IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

Susan Doxtator, Arlie Doxtator, and Sarah Wunderlich, as Special Administrators of the Estate of Jonathon C. Tubby,
Plaintiffs,

vs.

Erik O'Brien, Andrew Smith, Todd J. Delain, Heidi Michel, City of Green Bay, Brown County, Joseph P. Mleziva, Nathan K. Winisterfer, Thomas Zeigle, Bradley A. Dernbach, and John Does 1-5,

Defendants,

Case No. 1:19-cv-00137-WCG

REPLY MEMORANDUM IN SUPPORT OF MOTION TO COMPEL AND SANCTIONS

In opposing Plaintiffs' motion to compel and for sanctions, the Green Bay Defendants argue that (1) Officer Salzmann cannot be compelled to provide additional testimony because he is not named a defendant in the action; (2) that the testimony sought by Plaintiffs in a second deposition cannot be compelled because it is purportedly irrelevant; and (3) that because the information sought by Plaintiffs is, in the Green Bay Defendants' view, "not necessary to the issues in this case," sanctions for Officer Salzmann's failure to respond to the deposition question are not warranted. ECF 75 at 4-5. Each argument is wholly without merit—Officer Salzmann is an employee and agent of a party to this case (Defendant the City of Green Bay), non-party status does not excuse a deponent's disregard of discovery mechanisms and refusal to answer deposition questions, the Green Bay Defendants did not preserve any relevancy objection, and the questions are plainly relevant. For these reasons, sanctions are warranted.

A. The Green Bay Defendants erroneously claim that only named parties can be compelled to answer questions in a follow-up deposition.

The Green Bay Defendants claim that because "Officer Salzmann is only a witness to the shooting and not a named Defendant," he "cannot be compelled to provide additional testimony." ECF 75 at 4. While Officer Salzmann is not a party in his personal capacity, Officer Salzmann is an employee of Defendant City of Green Bay and therefore an agent of a named defendant. Therefore, the Green Bay Defendants are wrong to repeatedly characterize Officer Salzmann as a "non-party witness." Officer Salzmann is not a "non-party witness" because his testimony is being sought in connection with the actions he took on behalf of his employer, a party to this case.

More fundamentally, that Officer Salzmann is not a party in his personal capacity does not give him carte blanche to disregard the discovery process and refuse to answer questions at his deposition. In this regard, the Green Bay Defendants flatly mischaracterize the law. Rule 37 provides that a "party seeking discovery may move for an order compelling an answer . . . if . . . a *deponent* fails to answer a question asked under Rule 30." Fed. R. Civ. P. 37(a)(3)(B)(i). Thus, Rule 37 authorizes the court to compel a deponent to answer questions not answered at a deposition, and makes no distinction between defendant and non-party deponents. Indeed, the Green Bay Defendants fail to cite to a single authority to substantiate that only a named defendant can be compelled to submit to a follow-up deposition.

Contrary to the Green Bay Defendants' claim, courts routinely compel non-compliant fact witnesses to submit to follow-up depositions and answer previously refused

questions. *See Dorroh v. Deerbrook Ins. Co.,* Case No. 11-cv-2120, 2012 U.S. Dist. LEXIS 135590, *24-25, 2012 WL 4364149 (E.D. Cal. Sept. 21, 2012) (granting motion to compel second deposition of a fact witness due to non-responsiveness of answers in first deposition); *Cordova v. United States*, 2006 U.S. Dist. LEXIS 98226, *9 (granting motion to compel fact witness to respond to previously unanswered questions at a second deposition, and expressly rejecting deponent's argument that she could "refuse[] to answer [certain] questions because she was there as a 'fact witness'"); *Specht v. Google, Inc.*, 268 F.R.D. 596, 602, 2010 U.S. Dist. LEXIS 63194, *20 (N.D. Ill. June 25, 2010) (granting motion to compel obstinate fact witness to appear at a second deposition, with all costs and reasonable attorneys' fees to be paid by opposing party). Defendants' contention regarding the propriety of compelling Officer Salzmann to submit to a second deposition is not legally supportable.

B. The Green Bay Defendants' relevancy objections provide no basis to refuse to answer a deposition question and, in any event, are wholly without merit

The Green Bay Defendants' next contend that Officer Salzmann should not be compelled to submit to a second deposition because Officer Salzmann's testimony regarding the meaning of his tattoos in purportedly irrelevant.[1] ECF 75 at 4-5. An

[1] The Green Bay Defendants additionally cite to Federal Rule of Evidence 403 as justification for refusing to respond to the questions regarding Officer Salzmann's tattoos. Rule 403 is a catchall provision that permits the court to exercise its discretion to exclude evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. The evidence regarding Officer Salzmann's tattoos, celebrating his involvement as a police officer in officer-involved shootings, should be admissible at trial under this Rule—it is highly probative of Green Bay's culture of excessive force and also

objection to relevance provides no basis to refuse to answer a question in a deposition. Rule 30 makes clear that a deponent may refuse to answer a question "only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion [to terminate or limit the deposition]." Fed. R. Civ. P. 30(c)(2). Where a deponent objects to an aspect of the deposition, such as the relevance of a question, Rule 30 unequivocally states that the "examination still proceeds" and the "testimony is taken subject to [the] objection." *Id.* Accordingly, a motion seeking to compel a follow up deposition should be granted where the "only objection raised by [the deponent] was a relevance objection, and [the deponent's] counsel did not move for a protective order." *Ratajczak v. Beazley Sols. Ltd*, Case No. 13-cv-045, 2014 U.S. Dist. LEXIS 200255, *5-6 (E.D. Wis. Aug. 12, 2014); *see also, Bourne v. Arruda*, Case No. 10-cv-393, 2012 U.S. Dist. LEXIS 97987, *5-6, 2012 WL 2891099 (D.N.H. July 16, 2012) (explaining that an objection as to "relevance may be noted for the record during a deposition," but the objection does not provide "a proper basis for refusing to answer a specific question"); *Folz v. Union Pac. R.R.*, Case No. 13-cv-579, 2014 U.S. Dist. LEXIS 85960, *6, 2014 WL 2860271 (S.D. Cal. June 23, 2014) (granting motion to compel follow up deposition and stating that "[c]learly established

highly probative of Officer Salzmann's credibility and there is no risk of unfair prejudice, confusion, delay, cumulative evidence, etc.

Moreover, even if Rule 403 were implicated, Federal Rule of Civil Procedure 26(b) expressly provides that "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." In other words, the Federal Rules of Evidence limit "*admissibility* at trial, not discoverability." *Folz v. Union Pac. R.R.*, 2014 U.S. Dist. LEXIS 85960, *6, 2014 WL 2860271 (S.D. Cal. June 23, 2014) (emphasis in original).

federal law provides that a deponent may not refuse to answer a question based only a relevance objection").

Here, Officer Salzmann did not even state an objection during the deposition as to the relevance of the questions regarding the meaning of his tattoos, much less move for the protective order that would be necessary to authorize him to refuse to answer Plaintiffs' questions. *See* ECF 72 at 4-5. And now, months after Officer Salzmann refused to answer the questions regarding his tattoos, the Green Bay Defendants assert, in purely conclusory terms, that the stated relevance of Officer Salzmann's tattoos is "absurd[]," "baseless," and "contrary to the testimony that Officer Salzmann provided." ECF 75 at 5. In other words, the Green Bay Defendants make *no effort* to address Plaintiffs' explanations for why Officer Salzmann's testimony regarding the meaning of his tattoos is relevant.

First, the Green Bay Defendants fail to respond to Plaintiffs' contention that the fact of whether Officer Salzmann has tattoos celebrating his shootings in the line of duty is relevant to whether Green Bay has a custom of excessive force. "[E]vidence is relevant if 'it has any tendency to make a fact more or less probable than it would be without the evidence' and 'the fact is of consequence in determining the action.'" *Sys. Dev. Integration, LLC v. Computer Scis. Corp.*, Case No. 09-cv-4008, 2012 U.S. Dist. LEXIS 109318, *4, 2012 WL 3204994 (N.D. Ill. Aug. 3, 2012). Officer Salzmann's commemoration of his shootings is undoubtedly relevant because it supports that Officer Salzmann *celebrates* the use of deadly force against citizens and therefore provides evidence that a custom exists within the Green Bay Police Department to use force, even if excessive or unconstitutional. Instead of responding to this argument, the Green Bay

Defendants side step by claiming that the tattoos are irrelevant because he is not an "official policy maker." ECF 75 at 5. Regardless, however, of whether Green Bay has an officially promulgated policy of excessive force, it may have a custom of such force. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-691 (1978) (holding that "local governments . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels"). Whether Green Bay police officers—official policy makers or not—celebrate deadly force through tattooing is certainly relevant to whether a custom of excessive force exists.

Second, the Green Bay Defendants do not address Plaintiffs' assertion that the meaning of Officer Salzmann's tattoos is relevant to whether Green Bay adequately supervises its officers. Officer Salzmann's tattoos provide evidence that the Green Bay Police Department's supervisors have failed to detect tattoos that condone the celebration of violence within its police force—a viewpoint that is directly contradictory to the constitutional constraints on the use of force by police officers that are purportedly embraced by the Green Bay Police Department. The Green Bay Defendants do not address this point, and instead resort to *ipse dixit* claiming the issue is "completely irrelevant . . . to whether the City of Green Bay adequately supervises its police officers." ECF 75 at 5.

Third, the Green Bay Defendants altogether ignore that the meaning of Officer Salzmann's tattoos is plainly relevant to his possible bias as a witness to the fatal shooting of Mr. Tubby, and could serve as a basis for impeaching him during cross-examination. "Impeachment can be effected in a number of ways, including contradiction, which

involves presenting evidence that the substance of a witness's testimony is not to be believed." *United States v. Boswell*, 772 F.3d 469, 476 (7th Cir. 2014). A "tattoo-related inquiry" is relevant where a witness's tattoo depicts something related to the subject of a witness's testimony, because the image depicted by a tattoo may have a "tendency to impeach, or cast doubt upon, the truthfulness of the [witness's] trial testimony." *Id.* Furthermore, numerous jurisdictions have concluded that "tattoos [a]re relevant to the motive or intent of the persons bearing them." *State v. Tankovich*, 307 P.3d 1247, 1251 n.3 (Ida. Ct. App. 2013) (collecting cases). Here, Officer Salzmann is an eyewitness to the events that resulted in the death of Mr. Tubby and, if called as a witness, will testify on topics relating to Officer O'Brien's use of lethal force. Officer Salzmann's tattoo is highly relevant to his credibility as a witness if the tattoo commemorates his shootings in the line of duty. The Green Bay Defendants make no attempt to explain away the easily understood impeachment value of Officer Salzmann's testimony regarding the meaning of his tattoo.

Finally, the Green Bay Defendants' claim that the questions sought to be asked in a follow up deposition are irrelevant because Officer Salzmann's responded to them in the first deposition. ECF 75 at 5. Not so. Counsel for Plaintiffs respectfully asked Officer Salzmann multiple times if his tattoos commemorated or signified that he had killed someone in the line of duty. Officer Salzmann flatly refused to answer this question, even after counsel narrowed the question to call for a simple yes or no answer. *See* ECF 72 at 4-5. The information Officer Salzmann refused to provide in the initial deposition remains unknown, and for the reasons stated above, is highly relevant evidence. Moreover, by

failing to provide any answer to these questions, Officer Salzmann deprived Plaintiffs of the ability to ask follow up questions based on his answers.

C. The Green Bay Defendants fail to establish any hardship in submitting to a second deposition

The Green Bay Defendants note that the Court has discretion to deny discovery to protect a party from oppression or undue burden, ECF 75 at 3-4, yet the Green Bay Defendants fail to provide *any* explanation as to why the second deposition of Officer Salzmann on the narrow issue of the meaning of his tattoos would be oppressive or impose an undue burden. "Relief from otherwise relevant discovery is granted only upon a showing of 'good cause' for such relief." *Chicago Dist. Council of Carpenters Pension Fund v. Ortega*, Case No. 31-cv-2546, 1991 U.S. Dist. LEXIS 12124, *5, 1991 WL 171379 (N.D. Ill. Aug. 30, 1991) (citing Fed. R. Civ. P. 26(c)). "This showing may not be met by bare allegations of irrelevance or unnecessary burden." *Id.* "Rather the movant must demonstrate why it is entitled to protection from the 'annoyance, embarrassment, oppression, or undue burden or expense' of the requesting party's discovery." *Id.*; *see also, Perry v. Kelly-Springfield Tire Co.,* 117 F.R.D. 425, 426 (N.D. Ill. 1987) ("[T]he availability of a second deposition is left to the discretion of the trial court" and the party opposing the deposition "must demonstrate 'good cause' for a protective order").

Here, the most that the Green Bay Defendants can muster that even arguably relates to an undue burden analysis is that the second deposition "appears intended only to harass [Officer Salzmann]." ECF 75 at 3, 5. The Green Bay Defendants do not explain why it believes the questions regarding Officer Salzmann's tattoos are intended to harass, or how

a follow-up deposition on this distinct and narrow topic would unduly burden Officer Salzmann or the Green Bay Defendants. And even if the Green Bay Defendants had explained why the questions constituted harassment, their claims would be untimely. *See Ratajczak,* 2014 U.S. Dist. LEXIS 200255, *6 (finding that claims of witness harassment were untimely because counsel did not move for a protective order until after the proponent of the follow-up deposition moved to compel weeks later). As discussed above, contrary to the Green Bay Defendants' conclusory assertions, Plaintiffs have (and had) a legitimate reason for asking Officer Salzmann about his tattoos.

D. Plaintiffs are entitled to attorney's fees and costs.

The Green Bay Defendants claim that because they believe the information sought in the follow-up deposition is irrelevant, the Green Bay Defendants should not be required to pay attorney's fees and costs incurred by Plaintiffs in preparing this motion and arranging for the follow-up deposition. The Green Bay Defendants cite to no authority substantiating that an improper relevance objection excuses the opposing party from paying fees and costs after the Court grants a motion to compel. And even more pointedly, the Green Bay Defendants do not explain how their relevant objection fits within one of the exceptions to the general rule that the resisting party must pay the discovering party's costs in a successful motion to compel, *i.e.* because (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. Fed. R. Civ. P. 37(a)(5).

Accordingly, the Green Bay Defendants fail to provide a creditable basis for the Court to relieve them from their obligation to pay attorney's fees and costs.

Lastly, the Green Bay Defendants claim that the City of Green Bay should not be required to pay attorney's fees and costs, because the City of Green Bay should not be held accountable for its employees' refusal to respond to questions in the deposition. ECF 75 at 6. The Green Bay Defendants' ignore that Officer Salzmann is under their control: Officer Salzmann was represented by the Green Bay Defendants' counsel at his deposition, the City of Green Bay prepared Officer Salzmann for his deposition, the City of Green Bay asked the deposition to be taken at its own offices, and counsel for Green Bay Defendants was placed on notice at the deposition that Plaintiffs would likely move to compel Officer Salzmann's continued testimony yet the Green Bay Defendants' counsel never instructed him to answer. Plaintiffs also afforded the City of Green Bay the opportunity to offer Officer Salzmann for a follow-up deposition and avoid the costs incurred in preparing this motion. At each step, the City of Green Bay failed to take action to prevent the need for this motion. Therefore, the City of Green Bay's protestations regarding the fairness of imposing fees and costs upon it as a result of this motion are unavailing. In addition, Officer Salzmann should be jointly liable, personally, for those costs and fees.

CONCLUSION

For the foregoing reasons, and those stated in Plaintiffs' Memorandum in Support, the Court should grant Plaintiffs' motion to compel, order that Officer Salzmann appear for a second deposition on the limited topic of the tattoos on his forearm, and award

sanctions in favor of Plaintiffs for their costs and attorneys' fees incurred in preparing this motion and in continuing Officer Salzmann's deposition.

Dated: February 18, 2020.

By ***/s/ Forrest Tahdooahnippah.***

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 18 day of February, 2020, I served the foregoing **REPLY MEMORANDUM IN SUPPORT OF MOTION TO COMPEL AND SANCTIONS** via the Court's CM/ECF system, causing Defendants to be served electronically.

/s/ Forrest Tahdooahnippah
Forrest Tahdooahnippah

Appendix of Unreported Cases

In Plaintiffs' opening and reply memoranda, Plaintiffs cite to the below listed unreported cases. Pursuant to Local Rule 7(j)(2), copies of each case are provided in this appendix in alphabetical order.

1. *Bourne v. Arruda*, Case No. 10-cv-393, 2012 U.S. Dist. LEXIS 97987, *5-6, 2012 WL 2891099 (D.N.H. July 16, 2012)

2. *Chicago Dist. Council of Carpenters Pension Fund v. Ortega*, Case No. 91-cv-2546, 1991 U.S. Dist. LEXIS 12124, *5, 1991 WL 171379 (N.D. Ill. Aug. 30, 1991)

3. *Colon v. Town of Cicero*, Case No. 12-cv-5481, 2015 U.S. Dist. LEXIS 101456, *2, 2015 WL 4625003 (N.D. Ill. Aug. 3, 2015)

4. *Cordova v. United States*, Case No. 05-cv-563, 2006 U.S. Dist. LEXIS 98226, *9 (D.N.M. July 31, 2006)

5. *Dorroh v. Deerbrook Ins. Co.,* Case No. 11-cv-2120, 2012 U.S. Dist. LEXIS 135590, *24-25, 2012 WL 4364149 (E.D. Cal. Sept. 21, 2012)

6. *Duncan v. Pierce*, Case No. 07-cv-4028, 2008 U.S. Dist. LEXIS 86872, *21, 2008 WL 4724281 (C.D. Ill. Oct. 24, 2008)

7. *Folz v. Union Pac. R.R.*, Case No. 13-cv-579, 2014 U.S. Dist. LEXIS 85960, *6, 2014 WL 2860271 (S.D. Cal. June 23, 2014)

8. *Maxwell v. S. Bend Work Release Ctr.*, 2010 U.S. Dist. LEXIS 114462, *18, 2010 WL 4318800 (N.D. Ind. Oct 25, 2010).

9. *Miles Distribs., Inc. v. Speciality Constr. Brands, Inc.*, Case No. 04-cv-561, 2005 U.S. Dist. LEXIS 11061, *8, 2005 WL 8170730 (N.D. Ind. June 3, 2005)

10. *Nelson v. Nat'l Republic Bank*, 1984 U.S. Dist. LEXIS 18815, *6, Fed. Sec. L. Rep. (CCH) P91,448 (N.D. Ill. Mar. 7, 1984)

11. *Patterson v. Burge*, Case No. 03-cv-4433, 2007 U.S. Dist. LEXIS 33102, *12, 2007 WL 1317128 (N.D. Ill. May 4, 2007)

12. *Ratajczak v. Beazley Sols. Ltd*, Case No. 13-cv-045, 2014 U.S. Dist. LEXIS 200255, *5-6 (E.D. Wis. Aug. 12, 2014)

13. *Sys. Dev. Integration, LLC v. Computer Scis. Corp.*, Case No. 09-cv-4008, 2012 U.S. Dist. LEXIS 109318, *4, 2012 WL 3204994 (N.D. Ill. Aug. 3, 2012).

14. *Teed v. JT Packard & Assocs.*, Case No. 10-misc-23, 2010 U.S. Dist. LEXIS 86113, *7-8, 2010 WL 2925902 (E.D. Wis. July 20, 2010).

15. *Williams v. Ortiz*, Case No. 14-cv-792, 2017 U.S. Dist. LEXIS 17049, *36, 2017 WL 499996 (E.D. Wis. Feb. 7, 2017)

16. *Whitewater West Indus. v. Pac. Surf Designs, Inc.*, 2018 U.S. Dist. LEXIS 96970, *21 (S.D. Cal. June 8, 2018)

Bourne v. Arruda

United States District Court for the District of New Hampshire

July 16, 2012, Decided; July 16, 2012, Filed

Civil No. 10-cv-393-LM

Reporter
2012 U.S. Dist. LEXIS 97987 *; 2012 WL 2891099

Samuel J. Bourne v. John R. Arruda, Jr., et al.

Notice: NOT FOR PUBLICATION

Subsequent History: Motion to strike denied by, Costs and fees proceeding at, Motion granted by, Request denied by Bourne v. Arruda, 2012 U.S. Dist. LEXIS 110089 (D.N.H., Aug. 7, 2012)

Prior History: Bourne v. Arruda, 2012 U.S. Dist. LEXIS 97986 (D.N.H., July 16, 2012)

Case Summary

Overview
Defendants' Fed. R. Civ. P. 37 motion for an order compelling the plaintiff to answer questions that he refused to answer at his deposition, and to direct that the deposition be reconvened at the plaintiff's expense was granted to the extent that the plaintiff relied exclusively upon a relevance objection, Fed. R. Civ. P. 30(c)(2), or upon no specific objection when he refused to answer a question at the deposition, and to the extent that the plaintiff relied on the work product privilege. However, the court found that a sanction was not appropriate in light of the plaintiff's pro se status.

Outcome
Defendants' motion to compel was granted.

Counsel: [*1] Samuel J. Bourne, Plaintiff, Pro se, East Bridgewater, MA.

For John R. Arruda, Jr., Individually and officially, Defendant: Brian J.S. Cullen, LEAD ATTORNEY, CullenCollimore PLLC, Nashua, NH.

For Michael R. Brooks, Individually and officially, Madison, Town of, Defendants: Brian J.S. Cullen, CullenCollimore PLLC, Nashua, NH.

Judges: Landya McCafferty, United States Magistrate Judge.

Opinion by: Landya McCafferty

Opinion

ORDER

Currently before the court are the following motions [1]:

- Defendants' motion to compel plaintiff to answer deposition questions at a reconvened deposition (doc. no. 108);
- Defendants' motion for contempt (doc. no. 107);
- Defendants' motion to strike materials purporting to show witness intimidation and harassment (doc. no. 117), set forth in or appended to plaintiff's objection to defendants' contempt motion;
- Defendant's motion to stay proceedings (doc. no. 109); and
- Plaintiff's "Cross Motion for Abuse of Process" (doc. no. 112).

Plaintiff has objected to each of defendants' motions (doc. nos. 113-15, and 118), and defendants have objected to plaintiff's motion (doc. no. 116). The court herein addresses each motion.

