

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
DAN RATHER, :  
 : Index No. 603121/07  
 : Commercial Part 27  
 :  
 : Part Calendar No. 20058  
 :  
 Plaintiff, :  
 : Hon. Ira Gammerman  
 :  
 -against- :  
 :  
 :  
 CBS CORPORATION, :  
 : **ORAL ARGUMENT**  
 : **REQUESTED**  
 :  
 :  
 Defendant. :  
-----X

**DEFENDANT'S RESPONSE TO PLAINTIFF'S  
MOTION TO COMPEL DOCUMENT PRODUCTION FROM  
RICHARD THORNBURGH, LOUIS BOCCARDI, AND K&L GATES LLP**

Dated: November 3, 2008

James W. Quinn  
Mindy J. Spector  
Yehudah L. Buchweitz  
WEIL, GOTSHAL & MANGES LLP  
767 Fifth Avenue  
New York, NY 10153-0119  
(212) 310-8000

Of Counsel:

Anthony M. Bongiorno  
Mary Catherine Woods  
CBS LAW DEPARTMENT  
51 West 52nd Street  
New York, NY 10019  
(212) 975-2721

*Attorneys for Defendants*

## PRELIMINARY STATEMENT

Defendant CBS Corporation (“CBS”) respectfully submits this response to Plaintiff Dan Rather’s motion to compel document production from Richard Thornburgh, Louis Boccardi (together, the “Panel”), and K&L Gates LLP (“K&L”) (collectively, “the Panel Witnesses”) in order to correct misstatements in Plaintiff’s memorandum of law concerning CBS. Instead of focusing on the privilege issue, Rather’s memorandum, just like his letter to the Court dated September 3, 2008, attempts to distort the Independent Panel’s work into part of a conspiracy against Rather. While CBS takes *no position* with respect to the privilege dispute between Rather and the Panel Witnesses, non-parties to this action, CBS cannot allow Plaintiff to so grossly misstate the record.

Rather claims that CBS is funding and directing the Panel Witnesses’ current privilege dispute with him. Rather apparently believes that the Panel Witnesses are CBS’s surrogates in another battle with him, which is simply not true. Although CBS has agreed to indemnify the Panel Witnesses for their fees in responding to the subpoena and appearing for depositions, it has not paid and has informed K&L that it will not pay its legal fees in connection with this privilege dispute. Furthermore, CBS has not instructed the Panel Witnesses to assert privilege and in fact informed K&L in February 2008 that it was asserting no such privilege. Further, CBS advised Plaintiff in March 2008 that it is not asserting a privilege with respect to the communications between CBS and the Panel.

Rather also asserts that the Panel was not truly independent because CBS allegedly instructed the Panel to destroy documents, considered only conservative lawyers for the Panel, and dictated the outcome of the Panel’s investigation. As is clear from the sworn testimony of Linda Mason, it is completely false that CBS instructed the Panel Witnesses to destroy any drafts

of the Panel Report, interview notes or any other Panel-related documents. Further, as is clear from the deposition testimony, because of the perception that CBS News and Dan Rather had a liberal bias, CBS purposefully chose a Republican lawyer, not for any nefarious purpose, but to open itself up to its harshest conservative critics and to ensure that the Panel's findings would be found to be credible. Finally, the Panel was completely independent and conducted its investigation without the influence of CBS, as all the testimony in the case proves.

Rather also complains that the Panel did not conduct a "full" investigation. However, the Panel's investigation was in accord with its mandate. As Plaintiff admitted on multiple occasions in his brief, the Panel's mandate was to investigate the process by which the September 8, 2004 story concerning President Bush (the "Broadcast") was prepared and broadcast. (Pl.'s Br. at 4, 5). The Panel's mandate was not to report the news, nor was it to investigate whether what Rather reported in the Broadcast was true. All the testimony in the case is that CBS, at great expense, appointed the Panel and exposed itself to criticism by the Panel. In fact, CBS News was ultimately excoriated by the Panel.

