No. 71611-5-I

WASHINGTON STATE COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

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FOSS MARITIME COMPANY,

*Respondent,*

v.

JEFF BRANDEWIEDE and JANE DOE BRANDEWIEDE, and the marital community comprised thereof; and BRANDEWIEDE CONSTRUCTION, INC.,

*Petitioners*,

and

CORE LOGISTIC SERVICES; LISA LONG and JOHN DOE LONG, and the marital community comprised thereof; FRANK GAN and JANE DOE GAN, and the marital community comprised thereof,

*Defendants.*



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ON DISCRETIONARY REVIEW FROM KING COUNTY SUPERIOR COURT
Honorable Dean S. Lum

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# PETITIONER BRANDEWIEDE'S REPLY BRIEF

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## I. INTRODUCTION AND GENERAL REPLY

The trial court failed to apply the correct law at least twice when it disqualified Petitioners Brandewiede's counsel. ***First,*** it failed to make on-the-record findings of willfulness, prejudice, and consideration of lesser sanctions required under the *Burnet-Jones* line of cases[1] before a severe sanction such as disqualification of counsel or exclusion of unprivileged evidence is imposed which effectively disables a party's case. Foss' motion was based on alleged violations in discovery. ***Second,*** the trial court failed to make the findings and balancing required under the *Firestorm* (and Foss' proffered *Jain*) cases[2] for disqualification of counsel, irrespective of discovery sanctions.

The trial court also erred a third time by failing to grant Brandewiede sanctions of compensatory attorneys' fees for Foss' undisputed discovery violations as to the non-disclosure of contact information for Mr. Vorwerk or of the 38-page "wrongful termination" letter ("Narrative") he wrote and gave to Foss ***after*** he was fired by Foss and ***before*** Foss filed this case.

Despite no findings, the trial court's order accepted Foss' arguments that Brandewiede is responsible for ***Foss'*** mistakes, *i.e.*,

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[1] *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); *Jones v. City of Seattle*, 179 Wn.2d 322, 338-344, 314 P.3d 3380 (2013). *See* Opening Brief, pp. 12-15.

[2] *In re Firestorm 1991*, 129 Wn.2d 130, 135, 916 P.2d 411 (1996) *Richards v. Jain*, 168 F. Supp. 2d 1195 (W.D. Wash. 2001). *See* Opening Brief, pp. 20-22.

failing to protect its sensitive information when it fired Vorwerk and when it gave his contact information; failing to produce the Narrative that detailed the Alucia project, refuted Foss' partnership claim, and substantiated Brandewiede's counterclaim; and failing to give complete and timely responses in 2012 and 2013 of Vorwerk's correct contact information and that he was a ***former*** employee. As discussed in §II.B., *infra*, these failures caused material harm.

The Supreme Court made clear 20 years ago that counsel may not give misleading discovery responses. *Wa. State Physicians Ins. Exch et al. v. Fisons*, 122 Wn.2d 299, 346-47, 858 P.2d 1054 (1993). Rather, under CR 26(g), all counsel have an obligation to provide full and complete answers which help get to the truth of a case. *Fisons*, 122 Wn.2d at 342-344. Denials or evasive answers are not proper just because the requestor did not ask the "right question" or phrase it in the "right way" *See id.* at 352-53, rejecting the same sort of interrogatory response used by Foss,[3] and rejecting the defense that the failure to produce the smoking gun documents "resulted from the plaintiffs' failure to specifically ask for those documents or from their failure to move to compel production."

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[3] "It appears clear that no conceivable discovery request could have been made by the doctor that would have uncovered the relevant documents, given the above and other responses of the drug company. The objections did not specify that certain documents were not being produced. Instead the general objections were followed by a promise to produce requested documents. These responses did not comply with either the spirit or letter of the discovery rules and thus were signed in violation of the certification requirement." *Fisons,* 122 Wn.2d at 352.

The trial court's order, which affirms Foss' overly aggressive litigation tactics that sought to blame and disqualify Brandewiede's counsel for ***Foss'*** failures, must be reversed as wrong on the facts and the law. The order, proposed by Foss, does not set out the legal analysis and findings required to impose severe sanctions of excluding critical, smoking gun evidence or disqualification of counsel; nor does it set out the required analysis and balancing required under the decisions Foss argued govern disqualification of counsel.[4] The trial court's short additions to the order did not cure these problems. The wholesale exclusion of evidence that admittedly is neither privileged nor confidential is overreaching that must also be reversed for lack of a legal basis. *See* Opening Brief, pp. 31-35, 39-42 ("OB"). And the order is fundamentally wrong in punishing Brandewiede for ***Foss'*** discovery violations and its failures to protect privileged materials held by its ex-employee

There is no need to remand on the disqualification issue. This Court can decide that issue on the paper record, per *Firestorm* and *Fisons*. *See* OB, pp. 42-45. Rather than remand on the DQ issue, the Court should hold that Foss waived any privilege it may have had as to the documents Vorwerk gave to Brandewiede's counsel

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[4] While the trial court ruled that Mr. Welch failed to cite contrary legal authorities, nevertheless, his argument that the record did not justify disqualification or exclusion of evidence under the law as argued by Foss was valid. Foss' motion should have been denied because, substantively, the record does not meet the legal requirements. *See* OB, pp. 16–18 & fn. 21.

since: 1) the 38-page Narrative was written by Vorwerk ***after*** Foss fired him; and 2) Foss failed to protect the privileged information by failing to secure its documents when it fired Mr. Vorwerk, after receipt of the late June, 2012 Narrative, and when it belatedly directed Mr. Welch to contact Vorwerk directly in September, 2013.

Because Foss' discovery violations that led to the wrongful disqualification are undisputed, unexcused, and involve critical "smoking gun" evidence that goes to the core of Foss' claim against Brandewiede and his counterclaim against Foss (similar to *Fisons*), and to promote judicial economy, this Court should address the denial of terms against Foss per RAP 2.4(b).[5] Just as the Supreme Court ruled in *Fisons,* where the record disclosed clear violations as is the case with Foss' failures, the Court should order compensatory terms against Foss for these breaches. *See* OB, pp. 45-48. The only remand other than for trial and any supplemental discovery would be to determine the amount of fees to be paid to Brandewiede for the trial work related to the disqualification and discovery proceedings. Compensatory fees for the appellate proceedings can be determined by the Commissioner or the trial court. Such terms should be paid before trial may proceed.

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[5] *See Right-Price Recreation, LLC v. Connells Prairie Comm. Council,* 146 Wn.2d 370, 377-81, 46 P.3d 789 (2002) (Court of Appeals should *not* have declined to review the undesignated order entered shortly after the order designated in notice for discretionary review).

