UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re: GL Master, Inc., Debtor.	Case No.: 2:18-bk-24302-NB Chapter: 7 **MEMORANDUM DECISION (1) DENYING MOTION FOR STAY PENDING APPEAL BUT (2) GRANTING LIMITED RELIEF ON COURT'S OWN MOTION** Hearing Date: Date: December 14, 2021 Time: 2:00 p.m. Place: Courtroom 1545 255 E. Temple Street Los Angeles, CA 90012 (or Via ZoomGov)

For the reasons set forth below, this Memorandum Decision declines to stay this Court's forensic discovery order (the "Forensic Order," dkt. 431) based on the motion presented (the "Stay Motion," dkt. 447). This Memorandum Decision also denies the alternative requests by the movants (the "Stay Movants") to modify the Forensic Order at their request.

Nevertheless, this Court on its own motion is prepared to modify the Forensic Order, solely to protect the interests of third parties who have not been involved in this bankruptcy case. This Court described its contemplated modifications at the above-

captioned hearing; all parties agreed to them; and they are further described at the end of this Memorandum Decision. This Court is not issuing that order at this time because the Bankruptcy Appellate Panel for the Ninth Circuit (the "BAP") has stayed the existing Forensic Order, and this Court will await further guidance from the BAP about whether it will lift that stay or take other action.

Although it may appear academic to deny a stay on the Stay Movants' motion, but grant a stay on this Court's own motion, the distinction is important and may have significant consequences, such as standing to raise future issues. In any event, the stay contemplated by this Court is somewhat different from what the Stay Movants have sought, as described at the end of this Memorandum Decision.

1. SUMMARY

This Court has been cautious in proceeding incrementally over the period of more than three years since this bankruptcy case was filed, only issuing the Forensic Order after a long history of gamesmanship by the parties opposing discovery. This Court has also attempted at every stage to be mindful of the rights of third parties, including, for example, any employees who were not present when their employers agreed that all devices potentially containing discoverable material could be searched.

Partly for those reasons, the Forensic Order includes safeguards to prevent any human other than the Stay Movants from seeing any document until this Court can rule on any asserted basis to withhold such documents. The Forensic Order also tracks in all material respects the form of order that was proposed by the principal Stay Movants. Neither those persons nor anyone else has requested reconsideration of the Forensic Order.

In addition, staying the Forensic Order would cause serious harm to the parties seeking discovery, who are some alleged former employees of Debtor (the "Alleged Employees"). For one thing, there is no dispute that as new data are added to the Stay Movants' computers or other devices any old data will be overwritten, including deleted or "ghost" files that might contain very valuable information. In addition, any delay

increases the opportunities for mischief by those persons who have already been found by clear and convincing evidence to have lied under oath and have been held in contempt for violating this Court's discovery orders willfully and in bad faith.

Nevertheless, the Stay Motion asserts that forensic discovery of electronically stored information ("ESI") must not proceed, for two main reasons. First, the Stay Motion asserts that "imaging" the Stay Movants' computers, storing the images in encrypted format, and searching for key terms might disclose "sensitive" information belonging to the Stay Movants or their third-party clients. The Stay Movants speculate that this could occur through "hacking." But the principal Stay Movants previously agreed to forensic discovery by the same firm, Garrett Discovery Inc. ("Garrett Discovery"), and there is no evidence that any of the Stay Movants have since discovered any reason to question Garrett Discovery's competence, or its willingness to comply with this Court's orders to encrypt and safeguard the data.

The Stay Motions' other main argument is that the attorney-client privilege held by the Stay Movants' third-party clients could be jeopardized by the very act of providing Garrett Discovery with access to the Stay Movants' devices and accounts. Although, as noted above, no human outside of the attorney-client relationship will see any documents, this Court takes very seriously any potential impingement on the attorney-client privilege held by third parties.

But this Court must be careful to distinguish between those third parties and the Stay Movants themselves. For one thing, the law firms at issue and their principals (both of whom are contemnors, and both of whom previously agreed on the record to the procedures they now dispute) have waived and forfeited any objections they might assert on their own behalf. In addition, the Stay Movants have not claimed to be appearing in this case on behalf of any of the third parties about whom they now claim to be concerned. To be clear, the law firms and their principals certainly can and should point out that the procedures they previously proposed would harm innocent third parties (their own third-party clients); and they can ask this Court on its own motion to

take steps to protect those third parties. But the Stay Movants lack standing to make any representations or arguments on behalf of those third parties.

In addition, the Stay Movants have failed to cite any authority that the attorney-client privilege actually would be waived by the automated process contemplated in the Forensic Order. Those procedures will result in an encrypted string of 0s and 1s, held by a neutral search firm, to be retained according to protocols that the parties previously worked out, including payment by the Stay Movants and a confidentiality order signed by Garrett Discovery. To be clear, this Court expresses no view as to whether the Stay Movants' prior arrangements with Garrett Discovery would or would not create "privity" between the Stay Movants and Garrett Discovery, or whether third parties' attorney-client privilege would or would not be jeopardized. Rather, this Court is simply noting that the Stay Movants bear the burden of establishing cause for a stay of the Forensic Order, and they have not cited any authority on these issues. So, again, the Stay Motion itself is unpersuasive, although it can and does point out issues that were not raised before and that this Court might wish to address on its own motion.

For these reasons, and the additional reasons stated below, the Stay Movants have failed to meet their burden to show (i) a likelihood of success on the merits of their objections to the Forensic Order, (ii) that they would suffer irreparable injury absent a stay of the Forensic Order, (iii) that, even if there were some risk of injury to the Stay Movants, any such risk would outweigh the clear prejudice to the parties seeking discovery, or (iv) that the public interest favors the Stay Movants' position given (a) that the Forensic Order already includes protections against any human seeing any documents before any privilege or other asserted right is adjudicated, (b) this Court can and will amend the Forensic Order on its own motion to provide additional protection of third parties' attorney-client privilege and other interests, and (c) there is a strong public interest in enforcement of orders and protecting the integrity of the bankruptcy system against the principal Stay Movants' discovery gamesmanship. Accordingly, the Stay Motion will be denied.

As noted above, pursuant to the agreements of the parties in their papers and at the above-captioned hearing, this Court intends to modify the Forensic Order on its own motion, to provide that the actual retention of Garrett Discovery is to be by the Stay Movant law firms and/or their principals, as they requested. But that will not give the Stay Movants control over Garrett Discovery, except for assuring that Garrett Discovery has an obligation to the Stay Movants not to disclose any documents or information except as may be authorized by this Court. The modified order will also include additional safeguards, also agreed to on the record, to ensure that the Stay Movants do not use their modified relationship with Garrett Discovery to attempt to direct it not to conduct a full forensic investigation, or otherwise corrupt the discovery process.

