**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

| | | |
|---|---|---|
| CRISTIANO DINIZ and ANTONIO THOMAS, individually and on behalf of all those similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>ALPHA OB GYN GROUP, P.C. and DR. DANIEL E. MCBRAYER SR.,<br><br>Defendants. | ) | CIVIL ACTION NO.: 1:12-cv-02621-WCO |

**PLAINTIFFS' MOTION TO SANCTION DEFENDANTS FOR THEIR UNTIMELY PRODUCTION OF DOCUMENTS**

Plaintiffs Cristiano Diniz and Antonio Thomas and Opt-in Plaintiff Victoria Cherry ("Plaintiffs"), hereby move the Court for an order sanctioning Defendants for their untimely production of documents. Specifically, Plaintiffs seek an order sanctioning Defendants by (1) excluding Defendants' late-produced documents or, in the alternative, re-opening discovery and imposing sanctions relating to Defendants' withholding of documents, and (2) requiring Defendants to Pay Plaintiffs' attorneys' fees incurred in filing this motion. This motion is made based

upon the record and files herein, as well as Plaintiffs' Memorandum of Law in Support of their Motion.

DATED: October 7, 2014

By: /s/ Andrew Weiner
Andrew L. Weiner
Georgia Bar No. 808278
Jeffrey B. Sand
Georgia Bar No. 181568
THE WEINER LAW FIRM LLC
3525 Piedmont Road
7 Piedmont Center, 3rd Floor
Atlanta, Georgia 30305
(404) 205-5029 (Tel.)
(404) 254-0842 (Tel.)
(866) 800-1482 (Fax)
aw@atlantaemployeelawyer.com
js@atlantaemployeelawyer.com

COUNSEL FOR PLAINTIFFS

**CERTIFICATION OF COUNSEL**

Pursuant to Local Rule 5.1B, the undersigned counsel for Plaintiff files this Certification of Counsel stating that the foregoing document was prepared in Times New Roman, 14-point font.

By s/ Andrew L. Weiner
Counsel for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

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| CRISTIANO DINIZ and ANTONIO THOMAS, individually and on behalf of all those similarly situated, | ) | |
| Plaintiffs, | ) | |
| v. | ) | CIVIL ACTION NO.: 1:12-cv-02621-WCO |
| ALPHA OB GYN GROUP, P.C. and DR. DANIEL E. MCBRAYER SR., | ) | |
| Defendants. | ) | |

**CERTIFICATE OF SERVICE**

I certify that on October 7, 2014, I electronically filed the foregoing *MOTION TO SANCTION DEFENDANTS FOR THEIR UNTIMELY PRODUCTION OF DOCUMENTS* with the Clerk of the Court using the CM/ECF system, which will automatically send notice of such filing to the following attorneys of record:

A. Keith Logue, Esq.
LAW OFFICE OF A. KEITH LOGUE
3423 Weymouth Court
Marietta, GA 30062

By s/ Andrew L. Weiner
Counsel for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

| | | |
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| CRISTIANO DINIZ and ANTONIO THOMAS, individually and on behalf of all those similarly situated,<br><br>Plaintiffs,<br><br>v.<br><br>ALPHA OB GYN GROUP, P.C. and DR. DANIEL E. MCBRAYER SR.,<br><br>Defendants. | ) | CIVIL ACTION NO.: 1:12-cv-02621-WCO |

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO SANCTION DEFENDANTS FOR THEIR UNTIMELY PRODUCTION OF DOCUMENTS**

Plaintiffs Cristiano Diniz and Antonio Thomas and Opt-in Plaintiff Victoria Cherry ("Plaintiffs") hereby file this Memorandum of Law in Support of their Motion to Sanction Defendants For Their Untimely Production of Documents. Plaintiffs seek in this motion an order (1) excluding Defendants' late-produced documents or, in the alternative, the re-opening of discovery and sanctions relating to Defendants' withholding of documents and (2) requiring Defendants to pay Plaintiffs' attorneys' fees incurred in filing this motion. In support of their motion, Plaintiffs state as follows:

