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Court of Appeals

BRIEF OF RELATOR FILED
December 7, 2017 16:21

By: MARC E. DANN 0039425

Confirmation Nbr. 1245371

STATE OF OHIO, EX. REL., BRIAN J. ESSI

CA 16 104659

vs.

CITY OF LAKEWOOD, OHIO

Judge:

Pages Filed: 50

**IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO**

State of Ohio ex rel.	)	
BRIAN J. ESSI	)	CASE NO. CA-16-104659
	)	
Relator,	)	
v.	)	ORIGINAL ACTION IN MANDAMUS
	)	
CITY OF LAKEWOOD, OHIO	)	RELATOR'S REPLY TO
	)	RESPONDENT LAKEWOOD'S
Respondent.	)	RESPONSE TO RELATOR'S
	)	MOTION FOR SUMMARY
	)	JUDGMENT

A year and six months after initiating a lawsuit, Relator Brian J. Essi still awaits a complete and accurate response to the records he requested between May 2015 and September 20, 2016. The record and evidence as submitted to this Court in support of and opposed to the pending cross motions for Summary Judgement reveals that:

1. Contrary to the duty owed to the public, Respondent failed to produce records in a timely manner,
2. An unknown number of documents have not been produced or produced months or years after they were requested, because the City of Lakewood failed to conduct a basic, reasonable, and complete search of its servers, and
3. An unknown number of documents have been withheld and submitted under seal without justification.

Summary judgment should be denied to Lakewood, and as to the records which have been submitted to Essi, summary judgment should be granted in Essi's favor, as is more fully set forth in the attached brief.

INTRODUCTION

For purposes of Essi's Cross Motion for Summary Judgment, several matters are now undisputed:

1. It is undisputed that with respect to 77 PRRs, Lakewood took an average of 392 days to ultimately produce 27,346 pages of records in response to those 77 PRRs, but only after the Court ordered it to do so.¹
2. It is undisputed that Lakewood still has not searched the "primary" location where it stores public records--namely, its network servers.²
3. It is undisputed as a result of Lakewood's latest filing on November 16, 2017 (611 days after Essi's initial requests and 501 days after the filing of this action), it would have only taken Lakewood seconds to perform searches of Lakewood's email archives for each of Essi's requests yet it waited until after the Court Order to do so.³
4. It is undisputed that Lakewood's Motion for Summary Judgment did not explain with specificity the reasons for Lakewood's redactions and withholdings as required by the Court's Order.⁴

In a last ditch effort to excuse or explain its admitted failure to search its primary locations where it stores its records (i.e. the network servers folders), Lakewood belatedly, on November 16, 2017, inserted additional testimony of its IT manager to claim that conducting a search of the network servers for any records request sought by Essi would somehow "cripple

¹ Essi Aff. Exhibit A to Cross Motion for Summary Judgment at paragraph 6.

² Coletta Tr. 6:14-24.

³ Affidavit of Michael Coletta filed November 16, 2017 at Paragraph 6: Using the Barracuda email archiver: "One may type in a search term and seconds later, the results appear. This speed allows for searching across millions of email very quickly."

⁴ Lakewood's failure to do so precluded Essi's counsel from knowing the specific reasons Lakewood was claiming the redactions and withholdings and, therefore, precluded Essi's counsel from formulating any arguments regarding the same as Lakewood has not met its legal burden.

the City's IT infrastructure." (Coletta November 16, 2017 Affidavit at paragraph 7). To assess the veracity of Lakewood's excuses for failing to search its primary public records locations, Essi engaged a qualified expert---Timothy M. Opsitnick---who has opined in his Affidavit attached hereto as Exhibit A, among other things that:

1. The ability to search electronically stored information "ESI," for example, email, Microsoft Word, Excel and PowerPoint documents, PDF files, etc., across computers and folders in a computer network or email server is commonplace in organizations and public entities that are the size of Lakewood.
2. The indexing of the files and folders within a network and searching a keyword or words would not slow the performance of the system that would affect normal daily tasks for city employees or users of the IT infrastructure.
3. Searching select or limited indexed files and folders within the network by searching a keyword or keywords would not slow the performance of the system that would affect normal daily tasks for employees or users of the IT infrastructure.
4. Based upon the facts presented and the subject matter of the requests, seeking records created or stored in the folders of a relatively limited number folders of city employees or a relatively limited number of city departments would not necessitate an "across every folder" search described by Mr. Coletta. Instead, the better approach would be to select those folders or custodians likely to contain relevant records.
6. An organization must take reasonable and good faith efforts to collect and provide records, including electronically stored information, in response to a public records request.

7. Lakewood's failure to attempt to search folders of employees and departments within the city's network (which employees and departments were involved in the transaction about the records sought) is not reasonable given commonplace practices in organizations and entities of equivalent size to Lakewood.

Lakewood has presented this Court with an untenable paradox---Lakewood claims to have fully complied with all of Essi's requests, but also claims that it had not complied because it is not required to comply.

Lakewood has argued that as a citizen and citizen journalist, Essi is not entitled to certain public records. Additionally, Lakewood argues that if a citizen wants to obtain records to fully report to and educate the public regarding a particular transaction, the citizen and the public are not entitled to a full disclosure of the records on that particular transaction and must litigate for years to obtain them. Lakewood's ongoing conduct in this matter tortures the public records laws and sets back the cause of open government.

In a good faith effort to settle and resolve this matter, Essi voluntarily prioritized and withdrew dozens of legitimate records requests as a courtesy to the Court and Lakewood, not due to any defect in the requests so withdrawn. Lakewood has failed to constructively respond to Essi's good faith cooperation and courtesy. Lakewood continues its disingenuous claims and defenses that all of Essi's requests are somehow improper and that it somehow does not understand what records Essi has requested. It is Lakewood who has protracted this matter at Essi's and the public's expense.

The records laws were created to allow journalists and the citizens to learn and report on the government's activities affecting the public. The purpose of a mandamus action is to have the courts oversee the records statute to ensure that the state government and local political

subdivisions comply with the public's right to know. If the Court adopts Lakewood's outrageous position that providing public records more than 18 months after a request and then only in compliance with this Court's interlocutory order, then journalists and the citizens will never be able to investigate and report on the governmental activities of great public interest and to share that information with the public in a timeframe that allows the public's input into governmental action being contemplated or that is subject to Referendum.

I. It is Undisputed that Lakewood Has Not Provided Any Evidence That It Responded or Produced Records Within a Reasonable Time and Lakewood's Unsworn Excuses for Failing to Respond Timely Are Not Supported by Any Evidence.

Lakewood has provided no admissible evidence to the Court setting forth when it searched for records, when it reviewed records, or how much time it took Lakewood to search for the records. Lakewood cannot maintain that the timing of its efforts and responses are reasonable since it has not provided any evidence of efforts it took to search and produce records. "It's fair to say that a number of searches for records were conducted after March of 2017, yes, certainly." Butler TR. 43:6-13. "[W]e concluded that rather than wait, rather than put many, many more records requests before the court on summary judgment, we would do our best to identify search parameters that would result in as many responsive records as possible being produced that we thought would be responsive." Butler Tr. 43:22-44:3. This excuse makes no sense is light of the evidence.

Essi's sworn testimony must be accepted as true and said testimony has never been denied or refuted by Lakewood by any sworn statement by Lakewood. (See Paragraphs 16d and 18 of Exhibit B to Relator Brian J. Essi's Brief in Opposition to Respondent's Motion for

Summary Judgment and Relator's Cross Motion for Summary Judgment). Essi's testimony is clear and unambiguous:

"At the conclusion of the September 2016 meeting, Mr. Butler stated that he understood all of the public records requests that were outstanding at that time and that he would comply with his obligation under the Ohio Public Records Act as to each of the requests."

Essi Aff. Ex. A at Paragraph 16d.

"At the end of the September 8, 2016 meeting, Mr. Butler indicated that he understood all of the requests discussed during our interactions and he did not request clarification of any requests that were then outstanding."

Essi Aff. Ex. A at Paragraph 18.

It is undisputed that there is no evidence before this Court that Butler (or for that matter anyone else from the City of Lakewood) did not understand all of the requests or that Butler (or anyone else from the City of Lakewood) requested clarification of any requests outstanding in September 2016 (PRRs 1-225) or at any time thereafter. Such a request for clarification is a condition precedent under the statute to a claim that a public records request cannot be honored because it is "vague, overly broad and ambiguous." Accordingly, Lakewood cannot prevail on summary judgment based upon the arguments that any of Essi's requests were or remain "vague, overly broad and ambiguous." To the contrary, for purposes of Summary Judgment, reasonable minds can come to one but one conclusion and that is that Lakewood understood Essi's requests and did not need or seek any clarification subsequent to September 2016.

II. It is Undisputed that Lakewood Did Not Search its Network Drives and Its Failure is Not Reasonable, and, Therefore, Lakewood Is Not Entitled to Summary Judgment and Essi is Entitled to Summary Judgment.

"An organization must take reasonable and good faith efforts to collect and provide records, including Electronically Stored Information in response to a public records request."

Ex. A, Expert Opsitnick Affidavit at paragraph 28. Lakewood's failure to attempt to search

folders of employees and departments within the city's network (which employees and departments were involved in the hospital transaction about which the records sought) is not reasonable given commonplace practices in organizations and entities of equivalent size to Lakewood. Ex. A, Expert Opsitnick Affidavit at paragraph 29.

Lakewood admits that "...Respondent failed to search its network drives." (Reply at page 12). There is no evidence that Lakewood searched (electronically or otherwise) any folders or any city employee users' folder in Lakewood's file servers to respond to Essi's requests. On the contrary, there is undisputed evidence upon which reasonable minds cannot differ, that Lakewood did not conduct *any* search of any folder of *any* user to respond to Essi's requests (other than the email archiver).⁵ (Exhibit 1 to Lakewood's Reply--Coletta's Affidavit at paragraph 7.) The context of these startling facts is that Lakewood's IT officer testified that the servers (containing folders of each city hall employees) were the "primary" way in which Lakewood stores its records. (Coletta Tr. Page 6; lines 14-24 and page 9; line 3-8).

