

IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL
CIRCUIT, IN AND FOR BROWARD COUNTY, FLORIDA

POMPANO SENIOR SQUADRON FLYING CLUB, INC.
(aka POMPANO BEACH FLYING CLUB)

Plaintiff,

v.

Case No.: CACE 20-005993

Division (8)

CARL L. KENNEDY

Defendant

DEFENDANT'S REPLY TO PLAINTIFF'S RESPONSE
TO DEFENDANT'S MOTION FOR REHEARING¹

COMES NOW, Defendant, CARL L. KENNEDY, II ("Mr. Kennedy") by and through the undersigned counsel, and in reply to Plaintiff's Response to Mr. Kennedy's Motion for Rehearing filed on March 16, 2022 respectfully replies to the allegations made therein as follows (for convenience the allegations contained in Plaintiff's "Response" are first recited verbatim, with Mr. Kennedy's "Reply" immediately following):

1. CLUB: "Plaintiff Club finally after twenty months (July 2020) from when it first propounded its Request to Produce to Defendant Kennedy obtained an Order requiring Defendant Kennedy to provide a copy (fully accessible copy) of the Plaintiff's own financial and accounting data to it."

KENNEDY: The above statement is false and misleading. Plaintiff did not request electronic data from Mr. Kennedy until mid-late 2021. In fact, Plaintiff's general request for "electronic data" was made in their Second Request Request to Produce dated February 11, 2021 (not two (2) years ago). Plaintiff was forced to withdraw its claim for an injunction because it was forced to acknowledge its receipt from Mr. Kennedy of all accounting and financial data in hard copies.

¹ A transcript of the Hearing held on February 28, 2022 is attached hereto, with references herein noted "Tx: ____".

CLUB: “Such Order was not the first Order Plaintiff obtained requiring Defendant Kennedy to produce the electronic datafile.”

KENNEDY: The record is completely devoid of another Order to produce the electronic data file.

CLUB: “In fact, this Court entered Orders, requiring Defendant Kennedy to produce the electronic data file to Plaintiff Club on:

a. June 25, 2021;

KENNEDY: The Order dated June 25, 2021 does not address electronic data.

b. November 11, 2021;

KENNEDY: The Order is dated November 19, 2021, and Mr. Kennedy complied with the Order, providing the Quickbooks QBB data file to Plaintiff on December 9, 2021.

c. December 21, 2021; and finally on

KENNEDY: Mr. Kennedy complied with the Order dated December 22, 2021.

d. March 7, 2022.

KENNEDY: This Order is being reheard by the Court on April 4, 2022.

2. CLUB: “Despite being Ordered on at least four (4) occasions to unequivocally produce the full access Quickbooks datafile, Defendant Kennedy instead:

a. Produce nothing;

KENNEDY: This Order does not address electronic data!

b. Produce hard copies of what he alleged to be then entire data file;

KENNEDY: Mr. Kennedy produced what was required by the Court’s Order on December 9, 2021.

c. Produced electronic PDF copies of what he alleged to be the entire datafile;

KENNEDY: Mr. Kennedy's production complied with the Court's Order.

d. Filed a Motion for Rehearing alleging that Plaintiff Club had no legitimate basis to request full access *to its own data!*

KENNEDY: Mr. Kennedy provided Plaintiff with its electronic data in multiple formats, including all of the paper documents reflecting the QuickBooks data, a PDF of the QuickBooks data, an Excel spreadsheet containing the QuickBooks data, and a QBB file containing the QuickBooks data. Plaintiff has acknowledged it has the data it seeks. The only format containing the Quickbooks data file which Plaintiff does not have is an editable one.

3. CLUB "What more legitimate basis does Plaintiff Club need to produce to this Court besides this Court's very own ORDERS requiring the production by Defendant Kennedy?!"

KENNEDY: Plaintiff has not provided a legitimate basis for needing an editable version of the Quickbooks data file Mr. Kennedy gave them. The data file Mr. Kennedy provided is tantamount to an original document, and giving Plaintiff the ability to edit the data would be fraught with significant risk for Mr. Kennedy.

4. CLUB: "How is it that a party can defy three court orders to produce data and then not only request a rehearing on the fourth (4th) Order by allege that the Plaintiff who owns the fully accessible data file "has no legitimate basis to request" the thrice ordered data?!"

KENNEDY: Mr. Kennedy has complied with the Court's Orders. Plaintiff does not own the "fully accessible data file", Plaintiff only owns the data itself, which it has repeatedly admitted it has!

5. CLUB: "If this Court requires more justification than its own three (3) prior Orders which Defendant Kennedy violated, Plaintiff Club relies upon Florida statutes for its "legitimate basis"."

