CITY OF ALMATY, KAZAKHSTAN, and BTA BANK JSC, Plaintiffs,

v.

MUKHTAR ABLYAZOV, VIKTOR KHRAPUNOV, ILYAS KHRAPUNOV, and TRIADOU SPV S.A., Defendants

15-CV-05345 (AJN) (KHP)
United States District Court, S.D. New York

Filed May 19, 2020

Parker, Katharine H., United States Magistrate Judge

OPINION & ORDER & REPORT & RECOMMENDATION

*1 TO: THE HONORABLE ALISON J. NATHAN, UNITED STATES DISTRICT JUDGE

FROM: KATHARINE H. PARKER, UNITED STATES MAGISTRATE JUDGE

This Opinion and Order addresses the remaining portions of three different motions for sanctions filed by the parties in this action pursuant to Federal Rule of Civil Procedure 37 ("Rule 37"). (Dkt. Nos. 918, 967, and 971.) The Court's earlier decisions on aspects of the motions are found at docket numbers 1099 and 1101. The remaining issues are summarized as follows.

Plaintiffs, the City of Almaty, Kazakhstan ("Almaty") and BTA Bank JSC ("BTA Bank") (collectively, the "Kazakh Entities" or "Plaintiffs"), seek sanctions against Defendants Triadou SPV S.A. ("Triadou") and Ilyas and Viktor Khrapunov due to their alleged failure to comply with their discovery obligations and spoliation of evidence. (Dkt No. 918.) Plaintiffs contend that Triadou not only failed to take appropriate measures to preserve the emails of Ilyas Khrapunov and other witnesses who worked for and/or were consultants to Triadou, but also inappropriately deleted emails in violation of their discovery obligations. Because Triadou did not maintain its own servers or email domain during the relevant time period, all of the emails in question were on the servers of Triadou's parent company, Swiss Development Group S.A. ("SDG") – a company created by Ilyas Khrapunov.

In turn, Triadou and the Khrapunovs seek sanctions against Plaintiffs for failing to disclose information about an investigative firm it retained called Litco LLC ("Litco"). Litco is owned by Felix Sater, one of Plaintiffs' witnesses. Although Triadou and the Khrapunovs sought information about Litco during discovery, Plaintiffs opposed such discovery, contending that Litco's engagement was irrelevant to this action, insofar as Litco was merely a company retained to assist Plaintiffs in gathering information. Plaintiffs also maintained that their communications with Litco and engagement documents were protected by the work product doctrine and attorney-client privilege.

After it came to light that Sater owned Litco, this Court ordered the production of Plaintiffs' agreements with Litco and other correspondence between Plaintiffs and Sater. It turns out that Plaintiffs paid Litco over $2 million for its assistance in helping to gather evidence against the Defendants and agreed to pay Litco a percentage of the monies recovered from Defendants. It was also revealed that Sater, as the sole owner of Litco, was the indirect recipient of those payments. Defendants assert that Plaintiffs and their counsel deliberately failed to produce agreements they had with Litco, hid Sater's affiliation with Litco in violation of their discovery obligations, and violated ethics rules by entering into a contingent fee arrangement with a witness. (Dkt. Nos. 967 and 971.)

The parties submitted voluminous materials, including sworn deposition testimony, in support of their respective motions. Additionally, this Court took testimony from witnesses on August 8 and September 12, 2019. After careful consideration of the record and this Court's knowledge of the parties' actions during what has been a contentious and vigorously litigated case, Plaintiffs' remaining requests in their Motion are granted in part and denied in part. Defendants' remaining requests in their Motions are also granted in part

and denied in part.

BACKGROUND

1. *General Background*

*2 The Court assumes the reader's familiarity with the background of this case, as discussed in numerous prior opinions and orders.[1] Briefly, Plaintiffs allege that Viktor Khrapunov, the former Mayor of Almaty, and Mukhtar Ablyazov, the former Chairman of BTA Bank, embezzled billions of dollars from them from 1997 through 2009. They claim that Ilyas Khrapunov, who is Viktor's son and Ablyazov's son-in-law, assisted both men by helping them launder the stolen money through various shell corporations all over the world, including through SDG and Triadou, a subsidiary of SDG formed by Ilyas for the purported purpose of investing in real estate in the United States. All parties have vigorously litigated this case, and it would be putting it mildly to say that discovery has been contentious. The Court summarizes the alleged misconduct of the Khrapunovs, Triadou, and Plaintiffs below.

2. *The Khrapunovs' Alleged Misconduct in Discovery*

Plaintiffs propounded multiple discovery requests in this action on the Khrapunovs, seeking, among other things, relevant electronic communications from any email accounts used. They also sought certain information in interrogatories, including the whereabouts of key witness Gennady Petelin, who Triadou says provided the funds for its investments. However, the Khrapunovs provided little information in discovery and no relevant emails. Ilyas acted as the primary translator in this case for his father, who does not speak English. The Khrapunovs' U.S. lawyers also relied on Ilyas to transmit information about the case and discovery. Ilyas also served as a translator for Petelin, who happens to be related to the Khrapunovs through marriage.[2] Plaintiffs accuse Ilyas of actively destroying emails and subverting the discovery process and helping his father to do the same. They also accuse the Khrapunovs of hiding the location of Petelin, despite knowing that he resided in California. Plaintiffs claim that this deception caused them to experience delays and incur significant expense in their search for Petelin. Plaintiffs also contend that both Khrapunovs were evasive and non-responsive in their depositions.

A. *Ilyas Khrapunov*

Ilyas used multiple emails during the relevant time period. He used two SDG-hosted email accounts in connection with his work for Triadou and SDG. Ilyas also maintained another email account, supposedly for his work as a diplomat for the Central African Republic (the "C.A.R. Account"). (Dkt. Nos. 919, 920, and 921 ("Schwartz Decl. in Supp. of Pls.' Sanctions Mot.") Exs. 10, 28, and 29; Dkt. No. 922 ("Pls.' Mem. of Law in Supp. of Sanctions Mot.") 5-7, 7 n.7.) Ilyas used the C.A.R. Account on occasion for SDG and Triadou business. In or about July 2014, he stopped using all three accounts.

In or about August or September 2014, all of Ilyas's emails on SDG's servers were deleted, as were the email accounts of two former employees of Triadou named Nicolas Bourg and Kevin Meyer, who are also witnesses in this matter. Neither SDG nor Triadou preserved copies of the emails on backup tapes or otherwise. After the emails were deleted, SDG's server settings for Ilyas's SDG email accounts were changed to "POP-3," a setting that causes emails to be automatically deleted as soon as they are sent or received and opened. As a result, none of Ilyas's emails from his SDG accounts created after September 2014 were preserved. In late 2014, Ilyas deleted all of the emails from the C.A.R. Account, purportedly at the direction of the Central African Republic because he had ceased to be a diplomat for the country. After this case was commenced, Ilyas also directed SDG to deactivate his email accounts altogether.

*3 After Ilyas stopped using the SDG accounts and the C.A.R. Account, he began using anonymous, encrypted email accounts hosted by Cryptoheaven to transact business on behalf of SDG and Triadou. He continued to use the Cryptoheaven platform through at least 2016, and has admitted to using hundreds of different Cryptoheaven email accounts. Most of the accounts were named after Star Wars characters or natural resources (*e.g.*, Jabba@CryptoHeaven.com or Theuraniumguy@CryptoHeaven.com). To date, Ilyas has failed to produce any emails from any Cryptoheaven account, and has stated that he cannot remember all of the email accounts or passwords and cannot recover emails from the accounts. Ilyas also admitted to deactivating one of his Cryptoheaven email accounts in 2016, after the start of this action.

