for certain tax years – by which the plaintiffs claim they agreed to pay some $2.5 million in taxes, penalties and interest; (2) suggested that they were the subject of a criminal inquiry and that the civil audit could not be completed by the IRS while the alleged, criminal tax investigation was still pending; and further, allegedly told the plaintiffs that if they did not execute the proposed consents, the criminal inquiry would continue and might possibly be expanded to include Lenore Tantleff.

Approximately one year later, in October of 2002 – and again with Kestenbaum's advice – the plaintiffs attempted to negotiate a so-called "offer in compromise" ["OIC"] with the IRS – which in sum, is a "'vehicle by which the IRS agrees to a reduction in the amount of a taxpayer's liability * * * based either on doubt as to the liability, * * * collectability * * * or equitable consideration'" (Order of Bucaria, J., dated May 31, 2007 at 2-3[hereinafter "Order"]).

In September of 2003, and since their OIC offer was still outstanding, the plaintiffs retained their current counsel – Meltzer, Lippe, Goldstein & Breitstone ["Meltzer"] "to look at * * * [the] case," and in particular, to examine the OIC issue "'with fresh eyes * * *'" (Order at 3).

The Kestenbaum firm ultimately terminated its relationship with the plaintiffs at some point in late 2003 – although precisely why and when is disputed. Kestenbaum contends that, prior to his firm's withdrawal, the IRS sought additional information with respect to the plaintiffs' OIC request and that he communicated this request to the Tantleffs' accountant, third-party defendant James Ashe. According to Kestenbaum, Ashe supposedly informed him that the financial information previously submitted to the IRS was false and then allegedly asked Kestenbaum to assist in hiding additional assets from the IRS – a request which Kestenbaum rejected.

By summons and complaint dated September, 2006, the plaintiffs – with Meltzer as their counsel – commenced the within attorney malpractice action against the Kestenbaum firm, Mark S. Kestenbaum and Bernard S. Mark.

At approximately the same time, the plaintiffs apparently commenced a proceeding in the tax court challenging the validity of the consents which they had submitted at the defendants' behest.

The defendants have answered, denied the material allegations of the complaint and interposed various affirmative defenses, including claims that the plaintiffs allegedly "admitted" committing tax fraud and that, in fact, the plaintiffs were under criminal tax investigation at some point.

The defendants have since commenced a third-party action against the plaintiffs' accountant, James T. Ashe and his firm, Marcum & Kliegman [collectively "Marcum"], in which the defendants allege entitlement to indemnity upon the theory, ***inter alia***, that they relied solely upon figures supplied to them by Marcum – with the plaintiffs' knowledge and consent.

With respect to Kestenbaum's alleged malpractice, the complaint asserts, in sum and substance, that Kestenbaum: (1) did not perform an adequate "factual or legal" analysis of the "pass through" taxes imposed by the IRS as part of the Dr. Tantleff's individual assessment; (2) made no and/or an inadequate attempt to challenge the taxes referenced in the consents which they advised the plaintiffs to sign; negligently represented the plaintiff with respect to the 1996 settlement and OIC; and (3) failed to inform the plaintiffs that they could dispute the validity of, ***inter alia***, the individual assessment, certain penalties and/or that they could request an abatement of the interest charges which were apparently imposed.

The plaintiffs' complaint further alleges that "but for" the defendants' negligence, the plaintiffs allegedly would have saved over $800,000.00 in counsel fees and/or would

have paid less tax than they otherwise did; that by virtue of the defendants' negligence, Dr. Tantleff has, ***inter alia***, suffered "years of emotional distress;" and that he has sustained permanent injury to his career as an expert medical witness.

Thereafter, in July of 2007, the defendant served upon the plaintiffs, a 154- part discovery notice. By notice dated September 17, 2007, the defendants served a 35-part document demand upon Marcum and Ashe.

