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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

LANE POWELL, PC, an Oregon
professional corporation,

Plaintiff,

v.

MARK DECOURSEY and CAROL
DECOURSEY

Defendants

No. 11-2-34596-3 SEA

**REPLY IN SUPPORT OF
DEFENDANTS' MOTION TO
COMPEL DISCOVERY AND
SUBJOINED DECLARATION**

1. REPLY

Without waiving prior objection that Judge Eadie is disqualified to rule in this case under the Code of Judicial Conduct, CJC 2.11(A), the following is offered in support of Defendants' *Motion*:

Notably, Lane Powell does not deny that DeCourseys have propounded legitimate discovery requests, that Lane Powell possesses responsive documents, that it has been improperly withholding those documents for nine months past the due date, and that its actions are in flagrant violation of its obligations under the discovery rules. Lane Powell admits to withholding the documents in the *Response*, Page 5:

1 20 **B. Lane Powell Has Properly Refused to Produce the Documents at Issue Until**
2 21 **the DeCourseys Consent to Waiver of Privilege**

3 22 Lane Powell has not produced the electronic documents because the DeCourseys
refuse to take a position on waiver. ...

4 Instead, Lane Powell presents a battery of false and deceptive arguments and
5 statements to change or obscure the subject. When reading Lane Powell's *Response*, the
6 Court should keep in mind the simple fact that DeCourseys have propounded discovery
7 requests in accordance with the Rules, and despite their position as officers of the Court,
8 Lane Powell's lawyers are in defiance of their obligations under the Rules of Civil
9 Procedure.
10

11 **A. Lane Powell's False Arguments**

12 Lane Powell has responded with a number of arguments that should be addressed
13 directly.
14

15 **First**, on Page 1, Lane Powell argues:

16 17 ... Indeed, the DeCourseys fail to mention that
17 18 many of these electronic documents are likely duplicates of the very same documents
18 19 DeCourseys have spent months (and a staggering amount of judicial resources) refusing to
19 20 produce to Lane Powell based on claimed attorney-client privilege. ...

20 In the email discovery conferences, Lane Powell has never claimed these files are
21 duplicates. But now, Lane Powell speculates that DeCourseys "likely" have some of the
22 document already and argues that it should therefore not be required to produced those
23 records. On the other hand, in conference, Lane Powell has *denied* that there significant
24 overlap between electronic documents and paper documents offered for review. *Motion*
25 **Exhibit C**, email of April 9, 2011.
26

1 Lane Powell has previously argued that materials in the possession of the requester
2 must be produced regardless, and Lane Powell prevailed on the motion in which that was
3 argued. In its December 7, 2011 *Response*, Lane Powell argued (**Dkt. 40**, page 7):

4
3 **D. Defendants' Burden Objections Have Likewise Been Rejected by the Court
4 and Misapprehend the Requirements of the Rules**

5 Defendants' last argument in support of its Motion relies on the claimed burden of
6 responding to Lane Powell's discovery requests on the ground that the information is
7 "already in the possession of" Lane Powell. Mot. at 10. The Defendants expressly
8 reference their previous motion for a protective order in connection with this argument.
9 *Id.*

10 Put simply, the Court already rejected this argument as well in its November 17
11 Order. Dkt. 23. As Lane Powell explained in response to Defendants' last attempt to
12 raise this argument, Lane Powell is entitled to know what documents Defendants have in
13 their possession regarding the lawsuit and Lane Powell's representation. Dkt. 18 at 7.

14 Thus is Lane Powell's argument negated by judicial estoppel. But Lane Powell
15 would like the court to rule in its favor by a double standard.

16 **Second**, Lane Powell attempts to entangle the Court in privilege arguments once
17 again. Lane Powell admits that the privilege still belongs to DeCourseys and that
18 DeCourseys' privilege might affect or be affected by producing to DeCourseys documents on
19 which DeCourseys hold the privilege. *Response*, Page 1:

20 ... They fail to mention
21 that they have refused to respond to Lane Powell's numerous emails asking whether, by
22 demanding production of these electronic documents, the DeCourseys are now waiving
23 their privilege claim. Indeed, it is the DeCourseys'—not Lane Powell's—privilege to
24 waive. [Emphasis added]

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And again on Page 2:

Consistent with its ethical obligations, Lane Powell has not produced documents which may be subject to the DeCourseys' privilege claim. Lane Powell is willing to produce those documents *as long as* the DeCourseys agree in writing that the privilege is waived.