Notwithstanding Ilyas's failure to produce any emails, Plaintiffs were able to gather some of Ilyas's emails from non-party witnesses who had communicated with him over email. When Plaintiffs' counsel questioned Ilyas about the emails they obtained from non-parties, Ilyas refused to admit that he used the email accounts or sent the emails, even with respect to emails reflecting his name as the sender and emails attaching his personal information and documents, such as his passport and documents featuring his home address.

Plaintiffs are particularly concerned about Ilyas's failure to produce email exchanges he had with a witness

named Frank Monstrey concerning a $440 million wire transfer to a company called Northern Seas Waterage ("NSW").[3] This transaction lies at the heart of this case because it paved the way for Plaintiffs' stolen funds to be laundered and for some of those funds to be directed to Triadou for investment in the United States. (*See* Dkt. No. 1151.) Ilyas was intimately involved in the transaction. However, when confronted about the transaction and communications with Monstrey, Ilyas testified that he had no memory of them. (Schwartz Decl. in Supp. of Pls.' Sanctions Mot. Ex. 6.) Ilyas also failed to produce emails he exchanged with a witness named Eesh Aggarwal. Aggarwal acted as an intermediary between Ilyas and Petelin, and has produced documents and testified about his role in the money laundering scheme. Ilyas admitted he was in regular email communication with Aggarwal, yet produced no documents reflecting his communications. (*See id*. at Ex. 6; *see also id*. at Ex. 8.)

B. *Viktor Khrapunov*

Viktor admitted in his deposition that there are multiple potential sources for relevant documents, but produced no documents in this matter. (*See id.* Ex. 5.) The Khrapunovs' first counsel, which has since been replaced, did not show Viktor the Complaint and Crossclaims, and failed to speak directly with Viktor until the day before his deposition.[4] (*Id.*) Viktor also refused to answer questions concerning his communications with Ilyas about this litigation on the grounds of privilege, but when asked to produce a privilege log, listed no privileged communications between himself and Ilyas. (*Id*. at Exs. 5, 16, 56; *see also* Dkt. No. 768.)

3. *Triadou's Alleged Discovery Misconduct*

In or about March 2013, Triadou and its parent company, SDG, were sold to a company called Greencos S.A. ("Greencos"), which is owned by an individual named Philippe Glatz. While Plaintiffs argue that Glatz was a front for Ilyas, Triadou counters that Glatz and Greencos acquired SDG and Triadou in a bona fide transaction. Ilyas continued working for SDG and Triadou and then, in mid-2014, transitioned to being a consultant for the companies. SDG moved offices in or about August or September 2014. Supposedly, in connection with the office move and to conserve server space, SDG deleted emails from the accounts of certain Triadou employees, including those belonging to Kevin Meyer, Nicolas Bourg, and Ilyas. SDG subsequently deactivated Meyer's and Bourg's accounts, and switched Ilyas's account to POP-3.

*4 Plaintiffs contend that Triadou is jointly responsible with Ilyas for the destruction of relevant SDG email accounts. They also argue that Triadou is responsible for failing to preserve Ilyas' SDG emails going forward by switching to a POP-3 email protocol and failing to implement a method to preserve his emails after the commencement of this litigation. Plaintiffs maintain that Triadou and SDG are alter egos and that Triadou should, therefore, be held responsible for SDG's destruction and failure to preserve emails. Indeed, SDG and Triadou shared key employees and officers and directors, including Cesare Cerrito, who oversaw the computer systems function. (*See* Schwartz Decl. in Supp. of Pls.' Sanctions Mot. Ex. 1.)

Notably, in May 2014, just prior to the email deletions, Almaty filed suit against Viktor and Elvira Khrapunov, among others, in California (the "California Action"). (Pls.' Mem. of Law in Supp. of Sanctions Mot. 5; *see also* Dkt. No. 1181 ("Sept. 12, 2019 Hr'g Tr.") 57.) The California Action triggered an obligation to preserve emails in that case. Notably, however, neither SDG nor Triadou were named as defendants in that Action. The preservation obligation in this action did not arise until 2015—after the relevant emails had already been deleted Nevertheless, Plaintiffs argue that because the Khrapunovs were the subject of threatened and actual litigation, SDG and Triadou should have preserved their emails.

Triadou has never produced documentary evidence explaining the deletion of the emails, apart from saying they were deleted in connection with an office move. (*See* Dkt. No. 940 ("Triadou's Mem. in Opp'n") 4.) In his testimony before this Court, Cerrito explained that, while he had oversight of the computer systems at SDG and Triadou, a person named Jerome Point was the IT person in charge and that Point deleted the emails. Cerrito claims to have only learned about the deletion of emails from SDG's servers after the fact. (Sept. 12, 2019 Hr'g Tr. 45:08-46:04.) Cerrito also testified that he did not know the server size or how frequently Point deleted email accounts as part of routine maintenance to preserve server capacity. (*Id*. at 46:24-49:25.) Cerrito testified that it was Point's decision to switch Ilyas's email account to POP-3 purportedly as a "courtesy" to allow former directors to continue to use their SDG email account. (*Id*. at 49:21-50:08.) He also said that he did not learn about the switch to POP-3 until after the fact. (*See id.*)

Ilyas, who was a consultant to SDG in 2014 when the SDG emails were deleted, knew Jerome Point and participated in communications with him and Cerrito. It is possible that Ilyas had conversations with Point about which Cerrito has no knowledge and in which Ilyas directed Point to delete the contents of the email accounts and switch them to POP-3. Cerrito, however, claimed to have asked Point about this and said that Point denied having any such conversation. (*Id.* at 15:19-24; 19:05-08.) Points's statements to Cerrito, however, are inadmissible hearsay.[5] Notably, Cerrito testified that, in mid-2015, Ilyas asked Cerrito to

instruct Point to deactivate his SDG email account – supposedly because he was receiving too much spam. Cerrito complied, and Point then deactivated the account. (*Id.* at 51:04-08.) Cerrito also testified that he texted with Ilyas about Triadou and SDG business and conceded that Triadou did not produce any of his text messages. (*Id.* at 53:02-16.)

4. *Plaintiffs' Alleged Misconduct in Discovery*

In contrast to Defendants, Plaintiffs have produced numerous documents in this case. Yet, as detailed below, they have resisted certain discovery pertaining to their investigation into the alleged money laundering operation, partially out of fear that evidence may be destroyed before it can be presented in this case, and partially due to their belief that their investigation firm, its leads, and internal communications about the investigation are protected by the work product doctrine.

*5 Early in this case, Defendants learned that Plaintiffs had engaged an investigative firm named Arcanum Global ("Arcanum") to assist them in developing evidence and intelligence about Ablyazov, the Khrapunovs, their associates, and the disposition of the money they stole. (*See* Dkt. Nos. 333 and 337.) Although Defendants sought discovery from Aracanum, this Court declined to permit it. (Dkt. No. 337.) However, to the extent Arcanum identified witnesses and documents pertinent to this litigation, Plaintiffs identified those witnesses and produced the relevant documents. Additionally, to the extent Plaintiffs entered into any agreements with non-party witnesses, they also produced those agreements. (*Id.*)

In July 2017, non-party witness Kevin Meyer produced an email that referenced an entity called Litco that was assisting Arcanum with Plaintiffs' asset recovery efforts. (*See* Dkt. No. 969 Ex. 16.) Defendants sought the production of information about Plaintiffs' agreement with Litco, but Plaintiffs refused, arguing that their agreement with Litco was not relevant. Litco, like Arcanum, was also helping Plaintiffs to identify witnesses and providing information that could be used in the prosecution of this action. This Court initially agreed that the Litco agreement (the "Litco Confidential Assistance Agreement" or "Litco CAA") was not relevant. This changed, however, as the facts developed and, ultimately, this Court has found that the Litco CAA is relevant to this action.

