

IN THE SUPREME COURT OF MISSOURI

SUPREME COURT NO. SC88392

STATE ex rel. FORD MOTOR COMPANY

Relator,

vs.

THE HONORABLE MICHAEL W. MANNERS, CIRCUIT COURT OF JACKSON
COUNTY, MISSOURI, AT INDEPENDENCE, CIRCUIT JUDGE, DIVISION 2,

Respondent.

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JURISDICTIONAL STATEMENT

This Writ is before the Court on Relator Ford Motor Company's ("Relator") Petition for Prohibition to prevent The Honorable Michael W. Manners, Judge of the Circuit Court of Jackson County at Independence, from enforcing his Order dated January 29, 2007 threatening to vacate non-sharing protective orders granted for various categories of documents (hereinafter the "Post-Settlement Order"). Jurisdiction is proper in this Court pursuant to Article V, Section 3, of the Missouri Constitution because Relator alleges Respondent abused his discretion and exceeded his jurisdiction by threatening to vacate – after the underlying case had settled – non-sharing protective orders entered by Respondent for documents Relator asserts are protected by the attorney-client privilege and work product doctrine and/or that contain trade secret or other confidential research, development or commercial information.

STATEMENT OF FACTS

A. INTRODUCTION

Two factual points best illustrate why Respondent abused his discretion in the underlying matter:

(1) The parties reached a settlement on December 29, 2006, and Respondent approved this settlement on January 10, 2007; and

(2) Despite that settlement, and although Respondent had previously entered non-sharing protective orders for various categories of documents and denied Plaintiffs' multiple attempts to reconsider and vacate the non-sharing protective orders for certain categories of documents, Respondent reversed course on January 29, 2007 – exactly one month after the case was settled – and threatened to vacate the non-sharing protective orders “unless prohibited from doing so by a Court exercising supervisory authority[.]”

No justifiable reason exists to vacate a non-sharing protective order after a case settles.

B. OVERVIEW OF THE DOCUMENTS AND DISCOVERY RULINGS AT ISSUE

The underlying wrongful death, products liability case arose from a rollover accident on April 12, 2004, involving a 2002 Ford Explorer Sport driven by Justin Hachinsky, deceased. Plaintiffs asserted product liability claims against Relator,

claiming Mr. Hachinsky's death occurred as a result of defective and unreasonably dangerous conditions in the Explorer.

On August 11, 2006, Respondent appointed Mr. Fred Wilkins as Discovery Commissioner (the "Discovery Commissioner"). The Discovery Commissioner issued twenty-four orders, authorized invasive discovery of Relator (e.g., permitted Plaintiffs' counsel to conduct "live" searches of Relator's computer aided engineering files in Dearborn, Michigan), and charged Relator over \$30,000 in fees. As part of this process, the Discovery Commissioner compelled Relator to produce, among other things, the following categories of documents: (1) suspension orders; (2) Electronic Stability Control, Roll Stability Control, and Interactive Vehicle Dynamic ("IVD/ESC/RSC") documents; (3) the Vehicle Dynamic List ("VEHDYN List"); (4) computer aided engineering ("CAE") files; and (5) Records Management Program documents. Although the Discovery Commissioner initially compelled production of these documents pursuant to a sharing protective order, Relator obtained – and Respondent approved – non-sharing protective orders for these documents.

1. Suspension Orders

a. What Are Suspension Orders?

Suspension Orders are communications issued by attorneys in Relator's Office of the General Counsel in connection with anticipated or pending litigation or administrative proceedings that identify attorney-selected categories of documents required to be maintained beyond periods provided in Relator's records management program. (See Affidavit of Alan DeGraw at ¶ 10, App. at A1, A2 .) Responsibility for

issuing, monitoring, revising (if necessary) and deactivating (when appropriate) suspension orders rests entirely with attorneys within Relator's Office of the General Counsel. (Id. at ¶ 5, App. at A2.)

Among other things, Relator's Office of the General Counsel provides confidential legal advice and legal services to Relator with respect to (a) pending litigation and (b) administrative and other governmental proceedings that are closely analogous to litigation. Attorneys in the Office of the General Counsel assigned to represent Relator in such proceedings may retain outside counsel to provide additional legal advice and opinion. (Id. at ¶ 10, App. at A2.) Relator's management expects its lawyers to exercise professional judgment and to provide legal advice and opinion regarding all matters that may affect Relator's interests in the lawsuits and inquiries. (Id.)

In representing Relator in these lawsuits or inquiries, Relator's attorneys regularly provide confidential legal advice and opinion regarding the categories of information or documents for potential disclosure in the proceedings in accordance with applicable statutes, regulation, rules, or orders. (Id. at ¶ 11, App. at A2.) In doing so, Relator's attorneys form opinions and conclusions regarding numerous matters relating to such disclosure, including:

- a. The identity of particular statutes, administrative regulations, and court rules or orders that are or may be applicable to disclosure and the extent of the disclosure obligations established in such statutes, regulations, rules or orders;

- b. The identity of judicial decisions that are or may be applicable to the disclosure requirements;
- c. The nature and scope of claims made in the lawsuit or inquiry;
- d. Facts and legal theories that are or may be important for Relator's attorneys to know in their representation of, and provision of legal advice to, Relator in the lawsuit or administrative proceeding;
- e. The nature and scope of disclosure demands in the lawsuit or inquiry;
- f. The appropriate personnel with whom to communicate in connection with the disclosure demands; and
- g. The identity of documents, or categories of documents, to be examined in order to respond to the disclosure demands.

(Id. at ¶ 11, App. at A2.)

For example, Relator's attorneys may, in a particular lawsuit, analyze applicable law and rules regarding disclosure, evaluate the nature and scope of the claims asserted in the pleadings and in available discovery demands, and make additional assessments based on their own investigations and opinions. (Id. at ¶ 12, App. at A2-A3.) As a result, the attorneys may conclude Relator should maintain, during the pendency of the lawsuit, certain documents or categories of documents that otherwise could properly be disposed under Relator's records management program. (Id.) In such circumstances, the attorneys provide confidential legal advice, through a "suspension order," that Relator should suspend implementation of its records management policy

with respect to the categories of documents described by the attorneys in the suspension order. (Id.)

The legal advice provided by Relator's attorneys, and the mental impressions, conclusions, opinions, and legal theories enumerated in suspension orders, are intended for limited distribution within the company and only to employees who need to know the legal advice in order to implement it. (Id. at ¶ 13, App. at A3.)

Because suspension orders contain confidential communications between attorneys and representatives of Relator in which the attorney explicitly provides legal advice, Relator asserts suspension orders are protected from disclosure by the attorney-client privilege. (Id. at ¶ 14, App. at A3.) In addition, in advising personnel that certain categories of documents should be suspended from normal records management practices for a specified period, Relator's attorneys reveal their judgment, opinion, and assessment that retention of the attorney-selected categories will or might (a) satisfy Relator's obligations under applicable statutes, regulations, rules and orders, (b) assist Relator in defending the lawsuit or in responding to the administrative inquiry, and (c) otherwise protect Relator's interests in the lawsuit or inquiry. (Id.) Accordingly, Relator also asserts attorney work-product immunity protects from disclosure its attorneys' identification and selection of the document categories listed in suspension orders. (Id.)

b. Production of Suspension Orders in the Underlying Case

Plaintiffs served several requests for production seeking production of suspension orders. Relator opposed production of suspension orders because the documents are protected by the attorney-client privilege and the work product doctrine,

and compelling Relator to produce suspension orders over its legitimate privilege objections would result in severe extraterritorial ramifications and abrogate Relator's privilege that has been upheld by numerous state and federal courts in the United States. Relator also asserted suspension orders were wholly irrelevant, and the stated purpose of Plaintiffs' requests for suspension orders – "to verify . . . full disclosure" by Relator – was improper.¹ (See Plaintiffs' Motion to Reconsider Order No. 7, App. at A5-A16.)

The Discovery Commissioner, over Relator's objections, issued Order No. 6 on October 30, 2006 and compelled Relator to produce suspension orders. (See Order No. 6, App. at A17-A41.) Additionally, Order No. 6 required Relator to produce a corporate representative to provide testimony regarding suspension orders. (Id. at A17, A34-A40.) Given the severe consequences associated with producing privileged documents, Relator did two things: (1) it requested Respondent review and reconsider Order No. 6, and (2) alternatively, it requested a non-sharing protective order be entered to prevent dissemination of the suspension orders and deposition testimony. In response to Relator's request for a non-sharing protective order, the Discovery Commissioner

¹ See Misischia v. St. John's Mercy Medical Center, 30 S.W.3d 848, 864-65 (Mo. Ct. App. 2000) ("Discovery designed to test a party's previous responses constitutes nothing more than a fishing expedition launched in hopes of locating information demonstrating misconduct... Fishing expeditions are not within the proper scope of discovery.") Accordingly, Relator argued Plaintiffs' request for suspension orders was wholly improper given Plaintiffs' stated purpose for requesting the documents.

issued Order No. 7, which approved a non-sharing protective order to govern the production of suspension orders and the deposition testimony. (See Order No. 7, App. at A42-A43.) Notably, in approving the non-sharing order, the Discovery Commissioner agreed the possible violation of a *sharing* protective order entered in another matter for redacted suspension orders was “a matter[] of serious concern” and supported Relator’s request for the non-sharing protection.² (Id. at 1, App. at A42.)

