Dated: October 04, 2017
The following is SO ORDERED:

David S. Kennedy
UNITED STATES CHIEF BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re	**Case No. 14-22960-K**
Opus Medical Management, LLC,	**Chapter 7 (Originally filed under Chapter 11)**
Debtor.	
Tax ID/EIN: 20-4917889	

Michael E. Collins, Esquire, Chapter 7 Trustee of the estate of the above-named debtor,	
Plaintiff,	
v.	**Adv. Proc. No. 16-00075**
Internal Revenue Service,	
Defendant and Third-Party Plaintiff,	
v.	
Derek E. Denman and Marnie Denman,	
Third-Party Defendants.	

MEMORANDUM AND ORDER RE THE UNITED STATES OF AMERICA'S "MOTION FOR SANCTIONS FOR FAILURE TO COMPLY WITH THE COURT'S ORDER COMPELLING DISCOVERY" COMBINED WITH NOTICE OF THE ENTRY THEREOF

INTRODUCTION

This proceeding under 28 U.S.C. § 157(b)(2)(A) arises out of the United States of America's "Motion for Sanctions for Failure [of third-party defendant, Derek E. Denman] to Comply With the Court's Order Compelling Discovery" ("Motion") filed on July 27, 2017, by Sean P. O'Donnell, Esquire, and Kieran O. Carter, Esquire, on behalf of the defendant/third-party plaintiff, the Internal Revenue Service ("IRS"). The United States brings this Motion in the place and stead of its federal agency, the IRS. Christian R. Johnson, Esquire, attorney for third-party defendants, Derek E. Denman ("Mr. Denman") and Marnie Denman ("Mrs. Denman") (collectively, the "Denmans"), filed a written objection/response thereto. All the immediate parties in interest participated at the hearing on the Motion that was held in open court on August 15, 2017, where the parties' attorneys provided the court with oral statements on behalf and in support of their respective clients. At the conclusion of the hearing, the court took the Motion under submission and requested post-trial briefs be filed by the attorneys for each party.

The ultimate question for judicial determination here is whether this court should impose sanctions (e.g., rendering a default judgment) pursuant to FED. R. BANKR. P. 7037 and FED. R. CIV. P. 37(b)(2)(A)(vi) on a party (Mr. Denman), who assertedly failed to sufficiently comply with the court's prior Order compelling Mr. Denman to respond to the discovery requests of the United States by a date certain.

As noted earlier, this is a core proceeding under 28 U.S.C. § 157(b)(2)(A). It is expressly observed that no objection has been filed by a party to this court having the statutory and/or

constitutional authority to hear and determine this particular Motion subject to the traditional statutory appellate provisions and procedures under 28 U.S.C. § 158(a) and Part VIII of the Federal Rules of Bankruptcy Procedure. The following shall constitute the court's findings of fact and conclusions of law in accordance with Rule 7052 of the Federal Rules of Bankruptcy Procedure.

BACKGROUND FACTS AND PROCEDURAL HISTORY

The pre- and postpetition background facts and circumstances and procedural history are not in substantial dispute and may be summarized, in relevant part, as follows.[1]

On March 20, 2014 (the "Petition Date"), the above-named debtor, Opus Medical Management, LLC ("Opus"), and related entities, Reggie White Cardio-Pulmonary Rehabilitation Center, LLC ("Reggie White Cardio-Pulmonary Rehab"), Sleep Diagnostics, LLC ("Sleep Diagnostics"), and O2 Medical, LLC ("O2 Med") (collectively, "the Debtors"), each filed a voluntary Chapter 11 case in this Judicial District. At that time, Opus was the sole member of the Debtors: Reggie White Cardio-Pulmonary Rehab, Sleep Diagnostics, and O2 Med. Mr. Denman was the managing member, shareholder, and president of the Debtors from August 21, 2012, to February 20, 2014. Third-party defendant, Mrs. Denman, is the wife of Mr. Denman.