In September of 2007, the plaintiffs filed their response, which raised objections to each and every one of the defendants' requests, but which otherwise supplied no documentary materials. Subsequently, however, the plaintiffs produced three boxes of documents containing some 10,000 pages of materials – documents which, according to the defendants, were not organized by content or the precise manner in which they were responsive to the specific discovery demands made.

According to the plaintiffs, however, the foregoing documents were Bates-stamped and accurately reflected their manner of keeping in the ordinary course of the plaintiffs' business.

By letter dated November 28, 2007, the defendants objected to the plaintiffs' production and wrote to plaintiffs' counsel, advising that his firm had attempted to organize the materials produced. The defendants' November, 2007 letter also contained a list of 75 items which the defendants claimed had been omitted and/or needed to be produced.

At approximately the same time, the defendants wrote to Ashe/Marcum's counsel and advised them they also had yet to supply any of the requested materials, as set forth September, 2007 demand.

In early January, 2008, the plaintiffs claim that they reached an agreement with the IRS pursuant to which the IRS: (1) abated the civil fraud penalties that had been assessed previously against them; and (2) also agreed to reduce the amount of their overall tax liability based upon the allowance of certain business deductions allegedly never pursued by the defendants.

At approximately the same time, the plaintiffs filed a proposed OIC with the IRS, which they claim is still and currently being considered by the IRS.

Five months later, in May of 2008, defense counsel wrote to plaintiffs' counsel noting that none of the 75 items referenced in the November, 2007 letter had been produced.

By letter dated June 9, 2008, the plaintiffs' counsel replied by addressing each of the 75 items listed separately, *i.e.*, counsel either interposed objections and/or supplied additional materials – albeit in a way which the defendants contend was still inadequate and/or insufficiently responsive.

By letter dated July 28, 2008, defense counsel again wrote to plaintiffs' counsel, advising that certain materials still had not yet been produced, including (1) stated billing records of the Meltzer firm; (2) the "closing agreement" regarding the Tax Court case; (3) the most recent offer in compromise sent to the IRS (referenced above); and (4) certain billing information generated by James Ashe and Marcum.

The defendants claim that the plaintiffs subsequently produced the Tax Court agreement and certain (albeit incomplete, Meltzer billing materials), but to date, have not yet produced, ***inter alia***, the proposed, IRS offer in compromise.

With respect to third-party defendants Ashe and Marcum, counsel for the defendant wrote to their counsel in November, 2007, but claims to have received no response. Defense counsel notes that he again called and wrote to Marcum's counsel in December and January, 2008 requesting responses – which were allegedly promised, but not yet received at that point.

Defense counsel claims that, after a conference with Marcum's counsel, certain documents were provided but that the production was duplicative of prior document productions, and still omitted bills from 1998 to 2003, which the defendants claim is critical to their defense that Marcum was supposedly responsible for analyzing the tax due and the IRS's figures.

In response, counsel for Marcum/Ashe advises that: shortly thereafter, in February, 2008, some 1500 pages of documents were produced; that a further "supplemental" production of some 600 documents generated after Marcum ceased performing services for the plaintiffs, was made in July 2008; and a third and further production of certain bills was made by e-mail in September, 2008.

Counsel asserts that with the exception of the "offer in compromise" and documents relating thereto, it has produced its entire file for all time periods requested, and further, that it is willing to permit defense counsel to inspect its files so as to confirm that nothing has been withheld.

The defendants now move pursuant to CPLR 3124 for an order compelling the plaintiffs and third-party defendants to respond to stated discovery demands and/or for the imposition of sanctions.

The plaintiffs oppose the motion and cross move pursuant to CPLR 3103 for an order sealing the record. Notably, the defendants have annexed appendices "A" and "B" to their submissions which list and summarize the documents which they now contend should be produced, respectively, by the plaintiffs and third-party defendants. The defendants' motion is **granted** to the extent indicated below. The plaintiffs' motion is **denied** to the same extent.

