UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

REAL ESTATE INDUSTRY
SOLUTIONS, LLC,

Plaintiff/Counter-Defendant,

vs. CASE NO.: 6:10-CV-1045-ORL-22-GJK

CONCEPTS IN DATA MANAGEMENT
U.S., INC.,

Defendant/Counter-Claimant.
_____/

CDM'S MOTION TO IMPOSE DISCOVERY SANCTIONS AND FOR ADDITIONAL RELIEF

Pursuant to Rule 37(a) of the Federal Rules of Civil Procedure and Local Rule 3.04(a), Defendant/Counter-Claimant Concepts in Data Management U.S., Inc. ("CDM") moves on the following grounds for an order imposing sanctions on REIS and granting CDM various relief detailed below against Plaintiff/Counter-Defendant Real Estate Industry Solutions, LLC ("REIS") for a number of discovery abuses by REIS throughout this case. CDM seeks an order compelling REIS to preserve and collect documents from all of its agents, compelling answers to deposition questions, overruling REIS's meritless assertions of privilege and confidentiality to block discovery, compelling REIS to review and redesignate the more than *10,000* documents it produced on an "attorney's eyes only" basis, compelling the removal of improper redactions from documents, permitting CDM to retake the depositions of certain witnesses after REIS's abuses have been remedied, awarding CDM's reasonable attorneys' fees and costs incurred in connection with these disputes (including this motion) and additional discovery necessitated by REIS's

misconduct, and imposing any additional sanctions on REIS or granting any additional relief to CDM the Court deems appropriate.

I. INTRODUCTION

At virtually every step of the discovery process in this case, REIS has engaged in tactics and behavior designed to delay these proceedings, inhibit CDM's efforts to take meaningful discovery, and unnecessarily increase the cost of this litigation. CDM's counsel have engaged in time-consuming, costly efforts to resolve these issues to no avail. REIS has utilized and abused virtually every means of preventing discovery and use of evidence in this case, including: (1) designating over 10,000 documents, nearly two-thirds of REIS entire document production, as "attorney's eyes only" ("AEO") when it is clear that only a fraction of those documents may qualify for such protection; (2) in addition to the AEO designations, redacting from documents additional information that appears to be relevant, and possibly critical, to the issues in this case without cause or explanation; (3) improperly asserting the attorney-client privilege in attempts to exclude non-privileged documents and testimony; (4) improperly invoking confidentiality clauses in a settlement agreement with a key witness to prevent her from testifying about discoverable information; (5) failing to preserve and collect documents from current and former employees, officers, and board members; and (6) failing to produce a large number of documents responsive to CDM's requests and critical to this case.[1]

It appears that REIS is not interested in resolving this case on the merits or litigating the case in any other reasonable manner, but is instead engaging in a strategy intended to delay, obstruct, and make discovery so burdensome and costly on CDM that REIS can extract a favorable settlement. REIS's inappropriate tactics must stop and REIS should be required to remedy its past behavior and compensate CDM appropriately.

[1] S*ee* CDM's Motion to Compel REIS to Produce Documents filed contemporaneously herewith.

II. FACTUAL BACKGROUND

This case arises from REIS's wrongful termination of a services agreement with CDM after REIS reverse engineered CDM's web-based product and secretly developed a competing product. Before CDM could fully investigate REIS's actions, and in an obvious preemptive strike, REIS filed its original complaint on July 13, 2010, with meritless allegations of copyright infringement, misappropriation of trade secrets, breach of confidentiality agreement, and breach of contract. (Dkt. 1). CDM answered the complaint, denying REIS's unfounded allegations, and asserted counterclaims against REIS for breaches of contract and breach of the covenant of good faith and fair dealing. (Dkt. 9).[2]

The history between the parties in this case starts in 2001 when CDM first attained a license from the Florida Association of Realtors ("FAR") to provide software based forms services and support to real estate brokerages and associations across Florida using real estate forms created by FAR, through a proprietary internet-based platform developed by CDM. FAR is currently known as Florida Realtors, Inc. ("FR"), and REIS is its wholly owned subsidiary.

CDM and FR entered into an agreement to offer CDM's forms service as a member benefit to all FR members in August 2003. In October 2005, CDM and FR renewed the real estate forms license agreement through 2008. Shortly thereafter, FR incorporated REIS as a for-profit subsidiary, and asked CDM to assign the remainder of its services agreement to REIS. CDM agreed and began working with REIS to provide the forms services to FR members.

In 2006, CDM developed an enhanced forms product called "TransactionDesk," which offered advanced transaction management capabilities. CDM continued to offer FR members the original less advanced forms service as part of TransactionDesk. As the relationship

[2] REIS filed an amended complaint on March 17, 2011, which is identical to its original complaint except for one additional breach of contract claim. (Dkt. 38) CDM responded and reasserted its counterclaims on March 31, 2011. (Dkt. 39).

continued, CDM shared more information (including proprietary information) with REIS/FR, including usage numbers, product information, marketing plans, and sales activity. In 2006, CDM and REIS entered into a cross-marketing agreement pursuant to which each shared with the other detailed product information and royalties and cross-promoted products and services.

