Franklin County Legal Journal

Vol. 39, No.36 March 4, 2022 Pages 154 - 178

Designated by Order of the Court for the publication of court and other legal notices, the Franklin County Legal Journal (USPS 378-950), 100 Lincoln Way East, Chambersburg, Franklin County, PA 17201–2291, contains reports of cases decided by the various divisions of the Franklin County Branch of the Court of Common Pleas of the 39th Judicial District of Pennsylvania and selected cases from other counties.

Kidz Therapy Zone, LLC, Plaintiff v. Joseph Garcia, Defendant
Court of Common Pleas of the 39th Judicial District of Pennsylvania,
Franklin County Branch, Civil Action No. 2019-4794

HOLDING: Defendant's *Motion to Compel* is **GRANTED**. Defendant's *Motion for Sanctions* is **GRANTED.** Plaintiff's cross-*Motion to Compel* is **DENIED.** Plaintiff's *Motion for Sanctions* is **DENIED.**

HEADNOTES

Costs, Fees, and Sanctions: Sanctions

1. Counsel fees may be awarded as a sanction against a party for dilatory, obdurate, or vexatious conduct. 42 Pa.C.S. § 2503(7).

Costs, Fees, and Sanctions: Sanctions; Proceedings to Impose; Hearing, Determination, and Order

2. "Vexatious" is defined as "lacking justification and intended to harass," and "obdurate" is defined as "resistant to persuasion or softening influences: inflexible, unyielding." *Boyer v. Hicks*, 19 Pa. D. & C.3d 300, 305 (Pa. Com. Pl. 1981).

Costs, Fees, and Sanctions: Sanctions; Proceedings to Impose; Hearing, Determination, and Order

3. Conduct is "dilatory" where the record demonstrates that counsel displayed a lack of diligence that delayed proceedings unnecessarily and caused additional legal work. *See Gertz v. Temple Univ.*, 661 A.2d 13, 17 n. 2 (Pa. Super. 1995); *see also Sutch v. Roxborough Mem. Hosp.,* 142 A.3d 38 (Pa. Super. 2016).

Costs, Fees, and Sanctions: Sanctions; Proceedings to Impose; Hearing, Determination, and Order; Findings and Conclusions

4. Any award of counsel fees pursuant to statute that empowers courts to require a party to pay another participant's counsel fees as a sanction for dilatory, obdurate, or vexatious conduct during the pendency of a matter must be supported by specific finding of dilatory, obdurate, or vexatious conduct. *Township of South Strabane v. Piecknick*, 546 Pa. 551, 559 (Pa. 1996).

Appearances:
Paige Macdonald-Matthes, Esquire *for Plaintiff*
Erik R. Anderson, Esquire *for Defendant*

OPINION

Before Sponseller, J.

I. OVERVIEW

It is a well-known belief within the legal profession that judges despise discovery disputes. Although there are many differing opinions as to the truthfulness of this statement, we find that one experienced federal jurist explained it best:

> In the court's experience, it isn't that judges hate discovery disputes. It is that judges dislike unnecessary discovery disputes that involve unprofessional (some might say puerile) behavior by the lawyers or the parties. When the parties fail to courteously and cooperatively work through a good-faith scheduling error, this judge (and probably other judges) consider the need to resolve a dispute somewhat embarrassing.

Gopalratnam v. Hewlett-Packard Co., 2015 U.S. Dist. LEXIS 132837, 2015 WL 5772864 (E.D. Wis. Sept. 30, 2015).

It is not that courts object to handling problems that might arise in the process of discovery. Many of these problems are legitimate and arise from questions of law. But when a dispute arises because the conduct of the parties or their attorneys is childish and unprofessional, it brings courts no joy to sort through the muck or to exact the appropriate discipline. "Embarrassing" is an appropriate word, because the court must thoroughly review every aspect of the conduct of the parties to find the troublemaker, and must author an opinion explaining why their behavior was inappropriate. When the troublemaker is a member of the bar, and the Court must pass judgment on the conduct of a fellow legal professional, the task becomes even more delicate and considerably more embarrassing.

It is this type of problem that this Court is forced to address today. This relatively-straightforward employment dispute, barely a year and a half old, has been mired in controversy since its inception. The parties are considerably behind schedule. The pleadings and materials in the case are so voluminous that they already occupy an entire box in the Office of the Prothonotary. The animus between the lawyers in case is abundantly clear from their correspondence and pleadings, and the tension in the courtroom during their in-person hearings is palpable. Therefore, while it is tempting to dismiss these disputes as petty and puerile, they are truly anything but. The parties are at a near-complete standstill in their litigation, and it is clear

to the Court that it impossible for these two parties to move forward without intervention.

Furthermore, we emphasize that *both* parties in this case have requested the Court to settle this dispute. We are presented with cross-*Motions to Compel Discovery* and cross-*Motions for Sanctions*. Both attorneys insist that the other is at fault for the standstill, both attorneys believe that the other's conduct is worthy of sanctions, and both attorneys demand the Court perform a comprehensive review of their litigation. We are duty-bound, therefore, to perform such a review and to render a decision, no matter how unpleasant the task may be.

As such, we have thoroughly reviewed both *Motions*, the respective briefs filed by the parties, the exhibits submitted detailing the attorneys' private correspondence, and the record as a whole. We have done our duty and have found the troublemaker. Thus, for the reasons discussed herein, Defendant's *Motion to Compel* and *Motion for Sanctions* shall be granted. Plaintiff's cross-*Motion to Compel* and cross-*Motion for Sanctions* shall be denied.

II. STANDARD OF REVIEW

Because this case includes cross-*Motions for Sanctions*, we view the conduct of the parties and their attorneys through the lens required by 42 Pa.C.S. § 2503(7), which allows reasonable counsel fees to be awarded "as a sanction against another participant for dilatory, obdurate, or vexatious conduct during the pendency of the matter."

"Vexatious" is defined as "lacking justification and intended to harass," and "obdurate" is defined as "resistant to persuasion or softening influences: inflexible, unyielding." *Boyer v. Hicks*, 19 Pa. D. & C.3d 300, 305 (Pa. Com. Pl. 1981). Conduct is "dilatory" where the record demonstrates that counsel displayed a lack of diligence that delayed proceedings unnecessarily and caused additional legal work. *See Gertz v. Temple Univ.*, 443 Pa.Super. 177, 661 A.2d 13, 17 n. 2 (Pa. Super. 1995); s*ee also Sutch v. Roxborough Mem. Hosp.,* 142 A.3d 38, 2016 PA Super 126 (Pa. Super. 2016).

We further note that we are bound by law to address, with specificity, the reasons why the conduct in this case was dilatory, obdurate, or vexatious. *Township of South Strabane v. Piecknick*, 546 Pa. 551 (Pa. 1996). It would be insufficient to merely find that one party engaged in wrongdoing without explaining the reasons why. Therefore, we are bound to detail, with specificity, the facts in the record which support our findings.