## INTRODUCTION

Throughout the course of this action Defendants have demonstrated a disregard for the Federal Rules of Civil Procedure, the Court's Scheduling Order, and Plaintiffs' or the Court's time and resources. In this latest instance of misconduct, Defendants produced to Plaintiffs fifty pages of new and potentially relevant documents concerning Opt-in Plaintiff Cherry on the afternoon before the parties were to submit their pre-trial order. Defendants' failure to work cooperatively with Plaintiffs and to comply with the discovery schedule in this case has repeatedly been a source of contention and has caused multiple rounds of unnecessary motion practice. [1]

Now, despite knowing that the Cherry documents were produced well after the discovery period expired, after Plaintiffs filed a motion for partial summary judgment, and after Plaintiffs prepared the pre-trial order, Defendants nonetheless seek to use the late-produced documents at trial. In e-mail correspondence with Plaintiffs' counsel, Defendants' counsel acts as if Defendants can cure their untimely production of these documents by allowing Plaintiffs to take additional

[1] Defendants' conduct described herein is just the latest iteration of Defendants' bad faith conduct in this action. *See* Dkts. 32 (granting motion to compel Defendants to produce payroll and time records and ordering Defendants to reimburse Plaintiffs for cancelled depositions), 36 (granting motion to compel payroll records and awarding Plaintiffs attorneys' fees for filing the motion), and 62 (granting Plaintiffs' motion for sanctions due to Defendants' non-compliance with an order from the Court).

discovery with respect to these new documents. However, Defendants also seek to force Plaintiffs to incur the costs of the discovery (e.g., second depositions of individuals Plaintiffs already deposed), costs which could have been avoided had Defendants complied with their discovery obligations in the first place.

As explained below, Plaintiffs seek an order (1) excluding the late-produced documents or, in the alternative, re-opening discovery and imposing sanctions on Defendants relating to their withholding of the documents, and (2) requiring Defendants to pay the attorneys' fees Plaintiffs incurred in being forced to file this motion.

## BACKGROUND

On September 11, 2012, Plaintiffs Diniz and Thomas filed their Second Amended Complaint (the "Complaint"). (Dkt. 13.) Plaintiffs, who worked as medical and office assistants in Defendants' medical clinic, allege that they are entitled to, among other things, unpaid overtime compensation because of Defendants' violations of Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"). (*Id*.) Plaintiffs Diniz and Thomas also allege that Defendants retaliated against them in violation of the FLSA when they terminated their employment just days after they attempted to assert their rights to overtime compensation under the FLSA. (*Id.*)

On October 9, 2012, Plaintiffs served their Second Set of Requests for Production on Defendants ("Second RFPs"). (Dkt. 19.) In the Second RFPs, Plaintiffs sought documents concerning compensation paid to Defendants' hourly employees (including Opt-in Plaintiff Cherry), documents concerning the number of hours worked by Defendants' hourly employees, and documents concerning the work schedules of Defendants' hourly employees. Plaintiffs also noted that the Second RFPs were continuing in nature pursuant to Rule 26(e) of the Federal Rules of Civil Procedure and Defendants were requested to supplement their responses, if necessary.

In response to the Second RFPs, Defendants produced personnel files, time records, and compensation records for more than twenty of its employees, including Plaintiffs Diniz and Thomas, but they did not produce the personnel file or time records for Plaintiff Cherry.

On July 17, 2013, Plaintiffs filed Opt-in Plaintiff Cherry's Consent to Join Pursuant to 29 U.S.C. § 216(b). (Dkt. 41.)

