

APPENDIX

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APPENDIX A

**DISTRICT OF COLUMBIA
COURT OF APPEALS**

No. 15-CV-0210

[Filed June 29, 2017]

JEANETTE M. BRUCE, APPELLANT,	)
	)
v.	)
	)
POTOMAC ELECTRIC POWER COMPANY, APPELLEE.	)

Appeal from the Superior Court
of the District of Columbia
(CAB9586-12)

(Hon. Michael L. Rankin, Trial Judge)

(Argued October 26, 2016 Decided June 29, 2017)

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John R. Ates, with whom *Patricia A. Smith* and *Allison C. Pienta* were on the brief, for appellant.

Martin H. Freeman, with whom *Mark A. Freeman* was on the brief, for appellee.

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Before BLACKBURN-RIGSBY, *Chief Judge*,^{*}
GLICKMAN, *Associate Judge*, and PRYOR, *Senior Judge*.

BLACKBURN-RIGSBY, *Chief Judge*: In this appeal, appellant Jeanette M. Bruce challenges the trial court's enforcement of a subpoena against her and challenges the trial court's award of attorney's fees to appellee Potomac Electric Power Company ("Pepco"). She also challenges the trial court's decision declining to impose sanctions on Pepco. Because Mrs. Bruce ultimately complied with the subpoena, we conclude that her appeal of the trial court's order enforcing the subpoena is moot and should be dismissed. *Settlemire v. District of Columbia Office of Emp. Appeals*, 898 A.2d 902, 904-05 (D.C. 2006) ("[W]hen the issues presented are no longer 'live' or the parties lack 'a legally cognizable interest in the outcome,' a case is moot."). Regarding her remaining claims, we hold that the trial court did not abuse its discretion in declining to sanction Pepco because Pepco's subpoena was not improper, oppressive, or issued in bad faith. However, we conclude that the trial court abused its discretion by awarding Pepco attorney's fees, absent a finding from the trial court that Mrs. Bruce acted in bad faith. Accordingly, we vacate the trial court's order awarding attorney's fees and costs to Pepco, and affirm its decision declining to impose sanctions on Pepco.

^{*} Chief Judge Blackburne-Rigsby was an Associate Judge at the time the case was argued. Her status changed to Chief Judge on March 18, 2017.

I. Factual and Procedural Background

On June 29, 2012, during a “derecho” thunderstorm,¹ a tree fell onto a Pepco-operated power line in front of the residence of Shiva and Mohammed Ghafoorian, setting fire to Mr. Ghafoorian’s car. While attempting to extinguish the fire, Mr. Ghafoorian sustained serious injuries and later died. Mrs. Ghafoorian — who also sustained serious injuries, but survived the incident — filed suit against Pepco, claiming the downed power line electrocuted Mr. Ghafoorian, and that Pepco was negligent in failing to install interrupters to shut off the flow of electricity to the downed power line. In defense, Pepco argued that Mr. Ghafoorian could not have been killed by the downed power line because it was de-energized at the time of the incident. Pepco’s theory of the case was that Mr. Ghafoorian died from burns sustained while fighting the fire.

Mrs. Bruce, one of the Ghafoorians’ neighbors, took a photograph of the fire with her cell phone at 11:05 p.m. on the night of the storm. She voluntarily e-mailed a copy of the photograph to Pepco’s counsel during discovery on November 5, 2013. Shortly thereafter, Pepco deposed Mrs. Bruce and learned that she observed Mr. Ghafoorian using a fire extinguisher at the time she took the photograph. Although the photograph that was sent to Pepco was dark and

¹ A derecho thunderstorm is “is a widespread, long-lived wind storm. . . . associated with bands of rapidly moving showers or thunderstorms” Stephen F. Corfidi, Jeffry S. Evans & Robert H. Johns, *About Derechos*, noaa.gov, <http://www.spc.noaa.gov/misc/AbtDerechos/derechofacts.htm> (last updated April 21, 2017).

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unclear, it possibly contained a figure to the left of Mr. Ghafoorian's car. Because Pepco had independent evidence that the power line was deactivated by 10:55 p.m. on the night of the storm, the photograph and Mrs. Bruce's testimony that Mr. Ghafoorian was alive and fighting the fire at 11:05 p.m. appeared to corroborate Pepco's defense that Mr. Ghafoorian was not electrocuted.

One month later, Mrs. Bruce amended her deposition answers pertaining to when she saw Mr. Ghafoorian and when she took the photograph.² Concerned that the amended answers might affect their theory of the case, Pepco served Mrs. Bruce with a subpoena *duces tecum* requesting that she appear for a second deposition and produce her cell phone. It stated:

Mrs. Bruce is to produce her cell phone along with her sim card, the actual (unaltered) jpeg file containing the photograph of the car fire as described in your deposition taken on November 15, 2013 (attached hereto as Exhibit "A"), and the cell phone number, account number, account

² Specifically, Mrs. Bruce clarified:

"Yes, I saw Mr. Ghafoorian, but not when I took the picture."

"I went outside at least twice. I only saw Mr. Ghafoorian the first time."

"Yes, I went outside at least twice. I saw Mr. Ghafoorian using the fire extinguisher the first time. I saw the fire both times and took a picture of the scene with my cell phone the second time."

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name and service provider of the phone used to take the photograph as described in your deposition taken on November 15, 2013 of the car fire described in your deposition taken on November 15, 2013.

In response to the subpoena, Mrs. Bruce filed a motion to quash or modify the subpoena, and requested Pepco be sanctioned for “failing to take reasonable steps to avoid imposing an undue burden or expense on her” pursuant to Super. Ct. Civ. R. 45 (c)(1).³ She argued that Pepco’s subpoena was unduly burdensome because it violated her right to privacy, as her cell phone contained confidential information, and because “she ha[d] already produced the one photograph she took at the scene and [had] provided her deposition testimony” Pepco, in turn, filed a motion to compel production of her cell phone.

On April 24, 2014, the trial court denied Mrs. Bruce’s motion and granted Pepco’s motion to compel, permitting Pepco to inspect and copy the relevant photograph and “identifying information.” However, the trial court also ordered that Pepco conduct the inspection pursuant to an existing protective order for confidential information in the case. The protective

³ Super. Ct. Civ. R. 45 (c)(1) states:

A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney’s fees—on a party or attorney who fails to comply.

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order provided general rules and limitations for designating, handling, and destroying confidential materials. The court further ordered Pepco's expert to follow the procedure that Pepco claimed was necessary for obtaining the original photograph: "copy all of the photographs on Mrs. Bruce's phone and then . . . delete all but the single photograph Pepco sought."

Instead of handing over her phone, Mrs. Bruce retained her own expert in computer forensics to inspect the contents of her phone.⁴ After Pepco served a second subpoena on Mrs. Bruce, she submitted a declaration to Pepco from her expert attesting that the photograph she produced via email was an "exact duplicate" of the one on her phone, and submitted another copy of the photograph to Pepco using a flash drive. In addition, Mrs. Bruce filed a second motion to quash and a motion for reconsideration of the court's April 24, 2014, order for her to turn over her phone in light of the Supreme Court's decision in *Riley v. California*, 134 S. Ct. 2473 (2014).

The trial court denied both motions, finding that "the photograph and its identifying information could be dispositive" to Pepco's case. Pepco moved for Mrs. Bruce to be held in contempt, and in response, Mrs. Bruce argued that she was in substantial compliance with the court's order by furnishing her own expert to

⁴ Mrs. Bruce also appealed the April 24, 2014, order compelling production of her cell phone. We dismissed her appeal because a non-party witness must await a sanction for contempt before obtaining appellate review. *United States v. Harrod*, 428 A.2d 30, 31 (D.C. 1981) (en banc) ("[A] a witness may obtain review of a subpoena or a discovery order only after he persists in his refusal to comply and is sentenced for contempt of court.").

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supply the photograph for inspection. The trial court did not rule on the contempt motion, but ordered Mrs. Bruce to make her expert available for Pepco to depose, to provide Pepco with the expert's methodology, and to bear the costs associated with the deposition because in seeking her own expert Mrs. Bruce had "acted unilaterally and without prior court approval."

Pepco deposed Mrs. Bruce's expert, but maintained at a subsequent hearing on November 20, 2014, that it still needed its own expert to examine Mrs. Bruce's cell phone, in part because Mrs. Bruce had not provided all the documents related to her expert's methodology. The trial court agreed, and again ordered Mrs. Bruce to produce her cell phone to Pepco. However, the trial court also allowed Mrs. Bruce to propose additional safeguards for the inspection process. The trial court adopted many of Mrs. Bruce's suggested safeguards in an addendum to the stipulated protective order, including provisions that (1) allowed Mrs. Bruce's expert to monitor the inspection process; (2) limited access of the contents of the phone to the two experts; (3) constrained the temporal scope of information to be exported; and (4) required Pepco to immediately delete all other exported files, among other additional safeguards.

On December 4, 2014, Mrs. Bruce produced her cell phone for Pepco. Pepco's expert determined that the only photograph of the fire on Mrs. Bruce's cell phone was the same photograph that Mrs. Bruce's expert had already produced, and was the same photograph "that Ms. Bruce herself voluntarily shared with Pepco's counsel by email on November 5, 2013." Subsequently, the trial court dismissed Pepco's motion to hold Mrs.

Bruce in contempt because “she complied with the court’s order to turn over her cell phone to Pepco for inspection and copying.” Nonetheless, on January 23, 2015, the trial court issued an order granting Pepco’s request for Mrs. Bruce to pay Pepco \$4,742.00 in attorney’s fees and costs incurred in deposing Mrs. Bruce’s expert. The court concluded that by failing to provide Pepco with all the information concerning the methodology of her expert *before* the deposition, she was not in “substantial compliance” with the court’s April 24, 2014, order. In addition, the court denied Mrs. Bruce’s request to recover attorney’s fees and costs from Pepco for her involvement in the litigation, explaining that her costs were incurred solely as a result of her non-compliance with the trial court’s order to compel, and that her privacy argument based on *Riley* was “wholly inapplicable to the instant matter.” This appeal followed.

II. Discussion

A. Enforcement of the Subpoena

Mrs. Bruce argues that the trial court erred in enforcing the subpoena which compelled production of her cell phone by failing to properly weigh her privacy interests under the Fourth Amendment and Super. Ct. Civ. R. 45. Pepco counters that this issue is moot because Mrs. Bruce complied with the subpoena, and thus this court cannot provide any relief for her privacy concerns. To the extent Mrs. Bruce is seeking a declaration that the trial court committed a legal error when it ordered her to produce her cell phone, we agree with Pepco and hold that this issue is now moot.

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Generally, a case is moot where parties lack a “legally cognizable interest in the outcome,” or the issues are no longer “live.” *Fraternal Order of Police, Metro. Labor Comm. v. District of Columbia*, 113 A.3d 195, 198 (D.C. 2015) (quoting *Settlemire v. District of Columbia Office of Emp. Appeals*, 898 A.2d 902, 904–05 (D.C. 2006)). “Unless there is a possibility that further penalties or legal disabilities can be imposed as a result of the judgment, this court may not render in the abstract an advisory opinion.” *McClain v. United States*, 601 A.2d 80, 81-82 (D.C. 1992) (quoting *Holley v. United States*, 442 A.2d 106, 107 (D.C.1981)) (finding an appeal from an allegedly unlawful pretrial detention order was moot where a criminal defendant pled guilty shortly after filing an appeal, thus ensuring “no collateral legal consequences as a result of the pretrial detention”). Accordingly, this court will find a case to be moot where a party merely seeks a declaratory judgment, *Fraternal Order of Police, supra*, 113 A.3d at 199, or simply has a “desire for vindication.” *Settlemire, supra*, 898 A.2d at 907. In the discovery context, compliance with a subpoena will typically render an appeal from an enforcement order moot. *Office of Supervision Dep’t of Treasury v. Dobbs*, 931 F.2d 956, 957 (D.C. Cir. 1991) (compiling case law from U.S. Courts of Appeal). Mootness is avoided, however, if a court can still fashion at least a partial remedy for the complying party. *Church of Scientology v. United States*, 506 U.S. 9, 13 (1992); see, e.g., *Guam v. Sea-Land Serv., Inc.*, 958 F.2d 1150, 1153 (D.C. Cir. 1992) (“A party may challenge a subpoena following compliance with an enforcement order when the party

seeks the return of the documents it had supplied pursuant to the subpoena duces tecum.”).⁵

In this case, Mrs. Bruce no longer has a privacy interest to protect since she has produced her phone and Pepco completed its inspection. Additionally, there are no lingering post-inspection privacy concerns from which we could afford Mrs. Bruce relief. In accordance with the protective order and addendum, Pepco did not retain any of Mrs. Bruce’s cell phone data after the inspection, with the exception of the original copy of the photograph that Mrs. Bruce had already sent to Pepco voluntarily via email. *Cf. Church of Scientology, supra*, 506 U.S. at 13 (finding that, where privacy interests were at stake, requiring the government to return or destroy any and all copies of tapes that had been obtained by the IRS was a remedy sufficient to overcome mootness). Nor will there be any further discovery requested from Mrs. Bruce because the underlying suit between Pepco and the Ghafoorians settled. *See Guam, supra*, 958 F.2d at 1153 (finding partial compliance did not render an appeal from a discovery order moot where “one deposition remain[ed] to be taken and a number of documents ha[d] yet to be produced”). Therefore, we have no remedy to offer Mrs.