Unhappy with Order No. 7, Plaintiffs requested Respondent reconsider Order No. 7 on November 1, 2006. (See Plaintiffs’ Motion to Reconsider Order No. 7, App. at A5-A16.) In their motion, Plaintiffs argued suspension orders were not privileged or confidential, a sharing protective order sufficiently protected Relator’s interests, and a non-sharing protective order would frustrate Plaintiffs’ desire “to share [suspension orders] . . . with other attorneys that specialize in defective automobile

² Two Missouri courts – the Circuit Court of Jackson County at Independence and the Circuit Court for the City of St. Louis – are the only two courts in the United States to repeatedly compel production of suspension orders. In a case pending in the Circuit Court for the City of St. Louis, the court entered a sharing protective order to protect redacted suspension orders, and Relator had cause to believe the protective order may have been violated. Relator informed the Discovery Commissioner of the potential violation of the sharing protective order in support of its argument that a non-sharing protective order was warranted.

litigation in order to verify and achieve full disclosure.” (Id., App. at A9.) Plaintiffs requested Respondent grant an emergency hearing on their motion to reconsider. Two days later, on November 3, 2006, Respondent heard argument from the parties, denied Plaintiffs’ motion, and approved a non-sharing protective order for suspension orders. (See November 3, 2006 Order, App. at A44.) Importantly, at the November 3, 2006 hearing, Relator emphasized the privilege considerations warranted entry of a non-sharing protective order, and if Respondent permitted Plaintiffs’ lawyers to share suspension orders “with other attorneys that specialize in defective automobile litigation,” such authorization would have severe extraterritorial ramifications in that it would permit use of suspension orders in cases where courts had concluded suspension orders were privileged.³ The Discovery Commissioner then memorialized Respondent’s November 3, 2006 Order as Order No. 10. (See Order No. 10, App. at A286.)

Relying on Respondent’s November 3, 2006 Order, Relator produced nearly six hundred pages of suspension orders to Plaintiffs. As required, Relator also produced a corporate representative to testify regarding suspension orders on November 13, 2006. Notably, at the deposition, Relator invoked the protections of the non-sharing

³ Because Respondent granted Plaintiffs’ request for emergency hearing on their motion to reconsider Order No. 7, Respondent heard and resolved the protective order issue before Relator filed its Motion to Reconsider Order No. 6 on November 9, 2006. (See Relator’s Motion to Reconsider Order No. 6, App. at A45-A62.) Respondent denied Relator’s motion on November 16, 2006. (See November 16, 2006 Order, App. at A63)

protective order and required the privileged portions of the deposition (testimony and exhibits) to be sealed.

On November 17, 2006, Plaintiffs filed a second motion seeking to overturn the non-sharing protective order for suspension orders. (See Plaintiffs’ Motion and Suggestions in Support to Vacate Non Share Order Concerning Suspension Orders, App. at A64-A71.) In this motion, Plaintiffs argued Relator had made “false representations” regarding suspension orders and, therefore, asked Respondent “[t]o permit sharing of [suspension orders] with other litigants and Courts struggling to reach the right judicial determination[.]” (Id. at 6, App. at A69.) Five days later, Respondent denied Plaintiffs’ motion. (See November 22, 2006 Order, App. at A72.)

In summary, before Respondent entered his Post-Settlement Order, the Discovery Commissioner entered Order No. 7 approving a non-sharing protective order for suspension orders, and Respondent twice upheld Order No. 7.

2. Other Confidential, Proprietary Documents

In addition to suspension orders, four other sets of documents were given non-sharing protection: Electronic Stability Control, Roll Stability Control, and Interactive Vehicle Dynamic (“IVD/ESC/RSC”) documents; the VEHDYN List; computer aided engineering (CAE) files; and Records Management Program documents.

a. IVD/ESC/RSC Documents

Plaintiffs requested production of Relator’s IVD/ESC/RSC documents. Relator opposed production, arguing the documents – documents which contain information used in the development of computer coding for the algorithm used in

Relator's electronic stability control systems – were confidential, proprietary, and irrelevant to Plaintiffs' claims.⁴

In Order No. 2, dated September 25, 2006, the Discovery Commissioner compelled Relator to produce the IVD/ESC/RSC information, and Relator produced a collection of text-searchable electronic data contained on two hard drives and one CD-ROM. Before these materials were produced, the Discovery Commissioner agreed one hard drive in particular contained “especially sensitive current design information which, if it were disseminated outside of the litigation context, could place Ford at an immense competitive disadvantage[.]” (See Order No. 2, App. at A73, A86.) Accordingly, the Discovery Commissioner ordered production of this hard drive “on a non-sharing basis, meaning it may be utilized by Plaintiffs solely in connection with this present Hachinsky litigation and may not be otherwise shared with others.” (Id.)

Although Relator prepared a non-sharing protective order in accordance with Order No. 2, Plaintiffs' counsel refused to sign it and turned to the Discovery Commissioner for relief. On October 2, 2006, the Discovery Commissioner entered Order No. 4 and re-iterated that production of the hard drive referenced in Order No. 2 was “on a non-sharing basis, meaning that barring further Order, the information can be utilized by Plaintiffs only in connection with the Hachinsky litigation.” (See Order No. 4, App. at A94, A95.) Nevertheless, the Discovery Commissioner acknowledged

⁴ Relator argued the IVD/ESC/RSC documents were irrelevant because the 2002

Explorer Sport did not have an electronic stability control system.

Plaintiffs' lawyers' "reluctance" to sign a non-sharing order and expressed the opinion that Order No. 2 "adequately contained the non-sharing protection intended" for Relator. (Id.) Thus, rather than requiring Plaintiffs' lawyers to sign a protective order, "counsel for Plaintiffs [was] directed to send a separate letter to counsel for Ford acknowledging awareness that the production is subject to the non-sharing provisions in Order No. 2[.]" (Id.)

On October 5, 2006, Relator moved to reconsider the portions of Order No. 2 that compelled production of IVD/ESC/RSC information without requiring Plaintiffs to sign a non-sharing protective Order. (See Relator's Motion to Reconsider Order No. 2, App. at A99-A117.) In this pleading, Relator contended its "innovation and technical leadership in the development of [IVD/ESC/RSC] technology must be firmly protected" and explained how dissemination of this information could "cause significant competitive harm." (Id. at 18-19, App. at A116-A117.) Moreover, Relator warned that, without a signed non-sharing protective order, it would be unclear:

...exactly what plaintiffs' obligations are vis-a-vis this highly proprietary and confidential information. Furthermore, Ford would be at a disadvantage to determine when and to what extent plaintiffs had violated any applicable obligations, the nature and extent of Ford's remedies, or whether this Court would retain jurisdiction in the event of a breach subsequent to the resolution of this matter.

(Id. at 18, App. at A116.)

On November 3, 2006, Respondent heard oral argument on Relator's motion and, that same day, entered an order requiring Plaintiffs' to execute a signed non-sharing protective order for the IVD/ESC/RSC information. (See November 3, 2006 Order, App. at A118.) On November 10, 2006, the Discovery Commissioner issued Order No. 11, which memorialized the non-sharing protective order covering these documents. (See Order No. 11, App. at A119-A125.)

b. The VEHDYN List

During discovery, Plaintiffs sought access to Relator's Vehicle Dynamics (VEHDYN) website. Relator's VEHDYN website contains information relating to vehicle dynamics (e.g., ride, steering and handling); it does not contain data or information relating to the roof structure, which was the subject of Plaintiffs' allegations in the underlying case. Therefore, Relator objected to the relevance of Plaintiffs' requests. Over Relator's objections, the Discovery Commissioner ordered Relator to produce "a blank form that reflects what fields are included in the form for input into the database[.]" (See Order No. 8 at 5, App. at A126, A130.) Order No. 8 also required the VEHDYN list to "be subject to non-sharing unless and until a [sic] determined otherwise by the Trial Court." (Id.) Finally, with respect to the time frame to challenge Order No. 8, the Discovery Commissioner stated:

Previous orders of the Discovery Commissioner have been subject to a ten day period for seeking reconsideration by the Trial Court. The impending trial date makes that length of

time impractical. Any motions for reconsideration of this Order by the Trial Court should be filed within five days of November 7th.

(Id. at 11, App. at A126, A136.)

In Order No. 19, the Discovery Commissioner reiterated the VEHDYN list should be given non-sharing protection. The Discovery Commissioner reiterated this point because Relator had requested a separate protective order be entered (as opposed to a letter agreement and discovery order reflecting the non-share status) for the VEHDYN list. The Discovery Commissioner rejected Relator's position and noted:

It is reiterated here (and hopefully does not require repeating yet again) that when an Order of the Discovery Commissioner directs that certain information be produced on a non-sharing basis, that directive is sufficient to require production of the information by the Defendant without requiring execution by Plaintiffs' counsel some other free-standing agreement drafted by Defendant. Plaintiffs, their counsel, and their experts or consultants are all bound by the directive that such information is on a non-sharing basis in the absence of further order of the Court, and nothing further is required as a prerequisite to the mandated production. **Directly stated, Court Orders are Court Orders and should be recognized as such.**

(See Order No. 19 at 4-5, App. at A138, A141-A142.) (emphasis added.)

c. CAE Files

CAE stands for “computer-aided engineering” and, in layman’s terms, generally refers to the use of computer models of proposed, preliminary, or final vehicle components to conduct a wide variety of simulated performance tests during vehicle development. Plaintiffs sought production of CAE files from the beginning of litigation. While Relator objected to such requests due to the heavy burden associated with producing developmental computer simulated performance tests, the Discovery Commissioner ordered Relator “to produce what has been described as the ‘Bulk Data File’ and CAE File as they relate to the occupant compartment of the Ford Explorer for the 2002 model year.” (See Order No. 2, App. at A73, A82.)