Specifically, in 2017, Plaintiffs named Felix Sater as a witness. Sater had worked for Ilyas Khrapunov and Ilyas's company, Swiss Promotion Group ("SPG"), as a consultant. Sater had also advised Triadou and SDG on various business and real estate transactions in the United States. Upon learning that Sater would be a witness, Defendants sought all agreements between Plaintiffs and Sater. In response, Plaintiffs represented that there were no such agreements. A year later, when deposing Sater in September 2018, Defendants learned that Sater was the sole owner of Litco and had received over $2 million in fees under the Litco CAA and stood to earn a substantial commission from any recoveries Plaintiffs may obtain from the Defendants in this case. Plaintiffs' counsel also expressed surprise upon learning that Sater was affiliated with Litco. Sater's deposition was then adjourned, and Triadou and the Khrapunovs sought disclosure of all Litco-related agreements and all communications and agreements between Plaintiffs and Sater and/or Litco. After motion practice, this Court ordered production of the Litco-related agreements and Plaintiffs' communications with Sater. (Dkt. No. 901.) Plaintiffs produced some communications, but contended others were privileged, leading to further motion practice. This Court ultimately found that Plaintiffs had over-designated privileged documents and ordered production of additional documents. (Dkt. No. 1099.) Separately, Plaintiffs terminated the Litco CAA. Because the Agreement provided that Litco would not identify any witness who had an ownership interest in Litco, Plaintiffs claim that Litco breached the Agreement by identifying Sater as a potential witness. Litco, in turn, sued Plaintiffs for breach of contract. A separate arbitration concerning the breach of the Litco CAA is pending.

The critical issue to resolve in connection with the Khrapunovs' and Triadou's Sanctions Motions is when Plaintiffs and their lead counsel, Boies Schiller Flexner LLP ("BSF"), learned that Sater had an ownership interest in Litco. If Plaintiffs and BSF knew that Sater owned Litco and hid the Litco CAA from Defendants in discovery, then sanctions would be appropriate. If BSF knew Sater owned Litco when it named Sater as a witness and continued to resist disclosure of the Litco CAA, BSF would also have violated its discovery obligations and its ethical obligations under the Code of Professional Responsibility.[6]

*6 On August 8, 2019, a number of witnesses testified at a hearing before this Court on the issue of when Plaintiffs and BSF learned that Sater owned Litco. The witnesses included: Plaintiffs' lead counsel, Matthew Schwartz, from BSF; Felix Sater; Sater's counsel Jill Levi, from the law firm Todd & Levi LLP, who prepared the corporate paperwork to form Litco on Sater's behalf; Sater's counsel Robert Wolf, from the law firm Moses & Singer LLP, who negotiated the Litco CAA with Arcanum; a representative from Arcanum, Calvin Humphrey; a representative from BTA, Medet Tumabayev; and a representative from Almaty, Bauyrzhan Darmanbekov.

At the hearing, it came to light that Wolf had attempted to secure a deal with Almaty's counsel in California,

Latham & Watkins LLP ("Latham"), to provide litigation assistance with the California Action against the Khrapunovs and obtain a percentage of the monies recovered from the Khrapunovs. None of the parties to this action or their counsel were aware of Wolf's negotiations with Latham prior to the August 8, 2019 hearing. The parties also learned that Latham had entered into a non-disclosure agreement with Litco promising not to reveal the identity of Litco's owner (*i.e.*, Sater) to Almaty while it evaluated whether or not it could ethically enter into the agreement with Litco. This led the parties to subpoena Latham to obtain documents it had pertaining to Litco. The following is a summary of salient information revealed at the hearing and through the Latham document production.

A. *Formation of Litco and Initial Negotiations with Latham*

On March 23, 2015, Litco was established as a Delaware LLC. The state documents do not reveal its owner. (*See* Dkt. No. 1237-19.) In fact, no publicly available documents link Sater to Litco. (Dkt. No. 1165 ("Aug. 8, 2019 Hr'g Tr.") 38:02-21; 57:06-15.) On April 22, 2015, David Schindler from Latham emailed Wolf to confirm an agreement in principal by which Litco and Bourg would provide assistance to Almaty in connection with Almaty's efforts to recover assets taken by the Khrapunovs and Ablyazov. (Dkt. No. 1237-1, 2.) On May 9, 2015, Schindler emailed Wolf, copying Peder Garske from Arcanum, asking Wolf to draft the Litco agreement and indicating that, before the agreement could be finalized, both sides would need to run it by legal ethics advisors. (*Id.* at 4.) Sater was neither identified as the owner of Litco, nor copied on the email. The email indicates that identifying Litco's owner was central to evaluating the potential ethics issues.

On May 26, 2015, Latham signed a non-disclosure agreement pursuant to which Litco agreed to provide Latham with the name of its owner for purposes of Latham reviewing whether it was ethically permitted to enter into an agreement with Litco. The agreement was countersigned by Felix Sater on Litco's behalf. (*Id.* at 12-14.) The agreement provided that Latham would not be permitted to disclose the identity of Litco's owner to any person or entity, including Almaty. (*Id.*) Then, on May 26, 2015, Schindler emailed Wolf and explained that, under the applicable ethics rules, Latham could not enter into any agreements on Almaty's behalf that would entail contingent payments to witnesses. He stated that, for this reason, Almaty would not be going forward with the agreement. (*Id.* at 9.) The email also indicates that Almaty understood that it could not enter into any agreement that entailed a contingency payment to any witness and could not proceed with the terms of the agreement in principle reached on April 22. (*Id.*) On May 28, 2015, Wolf emailed Schindler the fully executed nondisclosure agreement, along with other documents, and disclosed that Sater is Litco's sole owner. (*Id.* at 10.)

*7 On May 31, 2015, Wolf emailed Schindler to assure him that Litco and Sater have no relationship with certain individuals and entities in Cyprus who were thought to have assets belonging to Almaty. He also stated that there was no chance that Sater or Bourg would be named as witnesses in connection with any proceeding in Cyprus. (*Id.* at 37.) In the email, Wolf distinguished the Cyprus matter from the New York real estate matters pertinent to the instant action, indicating an awareness of the ethical problems with the arrangement. Wolf also explicitly omitted Peder Garske of Arcanum from the email in order to keep Sater's identity, as Litco's owner, secret from Arcanum. (*Id.*) Ultimately, Latham refused to enter into an agreement with Litco in connection with litigation matters pending in California and New York on ethical grounds.

B. *Negotiation of Litco Confidential Assistance Agreement With Arcanum*

Although their negotiations with Latham fell apart, Wolf and Sater did not abandon their plan to profit from the information Sater could provide to Plaintiffs through Litco. Instead, Wolf began negotiating directly with Arcanum, and excluded Latham from those negotiations. Garske negotiated on behalf of Arcanum. The negotiation resulted in the Litco CAA, which stated that Litco would never identify a witness with a financial interest in Litco. The Litco CAA, however, did not mention Sater or explicitly state that Sater could not be called as a witness because Wolf and Sater did not want Plaintiffs to know that Sater was involved with Litco. (Aug. 8, 2019 Hr'g Tr. 82:05-83:21, 91:07-93:22, 126:17-25.)

The Litco CAA is dated June 12, 2015, and was signed by Kalsom Kam on behalf of Litco. Notices under the agreement were to be sent to Arcanum, but not to the Republic of Kazakhstan, Almaty or BTA. The CAA was countersigned by representatives of the Republic of Kazakhstan, Almaty, and BTA. (Dkt. No. 1237-9.) Wolf testified that it was a conscious decision to have Kam sign the Litco CAA instead of Sater because the goal was to keep Sater's affiliation with Litco secret from Almaty and BTA. (Aug. 8, 2019 Hr'g Tr. 91:21-92:12.) For his part, Sater testified that he wanted to remain anonymous to the Republic of Kazakhstan, Almaty, and BTA because he was concerned about his safety, as he believed that the Khrapunovs and Ablyazov had spies within the government of Kazakhstan and at BTA.[7] (*Id.* at 147:02-148:24.)