On October 16, 2014, the United States Trustee for Region 8 ("United States Trustee") filed a "Motion to Appoint Chapter 11 Trustee" under 11 U.S.C. § 1104(a). (Docket No. 74.) An "Objection to United States Trustee's Motion to Appoint Chapter 11 Trustee" was filed on October 24, 2014, by Steven N. Douglass, Esquire, acting as counsel for Opus. (Docket No. 82.) The court subsequently granted the United States Trustee's § 1104(a) motion on October 29, 2014. (Docket No. 88.) Michael E. Collins, Esquire ("Mr. Collins") was appointed by the United States Trustee

[1] Citations to the main bankruptcy case docket, Case No. 14-22960-K, will be to "Docket No."; citations to the adversary proceeding docket, Adv. Proc. No 16-00075, will be to "AP Docket No."; and citations to the Denmans' personal bankruptcy case docket, Case No. 17-24122, will be to "Denmans Bankr. Docket No.".

for Region 8 as Chapter 11 Trustee of the estate of the Debtors on October 30, 2014. (Docket No. 94.)

Thereafter, on November 11, 2014, the Chapter 11 Trustee in the Opus case filed a "Motion to Substantively Consolidate the Debtors' Bankruptcy Cases." (Docket No. 108); *see* FED. R. BANKR. P. 1015(b) and its accompanying Advisory Committee Note (1983). On December 17, 2014, after notice and hearing, this court entered an "Order Granting Chapter 11 Trustee's Motion to Substantively Consolidate the Debtors' Bankruptcy Cases." (Docket No. 120.) The substantive consolidation of such cases essentially resulted in an implied unitary administration of the various § 541(a) estates of the Debtors. It is noted that a substantive consolidation, as distinguished from a joint administration, is neither authorized nor prohibited by FED. R. BANKR. P. 1015(b). *See*, for example, *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215 (1941).

On June 12, 2014, prior to the appointment of the Chapter 11 Trustee, the United States Trustee filed a "Motion to Dismiss or, in the Alternative, Convert Chapter 11 Case to Case Under Chapter 7." (Docket No. 41); *see* 11 U.S.C. § 1112(b). After several continuances, the final hearing on the United States Trustee's § 1112(b) motion to convert the Chapter 11 case to a case under Chapter 7 was held on February 20, 2015. An "Order Converting Case to a Case Under Chapter 7" was entered by the court on February 25, 2015. (Docket No. 140.) On February 26, 2015, Mr. Collins was appointed by the United States Trustee as the Chapter 7 Trustee of the consolidated estates of the Debtors and currently serves in such capacity. (Docket No. 142.) On March 16, 2015, Mr. Collins filed a § 327(a) "Application to Employ Manier & Harod, P.C. as Attorney for the Chapter 7 Trustee." (Docket No. 149.) The court granted Mr. Collins' application on March 17, 2015, and Robert W. Miller, Esquire, of Manier & Harod, P.C. was appointed by the court as counsel for Mr. Collins in his capacity as Chapter 7 Trustee. (Docket No. 151.)

Almost one year later, on March 16, 2016, the Chapter 7 Trustee ("Plaintiff"), through counsel, filed a Part VII adversary proceeding ("Complaint") against the defendant, Internal Revenue Service ("IRS" or "Third-Party Plaintiff"), seeking to avoid certain prepetition transfers and recover property under 11 U.S.C. §§ 502, 544, 547, 548, 549, 550, and 551, (*Adv. Proc. No.* 16-00075, Docket No. 1), as core proceedings under 28 U.S.C. § 157(b)(2)(A), (B), (F), (H), (K), and (O). The Complaint alleged, *inter alia*, that prior to the Petition Date, the consolidated Debtors paid many of Mr. and Mrs. Denman's personal expenses and liabilities, including liabilities owed to the Defendant/IRS. (*Id*. at ¶¶ 9-11; *see also* AP Docket No. 1, Ex. A (containing a list of the transactions, dates, and amounts at issue in this case).) The Complaint further alleged that neither Mr. Denman nor Mrs. Denman ever reimbursed the Debtors for the prepetition payments made for and on behalf of their benefit. (*Id*.) The Complaint also stated that the consolidated Debtor was insolvent on a cash flow and/or balance sheet basis on the date(s) of the payments, causing the payments to be avoidable and recoverable transfers under the Bankruptcy Code. (*Id*. at ¶ 13); *see*, for example, 11 U.S.C. §§ 544(b), 547, 548, and 549. On April 21, 2016, the United States, acting for and on behalf of the Defendant, IRS, filed an "Answer" to the Complaint. (AP Docket No. 6.)

