STATE OF MINNESOTA	Filed in District Court State of Minnesota	**IN DISTRICT COURT**
COUNTY OF OTTER TAIL	12-6-2022	**SEVENTH JUDICIAL DISTRICT**

Craig Stevenson and Marie Stevenson,

Plaintiffs,

vs.

Sean Stevenson, Renee Stevenson, Lisa Stevenson-Allen, and Ashley Anderson,

Defendants.

ORDER AND MEMORANDUM GRANTING IN PART, DENYING IN PART, AND RESERVING IN PART SIX PRE-TRIAL MOTIONS

Court File No.: 56-CV-20-2928.

On November 7, 2022, the above-entitled matter came on before the undersigned Judge of District Court, remotely via Zoom, for a Motion Hearing, pursuant to Plaintiffs' Motions (Docs. 307, 308, 309, 315, 323) and Defendants' Motion (Doc. 310). Attorneys Matthew Schaap and Cassandra Wolfgram appeared on behalf of Plaintiffs. Attorneys Kirsten Hansen and Ross Tentinger appeared on behalf of Defendants. The Court heard argument on the motions orally and on the record. Based on the motions, the memoranda, the affidavits and attachments, the arguments of counsel, and the applicable law, and having been advised in the premises, the Court now issues the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. Plaintiffs' Motion for Spoliation against Defendant Sean Stevenson is **GRANTED IN PART** and **DENIED IN PART**. Specifically:
    a. Plaintiffs are awarded, and Defendant Sean Stevenson shall pay, the reasonable costs and fees incurred in Plaintiffs' forensic examinations of the phones of Renee Stevenson and Lisa Stevenson-Allen.

b. Plaintiffs' counsel shall submit an affidavit setting forth these costs and fees.

2. Plaintiffs' Motion for Spoliation against Defendant Renee Stevenson is **DENIED**.

3. Plaintiffs' Motion for Spoliation against Defendant Lisa Stevenson-Allen is **DENIED**.

4. Plaintiffs' Limited Motion for Reconsideration is **DENIED**.

5. Defendants' Motion to Compel is **GRANTED IN PART** and **RESERVED IN PART**. Specifically:

   a. Defendants' request relating to Plaintiff Marie Stevenson's medical records is **GRANTED, AS MODIFIED**. Specifically:

      i. Defendants shall serve an interrogatory on Plaintiffs demanding the names of all of Marie Stevenson's known medical providers.

      ii. Plaintiffs shall respond to that interrogatory without objection.

      iii. If Plaintiffs assert privilege as to the records of any of these providers, they must do so specifically at the time of their response.

      iv. If Plaintiffs' response lists providers for which a release of information has not previously been provided, Defendants may seek further relief on that basis.

   b. Defendants' request to compel production of the video recording of Plaintiff Marie Stevenson's May 27, 2019 panic attack is **GRANTED**.

   c. Defendants' request to compel the production of the book authored by Plaintiff Craig Stevenson, "DADDY HOLD YOU," is **RESERVED**.

   d. Defendants' request to compel production of a July 9, 2019 video recording showing Plaintiff Craig Stevenson reading the email of Defendant Renee

Stevenson, or, in the alternative, to inspect the server on which it was stored, is **RESERVED**.

e. Defendants' request for attorney fees, as it relates to the requests addressed in paragraphs 5.c and 5.d directly above, is **RESERVED**.

6. Plaintiffs' Motion to Extend Deadlines relating to discovery is **RESERVED**.

7. All other relief sought in the present motions not explicitly granted or reserved herein is **DENIED** at this time.

8. The above-entitled matter shall come on for a dispositive motion hearing on 2/6/2023 at 9:30 AM.

(Court Administrator: insert a date approximately 45 days from the issuance of this order)

9. The Court will provide direction for renewing the parties' reserved motions following a decision on any dispositive motions.

10. The attached **MEMORANDUM** is hereby incorporated by reference herein.

Dated this 6th day of December, 2022.

BY THE COURT:

Court File No. 56-CV-20-2928

Honorable Kevin M. Miller
Judge of District Court

MEMORANDUM

In this intra-familial litigation arising from claims of defamation, intentional infliction of emotional distress, and civil conspiracy, Plaintiffs bring their eighth, ninth, tenth, eleventh, and twelfth pre-trial motions, while Defendants bring their seventh pre-trial motion, all of which relate, directly or indirectly, to discovery disputes. For the reasons set forth below, the Court grants the requested relief in part, denies it in part, and reserves it in part.

Background

Plaintiffs Craig Stevenson and Marie Stevenson are husband and wife. Craig and Marie are the parents of two adult daughters: Makayla Stevenson and Miranda Stevenson. Defendant Lisa Stevenson-Allen is Craig's sister. Defendant Sean Stevenson is the adult son of Craig. Defendant Renee Stevenson is Sean's mother and Craig's ex-wife. Defendant Ashley Anderson is Sean's significant other. Because many of the parties and other people involved have the same or similar last names, the Court will refer to the parties by their first names.

Plaintiffs have brought a number of claims against Defendants, individually or collectively. First, Craig asserts a claim for defamation *per se* against Sean. Second, Marie asserts a claim for intentional infliction of emotional distress against Sean. Third, Craig asserts a claim for defamation *per se* against Renee. Fourth, Craig asserts a claim for civil conspiracy against all Defendants, apparently arising from the same transactions as Craig's defamation *per se* claim against Sean. Fifth, Marie asserts a claim for civil conspiracy against all Defendants arising from the same transactions as Marie's claim for intentional infliction of emotional distress against Sean. The parties are currently litigating a number of issues related to discovery. The Court will set forth the facts relevant to these disputes as part of its discussion of each issue.

Discussion

I. Plaintiffs' Motions for Spoliation

First, Plaintiffs bring three motions for spoliation sanctions against Defendants Sean, Renee, and Lisa on the basis that they intentionally deleted text messages from their phones. They seek (1) costs and fees incurred to obtain forensic examinations of those phones, (2) $5,000 in monetary sanctions from each of these three Defendants, and (3) an adverse-inference instruction due to spoliation. The Court denies the request for an adverse-inference instruction against all Defendants, and it denies the request for monetary sanctions against Renee and Lisa. However, it grants monetary sanctions against Sean in the amount of the costs and fees incurred to obtain two of the three forensic examinations.

a. Factual Background

In order to understand Plaintiffs' spoliation claims, it is useful to review a timeline of events. According to the complaint, the events underlying the claims began in 2019. The background of these events is that Sean was born in 1983, but his father Craig had essentially no contact with him beginning at some point in 1990. In 2006, Craig's sister Lisa attempted to arrange a visit between Craig and Sean, but this visit did not occur. The parties dispute why it did not occur. In 2018, Sean contacted his half-sister Makayla while she was at college, and this led to renewed contact with Craig. Both Craig and Sean attended a birthday and a funeral together. In April 2019, Sean attended Makayla's recital. On Memorial Day weekend 2019, Sean attended a gathering at the home of Craig and his wife Marie. During that event, the subject of the failed 2006 visit came up. This ultimately led to acrimony. As part of this acrimony, Sean sent various text messages in July and August 2019. Plaintiffs allege that these defamed Craig. Sean's

mother, Renee, sent an email in July 2019. Plaintiffs allege this also defamed Craig. And in November or December 2019, Sean created a Christmas card that allegedly defamed Craig.

According to the complaint, the events underlying the claims also continued into 2020. In May 2020, Sean and Lisa exchanged a draft of a letter addressed to Marie's estranged father, Melvin Liebsch, stating that "due to Craig's history, we have become increasingly concerned about [Marie]." In June 2020, Plaintiffs learned that Sean had sent the letter. Over the next few days, Craig sent Sean and the other Defendants a series of angry emails. Defendants did not respond. Instead, Sean printed the emails out and sent them to Mr. Liebsch. Sean also sent a third letter to Mr. Liebsch in July 2020. In August 2020, Plaintiffs' original attorney sent a cease-and-desist letter to Sean, but only Sean, demanding that he refrain from contacting Mr. Liebsch. Sean initially agreed, but then changed course. Plaintiffs then commenced this suit in November 2020.

On September 22, 2020, Plaintiff's second attorney sent cease-and-desist letters to Sean, to Renee, and to Lisa, all of which contained the following preservation notice:

> Finally, please have this letter serve as our formal notice to you to preserve all evidence, and that the destruction of evidence can cause a court to impose a penalty on the party that destroys the evidence in potential future litigation. You must preserve all relevant physical and electronic evidence, including but not limited to, emails, text messages, search history, voice mail, and preserving all electronic files, drives, and other archived or back up data, etc.

(Doc. 293, Ex. 31, at 2; Doc. 337, Ex. A, at 2; Doc. 337, Ex. B, at 2)

In April 2021, Plaintiffs served requests for production on Defendants, seeking, among other things, (1) all communications between Sean, Renee, and Lisa "relating to, referencing, or concerning the subject matter of this Civil Action from January 1, 2018 to the present;" (2) all communications between Sean, Renee, and Lisa "relat[ing] in any way to the claims and

defenses asserted in this litigation;" and (3) all documents and information "mentioning, referencing, relating to, or concerning Plaintiffs, their daughters, or Melvin Liebsch." (Doc. 84, Ex. 2, at Nos. 6, 8, 24; Doc. 88, Ex. 2, at Nos. 6, 8, 24; Doc. 92, Ex. 2, at Nos. 6, 8, 24)

In response, Defendants produced over 600 pages of emails and text messages. (Doc. 84, Ex. 4; Doc. 88, Ex. 4; Doc. 94, Ex. 4) But these did not include any text messages between Defendants. (Doc. 289, ¶ 6) Plaintiffs sent deficiency letters seeking additional communications. (Doc. 84, Ex. 8; Doc. 88, Ex. 5; Doc. 92, Ex. 6) Renee produced an additional 25 pages of documents, but asserted privilege over conversations between Defendants. (Doc. 88, Ex. 6) Sean also asserted privilege. (Doc. 92, Ex. 7) Lisa denied possessing any documents. (Doc. 84, Ex. 9) Plaintiffs brought motions to compel against Sean, Renee, and Lisa. Defendants both asserted privilege and denied having various messages in their possession. The Court denied the motions. Plaintiffs requested permission to move for reconsideration, and in response Defendants clarified that they would not assert privilege in any pre-litigation communications. (Docs. 166, 167, 169)

Plaintiffs subpoenaed records from Sean and Renee's phone carriers. These records revealed that text messages had been sent between various Defendants, but they did not reveal the contents of those text messages. (Doc. 290, Exs. 2-3) Following the receipt of these phone records, Plaintiffs served additional requests for documents, including a request that Defendants:

> produce all documents and [electronically stored information] comprising texts between [Defendants] between April 1, 2019 and November 19, 2020, which discuss any aspect of this case, Plaintiffs, Makayla, Miranda, Melvin [Liebsch], or Karen, including but not limited to, the … texts which the call detail records [obtained from the phone carriers indicate were sent between Defendants].

