IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA and the STATE OF MICHIGAN, Plaintiffs, v. BLUE CROSS BLUE SHIELD OF MICHIGAN, a Michigan nonprofit healthcare corporation, Defendant.	Civil Action No. 2:10-cv-14155-DPH-MKM Hon. Denise Page Hood Mag. Judge Mona K. Majzoub

PLAINTIFFS' REDACTED MOTION TO COMPEL A RESPONSE TO PLAINTIFFS' FIRST AND THIRD INTERROGATORIES AND TO COMPEL PRODUCTION OF DOCUMENTS RESPONSIVE TO PLAINTIFFS' DOCUMENT REQUEST NO. 50

For the reasons stated in the accompanying brief, Plaintiffs, the United States of America and the State of Michigan, respectfully submit this motion, pursuant to Rule 37(a)(3)(B)(iv) of the Federal Rules of Civil Procedure, for an order compelling Defendant Blue Cross Blue Shield of Michigan to answer Plaintiffs' Interrogatories 1 and 3(b) and to produce documents responsive to Document Request 50 of Plaintiffs' Fifth Request for Production of Documents from Blue Cross Blue Shield of Michigan.

In compliance with Rule 37(a)(1) and Local Rule 7.1, attorneys for the Plaintiffs certify that they have conferred in good faith with attorneys for Blue Cross regarding the nature of this Motion concerning Interrogatories 1 and 3(b) and Document Request 50, and its legal basis, after attempting in prior conversations to resolve Blue Cross's objections, but did not obtain concurrence in the relief sought.

Respectfully submitted,

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August 14, 2012

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BRIEF IN SUPPORT OF PLAINTIFFS' REDACTED MOTION TO COMPEL A RESPONSE TO PLAINTIFFS' FIRST AND THIRD INTERROGATORIES AND TO COMPEL PRODUCTION OF DOCUMENTS RESPONSIVE TO PLAINTIFFS' DOCUMENT REQUEST NO. 50

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STATEMENT OF ISSUES

(1) ***Interrogatory No. 1***—Despite this Court's May 30, 2012 order requiring Blue Cross to respond to Plaintiffs' first interrogatory, Blue Cross still refuses to provide what it represented in a filing with the Court as the "extensive factual and economic support" for the purported procompetitive effects of its MFN agreements, or state that such support does not exist. Should Blue Cross be required (again) to fully answer Plaintiffs' first interrogatory as written?

(2) ***Interrogatory No. 3(b)***—Plaintiffs' third interrogatory asks Blue Cross to identify hospitals where it has provided any payment, at least in part, for a hospital's acceptance of an MFN-plus clause. May Blue Cross evade a complete answer to this interrogatory by engrafting unreasonable limitations and exclusions on the word "payment"?

(3) ***Document Request No. 50***—Plaintiffs have requested Blue Cross to produce annual statements of work performed, performance evaluations, and related documents for 15 key employees. May Blue Cross limit its production to only three employees, and then to only those documents that "mention or relate to hospital contracting," when Blue Cross has injected numerous issues beyond hospital contracting into this litigation?

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* Denotes controlling or most appropriate authority for the relief sought. LR 7.1(d)(2)

Introduction

This motion to compel arises from three discrete discovery disputes. All share a common theme already familiar to this Court: Blue Cross's continued attempts to withhold facts and documents that are highly relevant to this case. *See, e.g.*, Dkts. 38, 185 (granting Plaintiffs' motions to compel documents); Dkt. 178 (granting Plaintiffs' motion to compel a response to Plaintiffs' first interrogatory). The present discovery disputes involve two interrogatories and one document request:

Interrogatory No. 1. On May 30, 2012, this Court ordered Blue Cross to respond to Plaintiffs' first interrogatory, finding that Blue Cross "know[s] exactly what [effects] are at issue in this case." Dkt. 178 at 13. This interrogatory calls for a detailed description of what Blue Cross represented in a filing with this Court as "the extensive factual and economic support" for the purported procompetitive effects of its most-favored-nations (MFN) agreements with Michigan hospitals. *See id.* at 7. Yet, despite the Court's order—and more than four years after Blue Cross began using MFNs in its agreements with Michigan hospitals—Blue Cross still refuses to provide the support for its representation about the procompetitive effects of its MFNs sought by the interrogatory, or state that such support does not exist. Blue Cross should (again) be required to fully answer Interrogatory No. 1.

Interrogatory No. 3(b). Plaintiffs' Interrogatory No. 3(b) seeks information that, according to Blue Cross's own counsel, is at the "heart" of this case: whether Blue Cross provided any payment, at least in part, for a hospital's acceptance of an MFN-plus clause. This interrogatory is clear on its face. For more than six months, however, Blue Cross has insisted this interrogatory is vague and ambiguous, claiming that it does not know what

"payment" means, while failing repeatedly to explain the supposed ambiguity. It has then used this supposed ambiguity as a pretext to (1) limit its answer to a contrived, highly restrictive set of circumstances that enables it to claim that it made no payments at all, and (2) exclude from its answer payments made, at least in part, for a hospital's acceptance of an MFN-plus clause. Contrary to its objection and improperly restricted answer, Blue Cross knows exactly what Interrogatory 3(b) seeks. The Court should therefore reject Blue Cross's efforts to evade Plaintiffs' third interrogatory and compel a full and correct answer to the interrogatory as written.

Document Request No. 50. Plaintiffs' Document Request No. 50 seeks documents relating to work performance, corporate goals, and payment incentives for 15 Blue Cross executives. These documents are likely to contain candid statements that will be relevant to issues in the case, including issues that Blue Cross has injected into the case such as its social mission and the accuracy of the health insurance markets pled by Plaintiffs. The documents will also provide useful information concerning the executives' job responsibilities—information that will assist with depositions of key Blue Cross executives. Blue Cross initially refused to produce any responsive documents to this request on relevance grounds. Ultimately, it provided just a few documents concerning only three of its executives, and limited those documents to hospital contracting. Blue Cross should be compelled to search for and produce a complete set of documents for the 15 employees required by Request 50.

I. Interrogatory No. 1

Plaintiffs' first interrogatory requires Blue Cross to describe what it represented in a filing with this Court as the "extensive factual and economic support" for the purported

procompetitive effects of its MFN agreements. *See* Dkt. 178 at 7.[1] Notably, the interrogatory has two related subparts that require Blue Cross to separately identify (1) each hospital where an MFN contributed to Blue Cross paying the hospital a lower rate than it otherwise would have paid (even if the actual rate that Blue Cross paid the hospital increased), and (2) each hospital where an MFN contributed to Blue Cross paying the hospital less relative to what it was paying before the MFN was in place. *Id.*

On May 30, 2012, this Court overruled Blue Cross's objections to the interrogatory, finding that Blue Cross "know[s] exactly what [effects] are at issue in this case." *Id.* at 13. The Court ordered Blue Cross to provide the "factual and economic support" for the purported procompetitive benefits of each of its MFN contracts. *Id.* The order provides that if Blue Cross has the facts, it should provide them; and if it does not have the facts, or does not know the answer, it should so state. *Id*. Blue Cross's answer disregards the Court's order.

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[1] Plaintiffs' first interrogatory states in full:

> Describe in detail "the extensive factual and economic support for [Blue Cross's] MFNs' procompetitive effects" (Defendant Blue Cross Blue Shield of Michigan's Reply Brief in Support of its Motion to Dismiss the City of Pontiac's Complaint at 4 n.5, *City of Pontiac v. Blue Cross Blue Shield of Michigan, et al.*, No. 2:11-cv-10276 (E.D. Mich. filed Aug. 22, 2011) (Dkt. # 153)), including, without limitation, separately for each subpart, identification of:
>
> (a) each and every hospital provider agreement in which a Blue Cross MFN provision has contributed, to any extent, to Blue Cross paying lower hospital reimbursement rates to (or obtaining greater discounts from) any Michigan hospital than it would have paid or obtained without the MFN provision; and
>
> (b) each and every hospital provider agreement in which a Blue Cross MFN provision has contributed, to any extent, to Blue Cross paying lower hospital reimbursement rates to any Michigan hospital, relative to the rates Blue Cross had been paying to the hospital before the hospital lowered its rates.

A. Blue Cross evades the question whether it obtained lower prices at Peer-Group Five hospitals because of the MFN.

Rather than simply answering the interrogatory, Blue Cross's response begins with a history of the Participating Hospital Agreement ("PHA"), an agreement that contains an MFN that applies to rural hospitals ("Peer-Group Five" hospitals) throughout the state. After reviewing this history, Blue Cross's answer states that the PHA's reimbursement formula resulted in lower prices at 37 hospitals participating in the PHA. *See* Ex. 1 at 4 ("the 2007 PHA resulted in lower rates" at 37 Michigan hospitals); *id.* at 6 ("[t]he 2007 PHA also resulted in lower costs to Blue Cross"). But Blue Cross never answers the question posed by the interrogatory: whether its MFN clauses contributed to those lower prices. The interrogatory does not simply ask for the identity of each hospital where Blue Cross's rates went down; rather, it asks Blue Cross to identify each hospital where *an MFN clause* contributed to lower rates. Blue Cross does not answer this question.

As Blue Cross knows, the MFN clause is just one provision in the PHA, a document that is over 50 pages long. Thus, if Blue Cross has information that the MFN in the PHA contributed to lower prices (rather than PHA's detailed reimbursement formula or one of its many other provisions), then Blue Cross should provide that information in its answer. Alternatively, if Blue Cross does not have information that the MFN in the PHA contributed to lower prices, as one Blue Cross executive's testimony has already suggested,[2] "it must state so." Dkt. 178 at 10. Without providing such information, Blue

[2] In an investigative deposition focused on the procompetitive effects of Blue Cross's MFN clauses, Kim Sorget, Blue Cross's Vice President of Provider Contracting and Network Administration, admitted that he was not aware of *any* instance where Blue Cross had obtained lower rates as a result of an MFN clause. *See* Dkt. 100 at 9 (describing deposition testimony).

Cross's discussion of the PHA's effects is an incomplete answer to the interrogatory. As with Interrogatory 3(b), discussed below, Blue Cross cannot evade the interrogatory as written by responding to a different question than the one being asked.

B. Blue Cross ignores Interrogatory No. 1's two subparts, failing to separate its factual claims.

Plaintiffs' interrogatory has two related subparts that require Blue Cross to identify separately (1) each hospital where an MFN contributed to Blue Cross paying lower prices than it would have otherwise paid; and (2) each hospital where an MFN contributed to Blue Cross paying less relative to what it was paying before. Dkt. 178 at 7. These subparts seek to clarify Blue Cross's factual claims, and ask Blue Cross to particularize its claims that its MFNs help it obtain lower hospital rates.

Blue Cross's answer ignores these subparts entirely, lumping all of its factual claims together. *See* Ex. 1. As this Court has held, however, "'[e]ach interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.'" *Sungjin Fo-Ma, Inc. v. Chainworks, Inc.*, No. 08–CV–12393, 2009 WL 2022308, at *3 (E.D. Mich. July 8, 2009) (Majzoub, Mag. J.) (quoting Fed. R. Civ. P. 33(b)(3)). Where, as here, "it is unclear which subparts have been answered in full and for which subparts Plaintiff has no information[, t]he Court will order Plaintiff to amend its answers . . . so that each subpart is responded to separately and fully with the information specific to that subpart or will state that it does not have the responsive information." *Id*. When Plaintiffs insisted that Blue Cross respond to each subpart separately, as required, *see* Ex. 2, Blue Cross ignored the request, but provided no reason for doing so. *See* Ex. 3.

To comply with the Court's order, in compliance with Rule 33(b)(3), Blue Cross should be required to separately identify the agreements that are responsive to Subparts

(a) and (b). This request should not be difficult; as the Court determined, "[t]he parties know exactly what [effects] are at issue in this case." Dkt. 178 at 13. If, for example, Blue Cross is not aware of any agreement where an MFN clause contributed to Blue Cross paying a lower hospital reimbursement rate relative to the rate it was paying before (responsive to Subpart (b)), then "it must state so." *Id*. at 10. And if Blue Cross *can* identify any agreements that are responsive to either Subparts (a) or (b), it should make clear which subpart the agreement is responsive to and provide the supporting facts, including the but-for reimbursement rates (under Subpart (a)) or the before-and-after reimbursement rates (under Subpart (b)).

C. Blue Cross's response for hospitals with an MFN-plus is evasive, incomplete, and ignores the Court's order.

The second section of Blue Cross's answer to Interrogatory No. 1 relates to hospitals that have MFN-plus clauses in their contracts—clauses that require hospitals to charge other insurers more than Blue Cross. *See* Ex. 1 at 6–7. Rather than simply answering the interrogatory, the first two paragraphs in this section instead explain why Blue Cross paid these hospitals *more* in exchange for the MFN-plus clause, *see id.* at 6—the very admission that Blue Cross tries to avoid in its response to Interrogatory 3(b), as explained below. Eventually, Blue Cross suggests that "in some instances, the [MFN-plus clause] *could* result in a decrease in the discount differential between Blue Cross and commercial insurers" (that is, lower prices relative to what Blue Cross might have otherwise obtained without the MFN-plus). *Id*. at 7 (emphasis added). But Blue Cross does not identify what those instances are, nor does it state whether any such instances have taken place.

The Court's order specifically requires that if Blue Cross does not have certain information—"such as whether an MFN clause caused the hospitals to agree to a different price . . . than they would have agreed to without the MFN"—then "[Blue Cross] must state so." Dkt. 178 at 12. Because Blue Cross has ignored this requirement, it must again be required to comply.

D. Blue Cross does not describe the research that is relying on.

Finally, when Blue Cross asserted that the 2007 PHA resulted in lower rates at 37 hospitals in Michigan, it based its assertion on "the best research currently available." Ex. 1 at 4. But Blue Cross did not describe what that research is, nor the details of what that research shows. When an interrogatory legitimately requests factual support, it is incumbent upon the responding party to provide an answer with relevant, supporting facts. *See, e.g.*, *ABX Logistics (USA), Inc. v. Menlo Logistics, Inc*, 09-CV-12792, 2011 WL 824683, at *2 (E.D. Mich. Mar. 7, 2011); *Mullins v. Prudential Ins. Co. of Am.*, 267 F.R.D. 504, 515 (W.D. Ky. 2010). Blue Cross should be required to do so.

II. Interrogatory 3(b)

A. Background

Plaintiffs have alleged that Blue Cross often "obtained an MFN from a hospital by agreeing to increase its payments to the hospital." Compl. (Dkt. 1) ¶ 44. In many instances, Blue Cross obtained MFN-plus clauses—which, as explained above, require hospitals to charge competing insurers more than Blue Cross—in return for increased payments. The likely effect of linking the MFN-plus clauses to increased payments "has been to raise the prices of hospital services paid by both Blue Cross and its competitors, and by self-insured employers." *Id*. These payments for MFN-plus clauses take on added significance because Blue Cross has repeatedly claimed both publicly and to this Court

that its MFN clauses help Blue Cross obtain the lowest hospital prices. *See, e.g.* Dkt. 12 at 1. Blue Cross's claims would be directly contradicted if Blue Cross was in fact paying hospitals higher rates or other additional reimbursement to obtain their agreement to MFN-plus clauses.

Subpart (b) of Plaintiffs' third interrogatory asks Blue Cross to state "whether any payment (in the form of a rate increase, a one-time payment, or any other for[m]) was offered or agreed to by Blue Cross, at least in part, for the hospital's acceptance of an MFN-plus clause and, if so, the form and amount paid by Blue Cross." See Ex. 4 at 2. Blue Cross does not dispute the relevance of the information sought; indeed, counsel for Blue Cross stated in a meet-and-confer discussion that the interrogatory goes "to the heart of the issues in the case."

Nonetheless, for months, Blue Cross has avoided responding to the interrogatory as written. In its initial response to Interrogatory 3(b), Blue Cross provided boilerplate objections, but no substantive answer, claiming the term "payment" was vague and ambiguous. Ex. 5. After extensive meet-and-confer discussions between the parties, Blue Cross agreed to provide a supplemental response, which it served in April.

In that supplemental response, Blue Cross, in effect, rewrote Interrogatory 3(b) by limiting its answer regarding payment to hospitals to [redacted]" Ex. 4 at 3. Further, Blue Cross added an additional limitation to its answer, stating that "payment" did not include "[redacted]

[redacted]" *Id.*[3] As discussed below, Blue Cross considered [redacted] Thus, Blue Cross's rewrite of Interrogatory 3(b) would allow it to answer that it made no payment for any hospital's acceptance of an MFN-plus clause. Yet, even after effectively rewriting this interrogatory, Blue Cross still failed to provide any substantive answer. Ex. 4 at 3.

Plaintiffs continued to press Blue Cross for a valid answer. Blue Cross ultimately agreed to supplement its supplemental response. Ten weeks later, Blue Cross finally served its second supplemental response. Ex. 6. This second supplemental response, however, retains the first supplemental response's cramped limitations on the scope of its answer, while adding only one sentence: Blue Cross's answer now states that, "subject

[3] In effect, Blue Cross's rewrite of Plaintiffs' Interrogatory 3(b) reads as follows (with omissions from Plaintiffs' actual interrogatory crossed out and Blue Cross's additions underlined):

> Identify each hospital that has agreed with Blue Cross to an MFN clause, and, for each hospital identified, state:
>
> (b) whether ~~payment (in the form of a rate increase, a one-time payment, or any other form) was offered or agreed by Blue Cross, at least in part, for the hospital's acceptance of an MFN-plus clause~~ Blue Cross offered any funds or agreed to pay specifically in exchange for an MFN, where, without the MFN, the final contract would have been at a lower rate of reimbursement than the rate that was ultimately agreed to, excluding situations where Blue Cross sought or received an MFN to further Blue Cross's legitimate business interests."

On its face, Blue Cross's rewritten Interrogatory 3(b) offers no utility to Plaintiffs. It is so narrowly drawn that it ensures Blue Cross could answer that it has not offered any payment for its MFN-plus clauses.

to" its restrictive limitations and exclusions, [redacted] Ex. 6 at 3.[4]

B. Blue Cross should respond to Interrogatory No. 3(b) as written because the term "payment" is neither vague nor ambiguous.

Blue Cross has now evaded a responsive, complete answer to Interrogatory 3(b), as propounded by Plaintiffs, for more than five months. It has done so by claiming the term "payment" is somehow "vague" or "ambiguous," and relying on that purported ambiguity as a pretext to engraft limitations and exclusions onto its answer that render it woefully incomplete and misleading. Blue Cross should not be permitted to evade a responsive, complete answer any longer. *Stamtec, Inc. v. Anson*, 195 F. App'x. 473, 481 (6th Cir. 2006) (upholding sanctions against what the district court referred to as a party's "'artful' answers [to interrogatories], suggesting that [the party] had deliberately structured answers in such a manner to avoid actually lying . . ., but evad[ed] answering the questions"); *Ahmed v. L&W Eng'g Co.*, No. 08-CV-13358, 2009 WL 2143827, at *3 (E.D. Mich. July 15, 2009) (Majzoub, Mag. J.) ("an evasive or incomplete . . . answer must be treated as a failure to disclose, answer or respond") (quoting Fed. R. Civ. P. 37(a)(4)); *see also OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*, 549 F.3d 1344, 1367 n.24 (11th Cir. 2008) (same).

The meaning of "payment" is clear from Interrogatory 3(b), which itself defines payment broadly to include "a rate increase, a one-time payment, or any other form [of payment]." Ex. 7 at 5. Blue Cross's objection to "payment" as "vague" and "ambiguous" is stated without specific grounds and is boilerplate. *Id*. at 6. Nor, during the several

[4] Both of Blue Cross's supplemental responses omitted the requisite Rule 26(g) certification by counsel, as do Blue Cross's other responses that answer Plaintiffs' interrogatories. Blue Cross recently stated that it will "provide the required verification pages." Ex. 3.

meet-and-confer conferences did Blue Cross explain what it finds vague or ambiguous about "payment" in Interrogatory 3(b).

The Federal Rules do not allow this approach. Merely objecting to an interrogatory as vague and ambiguous without supplying the specific ground is precisely the non-specific, boilerplate objection that Rule 33(b)(4) does not permit.[5] *See Powerhouse Marks, LLC v. Chi Hsin Impex, Inc.*, No. 04-CV-73923, 2006 WL 83477, at *2 (E.D. Mich. Jan. 12, 2006) (Majzoub, Mag. J.) (failure to state objections with specificity means that objections are waived); *see also Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 457 (6th Cir. 2008) ("The grounds for objecting to an interrogatory must be stated with specificity.").

Contrary to the unsupported limits and exclusions Blue Cross has imposed on its answer, Interrogatory 3(b) asks simply for all instances when Blue Cross has offered or agreed to a "payment (in the form of a rate increase, a one-time payment, or any other form)" to a hospital, at least in part, for the hospital's acceptance of an MFN-plus clause. *See McCoo v. Denny's Inc.*, 192 F.R.D. 675, 694 (D. Kan. 2000) ("A party responding to discovery requests should exercise reason and common sense to attribute ordinary definitions to terms and phrases utilized in interrogatories.") (internal quotation marks omitted). Further, contrary to the limitations and exclusions Blue Cross has imposed on its answer, Interrogatory 3(b), under any fair reading, does not ask Blue Cross about its motivations—good or bad—for making such a payment; nor does it ask what a payment's

[5] *See, e.g., Lynn v. Monarch Recovery Mgmt., Inc.*, No. WDQ-11-2824, 2012 WL 2445046, at *5 (D. Md. June 27, 2012) (objection that interrogatory is "vague and ambiguous" is "non-specific and boilerplate").

effect was on its ultimate reimbursement rate at the hospital in question. No reasonable interpretation of the term warrants these limitations.

Any purported ambiguity is belied also by Blue Cross's own conduct and communications. In negotiations with Ascension, Michigan's largest hospital network, Gerald Noxon, Blue Cross's Director of Provider Contracting, wrote to an Ascension executive: [redacted] Ex. 8 (emphasis added). [redacted]

These documents show that [redacted]. Blue Cross knows "exactly what . . . [is] at issue" in Interrogatory 3(b), and its boilerplate objection that the interrogatory is vague and ambiguous as written is not "genuine." Dkt. 178 (granting

Plaintiffs' motion to compel a response to Interrogatory No. 1). Thus, Blue Cross's answer is plainly incomplete. Blue Cross should be ordered to respond to the interrogatory as written, conduct a reasonable inquiry, and provide a full and honest accounting of its payments to Michigan hospitals for MFN-plus clauses. *See Stamtec, Inc.*, 195 F. App'x at 481.

III. Document Request No. 50

A. Blue Cross has failed to show that Request 50 seeks irrelevant documents.

Served on March 19, 2012, Document Request 50 requests production of "[a]nnual statements of work performed, achievements, or accomplishments; statements or recommendations supporting any bonus request, pay increase, award, or promotion; annual statements of incentives, goals, or objectives; any annual employee performance-evaluation, review, or appraisal; or any documents in the nature of the preceding documents" for varying periods for 15 key Blue Cross present or former employees. Ex. 11 at 4–5. Plaintiffs requested these documents from the selected executives for two basic reasons: (1) these types of documents frequently contain candid statements or evaluations about key employees' work accomplishments or goals that are likely to be highly relevant to claims or defenses raised in this case; and (2) they will assist Plaintiffs in focusing their depositions of those key Blue Cross employees on the issues with which they have been involved and in limiting deposition questioning about employees' responsibilities when there are so many substantive points to cover. See Ex. 5 at 4. The employees were chosen because of their likely involvement in or oversight of the conduct at issue in this case. To date, Blue Cross has produced only a trivial subset of documents from 3 of those 15 employees.

Blue Cross responded to Request 50 with only boilerplate objections, claiming that the request seeks irrelevant documents and "is overly broad, vexatious and is submitted for the purpose of harassment." Ex. 12 at 2. Blue Cross's response does not include the reasons for its objections or state whether Blue Cross would actually produce responsive documents. *Id*. No responsive documents were then produced.

Plaintiffs promptly sought to determine whether Blue Cross would produce responsive documents, Ex. 13, and four meet-and-confer discussions ensued. Ex. 5. In the first discussion, counsel for Blue Cross repeated its boilerplate objections and stated initially that Blue Cross would not produce responsive documents.[6] Plaintiffs outlined the requested documents' relevance generally and provided concrete examples, including how incentives or awards relating to its executives maintaining Blue Cross's [redacted] could be highly relevant concerning Blue Cross's intent in obtaining MFNs. Similarly, Plaintiffs also directed Blue Cross's attention to its Board of Directors Meeting Minutes of February 6, 2008, where the minutes report: [redacted] Ex. 14 at 5. Plaintiffs explained that work-performance statements showing accomplishments in reducing administrative costs—or the absence of goals to reduce administrative costs—would be highly relevant concerning Blue Cross's alleged market power. Defense counsel then stated they would consult with Blue Cross.

[6] During the entire meet-and-confer process, Blue Cross stated only one reason for either of Blue Cross's boilerplate objections: that Request 50 was vexatious because some responsive documents might disclose employees' salaries. Plaintiffs responded that, although the Amended Stipulated Protective Order Concerning Confidentiality (Dkt. 169) addresses that concern, Blue Cross could redact salary figures from the documents it produced.

Finally, during a fourth meet-and-confer discussion, Blue Cross counsel reported that Blue Cross had decided to produce *some* documents responsive to Request 50, but declined to provide any further information. Over two months after Blue Cross's document production was due, Blue Cross served a Supplemental Response to Request No. 50, stating, in relevant part:

> Blue Cross . . . states that it has conducted a reasonable and diligent search for responsive documents contained in the identified individuals' personnel files and will produce, to the extent that they exist for the named individuals, all Performance Appraisals and Incentive Compensation Goals that mention or relate to hospital contracting.

Ex. 15 at 3.

Finally, on July 10, in response to Request 50, Blue Cross appears to have produced a total of nine documents. See Ex. 5 at 3. The nine documents produced relate to only 3 of the 15 Blue Cross employees whom the request specifies, and the documents produced appear to be far from complete for even those 3 employees. Those few documents establish that Blue Cross appears to have ordinary-course documents responsive to at least two of the four categories of documents requested. Other documents produced suggest that Blue Cross maintains documents concerning all four categories requested, including executives' performance and accomplishments, award recommendations, statements of employees' incentives, and performance evaluations. *See*, *e.g.*, Ex. 16. Blue Cross has not claimed that it does not have additional responsive documents.

B. Blue Cross's attempt to evade Request 50 requires an order compelling a complete production of responsive documents.

This Court has observed that "[i]n applying the discovery rules, 'relevance' should be broadly and liberally construed." *Powerhouse Marks*, 2006 WL 83477, at *1.

As Plaintiffs explained the relevance of the requested documents to Blue Cross, their relevance fits well within the scope of permissible discovery. By contrast, Blue Cross's relevance objection fails to include "the reasons" for the objection, as required by Fed. R. Civ. P. 34(b)(2)(B). *Ahmed*, 2009 WL 2143827, at *3 (Majzoub, Mag. J.). Nor, in four meet-and-confer discussions, did Blue Cross offer any reason. "[W]hen discovery sought appears relevant, . . . the party resisting discovery bears the burden of establishing lack of relevance . . . ." *Hennigan v. Gen. Elec. Co.*, No. 09-11912, 2010 WL 4189033, at *3 (E.D. Mich. Aug. 3, 2010). Here, Blue Cross—far from establishing lack of relevance—has provided no reason for its relevance objection in either its response to Request 50, *see* Ex. 15 at 2, or four meet-and-confer discussions. Under these circumstances, the Court should reject Blue Cross's relevance objection.

Moreover, in the same way that Blue Cross has sought to avoid responding to Plaintiffs' first and third interrogatories, Blue Cross has effectively rewritten Request 50, limiting it to a subset ("Performance Appraisals" and Incentive Compensation Goals") of only two of the four types of documents requested and only to those documents within those two specific subsets that "mention or relate to hospital contracting." Ex. 15 at 3. Blue Cross's improper imposition of these limitations has resulted in its production of only nine documents, which has left Plaintiffs without most of the documents responsive to Request 50 from the 15 key employees listed—documents that are likely to be relevant to numerous issues beyond hospital contracting such as Blue Cross's discount-differential advantage and other issues that Blue Cross has injected into this litigation. Those issues include its social mission, the quality of care Blue Cross subscribers receive, and whether Blue Cross faces unique burdens because of state regulation. Blue Cross's minimal

response deprives Plaintiffs of most of the documents they have requested and amounts to "'an evasive or incomplete . . . response [that] must be treated as a failure to . . . respond.'" *Ahmed*, 2009 WL 2143827, at *3 (quoting Fed. R. Civ. P. 37(a)(4)).

Blue Cross's failure to respond completely to Plaintiffs' Request 50 following Plaintiffs' extensive meet-and-confer efforts now requires that the Court order Blue Cross to search for and produce a complete set of responsive documents from all 15 listed employees in time to enable Plaintiffs to use them in depositions of Blue Cross employees, which will start in late August and continue into November.

Conclusion

For the reasons stated above, the United States respectfully asks the Court to compel Blue Cross to (1) provide a complete answer to Plaintiffs' Interrogatory No. 1; (2) provide a complete answer to Plaintiffs' Interrogatory No. 3(b); and (3) search for and produce a complete set of documents for the 15 employees required by Request 50.

Respectfully submitted,

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August 14, 2012

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2012, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system, which will send notification of the filing to the counsel of record for all parties for civil action 2:10-cv-14155-DPH-MKM.

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA
and the STATE OF MICHIGAN,

Plaintiffs,

v.

Civil Action No. 10-cv-14155-DPH-MKM
Hon. Denise Page Hood
Hon. Mona K. Majzoub

BLUE CROSS BLUE SHIELD OF MICHIGAN, a Michigan nonprofit healthcare corporation,

Defendant.

DEFENDANT BLUE CROSS BLUE SHIELD OF MICHIGAN'S
SUPPLEMENTAL RESPONSE TO PLAINTIFFS' FIRST INTERROGATORY

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BLUE CROSS BLUE SHIELD OF MICHIGAN'S SUPPLEMENTAL RESPONSE TO PLAINTIFFS' FIRST INTERROGATORY

On September 29, 2011, Blue Cross Blue Shield of Michigan served its Objections and Response to Plaintiffs' First Interrogatory. Blue Cross objected to Plaintiffs' First Interrogatory on the grounds that it is vague, is a premature contention interrogatory, improperly seeks to shift the burden of proof to Blue Cross before completion of any meaningful discovery, improperly seeks Blue Cross's attorney work product, and improperly and prematurely seeks information that requires Blue Cross's experts' analysis. In the May 30, 2012 Order, Magistrate Judge Majzoub instructed Blue Cross "to provide the factual basis for its assertion that its MFN clauses caused procompetitive effects." Order at 10 (Doc. #178).

In addition, the Order instructed that "[i]f Blue Cross finds that it cannot answer certain parts of the interrogatory, such as if certain information is in a third-party's possession, it must state so, but that is not a reason not to answer the parts of the interrogatory that it can answer." *See id.* Accordingly, Blue Cross continues to maintain that much of the factual information concerning the procompetitive effects of the subject MFN clauses rests with third parties, including but not limited to hospitals, competitors, agents, various associations and government agencies.

Blue Cross, pursuant to the May 30, 2012 Order, hereby supplements its response to Plaintiffs' First Interrogatory. The response set forth below in no way precludes Blue Cross from introducing facts through third parties or testimony of Blue Cross's experts (*see id.* at 12) that support Blue Cross's position that the procompetitive benefits of the MFN clauses outweigh their anticompetitive effects (if any). Further, the response below does not preclude Blue Cross or its experts from identifying additional procompetitive benefits and relying on new or different facts that support those procompetitive benefits. Moreover, by answering, Blue Cross does not

necessarily agree that the "procompetitive benefits" identified by example at subparts (a) and (b) of Interrogatory No. 1 accurately identify the correct benchmarks.

INTERROGATORY NO. 1:

Describe in detail "the extensive factual and economic support for [Blue Cross'] MFNs' procompetitive effects" (Defendant Blue Cross Blue Shield of Michigan's Reply Brief in Support of its Motion to Dismiss the City of Pontiac's Complaint at 4 n.5, *City of Pontiac v. Blue Cross Blue Shield of Michigan, et al.*, No. 2:11-cv-10276 (E.D. Mich. filed Aug. 22, 2011) (Dkt. #153)), including, without limitation, separately for each subpart, identification of:

(a) each and every hospital provider agreement in which a Blue Cross MFN provision has contributed, to any extent, to Blue Cross paying lower hospital reimbursement rates to (or obtaining greater discounts from) any Michigan hospital than it would have paid or obtained without the MFN provision; and

(b) each and every hospital provider agreement in which a Blue Cross MFN provision has contributed, to any extent, to Blue Cross paying lower hospital reimbursement rates to any Michigan hospital, relative to the rates Blue Cross had been paying to the hospital before the hospital lowered its rates.

RESPONSE TO INTERROGATORY NO. 1:

It is Blue Cross's position that its members, as well as its statutory and regulatory goals, are best served when Blue Cross seeks to negotiate the lowest reimbursement rates that will allow hospitals to provide quality services. Given that Blue Cross is a significant purchaser of hospital services, it should obtain the hospitals' best possible reimbursement rates. Moreover, Blue Cross's payments, as well as its extensive quality and cost-management programs, improve the quality of health care provided to all patients—not just Blue Cross patients. Blue Cross recognizes that competitors will try to take unfair advantage of Blue Cross's commitments to and investments in Michigan hospitals. Blue Cross considers these issues in its negotiations with hospitals.

The MFNs at issue in this case arose in different ways, depending on the type of hospital. The Participating Hospital Agreement (PHA)[1] includes an MFN that applies to PG5 hospitals, which are rural hospitals with less than 100 beds and less than 6,000 annual admissions. In addition, Blue Cross negotiated MFN-with-differential clauses with certain PG1-4 hospitals (hospitals with more than 100 beds). Blue Cross did not expect that any of these MFNs would prevent commercial insurers from contracting with or continuing their relationship with any hospital subject to either type of MFN.

A. Blue Cross Peer Group 5

The 2007 PHA includes an MFN that requires PG5 hospitals to charge Blue Cross an amount that is at least equal to that of the lowest paying commercial insurer.

Blue Cross's payment strategy is based on its goal of supporting quality and access at Michigan's rural hospitals, but not to pay the hospitals more than necessary to meet these goals. Before negotiating the 2007 PHA, Blue Cross believed that it was overpaying rural hospitals, and thereby covering more than its pro-rata share of the PG5 hospitals' costs.[2]

Blue Cross, with input from MHA and Harold A. Cohen, PhD (a consultant in health care economics with expertise in hospital financing retained by MHA to study Michigan health care), developed a cost-based model designed to achieve a Blue Cross rate that is fair and sustainable,

---

[1] With input and assistance from the Michigan Hospital Association (MHA), Blue Cross developed a model hospital contract, called the Participating Hospital Agreement (PHA). The PHA was designed to simplify the complex contracting process with multiple third parties. The PHA is just a starting point, however, and numerous hospitals negotiate additional or different terms that are incorporated into Letters of Understanding (LOUs).

[2] Blue Cross was concerned that PG5 hospitals were overcharging Blue Cross and using those overcharges to either subsidize reimbursement arrangements with commercial insurers, or to engage in programs and activities that were not cost effective and did not provide quality and access benefits to Blue Cross members, or both. In addition, Blue Cross recognized that some PG5 hospitals were being absorbed by larger systems, which impacted quality and access considerations at those rural hospitals.

but not so low that it could potentially force rural hospitals out of business. It determined, based on the information then available, that a PG5 hospital's operations should be sustainable at a 3% margin. That margin would allow the hospital to maintain and make appropriate investments in services, facilities, equipment and technology for all patients, including Blue Cross subscribers.[3] If the hospital believed it could thrive at a lower margin, it could offer lower reimbursement rates to commercial insurers as long as those rates were also available to Blue Cross.

In addition to ensuring that Blue Cross would pay only its fair share of hospitals' financial requirements, the MFN reduced transaction costs. Without the MFN, Blue Cross would have had to negotiate rates more frequently, incur more expenditures trying to determine the range of its competitors' prices, and likely would have reached or neared impasse more frequently.

Blue Cross anticipated that the new PHA, including the MFN provision, would in general result in Blue Cross paying lower hospital reimbursements to (or obtaining greater discounts from) the PG5 hospitals than it would have otherwise paid (or obtained), and that in many cases those reimbursements would be lower than Blue Cross was paying under the previous agreements. Blue Cross's expectations proved to be correct. Based on the best research currently available, the 2007 PHA resulted in lower rates at the following 37 Michigan hospitals:

Allegan General Hospital
Aspirus Keweenaw Memorial Medical Center
Aspirus Ontonagon Memorial Hospital
Baraga County Memorial Hospital
Bell Memorial Hospital
Borgess Pipp Health Center

[3] Hospitals face significant revenue shortfalls caused by Medicare and Medicaid reimbursement practices. Because Medicare and Medicaid pay hospitals at less than their costs, hospitals are required to make up those losses from Blue Cross and commercial payors, or, alternatively cut services or quality or close their doors. This problem is exacerbated by the fact that the number of Medicare and Medicaid patients is rising.

Borgess-Lee Memorial Hospital
Bronson Lakeview Community Hospital
Caro Community Hospital
Charlevoix Area Hospital
Clinton Memorial Hospital
Community Hospital - Watervliet
Eaton Rapids Medical Center
Grand View Hospital
Harbor Beach Community Hospital
Hayes Green Beach Memorial Hospital
Helen Newberry Joy Hospital
Hills & Dales General Hospital
Huron Medical Center
Kalkaska Memorial Health Center
Marlette Community Hospital
McKenzie Memorial Hospital
Mid Michigan Medical Center - Clare
MidMichigan Medical Center - Gladwin
North Star (Iron County Community Hospital)
Otsego Memorial Hospital
Paul Oliver Memorial Hospital
Scheurer Hospital
Schoolcraft Memorial Hospital
Sheridan Community Hospital
South Haven Community Hospital
Sparrow Ionia County Memorial Hospital
Spectrum Health - Kelsey
Spectrum Health - Reed City
St. Marys of Michigan - Standish Hospital
Three Rivers Health
West Shore Medical Center

In addition, the 2007 PHA provides for an annual update process, to increase reimbursement rates in an amount sufficient to cover inflation. Under the 2007 PHA, if a PG5 hospital did not attest compliance with the Most Favored Discount clause, it would not receive the annual inflationary increase—i.e., its rates would freeze. *See* PHA Exhibit B § F. This occurred at Aspirus Ontonagon Hospital and Three Rivers Health, resulting in an even lower reimbursement rate at those hospitals.

In summary, Blue Cross's PG5 reimbursement methodology was designed to—and did—result in a payment structure that ensured sufficient revenue to allow hospitals to operate efficiently and provide quality care, and would prevent them from being forced to close or to reduce health care services, which, in turn, would harm consumers, particularly Blue Cross members. The 2007 PHA also resulted in lower costs to Blue Cross, while maintaining access and improving quality, not just for Blue Cross members but for all Michigan residents.

B. Peer Groups 1-4

The MFN-with-differential clauses applicable to some PG1-4 hospitals require Blue Cross's rate to be less than commercial insurers' rates at a particular hospital. These MFNs, each of which was separately negotiated, resulted in Blue Cross obtaining what it reasonably believed was the lowest possible reimbursement rate that the hospital would accept.

When these MFNs were negotiated, Blue Cross believed it already had significantly better discounts than commercial insurers. The hospitals were asserting that Blue Cross was not paying the hospitals an adequate reimbursement rate, such that the hospitals were in danger of being unable to provide the appropriate services. Consequently, hospitals demanded certain reimbursements from Blue Cross. Although Blue Cross acknowledged that hospitals may indeed need the reimbursement levels demanded to continue to provide the appropriate level of services, it did not believe it was appropriate for the hospitals to use these negotiations simply to change the payment mix (i.e., get more money from Blue Cross and less from other payors). The MFN-with-differential allowed Blue Cross to support its need to obtain discounts in line with its volume, support the need for the hospitals' request for additional reimbursement levels, and validate that it was still obtaining the lowest possible reimbursement it could, which allowed the deals to close.

In addition, Blue Cross believed that the differential applicable in each MFN was either the same as or smaller than the differential percentage that existed between Blue Cross and the commercial payor with the next-lowest rate at each hospital at the time of contracting. Blue Cross believed that, in some instances, the MFN-with-differential could result in a decrease in the discount differential between Blue Cross and commercial insurers.

* * * * *

Blue Cross's investigation and discovery is ongoing, and Blue Cross reserves the right to modify and supplement these objections and its response, and to present in any proceeding and at trial any documents and information obtained during discovery and preparation for trial.

Respectfully submitted as to all objections,

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P51953

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2012, I served the foregoing Blue Cross Blue Shield of Michigan's Supplemental Response to Plaintiffs' First Interrogatory via electronic mail on:

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EXHIBIT 2

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July 23, 2012

VIA EMAIL

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Re: Plaintiffs' First Interrogatory
United States and State of Michigan v. Blue Cross Blue Shield of Michigan
Case No. 2:10-cv-14155-DPH-MKM (E.D. Mich.)

Dear Ashley:

This letter addresses Blue Cross's Supplemental Response to Plaintiffs' First Interrogatory, which was served on July 16, 2012. Plaintiffs believe that Blue Cross's response continues to be deficient in a number of ways, and does not comply with the Court's Order compelling Blue Cross to respond to the interrogatory, Doc. #178 at 13, which was served on Blue Cross nearly one year ago, on August 26, 2011. We seek to meet and confer promptly on the issues raised below.

First, plaintiffs are concerned that Blue Cross has taken an unduly narrow interpretation of the Court's Order. The Court granted plaintiffs' motion to compel Blue Cross to answer plaintiffs' first interrogatory, overruling all objections. Doc. #178 at 13. The Court did not limit the relief requested. Blue Cross's supplemental response, however, does not appear to provide the detailed "economic support" sought by plaintiffs' interrogatory and asserted by Blue Cross to exist, and that is not "solely in the hands of experts" or "cannot be obtained without experts." *Id.* at 12. Plaintiffs believe that the Court's Order requires Blue Cross to set forth in detail the economic support for Blue Cross's MFN's procompetitive effects, or, if Blue Cross does not yet have economic support, to so state. *See id.* at 13. Also, though Blue Cross claims on page 1 of its supplemental response that some "facts" may also be provided by its experts, expert testimony more properly consists of conclusions and opinions drawn from facts. It is not itself a substitute for facts.

In addition, Blue Cross's response does not state which portions of the response are the factual support for the alleged procompetitive effects of Blue Cross's MFNs. For example, nowhere does Blue Cross's supplemental response state language such as "the factual support for Blue Cross's MFNs' procompetitive effects is . . . ," or any language to that effect. In fact, nowhere in Blue Cross's supplemental response does the phrase "procompetitive effects" even appear. Therefore, it is unclear whether everything in Blue Cross's response is intended to be a "fact" supporting alleged procompetitive effects.

On page 7, for example, Blue Cross states that it "believed that the differential applicable in each MFN was either the same as or smaller than the differential percentage that existed between Blue Cross and the commercial payor with the next-lowest rate at each hospital at the time of contracting [and that] Blue Cross believed that, in some instances, the MFN-with-differential could result in a decrease in the discount differential between Blue Cross and commercial insurers." Are those statements meant to be "facts" supporting alleged "procompetitive effects"? Plaintiffs believe that Blue Cross should clarify which portions of its response are facts supporting alleged procompetitive effects.

In the portion of Blue Cross's response under section heading A ("Blue Cross Peer Group 5"), plaintiffs have also identified the following issues:

- Blue Cross refers to "the best research currently available" without identifying what that research is or the facts it uncovered. Blue Cross's description of those facts is required for a complete and correct response to plaintiffs' first interrogatory. If this research has been produced as part of Blue Cross's document production Blue Cross should identify it by production number as required by Rule 33(d).

- On pages 4-5, Blue Cross states that "the 2007 PHA resulted in lower rates" at 37 Michigan hospitals. On page 6, Blue Cross states that "the 2007 PHA also resulted in lower costs to Blue Cross." Similarly, on page 6 Blue Cross's supplemental response addresses the purpose and results of the "PG5 reimbursement methodology," also without reference to the MFN. The MFN is just one provision in the 2007 PHA. If Blue Cross maintains that the MFN in the 2007 PHA, was the reason for "lower rates" for Blue Cross at those 37 hospitals, Blue Cross should state that specifically. If Blue Cross maintains that the MFN in the 2007 PHA, rather than the reimbursement methodology or some other provision of the PHA, was the reason for "lower costs to Blue Cross," Blue Cross should state that specifically. Blue Cross should also describe in detail the alleged effects of the MFN as opposed to the PG5 reimbursement methodology or any other provision of the 2007 PHA.

- Regarding the 37 hospitals listed on pages 4-5, Blue Cross should separately identify those hospitals for which it alleges that the MFN resulted in Blue Cross paying lower hospital reimbursements to (or obtaining greater discounts from) the PG5 hospitals than it would have otherwise paid (or obtained), and separately identify those hospitals for which Blue Cross alleges the reimbursements were

lower than Blue Cross was paying under the previous agreements. Blue Cross's supplemental response provides a combined list, but plaintiffs' interrogatory requires separate identification. If the answer is "none" for one of those categories, Blue Cross should so state. If known, Blue Cross should also describe in detail the facts, such as the but for or before and after reimbursement rates that support those alleged effects.

In the portion of Blue Cross's response under section heading B ("Peer Groups 1-4"), Blue Cross does not identify those hospitals for which it alleges that the MFN resulted in Blue Cross paying lower hospital reimbursements to (or obtaining greater discounts from) the hospitals than it would have otherwise paid (or obtained), or those hospitals for which Blue Cross alleges the reimbursements were lower than Blue Cross was paying under the previous agreements. Such identification, separately by category, is required by subparts (a) and (b) of plaintiffs' first interrogatory. If Blue Cross does not know the identity of such hospitals, it should so state. If known, Blue Cross should also describe in detail the facts, such as the but for or before and after reimbursement rates that support those alleged effects.

Finally, plaintiffs do not believe the signature of counsel complies with the requirements of Rule 26(g)(1)(A) and Rule 33(b)(5). The only signature is by counsel and counsel signed only "as to all objections."

***

Plaintiffs are available to schedule an immediate meet and confer on these issues. Please let me know if you have any questions.

Best regards,

/s/

Amy R. Fitzpatrick
Trial Attorney

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August 8, 2012

Via Email

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***United States v. Blue Cross Blue Shield of Michigan*,**
E.D. Mich., Case No. 10-cv-14155

Dear Amy:

We are happy to discuss the issues you have raised concerning Blue Cross's interrogatory responses. In advance of our discussion, Blue Cross states the following:

- Regarding the signature requirement, we will provide the required verification pages.

- Consistent with Rule 33(d), Blue Cross will specify records pertinent to Plaintiffs' Interrogatory Nos. 6-7, and will do so in sufficient detail to enable you to locate and identify them as readily as Blue Cross.

- Your recitation of Blue Cross's response to Interrogatory No. 8 is incomplete. The entirety of Blue Cross's answer provides appropriate supporting factual information. Please identify precisely what you contend is absent from the answer.

- There is no basis for Plaintiffs' position that Blue Cross's supplemental response to Interrogatory No. 1 is deficient. Blue Cross objected to that interrogatory because it believed Plaintiffs were attempting to use Interrogatory No. 1 to obtain counsel's work product and premature expert testimony. Plaintiffs repeatedly assured the Court that they were seeking *only factual* information within Blue Cross executives' knowledge. Now, Plaintiffs' demand for still more "economic" information and conclusions about procompetitive effects underscores that what Plaintiffs truly seek is, in fact, protected work product and premature expert testimony. Moreover, Blue Cross's point at page 1 of its supplemental response is not that there are facts to be provided by experts;

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rather, the point is that, in identifying the procompetitive benefits of the MFNs, an expert might determine that certain other facts inform that discussion. Blue Cross has provided the information "at its disposal." *See* Order at 10 (Doc. 178).

We request a meet-and-confer concerning the Department's responses to Interrogatory Nos. 3, 6, 7, 8 and 9. The Court has made clear that interrogatory responses should provide the factual basis for a party's assertions. *See* Order at 10 (Doc. 178). Since the Department served its responses to these interrogatories nearly a year ago, at which time it objected to these as "premature," the Department has engaged in sufficient discovery to provide fulsome responses. Indeed, the Department continues to insist that Blue Cross provide the factual support for its allegations (which Blue Cross has done). Yet, the Department's responses to Blue Cross Interrogatory Nos. 3, 6-9 provide only allegations, not facts. Specifically:

- *Response to Interrogatory No. 3*: This response states, for example, that "Plaintiffs' allegation that the Western and Central Upper Peninsula constitutes a relevant geographic market for commercial health insurance is further supported by the fact that commercial health insurers other than Blue Cross have not entered that geographic market because they have not been able to obtain a provider contract with Marquette General at prices competitive with those paid by Blue Cross. See Complaint ¶ 56; Objections and Response to Interrogatory No. 7." That is an allegation, not a recitation of facts indicating which commercial health insurer(s), when, and at what prices. As another example of the deficiencies in the Response to Interrogatory No. 3, the Department states that Blue Cross competitors agreed to pay higher prices at two hospitals in Montcalm County "as a likely result of Blue Cross's MFNs" rather than attempt to market insurance without those two hospitals in their network. That begs the question: which competitors, which hospitals, higher prices relative to what.

- *Response to Interrogatory No. 6*: This response improperly objects to the interrogatory as vague and ambiguous, attempts to re-define the term "overpayment," regurgitates the allegations in the Complaint (e.g., "The Complaint alleges that Blue Cross paid higher reimbursement rates to hospitals in exchange for agreeing to MFNs."), and makes no distinction between PG5 hospitals and hospitals subject to an MFN-with-differential clause.

- *Response to Interrogatory No. 7*: Like the Department's Response to Interrogatory No. 3, this response is based on a series of assumptions, not facts. For example, the Department states that "Blue Cross's MFN-plus with Marquette General has contributed significantly to reducing competition by likely increasing hospital rates

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paid by commercial health insurers and self-funded employers, and likely increasing commercial health insurers' premiums." Those are not facts; again, the statement begs the question. What hospital rates were increased and by how much? Which commercial health insurers' premiums were increased? The deficiency in the Department's Response to Interrogatory No. 7 concerning anticompetitive effects is particularly clear in view of the Court's Order (Doc. 178) regarding Plaintiffs' Interrogatory No. 1, which asks a similar question of Blue Cross concerning procompetitive effects.

- *Response to Interrogatory No. 8*: The Department's Response to Interrogatory No. 8 does nothing more than incorporate its Response to Interrogatory No. 7. This will not do.

These interrogatory responses are far from complete. And some contain assertions that (like the Complaint), based on the discovery taken to date (and, in fact, information that discovery has shown the Department had in its possession before the Complaint was filed), are incorrect and unfounded. The Department's responses to these interrogatories are deficient. The Department should supplement these responses based on the information now available to them. Moreover, the Department should state specifically who provided the information for each response; it is not sufficient—particularly at this juncture—for the Department to state simply that "Persons with information used in this response include Blue Cross and persons listed in Plaintiffs' Initial Disclosures."

We look forward to discussing these issues with you.

Sincerely,

/s/

Ashley Cummings

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EXHIBIT 5

U.S. Department of Justice

Antitrust Division

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July 20, 2012

VIA E-MAIL

Ashley Cummings, Esq.
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Dear Ashley:

This letter follows up on our review of Blue Cross's supplemental objections and responses to Plaintiffs' Document Requests 50 and 53, Blue Cross's second supplemental response to Plaintiffs' Interrogatory 3, and our July 5 letter requesting to meet and confer about the issues raised in the letter regarding Plaintiffs' Interrogatories 6-8. We are writing to inform you that, after our protracted effort to resolve the issues raised by Blue Cross's prior objections and responses, Blue Cross's supplemental objections and responses to Interrogatory 3 and Document Request 50 suggest we are at an impasse. For Document Request 53, we reserve our right to seek judicial relief, dependent on our review and analysis of the documents that Blue Cross has committed to produce in response to Request 53 by July 31. Lacking any response to our July 5 letter requesting that we meet and confer concerning the issues stated in the letter regarding Plaintiffs' Interrogatories 6-8, we believe we are very near impasse on those issues.

Interrogatory 3(b)

Interrogatory 3(b), which was served on January 20, 2012, asks Blue Cross to state "whether any payment (in the form of a rate increase, a one-time payment, **or** any other form) was offered **or** agreed to by **Blue Cross**, at least in part, for the hospital's acceptance of an **MFN-plus clause** and, if so, the form **and** amount paid by **Blue Cross**." (emphasis in original). This Interrogatory seeks information that will illuminate whether—contrary to Blue Cross's repeated claim that its MFN clauses enable it to pay hospitals the lowest price—Blue Cross's MFN-plus clauses contributed to Blue Cross paying hospitals more, in part, to agree to the clauses. As counsel for Blue Cross stated in our June 12 meet-and-confer discussion, Interrogatory 3(b) is "a question that goes to the very heart of the case."

Yet, instead of providing a complete and correct answer to Interrogatory 3(b), Blue Cross has attempted to avoid answering it, as asked. Blue Cross has objected repeatedly to

Interrogatory 3(b)'s use of the word "payment" as being "vague and ambiguous." But it has failed repeatedly, when asked in our several meet-and-confer discussions, to explain the ambiguity that it perceives, other than to argue irrelevantly that the United States objected to a Blue Cross interrogatory's use of the term "over-payment." That term is very different from the term "payment" in Interrogatory 3(b) because "over-payment," the term used in Blue Cross's interrogatory, necessarily relates to a benchmark for some level of payment that is not specified in Blue Cross's interrogatory.

After Blue Cross refused to provide any substantive answer in its initial response to Interrogatory 3(b) when due in February, Blue Cross eventually agreed to provide a supplemental response, which it served on April 17, 2012. In that supplemental response, however, Blue Cross rewrote Interrogatory 3(b) by contriving a narrow definition of "payment" that would enable it to answer "no" to whether it made any payment of the nature requested by Interrogatory 3(b), but even then it failed to answer the interrogatory.

When counsel met and conferred on Blue Cross's supplemental response to Interrogatory 3(b), Blue Cross counsel said it would confer with Blue Cross about plaintiffs' points that Blue Cross's definition of payment simply enabled it to avoid answering Interrogatory 3(b) as propounded and that it had not provided an answer to even its rewritten version of Interrogatory 3(b).

After additional meet-and-confer discussions, Blue Cross finally agreed to supplement its supplemental response, ultimately resulting in Blue Cross's second supplemental objections and response to Interrogatory 3(b), served on July 3, 2012. Unfortunately, Blue Cross's second supplemental response retains its first supplemental response's contrived redefinition of "payment." The only difference between Blue Cross's supplemental responses to Interrogatory 3(b) is one sentence in Blue Cross's second supplemental response—served over ten weeks after its first supplemental response—that provides the "no" answer omitted from Blue Cross's first supplemental response to Blue Cross's rewritten Interrogatory 3(b).

Blue Cross's refusal to answer Interrogatory 3(b) as propounded by plaintiffs has enabled it to avoid providing for nearly five months an answer that will illuminate whether Blue Cross's MFN-plus clauses contributed to Blue Cross paying hospitals more, in part, to agree to the clauses. We believe that, despite our extended efforts to resolve this matter without seeking the Court's involvement, we have exhausted our efforts and are at impasse.

Document Request 50

Served on March 19, 2012, Document Request 50 requests production of "[a]nnual statements of work performed, achievements, or accomplishments; statements or recommendations supporting any bonus request, pay increase, award, or promotion; annual statements of incentives, goals, or objectives; any annual employee performance-evaluation, review, or appraisal; or any documents in the nature of the preceding documents" for varying periods for 15 key Blue Cross present or former employees. Blue Cross's April 23 response to Request 50 stated objections, based primarily on relevance, but did not address whether Blue Cross would produce any responsive documents.

In a May 1 meet-and-confer discussion, counsel for Blue Cross repeated its objections to Request 50 and stated initially that Blue Cross would not produce responsive documents. After we explained the relevance of the documents sought, counsel agreed to consult with Blue Cross and then to reconvene our conversation at a later date. On May 14, we again discussed Document Request 50, and you continued to insist that we were requesting irrelevant documents, but you also said that Blue Cross would consider searching personnel files for responsive documents. In another meet-and-confer call on May 31, Blue Cross maintained its position, while making clear it was not agreeing to produce documents responsive to Request 50.

During yet another meet-and-confer discussion, on June 12, your co-counsel reported that Blue Cross had decided to produce some documents responsive to Request 50. Finally, on June 29, Blue Cross served its Supplemental Response to Request No. 50, stating, in relevant part,

> "Blue Cross . . . states that it has conducted a reasonable and diligent search for responsive documents contained in the identified individuals' personnel files and will produce, to the extent that they exist for the named individuals, all Performance Appraisals and Incentive Compensation Goals that mention or relate to hospital contracting."

On July 10, Blue Cross appears to have produced—we have used "appears" because you identified only one "Bates-stamp" page number, and refused to provide an end number to the bates range—one "document" compiling 46 pages (and one blank page) of nine discrete documents as follows in the order compiled:

- 2009 BCBSM EXECUTIVE PERFORMANCE APPRAISAL completed for Kim Sorget (5 pages)
- 2007 BCBSM EXECUTIVE PERFORMANCE APPRAISAL completed for Kim Sorget (1 page of 3 pages produced)
- 2009 BCBSM EXECUTIVE PERFORMANCE APPRAISAL for Robert Milewski (5 pages)
- 2007 Incentive Compensation Goals – VP Kim Sorget (7 pages)
- 2005 Incentive Compensation Goals – VP Kim Sorget (5 pages)
- 2006 Incentive Compensation Goals – VP Kim Sorget (5 pages)
- 2007 Incentive Compensation Goals – Robert Milewski (7 pages)
- 2005 Incentive Compensation Goals – SVP Michael Schwartz (6 pages)
- 2006 Incentive Compensation Goals – SVP Michael Schwartz (5 pages)

These nine documents involve only three of the fifteen Blue Cross employees who are the subject of the request, and the documents produced appear to be far from complete for even those three employees.

The few documents that Blue Cross finally did produce in specific response to Request 50 establish that Blue Cross appears to have ordinary-course documents for at least two of the four categories of documents requested: "annual statements of incentives, goals, or objectives;" and "annual employee performance-evaluation[s], review[s], or appraisal[s]." Blue Cross's June 29 response obscures, however, whether additional documents exist that respond to the other two categories of documents sought by Request 50: "[a]nnual statements of work performed, achievements, or accomplishments; statements or recommendations supporting any bonus request, pay increase, award, or promotion." Other documents produced by Blue Cross suggest that such documents exist.

As we have stated throughout our meet-and-confer discussions, we view each category of documents requested for the 15 key Blue Cross former or present employees listed, at minimum, to be likely to lead to the discovery of admissible evidence. For example, as we have explained repeatedly, annual statements of work performed and recommendations or statements supporting any award, for example, will help to focus depositions of key Blue Cross personnel on issues that they have had involvement in and provide a sense of an employee's level of involvement with an issue. Similarly, for example, we have explained that the absence of key employees' involvement with particular issues may be highly relevant. The restrictions Blue Cross has imposed on the scope of its search, particularly the fact that Blue Cross has produced some responsive documents from only three out of the fifteen requested employees, do not take into account either of those considerations. Further, your substantive limitation on the scope of the search ignores the myriad issues beyond hospital contracting that Blue Cross has injected into this litigation, including Blue Cross' social mission, the quality of care Blue Cross subscribers receive, and whether Blue Cross faces unique burdens because of state regulation.

Blue Cross's failure to respond completely and correctly to Document Request 50, as propounded, leaves us at an impasse.

Document Request 53

Blue Cross's June 29 supplemental response to Document Request 53, served on May 1, states: "A consulting relationship exists between Blue Cross and: (i) Michael Schwartz; (ii) Kevin Seitz; and (iii) Kim Sorget. To the extent written consulting agreements exist reflecting these consulting relationships, Blue Cross will produce a copy of the agreements." We understand that by July 31, Blue Cross will produce any written consulting agreements concerning these three individuals. Once we receive and review any such agreements, we reserve all rights under Document Request 53 to seek additional documents.

Blue Cross's Answers and Objections to Plaintiffs' Interrogatories 6-8

Finally, we repeat our request that Blue Cross meet and confer concerning the issues raised in our July 5 letter regarding Blue Cross's response to Plaintiffs' Interrogatories 6-8,

served on May 10. We have heard nothing in response to our July 5 request, and will infer, if we do not hear from you by Tuesday, July 24, that Blue Cross is unwilling to enter into good-faith discussions to attempt to resolve the issues we have raised.

* * *

Please advise us if we have misunderstood Blue Cross's position concerning Interrogatory 3(b) or Document Requests 50 and 53. We also hope you will engage with us promptly on Interrogatories 6-8. We invite your input on the issues we have raised with you, to help determine if we can avoid raising any of them with the Court

Sincerely yours,

/s/
David Z. Gringer

EXHIBIT 11

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA and the STATE OF MICHIGAN, Plaintiffs, v. BLUE CROSS BLUE SHIELD OF MICHIGAN, a Michigan nonprofit healthcare corporation, Defendant.	Civil Action No. 2:10-cv-1455-DPH-MKM Hon. Denise Page Hood Magistrate Judge Mona K. Majzoub

PLAINTIFFS' FIFTH REQUEST FOR PRODUCTION OF DOCUMENTS FROM BLUE CROSS BLUE SHIELD OF MICHIGAN

Pursuant to Federal Rule of Civil Procedure 34, the United States of America and State of Michigan ("Plaintiffs") serve this Fifth Request for Production of Documents directed to Blue Cross Blue Shield of Michigan. Plaintiffs request that Blue Cross Blue Shield of Michigan produce the requested documents within 30 days for inspection and copying by counsel for Plaintiffs.

DEFINITIONS

All applicable definitions in the Federal Rules of Civil Procedure apply to this Discovery Request. Each undefined term in this Discovery Request shall be interpreted in accordance with the definition in your industry and as used by your company. If no such definition exists, undefined terms in this Discovery Request shall be given their usual dictionary definition.

A. The terms "**BCBSM," "you," or "your company"** mean Blue Cross Blue Shield of Michigan, and all of its directors, officers, employees, agents, and representatives.

B. The terms **"and"** and **"or"** shall be construed either conjunctively or disjunctively as necessary to bring within the scope of each of the Request all responses that might otherwise be construed to be outside of their scope.

C. The term **"any"** means each and every.

D. The term **"document"** is synonymous in meaning and scope to that term in Federal Rule of Civil Procedure 34(a)(1)(A). The term includes electronically stored information, including all electronic communications (*e.g.*, emails and attachments), files, data and databases. The term includes each copy that is not identical to any other copy.

E. The term **"relating to"** means in whole or in part constituting, containing, concerning, discussing, describing, analyzing, identifying, or stating.

INSTRUCTIONS

A. In addition to the specific instructions below, this Document Request incorporates the instructions set forth in Federal Rule of Civil Procedure 34.

B. The Plaintiffs will accept production of business documents as Summation load files, consistent with the manner in which documents were produced during the pre-Complaint investigation. Electronic documents, such as Excel or PowerPoint, should be produced in their native format with a Bates-numbered tiff image of the first page. Each electronic media device must be labeled to identify the contents of the device, the source of the information, and the document control numbers of those documents.

C. Identify any search terms or search methodologies you intend to use before conducting a search for any electronically stored information, so that the parties can confer in good faith in advance of the search.

D. If you intend to use any de-duplication software or services when collecting or reviewing electronically stored information in response to this Discovery Request, contact the Plaintiffs in advance to discuss the manner in which the company intends to use de-duplication software or services.

E. Any documents that are withheld in whole or in part based on a claim of privilege shall be assigned document control numbers with unique consecutive numbers for each page of each document. For purposes of this instruction, each attachment to a document shall be treated as a separate document and separately logged, if withheld, and cross referenced, if produced. For each document, the company shall provide a privilege log that includes a statement of the claim of privilege and sufficiently describes the facts justifying withholding the document to allow the Plaintiffs to assess the privilege claim. You are encouraged to propose categorical limitations to exclude certain classes of privileged documents from the log.

DOCUMENTS REQUESTED

50. Annual statements of work performed, achievements, or accomplishments; statements or recommendations supporting any bonus request, pay increase, award, or promotion; annual statements of incentives, goals, or objectives; any annual employee performance-evaluation, review, or appraisal; or any documents in the nature of the preceding documents, however denominated, that were created, modified, sent, or received at any time during:

(a) January 1, 2004, through March 31, 2012, relating to:

(1) Kevin Seitz;

(2) Mike Schwartz;

(3) Robert Milewski;

(4) Doug Darland;

(5) Kim Sorget;

(6) Gerald Noxon;

(7) Eric Kropfreiter;

(8) Jeff Connolly;

(9) Connie Hoveland; and

(10) Dan Loepp; and

(b) January 1, 2007, through March 31, 2012, relating to:

(1) Ken Dallafior;

(2) Sue Barkell;

(3) Fred Schaal;

(4) Mark Johnson; and

(5) Lynda Rossi.

EXHIBIT 12

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA
and the STATE OF MICHIGAN,

Plaintiffs,

v.

Civil Action No. 10-cv-14155-DPH-MKM
Hon. Denise Page Hood
Hon. Mona K. Majzoub

BLUE CROSS BLUE SHIELD OF MICHIGAN, a Michigan nonprofit healthcare corporation,

Defendant.

DEFENDANT BLUE CROSS BLUE SHIELD OF MICHIGAN'S OBJECTIONS TO PLAINTIFFS' FIFTH REQUEST FOR PRODUCTION OF DOCUMENTS

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Thomas G. McNeill (P36895)
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Todd M. Stenerson (P51953)
D. Bruce Hoffman (Adm. E.D. MI, DC Bar 495385)
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David A. Higbee (Adm. E.D. MI; DC Bar 500605)
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Robert A. Phillips (P58496)
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DEFENDANT BLUE CROSS BLUE SHIELD OF MICHIGAN'S OBJECTIONS TO PLAINTIFFS' FIFTH REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to Rule 34 of the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the Eastern District of Michigan, Defendant Blue Cross Blue Shield of Michigan ("Blue Cross") objects and responds to Plaintiffs' Fifth Request for Production of Documents.

DOCUMENT REQUEST NO. 50:

Annual statements of work performed, achievements, or accomplishments; statements or recommendations supporting any bonus request, pay increase, award, or promotion; annual statements of incentives, goals, or objectives; any annual employee performance-evaluation, review, or appraisal; or any documents in the nature of the preceding documents, however denominated, that were created, modified, sent, or received at any time during:

a. January 1, 2004, through March 31, 2012, relating to: (1) Kevin Seitz; (2) Mike Schwartz; (3) Robert Milewski; (4) Doug Darland; (5) Kim Sorget; (6) Gerald Noxon; (7) Eric Kropfreiter; (8) Jeff Connolly; (9) Connie Hoveland; and (10) Dan Loepp; and

b. January 1, 2007, through March 31, 2012, relating to: (1) Ken Dallafior; (2) Sue Barkell; (3) Fred Schaal; (4) Mark Johnson; and (5) Lynda Rossi.

RESPONSE TO REQUEST NO. 50:

Blue Cross objects to Request No. 50 because it seeks documents that are neither relevant to this litigation nor reasonably calculated to lead to the discovery of admissible evidence. Objecting further, Blue Cross states that Request No. 50 is overly broad, vexatious and is submitted for the purpose of harassment. Blue Cross further objects to Request No. 50 to the extent it seeks information, documents, or communications that are protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or any other privilege. In addition, Blue Cross objects to the definition of the term "document" and to the "Instructions" as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the extent that definition or those "Instructions" seek to define or impose on Blue Cross obligations beyond those imposed under the Federal Rules of Civil Procedure.

