UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NXIVM CORPORATION (formerly known as EXECUTIVE SUCCESS PROGRAMS, INC.) and FIRST PRINCIPLES, INC., Plaintiffs, -against- MORRIS SUTTON, ROCHELLE SUTTON, THE ROSS INSTITUTE, RICK ROSS (a/k/a "RICKY" ROSS, STEPHANIE FRANCO, PAUL MARTIN, Ph.D., and WELLSPRING RETREAT, INC., Defendants and Counter-Claimants,		Civ. No.: 2:06-cv-01051 (DMC/MF) Oral Argument Requested

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BRIEF OF NXIVM PARTIES IN OPPOSITION
TO MOTIONS TO DISMISS AND/OR STRIKE

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PRELIMINARY STATEMENT

Defendants[1] did not provide the Court during the February 11 status call with either a complete or accurate depiction of how NXIVM responded to their latest discovery demands. Throughout this litigation, NXIVM has responded at least 7 times to numerous discovery requests - many of which were repetitive or marginally relevant - all before providing its February 2008 discovery responses, about which defendants now complain.

Defendants insincerely attempt to portray discovery delays and deficiencies in this case as one-sided. To the contrary, NXIVM's February responses were accurate, thorough and complete and three minor technical deficiencies have already been corrected. Defendants, on the other hand, have asserted numerous baseless blanket objections and have refused to produce discoverable information despite repeated requests by NXIVM and other parties.

Moreover, defendants' references to a "document dump" are untruthful. One of the problems NXIVM has had to deal with is, as this Court noted on the status call, that certain of defendants' discovery requests have gone

[1] For the sake of simplicity, Defendants Morris and Rochelle Sutton, Rick Ross, The Ross Institute, Stephanie Franco, Paul Martin and Wellspring Retreat, Inc., and Counter-claim Defendants Interfor, Inc., Juval Aviv and Anna Moody are collectively referred to herein as "Defendants." Likewise, Plaintiffs NXIVM Corporation and First Principles, Inc. and Counter-Claim Defendants Keith Raniere, Nancy Salzman and Kristin Keeffe will be referred to collectively as "NXIVM" even though the individuals are not necessarily representatives of NXIVM.

"far afield." In response to defendants' broad requests and their incessant claims of under-production, NXIVM produced all conceivably responsive documents to err on the side of caution. Every document produced relates to a demand by defendants, to NXIVM's theories of this case and/or is something NXIVM intends to use to examine witnesses at depositions and trial.

Finally, defendants attempt to portray Keith Raniere as shirking his obligation to appear for a deposition. This is not accurate either. Opposing counsel was told a week in advance that the date they unilaterally chose for his deposition had not been confirmed. When a different time frame in February was offered, defendants flatly refused to consider alternative dates, made no attempt to proceed with depositions of others who were available, and ran to this Court to seek dismissal.

This case has changed dramatically since Judge Cavanaugh's June 2007 decision on summary judgment. Some claims were dismissed and a counter-claim for defamation was added. Thus, although this case has been ongoing in one form or another for several years, it has been narrowed and simplified, requiring much less discovery and only limited and shortened depositions which will bring this case to prompt conclusion. Given NXIVM's repeated efforts to comply with the countless discovery requests served by the various parties, defendants' own inexcusable failures to respond to legitimate discovery demands and the

meritoriousness of NXIVM's remaining claims and defenses, NXIVM's case should not be disposed of based largely on invented discovery disputes at this late juncture rather than proceeding to trial on the merits.

Background

NXIVM offers training and enrichment programs to individuals and groups to help participants realize their fullest potential. NXIVM's training has application across all areas of human endeavor and in both the personal and public lives of people who complete the training.

To NXIVM's great misfortune, it has become entangled in a family dispute between defendants Morris and Rochelle Sutton (the "Suttons") and their son, Michael, relating to choices he made to take responsibility for his child and other circumstances of his personal life that conflict with the Suttons' religious beliefs.

This case is about how the Suttons hired a man named Rick Ross, a convicted felon who passes himself off as a "cult deprogrammer," and how Ross victimized a legitimate business by publicly and falsely labeling it a "cult" that employs "mind controlled techniques" and "brainwashing," in the hopes of drumming up demand for his so-called "cult deprogramming" services and in furtherance of the Suttons' expressed objective to "destroy" NXIVM's business.

