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United States District Court,
S.D. Indiana,
Indianapolis Division.
David R. LAWSON, Plaintiff,
v.
SUN MICROSYSTEMS, INC., Defendant.
No. 1:07-cv-196-RLY-TAB.

Oct. 16, 2009.

REPORT AND RECOMMENDATION ON DEFENDANT'S MOTION FOR SANCTIONS

[TIM A. BAKER](#), United States Magistrate Judge.

I. Introduction.

*1 This case presents the perfect storm of problems that can arise from voluminous electronic discovery in high stakes litigation. As with a storm of any magnitude--and this one might qualify as a Category 5 from the National Hurricane Center--the damage can be severe. Such is the case in the wake of this maelstrom.

Plaintiff David Lawson filed this action seeking more than \$7 million in commissions and related damages from Sun Microsystems. [Docket No. 11 at 5.] Lawson served discovery requests on Sun seeking voluminous amounts of electronically stored information ("ESI"). Sun's response was delayed and incomplete, prompting a motion to compel and Court intervention. Ultimately, Sun produced over 40,000 emails and other documents. Sun password protected some of these documents, though the parties argue mightily over what parameters, if any, Sun intended by shielding these documents in this fashion.

Sun's voluminous ESI production prompted Lawson's counsel to accuse Sun's lawyers of attempting "to conceal responsive materials by burying them among a tremendous volume of unrelated, unresponsive information." Due to the volume of discovery, Lawson's counsel enlisted Lawson to take a lead role in reviewing and organizing the data for use at

planned depositions. What happened next is also hotly disputed, but there is no doubt that Lawson unlocked the password-protected documents Sun produced. Immediately after doing so, Lawson notified his counsel of his feat by way of an email that proclaimed in the header, "Password protected files--Unlocked!"

When Sun learned of Lawson's actions, it filed the motion for sanctions that pends before this Court. Sun contends that Lawson's actions, and those of his now former counsel, warrant dismissal of this action and monetary sanctions of over \$500,000. Sun characterizes this case as the "e-discovery version of Watergate," where Lawson "was the henchman who broke into the password-protected documents" and his counsel later "engaged in a cover-up."

Lawson and his former counsel contend that no sanctions are warranted. On the contrary, Lawson's former counsel accuses Sun of deliberately misrepresenting facts to the Court in connection with the instant motion for sanctions.

The Court is left to sift through the wreckage of this case, which now is on hold until Sun's sanctions motion is resolved. The undersigned Magistrate Judge, who already has resolved several comparatively mild discovery skirmishes in this matter, concludes that some sanctions are warranted. But Sun's suggestion that the conduct at issue warrants dismissal and a multiple six-figure monetary sanction is both excessive and blissfully ignorant of the role Sun and its counsel played in the situation at hand.

II. Background.

Just prior to filing this suit in January 2007, Sun and Lawson--through their attorneys--negotiated the return of Lawson's company computer. Lawson at first requested to purchase the computer, which Sun denied. [Docket No. 121, Ex. 1.] Lawson then agreed to return the laptop without making efforts to remove any data if Sun would agree that the disclosure of any communications between Lawson and his counsel would not waive his attorney-client privilege. [*Id.*] Sun did not agree to this proposition. [*Id.*] Sun in-

stead proposed that Lawson encrypt any privileged communications prior to returning the computer. [*Id.*; Docket No. 107, Ex. BB, Part 4, Defendant's Ex. 118.] Lawson's counsel at that time, from the law firm of Hoover Hull, raised the concern that:

*2 while encryption would render the data less readily accessible, it would still likely constitute a knowing and voluntary disclosure of privileged communications. This would still be a potential waiver issue. We have requested--and have yet to receive--your agreement that disclosure of this material (whether encrypted or not) will not constitute waiver of privilege for the communications contained in the laptop or any other privileged communication between Mr. Lawson and his counsel. Once we have that agreement, we will be happy to encrypt the privileged communications, as you suggest, and return the laptop as quickly as possible.

[Docket No. 121, Ex. 1 at 1-2.] Sun's counsel agreed that Lawson did not waive his attorney-client privilege contingent upon Lawson's agreement that the encrypted files contained only communication between him and his attorneys. [*Id.* at 1.]

Several months after the commencement of the case, in early May 2007, Lawson served on Sun his first request for production of documents. Sun's counsel, Kim Ebert of Ogletree Deakins, responded that Lawson sought "confidential and privileged information" and therefore asked that Lawson's counsel "review and approve the proposed *Agreed Protective Order.*" [Docket No. 120, Ex. 4.] A few days later, Sun sent Lawson's counsel responses to the first request for production, including a letter stating that Sun was "prepared to provide [Lawson] with all non-privileged and relevant documents" but found the agreed protective order imperative to production. [Docket No. 120, Ex. 5.] The parties submitted their proposed protective order on May 21, 2007, which the Court approved. [Docket Nos. 19, 22.]

Around this time, counsel for the parties began to clash. On May 25, 2007, Lawson's attorney, Daniel Burke of Hoover Hull, sent Sun's attorney Ebert a nearly completed proposed Case Management Plan. With it Burke included an innocuous if not friendly letter requesting Ebert to review and confirm that the dates were as they had discussed, provide Sun's synopsis, and make arrangements for discovery production on May 29, given that the parties submitted their

joint motion for protective order. [Docket No. 33, Ex. C.] Ebert responded on May 29:

A suggestion: Don't take 10k days to send us a Case Management Plan after hours on the Friday before the Memorial Day weekend and then expect our response in one day. If you set unreasonable deadlines, you will be ignored. We will provide our synopsis in due course and, similarly, will provide our responses to the pending discovery in a timely manner as soon as the material has been reviewed for responsiveness and privilege, bates-stamped and copied. Thanks.

Kim

[*Id.* at Ex. D.] Burke subsequently took issue with Ebert's understanding of each party's responsibility concerning the preparation of the CMP as well as what constitutes production of discovery in a "timely" manner. [*Id.* at Ex. E.]

By early June, the parties' discovery squabbles had ripened into full-fledged disputes. [Docket No. 33, Exs. F-J.] In early July, as part of discovery, Lawson provided Sun with a tape recording of conversations between himself and Paul Heidkamp--Lawson's direct supervisor at Sun--which had taken place during the first quarter of 2006. [Docket No. 107, Ex. F at Interr. 7(a).] Also around this time period, the parties agreed to postpone the depositions of Mark Schlager and Lawson because Sun's discovery production was incomplete. [*See* Docket No. 33, Ex. J.]

*3 On July 23, 2007, Lawson filed a motion to compel discovery, requesting the Court order Sun to provide full and complete responses to his discovery requests, produce ESI in its native format, and provide a privilege log. [Docket No. 32.] On August 2, 2007, Sun filed a motion for extension of time to respond to discovery. [Docket No. 34.] On September 4, 2007, the Court largely granted Lawson's motion to compel, but it also gave Sun additional time to provide the discovery--until October 1, 2007. [Docket No. 40.] In late September, the parties agreed to a plan to address the massive amounts of ESI to be produced by Sun whereby Lawson would provide Sun fourteen days' notice prior to using any of the information and Sun would have seven days to object. Ebert memorialized this plan, together with other details pertaining to Sun's production of discovery, in a September 25, 2007, letter to Lawson's attorney. [Docket No. 121, Ex. 2.] The letter concludes: "[P]lease contact me ... if this letter does not accu-

rately represent our discussions and agreements about the October 1, 2007 production. Otherwise, we will produce all information in our possession under this understanding." [*Id.* at 3.] The letter says nothing about password protecting privileged documents as part of the production.

On October 2, 2007, Sun produced massive amounts of ESI together with a letter. In this letter Sun's attorney, Dorothy Parson of Ogletree Deakins, noted that "the electronically stored information being produced here is original as we received it." [Docket No. 121, Ex. 3 at 2.] She furthermore invoked the "Attorneys' Eyes Only" provision of the protective order such that Lawson could not review the information. Parson also noted:

we have password protected certain privileged information from the STK data that we were able to review prior to this large production with respect to Mark Schlager and Eula Adams. We have also directly communicated with Philip Auble and Mark Schlager, which would be contained in the Sun data that we have not had the opportunity to review. Accordingly, we have withheld their data so we can review and password protect that information and add it to our privilege log.

[*Id.* at 3.] Additionally, the letter discussed that Eula Adams's hard drive failed the day before. [*Id.* at 2.]

The next day, on October 3, Burke and Hoover Hull attorney Andrew Hull discussed with Ebert the Attorneys' Eyes Only provision. [See Docket No. 120, Ex. 12.] Ebert agreed to remove the designation as to Lawson, recognizing the practical concern that Lawson would need to be directly involved in the review process, stating: "Our main concern is that Mr. Lawson not make copies of confidential material for any use other than his pursuit of this lawsuit. Nor should Mr. Lawson reveal sensitive business or personal information of custodians to third parties." [*Id.* at 4 (emphasis added).]

That same day the parties also exchanged emails about the withheld data regarding Mark Schlager, Phil Auble, and Eula Adams. Ebert said that some of the data from Eula Adams's hard drive was lost. [*Id.* at 2.] As to the information regarding Mark Schlager and Phil Auble, Ebert proposed that Sun "produce the entire folder/document (e.g. Mark Schlager's "Inbox") to you in PDF format with the content of the attorney-client privileged communications redacted."

[*Id.*]

*4 In early October Sun was still reviewing documents that had not yet been provided to Lawson. [Docket No. 120, Ex. 13.] Burke sent a letter to Sun's counsel on October 10, 2007, taking issue with the incomplete production as well as the greater than expected number of documents, most of which were not searchable. [Docket No. 107, Ex. BB, Part 4, Defendant's Ex. 122.] Burke further stated: "[I]t appears that Sun did not attempt to review this material for responsiveness before producing it. This smacks of an impermissible attempt to conceal responsive materials by burying them amongst a tremendous volume of unrelated, unresponsive information." [*Id.* at 2-3.] Ebert responded that they were surprised by the letter given that Lawson's counsel had not previously objected to a late production. He also stated that the parties had:

reached an agreement ... to produce *un-reviewed data* in native format with the understanding that it was (1) confidential, (2) governed by the terms of the Amended Agreed Protective Order ("Protective Order"), and (3) that prior to your use of the data, you would provide us 14-day advance notice and allow us seven days to object.