⁵ There is also an established exception for cases that are “capable of repetition, yet evading review.” *United States v. Edwards*, 430 A.2d 1321, 1324 n.2 (D.C. 1981) (en banc), cert. denied, 455 U.S. 1022 (1982). To fall under this exception, “(1) the challenged action must be of too short a duration to be litigated fully prior to its cessation or expiration, and (2) there must be a reasonable expectation that the same complaining party will be subjected to the same action again.” *McClain, supra*, 601 A.2d at 82. Neither element of this exception is present here.

Bruce. *See Fraternal Order of Police, supra*, 113 A.3d at 199.

Mrs. Bruce argues that the only reason she complied with the subpoena is because the trial court threatened to find her in contempt and impose sanctions. However, the fact that the risk of contempt is uncomfortable for a litigant “does not provide a basis for [appellate] courts to act when [a case is otherwise moot].” *Fed. Ins. Co. v. Maine Yankee Atomic Power Co.*, 311 F.3d 79, 82 (1st Cir. 2002). “A pretrial order granting or denying discovery from a non-party witness is not ordinarily final for purposes of appeal unless, in the case of an order granting discovery, the subject of the order refuses to comply and is adjudicated in contempt.” *Crane v. Crane*, 657 A.2d 312, 315 (D.C. 1995). As such, “a witness may obtain review of a subpoena or a discovery order *only* after he persists in his refusal to comply and is sentenced for contempt of court.” *United States v. Harrod*, 428 A.2d 30, 31 (D.C. 1981) (en banc) (emphasis added). Because Mrs. Bruce complied with the subpoena and was not found in contempt by the trial court, the court’s order to compel production of her cell phone is not subject to review. Accordingly, we dismiss this portion of her appeal.

B. Sanctions under Super. Ct. Civ. R. 45 (c)(1)

Mrs. Bruce further requests that we order the trial court to “award fees and expenses for the undue burden” imposed on her by Pepco under Super Ct. Civ. R. 45 (c)(1). Specifically, she asserts that Pepco’s subpoena violated her right to privacy and that its subsequent motion to compel enforcement of that subpoena caused her unnecessary litigation expenses. Because the trial court did not abuse its considerable

discretion under Rule 45, we affirm the court’s denial of sanctions to Mrs. Bruce. *Featherson v. Educ. Diagnostic Inst., Inc.*, 933 A.2d 335, 338 (D.C. 2007) (“It is a rare circumstance where we find an abuse of discretion in the context of discovery disputes because we are appropriately reluctant to substitute our judgment for that of the trial court.”) (internal citation omitted).

Super. Ct. Civ. R. 45 (c)(1) requires a party or attorney issuing a subpoena take reasonable steps to avoid imposing an “undue burden or expense on a person subject to the subpoena.” *See* Super. Ct. Civ. R. 45 (c)(1). “The court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney’s fees — on a party or attorney who fails to comply.” *Id.* Our rule is substantially identical to its federal counterpart,⁶ and we may look “to decisions of the federal courts interpreting the counterpart federal rules as persuasive authority in interpreting our local civil rules.” *Nave v. Newman*, 140 A.3d 450, 454 n.3 (D.C. 2016).

⁶ The federal rule is identical to Super. Ct. Civ. R. 45 (c)(1) in all relevant respects. In full, Fed. R. Civ. P. 45 (d)(1) reads:

A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney’s fees—on a party or attorney who fails to comply.

The trial court's decision to impose sanctions is discretionary. *Featherson, supra*, 933 A.2d at 338; *Legal Voice v. Stormans Inc.*, 738 F.3d 1178, 1185 (9th Cir. 2013).⁷ When assessing whether a civil subpoena imposes an undue burden and ought to be quashed, the trial court should balance “the relevance of the discovery sought, the requesting party’s need, and the potential hardship to the party subject to the subpoena.” *In re Herndon*, 596 A.2d 592, 596 (D.C. 1991) (citation and internal quotation marks omitted). This inquiry includes the privacy concerns of non-parties. *Id.* at 597; *see also Watts v. S.E.C.*, 482 F.3d 501, 509 (D.C. Cir. 2007) (“The Rule 45 ‘undue burden’ standard requires district courts supervising discovery to be generally sensitive to the costs imposed on third parties.”).

Even if a court decides to quash a subpoena, however, Rule 45 does not require the court to automatically impose sanctions on the issuing party or attorney. *Goldberg v. Amgen, Inc.*, 123 F. Supp. 3d 9, 22 (D.D.C. 2015). “Rather, courts . . . have looked to whether the subpoena was issued in bad faith or for some improper purpose.” *Id.*; *see also Legal Voice, supra*, 738 at 1185 (“A court may [] impose sanctions when a party issues a subpoena in bad faith, for an improper purpose, or in a manner inconsistent with existing law.”); *Mount Hope Church v. Bash Back!*, 705 F.3d 418, 429 (9th Cir. 2012) (finding that “absent undue burden imposed by an oppressive subpoena, a facially defective subpoena, or bad faith on the part of

⁷ The 2013 amendment to the Federal Rules of Civil Procedure renumbered Rule 45 (c)(1) as Rule 45 (d)(1) without any substantive changes. *Legal Voice, supra*, 738 F.3d at 1180 n.1.

the requesting party, Rule 45 (c)(1) sanctions are inappropriate”); *Alberts v. HCA Inc.*, 405 B.R. 498, 503 (D.D.C. 2009) (“[B]latent abuse of the subpoena power is a common thread running through decisions in which sanctions have been awarded under [Federal] Rule 45 (c)(1).”).

Here, Mrs. Bruce has failed to explain how the trial court abused its discretion in failing to sanction Pepco under Super. Ct. Civ. R. 45 (c)(1). As an initial matter, she does not explain how Pepco’s subpoena was issued in bad faith or for an improper purpose. Pepco’s subpoena was narrowly tailored. Pepco sought to obtain the original data from a single photograph. *Compare to Legal Voice, supra*, 738 F.3d at 1185 (even where district court denied a motion to compel as to eight of the requested fourteen categories of information, subpoena against a non-party was not facially overbroad). And it sought this photograph only after Mrs. Bruce’s alterations to her original deposition undermined Pepco’s theory of the case that Mr. Ghafoorian was alive at the time Mrs. Bruce took the photograph — a fact the trial court found “could be dispositive” to Pepco’s case. Therefore, the subpoena was not facially overbroad and was targeted to obtaining information relevant to the underlying suit. *Cf. In re Herndon, supra*, 596 A.2d at 597 (affirming the decision to deny a “sweeping” discovery request to a non-party where the need for documents did not “sufficiently outweigh the burden and invasion of corporate privacy”) (internal quotes omitted).

Mrs. Bruce has also failed to explain how Pepco’s enforcement of its subpoena was oppressive or an abuse of the discovery process. Mrs. Bruce relies on her

general right to privacy to argue an undue burden existed. But subpoenaing private or sensitive information of a non-party does not automatically trigger an undue burden. *See Mount Hope, supra*, 705 F.3d at 427, 429 (reversing an award of sanctions where, after a district court granted a motion to quash a subpoena requesting the identities of seven anonymous e-mail account holders on First Amendment grounds, there was no bad faith in requesting the protected information). Rather, it requires the trial court to balance the competing interests of the litigants and hardships associated with compliance. *In re Herndon, supra*, 596 A.2d at 596. The trial court did so here, and found against Mrs. Bruce. While Mrs. Bruce is understandably frustrated that, in hindsight, the photo she was compelled to produce was, in fact, the same one she had already given to Pepco, this fact alone is not sufficient to award sanctions where Pepco's request was otherwise appropriate. *See Alexander v. F.B.I.*, 186 F.R.D. 188, 197 (D.D.C. 1999) (finding a subpoena for documents that "were ultimately held to be irrelevant" did not trigger an undue burden justifying sanctions under Fed. R. Civ. P. 45 (c)(1) because the request was not "overbroad or improper"). Moreover, no facts here demonstrate that Pepco acted improperly in enforcing the subpoena. In fact, early in the discovery process, Mrs. Bruce rejected Pepco's offer to negotiate and limit the "breadth and scope of the records subpoena," including by arranging "to have [Pepco's] forensic expert copy only that material relevant to this case without removing any personal information." Accordingly, we conclude that the trial court did not abuse its discretion by refusing to sanction Pepco under Super. Ct. Civ. R. 45 (c)(1).

C. Attorney's Fees

Lastly, we address whether the trial court abused its discretion in ordering Mrs. Bruce to pay Pepco \$4,742.00 in attorneys' fees for the deposition of Mrs. Bruce's expert. *Synanon Found., Inc. v. Bernstein*, 517 A.2d 28, 38 (D.C. 1986). There are two avenues by which the trial court could award attorney's fees against a non-party as a sanction for noncompliance with a subpoena: (1) through a finding of contempt via Super. Ct. Civ. R. 45 (e), see *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 n.8 (1991) (explaining that sanctions under the federal rules "are limited to those incurred as a result of the Rule violation"); or (2) through the court's inherent authority to impose sanctions for bad faith litigation. *Upson v. Wallace*, 3 A.3d 1148, 1165 (D.C. 2010). The trial court did not articulate the statute or rule that it relied on for its award, and did not expressly hold Mrs. Bruce in contempt for failing to comply with the subpoena under Rule 45 (e). See *Delacruz v. Harris*, 780 A.2d 262, 264 (D.C. 2001) ("In the absence of statutory or rule authority, attorney's fees generally are not allowed as an element of damages, costs, or otherwise.") (quoting *Roos v. LaPrade*, 444 A.2d 950, 951 (D.C.1982)). This leaves only the court's inherent authority to sanction a bad faith litigant as the basis for the court's order.

"Generally, under the 'American Rule' each party is responsible for paying its respective fees for legal services." *Assidon v. Abboushi*, 16 A.3d 939, 942 (D.C. 2011). One well-known exception to this rule is a court's authority to impose sanctions "when it finds that the attorney or party has engaged in bad faith litigation." *Jemison v. Nat'l Baptist Convention, USA*,

Inc., 720 A.2d 275, 287 (D.C. 1998) (holding that the court has inherent authority to impose sanctions against a non-party for bad faith litigation). In order to award attorney's fees for bad faith litigation, the party's conduct "must be so egregious that fee shifting becomes warranted as a matter of equity." *In re Jumper*, 984 A.2d 1232, 1247-48 (D.C. 2009) (citation omitted); *see also Synanon, supra*, 517 A.2d at 37 ("[T]he court must scrupulously avoid penalizing a party for legitimate exercise of the right of access to the courts."). "To ascertain whether a litigant has initiated an action in bad faith the court examines whether the claim is entirely without color *and* has been asserted wantonly, for purposes of harassment or delay, or for other improper reasons" *Id.* (citation omitted). Additionally, "[a] party's bad faith . . . may manifest itself through procedural maneuvers," such as those that lack justification or are initiated for an improper purpose, "such as harassment or delay." *Id.* (citing *Jung v. Jung*, 844 A.2d 1099, 1108 (D.C. 2004)). We require the trial court to make a finding of bad faith when exercising its inherent authority to impose sanctions for bad faith litigation. *Delacruz, supra*, 780 A.2d at 265; *Charles v. Charles*, 505 A.2d 462, 467 (D.C. 1986).