Prior to renewing the agreement between CDM and REIS in 2008, REIS began developing its own internet-based forms service to replace CDM's services for FR members and to compete with CDM's services in the national market. While working to develop its own forms service, REIS negotiated with CDM for renewal of the agreement for CDM's suite of services. During that process, REIS never revealed its true intentions to CDM, *i.e.*, to develop a competing forms service. REIS renewed its agreement with CDM on November 1, 2008, and this agreement is the primary basis of REIS's Amended Complaint against CDM. The renewal extended the contract through November 2011 but, for the first time, allowed REIS to terminate the contract if FR voted to stop funding TransactionDesk as a member benefit. It is now apparent that REIS demanded this new termination clause because it had a plan to procure the FR Board's vote against funding and terminate the CDM contract after REIS completed its new forms service.

Under the prior cross-marketing agreement, REIS had received large and detailed amounts of CDM's proprietary product and marketing information. REIS also had been providing technical support for FR members using CDM's services, thus gaining an extensive and intimate knowledge of the operation of CDM's services. CDM provided REIS employees with significant training on TransactionDesk and FOLG in connection with these services. CDM believes that REIS utilized CDM's proprietary and confidential information in developing its competing internet-based forms service.

In March 2010, CDM released a new interface into the TransactionDesk suite called TD Lite that was based on the easy-to-use interface found in CDM's prior services but with a "web 2.0" look and feel. The TD Lite interface offers direct access to some of the more basic functions available in TransactionDesk. CDM relabeled the group of more complex services and functionalities within the TransactionDesk suite as TransactionDesk Pro ("TD Pro"). The content and services currently available through the TD Lite interface and the TD Pro interface *have always been available to FR members through CDM's suite of services*. The two separate interfaces merely make it easier for users to access either basic functions or more complex functions as needed, and -- importantly -- *both interfaces utilize the same underlying source code*.

On April 1, 2010, REIS released its competing forms service called Form Simplicity. According to REIS, it is a more basic forms service designed for more technologically-inexperienced users. Form Simplicity is similar in content and functionality to CDM's services, offering a striking number of the same proprietary features that CDM first developed.

After releasing Form Simplicity, REIS began in earnest its campaign to convince the FR board to vote against funding CDM's services so that REIS could terminate the Agreement before the end of its term in 2011. In fact, REIS, with the blessing of FR management, filed this lawsuit in July 2010, prior to the FR board vote, in an effort to undermine CDM and make CDM look like "bad guys" in the eyes of the FR board. REIS was successful and the FR Board voted against funding CDM's services as a member benefit in September 2010. The FR Board simultaneously voted to use the funds previously earmarked for CDM to now be used to purchase the REIS Form Simplicity service as a member benefit. REIS promptly provided notice of termination of the Agreement. REIS's bad faith procurement of the basis to terminate

the contract so it could market its own competing product and REIS's use of CDM's confidential information to develop its own competing product are the subject of CDM's counterclaims.

III. ARGUMENT

A. Discovery proceedings background.

CDM began experiencing difficulty and a lack of cooperation from REIS from the very beginning of discovery in this case. Indeed, REIS's counsel set a discourteous tone for the case early on by insisting that the initial *in-person* meeting of counsel pursuant to Local Rule 3.05 take place at their Tampa office and unilaterally scheduling the meeting without clearing the date and time with CDM's counsel. CDM's counsel arrived on time for the meeting, only to wait 15-20 minutes for REIS's litigation counsel to attend the meeting *by telephone*.[3] This would prove to be a sign of things to come from REIS's counsel.

CDM served its First Request for Production of Documents (CDM's "Requests") and its First Set of Interrogatories (CDM's "Interrogatories") on December 3, 2010. REIS served its responses to CDM's Requests and Interrogatories on January 5, 2011. REIS's responses to mainly consisted of objections and refusals to produce documents except pursuant to a stipulated protective order by the Court. For the few Requests that REIS actually agreed to provide documents, REIS stated it would do so at a "mutually convenient date and time." REIS's responses to CDM's Interrogatories consisted entirely of objections, refusals to provide information until entry of a stipulated protective order by the Court, and statements that the requested information was "to be provided."

After receiving these largely improper and evasive responses, CDM's counsel waited to see what documents and information REIS would actually produce before initiating discovery

[3] An associate from the Tampa office of REIS's counsel's law firm met CDM's counsel in person, but that associate has not had any involvement in this case to date.

dispute procedures. However, REIS provided no documents, information, a proposed protective order for CDM's review, or even proposed dates for inspection of REIS's documents. Having heard nothing for two months, CDM's counsel sent a letter to REIS's counsel on March 10, 2011 in a good faith effort to get REIS's document production, actual answers to CDM's Interrogatories, and to address a number of other issues with REIS's discovery responses. **Ex. A.**

REIS's counsel responded on March 18, 2011, with a letter agreeing to provide a partial production of documents, providing a purported timeline for the production of its additional documents, and providing a proposed protective order for entry by the Court. **Ex. B.** Shortly thereafter, REIS produced approximately 3800 documents, consisting mostly of emails. CDM's counsel believed that progress was being made; however, that belief was short-lived.

The partial production contained few emails directly relevant to the key issues in this case and *no attachments* to the emails were provided. It became apparent that REIS was continuing to withhold the most relevant documents under the demand of entry of a protective order. REIS also failed to provide the additional documents it had promised in its March 18, 2011, letter or any substantive responses to CDM's Interrogatories.