The remainder of this Memorandum Decision addresses all of the foregoing issues in more detail.

2. BACKGROUND

a. Blatant violations of this Court's discovery orders

Clear and convincing evidence has compelled this Court to find, after two evidentiary hearings, that several of the Stay Movants have lied under oath, and failed and refused to comply with this Court's discovery orders willfully and in bad faith. Those persons are Fan Wang (aka "Fang" or "Freda" Wang), Lynn Chao, Esq. ("Ms. Chao"), Xiao ("Shawn") Wang, who is an employee of Ms. Chao's law firm ("ChaoLaw"), and, disappointingly, an officer of this Court: Debtor's bankruptcy counsel, Thomas J. Polis, Esq. ("Mr. Polis") of Polis & Associates, APLC ("PolisLaw"). *See* Memorandum Decision (dkt. 276) (Ms. Wang, Ms. Chao, Mr. Wang, Johnny Ling, etc.). (A Memorandum Decision finding Mr. Polis in contempt is forthcoming.)

This Court previously has used the term "Contemnors" to refer to Ms. Wang, Ms. Chao, ChaoLaw, and Debtor. Mr. Polis is now added to that list. Ms. Chao and Mr. Polis are the principal Stay Movants: the rest are their employees, and Ms. Wang.

The Contemnors' violation of their discovery obligations is all the more blatant in the face of two reasons why discovery should be flowing freely. First, at the start of this

case Debtor stipulated with certain alleged former employees (the "Alleged Employees") to produce broad categories of documents, including all communications between Debtor and ChaoLaw. Second, Debtor's Chapter 7 Trustee waived any prepetition attorney-client privilege. *See* dkt. 11 & 12 (Debtor's stipulation, and order thereon) *and* dkt. 21 (Trustee's waiver).

More recently this Court has ruled that repeated gamesmanship by the original Contemnors has resulted in their loss of any basis to withhold documents. *See* Order (dkt. 366), p. 4:10-16. This Court has also warned Mr. Polis that he and PolisLaw likewise could forfeit any basis to withhold documents; and based on his recent disregard of discovery orders this Court expects to revisit that issue soon.

Despite all of the foregoing reasons why discovery should have been forthcoming, the Contemnors have not been subtle in their past and present disregard of this Court's discovery orders. This Court will not address the Stay Motion's characterization of the facts, except to note that the Alleged Employees provide a better summary. *See* dkt. 451, pp. 2:18-7:4. This Court will, however, highlight some of the Contemnors' most brazen violations of this Court's discovery orders for many, many months. *See generally* dkt. 276, 291, 327, 361, 365, & 394.

First, ChaoLaw represented Debtor for over two years of prepetition litigation with the Alleged Employees, and yet ChaoLaw claimed not to have a single document from that representation. This Court found, by clear and convincing evidence and after a multi-day evidentiary hearing, that this assertion was completely incredible and false. *See* dkt. 276, pp. 14:8-23, 16:7-17:20.

Second, ChaoLaw and Debtor's designated person most knowledgeable, Ms. Wang (the "PMK"), claim to have virtually no knowledge of anything to do with Debtor, and no way of producing any meaningful discovery. Yet they have not pointed this Court to a single email, letter, text, or other communication that they ever sent to Debtor's former principals, officers, workers, accountants, or anyone else in an attempt to obtain documents responsive to this Court's discovery orders. This Court concluded

that they had utterly failed to meet their burden to show that they had taken all reasonable steps to comply with those orders, and establish categorically and in detail how compliance is impossible. *See* dkt. 276, pp. 26:22-29:25.

Third, hand in hand with that lack of production, the "privilege logs" belatedly provided by the Contemnors have been shams. They repeatedly omit whole categories of documents. They also fail to include the most basic information required of any privilege log, such as whether persons other than the attorney and client have had access to the documents at issue (the same issue that they now assert is of critical importance, lest disclosure to Garrett Discovery were to waive the attorney-client privilege). *See* dkt. 353, Ex. A, B & C, dkt. 361, pp. 7:8-8:2, 9:20-10:3 & dkt. 366, p. 4:10-16.

Fourth, Mr. Polis has asserted numerous times that he has inadvertently "overlooked" his obligations under this Court's discovery orders. He has repeated this assertion so often and so brazenly, even after having been reminded of his obligations, that he lacks any credibility and he will be found to have violated this Court's orders willfully and in bad faith.

In the context of these and other examples of patent stonewalling, the Alleged Employees have sought this Court's aid in compelling production. This Court has been persuaded incrementally to grant relief.

b. Daily coercive sanctions have, so far, been ineffective

In response to the Contemnors' willful and bad faith disregard of this Court's discovery orders the Alleged Employees have requested, and this Court has imposed, coercive contempt sanctions. This Court started with fines of $100.00 per day, later increased to $500.00 per day. *See* Orders (dkt. 291, 302 & 365).

To the extent, if any, that the Contemnors themselves are paying the coercive fines, it is difficult to determine what coercive effect the fines might have because the Contemnors have failed and refused to comply with this Court's repeated orders to disclose their finances as fully as if they were filing their own bankruptcy schedules. In

any event, most if not all of the fines, legal fees, and other expenses are being paid by someone else, or some group of people (collectively, the "Funder").

Those daily fines apparently are too little to coerce compliance. Perhaps that is because the fines are a fraction of the Alleged Employees' multi-million dollar claim, and the Alleged Employees have made no secret of the fact that they hope to pursue other persons such as the Funder, on theories such as successor liability, alter ego, or piercing the corporate veil. *See* Employee Brief (dkt. 451), p. 11:13-19.

The Contemnors claim to have almost no information about the Funder. But they also insist that the Funder is beyond the personal jurisdiction of this Court and has no reachable assets. This Court has characterized these assertions as "ludicrous," because they fail to address why the Funder has been paying hundreds of thousands of dollars in legal fee and sanctions to obstruct discovery if he and his assets truly are unreachable. *See* Order (dkt. 394), p. 3:16-20, *and* Tentative Ruling (dkt. 394), pp. 3:3-4:28. The Contemnors have offered no answer.