Discussion

I. Motion to Compel (doc. no. 108)

Defendants seek an order compelling Bourne to answer questions that he refused to answer at his May 7, 2012, deposition, and to direct that the deposition be reconvened at Bourne's expense. Defendants assert that Bourne engaged in bad faith and dilatory tactics by refusing to answer questions and by failing to bring reading glasses. The specific questions, answers, and objections in the deposition transcript relate to the request that Bourne authenticate, review, or comment on documents, which he refused to do because he lacked reading glasses; Bourne's assertion of a privilege, including specifically, work product privilege, as a reason for refusing to answer questions; and Bourne's assertion of irrelevance as a reason for refusing to answer questions. Defendants seek sanctions, including an award of their costs and fees, and the exclusion of Bourne's evidence relating to damages.

[1] Plaintiff's motion for reconsideration (doc. no. 110) is addressed in a separate **[*2]** order issued on this date.

Bourne's objection to the motion asserts, among other things, that the motion was submitted in bad faith, that his objections justified his refusals to answer, and that he should not be required to testify at a deposition regarding hearsay **[*3]** or his work product. Bourne also objects to the request for sanctions.

A. Standard

Rule 37(a) allows for motions to compel responses to deposition questions. See Fed. R. Civ. P. 37(a)(3). The party moving to compel generally bears the burden of showing that the inquiry is relevant to a claim or defense, see Caouette v. OfficeMax, Inc., 352 F. Supp. 2d 134, 136 (D.N.H. 2005), and that the answers were incomplete or evasive. See Vaughan v. Bernice A. Roy Elem. Sch., No. 05-cv-223-JD, 2007 U.S. Dist. LEXIS 47098, 2007 WL 1792506, *1 (D.N.H. June 19, 2007); see also Fed. R. Civ. P. 26(b)(1) (discovery is available as to any non-privileged matter that is relevant to any party's claim or defense).

A deponent may not generally refuse to answer a deposition question, except as necessary to preserve a privilege, to enforce a court-ordered limitation, or to allow time to file a motion asserting that the deposition is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. See Fed. R. Civ. P. 30(c)(2). If a claim of privilege is asserted, the party objecting to the motion to compel bears the burden of establishing that the privilege is applicable to the information **[*4]** at issue. See Lluberes v. Uncommon Prods., LLC, 663 F.3d 6, 24 (1st Cir. 2011); FDIC v. Ogden Corp., 202 F.3d 454, 460 (1st Cir. 2000).

B. Analysis

1. Refusals to Answer

Bourne prefaced all of his deposition testimony by stating that he would refuse to answer questions he deemed to be irrelevant or to seek privileged information. He refused to answer a number of questions during the deposition, sometimes relying exclusively on a relevance objection, and other times specifying a claim of work product protection. On one occasion, he simply refused to provide an answer without asserting any objection. [2] The inquiries at issue concerned:

- The prior litigation involving Bourne and/or Bourne's property in Madison, discussed by Brooks or Arruda when they made their allegedly defamatory comments; and
- The names of snowmobile club members who treated Bourne differently before and after the alleged defamation occurred.

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[2] With respect to the names of snowmobile club members, Bourne simply refused to answer without asserting a specific objection:

> [Atty. Cullen:] And with respect to the snowmobile club, who specifically in the snowmobile club treats you differently after June 9th, 2010, than they did beforehand?
>
> [Bourne:] Well, I'd have to give that some thought, but I'm not going to speculate on any particular names at this particular point.
>
> [Atty. Cullen:] So you can't name anybody as we sit here today?
>
> [Bourne:] I'm not going to name anybody at this point.
>
> [Atty. Cullen:] You're not going to or you don't know any names?
>
> [Bourne:] I said I'm not going to.
>
> [Atty. Cullen:] So you may know some names, but you're not willing to disclose them?
>
> [Bourne:] Correct. I'll leave that for testimony in court.

Depo. of Samuel Bourne, May 7, 2012, at 66 (doc. no. 108-3).

The court has examined the deposition transcript and finds that Attorney Cullen's questions and areas of inquiry during the deposition, including his inquiries into Bourne's cost basis for his property, the identity of possible witnesses, and Bourne's litigation history, were within **[*5]** the scope of permissible discovery in this case.

Federal Rule of Civil Procedure 30(c) indicates that objections as to form, hearsay, and relevance may be noted for the record during a deposition, but none of those objections typically provides a proper basis for refusing to answer a specific question. See Fed. R. Civ. P. 30(c)(2). Bourne's failure to respond **[*6]** completely to the questions at issue, in reliance only upon a relevance objection, violated Fed. R. Civ. P. 30(c)(2). See Kelly v. A1 Tech., 09 CIV. 962 LAK MHD, 2010 U.S. Dist. LEXIS 37807, 2010 WL 1541585, *20 (S.D.N.Y. Apr. 8, 2010) (irrelevance is not valid basis for refusing to answer); see also Cante v. Baker, 07-CV-1716 (ERK), 2008 U.S. Dist. LEXIS 38091, 2008 WL 2047885, *2 (E.D.N.Y. May 9, 2008) ("A hearsay objection is not a proper basis for a refusal to answer deposition questions; rather, the witness may note the hearsay objection on the record, 'but the examination still proceeds; the testimony is taken subject to any objection.'" (quoting Fed. R. Civ. P. 30(c)(2))). Accordingly, to the extent Bourne relied exclusively upon a relevance objection or upon no specific objection when he refused to answer a question at the May 7 deposition, the deposition may be reconvened, and Bourne is instructed to answer such questions.

2. Work Product

At the May 7, 2012, deposition, Bourne asserted claims of privilege when he refused to respond to questions regarding:

- whether Bourne spoke to or otherwise communicated with a set of witnesses,
- the facts underlying his belief that witnesses listed in response to Interrogatory No. 16 knew or were **[*7]** influenced by the broadcasts (except as to Senator Ayotte and the Supreme Court justices, as to whom he provided an answer to the question at issue),
- the identity of persons he knows who saw the broadcasts or attended the meetings,
- whether he has a mortgage on the Madison property,
- whether he consulted with an attorney prior to his deposition (without saying what was said),
- whether he socializes with the persons listed in his discovery responses, and
- the names of his friends and associates in Madison, New Hampshire, and Carroll County. [3]

Work product protection does not typically shield from discovery the facts concerning the creation of work product or the facts contained within the protected materials. See Jones v. Secord, CIV.A. 11-91101-PBS, 2011 U.S. Dist. LEXIS 63486, 2011 WL 2456097, *2 (D. Mass. June 15, 2011) (quoting Resolution Trust Corp. v. Dabney, 73 F.3d 262, 266 (10th Cir. 1995)); see also In re Grand Jury Subpoena, 220 F.R.D. 130, 141 (D. Mass. 2004). The court's review of the transcript **[*8]** indicates that the inquiries at issue targeted facts, and did not require Bourne to reveal his thought-processes and mental impressions. Bourne's work product objection to such questions is without merit.

Furthermore, to the extent that Bourne implicitly intended to rely on a work product privilege with respect to the names of snowmobile club members who treated him differently before and after the date of the alleged defamatory comments, this court concludes that the request sought relevant information and did not seek any information protected by the work product doctrine. Therefore, at a deposition reconvened pursuant to this court's order, Bourne is instructed to answer the questions at issue in this motion, as to which he asserted a work product privilege.

3. Freedom of Association

Bourne further contends that a court order requiring him to disclose the names of his friends and associates in Carroll County (where the allegedly defamatory statements were published) would violate his constitutional rights as recognized in NAACP v. Ala. ex rel. Patterson, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). That case stands for the proposition that compelled disclosure of the membership list of an advocacy organization **[*9]** may

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[3] Bourne also asserted a work product privilege as to whether he planned to testify. Defendants have not specifically challenged this assertion of privilege, and the court declines to rule on this issue at this time.

violate the First Amendment right to freedom of association. See id. at 462. Bourne, a Massachusetts resident who owns property in the Town of Madison, located in Carroll County, New Hampshire, has failed to make the requisite showing that he and his unnamed friends and associates in the area where he owns property belong to an association that engages in expression. See generally Boy Scouts of Am. v. Dale, 530 U.S. 640, 648, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000). Moreover, Bourne has failed to provide affidavits or evidence upon which this court could find that disclosing the names of Bourne's Carroll County friends and associates in discovery in this action would impair any expressive conduct by such an association or its members. See id. at 652. Bourne has thus failed to show that he has a constitutional privilege that would enable him to avoid disclosing names in response to deposition questions about persons with whom he socializes or associates in the Town of Madison or in Carroll County.

4. Reading Glasses

The court declines to find bad faith in Bourne's failure to bring his reading glasses, given his assertion that he simply forgot them. Bourne is specifically instructed in the future, however, to ensure **[*10]** that he has his glasses and such other personal items he might require, when he appears at a deposition or any other proceeding in this case, so that any further inconvenience and waste of resources will be avoided.

C. Sanctions

Defendants have requested sanctions including their costs and attorneys' fees for the motion (doc. no. 108), their costs and fees for the May 7 deposition, and the cost of reconvening a deposition of Bourne. They have also requested an order precluding Bourne from introducing evidence of damages at trial as a sanction for failing to answer deposition questions.

Rule 30(d)(2) authorizes the court to impose sanctions on any "person who impedes, delays, or frustrates the fair examination of the deponent." Fed. R. Civ. P. 30(d)(2). Rule 37(a) authorizes an award of costs and fees if a motion to compel is granted, if an award would not be unjust, and if other facts listed in the rule do not render an award improper. See Fed. R. Civ. P. 37(a).

Here, the court finds that a sanction is not appropriate. As to whether Bourne should be required to pay the costs of the May 7 deposition, to pay for a reconvened deposition, or to suffer the loss of an ability to present evidence **[*11]** at trial, the court finds as follows. The May 7 deposition was suspended by defendants' counsel, not Bourne, and Bourne had not utterly failed to answer pertinent questions in that deposition. Bourne is expected to bring his glasses, answer questions, and comply with the relevant rules at the reconvened deposition. Further sanctions are not necessary or appropriate for remedial or deterrent purposes.

Moreover, as to whether an award of defendants' costs or fees for filing this motion should be rendered, this court's review of the docket for prior federal cases involving Bourne indicates that Bourne's lawyers in his presence threatened to suspend depositions if they strayed into matters that Bourne's counsel deemed irrelevant. In light of Bourne's pro se status in this litigation, and the possibility that his prior counseled experiences affected his understanding of proper deposition behavior in this case, the court finds that an award of fees and costs for filing the motion would not be just. Moreover, Bourne's assertion of work product privilege, under the circumstances was substantially justified, in light of his pro se status. Therefore, each party shall bear its own costs and fees **[*12]** on the motion to compel answers to deposition questions.

II. Motion for Contempt

Defendants seek an order finding Bourne to be in contempt of this court's April 2, 2012, order (doc. no. 105), for failing to provide a complete response to Interrogatory No. 16, as drafted by defendants and as directed by the court. Defendants also seek sanctions including the exclusion of evidence and their costs and fees associated with the motion for contempt, the underlying motion to compel, and their costs and fees associated with deposing Bourne.

Bourne objects to the motion for contempt, asserting that it was filed in bad faith. He contends that he has properly complied with all court orders by providing a "more than complete" response to Interrogatory No. 16, and that

requiring him to limit his response to the question asked would require him to "produce hearsay comments . . . well beyond the scope of discovery, and not what the Court ordered."

A. Standard

If a party fails to comply with court-ordered discovery, the court may issue further "just order[s]," including an order treating the failure to comply as a contempt of court and an order precluding the introduction of certain evidence. Fed. R. Civ. P. 37(b)(2)(A); **[*13]** see also 28 U.S.C. § 636(e) (magistrate judge has civil contempt authority in consent cases). To warrant a contempt finding, the moving party must prove by clear and convincing evidence that the respondent has violated an express and unequivocal court order. See United States v. Conces, 507 F.3d 1028, 1041-42 (6th Cir. 2007). In addition to or in lieu of a contempt finding, the court may award the moving party its reasonable expenses caused by the failure to comply with a discovery order, including costs and attorney's fees, unless the failure to comply was substantially justified or other circumstances make the award unjust. Id. at 37(b)(2)(C).

B. Analysis

For reasons discussed in connection with the court's April 2, 2012, order on the underlying motion, filed by defendants, see Order (doc. no. 93), and its order set forth herein on the motion to compel deposition answers, the court finds that there is clear and convincing evidence that Bourne failed to comply with the court's April 2 order, and that the order in question was unequivocal. Bourne was instructed to provide a complete response to defendants' Interrogatory No. 16. The interrogatory required him to identify each and every **[*14]** individual who he knows saw the allegedly defamatory broadcasts. Bourne did not respond to that interrogatory as drafted. Rather Bourne chose to respond to his own question; he named fifty five individuals (including the Justices of the New Hampshire Supreme Court and Sen. Kelly Ayotte), which he described as a list of

> each person who I believe [has] direct knowledge of, [has] been influenced by the Defamatory Broadcasts, [was] additionally notified by the Defendants of the details of said defamatory broadcast, [was] present during one of the defamatory broadcast[s] meetings, and/or [has] viewed the Defamatory broadcasts on local television . . . ."

Bourne declined to clarify who on the list had seen the broadcasts, when asked in his May 7, 2012, deposition.

Bourne did not have a license to redraft the interrogatory and to answer that redrafted version. This court ordered Bourne to answer the interrogatory that defendants drafted; Bourne has not shown that his failure to do so was substantially justified.

Accordingly, defendants' motion for contempt is granted. Plaintiff is found in contempt of the court's discovery order, and sanctions therefor are specified below. Bourne is not required **[*15]** to pay defendants' expenses in connection with their underlying motion to compel, for reasons stated in the court's order on that motion, see Order (doc. no. 93)

III. Motion to Strike (doc. no. 117)

Local Rule 7.2(c) allows the filing of a motion to strike materials offered in support of or in opposition to another motion. Defendants have moved to strike from the record allegations set forth at pages 7-9 in Bourne's objection to the motion for contempt (doc. no. 115), and exhibits G-M to that objection, which purport to set forth a history of witness tampering and harassment by defendants and their counsel. Defendants contend that the allegations that they have a history of poisoning pets, burning down homes, intimidating witnesses, and blackballing building permit applicants is irrelevant, impertinent, scandalous, unsupported by evidence, and untrue.

The court notes that the pages and exhibits in question relate to a section of plaintiff's brief entitled, "Prior History of Defendant's witness tampering, and harassment schemes, now forces the Plaintiff to add additional information that may be considered distracting, but still necessary." The court finds that the information asserted **[*16]** therein is generally distracting, irrelevant to the motion for contempt, scandalous, and generally unsubstantiated. Therefore, the motion to strike is granted in part, to the extent that the court will disregard the unsubstantiated allegations at issue in connection with its ruling on the motion for contempt. Although the court declines to further sanction

Bourne, the court instructs Bourne not to use this case as a platform for dispensing irrelevant and unsubstantiated vitriol and invective.

IV. Motion to Stay and Modification to Schedule

Defendants have requested that this court extend the summary judgment deadline and stay proceedings pending Bourne's compliance with this court's rulings on defendants' motion to compel deposition answers and motion for contempt. The court has authority pursuant to Fed. R. Civ. P. 37(b), upon finding a party in contempt, to stay further proceedings until the order is obeyed, and for good cause, the court may modify the pretrial schedule, pursuant to Fed. R. Civ. P. 16.

Having found Bourne to be in contempt with respect to his failure to comply with the court's order that he answer defendants' Interrogatory No. 16, the court directs that no further motions **[*17]** shall be filed by Bourne, without leave of court, until he serves defendants with a complete answer to Interrogatory No. 16. The restriction shall be lifted by this court after it finds, upon a motion filed by any party, supported by an affidavit or other sworn declaration, that Bourne has complied with this court's order requiring him to serve defendants with an answer to Interrogatory No. 16. Furthermore, finding good cause to modify the pretrial schedule, pursuant to Fed. R. Civ. P. 16(b)(4), because of the delays engendered by these discovery disputes, the court further orders that the trial in this case be continued and that certain deadlines be extended, as set forth below.

V. Cross Motion for Abuse of Process (doc. no. 112)

Plaintiff in his Cross Motion for Abuse of Process ("Cross Motion") seeks an order sanctioning defendants for allegedly abusing this court's process and acting in bad faith by filing their motion for contempt, motion to compel, and motion to stay proceedings. Finding each of those motions to be well-founded and having granted relief in response to each, the court rejects the contention that those motions were filed for an improper purpose and denies the Cross **[*18]** Motion (doc. no. 112).

Conclusion

For the foregoing reasons, the court issues the following order:

1. Defendants' motion for contempt (doc. no. 107) is granted in part. Bourne is directed to provide an answer to Interrogatory No. 16 as drafted by defendants within 14 days of the date of this Order. Bourne is required to pay defendants' reasonable expenses, including costs and attorney fees, associated with the motion for contempt (doc. no. 107). Defendants shall file a statement of such reasonable expenses, including their costs and attorney's fees, within 20 days of this order. Bourne may file a response thereto within 30 days of this order, and no further briefing by either party shall be permitted, except as ordered by the court. The court directs that no further motions shall be filed by Bourne, without leave of court, until he serves defendants with a complete answer to Interrogatory No. 16, except as specified herein. The restriction on further filings shall be lifted by this court after it finds, upon a motion filed by any party, supported by an affidavit or other sworn declaration, that Bourne has complied with this court's order requiring him to serve defendants with an answer **[*19]** to Interrogatory No. 16, as required.

2. Defendants' motion to strike (doc. no. 117) is granted in part, to the extent that the court disregards all unsubstantiated allegations of pet poisoning, black-balling, and witness tampering, in connection with the court's ruling on the motion for contempt. The motion to strike is denied in all other respects.

3. Defendants' motion to compel (doc. no. 108) is granted. A deposition of plaintiff may be reconvened, with each party bearing its own expenses. The scope of the reconvened deposition may exceed the scope of the May 7, 2012, deposition. Plaintiff is specifically directed to respond to all questions that he did not answer during the May 7, 2012, deposition. As to those questions, plaintiff is permitted to assert objections, but is not permitted to refuse to answer. Plaintiff is further directed that he may not refuse to answer any questions exceeding the scope of the May 7, 2012, deposition, except as necessary to preserve a privilege or file a motion under Fed. R. Civ. P. 30(d)(3). Each party shall bear its own expenses associated with Doc. No. 108.

4. Defendants' motion to stay proceedings (doc. no. 109) is granted. The trial shall be continued, **[*20]** and interim deadlines for discovery and dispositive motions in this case will be extended, pending further order of this court. On or before August 15, 2012, the parties are directed to file individually or jointly a proposed schedule with such revised deadlines.

5. Plaintiff's "Cross Motion for Abuse of Process" (doc. no. 112) is denied.

SO ORDERED.

/s/ Landya McCafferty

Landya McCafferty

United States Magistrate Judge

July 16, 2012

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Chicago Dist. Council of Carpenters Pension Fund v. Ortega

United States District Court for the Northern District of Illinois, Eastern Division

August 30, 1991, Decided ; August 30, 1991, Docketed

No. 91 C 2546

Reporter
1991 U.S. Dist. LEXIS 12124 *; 1991 WL 171379

CHICAGO DISTRICT COUNCIL OF CARPENTERS PENSION FUND, CHICAGO DISTRICT COUNCIL OF CARPENTERS WELFARE FUND, and the CHICAGO AND NORTHEAST ILLINOIS DISTRICT COUNCIL OF CARPENTERS APPRENTICE AND TRAINEE PROGRAM FUND, Plaintiffs, v. SALVADOR ORTEGA individually d/b/a SAL'S DRYWALL SERVICE and DEL KAY CORPORATION, Defendant

Case Summary

Procedural Posture
Plaintiff carpenters' union funds filed an action against defendants, an individual and a corporation, and sought to compel the individual and corporation to submit to audits in accordance with the agreements and declarations of trust that established the union funds. The corporation filed a motion for a protective order under Fed. R. Civ. P. 26 and the union funds filed a motion for sanctions.

Overview
The union funds alleged that the individual was formally bound to the trust agreements pursuant to its collective bargaining agreement. The corporation was not so bound, but the union funds alleged that it was bound because it was the alter ego of the individual. A request for production of documents was served upon the corporation and the corporation claimed that the union funds were entitled to the documents only if they could have demonstrated sufficient basis for one or more of their alter ego theories. The union funds argued that the protective order should have been denied because the corporation failed to comply with U.S. Dist. Ct., N.D. Ill., R. 12(k), which required denial of discovery motions that had not been preceded by consultation aimed at resolving the discovery dispute. The court found that at least informal discussion had taken place and agreed with the corporation that initial discovery should have been limited to matters relating to the corporate identity issue, but held that the corporation failed to demonstrate that the documents were irrelevant to the alter ego status and it appeared that discovery could have reasonably led to relevant information.

Outcome
The court denied the corporation's motion for a protective order and also denied the union funds' motion for the imposition of sanctions.

Judges: **[*1]** Charles P. Kocoras, United States District Judge.

Opinion by: KOCORAS

Opinion

MEMORANDUM OPINION

This matter is before the court on Defendant Del Kay Corporation's motion for a protective order. The plaintiffs oppose the motion and have asked that the defendant be sanctioned for bringing it. For the reasons set forth below, the motion is denied.

BACKGROUND

According to the complaint in this case, the Agreements and Declarations of Trust establishing the plaintiff funds require participating employers to submit to audits conducted at the funds' direction. Through this action, the funds seek to compel submission to audits by two employers. The plaintiffs allege that Defendant Salvador Ortega d/b/a Sal's Drywall Service ("Ortega") is formally bound to the Trust Agreements pursuant to its collective bargaining agreement. Del Kay is not so bound, but is, according to the funds, the alter ego of Ortega in one of the following ways:

(a) the business transactions and operations of the [two companies] are and have been interrelated and intermingled; and/or (b) the employees or [the companies] have either been paid for work within the occupational scope of the Collective Bargaining Agreements performed **[*2]** for Ortega out of the accounts of Del Kay, and/or (c) the management and affairs of Del Kay are for all business purposes controlled and operated by the individuals who manage and control the affairs of Ortega; and/or (d) the same individuals own and control [the two companies]; and/or (e) Del Kay is merely the disguised continuance of Ortega.

Amended Complaint para. 8. In opposition to the instant motion, the plaintiffs have submitted the affidavit of a Union representative which suggests that the allegations of para. 8 are based on a finding that check stubs of two Ortega employees showed payment by Del Kay. The plaintiffs contend that by virtue of the alleged relationship with Ortega, Del Kay is bound to the Trust Agreements and must therefore open its books to an audit.