Rather's motion, replete with factual errors and bloviation, should be seen for what it is: yet another attempt to salvage his case by claiming that CBS is "hiding" critical information from him. As the Court may recall, at the inception of this case, Plaintiff told the media that CBS was "hiding" the investigative report of Erik Rigler, an independent investigator. Plaintiff clamored for the production of the report and the deposition of Rigler on the belief that such discovery would vindicate Rather and show that the Killian documents were authentic. Rigler's report and his deposition, of course, showed the exact opposite—that Rigler could not authenticate the documents or determine their source. With this motion, Rather again indulges in a fantasy that CBS and the Panel Witnesses are "hiding" important information from him.

Rather's unceasing desire to find "hidden" documents—first with Rigler and now with the Panel Witnesses—only demonstrates that the foundation of his case is built upon total speculation and is without factual support.

Although CBS does not know what information is contained in the withheld documents, the Panel Witnesses' internal work can be neither relevant to CBS's alleged contractual obligations to Rather nor to whether CBS owed and/or breached any alleged fiduciary duty to him. The current discovery dispute merely burdens the Court with yet another irrelevant sideshow that frustrates the speedy resolution of this case.

**A. The Panel's Investigation Was Independent.**

Unwilling to accept that the Panel operated independently of CBS, Rather resorts to unsubstantiated assertions that (1) CBS is funding K&L's efforts to block further discovery, (2) CBS instructed K&L to destroy notes and drafts, (3) the independence of the Panel is suspect because CBS only considered conservative lawyers, and (4) CBS was involved in the Panel's work and "dictated" its outcome. Each of these assertions is false.

First, Rather claims, without offering any evidence, that "CBS is now funding the effort of [the Panel] to block further discovery through an improper assertion of privilege" and that the Panel's privilege log was prepared on "CBS's nickel." (Pl.'s Br. at 2, 13, and 24 n.7). Although CBS has agreed to indemnify the Panel Witnesses for their efforts in responding to the subpoenas, CBS has informed K&L that it will not pay its legal fees with respect to its privilege dispute (See Spector Aff. at ¶3; Ex. 1 (Missal Depo Tr. at 7:18-8:24) (no mention of payment for preparing privilege log)).<sup>1</sup> Indeed, CBS advised both K&L and Plaintiff even before Plaintiff

---

<sup>1</sup> Relatedly, Rather asserts that K&L confirmed its engagement by CBS in a letter dated September 23, 2004. (Pl.'s Br. at 4). Plaintiff fails to disclose to the Court that this engagement letter was sent to Linda Mason, who is not a lawyer, and the letter was not countersigned by CBS. (See Pl.'s Ex. C). Defendant's exhibits are attached to the Spector Aff. as "Ex. \_\_\_."

served the subpoenas upon the Panel Witnesses that it would not be asserting privilege with respect to communications between CBS and the Panel. (See Spector Aff. at ¶2; Ex. 2 (March 17, 2008 letter from Mindy J. Spector to Edward Reich) (“We will also produce all documents provided to the Panel as well as communications between CBS and the Panel.”)).

Second, Rather’s claim that CBS instructed the Panel to destroy drafts of the Report is directly contradicted by the sworn testimony of Linda Mason. Ms. Mason unequivocally testified that she never instructed the Panel to discard or destroy drafts of the Panel Report, notes of any interviews generated concerning the Panel’s investigation or any other Panel-related documents. (See Ex. 3 (Mason Depo. Tr. at 167:13-169:2)).