III. FACTS AND PROCEDURAL HISTORY

Plaintiff Kidz Therapy Zone, LLC, (hereafter "KTZ") provides a variety of pediatric therapy services to the greater Chambersburg area, including occupational, speech/physical, language, vision, and social skills.[1] Defendant Joseph Garcia (hereafter "Mr. Garcia") is a licensed speech therapist who had been employed by KTZ as an independent contractor from January 5, 2017, until February 28, 2019.[2] KTZ alleges that Mr. Garcia failed to properly document six-hundred-fifty (650) patient charts[3], causing damages to KTZ in the amount of $141,942.00.[4]

Since the beginning of this litigation, KTZ has been represented by Paige Macdonald-Matthes, Esq., of Obermayer Rebmann Maxwell & Hippel, LLP (hereafter "Attorney Macdonald-Matthes.")[5] Mr. Garcia has been represented by Erik R. Anderson, Esq., of Post & Schell, P.C. (hereafter "Attorney Anderson") since March 9, 2020.[6]

On July 13, 2020, the Court entered an Order making firm the parties' agreed-upon Case Management Order, which set April 20, 2021 as the deadline for Discovery completion. The parties are nearly four months behind schedule.[7]

Throughout 2020, the parties were litigating sets of Preliminary Objections, which came to oral argument on November 5, 2020. At oral argument, the Court noticed an unusual display of animus between Attorney Macdonald-Matthes and Attorney Anderson. This was our first indication that anything was awry, but things otherwise appeared to be proceeding normally. We issued an Opinion and Order on December 11, 2020, sustaining two of KTZ's preliminary objections and overruling the remainder.

a. KTZ's First *Motion to Compel Discovery*

On January 26, 2021, KTZ, through Attorney Macdonald-Matthes,

1 Complaint ¶ 9.

2 Complaint ¶ 16, ¶ 55.

3 Complaint ¶ 52.

4 Complaint ¶ 64.

5 The record indicates that KTZ is also represented by Elizabeth K. Lilienthal, Esq., but she has had no involvement in the instant discovery dispute.

6 The record indicates that Mr. Garcia is also represented by Kerry E. Maloney, Esq., and was previously represented by James J. Kutz, Esq., both also of Post & Schell, P.C. Neither attorney has had any involvement in the instant discovery dispute. Prior to March 9, 2020, Mr. Garcia was represented by Corey J. Adamson, Esq., of Abom & Kutulakis, LLC, but he has had no involvement in the instant discovery dispute.

7 We note that the parties have mutually agreed to extend their deadlines. However, the extension was only necessary due to the breakdown in the working relationship between the attorneys. Therefore, calling the parties "behind schedule" is entirely accurate.

filed a 69-page *Motion to Compel Discovery* and requesting sanctions against Mr. Garcia relating to Mr. Garcia's response to a Request for Production of Documents.[8] In their motion, KTZ indicated that they "believe and aver" that Defendant's failure to timely comply with Plaintiff's discovery requests is "without legal support, is further intended to frustrate Plaintiff's efforts to litigate the causes of action raised against Defendant, and properly defend against his Counterclaims, and was done with the specific intention of causing Plaintiff additional prejudice in the form of counsel fees and costs . . . ."[9] At the time of filing, KTZ alleged that Mr. Garcia had delayed litigation by fourteen (14) days.

In his response to the *Motion to Compel*, Mr. Garcia, through Attorney Anderson, provided the Court with exhibits which detailed his efforts to comply with KTZ's request. Attorney Macdonald-Matthes had raised three pages of complaints via an email to Attorney Anderson regarding KTZ's request on January 12, 2021, and threatened Attorney Anderson with a *Motion to Compel* if the request was not met by January 19, 2021.[10] Attorney Anderson complied with Attorney Macdonald-Matthes' imposed deadline, providing her with a 12-page response, specifically detailing Mr. Garcia's position and including considerable case law to support it.[11]

The parties exchanged more correspondence in which Attorney Macdonald-Matthes continued to impose unreasonably short deadlines (including one response which was demanded within less than two hours from the time it was sent). Each time, Attorney Macdonald-Matthes would renew her threats to file a *Motion to Compel.* Attorney Anderson often met Attorney Macdonald-Matthes' unreasonable deadlines and continued to explain his client's position thoroughly.

We subsequently denied KTZ's *Motion to Compel* on March 8, 2021, and imposed no sanctions against Mr. Garcia. The Court, perhaps exhibiting a level of forlorn hope, did not believe that it was appropriate to involve itself in the dispute at the time. Communication between the attorneys had not broken down such that they could not settle the issue themselves, and KTZ had other ways they could obtain the information they sought. Furthermore, the Defendant's conduct had not been unreasonable, and we

8 We note that this was the first *Motion to Compel* litigated in this case which we decided on March 8, 2021. While we do not intend to re-litigate this *Motion*, the instant cross-*Motions to Compel* concern email correspondence between Mr. Anderson and Attorney Macdonald-Matthes which were exchanged throughout the beginning of 2021 while the first *Motion to Compel* was pending. Indeed, some of the complaints about Attorney Macdonald-Matthes' conduct raised in Mr. Garcia's instant *Motion to Compel* were first raised in his answer to KTZ's first *Motion to Compel.* For that reason, we find it appropriate to discuss the litigation surrounding KTZ's first *Motion to Compel* to put the instant *Motions* in context.

9 *Plaintiff's Motion to Compel Against Defendant, Joseph Garcia*, ¶ 16.

10 *Defendant's Answer in Opposition to Plaintiff's Motion to Compel*, Exh. C.

11 *Defendant's Answer in Opposition to Plaintiff's Motion to Compel*, Exh. D.

believed that the problem could best be worked out by the parties. Thus, without a written opinion, we denied KTZ's *Motion* on March 8, 2021.

b. The instant *Motions to Compel Discovery*

On May 10, 2021, Mr. Garcia filed his instant *Motion to Compel*.[12] Included within the *Motion* were a request for a protective order and a motion for sanctions. The controversy surrounded the issuance of a "Stipulated Protective Order" or "confidentiality agreement" which was to be put in place to protect a variety of discoverable documents by both parties which included potentially sensitive material.[13] Among the things requiring protection included confidential patient records requested by Mr. Garcia, similar patient information requested by KTZ, and documentation relating to Mr. Garcia's employment post-KTZ. Attached to Mr. Garcia's motion was a considerable amount of email correspondence between Attorney Anderson and Attorney Macdonald-Matthes. Attorney Anderson filed the *Motion to Compel* on behalf of Mr. Garcia on May 10, 2021.

KTZ filed their answer to Mr. Garcia's *Motion to Compel* along with their cross-*Motion to Compel*[14] on May 28, 2021. Included in their cross-*Motion to Compel* was a considerable amount more email correspondence as well as copies of each draft of the proposed confidentiality agreement as it was bounced between the two attorneys. Mr. Garcia filed his answer to KTZ's cross-*Motion to Compel* on May 17, 2021, which also included more correspondence for the Court to review. [15]

In total, the Court has been presented with over three-hundred (300) pages surrounding these *Motions*, including over thirty (30) pages of email correspondence and eight (8) different drafts of the proposed SPO. This is in addition to the one-hundred-sixty-three (163) pages concerning KTZ's

12 The full title of this document is "Defendant's Motion to Compel Plaintiff's Supplemental Responses to Defendant's Requests for Production of Documents and for a Protective Order and Sanctions." We refer to this document as Mr. Garcia's *Motion to Compel*.

13 The Court notes that while it is common for parties to obtain Stipulated Protective Orders when attempting to protect sensitive information, it is not necessary. It is preferred, however, as it relieves courts of having to decide a matter upon which both parties should be able to agree, and negates the need for the parties to spend time and money litigating a Motion for a Protective Order. The proposed confidentiality agreements were to be included within the Stipulated Protective Order, and the parties appear to use the terms "confidentiality agreement" and "Stipulated Protective Order" interchangeably in their correspondence. For the sake of continuity, we will use the term "Stipulated Protective Order" or "SPO" when discussing these documents.

