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LOS ANGELES
SUPERIOR COURT

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES**

STEPHEN SLESINGER, INC.,)	CASE NO. BC 022365
)	
Plaintiff,)	STATEMENT OF DECISION
)	RE: DEFENDANT'S MOTION
v.)	FOR SANCTIONS
)	
THE WALT DISNEY COMPANY,)	
)	
Defendant.)	
_____)	

I.

PREFACE

The Court here confronts a situation where a party, Plaintiff, Stephen Slesinger, Inc. ("SSI"), has tampered with the administration of justice and threatened the integrity of the judicial process. SSI's misconduct is so egregious that no remedy short of terminating sanctions can effectively remove the threat and adequately protect both the institution of justice and Defendant, The Walt Disney Company ("Disney"), from further SSI abuse. Exercising its inherent powers to preserve and protect the integrity of the judicial process, the Court dismisses SSI's action with prejudice as a terminating sanction.

II.

OVERVIEW

Soon after filing this action in the early 1990s, SSI embarked on a course of conduct extending over many years aimed at secretly acquiring Disney documents related to this litigation. SSI did not keep any records showing when, how and where it obtained Disney material. It did not record the full range, quantity and identity of: Disney documents procured; Disney documents retained; and Disney documents discarded. No reliable chain of custody was established. This absence of records is not, in the Court's view, accidental. The investigator who surreptitiously procured documents for SSI destroyed his notes and shredded his payment records by hand. SSI wanted his activities kept secret.

In the absence of any records, the Court cannot know the full sweep of SSI's activity, and SSI cannot give any sort of satisfactory accounting. The Court has no acceptable assurance SSI has produced all Disney writings acquired through its investigator. Deceptions surrounding SSI's piecemeal and grudging production of Disney documents causes the Court to believe SSI likely still possesses additional Disney material.

The documents examined in these proceedings were created by many Disney organizations operating at multiple, separate facilities. The materials include attorney-client and attorney work product documents. The more than 6,400 pages involved represent only a small portion of the Disney writings SSI acquired through its investigator. SSI claims it, and its agents, reviewed and then discarded the remainder. The Court is not convinced all the remaining acquired documents have been discarded. Only SSI knows what information

was, or is, in those materials.

SSI characterizes the Disney documents SSI claims to have discarded as “useless,” but the Court has no way to confirm that assertion, and doubts it in light of the extensive deceptions SSI has employed to conceal its activities and SSI’s demonstrated unwillingness to voluntarily, immediately, and fully produce the materials when required.

The Disney documents which SSI admits keeping are decidedly not useless. A number of key writings SSI retained are directly related to this litigation and reveal, among other things, privileged information useful to an opponent such as SSI. Indeed, after SSI’s misconduct came to light, it filed a motion seeking leave to use one of the documents against Disney, arguing the writing was “highly relevant” to SSI’s claims. The declaration of SSI’s investigator, attached in support of that motion, was wilfully false and calculated to induce the Court to rely on false testimony in deciding a motion in SSI’s favor – an attempted fraud on the Court.

SSI principals who read Disney’s writings possess in their minds information which no Court order or sanction can purge. The Court does not believe SSI will comply fully with any future remedial order if SSI concludes, as it apparently has in the past, that compliance with a court order does not serve its private tactical objectives. SSI’s willingness to tamper with, and even corrupt, the litigation process constitutes a substantial threat to the integrity of the judicial process – a threat requiring decisive, effective and stern sanctions to fully protect the institution of justice, its processes and its litigants from future abuse.

III.

DISCUSSION

Disney Documents Unlawfully Obtained and Altered by SSI

After commencing this litigation in the early 1990s, SSI hired an investigator, Mr. Terry Sands, to surreptitiously procure Disney documents outside the regular discovery process. Ms. Pati Slesinger is SSI's sole shareholder. Her husband, Mr. David Bentson, acting for SSI along with SSI's lawyers, received Disney writings from Sands as he acquired them. On occasion, Sands discussed his planned activities with SSI and its agents in advance. In most instances, SSI gave Sands a free hand.

Neither SSI, nor any of its agents, maintained logs or other records of what Disney documents Sands provided. SSI claims to have discarded many documents received from Sands, but SSI did not make any record of what it discarded or when.

The absence of records, considered with all the circumstances presented, leads to a rational inference that a candid and complete accounting would: impeach SSI's and Sands' assertions that Disney's documents were lawfully obtained from a single source; impeach SSI's assurances that all involved documents have either been disclosed to the Court or discarded by SSI and that none have been retained; and impeach SSI's claim that Disney's documents were useless.

Sands attempted unconvincingly in his testimony to narrow his sources of Disney writings to a single dumpster enclosure. He testified that his first search, executed at a Disney convention hotel, netted no documents other than one he removed from a waste paper

basket and returned. Other than the hotel waste paper basket, Sands claimed he only took Disney documents from dumpsters located at a single Disney site – Buena Vista Plaza, 2411 West Olive, Burbank, CA.