(Doc. 290, Exs. 5-7, at No. 8) Defendants produced an additional twelve pages of documents, but otherwise disclaimed having responsive documents in their possession. (Doc. 289, ¶ 20; Doc. 290, Ex. 8-10, at No. 8; Doc. 290, Ex. 11)

Defendants were examined about their text messages during their depositions. Sean testified that he did not delete any responsive text messages, and that he did not know why he did not possess the messages not produced. (Doc. 290, Ex. 12, at 129:20-130:1, 188:12-14, 190:1-3, 191:19-20) Renee testified that she routinely deletes text messages from her phone, but that she would only have deleted messages that did not have anything to do with the case. (Doc. 290, Ex. 13, at 26:20-27:5, 27:19-28:19, 291:3-14, 292:19-25, 296:11-12, 297:3-11) Lisa testified that her phone gets full and that she had deleted text messages between Defendants that had nothing to do with the case. (Doc. 291, Ex. 14, at 125:23-126:4, 159:11-160:6) Lisa has also submitted an affidavit stating that she habitually deletes all text messages because this is her practice with respect to the large number of confidential client messages she receives. (Doc. 336)

Following Sean's deposition, Defendants' counsel became aware that Sean had, in fact, deleted text messages related to the case from his phone after litigation had begun. (Doc. 272, at 1; Doc. 259, Ex. B, at 1) As a result, Defendants obtained and disclosed a forensic examination of Sean's phone from Carney Forensics in order to retrieve its contents, including some deleted messages still present on the device. (Doc. 259, Ex. A; Doc. 289, ¶ 24) The Court has received only portions of the report. In addition to a large number of ordinary text messages unrelated to this suit, the examination revealed some communications that were responsive to Plaintiffs' discovery requests, but which were also essentially irrelevant or privileged. (Doc. 259, Ex. A, at *667-668, 963, 969, 972, 1001-02, 1005-07, 1200-01, 1212-13) Four of these messages about retaining an attorney had been deleted. (Doc. 259, Ex. A, at *1005, 1007) In addition, two

exchanges were uncovered as part of the examination that are arguably discoverable. In one, Sean asked Renee to keep looking for a letter from Craig supporting the truth of an allegation that Craig stole from Renee. (Doc. 259, Ex. A, at *969-970) This conversation related to a claim which Plaintiffs ultimately sought to add to their complaint, but which the Court denied because court records from the divorce supported the truth of the allegation. In the other exchange, Sean and Lisa discussed Renee's theory that Craig would send a rant to them, and they indicated that they found this prospect humorous. (Doc. 259, Ex. A, at *1208-09) Five of these messages had been deleted, but were recoverable. (Id.)

The parties also obtained a Cellebrite Extraction Report from Sean's phone created by Computer Forensic Services[1] showing all communications between Defendants, including some deleted messages still present on the device. (Doc. 289, ¶ 37; Doc. 292, Ex. 25) This report contained a very large number of mundane messages having nothing to do with this lawsuit. (Doc. 292, Ex. 25) Many messages entirely unrelated to the lawsuit were shown as having been deleted. (Doc. 292, Ex. 24) There were also some messages that related to the lawsuit. The Court is not certain whether these were additional messages recovered in the second forensic analysis, or if they simply were not included in the portions of the Carney Forensics report that have been provided to the Court. These include a message from Ashley noting that: "It doesn't seem to have crossed Craig's mind that abuse comes in different forms. He is only referencing physical abuse." (Doc. 292, Ex. 25, at ln. 1499) They include discussions about retaining an attorney. (Doc. 292, Ex. 25, at lns. 1783-1807) And they include conversations between Sean and Renee and between Sean and Lisa prompted by Plaintiffs' filing of the lawsuit, including a discussion

[1] Plaintiffs' counsel's affidavit states that Defendants served Computer Forensic Services reports on Plaintiffs, and the reports are bates-stamped as Defendants' documents. However, the Court understands that Computer Forensic Services was retained by Plaintiffs. (Doc. 333, ¶¶ 1, 11-12)

of joint litigation strategy. (Doc. 292, Ex. 25, at lns. 2016-22, 2032) None of these additional messages had been deleted. To the extent they are not privileged, these messages are of little relevance.

The parties also obtained a Cellebrite Extraction Report from Renee's phones, again created by Computer Forensic Services. (Doc. 289, ¶ 39; Doc. 292, Ex. 26) The contents of Renee's phones obtained from the forensic query consisted almost entirely of messages between Renee and Ashley, as well as some photographs. (Doc. 292, Ex. 26) Renee has submitted an affidavit indicating that she deletes most messages, and she did not intend to keep these messages between herself and Ashley either. (Doc. 341) The large number of mundane messages between Renee and Sean that had been found on his phone were not present on Renee's phone. (Doc. 292, Ex. 26) One deleted message was recovered, in which Renee told Lisa, "[Don't] let [C]raig get to you. [You're] happy. He never will be." (Doc. 292, Ex. 26, ln. 131)

Finally, the parties obtained a Cellebrite Extraction Report from Lisa's phone produced by Computer Forensic Services. (Doc. 289, ¶ 41; Doc. 293, Ex. 27) The report disclosed a large number of mundane texts, as well as some related to this case. (Id.) Virtually all of the texts recovered had been deleted. (Id.) These texts include the same discussion about retaining an attorney and what goals to pursue in litigation as were recovered from Sean's phone. (Doc. 293, Ex. 27, lns. 340-415) They also include the same message recovered from Renee's phone. (Doc. 293, Ex. 27, ln. 63) Finally, the texts included two messages which relate somewhat to this case. On May 26, 2019, Sean texted Lisa saying "Well, had our meeting with Craig's family. He doubled down on his story." (Doc. 292, Ex. 27, ln. 45). On July 5, 2019, Lisa texted Sean saying "Ug. Is he referring to the [emails] between him and [M]arie? I never emailed him. Sean [I] am

so sick of this. I honestly don't care. He can blame me all he wants. I hold to the truth I know of that time. At this point [I don't] give a darn who believes me." (Doc. 292, Ex. 27, ln. 90)

Based on a comparison between phone carrier records and the forensic reports, it appears that a number of text messages were exchanged between the parties which were not able to be recovered from the phones. (Doc. 333) A director at Computer Forensic Services determined: (1) that 164 messages which could not be recovered were exchanged between Sean and Renee between April 2019 and November 2020 — 38 of which were exchanged between May 2020 and August 2020; (2) that nearly 127 messages which could not be recovered were exchanged between Sean and Lisa between March 2020 and August 2020; and (3) that one message which could not be recovered was likely exchanged between Renee and Lisa on October 12, 2020. (Doc. 333, ¶¶ 26, 27, 33, 35) In their briefing, Plaintiffs identify 67 unrecoverable messages they believe are likely to have been relevant based on their dates. (Doc. 287, at 16; Doc. 298, at 16; Doc. 295, 16-17) Based on its review of the record as a whole, the Court agrees that, of the messages Plaintiffs identify, the messages exchanged between Sean and Lisa on two dates in May and June 2020, around the time Sean sent letters to Melvin Liebsch, would likely have been relevant to show Sean and Lisa's knowledge, planning, motive, intent, or other state of mind.

Sean was ultimately deposed a second time in order to testify about his intentional deletion of text messages. His prior testimony that he did not intentionally delete any text messages was inaccurate. (Doc. 351, Ex. 8, at 8:16-17) Sean testified in his second deposition that, on two occasions, in the weeks after receiving Plaintiffs' initial complaint, he went through his phone and deleted messages that he felt Craig would "twist" — not necessarily in the sense of using them in litigation, but in a personal capacity. (Id. at 9:2-7, 9:21-10:15, 10:23-11:7, 16:6-17:4) He estimated that he deleted approximately ten messages, but no more than fifteen. (Id. at

11:8-10) These included text messages that were recovered, as well as a message that was not recovered, from approximately June 2020, in which Sean expressed that Craig lacked an ability to understand compassion. (Id. at 11:11-22, 12:11-15, 13:2-12) Sean denied intentionally deleting any other relevant text messages. (Id. at 17:17-20) Sean also denied speaking with the other Defendants about this deletion, and he likewise denied coordinating the deletion with the other Defendants. (Id. at 10:16-19, 47:1-14)

b. Legal Analysis

Based on the events just described, Plaintiffs move for spoliation sanctions. Spoliation occurs were a party has permitted key evidence to be destroyed, whether intentionally or inadvertently, after being on notice that it should be preserved. *Patton v. Newmar Corp.*, 538 N.W.2d 116, 119 (Minn. 1995). A trial court has discretion to impose sanctions for spoliation of evidence. *Miller v. Lankow*, 801 N.W.2d 120, 127 (Minn. 2011). The court acts as factfinder when determining whether sanctions are appropriate. Minn. R. Evid. 104(a); *Smothers v. Ins. Restoration Specialist, Inc.*, 2005 WL 624511 (Minn. App. Mar. 17, 2005) (unpublished). Whether to impose sanctions, and what kind to impose, depends primarily upon the nature and extent of prejudice suffered by the opposing party. *Gray v. Comm'r of Pub. Safety*, 918 N.W.2d 220, 226 (Minn. App. 2018); *Hoffman v. Ford Motor Co.*, 587 N.W.2d 66, 71 (Minn. App. 1998); *see also* Minn. R. Civ. P. 37.05, *2018 Advisory Committee Comment*. Also relevant is "the degree of fault of the [nonmoving] party." *Miller*, 801 N.W.2d at 132.

"If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court: (a) upon finding prejudice

to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or (b) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may … instruct the jury that it may or must presume the information was unfavorable to the party…." Minn. R. Civ. P. 37.05.

i. Timing and Duty

In order to obtain spoliation sanctions, a moving party must show: (1) that the nonmoving party had a duty to preserve relevant evidence, and (2) that relevant evidence has been lost. *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003); *E*Trade Sec. LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 588 (D. Minn. 2005). The duty to preserve evidence exists "whenever a party knows or should know that litigation is reasonably foreseeable." *Miller*, 801 at 127-28; *Willis v. Indiana Harbor Steamship Co.*, 790 N.W.2d 177, 184 (Minn. App. 2010) ("[D]isposal of evidence may be subject to a spoliation sanction when a party knows or should know that the evidence should be preserved for pending or future litigation."). The parties have not disputed that litigation was foreseeable by Defendants at the points they each received their respective cease-and-demand letters.

Defendants first argue that — with the exception of the messages identified in Sean's deposition — Plaintiffs have not shown that any relevant text messages were deleted at a time when Defendants had a duty to preserve evidence. None of the reports narrow down when deletions occurred. And — with the exception already noted — Defendants denied deleting relevant messages after litigation began. Thus, they argue that the unrecoverable messages might have been deleted soon after being exchanged, or that the messages might have been

inadvertently lost at a time when Defendants had not received a preservation letter and were under no duty to preserve any text messages.

Plaintiffs ask the Court to discredit Defendants' testimony and draw contrary inferences based on a number of arguments. First, Plaintiffs ask the Court to discredit Renee's testimony that she always deletes messages because many messages between Ashley and herself were not deleted. The Court declines to do so. The Court is satisfied with Renee's explanation for why these messages were not deleted. Moreover, it is clear from the examinations of Sean's phone that the great bulk of Renee's messages to him were mundane, with only a few messages that were marginally relevant to this case. Second, Plaintiffs ask the Court to discredit Lisa's testimony that she refrained from deleting relevant communications after receiving notice because they argue that there were relevant messages recovered from her phone that were exchanged and deleted after the notice of preservation. The Court disagrees. The messages that Plaintiffs cite consist of Sean and Lisa responding to Plaintiffs' letter threatening litigation by arranging to hire a lawyer and by discussing what the initial omission of claims arising from Sean's 2019 Christmas card meant. Even assuming these messages were relevant and discoverable, their relevance was so extremely marginal that Lisa could not reasonably be expected to know that they were relevant and she should not be held to a duty to preserve them.

Plaintiffs also ask the Court to infer that Defendants conspired to delete relevant evidence in response to litigation. The Court does not agree that the record supports such an inference. First, Defendants did not all delete the same messages, and all of them also deleted messages that had no conceivable connection to this case. Second, many of the messages that were deleted were recovered, and there was very little of relevance in them. It would make little sense for the Court to believe that there was a conspiracy to destroy evidence without also concluding that

Defendants actually succeeded in keeping messages of importance from being recovered. That would require believing one of two things. Either (1) Defendants had some way to control which deleted messages would be recoverable and which would not, or (2) by pure happenstance all of the important messages were rendered unrecoverable by random chance, while a larger number of unimportant messages were still recoverable. The second possibility is inherently implausible, and the first possibility is unsupported by the record. There is no evidence that Defendants had the technical savvy to control when deleted messages would be overwritten, and therefore become unrecoverable by a Cellebrite analysis. The date when messages were deleted might have been a factor in when they were overwritten. But if that is the case, then it supports the conclusion that the unrecoverable messages were deleted prior to litigation.