14 The full title of this document is "Plaintiff's Reply in Opposition to Defendant's Motion to Compel Supplemental Responses for Production of Documents and for a Protective Order and For Sanctions, Together With Plaintiff's Cross-Motion to Compel Defendant, Joseph Garcia's Attendance at Deposition and for Confidentiality Agreement/ Protective Order and Sanctions." We refer to this as KTZ's cross-*Motion to Compel.*

15 We stress that both parties in this case have had opportunities to provide a full and complete record of their correspondence for review. Both parties have done so, providing us through their pleadings a complete accounting of their correspondence from January 28, 2021, until May 28, 2021. We find no holes or gaps in the correspondence indicating any missing material and therefore find the record to be complete for our review.

first *Motion to Compel* and Mr. Garcia's answer, litigated throughout the same time period. It also does not include the hundreds of pages filed for the Court's review surrounding the preliminary objections filed by both parties, which are still being litigated. Thus, in reviewing the instant *Motions*, this Court has reviewed nearly one thousand documents across roughly forty filings made *this year alone*.

This is why discovery disputes of this kind are so vexing for courts to rule upon. Rather than reviewing substantive law and settling material disputes, the court is overwhelmed with hundreds of pages of documents displaying embarrassing and unprofessional conduct on the part of attorneys. Not only do the parties earn the ire of the judge, but they also incur considerable fees in litigating a dispute that ultimately does nothing to move them forward in their underlying claims. We therefore cannot express enough how important is it, for a myriad of reasons, that attorneys work together to settle their disputes internally without court involvement.

IV. ANALYSIS

a. The Stipulated Protective Order / Confidentiality Agreement

The issue of the Stipulated Protective Order was first raised by KTZ in their complaint, stating that they would provide documents in discovery "provided an appropriate confidentiality agreement is executed by the Defendant and his counsel, and a corresponding Order of Court is entered regarding the same."[16] On January 28, 2021, two days after KTZ filed its first *Motion to Compel*, Attorney Anderson emailed to Attorney Macdonald-Matthes Mr. Garcia's First Request for the Production of Documents along with a first draft of a Stipulated Protective Order.[17] This draft was nine (9) substantive pages long and included sixteen (16) numbered paragraphs. With the exception of the caption and signature page, the document does not contain identifying information regarding the instant case, and it appears to this Court that Attorney Anderson provided Attorney Macdonald-Matthes with a standard form used in other cases.

On February 2, 2021, having not heard from Attorney Macdonald-Matthes, Attorney Anderson sent another email correcting a prior mistake and enclosing several recently-obtained documents.[18] We note that Attorney Anderson supplied these documents as they were received, consistent with

16 Complaint ¶ 65. It is significant that at the outset of this dispute, *both* parties had indicated their need for a confidentiality agreement or Stipulated Protective Order to protect their discovery. The question has never been whether an SPO was necessary, and only its terms and provisions have been at issue.

17 Mr. Garcia's *Motion to Compel*, Exh. A.

18 Mr. Garcia's *Motion to Compel*, Exh. B.

his discovery obligations. In a footnote in this email, Attorney Anderson added that he was in possession of more documents, but that he would not produce these documents until an SPO was in place.[19]

On February 4, 2021, Attorney Macdonald-Matthes responded via email to Attorney Anderson.[20] Rather than agreeing to Attorney Anderson's reasonable request to put in place an SPO before supplying certain documents, and without communicating reasons why she could not accommodate such a request, Attorney Macdonald-Matthes insisted that the documents were not confidential and demanded them "once again." We note that, at the time Attorney Macdonald-Matthes wrote her letter, she had not seen the documents in question and was not aware of Attorney Anderson's reason for believing them to be confidential. Furthermore, Attorney Anderson had not unreasonably demanded that Attorney Macdonald-Matthes sign and return to her his proposed SPO (a demand which Attorney Macdonald-Matthes would later make herself.) Rather, Attorney Anderson merely informed Attorney Macdonald-Matthes that he would not turn over the documents until a suitable confidentiality agreement was in place, and offered his proposed SPO for review.

Upon review, Attorney Macdonald-Matthes took issue with several portions of the draft which included an unfounded accusation that one included provision was "intentionally dilatory in nature." This was a hefty accusation which we believe to be entirely unfounded because, as we noted above, it does not appear that this first draft was drafted for the instant case. Rather than attempt to work with Attorney Anderson on editing his proposed SPO, Attorney Macdonald-Matthes stated that the nine (9) page, standard-form confidentiality agreement was more than "a bit much," and stated that she would review a "pared down version" that would "address the issues [she had] pointed out in this email." It is significant, for reasons that will become clear later, that Attorney Macdonald-Matthes did not object to the proposed document as not being "HIPAA-Compliant."[21]

Attorney Anderson responded via email on February 8, 2021.[22] He

19 We note that we are not in the position to decide whether Mr. Anderson was right to withhold such documents without an SPO in place, as we do not have access to the documents in question. However, given that both parties were in agreement that an SPO was necessary, we do not find Mr. Anderson's request unreasonable. We further note that, throughout our analysis of this dispute, it is not at issue whether the attorneys are factually or legally correct in their stated positions as they attempt to work together. After all, we are reviewing mainly email correspondence, not legal pleadings. Our responsibility is to determine only when requests or surrounding conduct are so unreasonable such that they are obdurate, vexatious, or dilatory in nature.

20 Mr. Garcia's *Motion to Compel*, Exh. C. We note that, in KTZ's cross-*Motion to Compel*, Attorney Macdonald-Matthes claims that Mr. Garcia's *Motion to Compel*, Exh. C, is incomplete. *See* KTZ's cross-*Motion to Compel*, ¶ 6. This is untrue. The email correspondence is reproduced in full between Mr. Garcia's *Motion to Compel*, Exh. C and Exh. D.

21 The Health Insurance Portability and Accountability Act, better known as HIPAA, is a law designed to protect confidential protected health information, or "PHI."

22 Mr. Garcia's *Motion to Compel*, Exh. D.

briefly explained his reasoning for why the withheld documents required protection, writing that "the documents contain sensitive and specific information unique to marketplace competitors of KTZ's, none of whom are party to this action. So out of an abundance of caution, deference, and respect to these third parties, we will produce the documents just as soon as the protective order is in place. There's no need for quarrel."

Also included in Attorney Anderson's February 8, 2021, email was a "pared-down" version of his proposed SPO. It was, indeed, substantially pared-down, going from nine (9) substantive pages to only four (4). All of the provisions to which Attorney Macdonald-Matthes had previously objected had been removed in their entirety **without argument**, including the provision which she had called "intentionally dilatory in nature." This indicates to this Court that, at least at that time, Attorney Anderson was fully attempting to cooperate with Attorney Macdonald-Matthes, quarrel or no quarrel.

The question of whether or not there was a "quarrel" was disputed by Attorney Macdonald-Matthes in her response on February 12, 2021.[23] After thanking Attorney Anderson for sending it, she indicated that she did not believe there was a quarrel, and that "pointing out the need for changes to your original draft does not equate to a 'quarrel.'" But the existence of a quarrel is demonstrable to any outside observer, particularly since Attorney Macdonald-Matthes subsequently continued quarrelling about whether or not the withheld documents were confidential. She then demanded again that Attorney Anderson comply with her discovery requests, and although she acknowledged receipt of the "pared-down" draft, she offered no opinion on whether or not it was suitable. Indeed, this was the final time Attorney Macdonald-Matthes would address the issue of the proposed SPO until April 19, 2021. She never provided Attorney Anderson with feedback on this "pared-down" version, never informed Attorney Anderson that it was unacceptable, and did not provide her own proposed SPO until May 11, 2021, the day after Mr. Garcia's instant *Motion to Compel* was filed on the issue.

