The following constitutes the ruling of the court and has the force and effect therein described.

Signed December 22, 2017

United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: TIMOTHY MICHAEL FRAZIN, Debtor.		Case No. 02-32351-bjh-13 CHAPTER 13
TIMOTHY MICHAEL FRAZIN, Plaintiff, v. HAYNES AND BOONE, LLP, GRIFFITH & NIXON, P.C., SCOTT GRIFFITH, NINA CORTELL, AND WARREN DODSON, Defendants.		ADVERSARY NO. 08-3021-bjh Related to Dkt. No. 196

MEMORANDUM OPINION AND ORDER
DENYING TIMOTHY FRAZIN'S MOTION PURSUANT TO RULE 60(b)(3)

Before the Court is the Motion Pursuant to Rule 60(b)(3) (Docket No. 196) (the "**Rule 60(b)(3) Motion**") filed by Timothy Frazin ("**Frazin**" or the "**Debtor**"), pursuant to which Frazin requests that the Court vacate the judgments found at Docket No. 163 (the "**Liability Judgment**") and Docket No. 191 (the "**Original Fee-Defense Judgment**") based upon the defendants' alleged destruction and/or withholding of evidence. Responses to the Rule 60(b)(3) Motion were filed by (1) Haynes and Boone, LLP, Nina Cortell, and Warren Dodson (the "**H&B Defendants**"),[1] and (2) Scott Griffith and Griffith & Nixon, P.C. n/k/a Griffith, Nixon & Davison, PC (the "**G&N Defendants**"[2] and, collectively with the H&B Defendants, the "**Defendants**").

Although the Rule 60(b)(3) Motion was filed on July 17, 2009, no party requested that it be set for hearing or otherwise brought it to the Court's attention. The Rule 60(b)(3) Motion remained pending on the Court's docket when the adversary proceeding was closed on July 13, 2015 after all appeals were exhausted. Over two years later, Frazin filed a Motion for Ruling, requesting that the Court rule upon his separate motion filed pursuant to Federal Rule of Civil Procedure 59(e) ("**Rule 59**") challenging the Original Fee-Defense Judgment (Docket No. 195) (the "**Fee-Defense Rule 59 Motion**"). A hearing on the Fee-Defense Rule 59 Motion was held on November 3, 2017. At the hearing, Frazin's counsel did not adequately explain why he did not set the Fee-Defense Rule 59 Motion for hearing in the first instance, and no counsel was able to explain why the Court was not notified that the Fee-Defense Rule 59 Motion remained pending when the adversary proceeding was closed. At the hearing, the Court inquired whether there were any other pending motions, at which time the Court was informed for the first time of the Rule 60(b)(3) Motion. Unfortunately,

[1] H&B Defendants' Response to Timothy Frazin's Motion Pursuant to Rule 60(b)(3) (Docket No. 218) (the "**H&B Objection**").

[2] G&N Defendants' Response to Timothy Frazin's Motion Pursuant to Rule 60(b)(3) (Docket No. 223) (the "**G&N Objection**").

due to the passage of time, the Court has been unable to determine why the Clerk's Office closed the adversary proceeding with two motions pending.[3]

After the conclusion of the November 3, 2017 hearing on the Fee-Defense Rule 59 Motion, the Court's Courtroom Deputy received an email from all counsel requesting that the Court not hold oral argument and rule on the Rule 60(b)(3) Motion based upon the pleadings. The Court granted this request, and now issues this Memorandum Opinion and Order. For the reasons explained below, the Rule 60(b)(3) Motion is denied.

I. Factual and Procedural History

The factual and procedural history underlying this adversary proceeding is set forth in the Court's Memorandum Opinion entered September 23, 2008 (Docket No. 132) (the "**September Memorandum Opinion**")[4] and will not be repeated herein. However, a truncated version follows.

In his First Amended Original Complaint of Malpractice and to Determine Claim and Objection to Claim (the "**Complaint**"),[5] Frazin sued the Defendants for negligence, misrepresentation/deceptive trade practices, and breach of fiduciary duty in connection with their representation of him as special trial and/or appellate counsel in a state court lawsuit related to an alleged oral promise regarding an entitlement to certain profits originating from the sale of Beanie Babies (collectively, the "**Malpractice Claims**"). The Defendants disputed the validity of the Malpractice Claims and sought the final allowance under 11 U.S.C. § 330 of the contingency fees

[3] Frazin failed to file a motion to reopen the adversary proceeding prior to filing his Motion for Ruling. With the consent of the parties as orally stated at the hearing held November 3, 2017, the Court has re-opened the adversary proceeding so that the two motions pending when the adversary proceeding was closed may be addressed (Docket No. 303).