It is settled that the scope of disclosure is "open and far-reaching" (***Kavanagh v.Ogden Allied Maintenance,Corp.***, 92 NY2d 952, 954, 1998; ***Friel v. Papa***, 56 AD3d 607) and extends to matter "material and necessary" and "any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity"(***Allen v Crowell-CollierPub. Co.***, 21 NY2d 403, 406, 1968; *see,* ***Andon ex rel. Andon v. 302-304 Mott Street Associates***, 94 NY2d 740, 746, 2000).

Nevertheless, unfettered or "unlimited disclosure is not required" (***Smith v. Moore***, 31 AD3d 628). Nor will "*carte blanche* demands * * * be honored" (***European American Bank v. Competition Motors, Ltd.***, 186 AD2d 784, 785 *see,* ***Vyas v. Campbell, supra***, 4 AD3d at 418), particularly where the demands at issue would attach undue attention" to collateral matters (***Blittner v. Berg and Dorf***,138 AD2d 439, 440-441), or where they are overly broad, unduly burdensome, or lacking in specificity (*see,* ***Merkos L'Inyonei Chinuch, Inc. v. Sharf***, 59 AD3d 408).

Moreover, "'[i]t is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence'" (***Beckles v. Kingsbrook Jewish Medical Center***, 36 AD3d 733, *quoting from,* ***Crazytown Furniture v. Brooklyn Union Gas Co.***, 150 AD2d 420, 421; ***Boone v. Bender***, 11 AD3d 496; ***Vyas v. Campbell***, 4 AD3d 417, 418).

"Broad, unparticularized document demands" (***M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.***, 62 NY2d 75, 80 [1984]), and those employing categorical or unrefined introductory, terminology such "all," "any and all" or "each and every" are generally disfavored (*e.g.*, ***Haroian v Nusbaum***, 84 AD2d 532, 533 *see also,* ***MacKinnon v. MacKinnon***, 245 AD2d 690, 691 *see also,* ***Benzenberg v. Telecom Plus of Upstate New York, Inc.***, 119 AD2d 717).

Notably, "[t]he burden of serving a proper demand is upon counsel", and that Courts are not required to prune a defective demand or request, even though that it might relate to potentially discoverable material (*see,* ***Bell v. Cobble Hill Health Center, Inc.***, 22 AD3d 620).

The court possesses broad discretion to limit discovery in order to prevent

unreasonable annoyance, expense, embarrassment, disadvantage or other prejudice, and also "to determine what is 'material and necessary' as that phrase is used in CPLR 3101(a)" (***Auerbach v. Klein***, 30 AD3d 451).

Preliminarily, and in connection with their motion, the defendants have now submitted two document lists (Appendices "A" & "B"), which the Court will necessarily construe as an effort to simplify and winnow down the remaining documents requested and/or required. The Court will therefore consider the respective document appendices submitted as constituting the definitive list of outstanding items for which the instant application to compel has been brought.

Turning to those appendices – and Appendix "A" in particular – which relates to the materials sought from the plaintiffs – item "1" thereof first demands the recently submitted, but as yet – unaccepted "offer in compromise"; all supporting documents and all prior drafts of unspecified, supporting documents.

Although upon balancing the competing interests of confidentiality and broad discovery, the disclosure of settlement terms may be directed if, among other things, they are "material and necessary" to the nonsettling party's case" (*see generally,* ***Mahoney v. Turner Const. Co.***, ___AD3d___, 872 NYS2d 433, 435-436, 1st Dept., 2009; ***Masterwear Corp. v. Bernard***, 298 AD2d 249, 250). Herein, no settlement has been reached, since the IRS has not accepted or otherwise acted upon the plaintiffs' pending OIC offer (*cf.*, ***Gordon v. Village of Bronxville***, ***supra***, 2004 WL 2941317 at 4-5).