In weighing the evidence in order to exercise its discretion, the Court concludes that Plaintiffs have not shown that either Renee or Lisa destroyed (or failed to preserve) *relevant* evidence *after* they were aware of impending litigation.

ii. Monetary Sanctions

Having concluded that only Sean was responsible for destroying evidence he thought was relevant while under a duty to preserve it, the Court turns to the question of what sanctions are appropriate against him alone. Where spoliation has occurred, the trial court has "authority to quantify the defendant's prejudice and to fashion the sanction." *Patton*, 538 N.W.2d at 119. Sanctions may include any remedy necessary to cure the prejudice caused by the loss of relevant evidence. Minn. R. Civ. P. 37.05(a). The rule explicitly contemplates restoration or replacement of the lost evidence through additional discovery. *Id.* And necessary remedies can also include

the payment of fees and expenses incurred as a result of conducting such additional discovery. *See, e.g., Stevenson v. Union Pac. R. Co.*, 354 F.3d 739, 751 (8th Cir. 2004).

In this case Plaintiffs ask for two forms of monetary sanctions. First, they ask for their costs of obtaining a forensic examination for Sean's phone. Second, they ask for a flat award of $5,000.00 for failure to comply with discovery, for falsely representing that he complied with discovery, for lying under oath about destruction of evidence, and for intentional spoliation of evidence. They also ask for relief against Sean that is just, fair, and equitable. As relevant to that last demand, it is notable that Plaintiffs have also asked for an award of costs for obtaining forensic examinations of Renee and Lisa's phones, although these requests were raised in the motions against Renee and Lisa, rather than in the motion against Sean.

In considering the arguments and the evidence, the Court believes that it is appropriate to award Plaintiffs the costs of examining Renee and Lisa's phones. The Court finds it especially significant that Sean lied under oath about deleting text messages. Such conduct is independently sanctionable. *See, e.g., Mgmt. Registry, Inc. v. A.W. Companies, Inc.*, 2022 WL 4466071 (D. Minn. Sept. 26, 2022) (citing *Plaintiffs' Baycol Steering Comm. v. Bayer Corp.*, 419 F.3d 794, 802, 804 (8th Cir. 2005)). Moreover, regardless of the relevance of those deleted text messages, Sean's perjury is what created the necessity for additional discovery. It resulted in the first forensic examination of his phone. And that in turn resulted in Plaintiffs obtaining examinations of Renee and Lisa's phones in order to search for other deleted messages. Because it was highly foreseeable that Plaintiffs would seek those examinations, the Court finds a sufficient connection between Sean's conduct and Plaintiffs' expenses such that it is rational to make him pay those expenses. Although the evidentiary prejudice Plaintiffs suffered seems to have been minimal or

nonexistent, the financial burden Plaintiffs incurred while doing their due diligence is not out of proportion with the seriousness of Sean's misconduct.

In reaching this conclusion, the Court rejects Plaintiffs' other requests for monetary relief. Plaintiffs ask for the costs of conducting their own examination of Sean's phone. But Defendants already paid for one forensic examination of Sean's phone. And Plaintiffs have not identified any flaw in that examination that required them to perform a second examination. The Court has difficulty concluding that Sean's misconduct necessitated that expense. Plaintiffs also ask for a flat $5,000.00. But they have offered little in the way of justification for that particular figure. The Court believes that the expense of two forensic examinations is a sufficient punishment without adding an arbitrary sum on top of it.

iii. Adverse-Inference Sanctions

Next, Plaintiffs ask the Court for a ruling that it will "instruct the jury that it may or must presume" that unrecoverable text messages were "unfavorable to" Defendants, and to apply this inference in determining whether evidence that will be presented on summary judgment is sufficient to make out a question of fact for a jury. Minn. R. Civ. P. 37.05(b)(1). The Court agrees with Plaintiffs that spoliation sanctions may take the form of instructing a jury that it may draw a negative inference against the party responsible for the spoliation. *Wajda v. Kingsbury*, 652 N.W.2d 856, 861 (Minn. App. 2002) (citing *Federated Mut. Ins. Co., v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 436 (Minn. 1990)); Minn. R. Civ. P. 37.05(b)(1).

But such an instruction is appropriate only as to evidence lost because "the [non-moving] party acted with the intent to deprive [the moving] party of the information's use in the litigation." Minn. R. Civ. P. 37.05(b). And a negative inference must be both "reasonable" and

based on some form of "evidence tending to establish" the particular inference to be drawn. *McGinness v. Sch. Dist. No. 10*, 41 N.W. 103, 103 (Minn. 1888); 2 Wigmore on Evidence § 291; *see also Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 221 (S.D.N.Y. 2003); *Kelley as Tr. of BMO Litig. Tr. v. BMO Harris Bank N.A.*, 2022 WL 2801180 (D. Minn. July 18, 2022). The circumstances surrounding the destruction of evidence can provide sufficient grounds to conclude that the evidence would have been favorable to the moving party. *See, e.g., Paisley Park Enterprises, Inc. v. Boxill*, 330 F.R.D. 226, 235 (D. Minn. 2019). But a finding of potential favorability is key to the conclusion that an adverse-inference is an appropriate curative.

In weighing the evidence, the Court is skeptical that the instruction Plaintiffs request would be an appropriate curative. Such an instruction is appropriate only for intentional spoliation, and the only intentional spoliation that clearly occurred in this case was Sean deleting approximately ten text messages. Most of those messages have been recovered, however. And the remaining messages are unlikely to have been helpful to Plaintiffs.

Even if the Court were to assume that more messages must have been intentionally destroyed, there is little reason to believe that they were of a different character than the messages that have been recovered. As a whole, the existing messages offer little of value to Plaintiffs. When not helpful to Defendants, they are mostly relevant only to prove the sort of "ill will" that can be introduced to show "[common-law] malice" that will "overcome" a defense to defamation based on "qualified privilege." *Maethner*, 929 N.W.2d at 873. But they would largely be cumulative to other evidence if offered for this purpose — evidence of animus between the parties already abounds. The Court cannot conclude that Plaintiffs are substantially prejudiced by the lack of any additional such evidence. Alternatively, it is plausible that some of the unrecovered messages might have shown that Sean and Lisa discussed what to say to Melvin

Liebsch before sending letters to him. But such messages would also have been cumulative to other evidence if offered for this purpose — there is already an email documenting that Sean asked Lisa for feedback on a draft. And Plaintiffs can argue the natural inferences to be drawn from the timing and frequency of messages even without an adverse-inference instruction.

In short, an adverse-inference instruction is neither necessary nor advisable in order to restore Plaintiffs to their position prior to any spoliation. Monetary sanctions are sufficient.

II. Plaintiffs' Limited Motion to Reconsider

Plaintiffs' second motion is a motion for the Court to reconsider its prior denial of Plaintiffs' three prior motions to compel, specifically with regard to communications that occurred among Defendants following the commencement of litigation and their retention of joint counsel. The Court revises its analysis of when such communications are privileged, but it ultimately concludes that Plaintiffs have not shown that any unprivileged communications are within the bounds of proportional discovery. As such, the Court declines to alter its prior order.

a. Motion for Reconsideration Standard

A district court has inherent authority to reconsider pre-trial rulings. *Cf. State v. Papadakis*, 643 N.W.2d 349, 357 (Minn. App. 2002). However, "[m]otions for reconsideration play a very limited role in civil practice…." Minn. Gen. R. Prac. 115.11, *cmt.* Because of the need to promote fairness and judicial economy, "[m]otions for reconsideration are not opportunities for presentation of facts or arguments available when the prior motion was considered." *Id.* What this means is that a party asking for reconsideration bears a heavy burden. Where a court has heard arguments once and exercised its discretion in an informed manner, it

will not often alter course simply because it is later convinced that it would have exercised its discretion in a slightly different manner had it been presented with different arguments in a more timely manner. If the prior result is not palpably wrong, then the moving party usually must show that it would be inequitable to let the outcome of the prior order stand.

As the Court noted in its order permitting Plaintiffs to bring this motion, Plaintiffs submitted lengthy memoranda in support of their original motions to compel, but the arguments in this briefing were largely made at a high level of generality, with little analysis of particular responses, and little discussion of why the disclosures requested might be relevant. Defendants resisted Plaintiffs' motion by arguing, in part, that post-litigation communications among themselves were protected by the common-interest privilege. The Court denied Plaintiffs' motions, resting its decision, in part, upon the common-interest privilege, and in part on considerations of proportionality. Following this, in *Energy Policy Advocates v. Ellison*, 980 N.W.2d 146, 152 (Minn. 2022), the Minnesota Supreme Court adopted a formal definition of the common-interest privilege for the first time. Plaintiffs argue that this definition is inconsistent with the Court's prior order. Because arguments stemming from *Energy Policy Advocates* had not been available at the time of the prior motions, the Court permitted Plaintiffs to move for reconsideration. Nonetheless, the Court will not lightly overturn other parts of its prior decision.

b. Motion to Compel Standard

The decision being reconsidered in this motion is a denial of a motion to compel. The rules provide that a party seeking discoverable material may move for an order compelling a response where the other party fails to answer an interrogatory or fails to produce documents in response to a request for production. Minn. R. Civ. P. 37.01(b)(2)(C)-(D). A motion to compel

may also be brought based on "evasive or incomplete" discovery responses. Minn. R. Civ. P. 37.01(c). Trial courts have "wide discretion" when considering a motion to compel. *Shetka v. Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 921 (Minn. 1990). Material is discoverable — and therefore the proper subject of a motion to compel — if it is (1) "relevant," (2) "nonprivileged," and (3) "proportional to the needs of the case." Minn. R. Civ. P. 26.02(b).

c. Relevance

"[I]n civil discovery, relevance should be given a liberal interpretation, with the recognition that relevancy limits would be more circumscribed at any subsequent trial." *Kohn v. State by Humphrey*, 336 N.W.2d 292, 298 (Minn. 1983). Courts will "look to see if the information sought to be discovered may lead to admissible evidence." *SPX Corp. v. Cnty. of Steele*, 2002 WL 1988180 (Minn. Tax Aug. 19, 2002). But relevance is not without limits. Even though discovery "is not to be limited to facts which may be admissible as evidence, the ultimate goal is to ascertain facts or information which may be used for proof or defense of an action." *Jeppesen v. Swanson*, 68 N.W.2d 649, 656 (Minn. 1955).

In the present motion, as well as throughout litigation, Plaintiffs have advanced an overly broad theory of relevance and discoverability. In their initial discovery requests, Plaintiffs asked not just for communications that related to claims and defenses in this litigation, but also for anything that even *mentioned* themselves or their daughters. (Docs. 84, 88, 92, Ex. 2, at No. 24) Similarly, as part of their relief in the present motion, they ask for the production of all oral, written, and electronic communications "occurring from November 19, 2020 to the present which relate to, discuss, mention, or reference Plaintiffs, their daughters, or Melvin Liebsch." The breadth of these requests was not inadvertent. Rather, Plaintiffs have consistently offered

protest to any discovery responses that fall short of the full breadth of their requests. For instance, Plaintiffs have protested when Defendants did not produce text messages that consisted of nothing but amicable pre-dispute messages between family members sharing a photograph of one of Plaintiffs' daughters holding Sean's child — and they have maintained such objections even after losing their initial motion to compel.