## II. REPLY ARGUMENT

### A. Foss Did Waive Any Privilege It Had Under *Sitterson* and ER 502(b) by Failing to Take Reasonable Steps to Protect Its Secrets at the Times It: 1) Fired Mr. Vorwerk in May, 2012; 2) Received the June, 2012 Vorwerk Narrative; and 3) When It Invited Mr. Welch to Contact Vorwerk Directly Rather Than by Deposition Without First Taking Any Protective Measures.

Foss' actions ***did*** waive any privilege it may have had in any of the documents which Mr. Vorwerk voluntarily provided to Mr. Welch because its actions – its inactions – show no precautions were taken when Mr. Vorwerk's contact information was finally given in September 2013 and Foss eschewed having him examined in deposition with Foss counsel present. Nor were precautions taken after his firing, nor after delivery of his Narrative in mid-2012. Foss took three strikes and did not even swing. It did not evidence a clear intent to protect privileged documents or information Vorwerk may have had. It thus waived the privilege as to materials he held.

*Sitterson v. Evergreen School Dist., No. 114*, 147 Wn. App. 576, 584-589, 196 P.3d 735 (2008) sets out a five-part test for considering the circumstances surrounding unintended disclosures of privileged communications to determine if waiver applies:

> "(1) the reasonableness of precautions taken to prevent disclosure, (2) the amount of time taken to remedy the error, (3) the scope of discovery, (4) the extent of the disclosure, and (5) the overriding issue of fairness."

*Sitterson,* 147 Wn. App. at 588. *See* OB, pp. 26-28. Factor five is addressed in §II.B., *infra.* Not surprisingly, the Response Brief ("RB") avoids *Sitterson* since its factors call for waiver on this record. The Response does not address ER 502(b). The rule applies and helps show why Foss' efforts to distinguish *Sitterson* fail.[6]

Foss first claims *Sitterson* does not apply because there was no "inadvertent" disclosure since neither Foss nor its counsel was the sender, *see* RB, p. 39, thus arguing from the conflict of interest cases even though they are clearly inapposite. Foss also argued it was not "at fault" since neither it nor its lawyers supplied the documents to Brandewiede. RB 30-33. Foss' argument is both incorrect and, at best, sleight of hand.

*Sitterson* does not apply because neither Foss nor its counsel personally turned over privileged information in the course of providing discovery responses, so they can bear no responsibility. Really? It was Foss who invited Mr. Welch to contact Vorwerk directly, without first taking any protective steps beforehand, and

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[6] *Sitterson* involved a situation where the disclosed documents had been produced by the opposing party's attorney in discovery. *Id.,* 580-81. The decision thus focuses on the authority of the attorney to act for the client (who holds the privilege) in discovery. *Id.* at 583-84. Its analysis of the authority of counsel in discovery easily covers the actions by Foss' counsel here and their forseeable consequences. Just as the attorney in *Sitterson* "acted within the scope of his authority when he produced the documents to Sitterson [so] that his production could therefore waive the District's privilege," *id.* at 584, so Foss' counsel acted within the scope of his authority when he told Mr. Welch he could contact Mr. Vorwerk directly *ex parte* rather than conduct a deposition where Foss' counsel would be present.

despite the fact Foss knew Vorwerk had been fired in May, 2012. And also despite the fact that Foss had received his Narrative claiming wrongful termination of June 27, 2012, some 14 months before giving Mr. Welch *carte blanche* with Vorwerk in September, 2013.

But for Foss' invitation, Mr. Welch never meets alone with Vorwerk and gets an unredacted copy of the Narrative or the thumb drive. Foss' counsel was a necessary link to the disclosures. It also was forseeable to Foss' counsel that Vorwerk might disclose confidential or privileged information – via documents or unwritten memories – in a private meeting without them there to remind him of and protect the company's interests, or taking preventative steps beforehand. His corporate loyalty was tenuous at best given his firing and the title of the Narrative. What were they thinking?

As to Foss' arguments, nothing in either ER 502(b) or the term "inadvertent" requires that Foss or its counsel made the disclosure. The point of inadvertence is that the disclosure was not intended, because intentional disclosures always waive the privilege, as stated in *Sitterson*, 147 Wn. App. at 582-84. But an unintended disclosure may or may not result in waiver based on the principles in *Sitterson* and ER 502(b). Just because in this case the disclosure technically was made by a party's ex-employee rather than by the party or its attorney does not mean the principles of *Sitterson* and

ER 502(b) do not apply.[7] Both focus on whether the holder of the privilege reasonably protected itself, or "took reasonable steps to prevent disclosure," in the words of ER 502(b). The rule's text sets out three mandatory elements for use in a weighing approach in order to ***avoid*** a waiver,[8] similar to *Sitterson's* "balanced approach" of five factors to determine whether waiver applies.[9]

The basic requirement of each to find waiver is that the holder of the privilege can, in fact, do something to protect against the kind of unintended disclosure that occurred. *See Zink v. City of Mesa,* 162 Wn. App. 688, 725, 256 P.3d 384 (2011) (no waiver under

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[7] *See Zink v. City of Mesa,* 162 Wn. App. 688, 256 P.3d 384 (2011) (disclosure by third party analyzed under *Sitterson*).

[8] ER 502(b) states (emphasis added):

> b) Inadvertent Disclosure. When made in a Washington proceeding or to a Washington office or agency, the disclosure does not operate as a waiver in any proceeding if:
>
> (1) the disclosure is inadvertent;
>
> (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; **and**
>
> (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following CR 26(b)(6).

[9] *Sitterson* and its "balanced approach," in contrast to a "no-waiver rule" which is what Foss seeks here, has been applied in the local federal courts to find a waiver of privilege by employees who stored privileged information saved onto their work laptop computers, albeit in their personal web-based personal email accounts. *Aventa Learning, Inc. v. K12, Inc.*, 830 F. Supp. 2d 1083, 1106-10 (W.D. Wa. 2011). Judge Robart recognized that *Sitterson* "rejected a rule in which inadvertent disclosure could never waive the attorney-client privilege. Instead, the court adopted a 'balanced approach,' in which the court considered a variety factors surrounding the inadvertent disclosure in determining whether waiver had occurred," and that this was based on Washington's policy of "strictly limiting the attorney-client privilege to its purpose." *Aventa,* 830 F. Supp. 2d at 1110.

*Sitterson* where disclosure by third party was "unpreventable and inadvertent."). The balanced approach analysis of *Sitterson* and ER 502(b) thus can apply equally here to the "third-party" ex-Foss employee as to whom Foss could have taken protective measures, but did not.

The threshold question under both is, thus, what protections were taken by Foss and, were they reasonable? The requirement of reasonable protection applies here because, unlike the situation in *Zink,* the disclosure by Vorwerk was preventable. Foss could have taken preventive steps at three junctures, but chose to do nothing.

As far as Mr. Welch was concerned, Mr. Vorwerk was under Foss' control based on its discovery responses and trial witness disclosures. After learning from other sources that Mr. Vorwerk no longer worked for Foss, he approached Foss cautiously about contacting him, seeking a deposition via Foss. CP 151 (emails).

