

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND**

MARK SKAPINETZ	*	
Plaintiff/Counterclaim Defendant	*	Case No: 8:17-cv-01098
Vs.	*	
COESTERVMS.COM, INC., et al.	*	
Defendants/Counterclaim Plaintiff	*	

* * * * *

PLAINTIFF’S MOTION FOR SANCTIONS (REDACTED)

COMES NOW, Plaintiff MARK SKAPINETZ (“Skapinetz”), through undersigned counsel and pursuant to Federal Rule 37 (b) submits this Motion for Sanctions, and in support thereof, states the following:

After a discovery dispute ongoing for almost two months that culminated in a two hour hearing, this Court ordered the CoesterVMS.com, Inc. (“CoesterVMS”) to fully comply with all outstanding discovery requests by 5pm on September 28, 2018 (Exhibit A). This Court specifically noted the work needed to be completed on or before the deadline provided. Contrary to this Court’s order, and in keeping with their pattern of delay in this case, CoesterVMS provided an incomplete and inaccurate response and waited until after the Court’s deadline to attempt to resolve potential discrepancies in that response originally due on August 1st.

Skapinetz is unable to determine if failure to produce complete and accurate responses is due to a lack of diligence toward the discovery process or intentional efforts to ignore their

obligations. In either case, these actions do not comply with specific and general terms of the Court's order, or basic precepts of the discovery process.

Skapinetz certifies that, in accordance with Local Rule 104.7, good faith efforts were made to resolve this dispute before it had been raised to the Court. Counsel conferred on August 3rd, numerous emails were exchanged over the next several weeks, and counsel conferred again for three hours on September 18th and one hour on September 20th. Counter-plaintiff sought to continue conference after the Court's September 25th deadline passed, but Skapinetz asserted further attempts were beyond the scope of 104.7 due to the presence of the Court order.

Skapinetz has expended extensive effort to obtain discovery information central to the issues of this case, but has been met with a series of evasive and incomplete answers that continued even after the matter was brought before the Court for resolution.

Similar to the case of *McCloud v. SuperValue*, the incomplete discovery includes issues at the heart of this litigation and therefore Skapinetz requests the Court order sanctions to the fullest extent allowed by law, including dismissal of the Counterclaim and awarding reasonable expenses, including attorney's fees caused by Counter-Plaintiffs' history of dilatoriness and noncompliance. See Memorandum Opinion and Order, *McCloud v. Super Value, Inc.*, No. 8:2012cv00373 (D. Md. 2013).

In hopes of speedy resolution of this Motion, Skapinetz hereby requests a hearing.

FAILURE TO PRODUCE REQUESTED DISCOVERY ON DAMAGES

In their Counterclaim, Counter-Plaintiffs alleged Tortious Interference with Contract (Count I) and Tortious Interference with Economic Relations (Count II). Under Count I, they

alleged that as a direct and proximate result of an email send by Skapinetz, recipients of that email “canceled or declined to renew their contracts with Counter-Plaintiffs, causing damages to Counter-Plaintiff in excess of ten million dollars.”

Within the Counterclaim, Counter-Plaintiffs alleged Finance of America, a client generating approximately \$40,000.00 per month in revenue at the time, was one of the clients that terminated its relationship because of the email. Counter-Plaintiffs alleged other clients terminated their agreements because of the email, including clients from whom CoesterVMS received revenue of more than \$350,000.00 per month. Additionally, Counter-Plaintiffs alleged other potential clients declined to approve CoesterVMS because of the email, from whom CoesterVMS would have received revenue substantially in excess of \$250,000.00 per month.

Under Count II, Counter-Plaintiffs alleged that as a direct and proximate result of that email, other recipients of that email declined to enter into contracts with Counter-Plaintiffs, causing further damages to Counter-Plaintiff in excess of ten million dollars.

Skapinetz sought discovery to substantiate the allegations of lost revenue through multiple avenues, but instead of providing this basic information necessary to maintain their cause of action, Counter-Plaintiffs provided a range of evasive, incomplete, and contradictory responses.¹ Counter-Plaintiffs eventually produced partial revenue summaries and wrongfully

¹ Pertinent requests and responses included the following:

REQUEST 12. Produce business records showing monthly transactions with gross dollar revenues and net profits, broken down by client, during the period 1/1/2015 to present.