At this late hour in the years long litigation, Lakewood now attempts to obfuscate and excuse its failure to search *any single folder* by proffering testimony that searching "across every folder within the main file servers" at one time would "slow down the server for normal daily task" and "cripple the City's IT infrastructure." November 16, 2017 Aff. of Michael Coletta at paragraph 7.

However, Relator's expert, who is eminently more qualified than Lakewood's IT manager⁶ has opined as to the following:

⁵ Remarkably, there is nothing in the record that the Law Director (the person who spearheaded the entire governmental process and negotiated the the agreement that closed the hospital) even searched his own files in Lakewood's network folders.

⁶ The only evidence of Mr. Coletta's qualifications that is before the Court is that he possesses an MBA from Case Western Reserve.

1. The ability to search electronically stored information “ESI,” for example, email, Microsoft Word, Excel and PowerPoint documents, PDF files, etc., across computers and folders in a computer network or email server is commonplace in organizations and public entities that are the size of Lakewood. Expert Aff. at paragraph 18.

2. The indexing of the files and folders within a network and searching a keyword or words would not slow the performance of the system that would affect normal daily tasks for city employees or users of the IT infrastructure. Expert Aff. at paragraph 19.

3. Searching select or limited indexed files and folders within the network by searching a keyword or keywords would not slow the performance of the system that would affect normal daily tasks for employees or users of the IT infrastructure. Expert Aff. at paragraph 21.

4. Based upon the facts presented and the subject matter of the requests, seeking records created or stored in the folders of a relatively limited number folders of city employees or a relatively limited number of city departments would not necessitate an “across every folder” search described by Mr. Coletta. Instead, the better approach would be to select those folders or custodians likely to contain relevant records. Expert Aff. at paragraph 22.

Curiously, Lakewood and its IT manager do not deny that Lakewood possesses software necessary to search its servers. Lakewood claims, without evidentiary support that there is “no evidence that additional records reside on the servers” and “speculation is not evidence.” Essentially, Lakewood claims there are *no records* at all concerning the hospital transaction contained in its servers even though it never attempted to look—that is simply not credible—it is also incredible. At the same time, in another Lakewood paradox, Lakewood somehow argues

that there are duplicates contained on its servers that were somehow produced to Essi. How can Lakewood credibly make this unsupported claim if it never searched the servers? Nevertheless, since Lakewood has not conducted a search of the servers and Lakewood has failed to produce any evidence that there are no responsive records contained in its network folders concerning the largest transaction in Lakewood's history, it is Lakewood who is engaging in "speculation" that there are no responsive records on its servers. Indeed, Lakewood has not provided any sworn evidence and cannot provide any credible evidence that there are no records on its servers that are responsive to Essi's requests.

II. Lakewood Concedes That It Has Not Complied with Essi's Requests and Has Not Complied with Lakewood's Own Records Policy.

Lakewood complains that Essi made too many requests and that totality of the requests were designed to elicit all records concerning the hospital transaction. (Lakewood Reply at page 4). However, Lakewood's Records Policy is explicitly to the contrary of Lakewood's claims and provides: "*The City may not limit the number of public records requests that a single individual can make, nor limit the number of public records that will be made available during a fixed period of time.*" (See Exhibit A to Butler Deposition--Records Policy at page 2). Contrary to its own policy, Lakewood goes on to argue that it is not required to comply with Essi's requests and that if it were required to that somehow would be a dangerous precedent. (Reply at 5). Contrary to Lakewood's claims, it would be a dangerous precedent if this Court permits Lakewood to violate the statute and Lakewood's own policy by claiming Essi made too many requests and asked for too many records in a 17-month period.⁷ That failure to comply with its own policy amounts to a violation of the law under R.C. 149.43(B)(7)(b). Lakewood's claims are paradoxical—Lakewood cannot have it both ways—i.e. that Lakewood has somehow complied

⁷ Despite Lakewood's unsupported claim that Essi's requests were made in 6 month period, the record is clear that Essi made his requests beginning in May 2015 and ending in September 2016.

with all of Essi's requests and also that it does not have a legal obligation to comply with Essi's requests. Indeed, Lakewood only claims "Lakewood did its best to comply" with the "spirit" of the Court's Order. (Reply at 5). Lakewood does not claim it did actually comply with the letter of law and this Court's orders.

III. Lakewood is Not Entitled to Judgment as a Matter of Law and Relator is Entitled to Judgment as a Matter of Law that Lakewood has Failed to Establish with Any Specificity That Any Record Submitted Under Seal is the Subject of Attorney-Client Privilege--- Any Privilege has been Waived.

Lakewood is also not entitled to judgment on the issue of any record redacted or withheld for privilege or otherwise. Lakewood has not met its burden to establish a privilege. The Court's March 9, 2017 Order provided, in part, that:

"At the time of filing the Index, Lakewood shall also file a motion for summary judgment on the records released with redactions or withheld. The *motion for summary judgment shall explain with specificity the reasons for redaction or withholding.*"

Ohio law requires that the person/entity claiming the attorney-client privilege bears the burden of establishing the privilege. *Maddox v. Bd. of Commrrs.*, 2014-Ohio 1541 at paragraph 12, *Myers, Roman, Freidman, Lewis v. Malm*, 183 Ohio App 3d 195 (Cuy. Cuy. 8th Cir. App 2009). "Because it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed, and the party asserting the privilege bears the burden of proving each essential element." *United States v. Ruehle*, 583 F.3d 600, 607–08 (9th Cir. 2009) (citations and quotations omitted). The privilege may extend to communications with third parties who have been engaged to assist the attorney in providing legal advice. *United States v. Richey*, 632 F.3d 559, 566 (9th Cir. 2011). Voluntary disclosure of the contents of a privileged communication

waives the privilege as to all other communications on the same subject. *Id.* (citing *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981)). There is, however, a “common interest” or “joint defense” exception to ordinary waiver principles where two or more parties “make the communication in pursuit of a joint strategy in accordance with some form of agreement.” See, e.g., *In re Pac. Pictures Corp.*, 679 F.3d 1121, 1129 (9th Cir. 2012) (citing *Cont’l Oil Co. v. United Sates*, 330 F.2d 347, 350 (9th Cir. 1964)). *Waymo LLC v. Uber Technologies Inc.*, 2017 WL 2694191, U. S. District Court, N.D. California.

Lakewood falsely claims that Relator “does not take issue with any redaction or privilege asserted by Respondent in its Motion for Summary Judgment.” (Lakewood Reply at page 1.) Contrary to Lakewood’s claim, Essi did take issue with that fact in his Brief in Opposition to Lakewood’s summary judgment:

“The March 9th Order provides, in part, that, “[a]t the time of filing the Index, Lakewood shall also file a motion for summary judgment *on the records released with redactions or withheld*. The motion for summary judgment *shall explain with specificity* the reasons for the redactions or withholdings.” (Emphasis added.) Lakewood did not comply with the March 9th Order as it attempts to obtain summary judgment for PRRs for which it did supply records, and did not explain anything with specificity about the reasons for redacting and withholding records regarding certain PRRs.”

Relator Brian J. Essi’s Brief in Opposition to Respondent’s Motion for Summary Judgment and Relator’s Cross Motion for Summary Judgment at page 10.

Despite multiple extensions of time to do so, Lakewood failed to comply with the Court’s March 9, 2017 Order as to even one of Lakewood’s thousands of redacted and withheld records. Lakewood’s Motion for Summary Judgment did not explain with *any specificity* the reasons for redactions and withholding of records. Therefore the burden of proof as to the viability of the attorney client privilege has not yet shifted to the Relator. Relator need not argue to defeat a

redaction or privilege that has not been factually justified or established by Lakewood under applicable case law or per the Court's Order. Lakewood has not met its burden.

Additionally, Lakewood has redacted records and asserts privilege concerning records that are clearly not privileged. For example, a 10-page record Bates Stamped LKWD-THMPSN HNE 000660 through 000669 is an email from Thompson Hine attorneys to Lakewood's outside consultant, Huron Consulting, apparently containing an "*Outline Summary of 1990 Lease and Definitive Agreement*" with 9 pages of that outline summary completely redacted (See Ex. B. Aff Aff at paragraph 6 and Exhibit 2 thereto.) Huron was a public consultant whose engagement was to provide a public report to City Council and the general public. The Huron report made was made public and referenced statements by Thompson Hine as to the Cleveland Clinic's obligations under the 1996 Definitive Agreement. Huron was not Thompson Hine's client and Thompson Hine was not serving at Huron's attorneys. Upon issuing the report, Huron representatives attended a public City Council meeting at which members of the public asked Huron representatives questions concerning its report. Lakewood has offered no facts, much less any specificity, as to why Exhibit 1--Bates Stamped LKWD-THMPSN HNE 000660 through 000669 might somehow be privileged, because it is clearly not privileged.

IV. Undisputed Evidence Before the Court Suggests that Lakewood Waived Any Attorney-Client Privilege on the Hospital Matter.

Assuming arguendo that records submitted under seal contain attorney-client material relating to the Lakewood Hospital transaction, Lakewood has nevertheless waived any privilege it may otherwise have held by voluntarily publishing privileged materials on its website relating to the same matter.⁸ A party "cannot manipulate the attorney-client privilege by unilaterally

⁸ See paragraph 16 of Essi's Affidavit--Exhibit A to Relator's Motion for Cross Summary Judgment filed with the Court of November 6, 2017.

choosing to disclose information favorable to him, while concurrently seeking to bar the search for potentially unfavorable information.” *Meyers Roman Friedberg & Lewis v. Malm*, 183 Ohio App. 3d 195, 2009-Ohio-2577, 916 N.E.2d 832 (8th Dist.).