Rather than immediately running to the courthouse, CDM's counsel continued to try to work with REIS's counsel. CDM received a privileged document log from REIS on April 1, 2011, which appeared to be a comprehensive log of documents throughout REIS's entire anticipated production even though REIS had produced a small portion at that time. **Ex. C.** The parties agreed to a stipulated confidentiality agreement on April 13, 2011 (the "Confidentiality Agreement").[4] **Ex. D.** Given that CDM had served its Requests and Interrogatories over four

[4] REIS's counsel, with CDM's counsel's consent, originally filed the Confidentiality Agreement with a motion for entry of a stipulated protective order. (Dkt. 43). On April 20, 2011, the Court denied the motion and clarified that it would not enter a stipulated protective order but, rather, it would enforce a stipulated confidentiality agreement between the parties. (Dkt. 45).

months earlier and REIS had already produced a comprehensive privilege log, CDM expected to receive the remainder of REIS's document production and complete interrogatory answers shortly after agreeing to the Confidentiality Agreement. However, REIS did not provide supplemental responses to CDM's Interrogatories until April 29, 2011, and, despite repeated inquiries from CDM's counsel, REIS waited until May 27, 2011, to produce nearly 16,000 documents, roughly *6 months* after receiving CDM's Requests and only 3 weeks before the depositions of three key REIS witnesses scheduled for June 20, 21, and 22.[5]

At this point, CDM's counsel undertook the enormous task of attempting to review over 43,000 pages of material in a very short amount of time to prepare for depositions. Actually scheduling these depositions had been an extraordinarily difficult task in itself. Despite having been notified of CDM's intention to depose these witnesses in February, it took weeks of inquiry by CDM's counsel to actually schedule these depositions with REIS's counsel. In what appeared to be additional delay tactics, REIS's counsel wavered between having availability and then claiming schedule restrictions, claimed to be able to produce the witnesses and then claimed they could not (including REIS's own CEO, John Fridlington[6]), and even refused to clarify whether the witnesses were current or former employees of REIS, FR, or both and which lawyers would be representing the witnesses.

Shortly after production of REIS's documents, CDM's counsel became aware of yet another improper and unduly burdensome discovery tactic employed by REIS's counsel. Of the nearly 16,000 documents produced by REIS, *over 10,000* documents had been designated as

---

[5] These depositions included John Fridlington (CEO of REIS and FR) on June 20, Linda Rohrbaugh (former vice president and general counsel of REIS) on June 21, and Cynthia Shelton (former member of REIS's Board of Managers and former President of FR).

[6] Counsel for REIS actually advised CDM's counsel that Mr. Fridlington was not REIS's CEO, despite the fact that he is and is identified as such on numerous REIS documents, including documents filed with the Secretary of State.

AEO under the Confidentiality Agreement. Recognizing the extremely burdensome limitations such designations placed on the use of approximately two-thirds of REIS's entire document production, CDM's counsel once again reached out to REIS's counsel to attempt in good faith to address what was a blatant over-designation of the documents as AEO. On June 8, 2011, CDM's counsel sent an email to REIS's counsel requesting that REIS reconsider its overwhelming designation of the documents as AEO. **Ex. E.** CDM's counsel also requested confirmation that REIS's counsel would not use the Confidentiality Agreement to block CDM's use of these documents during the depositions of REIS's current and former employees, officers, and managers. REIS's counsel responded on June 11, 2011, that they would not reconsider the AEO designations and that they opposed any use of the documents designated as such that would be inconsistent with the strict terms of the Confidentiality Agreement. **Ex. F.** REIS's counsel further stated that they would only reconsider the AEO designations strictly pursuant to the terms of the Confidentiality Agreement, which requires a document by document challenge by CDM.

B. REIS engaged in mass, indiscriminate, and routinized designation of its documents as AEO.

The Confidentiality Agreement permits designation of documents, testimony, and other materials as AEO only for "extremely sensitive 'Confidential Information or Items,' disclosure of which to another Party or Non-Party would create a *substantial risk of serious harm* that could not be avoided by less restrictive means." (Confidentiality Agreement at § 2.7) (emphasis added). "Confidential Information or Items" is defined under the Confidentiality Agreement as "information (regardless of how it is generated, stored or maintained) or tangible things that qualify for protection under Federal Rule of Civil Procedure 26(c)." *Id.* at § 2.2. Rule 26(c) of the Federal Rules of Civil Procedure provides that a court may, "for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or

expense." The party designating documents as AEO under the Confidentiality Agreement bears "the burden of persuasion" on any challenge of such designations. (Confidentiality Agreement at § 6.3); *see also Knights Armament Co. v. Optical Systems Technology, Inc.*, 254 F.R.D. 463, 468 (M.D. Fla. 2008) ("any party wishing to designate information as Confidential or Attorneys' Eyes Only bears the burden of supporting that designation with good cause").

The Confidentiality Agreement also contains a clause requiring the exercise of restraint and care in designating materials for protection:

> Each Party or Non-Party that designates information or items for protection under this [Agreement] must take care to limit any such designation to specific material that qualifies under the appropriate standards. . .
>
> Mass, indiscriminate, or routinized designations are prohibited. Designations that are shown to be clearly unjustified or that have been made for an improper purpose (e.g., to unnecessarily encumber or retard the case development process or to impose unnecessary expenses and burdens on other parties) *expose the Designating Party to sanctions.*

(Confidentiality Agreement at § 5.1) (emphasis added).

