IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., **Plaintiff,** **v.** **SMALL SMILES HOLDING CO., LLC,** **Defendant,** **v.** **AFFINITY INSURANCE SERVICES, INC.,** **Third-Party Defendant.**	**Civil Action No. 3:10-cv-00743** **District Judge Kevin H. Sharp** **Magistrate Judge Juliet Griffin**

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR RECONSIDERATION IN PART OF JULY 11, 2011 ORDER

INTRODUCTION

This motion seeks reconsideration pursuant to Federal Rule of Civil Procedure 59(e) of a narrow, but critically important, aspect of the Court's July 11, 2011 Order ("Order") on Plaintiff National Union Fire Insurance Company of Pittsburgh, Pa.'s ("National Union") Motion to Compel Additional Custodians and Terms ("Motion to Compel") – the Court's ruling that the beginning date to be used for searches of the electronically stored information ("ESI") of 14 custodians (the "Covert Custodians" (referred to as the "Government Custodians" by Small Smiles)) using agreed upon search terms "shall be November 1, 2007, rather than 2004" (the "Date Restriction"). Order, at 3.

National Union respectfully submits that reconsideration of this aspect of the Court's decision is warranted for three compelling reasons, each of which is explained in more detail below.

First, the Court's ruling that the "begin date" for further searches should be November 1, 2007 (the Date Restriction) was expressly predicated on a clear error of law. In particular, this Court concluded that National Union had not demonstrated that Small Smiles' search and production to the various governmental entities in connection with the Medicaid Fraud Investigation (the "Government Production") was inadequate. This ruling was not legally correct because it shifted the burden from the party **objecting** to the discovery (Small Smiles) to the party **seeking** the discovery (National Union). In particular, having conceded that the Covert Custodians' ESI was collected as part of the Government Production and that their ESI contains relevant documents, **it was and is Small Smiles' burden** to defend its refusal to conduct searches of their ESI generated between 2004 and November 1, 2007 in connection with this massive action.

Small Smiles failed to carry that burden because it produced **no evidence whatsoever** regarding the criteria used to search for and produce responsive documents in connection with its Government Production. Rather Small Smiles once again hid behind the unsworn statements, and sterling reputation, of the Walker Tipps firm which had zero involvement in and no personal knowledge regarding what Small Smiles did to search and produce documents in the Government Production – and failed to produce any declarations from King & Spalding and those at Small Smiles who did participate in the Government Production. The assurances of a locally prominent – but uninvolved – law firm that Small Smiles' Government Production must

have been adequate is not a substitute for declarations from persons with knowledge of the Government Production.

Moreover, in the absence of any specific information regarding Small Smiles' prior searches, National Union does not have the information needed to compare the searches Small Smiles performed in connection with its Government Production with the agreed search terms in this action. Small Smiles' refusal to describe its prior searches, coupled with the Court's incorrect ruling on the burden, thus has the practical effect of continuing to cloak the criteria that Small Smiles used for its Government Production in secrecy. Without even attempting to describe the criteria it used for its Government Production, Small Smiles clearly cannot prove that the undisclosed methods that it used in the Government Production were an adequate – let alone a sufficient – search of the Covert Custodians' ESI for purposes of this action.

Small Smiles has also mischaracterized its prior searches, suggesting that they were a simple matter of having document reviewers fully review the ESI of each of the Covert Custodians for each and every category of each and every Medicaid Fraud Investigation subpoena directed to Small Smiles. But the reality is not so simple. Rather, because Small Smiles negotiated its productions with the various government entities (and surely reduced the scope of its production), the subpoenas to which Small Smiles points do not correlate with the actual scope of Small Smiles' searches and productions.

In other words, Small Smiles has tactically chosen not to provide information about its actual search criteria, instead pointing only to the great mass of subpoenas **without representing that the subpoenas actually correlate with the agreed scope of its productions to the government**. National Union, which was not privy to these negotiations, is not able to speculate regarding the types of documents that Small Smiles actually searched for, and therefore cannot

meaningfully evaluate whether additional searches for the time period covered by King & Spalding's prior searches are necessary. Accordingly, this Court should grant National Union's motion because Small Smiles has not met **its burden** of justifying its failure to search for and produce documents from the ESI of custodians whom Small Smiles admits generated documents responsive to National Union's discovery requests.

