STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Joint Petition of Hollis Telephone Company, Inc., Kearsarge Telephone Company, Merrimack County Telephone Company, and Wilton Telephone Company, Inc. ("Joint Petitioners"), for Authority to Block the Termination of Traffic from Global NAPs, Inc., to Exchanges of the Joint Petitioners on the Public Switched Telephone Network	**DT 08-028**

JOINT PETITIONERS' MOTION TO COMPEL GLOBAL NAPS, INC. TO RESPOND TO DATA REQUESTS

NOW COME Hollis Telephone Company, Inc., Kearsarge Telephone Company, Merrimack County Telephone Company, and Wilton Telephone Company, Inc. (collectively, the "Joint Petitioners") and, pursuant to N.H. Admin. Rules Puc 203.07 and 203.09(i), respectfully request the New Hampshire Public Utilities Commission ("Commission") to compel Global NAPs, Inc. ("GNAPs") to respond to the following four (4) Joint Petitioners' Data Requests that were propounded to GNAPs in this proceeding: **TDS:Global-7** (and restated in **TDS:Global-22**); **TDS:Global-21**; **TDS:Global-23** and **TDS:Global-26**. In support of their Motion, the Joint Petitioners state as follows.

1. By Secretarial Letter dated May 20, 2008, the Commission set a Procedural Schedule for this proceeding, which provided for an initial round of discovery and a follow-up round of discovery.

2. On May 23, 2008, the Joint Petitioners propounded their first set of data requests to GNAPs.

3. On June 6, 2008, GNAPs served its objections and responses to the data requests propounded by the Joint Petitioners.

4. On June 13, 2008, the Joint Petitioners propounded a set of follow-up data requests to GNAPs.

5. On June 27, 2008, GNAPs served its objections and responses to the follow-up data requests propounded by the Joint Petitioners.

6. On July 9, 2008, the Staff of the Commission convened a technical session ("Technical Session"), at which the Joint Petitioners reviewed GNAPs' objections and responses to the Joint Petitioners' data requests, expressed concern that GNAPs had failed to provide complete responses to a number of those data requests, and attempted in an extended discussion with GNAPs to elicit satisfactory responses from GNAPs to the Joint Petitioners' data requests.

7. At the Technical Session, GNAPs agreed to respond to certain supplemental data requests that the Joint Petitioners would provide in writing. However, GNAPs specifically refused to respond to Data Request TDS:Global-7 unless compelled to do so upon a Motion granted by the Commission.

8. The Joint Petitioners hereby certify, in accordance with N.H. Admin. Rule Puc 203.09(i)(4), that they made a good-faith effort, at the Technical Session, to resolve their discovery disputes with GNAPs informally.

9. Joint Petitioners served their written supplemental data requests on GNAPs on July 10, 2008.

10. GNAPs served its objections and answers to the Joint Petitioners' supplemental data requests on July 16, 2008.

11. The Joint Petitioners assert that GNAPs has improperly withheld, in whole or in part, its responses to Data Requests TDS:Global-7, TDS:Global-21, TDS:Global-22, TDS:Global-23 and TDS:Global-26. The Joint Petitioners accordingly ask that the Commission compel GNAPs to provide complete responses to the aforesaid Data Requests.

A. TDS:Global-7 and TDS:Global-22

12. In Data Request TDS:Global-7, the Joint Petitioners requested the following:

> Please provide a diagram that illustrates and displays the complete corporate structure of Global NAPs, Inc. and its relation to any and all affiliates and subsidiaries; **OR**, if no such diagram is available, please provide a narrative description of the aforesaid corporate structure that includes, without limitation, an explanation of the relationship of each affiliate and subsidiary to Global NAPs, Inc.

13. GNAPs responded to TDS:Global-7 as follows:

> Global objects on the basis of relevancy. Neither its corporate organization nor that of TDS is relevant to the issue of whether or not traffic is subject to access charges.

14. In their supplemental data requests, the Joint Petitioners then propounded TDS:Global-22, which states:

> Provide a diagram of all corporate entities affiliated with Global NAPs, Inc., Global NAPs Realty, Inc., Global NAPs Networks, Inc., Global NAPs New Hampshire, Inc., and Ferrous Miner Holdings, Ltd.

15. GNAPs responded to TDS:Global-22 as follows:

> This is beyond the discovery discussed and exceeds that which would reasonably lead to admissible evidence.
>
> FM
> I
> GNI – GNR – GNN – GN-NH

16. The Joint Petitioners challenge GNAPs' objections and answers to TDS:Global-7 and TDS:Global-22.

17. GNAPs expressly refused to answer TDS:Global-7 at the Technical Session absent a Motion to Compel, and its answer to TDS:Global-22 is wholly deficient.

18. In its response to TDS:Global-22, GNAPs failed to list "*all* corporate entities" affiliated with the five listed companies. Instead, GNAPs provided three lines of text comprising letters or initials that presumably purport to represent a partial corporate structure. GNAPs provided no definitions for the initials, and provided no information about the corporate entities apparently designated by those initials.

19. On information and belief, the Joint Petitioners allege that there are more affiliates in the GNAPs corporate family than the five entities that have been discussed to-date (i.e., Global NAPs, Inc., Global NAPs Networks, Inc., Global NAPs Realty, Inc., Global NAPs New Hampshire, Inc., and Ferrous Miner Holdings, Ltd.).

20. Discovery of the complete corporate structure of the GNAPs corporate family is relevant to the instant proceeding, which involves, in pertinent part, allegations that GNAPs is conducting its business in an unfair and deceptive manner, in violation of

N.H. Admin. Rules Puc 431.19 and 451.14, so as to avoid paying the Joint Petitioners the lawful charges to which they are entitled.[1]

21. GNAPs, as a New Hampshire Competitive Local Exchange Carrier ("CLEC"), is required to maintain sufficient assets to "satisfy its outstanding obligations to other LECs for New Hampshire services", pursuant to N.H. Admin. Rule Puc 431.14(e).

22. GNAPs represented in the July 9th Technical Session that five separate GNAPs entities "combine to provide service in New Hampshire: but only one, GNAPs, Inc., is certified to provide CLEC service."

23. In analogous state regulatory proceedings in other states (discussed further below), GNAPs has claimed its operating companies are not the entities responsible for providing service and thus are not ultimately responsible for the payment of intercarrier invoices and other regulatory obligations. Further, GNAPs has claimed in other jurisdictions that its operating companies lack sufficient assets to satisfy their regulatory obligations.

24. Last year, the California Public Utilities Commission ("California PUC") suspended the certificate of Global NAPs California Inc. ("GNAPs CA") until GNAPs CA pays Cox California Telecom, LLC ("Cox") $985,439.38 plus interest on overdue access charges invoiced by Cox.[2] At an April 9, 2007 hearing at which GNAPs CA was ordered to appear and either demonstrate payment or show cause for failure to pay,

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[1] *See* Joint Petition, paras. 32-33, at 7-8.

[2] *Cox California Telecom, LLC v. Global NAPs California, Inc.*, Docket No. 06-04-026, Opinion Suspending Registrant's Certificate of Public Convenience and Necessity, Decision 07-06-44, (Calif. PUC June 21, 2007), available at http://docs.cpuc.ca.gov/published/AGENDA_DECISION/69197.htm.

GNAPs CA claimed that it could not be found in contempt because GNAPs CA had no resources with which to pay Cox. GNAPs CA filed two separate affidavits in that proceeding in which its Treasurer, Richard Gangi, claimed that GNAPs CA has no liquid assets and owns no real estate, offices or banks in the state of California. The California PUC suspended GNAPs CA's certificate, finding that there was no doubt that GNAPs CA violated California's utility laws, and that "a fine is ineffectual as a response to this violation because [GNAPs CA] has admitted that it has no money and its debts are not guaranteed by its parent or any other solvent entity."[3]

25. In a separate proceeding, the California PUC found that GNAPs CA had breached its interconnection agreement with Pacific Bell Telephone Company ("AT&T California") by failing to pay invoiced access and reciprocal compensation charges. The California PUC ordered GNAPs CA to pay AT&T California $18,589,494.17.[4] Global NAPs CA filed an appeal, which was rejected with an invitation to re-file. Global NAPs CA re-filed its appeal on July 3, 2008.

26. The United States District Court in Connecticut recently ordered Global NAPs, Inc. to pay Southern New England Telephone Company ("SNET") $5.25 million for failure to pay access charges, and approximately $625,000 in attorneys' fees and costs. After SNET alleged that the corporate structure of Global NAPs, Inc. was a "sham" and amended its complaint to add defendants Global NAPs New Hampshire, Inc., Global NAPs Networks, Inc., Global NAPs Realty, Inc., and Ferrous Miner Holdings,

[3] *Id.*

[4] *Pacific Bell Tel. Co. d/b/a AT&T California v. Global NAPs California, Inc.*, Docket No. 07-11-018, Presiding Officer's Decision Finding Global NAPs California in Breach of Interconnection Agreement (Calif. PUC, June 4, 2008), available at http://docs.cpuc.ca.gov/efile/POD/83756.pdf.

Ltd., the Court ordered Global NAPs to produce financial and corporate information. Global NAPs, Inc. did not produce the documents. The Court issued a more detailed order of disclosure and granted SNET's motion for an order to attach personal property. In granting SNET a default judgment, the Court found that GNAPs willfully violated the court's discovery order to produce financial and corporate information, withheld and destroyed evidence in bad faith, gave misleading and nonresponsive answers to discovery requests, prejudiced the plaintiffs, squandered judicial resources, and committed a "fraud upon this court."[5]

27. Parties to the Connecticut action later alleged that GNAPs, Inc. transferred millions of dollars to a Virgin Islands bank account belonging to a Virgin Islands limited liability company owned by Frank Gangi, who was and may still be president and director of Global NAPs, Inc. A Virgin Islands Court issued, and refused to quash, a subpoena for the bank records of the Gangi-owned company, stating that the bank records were relevant to SNET's veil-piercing theory in the Connecticut case.[6]

28. In Massachusetts in 2006, Verizon New England, Inc. was granted an expedited prejudgment attachment and attachment by trustee process in the amount of $70 million. The U.S. District Court of Massachusetts found that Verizon had established a reasonable likelihood that it is entitled to the damages in the amount of $70 million, and the Court noted that "prejudgment remedies may be particularly appropriate in this case, since the record indicates that Global, its principals, and affiliated entities

[5] *Southern New England Telephone Company v. Global NAPS, Inc.*, Civ. A. No. 3:04-cv-20785, 2008 WL 2704495 (D. Conn. July 1, 2008) ("SNET Connecticut").

[6] *Southern New England Telephone Company v. Global NAPs, Inc.*, slip op., 2007 WL 3171949 (D. Virgin Islands, Oct. 6, 2007).

may have attempted to transfer or otherwise conceal Global's assets to avoid execution of any future judgments against it."[7]

29. In Illinois, a company called MyBell, Inc. ("MyBell") applied for a certificate to provide facilities-based local telecommunications in Chicago. Shortly after the certificate was granted by the Illinois Commerce Commission ("ICC"), Illinois Bell Telephone Company ("AT&T Illinois") moved for leave to intervene and reopen the record stating that it had evidence to prove that MyBell was yet another of the "shifting set of interlocking corporations created and owned by . . . the sole shareholder of the so-called parent company of the Global NAPs organization" and that MyBell's officers, directors, and management personnel were all employees of Global NAPs.[8] AT&T Illinois alleged that the Global NAPs corporations that are certificated in various states lack the financial resources to provide the services for which they are certificated, and that Global NAPs' treasurer had admitted that the Global NAPs organization includes companies with no assets or customers, which exist solely to hold a certificate to provide service and to enter into interconnection agreements.[9] Finally, AT&T Illinois stated that "the Global NAPs organization has been purposefully structured so as to intentionally deprive certificated entities like Global NAPs of Illinois of sufficient financial resources to provide service on a legitimate basis and to provide a source of financial recourse for

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[7] *Global NAPS, Inc. v. Verizon New England*, 2006 WL 2632804 (D.Mass. Sept. 11, 2006), at *6, f.n.6.

[8] *Application for a Certificate of Local Authority to Operate as a Facilities-Based Carrier of Telecommunications Services in Chicago in the State of Illinois*, Request for Reconsideration of Ruling on Petition for Leave to Intervene and Motion to Reopen Record to Hear Additional Evidence, Docket 07-0063 (Mar. 7, 2007), at 3 (available at http://www.icc.illinois.gov/downloads/public/edocket/192527.pdf).

[9] *Id.*, at 4.

creditors.[10] The ICC reopened the docket, and MyBell withdrew its application, depriving the ICC of the opportunity to investigate AT&T Illinois' claims.

30. AT&T Illinois brought suit against Global NAPs of Illinois in United States District Court, N.D. Illinois (Eastern Division) for millions of dollars in unpaid charges. That proceeding is ongoing.

31. A review of current and past cases at federal courts and public utilities commissions in the several states reveal judgments amounting to at least tens of millions, if not more than one hundred million dollars, as well as disturbing evidence of a corporate shell game causing assets to be rendered unavailable to satisfy those judgments.

32. Discovery of the corporate structure of the GNAPs corporate family is thus relevant to the Joint Petitioners' claims that GNAPs is conducting its New Hampshire business in an unfair and deceptive manner, and that GNAPs is in violation of New Hampshire utilities law.