It should be clear that the Court has already rejected Plaintiffs' overly broad position, and it continues to reject it. Communications like the one just mentioned are not relevant to this litigation. And Plaintiffs are not entitled to use the device of litigation in order to supervise every conversation that their estranged relatives might ever have had about their family. Discovery "is not intended to supply information for the personal use of a litigant that has no connection with the determination of the issues involved in the action on their merits." *Jeppesen*, 68 N.W.2d at 657. In deciding Plaintiffs' motion for reconsideration, the Court will only countenance specific arguments for why the materials they seek are likely to be relevant to a claim or defense.

i. Evidence that Craig is Reputed to have Claimed to be a Prophet

Plaintiffs first argue that communications between Defendants are relevant because Defendants might have discussed the allegation that Craig calls himself a prophet. This allegation is not referenced in the complaint, but Defendants have indicated that evidence of Craig making such a claim was relevant to the scope of their investigation during discovery. (Doc. 241, at 6) Craig's mother testified at a deposition that she has heard that Craig considers himself to be a prophet, but she doesn't remember who told her that, only that it was someone outside the family. (Doc. 242, Ex. 9, at 17:2-19) Lisa also heard this from her mother (who is also Craig's mother) and from a local pastor. (Doc. 244, ¶¶ 6, 8, 11) As the Court reads the

record, none of the Defendants claim to have *personal knowledge* that Craig ever actually referred to himself as a prophet. At best, the record indicates that Lisa alone has personal knowledge of Craig's *reputation* in the community, whether that reputation is deserved or not.

The state of a plaintiff's reputation immediately before and after a defamatory publication may be relevant to the element of damages for defamation. Thus, if a plaintiff alleges a diminution to his reputation for being a member of a church in good standing, a defendant may show that the plaintiff did not have such a reputation. Plaintiffs allege in their complaint that Craig is a "committed Christian," but in their current briefing they explicitly disclaim that they are alleging that Defendants injured Craig's reputation as a committed Christian. If this is so — and the Court has no reason to hold that it is not — then the Court fails to see why it is relevant whether Craig does or does not have a reputation for claiming he is a prophet.

Absent an allegation of harm to Craig's religious reputation, there is no reason to introduce evidence on the issue of his reputation, or lack thereof, for claiming to be a prophet. And reputation evidence is not generally admissible to speak to other issues. For instance, Lisa's testimony about what she heard could not be admitted to show whether Craig actually claimed to be a prophet, since it would be double hearsay or more. *See* Minn. R. Evid. 802 (hearsay); Minn. R. Evid. 805 (double hearsay). And reputation testimony could not be introduced in order to show Craig's character, because such evidence is admissible only as to a pertinent character trait, *see* Minn. R. Evid. 405, and Craig's character for religiosity is not pertinent to this litigation. *See Shirley v. Freunscht*, 735 P.2d 600, 602 (Or. 1987) (persuasively explaining why most character traits are not generally pertinent even to a defamation action). Because the allegation that Craig has claimed to be a prophet is irrelevant, the Court does not understand why it would matter whether Defendants discussed that allegation. Moreover, even if the allegation were relevant, the

Court does not see how it would affect anything to know whether Defendants had discussed that allegation. None of them had any personal knowledge concerning the allegation, so nothing that any of them could have said would tend to affect the likelihood that the allegation is true. In short, the possibility that Defendants may have discussed Craig's purported claim to be a prophet does not justify further discovery.

ii. Evidence of Spoliation

Plaintiffs next argue that post-litigation communications between Defendants are relevant because Plaintiffs postulate that Defendant communicated with each other in order to orchestrate the destruction of pre-litigation text messages. They argue that the number and timing of the messages that cannot be recovered from any Defendant's phone can only be explained through a concerted, coordinated effort among the parties to destroy evidence. As the Court has explained above, in the context of Plaintiffs' motion for spoliation, it does not find that argument to be compelling. There is no reason to think that Defendants had the ability to coordinate the deletion of a large number of messages, but then have most of those messages still be recoverable, with only the incriminating messages somehow being unrecoverable.

Moreover, this is a motion for reconsideration of the denial of Plaintiffs' 2021 motions to compel obedience to their first set of discovery requests. Plaintiffs do not identify the particular interrogatories or requests for production from that set of discovery requests to which the communications they now seek would have been responsive. Several of those requests did seek communications that related to claims and defenses in this litigation. But, as Defendants respond, spoliation is not a claim in this litigation. Plaintiffs reply that communications discussing spoliation are relevant to claims and defenses in this litigation because spoliation is an issue for

the jury. But the Court has denied Plaintiffs' requested jury instruction on spoliation. And Plaintiffs offer no other citations or arguments. To the extent that Plaintiffs are truly pursuing their motion for reconsideration with this argument, the Court expects more. Absent clear and compelling arguments, the Court will not alter the exercise of its discretion.

To the extent that Plaintiffs are really pursuing some other sort of relief with this argument, the Court is likewise unconvinced. Provided they had written discovery left, Plaintiffs could have served new discovery requests in order to obtain the information they now seek. And they could have filed a subsequent motion to compel if Defendants would not respond. They did not formally do this. And the Court is not inclined to construe the present motion that way, since it was filed only after discovery had closed. To the extent that Plaintiffs are really making a motion to allow for further discovery as a remedy for spoliation, the Court likewise declines to grant that relief. While such a request may legitimately be brought as part of a motion for spoliation, *see* Minn. R. Civ. P. 37.05, no such request was made as part of Plaintiff's formal spoliation motion. Moreover, the Court has already considered Plaintiffs' formal spoliation motion, and found that granting monetary sanctions was sufficient relief.

iii. Evidence of Civil Conspiracy

Finally, Plaintiffs make a number of statements which the Court construes as arguing that post-litigation communications between Defendants are relevant because they demonstrate that Defendants conspired with each other to defame Craig and to inflict emotional distress on Marie. There is no possible dispute that such evidence would clearly be discoverable and that it would be responsive to Plaintiffs' existing discovery requests. However, Defendants argue that post-litigation communications are not relevant because they contain no such evidence. Defendants

reason that they could only have formed the conspiracies alleged in Plaintiffs' complaint *prior* to litigation; evidence of this will not be in post-litigation communications. In other words, while pre-litigation communications might contain the actual formation of a conspiracy, there is no chance that post-litigation communications would include exchanges in which Defendants agreed to commit the torts alleged here.

Defendants' argument is well-taken, and it narrows substantially the range of relevant materials that might by found in their post-litigation communications, but it does not eliminate all potentially relevant material. Defendants could still have exchanged communication discussing their prior actions. Indeed, it appears that Defendants did exchange messages and meet in person in an attempt to prepare their litigation strategy. As such, it appears that at least some portion of Defendants' post-litigation communications is relevant to this litigation. The next step, therefore, is to determine, whether such communications are privileged.

d. Privilege

Where, as here, several defendants are jointly represented and share common legal interests, communications they share may be protected by a common-interest privilege.[2] "[T]he

[2] Commentary has distinguished between (1) the older joint-defense privilege, which is broad, but applies only to civil *defendants* who share joint counsel, or whose attorneys are cooperating, *see, e.g., Schmitt v. Emery*, 2 N.W.2d 413, 417 (Minn. 1942), and (2) the newer common-interest privilege, which can apply to civil *plaintiffs* as well. *See* Schaffzin, *An Uncertain Privilege*, 15 B.U. Pub. Int. L.J. 49, 61 (2005) ("Courts first developed the common interest doctrine as they considered whether the joint defense doctrine protected privileged communications that civil co-plaintiffs or even non-parties shared in the presence of counsel to further a joint prosecution strategy"). Commentary has also distinguished between (1) the older joint-client privilege, also broad, but applicable only where parties share a joint lawyer, *see, e.g., In re Lawrence*, 954 N.W.2d 597, 602 (Minn. App. 2020), and (2) the newer common-interest privilege, which applies where parties have different lawyers, but the lawyers cooperate. *See* Garsombke, *A Tragedy of the Common*, 40 Ga. L. Rev. 615, 627 (2006). Arguably the common-interest doctrine is a misnomer here and this case is really governed by the more-established joint-defense and joint-client doctrines. However, because the parties have used the term "common interest" in their arguments,

common-interest doctrine applies when (1) two or more parties, (2) represented by separate lawyers, (3) have a common legal interest (4) in a litigated or non-litigated matter, (5) the parties agree to exchange information concerning the matter, and (6) they make an otherwise privileged communication in furtherance of formulating a joint legal strategy." *Energy Pol'y Advocs.*, 980 N.W.2d at 153. The doctrine "applies to attorney work product and the attorney-client privilege." *Id.* at 155. And its scope "is generally consistent with … the Restatement" definition of the doctrine. *Id.* The issue in dispute here is only the last element — whether the communications exchanged between Defendants after the commencement of litigation were "otherwise privileged communication[s]" made "in furtherance of formulating a joint legal strategy." *Id.* at 153.

Throughout this litigation, the parties have offered various divergent views of when attorney-client privilege applies to communications where an attorney is not present. The Court believes it will be useful to discuss each of these views in turn. First, in their prior filings (Docs. 108-09, at 1-2), and in deposition objections brought to the Court's attention[3] (Doc. 329, Ex. 20, at 294:13-295:20), Defendants have sometimes seemed to argue that any communications between Defendants after they hired joint counsel are automatically privileged. In their present briefing, Defendants are more careful. They argue that, because they have not been in contact with Plaintiffs since litigation began, any information they have learned about Plaintiffs has been conveyed through counsel. Thus, they argue, anything they might have said to each other about the lawsuit, about Plaintiffs, or about Plaintiffs' family would necessarily involve privileged

because the Court previously used that term, and because cases invoking the doctrine are useful, the Court will continue to use that term.

[3] The purpose of this reference is illustrative only. The Court is not ruling on every invocation of the common-interest privilege that has occurred in this case. For example, the argument put forward in the deposition referenced above has never been challenged by means of a motion to compel relating to that deposition. The Court limits itself to consideration of the responses requested in the motions to compel now being reconsidered.

communications from counsel. There is a kernel of truth to this argument, but the Court believes that it goes slightly too far. Simply because two people discuss information learned from an attorney does not mean that they are conversing "in furtherance of formulating a joint legal strategy." It is possible to engage in mere gossip based on information learned from an attorney. And it is possible to discuss matters relevant to a lawsuit without having any intention of communicating them to a lawyer.

Conversely, Plaintiffs also appear to have taken multiple stances. In their reply brief they seem to argue, without qualification, that conversations between jointly represented litigants made outside the presence of counsel are *never* privileged. However, at hearing, Plaintiffs qualified this position, arguing that conversations exchanged between parties, without counsel present, *generally* are not privileged. They conceded that there are exceptions to this general rule when jointly represented clients discuss advice or information received from an attorney, or when they discuss sending questions or information to an attorney. But they argue that communications do not become privileged simply because parties are jointly represented, or simply because they discuss non-confidential information learned from an attorney. The Court agrees that Plaintiffs' general rule is accurate, and that their concessions are properly made.

"The attorney-client privilege protects from disclosure communications that seek to elicit legal advice from an attorney acting in that capacity, that relate to that purpose, and that are made in confidence by the client…." *State v. Taylor*, 869 N.W.2d 1, 21 (Minn. 2015). While the privilege usually applies to communications made directly between a client and an attorney, it can extend to other statements as well. For instance, it applies "to a communication prepared by an agent or employee" of a client "whether it is transmitted directly to the attorney by the client or" whether it is transmitted through "his agent or employee." *Brown v. Saint Paul City Ry. Co.*,

62 N.W.2d 688, 700 (Minn. 1954); *Schmitt v. Emery*, 2 N.W.2d 413, 416 (Minn. 1942) ("Where a document is prepared by an agent or [employee] by direction of the employer for the purpose of obtaining the advice of the attorney or for use in prospective or pending litigation, such document is in effect a communication between attorney and client."). In other words, communication can still be made "for the purpose of securing legal advice," even if they are communicated by, to, or through an agent. *Leer v. Chicago, M., St. P. & P. Ry. Co.*, 308 N.W.2d 305, 309 (Minn. 1981).

