Matter of All Weitz & Luxenberg
2014 NY Slip Op 33308(U)
December 15, 2014
Supreme Court, New York County
Docket Number: 190441/12
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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IN RE: ALL WEITZ & LUXENBERG CASES IN WHICH CLEAVER-BROOKS, INC. IS A DEFENDANT

Index No. 040000/88
Motion Sequence # 015

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MARY ANNE McCLOSKEY, as Administratrix of the Estate of PATRICK McCLOSKEY,

Index No. 190441/12
Motion Sequence # 023

Plaintiff,

DECISION AND ORDER

- against -

A.O. SMITH WATER PRODUCTS CO., et al.,

Defendants

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Motion sequence nos. 015 and 023 are consolidated for disposition.

By order dated June 11, 2014, this court confirmed a November 9, 2013 written recommendation by Special Master Shelley Rosoff Olsen which among other things directed defendant Cleaver-Brooks, Inc. ("CB") to produce to plaintiffs' counsel, the law firm of Weitz & Luxenberg, P.C. ("Plaintiffs"), certain documents in its possession, including those that "reference or otherwise mentioned asbestos or asbestos containing products, components or parts used on, in or in conjunction with, or as replacement parts for its boilers."[1] In so holding this court conveyed that compliance would not be problematic so long as CB and Plaintiffs worked together to devise a document production protocol.[2] Since then CB has resolutely taken the position that my order is unduly burdensome, although the parties have attempted, albeit unsuccessfully, to resolve these issues with the assistance of the Special Master and this court.

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1 A copy of the Special Master's recommendation is submitted as Plaintiffs' exhibit B ("Recommendation").

2 A copy of my June 11, 2014 order, which is incorporated by reference herein and made a part hereof, is submitted as Plaintiffs' exhibits C.

Motion Sequence #023, which CB filed under Master NYCAL Index Number 40000/88 and under Index No. 190441/12, is designated as a motion for clarification. In that regard CB seeks to establish certain parameters of its discovery obligations, and asserts the following:

- NYCAL plaintiffs seeking access to its documents should agree to and abide by a confidentiality order;
- Use of CB's records should be restricted to NYCAL cases;
- Production should be limited to those documents which explicitly reference asbestos or asbestos-containing parts;
- Plaintiffs should not be granted access to CB's "Index Card" repository which contains basic information regarding each of its 90,000 boilers;
- Plaintiffs should bear the costs of inspecting and copying the documents they review and select for production;
- CB should not be required to disclose or provide access to its electronic database of digitized commercial records prepared at the direction of CB's counsel for the purpose of defending CB in asbestos cases throughout the country. Such electronic database constitutes attorney work product which is protected from disclosure.

Plaintiffs argue that CB's motion is a delay tactic to slow the production of material information and should be denied outright since these issues have already been endlessly litigated. Substantively Plaintiffs argue that CB's so-called clarifications are unwarranted, inconsistent with this court's prior rulings, and contrary to New York law, to wit:

- CB's arguments (re: confidentiality, NYCAL limitations, Index Cards, production costs) were not raised in any discussions leading up to the issuance of the Special Master's Recommendation;
- Both the Recommendation and this court's confirmation order establish the broad nature of CB's discovery obligations;
- Plaintiffs are entitled to production of the index cards to facilitate its search of CB's commercial files, drawings, and specifications;
- CB's "hard drive" is not attorney work product and would sizably reduce the burden of production on both parties;
- Plaintiffs are willing to enter into a confidentiality agreement to avoid further litigation even though CB's commercial drawings do not contain trade secrets. However, the procedures proposed by CB to determine confidentiality are draconian and CB's definition of "confidential" is overly broad.

