

**IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND**

CHRISTOPHER S. WEAVER :  
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 Plaintiff & Counter-Defendant :  
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 vs. : Civil No. 238840  
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 ZENIMAX MEDIA, INC. :  
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 Defendant & Counter-Plaintiff :  
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**MEMORANDUM OPINION**

On December 13, 2002, the plaintiff, Christopher Weaver (hereinafter “Weaver”), filed suit against his former employer ZeniMax Media Technology (hereinafter ZeniMax) in Montgomery County alleging he had been constructively terminated. Weaver asserts he is entitled to receive the One Million Two Hundred Thousand Dollar (\$1,200,000.00) severance payment as specified in clause 4.3 of Weaver’s Executive Employment Agreement. The merits of this case have not yet been reached. The matter before this Court currently is a potentially dispositive motion for sanctions filed by the defendant corporation. ZeniMax argues that Weaver should not be allowed access to this forum because of certain egregious conduct which began during his employment and later came to light in the course of discovery.

A two-day evidentiary hearing began on April 1, 2004, and continued on May 5, 2004 in connection with the defendant's motion. Because this is a case of first impression in Maryland, the Court invited the parties to submit supplementary briefings prior to the first hearing date. After considering the evidence submitted in this matter and the papers filed by both sides, the Court finds the plaintiff's conduct amounts to civil vigilantism and agrees with the defendant that the plaintiff's actions ought to bar him from accessing this forum. Accordingly, ZeniMax's Sanctions Seeking Dismissal of the Plaintiff's First Amended Complaint Due to Discovery Abuses is GRANTED.

Facts:

ZeniMax Media Technology, the defendant corporation in this case, was created in 1999 by both Robert Altman (hereinafter "Altman"), who has been CEO of the corporation since its inception, and the plaintiff, Christopher Weaver. According to testimony, Weaver was to handle the technical side of the business and subsequently was named the Chief Technological Officer or CTO. Altman, a lawyer and businessman, was to be the chief administrator. Altman and Weaver were both made large

shareholders<sup>1</sup> in the new company and both continue to serve on the Board of Directors to this day.

The history of Weaver's employment with ZeniMax is a rocky one. By the summer of 2001, according to testimony, the research and development department had been closed down and September 2001 had not been a good month financially for the company. Disagreements, which arose regarding Weaver's teaching obligations at the Massachusetts Institute of Technology (MIT) and the expenses associated with his teaching, came to a head at the end of September. On Friday, September 28, 2001, Weaver received notice from Ms. Jasmine Flores, who worked in ZeniMax's Human Resources department that the company would no longer allow Weaver to teach on company time. This is ostensibly the trigger that set off the conduct that has the parties before the Court today.

Weaver testified that as a reaction to his conversation with Ms. Flores, he decided to take an immediate look at his employment agreement, which he believed gave him a right to teach at certain named institutions including MIT. Copies of these agreements were maintained in a binder in the office of G. Griffen Leshner, ZeniMax's General Counsel.

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<sup>1</sup> Mr. Weaver holds approximately 33% of ZeniMax's stock, while Mr. Altman holds slightly less than this amount. Mr. Ernest Del, President of ZeniMax, is also a large shareholder and board member.

Weaver testified under oath that he entered Leshner's office on that same Friday for the purpose of viewing his employment agreement.<sup>2</sup> In this same binder were copies of the employment agreements of Altman and Mr. Ernest Del, President of ZeniMax. Though Weaver, as a member of the board, had approved both of these agreements during an early board meeting, Weaver testified that he was surprised to learn that Altman's agreement was very different from his own. Specifically, he noted that Altman's agreement contained "lots of perks" and had been signed by Del. Weaver stated he had believed that he and Altman had intended to be equals in this venture and he was angered to learn that he had been, in his estimation, deceived by Altman.

Angered by what he had read Weaver testified that he went to the office that weekend and accessed Altman's office without authorization using a master key. Weaver's testimony regarding the exact details of this incursion is not reliable as his story on this subject has changed a number

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<sup>2</sup> The Court finds it interesting to note that the Plaintiff's Supplementary briefing to the Court on the Defendant's Motion for Sanctions dated March 26, 2004, states Mr. Weaver entered Leshner's office on this day "to review the minutes from Board meetings" and that Mr. Weaver "reviewed, and made copies of, the minutes." Plaintiff & Counter-Defendant Christopher S. Weaver's Memorandum in Response to Arguments Raised at the February 27, 2004 Hearing and Requesting Summary Denial of ZeniMax Media, Inc.'s Motion for Sanctions Seeking Dismissal of Plaintiff's First Amended Complaint Due to Discovery Abuses, Mar. 26, 2004, p. 7. This does not exactly match the testimony of the plaintiff during the evidentiary hearing held on the record on April 1, 2004.

of times. He has, under oath, both denied this conduct and rationalized it with a variety of explanations. As such, the Court has a hard time taking his current testimony at face value.

Counsel for both sides, however, do essentially agree on a rough timeline for Weaver's illicit activities. Weaver first improperly accessed Altman's office and logged onto Altman's computer using Altman's personal user id and login during the weekend of September 29, 2001. Weaver has admitted that he ran searches on Altman's email files looking for any information which included Weaver's name and other information that Weaver felt pertinent to his personal situation. We cannot know all that he saw, because even Weaver admits he did not print out all the emails he saw during this unauthorized foray. Business records from Weaver's attorney, Mr. Ronald Early, however, demonstrate that Weaver first contacted Mr. Early on Monday, October 1, 2001.<sup>3</sup> Documents eventually produced by the plaintiff after his misconduct was brought to light during deposition reveal that Weaver again improperly entered Altman's office on Tuesday, October 2, 2001, and again accessed his computer using Altman's identifiers and without Altman's knowledge or permission.

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<sup>3</sup> The Court heard no evidence to suggest that Mr. Early or his firm engaged in any misconduct at any point in this litigation. The Court takes note of this date, however, because it is significant evidence that Weaver, from the beginning of his personal misconduct, was contemplating litigation.

These same documents demonstrate that Altman's office is not the only office Weaver entered improperly; documents printed under the identifiers of both Mr. Leshner and Ms. Cindy Tallent, ZeniMax's Chief Financial Officer, were subsequently produced by the plaintiff. Furthermore, some of these documents bear dates revealing that Weaver accessed the offices of others over a course of several months until ZeniMax changed the office locks in May 2002. Plaintiff's counsel during closing arguments conceded that Weaver had improperly accessed Altman's computer "four or five times" in total.