In any event, the daily fines have been ineffective, so far, to coerce the Contemnors into compliance with this Court's discovery orders. But the Alleged Employees have not been deterred. They have sought, and this Court has granted, other relief.

c. This Court has held that most of the Contemnors have waived and forfeited any basis to withhold documents

The Alleged Employees sought a ruling that Ms. Chao, ChaoLaw, Ms. Wang, and the Debtor, through their gamesmanship, have waived and forfeited any right to withhold documents. Applying binding precedent of the Court of Appeals for the Ninth Circuit (the "Ninth Circuit"), this Court agreed:

> The attorney-client privilege, the attorney work product doctrine, and <u>any other privilege or basis to withhold documents has been forfeited and waived</u> by the Contemnors, for the reasons stated in this Court's written Tentative Ruling (dkt. 361) and on the record. *See In re Hamer*, 138 S. Ct. 13, 17 n.1 (2017) (distinguishing forfeiture and waiver); *Burlington N. & Santa Fe Ry. v. United States Dist. Court*, 408 F.3d 1142, 1159 (9th Cir. 2005). [Order (dkt. 366), p. 4:10-16 (emphasis added).]

Notably, the Stay Movants fail to cite or address *Burlington*, despite their assertion that they have a likelihood of success on the merits of their appeal.

d. The Contemnors, facing possible incarceration, agreed to a thorough forensic investigation

Following many months of the Contemnors' failure and refusal to comply with this Court's discovery orders, and several warnings about possible additional coercive sanctions, this Court directed the Contemnors to address whether they should be incarcerated to coerce their compliance with the discovery orders. *See, e.g.,* dkt. 391, pp. 61:23-63:3; dkt. 394, pp. 8:1-23 & 10:17-19. To persuade this Court not to order such incarceration, the Contemnors agreed, at a hearing on October 19, 2021, to a thorough and transparent forensic investigation of their ESI. Ms. Wang and Ms. Chao agreed as follows:

> **The Court [10/19/21, 11:16:13 a.m.]:** So, Ms. Wang, what I'm not hearing from you, and what I want to find out is, are you committing to provide full access to the computer forensic experts for all of your devices – email, wechat, everything?
>
> **Freda Wang [10/19/21, 11:16:30 a.m.]:** Yes.
> …
> **The Court [10/19/21, 11:16:40 a.m.]:** Ok. Ms. Chao. How about you?
>
> **Lynn Chao [10/19/21, 11:16:45 a.m.]:** Yeah, your honor. I have no problem with that ....[1]

This Court accepted Ms. Wang's and Ms. Chao's commitments, but this Court was concerned about any search of their employees' devices and accounts. On the one hand, the employees' mobile telephones, home computers, or personal email accounts might have been used for business, as some of them had already admitted, consistent with ChaoLaw's policy permitting such use. On the other hand, this Court

[1] This Court notes that at this hearing Mr. Polis raised <u>other</u> issues on behalf of the Contemnors concerning the forensic review (*e.g.,* the volume of documents to be searched). Audio recording (10/19/21 hearing), 11:17:14 a.m. – 11:21:25 a.m. But those issues are not persuasive (*e.g.,* there is no evidence that Garrett Discovery will be unable to handle the volume of documents from two small law offices and a half dozen individuals). Nor were those issues raised in supplemental papers or in the Contemnors' proposed form of forensic order, so those issues have been waived and forfeited.

noted that the employees were not present at the hearing, and asked Mr. Polis to address whether the forensic search could include them.

> **The Court [10/19/21, 11:29:25 a.m.]:** Why don't you address this issue about … gaining access to the electronic devices of [ChaoLaw employees] Mr. Shawn Wang, Johnny Ling, and so on.
>
> **Mr. Polis [10/19/21, 11:31:15 a.m.]:** As far as committing Ms. Chao committing on behalf of her colleagues in the office, uh, Johnny Ling, Shawn Wang, Zoe Chen, to produce … we would commit to that declaration and provide those devices, make those devices available to the e-discovery company that's been talked about.

In reliance on the above-quoted representations by Ms. Wang, Ms. Chao, and Mr. Polis, this Court orally ruled that Ms. Wang and Ms. Chao would not be incarcerated at that time. The Contemnors confirmed their representations ten days later in their own proposed form of order, which recited that this Court's rulings were based on:

> the agreement by Ms. Fang ("Freda") Wang, and the agreement of Lynn Chao on behalf of herself, the Lynn Chao Law Office, A PC, and on behalf of the associates and staff of Lynn Chao Law Office, A PC, to allow a forensic electronic exam of all their electronic devices and communications …. [*See* dkt. 409, p. 2:2-5 (emphasis added).

On November 15, 2021 this Court issued the Forensic Order (dkt. 431). That order includes two exceptions, described below, to the requirement for a full forensic search of all devices and accounts.

e. The Forensic Order excludes (for now) the personal devices of Mr. Polis and his employee, and it provides an opportunity to withhold any document until further Court order, before any human other than the movants can look at such a document

First, notwithstanding the deep concerns of the Alleged Employees and this Court about Mr. Polis' lack of candor and compliance with this Court's orders, the Forensic Order does not require him or his employee to turn over their personal devices. *See* dkt. 431, p. 2:23-28 ("this [Forensic O]rder does not extend to the personal Computers or other devices of the employees of PolisLaw"). Of course, this limitation was implemented before this Court's latest review of the record and

forthcoming Memorandum Decision that Mr. Polis is in contempt of this Court's discovery orders, which may change the situation. In addition, this Court also notes that no similar limitation was made for Ms. Wang, Ms. Chao, ChaoLaw, or their employees. No such limitation was requested; no representation was made that they do not use their personal devices for work; and, to the contrary, they have admitted using their personal accounts for work purposes, so the Forensic Order does not exclude their personal devices. *See* Memorandum Decision (dkt. 276), p. 13:10-15, Tr. 8/19/20 (dkt. 211), pp. 150:5-10, 151:18-24.

Second, another exception to full disclosure is the opportunity to list documents on a privilege log before any other human can look at such document. As noted above, most grounds to withhold documents have already been determined to have been waived and forfeited. But, for example, Mr. Polis raised objections at the hearing on October 19, 2021 regarding disclosure of his attorney work product, and this Court established a briefing schedule to address that issue.

After reviewing the parties' papers (dkt. 401, 411) and hearing oral argument at a hearing on November 9, 2021, this Court orally ruled that, Mr. Polis and employees of PolisLaw still had to turn over their work devices and accounts for forensic review by Garrett Discovery's automated systems – *i.e.,* with no human seeing any documents. But Mr. Polis retains whatever rights he might have to include any specific documents on a privilege log as protected attorney work product.

The same is true for any of the other movants who to seek to have documents withheld. When and if any specific document is flagged by the automated search as containing the search terms used by Garrett Discovery, that specific document can be listed on a privilege log. Then this Court will address any asserted basis to withhold those documents, and any related issues (*e.g.,* any waiver or forfeiture under *Burlington*). The Forensic Order includes specific hypothetical examples to illustrate this process. *See* Order (dkt. 431), pp. 14:1-16:25.

f. The movants have never sought reconsideration of the Forensic Order, or previously raised their objections before this Court

The Stay Movants have never sought reconsideration of the Forensic Order. That order is substantially in the form proposed by the principal movants themselves, in all material respects. Nor have those movants who committed on the record to providing full access to ESI alleged any excusable neglect or other reason to invalidate those commitments.