In Motion Sequence 015, filed exclusively under Master NYCAL Index Number 40000/88, Plaintiffs move for sanctions against CB pursuant to CPLR 3214 and CPLR 3126 in light of its purported "decade-long pattern of wilful and contumacious dilatory practices".[3] Plaintiffs specifically seek: (1) an order compelling CB to provide complete responses to Plaintiffs' First Standard Set of Liability Interrogatories and Requests for Production of Documents ("Interrogatories")[4]; (2) an order conditionally striking CB's 18th, 19th, 27th, 29th, and 50th affirmative defenses in all Weitz & Luxenberg cases in which CB is a defendant; and (3) an order prohibiting CB from introducing any evidence at trial in support of said defenses until such time as it complies with its discovery obligations.

DISCUSSION

Once again the court has been asked to intervene in this never-ending dispute between Plaintiffs and CB over the scope of CB's discovery obligations. Given my prior rulings I did not think that further judicial intervention would be necessary. I am hopeful that this decision finally puts these issues to rest.

CPLR 3101 "sounds the keynote" for disclosure in New York State. It has "pervasive bearing . . . . [and] establishes the broad scope of disclosure" permitted in our court system. (Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3101:1, at 13). CPLR 3101(a) allows a party to obtain "full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof . . . ." This statute "embodies the policy determination that liberal discovery encourages fair and effective resolution of

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[3] Affirmation of Gennaro Savastano, Esq. dated July 7, 2014, ¶ 7.

[4] See Exhibit D to the NYCAL Case Management Order, as amended ("CMO"), which can be accessed at the NYCAL website, www.nycal.net.

disputes on the merits, minimizing the possibility for ambush and unfair surprise." *Spectrum Sys. Int'l Corp. v Chem. Bank*, 78 NY2d 371, 376 (1991). Consistent therewith, the words "material" and "necessary" have been "interpreted liberally to require disclosure . . . of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity." *Allen v Crowell - Collier Publ. Co.*, 21 NY2d 403, 406 (1968); *see also Mann ex rel. Akst v Cooper Tire Co.*, 33 AD3d 24, 29 (1st Dept 2006). "'Pretrial disclosure extends not only to admissible proof but also to testimony or documents which may lead to the disclosure of admissible proof,' including material which might be used in cross-examination." *Polygram Holding, Inc. v Cafaro*, 42 AD3d 339, 341 (1st Dept 2007) (quoting *Fell v Presbyterian Hosp. in City of N.Y. at Columbia-Presbyt. Med. Ctr.*, 98 AD2d 624, 625 [1983]). "The test is one of usefulness and reason." *Allen v Crowell-Collier Publ. Co., supra*, at 406.

The ultimate objective of the CMO, the provisions of which are consistent with the CPLR, is "to allow the parties to obtain reasonably necessary documents and information without imposing undue burdens in order to permit the parties to evaluate the cases, reach early settlements, and prepare unsettled cases for trial."[5] Discovery in asbestos cases can be complex, time-consuming and expensive,[6] and this court has strived to minimize costs by ensuring that streamlined discovery is conducted under the NYCAL Special Master's supervision consistent with the CPLR and the CMO. In doing so, this court has broadly interpreted the discovery obligations of both plaintiffs and defendants alike with the hope that over time these asbestos cases can be resolved without occasioning expensive and drawn out disclosure periods. This approach has been consistently

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[5] CMO § II.

[6] *In re New York City Asbestos Litig.*, 37 Misc. 3d 1232(A) (Sup. Ct. NY Co. Nov 15, 2012, Heitler, J.)

approved by the First Department. *See In re New York City Asbestos Litig. (Georgia-Pacific)*, 109 AD3d 7 (1st Dept 2013); *In re NYC Asbestos Litigation (Ames v Kentile Floors)*, Index No. 107574/08, at *2 (Sup. Ct. NY. Co. June 17, 2009, Heitler, J.), *aff'd* 66 AD3d 600 (1st Dept 2009).

A. The Scope of CB's Discovery Obligations

This dispute dates back many years and arises from what has come to be known as the "no-duty defense" which certain NYCAL defendants formulated in response to Plaintiffs' claim that equipment manufacturers failed to warn against the hazards associated with after-market asbestos component parts.[7] This duty to warn was recently confirmed by the First Department in *Matter of New York City Asbestos Litig.* [*Dummit*], 121 AD3d 230 (1st Dept 2014).