[Docket No. 107, Ex. J at 2.] Sun sent the remaining ESI on October 12, 2007, and provided a privilege log on October 15, 2007. [Docket No. 123, Ex. I, Part 1 at 16.]

The introduction to Sun's privilege log states that the ESI "was produced without review, subject to the understanding that plaintiff must provide 14-day advance notice of their intent to use information, and allow defendant seven business days to assert an objection thereto." [Docket No. 121, Ex. 6.] It also indicates that Sun did not identify any attorney-client privileged communications occurring after October 13, 2006. [*Id.*] Finally, the introduction states that the "log sets forth material withheld from responses to plaintiff's discovery requests on the basis of attorney-client and/or work product privileges." [*Id.*] The privilege log primarily describes emails containing legal advice of counsel for unrelated matters. The privilege log also does not contain any documents to or from Eula Adams. [*Id.*] The privilege log, however, describes documents "Withheld from Production of Mark Schlager Hard Drive" and includes "Drafts of Chronology Prepared by Mark Schlager At Request of Counsel," "Drafts of Chart Prepared by Mark

Schlager At Request of Counsel Regarding Payments to all Employees Compensated on the JMPC Project," and "Drafts of Calculations Regarding David Lawson's Commission Prepared by Mark Schlager At the Request of Counsel." [*Id.*] The privilege log does not provide the date these documents were created or sent, nor does it note that these documents are password protected. [*Id.*]

The parties continued to have discovery difficulties after this massive production. For example, in a letter dated October 17, 2007, Burke notified Ebert of "two significant information gaps": no emails in Paul Heidkamp's "sent items" file and "inbox" during critical time periods. [Docket No. 107, Ex. K.]

*5 Sun produced responses to Lawson's first request for admissions on November 2, 2007. [Docket No. 107, Ex. B.] Also on this date, Lawson sent Burke an email (which he copied to Hull and Hoover Hull paralegal Jodie Stephens) with the subject line, "Password protected files--Unlocked!" and stating the following:

Dan,
I have now successfully unlocked most of the password protected files. I suspect it remains to be seen if these will be considered "privileged" with respect to our current situation or not. Regardless, it does begin to surface some of their strategy; under both the 05 & 06 plans....

* * * [\[FN1\]](#)

[FN1.](#) The asterisks represent portions of the email redacted by the Court for privilege because the content is not relevant to the dispute at issue. [*See* Docket No. 101, Ex. B.]

My system will be down until Sunday, so when I receive Kim's latest EMail to you from earlier this week, I'll review it at that time. Until then, please feel free to give me a call.

Thanks and best regards,
David R. Lawson

[Docket No. 107, Exhibit U, Part 3, Attach. 6.] Finally, on this date, Parson wrote to Burke and Hull seeking confirmation that Hoover Hull was not planning to use any of the ESI produced on October 2 for the deposition scheduled for November 15 given the 14/7 arrangement. [Docket No. 121, Ex. 8.] Burke responded the same day that they viewed the matter

differently. [*Id.*]

On November 3, Burke sent Lawson Sun's answers to interrogatories and request for admissions. [Docket No. 107, Ex. BB, Part 2 at 21 (email from Nov. 3, 2007, 6:05 p.m.).] Lawson responded on November 4:

Dan,
Thanks. I think I enjoyed reading their responses as much as I would enjoy a root canal. Can we pick a time-slot to huddle on Monday or Tuesday?
Topics:

* * *

Schlager's unlocked documents

* * *

Thanks!
DRL.

[*Id.*] Lawson also sent an email to Burke and Hull that day with comments that he said he was available to discuss "today if you would rather not wait until tomorrow." [*Id.* at 20 (email from Nov. 4, 2007, 9:39 a.m.).]

On November 5, 2007, Burke again requested Ebert to supplement Paul Heidkamp's missing emails as well as emails and attachments from other relevant Sun personnel. [Docket No. 107, Ex. N.] This letter also called into question the 14/7 arrangement. [*Id.*] On November 7, 2007, Sun filed an emergency motion for protective order requesting enforcement of the 14/7 arrangement, which the Court granted. [Docket Nos. 46, 50.] In December, the parties worked with the Court regarding the production of the emails and attachments, and the Court issued a discovery order on December 27, 2007, which required some production but also gave Sun permission to discontinue maintaining certain ESI. [Docket No. 57.]

In February of 2008, Burke and Hull withdrew as Lawson's attorneys and Irwin Levin, Eric Pavlack, and Gabriel Hawkins of the law firm Cohen & Malad appeared on Lawson's behalf. [Docket Nos. 59, 61-64.] Discovery disputes continued despite Lawson's new counsel. In a letter dated March 20, 2008, Pavlack wrote to Parson:

I am writing to follow up on our conversation of yesterday afternoon regarding the list of IXOS emails and electronic data for five of the em-

ployees responsive to paragraph 4(b) of the Court's December 27, 2007 Order. After we received that list and data with your correspondence of March 12, 2008, we brought to your attention the fact that it did not contain any emails from 2005 or the spring of 2006, arguably the most important portion of the time frame required by the Court's Order.

*6 Yesterday you informed me that this was the result of an error on Sun's part when running the query because it improperly entered the date range for that query. Given the past history of discovery problems in this case, it is of great concern to us that this error would have occurred. But for our noticing the gap in the list and data that was provided to us more than two months after the Court's order to do so, Sun would have avoided its obligation to provide the lion's share of emails from the most important time frame in this case.

[Docket No. 120, Ex. 17.]

On April 17, 2008, Sun deposed Lawson for the first time. [Docket No. 107, Ex. X.] During the deposition, Ebert questioned Lawson about tape-recorded conversations:

Q. Okay. Who did you tape-record conversations with? ... I'm talking with respect to your employment at STK or Sun.

A. Paul Heidkamp.

Q. Anyone else?

A. No.

[*Id.* at 234-35.] Later Ebert played the tape recording of conversations Lawson had produced during discovery and questioned Lawson further:

Mr. Ebert: Okay, for purposes of the record, we've just played the tape-recording that has been produced to us.

Q. First of all, with respect to--and there seem to be two conversations on that tape. Would you agree with me?

A. Multiple. I would say multiple.

Q. Okay. More than two?

A. I believe so. It was my impression there was multiple recordings with Paul Heidkamp, so--and I don't think I heard that on there.

Q. You recorded Paul Heidkamp multiple times?

A. I believe so, yes.

Q. Okay. More than just what we just listened to?

A. I believe so, yes.

Mr. Ebert: Okay. Well, we don't have that in our records. So, we'll need to follow up on that.

Q. Was the first conversation that was--we just lis-

tened to the conversation between you and Mr. Heidkamp?

A. That's correct.

* * *

Q. [Referencing the transcript of the tape-recording] There's a line that says, about two-thirds of the way down: Again, I'm not sure we have ESS contracts anymore, Tom. So, it's kind of difficult for me to say.

A. Uh-huh.

Q. Were you talking to someone named Tom in the second conversation that's on this tape-recording?

A. Yes. This is a conversation with Tom Kelly.

Q. Okay. Didn't you testify earlier today that you hadn't tape-recorded any other conversations in relation to your employment?

A. Yes. And Tom was in California. So, it was my understanding that was not a state where the recording would be applicable. So, it wasn't a valid recording as--as was explained to me.

Q. My question, I think, was fairly straightforward. It had nothing to do with California law. The question was: Have you tape-recorded any conversations with any other individuals at Sun or STK with respect to your employment at Sun and STK? And you told me, only Paul Heidkamp.

A. Right. That was my response to that.

Q. Okay. So, you're now changing your testimony?

*7 A. I'm correcting it, if that's what you're asking.

Q. Okay. At the time you answered originally, did you know that you had had this conversation with Tom Kelly that was tape-recorded?

A. Yes.

Q. Okay. You just decided not to tell me?

A. That's not accurate.

Q. Okay. When did you have this conversation with Tom Kelly?

A. Again, I believe that was before Lori Middlehurst's letter.

Q. Did you initiate that call?

A. No, Tom requested that call.

Q. And he was in California when you spoke with him?

A. Yes.

Q. Do you know whether it's a crime in California to tape-record a conversation--

A. No, I--

Q. --without somebody's knowledge and consent?

A. No, I do not.

Q. And you believe there are other tape-recordings that you have produced to your attorneys that are

not reflected on what we just heard?

A. Yes, I do.

Q. Would they be limited to conversations with Mr. Heidkamp, or are there other individuals who you've tape-recorded now that you recall?

A. I believe, just Paul Heidkamp.

Mr. Ebert: Well, we reserve the right to reopen this deposition to the extent that there've been--tape-recordings have been withheld. We'll just have to sort that out after the--

Mr. Pavlack: Right, I agree.

[*Id.* at 284-94.] On April 23, 2008, Pavlack sent counsel for Sun two tapes and a letter acknowledging that the tape previously provided was incomplete and explaining it was his understanding "that this was the result of problems in the tape duplication process of which we were not aware until we listened to the tape that was produced to Sun during Mr. Lawson's deposition and reviewed the transcript of the same." [Docket No. 120, Ex. 19.]