When Foss gave Mr. Vorwerk's contact information without reserving any right to a deposition, and without independently contacting Mr. Vorwerk to vet him before any contact with Brandewiede's counsel, as a practical matter Foss relinquished any protections it could have exerted over any materials, or information in his head, that Mr. Vorwerk had which they might have thought was privileged or confidential. Their ***choice*** of actions gave up, waived, any protection for privileged information he had.

Foss' actions were wholly ***in***consistent with asserting privilege as to any materials left in Vorwerk's possession. Nothing else explains Foss' willingness to simply give Mr. Welch Vorwerk's personal contact information without taking ***any*** precautions to assure that there was no danger of disclosure of privileged or proprietary information in his possession[10] – except the concern voiced by Mr. Welch, that it was, in fact, more of a trap laid for him by Foss' misdirection and obfuscation of Mr. Vorwerk's true relationship with Foss at the time Foss started the litigation, allowing Foss to yell "gotcha" when its former, disgruntled employee dumped copies of his retained job information on Mr. Welch. *See* RP 37: 13-20, distinguishing the facts of this matter from those in *Jain.*[11]

Foss' invitation of Mr. Welch to the *ex parte* contact thus was the functional equivalent of sending Mr. Welch all the confidential

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[10] Foss had many options available to protect any information in Mr. Vorwerk's possession, which it inexplicably did not use after being contacted by Mr. Welch as to Mr. Vorwerk's deposition. The simplest would have been to arrange for that deposition and, as is common for many employers with ex-employees, and provide him counsel for all testimony related to the Alucia project. That would have allowed Foss to review and object to any documents it believed were subject to privilege or confidentiality protection ***before*** they were seen by Mr. Welch. Foss did not choose this easy option.

[11] Mr. Welch stated correctly, that it does not seem fair. He was right.

> So it's not the same case [as *Jain*] at all. It's kind of like, like I said, it seems to me more of a "gotcha." We didn't give you good information about where this guy is. You finally decided to call him once we gave you the number and you got the information fro[m] him, and **now that you got the information that we didn't want to give you in the first place, now I'm going to try to get you disqualified. <u>It doesn't seem fair.</u>**

or privileged documents or information that Vorwerk possessed and decided to give him.

Under both *Sitterson* and ER 502(b), Foss waived its claims of privilege in the materials held by Vorwerk because the record here permits a finding ***only*** of a waiver of any privilege by Foss, at least as to Mr. Welch and Brandewiede as opposing party.

### B. It Is Fundamentally Unfair to Reward Foss For *Its Own* Discovery Failures With Sanctions Against Brandewiede Whose Counsel Did Nothing Wrong, Especially Sanctions That Effectively Win the Case For It. This Supports Waiver Under *Sitterson* and Terms Under *Fisons.*

#### 1. Foss' Discovery Violations Show Why Reversal Is Required and Support Finding Waiver.

Foss' principle defense in its Response is, as below, to take the offense and claim foul by Brandewiede to cover its own failures. Its goal is, again, the same as below: to prevent Brandewiede from using any of the information from Mr. Vorwerk. One look at pages four and five of Mr. Vorwerk's declaration shows one reason why Foss is so desperate to have it all excluded: it sinks their claim. *See* CP 190-95, Vorwerk Dec. *See also* RP 15:3-8 (description of the Narrative). It is a proverbial "smoking gun," like the drug memo in *Fisons*. A second reason disqualification is sought is it will end the case. Given Brandewiede's small size (one person) and depleted assets (compared to Foss with over 1,000 employees, *see* CP 240), Brandewiede cannot continue the case without Mr. Welch and his

firm, as he cannot pay the retainer for new counsel to learn the case and prepare for trial. *See* fn.17, #6, *infra.*

Foss' claim that Mr. Welch engaged in intentional misconduct and is "tainted" has as its primary purpose to shift the focus from the failures and misconduct of Foss both in the conduct of this litigation and in its management of the Alucia project to try and save their baseless claim that Brandewiede was in a partnership with Core Logistics and proceed against an undefended party. But the only undisputed misconduct in this litigation is by Foss. Since it was Foss' unexcused failures that created the circumstances by which it got Mr. Welch disqualified, disqualification would be fundamentally unfair, putting the fifth factor in *Sittleson* in favor of waiver for any privileged communications disclosed by Vorwerk.

***First***, Foss failed to properly disclose Mr. Vorwerk's actual relationship and contact information in its discovery responses dated October 12, 2012. *See* CP 135 Answer to Rog. #1 (identifying Mr. Vorwerk as one of three persons helping with the responses). ***Second***, Foss expressly misrepresented Mr. Vorwerk's contact information in its preliminary designation of witnesses dated July 1, 2013, by stating Mr. Vorwerk was to be contacted in care of Foss' law firm, which was not true. *See* CP 120, ¶ 5.[12]

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[12] While Foss may have correctly listed Vorwerk as a person whose information – his files – was used in providing the initial discovery responses served in October, 2012, that did not preclude also disclosing his then-correct

*(Footnote continued next page)*

These are not trivial oversights that make no difference. Imagine what would have occurred just if Foss had timely made full and complete disclosures on Vorwerk, much less if it had ***also*** produced a redacted copy of the Vorwerk Narrative.

Had Foss disclosed in its October, 2012, responses that Mr. Vorwerk no longer was a project manager and was not controlled by Foss but could be contacted directly, he would have been contacted immediately by Mr. Welch and interviewed over 13 months before the initial December, 2013, trial date. Shortly after the start of the litigation Brandewiede would have had a copy of Mr. Vorwerk's 38-page Narrative and learned that Mr. Vorwerk's view of the facts at the time of the Alucia project as its manager did not support Foss' claim that Brandewiede was in a partnership with Core Logistics and therefore owed Foss for the large loss it sustained on the project. In addition to gutting Foss' bogus partnership claim, Brandewiede also would have had his understanding confirmed from the project manager that it was Foss' mismanagement which was the primary cause of the losses they now sought from him.

Despite some passages in its Response, Foss' case really has nothing to do with the "sanctity" of the attorney-client privilege.

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contact information, which should have been disclosed at the same time. Foss gave it to Mr. Welch the day after he asked if Foss wanted to make Mr. Vorwerk "available through a notice of deposition" or whether he should be subpoenaed. CP 151.

And indeed, those principles are not at the slightest risk if the Court reversed the trial court here. Rather, they are enhanced because this Court will be reminding the Bench and Bar of the steps and proof required to analyze whether and when an attorney who comes into possession of allegedly privileged materials must be disqualified, and what protective steps a party must take to preserve any potentially privileged communications an ex-employee or key witness might possess and could disclose, particularly if the party makes the ex-employee available to the opposing party.