For some time now CB has asserted a no-duty defense as a part of its trial strategy. In response Plaintiffs have sought a broad range of documents from CB in order to show that it specified asbestos-containing components on its boilers. CB turned over limited records pertaining only to the boilers that the plaintiff in a specific case allegedly encountered. The parties then sought the intervention of the Special Master, who determined that CB's disclosure obligation was much broader. Her ruling, which is discussed in my prior order, bears repeating here (Plaintiffs' exhibit B):

> By ruling dated October 22, 2013, I reminded the parties that, consistent with my May 2013 ruling ordering the production of all operating and instruction manuals, parts and service manuals, drawings and blueprints for all CB boilers "at issue", this was to be broadly interpreted unless CB intended to withdraw its Berkowitz no-duty defense. Given that CB does, in fact, intend to raise a Berkowitz no-duty defense, plaintiffs are entitled to broad discovery in order to rebut that defense. This is consistent not only with both the spirit of the CMO and the CPLR, but with numerous decisions of this Court, and its Appellate Division. Moreover, compliance with the standard NYCAL discovery is not optional, nor is it contingent on defense counsel's opinion (or that of its appellate counsel), as to relevance. In

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[7] See *Berkowitz v A.C. & S., Inc.*, 288 AD2d 148, 149 (1st Dept 2001); *Sawyer v A.C.&S., Inc., et al.*, 32 Misc. 3d 1237[A], Index No. 111152/99 (Sup. Ct. NY Co. 2011, Heitler, J.)

any event, CB's general knowledge and/or recommendation of the use of asbestos insulation on and in its boilers, and the use of asbestos packing, gaskets and tape is relevant to plaintiffs' ability to rebut the Berkowitz defense.

* * * *

CB's discovery obligations are broad, continuing and are not extinguished by virtue of resolving the particular matter in which CB was first ordered to produce standard NYCAL responses.

* * * *

CB is directed to comply fully with the standard NYCAL discovery requests within one week of the date of this Recommendation. For all boilers it manufactured and/or sold, CB is directed to produce all documents, to the extent not previously exchanged, including, but not limited to all design drawings, blueprints, diagrams, specifications and recommendation that reference or otherwise mention asbestos or asbestos containing products, components or parts used on, in or in conjunction with, or as replacement parts for its boilers.

This court unequivocally confirmed the Recommendation in its June 11, 2014 order . As such CB was mandated to: (1) produce "all operating and instruction manuals, parts and service manuals, drawings and blueprints for all CB boilers 'at issue'"; (2) "comply fully with the Standard NYCAL discovery requests"; and (3) "produce all documents, to the extent not previously exchanged, including, but not limited to all design drawings, blueprints, diagrams, specifications and recommendations that referenced or otherwise mention asbestos or asbestos-containing products, components or parts used on, in or in conjunction with, or as replacement parts for its boilers". *Id.*

What CB now essentially asks this court to do is apply the principle *expressio unius est exclusio alterius*[8] by "confirm[ing] that the production of documents is limited to those referencing asbestos."[9] To be clear, this was never the court's intention. Nor does it appear to have been that of the Special Master who otherwise would not have preceded her ruling with "including, but not

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[8] "The express mention of one thing excludes all others"

[9] CB's memorandum of law, dated July 16, 2014, p. 16.

limited to", the plain meaning of which is that the production of documents that explicitly reference asbestos was not meant to be exhaustive of CB's disclosure obligations. *See In re Goetz's Will*, 71 App Div 272 (1st Dept 1902) (The word "'[i]ncluding' is not a word of limitation, rather is it a word of enlargement, and in ordinary signification implies that something else has been given beyond the general language which precedes it."). To hold otherwise would unjustly and unreasonably prevent Plaintiffs from obtaining relevant documents (i.e., correspondence with customers, installation reports, field service reports) simply because they do not contain the word "asbestos".