The trial court found that Mrs. Bruce's "non-compliance with the court's specific directive to provide Pepco with information concerning the methodology [her expert] used" led the court to conclude she was not in "sufficient compliance." However, this finding does not rise to the level of a finding of bad faith. In the discovery context, this court has found bad faith where a litigant "cynically attempt[s] to foil the discovery process," *Synanon Found., supra*, 517 A.2d at 38

(finding abundant evidence of bad faith where a party systematically destroyed discoverable evidence and made false representations to the trial court to obtain favorable discovery rulings), or undertakes filings simply to frustrate the trial court's orders. *See Am. Fed. State, County & Mun. Emps. v. Ball*, 439 A.2d 514, 516 (D.C. 1981) (affirming award of attorney's fees against a party for noncompliance with a subpoena where the trial court "gained the distinct impression that the [party] [was] attempting to thwart the orders of the [c]ourt" by seeking three protective orders in two jurisdictions, "each time proffering the same rationale"). Here, there is no evidence in the record, nor did the trial court find, that Mrs. Bruce made frivolous claims or undertook procedural maneuvers to harass or delay in bad faith. *In re Jumper, supra*, 984 A.2d at 1248. In fact, the trial court ordered the deposition of Mrs. Bruce's expert because, in the trial court's view, allowing Mrs. Bruce to use her expert would potentially aid in bringing her into compliance with the subpoena. We therefore vacate the January 23, 2015, order granting Pepco's request of fees and costs because the trial court abused its discretion in awarding attorneys' fees to Pepco without finding that Mrs. Bruce acted in bad faith.

III. Conclusion

We affirm the trial court's decision declining to impose sanctions on Pepco, but we reverse and vacate the award of attorney's fees that the trial court levied on Mrs. Bruce. We dismiss Mrs. Bruce's appeal of the trial court's April 24, 2014, order enforcing the subpoena.

So ordered.

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APPENDIX B

**IN THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division**

Civil Action No.: 2012 CA 009586

Calendar 4

Judge Michael L. Rankin

[Filed January 23, 2015]

SHIVA GHAFORIAN, individually and as the)	)
Personal Representative of the ESTATE OF)	)
MOHAMMED GHAFORIAN,)	)
Plaintiff,)	)
v.)	)
POTOMAC ELECTRIC POWER COMPANY)	)
("PEPCO"), <i>et al.</i> ,)	)
Defendants.)	)

ORDER GRANTING ATTORNEY'S FEES

This matter is before the court on Pepco's praecipe seeking attorney's fees and costs in the amount of \$4,742. Non-party Jeanette Bruce objects on two bases: she argues that 1) Pepco waived its entitlement to fees and costs by not being prepared to discuss substantial

compliance at the November 20, 2014 hearing and 2) the fees sought by Pepco are excessive.

Ms. Bruce's involvement in this case began when plaintiff's daughter identified Ms. Bruce as a potential fact witness. Subsequently, counsel for Pepco deposed Ms. Bruce on November 15, 2013. At the deposition, Ms. Bruce stated that she had observed the incident that gave rise to this litigation and had taken a photograph of the incident with her cell phone. By email dated December 13, 2013, Stephen Bruce, Ms. Bruce's husband,¹ emailed errata sheets of his deposition and Ms. Bruce's deposition to Ms. Paulette Chapman, counsel for plaintiff. Notably, Ms. Bruce indicated the following changes: 1) she stated that she saw Mr. Ghafoorian the night of the incident, but not when she took the picture²; 2) that she went outside at least twice, but only saw Mr. Ghafoorian the first time she went outside³; and 3) that she saw Mr. Ghafoorian

¹ Mr. Bruce, a member of the Bar of the District of Columbia, at times also represented Ms. Bruce in her various efforts to halt production of her cell phone.

² Ms. Bruce stated that this change was to clarify her previous answer of "yes" when asked "[Y]ou visually saw [Mr. Ghafoorian] when you took the picture? You saw him with your eyes?" *See* Def. Potomac Electric Power Company's Mem. of P & A in Opp. to Jeanette Bruce's Mot. to Quash or Modify Second Subpoena, Objection to Production of Cell Phone, and Request for Sanction, Ex. 8, Deposition Transcript of Jeanette Bruce at p. 31.9-15.

³ Ms. Bruce stated that this change was to clarify her previous answer of "yes" when asked "And on the second trip out, you did [see Mr. Ghafoorian using the fire extinguisher], correct?" *See* Def. Potomac Electric Power Company's Mem. of P & A in Opp. to Jeanette Bruce's Mot. to Quash or Modify Second Subpoena,

using a fire extinguisher the first time she went outside and took a picture of the scene the second time she went outside.⁴

On January 28, 2014, Pepco issued a subpoena for Ms. Bruce, commanding her to appear on February 14, 2014 for a second deposition and to produce her cell phone, SIM card, and the unaltered JPEG file of the incident, in addition to other documents and records. Pepco represented that a second deposition and production of the phone was necessary because the changes to the errata sheet significantly altered Ms. Bruce's testimony; moreover the fact that the changes were communicated to counsel for plaintiff raised the possibility that Ms. Bruce's testimony was in some way improperly influenced. In response, Ms. Bruce provided Pepco with written objections to the subpoena duces tecum and filed a motion titled "Motion to Quash or Modify Second Subpoena, Objection to Production of Cell Phone, and Request for Sanction Pursuant to Superior Court Rule 45(c)." Pepco, for its part, filed an opposition to this motion and also filed a motion to compel on March 6, 2014, which Ms. Bruce opposed.

Objection to Production of Cell Phone, and Request for Sanction, Ex. 8, Deposition Transcript of Jeanette Bruce at p. 32.16-21.

⁴ Ms. Bruce stated that this change was to clarify her previous answer of "yes" when asked "On at least those first two occasions, as I understand it, you saw Mr. Ghafoorian using the fire extinguisher, correct?" See Def. Potomac Electric Power Company's Mem. of P & A in Opp. to Jeanette Bruce's Mot. to Quash or Modify Second Subpoena, Objection to Production of Cell Phone, and Request for Sanction, Ex. 8, Deposition Transcript of Jeanette Bruce at p. 33.19-22.

At a status hearing on April 24, 2014,⁵ the court orally denied Ms. Bruce's motion to quash and orally granted Pepco's motion to compel and permitted Pepco to command Ms. Bruce to "produce her cell phone for the purpose of inspection and copying of: 1) the photograph she took on June 29, 2012 of the car fire, and 1) [sic] identifying information related thereto contained her cell phone." (April 24, 2014 Order at 1). The court further provided that the inspection and copying would occur pursuant to the protective order previously entered in this case. (*Id.* at 2).

Ms. Bruce filed a notice of appeal concerning this Order on May 1, 2014.⁶ One week later, she filed a motion for stay pending appeal. This court denied her motion for stay pending appeal by Order dated June 2, 2014.

Nevertheless, litigation concerning Ms. Bruce's cell phone continued. On September 12, 2014, Pepco served another subpoena on Ms. Bruce. On September 25, 2014, Ms. Bruce⁷ filed another motion to quash. In the motion, Ms. Bruce argued that the court's April 24, 2014 Order – which permitted Pepco to command Ms. Bruce to produce her cell phone for inspection and copying – was moot because Ms. Bruce had retained Mr. Charles Culley, a computer forensics expert who had "determined based on digital fingerprints (called 'hash values') that the photo stored on the SD card of

⁵ Neither Ms. Bruce nor her counsel appeared for this hearing.

⁶ Her appeal was dismissed on July 1, 2014.

⁷ Now represented by attorney Patricia Smith, Esq.

her cell phone is an ‘exact duplicate’ of the one already shared with counsel for both parties by email.” (Non-Party Jeanette Bruce’s Mot. to Quash or Modify Deposition Subpoena and Production Requests Attached to Deposition Notice at 6). Ms. Bruce also filed a motion to quash the subpoena duces tecum, dated September 26, 2014. That motion also sought reconsideration of the court’s April 24, 2014 Order. Once again, she argued that the court’s Order was moot in light of Mr. Culley’s examination and report and that reconsideration was warranted under *Riley v. California*, 134 S.Ct. 2473 (2014). Pepco opposed both motions and filed a motion for civil contempt on October 13, 2014.

By Order dated October 15, 2014, the court denied both of Ms. Bruce’s motions to quash. “The court has made its position perfectly clear: Pepco is entitled to discover the picture Ms. Bruce took of the incident.” (October 15, 2014 Order at 1). The court rejected Ms. Bruce’s argument that this issue is moot because of Mr. Culley’s report. At a status hearing on October 29, 2014,⁸ the court heard oral argument on the pending motion for contempt, including Ms. Bruce’s opposition wherein she argued that she had substantially complied with the court’s order. At the conclusion of the hearing, the court ordered Ms. Bruce to make Mr. Culley available for Pepco to depose, further ordering Ms. Bruce to bear the costs associated with this deposition because, as the court memorialized in written Order, Ms. Bruce “acted unilaterally and without prior court approval of an alternate way of

⁸ Again, Ms. Bruce failed to appear at this hearing. Her counsel, attorney Smith, and her husband were present.

complying with the subpoena.” (October 29, 2014 Order at 2).

Parties were before the court again on November 20, 2014. Although counsel for Ms. Bruce argued that the Pepco’s expert’s report supported her position that Ms. Bruce was in substantial compliance, counsel for Pepco noted that Ms. Bruce provided additional documents concerning the phone after the deposition of Mr. Culley and further stated that substantial compliance is impossible without Pepco’s expert having the opportunity to examine the phone. The court was further persuaded by the representations of counsel for defendant Utilimap Corporation who stated that, during the deposition of Mr. Culley, it became clear that Mr. Culley relied upon documents that were not provided to defendants in advance of his deposition. The court therefore ordered Ms. Bruce to turn over cell phone, stating that her alternative method – utilized after the court issued its April 24, 2014 Order – was insufficient to allow the court and parties to have an understanding that they had all available evidence. The court found that the protective order was sufficient to cover any reasonable privacy concerns and invited Ms. Bruce, through counsel, to submit a proposed addendum to the protective order. The court issued that addendum on November 25, 2014.

On December 16, 2014, Ms. Bruce submitted a second supplemental status report on compliance with the court’s order. In that report, Mr. Bruce stated that she produced her cell phone pursuant to the addendum to the stipulated protective order. Attached to the supplemental status report was Pepco’s expert report and certification which indicated that only one

photograph of the incident was recovered from the phone and that that photograph matched the photograph Ms. Bruce previously provided to counsel for Pepco. Pepco submitted a praecipe detailing costs and fees associated with the deposition of Mr. Culley on December 17, 2014. At a status hearing on December 17, 2014, the last time parties were before this court, the court dismissed Pepco's motion to hold Ms. Bruce in contempt, finding that she complied with the court's order to turn over her cell phone to Pepco for copying and inspection.

Turning to the instant fee dispute, contrary to Ms. Bruce's assertion, the court finds that counsel for Pepco did take a position on her argument of substantial compliance. More importantly, Ms. Bruce's non-compliance with the court's specific directive to provide Pepco with information concerning the methodology Mr. Culley used to analyze the phone data (October 29, 2014 Order at 2) led the court to conclude that her alternative to the court's specific directive did not constitute sufficient compliance.

Regarding Ms. Bruce's second ground for objection to Pepco's fee request, the amount of fees and costs Pepco is seeking is reasonable. The court specifically ordered that Ms. Bruce would bear the expense of Pepco's deposition of Mr. Culley, including preparation for that deposition with their expert. The court is satisfied that both Pepco's rates and hours billed are reasonable, and therefore grants their request in full.