The Affidavit of Brian J. Essi attached hereto as Exhibit B at paragraph 5 Exhibit 1 thereto contains a list of 950 Bates Stamped page numbers of records produced in just one of Lakewood’s productions listed on Lakewood’s Amended Index that were marked “confidential and privileged” but were not redacted. All of these 950 pages and dozens of other records marked attorney-client privileged from Lakewood’s other productions have been voluntarily published on Lakewood’s public website:

<http://www.onelakewood.com/accordions/healthcare-related-public-records-released-81717/#healthcare-related-public-records-released-81717>

<http://www.onelakewood.com/wp-content/uploads/2017/08/LKWD-THMPSN-HNE.pdf>

<http://www.onelakewood.com/wp-content/uploads/2017/08/LKWD-PRR240.pdf>

<http://www.onelakewood.com/wp-content/uploads/2017/08/LKWD-PRR292.pdf>

<http://www.onelakewood.com/wp-content/uploads/2017/08/LKWD-PRR235.pdf>

<http://lakewoodmayor.blogspot.com/>

(Each of these website pages was last viewed on December 7, 2017.)

Lakewood repeatedly concedes that Essi's requests concern the same subject matter-- namely the governmental process, planning, negotiation, deliberation, communications strategies, meetings and discussions that led to adoption of the Master Agreement that closed Lakewood Hospital. The law is clear that Lakewood cannot "cherry-pick" subsets of records, i.e. selectively redact and withhold certain records it wishes to continue to conceal from the public for its political purposes while releasing on its website hundreds of others for its other political

purposes on the same subject matter of the attorney-client representation---the hospital transaction. Lakewood has clearly waived any claim of privilege, if any, that might otherwise have existed on the subject of the hospital. Therefore, reasonable minds can come to but one conclusion when viewing evidence in favor of the Lakewood, and that conclusion is adverse to Lakewood, namely, none of the records delivered under seal are privileged.

VII. Lakewood violated 149.43(B)(2) by Failing to Organize and Maintain Public Records in a Manner that They Can be Made Available for Inspection and Copying in Accordance with the Law.

The first sentence of R.C.149.43(B)(2) provides: *“To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section.”* The latest affidavit of Michael Coletta, if true, makes clear that Lakewood does not organize and maintain records of the individual employee and department folders contained in its network servers (the “primary” location where Lakewood stores its records) to in a manner that they can be searched and made available for inspection and copying in accordance with R.C.149.43(B)(2). Indeed, Lakewood has claimed that it cannot search public records contained in its network folders--if that claim is true, it is an admission by Lakewood that it is in violation of its legal obligations under R.C.149.43(B)(2).

VIII. Unsupported Facts Presented by Lakewood.

At page 11 of its Reply Brief Lakewood claims that “it is undisputed that Lakewood produced records which are not email and are outside any Barracuda search, such as the records produced of financial records of the City of Lakewood, personnel files, the records relating to audits and in support of audits, including records responsive to Requests Numbers 1, 3, 4, 5, 6, 7,

8, 9, 11, 53, 56, 58, 60, 61, 62, 140, 141, 135, 190, 191, 192, 193, 194, 197, 199, 200, 201, 217, 218, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, and 321, as well as others. Mr. Butler's affidavit documents these efforts. The alleged authority for this alleged "undisputed" wide ranging "factual" assertion about records allegedly produced concerning 72 separate PRRs, is paragraph 4 of Butler's Affidavit of November 16, 2017---which paragraph and affidavit do not refer to any of the 72 PRRs Lakewood referred to on page 11 of its Reply. Moreover, a careful examination of the record of this case and Lakewood's Amended Index filed on October 10, 2017, reveals that Lakewood indexed records responsive to only 22 of the 72 PRRs (PRRs 297-308 and PRRs 310-319). Indeed, Lakewood indexed less than 75% of the records it claims that it produced. Ex B Aff of Essi at paragraph 7. So, Lakewood is claiming something is "undisputed" even though it has not produced evidence that the Court and Essi could examine to determine the matters are "undisputed."

CONCLUSION

In light of the foregoing, Relator prays for the following relief from this Honorable Court:

1. A finding that to the extent that Lakewood provided records to Relator, they were provided late and only after this lawsuit was filed and only after this Court's March 9, 2017 Order and, therefore, Lakewood violated the public records statute and Relator is the prevailing party entitled to statutory damages and attorney fees.
2. A finding that Lakewood be ordered to complete proper searches of its network folders for the outstanding records requests and that Lakewood provide produce responsive records those requests.

3. A finding that Lakewood did not comply with the Court's March 9, 2017 Order to explain with specificity the reasons for Lakewood's redactions and withholdings and that the records delivered under seal be released to Relator.

4. That the Court set a hearing to determine the award of statutory damages and attorney fees.

Respectfully submitted,

/s/ Marc E. Dann

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Certificate of Service

I hereby certify that on December 7, 2017, a copy of the foregoing was submitted via regular or electronic mail to the following:

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/s/ Marc E. Dann

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**IN THE COURT OF APPEALS
EIGHTH APPELLATE DISTRICT
CUYAHOGA COUNTY, OHIO**

State of Ohio ex rel.
BRIAN J. ESSI

Relator,

v.

CITY OF LAKEWOOD, OHIO

Respondent.

CASE NO. CA-16-104659

ORIGINAL ACTION IN MANDAMUS

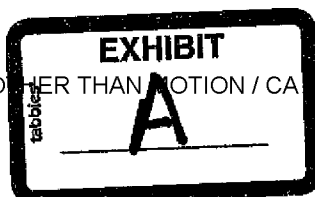
STATE OF OHIO

COUNTY OF CUYAHOGA

SS: AFFIDAVIT OF TIMOTHY M. OPSITNICK

I, TIMOTHY M. OPSITNICK, having been first duly sworn, depose and state that I have personal knowledge of the facts and matters that follow:

1. I am over the age of 18 and not laboring under any disabilities.
2. I am an attorney at law and have been licensed in the State of Ohio and in good standing since 1985.
3. I serve as Executive Vice President and General Counsel of Technology Concepts & Design, Inc. ("TCDI"). TCDI provides technology consulting services—including electronic discovery consulting, computer forensics, and information security—to corporations, law firms, and attorneys. TCDI's client base includes United States and international law firms, organizations, and companies. I originally founded JurInnov Ltd. in 2000, which provided similar services as TCDI. JurInnov was acquired in 2016 by Technology Concepts & Design, Inc. ("TCDI").
4. I am also a member of the American Bar Association, Ohio State Bar Association, Cleveland Metropolitan Bar Association, ARMA International, the Sedona Conference®, and InfraGard. Moreover, I have served on numerous professional



association committees concerning technology and discovery, including the discovery of electronically stored information.

5. Prior to founding JurlInnov, I was with the law firm Jones Day from 1986 until 2000, where I was a member of the Litigation and Product Liability sections. My practice focused on the management of complex, multi-district litigation, which included the identification, preservation, collection, review, copying, and production of large volumes of documents and information, including electronically stored information.
6. I am a founding participant in The Sedona Conference's Working Group Series on Best Practices for Electronic Document Retention and Production and was a member of the Working Group's drafting team to the publication "The Sedona Principles, Third Edition: Best Practices, Recommendations and Principles for Addressing Electronic Document Production" (Revised 2017), contributor to the publication "The Sedona Principles: Best Practices, Recommendations and Principles for Addressing Electronic Document Production" (Revised June 2007), and a contributor and editor to the publication "The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age" (Revised September 2005). Furthermore, I have and continue to contribute to and edit many of the other publications of the Sedona Working Group.
7. I am a contributor to the Working Group on Information Security Guidelines for Lawyers of the Information Security Committee of the Section of Science and Technology Law of the American Bar Association (April 2006).
8. I am also a contributor to the Duke Law Center for Judicial Studies, Electronic Discovery Reference Model (EDRM).
9. Furthermore, I have published articles regarding technology, information security, electronic discovery, and computer forensics.
10. I am a member of the Georgetown University Law Center's Continuing Legal Education Advisory Board, where I assist in the development of programs for its E-Discovery Institute. Furthermore, I am a past member of the Georgetown University Law Center's Continuing Legal Education Advisory Board that developed the E-Discovery Training Academy which provides certification to attorneys, paralegals, litigation support professionals, and other professionals regarding discovery and other issues related to electronically stored information.
11. I have also conducted numerous continuing legal education seminars regarding the discovery of electronically stored information and other technology issues.
12. I, together with others at JurlInnov, have founded a website, ESIBytes.com, which provides podcasts (audio broadcasts) from attorneys, technical experts, and judges regarding emerging issues concerning electronic discovery. The podcasts are

offered at no charge to bring awareness to legal issues and good business practices concerning electronically stored information.