The argument is absurd. Nothing produced to DeCourseys by the plaintiff would affect or be affected by DeCourseys' privilege. Lane Powell provides no logical argument in law, rules, or precedent whereby a lawyer is ethically required to withhold documents from a client that were collected or generated during the representation of that client. Lane Powell has already identified these 11,000 electronic documents as responsive under the claims and defenses of the parties. *Motion, Exhibit C*, email of April 9, 2012. It has now come time for Lane Powell to produce those documents like a law-abiding litigant, and for its attorneys to enforce the Rules of Civil Procedure on its client as proper officers of the court.

Third, Lane Powell argues that DeCourseys must accept the discovery documents in a particular sequence, and that materials offered later cannot be viewed before those offered earlier. *Response*, Page 1:

They fail to mention that they have refused to review Lane Powell's full Windermere case files, which have been available for them to inspect and copy since March.

DeCourseys have not "refused" to review Lane Powell's discovery production. Besides, nothing in the Rules or the law supports the argument that discovery must be viewed in any sequence. In point of fact, both the paper and electronic documents were overdue by the time Lane Powell saw fit to make them available.

1 **Fourth**, Lane Powell’s interpretation of the Rules is mercurial. In November 2011,
2 Lane Powell argued that a discovery conference (“meet and confer”) is not required until
3 after the production of materials. **Dkt. 18**, Page 4:

4
5 Lane
6 ...
7 Powell’s counsel again responded, asking Defendants to follow the procedure specified by
8 the Civil Rules: provide appropriate answers to the discovery requests, verified as
9 required by the Rules, to allow Lane Powell to make a determination whether a meet and
10 confer was required to attempt to resolve any objections. *Id.* at 1 (“Please answer my
11 discovery requests as required by the Civil Rules. Once I have your actual responses,
12 verified as required by the rules, we can arrange for a meet and confer under [the] Rules if
13 that is necessitated by your responses.””).
14 Defendants refused to provide responses and instead brought this Motion claiming
15 that counsel for Lane Powell should be sanctioned for refusing to meet and confer. Lane
16 Powell respectfully requests that the Court deny Defendants’ Motion and instruct them to
17 comply with the Civil Rules. [Emphasis added]

18
19 In March 2012, Lane Powell filed a motion to compel on the basis of an email
20 conversation without requesting a face-to-face or telephone discovery conference. **Dkt. 71**.
21 In those previous cases, Lane Powell settled for email conferences on the discovery issues,
22 and the Court accepted the same as sufficient and stepped into the discovery dispute. **Dkt.**
23 **93**.

24 Now, despite multiple email conversations extending over months, Lane Powell
25 refuses to produce the electronic documents, and Lane Powell claims to be aggrieved
26 because DeCourseys did not request a face-to-face or telephone discovery conference before
filing this Motion to Compel. *Response*, Page 1-2:

1 26 [REDACTED]. And they fail to mention that the instant motion to compel was filed without
2 1 meeting and conferring with Lane Powell as required by Civil Rule (CR) 26(i). [REDACTED]

3 What's good for the goose is apparently not good enough for the gander.

4 Notably, Lane Powell does not dispute the genuineness and authenticity of the email
5 conferences DeCourseys produced in evidence with the *Motion*. Undisputed, those
6 conferences and the admissions therein should therefore be accepted as a verity by the court.
7

8 Lane Powell produced a few hundred documents on January 17, 2012, the last legal
9 day of that request. It eventually produced about 1144 pages of material, of which almost
10 400 pages contain little more than the word "REDACTED." **Exhibit E.**

