

DOCKET NO.: FST CF 15-5014808-S

WILLIAM A. LOMAS,

Plaintiff,

versus

PARTNER WEALTH MANAGEMENT, LLC
KEVIN G. BURNS, JAMES PRATT-HEANEY,
AND WILLIAM P. LOFTUS

Defendants.

) SUPERIOR COURT
)
) JUDICIAL DISTRICT OF
) STAMFORD/NORWALK
)
) AT STAMFORD
)
)
)
) SEPTEMBER 9, 2016
)
)
)

**REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR
A PROTECTIVE ORDER PURSUANT TO PRACTICE BOOK §§ 13-4(b)(3) and 13-5**

PRELIMINARY STATEMENT

Practice Book § 13-5 permits the court to modify or limit the scope of discovery for “good cause shown” in order to protect a party from “annoyance, embarrassment, oppression, or undue burden or expense.” Nowhere in his opposition does Plaintiff even attempt to challenge Defendants’ undeniable claim that absent the protective order Defendants’ are and will be unduly burdened and incur unnecessary expenses because they must avoid having their attorneys and experts engage in meaningful discussions about this case via email. (*See also* Mot. Ex. D at 13, 2010 Adv. Comm. Notes discussing the undesirable consequences of permitting such discovery). And nowhere in his opposition does Plaintiff even attempt to show that he would be prejudiced by the issuance of the protective order.

The protective order seeks only to protect two important classes of work-product: draft reports by experts and (certain) attorney-expert communications. If these are not protected, then attorneys will “feel compelled to adopt a guarded attitude towards their interaction with testifying experts that impedes effective communication, and experts [will] adopt strategies that protect against discovery but also interfere with their work.” (*See* Mot. at 8, quoting 2010 Adv. Comm.).

Under the proposed protective order, Plaintiff will: (1) be provided with a final report or disclosure by any of Defendants’ testifying experts; (2) be entitled to discover all data and information relied upon by the expert in forming his opinion; (3) be entitled to discovery concerning any assumptions provided by an attorney to the expert; (4) have the opportunity to review the expert’s final report or disclosure with his own experts and to prepare a rebuttal report (drafts of which and attorney-expert communications in connection therewith would also be protected by the protective order); and (5) have the opportunity to depose the expert before trial

(if he so chooses) and to cross-examine the expert at trial.

In short, Plaintiff cannot point to a single legitimate reason for his opposition to the protective order. For the reasons previously stated in the Motion and now set forth below, Defendants respectfully request that the Court grant their motion and issue the requested protective order.

ARGUMENT

I. There Is A Justiciable Controversy

Plaintiff maintains that because Defendants' attorneys and experts have not created work-product yet, there is no justiciable controversy. This is simply incorrect. Plaintiff entirely ignores Defendants' discussion concerning Plaintiff's Second Set of Requests for Production ("RFPs"). (Mot. at 3-4 & Ex. B thereto). If Defendants' experts create a draft report, as surely as the sun rises in the east, Plaintiff will contend that it must be produced pursuant to any or all of RFP Nos. 10, 25, 56, 63, 64, 75, 76.

If Defendants' attorneys and Defendants' experts discuss, by email, their mental impressions, conclusions, opinions, or legal theories of the case, as surely as the sun sets in the west, the Plaintiff will contend that these must be produced pursuant to any or all of RFP Nos. 10, 25, 56, 63, 64, 75, 76.

The fact that such work-product and communications do not exist – and will never exist absent the issuance of the requested protective order – does not turn Defendants' motion into a request for an advisory opinion. A party does not need to first place itself in jeopardy or risk prejudice its case in order for there to be a justiciable controversy. Indeed, if anything, the fact that Defendants have control over whether these documents ever come into being dispositively demonstrates that they are quintessentially work-product. **The documents and**

communications for which protection is sought would be created solely in preparation for trial. In any event, unless Plaintiff is prepared to unequivocally declare in writing or in open court that he would not seek discovery of draft reports or attorney-expert communications (excepting the three classes of communications carved out in the protective order), then there is a live and justiciable controversy that requires an adjudication.

II. The Requested Protective Order Should Issue

Plaintiff makes two legal points in opposition to Defendants' motion, neither of which has merit.

A. Neither the 2009 Nor the 2016 Amendments to the Practice Book Provide Any Guidance As to Whether the Requested Protective Order Should Issue

Plaintiff attempts to argue that the 2009 and/or the 2016 amendments to the Practice Book have some bearing on whether a protective order should issue. But Plaintiff's arguments are misplaced. Although Plaintiff contends Section 13-4(b) is clear, he entirely ignores – and therefore concedes – Defendants' argument that § 13-4(b) sets forth default disclosures from the parties by agreement or the Court upon motion for “good cause shown” is free to modify. (*See* Mot. at 4-5). Absent the protective order, communications with testifying experts and trial preparation become unduly burdensome and unnecessarily more expensive. Moreover, Plaintiff has certainly offered no counter-veiling reason for not issuing the protective order.