As an example, CB Technical Services manager John Tornetta explained the purpose of CB's index card repository as follows[10]:

> Cleaver-Brooks also maintains 80-90,000 index cards for each of its boiler shipments. The index cards are arranged alphabetically by the name of the job site to which Cleaver-Brooks boilers have been shipped. The cards identify the job site and the boiler unit number(s) contained in the shipment. The unit numbers are in turned [sic] used to access the commercial records for each unit number. The index cards are not an inventory of boilers by state, and Cleaver-Brooks cannot search the cards by state. Nor do the index cards reference asbestos or any asbestos-containing parts. The index cards are maintained as confidential, internal documents.

Thus, even though CB's index cards do not reference asbestos, it is clear that they are necessary to facilitate Plaintiffs' search of CB's commercial records, drawings, and specifications, and must therefore be produced.

B. CB's Database of Commercial Records

CB has taken every opportunity to argue that the production of its 12 million document repository would be prohibitively expensive using its antiquated michofiche system. Now CB has revealed that for over a year it has engaged an outside law firm to transfer upwards of 9 million pages of commercial files to an easily accessible computer hard drive, the production of which

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[10] Supplemental Affidavit of John Tornetta, sworn to July 14, 2014, ¶ 9 .

would virtually eliminate production costs. Notwithstanding, CB takes the position here that this database is privileged as attorney work product and therefore not discoverable.

In general, "[t]he work product of an attorney shall not be obtainable" CPLR 3101(c); *see Hickman v Taylor*, 329 US 495 (1947). While this is an absolute privilege, (*see Spectrum Sys. Intl. Corp, supra*, at 376), it "applies only to documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy." *Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 190-191 (1st Dept 2005); *see also Hickman, supra*, at 511 (work-product of an attorney includes interviews, mental impressions, and personal beliefs); *Spectrum Sys. Intl. Corp, supra*, at 376.

Under CPLR 3101(d)(2), non-attorney materials prepared in anticipation of trial may also be considered privileged. Examples include liability insurer's files (*Kandel v Tocher*, 22 AD3d 513 [1st Dept 1965]; *Finegold v Lewis*, 22 AD2d 447 [2d Dept 1965]), records created by experts prior to trial (*Giordano v New Rochelle Mun. Hous. Auth.*, 84 AD3d 729 [2d Dept 2011]), and witness statements taken by counsel (*Valencia v Obayashi Corp.*, 84 AD3d 786 [2d Dept 2011]).

CB's hard drive does not fall into the category of the materials at issue in *Kandel, Finegold, Giordano*, and *Valencia*. It is therefore not protected from disclosure. By CB's own admission, the hard drive was compiled for the dual purposes of facilitating its ability to comply with its nationwide discovery obligations and modernizing its own records, to wit[11]:

> On or about December 5, 2013, to facilitate the ability of C-B and its defense counsel across the nation to respond to increasing discovery demands being advanced in the asbestos litigation, and to make the commercial records more readily accessible for use by C-B's defense counsel, my firm arranged to have the commercial records digitized. The records are

[11] Supplemental Affidavit of John Laffey, Esq., sworn to July 16, 2014, ¶ 4.

> kept on an independent server housed at my firm. C-B does not have access to the digitized version of the commercial records, the originals of which continued to be maintained by C-B on microfiche in the ordinary course of business.

That CB routed the task of digitizing its in-house records to an outside law firm does not cloak those records with privileged immunity. *See Spectrum Systems Int'l Corp., supra* (citing *Weisgold v Kiamesha Concord, Inc.*, 51 Misc. 2d 456 [Sup. Ct. Sullivan Co. Aug. 1, 1966]); *Carlo v Queens Transit Corp.*, 76 AD2d 824 (2d Dept 1980); Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3101:35, at 82-84. Moreover, nothing in the record before me suggests that the documents were manipulated in any way or that the hard drive contains counsel's thoughts, summaries, strategies, notes, or commentaries. Just the opposite, and as Plaintiffs put it, on the facts herein the hard drive appears to me nothing more than the functional equivalent of a photocopy of the subject documents, no more, no less. The process which CB undertook only recently in the ordinary course of business to bring it into the modern age may not now be characterized as privileged for purposes of CPLR 3101(d)(2) to shield it from its legitimate disclosure obligations. *See Westhampton Adult Home Inc. v National Union Fire Ins. Co.*, 105 AD2d 627, 627-28 (1st Dept 1984).

