UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 93-1425-CIV-HURLEY

WILLIAM B WEINTRAUB,

Plaintiff,

vs.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,

Defendant.
_____/

REPORT AND RECOMMENDATION

THIS CAUSE is before the Court on Plaintiff's Motion for Sanctions Including Striking Defendant's Answer and Affirmative Defenses (D.E. 283). This matter was referred to the undersigned United States Magistrate Judge by the Honorable Daniel T.K. Hurley, United States District Judge for the Southern District of Florida, and is now ripe for judicial review.[1]/

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[1]/ Oral argument was presented to the undersigned on August 30, 1995. Thereafter, and pursuant to request of counsel, this Court entered an order deferring ruling on Plaintiff's Motion for Sanctions pending receipt of documents required to be produced by the undersigned's October 18, 1995 Order and Supplemental briefings filed incident thereto. Plaintiff's Reply to Defendant's Response to Plaintiff's Supplemental Pleading was filed January 5, 1996. Accordingly, Plaintiff's Motion for Sanctions is now ripe for judicial review.

382/KB

I. BACKGROUND

This cause arises out of Plaintiff William Weintraub's ("Weintraub") claim against Nationwide Mutual Fire Insurance Company ("Nationwide") under a homeowner's insurance policy for damages sustained to Weintraub's South Dade home following Hurricane Andrew. Summary Judgment for Plaintiff on Count I was issued August 18, 1994, awarding Weintraub the balance due under his Nationwide homeowner's insurance policy. The remaining counts of the Second Amended Complaint are Count II for bad faith handling of Weintraub's insurance claim; Counts III and IV for breach of the agent's agreement; Count V, alleging Florida RICO violations; and Count VI, alleging federal RICO violations.

By this Motion, Weintraub seeks sanctions against Nationwide based upon: (1) Nationwide's alleged concealment of engineer Riva's report; (2) Nationwide's alleged concealment of documents ordered produced; and (3) Nationwide's allegedly willful and repetitive refusal to obey Order Compelling Answer to Interrogatory Regarding Commission Income. In the way of sanctions, Weintraub requests the most severe sanction available, namely, an order striking Nationwide's Answer and Affirmative Defenses as to Counts II and III of the Second Amended Complaint, entering a default judgment and reserving jurisdiction for the jury to set the amount of damages. Weintraub further seeks an order awarding him attorney's fees and costs for all time expended in connection with the subject discovery defaults alleged.

II. LEGAL ANALYSIS

Weintraub moves for sanctions against Nationwide pursuant to Rule 37 of the Federal Rules of Civil Procedure, which provides for sanctions as a result of failure to comply with a court order directing discovery. Rule 37b(2) states that the court "may make such orders in regard to the failure as are just" and lists several possible sanctions, including:

> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
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> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
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> * * *
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds the failure was substantially justified or that other circumstances make an award of expenses unjust.

Id. (emphasis added).

The possible sanctions set forth in Rule 37b(2) are not mutually exclusive. See Life Music, Inc. v. Broadcast Music, Inc., 41 F.R.D. 16 (S.D.N.Y. 1966). The trial court has broad discretion to fashion such orders as may be deemed appropriate. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S.

639 (1976); Guidry v. Continental Oil Co., 640 F.2d 523, 533 (5th Cir. 1981), cert. denied, 454 U.S. 818 (1982); Dorey v. Dorey, 609 F.2d 1128, 1135 (5th Cir. 1980). A trial court's decision as to the imposition of sanctions, including dismissal of a complaint or entry of a default, will not be disturbed on appeal absent abuse of discretion. Aztec Steel Co. v. Florida Steel Corp., 691 F.2d 480, 481 (11th Cir. 1982), Cert. denied, 460 U.S. 1040 (1983); Bankatlantic v. Blythe Eastman Paine Webber, Inc., 12 F.3d 1045, 1048 (11th Cir. 1994).