After considering the sensitivity and import of the pending OIC offer – and given the reality that a determination will inevitably be rendered by the IRS in due course – the Court finds that a balancing the parties' respective interests supports the plaintiffs' assertion that the materials sought in connection with item "1" need not be produced until the OIC offer is either rejected or accepted by the IRS – after which the OIC and those related documents which are relevant and material shall be supplied to the defendants.

With respect to items "2" and "3", both requests are as written, facially overbroad, since each demands "all" Meltzer bills and/or "records of services performed" (*cf.*, ***MacKinnon v. MacKinnon***, ***supra***; ***Haroian v Nusbaum***, ***supra***) with no topical/subject matter limitation (and no reference to the plaintiffs in item "2") – thereby ostensibly embracing legal services and records bearing no relation to the subject tax/malpractice dispute (*see generally,* ***Taji Communications, Inc. v. Bronxville Towers Apartments Corp.***, 48 AD3d 551, 552; ***Abbadessa v. Sprint***, 291 AD2d 363, 364). However, pruned and construed so as refer to Meltzer billing records bearing on the allegation that the plaintiffs unnecessarily expended "over $800,000.00 in legal fees," the demands request materials which are material and relevant.

In their opposing submissions, the plaintiffs advise that they will produce "redacted" bills relating, but not limited to, ***inter alia***, an informal refund claim; the Tax Court case negotiations leading to the closing agreement and, in general, all legal bills reflecting expenses attributable to their prosecution of the within malpractice action.

To the extent not yet produced, any Meltzer billing materials generated during the time span specified, which bear upon, ***inter alia***, the alleged $800,000.00 fee expenditure, must be supplied to the defendants. Failure to produce relevant billing material will preclude the plaintiffs later offering proof regarding that information at trial (***Sagiv v. Gamache***, 26 AD3d 368, 369; ***Bivona v. Trump Marina Casino Hotel Resort***, 11 AD3d 574). The plaintiffs are advised that, to the extent the billing materials are redacted, redactions shall be performed reasonably and in a manner which does not undermine the informational import of the affected materials, *i.e.*, so that expenses evidenced are discernable in a comprehensible, complete and meaningful fashion.

Items "4" and "5" request respectively, "all" billings issued to the plaintiffs or unspecified ("any") entities controlled by them, from Ashe and/or Marcum from January 1, 1998 to present; and "all" payments to Ashe/Marcum from the plaintiffs or any entity owned by the plaintiffs – with no end-date qualifying the chronological scope of latter request (item "5"). Essentially, the same documents have also been simultaneously requested from Ashe/Marcum in the defendants' Appendix "B", and the plaintiff contends that Marcum has already produced the requested items.

Notwithstanding whatever production has been made by Ashe – and narrowed from the literal and over broad scope of the requests as written – the Court directs the plaintiffs to: (1) provide the Marcum bills to the extent that they are relevant to the instant tax dispute; (2) as received from or paid by entities whose existence bears a relationship to the issues raised; (3) for the time period between 1998 to present. Although the ten year scope of the request is broad, the plaintiffs' complaint contains an express averment, *inter alia*, that Marcum performed a forensic analysis, at some point in 2006, which supposedly "proved" that there was no basis for the plaintiffs' "individual Assessment".

Item "6" requests "*all documents* relating" to the dispute between plaintiff A. Robert Tantleff and his partners referred to in "Bates Numbers 40-41". The Court agrees that this item – which requests matter subject to a confidentiality order – and which is sought based upon the unelaborated assertion that it is needed to test Tantleff's "credibility" – is significantly over broad and virtually unbounded in its potential applicability to collateral materials bearing no necessary relation to the issues tendered by the parties (*see*, ***Astudillo v. St. Francis-Beacon Extended Care Facility, Inc.***, 12 AD3d 469, 470; ***Apple Bank for Sav. v. Noah's Route 110, Inc.***, 210 AD2d 277).

Item "7" has been produced by the plaintiffs and annexed to their papers (Pltffs' Exh., "B").