As part of the Suttons' scheme, they sent their daughter, Michael's half sister, Stephanie Franco ("Franco"), to NXIVM under the guise of becoming a NXIVM course participant and coach, with the true purpose of stealing course materials and training materials that were only available to NXIVM coaches. Hiding her own competitive business as a self-improvement counselor, Ms. Franco breached her non-disclosure agreement with NXIVM and delivered the stolen course materials to the Suttons and Ross.

Furthering the Suttons' scheme and for his own self-aggrandizement, Ross, in turn, distorted these materials in order to brand a legitimate business "a cult" that taught techniques developed by a man Ross maintained had "serious mental problems." The man to whom Ross and Martin were referring, Keith Raniere, did indeed develop much of the methodology that forms a central tenet of NXIVM, but the rest is all distortion. Ross, and his chosen mouthpiece, Paul Martin, Ph.D. of the Wellspring Retreat, Inc. ("Martin at Wellspring"), took NXIVM's confidential, copyrighted and trade secret materials for their own and publicized false statements about those materials and their authors.

This case is not, as some defendants maintain, about free speech. False, factual assertions that plaintiffs practice "thought reform" and "brainwashing" and constitute a "cult" are defendants' new stock in trade and demonstrate their malicious intent to harm NXIVM.

NXIVM commenced this action to protect its intellectual property, which the defendants misappropriated in breach of multiple confidentiality agreements and then publicly disseminated and mischaracterized, including by posting portions of NXIVM's materials on the Internet. Shortly after learning of the defendants' actions in July 2003, Plaintiffs filed this action in August 2003 against Rick Ross, The Ross Institute, John Hochman, Paul Martin, and Stephanie Franco in the Northern District of New York.

ARGUMENT

I. DEFENDANTS OFFER NOTHING TO SHOW EITHER WILLFUL OR SIGNIFICANT FAILURE TO COMPLY WITH DISCOVERY

The law in this District that defines the factors that must be met to justify the extreme sanctions of dismissal or default, not only restricts those sanctions to the most egregious of cases, but also requires that there be no less-harsh alternatives available. (*See Poulis v. State Farm Fire and Cas. Co.*, 747 F.2d 863, 867-68 (3d Cir. 1984) ("We reiterate what we have said on numerous occasions: that dismissals with prejudice or defaults are drastic sanctions, termed 'extreme' by the Supreme Court …and are to be reserved for comparable cases.") "'When a district court has doubt, the decision whether to dismiss should be resolved in favor of reaching a decision on the merits and alternative sanctions should be used.'" *Kegolis v. Borough of Shenandoah*, 2006 U.S. Dist. LEXIS

59258, *5 (M.D. Pa. 2006) (quoting *Roman v. City of Reading*, 121 Fed. Appx. 955, 958 (3d Cir. 2005) (unpublished)).

In *Poulis*, the seminal case on this issue, plaintiff did not respond or even object to defendant's discovery demands. (*Id.* at 865.) Several weeks after discovery had closed and after the due-date for plaintiff's pretrial statement had passed, defendant filed a motion to compel, along with its own pretrial statement. (*Id*.) The court's staff called plaintiff's attorney requesting that plaintiff submit its pretrial statement. (*Id*.) Plaintiff never filed the statement and never requested an extension. (*Id.)* Thereafter, the court *sua sponte* dismissed plaintiff's complaint. (*Id.*)

The Third Circuit reversed and vacated the dismissal, noting its drastic nature and that the District Court had not considered alternate sanctions. (*Id.* at 866.) On remand, the District Court ordered the parties to file briefs on appropriate sanctions, and plaintiff filed its brief 4 days late. (*Id.)* Thereafter, the District Court again dismissed plaintiff's complaint without giving due consideration to alterative, less-harsh sanctions. On appeal, the Third Circuit pointed out the "consistency of [its] rulings emphasizing the extreme nature of a dismissal with prejudice or default judgment" and reiterated that "[d]ismissal must be a sanction of last, not first, resort." (*Id.* at 869). It then discussed 6 specific

parameters it would consider in reviewing any such future dismissals by the District Court:

> (1) the extent of the *party*'s personal *responsibility;* (2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a *history* of dilatoriness; (4) whether the conduct of the party or the attorney was *willful* or in *bad faith*; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of *alternative sanctions*; and (6) the *meritoriousness* of the claim or defense. (*Id.* at 868 (emphasis in original)).