A Request for Production of Documents and Things was served on both defendants along with the complaint. This request essentially asks the defendants to allow the funds' auditors to inspect the very documents necessary for the conduct of an audit. According to Del Kay, the plaintiff is entitled to many of those documents only if it can demonstrate sufficient basis for one or more of the alter ego theories listed **[*3]** in para. 8 of the amended complaint. The defendant therefore requests that initial discovery be limited to those documents bearing on the alleged alter ego relationship of the two defendants. Del Kay states that such limitation would initially bar access to the employer's quarterly tax returns, state unemployment compensation forms, cash disbursement journal, cash receipts journal, general ledgers, invoices of subcontractors and suppliers, listing or schedule of subcontractors,

contribution reports involving employees filed with other trust funds, IRS Forms 1099 and 1096, construction loan data, waivers of lien, and federal income tax returns.

The plaintiffs assert that the defendant's request should be denied because the defendant failed to comply with General Rule 12(k). That rule requires denial of discovery motions that have not been preceded by consultation aimed at resolving the discovery dispute. In addition, the plaintiffs argue that the requested discovery is relevant to this action because it is reasonably calculated to lead to information concerning a possible delinquency in contributions by Del Kay. Finally, the funds re-assert the legal and factual allegations in their **[*4]** complaint by arguing that Del Kay must comply with the discovery requests because it is contractually bound, through Ortega, to submit to audits by the funds. Based on these arguments, the funds further assert that Del Kay's motion is both frivolous and unreasonable, and therefore that Del Kay should be sanctioned under Federal Rule of Civil Procedure 11.

DISCUSSION

1. General Rule 12(k)

The local rules of this district state that discovery motions will not be entertained unless the movant includes with the motion a statement indicating that the movant has attempted to consult opposing counsel to resolve the differences which are the subject of the motion. N.D.Ill. General Rule 12(k). If such consultation has occurred the statement must indicate the date, time and place of the conference, and the names of the participating parties. Id. If no discussion has taken place, the statement must recite the efforts made by counsel to engage in consultation. Id.

Although the defendant's brief in support of its motion indicates that the defendant's attorney had at least requested from opposing counsel authorities to support the plaintiffs' discovery request, no Rule 12(k) statement **[*5]** was submitted. Based on this omission, the plaintiffs argue that the motion should be denied. In reply, Del Kay's lawyer filed an affidavit indicating that informal discussions had taken place with regard to the subject matter of this motion. The plaintiffs have objected to this affidavit as self-serving and belated.

But for the fact that the rule's substantive requirements appear to have been met, this court would not hesitate to impose the sanction provided by Rule 12(k). It is pretty clear from the parties briefs on this motion that at least informal discussion of the propriety of the plaintiffs' discovery has taken place and that further discussion is unlikely to be productive. Accordingly the court will proceed to the merits of the motion.

2. Federal Rule 26

Relief from otherwise relevant discovery is granted only upon a showing of "good cause" for such relief. Fed. R. Civ. P. 26(c). This showing may not be met by bare allegations of irrelevance or unnecessary burden. Rather the movant must demonstrate why it is entitled to protection from the "annoyance, embarrassment, oppression, or undue burden or expense" of the requesting party's discovery. Fed. R. Civ. P. 26(c).

The defendant **[*6]** argues that because the funds will be legally entitled to audit Del Kay only once they have shown that Del Kay is bound to the Trust Agreements through Ortega, initial discovery in this case should be limited to matters relating to the corporate identity issue. There is much logic to this argument, and in cases past this court has bifurcated discovery to spare the parties unnecessary burden or expense. See Wilson v. Wilson, No. 89 C 9620, Memorandum Opinion and Order at 8 (N.D.Ill. August 2, 1991)(access to documents relevant to damages or remedy of accounting barred pending discovery relevant to issue of duty and liability).

However, the defendant has failed to demonstrate that the documents to which it objects are irrelevant to the alleged alter ego status, and it appears to the court that discovery of those documents could reasonably lead to information relevant to the question of Del Kay's relationship (or the lack) with Ortega and the funds. Accordingly the defendant's motion for a protective order is denied.

As is indicated by the foregoing, the defendant's motion is not so devoid of merit as to justify the imposition of sanctions. Therefore the plaintiff's request for Rule **[*7]** 11 sanctions is also denied.

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Colon v. Town of Cicero

United States District Court for the Northern District of Illinois, Eastern Division

August 3, 2015, Decided; August 3, 2015, Filed

Case No. 12 CV 5481

Reporter
2015 U.S. Dist. LEXIS 101456 *; 2015 WL 4625003

WANDA COLON, as Administrator of the Estate of Cesar Munive, deceased, Plaintiff, v. TOWN OF CICERO and Cicero Police Officer DONALD GARRITY, Defendants.

Subsequent History: Reconsideration denied by Colon v. Town of Cicero, 2015 U.S. Dist. LEXIS 110961 (N.D. Ill., Aug. 21, 2015)

Prior History: Munive v. Town of Cicero, 2013 U.S. Dist. LEXIS 44312 (N.D. Ill., Mar. 28, 2013)

Counsel: [*1] For G. Cesar Munive, as Administrator of the Estate of Cesar Munive, Deceased, Plaintiff: Daniel J. Stohr, LEAD ATTORNEY, Chicago, IL; Jonathan I. Loevy, LEAD ATTORNEY, Loevy & Loevy, Chicago, IL; Elizabeth C. Wang, Julie Marie Goodwin, Loevy & Loevy, Chicago, IL; Joel H. Feldman, Law Offices of Joel H. Feldman, Chicago, IL.

For Town of Cicero, Defendant: K. Austin Zimmer, LEAD ATTORNEY, Del Galdo Law Group, LLC, Berwyn, IL; Cynthia Sara Grandfield, Eric T Stach, Joseph Anthony Giambrone, Veronica Bonilla-Lopez, Del Galdo Law Group, LLC, Berwyn, IL.

For Donald Garrity, Cicero Police Officer, Defendant: Craig Daniel Tobin, LEAD ATTORNEY, Tobin & Munoz, LLC, Chicago, IL; Sean Michael Sullivan, Tobin & Munoz, LLC, Chicago, IL; Tomas Petkus, Tobin & Munoz, L.L.C., Chicago, IL.

Judges: SIDNEY I. SCHENKIER, United States Magistrate Judge.

Opinion by: SIDNEY I. SCHENKIER

Opinion

MEMORANDUM OPINION AND ORDER

Defendant Donald Garrity, a police officer for the City of Cicero, refused to answer a number of questions at his deposition on April 28, 2015. Mr. Garrity based his refusal to answer on (1) his Fifth Amendment privilege against self-incrimination; (2) a "secret clearance" bar to answering questions about his military experiences; and **[*2]** (3) his claim that certain questions were outside the scope of discovery permitted by the district court judge when he allowed a reconvened deposition of Mr. Garrity. The plaintiff has moved to compel Mr. Garrity's responses to questions he refused to answer and the topics they involved (doc. # 272: Pl. Mot. to Compel). Mr. Garrity has filed a response to the motion (doc. # 279: Def. Resp. to Mot. to Compel), and the plaintiff has filed a reply (doc. # 283: Pl. Reply to Mot. to Compel). For the following reasons, we grant the plaintiff's motion to compel; Mr. Garrity must answer the questions with respect to the topics on which he declined to testify at his April 28, 2015 deposition.

I.

We set forth the background relevant to the instant motion. Mr. Garrity was working as a police officer for the City of Cicero when he was involved in an incident during which he shot and killed Cesar Munive (doc. # 191: Answer to Third Amended Complaint). Mr. Munive's estate subsequently filed a lawsuit against the City of Cicero and Officer Garrity for, *inter alia*, wrongful death, excessive force, and (against Cicero only) negligent hiring (doc. #178: Third Amended Complaint). During Mr. Garrity's first **[*3]** deposition on April 14, 2014, the plaintiff learned that Mr. Garrity had falsified certain parts of his application for employment with the Cicero police department (doc. # 279: Def. Resp. to Mot. to Compel, Ex. 5). At that deposition, Mr. Garrity also stated that, as a result of the events surrounding Mr. Munive's death, he suffered from post-traumatic stress disorder ("PTSD"), for which he was taking medication and receiving mental-health therapy (doc. # 194: PL Mem. on Relevance of Def. Medical Records, Ex. B).

On October 16, 2014, the presiding district judge issued an order allowing the plaintiff to take a second deposition of Mr. Garrity limited to "additional information" that the plaintiff's did not have when they took Mr. Garrity's first deposition (doc. 279: Def. Resp. to Mot. to Compel, Ex. 4). At the second deposition, taken in April 2015, Mr. Garrity asserted his Fifth Amendment privilege against self-incrimination as a basis for refusing to testify about (1) an interview he had with a psychologist who examined him in connection with his application for employment as a Cicero police officer, and (2) a document he completed as part of that interview. He also refused to answer a number **[*4]** of questions about his military experience during the 1993 Waco siege, on the ground that he was subject to a "secret clearance through the military" that prevented him from being able to describe his activities and duties (doc. # 279: Def. Resp. to Mot. to Compel, Ex. 6).

Mr. Garrity now contends that he should not be required to answer questions about his pre-employment psychological testing or his military activities at Waco both because the questions implicate his Fifth Amendment privilege against self-incrimination and also because the subject matter does not concern new information obtained after Mr. Garrity's first deposition. As we explain below, we reject both of these arguments.[1]

II.

Simply put, the Fifth Amendment protects against self-incrimination. U.S. Const, amend. V ("[n]o person . . . shall be compelled in any criminal case to be a witness against himself."). The protection covers "any disclosures **[*5]** which [a] witness reasonably believes could be used in a criminal proceeding or could lead to other evidence that might be so used." *Kastigar v. United States*, 406 U.S. 441, 444-45, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). And

[1] Mr. Garrity's response memorandum makes no effort to establish that he had a "secret clearance," or that any such clearance forms a proper basis for refusing to answer deposition questions about his experiences at Waco. Mr. Garrity has thus failed to establish that his alleged clearance was a proper basis to refuse to answer questions.

while the Court must liberally construe the privilege in order to fully protect the right it was intended to secure, *Shakman v. Democratic Organization of Cook County*, 920 F.Supp.2d 881, 887 (N.D. Ill. 2013) (*Schenkier, J.*), the protection is limited to those situations in which the witness's fear of prosecution from a direct answer is reasonable. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951).

That is, a witness may refuse to answer a question only if the (truthful) answer would have some tendency to subject him or her to criminal liability. *Genova v. Kellogg et. at.*, No. 12 C 3105, 2015 U.S. Dist. LEXIS 82770, 2015 WL 3930351 at *5 (N.D. Ill. June 25, 2015), *citing In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 663-64 (7th Cir. 2002). The Fifth Amendment does not give a witness *carte blanche* to refuse to answer all questions simply because he may subjectively believe that he will incriminate himself by giving truthful answers. *Shakman*, 920 F.Supp.2d at 887. The witness must have an objectively reasonable basis to perceive some real danger of prosecution; a perception that is imaginary or fanciful is not an objectively reasonable one. *United States v. Apfelbaum*, 445 U.S. 115, 128, 100 S. Ct. 948, 63 L. Ed. 2d 250 (1980).

The basis for Mr. Garrity's Fifth Amendment assertions is a letter that plaintiff's counsel sent to counsel for the City of Cicero on October 14, 2014, citing Mr. Garrity's April 2014 deposition testimony in which he admitted to providing false information on parts **[*6]** of his employment application to become a Cicero police officer (doc. # 279, Def. Resp. to PL Mot. to Compel, Ex. 1). In the letter, plaintiff's counsel stated that lying on an employment application can result in felony charges for forgery, mail fraud and wire fraud, and requested that the Town of Cicero supplement its discovery responses with any documents relating to attempts that may have been made by the Town of Cicero to refer Mr. Garrity for prosecution. Mr. Garrity asserts that he is entitled to claim Fifth Amendment protection with respect to any additional questions about whether he provided false or misleading information on documents related to his application to become a Cicero police officer because he fears prosecution for mail fraud, wire fraud and forgery.[2]

In their briefs on this motion, the parties discuss whether mail fraud, wire fraud, perjury, and forgery are possible felonies that could result from Mr. Garrity's false statements. However, the briefs also recognize that the statute of limitations period for pursuing prosecution has expired for all of those laws except forgery. And, in open court on July 29, 2015, Mr. Garrity's attorney further acknowledged that the statute of limitations has run for the crimes of wire fraud, mail fraud, and perjury and thus, Mr. Garrity could not be prosecuted for these crimes.

That leaves forgery as the only offense discussed by the parties for which the statute of limitations has not passed. Therefore, to establish that he may properly invoke a Fifth Amendment privilege, Mr. Garrity must show that he has a reasonable fear that his answers to plaintiff's questions could subject him to prosecution for forgery. *See Shakman*, 920 F.Supp.2d at 888 ("The party attempting to invoke the privilege bears the burden of establishing its foundation."). Further, Mr. Garrity must establish the possibility **[*8]** of self-incrimination with respect to each question individually, and explain to the Court as to each question "why an answer might tend to be incriminating." *Id.*

Mr. Garrity has not demonstrated a reasonable fear that he may be prosecuted for forgery for making false statements on his employment application. In his brief, Mr. Garrity argues that because plaintiff's counsel characterized Mr. Garrity's actions as possibly constituting forgery in the October 14, 2014 letter to the Town of Cicero, he had a legitimate basis to fear being prosecuted for that felony. But a bald statement by a lawyer that an action may constitute a crime does not make it so (and no one has adduced any evidence that Cicero in fact ever referred Mr. Garrity to authorities for prosecution for forgery). Plaintiff's counsel could have suggested that Mr. Garrity's falsification of his employment application would subject him to prosecution for bank robbery, but no one would argue that Mr. Garrity could reasonably refuse to answer questions out of a fear of being charged with that

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[2] The questions Mr. Garrity refused to answer concerned psychological testing he underwent as part of the application process to become a Cicero police officer. Some of the questions he answered, either in an interview or on a psychological profile document, were similar to questions he falsely answered on his employment application. For the purposes of this motion, we considered whether the giving of false information in any of these **[*7]** situations — on the employment application, in an interview, or on the psychological profile document — could support a charge of forgery under Illinois law.

offense. Unless Mr. Garrity can fulfill his burden of showing his apprehension of self-incrimination is reasonable with respect to each **[*9]** individual question, he may not refuse to answer them.

In this case, Mr. Garrity fails to meet his Fifth Amendment burden because his actions fail to satisfy all elements of forgery. Section 17-3 of the Criminal Code of 1961, 720 ILCS 5/17-3, states that "a person commits forgery when, with an intent to defraud, he knowingly makes a false document or alters any document to make it false, and that document is apparently capable of defrauding another." A false document includes, but is not limited to, a document "whose contents are false in some material way, or that purports to have been made by another or at another time, or with different provisions, or by authority of one who did not give such authority." *Id.* Tellingly, the Illinois Supreme Court has held that the requirement that a document is forged only when it "purports to have been made by another" is an essential part of the statute. *People v. De Filippo*, 235 Ill. 2d 377, 919 N.E.2d 921, 335 Ill. Dec. 896 (Ill. 2009) (defendant who lied in letters to pension board about his dates of service for purpose of securing extra pension credit did not commit forgery; although the letters contained false information they did not purport to come from someone other than defendant).

The facts here are quite similar to those in *DeFilippo*. Mr. Garrity falsified his **[*10]** employment application, and allegedly other documents,[3] because he "wanted a job" as a Cicero police officer (doc. 279: Def. Resp. to Mot. to Compel, Ex. 5 pg. 32). But, there is no allegation or evidence that someone other than Mr. Garrity completed or signed the documents, or that he intended to make anyone believe that someone else completed or signed the documents. As a result, Mr. Garrity's conduct in making false statements in his employment application or other documents does not satisfy the elements needed to fall within the forgery statute, and he has no reasonable fear of prosecution for forgery. Therefore, he cannot refuse to answer any of the questions concerning his interview with the psychologist or the document he filled out in preparation for his interview for the position of a police officer for the Town of Cicero.

III.

Mr. Garrity also argues that he should not have to answer questions related to his falsification of employment information or his experience as a member of the **[*11]** military at Waco because those topics were covered at his first deposition and thus do not constitute new information under the scope of the district judge's October 16, 2014 order allowing a farther deposition of Mr. Garrity. We disagree.

Plaintiff's questions about Mr. Garrity's military service at Waco and his psychological testing given as part of his employment application did not merely rehash matters covered at Mr. Garrity's 2014 deposition. It was only during Mr. Garrity's first deposition that the plaintiff became aware that Mr. Garrity lied on his employment application; it was this revelation that led to receipt of supplemental discovery concerning Mr. Garrity's psychological testing. While questions concerning his interview and personality test may have been similar to those concerning his falsifications in his employment application, they concerned a new and different document and thus were proper under the scope of the district court's order.

Similarly, Mr. Garrity did not raise the issue of PTSD until his first deposition, after which the plaintiff sought medical records and other discovery materials related to his condition. As part of the investigation into Mr. Garrity's **[*12]** allegation that he did not suffer from PTSD until after he shot Mr. Munive, plaintiff is entitled to discover whether there is evidence that the PTSD in fact predated that event. Given that Mr. Garrity also testified that he had previously (and temporarily) suffered from PTSD after another shooting when he was an officer at the Berwyn police department, the plaintiff is entitled to question Mr. Garrity about his activity at Waco and whether that event could also have caused his PTSD.

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[3] The plaintiff alleges that Mr. Garrity also falsified information on the psychological profile form he completed as part of the application and interview process to become a Cicero police officer.

CONCLUSION

For the reasons stated above, we grant plaintiff's motion to compel (doc. # 272). Mr. Garrity shall answer questions on the topics on which he declined to testify at his April 2015 deposition. The further deposition shall be limited to those specific topics, shall not exceed one hour in length, and shall be completed on a date convenient to the parties but no later than August 25, 2015.

ENTER:

/s/ Sidney I. Schenkier

SIDNEY I. SCHENKIER

United States Magistrate Judge

DATED: August 3, 2015

End of Document

Cordova v. United States

United States District Court for the District of New Mexico

July 31, 2006, Filed

No. CIV 05-563 JB/LFG

Reporter
2006 U.S. Dist. LEXIS 98226 *

ALFONSO CORDOVA, SR., individually and as personal representative of the estate of his son, ALFONSO CORDOVA, JR., EUFELIA CORDOVA, DONNA CORDOVA, ANNA MARIE CORDOVA, individually and as next friend of her minor son, Joseph Alfonso Roybal, GRACE CORDOVA, individually and as next friend of her minor child Timothy Ray Cordova, EMILY MARTINEZ, CLARIZA CORDOVA and JULIA SALAZAR, Plaintiffs, vs. THE UNITED STATES OF AMERICA and THE NEW MEXICO HEART INSTITUTE, P.A., a New Mexico corporation, Defendants.

Prior History: Cordova v. United States, 2006 U.S. Dist. LEXIS 95643 (D.N.M., July 31, 2006)

Counsel: [*1] For Plaintiff Alfonso Cordova, Sr. individually and as personal representative: William E. Snead, Albuquerque, New Mexico; Daniel Shapiro, Kallie Dixon, Shapiro Bettinger Chase L.L.P., Albuquerque, New Mexico.

For Defendant New Mexico Heart Institute, P.A.: William C. Madison, Michael Dekleva, Madison Harbour & Mroz PA, Albuquerque, New Mexico.

For Defendant United States of America: David C. Iglesias, United States Attorney for the District of New Mexico, Elizabeth Martinez, Assistant United States Attorney, Albuquerque, New Mexico.

For Dr. Beverly Demchuk: Lynn Sharp, Charles P. List, Sharp & Bowles, P.A., Albuquerque, New Mexico.

Judges: James O. Browning, UNITED STATES DISTRICT JUDGE.

Opinion by: James O. Browning

Opinion

AMENDED [1] MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on the Plaintiffs' Motion for Sanctions and to Compel Answer, filed April 5, 2006 (Doc. 72). The Court held **[*2]** a hearing on this motion on May 23, 2006. The primary issues are: (i) whether the Court should sanction the deponent's counsel for inappropriate behavior during a deposition; (ii) whether the Court should compel Dr. Beverly Demchuk, the deponent, to answer certain questions that Plaintiff Alfonso Cordova, Sr. attempted to ask during her deposition; and (iii) whether the Court should instruct the jury that it should assume that Dr. Demchuk answered certain questions in the affirmative. Because Dr. Demchuk's lawyer's conduct is inconsistent with the Federal Rules of Civil Procedure, the Court will grant the motion in part and compel Dr. Demchuk to answer certain questions, but will deny the motion to the extent that it seeks the Court to instruct the jury on certain issues.

PROCEDURAL BACKGROUND

On May 23, 2005, the Plaintiffs filed suit against the Defendants under the Federal Tort Claims Act and the Federally Supported Health Centers Assistance Act for allegedly failing to properly care for Alfonso Cordova, Jr. while he was treated for an aortic aneurysm. *See* Complaint PP 1, 12-23, at 1, 3-6, filed May 23, 2005 (Doc. 1). According to the Plaintiffs, a New Mexico Heart Institute employee **[*3]** had measured the size of the aneurysm by ultrasound as 6.5cm on August 25, 2003. *See* Motion for Sanctions at 1. The Plaintiffs allege that, subsequently, Dr. Demchuk had measured the size of the aneurysm as 7.5cm by cardiac catheterization. *See id.* The Plaintiffs assert that Cordova died on September 8, 2003, when the aneurysm ruptured, the night before he was scheduled to see a cardiac surgeon from the Heart Institute. *See id.* at 1-2.

The Plaintiffs move for sanctions against Dr. Demchuk's lawyer for his conduct during Dr. Demchuk's deposition on February 6, 2006. *See id.* at 2. Specifically, the Plaintiffs contend that Dr. Demchuk's lawyer made argumentative and suggestive objections, engaged in off-the-record conferences with Dr. Demchuk during pending questions, and instructed or influenced Dr. Demchuk not to answer some of the questions, thereby obstructing the deposition. *See id.* at 2-22. The Plaintiffs ask the Court to award sanctions personally against Dr. Demchuk's lawyer of $ 1,000.00 for the expenses that the Plaintiffs incurred in making the motion. *See id.* at 19. The Plaintiffs also ask that the Court compel Dr. Demchuk to answer certain questions at a new deposition. *See* ***[*4]*** *id.* at 19-20. Further, the Plaintiffs request that the Court instruct the jury, when this case goes to trial, that Dr. Demchuk did not answer three questions and that it should treat those questions as if they had been answered affirmatively; the Plaintiffs request that the Court compel Dr. Demchuk to answer a fourth question. *See id.* at 20-21.