Response: This response is confidential. [REDACTED]

asserted that Skapinetz must accept this response as sufficient based on earlier conference discussions of their limited ability to provide the information.

Counter-Plaintiffs provided several reasons why they could not comply with the document requests and interrogatories related to revenues and damages but did produce two files showing some financial data on August 2nd, a two page “2015 Financials - Income Statement-Balance Sheet Combined” (Exhibit B) and ten page “CoesterVMS 2016 and Current Financials”(Exhibit C). Skapinetz noted the response was deficient and counsel for the parties continued to disagree on what was required until the matter was brought before the Court on September 25th.

After being ordered by the Court to respond to overdue requests, Counter-Plaintiffs produced what they described as a “report of revenues from entities from whom Coester contends business was lost due to Plaintiff’s actions.” (Exhibit D). No information was provided regarding the source of the data used to create the chart provided, nor its author. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] No underlying business records were produced, despite Skapinetz’s specific request for them. The question remains how the chart could even have been produced as

REQUEST 4. Produce all documents concerning your claim for damages or the methods used to calculate such alleged damages.

Response: Coester objects to this request to the extent it calls for production of materials produced in anticipation of litigation. Subject to that objection, Coester will produce responsive, non-privileged documents.

INTERROGATORY 2. Itemize and show how you calculate any damages claimed by you in this action, whether economic, non-economic, punitive, or other.

Answer: VMS has not yet determined the extent of its damages and cannot do so until Plaintiff discloses the identities of all of the persons to whom he sent derogatory emails. VMS will supplement these Answers when such determinations are made.

Counter-Plaintiffs previously claimed they did not have records of monthly revenues by client (despite the fact their Counterclaim details such purported monthly revenues by client).

Despite its uncertain origins, Skapinetz has no choice but to rely on the Exhibit D as the most comprehensive discovery response provided to date. Unfortunately, it reveals further obfuscation in several ways.

Age Group	Percentage of Respondents
18-29	92%
30-49	88%
50-64	85%
65+	62%

INTERROGATORY 8: Provide a list of persons that ceased doing business or lowered the net value of their business transactions conducted with you or COESTERVMS.COM, INC. after 11/11/2016.

1st Supplemental Answer: The answer to this Interrogatory is CONFIDENTIAL, and covered by the Stipulated Confidentiality Order in this case.

[REDACTED]

[REDACTED]

[REDACTED]

Thus, the information provided by Counter-plaintiffs, only after much consternation, directly contradicts their assertions in the Counterclaim and other discovery responses.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] It is not possible to know to what extent without actual records.

Equally disturbing to the mismatch between the statements made in the Counterclaim and interrogatories, there are discrepancies between the three sets of numbers provided. [REDACTED]

[REDACTED]

[REDACTED] s.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] b. Counter-Plaintiffs can not even keep track of the details of their own allegations, possibly due to the absence of any documentation on the purported events. Once again, this error uncovered by Skapinetz, was only acknowledged under questioning at deposition.

At this point there is no reason to be confident in any of the summary compilations provided and only verifiable business records should be considered as evidence. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] However, since

Counter-Plaintiffs previously claimed they could not produce such records, they should be precluded from doing so at this late stage, except to the extent that they further disprove their counterclaim. Furthermore, the Court should rule that the absence of such records should be considered as evidence that the losses did not occur.

[REDACTED]

[REDACTED]

[REDACTED] However, no specific communications regarding such agreements was described to exist by Counter-Plaintiffs, and despite multiple document requests that pertain, no such draft contracts or agreements were provided.³ [REDACTED]

[REDACTED]

[REDACTED] If and when Counter-Plaintiffs produce such documents, it will only be after the same pattern of repeated denial and protest. This disregard for the rules of discovery should not be tolerated, and thus any such information provided at this late stage should be ruled inadmissible by the Court.

³ Pertinent requests and responses included the following:

REQUEST 2. Produce all documents (including, but not limited to, correspondence, notes, memoranda, and journal entries) which relate to, describe, summarize, or memorialize any communication concerning the occurrences.

Response: Coester will produce responsive, non-privileged documents.