Using this analysis, it found that the District Court did not abuse its discretion in ordering dismissal because of the egregious nature of plaintiff's one-sided and willful failures to provide any discovery or meet any deadlines and because defendant was prejudiced by having to file its pretrial statement without receiving any discovery from plaintiffs. The court also found that plaintiff had offered nothing to dispute the *prima facie* defense described by defendant. (*Id.* at 870.)

Any alleged discovery deficiencies in this case do not rise to the level this Court has found in the past to merit dismissal under *Poulis*. In fact, most of those cases involved parties that flatly refused to produce any discovery and that did not even oppose motions to strike or for dismissal. *See, e.g., Ramada Franchise Sys. v. Patel*, 2004 U.S. App. LEXIS 11300, *3-5 (3d Cir. 2004) (unpublished) (party failed to oppose motion to strike even after this Court sent the

party a letter offering them a last chance to do so); *Johnson-Shavers v. MVM, Inc.*, 2008 U.S. Dist. LEXIS 6320, *8-10 (D.N.J. Jan. 29, 2008) (unpublished) (party failed to oppose motion to dismiss, provided no discovery responses at all and refused this Court's direction to provide proposed discovery plan); *First Nat'l Bank v. Majestic Home Mortg.*, 2007 U.S. Dist. LEXIS 61243, *2 (D.N.J. 2007) (party failed to oppose motion to strike); *Sims v. Invacare Corp.*, 2007 U.S. Dist. LEXIS 46211, *3 (D.N.J. 2007) (unpublished) (party failed to oppose motion to dismiss); *Laure v. Costco Wholesale Grp.*, 2006 U.S. Dist. LEXIS 2592, *2-3 (D.N.J. 2006) (unpublished) (same; party also provided no discovery responses at all and refused to be deposed); *Chanel, Inc. v. Craddock*, 2006 U.S. Dist. LEXIS 10478, *4 (D.N.J. 2006) (unpublished) (failure to appear for Court-ordered settlement conference); *Elmorsy v. Ramanand*, 2005 U.S. Dist. LEXIS 30191, *14-17 (D.N.J. 2005) (unpublished) (party explicitly stated he would not attend deposition, and alternative sanctions would not remedy deficiencies because opposing party had already agreed once to dismissal without prejudice).

Dismissal is particularly inappropriate where no motion to compel has been brought by the opposing party. *See, e.g., Hawthorne v. American Mortg., Inc.*, 489 F. Supp.2d 480, 488 (E.D.Pa. 2007) (denying summary judgment in the absence of a motion to compel even though there were numerous discovery failures, including the failure to provide timely or adequate initial disclosures,

failure to respond to interrogatories and document requests, failure to produce a corporate designee for a deposition, and failure to attend a single deposition taken during the litigation.). "Generally, [Rule 37] requires the issuance of an order to compel and only after failure to comply with that order should a penalty be imposed." *McMullen v. Bay Ship Mgmt.*, 335 F.3d 215, 217 (3d Cir. 2003) (where dismissal was not the proper sanction for a subcontractor's refusal to respond to discover requests based on invocation of his Fifth Amendment privilege against self-incrimination).

A. NXIVM Bears No Personal Responsibility For Any Perceived Deficiencies Because The Alleged Deficiencies Either Do Not Exist Or Were Minor and Have Been Corrected.

Despite NXIVM's good faith attempts to comply with the numerous discovery demands made in this case, and despite the defendants' own documented deficiencies, defendants now move to strike NXIVM's pleadings. This case bears no resemblance to the level of abuse required by *Poulis* to justify any sanctions, let alone the extreme sanction of dismissal. In fact, no motion to compel has been brought and none of the 6 *Poulis* factors are met, therefore these motions should be denied in their entireties.

1. Sutton/Franco's Arguments Are Without Merit.

Sutton/Franco's complaints boil down to the following: (1) failure to respond to Nos. 10, 13, and 20 of Franco's Second Set of Interrogatories to

NXIVM, (2) failure to produce 35 videotapes, (3) failure to provide a certified copy of Nancy Salzman's Second Amended Responses to Franco's Interrogatories, (4) failure to produce documents relating to the retention of Interfor to investigate Franco, and (5) failure to produce documents requested from non-party Michael Sutton. (Sutton/Franco Mem. of Law at 3) In addition, Sutton/Franco unfairly portray NXIVM's February document production as a "document dump." (Franco/Sutton Mem. at 3) None of the Sutton/Franco allegations have merit and identify no deficiency on NXIVM's part as to merit the dismissal of NXIVM's Complaint and striking of its pleadings.