On October 17, 2013, after granting Defendant McBrayer's numerous requests to cancel and/or move his deposition, Plaintiffs finally deposed Defendant

McBrayer.[2] During the deposition, Plaintiffs' counsel questioned Defendant McBrayer – without the aid of the documents produced by Defendants on October 3, 2014 – about numerous topics, including Opt-in Plaintiff Cherry:

> Q Do you remember an hourly employee named Victoria Cherry --
> A Victoria Cherry. No.
> Q When you say no, you don't remember her or she wasn't an employee?
> A I don't know. I don't remember her.
> Q Do you have any knowledge of whether she worked more than 40 hours in any workweek for Defendants?
> A Again, it was supposed to -- I was supposed to be informed if someone had more than 40 hours a week. I was not informed that anyone had more than 40 hours a week. I had an abundance -- I had an abundance of employees. It was just -- I had 15 people, 15 to 17 people working for me.
> Q So was it hard to keep track?
> A I didn't try to keep track. It was also office policy not to work overtime.
> Q Do you remember if Victoria Cherry ever worked more than 40 hours in a particular workweek?
> A I don't remember her, so how can I remember that?

(Dkt. 47, Ex. E at 34:23-35:19.)

On September 3, 2014, months after Plaintiffs filed a motion for partial summary judgment, the Court ordered that the parties submit a written pre-trial

[2] For a recitation of Defendant McBrayer's multiple attempts to avoid being deposed, please see docket number 29.

order within thirty (30) days and noted that the discovery period in this matter had expired. (Dkt. 62.) Thus, the pretrial order was due on October 3, 2014.

In the following four weeks, Plaintiffs worked diligently to prepare the pretrial order, including e-mailing a proposed draft to Defendants' counsel on September 30, 2014. Defendants did not respond to that email, provide any additions or revisions to the draft sent by Plaintiffs, or attempt to communicate with Plaintiffs' counsel about the pretrial order.

Instead, at 1:47 p.m. on October 2, 2014 – the day before the pretrial order was due and well after the discovery period in this matter expired – Defendants' counsel emailed to Plaintiffs' counsel fifty (50) pages of previously-unproduced documents concerning Plaintiff Cherry's employment (the "Cherry Documents"). Defendants' counsel stated in the October 2, 2014 transmittal e-mail that "In reviewing my documents for this case, I came upon these documents that were provided to me not too long ago. I don't see where they were produced to you. If they were, sorry to send more paper." (Ex. A.) Essentially, the Cherry Documents appear to consist of personnel-type documents, perhaps from Plaintiff Cherry's personnel file, including purported time records and disciplinary documents.

On October 2, 2014, Plaintiff filed an Emergency Motion to Extend Time to File the Pre-Trial Order Due to Defendant's Last-Minute Document Production so

that Plaintiff could review and evaluate the Cherry Documents produced by Defendants, permit Plaintiffs' counsel time to discuss them with Plaintiff Cherry, and determine whether the parties need to request to reopen discovery in connection with the documents, including depositions related to the documents. (Dkt. 64.) The Court granted the motion on October 3, 2014. (*See* Oral Order dated October 3, 2014.)

On October 3, 2014, Plaintiffs' counsel emailed Defendants' counsel to inquire as to whether Defendants intended to include these new Cherry Documents on their pre-trial order exhibit list. (Ex. B at p. 5.) Defendants' counsel left no doubt: "I plan on using Cherry's time sheets, time cards and leave requests." (*Id.* at p. 4.)

In response, Plaintiffs' counsel emailed Defendants' counsel on October 6, 2014 as follows:

> Thanks for the email. Providing these Cherry documents to us months after discovery has ended, months after the summary judgment deadline, and after we had spent much time preparing the pre-trial order was improper. We disagree that your clients should be able to use the documents at trial. Should you seek to use them at trial, however, we will need to (1) reopen discovery and (2) depose Dr. McBrayer, Ms. Buckner, a 30(b)(6) witness, and possibly you concerning the documents, including questions relating to where the documents have resided for the past two years. To re-open discovery, we'd ask that Defendants pay for the court reporters (including the

> transcripts) and our attorney time in preparing for and taking the depositions. As you know, we've already taken (or attempted to take) Dr. McBrayer's deposition three times and Ms. Buckner's deposition once, and we cannot ask our clients to pay for additional depositions or attorney time because of Defendants' actions in withholding the documents. Whether or not we re-open discovery, we reserve the right to seek sanctions against Defendants for withholding these documents.
>
> Please let us know how you wish to proceed. We hope that we can agree on a process here without having to burden the Court, but we will have no choice other than seeking the Court's assistance if we cannot agree.