11 It announced possessing these 11,000 responsive electronic documents in April 2012,
12 albeit late. Lane Powell's current reluctance to produce this material may be traced directly
13 to the discreditable material DeCourseys found and submitted in evidence from the first
14 small batch. Unwilling to risk more damage or spend the resources unlawfully censoring this
15 volume of material, Lane Powell now attempts to simply withhold the entirety.
16

17 **B. Lane Powell's False and Deceptive Statements of Fact**

18 Lane Powell continues to make false statements to this court in violation of CR 11.

19 Lane Powell misrepresents DeCourseys' discovery responses, claiming that
20 DeCourseys have withheld documents because Lane Powell might already possess them.
21 This, of course has nothing to do with the subject of Lane Powell's compliance with
22 discovery rules. But it is also grossly untrue. Lane Powell's argument appears that
23 DeCourseys are withholding documents on that basis appears on Page 2:
24
25
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1 14 ... The DeCourseys' eventual responses to
2 15 Lane Powell's discovery requests were incomplete, claiming, among other things, (1)
3 16 ... (2)
4 17 that they should not be required to produce materials in their possession that they believed
5 18 Lane Powell already had. **Exs. B–D; Ex. E** at 4.

6 19 The DeCourseys have maintained these privilege and other objections to Lane
7 20 Powell's discovery requests throughout this litigation. They have yet to produce full
8 21 responses to Lane Powell's discovery requests on this basis. They maintained these
9 22 objections despite the Court's repeated rulings rejecting their position. *See Ex. E* at 4–5
10 23 (summarizing the Court's rulings on privilege). They persisted even after the Court held
them in contempt—twice—for their failure to comply with the Court's numerous orders

11 Again on Page 3:

12 7 ... —the DeCourseys still refuse to produce materials they claim are
13 8 privileged or believe Lane Powell already has. **Ex. J** at 8–11; *see also Exs. X–Z*. In sum,
14 9 the DeCourseys have taken the position that many documents in their possession are
15 10 privileged and/or need not be produced because Lane Powell also possesses them.

16 The true fact is, by March 9, 2012, DeCourseys had produced more than 12,000
17 pages of responsive documents to Lane Powell, despite the obvious, undisputed, and
18 admitted fact that Lane Powell already possessed the documents. DeCourseys announced
19 months ago to both the Court and to Lane Powell that the only documents withheld are
20 privileged documents not relevant to the claims and/or defenses of the parties. **Exhibit F**
21 email of March 6, 2012.

23 But all this is irrelevant to Lane Powell's failure to comply with DeCourseys'
24 discovery requests.

25 Lane Powell finally gets down to its position on Page 7. It will agree to produce the
26

1 requested documents *if and only if* DeCourseys agree to unilaterally waive privilege in
2 writing on everything Lane Powell might have learned about them through its representation.

3 7 ... The DeCourseys' motion to compel should be denied.⁵ Notwithstanding
4 8 these objections, Lane Powell is willing to produce those documents *as long as* the
5 9 DeCourseys agree in writing that the privilege is waived.

6 And in footnote 4 on Page 7, Lane Powell admits that it intends to assert the terms of
7 a similar bargain before producing the paper documents. Unless DeCourseys provide a
8 written waiver, Lane Powell intends to unlawfully withhold all discovery materials:
9

10 22 ⁴ Had the DeCourseys ever contacted Lane Powell to arrange for a time to review, Lane
11 23 Powell would have provided them with the same warning regarding their privilege waiver before
agreeing to a time for review.

12 What law or Rule permits Lane Powell to bargain over discovery materials, and offer
13 the other party's refusal to bargain as an excuse to the court for not complying with a lawful
14 discovery request? Yet without any basis in law, Lane Powell mounts this argument:
15

16 *Response, Page 6:*

17 4 ... Lane Powell repeatedly asked the
18 5 DeCourseys whether they intended to waive privilege. *See supra*, Section II.D. The
19 6 DeCourseys ignored Lane Powell's questions and refused to respond. *Id.* In deciding
20 7 waiver questions, the privilege belongs to the client and not to the attorney. *Olson v.*
21 8 *Haas*, 43 Wn. App. 484, 486, 718 P.2d 1 (1986). As such, Lane Powell has properly
22 9 refused to produce documents in its custody relating to the Windermere lawsuit without
23 10 the DeCourseys' consent to waiver.