After the parties entered into the Litco CAA, Litco's invoices were sent to Arcanum for payment. Arcanum did not pass the invoices on to Plaintiffs, but rather charged the amounts as disbursements. Additionally, the

payments from Plaintiffs to Litco went to law firm escrow accounts. (*Id*. at 44:17-45:22.) However, Sater's name appeared in some correspondence/invoices sent to Arcanum. (*Id*. at 74:06-76:16.) Thus, it appears that whoever processed the invoices for Arcanum was or should have been aware that Sater owned Litco.

C. *Retention of BSF and Additional Agreements Maintaining Sater's Anonymity*

Arcanum retained BSF to represent Plaintiffs in the instant action. Shortly after retaining BSF, on June 18, 2015, Arcanum introduced BSF to Wolf. At that time, BSF understood that Wolf was representing Bourg, a witness who could provide helpful information in this action. (*Id*. at 12:16-13:14.) Arcanum, however, did not identify Wolf as Litco's or Sater's counsel. Then, on July 8, 2015, Arcanum and Litco entered into a confidentiality and nondisclosure agreement (the "Litco CNDA"), pursuant to which Arcanum agreed that it would maintain information about Sater's ownership of Litco as confidential and not share it with Almaty or BTA or their counsel (*i.e.*, BSF). (Dkt. No. 1237-11.)

*8 BSF did not participate in the negotiation of the NDA. Arcanum's representative, Garske, knew that Sater was affiliated with Litco. (Aug. 8, 2019 Hr'g Tr. 106:01-19.) Wolf testified that the goal of the Litco CNDA was to prevent Arcanum from disclosing to BSF that Sater was affiliated with Litco. (*Id*. at 114:02-115:05.) This Court infers from the evidence presented that Garske did not circulate his knowledge about Sater's ownership of Litco broadly (if at all) within Arcanum. Garske died suddenly in 2016, and Calvin Humphrey took over Arcanum's interactions with Wolf and Litco. The Court also finds, based on the evidence presented, that no one from Arcanum ever disclosed to Plaintiffs or BSF that Sater owned Litco.

Just prior to the attachment hearing held on May 19, 2016, at the outset of this case, BSF entered into a mutual assistance agreement on behalf of Plaintiffs and an undisclosed client of Robert Wolf (the "Common Interest Agreement"). (Dkt. No. 1237-10.) The undisclosed client has now been identified as Litco. (Aug. 8, 2019 Hr'g Tr. 22:23-24:06.) At the time, however, BSF did not know the undisclosed client was Litco. Rather, BSF had a general understanding that Wolf was working with a client that was providing information to Arcanum regarding Plaintiffs' stolen assents. (*Id*.) BSF also did not know the financial terms of the Litco CAA at that time. (*Id*. at 28:18-24.) According to Wolf, BSF attorneys had nothing to do with the relationship between Litco and Arcanum, including billing. (*Id*. at 114:05-11.)

D. *Sater's Meetings with BSF and His Role in This Litigation*

BSF first met Sater in November 2016. (*Id*. at 34:19-23.) Arcanum coordinated this and the few subsequent meetings among BSF attorneys and Sater. (*Id*. at 115:25-116:12.) Sater was initially introduced to BSF by Wolf as someone who could assist Plaintiffs in settlement negotiations with Joe Chetrit, who was formerly a party to this action. (*Id*. at 34:24-35:15.) By in or about March 2017, BSF had learned that Wolf represented Sater. (*Id*. at 19:07-12.) BSF also was aware that a subsidiary of Triadou had sued Sater in connection with a real estate deal in which Sater was involved and that, as part of the settlement of the litigation, Sater received $20 million as his allocation from the real estate deal. (*Id*. at 29:17-23; Dkt. No. 973 Ex. G, 18.)

In 2017, a newspaper article was published indicating that Sater was receiving financial compensation from Plaintiffs in exchange for cooperating in their search for stolen assets. Defense counsel pointed out these articles to BSF and asked if there was an agreement between Plaintiffs and Sater. However, BSF and their clients maintained that there were no agreements between them and Sater. (Aug. 8, 2019 Hr'g Tr. 40:09-22.) In or about August 2017, Plaintiffs named Sater as a witness in this matter. At the time, BSF knew about Litco and had a copy of the Litco CAA. (*Id*. at 13:24-14:23.) BSF did not ask Wolf who owned Litco and did not ask Sater whether he had a financial interest in Litco. (*Id*. at 13:24-14:23; 30:14-24.) Sater never disclosed his ownership of Litco to Plaintiffs or BSF. (*Id*. at 148:09-151:25.) On September 12, 2018, the day before Sater's deposition in this case, BSF asked Wolf who owned Litco and Wolf stated he did not know. (*Id*. at 16:09-17:03, 86:21-88:07.) This was obviously a lie, as Wolf knew full well that Sater owned Litco and was receiving compensation under the Litco CAA. The next day, upon questioning at his deposition, Sater conceded that he owned Litco.

At the August 8, 2019 hearing, BTA's representative testified that BTA did not know that Sater owned Litco until September 2018, when it was disclosed at Sater's deposition. (*Id*. at 215:22-216:05.) Almaty's representative subsequently testified that it never was made aware of any agreement or potential agreement between Latham and Litco or Sater. (*Id*. at 228:10-15.) Almaty was also not aware of the identity of Litco's owner until September 2018, when Sater revealed his ownership at his deposition. (*Id*. at 234:10-236:24.)

LEGAL STANDARDS

*9 Rule 37 governs a party's failure to make disclosures or cooperate in discovery, and permits a party to move to request appropriate sanctions. Rule 37(b)(2) states that "[i]f a party ... fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is

pending may issue further just orders." Such orders may include: (1) directing that matters addressed in the order be taken as established by the prevailing party; (2) prohibiting the sanctioned party from supporting or opposing claims or defenses or from introducing evidence; (3) striking pleadings in whole or in part; (4) staying the proceedings until the order at issue is obeyed; (5) dismissing the action in whole or in part; (6) entering judgment against the disobedient party; and (7) treating the failure to obey the orders at issue as contempt of court (except where the orders direct the party to submit to a physical or mental examination). *See* Fed. R. Civ. P. 37(b)(2)(A); *see also* Agiwal v. Mid Island Mortg. Corp., 555 F.3d 298, 302 (2d Cir. 2009) (noting that a party's failure to comply with court-ordered discovery may result in terminating sanctions).

Discovery sanctions are designed to serve several purposes: (1) to ensure that a party will not benefit from its failure to comply; (2) to obtain compliance with the court's orders; and (3) to deter noncompliance, both in the particular case and in litigation in general. *See* Cine Forty–Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1066 (2d Cir. 1979); *see also* Southern New England Tel. Co. v. Global NAPs Inc., 624 F.3d 123, 147–49 (2d Cir. 2010) (district court did not err by imposing default judgment on defendants who willfully deleted and refused to produce relevant documents); Update Art, Inc. v. Modiin Publ'g, Ltd., 843 F.2d 67, 70–71 (2d Cir. 1988) (granting summary judgment to plaintiff was an appropriate sanction where defendant engaged in extreme dilatory tactics). At the same time, the Second Circuit has "consistently rejected the 'no harm, no foul' standard for evaluating discovery sanctions." Southern New England Telephone Co, 624 F.3d at 148. The reasons for this approach is that Rule 37 sanctions not only protect other parties to the litigation from prejudice resulting from a party's noncompliance with discovery obligations, but serve other functions unrelated to the prejudice suffered by individual litigants. *See id.*

When determining whether sanctions should be imposed under Rule 37, courts in the Second Circuit weigh the following non-exhaustive factors: " '(1) the willfulness of the non-compliant party or the reason for noncompliance; (2) the efficacy of lesser sanctions; (3) the duration of the period of noncompliance; and (4) whether the non-compliant party had been warned of the consequences of ... noncompliance.' " World Wide Polymers, Inc. v. Shinkong Synthetic Fibers Corp., 694 F.3d 155, 159 (2d Cir. 2012) (alteration in original) (quoting Agiwal, 555 F.3d at 302). Prejudice to the moving party may also be a significant consideration, although not an absolute prerequisite in all circumstances. *See* Southern New England Telephone Co., 624 F.3d at 148–49. No single factor is dispositive, and " 'they need not each be resolved against the party challenging the district court's sanctions ... to conclude that those sanctions were within the court's discretion.' " *See* World Wide Polymers, 694 F.3d at 159 (quoting Southern New England Tel. Co., 624 F.3d at 144)). As such, the Court must weigh each factor when determining whether a party should be sanctioned and what sanction, if any, should be imposed.