(Ex. B at pp. 3-4.)

Defendants' counsel responded to this email and, ignoring Plaintiff's counsel's question and turning his previous statement on its head, stated, "I have no plans to use the documents in my case." (Ex. B at p. 3) (emphasis added). In an attempt to clarify these seemingly inconsistent positions taken by Defendant's counsel, Plaintiff's counsel e-mailed Defendants' counsel asking: "To make sure we're not dancing around semantics, are you planning to use the documents at all at trial, whether in your case or in rebuttal?" (*Id.* at pp. 2-3.) Defendants' counsel replied, "Depending on how you use Cherry, if you call her in your case and depending on what she testifies to, I may use in her cross if she is not truthful about her hours. I do not plan on making her a part of my case." (*Id*. at p. 2.) Subsequently, Plaintiffs' counsel once again requested that Defendants pay for the

court reporters and attorney time in preparing for and taking the depositions. (*Id.* at p. 1.) Defendants' counsel responded as follows:

> You certainly may depose the doctor and whomever. I will object to you deposing me. We will not bear the cost as you would have had the cost anyway in deposing about [sic] Cherry's documents and the preparation time, and the court reporter.

(*Id*.)

## ARGUMENT

### 1. Defendants Should Be Sanctioned For Their Late Production Of The Cherry Documents.

Under Judge Forrester's Revised Case Instructions, "[a]ll discovery should end within the period allowed." (Dkt. 5 at p. 2.) Additionally, "[t]he court does not allow evidence at trial which was requested and not revealed during the discovery period." (*Id*.)

When a party fails to timely provide documents in discovery, the primary source of the Court's authority to issue sanctions stems from Rules 16 and 37 of the Federal Rules of Civil Procedure. Rule 16 provides that:

> On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney ... fails to obey a scheduling or other pretrial order.

Fed.R.Civ.P. 16(f)(1). Pursuant to Rule 16(f)(2) of the Federal Rules of Civil Procedure, "[i]nstead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses—including attorney's fees—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust."

Additionally, a party's failure to comply with its discovery obligations within the time provided by the Court's Scheduling Order constitutes a violation of Rule 16 and triggers the Court's authority to impose sanctions under Rule 37(b)(2), which may include:

> (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
> (iii) striking pleadings in whole or in part;
> (iv) staying further proceedings until the order is obeyed;
> (v) dismissing the action or proceeding in whole or in part;
> (vi) rendering a default judgment against the disobedient party; or
> (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Fed.R.Civ.P. 37(b)(2)(A). These rules give district judges broad discretion to fashion appropriate sanctions for violation of discovery orders. *Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536 (11th Cir. 1993).

**a. The Late-Produced Documents Should Be Excluded.**

Plaintiffs sought in the Second RFPs documents concerning Opt-in Plaintiff Cherry, including her compensation and time records. In their October 2014 e-mail producing the Cherry documents, Defendants effectively concede that the documents are responsive to Plaintiffs' discovery requests and that the production is tardy. There can be no question that the Defendants failed to provide responsive documents to Plaintiffs during the discovery period in this action.

Defendants cannot meet their burden of showing that their failure to disclose the Cherry Documents was substantially justified or harmless to Plaintiffs. In particular, Plaintiffs will be prejudiced should Defendants be allowed to use the Cherry Documents at trial because they will have been denied the opportunity to explore the documents during the discovery period and question Defendants' witnesses about them, including questions about the content of the documents, the preparation of the documents, the authenticity of the documents, and where the documents have resided for the two years since Plaintiff Diniz filed the Complaint in this case. *See, e.g., Roberts v. Scott Fetzer Co.*, 4:07-CV-80 CDL, 2010 WL

3546499, at *1 (M.D. Ga. Sept. 7, 2010) (granting plaintiff's motion to exclude evidence because defendant's failure to disclose relevant evidence lacked substantial justification and was harmful to plaintiff); *Caribbean I Owners' Ass'n, Inc. v. Great Am. Ins. Co. of New York,* CIV.A.07-00829-KD-B, 2009 WL 857439, at **1-2 (S.D. Ala. Mar. 25, 2009) (granting motion to exclude witness and finding Defendant's failure to identify witness during discovery is not harmless and Plaintiff would be unfairly prejudiced by late disclosure). Accordingly, the Cherry Documents should be excluded from trial for all purposes.