24 **C. Lane Powell's False Statements of Law**

25 Lane Powell argues (footnote 5, Page 7) that "DeCourseys have not cited an authority
26 to support their request for sanctions."

24 ⁵ The DeCourseys' request for sanctions should likewise be denied. *See* Mot. at 3.
25 Setting aside the fact that Lane Powell has fulfilled its discovery obligations, the DeCourseys do
26 not cite authority to support their request. *Cf.* LCR 37(d) (allowing sanctions for a party's failure
"to serve a *written* response to a request for production" (emphasis added)). The record shows it
is the DeCourseys—not Lane Powell—who have abused the discovery process throughout this
entire litigation.

Lane Powell is wrong again. On Page 2 of the *Motion*, DeCourseys list CR 37 among
other authorities. But perhaps Lane Powell is incoherently arguing that CR 37 does not
support sanctions for failure to produce documents (it's hard to tell just what Lane Powell is
arguing here). CR 34 (*Production of Documents*) provides enforcement through CR 37(a).
CR 37(d) is entitled, "*Failure of Party To Attend at Own Deposition or Serve Answers to
Interrogatories or Respond to Request for Production or Inspection.*" Once again,
DeCourseys acting *pro se*, must teach members of the Washington Bar basic lessons about
discovery.

Lane Powell moved this court pursuant to CR 37 to sanction DeCourseys for not
producing documents, and this Court (albeit in error) sanctioned DeCourseys under Rule 37.
Is Lane Powell now asking the Court to rescind those orders?

2. CONCLUSION

Lane Powell improperly and illegally refuses to produce discovery material. To
support its stance, Lane Powell offers these arguments:

1. DeCourseys hold the privilege.
2. DeCourseys don't hold the privilege.
3. DeCourseys must waive the privilege in order to receive discovery material.
4. DeCourseys "likely" already have the material.
5. DeCourseys refuse to bargain for the material.

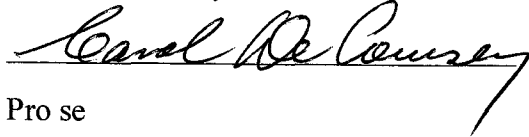
1 6. Surrendering documents to DeCourseys that either originated with DeCourseys or
2 were created for hire for DeCourseys might involve Lane Powell in ethical problems
3 because DeCourseys still hold the privilege (see #1 above).

4 7. DeCourseys have failed to inspect other documents – which, by the way – are
5 available only under same unlawful and bogus bargain because DeCourseys hold the
6 privilege, don't hold the privilege (etc. #1 through #3 and #6).


7
8 Since none of these objections are supported by law, the Court should grant
9 DeCourseys motion. A proposed order is provided with the *Motion*.

10 DATED this 30 day of September, 2012

11 Carol DeCoursey

12 
13 Pro se

11 Mark DeCoursey

12 
13 Pro se

1 **Declaration of Mark DeCoursey**

2 Mark DeCoursey hereby declares as follows:

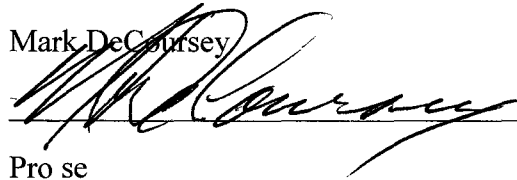
3 Being over the age of eighteen and competent to testify, I hereby attest and declare
4 the following under the laws of perjury of the State of Washington:

5 **Exhibit E** is a true and fair sample of Lane Powell's discovery production, almost 400
6 pages of which contain little more than the word "REDACTED."

7 **Exhibit F** is a true and fair sample of an email sent by DeCourseys to Lane Powell on
8 March 6, 2012 defining the scope of documents that was withheld from production.
9

10 DATED this 30 day of September, 2012

11 Mark DeCoursey

12 
13 Pro se