Finally, for all Foss' complaints about the allegedly privileged information to which ***Foss*** had directed Mr. Welch by sending him to Vorwerk, there is no dispute that the 38-page Narrative was written wholly and completely by Mr. Vorwerk ***after*** he was fired by Foss and not under its control. Whatever complaint Foss may have against Mr. Vorwerk for revealing its secrets, Foss can have no complaint against Mr. Welch for following ***its*** suggestion to contact Mr. Vorwerk directly and then receive Mr. Vorwerk's ***personal*** writing, a writing that Foss had received over 14 months earlier and failed to either produce in the litigation or take steps to protect.

### 2. Mr. Welch Did Not Engage in Any Wrongful Conduct.

It is neither surprising nor indicative of improper action by Mr. Welch that he included the Narrative in his exhibit list. Recall

the sequence of events as the November 12, 2013, witness and exhibit list deadline approached for the December 3 trial. While Mr. Welch had met Vorwerk and obtained the thumb drive on October 24, he knew Vorwerk was a long-term employee of Foss and now knows he has a major complaint about being fired. At present he is being cooperative, but Mr. Welch has no way to know if that will continue through trial. Trial designations are due, including exhibits. Mr. Welch has just received the most amazing gift a trial lawyer can get: a long, detailed narrative of the events by the opposing party's former, now-estranged project director detailing both what occurred on the project and that Foss' claims against Brandewiede are bogus. A detailed contemporaneous narrative, which Foss received 14 months earlier. But who knows if this new witness will show up at trial? Generically, a former employer such as Foss could amicably resolve any lingering employment-related claim or "concern" of the former employee before trial, who could then choose either to not be available, or be uncooperative as a witness if he does show up. In fact, the hearing contains Foss' reference to recent efforts by Foss as to Mr. Vorwerk to address "potential liability" with him, which efforts apparently were not yet resolved. *See* RP 29-30.

But with the contemporaneous Narrative available for both refreshing the former employee's memory and impeachment if necessary, it would be malpractice for any trial attorney in Mr.

Welch's position ***not*** to designate a document like the Narrative as a potential exhibit, particularly as it would not be publically filed until trial. Any redactions or limitations in the document based on privilege or confidential disclosures could be addressed pre-trial or at trial if and when the document is offered as an exhibit.

Mr. Welch did nothing wrong by reviewing the Narrative sufficiently to know it told the story he needed -- both to refute Foss' claims and establish Brandewiede's counterclaim -- and that he needed to designate it as an exhibit given the uncertainties as to Mr. Vorwork and his testimony. After all, Foss basically led him to that document. Foss cannot properly now say he is foreclosed from using the materials it led him to, which Foss should have produced a year before, and which it took no steps to protect. It has no right to assert that Mr. Brandewiede is foreclosed from telling the full story at trial so that the whole truth can be presented and the case decided on its merits. After all, getting to the truth is the fundamental goal of our court system.[13]

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[13] *See, e.g., In re Det. of Turay*, 139 Wn. 2d 379, 390, 986 P.2d 790 (1999) (cases should be decided on the merits, citing numerous prior cases, including *Curtis Lumber Co. v. Sortor*, 83 Wn. 2d 764, 767, 522 P.2d 822 (1974) re the civil rules are designed to get away from "a sporting theory of justice"); CR 1 (rules are to be construed "to secure the just . . . determination" of every action); ER 102 (rules are to be construed "to the end that the truth may be ascertained and proceedings justly determined"). *Accord,* RAP 1.2(a) (the appellate rules shall be "liberally interpreted to facilitate justice and the decision of cases on the merits.").

### C. Neither *Jain* Nor the *Meador* Test It Employed Have Been Adopted by Washington Courts. They Use the *Sitterson* Test and ER 502(b). *Meador/Jain* Is Irrelevant Except to The Extent Its Application Reinforces Finding Waiver Under *Sitterson* and Fees Under *Fisons.*

Foss argues that the *Meador* test applied by the federal district court in *Richards v. Jain,* 168 F. Supp. 2d 1195 (W.D. Wa. 2001), should be applied by this Court, even though it is not accepted Washington law. RB, pp. 23-24. But *Jain* has never been cited as an authority by a Washington appellate court in a published or unpublished decision. And as noted in § II.A., *supra,* Washington has already adopted a test and standards for this kind of situation in *Sitterson* and ER 502(b), both of which are more recent than *Jain* and the underlying test from the Texas courts *Jain* applied, *In Re Meador*, 968 S.W.2d 346, 41 Tex. Sup. Ct. J. 673 (1998). *Sitterson,* a 2008 case, has been cited in three Washington appellate court decisions and two federal trial courts, while the rule was adopted in 2010.[14] Had the Supreme Court wanted to adopt the *Meador* test directly, or as stated in *Jain,* it could have when the rule was adopted in 2010. It did not. Rather, *Firestorm* controls on disqualification (*see* OB, pp. 13, 17-22) and *Sitterson* on the waiver issue which, here, helps resolve the disqualification issue since if the privilege was waived as to disclosed materials, there is no basis to disqualify.

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[14] *See* Karl B. Tegland, 5A WASHINGTON PRACTICE, EVIDENCE LAW AND PRACTICE § 502.1 (5th ed. 2007, 2014 supp.), "Purpose and history of Rule 502."

A very recent unpublished federal decision from the Western District[15] explain why neither *Jain* nor *Meador* should now be applied by Washington Courts:

> Defendant's Motion to Disqualify Plaintiffs' firms (Dkt. No. 168) is based on **a case applying an old version of the model ethical rules and an outdated ABA opinion. *See Richards v. Jain***, 168 F. Supp. 2d 1195 (W.D.Wash.2001); *Mt. Hawley Ins. Co. v. Felman Production, Inc.*, 271 F.R.D. 125, 130–31 (S.D. W. Va. 2010). **The current version of RPC 4.4 does not require return of inadvertently sent documents, so Plaintiffs cannot be faulted for failure to do so**. *See* Wash. RPC 4.4(b).

*Kyko Global Inc. v. Prithvi Info. Solutions Ltd.*, 2014 WL 2694236, *2 (W.D. Wa. 2014) (emphasis added) (App. F hereto).

In any event, not only do the *Meador/Jain* factors show that disqualification is ***not*** appropriate or mandated here, application of those factors[16] reinforces the *Sitterson* analysis *supra* that any

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[15] Unpublished court decisions from non-Washington jurisdictions may be cited to Washington courts if citation is permitted under the law governing the issuing court, and the party must file and serve a copy with the pleading in which it is cited. GR 14.1(b), Unpublished federal decisions issued on or after January 1, 2007, may be cited pursuant to FRAP 32.1 and Ninth Circuit Rule 36-3(b).