Ultimately, Weaver has admitted under oath to entering the offices of other ZeniMax executives without their permission or authorization; accessing their computers under their own logins; searching and scanning their entire email caches for any material relating to his personal interests; printing out hundreds of these emailed documents, not for corporate reasons, but for personal purposes; and lastly, taking a confidential document from the office of Altman. Weaver has also admitted that he reviewed some or all of this material prior to his first deposition. He has also testified that the reason he repeatedly engaged in this misconduct, hid his actions and lied under oath about these deeds was to protect himself from Altman and ZeniMax. Weaver, according to his testimony, felt that

Altman “was out to get him.” Weaver has also stated it was his intention to disclose that he had these pilfered documents *after* Altman had his own deposition. Weaver testified that he felt sure that Altman would lie at his deposition and that Weaver could impeach Altman’s testimony with these documents in such a situation. In the end, Weaver’s fervent and misguided belief that these documents would protect him in this litigation demonstrates that he deliberately and willfully engaged in what this Court can only describe as civil vigilantism and requires this Court to dismiss his complaint.

Legal Precedent:

This is a case of first impression in the state of Maryland. Facts such as these rarely present themselves in a court of law. For precedent, this Court looks to the case law in its sister jurisdictions of California, New Jersey, and New York, as well as the U.S. District Courts for the District of New Jersey and the Western District of Washington. The Court reviewed the facts and legal reasoning behind seven cases with a similar factual predicate. We now turn to a discussion of each of these cases in chronological order.

***Joan C. Lipin v. Robert M. Bender, Jr., et al.***<sup>4</sup>

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<sup>4</sup> 193 A.D.2d 424 (Supreme Ct. NY, App. Div. 1<sup>st</sup> Dept., 1993).

The plaintiff in this matter, Joan Lipin, had been terminated from the American Red Cross in Greater New York (NYRC). She brought suit in state court in New York for sexual harassment and discrimination against her former employer. Having taken a position as a paralegal with her attorney, Lipin was seated next to her attorney at a hearing between the parties before a special referee to argue discovery matters. During these proceedings, a stack of documents consisting of hundreds of pages was inexplicably placed in front of the plaintiff. “The documents contained a series of internal memoranda prepared by counsel containing notes of various interviews with defendant Bender and other individuals employed or associated with NYRC concerning this action.”<sup>5</sup> While counsel argued the matter before the special referee, the plaintiff took these documents off the table and surreptitiously read them under the table and out of view of opposing counsel.

Lipin’s testimony stated that after reading these documents: “I decided that I was going to obtain possession of these papers for my own protection.”<sup>6</sup> During the luncheon recess the plaintiff went to her counsel’s office and made copies of the documents. Immediately following the conclusion of arguments before the special referee, Lipin informed her

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<sup>5</sup> *Id.* at 425.

<sup>6</sup> *Id.*

attorney of what she had learned and how she had done so, stating that she was horrified by the statements of the witnesses contained in the memos. Her attorney refused at that time to read the documents until he obtained a “second opinion.”

Two days later another attorney did review the papers. He testified he believed these documents contained evidence of a “conspiracy to ruin [the plaintiff’s] career.”<sup>7</sup> He then conferred with the referring attorney and together the two

formed the opinion that they were entitled to retain the documents under a claim of right and that any claim of confidentiality had been waived in view of the circumstances of discovery of the documents – that they had been left unsecured, directly in view of the plaintiff, in a public area, such that plaintiff had been ‘invited’ to read the documents.<sup>8</sup>

Plaintiff’s counsel then requested a settlement conference based upon the information gleaned from these materials and made significant demands based on the disclosure of this information. Defense counsel demanded both the return of the papers as well as an explanation of how they came into the plaintiff’s possession. Plaintiff’s counsel refused to

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<sup>7</sup> *Id.* at 426.

<sup>8</sup> *Id.*

comply with both demands, stating that he had no control over his client, “who could conceivably give the documents to the mass media.”<sup>9</sup>

Defendants then sought to suppress the privileged documents, disqualify plaintiff’s counsel, and impose sanctions. After testimony in an evidentiary hearing, defendants moved to amend their motion to seek dismissal of the complaint. Reading his decision into the record, the lower court held “I have to conclude that the actions of the plaintiff were so egregious in taking this material . . . so heinous that the only remedy, as much as I dislike to do this, is to dismiss the lawsuit.”<sup>10</sup>

On appeal, the Supreme Court of New York affirmed the lower court’s ruling finding that “it was the plaintiff herself who seized the opportunity presented to obtain *an unfair advantage over her adversaries in this litigation.*”<sup>11</sup> The plaintiff had argued that the lower court had exceeded its discretion, contending that the statute in question did not provide for dismissal of a complaint as a remedy to discovery abuses. The appellate court disagreed. “Under the unique circumstances presented, particularly the sort of willful misbehavior engaged in by plaintiff and her attorney, we

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<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 427.

<sup>11</sup> *Id.* (emphasis added).

conclude the IAS Court did not improvidently exercise its discretion in invoking the drastic sanction of dismissal of the complaint.”<sup>12</sup>

***Michael Perna, et al. v. Electronic Data Systems Corp.***<sup>13</sup>

This dispute arose over a contract formed by Michael Perna individually and Michael D. Perna and Associates (a legal partnership) with the defendant Electronic Data Systems Corporation. This case has a complicated procedural history which is not necessary to review for our purposes today. It suffices to note that on June 6, 1993, counsel for the defendants conducted a document inspection at the plaintiffs’ place of business. The relevant misconduct occurred at this inspection.

The facts of the incident are as follows. Defense counsel were situated in the office of one of Perna & Associates’ employees. Document inspection commenced with defendants’ representatives and plaintiffs’ counsel all present. Defense counsel had brought with them three briefcases containing, among other things, work product documents. At an appropriate time in the day, counsel for both parties broke for lunch. Instead of lugging their briefcases to lunch with them, defense counsel left these materials in the office where the inspection was ongoing. The cases

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<sup>12</sup> *Id.* at 428.

<sup>13</sup> 916 F. Supp 388 (D. NJ, 1995).

were closed and counsel clearly did not relinquish any claim of privacy over their belongings by leaving them in this office.

While counsel were at lunch, Perna entered the office in question to make photocopy for a client. Perna was aware that a document inspection was taking place there. According to testimony, he noticed some briefcases stacked on top of one another along side of a desk and that one fell over, scattering papers on the floor. Plaintiffs argue that Perna had no idea to whom these briefcases belonged at the time that one fell and that his only intention was to clean up the mess of papers. However, upon picking up some of the papers he noticed the words “weasel out of” and at this point realized the documents belonged to the defendant. Rather than stop reading immediately Perna’s “instinctive reaction” was to browse through the papers. He gathered a stack of papers approximately an inch and a half thick and made copies of this stack. That he knew his conduct was improper is evidenced by the fact that he solicited his partner Mr. Louis Pantalone to stand watch at the door. Perna then took the photocopies to lunch and read them all.