Plaintiff further attempts to argue that the Practice Book drafter's silence is evidence of their intent. But silence is very different than “studied silence.” It would be one thing if the drafters of the Practice Book had noted their consideration of the 2010 amendments to Fed. R. Civ. P. 26(b)(4)(B)-(C) and decided to leave Practice Book § 13-4(b) as it currently is. But there is no evidence that the drafters ever gave such consideration to the matter. Indeed, only two things are certain in light of the 2009 and 2016 amendments. Practice Book § 13-4 was amended a

year before Rules 26(b)(4)(B) and (C) were amended. And after the 2016 amendments to the Practice Book, Connecticut courts retain wide discretion to issue protective orders for good cause shown.

Defendants submit that granting their motion would constitute a sound exercise of that discretion as the protective order is reasonable, narrowly tailored, and is requested to protect quintessential work-product.

B. *Meleney-Distassio* Should Control the Outcome Here

Meleney-Distassio v. Weinstein, 2016 WL 570048 (Conn. Sup. Ct. Jan. 19, 2016) should control the outcome here. *Meleney* is the only authority cited by either of the parties that specifically addresses the meaning and interpretation of Practice Book § 13-4 in the context of the post-2010 versions of Rules 26(b)(4)(B)-(C). *Meleney* correctly concluded that Connecticut law protects the same classes of work-product that the federal rules protect.

For this reason and others, Plaintiff's reliance upon *Noble v. City of Norwalk*, 2012 WL 3870634 (Conn. Sup. Ct. Aug. 3 2012), *Steel v. Bosse*, 2014 WL 5356704 (Conn. Sup. Ct. Sept. 23, 2014), and *Barbierri v. Pitney Bowes, Inc.*, 2014 WL 6804459 (Conn. Sup. Ct. Oct. 17, 2014) is misplaced.

Although Plaintiff complains that Defendants' "out-of-state counsel" is seeking to deviate from the Practice Book in favor of the federal rules (Opp. at 3), the reverse is in fact the case. Plaintiff is using an *ad hominem* to tempt this Court to ignore the well-established tradition and practice of the courts of this state to looking to and rely upon the federal rules and federal authority for guidance in construing the Practice Book. Indeed, as *Meleney* and Plaintiff's own authority points out: "Because there are strong similarities between Connecticut discovery rules and the discovery rules contained in the Federal Rules of Civil Procedure, Connecticut courts

often look to federal court interpretations.” *Meleney*, 2016 WL 570048 at *2; *Noble* 2012 WL 3870634 at *2 (collecting authorities and noting: “As our appellate courts have often done, the court looks to the federal rules and interpretations for further guidance.”).

Finally, although Plaintiff’s authorities were all decided after the 2010 amendments to the federal rules and all (except *Steel*¹) actively relied on federal law in reaching their holding, these cases not only do not discuss the post-2010 version of Rules 26(b)(4)(B)-(C), but rely on the federal authorities that were overruled by the by the 2010 version of the federal rules. *See Meleney*, at *3. As the 2010 Advisory Committee made clear, these federal authorities were overruled by the rule change because the “Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects” – including eroding the work-product doctrine, unnecessarily driving up costs, creating delays, impeding effective communications between experts and counsel, and hampering experts ability to perform their role.²

¹ While *Steel* did not rely on invalid federal law, it provides no guidance here because the court did not explicate any of the facts.

² Thus, the holdings in *Noble* and *Barbierri* are deeply suspect. The *Noble* court’s entire *ratio decidendi* was based upon “the guidance provided by reference to the Federal Rules of Civil Procedure and interpretations thereof by the federal courts.” *Noble*, 2012 WL 3870634 at *5. But the cited decisions had all be overturned by the 2010 amendments to the federal rules.

Barbierri is similarly suspect. Although the court explicitly looked to the federal rules for guidance, it entirely ignored the post-2010 amended version of the Rules. *Barbierri*, 2014 WL 6804459 at *1. It should be noted, however, that the only document at issue there was determined to be – after an in camera review – “entirely factual” in nature and contained “no indication of counsel’s or the defendant’s mental impressions, conclusions, opinions, or legal theories” nor any “reference to anything said” by attorneys. *Id.* at *3. Thus, although suspect, the holding in *Barbierri* is entirely consistent with Defendants’ proposed protective order, under which the facts relied upon by the expert are still subject to disclosure.

CONCLUSION

For the reasons set forth in Defendants' motion and above, Defendants respectfully request that the Court grant their request for a protective order.

Dated: September 9, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September 2016, I caused the foregoing, Defendants' Reply Memorandum In Further Support of Their Motion for a Protective Order to be served via electronic mail and by U.S. mail on counsel as follows:

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