The few courts that have addressed the matter have applied a similar analysis to statements made directly between jointly-represented clients, even if they are not formally each other's agents or employees. These decisions hold that "communications … between non-lawyers" are privileged, even when made in the absence of an attorney, when they "discuss or relay legal advice" given to one of them by their joint attorney. *Crane Sec. Techs., Inc. v. Rolling Optics, AB*, 230 F. Supp. 3d 10, 21 (D. Mass. 2017) (collecting cases); *IBJ Whitehall Bank & Tr. Co. v. Cory & Assocs., Inc.*, 1999 WL 617842 n.4 (N.D. Ill. Aug. 12, 1999) (unpublished). The same rule should also apply when clients act to relay information to their joint attorney. *Cf. SmithKline Beecham Corp. v. Apotex Corp.*, 232 F.R.D. 467, 477 (E.D. Pa. 2005). And given that the common-interest doctrine applies in non-litigated matters, the Court also believes that communications discussing *whether* to retain an attorney and whether to fight a claim may also be covered. In the language of the Restatement, these discussions are made "between privileged persons" and "for the purpose of obtaining or providing legal assistance for the client." Restatement (Third) of the Law Governing Lawyers § 68.

Although these are narrow exceptions to the rule that privilege generally applies only when a lawyer is present, they are exceptions that loom large in this case. The Court has already

seen a large number of Defendants' pre-litigation communications. Of those that related to this litigation, most had little relevance, and a large number were about whether to fight Plaintiffs' demands, how to retain an attorney, and what the complaint meant for their litigation strategy. While there is ample reason to suspect that Defendants talked about the case, there is little reason to believe that Defendants would have further discussed any relevant facts except in the context of formulating a joint legal strategy. Any discussion that was had for the purpose of giving information to an attorney or receiving advice from an attorney would be privileged. Such privileged discussions likely constitute most or all of the relevant communications.

While it would be possible to order Defendants to identify all relevant communications and then assert individual claims of privilege to each of those communications, the likelihood that all of these communications would be privileged raises very real questions about the burdens, benefits, and proportionality of such an order. The Court turns to those questions next.

e. Proportionality

The scope of discovery should be constrained by what is "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Minn. R. Civ. P. 26.02(b). Like other discovery matters, questions of proportionality lie within the sound discretion of the trial court. *Chambers Self-Storage Oakdale, LLC v. Cnty. of Washington*, 971 N.W.2d 64, 72 (Minn. 2022). As Plaintiffs have acknowledged, "[w]here the damages at issue are small and the burden and expense of proposed discovery will outweigh any possible benefit, the discovery may be denied." (Doc. 83, at 13;

Doc. 87, at 12; Doc. 91, at 13) (citing *Walmart, Inc. v. Cnty. of Anoka*, 2020 WL 3865145 (Minn. Tax July 1, 2020); *Midland Funding LLC v. Ford*, 2020 WL 1910207 (Minn. App. Apr. 20, 2020) (unpublished)).

Plaintiffs request the disclosure of all oral, written, and electronic communications exchanged by Defendants following the start of litigation relating to Plaintiffs or their family. The Court finds that this request is not proportional to the needs of the case. The Defendants in this matter are close family members who communicate regularly. There would naturally be many communications exchanged by them over the course of the approximately two years since litigation began. It would be a burdensome process to identify all relevant communications and determine whether privilege applies. And the fruits of this endeavor are likely to be extremely minor. Based on the prior communications and the circumstances known, most or all of those communications were likely privileged. Moreover, the relevance of these communications would likely be only to show whether a conspiracy was formed. And, as the Court will detail at further length in its discussion of Plaintiffs' final motion, (1) this is not a case where the evidence Plaintiffs now seek is likely to be important to resolving Plaintiffs' civil conspiracy claim, and (2) the Court does not anticipate that there will be a substantial dollar amount in controversy arising from that claim. In short, the benefits of additional discovery do not match its burdens.

The totality of the record leaves the Court with the distinct impression that Plaintiffs' discovery strategy has borne less relation to an attempt to litigate their claims on the merits than it has to an attempt to use the court system to impose burdens upon, and exert control over, Defendants. (*See, e.g.,* Doc. 242, Ex. 12, at *4372, ¶ 6 of 7; Doc. 77) Their current request looks to fit that pattern. It is likely to impose a substantial burden, but unlikely to yield anything that is

not privileged. Given this, the Court denies Plaintiffs' motion for reconsideration and affirms its prior denial of Plaintiffs' motions to compel.

III. Defendants' Motion to Compel

The Court next turns to Defendants' four-part motion to compel discovery from Plaintiffs. They seek (1) to determine whether they possess complete medical records for Marie; (2) to compel production of a video recording of Marie having a "panic attack" similar to the panic attacks alleged in the complaint, but which occurred prior to the events of the complaint; (3) to obtain the entirety of a book written by Craig which Defendants assert Sean was parodying during an incident referenced in the complaint; and (4) to recover a copy of a video recording of Craig re-publishing an email he retrieved and read to his daughter Miranda.

Because the first two requests relate broadly to a contested element of Marie's entire claim for intentional infliction of emotional distress, and because they are discoverable, the Court grants Defendants' first two requests. Because the second two requests relate to specific incidents, and because the parties' arguments on this motion only serve to highlight the fact that all claims arising from these incidents must fail as a matter of law, the Court elects to reserve the latter two requests pending a decision on Defendants' upcoming summary judgment motion.

a. Marie's Medical Records

First, Defendants seek complete medical records for Marie, including a complete list of all her medical providers. As both parties agree, a claim for intentional infliction of emotional distress puts into issue "medical testimony" concerning "the severity and causation of emotional distress." *Langeslag v. KYMN Inc.*, 664 N.W.2d 860, 868, 870 (Minn. 2003). "If … a party

voluntarily places in controversy the [party's] physical [or] mental … condition" the party "waives any privilege … regarding the testimony of every person who has examined or may thereafter examine that party … with respect to the same physical [or] mental … condition." Minn. R. Civ. P. 35.03. The party shall provide "all medical reports previously or thereafter made by any treating or examining medical expert" and "shall provide written authority … to permit the inspection of all hospital and other medical records" which concern "the physical [or] mental … condition … as to which privilege has been waived." Minn. R. Civ. P. 35.04. In other words, a person claiming damages for emotional distress generally must provide releases and records for any medical or psychological condition within the scope of the issues at trial — *i.e.* any condition that could cause, or be caused by, emotional distress.

Defendants served a request for medical records and authorizations. (Doc. 319, Ex. 16) Plaintiffs responded by providing nine authorizations. (Doc. 343, ¶ 15) Defendants later served a request for admission to confirm that these were Marie's sole medical providers since 1987. (Doc. 319, Ex. 17) Plaintiffs responded by providing five additional medical releases. (Doc. 319, Ex. 18; Doc. 343, ¶ 17) They also denied the request for admission without further explanation. (Doc. 319, Ex. 19) During these events, Defendants also served a first set of requests for production seeking written authority permitting Defendants authority to examine all medical records. (Doc. 343, Ex. 4, at No. 8) Plaintiffs objected to the request. (Id.)

Later Defendants served a second set of requests for production seeking, among other things, all of Marie's medical records, and all records indicating treatment of Marie at any time whatsoever. (Doc. 319, Ex. 1, at Nos. 8-9) Plaintiffs responded by objecting to "[u]ndue burden; overly broad; [and] relevance." They also responded that "Plaintiffs have provided Defendants with multiple medical releases, which Defendants can and have used to obtain medical records."

(Id.) Defendant sent deficiency letters (Doc. 319, Exs. 2-3), and Plaintiffs responded that "medical records unrelated to [Marie's] mental health are not related, relevant, or material to [her intentional infliction of emotional distress] claim." (Doc. 319, Ex. 4, at 3) Plaintiffs also responded that they had "provided Defendants with a release of information to obtain Marie's medical records." (Id.) Defendants assert, and Plaintiffs do not deny, that no privilege log has been provided indicating records that Plaintiffs assert fall outside the scope of Marie's automatic waiver of medical privilege. Defendants later learned from the deposition of another family member that Marie has been diagnosed with cancer. (Doc. 319, Ex. 20, at 27:23-28:23) Plaintiffs supplemented the medical records following this disclosure, although they assert that these records are irrelevant, and therefore still privileged. (Doc. 343, ¶ 13)

Defendants argue that Plaintiffs' responses have made it impossible to get a definitive answer to whether they have all of Marie's records and whether they know all of her treating providers. Plaintiffs argue that they do not even know what records Defendants are still seeking. They assert to the Court that they have provided all records, but they have not provided discovery responses that confirm this. The Court agrees with Defendants that Plaintiffs' discovery responses are confusing, and they do not provide a clear answer to whether Marie has provided releases of information for all of her known medical providers. This confusion could be easily ended if Plaintiffs would simply (1) provide a list of all of Marie's known medical providers, and (2) make a clear invocation of continuing privilege as to the records of any medical provider for which she has not provided a medical release of information.

Plaintiffs object that Defendants never served an interrogatory asking Marie to identify all of her medical providers. That is true enough. But Plaintiffs did repeatedly request all medical records and releases of information for all providers. The identity of all of Marie's medical

providers was included within these requests. And Plaintiffs were required to provide this information, even though they were not required to provide it in the same form as if Defendants had served an interrogatory. The Court is less concerned with strict adherence to form than with moving this matter along. Rather than standing on technicalities, the Court believes it is in the interests of justice to bring all confusion to an end using the simplest method available.

As such, the Court orders that, notwithstanding any limitations that might otherwise apply, Defendants will be allowed to serve an interrogatory on Plaintiffs demanding the names of all of Marie's known medical providers, and Plaintiffs will be compelled to respond to that interrogatory without objection. If that list is the same as the fourteen providers already named, then this dispute will be over. If that list includes additional providers, then, concurrent with their response to this interrogatory, Plaintiffs must make a specific assertion of privilege as to any of these providers for which they have not previously provided releases of information. If Defendants object to an assertion of privilege, the Court can address it in further proceedings.

b. Marie's Panic Attack

Next, Defendants seek an order compelling Plaintiffs to disclose video footage, captured by Plaintiffs' home surveillance cameras, of Marie having a panic attack on May 27, 2019. Plaintiffs' claim for infliction of emotional distress (IIED) is premised, in large part, upon allegations that Marie experienced similar panic attacks in June, July, and September 2020, and also in February 2021, all as a result of actions taken by Sean. Plaintiffs have produced a large number of home surveillance videos, or transcripts thereof, including those which captured the panic attacks alleged in Plaintiff's complaint. (Doc. 319, Ex. 15) Plaintiffs have also produced an exhibit summarizing Marie's history of panic attacks and stating that Marie had a panic attack on

May 27, 2019, one day after Sean visited Plaintiffs' home, and due to Lisa's "betrayal." (Doc. 319, Ex. 13) There is no allegation that this panic attack was caused by actionable conduct on the part of Defendants.

Defendants made a request for production of all video recordings in Plaintiffs' possession relating to the subject matter of the litigation. (Doc. 343, Ex. 4) Plaintiffs objected to the request, in part on the basis of spousal privilege. (Id.) Defendants subsequently sent a deficiency notice demanding the recording of Marie's panic attack on May 27, 2019. (Doc. 319, Ex. 2) Plaintiffs reiterated their objection based on spousal privilege. (Doc. 343, Ex. 13) Defendants now bring a motion to compel production. Plaintiffs do not contest that a video recording of the panic attack exists and that they are in possession of it. But they object that the video recording is not relevant, and that, even if it is relevant, it contains material protected by the spousal privilege.