To the extent that Ms. Bruce's previous papers have requested this court to award her attorney's fees and the costs associated with retaining Mr. Culley,⁹ as the above factual recitation illustrates, any attorney's fees and costs were incurred as a result of Ms. Bruce's non-compliance with the court's explicit orders regarding a party's right to discovery. Moreover, the court has flatly rejected her privacy argument based on *Riley* as wholly inapplicable to the instant matter.

Accordingly, it is this 23rd day of January, 2015, hereby

ORDERED, that non-party Jeanette Bruce shall pay counsel for Pepco attorney's fees and costs in the amount of \$4,742.00

SO ORDERED.

s/_____
Michael L. Rankin, Associate Judge

January 23, 2015

⁹ In addition, at the December 17, 2014 status hearing, attorney Smith represented that she and her client intended to renew their request for attorney's fees and costs associated with Ms. Bruce's involvement in this litigation.

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Electronic copies to:
William Lightfoot, Esq.
Kelly Fisher, Esq.
Paulette Chapman, Esq.
Mark Freeman, Esq.
Martin Freeman, Esq.
Leslie Machado, Esq.
Martha Mullen, Esq.
Aaron Finkhousen, Esq.
Jonathan Pittman, Esq.
Stephen Bruce, Esq.
Patricia Smith, Esq.
Allison Pienta, Esq.
Robert Ferguson, Esq.

APPENDIX C

**IN THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division**

**Civil Action No.: 2012 CA 009586
Calendar 4
Judge Michael L. Rankin**

[Filed October 29, 2014]

SHIVA GHAFORIAN, individually and as the	)
Personal Representative of the ESTATE OF	)
MOHAMMED GHAFORIAN,	)
	)
Plaintiff,	)
	)
v.	)
	)
POTOMAC ELECTRIC POWER COMPANY	)
("PEPCO"), et al.,	)
	)
Defendants.	)

**ORDER REGARDING DEPOSITION OF
CHARLES CULLEY**

This matter was before the court for a status hearing on October 29, 2014. Pursuant to the court's October 22, 2014 Order to show cause, Det. McKinley Williams was present at the hearing. Based on his appearance, as well as representations by counsel for

the District of Columbia concerning scheduling a deposition, the court discharged the show cause order against Det. Williams and denied Pepco's motion for contempt.

Attorney Patricia Smith, counsel for third-party Jeanette Bruce, was also present at the hearing. The court asked parties to address Pepco's pending motion for an order of civil contempt with appropriate remedial sanctions against Jeanette Bruce for her refusal to comply with the April 24, 2014 Order of this court and corresponding subpoena issued by Pepco on September 12, 2014. The court rejected Ms. Bruce's argument that *Riley v. California*, 134 S.Ct. 2437 (2014) excused her from providing her cell phone to Pepco pursuant to the Court's April 24, 2014 Order and its October 15, 2014 Order.

The court considered the argument that Ms. Bruce has substantially complied with the Order by retaining Charles Culley, a computer forensics expert who examined the phone, photograph, and corresponding data. Recognizing the proposed alternative to compliance with the court's direct Order, the court determined that it should consider evidence-based arguments before determining whether Mr. Culley's report and the copy of the image provided to Pepco constituted the entirety of the information Pepco requested in its subpoena *duces tecum*.

As a result, the court ordered third-party Bruce to make Mr. Culley available for Pepco to depose, further ordering that Mr. Culley shall provide to Pepco, at least five days prior to the deposition, information concerning the methodology he used, the results of his investigation, and a copy of his curriculum vitae. The

court further ordered that third-party Bruce would bear the costs associated with Pepco's deposition of Mr. Culley because she acted unilaterally and without prior court approval of an alternate way of complying with the subpoena. Should third-party Bruce not comply with this order, or should she make any other attempt to avoid compliance, the court will interpret such action as evidence of a willful failure to comply.

Accordingly, it is this 29th day of October, 2014, hereby

ORDERED, that counsel for third-party Jeanette Bruce shall communicate with counsel for Pepco to determine a date and time at which counsel for Pepco can depose Charles Culley. Third-party Bruce will ensure that Mr. Culley attends the deposition and provides information concerning his methodology, results, and curriculum vitae at least five (5) days prior to the scheduled deposition. It is further

ORDERED, that counsel for Pepco will submit to the court a praecipe detailing the attorney's fees and costs associated with deposing Mr. Culley, which upon review, the court will order third-party Bruce to pay; and it is further

ORDERED, that parties and third-party Jeanette Bruce shall appear for a status hearing on Thursday, November 20, 2014 at 2:00 p.m. in courtroom 516.

SO ORDERED.

s/_____
Michael L. Rankin, Associate Judge

October 29, 2014

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Electronic copies to:
William Lightfoot, Esq.
Kelly Fisher, Esq.
Paulette Chapman, Esq.
Mark Freeman, Esq.
Martin Freeman, Esq.
Leslie Machado, Esq.
Martha Mullen, Esq.
Aaron Finkhousen, Esq.
Jonathan Pittman, Esq.
Stephen Bruce, Esq.
Patricia Smith, Esq.
Robert Ferguson, Esq.
Robert Fletcher, Esq.

APPENDIX D

**IN THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division**

Civil Action No.: 2012 CA 009586

Calendar 4

Judge Michael L. Rankin

[Filed October 15, 2014]

SHIVA GHAFORIAN, individually and as the)	)
Personal Representative of the ESTATE OF)	)
MOHAMMED GHAFORIAN,)	)
Plaintiff,)	)
v.)	)
POTOMAC ELECTRIC POWER COMPANY)	)
("PEPCO"), et al.,)	)
Defendants.)	)

**OMNIBUS ORDER CONCERNING DISCOVERY
MOTIONS**

This matter is before the court on non-party Jeanette Bruce's motion to quash or modify subpoena duces tecum for production of cell phone used to take picture on 6/29/2012 and motion for reconsideration of April 24, 2014 Order. Also pending is Ms. Bruce's

motion to quash or modify deposition subpoena and production requests attached to deposition notice. Defendant Pepco has opposes both motions.

The court has made its position perfectly clear: Pepco is entitled to discover the picture Ms. Bruce took of the incident. Ms. Bruce contends that this issue is now moot as she retained a computer forensic expert who downloaded the photograph and provided a declaration indicating that the file she provided to counsel was not altered in anyway. This position, however, is in contravention of the court's April 24, 2014 order, which explicitly stated that "Pepco shall copy the photograph," not Ms. Bruce. Pepco is entitled to retain an expert of its choosing to inspect the photograph as outlined by this court's Order. The court will not reconsider its April 24, 2014 Order, for the reasons set forth orally on the record, in the June 2, 2014 Order denying Ms. Bruce's motion to stay, and in the Court of Appeals' July 1, 2014 Order. Accordingly, the motion quash or modify subpoena duces tecum for production of cell phone used to take picture on 6/29/2012 and motion for reconsideration of April 24, 2014 Order is **DENIED**.

The court's April 24, 2014 Order also provided that Pepco was permitted to further depose Ms. Bruce concerning "1) the reason for and any communications related to the substantive changes in her previous sworn deposition testimony and 2) related to the enhancement of the photograph to the extent obtained" (emphasis added). Thus, the court finds that Pepco is entitled to any communications relating to her changed testimony, contrary to her assertion that "[t]he Order did not authorize Pepco to serve document requests."

To the extent that Ms. Bruce contends that she does not have any documents, this is an argument she can raise at her deposition.

Even if the subpoena did not specifically reference or cite the Order, the court's Order clearly controls what Pepco is entitled to copy and how that copying will occur, contrary to Ms. Bruce's motion which argues that because the court's limitations were not noted in the subpoena it should be quashed. In addition, the Order specifically permitted Pepco to question Ms. Bruce concerning why she changed her deposition testimony and to request related communications. The court has reviewed the attached notice of deposition and finds that it referenced, and is consistent with, the April 24, 2014 Order. As such, the motion to quash or modify deposition subpoena and production requests attached to deposition notice is **DENIED**.

Accordingly, it is this 15th day of October, 2014, hereby

ORDERED, that non-party Jeanette Bruce's motion to quash or modify subpoena duces tecum for production of cell phone used to take picture on 6/29/2012 and motion for reconsideration of April 24, 2014 Order is **DENIED**; and it is further

ORDERED, that Ms. Bruce's motion to quash or modify deposition subpoena and production requests attached to deposition notice is **DENIED**.

SO ORDERED.

s/_____
Michael L. Rankin, Associate Judge

October 15, 2014

Electronic copies to:

William Lightfoot, Esq.

Kelly Fisher, Esq.

Paulette Chapman, Esq.

Mark Freeman, Esq.

Martin Freeman, Esq.

Leslie Machado, Esq.

Martha Mullen, Esq.

Aaron Finkhousen, Esq.

Jonathan Pittman, Esq.

Stephen Bruce, Esq.

Patricia Smith, Esq.

Robert Ferguson, Esq.

Robert Fletcher, Esq.

Copy mailed to:

Jeanette Bruce

2701 31st Street, NW

Washington, DC 20008

APPENDIX E

**IN THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division**

Civil Action No.: 2012 CA 009586

Calendar 4

Judge Michael L. Rankin

[Filed April 24, 2014]

SHIVA GHAFORIAN, individually and as the)	)
Personal Representative of the ESTATE OF)	)
MOHAMMED GHAFORIAN,)	)
Plaintiffs,)	)
v.)	)
POTOMAC ELECTRIC POWER COMPANY)	)
("PEPCO"), et al.,)	)
Defendants.)	)

**ORDER GRANTING PEPCO'S MOTION TO
COMPEL**

This matter was before the court for a status hearing on April 24, 2014. At the hearing, the court orally denied non-party Jeanette Bruce's motion to quash and orally granted Pepco's motion to compel. Accordingly, it is this 24th day of April, 2014, hereby

ORDERED, that Pepco's motion to compel is **GRANTED**; and it is further

ORDERED, that pursuant to subpoena, Pepco may command Ms. Bruce to appear and provide additional deposition testimony limited to: 1) the reasoning for and any communications related to the substantive change in her previous sworn deposition testimony and 2) related to the enhancement of the photograph to the extent obtained; and it is further

ORDERED, that pursuant to subpoena, Pepco may command Ms. Bruce to produce her cell phone for the purpose of inspection and copying of: 1) the photograph she took on June 29, 2012 of the car fire, and 1) identifying information related thereto contained in her cell phone; and it is further

ORDERED, that any inspection and copying of Ms. Bruce's records and phones shall be conducted pursuant to the protective order entered in this case; and it is further

ORDERED, that through a forensic expert, Pepco shall copy the photograph and identifying information in the manner described to the court at the status hearing.

SO ORDERED.

s/_____
Michael L. Rankin, Associate Judge

April 24, 2014

Copies to:

William Lightfoot, Esq.

Kelly Fisher, Esq.

Paulette Chapman, Esq.

Mark Freeman, Esq.

Martin Freeman, Esq.

APPENDIX F

**DISTRICT OF COLUMBIA
COURT OF APPEALS**

**No. 15-CV-210
CAB9586-12**

[Filed December 12, 2017]

JEANETTE M. BRUCE,	)
Appellant,	)
	)
v.	)
	)
PEPCO,	)
Appellee.	)

BEFORE: Blackburne-Rigsby*, Chief Judge;
Glickman*, Fisher, Thompson, Beckwith,
Easterly, and McLeese, Associate Judges;
Pryor*, Senior judge.

ORDER

On consideration of appellant's petition for rehearing or rehearing *en banc*, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing *en banc*, it is

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FURTHER ORDERED that the petition for rehearing *en banc* is denied.

PER CURIAM

Copies to:

Honorable Michael L. Rankin

Director, Civil Division
Quality Review Branch

No. 15-CV-210

Copies e-served to:

John R. Ates, Esquire
1800 Diagonal Road
Suite 600
Alexandra, VA 22314

Martin H. Freeman, Esquire
Freeman & Freeman, P.C.
100 Park Avenue
Suite 250
Rockville, MD 20850

pii

APPENDIX G

**SUPERIOR COURT OF THE DISTRICT OF
COLUMBIA**

CIVIL DIVISION

Civil Action No. 2012-CAB-9586

Washington, D.C.
Wednesday, December 17, 2014

SHIVA GHAFOORIAN, et al,	)
	)
Plaintiffs	)
	)
v.	)
	)
POTOMAC ELECTRIC POWER COMPANY,	)
et al,	)
	)
Defendants.	)

The above-entitled action came on for a Hearing before the Honorable MICHAEL L. RANKIN, Associate Judge, Courtroom Number 516, commencing at approximately 1:07 p.m.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS HER ORIGINAL NOTES AND

RECORDS OF TESTIMONY AND PROCEEDINGS
OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Plaintiffs:

WILLIAM P. LIGHTFOOT, Esquire
KELLY J. FISHER, Esquire

On behalf of Jeanette Smith:

PATRICIA A. SMITH, Esquire
Washington, D.C.