The next day, on April 24, 2008, Ebert wrote a letter to Pavlack regarding "a matter of profound concern." [Docket No. 120, Ex. 20 .] Ebert informed Pavlack that "the information you recently delivered to us under the 14-7 day agreement (intended to be used in depositions) contains many documents that were password protected and designated in the Privilege Log" as being privileged. [*Id.*] Ebert informed Pavlack that they were "continuing to investigate what appears to be very serious misconduct on the part of Mr. Lawson." [*Id.*]

III. The Investigation.

Sun launched a comprehensive investigation into Lawson's alleged transgressions. This investigation included depositions of Lawson, Hull, Burke, and Hoover Hull paralegal Jodie Stephens, and an inspection by a third-party forensic examiner of the hard drives used by Lawson and his wife during the time period of this litigation. [Docket No. 123, Ex. I, Part 1 at 2.] Additionally, Sun transcribed the audiotapes produced by Pavlack on April 23.

A. Tape recordings.

1. Lawson.

Sun deposed Lawson on April 28, 2008, for the second time. Ebert questioned Lawson about the au-

diotapes produced on April 23. [Docket No. 107, Ex. Y.] Lawson clarified: "There were some other recorded conversations chiming in from, I believe, my wife, Michael Flashner and Matt Stepanski. But the recorded conversations have nothing to do with the substance of this case." [*Id.* at 350.] Matt Stepanski was an assistant to Don Grantham, the Executive Vice President of Service Sales for Sun, and was located in California at the time Lawson was taping him. [*Id.* at 352.] Lawson explained that the reason he had not discussed the Stepanski call at the previous deposition was because he did not think the conversation would be admissible since Stepanski was located in California at the time he was recorded. [*Id.* at 354.] Lawson also indicated that the recording of Stepanski was not necessarily intended and was unrelated to his claims for commission. [*Id.* at 373-74.] Michael Flashner--who was in service sales for Sun and was likely in Michigan at the time recorded--chimed in on the tape when Lawson was on hold or on a different call. [*Id.* at 353.] Lawson had not remembered that he had taped Flashner. [*Id.* at 355.]

*8 Lawson also discussed the quality of the tapes--the second copy being far better than the first. [*Id.* at 358-59.] Lawson explained that he made the first copy using his home stereo that would start and stop and "had seen much better days." [*Id.* at 358.] The second copy was a professional duplicate of the source tape. [*Id.* at 359.]

Sun deposed Lawson for a third time on April 20, 2009, and Ebert again asked Lawson about the tapes. [Docket No. 120, Ex 25.] Lawson said he had provided Burke with a copy of the tape without first reviewing it. [*Id.* at 653.] He recorded from "an old stereo and it would stop repeatedly" and he would "just go and hit record again and again and again and again and it continues." [*Id.* at 655.] He "didn't know that that would be a significant problem." [*Id.*] He said he told the Hoover Hull attorneys that he thought the tape should be transcribed, but Burke said his assistant had tried at one point to transcribe the tape but had a difficult time understanding it. [*Id.* at 653, 656.] Lawson said he offered a number of different times to make another recording but Hoover Hull never requested another copy, nor did they transcribe the tape. [*Id.* at 653.] He also stated he understood his attorneys to consider the tape not very significant. [*Id.*]

2. Burke.

Burke testified that Lawson provided him a copy of the tape and that he did not recall whether he and Lawson ever discussed gaining access to the original. [Docket No. 121, Ex. 12 at 72.] Burke said he and Lawson had discussed the poor quality of the tape and that Lawson had said he had used unsophisticated means to make the copy. [*Id.* at 73.] Burke testified he did not know how Lawson had made the tape, but that Lawson had represented that the original tape was also of poor quality. [*Id.*] Burke said his former assistant had attempted to transcribe the copy Lawson had provided him, but she gave up because the quality of the tape was too poor to understand. [*Id.* at 74.]

3. Hull.

Hull testified that he listened to the tape that they produced to Sun. [Docket No. 121, Ex. 11 at 32.] He said "I think that was a meeting with, perhaps, Dan and Mr. Lawson." [*Id.*] He recalled sitting around listening to it once or twice and that it was of very poor quality. [*Id.*] He testified that Lawson was listening to the tape with him, and that Lawson never indicated that he had a better quality tape. [*Id.* at 32-33.]

4. The Tapes and Transcripts.

Apparently, there are three sets of tapes: (1) the source tapes (the number of tapes is not clear from the record); (2) the tape Lawson originally provided his attorneys ("the homemade copy"); and (3) the professional copy of the source tape, consisting of two tapes, ("the professional copy"). The parties have not provided the Court with the tapes, but Sun provided a transcript of the homemade copy and a partial transcript of the professional copy. [*See* Docket No. 107, Ex. BB, Part 1.]

*9 The homemade copy resulted in one largely inaudible tape, about six minutes in length, amounting to five transcribed pages. [Docket No. 110 at 15.] It contains two conversations--the first between Lawson and Heidkamp and the second between Lawson and an unidentified person. [*See* Docket No. 107, Ex. BB, Part 1 at 2-6 .] Both conversations relate to the substance of this case, but the transcript indicates a good deal of the content is inaudible. [*Id.*]

The first tape of the professional copy is seventy-six minutes long. [Docket No. 110 at 14.] Sun provided the Court with forty-three transcribed pages, a good deal of which is not relevant to this lawsuit. [Docket No. 107, Ex. BB, Part 1 at 7-49.] It contains two calls between Lawson and Heidkamp directly pertaining to this lawsuit.

The second tape of the professional copy is about four minutes long, amounts to four transcribed pages, and contains two conversations. [*Id.* at 50-53.] The first conversation is between Lawson and Sun employee Tom Kelley and relates directly to this lawsuit. [*Id.* at 50-52.] The second conversation between Lawson and an unidentified person is short, incomplete, and its substance is unclear. [*Id.* at 52-53.]

Comparing the professional copy to the homemade copy shows that the unidentified person in the second conversation on the homemade copy is Tom Kelley, and that this conversation exists on the second tape of the professional copy. The professional copy fills in some of the missing words that are inaudible on the homemade copy. For example, in the conversation between Lawson and Heidkamp, Heidkamp asks Lawson "what number" he is "trying to go for," and Lawson replies, "Well, the math on it, I think, works out to be about 1.7." [*Id.* at 12.] The "about 1.7" is missing from the homemade copy. [*Id.* at 3.] Likewise, inaudible from the homemade copy is Kelley's question to Lawson: "what makes you think that the 1.9 million is fair?" [*Id.* at 52.]

B. Password-Protected Documents.

1. Lawson.

At the April 28, 2008, deposition, Lawson testified that he used a utility he got off the internet to unlock the password in order to access the documents. [Docket No. 107, Ex. Y at 395.] The following exchange occurred between Lawson and Ebert:

Q. Okay. And did you understand that it was your obligation not to view documents that were password-protected?

A. No.

* * *

Q. Did you have any conversation with your attor-

neys about the documents that you found to be password-protected before you accessed those documents?

A. Before, no.

Q. Subsequent to your breaching the doc--or, opening the documents with your utility and bypassing the password, did you advise your attorneys that you had done so?

A. Yes.

Q. Your current attorneys or your previous attorneys? [\[FN2\]](#)

[FN2.](#) Lawson's "previous attorneys" is referencing Burke and Hull.

A. Previous attorneys and provided them back with the other 400 gigs, or so, of data that you gave us.

* * *

*10 Q. And what was the response of your attorneys to that?

A. Not much. I mean, they didn't really see a lot of significance.

Q. Was that a cause for you to end your relationship with them, or them to end their relationship with you?

A. No.

[Id. at 396-98.]

At the April 20, 2009, deposition, Lawson testified that he does not recall receiving the email dated October 12, 2007, to which Burke had attached the letter from Sun regarding the password-protected documents, nor does he otherwise recall being informed about the documents from Burke. [Docket No. 120, Ex. 25 at 666-67.] Rather, Lawson recalls pointing out to Burke that some of the documents produced by Sun were password protected. *[Id. at 667.]* Lawson does not remember when he first received the letter or whether he read the letter when he first received it. *[Id. at 669-70.]* Lawson testified that when he discovered the password-protected documents he immediately called Burke and they conversed as follows:

I said "There's some password protected documents here. What do you want to do?" And Dan replied "It's probably just another delay or obfuscation attempt by Sun." I said "Well, do you want me to try to open them?" And he replied "Well, I wouldn't waste a whole lot of time on it, but why not."

[Id. at 677.] Lawson said he asked Burke whether they should demand that Sun provide the passwords

and that he does not recall what Burke's response was but Lawson believed Burke thought it was a waste of time. *[Id. at 701.]* Lawson admitted that he accessed the password-protected documents. *[Id.]*

When Ebert asked Lawson what he meant in his email to Burke when he said, "I suspect it remains to be seen if these will be considered 'privileged' with respect to our current situation," the following dialogue transpired:

A. Well, as Dan [Burke] said, he felt that it was all covered under the 174 agreement. Yet he wasn't sure if opposing counsel would object or not.

Q. When you say 174, you mean 147?

A. Sure, whatever agreement you guys cooked up, which I was also not embracing of.

Q. Did you discuss the fact that--with Mr. Burke that a document that was privileged would be between attorney and clients? Did you understand that concept?

A. I asked him about some of the privileged e-mails that we found, yeah.

Q. And what did he say?

A. Send them.

Q. To?

A. To him.

Q. So when you accessed a password protected document, you then sent it to Mr. Burke indicating that it was one that you had accessed through the password protection?

A. Okay, let me help clarify your question. The e-mails that we found that were privileged, Dan said go ahead and send them. I don't know that we found any documents necessarily that were privileged. Do you understand?

Q. No, I don't.

A. From my perspective what was explained to me is if it says "privileged" in an e-mail, that's a privileged e-mail and when I stumbled across some of those in my search, Dan said send them because again he felt we were covered under this 147 agreement.

*11 [Docket No. 107, Ex. Z at 690-91.]

2. Burke.

Burke signed an affirmation on January 29, 2009, stating that he had never had any discussions with any of Sun's counsel about the fact that some of Sun's ESI was password protected nor entered into any agreement regarding the same. [Docket No. 121, Ex.