33. Discovery of the corporate structure of the GNAPs corporate family is critical to a complete and meaningful review of the issues of this proceeding and to the relief requested by the Joint Petitioners.

34. For the foregoing reasons, the Joint Petitioners move to compel a full and complete response to TDS:Global-7 and TDS:Global-22.

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[10] *Id.*, at 5.

B. TDS:Global-21

35. In Data Request TDS:Global-21, the Joint Petitioners requested the following information:

> Please provide a list of all judgments entered against Global NAPs, Inc. Include for each listed judgment: (a) the caption of the case, (b) the docket number, (c) the full name of the court or administrative tribunal in which judgment was entered (e.g., United States District Court for the Southern District of New York), (d) the dollar amount of the judgment so entered against Global NAPs, and (e) whether the judgment included a limitation or revocation of Global NAPs, Inc.'s certification or authorization to provide any service, The list should include all judgments, regardless of whether reconsideration was requested, an appeal was taken or a collateral challenge was made.

36. GNAPs responded by providing only two documents. One purported to be a notice of a judgment in excess of $691,000, following an action by a GNAPs employee for an unlawful dismissal from her employment while she was on maternity leave. The second document purported to be a notice of an amended default judgment in favor of SNET in the amount of $5,893,542.86, following an action by SNET to recover unpaid access charges.

37. In addition to providing the two documents listed in paragraph 36 above, GNAPs also stated in its answer that:

> ... the Judgment in the United States District Court of the District of Connecticut. Docket No. 3:04-cv-02075-JCH, is subject to a pending Motion for Reconsideration.

38. As discussed previously in paragraphs 23-31, *supra,* the public record reveals numerous state judicial and regulatory actions that have resulted in judgments

against GNAPs and its corporate affiliates in the amount of tens of millions of dollars and the use of regulatory actions up to and including revocation or withdrawal of state operating authority for some GNAPs affiliates.

39. The Joint Petitioners' data request included "all judgments" regardless of "whether reconsideration was requested, an appeal was taken or a collateral challenge was made."

40. The Joint Petitioners' data request was not restricted to judgments involving monetary damages.

41. The cases cited by the Joint Petitioners in paragraphs 23-31, *supra*, provide examples of cases in which judgments were entered against Global NAPs, Inc., and its affiliates.

42. Judgments for monetary damages were entered against Global NAPs, Inc. in Massachusetts.[11]

43. The North Carolina Utilities Commission granted a different form of relief in favor of BellSouth Telecommunications, Inc. ("AT&T North Carolina"), authorizing AT&T to disconnect services to Global NAPs, Inc. for failure to pay access and other charges.[12]

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[11] *Global NAPS, Inc. v. Verizon New England, Inc.*, CIV.A 02-12489-RWZ, 05-10079-RWZ, 2006 WL 2632804, slip. op. at *5-6 (D. Mass. Sept 11, 2006) (granting Verizon a prejudgment attachment in the amount of $70 million against the assets of GNAPs, and discussing the procedural history of the litigation, which included a DTE arbitration order requiring GNAPs to pay access charges to Verizon. The DTE's order was affirmed by the First Circuit. *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59 (1st Cir. 2006)).

[12] *In the Matter of Termination of Services to Global NAPs North Carolina, Inc., by BellSouth Telecommunications, Inc., for Nonpayment*, P-1141, SUB2 (N.C. Util. Comm. Nov. 13, 2007) (authorizing AT&T to disconnect services to Global NAPs for nonpayment of access charges).

44. On information and belief, the Joint Petitioners allege that the two judgments provided by GNAPs and the additional examples cited herein do not provide an exhaustive list of the judgments entered against Global NAPs Inc., and its affiliates.

45. For the foregoing reasons, the Joint Petitioners move to compel a full and complete response to Data Request TDS:Global-21.

C. TDS:Global-23

46. In Data Request TDS:Global-23, the Joint Petitioners asked for the following information:

> Please provide a complete list of officers and directors for each of the following entities and identify an individual who is competent to testify under oath concerning the present financial condition of each such entity:
>
> a. Global NAPs, Inc.
> b. Global NAPs Networks, Inc.
> c. Global NAPs Realty, Inc.
> d. Global NAPs New Hampshire, Inc.
> e. Ferrous Miner Holdings, Ltd

47. GNAPs objected, stating:

> This is beyond the discovery discussed and exceeds that which would reasonably lead to admissible evidence. Notwithstanding such objection Frank T. Gangi is the only officer in the above listed companies that would testify to the present financial condition of each entity.

48. The Joint Petitioners challenge GNAPs' answer to Data Request TDS:Global-23.

49. The Joint Petitioners restate the assertions made in paragraphs 19-31, *supra*.

50. Discovery of the GNAPs corporate family, including the identification of every one of its officers, is relevant to the Joint Petitioners' claims that GNAPs is conducting its New Hampshire business in an unfair and deceptive manner, and that GNAPs is in violation of New Hampshire utilities law.

51. Discovery of the GNAPs corporate family, including the identification of every one of its officers, is critical to a complete and meaningful review of the issues of this proceeding and to the relief requested by the Joint Petitioners.

52. For the foregoing reasons, the Joint Petitioners move to compel a full and complete response to Data Request TDS:Global-23.

D. TDS:Global-26

53. In Data Request TDS:Global-26, the Joint Petitioners asked for the following information:

> Please provide true and complete copies of the completed Forms CLEC-2 (Assessment Report) and CLEC-3 (Annual Report) for Global NAPs, Inc., as submitted to the Commission for the fiscal or reporting Years 2004 through 2007, inclusive. If Global NAPs, Inc., did not submit the required Forms CLEC-2 and/or CLEC-3 to the Commission for any of the aforesaid years, please (a) state when Global NAPs, Inc., expects to submit any and all missing Forms CLEC-2 and CLEC-3 to the Commission, and (b) provide in the alternative true and complete copies of the audited financial statements of Global NAPs, Inc., to include, without limitation, a balance sheet, income statement and footnotes, certified by a responsible officer of Global NAPs, Inc. (or an affiliated entity) that the information contained therein is true and correct in all material respects.

54. In its answer, GNAPs stated:

> It is not clear that Global has not made filings. I have attached documents purported to represent filings made by Global. Global will work with Staff to complete any missing files to ensure complete regulatory compliance.

55. The Joint Petitioners challenge GNAPs's answer to Data Request TDS:Global-26.

56. GNAPs provided several attachments purporting to be the CLEC-3 report of Global NAPs, Inc. for 2004; a cover letter that purported to accompany GNAPs' CLEC-2 report for the year ending 2006 (although the report itself was not included); a combined CLEC-3 and CTP-3 report for 2007, and a CLEC-2 report for 2007.

57. GNAPs failed to provide completed CLEC-2 reports for the years 2004, 2005, and 2006, and completed CLEC-3 reports for the years 2005 and 2006.

58. Neither the CLEC-2 nor the CLEC-3 report for 2007 is signed, and there is no record that the two reports were actually filed at the Commission.

59. GNAPs redacted all financial information from the few documents that it did provide, namely, the document purporting to be the CLEC-3 report of Global NAPs, Inc. for 2004, the document purporting to be the combined CLEC-3 and CTP-3 report for of Global NAPs, Inc. for 2007, and the document purporting to be the CLEC-2 report of Global NAPs, Inc. for 2007.

60. The financial data included in CLEC-2 and CLEC-3 reports filed with the Commission is public information. GNAPs did not claim that such information is confidential, nor did it point to an agreement with the Commission to treat such information as confidential. The Joint Petitioners, therefore, fail to understand the reason

for which GNAPs redacted its financial information from the few documents that it provided in response to the Joint Petitioners' information request.

61. GNAPs failed to provide true and complete copies of the audited financial statements of Global NPs Inc. in lieu of the missing or redacted CLEC-2 and CLEC-3 reports for the years 2004-2007, inclusive, as requested by the Joint Petitioners in Data Request TDS:Global-26.

62. The Joint Petitioners restate the assertions made in paragraphs 19-31, *supra.*

63. Discovery of the GNAPs's financial data is relevant to the Joint Petitioners' claims that GNAPs is conducting its New Hampshire business in an unfair and deceptive manner, and that GNAPs is in violation of New Hampshire utilities law.

64. Discovery of the GNAPs financial data is critical to a complete and meaningful review of the issues of this proceeding and to the relief requested by the Joint Petitioners, particularly in the light of judicial findings indicating that "[Global NAPs, Inc.], its principals, and affiliated entities may have attempted to transfer or otherwise conceal Global's assets to avoid execution of any future judgments against it."[13]

65. For the foregoing reasons, the Joint Petitioners move to compel a full and complete response to Data Request TDS:Global-26, including the dates on which GNAPs purports to have filed the CLEC-2 and CLEC-3 for 2007.

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[13] *Global NAPS, Inc.*, 2006 WL 2632804 (D.Mass. Sept. 11, 2006), at *6, f.n.6. *See also, Southern New England Telephone Co. v. Global NAPs, Inc.*, slip op., 2007 WL 3171949 (D. V.I. Oct. 26, 2007).

WHEREFORE, the Joint Petitioners respectfully request the Commission to grant the following relief:

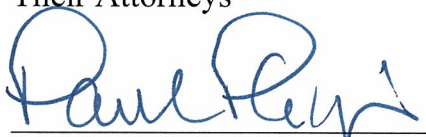
A. An Order compelling GNAPs to provide complete responses to Data Requests TDS:Global-7, TDS:Global-21, TDS:Global-22, TDS:Global-23 and TDS:Global-26; and

B. Such other relief as the Commission deems just and equitable in the due administration of justice.

Respectfully submitted,

HOLLIS TELEPHONE COMPANY, INC.,
KEARSARGE TELEPHONE COMPANY,
MERRIMACK COUNTY TELEPHONE COMPANY,
and WILTON TELEPHONE COMPANY, INC.

By: PRIMMER PIPER EGGLESTON & CRAMER PC,
Their Attorneys



By: Paul J. Phillips, Esq.
Cassandra LaRae-Perez, Esq.
Primmer Piper Eggleston & Cramer PC
P.O. Box 1309
Montpelier, VT 05601-1309
Tel: (802) 223-2102
E-mail: pphillips@ppeclaw.com

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & ST. JOHN

SOUTHERN NEW ENGLAND TELEPHONE COMPANY, Plaintiff, v. GLOBAL NAPS, INC., *et al.* Defendants.	)	Misc. Docket No. 2007-21 Civil Action No. 3:04 CV 2075 (JCH) (Pending in the U.S. District Court of Connecticut)

ATTORNEYS:

Ruth Miller, Esq.
St. Thomas, U.S.V.I.
For the Plaintiff.

Charles S. Russell, Jr., Esq.
St. Thomas, U.S.V.I.
For the Defendants.

MEMORANDUM OPINION

GÓMEZ, C.J.

Before the Court is the motion of third party BABP (V.I.) LLC ("BABP") to stay compliance with a subpoena duces tecum (the "Subpoena") pending an appeal to the Third Circuit Court of Appeals.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Subpoena in this action arises out of litigation (the "Connecticut Litigation") currently pending in the U.S. District

Court for the District of Connecticut (the "Connecticut Court").[1] Plaintiff Southern New England Telephone Company ("SNET") provides local telephone service in Connecticut. The defendant, Global NAPs, Inc. ("Global NAPs"), is a licensed telecommunications carrier in Connecticut. SNET and Global NAPs entered into an agreement to provide telecommunications services in Connecticut. In 2004, SNET filed a complaint against Global NAPs in the Connecticut Court, alleging, *inter alia*, that Global NAPs had failed to pay SNET certain charges. In 2006, SNET filed an amended complaint. The amended complaint added several defendants (the "Defendants") under alter ego and corporate veil-piercing theories.

SNET alleges that Frank Gangi, allegedly the president and director of the entities named as defendants in the Connecticut Litigation, is also the manager and owner of BABP. BABP is a limited liability company with business offices in St. Thomas, U.S. Virgin Islands and is organized under Virgin Islands law.

On July 16, 2007, this Court issued the Subpoena to the St. Thomas offices of Bank of Nova Scotia ("Nova Scotia"), where BABP holds accounts. The Subpoena required compliance by August 15, 2007 and required Nova Scotia to produce the following:

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[1] *Southern New England Telephone Co. v. Global NAPs, Inc., et al.*, No. 04-2075 (D. Conn.) (Hall, J.).

1. All bank statements for all accounts of BABP from January 2002 to the present.

2. For each deposit of $15,000 or greater into an account held by BABP from January 2002 to the present, all deposit slips, cancelled checks, money order or wire transfer receipts or instructions, and all similar detailed banking records.

3. For each withdrawal of $15,000 or greater from an account held by BABP from January 2002 to the present, all deposit slips, cancelled checks, money order or wire transfer receipts or instructions, and all similar detailed banking records.

SNET argues that BABP is "just another link in Frank Gangi's asset-siphoning scheme" and that the abovementioned documents are relevant to its corporate veil-piercing theory. (Pl.'s Mem. in Opp. to BABP's Mot. to Quash Subpoena 4). SNET states that it has evidence, some of which comes from the Defendants and the Defendants' accountants, establishing that the Defendants have transferred millions of dollars to BABP over the last several years.[2]

On August 15, 2007, BABP filed a motion in this Court to quash the Subpoena served on Nova Scotia. That motion was denied. BABP has appealed that denial to the Third Circuit. That appeal is pending.