MISS LORETTA E. KACZOROWSKI
Official Court Reporter

(202) 879-1058

[p.2]

APPEARANCES CONTINUED:

On behalf of the Defendant Ultimap:

LESLIE P. MACHADO, Esquire
Washington, D.C.

On behalf of the Defendant Capitol Paving of
D.C.A.:

JONATHAN D. NELSON, Esquire
Baltimore, MD

On behalf of the Defendant District of Columbia:

MARTHA J. MULLEN, Esquire
Assistant Attorney General
Washington, D.C.

On behalf of the Defendant PEPCO:

MARK A. FREEMAN, Esquire
Washington, D.C.

[p.3]

PROCEEDINGS

THE DEPUTY CLERK: Your Honor, calling the matter of Shiva Ghafoorian, et al versus PEPCO, et al, 2012-CA-9586.

Parties please stand and state your names for the record.

MR. LIGHTFOOT: Good afternoon, Your Honor. William Lightfoot for the plaintiffs.

THE COURT: Thank you, sir.

MS. FISHER: Kelly Fisher for the plaintiffs.

MR. MACHADO: Good afternoon, Your Honor. Leslie Machado on behalf of defendant Utilimap.

MR. NELSON: Your Honor, Jonathan Nelson on behalf of defendant Capitol Paving of D.C.A.

MS. MULLEN: May it please the Court, Martha Mullen on behalf of the District of Columbia. Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. FREEMAN: Good afternoon, Your Honor, Mark Freeman on behalf of PEPCO.

THE COURT: Thank you.

MS. SMITH: Your Honor, I'm Patricia Smith and I'm here for Jeanette Bruce, respondent party witness. I have with me Mrs. Bruce and Stephen Bruce and Allison Pienta.

THE COURT: Well, let me say good afternoon to everyone.

* * *

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* * *

MS. SMITH: Thank you, Your Honor. We have produced the LG telephone, and in accordance with the Court's order of November 20th.

Um, Mr. Fowler, the PEPCO's expert, reviewed the LG phone in the presence of our expert, and went through and in accord with the Court's addendum to the protective order and followed all those steps.

He created a report which he provided to us, we filed that report with the Court attached to our, um,

[p.40]

supplemental memorandum that we filed this week.

Um, the upshot of the report is that the photograph left on the LG phone is exactly the same as what we gave them voluntarily more than one year ago. So they have gained nothing through all of this. Exactly the same.

THE COURT: They gained something that most of us would give an arm and a leg for. Peace of mind.

MS. SMITH: Unfortunately it's the Bruces who paid an arm and a leg for this. But we --

THE COURT: Hopefully not an arm or a leg.

MS. SMITH: Well, not literally but figuratively.

But the phone has now been returned to us, we're in complete compliance with the most recent orders, and we substantially complied with the prior orders. We ask the Court to deny PEPCO's motion for contempt which is still pending.

THE COURT: There is no reason or desire on my part to hold anyone in contempt, and so we're happy to discharge that, that order.

MS. SMITH: Thank you, Your Honor.

THE COURT: Now is there anything else on this?

MS. SMITH: Not at the moment. PEPCO told the Court that it filed a statement of fees and costs. We have not had a chance to even look at that yet so I anticipate a response to that. We will also probably be filing with the Court a

[p.41]

motion for sanctions against PEPCO.

THE COURT: I don't want to hear any argument about that. I would ask you to think about whether you really want to do that or not.

MS. SMITH: We will, Your Honor.

THE COURT: I appreciate that.

MR. FREEMAN: Your Honor, if I could just be heard on the process. There has been argument, as far as the Bruce matter's concerned, but the requirements of a meet and confer before motion is filed is not required of a nonparty. I do not review the rules or read the rules of the District of Columbia to so state. I think anyone who's going to file a motion has that obligation. And certainly would request that to be the case with regard to any motion for sanction that's going to be filed. Certainly I'm not aware of what the grounds would be but that being said I think that Rule 12 (i) would apply.

THE COURT: I don't know if Rule 12 (i) applies to it because I've not looked at that but I can tell you that I'm going to require it now in this -- this matter.

MS. SMITH: Okay, certainly, Your Honor. Mr. Freeman wants us to confer with them on it we're happy to.

THE COURT: I think you ought to. I think that this would be a wonderful opportunity, you know, to step back and take a good look at the big picture, and see, you know, as an old guy used to say: Which way you want to go with this?

* * *

APPENDIX H

**IN THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division**

Civil Action No.: 2012 CA 009586

Calendar 4

Judge Michael L. Rankin

[Filed November 25, 2014]

SHIVA GHAFORIAN, individually and as the	)
Personal Representative of the ESTATE OF	)
MOHAMMED GHAFORIAN,	)
	)
Plaintiff,	)
	)
v.	)
	)
POTOMAC ELECTRIC POWER COMPANY	)
("PEPCO"), et al.,	)
	)
Defendants.	)

ADDENDUM TO THE STIPULATED
PROTECTIVE ORDER

This addendum to the Protective Order signed on March 29, 2013 applies to the forensic collection, preservation, analysis, and reporting related to the cell phone used by non-party Jeanette Bruce to take the photograph of the car fire on June 29, 2012.

For good cause shown, this Court hereby **ORDERS** as follows:

1. On December 1, 2014, or such other date as Pepco's and Ms. Bruce's forensic experts may mutually agree, Ms. Bruce shall produce her LG-VX-9700 cell phone at Freeman & Freeman, P.C., 100 Park Avenue, Suite 250, Rockville, MD 20850, for inspection and review by Pepco's forensic expert, identified at the November 20, 2014 hearing as Jonathan Fowler. Ms. Bruce's computer forensics expert, Charles J. Culley, may be present to monitor Mr. Fowler's forensic collection and analysis of the cell phone. Only Pepco's expert and Ms. Bruce's expert, and no other party or counsel for any party, shall have access to the phone, the storage media and programs that Pepco's expert uses, or any of the contents of the cell phone except as specifically described below.

2. Upon receipt of Ms. Bruce's LG phone, Pepco's expert shall conduct a field analysis of the LG phone by copying or imaging the data and information using a Cellebrite UFED. Pepco's expert is ordered not to alter, disable or destroy any of the data and information that is copied or imaged. Pepco's expert shall export the native files of the MMS photos and messages, SMS messages, video clips, and call logs that are dated after 12:00 a.m. (midnight) on June 28, 2012, and only those native files, from the image of Ms. Bruce's LG-VX-9700 cell phone. The data and information dated before 12:00 a.m. (midnight) on June 28, 2012 is irrelevant and shall not be exported.

3. Pepco's expert shall examine the native files from after 12:00 a.m. (midnight) on June 28, 2012 in order to identify any photograph or photographs of the

fire taken on June 29, 2012. Once that photograph or photographs has been identified and the path and other identifying information has been recorded, Pepco's expert shall immediately, completely, and permanently delete all other exported native files as well as any collected image or other work product from inspection of the LG phone from all of her storage media. Ms. Bruce's expert may monitor the extraction of data, export of native files, and the deletion of all files and images (except for the collected photograph or photographs of the fire).

4. Pepco's expert shall not disclose to any other expert, party, or party's counsel any of the data or information downloaded from Ms. Bruce's LG phone, other than the photograph or photographs of the June 29, 2012 car fire that he locates and related identifying metadata. Pepco's expert shall also not recreate or attempt to recreate any of the personal messages and other information that he initially imaged and did not include in the final export.

5. On or before December 10, 2014, Pepco's expert shall produce to Ms. Bruce's forensic expert and all the parties: a copy of the photograph or photographs of the June 29, 2012 fire exported from Ms. Bruce's LG phone; a report detailing the results obtained; and any and all records reflecting the use of any hardware and software employed to examine Ms. Bruce's LG phone, including the paths/locations of the photo or photos obtained and the EXIF metadata and hash values of the photo or photos paralleling the data extraction, EXIF metadata and hash value reports produced by Ms. Bruce's expert for this Court. Pepco's expert shall certify to this court that he has followed these procedures.

6. This Order incorporates the Stipulated Protective Order entered on March 29, 2013 and any person found in violation of this Protective Order shall be subject to sanctions pursuant to Super. Ct. Civ. R. 37(b)(2)(a)-(d).

SO ORDERED.

s/_____
Michael L. Rankin, Associate Judge

November 25, 2014

Electronic copies to:
William Lightfoot, Esq.
Kelly Fisher, Esq.
Paulette Chapman, Esq.
Mark Freeman, Esq.
Martin Freeman, Esq.
Leslie Machado, Esq.
Martha Mullen, Esq.
Aaron Finkhousen, Esq.
Jonathan Pittman, Esq.
Stephen Bruce, Esq.
Patricia Smith, Esq.
Allison Pienta, Esq.
Robert Ferguson, Esq.

APPENDIX I

**SUPERIOR COURT OF THE DISTRICT OF
COLUMBIA**

CIVIL DIVISION

Civil Action Number 2012-CAB-9586

Washington, D.C.
Thursday, November 20th, 2014

SHIVA GHAFORIAN, ET AL.,	)
	)
versus	)
	)
PEPCO, ET AL.,	)
	)
Defendants.	)

The above-entitled action came on for a hearing before the Honorable MICHAEL RANKIN, Associate Judge, in courtroom number 516.

THIS TRANSCRIPT REPRESENTS THE PRODUCT OF AN OFFICIAL REPORTER, ENGAGED BY THE COURT, WHO HAS PERSONALLY CERTIFIED THAT IT REPRESENTS TESTIMONY AND PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of the Plaintiffs:

PATRICIA SMITH, Esquire
WILLIAM LIGHTFOOT, Esquire
Washington, D.C.

On behalf of the Defendants:

LES MACHADO, Esquire
JONATHAN NELSON, Esquire
MARTHA MULLEN, Esquire
AARON FINKHOUSEN, Esquire
MARK FREEMAN, Esquire
Washington, D.C.

Deborah Armstrong
Official Court Reporter

(202) 879-1030

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P R O C E E D I N G S

THE DEPUTY CLERK: Calling on Your Honor's calendar Shiva Ghafoorian, et al., versus Potomac Electrical Power Company and others, civil action number 2012-CA-9586.

Would you state your names for the record, starting with the plaintiff.

MR. LIGHTFOOT: Good afternoon, Your Honor, William Lightfoot for the plaintiffs.

THE COURT: Thank you, sir.

MR. MACHADO: Good afternoon, Your Honor, Les Machado on behalf of the defendant, Utilimap.

THE COURT: Thank you.

MR. NELSON: Good afternoon, Your Honor, Jonathan Nelson on behalf of Capitol Paving --

THE COURT: Thank you.

MS. MULLEN: May it please the Court, Martha Mullen on behalf of the District of Columbia, and I'm joined by Aaron Finkhousen.

THE COURT: Thank you, ma'am.

MS. MULLEN: Thank you, Your Honor.

MR. FREEMAN: Good afternoon, Your Honor, Mark Freeman on behalf of PEPCO. I'm also joined by expert, Jonathan Fowler was in line behind me to get into the door, but he has not yet been in the courtroom.

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THE COURT: Thank you, Mr. Freeman.

MS. SMITH: Your Honor, I'm Patricia Smith. I represent the witness, Jeanette Bruce, and she is here with me today --

THE COURT: Thank you, Ms. Smith --

MS. SMITH: With Mr. Steven Bruce her husband and an associate from his firm, Allison Canta and Miranda (phonetic).

* * *

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* * *

THE COURT: I think I'm controlling the floor right now and I'm trying to see if we can not get pulled off point because you addressed -- a significant part of your paper that you filed yesterday addressed why PEPCO's expert does not need anything more than what you've provided.