**b. Alternatively, If The Court Does Not Exclude The Cherry Documents, It Should Re-Open Discovery And Defendants Should Be Sanctioned For Their Late Document Production.**

Should the Court decide to not exclude the Cherry Documents, Plaintiffs request that the Court enter an order (1) re-opening discovery to allow Plaintiffs to conduct discovery, including re-taking depositions of Defendant McBrayer, Angela Buckner (Defendants' office manager who has already been deposed in this action), and a Rule 30(b)(6) witness with respect to the Cherry Documents and (2) requiring Defendants to pay the costs of the depositions and the time spent by

Plaintiffs' counsel in preparing for and taking the additional depositions due to Defendants' actions.[3]

There is no question that Defendants owed the Cherry Documents to Plaintiffs during the discovery period. Defendants knew that Opt-in Plaintiff Cherry would be part of this case as early as July 17, 2013. (Dkt. 41.), Nevertheless, Defendants failed to produce to Plaintiffs the documents at issue until after depositions had been taken, after the discovery period expired, after Plaintiffs filed their motion for partial summary judgment, and just a day before the parties were to submit the pre-trial order to the Court.

Defendants' delay caused, among other things, Plaintiffs to depose Defendant McBrayer on October 17, 2013 without the benefit of the Cherry Documents and to spend time preparing a pre-trial order with incomplete information. Additionally, Defendants' production of the Cherry Documents immediately prior to the pre-trial order deadline begs the question of where these documents have been for the past year, a question that should be answered in an extended discovery period and at Defendants' expense. At bottom, if the Court

[3] Additionally, Plaintiffs spent several hours preparing the pre-trial order without the aid of the Cherry Documents. If the Court does not exclude the Cherry Documents, Plaintiffs will be required to re-work the pre-trial order as it relates to Plaintiff Cherry. Defendants should be required to reimburse Plaintiffs for the fees that they already incurred preparing the pre-trial order relating to Plaintiff Cherry.

decides to not exclude the Cherry Documents, Plaintiffs should be entitled to conduct discovery regarding the documents that Defendants withheld at Defendants' expense.

Defendants' position in the e-mail correspondence that it is unwilling to bear the costs of such discovery – including the deposition fees and Plaintiffs' counsel's fees in preparing for and taking the depositions – places the financial effects of Defendants' actions squarely on Plaintiffs' backs. Plaintiffs are individuals who lack substantial financial resources. They already have incurred court reporter fees and their counsel fees to take numerous depositions in this case, including depositions of Defendant McBrayer and Ms. Buckner, only to find out the day before the pre-trial order was due that additional documents exist that are likely relevant to the issues in the action. To force Plaintiffs to re-depose Defendants' witnesses at their own expense because of Defendants' admitted failure to produce the Cherry Documents is unfair and prejudicial.

As detailed in Plaintiffs' March 6, 2013 Supplemental Memorandum of Law in Support of Their Motions to Compel, Defendants' actions in seeking to avoid and/or delay Defendant McBrayer's deposition have already needlessly increased the cost of this litigation for Plaintiffs. (Dkt. 29 at pp. 3-4.) Defendants' request for Plaintiffs to incur the costs of yet another deposition of Defendant McBrayer,

even though it was their own actions that caused these potential costs to be incurred, should not be countenanced.

**c. Plaintiffs Are Entitled To The Fees Incurred In Bringing This Motion.**

Rule 16(f)(2) of the Federal Rules of Civil Procedure provides that, "[i]nstead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses—including attorney's fees—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust." Here, regardless of the type of sanction that the Court finds to be appropriate, it should order Defendants to reimburse Plaintiffs for the fees associated with being forced to file this motion. *See, e.g.*, *Johnson v. Bibb Cty. Bd. of Educ.*, No. 5:07-CV-425(CDL), 2008 WL 4539387 (M.D. Ga. Oct. 6, 2008) (granting motion to compel for failure to respond to discovery and further ordering that non-producing party "shall pay Defendants for their attorney fees in having to bring this motion … and that payment shall be made to Defendants within thirty days of today's Order").