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[2] SNET maintains that these documents are confidential and may be produced to the Court upon request.

SNET now moves to compel Nova Scotia to comply with the Subpoena despite BABP's appeal. BABP requests that the Court stay Nova Scotia's compliance with the Subpoena pending BABP's appeal.

II. DISCUSSION

When evaluating a motion for a stay pending an appeal, a court should consider: (1) whether the stay applicant made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will suffer irreparable injury absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 658 (3d Cir. 1991).

III. ANALYSIS

A. Likelihood of Success on the Merits

The first stay factor is whether the movant is likely to succeed on the merits.

BABP argues that it is likely to succeed on appeal because it is not a party to the Connecticut Litigation and has a legitimate interest in maintaining the confidentiality of its financial records. BABP further argues that the information contained in those records will not provide

evidence of the illegitimate payments SNET seeks to demonstrate. Finally, BABP appears to assert that the Subpoena is overbroad and irrelevant to the Connecticut Litigation.

Rule 26 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P." sets forth general provisions regarding discovery. These provisions are applicable to subpoenas. Fed. R. Civ. P. 45(d)(1) advisory comm. notes (1970). Fed. R. Civ. P. 26(b)(1) allows discovery regarding "any matter, not privileged, that is relevant to the claim or defense of any party." Fed. R. Civ. P. 26(b)(1). Fed. R. Civ. P. 26(c) provides that a court may, "[u]pon motion by a party or by the person from whom discovery is sought . . . and for good cause shown," issue an order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). Such an order may, for instance, mandate "that the disclosure or discovery not be had" or "that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters." Fed. R. Civ. P. 26(c)(4), (5). "A party's showing of 'good cause' required to limit discovery must describe with specificity the potential harm the party is trying to avoid." *Flanagan v. Wyndham Int'l*, 231 F.R.D. 98, 105 (D.D.C. 2005); *see also Glenmede Trust Co. v. Thompson*,

56 F.3d 476, 483 (3d Cir. 1995) ("Broad allegations of harm, unsubstantiated by specific examples . . . will not suffice.").

In addition to the scope limitations provided in Fed. R. Civ. P. 26, Fed. R. Civ. P. 45(c)(3) provides several grounds upon which a court may quash or modify a subpoena. Only two of these grounds are potentially applicable to BABP's motion to quash. First, a court may quash or modify a subpoena if it "requires disclosure of privileged or other protected matter and no exception or waiver applies." Fed. R. Civ. P. 45(c)(3)(iii). Second, a court may quash or modify a subpoena if it "subjects a person to undue burden." Fed. R. Civ. P. 45(c)(3)(iv).

Here, BABP's bank accounts are relevant to the action between SNET and the Defendants. SNET submits that during the pendency of the Connecticut Litigation, the Connecticut Court has held that SNET has established a prima facie case for its corporate veil-piercing theories. SNET further submits that it has evidence that the Defendants have transferred millions of dollars to BABP in an effort to hide funds from creditors. The Subpoena in this action seeks information relating to BABP's bank account activity. This information is relevant to SNET's claims because it may tend to prove or disprove that the Defendants' have transferred

large sums of money to BABP as part of an asset-concealment scheme. *See, e.g., R.J. Reynolds Tobacco v. Philip Morris, Inc.*, 29 Fed. Appx. 880, 882 (3d Cir. 2002) (finding that a subpoena served on a third party for documents relating to the third party's business and dealings with the defendant were relevant to the plaintiff's antitrust claims).

BABP does not argue that this information is privileged or that the Subpoena subjects it to "annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). Nor does BABP "describe with specificity the potential harm [it] is trying to avoid." *Flanagan*, 231 F.R.D. at 105. There is therefore no basis upon which to quash the Subpoena under Fed. R. Civ. P. 26.

The Subpoena must also accord with the provisions of Fed. R. Civ. P. 45. Courts may not quash third party subpoenas duces tecum on privilege or privacy grounds absent a specific showing by the movant of privilege or privacy. *Perez v. Sphere Drake Ins., Ltd.*, No. 2001-11, 2002 U.S. Dist. LEXIS 7427, at *3 (D.V.I. Feb. 15, 2002); *Windsor v. Martindale*, 175 F.R.D. 665, 668 (D. Colo. 1997); *In re County of Orange*, 208 B.R. 117, 120 (Bankr. S.D.N.Y. 1997).

The Subpoena in this action does not "require[] disclosure of privileged or other protected matter." Fed. R. Civ. P. 45(c)(3)(iii). The nearest BABP comes to claiming

that its bank accounts are privileged or otherwise protected is its argument that the accounts contain confidential financial records. This argument falls short of making a specific showing of privilege or privacy.

The Subpoena also does not impose an undue burden on BABP. The Subpoena is directed at Nova Scotia, and thus requires no action on the part of BABP. Examples of undue burden include "untimely service, inability to appear, inability to produce the requested documents or things, failure to identify items requested, or excessive cost." Moore's Federal Practice § 45.04[3][b]. None of these circumstances are presented.

Accordingly, the Court finds that BABP is unlikely to succeed in quashing the Subpoena on appeal.

B. Irreparable Injury

The second stay factor is whether the movant would suffer irreparable injury absent a stay.

BABP asserts that it will suffer irreparable injury because once its financial records are disclosed, "they cannot be retrieved." (BABP's Mem. of Law in Supp. of Mot. for Order Staying Compliance with Subpoena 5).

"The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are

not enough." *Wisconsin Gas Co. v. Fed. Energy Reg. Comm'n*, 758 F.2d 669, 674 (D.C. Cir. 1985) (emphasis in original; citation omitted). "Impact on business . . . 'may constitute irreparable harm only where the loss threatens the very existence of the movant's business." *In re Verizon Internet Servs.*, 257 F. Supp. 2d 244, 272 (D.D.C. 2003).

It is difficult to discern any irreparable injury in BABP's rather bare assertion that it will not be able to retrieve its financial records. BABP does not explain how its financial records will be "irretrievable" once disclosed. Nor does BABP specify what injury it will actually suffer. *See, e.g., CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995) (noting that courts "require the moving party to demonstrate at least 'some injury.'"); *CFTC v. Equity Fin. Group, LLC*, Civ. No. 04-1512, 2007 U.S. Dist. LEXIS 34706, at *5 (D.N.J. May 11, 2007) (denying a motion to stay where, *inter alia*, the movant made no showing of irreparable injury).

To the extent BABP's assertion could be construed as an argument that its privacy would be irreparably harmed, "a court can easily withdraw access and order the return of all documents and copies." *See, e.g., United States ex rel. Richards v. Guerrero*, Misc. No. 92-00001, 1992 U.S. Dist. LEXIS 12935, at *9 (D. N. Mar. I. July 29, 1992). Moreover,

SNET asserts that the Connecticut Court has entered a protective order to keep BABP's financial records confidential and prevent their release to the public. *See, e.g., CFTC*, 2007 U.S. Dist. LEXIS 34706, at *5 (denying a motion to stay where, *inter alia*, the movant's tax returns would be kept confidential).

Because BABP has not met its burden of showing irreparable injury, the Court finds that this factor weighs against a stay. *See, e.g., Phoenix Global Ventures, LLC v. Phoenix Hotel Assocs.*, No. 04-4991, 2004 U.S. Dist. LEXIS 24079, at *8 (S.D.N.Y. Nov. 29, 2004) (noting that a party seeking a stay bears a "difficult burden" and that to constitute "irreparable injury," the harm must be "imminent or certain, not merely speculative").

C. Injury to Other Parties

The third stay factor is whether there is a risk of substantial injury to the party opposing the stay. BABP has not put forward any argument with respect to this factor. The Court finds that there is no risk of substantial injury to SNET. Indeed, the fact that SNET has moved to compel Nova Scotia to comply with the Subpoena suggests that SNET can only benefit from compliance.

Accordingly, this factor weighs against issuing a stay.

D. Public Interest

The fourth factor to be weighed in deciding whether to grant a stay pending appeal is whether granting a stay serves the public interest.

BABP maintains that the public interest weighs in favor of a stay because "[a] substantial portion of the public uses charge cards and electronic transfers, and most consider their transaction statements private." (BABP's Mem. of Law in Supp. of Mot. for Order Staying Compliance with Subpoena 6).

The Court does not dispute the public interest in "safeguarding the confidentiality of financial records." *See, e.g., IDS Life Ins. Co. v. Sun America, Inc.*, 958 F. Supp. 1258, 1282 (N.D. Ill. 1997). However, the public interest in resolving the issues here on appeal is diminished by the Court's finding that there is no substantial possibility of success on the merits of the appeal, no showing of irreparable injury to BABP, and no risk of harm to other parties in this action. *See, e.g. In re Metiom, Inc.*, Misc. No. 04-M-47, 2004 U.S. Dist. LEXIS 25267, at *21 (S.D.N.Y. Dec. 15, 2004).

IV. CONCLUSION

For the reasons stated above, the motion to stay will be denied. An appropriate order follows.

Dated: October 26, 2007

S_____
CURTIS V. GÓMEZ
Chief Judge

copy: Hon. Geoffrey W. Barnard
Ruth Miller, Esq.
Charles S. Russell, Jr., Esq.
Carol C. Jackson
Lydia Trotman
Claudette Donovan
Olga Schneider
Gregory F. Laufer

HGlobal Naps, Inc. v. Verizon New England, Inc.
D.Mass.,2006.
Only the Westlaw citation is currently available.
United States District Court,D. Massachusetts.
GLOBAL NAPS, INC.
v.
VERIZON NEW ENGLAND, INC.
Civil Action Nos. 02-12489-RWZ, 05-10079-RWZ.

Sept. 11, 2006.

Christopher Savage, Cole, Raywid & Braveman, LLP, Jeffrey C. Melick, John O. Postl, Samuel Zarzour, Global Naps, Inc., William J. Rooney, Jr., Norwood, MA, Andrew Good, Good & Cormier, Boston, MA, for Global Naps, Inc.
Bertrand-Marc Allen, Scott H. Angstreich, Kellog, Huber, Hansen, Todd, Evans & Figel P.L.L.C., Washington, DC, Bruce P. Beausejour, Richard P. Owens, Verizon Communications Inc., Boston, MA, Keefe B. Clemons, Associate General Counsel Verizon, Robert L. Weigel, New York, NY, for Verizon New England, Inc.

MEMORANDUM OF DECISION

ZOBEL, D.J.
***1** Currently pending before me are two motions filed by defendant Verizon New England, Inc. ("Verizon") against plaintiff Global NAPS, Inc. ("Global") in Civil Action No. 05-10079, one of a set of related cases between the parties which has been consolidated with Civil Action No. 02-12489. Global's complaint seeks to "recover payment of intercarrier compensation for terminating telephone calls from Verizon's customers to Global's ISP customers after October 8, 2004."(Compl.¶ 11). Accordingly, Global seeks damages for amounts it claims it is owed under federal law, as well as a declaration that Verizon must pay Global such amounts going forward. Verizon has filed an answer and counterclaim, in which it responds that Global owes it $42 million in charges pursuant to the Interconnection Agreement between the parties. (Counterclaim ¶ 1). Accordingly, Verizon claims breach of contract and further seeks declaratory relief. Verizon has moved for judgment on the pleadings on Global's complaint. It also seeks expedited prejudgment attachment and attachment by trustee process of Global funds that would be used to satisfy any judgment in Verizon's favor on its counterclaim.

I. *Motion for Judgment on the Pleadings*

Because the purpose of the Telecommunications Act of 1996 ("the Act") [FN1] was to end local telephone monopolies, Congress required companies with historic local monopolies, known as incumbent local exchange carriers ("ILECs"), to allow competitive local exchange carriers ("CLECs") to interconnect with their networks. *See Global NAPS, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 61-62 (1st Cir.2006) ("*Global II*"). CLECs, such as Global, and ILECs, such as Verizon, must transport and deliver calls to each other. Compensation for the costs of transporting entirely local or intrastate telecommunications traffic is generally paid by the originating carrier. *Id.* at 63.Global's customers are internet service providers ("ISPs"). As the First Circuit noted in an earlier iteration of this litigation, the treatment of ISP-bound traffic has recently caused controversy. First, Global is able to assign its customers virtual numbers that makes it seem like the customer is located within the local calling area, though the customer may actually be located elsewhere. *Id.* at 64.Thus, the compensation regime that applies to local calls, and which requires the originating carrier to compensate the receiving carrier, applies to calls received by Global's ISP customers, though they may not actually be within the local calling area. *Id.* Second, Global is usually the receiving rather than originating carrier because calls to ISPs tend to be long and tend to "go exclusively ... to the ISP." *Id.* For these two reasons, Global, as the receiving carrier, "stands to gain a windfall" under the intrastate compensation regime. *Id.*

FN1.Pub.L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

In April 2001, the Federal Communications Commission ("FCC") issued what is commonly known as the ISP Remand Order.[FN2]The ISP Remand

Order established a compensation regime for ISP-bound calls, such as those made by Verizon customers to Global's ISP customers. First, the FCC set a rate cap, which established a declining ceiling on the rate that originating carriers like Verizon would have to pay for calls delivered to ISPs, and which was to take effect on the Order's effective date. (ISP Remand Order ¶ 78). But the FCC also explicitly stated that "because the rates set forth above are caps on intercarrier compensation, *they have no effect* to the extent that states have ordered LECs to exchange ISP-bound traffic either at rates below the caps we adopt here or on a bill and keep basis (or otherwise have not required payment of compensation for this traffic)."(*Id.* ¶ 80 (emphasis added)). There is no dispute that at the time of the ISP Remand Order, the Massachusetts Department of Telecommunications and Energy ("DTE") had reached the "settled conclusion that reciprocal compensation was not required" for any ISP-bound calls that Verizon delivered to Global. *Global NAPS, Inc. v. Mass. Dep't of Telecomms. & Energy*, 427 F.3d 34, 45 (1st Cir.2005) ("*Global I*"); *see* Order, *MCI WorldCom, Inc. v. New England Tel. & Tel. Co.*, D.T.E. 97-116-C, 1999 WL 634357 (Mass.D.T.E. May 26, 1999) ("May 26, 1999 DTE Order"); Order, *MCI WorldCom, Inc. v. New England Tel. & Tel. Co.*, D.T.E. 97-116-F, 2001 WL 1448563, at *9 (Mass.D.T.E. Aug. 29, 2001) ("August 29, 2001 DTE Order"); *MCI WorldCom Commc'ns, Inc. v. Mass. Dep't of Telecomms. & Energy*, 442 Mass. 103 (2004).