Mr. Sands admitted taking “bags full” of documents on numerous occasions and, once in his possession, SSI became responsible to account for them. Sands delivered some of the bags full to SSI without first sorting through the material. In those instances, he left the sifting task to SSI.

The Court does not believe Sands’ testimony that he consciously decided against taking documents from facilities other than Buena Vista Plaza because penetrating those locations would, in his judgment, constitute a trespass. The Court agrees that entering the other facilities would constitute a trespass, but does not believe Sands avoided those other locations for that reason. Mr. Sands does not impress the Court as a person who considers himself constrained by trespass laws.

Sands testified that before taking Disney material from Buena Vista Plaza, he checked with the Burbank Police Department to make sure his conduct, as he described it to the police, was legal. Sands kept no note of the contact, and no police report or other record was supplied to corroborate the contact. Sands admitted he did not show the police photographs of the Buena Vista Plaza dumpster enclosure, and he did not inform the police that Buena Vista Plaza and Disney were his targets. The Court does not believe the police contact ever occurred.

Soon after beginning his work for SSI, Sands obtained a directory of Disney personnel and their corresponding site locations. He used the directory to identify and survey multiple facilities where he might procure documents relating to this litigation. While he claims not to have penetrated any site other than Buena Vista Plaza, the Court does not believe him. Sands' initial survey formed the prelude for multiple trespasses over an extended period of years at many targeted facilities.

The truth emerged, in part, when Mr. Sands failed to provide a credible explanation for his deposition statement that the fruits of his activities depended on how much time he spent at "any given location." Additionally, Sands claimed he removed documents from four dumpsters within the Buena Vista Plaza enclosure. That 10x13 foot enclosure apparently never contained four dumpsters. Sands testified the trash bags at Buena Vista Plaza were clear plastic and that he peered through them to determine whether they contained targeted documents. The bags used at the time by Buena Vista Plaza janitors were dark plastic, not clear. It appears Mr. Sands confused his activities at various Disney locations.

A surveyed location of particular interest was the Golden State Fibres site at Canoga Park. Disney contracted with Golden State to dispose of internal company documents – including writings of the sort involved here. Disney employees dropped documents in special containers located inside Disney offices. Golden State collected the material and transported it, in containers, to the Canoga Park facility, where documents were pulverized.¹

¹ Disney employees may have discarded a number of documents in the ordinary trash not serviced by Golden State, but the Court is not convinced the large volume and wide variety of

Mr. Sands figured out Golden States' role and followed its trucks to find the Canoga Park site. This facility provided Sands with an obvious goldmine of Disney writings collected from multiple local Disney offices. He was sure to find targeted documents there.

Mr. Sands denies taking any Disney documents from the Canoga Park site, but the Court does not believe him. Sands testified that Dale Holman, Jr. occasionally went with him on document acquisition trips. Holman, Jr. testified his role was to remain in the car and flash the lights, or honk the horn, if someone approached. Holman, Jr. recalled going with Sands to an industrial site in "Reseda or Canoga Park" surrounded by a fence, where Sands entered private property through a hole in the fence and took documents, stuffing them into a duffel bag.² The Court believes Sands entered the Canoga Park site and took Disney documents.³ The wide variety of Disney documents involved here, originating from multiple Disney organizations at many separate office locations, persuades the Court, along with other

writings Sands procured slipped through the system through a single dumpster source at Buena Vista Plaza as SSI and Sands maintain.

² SSI urges the Court to disregard most of Holman, Jr.'s declaration on grounds he specifically initialed only two paragraphs. The Court finds that Holman, Jr. approved the declaration by placing his initials on all the disputed pages. The Court has not considered Sean Anderson's testimony for any purpose, whether corroborative of Holman, Jr. or otherwise, in reaching a decision here. The Court overrules SSI's objections to other declarations submitted by Disney, except the Court sustains SSI's objections to: Page 3, paragraph 10, lines 9-12 of the Huebner declaration; and all characterizations of the contents of documents stated in the Jih declaration. The Court overrules Disney's objections to declarations submitted by SSI, except the Court sustains Disney's objections to: Page 2, lines 6-7 of the 1/29/04 Fausett declaration; Page 20, lines 9-12 of the Sorensen declaration; and Tabs 10-11 of the SSI Appendix containing a law enforcement bulletin and a Chicago Tribune article.

³ While Golden States' President, Mr. Collet, wishes to believe his site, and related procedures, were secure from unauthorized penetration, they apparently were not.

evidence, that Golden State Fibres was a primary source of Disney documents procured by Sands.

In the mid-1990s, Disney security personnel received two anonymous telephone calls. The single caller stated he worked with Terry Sands and that he and Sands had been taking Disney documents from locations in Northridge, Burbank, Glendale and trash cans on Flower Street. The caller said documents had been taken off desks inside offices, as well as from trash containers. He indicated David Bentson had hired Sands to obtain documents relating to a lawsuit involving licences and royalties for Winnie the Pooh. Disney security investigated the anonymous tips but developed no actionable information verifying the caller's statements.