Pursuant to CPLR 3101(d)(2), privileged materials prepared in anticipation of litigation may be obtained if the party seeking discovery demonstrates that it has a substantial need for the materials, or that it is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. *See Giordano, supra*. Were the court to accept CB's assertions that Plaintiffs' discovery requests are overly burdensome, the hard drive would relieve such burden.

The court is surprised by CB's reluctance to turn over a copy of its digital files given its position on prior motions that compliance with its disclosure obligations using its antiquated microfiche system is overly burdensome. And while Plaintiffs have offered to share in the time and

expense associated therewith, the bottom line is that CB bears the costs associated with its own discovery obligations. *See U.S. Bank N.A. v GreenPoint Mtge. Funding, Inc.*, 94 AD3d 58, 62 (1st Dept 2012) ("it is the producing party that is to bear the cost of the searching for, retrieving, and producing documents, including electronically stored information."); *Clarendon Natl. Ins. Co. v Atlantic Risk Mgt., Inc.*, 59 AD3d 284, 285 (1st Dept 2009) ("during the course of the action, each party should bear the expenses it incurs in responding to discovery requests."). It would therefore be to CB's detriment not to produce the disk, which indisputably contains almost all of the information that can be found on its microfiche reels.

C. Confidentiality Order

At a July 14, 2014 court conference CB insisted that it is entitled to a confidentiality order before it would grant Plaintiffs access to its files. The parties have since exchanged proposed agreements but have been unable to agree on terms.[12] CB now argues that the court should enter an order which sets forth strict procedures in terms of assessing the confidentiality of its files. I decline to do so given the circumstances of this case.

The notion that a confidentiality order is necessary to protect CB's trade secrets is suspect given that the parties have engaged in decades of litigation without one. Over the years CB has furnished NYCAL plaintiffs with site-specific commercial records and commercial drawings on a case-by-cases basis, including customer correspondence, contract negotiations, specifications, installation and maintenance reports, and redacted drawings. These same documents have been used as exhibits in motion practice and admitted as evidence at trial. The court is unaware of a single

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[12] A copy of Plaintiffs' draft confidentiality order is attached as exhibit A to the August 29, 2014 affirmation of David Keyko, Esq. CB's draft confidentiality order is attached thereto as exhibit B. A redlined draft which shows the differences between the two proposals is attached thereto as exhibit C.

instance in which CB has conditioned their release upon a plaintiff's entering into a confidentiality agreement.

Moreover, CB has not met its burden to show that the documents sought by Plaintiffs contain actual trade secrets. *See Mann ex rel. Akst, supra*, 33 AD3d at 30-31 ("when trade secrets are sought by an adverse party in litigation, the burden of establishing that the information sought is a trade secret lies with the disclosure objectant. If that burden is met, the party seeking disclosure must show that the information appears to be indispensable and cannot be acquired in any other way.") A trade secret may be defined as a "formula, pattern, device or compilation of information ... used in one's business ... which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it."[13] In determining whether information qualifies as a trade secret, New York courts consider the following factors: (1) the extent to which the information is known outside of the business; (2) the extent to which the information is known by the employees of the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the efforts expended to develop the information; (6) the ease or difficulty with which the information could be acquired and/or duplicated by others. *Ashland Management v Janien*, 82 NY2d 395, 407 (1993).

CB argues that the engineering drawings and specifications for its boilers and their component parts reflect decades of investment in research, design and development; that such unpatented know-how, experience, and knowledge give CB a competitive advantage. In turn CB argues that the disclosure of such information without a confidentiality order could have very serious

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[13] RESTATEMENT OF TORTS § 757, comment *b*.

financial and commercial consequences on its continued operations.[14]

The flaw in CB's argument is that Plaintiffs have agreed to limit production to CB's pre-1986 documents given their belief that CB ceased incorporating asbestos into its products in 1985. In other words, the documents sought by Plaintiffs are at least 30 years old. Despite CB's arguments to the contrary, the court has a hard time imagining how the acquisition of such information by an industry competitor would somehow erase its current competitive advantage.