[16] The *Meador/Jain* factors are:

1. Whether the attorney knew or should have known that the material was privileged;
2. The promptness with which the attorney notifies the opposing side that he or she has received its privileged information;
3. The extent to which the attorney reviews and digests the privileged information;
4. The significance of the privileged information; i.e., the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate that prejudice;

*(Footnote continued next page)*

privileged communications disclosed by Vorwerk following the *ex parte* invitation should be considered waived.[17]

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5. The extent to which movant may be at fault for the unauthorized disclosure; and
6. The extent to which the nonmovant will suffer prejudice from disqualification of his or her attorney.

*In Re Meador*, 968 S.W.2d 346, 351-52, 41 Tex. Sup. Ct. J. 673 (1998).

[17] **One:** While Foss claims Mr. Welch knew or should have known he had received privileged information belonging to Foss, RB, pp. 26-27, Mr. Welch testified by declaration that he only briefly reviewed the 38-page Narrative, saw no indication of privileged material, and promptly ceased further review upon notification by Foss' counsel that the letter might contain privileged information. OB, p. 23; CP 313, App. C-2. He also testified he only reviewed a small portion of the documents on the thumb drive given to him by Vorwerk, ceased review on notice it might contain privileged information, CP 313, App. C-2, and sent the thumb drive to Foss without retaining a copy. CP 115-116, ¶¶ 6-7, App. A. *Accord*, Ruling Granting Review, pp. 3, 12-13 ("The emails were not designated as attorney-client privileged.").

**Two:** Foss' *Jain* argument that the short two weeks before notifying Foss' counsel of the flash drive documents justifies disqualification, RB, pp. 28-29, is in sharp contrast to the facts in *Jain* and *Meador*: In *Jain* the disqualified firm had a massive amount of, and *thoroughly reviewed* the privileged information for *eleven months* before notifying opposing counsel (168 F. Supp. 2d at 1200), while in *Meador*, the attorney *never* notified opposing counsel of the receipt of privileged information, yet the trial court's decision to ***forgo*** disqualification was upheld. *Meador*, 968 S.W.2d at 352. Here Mr. Welch informed Foss' trial counsel about his receipt of the thumb drive documents after just two weeks when he had reviewed only a few of them, had not seen any document "that would even remotely indicate" they were privileged, and immediately ceased review once Foss' counsel raised their concern of privilege. CP 313, App. C-2; CP 115-116, ¶¶ 6-7, App. A-3.

**Three:** While Foss assumes Mr. Welch's designation of the Narrative as a potential exhibit shows he reviewed and digested the entirety of the 38-page letter such that he was on notice of it contained privileged information, RB, p. 29, the undisputed evidence is that Mr. Welch only spent a small amount of time reviewing the Narrative and reviewed very little of the thumb drive documents. CP 313, App. C-2; CP 115-116, ¶¶ 6-7, App. A-3. There is no evidence Mr. Welch actually reviewed any privileged information contained on the thumb drive, *see* Ruling Granting Review, p. 8. Foss' counsel expressly disclaimed any need to determine how much or how quickly Mr. Welch had reviewed the Vorwerk materials, saying "I can suspend judgment" on what Mr. Welch actually

*(Footnote continued next page)*

## D. Foss Understates the Prejudicial Effect of the Trial Court's Exclusion of Evidence.

Foss claims that the trial court's exclusion of all evidence "tainted" by Mr. Welch's "wrongful conduct" is not prejudicial to Brandeweide, as Brandeweide may use the same information

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reviewed, RP 32: 10 – 25, because mere possession of the material was enough. RP 31:2-24. As to whether brief review of the short e-mail excerpts in the 38-page Narrative requires disqualification, it is questionable whether this excerpt is privileged at all, *see* OB, IV.C.2 and § II.A., *supra.* Based on the Commissioner's description, the excerpt is not *clearly* privileged, consistent with Mr. Welch's testimony he did not notice any clearly privileged materials in parts of the Narrative he did look at.

**Four:** While Foss claims the e-mails in the Narrative and especially on the thumb-drive include privileged communications regarding Foss' legal strategies against Brandeweide and the other defendants, RB, pp. 29-30, there is no evidence Mr. Welch actually reviewed any privileged information contained on the thumb drive. *See* Ruling Granting Review, p.8. The two short e-mail excerpts in the Narrative, which were not clearly designated as privileged, did not likely contain sufficient information to derail Foss' litigation strategy even assuming *arguendo* the excerpts were privileged and were carefully reviewed, which they were not. There has been no further review of those documents during this appeal, per the Commissioner's rulings.

**Five:** Although Foss tries to make Mr. Welch responsible for disclosure of the privileged information, it was the "movant" – ***Foss*** – who in fact provided the privileged information to him by directing him to contact Vorwerk without taking any protective steps. *See* § II.A, *supra.* Foss failed to take reasonable steps to prevent disclosure when it invited direct contact with a disgruntled former employee in lieu of a deposition. *Id.* See *also* OB, IV.C.2.a.ii.

**Six:** While Foss claims the cost of retaining new counsel is not sufficient to establish undue prejudice (RB, pp. 33-35), in this case that cost would effectively determine the outcome because the litigation costs coupled with Foss' refusal to pay him the over $200,000 for the work he completed has virtually bankrupted him and he could not retain new counsel. *See* Declaration of John Welch, p. 2 ¶ 2, dated April 2, 2014, and filed in support of Brandewiede's Motion for Emergency Stay ("Neither Brandewiede nor Brandewiede Construction have the financial resources to bring on new legal counsel . . . Without legal representation by Carney Badley Spellman, Jeff Brandewiede, his marital community and Brandewiede Construction are left without any legal representation."). Disqualification of Mr. Welch and the firm will severely prejudice Brandewiede.

contained in the excluded evidence to the extent that such information is un-privileged and available from a "proper source," which "proper source" is nowhere defined. RB, pp. 40-44. Although Foss acknowledges that this would include a redacted version of the Vorwerk Narrative, it also claims that all "non-privileged, non-proprietary, and non-confidential information" on the thumb-drive has already been produced in discovery. *Id.*

But Brandeweide has no way of confirming that Foss has indeed already produced all the non-privileged information located on the thumb-drive, as represented by a paralegal at Foss' outside firm. After all, their methods never produced the hugely relevant 38-page Vorwerk Narrative. And its response is equivalent to that of the non-producing party in *Fisons*: "We looked really hard, and looked again, but we're sure we produced everything we should have 'reasonably related' to your claims." *See Fisons,* 122 Wn.2d at 351-52. Foss' carefully worded disclaimers do not preclude the possibility the email Vorwerk remembers exists but is being withheld under some claim of privilege, particularly since Foss has never provided to Brandewiede a log of claimed privileged materials, either in its October 2012 production or later.