KENNEDY: First Mr. Kennedy did not violate any Order. Plaintiff still has not offered any reason that Mr. Kennedy needs to provide it with the capability of

editing the data Mr. Kennedy provided to them. First, Plaintiff said it didn't have the data. Mr. Kennedy proved them incorrect and they acknowledged they have the data (Tx: 3:2-3, 8-9). Then Plaintiff said they couldn't access the data. Mr. Kennedy proved them incorrect and Plaintiff acknowledged it can access the data. Then they said they couldn't run or print reports (Tx: 3:12-13, 15, 18; 8:15, 24). Mr. Kennedy proved them incorrect and they have since acknowledged they can run reports. Now Plaintiff is contending they need an editable file "just in case" the IRS audits them. Neither Plaintiff nor their "expert" affiant offer an explanation as to why they would need an editable file to address an IRS audit. Notwithstanding any such explanation, the mere "possibility" of a future IRS audit is not a legitimate basis for Mr. Kennedy to provide Plaintiff with an editable data file.

6. CLUB: "Florida statutes (both chapters 607 and 617, Florida's corporation statute and its not-for-profit corporation statute) gives a prior director 72 *hours* (emphasis added) to turn over all corporate assets after leaving office."

KENNEDY: This is again misleading. Plaintiff conspicuously fails to provide a specific citation in either of the statutes which would be applicable in this case to Mr. Kennedy, since Mr. Kennedy was not removed from office. The transition on February 12, 2020 to the new BOD was the natural conclusion of my term, and I chose not to run for another term. In fact, there is no 72 hour provision located within § 607.0808, Fla. Stat.

CLUB: "Based upon the pleadings by both parties herein Defendant Kennedy stopped serving as Plaintiff Club's treasurer and director in January 2020."

KENNEDY: This is false. Mr. Kennedy stopped serving at the conclusion of the election on February 12, 2020.

CLUB: "26 months ago which calculate to 18,980 hours, just slightly more than the 72 hours required by statute."

KENNEDY: Even this simple mathematical calculation is inaccurate.

7. CLUB: "There is no dispute as to the following:

a. Defendant Kennedy was an officer (treasurer) and director of Plaintiff Club until January 2020."

KENNEDY: This is false. Mr. Kennedy was Treasurer until the conclusion of the election on February 12, 2020.

b. The electronic QuickBooks data file is Plaintiff Club's data.

KENNEDY: What "the" electronic Quickbooks data file are they referring to? The Quickbooks data file Mr. Kennedy provided to Plaintiff contains Plaintiff Club's data. Mr. Kennedy used his own Quickbooks program for his own use while Mr. Kennedy was treasurer, but the Quickbooks data file does not belong to Plaintiff, only the data itself does, and Mr. Kennedy has provided to Plaintiff all of the Quickbooks data related to Plaintiff Club, as they have acknowledged.

c. The data file was created as part of the ongoing business of Plaintiff Club.

KENNEDY This is misleading. Mr. Kennedy used Quickbooks for his own use when Mr. Kennedy was treasurer. It was not created as part of the ongoing business of Plaintiff Club, as there was no requirement that Mr. Kennedy use Quickbooks, or that he maintain the financial data of the Club by any method or manner. The use of Quickbooks, his own program, was for his own convenience, and not required or "created as part of the ongoing business of Plaintiff Club".

d. The data file is an asset of Plaintiff Club.

KENNEDY: This is false. The Club financial position is made up of the data on the data file, and the data itself, which Plaintiff has already acknowledged it has, is an asset. The data file, however, does not belong to Plaintiff because it is a creation of his own making and for his own convenience.

8. CLUB: "Plaintiff Club has a legitimate need for the data file, has a legitimate need for the full access to its own data (a point that Plaintiff Club is beyond exasperation with having to argue with Defendant Kennedy). Based upon the attached affidavit in support hereof, Plaintiff Club has a very legitimate need to access."

KENNEDY: The "affidavit" is addressed separately in paragraph 16 below.

9. CLUB: “Defendant Kennedy stands accused of misappropriating hundreds of thousands of dollars from Plaintiff Club, of filing fraudulent liens against Plaintiff Club’s assets in Defendant Kennedy's personal name despite Defendant Kennedy having never provided the alleged funding to Plaintiff Club to support the legality of those liens, is the third-party Defendant in two (2) other lawsuits in which Plaintiff Club stands accused of borrowing money and not repaying same although no valid documents exists such as promissory notes, chattel mortgages, UCC-1 agreements, etc.”

KENNEDY: Plaintiff can accuse Mr. Kennedy of stealing millions of dollars, but the fact is, they are only exactly that – accusations! After almost two (2) years, it cannot point to one single dime that Mr. Kennedy “misappropriated”. They have been provided with all of the documentation, in multiple forms, to support every penny Mr. Kennedy handled while he was Treasurer.