Attorney Anderson responded via email on the afternoon of February 16, 2021.[24] He aptly stated, "I acknowledge that you disagree with the merits of our position on a protective order. But continued quarreling does not advance this routine issue, specifically, or this litigation, generally. In all events, a protective order is necessary to protect your client, as KTZ's trade-secrets claim would, of course, require the exchange of information related to the purportedly proprietary information." Attorney Anderson

23 Mr. Garcia's *Motion to Compel*, Exh. F.

24 Mr. Garcia's *Motion to Compel*, Exh. D.

went on to aver that his only reason for withholding the documentation was because of his good-faith belief in a need to protect its confidentiality.

As stated above[25], we will not discuss whether Attorney Anderson was correct in his position, as we cannot review the documents to determine their need for protection. We do find, however, that Attorney Anderson's position is entirely reasonable. KTZ, through Attorney Macdonald-Matthes, was the first to raise the matter of a Stipulated Protective Order when they filed their complaint. Putting an SPO in place is indeed a routine matter. It was also definitely necessary to protect KTZ's interests, not only related to their trade-secrets claim, but also related to the exchange of confidential patient information.[26] It was inevitable that, at some point, some kind of protection for confidential information would be necessary for *both* parties to fulfill their discovery obligations. Most importantly, Attorney Anderson was entirely correct that continued quarreling did not advance anyone's position. Attorney Anderson, again, attached the "pared-down" version for review.

About an hour after Attorney Anderson sent this email to Attorney Macdonald-Matthes, Attorney Anderson filed his answer to KTZ's first *Motion to Compel*, discussed above.[27] In this pleading, Attorney Anderson addressed the issue of the SPO, noted that Attorney Macdonald-Matthes had neither executed nor suggested revisions to the "pared-down" version, and attached as an exhibit his email from an hour earlier as evidence of his attempt to "negotiate an amicable resolution to advance the parties' interests and avoid seeking intervention by the Court."[28]

The references to the instant dispute in this February 16, 2021, pleading are significant for two reasons. First, it shows Attorney Anderson's exercise of good-faith and candor toward the Court. Throughout the pendency of these proceedings, Attorney Anderson has not attempted to hide or bury information relevant to the discovery disputes. He had been polite and accommodating in his correspondence with Attorney Macdonald-Matthes and he demonstrated so to the Court. At least up until this point, he had pulled no punches and played no games, and his February 16, 2021, pleading evidenced the fact that his position up to that point had been reasonable.

Secondly, the pleading serves to confound the Court further

25 *See* n. 19*, supra.*

26 This is particularly true considering that Attorney Macdonald-Matthes would later use the lack of an appropriate confidentiality agreement as grounds for redacting discoverable medical information.

27 The full title of this document is "Defendant's Answer in Opposition to Plaintiff's Motion to Compel," filed February 16, 2021.

28 Defendant's Answer in Opposition to Plaintiff's Motion to Compel, ¶ 8, ¶ 9, ¶ 10, ¶ 11, and Exh. K.

regarding why Attorney Macdonald-Matthes did not review the "pared-down" version of the proposed SPO. At first, this Court believed that Attorney Macdonald-Matthes had inadvertently neglected to respond. This was partially due to her cross-*Motion to Compel* filed on May 28, which included numerous references to the concerns she had raised in her February 4, 2021 email.[29] Each time, Attorney Macdonald-Matthes stated that Attorney Anderson had not responded to her concerns. Indeed, he did not. Rather than responding to her concerns, Attorney Anderson *removed the offending provisions entirely* and returned the "pared-down" version for her review. Had Attorney Macdonald-Matthes ever actually reviewed the "pared-down" version, she would not have repeatedly denied Attorney Anderson's claims that her concerns had not been addressed.

However, it is difficult for this Court to believe that Attorney Macdonald-Matthes' failure to review the "pared-down" version was a mere oversight. Attorney Macdonald-Matthes is clearly an extremely competent attorney who has, at all times during this case, provided dogged protection of her client and their interests. The matter of the "pared-down" version had been brought to her attention four times in eight days; first when it was sent on February 8; then when she acknowledged its receipt on February 12; then when Attorney Anderson responded via email on February 16; and finally in Attorney Anderson's February 16 response to her pending *Motion to Compel*. Each of these notifications indicated that the ball was in her court regarding the confidentiality agreement, and yet her answers in her May 28 cross-*Motion to Compel* would indicate that she had never reviewed it. Indeed, she must not even have reviewed it while writing her cross-*Motion to Compel*. But we need not speculate further about whether Attorney Macdonald-Matthes ignored the "pared-down" version intentionally or inadvertently, as only lack of due diligence is required to find her conduct dilatory.

But our review does not conclude there. After the February 16, 2021, *Answer* to KTZ's first *Motion to Compel*, the parties were silent for two weeks. On March 1, 2021, Attorney Macdonald-Matthes provided Attorney Anderson with their *Answers and Objections to Production of Documents* along with a substantial amount of discoverable material.[30] On March 8, 2021, this Court denied KTZ's first *Motion to Compel.* In late March and early April, the parties worked together to revise their Case Management Order deadlines, and a new Case Management Order was established by this Court in mid-April.

On April 1, 2021, Attorney Anderson sent Attorney Macdonald-

29 See KTZ's *Cross-Motion to Compel*, ¶ 7, ¶ 9, ¶ 13, ¶ 22 of the *Answer* and ¶ 18 of the *Cross-Motion.*

30 Mr. Garcia's *Motion to Compel*, Exh. H.

Matthes a deficiency letter in response to KTZ's March 1, 2021, *Answer and Objections to Production of Documents*.[31] Attorney Anderson claimed that KTZ's *Answer* was deficient for a variety of reasons, but his chief complaint was that many of the documents KTZ had produced had been redacted.[32] Attorney Macdonald-Matthes responded to the deficiency letter on April 19, 2021.[33]

Attorney Macdonald-Matthes stood by the redactions ten[34] times with exactly the same language, sometimes adding further response, but always including the same copy/pasted language:

> "As noted in the Plaintiff's Privilege Log, Patient Names have been redacted pursuant to HIPAA Regulations. Upon presentation of an appropriate, HIPAA compliant confidentiality agreement, Plaintiff will provide limited patient identifying information. Until then, Plaintiff has no intention of violating the provisions of HIPAA, as Defendant has done by way of the production of GARCIA 000197-00258."

Mr. Garcia's *Motion to Compel*, Exh. J, Document Request Nos. 2, 3, 4, 5, 6, 11, 13, 22, 24, 26.

This copy/pasted paragraph, repeated no less than ten separate times, demonstrates nearly everything wrong with Attorney Macdonald-Matthes' conduct throughout this case and must be addressed piecemeal.

First, it is patently ludicrous to repeatedly demand that opposing counsel provide documents without a confidentiality agreement in place, only to obstinately refuse to turn over unredacted documents for the same reason. Furthermore, assuming *arguendo* that Attorney Anderson improperly turned over confidential documents in violation of the law, then respect for his newfound caution necessitated by the previous mistake would be in order. Demanding that Attorney Anderson ignore his own concerns and provide documentation which he good-faith believes is in need of protection, while simultaneously using Attorney Anderson's previous failure to protect confidential damages against him, is contradictory and unreasonable.