REIS has clearly engaged in the type of "mass, indiscriminate, or routinized designations" that are expressly prohibited by the Confidentiality Agreement. REIS has designated two-thirds of its entire production as AEO knowing that such designations severely limit the manner in which those documents can be utilized in this litigation. REIS's counsel's only explanation for this mass designation of documents is that each and every document designated as AEO contains competitively sensitive information that must be protected from CDM. However, a cursory review of the documents designated AEO by REIS demonstrates that many, if not most, of these documents do not expose REIS to any risk of competitive injury or other substantial risk of serious harm. A cursory review of the documents designated as AEO

demonstrates REIS's blanket and indiscriminate designations. Just a few of the many examples of this include:

- Documents Bates labeled REI-0002418, 3246, 3696, 6228, 13364, 14403, 14988, 39111, and 42272 all appear to be confirmations of meetings generated through Microsoft Outlook that contain virtually no substantive information. **Ex. G.**

- Documents Bates labeled REI-0002675-2676, 4189, 4436-4441, 5648-5649, 5745-5747, and 6454-6455 all appear to be documents related to filling open staff positions with REIS that could not possibly expose REIS to a "substantial risk of serious harm." **Ex. H.**

- REIS has designated most of the meeting minutes and agendas for its Board of Managers and other bodies as AEO. Meeting minutes and agendas Bates labeled REI-0005354-5355, 14407-14409, 19049-19050, 21421-21423, 25819, and 27825-27826 clearly do not contain competitively sensitive or other harmful information requiring an AEO designation. **Ex. I.**

- Document Bates labeled REI-0005781-5785 is an internal email string that contains draft language for a Q&A document for Form Simplicity and is only designated "Confidential." Document Bates labeled REI-0028354-28357 appears to be the final version of the Q&A document, which looks to be designed for public distribution, and is designated AEO. It defies logic that the internal draft document is designated with less protection than the final public document. **Ex. J.**

- Document Bates labeled REI-0003321-3322 seems to be another public marketing document relating to Form Simplicity that REIS designated as AEO. **Ex. K.**

- Document Bates labeled REI-0010633 is a blank unexecuted non-disclosure agreement. **Ex. L.**

- Composite **Ex. M.** consists of a sampling on 25 additional emails that contain absolutely no competitively sensitive or other seriously harmful information warranting an AEO designation.

REIS's abusive pattern of over-designating is further demonstrated by REIS's own conduct following the deposition of Mr. Fridlington. CDM's counsel entered 15 exhibits during the deposition of Mr. Fridlington that had been originally designated as AEO by REIS. The day after the deposition, counsel for REIS informed counsel for CDM that REIS was downgrading 9 of these 15 exhibits to either "confidential" or no designation at all. This seems to confirm hat

the initial designation was indiscriminate and that when REIS's counsel *actually considered the documents*, he realized the designations were unjustified, contrary to prior representations that each and every designation was made in good faith.

REIS's strategy in making the indiscriminate designations is obvious - designate virtually all of the documents pertaining to Form Simplicity and other highly relevant documents as AEO and use the Confidentiality Agreement to shift the burden of challenging the designations on a document by document basis onto CDM. This is exactly what REIS's counsel demanded in its response to CDM's counsel's good faith communications. Requiring CDM to make a document by document challenge to two-thirds of REIS's production in advance of every deposition not only places an unjust burden on CDM but also provides REIS with the unfair advantage of advance notice of the documents CDM intends to use during depositions of REIS's witnesses. The Confidentiality Agreement also gives REIS the discretion to deny CDM's use of documents with certain witnesses, requiring CDM to take the issue up with the Court each time, thus adding additional burden and expense. This is exactly the type of "improper purpose" expressly prohibited in the Confidentiality Agreement that should expose REIS to sanctions for its conduct. Accordingly, CDM respectfully requests that the Court enter an order compelling REIS to reexamine all documents it designated as AEO and redesignate the documents appropriately. Further, CDM requests the Court award CDM its reasonable attorneys' fees and costs associated with addressing this issue and bringing this motion and impose any additional sanctions the Court deems appropriate for REIS's improper behavior.

C. REIS improperly asserted the attorney-client privilege to prevent the discovery and use of non-privileged evidence.

1. Legal standard.

Another tactic employed by REIS to hinder discovery in this case is the improper invocation of the attorney-client privilege as a way to block CDM's ability to discover key evidence in this case. The attorney-client privilege is meant to encourage "full and frank communication between attorneys and their clients." *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981). However, this privilege is also "inconsistent with the goal of discovering the truth at trial, therefore, '[it] ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle. *Rabin v. U.S.*, 896 F.2d 1267, 1270 (11th Cir. 1990) (quoting *U.S. v. Pipkins*, 528 F.2d 559, 563 (5th Cir. 1976)). The attorney-client privilege only protects disclosure of certain communications and does not prevent disclosure of underlying facts. *Upjohn*, 449 U.S. at 396; *Rabin*, 896 F.2d at 1270.

The mere fact that an attorney participates in communications does not automatically make the communications privileged. *See Int'l Telephone and Telegraph Corp. v. United Telephone Co. of Fla.*, 60 F.R.D. 177, 185 (M.D. Fla. 1973). The communication must have been made for the purpose of seeking or giving legal advice. *Universal City Development Partners, LTD. v. Ride & Show Engineering, Inc.*, 230 F.R.D. 688, 690 (M.D. Fla. 2005). Communications do not remain within the protection of the privilege if they are disclosed to parties outside the attorney-client relationship. *U.S. v. Pepper's Steel & Alloys, Inc.*, 1991 WL 1302864 at * 3 (S.D. Fla. 1991).