Third, Plaintiff suggests that CBS’s choice of a Republican Panel member (Thornburgh) is “suspicious.” (Pl.’s Br. at 1). However, CBS has made clear that selecting a Republican Panelist was a deliberate choice.<sup>2</sup> As Andrew Heyward explained, “[b]ecause CBS News, fairly or unfairly, had a reputation for liberal bias, the harshest scrutiny was obviously going to come from the right, and that’s why we thought a Republican lawyer would help inoculate us against that scrutiny.” (See Ex. 4 (Heyward Depo. Tr. at 342:15-21)).<sup>3</sup> This strategy of choosing one Republican Panel member, Heyward further testified, “worked brilliantly because the Panel found that there was no political bias in the report, which was a very, very positive thing for CBS News and for Mr. Rather’s reputation.” (See id. at 341:21-342:1). Far from choosing a Panel to

---

<sup>2</sup> Rather suggests that Ms. Mason was unable to recall “who the GOP sources were that CBS consulted” to discuss potential Panel members. (Pl.’s Br. at 8). More accurately, Ms. Mason testified that she “talked with other people who would have opinions,” not just GOP sources. (See Ex. 3 (Mason Depo. Tr. at 77:12-78:2)).

<sup>3</sup> See also Ex. 3 (Mason Depo. Tr. at 49:19-50:5) (“We were considering who panelists might be, and we thought that a Republican conservative lawyer would be a good person to have on the panel. . . . Because CBS News was known as a liberal organization, and we felt that somebody who didn’t come with liberal credentials would be able to deliver a report that would be accepted both within CBS News and in the world at large.”).

harm Rather or to appease the Bush Administration, CBS's choice of Messrs. Thornburgh and Boccardi for the Panel in fact *protected* Rather's reputation and ensured that the Report was not seen as a liberal whitewash.

To bolster his theory that the Panel was somehow not independent, Rather denigrates the contribution of Louis Boccardi, the highly-respected former President and CEO of the Associated Press, by calling him an "assistant to K&L." (Pl.'s Br. at 4). As Thornburgh once remarked, Boccardi made "enormous and significant contributions" and was "an equal partner in the investigation, and in writing and editing" the Report. (See Ex. 5 (CBS 16885)). Calling Boccardi a mere "assistant to K&L" displays Rather's willingness to disrespect a prominent member of his profession and to disregard the facts in order to advance his own agenda.

Finally, Rather asserts that CBS "dictated" the outcome of the investigation and was involved with the Panel's work. (Pl.'s Br. at 1, 2). Rather has no evidence to support his assertion because it is not true. Testimony adduced during discovery is undisputed that the Panel operated independently of CBS. Ms. Mason testified that "[t]he Panel did what it wanted" and agreed that CBS did not have "any input or influence with respect to the findings of the Panel." (See Ex. 3 (Mason Depo. Tr. at 163:14-23; 203:7)). Michael Missal testified that the Panel conducted an "objective fact investigation" with no preconceived outcome. (See Ex. 1 (Missal Depo. Tr. at 231:14-18)). Andrew Heyward testified that he agreed that the Panel and K&L "conducted the investigation in a completely independent manner." (See Ex. 4 (Heyward Depo Tr. at 58:7-20)). And Leslie Moonves testified that "categorically, we did not push or cajole or have anything to do with the [Panel] except to ask them when they possibly would be ready [with the Report]." (See Ex. 6 (Moonves Depo. Tr. at 207:9-11)). Rather does not (nor can he)

rebut the sworn testimony of these four witnesses who all agree that the Panel conducted its investigation without CBS's influence.

As for why CBS purportedly "dictated the outcome of the Panel's review," Rather asserts that it was to "criticize the Broadcast, empowering CBS to get rid of Mr. Rather and others." (Pl.'s Br. at 1). This statement is blatantly false. After the Report was released on January 10, 2005, Rather kept his job. (See Ex. 7 (CBS 5552-57) (Moonves statement dated January 10, 2005, noting that no action would be taken against Rather)). He continued to work for CBS as anchor of the *Evening News* until March 9, 2005. As he acknowledged at his deposition, Rather and CBS initiated discussions concerning the timing of his leaving the anchor chair *before* the Broadcast had aired, Rather finalized his decision before the Report had been released, and in any case, CBS had the unilateral right to remove Rather at any time. (See Ex. 8 (Rather Depo. Tr. at 344:3-24; 338:25-339:8)).