And you got up-to-date, Ms. Smith, and went over the history of this battle to get Ms. Bruce's telephone, but you didn't mention what seems to be the primary assertion in your paper yesterday. And, of course, Mr. Freeman hasn't addressed that either.

And maybe it's because he hasn't had a chance to digest your paper. That's why I asked at the outset -- I don't think anybody wants to just be here to waste time today.

But you've all have come down here and it's not clear that it's appropriate to go forward with this hearing, which really is to determine in the last analysis whether I'm going to hold Ms. Bruce in contempt or not.

You've suggested substantial compliance and you've made, I think, primarily two arguments in this

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paper. And I need to hear from PEPCO why they think that you're wrong. When I read your papers I said, now, this is -- now, they've given me something that I can make a ruling on.

But it probably would have been better if PEPCO had some advance knowledge of what was going to be in the paper. And you know -- I think it's really important for us to focus on what the issue really is here.

And this is not a contest between PEPCO and Ms. Bruce. It is a contest between Mr. Ghafoorian and all of these defendants. And then these defendants, some of them against each other, with Ms. Bruce having made herself a witness in this case by offering plaintiff what appears to be critical evidence.

And, you know, I think we're in some danger of spending too much time on matters collateral to what is really important here; and that is whether critical evidence is being withheld. If it is, I'm not going to tolerate it. If it's not, then I'm not going to waste any more time with it.

But we need to get the issue crystallized, as it were, so we can make that decision and then move on. What I need from you is not simply telling me how much better you would feel if you had your witness take Ms. Bruce's phone and analyze it. What I need to hear from you is why

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you are in a worse position to defend yourself with what Ms. Bruce is prepared to turned over voluntarily.

I think it's true, beyond any doubt, that you would feel better -- perhaps have a better sense of assurance if Ms. Bruce had complied with the Court's order as written. She has not. But it's my job to determine whether or not her alternative to the remedy I ordered is, if not on an equal footing, at least sufficient to provide you with the evidence you need to defend yourself.

And if it is, then I'm not going to get hung up on she didn't comply with the letter of the order. What's important is that we have all parties going forward to prepare for this trial with equal access to the evidence.

Now, I'm prepared to hear from anybody else. I don't need to hear any repetitions I've already heard. If anybody else wants to weigh in on this.

* * *

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* * *

THE COURT: Well, I appreciate that. I think that this last few minutes has been time well spent. You

know, I think it's clear that Ms. Bruce is going to have to turn that phone over and I'm so ordering right now.

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I want it clear -- as clear as I can be that this alternative method that came after I had already issued the order -- or to turn the phone over is insufficient to allow the Court, as well as these parties, to have an understanding that they've got all of the available evidence.

It is my view that the protective order that is in place is sufficient to cover any real concerns, reasonable concerns, that Ms. Bruce may have about privacy interests in that phone that -- at least her counsel tells me now -- has nothing on it because it was all taken away, as you've described, and put on a new phone.

So that seems to me reduces significantly any reasonable concern that Ms. Bruce would have about privacy interests in that old phone. It would also resolve, once and for all, not only the issue that PEPCO may have about whether or not it has all available evidence, but it will also, I think, assist all parties, defendants and plaintiff, going forward to resolve this question of whether or not there's a sufficient basis for PEPCO's expert's opinion. So it's going to solve two concerns in this case.

Now, Ms. Smith, I will invite you -- if you have not already -- to look at the protective order the Court issued a year ago. And if you see areas that would give

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your client more protection, I'm certainly open to that.

If you want to do that, you can file something within five days, working days, and we will consider it. And unless there is good reason not to, we'll approve it and add that into the protective order.

Ms. Bruce, I'd like you to be before the Court. If you will come up and join your counsel.

Say your name.

WOMAN SPEAKER: Jeanette Bruce.

THE COURT: Ms. Bruce, you are ordered to turn over that telephone that you used to take the photographs before getting yourself a new phone. We appreciate your concern and we are determined to give you every assurance that we can that your privacy concerns will be protected, and I stand ready to enforce this protective order in every legal way.

Do you have any questions?

WOMAN SPEAKER: No.

THE COURT: You have the same time to comply with this order as your attorney has to suggest any new protective measures.

Now, today is Thursday?

MS. SMITH: Yes, Your Honor.

THE COURT: I think next Thursday is Thanksgiving.

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MS. SMITH: Yes, Your Honor.

THE COURT: I want a report on the Monday after
-- what date is that?

Report from PEPCO's counsel as to whether he is
in receipt of this telephone. If PEPCO does not have
this phone by the close of business on Monday,
December 1st, then I will issue an order of contempt.

Any questions?

MS. SMITH: No, Your Honor.

* * *

APPENDIX J

**SUPERIOR COURT OF THE DISTRICT OF
COLUMBIA**

CIVIL DIVISION

Civil Action No. 2012 CA 9586 B

Washington, DC
October 29, 2014

SHIVA GHAFOORIAN, et al,	)
	)
Plaintiffs,	)
	)
v.	)
	)
POTOMAC ELECTRIC POWER COMPANY,	)
et al,	)
	)
Defendants.	)

The above-entitled action came on for a hearing before the Honorable MICHAEL RANKIN, Associate Judge, and a in Courtroom Number 516, commencing at approximately 10:04 a.m.

THIS TRANSCRIPT REPRESENTS THE
PRODUCT OF AN OFFICIAL REPORTER,
ENGAGED BY THE COURT, WHO HAS
PERSONALLY CERTIFIED THAT IT

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REPRESENTS THE TESTIMONY AND
PROCEEDINGS OF THE CASE AS RECORDED.

APPEARANCES:

On behalf of Plaintiff Ghafforian:
William Lightfoot, Esquire
Washington, DC

On behalf of Defendant Utilimap:
Les Machado, Esquire
Washington, DC

On behalf of Defendant Pepco:
Mark Freeman, Esquire
Washington, DC

APPEARANCES CONTINUED ON NEXT PAGE

Sherry T. Lindsay, RPR
Official Court Reporter

(202) 879-1050

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APPEARANCES CONTINUED

On behalf of Defendant Capitol Paving:
Jonathan Nelson, Esquire
Washington, DC

On behalf of Defendant District of Columbia:
Martha Mullen, Esquire
Washington, DC

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PROCEEDINGS

THE DEPUTY CLERK: Your Honor, calling the matter of Shiva Ghafoorian, et al, versus Pepco, et al, 2012 CA 9586.

Please stand and state your name for the record.

MR. LIGHTFOOT: Good morning, Your Honor. William Lightfoot for the plaintiffs.

MR. MACHADO: Good morning, Your Honor. Les Machado on behalf of defendant Utilimap.

MR. FREEMAN: Good morning, Your Honor. Mark Freeman on behalf of Pepco.

MR. NELSON: Good morning, Your Honor. Jonathan Nelson of behalf of defendant, Capitol Paving of DC, Inc.

THE COURT: Good morning.

Good morning.

Good morning to the audience.

Are we expecting the District of Columbia? I don't want to start before we are --

MR. LIGHTFOOT: We are expecting them.

THE COURT: Then maybe -- I think they are walking in now.

Good morning. Good morning. Slow down.

MS. MULLEN: I'm sorry, Your Honor. The lines downstairs keep getting larger and larger. I need to allow for that.

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THE COURT: I am well aware of that and I don't think these young gentlemen minded a bit accommodating you. So just --

MS. MULLEN: Thank you.

THE COURT: Yeah. There are a couple of matters that we need to look at today. But I always think it is best for me to defer and let counsel set the stage.

Mr. Lightfoot.

MR. LIGHTFOOT: Yes. Your Honor, first of all I would like to alert the court that Mr. Bruce and his attorney Pat Smith are in the audience.

* * *

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* * *

THE COURT: I think it probably would serve us better if you address the argument that Ms. Bruce has made, that, number one, you already have the information that the subpoena seeks to obtain and I guess the other number one. It --

MR. FREEMAN: I can address --

THE COURT: Excuse me. Maybe you want to make a note so that you don't lose your train of thought.

MR. FREEMAN: Yes, Your Honor.

THE COURT: But the other argument, which I think is also a primary argument, so it is hard for me to label it as number two, is that she has hired an expert who has given you, for the second time, the information that the subpoena seeks. So you are basically beating a dead horse.

MR. FREEMAN: Yes, Your Honor. Pepco does not -- we were provided with a disk or with a -- something from Ms. Bruce's expert. I don't know how Ms. Bruce's expert obtained it. I don't know in what fashion it was obtained. Certainly he has a declaration, but Pepco is under no

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obligation to rely on Ms. Bruce's expert. Pepco is entitled to have its own expert. This Court has said as much in its most recent order. As far as the expert -- Pepco has every right to hire its own expert. And I can't --

THE COURT: Nobody is arguing that you don't have a right to hire your expert. And everybody understands what I said in the past order. What Ms. Bruce is saying now is that she has substantially complied with the order because she has furnished you what you want with a certification from her own expert. Now, without going into the obvious fact of why Riley in California has no application in this matter, suffice to say that the constitution and the law that interprets right to privacy has long required that in civil actions, such as this, that we balance the interests of an individual's right to privacy against the litigant's right to obtain information to exonerate its legal concerns and interests.

Now, here Ms. Bruce is making a stand that information in her mobile phone is information that she doesn't want to share, notwithstanding the fact that she went out on her own and took photographs of the matter that has become a public matter and thereby exposing the contents of that phone to private litigants who are interested in this litigation. No one required Ms. Bruce to go out there and use that phone to take photographs. She did that on her

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own volition and put herself in the midst of this highly contested litigation. Now, this is no small case. Ms. Ghafoorian is not suing for small claims. And there are a number of defendants who have some interest in this discovery, notwithstanding that Pepco is carrying the ball. So what we are doing here is nothing that Riley requires us to do, it is what we have long been required to do. And that is balance the interests that are protected by the First Amendment. I don't know that the Fourth Amendment has any application here because no one is suggesting that this is the subject of a search and seizure or police action.

MR. FREEMAN: Yes, Your Honor. I can suggest that it is not possible for Pepco's expert to challenge the propriety or the validity of Mr. Culley's (ph) methodology or determine whether the data was corrupted.

* * *

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* * *

THE COURT: There is a protective order in place. And if we get to a suggestion by Ms. Bruce that we should somehow notwithstanding what I have already said, that we should somehow use dictum from Riley to analyze the issue that really is the issue confronting us. And that is whether or not this subpoena requires an unlawful invasion of Ms. Bruce's privacy. Then they would have to explain -- Ms. Bruce would have to explain why this Court's protective order does not serve to relieve her concern in that regard. The fact of the matter is that one of the things that we are required to do as a court from time to time is to require parties to turn over very, very private information. But we do it under seal, we do it in camera, we do it with protective orders in place.

MR. FREEMAN: And --

THE COURT: However, before we order parties to comply with subpoenas that required them to turn over confidential information or information that otherwise raises the specter of invasion of privacy concerns of a third party, we are required to see if there are other ways

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that the subpoenaing party can obtain this information. And so what Ms. Bruce has suggested is that you have got another way and that is to take what she is offering you from her expert. Now, I don't know that that satisfies your concerns or not. That is what I have to

find out and what I have to weigh in determining whether to enforce this order.

Now, I want to be clear that if what you came here to find out today for your client, Ms. Smith, is whether or not I am prepared to impose a contempt citation and a heavy fine, not a small one, the answer is, yes, I am prepared to do that. And if I do that, I am not issuing a stay. If you want to go to the Court of Appeals and get a stay, you go over there. But if my determination, based on the record, is that she is unlawfully withholding this information then I know what my responsibility is.

MS. SMITH: May I address the Court, Your Honor?

THE COURT: I want to hear him out first. I keep cutting him off, but he is not getting to the point.

MR. FREEMAN: Well, Your Honor, Ms. Bruce is taking the position that while Mr. Cully -- first of all, I don't have a way of knowing whether what was given to me --

THE COURT: What they are telling you is your simple curiosity is not enough. That is why I think that you are avoiding what is central to this decision. Because if you are -- you are actually falling right into the

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argument that they are making. Your suspicion isn't enough. What they have said is that -- let's start with what you have said. What you have said is that there is meta data on this photograph that allows you what you think is a complete defense in this case.