REQUEST 11. Produce all communications between Defendants and any entities alleged to have been impacted by Plaintiff's interference with your business, that address in any way Plaintiff's alleged interference with your business or any changes in your business relationships for any reason, from the date 11/10/2016 to the present.

Response: Coester will produce responsive, non-privileged documents. The documents produced are confidential.

REQUEST 9. Produce all contracts and agreements entered into (or initiated but not finalized), with lenders, appraisers, or real estate companies, that were in force or in negotiation over the past three years. Documents should be broken down into categories of those you allege were impacted by Plaintiff's alleged interference with your business, those that you believe may have been impacted, and those that you do not believe to have been impacted.

Response: This response is confidential. [REDACTED]

[REDACTED]

FAILURE TO PRODUCE REQUESTED DISCOVERY ON CAUSATION

Skapinetz also pursued discovery on the second critical element of causation through multiple avenues and was similarly denied good faith responses.⁴ Through interrogatories and document requests, Skapinetz sought information on negative feedback and complaints made against CoesterVMS and any communications regarding impact of the complaints on Counter-Plaintiffs' business. Counter-Plaintiff should readily be able to produce such information to show that it was Skapinetz that led to their losses and not other complaints by other parties. At first, Counter-Plaintiffs maintained that they had no records of complaints other than those made by Skapinetz. This claim was debunked [REDACTED] Ms. Bright [REDACTED] admitted to the existence of a variety of other complaints, but [REDACTED] denied such complaints had any impact on revenues.

After continued pressure by Skapinetz to provide at least some partial response to the document request, on September 25, 2018 CoesterVMS elected to provide a 15 GB data dump with tens of thousands of emails associated with a particular listserv, instead of finding those

⁴ In addition to those noted in footnote 2, pertinent requests and responses included the following:

REQUEST 8. Produce all documents containing direct or indirect feedback, reviews, or commentary received from lenders, appraisers, or real estate companies over the past three years, including positive, negative, or mixed characterizations.

Response: This response is confidential. [REDACTED]

On August 3rd, Plaintiff pointed out that within the documents that were produced by Defendant, the following inclusion on the signature block from CVMS emails made it obvious that Plaintiff did indeed know what "feedback" meant and that CVMS clearly had a simple alternative available to respond to the document request without going through 100k documents: "If you have enjoyed your experience with CoesterVMS, we want to hear from you! Send an e-mail to CoesterMerService@coestervms.com describing your experience."

actually responsive to the discovery request.⁵ Skapinetz spent many hours combing through the data dump and found numerous documents directly responsive to discovery requests, despite earlier denials such information existed.

In terms of substantiating the specific linkage of the Skapinetz email to decisions regarding their business relationship, Counter-Plaintiffs reported that no emails, no written correspondence, no meeting notes, nothing at all in their files that could be produced. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] As consistent

with their pattern, Counter-Plaintiffs failed to describe any of these communications as they should have in response to earlier interrogatories and Skapinetz would never have uncovered them without multiple demands for compliance.

Counter-Plaintiffs have a pattern of not being able to produce documents or not fully answering interrogatories after several additional follow-up requests. Given this history,

⁵ Despite being almost two months overdue, CoesterVMS claimed on September 24th they were unable to review the data before providing it and held it hostage until Skapinetz would agree to an inadvertent disclosure waiver and clawback agreement. This followed the same pattern with an earlier response to interrogatories that was overdue months before. At that time, CoesterVMS waited until after the deadline passed to state critical information would not be provided until a Confidentiality agreement was in place. This discovery dispute was recorded in Plaintiff's letter to the Court on June 30, 2018.

Skapinetz remains skeptical that Counter-Plaintiffs has no further documents that shed light on the critical question of alleged causation, including whether or not alleged verbal communications and meetings on the subject ever even took place as described.

In light of the notable gap between what documentation regarding causation Counter-Plaintiffs previously claimed to exist or not exist, they should be precluded from any later serendipitous introduction of documents into evidence that allegedly support the linkage between Skapinetz and Counter-Plaintiffs losses.