The privilege "was intended as a shield, not a sword." *Int'l Telephone*, 60 F.R.D. at 185. "Consequently, a party may not insist upon the protection of the privilege for damaging communications while disclosing other selective communications because they are self-serving."

Id. The party claiming the privilege has the burden of demonstrating the existence of the privilege. *Universal City*, 230 F.R.D. at 690.

2. REIS is attempting to prevent the use of non-privileged documents.

REIS has improperly asserted the attorney-client privilege a number of times in an effort to have damaging evidence excluded from use in this case and to prevent CDM from discovering other relevant, and potentially damaging, evidence. First, on June 16, 2011, one business day before the depositions of three key REIS witnesses, REIS's counsel emailed CDM's counsel a copy of a motion it intended to file the next day asserting the attorney-client privilege over a number of REIS documents that *CDM* produced to REIS months earlier--but that REIS failed both to produce and identify on its privilege log--and seeking the exclusion of these documents from use in this case. CDM's counsel stated they opposed the motion and REIS initially filed the motion on June 17, 2011. (Dkt. 58). REIS withdrew its initial motion and refiled on July 6, 2011. (Dkt. 63). As will be more fully explained in CDM's response to that motion the documents are either not covered by the privilege or the privilege has been waived because: (1) the documents do not reflect communications seeking or providing legal advice; (2) the alleged attorney involved in the communications, Linda Rohrbaugh, was acting in her capacity as a vice-president, not as counsel; (3) the documents were provided to CDM by a former manager of REIS, thus destroying any possible privilege; (4) the communications were directed to an individual not affiliated with REIS and, therefore, not covered by any privilege; (5) CDM produced the documents in question two months before REIS raised the issue; (6) the documents in question do not appear on REIS's privileged document log (and were not produced to CDM by REIS); and (7) REIS's counsel entered several of these documents as exhibits during the deposition of CDM on April 20, 2011, and providing additional copies of the documents to

counsel for CDM, without any qualification, confidentiality designation, or even reference to the documents being privileged. REIS's true motivation regarding these documents is not to protect the attorney-client privilege, but to exclude documents containing damaging statements from being utilized by CDM in this litigation.

3. REIS improperly instructed a witness not to answer on the basis of the attorney-client privilege.

Similarly, REIS's counsel asserted the attorney-client privilege and instructed Linda Rohrbaugh not to answer questions during her deposition on June 21, 2011. Ms. Rohrbaugh is a former employee of REIS who served in dual capacities as vice president of strategic initiatives and general counsel. REIS has failed to take any consistent positions regarding the topics, issues, or decisions that Ms. Rohrbaugh was involved in her capacity as general counsel and those that she was involved in as Vice President of Strategic Planning & Development. Instead, REIS asserts the privilege with regard to Ms. Rohrbaugh in a selective manner to prevent the disclosure or use of damaging evidence, as demonstrated with the documents subject to REIS's motion discussed above. During Ms. Rorhbaugh's deposition, CDM's counsel asked questions about whether REIS had a plan to develop Form Simplicity and then lobby FR to stop funding TransactionDesk. REIS's counsel objected and instructed Ms. Rohrbaugh not to answer on the basis of the attorney-client privilege. REIS maintained the objection and instruction even after CDM's counsel explained that he was seeking factual information about the timing of REIS's plans and even though it was apparent that Ms. Rohrbaugh and knowledge of the facts at issue in her role as REIS's Vice President of Strategic Planning & Development. **See Rohrbaugh Depo. at pp. 75-88.** This evidence is highly relevant, goes directly to CDM's counterclaim and, apparently, is damaging to REIS. REIS's instruction to Ms. Rohrbaugh not answer factual questions on the basis of the attorney-client privilege was wholly improper and yet another

attempt to obstruct CDM's discovery of evidence in this case.[7] CDM respectfully requests that the Court enter an order overruling REIS's objections, compelling Ms. Rohrbaugh to answer these questions, permitting CDM to retake Ms. Rohrbaugh's deposition, awarding CDM its reasonable attorneys' fee for retaking Ms. Rohrbaugh's deposition, awarding CDM its reasonable attorneys' fees in bringing this motion, and imposing any additional sanctions on REIS or providing any additional relief to CDM it deems appropriate.

4. REIS's privilege log is inadequate and demonstrates the assertion of the attorney-client privilege over non-privileged documents.

REIS's privilege log is also incomplete, inconsistent, and demonstrates additional abuses of the privilege. Pursuant to Federal Rule of Civil Procedure 26(b)(5)(A), a party withholding information or materials otherwise discoverable on the basis of a privilege must "describe the nature of the documents, communications or tangible things not produce or disclosed - and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Pursuant to this rule, a privilege log must be produced that identifies each document or item withheld "by date, author, recipients (including recipients of copies), specific privilege or protection claimed." *Conway v. Taylor,* 2006 WL 2045864 at *1 n.1 (M.D. Fla. 2006); *see also Jones v. Semoran Pizza Huts, Inc.*, 2006 WL 3412252 at *1 (M.D. Fla. 2006). A privilege log must also "describe the subject matter of each document or item of information withheld in sufficient detail to permit opposing counsel and the Court to assess the applicability of the claimed privilege or protection." *Id.* Finally, "[a] privilege log must be adequate on its face to establish prima facie support for the claimed privilege or protection." *Id.*