Second, at the Hearing, counsel for Small Smiles for the first time raised new facts not previously disclosed to National Union or the Court relating to alleged database incompatibilities, and, **based on a misunderstanding or a misstatement of the technical significance of these newly alleged facts**, incorrectly argued that a 2004 beginning date would be unduly burdensome. In particular, Small Smiles argued that because, through no fault of National Union, Small Smiles switched e-discovery vendors and is now using a different vendor (Fios) than it used for its Government Production (DSI), its new e-discovery vendor (Fios) may be entirely unable to remove (de-dupe) documents Small Smiles produced in the Government Production from the review pool for the ESI of its Covert Custodians, or might be able to do so only at prohibitive cost.

But, as demonstrated through a declaration from National Union's e-discovery consultant Stephen Adams of Autonomy, Small Smiles' new "facts" are not accurate and misled the Court into granting the Date Restriction. Mr. Adams' declaration, submitted herewith, explains that running the agreed search terms from 2004 forward on the ESI of the 14 Covert Custodians would **not** be unduly burdensome, and that even with the switch in vendors that Small Smiles complains about as complicating the de-duping, the new vendor could easily and quickly de-dupe Small Smiles' Government Production documents from the review pool. Moreover, Small Smiles' misstatements regarding the technical significance of the alleged database

incompatibilities appear to have been a central factor in the Court's conclusion that using 2004 as a search date would be unduly burdensome. Accordingly, because the Court was given misinformation on a critical issue for the first time at the Hearing, reconsideration is warranted. In light of the absence of any undue burden, and in light of the fact that Small Smiles concedes the Covert Custodians have relevant ESI, the agreed upon search terms should be run from 2004 forward.

Third, allowing Small Smiles to refuse to conduct searches of the ESI of critical custodians for the full relevant time period based on the conclusory and unsworn representation of the Walker Tipps firm that prior searches captured all relevant information, **while hiding the parameters of such prior searches from view**, would constitute a manifest injustice. The integrity of the discovery process requires Small Smiles to either disclose the details of its prior searches, or conduct a full and meaningful search of the ESI of the Covert Custodians now.

Accordingly, National Union respectfully requests that this Court grant the instant motion and order Small Smiles to utilize a "begin date" of January 1, 2004 for the searches of the Covert Custodians and vacate its prior imposition of the Date Restriction on Small Smiles' search of their ESI.

BACKGROUND

A. Small Smiles Raises a New Argument For the First Time At The Hearing

In its memorandum of law in support of its Motion to Compel Custodians and Terms ("Memorandum"), National Union explained at length why the time period that Small Smiles refuses to search, January 1, 2004- November 1, 2007, is of critical relevance to this litigation. See, Memorandum, at 24-26. In its opposing memorandum ("Opposition"), Small Smiles did not dispute the relevance of this time period, but argued that using 2004 as the start date for new

searches would require "re-review of materials **already produced**." Opposition, at 25 (emphasis added). To refute this argument, which had not been made during the meet and confer process, National Union submitted an expert declaration from Stephen Adams in connection with its reply memorandum of law ("Reply") which explained, at length, that re-review of previously produced documents is unnecessary, and that previously produced documents can be simply and quickly removed from the ESI of the Covert Custodians **prior to** running additional searches. See, Reply, at 17; July 5, 2011, Declaration of Stephen Adams, at ¶ 5. At the hearing, Small Smiles admitted that prior to its review of the Reply and the Adams declaration, it was not aware that removal of previously produced documents was even a possibility and had never considered doing it. Tr. of July 7, 2011 Hearing (hereafter "Tr. at __"), at 133:34-135:7.

At the July 7th hearing, Small Smiles' counsel, Mr. Callen did not dispute that the Adams Declaration was accurate, but attempted to save Small Smiles' burden argument by alleging new facts, claiming that Small Smiles' Government Production was done through DSI, while its current productions are being handled by another vendor, Fios, which uses an allegedly incompatible database program. Tr. at 133:15-135:16. Specifically, Mr. Callen, who, unlike Mr. Adams is not a career e-discovery professional on some of the largest bet-the-company cases in the country, stated that:

> the reason it's not as simple as Mr. Greenspan said is because we've got two different vendors with two different databases that handle these productions. The vendor who handled the original government production was here in Nashville, DSI. And their database in which these documents were produced is called Relatively.[1] Now, the current review we have that is being run through another vendor, Fios, has a different database. . . I get the reply on Tuesday from National Union with the declaration from Mr. Adams. I take it to my vendors and say, this is what he says. They tell me, well, it's not that simple because there are two different databases, but it may be possible. Maybe it's possible, but we don't know if it is for sure because we need -- the two separate vendors need to talk to each other, and we also don't know how much it's going to cost. It's not going to

[1] The database is actually called Relativity.