FAILURE TO PRODUCE REQUESTED DISCOVERY ON MITIGATION EFFORTS

Closely related to and indicative of issues of damages and causation, Skapinetz made multiple discovery requests concerned what efforts Counter-Plaintiffs may have engaged in to mitigate the alleged effects of his actions.⁶ Counter-Plaintiffs originally responded on June 22,

⁶ INTERROGATORY 6. Describe all communications following receipt of the mappraiser14@gmail.com email on 11/11/2016 referenced in the pleadings, which referred to the content of said email, or attempted to mitigate damages caused by said email.

Original Answer (Jun 22): [...] In response to the Skapinetz email, CoesterVMS hired Terraverde Management Advisors, to independently investigate the allegations contained therein, who determined that each was false. CoesterVMS then circulated that report to clients of CoesterVMS who had expressed concern about the allegations. In certain instances, Coester and Bright personally met with clients to attempt to mitigate such damages.

2nd Supplemental Answer (Jul 12): The second paragraph of the Answer to Interrogatory 6 is replaced in its entirety with the following: Following receipt of the Skapinetz email, in an effort to mitigate the damages, Coester and/or Bright had conversations with those clients of CoesterVMS listed in the answer to Interrogatory 8, each of whom expressed concern about the allegations in the email from Skapinetz, and/or similar information contained in other communications believed to be from him. Additional information about the efforts to mitigate damages are set forth in the Answer to Interrogatory 8.

Extract from 2nd Supplemental Answer to Interrogatory 8:

[REDACTED]

CVMS INTERROGATORY 14 (Aug 7). Identify all persons who received copies of the Terraverde Management Advisors report that Brian Coester indicated was circulated in his original response to interrogatory #6.

2018 that an outside consultant was specifically hired and generated a report (“Terraverde report”) in response to the Skapinetz email that was provided to customers that expressed concerns. On July 12, 2018, Counter-Plaintiffs provided a supplemental response with edited details on the origin of the Terraverde report. When Skapinetz pressed for specifics, Counter-Plaintiffs were unable to provide them. During conference with the Court on September 25, 2018, Counter-Plaintiff stated there was internal confusion about the Terraverde report and that after spending many hours searching they discovered their interrogatory response needed to

Answer: VMS is making diligent efforts to identify such recipients, and will shortly supplement these answers to identify such persons.

CVMS Supplemental Answer (Sept 28th): The prior answer to this Interrogatory is replaced with the following. As set forth in Brian Coester’s answer to Interrogatory 8 in his Second Supplementary Answers to Interrogatories, VMS believes the Terraverde Management Advisors report was provided to BankSouth, but does not know who else, if anyone, received copies.

CVMS INTERROGATORY 15. Describe the details of the meetings reported to have occurred by Brian Coester in his original response to interrogatory #6, including the specifics of who was in each meeting, their locations, the dates of each meeting, summaries of content of the substantive discussions and any agreements, understandings or other results of each meeting.

Answer: This answer is confidential and governed by the terms of the Confidentiality Order in this case. [REDACTED]

The following document should have produced results showing any mitigation efforts:

REQUEST 2. Produce all documents (including, but not limited to, correspondence, notes, memoranda, and journal entries) which relate to, describe, summarize, or memorialize any communication concerning the occurrences.

Response: Coester will produce responsive, non-privileged documents.

REQUEST 10. Produce all communications between Defendants and David Houseman or Finance of America, that address in any way Plaintiff’s alleged interference with your business or any changes in your business relationships for any reason, from the date 11/10/2016 to the present.

Response: Coester will produce responsive, non-privileged documents. The documents produced are confidential.

REQUEST 11. Produce all communications between Defendants and any entities alleged to have been impacted by Plaintiff’s interference with your business, that address in any way Plaintiff’s alleged interference with your business or any changes in your business relationships for any reason, from the date 11/10/2016 to the present.

Response: Coester will produce responsive, non-privileged documents. The documents produced are confidential.

be corrected. Subsequently, Counter-Plaintiff re-discovered their July 12, 2018 supplemental response and stated no further correction was necessary after the Court had already ordered such a correction to be provided by 9 AM on October 2, 2018.

The elusive Terraverde report is referred to over 500 times in the privilege log, [REDACTED] little seems to be known about its specific contents or its dissemination, including who specifically it was provided to and there are no non-privileged written communications that refer to it.