Although Mr. Welch did not see any privileged documents among the very limited portion of the documents he reviewed from the thumb drive, Mr. Vorwerk claims the thumb drive contained relevant communications between himself and his immediate boss,

Mark Houghton, who is not an attorney and would not presumably be privileged. Based on the description provided by Vorwerk, these non-privileged communications were responsive to discovery, yet they were never produced by Foss. The trial court's decision to exclude all evidence from the thumb drive effectively prevents Brandeweide from reviewing and comparing a privilege log of the documents located on the thumb-drive to the documents already produced by Foss.

### E. Remand of the Disqualification Issue to the Trial Court Is Not Necessary and Will Waste Judicial Resources Because the Issue Can Be Decided as a Matter of Law.

Foss claims that if this Court determines the trial court made inadequate on-the-record findings, the proper remedy is to remand back to the trial court to supplement the record with additional findings. Response, p. 42. In doing so, Foss relies on case law discussing remand to the trial court to make a record of findings in support of a fee award.[18] Foss' argument fails to recognize the difference between an appeal of a fee award, which is reviewed for the trial court's abuse of discretion, and the review of a disqualification order on a paper record, which does not involve an issue of discretion and may be decided as a matter of law.

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[18] *Manna Funding, LLC v. Kittitas County*, 173 Wn. App. 879, 902, 295 P.3d 1197 (2013) (review of fee award); *Laue v. Estate of Elder*, 106 Wn. App. 699, 713, 25 P.3d 1032 (2001) (review of fee award); *Morgan v. Kingen*, 141 Wn. App. 143, 150, 169 P.3d 487 (2007) (review of fee award).

*Firestorm*, 129 Wn.2d at 135. Unlike a fee award, this Court has the authority to review *de novo* the disqualification and exclusion of evidence resulting from the alleged violation of discovery or ethical rules and determine whether such disqualification and exclusion is appropriate as a matter of law. *Id. See* OB, pp. 11-12, 42-44. The Court should do so here to promote judicial economy.

### F. The Firm's Representation of Brandeweide on Appeal Does Not Present a Conflict of Interest.

Undersigned appellate counsel and his firm are representing Brandeweide on appeal, not the firm, and have been since the beginning of the appellate process. The cases Foss relies on to argue the existence of a conflict of interest all involved appeals where the attorneys appealed on behalf of ***themselves,*** as well as their client, a situation in which continued representation creates a true conflict of interest that is not present here.[19]

Foss relies on several cases from other jurisdictions to argue that firm's continued representation of Brandeweide on appeal is improper. However, these cases all involve attorneys disqualified for a conflict of interest, which presents a serious obstacle to continued representation and which, again, does not exist here.[20]

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[19] *Richardson-Merrel, Inc. v. Koller*, 472 U.S. 424, 433, 105 S. Ct. 2757, 86 L. Ed. 2d 340 (1985) (both attorney and clients were parties to appeal); *In re Marriage of Wixom*, 182 Wn. App. 881, 332 P.3d 1063 (2014) (attorney attempted to represent both himself and client on appeal).

[20] *United States v. Nabisco, Inc.*, 117 F.R.D. 40 (E.D.N.Y. 1987) (disqualified for conflict of interest); *Shaw v. London Carrier, Inc.*, 2009 WL

*(Footnote continued next page)*

Finally, the Commissioner already rejected this argument in her ruling granting the temporary stay. Since Foss did not move to modify that ruling, it is the law of the case. *See* Commissioner's Ruling Granting Temporary Stay, p. 6 (April 14, 2014) ("Courts (including the Illinois court case provided by Foss) have reviewed an order of disqualification where appeal was brought by a party through the law firm disqualified by that order.").

As this is not a conflict of interest case and the order of disqualification has been stayed, there is no obstacle to Mr. Welch's firm's continued representation of Brandeweide in this appeal.

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4261168 (W.D. Mich.) (disqualified for conflict of interest); *Harsh v. Kwait*, 2000 WL 1474501 (Ohio App. 2000) (disqualified for conflict of interest); *All Am. Semicon., Inc. v. Hynix Semicon., Inc.*, 2009 WL 292536 (N.D. Cal. 2009) (disqualified for conflict of interest); *First Wis. Mortg. Trust v. First Wis. Corp.*, 584 F.2d 201, 207 (7th Cir. 1987) (disqualified for conflict of interest); *Duskey v. Bellasaire Invs.*, 2007 WL 4403985 (C.D. Cal. 2007) (disqualified for conflict of interest); *Ragar v. Brown*, 3 F.3d 1174 (8th Cir. 1993) (disqualified for conflict of interest); *Iowa Supreme Court Attorney Disciplinary Bd. v. Wengert*, 790 N.W.2d 94 (Iowa 2010) (disqualified for conflict of interest). Foss cites only one case where the grounds for disqualification are unclear, *Harrison v. Cynthia Constantino and Trevett*, 2 A.D.3d 1315 (N.Y.A.D. 2003), where the court held continued representation by the disqualified attorney on appeal was improper because the disqualification order was not stayed. The order here is stayed.

## III. CONCLUSION

Petitioners Brandewiede respectfully ask the Court: 1) to vacate the order disqualifying Mr. Welch and his firm and excluding evidence; 2) to provide that the Vorwerk evidence may be used at trial subject to proper objections other than privilege as to communications for which the privilege is deemed waived; 3) to determine, as in *Fisons*, that monetary sanctions are required for Foss' discovery violations to address the trial court and appeal fees incurred by Brandewiede from at least the time Foss objected to use of the Vorwerk evidence, to be paid before trial; and 4) to remand for any supplemental discovery needed and trial.

Respectfully submitted this 26th day of February, 2015.

**CARNEY BADLEY SPELLMAN, P.S.**

By _____
Gregory M. Miller, WSBA No. 14459
*Attorneys for Petitioners Brandewiede*

# APPENDIX F

2014 WL 2694236
Only the Westlaw citation is currently available.
United States District Court, W.D. Washington, at Seattle.

KYKO GLOBAL INC. and Kyko Global Gmbh, Plaintiffs,
v.
PRITHVI INFORMATION SOLUTIONS LTD., et al., Defendants.

No. C13–1034 MJP. | Signed June 13, 2014.

**Attorneys and Law Firms**

Darian A. Stanford, Christina L. Haring-Larson, Slinde Nelson Stanford, Seattle, WA, Keith A. Pitt, Slinde Nelson Stanford, Portland, OR, for Plaintiffs.

Brandon P. Wayman, Mark D. Kimball, Mary K. Thurston, MDK Law Associates, Bellevue, WA, for Defendants.

**ORDER ON MOTION TO DISQUALIFY AND MOTION TO DETERMINE ADMISSIBILITY**

MARSHA J. PECHMAN, Chief Judge.