First, with respect to the alleged failure to respond to Nos. 10, 13, and 20 of Franco's Second Set of Interrogatories (requesting that NXIVM provide statements from the witnesses disclosed in NXIVM's pleadings – *i.e.*, requesting that NXIVM take testimony for defendants), those requests were properly answered. (Powers Decl. at 19) NXIVM is under no obligation to take testimony from witnesses on behalf of defendants. (*See, e.g.,* F.R.C.P. Rule 34(a); *Insituform Techs. v. Cat Contr.*, 168 F.R.D. 630, 1996 U.S. Dist. LEXIS 16181 (N.D. Ill. 1996) (party is under no obligation to create documents that do not exist)). NXIVM made the witnesses available to defendants – all it was required to do – and even provided defendants with expert calculations. (Powers Decl. at 19;

Keeffe Aff.) NXIVM provided defendants with more information than they are entitled to prior to the conclusion of expert discovery.

Second, regarding the alleged failure to produce 35 videotapes requested by Franco, NXIVM asserted valid objections to the production of this material. (Keeffe Aff.) Defendants have made no effort to resolve those objections. (Powers Decl. at 12; Keeffe Aff.) This material reveals NXIVM's proprietary training methods and contains the images and voices of dozens of NXIVM students whose privacy and confidentiality would be violated if NXIVM were to produce these tapes to Franco. (Keeffe Aff.) Additionally, videotapes of classes where Franco was not present is not relevant to any remaining claims and defendants have offered no satisfactory explanation as to why they are. Nor have defendants brought a motion to compel production of those tapes. (Edwards Decl.) Moreover, NXIVM conducted an exhaustive search for and then produced all of the videotapes that included Ms. Franco's image. (Keeffe Aff.) This Court has never ruled that NXIVM should produce the remainder of these materials, and doing so would violate the primary rights of many uninvolved students while shedding no light on any issue relevant to this action.

Third, Sutton/Franco argue that Ms. Salzman did not provide verified responses to interrogatories. (Sutton/Franco Mem. at 2) That is not accurate. Ms. Salzman's verified responses were produced along with the February

document production on February 1. (Powers Decl. at 12; Keeffe Aff.) They were certified by counsel and the certification page was delivered on February 20. (Powers Decl. at 10) Although they were not certified by counsel until after being produced, a procedural deficiency such as this is not unusual and was promptly addressed. Moreover, NXIVM's primary goal was to serve its discovery responses, answers and documents promptly. Contrast this with defendants' outright refusal to produce relevant information and their assertion of baseless objections which they stand by to this day.

Fourth, Sutton/Franco cite NXIVM's alleged failure to produce documents relating to the retention of Interfor to investigate Franco. (Sutton/Franco Mem. at 2) Defendants admit that this material has already been produced by others in this case. (Ross Mem. at 6) Despite this fact, NXIVM has tried to locate copies of the retainer agreements with Sitrick and Interfor and will produce them if and when located. (Keeffe Aff.) NXIVM has no non-privileged documents in its possession relating to this issue. (Keeffe Aff.)

Fifth, Sutton/Franco complain about NXIVM not providing documents from non-party Michael Sutton. (Sutton/Franco Mem. at 2) Like many of defendants' allegations in these motions, this is frivolous. NXIVM obviously has no obligation to produce materials demanded of a non-party where it does not control that party. NXIVM's counsel does not represent Michael Sutton and

NXIVM does not have his "file." In addition, NXIVM has already advised defendants that any of Michael Sutton's "files" cannot be located after having made a good faith effort to do so. Moreover, NXIVM has tried to assist defendants by producing equivalent information from its computers.

NXIVM's February document production was a good faith attempt to provide responses to all outstanding discovery so this matter can be concluded once and for all. Although voluminous, NXIVM's production was anything but a "document dump," as defendants incorrectly allege. NXIVM included only material that it believed was relevant to the issues in the case, responsive to outstanding discovery requests, or that would be used to examine witnesses and/or offered at trial. (Powers Decl. at 13; Keeffe Aff.) NXIVM's counsel has reviewed this submission, met with NXIVM and confirmed this. (Waala Aff.)