Of course, Rule 37 aside, all federal courts have the power under "common law to impose sanctions against recalcitrant lawyers and parties litigant." Carlucci v. Piper Aircraft Corp., Inc., 775 F.2d 1440, 1446 (11th Cir. 1985). "[D]eeply rooted in the common law tradition is the power of any court to 'manage its affairs [which] necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it'." Id. (quoting Flaka v. Little River Marine Construction Co., 389 F.2d 885, 888 n. 10 (5th Cir.), cert. denied, 392 U.S. 928 (1968)). See also Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980).

In the instant case Weintraub requests imposition of the most severe sanction available, namely, a striking of pleadings and judgment in his favor. The sanction of default is a drastic remedy requiring a finding of extreme circumstances. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976). Generally, to warrant the severe sanction of default, there must be a showing that: (1) the sanctioned party acted either willfully, in bad faith, or

was at fault for failing to comply with a Court order; (2) the moving party was prejudiced as a result; and (3) no lesser sanction would serve the punishment and deterrence goals of National Hockey League and its progeny. Roadway Express, Inc. v. Piper, 447 U.S. 752 (1980); Carlucci v. Piper Aircraft Corp., 775 F.2d 1440 (11th Cir. 1985); Telectron, Inc. v. Overhead Door Corp., 166 F.R.D. 107, 133 (S.D. Fla. 1987) (J. Marcus).

There are countless decisions upholding dismissal of complaints, default judgments and striking of pleadings for willful violations of discovery orders and/or rules of court. Thus, in Malantea v. Suzuki Motor Co., Ltd., 987 F.2d 1536 (11th Cir.), cert. denied, 114 S.Ct. 181 (1993), the Eleventh Circuit affirmed entry of a default pursuant to Rule 37b(2)(C) where the defendants "continually and willfully resisted discovery, even deliberately withholding discoverable information that the judge had ordered them to produce." Similarly, in Aztec Steel Company v. Florida Steel Corporation, 691 F.2d 480 (11th Cir. 1982), cert. denied, 460 U.S. 1040 (1983), the Eleventh Circuit upheld dismissal recommended by the magistrate judge who found the plaintiff had "willfully and knowingly" failed to comply with an order requiring answers to interrogatories. Orders of default and orders striking pleadings have also been upheld on findings of fault. "Fault", although an amorphous concept, has been held to authorize the sanction of default "where counsel has 'disregarded' its professional responsibilities in the discovery process or to the court ... or where counsel's conduct rises to the level of 'gross negligence'." Bankatlantic v. Blythe Eastman Paine Webber, Inc., 127 F.R.D. 224,

231 (S.D. Fla. 1989) (J. Scott). See also Aztec Steel Co. v. Florida Steel Corp., 691 F.2d 480, 481 (11th Cir. 1982), cert. denied, 460 U.S. 1040 (1983); Cine Forty-Second Street Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1068 (2d Cir. 1979). Thus, even when specific proof of intent is absent, default is still appropriate when counsel "clearly should have understood his duty to the court." Cine Forty-Second Street Theatre Corp., 602 F.2d at 1068. See also Bankatlantic, 127 F.R.D. 224.

With this standard in mind, we now proceed to address the merits of Plaintiff's charges.

A. Defendant's Alleged Concealment of Engineer Riva's Report

By way of summary, Weintraub alleges that approximately two years after the commencement of this action, he uncovered the report of an engineer retained by Nationwide to inspect the damages to his South Dade home caused by Hurricane Andrew. The engineer in question was a Mr. Antonio J. Riva of Riva, Klein & Timmons, a consulting structural engineering firm, who inspected Weintraub's home on or about October 10, 1992, shortly after the August 1992 hurricane. Weintraub alleges, and the documents support his claim, that Riva's report was directly contrary to the position taken by Nationwide and fully supported Weintraub's position in assessing the damages to his home. According to Weintraub, and again as the facts bear out, Nationwide intentionally concealed engineer Riva's report from Weintraub even though it was clearly within the scope of requests for production served upon Nationwide in August 1993 and was in the

possession of Nationwide's lawyers. Weintraub goes on to allege that by concealing the engineer's report from both him and Nationwide's designated "independent" appraiser, Nationwide procured false and incomplete testimony in the Court ordered appraisal proceeding, thus working a fraud upon this Court. Based upon the result reached at the appraisal proceeding, the District Court entered Summary Judgment on Count I of the Complaint in Weintraub's favor, but in an amount less than Weintraub's claim.