The Defendants deny that Dr. Demchuk's lawyer or the attorney for Defendant New Mexico Heart Institute, William Madison, engaged in this conduct and blame the Plaintiffs' attorney for asking questions that elicited repeated objections from Dr. Demchuk's lawyer and the Defendants. *See* Defendants' Response at 3-20, filed April 24, 2006 (Doc. 78). The Defendants argue that it would be unfair to the Heart Institute to be punished, through the Plaintiffs' proposed jury instructions, for the actions of a non-party's attorney. *See id.* at 10-20. In his brief, Dr. Demchuk's lawyer also denies that his conduct violated the Federal Rules of Civil Procedure. *See* Demchuk Response at 7-10, filed April 24, 2006 (Doc. 79).

RULE 30(d)

Rule 30(d)(1) of the Federal Rules of Civil Procedure states that "[a]ny objection during a deposition must be stated concisely **[*5]** and in a non-argumentative and non-suggestive manner." In applying this rule, courts have found that frequent and suggestive objections by opposing counsel can run afoul of rule 30(d)(1). *See Damaj v. Farmers*

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[1] In the Court's original Memorandum Opinion and Order, filed July 30, 2006 (Doc. 100), it incorrectly referred to Mr. Daniel Shapiro as "David Shapiro." *See id.* at 12. This Amended Memorandum Opinion and Order corrects this mistake, on page 12, and makes no other changes to the original Memorandum Opinion and Order.

Ins. Co., Inc., 164 F.R.D. 559, 560 (N.D. Okla. 1995)(McCarthy, J.). "If counsel objects to a question at deposition based on the form of the question, counsel may briefly explain the objection if the deposing counsel asks for an explanation and counsel does not in the explanation suggest an answer to the deponent." *Orr v. City of Albuquerque*, CIV No. 01-1365 JP/RHS, Memorandum Opinion and Order at 5 (D.N.M July 24, 2003)(Parker, J.)(citing *Quantachrome Corp. v. Micromeritics Instrument Corp.*, 189 F.R.D. 697, 701 n. 4 (S.D. Fla. 1999)(Gonzalez, J.)).

Courts have also interpreted this rule to mean that it is improper for counsel "to act as an intermediary, interpreting questions, deciding which questions the witness should answer." *Plaisted v. Geisinger Medical Center*, 210 F.R.D. 527, 534 (M.D. Pa. 2002)(McClure, J.)(citations and internal quotations omitted). This construction means that, if a witness is confused about a question, or if the question seems awkward or vague, the **[*6]** witness may ask deposing counsel to clarify the question; securing clarification is not the job of the witness' counsel. *See Quantachrome Corp. v. Micrometritics Instrument Corp.*, 189 F.R.D. at 700 (noting that the witnesses were scientists and engineers who were "[s]urely . . . intelligent enough to know when they do not understand a question"). "Counsel violates Rule 30(d)(1) when counsel's objections result in an incomplete answer or in the witness's adoption of counsel's statement. . . ." *Orr v. City of Albuquerque*, Memorandum Opinion and Order at 4 (quoting *Plaisted v. Geisinger Medical Center*, 210 F.R.D. at 534).

ANALYSIS

At the parties' request, the Court has reviewed, not only the highlighted and underlined portions of the deposition, and the excerpts of the deposition -- multiple times -- but the Court has also reviewed the transcript of the complete deposition. During Dr. Demchuk's deposition, Dr. Demchuk's lawyer violated rule 30(d) of the Federal Rules of Civil Procedure and caused the witness to answer questions incompletely or not at all. Dr. Demchuk's lawyer violated the rules in three ways. First, he made suggestive or "coaching" or "speaking" objections throughout the **[*7]** deposition. Second, he engaged in off-the-record conferences with the witness during pending questions. Finally, Dr. Demchuk's lawyer instructed the witness not to answer a question when the rules did not allow such an instruction, and also influenced the witness to refuse to answer certain questions. Dr. Demchuk's lawyer's conduct during the deposition frustrated the fair examination of Dr. Demchuk and, under the rules, is subject to sanction.

I. *DR. DEMCHUK'S LAWYER VIOLATED RULE 30(d)(1) BY MAKING FREQUENT ARGUMENTATIVE AND SUGGESTIVE OBJECTIONS*.

During Dr. Demchuk's deposition, Dr. Demchuk's lawyer made numerous lengthy objections that also suggested an answer. *See, e.g.*, Deposition of Beverly Demchuk at 47:20-48:5, 50:20-51:1,51:22-52:5, 87:13-25 (taken February 6, 2006)(hereinafter "Dr. Demchuk Depo."). Dr. Demchuk's lawyer's objections were frequently much longer than necessary to convey the gist of his points. *See id.* at 47:20-48:5 (eighty-two words); *id.* at 50:20-21 (fifty-nine words); *id.* at 52:22-52:5 (eighty-two words); *id.* at 67:7-17 (ninety-one words); *id.* at 68:19-69:6 (110 words). For example:

> [Dr. Demchuk's lawyer]: And I'm going to join in the objection. Dan, to the **[*8]** extent that Dr. Demchuk is here as a fact witness today, not as an expert witness -- and at this point in time, you are posing what is essentially a hypothetical, because she's already told you that the correlation between the echocardiogram and her cath measurements cannot be compared in that fashion. So you're essentially asking her to assume that there was a 10-millimeter enlargement, and I don't think that's been established.

Id. at 47:20-48:5.

> [Dr. Demchuk's lawyer]: Dan, here's the problem we've got. You are, at this point in time, clearly asking Dr. Demchuk to give standard-of-care testimony about the care that she provided to Mr. Cordova. She's here as a fact witness. As you know from previous cases that we've had, the risk is, if she gives standard-of-care testimony, it is conceivable that she becomes the standard-of-care expert by which the defendant is going to have to defend this case, and that's not appropriate. So to the extent that I feel that you're asking her direct

> standard-of-care questions about the care she provided to Mr. Cordova, I'm going to have to instruct her not to answer.

Id. at 68:19-69:6.

The deposition's transcript shows that her lawyer 's coaching began **[*9]** to have an effect on Dr. Demchuk, who soon refused to answer questions because she was there as a "fact witness" who was not to give opinions on "standard of care": "A. I'm here as a fact witness. I'm not here to give opinions on -- as far as I understand, opinions on standard of care. So that seems to be in the latter category, there." *Id.* at 74:13-16. As this activity continued, it became impossible to know if Dr. Demchuk's answers emanated from her own line of reasoning or whether she adopted Dr. Demchuk's lawyer's reasoning from listening to his objections.

Furthermore, the Plaintiffs were entitled to question Dr. Demchuk about her knowledge of the dangers associated with an expanding aneurysm. Her knowledge of such a growth is related to her assessment of Cordova Jr.'s condition and her subsequent treatment, or lack of treatment, of that condition. Though there may be some other explanation for the appearance of the growth that discovery may reveal, the Plaintiffs are entitled to question Dr. Demchuk on her knowledge of the dangers associated with such a growth. The questions relate to Dr. Demchuk's knowledge of the facts of this case and do not attempt to elicit expert testimony **[*10]** from Dr. Demchuk. Because Dr. Demchuk's lawyer's objections were not concise and suggested answers to Dr. Demchuk, they violated rule 30(d)(1)'s command that any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner.

II. *DR. DEMCHUK'S LAWYER IMPROPERLY ENGAGED IN OFF-THE-RECORD CONFERENCES DURING THE DEPOSITION WHILE A QUESTION WAS PENDING*.

Three times during the deposition, Dr. Demchuk's lawyer and Dr. Demchuk engaged in off-the-record conferences during the deposition while a question was pending. *See id.* at 52:6-18, 64:22-65:4, 68:8-69:19. Several courts have disapproved of such conferences, because they interfere with the deposing attorney's pursuit of the truth and allow the witness's attorney to suggest answers to the witness. *See Plaisted v. Geisinger Med. Ctr.*, 210 F.R.D. at 533; *In re Stratosphere Corp. Sec. Litig.*, 182 F.R.D. 614, 621 (D. Nev. 1998)(Hunt, M.J.); *Hall v. Clifton Precision*, 150 F.R.D. 525, 528-29 (E.D. Pa. 1993)(Gawthrop, J.). The transcript reflects that the conferences interrupted the flow of the deposition, because after two conferences Dr. Demchuk or her counsel asked to have the question repeated and **[*11]** refused to answer the Plaintiffs' question following another conference:

> Q. (By Mr. Shapiro) Will you please answer my question?
> A. May I just confer with my counsel here?
> MR. SHAPIRO: Sure.
> [Recess taken from 11:34 AM to 11:35 AM, and testimony continued as follows:]
> [Dr. Demchuk's lawyer]: Is there a question out at this point in time, Dan, or do you want her to try to add to what she's already told you?
> MR. SHAPIRO: There's a question out that hasn't been answered, and I'm happy to repeat it.
> [Dr. Demchuk's lawyer]: Okay. Why don't you do that, just so we're clear what it is.
> * * *
> Q. So is it your testimony that if they asked you could they go to the hospital now, your testimony is you probably would have said, "Yes, you can"?
> A. Can I go off the record again here with my counsel?
> MR. SHAPIRO: Yes.
> [Discussion off the record.]
> A. Sorry, can you repeat the question?
> * * *
> Q. And if the family had asked or Mr. Cordova had asked to be admitted, and you said that's not necessary, that would have been a violation of your training, right?
> MR. MADISON: Object to the form of the question.
> [Dr. Demchuk's lawyer]: Join.
> [Discussion off the record.]

MR. SHAPIRO: Let the record reflect that the witness is talking **[*12]** now to her counsel off the record with a question pending.
[Dr. Demchuk's lawyer]: Dan, here's the problem we've got. You are, at this point in time, clearly asking Dr. Demchuk to give standard-of-care testimony about the care that she provided to Mr. Cordova. She's here as a fact witness. As you know from previous cases that we've had, the risk is, if she gives standard-of-care testimony, it is conceivable that she becomes the standard-of-care expert by which the defendant is going to have to defend this case, and that's not appropriate. So to the extent that I feel that you're asking her direct standard-of-care questions about the care she provided to Mr. Cordova, I'm going to have to instruct her not to answer.
MR. SHAPIRO: Well, you give your instructions as you want to give them, and we'll see what the judge has to say about it.
Q. (By Mr. Shapiro) I have a question that's pending that you've spoken to your lawyer for the last three minutes about; is that correct, Dr. Demchuk?
A. You recall that I've mentioned several times that I don't recall having conversations.

Q. I understand that. My question to you -- you have been talking to your lawyer about your answer to my pending question **[*13]** for the last two or three minutes, right?
A. And I'm not answering.

Demchuk Depo. at 52:6-18, 64:22-65:4, 68:8-69:19. If Dr. Demchuk wished to speak with her attorney, she should have waited until there were no questions pending. By participating in these conferences, Dr. Demchuk's lawyer improperly interposed himself between the witness and the deposing attorney.

III. ***DR. DEMCHUK'S LAWYER VIOLATED RULE 30(d)(1) BY INSTRUCTING OR INFLUENCING DR. DEMCHUK NOT TO ANSWER***.

At one point, Dr. Demchuk's lawyer instructed Dr. Demchuk not to answer one of the Plaintiffs' questions. *See id.* at 68:19-69:6. Rule 30(d)(1) provides, however, that an attorney may instruct a witness not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under rule 30(d)(4). None of these circumstances was present: Dr. Demchuk's lawyer based his instruction on the fact that Dr. Demchuk was not a "standard-of-care" witness, not to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under rule 30(d)(4).

Throughout the rest of the deposition, it is apparent that Dr. Demchuk's lawyer's repeated references to Dr. **[*14]** Demchuk's status as a non-expert witness encouraged Dr. Demchuk to obstruct the deposition by refusing, on her own, to answer questions on that ground. *See id.* at 73:24-74:16, 75:25-76:13, 87:4-12. For instance: "A. I'd like to be able to answer a question based on facts, rather than speculation and/or standard of care." *Id.* at 76:7-8. Later, Dr. Demchuk informed the parties: "I'm going to, again, not answer that, because of the issue of facts. I have to be able to respond to questioning regarding facts, rather than speculation and/or expert witness." *Id.* at 87:9-12. While Dr. Demchuk's counsel may raise concise, non-argumentative objections, Dr. Demchuk may not herself refuse to answer questions -- outside of the three limited areas protected by rule 30(d)(1) -- based on her own legal analysis. Just as a lawyer can not tell a doctor how to perform surgery in the operating room, a witness does not have the last word on the propriety of questions posed to her by opposing counsel. By encouraging such behavior, Dr. Demchuk's lawyer violated rule 30(d)(1)'s commands.

IV. ***THE COURT WILL AWARD FEES AND COMPEL DEMCHUK TO ANSWER THE PLAINTIFFS' QUESTIONS***.

Rule 30(d)(3) provides that "[i]f the **[*15]** court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof." The Court has reviewed the transcript and has determined that Dr. Demchuk's lawyer frustrated the Plaintiffs from receiving complete answers to two questions: (i) "Would you agree that if the aneurysm had grown 10 millimeters from August 25th to September 4th, that would be a very dangerous situation?"; and (ii) "And if the family had asked for admission, and you had said that it is not necessary, that would have been a violation of your training, right?" The Plaintiffs are entitled to more direct answers. The Court believes that the Plaintiffs received a complete and adequate answer to:

(i) "And you knew that Mr. Cordova was not on a beta blocker?"; and (ii) "Knowing that Mr. Cordova was not on a beta blocker, why didn't you prescribe a beta blocker?"

Having determined that Dr. Demchuk's lawyer's conduct frustrated the fair examination of Dr. Demchuk, the Court must now determine the appropriate remedy. The Plaintiffs **[*16]** have, in large part, prevailed in convincing the Court of the correctness of their position. The Court will order Dr. Demchuk's lawyer to pay $ 1,000.00 to the Plaintiffs for the cost of bringing and arguing this motion, and for being substantially correct in their position. The Court will not, however, give the Plaintiffs' proposed jury instructions at trial, because doing so would shift too much of the burden of the rules' violations to the Heart Institute rather than to Dr. Demchuk and Dr. Demchuk's lawyer. The Court will leave it to Dr. Demchuk, Dr. Demchuk's lawyer, and perhaps others to decide who will actually pay this $ 1,000.00 to the Plaintiffs.

Furthermore, the Court will order Dr. Demchuk to answer, with direct answers, the following questions: (i) "Would you agree that if the aneurysm had grown 10 millimeters from August 25th to September 4th, that would be a very dangerous situation?"; and (ii) "And if the family had asked for admission, and you had said that it is not necessary, that would have been a violation of your training, right?" The Court will overrule Dr. Demchuk's objection to these questions. Within the context of this case, given that Dr. Demchuk was a treating **[*17]** physician, even if the two questions may be getting into her expertise and professional knowledge, the questions are appropriate. The Court believes that her knowledge and training are appropriate areas for inquiry, and the Court will direct her to answer these questions. It was not that long ago that this judge was a lawyer taking and defending depositions similar to those at issue in this case. The Court understands such depositions and the danger that a lawyer often feels about his or her client answering questions like those posed here. But the Court also thinks that the questioning attorney was entitled, in this situation, to those answers. The Plaintiffs may ask limited, reasonable follow-up questions.

The **[*18]** Court also thinks that these were more than just objections to form and that many of the objections were not proper. Dr. Demchuk should have answered the questions. The Court is also concerned about some of the conferences while questions were pending; what would not be proper at trial is normally not proper at a deposition. Hence, the Court thinks that the motion is well taken on that score and that the $ 1,000.00 reimbursement for the cost of bringing this motion is appropriate.

The deposition will be at Dr. Demchuk's expense. Because Dr. Demchuk appears to have decided how she would appear for the deposition -- by video conference -- the Court will leave that decision to her this time as well. The Plaintiffs cannot insist that Dr. Demchuk must come to Albuquerque. If Dr. Demchuk wants to present herself in a particular manner, that is her choice, but it will be at her expense. If Dr. Demchuk wishes to come to Albuquerque, or if the parties cannot arrange again for video conferencing, she will need to bear her own costs in doing so. If Dr. Demchuk wishes to present herself by video conference again, she may do so and will be responsible for all expenses associated with that format. **[*19]** If the deposition is arranged by video conferencing, all participants will have to bear their own expenses as they did earlier. And if Mr. Daniel Shapiro, the Plaintiffs' counsel, wants to go out to New Jersey for those questions, he will need to pay his own expenses.

IT IS ORDERED that the Plaintiffs' Motion for Sanctions and to Compel Answer is granted in substantial part. The Court orders Mr. Lynn Sharp to pay the Plaintiffs $ 1,000.00 for the cost of bringing this motion. The Court orders Dr. Demchuk to answer the following questions: (i) "Would you agree that if the aneurysm had grown 10 millimeters from August 25th to September 4th, that would be a very dangerous situation?"; and (ii) "And if the family had asked for admission, and you had said that it is not necessary, that would have been a violation of your training, right?" The Plaintiffs may ask Dr. Demchuk limited, reasonable follow-up questions. The deposition will be at the Defendants' expense. The Court will not, however, give the Plaintiffs' proposed jury instructions at trial.

/s/ James O. Browning

UNITED STATES DISTRICT JUDGE

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Dorroh v. Deerbrook Ins. Co.

United States District Court for the Eastern District of California

September 21, 2012, Decided; September 21, 2012, Filed

1:11-cv-2120 AWI GSA

Reporter
2012 U.S. Dist. LEXIS 135590 *; 2012 WL 4364149

ROBERT DORROH, et al., Plaintiffs, v. DEERBROOK INSURANCE COMPANY, a wholly-owned subsidiary of Allstate Insurance Company, Defendant.

Subsequent History: Motion denied by Dorroh v. Deerbrook Ins. Co., 2012 U.S. Dist. LEXIS 135578 (E.D. Cal., Sept. 21, 2012)

Prior History: Dorroh v. Wurst (In re Warren), 2011 Bankr. LEXIS 1494 (B.A.P. 9th Cir., Mar. 15, 2011)

Case Summary

Overview
In this insurance bad faith action, defendant's motion to compel was granted in part; defendant may inquire into the reasons why plaintiffs' attorney continued to assert the workers' compensation claim was denied even though one plaintiff received a monetary award as this was relevant for discovery purposes.

Outcome
Both motions to compel granted in part. Both motions for sanctions denied.

Counsel: [*1] For Robert Dorroh, Barbara Dorroh, Plaintiffs: Aaron Benjamin Markowitz, Carcione, Cattermole, Dolinski, Redwood City, CA.

For Cedar Sol Warren, Plaintiff: Bradley Paul Elley, LEAD ATTORNEY, Bradley Paul Elley, Esq., Incline Village, NV.

For Deerbrook Insurance Company, a wholly-owned subsidiary of Allstate Insurance Company, Defendant: Charles A. Danaher, Peter H. Klee, McKenna Long & Aldridge LLP, San Diego, CA; Charles P. Maher, Luce Forward

Hamilton & Scripps, LLP, San Francisco, CA.

Judges: Gary S. Austin, UNITED STATES MAGISTRATE JUDGE.

Opinion by: Gary S. Austin

Opinion

ORDER REGARDING DISCOVERY DISPUTES

(Docs. 64, 66, 67, and 75)

INTRODUCTION

This case involves claims of bad faith brought by Plaintiffs, Robert Dorroh and Barbara Dorroh ("Plaintiffs") against Defendant, Deerbrook Insurance Company ("Deerbrook" or "Defendant"). The parties in this case have a contentious history. On May 4, 2102, this Court conducted an informal telephonic conference call regarding a Motion for Protective Order filed by Defendant. (Doc. 59). The Court helped the parties resolve this dispute, however, the conflicts have continued as evidenced by the number of discovery motions pending before this Court. On July 17, 2012, Plaintiffs **[*2]** filed a Motion to Compel. [1] (Doc. 64). On July 19, 2012, Defendant filed a Motion to Compel. [2] (Doc. 66). Subsequently, on July 20, 2012, Plaintiffs filed a Motion for Protective Order to limit the testimony of Mr. Stucky, Esq. during his deposition. [3] The parties filed a Joint Statement Regarding Discovery Disputes ("Joint Statement") on August 27, 2012. (Doc. 75). Both parties have requested monetary sanctions. A hearing regarding all of the above motions was set for September 7, 2012. (Doc. 68). After reviewing the Joint Statement, this Court vacated the hearing date and took the matter under submission for written findings. (Doc. 80). The Court issues the following order as set forth below.

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[1] Plaintiffs' Notice of Motion to Compel seeks to compel the following: 1) responses to Special Interrogatories Nos. 3-10; 2) an order deeming Plaintiffs' requests for admissions Nos. 1 and 3 admitted; 3) an order requiring a designee on behalf of Defendant for a further deposition on items 1 through 16 and 25 through 37 of Plaintiffs' First Entity Deposition Notice to Deerbrook; and 4) sanctions for reasonable costs and attorney's fees. The Joint Statement only references some of Plaintiffs' **[*3]** requests outlined above. The Court presumes that the other items not contained in the Joint Statement were resolved by the parties prior to filing the pleading. As such, the Court will only rule on those disputes specifically addressed in the Joint Statement.

[2] Deerbrook's Motion to Compel seeks an order: 1) to compel the testimony of Joseph Carcione Jr. to provide further responses to questions that were asked at his June 28, 2012 deposition; 2) to compel a second session of Mr. Carcione's deposition; 3) to appoint a discovery referee to preside over the deposition; and 4) to sanction Mr. Carcione and Plaintiffs' counsel for reasonable costs and attorney's fees for bringing the motion.

[3] In addition to the above motions, a Motion to be Substituted as a Party was filed by Cedar Sol Warren on July 30, 2012 which will be addressed in a separate order. (Doc. 69).

RELEVANT BACKGROUND

The complaint alleges that on March 13, 2000, Cedar Warren was driving to work when he became distracted. To avoid a collision, Mr. Warren swerved into oncoming traffic, and struck the vehicle driven by Mr. Dorroh. As a result of the accident, Mr. Dorroh was gravely injured and rendered a paraplegic. At the time **[*4]** of the accident, Cedar Warren was insured under an insurance policy issued by Deerbrook. [4]

Because he was on his way to work at the time of the accident, Mr. Dorroh filed a claim against his employer's workers compensation insurance carrier, Superior National Insurance Company ("Superior"). Mr. Dorroh also made a claim against Deerbrook for $15,000.00 which was the policy limit in exchange for a release of all claims against Mr. Warren. At the time of the demand, Deerbrook was aware that Mr. Warren was 100% at fault for the accident, and that Mr. Dorroh had suffered in excess of $300,000.00 in medical bills. (Doc. 75, at Ex. 4 and 5).