Because Order No. 2 encompassed a voluminous amount of data, Relator immediately began its compliance efforts. Specifically, Relator utilized substantial resources and compiled a 50 gigabyte hard drive of CAE files from the computer systems of various engineers and other personnel.

Although the 50 gigabyte CAE hard drive was responsive to Plaintiffs’ CAE requests and fully compliant with Mo. R. Civ. P. 58, Plaintiffs were dissatisfied with the prospect of receiving CAE information in hard drive form. As a result, at a

hearing with the Discovery Commissioner in Lutes v. Ford,⁵ Plaintiffs' counsel argued he was entitled to direct, "live" access to Relator's CAE databases. In other words, Plaintiffs' lawyers wanted to travel to Dearborn, Michigan, walk in to Ford Motor Company, sit down at a computer terminal, and "fish" for CAE information.

Without reviewing the 50 gigabyte CAE hard drive compiled by Relator, the Discovery Commissioner agreed Plaintiffs were entitled to "unrestricted access" to Relator's CAE databases in Dearborn, Michigan. (See November 8, 2006 Lutes v. Ford Hearing Transcript at 42, l. 6, App. at A145.) According to the Discovery Commissioner, upon request from Plaintiffs' lawyers to search for CAE information, Relator was required to:

play like a senior engineer is asking you for information, this should be done on the basis that some engineer is in there wanting access to the system for Ford's ordinary business purposes without anything else, **absolutely unfettered** as far as that kind of thing is concerned.

(Id. at 19, ll. 17-23, App. at A145.) (emphasis added.)

Troubled by the prospect of providing Plaintiffs' lawyers "absolutely unfettered" access to its CAE databases (and, specifically, that "absolutely unfettered"

⁵ Mr. Wilkins was the Discovery Commissioner in Lutes v. Ford, a case pending in Cass County, Missouri, in which plaintiffs and Relator were represented by counsel of record in this case.

searches could result in immediate, irreparable harm by revealing irrelevant, confidential, and/or privileged information), Relator requested the Discovery Commissioner clarify the scope of permissible CAE inquiry. On November 8, 2006, the Discovery Commissioner entered Order No. 9 and ruled revelation of privileged material would “be deemed inadvertent and no waiver of any lawful privilege will result.”⁶ (See Order No. 9, App. at A146-A147.) Order No. 9 also provided the CAE information revealed during the live computer searches would be “produced pursuant to a non-sharing order and shall not be made available to anyone outside of its use by counsel for Plaintiffs and their expert consultants in connection with this case and this case alone.” (Id.)

On November 13, 2006, Relator moved to reconsider Order No. 9. (See Relator’s Motion to Reconsider Order No. 9, App. at A148-A160.) In this motion, Relator analogized the Discovery Commissioner’s approval of direct, “live” searches to permitting a party “to roam unchecked through an opponent’s file cabinets randomly searching through hardcopy documents[.]” (Id. at A148, A155.) Moreover, by granting Plaintiffs’ lawyers “absolutely unfettered” access to Relator’s CAE databases, the Discovery Commissioner effectively permitted Plaintiffs’ counsel “to walk into Ford’s

⁶ Interestingly, in Order No. 6, the Discovery Commissioner observed “once the privilege is discarded and the material produced, the damage from erroneous disclosure to the party from whom discovery is sought may be severe, is irreparable, and cannot be repaired on appeal.” (See Order No. 6, App. at A17, A28.) (citing State ex rel. Wilfong v. Schaeperkoetter, 933 S.W.2d 407, 408 (Mo. 1966)).

corporate offices in Dearborn, Michigan and rummage through all of Ford's file cabinets containing all records that relate to 'all documents describing any supporting structures and/or components of Ford Explorers...'" (Id. at 9, App. at A156.) (emphasis in original.) Relator also argued that, by requiring immediate production of CAE information in response to live search inquiries by Plaintiffs' counsel, the Discovery Commissioner deprived Relator of the basic protections afforded by the Missouri Rules of Civil Procedure and, in particular, the ability to exclude irrelevant, privileged, or confidential information from production. (Id.) Finally, Relator observed that the Discovery Commissioner approved the "live" searches even though he (nor Plaintiffs) never reviewed the 50 gigabyte hard drive Relator compiled and offered to produce. (Id. at 10-11, App. at 157-158.)

On November 14, 2006, in an Order bereft of reasoning or analysis, Respondent denied Relator's motion. (See November 14, 2006 Order, App. at A161.)

On November 24, 2006, the Discovery Commissioner entered Order No. 14 and backed off his previous statements that the CAE searches were "unfettered" in nature. (See Order No. 14, App. at A162-A164.) Rather, although Relator remained obligated to respond to Plaintiffs' counsels' inquiries as if a "Ford engineer" were making the request, Plaintiffs' search inquiries were limited by "the context and allegations of [the] lawsuit." (Id. at 2, App. at A163.) Additionally, Order No. 14 reiterated "in the event the search produced some privileged document . . . there would be no waiver of any applicable privilege and that in the absence of any further Order (if any)

on the subject, information produced would be deemed subject to a non-sharing protective order.” (Id. at 3, App. at A164.)

On November 22, 2006, Relator requested the Missouri Court of Appeals prohibit Respondent from enforcing his November 14, 2006 Order permitting direct, “live” searches of Relator’s CAE databases. On December 1, 2006, the Missouri Court of Appeals denied Relator’s request. On December 5, 2006, Relator requested this Court grant a writ of prohibition. On December 14, 2006, this Court denied Relator’s request. Five days later, on December 19, 2006, Plaintiffs’ lawyers traveled to Dearborn, Michigan, sat down at a computer terminal, performed direct searches of Relator’s computer systems for CAE information, and walked out of Ford Motor Company with CAE information.

d. Records Management Program Documents

In Order No. 2, the Discovery Commissioner ordered Relator to supplement production of Corporate Records Manuals that were already in the possession of Plaintiffs’ counsel from other litigation against Relator. Relator’s Records Management Program Documents were subject to a non-sharing protective order as set forth in a hearing with the Discovery Commissioner on December 11, 2006. The Discovery Commissioner memorialized his ruling in Order No. 18, which provided that current versions of Relator’s Records Management Program Documents “be produced subject to a non-sharing order[.]” (See Order No. 18, App. at A165-A167) (emphasis in original).

**C. THE SETTLEMENT AND EVENTS LEADING TO RESPONDENT'S
POST-SETTLEMENT ORDER**

On December 29, 2006 – less than two months after Respondent entered his November 3, 2006 Order approving the non-sharing protective orders – Plaintiffs and Relator settled the case. On January 3, 2007, despite the fact Respondent had **twice denied** identical requests for relief with respect to suspension orders, Plaintiffs filed a third motion requesting Respondent permit “Plaintiffs’ counsel to retain all documents and things produced by Ford in Hachinsky v. Ford to be used in other litigation involving this counsel of record and counsel who qualify under Order No. 1 [the sharing protective order].” (See “WHEREFORE” clause of Plaintiffs’ January 3, 2007 Motion, App. at A178, A181.) Plaintiffs’ third attack on the non-sharing protective orders rehashed the same, primary argument raised in their prior two motions, namely, that “plaintiffs’ counsel has ongoing need for use of documents and things produced in Hachinsky v. Ford for use in other litigation.” (Id. at 2, App. at A179.) However, in their third request, Plaintiffs expanded the scope of requested relief and asked for permission “to retain **all** documents and things” produced by Relator subject to Order No. 1, a sharing protective order. (Id. at 4, App. at A181.) (emphasis added.) (See also Order No. 1, App. at A184-A191.) Additionally, Plaintiffs argued (for the first time) the sole purpose of the non-sharing protective orders was “to move discovery along in the case.” (Id. at 4, App. at A181.) Relator opposed Plaintiffs’ Motion. (See Relator’s Opposition to Plaintiffs’ January 3, 2007 Motion, App. at A294-A304.) (See also Relator’s Supplemental Opposition to Plaintiffs’ January 3, 2007 Motion, App. at A192-A203.)

On January 10, 2007, Respondent approved the settlement. (See Order Approving Settlement, App. at A204-A206.) Although entitled to ten days under Jackson County Local Rule 33.5 to file a response to Plaintiffs’ January 3, 2007 motion, Relator filed its opposition prior to the January 10, 2007 settlement approval hearing. (See Relator’s Opposition to Plaintiffs’ January 3, 2007 Motion, App. at A294-A304.) At the settlement approval hearing, Relator advised Respondent it was prepared to argue its position with respect to Plaintiffs’ motion to vacate the non-sharing protective orders; however, Respondent delayed hearing argument on the motion because he had not yet read Relator’s opposition. (See January 10, 2007 Hearing Transcript at 4, l. 12 – 6, l., App. at A208-A210.) However, Respondent assured the parties he would allow “additional argument” if requested. (Id. at 5, ll. 1-3, App. at A208-A211.) Moreover, after observing Plaintiffs’ January 3, 2007 motion “was a little bit short on case authority,” Respondent permitted Plaintiffs to file a reply to any supplemental briefing filed by Relator. (Id. at 11, l. 2, App. at A212-A213.)