Plaintiff again lacks candor with the Court when it states Mr. Kennedy “never provided the alleged funding to Plaintiff Club”, as it is fully aware, and in possession of all documentation evidencing, the receipt of, and full use of, all monies loaned to and used by the Plaintiff from any source. Plaintiff knows that when Mr. Kennedy took office in 2014, Plaintiff had two (2) aircraft, and when Mr. Kennedy left office, due to his exceptional management of the Club’s finances, the Plaintiff had six (6) aircraft.

Plaintiff is facing two (2) lawsuits (as well as already having lost two (2) additional lawsuits), not due to any fault of Mr. Kennedy, but due to their own failure and refusal to honor legitimate debts of the Club. When Mr. Kennedy was treasurer, there were never any lawsuits against the Club, nor any pending when the new treasurer took office after the February, 2020 election. Plaintiff is trying to blame Mr. Kennedy for anything and everything they can, civilly and criminally, even joining him as a third-party Defendant in the two (2) current lawsuits against them.

10. CLUB: “Defendant Kennedy, again despite having been ordered three (3) times in the past to produce the data file in question, now asserts the Plaintiff can produce reports all it has to do it purchase some alleged and unnamed third-party software and jump through hoops to print such reports. The question to this court is WHY? Why should the owner of the very datafile in question, the rightful possessor of such datafile (pursuant to the By-Laws - which states only the current treasurer shall hold the corporate financial books of Plaintiff Club and statutory

authority) have to jump through more hoops *after having obtained four (4) court orders already? Why is the tail allowed to wag the dog?"*

KENNEDY: Plaintiff represented and maintained before this Court that it already has the ability to edit the data (Tx: 11:2-3; 8:18, 22, 25; 9:3), and based on that representation, this Court stated:

COURT "Let me tell you this. If there's no difference, if they can edit the data now and there's no difference as to whether or not they have administrative authority or administrator authority or not. Then I'm inclined to say, sure, let 'em have it, but if there's truly a difference where they can edit it if they have the administrator authority and they can't edit it now, that's a different ballgame" (Tx: 13:20-14:2), rendering the necessity of a further hearing scheduled for April 4, 2022.

KENNEDY: Plaintiff has now finally acknowledged that what it wants, and cannot do, is edit the data file Mr. Kennedy gave them.

KENNEDY: Conversely, Plaintiff cannot provide evidence of one specific penny Mr. Kennedy mishandled to support their accusation of his alleged misappropriation of Plaintiff's monies. They are determined to find wrongdoing by Mr. Kennedy, and he will not put that opportunity in their hands by providing an editable data file. Mr. Kennedy has a legitimate and good faith basis to refuse to give them an editable data file. Plaintiff now has the electronic data in multiple reasonable forms, which is all Plaintiff is entitled to in accordance with the Rules regarding discovery. Mr. Kennedy will not give Plaintiff the ability or opportunity to edit the data file he has provided them. Plaintiff has declared they "don't want to play nice in the sandbox" (direct quote from counsel Holodak), and have lived up to this position.

11. CLUB: "Plaintiff Club needs to be able to prepare for trial and produce evidence in this case against Defendant Kennedy to prove its claim, evidence that among other things is based upon its ability to produce reports from Quickbooks or through other means by having the capability of exporting its *own* data to other applications."

KENNEDY: Plaintiff is incorrect, as it has the ability to produce reports from within Quickbooks and has the capability of exporting that data to other applications they already possess (such as Excel), to create, print, and edit the data all they want. Plaintiff is not in any way impeded in connection with trial preparation or producing evidence. They have the data!!!

CLUB: “Steps that Defendant Kennedy has effectively blocked for more than two (years) by violating court orders, by producing other than what he was ordered to produce by having the tail wag the dog and Plaintiff Club seems to have the burden to explain time and time again why it has the audacity to demand its own data back from a former director, or to justify why it wants its own data to prepare for trial against the very person who has had the ability to manipulate the data files since he left office.”

KENNEDY: Again, there is no court order Mr. Kennedy has been found to have violated. Mr. Kennedy has produced exactly what he was ordered to produce. Plaintiff does not “want the data”, it has acknowledged that it has the data! What Plaintiff actually wants is the ability to edit the data file given to it by Mr. Kennedy.

12. CLUB: “The point should not be lost on the court that the rightful owner of the data is being prevented from having access to it, while the person who stands accused of misappropriating funds is allowed to have full control of that very same datafile?”

KENNEDY: Plaintiff has acknowledged they have the data itself and access to the data file Mr. Kennedy provided. Plaintiff has full control of the data file, with the sole exception of editing capabilities. The Quickbooks program, and Mr. Kennedy’s use of it to create an electronic format of the data (which data Plaintiff has acknowledged Mr. Kennedy has provided in multiple forms), which Mr. Kennedy used for his own convenience, belongs to Mr. Kennedy. Mr. Kennedy purchased and owns the Quickbooks program he used while he was Treasurer, and there was no requirement that he keep financial records electronically, or in any other form.