When counsel returned from lunch, Pantalone, who was unaware of the exact nature of Perna’s actions, nevertheless was able to inform their

counsel that Perna has “some stuff that I think would be interesting.”<sup>14</sup>

Upon Perna’s return, however, he informed Pantalone that “unfortunately everything [he] made copies of and [he] was looking at is nothing that we don’t already have, outside of that letter, which, you know, stated something about manuals or whatever.”<sup>15</sup> Plaintiffs contend that Perna then threw the photocopies away.

Pantalone then told his personal attorney about these events. To her credit, the attorney realized that an ethical violation may have been committed and related these events to plaintiffs’ counsel, Mr. Mark Soifer. Soifer then contacted Perna and Pantalone to discuss the incident and at this time learned that photocopies had been made. Soifer, uncertain as to whether his client has engaged in improper conduct, contacted defense counsel and informed them that an unspecified ethical issue had arisen and asked for a temporary stay of all proceedings pending an opinion from the New Jersey Supreme Court Advisory Committee on Professional Ethics.

The ensuing opinion ruled that counsel for the plaintiffs’ had an obligation to disclose “that the contents of [defense counsels’] briefcases

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<sup>14</sup> *Id.* at 393.

<sup>15</sup> *Id.*

may have been reviewed by plaintiffs during the document inspection and that copies of the contents thereof may or may not have been copied.”<sup>16</sup>

Upon disclosure, defense counsel filed a motion to dismiss asserting that such action was “the only viable sanction to redress plaintiffs’ conduct, and unless the plaintiffs’ actions are sanctioned, the entire proceeding will be irreparably tainted.”<sup>17</sup> Defense counsel argued that it was the intrusion and improper access itself, irrespective of the substantive content of the documents that warranted dismissal. Plaintiffs countered that the Court ought not to impose such a harsh sanction when nothing prejudicial was obtained by Perna’s unauthorized access.

U.S. Magistrate Judge Joel B. Rosen issued his report and recommendation in this matter. Judge Rosen found that dismissal was an appropriate exercise of the Court’s “inherent power in extreme circumstances, in response to abusive litigation practices, and to insure [sic] the orderly administration of justice and the integrity of the court’s order.” He noted, however, it was imperative that such power be exercised with restraint and discretion.

To reach his decision in the case before him, Judge Rosen looked to federal case law existing in the Fourth and Ninth Circuits considering the

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<sup>16</sup> *Id.* at 393-394.

<sup>17</sup> *Id.* at 394.

factors to be weighed in a court's exercise of its inherent power to punish "the perpetuation of fraud upon the court."<sup>18</sup> In synthesizing these cases, Judge Rosen set forth six relevant criteria required for the exercise of a court's inherent power.

- I. The existence of certain extraordinary circumstances;
- II. The presence of willfulness, bad faith, or fault by the offending party;
- III. The consideration of lesser sanctions to rectify the wrong and to deter similar conduct in the future;
- IV. The relationship or nexus between the misconduct drawing the dismissal sanction and the matters in controversy in the case;
- V. Prejudice and the public interest; and
- VI. The degree of the wrongdoer's culpability.

Reviewing Perna's conduct in light of these six factors, Judge Rosen found the circumstances were "definitely extraordinary." He particularly noted four facts: (1) Perna was a businessman familiar with litigation; (2) he knew the document inspection was ongoing in the office in question; (3) he was aware that defense counsel's belongings were left in the office during the lunch break; and (4) he posted a lookout to ensure his actions were not

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<sup>18</sup> *Id.* at 398.

immediately discovered. The judge concluded “the inappropriateness of his knowing and willful act is extreme in and of itself.”<sup>19</sup>

Unsurprisingly, based on his former finding, Judge Rosen found Perna’s conduct was willful and in bad faith.

This is not a situation where Mr. Perna inadvertently stumbled upon the documents, and immediately informed his attorney that he may have mistakenly gained access to the defenses [sic] materials. This is a scenario where Mr. Perna knew what he was doing. He knew his actions were inappropriate. . . . His intentions “were to find out how [the defendant] was trying to deceive [him].” . . . Mr. Perna was taking whatever measures he could to prevail in this lawsuit.<sup>20</sup>

The Court also found that no lesser sanctions would rectify the wrong perpetrated by Perna. Judge Rosen found that it was Perna’s acts, in and of themselves, that constituted a fraud upon the court, and that his acts necessitated discipline.

He then considered the effects of lesser sanctions, rejecting them all, and concluding that nothing less than dismissal would suffice because Perna’s conduct was undeniably “a calculated scheme to subvert the litigation process.”<sup>21</sup>

Regarding the nexus between the sanction imposed, the misconduct committed and the matter before the Court, Judge Rosen conducted an *in*

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<sup>19</sup> *Id.* at 399.

<sup>20</sup> *Id.* at 400.

<sup>21</sup> *Id.* at 401.

*camera* review of the index to the documents that were at the inspection site. Ultimately, however, the Court found that the substance of what was viewed was not dispositive of whether to impose sanctions for two reasons. First, the act itself was materially connected to the matter before the Court because this sort of conduct threatens the integrity of the judicial system. Secondly, there was no way for the Court to determine which documents were actually viewed. The only source for this information was the testimony of Perna himself. “Simply stated, Mr. Perna’s testimony lacked credibility. His testimony was inconsistent with his certification, the information contained in the plaintiffs’ brief, and the statement of facts described to the Advisory Committee by his attorney.”<sup>22</sup> Thus, the Court concluded, there was no way to know what he saw, copied, or retained in his memory, if anything. Reaching this conclusion, the Court found the nexus requirement was satisfied by the act alone.

Because there was no way for the Court to know what content was reviewed by Perna, one can never know whether actual prejudice arose. The Court held that in such circumstances “*prejudice must be presumed or at the very least not eliminated as to the defendant.*”<sup>23</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.* (emphasis added).

Our system is built on rules and procedures. Litigants who bring matters before this court must conduct themselves in an appropriate fashion. The behavior of Mr. Perna cannot be condoned. To impose a less serious sanction would send the wrong message to Perna and other litigants. . . . Litigants who avail themselves to the jurisdiction of the court to seek redress must conduct themselves within the orderly administration of justice and the rules of the court.<sup>24</sup>

Lastly, the Court looked to the degree of Perna's culpability. Here, Judge Rosen noted that Perna made an individual decision to photocopy and review the defendant's documents. Plaintiffs' counsel bore no culpability; their actions were appropriate and laudable. It is, thus, Perna himself who must shoulder the burden of the consequences of his misconduct.