Separate from and in addition to its power to sanction under Rule 37, courts have the inherent power to punish parties for contempt and have discretion to " 'fashion an appropriate sanction for conduct which abuses the judicial process.' " Ceglia v. Zuckerberg, 600 F. App'x 34, 36 (2d Cir. 2015) (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 44–45 (1991)); *see also* CAT3, LLC v. Black Lineage, Inc., 164 F. Supp. 3d 488, 497 (S.D.N.Y. 2016). " 'These powers are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.' " CAT3, LLC., 164 F. Supp. 3d at 497 (quoting Chambers, 501 U.S. at 43–44). Because of the "very potency" of the inherent contempt powers, courts must exercise them "with restraint and discretion." Chambers, 501 U.S. at 44.

*10 "[T]he party seeking sanctions pursuant to [Rule] 37 or the court's inherent power[ ] bears the burden of proof to establish the existence of grounds for the requested sanctions." United States v. Acquest Transit LLC, No. 12-CV-1146S, 2016 WL 9526566, at *3 (W.D.N.Y. Nov. 3, 2016). "To impose sanctions under the Court's inherent authority ... there must exist clear and convincing evidence that an individual's conduct was not merely negligent but was undertaken with subjective bad faith." S.E.C. v. Smith, 798 F. Supp. 2d 412, 422 (N.D.N.Y. 2011), *aff'd* 710 F.3d 87 (2d Cir. 2013). Subjective bad faith requires "proof of deliberate fraud or wrongdoing." Smith, 798 F. Supp. 2d at 424; *see also* Almeciga v. Center for Investigative Reporting, Inc., 185 F. Supp. 3d 401, 427 (S.D.N.Y. 2016) (explaining that courts should not impose sanctions pursuant to their inherent authority absent a finding, " 'by clear and convincing evidence, that the party or attorney knowingly submitted a materially false or misleading pleading, or knowingly failed to correct false statements, as part of a deliberate and unconscionable scheme to interfere with the Court's ability to adjudicate the case fairly.' " (quoting Braun ex rel. Advanced Battery Techs., Inc. v. Zhiguo Fu, No. 11cv04383 (CM)(DF), 2015 WL 4389893, at *17 (S.D.N.Y. July 10, 2015))); CAT3, 164 F. Supp. 3d at 499 (noting that "the appropriate standard of proof depends in part on the specific issue to be decided," thus, "clear and convincing evidence of bad faith may be appropriate while prejudice is better judged by the preponderance standard" (internal citations omitted)).

The court has broad discretion in fashioning the appropriate sanction, and does so on a case-by-case basis. *See* Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (2d Cir. 2001); Deanda v. Hicks, 137 F. Supp. 3d 543, 554 (S.D.N.Y. 2015). However, the court should also impose the least harsh sanction that will remedy the discovery violation and deter such conduct in the future. *See Grammar v. Sharinn & Lipshie, P.C.* , 14 Civ. 6774 (JCF), 2016 WL 525478, at *3 (S.D.N.Y. Feb. 8, 2016); Hawley v. Mphasis Corp., 302 F.R.D. 37, 46 (S.D.N.Y. 2014). Severe sanctions such as dismissal and judgment by default are to be applied sparingly, where no other sanction will suffice. *See* Agiwal, 555 F.3d at 302; CAT3, LLC, 164 F. Supp. 3d at 501; Arista Records LLC v. Usenet.com, Inc., 633 F. Supp. 2d 124, 138–39 (S.D.N.Y. 2009).

To impose sanctions on a party for discovery derelictions, the court must determine that he "acted with a culpable state of mind." R.F.M.A.S., Inc. v. So, 271 F.R.D. 13, 23 (S.D.N.Y. 2010) (internal quotation marks omitted), *adopted by* 271 F.R.D. 55 (S.D.N.Y. 2010); *see also* Arista Records LLC, 633 F. Supp. 2d at 140 (citing Fujitsu Ltd. v. Fed. Exp. Corp., 247 F.3d 423, 436 (2d Cir. 2001)). Courts are generally reluctant to grant a dispositive motion based solely on spoliation, and will not do so unless the non-moving party acted with bad faith and willfulness and there is no other effective remedy. *See* Burgos v. Satiety, Inc., No. 10–CV–2680 (MKB), 2013 WL 801729, at *5 (E.D.N.Y. Mar. 5, 2013) (first citing Dahoda v. John Deere Co., 216 F. App'x 124, 125 (2d Cir. 2007); then citing West v. Goodyear Tire & Rubber Co., 167 F.3d 776, 779 (2d Cir. 1999); then citing Arista Records LLC, 608 F. Supp. 2d at 442).

Additionally, to justify requiring a mandatory adverse inference instruction for spoliation, the court must find that: the targeted litigant destroyed evidence at a time when he had a duty to preserve it; he acted with intent; and the destroyed evidence was "relevant" to the movant's claims or defenses, such that it would have been favorable to the movant. *See* Chin v. Port Auth. of New York & New Jersey, 685 F.3d 135, 162 (2d Cir. 2012); Goonewardena v. New York Workers Comp. Bd., 258 F. Supp. 3d 326, 347 (S.D.N.Y. 2017), *aff'd sub nom.* Goonewardena v. New York State Workers' Comp. Bd., 788 F. App'x 779 (2d Cir. 2019); *see also* Fed. R. Civ. P. 37(e)(2) advisory committee's note to 2015 amendment (noting that courts may "use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the information acted with the intent to deprive another party of the information's use in the litigation," and "reject[ing] cases ... that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence."); Experience Hendrix, L.L.C. v. Pitsicalis, No. 17 CIV. 1927 (PAE), 2018 WL 6191039, at *7 (S.D.N.Y. Nov. 28, 2018) ("an instruction [for an adverse inference] requires a finding that the party accused of destroying, or otherwise failing to preserve, evidence did so intentionally"). In contrast to a mandatory adverse inference instruction, "a permissive adverse-inference instruction ... is not necessarily a sanction and may be given to a jury in situations where the elements of spoliation are not met." Tchatat v. O'Hara, 249 F. Supp. 3d 701, 707 (S.D.N.Y. 2017) (citing Mali v. Federal Ins. Co., 720 F.3d 387, 391–94 (2d Cir. 2013)), *adopted by* 2017 WL 3172715 (S.D.N.Y. July 25, 2017), *aff'd sub nom.* Tchatat v. City of New York, 795 F. App'x 34 (2d Cir. 2019).