CLUB: “That the Defendant is allowed to have privileges against Plaintiff Club’s data that Plaintiff Club is prevented from having by that same Defendant and must justify to this court five (5) times now as to why that should be allowed?”

KENNEDY: Mr. Kennedy doesn’t have “privileges” Plaintiff doesn’t have. In fact, what they have, what Mr. Kennedy provided them, also provides Plaintiff insurance that Mr. Kennedy can’t edit it, either! What Mr. Kennedy sent them is an original document against which both parties can easily compare for alterations or discrepancies.

13. CLUB: “Surely this cannot be deemed to be the proper outcome or a fair and reasonable resolution to this issue.”

KENNEDY: The Plaintiff, throughout this legal matter, continues to escalate its filings with rife duplicity.

14. CLUB: “That data is and has always been the asset of the corporation that is Plaintiff Club, under the Club’s By-Laws only the treasurer can possess the Club’s financial data, Defendant Kennedy is no longer the Club’s treasurer and has not been since January 2020, yet Defendant Kennedy remains the *only* person in possession of the data in such a manner as to be able to edit the data, export the data to other programs to run reports against, print reports from QuickBooks itself and do any other manipulation of Plaintiff Club’s data that he desires.” All the while claiming Plaintiff Club as “no legitimate basis to request full access to its own data.

KENNEDY: As explained above, the data itself is an “asset” of Plaintiff Club, but the Quickbooks data file is not. Mr. Kennedy was Treasurer until the conclusion of the elections on February 12, 2020. If Mr. Kennedy wanted to “edit” the data, wouldn’t he have already done so in the past 2 years? In addition, Plaintiff has all the paper and electronic records reflecting each item of data contained in the QBB data file they have been provided. Plaintiff has no legitimate basis to request or be granted the ability to edit or manipulate the data Mr. Kennedy provided them. This is exactly what Mr. Kennedy is trying to avoid. Mr. Kennedy will not give them the capability of in any way altering his “original document”.

15. CLUB: “Lastly, in his Motion for Rehearing Defendant Kennedy asserts, wrongfully, that Defendant Kennedy has met his obligations under Rule 1.350, Fla.R.Civ.P. This simply is FALSE, based upon each of the above cited Orders, Defendant Kennedy was obligated to turn over the *full* data file to Plaintiff Club.”

KENNEDY: Mr. Kennedy has provided the full data file, in a read-only format which Plaintiff can’t edit.

CLUB: “To date, Defendant Kennedy has yet to comply with any such Order of this Court and the tail continues to wag the dog.

KENNEDY: Mr. Kennedy has complied with the letter of every single Order. Additionally, Fla.R.Civ.P. 1.350(b) states, "If a request for electronically stored information does not specify the form of production, the producing party must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms."

Plaintiff's original Request for Production for electronic information did not specify the form of production. Mr. Kennedy nonetheless provided it to them in multiple "reasonably usable form or forms" (hard copy, PDF, Excel, and QBB). The only form in which they don't have the electronic data they seek is an editable one.

16. KENNEDY: Mr. Kennedy responds to the "correspondence" of Matthew Khan which was provided by Plaintiff with its response to Mr. Kennedy's Motion for Rehearing as follows:

KAHN: "I received the QuickBooks file for the Pompano Beach Flying Club. The username and password that was provided only allows me to view various reports on my screen.

KENNEDY: This is incorrect. Plaintiff can produce/generate any report imaginable, and the data can easily be printed from the data file Mr. Kennedy gave them by exporting it into their Excel program, giving Plaintiff full access to the electronic data file Mr. Kennedy provided them, in a form they can edit and print.

KAHN: "I am unable to print, export data to excel. and drill down into the detail of the various transactions reflected in the data to analyze information."

KENNEDY: Plaintiff can print and export data to excel. There is no impediment to Plaintiff's ability to "drill down into the detail of the various transactions reflected in the data to analyze information" in the Quickbooks data file Mr. Kennedy provided.

KAHN: "These functions are needed in aiding you in this case and determining how and why transactions were posted. as well as determining if we need to request source documents."

KENNEDY: “How and why transactions were posted” is also contained in the QBB file they possess, as every transaction contains description(s). They are already in possession of all source documents.

KAHN: “I therefore need to have administrative rights to this QuickBooks file.”

KENNEDY: Plaintiff already has administrative rights.

KAHN: “Without having this access, I am unable to provide the basic services needed regarding this case. The username and password for the administrative login is therefore required.”

KENNEDY: “They already have the username and password for login to administrative capabilities.”

KAHN: “Finally, the client should be given full access to this file so that IF the IRS would has any questions or audits any returns filed, the client would be able to research and furnish that information to the Department of Treasury.”