[4] The September Memorandum Opinion was entered in support of the Liability Judgment.

[5] The Complaint included other counts that were essentially subsumed in Frazin's objection to the fee applications of Haynes and Boone and G&N. Specifically, Frazin asked this Court to (1) determine the amount of the Defendants' fee claims, after offset for the Debtor's claims against them, (2) find the Defendants estopped to claim a waiver of the Malpractice Claims, and (3) deny the Defendants' requested fees and costs because such fees and costs were excessive and unreasonable.

and expenses provided for in their respective retention and fee agreements with Frazin. The Defendants, by way of counterclaims, also sought to recover the fees and expenses they had incurred in defending against the Malpractice Claims and Frazin's objections to the fee applications (referred to as the "**fee-defense fees**"). The Court held a trial in this adversary proceeding and fee objection on July 7-11 and July 16, 2008.

Prior to the Defendants' resting their respective cases, Frazin's counsel objected to the Court hearing evidence regarding any potential recovery of the fee-defense fees. In other words, while Frazin agreed that the Defendants were entitled to prove up their fee applications as part of their respective cases, Frazin asserted that the Defendants' requests for fee-defense fees should be heard after trial pursuant to Federal Rule of Civil Procedure 54(d)(2) ("**Rule 54**"). While the Defendants were concerned about this procedure (in case their recovery of fees was by statute and might be considered a part of their substantive claims), Frazin's counsel stipulated that he would not make any such objections (even assuming such an objection might be appropriate) and that all such fee requests should be made once the parties had the benefit of the Court's determination of the Malpractice Claims and the Defendants' fee applications. The Court accepted this stipulation, and thus Frazin's request to recover fees and expenses in bringing the Malpractice Claims and the Defendants' requests to recover fee-defense fees were heard post-judgment.

On September 2, 2008, the Court entered its Order Granting in Part Defendants' Motions for Judgment (Docket No. 131) (the "**Order on Motions for Judgment**"), pursuant to which the Court entered judgment against Frazin on various claims, carrying the remaining claims forward. The Court addressed the balance of Frazin's claims in the September Memorandum Opinion. Consistent with the Order on Motions for Judgment and the September Memorandum Opinion, the Court entered the Liability Judgment on April 7, 2009, pursuant to which it (1) entered judgment

against Frazin on all of his claims for relief, (2) awarded Haynes and Boone fees in the amount of $295,000.00, plus out-of-pocket expenses in the amount of $4,757.74, for a total award of $299,757.74, and (iii) awarded G&N fees in the amount of $1,009,393.76, plus out-of-pocket expenses in the amount of $86,329.99, for a total award of $1,095,723.75.

On November 3, 2008, Haynes and Boone filed a Motion for Attorneys' Fees and Expenses and Brief in Support (the "**H&B Fee-Defense Motion**").[6] On November 4, 2008, G&N filed a Motion for Attorneys' Fees and Expenses and Brief in Support (Docket No. 137) (the "**G&N Fee-Defense Motion**" and, together with the H&B Motion, the "**Motions**").[7] The Motions sought recovery of the firms' respective fee-defense fees. Frazin filed an opposition to the Motions on November 17, 2008, and replies were filed on November 24, 2008, following which the Court took the Motions under advisement.

The Court entered its Memorandum Opinion and Order on April 7, 2009 (Docket No. 162) (the "**Original Fee-Defense Memorandum Opinion and Order")**, which was followed by the Final Judgment on Fees and Defenses (Docket No. 191) (the "**Original Fee-Defense Judgment**") entered July 7, 2009 that fully resolved the Motions. Pursuant to the Original Fee-Defense Judgment, the Court awarded the H&B Defendants $751,760.90 in fee-defense fees under section 38.001 of the Texas Civil Practice and Remedies Code, *see* TEX. CIV. PRAC. & REM. CODE § 38.001 ("**Section 38.001**"), and awarded the G&N Defendants $525,750.03 in fee-defense fees under

[6] The H&B Defendants' Motion for Attorneys' Fees and Expenses and Brief in Support (Docket No. 135) originally sought attorneys' fees of $1,441,188.45 or, alternatively, attorneys' fees of $1,066,959, and expert witness fees of $87,340.69. However, those numbers did not match the amounts set forth in the Unsworn Declaration of Robin Phelan in Supp. of Haynes and Boone Defendants' Motion for Attorneys' Fees and Br. In Supp. (Docket No. 136) (the "**Phelan Declaration**"). On January 8, 2009, the H&B Defendants filed a Notice of Errata (Docket No. 161) clarifying that the amounts sought are those set forth in the Phelan Declaration.