Second, this was the first time Attorney Macdonald-Matthes had ever raised the matter of HIPAA compliance. She did not raise it in response to Attorney Anderson's first-draft SPO, nor did she raise it in response to

31 Mr. Garcia's *Motion to Compel*, Exh. I.

32 See Mr. Garcia's *Motion to Compel*, Exh. I, Document Request Nos. 2, 3, 4, 5, 6, 11, 13, 22, 24, 26, and 28.

33 Mr. Garcia's *Motion to Compel*, Exh. J.

34 See Mr. Garcia's *Motion to Compel*, Exh. J, Document Request Nos. 2, 3, 4, 5, 6, 11, 13, 22, 24, 26. Attorney Macdonald-Matthes did not address the issue of redaction in Request No. 28.

the "pared-down" version, nor did she raise it via correspondence with Attorney Anderson before supplying the redacted discovery on March 1, 2021. Though Attorney Macdonald-Matthes may disagree with Attorney Anderson's withholding of documents, at least he had the courtesy of informing her via email that he had documents he was withholding. At the time of this response, Attorney Anderson's "pared-down" version had been awaiting her review for seventy (70) days, giving Attorney Macdonald-Matthes ample time to include "HIPAA compliant" language or supply her own draft SPO for review. Rather than attempt to settle the SPO issue, secure protection for her confidential documents, and provide the appropriate unredacted documents, Attorney Macdonald-Matthes instead chose to redact hundreds of documents and send them to Attorney Anderson without informing him of her intention to do so. In essence, she forced Attorney Anderson to spend time correctly pointing out that redacted documents constitute discovery deficiency, only to respond by hiding behind a problem that she herself had created.

Third, Attorney Macdonald-Matthes has never explained, in any correspondence to Attorney Anderson or pleading to this Court, exactly *why* the proposed SPO's Attorney Anderson had supplied are not HIPAA compliant. As noted above, she did not raise the issue in response to either Attorney Anderson's first-draft or his "pared-down" version. In reviewing both drafts, we find that *either* of them would suitably protect patient health information.

Fourth, the counter-accusation that Attorney Anderson[35] is in violation of federal law for inappropriately turning over documentation supposedly protected by HIPAA is the lowest of blows. Attorney Macdonald-Matthes charitably describes this paragraph as merely "pointing out" that the filing was in error (and then accuses Attorney Anderson of failing and otherwise refusing to correct the deficiency)[36], but in reality it is a transparent attack on Attorney Anderson's integrity, character, and ability as an attorney. Merely "pointing out" that the filing was in error would have included sending Attorney Anderson an email politely informing him of the deficiency so that it could be corrected. Such a display of professional courtesy is not only expected by members of the legal profession, but it is *required* in similar situations. For example, Pennsylvania Rules of Professional Conduct Rule 4.4(b) requires that the recipient of inadvertently-sent documentation promptly notify the sender of the mistake. Rather than politely inform Attorney Anderson of something she perceived as a mistake, Attorney Macdonald-Matthes instead attempted to use it as a weapon for her own

35 Although the comment references Mr. Garcia, it is clearly directed at Mr. Anderson, who oversaw the production of documents in this case and who is responsible for ensuring his client's compliance with the law.

36 KTZ's cross-*Motion to Compel*, n. 7.

gain. Repeating an accusation *ten times* is not merely "pointing out" that the filing was in error. It is vexatious, unprofessional, and intended solely to harass opposing counsel.

Fifth, although we do not have access to any of the information in question, we find it hard to believe that its disclosure is a violation of HIPAA. As far as this Court is aware, the documents in question relate to patients treated by Mr. Garcia while he was employed by KTZ. Therefore, both Mr. Garcia and KTZ have been previously privy to this information. Indeed, Attorney Macdonald-Matthes said as much in her cross-*Motion to Compel*, where she avers that Mr. Garcia was in possession of at least some of the redacted information and that, even with the redactions, he could still identify the patients he treated.[37] In that case, we fail to see how either party turning over the information unredacted would be a violation of HIPAA.

Lastly, and most importantly, two wrongs do not make a right. Even if Attorney Anderson *did* violate HIPAA, that does not give Attorney Macdonald-Matthes the *carte blanche* ability to use HIPAA as an excuse for failing to comply with her own discovery obligations. Attorney Macdonald-Matthes did not bother to explain why the information was HIPAA protected nor did she ever attempt to cite any law to support her position. In sum, she put an accusation where a reason should go.

Even after this display of incivility and gamesmanship[38], our review is not yet complete. On April 23, 2021, Attorney Anderson gave Attorney Macdonald-Matthes yet another opportunity to put a Stipulated Protective Order in place.[39] Responding to her requests for an "appropriate, HIPAA compliant confidentiality agreement," Attorney Anderson again attached both versions of his proposed SPO, the original and the "pared-down" version. He noted that this was the fourth time Attorney Macdonald-Matthes had been provided with a proposed SPO, and yet she had still failed to offer any substantive feedback. He finished by writing, "if neither of these draft agreements is acceptable to your client, please prepare a draft agreement that is, and I will gladly review it."

Attorney Macdonald-Matthes ignored this correspondence entirely. Attorney Anderson also supplied her with another deficiency letter on April

37 KTZ's cross-*Motion to Compel*, ¶ 11.

38 We note that, in pleading related to KTZ's currently-pending preliminary objections, Attorney Macdonald-Matthes took issue with Mr. Anderson's use of the word "gamesmanship." *Plaintiff's Reply Brief to Defendant's Brief in Opposition to Plaintiff's Preliminary Objections to Defendant's Second Amended Answer, New Matter, and Counterclaims*, n.2. She even notes a case in which the court disapproved of the use of the word "gamesmanship" because of the "combative tone" of the pleadings. *Schrecengost v. Coloplast Corp.,* 425 F.Supp. 3d 448, n.6 (W.D. Pa. 2019). We will discuss Mr. Anderson's conduct within his pleadings below. However, though she may disagree with the characterization, gamesmanship is the appropriate word to describe Attorney Macdonald-Matthes' overall conduct surrounding the matter of this Stipulated Protective Order.

39 Mr. Garcia's *Motion to Compel*, Exh. H.

26, 2021.[40] This too, she ignored. Instead, Attorney Macdonald-Matthes sent Attorney Anderson an email on April 28, 2021, demanding to schedule Mr. Garcia for a deposition in late May or early June.[41] Two days later, Attorney Macdonald-Matthes supplied her own discovery demands, as well as updated the list of dates she was available for Mr. Garcia's deposition.

On May 3, 2021, Attorney Anderson responded via email, noting that he still had not received a response to his April 23, 2021, email.[42] He also stated that he was "ethically precluded" from scheduling his client for a deposition for which his client could not possibly be prepared. We agree. We also find it unusual that Attorney Macdonald-Matthes would wish to schedule Mr. Garcia for a deposition when she, too, had not yet received everything she had requested. Attorney Anderson concluded, "Paige, almost 84 days have gone by with no meaningful response from you on the proposed confidentiality agreement." He then, for the first and only time, set a deadline, requesting her response by May 6, 2021.

When he received nothing, Attorney Anderson filed the instant *Motion to Compel*. His brief was succinct, complaining mainly of his problems securing the SPO and of the redacted discovery responses, and reproducing a complete record of their correspondence for our review. He requested that we issue an order requiring KTZ to furnish complete and unredacted responses to his previous requests; order the parties to enter into a mutually agreeable confidentiality agreement; and award his client attorney's fees associated with his *Motion to Compel.*

The very next day, on May 11, 2021, Attorney Macdonald-Matthes sent Attorney Anderson a draft SPO. This draft was nine (9) substantive pages long – the same length as Attorney Anderson's first draft, which Attorney Macdonald-Matthes had described as more than "a bit much." Although Attorney Macdonald-Matthes insists that her version is more "HIPAA compliant" than those Attorney Anderson had provided, it fails to mention HIPAA even once, and includes many of the same provisions as Attorney Anderson's proposed drafts. Despite the fact that Attorney Anderson had previously sent his drafts using Microsoft Word, Attorney Macdonald-Matthes provided her draft in PDF format so that it could not be edited. She obstinately dismissed without merit Attorney Anderson's claim that he would be ethically-precluded from presenting his client for deposition, reiterated why she felt it was unnecessary to provide the

40 Mr. Garcia's *Motion to Compel*, Exh. L.

41 We note that "demand" is the right word. Attorney Macdonald-Matthes did not merely request to schedule the deposition. She made it clear that the deposition would occur at 10 A.M. at her office on one of five proposed dates. Indeed, Attorney Macdonald-Matthes implies in her answer that she was not required even to propose dates, and that she did so "as a professional courtesy."