Sutton/Franco also allege that NXIVM's "serial hiring and firing of counsel" and the fact that it made the February production without assistance of counsel somehow require dismissal of NXIVM's complaint. (Sutton/Franco Mem. at 5) To the contrary, as is well-documented, NXIVM was well within its rights to employ or dismiss prior counsel. It was necessary to do so in some cases where counsel was over-billing or outright stealing from NXIVM. (Powers Decl. at 9; Keeffe Aff.) Regardless, these are not events that warrant sanctions.

In addition, defendants' complaint that production was done without counsel's assistance is not accurate. While NXIVM handled the logistics of production, it did so in consultation with and under the direction of counsel. (Powers Decl. at 10; Waala Aff.) Moreover, NXIVM's additional counsel, Phillips Lytle LLP (not yet admitted in this case) has conducted a thorough review of NXIVM's February document production and has assured that the documents are relevant to defendants' demands and/or issues in this case. (Powers Decl. at 10; Waala Aff.) In addition, NXIVM's written responses and valid objections to interrogatories were complete, thorough and accurate. (Powers Decl. at 10; Keeffe Aff.)

2. Ross's Specific Arguments Are Also Without Merit.

First, NXIVM did not unilaterally fail to meet and confer as Ross alleges. In truth, it was defendants' counsel who refused to entertain alternate dates for Mr. Raniere's deposition when Mr. Edwards suggested a later date in February, choosing to instead bring these motions. (Powers Decl. at 11; Edwards Decl.) NXIVM is no more to blame for this issue than any other party. Regardless, the proper action when a party fails to meet and confer is a motion to compel, not a motion for sanctions, especially where so far no motion to compel has been brought.

Ross also complains about NXIVM's purported refusal to identify the trade secrets allegedly disclosed in the 3 articles published on Ross's site. (Ross Mem. at 8) NXIVM is not obligated to do a word by word comparison of its trade secrets vis-à-vis the publications on Ross's website, because NXIVM is under no obligation to create documents for defendants - only to produce documents in its possession, custody or control. (*See, e.g.,* F.R.C.P. Rule 34(a); *Insituform Techs. v. Cat Contr.*, 168 F.R.D. 630, 1996 U.S. Dist. LEXIS 16181 (N.D. Ill. 1996) (party is under no obligation to create documents that do not exist)). It is sufficient that NXIVM has produced evidence that up to 55% of its confidential, trade secret material was illegally published. (Cmplt. at ¶ 109; Norwick Decl. at 3) If defendant seeks additional discovery on this issue despite NXIVM's valid objections, the proper response is a motion to compel, not a motion for sanctions.

Second, Ross asserts that 3 pieces of written discovery were missing from the February document production: (1) written responses to Ross's Second Set of Discovery Demands, (2) verified answers to Rick Ross's First Set of Interrogatories to Nancy Salzman and (3) NXIVM's Second Amended Response to Rick Ross's First Set of Interrogatories. (Ross Mem. at 3) NXIVM admits that in its efforts to complete discovery by the deadline, it may have inadvertently left the second and third responses out of the February production, but it promptly produced those responses in certified form after defendants pointed this out.

(Powers Decl. at 10; Edwards Decl.; Keeffe Aff.) In addition, NXIVM's counsel has provided a written response to Ross's document requests, as required. (Powers Decl. at 11; Edwards Decl.) These minor procedural deficiencies do not warrant sanctions.

Third, Ross cites the failure of counsel to verify NXIVM's production. (Ross Mem. At 4) This is not accurate. While NXIVM personnel handled the logistics of that production, they did so under the direction of and in consultation with counsel. (Powers Decl. at 10; Waala Aff.) Additional counsel for NXIVM has met with its client, examined its document production, and has assured that a thorough search has been made and no non-privileged material has been withheld in response to Ross's requests. (Waala Aff.) In addition, a revised privilege log was provided on February 1 and will be supplemented as required. (Powers Decl. at 11; Edwards Decl.) Ross's arguments are therefore without merit.

Fourth, Ross asserts that NXIVM's February document production was a mere "document dump" comprising material that was not kept in the ordinary course, was not organized or labeled as required by Rule 34(b), and which was deliberately cleansed of print copyright dates ostensibly to make it appear that they were already in NXIVM's possession. (Ross Mem. at 4) To the contrary, NXIVM's document production included only material relevant to the issues in

this case and responsive to Ross's broad and countless demands. (Powers Decl. at 13; Waala Aff.; Keeffe Aff.)