Having analyzed Perna's behavior in light of the six relevant criteria, the Court found "all of the factors herein have been satisfied." Accordingly, the Court dismissed Perna's individual claim and held Perna and Pantalone jointly and severally liable for the expenses borne by the defendant for filing the instant motion and litigating this issue.<sup>25</sup>

***Wole Fayemi v. Hambrecht & Quist, Inc.***<sup>26</sup>

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<sup>24</sup> *Id.*

<sup>25</sup> As to the partnership's claim, the Court ordered a jury instruction to be read at trial to make the jury aware of the improper conduct of Perna and Pantalone as it related to the pair's credibility. *Id.* at 403.

<sup>26</sup> 174 F.R.D. 319 (S.D. NY, 1997).

Fayemi brought this action in federal court alleging that his former employer Hambrecht & Quist, Inc. (H & Q) had unlawfully terminated him on the basis of race, national origin and disability. Defendants moved to dismiss his complaint or, alternatively, to suppress evidence which they argued Fayemi had stolen from the company the weekend prior to his dismissal. It was undisputed that Fayemi had entered the office that weekend and obtained information about employment bonuses from the computer files of his supervisor, D. Larry Smith, making and retaining copies of this information for himself. Fayemi testified that he copied this information because “he was afraid that it would otherwise be destroyed.”<sup>27</sup> In this case, Fayemi’s belief was borne out as this information was subsequently discarded when Smith left his employment at H & Q in May 1995.<sup>28</sup> Though this suit had been filed in October 1994, no one requested that Smith preserve any documents at any time.

In its discussion of inherent authority, the Court, citing a variety of authority, stated “courts necessarily have the inherent equitable power over their own process ‘to prevent abuses, oppression and injustices.’”<sup>29</sup> Given this, the Court held that a court was permitted to use its inherent equitable

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<sup>27</sup> *Id.* at 323.

<sup>28</sup> There is no indication that this loss was incurred with the intent to deprive the plaintiff of this information. Rather, Smith discarded all his files upon the end of his employment. *Id.*

<sup>29</sup> *Id.* at 324.

powers to sanction a party seeking to use evidence in litigation that was wrongfully obtained.

Turning to the appropriate sanction, the Court concluded that dismissal in this case was not warranted. While the Court found that Fayemi's conduct was clearly wrongful and sufficiently serious to warrant a significant sanction, the Court wrote "there is little, if any, continuing prejudice to the defendants."<sup>30</sup> The Court found the ultimate discoverability of the information in question distinguished this case from *Lipin v. Bender*.<sup>31</sup> Additionally, the Court found the alternative remedy of precluding the use of this information in litigation would be sufficient to redress the plaintiff's misconduct in this matter. The Court, however, refused to impose this sanction because the defendant, though on adequate notice of Fayemi's suit, failed to take the appropriate precautions to ensure any relevant information was not lost.

***Maria Tartaglia v. Paine Webber, Inc. & Herb Janick (I)*<sup>32</sup> & *(II)*<sup>33</sup>**

This matter was first heard by the Law Division of the Superior Court of New Jersey upon defendant's motion seeking, by way of sanction,

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<sup>30</sup> *Id.* at 326. Notably the Court here does not indicate whether prejudice to the defendant was presumed in this matter as suggested by the *Perna* court. The Court's opinion, however, can be read to infer that prejudice was presumed but the presumption was overcome by the plaintiff.

<sup>31</sup> See discussion *supra* p. 8

<sup>32</sup> 775 A.2d 786 (Superior Ct. NJ, Law Div., Hudson Cty., Civil Pt., 2001).

<sup>33</sup> 794 A.2d 816 (Superior Ct. NJ, App. Div., 2002).

dismissal of the plaintiff's complaint, the immediate return of all documents at issue, a permanent injunction against the plaintiff's dissemination of the documents or their contents, and attorneys' fees. The lower court decision was subsequently appealed to the Appellate Division of the Superior Court of New Jersey. For the purposes of this discussion the cases will be denoted *Tartaglia I* and *Tartaglia II*, respectively.

Maria Tartaglia filed suit against Paine Webber, Inc., her former employer, on the grounds that her termination was unlawful and violative of New Jersey's Law Against Discrimination. Paine Webber sought these sanctions upon learning of the plaintiff's possession of five separate items, though the *Tartaglia I* Court only found two of the documents relevant. These two documents were (1) a 1997 memo to file authored by defendant Janick and (2) a computer generated employee information list. Tartaglia obtained the former during her employment and the latter after her termination.

The 1997 Memo was located within the computer and, according to its author Janick, should have been accessible only by him and the company's computer systems administrator. Tartaglia contended the file was among other word processing files that appeared on her computer screen in her Paine Webber office. Regardless, it was undisputed that the

file was clearly labeled “CONFIDENTIAL ATTORNEY WORK PRODUCT MATERIAL.” The *Tartaglia I* Court found this document was in no way related to the plaintiff’s employment responsibilities. Furthermore, it held plaintiff had appropriated this document for purely self-serving motives, namely “to advance and support the legal claims she anticipated bringing against defendant.”<sup>34</sup> The computer generated employee information list was sent to plaintiff by an undisclosed “friend” within the company’s legal department. Again, the *Tartaglia I* Court found plaintiff appropriated this information because she thought it would be useful in pursuing legal claims against her former employer.

The *Tartaglia I* Court found plaintiff’s conduct constituted “an act of lawlessness with clear criminal implications.”<sup>35</sup> Furthermore, the Court wrote: “Plaintiff, who now stands before this court seeking vindication of her legal rights, showed a callous disregard for the rights of others and an unflinching willingness to subordinate their interests to serve her own needs.”<sup>36</sup> In spite of these findings, the Court struggled with the appropriate sanction to impose because it concluded the misconduct here occurred “pre-litigation.” The *Tartaglia I* Court chose, therefore, to fashion

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<sup>34</sup> *Id.* at 789.

<sup>35</sup> *Id.* at 790.

<sup>36</sup> *Id.* at 791.

its sanction with reference to three guiding principles. The sanction must promote and safeguard the policies of uniformity, predictability, and security which provide for the efficient and orderly administration of civil disputes. Additionally, it must remove the taint this evidence would impart to the judicial process if permitted to be included in the plaintiff's case. Lastly, "it must deter this type of unilateral, self-help, lawless behavior."<sup>37</sup>

Guided by these principles the *Tartaglia I* Court refused to dismiss the complaint but did exclude from trial the evidence gathered pursuant to plaintiff's lawless pre-litigation activities. On appeal, however, the *Tartaglia II* Court reversed the lower court's holding.