42 Mr. Garcia's *Motion to Compel*, Exh. O.

unredacted discovery, and again demanded that Mr. Garcia be scheduled for a deposition. This email, however, came with another demand.

> "I am writing one more time to request that you kindly provide me with the dates you and your client are available for deposition during the first two weeks of June. If I do not hear from you by Thursday, May 27, 2021, I will prepare a cross motion to compel that I will file simultaneously with my objection to your recently filed Motion to Compel. I trust however that this will not be necessary, that your client will agree to sign the Confidentiality Agreement I have prepared, and we can finally get on with the deposition of Mr. Garcia that I have been trying to schedule in this matter since April 28, 2021."
>
> KTZ's Cross-*Motion to Compel*, Exh. C.

Throughout the many times Attorney Anderson had supplied Attorney Macdonald-Matthes with his draft SPO, he had never demanded that it be executed without revision. Indeed, he had been pleading with her for months to review the documents he had submitted to her to no avail. Yet, the first time Attorney Macdonald-Matthes submitted a draft, she expected it to be the *final* draft, executed immediately by Attorney Anderson's client without any revisions or changes.

As to its convenient timing, we are compelled to agree with Attorney Anderson:

> "Plaintiff's counsel, for 91 days, ostensibly ignored defense counsel's efforts to settle on a confidentiality agreement. But then, on May 10, Mr. Garcia's motion to compel hit the docket, and voila – on May 11, Plaintiff's counsel immediately engaged. This is transparent game-playing."
>
> Mr. Garcia's *Answer to Cross-Motion to Compel*, n. 1.[43]

On May 11, 2021, Attorney Macdonald-Matthes was presented yet another opportunity to demonstrate introspection about the issues the parties had been facing. She had just been notified that her failure to respond to the "pared-down" proposed SPO for over three months was going to be reviewed by the Court. The evidence of her negligence was demonstrable in Attorney Anderson's May 10, 2021 pleading. Yet, Attorney Macdonald-Matthes chose to double-down, *still* ignoring the "pared-down" version and instead demanding that her own version be signed. "Gamesmanship" is an apt descriptor.

43 The full title of this document is "Defendant's Answer to Plaintiff's Cross Motion to Compel Defendant Joseph Garcia's Attendance at Deposition and for Confidentiality Agreement/Protective Order and Sanctions." We refer to this document as "Mr. Garcia's *Answer to Cross-Motion to Compel*."

Despite the fact that he had received the document in PDF format, Attorney Anderson still provided edits to the new proposed draft and returned them to Attorney Macdonald-Matthes on May 17, 2021.[44] The parties continued email correspondence back and forth throughout the remainder of May, eventually reaching yet another standstill regarding one particular provision of the proposed SPO. Both parties reiterated their respective positions – Attorney Anderson would not present Mr. Garcia for deposition until they had received all the necessary unredacted documents, and Attorney Macdonald-Matthes believed that position to be meritless. Thus, on May 28, 2021, Attorney Macdonald-Matthes filed her cross-*Motion to Compel*, combined with her *Answer* to Mr. Garcia's *Motion to Compel*. Attorney Anderson filed his *Answer* to the cross-*Motion* on June 17, 2021. At long last, the pleadings had closed and the Court could undertake the task of settling this discovery dispute, hopefully once and for all.

b. Overall Civility and Professionalism

Even as we began our review of the cross-*Motions to Compel*, the relationship between the parties continued to sour. On June 8, 2021, KTZ, through Attorney Macdonald-Matthes, filed a second set of Preliminary Objections, to which Attorney Anderson responded on June 22, 2021. Oral argument on the Preliminary Objections was held on July 29, 2021, during which Attorney Macdonald-Matthes addressed the unprofessional nature of Attorney Anderson's brief in response. Attorney Anderson apologized to Attorney Macdonald-Matthes and expressed his and his client's frustration with the many delays in the case. Attorney Macdonald-Matthes then indicated to the Court her intention to file a reply brief post-argument to Attorney Anderson's brief, largely because she avers that his brief is in violation of the Code of Civility due to personal attacks and insults. She subsequently filed her reply brief on July 29, 2021.[45]

In reviewing the conduct by the attorneys in this case for the cross-*Motions to Compel*, at the forefront of the Court's mind is the expectation that the attorneys behave respectfully, professionally, and civilly. Maintaining cordial working relationships and extending professional courtesies is of paramount importance within the legal profession. Not only does civility ensure that complex legal matters can be settled in a timely fashion, despite

44 KTZ's cross-*Motion to Compel*, Exh. D.

45 We find it necessary to address the parties' conduct in their briefs surrounding these Preliminary Objections because we have been engaged in a comprehensive review of their general conduct and working relationship since the beginning of 2021. We are *extremely* displeased with the conduct of the parties in their pleadings on the Preliminary Objections as well. Therefore, although their conduct relating to the Preliminary Objections is not the subject of either *Motion* in the instant matter, we believe that this Opinion is the appropriate forum to discuss the issue and hopefully put an end to the increasingly-childish behavior we are seeing from the attorneys in this case.

the many difficulties that may arise, it also ensures that the matters can be settled without animus. No one wants to leave work at the end of the day angry, and this is just as true for attorneys as for everyone else. Given how unpleasant this task has been for the Court to review, the Court can only guess how unpleasant this has been for Attorney Anderson, Attorney Macdonald-Matthes, and the parties themselves.

Discovery disputes of this kind have often been equated to childish playground behavior. As discussed above, we believe this designation over-minimizes the seriousness of the situation. The courtroom is not a playground and litigation is not a game of hide-and-seek. There are serious consequences to unprofessional and uncivil behavior. A better example, evidenced by this Court's experience with a custody docket, would be the issue of two divorced parents attempting to share custody of their children despite the personal animus between them.

In such a situation, both parents are expected to get over their hatred of the other, no matter how vile the other may be, for the sake of the children. Respect, cooperation, and deference are valued over obstinance, unreasonableness, and incivility. The easiest decisions for Courts to make are in cases where one parent behaved consistently cordially and the other behaved only with contempt and vulgarity. Civility shows that one is able to rise above petty disputes and name-calling and work to co-parent in the best interests of the child, which is always looked on most favorably by the court. When parents fail to behave civilly, the person hurt most is always the child.

In civil litigation, opposing attorneys are effectively expected to "co-parent" their litigation. When opposing counsel is being consistently unreasonable, no matter how frustrating it may be, frustration is not an excuse for your own bad behavior. Fighting fire with fire is never a successful strategy.

Unfortunately, that was the direction in which Attorney Anderson eventually began to tread. His early pleadings, including the May 10, 2021, *Motion to Compel* and several earlier pleadings, demonstrate his understandable exasperation with the situation, but he never behaved unprofessionally. Throughout their email correspondence, Attorney Macdonald-Matthes is icy and crisp, unreasonably demanding, and routinely accusatory.[46] In reply, Attorney Anderson was respectful and cordial, calmly repeating his position no matter how frustrated he may have been. Indeed, Attorney Anderson never behaved unprofessionally within his correspondence.