13. I am a member of the Advisory Board for the American College of e-Neutrals, an organization dedicated to the education, training, credentials, and use of third party referees – mediators, arbitrators, masters, judges, liaisons, and magistrates – committed to resolving disputes arising from electronically stored information.
14. I have served as a Special Master or other court appointed technical expert or neutral. For example, I have served as a court appointed Technical Expert to the Special Masters and Judge in certain of the litigation concerning the World Trade Center disaster. I have also served as an expert witness in matters involving the preservation and discovery of electronically stored information.
15. Accordingly, I have substantial legal and technical knowledge regarding the preservation and discovery of documents and electronically stored information. I am familiar with the standards accepted by legal practitioners and electronic discovery professionals concerning all forms of electronic discovery (“industry standards”). A complete copy of my Curriculum Vitae, including court appointments, testifying expert appearances, publications, and selected continuing legal education seminars, is available at Exhibit A.
16. In the course of conducting my analysis I have reviewed: (1) the Affidavit of Michael Coletta dated July 17, 2017; (2) the Affidavit of Michael Coletta dated November 16, 2017; (3) the transcript of the deposition testimony of Michael Coletta dated October 25, 2017; (4) relevant portions of Respondent’s Reply in Support of Their Summary Judgment and Brief in Opposition to Relator’s Motion for Summary Judgment filed with the Court on November 16, 2017; and (5) Mr. Essi's letters to Lakewood Law Director Kevin Butler dated March 15, 2016, May 13, 2016 and September 20, 2016 containing PRRs 1 through 323.
17. I am able to provide this affidavit and the opinion testimony herein with the requisite degree of certainty.
18. The ability to search electronically stored information “ESI,” for example, email, Microsoft Word, Excel and PowerPoint documents, PDF files, etc., across computers and folders in a computer network or email server is commonplace in organizations and public entities that are the size of Lakewood.
19. The indexing of the files and folders within a network and searching a key word or words would not slow the performance of the system that would affect normal daily tasks for city employees or users of the IT infrastructure. The tools index the content of the records so that the results of searches are readily available. Furthermore, some of the tools available do not index the records and instead search across the records real time alleviating the concern of indexing. The tools that do not index take some time for the results to appear. Each type of tool then exports the documents or records that hit on the searches to a location for further analysis.

20. To alleviate any concern for system performance, indexing could be turned on for only the limited and select folders sought to be searched and/or could be done piecemeal in stages. Additionally, to alleviate any concern for system performance, testing of an "across every folder" search and other more limited searches could be conducted after hours or on weekends to determine the effect on the system performance. Furthermore, many of the software tools available permit the scheduling of indexing to occur during off hours.
21. In my opinion, searching select or limited indexed files and folders within the network by searching a keyword or keywords would not slow the performance of the system that would affect normal daily tasks for employees or users of the IT infrastructure.
22. In my opinion, based upon the facts presented and the subject matter of the requests, seeking records created or stored in the folders of a relatively limited number of city employees or a relatively limited number of city departments would not necessitate an "across every folder" search described by Mr. Coletta. Instead, the better approach would be to select those folders or custodians likely to contain relevant records.
23. Many inexpensive and affordable software tools are available to conduct searches of the individual folders and/or relevant city department folders.
24. For example, dtSearch is a common software tool that is utilized by organizations to index content and perform searches.
25. By way of further example, Discovery Attender is a tool that searches for keywords but does not require indexing of the content for the searches to be performed. Discovery Attender can be leased for 30 days for only \$1,500 or annually for \$4,950, including training and support. Per the vendor's literature: "Discovery Attender is a software tool designed to automate the search and collection of electronically stored information across a variety of platforms. This cost-effective solution enables in-house talent to identify and gather responsive information in a timely, defensible manner. Up and running in minutes, Discovery Attender streamlines the process of locating and producing data for eDiscovery requests, compliance, internal investigations and much more... Discovery Attender can easily search content in network file shares."
26. In addition, many consultants and service companies are available to provide expertise and software tools to guide organizations through the process of a records search.
27. In my experience and expertise in eDiscovery and compliance work, a typical approach employed to search for records such as those presented to Lakewood in this request would be to start by searching the three of four individual custodians' folders on the server who would likely have responsive ESI, to test for the existence

of responsive records, to test the key words, and the effect, if any, on system performance.

28. Furthermore, it is my opinion that an organization must take reasonable and good faith efforts to collect and provide records, including ESI, in response to a public records request.
29. In my experience and expertise in eDiscovery and compliance work and consultancy, Lakewood's failure to attempt to search folders of employees and departments within the city's network (which employees and departments were involved in the transaction about the records sought) is not reasonable given commonplace practices in organizations and entities of equivalent size to Lakewood.

FURTHER AFFIANT SAYETH NAUGHT.


Timothy M. Opsitnick

SWORN TO BEFORE ME and subscribed in my presence this 5th day of December 2017.



JOSEPH MICHAEL
ANGUILANO
NOTARY PUBLIC
STATE OF OHIO
Recorded in
Cuyahoga County
My Comm. Exp. 11/28/2021

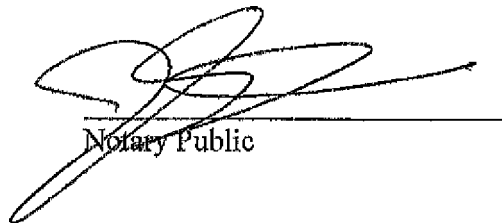

Notary Public

Exhibit A



Timothy M. Opsitnick, Esq.

**Executive Vice President and General Counsel
Technology Concepts & Design, Inc.**

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1375 Euclid Avenue
Cleveland, Ohio 44115
Phone: 216.664.1100
Facsimile: 216.664.0800
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**4510 Weybridge Lane
Greensboro, North Carolina 27407
Phone: 336.232.5874
Facsimile: 336.232.5805
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OVERVIEW

Timothy M. Opsitnick is Executive Vice President and General Counsel of Technology Concepts & Design, Inc. ("TCDI"). Mr. Opsitnick is at the forefront of practitioners addressing issues involved in the security and discovery of electronically stored information. He has conducted numerous continuing legal education seminars regarding electronic discovery, cybersecurity, and other technology issues. In addition, he has served as a court-appointed Special Master and as an expert witness. His clients include United States and international law firms and companies.

TCDI consults with corporations and law firms to provide litigation management software, electronic discovery, computer forensics, and cybersecurity services. TCDI is a recognized leader in technology for mass tort management, second requests, complex litigation and MDL litigation management.

Mr. Opsitnick was with the law firm of Jones Day from 1986 until 2000, where he was a member of the Litigation and Product Liability sections. His practice concentrated on the management of complex, multi-district litigation. Mr. Opsitnick founded JURINNOV Ltd. ("JURINNOV") in 2000. JURINNOV was acquired by TCDI in 2016, expanding their services to include data privacy, cybersecurity, and computer forensics.

EDUCATION

**Ohio Wesleyan University, Delaware, Ohio – 1978-82
Bachelor of Arts, Political Science and Psychology
Phi Beta Kappa**

**Case Western Reserve University, School of Law, Cleveland, Ohio – 1982-85
Juris Doctor**

BAR ADMISSIONS

United States Supreme Court

Northern District of Ohio

State of Ohio

LICENSES

Licensed Private Investigator, State of Ohio

PROFESSIONAL ASSOCIATIONS

Cleveland Metropolitan Bar Association – Litigation Section

Ohio Bar Association – Litigation Section

American Bar Association – Section of Science and Technology Law (Information Security Committee, Privacy and Computer Law Committee), Law Practice Management Section, Section of Intellectual Property Law, Section of Litigation (Pretrial Practice and Discovery Committee, Technology for the Litigator Committee)

Association of Records Managers and Administrators International (ARMA)

InfraGard

International Association of Privacy Professionals (IAPP)

The Lawyers Guild of the Catholic Diocese of Cleveland

BOARDS

Ohio Attorney General's Cybersecurity Advisory Board (2017 to present)

Council Of Smaller Enterprises (COSE), Board of Advisors (2017 to present)

Council Of Smaller Enterprises (COSE), Advocacy Committee (2014 to present)

Westlake/Bay Village Rotary (2005-2009), past President (2007-2008)

Entrepreneurs' Organization (2008-2009), Cleveland Chapter, Membership Chairman

Red Tail Master Home Owners Association (2003-2008, 2015 to present), past President (2003-2007)

Red Tail Master Home Owners Association, Architectural Review Board (2003 to present)

Cleveland Association of Phi Beta Kappa (2011 to present)

STANDARDS DRAFTING AND ADVISORY

Advisor and contributor to **Information Security for Lawyers and Law Firms**, April 2006, Section of Science and Technology Law, and the Law Practice Management Section (ABA)

Founding member, Sedona Conference's Working Group Series on Best Practices for Electronic Document Retention and Production (WG1)

Drafting Team, *The Sedona Principles, Third Edition: Best Practices, Recommendations and Principles for Addressing Electronic Document Production*, THE SEDONA CONFERENCE (2017)

Contributor and Editor to the publication, *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age*, THE SEDONA CONFERENCE (Second Edition 2007)

Contributor and Participant to the publication, *The Sedona Principles: Best Practices, Recommendations and Principles for Addressing Electronic Document Production*, THE SEDONA CONFERENCE (Revised January 2004)

Founding member, Sedona Conference's Working Group Series on International Electronic Information Management, Discovery and Disclosure (WG6)

Founding member, Sedona Conference's Working Group Series on Data Security and Privacy Liability (WG11)

Member of the Advisory Board for Georgetown University Law Center's Continuing Legal Education for the development of programs for its E-Discovery Institute

Past member of the Advisory Board for Georgetown University Law Center's Continuing Legal Education for the development of the E-Discovery Training Academy

Member of Advisory Board for the American College of e-Neutrals an organization dedicated to the education, training, credentials, and use third party referees—mediators, arbitrators, masters, judges, liaisons and magistrates—committed to resolving disputes arising from electronically stored information

Founder, ESIBytes.com which provides podcasts (audio broadcasts) from attorneys, technical experts and judges regarding emerging issues concerning electronic discovery. The podcasts are offered at no charge to bring awareness to legal issues and good business practices concerning electronically stored information

Founder, Cleveland eDiscovery, Data Privacy and Cybersecurity Roundtable

National Advisory Board, Center for Cybersecurity and Privacy Protection, Cleveland Marshall College of Law

Conference Planning Committee, Cybersecurity and Privacy Protection Conference, Center for Cybersecurity and Privacy Protection, Cleveland Marshall College of Law

Duke Law Center for Judicial Studies, Electronic Discovery Reference Model (EDRM).