> be a completely free process as suggested in Mr. Adams' declaration because you do have two different databases. . . . I know for a fact it's not as easy as suggested in Mr. Adams' declaration.

Mr. Callen's statement appears to assume that DSI is unwilling to assist Small Smiles even where it can do so more simply and cost-effectively than Fios. However, Small Smiles produced the metadata associated with its government productions to National Union on July 8, 2011, the very day after the Hearing. July 25, 2011, Declaration of Arthur H. Aizley ("Aizley Dec."), at 3. Because metadata is collected prior to a relevance review, Small Smiles' production of metadata **for only the produced documents** – and not for all of the ESI it collected in connection with its search for, and production of, materials in response to the government subpoenas – necessarily means that Small Smiles was able to distinguish between produced and non-produced documents. See July 20, 2011 Adams Declaration, at 5-6. Moreover, counsel for Small Smiles informed National Union that it was DSI, and not Fios, that provided it with the metadata that it provided to National Union, demonstrating that DSI is still able and willing to assist Small Smiles. Aizley Dec., at ¶ 4. Thus, if there was truly a problematic database compatibility issue, DSI could assist Small Smiles with a limited additional search of the previously collected ESI after excluding previously produced documents.

Even if Small Smiles insists that only Fios, and not DSI, perform additional searches, Mr. Callen incorrectly informed the Court at the Hearing that the use of different databases by these vendors[2] could be an insurmountable or prohibitively expensive problem. As the July 20, 2011,

[2] Mr. Callen appears to have reversed which of his vendors uses the Relativity database. To the best of National Union's knowledge, it is Fios, not DSI, that uses Relativity, the opposite of what Mr. Callen stated. See, http://www.fiosinc.com/about/press-room/releases-detail.aspx?id=674 (Fios press release announcing that Fios is now using Relativity.) Because both vendors do appear to use different databases, this is admittedly a clarification which does not impact this motion. But this error demonstrates National Union's continuing concern that Walker Tipps is not doing Small Smiles' e-discovery in this action, and that the lawyers who actually are, King & Spalding, remain beyond this Court's scrutiny – leaving Small Smiles' current counsel to interpret for the Court, the search efforts that other firms are performing, and affording them plausible deniability on what Small Smiles has done and is actually doing to comply with its e-discovery obligations.

Declaration of Steven Adams indicates, "data stored in incompatible databases is a routine issue faced by almost every e-discovery vendor" and there is a "simple and routine" method which, absent unusual complications, **should permit Fios to fully utilize the ESI collected by DSI** – including the information necessary to remove the documents previously produced by Small Smiles in the Government Production from the ESI of its Covert Custodians prior to running the agreed search terms on those custodians' ESI. Id., at ¶ 7. Specifically, Mr. Adams explains that data collected by the initial vendor (here DSI) can be exported in "system neutral format" and uploaded by the new vendor into its own system, together with all of the metadata and information necessary to remove previously produced documents prior to running additional searches – and that this process typically entails modest labor and computer time. Id., ¶¶ 7-11. After this process is complete, previously produced documents can be removed from the ESI and new searches run in the manner described in Mr. Adams' prior declaration. Id., at ¶ 12; July 5, 2011 Declaration of Stephen Adams, at ¶ 8. Thus, Mr. Callen was simply unaware that the use of different databases by his vendors was a technically routine and simple issue, and accordingly (even if, as we believe, he was speaking in good faith to the Court at the July 7th hearing) misinformed the Court that removal of previously produced documents might be impossible or prohibitively expensive.

B. Small Smiles Has Never Described The Criteria it Used For Its Prior Productions

The criteria that Small Smiles used to search for and produce documents in its Government Production must necessarily have been complex because: (1) there were at least 40 separate subpoenas and civil investigative demands served on Small Smiles containing hundreds or thousands of different topics; (2) Small Smiles made over 75 productions to various state and federal agencies in connection with the Medicaid Fraud Investigation during a 24-month period

(March 4, 2008 – February 22, 2010); and (3) Small Smiles used more than 30 different Bates ranges in connection with these productions. Aizley Dec., at ¶ 5. Moreover, as Mr. Callen stated at the Hearing, Small Smiles did **not** simply produce every document called for by every category of the 40 subpoenas and CIDs, and there were extensive negotiations regarding the scope of the productions. Tr., at 91:19-92:9. Accordingly, the scope of its production cannot be mechanically determined by assuming that Small Smiles searched for and produced documents responsive to every category in every subpoena.