46 We need not reiterate the reasons for finding that Attorney Macdonald-Matthes behaved in an uncivil and unprofessional manner throughout her email correspondence with Mr. Anderson. We note this only to show the contrast between the attorneys' behavior in their mutual dealings.

In her May 28, 2021, cross-*Motion to Compel*, we similarly note that Attorney Macdonald-Matthes did not engage in any specific *ad hominem* attacks, though it does possess an acidic tone. The next filing in the case chronologically was KTZ's *Brief in Support of Preliminary Objections to Defendant's Second Amended New Matter and Counterclaim*, filed June 8, 2021, and we find this filing by Attorney Macdonald-Matthes to have been entirely professional.

It was in Attorney Anderson's June 17, 2021, *Answer* that we see the first evidence of unprofessional behavior within the pleadings. Although we may agree with the characterization that Attorney Macdonald-Matthes was "playing games,"[47] it was not an appropriate accusation to make within a professional pleading. The same is true with Attorney Anderson's plea to the Court that, "At long last, this Court must stop Plaintiff's pernicious and prejudicial games."[48]

It was in his June 22, 2021, pleading where Attorney Anderson crossed the line.[49] The filing's introduction section opens by stating, "To describe Plaintiff's Preliminary Objections and supporting paper as overwrought would be a study in understatement."[50] The brief is styled in the same kind of acidic tone Attorney Macdonald-Matthes had previously employed. It also included an accusation that Attorney Macdonald-Matthes' brief was "little more than junior varsity gamesmanship."

It was these comments which Attorney Macdonald-Matthes had raised as inappropriate at the July 29, 2021, oral argument, and which Attorney Anderson attempted to excuse due to frustration. Until this situation occurred, we had nothing negative to say about Attorney Anderson's conduct, finding that he had behaved professionally and civilly throughout the pendency of these proceedings. It would be remiss of us, then, to ignore his wrongdoing at this late stage.

Such editorialization does not bolster an attorney's credibility with the Court. Indeed, it makes the task of reading the brief much more unpleasant. It also invited legitimate criticism from opposing counsel[51] and placed a new controversy before the Court. While counsel and his client were

47 *See* n. 36, *supra.*

48 Mr. Garcia's *Answer to Cross-Motion to Compel*, ¶ 14.

49 The full title of this document is "Defendant's Brief in Opposition to Plaintiff's Preliminary Objections to Defendant's Second Amended Counterclaim with New Matter."

50 *Id.* at 1.

51 We note that, notwithstanding our admonishment of Mr. Anderson, we have little sympathy for Attorney Macdonald-Matthes. In her *Reply Brief to Defendant's Brief in Opposition to Plaintiff's Preliminary Objections to Defendant's Second Amended Answer, New Matter, and Counterclaims*, filed July 29, 2021, Attorney Macdonald-Matthes chose to bold and underline passages of the Code of Civility to point out Mr. Anderson's wrongdoing, many of which she is herself guilty of violating. From our view, Attorney Macdonald-Matthes is throwing stones from a glass house.

no doubt frustrated, frustration is no excuse for incivility or unprofessional behavior. We expect that *both* parties will cease voicing their frustrations within their professional pleadings moving forward, and that they will focus their pleadings on the merit of their arguments rather than on their personal animosity.

V. REQUESTS FOR A PROTECTIVE ORDER

In their pleadings, both parties have requested a protective order. Attorney Anderson, on behalf of Mr. Garcia, has requested that we issue an order requiring KTZ to furnish complete and unredacted responses to his previous requests within fourteen (14) days, and that we order the parties to enter into a mutually agreeable confidentiality agreement within seven (7) days. He did not request that we enter our own protective order, instead requesting to go back and try again. Conversely, Attorney Macdonald-Matthes, has requested that we issue an order requiring Mr. Garcia to schedule a time for his deposition within five (5) days and that we order Mr. Garcia to agree to her most recent proposed SPO, which Attorney Anderson had previously rejected. It is not practical to grant either request.

The Court does not hold out much hope that the parties can reach any "mutually agreeable" confidentiality agreement at this stage as Attorney Anderson requests. After months of quarreling, the parties have not been able to reach any agreement, and the Court fails to see how requiring that they try again serves any purpose other than to delay proceedings further. More importantly, requiring such a response within seven days would effectively force KTZ to either to enter into an agreement that they disagreed with or, in the alternative, return before the Court because they were not able to settle on a draft that is "mutually-agreeable." Lastly, the main purpose for a *Stipulated* Protective Order is to avoid getting the court involved for an *actual* protective order. But this Court is already involved, and throughout its involvement, the Court is convinced that *both* parties require protection for their confidential documents.

KTZ is concerned that Mr. Garcia will misuse confidential material, as they allege he did so in the past, and without making any judgment on the issue we find their concerns reasonable. Likewise, Mr. Garcia is concerned that KTZ might misuse trade secrets that, although the secrets do not belong to Mr. Garcia, they do belong to other organizations with which Mr. Garcia is affiliated. Again, without making any judgment on the issue, we find his concern reasonable. Lastly, the Court notes that the substantial level animus between the parties and their attorneys necessitates mutual protection of their respective confidential documents. Therefore, it is extremely important that we issue a protective order that encompasses all of the confidential material

exchanged in this case.

However, we will not use the proposed draft from Attorney Macdonald-Matthes. This draft still contains contested provisions which, although Attorney Macdonald-Matthes believes they are necessary, we do not agree. Furthermore, given that Attorney Macdonald-Matthes never raised any objection to the "pared-down" version she had been provided on February 8, 2021, this remains the only uncontested version of the eight drafts the parties have exchanged. Attorney Macdonald-Matthes had already reviewed the first draft's provisions earlier that week and had made clear her few objections at that time, and none of those objectionable provisions remain present in the "pared-down" version. As noted above, we also see no reason why this version would fail to protect patient health information or fail to comply with HIPAA, which are the only remaining concerns Attorney Macdonald-Matthes has voiced about either of Attorney Anderson's proposed drafts.

We further stress that protective orders are properly in the ambit of the Court and that we do not have to take the parties' concerns into consideration when entering the Order. However, with the aim of settling this dispute as amicably as possible, we have chosen to utilize language that should be the most mutually-acceptable to both parties. We emphasize that we did not fully reproduce the "pared-down" version and that the parties should carefully review the provisions of the Protective Order. The Protective Order shall be filed simultaneously with this Opinion.

Because the Protective Order shall be in place effective immediately, the parties are also ordered to immediately turn over all documents previously withheld due to the lack of a protective order.

VI. REQUESTS FOR SANCTIONS

Both parties in this case have requested that the other be sanctioned for their conduct under 42 Pa.C.S. § 2503(7), and that they should be awarded attorney's fees associated with their respective pleadings. After its thorough review of this case, this Court believes that sanctions are appropriate against Obermayer Rebmann Maxwell & Hippel, LLP, for the conduct of its attorney, Paige Macdonald-Matthes, Esq.[52] The record plainly demonstrates, as discussed above, that Attorney Macdonad-Matthes consistently acted in a manner that was obdurate, vexatious, and dilatory for the purposes of 42 Pa.C.S. § 2503(7). We do not believe that sanctions are appropriate against Attorney Anderson.

52 We note significantly that, throughout these matters, there is no evidence that any party representatives of Kidz Therapy Zone, LLC, acted unreasonably or caused the sanctionable delays in this case. For that reason, we do not believe it would be appropriate to sanction KTZ nor to order them to pay the fees and costs associated with the delay.