*1 THIS MATTER comes before the Court on Plaintiffs' Motion to Determine Admissibility of Materials on Computer of Defendant Madhavi V. uppal apati Purchased by Plaintiffs at Public Auction as Part of Execution of the Federal Judgment (Dkt. No. 163) and Defendants' Motion to Disqualify Counsel (Dkt. No. 168). Having reviewed the motions, Defendants' Response to the admissibility motion (Dkt. No. 177), Plaintiffs' Reply (Dkt. No. 182), Plaintiffs' Response to the disqualification motion (Dkt. NO. 197), and Defendants' Reply (Dkt. No. 209), and all related papers, the Court hereby DENIES the Motion to Disqualify Counsel and HOLDS that Defendants did not waive their attorney-client privilege. Accordingly, Plaintiffs are ORDERED to provide Defendants with a copy of the hard drive within three (3) days so that Defendants may review it for privilege and Plaintiffs are ORDERED to provide Defendants with a privilege log within seven (7) days of the transfer.

**Background**

Plaintiffs Kyko Global, Inc. and Kyko Global GMBH (together "Kyko") are in the business of factoring-a type of financial arrangement where Kyko fronts money as advances on customer account receivables. (Dkt. No. 11.) In this fraud case, Kyko alleges Defendants created fictitious entities for the appearance of imitating legitimate business transactions and companies. (Dkt. No. 1.) Plaintiffs allege that using these sham companies as supposed account receivables of five legitimate companies, Defendant Prithvi Information Solutions Ltd ("PISL") and its affiliates, officers, directors and certain individuals acting in concert contracted with Kyko for factoring services. (Dkt. No. 11. at 2.) PISL and several affiliated companies executed guarantees with Kyko, promising to pay any obligation owed under the factoring agreement. Kyko alleges that in early 2013, Defendants stopped paying their invoices, leaving $17,000.00 outstanding. (Dkt. No. 11 at 4.)

The Complaint alleges fraud, negligent/intentional misrepresentation, conversion, unjust enrichment, Civil RICO claims for wire and mail, financial institution fraud, temporary and preliminary injunctive relief, and (against the entities who signed the guarantees) breach of guarantees. (Dkt. No. 1.)

Based on the Complaint and declarations submitted by Plaintiff, this Court issued an ex parte Temporary Restraining Order, finding Plaintiffs adequately pled a prima facie case for fraud and were likely to succeed on the merits of their claims. (Dkt. No. 11 at 10 .) Shortly after the Order, twelve of the named Defendants, including Madhavi V uppal apati, settled and confessed to judgment. (Dkt.Nos.70, 116.)

Plaintiffs then obtained a Writ of Execution pursuant to which the King County Sheriff seized various items of personal property, including a computer owned by Ms. V uppalapati, from Ms. Vuppalapati's residence on February 12, 2014. (Firuz Decl., Dkt. No. 164 & Ex. A.) The computer was sold at a public auction, and an attorney for Plaintiffs outbid a representative sent by Defendants and purchased the computer. (Dkt. No. 164 at 2–3; Dkt. No. 168 at 3; Jayaraman Decl., Dkt. No. 179 at 2.) Plaintiffs sent the computer to a third party for analysis (Dkt. No. 167 at 1–2) and now request a ruling as to the admissibility of potentially attorney-client privileged documents on the computer. (Dkt. No. 163.) Defendants, meanwhile, contend the actions of Plaintiffs violated

ethical rules, that Plaintiffs must return the computer to Defendants, and that their attorneys should be disqualified from further representation of Plaintiffs. (Dkt. No. 168.)

## Analysis

### I. *Disqualification*

*2 Defendant's Motion to Disqualify Plaintiffs' firms (Dkt. No. 168) is based on a case applying an old version of the model ethical rules and an outdated ABA opinion. *See Richards v.* Jain, 168 F.Supp.2d 1195 (W.D.Wash.2001); *Mt. Hawley Ins. Co. v. Felman Production, Inc.,* 271 F.R.D. 125, 130–31 (S.D.W.Va.2010). The current version of RPC 4.4 does not require return of inadvertently sent documents, so Plaintiffs cannot be faulted for failure to do so. *See* Wash. RPC 4.4(b).

It is true that when a party wrongfully obtains documents outside the normal discovery process, a court may impose sanctions including "dismissal of the action, the compelled return of all documents, restrictions regarding the use of the documents at trial, disqualification of counsel and monetary sanctions." *Lynn v. Gateway Unified School Dist.,* No. 2:10–CV–00981–JAM–CMK, 2011 WL 6260362, *5 (E.D.Cal. Dec.15, 2011) (citing *Fayemi v. Hambrecht & Quist, Inc.,* 174 F.R.D. 319, 324–27 (S.D.N.Y.1997)). However, such sanctions are only available where the acquisition of documents was wrongful. *Niceforo v. UBS Global Asset Management Americas, Inc.,* —— F.Supp.2d ——, 2014 WL 2071041, *2 (S.D.N.Y.); *see also Josephson v. Marshall,* 2001 WL 815517, *2 (S.D.N.Y. July 19, 2001) (holding that where documents were obtained outside the normal discovery process but not wrongfully, ordinary attorney-client privilege analysis applies).

Here, Plaintiffs' acquisition of the computer was not inherently wrongful. Plaintiffs purchased the computer at a public auction. To the extent Plaintiffs intended to obtain privileged materials through this purchase, the ethical considerations become somewhat murkier, but Plaintiffs claim they have not reviewed the materials (Dkt. No. 197 at 4), and Defendants have not cited case law that supports sanctions in this context.

Defendants also challenge Plaintiffs' use of forensic analysis to assess the contents of the hard drive, citing a WSBA opinion about the use of metadata that applied RPC 4.4(a). (Dkt. No. 168 at 7–8.) *See* WSBA Advisory Opinion 2216; RPC 4.4(a) ("In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."). Defendants' use of a third party vendor to make a copy of the hard drive is not equivalent to metadata mining of documents produced through the normal discovery process, because whereas the hard drive might plausibly contain many documents unprotected by any privilege, metadata mining is expressly aimed at the kind of information one would expect to be protected by attorney-client privilege and/or work-product protections. *See* WSBA Advisory Opinion 2216 ("Metadata is the 'data about data' that is commonly embedded in electronic documents and may include the date on which a document was created, its author(s), date(s) of revision, any review comments inserted into the document, and any redl i ned changes made in the document.") Because it their actions had a legitimate purpose apart from the discovery of privileged documents, Defendants' use of the hard drive as alleged by Plaintiffs does not violate 4.4(a).

### II. *Waiver of Attorney–Client Privilege*

*3 Plaintiffs now argue that to the extent the hard drive contains attorney-client privileged materials, that privilege was waived by a failure to secure the materials. (Pl's Admissibility Mot., Dkt. No. 163.)