Instead of providing the Alleged Employees with any opportunity to address their new objections before this Court, the Stay Movants filed a notice of appeal and sought a stay directly from the BAP. According to the colloquy at the above-captioned hearing, they apparently did so without adequate notice to the Alleged Employees.

In any event, the BAP granted a stay but directed the Stay Movants to file their Stay Motion and seek a ruling from this Court. *See* BAP Order (BAP No. CC-21-1261, dkt. 5). This Court issued a scheduling order (dkt. 445); the parties filed their papers (dkt. 447, 451, 453); and the matter came on for hearing at the above-captioned time. After consideration of oral arguments, this Court took the matter under submission.

3. JURISDICTION, AUTHORITY, AND VENUE

The discovery at issue is central to the administration of this bankruptcy estate. This Court's discovery orders have been issued pursuant to Rule 2004 (Fed. R. Bankr. P.) and the discovery being sought concerns the "acts, conduct, or property" of Debtor, as well as "the liabilities and financial condition" of Debtor, and other matters that "may affect the administration" of Debtor's estate, such as grounds for substantive consolidation with other entities, piercing the corporate veil, tracing where Debtor's goodwill and other assets went, determination of the existence of any avoidable transfers, and other bankruptcy-related issues.

This Bankruptcy Court has jurisdiction, and venue is proper, under 28 U.S.C. §§ 1334 and 1408. This is a "core" proceeding in which this Bankruptcy Court has the authority to enter a final judgment or order under 28 U.S.C. § 157(b)(2)(A), (B), (E), (H)

and (O). *See generally Stern v. Marshall*, 131 S. Ct. 2594 (2011); *In re Deitz*, 469 B.R. 11 (9th Cir. BAP 2012) (discussing *Stern*); *In re AWTR Liquidation, Inc.*, 547 B.R. 831 (Bankr. C.D. Cal. 2016) (same). Alternatively, the parties have implicitly consented to this Bankruptcy Court's entry of a final judgment or order in these discovery matters. *See, e.g.,* dkt. 11 (stipulation to discovery before this Court); *and see Wellness Intern. Network, Ltd. v. Sharif*, 135 S.Ct. 1932 (2015); *In re Pringle*, 495 B.R. 447 (9th Cir. BAP 2013); Rules 7008 & 7012(b) (Fed. R. Bankr. P.); LBR 9013-1(c)(5)&(f)(3).

The parties have not briefed the effect of the Notice of Appeal (dkt. 436, "NOA") of the Forensic Order. On the one hand, discovery orders generally are interlocutory, and interlocutory orders are not appealable as of right, so a notice of appeal "does not transfer jurisdiction to the appellate court absent leave of that court." *In re First Korean Christian Church of San Jose*, 567 B.R. 575, 578 (Bankr. N.D. Cal. 2017) (citing *In re Rains*, 428 F.3d 893, 904 (9th Cir. 2005)). *See also In re Stewart,* 157 B.R. 893 (9th Cir. BAP 1993). *Compare, e.g., In re Sherman,* 491 F.3d 948, 967 (9th Cir. 2007) (discussing appeals from final orders or judgments).

On the other hand, this Court interprets the BAP's order staying enforcement of the Forensic Order as also staying any modifications to that order, even with the parties' agreement. But this Court does not believe that there is any violation of either the letter or the spirit of the BAP's stay by exploring the alternative relief requested in the Stay Motion regarding modification of the Forensic Order. *Cf.* Rule 8008 (Fed. R. Bankr. P.) (providing for indicative rulings even when the bankruptcy court lacks jurisdiction). Accordingly, this Court concludes that it has the jurisdiction and authority to issue this Memorandum Decision, direct the parties to meet and confer about the form of order outlined at the end of this Memorandum Decision, and hold a hearing on that issue, without actually implementing any modifications to the Forensic Order unless and until the BAP lifts its stay.

4. LEGAL STANDARDS FOR A STAY

Pursuant to Rule 8007(a)(1)(A) (Fed. R. Bankr. P.), a bankruptcy court may issue a stay of a judgment, order, or decree pending appeal. In determining whether to grant a stay pending appeal, courts generally consider the following four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 433 (2009).

To be entitled to a stay pending appeal, the applicant must make a "minimum permissible showing" with respect to each of the four factors, but "the first two factors … are the most critical." *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (citing *Nken*, 556 U.S. at 434). Provided the applicant meets a minimum threshold as to each factor, the court may "balance the various stay factors once they are established." *Id.* at 965. Under this balancing approach, the applicant must show that irreparable harm is probable and either that (1) there is a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay or (2) the applicant has a substantial case on the merits and the balance of hardships tips sharply in the applicant's favor. *Id.* at 964-66.

A stay pending appeal "is not a matter of right, even if irreparable injury might otherwise result," and "should be sparingly employed and reserved for the exceptional situation." *Nken*, 556 U.S. at 427 (citation and quotations omitted); *In re Wymer*, 5 B.R. 802, 806 (9th Cir. BAP 1980).

5. ANALYSIS

a. The movants' arguments that their deleted files should not be searched are unpersuasive

In their reply the Stay Movants argue that this Court should authorize only "a search-terms-based search, not a complete device imaging process." Reply (dkt. 453), p. 3:4-5 (emphasis added). It is unclear from the reply exactly what is meant by a

"search-terms-based" search, but the reply implies (dkt. 453, p. 12:7-11), and the parties confirmed at the above-captioned hearing, that in practical terms this would mean no search of deleted or "ghost" files.

The Stay Movants dispute that the Alleged Employees have any "need" for deleted files because "all of the Moving Parties – who are attorneys and/or staff of attorneys – have declared under penalty of perjury that no items have been deleted." Reply (dkt. 453), p. 12:7-11. This is preposterous.

The Stay Movants ignore the fact that the most prominent of them are Contemnors, who have been found by clear and convincing evidence to have given false testimony under oath and disregarded this Court's discovery orders willfully and in bad faith. *See, e.g.,* Memorandum Decision (dkt. 276) (passim). The remaining Stay Movants are employees of those Contemnors.