The Court agrees with Defendants that Marie's prior panic attack is relevant. Marie's IIED claim against Sean requires proving that she "suffered severe emotional distress" that was the "result of the extreme and outrageous conduct." *Langeslag*, 664 N.W.2d at 869. She must show "a causal connection between the conduct and the emotional distress." *Id.* at 869. Her distress is not actionable if it was caused by "preexisting conditions" that were not "specifically aggravated by [Sean's] conduct." *Id.* Moreover, if some preexisting condition gave her "a peculiar susceptibility to such distress," then she cannot recover for distress caused by that condition, in excess of what a reasonable person would experience, unless Sean "had knowledge" of the condition. *Cafferty v. Garcia's of Scottsdale, Inc.*, 375 N.W.2d 850, 853 (Minn. App. 1985).

The fact that Marie had a panic attack not caused by any actionable conduct is probative of the elements of the claims and defenses in this case. First, it is evidence that tends to show that she had a preexisting condition. And it would allow a factfinder to judge the severity of her reaction in that incident compared to her reactions during the incidents listed in the complaint. This is relevant to the question of what caused the panic attack and whether it was specifically aggravated by Sean's conduct. Second, it is evidence that tends to show a reaction in excess of what a reasonable person would experience. As such, it might support limiting potential liability to only Sean's conduct after he was informed of Marie's reaction.

The Court also agrees with Defendants that spousal privilege does not protect the recording of the panic attack. Defendants argue both that having a panic attack is not a communication protected by the privilege, and also that Plaintiffs have waived any privilege. The Court need not address the first argument because the second is clearly meritorious. The holder of an evidentiary privilege may waive it explicitly or by implication. *State v. Walen*, 563 N.W.2d 742, 752 (Minn. 1997). She may do so by waiving privilege as to a portion of the material. *See State v. Madigan*, 68 N.W. 179, 180 (Minn. 1896) ("If the [privilege holder] does not wish a repulse, he should not attack [using the privilege]."). That waiver extends to all "[]related communications." *State v. Gore*, 451 N.W.2d 313, 319 (Minn. 1990). Waiver by implication also occurs where the privilege holder places the subject matter of the privileged communication at issue by asserting a claim or defense. *Kern v. Janson*, 800 N.W.2d 126, 132 n.3 (Minn. 2011).

As other courts have persuasively explained, "[w]hen a party reveals part of a privileged communication in order to gain an advantage in litigation, it waives the privilege as to all other communications relating to the same subject matter because the privilege of secret consultation

is intended only as an incidental means of defense and not as an independent means of attack, and to use it in the latter character is to abandon it in the former." *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982). Moreover, a privilege may be deemed waived, even absent a partial disclosure, where "the party asserting the privilege placed information protected by it in issue" by filing the suit, and "to allow the privilege to protect against disclosure of such information would have been manifestly unfair to the opposing party." *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975); *Medtronic, Inc. v. Intermedics, Inc.*, 162 F.R.D. 133, 135 (D. Minn. 1995); *Bieter Co. v. Blomquist*, 156 F.R.D. 173, 179 (D. Minn. 1994). As such, if a party's claim necessarily puts spousal observations at issue, the prosecution of the claim will automatically waive the spousal privilege as to issues which are relevant the claim. *See, e.g., United States v. 281 Syosset Woodbury Rd.*, 71 F.3d 1067, 1073 (2d Cir. 1995)*; Prink v. Rockefeller Ctr., Inc.*, 398 N.E.2d 517 (N.Y. 1979); *Arredondo v. State*, 411 P.3d 640, 647 (Alaska App. 2018).

Plaintiffs have waived spousal privilege by bringing a claim attempting to recover for emotional distress and introducing spousal observations in order to prove that claim. Having put Marie's emotional condition at issue, Plaintiffs cannot selectively disclose spousal observations that are advantageous to them, while denying Defendants the ability to obtain disadvantageous evidence of the same kind. To do so would be to use the privilege as a sword, rather than a shield, allowing Plaintiffs to present a distorted picture of the evidence due to a lack of necessary context. Fundamental fairness compels the conclusion that Plaintiffs have opened the door to letting Defendant obtain and use related spousal observations. Because a comparison between the recording of the May 27, 2019 panic attack and the recordings of the later panic attacks is likely to be probative of issues Plaintiffs have put into controversy, Defendants are entitled to obtain that recording, even if Marie made confidential statements to Craig.

c. Craig's Book

Defendants also seek an order compelling Plaintiffs to disclose the complete contents of a "book" — apparently kept as a series of digital documents — written by Craig over the course of many years and entitled "DADDY HOLD YOU." The context of this request is that Plaintiffs' complaint makes mention of the fact that Sean staged a photograph of himself holding a book entitled "SINS OF MY WIFE," and used this photograph for a Christmas card, allegedly with the assistance of the other Defendants. The complaint posits that Defendants discussed how to use the photograph to defame Craig and inflict emotional distress upon Marie.

A copy of the Christmas card contained in the record shows that Sean is seen making a comical face, and that the photograph is captioned "Several disappointing family secrets came to light this year." (Doc. 343, Ex. 29) The 'book' appears to be a three-ring binder with images of a front and back book cover attached to it. (Id.) The 'front' is laid out with a header reading "A really terrible book," a central title reading "SINS OF MY WIFE," and a footer reading "Craig." (Id.) The 'back' contains a bullet-point list indicating that a reader would "learn about" "burning the chicken once," "getting a cold," "speaking," "using the bathroom," and "breathing." (Id.) Nothing in the pleadings indicates that the Christmas card was ever sent to Craig or Marie, but the current record and the arguments indicate that Sean sent it to Makayla and Miranda.

Plaintiffs argue that Craig's book "DADDY HOLD YOU" is totally irrelevant to the pleadings, and that Sean simply made up "SINS OF MY WIFE" to harass Plaintiffs and their daughters. By contrast, Defendants argue that Craig's real book is relevant because the fictitious book on Sean's Christmas card could only have had its alleged effect because it was seen as parodying Craig's actual book. Lisa alleges that in the late 1990s or early 2000s, Marie spoke

with her on the phone. (Doc. 349, Ex 29 at No. 21) Marie was crying, and she allegedly described recent behavior on the part of Craig. (Id.) The behavior allegedly described was abusive behavior. (*See* id.) When Lisa asked Marie why she stayed with Craig, Marie allegedly responded that Craig was writing a book about all of her faults and that he would show it to their daughters if she left him. (Id.) At some point later, Lisa revealed what Marie had said to the other Defendants. (Doc. 349, Ex. 24) And Craig has confirmed both that Marie did tell Lisa about the book and that "Marie might have felt as if [Craig] had been keeping a record of all of her faults" in the book. (Id.) There is no dispute that "DADDY HOLD ME" is the book whose existence Marie and Craig were each talking about in the above-referenced communications. However, the bullet-point list of "sins" displayed on the Sean's Christmas card did not come from what either Marie or Craig said about "DADDY HOLD ME." (Doc. 343, Ex. 30 at 98:9-12) Rather, these "sins" were simply made up (Id.) — obviously for comic effect.

Defendants have specifically requested production of all chapters of Craig's book. Plaintiffs have provided portions of the book, but objected to production of other portions of the book pertaining to the events described above, both on grounds of relevance and on grounds of spousal privilege. Plaintiffs seek disclosure of the entire book, or, in the alternative, to strike the portions of Plaintiffs' pleadings dealing with the "SINS OF MY WIFE" Christmas card. The difficulty the Court faces in adjudicating this discovery request is that Plaintiffs have raised an objection to relevance; but the relevance of discovery inherently turns on the relationship between that evidence and some valid claim stated in the pleadings; and any examination of that relationship requires the Court to construe the pleadings. The problem is that the portions of Plaintiffs' pleadings dealing with the "SINS OF MY WIFE" Christmas card manifestly fail to state a claim upon which relief may be granted.

First, Plaintiffs have not pleaded a legally sufficient claim for defamation that involves the Christmas card. A claim for defamation must plead "a false and defamatory statement about the plaintiff." *Maethner v. Someplace Safe, Inc.*, 929 N.W.2d 868, 873 (Minn. 2019). As a matter of law, parodies are not defamatory if they cannot "reasonably be interpreted as stating actual facts." *Lund v. Chicago & Nw. Transp. Co.*, 467 N.W.2d 366, 369 (Minn. App. 1991) (citing *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 17, 21 (1990)); *see also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (indirectly quoting *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438, 442 (10th Cir. 1982)). The purported contents of "SINS OF MY WIFE" — characterizing things such as "breathing," "getting a cold," and "using the bathroom" as "sins" — are obviously and deliberately absurd. No reasonable person could interpret it literally. It is clearly parody.

At most, the Christmas card could be read as implying (1) that Craig had written a book which catalogued Marie's faults, and (2) that it was petty or unreasonable of Craig to document these things as faults. But Craig himself has admitted that a person could view his real book as cataloging Marie's faults. If the "gist or sting" of a statement "is true" it is not actionable. *Jadwin v. Minneapolis Star & Trib. Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986). And the implication that something is petty or unreasonable is a mere opinion, which is likewise not actionable. *See, e.g., Metge v. Cent. Neighborhood Improvement Ass'n*, 649 N.W.2d 488, 498 (Minn. App. 2002); *McGrath v. TCF Bank Sav., FSB*, 502 N.W.2d 801, 808 (Minn. App. 1993). Moreover, an objective reader could not conclude that this was the meaning of the Christmas card without additional context. "When the defamatory meaning arises only from facts not apparent upon the face of the publication, the plaintiff has the burden of pleading … such facts…." *Anderson v. Kammeier*, 262 N.W.2d 366, 371 (Minn. 1977). Plaintiffs provided no context in their pleadings, and so no defamatory meaning can be discerned from them.

In addition, a claim for defamation requires proof of special damages, except where the statement is defamatory *per se*. *Maethner*, 929 N.W.2d at 875. Special damages must be pleaded specifically. Minn. R. Civ. P. 9.07. Plaintiffs have pleaded no special damages, labeling their claim as one for defamation *per se*. But nothing that could be implied by the Christmas card is remotely defamatory *per se*. A statement that is defamatory *per se* is one that "from its nature … presumably will … occasion … pecuniary loss." *Pratt v. Pioneer Press Co.*, 28 N.W. 708, 709 (Minn. 1886). It must impugn a person's professional reputation, allege serious moral breaches, or allege commission of a crime. *See, e.g., Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 920 (Minn. 2009); *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 26 n.3 (Minn. 1996); *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987); *High v. Supreme Lodge of the World, Loyal Order of Moose*, 7 N.W.2d 675, 678 (Minn. 1943). Even where an absurd misreading is adopted, Sean's parody Christmas card alleges none of these things.

Second, Plaintiffs have not pleaded a legally sufficient claim for intentional infliction of emotional distress (IIED) that involves the Christmas card. Conduct is not actionable under this tort unless it is "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 439 (Minn. 1983). It "must lead an average member of the community to exclaim 'Outrageous!'" *Langeslag*, 664 N.W.2d at 865. "[I]nsults, indignities [and] petty oppressions" are insufficient. *Id.* An average member of the community might find Sean's Christmas card to be mean-spirited, in poor taste, or ill-advised. But it was not extreme, unusual, or intolerable in ordinary life. As such, the Christmas card is not actionable as a matter of law.