/s/ Todd M. Stenerson
Todd M. Stenerson (P51953)
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Fax: 202-778-7436
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CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2012 I served the foregoing Blue Cross Blue Shield of Michigan's Objections to Plaintiffs' Fifth Request for Production of Documents via electronic mail on:

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Attorneys for Plaintiff United States of America

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Attorney for Plaintiff State of Michigan

/s/ Todd M. Stenerson
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Fax: 202-778-7436
tstenerson@hunton.com

EXHIBIT 13

From: Gringer, David
Sent: Wednesday, April 25, 2012 3:19 PM
To: 'Cummings, Ashley'
Cc: Fitzpatrick, Amy; Joyce, Barry; Kramer, Steven; 'lippitte@michigan.gov'; 'markst@michigan.gov'; 'fait@whafh.com'; 'tangren@whafh.com'; 'DSmall@cohenmilstein.com'; 'rcacace@cohenmilstein.com'; 'DGustafson@gustafsongluek.com'; 'DHedlund@gustafsongluek.com'; 'eahrens@gustafsongluek.com'; 'epm@millerlawpc.com'; 'jef@millerlawpc.com'; 'caf@millerlawpc.com'; 'vlewis@gibsondunn.com'; 'jlipton@gibsondunn.com'; 'SAWilson@gibsondunn.com'; 'DMatheson@gibsondunn.com'; 'CFitzgerald@gibsondunn.com'; 'Stenerson, Todd M.'; 'Hoffman, Bruce'; 'Gilman, Neil'; 'Martin, Jack'; 'Michelle L. Alamo'; Koenig, Michael
Subject: RE: BCBSM - Correspondence

Ashley:

We would be happy to meet and confer with you on Request No. 50. In addition, we'd like to meet and confer once again on your supplemental response to Interrogatory No. 3 either at the same time or separately, depending on which would be more expeditious. We are available between 10AM and noon tomorrow, nine and 11:30 am and after four p.m. on Friday, and anytime on Monday 4/30.

Thanks,

David

From: Cummings, Ashley [mailto:acummings@hunton.com]
Sent: Wednesday, April 25, 2012 2:11 PM
To: Gringer, David
Cc: Fitzpatrick, Amy; Joyce, Barry; Kramer, Steven; lippitte@michigan.gov; markst@michigan.gov; fait@whafh.com; tangren@whafh.com; DSmall@cohenmilstein.com; rcacace@cohenmilstein.com; DGustafson@gustafsongluek.com; DHedlund@gustafsongluek.com; eahrens@gustafsongluek.com; epm@millerlawpc.com; jef@millerlawpc.com; caf@millerlawpc.com; vlewis@gibsondunn.com; jlipton@gibsondunn.com; SAWilson@gibsondunn.com; DMatheson@gibsondunn.com; CFitzgerald@gibsondunn.com; Stenerson, Todd M.; Hoffman, Bruce; Gilman, Neil; Martin, Jack; Michelle L. Alamo; Koenig, Michael
Subject: RE: BCBSM - Correspondence

David:

Thank you for your email. At this point, we see no relevance in Plaintiffs' Request No. 50, but we are willing to meet and confer with you to consider the reasons you believe that the documents you request in No. 50 are relevant. Please let us know when you would like to discuss.

Sincerely,
Ashley

From: Gringer, David [mailto:David.Gringer@usdoj.gov]
Sent: Tuesday, April 24, 2012 2:08 PM
To: Cummings, Ashley
Cc: Fitzpatrick, Amy; Joyce, Barry; Kramer, Steven; lippitte@michigan.gov; markst@michigan.gov; fait@whafh.com; tangren@whafh.com; DSmall@cohenmilstein.com; rcacace@cohenmilstein.com; DGustafson@gustafsongluek.com; DHedlund@gustafsongluek.com; eahrens@gustafsongluek.com; epm@millerlawpc.com; jef@millerlawpc.com; caf@millerlawpc.com; vlewis@gibsondunn.com; jlipton@gibsondunn.com; SAWilson@gibsondunn.com; DMatheson@gibsondunn.com; CFitzgerald@gibsondunn.com; Stenerson, Todd M.; Hoffman, Bruce; Gilman, Neil; Martin, Jack; Michelle L. Alamo; Koenig, Michael
Subject: RE: BCBSM - Correspondence

Ashley:

Thank you for your response. Notwithstanding Blue Cross's objections, does your client intend to produce relevant, responsive documents to the government Plaintiffs' Fifth Request for Production? If so, please inform us of the documents you intend to produce and when you intend to produce them. If Blue Cross will not produce any documents in response to this request, please inform us that this is your position in writing.

Best,

David

David Gringer
Trial Attorney
Antitrust Division
U.S. Department of Justice
(202) 532-4537
david.gringer@usdoj.gov

From: Cummings, Ashley [mailto:acummings@hunton.com]
Sent: Monday, April 23, 2012 4:49 PM
To: Fitzpatrick, Amy; Joyce, Barry; Kramer, Steven; Gringer, David; lippitte@michigan.gov; markst@michigan.gov; fait@whafh.com; tangren@whafh.com; DSmall@cohenmilstein.com; rcacace@cohenmilstein.com; DGustafson@gustafsongluek.com; DHedlund@gustafsongluek.com; eahrens@gustafsongluek.com; epm@millerlawpc.com; jef@millerlawpc.com; caf@millerlawpc.com; vlewis@gibsondunn.com; jlipton@gibsondunn.com; SAWilson@gibsondunn.com; DMatheson@gibsondunn.com; CFitzgerald@gibsondunn.com; Stenerson, Todd M.; Hoffman, Bruce; Gilman, Neil; Martin, Jack; Michelle L. Alamo; Koenig, Michael
Subject: RE: BCBSM - Correspondence

Counsel:

Attached is Blue Cross's Objections to the DOJ Plaintiffs' Fifth Request for Production.

Sincerely,
Ashley

<<Blue Cross Objections to Plaintiffs Fifth Request.pdf>>

Ashley Cummings
Partner

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website: www.hunton.com

EXHIBIT 15

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA
and the STATE OF MICHIGAN,

Plaintiffs,

v.

Civil Action No. 10-cv-14155-DPH-MKM
Hon. Denise Page Hood
Hon. Mona K. Majzoub

BLUE CROSS BLUE SHIELD OF MICHIGAN, a Michigan nonprofit healthcare corporation,

Defendant.

DEFENDANT BLUE CROSS BLUE SHIELD OF MICHIGAN'S SUPPLEMENTAL OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIFTH REQUEST FOR PRODUCTION OF DOCUMENTS

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DEFENDANT BLUE CROSS BLUE SHIELD OF MICHIGAN'S SUPPLEMENTAL OBJECTIONS AND RESPONSES TO PLAINTIFFS' FIFTH REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to Rule 34 of the Federal Rules of Civil Procedure and the Local Rules of the United States District Court for the Eastern District of Michigan, Defendant Blue Cross Blue Shield of Michigan ("Blue Cross") supplements its initial objections and responses to Plaintiffs' Fifth Request for Production of Documents.

REQUEST NO. 50:

Annual statements of work performed, achievements, or accomplishments; statements or recommendations supporting any bonus request, pay increase, award, or promotion; annual statements of incentives, goals, or objectives; any annual employee performance-evaluation, review, or appraisal; or any documents in the nature of the preceding documents, however, denominated, that were created, modified, sent, or received at any time during:

a. January 1, 2001, through March 31, 2012, relating to: (1) Kevin Seitz; (2) Mick Schwartz; (3) Robert Milewski; (4) Doug Darland; (5) Kim Sorget; (6) Gerald Noxon; (7) Eric Kropfreiter; (8) Jeff Connolly; (9) Connie Hoveland; and (10) Dan Loepp; and

b. January 1, 2007, through March 31, 2012, relating to: (1) Ken Dallafior; (2) Sue Barkell; (3) Fred Schaal; (4) Mark Johnson; and (5) Lynda Rossi.

RESPONSE TO REQUEST NO. 50:

Blue Cross objects to Request No. 50 because it seeks documents that are neither relevant to this litigation nor reasonably calculated to lead to the discovery of admissible evidence. Objecting further, Blue Cross states that Request No. 50 is overly broad, vexatious and is submitted for the purpose of harassment. Blue Cross further objects to Request No. 50 to the extent it seeks information, documents, or communications that are protected from disclosure by the attorney-client privilege, the work product doctrine, or any other privilege. In addition, Blue Cross objects to the definition of the term "document" and to the "Instructions" as overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence to the

extent that definition or those "Instructions" seek to define or impose on Blue Cross obligations beyond those imposed under the Federal Rules of Civil Procedure.

SUPPLEMENTAL RESPONSE TO REQUEST NO. 50:

Blue Cross hereby incorporates the objections it previously propounded to Request No. 50 as if fully stated herein. Subject to the forgoing objections, Blue Cross further states that it has conducted a reasonable and diligent search for responsive documents contained in the identified individuals' personnel files and will produce, to the extent that they exist for the named individuals, all Performance Appraisals and Incentive Compensation Goals that mention or relate to hospital contracting. Blue Cross further states that it has produced hundreds of thousands of documents, containing over two million individual pages, as part of its document production in this matter. To the extent that relevant, non-privileged documents responsive to this request were previously collected by Blue Cross, such documents have been produced as part of Blue Cross's responses to Plaintiffs' previously propounded discovery requests. Blue Cross has also collected over 500,000 emails from its email database pursuant to Plaintiffs' requests. To the extent that relevant, non-privileged documents responsive to this request exist in the collected emails, such documents will be produced.

/s/ Todd M. Stenerson
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2200 Pennsylvania Ave., NW
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Phone: 202-955-1500
Fax: 202-778-7436
tstenerson@hunton.com

Dated: June 29, 2012

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2012 I caused the foregoing Blue Cross Blue Shield of Michigan's Supplemental Objections and Responses to Plaintiffs' Fifth Request for Production of Documents to be served on the following via electronic mail:

Attorneys for Plaintiff United States of America

Amy R. Fitzpatrick, amy.fitzpatrick@usdoj.gov

Barry J. Joyce, barry.joyce@usdoj.gov

Steven Kramer, steven.kramer@usdoj.gov

David Gringer, david.gringer@usdoj.gov

Attorney for Plaintiff State of Michigan

M. Elizabeth Lippitt, LippittE@michigan.gov

Thomas Marks, tmarks@michigan.gov

/s/ Todd M. Stenerson
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DETROIT 19276-135 1251397v2

EXHIBIT 17

Not Reported in F.Supp.2d, 2009 WL 2022308 (E.D.Mich.)
(Cite as: 2009 WL 2022308 (E.D.Mich.))

United States District Court,
E.D. Michigan,
Southern Division.
SUNGJIN FO–MA, INC., Plaintiff/
Counter–Defendant,
v.
CHAINWORKS, INC., Defendant/
Counter–Plaintiff.

Civil Action No. 08–CV–12393.
July 8, 2009.

West KeySummary**Federal Civil Procedure 170A 1503**

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)2 Scope
170Ak1503 k. Relevancy and Materiality. Most Cited Cases

In a breach of contract action, the interrogatories submitted by a warehouse owner sought information relevant to the claims and defenses in the action, for purposes of deciding whether answers to the interrogatories could be compelled. The interrogatories at issue asked for detailed information relating to such things as purchase of raw material including suppliers, contacts, pricing and contract information, any increase or decrease in raw material prices, and identification of pieces or parts manufactured with the raw materials and sold to the warehouse owner. The warehouse owner argued that the information was relevant because it had fixed price contracts with metal parts producer and it raised prices by claiming that the price of raw materials had increased. Fed.Rules Civ.Proc.Rule 26(b), 28 U.S.C.A.

George S. Fish, Strobl and Sharp, Bloomfield Hills, MI, for Plaintiff/Counter–Defendant.

Sean P. Fitzgerald, Kreis Enderle Callander & Hudgins PC, Grand Rapids, MI, Stephen J. Hessen, Kreis, Enderle, Kalamazoo, MI, for Defendant/Counter–Plaintiff.

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT/COUNTER–PLAINTIFF'S MOTION TO COMPEL (DOCKET NO. 30)

MONA K. MAJZOUB, United States Magistrate Judge.

***1** This matter comes before the Court on Defendant/Counter–Plaintiff' Motion to Compel filed on May 28, 2009. (Docket no. 30). Plaintiff/Counter–Defendant filed a Response brief on June 15, 2009. (Docket no. 35). This matter was referred to the undersigned for decision pursuant to 28 U.S.C. § 636(b)(1)(A). (Docket no. 31). The parties' counsel appeared for hearing on these matters on June 18, 2009. The matter is now ready for ruling.

Plaintiff/Counter–Defendant Sungjin Fo–Ma, Inc. (“Plaintiff”) is a South Korean company which produces metal parts in South Korea. Plaintiff also has an office in Jackson, Michigan. Defendant/Counter–Plaintiff Chainworks, Inc. (“Defendant”) provides its customers with globally located warehouses and commercial support and resides in Jackson and Plymouth, Michigan. The claims arise from a series of contracts between the parties for the purchase of parts and for tooling. (Docket no. 1). Plaintiff brings claims for breach of contract, breach of implied contract, unjust enrichment, and alleges an account stated balance of $942,778,50. (Docket no. 1). Defendant counterclaims for breach of contract alleging unilateral price increases, wrongful termination, failure to perform and breach of non-compete, tortious interference with contract or business expectancy and unjust enrichment. (Docket no. 11).

Defendant brings its motion seeking complete

answers to its Interrogatory Nos. 3, 4, 6, 7, 9, 11, 12, 13 and 14 and seeking to compel two depositions. (Docket no. 30). Defendant also sought an extension to respond to Plaintiff's Motion for Partial Summary Judgment. The Court ruled on the extension issue and Defendant's Response is due September 3, 2009. Plaintiff argues that it has offered to make documents available to Defendant, including invoices from steel suppliers, which would have contained most of the information which Defendant seeks. At the hearing, counsel for the parties stated that they had resolved Interrogatory No. 11 and Plaintiff will serve an amended answer to Interrogatory No. 11 stating that it has no other responsive information. The parties also agreed that Interrogatory No. 12 is resolved.

I. Defendants' Motion to Compel Seeking Complete Answers To Interrogatories

Defendant served Interrogatories on Plaintiff on January 22, 2009. After receiving an extension to respond, Plaintiff served answers on March 13, 2009. Defendant alleges the answers are incomplete and/or evasive. (Docket no. 30). Defendant alleges that Plaintiff's answers reference Plaintiff's Rule 26 documents which Plaintiff made available for inspection at Plaintiff's counsel's office and Defendant alleges that it reviewed the documents and they do not contain "much of the information requested in the Interrogatories." (Docket no. 30 pg. 4 of 16). Plaintiff agrees that Defendant's counsel spent April 16 at Plaintiff's counsel's office reviewing 10,747 documents and identified those it wanted copied. Plaintiff's counsel also informed Defendant that it could make available invoices from steel suppliers and communications regarding payments to steel suppliers. Plaintiff alleges that Defendant has not requested these documents. Rather than address each individual Interrogatory, the Court will address the overarching issues addressed in the briefs and at the hearing and reference specific interrogatories within each issue.

A. Defendant's Interrogatories Are Relevant

***2** Rule 26(b) provides that a party "may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense .... Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b)(1). "An interrogatory may relate to any matter that may be inquired into under Rule 26(b)." Fed.R.Civ.P. 33(a)(2). The interrogatories at issue ask for detailed information relating to the following topics: purchase of raw material including suppliers, contacts, pricing and contract information, any increase or decrease in raw material prices, identification of pieces or parts manufactured with the raw materials and sold to Defendant, costs per piece and profit per piece for goods sold to Defendant, raw materials costs and their allocation to Defendant and Plaintiff's other customers, actions taken to maintain or increase contract prices, the manner and formula for allocating raw material prices to customers, and changes in price based on exchange rates. Defendant argues that this information is relevant because it had fixed price contracts with Plaintiff and Plaintiff raised prices claiming that the price of raw materials had increased. Defendant also alleges that it will rely on a duress defense because Plaintiff is the only supplier of these particular goods within the automotive industry. The Court finds that the interrogatories seek information relevant to the claims and defenses in this action. Fed.R.Civ.P. 26(b).

The interrogatories at issue are further limited in scope because the parties agree that the only raw material at issue is steel. The Court finds that Defendant's requests for information from 2001 to 2008 is reasonably limited. The alleged price increases occurred in 2004 and 2005 and Defendant argues that it needs a historical perspective on the prices and increases. Furthermore, Defendant alleges that its prices for goods should have been decreased when the costs of raw materials decreased sometime after 2005. Therefore, the scope of time is limited to relevant information.

B. Plaintiff's Objections To Interrogatories

Plaintiff makes general objections in response to Interrogatory Nos. 3, 4, 6, 7, 9, 13 and 14 that the interrogatories are overly broad and unduly burdensome. Such boilerplate or generalized objections are tantamount to no objection at all. *See Walker v. Lakewood Condominium Owners Ass'n,* 186 F.R.D. 584, 587 (C.D.Cal.1999); *Carfagno v. Jackson Nat'l Life Ins. Co.,* 2001 WL 34059032 at *4 (W.D.Mich. Feb.13, 2001) ("The court strongly condemns the practice of asserting boilerplate objections to every discovery request."). Therefore, although the objections were made within the extension of time to respond, they were as though no objections were served at all. Plaintiff also objects that Interrogatory Nos. 3, 6, 7, 9, 13 and 14 seek information that is confidential, proprietary and/or constitutes trade secrets. Plaintiff has neither filed a motion for protective order nor shown good cause for issuing a protective order, or provided any other basis for sustaining these objections; therefore those issues are not before the Court and the Court will order Plaintiff to answer the Interrogatories in full. Fed.R.Civ.P. 26(c).

***3** With respect to Plaintiff's objection that Interrogatory Nos. 7 and 9 are duplicative of Interrogatory No. 3, the Court finds that Interrogatory No. 7's limitation to months in which a price was assessed which was greater than the price stated in the original quote or purchase order with Chainworks differentiates Interrogatory Nos. 3 and 7 and it is relevant.

Interrogatory No. 9 seeks identification, by item number as it appears on Defendant's purchase orders, of the per piece profit on goods sold to Chainworks between 2001 and 2008 and, "[t]o the extent profit varied on different shipments or in different months, please specify the profit on each shipment or in each month." (Docket no. 30–3). The Court finds that the first part of this Interrogatory is duplicative of Interrogatory Nos. 3(C) and 3(E) which ask Plaintiff to "[d]escribe any piece or part manufactured with the raw materials by the part number appearing on Chainworks's purchase order for that part" and "[s]tate your profit per piece on the resale of any goods manufactured from the raw materials which you sold to Chainworks." Plaintiff has answered Interrogatory No. 9 in part by providing a chart of price profits at the time of quoting, listed by part number. The Court will therefore order Plaintiff to answer Interrogatory No. 9 limited to shipments or months in which the profit varied, which is not duplicative.

C. Sub-parts Must Be Responded To In Full

"Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath." Fed.R.Civ.P. 33(b)(3). Interrogatory Nos. 3, 4, 13 and 14 contain subparts. Plaintiff's answers are in narrative form, contain multiple boilerplate objections and it is unclear which subparts have been answered in full and for which subparts Plaintiff has no information. The Court will order Plaintiff to amend its answers to Interrogatory Nos. 3, 4, 13 and 14 so that each subpart is responded to separately and fully with the information specific to that subpart or will state that it does not have the responsive information.

D. Whether It is Unduly Burdensome to Determine Which Steel Shipments Were Used For Products Manufactured For Defendants

In response to Interrogatory Nos. 3 and 4 Plaintiff objected that it is unduly burdensome to determine which steel shipments were used for each shipment of products manufactured for Defendant and that it is beyond the scope of any obligation Plaintiff has to provide the information. Plaintiff alleges that different shipments of steel could be used to make a single delivery of parts. (Docket no. 35). Plaintiff alleges that Defendant is requesting very specific cost information for approximately 36,000,000 parts that were shipped from 2001 to 2008. Plaintiff also alleges that it did not have written contracts with its steel suppliers prior to 2007 and it has supplied Defendant with three contracts written in Korean.

Defendant, in essence, seeks information about raw material costs in relation to prices of the manu-

factured parts. While Plaintiff's counsel's explanation is plausible that different batches of raw material end up in different parts over time, it is less plausible that Plaintiff maintains no record whatsoever of costs for raw materials or the cost basis for the goods it manufactures and sells, whether such records track costs by month, year, parts, or in another manner. *See generally Laserdynamics, Inc. v. Asus Computer International,* 2009 WL 153161, at *3 (E.D.Tex. Jan.21, 2009) (Where the defendant alleged that it "cannot provide the request information because it does not track costs on a fixed or variable basis," the court ordered the defendant "to produce business documents that reflect, either directly or indirectly, its costs basis for each accused product."). The Court will order Plaintiff to answer the interrogatories related to raw material costs and per piece profit set forth in Interrogatory Nos. 3 and 4 by providing the requested information or, if that is not available, so stating and providing information that reflects the cost basis or profit requested, and if that is not available, simply state that it does not have the information.

E. Plaintiff's Reliance on Rule 33(d) Option To Produce Business Records

***4** In partial response to Interrogatory Nos. 3, 4 and 9 Plaintiff relied on the option to produce business records under Fed.R.Civ.P. Rule 33(d). Fed.R.Civ.P. 33 offers the option to produce business records in response to an interrogatory "[i]f the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party." Fed.R.Civ.P. 33(d). The Rule 33 Option To Produce Business Records requires that the responding party specify "the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could." Fed.R.Civ.P. 33(d)(1).

Plaintiff's answers do not comply with the specific requirements of Fed.R.Civ.P. 33(d). In answer to Interrogatory Nos. 3 and 4 Plaintiff states that some of the information requested in the Interrogatory "is contained in documents that have been made available as part of the Rule 26 disclosures or as produced in connection with Plaintiff's Response to Chainworks' First Request for Production of Documents" and that "[b]eginning in approximately March 2007, Plaintiff had contracts with its steel suppliers." In answer to Interrogatory No. 3 Plaintiff states that "the contracts did not set forth firm prices for steel." In answer to Interrogatory No. 4 Plaintiff states that "Chainworks may determine the terms of those contracts pursuant to Fed.R.Civ.P. 33(d)." In answer to Interrogatory No. 3 Plaintiff also states that "[a]dditionally, Plaintiff has invoices from steel suppliers and communications regarding payment all written in Korean." In partial answer to Interrogatory No. 9 Plaintiff "directs Chainworks to see the answers to the above Interrogatories, including Interrogatory No. 3."

Plaintiff did not specify which of the disclosure documents are responsive to which subsection or portion of Defendant's Interrogatories. Plaintiff did not specify which portions of the contracts answer which subparts of the interrogatories. Furthermore, to the extent Plaintiff offers to make available the steel invoices, including some written in Korean, the requirements of Rule 33(d) are not met. Plaintiff's counsel elaborated at the hearing by describing the documents from which Defendants could derive the answers as including approximately two bankers' boxes of steel invoices, at least some of which are written in Korean. With respect to Plaintiff's offer to make steel invoices available, as in *T.N. Taube Corp. v. Marine Midland Mortgage Corp.,* Plaintiff "has repeatedly offered only to make unspecified documents available for inspection and copying." *T.N. Taube Corp. v. Marine Midland Mortgage Corp.,* 136 F.R.D. 449, 455 (W.D.N.C.1991). "[D]irecting the opposing party to an undifferentiated mass of records is not a suitable response to a legitimate request for discovery." *T.N. Taube Corp.,* 136 F.R.D. at 455 (citation omitted).

The Court finds that Plaintiff did not meet Rule 33's requirements regarding specificity.

***5** Next, the burden of deriving the information or ascertaining the answer from the records must be substantially the same for either party. Because Plaintiff is referring to a large number of generally identified documents and failed to specify which documents respond to which interrogatories and their subparts, the burden on Defendants would be much greater than that on Plaintiff corporation, which should be familiar with its own documents. Similarly, the financial cost of reviewing the documents would also be more for Defendant than for Plaintiff, at least in part due to Defendant's lack of familiarity with the documents and the lack of specificity in Plaintiff's identification of the same.

Plaintiff argues that it is equally burdensome for Plaintiff to translate the documents as for Defendants. While the Court could come to the same conclusions set forth herein and decide this issue without reaching the question of who should bear the cost of translating the documents which are written in Korean, the Court will address that issue with respect to burden. Plaintiff's argument that Defendants should bear the burden of translation to examine the responsive documents ignores the fact that this issue is not before the Court on a Request for Production, but by way of Interrogatories [FN1]. Despite Plaintiff's argument that it does not have an employee with the language skills necessary to produce complete English translations of the documents without great burden, Plaintiff can readily refer to the documents and extract the information necessary to provide an English language answer to Defendant's interrogatories. *See E. & J. Gallo Winery v. Cantine Rallo, S.p.A.,* 2006 WL 3251830 at *3 (E.D.Cal. Nov.8, 2006) (The court found that "[b]ased on the volume of documents identified, and the repeated reference to the same documents in responding to all of the interrogatories," it would be less burdensome for the responding party, "who is far more familiar with its records and business, to provide the responses to the interrogatories based on the documents, than for [the requesting party] to attempt to ferret the information from the various documents.").

FN1. Plaintiff relies on three cases for the premise that the requesting party should bear the burden of the cost of translating documents from a foreign language. *See In Re: Puerto Rico Elec. Power Auth.,* 687 F.2d 501 (1st Cir.1982); *Cook v. Volkswagen of America,* 101 F.R.D. 92 (S.D.W.Va.1984); *In Re. Korean Air Lines Disaster of Sept. 1, 1983,* 103 F.R.D. 357 (D.D.C.1984). All the cases arose in the context of Rule 34 Requests for Production. The Court will not extend this rule to responses to interrogatories in this instance where the requirements to rely on Rule 33(d)'s option to produce business records have not been met in any respect.

Plaintiff's counsel stated at the hearing that there is information in the South Korean documents which is relevant. The burden on Defendant would be great if Defendant has to translate each document, assuming that some part of some of the documents is responsive to an as yet unidentified subpart of each of these three interrogatories. The Court finds that Defendant has shown that the "burden of deriving or ascertaining the answers is not substantially the same for both parties." *T.N. Taube Corp.,* 136 F.R.D. at 453 (citing 4A MOORE'S FEDERAL PRACTICE ¶ 33.25 (2d ed.1990)). Defendant has provided legal support for this finding even when the records are in a foreign language. *See generally Laserdynamics, Inc.,* 2009 WL 153161 (responding party tried to answer an interrogatory by producing an organizational chart "written in a foreign language" and the court ordered the responding party to provide a full and complete narrative response). In *E. & J. Gallo Winery,* the court pointed out that "[n]ormally, in responding to a request for production of documents, the requesting party would bear the cost of translating documents written in a foreign language.

However, here, [defendant] Rallo has made the decision to produce the documents in lieu of responding to an interrogatory, which imposes the duty on Rallo to provide documents from which the response to the interrogatory is clearly ascertainable." *E. & J. Gallo Winery,* 2006 WL 3251830 at *5. Although the *E. & J. Gallo Winery* court ordered the parties to share the costs of translation, this is distinguishable from the instant case because in *Gallo* there was an argument that the plaintiff had agreed to share the costs of translation and the court noted that "translation of these documents appears to be in the interest of both parties." *Id.* at *5.

***6** For these reasons, the Court will order Plaintiff to provide straightforward and full answers, by specific subpart, to Interrogatory Nos. 3, 4 and 9 (in which Plaintiff's answer references Interrogatory No. 3) where Plaintiff referenced steel contracts, steel invoices, Rule 26 disclosure documents and or its responses to Request for Production as the source for the information.

II. Defendant/Counter–Plaintiff's Request To Compel Depositions Of Y.S. Kim And A Rule 32(b) Deponent

On April 20, 2009 Defendant's attorney served Notices of Deposition for Y.S. Kim to be deposed on May 13, 2009 and a 30(b) (6) deponent on behalf of Plaintiff to be deposed on May 14, 2009. (Docket no. 30–4). Plaintiff's counsel adjourned the dates and Defendant alleges he inquired three additional times for new deposition dates. The parties have provided a series of email correspondence regarding attempts to procure dates for the depositions. Plaintiff argues that on May 22, 2009 it provided to Defendant's counsel two sets of three consecutive days for the depositions of Y.S. Kim and the 30(b)(6) designee, Plaintiff Sungjin's president, Mr. Sohn. (Docket no. 35 at 7). The dates were June 17–19 and June 24–26. At that time, Plaintiff was willing to make Mr. Sohn available for deposition in the United States. (Docket no. 35).

There is no argument that these deponents are not relevant or that the depositions are unduly burdensome or otherwise should not occur. There is no argument regarding where the depositions should occur. Fact discovery does not close until July 15, 2009 and the Notices were served well before this date. (Docket no. 26). The Court will order that Mr. Kim and Mr. Sohn will appear for deposition on dates mutually agreeable to the parties and occurring on or before August 31, 2009 as set forth in more detail below.

The Court will decline to award sanctions and expenses at this time on all issues. Fed.R.Civ.P. 37(a)(5)(A).

IT IS THEREFORE ORDERED that Defendant/Counter Plaintiff's Motion to Compel (docket no. 30) is **GRANTED** in part and Plaintiff must serve amended answers as follows on or before July 31, 2009:

a. Plaintiff will answer Interrogatory Nos. 3, 4, 13 and 14 separately and fully, including specific responses to each subpart, in compliance with Fed.R.Civ.P. 33(b)(3);

b. Plaintiff will answer Interrogatory Nos. 3, 4, 6, 7 and 9 fully with substantive information and where information is not available, Plaintiff will state that no information is available. Interrogatory No. 9 is limited to months or shipments in which profit varied as set forth above; and

c. Plaintiff will amend its answer to Interrogatory No. 11 and state that it has no further information responsive to this Interrogatory.

IT IS FURTHER ORDERED that Y.S. Kim and the Fed.R.Civ.P. 30(b)(6) deponent, Mr. Sohn, will appear for deposition on dates mutually agreeable to the parties occurring on or before August 15, 2009 at the office of Plaintiff's counsel in Bloomfield Hills, Michigan. Each deposition will be completed in one day of not to exceed seven hours.

***7 IT IS FURTHER ORDERED** that Defendant's request for attorneys fees and costs is

DENIED.

NOTICE TO THE PARTIES

Pursuant to Fed.R.Civ.P. 72(a), the parties have a period of ten days from the date of this Order within which to file any written appeal to the District Judge as may be permissible under 28 U.S.C. 636(b)(1).

E.D.Mich.,2009.
Sungjin Fo-Ma, Inc. v. Chainworks, Inc.
Not Reported in F.Supp.2d, 2009 WL 2022308 (E.D.Mich.)

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Not Reported in F.Supp.2d, 2011 WL 824683 (E.D.Mich.)
(Cite as: 2011 WL 824683 (E.D.Mich.))

Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
ABX LOGISTICS (USA), INC., Plaintiff,
v.
MENLO LOGISTICS, INC, d/b/a Menlo Worldwide Logistics, and Tower Automotive LLC., et al., Defendants.

Civil Action No. 09–CV–12792.
March 7, 2011.

Jonathan T. Walton, Jr., Walton & Donnelly, Detroit, MI, for Plaintiff.

Anthony A. Agosta, Matthew W. Heron, Clark Hill, Jason D. Menges, Nicholas J. Ellis, Vanessa L. Miller, Foley & Lardner LLP, Detroit, MI, for Defendants.

ORDER GRANTING IN PART AND DENYING IN PART TOWER AUTOMOTIVE, LLC'S MOTION TO COMPEL DISCOVERY FROM ABX LOGISTICS (USA) INC. AND BRIEF IN SUPPORT (DOCKET NO. 42)

MONA K. MAJZOUB, United States Magistrate Judge.

***1** This matter is before the Court on Defendant/Cross–Plaintiff/Counter–Defendant Tower Automotive, LLC's (Tower) Motion To Compel Discovery From ABX Logistics (USA) Inc. And Brief In Support filed on September 15, 2010. (Docket no. 42). Plaintiff ABX Logistics (USA), Inc. (ABX) Filed its Opposition To Defendant Tower Automotive LLC's Motion To Compel Discovery on September 28, 2010. (Docket no. 44). Defendant filed a Reply on October 8, 2010. (Docket no. 47). The parties filed a Joint Statement of Resolved and Unresolved Issues on October 14, 2010. (Docket no. 48). This matter was referred to the undersigned for decision pursuant to 28 U.S.C. § 636(b)(1)(A). (Docket no. 45). The Court dispenses with oral argument on this matter pursuant to E .D. Mich. Local Rule 7.1(f). (Docket no. 46). The motion is now ready for ruling.

1. Facts and Claims

Plaintiff brings this action alleging breach of contract, breach of contract implied in fact and promissory estoppel against Defendants Menlo and Tower and breach of contract implied in law/unjust enrichment against Tower. (Docket no. 32). Plaintiff ABX alleges that Defendant Tower asked Defendant Menlo to arrange logistics of the transport of Tower's Presses and other machinery from Michigan to Texas. Plaintiff ABX further alleges that ABX arranged the transportation through Menlo and that both Defendants refuse to pay a balance of approximately $302,296.46. (Docket no. 12).

Tower served its First Request For Production of Documents and First Set of Interrogatories on ABX on June 10, 2010. (Docket nos. 42–2, 42–3). ABX served is responses and answers on July 12, 2010 and Plaintiff alleges that ABX's answers and responses were not sufficient. (Docket nos. 42–4, 42–5). As set forth in the Joint Statement, the parties have been able to resolve much of Tower's motion. The remaining issues are Request for Production Nos. 7, 8, 10, 24, 25 and 26 and Interrogatory Nos. 7, 8, 11 and 12.

2. Analysis

Pursuant to Fed.R.Civ.P. 26(b)(1): "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense .... For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed.R.Civ.P. 26(b) (1).

Document Request Nos. 7 and 8 ask ABX to

identify and produce all the documents it contends "constitute the contract on which you base your claims against" Tower and Menlo, respectively. (Docket no. 42–4). Despite ABX's objections to the contrary, the Court finds nothing overly broad, burdensome, vague or ambiguous about requesting the contract or documents that constitute the contract in a breach of contract action and the request is relevant. Nor does the Court find that Tower's language "constitute the contract" calls for a legal conclusion. The requests are specifically limited in scope to ABX's own claims. ABX's objections and vague response referencing other documents is insufficient. The Court will order ABX to produce all documents responsive to Document Request Nos. 7 and 8 in compliance with Fed.R.Civ.P. 34 and amend its response to state whether it has produced all responsive documents within its possession, custody or control. Fed.R.Civ.P. 34(a)(1).

***2** Document Request No. 10 asks ABX to "[i]dentify and produce all documents referencing, reflecting, or constituting a purchase order received from Tower that relates in any way to the Presses." (Docket no. 42–4). ABX's repeated general objection that the documents "may be obtained from the Defendants with substantially greater facility than from ABX" is without merit in this Response and all the others. The Presses are defined as those at issue in ABX's action. (Docket no. 42–2). The Court finds Defendant's remaining objections without merit. Defendant's response identifying two blocks of bates numbered documents (totaling 289 pages) "as documents that *may* be responsive" does not comply with Rule 34. (Docket no. 42–4, emphasis added). The Court will order ABX to produce all responsive documents and further amend its response to state whether it has produced all the responsive documents within its possession, custody or control.

Document Request No. 24 asks ABX to "[i]dentify and produce all documents relating to the storage of the Presses." (Docket no. 42–4). Despite ABX's arguments to the contrary, the scope of the request is limited by the defined "Presses." For the reasons set forth below, with respect to Document Request Nos. 25 and 26, the Court will further limit Request No. 24 to storage only from Michigan to Texas. The Court will order ABX to produce all responsive documents and further amend its response to state whether it has produced all the responsive documents within its possession, custody or control.

Document Request Nos. 25 and 26 ask for documents related to the exportation of the Presses from the United States and importation of the Presses into Brazil. Tower's cross-claims related to the transport of the presses from Texas to Brazil were dismissed by the Court on January 28, 2011. After careful consideration the Court finds that these two requests relate to the dismissed claims and are not relevant to the remaining claims. Fed.R.Civ.P. 26(b). The Court will deny Tower's Motion as to Document Request Nos. 25 and 26.

Interrogatory Nos. 7 and 8 contain subparts which seek details of the factual basis for certain allegations made by ABX. Interrogatory No. 11 contains subparts which seek details regarding factual support for each item of damages ABX claims it is owed. Interrogatory No. 12 contains subparts which seek the details of all "ancillary services ABX alleges it performed for which it is owed payment by Tower." The interrogatories are relevant and ABX's boilerplate objections are without merit, as set forth with respect to the Document Requests above. The Court will order ABX to answer Interrogatory Nos. 7, 8, 11 and 12 in full by sub-part.

Attorneys fees will not be awarded. Fed.R.Civ.P. 37(a)(5) (A)(ii), (iii).

IT IS THEREFORE ORDERED that Tower Automotive, LLC's Motion To Compel Discovery From ABX Logistics (USA) Inc. (docket no. 42) is **GRANTED** in part and on or before March 31, 2011 Plaintiff ABX will serve amended responses, all responsive documents and amended answers to Document Request Nos. 7, 8, 10 and 24 and Inter-

rogatory Nos. 7, 8, 11 and 12 as set forth herein.

***3 IT IS FURTHER ORDERED** that the remainder of Tower Automotive, LLC's Motion To Compel (docket no. 42) is **DENIED** including Document Request Nos. 25 and 26 and the request for attorney fees and costs.

NOTICE TO THE PARTIES

Pursuant to Fed.R.Civ.P. 72(a), the parties have a period of fourteen days from the date of this Order within which to file any written appeal to the District Judge as may be permissible under 28 U.S.C. § 636(b)(1).

E.D.Mich.,2011.
ABX Logistics (USA), Inc. v. Menlo Logistics, Inc
Not Reported in F.Supp.2d, 2011 WL 824683 (E.D.Mich.)

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267 F.R.D. 504
(Cite as: 267 F.R.D. 504)

H

United States District Court,
W.D. Kentucky.
John A. MULLINS, Plaintiff
v.
PRUDENTIAL INSURANCE COMPANY OF AMERICA, et al., Defendants.

Civil Action No. 3:09-CV-371-S.
April 30, 2010.

Background: Plan participant brought action under Employee Retirement Income Security Act (ERISA) against employee disability benefit plan and insurance company that administered plan challenging denial of further long-term disability (LTD) benefits. Participant moved to compel discovery.

Holdings: The District Court, Dave Whalin, United States Magistrate Judge, held that:
(1) administrator's general references to plan documents and administrative record were not sufficiently responsive to participant's interrogatories;
(2) information regarding independent contractors employed by administrator was subject to disclosure; and
(3) information regarding number of plan participants who received LTD benefits, amount of LTD benefits paid under plan, administrator's rate of rejection of LTD claims, and profitability of administering plan were not subject to disclosure.

Motion granted in part and denied in part.

West Headnotes

[1] Labor and Employment 231H 690

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(K) Actions
231HVII(K)5 Actions to Recover Benefits
231Hk684 Standard and Scope of Review
231Hk690 k. Effect of administrator's conflict of interest. Most Cited Cases

Labor and Employment 231H 691

231H Labor and Employment
231HVII Pension and Benefit Plans
231HVII(K) Actions
231HVII(K)5 Actions to Recover Benefits
231Hk691 k. Record on review. Most Cited Cases

When ERISA plan administrator both evaluates and pays claims, ERISA plaintiffs may look beyond administrative record to explore existence and impact of inherent conflict of interest to determine whether such conflict affected benefits decision of defendant plan administrator/payor. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[2] Federal Civil Procedure 170A 1534

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)3 Answers; Failure to Answer
170Ak1534 k. Sufficiency. Most Cited Cases

ERISA plan administrator's general references to plan documents and administrative record were not sufficiently responsive to plan participant's interrogatories seeking factual basis of its defenses in his action challenging discontinuation of long term disability (LTD) benefits under employee disability benefit plan, and thus administrator had to specify records from which answer could be obtained, where claims file contained 1,300 pages. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.; Fed.Rules Civ.Proc.Rule 33(d), 28 U.S.C.A.

[3] Federal Civil Procedure 170A 1534

170A Federal Civil Procedure
170AX Depositions and Discovery

267 F.R.D. 504
(Cite as: 267 F.R.D. 504)

170AX(D) Written Interrogatories to Parties
170AX(D)3 Answers; Failure to Answer
170Ak1534 k. Sufficiency. Most Cited Cases

Party who seeks to rely upon reference to business records as response to interrogatory must not only certify that answer may be found in records referenced by it, but also must specify where in records answers can be found. Fed.Rules Civ.Proc.Rule 33(d), 28 U.S.C.A.

[4] Federal Civil Procedure 170A 1488.1

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)1 In General
170Ak1488 Number, Form and Importance
170Ak1488.1 k. In general. Most Cited Cases

Plan participant's interrogatory seeking information concerning each of ERISA plan administrator's employees involved in denial of his claim for long term disability (LTD) benefits was not improperly compound, where interrogatory's subject matter focused upon employment compensation, in all forms, paid to or awarded to those employees, and their supervisors, who were involved in decision to deny claim. Fed.Rules Civ.Proc.Rule 33(a), 28 U.S.C.A.

[5] Federal Civil Procedure 170A 1503

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)2 Scope
170Ak1503 k. Relevancy and materiality. Most Cited Cases

Interrogatory seeking information regarding independent contractors employed by ERISA plan administrator to evaluate plan participant's claim for long term disability (LTD) benefits, including history of remuneration flowing to contractors, and statistics concerning number of claims reviewed in relation to number of claims denied, fell within scope of appropriate ERISA discovery in participant's action challenging discontinuation of his benefits; information was relevant to plan administrator's inherent conflict of interest arising from its evaluation and payment of claims. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.; 29 C.F.R. § 2560.503-1(h)(3)(iii); Fed.Rules Civ.Proc.Rule 33, 28 U.S.C.A.

[6] Federal Civil Procedure 170A 1503

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)2 Scope
170Ak1503 k. Relevancy and materiality. Most Cited Cases

Interrogatory seeking information regarding number of plan participants who received long term disability (LTD) benefits under employee disability benefit plan, amount of LTD benefits paid under plan, plan administrator's rate of rejection of LTD claims, and profitability of administering plan fell outside scope of appropriate ERISA discovery in plan participant's action challenging discontinuation of his LTD benefits, even though administrator both evaluated and paid claims; information was not necessarily relevant, and was not required to address participant's own individual claim of bias. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.; Fed.Rules Civ.Proc.Rule 33, 28 U.S.C.A.

[7] Federal Civil Procedure 170A 1534

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)3 Answers; Failure to Answer
170Ak1534 k. Sufficiency. Most Cited Cases

ERISA plan administrator's statement, in response to interrogatory requesting information regarding its administrative processes and safeguards,

that its "administrative processes include but are not limited to training of claims professionals and quality review procedures" and that its administrative safeguards and processes "are evident from the administrative record" was not sufficiently specific, where administrator failed to provide any meaningful detail regarding training and quality review procedures. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.; 29 C.F.R. § 2560.503-1(b)(5).

[8] Federal Civil Procedure 170A 1591

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1591 k. Employment, records of. Most Cited Cases

Employment files of each person employed by ERISA plan administrator who was involved in decision to discontinue plan participant's long term disability (LTD) benefits was not discoverable in participant's action to establish administrator's inherent conflict of interest arising from its evaluation and payment of claims. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[9] Federal Civil Procedure 170A 1591

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1591 k. Employment, records of. Most Cited Cases

Intra-company communications relating to compensation or performance reviews of individual employees involved in ERISA plan administrator's decision to discontinue plan participant's long term disability (LTD) benefits were not discoverable to establish administrator's inherent conflict of interest arising from its evaluation and payment of claims. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[10] Federal Civil Procedure 170A 1591

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1591 k. Employment, records of. Most Cited Cases

Information relating to external training on claims processing and administration received by ERISA plan administrator's employees involved in denial of claim was not discoverable in participant's action to establish administrator's inherent conflict of interest arising from its evaluation and payment of claims, even though and training materials appeared to have defense oriented bent, where potential relevance of such documents was far exceeded by burden placed on administrator in obtaining them from each individual employee involved in claims review process. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[11] Federal Civil Procedure 170A 1591

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1591 k. Employment, records of. Most Cited Cases

Privileged Communications and Confidentiality 311H 409

311H Privileged Communications and Confidentiality
311HVII Other Privileges
311Hk409 k. Insurer and insured. Most Cited Cases

Documents relating to any legal or administrat-

ive action filed by any person insured or covered under group insurance contract were not discoverable in participant's action challenging plan administrator's discontinuation of his long term disability (LTD) benefits under ERISA employee disability benefit plan to establish administrator's inherent conflict of interest arising from its evaluation and payment of claims; documents were not relevant in any meaningful sense, other than to clearly establish dissatisfaction of other claimants who had failed to qualify for LTD benefits, and would unavoidably contain medical and health information of highly confidential nature. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[12] Federal Civil Procedure 170A 1592

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1592 k. Files and contents thereof in general. Most Cited Cases

Application, administrative, and underwriting files for employer's group insurance contract were not discoverable in plan participant's action challenging discontinuation of his long term disability (LTD) benefits under ERISA employee disability benefit plan to establish plan administrator's inherent conflict of interest arising from its evaluation and payment of claims. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

[13] Federal Civil Procedure 170A 1581

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1581 k. In general. Most Cited Cases

ERISA plan administrator's gross revenues and/or its net profit generated by group insurance contract were not discoverable in plan participant's action challenging discontinuation of his long term disability (LTD) benefits under ERISA employee disability benefit plan to establish plan administrator's inherent conflict of interest arising from its evaluation and payment of claims. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

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ORDER

DAVE WHALIN, United States Magistrate Judge.

This order considers two motions. Both motions arise from a discovery dispute that involves an Employee Retirement Income Security Act of 1974 (ERISA) claim. *See* 29 U.S.C. § 1001, *et seq.* (DN 43, 46). The claim is brought by Plaintiff John A. Mullins, a former employee of Gordon Food Services (GFS). GFS maintains its own employee disability benefit plan, known as the GFS Division Voluntary Employee Benefit Plan (GFS Plan). Mullins has sued the GFS Plan and the Prudential Insurance Company of America (Prudential) for their refusal to provide him with further long-term disability (LTD) benefits due to his osteoarthritis and degenerative disc disease in his cervical and lumbar spine.

The GFS Plan paid Mullins disability benefits for a year, then his disability claim was filed with Prudential, the insurer for the GFS Plan. Prudential paid Mullins retroactive LTD benefits for two years, but then determined that his condition, and its attendant limitations, did not meet Prudential's

definition of long term disability, an "any occupation" definition broader than the "similar occupation" definition found in the GFS Plan. Mullins, who by that time had been separately determined to be disabled for the same condition by the Social Security Administration, proceeded to bring suit against the GFS Plan and Prudential in federal court alleging, among other claims, that both had violated their fiduciary duties arising under ERISA, 29 U.S.C. § 1132.

After filing suit, Mullins served Prudential and the GFS Plan with interrogatories and requests for production of documents. Prudential responded to these discovery requests and supplemented its response. Mullins now maintains that the information provided by Prudential falls far short of what he is entitled to receive under *Metropolitan Life Ins. Co. v. Glenn,* 554 U.S. 105, 128 S.Ct. 2343, 171 L.Ed.2d 299 (2008), given the existence of a *per se* conflict of interest arising from Prudential's dual status as an ERISA plan administrator, who determines eligibility for benefits, and a payor who pays such benefits from its own pocket. *Glenn,* 128 S.Ct. at 2346.

Mullins insists in his motion to compel that he is entitled to full discovery, beyond the contents of the administrative record, to explore this inherent conflict of interest and the resulting bias. He supports this view with citation to a number of recent Kentucky district court decisions that discuss the impact of *Glenn* on the prior status of discovery established in *Wilkins v. Baptist Healthcare System, Inc.,* 150 F.3d 609, 619 (6th Cir.1998). *See, Kinsler v. Lincoln Nat. Life Ins. Co.*, 660 F.Supp.2d 830, 832-836 (M.D.Tenn.2009); *McQueen v. Life Ins. Co. of North America,* 595 F.Supp.2d 752, 754-56 (E.D.Ky.2009); *Thornton v. Western and Southern Life Ins. Co. Flexible Benefits Plan,* Case No. 3:08-CV-00648-M, 2010 WL 411119 (W.D.Ky. Jan. 28, 2010); *Raney v. Life Ins. Co. of North America,* 2009 WL 1044891 (E.D.Ky. Apr.20, 2009); *Johnson v. Conn. Gen. Life Ins. Co.,* 324 Fed.Appx. 459, 465-67 (6th Cir. Apr. 7, 2009); *Pemberton v. Reliance Standard Life Ins. Co.,* 2009 WL 89696 (E.D.Ky. Jan. 13, 2009).

The GFS Plan, in response to the discovery served by Mullins, has filed a separate motion for a protective order (DN 43). In this related motion, the plan seeks to preclude Mullins from taking discovery beyond the administrative record already provided to him. The plan also maintains that because it has fully paid Mullins all of the disability benefits available to him under its self-insured, one-year benefits plan, no possible basis for recovery against it remains under ERISA.

Background Facts

Plaintiff John Mullins is a former employee of Gordon Food Service (GFS). Mullins began work for GFS in the early 1990s and continued to work for the company as a customer development specialist until early ***508** October of 2005, when he took a FMLA leave of absence due to pain-related limitations arising from arthritic degenerative disc disease in his cervical and lumbar spine (DN 28, Administrative Record, GFS 225-229). Magnetic resonance imaging of Mullins' cervical spine confirmed the presence of moderate to severe spondylosis at the C3-C4 and C6-C7 vertebrae accompanied by degenerative osteoarthritic changes including narrowing of the spinal canal, along with the presence of a bulging cervical disc (DN 28, Admin. Rec. GFS 285-287). Mullins' job duties with GFS in 2005 required him to travel extensively in a designated sales territory to deliver GFS food products to commercial customers and solicit additional orders of GFS products (*Id.* at GFS 230). These duties, according to Mullins, would occasionally require him to lift and carry food products that weighed between 25 and 100 lbs.

Soon after taking leave from GFS, Mullins moved from his home in Rowan County, Kentucky, to Ocala, Florida near Gainesville where he sought treatment for his back and arm pain. Mullins began treatment with Dr. Gabrielle Umana and her physician's assistant, Mukti Patel, at the Family Care Specialists Center in Ocala (*Id.* at GFS 290-296).

Dr. Umana provided Mullins with a number of medical excuse slips advising GFS that Mullins remained unable to return to work. Mullins underwent weekly physical therapy at TLC Rehabilitation in late January through March of 2006 (DN 27, Admin. Rec. D138, D210-249). That January, he also sought pain management treatment from Dr. Mangala Shetty of Marion Pain Management (*Id.* D88). Mullins apparently was evaluated for possible orthopedic surgery to relieve his symptoms, but declined surgical intervention to pursue more conservative treatment.

In May of 2006, after learning of Mullins' relocation to Florida, GFS notified him that if he did not contact the company within 30 days he would be terminated from employment given the absence of any expected return to work date and his relocation to Ocala (DN 27, GFS 256). The following month, on June 1, 2006, GFS terminated Mullins' employment. Mullins, who was then receiving LTD benefits from GFS, was provided with a voluntary LTD benefits application for Prudential's plan in mid-July of 2006. He completed and submitted the application that August (*Id.* at GFS 233). Prudential initially denied his claim based on incomplete medical information (*Id.*). Mullins appealed with the assistance of his prior counsel and on March 12, 2008, was awarded 24-months of LTD benefits beginning October of 2006 (*Id.*).

During this time, Mullins had pending before the Social Security Administration an application for disability insurance benefits which he filed on October 20, 2005, based on his degenerative osteoarthritis, degenerative disc disease of the cervical and lumbar spine, obesity and diabetes mellitus (DN 28, Admin. Rec. D0092-97). Following a hearing before Administrative Law Judge James Quinlivin, the SSA found Mullins to be disabled as of October 4, 2005 from all substantial gainful activity due to his medical conditions (*Id.* at D0097). In reaching this result, the ALJ considered Mullins' medical history, including the diagnostic imaging of his spine, the resulting exertional limitations in his ability to perform work-related tasks, his past relevant work history, his age, education and the opinion of a vocational expert who testified, based upon all of the above factors, that no jobs existed in the national economy that an individual with Mullins' limitations would remain capable of performing. (*Id.* at D0096-97).

Despite the conclusion of the SSA and the opinions of various treating physicians that Mullins is totally disabled, Prudential terminated Mullins' long-term disability benefits effective October 4, 2008. In so doing, Prudential relied upon the opinions of a vocational rehabilitation expert, Sue Howard, and the medical opinions of two physicians employed by MES Solutions, Dr. Albert Fuchs, a doctor of internal medicine (*Id.* at D153-161) and Dr. Leela Rangaswamy, a board certified orthopedic surgeon. Howard indicated in her employability assessment report of April 2008, that Mullins remains capable of performing alternative work in the positions of sales representative for wholesale and manufacturing, food products or other companies (*Id.* at D114-119). Doctors Fuchs and Rangaswamy determined that Mullins has no functional impairments from October 5, 2008, ***509** forward that would impose any physical limitations on his ability to perform the demands of gainful employment.

Mullins took an administrative appeal of Prudential's decision to terminate his LTD benefits (*Id.* at D132-143). In his appeal, Mullins argued that his treating physicians, and Dr. Frederick Huffnagle, a physician who reviewed Mullins' medical records, uniformly concluded that he suffered with significant orthopedic limitations that severely impacted his ability to sit and stand for extended periods of time. Mullins pointed out that Dr. Jose L. Roman had determined that he was not able to adequately function in a work environment even at a sedentary exertional level, as did SSA ALJ Quinlivin (*Id.* at D138). Mullins argued that the combined effect of his various pain medications further limited his cognitive abilities, as did the physical capa-

city evaluation from Ocala Rehabilitation Associates, which performed a physical capacity evaluation in September of 2008, and concluded that Mullins is not capable of performing a stationary job that includes extended periods of sitting or standing (*Id.* at D141). These opinions notwithstanding, Prudential declined to alter its decision that Mullins' condition does not satisfy its contractual definition of disability, which requires in effect that the claimant be precluded from all substantial gainful activity, rather than merely the performance of his past relevant work. Accordingly, Mullins filed the present action.

LEGAL ARGUMENTS

Prudential argues in its response that the true focus of the present lawsuit falls on the question of whether it acted arbitrarily and capriciously when it denied Mullins' LTD claim under the "any occupation" definition of disability found in the terms of its plan (DN 56). The answer to this question Prudential asserts is found within the administrative record, which it has fully provided to Mullins along with all of the responsive discovery to which he is entitled. Prudential insists that Mullins has now set out upon a fishing expedition that, far from determining the possibility of alleged bias, is actually intended to substantially increase its litigation costs in violation of the principle that ERISA disability-related proceedings are intended to be both expeditious and inexpensive in their resolution.

Prudential disputes Mullins' broad reading of *Glenn,* and maintains that the fundamental principles of the *Wilkins* decision remain in place so that even post- *Glenn* discovery, if permitted, remains limited and dependent upon a colorable showing of bias that Mullins has yet to make. Further, Prudential insists that even if Mullins is entitled to discovery beyond the administrative record, Prudential has provided him with all of the relevant answers and documents he sought except for those items which clearly remain undiscoverable, *Glenn* notwithstanding.

Many of these same arguments are raised by the GFS Plan in its separate motion for protective order (DN 43). The plan, like Prudential, also insists that *Glenn* does not directly address the question of discovery in ERISA cases. Further, post-*Glenn* decisions from the Sixth Circuit, according to the GFS Plan, continue to hold that discovery is not automatically available absent a colorable procedural challenge. *See, Johnson v. Conn. Gen. Life Ins. Co.,* 324 Fed.Appx. 459, 465-67 (6th Cir., Apr. 7, 2009). Even in those decisions which permit discovery, the plan argues that such discovery remains limited to the narrow topic of the alleged conflict of interest. *See, Pemberton v. Reliance Standard Ins. Co.,* 2009 WL 89696 at *2-3 (E.D.Ky. Jan. 13, 2009).

The GFS Plan insists that no colorable due process violation or inherent conflict of interest exists as far as it is concerned because after one year on disability under the self-insured plan of GFS, its own obligation to make payments ceased and Prudential assumed responsibility for any further LTD benefits under the voluntary LTD benefit plan in place. In other words, GFS argues that it paid out all of the disability benefits to Mullins that were due him so that it extinguished its obligation under the self-insured plan. Accordingly, no procedural irregularity or inherent conflict of interest, the sole basis for the *Glenn* decision, remained. Alternatively, GFS argues that even if Mullins is entitled to some discovery, he clearly is not ***510** entitled to any discovery involving employee personnel files, performance reviews, disciplinary action or board certifications and professional backgrounds of reviewers. *See, Thornton v. Western and Southern Life Ins. Co.,* 2010 WL 411119 at *3 (W.D.Ky. Jan.28, 2010).

Mullins has filed his own response to the plan's motion for a protective order (DN 65). Mullins counters in his response that his claim for LTD benefits arises from and is payable from the GFS Plan, which he notes contains a definition of disability more limited in its scope than that definition now relied upon by Prudential to deny him LTD be-

nefits. Mullins reasons that if the Court determines that he is entitled to LTD benefits, then "the GFS Plan will be financially liable going forward ... [and] [a]s a result, the GFS Plan's financial conflict of interest is inherent-meriting discovery." (DN 65, p. 3). Nevertheless, despite the GFS inherent conflict of interest, Mullins advises the Court that he will be "satisfied with limiting discovery to the GFS Plan's past practice with enforcing its alleged reimbursement provision." (DN 65, p. 5). GFS has filed a reply which the Court has considered (DN 70).

Legal Analysis

The question of discovery in ERISA litigation has generated substantial conflict in the federal courts both before and after the recent Supreme Court decision in *Metro Life Ins. Co. v. Glenn,* 554 U.S. 105, 128 S.Ct. 2343, 171 L.Ed.2d 299 (2008). *See* R. Alberts, J. Ghozland & M. Steinhardt, *Circuits at Odds A Year After Glenn-No Clear Path,* 51 No. 9 DRA 33 (Sept.2009). Prior to *Glenn,* the Sixth Circuit judicial benchmark for discovery in ERISA cases was set by *Wilkins v. Baptist Healthcare System, Inc.,* 150 F.3d 609, 619 (6th Cir.1998). *Wilkins* provides that district court review of an ERISA claim for denial of benefits is confined to the administrative record with limited exceptions. *See, Thornton v. Western and Southern Life Ins. Co.,* 2010 WL 411119 at *1. The thought behind this particular approach is to promote a policy that disputes over the payment of benefits should be resolved as inexpensively and expeditiously as possible. *Perry v. Simplicity Engineering,* 900 F.2d 963, 967 (6th Cir.1990). Extensive discovery was felt to be contrary to such a policy and to the intent of Congress as well. *Id.* Accordingly, regardless of whether the federal courts of the circuit applied the *de novo* standard of review or an arbitrary and capricious standard, the general rule of *Wilkins* regarding discovery remained that the district courts were to focus on the administrative record and would only venture outside the record in those few instances in which an ERISA claimant satisfactorily alleged a violation of due process or bias by the administrator. *See, Kinsler v. Lincoln Nat. Life Ins. Co.,* 660 F.Supp.2d at 831-32 (citing *Miller v. Metro. Life Ins. Co.,* 925 F.2d 979, 986 (6th Cir.1991)).

Wilkins did not close the door, however, to judicial review of matters outside the administrative record. The decision cannot be read to prohibit discovery in ERISA cases. Rather, the focus after *Wilkins* shifted to judicially crafting an understanding of the prerequisites for "a limited foray into evidence outside the administrative record...." *Thornton,* 2010 WL 411119 at *1. The essential question became what must a plaintiff in an ERISA show in order to embark upon such a foray. Two schools of thought developed in the Sixth Circuit. *See, Kinsler v. Lincoln Nat. Life Ins. Co.,* 660 F.Supp.2d at 832-34 (discussing in depth the two competing lines of case law); *Bird v. GTX, Inc.,* 2009 WL 3839478 at *2 nn 1, 2 (W.D.Tenn. Nov. 13, 2009) (collecting case law from each line of authority).

One line of case law, the "initial threshold showing" line of authority, requires an ERISA plaintiff who seeks discovery to do more than merely allege the existence of a procedural irregularity, a due process violation or the existence of bias in order to be entitled to discovery. This line of cases began with an unpublished decision, *Putney v. Medical Mut. of Ohio,* 111 Fed.Appx. 803 (6th Cir.2004). Included in the initial threshold showing line of cases are a number of unpublished decisions such as *Huffaker v. Metropolitan Life Ins. Co.,* 271 Fed.Appx. 493, 504 (6th Cir.2008); *Bradford v. Metro. Life Ins. Co.,* Case No. 3:05CV-240, 2006 WL 1006578 at *3-4 (E.D.Tenn. Apr. 14, 2006); ***511** *Ray v. Group Long Term Disability Policy,* Case No. 2:06CV-460, 2007 WL 127983 (S.D.Ohio, Jan. 11, 2007); and *McInerney v. Liberty Life Assur. Co. of Boston,* Case No. 60-2681-MaV, 2007 WL 1650498 at *2-4 (W.D.Tenn. June 4, 2007). These decisions hold that the ERISA plaintiff who seeks discovery must justify his request with a colorable showing of the

existence of the alleged procedural irregularity or bias. *Huffaker,* 271 Fed.Appx. at 504 ("[a] plaintiff cannot obtain discovery beyond the administrative record-even if limited to a procedural challenge-merely by alleging a procedural violation.").

In competition with the initial threshold case line of cases is a second series of cases referred to as the "mere allegation" cases. This line of authority began with the published decision in *Calvert v. Firstar Finance, Inc.,* 409 F.3d 286 (6th Cir.2005) and continued with *Kalish v. Liberty Mut./ Liberty Life Assur. Co. of Boston,* 419 F.3d 501, 508 (6th Cir.2005) and *Moore v. LaFayette Life Ins. Co.,* 458 F.3d 416 (6th Cir.2006). All three of the decisions, *Calvert*, *Kalish* and *Moore,* hold that discovery in ERISA litigation over the denial of a claim for benefits does not depend upon the claimant making an initial threshold showing of a lack of due process or bias. Rather, in the view of these courts, an allegation of a due process violation or lack of bias is itself sufficient to permit the ERISA claimant to obtain discovery into the nature of the alleged bias or due process violation. *Kinsler,* 660 F.Supp.2d at 833-34.

This second line of authority, much like the unpublished initial threshold cases, suffered from its own limitation. In none of the three cases did the plaintiffs actually attempt to take discovery so that the published opinions in *Calvert*, *Kalish and Moore* appear to be dicta to the extent that the Sixth Circuit panels involved expressed the view that no threshold or colorable showing of a due process violation or bias is required to entitle an ERISA plaintiff to discovery. To this extent, the second line of case authority is no more clear precedent than the unpublished decisions of the first line of case authority. The situation remained unresolved until *Glenn* with "[t]he courts caught between two compelling interests-limited judicial review as a means of resolving benefit disputes inexpensively and expeditiously, *Perry,* 900 F.2d at 967 ... and the promotion of 'interest of employees and their beneficiaries in employer benefit plans and to protect their contractually defined benefits.' " *Bird,* 2009 WL 3839478 at *2 (citing *Firestone Tire & Rubber Co. v. Bruch,* 489 U.S. 101, 113, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989)).

In 2008, matters changed dramatically concerning these compelling interests with the Supreme Court decision announced in *Metropolitan Life Ins. Co. v. Glenn,* 554 U.S. 105, 128 S.Ct. 2343, 171 L.Ed.2d 299 (2008). In *Glenn,* the Supreme Court faced the question of "whether a plan administrator that both evaluates and pays claims operates under a conflict of interest in making discretionary benefit determinations" and "how such conflict should be taken into account on judicial review of a discretionary benefit determination." *Glenn,* 128 S.Ct. at 2347. The Supreme Court in resolving this question concluded that this dual role of administrator/payor creates a *per se* conflict of interest that the district court should weigh as a factor. The court in *Glenn* then continued to observe that this *per se* conflict of interest does not require that the courts "create special burden-of-proof rules, or other special procedural or evidentiary rules, focused narrowly upon the evaluator/payor conflict" as such "special procedural rules would create further complexity, adding time and expense to a process that may already be too costly for many of those who seek redress." *Glenn,* 128 S.Ct. at 2351. Thus, *Glenn,* while not speaking directly to the scope of discovery, strongly implies in its decision that some discovery is available to ERISA plaintiffs to the extent that such plaintiffs find themselves faced with such a *per se* conflict of interest.[FN1]

FN1. In *Pemberton,* 2009 WL 89696 at *2 the District Court for the Eastern District of Kentucky insightfully explains *Glenn* and its impact as follows:

> While the defendant correctly states that *Glenn* does not mention discovery, it incorrectly contends that *Glenn* does not have a impact on the rules of discovery in ERISA matters. Even though the Supreme Court did not expressly alter the

> rules of discovery in an ERISA conflict-of-interest case, they effectively did so by recognizing the inherent conflict and requiring courts to consider it as a factor when deciding whether the plan administrator abused its discretion. Without discovery plaintiffs would be severely hindered in their ability to obtain evidence to show the significance of the conflict of interest. Therefore, it is logical to assume that the Supreme Court meant for lower courts to allow some discovery beyond the administrative record when a conflict of interest is present.
>
> *Id.*

***512** [1] A number of recent district court decisions from both the Western and Eastern Districts of Kentucky, as well as Tennessee, have now concluded that *Glenn* has liberalized discovery to a degree. ERISA plaintiffs may look beyond the administrative record to explore the existence and impact of the inherent conflict of interest to determine whether such conflict affected the benefits decision of the defendant plan administrator/payor. *See, Thornton,* 2010 WL 411119 at *2 ("Since *Glenn,* many district courts within the Sixth Circuit have determined that discovery beyond the administrative record is appropriate to assist the court in determining whether an inherent conflict of interest gave rise to an actual abuse of discretion.") (collecting cases); *Bird,* 2009 WL 3839478 at *2 ("The practical implication of this holding [in *Glenn*] is to resolve the 'threshold or no threshold' debate in favor of the ERISA plaintiff ... [so that when] a conflict of interest exists ... limited discovery as to the conflict is warranted."); *McQueen,* 595 F.Supp.2d at 754 ("[U]nder *Glenn,* the dual role creates a conflict of interest, and the presence of that conflict of interest, on its own, is sufficient to permit a court to allow discovery beyond the administrative record."); *Hays v. Provident Life and Acc. Ins. Co.,* 623 F.Supp.2d 840, 843 (E.D.Ky.2008) ("This court is persuaded that, after *Glenn,* some discovery is appropriate in ERISA denial of benefits cases involving a conflict of interest. As the *Winterbauer* court stated, '[T]here is no way to determine the extent of the administrator's conflict of interest without looking beyond the administrative record.' ") (citing *Winterbauer v. Life Ins. Co. of North Amer.,* 2008 WL 4643942 at *4-5 (E.D.Mo., Oct. 20, 2008)).

The above decisions uniformly recognize the transformational impact of *Glenn* on the availability of discovery in ERISA actions that involve claims arising from the denial of benefits. The full extent of the transformation, however, remains to be determined with various courts left to flesh out the scope of discovery. *Bird,* 2009 WL 3839478 at *3 ("The task left to the lower courts to resolve [after *Glenn*] is shaping the contours of the limited discovery."). What is determined by *Glenn* is that the threshold showing requirement in the first line of cases discussed above, *Putney*, *Liks*, *Huffaker*, *Bradford*, *Ray* and *McInerney* has now been put to rest. The mere existence of an inherent conflict of interest that arises when the same entity is both plan administrator and benefits payor is itself the "threshold." ERISA plaintiffs need do no more than show the existence of such inherent conflict in order to obtain discovery. As *Kinsler* succinctly explains:

> The rulings in *Wilkins*, *Moore* and *Glenn* compel the result that discovery into this alleged conflict of interest is proper, even if the plaintiff has not made an initial threshold showing of bias beyond alleging the existence of this type of conflict of interest.
>
> *Kinsler,* 660 F.Supp.2d at 836.

What remains to be established is the scope of discovery that an ERISA plaintiff may obtain in order to establish the extent of the impact that such an inherent conflict of interest may have had upon the decision to deny his or her claim to benefits. Discovery must be broad enough to allow the benefits claimant to show to the court how the inherent con-

flict specifically affected the benefits determination in his or her case. Without adequate discovery, as *Kinsler* notes, as ERISA plaintiff will be "handcuffed" in his or her ability to adequately explore what may be a critical issue to the just outcome of the action. Although Prudential may decry such discovery as being a "mere fishing expedition," the district court in *Hays* incitefully offers the observation that " 'much of discovery is a fishing expedition of sorts, but the ***513** Federal Rules of Civil Procedure allow the courts to determine the pond, the type of lure, and how long the parties can leave their lines in the water.' " *Hays,* 623 F.Supp.2d at 844 (citing *Myers v. Prudential Ins. Co. of Amer.,* 581 F.Supp.2d 904, 913 (E.D.Tenn.2008)).

In fact, many of the post- *Glenn* decisions cited above have done just that-established a clear range of both permissible and impermissible subjects for discovery by an ERISA plaintiff faced with an inherent conflict of interest such as that in *Glenn.* For example, in *Hays,* the district court identified the kinds of information discoverable, which included: the history of the claims administration; any steps taken by the defendant plan administrator to reduce potential bias or promote accuracy; and the financial incentives, bonus or reward system, formal or informal, for those employees who were involved in any meaningful fashion in determining the outcome of the plaintiff's disability claims. *Hays,* 623 F.Supp.2d at 844 (citing *Myers,* 581 F.Supp.2d at 915).