Dale Holman, Sr. later admitted he was the anonymous caller. He and Sands together procured Disney documents on numerous occasions. While Holman, Sr. now seeks to distance himself from the truth of his originally anonymous statements, the Court finds his initial statements constitute the truth, and his attempts to disavow them are false.⁴ Holman, Sr. has an obvious motive to avoid admitting he committed potentially criminal acts, as does Sands. Holman, Sr. now claims he made the anonymous calls because he was mad at Sands but cannot remember why he was mad. The Court does not believe Holman, Sr. informed on Sands over a trivial cause which he cannot now remember, especially since Holman, Sr. was implicating himself in serious misconduct.

⁴ Holman, Sr's attempt at wholesale written correction of his deposition testimony is, in this Court's view, a fabrication unworthy of belief.

Mr. Sands, for his part, claims the anonymous calls coincided with an occasion when Sands discovered Holman, Sr. had molested Mr. Sands' daughter. Contemporaneous court documents relating to Mr. Sands' report of that incident, however, show he did not learn of the molestation until well after Holman, Sr. made the anonymous calls.

Holman, Sr. now claims only to have participated in taking documents from dumpsters at Buena Vista Plaza, but he admits going with Sands to a location in Canoga Park. Holman, Sr.'s story now predictably matches that of his accomplice. But, when his deposition was taken earlier, Holman, Sr. drew a diagram of a target facility that did not remotely resemble the Buena Vista Plaza enclosure. Indeed, Holman, Sr.'s drawing more closely sketches other Disney facilities surveyed and penetrated by Sands and Holman, Sr. When shown photographs of the Buena Vista Plaza site, Holman, Sr. did not recognize it.

The Court is fully convinced the writings procured by Sands did not come from a single dumpster source at Buena Vista Plaza as Mr. Sands claims and SSI asserts. As one of many, many documentary proofs: Sands procured a Disney audit report with the name "Vince Jefferds" highlighted on the distribution list. The document Sands acquired was a copy originally distributed to Mr. Jefferds, who worked in offices at Disney's main studio lot. Jefferds never worked at the Buena Vista Plaza location. Another example: Sands procured a series of documents involving Wendell Mohler, who worked for Jefferds. Many of these materials were stamped "Received" by Mohler's office. Others bear handwritten checkmarks next to Mohler's name on a "cc:" list. Like Jefferds, Mr. Mohler never worked

at Buena Vista Plaza.⁵

SSI's single dumpster thesis is untenable, and the Court rejects it as unpersuasive.

Even if Buena Vista Plaza was the only location penetrated by Sands, he still had no right to trespass that property, open the metal gates closing the dumpster site (whether or not they were locked), lift up the metal dumpster lids, climb into dumpsters and/or reach into them, and take targeted Disney documents.⁶ The Plaza dumpsters were located on private property, not at a street curb as occurs on trash collection days in residential neighborhoods. The applicable Burbank Municipal Code prohibits unauthorized removal of the contents of any garbage container. B.M.C. §§ 24-108(d), 24-111(f).

The contents of the Plaza dumpsters were not, in this Court's view, made available to the public so as to give SSI a right to treat Disney's documents as abandoned and use them for private advantage. *Ananda Church of Self-Realization v. Massachusetts Bay Ins. Co.* (2002) 95 Cal. App. 4th 1273 does not apply, because, here, SSI took Disney's documents unlawfully in the first instance, rendering abandonment inapplicable. *Ananda* holds, for insurance purposes, that abandoned trash is not insurable under a property damage policy. *Ananda* does not disturb the settled rule that abandonment requires a finding that a party

⁵ The presence of Management Audit and other functions at Buena Vista Plaza does not, on the evidence presented, disturb findings that Mr. Sands acquired Disney documents from multiple sources. The Court is persuaded by other evidence, including Mr. Sands' demeanor on the witness stand, that far more than a single dumpster source was involved.

⁶ SSI, through Sands, trespassed Disney's protected leasehold interest at Buena Vista Plaza. (Ex. 209, Standard Form Office Lease ¶ 16, Rules and Regulations ¶¶ 5, 24; Ex. 210 at 14, ¶ 25.)

relinquished its right to control its property at the point where the challenged taking occurred. The Court finds, on the evidence presented, that Disney had not relinquished its right to control its documents at any of the many sites where Sands took Disney documents, including Buena Vista Plaza.

SSI claims it instructed Sands to only obtain Disney documents by lawful means, but SSI remains fully responsible for Sands' misconduct, even if his acts, as SSI's agent, were contrary to SSI's explicit instructions. *Martin v. Leatham* (1937) 22 Cal. App. 2nd 442, 445. In light of all the circumstances, SSI had to suspect Sands was engaged in questionable conduct and that he was procuring documents from many Disney sources. Yet, SSI failed to adequately supervise Sands' activities. Rather, it essentially closed its eyes in circumstances which, if not carefully controlled, could lead to grave consequences.