MR. FREEMAN: Potentially, yes, Your Honor.

THE COURT: And they have told you that they have given you this photograph that has that meta data. Now, you have said, you know, that you couldn't -- that wasn't sufficient because you couldn't make it out from that. And so you want the phone and you have suggested a way that you could do that that would satisfy not only your desire to get evidence that could lead to admissible evidence in the trial, but would satisfy Ms. Bruce's concern for her privacy, whatever is on that phone. Now, the battle that she has waged to keep you from getting that phone has certainly piqued your curiosity. And the manner in which this has become such a big side issue in this litigation is an errata sheet that apparently came through counsel for plaintiff. And that led you to conclude that Ms. Bruce had reversed course on key testimony from a deposition. Now, I think that this bit about the reversing course and the errata, I think all of that is collateral to whether or not you have a right to get this phone. And I am not going to be distracted by that. What I am concerned with is whether

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or not Ms. Bruce has satisfied this subpoena by turning over this photograph and whether or not her alternative to your suggestion of turning it over through a forensic expert should end the question of whether or not she has substantially complied with the subpoena.

I can't know that unless one of us hears his testimony. And I don't plan to question him. So I think that means you have got to question him. Now, I don't

see that you should bear the expense of that. Because if they had complied with your subpoena, we wouldn't be here talking about this. So if that is Ms. Bruce's alternative to your suggestion, she will pay for the deposition.

MR. FREEMAN: And if -- through the deposition then I would assume we would come back to Your Honor and --

THE COURT: That's right. We'll find out whether or not this offer of compromise -- that is what I see it as -- satisfies your request. And if it does, then we move the -- turn the page. But if you still have got an argument after you have questioned him about his methodology and his results then she will get her chance to go over and see if the Court of Appeals agrees with the way I have handled this discovery issue. Because I will find her in contempt of court and I will impose a fine around \$5,000 a day until you comply with the subpoena. And that is about as clear as I can be on this. So what you need to do is what you did with

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McKenna Williams (ph), find out a date, get that deposition taken and then we'll come back here and find out what we need to do.

* * *

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* * *

THE COURT: I hear what you are saying. And I understand what you said and I appreciate what you said.

Let me ask Ms. Smith, if you will -- let me say this as a preface to what I am about to say. I recognize that you collectively want to be as clear on your record as you can be when and if you have to go to the District of Columbia Court of Appeals that you have complied with the rules. Somebody is not -- somebody is going to be clearly out of compliance with this order if that eventuality occurs but you want to be clear that you have complied with the rules.

Now, here is what I am saying: We are applying a balancing test to this request, motion, if you will, for an order to show cause why Ms. Bruce should not be held in contempt of court. We understand Ms. Bruce's suggestions of her concern, as well as Pepco's suggestions of its concerns. And we also understand that Ms. Bruce has argued to the Court that she is in substantial compliance. She says that she is in substantial compliance because you already have the information that is the subject of the subpoena duces tecum. She has also argued -- and I have not placed it as a secondary argument, I have placed it as a second primary argument, that she should be excused if she is not in substantial compliance because her interpretation of this

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Riley versus California case -- relieves her from complying with the Court's order. I -- as you lawyers like to say, I flatly reject that and suggest to you that that is a complete misunderstanding of what Riley holds. It is very clear that what Riley is concerned with is just what you have done, which is to come through the Court to get the information rather than have some police officer acting without Court intervention. So that

is not our situation at all. Our situation is that you have subpoenaed information. There has been a motion to quash, the Court has denied that and ordered the compliance with the subpoena and the subpoena has not been complied with. However, this substantial compliance argument is one that we believe should be considered thoroughly. And the only way to thoroughly consider it is for you to determine whether or not the methodology and the result obtained through that methodology from the forensic expert that Ms. Bruce, the third party, hired does indeed satisfy your subpoena. If it does, that is the end of it. Now, because -- because -- and the is important, because the third party's suggestion of substantial compliance is an avoidance of the Court's order for how to comply with the subpoena, we are placing the burden -- financial burden and the practical burden of getting this information to the subpoenaing party. So the requirement under this order is not simply that Ms. Bruce

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pay for this deposition, but that she arrange to have in your hands at least five days ahead of the deposition the information concerning the methodology and the results and, for that matter, if you don't already have it, this expert's CV so that you know his credentials or her credentials, if that be the case.

Now, to the extent that any of these requirements are not complied with or there appears to be an attempt to somehow avoid the spirit and the letter of what I am ordering, then I will interpret that attempt to avoid as further evidence of noncompliance. So I am looking for full cooperation from the third party. And I

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am looking for good faith from the subpoenaing party.
I am looking for good faith from everybody.

Now, do you have any questions now?

MR. FREEMAN: No, Your Honor. Thank you.

MS. SMITH: No, Your Honor.

* * *

APPENDIX K

**DISTRICT OF COLUMBIA
COURT OF APPEALS**

**No. 14-CV-539
2012 CAB 9586**

[Filed July 1, 2014]

JEANETTE M. BRUCE,	)
Appellant,	)
	)
v.	)
	)
SHIVA GHAFOORIAN, <i>et al.</i> ,	)
Appellee.	)

BEFORE: Thompson and Beckwith, Associate
Judges, and Nebeker, Senior Judge.

ORDER

On consideration of appellant's May 1, 2014, notice of appeal from an interlocutory order denying her motion to quash a subpoena duces tecum and granting the motion of appellee Potomac Electric Power Company ("Pepco") to compel production of appellant's cellular telephone and SIM card for inspection and copying of a photograph and related information stored thereon; appellant's motion for stay pending appeal, Pepco's opposition and motion for sanctions, and appellant's reply thereto; and Pepco's motion to dismiss the appeal and impose D.C. App. R. 38 sanctions,

appellant's opposition and citation of supplemental authority, and Pepco's reply thereto, it is

ORDERED that Pepco's motion to dismiss the appeal is granted and the appeal is hereby dismissed. Contrary to appellant's assertions, a discovery order compelling her to permit Pepco to copy a photograph from her telephone does not change or affect the possession of property within the meaning of D.C. Code § 11-721 (a)(2)(C) (2012 Repl.), *see Scott v. Jackson*, 596 A.2d 523, 527 n.5 (D.C. 1991), nor is it appealable as a collateral order, *see Walter E. Lynch & Co. v. Fuisz*, 862 A.2d 929, 931 (D.C. 2004); *United States v. Harrod*, 428 A.2d 30, 31-32 (D.C. 1981) (en banc). Appellant's attempts to distinguish these authorities by reference to the sensitive nature of the information stored on her telephone are unpersuasive, as this court has routinely required non-party witnesses to await a sanction for contempt before they may obtain review of their claim that a subpoena or discovery order offends a privilege or privacy interest. *See Scott, supra; Harrod, supra.* Moreover, *Perlman v. United States*, 247 U.S. 7 (1918), and its progeny afford no basis for an immediate appeal in this case, as the *Perlman* doctrine addresses a scenario in which the holder of the alleged privilege would otherwise be powerless to protect its interests against a subpoena directed at a disinterested third party. *See Walter E. Lynch & Co. v. Fuisz*, 862 A.2d 929, 931-32 (D.C. 2004). Finally, this case is not appropriate for invocation of this court's mandamus power because appellant has not shown the order exceeded the scope of the trial court's authority or that she lacked other means of redress. *See generally Banov v. Kennedy*, 694 A.2d 850, 858 (D.C. 1997) ("Abuse of discretion . . . is not enough to warrant mandamus; for

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mandamus to issue, a decision must qualify as ‘usurpation of judicial power.’” (citations omitted)); *Yeager v. Greene*, 502 A.2d 980, 983 (D.C. 1985) (explaining that, in general, a writ of mandamus will not issue to correct errors for which “appellate review [i]s available after final judgment”). It is

FURTHER ORDERED that appellant’s motion for stay is denied as moot. It is

FURTHER ORDERED that Pepco’s motions for D.C. App. R. 38 sanctions are denied, without prejudice to the filing of a D.C. App. R. 39 motion for costs.

PER CURIAM

No. 14-CV-539

Copies to:

Honorable Michael Lee Rankin

Director, Civil Division,
Civil Actions Branch

Todd S. Kim, Esquire
Solicitor General – D.C.

Stephen R. Bruce, Esquire
1667 K Street NW
Suite 410
Washington, DC 20006

Mark A. Freeman, Esquire
100 Park Avenue
Suite 250
Rockville, MD 20850

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Paulette E. Chapman, Esquire
William P. Lightfoot, Esquire
2001 Pennsylvania Avenue NW
Suite 450
Washington, DC 20006

Leslie Paul Machado, Esquire
1101 Connecticut Avenue NW
Suite 600
Washington, DC 20036

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APPENDIX L

**IN THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division**

**Civil Action No.: 2012 CA 009586
Calendar 4
Judge Michael L. Rankin**

[Filed June 2, 2014]

SHIVA GHAFORIAN, individually and as the	)
Personal Representative of the ESTATE OF	)
MOHAMMED GHAFORIAN,	)
	)
Plaintiffs,	)
	)
v.	)
	)
POTOMAC ELECTRIC POWER COMPANY	)
("PEPCO"), et al.,	)
	)
Defendants.	)

**ORDER DENYING NON-PARTY JEANETTE
BRUCE'S MOTION FOR STAY PENDING
APPEAL**

This matter is before the court on non-party Jeanette Bruce's motion for stay pending appeal and Pepco's opposition thereto. For the following reasons, the motion is **DENIED**.

At a status hearing on April 24, 2014, the court orally granted Pepco's motion to compel and orally denied Ms. Bruce's motion to quash.¹ The Order permitted Pepco to conduct an additional deposition of Ms. Bruce and to subpoena Ms. Bruce's cell phone for the purposes of inspecting and copying a photograph taken the night of the incident in question. Counsel for Pepco represented that the only way its experts would be able to copy the photograph and identifying information would be to use software that would copy all of the photographs on Ms. Bruce's phone and then to delete all but the single photograph Pepco sought. The court approved that method of obtaining the photograph but required that this process be conducted pursuant to the protective order previously entered in this case.

Ms. Bruce has now filed an appeal and moves the court to stay all proceedings pending appeal. "To prevail on a motion for stay, a movant must show that he or she is likely to succeed on the merits, that irreparable injury will result if the stay is denied, that opposing parties will not be harmed by a stay, and that the public interest favors the granting of a stay." *Barry v. Washington Post Co.*, 529 A.2d 319, 320-21 (D.C. 1987). The court finds that Ms. Bruce has not met any of these four conditions and a stay is not warranted under Super. Ct. Civ. R. 62.

Ms. Bruce has not indicated that she is likely to succeed on the merits, as this Court's April 24, 2014 Order was an interlocutory order and therefore not

¹ See Order dated April 24, 2014. Ms. Bruce did not appear for the hearing.

subject to immediate review by the Court of Appeals, absent exception. Ms. Bruce first argues that D.C. Code §11-721(a)(2)(C) gives the Court of Appeals jurisdiction. D.C. Code §11-721(a)(2)(C) states that “[t]he District of Columbia Court of Appeals has jurisdiction of appeals from interlocutory orders of the Superior Court of the District of Columbia changing or affecting the possession of property.” However, as District of Columbia case law makes clear, an order must change the *status quo* for it to have “chang[ed] or affect[ed] property.” See, e.g., *Jenkins v. Parker*, 428 A.2d 367 (D.C. 1981). The court’s supplemental discovery order does not change the status quo of Ms. Bruce’s property. Rather, it orders her to appear for a deposition and to provide her phone to the defendants for the sole purpose of inspecting and copying a single photograph, which she voluntarily provided to plaintiffs. Moreover, as Pepco notes in their opposition, if these routine orders to compel were automatically appealable, the Court of Appeals would be inundated with routine discovery disputes, effectively nullifying its oft-articulated rule that only final orders are subject to appeal, absent extraordinary circumstances.