Likewise, in *Raney,* a decision that characterized the scope of this discovery as being "narrow," the district court nevertheless identified the same factors as those earlier set out in *Hays*-a history of bias claimed denials, steps taken to reduce potential bias, and company policies, formal or informal, that reward claim denials. *Raney,* 2009 WL 1044891 at *3 (citing *McQueen,* 595 F.Supp.2d at 755-56). The district court in *Pemberton* also permitted discovery to "include statistical information about the outcome of claims submitted to reviewers...." *Pemberton,* 2009 WL 89696 at *3.

In those situations in which the same plan administrator relied upon third-party reviewers whose opinions or reports may have been unduly influenced by financial incentives, the courts have permitted ERISA plaintiffs similarly situated to Mullins to explore the compensation arrangements between the plan administrator and such third-party reviewers. Discovery may include contractual connections, annual financial payments and statistical data about the number of claims sent to the same reviewers and the number of denials resulting therefrom. *Id. Pemberton* additionally permits an ERISA plaintiff to obtain statistical data on the number of times that such reviewers found disability claimants able to work at a sedentary occupational or found the claimants to be not disabled from any occupation. *Id.* In fact, *Pemberton* permitted the plaintiff therein to "look back" over the history of claims administration for a period of 10 years prior to the final denial of his own disability claim. The same subject areas for discovery are recognized in the *McQueen* decision, as well. *McQueen,* 595 F.Supp.2d at 755-56.

These so-called "permitted areas of inquiry" are neatly laid out in *Bird,* which contains a bullet point list of the topics on which discovery related to an inherent conflict of interest may be had by an ERISA plaintiff. These topics, or areas of inquiry, are much the same as those set forth above in *McQueen, Pemberton, Raney* and *Hays.*[FN2] They include:

> FN2. All of these areas also are succinctly listed in the recent decision of our fellow magistrate judge announced in *Thornton. Thornton,* 2010 WL 411119 at *3.

- "incentive, bonus or reward programs or systems, formal or informal, for any employee(s) involved in any meaningful way in reviewing disability claims" *Myers,* 581 F.Supp.2d at 914

- "contractual connections between [plan admin-

istrator/payor] ... and the reviewers utilized in plaintiff's claim ... and financial payments paid annually to the reviewers from the ... [administrator/payor]" *Pemberton,* 2009 WL 89696 at *3

• "statistical data regarding the number of claims files sent to the reviewers and the number of denials which resulted" *Id.*

• "number of times the reviewers found claimants able to work in at least a sedentary occupation or found that claimants were not disabled" *Id.*

• "documentation of administrative processes designed only to check the accuracy of grants of claims (limited to claims guidelines actually consulted to adjudicate plaintiff's claim)."

Bird, 2009 WL 3839478 at *3.

Thornton, much like the other decisions including *Bird*, also identifies the general ***514** categories of information that fall outside the acceptable range of post- *Glenn* inquiry. As Thornton notes, "Courts typically refuse to permit discovery into areas falling under the general category of 'reviewer credibility.' " *Thornton,* 2010 WL 411119 at *3. These areas ordinarily encompass information such as employee pay records and personnel files. *Hays*, 623 F.Supp.2d at 845 (citing *Myers,* 581 F.Supp.2d at 915). Also normally excluded from discovery are matters that involve the professional backgrounds of reviewers such as "whether reviewers faced criminal charges, civil suits, or disciplinary action, failure to be come board-certified, or the history of patient treatment by medical reviewers." *Raney,* 2009 WL 1044891 at *3 ("These credibility-type requests are unlikely to lead to evidence of any claim of bias or conflict of interest.") (citing *Pemberton,* 2009 WL 89696 at*4) ("Because information regarding the training and qualifications of the reviewers is unlikely to lead to evidence concerning either the conflict of interest or bias, the plaintiff is not entitled to discovery on these issues."). *See also, Bird,* 2009 WL 3839478 at *3 (improper areas of inquiry include: personnel files, performance reviews and pay records of insurers' employees; and information regarding training and qualifications of reviewers). With these two sets of guidelines in mind, the Court now turns its focus to the individual discovery requests put at issue by Mullins' motion.

1. Interrogatories.

Mullins in interrogatory no. 2 seeks to obtain from Prudential the factual basis for defenses no. 2 through 9 set forth in Prudential's answer. Prudential objects in response and advises the Plaintiff that its defenses are "govern[ed][by] ERISA law and/or ... the terms of the plan documents/LTD policy at issue, which are readily identifiable by reviewing the plan documents produced under seal by Prudential in this matter, to which Prudential refers Plaintiff pursuant to Fed.R.Civ.P. 33(d)." (Document no. 46, p. 2). In other words, Prudential relies on the business records option of Rule 33(d) to generally respond to the Plaintiff's interrogatory.

[2] Prudential's general reference to Rule 33(d) is insufficient. Rule 33(d) applies only in those instances in which the information sought may be obtained by the examination of the opposing party's business records, and the burden of obtaining such responsive information is substantially the same for either party. Fed.R.Civ.P. 33(d). If both of these preconditions are satisfied, then the responding party may answer, but must do so by specifically identifying the records in sufficient detail to permit the requesting party to locate and identify them as easily as the responding party itself could. *Id. See, United States, ex rel. Englund v. Los Angeles County,* 235 F.R.D. 675, 680-81 (E.D.Cal.2006) ("Generally, if the information sought is contained in the responding party's files and records, he or she is under a duty to search the records to provide the answers ... But where information is contained in business records and answering the question would require the responding party to engage in burdensome or expensive research, the responding party may answer by specifying the records from which

the answer may be obtained and making them available for inspection by the party seeking discovery.") (citations omitted).

[3] Rule 33(d) is not intended to be used as "a procedural device for avoiding the duty to give information." *In re Johnson,* 408 B.R. 115, 122 n. 3 (Bankr.S.D.Ohio 2009). In other words, "The responding party may not avoid answers by imposing on the interrogating party a mass of business records from which answers cannot be ascertained by a person unfamiliar with them." *In re G-I Holdings, Inc.,* 218 F.R.D. 428, 438 (D.N.J.2003). A party who seeks to rely upon the Rule must not only certify that the answer may be found in the records referenced by it, but also "must specify where in the records the answers [can] be found." *Cambridge Electronics Corp. v. MGA Electronics, Inc.,* 227 F.R.D. 313, 322-23 (C.D.Cal.2004) (citing *Rainbow Pioneer No. 44-18-04A v. Hawaii-Nevada Investment Corp.,* 711 F.2d 902, 906 (9th Cir.1983)). A party that attempts to rely upon Rule 33(d) with a mere general reference to a mass of documents or records has not adequately responded. ***515***Hypertherm, Inc. v. American Torch Tip Co.,* 2008 WL 5423833 at *3 (D.N.H.2008). *See also, Dunkin' Donuts, Inc. v. N.A.S.T., Inc.,* 428 F.Supp.2d 761, 770 (N.D.Ill.2005) (reference to documents in the possession of the requesting party and documents produced in this case held insufficient to meet the requirements of the Rule); *In re Sulfuric Acid Antitrust Litigation,* 231 F.R.D. 320, 325-26 (N.D.Ill.2005) ("[T]here must be a sufficiently detailed specification of the records to permit the interrogating party to find the document as readily as can the party served. These are not optional requirements ... [R]eferring to business records en masse, without specifying particular documents is 'an abuse of the option.' ") (citing *Bonds v. Dist. of Columbia,* 93 F.3d 801, 811 (D.C.Cir.1996)).

Although Prudential insists that its response satisfies the requirements of Rule 33(d), the Court finds otherwise. Plaintiff is entitled to have Prudential's explanation for the factual basis of its affirmative defenses as set forth in its answer, rather than a passing reference to the existence of the administrative record, which is an inadequate response under the case law that interprets Rule 33(d).

The same reasoning applies with equal force to interrogatory no. 3 by which Mullins seeks to obtain the identity of each individual that was involved in the decision of Prudential to deny his claim for LTD benefits. Prudential once again merely makes a general reference to the administrative record, or "claims file produced under seal," without adequate specification of the specific documents therein in violation of Rule 33(d). Accordingly, for the reasons previously stated with respect to interrogatory no. 2, the Court finds Prudential's response to be insufficient.

Prudential's response to interrogatory no. 4 likewise is inadequate. Interrogatory no. 4 requests that Prudential provide Mullins with its policies and procedures for accumulating and maintaining the documents found in its claims file. Prudential in its response, after objecting that the interrogatory is argumentative, merely advises that "all documents and evidence specifically considered in the administration of claims should be included or referenced in the claims file," to include documents submitted by the claimant, correspondence between Prudential and the claimant, claims log, notes of Prudential employees and communications with third-party clinical and vocational professionals. (DN 46, pp. 4-5).

The answer provided by Prudential is not responsive to the interrogatory, which seeks to obtain Prudential's official policies and procedures as they relate to the accumulation, organization and maintenance of claims files. The Court further notes that Prudential's response refers only to those items that "should be included," rather than to Prudential's own policies on what must be included and what may be excluded from a claims file. The Court therefore finds this response to be insufficiently responsive.

The Court agrees with Prudential concerning interrogatory no. 5, which seeks to obtain information concerning the attorneys' fees and costs that Prudential seeks to recover under ERISA's statutory attorney's fees provision. Obviously, until such time as Prudential prevails, or otherwise specifically requests an award of fees, discovery of this information would appear to the Court to be somewhat premature. The Court therefore defers the production of attorney-fee related information requested in interrogatory no. 5 until such time as it appears the Prudential will make an application for attorney's fees and costs. FN3

FN3. The Court does not disagree with the authority cited by Mullins at p. 6 of his motion to compel (DN 46, p. 6) wherein he cites to various decisions that require the disclosure of attorney fee agreements that are relevant to a party's claim for attorney's fees. Until such time as Prudential makes its claim concrete by way of an application, the Court merely considers the matter to be presently unripe for consideration.

In interrogatory no. 6, Mullins seeks information concerning each of the Prudential employees involved in the denial of his claim for LTD benefits. Specifically, he requests each individual's title, years of employment, rate of pay for the past three years (2007 to 2009), along with any bonuses, awards, recognition, or other remuneration during that time. Similarly, Mullins seeks the name and job title of any supervisor who evaluated the job performance of any of the employees ***516** identified during the same three-year time period (DN 46, p. 6). Prudential in its response objected to the interrogatory on various grounds that include relevancy, over breadth, the compound nature of the interrogatory, and based on privacy concerns. Further, Prudential again merely referred the Plaintiff to "the claims file produced under seal" in response to his request for the identities of the employees involved in the decision to deny him LTD benefits.

None of these objections are persuasive. The Court has already considered and rejected the notion that a passing reference to the claims file, which Mullins correctly notes contains some 1,300 pages, is sufficient to satisfy the requirements of Rule 33(d). It is not. Further, the interrogatory as structured is not fatally compound. The Advisory Committee Notes to the 1993 Amendments to Rule 33(a) caution that a party may not evade the 25 written interrogatory limit "through the device of joining as 'subparts' questions that seek information about *discreet separate subjects.* " Fed.R.Civ.P. 33(a), 1993 Amendment, Advisory Committee Notes (emphasis added). In those instances, however, where the subparts of an interrogatory are logically and factually related to the primary question, no violation of the Rule will be found as the subparts are to be counted in the circumstances as but part of one interrogatory. *See, Kendall v. GES Exposition Services,* 174 F.R.D. 684 685-86 (D.Nev.1997) (citing *Ginn v. Gemini, Inc.,* 137 F.R.D. 320, 322 (D.Nev.1991)). *See also, Thomas v. Yates,* 2009 WL 3273280 at *1-2 (E.D.Cal. Oct. 9, 2009) ("Determining whether an interrogatory counts as a separate question requires a pragmatic approach. '[O]nce a subpart of an interrogatory introduces a line of inquiry that is separate and distinct from the inquiry made by the portion of the interrogatory that precedes it, the subpart must be considered a separate interrogatory no matter how it is designated.' ") (citing *Waterbury v. Scribner,* 2008 WL 2018432 (E.D.Cal.2008)).

[4] Using this standard, the Court does not find interrogatory no. 6 to be improperly compound as the subject matter of the interrogatory focuses upon the employment compensation, in all forms, paid to or awarded to those employees of Prudential, and their supervisors, who were involved in the decision to deny Plaintiff's claim for LTD benefits. Accordingly, no discreet subparts are required to be counted separate and apart from interrogatory no. 6. To the extent, however, that the interrogatory seeks to identify all supervisors or more senior employees of Prudential who evaluated the job performance of their subordinate employees that participated in the

denial of Plaintiff's claim, the interrogatory seeks information beyond that contemplated within the scope of post- *Glenn* discovery.

In this respect, Prudential's objection has merit given the apparent prohibition from discovery of employee personnel files as set forth in the case law discussed above. If employee personnel files are not discoverable, a proposition that the Court believes to be well established in the Sixth Circuit, then any supervisor's evaluation contained therein likewise would be undiscoverable, even in the post-*Glenn* environment. If the supervisor's evaluation is not discoverable than disclosure of the information sought concerning supervisors would not lead to the discovery of relevant evidence under Rule 26(b)(1). The Court therefor agrees with Prudential that information concerning supervisors is not discoverable. Otherwise, the Court rejects the remaining objections of Prudential to the extent that the company relies upon relevancy, over breadth, undue vagueness or privacy-related concerns involving the employees who participated in the processing of Mullins' claim for LTD benefits.

Interrogatory no. 7 requests the specific basis on which Prudential denied Mullins' claim for LTD benefits. Once again, Prudential initially referred Mullins only to the claims file of the administrative record. In its supplemental answer, however, Prudential has referred Mullins to the specific pages of the claims file that contain the denial letters sent to him. Mullins has not renewed his objections in his reply. It therefore appears to the Court that the supplemental response of Prudential has satisfied his request in this ***517** regard.[FN4]

FN4. The Court otherwise agrees with Mullins that he is entitled to know the factual basis of Prudential's denial of his claim for LTD benefits. One would naturally tend to conclude that Prudential relied upon the opinions of the MES physician/reviewers, both of whom concluded that Mullins had no functional limitations whatsoever from his medical conditions. Because Prudential's supplemental response apparently satisfies the Plaintiff's request, the Court makes no further ruling on it.

Interrogatory no. 8 requests from Prudential "the specific information that you would have needed in order to continue Plaintiff's ongoing benefits." Prudential has referred the Plaintiff to its final claims denial letter located at Bates Doc. D1252-D1262 in response. This response is sufficiently specific to satisfy the requirements of Rule 33(d). Plaintiff has not further renewed his arguments in his reply concerning this particular interrogatory. Once again, the Court concludes that Prudential's supplemental response is sufficient.

The dispute concerning interrogatory no. 9 appears now to the Court to be moot as well. It requests the name, address, job title, employer and phone number of any medical or vocational professional who had rendered a report or opinion to Prudential or has examined the medical records of the Plaintiff. Prudential has provided the Plaintiff with the medical reports of the third-party physicians and vocational expert on which the company rested its determination to deny Mullins' LTD benefits claim. Mullins does not renew his arguments concerning interrogatory no. 9 in his reply. The Court concludes as before that he apparently is satisfied with its supplemental response.

Interrogatories 10 through 13 focus on information concerning the same medical and vocational reviewers discussed in interrogatory no. 9. Basically, Mullins seeks to know historic information concerning these reviewers' business relationship with Prudential. For example, interrogatory no. 10 requests Prudential to provide for 2007 through 2009, information concerning the number of times that each reviewer reviewed a claim on behalf of Prudential, and whether the reviewer was contacted directly by Prudential or by a third-party under contract with Prudential. Interrogatory no. 11 asks Prudential to provide information on how much each of these reviewers was paid, or its employer

was paid, for their services in the Plaintiff's case and for their services in all such cases in which they reviewed claims during the same 3-year time period.

Interrogatory no. 12 relates directly to third-party reviewers, as opposed to reviewers employed by Prudential, and seeks basically the same information requested in the immediately preceding interrogatories-the number of claims reviews obtained from each third-party reviewer and how much each such reviewer was paid in 2007 through 2009. Interrogatory 13 asks the professional qualifications of each such reviewer and the policies of Prudential to ensure that each reviewer has obtained "appropriate training and experience in the field of medicine involved in the medical judgment." *See* 29 C.F.R. § 2560.503-1(h)(3)(iii).

[5] Prudential in response to these interrogatories maintains initially that they fall outside the scope of appropriate ERISA discovery. This conclusion is rejected by the Court. The Court previously has discussed in depth the resulting changes to discovery following the rendition of the *Glenn* decision. ERISA plaintiffs are now fully entitled to examine the contractual and financial connections betweenclaimsreviewersandplanadministrators/payors such as Prudential. The history of remuneration flowing to third-party service providers and the statistics concerning the number of claims reviewed in relation to the number of claims denied is now "fair game" for discovery.

While inquiry into the professional qualifications of such reviewers appears to remain outside the scope of discovery, Prudential has provided the Plaintiff with the medical credentials of its reviewers. Such credentials are set forth on the face of their medical reports. To this extent, the parties' dispute would appear to be moot. Otherwise, Mullins is entitled to the specific information that he seeks in interrogatories 10 through 13. Such information concerning the economic connection between, for example, MES and ***518** Prudential, is exactly the type of information relating to potential bias that district courts now have determined to be discoverable in this circuit.

The next series of interrogatories that are in dispute include interrogatory nos. 15 through 20. These interrogatories respectively seek to obtain: the total number of GFS employees to whom Prudential has paid LTD benefits (int. no. 15); the total dollar amount of LTD benefits paid to GFS employees by Prudential (int. no. 16); the dollar amount of premiums or other compensation Prudential has received from GFS for its LTD benefits policy (int. no 17); the total number of GFS employees who have applied for LTD benefits (int. no. 18); the total number of GFS employees who have received LTD benefits from Prudential, whose benefits have been denied or terminated (int. no. 19); the total number of GFS employees who have received LTD benefits from Prudential under its "any occupation" definition of disability and the average period during which such LTD benefits were paid (int. no. 20).

[6] Mullins now insists that Prudential's claim that these interrogatories are unduly burdensome or irrelevant to the merits of his own LTD benefits claim is wholly without merit. He insists that Prudential's claims administration of the GFS Plan "goes to the heart of Prudential's fiduciary obligations to plan participants and the question of whether its claims practices are unduly influenced by its own financial interest." As for the burden of responding to these interrogatories, Mullins points out that insurers such as Prudential are ordinarily required by law to maintain accurate records concerning claims made and any payments made on such claims. Accordingly, Mullins insists that Prudential will be put to no undue effort to produce information that is directly relevant to the question of its inherent conflict of interest and the possible impact of that conflict on its claims history.

Prudential counters that Mullins' own "subjective relevancy yardstick" is hardly the appropriate measure for discovery even after *Glenn.* According to the company, the simple number of

GFS claimants who sought LTD benefits and the benefits decisions regarding each of those separate individuals does not bear on the question of alleged bias, and just as importantly, the question of whether Mullins actually is disabled within the meaning of the plan. Further, Prudential maintains that the difficulties in marshaling this type of broad ranging information and producing it in a fashion convenient to Mullins far outweighs any minimal potential value that one could conceptualize, given that any inference based on such aggregate data would be so speculative, and far removed from the specific circumstances of Mullins' own claim, as to be virtually non-existent.

The Court is aware of no post- *Glenn* decision of any district court in the Sixth Circuit which has taken discovery to such lengths as to include the production of statistical data across the entire range of LTD benefits claimants under a particular plan. Certainly, statistical information of itself is not in any sense out of bounds. In fact, in *Pemberton,* 2009 WL 89696 at *2, the district court indeed did permit an ERISA plaintiff to obtain statistical information concerning the number and status of claims considered by the particular reviewers who also handle the plaintiff's unsuccessful LTD benefits claim. *Pemberton* even permitted the plaintiff involved to obtain look back discovery about the number of claims filed and sent to reviewers, and the number of claim denials which resulted over a period of ten years prior to the denial of the plaintiff's claim. What the Court did not do in *Pemberton,* however, was to reach the question of whether it would permit similar discovery with respect to statistics involving an undetermined number of other claimants under the same LTD benefits plan.

This notion that an ERISA plaintiff is entitled to reach out to obtain discovery on any number of LTD benefit claimants who have applied, successfully or otherwise, under the same employee benefits plan is unexplored legal territory to the Court's knowledge, at least in the context of ERISA. Neither party has cited any case law that has directly addressed this question. The Court is aware of none in this circuit. Several aspects of such requests, however, are troubling to the Court.

***519** For example, in larger employee benefit plans such a request might involve literally hundreds of claimants and require substantial effort on the part of plan administrators to marshal, organize and convey the necessary information. Additionally, this information is not necessarily relevant until one looks behind the raw data generated to determine the cause for the resulting class-wide claims history. For example, if ten GFS employees applied for LTD benefits in 2005, and none were approved, this statistical information would be insufficient of itself to support an inference that Prudential arbitrarily and capriciously denied the LTD benefit claims of all ten, or any of the ten for that matter. Without further discovery to go behind the raw data, any possible of inferences might be, or might not be, supported by the data.

The same type of problem plagues Mullins' request for information on the profitability of the GFS Employee Benefit Plan for Prudential. Profitability, in and of itself, is not on its face an indication of bias so that whether Prudential hypothetically made $1 million or $5 million in gross revenue from providing LTD coverage would not resolve the issue of whether bias played a role in the resolution of Mullins' own claim. The Court is not unaware of the basic logic that every dollar in benefits paid reduces proportionately the income from premium payments made to Prudential by GFS employees. The disclosure of such raw data on gross income and profitability, however, simply does not resolve what is the central question as far as Mullins' own lawsuit is concerned-whether Prudential's drive for profitability, the *raison d'etre* for every corporation, affected the outcome of his LTD benefits claim.

At most, Mullins is left with the argument that to the extent his own claim was denied, Prudential avoided a reduction in its profitability through the

payment of LTD benefits to him during that portion of his remaining work life in which he continued to satisfy the definition for disability found in the plan. This proposition is not illogical, but Mullins goes far beyond the information necessary to address his own individual claim of bias arising from Prudential's inherent conflict of interest. Accordingly, for all of the above reasons, the Court must agree with Prudential as to interrogatories 15 through 20 and denies the motion to compel in that regard.

The Court also agrees with Prudential concerning Mullins' motion to compel a response to interrogatory no. 21. This interrogatory seeks to determine the reserves and savings obtained by Prudential as a result of its decision to deny ongoing LTD benefits to him. In other words, Mullins asks the more specific question, essentially, how much money would you have lost if you were required to pay the disability benefits for the remainder of my work life? As Prudential points out, the amount of Mullins' monthly LTD benefit payment was previously established so that all Mullins need do is to multiply the monthly amount he received in LTD benefits by the number of months in his remaining work life in order to calculate the potential payout of benefits. More importantly, Prudential's response indicates on its face that no separate amount of reserves is maintained by Prudential. In view of the absence of a reserve amount, the Court can hardly compel Prudential to disclose a reserve that, according to its response, does not exist. The Court therefore will deny Mullins' motion to compel as to interrogatory no. 21.

The final interrogatory to be considered is interrogatory no. 23, in which Mullins requests that Prudential describe in detail its administrative processes and safeguards designed to ensure and verify that benefit claim determinations are made in accordance with governing plan documents, and that plan provisions have been applied consistently with respect to similarly situated claimants (DN 46, p. 17). Prudential in its response stated that its "administrative processes include but are not limited to training of claims professionals and quality review procedures." *Id.* Further, it responded that its administrative safeguards and processes "are evident from the administrative record already produced in this matter which demonstrates that personnel involved in analyzing initial claims and any subsequent administrative appeals examine the complete body of evidence in the administrative record are required to communicate the reasons for claim determinations***520** as to claimants including reference to governing plan documents where appropriate." *Id.* at 18. Mullins now maintains that Prudential's response is insufficiently specific in view of the regulatory requirement established by 29 C.F.R. 2560.503-1(b)(5). Prudential argues in its response that it has appropriately answered this interrogatory. Its response along with various documents previously provided, according to Prudential, fully sets forth the affirmative steps the company has taken to insulate decisions that concern benefit claims from potentially conflicting financial concerns.

[7] The Court must disagree with Prudential on this point. A mere reference to the existence of the "training of claims professionals" and to "quality review procedures" does not adequately disclose the substance of either the training or the review procedures. Instead, at most, the response merely asserts their existence without providing meaningful detail thereof. Mullins is entitled to know specifically what training such claims professionals received relevant to the subject matter of the interrogatory and what quality review procedures are in place at Prudential and were used to ensure the fair and proper administration of his own claim. For these reasons, Mullins' motion to compel is **GRANTED** as to interrogatory 23.

Requests for Production.

The final matters to be addressed with respect to Mullins' motion to compel are his requests for production of documents. In total, Mullins served 26 document requests upon Prudential. He now

challenges the adequacy of Prudential's response with respect to 15 of these document requests, which are discussed below. Because the subject matter of many of these document requests overlaps the interrogatories served by Mullins on Prudential, the Court need not analyze the document requests in the same level of detail as it did the disputed interrogatories.

The first request for production is Mullins' request that Prudential produce all documents relied on or referred to by it in each of its answers to his first set of interrogatories. (DN 46, p. 20). Prudential in its response merely advised Mullins that it had already produced to him the administrative record. Such response is inadequate to the extent that Prudential in its interrogatory responses referred to any documents outside the administrative record. For example, the training and quality review procedures referred to by Prudential in response to interrogatory no. 23, to the extent that Prudential has not previously provided any such training materials or quality review procedures to Mullins, it must do so to the extent that such training materials or quality review procedures were relied on by Prudential in the administration of Mullins' own claim. The Court further agrees with Mullins that to the extent that Prudential has not previously provided to him all relevant documents as that term is defined in 29 C.F.R. 2560.503-1(m)(a)(3), Prudential is required to do so now.

It appears to the Court that document request nos. 2, 3 and 4 may now be moot. Document request no. 2 sought from Prudential all contracts between it and any third parties referenced in the interrogatories of the Plaintiff. Prudential has produced its contracts with MES, MLS and vocational expert Howard. Prudential advises there are no other contracts with third-parties relevant to Mullins' case. The same response is made to document request no. 3 seeking all contracts between Prudential and any healthcare professionals referenced in interrogatory no. 9. Prudential has provided the contracts with MES, MLS and Howard. Accordingly, the Court concludes that no further dispute exists as to these two document requests, a conclusion that appears to be supported by the fact that Mullins makes no mention of any of his document requests in his reply to Prudential's response to his motion to compel (Doc. No. 66). Document request no. 4, which seeks Prudential's attorney's fees contract and legal cost, has been determined to be premature at this point of the litigation. Prudential has advised that it will produce these documents in post-judgment discovery if and when they become relevant. This response presently is sufficient in the Court's view.

[8] Document request no. 5 seeks the employment files of each person employed by ***521** Prudential who was involved in the decision to deny further LTD benefits to Mullins. This document request clearly falls outside the scope of the post- *Glenn* discovery available under the existing case law in this circuit. All of the district court decisions discussed above which touch upon discovery following *Glenn* uniformly hold that the personnel files, performance reviews and pay records of such employees are not discoverable. *See, McQueen,* 595 F.Supp.2d at 756 ("[T]he court will not require the defendant to respond to requests involving performance reviews and personnel files of reviewers who are its employees. The court finds that those requests are unduly burdensome and their intrusiveness outweighs any likely benefit."); *see Hays,* 623 F.Supp.2d at 845 ("The court will not permit discovery regarding individual employees of Provident, including pay records and personnel files"), *see also Bird,* 2009 WL 3839478 at *3. Accordingly, the Court denies Mullins' motion to compel as to request for production no. 5.

[9] Document request no. 6 also appears to the Court to have been resolved. Request no. 6 seeks to obtain documents relating to Prudential's written criteria or standards for employee compensation, evaluation, performance, bonus and awards. (DN 46, p. 23). Prudential advises that it has provided Mullins with the requested documents in its supple-

mental response. To the extent that Mullins apparently seeks to obtain intra-company communications relating to the compensation or performance reviews of individual employees, however, his document request goes beyond the parameters of allowable discovery as established by the above-cited case law.

The same is true of Mullins' document request no. 7, to the extent he seeks all performance evaluations, reviews or evaluations for each Prudential employee involved in the determination of Mullins' LTD benefits claim. The same case law cited immediately above precludes discovery of such documents, as do other cases discussed earlier in this order. *See, Thornton,* 2010 WL 411119 at *3 (personnel files, performance reviews and disciplinary actions involving reviewers are not discoverable).

Document request no. 8 relates to those documents involving training in the processing and administration of claims and appeals provided to each Prudential employee who was involved in the decision to deny further LTD benefits to Mullins. Prudential advises in its response to Mullins' motion to compel that it has supplied "all documents related to internal training/policies for its employees." Mullins does not dispute this assertion in his reply (DN 66), which focuses solely upon various disputed interrogatories. The Court therefore concludes that this matter also is resolved.

The next document request, no. 9, relates to any external training on claims processing and administration received by Prudential employees who were involved in the denial of Mullins' LTD benefits claim. Mullins cites as an example of such training the recent October 2009 conference held by the American Conference Institute on ERISA Litigation during which such topics as containing claims costs and "using the claims process to set up, control and strengthen the defense" were presented. He also points to the Defense Research Institute (DRI) and its annual seminar on life, health, disability and ERISA claims scheduled for April of this year, during which Prudential employee Leonard Guist, who manages litigation involving disputes over group disability insurance benefits, is scheduled to speak on unique strategies for reoccurring issues in the ERISA claims process. (DN 46, p. 26). Mullins insists that production of any training materials from such external seminars is relevant and discoverable to establish the potential bias of Prudential.

[10] The Court agrees that the title of certain of the subject matter presented at the DRI and the ACI would on its face appear to have a defense oriented bent. The nature of such presentations is hardly startling, however, given that they are sponsored by defense oriented organizations. More importantly, production of such materials would not appear to the Court to necessarily bear directly on any potential bias of those employees who were directly involved in the administration of Mullins' own claim. First, an employee's voluntary attendance at such a ***522** seminar would not tend to establish his or her bias. In fact, mere production of the seminar materials would not even establish whether the affected employee actually attended all sections of the seminar, including those with the type of defense-oriented titled cites in Mullins' motion to compel. Further, even if such employees did attend all sections of the seminar, that does not mean that their handling of Mullins' claim deviated from Prudential's internal policies and procedures. In other words, mere attendance at best raises a possible, albeit weak, inference of the attending employee's mind set, an inference several steps removed from any discernable impact on Mullins' claim for LTD benefits. The Court considers the potential relevance of such documents to be far exceeded by the burden placed on Prudential in obtaining them from each individual employee involved in the claims review process. Accordingly, the motion to compel is **DENIED** in this respect.

Documents request no. 10 for the curriculum vitae of each person referred to by Prudential in its answers to interrogatories is now moot. Prudential had provided the CVs for Drs. Fuchs and Ran-

gaswamy, as well as that of Sue Howard and Terry Trout. Because Mullins now has these documents, nothing remains to be resolved by the Court.

[11] As for document request no. 11, the Court considers it to seek documents far beyond the scope of discovery, even that permitted by *Glenn.* In this interrogatory, Mullins requests all documents that relate to any legal or administrative action filed by any person insured or covered under group insurance contract no. G-44096-MI. In other words, Mullins seeks virtually every administrative appeal and ERISA suit filed by any covered claimant under the Prudential group disability insurance plan obtained by GFS. Such documents, in the view of the Court, are not relevant in any meaningful sense, other than to clearly establish the dissatisfaction of other claimants who have failed to qualify for LTD benefits themselves. The same reasoning that applies to interrogatory request nos. 15-20, now applies with equal force to document request no. 11. Additionally, as Prudential points out, many of the requested documents would unavoidably contain medical and health information of a highly confidential nature that could not be produced without raising serious HIPAA and privacy concerns that make production of such documents far more burdensome than potentially relevant. Accordingly, for these reasons, the motion to compel is **DENIED** with respect to document request no. 11.

Document request no. 13 seeks to obtain the application, administrative and underwriting files for group insurance contract no. G-44096-MI. In response, Prudential supplied Mullins with only the group contract issued to GFS, rather than its application for such contract and the administrative and underwriting files that were generated during the successful application process. Mullins now seeks to have Prudential provide him with these documents, which he explains will help establish the pricing model created by Prudential for the GFS plan and the reserves and expected claims/loss ratio for the group policy issued. This information, according to Mullins, runs to the profitability of Prudential, and therefore its financial bias in favor of the denial of LTD benefit claims such as his own.

[12] The Court has already discussed the various considerations that make such information non-discoverable in the Court's view. No ERISA case rendered since *Glenn* in this circuit holds such information to be discoverable to establish an inherent conflict of interest resulting in a bias against payment of an otherwise meritorious LTD benefits claim. For the same reasoning that the Court relied upon in relation to the related interrogatories, the Court now concludes that this document request falls far outside the scope of discovery as it is presently defined post- *Glenn.* Accordingly, the motion to compel is **DENIED.**

[13] Document request nos. 14 and 15, likewise fail for the same reason. Request no. 14 asks for all documents that identify the reserves established for Mullins' LTD benefits claim to date and any changes in such reserves. Request no. 15 asks for all documents from Prudential that identify its gross revenues and/or its net profit generated***523** by group insurance contract no. G44096-MI. Such documents are not discoverable. The information contained in them would be relevant only to establish the profits that Prudential has obtained through its administration of the group insurance contract at issue. The Court previously has set forth its reasoning why this information is not discoverable and its view on the matter remains unchanged at this point.

The final document request, no. 4, involves the request of Mullins for the master insurance policy filed by Prudential with Michigan insurance authorities. Prudential advises in its response to the motion to compel that it has now supplemented its discovery responses to include the requested master insurance policy. Accordingly, this document request is no longer at issue. No further document requests are mentioned by Mullins in his motion to compel. His reply in support of such motion contains no discussion of any of the above-mentioned document requests. The Court therefore concludes that all of the document requests are now suffi-

ciently addressed by the contents of this order.

GFS Motion for Protective Order.

The final motion is the motion of GFS for a protective order. The motion for protective order now appears to the Court to be largely resolved. Mullins in his response to the GFS motion indicates on the final page of his response that he would be satisfied if GFS simply provided him with information concerning its past practices in seeking reimbursement of alleged overpayment of LTD benefits. In response, GFS in its own reply has included the affidavits of Joseph McFawn and Wayne VanderMolen (DN 70 Ex. A and B). McFawn is the disability and workers' compensation manager for GFS since June of 2007. VanderMolen is the supervisor of the division safety and disability for the Great Lakes division of GFS and was its disability and worker's compensation manager from June 2007, through July of 2010. Together, the affidavits of McFawn and VanderMolen advise that prior to Mullins' case, GFS had never been aware of a situation in which a participant in its employee disability benefits plan had been overpaid disability benefits. Mullins case is, according to McFawn and VanderMolen, the first time that GFS has ever sought reimbursement of an alleged disability benefits overpayment. Because this information fully addresses Mullins' remaining discovery concern involving GFS, the Court considers the entire matter to be fully resolved. Accordingly, the motion for protective order appears to the Court to be **MOOT.**

W.D.Ky.,2010.
Mullins v. Prudential Ins. Co. of America
267 F.R.D. 504

END OF DOCUMENT

Not Reported in F.Supp.2d, 2009 WL 2143827 (E.D.Mich.)
(Cite as: 2009 WL 2143827 (E.D.Mich.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
Ghazi AHMED, Plaintiff,
v.
L & W ENGINEERING COMPANY, Defendant.

Civil Action No. 08–CV–13358.
July 15, 2009.

West KeySummary**Federal Civil Procedure 170A**
1935.1

170A Federal Civil Procedure
170AXIV Pre-Trial Conference
170Ak1935 Order
170Ak1935.1 k. In General. Most Cited Cases

A plaintiff had good cause to file an amended witness list to add a counselor and a psychiatrist who began treating the plaintiff after the witness list deadline, and therefore it was appropriate to allow the plaintiff leave to amend. There was no evidence of bad faith by the plaintiff in beginning treatment with a new counselor and new psychiatrist. The new witnesses were unknown prior to the witness deadline, as they were not treating the plaintiff at the time of the deadline. Prejudice to the defendant from adding the witnesses would be minimal, as the defendant's medical health experts had not yet examined the plaintiff, and an independent medical examination had yet to be conducted. Fed.Rules Civ.Proc.Rule 16(b)(4), 28 U.S.C.A.

Ralph J. Sirlin, Reosti, James, Pleasant Ridge, MI, for Plaintiff.

Kathleen M. Gatti, Linda G. Burwell, Nemeth Burwell, Detroit, MI, for Defendant.

OPINION AND ORDER DENYING PLAINTIFF'S MOTION TO COMPEL (DOCKET NO. 20), GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO COMPEL (DOCKET NO. 22) AND DENYING DEFENDANT'S MOTION TO STRIKE (DOCKET NO. 31)

MONA K. MAJZOUB, United States Magistrate Judge.

***1** This matter comes before the Court on three motions. The first motion is Plaintiff's Motion to Compel Defendant to Answer Plaintiff's Interrogatory No. 1 Of Plaintiff's Second Set Of Discovery ("Plaintiff's Motion to Compel") filed on April 22, 2009. (Docket no. 20). Defendant filed a Response in Opposition on May 8, 2009. (Docket no. 29). The second motion is Defendant's Motion to Compel Plaintiff's Signed Answers To Defendant's Second Interrogatories And Second Request For Production Of Documents And To Compel Plaintiff's Answers To Defendant's Third Interrogatories, Third Request For Production Of Documents And Fourth Request For Production Of Documents ("Defendant's Motion To Compel") filed on April 27, 2009. (Docket no. 22). The Court struck Plaintiff's untimely Response filed on June 9, 2009. (Docket no. 25, 41, 56). The Court also struck Defendant's Supplemental Brief In Support which was filed without leave on May 13, 2009. (Docket no. 30, 55). The third motion is Defendant's Motion To Strike Plaintiff's First Amended Witness List ("Defendant's Motion To Strike") filed on May 15, 2009. (Docket no. 31). Plaintiff filed a Response To Defendant's Motion To Strike on June 2, 2009. (Docket no. 40). The parties filed a Joint Statement Of Resolved And Unresolved Issues as to each Motion on June 16, 2009. (Docket nos. 44, 45, 46). The matters have been referred to the undersigned for decision pursuant to 28 U.S.C. § 636(b)(1)(A). (Docket nos. 21, 24, 35). The parties' counsel appeared for hearing on these matters on June 24, 2009. The matters are now ready for ruling.

I. Plaintiff's Motion To Compel (Docket no. 20)

Plaintiff served a Second Set of Interrogatories and Requests for Production of Documents on March 19, 2009. Defendant served responses on April 20, 2009. Plaintiff seeks to compel Defendant's complete response to Interrogatory No. 1 [FN1] which states, "Produce the following material pertaining to Plaintiff Ghazi Ahmed and Frances Mathis: a) Sort logs from customers; (b) Daily audit reports; (c) Dock audit reports; (d) Production sheets for running a machine press; and (e) Expense reports." Defendant responded that it "objects to Request No. 1 on the basis that it is vague, overbroad, unduly burdensome, irrelevant, not reasonably calculated to lead to the discovery of admissible evidence and unlimited in time and scope."

> FN1. At the hearing the parties announced that prior to the hearing they had resolved "15(g)" and Plaintiff had received the "personnel file." This issue does not appear in Plaintiff's Motion to Compel and was never before this Court.

Plaintiff's one sentence brief in support merely references "FRCP 2.313." Plaintiff provided no further legal authority or explanation of the relevance of this material prior to making arguments at the hearing. Plaintiff has mischaracterized this discovery request in his motion as an "interrogatory," yet it solely asks Defendant to "produce" documents. Defendant explained in its brief that Ms. Mathis is a female co-worker who Plaintiff claims should have been laid off instead of him. Defendant points out that Ms. Mathis was laid off in a subsequent round of lay-offs occurring over a year later.

***2** In support of its arguments that this Request/Interrogatory is unduly burdensome, overbroad and irrelevant, Defendant states that the request is not limited in scope of time, Plaintiff worked for Defendant for 10 years and Ms. Mathis was employed for 5 years, some of the documents no longer exist due to a document retention policy and to the extent Defendant kept a portion of these documents, they are mixed in with thousands of other documents and could not be segregated without going through each and every document. To the extent Plaintiff requests reports related to running a machine press, Defendant argues that he and Ms. Mathis were Quality Technicians, not Machine Operators. Plaintiff argues that they ran machine presses on occasion. Finally, Defendant argues that sort logs, daily audit reports and dock audit reports are irrelevant and Defendant provided with his response brief the deposition testimony of two supervisors who performed Plaintiff's evaluation and did not refer to any of these documents when they performed Plaintiff's and Mathis's evaluations. At the hearing Plaintiff argued that the material is relevant because the supervisor had stated in his deposition that Ms. Mathis kept better paperwork. Plaintiff has offered to limit his Interrogatory to the two year time period of 2006 and 2007 when Plaintiff and Ms. Mathis both worked for Defendant.

In light of Plaintiff's argument that the material is relevant to the supervisor's testimony, Plaintiff's limitation to the two year period, and Defendant's counsel's statement that it does not retain many of these documents due to its document retention policies, the Court will order Defendant to amend its answer to Interrogatory (sic) No. 1 and produce the responsive documents for the years 2006 and 2007 or otherwise state by subpart that it does not have the documents or items within its possession, custody or control and the policy or reason it does not have such documents. Fed.R.Civ.P. 26(b)(1), 34(a)(1).

II. Defendant's Motion To Compel (Docket no. 22)

Defendant served a series of discovery requests on Plaintiff between November 20, 2008 and March 18, 2009 to which Plaintiff had not responded at the time of Defendant filing this motion on April 27, 2009 [FN2]. Although Plaintiff alleged that it produced answers to Defendants' discovery requests on April 29, 2009, after Defendant filed its Motion to Compel, Defendant in the Joint Statement argued that the responses and answers to the following remained deficient:

FN2. Defendant served its Second Sets of Interrogatories and Requests for Production on November 20, 2008. Plaintiff's responses, answers and objections were due on December 26, 2008. Fed.R.Civ.P. 33(b)(2), 34(b)(2). Plaintiff served unsigned answers to the interrogatories and response to the request for production on January 12, 2009. Plaintiff served untimely signed answers to the interrogatories until April 29, 2009. Fed.R.Civ.P. 33(b)(5).

Defendant served its Third Set of Interrogatories and Third Set of Requests for Production on March 9, 2009. Plaintiff's answers, responses and objections were due April 13, 2009. Plaintiff served untimely answers and responses on April 29, 2009.

Defendant served its Fourth Request for Production on March 18, 2009. Plaintiff's responses were due on April 20, 2009. Plaintiff served untimely responses on April 29, 2009.

A. Whether Plaintiff should be ordered to supply a full and complete answer to Defendant's Third Set of Interrogatories, Interrogatory No. 1;

B. Whether Plaintiff should be ordered to produce all documents requested by Defendant's Third Request For Production, Request No. 3;

C. Whether Plaintiff should be ordered to produce all documents requested in Defendant's Fourth Request for Production of Documents; and

D. Whether Defendant should be awarded costs and attorneys' fees and/or other sanctions because Plaintiff is in violation of the Court's January 1, 2009 Order.

***3** The issue of unsigned interrogatories was resolved by the parties prior to the hearing.

A. Defendant's Third Set of Interrogatories, Interrogatory No. 1

Defendant's Interrogatory No. 1 from its Third Set of Interrogatories asks that "[W]ith regard to each lay witness listed on plaintiff's Witness List, state the expected substance of this person's testimony and/or the reason why Plaintiff would call this person to offer testimony at the trial." (Docket no. 22–9). Defendant argues that Plaintiff's April 29, 2009 answer provides information on only nine of the 38 individuals listed on Plaintiff's witness list and no information on two individuals named in Plaintiff's First Supplemental Witness List filed on April 29, 2009. (Docket no. 45). At the hearing Plaintiff agreed to supplement his answer and state that Plaintiff does not intend to call lay witnesses other than these nine (and presumably the two new witnesses) at trial. The Court will order Plaintiff to supplement his answer as agreed to at the hearing for the listed witnesses.

B. Third Request for Production, Request No. 3

Rule 34, Fed.R.Civ.P., provides that a party may serve on any other party a request "to produce and permit the requesting party ....to inspect, copy, test or sample the following items in the responding party's possession, custody or control." "The word 'control' is to be broadly construed. A party controls documents that it has the right, authority, or ability to obtain upon demand." *Scott v. AREX, Inc.,* 124 F.R.D. 39, 41 (D.Conn.1989). Furthermore, "For each item or category, the response must either state that inspection and related activities will be permitted as requests or state an objection to the request, including the reasons." Fed.R.Civ.P. 34(b)(2)(B). "An objection to a party of a request must specify the part and permit inspection of the rest." Fed.R.Civ.P. 34(b)(2)(C).

Plaintiff's response of "not applicable" is not a proper answer or response to any of the discovery requests. Fed.R.Civ.P. 37(a) (4) provides that "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer or respond ." Prior to the hearing the parties

resolved the issue with respect to Defendant's Third Request for Production, Request No. 3 and agreed that Plaintiff will serve amended response stating that he does not have the documents rather than stating "not applicable." The Court will order Plaintiff to serve an amended response to Defendant's Third Request for Production to indicate in all responses whether he has produced all responsive documents within his possession, custody or control. Fed.R.Civ.P. 34(a)(1).

C. Defendant's Fourth Request for Production of Documents

Defendant's Fourth Request for Production of Documents asks Plaintiff to produce "all exhibits which will be introduced at trial." (Docket no. 22–10). The parties resolved this issue prior to the hearing and Plaintiff agreed to produce a collection of exhibits which will be introduced at trial. The Court will so order.

D. Defendant's Request for Attorney Fees and Costs

***4** Defendant moves the Court for attorneys fees and costs incurred in bringing this Motion under 37(a)(5) and because Plaintiff violated this Court's prior discovery order in responding to the discovery requests which are the subject of Defendant's current motion. The Court need not decide whether Plaintiff is in violation of the earlier order because Rule 37(a)(5) provides that "[i]f the motion is granted- or if the disclosure or requested discovery is provided after the motion was filedthe court must, after giving an opportunity to be heard, require the party ... whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed.R.Civ.P. 37(a)(5)(A). In this instance, Plaintiff did not serve its untimely answers and responses until after Defendant filed its motion. The Court will order Plaintiff to pay Defendant's reasonable attorney's fees expenses incurred in connection with Defendant's Motion to Compel. (Docket no. 22).

III. Defendant's Motion To Strike Plaintiff's First Amended Witness List (Docket no. 31)

Defendant moves for an order striking Plaintiff's First Amended Witness List filed on April 29, 2009. (Docket no. 26, 31). Pursuant to the Court's Scheduling Order, witness lists for both lay and expert witnesses were due on February 20, 2009. (Docket no. 8). The parties filed their witness lists on February 20, 2009. (Docket no. 17). On April 29, 2009, eight days after the discovery deadline, Plaintiff filed a First Amended Witness List which added Sanaa Haider, therapist at ACCESS, and Abdullahi Mohammed, M.D., psychiatrist, of ACCESS. (Docket no. 26). Neither of these witnesses appear on Plaintiff's original Witness List. At the hearing, Plaintiff's counsel stated that he would provide the treatment records for these providers to Defendant. At the hearing, the Court ordered Plaintiff to produce the records to the Court for in camera review. Plaintiff provided the records to the Court and served them on opposing counsel on June 29, 2009.

Plaintiff filed the First Amended Witness List after the deadline and without moving to amend the list. Rule 16 provides that "[a] schedule may be modified only for good cause and with the judge's consent." Fed.R.Civ.P. 16(b)(4). Good cause is met by determining the moving parties' diligence in attempting to meet the scheduling order and whether the opposing party will suffer prejudice by amending the scheduling order. *See Leary v. Deaescher,* 349 F.3d 888, 906 (6th Cir.2003).

The parties agree that these new witnesses began treating Plaintiff after the witness list deadline. Despite Defendant's speculation that Plaintiff added these additional treatment providers in an attempt to circumvent testimony of two previously named medical providers, Plaintiff's counsel stated at the hearing that counselor Haider took over Plaintiff's care from a prior counselor who was listed on the witness list and Plaintiff was referred to Dr. Mohammed through his therapy at ACCESS. (Docket no. 17).

***5** Defendant also argues that Plaintiff received treatment from Dr. Mohammed in March 2009, before the discovery cut-off date and Plaintiff did not supplement Interrogatory No. 10 in Defendant's First Set of Interrogatories which asked Plaintiff to identify his treatment providers. Plaintiff's counsel argues that as soon as it became known to counsel that Plaintiff was treating with these individuals, Plaintiff filed the First Amended Witness List. Plaintiff has not yet been examined by Defendant's medical health experts and the parties agreed to conduct Plaintiff's independent medical examinations ("IME") after the close of discovery if necessary, although this is due to Plaintiff's failure to appear for two scheduled IMEs.

The Court finds that any prejudice to Defendant in adding the two new witnesses is minimal where trial is set on the trailing trial docket for September 1, 2009 and Plaintiff has not yet undergone the IMEs. Furthermore, there is no evidence of bad faith on Plaintiff's part in treating with a new counselor and psychiatrist at this time and under these circumstances and Plaintiff was diligent in adding the new witnesses, who were unknown prior to the witness list deadline. The Court will deny Defendant's Motion to Strike and allow the filing of Plaintiff's Amended Witness List. (Docket no. 8).

IT IS THEREFORE ORDERED that Plaintiff's Motion to Compel Defendant To Answer Plaintiff's Interrogatory No. 1 Of Plaintiff's Second Set Of Discovery (docket no. 20) is **GRANTED in part** and Defendant will serve on or before July 27, 2009 an amended Response with responsive documents to Plaintiff's Interrogatory No. 1 as set forth above.

IT IS FURTHER ORDERED that Defendant's Motion To Compel Plaintiff's Signed Answers To Defendant's Second Interrogatories And Second Request For Production Of Documents And To Compel Plaintiff's Answers To Defendant's Third Interrogatories, Third Request For Production Of Documents And Fourth Request For Production Of Documents (docket no. 22) is **GRANTED** as set forth herein and Plaintiff will serve on or before July 27, 2009 amended responses and answers as agreed to by the parties and as set forth herein.

IT IS FURTHER ORDERED that Defendant's request for attorneys fees and costs in its Motion to Compel (docket no. 22) is **GRANTED** and Defendant will file on or before July 21, 2009 a Bill of Costs for the reasonable expenses including attorney's fees associated with Defendant's Motion to Compel (docket no. 22) and an affidavit in compliance with E.D.Mich. LR 54.1.2(b) setting forth in detail the number of hours spent on Defendant's Motion to Compel (docket no. 22) and including but not limited to the other information required under E.D.Mich. LR 54.1.2(b). Plaintiff may file a Response to Defendant's Bill of Costs and affidavit on or before July 31, 2009.

IT IS FURTHER ORDERED that Defendant's Motion To Strike Plaintiff's First Amended Witness List (docket no. 31) is **DENIED.**

NOTICE TO THE PARTIES

***6** Pursuant to Fed.R.Civ.P. 72(a), the parties have a period of ten days from the date of this Order within which to file any written appeal to the District Judge as may be permissible under 28 U.S.C. § 636(b)(1).

E.D.Mich.,2009.
Ahmed v. L & W Engineering Co.
Not Reported in F.Supp.2d, 2009 WL 2143827 (E.D.Mich.)

END OF DOCUMENT

195 Fed.Appx. 473, 2006 WL 2567521 (C.A.6 (Ky.)), 2006 Fed.App. 0661N
(Not Selected for publication in the Federal Reporter)
(Cite as: 195 Fed.Appx. 473, 2006 WL 2567521 (C.A.6 (Ky.)))

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Sixth Circuit Rule 28. (Find CTA6 Rule 28)

United States Court of Appeals,
Sixth Circuit.
STAMTEC, INC., Plaintiff-Appellee,
v.
John ANSON; Pam Anson; Anson Industries, LLC, A KY Limited Liability Company; Anson Machine and Manufacturing Company, LLC, KY Limited Liability Company; Frankfort Properties Limited Liability Company, KY Limited Liability Company; Bourbon Country Products, Inc., KY Corporation, Defendants-Appellants.

No. 05-5300.
Sept. 1, 2006.

Background: Judgment creditor filed action to hold judgment debtor, its owner, and related entities liable for judgment entered in breach of contract action. The United States District Court for the Western District of Kentucky granted creditor's motion for sanction of default judgment for failure to comply with discovery, and entered judgment joint and severally against defendants. Defendants appealed.

Holdings: The Court of Appeals, Clay, Circuit Judge, held that:
(1) court failed to adequately articulate its resolution of factual, legal, and discretionary issues as they related to judgment debtor and related entities, but
(2) default judgment was appropriate as entered against debtor's owner.

Affirmed in part, and vacated in part.

West Headnotes

[1] Federal Civil Procedure 170A 1636.1

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)5 Compliance; Failure to Comply
170Ak1636 Failure to Comply; Sanctions
170Ak1636.1 k. In General. Most Cited Cases

District court failed to adequately articulate its resolution of factual, legal, and discretionary issues as they related to judgment debtor and related entities, to enable effective review of order, which entered sanction of default judgment for failure to comply with discovery against judgment debtor, its owner, and related entities, given that judgment creditor's unanswered request for production of documents was propounded only upon owner.

[2] Federal Civil Procedure 170A 1278

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1278 k. Failure to Respond; Sanctions. Most Cited Cases

Evidence, including hearing transcript containing numerous references to fact that judgment debtor's owner was the driving force behind the delay and lack of cooperation, established that there was wilfulness, bad faith, and fault on the part of owner for the discovery abuses, for purposes of determining whether sanction of default judgment for failure to comply with discovery was warranted, in action to hold judgment debtor, its owner, and related entities liable for judgment. Fed.Rules Civ.Proc.Rule 37, 28 U.S.C.A.

[3] Federal Civil Procedure 170A 1636.1

195 Fed.Appx. 473, 2006 WL 2567521 (C.A.6 (Ky.)), 2006 Fed.App. 0661N
(Not Selected for publication in the Federal Reporter)
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170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)5 Compliance; Failure to Comply
170Ak1636 Failure to Comply; Sanctions
170Ak1636.1 k. In General. Most Cited Cases

Judgment creditor was prejudiced by failure of judgment debtor's owner to cooperate in discovery, for purposes of determining whether sanction of default judgment for failure to comply with discovery was warranted, in action to hold judgment debtor, its owner, and related entities liable for judgment; as a result of owner's behavior in failing to produce requested arbitration documents, and failing to reveal that counsel had never even sought the documents, creditor was needlessly forced to move to formally intervene in arbitration action and to participate in no fewer than four telephone conferences regarding issue, during which owner's counsel misrepresented status of documents. Fed.Rules Civ.Proc.Rule 37, 28 U.S.C.A.

[4] Federal Civil Procedure 170A 1278

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1278 k. Failure to Respond; Sanctions. Most Cited Cases

Judgment debtor's owner was on notice about the consequences of his behavior, with regard to unanswered discovery requests, as he was repeatedly warned that failure to cooperate could lead to entry of default judgment, for purposes of determining whether sanction of default judgment for failure to comply with discovery was warranted, in action to hold judgment debtor, its owner, and related entities liable for judgment. Fed.Rules Civ.Proc.Rule 37, 28 U.S.C.A.

[5] Federal Civil Procedure 170A 1278

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1278 k. Failure to Respond; Sanctions. Most Cited Cases

For purposes of determining whether sanction of default judgment for failure to comply with discovery was warranted, in action to hold judgment debtor, its owner, and related entities liable for judgment, district court imposed less drastic sanctions before entering default judgment, including awarding judgment creditor's counsel compensation in the amount of $3,260 for the time expended in attempts to obtain compliance with magistrate judge's discovery order, and warning owner that it would not tolerate continued attempts to "see how much they could get away with." Fed.Rules Civ.Proc.Rule 37, 28 U.S.C.A.

***474** On Appeal from the United States District Court for the Western District of Kentucky.

BEFORE: BATCHELDER, CLAY, and McKEAGUE, Circuit Judges.

CLAY, Circuit Judge.

****1** Defendants John Anson; Pam Anson; Anson Industries, LLC; Anson Machine and Manufacturing Co., LLC; Frankfort Properties, LLC; and Bourbon Country Products, Inc. ("Anson Defendants"), appeal the district court's grant of Plaintiff Stamtec, Inc.'s ("Stamtec") Motion For Sanction of Default Judgment, and entry of judgment joint and severally, in the amount of $264,880 plus accrued interest against them.[FN1] For the reasons set forth below, we **AFFIRM** the judgment of the district court in part and **VACATE** it in part.

FN1. John Anson is sole owner of Anson Stamping and Anson Machine and Mfg.; John and Pam Anson jointly own Frankfort Properties; Anson Industries is owned by Anson Machine and Mfg.; John Anson is President of Bourbon Country Products,

195 Fed.Appx. 473, 2006 WL 2567521 (C.A.6 (Ky.)), 2006 Fed.App. 0661N
(Not Selected for publication in the Federal Reporter)
(Cite as: 195 Fed.Appx. 473, 2006 WL 2567521 (C.A.6 (Ky.)))

which lists no assets. All of these are limited liability companies incorporated under the laws of Kentucky.

BACKGROUND

This appeal arose as a result of a separate action between Plaintiff Stamtec and Anson Stamping Company, Inc. (not a party to this action) that originally commenced in the United States District Court for the Middle District of Tennessee. According to the complaint, in March 1996, Anson Stamping entered into an agreement with Stamtec to purchase two mechanical presses from Stamtec, for a total price of $3,800,000.00. Anson Stamping never paid Stamtec for these presses, and Stamtec filed suit, eventually winning a $600,000 judgment against Anson Stamping, that was reduced to $264,880.00 by this Court on appeal. *See, Stamtec, Inc. v. Anson Stamping Co., LLC,* 346 F.3d 651, 654 (6th Cir.2003).

On July 8, 2002, Plaintiff filed the present action, seeking to hold John Anson, Pam Anson, Bourbon County, Frankfort Properties, Anson Industries and Anson Machines jointly and severally liable for the judgment that was entered in Plaintiff's favor.[FN2]

FN2. The United States District Court for the Middle District of Tennessee, finding that venue was improper, *sua sponte* transferred the case to the Western District of Kentucky on March 11, 2003.

***475** On November 26, 2002, Plaintiff propounded interrogatories and document requests to Defendants. Defendants objected to all the interrogatories without answering any of the specific questions asked. On January 7, 2003, Plaintiff filed a Motion to Compel Discovery and For Award of Attorneys Fees, seeking to compel Defendants to respond to the interrogatories and produce the requested documents. Plaintiff then filed a Renewed Motion to Compel Discovery and for Award of Attorney Fees on January 29, 2003. The magistrate judge issued an order granting that motion on July 25, 2003, finding that Plaintiff was fully entitled to the discovery requested and that Defendants' failure to respond would continue to prejudice Plaintiff. Defendants were given twenty days to respond to the discovery requests.

On August 15, 2003, Defendants filed a Motion for Extension of Time to Complete Discovery Responses, requesting an additional forty-five days to comply with the request on the grounds that old counsel was going to withdraw and new counsel, Donald Darby ("Darby") was to enter an appearance. On September 3, 2005, the district court entered an order denying Defendants' Motion For Extension of Time, finding that Defendants filed the motion "[o]ne day *after* the twenty-day time limit for complying with the order expired on August 14, 2003." (J.A. at 112.) Defendants were ordered to "provide discovery responses forthwith." (J.A. at 113.) On September 30, 2003, Plaintiff filed a Motion to Impose Sanction of Default Judgment. Darby filed a response to Plaintiff's motion on October 7, 2003. On October 21, 2003, Plaintiff filed its Reply Memorandum in Further Support of Motion to Impose Sanction of Default Judgment, arguing that Defendants served supplemental answers to the first interrogatories that were improper and evasive. On November 19, 2003, the magistrate judge conducted a status conference, and scheduled a hearing before the district court judge on Plaintiff's Motion for Sanction of Default Judgment ("Motion for Default Judgment") for December 17, 2003.

****2** During the December 17, 2003 hearing, the district court indicated that there was an "abundance of proof" that would justify granting Plaintiff's Motion for Default Judgment. The district court expressed frustration over what it considered to be Defendants', and particularly John Anson's, evasive behavior and delaying tactics. "I'm looking here in December of 2003 with [sic] a party that has been played with for a year by these defendants in trying to get this information under way. And even after a court order it wasn't done."

(J.A. at 365.) The district court allowed Defendants' counsel Darby to explain Defendants' position, but kept coming back to the lack of answers to the interrogatories, even going through the interrogatories individually to make the point that they had not been answered. "These interrogatories, as I see them here, were not answered in a timely fashion. The orders of this Court were not complied with. And as we sit here today, they have not yet been fully answered." (J.A. at 361.) "Whatever happened, the Magistrate Judge ordered full compliance a long time ago, and it hasn't happened ... I have a distinct flavor here that there has been a 'let's see how much we can get away with' in this case." (J.A. at 361.)

In its final analysis, the district court was frustrated that court orders six months old had not been complied with. "This has gone on so long. We have a court order that was entered in July, and we have an extension of time that was denied. And still, we don't have this information produced-even partially in some ***476** cases." (J.A. at 398.) The district court told the parties that "the courts are very reluctant to impose sanctions of judgment for failure to comply with discovery ... But there's always the question, how much can you get away with before the line snaps and you are out of rope? I think that there is enough here for the line to snap." (J.A. at 399.) But yet, the district court still did not impose the sanction of default judgment against Defendants at that time, giving Defendants the opportunity to sort the matter out, but admonishing Darby that Defendants were getting "the last bite in the apple." (J.A. at 403.)

Following the December 17, 2003 hearing, the district court issued an order denying Plaintiff's Motion for Default Judgment without prejudice, but stating that "there was strong evidence of a pattern of delay, obfuscation, partial and incomplete answers and production, and failure to comply with the magistrate judge's orders such that the court would be justified in sanctioning the defendants." (J.A. at 215.) The district court warned that it would permit Plaintiff to refile the motion "if this effort to bring the discovery practice in this case into line with the requirements of the [F.R.C.P.] proves unavailing." (J.A. at 216.) The district court did, however, grant Plaintiff's attorney $3,260 in compensation for the hours spent in attempts to obtain compliance with the magistrate's discovery orders.

****3** In the Spring of 2004, Darby informed Plaintiff of a pending arbitration proceeding between non-parties Anson Stamping and General Electric ("GE"). Darby told Plaintiff that Anson Stamping was going to be awarded a judgment in that action that would likely be sufficient to satisfy the amounts owed Plaintiff. On May 28, 2004, Plaintiff propounded document requests, seeking production by John Anson of all documents related to the arbitration between Anson Stamping and GE. John Anson resisted producing those documents, however, so Plaintiff filed a motion to compel. John Anson then claimed that the documents were subject to a confidentiality agreement.

On July 6, 2004, Plaintiff filed a Motion to Impose Sanction of Default Judgment or, In the Alternative, for Order Compelling Production of Documents, seeking a response to the May 28, 2004 document request. John Anson responded, stating that he would not produce the documents because of the confidentiality agreement. On August 10, 2004, the magistrate judge convened a telephone conference with all the parties. During the August 10 hearing, Darby informed the court that GE had filed an action in federal court to set aside the judgment and vacate the arbitration award, and that the district court judge in that case had sealed the record. The magistrate judge verified that information and convened a second telephone conference the next day on August 11, 2004. According to the magistrate judge's order issued after the conference, Darby offered to contact counsel for GE to determine whether GE would informally agree to provide the documents to Plaintiff.[FN3] However, the magistrate judge counseled against this approach, in-

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stead recommending that all the parties to the present action tender an agreed order to the court handling the arbitration dispute, asking that court to alter the seal and allow the documents to be produced. Barring that, the magistrate judge advised Plaintiff that it could move to intervene in the arbitration action as a judgment creditor. The magistrate judge ***477** denied without prejudice, Plaintiff's motion for default judgment.

> FN3. Defense counsel Darby denies that he offered to contact GE's counsel, and instead claims that he was not aware that it was his duty to contact GE because the magistrate judge never established who was to contact GE. (J.A. at 289.)

During a subsequent telephone conference on August 27, 2004, Darby told the Court that GE would not enter into an agreed order, and thus the magistrate judge entered an order stating Plaintiff's intention to file a motion to intervene in the arbitration action to obtain the records that were the subject of the pending motion. Plaintiff filed its motion to intervene in the arbitration action on September 10, 2004. GE responded to that motion indicating that it had no objection to entering into an agreed order, that it would have agreed to such an order even without the motion to intervene, that no one had ever approached it about the production of the documents, that the confidentiality clause was invalid, and that GE had not sought to seal the records of the arbitration. Anson Stamping and Defendant Anson Machine & Mfg., in fact filed an objection to Plaintiff's motion to intervene, stating that it would violate the confidentiality clause for Plaintiff to intervene.

****4** On September 22, 2004, Plaintiff filed a Renewed Motion to Impose Sanction of Default Judgment. The magistrate judge held another telephone conference on October 6, 2004. During that conference, Darby claimed that he was not aware of the fact that he was expected to contact GE, and that there was a misunderstanding between the parties. On October 19, 2004, the magistrate judge entered an order allowing Plaintiff to file a supplemental motion for imposition of attorney's fees and costs, allowing Defendants to file any response, and accepting Plaintiff's Renewed Motion to Impose Sanction of Default Judgment as submitted to the district court. In the October 19 order, the magistrate judge detailed the recent dispute over the arbitration documents and expressed its outrage over Defendants' behavior.

The magistrate judge opined that "Darby left the Court and opposing counsel with the definite, yet incorrect, impression that he had honored his promise to contact GE and that GE had refused to submit an agreed order;" and that as a result of that misrepresentation, Plaintiff filed an unnecessary motion to intervene, making false allegations against GE. According to the magistrate judge, Darby made a "faltering apology" to the court. (J.A. at 290.) The magistrate judge expressed his frustration with Darby, stating the following:

> The written word cannot adequately convey the growing frustration of the Magistrate Judge with the manner in which this situation has unfolded. It is clear that attorney Darby has not been forthcoming with the court. Candor with the Court is a cornerstone of proper conduct before the court ... Just as certainly, his conduct has unnecessarily complicated and delayed the resolution of a discovery dispute that otherwise would have been a simple matter. The Court presently has a sufficient case load to occupy itself without casting about for more disputes to resolve, particularly needless ones. The conduct exhibited in this entire sorry affair by attorney Darby is distinctly unpraiseworthy.

(J.A. at 291.) The magistrate judge was not able to rule on Plaintiff's motion for default judgment, but instead referred the matter to the district court. On January 30, 2005, the district court entered an order granting Plaintiff's Renewed Motion to Impose Sanction of Default Judgment. Defendant's answer was stricken and declaratory judgment was entered finding Defendants jointly and

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severally liable for all debts, and entering judgment against each of the defendants for the sum of ***478** $264,880. plus 5.407% interest, along with payment of all attorneys fees and expenses related to Plaintiff's attempts to obtain the documents that were the subject of the motion. (J.A. at 40.)

Defendants filed this timely appeal on February 2, 2005.

DISCUSSION

I.

The standard of review for a district court's order granting sanctions and fees is for abuse of discretion.[FN4] *First Bank of Marietta v. Hartford Underwriters Ins. Co.,* 307 F.3d 501 (6th Cir.2002). "An abuse of discretion exists if the district court based its ruling on an erroneous view of the law or a clearly erroneous assessment of the evidence." *Id.* (citations and quotations omitted). "The question ... is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in doing so." *National Hockey League v. Metropolitan Hockey Club, Inc.,* 427 U.S. 639, 642, 96 S.Ct. 2778, 49 L.Ed.2d 747 (U.S.1976).

> FN4. We assume that the default judgment in this case was granted pursuant to F.R.C.P. 37(b), although there is no reference in the district court's opinion, Plaintiff's motion or any of the briefs before this Court to this particular rule. However, given that both parties cite to cases that deal with dismissals as sanctions pursuant to 37(b), we address the merits under the assumption that 37(b) applies here. Rule 37(b)(2) permits a court to make " 'such orders ... as are just' with regard to a party's failure to 'obey an order to provide or permit discovery, including an order made under [Rule 37(a), Motion for Order Compelling Discovery].' " *Regional Refuse Systems, Inc. v. Inland Reclamation Co.,* 842 F.2d 150, 153 (6th Cir.1988). One sanction permitted by the rule is "[a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party." Fed.R.Civ.P. 37(b)(2)(C).