In this context, it should be obvious that King & Spalding did not simply hand its document reviewers 40 subpoenas and expect them to figure out what to look for, ignoring its negotiations with the government entities. Nonetheless, in the "Background" section of its Opposition, Small Smiles did not describe its search or production efforts, other than to indicate that the ESI of the Covert Custodians was manually reviewed without the use of search terms for responsiveness to the subpoenas. Opposition, at 5-6. Similarly, in the argument section of its Opposition, Small Smiles' current lawyers, who were not involved in the search for responsive documents, list selected categories found in the subpoenas and allege that Small Smiles reviewed the ESI of the Covert Custodians for "all these various categories." Opposition, at 24. Because Small Smiles does not appear to have produced all of its correspondence reflecting agreements on the scope of Small Smiles' searches and productions, National Union lacks sufficient information to determine whether there are categories of documents that are relevant to this litigation that Small Smiles did not search for or produce in the ESI of the Covert Custodians. Aizley Dec., at ¶ 6.

ARGUMENT

I. Applicable Legal Standards Governing Motions for Reconsideration

Although the Federal Rules do not expressly provide for a "motion for reconsideration," it is long-settled that Federal Rule of Civil Procedure 59(e) may, when the criteria for doing so are met, be used to seek reconsideration of any judicial order. Westerfield v. United States, 366 Fed. Appx., 2010 WL 653535, at *4 (6th Cir., February 24, 2010). A motion for reconsideration may be granted: (1) to correct a clear error of law; (2) to account for newly discovered evidence; (3) as a result of an intervening change in law; or (4) to prevent manifest injustice. Id.; American Civil Liberties Union of Kentucky v. McCreary County, Kentucky, 607 F.3d 439, 450 (6th Cir., 2010) For example, in Westerfield, the Sixth Circuit held that it was error for the District Court to refuse to grant reconsideration of a summary judgment decision, and consider a detailed affidavit explaining why further discovery was necessary. Id., at *5-6.

Here, as detailed below, reconsideration is warranted under these standards for three basic reasons. First, Small Smiles' sole remaining burden argument is based on alleged database incompatibilities between DSI and Fios first raised at the Hearing itself, and National Union's rebuttal of these new allegations through the new declaration of its seasoned e-discovery consultant, Steve Adams, clearly constitutes new, previously unavailable, evidence. Second, the Court committed a clear error of law by holding that National Union had the burden of demonstrating that Small Smiles' prior searches were inadequate, as the burden of affirmatively establishing the adequacy of its prior searches rests squarely with Small Smiles. Third, reconsideration is necessary to prevent manifest injustice, because the discovery at issue is of critical relevance (and concerns the ESI of 14 key custodians including the notorious author of the "vampiric intentions" memo, Dr. Aldred Williams), and Small Smiles has refused to disclose

any details concerning its search for and production of documents in response to the governmental subpoenas, depriving National Union of the ability to evaluate the need for further searches.

II. The Court Incorrectly Held That National Union Has The Burden of Proving That Small Smiles' Prior Searches Were Inadequate

The Court's Order held that:

> there was no reason to believe that the documents of the 'government production' custodians had not been provided during the government investigation that have been or will be provided to the plaintiff. Although the plaintiff suspects that there may be more responsive documents than were disclosed to the government, such suspicion, without more, is an insufficient basis for requiring the defendant to engage in a second search of those custodians for the time period preceding November 1, 2007, when the government issued its first subpoena. Order, at 4.

The Court's statement that there was "no reason to believe" that documents "had not been provided" in connection with the Government Production makes clear that **the Court did not make an affirmative factual finding that Small Smiles' prior searches were adequate**, and there were certainly no facts before the Court on which it could have made such a finding. Pivotally, the unsworn and conclusory assurances of Small Smiles' current counsel, Jason Callen of Walker Tipps, who was not involved in the Government Production and who therefore has zero personal knowledge of what Small Smiles did, or did not do, to search for and produce documents in the Government Production, provides no support whatsoever for such a finding. The wholesale deprivation of almost four years of documents from these 14 key custodians – which is exactly what the Date Restriction does – requires far more support than a "trust me" assurance from a law firm with no involvement in the very Government Production.