Moreover, NXIVM produced its files to Ross in the order they were either kept or received, not in an unorganized fashion as Ross alleges. (Keeffe Aff.) In fact, with the exception of a few misplaced pages or documents, all of the production was made in distinct groupings of documents arranged by category or subject matter as NXIVM keeps its files and as the documents were demanded. (Keeffe Aff.) NXIVM is under no obligation to organize defendants' case for them.

Defendants are correct that material was collected from the internet shortly before production. (Keeffe Aff.) This, however, is no ground for objection, especially as Ross's requests are unlimited as to any time period. (Ex. 20) In fact, much of the material was collected from internet archives and relates to time periods well before the actual collection, printing, or production of the documents. (Keeffe Aff.)

Fifth, Ross complains that the production did not include email or other communications relating to the Ross Investigation and that NXIVM either deliberately withheld documents, or failed to preserve or destroyed documents while litigation was pending. (Ross Mem. at 5) No records were withheld other

than on the basis of good faith objections, and no records were destroyed. (Keeffe Aff.)

Ross also complains that the only responsive documents provided by NXIVM in its document response last year were files that had been produced by Interfor, Sitrick and Company, and O'Hara. (Norwick Decl. at 4) That is not a credible objection. NXIVM produced those documents because they were the only responsive documents NXIVM located in its files at the time. (Powers Decl. at 11; Keefe Aff.) The February 1 production supplements that production and after receiving defendants' new requests, NXIVM produced additional responsive documents as already described. Contrary to defendant's assertions about Mr. Edwards February 1 letter, counsel has certified that a thorough search for responsive documents has been undertaken. (Powers Decl. at 11; Waala Aff.)

Moreover, NXIVM has already advised defendants that it either (a) does not possess these documents (*i.e.*, in the case of emails, which NXIVM does not save in the ordinary course per its company policy) or (b) has already asserted privilege with respect to them.[2] No documents have been deliberately destroyed,

[2] Ross also falsely alleges that a privilege log was not submitted. (Norwick Decl. at 5) NXIVM's counsel provided a revised privilege log to defendants on February 1 to address their complaints that the prior log was not sufficiently detailed. (Edwards Decl. at 3) Moreover, NXIVM has objected to producing material developed with the direct involvement of prior counsel. While ordinarily unquestionably privileged, the decision in the *O'Hara* case has clouded the issue and in some cases caused outright confusion as to what is to be produced. The

and no documents have been withheld for any reason other than on the basis of NXIVM's valid good faith objections which remain in effect today. (Powers Decl. at 11; Keeffe Aff.) Defendants have never challenged those objections with a motion to compel. (Edwards Decl.)

3. Interfor Abused The Discovery Process.

(a) Interfor served no discovery demands and therefore has no standing to even bring this motion.

Interfor admittedly has never served discovery on NXIVM in this case. (Lack Decl. at 2) Accordingly, there was never an Interfor demand to which NXIVM owed a response. Clearly, therefore, Interfor has no basis to complain that NXIVM has not met discovery obligations owed to Interfor. Its assertions that NXIVM owed some such duty is simply not true.

(b) Interfor's responses to NXIVM's and Ross's discovery requests contained only blanket objections while providing no substantive response.

Interfor objected to every one of NXIVM's discovery demands on the ground that each was "untimely" because the response date for NXIVM's demands (served January 2, 2008) should be February 4 and the Court set February 1 as the due date for responses. (Interfor Objections to NXIVM Document Requests and Interrogatories Served January, 2008.) Rather than attempt to provide a

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parties have never agreed to that amicably, and no motion to compel or for a protective order has been brought. Likely, the only way to resolve this issue is via one such motion or to submit this material for the Court's *in camera* review.

substantive response by the Court-imposed February 1 deadline as NXIVM did, or discuss a compromise date, Interfor chose instead to run out the discovery clock and then seek dismissal of NXIVM's Answer on the basis that NXIVM did not meet its discovery obligations.

This Court specifically admonished Interfor's counsel on the February 11 status call for making these meritless objections (Edwards Decl.), apparently to no effect. Interfor's disregard for the direction of this Court should not be tolerated, much less rewarded with consideration of its brazen motion for sanctions.