II.

****5** "Dismissal of an action for failure to cooperate in discovery is a sanction of last resort that may be imposed only if the court concludes that a party's failure to cooperate in discovery is due to wilfulness, bad faith, or fault." *Patton v. Aerojet Ordnance Company,* 765 F.2d 604, 607 (6th Cir.1985) (citing *Societe Internationale v. Rogers,* 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958)). This Circuit has taken the position, however, consistent with Supreme Court precedent, that "if a party has the ability to comply with a discovery order and does not, dismissal is not an abuse of discretion." *Regional Refuse Systems,* 842 F.2d at 154. This Court has recognized that

> the most severe in the spectrum of sanctions provided by statute or rule must be available to the District Court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

Id. Similarly, in *Bank One of Cleveland, N.A. v. Abbe,* 916 F.2d 1067, 1073 (6th Cir.1990), we expanded *Regional Refuse* to include the granting of a default judgment as a sanction, stating that dismissal "or entry of default judgment" is not an abuse of discretion if a party has the ability to comply with discovery orders but fails to do so. *Id.*

The *Regional Refuse* Court articulated four factors that this Circuit considers to be relevant when reviewing dismissals ***479** [and default judgments] under Rule 37,[FN5] namely: (1) whether the party's failure to cooperate in discovery is due to wilfulness, bad faith, or fault; (2) whether the ad-

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versary was prejudiced by the dismissed party's failure to cooperate in discovery; (3) whether the dismissed party was warned that failure to cooperate could lead to dismissal; and (4) whether less dramatic sanctions were imposed or considered before dismissal was ordered. *Id.* at 155; *Stough v. Mayville Community Schools,* 138 F.3d 612, 615 (6th Cir.1998); *Freeland v. Amigo,* 103 F.3d 1271, 1277 (6th Cir.1997); *Harmon v. CSX Transport.,* 110 F.3d 364, 367 (6th Cir.1997) (finding that it was not an abuse of discretion for the district court to grant defendant's Rule 37 motion to dismiss where plaintiffs had not complied with defendant's discovery requests or court orders for over nine months).

> FN5. This Circuit has been more ready than others to reverse dismissals for disobedience to discovery orders, particularly where it appears that the party is blameless. *Regional Refuse,* 842 F.2d at 155. See *e.g. Patterson v. Grand Blanc Tp.,* 760 F.2d 686, 688 (6th Cir.1985) (finding that the sanction of dismissal was an abuse of discretion and was "extremely harsh in that it deprives a plaintiff of his day in court due to the inept actions of his counsel."); *Carter v. City of Memphis,* 636 F.2d 159, 161 (6th Cir.1980) ("Dismissal is usually inappropriate where the neglect is solely the fault of the attorney."); *Buck v. U.S. Dep't of Agric., Farmers Home Admin.,* 960 F.2d 603, 608 (6th Cir.1992).

As a preliminary matter, we would like to address a couple of issues raised by Defendants. First of all, Defendants argue that the district court erred in entering default judgment against all the Anson Defendants because Plaintiff's request for production of documents related to the GE arbitration was propounded only upon John Anson, not upon any of the other Defendants, and therefore, any default judgment should have been issued against John Anson only. In support of this argument, Defendants rely upon the language from this Court's decision in *Patton v. Aerojet Ordnance Co.,* 765 F.2d 604, 606 (6th Cir.1985), in which we stated that " 'one party to litigation will not be subjected to sanctions [for failure to cooperate in discovery] because of the failure of another to comply with discovery, absent a showing that the other party controlled the actions of the non-complying party' " (citing *DeLetelier v. Republic of Chile,* 748 F.2d 790, 795 n. 2 (2d Cir.1984)).

****6** [1] While we do not agree with Defendants' argument that default judgment was inappropriate as to all the Defendants, we do agree that the record is unclear as to why all the Anson Defendants, rather than just John Anson, should have been sanctioned. There is ample indication that John Anson himself ignored and or defied court orders and was largely uncooperative, but there is little or no mention in the district court record of the other Defendants' fault in the matter. In our supervisory role, we require that use of a "last resort" sanction like dismissal or entry of default judgment be accompanied by "some articulation" of the district court's resolution of the factual, legal and discretionary issues presented. In this case, the district court has not explained why it treated all Defendants as one for purposes of the final sanction. Nor has Plaintiff Stamtec offered any persuasive defense of the district court's expansive sanction. On this record, we can only conclude that the district court has not adequately articulated its resolution of the issues presented as they relate to the other Anson Defendants, to enable effective review.

Therefore, in the absence of clear indication from the district court as to why the default judgment is appropriate as entered against Pam Anson, Anson Industries, Anson***480** Machine, Frankfort Properties, and Bourbon Country Products, we vacate the judgment as to those defendants and remand the matter to the district court for a determination of whether the sanction of default appropriate as to them and, if so, for an articulation of the court's reasoning.

Hereinafter, we continue our discussion as to

why the judgment was appropriate as entered against John Anson only.

Defendants also argue that the default judgment was improper where the district court did not clearly articulate in its final order, the legal and factual reasons for granting Plaintiff's motion. "A dismissal of a complaint with prejudice as a sanction for failure to cooperate in discovery must be 'accompanied by some articulation on the record of the court's resolution of the factual, legal, and discretionary issues presented.' " *Id.* (quoting *Quality Prefabrication, Inc. v. Daniel J. Keating Co.,* 675 F.2d 77, 81 (3d Cir.1982)). The district court's final order referred, however, to the fact that it was granting Plaintiff's motion on the basis of the entire record of the case as well as the magistrate judge's October 19, 2004 order, which addressed the dispute over the arbitration documents. Furthermore, the district court was on record as being of the opinion that Defendants' behavior in this case, and specifically the behavior of John Anson, was sanctionable. The district court opined at length about its frustration with John Anson's behavior during the December 17, 2003 hearing, and stated in its subsequent order that it would in fact allow Plaintiff to renew its motion for sanction of default judgment if the discovery abuses continued. We therefore believe that the reasons for the district court's resolution of the factual and legal issues as they relate to John Anson, are in fact articulated in the record.

i. Fault of the Defendant

****7** [2] Applying the first of the *Regional Refuse* factors, we believe that the record from the district court adequately establishes that there was wilfulness, bad faith, and fault on the part of the primary defendant in this case, John Anson. The transcript of the December 17, 2003 hearing contains numerous references to the fact that John Anson was the driving force behind the delay and lack of cooperation. The district court questioned counsel Darby about why John Anson had failed to respond to the interrogatories, at one point, asking whether Anson had "something better to do than answer interrogatories." (J.A. at 388.) At another point, the district court commended Darby for "coming in here and taking this kind of assault on what your client and your client's representatives have done, or more particularly, not done over the past 12 months." (J.A. at 384.)

The district court also explicitly referred to what it considered to be John Anson's bad faith in refusing to answer or being evasive in answers to interrogatories, stating "had the defendant been operating in good faith, he would not have simply said, 'you don't need this information until the judgment is affirmed' ... they would have ... gone into the court and said, I would like the court to put this matter into a class of stay until this is determined...." (J.A. at 382.) The court repeatedly remarked upon the fact that this behavior predated Darby, who was the third or perhaps fourth attorney representing Defendants, and that there was a history of ignoring discovery requests and orders from the magistrate judge. In response to a suggestion that the records were simply too "massive" to readily produce, the Court challenged, "Mr. Darby, if it is so massive, where has Mr. Anson been since December of 2002? This is not something ***481** that has come up since October ... Mr. Anson has the responsibility to provide this information ... and you have said that this has been a daily effort [to produce the requested documents] ... And I would simply say that that is hard for this Court to believe to be a truthful statement." (J.A. at 364-65.)

The district court also referred to what it called "artful" answers, suggesting that John Anson had deliberately structured answers in such a manner to avoid actually lying in the interrogatories, but evading answering the questions. (J.A. at 374.) The district court judge further opined that he had "a distinct flavor here that there has been a 'let's see how much we can get away with' in this case ... by Mr. Anson and the people working with him and, arguably counsel." (J.A. at 361.)

As stated in *Regional Refuse,* "[w]hile this cir-

cuit has been more ready than others to reverse dismissals for disobedience to discovery orders, especially when it appears that the party is blameless, this is not a case in which a party has simply failed to appear and no one is clearly at fault except for the party's attorney." *Regional Refuse,* 842 F.2d at 150. The Court concludes that in this case the evidence suggests that John Anson was at fault for the discovery abuses, and therefore, the first *Regional Refuse* factor is satisfied.

ii. Prejudice

****8** [3] We also believe that the second requirement, that the adversary has been prejudiced by the dismissed party's failure to cooperate in discovery, is also clearly satisfied in the present case. Plaintiff's counsel continually sought Defendants' compliance with discovery-related court orders. There are letters all throughout the record, where Plaintiff implores Defendants, through John Anson, to either answer interrogatories or produce requested documents. The district court and magistrate judge also found that Plaintiff had been prejudiced by John Anson's actions. The prejudice to Plaintiff is particularly apparent with regard to the arbitration documents. As stated by the magistrate judge, as a result of John Anson's behavior in failing to produce the arbitration documents, and failing to reveal that counsel had never even sought the documents, Plaintiff "was needlessly forced to move to formally intervene [in the arbitration action with GE]." (J.A. at 290.) John Anson's behavior caused Plaintiff's counsel to participate in no fewer than four telephone conferences regarding this issue, during which, Darby misrepresented to the magistrate judge that GE was not cooperating in producing the documents when it was in fact Defendants' counsel who never sought the documents. We can only imagine the embarrassment that Plaintiff suffered once it received GE's response to its motion to intervene, in which Plaintiff accused GE of conspiring with Defendants to "hinder and delay Stamtec in collecting its judgment." (J.A. at 414.) Moreover, John Anson still did not produce the requested arbitration documents until after Plaintiff had gone through all these various hearings, and numerous motion. We therefore hold that Plaintiff was prejudiced by John Anson's behavior.

iii. Prior Warnings

[4] As discussed above, John Anson was repeatedly warned that failure to cooperate could lead to entry of default judgment. The district court made it abundantly clear that it specifically considered John Anson's behavior to be grounds for dismissal as early as the December 17, 2003 hearing, telling John Anson and his counsel that they were getting the "last bite in the apple" and dismissing Plaintiff's motion without prejudice and warning that ***482** Plaintiff would be allowed to renew the motion if the behavior did not change. Even prior to that hearing, however, the magistrate judge had indicated that Defendants had delayed long enough in complying with discovery requests. The record is rife with instances in which the court below warned John Anson that his continued engagement in obstructionist behavior could resort in entry of a judgment against him and the other Anson Defendants, but John Anson not only continued his pattern of behavior, but escalated into blatantly misleading the court on the matter of the arbitration documents. As a result, we believe that John Anson was on notice about the consequences of his behavior, and that the third *Regional Refuse* factor is met.

iv. Less Drastic Sanctions

****9** [5] Lastly, the record reveals that less drastic sanctions were imposed before the default judgment was entered against Defendants. The district court's order of January 28, 2004 awarded Plaintiff's counsel compensation in the amount of $3,260 for the time he "expended in attempts to obtain compliance with the magistrate judge's discovery order." (J.A. at 218.) The evidence shows that the district court did not hastily enter the default judgment, and had in fact openly contemplated the harshness of such an action during the December 17, 2003 hearing. At the hearing, the district court expressed its reluctance about enforcing the sanc-

tions, but warned that it would not tolerate Defendants' continuing to "see how much they could get away with." It appears from the record that the district court felt that Defendants, and especially John Anson, were deliberately flouting the authority of the court, knowing that the sanction of default judgment is, as the case law reveals, a "last resort." It seems that in this case, John Anson went too far, ignored the court's warnings, and did not appreciate, even after being warned and ordered to pay Plaintiff's counsel's expenses, that this particular district court was serious about not tolerating further discovery abuses.

In light of a record chock-full of evidence of flagrant discovery abuses and even misrepresentations to the district court and magistrate, we decline to reverse the default judgment against Defendant John Anson.

CONCLUSION

For the reasons set forth in this opinion, we **AFFIRM** in part and **VACATE** in part. We **AFFIRM** the default judgment as entered against John Anson, but **VACATE** the default judgment as to the remaining Anson Defendants, and **REMAND** the matter to the district court for further proceedings, which may include reconsideration and clarification as to whether and why entry of default judgment is appropriate with respect to the other Anson Defendants.

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(Cite as: 549 F.3d 1344)

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United States Court of Appeals,
Eleventh Circuit.
OFS FITEL, LLC, OFS Brightwave, LLC,
Plaintiffs-Appellants,
v.
EPSTEIN, BECKER AND GREEN, P.C., Defendant-Appellee.

No. 07-10200.
Nov. 28, 2008.

Background: In attorney negligence case, the United States District Court for the Northern District of Georgia, No. 05-02857-CV-TWT-1,Thomas W. Thrash, J., entered final judgment of dismissal and imposed discovery sanctions. Clients appealed, contending that district court abused its discretion in imposing discovery sanctions. Law firm moved to dismiss appeal for lack of jurisdiction.

Holdings: The Court of Appeals, Hull, Circuit Judge, held that:
(1) appeal was authorized by statute because it was appeal of final judgment of dismissal with prejudice;
(2) there was sufficient adverseness as to that final dismissal to satisfy "case or controversy" requirement of United States Constitution;
(3) plaintiff's disclosure of expert's written report after close of discover violated federal and local rules;
(4) district court abused its discretion in excluding expert's testimony and subsequently dismissing entire complaint with prejudice; and
(5) dismissal of plaintiff's attorney fee claim was proper sanction for plaintiff's failure to produce its attorney fee agreement and attorney bills incurred in case.

Affirmed in part, reversed in part, and remanded.

Tjoflat, Circuit Judge, filed dissenting opinion.

West Headnotes

[1] Federal Courts 170B 30

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk29 Objections to Jurisdiction, Determination and Waiver
170Bk30 k. Power and Duty of Court. Most Cited Cases

Court must first determine whether it has proper subject matter jurisdiction before addressing substantive issues.

[2] Federal Courts 170B 541

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(B) Appellate Jurisdiction and Procedure in General
170Bk541 k. In General. Most Cited Cases

For Court of Appeals to exercise jurisdiction over appeal, its jurisdiction must be both (1) authorized by statute and (2) within constitutional limits.

[3] Federal Courts 170B 589

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk585 Particular Judgments, Decrees or Orders, Finality
170Bk589 k. Dismissal and Nonsuit in General. Most Cited Cases

For purposes of determining whether appellate jurisdiction existed over appeal from judgment dismissing attorney negligence case and imposing sanctions based on noncompliance with discovery order, appeal was authorized by statute because it

was appeal of final judgment of dismissal with prejudice. 28 U.S.C.A. § 1291; Fed.Rules Civ.Proc.Rule 37, 28 U.S.C.A.

[4] Federal Courts 170B 723.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(I) Dismissal, Withdrawal or Abandonment
170Bk723 Want of Actual Controversy
170Bk723.1 k. In General. Most Cited Cases

Where party appeals through final judgment appeal statute, she must be adverse as to the final judgment. 28 U.S.C.A. § 1291.

[5] Federal Courts 170B 723.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(I) Dismissal, Withdrawal or Abandonment
170Bk723 Want of Actual Controversy
170Bk723.1 k. In General. Most Cited Cases

Sufficient adverseness to satisfy "case or controversy" requirement of United States Constitution is not present when plaintiff loses contested interlocutory ruling on motion to remand and then voluntarily files written request that final judgment be entered with prejudice; in such cases, contested remand denial affects only forum in which plaintiff must litigate, and dismissal on the merits derives only from plaintiff's own written request and thus, when plaintiff after denial of motion to remand requests dismissal with prejudice, there is no contested court ruling, either interlocutory or final, as to merits of plaintiff's claims. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[6] Federal Courts 170B 724

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(I) Dismissal, Withdrawal or Abandonment
170Bk723 Want of Actual Controversy
170Bk724 k. Particular Cases. Most Cited Cases

For purposes of determining whether appellate jurisdiction existed over appeal from judgment dismissing attorney negligence case and imposing sanctions based on noncompliance with discovery order, there was sufficient adverseness as to final dismissal to satisfy "case or controversy" requirement of United States Constitution; (1) sanctions order excluding plaintiff's legal expert was case-dispositive because it foreclosed plaintiff from presenting expert testimony required to prove professional negligence, which was core element in all of its claims, (2) case involved attorney who candidly informed district court of impact of its sanctions ruling on plaintiff's case, and (3) district court agreed with suggestion of plaintiff's counsel that sanctions ruling was case-dispositive. U.S.C.A. Const. Art. 3, § 2, cl. 1; Fed.Rules Civ.Proc.Rule 37, 28 U.S.C.A.

[7] Federal Courts 170B 660.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(E) Proceedings for Transfer of Case
170Bk660 Certification and Leave to Appeal
170Bk660.1 k. In General. Most Cited Cases

Certification of interlocutory order for appeal is wholly discretionary with both district court and Court of Appeals. 28 U.S.C.A. § 1292(b).

[8] Federal Courts 170B 660.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(E) Proceedings for Transfer of Case
170Bk660 Certification and Leave to Appeal
170Bk660.1 k. In General. Most Cited

Cases

Interlocutory appeal statute sets a high threshold for certification to prevent piecemeal appeals; indeed, to obtain certification to appeal interlocutory decision, litigant must show not only that immediate appeal will advance termination of litigation but also that appeal involves controlling question of law as to which there is substantial ground for difference of opinion. 28 U.S.C.A. § 1292(b).

[9] Federal Courts 170B 769

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk768 Interlocutory, Collateral and Supplementary Proceedings and Questions
170Bk769 k. On Appeal from Final Judgment. Most Cited Cases

When appeal is from final judgment, fact that appeal substantively concerns interlocutory ruling is no bar to jurisdiction. 28 U.S.C.A. § 1291.

[10] Federal Courts 170B 820

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk820 k. Depositions and Discovery. Most Cited Cases

Federal Courts 170B 870.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)5 Questions of Fact, Verdicts and Findings
170Bk870 Particular Issues and Questions
170Bk870.1 k. In General. Most Cited Cases

Review by Court of Appeals of district court's decision to impose sanctions based on noncompliance with discovery order is sharply limited to search for abuse of discretion and determination that findings of trial court are fully supported by the record. Fed.Rules Civ.Proc.Rule 37, 28 U.S.C.A.

[11] Federal Civil Procedure 170A 1274

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1272 Scope
170Ak1274 k. Evidentiary Matters. Most Cited Cases

Federal Civil Procedure 170A 1275

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1272 Scope
170Ak1275 k. Identity and Location of Witnesses and Others. Most Cited Cases

Disclosure of expert testimony within meaning of federal civil discovery rule contemplates not only identification of expert, but also provision of expert's written report, which must contain specified information. Fed.Rules Civ.Proc.Rule 26(a)(2), 28 U.S.C.A.

[12] Federal Civil Procedure 170A 1278

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1278 k. Failure to Respond; Sanctions. Most Cited Cases

Plaintiff's disclosure of expert's written report in attorney negligence case after close of discovery violated federal and local rules. Fed.Rules Civ.Proc.Rule 26, 28 U.S.C.A.; U.S.Dist.Ct.Rules N.D.Ga., Rule 26.2(C).

[13] Federal Civil Procedure 170A 1278

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General

170Ak1278 k. Failure to Respond; Sanctions. Most Cited Cases

District court clearly has authority to exclude an expert's testimony where party has failed to comply with discovery rule unless failure is substantially justified or is harmless. Fed.Rules Civ.Proc.Rule 26(a), 37(c)(1), 28 U.S.C.A.

[14] Federal Civil Procedure 170A 1278

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1278 k. Failure to Respond; Sanctions. Most Cited Cases

District court abused its discretion in excluding expert's testimony and subsequently dismissing entire attorney negligence complaint with prejudice as sanction for noncompliance with discovery rule; record did not support district court's finding that plaintiff engaged in willful or "stonewalling" delay as to written report of its expert, and instead plaintiff had substantial justification for its conduct as to that report. Fed.Rules Civ.Proc.Rules 26, 37, 28 U.S.C.A.

[15] Federal Civil Procedure 170A 1278

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1278 k. Failure to Respond; Sanctions. Most Cited Cases

In cases where there has been prior order compelling discovery, ultimate sanction of dismissal with prejudice should be imposed only in cases of bad faith, willful delay, or flagrant disregard for district court's discovery orders. Fed.Rules Civ.Proc.Rule 37, 28 U.S.C.A.

[16] Federal Civil Procedure 170A 1636.1

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)5 Compliance; Failure to Comply
170Ak1636 Failure to Comply; Sanctions
170Ak1636.1 k. In General. Most Cited Cases

District court did not abuse its discretion in attorney negligence case by dismissing plaintiff's attorney fee claim as sanction for plaintiff's failure to produce its attorney fee agreement and attorney bills incurred in case, where record evidence supported district court's finding of complete and willful failure to comply with defendant law firm's discovery requests. Fed.Rules Civ.Proc.Rule 37(b)(2)(C), 28 U.S.C.A.

***1347** Jeffrey O. Bramlett, David G.H. Brackett, Bondurant, Mixson & Elmore, LLP, Atlanta, GA, for Plaintiffs-Appellants.

Robert B. Wedge, Shapiro, Fussell, Wedge & Martin, LLP, Atlanta, GA, for Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before TJOFLAT, HULL and WILSON, Circuit Judges.

HULL, Circuit Judge:

In this attorney negligence case, plaintiffs OFS Fitel LLC and OFS BrightWave LLC (collectively, "Fitel") appeal the district court's final judgment of dismissal, contending the district court abused its discretion in imposing discovery sanctions. Defendant Epstein, Becker & Green, P.C. ("EBG") moved to dismiss the appeal for lack of jurisdiction. After review and oral argument, we conclude that jurisdiction exists over the appeal, and we affirm in part and reverse in part the district court's sanctions order and dismissal of Fitel's claims.

I. BACKGROUND

A. Fitel Purchases OFS and Considers No Double Dipping Policy

In November 2001, Fitel's parent company Furukawa Electric Company, Ltd. ("Furukawa") purchased Optical Fiber Solutions ("OFS"), a division of Lucent Technologies, Inc. that supplied fiber optic cable and materials to the telecommunications industry. Furukawa formed Fitel to own and operate OFS after the purchase, and, in connection with the purchase, hired EBG, a law firm, to provide legal advice regarding compliance with American labor and employment law.

Upon consummation of the purchase, many OFS management employees became Fitel's employees. Fitel wished to provide these employees with a variety of benefits, including retirement and severance packages and paid vacation time, which would increase based on their years of service, including their time at Lucent. Some of these employees were already eligible for full retirement benefits from Lucent; these employees generally were older than those who were not yet full-retirement-eligible. Fitel's management preferred not to permit these employees to "double dip" by taking full retirement benefits from Lucent while also having their years of Lucent service increase their benefits from Fitel.

Thus, Fitel adopted a policy giving non-retirement-eligible employees at Fitel full credit for their years of service at Lucent, while treating retirement-eligible employees as newly hired for purposes of calculating their benefits at Fitel. According to Fitel, EBG attorneys researched whether Fitel's proposed "no double dipping" policy might violate the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.,* but never warned Fitel that the policy could subject Fitel to viable or potentially viable claims or lawsuits under the ADEA.

B. ADEA Claims Against Fitel

During the two years after its OFS purchase, Fitel engaged in a series of layoffs of OFS/Fitel employees. Beginning in ***1348** July 2003, Fitel received demand letters from several laid-off former OFS/Fitel employees contending that Fitel's less favorable treatment of older workers constituted actionable age discrimination under the ADEA. Fitel retained independent counsel, investigated the claims, and determined the claims had merit. Fitel settled the ADEA claims at a cost of $1.9 million in payments to the employees and approximately $450,000 in legal fees.

C. Fitel Sues EBG

In October 2005, Fitel sued EBG in state court, asserting claims for legal malpractice, breach of fiduciary duty, unjust enrichment, attorney's fees, and punitive damages. The crux of each claim was that EBG, in failing to warn Fitel of the "no double dipping" policy's potential non-compliance with the ADEA, had rendered deficient legal advice and failed to meet the standard of care imposed by the attorney-client relationship. EBG thereby committed malpractice, breached its fiduciary duty, and was unjustly enriched. EBG's professional negligence was a core element of each claim. As Georgia law requires in professional negligence actions, Fitel attached to its complaint an expert's affidavit identifying the defendant's allegedly negligent acts and the factual bases for the charge of negligence. Fitel's expert was Atlanta attorney Nancy Rafuse. Fitel's complaint sought to recover not only the ADEA settlement money and the fees paid to EBG but also Fitel's attorney's fees incurred in bringing the instant action.

EBG removed the case to federal district court because diversity jurisdiction existed. The district court set the close of discovery for August 13, 2006.

EBG served upon Fitel a request for production of "all documents reflecting [Fitel's] fee agreement or other agreements with the attorneys or law firms representing [Fitel] in this Action; all invoices [Fitel] received from such attorneys or law firms and all ... other documents reflecting payment made to such attorneys" (the "Document Request"). Fitel's response objected on privilege, work product immunity, and relevance grounds but, subject to those objections, agreed to "produce documents re-

sponsive to [the Document Request] that reflect the amounts of attorneys fees billed to and paid by [Fitel] in connection with this action (redacted, if necessary, to protect privileged information)."

A dispute arose over what documents Fitel would produce and when production would occur. Fitel indicated that it would produce a summary of its counsel's bills, while EBG insisted on the actual bills. Fitel reiterated to EBG its position that a summary was sufficient and stated that it would provide the summary as soon as EBG "confirm[ed] that if we provide the [summary], EBG will not contend that [Fitel's] response is insufficient." Because EBG never agreed that a summary was enough, Fitel never produced it. Fitel never produced the actual bills or a fee agreement either.

Another dispute arose over Rafuse's written expert report due under Federal Rule of Civil Procedure 26. As stated above, Fitel identified Rafuse as its expert on the legal standard of care and attached her expert affidavit to its complaint. Fitel confirmed its designation of Rafuse as its expert witness in its post-removal initial disclosures. On May 18, 2006, Fitel noticed for late June the depositions of four EBG attorneys living in New York.[FN1] On June 12, 2006, Fitel wrote EBG in an attempt to schedule these depositions by agreement. Fitel's letter informed EBG ***1349** that Rafuse's expert report would "take into account the deposition testimony" of those EBG attorneys and that "[w]e believe her report can be completed within thirty (30) days of the completion of these four depositions." Throughout this case, Fitel consistently has contended it needed information from the EBG attorneys about what they did in representing Fitel in order for Rafuse to complete her report. As noted later, Rule 26(a)(2)(B) requires that an expert's written report contain not only a statement of her opinions but also, among other things, the "data or other information considered by the witness in forming the opinions."[FN2]

FN1. All four were EBG attorneys when EBG represented Fitel, but one later left EBG.

FN2. In this opinion we quote the rules as they read when the district court issued its rulings in 2006. Effective December 1, 2007, however, the Federal Rules of Civil Procedure were amended "to effect a 'general restyling ... to make them more easily understood and to make style and terminology consistent.' " *Mills v. Foremost Ins. Co.,* 511 F.3d 1300, 1308 n. 11 (11th Cir.2008) (quoting Fed.R.Civ.P. 1, Advisory Comm. note on 2007 Amendment). "Except for a very small number of minor technical amendments," none of which is relevant here, "the amendments were intended to make no changes in substantive meaning." *Id.* (quotation marks and citation omitted).

On June 14, 2006, EBG filed a motion and brief for extension of discovery from August 13, 2006 until December 13, 2006. EBG's brief argued the discovery extension was needed for several reasons, including that Fitel's expert report would not be prepared until EBG attorneys were deposed and then EBG needed time to depose that expert:

> On June 12, 2006, counsel for Plaintiffs informed counsel for defendant that no expert report will be prepared by said expert until approximately thirty days after Plaintiff[s] depose[ ] certain attorneys employed by EBG (which depositions were originally noticed by Plaintiffs for the week of June 26, 2006 and which are currently the subject of discussion between counsel). Even if those depositions were taken on the dates originally noticed by Plaintiffs, said expert report would not be supplied before August of 2006, with the present discovery deadline being August 13, 2006. Once such an expert report is furnished to it, Defendant will want to depose said expert and evaluate the necessity of identifying an expert to testify in response thereto.

(Citation omitted). Thus, EBG acknowledged it

was aware Fitel needed the EBG attorneys' depositions before Fitel would be producing its expert's written report. Shortly thereafter, the parties submitted a consent order, which the district court signed, extending the discovery period until October 31, 2006. The depositions of the EBG attorneys did not take place in June 2006 as originally noticed, and two of the four were delayed until September 2006 for the convenience of the attorneys. After EBG informed Fitel that one of the EBG attorneys' depositions could not be scheduled until September 14, Fitel sent a letter to EBG reminding EBG that it needed the deposition to finalize Rafuse's expert report:

> [W]e remind you that we will need approximately thirty (30) days after the completion of the EBG lawyer depositions to finalize our expert report. If these gentlemen cannot find any earlier opening in their schedules, you should not expect our expert report until mid-October.

The last of the four EBG attorneys was deposed on September 27, 2006, and Fitel's counsel obtained the transcript from the court reporter on October 16, 2006. Fitel produced Rafuse's written report on November 3, 2006, which was eighteen days after receiving the last deposition transcript ***1350** but three days after the close of discovery on October 31, 2006.

D. Discovery Motions, Hearing, and Sanctions Rulings

In late October 2006, EBG filed a series of discovery-related motions. Specifically, EBG moved the district court to, among other things: (1) exclude Fitel's claim for attorney's fees because of its failure to produce the bills from its current legal counsel; and (2) exclude the testimony of Rafuse and any other expert witness that Fitel might designate because of Fitel's failure to timely produce the Rule 26(a)(2) written expert report. The district court heard argument on EBG's motions on December 15, 2006.[FN3]

> FN3. At the hearing, Fitel was represented by Jeffrey O. Bramlett of Bondurant, Mixson & Elmore LLP, and EBG was represented by Robert B. Wedge of Shapiro, Fussell, Wedge & Martin, LLP.

EBG first presented its motion to strike Fitel's claim for attorney's fees. Fitel argued that Georgia law did not require it to disclose its ongoing attorney's bills on a regular basis. The court was not persuaded, stating "[i]f there was a personal injury case and your client was having ongoing medical bills would you say, well, I'm not going to give you any of the medical expenses because they're ongoing? I mean, what's the difference?" Fitel replied that providing its bills would require it to disclose "essentially, a blueprint of what the lawyers are doing and who they're talking to and their work product." The court responded that "you would have the right to redact from your bills that sort of information .... But to say we're demanding attorney's fees as part of our damages, and we refuse to give you the bills that document what those fees are ... I'm just mystified by that argument."

Fitel then argued it had offered to produce a summary of its bills, but EBG rejected this offer and failed to bring this dispute to the court's attention before the close of discovery. After hearing EBG's rebuttal, the court dismissed with prejudice Fitel's claim for attorney fees, finding a complete, willful failure by Fitel to provide its attorney's fee documents:

> [I]t appears, to me, that there's been just a complete and willful failure to provide the defendants with discovery to which they're entitled. And I'm going to grant the defendant's motion to exclude the plaintiff's claim for attorney's fees under the authority of Rule 37(d) and 37(b)(2)(C). It's not-not appropriate to simply refuse to produce documents that are clearly relevant to a claim then say, well, you accept something less than that and I'll give it to you and then, if you don't accept it, to say, well, we're going to make the judge order us to do it. And if the judge then orders us to do it, well, we'll do it. That's just not the way cases are handled in my court, and it's not the way I'm

> going to permit cases to be handled in my court. So I grant the motion and dismiss, with prejudice, the plaintiff's claim for attorney's fees.

The court next heard argument on EBG's motion to exclude Fitel's legal expert. Fitel argued that Rafuse's expert affidavit, filed with the complaint, complied with Rule 26(a)(2) because the affidavit contained a summary of Rafuse's opinions and the legal conclusions underpinning them, and thus enabled EBG to depose Rafuse during the discovery period. Fitel also pointed out that the delay in producing a formal expert report was caused by EBG's failure to make its EBG attorney witnesses in New York available for depositions earlier in the discovery period. Without their testimony, Fitel claimed, Rafuse***1351** could not produce a report any more comprehensive than her affidavit.

Finally, Fitel offered, in lieu of sanctions, to make Rafuse available for deposition by EBG at its request. Specifically, Fitel's counsel stated, "[B]ecause it is a case dispositive issue, we would ask that the court permit the report to be filled [sic] out of [time] and permit the defendant to take a deposition if the defendant wants to do that." In response, EBG's counsel reiterated that Rafuse's affidavit did not provide sufficient notice of her opinions to excuse non-production of the Rule 26(a)(2) written report, that Rule 26 and Local Rule 26.2(C) require the report to be produced early enough to permit expert depositions to be taken before the discovery period closes, and that "a failure to provide information [required by Rule 26(a)(2)] is, by itself, sufficient to warrant sanctions, including [exclusion] of the expert's testimony."

After hearing argument, the court granted EBG's motion to exclude Fitel's legal expert, reasoning:

> Again there, was just a complete failure to comply with the rules and it's not acceptable, to me, for a party to say, well, we didn't comply with the rule because we thought it would be more efficient or better practice to do it our way, rather than the way the rule says you're supposed to do it. It's also not acceptable to me for a party to fail to provide discovery and then say, well, judge, if you decide we did wrong in not complying with the rules, well, we'll do it now. That completely disrupts the orderly disposition of a case like this. For example, if I accepted Mr. Bramlett's suggestion that, well, we'll make the expert available to be deposed, that means discovery's got to be reopened for that deposition. Then Mr. Wedge has got to hire his expert, and the plaintiff has got to depose his expert. And finally, I regret to say, and say after only very careful consideration that, frankly, this appears, to me, to be part of a pattern by the plaintiffs, of stonewalling and delaying discovery. And, for those reasons, I feel that it is my duty to enforce the local rule that says that, if you don't comply, you don't designate your experts sufficiently early in the discovery period, you don't provide the report that allows the other side to take their deposition, the sanction is exclusion. And that's why I'm granting the motion.

The court asked EBG's counsel to proceed with his next motion. Fitel's counsel then pointed out that the court's exclusion of Fitel's legal expert was case-dispositive and there was nothing left in the case, stating:

> Your Honor, if I may, the court's ruling on that motion is, in fact, case dispositive. Under the law if the plaintiff is unable to offer expert testimony on the issue of professional negligence, there is no case left. So if the court wants to proceed with these other motions, that is certainly the court's prerogative. But my suggestion is, in light of the court's ruling, we cannot proceed in this case. And so my thought is-and if you want to hear these other motions, that's fine. But we've got to decide whether we-this case is going nowhere, based on that ruling; therefore, we'll have to decide whether we need to appeal that or not or dismiss or whatever we're going to do. Frankly, if the court wants to pursue these other motions,

that's fine. But there's nothing left of this case in light of that last ruling, and the court could save everybody a lot of time and money by, simply, moving forward.

The court asked for comment by EBG's counsel, who replied:

***1352** My only concern, your honor, is ... I think that the motion we haven't heard yet [the fifth motion, regarding Fitel's alleged "willful failure to engage in discovery"] is, perhaps, the most illustrative of the stonewalling and the failure to make discovery of anything that we've seen so far today. We got 16,000 electronic documents dumped on us starting four days before the discovery period ended .... Now in our motion for sanctions, one of our prayers for relief we made was dismissal of the complaint based on that conduct. And the only concern I have, at this juncture, is if the plaintiff appeals the ruling of the court with respect to the expert affidavit ... the record would not have, in it, another potential ground for upholding that decision. And I guess the-I guess the net effect of all of that would be that, if the plaintiff were successful in an appeal on that ruling, I suppose we could address these remaining motions at that time. There are a lot of messy issues in these remaining motions .... So perhaps, the best course, at this time, would be for us to reserve our rights, with respect to our other outstanding motions, rather than subjecting the court and everybody else to [hearing that motion] .... I would, simply, want to be able to preserve our rights with respect to those motions, your honor.

The court asked Fitel's counsel: "Do you want to respond in terms of the other motions for sanctions?" He replied:

Well ... in suggesting ... the case dispositive nature of the last ruling by the court, I offered the proposition that the case should terminate, at this point, based on efficiency. I have no problem with putting something in the order that preserves Mr. Wedge's rights to reassert these motions if you, at any point, feel it's necessary to do that .... [B]ut we're talking about a case that is dead at this point, based on the last ruling, it seems to me. There are other things to do.

The court then stated:

Well, Mr. Bramlett, I can't tell you how painful it has been for me to do what I did and how painful it was going to be for me and you to go through these next few motions. I appreciate your suggestion. I think it's appropriate. And, based upon the stipulation by the plaintiff that the exclusion of its expert is a case dispositive event, this action is dismissed.

On January 5, 2007, the court entered an order of dismissal, which stated, among other things, that:

After the Court announced its rulings on the two [motions for sanctions], counsel for Plaintiffs ... suggested that, in lieu of proceeding with the remaining pending discovery motions, the Court simply proceed to dismiss the case. Defense counsel did not object and the Court found this suggestion appropriate. Accordingly, based on [Plaintiff's] stipulation that the Court's ruling on [the expert motion] is "case dispositive," the Court dismissed the case with prejudice.

E. Appeal and Motion to Dismiss

Fitel timely appealed the district court's judgment of dismissal, arguing that the court abused its discretion in imposing the discovery sanctions. EBG then moved this Court to dismiss Fitel's appeal for lack of jurisdiction. We carried EBG's motion with the case and held oral argument.

II. JURISDICTION

[1] We first consider our jurisdiction. *See Taylor v. Appleton,* 30 F.3d 1365, 1366 (11th Cir.1994) ("[A] court must first determine whether it has proper subject matter jurisdiction before addressing the ***1353** substantive issues."); *Parklane Hosiery Co. v. Parklane/Atlanta Venture (In re Parklane/Atlanta Joint Venture),* 927 F.2d 532, 534 (11th Cir.1991) ("Before reaching the principal is-

sue raised in this appeal, this Court must first determine whether it has jurisdiction."). Fitel submits this Court has jurisdiction over its appeal under 28 U.S.C. § 1291 and pursuant to *United States v. Procter & Gamble Co.,* 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958). EBG contends we lack jurisdiction, citing *Druhan v. American Mutual Life,* 166 F.3d 1324 (11th Cir.1999) and *Woodard v. STP Corp.,* 170 F.3d 1043 (11th Cir.1999). After review, we conclude appellate jurisdiction exists under 28 U.S.C. § 1291 and the Constitution. The parties are correct that *Procter & Gamble, Druhan*, and *Woodard* are relevant to our inquiry. Consequently, we discuss and then apply these precedents.

A. Precedents

1. *United States v. Procter & Gamble Co.*

In *United States v. Procter & Gamble Co.,* the government filed a civil antitrust lawsuit following a grand jury investigation in which no indictment was returned. 356 U.S. at 678, 78 S.Ct. at 984. Because the government was using the grand jury transcript to prepare for the civil trial, the defendants sought access to the transcript as well. *Id.* The government refused, but the district court ordered production. *Id.* at 679, 78 S.Ct. at 985. The government, "adamant in its refusal to obey," moved the district court to either (1) stay its order pending the filing of an appeal and an application for an extraordinary writ, or (2) amend its order to state that if the government failed to produce the transcript, the district court would dismiss the complaint. *Id.* The district court granted the government its latter option and amended its order to provide for dismissal if the grand jury transcript was not produced. *Id.* The government refused to produce the transcript, and the district court dismissed the case. *Id.* at 679-80, 78 S.Ct. at 985.

The government appealed, and the Supreme Court confronted "the question of jurisdiction." *Id.* at 680, 78 S.Ct. at 985. The Supreme Court first noted that the dismissal order was a final order that ended the case. *Id.* The Supreme Court then acknowledged "the familiar rule"-invoked by the defendants in arguing that jurisdiction was lacking-that a plaintiff who has voluntarily dismissed his complaint may not appeal. *Id.* However, the Supreme Court concluded that "[t]he rule has no application here," because the government had "at all times opposed the production orders" and invited the dismissal sanction as a "way of getting review of the adverse ruling." *Id.* In that regard, the Supreme Court held that when the government "proposed dismissal for failure to obey, it had lost on the merits and was only seeking an expeditious review." *Id.* at 680-81, 78 S.Ct. at 985. In other words, " '[t]he plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might come to this court without further delay.' " *Id.* at 681, 78 S.Ct. at 986 (quoting *Thomsen v. Cayser,* 243 U.S. 66, 83, 37 S.Ct. 353, 358, 61 L.Ed. 597 (1917)). Thus, the Supreme Court had jurisdiction to decide the merits of the appeal.

2. *Druhan v. American Mutual Life*

After *Procter & Gamble,* this Court heard two cases where (1) the district court denied a plaintiff's motion to remand its case to state court; (2) the plaintiff then filed a written motion to dismiss; and (3) the district court granted the motion ***1354** and dismissed the case with prejudice. In both remand cases, this Court concluded the plaintiff was not adverse to the final judgment, and thus jurisdiction did not exist.

Specifically, in *Druhan v. American Mutual Life,* this Court addressed the question of whether an appeal from a final judgment, which resulted from a voluntary dismissal with prejudice after the plaintiff lost a motion to remand to state court, is within this Court's jurisdiction. 166 F.3d at 1325. The plaintiff Druhan sued the defendant insurance company in state court, alleging the defendant fraudulently induced her to purchase one of its policies. *Id.* at 1324. Because Druhan purchased the

policy in connection with her employer's benefit package, the defendant believed Druhan's claims were preempted by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.,* and removed the case to federal court. *Id.* at 1324-25. Druhan moved the district court to remand the case to state court, arguing that ERISA did not preempt her claims. *Id.* at 1325. The district court agreed with the defendant and denied Druhan's remand motion. *Id.*

Druhan then filed a written "Request and Stipulation for Entry of Final Judgment" (the "Judgment Request"). *Id.* at 1325 & n. 3. Because it was not signed by the defendant, this Court characterized the Judgment Request as "a motion to dismiss under Rule 41(a)(2) of the Federal Rules of Civil Procedure." *Id.* at 1325 n. 3. In her Judgment Request, Druhan "stated that she had no claims under ERISA and thus the [district] court's order denying her motion to remand effectively left her without a remedy." *Id.* at 1325. Although the district court granted Druhan's request by dismissing the action with prejudice,[FN4] the *Druhan* majority opinion does not state that the district court ever approved or agreed with Druhan's assertion that she had no claim under ERISA. Indeed, Judge Barkett's concurrence points out the district court's remand order was not case-dispositive. *See Druhan,* 166 F.3d at 1327 (Barkett, J., concurring) ("The district court's denial of Druhan's motion to remand ... did not have the effect of dismissing her action. Druhan still had the ability to make her claim under ERISA."); *see also id.* at 1326 (majority opinion) (stating that "plaintiff believes [the remand order] effectively disposed of her case," but not stating that the district court ever agreed).

> FN4. Druhan's Judgment Request apparently did not specify whether she sought a dismissal with or without prejudice; this Court presumed the dismissal with prejudice conformed to Druhan's wishes because she never argued otherwise on appeal. *See id.* at 1325 n. 3.

Druhan appealed, arguing that the district court erred in denying the remand motion because ERISA did not preempt Druhan's state law claims. Because Druhan affirmatively invited the final judgment entered against her, this Court confronted a jurisdictional issue-specifically, "whether an appeal from a final judgment that resulted from a voluntary dismissal with prejudice is within this court's jurisdiction." *Id.* at 1325.

Although the judgment was with prejudice and indisputably final, the *Druhan* Court determined that it lacked jurisdiction because there was no "case or controversy." *Id.* at 1326.[FN5] The *Druhan* Court ***1355** pointed out that Article III of the United States Constitution limits federal court jurisdiction to "Cases" and "Controversies," and "[a]t the heart of the case or controversy requirement is the presence of adverse parties." *Id.* The Court concluded that because the final judgment was entered in response to the plaintiff's motion for a dismissal with prejudice, and because neither party was contending the district court entered that judgment in error, "[t]here is therefore no adverseness as to the final judgment, and thus no case or controversy." *Id.* (emphasis added).

> FN5. The *Druhan* Court concluded that *Procter & Gamble* did not control; that case, the *Druhan* Court found, was "very different" because it did not involve "an affirmative request by the plaintiff that the case be dismissed with prejudice" but merely an attempt by the plaintiff "to influence the court's discretion in determining the appropriate sanction for discovery violations." *Id.* at 1325 n. 4.

Additionally, the *Druhan* Court looked beyond the form of the appeal to the substance and concluded that it was "not an appeal from a final judgment, but an appeal from an interlocutory order denying the plaintiff's motion to remand." *Id.* The *Druhan* Court determined that such an appeal from an interlocutory order is "not statutorily authorized" because the "district court's order denying remand

is not among the orders from which an appeal lies as a matter of right, and the plaintiff did not seek an appeal by certification" pursuant to 28 U.S.C. § 1292(b). *Id.* Although recognizing that there may be good policy reasons to allow the appeal to proceed, the Court concluded, "[t]hat, however, is a decision that rests in the hands of Congress, which, along with the Constitution, sets the boundaries of this court's jurisdiction." *Id.*

3. *Woodard v. STP Corp.*

Shortly after *Druhan,* this Court confronted a similar issue in *Woodard v. STP Corp.,* 170 F.3d at 1043. Like *Druhan, Woodard* involved an appeal from an invited final judgment after the denial of the plaintiff's motion to remand a case to state court. Also like *Druhan, Woodard* did not involve an order that was case-dispositive.

Specifically, the *Woodard* plaintiff brought a class action in state court. *Id.* at 1044. After a grant of conditional class certification, the defendants removed the case to federal court based on diversity jurisdiction. *Id.* The plaintiff moved to remand the case to state court. *Id.* The district court denied the motion and vacated the state court's conditional class certification. *Id.* The plaintiff then filed a motion for voluntary dismissal, which the defendants opposed. *Id.* The district court granted the plaintiff's motion and dismissed the case with prejudice. *Id.* The plaintiff appealed, challenging, among other things, the district court's denial of remand. *Id.*

This Court noted that the plaintiff did not obtain § 1292(b) certification and thus could not appeal directly from the order denying remand. *Id.* Although the plaintiff obtained a final judgment when the court granted with prejudice his motion for voluntary dismissal, the *Woodard* Court concluded the judgment was not appealable because "it was obtained at the request of the plaintiff and there is therefore no 'case or controversy' in regard to it." *Id.* (citing *Druhan,* 166 F.3d at 1326). This Court dismissed the appeal of the remand denial for lack of jurisdiction. *Id.* at 1044-45.

B. Jurisdictional Analysis

[2] In light of these precedents, it is clear that for this Court to exercise jurisdiction over an appeal, our jurisdiction must be both (1) authorized by statute and (2) within constitutional limits. *Druhan,* 166 F.3d at 1326. As to the first prong, Congress authorized by statute appeals from final judgments. *See* 28 U.S.C. § 1291 ("The courts of appeals ... shall have jurisdiction of appeals from all final ***1356** decisions of the district courts ... except where a direct review may be had in the Supreme Court.").

[3] Fitel's appeal satisfies the requirement of being authorized by statute because it is an appeal of a final judgment of dismissal with prejudice. *See* District Court Order of Jan. 5, 2007 (the "Dismissal Order"), at 4 ("this action is hereby dismissed with prejudice"). If Fitel loses this appeal, the case is over. Fitel cannot re-file because the district court's dismissal was with prejudice.[FN6] *See McMahon v. Presidential Airways, Inc.,* 502 F.3d 1331, 1338 (11th Cir.2007) (stating that an order is final and appealable when it "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment").[FN7] Because Fitel appeals a final judgment, jurisdiction exists under § 1291 regardless of whether the substance of Fitel's appeal concerns an interlocutory order. *See Myers v. Sullivan,* 916 F.2d 659, 673 (11th Cir.1990) ("Under general legal principles, earlier interlocutory orders merge into the final judgment, and a party may appeal the latter to assert error in the earlier interlocutory order."); *Barfield v. Brierton,* 883 F.2d 923, 931 (11th Cir.1989) (holding that "review of the final judgment opens for consideration the prior interlocutory orders"). Thus, Fitel's appeal of the district court's final dismissal with prejudice is expressly authorized by § 1291.

FN6. In contrast, "[w]e have held that we do not have jurisdiction to hear appeals from voluntary dismissals *without* prejudice, because they leave the plaintiff free to bring the case again and therefore are

not 'final' decisions for purposes of appellate jurisdiction under 28 U.S.C. § 1291." *Druhan,* 166 F.3d at 1325 n. 4. The *Druhan* Court pointed out, though, that the line of cases concerning dismissals without prejudice is "distinguishable from the case at hand [because] the appellant in this case is not free to bring the case again, and thus the judgment entered by the district court was truly 'final.' " *Id.*

FN7. *See also Carpenter v. Mohawk Indus., Inc.,* 541 F.3d 1048, 1052 (11th Cir.2008) (stating that a final decision for the purpose of obtaining appellate jurisdiction under § 1291 "is one that 'ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment' " (quoting *McMahon,* 502 F.3d at 1338)).

[4] The only question is whether there is sufficient adverseness as to that final dismissal to satisfy the case or controversy requirement of the Constitution. Where a party appeals through § 1291 (the final-judgment appeal statute), she must be adverse "as to the final judgment." *See Druhan,* 166 F.3d at 1326. EBG argues that the adverseness question is controlled by this Court's precedent in *Druhan* and *Woodard* and that Fitel is thus not adverse to the district court's final judgment. We disagree.

[5] This Court addressed the adverseness question in *Druhan* and *Woodard* only in the context of the appeal of a denial of a motion to remand, not an interlocutory ruling that was effectively case-dispositive. In both *Druhan* and *Woodard,* this Court found that sufficient adverseness is not present when a plaintiff loses a contested interlocutory ruling on a motion to remand and then voluntarily files a written request that a final judgment be entered with prejudice. In such cases, the contested remand denial affects only the forum in which the plaintiff must litigate, and the dismissal on the merits derives only from the plaintiff's own written request. Thus, when a plaintiff after denial of a motion to remand requests a dismissal with prejudice, there is no contested court ruling, either interlocutory or final, as to the merits of the plaintiff's claims.

Consequently, in the factual circumstances of *Druhan* and *Woodard,* the ***1357** plaintiff is adverse to the remand order but not adverse as to the final judgment on the merits, and thus no case or controversy exists. *See Woodard,* 170 F.3d at 1044 (stating that there was no case or controversy as to the final judgment because the plaintiff requested it after remand was denied, and implying that both the district court and the defendants anticipated that the plaintiff and/or his counsel intended to re-file the claims elsewhere); *Druhan,* 166 F.3d at 1326 (stating that "the required adverseness is lacking" as to the final judgment that "the plaintiff specifically requested"); *see also Druhan,* 166 F.3d at 1327 (Barkett, J., concurring) ("Druhan still had the ability to make her claim under ERISA.").

[6] But *Druhan* and *Woodard* are not directly on point here because the present case contains distinct factual ingredients that are critical to the adverseness issue. First, the contested interlocutory orders at issue are materially different. Unlike the remand orders at issue in *Druhan* and *Woodard* that concerned only the forum where the cases would be heard, the sanctions order here excluding plaintiff's legal expert was case-dispositive because it foreclosed Fitel from presenting the expert testimony required to prove professional negligence, which was a core element in all of its claims. *See Howard v. Walker,* 242 Ga. 406, 249 S.E.2d 45, 46 (1978) (holding that in legal malpractice actions, "for the plaintiff to recover he must produce opinion testimony of an expert witness"); *Schluter v. Perrie, Buker, Stagg & Jones, P.C.,* 230 Ga.App. 776, 498 S.E.2d 543, 545 (1998) ("The law presumes that lawyers perform legal services in an ordinarily skillful manner. This presumption remains with the attorney until the presumption is rebutted by expert legal testimony; otherwise the grant of a summary judgment in favor of the attorney is proper."

(quotation marks and footnotes omitted)).[FN8]

> FN8. In the district court, EBG's counsel did not disagree with or object to Fitel's counsel's characterization of the district court's sanctions ruling as case-dispositive. On appeal, EBG now argues the district court's exclusion of Fitel's expert was not, in fact, case-dispositive because the expert's testimony addressed only Fitel's attorney malpractice claim and not its claims for breach of fiduciary duty, unjust enrichment, attorney's fees, or punitive damages. That argument lacks merit. As Fitel's complaint makes clear, the crux of its unjust enrichment and breach of fiduciary duty claims is EBG's failure to meet the standard of care imposed by the attorney-client relationship. Both the breach of fiduciary duty and unjust enrichment counts incorporate the allegations of legal malpractice without adding any independent factual allegations, and the latter count expressly alleges that EBG was unjustly enriched by receiving compensation for "defective, unskillful, and harmful legal advice." And under Georgia law, neither an O.C.G.A. § 13-6-11 attorney's fee claim nor an O.C.G.A. § 51-12-5.1 punitive damages claim can survive without an award of relief on an underlying claim. *Morris v. Pugmire Lincoln Mercury, Inc.,* 283 Ga.App. 238, 641 S.E.2d 222, 225 (2007). Thus, Fitel's claims, as pled, all required proof of attorney malpractice, and the interlocutory ruling, as all agreed in the district court, was case-dispositive.

Second, this case involves an attorney who candidly informed the district court of the impact of its sanctions ruling on the plaintiff's case. Fitel's counsel advised the district court that its interlocutory sanctions ruling was case-dispositive and that the court should terminate the case at that point for efficiency purposes rather than proceed with the other pending motions. The dissent treats Fitel's counsel's suggestion as only a voluntary consent to a judgment against Fitel. However, the more accurate and fairer reading of Fitel's counsel's statements, both literally and in context of the record as a whole, is not that Fitel was consenting to an adverse judgment***1358** against it but only stating that, since the court had excluded its required expert, the court should expedite the case and put the ruling in final form because that ruling was undisputedly case-dispositive.

Third, and importantly, the district court here agreed with Fitel's counsel's suggestion that the sanctions ruling was case-dispositive. The district court stated that the nature of the sanctions ruling made the case "dead at this point." In regard to Fitel's counsel's statement that the case should terminate for efficiency, the district court responded, "I appreciate your suggestion. I think it's appropriate."[FN9] And because Fitel was willing to stipulate to the fact that the court's expert sanctions ruling was case-dispositive, this allowed the court to act immediately rather than proceeding with other motions. The court itself then stated, "And, based upon the stipulation by the plaintiff that the exclusion of its expert is a case dispositive event, this action is dismissed." The basis of the district court's dismissal was thus the undisputed case-dispositive nature of its contested interlocutory sanctions order. And by basing its dismissal on that case-dispositive event, the district court effectively made that contested interlocutory expert exclusion order a final order.

> FN9. Also, during argument on the expert report sanctions motion and before the district court issued its ruling, the court said to Fitel's counsel, "That's why I find it so hard to believe ... that you just did nothing, subjecting yourself to, potentially, having the whole case go away because you simply failed to file the report the rule says you've got to file."

Because of these important factual distinctions,

this Court's precedent in *Druhan* and *Woodard* is not directly on point here as to the adverseness question. Instead, this case is factually closer to, and thus controlled by, the Supreme Court's decision in *Procter & Gamble.* As in *Procter & Gamble,* Fitel had lost on the merits of the contested exclusion of its expert and the district court's final order merely allowed Fitel to seek an expeditious review of that ruling. *See Procter & Gamble,* 356 U.S. at 680-81, 78 S.Ct. at 985 (acknowledging rule that a plaintiff who seeks voluntary dismissal may not appeal but concluding that rule is inapplicable when the plaintiff opposed an interlocutory production order and invited dismissal after "it had lost on the merits" and only as a way of "seeking an expeditious review"). Because the interlocutory sanctions order was case-dispositive and Fitel opposed that interlocutory order on the merits, Fitel stands adverse to the resulting final judgment that was expressly based on the undisputed case-dispositive nature of the contested interlocutory ruling. Accordingly, because Fitel's appeal satisfies both the statutory requirement of a final judgment and the Constitutional requirement of parties that are adverse to the final judgment, we have jurisdiction to hear Fitel's appeal.

Lastly, we pause to address the dissent's concerns. Our dissenting colleague suggests Fitel should have simply asked the district court to certify the appealability of the expert exclusion order under 28 U.S.C. § 1292(b). Such reasoning has fatal flaws.

First, the district court entered a *final* judgment, making the § 1291 route directly applicable. There is no requirement that a party travel the § 1292 route before filing a § 1291 appeal from a final judgment. Rather, the only question here is whether the requisite adverseness as to that final judgment exists to satisfy the Constitution, and it does.

[7][8] Second, § 1292(b) certification is wholly discretionary with both the district court and this Court.[FN10] Furthermore, ***1359** § 1292(b) sets a high threshold for certification to prevent piecemeal appeals. Indeed, to obtain § 1292(b) certification, the litigant must show not only that an immediate appeal will advance the termination of the litigation but also that the appeal involves "a controlling question of law as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b). Most interlocutory orders do not meet this test.[FN11] Although the district court's order excluding Fitel's expert was case-dispositive, it was nonetheless a discovery sanctions order where the chances of § 1292(b) review are slim.[FN12]

FN10. *See Jenkins v. BellSouth Corp.,* 491 F.3d 1288, 1291 (11th Cir.2007) ("Under section 1292(b), both the district court and the court of appeals exercise discretion about granting interlocutory review ....").

FN11. In addition, to accept the dissent would mean interlocutory orders that are case-dispositive but rest on the application of settled law are unreviewable.

FN12. The dissent attempts to avoid *Procter & Gamble* by noting § 1292(b) was not enacted at the time of that Supreme Court decision. However, in *Procter & Gamble* and this case, there was in fact a final judgment entered that ended the case, making § 1292(b) inapplicable in any event. The jurisdictional question in *Procter & Gamble,* which is directly relevant here, was whether the plaintiff's inviting that final judgment, after losing the discovery issue on the merits, precluded jurisdiction over that final judgment.

[9] Third, the dissent advocates looking beyond the form of the final dismissal *with prejudice* to the substance of the underlying issue raised on appeal. However, as discussed above, our precedent establishes that when the appeal is from a final judgment, the fact that the appeal substantively concerns an interlocutory ruling is no bar to jurisdiction. *See, e.g., Myers,* 916 F.2d at 673 (stating that

"earlier interlocutory orders merge into the final judgment, and a party may appeal the latter to assert error in the earlier interlocutory order").

Fourth, and more troubling, the dissent's approach foists upon litigants and counsel an untenable position that is not required by § 1291 nor § 1292 nor the Constitution. Under the dissent's approach, an attorney dare not candidly tell the court that its ruling is case-dispositive and that it, for efficiency reasons, should consider terminating a case with prejudice due to the case-dispositive nature of the interlocutory order because any subsequent attempt to appeal would be insufficiently adverse and there would be no jurisdiction. The dissent suggests the attorney instead should move for a § 1292(b) certification and, if that fails, proceed to a Rule 12(b)(6) or summary judgment determination. Thus, under the dissent's approach, an attorney in Fitel's counsel's position faces an ethical dilemma. He can either (1) fulfill his duty of candor and ethical responsibility to the court by forthrightly informing the court that its ruling was case-dispositive and a final dismissal with prejudice is thus appropriate for efficiency purposes, thereby surrendering Fitel's right to appeal the court's order, or (2) continue to litigate to finality a case he knows has no legitimate basis for proceeding without an expert witness, just so Fitel ultimately can challenge the court's case-dispositive interlocutory order excluding the expert.

On the other hand, if we recognize that adverseness as to the final judgment (i.e., the dismissal with prejudice here) is preserved when the contested interlocutory order is case-dispositive and the district court bases its dismissal with prejudice on the fact that its interlocutory decision disposed of the entire case, and the plaintiff consistently has opposed the order underlying the final dismissal, we prevent such a dilemma and also harmonize *Druhan* and ***1360** *Woodard* with *Procter & Gamble.*[FN13] Furthermore, this approach is consistent with the fundamental appellate jurisdiction principles of judicial efficiency and avoiding piecemeal appeals highlighted by the dissent. It avoids the waste of a party going through a dismissal or summary judgment procedure that it already knows it will lose simply to get a final judgment. And because this approach rests on the facts that the district court's interlocutory ruling was case-dispositive and the final judgment was with prejudice, an appeal of such an interlocutory order is no more piecemeal than an appeal of a dismissal or summary judgment order as the case either will end on appeal if the district court is affirmed or be remanded for further proceedings if the district court is reversed. If anything, this approach is less piecemeal than the dissent's approach, which encourages increased reliance on the interlocutory appeal statute.

> FN13. The dissent also states that Congress, in enacting § 1292(b), "required that the district judge determine the dispositive effect of the order it has entered. This makes perfect sense." However, its discussion conflates § 1292(b)'s standard for certification (requiring, among other things, that an immediate appeal from an interlocutory order "materially advance the ultimate termination of the litigation") with the quite different question of whether the interlocutory order already entered was case-dispositive and left nothing of the litigation except judgment and appeal. The dissent fails to recognize the effect of a district court's contested interlocutory order already being case-dispositive on the plaintiff's adverseness to the final judgment.

For all these reasons, we conclude jurisdiction over this appeal exists under § 1291 and the Constitution. Now we turn to the merits of Fitel's appeal.

III. SANCTIONS RULINGS

[10] Fitel's appeal challenges these rulings on EBG's discovery motions: (1) the district court's exclusion of Fitel's expert as a sanction for its untimely production of Rafuse's written expert report; and (2) the court's striking of Fitel's claim for attor-

ney's fees as a sanction for its refusal to produce copies of its attorney's fee agreement and attorneys' bills. Our review of a district court's decision to impose sanctions under Rule 37 is "sharply limited to a search for an abuse of discretion and a determination that the findings of the trial court are fully supported by the record." *Serra Chevrolet, Inc. v. Gen. Motors Corp.,* 446 F.3d 1137, 1146-47 (11th Cir.2006) (quotation marks and citations omitted); *BankAtlantic v. Blythe Eastman Paine Webber, Inc.,* 12 F.3d 1045, 1048 (11th Cir.1994); *Pesaplastic, C.A. v. Cincinnati Milacron Co.,* 799 F.2d 1510, 1519 (11th Cir.1986). We discuss each in turn.

A. Exclusion of Expert Testimony

The district court excluded Fitel's legal expert because it found (1) Fitel violated Federal Rule of Civil Procedure 26(a)(2) and Local Rule 26.2(C) by failing to provide its expert witness report until three days after the expiration of the discovery period, *and* (2) Fitel had engaged in "willful" delay in producing the report, which the court described as "stonewalling." Fitel argues the district court abused its discretion in excluding its expert because Fitel timely produced its expert's affidavit, the affidavit complied fundamentally with the discovery rules, the rules do not require its expert's report to be produced before the close of discovery, and, in any event, the record establishes that any delay as to the report was substantially justified.

[11] We start with Rule 26(a)(2), which requires a party to disclose to the other parties the identity of any expert witness ***1361** it may use at trial to present evidence and "[e]xcept as otherwise stipulated or directed by the court, this disclosure shall ... be accompanied by a written report prepared and signed by the witness." Fed.R.Civ.P. 26(a)(2). Thus, " '[d]isclosure of expert testimony' within the meaning of [Rule 26] contemplates not only the identification of the expert, but also the provision of [the expert's] written report." *Reese v. Herbert,* 527 F.3d 1253, 1265 (11th Cir.2008); *see Prieto v. Malgor,* 361 F.3d 1313, 1317-18 (11th Cir.2004). The expert's written report must contain:

> a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Fed.R.Civ.P. 26(a)(2)(B). Here, it is undisputed that Fitel's complaint identified its expert and on November 3, 2006 Fitel produced a written report that contained all of the information required by Rule 26(a)(2)(B).

Rather, the dispute here concerns only *the timing* of the disclosure of the expert's report. Rule 26(a)(2)(C) provides that, absent a stipulation or court order, the expert report must be disclosed "at least 90 days before the trial date or the date the case is to be ready for trial." In this case, however, no date had been set for the trial or for the case to be ready for trial.[FN14] Nonetheless, the heart of EBG's argument is that Local Rule 26.2(C), when read with Federal Rule 26(b)(4)(A), requires disclosure of Fitel's expert report before the close of discovery so that the expert can be deposed within the discovery period.

> FN14. EBG filed its expert exclusion motion on October 23, 2006, discovery was set to close on October 31, 2006, and Fitel produced its expert report on November 3, 2006. By Local Rule and the court's scheduling order the parties had twenty days to file a motion for summary judgment after the close of discovery. *See* N.D. Ga. Civ. Loc. R. 56.1(D). The parties then had thirty days after the court rules on the summary judgment motion(s) to file a con-

> solidated pretrial order. The case is "presumed ready for trial" on the first trial calendar after the consolidated pretrial order has been filed. *See* Local Rules 16.4(A), 40.1. There was no pretrial order in this case, no date set for the case to be ready for trial, and no trial date set.

In *Reese,* this Court recently examined the same Local Rule and the timing of the disclosure of an expert's report when a trial date had not yet been set.[FN15] The *Reese* Court first stated that "Rule 26 does not prescribe a specific deadline applicable" for disclosure of the expert's written report "because a trial date had not been set." *Id.* at 1265. The Court in *Reese* then read Local Rule 26.2(C)'s requirements, along with Rule 26(b)(4)(A)'s deposition prerequisite, and determined that both the expert's name and report should be disclosed before the close of discovery. *Id.* Here is how *Reese* reached that conclusion.

> FN15. As we do here, *Reese* quoted and interpreted the Federal Rules of Civil Procedure as they were phrased in 2006, before the general restyling that became effective December 1, 2007. *Reese,* 527 F.3d at 1264-65 & n. 18; *see supra* n. 2.

The *Reese* Court first stressed that Rule 26's "expert disclosure rule is intended to provide opposing parties reasonable opportunity to prepare for effective cross examination***1362** and perhaps arrange for expert testimony from other witnesses." *Reese,* 527 F.3d at 1265 (quotation marks omitted). The *Reese* Court then noted that "in accordance with this purpose," Local Rule 26.2(C) requires that a party "shall designate" its expert "sufficiently early in the discovery period": (1) "to permit the opposing party the opportunity to depose the expert"; and (2) "if desired, to name its own expert" so that the second expert could also be deposed "prior to the close of discovery." *Id.* (quoting Local Rule 26.2(C)).[FN16] While Local Rule 26.2(C) does not reference the expert's written report, it does require the expert be deposed "*prior to the close of discovery.*" The *Reese* Court pointed out that Rule 26(b)(4)(A) does not permit an expert to be deposed until after her report is provided to the opposing party. *Id.* The syllogism in *Reese* appears to be: (1) the expert must be deposed before the close of discovery (Local Rule 26.2(C)), (2) the report must come before the expert's deposition (Rule 26(b)(4)(A)), and (3) therefore the expert's report necessarily must come before the close of discovery. In *Reese,* this Court concluded that plaintiff's filing of his expert affidavit seven weeks after the close of discovery and in response to defendants' summary judgment motion violated Rule 26 and Local Rule 26.2(C) because disclosure of the expert's report was not before the close of discovery, much less sufficiently in advance of the close of discovery to furnish defendants an opportunity to depose that expert and obtain a rebuttal expert during the discovery period. *Id.*

> FN16. Northern District of Georgia Civil Local Rule 26.2(C) states:
>
> > Any party who desires to use the testimony of an expert witness shall designate the expert sufficiently early in the discovery period to permit the opposing party the opportunity to depose the expert and, if desired, to name its own expert witness sufficiently in advance of the close of discovery so that a similar discovery deposition of the second expert might also be conducted prior to the close of discovery.
> >
> > Any party who does not comply with the provision of the foregoing paragraph shall not be permitted to offer the testimony of the party's expert, unless expressly authorized by court order based upon a showing that the failure to comply was justified.
>
> Local Rule 26.2(C).

[12] Here, Fitel did not produce Rafuse's writ-

ten report until after the close of discovery. Thus, Fitel's disclosure of Rafuse's written report after the close of discovery ran afoul of Rule 26 and Local Rule 26.2(C), as interpreted in *Reese.*[FN17]

> FN17. Although *Reese* was decided in May 2008, well after the 2006 conduct at issue here and the briefing in this appeal, EBG maintained throughout this appeal that Rule 26 and Local Rule 26.2(C) should be read together in the same way that *Reese* now reads them together.