*11 Finally, Courts should decline to impose spoliation sanctions "unless there has been a showing—inferential or otherwise—that the movant has suffered prejudice." Goonewardena, 258 F. Supp. 3d at 348 (internal quotation marks and citation omitted). Rule 37(e)(1) "does not place a burden of proving or disproving prejudice on one party or the other." Fed. R. Civ. P. 37(e)(1) advisory committee's note to 2015 amendment. Rather, the rule leaves judges with discretion to determine how best to assess prejudice in a particular case. *See id.*; *see also* Leidig v. Buzzfeed, Inc., No. 16 Civ. 542 (VM) (GWG), 2017 WL 6512353, at *12 (S.D.N.Y. Dec. 19, 2017); Goonewardena, 258 F. Supp. 3d at 348 (explaining that, in the context of "spoliation or withholding of evidence, the absence of prejudice can be shown by demonstrating ... that during discovery [the other parties] never asked for the evidence later shown to have been spoliated." (alteration in original) (quoting R.F.M.A.S., Inc. v. So, 271 F.R.D. at 25)).

DISCUSSION

1. *Sanctions Against the Khrapunovs*

Plaintiffs claim that Ilyas Khrapunov: (1) destroyed emails; (2) failed to produce emails and other records concerning key witnesses, including Frank Monstrey and Eesh Aggarwal; (3) failed to disclose the location of Gennady Petelin, another key witness, in order to deter and delay his deposition; and (4) assisted his father, Viktor Khrapunov, and non-party witness Petelin in avoiding their discovery obligations by acting as a translator and obfuscating communications and/or directly instructing them not to comply with those obligations. They also contend that Viktor Khrapunov obstructed discovery by refusing to answer questions at his deposition and failing to produce documents. Plaintiffs posit that the emails and communications sought, if produced, would have shown that Ilyas controlled Triadou during the relevant timeframe and laundered Plaintiffs' stolen funds through NSW. Accordingly, Plaintiffs now request that the Court sanction the Khrapunovs by entering a default judgment against Ilyas or, in the alternative, impose an adverse

inference and preclude certain of his defenses. Plaintiffs have also asked this Court to strike Viktor's personal jurisdiction defense. They also request that this Court award them their costs and attorneys' fees associated with bringing the instant Sanctions Motion against the Khrapunovs.

The Court agrees that the Khrapunovs' conduct in discovery is sanctionable. They have approached discovery as a game of cat and mouse, and there is strong evidence that their non-compliance has been willful and that they, in fact, have engaged in the spoliation of evidence. This includes:

• Failing to produce any financial records concerning bank accounts, sources of wealth, and assets—all of which are relevant to ascertaining the source of their investment funds. The Khrapunovs offer no excuse whatsoever for failing to produce such records that they no doubt have. They also failed to contact parties under their control, such as banks and accountants, and other witnesses who might have copies of such records, such as Monstrey and Aggarwal.

• Failing to produce emails concerning financial transactions at issue in this case. As an excuse, Ilyas claimed, incredibly, that he simply cannot remember the passwords for those email accounts. Typically, passwords can be reset. Thus, this lack of memory is not a valid excuse. More troubling, Ilyas admitted that he destroyed certain emails. He also made no effort to retrieve destroyed emails by, for example, contacting his email provider to determine whether it was possible to obtain copies of his emails. He likewise made no effort to contact his agents, such as accountants, with whom he corresponded and who might have relevant emails.

*12 • Forcing Plaintiffs to file multiple motions to compel. Rule 1 requires parties to construe the Federal Rules of Civil Procedure so that litigation is as efficient and inexpensive as possible. Discovery is not a game. Yet, the Khrapunovs, and particularly Ilyas, have treated discovery as such. As a result, Plaintiffs were forced to make multiple motions to compel and expend considerable resources to obtain information relevant to the Khrapunovs' relationship to Triadou and Ablyazov and their involvement and interest in the real estate investments at issue in this case. Their conduct not only cost Plaintiffs additional attorneys' fees, but imposed burdens on the Court by requiring it to resolve multiple discovery motions.

• Failing to produce an accurate privilege log, despite claiming that certain communications were privileged.

• Being evasive in depositions by claiming not to remember facts pertinent to key financial transactions and investments at issue—all of which involved tens or hundreds of millions of dollars—or their relationship with other witnesses and parties. Neither Khrapunov has explained their wholesale, and frankly unbelievable, lapses in memory.

In sum, the Khrapunovs' non-compliance in discovery has been complete, and they produced no evidence in discovery. This is contrary to their obligation under Rules 1 and 26 of the Federal Rules of Civil Procedure. This Court previously warned the Khrapunovs about their obligations to comply with discovery and already sanctioned Ilyas Khrapunov for leaking a confidential deposition transcript onto the internet after initially threatening to leak it on Facebook. (Dkt. No. 564.)

Rule 37 provides that "the court must" require a party who has failed to provide information in discovery to "pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C). "Although the Second Circuit has never explicitly held that the payment of expenses pursuant to Rule 37(b)(2)(C) is mandatory, the burden is on the violator to show that there was a substantial justification for the violation, or that circumstances would make it unjust to award reasonable expenses to the moving party." *JCDecaux Airport, Inc. v. Tom Sawyer Prods., Inc.*, 16 Civ. 5067 (NRB), 2020 WL 635580, at *6 (S.D.N.Y. 2020) (internal quotation marks and citation omitted).

Here there is no excuse for the Khrapunovs' intentional misconduct during discovery. Thus, Plaintiffs are entitled to fees and costs incurred in connection with their numerous motions to compel brought against the Khrapunovs. This remedy, however, is insufficient in and of itself to redress the Khrapunovs' conduct. Accordingly, I also find that an adverse inference should be imposed against the Khrapunovs, and that they should be barred from introducing any documents into evidence that have not been produced in this matter. Indeed, it appears that the documents they refused to produce are highly relevant and, in fact, damaging to their defense. For example, documents produced by other key witnesses, including email correspondence from Monstrey and Aggarwal pertaining to NSW, link the money Triadou invested in New York real estate to Plaintiffs' stolen funds. A lesser sanction would not be appropriate, given the Khrapunovs' utter disregard for court rules and obvious ducking of their obligations. *See* World Wide Polymers, Inc., 694 F.3d at 158–59; Experience Hendrix, L.L.C., 2018 WL 6191039 (adverse inference instruction was appropriate where defendants deleted files from their computers after the commencement of litigation); Joint Stock Co. Channel One Russia Worldwide v. Infomir LLC, No. 16-CV-1318 (GBD) (BCM), 2017 WL 3671036, at *21

(S.D.N.Y. July 18, 2017)) (sanctions should be "just" and "commensurate" in severity with the non-compliance), *adopted by* 2017 WL 4712639 (S.D.N.Y. Sept. 28, 2017); Shanghai Weiyi Int'l Trade Co. v. Focus 2000 Corp., No. 15-CV-3533(CM)(BCM), 2017 WL 2840279, at *11 (S.D.N.Y. June 27, 2017) (where "discovery misconduct has deprived the opposing party of key evidence needed to litigate a contested issue, an order prohibiting the disobedient party from contesting that issue – or simply directing that the matter be taken as established – is also appropriate").

*13 Because the Honorable Alison J. Nathan will preside over the trial in this case, she is responsible for providing instructions to the jury and determining other evidentiary matters. Accordingly, this Court respectfully recommends, for the above reasons, that the Khrapunovs be precluded from introducing any documents at trial that were not produced in discovery and that an appropriate adverse inference instruction be given to the jury.

2. *Sanctions Against Triadou*

Plaintiffs claim that Triadou was controlled by Ilyas Khrapunov and that Triadou assisted him and the other Individual Defendants by destroying emails and/or failing to comply with its preservation obligations. Plaintiffs seek an adverse inference against Triadou that the emails would have contained helpful information to Plaintiffs and would have been harmful to Triadou. They also seek attorneys' fees and costs associated with bringing the instant Sanctions Motion.