As with other inquiries, Counter-Plaintiffs' responses indicate a total absence of documents to memorialize any mitigation efforts specifically tied to Skapinetz. Counter-Plaintiffs referred to "intensive efforts" to mitigate, but were unable to provide a single exact date that any of these took place. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Without the necessary details, Skapinetz is prejudiced by the inability to impeach this testimony and therefore the Skapinetz respectfully requests this Court to preclude Counter-Plaintiffs from introducing such uncorroborated evidence.

OTHER FAILURES IN DISCOVERY RESPONSES

As several of Counter-Plaintiffs' discovery responses indicated privileged material had been withheld, Skapinetz promptly inquired as to the absence of an accompanying log. For over a month, Counter-Plaintiffs denied the requirement to produce a log and attempted to gain concessions on what it should contain. On September 25, the Court ordered CoesterVMS to "produce a full and complete privilege log to Skapinetz that complies with Federal Rule of Civil Procedure 26(b)(5)."

Despite indicating on the record before the Court on September 25, 2018 that the log had already been provided, later clarifying that it had not, and then saying it would be provided that day, the actual log was not provided until September 28, 2018 in four separate files at 5:02 and 5:08pm. The 81 page log, which appeared to be in random order, failed to meet the requirements of 26(b)(5) in several ways (See Exhibits E - H). Instead of describing the nature of the communications in a manner that would enable the claim to be assessed (without revealing information itself privileged or protected), the documents simply listed the actual "subject line" of the emails as originally written. Some of these were innocuous statements such as "See Attached" or "PRIVILEGED & CONFIDENTIAL." In other cases, subjects or dates of communications were left blank. Finally, there were hundreds of entries that were exact duplicates interspersed across the log, making it almost impossible to divine usable information on what communications actually took place that may or may not meet the criteria for privilege being asserted.⁷

⁷ On September 30th, Counter-Plaintiff's provided a revised privilege log addressing some of Skapinetz's concerns, but it led to more questions regarding the previous inclusion of hundreds of duplicate entries. (Exhibit I)

Skapinetz respectfully requests the Court obtain the hundreds of documents CoesterVMS claims privilege for in order to ascertain whether such privilege is justified, but also to evaluate efficacy of the log itself. Skapinetz asserts the log represents yet another example of failure of due diligence in the discovery process.

After providing the log, CoesterVMS called Skapinetz's attention to entries that include Ben Carson, Jr. in an attempt to avoid controversy as to why the Mr. Carson was not included in the list of their employees. CoesterVMS explained that Ben Carson, Jr. was "providing services as an acting CFO for VMS, and was acting as its agent" and later clarified that Mr. Carson "was not acting CFO personally. His company, Interprise Partners, LLC, provided CFO and other management services on a contract basis, and neither Mr. Carson nor anyone in his company were employees of VMS. They began to provide services in December, 2016, and their services were terminated in early 2018."

This incredible revelation shows two things. First, it is another example of the failure of Counter-Plaintiffs to provide vital information responsive to direct discovery inquiries.⁸ Based

⁸ Pertinent requests and responses included the following:

INTERROGATORY 4. Identify all persons having, or whom you believe may have, personal knowledge of the subject matter of this litigation, including any fact alleged in the complaint, Defendants' answer to the Complaint, the Counterclaim, and Defendants' discovery responses, and state the subject matter of the personal knowledge possessed by each such person.

(The initial answer provided included Brian Coester and one other employee.)

INTERROGATORY 7. List all persons providing services to CoesterVMS.Com, Inc. as fulltime, part-time employees or independent contractors, at any time from 11/10/2016 to the present date, including their job title, job description, location, dates of employment and their category (full- time, part-time, or independent contractor).

Answer: VMS objects to this Interrogatory and declines to answer because it is overly broad and burdensome, vague, and not reasonably calculated to lead to the discovery of admissible evidence. Over the nearly two years specified in this interrogatory, hundreds of persons provided services of all kinds to VMS, and it would be virtually impossible to identify them all. This Interrogatory is not limited to any particular service or services and would include all vendors and contractors of any kind, as well as employees performing services totally unrelated to the issues in this litigation and is not limited to persons with knowledge relevant to this case.

on his role as Chief Financial Officer, Ben Caron, Jr. must assuredly have information pertinent to alleged revenue losses, yet he was not identified as a person with knowledge of the facts of the litigation.