5 at ¶¶ 6-7.] Burke further affirmed that he passed on the October 2 letter from Sun to Lawson twice--one time hand-delivered and one time via email--but that Burke did not provide Lawson with a transmittal letter. [*Id.* at ¶¶ 8-9.] Burke acknowledged that he received an email from Lawson [FN3](#) on November 2, 2007, with the subject line "Password protected files--Unlocked!" but Burke did not recall receiving the email, printing the email, or responding to it. [*Id.* at ¶¶ 10-11.] Burke also affirmed that he received an email from Lawson on November 4, 2007, containing a reference to "Schlager's unlocked documents," but he did not recall receiving this email and did not respond to it. [*Id.* at ¶ 12.] Burke claims he never opened the attachments Lawson sent on November 2, never reviewed them, and has no personal knowledge of their contents. [*Id.* at ¶¶ 14-15.]

[FN3](#). More specifically, the affirmations Burke and Hull signed state only that "Hoover Hull" received this email. [Docket No. 121, Ex. 4 at ¶ 9; Docket No. 121, Ex. 5 at ¶ 10.] However, the record demonstrates that Lawson sent this email to Burke, Hull, and Stephens, although they have no recollection of this email and claim to have not seen it.

Burke also testified that he provided Lawson with the hard drives containing Sun's ESI, as well as a copy of the privilege log, as Lawson was to take the lead in reviewing the hard drives. [Docket No. 121, Ex. 12 at 45-47.] Burke did not believe that anyone at Hoover Hull reviewed the material on those hard drives prior to its delivery to Lawson. [*Id.* at 46.] Burke did not recall giving Lawson any instructions about any documents that might be password protected, nor did he discuss with Lawson the October 2 letter from Sun. [*Id.* at 47, 52.] Burke did not recall discussing with Lawson any process regarding the ESI review. [*Id.* at 50.] Burke also did not recall ever authorizing or even discussing with Lawson any attempts to gain access to the password-protected documents. [*Id.* at 57-61.]

On May 28, 2009, Burke signed a second affirmation in which he explained Hoover Hull's strategy in dealing with Lawson's claim. [Docket No. 121, Ex. 7.] He explained that Hoover Hull had decided to prepare for the depositions of Paul Heidkamp and Mark Schlager in three phases. [*Id.* at ¶ 3.] In the first

phase, Hoover Hull planned to review the documents that Lawson had provided to Hoover Hull before the litigation began and to use these documents to create outlines. [*Id.* at ¶ 4.] These documents included "over 40,000 emails, most of which had attachments, and other documents pertaining to the transaction underlying his commission claim." [*Id.*] Burke stated that "[a]s of November 2, 2007 (approximately two weeks before the deposition of Mr. Heidkamp), Hoover Hull had not completed this initial phase of its deposition preparation." [*Id.*] In the second phase, Hoover Hull was planning to review Sun's May 30, 2007, initial document production, consisting of approximately three bankers boxes of paper. [*Id.* at ¶ 5.] Finally, Hoover Hull was planning "to turn to Sun's electronic production [over 30,000 bankers boxes worth of data] after ... Lawson had plowed through Sun's enormous data dump to try to isolate materials that were relevant to his claim." [*Id.* at ¶¶ 6-7.]

*12 Burke affirmed that between October 15, 2007, and November 2, 2007, Lawson sent Hoover Hull "over thirty e-mails forwarding information he had found through his review, often attaching several files to the e-mails." [*Id.* at ¶ 8.] Burke stated that "Hoover Hull deliberately set aside Lawson's e-mails forwarding materials uncovered through his data review until the firm was ready to begin phase three of its preparation." [*Id.* at ¶ 9.] According to Burke, Hoover Hull never reached the second or third phases of the deposition preparation because on November 2, 2007, Parson emailed Hoover Hull invoking the parties' 14/7 arrangement, and Hoover Hull turned its attention to whether this arrangement applied to depositions. [*Id.* at ¶¶ 10-11.] Because the Court determined that the 14/7 arrangement applied to depositions, Hoover Hull withdrew the deposition notices of Heidkamp and Schlager. [*Id.* at ¶¶ 11-12.] Over the following weeks, Hoover Hull concluded it needed to withdraw as counsel for Lawson, so Hoover Hull never reviewed the emails sent by Lawson during that time period, including those received on November 2 and 4. [*Id.* at 13.]

3. Hull.

Hull signed an affirmation on January 29, 2009, stating that he had never had any discussions with any of Sun's counsel about the fact that some of Sun's ESI was password protected nor entered into any agreement regarding the same. [Docket No. 121, Ex. 4 at

¶¶ 6-7.] Hull affirmed that he received an email from Lawson entitled "Password protected files--Unlocked!" but that he did not recall receiving it, nor did he recall ever opening the attachments. [*Id.* at ¶¶ 9-10.] He affirmed that he did not review the attachments at any time and has no personal knowledge of their contents. [*Id.* at ¶ 14.]

Hull likewise testified by deposition that he never talked with Lawson or Burke about the password-protected documents produced by Sun on October 2 as part of discussions regarding how they intended to review the ESI. [Docket No. 121, Ex. 11 at 25.] He does not recall receiving the email sent by Lawson on November 2, nor did he have any conversations with Lawson or Burke about the fact that Lawson had accessed the documents. [*Id.* at 28.]

4. Stephens.

Hoover Hull paralegal Jodie Stephens testified that she participated in meetings with Lawson in which the data produced by Sun was discussed. [Docket No. 123, Ex. B at 20.] She testified that she never came across any password-protected documents nor any attorney-client privileged materials. [*Id.*] Further, she said she never discussed any password-protected documents with Burke or Hull, nor does she recall seeing the email sent by Lawson to her, Burke, and Hull indicating that he had unlocked password-protected documents. [*Id.* at 22-23.]

5. Rebecca Hendricks.

Rebecca Hendricks--the expert hired by the parties to conduct a forensic examination of four images of hard drives of the computers of Lawson and his wife--provided an affidavit setting forth her conclusions. [Docket No. 107, Ex. U.] Hendricks searched for password-protected documents, copies of documents that were password protected but had the password removed, and documents created from September 1, 2007, through November 30, 2007, containing certain terms such as "password," "crack," and "decrypt." [*Id.* at ¶ 15.] The parties also narrowed Hendricks's search to reduce the results. [*Id.* at ¶¶ 19-21.] Hendricks found that Lawson had attempted to unlock the password-protected documents on October 9, October 10, October 14, October 21, November 1, and was successful on November 2, 2007. [*Id.* at ¶ 22e-22s.] Hendricks also determined that Lawson ac-

cessed the files on March 9, 2008, and on April 14, 2008. [*Id.* at ¶ 22t-22u.]

IV. Discussion.

A. Legal Standard.

*13 Sun argues that sanctions should be imposed based on [Federal Rule of Civil Procedure 37](#), the inherent power of the court, and [28 U.S.C. § 1927](#). "If a determination is properly made that sanctions are warranted, the district court *shall* impose a sanction." [Ins. Benefit Adm'rs. v. Martin](#), 871 F.2d 1354, 1358-59 (7th Cir.1989) (citing [Frantz v. U.S. Powerlifting Fed'n](#), 836 F.2d 1063, 1065 (7th Cir.1987)). A court has a wide range of possible sanctions that may--but need not--include a monetary assessment. [Id.](#) at 1359.

1. [Federal Rule of Civil Procedure 37](#).

Sun directs the Court to [Federal Rule of Civil Procedure 37](#). [Rule 37\(a\)\(4\)](#) provides that "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond." [Rule 37\(c\)\(1\)](#) provides that "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless ." Additionally, [Rule 37\(c\)\(1\)](#) provides alternate sanctions including payment of fees, informing the jury of the party's failure, or any of the sanctions listed in [Rule 37\(b\)\(2\)\(A\) \(i\)-\(vi\)](#), i.e., directing matters be designated as facts for purposes of the action, prohibiting the use of materials, striking pleadings, staying further proceedings until an order is obeyed, dismissing the action in whole or part, and rendering a default judgment against the disobedient party.

Of these potential sanctions, Sun specifically requests monetary sanctions and dismissal. "[Rule 37](#) supports only the reimbursement of fees resulting from the discovery violation." [Maynard v. Nygren](#), 332 F.3d 462, 471 (7th Cir.2003). Further, [Rule 37\(c\)\(1\)](#), sanctions for failure to supplement discovery, only provides attorneys' fees and costs be paid by the client, not the attorney (unlike [Rule 37\(b\)](#)), where there is failure to comply with a court order). *1100 West, LLC v. Red Spot Paint & Varnish Co.*, 1:05-cv-

1670- LJM-JMS, 2009 U.S. Dist. LEXIS 47439, *72-73 (S.D. Ind. June 5, 2009).

"Dismissal is a drastic penalty" Negrete v. AM-TRAK, 547 F.3d 721, 724 (7th Cir.2008) (determining dismissal was appropriate where the plaintiff lied during a deposition about his sources of income, potentially lied about ability to work, lied about who worked on his buildings, and missed twenty-one discovery deadlines). "[D]ismissal is an appropriate sanction for a violation of Rule 37 only when there is 'clear and convincing evidence of willfulness, bad faith or fault.'" Wade v. Soo Line R.R. Corp., 500 F.3d 559, 564 (7th Cir.2007) (quoting Maynard, 332 F.3d at 471) (noting, however, that this high standard from Maynard is probably not actually required as heightened burdens of proof do not apply in civil cases unless required by a statute or the Constitution, Grogan v. Garner, 498 U.S. 279 (1991)).

