

Western District Case Notes

■ Kevin Hogan And Sean McPhee **SPECIAL TO THE DAILY RECORD**

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INTERLOCUTORY APPEAL AND MOTION FOR STAY PENDING APPEAL

In *Consumer Financial Protection Bureau v. Stratfs, LLC*, 24-cv-40-EAW-MJR (July 1, 2025)—an action seeking injunctive relief, restitution and civil money penalties in connection with defendants’ marketing and sale of debt-relief services—the District Judge initially entered a temporary restraining order and, after the parties consented to the Magistrate



Kevin Hogan

Judge’s authority to issue a final decision and order on plaintiffs’ motion for a preliminary injunction, the Magistrate Judge granted a preliminary injunction, which continued the temporary restraining order’s asset freeze and receivership. Defendants took an interlocutory appeal and sought a stay pending appeal from the Second Circuit, but the motion for a stay was denied and the Second Circuit affirmed the preliminary injunction. Thereafter, the Receiver identified additional entities that he believed were related to defendants and, therefore, fell within the scope of the preliminary

injunction, so the Receiver identified them as “receivership defendants” that are subject to the preliminary injunction. Those receivership defendants filed motions with the Court objecting to the Receiver’s designation, but their motions were denied, and the receivership was expanded to include them within the scope of the preliminary injunction to maintain the status quo, prevent the dissipation of assets, and protect consumers in the event plaintiffs ultimately prevail in the lawsuit. The receivership defendants then filed interlocutory appeals with the Second Circuit and moved the Magistrate Court for a stay pending their appeals or, in the alternative, for a short-term stay to allow them to seek a stay directly from the Second Circuit. The Court denied the motion for several reasons, holding first that it is likely their appeals will be dismissed for lack of appellate jurisdiction. In reaching this conclusion, the Court observed that appellate jurisdiction is usually limited to final decisions of the district court and, although there is an exception allowing for interlocutory appeals from orders granting injunctions and appointing receivers, the Court’s order that was the subject of the appeals did neither. Rather, it merely expanded the scope of a previously created receivership estate. Next, the Court held that, even if the Second Circuit has jurisdiction over the appeals, the receivership defendants are not likely to succeed on the merits, which is



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a primary factor when deciding a motion for a stay. Indeed, while the receivership defendants argued that expansion of the receivership will be vacated by the Second Circuit for lack of jurisdiction because they did not consent to the Magistrate Court’s jurisdiction to either issue the preliminary injunction or issue orders designating them as receivership defendants, their argument was rejected because it would “defy both logic, and the entire purpose of the receivership,” if consent would be needed from such entities before the Court could decide whether they should be included within the receivership estate. Finally, the Court found that the receivership defendants would not suffer irreparable harm absent a stay, but returning assets to their control would risk further dissipation of assets and encourage the potential hiding of assets, which would harm the interests of opposing parties, and the millions of consumers entitled to restitution should plaintiffs ultimately prevail in the action.

PRIVILEGE AND SUBJECT MATTER WAIVER

In *Fresh Air for the East Side, Inc. v. Waste Management of New York, LLC*, 18-cv-6588-MAV-MJP (July 28, 2025), defendant moved for *in cam-*

era review of attorney-expert communications and documents that plaintiff withheld from production under claims they were protected by the work product doctrine and attorney expert privilege. Defendant argued that any privileges had been waived because of disclosures made by plaintiff in its complaint, interrogatory responses, and document productions, all pertaining to the same subject matter. The Court held that those prior allegations and disclosures had resulted in subject matter waiver of the privileges, and ordered plaintiffs to produce the documents that had been withheld. The Court noted that voluntary disclosure by a party during judicial proceedings may waive the work product privilege not just for the disclosed information but also for otherwise privileged and undisclosed information relating to the same subject matter. According to the Court, such subject matter waiver occurs only if the waiver is intentional, the disclosed and undisclosed documents concern the same subject matter, and they ought in fairness be considered together. The Court also observed that subject matter waiver is reserved for those unusual situations in which fairness requires further disclosure of related protected information in order to prevent a selective and misleading presentation of evidence to the disadvantage of an adversary. Here, the Court found that plaintiff's waiver was intentional, the disclosed and undisclosed documents concerned the same subject matter, and considerations of fairness required that defendant have access to the undisclosed documents so that it would have a contextual understanding of the information that had been disclosed previously.