> FN2. Order on Remand and Report and Order, In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 16 F.C.C.R. 9151 (2001).

***2** The ISP Remand Order further stated that it did "not preempt any state commission decision regarding compensation for ISP-bound traffic for the period prior to the effective date of the interim regime we adopt here."However, the FCC clarified that "[b]ecause we now exercise our authority under section 201 to determine the appropriate intercarrier compensation for ISP-bound traffic, ... state commissions will no longer have authority to address this issue."(ISP Remand Order ¶ 82). In *Global II*, the First Circuit analyzed this provision and determined that the ISP Remand Order did not preempt state regulation of all ISP-bound traffic, but rather preempted only state regulation of local ISP-bound traffic. 444 F.3d at 73.[FN3]

> FN3. Accordingly, Global's assertion that the ISP Remand Order "preempted the regulation of intercarrier compensation for ISP-bound calls" (Compl.¶ 12) is incorrect to the extent that it includes non-local ISP-bound calls within the scope of preemption.

In October 2004, the FCC issued an order in response to a petition for forbearance from enforcement of the ISP Remand Order, referred to as the Core Forbearance Order.[FN4]In that order, the FCC held that it would enforce certain aspects of the ISP Remand Order. Specifically, the FCC declined to forbear from enforcing "the rate caps and mirroring rule" set forth in the ISP Remand Order, but granted forbearance from enforcement of "the growth caps and new markets rule."(Core Forbearance Order ¶¶ 15, 18, 20-21, 23, 25).

> FN4. Order, Petition of Core Communications, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Application of the ISP Remand Order, 19 F.C.C.R. 20179 (2004) ("Core Forbearance Order").

In November 2004, Global began sending Verizon invoices for calls originated by Verizon's customers and delivered to Global's ISP customers. Verizon refused to pay, and Global filed the instant action. The complaint asserts that the Core Forbearance Order entitles "all carriers ... to be paid the federal rate for terminating all ISP-bound traffic."(Compl.¶ 21). Accordingly, Global seeks payment at the rate of $0.0007 per minute-the federal rate cap-for all calls received from Verizon and delivered to ISP customers after October 8, 2004, the effective date of the Core Forbearance Order. (*Id.* ¶ 23).

A motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c) is analyzed under "essentially the same" substantive standard applied to motions for dismissal under Fed. R. Civ P. 12(b)(6).*See, e.g., Pasdon v. City of Peabody*, 417 F.3d 225, 226 (1st Cir.2005). The court accepts the complaint's factual assertions as true and draws every reasonable inference in the plaintiff's favor. *Id.* Judgment is appropriate only if it is "beyond doubt that the

plaintiff can prove no set of facts in support of his claim which would entitle him to relief."*Id.* (internal quotation marks omitted).

Although it seems to be an issue beyond dispute, the parties still apparently disagree as to the effect of the ISP Remand Order upon DTE's regulations. As a threshold matter, therefore, I must determine whether the ISP Remand Order purported to apply the rate caps set forth in ¶ 78 within Massachusetts. Verizon argues-based on ¶ 80-that the rate caps set forth in the ISP Remand Order never applied within Massachusetts. This was the conclusion reached by the DTE and affirmed by the Massachusetts Supreme Judicial Court. *See* Aug. 29, 2001 DTE Order; MCI *WorldCom Commc'ns, Inc.*, 442 Mass. 103. Global nevertheless disputes this reading of the ISP Remand Order and-at the motion hearing-went so far as to contend that the ISP Remand Order exempted states such as Massachusetts from the rate caps only for the period prior to 2001 (i.e., prior to effective date of interim regime). This argument is clearly without merit. The Remand Order implemented interim compensation rates from the effective date going forward; it did not implement the rate caps retroactively. Thus, it would have made little sense for the Remand Order to have exempted certain states, like Massachusetts, from the rate caps retroactively. Instead, the ISP Remand Order imposes the rate caps "[b]eginning on the effective date of this Order" (¶ 78), except in states-such as Massachusetts-that have already ordered carriers to exchange ISP-bound traffic below rate caps. In those states, the rate caps do *not* take effect on the effective date. Global's reading of ¶ 80 of the ISP Remand Order is therefore insupportable.

*3 The crux of Global's claim is that the Core Forbearance Order suddenly entitled it to seek compensation at the rate of $0.0007 per minute. (*E.g.*, Compl. ¶ 24). Thus, it asserts that the Core Forbearance Order entitles "all carriers ... to be paid *the federal rate* for terminating all ISP-bound traffic."(*Id.* ¶ 21). There are several problems with Global's position. First, there is no such thing as an "applicable federal rate." The ISP Remand Order establishes a "rate cap," not an "applicable federal rate." The FCC explicitly referred to the rate caps as "ceiling[s]," indicating that they were an upper limit, below which any rate was permissible. (ISP Remand Order ¶ 78). Second, even if I accept Global's position and assume that the $0.0007 rate cap established in the ISP Remand Order in fact functions as an "applicable federal rate," nothing in the Core Forbearance Order changes enforcement of the rate cap. Instead, enforcement of the rate cap remains the same under the Core Forbearance Order as it originally did under the ISP Remand Order. (Core Forbearance Order ¶ 1 (denying petition to forbear from enforcing ISP Remand Order with respect to rate caps)). And, as explained above, under the ISP Remand Order as originally implemented, the rate cap did not apply within Massachusetts. Accordingly, under the Core Forbearance Order, as under the original ISP Remand Order, the rate cap does not apply within Massachusetts.

What the FCC did agree to forbear from enforcing were the growth caps and new market rule. (*Id.*). Neither of these changes, however, affected the compensation for ISP traffic within Massachusetts. The growth caps imposed in the ISP Remand Order limited the "total ISP-bound minutes" for which a carrier could receive compensation. (*Id.* ¶ 7). By removing the growth cap, the Core Forbearance Order allowed carriers to seek compensation for additional minutes. Because compensation is determined by multiplying minutes by a rate per minute, however, and because the rate per minute in Massachusetts is zero, the removal of the growth cap in the Core Forbearance Order had no effect on Global's entitlement (or lack thereof) to intercarrier compensation for ISP traffic. As for the new market rule, it held that any carriers not exchanging traffic pursuant to an interconnection agreement as of the time of the ISP Remand Order should exchange ISP traffic on a bill-and-keep basis rather than under any intercarrier compensation regime. (ISP Remand Order ¶ 81). Again, the new market rule-and its effective reversal in the Core Forbearance Order-could not have affected Global's right to compensation from Verizon for ISP traffic because within Massachusetts Verizon did not owe Global any such compensation.

Perhaps recognizing these weaknesses in its complaint, Global argues in its opposition that it seeks compensation not on the basis of the Core Forbearance Order or the federal rate cap set forth in the ISP Remand Order, but rather on the basis of the Interconnection Agreement between the parties. Specifically, Global contends (1) that the ISP

Remand Order prevented it from implementing the parties' rate agreement, as set forth in § 8.1 of the Agreement, and (2) that the Core Forbearance Order, by halting enforcement of the ISP Remand Order, allowed Global to enforce the parties' contractual rate. Global's sudden reliance on the Interconnection Agreement is unpersuasive. The Agreement is mentioned nowhere in its complaint, which instead repeatedly refers to "the applicable federal rate" and the Core Forbearance Order as the legal basis for its claim. Nor does the complaint anywhere assert breach of contract or refer to a contractual right. In fact, Global itself-in opposing consolidation of this action with Civil Action No. 02-12489-unequivocally asserted that the charges for which it was claiming compensation in this case were "not provided for in *any interconnection agreement,*" but were instead "required by federal law."(Docket # 48 at 2).

***4** In any event, Global's reference to the Interconnection Agreement is unavailing. In Section 8.1 of the Interconnection Agreement, the parties agree that "intercarrier compensation ... shall be governed by the terms of the FCC Internet Order and other applicable FCC orders and FCC regulations."The Agreement's glossary in turn defines the FCC Internet Order as the ISP Remand Order. As explained above, however, under the ISP Remand Order, the rate caps have "no effect" in Massachusetts and instead the DTE's regulations-which set the compensation Verizon owes to Global at zero-govern. Thus, under the Interconnection Agreement itself, Global's claim fails. Global also contends that the Core Forbearance Order emphasizes the importance of a "unified compensation regime." (Core Forbearance Order ¶ 20). According to Global, this policy is "utterly defeated if some states allow no compensation for Internet traffic and the others employ the FCC rate ."(Global's Opp. 5). But Global's argument ignores the fact that the FCC's decision to exempt states like Massachusetts was based on its conclusion that such states had already adopted the bill-and-keep or lower rate cap arrangements toward which the FCC ultimately meant to steer all states. Thus, the reason why the FCC rate cap was never effective in Massachusetts was precisely because the FCC expected other states would eventually adopt a similar compensation regime, thereby satisfying the Commission's concern with a "unified compensation regime."

Finally, Global suggests that Verizon's position implicitly undermines its own counterclaim. This argument, whatever merit it may have with respect to Verizon's counterclaim, does not affect the analysis of Global's complaint.

Because Global is not entitled to compensation under the Core Forbearance Order, the ISP Remand Order, or the Interconnection Agreement, Verizon's motion for judgment on the pleadings is allowed.

II. *Motion for Prejudgment Attachment and Attachment by Trustee Process*

Verizon's counterclaim in Civil Action No. 05-10079 seeks damages for unpaid access charges and late payment charges that Global allegedly owes Verizon for non-local ISP-bound traffic. In prior stages of this litigation, Global disputed these charges and lost. Specifically, in the consolidated Civil Action No. 02-12489, Global challenged the DTE's arbitration order, which found in Verizon's favor and required Global to pay such charges. *See* Global II, 444 F.3d at 61. This court granted summary judgment in favor of Verizon, and the First Circuit affirmed. *Id.* The First Circuit expressly held that the "DTE [is] free to impose [such] access charges ... under state law."*Id.* In the instant motion, Verizon seeks prejudgment attachment and attachment by trustee process of the approximately $73 million it says Global owes. Under Fed.R.Civ.P. 64, I apply the law of the forum state in considering requests for prejudgment remedies. Under Mass. R. Civ. P. 4.1(c), which governs prejudgment attachment, Verizon must demonstrate "that there is a reasonable likelihood that [it] will recover judgment, including interests and costs, in an amount equal to or greater than the amount of the attachment over and above any liability insurance shown by [Global] to be available to satisfy the judgment."Where, as here, the defendant lacks liability insurance, "the only issues before the Court are whether [Verizon] is reasonably likely to succeed on the merits and, if so, the extent of [its] monetary recovery."Rodriguez v. Montalvo, 337 F.Supp.2d 212, 215 (D.Mass.2004). The standard applicable to Verizon's request for attachment by trustee process is essentially the same.[FN5] *See* Mass. R. Civ. P. 4.2(c) (authorizing attachment by trustee process "upon a finding by the court that there is a reasonable likelihood that the plaintiff will recover

judgment, including interests and costs, in an amount equal to or greater than the amount of the attachment").

> FN5. Trustee process attachment is "a different Massachusetts device to freeze interests held by a third party but belonging to the defendant."*Micro Signal Research, Inc. v. Otus,* 417 F.3d 28, 30 n. 1 (1st Cir.2005).

***5** Verizon has sufficiently established a likelihood of success on the merits by prevailing at earlier stages in this litigation. By virtue of the DTE's arbitration order, and the decisions of this court and the First Circuit, Global is liable for access charges for non-local ISP-bound traffic. *See Global II,* 444 F.3d at 61. Global concedes its liability. (Global's Opp. 10). Accordingly, the only question before the court is whether Verizon has established a reasonable likelihood that it is entitled to the amount of damages-approximately $73 million-that it seeks. On this point, Global raises a number of objections to Verizon's calculation. Because none of these objections have merit, however, the motion is allowed.