PUBLICATIONS

Spyware, in Information Security for Lawyers and Law Firms, Section of Science and Technology Law, and the Law Practice Management Section (ABA), April 2006.

Metadata, in Information Security for Lawyers and Law Firms, Section of Science and Technology Law, and the Law Practice Management Section (ABA), April 2006.

Internet Hosting Services Checklist, in The Electronic Evidence and Discovery Handbook: Forms, Checklists and Guidelines, Law Practice Management Section (ABA), April 2006.

"Electronic Records Create Greater Value, New Risks," Cleveland Bar Journal, February 2006.

"Computer Forensic Technology: Looking for ... 'Just the Facts Ma'am,'" Cleveland Bar Journal, January 2006.

"Social Media -- After the Breach," Information Security and Privacy News, A Publication of the Information Security Committee, American Bar Association, Section of Science and Technology Law, Winter 2013, Volume 4, Issue 1.

"Client Data Security Obligations Begin with the Law Firm," Law Technology News, November 9, 2016.

"Using Computer Forensics to Investigate Employee Data Theft," Cybersecurity Law and Strategy, April 2017.

"Using Computer Forensics to Investigate Employee Data Theft," LegalTech News, April 13, 2017.

SPECIAL MASTER AND OTHER COURT APPOINTMENTS

In Re World Trade Center Disaster Site Litigation, (S.D.N.Y), Case No. 21 MC 100.

Marjorie Reimer v. Dennis Reimer, (Cuyahoga County Domestic Relations, Ohio), Case No. DR05 307226.

Cleveland Area Board of Realtors v. Lustic, (N.D. Ohio), Case No. 1:05CV0086.

Medtronic, Inc. v. St. Jude Medical, Inc. et al., (County of Ramsey, State of Minnesota).

William J. Yung, et al. v. Grant Thornton, LLP and The 1994 Yung Family Trust, (Kenton Circuit Court, State of Kentucky), Case No. 07-CI-02647.

The Timken Company v. Chi Cheung, (County of Stark, State of Ohio), Case No. 2012 CV 02802.

Approved E-Discovery Special Master for United States District Court (W.D. PA).

EXPERT WITNESS

In Re Tyco International, LTD., Securities Litigation, (D.N.H), Case No. 02-MDL-1335-B.

Ebling and Ebling, et al. v. The Dow Chemical Company, Inc., et al., (Floyd County, Indiana), Case No. 22D01-9601-CT-30,

CSAHS/UHHS - Canton, Inc. d/b/a/ Mercy Medical Center v. Aultman Health Foundation, et al., (Stark County, Ohio), Case No. 2007-CV-05227.

Michael E. Cullen v. State Farm Automobile Insurance Company, (Cuyahoga County, Ohio), Case No. 555183.

Bradley B. Larsen, et al. v. Coldwell Banker Real Estate Corporation, et al., (C.D. Cal.), Case No. 2ACV10-00401, AG (MLGX).

Dulles Jet Center Litigation v. Landow Aviation L.P., et al., (Loudoun County, Virginia), Consolidated Case No. CL 00061040.

Medline Diamed, LLC v. Diamed USA, LLC, et al., (Stark County, Ohio), Case No. 2011CV00128.

Acklin v. Cuyahoga Community College, et al., (Cuyahoga County, Ohio), Case No. 10 736415.

United States of America, and the States of California, Illinois, North Carolina and Ohio v. Dish Network, L.L.C., (C.D. Ill.), Case No. 3:09-CV-03073-SEM-BGC.

Energy Intelligence Group, Inc. and Energy Intelligence Group (UK) Limited v. Keybank Capital Markets Inc., (S.D. TX), Case No. 13-CV-01252.

State Farm Lloyds, multiple wind/hail matters in Texas state and federal courts

Bridgestone Americas, Inc. v. International Business Machines Corporation, (M.D. Tenn.), Civil Docket No. 3:13-CV-1196.

EPAC Technologies, Inc. v. Harper Collins Christian Publishing, Inc. f/k/a Thomas Nelson, Inc., (M.D. Tenn.), Civil Docket No. 3:12-CV-00463.

Oracle USA, Inc., Oracle America, Inc. and Oracle International Corporation v. Rimini Street, Inc. and Seth Ravin, (D. NV.), Case No. 2:10-CV-0106-LRH-PAL.

Applied Maintenance Supplies and Solutions, LLC v. Bradley Black, (Polk County, Iowa), Case No. TBD.

In Re State Farm Lloyds, (Tex.) Case No. 15-0903, 15-0905.

AWARDS

2007 Socha-Gelbman Top Provider Electronic Discovery Survey

2010 Ringtail Partner Consultants of the Year

2010 Inc. 5000 Fastest Growing Companies, No. 2300

2012 Goldman Sachs 10,000 Small Businesses Alumni

PATENTS

System and Method Facilitating Management of Law Related Service(s). U.S. Patent 7,865,450, January 4, 2011

MEDIA APPEARANCES

How to Protect Yourself from Cyber Fraud, WKYC, Cleveland, Ohio, September 2, 2014

Cybersecurity Expert: Data Breaches Evolving, 19 Action News, Cleveland, Ohio, September 2, 2014

Cyber Security Firm Founder on Target Breach, WKYC, Cleveland, Ohio, January 10, 2014

Cyber Experts Offer Tips to Those Impacted by Target Data Breach, WKYC, Cleveland, Ohio, December 20, 2013

Computer Forensics, Cox Cable, Business Channel, Northeast Ohio, recurring throughout October, 2004

SELECTED SPEAKING ENGAGEMENTS

An eDiscovery Primer: What Forensic Experts Bring to the Table, Toledo Bar Association, Toledo, Ohio, December 1, 2017

Law Firm Cybersecurity and Incident Response, Applied Business Strategies, Cleveland Metropolitan Bar Association, Cleveland, Ohio, November 13, 2017

Managing Legacy Data and Inactive Information, Thacker Robinson LLP, Toledo, Ohio, November 8, 2017

Defensibility of the Search Process, Thacker Robinson LLP, Toledo, Ohio, November 8, 2017

Ethics: Exploring the Boundaries of Zealous Advocacy, The Sedona Conference WG1, Phoenix, AZ, November 3, 2017

Cloud Computing, Cybersecurity and Data Privacy Issues, Cleveland Marshall School of Law, Cleveland, Ohio, October 25, 2017

Keyword Searching Strategies, eDiscovery, Data Privacy and Cybersecurity Roundtable, Cleveland, Ohio, October 18, 2017

Using Needles to Find More Needles, Not More Haystacks, Electronic Discovery Institute (EDI), Tucson, AZ, October 12, 2017

Education Data Breach Table Top Exercise, K-12 CyberSecurity Forum, Cleveland Marshall Law School, Cleveland, Ohio, October 6, 2017

Developing and Implementing a Data Security and Privacy Panel, K-12 CyberSecurity Forum, Cleveland Marshall Law School, Cleveland, Ohio, October 6, 2017

Cybersecurity Incident Response Strategies and Tactics, NEO Ohio RIMS, Cleveland, Ohio, October 5, 2017

Cyber Threats in Northeast Ohio, Greater Cleveland Partnership, Cleveland, Ohio, May 11, 2017

Incident Response, Center for Cybersecurity and Data Privacy Protection, Cleveland Marshall College of Law, Cleveland, Ohio, April 28, 2017

Insurance and Cyber Risk Management, Cleveland Marshall College of Law, Center for Cybersecurity and Privacy Protection, Cleveland, Ohio, December 16, 2016

Consultants: eDiscovery Challenges and Corresponding Solutions, Georgetown University Law Center Continuing Legal Education, Advanced eDiscovery Institute, Washington, D.C., November 11, 2016

Protecting Confidential Client Information from Cyber Threats, The Sedona Conference WG1, Atlanta, GA, October 28, 2016

CyberSecurity, John Carroll University Entrepreneurs Association, University Heights, Ohio, October 20, 2016

What is the Future of eDiscovery, Electronic Discovery Institute (EDI), Fort Lauderdale, FL, October 13, 2016

Assessing Your Risk to Data Breaches and Cyber Attack – Understanding the Technology, the Threat, and the Targets – What is Your Risk, Product Liability Advisory Council (PLAC), Colorado Springs, Colorado, October 6, 2016

Data Analytics: Document Review and Evolving Litigation Trends, Ohio State Bar Association, Litigation Section, Fall Meeting, Columbus, Ohio, September 30, 2016

The Ethics & Cost of E-Discovery: Lessons from Litigation, O'Neill Bankruptcy Institute, Cleveland Metropolitan Bar Association, Cleveland, Ohio, June 10, 2016

Incident Response Strategies and Tactics, Center for Cybersecurity and Data Privacy Protection, Cleveland Marshall College of Law, Cleveland, Ohio, April 8, 2016

Current Regulatory Issues and Opening Keynote, Center for Cybersecurity and Data Privacy, Cleveland Marshall College of Law, Cleveland, Ohio, April 7, 2016

Check Your Sources: Understanding the Technical Aspects of Data Collection, Georgetown University Law Center Continuing Legal Education, Advanced eDiscovery Institute, Tysons Corners, Washington, D.C., November 19, 2015

Data Privacy Pioneers Discuss Data Privacy and Security, ESIBytes.com, Podcast, November 13, 2015

Do the Amended eDiscovery Rules Modify the Presumptive Scope of Discovery, The Sedona Conference WG1, Orlando, FL, October 29, 2015

Cybersecurity, National Association of Graphics, Cleveland, OH, October 6, 2015

Cybersecurity, The Refractories Institute, Cleveland, OH, October 1, 2015

eDiscovery and the Pending Federal Rule Amendments, Cleveland Marshall Law School, Cleveland, OH, September 4, 2015

Online Working Group Meeting, Principles 11-14, The Sedona Conference WG1, Webinar, August 20, 2015

Online Working Group Meeting, Principles 6-10, The Sedona Conference WG1, Webinar, August 6, 2015