## CONCLUSION

WHEREFORE, Plaintiffs respectfully pray that this Court enter an order (1)

excluding the Cherry Documents or, in the alternative, re-opening discovery and imposing sanctions on Defendants with respect to their withholding of the documents, and (2) requiring Defendants to reimburse Plaintiffs for the fees incurred in being forced to file this motion, along with any further relief that the Court deems just and proper.

**Good Faith Certification**

Counsel for Plaintiffs certifies that the movant has in good faith conferred or attempted to confer with counsel for Defendants in an effort to resolve the aforementioned issues without Court action.

DATED: October 7, 2014

By: /s/ Andrew Weiner
Andrew L. Weiner
Georgia Bar No. 808278
Jeffrey B. Sand
Georgia Bar No. 181568
THE WEINER LAW FIRM LLC
3525 Piedmont Road
7 Piedmont Center, 3rd Floor
Atlanta, Georgia 30305
(404) 205-5029 (Tel.)
(404) 254-0842 (Tel.)
(866) 800-1482 (Fax)
aw@atlantaemployeelawyer.com
js@atlantaemployeelawyer.com

COUNSEL FOR PLAINTIFFS

**CERTIFICATION OF COUNSEL**

Pursuant to Local Rule 5.1B, the undersigned counsel for Plaintiff files this Certification of Counsel stating that the foregoing document was prepared in Times New Roman, 14 point font.

By s/ Andrew L. Weiner
Counsel for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
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| CRISTIANO DINIZ and ANTONIO THOMAS, individually and on behalf of all those similarly situated, | ) | |
| Plaintiffs, | ) | |
| v. | ) | CIVIL ACTION NO.: 1:12-cv-02621-WCO |
| ALPHA OB GYN GROUP, P.C. and DR. DANIEL E. MCBRAYER SR., | ) | |
| Defendants. | ) | |

## CERTIFICATE OF SERVICE

I certify that on October 7, 2014, I electronically filed the foregoing *Memorandum of Law in Support of Motion to Sanction Defendants For Their Untimely Production of Documents* with the Clerk of the Court using the CM/ECF system, which will automatically send notice of such filing to the following attorneys of record:

A. Keith Logue, Esq.
LAW OFFICE OF A. KEITH LOGUE
3423 Weymouth Court
Marietta, GA 30062

By s/ Andrew L. Weiner
Counsel for Plaintiffs

# EXHIBIT A

**Andrew Weiner**

**From:** Keith Logue <Keith@logue-law.com>
**Sent:** Thursday, October 02, 2014 1:47 PM
**To:** Andrew Weiner (aw@atlantaemployeelawyer.com)
**Subject:** Diniz v. Alpha
**Attachments:** Cherry Documents.pdf

Andy,

In reviewing my documents for this case, I came upon these documents that were provided to me not too long ago. I don't see where they were produced to you. If they were, sorry to send more paper.

*A. Keith Logue*
LOGUE LAW FIRM, P.C.
3423 Weymouth Court
Marietta, Georgia 30062
(770) 321-5750
(770) 321-5751 Fax
keith@logue-law.com
Visit us at www.logue-law.com

# EXHIBIT B

**Andrew Weiner**

**From:** Keith Logue <Keith@logue-law.com>
**Sent:** Monday, October 06, 2014 10:24 AM
**To:** Andrew Weiner
**Subject:** RE: Diniz v. Alpha

Andy,

You certainly may depose the doctor and whomever. I will object to you deposing me. We will not bear the cost as you would have had the cost anyway in deposing about Cherry's documents and the preparation time, and the court reporter.