[7] REIS's counsel gave a similar instruction when Ms. Rohrbaugh was asked if there was a policy at RESI to conceal from CDM REIS's plans to develop Form Simplicity, although Ms. Rohrbaugh answered the question, for the most part. **Rohrbaugh Depo. at p. 94.**

REIS produced its 37 page privilege log on April 1, 2011, nearly two months before making its full production of documents. **Ex. C.** It purports to be a complete log covering all allegedly privileged documents. However, the production numbers on the log do not correspond to the Bates numbers of the documents actually produced.[8] This issue is particularly problematic when trying to determine the reasons for the numerous redactions found throughout the document produced by REIS. In addition to the lack of corresponding document numbers, the privilege log contains a number of other deficiencies. REIS has asserted the attorney-client privilege over a large number of documents reflecting communications with FR employees and communications with FR's legal counsel. For example, page 1 of the log contains document number REIS-0000517, which is described as a letter between Joel Rothman, REIS's litigation counsel in this case, and Janet Valentine of FR. FR is not a party to this case and Mr. Rothman does not represent FR in any way.[9] Moreover, a large number of documents appear on the privilege log as containing communications with Margy Grant (*e.g.*, REIS-0002057). During his deposition, Mr. Fridlington testified that Margy Grant is in-house counsel for FR. **Fridlington Depo. at p.131.** Many of these documents containing communications with Ms. Grant also appear to have been withheld in their entirety despite the fact that the "explanation" column states that the document contains an "attorney-client communication with Margy Grant embedded in email string" (*e.g.*, REIS-0002057, REIS-0002074, REIS-0002544). If REIS is entitled to any protection over such communications, the proper method would have been to redact the communication and not withhold he entire document.

[8] CDM's counsel raised this issue with REIS's counsel on June 14, 2011. REIS's counsel responded that they would produce a new privilege log but have not done so as of the filing of this Motion. **Ex. N.**

[9] Indeed, CDM accommodated requests by Mr. Rothman to conduct depositions at the office of FR's counsel, Daryl Bloodworth.

Additionally, many of the entries on the privilege log do not reflect the dates of documents, the authors of documents, the recipients of documents, or even an explanation of the privilege asserted. The entries for meeting minutes often only contain the explanation of "legal advice redacted," even though many of the meeting minutes produced by REIS have multiple redactions throughout the document. Even a superficial review of the privilege log demonstrates that it is sadly inadequate and fails to provide CDM with enough information to evaluate and challenge, if appropriate, the documents withheld and/or redacted by REIS for privilege.

Accordingly, CDM respectfully requests that the Court enter an order compelling REIS to immediately produce all communications with FR employees and counsel that it has withheld, compelling REIS to produce an adequate privilege log, awarding CDM its reasonable attorneys' fees in bringing this motion, and imposing any additional sanctions on REIS or providing any additional relief to CDM it deems appropriate.

D. REIS improperly redacted documents.

In addition to designating two-thirds of its entire production as AEO and another 1,000 documents as "Confidential," REIS produced over 100 documents containing additional redactions. CDM's counsel asked for an explanation of all these redactions in an email dated June 14, 2011, but received no response on the issue. **Ex. N.** These redactions often appear where key topics relevant to this litigation are discussed. For example, documents Bates labeled REI-0001249-1252, 6732-6734, 13789-13793, 17172-17178, 22503-22506, 37250-37254, 38344-38350, and 38457-38459 are all email strings containing highly relevant discussions about the development of Form Simplicity that contain numerous unexplained redactions obscuring what appears to be the most substantive information in the documents. **Ex. O.** Additionally, documents Bates labeled REI-1408-1412, 2486-2492, 6938-6942, 19311-19313, 19615-19619,

20419-20425, 20583-20586, and 32397-32400 are meeting minutes of the REIS Board of Managers that contain a multitude of unexplained redactions, particularly before or after references to CDM, TransactionDesk, Forms Simplicity, and other "strategic initiatives." **Ex. P.** Finally, documents Bates labeled REI-0001691-1692, 1832, 3757-3759, 4465, 4550, 7547-7549, and 12597 are examples of the seemingly random and improper nature of these redactions, including REIS's practice of redacting all sender, recipient, cc, bcc, and subject information from these emails. **Ex. Q.**

Due to the deficiencies in REIS's privileged document log and REIS's practice of redacting the email information above, CDM has no way to discern the reasons for these redactions and whether such redactions are indeed proper. Without such additional information, CDM assumes that these redactions were made improperly and for the purposes of withholding relevant and damaging information, consistent with REIS's pattern in this case.. Accordingly, CDM respectfully requests that the Court enter an order compelling REIS to remove all redactions and produce full and complete substitute copies of all previously redacted documents, permitting CDM to retake the depositions of Mr. Fridlington, Ms. Rohrbaugh, and Ms. Shelton to question them about the redacted portions of these documents, awarding CDM its reasonable attorneys' fees incurred in retaking these depositions, awarding CDM its reasonable attorneys' fees in bringing this motion, and imposing any additional sanctions on REIS or providing any additional relief to CDM it deems appropriate.

E. REIS improperly invoked the confidentiality provision of a settlement agreement to prevent witness testimony on discoverable topics.