Moreover, the First Amendment "provides protection for … parody…." *Mink v. Knox*, 613 F.3d 995, 1005 (10th Cir. 2010). A public figure may not recover damages for emotional

distress based solely upon another's mockery. *Hustler Mag., Inc.*, 485 U.S. 46. And courts have applied the same rule to private figures as well. *Deupree v. Iliff*, 860 F.2d 300, 304-05 (8th Cir. 1988). In addition, even where "the First Amendment does not bar liability, the protection of speech is nonetheless a weighty enough concern" to bar liability in all but the most unusual cases. Restatement (Third) of Torts: Phys. & Emot. Harm § 46, *cmt.* c. Because the Christmas card here is obviously a parody, public policy would preclude liability for emotional distress based on that parody, even if it could make an ordinary person exclaim "Outrageous!"

Additionally, Minnesota law has adopted the Second Restatement's requirement that IIED claims must arise from conduct "directed at" either the plaintiff or someone who is in the plaintiff's presence at the time of the act. *Dornfeld v. Oberg*, 503 N.W.2d 115, 120 (Minn. 1993); Restatement (Second) of Torts § 46; *see also Martin v. Citibank, N.A.*, 762 F.2d 212, 220 (2d Cir. 1985); *Upchurch v. New York Times Co.*, 431 S.E.2d 558, 561 (S.C. 1993). A communication made to a third party, not in the presence of the plaintiff, is not actionable, even if a plaintiff may justifiably be upset upon learning that the communication was made. *Carter v. Willowrun Condo. Ass'n, Inc.*, 345 S.E.2d 924, 927 (Ga. App. 1986) (letter about plaintiffs sent to plaintiff's lessor, not to plaintiffs); *Reid v. Pierce Cnty.*, 961 P.2d 333, 337 (Wash. 1998) (misused autopsy photographs of plaintiffs' relatives shown to others, not to plaintiffs).

Related to this, IIED claims sounding in defamation generally must follow the pleading requirements of defamation actions. "At a minimum, the plaintiff must allege who made the allegedly libelous statements, to whom they were made, and where." *Pope v. ESA Servs., Inc.*, 406 F.3d 1001, 1011 (8th Cir. 2005). The combination of the requirement of "directed" conduct and the requirement of specific pleading dooms the claim here. The portions of Plaintiffs' complaint setting forth Marie's IIED claim fail to allege that Sean sent his Christmas card

directly to Marie or that he directed his activities toward Marie in some other way. Indeed, there is no explicit allegation of publication at all. Moreover, the record indicates that it was not sent to her at all; it was sent to her daughters. Thus, Marie cannot recover for IIED based on the card.

Third, Plaintiffs have not pleaded a legally sufficient claim for civil conspiracy that involves the Christmas card. A "civil conspiracy" is not "independently actionable." *Leiendecker v. Asian Women United of Minnesota*, 848 N.W.2d 224, 228 (Minn. 2014). "The gist of the action is not the conspiracy charged, but the tort working damage to the plaintiff." *Harding v. Ohio Cas. Ins. Co. of Hamilton, Ohio*, 41 N.W.2d 818, 824 (Minn. 1950); *Bohn Mfg. Co. v. Hollis*, 55 N.W. 1119, 1121 (Minn. 1893). Because Plaintiffs have not validly pleaded any underlying tort involving the "SINS OF MY WIFE" incident, their civil conspiracy claims fail as to that incident as well.

As an alternative to production of Craig's book, Defendants ask for partial dismissal of Plaintiffs' claims as to "SINS OF MY WIFE." Under the circumstances of this case, the Court thinks that dismissal is a better outcome than compelling production. It would clearly be a burden on Plaintiffs to produce Craig's book, and there is no reason to impose that burden in order to serve a claim that is clearly futile. Indeed, at oral argument, Plaintiffs' counsel admitted that the Christmas card incident largely serves as "context" for their main claims. This function will not be diminished by striking the incident from Plaintiffs' pleadings. But striking the incident will narrow the formal claims sufficiently that the Court finds only the most minimal remaining significance to Craig's actual book, such that discovery is unnecessary.

Plaintiffs argue that dismissal is an extreme sanction, and not called for here. But dismissal on the merits is not a sanction at all. A trial court "has the authority to grant summary

judgment, *sua sponte*, when" (1) "no genuine issues of material fact remain," (2) "one of the parties deserves judgment as a matter of law," and (3) "the absence of a formal motion creates no prejudice to the party against whom summary judgment is granted." *Hebrink v. Farm Bureau Life Ins. Co.*, 664 N.W.2d 414, 419 (Minn. App. 2003). This is because a trial court has "inherent power … to dispose summarily of litigation when there remains no genuine issue as to any material fact and judgment must be ordered for one of the parties as a matter of law." *Del Hayes & Sons, Inc. v. Mitchell*, 230 N.W.2d 588, 591-92 (Minn. 1975). The Court believes this is the situation here. However, in an abundance of caution, the Court will delay entering a dismissal. There is a summary judgment motion looming, so the Court will reserve this portion of Defendants' motion pending the outcome of summary judgment, so as to ensure that Plaintiffs are not prejudiced by the lack of a formal motion for dismissal on the merits.

d. Craig's Republication

Defendants' final request to compel discovery seeks a July 9, 2019 video recording of Craig reading an email sent by Renee to Miranda's email address. Plaintiffs' complaint alleges that, on July 8, 2019, Renee defamed Craig by sending an email to Plaintiffs' youngest daughter, Miranda. (Doc. 161, ¶¶ 48-49; Doc. 84, Ex. 21) Plaintiffs asserts that this email implied that Craig was abusing or falsely imprisoning Marie or his daughters. (Doc. 161, ¶ 50) Miranda was deposed concerning the email. She testified that she did not receive the email directly because it was filtered out. (Doc. 319, Ex. 5, at 164:7-166:24) She only saw the email because Craig "rescued" it from the filter, printed it out, and read it to her the next day. (Id.) A video recording of Craig reading the email to Miranda would have been captured by a surveillance video taken inside the house and stored for at least 30 days, during which time Craig could have saved a backup of the recording. (Id. at 172:1-5, 178:13-179:22)

Defendants have requested the recording of Craig reading the email to Miranda. Plaintiffs do not contest that the incident occurred, or that the recording would be relevant if it existed, but they assert that the recording was never saved. Defendants point both to the production of numerous other videos from the same time and also to the timing of this production to cast doubt on the assertion that the recording is no longer retrievable. They ask to compel production of the recording, or, in the alternative, to permit a forensic examination of the server where it initially would have been stored. Plaintiffs point to various distinctions to explain why the production of the recordings cited by Defendants was possible while the production of this recording is not.

It would be possible for the Court to engage in a long discussion of these arguments, but for the Court's purposes here it suffices to state two simple conclusions. First, the Court is inclined to believe that Plaintiffs can no longer retrieve the recording, and even if the Court did not believe Plaintiffs, it is not practical to compel them to produce a recording they claim does not exist. Either way, the only practical way forward is a forensic examination. Second, the Court is not so sure that a forensic examination of the server would be fruitless, as Plaintiffs argue. Moreover, Plaintiffs are not in a good position to complain about a forensic examination that might lead to nothing. They have pursued several forensic examinations in search of messages not recovered. They faulted Defendants for deleting messages before Defendants should have anticipated litigation, while they failed to save a recording of one of the incidents that caused them to initiate litigation. It would be fair play to allow Defendants to engage in a forensic examination of the server if the cost of doing so were worth the benefit. *However*, the Court does not believe that the cost is worth the benefit. That is because there is no reason to invade Plaintiffs' privacy or to impose the costs of an examination on Defendants in order to obtain evidence where the claim to which that evidence would relate is clearly futile.

The primary reason why a recording of Craig reading the email to Miranda would be relevant is that defamation generally requires an "unprivileged publication to a third party." *Maethner*, 929 N.W.2d at 873. "Generally, there is no publication where a defendant communicates a statement directly to a plaintiff, who then communicates it to a third person." *Lewis v. Equitable Life Assur. Soc. of the U.S.*, 389 N.W.2d 876, 886 (Minn. 1986). Unless the "defamed person was in some way compelled to communicate the defamatory statement to a third person, and if it was foreseeable to the defendant that the defamed person would be so compelled," the "communication of a defamatory statement to a third person by the person defamed is not actionable." *Id.* "[T]he injured party cannot create [his] own cause of action by communicating the defamatory statements to others unless under strong compulsion to do so." *Doe v. Hagar*, 765 F.3d 855, 861 (8th Cir. 2014).

The self-publication exception "should be cautiously applied." *Id.* at 888. To be applicable, "the defamed person" must have "no reasonable means of avoiding publication of the statement or avoiding the resulting damages." *Id.* Minnesota courts have recognized a compulsion to self-publish *only* in the context of defamatory reasons given by an ex-employer for termination of employment. *Id.*; *see also Fieser v. Univ. of Minnesota*, 1992 WL 15582 (Minn. App. Feb. 4, 1992) (unpublished); *McInnis v. Stuart Corp.*, 1994 WL 91191 (Minn. App. Mar. 22, 1994) (unpublished). And even in other jurisdictions, it is an extreme rarity for courts to hold that self-publication to a family member has triggered the exception. *See, e.g., Carey v. Mt. Desert Island Hosp.*, 910 F. Supp. 7, 12 (D. Me. 1995) ("Repetition … to friends or family … would not likely meet the compulsion standard."); *Humann v. KEM Elec. Co-op., Inc.*, 450 F. Supp. 2d 1006, 1017 (D.N.D. 2006), *aff'd*, 497 F.3d 810 (8th Cir. 2007) (republications to "members of her immediate family ... as a matter of law, do not satisfy the publication

requirement"). For instance, the Restatement gives the following illustration: "[Defendant] writes a defamatory letter about [Plaintiff] and sends it to [Plaintiff]," who "indignantly shows the letter to his son." Restatement (Second) of Torts § 577, *illus.* 9. "[Plaintiff], not [Defendant], has published a libel." *Id.* A plaintiff therefore bears a heavy burden to show self-publication.

In addition, those courts that have addressed the matter have concluded that the theory of compelled self-publication must be pleaded expressly. *See, e.g., Bowles v. Constellation Brands, Inc.*, 444 F. Supp. 3d 1161, 1174 n.6 (E.D. Cal. 2020). Because Minnesota law requires that a "plaintiff must allege who made the allegedly libelous statements, to whom they were made, and where," the Court is likewise persuaded that compelled self-publication must be pleaded. *Pope*, 406 F.3d at 1011. In other words, it is insufficient to plead only that there was a publication to a third party when a plaintiff seeks to rely upon a theory of compelled self-publication.

In this case, Miranda testified that she received Renee's email only because Craig "rescued" it and showed it to her. Plaintiffs have given no indication that they will contest the truthfulness of Miranda's testimony. If they wished to do so, they had ample incentive to do so as part of the present motion. Thus, assuming that Miranda's testimony is true, Renee never successfully published the allegedly defamatory email to a third party; Craig is the one who actually received it. Thus, Plaintiffs cannot recover for defamation to Craig unless they plead and prove compelled self-publication. Plaintiffs have not pleaded self-publication; they have pleaded publication to a third party. And even if Plaintiffs had pleaded compelled self-publication, there is no reason to expect that the doctrine should be extended to self-publication to family.

A video recording of Craig reading Miranda the email would certainly be competent evidence to support dismissal of the libel claim against Renee on the grounds that there was no

actionable publication. But the record also indicates that such a recording would be entirely cumulative. Miranda's testimony, if uncontradicted, would be sufficient to enter judgment as a matter of law. And, importantly, that testimony is the more crucial piece of evidence, because it explains why Miranda would not have received the email but for Craig's self-publication. Absent some unexpected change in the record, or some unexpected legal argument from Plaintiffs, the Court simply cannot see how the video recording would provide enough additional relevant information to justify the burden of attempting to recover it. As such, the Court elects to reserve this portion of Defendants' motion pending the outcome of summary judgment.