2. Inherent Power of the Court.

*14 "A district court has inherent authority to sanction conduct that abuses the judicial process." Montano v. City of Chi., 535 F.3d 558, 563(7th Cir.2008). "[T]he inherent power of the court 'is a residual authority, to be exercised sparingly' and only when other rules do not provide sufficient basis for sanctions" Dal Pozzo v. Basic Mach. Co., 463 F.3d 609, 614 (7th Cir.2006) (quoting Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co., 313 F.3d 385, 390-91 (7th Cir.2002)). Likewise, to use such power, "a court must find that the party 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons'" Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhiman-tec, 529 F.3d 371, 386 (7th Cir.2008) (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 45 (1991)). Dismissal is a "particularly severe" sanction that is within the Court's discretion to use as part of its inherent power, though--like other sanctions--must only be used if proportionate to the gravity of the offense. Montano, 535 F.3d at 563.

3. 28 U.S.C. § 1927.

An attorney who "so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. A violation of this statute is "a form of intentional

tort" and "depends ... on a finding of bad faith." Shales v. Gen. Chauffeurs, Sales Drivers & Helpers Local Union, 557 F.3d 746, 749 (7th Cir.2008). The Seventh Circuit draws a distinction between subjective bad faith and objective bad faith. Dal Pozzo, 463 F.3d at 614. Subjective bad faith, which is more difficult to demonstrate, need only be shown "if the conduct under consideration had an objectively colorable basis." *Id.* "The standard for objective bad faith does not require a finding of malice or ill will; reckless indifference to the law will qualify." *Id.* "[T]his statute authorizes awards against individual lawyers but not law firms." United Stars Indus. v. Plastech Engineered Prods., 525 F.3d 605, 609 (7th Cir.2008); see also Clairborne v. Wisdom, 414 F.3d 715, 724 (7th Cir.2005).

B. Arguments.

1. Sun.

Sun argues that Lawson and Hoover Hull should be sanctioned, accusing them of the following:

1. Lawson's affirmatively breaking the password protection of Sun's attorney-client privileged electronic documents on external drives that had been produced to Lawson's attorneys and not disclosing this misconduct;
2. Lawson's viewing the privileged communications contained on those hard drives, when the basis for password protecting those documents (which included analysis of the underlying case) was to keep them confidential and privileged;
3. Non-disclosure by Lawson and Hoover Hull attorneys that Lawson had viewed the privileged documents;
4. Lawson's intentional production of only a portion of a taped conversation that Lawson had with Heidkamp, and his intentional reproduction of that taperecording in a manner that made the reproduction significantly inferior to the original in his possession;
- *15 5. Lawson's failure to disclose the existence of two tapes containing recordings of multiple conversations he had with other Sun employees and his failure to produce the tapes of those conversations until more than 14 months after filing the instant lawsuit;
6. Lawson's initially lying during his deposition about the taping and only admitting to the taping, which itself was in violation of Illinois and Cali-

fornia state laws, during subsequent questioning during the deposition;

7. The failure of Lawson's attorneys to produce the tape recordings until Lawson admitted to the existence of the tapes during his deposition; and,

8. Lawson's falsely affirming under penalties of perjury in his Interrogatory Answers, first supplemental Interrogatory Answers, and second supplemental Interrogatory Answers that the representations contained in those documents were true and correct to the best of his knowledge and belief.

[See Docket No. 110 at 1-2.]

Sun first argues that the appropriate sanction is dismissal of this action. Sun says that the documents Lawson accessed "were prepared at the direction of in-house counsel to outline various potential commission payment scenarios taking into consideration a variety of fact patterns" and that "[b]y his misconduct, Lawson has completely compromised Sun's defenses." [Docket No. 110 at 28.] Sun further argues that "there is no question that Sun invoked the password protection protocol without objection or question by Plaintiff or the Hoover Hull attorneys" and that "Lawson understood the concept of attorney-client privilege from at least the inception of this lawsuit." [Id. at 29.] Sun argues that many circuits have dismissed cases when "a party garnered unauthorized access to the other party's documents and records," and that the Court has authority to do so in this case. [Id. at 28.]

Sun also argues Lawson's case should be dismissed because he failed to disclose that he had taped multiple conversations, failed to turn over the recordings when requested, and stated in his first deposition that he had only recorded Heidkamp when in fact he had recorded other Sun employees as well. [Id. at 29-30.] Sun argues that Lawson's interrogatory responses go beyond mere neglect. [Id. at 29.] Sun says, "Lawson's testimony lacks credibility given his lack of candor in disclosing conversations with individuals other than Paul Heidkamp when he first had the opportunity during his deposition" and that Lawson recanted his testimony that Heidkamp was the only person he recorded "upon hearing the tape that was played during his deposition on April 17, 2008." [Id. at 29-30.] Sun suggests that a comparison of the transcripts leads "to the inescapable conclusion that the first audiotape was purposefully cut and pasted together from conversations with Heidkamp (taken from 76 minutes

down to 4 minutes) and Kelley (merged in with Heidkamp's conversation at the end)." [Id. at 30.] Sun also points out that while Lawson says the first time he noticed the tape was incomplete was during his deposition, Hull testified that he listened to the tape multiple times with Lawson prior to producing it.

*16 Sun contends that monetary sanctions should be imposed on Lawson and Hoover Hull. Sun points out that at the beginning of the case, Hoover Hull and Lawson had password protected privileged documents on the laptop that Lawson returned to Sun, so both should have been aware of the protocol set by doing so. [Id. at 31.] Sun included in the October 2 letter with its ESI production that it had password protected these documents, which Hoover Hull never objected to nor questioned, and so they implicitly agreed to the password protection. [Id.; Docket No. 125 at 3.] Thus, Sun claims that this "is essentially the e-discovery version of Watergate," where Lawson "was the henchman who broke into the password-protected documents" and that then "Hoover Hull engaged in a cover-up." [Docket No. 110 at 31-32.]

Sun believes Hoover Hull violated [Indiana Rule of Professional Conduct 1.2\(a\)](#) (prohibiting assisting a client in criminal conduct), Rule 4.1 (prohibiting failure to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client), and Rule 1.4 (requiring attorney to maintain reasonable communication with a client). [Id. at 33.] Furthermore, Sun argues that Hull was responsible for monitoring Burke per Rule 5.1 and both were responsible for monitoring Lawson per Rule 9.1, but they did not do so. [Id. at 34.] Sun further states that the Hoover Hull attorneys acted with objective bad faith in that: "There is no question they knew of the password protection protocol; that Sun had password protected documents; and that Lawson informed them he had opened Sun's password protected documents." [Id. at 27.]

Sun claims that the conflicting versions of fact offered by Lawson and Hoover Hull "show that either or both are lying." [Docket No. 125 at 3-4.] Sun says that if Lawson is to be believed, Burke gave Lawson misguided and sanctionable instructions to open the password-protected documents. [Id. at 4.] If Lawson is lying, Sun says that Hoover Hull still cannot contest that it ratified Lawson's conduct given the email Lawson sent Burke and Hull on November 2, 2007,

entitled "Password protected files--Unlocked!" [*Id.*] Sun concludes, "depending upon whose testimony one believes, Hoover Hull authorized Lawson to affirmatively access and open these privileged documents using password-cracking utility programs, or else Burke negligently and recklessly allowed Lawson to do so." [Docket No. 110 at 32.]

Finally, Sun argues that Hoover Hull violated its duties as a bailee by allowing its agent (Lawson) to use bailed property (the hard drives and external drives) in an unauthorized manner (accessing the password-protected documents). [*Id.* at 35.] Sun argues that "as a matter of fairness," it should be allowed to recoup some of the cost prior to October 2007 as well as everything after October 2007. [*Id.* at 38.]

2. Hoover Hull.

*17 Hoover Hull argues that Lawson's April 28, 2008, testimony that he did not "have any conversation with [his] attorneys about the documents that [he] found to be password-protected before [he] accessed those documents" is consistent with Hoover Hull's attorneys' testimony that they did not advise Lawson to access the password-protected data. [Docket No. 121 at 16, 18.] Hoover Hull points out that Sun only provided to the Court Lawson's later inconsistent testimony that he consulted Burke before opening the password-protected documents. [*Id.* at 16.] Hoover Hull says that this "self-serving testimony is analogous to a 'sham affidavit' by which a party seeks to avoid summary judgment by contradicting prior sworn testimony." [*Id.* at 16.] Hoover Hull argues: "Sun and its counsel buried Lawson's initial [April 28, 2008] testimony in their 720-page designation of evidence, said not a word about it in their brief, and instead relied on Lawson's later, contradictory testimony to support their attacks on Hoover Hull ... [which] constitutes an inexcusable lack of candor and amounts to a deliberate misrepresentation." [Docket No. 129 at 2.] Hoover Hull further contends that "[g]iven Sun's consistent, repeated attacks on Lawson's credibility, Sun has no good faith basis for contending that Hoover Hull was somehow complicit." [Docket No. 121 at 15.] Thus, Hoover Hull argues the latter "inconsistent" testimony should be stricken per Seventh Circuit precedent. [*Id.* at 16-17.]

Hoover Hull likewise argues that sanctions are not warranted for Sun's allegations that Hoover Hull did not adequately instruct Lawson to refrain from accessing the password-protected documents. [*Id.* at 19.] Hoover Hull argues that it treated the password-protected material with at least the same care that Sun did--it provided Lawson the letter indicating the existence of the passwords two times--and that "Sun cannot fairly hold Hoover Hull to a different standard than it applies to its own counsel." [*Id.*]

As for Sun's contention that Hoover Hull should have disclosed Lawson's conduct immediately, Hoover Hull states that it could not do so for two reasons. [*Id.*] First, it was not aware that Lawson had accessed the password-protected data until it received Sun's letter in April of 2008, after it had withdrawn as counsel for Lawson. [*Id.*] Second, even if Hoover Hull had known, it could not disclose Lawson's activity without Lawson's prior consent per [Rule of Professional Conduct 1.6\(a\)](#), which requires that an attorney "shall not reveal information relating to representation of a client unless the client gives informed consent." [*Id.* at 20.]

