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A FEDERAL COURT MAY NOT PLACE THE BURDEN OF PROOF ON A SUBSIDIARY TO PROVE THAT IT DOES NOT HAVE CONTROL OF DOCUMENTS IN THE POSSESSION OF ITS PARENT CORPORATION

Business & Commercial Litigation Newsletter

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Maniscalco, et al. v. Brother Int'l Corp., Civ. Action No. 06-4907, and *McFadden, et al. v. Brother Int'l Corp.*, Civ. Action No. 07-1905, are two putative nationwide class actions pending in New Jersey federal district court that have been consolidated for pre-trial purposes.¹ Each alleges that Brother International Corporation ("Brother"), a Delaware corporation, violated the New Jersey Consumer Fraud Act ("CFA") in its sale of "all-in-one" inkjet printers. During discovery, the plaintiffs sought to compel Brother to produce the design and engineering documents related to the "all-in-one" inkjet printers. Those documents were, however, in the possession of Brother's foreign parent corporation, Brother Industries, Ltd. (the "parent" or "Brother's parent"). After an initial round of briefing, the Magistrate Judge ruled that the current evidentiary record did not support the conclusion that Brother had "control" over those documents as required by *Gerling Int'l Ins. Co. v. Commissioner*, 839 F.3d 131, 140-41 (3d Cir 1988) and *Camden Iron & Metal, Inc. v. Marubeni Am. Corp.*, 138 F.R.D. 438, 441 (D.N.J. 1991). But the plaintiffs were given permission to depose Brother on the issue.

Following two depositions and further briefing, the Magistrate Judge concluded that Brother had control over the documents and ordered Brother to obtain and produce them. The Magistrate Judge found that because Brother's parent had only twice before denied a request from Brother for documents, and because Brother's parent had agreed to fund Brother's defense and (possibly) a settlement in these cases, the plaintiffs had established Brother's control. In the Magistrate Judge's view, Brother's failure to request the documents from the parent further evidenced control. Those findings ostensibly outweighed other findings that supported a conclusion that Brother did not have control over the documents. Indeed, the Magistrate Judge observed that Brother lacked access, in the ordinary course of its business, to the design and engineering documents sought by the plaintiffs and that the parent had

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never before provided Brother with documents of that type. It was nevertheless “inconceivable” to the Magistrate Judge that Brother would not be able to obtain the design and engineering documents upon request.

Brother moved for reconsideration, advising the Court, through an affidavit from in-house counsel, that it was unable to comply with the Order because it could not obtain the requested documents from the parent. Brother further contended that the Magistrate Judge impermissibly saddled it with the burden to prove a negative, *i.e.*, that it did not have control. The Magistrate Judge refused to consider the affidavit, rejected Brother’s argument, and denied reconsideration. 2009 U.S. Dist. LEXIS 98805 (D.N.J. Oct. 23, 2009). Brother appealed to the District Judge from the Order denying reconsideration as permitted by Federal Rule of Civil Procedure 72(a).

On appeal, Brother argued that the Magistrate Judge’s conclusion that Brother had control of the documents was logically inconsistent with her finding that Brother did not have access to the parent’s design and engineering documents in the ordinary course of its business. Brother further contended that the Magistrate Judge’s ruling did not adhere to well-established precedent on the question of “control” as set forth in *Gerling Int’l* and *Camden Iron & Metal*. Brother alerted the District Judge to what it viewed as the Magistrate Judge’s implicit—and impermissible—shift of the burden to Brother to prove that it did not have “control” of the documents in the parent’s possession.

Agreeing with Brother, the District Judge concluded that the Magistrate Judge erred by putting the burden on Brother to disprove control. *Maniscalco, et al. v. Brother Int’l Corp.*, 2010 U.S. Dist. LEXIS 20212, *33 (D.N.J. Mar. 5, 2010). The plaintiffs had not demonstrated control through the initial round of briefing, and they were therefore required to elicit through discovery evidence establishing Brother’s control. The District Judge found that the plaintiffs had failed to do so:

Plaintiffs do not identify, nor does this Court’s review of the deposition transcripts reveal, any testimony whatsoever indicating that [Brother’s parent] has ever actually provided [Brother] with engineering or design documents in the nature of those requested here. Nevertheless, because the circumstances surrounding [the parent’s] refusal to provide requested documents were limited and factually distinguishable and because both witnesses testified that they were unaware of whether [the parent] maintained an official policy regarding [Brother’s] access to information in [its] possession, the Magistrate Judge presumed that Brother must be able to obtain [the parent’s] engineering and design

documents upon request. In doing so, the Court finds that the Magistrate Judge impermissibly placed the burden on Brother to disprove control.

* * *

The record is devoid of evidence that any design or engineering related documents were ever previously produced by [Brother's parent] such that a determination could be made that [Brother] has access to the requested documents to meet its business needs, including its business needs in connection with the instant litigation. The testimonial evidence suggested only instances in which design related documents were requested, but not supplied. . . . There is no evidence that any design related documents were ever supplied. The absence of such evidence, where Plaintiffs bore the burden, is fatal to their assertion that Brother had control over requested design and engineering related documents.

[*Id.* at *34-37.]

Maniscalco provides valuable guidance for domestic subsidiaries and their parents on handling the parent's documents in the ordinary course of business. Pre-litigation, it is critical to maintain corporate formalities and to establish clearly-defined document management boundaries between the subsidiary and the parent. If litigation arises, and the plaintiff attempts to compel production of the parent's business documents through the subsidiary, counsel must emphasize that the burden is on the plaintiff to establish control.

Strategically, the subsidiary must consider whether to request—before objecting or moving for a protective order—that the parent provide documents in its possession that are sought by the opposing party. Brother did not do so in *Maniscalco*, and the Magistrate Judge found that fact to be probative of control. The District Judge's opinion suggests, however, that it is not improper to object to discovery on the ground of lack of control before making the request. That said, there is some risk in pursuing such a strategy. In assessing that risk, a subsidiary and its counsel should consider a variety of factors, including concerns about the propriety of such a request from a business perspective (especially when the parent is a foreign corporation) and the costs associated with producing the documents if the parent accedes to the request. Perhaps more importantly, the subsidiary must not overlook the potential consequences, particularly in connection with future litigation, if the parent provides the subsidiary with the sought-after documents. Such action could be used by a future adversary as evidence of the subsidiary's control over the parent's documents.

¹ The analysis and views expressed in this article are solely those of the authors, and do not necessarily represent the views of Gibbons P.C. or of Brother International Corporation.

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