IV. Plaintiffs' Motion to Extend Discovery

Plaintiffs' final motion seeks an order extending the deadline for discovery and pushing off the hearing of dispositive motions. The motion was filed on the last day of discovery. Because a motion for summary judgment can fruitfully be heard even prior to the completion of all discovery, and because it is foreseeable that a summary judgment motion would moot all remaining discovery issues, the Court denies the request to delay summary judgment, and it reserves the question of whether to reopen discovery pending the results of summary judgment.

a. Arguments

As Plaintiffs note, "[a] scheduling order … may be amended … for good cause shown." Minn. Gen. R. Prac. 111.04; Minn. R. Civ. P. 16.02 ("A schedule [may] be modified … upon a showing of good cause."); *see also Mercer v. Andersen*, 715 N.W.2d 114, 123 (Minn. App. 2006) (broad discretion). However, when a party seeks to delay summary judgment in order to procure additional discovery, courts must examine: (1) "whether the party seeking more time is acting from a good faith belief that material facts will be discovered," and (2) "whether the party

has been diligent in seeking discovery prior to bringing the motion." *Bixler by Bixler v. J.C. Penney Co.*, 376 N.W.2d 209, 216-17 (Minn. 1985).

Plaintiffs argue that there is good cause to extend the discovery deadline so that they can seek information about deleted text messages exchanged between the Defendants. They point out (1) that Sean lied about deleting some of these messages during his first deposition, (2) that they deposed Renee and Lisa without knowing this, and (3) that they were not able to depose Sean about his false testimony until recently. In addition, it was only at the motion hearing that Defendants clarified that they had performed an additional forensic examination of Lisa's phone that Defendants' counsel was still in the process of reviewing prior to disclosure. If discovery were extended, then Plaintiffs would seek second depositions of Renee and Lisa in order to propound further questions about the deleted messages. They have not sought those second depositions before, even though they have known for some time that Sean would testify that he did delete some messages.

Defendants argue that good cause to extend the deadline for discovery does not exist because the additional discovery that Plaintiffs would seek is excessive and not proportional to the needs of the case. As they note, "the scope of discovery" should be "*proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy*, the parties' relative access to relevant information, the parties' resources, *the importance of the discovery in resolving the issues*, and *whether the burden or expense of the proposed discovery outweighs its likely benefit*." Minn. R. Civ. P. 26.02(b) (emphasis added). They argue that discovery should not be a never-ending battle of attrition. Its purpose is not to harass or wear down an opponent, it is to obtain facts relevant to resolve claims on their merits.

b. Discussion

The Court finds it difficult to conclude, at this juncture, that there is good cause to extend discovery. Virtually all of the additional discovery Plaintiffs seek relates exclusively to their civil conspiracy claims, and exclusively to the element of that claim that requires the existence of a conspiracy. But there has already been extensive and burdensome discovery on this subject. And the existence of a conspiracy is *not* the only necessary element of these claims. As previously discussed, the claim also requires an independent "tort working damage to the plaintiff." *Harding*, 41 N.W.2d at 824. Damage means *actual* damages. *Hutchins v. Hutchins*, 7 Hill 104 (N.Y. 1845) ("A simple conspiracy, however atrocious, unless it resulted in *actual damage* to the party, never was the subject of a civil action…." (emphasis added)); *see Griva v. Davison*, 637 A.2d 830, 849 (D.C. 1994); *James v. Bob Ross Buick, Inc.*, 855 N.E.2d 119, 125 (Ohio App. 2006); *Cohen v. Pelagatti*, 528 A.2d 657, 659 (Pa. Super. 1987); *see also Bunton v. Bentley*, 176 S.W.3d 1, 15-16 (Tex. App. 1999); *More v. Johnson*, 568 P.2d 437, 440 (Colo. 1977); *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 150 (Del. 1987); *Van Royen v. Lacey*, 277 A.2d 13, 14 (Md. 1971).

There is ample reason to doubt that Plaintiffs are capable of proving an independent tort which caused *actual* damages. First, Plaintiffs have alleged that Sean published false and defamatory statements to Sarah Duffy, to Melvin Liebsch, to Miranda Stevenson, and to Makayla Stevenson. As to the statements made to Plaintiffs' first attorney, Ms. Duffy, these do not appear to be actionable at all given that they were made to opposing counsel in response to a threat of litigation. *See Mahoney & Hagberg v. Newgard*, 729 N.W.2d 302, 306 (Minn. 2007); *Freier v. Indep. Sch. Dist. No. 197*, 356 N.W.2d 724, 733 (Minn. App. 1984) ("absolute privilege applies with equal force to both" claims for "defamation and emotional distress"); *see also Doe*

v. Nutter, McClennen & Fish, 668 N.E.2d 1329, 1332 (Mass. App. 1996) (response to demand letter); *Ashton-Blair v. Merrill*, 928 P.2d 1244, 1246 (Ariz. App. 1996) (similar).

As to the remaining recipients, Plaintiffs have not alleged special damages. Therefore, in order to recover substantial damages on that claim, Plaintiffs must show an unprivileged publication of a statement that is false and defamatory *per se*. *Maethner*, 929 N.W.2d at 873, 875. The statements to Mr. Liebsch appear to state or imply opinions, interpretations, or allegations of non-criminal conduct, and so do not appear to be defamatory *per se*. *See McKee v. Laurion*, 825 N.W.2d 725, 731 (Minn. 2013); *Larson v. R.B. Wrigley Co.*, 235 N.W. 393, 394 (Minn. 1931) (Words are actionable *per se* by implication only if "in their ordinary acceptance, [they] would naturally and presumably be understood, in the connection and under the circumstances in which they are used, to impute a charge of crime."). The statements to Miranda appear not to have caused any damages because she did not believe them. (Doc. 319, Ex. 5, at 161:20-162:22) And the record gives little reason to guess that the statements made to Makayla will fare any better as a basis for substantial damages.

Second, Plaintiffs have alleged that Sean intentionally inflicted emotional distress upon Marie. But they must meet a "high threshold" in order to take such a claim to a jury. *Hubbard*, 330 N.W.2d at 438. And Plaintiffs' claim faces substantial hurdles in meeting that threshold. *See, e.g.,* Restatement (Third) of Torts: Phys. & Emot. Harm § 46, *cmt.* f. The Court is not aware of any case, in this jurisdiction or any other, that has upheld a claim of intentional infliction of emotional distress based on facts similar to those underlying Marie's claim. And this is not because conduct like that alleged in the complaint is rare. Any district court judge with a family or probate calendar can expect to read about similar incidents on a regular basis.

Third, Plaintiffs have alleged that Renee published false and defamatory statements to the other Defendants, to other unidentified family members on unidentified occasions, and to Miranda in an email. It is not clear that Plaintiffs have even pleaded that these statements are part of the claim for civil conspiracy. But even if they have, the statements provide a poor prospect for actual damages. As discussed above, the email appears to be non-actionable because it was intercepted by Craig. The statements to unidentified family members are inadequately pleaded. *Pope*, 406 F.3d at 1011 ("At a minimum, the plaintiff must allege … to whom they were made, and where."). And it appears that any statement made to other Defendants had no effect because it was not new information to them.

In short, Plaintiffs' civil conspiracy claims appear likely to fail based upon the contents of the complaint, based upon the documents referenced in the complaint, or based upon facts easily available to Plaintiffs prior to the commencement of this litigation, and which are unrelated to the parties' discovery disputes. Perhaps it is possible that Plaintiffs will ultimately bring forth additional facts or make additional arguments that will give the Court reason to believe that Plaintiffs could potentially prevail on a civil conspiracy claim. But, at this juncture, there is no reason to think that Plaintiffs could sustain such a claim, even if they had every bit of evidence of a conspiracy that they have sought. Given that there has already been extensive discovery, there is little reason to further extend Plaintiffs' opportunity for discovery based on the present record. In the words of the rules, "the importance of" the additional discovery that Plaintiffs seek to "resolving the issues" appears to be extremely minimal. Minn. R. Civ. P. 26.02(b).

Defendants have repeatedly indicated that there will soon be a motion for summary judgment. That motion will help to clarify what is really at stake in this litigation. And the Court

is entirely capable of considering that motion even while some discovery might still be outstanding. Plaintiffs can, of course, resist summary judgment by submitting an affidavit explaining why they believe they lack access to evidence that Defendants formed a conspiracy. *See* Minn. R. Civ. P. 56.04. If Plaintiffs can show that they are otherwise able to meet the elements of a civil conspiracy claim, the Court will determine how to address further discovery issues. But if Defendants are entitled to judgment as a matter of law based on facts that are both undisputed and ripe for summary judgment, then there will be no further need for discovery as to immaterial issues. *Cf. QBE Ins. Corp. v. Twin Homes of French Ridge Homeowners Ass'n*, 778 N.W.2d 393, 400 (Minn. App. 2010) ("[W]hen further discovery will not reveal material facts, the district court may" grant summary judgment without allowing additional discovery.); *Rice v. Perl*, 320 N.W.2d 407, 412 (Minn. 1982) (further discovery justified when it could uncover *material* facts). As such, the Court elects to reserve Plaintiffs' motion to extend discovery.

V. Attorney Fees

Finally, the Court addresses the parties' various requests for attorney fees. First, Plaintiffs seek their attorney fees for bringing their three motions for spoliation, and Defendants seek their attorney fees for responding to those motions. Neither party prevailed in the entirety of these motions. Given that mixed outcome, the Court believes it is fair and equitable for the parties to bear their own costs. That outcome is more efficient than making cross-awards. Moreover, courts do not wish to discourage legitimate motion practice, and the mixed result here indicates that counsel could believe their motions were arguably meritorious in their entirety. Finally, neither party cites a rule that is clearly applicable to attorney fees requested in a spoliation motion.

Second, Defendants seek their attorney fees for bringing their motion to compel, and Plaintiffs seek their attorney fees for responding to this motion. If a motion to compel is granted, attorney fees may be awarded to the moving party unless "the opposing party's nondisclosure, response, or objection was substantially justified or … other circumstances make an award of expenses unjust." Minn. R. Civ. P. 37.01(d)(1). Likewise, if a motion is denied, attorney fees may be awarded to the opposing party on a similar basis. Minn. R. Civ. P. 37.01(d)(2). Fees may also be apportioned. Minn. R. Civ. P. 37.01(d)(3). An award of attorney fees is discretionary. *Frontier Ins. Co. v. Frontline Processing Corp.*, 788 N.W.2d 917, 926 (Minn. App. 2010).

For the current motion to compel, the Court has reserved ruling on two parts of the motion; it will likewise reserve attorney fees for these portions of the motion. This leaves the two parts that were granted. For the first part, involving Marie's medical providers, the Court finds that the circumstances of the motion were sufficiently irregular that an award of attorney fees is not justified; the Court's main objective is to enact a practical solution and keep the matter moving forward. For the second part, involving the video of Marie's panic attack, the Court has not ruled that the video was never privileged, but has ruled only that the privilege has been waived. Given that waiver of marital privilege is an issue that is litigated only infrequently, the Court can understand why a party could reasonably litigate the issue in good faith. The Court, in its discretion, elects to award no attorney fees at this time.

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Conclusion

In summary: (1) the Court orders Sean to pay for the forensic examinations of Renee and Lisa's phones; (2) it orders Plaintiffs to provide a definitive list of Marie's medical providers; (3) it orders Plaintiffs to produce the video of Marie's May 27, 2019 panic attack; (4) it reserves Defendants' requests to examine Plaintiffs' server and Craig's book; (5) it likewise reserves Plaintiffs' motion to extend discovery pending summary judgment; and (6) it denies all other relief sought. The Court will provide the parties with guidance on how to renew their reserved motions following summary judgment, provided that it is appropriate to do so.

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