During settlement negotiations between the Dorrohs and Deerbrook, the parties agreed to a settlement of the $15,000.00 policy limit. However, before the settlement had been finalized, Deerbrook received a "notice of lien" from Superior, advising Deerbrook of an unknown lien amount. (Doc. 75, Ex. A). Based on the notice of lien, Deerbrook advised Mr. Carcione, Mr. Dorroh's attorney, that it was required under California law to list Superior as a co-payee on any settlement payment made to **[*5]** the Dorrohs. (Doc. 75, at Ex. 7 and 24). In fact, Deerbrook explained that it had concerns that if they ignored the lien notice, it could expose Mr. Warren to personal liability from the lienholder and possibly subject Deerbrook to tort liability for interfering with the lien.

Mr. Carcione refused to accept a joint payee settlement check and demanded that Deerbrook make the check payable to the Dorrohs only. Attorney Carcione contended that Deerbrook could ignore the lien notice because the workers' compensation carrier had denied the claim and no monies were paid. (Doc. 75, at Ex. 8 and 9). Deerbrook asked for written proof that the claim was denied, but Mr. Carcione did not timely provide a denial letter. [5] Mr. Carcione however, did offer to indemnify Warren and hold him harmless "from third parties who may claim against [Warren] for additional monies over and above the $15,000.00." (Doc. 75 at Ex. 9, pg. 1).

After it was clear the parties were at an impasse, the Dorrohs filed suit against Cedar Warren in Tuolumne Superior Court. In August 2006, prior to starting a bench trial, the Dorrohs' counsel proposed that Warren assign his claim to the Dorrohs, and that Warren and Deerbrook stipulate to a judgment against Warren. The Dorrohs proposed they would agree not to execute the judgment against Warren, and instead would file a bad faith case only against Deerbrook, thus avoiding the need for a trial between the Dorrohs and Warren, and limiting Warren's liability. (Doc. 75 at Ex. 10). However, Deerbrook, rejected this offer. Mr. Warren then filed for bankruptcy in the United States Bankruptcy Court, District of Oregon, prior to the entering of the verdict. The case went to trial, and on April 1, 2008, a $16 million judgment was entered against Warren. (Doc. 75, at Ex. 1, 14 and 15). Warren and Deerbrook appealed the state court **[*7]** judgment which was ultimately upheld on appeal and is now final. (Doc. 75, Ex. 15).

Meanwhile, Warren scheduled a "bad faith claim" against Deerbrook for its failure to issue a settlement check without listing Superior as a co-payee as an asset of his bankruptcy estate. In May 2009, subject to bankruptcy court approval, the Bankruptcy Trustee reached an agreement with Deerbrook for the settlement of the bad faith claim in the amount of $125,000.00. (Doc. 75, at Ex. 17, pg. 4). The Dorrohs objected to this agreement. The Bankruptcy Court held a bench trial. (Doc. 75, at Ex 17, pg. 8). After the two parties submitted bids, the Bankruptcy Court issued a decision and held *inter alia*, that Deerbrook's final bid was superior to the Dorrohs final bid and that the bad faith claim had little or no merit. The Dorrohs timely appealed the decision to the Ninth Circuit.

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[4] Cedar Warren was an insured under his father, James Warren's policy.

[5] In fact, Mr. Dorroh's workers' compensation claim had been denied, however, he had also filed an appeal with the Workers' Compensation Appeals Board ("WCAB"). On July 14, 2001, the WCAB ruled that Mr. Dorroh was injured in the course of his employment. (Doc. at 75, at Exhibit **[*6]** 3). Mr. Dorroh subsequently collected several hundred thousand dollars in workers' compensation benefits. The Dorrohs eventually presented the denial letter to Deerbrook, but this allegedly did not occur until several years after the WCAB had ruled. (Doc. 75 at Ex. 22).

On March 15, 2011, the Ninth Circuit Bankruptcy Appellate Panel ("BAP") held that the Bankruptcy Court had abused its discretion when it approved the settlement with Deerbrook. Specifically, the BAP held that the court had erred in accepting Deerbrook's setttlement because *inter alia*, there was no finding that the bad faith case was **[*8]** frivolous, the court had failed to determine which of the two bids submitted were of greater value to the estate, and the proposed distribution to creditors violated certain provisions of the Bankruptcy Code. (Doc. 75, Ex 17 at pgs. 16-17). The case was remanded for further proceedings to remedy these deficiencies. (Doc. 75, Ex 17 at pg. 19-20).

Subsequently, on April 19, 2011, David F. Wurst, Trustee of the Bankruptcy Estate of Cedar Sol Warren, filed a complaint for bad faith in the Eugene Division of the United States District Court, District of Oregon, naming Deerbrook as the sole defendant. (Doc. 1). On September 7, 2011, a Notice and Request for Approval of Substitution of Party was filed with the Oregon court. Thereafter, the Dorrohs were substituted in as Plaintiffs for Trustee Wurst (Doc. 26). The matter was then transferred to this Court, following a motion by the Dorrohs (Docs. 27-29). (Doc. 36.)

The Dorrohs are now pursuing the bad faith claim against Deerbrook as Warren's assignee. For the purposes of the discovery issues, the Dorrohs contend that Deerbrook acted in bad faith by: (1) refusing to ignore the workers' compensation lien; (2) failing to issue a settlement draft **[*9]** in Dorrohs name only; and (3) by not accepting Dorrohs proposed judgment prior to the entry of judgment during the state court proceeding. The Dorrohs also allege that Deerbrook inappropriately advised Mr. Warren to file for bankruptcy and offered to pay his bankruptcy fees, and improperly manipulated the Bankruptcy Trustee by convincing him to sell the estate's bad faith claim to Deerbrook for $125,000.00. In contrast, Deerbrook contends that the Dorrohs' bad faith claim is meritless as evidenced by California law and the Bankruptcy Court's finding that the case lacked merit. Moreover, Deerbrook argues that the discovery should be limited to the events related to the notice of lien only, and the Dorroh's discovery requests are too broad as the issues in the bankruptcy and subsequent settlement negotiations are not relevant.

DISCUSSION

As a preliminary matter, the Court notes that much of the parties' positions related to the discovery disputes in this matter have been premised on arguments about whether Deerbrook acted in bad faith when it refused to issue the $15,000.00 settlement check to the Dorrohs without listing Superior as a co-payee. The parties have each argued their respective **[*10]** interpretations of California statutes and case law on this issue including citing *inter alia*, *Coe v. State Farm Mut. Auto. Ins. Co.*, 66 Cal. App. 3d 981, 994, 136 Cal. Rptr. 331 (1977), *Mercado v. Allstate Ins. Co.*, 340 F. 3d 824 (9th Cir. 2003) and California Labor Code section 3859. However, while this legal discussion is informative for purposes of establishing a context of the issues, it has done little to aid the Court in resolving the *discovery* disputes presented; the Court would be constrained to limit the discovery of either side absent a ruling from the district court judge on this issue. Moreover, it is apparent that much of this dispute is the result of the attorneys' inability to effectively meet and confer which is a requirement of Fed. R. Civ. P. 26. This is evidenced by the fact that the first twenty pages of the parties' fifty page joint statement consist largely of engaging in unprofessional bantering amongst themselves. The parties are reminded that discovery is broad in scope and is defined in Fed. R. Civ. P. 26(b) which in pertinent part states as follows:

> Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, **[*11]** description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. 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 trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Given the broad scope of discovery, the Court will address each of the issues raised in the Joint Statement.

Post-February 2001 Discovery

The Dorrohs have argued that they are entitled to discovery for events that occurred post-February 2001 (after the initial settlement discussions between the Dorrohs and Deerbrook) because Deerbrook's subsequent actions are further evidence of its bad faith. These actions include its refusal to stipulate to the Dorrohs' settlement offer at trial, its alleged influence over Mr. Warren to file bankruptcy, and its alleged inappropriate contact with the Bankruptcy Trustee during the bankruptcy proceedings. The Dorrohs also argue that Deerbrook's motion for summary judgment raises several defenses based on the **[*12]** bankruptcy proceedings which makes those proceedings relevant. Finally, this information is relevant to the economic, emotional, and punitive damages that both Mr. Warren and the Dorrohs are entitled to.

In opposition, Deerbrook argues that post-February 2001 events are only relevant to the emotional and punitive damages of the bad faith claim and that as an assignee, the Dorrohs are not entitled to that relief. Furthermore, only Warren can raise claims related to the bankruptcy proceeding. With regard to the rejection of the settlement agreement, Deerbrook contends that as a matter of law it was within its rights to reject the settlement offered by the Dorrohs during the state trial. Finally, it notes that there is no motion for summary judgment pending and that any reference to the bankruptcy proceedings in the motion for summary judgment was done for context purposes only. [6]

Preliminarily, in a separate order this Court has determined that Mr. Warren cannot be substituted in as a party and he will not be able to pursue additional claims in this lawsuit. Notwithstanding this finding, at this juncture of the proceedings, this Court is unable to make dispositive determinations regarding which aspects of the bankruptcy proceeding claims (i.e. economic or otherwise) belong to the Dorrohs versus Mr. Warren. Those dispositive issues need to be resolved by the District Court Judge. Moreover, no dispositive ruling has been made regarding whether Deerbrook had a right to reject the settlement offer during the state court proceedings. Therefore, post-February 2001 events remain relevant for discovery purposes. Whether the Dorrohs have cognizable **[*14]** claims, and whether any of this related evidence will be admissible at trial are determinations to be made by Judge Ishii once the dispositive motions have been filed and ruled upon. As such, the Court will permit discovery on post-February 2001 issues at this point in the proceedings.

Ms. Harcharik's Deposition

Plaintiffs argue that Defendant's designee, Ms. Harcharik, was insufficiently prepared for the deposition as they clearly wanted to ask questions about Deerbrook's claims manual. In particular, the witness did not have information related to how and why some of the policies end up in the manual, how the manual is assembled, and how and when revisions are made.

Deerbrook contends that Ms. Harcharik was adequately prepared given the vague and over broad description contained on the examination notice. Defendants argue that since they complied with the deposition notice, Plaintiffs should request the remaining information in a written interrogatory.

In response, Plaintiffs' counsel has indicated that he does not believe an interrogatory would be an effective way to obtain the information. He would be willing to provide a more detailed deposition notice clearly identifying what information **[*15]** about the claim manual he is seeking

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[6] The Court acknowledges that Deerbrook has withdrawn its motion for summary judgment and Plaintiffs' relevancy argument on that basis is without merit. There is nothing in the record as it currently exists to indicate that Deerbrook intends to make this argument in the future. However, Deerbrook is cautioned the **[*13]** Court has reviewed the motion and notes that it is unpersuaded by Deerbrook's representations that references to the bankruptcy proceedings were used only for purposes of context. Deerbrook relies on the findings of the Bankruptcy Court in the motion for summary judgment as a defense and in support of its motion which would make the bankruptcy proceedings relevant under Rule 26. *Compare* Doc. 75 at pg. 23 and Doc. 54-1 pg. 25.

Federal Rule of Civil Procedure 30(b)(6) provides that notice of a subpoena directed to an organization must describe with reasonable particularity the matters for examination. Fed. R. Civ. P. 30(b)(6). A review of the notice reveals it could have been more specific. On the other hand, Ms. Harcharik's deposition testimony reveals that she possessed limited information to answer questions regarding the claims manual. In fact, she had not referred to the manual in several years. As such, the Court will permit further deposition of another designee on the condition that Plaintiffs' deposition notice clearly identifies the information sought. The Court will not dictate to Plaintiffs' counsel which discovery devices are most appropriate. Counsel are cautioned that they shall work together to ensure the requested information is exchanged. Both sides need to be realistic about which discovery devices are the best methods for obtaining this information. This issue clearly could have been resolved through a meaningful meet and confer.

Written Responses to Plaintiffs' Written Discovery

Plaintiffs contend that Deerbrook failed to answer Plaintiffs' Special Interrogatories **[*16]** Nos. 3 and 4 that relate to information concerning whether Defendant offered to pay Mr. Warren's bankruptcy fees. (Doc. 75, Ex. 21). Although there were several objections raised in the initial response to the interrogatories, the only basis for the objection in the Joint Statement relates to the time limitation and the fact that the Dorrohs cannot recover emotional distress damages. [7] These issues have already been addressed previously in this order. As such, Defendant must answer these interrogatories.

Plaintiffs also argue that Defendant failed to adequately answer Special Interrogatories Nos. 8-9 which relate to the steps that Deerbrook took to verify the lien that Superior National had against Robert Dorroh as of February 21, 2001. (Doc. 75, Ex 21). Plaintiffs argue that Deerbrook did not answer the questions and only gave information related to what attempts it made to obtain a "denial letter," which was not the question posed. In response, Deerbrook argues that based on California law, it was required to honor the lien whether or not Superior National paid any money to the Dorrohs and that **[*17]** it fully answered the question.

Functions of interrogatories include obtaining evidence, information which may lead to evidence and admissions, and to narrow issues to be tried. *United States v. West Virginia Pulp and Paper Co.*, 36 F.R.D. 250, 252 (S.D.N.Y. 1964) (citing *United States v. Watchmakers of Switzerland Information Center, Inc.*, 1959 U.S. Dist. LEXIS 3943, 2 F.R.Serv.2d 33.353, Case 3 (S.D.N.Y. 1959)). The party answering interrogatories must furnish "the information available to the party." Fed. R. Civ. P. 33(b)(1)(B). Fed. R. Civ. P. 33(b)(3) requires that each interrogatory, unless objected to, must be answered separately and fully in writing, under oath. Fed. R. Civ. P. 33(b)(3). An "evasive or incomplete . . . answer, or response is to be treated as a failure to . . . answer, or respond." Fed. R. Civ. P. 37(a)(4).

"Parties must provide true, explicit, responsive, complete, and candid answers to interrogatories." *Hansel v. Shell Oil Corp.*, 169 F.R.D. 303, 305 (E.D. Pa. 1996). If a responding party is unable to supply requested information, "the party may not simply refuse to answer, but must state under oath that he is unable to provide the information and 'set forth the efforts he used to obtain **[*18]** the information.'" *Hansel*, 169 F.R.D. at 305 (quoting *Milner v. National School of Health Tech.*, 73 F.R.D. 628, 632 (E.D. Pa. 1977)). Fed. R. Civ. P. 33 "is to be given a broad and liberal interpretation in the interest of according to the parties the fullest knowledge of the facts and of clarifying and narrowing the issues." *West Virginia Pulp*, 36 F.R.D. at 252.

The Court has reviewed Deerbrook's response to Interrogatories 8 and 9 and disagrees with Defendant that it answered the questions. Although it is Deerbrook's position that the question is not relevant based on California law, Judge Ishii has not made that determination. Therefore, the questions posed by Plaintiffs are relevant and Deerbook must provide answers. As noted by Plaintiffs, if Deerbrook did nothing other than request a copy of the denial letter then it should state so.

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[7] Since the other objections were not raised in the Joint Statement, they have been waived.

Attorneys' Depositions

The remaining disputes involve the extent of questions of two attorneys: 1) Mr. Roger Stucky, a partner at Carcione, Cattermole, Dolinski, et al., ("the Carcione law firm") the attorneys of record for Plaintiffs Robert and Barbara Dorroh [8] and 2) Mr. Carcione, Esq., who handled the initial settlement negotiations between the Dorrohs **[*19]** and Deerbrook. Plaintiff is seeking to limit the questions that Mr. Stucky can be asked in an anticipated deposition. Deerbrook has filed a motion to compel additional testimony from Mr. Carcione in a second deposition.

Mr. Stucky

Plaintiffs have agreed that Mr. Stucky may be deposed but argue the questions should be limited to those matters where he is a factual witness only, including his conversations with Deerbrook's claim adjuster, Jason Kenady, and possibly to non-privileged matters that occurred during Mr. Dorroh's workers' compensation case.

Defendant agrees that it should be permitted to question Mr. Stucky on the issues outlined above, but that it should also be permitted to obtain information about why Mr. Stucky promised to provide Deerbrook the denial letter, but failed to do so until September 2009. Additionally, Deerbrook argues it is entitled to ask questions about why the Dorrohs contend the compensation claim was denied when Mr. Dorroh received $485,000.00 in workers' compensation benefits. In support of its position, Deerbrook argues that the advice of several legal treatises indicate that **[*20]** members of the Carcione law firm should not be representing the Dorrohs in this bad faith action given that it represented the Dorrohs during the underlying settlement negotiations. It also cites *Fireman's Fund Insurance Company v. Superior Court (Hicks)*, 72 Cal. App. 3d 786, 140 Cal. Rptr. 677 (1977) for the proposition that when an attorney is the sole negotiator in a bad faith action alleging punitive damages, then the attorney can be deposed and facts fall outside of the attorney-client privilege, and outside of the work product rule.

Plaintiffs respond that the attorneys at the firm understand the implications and limitations of their legal representation and will hire additional attorneys to try the case if necessary. Moreover, the Dorrohs argue that the reason Mr. Stucky did not provide the denial letter is irrelevant as this would not have changed the outcome of this case. Finally, the answers to Deerbrook's questions involving Mr. Stucky's legal contentions can be obtained via contention interrogatory rather than deposition.

As a preliminary matter, absent a motion to disqualify counsel, this Court will not offer an opinion about whether the Carcione law firm should be representing the Dorrohs **[*21]** in this matter. It is not the role of this Court to advise attorneys whether or not to take advice offered in any legal treatises. As such, Defendant's argument in this regard is unpersuasive. [9]

Moreover, Fed. R. Civ. P. 30(a) provides that depositions may be taken of "any person." Fed. R. Civ. P. 30(a). Therefore, there is no express prohibition against the taking of attorney depositions. However, courts have long recognized the burdens imposed on the adversary process when lawyers themselves are the subject of discovery requests and have resisted the notion that lawyers should be routinely subjected to broad discovery. *Shelton v. American Motors Corp.*, 805 F. 2d 1323, 1327 (8th Cir. 1986). The Eighth Circuit has held that opposing counsel should only be deposed after a showing that: (1) no other means exist to obtain the information sought; 2) the information sought is relevant and nonprivileged; and 3) the information is crucial to the preparation of this case. *Shelton v. American Motors Corp.*, 805 F. 2d at 1328. The Sixth Circuit has adopted the *Shelton* rule and **[*22]** the Dorrohs have argued that *Shelton* is the leading case in this area. *See, Nationwide Mutual Ins. Co. v. Home Ins. Co.*, 278 F. 3d 621, 628 (6th Cir. 2002) (adopting *Shelton*). However, the Court notes that the Second Circuit has adopted less stringent criteria. In *In re Subpoena Issued to Dennis Friedman*, 350 F. 3d 65, 72 (2d Cir. 2003), the court held that Rule 26 requires a flexible approach to attorney depositions that takes into consideration all of the

[8] Mr. Stucky is still handling Mr. Dorroh's ongoing worker's compensation matter.

[9] Defendant itself acknowledges that it is the Dorrohs' attorneys prerogative to ignore this advice. (Doc. 75 at pg. 38).

relevant facts and circumstances to determine whether the proposed deposition would entail an inappropriate burden or hardship. Such considerations may include the need depose the lawyer, the lawyer's role in connection with the matter on which discovery is sought in relation to the pending litigation, the risk of encountering privilege and work product issues, and the extent of discovery already conducted. The Court noted that these factors are appropriately considered in determining whether interrogatories should be used in lieu of a deposition. *Id*. The Ninth Circuit has not ruled on this issue.

This case presents an unusual circumstance because Mr. Stucky is not only a fact witness in this case, but his actions were also implicated **[*23]** in the underlying settlement negotiations. Deerbrook cites *Merritt v. Superior Court (Reserve Ins. Co.),* 9 Cal. App. 3d 721, 88 Cal. Rptr. 337 (1970) for the proposition that in a third party bad faith case, an attorney may be deposed who represented the insured in that action on relevant non-privileged matters such as settlement demands or offers received, and non-privileged communications with the insurer's claims representatives or attorneys. The holding is not as broad as Deerbrook alleges however. In *Merritt*, the Court was examining a specific interrogatory and held that when determining what discovery devices can be used when getting information from an attorney, is important to examine the manner in which the case is prosecuted. *Merritt v. Superior Court,* 9 Cal. App. 3d at 730. Specifically, in *Merritt*, the Court found that discovery of information held by plaintiff's former counsel would be permitted because the plaintiff was relying heavily on evidence that his prior attorney could only have learned in the course of his employment. *Id*. In doing so, the Court concluded that Plaintiff had initiated a lawsuit in which he placed the attorney's decisions, conclusions, and mental state of at issue. **[*24]** *Id*.

Here, the Dorrohs agree that Mr. Stucky can be deposed but seek to limit the questions to those of a fact witness. However, Deerbrook is seeking information as to why Mr. Stucky did not send the denial letter, as it will argue negligence by the Carcione law firm as a defense in this action. As such, the Court will permit the deposition testimony of Mr. Stucky on that issue. The Court also finds that Deerbrook may inquire into the reasons why Mr. Stucky continues to assert the workers' compensation claim was denied even though Mr. Dorroh received a monetary award as this is relevant for discovery purposes. [10] The Court will not make a broad ruling as to the other issues that may arise in the course of the deposition. Privilege objections must be asserted to particular questions and evaluated. Blanket privilege objections are not permitted. If counsel believes that a question is improper, he should state a specific objection to the question and the Court will rule on the issue at a later time if needed.

Mr. Carcione

Deerbrook has brought a motion **[*25]** to compel a second deposition of Mr. Carcione, a percipient witness in this case. Deerbrook contends that during his deposition, Mr. Carcione obstructed the questioning by providing non-responsive argumentative testimony, abused and insulted opposing counsel, and pretended not to understand the questions presented. Deerbrook requests that the Court order a second session of Carcione's deposition, requiring that : 1) Mr. Carcione provide straightforward, non-argumentative responses; 2) the Court order that a discovery referee preside over the second session of Carcione's deposition at Plaintiffs' expense; and 3) that the Court order monetary sanctions in the amount of $6,020.00 to compensate Deerbrook for the cost and expense of bringing this motion.

The Dorrohs contend that they allowed Mr. Carcione to be deposed as a fact witness in this case. However, they argue that Deerbrook's questions at the deposition were inappropriate as they went beyond the scope of a fact witness and instead asked questions: 1) that required legal analysis, 2) that related to the attorney client privilege and work product, and 3) that were unrelated to this case. The Dorrohs contend that Mr. Carcione answered **[*26]** questions to the best of his ability and that Deerbrook has not identified any proper questions under *Shelton* that went unanswered.

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[10] The Court notes that Dorrohs' counsel has already answered both of these questions in the Joint Statement. (Doc. 75, at pg. 36, fn. 20).