On January 29, 2007 – without reviewing the documents or requesting argument – Respondent entered his Post-Settlement Order and threatened to vacate the non-sharing protective orders. (See Respondent’s January 29, 2007 Order, the “Post-Settlement Order,” App. at A210.) Even though (1) Relator provided multiple reasons – in its pleadings and in oral argument – supporting its requests for non-sharing protective orders, (2) the Discovery Commissioner identified various reasons – including many substantive reasons – for entry of non-sharing orders, and (3) most importantly, Respondent approved the non-sharing protective orders and **twice denied** Plaintiffs’

requests to overturn the non-sharing protective order for suspension orders, Respondent reversed course, stating “[t]he Court endorsed a non-sharing protective order to expedite discovery, with the hope of holding on to the trial date. That concern is now moot.” (Id.)

However, Respondent:

[r]ecognize[d] that Ford should be afforded an opportunity to seek meaningful appellate review of this Court’s Order. Accordingly, this Court will delay entering an Order SUSTAINING Plaintiffs’ Motion to Retain unless prohibited from doing so by a Court exercising supervisory authority within 21 days of the date of this Order.

(Id.) Thus, without looking at the documents or entertaining additional argument, Respondent threatened to vacate the same non-sharing protective orders he had entered and/or repeatedly upheld just months before.

On February 7, 2007, Relator sought a Writ of Prohibition with the Missouri Court of Appeals for the Western District. The Missouri Court of Appeals denied Relator’s request on March 16, 2007. On March 20, 2007, Relator requested this Court enter a preliminary Writ of Prohibition. On May 1, 2007, this Court granted Relator’s request for a preliminary Writ of Prohibition. Relator now asks this Court to make permanent the May 1, 2007 preliminary Writ of Prohibition and prohibit Respondent from enforcing his Post-Settlement Order.

POINTS RELIED ON

POINT NO. 1

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS POST-SETTLEMENT ORDER THAT THREATENED TO VACATE PREVIOUSLY ENTERED NON-SHARING PROTECTIVE ORDERS, BECAUSE RESPONDENT EXCEEDED HIS JURISDICTION AND ABUSED HIS DISCRETION BY ENTERING HIS POST-SETTLEMENT ORDER, IN THAT (1) DUE TO THE PARTIES' SETTLEMENT, RESPONDENT LACKED JURISDICTION TO GRANT RELIEF TO PERSONS NOT BEFORE THE COURT, (2) RESPONDENT ENTERED HIS POST-SETTLEMENT ORDER WITHOUT REVIEWING THE PRIVILEGED, CONFIDENTIAL, AND COMMERCIALY SENSITIVE DOCUMENTS, AND HE IMPROPERLY RELIED ON A SINGLE ORDER OF HIS DISCOVERY COMMISSIONER, AND (3) RELATOR PROPERLY AND SUBSTANTIALLY RELIED UPON THE NON-SHARING PROTECTIVE ORDERS.

Missouri Soybean Ass'n v. Missouri Clean Water Comm'n, 102 S.W.3d 10 (Mo. 2003)

State ex rel. Gardner v. Hall, 221 S.W. 708 (Mo. 1920)

Luethans v. Washington Univ., 894 S.W.2d 169 (Mo. 1995)

AT&T Corp. v. Sprint Corp., et al., 407 F.3d 560 (2nd Cir. 2005)

Respondent's November 3, 2006 Orders Granting Non-Sharing Protective Orders

Order Nos. 2, 8, 9, 11, 14, 18, and 19 of the Discovery Commissioner

Mo. R. Civ. P. 56.01(c)

POINT NO. 2

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS POST-SETTLEMENT ORDER THAT THREATENED TO VACATE A PREVIOUSLY ENTERED NON-SHARING PROTECTIVE ORDER FOR SUSPENSION ORDERS, BECAUSE RESPONDENT EXCEEDED HIS JURISDICTION AND ABUSED HIS DISCRETION BY ENTERING HIS POST-SETTLEMENT ORDER, IN THAT THE ATTORNEY-CLIENT PRIVILEGE, THE ATTORNEY WORK PRODUCT DOCTRINE, AND PRINCIPLES OF FEDERALISM AND COMITY WARRANT NON-SHARING PROTECTION FOR SUSPENSION ORDERS, AND RELATOR PRODUCED THE PRIVILEGED AND CONFIDENTIAL SUSPENSION ORDERS IN RELIANCE ON THE NON-SHARING PROTECTIVE ORDER, WHICH RESPONDENT HAD TWICE UPHELD PRIOR TO APPROVING THE SETTLEMENT.

Dykhouse v. Edwards, 908 S.W.2d 686, 689–90 (Mo. banc 1995)

Keene Corp v. Caldwell, 840 S.W.2d 715 (Tex. App. 1992)

State ex rel. Wilfong v. Schaeperkoetter, 933 S.W.2d 407 (Mo. 1996)

AT&T Corp. v. Sprint Corp., et al., 407 F.3d 560, 562

Respondent’s November 3, 2006 Order Granting Non-Sharing Protective Order

Order No. 10 of the Discovery Commissioner

Robeck v. Ford Motor Company Court Order

Kirk v. Ford Motor Company Court Order

Herrington v. Ford Motor Company Court Order

Gibson v. Ford Motor Company Court Order

Guzman v. Ford Motor Company Court Order

Capitano v. Ford Motor Company Court Order

Missouri Constitution, Article III

Mo. R. Civ. P. 56.01(c)

POINT NO. 3

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS POST-SETTLEMENT ORDER THAT THREATENED TO VACATE PREVIOUSLY ENTERED NON-SHARING PROTECTIVE ORDERS, BECAUSE RESPONDENT EXCEEDED HIS JURISDICTION AND ABUSED HIS DISCRETION BY ENTERING HIS POST-SETTLEMENT ORDER, IN THAT PLAINTIFFS FAILED TO TIMELY CHALLENGE THE ORDERS ENTERING THE NON-SHARING PROTECTIVE ORDERS FOR THESE DOCUMENTS, AND NON-SHARING PROTECTIVE ORDERS WERE WARRANTED FOR THE DOCUMENTS.

AT&T Corp. v. Sprint Corp., et al., 407 F.3d 560, 562

Keene Corp v. Caldwell, 840 S.W.2d 715 (Tex. App. 1992)

State ex rel. Wilfong v. Schaeperkoetter, 933 S.W.2d 407, 408 (Mo. 1996)

Respondent's November 3, 2006 Orders Granting Non-Sharing Protective Orders

Order Nos. 2, 8, 9, 11, 14, 18, and 19 of the Discovery Commissioner

Mo. R. Civ. P. 56.01(c)

ARGUMENT

A. INTRODUCTION

Respondent's Post-Settlement Order sets an alarming precedent. During discovery, Relator legitimately fought to have privileged, highly confidential, and proprietary documents protected by non-sharing protective orders. Specifically, Relator requested the Discovery Commissioner approve non-sharing protective orders, obtained multiple orders from the Discovery Commissioner and Respondent approving the non-sharing protective orders, and successfully opposed **two requests** by Plaintiffs that Respondent overturn the non-sharing order for suspension orders. Simply put, Relator followed appropriate procedure and obtained the non-sharing protection it sought.

Once Respondent entered the non-sharing protective orders, Relator relied heavily on the protection afforded by the orders. Specifically, Relator (1) relied on the fact that Plaintiffs' attorneys⁷ could only use the documents in the instant case and could not share them with other attorneys, (2) heavily considered the non-sharing protection when evaluating whether to seek appellate relief from the orders compelling production of the confidential documents, and (3) relied upon the non-sharing protection during settlement negotiations and, ultimately, the decision to settle the underlying case.

The case then settled, and Plaintiffs released all claims against Relator. Thereafter, **and for the sole purpose of facilitating existing and future litigation**

⁷ The lead attorneys representing Plaintiffs are Messrs. Daniel DeFeo and Omar Medina. Both lawyers currently have cases pending against Relator in a number of jurisdictions.

against Relator, Plaintiffs' lawyers asked Respondent to vacate the non-sharing protective orders. Despite denying two similar requests for relief, Respondent entered his Post-Settlement Order and threatened to vacate the non-sharing protective orders and permit Plaintiffs' attorneys to share the documents with other lawyers involved in litigation against Relator. This is wrong.

Respondent's after-the-fact Order leaves Relator in a dire situation. Although Plaintiffs released all claims against Relator and have no need for the privileged and confidential documents, Plaintiffs' lawyers possess the documents and have expressed their intent to use the documents in lawsuits pending in other jurisdictions. Importantly, this includes jurisdictions where the courts have ruled certain documents are protected by the attorney-client privilege, the work product doctrine, or other legal theories. In other words, although other courts have prohibited Plaintiffs' lawyers from discovering, let alone using, certain documents, they intend to circumvent these rulings with Respondent's Post-Settlement Order.