Specifically, we find that Attorney Macdonald-Matthes' failure, whether intentional or inadvertent, to review and revise Attorney Anderson's "pared-down" draft SPO constituted dilatory conduct. Attorney Macdonald-Matthes was consistently obdurate by making unreasonable and often unnecessary demands of opposing counsel and by unwaveringly refusing to understand opposing counsel's reasoned positions. Her "my way or the highway" attitude was the primary cause of delay in this case. Lastly, we view much of her conduct as intended to harass opposing counsel, for whatever reason, requiring him to respond to acidic and voluminous correspondence and pleadings during which she presented herself as entirely unwilling to cooperate. None of this conduct was warranted.

The statute discussing the right of participants to receive counsel fees, 42 Pa.C.S. § 2503, does not specify any amount of fees that Courts may award. The statute merely allows for "a reasonable counsel fee" and does not require the Court to award any specific amount for any specific purpose. The Court is constrained only to awarding fees that are "reasonable."

We have spent the majority of this brief discussing Attorney Macdonald-Matthes and Attorney Anderson, as nearly all of the controversy in this case surrounds them. However, the parties themselves have borne the real costs of litigating this dispute as they are the ones footing the bill. While the party representatives at Kidz Therapy Zone, LLC, could have avoided the extra costs by requesting that Attorney Macdonald-Matthes direct her attention elsewhere, Joseph Garcia was not afforded that privilege. He had no choice but to pay his attorney to attempt to settle the dispute in all the forms that Attorney Anderson tried. Each time Attorney Anderson sent and reviewed correspondence, reviewed and revised the draft SPO's, and wrote and responded to related pleadings, it was Mr. Garcia who would ultimately bear those costs.

Thus, in asking only that we order fees related to the pleadings in this case, Attorney Anderson did not ask for enough. Mr. Garcia deserves to be made whole for the entire amount of unnecessary work for which he is forced to compensate Attorney Anderson. Although the bulk of those fees likely surround the costs of responding to and drafting the pleadings surrounding the *Motions to Compel*, it would be injustice to award Mr. Garcia anything less than the amount he was forced to spend as a result of opposing counsel's sanctionable conduct.

Therefore, Mr. Garcia is entitled to attorney's fees for the following:

1. The time his attorney spent researching and drafting the *Motion to Compel* and its corollary pleadings, including responding to KTZ's cross-*Motion.*

2. The time his attorney spent reading and responding to correspondence about the Stipulated Protective Orders beginning February 9, 2021.[53]

3. The time his attorney spent researching and drafting the April 1, 2021, deficiency letter and reviewing and responding to KTZ's April 19, 2021, response.[54]

4. The time his attorney spent working to extend the parties' case management deadlines.[55]

5. The time his attorney spent related to Attorney Macdonald-Matthes' demands to schedule Mr. Garcia for a deposition.[56]

VII. CONCLUSION

We lament that the working relationship between these attorneys has devolved so far and we empathize with the misery of all involved, including Attorney Macdonald-Matthes, who we recognize is not receiving a decision for which she had hoped. Nevertheless, this Court has fulfilled its obligation to settle this dispute as the parties had requested. Thus, we truly hope that the attorneys in this case can repair their working relationship, resolve their personal animus, and resume the litigation of the underlying dispute.

In light of the foregoing discussion, and for the reasons set forth fully above, Defendant's *Motion to Compel* is **GRANTED**. Defendant's Motion for Sanctions is **GRANTED.** Plaintiff's cross-*Motion to Compel* is **DENIED.** Plaintiff's *Motion for Sanctions* is **DENIED.** Two appropriate Orders follow.

53 Attorney Macdonald-Matthes was not patently unreasonable in her February 4, 2021, request for a "pared-down" version, and therefore she is not responsible for Mr. Anderson's response thereto, nor for Mr. Anderson's time spent revising the "pared-down" version. However, her dilatory conduct following the February 8, 2021, delivery of the "pared-down" version warrants attorney's fees for all the unnecessary work it created. This **includes** the work Mr. Anderson performed surrounding the proposed-draft Attorney Macdonald-Matthes submitted on May 11, 2021.

54 This relates to the unnecessary work created for Mr. Anderson by the redactions and the response thereto. No fees shall be awarded, however, regarding the April 19, 2021, deficiency letter, nor for subsequent deficiency letters, nor for correspondence regarding the deficiency letters.

55 We find that the dilatory conduct by Attorney Macdonald-Matthes was entirely responsible for the failure of the parties to meet their original deadlines.

56 We find that Attorney Macdonald-Matthes was not making her deposition requests in good faith, knowing that there were other discovery matters on the table which needed to be completed before Mr. Garcia could be deposed. Her repeated refusal to consider opposing counsel's concerns constituted obdurate and vexatious conduct.

ORDER OF COURT

NOW THIS 10th day of August, 2021, upon review and consideration of Defendant's *Motion to Compel Plaintiff's Supplemental Responses to Defendant's Requests for Production of Documents and for a Protective Order and Sanctions*, filed May 10, 2021; Plaintiff's *Reply in Opposition to Defendant's Requests for Production of Documents and for a Protective Order and Sanctions*, *Together with Plaintiff's Cross Motion to Compel Defendant Joseph Garcia's Attendance at Deposition and for Confidentiality Agreement/Protective Order and Sanctions,* filed May 28, 2021; Defendant's *Answer to Plaintiff's Cross Motion to Compel Defendant Joseph Garcia's Attendance at Deposition and for Confidentiality Agreement/ Protective Order and Sanctions*, filed June 17, 2021; the complete exhibits attached to the above filings detailing the correspondence between the attorneys; and the applicable law;

IT IS HEREBY ORDERED as follows:

1. Plaintiff shall produce full, complete, and non-redacted (where applicable) responses to all of Defendant's discovery requests; including, specifically, Document Requests 1-6, 11, 13, 22-24, 26, and 28, within ten (10) days of this Order.

2. Defendant shall produce full, complete, and non-redacted (where applicable) responses to all of Plaintiff's discovery requests; including, specifically, the documents which Defendant indicated he was withholding due to the lack of a protective order within ten (10) days of the date of this Order.

3. Within fifteen (15) days of the date of this Order, Defendant shall file an itemized Bill of Costs with this Court relating to the following:

   a. The time his attorney spent researching and drafting the Motion to Compel and its corollary pleadings, including responding to KTZ's cross-Motion.

   b. The time his attorney spent reading and responding to correspondence about the Stipulated Protective Orders beginning February 9, 2021.

   c. The time his attorney spent researching and drafting the April 1, 2021, deficiency letter and reviewing and responding to KTZ's April 19, 2021, response.

   d. The time his attorney spent working to extend the parties' case management deadlines.

   e.The time his attorney spent related to Ms. Macdonald-Matthes'

demands to schedule Mr. Garcia for a deposition.

4. Within thirty (30) days of the date of this Order, Obermayer Rebmann Maxwell & Hippel, LLP shall reimburse Post & Schell, P.C., the amount of attorney's fees listed in the Bill of Costs described in Paragraph 3.

5. Upon the completion of the above, Defendant is ordered to produce Joseph Garcia for deposition, with the date, time, and location of the deposition being mutually agreeable to the parties.

Pursuant to the requirements of Pa. R.C.P. 236(a)(2)(b) and (d), the Prothonotary shall immediately give written notice of the entry of this Order, including a copy of this Order, to each party's attorney of record, or if unrepresented, to each party; and shall note in the docket the giving of such notice and the time and manner thereof.