In addition to the Contemnors' blatant disregard for their discovery obligations, as described at the start of this Memorandum Decision, they have sworn under oath repeatedly that they have produced "all" responsive documents, only for the Alleged Employees and this Court to find out later, repeatedly, that they and the other Stay Movants have failed to produce numerous documents. *See, e.g.,* dkt. 276, pp. 11:12-17:28; dkt. 327, pp. 5:27-6:3; dkt. 360, p. 3:20-22; dkt. 389, pp. 3:23-4:1; dkt. 390, p. 4:8-14. It is not just the Contemnors who have failed to meet their discovery obligations. The employees of PolisLaw and ChaoLaw have been directly involved in several failed productions: Mr. Polis' employee allegedly forgot to forward documents; Shawn Wang allegedly overlooked the need to check with Johnny Ling for whole categories of documents; and Johnny Ling allegedly forgot to provide privilege logs or produce any documents for five out of six litigation matters he handled for Debtor.

Moreover, the contention that the Alleged Employees have no "need" for deleted files flies in the face of experience and common sense. Deleted files typically are a prime source, if not the best source, of valuable information. *See* Garrett Decl. (dkt. 451), pp. 1:20-3:15 (PDF pp. 16-18).

The whole point of a "forensic" search of ESI is to uncover documents that would not otherwise be produced, or evidence that such documents have been deleted or hidden. As the Alleged Employees point out (dkt. 451, p. 12:3-27), the Stay Movants' suggestion would eviscerate the forensic aspect of the ESI search.

The Stay Movants contend that there is no true risk of harm because if deleted files from years ago remain on their hard drives then there is no reason to believe that those files will be now be lost in the weeks it will take to prosecute their appeal. Reply (dkt. 453), p. 13:15-24. But that argument ignores the undisputed fact that deleted files will be overwritten as new data is added to any device. Any delays also require the Alleged Employees and this Court to trust the Stay Movants not to take any actions that might result in further spoilation of responsive discovery – such as, for example, downloading large files to increase the potential that deleted or "ghost" files are permanently erased. *See* Garrett Decl. (dkt. 451), pp. 1:20-3:15 (PDF pp. 16-18). The record does not support any such trust.

b. The principal Stay Movants have long been aware of, and previously agreed to, the same forensic investigation protocols to which they now object

The Stay Movants claim to have been surprised by the "changed terms" that purportedly switched from a search-terms-based search to an "imaging" of all their computers or other devices. Reply (dkt. 453), p. 4:8-16. They assert that they should be allowed to select and retain their own "e-discovery company," not Garrett Discovery (although, as a fallback position, they suggest that they could retain Garrett Discovery). *See* Stay Motion (dkt. 447), at, *e.g.,* p. 21:6-10, *and* Reply (dkt. 453), at, *e.g.,* pp. 3:6-10, 9:1-11:18, *and* 16:5-7.

The record completely belies any assertion of any change in terms. Indeed, the Contemnors themselves eventually proposed the same imaging of devices and other parameters to which they now object.

At least as early as July 30, 2021, the Alleged Employees suggested the use of a forensic expert. Dkt. 334, p. 4:14-16. This Court directed the parties to meet and confer regarding the retention of a forensic specialist and the parameters of any production. *See* dkt. 345, p. 3:13-21 & dkt. 366, p. 4:17-24.

On August 31, 2021 the Alleged Employees emailed Mr. Polis about imaging all relevant devices. *See* dkt. 353, Ex.F, at PDF p. 30 of 37 (proposing that Garrett Discovery should "image the Contemnors servers and phones on site, leave a duplicate copy with the owners, and then review the images within [Garrett Discovery's] lab") (emphasis added). The proposed imaging process was reiterated in the Alleged Employees' filed papers:

> [T]he Alleged Employees suggest Garrett[ ]Discovery be hired, be authorized to take images of each computer server and cell phone used by persons in the Polis, and Lynn Chao law offices, and used by Freda Wang. Garrett would leave an exact duplicate copy of the image at each location, and then be able to access and analyze the data back at its lab.
>
> This office is working with Mr. Polis on parameters to be followed, involving at least a list of names, email address suffixes, and Little Sheep location names. Though Mr. Polis has indicated that there is no need to review his computer servers (Ex G), Alleged Employees do seek a review of his servers as well. [Dkt. 353, p. 10:15-23 (emphasis added).]

The Alleged Employees reviewed the protocol with the Contemnors yet again in an email on October 5, 2021:

> Attached is another, slightly amended list of search terms (and my overview summary of the process) as well as the three Garrett Discovery proposed protocols for computer imaging, mobile device imaging, and webmail review. [Status Report (dkt. 393), Ex. I, at PDF p. 34 of 50 (emphasis added).]

Among many other things, the draft protocol refers to "electronic storage device(s)" that are "to be imaged" (dkt. 393, Ex. I, at PDF p. 40, item "2"), a "[s]trict chain of custody" (id., item 8), and:

> [Garrett Discovery] will execute a confidentiality order binding [Garrett Discovery] to the court and [providing that Garrett Discovery] will not to disclose any of the Producing Party's ESI to the [Alleged Employees] or any

> non-party without order of the court or agreement of the parties [*id.,* item "9" (emphasis added)[2]]

Mr. Polis, on behalf of the Contemnors, represented in filed papers and orally on the record that the parties had agreed on Garrett Discovery to conduct the forensic review, that the Contemnors would bear the costs, and that the parties were finalizing their agreed upon search terms. Dkt. 354, pp. 4:26-5:3 & Tr. 9-14-21 (dkt. 391) pp. 20:8-21:15. In addition, both the Alleged Employees and the Contemnors had an opportunity to submit proposed forensic orders (*see* dkt. 402 & 409) and this Court adopted the Contemnors' own version in substantial part. *See* dkt. 431.

The Contemnors own proposed Forensic Order (exhibit to dkt. 409) would have provided for (i) a search for all materials "related to Debtor" or to the discovery topics, just like the actual order issued by this Court, (ii) the same "imaging" of devices to which they now object, and (iii) the same arrangement for retention of Garrett Discovery to which they now object. For example, this Court's Forensic Order provides:

> [The] Producing Parties [*i.e.,* the Contemnors, their employees/independent contractors, and any other person through whom they have or assert possession, custody, or control of any responsive documents[3]] shall make available for inspection all computers/servers or other computing devices (collectively, as further defined below, "Computers") containing documents, communications, and/or data related to the Debtor or any Rule 2004 Examination ordered in this matter. [Forensic Order (dkt. 431), p. 2:19-22 (emphasis added).]

The Contemnors' own proposed form of order would have required a search of "servers," not just computers, and the same breadth of information "related to Debtor or any Rules 2004 Examination":

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[2] The movants point out that, although the final version of the Forensic Order that was entered on the docket requires Garrett Discovery to execute a confidentiality order concerning mobile electronic devices and email accounts (dkt. 447, p. 12:23-25 & dkt. 431, pp. 7:7-9 & 9:21-24), there is no similar provision regarding computers. But (i) that omission appears to the result of their own error, (ii) the other provisions requiring Garrett Discovery to execute a confidentiality order (dkt. 447, p. 12:23-25 & dkt. 431, pp. 7:7-9 & 9:21-24) appear to be broad enough to cover computers even in the absence of a specific provision requiring it, and (iii) the omission can be easily cured, either by amending the Forensic Order or by obtaining Garrett Discovery's signature on a confidentiality order covering computers.