3. Lawson.

Lawson argues that Sun cannot demonstrate that it has been harmed by Lawson's viewing of the password-protected documents. [Docket No. 119 at 15-16.] Lawson suggests that while Sun knew in April 2008 that he viewed these documents, Sun waited until a year later to bring its motion and insists on the significance of these documents in order to justify the time and expense of investigation incurred by everyone in this litigation. [*Id.* at 15.] Lawson states that the investigation resulted in no new evidence of alleged malfeasance and that both Lawson and all of his attorneys have testified that these documents were ultimately insignificant. [*Id.* 15-16.] More specifically, Lawson testified that he initially thought these documents were significant because he thought they suggested that a Sun witness was going to lie about a critical conference call involving the account at issue in this case. [*Id.* at 15.] And Lawson's attorney states that based just on their titles, the information in these documents is easy to guess given that "Lawson's claims and Sun's defenses are not rocket science." [*Id.*]

*18 Lawson further argues that Sun made no effort to

emphasize the passwords or their importance. [*Id.* at 16-18.] The only mention of the passwords is one sentence in the third paragraph of the third page of a letter. [*Id.* at 16-17.] Sun did not discuss these passwords with Lawson or his attorneys, did not seek or acquire an agreement about them, did not send a dedicated letter about them, and did not provide Lawson or Hoover Hull any protocol regarding them. [*Id.* at 17.] Lawson also raises the question of why Sun felt the need to produce this privileged information given Sun's assertion that it spent \$200,000 to password protect these documents. [*Id.*] Lawson suggests these password-protected documents were a trap by Sun. [*Id.*]

Lawson also questions whether he had sufficient notice. He suggests that given the sentence discussing password-protected documents was raised in the context of the 14/7-day agreement, Lawson and Hoover Hull could reasonably have understood the passwords to be an attempt by Sun to further protect its information. [*Id.* at 18.] Lawson points out that Sun's own summary of the parties' agreement, which states that Sun had not reviewed the data, does not mention the passwords. [*Id.*] Lawson claims he had not read this portion of the letter prior to beginning his examination of the evidence, and Hoover Hull had not discussed the issue with him. [*Id.* at 19.] Furthermore, the letter was given to him in the middle of eighteen pages of exhibits attached to the letter. [*Id.*]

Lawson argues that the encryption of his emails in January 2007, which was agreed to between the parties prior to litigation, did not establish any protocol intended to survive the litigation. [*Id.* at 19-20.] Lawson contends that the original agreement was between Hoover Hull and Sun's general counsel and there were no discussions between Hoover Hull and Ogletree Deakins about encryptions or passwords. [*Id.* at 20.] Thus, Sun's unilateral decision to password protect documents twenty months later is a "belated afterthought." [*Id.*]

As for the tape recordings, Lawson argues that he adequately explained why he initially answered that he had only recorded statements with Heidkamp: Lawson thought because the recording of Tom Kelley was in California then "it doesn't exist to the courts"--basically confusing admissibility with existence. [*Id.* at 21.] Lawson also argues that he testified he believed he had produced a tape containing all the

phone conversations he had recorded, about which he had no motive to lie. [*Id.*] Lawson says there is no support for Sun's contention that the first tape was cut and pasted. [*Id.*] He says the first tape includes a partial conversation between Heidkamp and Lawson and a conversation with Kelley. [*Id.*] The second tape includes the entire conversation between Heidkamp and Lawson, a second conversation between them, and the conversation with Kelley. [*Id.* at 22.] This, Lawson argues, is consistent with his explanation that his old stereo started and stopped several times during the recording. [*Id.*] Lawson also argues that the only "disturbing difference" between the transcripts regarding quality that Sun mentions is that in the first tape the \$1.7 million figure is inaudible, which Lawson explains was what he believed his commission might work out to prior to this litigation. [*Id.* at 23.]

*19 Lawson contends that Sun's attempts to discredit him fail. He characterizes Sun's description of him as the henchman of an ESI Watergate as "outrageous" and confirms that Sun "has blown this discovery distraction completely out of proportion to reality," particularly since Sun has no evidence of a cover-up. [*Id.* at 24-25.] Lawson suggests his "voluntary actions and candidness [] belie Sun's allegations that he is some type of henchman." [*Id.* at 25.] In particular, Lawson notes that he volunteered that the first recorded tape was incomplete and that he had opened the password-protected documents. [*Id.* at 25-26.] Lawson argues that Sun's attempts to impeach him are meant to distract the Court from the deficiencies of Sun's production. [*Id.* at 26-27.]

Finally, Lawson argues that his testimony regarding his discussions with Burke are not inconsistent. [Docket No. 134 at 2-3.] He argues that his testimony that he had not had "any conversation with [his] attorneys about the documents that [he] found to be password-protected before [he] accessed those documents" is essentially meant to convey that Hoover Hull did not discuss with Lawson the password-protected documents around the time Hoover Hull gave the ESI to Lawson and before he came across these documents. [*Id.* at 2.] Thus, Lawson argues this testimony is consistent with his later testimony that, after he came across these documents, he called Burke to ask what he should do. [*Id.* at 3.] Lawson also points out that his November 2, 2007, email to Hoover Hull "clearly and undisputedly references prior communications." [*Id.* at 5 ("Dan, I have now

successfully unlocked most of the password protected files.".)]

C. Analysis.

1. Disputed Facts and Allegations.

Obviously, the foregoing factual background contains discrepancies that must be addressed. Accordingly, based on the evidence presented to the Court, the Magistrate Judge recommends the findings of fact set forth below.

a. The email.

While the email sent by Lawson to Burke has a very loud subject line ("Password protected files--Unlocked!"), there is no evidence to dispute the testimony of Burke, Hull, and Stephens that none of them read the email prior to Hoover Hull withdrawing as Lawson's attorneys and Ebert calling into question what happened a year later. The Magistrate Judge finds that neither Burke nor Hull nor Stephens read Lawson's email while Hoover Hull was representing Lawson. This finding is consistent with the Hoover Hull attorneys' decision to phase their approach to deposition preparation, and to turn over to Lawson the bulk of the ESI review. This proposed finding, however, does not change the undisputed fact that Burke, Hull, and Stephens received this email, or eliminate the possibility of sanctions for Hoover Hull's failure to properly review and respond to this email.

b. Lawson-Burke conversation.

Second, the Magistrate Judge finds that Burke did not speak with Lawson about the password-protected documents. According to Lawson's April 20, 2009, deposition, Lawson called Burke immediately upon finding the password-protected documents and was given permission by him to attempt to open the documents. Lawson also argues that the email he sent to Burke implies that previous conversations about password-protected documents had taken place between Lawson and Burke. Burke testified that he had no conversation with Lawson about password-protected documents.

*20 While perhaps some miscommunication or erro-

neous recollection has exacerbated this factual discrepancy, both versions simply cannot be correct. Forced to pick sides, Burke's version is the more believable. Lawson testified on April 28, 2008, that he did not "have any conversation with [his] attorneys about the documents that [he] found to be password-protected before [he] accessed those documents." [Docket No. 107, Ex. Y at 395.] While Lawson characterizes this assertion as referring to whether he spoke with his attorneys before they gave him any ESI to review, the context of the questioning during the deposition suggests the more obvious interpretation: Lawson did not speak with Burke prior to accessing (opening) the password-protected documents.

Other instances further call into question Lawson's credibility. For example, in his first deposition, Lawson "corrected" his testimony after the tape was played to him to clarify that he had taped not only Paul Heidkamp, but also Tom Kelley. He explained that he did not originally name Kelley, who was in California at the time recorded, because he thought the recording was not a valid recording under California law. Ebert said in response: "My question, I think, was fairly straightforward. It had nothing to do with California law." Ebert shortly thereafter asked if the other tape recordings included other individuals. Lawson replied, "I believe, just Heidkamp." However, after the complete tape was produced, it was revealed that other individuals were also recorded. Lawson explained he had forgotten he had a conversation with Michael Flashner. As for Matt Stepanski, an assistant to the Executive Vice President of Sales of Sun, Lawson explained that he did not disclose the recorded conversation with him at the prior deposition because Stepanski was in California at the time of the call so Lawson did not believe it was admissible. Lawson offers this reason despite Ebert's clarification and Lawson's subsequent same answer at the first deposition. Lawson's alleged confusion about his obligation to testify completely and honestly--rather than to filter his testimony based on his own admissibility determinations--undermines his credibility.

Lawson's sketchy tape production also fuels the Court's skepticism of his veracity. Lawson's testimony that his home stereo is at fault for the brevity and inaudibility of his homemade copy does not eliminate Lawson's contribution to the problem. He admits he knew the recording was stopping and starting (and stopping and starting). He does not dispute that he sat

and listened to the tape with Burke and Hull. So presumably he knew at that time that the quality, and arguably the completeness, of the tape was poor. Lawson asserts that he volunteered to recopy the tape, but he does not deny Burke and Hull's assertion that they did not know that a better version existed. It appears that the very best gloss that can be put on this situation is that Lawson was not taking seriously his obligation to fully produce responsive discovery.

*21 While Lawson argues that his November 2, 2007, email to Burke "clearly and undisputedly references prior communications," [Docket No. 119 at 5], it does not. If this is the strongest evidence outside his own inconsistent testimony that he spoke with Burke prior to accessing the password-protected documents, his version of the events is less than compelling. All of these facts call Lawson's veracity into question.

In sharp contrast, there is nothing inconsistent about the stories of Burke, Hull, and Stephens, which are also consistent with the most logical interpretation of Lawson's initial testimony on the matter. And while Plaintiff's interest in this action may be limited to the outcome of the case, Hull and Burke have much more at stake. Submitting false affidavits to this Court in the context of a discovery dispute could jeopardize their law licenses. It is hard to fathom that these lawyers would take such a risk. Hoover Hull is a respected law firm. Andrew Hull, who has earned Martindale-Hubbell's highest professional rating (AV), has appeared before the undersigned many times and always conducted himself professionally. Accordingly, the Magistrate Judge finds the version of events set forth by Burke, Hull, and Stephens to be more credible than Lawson's version. It is with these findings of fact that the Court now addresses Sun's specific allegations.

c. Sun's allegations.