The appellate court, while noting the lower court's ruling was consistent with the policies of protecting judicial integrity and deterring litigant self-help, nevertheless ruled that the suppression of the relevant evidence was unwarranted in this case. The *Tartaglia II* Court reached this conclusion on the basis of two general contentions. First, the Court found the defendants in this case were not substantially prejudiced.<sup>38</sup> The plaintiff did not destroy or deprive the defendants of the two documents at issue, which at all times remained within the possession of the defendants.

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<sup>37</sup> *Id.* at 793.

<sup>38</sup> Unlike in *Perna*, the *Tartaglia* courts clearly do not apply a presumption of prejudice to the defendants in light of the plaintiff's actions. The Court, however, finds it notable that here the parties mutually agree that the universe of materials at issue is limited and definite.

Furthermore the *Tartaglia II* Court could not pinpoint any sort of unfair advantage gained by the plaintiff through her possession of these documents. Secondly, the Court held there was “no basis in these circumstances to suppress any evidence which tends to preclude the development of the true and relevant facts, particularly when the documents are inevitably discoverable.”<sup>39</sup> The Court noted illegally obtained evidence is generally deemed inadmissible only in the context of criminal prosecutions. The policy rationale behind such suppression is to deter police and government officials from infringing the constitutional rights of individuals. As civil litigation does not present this same constitutional threat, the *Tartaglia II* Court found the significance of the method by which the plaintiff obtained these materials failed to overcome the significance of their probative value at trial. The appellate court specifically highlighted that the lower court had found the two documents would have been discoverable in the normal course of litigation. Based on this line of reasoning the *Tartaglia II* Court reversed the lower court’s suppression order and remanded the case.<sup>40</sup>

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<sup>39</sup> *Id.* at 821.

<sup>40</sup> The *Tartaglia II* opinion expressly stated it did not preclude the imposition of other sanctions nor did it preclude defendants from pursuing any further remedies they believed appropriate in light of plaintiff’s alleged wrongful acts.

***Rahn D. Jackson, et al. v. Microsoft Corp.***<sup>41</sup>

Mr. Jackson was an employee at Microsoft until he left his position there in 2000 and went to work for its competitor, Sun Microsystems. He subsequently filed suit in federal district court in California against his former employer alleging violations of Title VII of the Civil Rights Act.

Ten months after his departure from the defendant corporation, the plaintiff sat for a deposition. At that deposition, plaintiff turned over to Microsoft materials that had been stolen from the company, some of which were documents that had been altered or partially destroyed. In response the defendant filed a motion to dismiss as a sanction. The Court ultimately granted this motion finding that Jackson had not only unlawfully obtained proprietary materials from Microsoft but also had “perpetuated a lengthy series of elaborate misrepresentations and lies to both the Court and counsel.”<sup>42</sup>

Over the course of two evidentiary hearings the Court determined that Jackson had inappropriately acquired two compact discs (CDs) containing around 10,000 email messages, some of which contained significant amounts of privileged and other sensitive information, including trade secrets, confidential employment information, and attorney-client

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<sup>41</sup> 211 F.R.D. 423 (W. D. WA, Seattle Div., 2002).

<sup>42</sup> *Id.* at 425.

communications between management officials and counsel. Among these emails were communications concerning Jackson's job performance.

The plaintiff first disclosed to the defendant these materials were in his possession during the first day of his deposition. He then turned the first CD over to Microsoft that day and the second CD on the second day of his deposition along with the hard drive to his laptop computer and all hard copies of any and all Microsoft files in his possession as requested by the defendant. Experts later testified that they had determined the CDs had been created the day before Jackson left Microsoft and that the information contained therein had been copied to Jackson's laptop computer later that same evening. In addition to the CD information, Jackson turned over hard copies of emails that were not contained on the CDs. All of these emails had the top portion of the document removed so that one could not identify from whose computer they had been printed. Also among the hard copies were personnel records relating to various Microsoft employees that were not saved on the CDs.

During his deposition Jackson provided highly inconsistent testimony regarding the manner in which he obtained these various materials and the manner in which several of the documents had been altered and damaged. Later in a sworn declaration in opposition to the defendant's motion to

dismiss, Jackson's statements conflicted with statements he made while under oath at other times during the litigation. Jackson did admit to reviewing the content of the CDs and recognizing that some of the materials were attorney-client communications and personnel information. He also stated some of the materials supported the claims at issue in this litigation. At the second evidentiary hearing, Jackson "provided yet another version of events surrounding his acquisition of the CDs."<sup>43</sup> Nevertheless, the Court reached several conclusions based upon the record before it.

Mr. Jackson's conduct was willful and exemplifies the bad faith with which he has pursued this litigation. Although the parties have bickered for months over the exact manner in which Mr. Jackson obtained [the material on the CDs], there are some facts which are beyond dispute. Mr. Jackson received 10,000 E-mails from an unknown source. Those E-mails included Microsoft's proprietary secrets, Microsoft's confidential attorney-client work product, and confidential information regarding the evaluation and compensation of other Microsoft employees. Mr. Jackson paid \$1,000 for these CDs.<sup>44</sup>

The Court looked to Ninth Circuit precedent which set forth a five factor analysis governing a court's inherent power to sanction discovery violations. As stated in *Anhaeuser-Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 348 (9th Cir. 1995), these five factors are "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to

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<sup>43</sup> *Id.* at 429.

<sup>44</sup> *Id.* at 431.

manage its docket; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions.” The *Jackson* opinion emphasized prejudice and the availability lesser sanctions as the “key factors.”<sup>45</sup>

Ultimately the Court found Jackson’s ongoing conduct highly prejudicial and held that no lesser sanction was available to rectify his wrongdoing.

. . . Mr. Jackson’s conduct in obtaining (and in some cases altering) this vast quantity of Microsoft’s data was egregious in the extreme. A theft on this scale would be sufficient reason to justify dismissal. See, generally, *Perna v. Elec. Data Sys. Corp.* [citation omitted]. Plaintiff’s secretive behavior and clear reliance on the stolen documents in the preparation of his case only makes dismissal more appropriate. Sadly, Mr. Jackson’s misconduct did not cease when he finally turned over the stolen materials to their rightful owner. Beginning at least with his deposition, Mr. Jackson told an ever more elaborate series of lies about his misconduct. This began with Mr. Jackson’s perjured statements at his deposition, and continued through a sworn declaration and two separate evidentiary hearings.