Verizon calculated this amount by multiplying number of minutes by the access charge rate. Verizon determined the number of minutes by using Global's own monthly bills to Verizon and by relying on Global's representation that all of those calls were the type of call-referred to as Virtual NXX calls-to which access charges apply. Verizon determined the applicable rate by averaging its per minute revenue for all switched access service. (*See* McKinley Decl.). Global first disputes this amount by arguing that Verizon's calculation "completely ignore[s] Global's offsetting claims," i.e ., the claims for intercarrier compensation set forth in Global's complaint. (*Id.* at 8). Because Verizon has prevailed on its Rule 12(c) motion as to these claims, however, no offset is due, and the argument fails.

Second, Global disputes the rates used by Verizon in its calculation. Verizon employed "a rate equal to the average rate all standard switched access customers in Massachusetts paid" during the relevant periods. (McKinley Decl. ¶ 17). Global argues that Verizon should instead have applied a rate of $0.0007 pursuant to § 8.1 of the Interconnection Agreement. Section 8.1 states that "a Party shall not be obligated to pay any intercarrier compensation for Internet Traffic that is in excess of the intercarrier compensation for Internet Traffic ... required ... under the FCC Internet Order."(Fox Aff., Ex. A, § 8.1). Global contends that access charges fall within the scope of "intercarrier compensation," and are thus governed by § 8.1. Global further contends that the calls for which Verizon seeks to impose access charges qualify as "Internet Traffic." Thus, Global asserts that, under § 8.1, the rate imposed cannot exceed any rates set forth in the FCC Internet Order, which is the ISP Remand Order. Under ¶ 78 of the ISP Remand Order, intercarrier compensation is capped at $0.0007 per minute during the relevant period. Accordingly, Global maintains that Verizon may not apply a higher rate.

For two reasons, this line of argument is unpersuasive. First, in its previous effort to obtain a temporary restraining order, Global asserted that the access charges to which it was subject under the DTE's arbitration order were prohibitive. Global specifically complained that under the DTE's arbitration order, it would owe access rates of $0.00525 per minute. (Global's Mem. in Supp. of Mot. for TRO, Apr. 29, 2005, at 14). Global sought a preliminary injunction on grounds that enforcement of such access charges-at a rate much higher than the $0.0007 it currently advocates-would be devastating. Having previously argued that under the arbitration order, as implemented by the Interconnection Agreement, the applicable rate is $0.00525, it is wholly inconsistent for Global now to argue that the Agreement only imposes a rate of $0.0007. Global's inability to reconcile this inconsistency at the motion hearing suggests that its view of the appropriate rate turns less on the applicable law and contractual provisions, than on its continually evolving litigation strategy. (*See* Tr. July 20, 2006 Hearing, at 52-53). To that extent, its inconsistency with regard to the applicable rate undermines its current position. Second, Global's argument fails on the merits. As explained above, in connection with Verizon's Rule 12(c) motion, the ISP Remand Order-and the rate caps established in ¶ 78-do not apply within Massachusetts. Moreover, the First Circuit has already rejected any argument that the FCC's ISP Remand Order "preempts state regulation of access charges for the non-local ISP-bound traffic at issue here."*Global II,* 444 F.3d at 72.

*6 The methodology employed by Verizon in determining the appropriate rate is reasonable. Most Verizon customers are billed for switched access service based upon the precise mix of switching services they use. (McKinley Decl. ¶ 15). Because it is impossible to determine the specific mix of switching and transport that Global uses, Verizon instead charged Global a rate equal to the average paid by Verizon customers for all switched access services. (*Id.* ¶ 17). Indeed, because Global has only two "hand-off points" in Massachusetts, whereas most switched access customers have several, Global likely owes a higher rate than other customers because it likely uses a higher transport mileage than the average customer. (*Id.* ¶ 22). Because Global has offered no other challenge to Verizon's applied rate, and because Verizon's rate calculation methodology was reasonable, Global's objection to application of the rate fails.

In its opposition memorandum, Global also challenges the number of minutes used by Verizon in computing damages. At the motion hearing on July 20, 2006, however, Global accepted Verizon's determination of the appropriate number of minutes, with the exception of a relatively small fraction of the total minutes, which Global asserts should be excluded as interstate traffic. (Tr. July 20, 2006 Hearing, at 55-60). Even Global concedes, however, that excluding these minutes would only reduce the total amount owed-at Verizon's applicable rate-by $3 million. Because Verizon seeks attachment of approximately $73 million, and because Global concedes that-under the rate imposed by Verizon and accepted by the court-it owes that amount less $3 million, Verizon has established a reasonable likelihood that it is entitled to damages of at least $70 million. It has therefore satisfied the standard set forth in Mass. R. Civ. P. 4.1(c) and 4.2(c), and is entitled to prejudgment attachment and attachment by trustee process in that amount.[FN6]

> FN6. In addition, prejudgment remedies may be particularly appropriate in this case, since the record indicates that Global, its principals, and affiliated entities may have attempted to transfer or otherwise conceal Global's assets to avoid execution of any future judgment against it. *Cf.* *Rodriguez*, 337 F.Supp.2d at 217 (prejudgment attachment appropriate where defendant may have encumbered assets after commencement of litigation). Global hotly disputes Verizon's assertions, but Verizon's submissions at least raise a question as to the motive behind, and propriety of, certain of Global's recent transactions.

III. *Conclusion*

Accordingly, Verizon's motion for judgment on the pleadings on Global's complaint in Civil Action No. 05-10079 (Docket # 157 in Civil Action No. 02-12489) is allowed. The parties shall proceed with the briefing schedule previously established with respect to Verizon's counterclaim.

Verizon's motion for expedited prejudgment attachment and attachment by trustee process (# 149) is allowed in the amount of $70 million.

In addition, Global's motions for leave to file (99 and 151) are denied as moot, as is Verizon's motion for leave to file (# 128). Verizon's motion for additional security (# 116) is moot in light of the court's November 9, 2005 order. Verizon's motion for leave to file (# 162) is allowed. Global's motion for leave to appear pro hac vice (# 176) is also allowed.

Verizon's stipulated motion for entry of a protective order (# 166) is allowed.

D.Mass.,2006.
Global Naps, Inc. v. Verizon New England, Inc.
Slip Copy, 2006 WL 2632804 (D.Mass.)

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HSouthern New England Telephone Co. v. **Global NAPs**, Inc.
D.Conn.,2008.
Only the Westlaw citation is currently available.
United States District Court,D. Connecticut.
The SOUTHERN NEW ENGLAND TELEPHONE COMPANY, Plaintiff,
v.
GLOBAL NAPs, INC. et al, Defendants.
Civil Action No. 3:04-cv-2075 (JCH).

July 1, 2008.

SECOND AMENDED RULING RE: PLAINTIFF'S REDACTED MOTION FOR DEFAULT JUDGMENT (Doc. No. 517), PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT (Doc. No. 519) AND DEFENDANT'S MOTION TO MODIFY THE COURT'S OCTOBER 19, 2007 ORDER (DOC. NO. 618)

JANET C. HALL, District Judge.

I. INTRODUCTION

*1 Plaintiff, Southern New England Telephone Co. ("SNET"), moves the court to sanction defendants, **Global NAPs**, Inc., **Global NAPs** New Hampshire, Inc., **Global NAPs** Networks, Inc., **Global NAPs** Realty, Inc ., and Ferrous Miner Holdings, Ltd.[FN1] (collectively "defendants"), for failure to comply with discovery orders. The sanction sought is a default judgment against the defendants pursuant to Federal Rule of Civil Procedure 37(b).*See* Pl.'s Mot. for Default at 1 (Doc. No. 519).

II. PROCEDURAL BACKGROUND

SNET brought this action against defendant **Global NAPS**, Inc. ("Global") on December 7, 2004. SNET's original Complaint alleged that Global had misrouted long-distance traffic of certain circuits not designated for such traffic, thereby depriving SNET of applicable access charges and that Global failed to pay SNET access charges specified in SNET's federal tariff for special access circuits Global ordered from SNET's tariff. This court stayed SNET's misrouting claims under the doctrine of primary jurisdiction on October 26, 2005 (Doc. No. 38). On May 5, 2006, this court granted SNET's Motion for a Prejudgment Remedy in the amount of $5.25 million. *See* Transcript of Ruling, May 5, 2006 (Doc. No. 133). This court entered summary judgment in favor of SNET on twenty-one of the twenty-six circuits at issue on March 27, 2007 (Doc. No. 406).

On December 9, 2006, SNET filed an Amended Complaint, which added as defendants **Global NAPS** New Hampshire, Inc. ("Global NH"), **Global NAPS** Networks, Inc. ("Global Net"), **Global NAPS** Realty, Inc. ("Global Realty"), and Ferrous Miner Holdings, Ltd. ("Ferrous Miner"). All of the defendants are Delaware corporations with principal places of business at 10 Merrymount Street in Quincy, Massachusetts. SNET's Amended Complaint alleges that the defendants' corporate structure is a "sham" (Am.Compl.¶ 15), and seeks to hold the defendants collectively liable for the underlying allegations set forth in SNET's original Complaint against Global.

III. FACTS

The long battle for discovery in this case began in earnest over two years ago, on May 5, 2006, when this court granted SNET's Motion for a Prejudgment Remedy in the amount of $5.25 million. *See* Transcript of Ruling, May 5, 2006 (Doc. No. 133). The court ordered Global to disclose assets sufficient to secure the prejudgment remedy within two weeks. *See id.*By May 24, 2006, Global had not complied with the court's May 5, 2006 Order, forcing SNET to file a Motion to Compel. *See* Motion to Compel (Doc. No. 142).

On May 26, 2006, this court issued a Ruling on SNET's Motion to Compel, finding that Global had failed to "comply to date in any acceptable manner."*See* Ruling at 1 (Doc. No. 149). At that time, the court entered a second, detailed Order requiring, in part, that Global produce an employee, pursuant to Federal Rule of Civil Procedure 30(b)(6), to testify on the existence of Global's assets and Global's current financial condition. *Id.* at 2. At that

deposition, Global was ordered to produce "information and documents relating to Global's current financial position" including tax returns and financial statements "from 2002 to the present" and, for every asset it disclosed that could go towards satisfying the prejudgment remedy, to provide "documents that describe or evidence the location, identity, and valuation, through objective criteria, of that asset."*Id.*

***2** A deposition was held pursuant to the May 26, 2006 Order on May 31, 2006. At that deposition, Global's treasurer, Richard Gangi, testified that he had not brought any financial statements or tax records of any of the Global entities with him. He further testified that he had "never seen" a financial statement prepared for "any of the Global entities" and that the only financial statement Global's accountant would have prepared would be that of Ferrous Minor. *Id.* at page 95, lines 16-22. These statements were patently untrue. [FN2]

Still having not received documentation in compliance with the court's May 5 or May 26, 2006 Orders, SNET filed a Motion for Contempt and Sanctions on June 12, 2006. *See* Motion for Contempt and Sanctions (Doc. No. 171). In opposition, Global argued, in part, that it could not be sanctioned for failing to provide the requested documents because they were not in the "custody or control" of Global. *See* Def.'s Mem. in Opp. to Pl.'s Mot. for Sanctions at 6 (Doc. No. 184). Global asserted that it was making "diligent attempts" to obtain tax returns, which it claimed were in the custody of its "corporate parent" Ferrous Minor; bookkeeping records, which it claimed were in the custody of its bookkeeper, Select & Pay, Inc.; and tax records, which it claimed were in the possession of its accountants, Nardella & Taylor. *Id.* at 6-8.At a hearing on this Motion, Richard Gangi testified to the court that he believed that general ledgers existed for Global and that his bookkeeper, Janet Lima of Select & Pay, had the ledgers but had not turned them over to Global, despite Global's requests. *See* Testimony of Richard Gangi at 104, Ex. II to Pl.'s Mot. for Def. Judg.

On November 27, 2006, the court ruled on SNET's June 12, 2006 Motion for Contempt and Sanctions, finding that the statement made by Richard Gangi that he had "never seen" a financial statement for any of the Global entities was "demonstrably false," and that it was "clear" that Global had violated the May 26, 2006 Order. *See* Ruling at 4 (Doc. No. 277). While the court found that Global had been "anything but forthcoming in complying with the court's May 5 and 26 Orders," the court was "not prepared to conclude that there is clear and convincing evidence to conclude that Global has acted with the bad faith necessary for the court to exercise its inherent contempt powers."*Id.* at 2-3.However, the court found Global had offered no "substantial justification" for violating the May Orders and ordered Global to pay SNET "reasonable expenses caused" by its noncompliance. *Id.* at 4. Further, the court ordered Global to obtain their records from third-party entities Select & Pay, Inc. and Nardella & Taylor, and to produce them to SNET by December 6, 2006. *Id.* at 5. The court warned Global that failure to produce these documents would "likely result in the entry of a default judgment."*Id.* The records were not produced.