Item "8", *i.e.*, a letter from the office of Professional misconduct referenced in Bates 60, is apparently already in the defendants' possession – a claim advanced by the plaintiffs which is not disputed or otherwise commented upon by the defendants in their reply submissions.

Item "9" broadly demands "all" documents in the action entitled ***Tantleff v Boykoff***, ___Misc3d___ [Nassau County Index No. 011781-01]). The Court agrees these need not be produced since "production of documents in a prior action should not be compelled to the extent that they are available as a matter of public record" (***Blagrove v. Cox***, 294 AD2d 526). Moreover, the demand is, again, over broad since it literally demands, in unqualified fashion, "all" documents in the case, thereby including file materials and other inconsequential matter which would plainly lack any meaningful relation to the matters at issue here (***Abony v. TLC Laser Eye Center, Inc.***, 44 AD3d 553).

Item "10" demands "[a]ll" bank documents "relating" to individual or business accounts on which either plaintiffs is a signatory for the period 1993 to present. The foregoing demand is unduly broad, and temporally over-extensive, since it demands, without reasonable particularization, "all" bank documents, apparently of any sort, which merely relate to the plaintiffs' accounts over a lengthy, 16-year span – a request whose apparent scope would be virtually limitless in terms of the documents and materials which it would potentially implicate.

Item "11" requests, without substantive qualification and/or limitation, all e-mails between Meltzer and James Ashe for the six-year period between 2003 to present – a request which, the plaintiffs claim was not included in the defendants' original, July 2005 discovery demand. The Court agrees that such a demand is over broad, and if literally applied, would encompass materials and communications bearing no relation to the subject litigation (***Astudillo v. St. Francis-Beacon Extended Care Facility, Inc.***, ***supra***, at 470).

However, as narrowed, the plaintiffs have agreed to produce stated e-mails from 2003 to date, provided that they are relevant and not subject to any applicable privilege. Those documents shall be produced, and the basis for any privilege should be separately articulated in specific and comprehensible terms.

Items "12," "13" and "14" respectively demand, again in unqualified terms, (1) "all" documents regarding "Leasestar" – a business venture in which plaintiff Tantleff apparently invested several years ago; (2) "all" documents regarding a sexual harassment claim referred to the plaintiff in Bates 4922 and 5340; and (3) an unelaborated request for "documents regarding Department of Health investigation of suspected malpractice" dating back some nine years.

Putting aside the breadth of the unqualified requests made, the Court agrees that these materials are remote – and absent an analytical, factual discussion demonstrating their relevance and materiality – not provided here – these documents need not be produced.

The Court notes that defendants' reply submissions, with respect to the "Leasestar" materials in particular, are conclusory, circular and fail to demonstrate precisely how and why "the discovery sought will result in the disclosure of relevant evidence" (*e.g.*, ***Beckles v. Kingsbrook Jewish Medical Center***, ***supra***, 36 AD3d 733; ***Fairview at Old Westfield, L.P. v. European American Bank***, 186 AD2d 238, 239).

Item "15" requests "Document[s] related to the malpractice suit set forth in Bates 5507." This request, as crafted in the notice, would literally be applicable to every paper generated in the lawsuit, and conceivably others outside it as well – whether relevant or not to the issues presented, and is over broad in its scope and reach. Moreover, the defendants' papers do not articulate a factual rationale supporting their specific relevance to the instant action. Further, it is not alleged that the materials are not publicly available to the extent that they involve filed pleadings and other litigation documents.

Item "16" demands unspecified "documents" relating to an unnamed "report to the National Practitioner Data Bank set forth in Bates 5521" – a demand which the defendants have not, in their reply submissions, explained or commented upon insofar as the Court can ascertain.