Based upon this Court's review of the pleadings and record in this case and having heard oral argument on this issue, this Court is convinced that developments in this case unfolded as Weintraub has described and that Nationwide willfully and intentionally concealed engineer Riva's report from both Weintraub and Nationwide's designated "independent" appraiser. The following chronology of events either are not or cannot reasonably be disputed and conclusively establish Nationwide's deliberate concealment of the engineer's report.

Sometime just before or immediately following Weintraub's notice of claim, Nationwide retained the Miami law firm of Adorno & Zeder to represent it. Primary counsel handling Weintraub's claim on behalf of Adorno & Zeder at this time was Roseanne Olmstead.

On September 30, 1992, Attorney Olmstead's partner, Mr. Gregory Victor, wrote to Weintraub's counsel that, based upon an engineer's inspection of the Weintraub home, Nationwide learned it had mistakenly overpaid Weintraub for

damages. Nationwide's counsel stated that Nationwide's engineer determined that all exterior wood sheathing on the roof and certain interior ceilings would not actually need to be replaced and Nationwide had therefore overpaid Weintraub by at least $11,000.00. See Exh. 6 attached to Plaintiff's December 11, 1995 Supplement.

Sometime during this time period and approximately five (5) weeks after Hurricane Andrew, Roseanne Olmstead, on behalf of Nationwide and in the process of handling Weintraub's claim, retained architect Wilfredo Borroto to examine Weintraub's residence. Incident to his duties in analyzing the damage to Weintraub's home, Mr. Borroto retained engineer Antonio Riva of the consulting structural engineering firm of Riva, Klein & Timmons. Engineer Antonio Riva inspected the Weintraub home on or about October 10, 1992 and generated a one-page report which noted, in full, as follows:

> The entire roof facing east has been destroyed by the hurricane forces. It is conceivable that with some incredible effort, some of the trusses could be salvaged. In my professional opinion it would be a waste of time, money and possibly dangerous. Therefore I recommend that the entire roof be removed and replaced including all interior finishes--expose T/B [tiebeam] and replace from T/B [tiebeam] up.

In its Response to Plaintiff's Motion, Nationwide makes the startling representation that the Riva report does not conflict with the opinion of SEA, another engineering firm Nationwide retained during the same time period Riva was retained, and whose report Nationwide relied upon at the arbitration hearing.

This representation is startling because it is so obviously false. On the essential points, the Riva report and the SEA report could not be any more in disagreement. The pertinent sections of the SEA report can be summarized as follows:

> 4.1 Roof sheathing and roof trusses on the southeastern section of the residence must be replaced.
>
> 4.2 The sheathing on the western exposure, for the main part, had remained intact and did not require replacement.
>
> 4.3 The remaining roof trusses were intact and undamaged.
>
> 4.4 Cracks at the interface of interior walls and ceiling. Interior partition walls should be easily repairable.

Engineer Riva's report stands in stark contrast to that of SEA. Engineer Riva's report recommends removal of the entire roof, which includes all trusses, and "replacement of all interior finishes." At his deposition, Mr. Riva made clear that by removing all "interior finishes", his report recommends that the entire inside of Weintraub's house be gutted. See Deposition of Antonio Riva, pgs. 5-6, attached as Exh. 20 to Plaintiff's Appendix to Motion for Sanctions. Accordingly, Nationwide's representation that "the Riva report does not conflict with the opinions of SEA ..." Nationwide's Response Memorandum, pg. 4, is nothing short of false.