Subsequently, on May 4, 2016, the United States filed a "Third-Party Complaint" against Mr. Denman and Mrs. Denman to implead them into the above-captioned adversary proceeding pursuant to FED. R. BANKR. P. 7014 and FED. R. CIV. P. 14(a)(1). (AP Docket No. 8.) The Third-Party Complaint stated, *inter alia*, that Mr. Denman was the president of the Debtors at the time of the asserted fraudulent transfers (payment of joint personal tax liabilities of Mr. and Mrs. Denman) alleged by the Chapter 7 Trustee in the original adversary proceeding. (*Id*. at ¶¶ 6-7.) In addition, the United States alleged that due to Mr. Denman's title in Opus, LLC case as the Tax Matters Member, he was responsible for ensuring that Opus properly and timely filed and paid all

tax liabilities in accordance with the Internal Revenue Service laws. (*Id*. at ¶ 10.) Further, the United States argued that Mr. and Mrs. Denmans would be unjustly enriched to the extent the Chapter 7 Trustee recovers any funds as fraudulent or preferential transfers from the government. (*Id*. at ¶ 12.) An "Answer" to the Third-Party Complaint was filed by Bo Luxman, Esquire, prior counsel for the Denmans, on July 19, 2016. (AP Docket No. 20.) On September 14, 2016, the United States Trustee filed a "Report of the Parties' Planning Meeting Under Federal Rule of Bankruptcy Procedure 7026(f)," which was signed by all parties, discussing discovery deadlines and trial preparation deadlines. (AP Docket No. 21.)

Thereafter, the United States sent Mr. Denman, after the Chapter 11 cases were converted to Chapter 7, written discovery requests on January 31, 2017. (*See* AP Docket No. 22-4, Ex. 1, *Email Sending Discovery Requests to Denman*; *see also* AP Docket No. 22-5, Ex. 1A, *United States' First Set of Interrogatories*.) No discovery responses were sent by Mr. Denman. On March 13, 2017, after having received no response and multiple attempts to confer with Mr. Denman's counsel, the United States filed a "Motion to Compel" discovery responses to its interrogatories and requests for production. (AP Docket No. 22.) An "Order" granting the United States' motion to compel was entered by the court on April 10, 2017, giving Mr. Denman until April 18, 2017, at 5:00 p.m. Central Standard Time to respond. (AP Docket No. 29.)

On May 8, 2017, the Denmans filed a voluntary joint § 302 Chapter 7 liquidation case, and listed Mr. Johnson as their attorney of record. *See In re Denman*, 17-24122-K (Bankr. W.D. Tenn.). The United States received notice of the Denmans' Chapter 7 case and subsequently filed a § 362(d)(1) "Motion for Relief from Automatic Stay" on June 2, 2017, seeking to continue litigation in the above referenced adversary proceeding against Mr. Denman. (Denmans Bankr. Docket No. 19.) On June 14, 2017, the Denmans filed an "Objection to Motion" asserting that the

tax liability, even if ultimately given a judgment, would nevertheless be dischargeable in their personal Chapter 7 bankruptcy case.[2] (Denmans Bankr. Docket No. 25.) The Denmans also have filed an adversary proceeding under § 523(a)(1)(B) and (14) against the IRS seeking a discharge of certain scheduled tax obligations; and a pretrial conference is set for October 24, 2017, at 10:00 a.m. *Denman v. IRS* (*In re Denman*), Ch. 7 Case No. 17-24122-K, Adv. No. 17-00193 (Bankr. W.D. Tenn.).