Thus, the only barrier preventing improper distribution and use of the documents is the non-sharing protective orders. If Respondent vacates the non-sharing orders, as he has threatened to do unless "prohibited by a court of supervisory jurisdiction," Relator is without relief to undo the severe and permanent consequences that will follow dissemination of the documents. Simply put, once the documents are shared, Relator cannot "unring the bell," and Respondent should not vacate a non-sharing order for no valid reason, especially where the consequences to Relator are devastating. A permanent writ is warranted.

POINT NO. 1

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS POST-SETTLEMENT ORDER THAT THREATENED TO VACATE PREVIOUSLY ENTERED NON-SHARING PROTECTIVE ORDERS, BECAUSE RESPONDENT EXCEEDED HIS JURISDICTION AND ABUSED HIS DISCRETION BY ENTERING HIS POST-SETTLEMENT ORDER, IN THAT (1) DUE TO THE PARTIES' SETTLEMENT, RESPONDENT LACKED JURISDICTION TO GRANT RELIEF TO PERSONS NOT BEFORE THE COURT, (2) RESPONDENT ENTERED HIS POST-SETTLEMENT ORDER WITHOUT REVIEWING THE PRIVILEGED, CONFIDENTIAL, AND COMMERCIALY SENSITIVE DOCUMENTS, AND HE IMPROPERLY RELIED ON A SINGLE ORDER OF HIS DISCOVERY COMMISSIONER, AND (3) RELATOR PROPERLY AND SUBSTANTIALLY RELIED UPON THE NON-SHARING PROTECTIVE ORDERS.

B. ARGUMENTS RELEVANT TO ALL DOCUMENT CATEGORIES

1. Standard of Review

Prohibition is the proper remedy when a trial court abuses its discretion or exceeds its jurisdiction in making orders in discovery proceedings. State ex. rel. Tennill v. Roper, 965 S.W.2d 945, 947 (Mo. Ct. App. 1998); State ex. rel. State Bd. of Pharmacy v. Otto, 866 S.W.2d 480, 485 (Mo. Ct. App. 1993); State ex. rel. Pierson v. Smith, 838 S.W.2d 490, 493 (Mo. Ct. App. 1992); State ex. rel. Upjohn Co. v. Dalton, 829 S.W.2d 83, 85 (Mo. Ct. App. 1992).

2. Respondent Has No Jurisdiction or Authority to Vacate Non-Sharing Protective Orders after a Case Has Settled to Benefit and Grant Relief to Persons not before the Court.

A trial court has jurisdiction to decide controversies between parties. Plaintiffs settled their claims against Relator on December 29, 2006, and Respondent approved this settlement on January 10, 2007. (See Order Approving Settlement, App. at A204-A206.) Because the settlement required Plaintiffs to release all claims against Relator, Plaintiffs have no need for the documents covered by the non-sharing protective orders. To the contrary, Plaintiffs' lawyers are the ones seeking "relief" from the non-sharing protective orders, and the only reason they are requesting the non-sharing protective orders be vacated is to facilitate other litigation against Relator. Indeed, Plaintiffs' lawyers have conceded this point, as they have repeatedly admitted – in their three motions to vacate the non-sharing protective orders and in their Answer to Relator's Writ of Prohibition – they intend to use the protected documents in other cases. (See

Plaintiffs' November 1 and 17, 2006 Motions and Plaintiffs' January 3, 2007 Motion, App. at A5-A16, A64-A71, A178-A183.) (See also Respondent's Answer to Writ of Prohibition at 10-11 (stating "Respondents admit that they intend to make legitimate use in Robeck and other cases" of certain documents at issue.)) Likewise, in other cases, Plaintiffs' lawyers have cited the protected documents produced herein, as well as Respondent's Post-Settlement Order, in an attempt to obtain discovery of similar documents without non-sharing protection. In short, it is abundantly clear from Plaintiffs' lawyers' representations, in this case and in others, they are the only people who want the non-sharing protective orders lifted, and their motive is simple: to facilitate their business interests.

Plaintiffs' lawyers, however, are not parties to the underlying lawsuit, and Respondent has no jurisdiction to grant them relief, especially after a case has settled. A court's authority to adjudicate a controversy is based on three essential elements: (1) jurisdiction of the subject matter; (2) jurisdiction of the parties; and (3) jurisdiction to render the particular judgment in the particular case. Missouri Soybean Ass'n v. Missouri Clean Water Comm'n, 102 S.W.3d 10, 21 (Mo. 2003). A court's power to hear and determine matters is limited to its jurisdiction as defined by law. Orders entered by courts that are outside of this jurisdiction are null. State ex rel. Gardner v. Hall, 221 S.W. 708, 712 (Mo. 1920); State ex rel. Mercantile Nat. Bank at Dallas v. Rooney, 402 S.W.2d 354, 357 (Mo. 1966). Here, Respondent's Order is a nullity because he has no jurisdiction to grant relief to Plaintiffs' attorneys, or to other plaintiffs involved in

litigation against Relator. Rather, his jurisdiction extended only to the parties themselves.

Further, Respondent abused his discretion in granting relief to the Plaintiffs' lawyers because, exactly one month before Respondent entered his Post-Settlement Order, Plaintiffs signed a settlement agreement and released all claims against Relator. The parties filed the settlement agreement with the trial court, and Respondent approved the settlement on January 10, 2007. Thus, by entering his Post-Settlement Order and threatening to vacate the non-sharing protective orders, Respondent acted in excess of his jurisdiction as Plaintiffs had no justifiable claims existing against Relator. See e.g., Wenneker v. Frager, 448 S.W.2d 932, 935 (Mo. Ct. App. 1969) (stating a settlement "terminates the cause of action" and warrants "judgment in accordance with the terms of the settlement[.]") Therefore, Respondent's Post-Settlement Order is a ruling by judicial fiat. See American Family Mutual Ins. v. Ward, 789 S.W.2d 791, 797 (Mo. 1990). The court only has jurisdiction to rule on concrete issues in particular cases limited to the issues presented by the parties – anything beyond is void. The court's judicial power is set in motion by the Petition, and the court only possesses jurisdiction to decide questions presented by the parties through their pleadings. Riggs v. Moise, 128 S.W.2d 632, 635 (Mo. banc 1939); State ex rel. McManus v. Muench, 117 S.W. 25, 29 (Mo. 1909). The court does not have the power to decide questions except those that are presented by the parties in their pleadings. Luethans v. Washington Univ., 894 S.W.2d 169, 171-72 (Mo. 1995); Clay v. Missouri Highway and Transp. Com'n, 951 S.W.2d 617, 631 (Mo. Ct. App. 1997); Vangundy v. Vangundy, 937 S.W.2d 228, 231 (Mo. Ct. App.

1996). Plaintiffs' claims, as defined by the pleadings, were settled and released by the settlement agreement, which was signed, filed, and approved prior to Respondent's Post-Settlement Order. As such, any ruling on Plaintiffs' claims is null and void.

Simply put, a Missouri judge cannot – for the benefit of one party's lawyer and to the detriment of the opposing party – vacate protective orders after a case has settled. Respondent had no justification, authority, or jurisdiction to enter his Post-Settlement Order, and entry of the order is a patent abuse of discretion.

3. Respondent Did Not Review the Documents before Entering His Post-Settlement Order, and He Improperly Relied on Order No. 6 of His Discovery Commissioner.

a. Respondent Should Have Reviewed the Documents

Even if Respondent had justification, authority, or jurisdiction to vacate the non-sharing protective orders, which he did not, Respondent should have looked at the documents subject to the non-sharing protective orders before entering his Post-Settlement Order. Simply put, if Respondent intended to vacate the multiple non-sharing orders for the various categories of documents, a thoughtful, reasoned review of the documents at issue was warranted. See e.g., State ex rel. Lester E. Cox Med. Ctr. v. Keet, 678 S.W.2d 813, 815 (Mo. 1984) (finding determination of whether documents were privileged could not be made without in camera review) (emphasis added); State ex rel. Chance v. Sweeney, 70 S.W.3d 664, 668 (Mo. Ct. App 2002) (in camera review of records requested in discovery that may contain privileged information is appropriate);

State ex rel. Ford Motor Company v. Westbrooke, 151 S.W.3d 364, 368 (Mo. 2004) (same). No such review occurred.

Respondent's record comments in this case underscore the need for a thorough, reasoned review of the documents at issue. Even as late as December 5, 2006, Respondent admitted he was "lost in the fog of debate in this case[.]" (See December 5, 2006 Hearing Transcript at 57, l. 25; 58, l. 1, App. at A212.) To help lift the fog (i.e., to resolve the outstanding discovery issues), Respondent issued the following instruction to the parties on December 5, 2006:

But before you all go back to wherever you came from, I would strongly suggest to you that you get together with [Discovery Commissioner] Wilkins and sit down. And I would like Mr. Wilkins to take a look at Ford's responses, compare them to his orders, and figure out what, if anything, still needs to be produced. Hell, maybe it all has. And if he tells me it's all produced, I'll place great weight in his report to me. But he's in a lot better position than I am to make that determination. And he's got more time to do it, too.

(Id. at 67, ll. 20-25; 68, ll. 1-6., App. at A213.)