The Court has reviewed the transcript and finds that a second deposition is warranted as Mr. Carcione's and Mr. Markowitz's actions in the deposition were unresponsive and uncooperative. Likewise, many of the questions posed by Mr. Klee, Deebrook's attorney, were not clearly worded, or would undoubtedly illicit a privilege or relevancy objection. In the second deposition, Mr. Carcrione shall answer questions related to the factual matters of this case, i.e., the dates and times that certain events occurred, as well as his reasons for declining to accept Deerbrook's $15,000.00 settlement offer with Superior National listed as co-payee. Since the Dorrohs are arguing bad faith based on Deerbrook's rejection of the settlement offer at the subsequent state proceedings, and Deerbrook's alleged misconduct conduct at the bankruptcy proceedings, Mr. Carcione shall also answer questions on those topics if he was involved in those proceedings. In reaching this conclusion, the Court is not giving Deerbrook carte blanch to pose any questions it wishes with regard to **[*27]** the issues listed above. Deerbrook shall not engage in a fishing expedition. In fact, some information may indeed be protected by a privilege. However, it is clear from the holdings in *Merritt* and *Fireman's Fund Insurance Company* that while certain privileges are waived in third party actions alleging bad faith, it is important to examine the information sought and the specific facts at issue when ruling on privileged matters. In this circumstance, the Court will not adhere to the *Shelton* test but will adopt the more flexible approach outlined in *In re Subpoena Issued to Dennis Friedman* as this is more consistent with the holdings in *Merritt* and *Fireman's Fund Insurance Company*. As such, the Court declines to prospectively carve out the contours of the privilege in this case as it would be inappropriate to do so. When and if the Court is called upon to resolve a specific privilege claim, it will do so.

During any of these depositions, the Court expects that counsel will conduct themselves professionally. The Court directs the parties to Fed. R. Civ. P. 30 (c) which in relevant section provides as follows :

> (1) ***Examination and Cross-Examination***. The examination and cross-examination of **[*28]** a deponent proceed as they would at trial under the Federal Rules of Evidence ...
>
> (2) ***Objections***. An objection at the time of the examination - whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of the taking the deposition, or to any other aspect of the deposition - must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limited ordered by the court, or to repsent a motion under Rule 30(d)(3). Fed. R. Civ. P. 30(c)(1) and (2).

Any non-compliance with completing the discovery in the case pursuant to these guidelines will be looked upon with great disfavor. Although the Court has given Deerbrook permission to question the attorneys in this case, the Court expects that Deerbrook will be thoughtful when formulating questions and *only* ask questions that are relevant and necessary. Similarly, Plaintiffs' counsel are forewarned that they shall make a good faith effort toward answering questions and shall invoke **[*29]** privileges or other objections *only* when appropriate and in a professional manner. The Court denies Deerbrook's request for a referee at the second deposition. However, counsel are advised that failure to follow these guidelines will result in the probability of heavy sanctions against the offending attorney or party.

Sanctions

Here, both parties are requesting monetary sanctions for bringing these motions. The Dorrohs request $5,400.00 and Deerbrook requests $6,020.00. A party seeking discovery may move for an order compelling an answer if a party fails to permit inspection as requested under Rule 34. Fed. R. Civ. P. 37(a)(3)(B)(iv). If the motion is granted, or if the discovery is provided after the motion is filed, the court may require the party whose conduct necessitated the motion to pay the movant's reasonable expenses incurred in making the motion, including attorney fees. Fed. R. Civ. P. 37(a)(5)(A). However, the court must not order payment if the movant filed the motion before attempting in good faith to obtain the discovery without a court order, if the opposing party's non-disclosure, response or objection was substantially justified, or other circumstances make an award of **[*30]** expenses unjust. Fed. R. Civ. P. 37(a)(5)(A)(i-iii).

Similarly, if the motion to compel is denied, the court may require that the movant pay the opposing party its reasonable expenses incurred in opposing the motion including attorney's fees. However, the court must not order payment if the movant filed the motion before attempting in good faith to obtain the discovery without a court order, if the opposing party's non-disclosure, response or objection was substantially justified, or if other circumstances make an award of expenses unjust. Fed. R. Civ. P. 37(a)(5)(B). If the motion is granted in part, and denied in part, the court may apportion reasonable expenses for the motion. Fed. R. Civ. P. 37(a)(5)(C).

Here, the Court has granted both of the parties' motions in part. However, the Court denies both parties' request for sanctions. In this case, neither party has clean hands as both parties have engaged in dilatory tactics. As previously noted, many of these discovery disputes could have been resolved by the parties if counsel had cooperated with each other. It is not this Court's practice to mediate the attorney's personal vendettas. Counsel are cautioned that gamesmanship and future motions **[*31]** to compel without *meaningful* meet and confer will result in the imposition of sanctions.

ORDER

Based on the above, Plaintiffs' Motions to Compel and Defendant's Motion to Compel are GRANTED IN PART as outlined in this order. Both parties' request for sanctions is DENIED. All of the relevant discovery outlined in this order shall be completed by **October 31, 2012**. All other deadlines in this case remain in effect as outlined in this Court's scheduling order issued on March 29, 2012. (Doc. 51).

IT IS SO ORDERED.

Dated: September 21, 2012

/s/ Gary S. Austin

UNITED STATES MAGISTRATE JUDGE

End of Document

Duncan v. Pierce

United States District Court for the Central District of Illinois

October 24, 2008, Decided; October 24, 2008, E-Filed

07-4028

Reporter
2008 U.S. Dist. LEXIS 86872 *; 2008 WL 4724281

DARRYL DUNCAN, Plaintiff, vs. GUY PIERCE, et. al., Defendants.

Prior History: Duncan v. Pierce, 2008 U.S. Dist. LEXIS 86416 (C.D. Ill., Oct. 23, 2008)

Counsel: [*1] Darryl R Duncan, Plaintiff, Pro se, North Chicago, IL.

For Guy Pierce, Tod Vanwolvelare, Steven Ballard, Frainey, . Newton, Jim Collins, Davis, Edward McNeil, Pitts, D Oleson, G Ricke, Guy Johnson, Scott Johnson, Defendants: Ellen C. Bruce, LEAD ATTORNEY, ILLINOIS ATTORNEY GENERAL, Springfield, IL.

For Dr. William Edward Rankin, sued as William Rankin, Defendant: Theresa M Powell, LEAD ATTORNEY, HEYL ROYSTER VOELKER & ALLEN, Springfield, IL.

Judges: HAROLD A. BAKER, UNITED STATES DISTRICT JUDGE.

Opinion by: HAROLD A. BAKER

Opinion

CASE MANAGEMENT /SUMMARY JUDGEMENT ORDER

This cause is before the court for consideration of Defendant Rankin's motion for summary judgement [d/e 67] and Defendants Newton, Collins, Davis, McNeil, Pitts, Oleson, Ricke, G. Johnson, S. Johnson, Pierce, Vanwolvelare, Ballard and Frainey's motion for sanctions. [d/e 65].

I. BACKGROUND

The plaintiff, Darryl Duncan, originally filed his complaint pursuant to 42 U.S.C. §1983 claiming that his constitutional rights were violated in the East Moline Correctional Center. The plaintiff has the following surviving claims against 14 defendants:

> a) Defendants Dr. Rankin and Scott Johnson were deliberately indifferent to the plaintiff's serious medical condition **[*2]** when they refused to reassign the plaintiff to different job on June 5 and June 13 of 2006.
> b) Defendants Collins, Davis, Newton, Ricke, Guy Johnson and Vanwolvelare were deliberate indifference to the plaintiff's serious medical condition on March 12, 2007 in violation of the Eighth Amendment.
> c) Defendants Oleson and Pitts violated the plaintiff's Eighth Amendment rights when they placed him in a cell without running water or toilet facilities in March of 2007.
> d) Defendants Dr. Frainey, Dr. Rankin, McNeil, Pierce and Ballard retaliated against the plaintiff for his grievances in violation of the First Amendment. The plaintiff alleges that Defendants Dr. Frainey and Dr. Rankin provided false information so the plaintiff would be placed in medical segregation. Defendants McNeil, Pierce and Ballard denied the plaintiff admission in a work release program.

On October 15, 2007, the plaintiff filed a notice of appeal. [d/e 41]. The plaintiff disagreed with the outcome of the merit review order and disagreed with the denial of his motion for appointment of counsel. The plaintiff did not initially file a motion to proceed *in forma pauperis* on appeal. However, when the plaintiff did file this **[*3]** motion, it was denied on February 15, 2008. The plaintiff was advised he must pay the appellate filing fee within 14 days. *See* February 15, 2008 Court Order.

On April 4, 2008, Defendant Rankin filed a motion for sanctions against the plaintiff. The defendant stated that a deposition of the plaintiff was scheduled for March 19, 2008 at the Vienna Correctional Center. The plaintiff received proper notice of the time and place of his deposition. Defense counsel stated that the plaintiff refused to give his deposition and refused to give a statement on the record as to his reasons for refusing the deposition. The defendants asked that the plaintiff's case be dismissed or in the alternative, that the plaintiff be assessed reporter fees and mileage costs.

On April 23, 2008, the court denied the defendant's motion. However, the court clearly admonished the plaintiff:

> The plaintiff chose to file this lawsuit and therefore must participate in the discovery process. Because the plaintiff is proceeding *pro se,* the court will allow the plaintiff one more opportunity. The defendants are to reschedule the plaintiff's deposition and provide the proper notice to the plaintiff. The plaintiff must cooperate **[*4]** and participate in the deposition. If the plaintiff refuses to cooperate in the deposition, his case will be dismissed. April 23, 2008 Court Order.

The court then on its own motion extended the discovery deadlines.

On May 28, 2008, the United States Appellate Court for the Seventh Circuit also told the plaintiff he must pay the appellate filing fee within 14 days or his appeal would be dismissed. [d/e 63] His appeal was dismissed on July 18, 2008 [d/e 73].

II. MOTION FOR SUMMARY JUDGEMENT

Defense counsel for Dr. Rankin has filed a motion for summary judgement or in the alternative motion for dismissal based on the plaintiff's failure to participate in his deposition. The motion was filed on June 27, 2008, but the plaintiff has failed to file a response and has failed to ask for additional time to file a response. The plaintiff claims Dr. Rankin was deliberately indifferent to the plaintiff's serious medical condition when he refused to reassign the plaintiff to a new job in June of 2006. In addition, the plaintiff claims Dr. Rankin retaliated against the plaintiff for his grievances in violation of the First Amendment. Specifically, the plaintiff alleges that Dr. Rankin provided false **[*5]** information so the plaintiff would be placed in medical segregation.

A. FACTS

The undisputed facts stated by the defendant are as follows: Dr. Rankin is the Medical Director at East Moline Correctional Center and saw the plaintiff as a patient when he was housed at the facility. (Def. SJ Mot, Ex. A, p. 1).

The defendant says he saw the plaintiff on June 15, 2006 for a scheduled follow-up visit due to a cyst on his toe. However, the plaintiff's chief complaint was pain in his left arm after fell on it the previous day. The doctor says he examined the plaintiff and found that he had full range of motion in his wrist, but was complaining of pain. The doctor ordered a splint, ibuprofen for pain, an X-ray and provided him a permit to be off work for six days. (Def. SJ Mot, Ex. A, p. 2). The plaintiff was also to return for a follow up examination in six days.

On June 23, 2006, Dr. Rankin again saw the plaintiff. The x-rays were negative and the doctor observed no tenderness in the plaintiff's wrist. The plaintiff was also able to make a fist. The doctor says he discontinued the splint and advised the plaintiff to return to the health care unit as needed. (Def. SJ Mot, Ex. A, p. 3). Dr. Rankin **[*6]** says:

> [b]ased upon my observations and evaluation of Mr. Duncan regarding his complaints and toe complaints, I provided Mr. Duncan a permit to remain free from work for approximately six days. After that, there was no medical reason which would prohibit Mr. Duncan from being able to return to his job in my opinion. (Def. SJ Mot, Ex. A, p. 3).

Dr. Rankin says he has no role in work assignment for inmates and says he is not aware of what jobs the plaintiff may have had at the East Moline Correctional Center or any other correctional facility. (Def. SJ Mot, Ex. A, p. 3).

Dr. Rankin again says he next saw the plaintiff on June 29, 2006 to check on his toe and complaints of left arm pain. The doctor states the plaintiff looked well and had no tenderness. The plaintiff also had full range of motion in his arm. The doctor still provided him pain medication.

On July 18, 2006, the plaintiff returned to the health care unit. The plaintiff was complaining of elbow pain. Dr. Rankin says he evaluated the plaintiff and noted that he walked well. His elbow had a full range of motion, but some tenderness. The doctor provided him treatment for his complaints and a band aid for his toe. "I did not consider **[*7]** Mr. Duncan's condition to be a serious medical need. The blisters on his toes appeared to be the result of a possible ganglion cyst, which is not a serious medical need." "These types of cysts are difficult to manage as their causes can vary and treatment provides no guarantee of relief. In general, such cysts are not painful in and of themselves without aggravation." (Def. SJ Mot, Ex. A, p. 4, 5).

Dr. Rankin saw the plaintiff next on August 30, 2006. The plaintiff complained of problems with his left arm, but made no reference concerning any prison job. (Def. SJ Mot, Ex. A, p. 5). The doctor treated the plaintiff with ibuprofen and an injection of a steroid.

The plaintiff next saw Dr. Rankin on November 8, 2006. The plaintiff complained of left elbow pain. The doctor provided him "with ibuprofen, as well as A-balm (analgesic balm) and antacids to treat the side effects of the pain medication." (Def. SJ Mot, Ex. A, p. 6). Dr. Rankin also states "there was no objective finding with respect to Mr. Duncan's elbow, all we could do at that time was treat Mr. Duncan's complaints of pain." (Def. SJ Mot, Ex. A, p. 6)

On March 12, 2007, Dr. Rankin says he saw the plaintiff after he was placed **[*8]** in segregation. Dr. Rankin says he had no involvement in the decision to place the plaintiff in segregation. The doctor says shortly after the plaintiff was taken to segregation he complained of pain in his chest, shoulder and back. The doctor ordered medication for his complaints and ordered him to be put on 24-hour observation.

Dr. Rankin saw the plaintiff the next day for further evaluation. He complained of left arm pain and neck pain, but was alert and oriented and able to converse with the doctor. The doctor conducted an examination and noted that the plaintiff may have a possible cervical disc problem. Medications were prescribed.

Dr. Rankin evaluated the plaintiff again on March 16, 2007 and March 20, 2007. On March 20, 2006, the plaintiff says when he woke up his jaw was locked. He also complained of pain in his chest and back. He was not in distress when talking to the doctor. Dr. Rankin ordered medication and placed the plaintiff in the infirmary for observation. "It was my recommendation that Mr. Duncan be admitted to the infirmary so that he could be monitored for his complaints and abilities." (Def. SJ Mot, Ex. A, p. 7).

Dr. Rankin says he made several notations concerning **[*9]** the plaintiff's progress while in the infirmary. "Overall, my notes suggested that Mr. Duncan had continued complaints of pain, but no longer needed to be in the infirmary following March 23, 2007." (Def. SJ Mot, Ex. A, p. 8). The plaintiff left East Moline Correctional Center in April of 2007.

Defense counsel also notes that after receiving proper notice of his second deposition, the plaintiff refused to be placed under oath or answer any questions.

B. LEGAL STANDARD

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Any discrepancies in the factual record should be evaluated in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (*citing Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158-59, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970)). The party moving for summary judgment must show the lack of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly **[*10]** preclude the entry of summary judgment." *Anderson,* 477 U.S. at 248.

"Summary judgment is the 'put up or shut up' moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of events. *Johnson v. Cambridge Indus.,* Inc., 325 F.3d 892, 901 (7th Cir. 2000). A party opposing summary judgment bears the burden to respond, not simply by resting on its own pleading but by "set[ting] out specific facts showing a genuine issue for trial." *See* Fed. R. Civ. P. 56(e). In order to be a "genuine" issue, there must be more than "some metaphysical doubt as to the material facts." *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). "If [the nonmovant] does not [meet his burden], summary judgment should, if appropriate, be entered against [the nonmovant]." Fed. R. Civ. P. 56(e).

Affidavits must be based on the personal knowledge of the affiant and "set out *facts* that would be admissible in evidence." Fed. R. Civ. P. 56(e) (emphasis added). Personal knowledge may include inferences and opinions drawn from those facts. *Visser v. Packer Eng. Assoc., Inc.,* 924 F.2d 655, 659 (7th Cir. 1991). "But the inferences and opinions **[*11]** must be grounded in observation or other first-hand personal experience. They must not be based on flights of fancy, speculations, hunches, intuitions or rumors remote from that experience." *Visser,* 924 F.2d at 659.

C. ANALYSIS

Defendant Rankin argues there is no evidence of deliberate indifference to a serious medical condition. The plaintiff must pass both an objective and a subjective test in order to establish that the defendants violated the Eighth Amendment. *Rhodes v. Chapman,* 452 U.S. 337, 346, 101 S. Ct. 2392, 69 L. Ed. 2d 59 (1981); *Wilson v. Seiter,* 501 U.S. 294, 297, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991). The first prong of the test requires the plaintiff to demonstrate that the alleged deprivation was sufficiently serious. *Id.* The Seventh Circuit has acknowledge that a "serious medical need" is far from "self-defining." *Gutierrez v Peters,* 111 F.3d 1364, 1370 (7th Cir. 1997). However, the court noted that the Supreme Court clearly intended to include not only conditions that are life-threatening, but also those in which denial or delay in medical care results in needless pain and suffering. *Id.* On the other hand, "to say that the Eighth Amendment requires prison doctors to keep an inmate pain-free in the aftermath of proper medical treatment **[*12]** would be absurd." *Snipes v Detella,* 95 F. 3d 586, 592 (7th Cir. 1996).

The second prong of the Eighth Amendment test requires the plaintiff to show that the defendants acted with deliberate indifference. *Farmer v. Brennan,* 511 U.S. 825, 828, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994). "[A] finding of deliberate indifference requires evidence that the official was aware of the risk and consciously disregarded it nonetheless." *Mathis v. Fairman,* 120 F.3d 88, 91 (7th Cir. 1997)(citing *Farmer* at 840-42) Inadequate medical treatment due to negligence or even gross negligence does not support an Eighth Amendment violation. *Shockley v Jones,* 823 F.2d 1068, 1072 (7th Cir. 1987). In addition, inmates are not entitled to a specific type of

treatment, or even the best care, only reasonable measures to prevent a substantial risk of serious harm. *Forbes v. Edgar,* 112 F.3d, 262, 267 (7th Cir. 1997).

The plaintiff alleged that Dr. Rankin was deliberately indifferent to the plaintiff's serious medical condition when he refused to reassign the plaintiff to a new job in June of 2006. Dr. Rankin first contends that the plaintiff did not suffer from a serious medical condition at this time. However, irregardless of whether the plaintiff's **[*13]** condition did rise to this standard, the only evidence before the court is the doctor did provide treatment to the plaintiff, did order X-rays and did give him a week off of work. After seeing the plaintiff a second time, the doctor saw no medical reason the plaintiff should not return to week. A difference of opinion with the doctor is not the proper basis for a §1983 lawsuit. In addition, there is no evidence this defendant had any say over the assignment of any prison job. The motion for summary judgment on this claim is granted.

Dr. Rankin also argues there is no evidence that he retaliated against the plaintiff. To succeed on a retaliation claim, the plaintiff must "establish that his protected conduct was a motivating factor behind [the defendants' actions], but that should not end the inquiry. Because the ultimate question is whether events would have transpired differently absent the retaliatory motive . . ." *Babcock v. White,* 102 F.3d 267, 275 (7th Cir. 1996). If the same action would have occurred regardless of the retaliatory motive, the claim fails. *See Spiegla v. Hull,* 371 F.3d 928, 942 (7th Cir. 2004). Therefore, if a prison officer's actions are supported by legitimate **[*14]** penological concerns, the retaliation claim fails as a matter of law. It would be illogical and destructive of the disciplinary system of a penal institution to say that an act by a corrections officer that is supported by legitimate penological purposes can support a claim of retaliation for exercise of a constitutional right.

The plaintiff alleged that Dr. Rankin retaliated against the plaintiff for his prior grievances. The plaintiff claims Dr. Rankin provided false information so the plaintiff would be placed in medical segregation. First, there is no evidence of prior grievances or that Dr. Rankin was aware of prior grievances. Second, there is no evidence the doctor had any input in the decision to place the plaintiff in segregation. Finally, the doctor did order the plaintiff to be put under 24 hour medical supervision due to his complaints of chest pain. The doctors decision is supported by legitimate penological concerns. The motion for summary judgement on the retaliation claim is also granted. The claims against Dr. Rankin are dismissed.

The court notes Defendant Rankin also argued that the plaintiff's case should be dismissed due to his failure to cooperate in his second **[*15]** deposition.

III. MOTION FOR SANCTIONS.

Defendants Newton, Collins, Davis, McNeil, Pitts, Oleson, Ricke, G. Johnson, S. Johnson, Pierce, Vanwolvelare, Ballard and Frainey have filed a motion for sanctions. [d/e 65] The defendants state they arranged for the second deposition on May 21, 2008 and a notice was sent to the plaintiff on May 5, 2008. Defense counsel again traveled to the Vienna Correctional Center for the deposition. Counsel for the Illinois Department of Corrections (herein IDOC) employees is based in Springfield, Illinois and therefore traveled 215 miles, one-way. The plaintiff again refused to participate in the deposition. The defendants have provided a copy of the court reporter's transcript.

During the encounter, the plaintiff says he was "mentally and physically out of it" although he does not provide specific information beyond stating that he was experiencing foot pain and had taken several Motrin. When defense counsel informed the plaintiff that they were there to question him concerning this case, the plaintiff stated that the district court had made a mistake in denying his motion for appointment of counsel, that he had filed an appeal and he was asking for a new **[*16]** merit review hearing. (Def. Mot, Ex. A, p. 7) The plaintiff stated that the matter was before the Appellate Court and he would not be answering any questions. The plaintiff was given another copy of the court order informing him that he must cooperate with discovery, including his deposition, or his case would be dismissed. The plaintiff acknowledged that he had received the order, but refused to be placed under oath and refused to participate in the deposition.

Defense counsel for the IDOC employees says the plaintiff's lawsuit involves his medical needs, conditions of confinement and retaliation and all of these issues would have been the subject of his deposition. Defense counsel for the IDOC employees further states counsel traveled a total of over 430 miles for a second time to conduct the

deposition. In addition, defense counsel had to pay court reporter fees. Defense counsel estimates his costs at $ 271.15. (Def. Mot, p. 3). The plaintiff was notified of the deposition, but did not provided any advance notice that he again was refusing to participate in the deposition. The plaintiff has not provided any response to the defendants' motion for sanctions filed more than three months **[*17]** ago.