While SSI closed its eyes to Sands' activities, it paid close attention to the fruits of his labor. Several examples illustrate the point.

Suit Overview Document

Mr. Bentson testified that Sands procured a document titled Suit Overview. (Ex. 532.) The writing, when obtained by Sands, bore a privilege legend on its cover sheet. Material of this nature, prepared by Disney's Strategic Planning Department with its lawyers, always bore a "Privileged & Confidential – Attorney Work Product" cover sheet legend.

Even the most cursory reading of the document's contents indicates its privileged nature. The Suit Overview distills "two central issues" of this case and contains a risk analysis of potential outcomes, with percentage risks assigned. One page, titled "Expected

Value of Potential Outcomes,” charts various assumed results with corresponding contingencies. While numbers are not assigned to values on the chart, the analytical framework is fully revealed.

At its core, the Suit Overview evaluates Disney’s chances for success in this litigation. While the evaluation is preliminary and incomplete, it is hard to imagine a work product document whose contents could be more confidential. Indeed, the work product privilege is absolute for this type of material. SSI had to realize the tactical significance of the document. SSI’s attorneys surely did.

Attorney Memorandum

Sands procured and provided SSI a Disney Legal Department memorandum with the subject line “Slesinger v. Disney.” (Ex. 533.) The document, written on “Office of Counsel” letterhead, was marked “PRIVILEGED AND CONFIDENTIAL.” Addressed to Edward Nowak, Disney’s senior in-house litigation attorney handling this case, the memo analyzes the meaning of the term “merchandise” for purposes of the Agreement in dispute here. The copy produced by SSI bears a fax header showing it was transmitted from Pati Slesinger’s offices to SSI’s attorneys.

SSI, and its attorneys, circulated the document among themselves and reviewed it in detail. In producing the memo, SSI redacted notes made on it by SSI, or its attorneys, and now claims a privilege for the marginalia. The contrast between SSI claiming privileges for itself, on the one hand, and utterly disregarding Disney’s privilege rights, on the other, could not be more revealing.

SSI, and its attorneys, secretly read Disney's privileged thinking on a core issue in this litigation. And, as previously noted, they secretly read Disney's privileged analysis of potential outcomes.

One must pause here.

Conduct of this sort strikes at the heart of the judicial process. Lay persons know that. Lawyers do too.

Restricted Items List

Mr. Sands procured a Disney Restricted Items List. This 278-page document, maintained by Disney in-house counsel, summarizes information relating to exclusive licenses with third parties.

One copy of the document produced by SSI's attorneys (Ex. 539A) contains a cover page labeled "C O N F I D E N T I A L" in large, bold letters. That copy also includes within it a Corporate Participants section containing 24 pages of material with "CONFIDENTIAL - For Internal Use Only" stamped in bold letters at the bottom of each page.⁷

In contrast, another copy of the same Restricted Items List (Ex. 541A), produced from Pati Slesinger's files, lacks the confidential legend on its cover page and lacks the 24

⁷ Mr. Sands claims he never knowingly took any documents from Disney marked confidential. SSI, however, concedes it received the Restricted Items List from Sands. The document, conspicuous in bulk and nearly two inches thick, bore on its face, in bold-faced, large capitals, the legend "C O N F I D E N T I A L." The Court believes Mr. Sands took the document knowing it was marked "C O N F I D E N T I A L."

confidential Corporate Participants pages, creating the false appearance that Disney made no claim of confidentiality as to any portion of the document.

SSI suggests Disney may have generated two versions of the document, one confidential and one non-confidential. No evidence supports this hypothesis and, to the contrary, Disney's in-house attorney personally responsible for creating the List, Ms. Vipperman, declared she never generated a non-confidential version and never omitted the confidential Corporate Participants section materials.⁸

Expert testimony by forensics document examiner Erich Speckin establishes that the Restricted Items List from Ms. Slesinger's file, with the confidential legend missing on its face page, is the source document from which SSI and its agents made copies bearing the confidential legend. The legend was removed from Ms. Slesinger's document after copies were made. Unique, identical damage markings common to all copies prove the point beyond all reasonable doubt.

Pati Slesinger's List and SSI's counsel copies are not independently created versions. The cover page on her List is an altered replacement of a page originally bearing a confidential legend. The cover pages on SSI's counsels' Lists are copies of the cover originally on Slesinger's List before alteration. Ms. Slesinger, or someone acting for SSI, altered her cover page, eradicating the word "C O N F I D E N T I A L" to create the false

⁸ While others apparently participated, at times, in preparing the Restricted Items List (e.g., Shoosh Karpman, Julie White and Lea Adamitz), no evidence demonstrates that any of them varied from Ms. Vipperman's stated practices and procedures.

appearance that Disney made no claim of confidentiality as to the entire document possessed by SSI in Ms. Slesinger's files and to create the false impression that Disney created both non-confidential and confidential versions of the Restricted Items List.⁹

The Court finds that the Restricted Items List which Mr. Sands delivered to SSI contained all 24 pages of the confidential Corporate Participants section, and all those pages were marked "**CONFIDENTIAL - For Internal Use Only.**" An orange divider page immediately following the Corporate Participants title page in the Slesinger List has a tiny piece of white fibrous material on it. While not conclusive, the fibrous material is consistent with a finding that white paper once occupied the space between dividers in Ms. Slesinger's List. The initial pages of the 24-page group from SSI's counsels' copies have damage patterns matching the damage pattern on the Corporate Participants title page in the Slesinger List.