KENNEDY: There is no impediment to Plaintiff’s ability “to research and furnish that information to the Department of Treasury” if ever needed. At this time, Plaintiff has no legitimate basis to request an editable version of the QBB file Mr. Kennedy provided.”

17. ***KENNEDY: Plaintiff has spent an exorbitant amount of money on attorney’s fees in pursuit of the ability to edit Mr. Kennedy’s data, rather than spend the money to simply input the data Mr. Kennedy gave them, themselves, into any program or format they wish. Plaintiff doesn’t want to do that because they want to edit Mr. Kennedy’s data and present it in a fashion that alterations may appear to be those of Mr. Kennedy, or with edits Mr. Kennedy could not readily discover or discern without going through each and every entry in the data file he gave them, comparing what he gave them against what they can “create” by editing his data file and attempting to present it to the trier of fact – perhaps for the first time at trial! ~~Mr. Kennedy is~~***

~~the Defendant, and they are viciously persecuting him.~~ The Court should not give them the ability to, in any manner edit or alter the data contained in the data file he gave them.

18. **KENNEDY:** Plaintiff's disrespectful and offensive "chastising" of this Court by suggesting "the tail is wagging the dog", is not only inappropriate, but also further evidence of the Plaintiff's bullying tactics which they have demonstrated from the beginning of this case. This Court should not be "goaded" into submitting to Plaintiff's desire to edit his data. Counsel's assertion that because Mr. Kennedy is named the Defendant in this matter somehow establishes his guilt, is improper and unethical.

19. **KENNEDY:** On March 8, 2022, in good faith, the undersigned and counsel for Plaintiff had a conference call in an attempt to assist counsel for Plaintiff as to the Club's abilities to work within the .QBB data file. Mr. Kennedy offered to speak to Plaintiff's accountant/bookkeeper, again to facilitate Plaintiff's access to the data file Mr. Kennedy provided. Opposing counsel stated he would arrange a conference call, but never followed up. On March 9, 2022, the undersigned sent an email to opposing counsel, in yet one more attempt to facilitate Plaintiff's access to the QBB file, informing him that Mr. Kennedy and I were available, after hours if necessary, to accomplish this task. Plaintiff's counsel failed to respond to this email.

WHEREFORE, Defendant, CARL L. KENNEDY, II respectfully requests the Court enter an Order denying Plaintiff's request for an editable form of the electronic data Mr. Kennedy provided in accordance with the Rules regarding discovery.

[CERTIFICATE OF SERVICE ON FOLLOWING PAGE]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of April 2022 a copy of the foregoing was e-filed and delivered to Edward F. Holodak, Esq., 7951 SW 6th St., Suite 210, Plantation, FL 33324, pleadings@holodakpa.com.

KALISH & JAGGARS, PLLC.

/s/ Scott J. Kalish

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1 IN THE CIRCUIT COURT OF
2 THE 17TH JUDICIAL CIRCUIT IN
3 AND FOR BROWARD COUNTY
4 FLORIDA

5 POMPANO SENIOR SQUADRON
6 FLYING CLUB, INC., a Florida
7 corporation, CASE NO.:CACE 20-005993 (08)

8 Plaintiff/Counter-Defendant

9 v

10 CARL KENNEDY, individually,
11 Defendant/Counter-Plaintiff

12 February 28, 2022

13 11:00 a.m. - 11:19 a.m.

1 A P P E A R A N C E S:

2 (Teleconference via ZOOM)

3 EDWARD F. HOLODAK, P.A.
4 BY: EDWARD F. HOLODAK, ESQ.
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Attorney on behalf of the Defendant.

1 MR. HOLODAK: As you know, we were before you
2 a couple of times trying to get the Quick Books data
3 file for Mr. Kennedy, which he, ultimately, provided,
4 but the method in which he provided it didn't give
5 what's called, I believe, "administrator authority,"
6 which is a classification under Quick Books which
7 allows the Association or the Club to utilize the data,
8 produce reports, et cetera, et cetera. So he did,
9 ultimately, provide the data. It took us a long time
10 to get it, but he finally got it to us, but in the --
11 in the method that he gave it to us, without that
12 authority, we can't run the reports, we can't produce
13 reports. So, you know, the Club needed the data for two
14 purposes, one, outside the scope of this case to file
15 past tax returns and they can't produce their reports
16 necessary for their accountant to file the tax returns
17 without the authority on the data file. And, two, to
18 produce reports to compare Mr. Kennedy's American
19 Express bills to what was dispersed from the Club's
20 bank accounts, how the reports are -- how Mr. Kennedy
21 accounted for those things inside the data file. Now,
22 evidently, you know, obviously what's gonna happen
23 here, we're gonna move forward and claim that, as we
24 have, that there was misappropriation of funds and
25 things weren't accounted for correctly. And the other