On October 13, 1992, Nationwide's attorney, Roseanne Olmstead, received engineer Riva's report explaining that Weintraub's home should be completely gutted. This information is in direct conflict with the September 30, 1992, letter

to Weintraub alleging a possible overpayment. On the same date, attorney Olmstead faxed engineer Riva's report to Ed Baird, the Nationwide adjustor then handling Weintraub's claim at the temporary storm claims center in Broward County. While Ed Baird claims never to have received or otherwise seen the report, this Court questions the veracity of his representation. According to Nationwide, Baird's failure to receive the fax copy is not surprising considering the "jumble of activity" taking place at the temporary storm shelter. While at first glance this explanation appears plausible, a thorough review of the facts reveals otherwise.

Engineer Riva's report is addressed to architect Borroto, who wrote a separate one-page report without referring to Riva's report. Attorney Olmstead testified she sent two faxes to Nationwide on October 13, 1992. One fax contained the single page report of architect Borroto along with his statement. This fax was addressed to Nationwide adjustor Pike and was produced by Nationwide with the handwritten correction reflecting that it should have been addressed to Mr. Baird. On the very same day, October 13, 1992, attorney Olmstead testified she sent by a separate fax, with a separate fax cover sheet addressed to adjustor Ed Baird, the one-page report of engineer Riva which was addressed to architect Borroto. Oddly enough, it was this report, the one addressed to the right person, that was allegedly never received by Baird. Strange how, despite this "jumble of activity", the innocuous report of architect Borroto addressed to the wrong individual should somehow reach Ed Baird's hands, while

the crucial and damaging Riva report sent to the same location on the same date, but this time to the correct addressee, should somehow mysteriously vanish.

Were this the only coincidence involved here, the Court might be able to accept Nationwide's and Baird's representation. But, sadly, this is not the case.

In his initial Motion for Sanctions, Weintraub deduced from the circumstances, namely, Nationwide's production of only one of the two faxes intended for Ed Baird,[2]/ that Nationwide removed the more damaging fax containing engineer Riva's report from its file and deliberately concealed it from him. In the Motion, he went on to note the then pending discovery dispute involving his unsuccessful attempts to obtain the fax cover sheet which accompanied Riva's report, to which Olmstead had asserted the attorney-client privilege. Subsequently, this Court ordered production of the fax cover sheet over Olmstead's asserted privilege claim. In what appears to lend credence to Weintraub's assumption, the fax cover sheet contains Ms. Olmstead's handwritten notes to Mr. Baird which read, in part, "Encl. is engineer's report. Pls. do not disclose to Mr. Weintraub. Was the claim settled?" (emphasis in original). It would appear from the circumstances that Ed Baird took Olmstead's plea not to disclose the Riva report to Weintraub a little too seriously and a little too far.

Adding further fuel to the fire is the following chronology of telephone calls between attorney Olmstead and Ed Baird which occurred during the same time

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[2]/Additional factors, some of which will be addressed subsequently herein, also helped lead Weintraub to this conclusion.

period and were with reference to Weintraub's claim.

Attorney Olmstead's billing records reflect that on October 15, 1992, just two days after faxing the Borroto and Riva reports to Baird, she had a telephone conference with Nationwide adjustor Ed Baird "re: meeting" for 12 minutes; and, that she had an "office conference with Mr. Baird re: finalizing claim" for 24 minutes. Exh. 8 to Plaintiff's December 11, 1995 Supplement. Consistent with Olmstead's time records, adjustor Baird's log notes reflect the following:

> Weintraub -- 10-15-92
>
> Discussed w/Roseanne/counsel my direction to try to conclude ok'd if works - - will advise
>
> Sea and Architect Report not to be discussed[3]/

Exh. 9 to Plaintiff's December 11, 1995 Supplement.