At the same time, Rather alleges that the Panel Report "exonerated" him and found "no wrongdoing" on his part. (See Pl.'s Ex. Z (Am. Compl. ¶¶ 7, 87); Ex. 8 (Rather Depo. Tr. at 350:22-25)). But the Panel Report excoriated CBS News as an organization, finding "considerable and fundamental deficiencies relating to the reporting and production of the September 8 segment and the statements and news reports during the Aftermath." (See Ex. 9 (Panel Report at 4)).<sup>4</sup> Despite these facts, Rather wants the Court to believe that CBS had wanted to "get rid of" Rather all along by using the Report as a pretext. Rather's theory is that CBS News commissioned a costly Panel, in order to *criticize itself*, exonerate Dan Rather, and give themselves cover for doing something that it had a contractual right to do anyway. Rather's position defies logic and common sense.

---

<sup>4</sup> See also Ex. 9 (Panel Report at 221-223) (summarizing the "litany of missteps" that CBS took in airing the Broadcast and responding to its aftermath).

Regarding CBS's purported "true involvement" with the Panel's investigation, Rather once again engages in irrelevant and unfounded speculation. (Pl.'s Br. at 2). While CBS was apprised of the Panel's progress, there is not a scintilla of evidence that CBS thereby *influenced* the outcome of the investigation. Rather asserts, disingenuously, that Ms. Mason "contradicted" herself when she testified that she never received any interim reports before December 29, 2004 but later added that the Panel described certain aspects of the Panel Report to her over the telephone. (Id. at 9). There is no contradiction here. Having aspects of the report described over the phone is not the same as having received a copy of any interim reports. Similarly, no fair reading of the December 17, 2004 email would indicate, as Rather asserts, that Heyward had knowledge of the specifics of the report before a draft was sent to CBS on December 29th. (Id.)<sup>5</sup> Both Ms. Mason and Mr. Heyward testified under oath that the email discussion concerned the format of the report, not its contents. (See Ex. 3 (Mason Depo. Tr. at 195:6-15); Ex. 5 (Heyward Depo Tr. at 618:13-619:21)).

**B. The Panel's Mandate Was to Investigate CBS's Processes in Connection With the Broadcast, Not to Conduct Investigative Work Rather and His Team Should Have Done.**

To this date, Plaintiff continues to refuse to accept that the purpose of the Panel was not to investigate the underlying truth of the Broadcast or the authenticity of the Killian documents. Rather claims that the "Panel's failure to [conduct a full and independent investigation] evidences that CBS's true motivations were not to report the news, but to appease the Bush Administration and its partisan allies in Congress, whose anger over the substance of an important news story threatened the business interests of its parent, Viacom, Inc." (Pl.'s Br. at

---

<sup>5</sup> With respect to what parts of the Panel Report will be made public, Heyward stated, in relevant part, "yes, but what's 'the report' and what's 'the backup material' or 'appendix'? even if they had to expand the summary, we should consider this option if the big doc is too destructive." (Pl.'s Ex. O).

1). This statement is completely false and is a ludicrous and improper jump in logic. First, as quoted by Rather himself, the Panel's mandate was to "examine the *process* by which the September 8 segment was prepared and broadcast." (Pl.'s Br. at 5) (emphasis added).<sup>6</sup> The Panel was never asked to "report the news." As Linda Mason testified, the Panel's mandate was not to "trace down every element of the story" or to determine whether the reported story was true. (See Ex. 3 (Mason Depo. Tr. at 112:20-24; 114:12-19)).