Alternatively, Ms. Bruce argues that jurisdiction is founded in the collateral order doctrine. The collateral order doctrine creates a very narrow exception for parties to appeal interlocutory orders that resolve important issues that are completely separate from the merits of the case and have an irreparable effect on parties’ rights. See *Walter E. Lynch & Co. v. Fuisz*, 862 A.2d 929, 931, n.3 (D.C. 2004) (citing *Bible Way Church v. Beards*, 680 A.2d 419, 425-26 (D.C. 1996)). Thus, under the collateral order doctrine, the order in question must: “(1) conclusively determine the disputed

question, (2) resolve an important issue completely separate from the merits of the action, (3) be effectively unreviewable on appeal from a final judgment.” *Galloway v. Clay*, 861 A.2d 30, 32 (D.C. 2004) (internal citations omitted).

Although the April 24, 2014 order does definitively resolve Ms. Bruce’s discovery obligations, her testimony and the impact of the photograph she took is not separate from the merits of the case. As Pepco’s opposition points out, the subpoena

“command[s] the production of critical evidence and testimony from Mrs. Bruce, which not only bears upon the merits of Plaintiff’s claims, but may prove case dispositive. Accordingly, any appellate evaluation of the propriety of this Court’s April 24, 2014 Order will necessarily require inquiry into the importance of the information sought by Pepco and the adequacy and reliability of Mrs. Bruce [sic] testimony and subsequent changes . . . which under any analysis are inextricably intertwined with the merits of this case.” (Pepco’s Opp. to Mot. to Stay 6)

Accordingly, because this discovery dispute is so intertwined with the merits of the case, the court finds that the collateral order doctrine would not vest the Court of Appeals with jurisdiction and a stay is inappropriate. “This [Court of Appeals] has jurisdiction over all final orders and judgments of the Superior Court, but orders compelling discovery are not final, nor are they interlocutorily appealable under the collateral order doctrine.” *Walter E. Lynch*, A.2d at 931.

The Court of Appeals recently stated that “a pretrial order granting or denying discovery from a non-party witness is not ordinarily final for purposes of appeal, unless, in the case of an order granting discovery, the subject of the order refuses to comply and is adjudicated in contempt.” *John Doe No. 1 v. Burke*, 13-CV-83 (D.C. May 29, 2014) (citing *Crane v. Crane*, 657 A.2d 312, 315 (D.C. 1995)). Here, Ms. Bruce has not refused to comply with the subpoenas this court has authorized Pepco to issue, thus the court’s order is non-final and she has a mechanism for review by the Court of Appeals vis-à-vis contempt proceedings.

Next, Ms. Bruce argues that jurisdiction can be founded in the *Perlman* doctrine. Under the *Perlman* doctrine “a discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance.” *Lynch*, 862 A.2d at 932 (internal citations omitted). However, the *Perlman* doctrine addresses a situation when the subject of the discovery order and the holder of a certain privilege are different individuals, which is not this case; thus, the court concludes that *Perlman* does not aid Ms. Bruce in obtaining a stay of proceedings.

Finally, she argues that the Court of Appeals has discretionary authority to hear her appeal under a writ of mandamus. “The writ of mandamus is part of the more general class of prerogative or extraordinary writs.” *Yeager v. Greene*, 502 A.2d 980, 982 (D.C. 1985) (internal citations omitted). As the Court of Appeals has recognized, such an “extraordinary” remedy is “to be used sparingly,” and “may not be implemented as a

substitute for an appeal.” *Id.* at 983. “The party seeking a writ must demonstrate a clear and indisputable right to have the writ issue. . . . [W]here a matter is committed to discretion, it cannot be said that a litigant’s right to a particular result is clear and indisputable.” *Id.* (internal citations omitted). Here, the court finds little likelihood of issuance of a writ of mandamus. First, discovery disputes are typically left to the discretion of the trial court, the type of decision *Yeager* establishes as inappropriate for appellate review under a writ of mandamus. Moreover, as discussed *supra*, this court’s order is non-final and it is unlikely the Court of Appeals will consider such a dispute under a writ of mandamus.

In sum, Ms. Bruce has not demonstrated that she is likely to prevail on the merits. She also has not shown how she will suffer any irreparable injury if the stay is denied because the court has ordered the copying of her photograph and indentifying information to be conducted pursuant to the protective order in this matter. The court also notes that it was Ms. Bruce who created the instant discovery dispute when her errata sheet reversed key testimony that she had provided at her deposition. Thus, the court concluded that additional investigation, including investigation of the photograph, was warranted.

The motion to stay states that “there is little risk of harm to Pepco or other parties from a stay,” noting that discovery is not set to close until the end of 2014. (Mot. to Stay 10). However, the court is persuaded by Pepco’s opposition that the photograph and its identifying information could be dispositive, transforming the course of litigation in this matter, and delay would

prejudice Pepco and the other defendants. The court also notes that the incident in question occurred nearly two years ago, and to grant a stay would further delay discovery in this litigation.

Finally, Ms. Bruce has not shown how the public interest favors granting a stay. She cites to case law where a person's cell phone was searched using a Universal Forensic Extractor Device ("UFED") without a warrant, ignoring the fact that here, there is a court order requiring her to produce her cell phone for copying and inspection, to be conducted according to the protective order entered to address the exact privacy concerns Ms. Bruce articulated. The fact that the court's order is specific and requires compliance with a protective order adequately addresses Ms. Bruce's privacy concerns.

Accordingly, it is this 2nd day of June, 2014, hereby

ORDERED, that the motion for stay pending appeal is **DENIED**.

SO ORDERED.

s/_____
Michael L. Rankin, Associate Judge

June 2, 2014

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Copies to:

William Lightfoot, Esq.

Kelly Fisher, Esq.

Paulette Chapman, Esq.

Mark Freeman, Esq.

Martin Freeman, Esq.

Leslie Machado, Esq.

Martha Mullen, Esq.

Aaron Finkhousen, Esq.

Jonathan Pittman, Esq.

Stephen Bruce, Esq.

APPENDIX M

**SUPERIOR COURT OF THE DISTRICT OF
COLUMBIA**

CIVIL DIVISION

Civil Action Number: 2012 CAB 009586

Thursday, April 24, 2014
Washington, D.C.

SHIVA GHAFOORIAN, ET AL,	)
	)
Plaintiff,	)
	)
vs.	)
	)
PEPCO, ET AL,	)
	)
Defendant.	)

The above-entitled action came on for a hearing
before the Honorable MICHAEL L. RANKIN, Associate
Judge, in Courtroom Number 516.

APPEARANCES:

On Behalf of the Plaintiff:

PAULETTE E. CHAPMAN, Esquire
WILLIAM P. LIGHTFOOT, Esquire
KELLY J. FISHER, Esquire
Washington, D.C.

On Behalf of the Defendant Utilimap:

LESLIE P. MACHADO, Esquire
JEFFERY O'HARA, Esquire
Washington, D.C.

14-02215

Deposition Services, Inc.
12321 Middlebrook Road, Suite 210
Germantown, MD 20874
Tel: (301) 881-3344 Fax: (301) 881-3338
info@DepositionServices.com
www.DepositionServices.com

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On Behalf of the Defendant D.C.:

MARTHA J. MULLEN, Esquire
Washington, D.C.

On Behalf of the Defendant PEPCO:

MARK FREEMAN, Esquire
Washington, D.C.

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P R O C E E D I N G S

THE DEPUTY CLERK: Your Honor calling the matter of Shiva Ghafoorian, et al versus PEPCO, et al, 2012 CA 9586. Parties please stand and state your names for the record.

MR. LIGHTFOOT: Good morning, Your Honor. William Lightfoot for the plaintiff.

THE COURT: Thank you. Good morning.

MS. CHAPMAN: Paulette Chapman for the plaintiff. Good morning.

THE COURT: Good morning.

MS. FISHER: Kelly Fisher for the plaintiff.

THE COURT: Good morning.

MS. FISHER: Good morning.

MR. MACHADO: Good morning, Your Honor. Les Machado for defendant Utilimap.

MR. O'HARA: Good morning, Your Honor. Jeffery O'Hara also on behalf of Utilimap.

MS. MULLEN: May it please the Court, Martha Mullen on behalf of the District of Columbia. I'm the third party defendant, or actually I should say my client is a third party defendant. We've recently been sued by the plaintiff as well.

THE COURT: Good morning.

MS. MULLEN: Good morning.

* * *

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* * *

MR. FREEMAN: The next issue that was brought up by plaintiff's counsel was the outstanding motion to quash, PEPCO's motion to compel. The Court may recall at our last status conference, I think the Court had indicated the Court was inclined to allow that discovery.

THE COURT: You know what, now this one, you've got a winner here. I don't know that the Court needs to take any additional time with this, or, that Mr. Bruce needs to come here and make any additional arguments. I've read what he has to say. I have considered the positions of the various parties. He's wrong, and so this, this motion to quash is denied, and, and to the extent that it's not clear the motion to compel is granted.

MR. FREEMAN: Your Honor, really quickly on that, we had, PEPCO had submitted a proposed order, which was attached to our motion. There is one, I had talked to our expert who obtains information from, from cell phones.

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In the proposed order, one of the ordering paragraphs says that PEPCO through its forensic expert or otherwise should copy only the photograph, or other identifying information relating to that photograph.

THE COURT: Do you have that? Give her a second to pull it up?

(Pause.)

THE COURT: Yes, sir.

MR. FREEMAN: Yes. It's actually the, one, two, three, four, the fifth ordering paragraph, which is at page two of the order.

THE COURT: No, is it numbered five?

MR. FREEMAN: It is not. They are not numbered.

THE COURT: How does it begin?

MR. FREEMAN: It begins, ordered that PEPCO through its forensic expert or otherwise, copy only the photograph and other identifying information, relating to the photograph, without removing or copying any other personal information.

THE COURT: Okay.

MR. FREEMAN: I can report that my expert has told me, we have no interest in her, in her texts or anything else, but as far as the photograph, apparently have store photographs. The expert has to copy the entire file of all photographs, download those, and then I said

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well, but we're only interested in the one.

He says that's fine but the way that his software copies it, you'd have to copy all the photographs, and then he can delete all but the one, and I said, and you will agree to do that, and he said absolutely he would agree to do that, and I can report that to the Court.

But that's the scientific process of how that has to occur apparently. There is, and just so the Court is aware, there is a, where is it? One moment, Your Honor. There is a particular, there is a specialized equipment, which is called a cellebrite (phonetic sp.) unit, and something called an oxygen mobile forensic software, which actually does that process.

But I can report to the Court as opposed to literally as it looks, you can only take the one photograph, take all them, and then, and leave the ones that are on

there, and then delete everything but that particular photograph.

MR. LIGHTFOOT: I'm just speaking on behalf of Mr. Bruce because he --

THE COURT: I understand.

MR. LIGHTFOOT: Okay. He informed that he was, he proposed that the information from his wife's phone be downloaded onto a thumb drive, and then given to PEPCO.

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His rationale was he thought that to do anything else was to invade her privacy with respect to photographs, which is exactly what Mr. Freeman is recommending, or asking to do, and I would just say on behalf of Mr. Bruce, why can Mr. Bruce not download the relevant photo onto a thumb drive and produce that to PEPCO?

THE COURT: Well, I mean suppose that when people put themselves within the public domain they run some risk that things that would otherwise be private are private. It occurs to me that this person taking these photographs, either knew or had reason to know that she was recording something that would be of interest beyond just taking photographs.

So, I'm inclined in this instance to, to have the party who speaks sooner to have the option of how they wanted to do this. I'm also inclined, if there is a concern for privacy, to consider some type of a protective order, sealing order.

MR. FREEMAN: Your Honor, if I may be heard on that, as part of the actual order that's actually in one

of the ordering paragraphs requires that the information be obtained pursuant to the protective order that's already in place in this case.

Your Honor, has already signed a protective order as it relates to feeder maps and things of a

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sensitive nature. Certainly that protective order does not only apply to feeder maps from PEPCO, but can apply to any particular matters that are, that fall under the purview of this case.

THE COURT: I thank you for pointing out this section of the, of the order, but we are fairly clear, well, we're clear that the defendant has the right to obtain this information in the way it has proposed, over Mr. Bruce's objection on behalf of Ms. Bruce.

* * *