Second, it reveals the failure of Counter-Plaintiffs to fully respond to a simple request for a list of employees and contractors, the continued obfuscation of key information, and the prevention of Skapinetz from being able to fully defend against the Counterclaim. After denying the ability to list its employees, contractors, and agents, Counter-Plaintiffs finally provided a partial response on September 24, 2018 (Exhibit J). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In addition to not including any information on contractors performing key roles, the information provided lacks important information specifically requested, such as job titles and dates of employment. When this gap was pointed out, Counter-Plaintiffs provided some very limited information on three people listed, while stating that no former employees had any involvement or knowledge or of any of the facts relevant to this litigation. It was not within their purview to limit the scope of this request, as Skapinetz will determine (if and when the actual listing is provided) which employees he seeks to obtain further discoverable information from (whether it may be the Secretary, Janitor, or the Acting CFO).⁹

⁹ Ten days after the Court ordered deadline passed, Counter-Plaintiffs provided an updated list of former employees, filling in more of the information that had been requested earlier. (Exhibit K)

The failure to provide information on employees is part of a larger pattern. Coester initially failed to include any contact information for the companies they claim they lost business from. After Skapinetz requested clarification, names were provided without the required phone numbers, and after inquiry it was discovered that two of the people no longer even work at the companies they were identified as the points of contact for. Skapinetz attempted again to gain insight through a second interrogatory that asked for all points of contact at these companies Counter-Plaintiffs communicated with, but no additional names were provided.¹⁰ However, after careful scrutiny of the 15GB data dump, Skapinetz found communications that included contact information for at least four other key personnel at the companies that CoesterVMS communicated with on revenue matters in those organizations (including the two where only former employee's information had been provided). Once again, after Skapinetz had been told no information exists, he was able to determine that the exact information requested did indeed exist.

Counter-Plaintiffs have repeatedly failed to provide necessary identification information for potentially critical witnesses. As a final example, an initial response claimed no contact information was available for a former employee who was allegedly in a meeting where one of the customers discussed their decision to cease doing business. After noting the requirement was

¹⁰ Pertinent requests and responses included the following (in addition to those previously listed):

INTERROGATORY 13. Identify all employees or agents of the entities listed in Brian Coester's response to interrogatory #8 with whom you have had communications or other interactions with since 4/2016 (other than those named individuals already listed in that response).

Answer: The prior answer to this Interrogatory is replaced with the following. Other than communications related to day-to-day issues regarding specific appraisal orders, among employees of VMS and their counterparts at those entities, VMS knows of no such communications or interactions.

to include last known information, Counter-Plaintiffs provided a phone number that, when dialed, turned out to be the CoesterVMS central operator.

All of these additional discrepancies call into question Counter-Plaintiffs' assertions that the critical element of causation rests solely on oral communications, of which there is no record. If key witnesses, who can potentially confirm or refute the existence of such meetings and conversations, can not be identified or located then Counter-Plaintiffs' version of events goes unchallenged. Therefore, an appropriate remedy for Counter-plaintiff's failures is to balance this gap by precluding the self-serving oral testimony they have offered. If the Counterclaim is to go forward, it should be on based on business records and correspondence.

CONCLUSION

Counter-Plaintiffs chose to launch this \$20M litigation but continually failed to meet their discovery obligations. If they were unable or unwilling to provide the required information to substantiate their claim, the action should never have been initiated and should now be withdrawn.

After being ordered by the Court to provide a full and complete response to outstanding discovery by 5pm on September 28, Counter-Plaintiffs provided a response that was incomplete and should be treated as a failure to respond.

While dismissing the action is typically a harsh measure, it is warranted here for two reasons. First, if the Court were to take a lesser action of precluding additional evidence to replace the existing contradictory or misleading information regarding damages, the ruling would have the same ultimate effect. Without evidence of damages, there is no Counterclaim.

Second, the repeated pattern of delay and obfuscation for all aspects of discovery indicates this has not been a mere error or failure of oversight. The very basis of the Counterclaim appears to be nothing more than an attempt to delay resolution of the Claim on its merits. Skapinetz has suffered significant prejudice due to Counter-Plaintiff's continued noncompliance with discovery requests that go to their heart of their claim.