1 side's gonna ask us to show whatever proof we have of
2 that. And without being able to run and produce these
3 reports, we're not gonna be able to do that. So there
4 are two ways for this -- to the club to get the
5 authority that they need. One, is to take the data that
6 Mr. Kennedy gave them and have somebody reenter the
7 entire data file, do a data-entry project or simply to
8 have Mr. Kennedy reproduce the file with that authority
9 when he reproduces the file. So it would take Mr.
10 Kennedy all of about 5 to 10 minutes to do his share,
11 as opposed to hundreds of hours of work for the club to
12 reenter this data into a new Quick Books data file. So
13 we've asked the court to -- we've asked Mr. Kennedy
14 through Mr. Kalish to give us that authority. He has
15 not. He hasn't responded to that request. So, again,
16 we're back before the court, trying to get the data
17 file. You know, both Mr. Kennedy and Mr. Kalish are
18 fond in saying that as soon as we get the data file,
19 they're sure that this case will go away because it'll
20 prove that he didn't misappropriate or mispending
21 anything. And, yet, to give us this authority. So we
22 can produce these reports and determine whether or not
23 that's true is meeting with reluctance and refusal or,
24 at least, silence on Mr. Kennedy's behalf to give us
25 that authority. So we're asking in the court to compel

1 Mr. Kennedy, to reproduce the data file. With that
2 authority, it's just a click of a couple of buttons
3 again within Quick Books to do so. So that's it.

4 JUDGE LYNCH: Thank you, Mr. Kalish, what's
5 your position, sir?

6 MR. KALISH: Yes, Your Honor, so my client's
7 position is that he's very, very reluctant to give that
8 data file with administrative access, principally,
9 because there's been a lot of distrust and dishonesty,
10 between the parties. You know, prior to me getting on
11 this case, my client has represented to me that there's
12 been, at least, four different instances of active
13 dishonesty on the part of the Club. I just wanna focus
14 the Court in on the fact that my client has absolutely
15 complied in good faith with Discovery. In June of
16 2021, he produced every single piece of paper that he
17 ever had as it related to the Club to -- Mr. Holodak.
18 That was in June of 2021. In October of 2021, he
19 produced every single piece of paper in electronic
20 format to the Club. That wasn't good enough. In
21 December of 2021, he produced the data file. Now, not
22 only did he produce the data file, Your Honor, but Mr.
23 Holodak had some, call it, IT issues. And my client at
24 around 9:00 p.m. one night, we got on Zoom with Mr.
25 Holodak, which he can confirm and we walked him through

1 those issues so he could access the data file. To say
2 that my client went above and beyond is a complete
3 understatement. I'll say that there are alternatives to
4 what he's asking for. In his motion, I think it's
5 important just to highlight that he doesn't put in the
6 record that he can't run any reports. What the Club is
7 saying is they can't run any reports for printing or
8 saving. It's my client's position that they're able to
9 run reports and if they're able to run reports, they're
10 able to, you know, take a, like sort of like a screen
11 capture and print their screen. So we can see what is
12 on, you know, what I'm saying, the report that they've
13 produced. The other alternative is they can send us a
14 Discovery request for the specific report for the
15 specific time periods that they're looking for. And
16 we'd be happy to run that report and produce those
17 records. Now, just going back to my client's problem
18 here. Like I said before, there have been several
19 instances of dishonesty that my client has brought to
20 my attention and it would be extremely prejudicial,
21 extremely dangerous for my client to provide the Club
22 with administrative access because then in terms of
23 tracing and protecting against any manipulation or
24 modification of the data, it'd be virtually impossible.
25 This case would turn into, hey, did he misappropriate

1 funds, yes or no, to, Hey, did the data change in any
2 way, shape or form and to what extent did it do. He
3 would have to hire a forensic to analyze the data.
4 It's just very odd that in pending litigation, we would
5 give the opposing party who has an interest in how that
6 data is set up access to completely manipulate and
7 modify evidence. I mean, that's exactly what we have
8 here. It's key evidence in this case. We're talking
9 about several years of data. His motion, Your Honor,
10 with all due respect to Mr. Holodak, it's completely
11 bare bones. There's no specific report that are
12 referenced. What we have here, what this case is about
13 whether or not my client used club funds to pay
14 personal Amex bills. My client, while I've been on the
15 case, he's provided detailed entries and records to
16 explain each and every Amex bill that he paid and he
17 was able to tie it to a club expense. So, with all due
18 respect, Judge, I'm gonna ask that the court deny Mr.
19 Holodak's motion and find that my client has complied.
20 They have what they need. And, you know, if he can
21 come up with a more specific request, a specific
22 report, we're happy to accommodate, but in terms of
23 giving them access to completely modify evidence here,
24 that's a huge problem.