Plaintiffs vacillate between calling Defendants' relinquishment of the computer an "involuntary disclosure" or an "inadvertent disclosure." First, Plaintiffs cite Federal Rule of Evidence 502(b), which concerns inadvertent disclosure. (Dkt. No. 163 at 4–5 .) Next, they argue the issue is involuntary disclosure. (Dkt. No. 163 at 7.) This difficulty is understandable: As in situations where an opposing party obtains privileged information from a party's trash, "[t]his case lies between the inadvertent disclosure cases, where the information is transmitted in public or otherwise clearly not adequately safeguarded, and the involuntary disclosure cases, where the information is acquired by third parties in spite of all possible precautions." *Suburban Sew 'N Sweep, Inc. v. Swiss–Bernina, Inc.,* 91 F.R.D. 254, 260 (N.D.Ill.1981).

Federal Rule of Evidence 502(b) is of uncertain applicability in this circumstance because the disclosure (if the relinquishment of the computer to the sheriff's auction can be termed a disclosure) occurred outside the usual discovery process-in other words, the disclosure was arguably not "made in a federal proceeding." FRE 502(b); *but see Multiquip, Inc. v. Water Management Systems LLC,* No. CV 08–403–S–EJL–REB, 2009 WL 4261214, *3 n. 3 (D.Idaho Nov.23, 2009) (holding that

"FRE 502(b) applies broadly to conduct taking place within the context of a federal proceeding."). Similarly, the clawback procedures outlined in FRCP 26(b)(5)(B) do not apply to documents obtained outside the usual discovery process. *See United States v. Comco Management Corp,* No. SA CV 08–0668–JVS (RN Bx), 2009 WL 4609595, *2 (C.D.Cal.2009); FRCP 26(b)(5)(B) (requiring that the privileged information be "produced in discovery"). However, Rule 502(b) was a codification of prior common law rulings regarding waiver, and waiver in this circumstance is still be governed by the common law of attorneyclient privilege in Washington.

Washington courts use a balancing test to determine waiver that is similar to Rule 502(b). *See Sitterson v. Evergreen School Dist. No. 114,* 147 Wash.App. 576, 587–88, 196 P.3d 735 (2008). The factors that are considered in determining waiver are: "(1) the reasonableness of precautions taken to prevent disclosure, (2) the amount of time taken to remedy the error, (3) the scope of discovery, (4) the extent of the disclosure, and (5) the overriding issue of fairness." *Id.* at 588, 196 P.3d 735. *See also* Zink *v. City of Mesa,* N os. 27596–5–III, 28112–4–III, 162 Wash.App. 1014, 2011 WL 2184965, * 17 (W n. A pp. June 7, 2011) ("Accidental release of all the communications on appeal, however, did not waive the exemption for all of the documents because the disclosure was unpreventable and inadvertent.").

The closest analogy to the unique fact pattern at issue here may be early cases in which an opposing party discovers a privileged document in the other party's trash. The act of discarding privileged material can lead to waiver if the opposing party can show that the person who discarded the material was unconcerned with maintaining its confidentiality. So, for example, when the discarded documents are fully legible, courts often hold that the privilege was waived. *See, e.g., United States v. McMahon,* Nos. 95–5919, 95–5920, 95–5921, 1998 W L 372477, *5 & n. 7 (4th Cir. June 8, 1998) (per curiam). But the precautions taken by the discarding party are a paramount concern: When a privileged memo was discarded but torn into pieces, another court held that the privilege had not been waived. *McCafferty's, Inc. v. The Bank of Glen Burnie,* 179 F.R.D. 163, 169 (D.Md.1998) ("The significance of this fact cannot be overstated, for it evidences her intent ... to destroy or make the memo unintelligible before it was thrown away."). When the person asserting the privilege was separated from the privileged material forcibly and under time pressure, courts are also less likely to find waiver. *See, e.g., Sparshott v. Feld Entertainment, Inc.,* No. 99–CV–0551 (JR), 2000 WL 35825607 (D.D.C. Sept.21, 2000).

***4** Here, Defendant Madhavi Vuppalapati states in a declaration that she had "someone at her office" reformat the hard drive on the computer and install a new operating system. (V uppal apati Decl., Dkt. No. 170 at 2.) She further states that she believed her documents had been erased and were not readily accessible. (*Id.*) There is some dispute over whether the hard drives were password protected at the time of the sale. (*See id.* (V uppal apati hard drive); Jayaraman Decl., Dkt. No. 169 at 2(d-link); Warren Decl., Dkt. No. 187 at 2. (stating that a clone of the V uppal apati hard drive was not password protected and that the d-l i nk was not analyzed).) It is not inconceivable that Ms. V uppal apati believed no one could access the documents on her computer, even if reformatting a hard drive does not have that actual effect. The facts here bear a closer resemblance to the memo torn into 16 pieces than a document simply placed in a trash can without alteration. Along with Defendants' prompt efforts to remedy the error by filing a motion with the Court and the general sense that parties should not be able to force waiver of attorneyclient privilege through investigative activities outside the discovery process and a superior understanding of the relevant technology, the Washington balancing test weighs against waiver.

## Conclusion

Plaintiffs' Motion to Disqualify Counsel is DENIED because Plaintiffs failed to show that Defendants violated Rules of Professional Conduct and Defendants' Motion to Determine Admissibility is DENIED insofar as it seeks waiver of Plaintiffs' attorney-client privilege. Plaintiffs are further ORDERED to provide Plaintiffs with a copy of the hard drive within three (3) days, and Plaintiffs are ORDERED to review the hard drive for privileged documents and provide Defendants with a privilege log within seven (7) days of the transfer.

The clerk is ordered to provide copies of this order to all counsel.

**End of Document**

WASHINGTON STATE COURT OF APPEALS, DIVISION I

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| FOSS MARITIME COMPANY,<br>Respondent,<br>v.<br>JEFF BRANDEWIEDE and JANE DOE BRANDEWIEDE, and the marital community comprised thereof; and BRANDEWIEDE CONSTRUCTION, INC.,<br>Petitioners.<br>CORE LOGISTIC SERVICES; LISA LONG and JOHN LONG, and the marital community comprised thereof; FRANK GAN and JANE DOE GAN, and the marital community comprised thereof,<br>Defendants. | NO. 71611-5-I<br>CERTIFICATE OF SERVICE |



I declare under penalty of perjury that I caused true and correct copies of *Petitioner Brandewiedes' Reply Brief,* and this *Certificate of Service* to be served upon counsel of record, as follows:

| | |
|---|---|
| John Crosetto<br>Tyler W. Arnold<br>GARVEY SCHUBERT BARER<br>1191 Second Avenue, 18th Floor<br>Seattle, WA 98101<br>Tel: (206) 464-3939<br>Fax: (206) 464-0125<br>jcrosetto@gsblaw.com<br>tarnold@gsblaw.com<br>*[counsel for Foss Maritime Co]* | ☐ U.S. Mail, postage prepaid<br>☒ Messenger<br>☐ Fax<br>☐ Email<br>☐ Other |

DATED at Seattle, Washington, this 26th day of February, 2015.

Lou Rosenkranz, Legal Assistant