1. Lawson affirmatively broke the password protection of Sun's attorney-client privileged electronic documents on external drives that had been produced to Lawson's attorneys and did not disclose his misconduct;

The first part of the allegation--that Lawson broke the password protection on the documents--is undisputedly correct. The second part--that Lawson did not

disclose his actions--is incorrect. Lawson clearly attempted to disclose his actions, at least to his attorneys, as demonstrated by his email to Burke, which was copied to Hull and Stephens. Lawson was entitled to believe that his attorneys would read his emails and direct him accordingly.

2. Lawson viewed the privileged communications contained on those hard drives, when the basis for password protecting those documents (which included analysis of the underlying case) was to keep them confidential and privileged;

This allegation is true. The statement in the email Lawson sent to Burke, "it does begin to surface some of their strategy; under both the 05 & 06 plans," demonstrates that he viewed the documents that had been password protected. Hendricks's investigation of Lawson's computers shows the documents were opened, which also indicates that Lawson viewed the documents. The October 2, 2007, letter sent by Sun with the ESI to Hoover Hull indicates that the documents were password protected on the basis of privilege.

3. Lawson and Hoover Hull attorneys, specifically Hull and Burke, failed to disclose that Lawson had viewed the privileged documents;

*22 It is true that Lawson, Burke, and Hull did not disclose to Sun that Lawson had viewed the privileged documents. However, Lawson did disclose to Hull and Burke that he had unlocked and viewed the password-protected documents. Moreover, as set forth above, the Magistrate Judge has determined that Hull, Burke, and Stephens did not read the emails Lawson sent. While Hull and Burke's failure to review, read, and respond to Lawson's November 2 and 4, 2007, emails on this topic is alarming and not without consequence, there is no basis to believe that Hoover Hull or its attorneys had actual knowledge of what Lawson had done or intentionally failed to disclose Lawson's actions to Sun.

4. Lawson intentionally produced only a portion of a taped conversation that Lawson had with Paul Heidkamp, and intentionally reproduced that tape recording in a manner that made the reproduction significantly inferior to the original in his possession;

Lawson's homemade copy is obviously deficient.

However, the Magistrate Judge stops short of concluding that Lawson acted intentionally in this regard. Most important, as soon as Lawson heard the tape at the deposition, he volunteered that the tape was missing conversations with Heidkamp. His recording efforts may have been inadequate and even careless, but had Lawson gone to the trouble to edit the tape to make portions inaudible, it goes beyond reason to think he would have so quickly volunteered that the tape was incomplete. Still problematic, however, is that Lawson waited until the deposition to clarify this point rather than when his attorneys listened to the tape with him. Thus, the Magistrate Judge concludes that Lawson acted carelessly--playing fast and loose--when it came to certain aspects of discovery. But the Magistrate Judge stops short of labeling this behavior intentional.

5. Lawson failed to disclose the existence of two tapes containing recordings of multiple conversations he had with other Sun employees and failed to produce the tapes of those conversations until more than 14 months after filing the instant lawsuit;

Some of the conversations Lawson had with other Sun employees and his wife are not relevant to this lawsuit (as evidenced by the fact that the Court was not provided the transcripts of them), so Lawson was not obligated to produce those recordings. [\[FN4\]](#) However, portions of the conversations between Lawson and Heidkamp and Lawson and Kelley are relevant, and should have been produced in their entirety the first time. As noted above, the transcripts provided to the Court together with the parties' indications of what tapes exist (i.e., the source tapes of unknown number, the homemade copy, and the professional copy) demonstrate an inescapable conclusion that Lawson's inadequate production was careless and sloppy. However, the evidence is insufficient to conclude that Lawson intentionally withheld recordings.

[FN4.](#) Of course, when Lawson was asked in the deposition whether he had recorded other employees, he was obligated to answer honestly, even though the recordings were not relevant to this lawsuit. Answering honestly would allow Sun's counsel to make their own determination of relevance.

6. Lawson initially lied during his deposition about

the taping and only admitting to the taping, which itself was in violation of Illinois and California state laws, during subsequent questioning during the deposition;

*23 While the Court so far has stopped short in concluding that Lawson's misconduct was intentional, this conclusion does not apply to Lawson's deposition testimony. The only reasonable conclusion from the evidence is that Lawson was intentionally evasive in answering questions about whom he had taped. In his April 17, 2008, deposition, after Lawson explained that he had not disclosed the recorded conversation with Kelley because of his understanding of California law, Ebert made clear that his question was "fairly straightforward" and that it "had nothing to do with California law." Nonetheless, later in this same deposition, Lawson again denied recording any other Sun employees. [Docket No. 107, Ex. X at 294.] This is despite the fact that at the April 28, 2008, deposition--after the full tape was produced-- Lawson admitted that he had recorded Matt Stepanski. And unlike the recording of Michael Flashner, he admitted that he had remembered that he had recorded Matt Stepanski. Even if Lawson was confused about the law, there is no justification for his untruthful answers to clearly factual questions, particularly after it was clear that Ebert's question extended beyond Lawson's purported understanding of the law.

7. Lawson's attorneys failed to produce the tape recordings until Lawson admitted to the existence of the tapes during his deposition;

There is no evidence to suggest that Lawson's attorneys knew that the homemade tape was incomplete. Thus, this was not a failure on their part.

8. Lawson falsely affirmed under penalties of perjury that the representations in his Interrogatory Answers, first supplemental Interrogatory Answers, and second supplemental Interrogatory Answers were true and correct to the best of his knowledge and belief.

Having determined that Lawson acted carelessly, but not intentionally, in producing the incomplete tape, the Magistrate Judge likewise determines that Lawson did not falsely affirm that his production was "true and correct to the best of his knowledge and belief."

2. Sanctions.

a. Lawson.

[Rule 37](#) and the inherent power of the Court provide the authority for possible sanctions against Lawson. The findings set forth above demonstrate that sanctions are appropriate. In particular, Lawson intentionally accessed Sun's password-protected documents and reviewed their contents. Lawson had to at least suspect that the password-protected documents were not meant to be viewed by him, and yet he spent a good deal of time trying to access them. [FN5](#) Lawson also acted carelessly, but not intentionally, with respect to certain aspects of discovery, such as providing an obviously audibly deficient homemade copy of a tape. Lawson also failed to fully disclose the existence of two tapes containing recordings of multiple conversations he had with other Sun employees. Though this failure was the result of carelessness, rather than an intent to deceive, it is nonetheless troubling. Although the tapes were not entirely relevant, Lawson should have produced them or disclosed their existence.

[FN5](#). Even assuming the conversation between Lawson and Burke happened as Lawson claims--with Burke giving him the go ahead but telling him not to spend much time on it--the evidence demonstrates that he spent considerable time on it, attempting to break the passwords on six different occasions.

*24 And then there is the matter of Lawson's responses to discovery and deposition questions. The Magistrate Judge has found that Lawson's failure to produce complete tapes was careless but not intentional. It follows, then, that Lawson did not knowingly falsely affirm in his interrogatory responses that his production was true and correct. But even giving Lawson the benefit of the doubt on this point, the inescapable conclusion is that Lawson was intentionally evasive--he lied--at his deposition in answering questions about whom he had taped. There is no justification for his deceit.

Nevertheless, Lawson's inappropriate behavior is mitigated in several ways. First, Lawson's own conduct has mitigated the havoc he has helped cause. Lawson volunteered at his deposition that the tape he

had produced was incomplete. Lawson also volunteered that he had accessed the password-protected documents, and he was forthright in explaining generally how he did it. Sun's extensive investigation did not unearth anything different from what Lawson offered. Finally, it is undisputed that Lawson emailed his attorneys about breaking the password-protected documents; he was not attempting to hide his actions.

Also mitigating Lawson's behavior is that of his own attorneys at Hoover Hull. Clearly they ignored him at a critical juncture in this case. This occurred after they turned all the ESI discovery completely over to him, apparently without much, if any, direction. The volume of ESI made the request for Lawson's assistance with the chore of document review understandable. But this convenience, even if viewed as an efficient cost-savings strategy, is no substitute for attorney oversight in the discovery process. Obviously, this lack of oversight contributed to the situation at hand. Lawson's attorneys also failed to read multiple emails he sent them, and failed to respond to those emails. Lawson cannot be blamed for the lack of attention paid to him by his attorneys.

Moreover, Lawson's improprieties are mitigated by the part Sun and its counsel played in creating this perfect storm of a disaster. Sun delayed production of ESI until forced to do so by the Court. It then dumped its massive production on Lawson without review, relying instead on the 14/7 agreement as the basis for any objections to Lawson's use of the information. Sun even produced unprotected privileged documents (Sun was clear that the privilege log does not identify attorney-client privileged communications after October 13, 2006). It is unclear why exactly Sun did not just pull those documents it knew were privileged from the production rather than password protect them. While the Court rejects Lawson's suggestion that Sun was setting a discovery trap for him (considering the embarrassment of a computer solutions company having their password-protected documents hacked by an amateur), the always convenient benefit of hindsight shows that withholding these documents would have avoided this portion of the current discovery maelstrom.

*25 After deciding, for whatever reason, that password protecting the documents was the better approach, Sun's attorneys failed to discuss this course of action with Lawson's attorneys. Instead, Sun made

only one short mention of the password-protected documents on the third page of the transmittal letter. This lack of emphasis from Sun is somewhat incredible considering the lengthy exchange between the parties at the beginning of the case on the same issue, and Hoover Hull's earlier position that "encryption would render the data less readily accessible" but "it would still likely constitute a knowing and voluntary disclosure of privileged communications." [Docket No. 121, Ex. 1 at 1-2.] This exchange, along with the fact that Sun has both pulled and redacted privileged documents in other instances throughout its production, undercuts Sun's argument that password protecting privileged documents was established by protocol in this case. On top of all this, when discussing whether Lawson would be allowed to view the ESI, Ebert again made no mention of the privileged documents but stated Sun's main concern: "that Lawson not make copies of confidential material for any use other than his pursuit of this lawsuit" nor "reveal sensitive business or personal information of custodians to third parties." To now cry foul so loudly seems somewhat misplaced.