*A. Keith Logue*
LOGUE LAW FIRM, P.C.
3423 Weymouth Court
Marietta, Georgia 30062
(770) 321-5750
(770) 321-5751 Fax
keith@logue-law.com
Visit us at www.logue-law.com



**From:** Andrew Weiner [mailto:aw@atlantaemployeelawyer.com]
**Sent:** Monday, October 06, 2014 10:07 AM
**To:** Keith Logue
**Cc:** Jeff Sand
**Subject:** RE: Diniz v. Alpha

Keith,

We do plan to call Ms. Cherry and she does plan to testify about the hours that she worked. Given your email below, it appears likely that you will seek to use at trial the documents that you just produced. Thus, it appears that we will need to (1) reopen discovery and (2) re-depose Dr. McBrayer, Ms. Buckner, a 30(b)(6) witness, and possibly you concerning the documents, including questions relating to where the documents have resided for the past two years. To re-open discovery, we'd ask that Defendants pay for the court reporters (including the transcripts) and our attorney time in preparing for and taking the depositions. Please let us know if your clients will agree to this process or whether we'll need to seek assistance from the Court.

Best,

Andrew Weiner, Esq.

THE WEINER LAW FIRM LLC

3525 Piedmont Road
7 Piedmont Center
3rd Floor
Atlanta, Georgia 30305
(404) 254-0842
(866) 800-1482 (fax)
aw@atlantaemployeelawyer.com

www.atlantaemployeelawyer.com
www.backgroundreportproblems.com



**From:** Keith Logue [mailto:Keith@logue-law.com]
**Sent:** Monday, October 06, 2014 9:59 AM
**To:** Andrew Weiner
**Subject:** RE: Diniz v. Alpha

Depending on how you use Cherry, if you call her in your case and depending on what she testifies to, I may use in her cross if she is not truthful about her hours. I do not plan on making her a part of my case.

*A. Keith Logue*
LOGUE LAW FIRM, P.C.
3423 Weymouth Court
Marietta, Georgia 30062
(770) 321-5750
(770) 321-5751 Fax
keith@logue-law.com
Visit us at www.logue-law.com



**From:** Andrew Weiner [mailto:aw@atlantaemployeelawyer.com]
**Sent:** Monday, October 06, 2014 9:54 AM
**To:** Keith Logue
**Cc:** Jeff Sand
**Subject:** RE: Diniz v. Alpha

Keith,

To make sure we are not dancing around semantics, are you planning to use the documents at all at trial, whether in your case or in rebuttal? Your email from Friday stated that you "plan on using Cherry's time sheets, time cards and

leave requests," but your email today states that you "have no plans to use the documents in my case." If you plan to use the documents at any point during the trial, please let us know your response to our email below.

Best,

Andrew Weiner, Esq.

THE WEINER LAW FIRM LLC

3525 Piedmont Road
7 Piedmont Center
3rd Floor
Atlanta, Georgia 30305
(404) 254-0842
(866) 800-1482 (fax)
aw@atlantaemployeelawyer.com

www.atlantaemployeelawyer.com
www.backgroundreportproblems.com



---

**From:** Keith Logue [mailto:Keith@logue-law.com]
**Sent:** Monday, October 06, 2014 9:29 AM
**To:** Andrew Weiner
**Subject:** RE: Diniz v. Alpha

I have no plans to use the documents in my case.

*A. Keith Logue*
LOGUE LAW FIRM, P.C.
3423 Weymouth Court
Marietta, Georgia 30062
(770) 321-5750
(770) 321-5751 Fax
keith@logue-law.com
Visit us at www.logue-law.com



---

**From:** Andrew Weiner [mailto:aw@atlantaemployeelawyer.com]
**Sent:** Monday, October 06, 2014 9:12 AM
**To:** Keith Logue
**Cc:** Jeff Sand
**Subject:** RE: Diniz v. Alpha

Keith,

Thanks for the email. Providing these Cherry documents to us months after discovery has ended, months after the summary judgment deadline, and after we had spent much time preparing the pre-trial order was improper. We disagree that your clients should be able to use the documents at trial. Should you seek to use them at trial, however, we will need to (1) reopen discovery and (2) depose Dr. McBrayer, Ms. Buckner, a 30(b)(6) witness, and possibly you concerning the documents, including questions relating to where the documents have resided for the past two years. To re-open discovery, we'd ask that Defendants pay for the court reporters (including the transcripts) and our attorney time in preparing for and taking the depositions. As you know, we've already taken (or attempted to take) Dr. McBrayer's deposition three times and Ms. Buckner's deposition once, and we cannot ask our clients to pay for additional depositions or attorney time because of Defendants' actions in withholding the documents. Whether or not we re-open discovery, we reserve the right to seek sanctions against Defendants for withholding these documents.