It perhaps should be noted that on May 24, 2017, after learning of the Denmans' personal Chapter 7 case filing, Mr. Luxman filed a motion and subsequent amended motion to withdraw as attorney of record for Mr. Denman in the Debtors' consolidated Chapter 7 case as well as Adv. Proc. No. 16-00075, due to the belief that Mr. Denman had hired other counsel to represent him. *See* (Docket No. 308); *see also* (AP Docket Nos. 31 and 32.) After notice and hearing, the court granted Mr. Luxman's amended motion on June 20, 2017; and a "Notice of Appearance" was filed in the above referenced adversary proceeding by the Denmans' current counsel, Christian R. Johnson, Esquire, on July 7, 2017. (AP Docket No. 36.)

On July 27, 2017, the United States filed the instant "Motion for Sanctions for Failure to Comply with the Court's Order Compelling Discovery," seeking a default judgment against Mr. Denman based on Mr. Denman's alleged failure to cooperate in discovery and "continued willful violation" of the court's prior Order compelling his discovery responses. (AP Docket No. 37); *see* FED. R. BANKR. P. 7037 and FED. R. CIV. P. 37(b)(2)(A)(vi). An "Objection" was filed by Mr. Denman on August 10, 2017, stating that responses to the discovery requests were forwarded to counsel for the United States on April 18, 2017, and were answered "truthfully" and "to the best

[2] The United States Trustee has filed a pending "Complaint to Deny Discharge," under 11 U.S.C. § 727(c)(1) and FED. R. BANKR. P. 7001(4), as to Mr. Denman only in the Denmans' personal joint Chapter 7 case. *See Crocker v. Denman* (*In re Denman*), Ch. 7 Case No. 17-24122-K, Adv. No. 17-00171 (Bankr. W.D. Tenn.).

of his knowledge." (AP Docket No. 40.) It is expressly noted that the United States' Motion is against Mr. Denman only—not Mrs. Denman.

On August 15, 2017, the court held a final hearing on two proceedings: (1) the United States' § 362(d)(1) "Motion for Relief" filed in the Denmans' personal Chapter 7 case; and (2) the United States' "Motion for Sanctions" pursuant to FED. R. BANKR. P. 7037 filed in the above referenced adversary proceeding. Oral testimony regarding each Motion was adduced by the parties thereto. At the hearing, the court granted the United States' motion for relief under § 362(d)(1) for the purpose of ultimately litigating the above referenced adversary proceeding, and an "Order" was entered thereon by this court on September 5, 2017. (Denmans Bankr. Docket No. 37.) However, the United States' FED. R. BANKR. P. 7037 motion for sanctions seeking a default judgment was taken under submission by the court for further deliberation and consideration. As noted earlier, the court asked the parties to submit post-hearing briefs, and a scheduling order setting forth certain dates was entered on September 1, 2017. (AP Docket No. 45.) After having reviewed the parties' briefs and the Chapter 7 case record as a whole, the court will now address and discuss the Rule 7037 sanction issue below.

DISCUSSION

A court has broad discretion in determining the appropriate sanction for a party who has violated the court's discovery order. *See,* for example and among others, *Phillips v. Cohen*, 400 F.3d 388, 402 (6th Cir. 2005) ("The choice of what sanction to impose is vested in the court's discretion."). Rule 7037 of the Federal Rules of Bankruptcy Procedure applies to contested matters in accordance with Bankruptcy Rule 9014 and specifically provides also that "Rule 37 F.R.Civ.P. applies in adversary proceedings." *See* FED. R. BANKR. P. 7037; *see also* FED. R. BANKR. P. 9014.

Rule 37 provides numerous options of which the trial court may avail itself when faced with a party who unjustifiably disregards discovery orders or the like. *See* FED. R. CIV. P. 37. Rule 37(b) provides, in pertinent part, that:

> [i]f a party or a party's officer, director, or managing agent . . . fails to obey an order to provide or permit discovery . . . the court where the action is pending may issue further just orders. They may include . . . rendering a default judgment against the disobedient party.

FED. R. CIV. P. 37(b)(2)(A)(vi). In addition, the court has the inherent authority to dismiss a party's claims, enter default judgment against a party, and/or assess attorney's fees as a sanction for discovery abuse only "when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons" or "when the conduct is tantamount to bad faith." *Metz v. Unizan Bank*, 655 F.3d 485, 489 (6th Cir. 2011) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980)). The Sixth Circuit Court of Appeals has commented that "[j]udgment by default is a drastic step which should be resorted to only in the most extreme cases." *Stooksbury v. Ross*, 528 F. App'x 547, 552 (6th Cir. 2013) (quoting *United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 845 (6th Cir. 1983)); *see also Grange Mut. Cas. Co. v. Mack*, 270 F. App'x 372, 376 (6th Cir. 2008) (explaining that default judgment is the court's most severe discovery sanction) (emphasis added).