The Court finds that SSI's counsels' copies were made from the Slesinger List at a time when the Slesinger List contained the 24 pages of confidential Corporate Participants material. SSI, or someone acting in its behalf, subsequently removed the 24 pages marked confidential from the Slesinger List to create the false impression that the contents of the Restricted Items List were not confidential and to create the false impression that Disney created both non-confidential and confidential versions of the Restricted Items List.

⁹ Producing in civil discovery documents which the producing party has altered, and which the producing party pretends not to have altered, can constitute a crime. *See People v. Pereira* (1989) 207 Cal. App. 3d 1057. Removing pages, as well as secretly redacting written portions of pages, is equally offensive.

SSI eventually produced to Disney certain pages removed from the Restricted Items List, claiming SSI had only recently found the pages in its files, and claiming not to know how the pages got into SSI's files. At about the same time, SSI made statements to the Court calculated to lead it to believe those pages were not confidential. When Disney moved for a protective order, SSI again disclaimed knowledge of confidentiality. Disney ultimately took its motion off calendar when SSI agreed to return to Disney "all copies ... of the contract summaries." That representation proved false. SSI retained copies of the material, including the source document in Pati Slesinger's file.

Contrary to its representations to Disney and the Court, SSI knew how it had obtained the Restricted Items List and knew it bore conspicuous confidential markings when originally procured by Sands. SSI either knew, or certainly should have known, that it had not returned all copies of the List to Disney. Whether intentionally deceptive, or something less culpable, the Court finds that SSI cannot be trusted to comply fully with any future order requiring it to purge its files of improperly obtained Disney documents. The Court finds SSI knowingly did not return all copies of the Restricted Items List, and the deception was intentional.

Interrogatory Tables

In preparing to respond to a series of interrogatories propounded by SSI in this case, Disney compiled an extensive set of Interrogatory Tables protected by the attorneys' work product privilege. Sands surreptitiously obtained a number of Interrogatory Table pages.¹⁰

¹⁰ Sands may have obtained the entire table. Neither Sands nor SSI have fully accounted for what was taken.

(Exs. 535A, 567/567A, 1029A.) A copy of a Table page produced by SSI's counsel (SSI-X 11760) bears the legend "Attorney work product. Privileged and confidential. Created at the request of counsel." This page bears two fax headers showing it was faxed from Pati Slesinger's Goldbook office and from Sirley Lasswell's Slesinger & Ryder office.¹¹ SSI reviewed the document.

Like the privileged Slesinger v. Disney memo, the Table page has been redacted to remove notations added by SSI which SSI now claims are privileged. The page is part of a larger set of 24 pages of Interrogatory Tables produced from the files of SSI's attorneys during Disney's inquiry into Sands' activities (SSI-X 12943-66). SSI's attorneys disclosed that this 24-page set came originally from Pati Slesinger. While the single page and 24-page group bear the same date, format, and general content, the privilege legend is missing from every page of the 24-page set.

The Court believes all the Interrogatory Table pages presently in question were originally created by Disney with privilege legends. The Court finds the Table page produced by SSI's counsel and the Table pages from Pati Slesinger's file all came from the same legend-bearing source. Transient photocopying damage marks prove they came from a common source document.

The Court finds that SSI, or someone acting on its behalf, removed Disney's privilege legends without disclosing the alterations when the material was ultimately produced. The

¹¹ Ms. Lasswell is SSI's only corporate officer and board member.

deception was calculated to create a false impression that Disney had originally generated the material without protective legends.

Ms. Slesinger claimed, in live testimony before the Court, that she did not remove the confidential and privilege legends from the Restricted Items List and the Interrogatory Table documents. Her demeanor on the witness stand when making those denials, coupled with evidence linking her directly to the documents,¹² convinces the Court that Ms. Slesinger's denials were false.

The Remaining Body of Disney Documents

Many of the remaining documents contain material which, on its face, appears to constitute confidential business and/or legal information. A few examples include: privileged and confidential memoranda concerning Disney negotiations with the Milne Trust for addition of a Winnie the Pooh attraction at Tokyo Disneyland (Exs. 572-80) and concerning the scope of Disney's legal rights relating to Winnie the Pooh (SSI-X 13325-26), rights at issue here; draft Disney discovery responses in this case (SSI-X 11583-11594); draft agreements with handwritten change suggestions (SSI-X 11709-40); draft answers and counterclaims to be filed by Disney in an unrelated lawsuit (SSI-X 11052-72); and documents discussing matters addressed to Disney's Legal Department (SSI-X 11630).