Online Working Group Meeting, Principles 1-5, The Sedona Conference WG1, Webinar,
July 23, 2015

**The Great Round Up: Preserving , Collecting, and Producing ESI from Personal
Devices, Mobile Devices, and the Cloud, 9th Annual Sedona Conference Institute, The
Sedona Conference, Nashville, TN, March 19-20, 2015**

**9th Annual Sedona Conference Institute, Staying Ahead of the eDiscovery Curve and Keeping
Pace with the New Rules, Co-Chair for event, The Sedona Conference, Nashville, TN, March 19-20,
2015**

Data Privacy and Security: Substantive Claims and eDiscovery Issues Abound,
Georgetown University Law Center Continuing Legal Education, Advanced eDiscovery
Institute, Tysons Corners, McLean, VA, November 20, 2014

**Lawyers as Leaders: Creating a Culture of Security, Cleveland Metropolitan Bar
Association, Cleveland, Ohio, November 13, 2014**

CyberSecurity: Protect Yourself, Westlake Rotary, Westlake, Ohio, November 12, 2014

**The Sedona Principles – Proposed Updates and Revisions, The Sedona Conference WG1,
New Orleans, LA, November 5, 2014**

**General Counsel Forum: What Your Board and C-Suite Need to Know about Cyber
Security, Thompson Hine, Cleveland, Ohio, October 22, 2014**

**Creating a Culture of Security, Great Lakes Regional RIMS Conference, Cleveland, Ohio,
October 2, 2014**

**IT Outsourcing and Security, Ernst and Young CIO Roundtable, Union Club, Cleveland,
Ohio, May 22, 2014**

**Predictive Coding, Northern District of Ohio Rules Committee, Federal Courthouse,
Cleveland, Ohio, May 7, 2014**

**Cybersecurity Breakfast Series: Third Party Data Security Considerations, Tri-C,
Cleveland, Ohio, January 29, 2014**

**Discovery Land Show (eDiscovery Over the Last Decade), ESIBytes.com, Pittsburgh, PA,
January 14, 2014**

**Computer Forensics, Ohio State Bar Association Technology Conference, Columbus, OH,
December 12, 2013**

**The Sedona Principles, 2d: Development in Law and Practice Since 2007, The Sedona
Conference WG1, Phoenix, Arizona, November 7, 2013**

Cloud Computing, Cleveland Accounting Show, Cleveland, Ohio, October 30, 2013

Cloud Computing, Amplify Speaker Series, Cleveland, Ohio, September 18, 2013

Cybersecurity Breakfast Series: HIPAA Compliance, Tri-C, Cleveland, Ohio, July 31, 2013

Everything You Don't Know About E-Discovery (But Wish You Did), National Business Institute, Cleveland, Ohio, June 13, 2013

The Cloud, Crain's Cleveland Business Breakfast Series, Cleveland, Ohio, June 4, 2013

Computer Forensics and Fraud, Cleveland State University, Cleveland, Ohio, April 9, 2013

Computer Forensics and Fraud, Case Western Reserve University, Weatherhead School of Management, Cleveland, Ohio, March 20, 2013

EDiscovery and Computer Forensics, Kent State University School of Library Sciences, Kent, Ohio, November 6, 2012

Computer Forensics and Information Security, Ohio Business Talks, Cleveland, Ohio, June 13, 2012

Computer Forensics and Social Media, Cavitch Familo & Durkin, Cleveland, Ohio, June 4, 2012

Computer Forensics and Social Media, Lorain County Bar Association, Elyria, Ohio, May 17, 2012

Computer Forensics, Cleveland Employment Lawyers Association, Cleveland, Ohio, May 11, 2012

Computer Forensics and Fraud, Case Western Reserve University, Weatherhead School of Management, Cleveland, Ohio, March 1, 2012

Current E-Discovery Issues from a Practitioner and Judicial Perspective, Cleveland-Marshall College of Law, Cleveland, Ohio, November 10, 2011

E-Neutrals and Special Masters in Electronic Discovery Cases, ESIBytes.com, Pittsburgh, PA, June 30, 2011

Computer Forensics and Fraud, Case Western Reserve University, Weatherhead School of Management, Cleveland, Ohio, February 24, 2011

Producing ESI and Associated Issues, ESIBytes.com, Pittsburgh, PA, January 25, 2011

Computer Forensics and Fraud: What Does "Delete" Really Mean and Other Technical Follies, Ohio Society of CPA's, Independence, Ohio, December 2, 2010

ESI Data Processing, ESIBytes.com, Cleveland, Ohio, September 21, 2010

Corporate Counsel eDiscovery Roundtable Discussion Series: Best Practices for Handling Electronic Information, TCDI, Greensboro, North Carolina, August 19, 2010.

Computer Forensics and Fraud, Case Western Reserve University, Weatherhead School of Management, Cleveland, Ohio, March 25, 2010

Electronic Evidence in the Courtroom and in Discovery, Lorain County Bar Association, Elyria, Ohio, March 19, 2010

Technology Focus: Backup Systems--Tapes Disks, and Emerging Media and Methodologies, Georgetown University Law Center Continuing Legal Education, Advanced eDiscovery Institute, Washington, D.C., November 12, 2009

Lawyer Geeks and the Discovery Revolution, Corporate Counsel Forum, Roetzel & Andress, Independence, Ohio, November 12, 2009

Search and Retrieval Tips from the Bench, ESIBytes.com, Cleveland, Ohio, June 9, 2009

Computer Forensics and Fraud, Case Western Reserve University, Weatherhead School of Management, Cleveland, Ohio, April 2, 2009

Understanding Electronic Document Management Databases, Georgetown University Law Center E-Discovery Training Academy, Washington, D.C., February 12, 2009

Best Practices in Addressing Electronic Communications, Georgetown University Law Center Continuing Legal Education, Washington, D.C., November 20, 2008

Computer Forensics and Fraud, Case Western Reserve University, Weatherhead School of Management, Cleveland, Ohio, April 3, 2008

Managing EDiscovery Vendors and Databases, NITA, Cleveland, Ohio, March 12, 2008

E-Discovery Update—One Year Later, Cleveland Bar Association, Cleveland, Ohio, December 13, 2007

Electronic Document Review: Why Best Practices for Traditional Paper Review Doesn't Translate to ESI, Georgetown University Law Center Continuing Legal Education, Washington, D.C., November 16, 2007

Electronic Data and Computer Forensic Considerations, Roetzel & Andress, LPA, Akron, Ohio, November 14, 2007

Protecting Trade Secrets in the Digital Age, Schottenstein, Zox & Dunn Co., LPA, Columbus, Ohio, September 27, 2007

New Risks of ESI, Hyland Software, Cleveland, Ohio, June 29, 2007.

Electronic Discovery: Practical Solutions, Schottenstein, Zox & Dunn Co., LPA, Columbus, Ohio, June 22, 2007

Use of Statistics to Defend Reasonable, Good Faith Document Production Efforts, The Sedona Conference WG1, Phoenix, Arizona, May 10, 2007

Information Security for the Small and Medium-Sized Law Firm, American Bar Association, audio webcast, April 24, 2007

An Introduction to Computer Forensics and Data Recovery, Buchanan Ingersoll & Rooney PC, Pittsburgh, Pennsylvania, March 7, 2007

An EDD Primer – What is Electronically Stored Information and How Should It Be Treated, Reminger & Reminger Co., L.P.A., Cleveland, Ohio, February 28, 2007

Computer Forensics: An Introduction, Thompson Hine LLP, Cleveland, Ohio, February 17, 2007

The New Federal Rules: E-Discovery, Cleveland Bar Association, Cleveland, Ohio, November 29, 2006

Managing the E-Discovery Process, Georgetown University Law Center Continuing Legal Education, Washington, D.C., November 16, 2006

Enough Technology to be Dangerous, Georgetown University Law Center Continuing Legal Education, Washington, D.C., November 15, 2006

A Lawyer's Obligation to Protect Client Data – And How to Do it, Cleveland Bar Association, Cleveland, Ohio, November 10, 2006

Mastering the Latest Legal Technology: Managing the Exponential Growth of Electronic Discovery, Alston & Bird, Atlanta, Georgia, October 13, 2006

An EDD Primer – What is Electronically Stored Information (ESI) and How Should It Be Treated, Paralegal Super Conference, Atlanta, Georgia, October 12, 2006

Discovery Land, Special Counsel, Minneapolis, Minnesota, July 19, 2006

Technology and Staffing Go Head to Head: The Nuts and Bolts of E-Discovery, the Allegheny County Bar Association, Pittsburgh, Pennsylvania, June 21, 2006

Metadata, ABA TechShow, Chicago, Illinois, April 20, 2006

An Electronic Evidence and Computer Forensics Primer, ABA TechShow, Chicago, Illinois, April 20, 2006

Taming a Tsunami: The Management of Electronic Evidence, ABA TechShow, Chicago, Illinois, April 20, 2006

The 4th C Electronic Discovery Case Study, Special Counsel, Indianapolis, Indiana, April 26, 2006

Discovery of Electronic Information and Computer Forensics, American Corporate Counsel Association, Cleveland, Ohio, February 16, 2006

The Sedona Conference Presents: The Sedona Guidelines, Greater Cleveland Chapter ARMA, Independence, Ohio, April 11, 2006

The Sedona Conference Presents: The Sedona Guidelines, International Quality & Productivity Center, Miami, Florida, February 28, 2006

E-Discovery Secrets: How to Build a Process for Success—All Star Panel, Pike & Fischer, Pittsburgh, Pennsylvania, January 26, 2006

Computer Forensics, Union Club, Cleveland, Ohio, November 4, 2005

Stepping Outside the Box: Utilizing Electronic Discovery, National Business Institute, Cleveland, Ohio, May 12, 2005