The Sixth Circuit considers four factors, none of which are dispositive, when determining whether to enter a default judgment sanction against a party for failure to cooperate with discovery: (1) whether the party's failure to cooperate is due to willfulness, bad faith, or fault; (2) whether the adversary was prejudiced by the party's failure to cooperate; (3) whether the party was warned that failure to cooperate could lead to a default judgment; and (4) whether less drastic sanctions were first imposed or considered. *Peltz v. Moretti*, 292 F. App'x 475, 479 (6th Cir. 2008) (citation omitted); *Phillips v. Cohen*, 400 F.3d 388, 402 (6th Cir. 2005); *Harmon v. CSX Transp., Inc.*, 110

F.3d 364, 366-67 (6th Cir. 1997); *Reg'l Refuse Sys., Inc. v. Inland Reclamation Co.*, 842 F.2d 150, 153-55 (6th Cir. 1988), *superseded by statute on other grounds, as recognized in Vance, by and Through Hammons v. United States*, 182 F.3d 910 (6th Cir. 1999). As the party seeking to avoid default under Rule 37(b)(2), Mr. Denman bears the burden to show that he did not have the ability to fully comply with the discovery requests. *See*, for example, *Beil v. Lakewood Eng'g and Mfg. Co.*, 15 F.3d 546, 552 (6th Cir. 1994).

The court will now address and apply each of the above-stated factors to the particular facts and circumstances of the instant proceeding.

1) *Willfulness, Bad Faith, or Fault*

The first factor the court looks at is whether Mr. Denman acted with willfulness, bad faith, or fault by not fully cooperating in the discovery process. Willfulness, bad faith, vexatiousness, oppressiveness, or fault requires "a clear record of delay or contumacious conduct." *Carpenter v. City of Flint*, 723 F.3d 700, 704 (6th Cir. 2013) (quoting *Freeland v. Amigo*, 103 F.3d 1271, 1277 (6th Cir. 1997)). Contumacious conduct is considered to be "behavior that is perverse in resisting authority and stubbornly disobedient." *Id*. at 704-05 (quoting *Schafer v. City of Defiance Police Dep't*, 529 F.3d 731, 737 (6th Cir. 2008)). "The plaintiff's conduct must display either an intent to thwart judicial proceedings or a reckless disregard for the effect of his conduct on those proceedings." *Id*. at 705 (internal quotation marks and brackets omitted). The Sixth Circuit has held that failure to respond to a discovery request may constitute contumacious conduct. *See id.*; *see also Harmon*, 110 F.3d at 368. In addition, when a party's dilatory tactics and disobedience persist through drawn-out litigation, the court may infer that the party has acted willfully and/or in bad faith. *Harmon*, 110 F.3d at 367.

Here, Mr. Denman stated that he was locked out of his business office at Opus on or about October 2014. He further stated that he was not even able to go into the place of business and retrieve his personal belongings. A willful violation is when there is a conscious and intentional failure to comply with the court's order. *Bass v. Jostens, Inc.*, 71 F.3d 237, 241 (6th Cir. 1995). In addition, a party can show bad faith "by delaying or disrupting litigation or by hampering enforcement of a court order." *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1978) (citations omitted). Based on the facts above, it is safe to say that Mr. Denman was not vexatiously and willfully failing to comply with the court's order so as to trigger such a drastic sanction as a default judgment. If Mr. Denman had complete and ready access to the sought for documents to help him fully answer all of the questions, the legal position of the United States would, of course, be much stronger.

The United States brings up the fact about Mr. Denman's willfulness in failing to provide third-party documents that would be related to their interrogatories and requests for production. Based on the testimony at the hearing, the court must emphasize that Mr. Denman has not shown a complete inability to fully respond and produce relevant personal bank statements, emails, or any other related third-party records in the course of the regular discovery period. At the hearing, when asked about personal bank statements, personal email accounts, and the like, Mr. Denman stated that he was unsure if some of the bank accounts remained open and also unsure if he could log on to his prior email account or if one even still existed. The Sixth Circuit has addressed human error, specifically "the excuse of bad memory," as a reason for a party's inability to fully comply with discovery orders and observed as follows in the context of Rule 37(b)(2) sanctions:

> While it is true that one is not obligated to provide perfect responses to discovery requests, and that district courts must make room for some lapses of memory, plaintiffs must do as much as they can, and certainly more than they did here, to provide defendants with all relevant discoverable information.

Bryant v. United States ex rel. U.S. Postal Serv., 166 F. App'x 207, 210–11 (6th Cir. 2006). The Sixth Circuit's dicta aptly describes the situation that is now before the court. Mr. Denman's failure to supplement by producing his personal bank statements, emails, and other third-party financial records seems somewhat to be more a matter of inconvenience and/or negligence, and not willfulness or bad faith. The United States' interrogatories and requests for production did not specifically ask for Mr. Denman's personal bank statements or personal emails. Without a specific request for such, the court cannot find absolute willfulness or bad faith. However, the court will take Mr. Denman's negligence into consideration when reviewing and later discussing the possibility of alternative sanctions.

Although no one factor is dispositive, the Sixth Circuit has stated that "[e]ntry of a default judgment against a party 'for failure to cooperate in discovery is a sanction of last resort,' and may not be imposed unless noncompliance due to 'willfulness, bad faith, or fault.'" *Thurmond v. Cty. of Wayne*, 447 F. App'x 643, 647 (6th Cir. 2011) (quoting *Bank One of Cleveland, N.A. v. Abbe*, 916 F.2d 1067, 1073 (6th Cir. 1990)). Based on the foregoing, combined with the totality of the particular facts and circumstances, Mr. Denman does not appear to have been sufficiently acting with willfulness, bad faith, or fault. Accordingly, the court finds that the first factor weighs against imposing sanctions against Mr. Denman at this time.

2) Prejudice to the Opposing Party

The second factor the court is required to examine is whether the United States was prejudiced by Mr. Denman's conduct. The Sixth Circuit has stated that a party is prejudiced by an opposing party's dilatory conduct if the party is "required to waste time, money, and effort in pursuit of cooperation which [the opposing party] was legally obligated to provide." *Harmon,* 110 F.3d at 368.

In this case, the United States has consistently sought Mr. Denman's compliance with discovery-related court orders. There are letters permeating the record where the United States implores Mr. Denman, through his prior counsel, to either answer interrogatories or produce requested documents. Additionally, the United States agreed to amend scheduling orders to allow Mr. Denman adequate time to thoroughly respond. Seven (7) months have passed since the United States originally propounded its first set of discovery requests to Mr. Denman, and the United States has spent the past seven (7) months seeking this information.

However, "[D]elay alone is not a sufficient basis for establishing prejudice." *INVST Fin. Grp. v. Chem-Nuclear Sys., Inc.*, 815 F.2d 391, 398 (6th Cir. 1987), *cert. denied*, 484 U.S. 927 (1987) (internal quotation marks omitted) (citation omitted). Nor does increased litigation cost generally support entry of default. *See United States v. $22,050.00 U.S. Currency*, 595 F.3d 318, 325 (6th Cir. 2010); *see also Crossman v. Raytheon Long Term Disability Plan*, 316 F.3d 36, 39 (1st Cir. 2002) (concluding that defendants' "expense incurred in unsuccessfully attempting to communicate with [plaintiff] . . . . [is] not unusual in the course of litigation and do[es] not rise to the level of prejudice justifying dismissal"). Instead, "it must be shown that delay will result in the loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion." *INVST Fin. Grp.*, 815 F.2d at 398 (internal quotation marks omitted) (citation omitted).

The delay in this case has not seemingly created any loss of evidence or increased difficulties of discovery. Mr. Denman answered the first set of discovery requests by April 18, 2017, which was the date given by the court in the order granting the United States' motion to compel. Mr. Denman did not and assertedly could not provide supplemental responses to his discovery requests as sought by the United States because he claimed he did not have any further

information than what he had already provided. Mr. Denman still possesses the same information as he possessed seven (7) months ago. Mr. Denman has reiterated that he was locked out of his business office in October 2014 and has not had access to Opus documents or files since that time. It is emphasized that these books and records are property of the § 541(a) estate; and by virtue of 11 U.S.C. § 323(a), the Bankruptcy Trustee (not Mr. Denman) is the representative of the estate. Such books and records in the business and personal bankruptcy cases no longer belong to Mr. Denman and/or possibly Opus. *Compare* 11 U.S.C. § 704(a) regarding the duties of a bankruptcy trustee, and especially *see* 11 U.S.C. § 704(a)(7). In addition, it should be noted that part of the delay potentially came from the withdrawal of Mr. Denman's prior counsel, Mr. Luxman, and the later appointment of Mr. Johnson in this matter. Hiring new counsel during the midst of discovery is plausible to cause some delay.

Although the United States in performing its statutory duties and responsibilities has spent a significant amount of time pursuing this litigation, the court, although not totally free from doubt, cannot find at this time that it has been sufficiently prejudiced by Mr. Denman's alleged failure to cooperate in discovery to trigger the drastic results of a default judgment as sought by the United States. The United States seemingly has access to substantially the same information and documentation as Mr. Denman, with the exception of his personal documents. Therefore, the court finds the second factor to weigh against the imposition of such a drastic discovery sanction against Mr. Denman as sought here.

3) Proper Warning of Consequence

The third factor the court must consider is whether the party (i.e., Mr. Denman) was given adequate warning of the sanction that could be imposed. Both parties agree that Mr. Denman had notice that a default judgment could be taken against him as a sanction for violating the court's

discovery order. However, Mr. Denman states that he has answered the United States' discovery requests to the best of his knowledge and ability. (*See* AP Docket No. 47, Ex. 1, *Hr'g Tr., In re Denman*, 42-43/17-24122, Aug. 15, 2017, at 8:9-16 ("Q: [. . .] Did you answer the interrogatories and the discovery requests given to you by the United States government, the IRS, to the best of your knowledge and the best of your ability? A: Yes, sir.").) Upon consideration, the court finds that Mr. Denman indeed did have the required notice of a potential default judgment against him. Thus, the court finds that the third factor indeed weighs in favor of the imposition of sanctions of sorts against Mr. Denman.

4) *Alternative Sanctions*

Lastly, the court must decide whether there are lesser sanctions pursuant to Rule 37(b)(2)(A) that should be imposed against Mr. Denman for his asserted failure to fully cooperate. The United States Supreme Court has stated that a default judgment "must be available . . . in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *Nat'l Hockey League v. Metropo. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976). The court concludes here that because Mr. Denman has not demonstrated clearly "contumacious conduct," *Schafer*, 529 F.3d at 737, the court will consider an "alternative sanction [that] would protect the integrity of the [judicial] process." *Fharmacy Records v. Nassar*, 379 F. App'x 522, 524 (6th Cir. 2010) (quoting *Schafer*, 529 F.3d at 738). Under a totality of the particular facts and circumstances, the court has considered other potential sanctions, and has found that reimbursement of "out-of-pocket" expenses and concomitantly requiring Mr. Denman to provide supplemental discovery responses within a reasonable time may be more appropriate at this stage of the litigation. Rule 37(b)(2)(C) provides:

> Instead of or in addition to the orders above, the court must order the disobedient party . . . to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

FED. R. CIV. P. 37(b)(2)(C). Because the court is not completely free from doubt regarding whether Mr. Denman's asserted failure to comply was "substantially justified," the court finds that it clearly is appropriate to impose "out-of-pocket" expenses, excluding attorney's fees, against Mr. Denman. *See, e.g.*, *Austin Theatre, Inc. v. Warner Bros. Pictures, Inc.*, 22 F.R.D. 302 (S.D.N.Y. 1958) (awarding costs against the opposing party for reasonable expenses incurred in securing the court order); *cf. Pickholtz v. Rainbow Techs., Inc.*, 284 F.3d 1365 (Fed. Cir. 2002) (awarding a *pro se* debtor costs, but denying the debtor attorney's fees under Rule 37). Such expenses shall include, for example, meals, hotel, and travel expenses for Mr. O'Donnell and Ms. Carter's attendance at the hearing on this Motion. The court further finds at this stage that it may be unjust under the particular facts at this time to award any additional fees or costs (i.e., beyond the "out of pocket" expenses noted above).

In addition, the court further finds that it is now appropriate to require Mr. Denman to supplement and more fully develop his prior discovery responses using his and any third-party documents relating to Opus and the consolidated Debtors that he may have access to (e.g., personal bank statements, emails, financial records from third parties, etc.). A document in possession of a third party must be produced if the party responding to the production request "has the legal right to obtain the documents on demand." *In re Bankers Tr. Co.*, 61 F.3d 465, 469 (6th Cir. 1995) (citation omitted); *see also Bleecker v. Standard Fire Ins. Co.*, 130 F.Supp.2d 726, 739 (E.D.N.C. 2000); *United States v. Approx. $7,400 in U.S. Currency*, 274 F.R.D. 646, 647 (E.D. Wisc. 2011) ("A party is obligated to produce her account records when she has the legal right to those records

even though the party does not have a copy of the records."). Mr. Denman's oral testimony given at the hearing shows that he quite possibly could have requested various third-party documents and produced them to the United States at any time, but did not realize they would be applicable to the discovery requests. (*See* AP Docket No. 74, Ex. 1, *Hr'g Tr.*, *In re Denman*, 42-43/17-24122, Aug. 15, 2017, at 18:16-19 ("Q: [Y]ou could go to the bank and ask for your bank statements for 2012 through '14, isn't that right? A: Yes, I could."); *see also id.* at 20:17-23 (Q: But you could have logged in with a login and password, isn't that right? A: I – I'm not technologically gifted. I don't know. Q: But you said you had an email account? A: I had an email account."); *see further id.* at 22:21-23:1 (Q: [. . .] The question is: Did they make a payment on your behalf to a third party that you could now go to, who's acting as your agent, and get records from? A: I guess I could.").)

Because it has been shown that Mr. Denman is required and has the ability to more fully supplement his discovery responses, the court finds that Mr. Denman shall have twenty-one (21) days from the entry of this Order to provide necessary supplemental discovery responses and all relevant third-party documents to the United States. The time allowed Mr. Denman is in accordance with the court's prior order granting the United States' motion to compel, and the court believes it to be reasonable under the circumstances. Additional sanctions shall be reserved at this time and will be addressed by the court upon the filing of a supplemental motion by the United States for sanctions should Mr. Denman fail to comply with this Memorandum and Order.

CONCLUSION

In summary, the court has weighed the factors required of it under *Peltz*, *supra*. Although not totally free from doubt, the court finds that entry of a default judgment against Mr. Denman is too drastic a result and not warranted at this time. However, costs shall be assessed against Mr.

Denman in favor of the United States as to its "out-of-pocket" expenses only, not including attorney's fees at this time. In addition, Mr. Denman will be given twenty-one (21) days from the entry of this Order to more fully supplement his discovery responses with his, any Opus, and related third-party documents he may have access to (e.g., personal bank statements, emails, financial records from third parties, etc.). Simply put, Mr. Denman's inconvenience and time spent on such discovery matters are outweighed here by the seriousness, importance, and integrity of the discovery and judicial process.

Based on foregoing and consideration of the entire case record as a whole**, IT IS ORDERED AND NOTICE IS HEREBY GIVEN** that:

1. The United States' "Motion for Sanctions for Failure to Comply With the Court's Order Compelling Discovery" is **DENIED in part** and **GRANTED in part in accordance with the foregoing.** The *denial in part* is without prejudice to the United States to renew its motion for sanctions after the twenty-one (21) day period discussed above, if appropriate to do so.
2. The Bankruptcy Court Clerk shall cause a copy of this Memorandum, Order, and Notice of the entry thereof to be sent to the following interested parties:

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