DEPOSITIONS OF HIGH-RANKING GOVERNMENT OFFICIALS

In *Murray v. State Univ. of N.Y. State Univ. College at Brockport*,

22-cv-6306-CJS-CDH (July 8, 2025), plaintiff sued his former employer—a College within the State University of New York system—for age discrimination and retaliation. As part of discovery, plaintiff sought to depose the College's President and when defendant refused, plaintiff moved to compel the deposition. The Court first noted that, given the broad scope of discovery in federal civil litigation, it is exceedingly difficult to demonstrate an appropriate basis for an order barring the taking of a deposition. Nonetheless, the Court then recognized that a different rule applies where a party seeks to depose a "high-ranking government official." This is because such officials are generally shielded from depositions given their greater duties and time constraints, and if courts did not impose appropriate limitations, such officials would spend an inordinate amount of time tending to pending litigation. Thus, to depose a high-ranking government official, a party must demonstrate exceptional circumstances justifying the deposition, such as where the official has unique first-hand knowledge that cannot be obtained through other, less burdensome or intrusive means. Here, plaintiff did not contest that the College's President qualified as a high-ranking government official but instead argued that she should be deposed because she was personally involved in the actions underlying the allegations in plaintiff's Complaint. Moreover, any inconvenience would be minimized because her deposition could be conducted virtually and would only last an hour. The Court denied the motion, however, finding that plaintiff had not met his burden. Indeed, the College's President submitted a sworn declaration stating under penalty of perjury that she had no unique knowledge or infor-

mation regarding any of the issues surrounding the lawsuit and did not personally make the decisions underlying plaintiff's claims. In addition, the evidence cited by plaintiff confirmed that other personnel were involved, so the information plaintiff sought could be obtained from other sources.

MOTION TO EXTEND CASE MANAGEMENT ORDER DEADLINES

In *United States v. Provenzi, et al*, 21-cv-398-LJV-JJM (July 9, 2025) — an interpleader action that had been pending for over four years in which the case management order had been amended already *three* times—defendant moved to extend the expert disclosure deadline and to compel a co-defendant to produce a contested vehicle for inspection, six weeks after the deadline for fact discovery had closed and on the date when expert disclosures were due. Consistent with Rule 16(b)(4), the Court had cautioned the parties in each its four earlier case management orders that the schedule's deadlines may be modified "*only* for good cause and with the judge's consent," and that "a finding of good cause depend[ed] on the diligence of the moving party." Defendant argued that the proposed extensions in the schedule would cause no prejudice to any party, and that good cause should include consideration of whether the extensions would cause prejudice to the non-party, citing a 2007 Second Circuit decision in *Kassner v. 2nd Ave. Delicatessen Inc.*, 496 F.3d 229. The Court disagreed, though, noting that a panel of the Second Circuit is bound by the decisions of the prior panels until such time as they are overruled either by an *en banc* panel or by the Supreme Court. Thus, the *Kassner* decision could not be interpreted as dispensing with the requirement that good cause exist in order to modify a

scheduling order, as the Second Circuit had ruled in its often cited decision from 2000 in *Parker v. Columbia Pictures Industries*, 204 F.3d 326. Having found that defendant had not been diligent before making its motion, the Court denied the motion to amend the case management order. The Court also denied the motion to compel because it had been filed after the close of discovery and, therefore, was deemed untimely. In closing, the Court quoted from multiple decisions all from the Western District: “While this may seem a harsh result, Rule 16(b)(4) requires a showing of good cause for an extension of [scheduling order] deadlines, and I have no power to rewrite the Rules;” “For the court to now say that it did not mean what it stated in the ... Scheduling Order ... would significantly undermine the court’s authority...;” “A scheduling order entered by a court is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril;” and, “[I]f the courts do not take seriously their own scheduling orders[,] who will?”