***3** By June 21, 2007, it became clear that Global's claim that third-party Select & Pay was withholding their financial records was a lie intended to delay the production of financial records in compliance with SNET's discovery requests and the court's discovery Orders.[FN3]On that day, Select & Pay's President, Janet Lima, signed an affidavit stating that, "Select & Pay does not keep or maintain or otherwise control Global's records, or any copies of them. To the extent Select & Pay, Inc. prepares Global documents, they are left at the Global premises."Lima Affidavit at ¶ 13, Ex. Z to Pl.'s Mot. for Def. Judg. Further, Lima attested that, "the documents are actually kept in the client's custody and control."*Id.* at ¶ 9.

In addition, Global violated the court's November 7, 2006 Order by failing to produce the records in question. Even if one were to have accepted Global's position that it did not have custody of the records (which the court once did, but no longer does), Global violated the November 7, 2006 Order in that it failed to obtain its own records from its accountant and bookkeeper. SNET eventually, by subpoena, obtained some records from the accountant, which had not previously been produced by Global. *See, e.g.,* Financial Documents produced by Nardella & Taylor, Ex.'s G-O to Pl.'s Mem. in Supp.

Even after the fiction that Select & Pay had withheld

Global's records was exposed, Global has still failed to provide its general ledger in accordance with this court's May 2006 Orders. On May 2, 2008, almost exactly two years after the court originally ordered Global to produce its financial records, when asked by the court why Global had failed to produce its general ledger, Global's counsel was unable to offer any credible explanation.

While Global's noncompliance with the court's May 2006 Orders dragged on, yet another discovery dispute arose. On April 17, 2007, SNET moved the court to compel Global to comply with twenty-nine requests for the production of documents relevant to SNET's veil-piercing allegations. *See* Pl.'s Mot. to Compel at 1 (Doc. No. 420). On May 31, 2007, this court granted SNET's Motion and ordered each of **Global NAPs** New Hampshire, **Global NAPs** Networks, and **Global NAPs** Realty to produce to SNET within two weeks "the books of the company," including "balance sheets, cash statements, registers, journals, ledgers" in "the form in which the records are kept," and within a slightly longer period to produce other financial documents that may have had to be gathered from third parties. *See* Motion Hearing, May 31, 2007. The court later extended this Order to include defendant Ferrous Minor Holdings, Ltd. *See* Motion Hearing, June 18, 2007. Global was subject to the same discovery requests that were the subject of this Order.

On June 15, 2007, defendants Global, **Global NAPs** Networks, **Global NAPs** New Hampshire and **Global NAPs** Realty (collectively the "Global defendants"), produced documents; however, only about a dozen pages of which contained material not previously produced. In lieu of the bookkeeping records ordered to be produced by the court, the Global defendants wrote a letter to opposing counsel explaining that they were "unable to locate copies of all the ledgers from the relevant time period."*See* Letter from Miller to Jensen at 1, Ex. B to Pl.'s Mot. for Def. Judg. The letter relied on an Affidavit from James Scheltema, Vice President of Regulatory Affairs for **Global NAPs**, Inc. *Id.*Scheltema claimed that, on June 12, 2007, he had undertaken a "thorough, unannounced search of all three **Global NAPs** locations in Massachusetts" where he located "limited documents relevant to the production requests."*Id.* He attested that he "searched the hard drive of the computer used by Select & Pay. Although the hard drive had Peachtree [accounting] software, there was no data relating to a Global entity, merely the program."Scheltema Affidavit at ¶ 15, Att. to Ex. A to Pl.'s Mot. for Def. Judg.

*4 On June 21, 2007, Ferrous Minor's counsel reported to SNET via email that Scheltema's search included a search for Ferrous Minor's documents. *See* Email, Ex. C to Pl.'s Mot. for Def. Judg. Ferrous Minor did not produce any documents despite the fact that its Director, Frank Gangi, testified on June 12, 2007, in different litigation, that "Ferrous Minor generates its own separate financial statements," Frank Gangi Declaration at ¶ 15, Ex. D to Pl.'s Mot. for Def. Judg., and Richard Gangi had testified on May 31, 2006, that Global's accountants "would have the financial statements of Ferrous Minor Holdings."Richard Gangi Depo. at 95, Ex. GG to Pl.'s Mot. for Def. Judg.

Defendants have falsely argued to the court that documentation for periods prior to June 2006, did not exist because there had been "uncontroverted testimony that the computer Ms. Lima was using 'crashed' and all of her data was lost."Def.s' Mem. in Opp. at 8-9 (citing Sheltema Depo. at 66-69, Ex. 2 to Def.'s Mem. in Opp.). Defendants went on to speculate that the "crash occurred and [the] data [was] lost in the summer of 2006."*Id.* In fact, the "crash" of this computer should have had absolutely no impact on the production of discovery because Janet Lima testified that she "dropped" [FN4] the computer she had used for the last five years in late December 2006, *after* the court-ordered deadline for production had come and gone. Lima Depo. at 181-182, Ex. G to Pl.'s Suppl. Mem.

Not only was the computer "dropped" after the deadline for production had passed, but based on Lima's testimony, there is no reason to believe that data on the computer was irretrievably lost. Lima testified that the computer she dropped had been "turning itself off" and "things were popping up," so she picked up the computer to take it to Richard Gangi's office. *Id.* While carrying the computer, she fell down the stairs, dropping the computer, which broke into many pieces. *Id.* at 183.Lima picked up the pieces and left them in her office. She saw Richard Gangi take those pieces, along with the rest of the computer, out of her office in a plastic bag. *Id.* at 186.She never saw that computer again, or was

informed of what happened to it. *Id.* Even assuming that Lima's testimony should be credited that she dropped the computer and it broke into pieces, the hard drive of this "dropped" computer has never been produced. The defendants have never explained why documents were unretrievable from the hard drive, why the computer has not been produced, or where it is.

On January 19, 2007, defendants' tax accountants, Nardella & Taylor produced, pursuant to third-party subpoena, hard copy excerpts of many financial documents that defendants had never previously produced, including "excerpts of a general ledger, customer ledgers, fixed asset and depreciation spreadsheets, an aged payables journal, and an aged receivables report."Pl.'s Suppl Mem. at 2; Mem. in Support at 5-6 and Exhibits G-O. On June 25, 2007, Nardella & Taylor produced adjusted trial balance reports for defendants and summary financial statements for Ferrous Minor for the year ending December 31, 2006. *See* Pl.'s Suppl. Mem. at 2; Pl.'s Mem. in Supp. at 6 and Ex. P. Ed Taylor of Nardella & Taylor has testified that the hard copies of records he produced were largely created by defendants. *See* Ed Taylor depo. at 34, 49, 51. He also testified that he was sure he had seen a general ledger for defendants over the years. *See id.* at 70.

***5** In light of defendant's failure to produce a general ledger in compliance with the court's May 31, 2007 Order, the parties jointly hired FTI Consulting to "image" the replacement computer "searched" by Sheltema and used by Janet Lima after her other computer "crashed." *See* Letter from FTI consulting to SNET's counsel, Ex. E to Pl.'s Mot. for Def. Judg. The expert found the only "active" financial data on the new computer involved a few days worth of check registers for June and July of 2007. *Id.* However, the expert did find an email attachment containing a sales journal for the year 2000, and using "forensic techniques," located a cash disbursement journal for June 1, 2006 through December 31, 2006 that had been deleted. *Id.*

Based on the expert's conclusion that at least one seemingly relevant financial document had been erased from Janet Lima's computer, the parties agreed to a more thorough examination of the computer. FTI consulting produced a second report, indicating that the application "Window Washer," a software program with the capability to "overwrite data and disk space" had existed on Janet Lima's computer. Letter from FTI Consulting at 1-2, Ex H to Pl.'s Suppl. Mem. in Supp. of Mot. for Def. Judg. ("Pl.'s Suppl. Mem."). Parts of this program were initially created on the morning of June 12, 2007, the same morning Scheltema arrived to "search" for responsive documents. *See id.;*Scheltema Affidavit at ¶ 15, Att. to Ex. A to Pl.'s Mot. for Def. Judg. FTI reported that, "[m]ore time would be needed to identify further components and registry entries of Window Washer as well as its forensic artifacts when executed."*Id.*

In a deposition of Lima taken November 28, 2007, Lima admitted installing and running Window Washer on her computer the morning Scheltema arrived on June 12, 2007. *See* Lima Depo. at 204-205, Ex. G to Pl's Suppl. Mem. She says that she ran the program because she was concerned that her personal information was on the computer, and she did not want anyone involved in this litigation to have access to it. *See id.*She further testified that she never ran Window Washer again. *See id.* at 209-210.

However, SNET hired LECG, LLC to conduct further forensic analysis of the computer. *See* LECG report, Appendix A to Ex. I to Pl.'s Suppl. Mem. LECG's analysis shows that, at the time Lima used Window Washer on the morning of June 12, 2007, she did not merely use the program in its default mode, but chose the "wash with bleach" option, which overwrites deleted files. *Id.* at 9. While it is impossible to determine everything that was erased, LECG was able to determine that "file shortcuts" to files titled "2000 Sales Journal," "checkregisterNH7-12-2006," and "NH check Jan thru May 06" were deleted. *Id.* at 9-10.

LECG's Report further explains that Window Washer has a "data wiping utility" separate from the main program. *Id.* at 6. This program, called wwShred.exe, allows a user to manually erase files. For every file erased using this utility, the user must chose to "Shred (wash with bleach)" each individual file or directory, and then click again to confirm that they want to erase that file or directory. *Id.* LECG's analysis shows that Window Washer's data wiping utility was first used on June 16, 2007, on which day it was run three times, and was used again on June 20, 2007. *Id.* at 10-11.

*6 In order to determine what, or how many files, have been deleted, LECG relies on "metadata." *Id.* at 2. Metadata is a record created for all files containing their name, the date, and where the data is stored on the disk, among other things. *See id.*Metadata is stored in a database called a Master File Table ("MFT").*Id.* Generally, a deleted file maintains its metadata, so it is possible to determine some things about the deleted file even after it has been erased. *See id.* at 2-3.However, when a deleted file has no metadata, "it is likely that anti-forensics software has been employed by the user to erase the file and clear the MFT data."*Id.*

LECG determined that, out of 93,560 items in the MFT, nearly 20,000 had no metadata, meaning they had likely been erased using anti-forensic software such as Window Washer's Shred utility. *Id.* at 2-3.At least 103 of these files were "user created files," that is, "substantive files created by a user as opposed to a computer generated record."Def.'s Suppl. Mem. at 10-11 (citing Expert Witness Report of Ashley, Ex. A to Def.'s Suppl. Mem. at 3). Window Washer was uninstalled from Lima's computer the night of June 20, 2007. *Id.* at 11.The "Disk Defragmenter" utility was used on Lima's computer on June 25, 2007. *Id.* at 13.While the Disk Defragmenter can be used to improve the computer's performance, it also makes forensic analysis of a computer more difficult when files have been deleted. *Id.* This was the first and only time the Disk Defragmenter was used on Lima's computer.

Defendants have also attempted to excuse their failure to produce documents by claiming that,

> [t]here is the possibility that there were additional financial documents that were in Richard Gangi's possession at the time of his death. Unfortunately, Mr. Gangi died intestate ... the result of the absence of a will is that, under Massachusetts law, documents in the decedent's possession at the time of his death may not be searched nor removed from his house....

Letter from Global's Counsel to SNET's Counsel at 2, Ex. B to Pl.'s Mem. in Supp. This explanation, like the suggestion that Select & Pay was withholding defendants' records or that defendants' records were necessarily lost when Lima dropped her computer, was a red herring devised to frustrate timely, indeed any, compliance with discovery orders. Sheila Gangi, Richard Gangi's ex-wife, testified at a deposition taken during the probate proceedings that she witnessed Janet Lima removing Richard Gangi's computer from Richard Gangi's home after his death. *See* Sheila Gangi depo. at 54 lines 17-23, Ex. 3 to Pl.'s Reply. She further testified that Lima told her the computer would be "emptied" and that she would bring it back to the house if Sheila Gangi wanted it back.*Id.* Sheila Gangi also testified that, "[a]ll of Richard's mail, all of Richard's filing cabinet papers and the safe" were removed from the house.*Id.* at 58.While Gangi did not see anyone remove the items from the filing cabinet, she later asked Frank Gangi to return the title to her truck (which had been in the filing cabinet) and subsequently received it from Lima in the mail. *Id.* at 59.She had conversations with Frank Gangi and Janet Lima about the truck title and the contents of the filing cabinet. *Id.* at 63.She also testified that, prior to Richard Gangi's death, she was the only person with the security code to Richard Gangi's house. *See* Affidavit of Sheila Gangi, Ex. 3 to Def.'s Mem. in Opp. She gave that code after Richard Gangi's death to Frank Gangi and to no one else. *Id.*

*7 On February 25, 2008 and March 7, 2008, defendants produced some additional financial documents not previously produced. These documents included emails and attachments that were clearly subject to the court's November 27, 2006 Order or the court's May 31, 2007 Order. *See, e.g.,* Email from Anne Hartman dated February 23, 2007, Ex. M to Pl.'s Suppl. Mem.; Email from Anne Hartman dated May 29, 2006, Ex. N to Pl.'s Suppl. Mem.; Email from Anne Hartman dated July 7, 2006, Ex. O to Pl.'s Suppl. Mem.; Email from Anne Hartman dated August 18, 2006, Ex. P to Pl.'s Suppl. Defendants failed to produce them until after SNET had taken depositions for which the documents would have been quite pertinent.