The Nuts and Bolts of E-Records and E-Discovery, the Allegheny County Bar Association, Pittsburgh, Pennsylvania, April 19, 2005

Discovering Electronically, Business Litigation Seminar, Cleveland Bar Association, Cleveland, Ohio, December 17, 2004

Computer Forensics, Cox Cable, Business Channel, Northeast Ohio, recurring throughout October, 2004

The Intersection of Electronic Information, Records Management and Litigation in the Digital Age, International Law and Technology Forum, Institute for Law and Technology, the Center for American and International Law, Plano, Texas, September 24, 2004

Emerging Trends in Electronic Discovery and Computer Forensics, Calfee Halter & Griswold LLP, Cleveland, Ohio, May 20, 2004

Electronic Data Issues and Computer Forensics, Cleveland Bar Association, Cleveland, Ohio, April 23, 2004

Electronic Data Issues and Computer Forensics, Taft Stettinius & Hollister LLP, Cincinnati, Ohio, April 2, 2004

Electronic Discovery Seminar, Cooper Walinski, Toledo, Ohio, December 2, 2003

Knowledge Management and Case Management: Discerning Between Meat and Mantra, International Law and Technology Forum, Institute for Law and Technology, the Center for American and International Law, Plano, Texas, November 4, 2003

International Dimensions to the Electronic Discovery Dilemma, the Sedona Conference, Sante Fe, New Mexico, October 17, 2003

Best Practices Recommendations and Principles for Addressing Electronic Document Production, Managing Electronic Records (MER), Cohasset Associates, Inc., Chicago, Illinois, September 22, 2003

Electronic Data Issues and Spoliation, Anthony J. Celebrezze Inn of Court, Cleveland, Ohio, April 8, 2003

Collection of Electronic Data for Discovery, the Sedona Conference WG1, Phoenix, Arizona, October 17, 2002

New Technologies and Tools to Think and Worry About, the Sedona Conference, Phoenix, Arizona, October 17, 2002

Technology for In-House Counsel: Friend or Foe, Georgetown Corporate Counsel Institute, Washington, D.C., March 14, 2002

PROFESSIONAL LEGAL PRACTICE

Opsitnick's professional legal practice encompassed the following activities:

Coordination of nation-wide, multi-district, defensive discovery matters for product liability clients;

Coordination of defensive discovery issues concerning discovery requests, motions to compel, motions for protective orders (including protective orders for trade secret and confidential information), collection and production of documents, creation and development of document repositories, privilege matters, witness preparation, electronic data (including e-mail), and forensics;

Coordination of defensive discovery issues with and among joint defendants in cases throughout the United States;

Supervision of the efforts of hundreds of attorneys and legal assistants in connection with discovery demands;

Pioneering the development of Internet web sites to meet discovery obligations as well as compliance with national settlement of claims for litigation clients;

Development of content and structure for Internet document web sites for use in management of defensive discovery production in nation-wide, complex litigation;

Briefing and presenting arguments regarding electronic data and Internet document web site issues to courts and plaintiffs' counsel throughout the United States;

Development of technology solutions for demanding client problems, including the development of Internet-based solutions for knowledge management of litigation information;

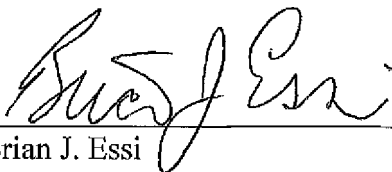
Supervision of the rollout of Internet litigation management technology and Internet document web sites to numerous offices of national and local counsels throughout the United States and abroad;

Implementation and direction of industry-wide compliance efforts under portions of multi-state settlement agreement of claims brought by various states attorneys general.

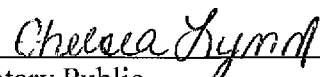
2016, received only two LFIA board books which were heavily redacted and which Mr. Butler wrote when he produced them: We have recently obtained the attached three records responsive to these requests as part of matter in litigation. These records were not responsive to my request.”

4. Lakewood never proffered any search terms to me. Lakewood’ claim that I never committed to accept search terms proffered by Lakewood in untrue since they never proffered any search terms.
5. The spreadsheet attached hereto as Exhibit 1 contains a list of 950 Bates-Stamped pages that were (1) marked “Privileged and Confidential”; (2) were not redacted; (3) were listed on Lakewood’s Amended Index filed with the Court on October 10, 2017. All 950 pages of un-redacted material were published by Lakewood on its public website at: <http://www.onelakewood.com/wp-content/uploads/2017/08/LKWD-THMPSN-HNE.pdf> (I last accessed that website on December 4, 2017). Per Exhibit A to Lakewood’s Answer to the Amended Complaint in this action, Lakewood asserted the defense of “joint defense and trial preparation” records and communications in response to PRRs 120, 124, 125, 171, 172, 173, 202, 204, 205, and 206 and refused to produce those records that would be responsive to those requests.
6. Attached hereto as Exhibit 2 is a true and accurate copy of Bates Stamped records LKWD-THMPSN HNE 660-669 showing that pages 660-669 are fully redacted.
7. Per my review of Lakewood’s Amended Index filed with the Court on October 10, 2017 it indexes 26,614 pages of records. The Amended Index only contains records produced by Lakewood beginning on June 14, 2017. Lakewood did not index the nearly 9,000 pages of records it produced prior to June 14, 2017 that were produced in response to my PRRs that are the subject of this action.

FURTHER AFFIANT SAYETH NAUGHT.


Brian J. Essi

SWORN TO BEFORE ME and subscribed in my presence this 7th day of December 2017.

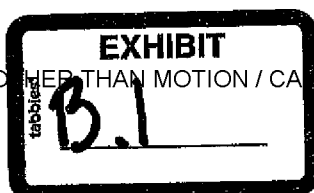

Notary Public



CHELSEA E. LYNN
NOTARY PUBLIC
STATE OF OHIO
Recorded in
Cuyahoga County

My Comm. Exp. 12/19/2020 OTHER THAN MOTION / CA 16 104659 / Confirmation Nbr. 1245371 / CLGAJ

BATES STAMPED NUMBERS	NUMBER OF PAGES MARKED PRIVILEGED
LKWD -THOMPSN HNE 1917-1928	12
2056-	1
2057-2063	7
2064-	1
2065-	1
2093-	1
2108-2109	2
2118-2119	2
2120-2121	2
2122-2123	2
2124-2125	2
2126-2127	2
2128-2129	2
2152-2153	2
2155-2156	2
2158-2212	55
2227-	1
2230-	1
2261-2294	34
2691-2693	3
2717-2719	2
2746-2778	32
2794-2831	38
2834-2842	9
2844-2846	3
3117-3262	146
3267-3268	2
3298-3313	16
3410-3413	4
3416-3423	8
3433-3434	2
3575-3596	22
3816-3842	27
4104-4113	10
4116-4185	70
4188-4214	27
4216-	1
4283-4284	2
4355-4382	28
4532-4553	22
6047-6050	4
6073-6410	338
6426-6427	2
TOTAL	950



From: Greenwald, Cathryn
Sent time: 06/23/2015 10:46:36 AM
To: John Bodine (jbodine@huronconsultinggroup.com) <jbodine@huronconsultinggroup.com>
Cc: Smyers, Robyn Minter
Subject: City of Lakewood - Outline Summary of 1996 Lease and Definitive Agreement
Attachments: City of Lakewood - Outline Summary of 1996 Lease and Definitive Agreement - v2.DOCX

Hi John,

Attached is an outline we prepared of the lease and definitive agreement that will be helpful to our discussion. We will be opening the conference line momentarily. Thanks!

Cathryn Greenwald | Associate | **Thompson Hine LLP**
3900 Key Tower, 127 Public Square | Cleveland, Ohio 44114
Office: 216.566.5694 | **Mobile:** 216.534.6301
Fax: 216.566.5800 | **Email:** Cathryn.Greenwald@ThompsonHine.com
Web: <http://www.ThompsonHine.com>