25 JUDGE LYNCH: Mr. Holodak.

1 MR. HOLODAK: Yeah. A couple of -- yeah, a
2 couple of fallacies in Mr. Kalish.

3 JUDGE LYNCH: One question then. Is there a
4 valid alternative to giving our client administrative
5 authority cause he raises -- raises the concern that
6 there's a potential of changing records. And certainly
7 we wanna avoid that, especially since that, as I
8 understand it, can't be tracked, but is there another
9 alternative? Your client certainly should be able to
10 review everything and have printed anything that your
11 client needs for either, number one, Discovery or
12 number two, to file taxes. So --

13 MR. HOLODAK: Yeah, Judge, that's the
14 problem. When you say, should be able to print every.
15 Without administrative authority, we cannot print
16 anything. That's one issue. So second issue, Mr.
17 Kalish's fallacy. The fallacy of his argument is this.
18 We can edit the data right now. So Mr. Kalish says,
19 run the report, take a screenshot, and that'll solve
20 your problem. And because we don't wanna give you
21 administrative authority because that allows you to
22 edit the data. We can edit the data right now.
23 Administrative authority does not prevent us from
24 editing the data. It only prevents from printing
25 reports. So I can edit the data, run a screenshot,

1 take a picture of it. And there's the issue here that
2 Mr. Kalish raises isn't resolved. Because if I want to
3 edit the data, I can edit the data, and take a
4 screenshot of it. Or, you know, when he says, well,
5 just access a report. Judge, we had to ask for the
6 data for two and-a-half years. We had to get four
7 court orders to compel -- Scott, you could shake your
8 head. Look at the request to produce statement.
9 Judge, my client --

10 MR. KALISH: We had to in every request.

11 JUDGE LYNCH: One at a time, gentleman.

12 MR. HOLODAK: No, you didn't.

13 JUDGE LYNCH: One at a time gentleman. We
14 have a court reporter. Hold on.

15 MR. HOLODAK: Hold on, Scott. Judge, we have
16 a to get court orders to compel and sanction to get the
17 data out of Mr. Kennedy.

18 MR. KALISH: We've never sanctioned, Mr.
19 Kennedy.

20 MR. HOLODAK: He was ordered. Scott, I
21 didn't interrupt you. He was ordered to produce the
22 data. And instead of producing the Quick Books data, he
23 first printed out what he thought we should have and
24 gave us hard copies. Then when he was, again, ordered
25 to produce the Quick Books data, rather than give us

1 the electronic data, he printed out PDF documents and
2 sent us PDF documents. So when Scott says, oh, he
3 complied with everything. Four court orders, Judge.
4 Four court orders, four contempt orders, four motions
5 to compel before we got the data. The only
6 alternative --

7 JUDGE LYNCH: Hold on. Hold on. Stop. Sir,
8 let him finish the -- and respond.

9 MR. HOLODAK: And if you want me to up the
10 four court orders, I'd be happy to pull them up and
11 share them because Scott seems to think they don't
12 exist. They're out there. What we have to do is look at
13 the docket. All we have to do is look at how many
14 times I had to file motions to compel. We came before
15 you twice. We were before Judge Haimen once. So as far
16 as being manipulative and editing the data, let's
17 remember who the Defendant here is and who the
18 Plaintiff is. We've sued Mr. Kennedy for
19 misappropriation of our funds. We've sued Mr. Kennedy
20 for misusing our money and stealing our money. Now,
21 he's turning around saying, well, he doesn't trust us.
22 We're not the guys being sued, he is. We weren't the
23 ones that misappropriated funds. According to the
24 complaint, he is. So for him to say, oh, he doesn't
25 trust us. It's a little bit of a pot calling the

1 kettle black. And, again, everything that he says, as
2 far as, you know, editing the data, we can edit the
3 data right now. So giving us administrative authority
4 doesn't solve or prevent any of the issues that Mr.
5 Kalish raised. So he says, we have alternatives. We can
6 ask him -- send him a request to produce and he'll
7 produce the reports for us. Again, given the history
8 of the Discovery in this case, I'm gonna ask him for a
9 report. He's gonna object. We're gonna have motions to
10 compel. If he gives us the administrative data, the
11 administrative authority, we'll run our own reports. I
12 don't have to run back to him every time we want
13 something done and drag this case out on in fine item
14 because we're having Discovery disputes for a year
15 and-a-half from now over the reports. It's a simple
16 solution, give us the administrative authority. It
17 allows us to run and print the reports. The only two
18 things we can't do right now without the authority.