In contrast to the conduct of the Khrapunovs in this litigation, Triadou has fully participated in discovery. Triadou has produced documents and provided witnesses. Moreover, Triadou's counsel has acted no more vigorously than Plaintiffs' counsel, and abided by the discovery rules while providing ethical and zealous representation. As noted above, a non-party purchased SDG and Triadou in 2013—well before the start of this lawsuit. Furthermore, the emails on SDG's server were deleted in mid-2014, before this suit was initiated. To the extent Plaintiffs had threatened litigation or sued the Khrapunovs in California in 2014, the obligation to preserve extended to the Khrapunovs—not to Triadou. Additionally, to the extent a Triadou subsidiary and Sater were involved in litigation in 2013, any duty to preserve emails expired when that litigation settled at the end of 2013, before SDG deleted its emails. Ilyas was merely a consultant to SDG/Triadou at the time the emails were deleted. Moreover, Greencos, a totally independent company, owned SDG and Triadou at the time the emails were deleted. Thus, SDG and Triadou cannot be deemed to have been agents of the Khrapunovs at the time the emails were deleted. Triadou has produced evidence that the emails were deleted as part of routine maintenance well before it was a target of litigation. Thus, there is no basis for finding that Triadou (or SDG) deliberately (or negligently) engaged in spoliation of evidence in violation of their obligations in this case.

The next issue Plaintiffs raise is the conversion of the SDG/Triadou email accounts to POP-3. The Court views this issue to be insignificant in the grand scheme of things. While it is true that Triadou had an obligation to turn off the POP-3 function and preserve Ilyas' emails going forward upon being named as a defendant in this suit, there is no evidence that there were relevant emails created on SDG's servers since this case was commenced. Rather, and as noted Plaintiffs, the evidence shows that Ilyas began using Cryptoheaven email accounts. Further, the emails relevant to this case all were created well before this lawsuit commenced, and Ilyas ceased to have an email account with SDG in 2015. Thus, there were no emails for SDG/Triadou to preserve going forward. Accordingly, Triadou did not violate its preservation obligations as to these emails, and no sanctions are warranted.

3. *Sanctions Against Plaintiffs*

Triadou and the Khrapunovs seek: fees and costs associated with having to conduct a second day of Sater's deposition; fees and costs associated with all of the motions to compel production of the Litco CAA and various other documents withheld on privilege grounds; and fees and costs incurred in connection with the instant Sanctions Motions. The Khrapunovs also request reimbursement for the second day of Monstrey's deposition, that Sater and other witnesses identified by Sater and Litco be barred from testifying, and that the Court refer Plaintiffs' counsel to the U.S. Department of Justice for criminal investigation for violating laws that prohibit the payment of witnesses.

*14 If Plaintiffs and their counsel at BSF knew that Sater owned Litco prior to Sater's deposition, then their conduct in discovery would clearly be sanctionable because this would mean that they misrepresented the nature of their relationship with Litco to the Court, entered into an agreement to pay a fact witness, and obstructed discovery. But, after careful consideration of the timeline of events and the evidence presented, the Court finds that Plaintiffs and their counsel at BSF did not know that Sater owned Litco prior to Sater disclosing this information at his deposition in September 2018.

Although representatives from BTA and Almaty signed the Litco CAA, none had direct contact with Wolf or

Sater at any time concerning this litigation. Neither BTA nor Almaty was represented by an attorney when signing CAA. Rather, Arcanum provided the Litco CAA and simply requested a sign-off. The representative from Almaty testified that Almaty was never provided a Russian translation of the document and simply signed the document based on a general understanding that it was a contract with an investigative firm. Importantly, Sater is not mentioned in the Litco CAA at all.

Garske, the Arcanum representative who negotiated the Litco CAA, knew that Sater owned Litco. However, it appears that this information was not widely disseminated, if at all, within Arcanum. Garske died unexpectedly in late 2016, at which point Calvin Humphrey took over the relationship. This Court is skeptical that Humphrey had no inkling that Sater owned Litco, given that some Litco invoices sent to him mentioned Sater and that he met with both Wolf and Sater. Yet, Arcanum also signed a non-disclosure agreement with Litco agreeing not to share Sater's identity as Litco's owner with Plaintiffs or BSF. As such, this Court finds the testimony from Plaintiffs' representatives and BSF to be credible.

The credibility of Plaintiffs and their counsel is bolstered by the Litco CNDA between Litco and Arcanum, entered into without Plaintiffs' or BSF's knowledge, providing that Arcanum would not share information about Litco's ownership to Plaintiffs or BSF. The financial incentives to Litco, Sater, and Arcanum to keep Sater's interest in Litco secret were substantial. Indeed, Arcanum receives substantial sums from Plaintiffs for its work, and Litco has received over $2 million and stood to receive 16 percent of the money recovered from this litigation based on Sater's knowledge from the arrangement. Had Sater's true interest in Litco been revealed at any point in this litigation, the Litco CAA would have been terminated, just as it now has been. An email produced by non-party Kevin Meyer provides additional contemporaneous proof that Wolf and Sater were aligned on seeking profit. (*See* Dkt. No. 992 Ex. 2.) These financial incentives provide further evidence supporting the Court's finding that Arcanum and Wolf did not reveal Sater's interest in Litco. For these reasons, the Court does not impute Arcanum's knowledge about Sater to BSF or to Plaintiffs for purposes of this resolving the instant Sanctions Motions.

Further, there are no public documents reflecting Sater's ownership of or affiliation with Litco. Thus, BSF could not have learned Sater's affiliation with Litco through a public records search. In fact, Sater and Wolf both testified that they deliberately attempted to keep Sater anonymous. Neither wanted BSF or Plaintiffs to know that Sater owned Litco. Sater testified that he feared that the Khrapunovs and Ablyazov had spies within Almaty and BTA and that his safety could be at risk if his cooperation were discovered. This fear is credible, given that Ablyazov was convicted in Kazakhstan in 2018 of murdering a former BTA executive and has been convicted of other numerous crimes.[8] Based on the confidentiality obligation that Sater had to SPG in his consulting agreement with that entity (which was partially owned by Ilyas Khrapunov), it is also likely that Sater did not want to disclose his ownership of Litco to BSF, Arcanum or others to minimize the risk of suit by SPG for breach of contract. Wolf also went so far as to lie to BSF attorneys the day before Sater's deposition claiming not to know who owned Litco when he clearly did know.

*15 This Court also finds the testimony of Matthew Schwartz from BSF to be credible—that he and others at BSF were surprised to learn that Sater owned Litco and only learned this information when Sater disclosed it during his deposition. In fact, the revelation before this Court at the August 8, 2019 hearing, that Latham had discussions with and entered into a nondisclosure agreement with Litco, was a surprise to all parties in this case. Latham agreed not to disclose Sater's interest in Litco to anyone, and this Court finds that Latham honored its obligation and did not inform BSF or their client.

Whether BSF should have learned Sater's interest in Litco sooner is another question. BSF showed an incredible lack of curiosity as to the people and entities Wolf represented. Wolf identified critical witnesses and information in this case. How were his clients sourcing their information? Were they violating any agreements with others? Were their methods lawful? BSF's hands-off approach to one of its most important investigative sources seems strange. Then, when articles appeared in the news that Sater was helping Almaty, inquiring minds might have asked *why* Sater was helping, not just whether Almaty had an agreement with Sater. When BSF learned that Sater had received $20 million dollars in a settlement with a Triadou subsidiary, and Sater then became a "target," the Court wonders why BSF would not have further researched Sater's motivations to help Almaty and BTA and whether there were profit incentives, particularly in light of news indicating that Sater might be receiving compensation from Almaty.[9] It seems, however, that BSF attorneys were content to receive information in an unquestioning manner. Nevertheless, this Court cannot say that BSF was deliberately indifferent, and finds that sanctions are not warranted for Plaintiffs' and BSF's initial objections to producing the Litco CAA, before it knew that Sater owned Litco. However, its resistance to disclosing the Litco CAA after Sater's ownership in Litco was revealed at Sater's deposition was improper, as the Agreement was not, in fact, a privileged document.