Redactions of marginal notes on over 300 pages of these documents – cataloged in SSI's redaction logs – suggest extensive document-by-document review of the material by

¹² Altered Disney documents were produced from her files.

SSI or its agents.

In late 2002, SSI filed a motion seeking the Court's permission to use one of the Sands-procured Disney documents in this litigation, arguing it is "highly relevant" to the merits of SSI's claims. SSI supported its motion with a declaration of Mr. Sands. The Sands declaration is misleading and outright false in material respects. The Court does not believe Mr. Sands' statement in his declaration that he contacted the Burbank Police Department, and finds he did not. Mr. Sands made the false statement to mislead the Court into believing Sands' conduct was considered appropriate and lawful by local police. Further, Mr. Sands declared: "Although I did visit dumpsters at two other locations [in addition to Buena Vista Plaza], I never found any documents related to Winnie the Pooh from those locations and never delivered any documents from those locations to David Bentson or the lawyers." The Court finds, on the evidence previously discussed, that Mr. Sands in fact "visited" more than just two other locations in addition to Buena Vista Plaza.¹³ His false statement confining his "visits" to only two other locations was calculated to mislead the Court into believing incorrectly that Sands' activities were very limited in scope.

Mr. Sands' live testimony, and his demeanor while testifying, along with other evidence, convinces the Court that the Sands declaration of October 11, 2002 is willfully misleading and false and calculated to induce the Court to rely on deceptive, false testimony

¹³ To say in his declaration that he never "found" any documents related to Winnie the Pooh at other locations supports, along with other evidence, an inference that he actively searched for documents at those other locations. Mr. Sands did far more than simply "visit" other Disney facilities, he searched them for documents.

in deciding a motion in SSI's favor – an attempted fraud on the Court.¹⁴

SSI argued at the February hearing that any mistakes it may have made were a product of confusion and inadvertence on its part. The Court does not accept either excuse. On numerous occasions, both formal and informal, on the record and off, SSI had opportunities when it could have, and should have, made a complete and fully candid disclosure. It did not, and, instead, chose the opposite deceptive course, avoiding affirmative, voluntary disclosure at every turn, except on a single occasion in October, 2002, when SSI decided that proactive disclosure of a single Disney writing worked to its tactical advantage.

When disputed documents first emerged in discovery, SSI claimed falsely not to know how it had obtained them. SSI next claimed falsely that confidential documents bore no confidentiality legends, when SSI had itself removed the legends to support its false assertion that the material was not confidential. SSI next delivered a batch of disputed documents to Disney, claiming falsely to have returned all copies in its possession – a tactic apparently designed to end the controversy short of full disclosure. The tactic worked at first, as Disney agreed to withdraw a motion which had placed the issue of questioned documents before the Court. Neither Disney nor the Court knew at the time that SSI possessed far more documents than the few then at issue.

¹⁴ SSI's motion, with the Sands declaration attached in support, is presently pending before this Court and would be flatly denied if it were not mooted by terminating sanctions. When the motion was originally filed, the facts now presented had not yet come fully to light. Thankfully, the truth emerged in time to thwart the attempt at inducing the Court to rely on falsifications.

At a deposition of Ms. Shirley Lasswell, Disney asked about the anonymous caller's tips, and Ms. Lasswell responded: "I don't know anything about anything like that." Confidential Disney documents taken by Sands and his helpers bear fax transmission headers to and from Shirley Lasswell's Florida office.

In October, 2002, SSI's then attorneys, responding to a subpoena, delivered 1,054 pages of Disney documents obtained by SSI outside discovery. The batch included, among other things, the Suit Overview and the Restricted Items List. Over the following months, more and more documents came to light. Then, after SSI changed counsel, its new attorneys produced a final group of about 500 pages in a file labeled "Documents Received from Terry Sands on 6/7/02." These materials came from the files of SSI's former lawyers.¹⁵

In her 2002 deposition, Pati Slesinger was asked if she knew what investigators had done for SSI. She responded: "Whatever investigators do. I don't - no, I don't." At the deposition she was properly instructed by her attorneys not to reveal what her attorneys had told her privately. The Court finds, however, that Ms. Slesinger knew of her investigator's activities through sources and personal experiences independent of conversations with her attorneys. She personally met with Mr. Sands and personally visited the Buena Vista Plaza dumpster site. She maintained Disney documents procured by Sands in her files.

¹⁵ It appears Mr. Sands may have removed the documents from his possession just days before receiving a deposition subpoena. Disney contends Sands knew in advance he would be deposed and required to produce documents. SSI offers no explanation for how the Sands documents got into its attorney's files. One document in the Sand's file is dated June 5, 2002, indicating that Sands was procuring Disney material long after SSI claims to have halted the activity.