Attorney Olmstead's billing records go on to reflect that on October 16, 1992, she spoke with engineer Riva for 24 minutes and with adjustor Ed Baird for 12 minutes. Exh. 8 to Plaintiff's December 11, 1995 Supplement. Nationwide would have this Court believe that at no time during these conversations between Olmstead and Baird, at least one of which came on the heels of a conversation between Riva and Olmstead about the very report in question, was the crucial Riva report discussed. For obvious reasons, this Court finds such a notion inconceivable.

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[3]/Under the circumstances here presented, this Court is reasonably certain that the "Architect Report" Baird is referring to is the Riva engineering report.

To make matters worse, on August 13, 1993, Weintraub served the following requests for production on Nationwide, both of which would have required production of engineer Riva's report which had been faxed to Ed Baird:[4]/

Instructions and Definitions

> I. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY (hereinafter NATIONWIDE) means, individually and collectively, in any capacity, its officers, directors, agents, servants, attorneys ...
>
> DOCUMENTS REQUESTED
>
> 1. The entire claim file including all documents pertaining to the claim of Plaintiff, William Weintraub, under NATIONWIDE's Golden Blanket Homeowner's Insurance Policy No. 77HO237-276.
>
> 8. All documents prepared by or received by NATIONWIDE adjustor Ed Baird or any other employee of NATIONWIDE pertaining to the claim of William Weintraub which is the subject matter of this lawsuit.

Sometime in September 1993 Nationwide's counsel, in response to the above-stated requests for production, served on Weintraub a privilege log listing seven items it withheld from production. See Exh. 10 to Plaintiff's December 11, 1994 Supplement. Item number 7 on Nationwide's privilege log falsely describes as a bill from Adorno & Zeder to Nationwide for costs of professional services ,

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[4]/The report should also have been in Nationwide's counsel's files. Attorney Olmstead testified at her deposition on July 21, 1995 that her original file was picked up by Nationwide at least a year ago and that Nationwide's present counsel also had a copy of that file which contained engineer Riva's report.

what in actuality was not a bill from Adorno & Zeder at all[5]/ but a cover letter from Adorno & Zeder to Nationwide's in-house counsel, Ray Meyrowitz, enclosing the October 13, 1992 bill of engineer Riva's firm for a house inspection of the Weintraub residence. The importance of this newly discovered evidence cannot be overstated. Local Rule 26.1(E)(5)(b)(ii)(A) requires that a claim of privilege be accompanied by a privilege log describing

> (1) the type of document; (2) general subject matter of the document; (3) the date of the document; (4) such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author of the document, the addressee of the document, and, where not apparent, the relationship of the author and addressee to each other ...

Id. Ignoring this requirement, Nationwide simply disguised the incriminating document, incriminating because had it been disclosed it would have revealed to Weintraub the existence of the Riva report, as an Adorno & Zeder invoice. Thus, owing to documents recently obtained pursuant to this Court's December 4, 1995 order compelling discovery, Weintraub has now been able to show that in preparing the above-stated privilege log, Nationwide's counsel was well aware of and affirmatively concealed that engineer Riva had been retained by Nationwide and in fact inspected Weintraub's residence. Again, the purpose of this misleading privilege log could not be any clearer: in this way, Nationwide hoped to conceal

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[5]/See Exh. 10 to Plaintiff's December 11, 1994 Supplement. Item Number 7 reads as follows: "Bill dated December 9, 1992 from Adorno & Zeder to Nationwide for costs of professional services. It is being withheld on attorney/client privilege and attorney work-product grounds."

engineer Riva's bill by falsely describing it as an invoice from Adorno & Zeder. In this Court's view, Nationwide's withholding of engineer Riva's bill and its intentional failure to describe it in the privilege log as required by the Local Rule serves to confirm Nationwide's fraudulent intent.