Second, the result of the Panel's investigation contradicts Rather's assertion that the investigation was done to "appease" the Bush Administration. Rather cannot deny that the Panel's Report found no evidence of political bias on the part of CBS News and Rather in reporting the Broadcast. (See Ex. 9 (Panel Report at 211). In Rather's own words, the Panel also "exonerated" him and found "no wrongdoing" on his part. (See Pl.'s Ex. Z (Am. Compl. ¶¶ 7, 87); Ex. 8 (Rather Depo. Tr. at 350:22-25)). Moreover, multiple witnesses have been questioned, but the sworn testimony is unanimous that no decisions—not the decision to appoint a Panel or any decision about Rather's status—were done to appease the Bush Administration or Congress because their "anger" supposedly "threatened the business interests of its parent, Viacom, Inc." (See, e.g., Ex. 3 (Mason Depo. Tr. at 53:15-54:2) ("I don't think we wanted to appease anybody"); Ex. 4 (Heyward Depo. Tr. at 613:25-614:9) (in having an investigation, CBS was not "kowtowing to the right-wing Washington establishment, but [was] trying to restore [its] credibility"); Ex. 6 (Moonves Depo. Tr. at 138:20-23) (testifying that mollifying the right was "[n]ot at all" one of the purposes of this Panel); Ex. 10 (Melton Depo. Tr. at 166:14-15; 175:21-176:17) (in response to questioning on the advice Melton gave Heyward on continuing to defend the Broadcast, "it was never discussed as to what Viacom's business interests were"; never had

---

<sup>6</sup> See also Pl.'s Br. at 4 (CBS announced an Independent Review Panel that would "examine the *process* by which [the Broadcast] was prepared and broadcast.") (emphasis added.)

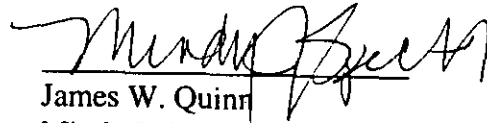
conversations on the impact of continuing to defend the Broadcast on Viacom's business interests).

Finally, all the testimony in the case is that CBS, at great expense, appointed the Panel and opened itself up to criticism by the Panel in an effort to determine what went wrong at CBS News. CBS News implemented the recommendations made by the Panel. There is no evidence whatsoever, as Rather suggests, that the Panel was part of any government-corporate conspiracy. Rather's theory is a fantasy and his motion is nothing more than an intrusive and expensive fishing expedition. Finally, in any event, the Panel and its work are irrelevant to Rather's remaining legal claims.

Dated: New York, New York  
November 3, 2008

Of Counsel:

Anthony M. Bongiorno  
Mary Catherine Woods  
CBS Law Department  
51 West 52nd Street  
New York, NY 10019



James W. Quinn  
Mindy J. Spector  
Yehudah L. Buchweitz

WEIL, GOTSHAL & MANGES LLP  
767 Fifth Avenue  
New York, NY 10153  
(212) 310-8000

*Attorneys for Defendants*

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

DAN RATHER

Plaintiff,

v.

CBS CORPORATION

Defendant.

**DEFENDANT'S RESPONSE TO PLAINTIFF'S  
MOTION TO COMPEL DOCUMENT PRODUCTION FROM  
RICHARD THORNBURGH, LOUIS BOCCARDI, AND K&L GATES LLP**

**WEIL, GOTSHAL & MANGES LLP**

*Attorneys for* DEFENDANTS

767 FIFTH AVENUE  
BOROUGH OF MANHATTAN, NEW YORK, N.Y. 10153  
(212) 310-8000

To:

*Attorney(s) for*

*Service of a copy of the within*

*is hereby admitted.*

*Dated:*

.....  
*Attorney(s) for*

**PLEASE TAKE NOTICE**

Check Applicable Box

*that the within is a true copy of a  
entered in the office of the clerk of the within named court on*

**NOTICE OF  
ENTRY**

*that an Order of which the within is a true copy will be presented for settlement to the Hon.  
one of the judges of the within named Court,*

**NOTICE OF  
SETTLEMENT**

*at  
on*

*Dated:*

**WEIL, GOTSHAL & MANGES LLP**

*Attorneys for*

767 FIFTH AVENUE  
BOROUGH OF MANHATTAN, NEW YORK, N.Y. 10153

To:

*Attorneys (for)*