Ms. Slesinger testified she thought everything to do with Mr. Sands was protected by either the spousal or attorney-client privilege, and she appeared confused in her video-taped deposition. Given her potential confusion, the Court does not weigh her deposition answers on this particular point in the balance against her in deciding this motion.¹⁶

SSI was represented by attorneys who had unfettered access to Disney's privileged and confidential documents. SSI's attorneys had a duty, at least in the event of inadvertent production, to inform Disney they possessed Disney documents which appeared potentially privileged and confidential. *State Compensation Ins. Fund v. WPS, Inc.* (1999) 70 Cal. App. 4th 644. This duty, if only by analogy here, protects the integrity of the litigation process by insuring, as to inadvertently produced material, that questions of privilege are resolved by courts, when necessary, and not unilaterally by adversaries secretly taking matters into their own hands.

Attorneys possessing an adversary's potentially privileged documents, inadvertently produced, must not only notify the opposing side immediately, but must also refrain from examining the materials and return all copies to avoid disqualification. And, more illuminating here, the attorneys must not divulge the contents of such documents to their clients, because to do so incurs the risk that a court may need to terminate the client's case,

¹⁶ The Court is troubled, however, by the fact that in a court proceeding following the Slesinger deposition, her attorney, who represented her at the deposition, apparently referenced her deposition testimony and asserted "she didn't know anything about it, this document stealing." The Court finds she did know all along.

because clients cannot be disqualified, and clients' minds retain ill-gotten information for potential future use in litigation.

In short, the lawyer's strict duty, in circumstances of inadvertent production, is designed to prevent client contamination. ABA Comm. On Ethics and Professional Responsibility, Formal Op. 92-368. Here, SSI contaminated itself, and the contamination is incurable. Perhaps the contamination could have been contained if SSI's misconduct had come to light early on and an effective remedy applied early in the process, but no disclosure was made, and the document acquisition and contamination process continued unabated for years.

SSI now claims Disney waived any privileges it originally may have possessed in connection with documents taken by Sands. The Court finds, on the facts presented, that Disney did not knowingly, intentionally, or inadvertently waive any privileges it could have originally asserted. An operative waiver requires more evidence than exists here.

Disney's document processing procedures cut against a finding of waiver. Sands' trespasses at multiple locations, including the document disposal facility operated by Golden State Fibres, contradicts SSI's waiver claims. Sands' admission at the February hearing that he knew Disney would prevent his dumpster activities, if discovered, refutes any SSI claim that it believed, in good faith, that Disney intended to waive its privileges.

SSI had no right to break laws to obtain evidence. *See Pullin v. Superior Court* (2000) 81 Cal. App. 4th 1161, 1164-65 (evidence must be obtained lawfully, without trespass); *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal. 4th 553, 577 ("[A]

private party has no privilege or immunity to employ illegal means to obtain evidence[.]”)

And, SSI had no right to covertly or overtly use unlawfully obtained evidence for its own tactical purposes.

Other Information and Documents Withheld from Discovery

Beginning near the inception of this lawsuit, and continuing over a period of years, Disney propounded many separate interrogatories and requests for documents requiring SSI to identify all relevant promises, including oral and written representations, allegedly made by Disney to SSI. As far back as March 27, 1991, Disney requested all documents concerning “any agreements” and “any communications” between the parties. Disney had a right to receive this information early on so it could adequately defend itself and obtain relevant evidence.

SSI has repeatedly failed to supply certain key information and documents on point, despite court orders requiring compliance. SSI’s withholding of its own information and documents called for repeatedly in discovery appears more than inadvertent.

Both sides agree Vincent Jefferds is a central character in this case. He was a Disney employee involved in negotiating the April 1, 1983 Agreement. Both sides knew this from the outset. Disney contends that six years into the case, and following many occasions when SSI had a discovery duty to disclose all representations Jefferds allegedly made to SSI’s principals, SSI for the first time supplied certain key documents allegedly written years ago by SSI principals relating to communications with Mr. Jefferds and other Disney employees.

When asked why the documents, and the information they contain, had not been disclosed earlier, SSI initially claimed disclosure had been made.¹⁷ Later modifying its position, SSI asserted the relevant documents had previously been withheld in a privilege file.

The Court finds no applicable privilege that would justify not disclosing the documents. At a minimum, SSI's documents should have been listed on a privilege log, unless the material had been previously produced.

The Court does not view SSI's delayed production as merely "belated," as SSI suggests. SSI was obligated early on to disclose fully in discovery the underlying non-privileged facts concerning non-privileged conversations between SSI and Jefferds. SSI did not fulfill this obligation.

Disney contends that by the time SSI began disclosing its relevant documents, key percipient witnesses were dead, including Mr. Jefferds, Mr. Dick Floum (one of SSI's principal negotiators) and Mr. Seymour Bricker (negotiator for the Milne Trust). Disney argues that while it was fully aware of Mr. Jefferds and his role in dealing with SSI, the delay in disclosing SSI's information and documents deprived Disney early in the case of a fair opportunity to preserve Jefferds' responsive testimony.