FRAUDULENT CONVEYANCES AND SUMMARY JUDGMENT

In *Horwitz v. MacKinnon*, 18-cv-33-LJV (June 20, 2025), a company filed a voluntary petition for Chapter 11 bankruptcy and a trustee was appointed. Thereafter, the trustee reported to the bankruptcy court that the parties had agreed to a Chapter 11 plan, which was ultimately approved by the bankruptcy court. When the terms of that plan were not met, however, the trustee filed an involuntary Chapter 7 petition, and a Chapter 7 trustee was appointed. The Chapter 7 trustee then commenced adversary proceedings seeking to unwind certain conveyances that were allegedly made without fair consideration rendering them constructively

fraudulent. One such transfer consisted of \$130,000 that the bankrupt entity made to the wife of one of its principals. The Chapter 7 trustee moved for summary judgment, and defendants opposed the motion arguing that the payment was for the principal’s salary and merely paid to the wife to permit her to pay household bills and expenses, since she paid the household’s joint family bills. Noting that to avoid a transfer of salary payments, the trustee must establish that the payments were made in bad faith or excessive in light of the defendant’s employment responsibilities, the Court found that the trustee had not met his burden on summary judgment because there were questions of fact—based on the principal’s testimony and that of his wife—as to whether the payment represented the principal’s salary. As a result, the motion was denied, without prejudice.

ATTORNEYS’ FEE AWARD

In *Midwest Athletics and Sports Alliance, LLC v Xerox Corp.*, 19-cv-6036-EAW (June 20, 2025) —a patent infringement lawsuit—the Court previously granted in part defendant’s requests for attorneys’ fees, finding that the case was “exceptional” under 35 U.S.C. §285 because of plaintiff’s belated pursuit of previously undisclosed infringement theories and disregard for the Court’s Local Patent Rules and prior rulings, the combination of which rendered the case “one that stands out from others with respect to the unreasonable manner in which it was litigated.” In response to defendant’s fee request and plaintiff’s objection, the Court granted defendant’s application for most but not all of its requested attorneys’ fees. Having determined an award of fees was warranted, the Court used the “lode-star” approach to determine what fee would be reasonable, by multiplying

a reasonable hourly rate (or rates for multiple attorneys) by the reasonable number of hours spent, and then considering six general factors and twelve case specific factors that can influence whether that “lode star” approach is reasonable. The first noted the general rule that a “reasonable” hourly rate is one that a paying client would be willing to pay, bearing in mind that a reasonable paying client wishes to spend the minimum necessary to litigate the case effectively. Although, in most cases, courts follow this so-called “forum rule” and use the prevailing hourly rates in the district where they sit, courts need not strictly adhere to that rule when the case involves highly specialized and complex areas of law such as were involved here. The Court concluded that defendant had rebutted the presumption in favor of the forum rule and ruled that considerably higher hourly rates than are generally charged in this district were appropriate. While noting that the success of the work performed, the complexity of the litigation, the basis for the fee award, the experience of counsel, and the market in which defendant’s counsel practice, all weighed in favor of the substantial increase, the Court nevertheless did not award the full amount sought by defendant, and instead ordered hourly rates for attorneys ranging from \$455.63 to \$731.25 and for paralegals of \$195.75 per hour.

Kevin M. Hogan is a partner at Phillips Lytle LLP. He concentrates his practice in litigation, intellectual property and environmental law. He can be reached at khogan@phillipslytle.com or (716) 847-8331.

Sean C. McPhee is a partner at Phillips Lytle LLP where he focuses his practice on civil litigation, primarily in the area of commercial litigation. He can be reached at smcphee@phillipslytle.com or (716) 504-5749.