In the alternative or in addition to dismissal, Skapinetz prays the Court afford appropriate relief to the full extent permitted by law, to include shifting of fees and costs incurred for the discovery dispute and case as a whole. As in the *McCloud v. Supervalu* case where Judge Grimm dismissed a claim as a sanction, noncompliance over a period of months has prejudiced Skapinetz and caused additional expense, aggravation and delay that was entirely unnecessary. (See Memorandum Opinion and Order, *McCloud v. Super Value, Inc.*, No. 8:2012cv00373 (D. Md. 2013)).

As additional context regarding their diligence in pursuing this case and meeting the Court's deadlines, it is important to point out Counter-Plaintiffs also failed to pursue timely discovery on their own behalf. The Court reminded Coester's counsel of their obligations to do so during the August 29, 2018 conference, specifically directing Defendant to get his Requests for Documents out without further delay. Despite the Court's instruction, that action did not occur until October 4th, 36 days later. Previously, when directed by the Court in June to submit interrogatories, Coester's counsel indicated he would do so within the week, but only submitted

them 6 weeks later. When questioned by the Court about the delay, the justification was computer failures.¹¹

Further illustrative of the pattern of delay warranting sanction, counsel for CoesterVMS has failed to comply with local rules on numerous occasions. Skapinetz submitted three letters to the Court seeking resolution of discovery disputes during the course of the litigation. When the Court scheduled a telephone conference to resolve the later disputes, CoesterVMS counsel neglected to check his calendar until that weekend and asked the day before for it to be rescheduled. After the conference was shifted to the afternoon to accommodate him, he filed a response letter just two hours prior to the conference (in direct contradiction to LR 105.2b and the Court's letter order on discovery disputes). In response, an order was issued where counsel were directed to appear before the Court. That order warned that the Court would address the propriety of sanctions to include shifting costs and fees for the discovery dispute.

The Court warned CoesterVMS again in the September 25, 2018 order, noting that failure to produce complete and accurate responses or answers, or otherwise exhibit a lack of diligence toward the discovery process, will result in appropriate sanctions, including but not limited to monetary penalties, adverse evidentiary rulings, preclusion of issues and defenses, default judgment, and contempt findings.

¹¹ Occasional computer problems are issues everyone has suffered through, but it is assumed some margin for the unexpected should be built into response times. This was the third time unspecified computer problems led to delays or missed deadlines by Coester's counsel. After counsel obtained an extension to submit his initial filing of a pre-answer Motion to Dismiss, he missed that extended deadline and had to seek leave from the Court to file his supporting memorandum late due to unspecified computer problems that lasted two days. A similar request had to be made when he had another unspecified computer problem that caused him to miss the midnight filing deadline for submitting the Answer and Counterclaim.

Following these two orders with explicit warnings, CoesterVMS did take steps to comply with overdue discovery responses, but in keeping with their pattern they either failed to exercise necessary diligence required to fully comply, or chose not to fully comply. Thus, having been provided two warnings, the Court should now apply the sanctions as appropriate under Fed. R. Civ. P. 37(b)(2) because “stalling and ignoring direct orders of the court ...must obviously be deterred.” *Mut. Fed. Sav. & Loan Ass’n*, 872 F.2d at 93.

Counter-Plaintiffs' noncompliance and delays have prejudiced Skapinetz by withholding information such that it could not build its defense, disrupted the judicial process, and must be deterred. Counter-Plaintiffs should not be allowed to pick and choose what rules they will comply with or what deadlines they adhere to. Counter-Plaintiffs should not be allowed to benefit from shifting the burden of meeting their discovery obligations to Skapinetz. The Court is respectfully urged to take action to maintain the integrity of the judicial process. See *McCloud* (D. Md. 2013) (quoting *Nat'l Hockey League v. Metro. Hockey Club*, 427 U.S. 639, 643 (1976). (“Deterring egregious acts of noncompliance should prevent future litigants from ‘flout[ing] other discovery orders of other District Courts.’”))

Respectfully Submitted,

_____/s/_____

Arnold J. Abraham, Esq.

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CERTIFICATE OF SERVICE

I HEREBY certify on this of 9th day of October, 2018, I caused copies of the foregoing Motion for Sanctions (Redacted) to be sent via ECF to counsel of record for the Defendants.

_____/s/_____

Arnold J. Abraham, Esq.