Defense counsel is asking that the plaintiff's complaint be dismissed, or that the plaintiff be barred from testifying to the issues in his complaint. Defense counsel for the IDOC employees is also asking that the matter be stayed pending ruling on this motion.

The defendants have made their motion pursuant to Federal Rule of Civil Procedure 37(d). Under this section, the court may impose sanctions when a party fails to appear for his deposition after receiving proper notice. However, courts have strictly construed the phrase 'failure to appear' to require a showing that the deponent actually failed to physically appear at the scheduled deposition. *See Stevens v Greyhound Lines, Inc.,* 710 F.2d 1224, 1228 (7th Cir. 1983), *see also Arizona v. Wright,* 34 F.3d 587, 589 (8th Cir. 1994) (refusal to answer questions or participate in deposition did not constitute "failure to appear.") Although the plaintiff was incarcerated at the time and had little choice, he did clearly appear for his deposition.

Nonetheless, the plaintiff did refuse to follow a court order when he refused to participate in the deposition. Federal Rule of Civil Procedure 37(b)(2) provides that if a party fails to obey **[*18]** an order to provide or permit discovery, the court may impose sanctions including dismissing the action. Fed.R.Civ.P 37(b).

> District courts have discretion in deciding when to dismiss an action for failure to comply with discovery orders. Dismissal is appropriate when a plaintiff fails to comply with a discovery order and that failure results from willfulness, bad faith or fault. Bad faith is characterized by intentional or reckless disregard of an obligation to comply with a court order. Fault refers to the reasonableness of the conduct that lead to the violation and not the non-complying party's purpose." *Sparrgrove v Wachter,* 2004 U.S. Dist. LEXIS 15827, 2004 WL 1795238 at 4 (W.D. Wis. Aug. 4, 2004).

In reviewing the procedural history of this case, the plaintiff first filed his appeal on October 15, 2007. No final denial of his appeal had been entered when the plaintiff refused to participate in his first deposition on March 19, 2008. The court entered an order on April 23, 2008 clearly stating that the plaintiff must still participate in the discovery process and must participate in his deposition. The plaintiff was told if he refused to cooperate in the deposition, his case would be dismissed. April 23, 2008 **[*19]** Text Order.

The defendants rescheduled the deposition for May 21, 2008 and again properly notified the plaintiff of the time and place. The plaintiff did not respond or object. When the defendants arrived, the plaintiff again refused to participate. The plaintiff said he disagreed with the court's earlier merit review and denial of his motion for appointment of counsel. The plaintiff said the matter was before the appellate court.

The plaintiff chose not to respond to the motion for sanctions and clarify his position. The plaintiff is proceeding pro se. An argument could perhaps be made that the plaintiff was confused about the status of his case and which court had jurisdiction. However, the district court still retained jurisdiction over this case since the plaintiff had filed an appeal from an unappealable order. *See United States v. Bastanipour,* 697 F.2d 170 (7th Cir. 1982). The claims dismissed in the merit review order were not dismissed with prejudice, and the plaintiff always had the option to file a motion to amend his complaint. *See Taylor-Holmes v. Office of Cook County Public Guardian,* 503 F.3D 607 (7th Cir. 2007); *see also Schatz v McCauhtry,* 1996 U.S. App. LEXIS 15722, 1996 WL 326015 (7th Cir. June 11, 1996).

Furthermore, **[*20]** if the plaintiff had any doubts, his appeal was still pending when this court informed the plaintiff that he must cooperate with discovery or his case would be dismissed. The district court also advised the plaintiff on February 15, 2008 that he had to pay the appellate filing fee or his appeal would be dismissed. He clearly did not pay the fee prior to the deposition. Finally, the defendants reminded the plaintiff of the court order to cooperate with the deposition. The plaintiff acknowledged that he had received the order.

The court acknowledges that given the fact that the plaintiff is proceeding pro se, the defendants will be greatly disadvantaged without an opportunity to depose the plaintiff and clarify the claims against them. Most of the IDOC defendants will not have medical records to rely on such as Dr. Rankin. In addition, the court cannot simply bar the plaintiff from testifying as to the matters that would have been covered in the deposition. The impact would be the same as dismissing the case.

While the plaintiff has continued to file motions with this court, he has not filed a response to the motion for sanctions. The court does believe the plaintiff's failure to participate **[*21]** in the deposition was willful and in bad faith. While the plaintiff had filed an appeal concerning his merit review and motion for appointment of counsel, he had filed this impermissible interlocutory appeal prior to the first deposition. The court had already given the plaintiff the benefit of the doubt after his refusal to participate in the first deposition and clearly ordered the plaintiff to participate in the second deposition. The plaintiff acknowledged receipt of that order, but still refused to answer questions. Sanctions are appropriate. Nonetheless, because this plaintiff is proceeding pro se, the court will not dismiss the plaintiff's case at this time. Instead, the court will order the plaintiff to reimburse the defendants the cost of the second deposition. The plaintiff must pay $ 271. 15 to the clerk of the court within twenty-one days. If the plaintiff fails to pay this fee within twenty-one days, his case will be dismissed in its entirety. The court cannot allow the plaintiff to continue to ignore court orders and fail to participate in the discovery process.

IT IS THEREFORE ORDERED that:

1) Defendant Rankin's motion for summary judgement is granted pursuant to Fed. R. Civ. P. 56. [*22] [d/e 67] The clerk of the court is directed to enter judgment in favor of the defendant in accordance with this order. The parties are to bear their own costs.

2) Defendants Newton, Collins, Davis, McNeil, Pitts, Oleson, Ricke, G. Johnson, S. Johnson, Pierce, Vanwolvelare, Ballard and Frainey's motion for sanctions is granted. [d/e 65] The plaintiff must pay $ 271. 15 to the clerk of the court within 21 days. IF THE PLAINTIFF FAILS TO MAKE THE FULL PAYMENT WITHIN 21 DAYS OF THIS ORDER, HIS CASE WILL BE DISMISSED. NO EXTENSIONS WILL BE ALLOWED.

3) The case is stayed pending the plaintiff's payment. Once the payment is made, a deposition will be scheduled and the case will proceed.

ENTERED this 24th day of October, 2008.

/s/ Harold A. Baker

HAROLD A. BAKER

UNITED STATES DISTRICT JUDGE

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Folz v. Union Pac. R.R.

United States District Court for the Southern District of California

June 23, 2014, Decided; June 23, 2014, Filed

Case No. 13-CV-00579-GPC-(PCL)

Reporter
2014 U.S. Dist. LEXIS 85960 *; 2014 WL 2860271

DELBERT FOLZ, Plaintiff, v. UNION PACIFIC RAILROAD COMPANY, Defendant.

Prior History: Folz v. Union Pac. R.R. Co., 2014 U.S. Dist. LEXIS 15020 (S.D. Cal., Jan. 29, 2014)

Counsel: [*1] For Delbert Folz, Plaintiff: Larry Lockshin, LEAD ATTORNEY, Larry Lockshin Esq A Law Corporation, Sacramento, CA.

For Union Pacific Railroad Company, Defendant: Jacob D. Flesher, LEAD ATTORNEY, Flesher McKague LLP, Folsom, CA; Jason W. Schaff, LEAD ATTORNEY, Flesher McKague LLP, Rocklin, CA.

Judges: Peter C. Lewis, United States Magistrate Judge.

Opinion by: Peter C. Lewis

Opinion

ORDER ON DEFENDANT'S MOTION TO COMPEL DEPOSITION OF JEFF WOOD AND REQUEST FOR SANCTIONS

I. INTRODUCTION

Defendant filed a Motion to Compel Deposition Testimony of Jeff Wood and Request for Sanctions on May 9, 2014. (Doc. 38.) Defendant seeks to compel Mr. Wood to answer two questions, asked at his deposition on March 3, 2014, upon which Plaintiff has laid several objections including: violations of the work-product doctrine; relevance; inadmissible character evidence; and attorney-client privilege. (Doc. 51.) After Plaintiff's Response (Doc. 51) and Defendant's Reply (Doc. 54), the Court now **GRANTS** the motion to compel.

II. FACTUAL BACKGROUND

Underlying this motion is a simple set of uncontested facts.

Mr. Wood was hired by Plaintiff to investigate the accident in which Plaintiff was injured and precipitated Plaintiff's Complaint (Doc. 1), by **[*2]** interviewing a witness: Mr. Abraham Atondo. (Doc. 38-1, at 2; Doc. 51, at 1.) After interviewing Mr. Atondo, Mr. Wood prepared a written statement which Mr. Atondo refused to sign. (Doc. 38, at 2; Doc. 51, at 2.) Mr. Wood destroyed the handwritten notes he took while interviewing Mr. Atondo. (Id.)

Next, "With Mr. Atondo's refutation of the statement drafted by Mr. Wood... [Defendant] sought discovery regarding Mr. Wood's credibility as a witness." (Doc. 38-1, at 3.) In other words, Defendants deposed Mr. Wood. (See Deposition of Jeff Wood, Vol. 1. Doc. 38-3; Defendant's Exhibit "A".) At Mr. Wood's deposition, Plaintiff's counsel advised Mr. Wood not to answer two separate questions on a relevance, work-product doctrine, and attorney-client privilege grounds. (Doc. 38-3, at 16.)

III. LEGAL STANDARD

Federal Rule of Civil Procedure 26 provides, in general, that:

> [p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party.... 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 **[*3]** calculated to lead to the discovery of admissible evidence.

Fed.R.Civ.P. 26(b)(1). Further, the definition of relevancy, for purpose of discovery, "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978). The rule governing scope of discovery is liberally interpreted to permit wide-ranging discovery of all information reasonably calculated to lead to discovery of admissible evidence; but the discoverable information need not be admissible at the trial. Fed.R.Civ.P. 26(b)(1), 28 U.S.C.A.

If a party fails to make a disclosure required by Federal Rule of Civil Procedure 26(a), "any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action." Fed.R.Civ.P. 37(a)(2)(A).

Rule 30 provides that counsel may make objections to deposition questions and "may instruct a deponent not to answer [a question] only **[*4]** when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4)." Fed.R.Civ.P. 30(d)(1). Thus, attorneys representing a deponent or party may, of course, object to questions asked a witness, provided the objections are not disruptive of the proceedings. Id. Indeed, a party waives certain objections, such as to the form of questions or answers or to other errors that might be obviated, removed, or cured if promptly presented, by failing to make the objection at the deposition. Fed.R.Civ.P. 32(d)(3)(B). However, "[u]nder the plain language of Fed.R.Civ.P. 30(d)(1), counsel may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to suspend a deposition in order to present a motion [for a protective order]." Resolution Trust Corp. v. Dabney, 73 F.3d 262, 266 (10th Cir.1995); Redwood v. Dobson, 476 F.3d 462, 467-69 (7th Cir.2007). Thus, A deponent may object on the basis of relevance, but may not refuse to answer the questions based on that objection. Detoy v. City and County of San Francisco, 196 F.R.D. 362, 366 (N.D.Cal.2000); see also Holloway v. Cohen, C-00-20644 JW PVT, 2007 U.S. Dist. LEXIS 45231, 2007 WL 1725452 (N.D. Cal. June 14, 2007) **[*5]** objections overruled, C 00-20644 JW PVT PR, 2007 WL 2221021 (N.D. Cal. July 31, 2007).

IV. DISCUSSION

A. Deponent Must Answer Despite A Relevance Objection

The first question Plaintiff's counsel advised Mr. Wood not to answer was: "I understand there's an investigation sometime ago regarding the Railroad Retirement Board?" (Doc. 38-3, at 3.) Plaintiff's counsel objected on relevance grounds. (Id.)

Defendant argues that where a party objects on the basis of irrelevancy, "such an objection does not warrant a refusal to answer questions." (Doc. 38-1, at 6; quoting Int'l Union of Elec., Radio & Mach. Workers, AFL-CIO v. Westinghouse Elec. Corp., 91 F.R.D. 277, 279 (D.D.C. 1981), citing Drew v. Sulphite & Paper Mill Workers, 37 F.R.D. 446, 449-50 (D.D.C. 1965).) Defendant does not provide precedent from the Ninth Circuit. (See Doc. 38.)

In its Opposition, Plaintiff argues that Mr. Wood has privacy interests, protected by the US and California Constitutions, which override the discovery interests in this case. (Doc. 51, at 4.) However, Plaintiff does not make any argument or showing to support this contention.

Additionally, **[*6]** Plaintiff argues that Federal Rule of Evidence 608(b)(1) prevents asking Mr. Wood about his prior investigation because it is extrinsic evidence to prove untruthfulness. (Id., at 5.)

Lastly, Plaintiff argues that the prior investigation of Mr. Wood is irrelevant, and he should not have to answer the question, at deposition, pursuant to Federal Rule of Evidence 403. (Id.)

Plaintiff does not provide any precedent for his arguments. (See Id., at 4-5.) Clearly established federal law provides that a deponent may not refuse to answer a question based only a relevance objection. Fed.R.Civ.P. 30(d)(1); Detoy, 196 F.R.D. 362, *supra.* Plaintiff did not assert that refusing to answer was to preserve a privilege, to enforce a limitation directed by the court, or to suspend Mr. Wood's deposition in order to present a motion for a protective order. See Resolution Trust Corp 73 F.3d 262, *supra.*

Further, Rule 608(b)(1) cannot be used as a basis to refuse to answer a question at a deposition. Rather, Rule 608(b) limits *admissibility* at trial, not discoverability. Fed. R. Evid. 608(b)(1); see also Fed.R.Civ.P. 26(b)(1).

Based on the foregoing, Plaintiff has no legal basis for refusing to answer this question **[*7]** at deposition. Motion to compel as to this question is **GRANTED.**

B. Mr. Wood's Custom and Practice Interviewing Witnesses

Plaintiff's counsel also advised Mr. Wood not to answer the following question subject to this motion to compel:

> "...As a person who is hired by a plaintiff's attorney contacting potential witnesses, is one of the areas of inquiry, pursuant to your custom and practice, to find out whether or not this witness did something for which caused the accident?"

(Doc. 38-3, at 16.) Plaintiff's counsel objected to this question as follows:

> Well, to the extent it's not related to this case, to this particular interview, then I don't think it's relevant. And I think to the extent that you are asking for his custom and practice as relayed by what a principal may be asking him to do, I think that is work product, perhaps attorney-client privilege. And I'm going to instruct him not to answer.

(Id., at 16.) Defendant rephrased the question to:

> Is it your custom and practice to try to find out from the witness whether or not they had an act or omission for which caused the accident?

(Id., at 17.) Plaintiff's counsel then elaborated on its objection:

> You are asking for substance. And your **[*8]** substance asks for attorney-client and attorney work-product privileged communications, because its going to the work product, the mental impressions of the attorney. To the extent that he instructs an investigator or consultant to ask those types of questions, you are getting into attorney-client/attorney work-product and, Jason [Schaff], I'm going to instruct him not to answer. If you want to ask [Mr. Wood]... the mechanics of what [Mr. Wood] is asking and how he handles it, I have no problem with that.

(Id., at 17-18.)

As discussed above, a mere relevance objection is insufficient to allow a deponent to refuse to answer a question. Fed.R.Civ.P. 30(d)(1). However, both the work-product doctrine and attorney-client privilege may serve to shield a deponent from answering, if a privilege would be vitiated by answering. (Id.) As discussed below, neither applies here.

1. Work-Product Doctrine

The work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. Fed.R.Civ.P. 26(b)(3); 28 U.S.C.A. The party asserting work-product doctrine bears the burden of establishing that the work-product privilege **[*9]** applies to bar discovery. Fed.R. Civ.P.Rule 26(b)(3, 5); United States v. Munoz, 233 F.3d 1117, 1128 (9th Cir.2000); United States v. Chevron Texaco Corp., 241 F. Supp. 2d 1065 (N.D. Cal. 2002); see also Barclaysamerican Corp. v. Kane, 746 F.2d 653, 656 (10th Cir.1984). Mere invocation of the work-product doctrine's protection does not satisfy the burden of establishing its applicability. Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540, 542 (10th Cir.1984), cert. dismissed, 469 U.S. 1199, 105 S. Ct. 983, 83 L. Ed. 2d 984 (1985). Rather, some showing or explanation of the work-product doctrine's applicability is necessary to bar discovery. See ChevronTexaco 241 F. Supp. 2d 1065, *supra*; see also Barclaysamerican Corp., 746 F.2d 653, *supra.*

The work product doctrine protects documents created by an attorney and may protect documents created by an agent or client of an attorney as well. In re Grand Jury Subpoena (Torf), 357 F.3d at 907 (documents created by investigator at direction of counsel are protected work product); see also McEwen v. Digitran Systems, Inc., 155 F.R.D. 678, 683 (D.Utah.1994) ("The work product doctrine protects 'material prepared by agents for the attorneys as well as those prepared **[*10]** by the attorney for himself.' "); (quoting United States v. Nobles, 422 U.S. 225, 238-39, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975)); Gucci Am., Inc. v. Guess?, Inc., 271 F.R.D. 58, 74 (S.D.N.Y.2010) (the work product doctrine has been "extended ... to work product produced by a client at the direction of counsel in anticipation of litigation").

The work-product doctrine's protection applies only to "documents and tangible things." Fed.R.Civ.P. 26(b)(3). A party asserting work product privilege must show that the materials withheld are: (1) documents and tangible things; (2) prepared in anticipation of litigation; and (3) the materials were prepared by or for the party or attorney asserting the privilege. Garcia v. City of El Centro, 214 F.R.D. 587, 591 (S.D.Cal.2003). "Because the work product doctrine is intended only to guard against divulging the attorney's strategies and legal impressions, it does not protect facts concerning the creation of work product or facts contained within the work product." Resolution Trust Corp. v. Dabney, 73 F.3d 262, 266 (10th Cir.1995).

Plaintiff's Opposition does not explain how the work-product doctrine would apply to this question, nor does Plaintiff provide **[*11]** any federal precedent for his argument. (Doc. 51, at 5-6.) Instead, Plaintiff cites a California Superior Court case for the proposition that "witness *statements* obtained through attorney-directed interviews may reveal the attorney's thought processes because they reflect the questions asked." (emphasis added) (Id., at 5, citing Coito v. Superior Court, 54 Cal.4th 480, 496, 142 Cal. Rptr. 3d 607, 278 P.3d 860.) This argument does not address the issue presented by Defendant's question, of course, because Defendants did not ask for "witness statements obtained through attorney-directed interviews." (Doc. 38-3, at 16-18.)

Defendants have not broached the concerns of the Coito court, or Rule 26. Rather, Defendants have couched their question to specifically address the "custom and practice" of Mr. Wood (Id., at 17; Doc. 38-1, at 8); to wit, "facts concerning the creation of work product." Resolution Trust Corp. *supra*, 73 F.3d at 266. Mr. Wood's personal and undirected approach to questioning witnesses, independent from this case and investigation, is unprotected by the work-product doctrine. Id. Further, his custom and practice is not a document or tangible thing. Fed.R.Civ.P. 26(b)(3); see also Garcia, 214 F.R.D. 587.

2. [*12] Attorney-Client Privilege

A party claiming the attorney-client privilege must identify specific communications and the grounds supporting the privilege as to each piece of evidence over which privilege is asserted. United States v. Osborn, 561 F.2d 1334, 1339 (9th Cir.1977). Blanket assertions are "extremely disfavored." Clarke v. Am. Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir.1992). Further, the communication must be between the client and lawyer for the purpose of obtaining legal advice. U.S. v. Plache, 913 F.2d 1375, 1379 n. 1.

Plaintiffs do not address their claim of attorney-client privilege whatsoever in their Opposition. (See Doc. 51.) In addition, Defendant's question to Mr. Wood, "[I]s it your custom and practice to try to find out from the witness whether or not they had an act or omission for which caused the accident?" does not address any communications between an attorney and his or her client. As discussed above, it is concerned Mr. Wood's custom and practice as an investigator, and the potential creation of investigative materials. There is no communication between Plaintiffs counsel and a client at issue. Therefore, the question clearly does not fall within the **[*13]** ambit of the attorney-client privilege. See Plache, 913 F.2d 1375.

V. SANCTIONS

Defendant's request for sanctions in the amount of $2,250 is denied.

VI. CONCLUSION

Based on the foregoing, the Court **GRANTS** Defendant's Motion to Compel in whole.

IT IS SO ORDERED.

DATED: June 23, 2014

/s/ Peter C. Lewis

Peter C. Lewis

United States Magistrate Judge

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Maxwell v. S. Bend Work Release Ctr.

United States District Court for the Northern District of Indiana, South Bend Division

October 25, 2010, Decided; October 25, 2010, Filed

3:09-CV-008-PPS-CAN

Reporter
2010 U.S. Dist. LEXIS 114462 *; 2010 WL 4318800

VALDEZ N. MAXWELL, Plaintiff, v. SOUTH BEND WORK RELEASE CENTER, et al., Defendants.

Subsequent History: Summary judgment granted by, Dismissed by, in part, Motion denied by, As moot Maxwell v. South Bend Work Release Ctr., 2011 U.S. Dist. LEXIS 40315 (N.D. Ind., Apr. 13, 2011)

Prior History: Maxwell v. South Bend Work Release Ctr., 2010 U.S. Dist. LEXIS 83087 (N.D. Ind., Aug. 13, 2010)

Counsel: [*1] For Valdez N Maxwell, Plaintiff: Kent Hull, LEAD ATTORNEY, Indiana Legal Services Inc - SB/IN, South Bend, IN.

For South Bend Work Release Center, a unit of Indiana Department of Corrections, Defendant: Akia Haynes, Laura L Bowker, LEAD ATTORNEYS, Indiana Attorney General's Office - IAG/302, Indianapolis, IN.

For Imperial Stamping Corp, Defendant: Randall G Hesser, LEAD ATTORNEY, Warrick and Boyn LLP, Elkhart, IN.

For Edwin G Buss, in his official capacity as Commissioner of Indiana Department of Corrections, Defendant: Laura L Bowker, LEAD ATTORNEY, Indiana Attorney General's Office - IAG/302, Indianapolis, IN.

Judges: PHILIP P. SIMON, CHIEF JUDGE.