The cover-up continues. Not only must Nationwide adjustor Ed Baird and Nationwide outside counsel have been aware of the Riva report, but Nationwide in-house counsel, Mr. Ray Meyrowitz, must also have known. At all times, Ray Meyrowitz was Nationwide's senior Florida in-house lawyer based in its Gainesville headquarters. Mr. Meyrowitz was actively involved in the discovery in this cause, attended numerous depositions and was himself deposed on May 12, 1994. The December 9, 1992 Adorno & Zeder letter enclosing engineer Riva's bill was addressed to Ray Meyrowitz. On February 25, 1993, attorney Olmstead sent a follow-up letter to Mr. Meyrowitz, again enclosing the statement of engineer Riva's firm. Exh. 11 to Plaintiff's December 11, 1994 Supplement. Clearly, Ray Meyrowitz knew or should have known that engineer Riva had inspected Weintraub's residence and with this information in hand was under an obligation to have disclosed same to Weintraub.

At the August 30, 1995 hearing before the undersigned and in previous and subsequent pleadings filed, Nationwide's counsel has unsuccessfully attempted to proffer a reasonable explanation as to how it is that Riva's report, which should have been in four separate places, to wit, attorney Olmstead's file; attorney Don Cox's file; the original file of Roseanne Olmstead picked up by Nationwide; and

Weintraub's claim file, could have simply vanished or otherwise escaped everyone's attention. Attorney Cox's attempt to explain away what he would like this Court to believe to be a mere oversight has failed miserably. This concealment of the Riva report by Nationwide was no mere oversight. The record indisputably shows that Nationwide's personnel were well aware of the Riva inspection and report, as were Nationwide's in-house and outside counsel who had in their possession and affirmatively concealed the Riva billing statement in preparing Nationwide's September 1993 privilege log. To believe otherwise would be to believe in the tooth fairy.

That there has been a showing of willful and intentional concealment of Riva's report there can be no doubt. Nor for that matter can there be any doubt that Weintraub has been prejudiced as a result of such concealment. During June of 1993, Nationwide designated Robert Maddox as its independent appraiser for the proceedings before court-appointed umpire Block. In his report to umpire Block, Maddox made it clear that he had asked Nationwide to supply him with its entire file. See Appendix 22 at page 129, accompanying Plaintiff's Motion. Despite this request, Maddox was never provided a copy of the Riva report. For reasons which might fairly be attributed to the absence of the Riva report, Maddox opined that it was only necessary to replace half the interior walls, that it was unnecessary to replace a lot of the electrical wires which ran through the interior walls, and that only portions of the roofing needed to be replaced. See Appendix 22 at pgs. 140-142, 148-149, 164-165, 170-171, accompanying Plaintiff's

Motion. It is true that in reaching these conclusions, appraiser Maddox relied heavily upon an earlier out of state engineer's report obtained by Nationwide. Nonetheless this does not cure Nationwide's withholding of this material evidence in what can only be presumed by this Court to have been an attempt by Nationwide to induce Maddox to make a false report to umpire Block based upon partial information. By concealing this report, Weintraub was denied the opportunity to offer it into evidence or to utilize it to cross-examine both Maddox and adjustor Ed Baird, who himself personally testified at the February 21, 1994 appraisal proceeding.

In refuting Weintraub's claim of prejudice, Nationwide makes the false representation that Plaintiff got everything he wanted from the appraisal process. Even if the report had been concealed from the umpire, a suggestion that Nationwide denies, it would have no bearing upon the outcome of the appraisal. Nationwide's Response Memorandum, pg. 6. This statement is untrue. Attached to Plaintiff's Response to Plaintiff's Supplement to Motion for Sanctions, filed September 11, 1995, is an excerpt of the closing argument of Weintraub's counsel at the appraisal proceeding reflecting that Weintraub sought an award of $174,000 for damages to his house, which is the amount set forth by Weintraub's designated appraiser admitted as an exhibit at the appraisal proceeding. The appraisal award to Weintraub for damages to his house was $162,619, over $10,000 less than Weintraub requested. Additionally, Weintraub sought $12,000 of additional living expense reimbursement over and above the amount determined

by the appraisers. Had the Riva report not been withheld, Weintraub may have been able to persuade the umpire to increase the living expense award inasmuch as the Riva report made it obvious that additional time would reasonably and necessarily be required to repair Weintraub's home.