Respondent's comments illustrate that, in addition to having insufficient time to address the discovery issues in this case, he had little idea what documents had been produced, let alone what the specific contents of the documents may have been. Nevertheless, less than two months later after making these comments – and without the

benefit of reviewing the documents or entertaining additional argument from the parties – Respondent concluded (contrary to his prior orders) the documents were not entitled to non-sharing protection. In other words, other than the important fact that a settlement had been reached by the parties and approved by Respondent, nothing occurred between December 5, 2006 (when Respondent was “lost in the fog of debate”) and January 29, 2007 (the date Respondent entered his Post-Settlement Order) that would have allowed Respondent to re-evaluate the propriety of the non-sharing protective orders. No document review, no argument, no briefing – nothing at all.

The bottom line is this: if Respondent had decided to vacate the non-sharing orders, at a bare minimum, he first should have looked at the documents. That is especially true where, as here, Respondent’s record comments illustrate he had insufficient understanding of the specific contents of the documents before entering his Post-Settlement Order.

b. Respondent’s Reliance on Order No. 6 is Misplaced

In his Post-Settlement Order, Respondent deferred to Order No. 6 of his Discovery Commissioner, finding the “reasoning in Order No. 6 is sound.” (See Post Settlement Order, App. at A210.) Respondent’s reliance on Order No. 6 is misplaced.

First, Order No. 6 predated Respondent’s orders approving non-sharing protective orders and denying Plaintiffs’ requests to vacate the non-sharing protective order for suspension orders. Even assuming the “reasoning” in Order No. 6 was sound (a point Relator contests), Article III of the Missouri Constitution requires Respondent, not the Discovery Commissioner, to adjudicate the parties’ discovery disputes. Respondent

did that, as he entered (1) the November 3, 2006 Orders approving the non-sharing protective orders, and (2) the November 3 and 22, 2006 Orders denying Plaintiffs' motion to vacate the non-sharing protective order for suspension orders. Thus, pursuant to Article III of the Missouri Constitution, Respondent's Orders must take precedence over Order No. 6 (or any other order) of the Discovery Commissioner.

Second, Order No. 6 dealt only with suspension orders; it did not address IVD/ESC/RSC, the VEHDYN List, CAE, or Records Management Program documents. Rather, the Discovery Commissioner entered multiple other orders – orders which approved the entry of non-sharing protective orders – for these categories of documents. (See Order Nos. 2, 7, 8, 9, 11, 19, App. at A73-A93, A42-A43, A126-A137, A146-A147, A119-A125, A138-A142.) Thus, even if Respondent's wholesale reliance on Order No. 6 was proper, which it was not, that Order had nothing to do with IVD/ESC/RSC, the VEHDYN List, CAE, and Records Management Program documents.

Third, Order No. 6 did not address the propriety of a protective order, whether it be sharing or non-sharing, for suspension orders. Instead, Order No. 7 approved a non-sharing protective order for suspension orders, and it is Order No. 7 (not Order No. 6) that Respondent repeatedly upheld and approved.

In summary, Order No. 6 did not address whether suspension orders, IVD/ESC/RSC, the VEHDYN List, CAE, and Records Management Program documents were entitled to non-sharing protection. To the contrary, other orders – orders Respondent upheld – subjected the documents to non-sharing protection. Respondent's

wholesale reliance on Order No. 6 in his Post-Settlement Order was, therefore, misplaced.

4. Relator Relied Heavily on the Non-Sharing Protective Orders

In his Answer to Relator's Writ of Prohibition, Respondent asserts Relator's "reliance on the non-sharing order was misplaced and ill-advised." (See Respondent's Answer to Relator's Writ at 23.) This assertion is ridiculous. Without a doubt, Relator is entitled to rely upon a non-sharing protective order entered by a Missouri court. That is especially true where, as here, (1) Respondent twice denied Plaintiffs' requests to overturn the non-sharing protective order for suspension orders, and (2) Plaintiffs did not challenge the non-sharing protective orders for the other categories of documents.

Parties have a right to rely on protective orders, and courts cannot "pull the rug out" from underneath a party (i.e., vacate a protective order) without a compelling reason, especially after a case has settled. As stated in AT&T Corp. v. Sprint Corp., et al., 407 F.3d 560, 562 (2nd Cir. 2005):

It is presumptively unfair for courts to modify protective orders which assure confidentiality and upon which the parties have reasonably relied. Once a court enters a protective order and the parties rely on that order, it cannot be modified absent a showing of improvidence in the grant of the order or some extraordinary circumstance or compelling need.

Id. (internal quotations and citations omitted) (citing S.E.C. v. TheStreet.com, 273 F.3d 220, 230 (2nd Cir. 2001); Martindell v. Int'l Tel. & Tel. Corp., 594 F.2d 291, 296 (2nd Cir. 1979)).

Here, Relator properly and substantially relied on the non-sharing protective orders. For example, with respect to suspension orders, courts across the country have found Relator's suspension orders to be protected attorney-client communications and opinion work product. Relator consistently defends these privileges, and it strongly considered seeking appellate relief once Respondent compelled production of suspension orders. Had the non-sharing protective order not been entered, and if Plaintiffs were permitted to share these privileged documents with other lawyers, Relator would have sought appellate relief on that issue. The same holds true for the other document categories, as the confidential, technical, proprietary, and commercially sensitive information contained therein is extremely valuable to an automotive manufacturer such as Relator.

Relator also relied upon the non-sharing protection during settlement negotiations and, ultimately, its decision to settle this matter. Had Relator suspected the non-sharing protection could be vacated – after the case was settled and without an opportunity for Relator to be heard – Relator would have insisted on terms in the settlement agreement that enforced the non-sharing protective orders.

It is ridiculous to suggest, as Respondent does, that Relator cannot rely upon protective orders entered by a Missouri court. Relator relied on the non-sharing orders in multiple respects, and it is highly improper for Respondent to threaten to vacate

these protective orders given Relators' substantial reliance on the orders. That is especially true where, as here, the underlying case had settled, and no "extraordinary circumstance or compelling need" exists to vacate the non-sharing orders. AT&T Corp., 407 F.3d at 562.

5. Conclusion

There is no justifiable reason for Respondent's Post-Settlement Order. Plaintiffs released all claims against Relator and no longer need the documents. Although Plaintiffs' lawyers want to keep the documents for use in other litigation against Relator – which is precisely why they filed their three motions to overturn the protective orders – Respondent has no jurisdiction to provide relief to these and other lawyers who routinely litigate against Relator. Even if Respondent had jurisdiction, or a good reason, to enter his Post-Settlement Order (which he did not), Respondent did not examine the documents or invite additional argument (as promised) before issuing his Post-Settlement Order. The importance of such examination or argument cannot be overstated, given the confidential nature of the documents and Respondent's admitted lack of understanding regarding the specific contents of the documents themselves. Finally, Relator relied, in numerous, material respects, on the non-sharing protective orders, and it would be tantamount to a denial of due process to permit Respondent to enforce his after-the-fact Order.

POINT NO. 2

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS POST-SETTLEMENT ORDER THAT THREATENED TO VACATE A PREVIOUSLY ENTERED NON-SHARING PROTECTIVE ORDER FOR SUSPENSION ORDERS, BECAUSE RESPONDENT EXCEEDED HIS JURISDICTION AND ABUSED HIS DISCRETION BY ENTERING HIS POST-SETTLEMENT ORDER, IN THAT THE ATTORNEY-CLIENT PRIVILEGE, THE ATTORNEY WORK PRODUCT DOCTRINE, AND PRINCIPLES OF FEDERALISM AND COMITY WARRANT NON-SHARING PROTECTION FOR SUSPENSION ORDERS, AND RELATOR PRODUCED THE PRIVILEGED AND CONFIDENTIAL SUSPENSION ORDERS IN RELIANCE ON THE NON-SHARING PROTECTIVE ORDER, WHICH RESPONDENT HAD TWICE UPHELD PRIOR TO APPROVING THE SETTLEMENT.

C. ARGUMENTS RELEVANT TO SUSPENSION ORDERS

1. Introduction

Relator incorporates by reference the arguments advanced in Section II. Additionally, as will be discussed, the attorney-client and work product considerations surrounding suspension orders heighten the materiality and importance of the arguments previously raised in Section II.

2. Vacating Relator's Non-Sharing Protective Order Would Abrogate Decisions In Other Courts Across The Country.

a. Respondent's Post-Settlement Order Creates an Impermissible Extraterritorial Reach

Relator strongly opposed production of suspension orders on the grounds that such documents are irrelevant and, more importantly, protected by the attorney-client privilege and opinion work product doctrine. In support of its arguments, Relator cited the decisions of numerous courts – from Idaho, Texas, Minnesota, and Georgia – holding Relator's suspension orders encompass communications protected from disclosure by the attorney-client privilege and opinion work product doctrine.⁸ Notwithstanding this

⁸ (See Grant Kirk v. Ford Motor Co., 116 P.3d 27, 33-34 (Idaho 2005), App. at A224, A230)) (Chief Justice Schroeder held, "Even if relevant, the Suspension Orders were properly protected from discovery as privileged attorney-client communications."); (See also Order in Guzman v. Ford Motor Co., Zapata County, Texas, Cause No. 5309, App.

at A232, A244) (March 23, 2004 Pre-Trial Hearings, pp. 10-19, “With regards to the Suspension Orders ... the privilege is sustained.”); (See also Order in Robeck v. Ford Motor Co., United States District Court for the District of Minnesota, App. at A245, A253) (finding “the suspension orders at issue constitute both privileged attorney-client communications and opinion work product.”)