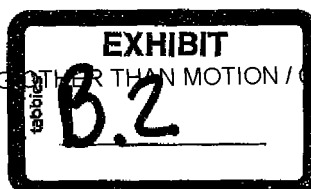
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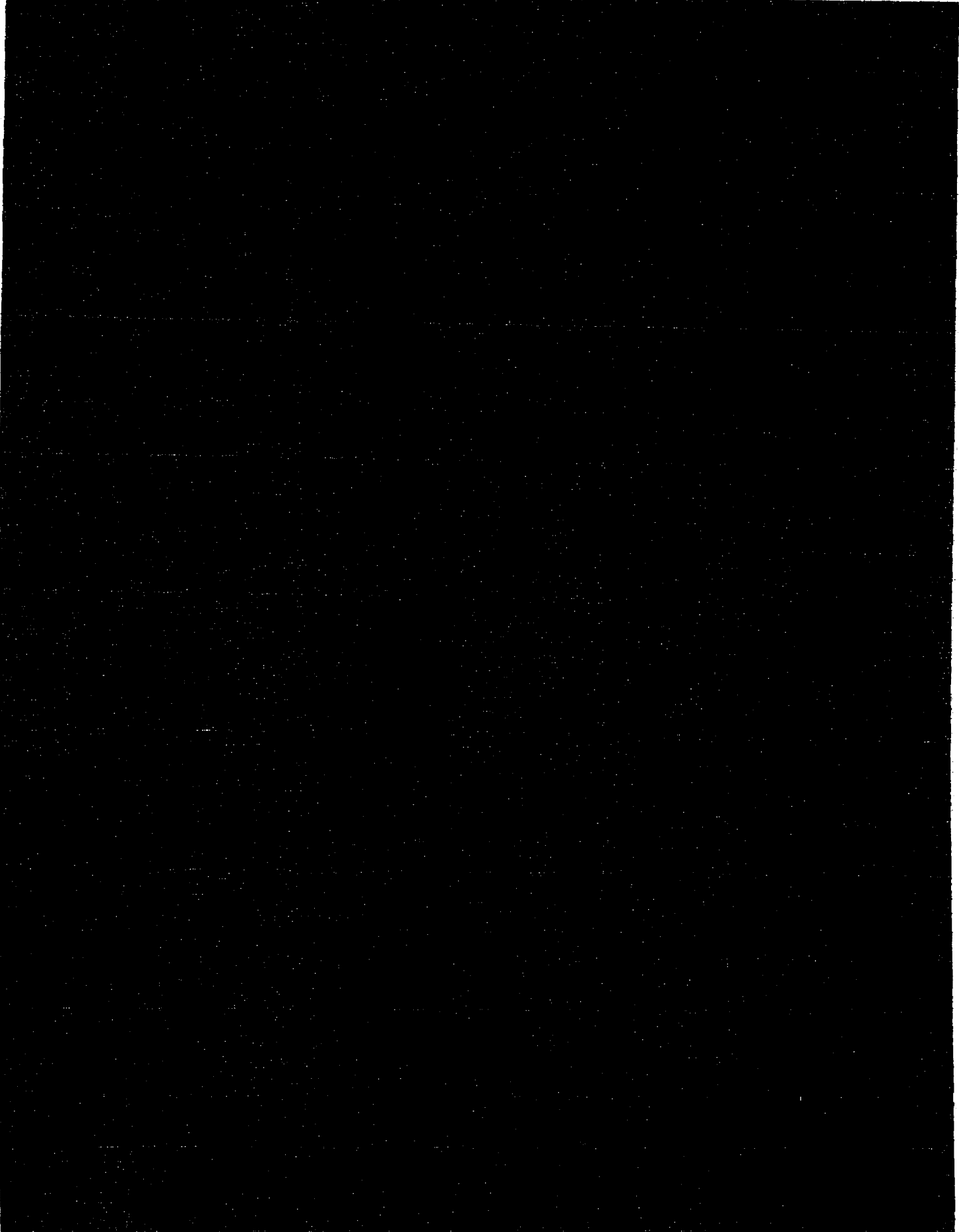
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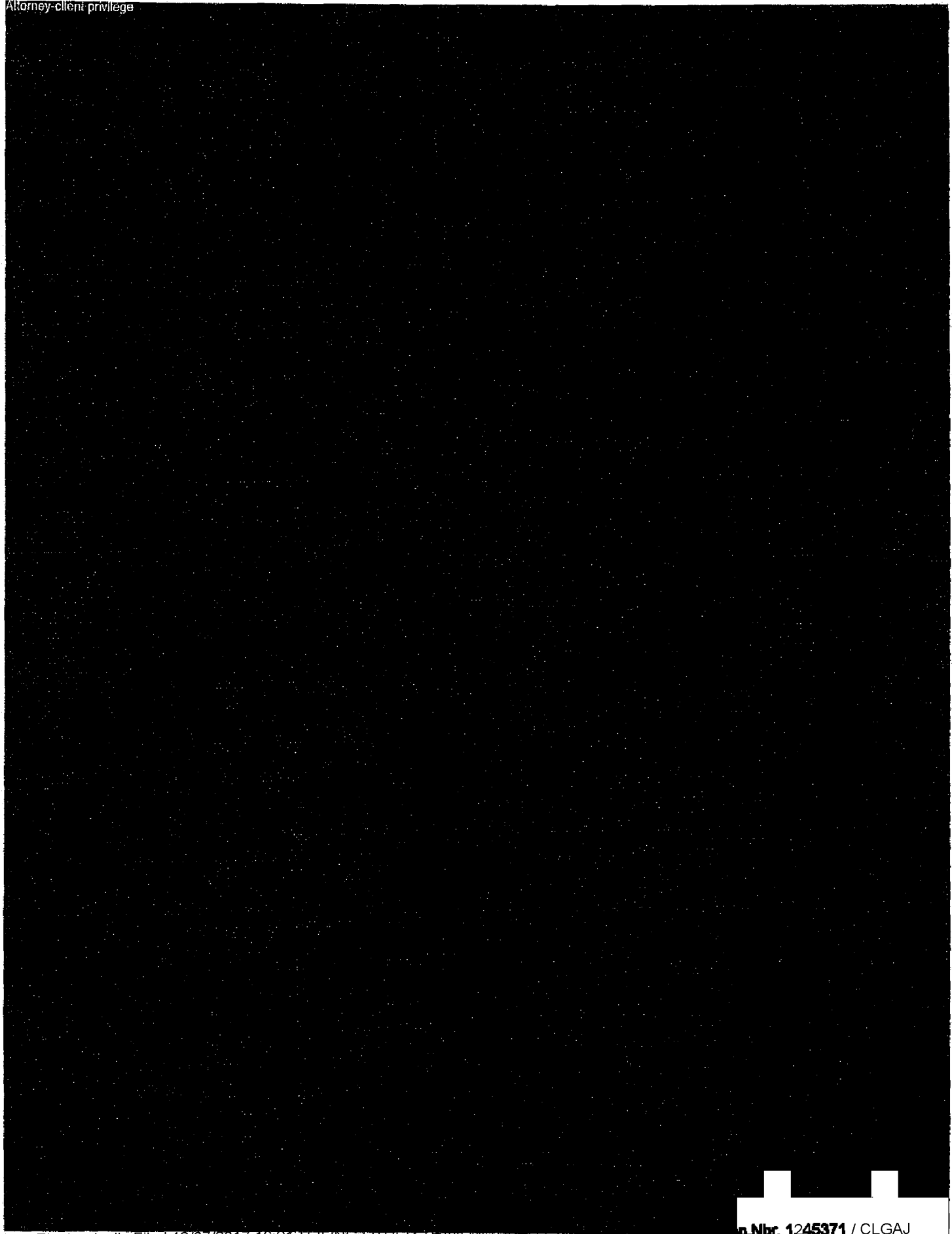
LKWD-THMPSN HNE000660



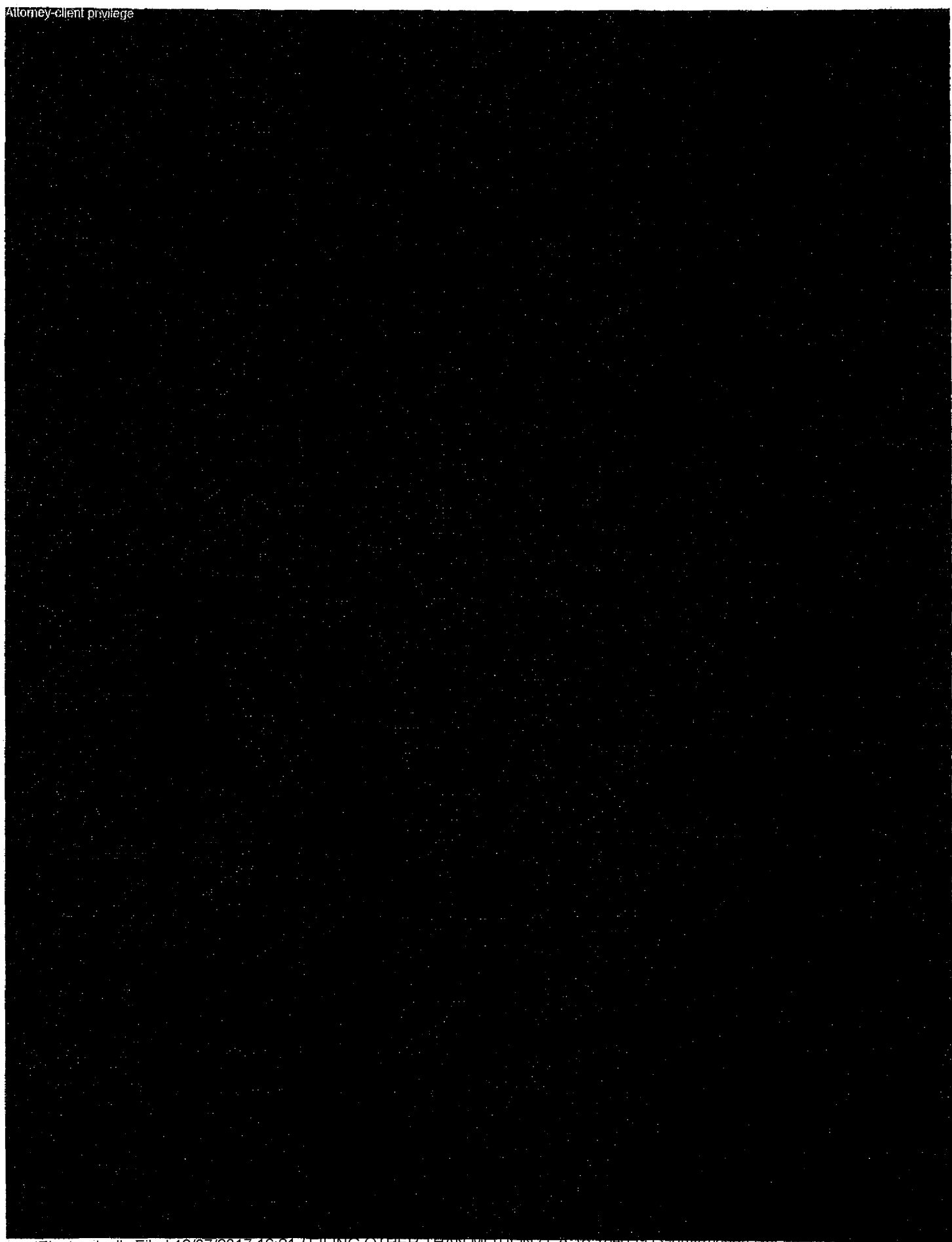


Attorney-client privilege





Attorney-client privilege



Attorney-client privilege