[3] The record does not reflect any Producing Parties other than the Contemnors, PolisLaw, and their employees: (i) Cristina Allen (employed by PolisLaw), (ii) Shawn Xiao Wang (employed by ChaoLaw), (iii) Johnny Ling (same), (iv) Zoe Chen (same), and (v) Andrew Lei (same, and Ms. Chao's husband).

> [The] Producing Parties … shall make available for inspection all computers/servers containing documents, communications, and data related to the Debtor or any Rule 2004 Examination ordered in this matter. [Contemnors' Proposed Order (dkt. 409, Exhibit), p. 2:11-13 (emphasis added).]

True, mobile telephones are not included in the above excerpt. But they are included in the remainder of the Contemnors' proposed form of order, so clearly the Contemnors anticipated that mobile telephones would be subject to discovery. Indeed, just as this Court's Forensic Order provides for "imaging" all devices and the equivalent for all accounts by Garrett Discovery, the Contemnors' own proposed form of order included extensive, essentially identical provisions for the same things:

> I. COMPUTER COLLECTION AND IMAGING PROTOCOL
>
> …
>
> The following Computer Imaging Protocol shall be followed:
>
> 1. The imaging of any Computers shall be performed by Garrett Discovery Inc.
>
> ...
>
> 8. The Computers will be imaged using industry standard processes, software and hardware deemed necessary to complete the imaging process. The images will be actual "forensic" images (at the bit level). [Contemnors' Proposed Order (dkt. 409, Exhibit), pp. 2:7, 3:13-15 (emphasis added).
>
> * * *
>
> II. MOBILE ELECTRONIC DEVICE COLLECTION AND IMAGING PROTOCOL
>
> ...
>
> [10.] c. Garrett Discovery shall obtain a forensic image of the Mobile Electronic Device [broadly defined] by conducting all appropriate extraction methods, such as [various specified methods]. [Contemnors' Proposed Order (dkt. 409, Exhibit), pp. 4:21, 6:7-15]
>
> * * *
>
> III. WEBMAIL COLLECTION PROTOCOL
>
> ...
>
> 10. The webmail account(s) [broadly defined] will be collected using industry standard processes, software and hardware deemed necessary to complete the collection process.
>
> ...
>
> d. An MD5 and/or SHA1 and/or SHA256 hash value(s) will be calculated of the time of collection. This hash value will serve as a digital fingerprint for the evidence being acquired.
>
> 11. The collection(s) will remain in the custody of Garrett Discovery Inc until the disposition, order of the court or agreement of the parties. [Contemnors' Proposed Order (dkt. 409, Exhibit), pp. 7:7, 8:11-24 (emphasis added)]

* * *

> IV. EXAMINATION AND ANALYSIS PROTOCOLS
> The following Computer, Mobile Device, and Webmail Examination and Analysis Protocol shall be followed to preserve data, analyze contents and produce responsive data for review.
> 1. Garrett Discovery Inc will consult with the parties to obtain input as to search methodology.
> 2. Garrett Discovery Inc will search the ESI contained on the images to identify data responsive to this matter.
> 3. Garrett Discovery Inc will generate and deliver to both parties a "Search Hit" report which will summarize the volume of data responsive Parties agree to review search hit report and consult with each other as to any changes to search criteria. …
> [Etc.] [Contemnors' Proposed Order (dkt. 409, Exhibit), p. 9:1-28 (emphasis added)]

Not only were these specific protocols proposed by the Contemnors themselves, they also failed to raise any objection to any of the foregoing before, at, or after the hearing, until now. Except for the limited work product assertion by Mr. Polis noted above, there was (i) no objection to the requirement to provide access to all devices "containing documents, communications, and/or data related to the Debtor or any Rule 2004 Examination ordered in this matter" (Forensic Order, dkt. 431, p. 2:19-22), (ii) no objection to "imaging" all devices and an equivalent process for all accounts, and (iii) no objection to the retention of Garrett Discovery, its "imaging" of all devices, or its automated searches of the ESI data.

In their reply papers in support of the Stay Motion, the movants complain that they were rushed in preparing their proposed Forensic Order because they had no assurance that the Alleged Employees' proposed order would be held for a seven-day period. Dkt. 453, p. 10:5-24.[4] But in fact they had two additional weeks before this Court issued its own Forensic Order, so they had plenty of time in which to lodge an amended proposed form of order or object to any proposed terms. *See* Contemnors' Notice of Lodgment (dkt. 409) (filed October 29, 2021) *and* Forensic Order (dkt. 431) (issued and entered November 15, 2021).

[4] *See* "Procedures of Judge Bason" (available at www.cacb.uscourts.gov) ("The judge often issues orders immediately (*i.e.,* without waiting the 7 days per Rule 9021 1(b)(3)(B)) , *e.g.,* when the order … does not appear to warrant any delay. …"). *See also* LBR 1001-1(d) ("The court may waive the application of any Local Bankruptcy Rule in any case or proceeding").

In sum, the Stay Movants' assertion that there was any "change" in terms or any surprise is nonsense. They were on notice of all the terms to which they now object for weeks if not months, and the principal movants affirmatively agreed to all of the procedures to which they now object.

c. The Stay Movants' objections about disclosure of private or confidential matters ignore the provisions of the Forensic Order

The Stay Motion objects that "thousands of privileged (and unrelated) client files, in addition to the financial, medical, and personal data of Movants, will be subject to the discovery, infringing on the privacy rights of not only Movants, but their clients as well, destroying those clients' expectations of confidentiality and privilege." Stay Motion (dkt. 447), pp. 6:27-7:2. But their carefully worded description of files being "subject to the discovery" (emphasis added) glosses over three critical protections.

First, under the Forensic Order and the parties' protocols, all data will be encrypted and searches will be automated, so neither Garrett Discovery nor anyone else will actually see the files. Second, if those files do not contain a search term such as "Little Sheep International" (Debtor's prepetition name) or "Guangyang International, LP" (Debtor's co-defendant in the State Court litigation) then those files will never show up in Garrett Discovery's automated search. Third, as this Court has repeatedly noted, even if there are some "search hits," no human other than the movants will see those documents until after the movants have an opportunity to list them on a privilege log and this Court rules on any asserted privacy interest or privilege. Some hypothetical examples will illustrate.