Relator cited these orders in its briefing before Respondent. Additionally, since the above-referenced orders were entered, three other courts have found suspension orders privileged. For example, in Capitano v. Ford Motor Company, 831 N.Y.S.2d 687, 689 (N.Y. Sup. Ct. 2007), the New York Supreme Court concluded “[t]his court is satisfied that the suspension orders in question are privileged communications from attorney to client which relate to legal advice given by counsel to client...” (See Capitano v. Ford Motor Company Opinion, App. at A258, A259.) (See also Order in Herrington v. Ford Motor Company, Inc., App. at A261.) (stating “this Court finds, as did the Idaho and New York Supreme Courts, that the [suspension orders] are protected by the attorney-client privilege...”) Moreover, in denying plaintiffs’ request for suspension orders, a federal court in Georgia expressed the following policy rationale against compelling disclosure:

Not only is the [suspension order] likely to constitute attorney work-product, but its compelled production could dissuade other businesses from issuing such instructions in the event of litigation. Instructions like the one that appears to have been

authority, Respondent compelled production of suspension orders, and Relator immediately requested and obtained a non-sharing protective order to provide limited protection over the documents many other courts have held to be immune from discovery. If Respondent's Post-Settlement Order is permitted to stand, however, the decision of one Missouri judge will render meaningless the rulings in these other courts.

The risk of the conflicting extraterritorial effect of Respondent's Post-Settlement Order is real. For example, since Respondent compelled production of a single suspension order in another case, Helm v. Ford Motor Company,⁹ requests to produce suspension orders have arisen in over 25 cases across the country. (See Helm v. Ford Order, App. at A283.) In many of these cases, and in an attempt to abrogate

issued here insure the availability of information during litigation. Parties should be encouraged, not discouraged, to issue such directives. Defendants are not required to produce these materials.

(See Gibson v. Ford Order, App. at A262-A282.) Respondent's Post-Settlement Order will override the orders issued by these courts, as Plaintiffs' lawyers have made abundantly clear they intend to use the suspension orders in cases, like those cited above, where courts have concluded suspension orders are protected from disclosure.

⁹ The fact that Helm dealt with a single suspension order is important, as the number of suspension orders at issue in this case is much larger. Thus, the need for a non-sharing protective order is greater given the increased number of suspension orders.

Relator's legitimate privilege arguments, counsel for plaintiffs have cited the Helm Order and attached the single suspension order produced in Helm to their respective motions to compel suspension orders. Putting aside the propriety of Respondent's Order in Helm, the order clearly had an extraterritorial effect, as it was repeatedly cited as authority to override or abrogate Relator's attorney-client and work product protections in other jurisdictions.

Indeed, when Relator's counsel informed Respondent how plaintiffs' counsel were misusing his Helm order, Respondent remarked:

...and I have a hard time seeing how that's going to have precedential value in other courts any more than I have a hard time seeing how my order in Helm is apparently being read in California. **But I guess my capacity for amazement is continually tested...**

(See November 3, 2006 Transcript at 74, ll. 19-25, App. at A284-A285.) (emphasis added.) Less than three months after expressing his "amazement" at how his Helm order was being used, Respondent entered his Post-Settlement Order and authorized extraterritorial use of the suspension orders and other documents produced in this case subject to non-sharing protective orders.

One need look no further than the case of Robeck v. Ford Motor Company, cited by Respondent in his Answer to Relator's Writ, to see the extraterritorial ramifications of vacating the non-sharing protective order governing suspension orders. In Robeck, Civil No. 04-4858 (JNE/JGL), United States District Court for the District of

Minnesota, plaintiffs' counsel, Mr. Daniel DeFeo (who is also Plaintiffs' counsel in this case), served written discovery requesting Relator's suspension orders. Relator objected on grounds of attorney-client and work product privileges. Plaintiffs' counsel filed a Motion to Compel production of suspension orders. After briefing and oral argument, the United States District Court for the District of Minnesota denied the Motion to Compel filed by plaintiffs' counsel, finding:

Given the representations of Ford's counsel, the court finds that the suspension orders at issue constitute both privileged attorney-client communications and opinion work product.

(See Robeck Order at 9, App. at A245, A253.) The federal court in Minnesota, as well as numerous other courts across the country, denied Plaintiffs' attorneys' access to suspension orders because they are protected from disclosure by the attorney-client privilege and the work product doctrine.

Notwithstanding these orders, Plaintiffs' attorney has advised he intends "to make legitimate use in Robeck and other cases of the suspension orders produced in this litigation[.]" (See Respondent's Answer to Relator's Writ of Prohibition at ¶21, pp. 10-11.) But therein lies the problem: according to the Robeck court, and many other courts, there is no "legitimate use" of suspension orders by a plaintiff's lawyer, as those documents constitute attorney-client communications and opinion work product. Thus, if Respondent vacates the non-sharing protection afforded suspension orders so the documents could be used in Robeck (or any other case), Respondent would be participating in an impermissible extraterritorial reach that directly circumvents the

orders issued in Robeck and other courts. Again, given his record comments at the November 3, 2006 hearing in this matter, Respondent knows this is wrong.

Based on the above, this Court should vacate Respondent's Post-Settlement Order and deny the relief requested by Plaintiffs. Plaintiffs' counsel (and Respondent) should not be permitted to circumvent the well-reasoned decisions in other jurisdictions finding Relator's suspension orders are protected from disclosure by the attorney-client privilege and opinion work product doctrine. If Respondent is permitted to enforce his Post-Settlement Order, that is exactly what will occur, as Plaintiffs' lawyers have admitted they intend to make "legitimate use" of suspension orders in Robeck and elsewhere, even though these courts have already concluded a plaintiff's lawyer cannot make "legitimate use" of a suspension order due to attorney-client and work product considerations. Clearly, as acknowledged by Respondent at the November 3, 2006 hearing, the decision of one Missouri judge cannot have such an extraterritorial impact.

b. Comity Dictates that Respondent's Order be Overturned.

"Comity is a voluntary decision of one state to defer to the policy of another in an effort to promote uniformity of laws, harmony in their application, and other related principles. Dykhouse v. Edwards, 908 S.W.2d 686, 689-90 (Mo. banc 1995). Missouri "has long held that comity is more than mere courtesy or good will, but it is a doctrine under which contracts are made, rights are acquired, and obligations in one state are enforced in another state." Langston v. Hayden, 886 S.W.2d 82, 85 (Mo. Ct. App. 1994). Comity extends to substantive rights. Dykhouse, 908 S.W.2d at 690. One

of the only obstacles to not enforcing the rights of comity occurs when the law of the other state violates some definite public policy of this state. Langston, 886 S.W.2d at 85.

In Keene Corp v. Caldwell, 840 S.W.2d 715 (Tex. App. 1992), the Texas Court of Appeals held a court abused its discretion in ordering production of documents protected by a court in another jurisdiction. The court stated:

Reliance on a protective order is a factor which should be given great weight when a court determines whether a protective order should be later vacated or modified. Omega Homes, Inc. v. Citicorp Acceptance Co., 656 F.Supp. 393 (W.D.Va. 1987). This is especially true when one court is considering vacating the order of another court....

Further, we believe a situation such as this goes to the very heart of the concept of comity. Comity is a principle in which the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another, not as a matter of obligation, but out of deference and respect. Black's Law Dictionary 242 (5th ed. 1979). To allow one court to intrude upon the orders of another is not in the interest of judicial economy and is inappropriate without concrete public policy concerns. We hold that the principle of comity is applicable here and that deference should be given to the federal protective order. There are no overriding public policy

concerns that dissuade us from this decision. We also hold that the full faith and credit clause of the United States Constitution requires that the federal protective order be enforced. The full faith and credit clause of the United States Constitution applies to enforcement of federal judgments in state courts. Bigelow v. Old Dominion Copper Mining and Smelting Co., 225 U.S. 111, 32 S.Ct. 641, 56 L.Ed. 1009 (1912). A protective order, especially one that is relied on by the parties, is entitled to full faith and credit protection. But see ACandS v. Askew, 597 So.2d 895, 898 (Fla.App. 1 Dist. 1992) (holding that a modifiable and non-final order not entitled to full faith and credit). Therefore, we hold that based on the principle of comity and the full faith and credit clause, the trial court abused its discretion in ordering Keene to produce documents protected by the federal order.

Keene Corp. v. Caldwell, 840 S.W.2d 715, 720 (Tex. App. 1992).

Relator relied on the non-sharing protective order, both in producing the suspension orders and negotiating the settlement. Moreover, the non-sharing provision was consistent with the decisions of other states that have considered this issue and either precluded discovery or limited the discovery to a particular case. Under these circumstances, to permit Respondent to lift the non-sharing provision would be contrary to the concept of comity and fail to give full faith and credit to the orders of sister

jurisdictions, state and federal, that have clearly stated their views on this issue that suspension orders are not to be disseminated.

Numerous courts have protected Relator's suspension orders from disclosure by the attorney-client privilege and work product doctrine. To allow Respondent's Post-Settlement Order to render meaningless the rulings of these other courts would result in that which the principles of comity are intended to prevent – laws that are not uniform and in contrast to one another. To be sure, the minute Plaintiffs' counsel is allowed to share suspension orders, he will send the documents to lawyers across the country involved in litigation against Relator. This means Plaintiffs' attorneys will make use of the suspension orders produced in this case in Robeck – just as they have advised they will do – even though the Robeck court concluded there was no “legitimate use” of the documents. In similar fashion, an attorney in Georgia (plaintiff's attorney in the Gibson case for example), will have access to documents the Gibson court concluded were privileged. This abuse of the judicial system should not occur.

Finally, no Missouri public policy will be violated by upholding the non-sharing protective order in this case, meaning there is no reason not to apply the doctrine of comity. The underlying case has settled and Plaintiffs have received their settlement monies, so no prejudice will occur to Plaintiffs if Respondent's Post-Settlement Order is vacated. On the other hand, overturning Respondent's Post-Settlement Order will promote uniformity and harmony among the fifty states and ensure Relator's privileged documents are not subject to widespread dissemination across the country.

3. Conclusion

In Order No. 6, the Discovery Commissioner's observed the following with respect to production of privileged materials: "[O]nce the privilege is discarded and the material produced, the damage from erroneous disclosure to the party from whom discovery is sought may be severe, is irreparable, and cannot be repaired on appeal." (See Order No. 6 at p. 12, App. at A17, A28.) (citing State ex rel. Wilfong v. Schaeperkoetter, 933 S.W.2d 407, 408 (Mo. 1996)). Given his citation to Wilfong, one wonders why the Discovery Commissioner compelled production of Relator's suspension orders. Be that as it may, the fact remains that, unless you are litigating a suspension order issue in one of two jurisdictions in Missouri,¹⁰ courts across the country have uniformly held that Relator's suspension orders are protected by the attorney-client privilege and work product doctrine. This is important because, if Respondent's Post-Settlement Order is permitted to stand, the decisions of these other courts will be for naught, and the "irreparable" damage observed by the Wilfong court (and the Discovery Commissioner) will occur. Again, by admitting they intend to use suspension orders in cases where courts have concluded suspension orders are protected, Plaintiffs' lawyers have demonstrated this "irreparable" damage is certain to occur. That is, of course, unless this Court prevents it from happening.

10 Two Missouri courts – the Circuit Court of Jackson County, Missouri and the Circuit Court for the City of St. Louis – are the only courts in the United States to repeatedly compel production of suspension orders.

POINT NO. 3

RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS POST-SETTLEMENT ORDER THAT THREATENED TO VACATE PREVIOUSLY ENTERED NON-SHARING PROTECTIVE ORDERS, BECAUSE RESPONDENT EXCEEDED HIS JURISDICTION AND ABUSED HIS DISCRETION BY ENTERING HIS POST-SETTLEMENT ORDER, IN THAT PLAINTIFFS FAILED TO TIMELY CHALLENGE THE ORDERS ENTERING THE NON-SHARING PROTECTIVE ORDERS FOR THESE DOCUMENTS, AND NON-SHARING PROTECTIVE ORDERS WERE WARRANTED FOR THE DOCUMENTS.

D. ARGUMENTS RELEVANT TO IVD/ESC/RSC, THE VEHDYN LIST, CAE, AND RELATOR'S RECORDS MANAGEMENT PROGRAM

1. Introduction

Relator incorporates by reference its arguments in Section II. In short, for all document types, Respondent lacked justification and jurisdiction to vacate the non-sharing protective orders given the parties' settlement. That is especially true where, as here, Respondent did not review documents before entering his Post-Settlement Order, and Relator substantially relied on the non-sharing protective orders.

2. Plaintiffs Failed to Timely Challenge the Non-Sharing Orders

After Respondent appointed the Discovery Commissioner, the parties agreed to challenge any order of the Discovery Commissioner within 10 days of his ruling. (See Order No. 8, App. at A126-A137.) It is undisputed Plaintiffs did not challenge, until after the case had settled, the non-sharing orders entered for IVD/ESC/RSC documents, the VEHDYN list, CAE information, or Relator's Records Management Program Documents. This is true even though (1) Plaintiffs were aware a procedure had been implemented to challenge the orders issued by the Discovery Commissioner, and (2) when it mattered most (i.e., for suspension orders), Plaintiffs followed the procedure. For the remaining documents, Plaintiffs waited until January 3, 2007 – two weeks after the case had settled – to challenge the non-sharing protective orders. Simply put, Plaintiffs' challenge came too late, as the Discovery Commissioner

entered the last non-sharing protective order (Order No. 11) on November 10, 2006.¹¹
(See Order No. 11, App. at A119-A125.)

3. The Documents Deserve Protection

In his Answer, Respondent asserts Relator did not meet its burden of showing that the documents were worthy of protection. (See Respondent’s Answer at 28). This argument is absurd, as the number of briefs, argument, and protective orders entered by the Discovery Commissioner and Respondent demonstrate substantial attention was given to this issue. In fact, on several occasions, the Discovery Commissioner chastised Relator for insisting separate protective orders be entered for each document type, as opposed to a letter agreement or reference in a discovery order that a specific document type was entitled to non-share protection. (See e.g., Order No. 18 at 4-5, App. at A165, A168-A169.) Thus, contrary to Respondent’s assertions, Relator repeatedly argued it was entitled to non-sharing protective order—sometimes to its detriment.

More importantly, each document category is deserving of Rule 56.01(c) protection. For instance, with respect to IVD/ESC/RSC, the Discovery Commissioner agreed in Order No. 2 the information was “exceptionally sensitive” and entitled to non-sharing protection. (See Order No. 2, App. at A73-A93.) (See also Order No. 4, App. at A94-A98.) Indeed, information relating to Relator’s stability control systems is precisely

¹¹ More importantly, Respondent entered orders granting non-sharing orders for suspension orders, IVD/ESC/RSC, the VEHDYN list, and CAE on November 3, 2006.

the type of “confidential research, development, or commercial information” that warrants protection under Mo. R. Civ. P. 56.01(c)(7), and Respondent agreed with Relator on this issue. (See also Respondent’s November 3, 2006 Order, App. at A44.) The same is true for the VEHDYN list, as the information contained in Relator’s vehicle dynamics website is regularly used by engineers during the vehicle design and development process. (See Order Nos. 8 and 19, App. at A126-A137, A138-A142.)

CAE was addressed in Order Nos. 2, 8, 9, 14, 17, and 18, and this issue received substantial attention from the parties, in large part due to the technical nature of the subject matter and difficulty and expense associated with retrieving it. To suggest that computerized data containing proposed, preliminary, or final vehicle components – all of which is used in simulated performance tests during vehicle development – is not worthy of Rule 56.01(c)(7) protection is preposterous, as this information goes to the heart of vehicle design. That is especially true where, as here, Plaintiffs obtained the CAE data through direct, live searches conducted by Plaintiffs’ counsel at Relator’s place of business in Dearborn, Michigan. It is for these very reasons that the Discovery Commissioner approved a non-sharing protective order for CAE. (See Order Nos. 9 and 14, App. at A146-A147, A162-A164.)

Finally, it is not surprising Relator has a records retention policy. However, Relator’s internal classifications of documents, the retention schedules for the various classifications of documents, and the directives given to personnel in accordance with that policy are commercially sensitive and proprietary information. It is for precisely this reason the Discovery Commissioner expressly held that Relator’s Records

Management Program Documents were subject to non-sharing protection. (See Order No. 18 at 3, App. at A165, A167.)

In conclusion, Relator demonstrated each document type was entitled to Mo. R. Civ. P. 56.01(c) protection. Respondent cannot now, in hindsight, play “Monday morning quarterback” and argue Relator did not meet its Mo. R. Civ. P. 56.01(c) burdens. That is especially true where, as here, Respondent did not challenge the entry of the non-sharing orders for most document types. More importantly, had Relator not met its burden, the Discovery Commissioner nor Respondent would not have entered multiple orders granting non-sharing protective orders.¹²

¹² For these reasons, Respondent’s assertion the non-sharing protective orders were entered “to expedite discovery, with the hope of holding on to the trial date” is false. (See Post Settlement Order, App. at A210.) To the contrary, as demonstrated by the orders of the Discovery Commissioner, numerous substantive reasons warranted non-sharing protection.

CONCLUSION

There is no justification, factual or legal, for Respondent's Post Settlement Order. Simply put, a Missouri judge cannot enter important discovery orders – orders which protect important categories of documents – and vacate those orders after a case has settled. If a Missouri judge could do that, Mo. R. Civ. P. 56.01(c) would have little, if any, meaning. Parties are entitled to rely upon protective orders, and Missouri judges cannot rip those orders away after a party has (1) followed proper procedure to obtain the orders, (2) relied upon the orders, and (3) settled a case.

In Order No. 19, the Discovery Commissioner stated “Court Orders are Court Orders and should be recognized as such.” (See Order No. 19, App. at A138-A142.) Non-sharing protective orders are no different, and a Missouri judge cannot treat a protective order, let alone several of them, as a “preliminary” ruling that can be vacated after the case has settled and for the sole purpose of providing relief to persons not before the court. To treat a protective order as such constitutes an abuse of discretion, and Relator respectfully requests this Court make permanent its preliminary Writ of Prohibition.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word and contains approximately 12,973 words and approximately 1,274 lines, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 13-point type. A 3-1/2 inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk. Further, the brief includes the information required by Rule 55.03 of the Missouri Rules of Civil Procedure.

Michael J. Kleffner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing pleading was served via U.S. Mail this ____ day of June, 2007, to:

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