While Small Smiles pointed to some of the many subpoenas served against it, Small Smiles **never alleged that it produced every category of information in every**

subpoena, and admitted to **negotiating the scope of the subpoenas with the government**. Tr., at 91:19-92:9. Accordingly, Small Smiles' tactical decision to attach some of the subpoenas to its papers and have its current lawyers, who did not work on these searches, state in essence "look at these subpoenas, our reviewers looked for **some** of the categories in these subpoenas" does not prove what Small Smiles actually searched for. Indeed, Mr. Callen's comments at the hearing were extremely telling:

> The requested categories swept up anything from that time period predating the subpoenas that could possibly be relevant in this case. . . . We included descriptions of **some of those categories** in our brief. **Some of them**, just for Your Honor's benefit now, included . . . So those are just **some of the categories**. There are many more categories than that, Your Honor. (Tr. 131:25-132:15) (emphasis added.)

Mr. Callen's careful dance is the reason this motion is necessary. While Small Smiles concedes it negotiated these subpoenas with the government, and does not and cannot claim that it produced **every category** of information in **every subpoena**, it does not want to disclose what categories of information it actually searched for. Instead, Small Smiles wants to talk about "some of" the categories it searched for, trying to give the incorrect impression that it searched for every category of information in every subpoena. Because of Small Smiles' refusal to disclose what categories of information it actually searched for, illustrated by Mr. Callen's repeated use of the word "some," neither the Court, nor National Union, have sufficient information to evaluate the searches that Small Smiles actually did. Small Smiles plainly does not want to disclose the actual parameters of its searches for responsive documents, because that would permit National Union and the Court to evaluate such searches and determine if there are categories of information that were not searched for that are responsive to National Union's discovery requests and relevant to this litigation. Hiding its Government Production search and production efforts (and hiding those who actually did the production) behind the sterling

reputation of its Nashville counsel is not a substitute for a comprehensive, sworn declaration by Small Smiles as to what it did to search for and produce documents in the Government Production, along with an opportunity to depose the declarant.

Thus, the Court could not, and it appears did not**,** make any affirmative finding regarding the adequacy of Small Smiles' prior searches. Instead, it appears that the Court incorrectly held that National Union had the burden of proving that Small Smiles' prior searches were inadequate. This is not the law. Rather:

> Once an objection to the relevance of the information sought is raised, the party seeking discovery must demonstrate that the requests are relevant to the claims or defenses in the pending action. If that party demonstrates relevancy, **the party resisting discovery bears the burden of demonstrating why the request is unduly burdensome or otherwise not discoverable under the Federal Rules**. See, Anderson v. Dillards, Inc., 251 F.R.D. 307, 309-310 (W.D. Tenn., 2008) (citations omitted) (Emphasis added).

Thus, where, as here, the responding party (i.e., Small Smiles) does not contest the relevancy of the propounding party's discovery requests and the propounding party (i.e., National Union) demonstrated the relevance of the discovery at issue (the Covert Custodians' ESI), the responding party (i.e., Small Smiles) bears the burden of establishing a valid objection to the discovery. In the context of e-discovery, courts around the country have applied these principles to require that the responding party explain what it did to search the ESI. For example, in Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251 (D. Md. 2008) the court held:

> Selection of the appropriate search and information retrieval technique requires careful advance planning by persons qualified to design effective search methodology. The implementation of the methodology selected should be tested for quality assurance; and **the party selecting the methodology must be prepared to explain the rationale for the method chosen to the court, demonstrate that it is appropriate for the task, and show that it was properly implemented.** Id., at 262 (emphasis added).

Similarly, in Peskoff v. Faber, 240 F.R.D. 26 (D.D.C. 2007), the court held that, in response to the plaintiff's motion to compel electronic discovery, the defendant would be required to conduct a search of all depositories of electronic information in which one could reasonably expect to find all emails to plaintiff, from plaintiff, or in which plaintiff's name appeared, and make the results of the search available to the plaintiff. Further, the court required that the defendant file a statement under oath by the person who conducted the search explaining how the search was conducted, which electronic depositories were searched, and how it was designed to produce, and did in fact produce, all of the emails the court ordered be produced. Id. The court also ordered that an evidentiary hearing be held at which the person who made the required attestation would testify regarding how they conducted the search, his or her qualifications to conduct the search, and why the court should find the search adequate. Id.