Further prejudice is established by the need for Weintraub to engage in nearly two years of additional discovery as a result of Nationwide's concealment of the Riva report. Nationwide offers no explanation as to why it failed to comply with Local Rule 26.1(E)(5)(b)(ii)(A) by simply describing engineer Riva's bill for inspecting Weintraub's home in its privilege log. The Riva bill clearly states that it is for house inspection of Weintraub's home, located at 14825 SW 97th Court. Nationwide's transparent action in affirmatively withholding engineer Riva's bill as privileged while intentionally failing to identify the bill in its September 1993 privilege log, caused Weintraub to engage in nearly two years of additional discovery before the fact of engineer Riva's inspection was uncovered and that crucial report was obtained. Unfortunately for Weintraub, by the time the Riva report was uncovered, the District Court had already determined the damages to Weintraub's home and entered the summary judgment on Count I against Nationwide. This Court agrees with Weintraub that Nationwide's withholding of engineer Riva's bill and its intentional failure to describe it in the privilege log as required by the Local Rule confirms Nationwide's fraudulent intent. This, coupled with Nationwide's conduct in concealing engineer Riva's report and procuring false and incomplete statements from its independent appraiser, Maddox,

demonstrates the utmost bad faith in these proceedings and justifies the striking of Nationwide's answer and affirmative defenses as to Count II, the statutory bad faith claim.

B. Alleged Concealment of Documents Ordered Produced Regarding Ordinance or Law Coverage

Because this Court has already found willful and bad faith actions on the part of Nationwide sufficient to justify the severe sanction of default, the additional bad faith conduct alleged shall be addressed only briefly.

Incident to the bad faith claim, Weintraub alleges that Nationwide's initial refusal to pay for code upgrades, which Nationwide later conceded it was liable for, was done in bad faith. Nationwide's defense to this bad faith allegation is that its liability for code upgrades was not clear and fairly debatable. Accordingly, the subject of ordinance or law coverage has been a vital area of discovery in this proceeding.

What Weintraub alleges and what the record reveals to be true is that Nationwide concealed from Weintraub, in direct violation of this Court's August 15, 1994 Order compelling certain discovery, a twelve (12) page legal opinion prepared by its counsel dealing with the precise issues of ordinance or law coverage and code upgrades. Despite Nationwide's contention to the contrary, this Court finds indisputable that this opinion letter, which admittedly was in the care, custody and/or control of Nationwide, should have been produced pursuant to both a records custodian subpoena and a production request issued to

Nationwide. Again, because this Court has already found bad faith on the part of Nationwide for its willful concealment of the Riva report, whether Nationwide's failure to produce this obviously relevant document was willful or just plain negligent, need not be decided. Nationwide's failure in this regard is simply noted for the record.

C. Alleged Failure of Nationwide to Comply with Court Order Compelling Commission Income Discovery

In Counts III and IV of the Complaint, Weintraub seeks to recover lost commission income allegedly resulting from Nationwide's breach of its agency agreement with him. The alleged breach concerns termination of Weintraub's participation in a certain sales program (the 800 Number Program) in which six other Nationwide agents participate. To prove his damages incident to these counts, Weintraub sought to establish the amount of commission income earned by the other six participating agents by propounding an interrogatory and production request to Nationwide. The interrogatory request sought to learn [h]ow much annualized commissions were earned or accrued by the six other 800 Number Program sales agents during a limited time period. The production request asked Nationwide to produce all documents utilized to answer the above-stated interrogatory. Nationwide raised objections to the discovery requests and Weintraub moved to compel same. By Order dated September 13, 1994, the undersigned issued an Order granting Weintraub's Motion to Compel and directing Nationwide to produce the subject discovery requests within fifteen (15) days

from the date thereof. As of the date of Weintraub's Motion for Sanctions, filed nearly nine (9) months after Nationwide was ordered to produce the subject discovery, Nationwide has failed to comply with this Court's Order.