. . . Courts have inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice. Mr. Jackson’s attorney . . . urged the Court “not to cut off [Mr. Jackson’s] ability to seek justice.” Based on Mr. Jackson’s astonishing pattern of deceptive acts and fraudulent testimony, the Court finds no assurance that a trial in this matter would indeed be a fact-finding endeavor.<sup>46</sup>

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 431-432.

***Stephen Slesinger, Inc. v. The Walt Disney Co.***<sup>47</sup>

The underlying suit between Stephen Slesinger, Inc. [SSI] and the Walt Disney Co. [Disney] pertained to contractual agreements between the two companies. Evidence demonstrated that at some point after commencing this litigation, SSI hired an investigator, Mr. Terry Sands, to procure Disney documents outside of the regular course of discovery. These documents were then given to SSI's lawyers and Mr. David Bentson, the husband of Ms. Patty Slesinger, SSI's sole shareholder. From these surreptitious forays, primarily into various dumpsters and trash collection sites, Sands retrieved a number of privileged Disney documents relevant to this suit, which SSI lawyers accepted and then utilized to prepare for the case. There was clear evidence of a conspiracy to prevent the discovery of this conduct. The Court expressly disavowed SSI's representations that these materials were lawfully obtained and flatly doubted that all involved documents had either been disclosed to the Court or discarded by SSI.

SSI justified its actions by stating that it was not responsible for any illegal actions undertaken by Sands asserting its agents had expressly directed that he use only lawful means to obtain Disney documents. Yet, as the Court notes, "while SSI closed its eyes to Sands' activities, it paid

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<sup>47</sup> Case No. BC 022365 (Superior Ct. CA, LA Cty., 2004).

close attention to the fruits of his labor.”<sup>48</sup> Incredibly, SSI claimed privilege for the notes SSI attorneys made on the Disney documents that Sands improperly obtained and SSI redacted all such marginalia. This stance justly infuriated the trial judge, Charles W. McCoy, Jr. After recounting this behavior in his opinion, Judge McCoy writes: “One must pause here. Conduct of this sort strikes at the heart of the judicial process. Lay persons know that. Lawyers do too.”<sup>49</sup>

Turning to Judge McCoy’s legal analysis, he reviewed the standards governing courts’ inherent powers in California state court, noting such power exists to control the proceedings and to make orders “which prevent the frustration, abuse, or disregard of the court’s processes.”<sup>50</sup> These powers exist apart from legislative grant, but must only be exercised as a last resort, when lesser sanctions are inadequate.

He then evaluated whether any appropriate lesser sanctions existed and dismissed them all in turn. The Court expressed little confidence that an order to return all Disney documents to the defendant would be fully honored. Nor could the mental impressions and opinions formed in the minds of SSI principals be expunged. Thus, the wrongdoers would still

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<sup>48</sup> *Id.* at 11.

<sup>49</sup> *Id.* at 13.

<sup>50</sup> *Id.* at 26.

have access to the fruits of their illicit acts. Neither court orders nor curative jury instructions could remedy this injury. The Court also rejected disqualifying counsel.<sup>51</sup> Though the Court felt monetary sanctions were appropriate, alone they were insufficient. Divesting SSI's principals of money would not divest their minds of their ill-gotten gains of relevant information. Nor did the Court believe that such punitive fines would deter SSI from committing similar future abuses, finding SSI was dishonest and lacked remorse for its actions.

The Court then turned to evaluating the heavy burden of clear and convincing evidence borne by defendant. In California, terminating sanctions required Disney to overcome both the burden of persuasion and proof by this standard. The Court found Disney's evidence compelling and SSI's misconduct willful, tactical, egregious and inexcusable. As such, Judge McCoy wrote that in this instance terminating sanctions were not merely punitive but restorative and prophylactic because SSI's actions both threatened and abused the integrity of the judicial process. He granted Disney's motion to dismiss.

#### Applicable Legal Framework:

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<sup>51</sup> Counsel for SSI at the time the opinion was rendered had been recently obtained and not the counsel who had been parties to the abuses complained of by Disney.

Having reviewed the above cases, the Court notes the case at bar is unique in its own right and can be distinguished from all of these other precedents. There is no dispute that Weaver's conduct began during his employment and prior to the filing of his suit. The Court, however, is not convinced that this fact alone magically transforms this matter into a case of purely pre-litigation conduct. In fact, the Court is persuaded by the evidence that Weaver continued his course of illicit conduct specifically with the aim of obtaining materials that would be useful to him in future litigation with ZeniMax. From the evidence presented at the hearings the Court believes that Weaver fully anticipated filing suit against ZeniMax as early as October 2001 if his employment demands were not met.

While no other plaintiff engaged in such prolonged misconduct, the Court finds that Mr. Weaver's actions and motives most closely resemble that of the plaintiffs in the *Microsoft*, *Perna*, and *Lipin* cases. In each of these cases the plaintiff specifically undertook an illegal and improper course of action to gain a strategic litigation advantage against its adversary. The fact that these plaintiffs all seem to suffer from the misapprehension that such conduct could be mitigated or even condoned because he or she believed the other party was out to get him or her only demonstrates each plaintiff's willingness to subvert the judicial system to

achieve his or her own personal aims. This is quite simply civil vigilantism regardless of when the conduct began. It is the act alone that offends justice and the Court cannot rationalize such a perversion of its process because the initial actions first occurred prior to the filing of a suit.

As such, the Court expressly rejects the reasoning advanced by both *Tartaglia* courts which distinguished the conduct in that case on the basis that it occurred “pre-litigation.” As was eloquently stated by ZeniMax’s counsel during closing arguments, it is absurd to draw an arbitrary line between conduct that occurs before the date a suit is filed and conduct that occurs afterwards. Such a rule invites the unscrupulous litigant to engage in willful misconduct prior to a suit’s filing and not risk dismissal. Justice should not seek to reward the illicit actions of a sophisticated thief by punishing his conduct less severely than an inept one.

Having concluded the plaintiff’s act, regardless of the date it first commenced, is a proper subject for the Court’s consideration, the Court now sets forth the criteria we believe govern the exercise of its inherent authority over the judicial process.

First, we confront a threshold question. As the defendant in this case asks the Court to act in this matter outside of the constraints of binding common or statutory law, the Court must initially reach the conclusion that

such extraordinary circumstances are present which warrant the exercise of the Court's inherent authority to safeguard the integrity of its judicial process. If such circumstances are present, then the Court must consider the following five questions.