Fitel argues its inclusion of Rafuse's expert affidavit in its complaint was enough to comply with Rule 26 and Local Rule 26.2(C). We disagree. Rule 26 mandates that an expert's written report contain specific information-such as the expert's compensation for study and testimony, a list of all publications the expert authored in the preceding ten years, and a list of all cases in which the expert testified at trial or by deposition in the preceding four years. Fed.R.Civ.P. 26(a)(2)(B). All of this information is wholly absent from Rafuse's affidavit. This type of information is required in the expert's written report precisely because it is important information necessary to attorneys in preparation for deposing the expert. Moreover, the affidavit does little more than assume the complaint's facts are true and, on that basis, opines generally that EBG departed from the professional standard of care by not advising Fitel that its suggested approach***1363** to the "double dip" issue might violate the ADEA. The affidavit provides no meaningful analysis of how and why EBG's actions breached the standard of care. The written report Fitel ultimately produced, on the other hand, provides the level of detailed analysis that the expert disclosure rule requires. It simply came too late.

Alternatively, Fitel argues it could not produce a meaningful legal expert report without first taking the depositions of the EBG attorneys who had represented Fitel regarding its "no double dipping" policy and then reviewing those transcripts. Fitel contends it was justified in not producing the report until after those EBG depositions and it repeatedly advised EBG that EBG's rescheduling the depositions would delay Fitel's report. As discussed later, this argument, along with other undisputed facts in this record, provide substantial justification for Fitel's conduct but they do not negate the fact that the timing requirement in the rules was violated.[FN18] As this Court noted in *Reese,* "compliance with the requirements of Rule 26 is not merely aspirational." *Reese,* 527 F.3d at 1266.

> FN18. We note that EBG's motion for an extension of discovery asked for an extension through December 13, 2006. EBG's motion shows that EBG knew Fitel needed the EBG attorney depositions before producing a complete report and that December 13, 2006 was a more realistic time frame.

[13][14] Nevertheless, determining that Fitel violated Rule 26 and Local Rule 26.2(C), as interpreted in *Reese,* comprises only half the inquiry. We still must consider whether the sanction imposed by the district court was within its discretion. Here, the district court excluded Rafuse's expert testimony. Under Rule 37(c)(1), a district court clearly has authority to exclude an expert's testimony where a party has failed to comply with Rule 26(a) *unless the failure is substantially justified or is harmless. See* Rule 37(c)(1); Local Rule 26.2(C).[FN19] The district court's sanction was based on its finding that Fitel had engaged in "willful" delay in producing Rafuse's written expert report, which the court characterized as "stonewalling." While the district court did not use the term "substantially justified," the court's finding that Fitel's delay was willful and "stonewalling" is effectively a finding of no such substantial justification. Fitel argues the undisputed facts in the record do not support the willfulness/stonewalling finding, but establish only substantial justification. We agree and explain why.

> FN19. Rule 37(c)(1) provides that "[a] party that *without substantial justification* fails to disclose information required by

> Rule 26(a) or 26(e)(1) ... is not, *unless such failure is harmless,* permitted to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed." (Emphasis added). Similarly, Local Rule 26.2(C) provides that any party who does not comply with the provisions in the foregoing paragraph (*see supra* n. 16) "shall not be permitted to offer the testimony of the party's expert, unless expressly authorized by court order based upon a showing *that the failure to comply was justified.*" (Emphasis added.)

First, this is not a case of complete failure to provide information about an expert witness. Fitel identified Rafuse as its expert when it filed its complaint, confirmed that designation in its post-removal initial disclosures, and filed an affidavit of Rafuse with at least some information about her opinions.

Second, Fitel repeatedly told EBG it needed the EBG attorney depositions before Rafuse could do her report. As early as June 2006, well before the end of the discovery period, Fitel's counsel informed EBG that Rafuse's report needed to "take into account the deposition testimony" of the EBG attorneys whose depositions the ***1364** parties were scheduling and that Fitel "believe [d] her report can be completed within thirty ... days of the completion of these four depositions." *See* June 12, 2006 letter from Fitel's counsel to EBG's counsel. Moreover, Fitel, also in May 2006, noticed the depositions of the EBG attorneys for late June, affording EBG over four weeks of advance notice. If these EBG depositions had occurred as scheduled in late June, Fitel's Rafuse report would have been timely produced in mid- to late-July. We know that because once Fitel had those four EBG depositions, it produced Rafuse's report in eighteen days.

Rather than those EBG depositions taking place in June, Fitel's counsel cooperated with EBG's counsel to schedule those depositions at the attorneys' convenience, and those depositions were not completed until September 27, 2006. Indeed, Fitel reiterated its position after scheduling difficulties arose with regard to the EBG attorney depositions, expressly reminding EBG's counsel in a July 11, 2006 letter that "we will need approximately thirty ... days after the completion of the EBG lawyer depositions to finalize our expert report" and that if those depositions could not be scheduled until mid-September, "you should not expect our expert report until mid-October." FN20 Once Fitel obtained the transcript of the final EBG attorney deposition, it promptly produced the expert report, which the parties agree complies with Rule 26(a)(2)(B).

> FN20. At no time before filing its October 23, 2006 motion to exclude expert testimony did EBG complain of or object to Fitel's disclosed plan to submit its expert report when the EBG attorney depositions were completed and Fitel's expert had an opportunity to take into account the testimony of the EBG fact witnesses about whose professional conduct she was asked to opine.

Third, it is noteworthy that in June 2006, EBG itself moved for an extension of discovery from August 13, 2006 until December 13, 2006 and even noted that it was needed in part because Fitel "informed [EBG] that no expert report will be prepared ... until approximately thirty days after [Fitel] deposes certain attorneys employed by EBG," and that "[o]nce such an expert report is furnished to it, [EBG] will want [time] to depose said expert and evaluate the necessity of identifying an expert to testify in response thereto." EBG well knew Fitel's report would come only after the EBG depositions. There was no element of surprise to EBG about when the expert report was going to be provided.

Fourth and most importantly, no trial date for the case had been set or was imminent. Fitel produced Rafuse's expert report on November 3, 2006, and EBG had ample time to take Rafuse's deposition in November 2006 and designate its rebuttal

expert.[FN21] There is no claim here that the passage of time affected EBG's ability to employ a rebuttal legal expert or the ability of its expert to conduct needed analysis.

> FN21. *See supra* n. 14. The hearing on EBG's discovery motions was not until December 15, 2006. Just as the parties cooperated in scheduling the EBG attorney depositions in June through September, they easily could have cooperated in scheduling Rafuse's deposition in November 2006 and then the deposition of EBG's expert.

Fifth, this is not a case where the plaintiff knew all the facts anyway; rather, Fitel reasonably needed the depositions of the defendant EBG's attorneys before it produced its legal expert's report. Here, the issue involves not so much Fitel's interaction with EBG, which Fitel would have known at the outset of the case, but what actions, investigation, and research occurred within the confines of the law firm before EBG gave its advice, or allegedly failed to give any ADEA advice that ***1365** forms the crux of the case. Certainly, Fitel knew what advice the EBG attorneys gave to it and what the no double dipping policy said, but the attorneys' depositions were required to show what the EBG attorneys did, and knew, before rendering that advice or failing to render it, as Fitel alleges.[FN22]

> FN22. In *Reese,* by contrast, this Court rejected the plaintiff's argument that his failure to disclose his expert's opinions until seven weeks after the close of discovery-and then only in his response to the defendants' summary judgment motion-was substantially justified because he needed the defendants' depositions. 527 F.3d at 1265-66. *Reese* involved a 42 U.S.C. § 1983 excessive force claim arising from the plaintiff's arrest by the defendant police officers. Obviously, in that case the plaintiff was present for all the relevant events concerning the arrest and use of force. *See id.* at 1266 (stating Reese's expert "could have rendered a report ... based upon factual assumptions furnished to him by Reese"). Further, Reese's written disclosures did not identify an expert, his counsel verbally identified the expert only twelve days before discovery closed, and Reese never sent opposing counsel a written report at all (or other information from his expert) but simply filed the expert's affidavit in opposition to the defendants' summary judgment motion.

In sum, the undisputed facts in the record reveal that Fitel failed to produce its legal expert's report not through willful delay or stonewalling, but from: (1) a good-faith attempt to accommodate the EBG attorneys in scheduling their depositions over several months (with the last one occurring on September 27, 2006, shortly before the end of discovery), rather than Fitel's insisting on taking all the EBG attorneys' depositions on the noticed, fixed dates in June 2006; and (2) a good-faith belief that the more "practical[ ]" and productive way to structure discovery in this legal negligence case was to identify its legal expert, engage in all relevant fact discovery of the EBG attorneys, and then to produce the expert's written report and to engage in expert discovery. Further, this approach was reasonable given the nature of the case and the actual need for those attorney depositions in order to have a meaningful legal expert report.

Simply put, given all these particular factual circumstances in this case, we cannot say the record supports the district court's finding that Fitel engaged in willful or "stonewalling" delay as to the written report of its expert. Instead, we conclude that the undisputed facts show Fitel had substantial justification for its conduct as to its expert report, that the record does not support the district court's willful-delay determination as to that report, and thus the district court abused its discretion in excluding Rafuse's expert testimony. Therefore, we reverse the district court's exclusion of Fitel's ex-

pert and subsequent dismissal of Fitel's entire complaint with prejudice and remand for further proceedings.

B. Dismissal of Attorney's Fees Claim

Fitel also challenges the district court's decision to dismiss Fitel's attorney's fees claim as a sanction for Fitel's failing to produce its attorney's fee agreement and attorneys' bills incurred in the instant case. The district court found that there was a complete and willful failure by Fitel to provide EBG with the required documents given that Fitel expressly sought to recover its attorney's fees incurred in this case.

The district court imposed the sanction pursuant to Rule 37(d) and 37(b)(2)(C). Rule 37(d) states that if a party

> fails ... to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, ***1366** and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule.

Fed.R.Civ.P. 37(d). In turn, Rule 37(b)(2)(C) lists dismissal as a permitted sanction, stating that the court may issue "[a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or *dismissing the action or proceeding or any part thereof,* or rendering a judgment by default ...." Fed.R.Civ.P. 37(b)(2)(C) (emphasis added). Thus, these rules permit dismissal as a sanction for failure to produce documents.

[15] Construing these same rules, this Court concluded, "where appropriate, a court is authorized to strike pleadings, stay proceedings, dismiss the action or any part thereof, or render a judgment by default against a disobedient party." *United States v. Certain Real Prop. Located at Route 1, Bryant, Ala.,* 126 F.3d 1314, 1317 (11th Cir.1997). FN23 However, we also indicated that a district court may impose the severe sanction of dismissal of a claim with prejudice only where the party's noncompliance is willful or in bad faith. *Id.* at 1317-18.FN24

> FN23. The *Route 1* Court noted that Rule 37 on its face does not require that a court formally issue an order compelling discovery before sanctions are authorized. 126 F.3d at 1317. However, the Court concluded that a district court may not impose sanctions pursuant to Rule 37(d) that dismiss a party's claims in "the absence of either a motion to compel filed by the [opposing party] or an order of the court compelling discovery." *Id.* at 1318. Here, however, EBG did move the court, alternatively to its motion for sanctions, for an order compelling Fitel to produce the records substantiating its attorney's fees claim.

> FN24. In cases where there has been a prior order compelling discovery, this Court has stated that the ultimate sanction of dismissal with prejudice should be imposed only in cases of bad faith, willful delay, or flagrant disregard for the district court's discovery orders. *Wouters v. Martin County, Fla.,* 9 F.3d 924, 934 (11th Cir.1993); *Cox v. Am. Cast Iron Pipe Co.,* 784 F.2d 1546, 1556 (11th Cir.1986); *McKelvey v. AT&T Techs., Inc.,* 789 F.2d 1518, 1520 (11th Cir.1986). "The trial court's discretion regarding discovery sanctions is not unbridled. We have consistently held that while district courts have broad powers under the rules to impose sanctions ..., dismissal is justified only in extreme circumstances and as a last resort." *Wouters,* 9 F.3d at 933 (citations omitted). In *Route 1,* where there was no prior discovery order, we recognized the need for a showing of bad faith or willful

delay to support the sanction of dismissal. *See Route 1,* 126 F.3d at 1317-18. If bad faith or willful delay is required to support dismissal where there was a prior discovery order, it is certainly required where there is only a motion to compel, as in this case.

[16] As to Fitel's attorney agreement and attorney's bills, there is record evidence to support the district court's finding of a complete and willful failure to comply with EBG's discovery requests. The documents responsive to EBG's Document Request were directly relevant to Fitel's claim for attorney fees. In its answer to the Document Request, Fitel first agreed to produce the responsive documents (redacted to protect privilege), as follows:

> [Fitel] objects to Request Number 32 to the extent that it improperly seeks privileged communications between [Fitel] and its counsel. [Fitel] further objects to Request Number 32 to the extent that it seeks information that is not relevant to any claim or defense asserted in the action. Subject to and without waiving the foregoing objection and the General Objections above, [Fitel] will produce documents responsive to Request Number 32 that reflect the amounts of attorneys fees billed to and paid by [Fitel] in ***1367** this action (redacted, if necessary, to protect privileged information).

Nevertheless, despite repeated entreaties, Fitel produced nothing at all. Instead, Fitel (1) decided unilaterally that a summary of its counsel's bills-rather than the documents EBG requested and Fitel stated it would provide with redactions-would be sufficient, and then (2) told EBG that even the summary would not be produced until EBG agreed not to challenge the sufficiency of Fitel's production. At the time of the motions hearing and court's sanctions ruling, Fitel still had produced *nothing* at all, not even the summary or the underlying agreement. The district court also found that Fitel's conduct evinced a strategy by Fitel and/or its counsel of "we're going to make the judge order us to" produce the attorney's fees documents.[FN25]

FN25. Rule 37(d) provides that a district court may sanction a party who fails, among other things, "to serve answers or objections to interrogatories submitted under Rule 33" or "to serve a written response to a request for inspection submitted under Rule 34." Although Fitel served a response to the Document Request, that is not enough to insulate it from a Rule 37(d) sanction under these facts. *See In re Plywood Antitrust Litig.,* 655 F.2d 627, 638 (5th Cir. Unit A Sept.1981) (affirming a district court's imposition of Rule 37(d) sanctions for failure to respond to interrogatories and stating that "under appropriate circumstances, evasive and incomplete answers ... are tantamount to no answers at all" (citations omitted)); *Bonner v. City of Prichard,* 661 F.2d 1206, 1207 (11th Cir.1981) (*en banc*) (accepting as binding precedent all Fifth Circuit cases decided before October 1, 1981). This is particularly true where the response said Fitel would produce the documents and Fitel then produced nothing at all. We recognize Fitel later stated it was willing to produce a summary of the fees and expenses if EBG would agree that Fitel's summary resolved the discovery dispute. However, this misses the point that Fitel had an obligation to produce something and could not simply say it would produce nothing unless EBG agreed in advance to the adequacy of its summary that EBG had not even seen. Fitel, at a minimum, readily could have produced its fee agreement and revealed the amount of the fees charged to date.

In sum, Fitel's conduct as to its attorney's fee agreement and the attorney bills is starkly different from its cooperative conduct as to Rafuse's written expert report. Further, while we may have chosen a different sanction (such as awarding EBG its costs

in filing its motion to compel), the district court's choice of sanction-dismissal of the attorney's fee claim-was within its range of options under Rule 37(d) and 37(b)(2)(C) given its finding of a complete and willful failure to comply with EBG's Discovery Request. Thus, we cannot say the district court abused its discretion in its dismissal of Fitel's attorney's fees claim pursuant to Rule 37(d) and 37(b)(2)(C).

IV. CONCLUSION

For the reasons set forth above, we reverse the district court's exclusion of Fitel's expert witness and dismissal of Fitel's entire complaint but affirm its dismissal of Fitel's claim for attorney's fees. We remand the case to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

TJOFLAT, Circuit Judge, dissenting:

> It is axiomatic, as a matter of history as well as doctrine, that the existence of appellate jurisdiction in a specific federal court over a given type of case is dependent upon authority expressly conferred by statute. And since the jurisdictional statutes prevailing at any given time are so much a product of the whole history of both growth and limitation of federal-***1368** court jurisdiction since the First Judiciary Act, they have always been interpreted in the light of that history and of the axiom that *clear statutory mandate must exist to found jurisdiction.*
>
> *Carroll v. United States,* 354 U.S. 394, 399, 77 S.Ct. 1332, 1336, 1 L.Ed.2d 1442 (1957) (citations omitted) (emphasis added). Despite this guidance from the Supreme Court and our court's precedent to the contrary, a majority of this court today holds that a party aggrieved by certain interlocutory orders can bypass the traditional requirements governing discretionary interlocutory appellate review, *see* 28 U.S.C. § 1292(b), and instead *automatically* receive appellate review by manufacturing a final judgment through inviting the district court to enter a voluntary dismissal with prejudice. Because the majority's decision is at odds with both fundamental appellate jurisdiction tenets and our prior precedent, I respectfully dissent. Part I explains and applies to this case the background principles animating appellate jurisdiction and our judiciary's long-standing policy disfavoring piecemeal appellate review. Part II discusses the direct precedent that I believe controls the disposition of this case-precedent that the majority skirts around and ignores. Part III briefly concludes with guidance for future litigants on the proper way to proceed when faced with a case dispositive discovery motion.

I.

We start any jurisdictional analysis by being mindful of two fundamental principles that limit our court's authority. First, a court of appeals can only entertain an appeal from a district court order if Congress has, by statute, conferred the court with jurisdiction. *See, e.g., Kirkland v. Midland Mortgage Co.,* 243 F.3d 1277, 1280 (11th Cir.2001) ("Article III of the Constitution provides the outer limits of the federal courts' jurisdiction and vests in Congress the power to determine what the extent of the lower courts' jurisdiction will be."). Second, even where Congress has conferred jurisdiction, the Constitution requires that there must exist a real case or controversy. U.S. Const. art. III, § 2. *See also Aetna Life Ins. Co. of Hartford, Conn. v. Haworth,* 300 U.S. 227, 240-41, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1937) ("A 'controversy' in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.") (citations omitted). I address in turn both of these

principles and how they apply in this context.

A.

As a general rule, Congress has statutorily conferred broad jurisdiction to the courts of appeals to hear *final* decisions from district courts. 28 U.S.C. § 1291.[FN1] A final decision "ends the litigation on the ***1369** merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States,* 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911 (1945). Although the so-called "final judgment rule" serves many purposes, the central objectives are to promote the policies of judicial efficiency, avoid piecemeal litigation, and preserve the independence of district courts. *See Constr. Aggregates, Ltd. v. Forest Commodities Corp.,* 147 F.3d 1334, 1336 (11th Cir.1998). "If a party seeks to appeal a district court order that does not constitute a 'final decision' under § 1291 (and does not fall within an exception to the final judgment rule), we must dismiss the case for lack of appellate jurisdiction." *SEC v. Carrillo,* 325 F.3d 1268, 1272 (11th Cir.2003).

FN1. 28 U.S.C. § 1291 provides that:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

In certain instances, though, Congress has granted the courts of appeals jurisdiction to hear interlocutory, non-final orders. For example, Congress has conferred jurisdiction over interlocutory appeals with respect to injunctions,[FN2] receiverships,[FN3] and admiralty decrees determining the rights and liabilities of the parties.[FN4] Moreover, in addition to these general grants of interlocutory appellate authority, Congress has at times provided for specialized interlocutory appellate jurisdiction. *See, e.g.,* 18 U.S.C. § 3626(f)(3)(providing for "the right to an interlocutory appeal of the judge's selection of the special master" under the Prison Litigation Reform Act provisions). Thus, when Congress has chosen to allow parties to seek immediate interlocutory appellate review, it has done so explicitly.

FN2. *See* 28 U.S.C. § 1292(a)(1) ("[T]he courts of appeals shall have jurisdiction of appeals from ... Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court").

FN3. *See* 28 U.S.C. § 1292(a)(2) ("[T]he courts of appeals shall have jurisdiction of appeals from ... Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property").

FN4. *See* 28 U.S.C. § 1292(a)(3) ("[T]he courts of appeals shall have jurisdiction of appeals from ... Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed").

As we have often stated, discovery motions are generally not final orders for purposes of obtaining appellate jurisdiction. *Carpenter v. Mohawk Indus., Inc.,* 541 F.3d 1048, 1052 (11th Cir.2008). Therefore, discovery orders are normally not immediately appealable. *Id.*; *Rouse Constr. Int'l, Inc. v. Rouse*

Constr. Corp., 680 F.2d 743, 745 (11th Cir.1982). Congress has not statutorily authorized interlocutory appellate review for discovery motions, and for sound policy reasons-the preservation of district court integrity and the promotion of judicial efficiency dictates that parties should not be able to circumvent lower courts by seeking piecemeal appellate review. Instead, through the Interlocutory Appeals Act of 1958, Congress created a bi-level procedure for establishing appellate jurisdiction to review non-final orders in civil actions. *See* 28 U.S.C. § 1292(b).[FN5] Under section 1292(b), appellate***1370** courts may, at their discretion, review non-final orders if a trial judge certifies that the "order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.* Absent both certification from a trial judge and acceptance of the appeal by the Court of Appeals, parties are not permitted to have immediate review of discovery orders.

FN5. The full text of 28 U.S.C. § 1292(b) is as follows:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

As axiomatic as these jurisdictional principles might seem, in the present case, OFS Fitel LLC and OFS BrightWave LLC (collectively "Fitel") have engineered a scheme of jurisdictional gymnastics to circumvent the section 1292(b) trial court certification/appellate court acceptance requirement. Here, when presented with an adverse discovery order, Fitel did not seek section 1292(b) certification from the district court. Instead, Fitel sought immediate automatic appellate review by asking the district court to dismiss the entire case with prejudice.[FN6] While in form, Fitel has presented a final order for appeal (albeit a final order without the requisite adverseness, an issue that I address next), the substance of the appeal reveals that this is an appeal from an interlocutory discovery order. As we have previously stated, when an appeal from a final order is merely masquerading as an appeal from an interlocutory order, we lack jurisdiction to hear the case. *See Druhan v. American Mutual Life,* 166 F.3d 1324, 1326 (11th Cir.1999) ("In substance, this is not an appeal from a final judgment, but an appeal from an interlocutory order .... The problem with [this] approach is that it is not statutorily authorized.").

FN6. In its briefs, Fitel objects to this characterization of the lower court proceedings. Fitel instead suggests that it merely presented the district court with the information that its sanction was case dispositive. However, the record strongly suggests that Fitel sought a dismissal with prejudice. The district court's January 7, 2007 order dismissing the case confirms this fact. Referring to the fact that, at the December 15 hearing, "counsel for the Plaintiffs ... suggested that, in lieu of proceeding with the remaining pending discovery motions, the Court simply proceed to dismiss the case," the January 7 order stated: "based on [Plaintiff's] stipulation

> that the Court's ruling [excluding the expert witness] is 'case dispositive,' the Court dismissed the case."
>
> > If Fitel disputed the district court's characterization of the proceedings, the proper avenue to raise an objection is through Rule 59(e) of the Federal Rules of Civil Procedure. Rule 59(e) provides parties with the option of petitioning the court to alter or amend a judgment. Because Fitel did not pursue this route, we must assume that Fitel did not dispute the district court's characterization of the motion to dismiss with prejudice.

Since Congress has not statutorily authorized this approach, I believe that Fitel should not be allowed to circumvent the prescribed boundaries of our court's jurisdiction and receive an automatic appeal by requesting that the district court enter an order that is "final" only in form, but not in substance.

B.

However, even if I were to concede that Fitel is appealing a final order, this Court still does not have jurisdiction to hear this appeal because the final order in question here lacks the Constitutional requisite of adverseness. It is this point that I next ***1371** address. As a formal matter, it is clear that we have no jurisdiction to review the judgment in this case, because there is no case or controversy. The jurisdiction of the federal courts, under Article III of the U.S. Constitution, is limited to "Cases" and "Controversies." U.S. Const. art. III, § 2. At the heart of the case or controversy requirement is the presence of adverse parties. *See GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.,* 445 U.S. 375, 382-83, 100 S.Ct. 1194, 1199-1200, 63 L.Ed.2d 467 (1980).

As the Supreme Court has previously noted, the purpose of the Constitutional case-or-controversy requirement is to "limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen,* 392 U.S. 83, 95, 88 S.Ct. 1942, 1950, 20 L.Ed.2d 947 (1968). Moreover, the clash of adverse parties "sharpens the presentation of issues upon which the court so largely depends for illumination of difficult ... questions." *Baker v. Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). Accordingly, there is no Article III case or controversy when the parties desire "precisely the same result." *Moore v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 47, 48, 91 S.Ct. 1292, 1293, 28 L.Ed.2d 590 (1971) (per curiam).

This Constitutional mandate imposes serious restrictions on our court's ability to hear cases. We are not free to disregard the Constitutional adverseness requirement merely because we desire to reach the merits of a claim. This case is no exception. Here, it is without dispute that neither Fitel nor Epstein, Becker & Green, P.C. ("EBG") objected to the district court's order dismissing the case with prejudice. Indeed, there was no reason for EBG to object, and Fitel invited the dismissal with prejudice. *See supra* note 6. Because there was no adverseness by either party, we have no case or controversy. Accordingly, we are Constitutionally barred from hearing the case before us.

The majority tries to circumvent the Constitutional requirement of adverseness by noting that Fitel is adverse to the merits of the decision-that is, Fitel did not desire the case dismissal, but only accepted the dismissal with prejudice because the district court had entered a case-dispositive order. Indeed, under the majority's reading, Fitel merely "suggested" that for "efficiency reasons" the court should place its judgment "in the final form of a case termination." Even if that is the case-which the record does not suggest one way or the other-then Fitel should have raised at least *some* objection and at least sought section 1292(b) certification of an interlocutory order. Fitel's failure to raise *any type* of objection to the dismissal with prejudice necessitates a finding that we cannot hear this case for

lack of a real "case or controversy." *See Moore,* 402 U.S. at 48, 91 S.Ct. at 1293, 91 S.Ct. 1292 (stating that when "both litigants desire precisely the same result," there is "no case or controversy within the meaning of Art. III of the Constitution"); *see also Reynolds v. Roberts,* 202 F.3d 1303, 1312 (11th Cir.2000) ("a party normally has no standing to appeal a judgment to which he or she consented").

Accordingly, I believe that this court is incapable of hearing Fitel's appeal for both the lack of statutory jurisdiction and the lack of the requisite Constitutional adverseness. The majority ignores these axiomatic principles in an effort to reach the merits-a decision that I believe both flouts limits on our authority and sends the wrong message to litigants and the district judges of our circuit.

***1372** II.

Apart from the Constitutional and Congressional limitations on our jurisdiction, this court has direct precedent that necessitates that we do not reach the merits of Fitel's appeal. The majority, in a desire to reach the merits of Fitel's claims, limits the reach of our prior decisions. Because I believe that these holdings are directly on point, I turn my attention now to that precedent.

A.

The holdings of *Druhan v. American Mutual Life,* 166 F.3d 1324 (11th Cir.1999), and *Woodard v. STP Corp.,* 170 F.3d 1043 (11th Cir.1999), are directly on point and therefore should control our decision. In both cases, the plaintiff, after suffering an adverse interlocutory ruling, moved the district court to dismiss the action with prejudice, and then, after the court granted the motion, appealed the dismissal[FN7] for the purpose of obtaining appellate review of the interlocutory ruling.[FN8] *Druhan,* 166 F.3d at 1325; *Woodard,* 170 F.3d at 1044. In both cases, we held that we lacked jurisdiction to review the interlocutory ruling. *Druhan,* 166 F.3d at 1326; *Woodard,* 170 F.3d at 1044. Druhan had appealed from a non-adverse final judgment; "[n]either party contend[ed] that the district court erred in entering final judgment for the defendant-the plaintiff specifically requested it and the defendant (understandably) [was] not complaining." *Druhan,* 166 F.3d at 1326. As I have explained earlier, adverse parties are indispensable to the creation of the "case or controversy" required by Article III of the Constitution to enable an appeal to go forward. *Id.* Since adverse parties were not present, there was no "case or controversy" to review, and the appeal was accordingly dismissed. *Id.* Like Druhan, ***1373** Woodard attempted to appeal a "judgment [that was] not appealable ... because it was obtained at the request of the plaintiff and there [was] therefore no 'case or controversy' in regard to it." *Woodard,* 170 F.3d at 1044.

FN7. Both *Druhan* and *Woodard* were appeals brought under section 1291. *See Druhan,* 166 F.3d at 1325; *Woodard,* 170 F.3d at 1044.

FN8. In *Druhan,* Virginia Druhan brought suit against American Mutual Life Insurance Company ("Mutual") in Alabama state court, alleging that Mutual had fraudulently induced her to purchase a life insurance policy. *Druhan,* 166 F.3d at 1324. Mutual removed the case to federal court, on the basis that since Druhan's policy was "purchased in connection with a benefits package provided by her employer," her suit was preempted by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461. *Id.* at 1324-25. Druhan, "contending that her claims were not preempted by ERISA, moved the district court to remand the case to state court." *Id.* at 1325. The district court denied the motion. *Id.*

Druhan then moved the district court to dismiss her complaint with prejudice. In her moving papers, she stated that she had no claims under ERISA and thus the court's order denying her motion to remand effectively left her without a rem-

> edy. The court granted her request, and subsequently entered a final judgment dismissing Druhan's claims with prejudice.
>
> *Id.* (footnote omitted). Druhan immediately appealed the judgment to obtain review of the district court's interlocutory order denying her motion to remand. *Id.*
>
> In *Woodard,* Woodard brought a class action against STP Corporation and First Brands Corporation in Alabama state court, and the state court granted a conditional class certification. 170 F.3d at 1044. The defendants removed the case to federal court, and Woodard moved the court to remand the case to the state court. *Id.* The district court denied the motion and vacated the state court's conditional class certification. *Id.* Woodard then moved the district court for a voluntary dismissal without prejudice. *Id.* The defendants objected to the court dismissing the case without prejudice because they had incurred considerable expenses in litigating the case and did not want to face another suit in state court. *Id.* The court granted Woodard's motion, but dismissed the case with prejudice. *Id.* Woodard appealed the dismissal, intending to obtain appellate review of the district court's interlocutory order denying his motion to remand the case. *Id.*

Druhan asked us to ignore the fact that she had asked for the dismissal, and that American Mutual had not objected to it, and to look "beyond the form of the appeal to the substance thereof," to find that the parties, although not adverse to the dismissal, were adverse as to the district court's decision not to remand the case to the state court. *Druhan,* 166 F.3d at 1326. We agreed that "in substance, [Druhan's appeal was] not an appeal from a final judgment, but an appeal from an interlocutory order denying [her] motion to remand." *Id.* Druhan had "requested [the dismissal] only as a means of establishing finality in the case such that [she] could immediately appeal the interlocutory order-an order that [she] believe[d] effectively disposed of her case." *Id.* We then explained as follows:

> The problem with [Druhan's] approach is that it is not statutorily authorized. Congress has clearly stated the circumstances under which this court may hear an appeal from an interlocutory order. *See* 28 U.S.C. § 1292 (1994).... The district court's order denying remand is not among the orders from which an appeal lies as a matter of right, and the plaintiff did not seek an appeal by certification [pursuant to 28 U.S.C. § 1292(b)]. The plaintiff instead attempts to appeal the interlocutory order by obtaining a dismissal with prejudice [and appealing the final judgment pursuant to 28 U.S.C. § 1291]. There may (or may not) be good policy reasons for allowing an appeal to proceed in this manner. That, however, is a decision that rests in the hands of Congress, which, along with the Constitution, sets the boundaries of this court's jurisdiction. *See Swint v. Chambers County Comm'n,* 514 U.S. 35, 45-48, 115 S.Ct. 1203, 1209-11, 131 L.Ed.2d 60 (1995). This appeal lies beyond those boundaries.

Id. at 1326-27 (citations omitted)(footnotes omitted). Thus, in looking "beyond the form of the appeal to the substance thereof," what we saw in *Druhan* was an appeal of an interlocutory order which we lacked statutory authority to hear. *Id.* at 1326.

B.

Fitel contends that the *Druhan*/ *Woodard* jurisdictional holdings cannot be squared with *United States v. Procter & Gamble Co.,* 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958), and *Greenhouse v. Greco,* 544 F.2d 1302 (5th Cir.1977), a former Fifth Circuit decision.[FN9] According to Fitel, these cases stand for two propositions: if a plaintiff suffers an adverse, and dispositive, interlocutory ruling and then dismisses its case with prejudice and appeals, (1) the appeal presents an Article III case or

controversy and (2) this court would have jurisdiction to hear the appeal under section 1291, despite the appeal being based on an interlocutory, rather than a final, order. I disagree with Fitel's reasoning.

> FN9. In *Bonner v. Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), we adopted as binding precedent in the Eleventh Circuit all decisions of the former Fifth Circuit announced prior to October 1, 1981. *Greenhouse* was decided prior to that date and therefore prior to *Druhan* and *Woodard.* Hence, we disregard *Druhan* and *Woodard*'s holdings to the extent that they contradict *Greenhouse*' s, as our decision in *Cohen v. Office Depot, Inc.,* 204 F.3d 1069, 1072 (11th Cir.2000), dictates that "[w]here ... prior panel decisions conflict we are bound to follow the oldest one."

***1374** 1.

In *United States v. Procter & Gamble Company,* 356 U.S. 677, 678, 78 S.Ct. 983, 984, 2 L.Ed.2d 1077 (1958), the United States, in effect, FN10 voluntarily dismissed its civil antitrust action against Procter & Gamble in response to an unfavorable interlocutory order and then directly appealed the district court's decision to the Supreme Court under 15 U.S.C. § 29. FN11 *Procter & Gamble,* 356 U.S. at 679-80, 78 S.Ct. at 985. The Supreme Court held that it had jurisdiction to hear the appeal. It explained:

> FN10. In *Procter & Gamble,* the Government sued Procter & Gamble after a federal grand jury refused to indict the company for violating the criminal antitrust laws. *Procter & Gamble,* 356 U.S. at 678, 78 S.Ct. at 984. During discovery in the civil action, Procter & Gamble requested that the Government disclose the transcripts of the grand jury proceedings. *Id.* The Government resisted the request, the district court ordered it to disclose the transcripts, and the Government, "adamant in its refusal to obey, filed a motion in the District Court requesting that those orders be amended to provide that, if production were not made, the court would dismiss the complaint." *Id.* at 678-79, 78 S.Ct. at 984-85. The district court entered the order, amended as the Government requested, and dismissed the case. *Id.* at 680, 78 S.Ct. at 985.
>
> FN11. The version of 15 U.S.C. § 29 then in effect stated
>
> > In every civil action brought in any district court of the United States under any of said Acts [antitrust acts], wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.
>
> 15 U.S.C. § 29 (1948).

Appellees urge that this appeal may not be maintained because dismissal of the complaint was solicited by the Government. They invoke the familiar rule that a plaintiff who has voluntarily dismissed his complaint may not sue out a writ of error. *See Evans v. Phillips,* [17 U.S. 73, 4 L.Ed. 516 (1819)]; *United States v. Babbitt,* 104 U.S. 767, 17 Ct.Cl. 431, 26 L.Ed. 921 [(1881)]. The rule has no application here. The Government at all times opposed the production orders. It might of course have tested their validity in other ways, for example, by the route of civil contempt. Yet it is understandable why a more conventional way of getting review of the adverse ruling might be sought and any unseemly conflict with the District Court avoided. When the Government proposed dismissal for failure to obey, it had lost on the merits and was only seeking an expeditious review. This case is therefore like *Thomsen v. Cayser,* 243 U.S. 66, 37 S.Ct. 353, 61 L.Ed. 597 [(1917)], where the losing party got the lower court to dismiss the complaint rather than remand for a new trial, so that it could get review in this Court. The court, in denying the motion to dis-

> miss, said "The plaintiffs did not consent to a judgment against them, but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that they might come to this court without further delay."
> *Id.* at 680-81, 78 S.Ct. at 985-86 (quoting *Thomsen,* 243 U.S. at 83, 37 S.Ct. at 358).

The Court's holding was in response to Procter & Gamble's argument that the Government had sought, i.e., consented to, the judgment and therefore waived its right to challenge the interlocutory orders on appeal. *Procter & Gamble,* 356 U.S. at 680, 78 S.Ct. at 985;[FN12] *see also* ***1375***Shores v. Sklar,* 885 F.2d 760, 764 n. 7 (11th Cir.1989) (en banc) (explaining that the "consent-to-judgment doctrine does not implicate the subject matter jurisdiction of the court" but rather that it rests on waiver of error). The Court was simply stating that the Government had not waived its objection to the district court's interlocutory order by requesting a final judgment-this is why the Court noted that the "government at all times opposed the production" and cited to *Thomsen,* where it rejected the same "consent judgment" argument advanced by Procter & Gamble. *Procter & Gamble,* 356 U.S. at 680-81, 78 S.Ct. at 985-86; *see Thomsen,* 243 U.S. at 82, 37 S.Ct. at 357 (describing the argument in support of appellee's motion to dismiss the appeal as: "[t]he judgment of the circuit court was entered in the form finally adopted at the request of the plaintiffs and by their consent, and the errors assigned by plaintiffs were waived by such request and consent").

> FN12. The *Procter & Gamble* Court cited *Evans v. Phillips,* 4 Wheat. 73, 17 U.S. 73, 4 L.Ed. 516 (1818), and *United States v. Babbitt,* 104 U.S. 767, 768, 26 L.Ed. 921 (1881), as supporting the argument put forward by Procter & Gamble. 356 U.S. at 680, 78 S.Ct. at 985. *Evans* states only that "[a] writ of error will not lie on a judgment of nonsuit." 17 U.S. at 73. *Babbitt*, though, has a more detailed holding, in which the Court explained
>
> > In *Pacific Railroad v. Ketchum* (101 U.S. 289, 25 L.Ed. 932), we decided that when a decree was rendered by consent, no errors would be considered here on an appeal which were in law waived by such a consent. In our opinion, this case comes within that rule. The consent to the judgment below was in law a waiver of the error now complained of. For this reason the judgment below must be affirmed.
> >
> > *Babbitt,* 104 U.S. at 768.

Procter & Gamble, then, deals only with whether the plaintiff waived its objection to the interlocutory order by requesting a dismissal-it never directly addresses the case or controversy issue we considered in *Druhan.* Nor does the fact that the Court heard the Government's appeal in *Procter & Gamble* implicitly foreclose our Article III holding in *Druhan*. Procter & Gamble never argued that the Government lacked the requisite adversity to the final order, and "when questions of jurisdiction have been passed on in prior decisions *sub silentio,* [the] Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before [the Court]." *Hagans v. Lavine,* 415 U.S. 528, 533 n. 5, 94 S.Ct. 1372, 1377 n. 5, 39 L.Ed.2d 577 (1974).

Procter & Gamble also does not address our *Druhan* holding that Congress has not authorized the approach Druhan used-obtaining the dismissal of the case for the purpose of appealing a case dispositive interlocutory order. At the time of the Government's appeal, the statutory law did not provide the Supreme Court with jurisdiction to hear an interlocutory appeal of the order the Government wanted to challenge; under section 15 of title 28 of the U.S. Code, all that the Government could bring to the Supreme Court was a final judgment. Thus, the Government's only options for obtaining Supreme Court review of the district court's inter-

locutory order were to either request that the district court dismiss its case and appeal the dismissal, or suffer the dismissal of its case as a contempt sanction and appeal the sanction, an option the Court described as "unseemly." *Procter & Gamble,* 356 U.S. at 681, 78 S.Ct. at 986. Fitel, by contrast, had the option of requesting the district court to certify the interlocutory order at issue for appeal under § 1292(b).[FN13]

FN13. In addition to its argument based on *Procter & Gamble,* Fitel, citing Judge Barkett's concurrence in *Druhan,* suggests that *Druhan*'s holdings do not apply when the interlocutory order at issue has the effect of dismissing the plaintiff's case and contends that the district court's order striking its expert witness effectively dismissed its legal malpractice claim. *See Graves v. Jones,* 184 Ga.App. 128, 361 S.E.2d 19, 20 (1987) ("[E]xcept in clear and palpable cases (such as the expiration of a statute of limitation), expert testimony is necessary to establish the parameters of acceptable professional conduct, a significant deviation from which would constitute malpractice."). The concurrence stated

> I am not prepared at this time to agree with the [majority's discussion] in footnote 7 rejecting outright our sister circuits' views permitting appellate review of a "voluntary dismissal where such a dismissal was granted only to expedite review of an order which had in effect dismissed appellant's complaint." *Studstill v. Borg Warner Leasing,* 806 F.2d 1005, 1008 (11th Cir.1986) (collecting cases). It is unnecessary to confront this issue directly, as the cases permitting such review do so only if it is clear that the appellant has "lost on the merits" and " 'only seeks' an 'expeditious review.' " *Laczay v. Ross Adhesives,* 855 F.2d 351, 355 (6th Cir.1988) (quoting *United States v. Procter & Gamble Co.,* 356 U.S. 677, 78 S.Ct. 983, 2 L.Ed.2d 1077 (1958)). The district court's denial of Druhan's motion to remand, however, did not have the effect of dismissing her action. Druhan still had the ability to make her claim under ERISA.
>
> *Druhan,* 166 F.3d at 1327.

The concurrence quoted our decision in *Studstill,* which had quoted, in dicta, the Sixth Circuit's holding in *Raceway Properties v. Emprise Corp.,* 613 F.2d 656 (6th Cir.1980). *See Druhan,* 166 F.3d at 1327 n. 7 (distinguishing *Studstill* from cases in which the plaintiff voluntarily dismisses his complaint in response to an unfavorable interlocutory order). *Raceway* relied on the Supreme Court's decision in *Procter & Gamble. Raceway,* 613 F.2d at 657. The concurrence also quoted the Sixth Circuit's decision in *Laczay v. Ross Adhesives,* 855 F.2d 351, 355 (6th Cir.1988), which relied on both *Raceway* and *Procter & Gamble.*

The concurrence, in relying on *Raceway* and, by extension, *Procter & Gamble,* at least implicitly argued that these cases stood for the proposition that if the interlocutory order effectively dismissed the plaintiff's cause of action, there would be a case or controversy under Article III and we could hear the plaintiff's appeal pursuant to 28 U.S.C. § 1291. *Procter & Gamble* does not stand for this proposition, *see supra* Part II.B.1., and neither does *Raceway.*

In *Raceway,* the plaintiff voluntarily dismissed his case with prejudice after the district court denied his motion for summary judgment and, in so doing, resolved an issue of law against the plaintiff. *Raceway,* 613 F.2d at 657. The

appellee in *Raceway,* as in *Procter & Gamble,* challenged the court's jurisdiction to hear the appeal, relying on the well-established rule that parties to a consent judgment waive the right to appeal that judgment. *Id.* (citing *Scholl v. Felmont Oil Co.,* 327 F.2d 697, 700 (6th Cir.1964) (holding that consent to a judgment waives the appellant's objections to that judgment, in support of the appellee's argument)). The Sixth Circuit interpreted *Procter & Gamble* to create an exception to that rule, holding that "the judgment below is appealable [as a final order under 28 U.S.C. § 1291] since appellant's solicitation of the formal dismissal was designed only to expedite review of an order which had in effect dismissed appellant's complaint." *Id.* Similarly, in *Laczay v. Ross Adhesives,* 855 F.2d 351 (6th Cir.1988), the Sixth Circuit again held that *Procter & Gamble* created an exception to the rule that parties to a consent judgment waive any objections. *Laczay,* 855 F.2d at 355 ("The basic requirement for appealability of a consent judgment is that the one proposing or soliciting it shall have 'lost on the merits and [be] only seeking an expeditious review.' ") (quoting *Procter & Gamble,* 356 U.S. at 681, 78 S.Ct. at 985).

Judge Barkett's concurrence, then, rests on inapposite cases-cases that deal only with waiver-and provides no support for Fitel's suggestion that the allegedly case-dispositive nature of the district court's order striking its expert provides us with Article III jurisdiction to hear its appeal. Moreover, the logic of *Druhan*'s majority opinion forecloses Fitel's argument. I fail to see how the fact that an interlocutory order effectively disposed of a claim could make a difference under the rationale set forth in *Druhan.* In this case, the court is still faced with, in the form of the appeal, a final order dismissing Fitel's case, which was requested by Fitel, and in substance, an appeal from an interlocutory order which we lack statutory jurisdiction to hear.

***1376** 2.

Like *Procter & Gamble, Greenhouse* does not explicitly address the question before us, whether Fitel's appeal presents an Article III case or controversy. Fitel contends that *Greenhouse* addresses the question implicitly and answers it in the affirmative.

Greenhouse involved a class action seeking to "end[ ] alleged segregation and other***1377** racially discriminatory practices in the parochial schools in the Roman Catholic diocese of Alexandria, Louisiana." *Greenhouse,* 544 F.2d at 1303. The defendants included the parish church, which held title to a "substantially all-white parochial school" in Marksville, Louisiana, the bishop of the diocese, and several federal agencies. *Id.* In two interlocutory orders, the district court limited the plaintiff class to residents of Marksville and dismissed the claims against the bishop, but the orders were not reduced to judgment. *Id.* After the court made these rulings, the Marksville parish schools were desegregated. At this point, the plaintiffs asked the court to dismiss the case as moot, and, as the defendants had no objection, the court dismissed it as moot. *Id.* at 1303-04. The plaintiffs then appealed the dismissal for the purpose of obtaining appellate review of the two interlocutory orders the court had entered, which had limited the class and dismissed the claims against the bishop. *Id.* at 1304. The defendants promptly moved the court of appeals to dismiss the appeal on the ground that the district court's dismissal of the case as moot constituted a consent judgment and, as such, was not appealable. *Id.*

The court of appeals agreed that the claims against the Marksville parish church were moot, but

held that the district court's order dismissing the case had not terminated the litigation. *Id.* Rather, the litigation was still ongoing because the district court had not reduced to final judgment its interlocutory order dismissing the plaintiffs' claims against the bishop; moreover, the plaintiffs' claims against the federal agencies were still pending. *Id.* In the panel's words, the case against the federal agencies "w[as] dormant but for want of a final order, not for mootness." *Id.* The court therefore vacated the district court's order dismissing the case as moot for want of an appealable final judgment under section 1291.[FN14] *Id.*

FN14. In doing so, the court instructed the district court to either enter a final judgment as to all parties or a partial final judgment pursuant to Federal Rule of Civil Procedure 54(b). *Greenhouse,* 544 F.2d at 1305.

It is obvious that, in arriving at this disposition, the court was not required to answer the question of whether the plaintiffs could have maintained an appeal and obtained review of the two interlocutory orders, had they, like Fitel, first obtained the dismissal of all of their claims with prejudice. According to Fitel, the court nonetheless answered this question, presumably as an alternative holding. Fitel bases its argument on language appearing in the court's opinion antecedent to the statement that the appeal was being dismissed for want of a judgment. The language Fitel cites relates to the fact that the district court dismissed the case as moot in response to a letter-motion the plaintiffs had sent to the court, *see id.* at 1303-04, and explores whether this precluded the plaintiffs from appealing the two interlocutory orders the court had previously entered. The court stated,

> The doctrine that one may not appeal from a consent judgment does not apply to the situation before us. "By consenting to the judgment that is entered, a party waives his right to appeal from it. He may, however, urge on appeal that his consent was not actually given." 9 Moore Federal Practice P 203.06. It is obvious that plaintiffs did not intend by their letter-motion to consent to a judgment that would preclude them from the appellate review the desire for which triggered their request that a judgment be entered. Nor could the trial court have entertained such an intent. It was aware that plaintiffs were seeking to ***1378** review the two orders that had narrowed the case. It would be inconsistent with the court's obligation under F[ed]. R. Civ. P. 23 for the court to terminate the case by a non-appealable judgment that would dispose of the claims for diocesan-wide relief, raised by non-Marksville plaintiffs and on behalf of a diocesan-wide class.

Id. at 1305. Drawing on part of this language, Fitel's brief in opposition to EBG's motion to dismiss the appeal asserts that

> Even where an appellant has affirmatively requested dismissal (which is not the case here), binding authority of this Circuit has held that dismissal of the appeal is improper where "[i]t is obvious that plaintiffs did not intend by their letter-motion to consent to a judgment that would preclude them from the appellate review the desire for which triggered their request that a judgment be entered." *Greenhouse v. Greco,* 544 F.2d 1302, 1305 (11th [5th] Cir.1974); *see also Dorse v. Armstrong World Indus., Inc.,* 798 F.2d 1372 (11th Cir.1986) (refusing to dismiss appeal despite fact that appellant had entered into a stipulation of judgment).[FN15] Similarly, it was obvious to the [district c]ourt and counsel for EBG that [Fitel] clearly and consistently objected to the district court's preclusion of expert testimony and that [Fitel] never consented, or intended to consent to a judgment that would preclude [Fitel] from appellate review.

FN15. We distinguished *Dorse v. Armstrong World Indus., Inc.,* 798 F.2d 1372 (11th Cir.1986), in *Druhan. Druhan,* 166 F.3d at 1325 n. 4.

The *Greenhouse* language the brief quotes

provides Fitel no support for two reasons. First, the language is pure dicta; it deals with a hypothetical scenario. It assumes that the district court had entered a judgment that was final as to all issues and parties and thus appealable under section 1291; that the plaintiffs had appealed the judgment; that the defendants had moved to dismiss the appeal on the ground that the plaintiffs had "consented" to the judgment; FN16 that the plaintiffs had responded to the motion by stating that their "consent was not actually given"; and that it was obvious that the trial court, in discharging its responsibilities under Rule 23, could not have entertained the notion that the plaintiffs were consenting to the dismissal of their case. The dicta ends with this implication: if faced with this scenario, the panel would have found that the plaintiffs had not consented to the dismissal.

> FN16. The *Greenhouse* panel acknowledged the doctrine that one "may not appeal from a consent judgment. 'By consenting to the judgment that is entered, a party *waives* his right to appeal from it.' " *Greenhouse,* 544 F.2d at 1305 (emphasis added).

Second, *Greenhouse* has no bearing on our "case or controversy" holdings in *Druhan* and *Woodard.* Since the *Greenhouse* panel was not presented with a final judgment it was not necessary for the panel to reach the issue of standing, and thus it did not do so explicitly. If it reached the issue, it did so *sub silentio*. In this circuit, a panel's *sub silentio* jurisdictional finding in one case does not constitute binding precedent, as "it is well-established circuit law that we are not bound by a prior decision's *sub silentio* treatment of a jurisdictional question." *Main Drug, Inc. v. Aetna U.S. Healthcare, Inc.,* 475 F.3d 1228, 1231 (11th Cir.2007) (quotation omitted).

Accordingly, I believe that our precedent in *Druhan* and *Woodard* effectively ends the day for Fitel's appeal. Fitel should not be permitted to receive immediate, automatic appellate review by seeking a dismissal with prejudice. Instead, Fitel ***1379** should have used the statutory mechanism in place, section 1292(b), if it wanted to receive appellate review. It is to this point that I now turn.

III.

When all is said and done, it is obvious that an interlocutory order that effectively forecloses the plaintiff's case is appealable under section 1292(b). Section 1292(b) provides for the appeal of an interlocutory order if the district court certifies that it "may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). An interlocutory order that effectively terminates the plaintiff's case-like the order Fitel is attempting to appeal-obviously meets this definition. Congress, in enacting section 1292(b) in 1958, could have authorized the appeal of such an order without the district court's certification (and the court of appeals's acceptance of the appeal), provided that the appellant demonstrated to the court of appeals that the order effectively, and adversely, disposed of its case, but Congress chose not to go that route.

Instead, Congress required that the district judge determine the dispositive effect of the order it has entered. This makes perfect sense. The district judge is in the best position to assess the situation at hand-in particular, the efficiency and cost effectiveness of authorizing the interlocutory appeal to go forward. FN17 In certifying ***1380** the order, and carefully circumscribing and plainly stating the issue, the judge is telling the court of appeals that entertaining the appeal will enhance efficiency and cost-effectiveness in reaching a final judgment in the case. FN18 The court of appeals, as a total stranger to the case, is ill-suited to undertake this task in the first instance. Adopting a policy of entertaining interlocutory appeals that could be certified under section 1292(b), but are not, may encourage some lawyers to dismiss a claim that might succeed notwithstanding the adverse interlocutory ruling. By traveling the section 1292(b) route rather than the route Fitel has taken, a lawyer can avoid the risk of dismissing such a claim, and thereby en-

countering a malpractice suit.[FN19] If unsuccessful on appeal, counsel will have the opportunity to revisit the client's case before deciding whether to call it a day. If it appears that, in light of the unsuccessful appeal, the case lacks merit, counsel simply informs the court-perhaps on summary judgment, a Rule 12(b)(6) determination setting, or under Rule 41(a) or (b)-that the plaintiff cannot establish its claim.

FN17. The role of the district court in screening interlocutory appeals is emphasized in the legislative history of section 1292(b). We recounted this history in *McFarlin v. Conseco Services.,* 381 F.3d 1251, 1257 (11th Cir.2004), stating

> The addition of [section] 1292(b) was prompted by a proposal to Congress from the Judicial Conference of the United States Courts. The specifics of that proposal originated from a committee of judges appointed by the Chief Justice to study the matter of interlocutory appeals. The committee's report was approved by the Judicial Conference and transmitted to Congress, where it was reproduced in the reports of the House and Senate Judiciary Committees when they acted favorably on the legislation. The report of the Judicial Conference committee is particularly persuasive in regard to the intent behind the provision, because Congress enacted the report's proposed language verbatim.
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> *Id.* (citations omitted).
>
> The report from the Judicial Conference committee was attached to the report issued by the Senate Committee on the Judiciary and states
>
> The right of appeal given by the amendatory statute is limited both by the requirement of the certificate of the trial judge, who is familiar with the litigation and will not be disposed to countenance dilatory tactics, and by the resting of final discretion in the matter in the court of appeals, which will not permit its docket to be crowded with piecemeal or minor litigation.
>
> S. Rep. No. 85-2434 (1958), *reprinted in* 1958 U.S.C.C.A.N. 5255. The Senate Report itself states
>
> [W]hile it may be desirable to permit appeals from any interlocutory order in certain instances, the indiscriminate use of such authority may result in delay rather than expedition of cases in the district courts. Obviously, such appeals should not be allowed if they are filed solely for the purpose of delay or are based on spurious grounds. In order to eliminate such appeals the bill is cast in such a way that the appeal is discretionary rather than a matter of right. It is discretionary in the first instance with the district judge ....
>
> *Id.* at 5256-5257. The Senate Report also included a report from a committee appointed by the Chief Judge of the Tenth Circuit, which addressed the procedure by which interlocutory appeals should be taken. *Id.* at 5258. The committee recommended an interlocutory appeals procedure similar to that eventually adopted by Congress in § 1292(b). The Senate Committee apparently thought the Tenth Circuit committee's report to be instructive and therefore included it in its report. The Tenth Circuit committee's report states
>
> [it is necessary] to provide a procedural screen through which only the desired cases may pass .... We believe that the certificate of the trial judge is essential

> both to recognition of the appropriate case [for hearing an interlocutory appeal] and to rejection of applications calculated merely to delay the judgment. Only the trial court can be fully informed of the nature of the case and the peculiarities which make it appropriate to interlocutory review at the time desirability of the appeal must be determined; and he is probably the only person able to forecast the further course of the litigation with any degree of accuracy. Immediate availability of counsel for informal conference should prove a great advantage to the trial judge in isolating the extraordinary case in which valuable savings could be expected to follow an immediate review. Requirement that the trial court certify the case as appropriate for appeal serves the double purpose of providing the appellate court with the best informed opinion that immediate review is of value, and at once protects appellate dockets against a flood of petitions in inappropriate cases.
>
> *Id.* at 5262.

FN18. This case provides an excellent example of how following the procedure established by section 1292(b) enhances judicial efficiency and thus reduces transaction costs. In evaluating whether to authorize a section 1292(b) appeal, the district court must consider if "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Consequently, had Fitel requested a section 1292(b) certification of the order striking its expert, it is a safe assumption that the district court would have finished the hearing that it was already conducting and would have considered EBG's remaining motions for sanctions, since EBG's fifth motion, which sought the dismissal of Fitel's entire complaint with prejudice, might have terminated the litigation, thus obviating any need for an interlocutory appeal. Had the court heard the remaining motions and, as seems likely given the tenor of the December 15, 2006 hearing, dismissed Fitel's complaint, Fitel would have appealed, and it may have turned out that a ruling on the interlocutory order Fitel now presents would have been unnecessary. As the case stands now, the district court, again given the tenor of the December 15 hearing, may dismiss Fitel's complaint after hearing EBG's remaining motions, in which event, this case will come before us once again.

FN19. Where a court of appeals has reviewed an interlocutory order in an appeal taken from a judgment of dismissal entered solely at the plaintiff's request, one must ask whether the court of appeals, in sidestepping section 1292(b)'s limitation, took the appeal because plaintiff's counsel may have committed malpractice in failing to seek a section 1292(b) certification.

The majority objects to this approach by noting that section 1292(b) certification was by no means "guaranteed" ("there is no basis for the dissent's bold prediction that a section 1292(b) request likely would have been granted") and that Fitel could have been denied appellate review if the district judge failed to certify the order. Indeed, that is possible. However, a denial of certification would suggest that the ***1381** district judge, who is in the best position to see the entire landscape of the unfolding case, did not believe either that his order involved a "controlling question of law as to which there is substantial ground for difference of opinion" or that appellate review would "materially advance the ultimate termination of the litigation." In either case, the decision of whether immediate appellate review is appropriate is best made by a district court judge, not the individual litigants.

Additionally, the majority rejects my reasoning by arguing that the section 1292(b) route "foists upon litigants and counsel an untenable position" where the "attorney dare not candidly tell the court that its ruling is case-dispositive." I fail to see how requesting section 1292(b) certification of an interlocutory order places an attorney in a vexing ethical dilemma. Indeed, by requesting section 1292(b) certification, an attorney is candidly informing the court that the order at hand will "materially advance the ultimate termination of the litigation." There is no ethical dilemma that an attorney faces if the attorney candidly informs the court about his client's positions and diligently pursues his client's goals through the statutory framework.

It is for these reasons that I respectfully DISSENT.

C.A.11 (Ga.),2008.
OFS Fitel, LLC v. Epstein, Becker and Green, P.C.
549 F.3d 1344, 72 Fed.R.Serv.3d 86, 21 Fla. L. Weekly Fed. C 1270

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Not Reported in F.Supp.2d, 2006 WL 83477 (E.D.Mich.)
(Cite as: 2006 WL 83477 (E.D.Mich.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan, Southern Division.
POWERHOUSE MARKS, L.L.C. and Powerhouse Licensing, L.L.C., Plaintiffs,
v.
CHI HSIN IMPEX, INC., et al., Defendants.

No. Civ.A.04CV73923DT.
Jan. 12, 2006.

George T. Schooff, Robert M. Siminski, Brent Seitz , David P. Utykanski, Harness, Dickey, Troy, MI, for Plaintiffs.

Edward R. Schwartz, Christie, Parker, Pasadena, CA, How GuinRobert Fong, Ku and Fong, Los Angeles, CA, Kathleen A. Lang, Dickinson Wright, Howard W. Burdett, Jr., Foley & Lardner, Detroit, MI, for Defendants.

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO COMPEL DEFENDANT WAL-MART TO PROVIDE COMPLETE, NON-EVASIVE ANSWERS TO INTERROGATORY NOS. 1, 2, AND 7

MAJZOUB, Magistrate J.

***1** On October 6, 2004, Plaintiffs Powerhouse Marks L.L.C. and Powerhouse Licensing, LLC, owners of the "Powerhouse" and "Powerhouse Gym" trademarks, sued Defendant Chi Hsin Impex ("Impex"), a maker and distributor of exercise equipment, alleging that Defendants' sales of exercise equipment using Plaintiffs' registered marks violate the Federal Lanham Act, infringe on the marks, and violate Michigan consumer protection law. Plaintiffs filed an Amended complaint on April 5, 2005, adding Wal-Mart Stores, Inc. ("Wal-Mart") and several other retailers as defendants. Defendant Wal-Mart filed an answer to the complaint on April 26, 2005.

On July 7, 2005, Powerhouse served its First Set of Interrogatories on Defendant Wal-mart. Defendant Wal-Mart responded on July 19, 2005, and objected that Interrogatories 1 and 2 were "compound, overly broad, unduly burdensome, and [seek] information that is equally available to Powerhouse from third-parties, including Defendant Chi Hsin Impex, Inc." and also listed the names and addresses of several individuals with knowledge of the subject of the Interrogatories. (Plaintiffs' Exhibit 1 attached to Motion to Compel). With respect to Interrogatory 7, Defendant Wal-Mart objected that the terms in the Interrogatory were vague and undefined, and that Interrogatory 7 sought information protected by the work product privilege.[FN1]

FN1. Wal-Mart provided no privilege log, or any factual basis for the claim of privilege.

On September 8, 2005, Defendant Wal-Mart served Supplemental Responses to Plaintiffs' discovery requests in which they reiterated their previous objections, but also referred Plaintiffs to 1771 pages of Bates stamped documents which Defendant Wal-Mart contends sufficiently respond to Plaintiffs' Interrogatories. Plaintiffs maintain that Defendant's Supplemental Responses are still inadequate in that Plaintiffs are unable to ascertain with reasonable effort how the voluminous documents are responsive to Plaintiffs' Interrogatories.

On September 21, 2005, Plaintiffs filed their Motion to Compel, which has been referred to the undersigned for hearing and determination pursuant to 28 U.S.C. § 636(b)(1)(A). Defendant Wal-Mart filed its Opposition to Plaintiffs' Motion to Compel and Plaintiffs filed their Reply. The Court is dispensing with oral argument pursuant to E.D. Mich. LR 7.1(e). *See generally In re Texas Bumper Exchange, Inc. v. Veliz,* 2005 Bankr.LEXIS 1936 (Bankr W.D. Texas 2005)(holding that Fed.R.Civ.P. 37(a) "does not by its terms require

that there be a hearing on a party's application for an order compelling discovery-only that there be reasonable notice.").

GENERAL DISCOVERY STANDARDS

The Federal Rules of Civil Procedure provide for broad, liberal discovery of any information which may be relevant to a suit. The discovery rules, like all of the Rules of Civil Procedure, must "be construed and administered to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1; *accord North River Ins. Co. v. Greater N.Y. Mut. Ins. Co.,* 872 F.Supp. 1411, 1412 (E.D.Pa.1995) (courts should apply discovery rules in accordance with "the important but often neglected Rule 1 of the Federal Rules of Civil Procedure[.]"). Under FED. R. CIV. P. 26(b)(1), discovery may be had "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action ... if the information sought appears reasonably calculated to the discovery of admissible evidence." The determination of "relevance" is within the court's sound discretion. *See, e.g., Watson v. Lowcountry Red Cross,* 974 F.2d 482 (4th Cir.1992); *Todd v. Merrell Dow Pharm.,* 942 F.2d 1173 (7th Cir.1991); *McGowan v. General Dynamics Corp.,* 794 F.2d 361 (8th Cir.1986). In applying the discovery rules, "relevance" should be broadly and liberally construed. *Herbert v. Lando,* 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979); *Hickman v. Taylor,* 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947); *Coughlin v. Lee,* 946 F.2d 1152 (5th Cir.1991). "The requirement of relevancy should be construed liberally and with common sense, rather than in terms of narrow legalisms." *Miller v. Pancucci,* 141 F.R.D. 292, 294 (C.D.Cal.1992). Additionally, "[i]n ruling on a discovery motion, a court will not determine whether the theory of the complaint is sound, or whether, if proven, would support the relief requested." 4 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE ¶ 26.07[1] (2d ed.1995); *see also, Garland v. Torre,* 259 F.2d 545 (2d Cir.1958).

***2** Under Fed.R.Civ.P. 33(b), "[a]ll grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown." "An objecting party must specifically establish the nature of any alleged burden, usually by affidavit or other reliable evidence." *Burton Mechanical Contractors, Inc., v. Foreman,* 148 F.R.D. 230 (N.D.Ind.1992); *see also McCleod, Alexander, Powel & Apffel, P.C. v. Quarles,* 894 F.2d 1482, 1485 (5th Cir.1990); *Josephs v. Harris Corp.,* 677 F.2d 985, 992 (3d Cir.1982); *Schaap v. Executive Indus., Inc.,* 130 F.R.D. 384 (N.D.Ill.1990). As one court has noted "[a] party resisting discovery is swimming against a strong upstream policy current [where] [t]he policy underlying the discovery rules encourages more rather than less discovery, and discourages obstructionist tactics." *In re Texas Bumper Exchange, Inc., v. Veliz,* 2005 Bankr.LEXIS 1936 (2005).

Plaintiffs' Interrogatories No. 1 and 2

At issue here are Plaintiffs' Interrogatories Nos. 1 and 2, which state:

> 1. Identify the following, with the information pertaining to products bearing and/or sold under the mark POWERHOUSE being listed separately: every product purchased by Defendant from Chi Hsin Impex, Inc. ("Impex") by name and model number and state the date that each product was purchased; the quantities of each purchase; the price paid by Defendant per product; and all persons known to the Defendant to have knowledge of these facts.
>
> 2. With respect to the products identified in response to Interrogatory No. 1, please provide the following with products bearing and/or sold under the mark POWERHOUSE being listed separately: the dates that each product was sold by Defendant; the average yearly price that each product was sold at; the dollar volume of each product sold on an annual basis; Defendant's profits for each product on an annual

> basis; and Defendant's costs for each product on an annual basis with an explanation as to how such costs are calculated; and all persons known to the Defendant to have knowledge of these facts.

(Plaintiffs' Exhibit 1). This Court addressed a nearly identical dispute involving similar Interrogatories to co-defendant retailers in an opinion dated November 15, 2005. The Court's reasoning in that opinion applies with full force here.

Defendant Wal-Mart has asserted perfunctory "general objections" to each Interrogatory, asserting nearly every ground for objecting to an Interrogatory ever available to any party with respect to each and every one of Plaintiffs' Interrogatories. These objections can be easily discarded by a plain reading of Rule 33(b) which requires that "[a]ll grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown." Fed.R.Civ.P. 33(b)(4).

***3** Defendant also points to hundreds of pages of database printouts produced as allegedly responsive to Plaintiffs' Interrogatories. Plaintiffs maintain that the documents produced by Defendant are indecipherable and do not adequately answer their Interrogatories.

Resolution of this conflict rests on Fed.R.Civ.P. 33(d) which provides:

> Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained [ ].

Fed.R.Civ.P. 33(d). The Court has also reviewed the documents submitted under seal and concludes they are not adequately responsive to Interrogatories 1 and 2. The documents contain line item data arranged by columns and UPC codes. From this raw data, the Court is unable to ascertain the information sought by the Interrogatories. Thus Defendant Wal-Mart's document production is not adequately responsive to Plaintiffs' discovery requests.

The Court is convinced that given the nature of the raw data and the fact that it is much more easily used in conjunction with a financial database, Defendant's burden in deriving the information sought in Plaintiffs' interrogatories is significantly less than Plaintiffs'. The Court is also convinced that Defendant is better positioned to accurately interpret and explain how the documents produced are responsive to Plaintiffs' Interrogatories 1 and 2. Certainly Defendant has the capability to compute and provide in summary fashion annual sales figures and expenditures for specific products. Under the Federal Rules, a party may be ordered to produce such information even when the electronic information does not exist in the format requested. *See generally* Fed.R.Civ.P. 34, Advisory Committee's notes specifying that a "respondent may be required to use his devices to translate the data into usable form." Furthermore:

> Although there may be some differences between requiring the production of existing tapes and requiring a party to so program the computer as to produce data in computer-readable as opposed to printout form, we find it to be a distinction without a difference, at least in the circumstances of this case.

In re Air Crash Disaster at Detroit Metropolitan Airport on August 16, 1987, 130 F.R.D. 634, 636 (E.D.Mich.1989)(citing *National Union Electric Corp. v. Matsushita Electric Industrial Co., Ltd.,* 494 F.Supp. 1257, 1262-63 (E.D.Pa.1980)).

This Court similarly concludes that Defendant must produce to Plaintiffs a more usable form of data that is responsive to Plaintiffs' Interrogatories 1 and 2.

***4** Accordingly, Plaintiffs' Motion to Compel Defendant Wal-Mart to Provide Complete, Non-Evasive Answers to Interrogatory 1 and 2 is GRANTED. Defendant must produce within fifteen (15) days of this Order those documents responsive to Plaintiffs' interrogatory requests and or answers to Interrogatories 1 and 2.

Plaintiffs' Interrogatory No. 7

Plaintiffs' Interrogatory No. 7 asks Defendant to:

> Describe when (month/day/year) that Defendant first became aware of Plaintiffs, how Defendant learned of Plaintiffs, and state with specificity what investigation, if any, Defendant conducted prior to offering to sell and selling the products identified in response to Interrogatory No. 2, including whether Defendant sought and obtained an opinion from counsel prior to doing so, and set forth the contents of any such opinion.