Finally, Sun has not sufficiently demonstrated what harm resulted from Lawson's conduct. As for the tapes, Sun now has a corrected copy of Lawson's tape recordings (just like Lawson has now received Sun's emails from 2005 and spring of 2006, despite Sun's careless initial query for responsive information). As for the password-protected documents, the Magistrate Judge has reviewed them and gathers that they essentially outline the chronology of events, the various contracts and sales incentive plans, what Sun has paid Lawson, and some analysis of this information. Most, if not all of the underlying information has been or could be obtained by Lawson through discovery. Lawson's current attorneys have not viewed the information so they will not use it. To suggest, as Sun does, that Lawson's misconduct has "completely compromised Sun's defenses," [Docket No. 110 at 28], is yet another overstatement by Sun.

These points of mitigation are relevant to determining the appropriate sanction against Lawson. Although Sun first requests dismissal, such a drastic remedy is not appropriate. Lawson timely mitigated the fallout from his actions. In addition, Lawson's prior counsel's inattention to his emails allowed this situation to go unchecked. Finally, Sun and its counsel also played a role in the mess that this case has

become. Thus, dismissal pursuant to [Rule 37](#) or the inherent power of the Court is inappropriate.

Sun also requests "Significant Monetary Sanctions"--between \$200,162 and \$500,000. [Docket No. 110 at 37-39.] Sun's comparison of what happened in this case to presidential scandal and resignation demonstrates just how out of proportion Sun understands this situation to be, particularly when viewed in the context of Sun's own mishaps. Likewise, Sun's monetary request, which given its size is itself akin to dismissal, is unreasonable. The Magistrate Judge certainly does not condone Lawson's behavior or that of the Hoover Hull attorneys, and Sun obviously has spent considerable time and resources investigating the conduct at issue here and briefing the sanctions motion. But the fact remains that Sun could have avoided most of the expenses it incurred in this situation had it proceeded differently. Sun and its counsel cannot escape several nagging questions. First, why did Sun even produce privileged documents at all? And then, when Sun did produce the documents, why did Sun provide documents it now claims are so significant with such little notice that they were password protected? Finally, why did Sun's counsel stress that its "main concern" was that Lawson not use this information for purposes other than this lawsuit?

*26 So, the Court is left to ask: what is a fair and appropriate sanction against Lawson? As noted above, the appropriate sanction is neither dismissal nor a staggering monetary award that operates as a de facto dismissal. But the findings above certainly warrant more than a slap on the wrist, and any sanction must reimburse Sun for at least some of the fees and costs Lawson has caused it to incur. At the same time, a fair and appropriate sanction must also take into consideration that Sun may have been able to avoid the whole situation had it acted differently. Even if Sun could not have avoided the situation entirely, Sun's response certainly could have been more measured, thereby mitigating its expenses.

On the other hand, reasonable fees associated with the depositions of Lawson, Burke, Hull, and Stephens would be justified. A review of the billing records Sun submitted reveals that Sun incurred about \$10,000 in fees from Lawson's third deposition on April 20, 2009. [\[FN6\]](#) Fees associated with Burke's, Hull's, and Stephens's depositions and related discovery were approximately \$24,500. Thus, these total

deposition fees are approximately \$34,500.

[FN6](#). Sun also deposed Lawson a second time on April 28, 2008, but it does not appear that Sun submitted time records in connection with this deposition.

Fees also would be appropriate for briefing a properly focused sanctions motion. But Sun seeks approximately \$44,000 in fees for briefing the sanctions motion, in addition to approximately \$7,300 in pre-motion work, which again drips of excess. In the Magistrate Judge's view, Sun should not have incurred more than \$20,000 in fees for briefing the sanctions issues raised by the current discovery dispute. Thus, a reasonable fee for the depositions and briefing should be no more than \$54,500.

This does not mean that Lawson should be sanctioned the full \$54,500. Rather, this sum represents the maximum possible monetary sanction based upon reasonable costs Sun incurred through depositions and briefing the sanctions motion. Lawson should be held accountable for the largest portion of the \$54,500 for, as set forth above, he lied at his deposition, he acted carelessly with respect to other discovery matters, and he intentionally accessed password-protected documents. But the Hoover Hull attorneys and Sun and its counsel contributed to this discovery storm as well. As a result, the Magistrate Judge finds that it is fair and appropriate for Lawson to be sanctioned 50% of the \$54,500, or \$27,250. In reaching this conclusion, the Magistrate Judge allocates 25% of the problem at hand to Sun and its counsel. As discussed above, Sun cannot escape several nagging questions, the answers to which suggest Sun could have avoided or greatly minimized the situation at hand. For reasons discussed more fully below, the remaining 25% is properly attributed to Hoover Hull's attorneys.

b. Burke, Hull, and Hoover Hull.

Any authority to sanction Burke and Hull must arise pursuant to [28 U.S.C. § 1927](#) and the inherent power of the Court. [Rule 37\(c\)](#) is not an option because it only authorizes fees be paid by the client, not the attorney. See *Red Spot*, 1:05-cv-1670-LJM-JMS, 2009 U.S. Dist. LEXIS 47439, at *72-73.

*27 It is extremely difficult to believe that neither

Burke, Hull, nor Stephens so much as noticed the subject line of Lawson's email--"Password protected files--Unlocked!"--during the relevant time period. Seeing a subject line such as this from a client would have jolted nearly any lawyer into action. Perhaps their failure to act actually reinforces the conclusion that they did not see the emails in question. In any event, the undisputed evidence indicates that they did not see these emails or their subject lines, or at least these attorneys and paralegal Stephens do not recall ever seeing them.

But the Hoover Hull attorneys cannot escape responsibility here by the fact that they do not recall seeing or reading Lawson's November 2 and 4 emails. The failure by Burke and Hull to read these emails--or even just look at the November 2 subject line--is unacceptable. [Indiana Rule of Professional Conduct 1.4](#) imposes upon attorneys a responsibility to communicate with their clients. Burke emailed Lawson on many prior occasions, reasonably leading Lawson to believe that email was an effective mode of communication for case-related purposes. Despite this fact, Burke and Hull devised a discovery plan that charged Lawson with responsibility for reviewing and prioritizing Sun's ESI discovery responses, including password-protected documents, yet then ignored two critical emails regarding that discovery. This approach was blatantly careless.

If Burke or Hull had timely read Lawson's emails, or even simply taken proper note of the subject line on Lawson's November 2, 2007, email, they would have been aware much sooner that Lawson had accessed the password-protected documents. Addressing this issue contemporaneously may well have minimized some of the massive storm clouds that resulted when this revelation ultimately occurred many months later. Certainly it would have prevented Lawson from continuing to access these documents on later dates. Such action also would have helped reduce the resulting costs to Sun and avoid the delay that is now plaguing the resolution of this action.

Despite their carelessness, there is no evidence to suggest that Burke and Hull's conduct amounted to bad faith that unreasonably and vexatiously multiplied the proceedings. Thus, sanctions under [§ 1927](#) are not warranted. Nevertheless, the fact remains that the unacceptable and careless conduct of Burke and Hull contributed to the resulting expenses Sun has

incurred and the regrettable delay this case has experienced during the pendency of this sanctions side-show. [\[FN7\]](#) As a result, the Magistrate Judge recommends that the Court use its inherent power, which is to be used "when the other rules do not provide sufficient basis," [Dal Pozzo, 463 F.3d at 614](#), to sanction Burke and Hull.

[FN7](#). The facts do not support a finding that the Hoover Hull law firm itself should be sanctioned. Rather, the missteps here were those of Burke and Hull.

The next issue, then, involves determining what sanction is fair and appropriate. This issue must be considered in light of the Magistrate Judge's prior finding that there is no evidence to show that Lawson's attorneys knew that the homemade tape recordings Lawson made were incomplete. Likewise, Lawson's other missteps do not implicate the Hoover Hull attorneys. Thus, while counsel's conduct is careless and unacceptable, it stems from a single decision to charge Lawson with critical discovery responsibilities, the related failure to monitor his emails regarding that discovery, and the messy fallout from that failure.

*28 In addition, any consideration of monetary sanctions must be made with due regard for the fact that Hoover Hull has itself spent a good deal of money in attorney's fees, depositions, and other related expenses in defending against Sun's allegations. As a result of Sun's sanctions motion, Burke, Hull, and Stephens all gave depositions. In addition, Hoover Hull has hired its own counsel and filed briefs in opposition to Sun's sanctions motion. Finally, the admonitions contained herein are undoubtedly professionally (and personally) costly to Burke, Hull, and Hoover Hull even if no monetary sanctions were appropriate.

However, for all the reasons previously set forth, the Magistrate Judge finds that it is fair and appropriate for Burke and Hull to be jointly sanctioned 25% of the \$54,500, or \$13,625. This 25% allocation is consistent with the allocation recommended for Sun, but half as much as the 50% allocated to Lawson.

V. Conclusion.

The Magistrate Judge recommends that the Court

grant in part and deny in part Sun's motion for sanctions [Docket No. 105]. The Magistrate Judge recommends that Lawson be sanctioned \$27,250, and that Burke and Hull be jointly sanctioned the total of \$13,625. The Magistrate Judge further recommends that these sanctions be paid to Sun within 60 days after the adoption of this Report and Recommendation.

Any objections to the Magistrate Judge's Report and Recommendation shall be filed with the Clerk in accordance with [28 U.S.C. § 636\(b\)\(1\)](#), and failure to file timely objections within the ten days after service shall constitute a waiver of subsequent review absent a showing of good cause for such failure.

Slip Copy, 2009 WL 5842136 (S.D.Ind.)

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