- I. Did the plaintiff act willfully, wrongly, and in bad faith?
- II. Does an adequate nexus exist between the misconduct precipitating the motion for the dismissal sanction and the matters in controversy in the case?
- III. Is the risk of prejudice to the party seeking sanctions impossible to discount absolutely or, alternatively, is the taint this evidence would impart to the judicial process impossible to remove if permitted to be included in the plaintiff's case?
- IV. In the absence of sanctions would the promotion and safeguarding of the efficient and orderly administration of civil disputes be irrevocably undermined by the public policy favoring disposition of cases on their merits?
- V. Do no other lesser sanctions exist to account for and to deter this type of unilateral, self-help, and lawless behavior?

Only if each of these five questions is answered affirmatively is the Court then justified in exercising its inherent authority to dismiss the matter as a sanction.

Findings of Fact and Legal Analysis:

The Court finds the plaintiff engaged in a systematic, calculated, and months-long scheme to obtain an advantage in a litigation that he planned to file and pursue. The Court finds the evidence reveals that Weaver believed that he was being wronged by both his employer and Mr. Altman personally. Acting pursuant to this belief, Weaver incorrectly believed he had an unfettered right to uncover information relevant to his personal situation by initially accessing business records of the corporation without a prior written request<sup>52</sup> and later through illicit incursions into the offices, computers, and email accounts of at least three ZeniMax executives, Altman, Mr. Leshner, and Ms. Tallent.

During his incursions into these, and possibly other offices, Weaver scanned, at a minimum, hundreds of emails. While the Court finds his testimony highly self-serving and altogether unreliable, it does accept his

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<sup>52</sup> As a shareholder in the corporation, Weaver most certainly had and continues to have a right to review the business records of the corporation. §2-512 and §2-513 of the Corporations and Associations Article. When, as was the case in this instance, he sought to examine these records in a wholly private capacity, without following proper procedures and with an aim to benefit himself at a foreseeable disadvantage to the corporation, he was no longer acting in his corporate capacity and, as such, his access was clearly wrongful.

admission that he did not copy or print out every message or file that he accessed. Nevertheless, the documents he eventually produced in discovery amount to nearly an entire ream of paper. The Court does acknowledge that some of these documents are duplicates of other messages contained within the collection itself. Rather than mitigate his conduct, the Court finds these duplicates merely underscore the diligence with which he pursued his goal of seeking all information which pertained to his personal situation. He quite clearly used similar if not exact search terms in his computer assisted scanning of the email caches of each of his colleagues during each of his illicit incursions. He also admitted to reviewing these documents prior to his deposition and to planning to use them at a later date against Altman to gain a strategic litigation advantage.

It is also clear to the Court that Weaver, in spite of his rationalizations to himself and to this Court, was in fact aware that his conduct was wrongful. He confined his illicit incursions into the offices of the other ZeniMax executives to nights and weekends when his activities were less likely to be detected. He logged onto the computers of his colleagues under their own personal logins despite the fact he had administrator privileges on the network. The Court finds he used this access method specifically to avoid leaving easily traceable evidence of his improper

activity. Incredibly, Weaver's own words demonstrate that he understood that unauthorized access into the offices of others was inappropriate and would constitute a violation of the privacy of other ZeniMax employees. After the locks of the offices were changed in May 2002, Weaver's master key no longer worked. Incensed over the fact he was not given a new key, Weaver fired off an email demanding a new key and asserting "he has never violated the privacy of others." He later admitted that parts of that email were not true, but continued to insist that he was not untruthful when he wrote the email.<sup>53</sup>

Lastly, at least one of the documents improperly viewed and retained by Weaver was relevant to the underlying litigation and would likely have been appropriately deemed privileged, but for its disclosure through the plaintiff's illicit and improper actions. The document to which we refer is a copy of Weaver's employment contract with hand-written marginalia authored by Mr. Altman. At the hearing Weaver testified that he took this document from the trash can in Altman's office, though his assertions specifically regarding this document have been particularly prone to reassessment and rationalization. The comments written on the contract

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<sup>53</sup> It is this sort of self-serving rationalizing in which Weaver continued to engage throughout the course of his testimony during the evidentiary hearing before this Court. In light of the evidence presented during that hearing, the Court found, as noted earlier, Weaver to be a highly uncredible witness.

copy relate to the clauses that Altman believed should be changed in Weaver's upcoming contract. As the underlying matter in this litigation would revolve on the correct interpretation of Weaver's employment contract, Altman's notes and conclusions as the CEO would be highly probative of ZeniMax's position regarding key contract language.

Unfortunately for Mr. Weaver, these marginalia clearly appear to be written communications between a client – here ZeniMax, through Mr. Altman as its representative – with its attorney – here Mr. Leshner acting in his corporate capacity as ZeniMax's General Counsel. As such, this document ought to have remained confidential and likely would have but for the wrongful conduct of Mr. Weaver.

Having made these findings the Court now turns to the legal framework set forth above. Initially, it is to be noted that Zenimax is not asserting a simple "unclean hands"<sup>54</sup> equity defense. Rather, Zenimax strikes at the very core of the Plaintiff's claim because it asserts that the very legal process has been corrupted by the actions of the Plaintiff. Corruption of the legal process is to be distinguished from a litigant's unconscionable conduct, but unrelated to the very legal process intended to govern the rights of parties who bring their dispute to the court. Here,

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<sup>54</sup> Sometimes referred to as the "clean hands" doctrine.

the claim by Weaver is to recover on contract rights payable as a result of his termination. The relief sought is not equitable in nature and the equitable defense is not available. Additionally, the asserted defense in this case reaches beyond the scope of the equitable doctrine of “unclean hands.”

As to the threshold question, the Court unequivocally finds the plaintiff’s conduct in this matter rises to the level of extraordinary circumstances. It is, thankfully, rare that a court confronts facts similar to the one at bar. Even viewed in a light most favorable to the plaintiff, Weaver’s conduct clearly constitutes an unauthorized and improper intrusion into the offices, computers, files, email accounts, and trash bins of at least three ZeniMax employees. Alone this improper access would be extraordinary enough, but plaintiff compounded his error by printing, copying, and retaining a voluminous number of these documents, and by referring to his ill-gotten gains both before and during the course of this litigation. Therefore, the Court finds it necessary to evaluate the plaintiff’s conduct in light of the framework it has established and its findings of fact as set forth above.