As this Court previously held, Plaintiffs and BSF clearly over-designated documents as privileged and resisted

disclosure of the Litco CAA after Sater's ownership of Litco was known. (*See* Dkt. Nos. 901, 1099.) An award of reasonable expenses incurred in connection with a motion to compel discovery is typically required under Rule 37, unless the movant filed the motion before attempting to resolve the dispute through a good faith meet an confer process, the nondisclosure or objection was substantially justified, or other circumstances make an award of expenses unjust. *See* Fed. R. Civ. P. 37(a)(5)(A). The Court evaluates the failure to comply with discovery demands in light of the full record. *See* Cine Forty-Second St. Theatre Corp., 602 F.2d at 1068. When a court grants a motion to compel, a court may award attorneys' fees in addition to costs in its discretion. *See S.E.C. v. Yorkville Advisors, LLC*, 12 Civ. 7728 (GBD)(HBP), 2015 WL 855796, at *3–4 (S.D.N.Y. Feb. 27, 2015).

Here, the Court finds that Triadou and the Khrapunovs are entitled, under Rule 37, to their reasonable attorneys' fees and costs in connection with their Motions to Compel production of the supposedly privileged communications with Sater and Monstrey and the Litco CAA. Defense counsel met and conferred with Plaintiffs' counsel prior to filing the motions, and Plaintiffs did not have a reasonable basis to resist production based on applicable privilege law. Their refusal to compromise cost Defendants money and this Court time to resolve the Motions.

*16 To the extent the Khrapunovs seek harsher sanctions against Plaintiffs and BSF, I find they are not warranted. Defendants have not demonstrated that Plaintiffs' and BSF's conduct was in the nature of willful noncompliance with discovery, as opposed to hyper-aggressive advocacy. Plaintiffs, in fact, initially believed, and this Court found, that their communications with Litco were protected work product. While an engagement letter is not typically privileged, it also is not typically relevant. It was only when Sater revealed that he owned Litco that the Litco CAA became relevant for impeachment purposes. Because Plaintiffs and BSF were unaware that Sater owned Litco until he revealed it at his deposition, they did not knowingly pay a fact witness for testimony. Indeed, they are now embroiled in a contract dispute with Litco and have sued Sater in a separate lawsuit. Thus, it is unclear whether Sater will be called as a witness or, if called, be designated a hostile witness. In any event, Defendants have plenty of material upon which to cross examine Sater and the other witnesses.

As for the communications with Sater and Monstrey, none pertain to the underlying facts at issue in this case. For this reason, it was not unreasonable for Plaintiffs to fail to produce them or list them on a privilege log initially. Later in the litigation, when Sater's relationship to Litco became clear, and when the timing of Plaintiffs' knowledge of and interactions with Sater became an issue, Plaintiffs' communications with these witnesses became relevant. The duration of the noncompliance was short. This Court has not had to previously warn Plaintiffs' counsel, and none of the emails withheld go to the underlying merits of this case. Accordingly, it is not appropriate to impose an adverse inference or other terminating sanctions as to Plaintiffs.

CONCLUSION

For the reasons set forth above, Plaintiffs' Motion for Sanctions against the Khrapunovs is GRANTED, as set forth above; Plaintiffs' Motion for Sanctions against Triadou is DENIED; Triadou's and the Khrapunovs' Motions for Sanctions against Plaintiffs are DENIED, except insofar as this Court previously held that Plaintiffs over-withheld privileged documents.

The Khrapunovs shall pay Plaintiffs' attorneys' fees and costs in connection with their various motions to compel discovery and the instant Motions for Sanctions. Additionally, I respectfully recommend that, consistent with Rule 37(c)(1), the Khrapunovs be precluded from offering or referring to any documents not produced in discovery in opposition to any dispositive motion or at trial. This sanction is needed to ensure that the Khrapunovs will not be rewarded for their refusal to participate in discovery and to deter noncompliance with discovery obligations. I also recommend that the Court draw an adverse inference against the Khrapunovs for purposes of determining liability as a sanction for their failure to produce relevant documents over which they have custody and control, Ilyas Khrapunov's spoliation of evidence, and both Khrapunovs' failure to provide full and credible responses to deposition questions and interrogatories concerning their finances.

Triadou and the Khrapunovs shall be entitled to their attorneys' fees and costs in connection with this Court's granting of their Motion for Sanctions and Motions to Compel production of communications with Sater and Monstrey that Plaintiffs' initially withheld on the basis of privilege and to compel production of the Litco CAA after it was revealed during Sater's deposition that Sater owned Litco.

Motions for fees' and costs shall be submitted by June 9, 2020, and opposition briefs are due by June 23, 2020. No replies will be permitted.

SO ORDERED AND RESPECTFULLY SUBMITTED,

NOTICE

The parties shall have fourteen days from the service of the portion of this Opinion that is a Report and Recommendation to file written objections to this Court's recommendation concerning the sanctions of preclusion and adverse inference pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure. *See also* Fed. R. Civ. P. 6(a), (d) (adding three additional days only when service is made under Fed. R. Civ. P. 5(b)(2)(C) (mail), (D) (leaving with the clerk), or (F) (other means consented to by the parties)). If objections are filed, there shall be a fourteen-day period to file a written response pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure.

*17 Any objections shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Alison J. Nathan at the United States Courthouse, 40 Foley Square, New York, New York 10007, and to any opposing parties. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P.6(a), 6(d), 72(b). Any requests for an extension of time for filing objections must be addressed to Judge Nathan. The failure to file these timely objections will result in a waiver of those objections for purposes of appeal. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(d),72(b); Thomas v. Arn, 474 U.S. 140 (1985).

Footnotes

[1]

City of Almaty, Kazakhstan v. Ablyazov, No. 15-cv-5345 (AJN), 2018 WL 3579100 (S.D.N.Y. July 25, 2018); City of Almaty, Kazakhstan v. Ablyazov, 278 F. Supp. 3d 776 (S.D.N.Y. 2017); City of Almaty, Kazakhstan v. Ablyazov, 226 F. Supp. 3d 272 (S.D.N.Y. 2016).

[2]

This Court previously expressed concern about this translating arrangement and ordered the Khrapunovs' counsel to retain an independent translator. (Dkt. No. 800.)

[3]

Monstrey produced the emails he had retained and also testified about the $440 million transaction. (Schwartz Decl. in Supp. of Pls.' Sanctions Mot. Exs. 60 and 61.)

[4]

This Court previously recognized that the Khrapunovs' counsel improperly relied on Viktor, using only Ilyas as a translator, to locate and produce documents rather than utilize an independent translator and take other steps to search for relevant documents. (*Id.* at Ex. 15; *see also* Dkt. No. 800.)

[5]

Point refused to testify, and the Court accepts Cerrito's testimony for purposes of recognizing that Cerrito and Triadou conducted a reasonable inquiry about the emails for purposes of discovery.

[6]

Sater's consulting agreement with SPG contained a confidentiality obligation. (Dkt. No. 972 ("Khrapunovs' Mem. of Law in Supp."), 3; Dkt. No. 973 ("Khrapunovs' Decl. in Supp.") Ex. F.) The Khrapunovs claim that Sater violated his agreement with SPG and that, to the extent Plaintiffs and BSF knew about the confidentiality provision, they may have abetted the breach and interfered with the contract.

[7]

For more background information about the Litco CAA, which the Court incorporates by reference, see docket entries 901 and 1099.

[8]

See, e.g., Almaty v. Sater, 19-cv-2645 (AJN) (KHP) (S.D.N.Y.) (Dkt. No. 120 ("Am. Compl.").)

[9]

As this Court recognized during the August 8, 2019 hearing, the documents and evidence illustrate the difference between the diligent approach Latham undertook to maintain compliance with the ethics rules and the approach taken by BSF. (*See* Aug. 8, 2019 Hr'g Tr. 20 26:19-32:24, 37:22-38:21.)

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