NXIVM had asked, for example, for Interfor's files relating to NXIVM's retention of Interfor, the claim that NXIVM breached its agreement with Interfor, and that NXIVM closely supervised Interfor's investigation of Ross. (Interfor Objections to NXIVM Document Requests and Interrogatories Served January, 2008.) Interfor objected to each of these obviously relevant requests. Similarly, Interfor served only blanket objections on December 20, 2007 to discovery served by Ross with no substantive response. (Interfor Objections to Ross Discovery) With this history, it is disingenuous for Interfor to suggest that NXIVM has breached its discovery obligations or that sanctions should be imposed on it.

B. There Is No Prejudice To Any Party.

Contrary to defendants' assertions, paper discovery in this case is complete, with the exception of any decisions this Court may have with respect to the various objections made by each of the parties and any outstanding privilege issues. NXIVM has made a good faith effort to respond to all outstanding discovery demands, even in some cases exceeding its obligations by gathering and producing data not then in its possession and producing information duplicative of discovery already produced by other parties. (Powers Decl. at 12; Keeffe Aff.) Any alleged deficiencies are minor at best and have already been corrected. Defendants, therefore, can demonstrate no prejudice.

Interfor has not served discovery on NXIVM, has failed to provide substantive responses to discovery and was notified by NXIVM's counsel on January 30 that Mr. Raniere's deposition could not be confirmed for February 6 - almost a week beforehand. Incredibly, Interfor admits this fact in its papers, but untruthfully tells the Court that it was only told of Raniere's unavailability on February 5 – the day before. Regardless, in light of Interfor's documented failures and its own delaying tactics, its argument that NXIVM somehow caused prejudice is without merit.

C. The Alleged History Of Noncompliance Is Inaccurate.

Defendants assert NXIVM's alleged failure to provide the requested videotapes and information on damages as a "history" of noncompliance. To the contrary, even though these requests required the impermissible invasion of the privacy of non-parties and were of marginal, if any, relevance, NXIVM reviewed all of its videotapes and produced those on which Franco appeared and objected to production of the others, rather than asserting a proper blanket objection. NXIVM also provided lists of witnesses willing to offer testimony to defendants on the issue of damages. (Powers Decl. at 12; Keeffe Aff.) To suggest this reveals a history of non-compliance is not credible.

In fact, it is defendants who have abused the discovery process throughout these proceedings, ignoring NXIVM's repeated requests for material that is relevant to its prima facie claims, and in the case on Interfor, serving blanket objections with no substantive responses to coincide with the February discovery deadline. Defendants most recent attempt to shirk their discovery obligations by failing to seek a mutually agreeable deposition date for Mr. Raniere to instead run directly to Court seeking sanctions, is the most recent, if not most glaring, example of this history of abuse.

During the course of this litigation NXIVM has repeatedly responded to discovery requests, often going above and beyond what is required, and any

deficiencies were minor and have already been corrected. This cannot be considered a history of noncompliance, and as such, defendant's allegations should not be a basis for dismissing NXIVM's valid claims or striking its prima facie defenses.

D. There Was No Willfulness Or Bad Faith On NXIVM's Part.

Sutton/Franco assert that the requests to which NXIVM allegedly failed to properly respond are longstanding, and that their relevance is clear. (Sutton/Franco Mem. at 6) This is simply not true. The only material NXIVM has not produced is material it either does not possess or has objected to producing on valid grounds. (Keeffe Aff.) If the information sought is so clearly relevant, Sutton/Franco should have sought an order from this Court to compel production. Instead, Sutton/Franco seek to have NXIVM's claims and defenses dismissed because they fear trying this case on the merits.

Any bad faith has been on the part of defendants, who have served volumes of discovery demands, and then when NXIVM makes a good faith effort to respond, run to the Court seeking sanctions. Or, as to Interfor, served no demands and produced no discovery in response to NXIVM's proper demands. If that is not bad faith, surely NXIVM's extensive efforts do not qualify as such.

E. The Ultimate Punishment Of Dismissal Or Default Is Grossly Inappropriate Because Several Less-Harsh Sanctions Are Available For Any Perceived Deficiencies And No Motion To Compel Was Brought.