Wal-Mart originally objected to Interrogatory No. 7 on the grounds that:

> [T]he phrase "became aware of Plaintiffs" is vague, ambiguous and undefined. Wal-Mart further objects ... because the phrase "learned of Plaintiffs" is vague, ambiguous and undefined. Wal-Mart further objects to this interrogatory insofar as it seeks information protected by the work product and/or attorney client privileges.

Defendant Wal-Mart objects that that, as a corporation composed of individuals whose personal knowledge cannot always be imputed to the corporation as a whole, Wal-Mart cannot state what it "knows" or when it "learned" it. This objection is disingenuous at best. Wal-Mart should be able to document its initial business contacts with Plaintiffs. In addition, Defendant Wal-Mart has failed to produce a privilege log or provide any factual basis underlying its privilege claim. As a result, Wal-Mart has failed to carry its burden to demonstrate the existence of a privilege with respect to Interrogatory 7. Plaintiff's Motion to Compel is Granted. Wal-Mart is ordered to answer Interrogatory 7 to the best of its ability.

Plaintiffs' Motion to Compel also seeks an order that depositions of Defendant Wal-Mart's designated corporate representatives take place within the Eastern District of Michigan, rather than at Wal-Mart's headquarters in Bensonville, Arkansas. Plaintiffs' Motion to Compel is DENIED as moot because Wal-Mart has agreed to allow its representatives to be deposed in this district.

Finally, the Court considers Plaintiffs' request for costs incurred in bringing this motion. Fed.R.Civ.P. 37 governs sanctions for a party's failure to make or cooperate in the discovery process. Specifically, Rule 37(d) authorizes a district court to impose discovery sanctions notwithstanding the absence of an order compelling discovery. In *Jackson v. Nissan Motor Corp.,* 888 F.2d 1391 (6th Cir.1989)(unpublished), the court held that "the majority view authorizes Rule 37(d) sanctions when a party's 'evasive or incomplete answers to proper interrogatories impede discovery." ' *Jackson,* 888 F.2d at 1391 (citing *Badalamenti v. Dunham's Inc.,* 118 F.R.D. 437, 439 (E.D.Mich.1987); *Bell v. Automotive Club of Michigan,* 80 F.R.D. 228, 232 (1978); *Airtex Corp. V. Shelley Radiant Ceiling Co.,* 536 F.2d 145, 155 (7th Cir.1976)). Additionally, "[a] district court has the inherent power to sanction a party when that party exhibits bad faith, including the party's refusal to comply with the court's orders." *Youn v. Track, Inc.,* 324 F.3d 409, 420 (6th Cir.2003)(citing *Chambers v. NASCO, Inc.,* 501 U.S. 32, 43-50, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)).

***5** In this case, the Court concludes that Defendant's objections to Plaintiffs' discovery failed to

conform with the Federal Rules of Civil Procedure. In this respect, Plaintiff is entitled to fees and costs under Rule 37. The Court also concludes that an award of costs and fees is an appropriate sanction given Defendant's bad faith and dilatory discovery tactics. Plaintiff is hereby ordered to submit, within ten (10) days from the date of this order, a Bill of Costs incurred in bringing this motion. Defendant may file an objection to Plaintiffs' Bill of Costs within five (5) days following Plaintiffs' filing after which the Court will determine the reasonableness of Plaintiffs' proposed Bill of Costs.

IT IS SO ORDERED.

Pursuant to Fed.R.Civ.P. 72(a), the parties have a period of ten days from the date of this Order within which to file any written appeal to the District Judge as may be permissible under 28 U.S.C. 636(b)(1).

E.D.Mich.,2006.
Powerhouse Marks, L.L.C. v. Chi Hsin Impex, Inc.
Not Reported in F.Supp.2d, 2006 WL 83477 (E.D.Mich.)

END OF DOCUMENT

538 F.3d 448, 71 Fed.R.Serv.3d 477, 87 U.S.P.Q.2d 1923
(Cite as: 538 F.3d 448)

C

United States Court of Appeals,
Sixth Circuit.
INFO-HOLD, INC., Plaintiff-Appellant,
v.
SOUND MERCHANDISING, INC., dba Intellitouch Communications, Defendant-Appellee.

No. 07-4238.
Argued: July 23, 2008.
Decided and Filed: Aug. 18, 2008.

Background: Patent owner filed action against competitor alleging infringement. Parties entered into settlement agreement and dismissed action. Owner brought motion for relief from judgment. The United States District Court for the Southern District of Ohio, Timothy S. Black, United States Magistrate Judge, denied motion. Owner appealed.

Holdings: The Court of Appeals, Clay, Circuit Judge, held that:
(1) competitor had not affirmatively misrepresented features of accused product series during settlement negotiations;
(2) competitor had not deliberately breached duty to disclose features of accused product series during settlement negotiations; and
(3) owner did not demonstrate that agreement had been breached, or that circumstances were so extraordinary or exceptional that relief from dismissal order was warranted.

Affirmed.

West Headnotes

[1] Federal Courts 170B 829

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk829 k. Amendment, vacation, or relief from judgment. Most Cited Cases

A district court's denial of a motion for relief from a final judgment, order, or proceeding is reviewed for abuse of discretion. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

[2] Federal Courts 170B 812

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)4 Discretion of Lower Court
170Bk812 k. Abuse of discretion. Most Cited Cases

A district court abuses its discretion when it commits a clear error of judgment, such as applying the incorrect legal standard, misapplying the correct legal standard, or relying upon clearly erroneous findings of fact.

[3] Patents 291 323.3

291 Patents
291XII Infringement
291XII(B) Actions
291k323 Final Judgment or Decree
291k323.3 k. Relief from judgment or decree. Most Cited Cases

Competitor had not affirmatively misrepresented features of accused product series during settlement negotiations, as required for patent owner to obtain relief from dismissal order that had been entered on basis that parties had entered into settlement agreement, where parties had factual dispute concerning whether misrepresentation actually had been made and evidence existed in record suggesting that misrepresentation had not been made. Fed.Rules Civ.Proc.Rule 60(b)(3), 28 U.S.C.A.

[4] Federal Civil Procedure 170A 928

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(I) Motions in General
170Ak928 k. Determination. Most Cited

Cases

Federal Civil Procedure 170A 2657.1

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2657 Procedure
170Ak2657.1 k. In general. Most Cited Cases

The party seeking relief on a motion for relief from a final judgment, order, or proceeding bears the burden of establishing the grounds for such relief by clear and convincing evidence. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

[5] Federal Courts 170B 433

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(C) Application to Particular Matters
170Bk433 k. Other particular matters. Most Cited Cases

Statutes 361 226

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k226 k. Construction of statutes adopted from other states or countries. Most Cited Cases

The meaning of a federal statute or rule generally is not determined by state law unless the statute or rule so directs.

[6] Courts 106 85(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(F) Rules of Court and Conduct of Business
106k85 Operation and Effect of Rules
106k85(1) k. In general. Most Cited Cases

Statutes 361 222

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k222 k. Construction with reference to common or civil law. Most Cited Cases

When a federal statute or rule includes terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress meant to incorporate the established meaning of those terms.

[7] Federal Civil Procedure 170A 928

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(I) Motions in General
170Ak928 k. Determination. Most Cited Cases

Federal Civil Procedure 170A 2654

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds
170Ak2654 k. Fraud; perjury. Most Cited Cases

For the purpose of evaluating fraud on a motion for relief from a final judgment, order, or proceeding, "fraud" is the knowing misrepresentation of a material fact, or concealment of the same when there is a duty to disclose, done to induce another to act to his or her detriment; thus, fraud includes deliberate omissions when a response is required by law or when the non-moving party has volunteered information that would be misleading without the omitted material. Fed.Rules Civ.Proc.Rule 60(b)(3), 28 U.S.C.A.

[8] Federal Civil Procedure 170A 928

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(I) Motions in General
170Ak928 k. Determination. Most Cited Cases

Federal Civil Procedure 170A 2654

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds
170Ak2654 k. Fraud; perjury. Most Cited Cases

To establish grounds for relief on a motion for relief from a final judgment, order, or proceeding due to fraud, the moving party need not demonstrate that the adverse party has committed all the elements of fraud specified in the law of the state where the federal court is sitting, but rather must simply show that the adverse party's conduct was fraudulent under the general common law understanding. Fed.Rules Civ.Proc.Rule 60(b)(3), 28 U.S.C.A.

[9] Patents 291 323.3

291 Patents
291XII Infringement
291XII(B) Actions
291k323 Final Judgment or Decree
291k323.3 k. Relief from judgment or decree. Most Cited Cases

Competitor had not deliberately breached duty to disclose features of accused product series during settlement negotiations, as required for patent owner to obtain relief from dismissal order that had been entered on basis that parties had entered into settlement agreement, where competitor exercised its right during discovery to object to question requesting such information, district court had not ruled on motion to compel and thus competitor did not have discovery duty to respond, and product that had not been disclosed had been publicly available for purchase for over four months prior to settlement conference. Fed.Rules Civ.Proc.Rules 26(b)(1, 2), 26(e)(1), 33(b)(3, 4), 60(b)(3), 28 U.S.C.A.

[10] Patents 291 323.3

291 Patents
291XII Infringement
291XII(B) Actions
291k323 Final Judgment or Decree
291k323.3 k. Relief from judgment or decree. Most Cited Cases

Patent owner's allegation that competitor's attorneys three months after settlement filed pleading on behalf of other competitor, which "asserted counterclaims and invalidity allegations that appear[ed] to be based upon information that only [competitor] and [patent owner] had at the time of the pleading," without actual evidence to support claim of violation of provision in settlement agreement did not demonstrate that agreement had been breached, or that circumstances were so extraordinary or exceptional that relief from dismissal order was warranted. Fed.Rules Civ.Proc.Rule 60(b)(3, 6), 28 U.S.C.A.

[11] Federal Civil Procedure 170A 928

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(I) Motions in General
170Ak928 k. Determination. Most Cited Cases

Federal Civil Procedure 170A 2651.1

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(G) Relief from Judgment
170Ak2651 Grounds
170Ak2651.1 k. In general. Most Cited Cases

The breach of a settlement agreement does not, by itself, justify relief from a final judgment, order, or proceeding under the catch-all provision. Fed.Rules Civ.Proc.Rule 60(b)(6), 28 U.S.C.A.

[12] Federal Civil Procedure 170A 1840

170A Federal Civil Procedure
170AXI Dismissal
170AXI(B) Involuntary Dismissal
170AXI(B)5 Proceedings

170Ak1839 Vacation
170Ak1840 k. Grounds and objections. Most Cited Cases

A court may vacate a prior order of dismissal which was based upon a settlement agreement only when required in the interests of justice, not whenever the settlement agreement has been breached. Fed.Rules Civ.Proc.Rule 60(b)(6), 28 U.S.C.A.

Patents 291 ⚿328(2)

291 Patents
291XIII Decisions on the Validity, Construction, and Infringement of Particular Patents
291k328 Patents Enumerated
291k328(2) k. Original utility. Most Cited Cases

6,272,211, 6,687,352. Cited.

***450 ARGUED:** Daniel J. Wood, Law Office, Cincinnati, Ohio, for Appellant. Thomas P. O'Brien III, Frost Brown Todd, Louisville, Kentucky, for Appellee. **ON BRIEF:** Daniel J. Wood, Law Office, Cincinnati, Ohio, for Appellant. Thomas P. O'Brien III, Frost Brown Todd, Louisville, Kentucky, for Appellee.

Before: BOGGS, Chief Judge; MOORE and CLAY, Circuit Judges.

OPINION

CLAY, Circuit Judge.

Plaintiff, Info-Hold, Inc. ("Info-Hold"), appeals the district court's denial of its Federal Rule of Civil Procedure 60(b) motion for relief from an order, entered pursuant to a Settlement, Release, and License Agreement (the "Settlement Agreement"), dismissing InfoHold's patent infringement action, brought under 28 U.S.C. § 1338 (2000), against Defendant, Sound Merchandising, Inc. ("SMI"), doing business as Intellitouch Communications. Info-Hold contends that relief is warranted because (1) SMI fraudulently induced Info-Hold to enter the Settlement Agreement, and (2) SMI committed a material breach of the Settlement Agreement. For the reasons that follow, we **AFFIRM** the district court's denial of Info-Hold's Rule 60(b) motion.

*451 I. BACKGROUND

Info-Hold and SMI are manufacturers of on-hold message players. On-hold message players are devices that can be connected to a business telephone system to play pre-stored audio messages through that phone system so that a caller can hear the messages when he or she is placed on hold. Info-Hold has secured several patents to protect the technology used in its various on-hold messaging products.

On December 31, 2003, Info-Hold filed a patent infringement action against SMI in the United States District Court for the Southern District of Ohio. As subsequently amended, InfoHold's complaint alleged that SMI had infringed upon Info-Hold's U.S. Patent Nos. 6,272,211 and 6,687,352 by making and selling its own on-hold message players. Info-Hold's amended complaint, however, did not identify which of SMI's message players Info-Hold considered to be patent-infringing.

On January 11, 2005, the district court entered a case management and scheduling order which (1) directed Info-Hold to identify by January 30, 2005, the name and model number of any allegedly patent-infringing products of SMI, and (2) ordered that all non-expert discovery be completed by September 30, 2005. By March 1, 2005, Info-Hold had still not specified which of SMI's products it found to be patent-infringing and the district court issued a second order directing Info-Hold to do so. On March 5, 2005, Info-Hold finally identified SMI's OHP5000 product as the allegedly patent-infringing device.

Several months later, on August 5, 2005, Info-Hold sent SMI its first set of discovery interrogatories, which included the following question:

> 10. Please describe all products or services offered by Defendant or any companies or busi-

ness entities owned in whole or in part by Defendant, Michael Sakakeeny, or any business associate of either, that relate to the on-hold messaging industry.

a. Please produce any and all documents related to such products or services.

J.A. at 268. In its September 6, 2005 response to this first set of interrogatories, SMI answered question 10 as follows:

10. ANSWER: SMI objects to this Interrogatory for the reason that the phrase "relate to the on-hold messaging industry" and the term "business associate" are vague and ambiguous, and for the further reason that this Interrogatory is overly broad, unduly burdensome and seeks the discovery of information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Michael Sakakeeny is not a party in this action and does not control SMI. Without waiving and subject to the foregoing objections, and to the extent this Interrogatory can be understood, SMI offers business telephone units and on-hold message players. SMI offers no "services" other than sales-related services in connection with assisting customers select products.

a. RESPONSE: SMI objects to this Request for the reason that it is vague, ambiguous, overly broad and unduly burdensome. As written, this Request would literally require production of every document in SMI's possession concerning its business in some way, without regard to whether such business involves allegedly infringing activity in this action. Without waiving and subject to the foregoing objections, see documents produced herewith bearing production nos. SM 0184-SM 0240 [relating to SMI's OHP5000 and OHP5500 on-hold message players].

***452** J.A. at 268. Not satisfied with this response, on September 14, 2005, Info-Hold filed a motion to compel SMI to answer question 10 by producing all documents that relate to SMI's on-hold messaging products. The following day, the district court addressed this motion in a telephone conference with the parties' counsel, but reserved judgment on it so as "to give [the] parties time to work it out." J.A. at 133. Despite the district court's hope for a mutual resolution of the issue, Info-Hold and SMI did not have any further discussions, either before or after the close of the discovery period, regarding Info-Hold's request for documents concerning SMI's on-hold messaging products. Moreover, as Info-Hold never sought to renew its motion to compel during the pendency of the suit, the district court never issued a ruling on it.

In the meantime, as the patent-infringement action proceeded, an essential component for production of the OHP5000 became unavailable and SMI was forced to discontinue the product. In January of 2006, SMI replaced its OHP5000 product line with a new OHP7000 product line. As introduced to distributors, the OHP7000 came in two configurations, one which enabled the user to select only one message from among a plurality of messages on a disc to play (later labeled as the "OHP7000S"), and another which allowed the user to create a multi-track selection of messages for repeated playback in user-selected order (later labeled as the "OHP7000M").[FN1] While the OHP7000 was available for purchase beginning in January of 2006, Info-Hold appears not to have learned of the existence of the product until March of 2006 when it saw the product on display at a trade show.

FN1. These specific "S" and "M" product designations were adopted by SMI upon completion of the Settlement Agreement so as to assist with record-keeping for SMI's royalty obligations under the Settlement Agreement.

On May 16, 2006, Info-Hold and SMI took part in a settlement conference under the supervision of Magistrate Judge Timothy S. Black. After a full day of negotiation, the parties reached an agreement to settle and terminate the litigation. This agreement

was subsequently memorialized in the written Settlement Agreement, signed by both parties on June 19, 2006. Among other things, the Settlement Agreement granted SMI a license to make, use, or sell on-hold message players incorporating the technology contained in Info-Hold's patents, and provided that SMI would pay royalties to Info-Hold with respect to certain defined categories of these message players. In particular, the Settlement Agreement classified SMI's on-hold message players as either "Type 1" or "Type 2" depending on their functionality.[FN2] ***453** SMI was to pay Info-Hold a $1.00 royalty for each Type 1 player sold and a $5.00 royalty for each Type 2 player sold. In addition to this royalties arrangement, paragraph 17 of the Settlement Agreement prohibited SMI from providing any assistance, monetary or otherwise to other parties against whom Info-Hold might bring patent-infringement actions in the future.[FN3]

FN2. The Settlement Agreement defines the two types of on-hold message players for which royalty payments are required as follows:

> *Type 1 ("single track selectable") Player:* Any telephone on-hold message playback machine having on-board hardware, software and/or circuitry and an audio signal output connection, that allows a user to program and cause the machine to repeatedly and continuously play one distinct audio message selected by the user from among a plurality of distinct audio messages stored on the machine on a fixed or removable audio storage medium, to the audio output connection.
>
> *Type 2 ("multi-track selectable") Player:* Any telephone on-hold message playback machine having on-board hardware, software and/or circuitry and an audio signal output connection, that allows a user to program and cause the machine to repeatedly and continuously play a user's selections, in any order the user may desire, of two or more distinct audio messages selected from among a plurality of distinct audio messages stored on the machine on a fixed or removable audio storage medium, to the audio output connection.
>
> J.A. at 239.

FN3. The full text of paragraph 17 reads:

> *Participation in Subsequent Patent Infringement Litigation.* In litigation of any claims of infringement of any of the Patents that IH and/or Hazenfield may hereafter assert, that have not been released under this Agreement, against parties for conduct that is not licensed under the terms of this Agreement, SMI shall not (a) provide any money to such parties, or assume any expenses for such parties, for purposes of supporting their efforts in such litigation; or (b) voluntarily engage in any efforts to assist such parties in any way in gathering or preparing evidence or arguments for such litigation. Nothing in this paragraph is to be interpreted to require SMI to oppose, resist or seek to avoid court orders, subpoenas or other process purporting to require SMI to produce documents and things or to appear to give testimony.
>
> J.A. at 242-43.

On June 20, 2006, after both parties had signed the Settlement Agreement, the district court dismissed Info-Hold's patent-infringement claims with prejudice, pursuant to Federal Rule of Civil Procedure 41(a), but retained jurisdiction over the case so as to enforce the terms of and resolve disputes concerning the Settlement Agreement.

On December 12, 2006, following a dispute with SMI regarding royalty payments sent under

the Settlement Agreement, Info-Hold filed a motion with the district court seeking interpretation of the Settlement Agreement or, in the alternative, relief from the district court's dismissal order under Rule 60(b). Specifically, Info-Hold requested that the district court interpret the Settlement Agreement as classifying all of SMI's OHP7000 products, including the OHP7000S, as Type 2 players for purposes of royalties collection. Alternatively, Info-Hold argued that it was entitled to relief from the dismissal order under Rule 60(b) because SMI had fraudulently concealed information about its OHP7000 players during the settlement negotiations and because SMI's attorneys had breached the terms of paragraph 17 of the Settlement Agreement.

On July 23, 2007, the district court entered an order denying Info-Hold's motion. With respect to Info-Hold's interpretation argument, the district court found that there was no dispute that SMI's OHP7000S was not a Type 2 player and refused to modify the Settlement Agreement's language so as to bring the OHP7000S within the Type 2 definition. Turning to Info-Hold's Rule 60(b) argument, the district court held that Info-Hold had failed to produce clear and convincing evidence of fraud or misconduct on the part of SMI. Finally, the district court noted that there was insufficient evidence to demonstrate a breach of paragraph 17 of the Settlement Agreement. Accordingly, the district court concluded that Info-Hold was not entitled to relief under Rule 60(b) and denied the motion.

On September 20, 2007, Info-Hold filed this timely appeal. On appeal, Info-Hold has abandoned its argument regarding the interpretation of the Settlement Agreement and has focused solely on the issue of whether the district court erred in failing to grant relief under Rule 60(b).

II. DISCUSSION

A. Standard of Review

[1][2] We review a district court's denial of a Rule 60(b) motion for abuse of ***454** discretion. *Browder v. Dir., Dept. of Corr. of Illinois,* 434 U.S. 257, 263 n. 7, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978); *In re Ferro Corp. Derivative Litigation,* 511 F.3d 611, 623 (6th Cir.2008). A district court abuses its discretion "when it commits a clear error of judgment, such as applying the incorrect legal standard, misapplying the correct legal standard, or relying upon clearly erroneous findings of fact." *In re Ferro Corp.,* 511 F.3d at 623. In other words, under this abuse of discretion standard, "conclusions of law are reviewed *de novo* and factual findings are reviewed for clear error." *Jordan v. Paccar, Inc.,* No. 95-3478, 1996 WL 528950, at *5 (6th Cir. Sept.17, 1996) (unpublished); *accord United States v. Pauley,* 321 F.3d 578, 581 (6th Cir.), *cert. denied,* 540 U.S. 877, 124 S.Ct. 201, 157 L.Ed.2d 140 (2003).

B. Analysis

[3][4] Rule 60(b) sets forth the criteria for determining whether relief from a federal court's judgment or order is warranted. It provides:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

Fed.R.Civ.P. 60(b). "[R]elief under Rule 60(b) is circumscribed by public policy favoring finality of judgments and termination of litigation." *Blue Diamond Coal Co. v. Trs. of UMWA Combined Benefit Fund,* 249 F.3d 519, 524 (6th Cir.2001) (internal quotation marks omitted). Accordingly, the party seeking relief under Rule 60(b) bears the burden of establishing the grounds for such relief by clear and convincing evidence. *See Crehore v.*

United States, 253 Fed.Appx. 547, 549 (6th Cir.2007) (unpublished) (citing *Jordan,* 1996 WL 528950, at *9); *Ty Inc. v. Softbelly's, Inc.,* 517 F.3d 494, 498 (7th Cir.2008).

Info-Hold argues that it is entitled to relief under Rule 60(b) for two separate reasons.[FN4] First and foremost, Info-Hold contends that the district court's dismissal order should be set aside because SMI engaged in fraud, misrepresentation, or misconduct during the settlement negotiations. Second, Info-Hold claims that relief from the dismissal order is warranted because SMI breached the terms of paragraph 17 of the Settlement Agreement. We find neither of these arguments to have merit and accordingly hold that the district court did not abuse its discretion in denying Info-Hold's Rule 60(b) motion.

> FN4. In its brief, Info-Hold also appears to argue that the Settlement Agreement should be set aside for a third reason, namely that it is not a valid contract under Ohio law. However, as Info-Hold never presented this argument to the district court when seeking Rule 60(b) relief, we decline to address it on appeal. *See, e.g., Scottsdale Ins. Co. v. Flowers,* 513 F.3d 546, 552 (6th Cir.2008) ("[A]n argument not raised before the district court is waived on appeal to this Court.").

1. SMI's Alleged Fraud in the Settlement Negotiations

Info-Hold's primary argument in support of Rule 60(b) relief is that SMI committed fraud during the settlement negotiations.***455** In particular, Info-Hold contends that SMI failed to fully disclose that it had two versions of its OHP7000 product, one of which was single-track selectable. Info-Hold claims that the failure to disclose this information was fraudulent because SMI was under a discovery obligation to disclose it, such information was material to the parties' negotiation of the royalty arrangement, and Info-Hold reasonably relied upon this lack of information to its detriment. The district court found these contentions to be unsupported by clear and convincing evidence and denied Info-Hold's request for relief. We are unable to conclude that the district court abused its discretion in reaching this result.

Info-Hold's fraud argument relies on Rule 60(b)(3) as a basis for relief. As noted above, this provision allows a district court to grant relief in cases of "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party." Fed.R.Civ.P. 60(b)(3). However, while Rule 60(b)(3) clearly requires the moving party to "show that the adverse party committed a deliberate act that adversely impacted the fairness of the relevant legal proceeding [in] question," *Jordan,* 1996 WL 528950, at *6, neither the rule itself nor its official commentary provide a specific definition of "fraud." Likewise, this Court and the Supreme Court have never identified with precision what constitutes "fraud" for purposes of seeking relief under Rule 60(b)(3). *See id.* at *6 (failing to define fraud for purposes of Rule 60(b)(3), but indicating that " 'fraud' can be interpreted as reaching deliberate omissions when a response is required by law or when the nonmoving party has volunteered information that would be misleading without the omitted material").

[5][6] Following the lead of the district court, the parties seem to presume that the meaning of "fraud" as used in Rule 60(b)(3) should be determined by state law. *See, e.g.,* J.A. at 198-99 (Order Denying Info-Hold's Motion for Relief from Settlement Agreement) (citing Ohio cases for the elements of fraud). We find this approach to be misguided.[FN5] The meaning of a federal statute or rule is generally not determined by state law unless the statute or rule so directs. *See, e.g., Taylor v. United States,* 495 U.S. 575, 590-92, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (rejecting the notion that the meaning of "burglary," for purposes of 18 U.S.C. § 924(e), should depend on the definition adopted by the state of the defendant's conviction, and instead finding that the term, as used in § 924(e), "must

have some uniform definition independent of the labels employed by the various States' criminal codes"). Instead, when a federal statute or rule includes "terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress mean[t] to incorporate the established meaning of [those] terms." *Neder v. United States,* 527 U.S. 1, 21, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (quoting *Nationwide Mut. Ins. Co. v. Darden,* 503 U.S. 318, 322, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1992)); *accord* ***456***Carter v. United States,* 530 U.S. 255, 266, 120 S.Ct. 2159, 147 L.Ed.2d 203 (2000) ("[W]e have not hesitated to turn to the common law for guidance when the relevant statutory text does contain a term with an established meaning at common law."); *Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1, 59, 31 S.Ct. 502, 55 L.Ed. 619 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense unless the context compels to the contrary.").

> FN5. We note, however, that, as a practical matter, the parties' misguided approach to the application of Rule 60(b)(3) is not outcome determinative in this case. The record does not establish that SMI either made an affirmative misrepresentation or failed to disclose information which it had a duty to provide during the settlement negotiations. *See infra* pp. 456-58. Thus, Info-Hold has failed to establish fraud on the part of SMI under any definition of that term. Nevertheless, as we must ensure that the Federal Rules of Civil Procedure are properly administered by district courts, we find it useful to clarify the definition of fraud to apply in Rule 60(b)(3) cases.

[7][8] In light of these considerations, we will, for the purpose of evaluating Rule 60(b)(3) motions, employ the following general definition of fraud: Fraud is the knowing misrepresentation of a material fact, or concealment of the same when there is a duty to disclose, done to induce another to act to his or her detriment. *See* BLACKS LAW DICTIONARY 685 (8th ed.2004); 37 AM.JUR.2D Fraud and Deceit § 23 (2001) ("The five traditional elements of fraud ... include: a false representation; in reference to a material fact; made with knowledge of its falsity; with the intent to deceive; and on which an action is taken in justifiable reliance upon the representation."); 12 MOORE'S FEDERAL PRACTICE § 60.43[1][b] (3d ed. 1999) ("Pursuant to [Rule 60(b)(3)], judgments have been set aside on a wide variety of alleged frauds, such as allegations that adverse parties failed to properly respond to discovery requests, thus preventing opposing parties from adequately preparing for trial, to claims that evidence presented at trial itself consisted of perjured testimony or false documents."). Fraud thus includes "deliberate omissions when a response is required by law or when the nonmoving party has volunteered information that would be misleading without the omitted material." *Jordan,* 1996 WL 528950, at *6; accord *O'Neal v. Burger Chef Systems, Inc.,* 860 F.2d 1341, 1347 (6th Cir.1988) ("General common law theories of fraud encompass both acts of commission, i.e., a false representation of an existing fact, and acts of omission, i.e., failure to disclose material facts when under a duty to do so."). Accordingly, to establish grounds for relief under Rule 60(b)(3), the moving party need not demonstrate that the adverse party has committed all the elements of fraud specified in the law of the state where the federal court is sitting, but rather must simply show that the adverse party's conduct was fraudulent under this general common law understanding.

Applying this common law notion of fraud to the facts of the instant case demonstrates that the district court did not abuse its discretion in denying Info-Hold's request for Rule 60(b)(3) relief. Info-Hold failed to establish by clear and convincing evidence that SMI either affirmatively misrepresented the features of its OHP7000 series products or deliberately breached a duty to disclose such in-

formation. While Info-Hold claims that SMI indicated during the settlement negotiations that the OHP7000 was multi-track selectable, and thus a Type 2 on-hold message player-a statement which would be only partially true given the two different configurations of the OHP7000-the record is equivocal on this point. *Compare* J.A. at 244 (Declaration of Joey C. Hazenfield, Info-Hold's President and Chief Executive Officer) ("During the conference, Jim Fallon [Chief Financial Officer of SMI] represented or acknowledged, on more than one occasion, that the OHP7000 player was programmable and/or a Type 2 player.... During the conference, I spoke of the OHP7000 player as being programmable. Jim Fallon never objected or raised an issue about this characterization."), *with* J.A. at 297 (Declaration of Jim ***457** Fallon) ("I did not make any statement that the OHP7000 was programmable or multi-track selectable during the Settlement Conference."); J.A. at 256 (E-mail from Jim Fallon to Joey Hazenfield sent on Sept. 12, 2006) ("It is my recollection that during the settlement conference we specifically discussed the feature sets for [SMI's on-hold message players]. The standard [OHP]7000 is single-track selectable; I believed this was clear from the discussions.... At no time did we distinguish the 6000 from the 7000 on the basis of track selectability (the main significant distinction is the 7000 has a CD drive and the 6000 does not), and at no time did I represent that the 7000 was or was not multi-track selectable."). In light of the parties' factual dispute concerning whether such a misrepresentation was actually made and the presence of evidence in the record suggesting that such a misrepresentation was not made, we cannot find that the district court clearly erred in determining that SMI did not make such a misrepresentation. *See, e.g., Anderson v. City of Bessemer City,* 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985) ("Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.").

[9] Likewise, we are not convinced that the district court erred in concluding that SMI did not deliberately breach a duty to disclose information about its OHP7000 product line. Info-Hold contends that SMI had a continuing discovery obligation to provide information about the OHP7000 as a response to question 10 of its first set of interrogatories, which SMI breached when it failed to inform Info-Hold that there was a single-track selectable version of the product. The record, however, does not clearly demonstrate that SMI violated any of its discovery obligations.

Federal Rule of Civil Procedure 26 generally enables a party to "obtain discovery regarding any nonprivileged matter that is relevant to [the] party's claim or defense," Fed. R. Civ. P 26(b)(1), and to have that discovery material updated and corrected by the opposing party throughout the course of the proceedings. Fed.R.Civ.P. 26(e)(1). Nevertheless, "district courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce." *Surles ex rel. Johnson v. Greyhound Lines, Inc.,* 474 F.3d 288, 305 (6th Cir.2007) (citing Fed.R.Civ.P. 26(b)(2)); *accord Marshall v. Westinghouse Elec. Corp.,* 576 F.2d 588, 592 (5th Cir.1978) (Rule 26 "does not, however, permit a plaintiff to 'go fishing' and a trial court retains discretion to determine that a discovery request is too broad and oppressive."). Likewise, a party who reasonably perceives a discovery request from the opposing party as too broad or too vague to comply with may object to the request and seek clarification from the opposing party and the district court. *See* Fed.R.Civ.P. 26(b)(2); Fed.R.Civ.P. 33(b)(3) ("Each interrogatory must, *to the extent it is not objected to,* be answered separately and fully in writing under oath." (emphasis added)).

In the instant case, SMI appears to have exercised this right by objecting to question 10 of Info-Hold's first set of interrogatories on the grounds that the question was "overly broad, unduly burdensome, and [sought] discovery of information that [was] neither relevant nor reasonably calculated to

lead to the discovery of admissible evidence." J.A. at 268; *see* Fed.R.Civ.P. 33(b)(4) ("The grounds for objecting to an interrogatory must be stated with specificity."). In providing this objection,***458** SMI shifted the burden to Info-Hold to either clarify its discovery request or seek an order from the district court directing SMI to comply with Info-Hold's discovery request as originally phrased. *See* Fed.R.Civ.P. 26(b)(2); Fed.R.Civ.P. 33(b)(4). Although Info-Hold initially pursued this latter course of action, the district court never ruled on Info-Hold's motion to compel and thus never affirmatively placed an obligation on SMI to respond to Info-Hold's discovery request. Despite this non-ruling, Info-Hold never renewed its motion to compel or sought a ruling on it.

In light of this lack of a ruling by the district court, it is not clear that SMI's response to InfoHold's interrogatory and subsequent failure to update its response with information about the OHP7000 was a violation of its discovery duty to respond. On the contrary, the district court's later ruling on Info-Hold's Rule 60(b) motion suggests that it did not view SMI as having a discovery obligation to provide Info-Hold with information about the features of the OHP7000. Moreover, given the fact that the OHP7000 had been publicly available for purchase for over four months prior to the settlement conference, it seems likely that SMI reasonably believed that Info-Hold was already aware of the product's features as well as its two configurations-the OHP7000S and the OHP7000M-and thus felt it unnecessary to discuss such information during the settlement conference.

In short, Info-Hold has failed to present clear and convincing evidence that SMI deliberately withheld information about the OHP7000 which it was required to provide. Accordingly, we find that the district court did not abuse its discretion in concluding that Info-Hold has not sufficiently demonstrated fraud or misconduct on the part of SMI so as to justify relief from the dismissal order under Rule 60(b)(3).

2. SMI's Alleged Breach of the Settlement Agreement

[10] Info-Hold's second argument for Rule 60(b) relief is that SMI breached paragraph 17 of the Settlement Agreement. In particular, Info-Hold claims that, approximately three months after the settlement conference, SMI's attorneys filed a responsive pleading in a patent-infringement action brought by Info-Hold against a different defendant, Trusonic, Inc. ("Trusonic"), which "asserted counterclaims and invalidity allegations that appeared to have been based on information that only SMI and Info-Hold had at the time of the pleading." Pl. Br. at 45. The district court found this argument to be without merit and refused to grant relief from its order on this basis. We do not find this decision to constitute an abuse of discretion.

[11][12] Info-Hold does not specify which prong of Rule 60(b) it relies upon in seeking relief for SMI's alleged breach of the Settlement Agreement. A review of the Rule reveals two plausible candidates: (1) Rule 60(b)(3), which permits a court to grant relief for an opposing party's "misconduct," Fed.R.Civ.P. 60(b)(3); or (2) Rule 60(b)(6), a catch-all provision, which allows a court to grant relief for "any other reason that justifies relief." Fed.R.Civ.P. 60(b)(6). With respect to the former, we note that only one federal court has even suggested that the "misconduct" provision in Rule 60(b)(3) might encompass the breach of a settlement agreement. *See Nigrelli v. Catholic Bishop of Chicago,* No. 94-2528, 1995 WL 605504, at *2 (7th Cir. Oct.11, 1995) (unpublished) (noting that the plaintiff had argued that the defendant's breach of their settlement agreement was "so substantial as to require ***459** rescission of the settlement agreement and reopening the case under the 'misconduct' provision of Rule 60(b)(3)," but finding that the defendant had not breached the settlement agreement). Rule 60(b)(6), in contrast, appears to be the provision most relied upon in seeking relief from a judgment on the basis of a breach of the underlying settlement agreement. *See, e.g., Kokkonen v. Guardian Life Ins. Co. of Am.,* 511 U.S. 375, 378,

114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) (noting that some courts of appeals have held that the re-opening of a dismissed suit on the basis of a breach of the underlying settlement agreement can be obtained under Rule 60(b)(6)). In our Circuit, however, the breach of a settlement agreement does not, by itself, justify relief under Rule 60(b)(6). *See Ford Motor Co. v. Mustangs Unlimited, Inc.,* 487 F.3d 465, 469-70 (6th Cir.2007). Rather, because Rule 60(b)(6) is intended to apply "in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule," *Blue Diamond Coal Co.,* 249 F.3d at 524 (quoting *Olle v. Henry & Wright Corp.,* 910 F.2d 357, 365 (6th Cir.1990)), a court may vacate a prior order of dismissal which was based upon a settlement agreement only "when required in the interests of justice, not whenever [the] settlement agreement has been breached." *Ford,* 487 F.3d at 470 (quoting *Harman v. Pauley,* 678 F.2d 479, 481 (4th Cir.1982)) (emphasis altered).

In the instant case, Info-Hold has not only failed to demonstrate by clear and convincing evidence that the Settlement Agreement was breached, but has also failed to establish that "the circumstances herein are [so] extraordinary or exceptional" that relief is warranted under Rule 60(b)(6). *Id.* In support of its Rule 60(b) motion, Info-Hold provided only its allegation that, three months after the settlement in this case, SMI's attorneys had filed, on behalf of Trusonic, a pleading which "asserted counterclaims and invalidity allegations that appear to be based upon information that only SMI and Info-Hold had at the time of the pleading." J.A. at 233. Info-Hold offered no actual evidence to support this claim or any documents which might have enabled the district court to determine whether the assistance that SMI's attorneys allegedly provided Trusonic was in fact in violation of paragraph 17. Likewise, nothing in the record appears to support a finding that such alleged conduct would, in the interests of justice, require vacating the dismissal order. In light of this lack of evidence to support Info-Hold's request for relief, we are unable to conclude that the district court abused the discretion granted it by Rule 60(b)(6) when denying Info-Hold's motion.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is **AFFIRMED.**

C.A.6 (Ohio),2008.
Info-Hold, Inc. v. Sound Merchandising, Inc.
538 F.3d 448, 71 Fed.R.Serv.3d 477, 87 U.S.P.Q.2d 1923

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192 F.R.D. 675
(Cite as: 192 F.R.D. 675)

United States District Court,
D. Kansas.

Jacqueline McCOO, et al., Plaintiffs,
v.
DENNY'S INC., et al., Defendants.

Civil Action No. 98-2458-RDR.
April 18, 2000.

Patrons of restaurant chain, allegedly denied service due to their race, brought discrimination action against chain. Patrons moved to compel discovery, and for sanctions. The District Court, Waxse, United States Magistrate Judge, held that: (1) letters written to Kansas Human Rights Commission, by counsel for restaurant chain, was not protected from discovery by attorney-client or work product privileges; (2) confidentiality provision of consent decree, resolving earlier lawsuit in another district, only barred production of documents that would not have existed but for existence of decree; (3) written statements of witnesses to alleged incident were not protected from discovery under work product exception; (4) personnel records of employees working in restaurant in question, customer complaints of racial discrimination, and company documents relating to policies on discrimination were discoverable; (5) claimants could propound interrogatories regarding customer complaints, employee complaints and employee discipline and (6) law firm representing restaurant chain would be sanction for failure to cooperate with discovery.

Order accordingly.

West Headnotes

[1] Federal Civil Procedure 170A 1604(1)

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1604 Work Product Privilege; Trial Preparation Materials
170Ak1604(1) k. In General. Most Cited Cases
(Formerly 170Ak1600(3))

Privileged Communications and Confidentiality 311H 173

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk171 Evidence
311Hk173 k. Presumptions and Burden of Proof. Most Cited Cases
(Formerly 410k222)

In order for attorney-client privilege or work product immunity to apply, proponent must make clear showing of applicability, including description in detail of documents or information sought to be protected and precise reasons for objections. Fed.Rules Civ.Proc.Rule 26(b)(5), 28 U.S.C.A.

[2] Federal Civil Procedure 170A 1604(1)

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1604 Work Product Privilege; Trial Preparation Materials
170Ak1604(1) k. In General. Most Cited Cases
(Formerly 170Ak1600(3))

Privileged Communications and Confidentiality 311H 173

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk171 Evidence

311Hk173 k. Presumptions and Burden of Proof. Most Cited Cases
(Formerly 410k222)

Party asserting attorney-client or work product exemption from disclosure of information must provide sufficient information to enable court to determine whether each element of asserted objection is satisfied. Fed.Rules Civ.Proc.Rule 26(b)(5), 28 U.S.C.A.

[3] Federal Civil Procedure 170A 1604(1)

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1604 Work Product Privilege; Trial Preparation Materials
170Ak1604(1) k. In General. Most Cited Cases
(Formerly 170Ak1600(3))

Privileged Communications and Confidentiality 311H 169

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk169 k. Objections; Claim of Privilege. Most Cited Cases
(Formerly 410k222)

A party's failure to show that each and every element of attorney-client or work product exemption from disclosure was satisfied, when trial court is asked to rule upon existence of immunity, is not excused because document is later shown to be one that would have been privileged if timely showing had been made. Fed.Rules Civ.Proc.Rule 26(b)(5), 28 U.S.C.A.

[4] Privileged Communications and Confidentiality 311H 158

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk157 Communications Through or in Presence or Hearing of Others; Communications with Third Parties
311Hk158 k. In General. Most Cited Cases
(Formerly 410k206)

Attorney-client privilege did not apply to letters from counsel for restaurant chain to Kansas Human Rights Commission, in civil rights action brought by claimants alleging denial of service on racial grounds. Fed.Rules Civ.Proc.Rule 26(b)(5), 28 U.S.C.A.

[5] Federal Civil Procedure 170A 1604(1)

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1604 Work Product Privilege; Trial Preparation Materials
170Ak1604(1) k. In General. Most Cited Cases
(Formerly 170Ak1600(3))

Work product privilege did not apply to letters from counsel for restaurant chain to Kansas Human Rights Commission, in civil rights action brought by claimants alleging denial of service on racial grounds. Fed.Rules Civ.Proc.Rule 26(b)(5), 28 U.S.C.A.

[6] Federal Civil Procedure 170A 2397.5

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(A) In General
170Ak2397 On Consent
170Ak2397.5 k. Construction and Operation. Most Cited Cases

Provision of consent decree, terminating race discrimination suit against restaurant chain, under which information preserved pursuant to decree was immunized from disclosure even in discovery procedures brought in other courts, applied only to

information that would not have come into existence but for consent decree.

[7] Federal Civil Procedure 170A 2397.5

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(A) In General
170Ak2397 On Consent
170Ak2397.5 k. Construction and Operation. Most Cited Cases

Letters from counsel for restaurant chain to Kansas Human Rights Commission could not be withheld from discovery in suit alleging racial discrimination in provision of services, on grounds that monitor appointed pursuant to consent decree resolving another civil rights suit consented to restaurant's investigation of charges in present case and consent decree provided for nondisclosure of information generated pursuant to decree; letters would have been written even if there was no decree.

[8] Federal Civil Procedure 170A 1604(1)

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1604 Work Product Privilege; Trial Preparation Materials
170Ak1604(1) k. In General. Most Cited Cases
(Formerly 170Ak1600(3))

Work product immunity did not extend to written statements of witnesses to incident in which restaurant allegedly denied service to claimants suing for racial discrimination; at time statements were made, litigation was not imminent.

[9] Federal Civil Procedure 170A 1604(1)

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1604 Work Product Privilege; Trial Preparation Materials
170Ak1604(1) k. In General. Most Cited Cases
(Formerly 170Ak1600(3))

To justify disclosure of information otherwise protected by work product privilege, under necessity exception, proponent of disclosure must show importance of information to preparation of its case and the difficulty it will face in obtaining substantially equivalent information from other sources if production is denied.

[10] Federal Civil Procedure 170A 1604(1)

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1604 Work Product Privilege; Trial Preparation Materials
170Ak1604(1) k. In General. Most Cited Cases
(Formerly 170Ak1600(3))

Under necessity exception to work product privilege, restaurant chain was required to turn over to claimants suing for racial discrimination in furnishing of services handwritten statements made by eyewitnesses to refusal incident; claimants could not obtain information from witnesses in other ways, as they refused to submit to depositions even when served with subpoenas, and in view of extreme factual conflicts in case witnesses' written statements were of great importance to claimants.

[11] Federal Civil Procedure 170A 1272.1

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1272 Scope
170Ak1272.1 k. In General. Most Cited Cases

Request for discovery should be considered relevant if there is any possibility that information sought may be relevant to subject matter to action. Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.

[12] Federal Civil Procedure 170A 1271

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1271 k. Proceedings to Obtain. Most Cited Cases
(Formerly 170Ak1269.1)

When the discovery sought appears relevant, the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery does not come within the broad scope of relevance as defined under the federal procedure rules or is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure. Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.

[13] Federal Civil Procedure 170A 1588

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1588 k. Corporations, Records of in General. Most Cited Cases

Claimants suing restaurant chain for alleged racial discrimination in refusal to provide services made relevant discovery request when asking for copies of instructional materials in any way related to chain's policy toward racism or discrimination for five year period predating incident in question. Fed.Rules Civ.Proc.Rule 26(b)(1), 28 U.S.C.A.

[14] Federal Civil Procedure 170A 2397.5

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(A) In General
170Ak2397 On Consent
170Ak2397.5 k. Construction and Operation. Most Cited Cases

Certain portions of instructional material having to do with restaurant chain's policies toward racism and discrimination, would be excluded from discovery in suit alleging racial discrimination in denial of services, pursuant to consent decree terminating another lawsuit barring disclosure of information generated in connection with the decree.

[15] Federal Civil Procedure 170A 1591

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1591 k. Employment, Records Of. Most Cited Cases

Discovery request by claimants alleging that restaurant chain engaged in racial discrimination by denying them service, for personnel records of all employees of restaurants located in city, would be narrowed to files of those employees in restaurant where alleged incident took place, who allegedly participated in, were involved in, or witnessed incident.

[16] Federal Civil Procedure 170A 1591

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1591 k. Employment, Records Of. Most Cited Cases

Claimants alleging racial discrimination in denial of service by restaurant chain could obtain copies of personnel records of employees in restaurant where incident allegedly occurred, who had something to do with incident, even though chain claimed that inadmissible information regarding remedial actions would be disclosed.

[17] Federal Civil Procedure 170A 2397.5

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(A) In General
170Ak2397 On Consent
170Ak2397.5 k. Construction and Operation. Most Cited Cases

Documents contained in personnel records of employees of restaurant chain, reflecting receipt of policies regarding nondiscrimination and reflecting attendance at nondiscrimination meetings mandated pursuant to consent decree terminating earlier racial discrimination suit, would be excluded from discovery in subsequent suit as documents generated by consent decree and subject to confidentiality provisions of decree.

[18] Federal Civil Procedure 170A 1588

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1588 k. Corporations, Records of in General. Most Cited Cases

Discovery request made by claimants alleging that restaurant chain engaged in racial discrimination when denying them service, seeking records and documentation of customer complaints made over last five years against chain in city containing two restaurants, would be limited to complaints of racial discrimination involving restaurant where alleged incident occurred.

[19] Federal Civil Procedure 170A 1558.1

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)1 In General
170Ak1558 Objections and Grounds for Refusal
170Ak1558.1 k. In General. Most Cited Cases

Privileged Communications and Confidentiality 311H 169

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk169 k. Objections; Claim of Privilege. Most Cited Cases
(Formerly 410k222)

Restaurant chain sued for racial discrimination failed to adequately assert attorney-client privilege or work product exception in resisting request for disclosure of all documents referred to in chain's initial disclosure of evidence sources required under federal procedure rule, by objecting to production of documents identified in specified paragraphs of disclosure without further identification, and without indicating which privilege was applicable to particular document. Fed.Rules Civ.Proc.Rule 26(b)(5), 28 U.S.C.A.

[20] Privileged Communications and Confidentiality 311H 102

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk102 k. Elements in General; Definition. Most Cited Cases
(Formerly 410k198(1))

Under federal common law governing attorney-client privilege, (1) when legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except when the protection is waived.

[21] Privileged Communications and Confidentiality 311H 174

311H Privileged Communications and Confidentiality

311HIII Attorney-Client Privilege
311Hk171 Evidence
311Hk174 k. Weight and Sufficiency. Most Cited Cases
(Formerly 410k222)

Conclusory allegations that attorney-client privilege applied to three memoranda, identified by restaurant chain defending racial discrimination claim in its disclosure of sources of evidence required under federal procedure rule, was insufficient to preserve memoranda from discovery. Fed.Rules Civ.Proc.Rule 26(a), (b)(5), 28 U.S.C.A.

[22] Federal Civil Procedure 170A 1604(1)

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1604 Work Product Privilege; Trial Preparation Materials
170Ak1604(1) k. In General. Most Cited Cases
(Formerly 170Ak1600(3))

Restaurant chain defending racial discrimination claim failed to establish that work product doctrine precluded production of three memoranda, identified in disclosure of sources of evidence required under federal procedure rule, by failure to establish that memoranda were prepared in anticipation of litigation. Fed.Rules Civ.Proc.Rule 26(a), (b)(5), 28 U.S.C.A.

[23] Federal Civil Procedure 170A 1634

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)5 Compliance; Failure to Comply
170Ak1634 k. Sufficiency of Compliance. Most Cited Cases

Defendant failed to adequately respond to discovery request for document by stating that document was not in its possession, as obligation extended to documents in its possession, custody or control. Fed.Rules Civ.Proc.Rule 34(a), 28 U.S.C.A.

[24] Federal Civil Procedure 170A 1588

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1588 k. Corporations, Records of in General. Most Cited Cases

Discovery request, made by claimants alleging racial discrimination in provision of service by restaurant chain, seeking production of all policies, guidelines, training materials, employee handbooks, supervisor's handbooks, and any other corporate policies maintained at chain's facilities in city at time of incident in question, would be limited to materials relating to customer service and racial discrimination, involving only restaurant at which incident allegedly took place.

[25] Federal Civil Procedure 170A 1501

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)2 Scope
170Ak1501 k. In General. Most Cited Cases

Interrogatory, propounded by claimants alleging that restaurant chain engaged in racial discrimination in refusing to provide service, was not unduly vague by requesting information about complaints filed with state Human Relations Commission, similar city commission and "any similar agency."

[26] Federal Civil Procedure 170A 1503

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)2 Scope

170Ak1503 k. Relevancy and Materiality. Most Cited Cases

Interrogatory propounded by claimants alleging that restaurant chain engaged in racial discrimination involving failure to provide service, asking whether there had been any customer complaints of racial discrimination lodged against either of two restaurants in city during five year period preceding alleged incident in question, would be limited to complaints involving restaurant where incident occurred.

[27] Federal Civil Procedure 170A 1512

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)2 Scope
170Ak1512 k. Identity and Location of Witnesses and Others. Most Cited Cases

Interrogatory propounded by claimants, alleging racial discrimination by restaurant chain based on alleged refusal to provide service, asking for names, addresses and other identifying information for all persons employed at restaurant where incident allegedly occurred, for period of five years prior to date of incident, would be limited to disclosure of information for employees working at restaurant in year preceding incident.

[28] Federal Civil Procedure 170A 1503

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)2 Scope
170Ak1503 k. Relevancy and Materiality. Most Cited Cases

Claimants alleging that restaurant chain engaged in racial discrimination by refusing to serve them could propound interrogatory asking whether any employee at restaurant in question complained of racial discrimination in year preceding alleged discriminatory incident, despite claim that discrimination involving employees was irrelevant to claim of discrimination involving customers.

[29] Federal Civil Procedure 170A 1503

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)2 Scope
170Ak1503 k. Relevancy and Materiality. Most Cited Cases

Claimants alleging that restaurant chain engaged in racial discrimination by refusing to serve them could propound interrogatory asking whether any employee at restaurant in question had been disciplined for engaging in race discrimination during year preceding alleged incident, and seeking additional details.

[30] Federal Civil Procedure 170A 1278

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1278 k. Failure to Respond; Sanctions. Most Cited Cases

Requirement that party to be sanctioned for failure to cooperate in discovery have notice and opportunity to be heard prior to application of sanctions was satisfied when adverse party moved to compel discovery, asking for sanctions, and party to be sanctioned responded but did not oppose sanctions. Fed.Rules Civ.Proc.Rule 37(a)(4)(C), 28 U.S.C.A.

[31] Federal Civil Procedure 170A 1278

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1278 k. Failure to Respond; Sanctions. Most Cited Cases

In light of state professional conduct rule requiring partners and shareholders of law firm to make reasonable efforts to assure that all attorneys in firm conform to professional conduct rules, sanctions for noncooperation with discovery under federal procedure rules would be assessed against firm, rather than individual attorneys working on case.

Fed.Rules Civ.Proc.Rules 11(b)(2, 3), 26(g)(2), 28 U.S.C.A.; Kan.Sup.Ct.Rules, Rule 226, Rules of Prof.Conduct, Rule 5.1.

***679** Pantaleon Florez, Jr.,Florez & Frost, P.A., Topeka, KS, for plaintiffs.

Karen J. Halbrook, John R. Cleary, Karen M. Gleason, Shughart, Thomson & Kilroy, P.C., Kansas City, MO, for Denny's Inc., defendants.

MEMORANDUM AND ORDER

WAXSE, United States Magistrate Judge.

This matter is before the Court on Plaintiffs' Motion to Compel Discovery (doc. 74). Plaintiffs seek to compel Defendant Denny's, Inc. ("Denny's") to answer Plaintiffs' First Requests for Production of Documents, Second Requests for Production of Documents, and First Interrogatories. With the exception of Plaintiffs' Interrogatories No. 1 and 4, Denny's has asserted objections to each and every one of the requests for production and interrogatories.

The Parties focus their arguments on Denny's objections of (1) work product protection; (2) attorney-client privilege; (3) confidentiality pursuant to the non-disclosure provision of the Kansas Act Against Discrimination ("KAAD"), K.S.A. 44-1005(e); and (4) confidentiality pursuant to the non-disclosure provision of a consent decree to which Denny's is a party. Plaintiffs also generally assert that the remainder of Denny's objections are insufficient. While none of the Parties has fully briefed those remaining objections, Denny's has nonetheless indicated that it is still relying on those objections of irrelevance, overly broad, unduly burdensome and vagueness. Rather than discussing the basis for those objections in its brief, Denny's merely refers the Court to the objections it set forth in its responses to the requests for production and interrogatories. Thus, the Court will also consider the validity of the other objections asserted by Denny's.

In addition to seeking to compel Denny's to respond to these requests for production and interrogatories, Plaintiffs request that Denny's be ordered to pay the attorney fees and expenses Plaintiffs have incurred in bringing their Motion to Compel.

I. BACKGROUND INFORMATION

This is an action brought pursuant to 42 U.S.C. § 1981 by two African-American individuals against Denny's and Jerry Monosmith, a security officer working for Denny's. Plaintiffs claim they were denied their equal rights under the law to make and enforce a contract for services with Denny's. Plaintiffs were customers in a Denny's restaurant in Topeka, Kansas on February 21, 1997, when Plaintiffs claim they were subjected to racially derogatory comments. Plaintiffs also allege that, because of their race, they were refused service and directed to leave the premises without receiving their meals. Plaintiffs also assert a claim against Mr. Monosmith in his individual capacity under 42 U.S.C. § 1983 for deprivation of their equal protection rights.

Plaintiff Jacqueline McCoo filed a complaint of race discrimination with the Kansas Human Rights Commission ("KHRC") on ***680** April 24, 1997. Plaintiff Nathalie Kerr filed her complaint with the KHRC on July 15, 1997.

II. PLAINTIFFS' FIRST REQUESTS FOR PRODUCTION

A. First Request for Production No. 1

Request for Production No. 1 requests all "[d]ocuments, correspondence or other materials received from or provided to the Kansas Human Rights Commission in response to Plaintiffs' complaints." Denny's objects on the basis of attorney-client privilege and work product immunity. Denny's also objects on the basis that these documents "were made as part of the Kansas Human Rights Commission investigative process," and cites K.S.A. 44-1005(e) and *Atchison, Topeka & Santa Fe Ry. Co. v. Lopez,* 216 Kan. 108, 531 P.2d 455

(1975). Denny's further asserts that the request is objectionable because it seeks information that Denny's has been ordered not to disclose under a consent decree entered by the United States District Court for the District of Maryland in *Dyson v. Flagstar, et al.,* No. DKC-93-1053 ("Consent Decree"), and a Stipulation and Order regarding Clarification of Confidentiality Provisions of Consent Decree ("Stipulation"), which amends the Consent Decree.

1. Attorney-client privilege and work product immunity

[1] Denny's, as the party asserting the attorney-client privilege and work product immunity, has the burden of establishing that the privilege/immunity applies. *Boyer v. Board of County Comm'rs,* 162 F.R.D. 687, 688 (D.Kan.1995). To carry that burden, Denny's must make a "clear showing" that the asserted objection applies. *Ali v. Douglas Cable Communications, Ltd. Partnership,* 890 F.Supp. 993, 994 (D.Kan.1995). Denny's must also "describe in detail" the documents or information sought to be protected and provide "precise reasons" for the objection to discovery. *National Union Fire Ins. Co. v. Midland Bancor, Inc.,* 159 F.R.D. 562, 567 (D.Kan.1994). Federal Rule of Civil Procedure 26(b)(5) provides that when a party withholds documents or other information based on a privilege or work product immunity, the "party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection."

[2][3] As the party asserting the privilege/work product objection, Denny's must also provide sufficient information to enable the court to determine whether *each element* of the asserted objection is satisfied. *Jones v. Boeing Co.,* 163 F.R.D. 15, 17 (D.Kan.1995). A "blanket claim" as to the applicability of the privilege/work product doctrine does not satisfy the burden of proof. *Marten v. Yellow Freight Sys. Inc.,* No. 96-2013-GTV, 1998 WL 13244, at *4 (D.Kan. Jan.6, 1998); *Kelling v. Bridgestone/Firestone, Inc.,* 157 F.R.D. 496, 497 (D.Kan.1994). A party's failure to meet this burden when the trial court is asked to rule upon the existence of the privilege/work product immunity is not excused because the document is later shown to be one that would have been privileged if a timely showing had been made. *Peat, Marwick, Mitchell & Co. v. West,* 748 F.2d 540, 542 (10th Cir.1984).

[4] Denny's has failed to meet its burden to show that these documents are privileged attorney-client communications. The "Privilege Log" that Denny's provides in response to Request for Production No. 1 indicates that the claimed privileged documents are letters from Denny's counsel to the Executive Director of the KHRC and not correspondence between Denny's legal counsel and any employee, officer, director, or other representative of Denny's. Thus, there simply is no basis for Denny's to contend that any letters it *provided to* the KHRC are attorney-client communications. Even if these letters did contain attorney-client communications, any privilege would have been waived when they were disclosed to the KHRC. *See Burton v. R.J. Reynolds Tobacco Co.,* 167 F.R.D. 134, 140 (D.Kan.1996) (under privilege law of Kansas, "[i]ntentional disclosure to third parties of privileged information is a waiver of any privilege."). To the extent that Denny's is also asserting that certain ***681** documents it *received from* the KHRC are attorney-client communications, the Court also finds no valid privilege. Denny's does not identify any such documents in its Privilege Log, and the Court cannot fathom how any documents that the KHRC provided Denny's could be deemed attorney-client privileged. The Court therefore overrules this objection.

[5] The Court likewise finds no basis for ruling that any documents received from or provided to the KHRC are work product. With respect to the three letters that Denny's provided to the KHRC, the Court has already ruled that any work product

protection they may have enjoyed was waived when they were provided to the KHRC. *See* March 21, 2000 Memorandum and Order (doc.118). The Court therefore also overrules this objection.

2. Confidentiality pursuant to K.S.A. 44-1005(e)

Denny's also contends that the requested KHRC documents are not discoverable pursuant to the non-disclosure provision of the KAAD, K.S.A. 44-1005(e). The Court previously rejected this argument in its March 21, 2000 Memorandum and Order. This objection is therefore overruled.

3. Confidentiality pursuant to the Consent Decree and Stipulation

[6] Denny's also objects to producing the requested documents on the basis they are protected under the confidentiality provisions of a consent decree entered by the United States District Court for the District of Maryland in *Dyson v. Flagstar, et al.,* No. DKC-93-1053 ("Consent Decree"), and a Stipulation and Order Re: Clarification of Confidentiality Provisions of Consent Decree ("Stipulation"), which amends the Consent Decree. The Consent Decree was entered into by Denny's and other related entities in May 1994 to settle a class action race discrimination lawsuit brought by customers of Denny's under 42 U.S.C. §§ 1981 and 2000a. The Consent Decree became effective May 24, 1994 and is to remain in effect for seven years from that date. Consent Decree, Sec. IV.C at pp. 8-9.

The stated purpose of the Consent Decree is to ensure that "all future customers of company-owned and franchise-owned Denny's Restaurants are accorded equal treatment and service regardless of race and/or color." *Id.,* Sec. II.A at p. 5. In order for the Decree to be appropriately monitored, Denny's and the Monitor[FN1] are required to maintain appropriate records. *Id.,* Sec. X at p. 16. The Consent Decree sets forth specific recordkeeping duties of the Monitor. The Monitor must "maintain" records of the following: (a) all race discrimination complaints made by any customer; (b) all training materials, including guidelines, policy statements and videos; (c) all advertisements and promotional materials; (d) all records relating to "tests" conducted pursuant to the Consent Decree, and (e) all records "relating to the implementation of any provision of the Consent Decree." *Id.,* Sec. XIV.B.3 at pp. 54-55. In turn, Denny's has a duty to retain all documents that it "creates, generate, or receives from the Monitor that pertain to the Decree." *Id.,* Sec. XIV.B.4 at p. 55. Denny's also has the duty to "maintain all documents and records provided by the Monitor as well as all documents and records maintained and/or generated by Denny's that pertain to the Decree." *Id.*

FN1. The Monitor is an individual selected by the parties to the Consent Decree. The Monitor's duties include assisting the District Court in Maryland and class counsel in monitoring the defendants' compliance with the Decree and ensuring that the Decree is implemented effectively. Consent Decree, Sec. XIV.A.1 at pp. 42-25.

Section XIV.B of the Consent Decree contains certain confidentiality provisions. Subsection 1 was amended by the Stipulation, to provide in pertinent part:

> *Information of any kind, written or oral, that is generated, maintained, produced or preserved pursuant to the terms of the Decree* (hereafter "Confidential Information") *shall be kept confidential* and used and/or disclosed solely for the purposes of this decree in accordance with the intentions of the parties to the Decree. Confidential Information shall be kept confidential***682** and shall only be used by and/or disclosed to the Monitor, Denny's, Class Counsel, and their respective employees or agents who have a need to know or use such information, solely for purposes of enforcing, monitoring or administering this Decree. Only the Court, the parties, and the Monitor have the right under the Decree to enforce, monitor, or administer the Decree. *The Monitor, Denny's and Class Counsel and their respective employees or agents shall not disclose*

Confidential Information to any person who is not a party to this Decree, including without limitation any person who seeks such Confidential Information in other litigation through discovery process in other courts, unless they are otherwise ordered to do so by this Court or unless all of the parties agree in writing that such disclosure will promote the enforcement, monitoring, or administration of the Decree. If a person not a party to this Decree seeks disclosure of Confidential Information from this Court, it is the intent of the parties that such information shall not be disclosed unless the person establishes that this confidentiality provision has been expressly waived in writing by all of the parties with respect to the particular information sought.

Stipulation, Sec. B at pp. 4-6 (emphasis added).

This Court has previously noted its concerns about the extent that Denny's may use the Consent Decree to diminish the rights of individuals and entities who were not parties to the Consent Decree, including Plaintiffs in this case. *See* February 11, 2000 Memorandum and Order, doc. 104. In its February 11, 2000 Memorandum and Order, the Court ruled that it would apply the holding of *United States v. Bleznak,* 153 F.3d 16 (2d Cir.1998) to the confidentiality provisions of the Consent Decree and Stipulation ("Confidentiality Provisions") in this case. As the Court noted, under the *Bleznak* rule, only those documents subject to the Confidentiality Provisions *that would not have come into existence but for the existence of the Consent Decree* will be shielded from discovery.

The Court directed the Parties to submit supplemental briefs addressing this issue, and the Court is now prepared to rule as to which documents sought by Plaintiffs are protected by the Confidentiality Provisions.

[7] Denny's contends that the letters from its in-house counsel and legal assistant to the KHRC are protected by the Confidentiality Provisions because they "relate to the investigation allowed by the Consent Decree's Civil Rights Monitor." Denny's Supp. Mem. (doc. 111) at 8. Under the Consent Decree, Denny's must notify the Monitor if it wishes to conduct an investigation of a complaint of discrimination. Consent Decree, Sec. XIV at p. 51. Here, the Monitor granted Denny's permission to investigate, and the letters to the KHRC apparently are based on, or refer to, the factual information obtained through that investigation. Denny's argues that the letters would not have been prepared or provided to the KHRC but for the existence of the Consent Decree.

The Court is not persuaded by Denny's argument. The investigation conducted by Denny's was merely *allowed,* but *not required,* by the Consent Decree. *See* Consent Decree, Sec. XIIV at pp. 50-51 (all discrimination complaints must be forwarded to the Monitor for investigation, but "nothing contained in this Decree shall prohibit Denny's from conducting its own investigation ... provided such investigation does not interfere with the Monitor's investigation.") Furthermore, it is reasonable to assume that the investigation probably would have occurred even in the absence of the Consent Decree.

In light of the above, the Court concludes that the documents do not meet the *Bleznak* standard. In other words, the requested documents cannot reasonably be deemed material that "would not have come into existence but for the existence of the Consent Decree." The requested KHRC documents are therefore not protected by the Confidentiality Provisions of the Consent Decree and Stipulation.

In light of the above, the Court overrules all of Denny's objections to Plaintiffs' First Request for Production No. 1, and Denny's shall produce the requested documents.

***683 B. First Request for Production No. 2**

This request seeks all "[w]ritten or otherwise recorded statements of Plaintiffs or any person known to be a witness to any fact relevant to Plaintiffs' complaints." Denny's objects to produ-

cing handwritten statements of five witnesses[FN2] on the basis of the Confidentiality Provisions of the Consent Decree and Stipulation, attorney-client privilege, and work product immunity. Denny's states that the handwritten statements were obtained by a Denny's corporate representative in the course of the internal investigation discussed above. According to Denny's, that investigation was undertaken pursuant to the direction of Denny's in-house counsel and in anticipation of litigation. The statements were provided in February, March, and early April 1997. Plaintiff McCoo filed her KHRC charge in late April, while Plaintiff Kerr filed her charge in July 1997.

FN2. The Court notes that Roger Zebill provided two handwritten statements. Plaintiffs state in their reply brief that Denny's has produced Mr. Zebill's March 17, 1997 statement. The Court will therefore deny as moot Plaintiffs' motion to compel production of that particular statement.

1. Confidentiality pursuant to the Consent Decree and Stipulation

The Court is not persuaded by Denny's arguments that the witness statements are shielded from discovery under the Confidentiality Provisions of the Consent Decree and Stipulation. As noted above, the investigation was merely allowed and not required by the Consent Decree and it is was an investigation that probably would have taken place even in the absence of the Consent Decree. This objection is therefore overruled.

2. Work product immunity

[8] The Court is also not persuaded by Denny's argument that the statements are protected by work product immunity. Although Denny's has satisfied the first two elements of the work product doctrine, *i.e.,* that the statements are documents and that they were prepared by a party, it has not satisfied the third element that they were "prepared in anticipation of litigation." *See Bohannon v. Honda Motor Co. Ltd.,* 127 F.R.D. 536, 538-39 (D.Kan.1989) (setting forth the elements of work product immunity); Fed.R.Civ.P. 26(b)(3).

"It is well settled that the party seeking to invoke work product immunity ... has the burden to establish *all elements* of the immunity ... and that this burden 'can be met only by an evidentiary showing based on competent evidence.' " *Johnson v. Gmeinder,* Nos. 98-2556-GTV, 98-2585-GTV, 2000 WL 133434, at *4 (D.Kan. Jan.20, 2000) (quoting *Audiotext Communications Network, Inc. v. U.S. Telecom, Inc.,* No. 94-2395-GTV, 1995 WL 625962, at *7 (D.Kan. Oct.5, 1995)) (emphasis added by *Johnson). Accord National Union Fire Ins. Co. v. Midland Bancor, Inc.,* 159 F.R.D. 562, 567 (D.Kan.1994). That burden "cannot be 'discharged by mere conclusory or ipse dixit assertions.' " *Johnson,* 2000 WL 133434, at *4 (quoting *Audiotext,* 1995 WL 625962, at *7 (quoting *Bowne of New York City, Inc. v. AmBase Corp.,* 150 F.R.D. 465, 470 (S.D.N.Y.1993))).