Upon the termination of Linda Rohrbaugh's employment with REIS, she apparently entered into a settlement agreement with REIS that contained a confidentiality clause prohibiting disclosure of the terms of the settlement and certain other information. During her deposition,

CDM's counsel questioned Ms. Rohrbaugh about the circumstances of her departure from REIS. REIS's counsel objected and claimed that discovery of the information was barred by the settlement agreement. Although REIS's counsel did not instruct Ms. Rohrbaugh not to answer the questions, his comments were clearly calculated to discourage her doing so and he was successful. **Rohrbaugh Depo. at pp. 30 - 35.** REIS's counsel took the same position and made the same objections during the deposition of Cynthia Shelton, a key figure in this dispute. **Shelton Depo. at pp. 64 - 75.** Of course, REIS failed to produce the settlement agreement, either before or during the deposition, despite the parties' confidentiality agreement, which REIS, as previously discussed, has not been shy about invoking.

It is well settled that confidentiality provisions of settlement agreements cannot be used to prevent production of a settlement agreement and related documents, discovery of the terms of a settlement agreement, or to block witness testimony if the discovery efforts are reasonably calculated to lead to the discovery of admissible evidence. *In re Denture Cream Products Liability Litig.*, 2011 WL 1979666 at *4-5 (S.D. Fla. 2011); *Jeld-Wen, Inc. v. Nebula Glass Int'l, Inc.*, 2007 WL 1526649 at *2 (S.D. Fla. 2007); *Gutter v. E.I. DuPont de Nemours and Co.*, 2001 WL 36086590 at *1 - 2 (S.D. Fla. 2001) (citing a number of courts that have held "that such confidentiality provisions will not be utilized as a shield to obstruct the discovery process," particularly when "confidentiality provisions may have the effect of silencing witnesses.").

CDM is entitled to take discovery on the circumstances of Ms. Rohrbaugh's termination from REIS and the terms of her settlement with REIS. Ms. Rohrbaugh played a key role in many of the most important facts and circumstances at issue in this case, including the negotiation of the 2008 Services Agreement between REIS and CDM, which is the basis of most of the claims in this case, and the development of REIS's competing product, Form Simplicity. As REIS's

counsel is well aware, Ms. Rohrbaugh's knowledge of these issues goes to the heart of CDM's counterclaims in this case. Based on the testimony provided by Ms. Rohrbaugh during her deposition, CDM has reason to believe that certain facts and circumstances at issue in this case, particularly CDM's relationship with REIS and the development of Form Simplicity, played a role in Ms. Rohrbaugh's termination from REIS. At minimum, the circumstances surrounding a key employee's termination can be relevant to the witness's bias.

CDM's inquiry into these areas with Ms. Rohrbaugh and Ms. Shelton was proper and reasonably calculated to lead to the discovery of admissible evidence. CDM requests that the Court enter an order overruling REIS's objections, compelling REIS to produce the settlement agreement with Ms. Rohrbaugh and any related documents, compelling Ms. Rohrbaugh to answer the questions posed by CDM's counsel, permitting CDM to retake Ms. Rohrbaugh's deposition, awarding CDM its reasonable attorneys' fee for retaking Ms. Rohrbaugh's deposition, awarding CDM its reasonable attorneys' fees in bringing this motion, and imposing any additional sanctions on REIS or providing any additional relief to CDM it deems appropriate.

F. **REIS failed to preserve and collect documents of current and former employees, officer, managers, and other agents.**

It is well settled that "[a] party has an obligation to retain relevant documents, including emails, where litigation is reasonably anticipated." *Managed Care Solutions, Inc. v. Essent Healthcare, Inc.*, 736 F. Supp. 2d 1317, 1324 (S.D. Fla. 2010); *see also Southeastern Mechanical Services, Inc. v. Brody,* 2009 WL 2242395 at *2 (M.D. Fla. 2009) (explaining that "[o]nce a party files suit or reasonably anticipates doing so, however, it has an obligation to make a conscientious effort to preserve electronically stored information that would be relevant to the dispute."); *Wilson v. Wal-Mart Stores, Inc.*, 2008 WL 4642596 at *2 (M.D. Fla. 2008)

(stating that "[t]he law imposes a duty upon litigants to keep documents they know, or reasonably should know, are relevant to the matter."); Fed. R. Civ. P. 37, advisory committee notes to 2006 amendments ("When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a 'litigation hold.'"). The duty to preserve documents and other relevant evidence can, and often does, arise prior to the commencement of actual litigation. *See Preferred Care Partners Holding Corp. v. Humana, Inc.*, 2009 WL 982460 at *4 (S.D. Fla. 2009) (explaining that a party's duty to preserve evidence arises "[o]nce a party reasonably anticipates litigation"); *Cyr v. Flying J Inc.*, 2007 WL 1716365 at *3 (M.D. Fla. 2007) (finding that the plaintiff's duty to preserve evidence arose at the time plaintiff was contemplating filing a lawsuit). "Sanctions may be imposed upon litigants who destroy documents while on notice that they are or may be relevant to litigation or potential litigation, or are reasonably calculated to lead to the discovery of admissible evidence." *Banco Latino, S.A.C.A. v. Lopez*, 53 F. Supp. 2d 1273, 1277 (S.D. Fla. 1999).