This is not to say that CB's documents do not contain proprietary information or that they are not worthy of some sort of protection. However, CB has not shown herein that the court should require Plaintiffs to accept their proposed procedures and definitions for assessing confidentiality. This is especially true since the parties have the benefit of and expertise of the Special Master whom the court believes is keenly positioned to evaluate whether or not any such materials should be given a confidential designation and whether there should be any limitations upon their use.

Thus, those documents which are responsive to Plaintiffs' disclosure notices as to which CB asserts confidentiality shall be designated on a privilege log and submitted to the Special Master for *in-camera* review. Should the Special Master (and if necessary the court) determine that any or all of the documents listed thereon should be kept confidential the court will enter a confidentiality order regarding same.[15]

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[14] Tornetta Affidavit, ¶¶ 8, 10, 14.

[15] As the court declines to enter a confidentiality order herein there need is no to determine whether its documents can only be used in NYCAL. That being said, the court must express its general reluctance to limit the parties rights in other jurisdictions.

D. Plaintiffs' cross-motion

Plaintiffs' cross-motion seeks to compel CB to provide full and complete Interrogatory Responses, to strike certain of CB's affirmative defenses, and to prohibit CB from introducing any evidence at trial in support of such defenses.

That portion of Plaintiffs' motion regarding CB's Interrogatory Responses is granted. Compliance with standard NYCAL discovery is not optional nor is it contingent on CB's counsel's opinion whether the information sought is relevant.

This court reserves judgment on the remainder of Plaintiffs' cross-motion pending the completion of discovery as directed herein. CB is strongly cautioned that further non-compliance and/or delay will result in the requested sanctions.

CONCLUSION

The CPLR requires the court to ensure that pre-trial disclosure is broad enough for litigants to obtain relevant information so that their claims may be adjudicated on the merits. In the context of this case, this means that CB must produce, among other things, records which bear any relation to Plaintiffs' claim that CB's boilers incorporated asbestos components and/or that it advised its customers to maintain its boilers using asbestos components. CB's own narrow interpretation of the Special Master's Recommendation and this court's June 11, 2014 order would improperly allow it to withhold thousands of pages of relevant information and force Plaintiffs to haphazardly review its commercial records out of context. This cannot be allowed to continue.

In light of all of the foregoing, it is hereby

ORDERED that Cleaver-Brooks, Inc.'s request for clarification is decided as set forth herein, and otherwise denied; and it is further

ORDERED that[16]:

- within 60 days from the date hereof, CB is directed to produce an electronic copy of its digitized commercial records database and paper copies of any commercial records not yet digitized;
- within 60 days from the date hereof, CB is directed to produce electronic copies (to the extent they exist, and otherwise paper copies) of all other relevant documents and records, *including but not limited to* commercial records, boiler drawings, designs and specifications, correspondence, and installation and maintenance reports;
- within 60 days from the date hereof, CB is directed to provide Plaintiffs access to its index card database and any microfiche reels and microfiche readers in its possession;
- CB shall bear the cost of such production.

It is further ORDERED that any documents which CB believes in good faith should be withheld as confidential or privileged shall be designated on a privilege log and submitted to the Special Master for *in-camera* review; and it is further

ORDERED that Plaintiffs' motion for sanctions is granted to the extent that, within 60 days from the date hereof, CB is directed to provide full and complete responses to Plaintiffs' First Standard Set of Liability Interrogatories and Requests for Production of Documents; and it is further

ORDERED that the remainder of Plaintiff's motion for sanctions is held in abeyance pending the completion of discovery as set forth herein.

This constitutes the decision and order of the court.

DATED: 12-15-14

SHERRY KLEIN HEITLER, J.S.C

[16] As set forth herein, CB's discovery obligations are limited to pre-1986 documents.