To justify work product protection, Denny's must show that the threat of litigation was "real and imminent." *See Audiotext,* 1995 WL 625962, at *9. "The inchoate possibility, or even the likely chance of litigation, does not give rise to the privilege." *Id.* Thus, to support its claim of work product, Denny's must provide more than mere assertions that these documents were created in anticipation of litigation. *See id.*

Denny's has provided no affidavit or other evidentiary support for its contention that the witness statements were obtained in anticipation of litigation. It establishes no facts that would have put Denny's on notice that litigation could be expected. Denny's merely alleges that a few hours after the incident, Plaintiff McCoo "returned to the restaurant with two male friends who entered the restaurant and threatened the manager." Response to Motion to Compel (doc. 76) at 2. Denny's then "submits that the documents created during the internal investigation were prepared in anticipation for litigation." *Id.* at 4. These conclusory allegations are not sufficient to meet Denny's burden.

***684** Moreover, Denny's cannot rely on the doctrine that the filing of an administrative charge provides reasonable grounds for anticipating litigation sufficient to satisfy this third element. *See Equal Employment Opportunity Comm'n v. General Motors Corp.,* No. 87-2271-DES, 1988 WL 170448 at *2 (D.Kan. Aug. 23, 1988) (documents deemed prepared in anticipation of litigation when prepared after charges were filed with EEOC). Indeed, the witness statements here were obtained *before* either of the KHRC charges was filed.

Even if the Court were to find that Denny's has met its burden to show that the documents were prepared in anticipation of litigation and therefore work product, the Court would still find that three of the statements were discoverable under the "necessity" exception. *See Frontier Refining Inc. v. Gorman-Rupp Co., Inc.* 136 F.3d 695, 702-703 (10th Cir.1998). Under that exception, fact work product, such as the witness statements here,[FN3] is discoverable if:

> FN3. Denny's does not contend that the witness statements are attorney or opinion work product to which the necessity exception would not apply, and the Court finds that the statements constitute ordinary, fact work product.

> (1) there is a substantial need of the material in the preparation of [the] case; and (2) that [the discovering party] is unable without undue hardship to obtain the substantial equivalent of the materials by other means.

Bohannon v. Honda Motor Co. Ltd., 127 F.R.D. 536, 538-39 (D.Kan.1989) (citing Fed.R.Civ.P. 26(b)(3)). *Accord Frontier Refining,* 136 F.3d at 702-703.

[9] The party attempting to pierce the work product protection by relying on the necessity exception bears the burden of proof and persuasion. *See Audiotext,* 1995 WL 625962, at *9; *Comeau v. Rupp,* 142 F.R.D. 683, 685 (D.Kan.1992). To justify disclosure, that party must show the importance of the information to the preparation of its case and the difficulty it will face in obtaining substantially equivalent information from other sources if production is denied. *Blair v. United States,* No. 87-4140-RDR, 1990 WL 171058, at *2 (D.Kan. Oct.3, 1990). The Court has broad discretion to determine whether the requisite showing has been made. *In re San Juan Dupont Plaza Hotel Fire Litigation,* 859 F.2d 1007, 1019, 1021 (1st Cir.1988); *United States v. Rockwell Int'l Corp.,* 144 F.R.D. 396, 400 (D.Colo.1992); *Blair,* 1990 WL 171058 at *2.

Plaintiffs contend that they have a substantial need for the statements because they were provided by Denny's employees who witnessed the alleged discriminatory incident and will most likely contain a factual recitation of the events as witnessed by them. Plaintiffs assert that they are unable to obtain the factual material that is the subject of these witness statements by other means. Plaintiffs state, and Denny's does not dispute, that the Parties have tried to take the depositions of three of these witness (Deena Sharp, Delonah Fisher and Tanya Gamez) on several occasions, but the witnesses failed to appear despite their being served with subpoenas. Plaintiffs contend that the handwritten statements are "the only available version of the witnesses' account of the incident." Plaintiffs' Supp. Mem. (doc. 113) at 8.

[10] The Court agrees, and finds that Plaintiffs have met their burden to establish this element[FN4] - at least with respect to the three witnesses identified above who have failed to appear for their subpoenaed depositions. Several cases have held that the unavailability of witnesses satisfies the element that the party is unable to obtain the substantial equivalent of the information. *See, e.g., Scurto v. Commonwealth Edison Co.,* No. 97 C 7508, 1999 WL 35311, at *2 (Jan. 11, 1999 N.D.Ill.) (party may obtain fact work product "only in 'rare situations' such as those involving witness unavailability"); *United States v. Davis,* 131 F.R.D. 391, 395-96 (S.D.N.Y.1990) (statement discoverable

where witness was "effectively unavailable" because in Greece); *McNulty v. Bally's Park Place, Inc.,* 120 F.R.D. 27, 30 (E.D.Pa.1988) (statement from defendant's employee discoverable***685** where plaintiff's efforts to reach him were "unavailing"); *Hanson v. Gartland S.S. Co.,* 34 F.R.D. 493, 495 (N.D.Ohio 1964) (statements of seamen who could not be found at address given by defendant subject to discovery); *Goldner v. Chicago & N.W.Ry. Sys.,* 13 F.R.D. 326, 329 (N.D.Ill.1952) (statements discoverable if witnesses cannot be found or refuse to give information). *See also* James W. Moore, Moore's Federal Practice, Discovery of Trial Preparation, ¶ 26.15[3] at 26-308 & -309 ("In general, discovery will not be permitted where the party seeking production of the statement has access to the witness and may thus obtain equivalent evidence. However, if the witness has become unavailable since making the earlier statement, production is often ordered."). *Cf. Goodyear Tire and Rubber Co. v. Chiles Power Supply, Inc.,* 190 F.R.D. 532, 539 (S.D.Ind.1999) (statements not discoverable where witnesses were known and available); *Front Royal Ins. Co. v. Gold Players, Inc.,* 187 F.R.D. 252, 259 (W.D.Va.1999) (same); *FDIC v. Cherry, Bekaert & Holland,* 131 F.R.D. 596, 605 (M.D.Fla.1990) (statement not discoverable where party seeking statement "made no attempt" to depose or interview the witness).

> FN4. In this case, Plaintiffs have gone beyond showing that they can obtain the substantial equivalent of this information only *with undue hardship,* and have shown that they most likely cannot obtain it at all.

Although the Court finds that the "unable to obtain the substantial equivalent" element has been satisfied with respect to the statements of Deena Sharp, Delonah Fisher and Tanya Gamez, the Court does not find that it has been satisfied with respect to Roger Zebill, whom Plaintiffs indicate they have deposed. The Court also finds that the element has not been satisfied with respect to Vicki McComas since there is nothing in the record indicating that Plaintiffs have made any attempt to depose or contact her.

Having established that they are unable to obtain the substantial equivalent of the witness statements of Deena Sharp, Delonah Fisher and Tanya Gamez through another source, Plaintiffs must next satisfy the substantial need factor. The Court finds that Plaintiffs have met this factor. Although Plaintiffs cannot know for sure what information the statements contain, they do know that the Roger Zebill statement which Denny's has already produced contains a "factual recitation" of the events giving rise to Plaintiffs' lawsuit. Plaintiffs' Reply (doc. 80) at 2. It is highly likely that the other witness statements will also contain a factual recitation of the alleged discriminatory incident as observed by each of them. All of these witnesses, like Mr. Zebill, were employed by Denny's and present at the time the alleged incident occurred. The facts of this case are highly disputed and each of these individuals appears to be an important fact witness. (This is particularly true in Deena Sharp's case since she is the individual who waited on Plaintiffs and who is alleged to have made one of the racially disparaging comments.) The Court therefore finds that Plaintiffs have shown a substantial need for the witness statements made by Deena Sharp, Delonah Fisher and Tanya Gamez. Thus, even if the Court were to find that Denny's had supported its objection and that the statements of these three individuals were work product, the Court would still find that they were discoverable under the necessity exception.

To summarize, the Court overrules Denny's work product objection and the other objections discussed above. The Court will grant Plaintiffs' motion to compel production of the witness statements, with the exception of (1) both of Roger Zebill's statements, and (2) Vicki McComas' statement.

C. First Request for Production No. 3

This Request seeks "[a]pplicable handbooks, training materials, statements or other materials is-

sued by Defendant to the Topeka, Kansas Denny's Restaurants delineating Defendants' policies in any way related to racism or discrimination for the five year period prior to February 1997." Denny's objects on the basis that the request seeks irrelevant information, is not reasonably calculated to lead to the discovery of admissible evidence, and is overly broad and unduly burdensome. Denny's also objects on the basis that the requested documents are covered by the Confidentiality Provisions of the Consent Decree and Stipulation.

1. Relevancy

[11][12] The Court will first address Denny's objections as to relevancy. Relevancy is broadly construed, and a request for discovery***686** should be considered relevant if there is "any possibility" that the information sought may be relevant to the subject matter to the action. *Scott v. Leavenworth Unified School District No. 453,* 190 F.R.D. 583, 585 (D.Kan.1999); *Etienne v. Wolverine Tube, Inc.,* 185 F.R.D. 653, 656 (D.Kan.1999). A request for discovery should be allowed "unless *it is clear* that the information sought can have *no possible bearing* on the subject matter of the action." *Scott,* 190 F.R.D. at 585 (quoting *Snowden v. Connaught Lab.,* 137 F.R.D. 336, 341 (D.Kan.1991)) (emphasis added by *Scott*). When the discovery sought appears relevant, the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery (1) does not come within the broad scope of relevance as defined under Fed.R.Civ.P. 26(b)(1), or (2) is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure. *Scott,* 190 F.R.D. at 585 (citations omitted).

[13] On its face, this request appears to seek relevant materials. Whether Denny's has issued any handbooks, policies or statements regarding race discrimination relates not only to the factual issues of whether discrimination may have occurred and whether any racially derogatory comments were made, but also to Plaintiffs' claims that Denny's acted with reckless indifference to Plaintiffs' rights. Because the materials requested appear relevant, Denny's has the burden to establish the lack of relevance. Denny's has made no attempt to meet its burden, and, in fact, comes forward with nothing to support its irrelevance objection. The Court therefore overrules this objection.

2. Overly broad scope of the request

The Court will next turn to Denny's objection that the request is overly broad. Unless the request is overly broad on its face, Denny's, as the party resisting discovery, has the burden to support its objection. *Etienne v. Wolverine Tube, Inc.,* 185 F.R.D. 653, 656 (D.Kan.1999); *Daneshvar v. Graphic Technology, Inc.,* No. 97-2304-JWL, 1998 WL 726091, at *1 (D.Kan. Oct. 9, 1998). *Hilt v. SFC Inc.,* 170 F.R.D. 182, 186 (D.Kan.1997). This includes any objection to the temporal scope of the request. *Daneshvar,* 1998 WL 726091, at *1*; Hilt,* 170 F.R.D. at 186.

The Court does not find the request or the time period overly broad on its face, and Denny's makes no attempt to support its overly broad objection. The Court therefore overrules this objection.

3. Unduly burdensome

The Court also overrules Denny's objection that the request is unduly burdensome. Again, Denny's has the burden to support this objection. *See Snowden v. Connaught Lab., Inc.,* 137 F.R.D. 325, 332 (D.Kan.1991). Denny's has the burden to show not only "undue burden or expense," but also to show that the burden or expense is unreasonable in light of the benefits to be secured from the discovery. *Id.* Denny's has not even attempted to make such a showing. It makes no effort to show that the documents are voluminous or that any heavy expenditures of time, effort or money would be necessary to produced the requested documents. The Court therefore overrules this objection.

4. Confidentiality pursuant to the Consent Decree and Stipulation

[14] Denny's identifies nineteen items that it

contends are responsive to this Request and covered by the Confidentiality Provisions. It asserts that these materials, which include a "Leader's Manual," a training workbook, training videos, and "Guest Services and Public Accommodations Policies," would not have come into existence but for the Consent Decree.

The Court finds that these materials were created as a result of the Consent Decree, specifically Sections X.A, X.B, and X.C. The Court will therefore sustain Denny's objections to producing the eighteen items identified on pages 3 and 4 of its Supplemental Memorandum (doc. 111) and the additional item identified on page 1 of its Supplement to Supplemental Memorandum (doc. 113). To the extent, however, that Denny's possesses any other materials responsive to this request (for example, any policies or handbooks that it has not identified and that may predate***687** the Consent Decree), Denny's must produce those documents.

D. First Request for Production No. 4

This Request seeks "[a]ll personnel files, including any disciplinary records or complaints, supervisory files both formal and informal, for all employees of all Topeka area Denny's restaurants from February 1992 to present." Denny's objects, asserting attorney-client privilege, work product immunity, irrelevance, undue burden, remedial action, and protection by the Confidentiality Provisions.

1. Attorney-client privilege

Denny's makes no attempt to support its assertion of attorney-client privilege, and, thus, the Court overrules this objection.

2. Work product immunity

With respect to work product immunity, Denny's asserts that some of the personnel files contain the witness statements it identified in response to First Request No. 2 and should not be disclosed. Given that the Court has overruled Denny's objections to producing the witness statements, this objection must also be overruled.

3. Unduly burdensome

Denny's has not even attempted to support its undue burden objection. The Court therefore overrules this objection.

4. Overly broad in scope and relevancy

With respect to its overly broad and irrelevant objections, Denny's asserts that it has two restaurants located in Topeka, Kansas: one located on South Topeka Boulevard and the other located on Wanamaker Road. Denny's contends that only the requested documents for the South Topeka Boulevard restaurant, where the incident occurred, would be relevant or likely to lead to the discovery of admissible evidence. The Court agrees.

[15] While the Court has been unable to locate any case law addressing this issue in the context of this case, the case law dealing with employment discrimination would appear to be applicable. Employment discrimination cases have held that in determining the geographic scope of discovery for non-class complaints, the focus should be upon the source of the complained discrimination, *i.e.,* the unit or facility that employed the plaintiff, absent some showing of particularized need and relevance. *See, e.g., Mackey v. IBP, Inc.,* 167 F.R.D. 186, 195 (D.Kan.1996) (limiting scope of discovery to defendant's Emporia plant that employed plaintiff); *Gheesling v. Chater,* 162 F.R.D. 649, 650 (D.Kan.1995) (limiting scope to plaintiff's employing unit). Similarly, the focus here should be upon the restaurant where the alleged discriminatory conduct occurred. The Court will therefore limit this request to the South Topeka Boulevard restaurant.

The Court must now determine whether all of the personnel files and the other requested documents for the South Topeka Boulevard restaurant should be produced. Again, the Court was unable to locate any case law addressing this issue in this context, but finds that cases decided in the employment discrimination context are helpful. Those cases have held that merely because a person may be called as a witness at trial does not justify disclosure of his/her personnel file. *See, e.g., Hicks v.*

Kansas Masonic Home, No. 97-1307-MLB, 1998 WL 173197, at *2 (D.Kan. March 5, 1998); *Haselhorst v. Wal-Mart Stores, Inc.,* 163 F.R.D. 10, 11 (D.Kan.1995). If, however, the individual is alleged to have engaged in the discrimination or harassment at issue or played an important role in the employment decision or incident that gives rise to the lawsuit, the personnel file will be considered relevant and/or reasonably calculated to lead to the discovery of admissible evidence, and therefore discoverable. *See, e.g., Daneshvar v. Graphic Technology, Inc.,* No. 97-23044-JWL, 1998 WL 726091, at *5 (D.Kan. Oct. 9, 1998) (compelling production of personnel files of three "key witnesses" who "played important roles in the employment decisions affecting plaintiff"); *Krenning v. Hunter Health Clinic, Inc.,* 166 F.R.D. 33, 35 (D.Kan.1996) (compelling production of personnel files of alleged harasser and employer's chief executive officer); *Hoskins v. Sears, Roebuck and Co.,* No. 96-1357-MLB, 1997 WL 557327, at *2 (D.Kan. Sept. 2, 1997) (compelling production of personnel files of "eight individuals who ***688** are alleged to have been involved in, witnessed, or failed to report" the claimed harassment). *See also Leighr v. Beverly Enterprises-Kansas Inc.,* No. 94-2474-GTV, 1996 WL 63501, at *2 (D.Kan. Feb.7, 1996) (noting that the "personnel file of an allegedly discriminatory defendant would appear to contain relevant information," but declining to compel production of the file after reviewing defendant's itemization of the files contents and finding nothing relevant to plaintiff's discrimination claims).

Applying these standards, the Court finds that Plaintiffs are entitled to discover the personnel files of those employees of the South Topeka Boulevard restaurant who allegedly participated in, were involved in, or witnessed any of the claimed discriminatory or other wrongful events giving rise to this lawsuit. All documents contained within those employees' personnel files shall be produced to Plaintiffs, with the exception of any documents that the Court finds are protected under the Confidentiality Provisions, as set forth below in subpart 6.

5. Remedial action

[16] Denny's further objects to this request "because it asks for documents that may evidence remedial action taken by defendant Denny's." Denny's provides no case law for this proposition, and the Court can find none. Denny's is apparently confusing admissibility with discoverability. Federal Rule of Evidence 407 provides that evidence of subsequent remedial measures is not admissible to prove negligence, culpable conduct, and certain matters relating to product liability law. Even if applicable to this case, the Rule limits the *admissibility* of evidence, and not its *discovery.* The Court therefore overrules this objection.

6. Confidentiality pursuant to the Consent Decree and Stipulation

[17] Denny's also objects to producing any documents from the personnel files that contain "information provided to employees about the decree." Denny's Response (doc. 76) at 7. Specifically, Section X.C.1.a of the Consent Decree provides that employees shall be provided with certain information about the Consent Decree and Denny's nondiscrimination policies and that employees are to execute statements acknowledging receipt of this information. Consent Decree at pp. 18-19. In addition, Section X.C.2.d provides that any employee who participates in a Denny's training programs shall sign a statement acknowledging participation in the program. *Id.* at p. 26.

Denny's does not specifically identify the documents in each personnel file that it contends came into existence because of the Consent Decree. It does, however, identify a group of nineteen documents that are generally responsive to Request Nos. 3 and 4. Twelve of those documents (nos.6-12, 14-18) are "We Can" Attendance Logs, "We Can" Class Rosters, and "Acknowledgments and Agreements to Abide by Consent Decree and Non-Discrimination Policies" that were signed by various employees The Court assumes that these twelve documents are the personnel file documents that

Denny's contends are protected by the Confidentiality Provisions.[FN5]

> FN5. The other documents identified as generally responsive to Request Nos. 3 and 4 are not the type of documents one would expect to find in a personnel file, *i.e.,* a workbook, a Leader's Manual, and a training video.

The Court finds that these twelve documents are covered by the Confidentiality Provisions and that they came into existence only as a result of the Consent Decree. The Court thus rules that they are protected by the Confidentiality Provisions. The Court will therefore sustain Denny's objection to producing from the personnel files these particular twelve documents and any other "We Can" Attendance Logs, "We Can" Class Rosters, and "Acknowledgments and Agreements to Abide by Consent Decree and Non-Discrimination Policies," which were signed by other employees.

To summarize, Denny's is required to produce the personnel files of those employees of the South Topeka Boulevard restaurant who allegedly participated in, were involved in, or witnessed any of the claimed discriminatory or other wrongful acts giving rise to ***689** this lawsuit, with the exception of the following documents contained therein: (1) "We Can" Attendance Logs, (2) "We Can" Class Rosters, and (3) "Acknowledgments and Agreements to Abide by Consent Decree and Non-Discrimination Policies."

E. First Request for Production No. 5

[18] This request seeks "[a]ll records or other documentation of customer complaints lodged against any Topeka area Denny's restaurant from February 1992 to present alleging racial or other discriminatory treatment." Denny's objects on the basis that the request is overly broad and unduly burdensome and seeks irrelevant information. Denny's also objects to the term "Topeka area" as ambiguous, noting that it has two restaurants in Topeka. It also objects to the five-year time period as overly broad and placing an undue burden on Denny's. Finally, it objects to the request because it is not limited to the "same type or incident similar to the incidents alleged in this lawsuit."

For the same reasons set forth above in Part C, the Court overrules Denny's overly broad and burdensome objections and the objection to the five-year time period. The Court also overrules Denny's objection that the term "Topeka area" is vague and ambiguous[FN6]; however, for the same reasons discussed above in Part D, the Court will limit the request to the South Topeka Boulevard restaurant where the alleged incident occurred. The Court will also limit the request to complaints of race discrimination (including any complaints of racial harassment), since race is the only asserted basis of discrimination in this case. *See Jackson v. Montgomery Ward & Co., Inc.,* 173 F.R.D. 524, 528 (D.Nev.1997) (limiting discovery to same types of discrimination alleged by plaintiff); *Gheesling v. Chater,* 162 F.R.D. 649, 651 (D.Kan.1995) (same).

> FN6. The Court notes that Denny's failed to object to the term as being vague and ambiguous as used in the preceding request.

F. First Request for Production No. 6

This requests seeks "[a]ll materials provided to or received from the Civil Rights Monitor in response to Plaintiffs' Complaints." The only objection Denny's asserts to this request is based on the Confidentiality Provisions. In Denny's response to Plaintiffs' Motion to Compel, Denny's reasserts the objection (*see* doc. 76 at p. 7), but does not identify, either generically or specifically, any of the documents that it contends fall within the scope of this request. In its supplemental memorandum (doc. 111), Denny's does not even address this request. The Court therefore finds this objection unsupported, and overrules it. Denny's shall produce the requested documents.

G. Request for Production No. 7

This request seeks "[a]ll consent decrees

entered into by Denny's related to racial discrimination in the service provided to ethnic or racial minority patrons." Denny's objects on the grounds of confidentiality and relevancy.

1. Confidentiality

Denny's objects to "the production of court orders to the extent any court orders exist, if those orders state that they are to be confidential in nature." Nowhere in its objections, or, for that matter, in its response to the Motion to Compel or supplemental memorandum, does Denny's identify any such court orders. Denny's does make a passing reference to this request in its response to the Motion to Compel and appears to be asserting that the *Dyson v. Flagstar* Consent Decree (the decree discussed herein) is itself protected from disclosure by the Confidentiality Provisions. Even assuming this is true, Denny's has already provided Plaintiffs with a copy of the Consent Decree (*see* Exhibit B to Denny's response to Plaintiffs' Motion to Compel), and the objection is moot as to that particular decree.

With respect to any other consent decree or court order that Denny's may contend is confidential, the Court will overrule Denny's objection since Denny's has not identified any court opinion or order requiring it to keep any court order confidential. Moreover, confidentiality does not necessarily bar ***690** discovery, and, in many cases, confidentiality concerns may be addressed with an appropriate protective order. *Mackey v. IBP, Inc.,* 167 F.R.D. 186, 196 (D.Kan.1996). In light of the above, the Court overrules this objection

2. Relevancy

Denny's also objects on the basis of relevance. Once again, however, Denny's does not support its objection. The Court therefore overrules this objection. Denny's shall produce the requested documents.

H. First Request for Production No. 8

This request seeks "[a]ll materials received from or provided to the Civil Rights Compliance Division related to Plaintiffs' complaints." Denny's objects, stating that, to its knowledge, such an agency does not exist. Denny's does state, however, that it would "revisit" its response if Plaintiffs would clarify the request. Plaintiffs do not address this objection in their briefs, and, as best as the Court can determine, Plaintiffs have made no effort to clarify the request for Denny's. Like Denny's, the Court is also not aware of any such entity. The Court will therefore sustain Denny's objection to this request.

I. First Request for Production No. 9

This request seeks all statements of witnesses "to any fact relevant to Defendants' defenses asserted in their answer to Plaintiffs' complaint." Because this request is similar to First Request No. 2 and because Denny's asserts the same objections it asserted it response to that request, the Court makes the same ruling here and for the same reasons discussed above with respect to Request No. 2 (*see* Part B above).

J. First Request for Production No. 10

[19] This request seeks "[c]opies of all documents identified by Defendants in their initial disclosures and any supplemental or final lists of exhibits to be filed in this case."

1. Confidentiality pursuant to K.S.A. 44-1005(e)

Denny's objects again to producing the three letters it provided to the KHRC, based on K.S.A. 44-1005(e). For the same reasons discussed above in Part A, the Court overrules this objection.

2. Attorney-client privilege and work product immunity

Denny's also asserts attorney-client privilege and work product protection, as follows:

> Defendant objects to the production of the documents identified in paragraphs 1, 2, 3, 4, 6, 7, 8, 9, 10, 13, 14 and 16 of Defendant's Rule 26(a) Disclosures based on work product privilege and attorney-client privilege.

The Court does not have a copy of Denny's

Disclosures or the privilege log that apparently accompanied the Disclosures. In its response to Plaintiffs' Motion to Compel, Denny's states that it objects to producing a "corporate investigative file," but does not identify the contents of that file or describe the circumstances under which the file was created. It merely states that the file "is identified extensively in Defendant's Rule 26(a) disclosures." Denny's Resp. to Motion to Compel (doc. 76) at 3. In its supplemental memorandum, Denny's identifies only three documents that are responsive to this request and states that it identified those documents in its Rule 26(a) privilege log. Those three documents are described as memoranda prepared by three different Denny's human resources personnel that were "generated as a result of the investigation [into Plaintiffs' complaints] allowed by the Monitor." Denny's Supp. Mem. (doc. 111) at 8-9. One of those memoranda was addressed to Denny's corporate counsel. Denny's provides the Court with no additional information about any of these claimed privileged documents.

As noted above, Fed. R. Civ. P 26(b)(5) requires the party withholding documents under a claim of privilege or work product immunity to specifically describe the nature of the documents. In addition to describing the documents "in detail," the party must provide "precise reasons" for the objection to the discovery. *National Union Fire Ins. Co. v. Midland Bancor, Inc.,* 159 F.R.D. 562, 567 (D.Kan.1994). This information must be sufficient to allow the court to determine whether***691** each and every element of the asserted objection has been satisfied. *Jones v. Boeing Co.,* 163 F.R.D. 15, 17 (D.Kan.1995).

Applying these standards, the Court finds that Denny's assertion of privilege and work product immunity is inadequate in the following respects. First, Denny's fails to specify whether each document is being withheld under a claim of attorney-client privilege or attorney work product (or both). *See Johnson v. Gmeinder,* Nos. 98-2556-GTV, 98-2585-GTV, 1999 WL 1095463, at *3 (D.Kan.Nov.19, 1999) (objection inadequate where defendants failed to specify which privilege, *i.e.,* work product or attorney-client privilege, they were relying upon); *First Sav. Bank v. First Bank Sys., Inc.,* No. 95-4020-SAC, 1995 WL 250394, at *4 (D.Kan. Mar.30, 1995) (same).

Second, with the exception of the three memoranda identified in its Supplemental Memorandum, Denny's makes no attempt to identify the documents that it claims are privileged and/or protected. The Court has no idea what documents Denny's may have identified in its disclosures.

Third, with respect to the three memoranda that Denny's does identify in its supplemental memorandum, Denny's fails to provide any evidentiary basis to support its privilege/work product objections. This is discussed below in detail with respect to each objection.

a. Attorney-client privilege

[20] Because this action arises under a federal statutory scheme, federal law provides the rule of decision at to application of the attorney-client privilege. *See Sprague v. Thorn Americas, Inc.,* 129 F.3d 1355, 1368-69 (10th Cir.1997) (federal privilege law applies to federal claims). Under federal common law, the essential elements of the attorney-client privilege are:

> (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except [where] the protection be waived.

Marten v. Yellow Freight Sys., Inc., No. 96-2013-GTV, 1998 WL 13244, at *4 (D.Kan. Jan.6, 1998) (quoting *Great Plains Mut. Ins. Co. v. Mutual Reinsurance Bureau,* 150 F.R.D. 193, 196 n. 4 (D.Kan.1993)). The privilege "protects confidential communications made by a client to an attor-

ney in order to obtain legal assistance from the attorney in his or her capacity as a legal advisor." *Marten,* 1998 WL 13244, at *6 (quoting *Jones v. Boeing Co.,* 163 F.R.D. 15, 117 (D.Kan.1995)).

[21] Denny's conclusory allegation that the attorney-client privilege applies to these three memoranda does not satisfy its burden of proof. *See Marten,* 1998 WL 13244, at * 4 ("blanket claim" that privilege applies is not sufficient to meet burden of establishing privilege). Denny's has made no evidentiary showing with respect to any of these memoranda that each element of the attorney-client privilege is satisfied.

b. Work product immunity

[22] Denny's has also failed to establish the applicability of the work product doctrine to these three memoranda, most notably because it fails to establish that they were prepared in anticipation of litigation.

In light of the above, the Court overrules Denny's assertion of the attorney-client privilege and work product immunity as to these three memoranda, as well as to any other documents that are responsive to this request. Denny's shall therefore produce all documents responsive to this request.

K. First Request for Production No. 11

This requests seeks "all documentation, notes or other writings made by the wait staff or other employees in any way related to Plaintiffs' visit to Defendants' restaurant on or about February 21, 1997." Denny's objects on the basis of attorney-client privilege and work product. It also objects on the basis of the Confidentiality Provisions. Denny's identifies the same witness statements it identified in response to Plaintiffs' First Request for Production No. 2. The ***692** Court makes the same rulings here that it made with respect to that request. (*See* Part B above.)

L. First Request for Production Nos. 12 and 13

Request No. 12 seeks "all material evidencing an employment or other relationship between Defendant Monosmith and Defendant Denny's." Denny's objects on the basis of the Confidentiality Provisions. It does, however, state that it will produce Monosmith's W-4 form and his 1099 forms for the year 1997.

Request No. 13 seeks "[a]ll job descriptions, policies or other directives or directions related to Defendant Monosmith's position with Defendants Denny's." Denny's again objects on the basis of the Confidentiality Provisions.

In its supplemental memorandum, Denny's identifies four documents that are responsive to these requests, including signed acknowledgment forms relating to the Consent Decree, a signed "Completion of Training Program" form, and a document entitled the "Duties and Objectives of the Security Guard." The Court finds that these four documents are covered by the Confidentiality Provisions and that they would not have come into existence but for the Consent Decree. The Court therefore upholds Denny's objection *as to these four documents.* To the extent that any other responsive documents exist, the objection is overruled, and Denny's shall produce the documents.

M. First Request for Production Nos. 14 and 15

Request No. 14 seeks "all material evidencing a 'hold harmless agreement' between the city of Topeka and Defendant Denny's, Inc. regarding Defendant Monosmith." Request No. 15 seeks "[a]ny evidence of permission by the city of Topeka for Defendant Monosmith to work as security in his 'off-duty' time." Denny's objects to both requests on the basis that the documents sought are irrelevant and not reasonably calculated to lead to the discovery of admissible evidence.

[23] The Court finds that the requests seek relevant information and overrules the objections. The Court notes that in response to Request No. 15, Denny's has stated that, without waiving its objections, "it has no such documents in its possession." Denny's must, however, produce not only respons-

ive documents in its "possession," but also those responsive documents in its "custody or control." *See* Fed.R.Civ.P. 34(a) (party must produce all responsive documents in its "possession, custody or control"). A party may retain the requisite control or custody of documents even if they are outside the party's actual possession. *Pulsecard, Inc. v. Discover Card Services, Inc.,* 168 F.R.D. 295 307 (D.Kan.1996). The Court will therefore order Denny's to produce all responsive documents in its possession, custody or control. If it has already done so, it shall affirmatively state so in a supplemental response.

III. PLAINTIFFS' SECOND REQUESTS FOR PRODUCTION

A. Second Request for Production No. 1

This request seeks "[a]ll materials provided to or received from the Kansas Human Rights Commission, the Topeka Human Relations Commission or any similar agency relating to any complaints based on discrimination filed against the Topeka Denny's restaurants from 1992-1997." Denny's objects on the basis that the request seeks irrelevant information and is overly broad and unduly burdensome. It also objects on the basis of attorney-client privilege, work product immunity, and the KAAD confidentiality provision contained in K.S.A. 44-1005(e).

1. Overly broad in scope, relevancy, and undue burden

Denny's does little to support these objections. Denny's does, however, assert that it should not have to produce these documents for the Wanamaker Road restaurant. For the reasons discussed above in Part I.D, the Court finds that the request should be limited to the South Topeka Boulevard restaurant where the alleged incident took place. Denny's also objects to the five-year time period. For the same reasons discussed above in ***693** Part I.C, the Court finds the five-year time period reasonable.

Denny's also objects to the request because it is not limited to "complaints filed under the same or similar circumstances as plaintiffs' complaints." Resp. to Motion to Compel (doc.76) at 5, n 2. For the reasons discussed above in Part I.D, the Court will limit the request to complaints of race discrimination and racial harassment.

2. Attorney-client privilege and work product immunity

Denny's does not support its assertion of attorney-client privilege, and even if some of the documents were privileged, the privilege would have been waived upon producing the documents to the agency. The Court likewise finds that Denny's has not supported its work product objection. In addition, the Court has already ruled that any documents, even if protected work product, would have lost their protected status when they were provided to the KHRC or other agency investigating the party for discrimination or other unlawful conduct. *See* March 21, 200 Memorandum and Order (doc. 118). These objections are therefore overruled.

3. Confidentiality pursuant to K.S.A. 44-1005(e)

The Court has previously rejected Denny's argument that K.S.A. 44-1005(e) shields from discovery any documents provided to the KHRC. *See id.* The Court therefore overrules this objection.

B. Second Request for Production No. 2

This request seeks "[a]ll materials upon which answers to the propounded interrogatories relied." Denny's response states: "Defendant incorporates by reference the objections set forth in Defendant's Objections to Plaintiffs' Interrogatories." It also states that it relied on no documents for its answers to Interrogatory Nos. 1 and 4.

As indicated in Part IV below, the Court is overruling many of Denny's objections to the interrogatories. Denny's shall therefore supplement its response to this request after it has supplemented its interrogatory answers as ordered below.

C. Second Request for Production No. 3

[24] This request seeks copies of "all Denny's policies, guidelines, training materials, employee handbooks, supervisor's handbooks, and any other corporate policies maintained at the Topeka Denny's facilities in February 1997." Denny's objects to this request as overly broad, unduly burdensome, and seeking irrelevant information. It also objects on the basis of work product, attorney-client privilege, and the Confidentiality provisions.

1. Overly broad in scope, undue burden, and relevancy

Specifically, Denny's objects to producing documents for the Wanamaker Road restaurant. It also asserts that the request would require Denny's to produce hundreds of policies, training materials, and other documents that have no relevance to the lawsuit.

The Court agrees that only documents maintained at the South Topeka Boulevard restaurant should be produced. The Court also finds the request overly broad and irrelevant on its face. Plaintiffs do not meet their burden to show how all of these documents would be relevant or lead to the discovery of admissible evidence. While policies, guidelines, and training materials relating to customer service and racial discrimination would clearly be relevant, the Court can imagine many other types of policies training materials, and handbooks relating to restaurant operations that would have absolutely no bearing on any of the issues in this case. The Court will therefore sustain in part and deny in part Denny's objections. The Court orders Denny's to produce only those policies and other requested materials that pertain to customer service, customer complaints, security issues, and discrimination or harassment. Only those materials maintained at the South Topeka Boulevard restaurant in February 1997 shall be produced.

***694 2. Attorney-client privilege and work product**

Denny's provides no support for these objections, and the Court is at a loss to even imagine how any of the requested documents would fall within the scope of those privileges. The Court therefore overrules these objections.

3. Confidentiality pursuant to the Confidentiality Provisions

Denny's identifies on pages 3 and 4 of its supplemental memorandum and page 1 of its supplement to its supplemental memorandum various items that it contends are covered by the Consent Decree and that came into existence as a result of the Decree. Those items include a training video and various policies, manuals, and workbooks. The Court agrees that all nineteen of the items identified are protected by the Confidentiality Provisions and would not exist but for the Consent Decree. The Court therefore upholds this objections as to these particular documents. To the extent that any other policies or other materials responsive to this request exist, Denny's shall produce them.

IV. PLAINTIFFS' FIRST INTERROGATORIES

A. Interrogatory No. 2

[25] This interrogatory seeks information about complaints filed with the KHRC, the Topeka Human Relations Commission or "any similar agency" against either of the Topeka restaurants for the period 1992 to present. It asks for the following specific information:

a. The complainant's full name, last known address and telephone number;

b. The date of the complaint;

c. The allegations made in the complaint;

d. Which restaurant was involved;

e. Which Denny's employees were involved;

f. What action was taken by Denny's in response to each complaint?

Denny's objects on the basis that the interrogatory is overly broad and unduly burdensome and be-

cause it seeks irrelevant information. Denny's also objects on the basis of attorney-client privilege and work product immunity. Finally, Denny's asserts that the term "any similar agency" is vague and ambiguous.

1. Attorney-client privilege and work product immunity

Denny's does not support these objections. Furthermore, the Court has already ruled that any documents provided to the KHRC or other agency investigating a party for discrimination or other unlawful acts results in waiver of any work product immunity. See March 21, 2000 Memorandum and Order (doc. 118). These objections are therefore overruled.

2. Overly broad in scope, undue burden and relevancy

Denny's makes no specific objections other than to object to providing information for the five-year period and for the Wanamaker Road restaurant. For the reasons discussed above, the Court finds the five-year time frame reasonable and overrules the objection to the time period. The Court, however, agrees with Denny's that the interrogatory should be limited to the South Boulevard Topeka restaurant. The Court will also limit the interrogatory to complaints of racial discrimination and/or racial harassment.

3. Vague and ambiguous

The party objecting to discovery as vague or ambiguous has the burden to show such vagueness or ambiguity. *Pulsecard, Inc. v. Discover Card Services, Inc.,* 168 F.R.D. 295, 310 (D.Kan.1996). A party responding to discovery requests "should exercise reason and common sense to attribute ordinary definitions to terms and phrases utilized in interrogatories." *Id.* If necessary to clarify its answers, the responding party may include any reasonable definition of the term or phrase at issue. *Id.*

Denny's has not carried its burden to show that the term "any similar agency" is vague and ambiguous. When taken in context with the rest of the sentence, it should be apparent to Denny's that the term refers to agencies like the KHRC or Topeka Human Rights Commission which receive and investigate ***695** claims of discrimination. This objection is therefore overruled.

B. Interrogatory No. 3

[26] This interrogatory asks whether there have been "any customer complaints based on race lodged against either of the Topeka Denny's restaurants from 1992 to the present." It then requests specific information about any such complaints. Denny's objects to the language "based on race" as being vague and ambiguous. It further objects to the interrogatory as being overly broad and unduly burdensome. It also objects "to the extent that it seeks information that is protected by the attorney-client privilege or work product privilege." It then states: "Without waiving this objection and subject to it, see the document produced to plaintiffs on August 10, 1999, which represents plaintiff Jacqueline McCoo's customer complaint...."

1. Vague and ambiguous

Denny's fails to meet its burden to show that the term "complaint *based on race* " is vague and ambiguous. It is apparent to the Court that the term is referring to any complaint asserting racial discrimination or harassment. Indeed, Denny's apparently interpreted the interrogatory in this manner inasmuch as it referred Plaintiffs to a document "representing" Plaintiff McCoo's customer complaint. The Court will therefore overrule this objection.

2. Overly broad in scope and unduly burdensome

Denny's asserts that (1) the interrogatory is not limited to the " 'same or similar circumstances' as those alleged in Plaintiffs' complaint;" (2) the interrogatory asks for information about the Wanamaker Road restaurant; and (3) the five-year time period is unreasonable. For the same reasons discussed above, the Court sustains the objection as to the Wanamaker Road restaurant, but overrules the objection to the five-year time frame. In addition, the

Court overrules the objection that the interrogatory is overly broad because it is not limited to the "same or similar circumstances." As noted above, the term "based on race" means complaints of racial discrimination and racial harassment, which the Court has found is relevant and appropriately limited.

3. Attorney-client privilege and work product immunity

Denny's fails to support these objections in any way. Moreover, the Court notes that, generally speaking, the work product doctrine protects only documents and tangible things, and does not protect from disclosure facts that the adverse party's lawyer has learned. *See Audiotext Communications Network, Inc. v. U.S. Telecom, Inc.,* 1995 WL 625962, at *9 (D. Kan.1995). These objections are therefore overruled.

C. Interrogatory No. 5

This interrogatory asks Denny's to identify all persons employed at the Topeka Denny's restaurant on Wanamaker Road for the time period 1992-1997. Denny's asserts numerous objections, one of which is that the interrogatory seeks information irrelevant to this case. The Court agrees that the Wanamaker Road restaurant is not relevant to any of the issues in this lawsuit. The Court therefore sustains this objection, and Denny's need not answer this interrogatory.

D. Interrogatory No. 6

[27] This interrogatory asks Denny's to identify all persons employed at the Topeka Denny's restaurant on South Topeka Boulevard for the time period 1992-1997. For each employee identified, it requests the employee's address, telephone number and race, the dates of employment, the positions and titles held, and the reason for separation, if applicable. Denny's generally objects on the basis that the interrogatory seeks irrelevant information and is unduly burdensome. It also specifically objects to the five-year time period as unreasonable. Denny's asserts that information about employees is not relevant since this is not an employment discrimination case. It does, however, provide the names of the seven employees who were working at the restaurant at the time of the alleged incident.

***696** Denny's does not support its unduly burdensome objection with any evidence of the amount of time or expense required to provide this information. This objection is therefore overruled.

With respect to relevancy, the Court is not persuaded by Denny's argument that because this case involves discrimination against *customers, employee* information is wholly irrelevant. Plaintiffs could use the requested information to contact employees regarding Denny's treatment of other customers and any other similar incidents or customer complaints. The requested information might also yield information about employees terminated for engaging in discrimination.

While the Court finds that the information could lead to the discovery of admissible evidence, the Court fails to see how employee information for the entire requested five-year period is relevant. The Court believes a more reasonable time frame to be February 21, 1996 (one year prior to the February 21, 1997 incident) through the end of 1997. The Court will therefore sustain Denny's objection in part. Denny's is ordered to respond to this interrogatory, but only for the period February 21, 1996 through December 31, 1997.

E. Interrogatory No. 7

[28] This interrogatory asks Denny's whether any of the employees identified in Interrogatory Nos. 5 and 6 complained of racial discrimination and asks Denny's to identify the employee, the date of the complaint, the nature of the complaint, and any action taken by Denny's. Denny's objects on the basis that the requested information is irrelevant since this case involves alleged racial discrimination against customers and not employees.

The Court does not agree. The Court finds that this information (as limited to the employees of the South Topeka Boulevard store and the time period

described above in Part IV.D) may lead to the discovery of admissible evidence. This objection is therefore overruled in part and sustained in part. Denny's shall serve a supplemental response to this interrogatory.

F. Interrogatory No. 8

[29] This interrogatory asks whether any of the employees identified in response to Interrogatory No. 5 or 6 have been disciplined for engaging in race discrimination and asks for the employee name and the date of, reason for, and kind of, any discipline. Denny's again objects on the basis of relevancy. As with Interrogatory No. 7, the Court finds that the information (as limited to the employees of the South Topeka Boulevard store and the time period described above in Part IV.D) may lead to the discovery of admissible evidence. This objection is therefore overruled in part and sustained in part. Denny's shall serve a supplemental response to this interrogatory.

V. PLAINTIFFS' REQUEST FOR FEES AND EXPENSES

Plaintiffs seek their reasonable expenses, including attorney fees, incurred in preparing the Motion to Compel. Federal Rule of Civil Procedure 37(a)(4)(C) allows a court to impose sanctions where, as here, a motion to compel is granted in part and denied in part. Under that rule, the court may "apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner." Fed.R.Civ.P. 37(a)(4)(C).

In this case, the Court has overruled the majority of Denny's objections. The Court finds that most of the objections were not substantially justified. The Court thus deems it just to allow Plaintiffs to recover a portion, if not all, of the reasonable expenses, including attorney fees, that they incurred in bringing their Motion to Compel.

To aid the Court is determining the proper amount of expenses, Plaintiffs' counsel shall file, on or before May 1, 2000, an affidavit itemizing the expenses, including attorney fees, that Plaintiffs incurred in bringing this Motion to Compel. Denny's shall have until May 15, 2000 to file a response to the affidavit. The Court will then issue a second order, apportioning the expenses and fees and specifying the amount and time of payment.

***697** [30] The Court recognizes that before Rule 37(a)(4) sanctions may be imposed against a party, the Court must afford the party an "opportunity to be heard." *See id.* The Advisory Committee Notes to the 1993 Amendments to Fed.R.Civ.P. 37(a)(4) make it clear that the Court may consider the issue of sanctions "on written submissions." Here, Plaintiffs specifically requested their expenses in their Motion to Compel. Denny's responded to the Motion, but chose not to address the sanctions issue. The Court therefore finds that Denny's has had sufficient "opportunity to be heard" within the meaning of Fed.R.Civ.P. 37. *See Boilermaker-Blacksmith Nat'l Pension Fund v. Nevada Boiler Works, Inc.,* No. 96-2168-GTV, 1997 WL 118443 (D.Kan. Mar.11, 1997) ("opportunity to be heard" requirement of Rule 37(a) satisfied where party had opportunity to address, but did not address, sanctions in response to motion to compel containing request for sanctions).

[31] Having determined that Plaintiffs are entitled to recover at least a portion, if not all, of their reasonable expenses, the Court must next determine whether Denny's counsel or Denny's should be required to pay the sanctions. To the extent possible, sanctions should be imposed only upon the person or entity responsible for the sanctionable conduct. *White v. General Motors Corp. Inc.,* 908 F.2d 675, 685-86 (10th Cir.1990) (imposing Rule 11 sanctions); *Starlight Int'l, Inc. v. Herlihy,* 190 F.R.D. 587, 593 (D.Kan.1999) (imposing Rule 26(g) and 37(b) and (d) sanctions); *Giroux v. Farm Credit Bank of Wichita,* No. 95-1499-MLB, 1997 WL 109733, at *1 (D.Kan. Feb. 13, 1997) (imposing Rule 37(a)(4) sanctions). The sanctioning of a *party,* as opposed to the party's *counsel,* "requires specific findings that the party was aware of the wrongdoing." *Id.* (citing *White,* 908 F.2d at

685-86). In the absence of any evidence that Denny's was responsible for the unsupported objections made here, the Court finds it appropriate to hold Denny's counsel[FN7] solely responsible for paying the monetary sanctions. *See Starlight Int'l,* 190 F.R.D. at 594 (attorneys rather than parties responsible for insuring adequacy of responses to requests for production). The Court also finds it appropriate to assess the sanctions against counsel rather than Denny's based on counsel's Rule 11 and Rule 26(g) obligations.

> FN7. Pursuant to Kansas Rule of Professional Conduct 5.1 and the comment thereto, the partners or shareholders in a law firm are responsible for making reasonable efforts to assure that all lawyers in the firm conform to the rules of professional conduct. The Court therefore holds that the law firm representing Denny's rather than the individual attorneys shall be responsible for payment of the expenses.

Under Rule 11, counsel has the duty to ensure that the legal and factual contentions he/she sets forth in every pleading are "warranted by existing law" and "have evidentiary support." Fed. R Civ. P. 11(b)(2) and (3). Rule 26(g)(2) expounds on that duty as it applies to responses and objections to discovery requests. It provides in pertinent part:

> Every discovery request, response, or objection made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated.... The signature of the attorney or party constitutes a certification that to the best of the signer's knowledge, information, and belief, formed after a reasonable inquiry, the request, response, or objection is:
>
> (A) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; [and]
>
> (B) not interposed for a any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation....
>
> Fed.R.Civ.P. 26(g)(2).

Given the importance of this duty, Rule 26(g)(3) permits a court, upon motion or upon its own initiative, to impose sanctions upon the attorney making the certification, including payment of the reasonable expenses and attorney fees incurred because of the violation.

The Court is well aware of counsel's obligations to act as an advocate for his/her client and to use legal procedure for the ***698** fullest benefit of the client. *See* Kansas Sup.Ct. Rule 226, KRPC 3.1 cmt. Those obligations, however, must be tempered against counsel's duty not to abuse legal procedure. *See id.* Thus, even if the client directs counsel to respond to discovery requests in a certain manner, counsel has the *ultimate obligation* to ensure that the responses and objections are well grounded in fact and law.

In light of the above rules, the Court concludes that Denny's counsel, rather than Denny's, had the ultimate responsibility for ensuring that its objections were proper. Since counsel failed to meet that obligation with respect to a number of the asserted objections, the Court holds that counsel should be responsible for payment of Plaintiffs' expenses and fees.

VI. CONCLUSION

For the foregoing reasons, the Court hereby grants in part and denies in part Plaintiffs' Motion to Compel Discovery (doc. 74). On or before ***May 1, 2000,*** Denny's shall supplement its answers to Interrogatories 2-3 and 6-8, as directed herein. It shall also produce, on or before ***May 1, 2000***, documents responsive to First Request for Production Nos. 1-7 and 9-15 and Second Request for Production Nos.1-3, as directed herein. Such production shall take place at the offices of Plaintiffs' counsel or at any other location agreed upon by the Parties. The

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(Cite as: 192 F.R.D. 675)

Court hereby grants Plaintiffs' request for expenses as set forth herein. On or before ***May 1, 2000***, Plaintiffs shall file an affidavit itemizing the expenses, including attorney fees, that Plaintiffs incurred in bringing this Motion. Denny's shall have until May 15, 2000 to file a response to the affidavit.

IT IS SO ORDERED.

D.Kan.,2000.
McCoo v. Denny's Inc.
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END OF DOCUMENT

--- F.Supp.2d ----, 2012 WL 2445046 (D.Md.)
(Cite as: 2012 WL 2445046 (D.Md.))

United States District Court,
D. Maryland,
Northern Division.
Kevin M. LYNN, Plaintiff,
v.
MONARCH RECOVERY MGMT., INC, Defendant.

Civil No. WDQ–11–2824.
June 27, 2012.

Michael Craig Worsham, Law Office of Michael Craig Worsham, Forest Hill, MD, for Plaintiff.

Erin O. Brien Millar, Whiteford Taylor and Preston LLP, Baltimore, MD, Justin H. Homes, Bryan Christopher Shartle, Sessions Fishman Nathan and Israel LLC, Metairie, LA, for Defendant.

MEMORANDUM OPINION

PAUL W. GRIMM, United States Magistrate Judge.

***1** This Memorandum Opinion and its accompanying Order address Plaintiff Kevin M. Lynn's Motion to Compel Discovery, ECF No. 24–1; Defendant Monarch Recovery Management, Inc.'s Memorandum in Response to Plaintiff's Motion to Compel, ECF No. 24–3; and Plaintiff's Reply, ECF No. 24–7.[FN1] In his motion, Plaintiff seeks to compel answers to seven of his interrogatories (numbers 1, 6, 9, 12, 15, 16, and 17), five of his document production requests (numbers 11, 12, 15, 18, and 19), and seven of his requests for admissions (numbers 1, 4, 5, 7, 8, 9, and 10). Pl.'s Mot. 1. For the reasons stated herein, Plaintiff's Motion to Compel is GRANTED IN PART and DENIED IN PART. Accordingly, this Memorandum Opinion and its accompanying Order dispose of ECF Nos. 24, 24–1, 24–3, and 24–7.

FN1. Judge Quarles referred this case to me to handle all discovery and related scheduling matter on April 17, 2012, pursuant to 28 U.S.C. § 636 and Local Rules 301 and 302. ECF No. 25.

I. BACKGROUND

Substantively, this case involves Plaintiff's allegations that Defendant violated the federal and state Telephone Consumer Protection Acts by repeatedly calling Plaintiff using an "automatic telephone dialing system," or an artificial or prerecorded voice, without Plaintiff's express consent. *See generally* Compl., ECF No. 2; 47 U.S.C. § 227 (federal statute); Md.Code Ann., Com. Law §§ 14–3201 – 14–3202 (Maryland statute). Plaintiff alleges that, as a result of Defendant's repeated telephone calls, he suffered actual damages, "including phone charges for both the incoming calls and the caller ID information for each call," Compl. ¶ 24, and various noneconomic damages, for, *inter alia,* disruption of "Plaintiff's peace of mind," *id.* ¶ 30.

Plaintiff served interrogatories, document production requests, and requests for admission on Defendant on October 20, 2011. Pl.'s Mot. ¶ 1. Defendant served its discovery responses on Plaintiff on December 5, 2011. *Id.* ¶ 2. At various times thereafter, counsel conferred with each other regarding what Plaintiff views as deficiencies in Defendant's discovery responses, as this Court's Local Rules require. *See id.* ¶¶ 3–6; D. Md. Loc. R. 104.7; Loc. R. 104.8.b. On April 13, 2012, Plaintiff filed a Local Rule 104 .7 certificate, stating that counsel had conferred regarding discovery disputes for approximately one hour on December 14, 2011 at 2:30 PM. *See* Pl.'s Loc. R. 104.7 Certificate 1, ECF No. 24; *see also* Pl.'s Mot. 1 (itemizing the discovery disputes requiring resolution by the Court). Not all issues were resolved at that conference. *Id.* Consequently, pursuant to Local Rule 104.8, Plaintiff appended to his certificate a copy of his Motion to Compel and all memoranda exchanged by the parties. Thus, briefing of Plaintiff's Motion to Compel is complete and pending determination by this

Court.[FN2] Plaintiff's motion requests that the Court compel answers to seven of his interrogatories, five of his document production requests, and seven of his requests for admissions. *See* Pl.'s Mot. 1.

FN2. On April 30, 2012, Plaintiff's counsel wrote to the Court that counsel had been productively conferring in an effort to resolve without Court intervention the discovery disputes raised in Plaintiff's Motion to Compel. *See* Pl.'s Apr. 30, 2012 Ltr. 1, ECF No. 26. Accordingly, counsel requested that "the Court wait until [hearing further from counsel] to spend time on this particular Motion." *Id.* On May 14, 2012, Plaintiff's counsel wrote to the Court, listing those items in Plaintiff's Motion to Compel on which the parties had been able to reach agreement and those for which Court resolution remained necessary. *See* Pl.'s May 14, 2012 Ltr. 1–2, ECF No. 27 (requesting that the Court resolve the parties' disputes regarding Document Production Request # 18 and Interrogatory # 15 and noting resolution of all other disputes). However, on May 28, 2012, Plaintiff's counsel again wrote to the Court, stating that, since his May 14, 2012 letter, he has "not received any of the discovery promised to [him] by [Defendant] and its counsel." Pl.'s May 28, 2012 Ltr. 1, ECF No. 29. Accordingly, counsel stated, he "consider[s] as unresolved the items that had been identified in [his] May 14 letter as having been resolved." *Id.* Thus, all of the disputes raised in Plaintiff's Motion to Compel remain ripe for review.

II. DISCUSSION

Federal Rule of Civil Procedure 37(a) provides that, where notice has been given, "a party may move for an order compelling disclosure or discovery." Fed.R.Civ.P. 37(a)(1). The motion to compel "must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action," Fed.R.Civ.P. 37(a)(1); *see also* D. Md. Loc. R. 104.7, and must be made "in the court where the action is pending," Fed.R.Civ.P. 37(a)(2). Interrogatories, document production requests, and requests for admission all are properly the subject of a motion to compel discovery under Rule 37. *See* Fed.R.Civ.P. 37(a)(3)(B).

***2** Central to resolving any discovery dispute is determining whether the information sought is within the permissible scope of discovery, as stated in Fed.R.Civ.P. 26(b)(1). *See, e.g.,* Fed.R.Civ.P. 33(a)(2) ("An interrogatory may relate to any matter that may be inquired into under Rule 26(b)."); Fed.R.Civ.P. 34(a) (stating that document production requests must be "within the scope of Rule 26(b)"); Fed.R.Civ.P. 36(a)(1) (limiting requests to admission to "any matters within the scope of Rule 26(b)(1)"). Under Rule 26(b)(1), "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed.R.Civ.P. 26(b)(1); *see also* Fed.R.Evid. 401; Fed.R.Civ.P. 26(b)(3) (explaining that work product or trial preparation material ordinarily is not discoverable). If good cause is shown, the Court "may order discovery of any matter relevant to the subject matter involved in the action." Fed.R.Civ.P. 26(b)(1). "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* In addition, "[a]ll discovery is subject to the [proportionality] limitations imposed by Rule 26(b)(2)(C)." *Id.; see also Victor Stanley, Inc. v. Creative Pipe, Inc.,* 250 F.R.D. 251, 260 n.10 (D.Md.2008).

Federal Rule of Civil Procedure 26(b)(2)(C) "cautions that all permissible discovery must be measured against the yardstick of proportionality." *Victor Stanley, Inc. v. Creative Pipe, Inc.,* 269 F.R.D. 497, 523 (D.Md.2010). Under that rule, the court, acting *sua sponte* or at a party's request, "must limit the frequency or extent of discovery" if:

(i) "the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive"; (ii) "the party seeking discovery has had ample opportunity to obtain the information by discovery in the action"; or (iii) "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Fed.R.Civ.P. 26(b)(2)(C)(i)-(iii).

A. Answers to Interrogatories

Federal Rule of Civil Procedure 33 governs interrogatories to parties. Interrogatories may "relate to any matter that may be inquired into under Rule 26(b)." Fed.R.Civ.P. 33(a)(2). Interrogatories must be answered "by the party to whom they are directed," or, where that party is a corporation, partnership, organization, or agency, "by any officer or agent, who must furnish the information available to the party." [FN3] Fed.R.Civ.P. 33(b)(1). To the extent they are not objected to, each interrogatory must "be answered separately and fully in writing under oath." Fed.R.Civ.P. 33(b)(3). The party served with an interrogatory may object to the interrogatory if a legitimate basis for doing so exists. *See* Fed.R.Civ.P. 33(b)(4). For example, a party may object that the interrogatory exceeds the scope of discovery permitted by Fed.R.Civ.P. 26(b)(1), or that it would require the disclosure of attorney-client privileged or work product protected material, Fed.R.Civ.P. 26(b)(3). If the responding party objects to an interrogatory, the grounds for objecting "must be stated with specificity." [FN4] Fed.R.Civ.P. 33(b)(4); *see also* D. Md. Loc. R. 104.6. In other words, objections to interrogatories must be specific, non-boilerplate, and supported by particularized facts where necessary to demonstrate the basis for the objection. *Hall v. Sullivan,* 231 F.R.D. 468, 470 (D.Md.2005); *Thompson v. U.S. Dep't of Hous. & Urban Dev.,* 199 F .R.D. 168, 173 (D.Md.2001); *Marens v. Carrabba's Italian Grill, Inc .,* 196 F.R.D. 35, 38–39 (D.Md.2000). The failure to state with specificity the grounds for an objection may result in waiver of the objection, unless the Court excuses the failure for good cause shown. Fed.R.Civ.P. 33(b)(4); Hall, 231 F.R.D. at 474; *Victor Stanley, Inc.,* 250 F.R.D. at 263–67. Rule 33(b)(4) "should be read in light of Rule 26(g)," which authorizes the Court "to impose sanctions on a party and attorney making an unfounded objection to an interrogatory." Fed.R.Civ.P. 33 Advisory Committee Note (1993); *see* Fed.R.Civ.P. 26(g)(1)(B), (g)(3).

FN3. Where the requesting party may determine the answer to an interrogatory by "examining, auditing, compiling, abstracting, or summarizing a party's business records," including digital records, the responding party may answer "specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could," and "giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries." Fed.R.Civ.P. 33(d). Such an answer is appropriate only where "the burden of deriving or ascertaining the answer will be substantially the same for either party." *Id.; see also United Oil Co., Inc. v. Parts Assocs., Inc .,* 227 F.R.D. 404, 419 (D.Md.2005) (" Rule 33 production is suited to those discovery requests requiring compilation or analysis, accomplished as easily by one party as another, or where neither side has clear superiority of knowledge or familiarity with the documents. Accordingly, Rule 33 is well-suited to reply to inquiries of an intensely objective nature."); *see also Hege v. Aegon USA, LLC,* No. 8:10–cv–01578–GRA, 2011 WL 1119871, at *2 (D.S .C. Mar. 25, 2011) (citing *Nat'l Fire Ins. Co. v. Jose Trucking Corp.,* 264 F.R.D. 233, 239

(W.D.N.C.2010); *SEC v. Elfindepan, S.A.*, 206 F.R.D. 574, 576–77 (M.D.N.C.2002)) (noting that the Fourth Circuit has not explicitly stated a standard "for evaluating a Rule 33(d) response" and outlining the approach taken by the majority of district courts in the Fourth Circuit).

FN4. If a party objects on attorney-client privilege or work product grounds, the objection must be particularized, *see* Fed.R.Civ.P. 26(b)(5)(A), and it must be accompanied by the information required by this Court's Discovery Guidelines, *see* D. Md. Loc. R ., App'x A, Guidelines 7 & 10.d. Failure to do so may result in waiver. *Victor Stanley, Inc.*, 250 F.R.D. at 263–67.

1. Interrogatories # 1 and # 6

***3** Plaintiff's Interrogatory # 1 states: "Identify all persons who are likely to have personal knowledge of any fact alleged in the complaint, and state the subject matter of the personal knowledge possessed by each such person." Pl.'s Mot. 2. Plaintiff's Interrogatory # 1 is this Court's Standard Interrogatory No. 1.[FN5] *See id.; see also* D. Md. Loc. R., App'x D, Standard Forms, at 135. In its answer, Defendant lists the names and job titles of four current employees "who may have knowledge regarding the facts at issue in the complaint." Pl.'s Mot. 2. Defendant also lists the names, job titles, and addresses (without zip codes) of two former employees "who may have knowledge regarding the facts at issue in the complaint." Pl.'s Mot. 2. Lastly, Defendant notes that it intends to "supplement its response [to this interrogatory] as investigation and discovery continue." *Id.* Plaintiff's Interrogatory # 6, which is this Court's Standard Interrogatory No. 6, states: "Identify all persons who are likely to have personal knowledge of any fact alleged in the complaint or in your answer to the complaint, and state the subject matter of the personal knowledge possessed by each such person." *Id.* at 3. In its answer, Defendant instructs Plaintiff to "[s]ee Response to Interrogatory No. 1, above." *Id.*

FN5. I note that Standard Interrogatory No. 1 is a standard interrogatory to a plaintiff. *See* D. Md. Loc. R., App'x D, at 135. In this case, Plaintiff submitted this interrogatory to Defendant. Plaintiff also submitted Standard Interrogatory No. 6 to Defendant. Standard Interrogatory No. 6 is a standard interrogatory to a defendant. *See id.* at 136. The two interrogatories are largely repetitive, and Plaintiff would have obtained the same information by submitting only No. 6. Plaintiff should not have propounded both interrogatories; doing so would impose unnecessary burden and expense on Defendant, and would violate Fed.R.Civ.P. 26(g)(1)(B)(ii).

Plaintiff argues that Defendant's answers to Interrogatories # 1 and # 6 fail to "state the subject matter of the personal knowledge that any of these employees have about this case." *Id.* at 2. Additionally, Plaintiff states that Defendant's answers fail to "provide any phone numbers, or zip codes, which are discoverable and necessary to contact and possibly depose these actual or potential discovery or trial witnesses." *Id.* In its response to Plaintiff's motion, Defendant provides previously undisclosed information about the subject matter of the personal knowledge that the four present and two former employees may have; identifies three additional persons who may have relevant personal knowledge and states the subject matter of their knowledge; and provides the last known zip codes of the two former employees. *See* Def.'s Resp. 1–3. In his reply, Plaintiff acknowledges Defendant's supplementation of its answers to Interrogatories # 1 and # 6, but complains that Defendant has yet to supply telephone numbers for the two former employees.[FN6] *See* Pl.'s Reply 2–3. Thus, the dispute with regard to Interrogatories # 1 and # 6 appears to boil down to one question: Should Defendant be compelled to provide to Plaintiff telephone contact information for the two former employees listed in their original answer?

FN6. Plaintiff's reply also states that Defendant "should be ordered to identify what knowledge these two former employees have," mistakenly asserting that Defendant "only [made] the generic statement that these former employees 'may have knowledge regarding the facts at issue in the complaint,' which does not really state anything about what they know or may know." Pl.'s Reply 3. While Defendant's original answer stated only that the two former employees "may have knowledge regarding the facts at issue in the complaint," Pl.'s Mot. 2, Defendant's response to Plaintiff's motion provides sufficient additional detail: According to Defendant, "Nikole Stampone is a former Monarch collector who may have knowledge regarding collection of the subject accounts," and "Moses Dukuly is a former Monarch collector who may have knowledge regarding collection of the subject accounts." Def.'s Resp. 2; *see also* Pl.'s Mot. 2.

A party responding to an interrogatory "must furnish information that is available to it and that can be given without undue labor and expense." 8B Charles Alan Wright et al., *Fed. Prac. & Proc. Civ.* § 2174 (3d ed.2012); *id.* § 2177 ("Though there are limits on the extent to which a party can be required to hunt out information in order to answer interrogatories, it will be required to provide facts available to it without undue labor and expense."). Put differently, a party must "provide relevant facts reasonably available to it but should not be required to enter upon independent research in order to acquire information merely to answer interrogatories." *Id.* § 2174. Appendix D of this Court's Local Rules provides a number of useful standard forms and definitions. Included in this Appendix are the Court's standard interrogatories. Appendix D also contains a sample definitional section, which the parties may include in their interrogatories, or to which the Court may refer for guidance. The definition of "identify (with respect to persons)" included in that section provides: "When referring to a person, to 'identify' means to state the person's full name, present or last known address, and, when referring to a natural person, additionally, the present or last known place of employment. *If the business and home telephone numbers are known to the answering party, and if the person is not a party or present employee of a party, said telephone numbers shall be provided.*" D. Md. Loc. R., App'x D, Def. 4, at 134 (emphasis added). Because there is no contention that these phone numbers are outside the scope of discovery permitted by Fed.R.Civ.P. 26(b)(1), and in light of the definition stated above, to the extent that either the business or home telephone numbers of the two former employees are known to Defendant or may be obtained without undue burden or expense, Defendant is DIRECTED to provide them to Plaintiff within fourteen (14) days of this Order. Thus, with regard to Interrogatories # 1 and # 6, Plaintiff's Motion to Compel is GRANTED.

2. Interrogatories # 9 and # 12

***4** Plaintiff's Interrogatory # 9 states: "State the date, time, and originating number for every call made to 301–62–2250 by you or any person calling or acting on your behalf, and identify all persons with knowledge of these calls." Pl.'s Mot. 3. In its answer, Defendant states that it is further investigating its response. *Id* . Nonetheless, Defendant attaches a listing, showing telephone numbers from which the calls to Plaintiff's phone number could have been made. *See id.* According to Defendant, the date, time, and content of the calls included on the listing "are set forth in the relevant account records," which Defendant feels, "cannot be produced without an appropriate confidentiality agreement or order." *Id.* Plaintiff's Interrogatory # 12 states: "Identify and describe the substance of all communications you, your employees, contractors, or agents have initiated or had with [Plaintiff], and state the date and time of each communication, including the length, date, time, location[,] and method (phone, fax, e-mail, mail) of each communication, and the address, phone number, fax number[,]

or e-mail address used in each communication, including the number and/or carrier from which any call or fax was initiated." *Id.* Defendant's answer directs Plaintiff to its response to Interrogatory # 9. *Id.* at 4.

Plaintiff argues in his motion that Defendant "needs to identify which calls to [Plaintiff] came from which of the many numbers included in the list, and not just respond with 'could have originated from the phone numbers' in the list." *Id.* Defendant responds that it is "unable to provide any further clarification beyond that already produced and provided in response to Interrogatory No. 12." Def.'s Resp. 4. Additional information is necessary, Plaintiff replies, so that Plaintiff can, at the very least, issue a subpoena Defendant's telecommunications carrier to obtain the necessary information. Pl.'s Reply 4. Without additional detail, Plaintiff is unable to define a narrow search for the telecommunications carrier, and therefore is unable to obtain the documents by subpoena. *See id.; see also* Fed.R.Civ.P. 45(c)(1) ("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."). Essentially, Plaintiff requests that Defendant match each call made to Plaintiff with the originating office and telephone number. Because Defendant has not made any particularized showing that it is unable to do so "without undue labor and expense," it is DIRECTED to provide this information within fourteen (14) days. Thus, as to Interrogatory # 9, Plaintiff's Motion to Compel is GRANTED.