Please let us know how you wish to proceed. We hope that we can agree on a process here without having to burden the Court, but we will have no choice other than seeking the Court's assistance if we cannot agree.

Best,

Andrew Weiner, Esq.

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aw@atlantaemployeelawyer.com

www.atlantaemployeelawyer.com
www.backgroundreportproblems.com



**From:** Keith Logue [mailto:Keith@logue-law.com]
**Sent:** Friday, October 03, 2014 10:46 AM
**To:** Andrew Weiner
**Subject:** RE: Diniz v. Alpha

Andy,

I plan on using Cherry's time sheets, time cards and leave requests.

*A. Keith Logue*
LOGUE LAW FIRM, P.C.
3423 Weymouth Court
Marietta, Georgia 30062
(770) 321-5750

(770) 321-5751 Fax
keith@logue-law.com
Visit us at www.logue-law.com



**From:** Andrew Weiner [mailto:aw@atlantaemployeelawyer.com]
**Sent:** Friday, October 03, 2014 10:42 AM
**To:** Keith Logue
**Cc:** Jeff Sand
**Subject:** RE: Diniz v. Alpha

Keith,

Thanks for the email. As we will each need to respond to certain of one another's sections in the PTO, we'd ask that you get it back to us well before the deadline. That being said, the PTO may change from its current state depending on what needs to be done over the next few weeks due to the late production. We are analyzing what should be done about Defendants' production, but it would be helpful to know whether you intend to include these new documents on Defendants' exhibit list. Please let us know. Thanks.

Best,

Andrew Weiner, Esq.

THE WEINER LAW FIRM LLC

3525 Piedmont Road
7 Piedmont Center
3rd Floor
Atlanta, Georgia 30305
(404) 254-0842
(866) 800-1482 (fax)
aw@atlantaemployeelawyer.com

www.atlantaemployeelawyer.com
www.backgroundreportproblems.com



**From:** Keith Logue [mailto:Keith@logue-law.com]
**Sent:** Friday, October 03, 2014 10:38 AM
**To:** Andrew Weiner
**Subject:** RE: Diniz v. Alpha

Andy,

I just saw where court granted the motion and the PTO is due 10/24. I will keep working on it and get it back before the deadline. Let me know if depositions are required.

*A. Keith Logue*
LOGUE LAW FIRM, P.C.
3423 Weymouth Court
Marietta, Georgia 30062
(770) 321-5750
(770) 321-5751 Fax
keith@logue-law.com
Visit us at www.logue-law.com



**From:** Andrew Weiner [mailto:aw@atlantaemployeelawyer.com]
**Sent:** Friday, October 03, 2014 9:47 AM
**To:** Keith Logue
**Subject:** RE: Diniz v. Alpha

Keith,

I believe you may be right about the likelihood that the Court will grant the extension, but we cannot assume that the Court will do so. We need to work to finalize the PTO until we hear otherwise from the Court. Please send me your comments/additions so that we can move this forward.

Best,

Andrew Weiner, Esq.

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**From:** Keith Logue [mailto:Keith@logue-law.com]
**Sent:** Friday, October 03, 2014 9:25 AM
**To:** Andrew Weiner (aw@atlantaemployeelawyer.com)
**Subject:** Diniz v. Alpha

Andy,

Got your call late last night. I had to leave earlier yesterday but came in late to try and work on PTO and saw your motion. I filed consent late last night. I am not quite finished with PTO and am going to assume Court will allow you time to take depos or whatever needs to be done (and I don't object) and for more time to complete the PTO. Let me know if you have differing opinion.

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