Similarly, in In re Seroquel Products Liability Litigation, 244 F.R.D. 650, 660 (M.D. Fla. 2007), the plaintiffs sought sanctions against the drug manufacturer AstraZeneca ("AZ") for violations of a case management order that required it to allow the plaintiffs to conduct informal interviews of knowledgeable AZ IT employees who could adequately address the plaintiffs' questions regarding specified databases and how information could be extracted from them. The court criticized both parties for their "posturing and petulance," but noted that "it is primarily AZ, as the creator and owner of the information, which has failed to make a sincere effort to facilitate an understanding of what records are kept and what their availability might be." Id. at 660.

Here, Small Smiles does not dispute that the Covert Custodians had ESI related to the Medicaid Fraud Investigation (such as Dr. Alfred Williams' "vampiric intentions" email), or that they generated relevant and responsive documents during the time period it now refuses to

search. Tr. at 108:13-109:5 ("I'm not going to suggest that the 14 people who have their documents collected as part of the government investigation don't have materials related to the government investigation.") While Small Smiles took issue with National Union's use of phrase "critically relevant," it concedes that these custodians have relevant information. Id. Moreover, Small Smiles did not even attempt to refute any aspect of National Union's extensive explanation of the roles of the Covert Custodians, their importance to this case and why the full time period is important. Memorandum, at 7-8, 19-26.

Having failed to contest the relevance of these custodians and the full time period beginning January 1, 2004 (and in any event, given that National Union proved the relevance of the Covert Custodians with detailed evidence, including the many exhibits attached to its moving papers), it was and is Small Smiles' burden to establish that it previously searched for and produced all documents responsive to National Union's discovery requests with respect to the Covert Custodians. By not even submitting a declaration from one of the King & Spalding lawyers involved with the Government Production describing the actual search and production criteria used by Small Smiles to search the Covert Custodians' ESI, Small Smiles did not even attempt to meet its burden.

Moreover, Small Smiles cannot meet its burden by simply pointing to a stack of subpoenas, and having a lawyer that was not involved with the searches make the unsworn statement that Small Smiles searched for and produced "some of" the categories listed in the subpoenas, as Mr. Callen did. Generalities and conclusory statements aside, Small Smiles did not even attempt to prove what it actually searched for and produced with respect to the Covert Custodians. Having failed to meet its burden of proof – and having not even tried to do so – the

Court should grant this motion and require Small Smiles to run the agreed upon search terms on the Covert Custodians from a "begin date" of January 1, 2004.

III. At the July 7th Hearing, Small Smiles Misinformed This Court That The Use of the 2004 Begin Date for Searches Is Likely Burdensome When, In Fact, It Is Not

At the Hearing, Mr. Callen admitted that Small Smiles had been unaware (and had not even considered) that the documents it previously produced in the Government Production could be removed from the ESI of the Covert Custodians prior to conducting additional searches until he reviewed the declaration of Stephen Adams submitted with National Union's Reply. Tr. at 133:34-135:7. This concession eviscerated the only burden argument that Small Smiles had made at that point regarding the "begin date" for these searches. In a last ditch effort to convince the Court to adopt its Date Restriction on the ESI of the Covert Custodians, Small Smiles articulated an entirely new (but completely inaccurate) burden argument at the Hearing – that the e-discovery vendor Small Smiles used for the Government Production (DSI of Nashville, Tennessee) used a different database than the vendor currently used by Small Smiles in this litigation (Fios), and that this might make it impossible or prohibitively expensive to conduct the searches at issue. As demonstrated in Stephen Adams' declaration, however well-intentioned Mr. Callen's statement may have been, it was, and is, dead wrong and misled this Court into granting the Date Restriction. If left to stand, this ruling would create a miscarriage of justice by depriving National Union of huge swaths of documents (almost four years of documents) from 14 key Small Smiles' custodians – the Covert Custodians.