Defendant's objection to production of the account records that would satisfy Plaintiff's Interrogatory # 12 is not unqualified. *See* Pl.'s Mot. 3–4; *see also* Fed.R.Civ.P. 33(d) (explaining when business records may be produced as an alternative to answering the interrogatories). Rather, Defendant states that such documents "cannot be produced without an appropriate confidentiality agreement or order." Pl.'s Mot. 3. Subsequent to the filing of Plaintiff's Motion to Compel and Defendant's response thereto, the parties' supplied, and I approved, a stipulated confidentiality order governing production of these documents. *See* Stipulated Confidentiality Order, ECF No. 37. In light of this order, Plaintiff's Motion to Compel is GRANTED as to Interrogatory # 12. Defendant will produce the responsive documents to Plaintiff within fourteen (14) days, subject to the terms of the confidentiality order.

3. Interrogatory # 15

***5** Plaintiff's Interrogatory # 15 states: "Describe fully your involvement in and knowledge of the calls alleged in this suit, including but not limited to the creation, initiation, delivery, arrangement or coordination of the necessary phone lines, provision of numbers, provision of any script or prerecorded message, or any other product or service in any way related to the alleged calls." Pl.'s Mot. 4. Defendant objected to this interrogatory "as vague and ambiguous," noting that Defendant "does not understand this interrogatory." *Id.* Plaintiff argues that responses to this interrogatory should be compelled because Defendant has failed to answer, giving only "a frivolous objection that [Defendant] could not understand this perfectly straightforward question to describe [Defendant's] involvement with the collection calls at issue." *Id.* In its response, Defendant notes that subsequent conversations with Plaintiff's counsel have indicated that, through Interrogatory # 15, counsel may be "seeking the identity of the person(s) responsible for [Defendant] dialer campaigns." *Id.* To that end, Defendant supplements its response by referring Plaintiff to its response to Interrogatory # 1, "identifying Anthony Mazzacano, as Chief Strategy Officer/Owner who manages [Defendant's] dialer and telephone resources and has knowledge and information regarding the dialer and dialer technology, and Brian Holmes as the person who builds and manages [Defendant's] dialer campaigns." *Id.* In his reply, Plaintiff states that his interrogatory "does not seek the identity of employees," as Defendant appears to believe. Pl.'s Reply 5. Rather,

"[i]t seeks a full description of [Defendant's] involvement in and knowledge of the calls alleged in the suit." *Id.*

Generally, the "party objecting to discovery as vague or ambiguous has the burden of showing such vagueness or ambiguity." *Deakins v. Pack,* No. 1:10–1396, 2012 WL 242859, at *12 (S.D.W.Va. Jan. 25, 2012) (citing *McCoo v. Denny's Inc.,* 192 F.R .D. 675, 694 (D.Kan.2000)); *see also Hall,* 231 F.R.D. at 470 (explaining that objections to interrogatories must be specific and non-boilerplate). Defendant's original answer to Plaintiff's Interrogatory # 15 is non-specific and boilerplate, as it asserts only that the interrogatory is "vague and ambiguous," and that Defendant does not understand it. *See* Pl.'s Mot. 4. Defendant elaborates on its objection in its response to Plaintiff's motion, explaining that "[i]t is not clear to [Defendant] what a 'product or service in any way related to the alleged calls' means in context with other aspects of the request which seeks information regarding voice scripts that may have been used in connection with any calls, the hardware used to place the calls, and the 'creation, initiation, delivery, arrangement or coordination' of phone lines and/or phone numbers." Def.'s Resp. 5.

While a responding party " 'should exercise reason and common sense to attribute ordinary definitions to terms and phrases utilized in interrogatories,' " *Deakins,* 2012 WL 242859, at *12 (quoting *McCoo,* 192 F.R.D. at 694), there are limits to how accommodating the responding party must be in trying to understand and respond to a poorly worded, compound, and ambiguous interrogatory. I agree that Interrogatory # 15 is unnecessarily compound, confusing, and ambiguous. It is equally clear, however, that the central aim of the interrogatory is to obtain facts relating to the telephone calls that are at issue in this case, which surely is discoverable. Counsel are DIRECTED to confer to clarify the nature of Plaintiff's request within seven (7) days so that this interrogatory may be answered by Defendant within fourteen (14) days. In the unlikely event that Plaintiff is unable to clarify its request, or if Defendant unreasonably claims that it is unable to understand the request once it has been clarified, counsel will advise me and I will identify what information must be produced. I note, however, that it would be unwise for counsel to return this issue to the Court for resolution if they have not undertaken a good faith and reasonable attempt to resolve this dispute. Thus, as to Interrogatory # 15, Plaintiff's Motion to Compel is GRANTED, subject to Plaintiff's clarification.

4. Interrogatories # 16 and # 17

***6** Plaintiff's Interrogatory # 16 states: "Identify any and all persons who made or assisted you in making calls for you to Plaintiff or 301–620–2250." Pl.'s Mot. 4. Plaintiff's Interrogatory # 17 states: "Identify fully all persons who approved the making of the calls [sic] on your behalf." *Id.* Defendant answered both interrogatories by stating that it objected to the questions "as overbroad and unlimited in time." *Id.* Subject to that objection, Defendant directed Plaintiff to "see the individuals identified in [Defendant's] Response to Interrogatory No. 1, above." *Id.* In his motion, Plaintiff states that counsel "agreed to limit the question[s] to the [three] accounts involved, and limit the scope to 2010 to 2011." *Id.* In Plaintiff's view, an answer to Interrogatory # 16 "should include [a list of] persons involved in creating any prerecorded voice message that was delivered, as well as live collectors." *Id.* Plaintiff contends that referral to the persons listed in the answer to Interrogatory # 1 is insufficient because it requires Plaintiff to guess, among those persons listed, who "really approved the making of the calls." *Id.* at 4–5. Defendant responds that its answer to Interrogatory # 1 identifies the collectors who called Plaintiff's number," and identifies the individuals who build and manage Defendant's dialer and telephone resources and campaigns. Def.'s Resp. 5–6. In his reply, Plaintiff states that the persons identified in Defendant's answer to Interrogatory # 1 are "managers, supervisors, collectors, technology persons, etc., but not ... the person(s) who made the

calls." Pl.'s Reply 6. "Some person or persons," Plaintiff states, "made the calls," and "Plaintiff wants to know who." *Id.* Additionally, according to Plaintiff, Defendant's answer to Interrogatory # 1 does not make clear "who authorized the making of the calls." *See id.* As a result, Plaintiff argues that Defendant's responses are deficient and complete answers should be compelled.

Merely stating that an interrogatory is "overbroad" does "not suffice to state a proper objection." *Cappetta v. GC Servs. Ltd. P'ship,* No. 3:08CV288, 2008 WL 5377934, at *3 (E.D.Va. Dec. 24, 2008) (citing *Josephs v. Harris Corp.,* 677 F.2d 985, 991 (3d Cir .1982)). Instead, the "objecting party must specify which part of a request is overbroad, and why." *Id.* Defendant's objection to Plaintiff's Interrogatories # 16 and # 17 failed to do so. However, Plaintiff's counsel later agreed to limit the scope of the question to a one year period, from 2010 to 2011. With this limitation in place, I do not find that Interrogatories # 16 and # 17 are overbroad, and I further find that Defendant's responses are incomplete and evasive, which is tantamount to a failure to answer. *See* Fed.R.Civ.P. 37(a)(4). A party answering interrogatories must provide to the requesting party all "information that is available to it and that can be given without undue labor and expense." Wright et al., *supra,* § 2174. To the extent that Defendant knows which employees made the calls, as well as who created the prerecorded voice message delivered to Plaintiff, which employees served as live collectors, and which employees authorized the making of the calls, or is able to obtain such information without undue labor and expense, Defendant must provide that information to Plaintiff. Thus, as to Plaintiff's Interrogatories # 16 and # 17, Plaintiff's Motion to Compel is GRANTED. Accordingly, Defendant is DIRECTED to fully and completely respond to Interrogatories # 16 and # 17 within fourteen (14) days.

B. Responses to Document Production Requests

***7** Federal Rule of Civil Procedure 34 governs document production requests. Pursuant to Rule 34, a party may request that the opposing party "produce and permit the requesting party ... to inspect, copy, test, or sample" relevant documents, electronically stored information, and tangible things that are within the party's "possession, custody, or control." Fed.R.Civ.P. 34(a)(1). The party served with a document production request may object to the request if a legitimate basis for doing so exists. *See* Fed.R.Civ.P. 34(b)(2)(B); *see also* Fed.R.Civ.P. 34(b)(2)(C). Thus, a party may object that a document production request exceeds the scope of discovery permitted by Fed.R.Civ.P. 26(b)(1); that it should be denied for the grounds stated in Fed.R.Civ.P. 26(b)(2)(C); that it impermissibly requests privileged or work product material, *see* Fed.R.Civ.P. 26(b)(3); or that documents should not be produced without implementation of a protective order, *see* Fed.R.Civ.P. 26(c). All objections to document production requests must be stated with particularity and specificity; objections may not be "boilerplate." *See Hall,* 231 F.R.D. at 470; *Thompson,* 199 F.R.D. at 173; *Marens,* 196 F.R.D. at 38–39.

To the extent that the specific items at issue are relevant and properly discoverable, taking into consideration the Rule 26(b)(2)(C) proportionality factors, and to the extent that they have not been produced by Defendant, Plaintiff's motion to compel should be granted. The motion should be denied, however, if the items are not relevant or discoverable.

1. Document Production Request # 11

Plaintiff's Document Production Request # 11 requests "[a]ll documents identifying any calls to Plaintiff or 301–620–2250." Pl.'s Mot. 5. Defendant objects to this request "as overbroad and unlimited in time, and as seeking the production of documents containing financial and personal identifying information of third parties that cannot be produced without an appropriate confidentiality agreement or order." *Id.* Plaintiff argues in his Motion to Compel that Defendant's "telephone statements or invoices

will show the calls to Plaintiff or [to] his number 301–620–2250," and that "[t]here is no reason these cannot be produced, with [Defendant] redacting calls to other persons that appear on the same statement or invoice page if it chooses." *Id.* In its response, Defendant states that it subsequently has "provided the account notes [to Plaintiff] without a confidentiality agreement, but in a redacted format to preserve the confidential aspects of those documents." Def.'s Resp. 6. According to Defendant, "Plaintiff now has 'all documents identifying any calls to Plaintiff or 301–620–2250' that [Defendant] has in its possession." *Id.* Put simply, Defendant "has nothing further to produce." *Id.* Moreover, Defendant states, "the present request ... is based on a faulty presumption that [Defendant] is in possession or control of any 'telephone statements or invoices.' " *Id.* at 7. Defendant maintains that it "does not receive an itemized phone bill from the relevant carrier." *Id.*

***8** Rule 34 requires a party to produce only those documents that are within the party's "possession, custody, or control." Fed.R.Civ.P. 34(a)(1). Rule 34 "control" does not require a party to have legal ownership or actual physical possession of any [of the] documents at issue." *Goodman v. Praxair Servs., Inc.,* 632 F.Supp.2d 494, 515 (D.Md.2009) (citation omitted). Instead, "documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain the documents from a non-party." *Id.* (citation and internal quotation marks omitted); *Steele Software Sys., Corp. v. DataQuick Info. Sys., Inc.,* 237 F.R.D. 561, 563–65 (D.Md.2006). Because Defendant has an account with the telephone carrier, Defendant likely has "the right, authority, or practical ability" to obtain an itemized telephone bill from the carrier, and may be compelled to do so. *See Goodman,* 632 F.Supp.2d at 515. However, Fed.R.Civ.P. 26(b)(2)(C) instructs the Court to "limit the frequency or extent of discovery otherwise allowed" if, *inter alia,* "the discovery sought ... can be obtained from some other source that is more convenient, less burdensome, or less expensive." In light of the foregoing, the parties are DIRECTED as follows: If there are any additional documents not previously produced "identifying any calls to Plaintiff or 301–620–2250" in Defendant's actual possession or custody, Defendant must produce them, subject to the parties' stipulated confidentiality order, if Defendant contends that they contain confidential information. *See* Fed.R.Civ.P. 34(a)(1). If documents responsive to this request are not in Defendant's possession or custody, but are in the physical custody of a non-party telephone carrier, Defendant will not be compelled to produce them. *See* Fed.R.Civ.P. 26(b)(2)(C)(i). Rather, Plaintiff may obtain the documents by issuing a Fed.R.Civ.P. 45 subpoena to the telephone carrier. *See* Fed.R.Civ.P. 34(c) ("As provided in Rule 45, a nonparty may be compelled to produce documents."); *DataQuick Info. Sys., Inc.,* 237 F.R.D. at 564 ("With regard to non-parties, Rule 34(c) contemplates that they may be required to produce documents through the use of a subpoena issued under Rule 45."). Thus, as to Request # 11, Plaintiff's Motion to Compel is GRANTED IN PART and DENIED IN PART.[FN7]

FN7. I note, additionally, that Plaintiff requested in his reply that Defendant "be required to swear to" the assertion made in its response that it does not receive an itemized telephone bill. *See* Pl.'s Reply 6. Plaintiff cites no authority for this demand, nor is Plaintiff's demand necessary. By virtue of signing, filing, submitting, or later advocating on a pleading, written motion, or other party, an attorney "certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances ... the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed.R.Civ.P. 1 1(b)(3) ; *see also* Fed.R.Civ.P. 26(g) (stating the

> effect of an attorney placing his or her signature on a discovery request, response, or objection). Violations of Rule 11(b) may subject "any attorney, law firm, or party that violated the rule or is responsible for the violation" to sanctions. *See* Fed.R.Civ.P. 11(c). There is no factual basis of record for believing that Defendant has in any way violated this rule. Accordingly, Plaintiff's demand for a sworn statement from Defendant is meritless.

2. Document Production Request # 12

Plaintiff's Document Production Request # 12 requests "[t]he complete telephone invoices or statements for your phone bills or statements including call detail records for the periods from (1) July 1, 2010 through August 31, 2010 and (2) from March 1, 2011 through May 31, 2011." Pl.'s Mot. 5. Defendant objects to this request as overbroad, stating that "it will unduly burden [Defendant] with the task of obtaining itemized phone records from its service provider, ... which [Defendant] does not maintain in the ordinary course of business." *Id.* In his motion, Plaintiff argues that he "need[s] the independent records of the telecommunications company," as the records already produced, including Defendant's "own collection logs of its calls to Plaintiff," "do not show the length of time of each call." *Id.* Information about the length of the calls will enable Plaintiff to determine which, if any, of the calls made by Defendant were "hang up" calls. *See id.* at 5–6. Defendant responds that, as explained in its response to Document Production Request # 11, Defendant "does not receive an itemized phone bill from [its telephone] carrier." Def.'s Resp. 7. Moreover, Defendant maintains, "nothing prevents [Plaintiff] from issuing an appropriate subpoena to the carrier to obtain the requested documents or information." *Id.* Plaintiff's reply does not respond to Defendant's arguments.

***9** Plaintiff has failed to show that the additional documents that it seeks pursuant to this request are within Defendant's possession, custody, or control. Accordingly, as to Document Production Request # 12, Plaintiff's motion is DENIED. Plaintiff may obtain the documents it seeks directly from Defendant's telephone service provider through a Rule 45 subpoena.

3. Document Production Request # 15

Plaintiff's Document Production Request # 15 seeks production of "[t]he owners [']s manual, instructions[,] and any other manuals related to any equipment used to dial or call Plaintiff or 301–620–2250." Pl.'s Mot. 6. This request is aimed at obtaining information necessary for Plaintiff to prove that Defendant used an "automatic telephone dialing system," as that term is defined by federal statute. *See id.* On June 8, 2012, the parties submitted a discovery stipulation, stating that they agree and stipulate, "for purposes of this suit only," that any calls made to Plaintiff "were made using Aspect dialer equipment that constitutes an 'automatic telephone dialing system' as that term is defined by the federal Telephone Consumer Protection Act." *See* Stipulation as to ATDS 1, ECF No. 33. In light of the parties' stipulation, Plaintiff's Motion to Compel is DENIED AS MOOT as to Document Production Request # 15.

3. Document Production Requests # 18 and # 19

Plaintiff's Document Production Request # 18 seeks "[a]ll account documents including electronic ones related to any debt or account for which the alleged calls to the Plaintiff or 301–620–2250 were made by you or any person or entity acting on your behalf or for which you were trying to reach [the debtor] or obtain any information about at the number 301–620–2250." Pl.'s Mot. 6. Plaintiff's Document Production Request # 19 seeks "[c]all detail records, reports, records[,] or logs for each and every alleged call to Plaintiff or 301–620–2250." *Id.* at 7. Defendant objects to production of the documents requested on the grounds that Plaintiff's request is overbroad and seeks "the production of documents containing financial and personal identifying information of third parties that cannot be produced without an appropriate confidentiality

agreement or order." *See id.* at 6–7. In his motion, Plaintiff argues that the documents requested in Document Production Request # 18 must be produced because, under the Fair Debt Collection Practices Act, one of the causes of action asserted by Plaintiff, he must establish that Defendant was attempting to collect on a debt, as defined in 15 U.S.C. § 1692a(5). *See id.* at 7. As to Document Production Request # 19, Plaintiff argues that, while Defendant has produced redacted logs, Plaintiff "need[ ]s the full unredacted account numbers for the three accounts involved." *Id.* According to Plaintiff, his efforts to serve subpoenas on two financial institutions using the redacted account numbers has been unsuccessful; the financial institutions have reported to Plaintiff that the full account numbers are necessary. *See id.*

***10** Defendant jointly responds to Plaintiff's request to compel his Document Production Requests # 18 and # 19, stating that the requests seek "the records of accounts [Defendant] collected or attempted to collect from third parties." Def.'s Resp. 8. Defendant reports that it "has already provided the account notes in a redacted format to preserve the confidential aspects of those documents, which contain personal or financial information regarding non-parties." *Id.* Plaintiff, however, "argues that he needs full account numbers in order to subpoena the creditors or original creditors on those accounts." *Id.; see* Pl.'s Mot. 7; Pl.'s Reply 8. Defendant "remains willing to provide this information and [non-redacted] documents ... if [Plaintiff] enters into a confidentiality agreement to protect the privacy rights of the subject account-holders." Def.'s Resp. 8. In light of the parties' stipulated confidentiality order, which governs production of this material, Plaintiff's Motion to Compel is GRANTED, subject to the terms thereof.

C. Responses to Requests for Admission

Federal Rule of Civil Procedure 36 governs requests for admission. Under that rule, a party "may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1)" that relate to "facts, the application of law to fact, or opinions about either" and "the genuineness of any described documents." Fed.R.Civ.P. 36(a)(1). A matter is deemed admitted if the responding party fails to timely provide a written answer or objection to the request for admission. Fed.R.Civ.P. 36(a)(3); *see also* Fed.R.Civ.P. 36(b) ("A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended.").

If a matter raised in a request for admission is not admitted, the responding party's answer "must specifically deny [the matter] or state in detail why the answering party cannot truthfully admit or deny it." Fed.R.Civ.P. 36(a)(4). The denial "must fairly respond to the substance of the matter." *Id.; see also* Wright et al., *supra,* § 2260 ("It is expected that denials will be forthright, specific, and unconditional. If a response is thought insufficient as a denial, the court may treat it as an admission."). When "good faith requires that a party qualify an answer or deny only a part of a matter, the answer [to the request for admission] must specify the part admitted and qualify or deny the rest." Fed.R.Civ.P. 36(a)(4). The party responding to a request for admission also may "assert lack of knowledge or information as a reason for failing to admit or deny." *Id.* But, the party may do so "only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny." *Id.;* Wright et al., *supra,* § 2261 ("A general statement that [a party] can neither admit nor deny, unaccompanied by reasons, will be held to be an insufficient response, and the court may either take the matter as admitted or order a further answer.").

***11** Additionally, the party responding to a request for admission may object to the request if a legitimate basis for doing so exists. *See* Fed.R.Civ.P. 36(a)(5). "The grounds for objecting to [the] request must be stated," and a party may not object "solely on the ground that the request

presents a genuine issue for trial." *Id.* A party may, for example, object that a request for admission exceeds the scope of discovery stated in Fed.R.Civ.P. 26(b)(1); that responding to a request would require disclosure of attorney-client privileged or work product protected material, *see* Fed.R.Civ.P. 26(b)(3); or that a request is defective in form and therefore unanswerable, *see* Fed.R.Civ.P. 36(a)(2) ("Each matter must be separately stated."); Wright et al., *supra,* § 2262 ("The [responding party] should not be required to go through a document and assume the responsibility of determining what facts it is being requested to admit. Each request ... should be phrased simply and directly so that it can be admitted or denied without explanation.") The purpose of Rule 36 admissions is " 'to narrow the array of issues before the court, and thus expedite both the discovery process and the resolution of the litigation.' " *EEOC v. Balt. Cnty.,* No. L–07–2500, 2011 WL 5375044, at *1 (D.Md. Nov. 7, 2011) (quoting *Adventis, Inc. v. Consol. Prop. Holdings, Inc.,* 124 Fed. App'x 169, 172 (4th Cir.2005)). If a party's answers are "evasive or fail to respond to the substance of the question, and the evidence establishes that the request should have been admitted," the Court may deem the matter admitted. *Id.* (citing *Southern Ry. Co. v. Crosby,* 201 F.2d 878, 880–81 (4th Cir.1953)).

1. Request for Admission # 1

Plaintiff's Admission Request # 1 states: "The calls made to 301–620–22[50] were made by an automatic telephone dialing system." Pl.'s Mot. 8. Defendant's response states: "Despite reasonable inquiry[,] [Defendant] is unable to admit or deny." *Id.* In light of the parties' recent stipulation that "any telephone calls [made] to telephone number 301–620–2250 at issue in this suit were made using Aspect dialer equipment that constitutes an 'automatic telephone dialing system' as that term is defined by the federal Telephone Consumer Protection Act," Stipulation 1, Plaintiff's Motion to Compel is DENIED AS MOOT as to Request for Admission # 1.

2. Request for Admission # 4

Plaintiff's Request for Admission # 4 states: "You were attempting to collect a debt as defined above on the dates the calls alleged in paragraph 23 of the complaint were made." Pl.'s Mot. 8. Defendant's response states: "Despite reasonable inquiry[,] [Defendant] is unable to admit or deny." *Id.* In its response to Plaintiff's motion, Defendant amends its response to Plaintiff's Request for Admission # 4, stating that Defendant now denies the request, as it "has no information with which to confirm or refute that the subject account holders purchased any product or services 'primarily for personal, family, or household purposes,' as [would be] required to characterize the subject accounts as 'debts' under the Fair Debt Collection Practices Act." Def.'s Resp. 9. It is Plaintiff's burden, Defendant argues, "to prove that [Defendant] was attempting to collect a 'debt' as that term is defined under" the statute. *Id.*

***12** I note, preliminarily, that Defendant's original response to Plaintiff's Request for Admission # 4 is insufficient. Unaccompanied by reasons, a general statement that a party can neither admit nor deny a matter is an insufficient response to a request for admission. Wright et al., *supra,* § 2261; *see Hall,* 231 F.R.D. at 470 ("If a party responding to a discovery request objects, in whole or part, to the discovery, objections must be specific, non-boilerplate and supported by particularized facts where necessary to demonstrate the basis for the objection."); *cf. Stevens v. Federated Mut. Ins. Co.,* No. 5:05–CV–149, 2006 WL 2079503, at *7 (N.D.W.Va. July 25, 2006) (finding that a response was inadequate where a party failed to describe his efforts to gain information that would enable him to admit or deny, and directing the party to "provide an explanation why he can neither deny nor admit" the request for admission). Defendant's original response fails to provide any explanation as to why it is unable to admit or deny.

Defendant, having answered a Rule 36 request for admission, has a duty to supplement its re-

sponses. Fed.R.Civ.P. 26(e)(1) ("A party who has ... responded to a[ ] ... request for admission ... must supplement or correct its ... response."); *House of Giant of Md. LLC,* 232 F.R.D. 257, 259 (E.D.Va.2005). A party's failure to properly supplement may result in sanctions. *See* Fed.R.Civ.P. 37(c); *Southern States Rack & Fixture, Inc. v. Sherwin Williams Co.,* 318 F.3d 592, 597 (4th Cir.2003) . Defendant's response in opposition to Plaintiff's Motion to Compel amounts to an informal supplementation. *Cf.* Fed.R.Civ.P. 26(e)(1)(A) (stating that formal supplementation is required where "the additional or corrective information has not otherwise been made known to the other parties during the discovery process"). While Defendant's supplemented response states that it now denies Request for Admission # 4, *see* Def.'s Resp. 9, the response is perhaps better characterized as providing additional detail as to why Defendant "cannot truthfully admit or deny it." [FN8] *Id.* (stating that Defendant "has no information with which to confirm or refute" the matter); *see* Fed.R.Civ.P. 36(a)(4); *see also* Fed.R.Civ.P. 1 (requiring that the rules of procedure "be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding"). Having provided in its response additional information about why it is unable to admit or deny Plaintiff's request, I find that Defendant now has fully responded to Plaintiff's request. Accordingly, Plaintiff's Motion to Compel is DENIED as to Request for Admission # 4.

> FN8. In his reply, Plaintiff notes that Defendant now denies Request for Admission # 4 and states that he "may seek additional fees at a later point when it is proven that [Defendant] was attempting to collect a debt" as defined by the federal statute. Pl.'s Reply 9. Under Rule 37(c), if a party fails to admit a request made under Rule 36, "and if the requesting party later proves ... the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof." Fed.R.Civ.P. 37(c)(2). The Court must award fees unless: (A) "the request was held objectionable under Rule 36(a)"; (B) "the admission sought was of no substantial importance"; (C) "the party failing to admit had a reasonable ground to believe that it might prevail on the matter"; or (D) "there was other good reason for the failure to admit." Fed.R.Civ.P. 37(c)(2)(A)—(D). Because I find that Defendant's supplemental response to Request for Admission # 4 is best characterized as an explanation of why it cannot admit or deny the matter, such sanctions will not be available.

In his reply, Plaintiff requests attorney's fees because Defendant only completely answered Request for Admission # 4 after a motion to compel was filed. Pl.'s Reply 9. Under Rule 37, if requested discovery is provided after a motion to compel is filed, unless an exception applies, the court must "require the party ... whose conduct necessitated the motion ... to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed.R.Civ.P. 37(a)(5)(A). The rule provides for three exceptions where an award of fees is not mandatory, despite the submission of discovery responses after filing a motion to compel. *See id.* Those exceptions are where: "(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust." *Id.* Defendant only provided a complete response to Plaintiff's Request for Admission # 4 after Plaintiff filed a motion to compel; Defendant's original response was not sufficient. *See supra.* None of the exceptions to Rule 37(a)(5)(A) apply. First, Plaintiff made a number of efforts to obtain the discovery without court action. Fed.R.Civ.P. 37(a)(5)(A)(i); *see, e.g.,* Pl.'s Mot. ¶¶ 3–6; Pl.'s Apr. 30, 2012 Ltr. 1; Pl.'s May 14, 2012 Ltr. 1–2.

Second, Defendant's initial response was not substantially justified. *See* Fed.R.Civ.P. 37(a)(5)(A)(ii) . A party satisfies the "substantially justified" standard "if there is a 'genuine dispute' as to proper resolution or if 'a reasonable person could think [that the failure to produce discovery is] correct, that is, if it has a reasonable basis in law and fact.' " *Decision Insights, Inc. v. Sentia Grp., Inc.,* 311 Fed. App'x 586, 599 (4th Cir.2009) (quoting *Pierce v. Underwood,* 487 U.S. 552, 565 (1988)). "Courts have concluded that 'substantial justification' could include making meritorious objections to requested discovery, or even engaging in a legitimate dispute over the sequence of discovery." *Kemp v. Harris,* 263 F .R.D. 293, 296–97 (D.Md.2009) (citations omitted). However, to avoid the imposition of costs, "parties must sufficiently argue that they were substantially justified in their actions." *Id.* at 297 (citing *Humphreys Exterminating Co. v. Poulter,* 62 F.R.D. 392, 394 (D.Md.1974)). Defendant does not provide any legitimate justification—let alone a substantial justification—as to why a complete answer to Request for Admission # 4 was not provided to Plaintiff prior to submission of Defendant's response to Plaintiff's motion to compel. Finally, no other circumstances are present that would render an award of expenses unjust. *See* Fed.R.Civ.P. 37(a)(5)(A)(iii). Because none of the exceptions stated in Rule 37(a)(5)(A) apply, and because Defendant failed to meet its obligations with respect to Request for Admission # 4 until after Plaintiff filed his motion, Plaintiff is AWARDED expenses and fees, but only related to the making of the motion to compel this particular request for admission, as well as any additional discovery requests that are granted by the Court and for which sanctions are awarded. Plaintiff is instructed to follow the directions for submission of a Certification of Fees and Costs stated in Part II.B.6, below.

3. Request for Admission # 5

***13** Plaintiff's Admission Request # 5 states: "You are a debt collector as defined above." Pl.'s Mot. 9. Defendant's response states: "Despite reasonable inquiry[,] [Defendant] is unable to admit or deny." *Id.* According to Plaintiff, Defendant's response is "frivolous and in bad faith and should be sanctioned." *Id.* Defendant, Plaintiff asserts, "is registered and licensed with the State of Maryland as a debt collector, with license # 1416 and/or 5600." *Id.* In its response to Plaintiff's motion, Defendant now admits that it is a debt collector "to the extent it regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another, but may not have been acting as a 'debt collector' if ongoing discovery shows that the subject account holders did not purchase any product or services 'primarily for personal, family, or household purposes,' as required to characterize the subject accounts as 'debts' under the Fair Debt Collection Practices Act." Def.'s Resp. 9. Acknowledging Defendant's admission, Plaintiff requests attorney's fees for Defendant's failure to properly and completely respond to Request for Admission # 5 until after Plaintiff filed his motion to compel. *See* Pl.'s Reply 9.

Defendant's original response to Plaintiff's Request for Admission # 5 is insufficient, as it was not accompanied by a specific explanation as to why Defendant was unable to admit or deny. Wright et al., *supra,* § 2261; *see Hall,* 231 F.R.D. at 470. Defendant's amended response, provided in its response to Plaintiff's motion to compel, is sufficient: It specifies the part admitted and qualifies the remainder of its response. *See* Fed.R.Civ.P. 36(a)(4). Because Defendant has now provided a complete response to Plaintiff's request, Plaintiff's Motion to Compel is DENIED with regard to Request for Admission # 5. However, Plaintiff is entitled to attorney's fees under Rule 37(a)(5)(A): Defendant provided a complete discovery response only after Plaintiff filed his motion to compel, and none of the rule's exceptions apply. *See* Fed.R.Civ.P. 37(a)(5)(A). First, Plaintiff made a number of efforts to obtain the discovery without court action. *See* Fed.R.Civ.P. 37(a)(5)(A)(i); *see, e.g.,* Pl.'s Mot. ¶¶ 3–6; Pl.'s Apr. 30, 2012 Ltr. 1; Pl.'s May 14, 2012 Ltr. 1–2. Second, Defendant's response does

not provide any justification for its failure to provide a complete response to Plaintiff until after the motion to compel was filed. *See* Fed.R.Civ.P. 37(a)(5)(A)(ii); *Kemp,* 263 F.R.D. at 296–97. Finally, no other circumstances render an award of expenses unjust. *See* Fed.R.Civ.P. 37(a)(5)(A)(iii). In light of the foregoing, Plaintiff is AWARDED those expenses and fees incurred in making the motion to compel with regard to Request for Admission # 5. Plaintiff is instructed to follow the directions for submission of a Certification of Fees and Costs stated in Part II.B.6, below.

4. Requests for Admission # 7, # 8, and # 10

***14** Plaintiff's Request for Admission # 7 states: "The name of the individual called was not clearly stated at the beginning of the calls alleged in paragraph 23 of the complaint." Pl.'s Mot. 9. Plaintiff's Request for Admission # 8 states: "The name of the business, individual[,] or other entity responsible for initiating the calls was not clearly stated for the calls alleged in paragraph 23 of the complaint." *Id.* Plaintiff's Request for Admission # 10 states: "The calls alleged in paragraph 23 of the complaint did not provide meaningful disclosure of the caller's identity." *Id.* at 10. Defendant originally denied all three requests. *See id.* at 9–11. Plaintiff argues that responses to the requests should be compelled because "[i]t is not really in any dispute that for at least several of [Defendant's] calls to [Plaintiff] or to his number ..., [Defendant] left no message during the calls." *Id.* at 9–10. As a result, Plaintiff states, "the individual caller, and name of the business, could not possibly have been identified, as the denial necessarily states." *Id.* In its response, Defendant indicates that Plaintiff's motion highlighted "a nuance that undersigned counsel did not previously understand," namely the significance of the calls where no message was left. *See* Def.'s Resp. 10–11. In light of its new understanding, Defendant clarified and supplemented its response to Requests for Admission # 7, # 8, and # 10 by stating that it "admits that the name of the business, individual caller[,] or other entity responsible for initiating the subject calls was obviously not identified in those instances in which a call was disconnected or did not connect to a live person or a message was not left on an answering machine during the subject calls." *Id.* Defendant "continues to deny that it failed to clearly state the name of the business, individual caller or other entity responsible for initiating the subject calls at the beginning of all other calls ." *Id.* Plaintiff acknowledges Defendant's amended response and requests attorney's fees for Defendant's failure to fully respond to Plaintiff's requests for admission until after Plaintiff filed his motion to compel. Pl.'s Reply 10–11.

Defendant's original answer to Plaintiff's requests was the result of a failure to appreciate a "nuance" of the requests, and not a product of evasiveness. *See* Fed.R.Civ.P. 36(a)(4); Wright et al., *supra,* § 2259. Defendant's answer was amended in light of the understanding of Plaintiff's requests that it gained from Plaintiff's motion papers.[FN9] As amended, Defendant's answer to Plaintiff's request provides additional information, and is sufficient. *See* Fed.R.Civ.P. 36(a)(4) ("[W]hen good faith requires that a party ... deny only part of a matter, the answer must specify the part admitted and qualify or deny the rest."). Accordingly, Plaintiff's Motion to Compel is DENIED as to Requests for Admission # 7, # 8 and # 10. I find that Plaintiff is not entitled to fees for the belated supplementation of Defendant's original answers to these requests. Defendant's disclosure of additional information in its response to the motion that was not conveyed in its original answers was substantially justified. *See* Fed.R.Civ.P. 37(a)(5)(A)(ii). Plaintiff's original requests did not make clear that Plaintiff was seeking admissions relating to calls that were not answered and for which no message was left. *See* Pl.'s Mot. 9–10; Def.'s Resp. 10–11. Defendant's original answers had a "reasonable basis in law and fact." *Decision Insights, Inc.,* 311 Fed. App'x at 599. Put differently, Defendant's original denial was both legally sound, *see* Fed.R.Civ.P. 36(a)(4), and based on a reasonable interpretation of Plaintiff's requests. Upon learning, from Plaintiff's motion, that he desired additional information, Defendant promptly

provided that information in its response to the motion. Accordingly, Plaintiff's request for expenses and fees incurred in making the motion to compel with regard to Requests for Admission # 7, # 8, and # 10 is DENIED.

> FN9. The Court cannot help but observe that, had counsel truly conferred in good faith in an attempt to resolve these disputes without Court involvement, this dispute should have been resolved before the motion was filed, based on Defendant's new understanding of the "nuance" of the requests. That it was not is symptomatic of the failure of counsel to approach their discovery obligations as required by the federal rules and this Court's local rules and guidelines.

5. Request for Admission # 9

***15** Plaintiff's Admission Request # 9 states: "The purpose of the calls alleged in paragraph 23 of the complaint included the acquisition of location information." Pl.'s Mot. 9. Defendant's response states: "Denied as written. The purpose of the calls alleged in paragraph 23 of the complaint was the collection of debts ." *Id.* In his motion, Plaintiff argues that its admission request asks Defendant "to admit that the purpose of the calls 'included' the acquisition of location information." *Id.* Therefore, "even if there was another, second, purpose of the calls," *i.e.,* the collection of debts, the request should have been admitted "wholly or at least in part, if the purpose *included* acquiring location information." *Id.* at 9–10 (emphasis added). In its response, Defendant clarifies its answer to the request, "admit [ting] that the purpose of the calls alleged in ¶ 23 of the complaint was the collection of money owed to creditors by persons other than Plaintiff ..., and that, included in this purpose was the acquisition of information to locate the subject account-holders." Def.'s Resp. 10. Plaintiff replies that Defendant "had no basis for [originally] denying Request # 9," and requests reasonable fees and expenses for Defendant "only admitting Request # 9 after a Motion to Compel was filed." Pl.'s Reply 10.

Where a party does not admit a matter stated in a request for admission, it "must specifically deny [the matter] or state in detail why [it] cannot truthfully admit or deny it." Fed.R.Civ.P. 36(a)(4). Denials "must fairly respond to the substance" of the request, and answers to requests for admission must not be evasive. *Id.; EEOC v. Balt. Cnty.,* 2011 WL 5375044, at *1; *see also Fisher,* 2012 WL 2050785, at *3. The phrase "denied as written," without additional elaboration, is evasive, and is tantamount to a failure to answer. Fed.R.Civ.P. 37(a)(4). Where "good faith requires that a party qualify an answer or deny only part of a matter," the answer to the request for admission must specify what is admitted and what is qualified or denied. Fed.R.Civ.P. 36(a)(4). Defendant's original answer to Plaintiff's request stated that debt collection was the primary purpose of the subject calls. *See* Def.'s Resp. 10. In its response to Plaintiff's motion, Defendant adds that "included in this [primary] purpose was the acquisition of information to locate the subject account-holders ." *Id.* Because Defendant has now provided a complete response to Plaintiff's request, Plaintiff's Motion to Compel is DENIED with regard to Request for Admission # 9. However, Plaintiff is entitled to attorney's fees and costs under Rule 37(a)(5)(A) with respect to the motion to compel a responsive answer to Request for Admission # 9: Defendant's original answer to Plaintiff's request was evasive, and a complete response was provided only after Plaintiff filed his motion to compel. *See* Fed.R.Civ.P. 37(a)(5)(A). None of the rule's exceptions apply: (1) Plaintiff made a variety of efforts to obtain the discovery without court action, Fed.R.Civ.P. 37(a)(5)(A)(i); (2) Defendant has provided no explanation for failing to provide the additional information included in its response to Plaintiff's motion in its original answer to Plaintiff's request for admission, Fed.R.Civ.P. 37(a)(5)(A)(ii); and (3) no other circumstances render an award of expenses unjust, Fed.R.Civ.P. 37(a)(5)(A)(iii). In light of the

foregoing considerations, Plaintiff is AWARDED expenses and fees incurred in making the motion to compel with regard to Request for Admission # 9. Plaintiff is instructed to follow the directions for submission of a Certification of Fees and Costs stated in Part II.B.6, below.

6. Fee Award in Relation to Requests for Admission

***16** Plaintiff is awarded expenses and fees pursuant to Fed.R.Civ.P. 37(a)(5)(A) as to Requests for Admission # 4, # 5, and # 9. In light of this award, Plaintiff is DIRECTED to file a Certification of Fees and Costs associated with preparing these three discrete aspects of the motion to compel within fourteen (14) days. Plaintiff's certification is to address only those discovery requests for which fees have been awarded-namely, Requests for Admission # 4, # 5, and # 9. Expenses and fees will not be awarded as to any other discovery requests litigated in the motion to compel.[FN10] Defendant will file its objection, if any, to Plaintiff's fee and cost assessment within fourteen (14) days of service. Plaintiff will file a response to Defendant's objections, if any, within seven (7) days of service. In preparing its Certification of Fees and Costs, Plaintiff is directed to refer to Appendix B of this Court's Local Rules, which provides rules and guidelines for determining attorney's fees in cases such as this. Appendix B is available on the Court's website at http: / /www.mdd.uscourts.gov/localrules/LocalRules.pdf.

> FN10. Plaintiff's papers request fees only for those discovery requests that were answered fully by Defendant after Plaintiff's motion was filed. *See* Pl.'s May 14, 2012 Ltr. 2. Under Rule 37, where a motion to compel is granted in part and denied in part, the court may ..., after giving an opportunity to be heard, apportion the reasonable expenses for the motion." Fed.R.Civ.P. 37(a)(5)(C). Beyond the expenses and fees associated with litigating those discovery requests that Defendant plainly could have answered fully prior to Plaintiff's filing of the present motion, I do not find that an additional award of expenses or fees against Defendant is appropriate.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Compel is GRANTED IN PART and DENIED IN PART. My ruling as to each discovery request is outlined in detail below.

1. As to Interrogatory # 1, Plaintiff's Motion to Compel is GRANTED. Defendant is directed to provide the relevant telephone numbers to Plaintiff within fourteen (14) days.

2. As to Interrogatory # 6, Plaintiff's Motion to Compel is GRANTED. Defendant is directed to provide the relevant telephone numbers to Plaintiff within fourteen (14) days.

3. As to Interrogatory # 9, Plaintiff's Motion to Compel is GRANTED. Defendant is directed to provide the requested information to Plaintiff within fourteen (14) days.

4. As to Interrogatory # 12, Plaintiff's Motion to Compel is GRANTED. Defendant is directed to produce the responsive documents to Plaintiff within fourteen (14) days.

5. As to Interrogatory # 15, Plaintiff's Motion to Compel is GRANTED. The parties are directed to confer to clarify the nature of Plaintiff's request within seven (7) days, so that the interrogatory may be answered by Defendant within fourteen (14) days.

6. As to Interrogatory # 16, Plaintiff's Motion to Compel is GRANTED. Defendant is directed to fully and completely respond to Interrogatory # 16 within fourteen (14) days.

7. As to Interrogatory # 17, Plaintiff's Motion to Compel is GRANTED. Defendant is directed to fully and completely respond to Interrogatory #

17 within fourteen (14) days.

8. As to Document Production Request # 11, Plaintiff's Motion to Compel is GRANTED IN PART and DENIED IN PART. If the responsive documents are within Defendant's actual possession or custody, Defendant must produce them, subject to the parties' stipulated confidentiality order, if Defendant contends that they contain confidential information. If the documents are in the physical custody of a non-party telephone carrier, Plaintiff may obtain the documents by issuing a Rule 45 subpoena to the carrier.

***17** 9. As to Document Production Request # 12, Plaintiff's Motion to Compel is DENIED. Plaintiff may obtain the documents from the telephone service provider by subpoena.

10. As to Document Production Request # 15, Plaintiff's Motion to Compel is DENIED AS MOOT in light of the parties' June 8, 2012 Stipulation As to ATDS, ECF No. 33.

11. As to Document Production Request # 18, Plaintiff's Motion to Compel is GRANTED, subject to the terms of the parties' Stipulated Confidentiality Order, ECF No. 37.

12. As to Document Production Request # 19, Plaintiff's Motion to Compel is GRANTED, subject to the terms of the parties' Stipulated Confidentiality Order, ECF No. 37.

13. As to Request for Admission # 1, Plaintiff's Motion to Compel is DENIED AS MOOT in light of the parties' June 8, 2012 Stipulation As to ATDS, ECF No. 33.

14. As to Request for Admission # 4, Plaintiff's Motion to Compel is DENIED. However, Plaintiff is awarded expenses and fees incurred in making the motion to compel as to Request for Admission # 4, and is directed to submit a Certification of Fees and Costs.

15. As to Request for Admission # 5, Plaintiff's Motion to Compel is DENIED. However, Plaintiff is awarded expenses and fees incurred in making the motion to compel as to Request for Admission # 5, and is directed to submit a Certification of Fees and Costs.

16. As to Request for Admission # 7, Plaintiff's Motion to Compel is DENIED.

17. As to Request for Admission # 8, Plaintiff's Motion to Compel is DENIED.

18. As to Request for Admission # 9, Plaintiff's Motion to Compel is DENIED. However, Plaintiff is awarded expenses and fees incurred in making the motion to compel as to Request for Admission # 9, and is directed to submit a Certification of Fees and Costs.

19. As to Request for Admission # 10, Plaintiff's Motion to Compel is DENIED.

20. If modifications to the discovery schedule are merited as a result of this Order, the parties are directed to submit a jointly proposed modified Scheduling Order to Judge Quarles.

A separate Order shall issue.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is, this *27th* day of *June, 2012,* ORDERED that:

1. As to Interrogatory # 1, Plaintiff's Motion to Compel is GRANTED. Defendant is directed to provide the relevant telephone numbers to Plaintiff within fourteen (14) days.

2. As to Interrogatory # 6, Plaintiff's Motion to Compel is GRANTED. Defendant is directed to provide the relevant telephone numbers to Plaintiff within fourteen (14) days.

3. As to Interrogatory # 9, Plaintiff's Motion to Compel is GRANTED. Defendant is directed to provide the requested information to Plaintiff with-

in fourteen (14) days.

4. As to Interrogatory # 12, Plaintiff's Motion to Compel is GRANTED. Defendant is directed to produce the responsive documents to Plaintiff within fourteen (14) days.

5. As to Interrogatory # 15, Plaintiff's Motion to Compel is GRANTED. The parties are directed to confer to clarify the nature of Plaintiff's request within seven (7) days, so that the interrogatory may be answered by Defendant within fourteen (14) days.

***18** 6. As to Interrogatory # 16, Plaintiff's Motion to Compel is GRANTED. Defendant is directed to fully and completely respond to Interrogatory # 16 within fourteen (14) days.

7. As to Interrogatory # 17, Plaintiff's Motion to Compel is GRANTED. Defendant is directed to fully and completely respond to Interrogatory # 17 within fourteen (14) days.

8. As to Document Production Request # 11, Plaintiff's Motion to Compel is GRANTED IN PART and DENIED IN PART. If the responsive documents are within Defendant's actual possession or custody, Defendant must produce them, subject to the parties' stipulated confidentiality order, if Defendant contends that they contain confidential information. If the documents are in the physical custody of a non-party telephone carrier, Plaintiff may obtain the documents by issuing a Rule 45 subpoena to the carrier.

9. As to Document Production Request # 12, Plaintiff's Motion to Compel is DENIED. Plaintiff may obtain the documents from the telephone service provider by subpoena.

10. As to Document Production Request # 15, Plaintiff's Motion to Compel is DENIED AS MOOT in light of the parties' June 8, 2012 Stipulation As to ATDS, ECF No. 33.

11. As to Document Production Request # 18, Plaintiff's Motion to Compel is GRANTED, subject to the terms of the parties' Stipulated Confidentiality Order, ECF No. 37.

12. As to Document Production Request # 19, Plaintiff's Motion to Compel is GRANTED, subject to the terms of the parties' Stipulated Confidentiality Order, ECF No. 37.

13. As to Request for Admission # 1, Plaintiff's Motion to Compel is DENIED AS MOOT in light of the parties' June 8, 2012 Stipulation As to ATDS, ECF No. 33.

14. As to Request for Admission # 4, Plaintiff's Motion to Compel is DENIED. However, Plaintiff is awarded expenses and fees incurred in making the motion to compel as to Request for Admission # 4, and is directed to submit a Certification of Fees and Costs.

15. As to Request for Admission # 5, Plaintiff's Motion to Compel is DENIED. However, Plaintiff is awarded expenses and fees incurred in making the motion to compel as to Request for Admission # 5, and is directed to submit a Certification of Fees and Costs.

16. As to Request for Admission # 7, Plaintiff's Motion to Compel is DENIED.

17. As to Request for Admission # 8, Plaintiff's Motion to Compel is DENIED.

18. As to Request for Admission # 9, Plaintiff's Motion to Compel is DENIED. However, Plaintiff is awarded expenses and fees incurred in making the motion to compel as to Request for Admission # 9, and is directed to submit a Certification of Fees and Costs.

19. As to Request for Admission # 10, Plaintiff's Motion to Compel is DENIED.

20. If modifications to the discovery schedule are merited as a result of this Order, the parties are directed to submit a jointly proposed modified

--- F.Supp.2d ----, 2012 WL 2445046 (D.Md.)
(Cite as: 2012 WL 2445046 (D.Md.))

Scheduling Order to Judge Quarles.

D.Md.,2012.
Lynn v. Monarch Recovery Management, Inc.
--- F.Supp.2d ----, 2012 WL 2445046 (D.Md.)

END OF DOCUMENT

Not Reported in F.Supp.2d, 2010 WL 4189033 (E.D.Mich.)
(Cite as: 2010 WL 4189033 (E.D.Mich.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
Timothy HENNIGAN, et al., Plaintiffs,
v.
GENERAL ELECTRIC COMPANY, et al., Defendants.

No. 09–11912.
Aug. 3, 2010.

Ann L. Miller, Darryl G. Bressack, E. Powell Miller, The Miller Law Firm, Rochester, MI, Hassan A. Zavareei, Jeffrey D. Kaliel, Lorenzo B. Cellini, Tycko & Zavareei LLP, Washington, DC, for Plaintiffs.

F. Peter Blake, Blake, Kirchner, Kelley M. Haladyna, Kenneth J. McIntyre, Michelle Thurber Czapski, Richard A. Wilhelm, Dickinson Wright, Detroit, MI, for Defendants.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO COMPEL AND FOR SANCTIONS (Dkt.32)

MICHAEL HLUCHANIUK, United States Magistrate Judge.

A. *Procedural History*

***1** Plaintiff filed a motion to compel discovery on January 22, 2010. (Dkt.32). This motion was referred to the undersigned for hearing and determination on January 27, 2010. (Dkt.36). On March 18, 2010, a hearing was conducted on the motion, pursuant to notice. (Dkt.37). At the hearing, the Court directed plaintiffs to conduct to take the depositions of GE's corporate representatives pursuant to Rule 30(b)(6) in order to provide the Court with a "more factually accurate picture of the circumstances," surrounding the storage and retrieval of pertinent documents. (Dkt. 49, Tr. at 27). The parties were directed to file supplemental briefs on the issues raised in the motion to compel, after the discovery was completed. The parties filed supplemental briefs on June 11, 2010. (Dkt.57, 58). The Court held a second hearing on June 16, 2010.

B. *GE's Compliance with Order Regarding Rule 26(a) Disclosures and Sanctions*

Plaintiffs argue that GE failed to comply with Judge Roberts' Order that it produce "any complaints it has received from consumers with Microwave Models identical to those of the named Plaintiffs, that their microwaves turn on by themselves. General Electric is also to provide Plaintiffs with any information it has from consumers who have made this same complaint, regardless of the type or model of microwave oven." (Dkt.18, ¶ 5). Four months after the Court's deadline expired, GE produced eight incident reports of microwave ovens that turned on without user direction. GE claimed these were the only responsive documents. However, plaintiffs submitted evidence (based on public reports of other incidents reported to GE) that GE has not produced all of the complaints it has received.

At the first hearing on this motion, GE's counsel stated, "there is no separate segregated repository, whether it's paper or electronic, of just consumer complaints. All the information is on a number of databases .... " (Dkt.49, p. 16). GE also claimed that it would cost tens of thousands of dollars to search for customer complaints because it would be a "monumental task" to search through all of the consumer complaints using search terms to find customer complaints regarding microwave fires. GE's counsel also stated that "we don't have a file of complaints, Your Honor ... there is no file if you will in any one person's or any number of persons' desks that contain consumer complaints ..." *Id.* at 14.

Plaintiffs contend that the testimony of GE witness Patrick Galbreath (former Safety Manager responsible for GE microwave ovens) reveals that

these contentions are false. Mr. Galbreath testified that GE maintains a discrete microwave oven "Safety Database," which has a feature that would allow anyone to simply print out all consumer safety reports relating to microwave fires. Indeed, Mr. Galbreath testified that this database has a specific dropdown menu for "auto start" within the "Fire" sub-database, all of which is easily retrievable. (Dkt.58, Ex. G, pp. 10–16). Although GE claimed that there was no segregated file of consumer complaints (either "paper or electronic"), Mr. Galbreath testified that, in addition to the Safety Database, there is also a paper file of consumer complaints-a "four foot" "hard copy" file containing all of the consumer complaints from the CPSC relating to microwave ovens. *Id.* Plaintiffs contend that both the CPSC documents and the Safety Database documents were directly responsive to Judge Roberts Order, were easily accessible to GE, and that GE failed and refused to produce these documents. According to plaintiffs, these documents were uncovered without any of the electronic searches that GE claimed were necessary and, there is no excuse for GE's six-month delay after Judge Roberts' Order to produce these readily accessible documents and forcing plaintiffs to take depositions and file a motion to compel to obtain these documents.

***2** GE contends that Judge Roberts' Order only required GE to "provide Plaintiffs with any complaints it has received *from consumers* with Microwave Models identical to those of the named Plaintiffs, that their microwaves turn on by themselves" and "any information it has from consumers who have made this same complaint, regardless of the type of model of microwave oven." GE asserts that, despite the fact that it does not maintain a file with all the consumer complaints similar to the ones alleged in plaintiffs' complaint, it ran a query of a database of complaints made after 2005 for the model number of microwaves owned by plaintiffs. Based on the search criteria used, GE generated 52 hits, only eight of which suggested anything similar to plaintiffs' claims. These documents were produced to plaintiffs before the hearing.

GE also argues that its representations at the first hearing were entirely accurate because, GE does not have a "centralized file" containing all of the consumer complaints that it receives. Rather, according to GE, as the 30(b)(6) deponents explained, that information is contained in GE's large electronic databases, some of which are not searchable in their native format. GE also argues that the fact that it stores complaints (not organized or catalogued in any way) received from the CPSC and not from the consumers themselves, in no way made counsel's statement to the Court false.

In the view of the Court, GE failed to undertake reasonable efforts to locate responsive documents in accordance with Judge Roberts' Order. While the Court has no doubt that counsel did not deliberately misrepresent the facts regarding the GE's search for and the availability of responsive documents, the Court finds that GE's counsel failed to undertake reasonably diligent efforts to determine the availability of responsive documents. This is counsel's obligation under the Federal Rules. While it is true that a complete and comprehensive search would involve the search of multiple databases, including seven terabytes of information as described by GE, it would have taken little effort or expense to uncover the readily available and responsive documents in the CPSC file and the Safety Database. Moreover, the Court finds that GE's interpretation of Judge Roberts' Order that it was not required to produce any documents it obtained from the CPSC to be an unduly narrow interpretation of her order that is not well-taken. Even giving GE the benefit of the doubt, it offers no legitimate reason for its failure to timely provide the Safety Database documents, which required no search terms and was organized in such in a way that GE could have easily produced, in accordance with Judge Roberts' Order, the narrow category of responsive documents that it has advocated to be the proper scope of discovery in this case.

Federal Rule of Civil Procedure 37(b)(2)(A)

provides for sanctions to be imposed against a party who "fails to obey an order to provide or permit discovery," including the dismissal of the proceeding, striking the pleadings, holding the party in contempt, as well as other sanctions. In addition to, or instead of, the sanctions listed under Rule 37(b)(2)(A), the court "must" order the "disobedient party, the attorney advising the party, or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed.R.Civ.P. 37(b)(2)(C). In the circumstances of this case, the award of sanctions under Rule 37(b)(2)(A) is not warranted. However, the Court finds that the failure to comply with Judge Roberts' Order was not substantially justified under Rule 37(b)(2)(C) and an award of costs and attorney fees is appropriate. A review of plaintiffs' counsel's affidavit reveals significant costs incurred in pursuing this motion and in obtaining the discovery necessary to locate the readily accessible documents in GE's possession that are responsive to Judge Roberts' Order. (Dkt.58, Ex. F). However, with respect to the remaining documents, as discussed below, there are legitimate issues for resolution relating to search terms and the extent to which those documents requiring the searching of seven terabytes of data are responsive. For these reasons, the Court finds that the costs incurred by plaintiffs for the Rule 30(b)(6) depositions should be borne by GE. Those costs, according to plaintiffs' counsel's affidavit, total $3,635.61 and must be paid to plaintiffs by defendant within 21 days of entry of this order. (Dkt.58, Ex. F).

C. *Scope of Plaintiff's Discovery Requests and Search Terms*

1. Legal standards

***3** Determining the proper scope of discovery falls within the broad discretion of the trial court. *Lewis v. ACB Business Services, Inc.,* 135 F.3d 389, 402 (6th Cir.1998). Rule 37 of the Federal Rules of Civil Procedure authorizes a motion to compel discovery when a party fails to provide proper response to interrogatories under Rule 33 or requests for production of documents under Rule 34. Rule 37(a) expressly provides that "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond." Fed.R.Civ.P. 37(a)(4). Discovery may relate to any matter that can be inquired into under Rule 26(b). Fed.R.Civ.P. 33, 34. Rule 26(b)(1) authorizes discovery regarding any non-privileged matter relevant to the subject matter of the pending action. Fed.R.Civ.P. 26(b)(1); *see also Miller v. Federal Express Corp.,* 186 F.R.D. 376, 383 (W.D.Tenn.1999) ("Relevancy for discovery purposes is extremely broad."). The information sought need not be admissible at trial so long as it appears reasonably calculated to lead to the discovery of admissible evidence. Fed.R.Civ.P. 26(b)(1). "Although a plaintiff should not be denied access to information necessary to establish her claim, neither may a plaintiff be permitted to go fishing and a trial court retains discretion to determine that a discovery request is too broad and oppressive." *Surles v. Greyhound Lines, Inc.,* 474 F.3d 288, 305 (6th Cir.2007) (quotation marks and citation omitted).

If a party objects to the relevancy of information sought, as defendant has done in this case, the party seeking the information bears the burden of showing its relevance. *Grant, Konvalinka & Harrison, P.C. v. U.S.,* 2008 WL 4865566, *4 (E.D.Tenn.2008), citing, *Westlake Vinyls, Inc. v. Goodrich Corp.,* 2007 WL 1959168, *3 n. 1, (W.D.Ky.2007); *see also Monsanto Co. v. Ralph,* 2001 WL 35957201 (W.D.Tenn.2001) (differentiating between instances when discovery sought appears relevant, in which case the party resisting discovery bears the burden of establishing lack of relevance, and instances where the relevancy is not apparent, in which case the party seeking discovery bears the burden.). The party resisting discovery, however, bears of the burden of establishing that compliance with the request is unduly burdensome. *Ford Motor Co. v. U.S.,* 2009

WL 2922875, *2 (E.D.Mich.2009).

2. Analysis and Conclusions

According to GE, plaintiffs have consistently described this case as one about microwaves that allegedly turn on by themselves and then smoke or catch fire and discovery should be so limited as well. Plaintiffs allege in the thirdamended complaint that "[t]he GE-branded microwave ovens contain defects that cause the microwave ovens to begin operation unassisted and may result in smoke or fire." (Dkt 56, ¶ 22). GE asserts that plaintiffs' allegations in their pleading regarding defects in the heat sensor and magnetron, tie those components directly to their allegations of self-start. In other words, according to GE, they do not claim any stand-alone defects in the heat sensor or magnetrons GE microwave ovens, so mentioning these components does not provide any basis to expand discovery beyond alleged self-starts and do not change the fact that this is a case about microwave ovens that allegedly start on their own. GE argues that to reach discovery of incidents other than the incident underlying a products liability action, plaintiffs must "demonstrate that the circumstances surrounding the other accidents are similar enough that information concerning those incidents is relevant [for purposes of discovery] to the circumstances of the instant case." *Froelich, et al v. Aurora Corp. of Am., et al.,* 2010 U.S. Dist. LEXIS 40139, *8 (M.D.La.2010).

***4** To illustrate the difference in volume between the scope of the documents requested by plaintiffs as compared with the scope of the requests when limited as suggested by GE, GE ran a test search on a sample from its Factory Service invoice database, one of five databases that contain responsive information. The search sample was over-the-range microwave data from 1/1/2005 through 1/22/2010. The first search of this database was performed using search terms requested by plaintiffs: "fire," "spark," "smok," "burn," "scorch," "explo," "control," "board," "arc," "start," "auto," "self," "flam," "charr," "popp," "turned on," "by itself," and "unattended." According to GE, this search resulted in 86,632 Factory Service records. When the same search terms were run, but were limited to records in which the words "self," "auto" or "start" also appeared, only 16,881 records were found. Thus, according to GE, the addition of one of three terms designed to more precisely catch all Factory Service records in which a customer had reported a self-start, significantly decreased the burden of the request on GE.

According to plaintiffs, GE's restrictive reading of its discovery obligations is unwarranted. Plaintiffs' third amended complaint alleges two separate defects that together make the microwave ovens dangerously defective. The first defect causes the microwave to turn on when it is not in use. The second defect causes it to catch fire. Plaintiffs asserts that, although all microwave ovens may not manifest both defects together, they are entitled to all evidence related to the second defect because that defect is a necessary part of their claims. Plaintiffs asserts that in products liability cases, information regarding whether other purchasers or users experienced similar problems with the product is relevant to a design defect claim. *See In re Guidant Defibrillators Prods. Liab. Litig.,* 2006 WL 692292, *2–*3 (D.Minn.2006) (Plaintiffs' requests were not overbroad, even though some of the material sought might not relate to each of the specific life-sustaining implantable devices at issue because "at a minimum, the evidence is circumstantially relevant to the issues in the case."). Further, plaintiff argues that courts have been unwilling to limit discovery as to allegedly substantially similar incidents on a defendant's "unverified and factually unsupported claim that the other incidents in which it has been involved are 'substantially dissimilar' from the plaintiff's allegations ..." *Amcast Indus., Corp. v. Detrex Corp.,* 138 F.R.D. 115, 120 (N.D.Ind.1991), rev'd on other grounds, 2 F.3d 746 (7th Cir.1993). According to plaintiffs, if GE's position is that the auto-start fires are caused by something unrelated to all of the other fires in its microwave ovens, it has the burden of establishing

that contention. And, according to plaintiffs, GE has presented no evidence to support its argument and meet its burden.

***5** As explained at the hearing, plaintiffs's complaint encompasses two potentially separate, but possibly related, defects: microwaves that turn themselves on, and microwaves that catch on fire while in use, but fail to turn off. According to plaintiffs, these two defects may exist together or separately. The Court concludes that plaintiffs' third amended complaint provides sufficient notice of the potential defects about which plaintiffs' complain such that the broader discovery sought by plaintiff is appropriate and relevant to the issues presented in this lawsuit.

The tests applied to reach this conclusion are not as narrowly construed as GE has advocated. It is true that courts generally permit "discovery of similar, if not identical, [product] models[.]" *Tolstih v. L.G. Electronics,* 2009 WL 439564 (S.D.Ohio 2009), quoting, *Holfer v. Mack Trucks, Inc.,* 981 F.2d 377, 380–81 (8th Cir.1992). However, GE's objection to the scope of discovery sought by plaintiffs does not appear to be based on any claim of over breadth as to the models or products at issue. (Dkt.38, 57). And, the cases on which GE relies standing for the proposition that plaintiffs bear the burden of first showing "substantial similarity" before obtaining discovery of other incidents, actually involve the *admissibility* of evidence of prior accidents, not the *discoverability* of that evidence. *Tolstih,* at *5 ("In the context of determining admissibility of prior accidents involving various products, the United States Court of Appeals for the Sixth Circuit has concluded that 'substantial similarity' exists in incidents involving the same model, the same design, the same defect and occurring under similar circumstances.") citing, *Anderson v. Whittaker Corp.,* 894 F.2d 804, 813 (6th Cir.1990); *Croskey v. BMW of North Am., Inc.,* 532 F.3d 511, 518 (6th Cir.2008) ("Substantial similarity means that the accidents must have occurred under similar circumstances or share the same cause."); *Surles v. Greyhound Lines, Inc.,* 474 F.3d 288, 297 (6th Cir.2007) (same); *Rye v. Black & Decker Mfg. Co.,* 889 F.2d 100, 102 (6th Cir.1989) (same). It would be difficult, if not impossible, for a plaintiff to make a showing that other incidents are substantially similar, if they are precluded from discovery of that information in the first place. Notably, discovery in class action cases and in product liability actions involving both design and manufacturing defects (as is alleged here) is often broader in scope. *See e.g., Bradley v. Cooper Tire & Rubber Co.,* 2006 WL 3360926, *2 (S.D.Miss.2006) (Noting that product liability class action discovery may be broader in scope than is typical and where claims were based on both design and manufacturing defects, discovery should not be limited to products with the same specification limits as the subject products.). Based on these principles, the Court concludes that plaintiffs have made a sufficient showing that their discovery requests are relevant to their claims.

***6** The Court also finds that the search term delimiters proposed GE are unduly narrow for two reasons. First, they would exclude the discovery sought by plaintiffs that the Court has already concluded is sufficiently relevant and discoverable. Second, plaintiff has made a showing that the delimiters proposed by GE cast too narrow a net even with respect to plaintiffs' claimed defect regarding "self-starting" microwave ovens. Plaintiff offered several examples where these precise claims would not be captured in a search conducted as proposed by GE. The Court finds that the search terms proposed by plaintiff, while they may force GE to review some documents that are not relevant to the claims asserted by plaintiffs (which will virtually always be the case when using search terms to identify responsive electronic evidence), they are sufficiently well-defined, narrow in scope, and reasonable under the circumstances. Thus, GE has not established that the discovery sought by plaintiff, as limited above, is unduly burdensome. Plaintiff's motion to compel and for sanctions is, therefore, granted in part and denied in part.

IT IS SO ORDERED.

The parties to this action may object to and seek review of this Order, but are required to file any objections within 14 days of service as provided for in Federal Rule of Civil Procedure 72(b)(2) and Local Rule 72.1(d). A party may not assign as error any defect in this Order to which timely objection was not made. Fed.R.Civ.P. 72(a). Any objections are required to specify the part of the Order to which the party objects and state the basis of the objection. Pursuant to Local Rule 72.1(d)(2), any objection must be served on this Magistrate.

E.D.Mich.,2010.
Hennigan v. General Elec. Co.
Not Reported in F.Supp.2d, 2010 WL 4189033 (E.D.Mich.)

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA and the STATE OF MICHIGAN, Plaintiffs, v. BLUE CROSS BLUE SHIELD OF MICHIGAN, a Michigan nonprofit healthcare corporation, Defendant.	Civil Action No. 2:10-cv-14155-DPH-MKM Hon. Denise Page Hood Mag. Judge Mona K. Majzoub

INDEX OF EXHIBITS TO
PLAINTIFFS' SEALED MOTION TO COMPEL A RESPONSE TO PLAINTIFFS' FIRST AND THIRD INTERROGATORIES AND TO COMPEL PRODUCTION OF DOCUMENTS RESPONSIVE TO PLAINTIFFS' DOCUMENT REQUEST NO. 50

1. Defendant Blue Cross Blue Shield of Michigan's Supplemental Response to Plaintiffs' First Interrogatory (July 16, 2012)

2. Letter from Amy Fitzpatrick, United States Department of Justice, to Ashley Cummings, Hunton & Williams LLP (July 23, 2012)

3. Letter from Ashley Cummings, Hunton & Williams LLP, to Amy Fitzpatrick, United States Department of Justice (August 8, 2012)

4. Defendant Blue Cross Blue Shield of Michigan's Supplemental Response to Plaintiffs' Interrogatory No. 3 (April 17, 2012)

5. Letter from David Gringer, United States Department of Justice, to Ashley Cummings, Hunton & Williams LLP (July 20, 2012)

6. Defendant Blue Cross Blue Shield of Michigan's Second Supplemental Response to Plaintiffs' Interrogatory No. 3 (July 3, 2012)

7. Defendant Blue Cross Blue Shield of Michigan's Answers and Objections to Plaintiffs' Second Set of Interrogatories (February 24, 2012)

8. Email From Gerald Noxon, Blue Cross Blue Shield of Michigan Director of Providing Contracting to an Ascension Executive (April 4, 2008; AHSJP-013912)

9. Blue Cross Blue Shield of Michigan Excel Document About Marquette General Hospital's Reimbursement (May 21, 2008; BLUECROSSMI-99-01049930)

10. Alpena Regional Medical Center Signature Approval Memorandum (December 22, 2009; BLUECROSSMI-99-050775)

11. Plaintiffs' Fifth Request for Production of Documents from Blue Cross Blue Shield of Michigan (March 19, 2012)

12. Defendant Blue Cross Blue Shield of Michigan's Objections to Plaintiffs' Fifth Request for Production of Documents (April 23, 2012)

13. Email from David Gringer, United States Department of Justice, to Ashley Cummings, Hunton & Williams LLP (April 24th 2012 to April 25th 2012)

14. Blue Cross Blue Shield of Michigan Board of Directors Meeting Minutes of February 6, 2008 (BLUECROSSMI-99-021687)

15. Defendant Blue Cross Blue Shield of Michigan's Supplemental Objections and Responses to Plaintiffs' Fifth Request for Production of Documents (June 29, 2012)

16. Email from Catherine Sinning, Director of Executive Compensation at Blue Cross Blue Shield of Michigan, to Daniel Loepp, President and CEO of Blue Cross Blue Shield of Michigan (January 13, 2005; BLUECROSSMI-99-01938825)

17. Unpublished Cases