¹⁷ SSI argues that a "possibility" exists some of the withheld documents were produced by SSI at an early stage of the litigation, when a number of documents may have been produced without Bates numbers. The Court finds, in light of all the evidence considered here, that the claimed possibility does not rise above unpersuasive speculation.

If SSI's failure to timely produce, and active withholding of, relevant SSI information and documents were the only issues here, a remedy short of terminating sanctions might be appropriate. But SSI's other misconduct, discussed earlier in this Statement of Decision, compels the Court to consider and ultimately order terminating sanctions.

Lifting or modifying, as a counterbalance, sanctions previously imposed on Disney would not, in this Court's view, constitute an appropriate alternative. When the integrity of the institution of justice is threatened by a party such as SSI, two wrongs cannot be placed in the balance so as to generate a single corrective right.¹⁸

IV.

CONCLUSION

The Court possess "the inherent power to control the proceedings before it and to make orders which prevent the frustration, abuse, or disregard of the court's processes." *Conn v. Superior Court* (1987) 196 Cal. App. 3d 774, 785. The Court's inherent powers include the power to sanction misbehavior and to preserve the integrity of the judicial process. *Peat, Marwick, Mitchell & Co. v. Superior Court* (1988) 200 Cal. App. 3d 272, 287. Inherent judicial powers to sanction misbehavior are not limited to redressing discovery abuses or confined only to monetary sanctions. The Court's discretionary powers here exercised exist apart from legislative grant. *Id.* at 285-89; *see also Russell v. Dopp* (1995)

¹⁸ Disney's request for sanctions arising out of SSI's apparent failure to prevent destruction of SSI's accounting records is rendered moot by the terminating sanctions ordered here.

36 Cal. App. 4th 765, 774-75 (fraud on the court).

Courts resort to terminating sanctions only as a last resort, where lesser sanctions will not adequately redress the wrong. *R. S. Creative, Inc. v. Creative Cotton, Ltd.* (1999) 75 Cal. App. 4th 486, 496. Whatever opportunity the Court may at one time have had to remedy SSI's misconduct with lesser sanctions has long since passed through no one's fault but SSI.

Ordering return of Disney's documents is not an effective remedy. The Court has no confidence SSI would fully obey the order. Even if SSI did comply, SSI's principals reviewed the documents and retain the contents in their minds. They could, and likely would in the future, consciously or subconsciously use the information in this litigation. No order the Court could fashion would prevent it. No jury instruction could remedy the harm done.

Disqualifying counsel will not work. SSI's recently retained counsel have not done anything to warrant disqualification and have represented their client well and honorably in very difficult circumstances.

While SSI deserves punishment through substantial monetary sanctions, money sanctions cannot purge improperly obtained information from the minds of SSI's principals. Moreover, the Court is not convinced that monetary sanctions would deter SSI's future misuse of the information. SSI is dishonest and shows no remorse.

The Court emphasized at the outset of this process that Disney faces a heavy burden to convince the Court to order terminating sanctions. That burden remained heavy in the Court's mind as it listened to live testimony, assessed demeanor, heard oral arguments, reviewed declarations and documentary evidence, read the thoughtful briefs submitted by

counsel and, in the end, wrote this Statement of Decision.

The Court has decided issues in this matter with the burdens of proof and persuasion placed fully on Disney where appropriate. Disney has clearly and convincingly carried both burdens. The credibility of Disney's evidence, the contrasting incredibility of SSI's evidence, and the gravity of SSI's misconduct, along with other relevant considerations, ultimately led the Court to the decision it now renders. Disney's evidence was, by and large, compelling. SSI's evidence, and SSI's attempts at innocent explanations, were unpersuasive. The Court finds that SSI's misconduct was wilful, tactical, egregious and inexcusable.

Terminating sanctions, in this instance, are not "merely punitive" as SSI argues. They are restorative and prophylactic. In any event, courts possess inherent powers to order sanctions with elements of punishment where, as here, the integrity of the judicial process has been both threatened and abused. *McGinty v. Superior Court* (1994) 26 Cal. App. 4th 204, 212 (citing *Peat, Marwick, Mitchell & Co.*, 200 Cal. App. 3d at 286.)

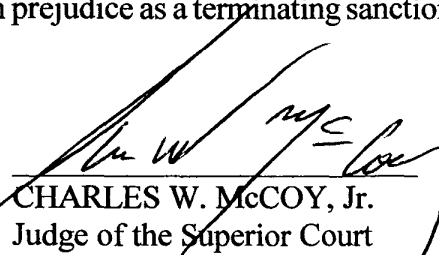
Terminating sanctions are here the proper remedy to restore the integrity of the judicial process and fully protect the institution from further SSI abuse.

V.

ORDER

SSI's complaint against Disney is dismissed with prejudice as a terminating sanction.

DATED: March 29, 2004.


CHARLES W. McCOY, Jr.
Judge of the Superior Court