National Union appreciates Mr. Callen's candid admission that Mr. Adams' initial declaration opened Small Smiles' eyes to technical possibilities its Nashville counsel was not previously aware of. Unfortunately, Mr. Callen again erred and mischaracterized the burden associated with removing previously produced documents from the ESI of the Covert Custodians

at the July 7th hearing. Specifically, a new Adams declaration, submitted herewith, explains that e-discovery vendors routinely pick-up matters previously handled by other vendors, and that there are routine, simple and quick procedures that, absent unusual complicating factors, can be used to transfer data from the old vendor to the new vendor **even if they use different database programs** without losing the information necessary to conduct additional searches and to exclude previously produced documents prior to running such searches. July 20, 2011 Adams Declaration, at ¶¶ 7-12. Mr. Adams' declaration simply eviscerates Small Smiles' new "burden" argument that Mr. Callen advanced at the July 7th hearing. To further assist this Court, National Union will bring Mr. Adams to the hearing on this motion to discuss this, and to answer any of the Court's questions. Mr. Adams will lift the fog of e-discovery inaccuracy that Small Smiles created in order to obtain the Date Restriction from the Court.

In addition to resting on inaccurate assumptions refuted by the Adams Declaration, Small Smiles' database-incompatibilities argument is also disingenuous. Small Smiles has admitted that King & Spalding, which was involved in the Government Production, is assisting Small Smiles with the document and e-discovery in this action behind the scenes. King & Spalding was assisted by DSI in making that production, **and DSI, like King & Spalding, is apparently still involved behind the scenes**. Specifically, Small Smiles produced the metadata associated with its government production to National Union on July 8, 2011, the day after the Hearing. When asked, Small Smiles admitted that DSI, and not Fios, provided it with this metadata. Aizley Dec., at ¶ 4. Having just availed itself of DSI's assistance, Small Smiles can hardly claim that it is unable or unwilling to do so merely to shield itself from discovery it does not wish to undertake. Small Smiles should not be permitted to selectively utilize King & Spalding and DSI when it chooses, and at the same time argue that they cannot or need not undertake discovery

because King & Spalding's name is not on the pleadings, or because Small Smiles is now using Fios for its new productions in this action.

Having no valid burden argument specific to the issue at hand, Small Smiles is left only with its "discovery is getting really expensive" argument. The Court has already, however, disposed of this argument. Indeed, after hearing extensive evidence regarding the potential amount in controversy in this case, the Court expressly concluded that Small Smiles would need to commit substantial resources to discovery:

> "Its obviously a case that involves a lot of money, and Small Smiles is going to have to spend money. . . . This is not the most expensive price tag I've seen for the production of e-discovery with a case, if I can recall correctly, going in the several million dollars of e-discovery. I'm not saying that's where you have to be looking, but I think that's just what has to happen."

(Tr. at 158:21-159:12). Accordingly, the Court should grant this motion because the relevance of the time period and Covert Custodians is uncontested and unquestionable, and Small Smiles – itself owned by rich and politically powerful entities – has no valid burden argument.

IV. Reconsideration Is Necessary to Prevent Manifest Injustice

As detailed above, Small Smiles has carefully avoided disclosing the criteria it actually used to search for and produce documents in response to the various government subpoenas. Even though there were at least 40 subpoenas with hundreds or thousands of distinct categories, **and even though Small Smiles negotiated these subpoenas with the government (and surely reduced the scope of what was to be the Government Production)**, Small Smiles refuses to say anything other than that its reviewers searched for "some of" the categories of documents in "some of" the subpoenas.

Having tactically chosen to hide behind generalities offered by lawyers who were not involved in the search (the Walker Tipps firm) – even though the lawyers who were involved in

the Government Production search, review and production, King & Spalding, are actively assisting Small Smiles behind the scenes of this action – Small Smiles has deprived National Union and the Court of the ability to compare the search, review and production King & Spalding and Small Smiles performed in the Government Production with the scope of National Union's discovery requests in this action. Permitting Small Smiles to immunize its prior searches from any inquiry by hiding behind the shelter of its Nashville counsel's strong reputation – in light of the uncontested relevance of the Covert Custodians and the full time period commencing January 1, 2004 – would reward Small Smiles for inequitable conduct, and potentially deprive National Union of critical discovery. Accordingly, the Court should reconsider its prior ruling and hold that the searches in question must use a "begin date" of January 1, 2004 to prevent manifest injustice.

CONCLUSION

For the foregoing reasons, National Union respectfully requests the Court issue an Order granting reconsideration of its July 11, 2011 Order to the extent it held that Small Smiles could search the ESI of the fourteen Covert Custodians using the agreed search terms using a "begin date" of November 1, 2007, and to revise such order to specify a "begin date" of January 1, 2004.

Dated: July 25, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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