IV. DISCUSSION

A district court may sanction a party who fails to comply with a discovery order of that court, including rendering a default judgment against the noncompliant party. *See*Fed.R.Civ.P. 37(b)(2)(A)(v). Such a sanction derives from the district court's "broad inherent power to protect the administration of justice by levying sanctions in response to abusive litigation practices."*Penthouse Int'l, Ltd. v. Playboy*

Enter.s, Inc., 663 F.2d 371, 386 (2d Cir.1981) (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) and *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976)).Rule 37 sanctions serve two purposes: "to penalize those whose conduct may be deemed to warrant such a sanction" and "to deter those who might be tempted to such conduct in the absence of such a deterrent."*Id.* (quoting *National Hockey League*, 427 U.S. at 643). District courts must have the power to dismiss cases with prejudice "in order to prevent undue delays in the disposition of cases and to avoid congestion in the calendars of the District Courts."*Id.* However, dismissal pursuant to Rule 37 is a "drastic remedy" that "should only be imposed in extreme circumstances, usually after consideration of alternative, less drastic sanctions."*West v. Goodyear Tire and Rubber Co.*, 167 F.3d 776, 779 (2d Cir.1999) (internal quotation and citations omitted). Notwithstanding that, "discovery orders are meant to be followed," and a party who "flouts such orders does so at his peril."*Bambu Sales, Inc. v. Ozak Trading Inc.*, 58 F.3d 849, 853, (2d Cir.1995) (internal quotation omitted).

Dismissal is appropriate if there is a showing of "willfulness, bad faith, or fault on the part of the sanctioned party."*Id.* A party may also be found at "fault" sufficient to justify dismissal of the case if they were "grossly negligent" in following discovery orders. *Penthouse*, 663 F.2d at 387. While a showing of prejudice to the moving party is not a requirement for a dismissal under Rule 37, a court may consider it in weighing the appropriateness of the sanction. *See Metropolitan Opera Ass'n, Inc. v. Local 100, Hotel Employees and Restaurant Employees Int'l Union*, 212 F.R.D. 178, 229 (S.D.N.Y.2003). In addition to willfulness or bad faith on the part of the nonmoving party and prejudice to the moving party, other factors that appear appropriate to this court to consider are the history, if any, of noncompliance, whether lesser sanctions would be effective, whether the noncompliant party has been warned about the possibility of sanctions, and the client's involvement. *See American Cash Card Corp. v. AT & T Corp.*, 184 F.R.D. 521, 524 (S.D.N.Y.1999).

A. Defendants have willfully violated this court's discovery Order to produce their general ledger

***8** Defendants have failed to produce their general ledger or ledgers in violation of the court's May 31, 2007 Order. The court's May 31, 2007 Order specifically required defendants to produce "balance sheets, cash statements, registers, journals, ledgers."It is clear from the testimony of Joan Conway, *see* Joan Conway depo. at 76, 81, Ex. D to Pl.'s Supp. Mem., and Richard Gangi, *see* Richard Gangi depo. at 87, Ex. E to Pl.'s Suppl. Mem., and from the excerpts of the general ledger produced by defendants' tax accountants Nardella & Taylor, *see* general ledger excerpts, Ex. A to Pl.'s Suppl. Mem, that defendants possess or have possessed at some point during this litigation a general ledger. Defendants have offered no plausible explanation for why these business records have not been produced and, as such, the court finds that defendants have willfully violated the court's May 31, 2007 Order to produce general ledgers.

Defendants argue that production of the ledger was not necessary because "[t]here is no reason to believe that if it was available, a 'full' general ledger would provide any additional information not already in SNET's possession."Def.'s Suppl. Mem. in Opp. ("Def.'s Suppl. Mem.") at 2 (Doc. No. 744). This argument misses the point for two reasons. First, as SNET points out, a general ledger, unlike the other bits and pieces of financial documents defendants have produced, "shows how, in the ordinary course of business, the defendants characterized and accounted for ... intercompany transaction, if they accounted for it at all;" a general ledger shows how defendants "characterized and accounted" for revenue; and, a general ledger shows transfers of non-fund assets, such as network equipment. Pl.'s Suppl. Mem. at 4. This type of information is clearly relevant to SNET's veil-piercing claims and is not similarly disclosed through check registers, cash disbursement journals, and bank account statements, as defendants would suggest. Second, even if the general ledger were largely redundant of other discovery SNET received, which the court finds it is not, the court's May 31, 2007 Order specifically and unequivocally ordered defendants to produce "ledgers." Absent any objection to the Order, defendants claim at this late date that such production is unnecessary is frivolous.

Global further argues that it is not obliged to produce financial documents, including the general ledger,

created prior to Spring 2006, because only at that point did those documents become "relevant to the litigation." Def.'s Suppl. Mem. in Opp. at 8. As this court stated at a hearing on October 3, 2007, "[t]his case was commenced at the end of 2004;" therefore "[f]rom and after the time this lawsuit was pending, there should not have been one piece of paper destroyed."Transcript of October 3, 2007 Hearing at 59 (Doc. No. 582). The court found that Global's financial records should exist for "at least" the years 2004-2007. *See id.*Defendants' counsel agreed, *see id.,* and Global does not point to any objection it raised to any of the court's discovery orders based on the argument that they were not on notice that such documents were relevant to the litigation. Therefore, lack of notice does not suffice to excuse Global from producing documents predating 2006 in compliance with the court's May 31, 2007 Order.

***9** Even if one accepts the suggestion that it was not until SNET filed its Motion to Amend (Doc. No. 192) on June 30, 2006, that the veil piercing defendants would have been on notice to preserve documents, it is completely implausible that absolutely no documents existed, on that date, that predated June 30, 2006.[FN5]And yet, defendants have produced merely a few such documents.

The defendants have often defended SNET's Motions to Comply and other discovery matters by responding that SNET could not prove that any of the documents it sought were in existence, and in defendants' custody or control. *See, e.g.,* Global's Opp. to Pl.'s Mot. for Contempt and Sanctions at 2 (Doc. No. 184) ("SNET cannot prove that the purportedly 'missing' documents even exist, let alone that Global has withheld them intentionally and in bad faith"); Def.s' Mem. in Opp. to Pl.'s Mot. for Def. Judg. at 6 (Doc. No. 548) ("SNET has not and cannot prove that financial documents exist that have not been produced by defendants or its agents."). It is indeed often the case that an opponent complains about the lack of production of documents the opponent "expects" that the non-producing party should, or likely would, have. Unfortunately for these defendants, the pieces of evidence obtained from Nardella & Taylor's eventual third-party disclosure demonstrates that the general ledgers, and other financial documents like "a sales journal, customer ledgers, a cash receipts journal, aged receivable reports, an aged payables journal, and records regarding the purchase of assets, loan receivables, and notes payable," (Pl.'s Mem. at 6 summarizing contents of Ex.'s G-O to Pl.'s Mem.) were created, and have either been destroyed or hidden to prevent their discovery. Testimony of the defendants' accountant that he was sure he had seen a general ledger for defendants over the years further supports this conclusion, *see* Taylor Depo. at 70, as does the testimony of Joan Conway, *see* Joan Conway Depo. at 76, 81, Ex. D to Pl.'s Supp. Mem., and Richard Gangi, *see* Richard Gangi Depo. at 87, Ex. E to Pl.'s Suppl. Mem. Evidence of detailed financial records was further uncovered in the forensic analysis of Lima's computer. *See* discussion of Lima's computer, Section IV. B, *infra;* excerpt of Sales Journal for Year 2000, Ex. E to Pl.'s Suppl. Mem. Furthermore, the court draws an inference from the destruction of evidence on Janet Lima's computer that defendants possessed relevant financial documents which they destroyed to avoid their discovery. In summary, the conclusion that defendants have willfully destroyed or hidden financial documents in violation of this court's orders is unavoidable.

B. Global has erased computer documents in bad faith

The court finds that, based on the facts recited above, defendants willfully destroyed evidence contained on the computer used by Janet Lima, in violation of the court's November 27, 2006 and May 31, 2007 Discovery Orders.

***10** Defendants make several unpersuasive arguments in an attempt to discredit SNET's expert report on the use of file shredding software on the disputed computer. First, Global argues that *only* 103 of the 53,100 deleted files are "user files," that is, "substantive files created by a user as opposed to a computer generate record."Def.'s Suppl. Mem. in Opp. at 10-11. Even crediting defendants' expert that this is the case, not one file should have been deleted, much less 103 files. *See* discussion of Court's admonition on October 3, 2007, discussed in section A, *infra,* at 16.

Defendants also argue, "it can be inferred that [plaintiff's expert] is aware" that Window Washer does not erase metatdata of MFT entries because, had Window Washer been the anti-forensics software used, SNET's expert "would have said so." *Id.* at

11.The court disagrees. The fact that a program with the capability to "overwrite data and disk space" was executed on Janet Lima's computer, Letter from FTI Consulting at 1-2, Ex H to Pl.'s Suppl. Mem. in Supp, in conjunction with evidence that files on Lima's computer had been "wiped" rather than merely deleted, convinces the court that at least Window Washer, and potentially other file wiping programs, were run on Lima's computer with the intent and result of irrevocably erasing files from that computer. Further, this activity on the computer did not occur in a vacuum; the defendants' persistent non-compliance with discovery is further support for the court's conclusion of intentional destruction of evidence.

Defendants next argue that, "that there is no proof that any files of consequence were deleted."Def.'s Suppl. Opp. at 13. This argument entirely misses the point. First, plaintiff need not prove that the deleted files were material; "the intentional or grossly negligent *destruction* of evidence in bad faith can support an inference that the destroyed evidence was harmful to the destroying party."*Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 110 (2d Cir.2002) (emphasis in original) (internal citation omitted). SNET is not required to show that the destroyed files were material as long as it can prove that the deletion of the files was in bad faith. FN6

The court finds that the deletion of files in this case was done in bad faith. Defendants argue that Lima's use of Window Washer is "regrettable" but excusable, because she merely wanted to protect her personal information. Def.'s Suppl. Mem. at 13. The court finds this explanation entirely incredible. First, the court credits SNET's expert report, which found that Lima did not merely use Window Washer in its default mode, which "empties the Recycle Bin, clears the Internet browsing history and cookie files, clears certain temporary folders, and clears the Recent Documents history."Pl.'s Suppl Mem. at 11. Instead, she deliberately chose to use the "wash with bleach" option to permanently delete and overwrite files that clearly did not contain her personal information, including files named "2000 Sales Journal," "NH check Jan thru May 06," "checkregisterNH7-12-2006", and "cash recI NC7-12-2006". LECG report at 9, App. A to Ex. I to Pl.'s Suppl. Mem. Even if Lima intended only to erase her personal information, which the court does not find to be the case, her actions would be at the least grossly negligent given that the court had ordered discovery of defendant's bookkeeping records and Lima had been specifically told not to destroy any records starting at the beginning of this litigation. *See* Lima Depo. at 122-3, Ex. G to Pl.'s Suppl. Mem. "Grossly negligent failure to obey a discovery order may justify severe disciplinary measures," even dismissal under Rule 37. *Penthouse*, 663 F.2d at 387. Furthermore, the court finds that the "shredding" feature of Window Washer was used on June 16, 2007 and June 20, 2007. Given that the shredding utility requires that a user confirm his or her intent to shred files, as described above, permanently destroying files using this utility can only be described as willful. Because the computer was in the possession and control of the defendants at all times, the conclusion that this program was used intentionally to destroy files that should have been preserved is inescapable. Such a conclusion is bolstered by the fact that the computer's Disk Defragmenter was run, for the first and only time, on June 25, 2007. While defendants urge that this program was used to improve the computer's performance, *see* Def.'s Suppl. Mem. at 15, the court does not credit this explanation in light of the earlier deletion of files, and given that the program makes forensic discovery of deleted files more difficult. *See* LECG Report at 13, Appendix A to Ex. I to Pl.'s Suppl. Mem. In light of the fact that a shredding utility had been used to permanently delete files only days before, the timing of the use of the Disk Defragmenter only corroborates the court's conclusion that defendants had willfully destroyed evidence and then attempted to conceal their actions.

***11** "Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation."*West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir.1999)."A federal district court may impose sanctions under Fed.R.Civ.P. 37(b) when a party spoliates evidence in violation of a court order."*Id.* In June 2007, defendants were clearly subject to the court's May 31, 2007 Order to produce financial documents. Defendants have failed to offer any credible explanation for why documents on their computer, which was used by their bookkeeper, were destroyed within a month of the court's Order. Therefore, the court concludes that the defendants' destruction of documents relevant to this litigation was, at best, gross negligence in the case of Lima's

admitted deletions, and at worst, bad faith, intentional destruction in the case of the use of the shredding application later in that month.

C. Richard Gangi lied to the court that defendants' bookkeeping records were in the control of Select & Pay in an attempt to delay discovery.