Among the objections made by Nationwide and rejected by this Court was Nationwide's assertion that it was impossible to determine the annualized commissions. Despite this Court's rejection of this assertion and an Order compelling Nationwide to respond, Weintraub sent a revised interrogatory to Nationwide, requesting the commission information on a month-by-month basis. In this way Weintraub hoped Nationwide would re-consider its refusal to obey the Order. Regrettably, this did not happen. To this revised interrogatory, Nationwide simply restated its objections made to the initial interrogatory which the undersigned previously rejected. Nationwide went on to note the information was not compiled by Nationwide in the ordinary course of business and suggested Weintraub seek the information from the six (6) agents themselves.

Frustrated by Nationwide's continued refusal to obey the undersigned's Order and hoping to avoid a contempt Motion, Weintraub subpoenaed for deposition one of the six (6) Nationwide 800 Number Program agents, Dennis Britten. Mr. Britten's deposition irrefutably confirms that Nationwide was and is in possession of the information it has been required to provide by the undersigned's September 13, 1994 Order.[6]/ According to Dennis Britten's testimony, not only

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[6]/Mr. Britten's testimony establishes that before becoming a sales agent, Mr. Britten was employed by Nationwide as a senior management executive in various capacities, including

was all the information necessary to comply with the September 13, 1994 Order in Nationwide's possession in the ordinary course of business, but that same information was delivered to Nationwide by the six (6) agents involved, at Nationwide's request and at or around the time the September 13, 1994 Order was entered. Indeed, at his deposition Mr. Britten was surprised to learn that Nationwide had not produced the subject information, as same had been requested of the agents by Nationwide. See Deposition of Dennis Britten, attached as Appendix 8 to Weintraub's Motion, pgs. 43-44.

Nationwide's refusal to comply with this Court's Order requiring its answer as to commission income and production of the backup documentation, despite such information clearly being in Nationwide's possession, demonstrates a flagrant disregard for this Court.

III. CONCLUSION

It is clear from the foregoing that Nationwide deliberately concealed the crucial Riva report and that Weintraub was prejudiced thereby. It is equally clear that Nationwide has a history in this case of disregarding discovery orders and continually making false representations to Weintraub as to what discovery it has and does not have. Nationwide's strategy in this case is clear: advance its position at all costs by preventing Weintraub from being capable of preparing for

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Nationwide's national director of compensation and contracts for its sales agents. In this capacity Mr. Britten was thoroughly familiar with Nationwide's business records, including those pertaining to agents' compensation. See Appendix 8 attached to Weintraub's Motion for Sanctions, pgs. 4-5.

trial even if such deceit results in monetary sanctions. Thus, even after being assessed with a $9,600 sanction and being admonished of more severe sanctions if it was discovered to be withholding documents, Nationwide continued and continues to this day to willfully disregard this Court's Orders. Obviously, under the circumstances here presented, a mere monetary sanction for the aforedescribed bad faith conduct of Nationwide is not adequate. For these reasons and for the reasons more fully described herein, this Court recommends the most severe of sanctions be imposed, including a finding of contempt, a striking of Nationwide's Answer and affirmative defenses, entry of a default judgment and an award of attorneys' fees.

In accordance with the above and foregoing, it is hereby

RECOMMENDED that the said Motion be **GRANTED** in accordance with the terms hereof.

The parties have ten (10) days from the date of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable Daniel T.K. Hurley, United States District Court Judge for the Southern District of Florida. Failure to file objections timely shall bar the parties from attacking on appeal the factual findings contained herein. Conte v. Dugger, 847 F.2d 745 (11th

Cir. 1988), cert. denied, 488 U.S. 958, 109 S.Ct. 397 (1988). RTC v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993).

DONE AND ORDERED in chambers, Miami, Florida, this 25 day of December, 1995.

LINNEA R. JOHNSON
UNITED STATES MAGISTRATE JUDGE

cc: Hon. Daniel T.K. Hurley
Counsel of record