First, suppose that an employee of ChaoLaw has on his personal mobile phone (i) an embarrassing photograph, (ii) the password to his bank account, and (iii) someone else's private medical information. Unless those documents contain search terms such as "Little Sheep," they will never be identified in Garrett Discovery's automated searches, so they will remain in encrypted sets of 0s and 1s that are never seen by any other human.

Second, suppose that another employee of ChaoLaw, such as Johnny Ling, sent an email to a client, communicating about sensitive military matters, and suppose further that Johnny Ling suggests meeting for lunch at a "Little Sheep" restaurant. That email will be a "search hit" in Garrett Discovery's automated search, but the movants will have an opportunity to list that email in a privilege log. If the Alleged Employees doubt the privilege log's explanation and object, this Court can hear arguments and review evidence, including testimony under oath and, if necessary or appropriate, *in camera* review. On these (hypothetical) facts, the Alleged Employees will never see that email.

Third and finally, suppose that Johnny Ling's email said, "Dear [redacted], I can't meet for lunch at Little Sheep to talk about [redacted] because I'm tied up all day destroying its documents to prevent them from falling into the hands of [the Alleged Employees]." No sensitive or privileged information of any third party client will be disclosed to the Alleged Employees or anyone else from the search for, or production of, this redacted email.

The Stay Motion also objects that the movants will "lose their … ability to safeguard [their data] from hackers." Stay Motion (dkt. 447), p. 18:22-23. But, as noted above, the Forensic Order includes provisions for Garrett Discovery to be subject to a confidentiality order and to use protocols that include a chain of custody and encryption. In addition, the principal movants previously agreed to the selection of Garrett Discovery to conduct the forensic review of ESI, and there is no evidence that since that time any of the movants have discovered reasons to question Garrett Discovery's trustworthiness or competence, including its ability to safeguard the encrypted data.

In contrast, as referenced above, there is evidence that ChaoLaw has no policy against using personal emails for work; its employees regularly do so; and the record before this Court includes examples of some of their unencrypted emails. The movants' objection about losing their existing ability to "safeguard" their data from hackers rings hollow.

Finally, this Court recognizes that there is always a remote possibility of hacking or inadvertent disclosure. But if that were sufficient to block discovery of ESI then no electronic discovery could ever proceed.

d. The movants have not shown that they have standing, on behalf of unnamed third parties, to seek a stay of the Forensic Order

Standing is a threshold issue that this Court must address *sua sponte*. *See, e.g., Berhardt v. County of L.A*., 279 F.3d 862, 868 (9th Cir. 2001) ("Federal courts are required sua sponte to examine jurisdictional issues such as standing") (citations and quotations omitted). The Stay Motion asserts that there is an obvious "grave concern when it comes to sensitive government and military information" and that "Movants will lose their rights to keep this information private, as well as their ability to safeguard it from hackers." Stay Motion (dkt. 447), p. 18:22-24 (emphasis added). This (undoubtedly inadvertent) conflation of the Stay Movants and their clients illustrates an important point: it is not the Stay Movants' rights that are at issue, but their third-party clients' rights, and yet the Stay Movants' counsel did not dispute at oral argument that nobody, including the Stay Movants, has appeared in this case on behalf of any such third parties.

True, the Stay Movants might represent such third parties in matters other than this bankruptcy case. But none of the Stay Movants assert that they are authorized to represent such third parties in this discovery dispute, and this Court cannot ignore that distinction. *Cf. In re Villar,* 317 B.R. 88, 93-94 (9th Cir. BAP 2004) (courts cannot presume that attorneys who represented parties in non-bankruptcy matters have also been authorized to represent them and accept service in bankruptcy matters).

This Court concludes that the Stay Movants lack standing to make any representations or arguments on behalf of those third parties. To be clear, the Stay Movant law firms and their principals certainly can and should point out that the procedures they previously proposed would harm innocent third parties (their own third-party clients). They can ask this Court on its own motion to take steps to protect those

third parties (which this Court will do). But on the present record the Stay Movants lack standing to make any representations or arguments on behalf of those third parties.

Of course, this Court always attempts to be careful about possible risks to third parties, all the more so when there is nobody with standing to speak for those third parties. Therefore, this Court now turns to what risks to third parties might be presented.

e. The Stay Motion cites no authority that the protocols to which the principal Stay Movants previously agreed would destroy third parties' attorney-client privilege

The Stay Movants cite no legal authority that surrendering their devices to Garrett Discovery for imaging would, as they put it, "destroy[] the privilege" of third party clients. Stay Motion (dkt. 447), p. 21:4-5). This Court notes that the answer might not be obvious given the automated process contemplated in the Forensic Order. That process will result in an encrypted string of 0s and 1s, to be held by a neutral search firm pursuant to protocols that the parties previously worked out, including payment of Garrett Discovery by the Stay Movants, and a confidentiality order signed by Garrett Discovery.

To be clear, this Court expresses no view whether the Stay Movants' prior arrangements with Garrett Discovery actually would create "privity" between the Stay Movants and Garrett Discovery, or whether third parties' attorney-client privilege actually would be jeopardized. Rather, this Court is simply noting that the Stay Movants bear the burden of establishing cause for a stay of the Forensic Order, and they have not cited any authority on these issues. So, again, the Stay Motion itself is unpersuasive, although it can and does point out issues that were not raised before and that this Court might wish to address on its own motion.

f. The Stay Movants have not met their burden to show sufficient cause for a stay of the Forensic Order

As noted above, this Court must consider (1) whether the Stay Movants have made a strong showing that they are likely to succeed on the merits; (2) whether the Stay Movants will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Nken*, 556 U.S. 418, 433. The Stay Movants have not met their burden on any of these issues.

They argue that they are likely to obtain reversal of the Forensic Order because it is "so overbroad, and so injurious to third-party rights and privileges, that it violates the rights of third parties without notice or opportunity to respond" and was an abuse of this Court's discretion. Stay Motion (dkt. 447), p. 15:4-6. But this argument ignores all of the history of this case amply justifying a comprehensive forensic search of ESI, as well as the numerous protections in the Forensic Order for any rights and privileges.

As explained above, the Forensic Order provides for encryption and automated searches that protect all data from being seen by any human until a full opportunity to be heard and a ruling by this Court. Although this Court will modify the Forensic Order on its own motion because of the possibility that "imaging" and automated searches might threaten third parties' rights or interests, that does not mean that the Stay Movants have met their burden to show that they have a likelihood of prevailing on the merits, or even that they have standing to make any representations or arguments on behalf of third parties and use those purported concerns as a basis to block discovery.

As for irreparable harm, the Stay Movants must show that it is "probable" that they will suffer such harm if the stay is not granted. *Leiva-Perez*, 640 F.3d at 968 (emphasis added). That burden "is higher than it is on the likelihood of success prong." The Stay Movants have failed to meet that burden, for the same reasons discussed above and for the following additional reason.