[7] The Court required the filing of the Motions by November 3, 2008. However, because G&N experienced problems with electronic filing of the lengthy documents, it sought and received leave of Court to file the G&N Motion on November 4, 2008.

Section 38.001. The Court also awarded the Defendants post-judgment interest from the date of the judgment at the maximum legal rate until paid in full.

With this background in mind, the Court will turn to Frazin's request to vacate the Liability Judgment and the Original Fee-Defense Judgment under Rule 60(b)(3).

II. ANALYSIS

A. Legal Standard

Rule 60(b)(3) of the Federal Rules of Civil Procedure provides, in relevant part, that:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: … (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party….

FED. R. CIV. P. 60(b)(3).

"Rule 60(b)(3) provides a basis for relief from judgment where the movant presents clear and convincing evidence of fraud ..., misrepresentation, or other misconduct of an adverse party." *MGM Well Servs., Inc. v. Mega Lift Systems, LLC*, 2007 WL 861098, *3 (S.D. Tex. Mar. 19, 2007) (citing *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 641 (5th Cir. 2005)). "A party making a Rule 60(b)(3) motion must 'establish by clear and convincing evidence (1) that the adverse party engaged in fraud or other misconduct and (2) that this misconduct prevented the moving party from fully and fairly presenting his case.'" *Gov't Fin. Serv. One Ltd. P'ship v. Peyton Place, Inc.*, 62 F.3d 767, 772 (5th Cir. 1995) (quoting *Washington v. Patlis*, 916 F.2d 1036, 1039 (5th Cir.1990)); *accord Diaz v. Methodist Hosp.*, 46 F.3d 492, 496 (5th Cir.1995). A motion for relief under Rule 60(b) is extraordinary. *Patlis*, 916 F.2d at 1038. "That spirit of finality which is implicit in all judgments, commands that courts be cautious in exercising the discretion vested in them to reopen proceedings for a new trial[.]" *Id*. (quoting *Ag Pro, Inc. v. Sakraida*, 512 F.2d 141, 143 (5th

Cir.1975), *rev'd on other grounds*, 425 U.S. 273 (1976)). "The purpose of the rule is to afford parties relief from judgments which are unfairly obtained, not those which may be factually incorrect." *Diaz*, 46 F.3d at 496; *accord Johnson v. Offshore Expl., Inc*., 845 F.2d 1347, 1359 (5th Cir.), *cert. deni*ed, 488 U.S. 968 (1988).

As a general rule, however, the bankruptcy court is divested of jurisdiction to hear a Rule 60(b) motion immediately and automatically upon the appeal of that judgment. *Alice L. v. Dusek*, 492 F.3d 563, 564–65 (5th Cir. 2007) (citing *Griggs v. Provident Consumer Disc. Co*., 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.")). The rationale for this rule is straightforward—a trial court and a court of appeals should not assert jurisdiction simultaneously over a case. *Griggs*, 459 U.S. at 58. The Fifth Circuit, however, does recognize

> the power of the [trial] court to consider on the merits and deny a 60(b) motion filed after a notice of appeal, because the [trial] court's action is in furtherance of the appeal. When the [trial] court is inclined to grant the 60(b) motion, however, then it is necessary to obtain the leave of the court of appeals. Without obtaining leave, the [trial] court is without jurisdiction, and cannot grant the motion.

Travelers Ins. Co. v. Liljeberg Enter., Inc., 38 F.3d 1404, 1407 n.3 (5th Cir.1994).

B. Jurisdiction to Consider the Rule 60(b)(3) Motion

On July 17, 2009, Frazin appealed the Liability Judgment. Notice of Appeal of April 7, 2009 Judgment (Docket No. 197).[8] In the first round of appeals, the Fifth Circuit affirmed the Liability Judgment with respect to Frazin's malpractice and fiduciary duty claims, upheld the Court's findings of fact regarding the deceptive trade practices ("**DTPA**") claim and, under *Stern v.*

[8] As discussed further below, Frazin filed a separate Rule 59 challenge to the Liability Judgment, which tolled his time to appeal.