I. *Did the plaintiff act willfully, wrongly, and in bad faith?*

Yes, the Court finds the plaintiff acted willfully, wrongly and in bad faith.<sup>55</sup>

II. *Does an adequate nexus exist between the misconduct precipitating the motion for the dismissal sanction and the matters in controversy in the case?*

Yes, the Court finds Weaver's conduct was specifically motivated by his misguided desire to protect himself from any potential impropriety by ZeniMax and/or Mr. Altman in a litigation that at the time had not even been filed. To achieve this aim, Weaver sought to uncover damaging evidence which would provide him a strategic advantage in litigation. He attempted to unearth this information through his illicit incursions and improper acquisitions of hundreds of documents. As the matters in controversy in this case relate to a dispute over his personal employment contract, Weaver's very act of seeking such an advantage by illicit actions outside of the normal discovery procedures constitutes an adequate nexus over which the Court may exercise its inherent authority.

III. *Is the risk of prejudice to the party seeking sanctions impossible to discount absolutely or, alternatively is the taint this evidence*

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<sup>55</sup> The parties did not raise or argue the standard of proof necessary to resolve the issues before the court. This Court believes that the standard civil burden of "proof by a preponderance of the evidence" is the applicable and appropriate standard. However, the nature of the remedy of dismissal or some similar disabling action might require a higher burden of proof. Notwithstanding this belief, this Court notes that the factual matters upon which this Court took evidence would have been resolved in the same manner as set forth in this opinion using the "clear and convincing" standard.

*would impart to the judicial process impossible to remove if permitted to be included in the plaintiff's case?*

Yes. In circumstances like these where the defendant has shown the plaintiff has engaged in improper conduct and gained access to confidential and possibly privileged materials and the precise scope of knowledge acquired by the plaintiff's improper conduct is not determinable, this Court believes prejudice must be presumed. Although Weaver had an opportunity to overcome this presumption, we find he has failed to do so. It is impossible to rule out completely the risk of prejudice to the defendant, because no one but Weaver knows for certain what information he has improperly reviewed and may still retain in his memory. He has admitted that the materials he has turned over to opposing counsel do not encompass everything he saw, reviewed, or accessed, as he only copied or printed select materials. Thus, this Court can never know the extent to which the evidence in this case has been tainted by his illicit actions. Without being able to assess how and to what extent evidence at trial would be tainted, this Court cannot craft a means to remove such taint at trial.

*IV. In the absence of sanctions would the promotion and safeguarding of the efficient and orderly administration of civil*

*disputes be irrevocably undermined by the public policy favoring disposition of cases on their merits?*

Yes. Our judicial system is predicated upon the basis that disputes will be decided fairly and impartially, and that in general, decisions will be reached on the merits of the cases presented to the tribunal.<sup>56</sup> While public policy strongly favors deciding cases on their merits rather than arriving at a final disposition on another basis, this Court cannot disregard the fact that Mr. Weaver by his actions consciously attempted to tamper with the efficient and orderly administration of this dispute. He now seeks to access this forum and requests the opportunity to present evidence to the fact finder. This Court, however, is unable to ignore the incongruity of permitting a litigant, who has attempted to thwart the fair and efficient administration of justice to further his own purposes, to seek to vindicate his interests in the same forum he has attempted to undermine. We find that sanctions in this matter are not only appropriate, but imperative to ensure the legitimacy and fairness of this Court's processes.

*V. Do no other lesser sanctions exist to account for and to deter this type of unilateral, self-help, and lawless behavior?*

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<sup>56</sup> We qualify this statement as there are situations in which a court will not reach its decision on the merits of the case. Most commonly included in these situations are cases which have been filed without proper personal or subject matter jurisdiction or where the matters before the court are not justiciable.

Yes. This Court has concluded no sanction but dismissal exists to account for and deter the sort of premeditated, prolonged, and egregious conduct in which Mr. Weaver has engaged.

In response to the Court's inquiry regarding lesser sanctions, the plaintiff has advanced two alternatives. "One is to bar Mr. Weaver from utilizing some or all of the privileged documents which he obtained from Mr. Altman's computer."<sup>57</sup> The other would be a monetary sanction. We believe any monetary sanction should be nominal under the circumstances of this case."<sup>58</sup> The Court finds both of these proposals inadequate. Plaintiff's first suggested alternative only addresses the materials that Weaver has so far turned over to opposing counsel. It fails to remedy or protect against any taint in these proceedings stemming from information that Weaver may have seen but not hard copied. This remedy also fails to account for information that Weaver may have retained in his memory, from which he presumably could continue to benefit were the case to come to trial on the merits. Plaintiff's second alternative completely fails to address the taint. Furthermore, it incredibly suggests that one could buy himself out

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<sup>57</sup> The Court has chosen to read the plaintiff's use of the phrase "obtained from Mr. Altman's computer" to denote all materials improperly copied or printed by Mr. Weaver. It is clear from the evidence that these materials include more than just documents obtained from Mr. Altman's computer. We believe this was merely an inadvertent typographical misstatement.

<sup>58</sup> Letter to the Honorable Durke G. Thompson from Ronald L. Early, May 13, 2004, p. 4, ¶ 1.

of the consequences of deliberate interference and subversion of the judicial process with a “nominal” sum.

The Court believes a better discussion of possible lesser sanctions exists in the *Perna* decision. Striking the testimony of the offending plaintiff, ordering the plaintiff to obtain new counsel, assessing costs and fees alone, and administering a curative jury instruction were lesser all considered by the Court. Each was rejected.

Striking Mr. Perna’s testimony would be ineffective. Ordering Mr. Perna to obtain new counsel would likewise be ineffective as Mr. Perna would have already tainted the entire litigation process by this intrusion. Further, the assessment of costs and fees alone would be conveying a message to litigants that money could cure one’s improper acts. Finally, administering a jury instruction at trial . . . would be ineffective and not proportionate to the severity of his improper conduct.<sup>59</sup>

The Court believes the *Perna* Court’s assessment of lesser sanctions equally applies in this matter. Dismissal of this action is the only means at the disposal of this Court which adequately addresses the injury to both the defendant and to the integrity of judicial process itself which has been exacted by plaintiff’s deliberate, lawless, and unilateral actions.

Conclusion:

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<sup>59</sup> *Perna*, 916 F. Supp. 388, 400 (D. NJ 1995).

This Court, having considered all five factors controlling the inherent authority of a court to dismiss a matter as a sanction and reaching an affirmation conclusion in this matter regarding each factor, now exercises that authority. In accordance with the reasons set forth above, this Court grants defendant ZeniMax's Motion for Sanctions Seeking Dismissal of the Plaintiff's First Amended Complaint Due to Discovery Abuses pursuant to an order entered on this same date of September 3, 2004.

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DURKE G. THOMPSON, JUDGE  
Circuit Court for Montgomery  
County, Maryland