The Stay Movants argue for the first time in their reply papers that they will be forced to incur substantial costs under the Forensic Order. Reply (dkt. 453), p. 14:9-20. But any added expense beyond normal discovery costs is attributable to the fact that the Contemnors have elected to stonewall discovery for well over two years.

Weighed against the Stay Movants' lack of showing of merit, or irreparable injury, is the substantial injury to the Alleged Employees if the Forensic Order continues to be stayed. As described above, delay is greatly increasing the dangers of loss or spoliation of evidence.

The final factor is the public interest. There is certainly a substantial public interest in protecting third parties' rights, but (i) the Forensic Order already includes protections against any human seeing any documents before any privilege or other asserted right is adjudicated, (ii) this Court can and will amend the Forensic Order on its own motion to provide additional protection of third parties' attorney-client privilege and other interests, and (iii) there is a strong public interest in enforcement of orders, timely resolution of disputes, and protecting the integrity of the bankruptcy system against the principal Stay Movants' discovery gamesmanship. *See, e.g., In re Swartout,* 554 B.R. 474 (Bankr. E.D. Cal. 2016) (citing *U.S. v. Sumitomo Marine & Fire Ins. Co.,* 617 F.2d 1365, 1371 (9th Cir. 1980) ("In short, the public interest favors compliance – not disobedience – with court orders."); *Chevron Corp. v. Donziger*, 2013 U.S. Dist. LEXIS 151094, at *7 (N.D. Cal. Oct. 21, 2013) ("[T]here is a strong public interest in favor of timely compliance with orders of the court").

As this Court has observed on the record, it is an enormous privilege to be able to withhold documents from production merely by listing them on a privilege log. But that privilege depends on trust that the persons preparing the privilege log are doing so diligently, competently, and in good faith. All of the Stay Movants who have been responsible for discovery responses have done the opposite. Most of them have already been found to have lied under oath and violated this Court's discovery orders willfully and in bad faith. The public interest does not favor the Stay Movants.

For all of the foregoing reasons, this Court will not stay the Forensic Order.

6. ALTERNATIVE REQUESTS FOR RELIEF

The Stay Motion includes, as an alternative request for relief, a suggestion that the forensic search be conducted by a firm that is "an agent of Movants" so that the firm would be "bound by the client privilege." Stay Motion (dkt. 447), p. 21:6-10. The Stay Motion requests that the Stay Movants be permitted to select their own forensic expert. Stay Motion (dkt. 447), pp. 20:22-21:16. In their reply they amend their position to state that they "do not object" to their retention of Garrett Discovery (dkt. 453, p. 14:9-14), except that they complain about the cost of a device-based search instead of a "search-terms-based" search.

Permitting the Stay Movants to choose and manage their own ESI search firm would be placing the fox in charge of the henhouse. As for limiting, in advance, the time and expenses of Garrett Discovery, that is just another attempt to block discovery.

As noted from the start of this Memorandum Decision, this Court will amend the Forensic Order to provide for the Stay Movants to retain Garrett Discovery. But that will be on this Court's own motion, not the Stay Movants' request, and they will have no control over the process except that Garrett Discovery will be expressly obligated to the Stay Movants not to disclose any information except as ordered by this Court.

7. MODIFICATIONS TO THE FORENSIC ORDER ON THIS COURT'S OWN MOTION

Pursuant to the agreements of the parties in their papers and at the above-captioned hearing, this Court contemplates modifying the Forensic Order on its own motion, to provide that the actual retention of Garrett Discovery is to be by the Stay Movant law firms and/or their principals or agents, as they requested. But that will not give the Stay Movants control over Garrett Discovery, except for assuring that Garrett Discovery has an obligation to the Stay Movants not to disclose any documents or information except as may be authorized by this Court. The modified order will also include additional safeguards, also agreed to on the record, to ensure that the Stay Movants do not use their modified relationship with Garrett Discovery to attempt to

direct it not to conduct a full forensic investigation, or otherwise corrupt the discovery process.

Specifically, in addition to the already existing provisions of the Forensic Order requiring Garrett Discovery to provide both parties with a list of "hits" from various searches, and other protocols, this Court contemplates that Garrett Discovery will be directed to compile much of the data required to be included in a privilege log. For example, this Court contemplates that Garrett Discovery would be directed to compile a spreadsheet listing for each communication the person sending it, and all recipients including "cc" and "bcc" recipients (collectively, all "Recipients"). That data must be provided in a spreadsheet format, or other format that can be (a) converted into a privilege log and (b) compared with that privilege log to track any changes from what Garrett Discovery provided.

The Stay Movants will then be required to compile that data into an actual privilege log. Then Garrett Discovery will be required to prepare a draft declaration identifying every instance in which there has been a deletion or alteration of any Recipient or other data listed by Garrett Discovery. The Stay Movants will have an opportunity to review Garrett Discovery's draft declaration, to be sure that it does not inadvertently disclose privileged or otherwise protected information. If the Stay Movants change the draft declaration, Garrett Discovery will be required to include a statement to that effect in its amended declaration (without disclosing the material deleted by the Stay Movants or the substance thereof). This process will assure that the Alleged Employees, the Stay Movants, and this Court are alerted to the existence of the issues and can take appropriate steps to address them.

For example, using the hypothetical emails described above between Johnny Ling and a military client, suppose that Mr. Ling's email disclosing his destruction of Little Sheep documents is described by Garrett Discovery, in its spreadsheet provided to the Stay Movants, as "email re destruction of Little Sheep documents." Suppose further that the Stay Movants insist, through their counsel of record, that this be

changed to, "email re meeting at Little Sheep for lunch and client-related matters including sensitive military communications," and insist on withholding rather than just redacting the email. In that situation, Garrett Discovery's declaration should note that the description of this email has been changed by the Stay Movants.

This Court contemplates directing the parties to meet and confer regarding the precise form of these provisions, and any additional safeguards of the discovery process. Meanwhile, this Court will issue an order (i) temporarily staying the Forensic Order on its own motion, (ii) directing the parties to meet and confer regarding the precise terms of any modifications to the Forensic Order, and (iii) setting a hearing to address such modifications. All of the foregoing is subject, of course, to the current stay by the BAP of any actual enforcement or modification of the Forensic Order, and whatever else the BAP may order.

8. CONCLUSION

For the reasons set forth above, the Stay Motion is denied, but this Court will grant limited relief on its own motion, subject to further directions from the BAP. A separate order implementing this Memorandum Decision will be issued shortly.

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Date: December 17, 2021

Neil W. Bason
United States Bankruptcy Judge