In addressing the relevance of this demand, the plaintiffs contend – and the defendants do not argue to the contrary – that the "National Practitioner Data Bank" is, according to its own website, a government created site. The prefatory comments contained on the website's home page generally describe the site as one which "primarily [functions] an alert or flagging system intended to facilitate a comprehensive review of health care practitioners' professional credentials. The information contained in the NPDB is intended to direct discrete inquiry into, and scrutiny of, specific areas of a practitioner's licensure, professional society memberships, medical malpractice payment history, and record of clinical privileges" (*quoted from, National Practitioner Data Bank, "Why the NPDB Was Created"* at http://www.npdb-hipdb.com/npdb.html).

It is unclear – and unstated – precisely what data base materials the defendants are looking for; what relevance, if any, the materials in question may have; and precisely what import a report to the data base possesses in terms of its probity, relevance and nexus to the specific issues presented here (*cf.*, ***McFarlane v. County of Suffolk***, ___AD3d___, 2009 WL 791265, 2nd Dept., 2009; ***Auerbach v. Klein***, ***supra***, 30 AD3d at 452).

Item "17" demands in unparticularized form, all "financial records" for: (1) Dr. Tantleff; and (2) for any entity used to receive fees for expert testimony the period 2004 to present. Although the plaintiffs have placed Dr. Tantleff's expert witness income in issue by claiming, *inter alia*, that the defendants' alleged malpractice permanently injured and/or jeopardized Dr. Tantleff's career as an expert witness career, a baldly framed demand which simply requests all "financial records" is over broad and burdensome since it would require the unlimited production of materials and records which potentially bear no relation to the instant dispute.

With respect to Ashe/Marcum, James Ashe – as a member of the Marcum firm – has asserted, under oath, that all bills and work papers in their clients' possession responsive to the defendants' demands, *i.e.*, the "entire file" (except documents relating to the Offer In Compromise), have already been produced (*cf.*, ***Wilensky v. JRB Marketing & Opinion Research, Inc.***, 161 AD2d 761, 763 *see*, ***Longo v. Armor Elevator, Co., Inc.***, 278 AD2d 127, 129).

It is settled that "a party may not be compelled to produce or sanctioned for failing to produce information which he does not possess" (***Sagiv v. Gamache***, 26 AD3d 368, 369; ***Euro-Central Corp. v. Dalsimer, Inc.***, 22 AD3d 793). Nevertheless, "[w]here a party * * * [contends] that he or she does not possess * * * information, 'failure to provide the information in his [or her] possession would preclude him from later offering proof regarding that information'" (***Kontos v. Koakos Syllogos "Ippocrates," Inc***., 11 AD3d 661, *quoting from*, ***Corriel v. Volkswagen of America, Inc.***, 127 AD2d 729, 730-731).

Based upon Ashe's sworn assertion that no additional materials responsive to the defendants' demands allegedly exist, Marcum/Ashe shall be foreclosed at the defendants' option, from later introducing any documents referenced in the demands which have not been disclosed (*e.g.*, ***Sagiv v. Gamache***, ***supra***, at 369; ***Bivona v. Trump Marina Casino Hotel Resort***, ***supra***; ***Corriel v. Volkswagen of America, Inc***., ***supra***, 127 AD2d at 731).

In the exercise of its broad discretion in supervising discovery, the Court declines to impose sanction at this juncture.

Lastly, the plaintiffs' cross motion for an order sealing the record is **denied**.

With respect to sealing, since confidentiality is the exception, the court must make an independent determination of whether to seal court records in whole or in part for "good cause" (***Mancheski v. Gabelli Group Capital Partners***, 39 AD3d 499; ***Matter of Hofmann***, 284 AD2d 92, 93-94; ***In re Petrowski***, 20 Misc.3d 860 [Surrogates Court, Kings County 2008]; ***Condon v. Inter-Religious Foundation for Community Organization, Inc.***, ___Misc3d___ , 2008 WL 4972898 [Supreme Court, New York

County 2008] *see*, 22 NYCRR 216.1[a]). "This task involves weighing the interests of the public against the interests of the parties" (***Mancheski v. Gabelli Group Capital Partners***, ***supra***). Further, "the mere fact that embarrassing allegations or claims injurious to a movant's reputations, "may be made" * * * even if ultimately found to be without merit, are not necessarily a "sufficient basis for a sealing order" (***Matter of Hofmann***, ***supra***, 284 AD2d at 94 *see also*, ***Liapakis v. Sullivan***, 290 AD2d 393, 394).