Mr. Fridlington is the CEO of both REIS and FR. During his deposition, Mr. Fridlington testified that he does not, nor has he ever, maintained separate email accounts or other electronic or hard copy files for business related to REIS and business related to FR; that all emails and electronic files for both REIS and FR have been and are maintained in his FR email account and FR files; that no one on behalf of REIS has searched his email account or files for documents responsive to CDM's Requests; that no one on behalf of REIS instructed him to preserve any documents, communications, or other information that may be relevant to this litigation; and that his e-mails are permanently deleted every two months or so. **Fridlington Depo. at --. 54 - 61.**

Ms. Rohrbaugh is a former vice president and general counsel of REIS. Ms. Shelton is a former member of the Board of Managers of REIS. Both individuals acted on behalf of REIS in some of the key situations at issue in this case. For example, both witnesses were heavily involved in the negotiations of the 2008 Services Agreement between CDM and REIS that is the basis of the majority of the claims asserted in this case. However, Ms. Rohrbaugh and Ms. Shelton both testified that they primarily conducted business on behalf of REIS through personal or other business email accounts. It is clear from the extensive use of these other email accounts that REIS was fully aware of this practice. They both further testified that REIS has not made any attempts to contact them with instructions to preserve relevant documents or made any attempts to collect relevant documents from them. **Rohrbaugh Depo. at pp. 12 - 13; Shelton Depo. at pp. 22 - 23; 117.**

Additionally, REIS has been on notice about potential litigation over the issues asserted in CDM's counterclaims since at least mid-2008. The emails that REIS itself seeks to exclude from use in this case demonstrate REIS's concerns that CDM may assert legal claims if REIS proceeded with its plans to secretly develop a competing forms product while continuing its relationship with CDM. (*See* CDM008548 (Shelton stating "My concern is that is [sic] we are going forward with building a platform to do our own and enter into this agreement [CDM] might create issues and take us to court!")[10]; CDM000591 (Rohrbaugh responding "I agree with Cynthia that if FAR enters into this arrangement, [CDM] will be looking to draw blood if we should create a competing product. That is exactly the reason he gave as to why he doesn't enter into one year agreements.")) **Ex. R and Ex. S**. CDM asserts that REIS's obligations to preserve documents relevant to this litigation arose at this time.

[10] During Ms. Shelton's deposition, REIS's counsel continuously asserted the attorney-client privilege in an attempt to block Ms. Shelton's testimony, despite her repeated testimony that her concerns were personal and based on her business experience, not based on advice of counsel. **Shelton Depo. at pp. 119 - 124.**

REIS is clearly obligated to preserve and produce all materials of its own CEO that are relevant to this litigation. REIS should be further obligated to make efforts to collect and produce documents from other key former employees that REIS knew was conducting business on its behalf through email accounts and computer systems outside of REIS's control. *See Helmert v. Butterball, LLC*, 2010 WL 2179180 at *9 (E.D. Ark. 2010) (ordering corporation to search the "hard drives, laptops, and the personal email accounts" of key employees); *Export-Import Bank of the U.S. v. Asia Pulp & Paper Co., LTD.*, 233 F.R.D. 338 341 (S.D.N.Y. 2005) (finding that corporations are obligated "at the very least, to ask their former employees to cooperate before asserting that they have no control over documents in the former employees' possession"); *McCoy v. Whirlpool Corp.*, 214 F.R.D. 637, 641 (D. Kan. 2003) (ordering corporation to contact former employees to determine if they had responsive documents).

Accordingly, CDM respectfully requests that the Court enter an order compelling REIS to immediately search all email accounts, computers, hard copy files, or other sources for responsive documents or other materials from Mr. Fridlington, Ms. Rohrbaugh, Ms. Shelton, and all other key employees and board members during the relevant time period; compelling REIS to make immediate efforts to preserve and collect documents and other materials relevant to this litigation from any current and former employees, officers, members of the Board of Managers, or other agents that had any involvement in the facts and circumstances at issue in this litigation; permitting CDM to retake the depositions of Mr. Fridlington, Ms. Rohrbaugh, and Ms. Shelton if additional documents or materials are found and produced; awarding CDM its reasonable attorneys' fees incurred in retaking any depositions; awarding CDM its reasonable attorneys' fees in bringing this motion; and imposing any additional sanctions on REIS or providing any additional relief to CDM it deems appropriate.

IV. CONCLUSION

As the foregoing demonstrates, REIS has engaged in a consistent pattern of obstructionist tactics designed to inhibit CDM's ability to conduct meaningful discovery, delay this litigation, and create unnecessary burdens and expense on CDM. REIS's abuses and improper conduct should not be permitted to continue and must be remedied. Accordingly, CDM respectfully requests that the Court enter an order providing the relief requested by CDM herein, including awarding CDM's reasonable attorneys' fees, and imposing additional sanctions on REIS as the Court deems appropriate.

NOTICE OF COMPLIANCE WITH LOCAL RULE 3.01(g)

Counsel for CDM certify that they have conferred on many occasions with counsel for REIS to attempt to resolve all matters set forth in this motion, but have been unsuccessful.

HOLLAND & KNIGHT LLP

/s/ Bradford D. Kimbro
Bradford D. Kimbro
Florida Bar No. 908002
brad.kimbro@hklaw.com
Joseph H. Varner III
Florida Bar No. 394904
joe.varner@hklaw.com
Dominic Kouffman
Florida Bar No. 085099
dominic.kouffman@hklaw.com
Post Office Box 1288
Tampa, Florida 33601-1288
(813) 227-8500
(813) 229-0134 (fax)
Attorneys for Defendant/Counterclaimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 12, 2011, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will provide electronic notice to all counsel of record.

/s/ Bradford D. Kimbro
Attorney