Even if this Court were to find that NXIVM (or the defendants) has been deficient in its discovery obligations, several remedies are available in lieu of dismissal. For example, an order to compel production or a conditional order of preclusion could be entered, directing all parties to respond to certain discovery and conduct depositions or face dismissal of claims and defense or preclusion of proof at trial for failing to do so. This Court has never been asked to decide even one motion to compel because defendants have never brought one. (Edwards Decl.)

Sutton/Franco's counsel admittedly has made no effort to compel discovery at any time during the entire 2½-year period about which they now complain. (Kofman Cert. at 2). Dismissal is particularly inappropriate here where, unlike in *Poulis*, the discovery period has not ended, no motion to compel has ever been brought and substantial amounts of discovery has been exchanged. (*See Poulis* at 865; *Hawthorne v. American Mortg., Inc.*, 489 F. Supp.2d 480 (E.D.Pa. 2007)).

Counsel for NXIVM has met with its client, determined that a thorough search had been conducted, reviewed materials for relevance, responsiveness and privilege, supplemented the production with a written response,

corrected the late certifications, and supplied the 2 sets of inadvertently omitted interrogatories, all in a matter of days and all prior to the end of discovery. The Court can therefore be assured that any other perceived deficiencies could be quickly remedied before trial and any further delays avoided. As such, ordering the most severe penalties against NXIVM -dismissal, default, or the striking of pleadings- would be grossly inappropriate.

F. NXIVM's Claims And Defenses Are Meritorious.

The Third Circuit in *Poulis* warned that "Although sanctions are a necessary part of any court system, we are concerned that the recent preoccupation with sanctions and the use of dismissal as a necessary "weapon" in the trial court's "arsenal" may be contributing to or effecting an atmosphere in which the meritorious claims or defenses of innocent parties are no longer the central issue. (*Poulis* at 867.) NXIVM has several claims and *prima facie* defenses against the defendants that remain after Judge Cavanaugh's June 27, 2007 decision: (1) copyright infringement against Ross; (2) misappropriation of trade secrets against Franco, Ross, and Wellspring; (3) breach of a confidentiality agreement against Franco; and (4) interference with contract against the Sutton and Ross defendants. (Powers Decl. at 9; Ex. 5) NXIVM's claims for misappropriation of trade secrets and breach of contract were not even challenged on summary judgment. (*Id.*)

Sutton/Franco, however, argue that because some of NXIVM's claims were dismissed by this Court's summary judgment decision, the claims that survived summary judgment or were not even challenged by the opposing parties are somehow "baseless." (Sutton/Franco Mem. at 7) This curious assertion obviously has no basis in law or facts. To the contrary, this Court specifically held that

> Accepting these allegations as true, it is the finding of this Court that Plaintiffs adequately state a claim that [Sutton and Ross] acted with malice by intentionally interfering with the contractual relationship between Plaintiffs and Franco. Specifically, these allegations adequately state a claim for tortious interference with contractual relations because urging a party to a contract to breach a confidentiality agreement in order to destroy another's business is outside of the "rules of the game." *See* Ex. 5 at *44.

Even Ross admits in his motion papers that "three claims against the Ross parties remain (Trade Secret Misappropriation, Interference with Stephanie Franco's Confidentiality Contract, and Copyright Infringement)." (Ross Mem. at 10) These claims have survived a motion for summary judgment, or were not challenged by defendants, and are therefore *per se* meritorious, at least at this stage of the litigation.

Interfor asserts that NXIVM's defense against its counterclaim for indemnification -that the actions Interfor took were unauthorized and outside the scope of its retention- is without merit. In attempting to demonstrate it had

authorization, Interfor cites to one document from non-party Joseph O'Hara as proof that NXIVM had intimate knowledge of the details of the Ross Investigation. (Lack Decl. at 4) Apart from the fact that Interfor relies solely on a document prepared by an indicted attorney who created false documentation to protect his own interests and to cover up an egregious, well-documented theft of millions of dollars from its clients, NXIVM will offer compelling proof at trial that it had no knowledge of and did not authorize any of the allegedly criminal conduct by Interfor. (Powers Decl. at 10; Keeffe Aff.)

It is abundantly clear that NXIVM has asserted valid claims and *prima facie* defenses in this action. These claims have either stood the test on summary judgment or were not even challenged. Accordingly, the argument that NXIVM's claims and defenses are not meritorious must fail.

II. CONCLUSION

For the foregoing reasons, defendant's motions should denied.

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