The court finds that Richard Gangi's testimony that defendants' accounting firm was withholding bookkeeping records, despite requests from defendants for those records, was willfully false. *See* Testimony of Richard Gangi at 104, Transcript of Hearing October 11, 1006, Ex. II to Pl.'s Mot. for Def. Judg. While the court does not credit all of Lima's testimony, the court does credit her testimony that defendants' bookkeeping records were always within their own control. *See* Lima Affidavit at ¶ 13, Ex. Z to Pl.'s Mot. for Def. Judg. Despite a specific Order to obtain the records from their accountant and bookkeeper, defendants offer no explanation as to what efforts it took to obtain them and why they did not succeed. There is no record before this court evidencing an accountant willfully refusing to provide defendants their documents, despite repeated requests, or even a lawsuit asserting a replevin claim. Absent any plausible alternate explanation for Gangi's testimony, the court concludes that Gangi intentionally lied to the court with the purpose of delaying the discovery of bookkeeping records in compliance with the court's discovery Orders.

D. Frank Gangi Caused Documents and a Computer to be Removed from Richard Gangi's House

Defendants suggested that additional financial documents may have been in the possession of Richard Gangi, but could not be searched until his estate was settled. *See* Letter from Global's Counsel to SNET's Counsel at 2, Ex. B to Pl.'s Mem. in Supp. The court finds that, while making this excuse, Frank Gangi directed his agents and employees, including Janet Lima, to remove Richard Gangi's computer from his house and to empty his home filing cabinet of documents. The court understands that Sheila Gangi never saw Frank Gangi remove anything from Richard Gangi's house, nor did she see anyone remove the files. However, the court credits Sheila Gangi's testimony that she spoke with Frank Gangi and Janet Lima about the contents of the file cabinet, and that, after requesting Frank Gangi to return a document that had been in the cabinet, Janet Lima returned them to her. In these circumstances, the inference that Frank Gangi had the contents of Richard Gangi's filing cabinet removed from the house, at the same time defendants were using Richard Gangi's estate as an excuse for failing to produce relevant discovery, is unavoidable. Furthermore, the court credits Sheila Gangi's testimony that she witnessed Janet Lima remove Richard Gangi's computer from his home and offer to bring it back after it had been "emptied." [FN7] *See* Sheila Gangi Depo. at 54 lines 17-23, Ex. 3 to Pl.'s Reply. In summary, the court finds that the defendants deliberately removed Richard Gangi's computer [FN8] and paper files that had been in the possession of Richard Gangi, have not produced those documents or computer despite court Orders, and meanwhile used Gangi's death to further delay and frustrate compliance with the court's discovery orders.

E. Defendants have given misleading and nonresponsive answers to discovery requests

***12** On several occasions, defendants have given SNET misleading or nonresponsive answers to discovery requests. For example, **Global NAPs** Realty told SNET (May 4, 2007 email from **Global NAPs** Realty counsel to SNET, Ex. W to Pl.'s Mem.), and the court (Hearing on May 31, 2007) that it did not have a bank account. It later recanted this statement, but has still not produced statements for that account. *See* Pl.'s Mem. at 15. Similarly, in response to SNET's discovery requests, **Global NAPs** New Hampshire produced only a cash disbursement journal for June 2006 through April 2007 and referred SNET to **Global NAPs**, Inc. records, which **Global NAPS** New Hampshire's counsel later admitted were nonresponsive. Hearing of May 31, 2007.

F. Defendants have a history of violating discovery orders

As discussed above, the court has already found that the statements made by Richard Gangi indicating that he had "never seen" a financial statement for any of the Global entities was "demonstrably false," and that it was "clear" that Global had violated the May 26, 2006 Order. *See* Ruling at 4 (Doc. No. 277). The court sanctioned Global for this violation by

requiring it to pay SNET's expenses in prosecuting that Motion to Compel. *See id.*

More significantly, on July 9, 2007, the court found Global in civil contempt for violating the prejudgment remedy Orders of May and October 2006. *See* Ruling re: Plaintiff's Motion for Contempt and Sanctions at 11 (Doc. No. 496). In that Ruling, the court found "there to be clear and convincing proof that Global's conduct was a blatant violation of the court's clear and unambiguous" orders.*Id.* The court imposed civil contempt sanctions in the form of SNET's costs in prosecuting the Motion for Contempt and Sanctions, including attorneys' fees, expert fees, and other costs. *See id.* at 13.The court subsequently granted SNET $645,760.41 in costs and fees. *See* Ruling re: Motion for Costs and Fees (Doc. No. 757).

The Second Circuit's discussion of the relevance of past actions in *Penthouse* is exactly on point:

> It would be excessively formalistic to view the defiance of [an] order in isolation rather than against the background of Penthouse's prolonged and vexations obstruction of discovery with respect to closely related and highly relevant records ... which Penthouse kept from Playboy and from the court during the pretrial and trial of the case through perjurious testimony of its top officials and false representations to the court by its counsel.

Penthouse, 663 F.2d at 388. "Sanctions must be weighed in light of the full record in the case."*Id.* (internal citation omitted).

Defendants' past violations weigh heavily in favor of imposing a default judgment against them at this time. The court has imposed lesser sanctions on defendants to no avail. In light of these prior sanctions, the court is confident that sanctions less severe than default would not be effective in deterring defendants from continuing to violate discovery and other court orders. Certainly orders compelling disclosure and imposing monetary sanctions have not worked. *See, e.g.,* Order and Ruling of May 26, 2006 (Doc. No. 149); Ruling on Motion for Contempt of June 10, 2007 (Doc. No. 496). While adverse inferences can be effective tools for situations involving the destruction of evidence, in this case the extent of defendants' noncompliance and either wilful withholding or destruction is so extensive that any adverse inference sufficient to sanction defendants and address the harm to SNET would effectively amount to a directed verdict or the equivalent of a default judgment.

G. Plaintiffs have been prejudiced and judicial resources squandered

***13** While a finding of prejudice to the plaintiffs is not necessary for the imposition of a default judgment, *see Met. Opera Ass'n, Inc.*, 212 F.R.D. at 229, the court finds that defendants' violations have prejudiced SNET. There can be no doubt that a delay of over a year and a half in producing court ordered discovery has prejudiced its ability to prepare its case for trial. Furthermore, SNET was prejudiced by having to conduct the depositions of Ed Taylor, Ann Hartman, Janet Lima, and Joan Conway without the benefit of defendants' most recent productions. Defendants argue that, "SNET was advised that the supplemental production would be forthcoming before the depositions, but made the strategic decision to press ahead without additional documents."Def.'s Suppl. Mem. at 16. Given the repeated delays and intransigence by defendants in following discovery orders, SNET was wise to discount any promise from defendants that discovery would be forthcoming and proceed with the depositions when they could get them. Having followed that wise course, SNET has been prejudiced by their inability to use the recently produced documents during those depositions.

Another factor the court considers is the tremendous waste of judicial resources defendants have caused by their repeated violations of the court's discovery orders. Defendants' "prolonged and vexation destruction of discovery,"663 F.3d at 338, has caused a morass of discovery disputes. The Second Circuit in *Playboy* expressed its concern that,

> If parties are allowed to flout their obligations, choosing to wait to make a response until a trial court has lost patience with them, the effect will be to embroil trial judges in day-to-day supervision of discovery, a result directly contrary to the overall scheme of the federal discovery rules.

Penthouse, 663 F.2d at 388. The Second Circuit's concern in *Playboy* has come to fruition in this case, with the court holding many lengthy hearings on

discovery motions, and spending innumerable hours dealing with defendants' recalcitrance. In this circumstance, a default judgment is warranted to prevent defendants' wilful noncompliance and destruction from impacting the court's other cases and thus impacting the orderly administration of justice for other litigants.

H. Global was clearly put on notice that failure to produce their general ledger would result in the court entering default against them.

While default judgment is a proper remedy as long as a party had notice of a discovery order, *see* United States Freight Co. v. Penn Central Transport., 716 F.2d 954, 955 (2d Cir.1983), the court went even further to explicitly put Global on notice that failure to produce its general ledger would "likely result in the entry of a default judgment."*See* Ruling at 4 (Doc. No. 277). That Ruling was made on November 27, 2006. A clear and unambiguous warning that default would enter is apparently not enough to cause Global to comply with this court's Orders.

V. CONCLUSION

***14** The court finds that all defendants have willfully violated the court's discovery orders by failing to turn over their general ledgers and other business records, lying to the court about the inability to obtain documents from third parties, and destroying and withholding documents that were within the scope of the discovery requests and Orders. These defendants have committed a fraud upon this court. These willful violations have prejudiced, indeed likely destroyed, SNET's ability to prove its case, and have squandered judicial resources by dragging the court into frequent policing of discovery disputes over an inordinate period of time. In light of the defendants' history of violations, and the explicit warning that failure to comply would result in a default judgment entering, the court finds that lesser sanctions would not deter the defendants from further delaying discovery in this case. Indeed, the court has little confidence that the discovery sought continues to exist.

In conclusion, defendants' behavior exemplifies the type of willful disregard for the process of discovery created by the Federal Rules of Civil Procedure that warrants the ultimate sanction of dismissal. Defendants "rolled the dice on the district court's tolerance for deliberate obstruction," and this court does not believe they should be allowed to "return to the table." *Bambu Sales*, 58 F.3d at 853.

For the forgoing reasons, plaintiff's Motions for Default Judgment (Doc.Nos. 517 & 519) are GRANTED. Those of SNET's claims which involve IP-related transmissions and were stayed pending determination by the Federal Communications Commission of the issues raised in the plaintiff's Complaint (Counts II through VII and part of Count 1), *see* Ruling (Doc. No. 38), are administratively DISMISSED without prejudice to reopen if a Motion to Reopen is filed within thirty days of the final administrative action which restores jurisdiction over those claims to this court. The Clerk is ordered to enter judgment in favor of the plaintiff on all other claims and against the defendants, jointly and severely, in the amount of $5,247,781.45. (The Judgment should also include the award of fees and costs of $645,760.41 *see* Doc. No. 757.)

Global's Motion to Modify the Court's October 19, 2007 Order is DENIED. The court credits Sheila Gangi's testimony that Frank Gangi did remove Richard Gangi's laptop from the hospital. *See* page 21, n. 6 *infra.* Alternatively, the Motion is moot in light of the default judgment. SNET's Motions to Amend (Doc. No. 770) and to Register (Doc. No. 771) are denied as moot. The Clerk is directed to enter judgment and to close this case.

SO ORDERED.

FN1. This Second Amended Ruling is filed to correct the misidentification of a defendant, Ferrous Miner Holdings, Ltd.

FN2. Only six months before, on November 17, 2005, Richard Gangi had identified "statements of income and expense of **Global NAPs**, Inc. for the years ended December 31, 2004, 2003, 2002, 2001 and 2000" at a deposition in different litigation. *See* Notice, Doc. No. 226 at 5. These documents had been prepared by defendants' accountants. *See* Gangi Depo. at 94 line 25 and 95 lines 1-5, Ex. GG to Pl.'s Mot. for Default Judgment.

FN3. The fact that Select & Pay did not

maintain control over defendants' records was affirmed in a separate litigation, in which Select & Pay responded to a request for documents by stating that "none were presently in the control, custody or possession" of Select & Pay. *See* Response from Select & Pay at 1-2, Ex. Y to Pl .'s Mot.

FN4. The court notes that Lima testified that she "dropped" her computer, whereas Scheltema testified that she told him it had a "meltdown" with respect to the "storage mechanism, the drive." *See* Lima Depo. at 118, Ex. G to Pl.'s Suppl. Mem. and Scheltema Depo. at 66, Ex. L to Pl.'s Suppl. Mem. Defendants' counsel had represented to the court that it "crashed," suggesting to the court a computer malfunction, not physical contact with the ground. *See* Def.s' Mem. in Opp. at 8-9 (citing Sheltema depo. at 66-69, Ex. 2 to Def.'s Mem. in Opp.)

FN5. Despite defendants' failure to produce their general ledger or ledgers in violation of the court's discovery orders, there is evidence in the record that defendants were a multimillion dollar enterprise. *See e.g.* Summary Financials, Ex. P to Pl.'s Mot. (showing $55 million in sales for Ferrous Minor in 2006); **Global NAPs** New Hampshire check register, Ex. S to Pl.'s Mot. (showing **Global NAPs** New Hampshire transferred millions of dollars to other Gangi-run enterprises). The suggestion that they have no complete financial records as a matter of practice, rather than because they willfully destroyed them to avoid discovery, is incredible to this court.

FN6. Further, in a case that seeks recovery under a pierce-the-corporate-veil theory, the corporate accounting and financial records are necessarily material.

FN7. The court credits Sheila Gangi's testimony concerning events following Richard Gangi's death despite not having the benefit of observing the relevant witnesses on the stand. Sheila Gangi's testimony is corroborated by the defendants' prior and subsequent persistence in refusing to produce documents. While Sheila Gangi may have had reason to mislead the court, although the court does not find that she did, the defendants have demonstrated that they will mislead, and have misled, the court. Further, while defendants have attacked the credibility of Sheila Gangi's testimony, they have offered no credible evidence to contradict her version of events, instead quibbling over words she used (Frank Gangi removing items, versus Frank Gangi's agents removing items).

FN8. There was also a second laptop computer used by Richard Gangi, which he had at the hospital before his death, and which computer Frank Gangi removed from the hospital, that has not been produced. *See* Sheila Gangi Affidavit at ¶ 11, Ex. DD to Pl.'s Mot.

D.Conn.,2008.
Southern New England Telephone Co. v. Global NAPs, Inc.
--- F.Supp.2d ----, 2008 WL 2704495 (D.Conn.)

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