Marshall, 564 U.S. 462 (2011), reversed and remanded only with respect to the district court's entering final judgment on the DTPA claim. *See Frazin v. Haynes & Boone, LLP (In re Frazin)*, 732 F.3d 313 (5th Cir. 2013), *cert. denied* 134 S. Ct. 1770 (2014). In the second round of appeals, following remand and entry of a take-nothing judgment on Frazin's DTPA claim by the district court, the Fifth Circuit affirmed. *Frazin v. Haynes & Boone, LLP (In re Frazin)*, 598 F. App'x 335 (5th Cir. 2015).

As previously explained, Frazin's appeal of the Liability Judgment would normally prevent this Court from granting the motion absent leave of the appellate court.[9] However, after a careful review of the Rule 60(b)(3) Motion, the Court is satisfied that it must be denied, which the Court can do notwithstanding the filing of Frazin's Notice of Appeal.

C. Frazin's Challenge of the Liability Judgment

As grounds for a new trial, Frazin alleges that the Defendants improperly withheld and/or destroyed evidence, which prevented him from putting on a full case at trial. *Id.* at 9. More particularly, he alleges that, had the Defendants fully complied with their discovery obligations, he would have had access to documents that (1) would have permitted him to refute the Defendants' challenges to his credibility, and (2) "might well have provided for an entirely different approach to the case." Rule 60(b)(3) Motion ¶¶ 12-23, 24-25.

The Defendants each filed an objection to the Rule 60(b)(3) Motion. Haynes & Boone objects on several grounds, including that (1) the Rule 60(b)(3) Motion is nothing more than a re-hash of Frazin's previously denied Rule 59 challenge to the Liability Judgment, with the only

[9] After the Court denied the Liability Judgment Rule 59 Motion on July 7, 2009, Frazin filed the Rule 60(b)(3) Motion and the Notice of Appeal regarding the Liability Judgment. Although Frazin robustly prosecuted his appeal, he let the Rule 60(b)(3) Motion lay dormant for over eight years, during which time the appellate process ran its full course, resulting in two Fifth Circuit opinions and a denial of certiorari by the Supreme Court. Because of this, the Rule 60(b)(3) Motion is in a very anomalous procedural posture. While the Rule 60(b)(3) Motion may be moot, the safer

difference being the exclusion of the appellate negligence claims, and (2) in any event, Frazin failed to meet the standard for relief under Rule 60(b)(3). The G&N Defendants' Objection adopts the H&B Defendants' Objection, and includes various unsworn declarations explaining the procedure followed when producing evidence and explaining the alleged inconsistencies in the documents produced before and after trial.

1. Frazin Failed to Prove, by Clear and Convincing Evidence, that the Defendants Engaged in Fraud, Misrepresentation, or Other Misconduct

Frazin's allegations of fraud, misrepresentation, and misconduct can be broken down into three general categories: (1) the Defendants' general "lack of candor" with the Court throughout the case, (2) inconsistencies in the documents that the Defendants produced for inspection before trial and the client files they returned to Frazin after trial, and (3) the Defendants' failure to produce a redline brief reflecting Frazin's suggestions to an appellate brief to be filed in the state court action and the accompanying cover email.

With regard to his first category of allegations, Frazin refers this Court to 12 pleadings filed by various parties in relation to his separate Rule 59 challenge to the Liability Judgment (Docket No. 170) (the "**Liability Judgment Rule 59 Motion**"), which was denied on July 7, 2009 (Docket No. 192).[10] The Court did not find Frazin's allegations regarding the Defendants lack of candor persuasive then and it finds them similarly unpersuasive now. Simply put, the record is devoid of any credible evidence suggesting that the Defendants had a lack of candor with the Court during the adversary proceeding, much less clear and convincing evidence sufficient to grant the extraordinary remedy of vacating the Liability Judgment.

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outcome is to consider it on the merits, which the Court does herein.

[10] The Court held a hearing to consider the Liability Judgment Rule 59 Motion on July 6, 2009, and read its oral ruling into the record at a hearing held July 28, 2009, a transcript of which may be found at Docket No. 211 (the "**Oral**

The Court finds Frazin's second category of allegations, including that the Defendants withheld tens of thousands of documents during discovery, similarly unpersuasive. In support of these allegations, Frazin submits the declaration of his attorney, Gary Schepps (Docket No. 196-1) (the "**Schepps Declaration**"). In the Schepps Declaration, Schepps details his visits to G&N's and Haynes and Boone's offices to review Frazin's files and his observations regarding the documents produced for inspection during discovery versus the client files returned to Frazin post-trial. With respect to Haynes & Boone, Schepps avers that:

> The file that was produced to me by Haynes and Boone in February 2008 did not look like the file which was released to Mr. Frazin in 2009. The boxes may have physically been the same boxes as I saw in February, but the document production inside was not. I have no way to fully determine to what extent the contents changed, but can say that unlike the file which I was shown in February 2008, the file which was released to Mr. Frazin was broken apart, the materials were in a very different order and had been segregated and bates stamped.

Schepps Declaration ¶ 10. Schepps, however, provides no specific information regarding the documents that the H&B Defendants allegedly withheld, only a passing statement that the files looked different. Notably, Schepps does not state that he took pictures of the file, copied the entire file, or even counted the pages produced for inspection. And, as Schepps freely admits, he has "no way to fully determine to what extent the contents changed." *Id.*

In response, Haynes and Boone filed the unsworn declaration of Angela M. Josephs, the individual with Haynes and Boone who maintained the documents at issue (Docket No. 176) (the "**Josephs Declaration**"). According to Josephs, she "carefully maintained the integrity of the Haynes and Boone files" and, post-trial, Frazin received "the same boxes that had been available throughout litigation; no documents were removed, withheld, altered or modified in any way." Josephs Declaration ¶ 8.

Ruling").

Based upon this record, the Court finds that Frazin failed to prove by clear and convincing evidence that Haynes and Boone participated in any type of fraud, misrepresentation, or misconduct in relation to the documents produced to him during discovery and that were later turned over to him after trial.

With respect to G&N, the Schepps Declaration states that:

> In or about the first week of February 2008, I went to the offices of Griffith & Nixon to review their production of Mr. Frazin's file. At the time Scott Griffith represented to me that I was being shown Mr. Frazin's entire file. At that time the production included just over 40 boxes of material. I opened each and every box and examined each item contained in the production. I did not examine every page of every item, but checked at least that each item appeared to contain what it represented.
>
> ***
>
> On or about April 28, 2009 I accompanied Mr. Frazin to pick up his file (Griffith & Nixon refused to release the electronic portions of his file) from Griffith & Nixon. At that time, about a year after the trial of Mr. Frazin's case against Griffith & Nixon, in place of the amount of documents I had been shown prior to trial, there were over 50 boxes of documents.
>
> ***
>
> Griffith & Nixon released in April 2009 almost ten more large boxes of material, being an estimated 40,000 more pages of documents, than had been shown to me for inspection in 2008 prior to trial.

Schepps Declaration ¶¶ 2, 6, 8. As was the case with Haynes and Boone, Schepps physically inspected the documents, but he did not take pictures of the file, copy the entire file, or count the number of pages contained in the boxes. Instead, he apparently bases his calculation of "40,000 more pages of documents" solely upon the number of boxes.

In response, G&N filed the unsworn declarations of Nicole LeBoeuf (Docket No. 223-1) (the "**LeBoeuf Declaration**") and Anthony Jach (Docket No. 223-2) (the "**Jach Declaration**"). Together, these declarations detail how G&N tracked the files at issue, including how it initially

produced the documents in 42 boxes for inspection but then, in order to keep track of documents copied by Frazin's counsel during discovery, G&N organized the documents in a different manner, which increased the box count to 51. As explained by Jach,

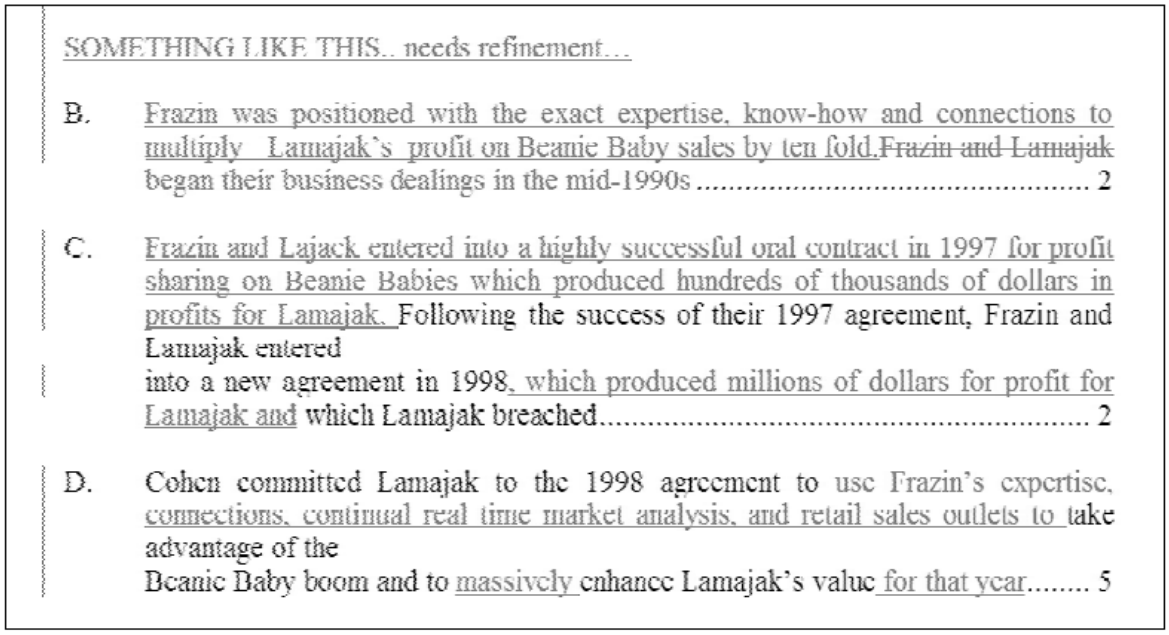
> the same number of documents contained within the litigation file never changed from the date Mr. Schepps inspected the documents in February 2008, to the time Mr. Galow inspected the litigation file in May 2008, until the time that the litigation file was released to Frazin in April 2009. I absolutely dispute Mr. Gary Schepp's affidavit dated July 17, 2009, wherein he states that G&N released an estimated 40,000 more pages of documents than had been shown to Mr. Schepps in February 2008.

Jach Declaration ¶ 20. According to LeBoeuf, when Frazin picked up the 51 boxes after trial, he "complained to Schepps in my presence that the receipt was inaccurate because the boxes were not full." LeBoeuf Declaration ¶ 4. Thus, the Court questions the accuracy of Schepp's estimate that G&N failed to produce an estimated 40,000 pages of documents.

Based upon this record, the Court finds that Frazin failed to prove by clear and convincing evidence that the G&N Defendants participated in any type of fraud, misrepresentation, or misconduct in relation to the documents produced to him during discovery and that were later turned over to him after trial.

The Court will now turn to Frazin's allegations that the Defendants allegedly withheld and/or destroyed (1) a redline brief reflecting Frazin's comments to an appellate brief prepared by Haynes and Boone that was to be filed in the state court appeal, and (2) the cover email from Frazin to Haynes and Boone to which the redline brief was attached. These allegations arise from the screenshot of a portion of the brief purportedly discovered post-trial by Shawn Frazin, Frazin's brother (a lawyer), while reviewing files saved to his personal computer by a program called "clipmate." August 2009 Declaration of Shawn M. Frazin (Docket No. 224-2) ("**Shawn's**

Declaration") ¶ 4. Per the Declaration of Shawn M. Frazin found at Docket No. 170-1,[11] a true and correct copy of the screen clip is as follows:



SOMETHING LIKE THIS.. needs refinement…

B. Frazin was positioned with the exact expertise, know-how and connections to multiply Lamajak's profit on Beanie Baby sales by ten fold.~~Frazin and Lamajak~~ began their business dealings in the mid-1990s 2

C. Frazin and Lajack entered into a highly successful oral contract in 1997 for profit sharing on Beanie Babies which produced hundreds of thousands of dollars in profits for Lamajak. Following the success of their 1997 agreement, Frazin and Lamajak entered into a new agreement in 1998, which produced millions of dollars for profit for Lamajak and which Lamajak breached..... 2

D. Cohen committed Lamajak to the 1998 agreement to use Frazin's expertise, connections, continual real time market analysis, and retail sales outlets to take advantage of the Beanie Baby boom and to massively enhance Lamajak's value for that year..... 5

In his Rule 60(b)(3) Motion, Frazin alleges that the clip proves that the redline brief and cover email exist and, because the documents were not produced during discovery or returned to him with his case file, Haynes and Boone must have withheld and/or destroyed the documents, preventing him from fully and fairly presenting his case. Frazin, however, provides no evidence indicating that he did, in fact, email the redline brief to Haynes and Boone or that the documents were otherwise in Haynes and Boone's possession. Instead, Frazin asks this Court to make unsupported inferences and leaps in logic to find that, not only did the Defendants fail to comply with discovery requests, Haynes and Boone purposefully withheld and/or destroyed evidence. There is nothing in the record that would support such findings.

Thus, based upon this record, the Court finds that Frazin failed to prove by clear and

[11] Shawn's Declaration (Docket No. 224-2) was filed in support of the Rule 60(b)(3) Motion, while his declaration

convincing evidence that the Defendants participated in fraud, misrepresentation, or misconduct in relation to the redline brief and alleged cover email.

2. Frazin Failed to Prove, by Clear and Convincing Evidence, that the Alleged Fraud, Misrepresentation, or Misconduct Prevented Him From Fully and Fairly Presenting his Case

Even if Frazin could prove by clear and convincing evidence that the Defendants engaged in fraud, misrepresentation, or misconduct (which the Court previously found he had not), Frazin failed to prove that the alleged fraud, misrepresentation, or misconduct prevented him from fully and fairly presenting his case at trial.

In his Rule 60(b)(3) Motion, Frazin alleges that Haynes and Boone and G&N improperly destroyed and/or withheld documents during discovery that could have (1) changed the manner in which he presented his case, including his asserting additional, though unspecified, causes of action against the Defendants, and (2) permitted him to defend against the Defendants' attacks to his credibility.

According to Frazin, he

> was not able to put on a full case at trial. The defendants attacked plaintiff's credibility on the basis that Mr. Frazin (nor anyone on his behalf) never requested that Haynes and Boone simply respond by including specific contractual obligations in the briefing. Mr. Frazin had no independent evidence to prove that Haynes and Boone had in fact received a request from him asking them to respond by including specific contractual obligations in the briefing. Three out of the Court's four enumerated basis for judging Mr. Frazin as not credible were directly disproved by the withheld evidence.

Rule 60(b)(3) Motion ¶ 22.

By way of background, Frazin premised his negligence claim against the G&N Defendants on an allegation that the G&N Defendants "failed to ask the proper questions at trial to establish

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found at Docket No. 170-1 was filed in support of the Liability Judgment Rule 59 Motion.

contract formation – *i.e.*, a sufficiently definite oral agreement between Lamajak and Frazin." September Memorandum Opinion at 51. During trial before this Court, Frazin asserted that he had given more details of the oral agreement to his counsel than was elicited at the state court trial, and that, if he had been asked the proper question, the additional detail would have been introduced as evidence and would, on appeal, have supported the jury's verdict on breach of contract.

Testifying to the contrary in the adversary proceeding, Scott Griffith of G&N stated that Frazin had not given him more detail and, in fact, the details to which Frazin testified at the trial of this adversary proceeding were more specific than anything Frazin had reported about the oral agreement to the G&N Defendants or at Frazin's depositions taken while he was represented by other counsel. *See* September Memorandum Opinion at 53. In its September Memorandum Opinion, the Court noted that Griffith's testimony was consistent with Frazin's 2002 deposition testimony regarding what was said at the time of the oral agreement. *Id*. at 53-54. This Court further noted that the testimony of Mark Walsh, a lawyer not named as a defendant in the adversary proceeding and with no financial interest in its outcome, was also credible and consistent with Griffith's testimony. *Id*. at 16-17 n.11, 54-55. Finding Frazin's testimony contradictory to his prior testimony and simply not credible, the Court found that Frazin did not tell the G&N Defendants about the more specific oral promises he now claims to have made. *Id.* at 62 – 68.

Returning to the Rule 60(b)(3) Motion, Frazin's argument that the Defendants' alleged withholding of the redline brief prevented him from fully and fairly presenting his case does not comport with the record before the Court. Indeed, as previously found by the Court in its Oral Ruling:

> it appears that the 'newly discovered' screen clip was referenced in a Warren Dodson email that was provided and selected for copying during Frazin's counsel's April 10, 2008 document review visit and was thus available to Frazin and his

> counsel prior to trial. Frazin and his counsel could have asked for the attachment or researched Shawn Frazin's computer well before the July 2008 trial.

Oral Ruling at 6:6-12. Moreover, the clip was on Shawn's computer at all times, and Frazin presumably had access to his brother's computer prior to trial. In fact, Shawn held a power of attorney to act on Frazin's behalf during a critical juncture of the state court case. If Frazin knew he had told G&N about these specific promises, and that his brother Shawn was handing his affairs during this critical period pursuant to the power of attorney, all documents on Shawn's computer, including the clip, could and should have been reviewed in preparation for the trial.

Notably, Frazin does not explain why a search of his brother's computer was not performed prior to trial, other than Shawn's statement in his declaration that a random search of the files saved by clipmate "would take between 2,000 to 8,000 hours depending on if I was allowed to take breaks, and how quickly it would be possible to recognize which clip, if any, related to Tim's case." Shawn's Declaration ¶ 7. That review would be burdensome does not change the fact that Frazin and/or Shawn knew what they had asked to be added to the appellate brief and approximately when, particularly since Frazin's attorney had obtained a document referencing the document in an April 2008 discovery production.[12]

Moreover, the clip does nothing to establish (or even suggest) that Frazin told G&N prior to the trial about specific promises made in regards to the oral agreement at issue. And, even if the clip supported Frazin's argument, that would only refute one reason why the Court rejected Frazin's trial testimony as not credible, not the several others.

Finally, that Frazin "might well have" changed his trial strategy or alleged different (though

[12] Notably, Frazin could not obtain a copy of the documents from his computer because his hard drive crashed. Rule 60(b)(3) Motion at 6. Moreover, Shawn did not remember that the redline brief existed until he saw the clip, and he does not have a copy of the original saved in his email. Declaration of Shawn Frazin (Docket No. 170-1) ¶ 6.

unspecified) causes of action had Defendants produced the allegedly missing documents is insufficient to prove, by clear and convincing evidence, that the Liability Judgment should be vacated. *See Lloyd v. Rubin*, 1999 WL 1204484, *5 (N.D. Tex. Dec. 15, 1999) ("The court rejects the proposition that the need to adjust trial plans and themes is sufficient of itself to meet the relevant [Rule 60(b)(3)] standard."). This is particularly so in light of the apparent availability of the clip prior to trial. For whatever reasons, Frazin chose not to follow up on the redline brief or provide testimony as to its existence at trial, although each option was available to him. Accordingly, the Court finds that Frazin failed to prove by clear and convincing evidence that the Defendants' alleged fraud, misrepresentation, or misconduct prevented him from fully and fairly presenting his case.

In summary, Frazin failed to demonstrate by clear and convincing evidence that (1) the Defendants participated in fraud, misrepresentation, or misconduct in regards to their candor with the Court or their discovery obligations, or (2) any alleged fraud, misrepresentation, or misconduct, if it occurred, prevented him from fully and fairly presenting his case. Accordingly, Frazin's request to vacate the Liability Judgment under Rule 60(b)(3) is denied.

D. Frazin's Challenge to the Original Fee-Defense Judgment

On July 17, 2009, Frazin filed the Fee-Defense Rule 59 Motion requesting that the Court alter or amend the portion of the Original Fee-Defense Judgment holding him liable for the Defendants' respective fee-defense fees under Section 38.001. The Defendants each filed an objection to the Fee-Defense Rule 59 Motion (Docket Nos. 209 and 210) and Frazin filed replies (Docket Nos. 212 and 213).

The Court held a hearing on the Fee-Defense Rule 59 Motion on November 3, 2017. For the reasons stated in its Memorandum Opinion and Order entered December 22, 2017 (Docket No.

305) (the "**Revised Fee-Defense Memorandum Opinion and Order**"), the Court granted the Fee-Defense Rule 59 Motion and issued an amended and superseding memorandum opinion and order concluding that the Defendants were not entitled to recover the fee-defense fees under applicable law. A revised Judgment followed (Docket No. 306) (the "**Revised Fee-Defense Judgment**"), holding that Frazin is not liable for the payment of the Defendants' respective fee-defense fees under any of the alleged grounds.

Accordingly, the Court finds and concludes that Frazin's request to vacate the Original Fee-Defense Judgment under Rule 60(b)(3) is moot in light of the entry of the Revised Fee-Defense Judgment.

III. CONCLUSION

For the reasons set forth above, the Court finds and concludes that:

- Frazin's request to vacate the Liability Judgment under Rule 60(b)(3) must be denied because Frazin failed to prove by clear and convincing evidence that (1) the Defendants engaged in fraud, misrepresentation, or misconduct, and (2) the alleged fraud, misrepresentation, or misconduct, if it had occurred, prevented him from fully and fairly presenting his case at trial.

- Frazin's request to vacate the Original Fee-Defense Judgment under Rule 60(b)(3) is moot due to this Court previously granting the Fee-Defense Rule 59 Motion and entering the Revised Fee-Defense Judgment holding that Frazin is not liable for the payment of the Defendants' fee-defense fees.

Accordingly, it is hereby ORDERED that the Rule 60(b)(3) Motion is DENIED.

END OF MEMORANDUM OPINION AND ORDER # #