19 JUDGE LYNCH: Mr. Kalish.

20 MR. KALISH: Absolutely. Your Honor. So if he
21 can edit the data, he certainly can't edit the data in
22 a way that he can then produce reports to, you know,
23 from an administrator. That's the concern here is that
24 he would be able to edit the data or someone would be
25 able to edit the data. The Club would be able -- able

1 to edit the data and then save it as an administrator
2 and then produce reports as if this was the original
3 data. I mean, this is really --

4 JUDGE LYNCH: Are they not -- are they not
5 able to do that now? He indicates that now they can
6 edit the data.

7 MR. KALISH: He can -- I don't know what he
8 can do, but he -- but even if that was true, if he
9 cannot edit the data -- he wouldn't be able to edit it
10 as an administrator. And that's what we're trying to
11 guard against. Because then if he edits it as an
12 administrator, how do we tell which version is correct.
13 And which version is the original version -- I mean --

14 MR. HOLODAK: There's a solution for that,
15 Your Honor.

16 JUDGE LYNCH: Hold on. Hold on a second.
17 Hold on. What is the difference between editing and
18 editing, as an administrator. Is there a difference?

19 MR. KALISH: To be honest with you -- with
20 the court, I would request some testimony be elicited
21 from an expert because now we're getting sort of above
22 my head with Quick Books. I can tell the court.

23 JUDGE LYNCH: Do you wanna hire an expert to
24 testify that there's a difference between editing now
25 and editing as an administrator, you want to do that?

1 MR. KALISH: Sir, I don't know if expert
2 testimony would be necessary, my client's been using
3 Quick Books since the 90's.

4 JUDGE LYNCH: You just indicated --

5 MR. KALISH: Well, no, no, absolutely. Well,
6 well, I --

7 JUDGE LYNCH: Hold on. Hold on.

8 MR. KALISH: Sure.

9 JUDGE LYNCH: You just indicated you need
10 expert testimony and now you said you're not an
11 independent expert. My client knows Quick Books very,
12 very well he tells me. So he's been using it since the
13 nineties since it first came out. I think, after
14 speaking with him, I'd be able to rely on his testimony
15 alone. If we had to bring in an expert for a very
16 limited purpose, another accountant that uses Quick
17 Books and knows the back-end, then absolutely.

18 JUDGE LYNCH: Well, that was your suggestion.
19 And I don't think it's a bad idea because I don't know
20 the answer. Let me tell you this. If there's no
21 difference, if they can edit the data now and there's
22 no difference as to whether or not they have
23 administrative authority or administrator authority or
24 not. Then I'm inclined to say, sure, let 'em have it,
25 but if there's truly a difference where they can edit

1 it if they have the administrator authority and they
2 can't edit it now, that's a different ballgame. I don't
3 want to have --

4 MR. HOLODAK: Can I offer one other -- yeah.
5 Yeah, can I offer one other point? Just like you can
6 do with Word or any of the other software programs, you
7 can run a compare between two data files and see what
8 the difference is between the data files. So if we run
9 reports and they allege that we edited the data and,
10 therefore, the report we produce to the court is not
11 the accurate, we can run it compare between the two
12 data files and show that there have been no changes
13 made between the data files, which would alleviate any
14 concern that we would manipulate the data to produce
15 reports that we want to produce. We have the
16 software --

17 JUDGE LYNCH: I have an idea. What I'm
18 inclined to do, what I'm going to do is grant their
19 motion, effective 10 days from now, and give Mr. Kalish
20 and his client that 10-day period because sir, if you
21 present something to me that would indicate that there
22 is a difference. Then I have a different ruling, but
23 you know, that way we wouldn't have to have another
24 hearing. And it wouldn't cause time I effort, if
25 there's no difference. If there's a difference, I'll

1 give you time. It's gonna be tough to find the time,
2 but I'll find it anyway. So here's what I'm doing, I'm
3 granting the motion, effective 10 days from now. And
4 during that 10-period, if you want to consult with
5 someone. If Mr. Kalish, if you come up with an opinion
6 that I should hear that it would be different then
7 I'll have a different rule that way we can avoid having
8 an other hearing unless I should change my ruling and I
9 will change my ruling. If I'm convinced that there is
10 a difference, then we'll find another alternative. So
11 right now the motion's granted effective 10 days from
12 today.

13 MR. HOLODAK: Opinion by somebody other than
14 Mr. Kennedy.

15 JUDGE LYNCH: Right.

16 MR. KALISH: Does the court want an affidavit
17 from another individual?

18 JUDGE LYNCH: If you send me an affidavit
19 with some -- on that particular individual, that there
20 is truly a difference that would make a ruling that
21 should be vacated. Then I'll do it. I'll have a
22 hearing. I'll review it and have a quick hearing. You
23 know, we -- as long as you, generally, are somewhat
24 flexible about the timing of the hearing, I can find
25 the time for a short hearing. So that's my ruling. If

1 someone could prepare a report, send it to me, and
2 let's make the -- so there's no delay 10 days from
3 today, not from when I sign and file the report.

4 MR. KALISH: Yes, Your Honor. Okay.

5 JUDGE LYNCH: Thank you very much. Nice to
6 see you. Take care.

7 (Whereupon, the zoom virtual hearing was
8 concluded at 11:19 a.m.)

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