Significantly, "[t]he party seeking to seal documents must demonstrate compelling circumstances" (***Mancheski v. Gabelli Group Capital Partners***, ***supra***) and "[c]ourts should be reluctant to seal court records even when all of the parties to the litigation have requested such sealing" (***Fordham-Coleman v. National Fuel Gas Distribution Corp***., 42 AD3d 106, 115; ***Gryphon Dom. VI, LLC***, 28 AD3d 322, 324 *see also*, ***Liapakis v. Sullivan***, ***supra***; ***Matter of Twentieth Century Fox Film Corp***., 190 AD2d 483, 485-486).

Here, the subject sealing application has raised for the first time in a cross motion made two years after the action was commenced, and some 17 months after the defendants' original document demand was served. Moreover, it is undisputed that the plaintiffs made a very similar sealing application before the United States Tax Court which was denied, with the result that many of the same records are now – and continue to be – publicly available. The Court notes that the Tax Court effectively rejected the same theory advanced and relied upon by the plaintiffs here, *i.e.*, that the alleged damage to Dr. Tantleff's livelihood as an expert witness counterbalances and outweighs the public's right to open and free access to Court proceedings and documents.

The Court is also unpersuaded by the plaintiffs' claims that sealing is alternatively warranted because: (1) the defendants' have generally denigrated Dr. Tantleff's character; or (2) because the defendants allegedly possess influence with the IRS, which they might vindictively wield in order to sabotage the plaintiffs' current dealings with that agency (*see*, ***Liapakis v. Sullivan***, ***supra***).

However, and with respect to the latter claim, the Court notes that sanctions may be imposed if, ***inter alia***, it is shown that a party has made vindictive allegations of unethical and criminal conduct which are materially false and/or which have been "made merely to harass or injure * * * [the plaintiffs] or gain some leverage in the instant litigation" (***Liapakis v. Sullivan***, ***supra***, at 364 *see generally*, 22 NYCRR § 130-1.1[c][2],[3]).

In sum, the plaintiffs' submissions fall short of establishing the existence of "compelling circumstances" supporting the issuance of a sealing order (*e.g.*,***Mancheski v. Gabelli Group Capital Partners***, ***supra***; ***Eusini v. Pioneer Electronics (USA), Inc.***, ***supra***).

Finally, the Court reminds the parties in no uncertain terms that the discovery process is not to be employed as a forum for gamesmanship or dilatory behavior, but rather, exists to promote the "ascertainment of truth at trial" and "accelerate the disposition of suits" (***M. Farbman & Sons, Inc. v. New York City Health and Hospitals Corp.***, ***supra***, 62 NY2d at 80; ***Allen v Crowell-CollierPub. Co.***, ***supra***, 21 NY2d at 406, 1968). Moreover, submissions which primarily feature argumentative commentary and adversarial rhetoric offer minimal assistance to the Court in its effort to parse through the morass of discovery items and conflicting claims advanced by the parties.

The Court has considered the parties' remaining contentions and concludes that none warrants an award of relief in excess of that granted above.

The documents which are to be produced in accord with the Court's order shall be delivered to the defendants within 20 days of the date of this order.

The foregoing constitutes the decision and order of the Court.

A status conference is scheduled for June 5, 2009 at 9:30 a.m. in Chambers of the undersigned.

Dated MAY 06 2009

Stephen A. Bucaria
J.S.C.

ENTERED
MAY 08 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE