

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MATT PAIGE and JAMES GAMMON,

Plaintiffs,

Case No.: 09-cv-11657
Hon. Stephen J. Murphy, III

v

BAE SYSTEMS TECHNOLOGY SOLUTIONS
& SERVICES, INC.,

Defendant.

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**PLAINTIFFS' MOTION TO COMPEL
DISCOVERY AND FOR DISCOVERY SANCTIONS**

NOW COMES Plaintiffs, Matthew Paige and Jim Gammon, by and through their attorneys, MILLER COHEN, P.L.C., with their Motion to Compel Discovery and for Discovery Sanctions, state as follows:

Plaintiffs rely on their brief in support. Plaintiffs requested, but were unable to receive, concurrence with this matter.

WHEREFORE, Plaintiffs pray that the court grant their Motion to Compel and Motion for Discovery Sanctions and for such other and further relief to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,

MILLER COHEN, P.L.C.

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Dated: April 27, 2015

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**PLAINTIFFS' BRIEF IN SUPPORT OF MOTION TO COMPEL
DISCOVERY AND FOR DISCOVERY SANCTIONS**

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STATEMENT OF QUESTIONS PRESENTED

- (1) Whether Defendant should be compelled to supplement discovery responses where it objected on the basis that the information and documents requested were related to Plaintiffs' allegations that Defendant requested payment on false claims from the government?

Plaintiffs answer: Yes.

Defendant answers: No.

- (2) Whether Defendant should be compelled to provide information regarding other civil matters relating to whistleblowing and qui tam suits.

Plaintiffs answer: Yes.

Defendant answers: No.

- (3) Whether Defendant should be ordered to pay Plaintiffs' costs and expenses and be sanctioned for its misconduct in discovery.

Plaintiffs answer: Yes.

Defendant answers: No.

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**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL
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NOW COMES Plaintiffs, Matthew Paige and James Gammon, by and through their attorneys, MILLER COHEN, P.L.C., with their Brief in Support of their Motion to Compel Discovery and for Discovery Sanctions, and states as follows:

I. INTRODUCTION

Defendant's objections to Plaintiffs' discovery requests are akin to putting the inmates in charge of the prison. Defendant argues that it can unilaterally determine what is relevant versus what is not with impunity repeatedly proffering the same lengthy form objection over and over throughout its answers to Plaintiffs' Interrogatories and Requests to Produce. Specifically, Defendant objects on the basis of relevance asserting that evidence regarding the underlying false claims is irrelevant because Plaintiff's *qui tam* claims were dismissed and the only remaining claim concerns retaliation.

Of course, this objection ignores the fact that the retaliation forming the basis of Plaintiffs' Amended Complaint relates to the false claims and that the two matters are interrelated. Evidence of the underlying claims can be probative to the issue of establishing protected activity, knowledge of Plaintiffs' protected activity, causation, and retaliatory motivation.

Defendant also improperly objects to producing evidence of past litigation involving issues relating to whistleblowing and false claims once again claiming that these materials are irrelevant. Yet, this evidence can be probative to causation and retaliatory motivation and may indicate a larger policy regarding whistleblower-employees.

On the basis of these objections, Defendant refuses to produce information and documents to over ten discovery requests. Defendant argues that these unilateral objections entitle it to refuse to comply with Plaintiffs' discovery requests. In making this unilateral determination of what is relevant versus what is not, Defendant has stepped into the shoes of this Court and has taken it upon itself to determine what is or is not required by the Federal Rules of Civil Procedure.

This certainly does not fulfill the broad discovery contemplated by the Federal Rules of Civil Procedure. Defendant's objections are boilerplate refusals to produce or answer do not take into account all relevant purposes for the information and documents requested and, consequently, Defendant should be ordered to respond accordingly and Plaintiff should be awarded costs and sanctions for being forced to file this Motion. *Walker v. Lakewood Condominium Owners Ass'n*, 186 F.R.D. 584, 587 (C.D.Cal.1999)(The filing of boilerplate objections is tantamount to filing no objections at all.); see *Carfagno v. Jackson Nat'l Life Ins. Co.*, 2001 WL 34059032, at *4 (W.D.Mich. Feb.13, 2001) ("The court strongly condemns the practice of asserting boilerplate objections to every discovery request.")(attached as *Exhibit A*).

II. STATEMENT OF FACTS

Plaintiffs served their First Set of Interrogatories and Requests to Produce on December 10, 2014. The parties agreed to rolling production providing time for supplemental responses over the course of a month. Defendant initially responded

on January 23, 2015. Defendant supplemented on two other occasions on February 13, 2015 and March 27, 2015. Afterwards, Plaintiffs identified several defects in Defendant's responses and raised these concerns to Defendant. Over the course of a month, Defendant agreed to supplement, but refused to provide information or documents described below.

Namely, Defendant provided a broad objection as to relevance regarding the following Interrogatories and Requests to Produce Interrogatory 6 and Requests to Produce 1, 3, 10, 14, 15, 19, 20, 23, and 25 thru 78. Those discovery requests provide:

6. Please identify and describe every step taken by Defendant to investigate the concerns regarding Plaintiffs' reports, comments, or statements made, both internal and external, asserting that Defendant was engaging in improper billing or improper bidding on contracts with the United States government.
1. Produce all documents, correspondence, reports, emails, or memos exchanged between Defendant and a government agency, either state or federal, or drafted or exchanged internally that relate to the concerns, comments, reports, or statements made by Plaintiffs, both internal and external, asserting that Defendant was engaging in improper billing or improper bidding on contracts with the United States government.
3. Produce all statements or affidavits prepared by, for or on behalf of witnesses, or concerning conversations with employees, that relate to allegations and statements of the pleadings in this case.
10. Produce emails relevant to the allegations in the pleadings or that reference one or both of the Plaintiffs, including emails from or to: Tom Wallace, Mark Miller, Bobby White, Jim Gentry, Judy Moore, Michelle Hahn, Bruce Teeters, Duanne Brummit, Shelia Hegwood,

Nicole Western, Ray Putz, Jeff Bogart, Ann Skinner, and Penny Vitiero.

14. Please produce all documents, including but not limited to e-mails, letters, correspondence, memoranda, reports, and/or summaries, whether in electronic or paper format, that mention and/or refer to Plaintiffs (whether or not by name).
15. Please produce all documents, including but not limited to e-mails, letters, correspondence, memoranda, reports, and/or summaries, whether in electronic or paper format, that are relevant in any way to this case, to the factual and/or legal allegations contained in Complaint, or amendments thereto, and/or to Defendant's factual and/or legal defenses to those allegations.
19. Please produce all documents, including but not limited to detailed notes, e-mails, correspondence, and/or telephone logs that relate to, or refer to documents that relate to conversations with Plaintiffs or about Plaintiffs beginning on January 1, 2008 to today.
20. Please produce all documents, including but not limited to detailed notes, e-mails, correspondence, and/or telephone logs, that relate to, or refer to documents that relate to any investigation performed by a government body or internally dealing with the allegations alleged in Plaintiffs' pleadings.
23. Produce all documents related to an internal or external investigation conducted regarding Plaintiffs' reports, comments, or statements made asserting that Defendant was engaging in improper billing or improper bidding on contracts with the United States government, including all documents Defendant turned over to the government.

(Exhibit B) In addition, Plaintiffs requested other assorted documents, including government contracts with BAE; documents, reports, time sheets, and invoices for government contracts; proposals, bids, and RFPs for government work pursued by BAE; and emails or other correspondence regarding the bids of other contractors,

between Tom Wallace and Bobby White regarding the bids of other contractors, and directing employees to change their time sheets. (*Exhibit B*, RTP 25-78)

For each of the preceding discovery requests, the Defendant provided a similar form objection:

By Order of the Court dated August 22, 2013, Plaintiffs' qui tam claims under 31 U.S.C. § 3729(a)(1) and (a)(2) were dismissed with prejudice. Plaintiffs did not appeal dismissal of the Dismissed Claims. The only claim remaining before the Court is the retaliation claim under 31 U.S.C. § 3730(h). To the extent this request seeks documents that relate to government's investigation into Plaintiffs' Dismissed Claims, these documents cannot have any conceivable relevance to Plaintiffs' retaliation claim under 31 U.S.C. § 3730(h).

(*Exhibit C*)

Defendant also maintains its objection to Interrogatory 15, which requests information of past litigation involving whistleblowing and false claims. Defendant claims that these matters are irrelevant as well.

III. STANDARD

The Federal Rules of Civil Procedure authorize extremely broad discovery over "any nonprivileged matter that is relevant to any party's claim or defense"; in other words, a matter that may reasonably lead to the discovery of admissible evidence. FED. R. CIV. PRO. 26(b)(1); *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 657 (6th Cir.1976), cert. denied 430 U.S. 945, 97 S.Ct. 1579, 51 L.Ed.2d 792 (1977). The Rules provide that "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of

admissible evidence.” *Id.*; *Mellon v. Cooper–Jarrett, Inc.*, 424 F.2d 499, 500–01 (6th Cir.1970); *Coleman v. American Red Cross*, 23 F.3d 1091, 1097 (6th Cir.1994)(“A court is not permitted to preclude the discovery of arguably relevant information solely because if the information were introduced at trial, it would be ‘speculative’ at best.”). Courts have noted that FED. R. CIV. PRO. 26 is to be liberally construed in favor of allowing discovery. *Dunn v. Midwestern Indemnity*, 88 F.R.D. 191, 195 (S.D.Ohio 1980).

Furthermore, information subject to disclosure during discovery need not relate directly to the merits of the claims or defenses of the parties. Rather, it may also relate to any of the myriad of fact-oriented issues that arise in connection with the litigation. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978). Rule 26(b) permits discovery to be had without leave of court if that discovery “is relevant to the claim or defense of any party....” Upon a showing of good cause, however, the court may permit broader discovery of matters “relevant to the subject matter involved in the action.” *Id.*

FED. R. CIV. P. 37 (a)(3)(B)(iii) & (iv) authorize a party to make a motion to compel opposing party to answer interrogatories and permit inspection of documents under Rules 33 and 34. Under FED. R. CIV. P. 37(a)(4), evasive or incomplete answers or responses are treated as failure to answer or respond. If Plaintiff’s Motion is granted, FED. R. CIV. P. 37 (a)(5) states that “the court must, after giving an opportunity to be

heard, require the party or deponent who conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." The only exceptions are:

- (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
- (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
- (iii) other circumstances make an award of expenses unjust.

FED. R. CIV. P. 37 (a)(5).

IV. ARGUMENT

A. Defendant Must Provide All Information and Documents Responsive to Plaintiffs' Discovery Requests Regardless of Whether the Requests Touch Upon the Underlying False Claims

Defendant repeatedly claims that Plaintiffs' requests are irrelevant because Plaintiffs' *qui tam* claims were dismissed and the only remaining claim concerns retaliation. However, this objection ignores Plaintiffs' burden of proof. Under the False Claims Act, relators are protected from retaliation for engaging in "protected activity", which is defined as "activity which reasonably could lead to a viable FCA action." 31 U.S.C. § 3730(h); *McKenzie v. BellSouth Telecomm., Inc.*, 219 F.3d 508, 516 (6th Cir. 2000). "Under the whistleblower statute, 'an employee engages in protected activity where (1) the employee in good faith believes, and (2) a reasonable employee in the same or similar circumstances might believe, that the employer is

possibly committing fraud against the government.”” *Thompson v Quorum Health Res, LLC*, 2010 WL 234801, at *3 (WD Ky January 13, 2010)(quoting *Wilkins v. St. Louis Housing Auth.*, 314 F.3d 927, 933 (8th Cir.2002) and *Moore v. Cal. Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 845 (9th Cir. 2002))(attached as *Exhibit D*). In addition, plaintiffs must prove that the defendant knew about the protected activity and “that the employer ... discharged or otherwise discriminated against the employee as a result of the protected activity.” *McKenzie*, 219 F.3d at 514 (citations omitted). To show causation, plaintiffs must provide evidence that “the retaliation was motivated, at least in part, by the employee's engaging in protected activity.” *Id.* n. 4 (citations omitted).

Afterwards, “a presumption of retaliation arises” and the defendant must provide evidence there was “a legitimate, non-retaliatory reason for the adverse actions.” *Scott v. Metro. Health Corp.*, 234 Fed. Appx. 341, 346 (6th Cir.2007) (citing *Balmer v. HCA, Inc.*, 423 F.3d 606, 614 (6th Cir.2005)) (applying the *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) burden-shifting framework used in Title VII discrimination claims to an FCA retaliation claim). If defendant meets this burden, then “[t]he burden then shifts back to [the employee] the show by a preponderance of the evidence that [the employer's] stated lawful reason was a pretext for retaliation.” *Id.* “The employee may meet this burden by persuading the factfinder either directly that a retaliatory reason more than

likely motivated the employer or indirectly that the proffered reason for the employment decision is not worthy of belief.” *Mann v. Olsten Certified Healthcare Corp.*, 49 F. Supp. 2d 1307, 1317 (M.D.Ala.1999) (citing *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)).

Defendant’s objection that the *qui tam* count was dismissed does not take into account other relevant purposes that information and documents that Plaintiffs requested may be used for by Plaintiffs. Evidence regarding the underlying false claims could be used to establish retaliatory motivation that can be used both for Plaintiffs’ *prima facie* case and to rebut Defendant’s non-discriminatory reason. Defendant asserts that its actions regarding Plaintiffs’ employment were not retaliatory. In Mr. Gammon’s case, Defendant alleges that he was simply laid-off. In Mr. Paige’s case, Defendant alleges that any adverse actions he suffered had nothing to do with his report of false claims and that his position was eliminated.

Since Defendant has raised this defense, Plaintiffs should be permitted to use evidence of fraud to prove that the stated reason was mere pretext. If Plaintiffs’ reports of misconduct are true, then the Defendant would have more of a motive to retaliate against the Plaintiffs. In addition, how Defendant responded to Plaintiffs’ reports and the underlying false claims may indicate retaliatory animus, which is relevant to establishing causation and rebutting Defendant’s legitimate non-discriminatory reasons for the adverse actions.

As noted by another court dealing with a similar issue:

When considering a motion to compel “a request for discovery should be considered to be seeking relevant information if there is *any* possibility that the information sought may be relevant to the claim or defense of any party in the action.” *Invesco Institutional, Inc. v. Paas*, 244 F.R.D. 374, 380 (W.D.Ky.2007) (citing *Goodyear Tire & Rubber Co. v. Kirk's Tire & Auto Servicer*, 211 F.R.D. 658, 663 (D.Kan.2003)) (emphasis in original). Although the parties have placed some emphasis on the fact that the Rules were amended in 2000 to narrow the scope of discovery, “[t]he federal courts, even after the amendment of Rule 26(b) in 2000, have continued to hold that, ‘[r]elevance for the purpose of Rule 26 is broadly construed.’ ” *Id.* (quoting *Jade Trading, LLC v. United States*, 65 Fed. Cl. 188, 190-91 (2005)) (citations omitted). Furthermore, “[a] party who seeks to avoid disclosure of requested materials ‘bears a heavy burden of demonstrating that disclosure will work a clearly defined and very serious injury....’ ” *Id.* (quoting *Empire of Carolina, Inc. v. Mackle*, 108 F.R.D. 323, 326 (S.D.Fla.1985)) (citations omitted).

Dilback v. Gen. Elec. Co., No. CIV.A 4:00-CV-222, 2008 WL 4372901, at *3-5 (W.D. Ky. Sept. 22, 2008)(attached as *Exhibit E*). In *Dilback*, the defendant similarly argued that it should not be compelled to produce evidence relating to an underlying *qui tam* claim when the underlying claim was dismissed and the only count remaining dealt with retaliation. The court disagreed noting:

It appears to the Court that there is a good possibility that the information sought may be relevant to the Plaintiff’s claim-particularly as to pretext. To show pretext, the Plaintiff must show “either directly that a retaliatory reason more than likely motivated the employer or indirectly that the proffered reason for the employment decision is not worthy of belief.” *Mann*, 49 F.Supp.2d at 1317 (citing *Burdine*, 450 U.S. at 256). Thus, evidence of motive is extremely relevant in the pretext analysis. If Plaintiff can show that the documents he was attempting to retrieve reveal the existence of false claims on the part of the Defendant, then such evidence may be probative of the Defendant’s

motivation. To the extent that the Magistrate concluded that evidence of underlying fraud was not probative of the Defendant's motivation, or that motivation was not relevant to pretext, such was clearly erroneous and contrary to the law and the Plaintiff's objections are sustained.

Id.

Interrogatory 6 and Requests to Produce (RTP) 1, 3, 20, and 23 request that Defendant identify and describe the steps taken to investigate Plaintiffs' reports, both internal and external, regarding the false claims and require Defendant to produce documents regarding those steps and affidavits or written statements relating to the false claims asserted by Plaintiffs. Defendant responded: "To the extent this request seeks documents that relate to government's investigation into Plaintiffs' Dismissed Claims, these documents cannot have any conceivable relevance to Plaintiffs' retaliation claim under 31 U.S.C. § 3730(h)." (*Exhibit C*) However, like *Dilback*, these documents may reveal the existence of false claims, which would be pertinent to motivation. Also, depending on the scope of any investigation, either internal or external, the description and accompanying documents would evidence Defendant's response to Plaintiffs' claims or the impact that these claims had on the company, which would also be probative to the issue of motivation.

In RTP 10, Plaintiffs requested email correspondence between relevant actors regarding the allegations in the pleadings. Similarly, RTP 15 expands this request beyond just emails. Defendant's response to both limits the documents produced to only those Defendant deems relevant based on the dismissal of the *qui tam* claims.

By unilaterally excluding correspondence relating to the qui tam claims, Defendant is anointing itself the sole determiner of what is relevant, which may include correspondence that is probative as to motivation.

RTP 14 requests documents referencing Plaintiffs, including emails and written summaries. Similarly, RTP 19 requests all documents referencing conversations with or about Plaintiffs. Again, Defendant has appointed itself Judge over what documents Plaintiffs receive. What documents relating to this case are not also related to the false claims reported by Plaintiffs? After all, Plaintiffs allege that the false claims they reported is the reason for why they were retaliated against. If Defendant is allowed to excise all documents that relate to the qui tam claims, then potentially probative documents will be forever hidden that may directly indicate a retaliatory motive.

Plaintiffs' requests, including RTP 25-78, are also relevant because Plaintiffs must show that they objectively and subjectively believed in good faith that the Defendant was committing fraud against the government. Evidence of Plaintiffs' reports regarding Defendant's misconduct is important to prove what they understood at the time regarding the alleged fraud. In addition, Plaintiffs' requests are also relevant for establishing Defendant's knowledge regarding Plaintiffs' protected activity. Plaintiffs are not seeking this evidence to establish the validity of

the underlying false claims—only to substantiate their own reasonable belief and Defendant’s knowledge regarding these reported false claims.

At the time this Motion was filed, Defendant indicated a willingness to stipulate as to certain aspects of Plaintiffs’ Complaint. Unfortunately, this stipulation was insufficient because it came with certain conditions that Plaintiffs were not ready to accept. Furthermore, the stipulation would not have resolved the other ways that requested information and documents could be relevant to Plaintiffs’ case, including causation and motivation. As a result, Plaintiffs were forced to file this Motion.

Part of Plaintiffs’ burden requires Plaintiffs to tell a story of the events that led to their separation. This burden begins with explaining the issues that Plaintiffs’ were concerned about that led to the reports, how their employer reacted, whether that reaction impacted Plaintiffs’ lives including their employment, and how Plaintiffs’ have been adversely impacted by that reaction. Each of Plaintiffs’ requests “are pieces of the larger mosaic of defendant's treatment” of Plaintiffs. *Ott v. Midland-Ross Corp.*, 600 F.2d 24, 31 (6th Cir. 1979). Consequently, Plaintiffs are requesting that this Court overrule Defendant’s objection and compel supplementation of every Interrogatory or Request to Produce where that objection was used.

B. Defendant Should be Compelled to Respond to Interrogatory No. 15, Which Seeks Information About Other Lawsuits—Defendant Refuses to Answer Without Justification

“Discovery of other lawsuits is not a subject that is amenable to a *per se* rule. The Court must look to the relevance of the other suits to the particular claims at issue.” *Thornton v. State Farm Mutual Auto Ins. Co.*, 2006 WL 3499986 *2 (N.D. Ohio 2006)(attached as *Exhibit F*). “[W]hether pleadings in one suit are “reasonably calculated” to lead to admissible evidence in another suit ... depends on the nature of the claims, the time when the critical events in each case took place, and the precise involvement of the parties, among other considerations.” *Payne v. Howard*, 75 F.R.D. 465, 469 (D.D.C.1977); *Thornton*, 2006 WL 3499986 *2. Other lawsuits could lead to evidence of knowledge. *Thornton*, 2006 WL 3499986 *3; *see also Lohr v. Stanley-Bostitch, Inc.*, 135 F.R.D. 162, 164 (W.D.Mich.1991) (“For discovery purposes, the court need only find that the circumstances surrounding the other accidents are similar enough that discovery concerning those incidents is reasonably calculated to lead to the uncovering of substantially similar occurrences.” *Id.* at 164; *Parrottino v. Bankers Life and Cas. Co.*, 2014 WL 1516195 (E.D. Mich. 2014) (finding plaintiff’s request of other lawsuits may lead to the discovery of admissible evidence and ordering defendant to respond)(attached as *Exhibit H*). In *Brown v. Sun Healthcare Group Inc.*, 2007 WL 2963951 at *4 (E.D. Tenn. 2007)(attached as *Exhibit G*), the court found that other

lawsuits against the defendant “fall within the broad definition of relevance contemplated by the federal rules.”

Similarly here, other lawsuits against Defendant fall within the broad definition of relevance contemplated by the federal rules. To establish a retaliation claim under 31 U.S.C. § 3730(h) a plaintiff must prove the following three elements: 1) he was engaged in a protected activity; 2) the employer knew about it; and 3) the employer must have discharged or otherwise discriminated against the employee as a result of the protected activity. *See McKenzie v. BellSouth Telecommunications, Inc.*, 123 F.3d 935, 944 (6th Cir. 1997). Information about other lawsuits may be relevant to prove the first and the third element of Plaintiff’s retaliation claim.

As explained above, the protected conduct element of a retaliation claim has a subjective and an objective component. The issue is not only whether Plaintiffs in good faith believed, but also whether a reasonable employee in the same or similar circumstances might believe, that the employer is possibly committing fraud against the government.”” *Thompson v Quorum Health Res, LLC*, 2010 WL 234801, at *3 (WD Ky January 13, 2010). Other lawsuits may provide evidence that other employees had a reasonable belief that Defendant was possibly committing fraud. This evidence may go towards the first element of Plaintiffs’ retaliation claim.

Other lawsuits may also be relevant for the third element of Plaintiffs’ retaliation claim, which requires proof that the employer must have discharged or otherwise

discriminated against the employees as a result of the protected activity. Plaintiffs have to show that the retaliation against them “was motivated at least in part by the employee[s’] engaging in protected activity.” See *U.S. ex rel. Yesudian v. Howard University*, 153 F.3d 731, 736 (D.C. Cir. 1998), quoting S. REP. NO. 99-345, *reprinted in* 1986 U.S.C.C.A.N. at 5300. In *Thompson v. Quorum Health Resources, LLC*, 2010 WL 234801 (W.D. Ky 2010) the plaintiff wanted to offer evidence of a prior *qui tam* action and a *qui tam* settlement. As part of the agreement, the defendant agreed to refrain from engaging in fraudulent or illegal activity for five years. Any violation of that agreement would have resulted in enhanced penalties. Therefore it could show the motivation of the defendant to retaliate against the plaintiff for filing a *qui tam* complaint. The court found that the underlying *qui tam* action was relevant and admissible. 2010 WL 234801 at *2.

Evidence of other lawsuits concerning fraudulent or unethical behavior on the part of Defendant may show motivation of Defendant to retaliate against Plaintiffs for engaging in protected activity. If there were other lawsuits concerning fraudulent, unethical or corrupt practices, Defendant may have had a strong motivation to quash any additional allegations of fraud. Therefore, evidence of other lawsuits may be probative to the issue of motivation to retaliate against Plaintiffs for filing their *qui tam* complaint. The evidence may show that Defendant’s retaliation against Plaintiffs was motivated at

least in part by their engaging in protected activity. Consequently, the information and documents requested is relevant and should be produced.

C. Defendant Should Be Sanctioned Under Rule 37 of the Federal Rules of Civil Procedure

Based upon the patent frivolousness of the Defendant's objections and its refusal to reasonably cooperate with discovery, Plaintiffs respectfully request this Court award costs and sanction the Defendant. The majority of objections raised by the Defendant are mere excuses to avoid their responsibilities to comply with Rules 33, 34, and 37 of the Federal Rules of Civil Procedure. While form objections are unfortunately increasingly common in modern litigation, the sheer number of obstreperous and baseless objections raised by the Defendant warrant sanctions in this case. Because of the Defendant's unfair tactics, discovery has been hindered and delayed so much that, in an effort to try to meet the discovery deadline and avoid court intervention, Plaintiffs have had to conduct depositions without the benefit of complete discovery responses. Further, Plaintiffs have incurred additional attorneys' fees which would not have been necessary had Defendant simply complied with the discovery rules as it is required to do.

Under Rule 37(d) of the Federal Rules of Civil Procedure ("Rule 37(d)"), a party is subject to sanctions for failing to answer interrogatories and produce documents as required by Rule 26(a) of the Federal Rules of Civil Procedure. These sanctions may be imposed against the parties and their attorneys. Rule 37(d) specifically provides that:

In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorneys' fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

See also FDIC v. Conner, 20 F.3d. 1376, 1382 (5th Cir. 1994) (interpreting Rule 37(d) sanctions to include, among others, attorneys' fees, issue establishment, issue preclusion and/or dismissal of the action). Furthermore, Rule 37(d) provides that the failure to answer interrogatories and produce documents as required by Rule 26(a) may not be excused on the grounds that the discovery request is objectionable unless the party failing to respond has a pending Motion for Protective Order. FED. R. CIV. PRO. 37(d) ("failure to act described in this subdivision may not be excused on the ground discovery sought is objectionable unless the party failing to act has a pending Motion for Protective Order as proved by Rule 26(c)").

In the present case, the Defendant's refusal to respond to the Plaintiffs' discovery requests merits sanctions under Rule 37(d). More than 5 months have passed since Plaintiffs sent their discovery requests to the Defendant in this case and yet a significant portion of their discovery responses remain incomplete even after several requests for supplementation.

Counsel for Plaintiffs attempted to resolve this discovery dispute as recently as. Defendant's counsel was not interested in resolving the discovery issues described above. Based upon these facts, Plaintiffs ask this Court to compel the Defendant to

respond to Plaintiffs' Interrogatories and Requests for Production as set forth above and to order the Defendant to pay their attorneys' fees incurred in resolving these issues and/or to impose other sanctions as the court deems just and proper.

V. CONCLUSION

WHEREFORE, Plaintiffs pray that the court grant their Motion to Compel and Motion for Discovery Sanctions and for such other and further relief to which Plaintiffs may show themselves justly entitled.

Respectfully submitted,

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Dated: April 27, 2015

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MATT PAIGE and JAMES GAMMON,

Plaintiffs,

Case No.: 09-cv-11657
Hon. Stephen J. Murphy, III

v

BAE SYSTEMS TECHNOLOGY SOLUTIONS
& SERVICES, INC.,

Defendant.

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CERTIFICATE OF SERVICE

I hereby certify that on *April 27, 2015*, the foregoing document was electronically filed by the undersigned's authorized representative, using the ECF system, which will send notification of such filing to all parties of record.

Respectfully submitted,

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