Opinion by: PHILIP P. SIMON

Opinion

OPINION AND ORDER

On June 28, 2010, Magistrate Judge Nuechterlein granted Defendants' respective motions to compel and permitted Defendants to file bills of costs for those motions [DE 107]. This matter is before the Court on Plaintiff Valdez Maxwell's objection to the Magistrate's order [DE 125]. Because the Magistrate's order was not clearly erroneous or contrary to law, the Court **AFFIRMS** it, and thus declines to modify or set aside any portion of that order. As for the bills of costs, the Court, for the reasons discussed below, reduces **[*2]** defendant Imperial's expenses to $1,755, and reduces the State Defendants' expenses to $3,000.

BACKGROUND

The Magistrate's referral in this case initially terminated on May 5, 2010, at the close of discovery [DE 82]. During a subsequent status conference before this Court, the State Defendants indicated their intention to file a motion to compel relating to questions that Maxwell, per the instruction of his counsel, refused to answer at his deposition [DE 86]. Defendant Imperial also indicated its intent to file a motion to compel, relating to Maxwell's responses to Imperial's written discovery, primarily Maxwell's deficient document production [*Id.*]. The Court therefore referred the case back to the Magistrate to resolve these motions.

The Defendants filed the motions as anticipated [DE 87 & 91], and the Magistrate heard oral argument on June 24, 2010 [DE 105]. The Magistrate's June 28, 2010 order granted both motions, requiring Maxwell to submit to an additional deposition by the State Defendants on the questions the Magistrate found Maxwell had improperly refused to answer, and requiring Maxwell to organize his responses to Imperial's document requests in accordance with Rule 34 [DE **[*3]** 107]. The order also granted Defendants leave to file bills of costs relating to the two motions to compel, and Maxwell leave to file any objections to the bills of costs [*Id.*].

In the bills of costs, Imperial seeks $4,735.50 and the State Defendants seek $3,875 plus additional expenses yet to be determined [DE 111-112]. Maxwell filed an objection to the Magistrate's order [DE 125] which is what is presently before me. Maxwell's objection takes issue only with the Magistrate's ruling on the motion to compel additional deposition testimony, not the ruling on the motion relating to Maxwell's document production [*Id.*].

Maxwell did not file an objection to the bills of costs, despite receiving an extension of time to do so [DE 124]. In his reply supporting his objection to the Magistrate's order, however, Maxwell contends that the bills of costs are conclusory because they include no evidence as to the reasonableness of the hourly rates and time spent on the itemized tasks [DE 136 at 5].

DISCUSSION

Federal Rule of Civil Procedure 72(a) governs the appeal of a magistrate judge's order on a nondispositive motion, such as the motions to compel at issue here. In reviewing such an order, the district **[*4]** judge shall consider the objections to the magistrate judge's order and shall modify or set aside any portion of the order found to be "clearly erroneous" or "contrary to law." Fed. R. Civ. P. 72(a). "The clear error standard means that the district court can overturn the magistrate judge's ruling [on discovery matters] only if the district court is left with the definite and firm conviction that a mistake has been made." *Weeks v. Samsung Heavy Indus. Co. Ltd.*, 126 F.3d 926, 943 (7th Cir. 1997). So this Court will set aside Magistrate Judge Nuechterlein's order only to the extent that it is clearly erroneous or contrary to law. Fed. R. Civ. P. 72(a).

I. Motion to Compel Deposition Testimony

The Magistrate granted the State Defendants' motion to compel additional deposition testimony because he found that Maxwell's refusals to answer certain lines of questioning were groundless. At the hearing on this motion, Maxwell's counsel, Kent Hull, argued that he was justified in instructing his client not to answer because the information sought was either irrelevant or inadmissible [DE 107 & 123]. The Magistrate, however, found that the questions Maxwell refused to answer met the Rule 26 standard **[*5]** of being "reasonably calculated to lead to the

discovery of admissible evidence," and that Maxwell's relevance and admissibility objections were thus improper [DE 107]. The Magistrate further found that counsel's instructions not to answer were improper because they were not based on a privilege objection [*Id.*]. As to Maxwell's contention that the questioning was inflammatory, the Magistrate observed that Maxwell's refusal to answer such questions was improper absent a motion to terminate or limit the deposition under Rule 30(d)(3) [*Id.*].

Maxwell's principal ground for objecting to this ruling is that the Magistrate supposedly ignored the fact that the deposition questions at issue were subject to a law enforcement privilege, deriving from Maxwell's alleged "police-related employment," presumably as a police informant [DE 125 at 3]. This argument is a non-starter because Maxwell raises it for the first time in his objection. Arguments not raised before a magistrate judge and raised for the first time in the objections filed before the district judge are waived. *See U.S. v. Moore*, 375 F.3d 580, 584 n.2 (7th Cir. 2004); *U.S. v. Melgar*, 227 F.3d 1038, 1040 (7th Cir. 2000). Maxwell's counsel **[*6]** did not assert a law enforcement, or any other, privilege objection at the deposition, nor did Maxwell raise this issue in either the briefing on the motion to compel, or during the hearing. Accordingly, this argument is waived, and the Court declines to address it further.

Maxwell's remaining objection to the order compelling additional deposition testimony is not persuasive. Essentially, Maxwell's counsel contends that the Magistrate failed to take account of Maxwell's supposedly justifiable outrage at certain topics of inquiry, including questions about his criminal history, prior drug use, and use of aliases [DE 125 at 2-3]. Maxwell is simply incorrect. The Magistrate specifically found that this area of questioning was fair game [DE 107]. In so ruling the Magistrate noted that he was "highly disturbed" by Maxwell's "vulgar, and intimidating statements," and "disappointed and disturbed" at Maxwell's counsel's failure to calm down his client during the deposition [DE 107 at 5].

This Court agrees that Maxwell's conduct at the deposition was unacceptably disruptive and aggressive. Here is a representative exchange between Maxwell and the State Defendants' attorney, Ms. Bowker:

> Q: How **[*7]** many aliases have you used?
> * * *
> A: What's that got to do with anything? I already told you, I've worked for the United States government as a covert operative, strike force with the Minneapolis Police Department, with the FBI, the U.S. Customs, ATF here locally, the Department of Justice. . . . Give me a break. How naive can you be? Jesus Christ. Shit. Federal agents didn't give a damn about me using an alias. They told me to use an alias. What the hell are you talking about?
> Q: Have you used the name Val Santius Charles?
> A: Jesus Christ. Why?
> Q: I'm asking you because that's a name that I have that you used as an alias.
> A: What else have you got?
> Q: Well, can you answer that question?
> A: You know, you're full of shit. . . . This is all bullshit.
> * * *
> MR. HULL: Okay. Mr. Maxwell, let me clarify.
> THE WITNESS: Shit.
> MS. BOWKER: I don't appreciate you yelling at me.
> THE WITNESS: I don't appreciate you asking me some bullshit. It's bullshit.

[DE 89-2, Tr., 230:4-231:25.]

The Court also agrees with the Magistrate that Maxwell's counsel, Mr. Hull, not only could not control Maxwell's inappropriate outbursts, he emboldened him by implying that his behavior was justified:

> MR. HULL: I'm going to ask that **[*8]** you simply answer the questions and leave it —
> THE WITNESS: Shit. Damn it. Motherfuckers.
> MS. BOWKER: I'm going to ask that you stop shouting at me and stop using curse words.

> THE WITNESS: Let me tell you something, you don't be — you don't be paternalistic to me. Okay? You have no right to be paternalistic to me.
> MR. HULL: Okay. Mr. Maxwell.
> THE WITNESS: Do you understand me?
> MR. HULL: Mr. Maxwell . . .
> * * *
> THE WITNESS: You don't tell me anything.
> MR. HULL: Mr. Maxwell . . .
> THE WITNESS: You understand me? Nothing.
> MS. BOWKER: No, I don't understand you.
> THE WITNESS: Well, you better get a — you better get a quick grip. You don't tell me nothing.
> * * *
> MR. HULL: I'm going to ask you to stop talking. If you want me to be your lawyer, you're going to have to stop talking, and answer her questions the way she's asking them.
> THE WITNESS: Don't tell me what to do.
> MR. HULL: All right.
> THE WITNESS: I ain't your child.
> MR. HULL: I'm going to state for the record that, quite frankly, Ms. Bowker, you started part of this when you asked him questions that were totally inappropriate. He is still angry about it.

[DE 89-2, Tr., 275:25-278:1.]

Both of these excerpts demonstrate that Maxwell's deposition had simply **[*9]** gone off the rails, through a combination of Maxwell's unruliness and his counsel's inability to correct the behavior, or put a stop to the deposition. The Seventh Circuit has held that, where a party believes a deposition is being conducted in bad faith, the proper course of action under Rule 30(d)(3) is to "halt the deposition and apply for a protective order." *Redwood v. Dobson*, 476 F.3d 462, 467 (7th Cir. 2007). This is what Maxwell's attorney should have done, particularly given his belief that Maxwell's behavior was provoked by improper questioning. The Magistrate was right to find that Maxwell's refusal to answer the State Defendants' questions, however inflammatory Maxwell felt them to be, was improper absent a Rule 30(d)(3) motion.

Accordingly, because this Court is not left with a "definite and firm conviction that a mistake has been made" as to the Magistrate's ruling on the State Defendants' motion to compel, the Court affirms the Magistrate's order granting that motion.

II. Bills of Costs

Discovery sanctions may be imposed where, as here, a deponent refuses to answer a question, and the opposing party successfully moves to compel. *See* Fed. R. Civ. P. 30(d)(2) ("The court **[*10]** may impose an appropriate sanction — including the reasonable expenses and attorney's fees incurred by any party — on a person who impedes, delays, or frustrates the fair examination of the deponent."). Discovery sanctions may also be imposed where, as the Magistrate found here, a party's document production violates Rule 34(b)'s requirement that documents must be produced as they are kept in the ordinary course of business. *See Rothman v. Emory University*, 123 F.3d 446, 455 (7th Cir. 1997) (affirming sanctions where plaintiff turned over three large banker boxes containing unrelated and unorganized information); *see also In re Sulfuric Acid Antitrust Litig.*, 231 F.R.D. 351, 363 (N.D. Ill. 2005).

Moreover, Rule 37(a)(5) contains a presumption that the prevailing party on a motion to compel is entitled to expenses, including attorneys' fees. Fed. R. Civ. P. 37(a)(5)(A) (court must require the party or attorney whose conduct necessitated a motion to compel to "pay the movant's reasonable expenses incurred in making the motion, including attorney's fees"); *see also Rickels v. City of South Bend, Ind.*, 33 F.3d 785, 786-787 (7th Cir. 1994) ("[t]he great operative principle of [Rule 37(a)(5)] **[*11]** is that the loser pays"). Any award of sanctions, however, "must be proportionate to the circumstances surrounding the failure to comply with discovery." *Crown Life Insurance Co. v.*

Craig, 995 F.2d 1376, 1382 (7th Cir. 1993). And Rule 37(a)(5)(A) mandates an award of only those expenses that are "reasonable." Moreover, Rule 37(a)(5)(A)(iii) provides that the court must not order payment if "other circumstances make an award of expenses unjust." Accordingly, the only fees this Court will grant will be those that (a) the movant demonstrably incurred; (b) are reasonable; and (c) are in fact the product of Maxwell's failure to answer deposition questions (in the case of the State Defendants' motion), or failure to produce documents in conformity with Rule 34 (in the case of Imperial's motion), and the motion practice and discovery that ensued in connection with such failures. *Cf. Alek v. University of Chicago Hospitals*, No. 99 C 7421, 2001 U.S. Dist. LEXIS 20000, 2001 WL 1543518, at *1 (N.D. Ill. Nov. 30, 2001); *Illinois Tool Works, Inc. v. Metro Mark Products, Ltd.*, 43 F. Supp. 2d 951, 962 (N.D. Ill. 1999).

To determine the reasonableness of attorneys' fees, I must multiply the number of hours reasonably expended **[*12]** on the work by a reasonably hourly rate, a technique known as the lodestar method. *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).

A. Imperial's Bill of Costs

According to Imperial's bill of costs, three people worked on this matter: attorney Hesser ($270/hour), attorney Leazenby ($250/hour) and paralegal Shumaker ($105/hour) [DE 111]. Based on these rates, Imperial requests a total of $4,735.50 in fees in connection with its motion to compel [*Id.*], and the clerk has taxed costs in the same amount [DE 113]. Maxwell contends that Imperial's evidence of the reasonableness of these rates is insufficient, but he does not otherwise object to these rates [DE 136 at 5]. The Court, however, finds the rates to be reasonable. Some of Imperial's attorneys' time entries also appear reasonable. Other entries, however, appear either excessive or not reasonably related to the motion to compel. These will be either reduced or denied.

All of the time entries for Mr. Leazenby and Ms. Shumaker—a total of seven hours—are for hours spent reviewing Maxwell's document production [DE 111, ¶¶ 1-2]. Time may be excluded if the work most likely would have still been performed in the absence of a motion to compel. **[*13]** *Cf. Heneghan v. City of Chicago*, No. 09 C 0759, 2010 U.S. Dist. LEXIS 95471, 2010 WL 3715142, at *3 (N.D. Ill. Sept. 14, 2010). Here, it appears that the time spent reviewing documents, however poorly they were organized, probably would have been done regardless of the motion to compel. This is a close call. But the movant bears the initial burden of documenting that its hours are reasonable. *See Tomazzoli v. Sheedy*, 804 F.2d 93, 96 (7th Cir. 1986). And Imperial failed to carry this burden with respect to the attorney time spent on document review. Imperial's fees for document review are therefore denied.

Mr. Hesser spent 7.4 hours drafting the motion to compel papers [DE 111, ¶ 3b-d]. The hours worked on these papers appear higher than usual, particularly given that the memorandum is just three pages, and cites no case law. Accordingly, the Court reduces this entry to 3.5 hours. *Cf. Arrington v. La Rabida Children's Hosp.*, No. 06 C 5129, 2007 U.S. Dist. LEXIS 31127, 2007 WL 1238998, at *3 (N.D. Ill. Apr. 25, 2007) (reducing requested time when brief in support of motion to compel cited no case law); *Mattenson v. Baxter Healthcare Corp.*, No. 02 C 3283, 2003 U.S. Dist. LEXIS 17983, 2003 WL 22317677, at *1 (N.D. Ill. Oct. 9, 2003) (two **[*14]** hours reasonable for three page motion).

Mr. Hesser spent three hours preparing for, traveling to and from, and attending the hearing on the motion to compel [DE 111, ¶ 3f]. The time spent preparing for and attending the hearing is related to the motion to compel. *Cf. Heneghan*, 2010 U.S. Dist. LEXIS 95471, 2010 WL 3715142, at *2. Accordingly, fees for this time entry are granted

Mr. Hesser spent 5.5 hours preparing for, traveling to and from, and attending the continued deposition of Maxwell [DE 111, ¶ 4]. Maxwell's continued deposition is unrelated to Imperial's motion, which was limited to the issue of Maxwell's written discovery responses. Accordingly, fees for this time entry are denied.

Mr. Hesser spent 1.8 hours on the non-itemized activities of reviewing Maxwell's production, correspondence with Maxwell regarding the parties' discovery dispute, and a proposed motion to compel [DE 111, ¶ 3a]. As before, the Court will not grant fees for this document review, which likely would have been done regardless of the motion to compel. The time spent communicating with opposing counsel, however, is related to the motion to compel. *Cf.*

Budget Rent-A-Car Sys., Inc. v. Consol. Equity, LLC, No. 04 C 1772, 2005 U.S. Dist. LEXIS 16070, 2005 WL 6088859, at *2 (N.D. Ill. Aug. 3, 2005). **[*15]** So is the time spent reviewing the proposed motion to compel.

But this entry provides the Court with no way of determining how much of the 1.8 hours was allocated to these allowable activities as opposed to document review. As the moving party, Imperial has the burden of documenting the hours spent with enough specificity to determine whether they are reasonable. *Hensley*, 461 U.S. at 433; *Huss v. IBM Medical And Dental Plan*, No. 07 C 7028, 2010 U.S. Dist. LEXIS 71126, 2010 WL 2836743, at *6 (N.D. Ill. Jul. 15, 2010). And entries that lack enough specificity to determine if the time was reasonable may be reduced or eliminated. *Hensley*, 461 U.S. at 433; *Huss*, 2010 U.S. Dist. LEXIS 71126, 2010 WL 2836743, at *6. Because I have no way of unbundling them, and the burden is on Imperial, the fees for this time entry are denied.

Finally, Mr. Hesser spent 1.7 hours on the non-itemized activities of reviewing Maxwell's document production, preparing for the hearing on the motion to compel, and reviewing Maxwell's responses to both motions to compel [DE 111, ¶ 3e]. Of these activities, only the fees for preparing for the hearing and reviewing Maxwell's response to Imperial's motion are allowable. But once again, this entry provides the Court with no way **[*16]** of determining how much of the 1.7 hours was allocated to these allowable activities. Thus, fees for this entry are also denied. *See Hensley*, 461 U.S. at 433; *Huss*, 2010 U.S. Dist. LEXIS 71126, 2010 WL 2836743, at *6.

This leaves a total of 6.5 attorney hours at a rate of $270 per hour that the Court will grant, for a total of $1,755.

B. The State Defendants' Bill of Costs

Laura Bowker was the only attorney to work on this matter ($250/hour) [DE 112]. Based on this rate, the State Defendants request a total of $3,875 in fees in connection with their motion to compel [*Id.*], and the clerk has taxed costs in the same amount [DE 114]. The State Defendants also seek an order requiring Maxwell to pay the costs of the videographer and court reporter for the continued deposition the Magistrate ordered, once the State Defendants receive the bill for such costs [DE 112]. Maxwell contends that the State Defendants' evidence of the reasonableness of its attorney's rate is insufficient, but he does not otherwise object to the rate [DE 136 at 5]. I find Ms. Bowker's rate to be reasonable, particularly in light of her 24 years of experience practicing law [DE 112, ¶ 5].

Ms. Bowker, who lives in West Lafayette, Indiana, spent 6.75 **[*17]** hours traveling to and from, and attending the hearing on the motion to compel; she also spent 8.75 hours traveling to and from and taking Maxwell's continued deposition [*Id.*, ¶ 12]. These are the only tasks for which the State Defendants seek attorney's fees [*Id.*]. And Maxwell does not object to either category, other than to contend that the State Defendants provide no evidence that the time spent on these tasks is reasonable [DE 136, ¶ 5].

As for the 6.75 hours relating to the hearing on the motion to compel, the time spent preparing for and attending the hearing is related to the motion to compel. *Cf. Heneghan*, 2010 U.S. Dist. LEXIS 95471, 2010 WL 3715142, at *2. So fees for this time entry are granted.

As for the 8.75 hours relating to the continued deposition, the State Defendants are not entitled to attorney's fees for the time *during* Maxwell's subsequent deposition. Such deposition time would have occurred even if Maxwell had answered the State Defendants' questions the first time around. Ms. Bowker's travel time to and from Maxwell's subsequent deposition, however, is reasonably related to the motion to compel. The bill of costs does not indicate what portion of this 8.75 hours was spent on travel time, **[*18]** as opposed to deposition time. Ms. Bowker's 6.75-hour time entry for travel to and from and attending the hearing on the motion to compel, however, contains a clue. That hearing appears to have lasted 1.5 hours [DE 100 & 123], which leaves 5.25 hours for travel time between West Lafayette and South Bend for the hearing. Assuming the deposition, like the hearing, was conducted in South Bend, where Maxwell resides, Ms. Bowker likely also spent 5.25 hours traveling to and from the deposition. Accordingly, the Court reduces the entry for 8.75 hours to 5.25 hours.

This leaves a total of 12 attorney hours at a rate of $250 per hour that the Court will grant, for a total of $3,000.

The Court denies the State Defendants' request for videographer and court reporter costs for Maxwell's continued deposition. The Court normally would award such expenses. Rule 37, however, gives the Court discretion to limit or deny sanctions where other circumstances make such an award unjust. Fed. R. Civ. P. 37(a)(5)(A)(iii). Mr. Hull has represented that Maxwell is unemployed and indigent [DE 123 at 14]. The Court finds that these circumstances make an award of sanctions in addition to the $3,000 already awarded **[*19]** in the State Defendants' favor unjust.

C. Against Whom to Award Sanctions

The remaining issue as to sanctions is whether expenses should be assessed against (1) Maxwell; (2) Maxwell's counsel, Mr. Hull; or (3) both. Rule 37(a)(5)(A) permits the Court to award expenses against the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both. Fed. R. Civ. P. 37(a)(5)(A); *cf. Redwood v. Dobson*, 476 F.3d 462, 469-70 (7th Cir. 2007) (applying Rule 30(d)(2) sanctions to an attorney for improperly instructing his client not to respond to questions). The Magistrate found, and this Court agrees, that Maxwell's counsel, Mr. Hull, not only improperly objected to the State Defendants' deposition questions, but that Mr. Hull's improper objections, and instructions to his client not to answer, encouraged Maxwell's highly inappropriate behavior at the deposition [DE 107 at 5]. The Court therefore finds that Maxwell and his counsel are equally responsible for necessitating the motion to compel Maxwell's deposition testimony. Accordingly, expenses relating to the motion to compel Maxwell's deposition testimony are awarded against Maxwell and his counsel, **[*20]** Mr. Hull, jointly and severally.

As for the motion to compel relating to Maxwell's document production, the Court finds that Mr. Hull is chiefly responsible for Maxwell's failure to organize his document production in accordance with Rule 34's requirements. Therefore, expenses relating to Imperial's motion to compel are awarded only against Mr. Hull.

CONCLUSION

For the foregoing reasons, the Court **AFFIRMS** Magistrate Judge Nuechterlein's June 28, 2010 order [DE 107] in its entirety, and declines to modify or set aside any portion of that order. Correspondingly, the Court **DENIES** Plaintiff's objection to that order [DE 125]. Defendant Imperial is entitled to sanctions in the amount of $1,755, and the State Defendants are entitled to sanctions in the amount of $3,000. Mr. Maxwell and Mr. Hull are jointly and severally responsible for the award of $3,000 in the State Defendants' favor. Mr. Hull is solely responsible for the award of $1,755 in Imperial's favor. The State Defendants' request for expenses relating to the videographer and court reporter fees for Maxwell's continued deposition [DE 112] is **DENIED**. The clerk is instructed to ensure that the docket entries relating to the costs taxed **[*21]** in this matter [DE 113-114] are adjusted in conformity with this order.

SO ORDERED.

ENTERED: October 25, 2010

/s/ Philip P. Simon

PHILIP P. SIMON, CHIEF JUDGE

UNITED STATES DISTRICT COURT

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Miles Distribs., Inc. v. Speciality Constr. Brands, Inc.

United States District Court for the Northern District of Indiana, South Bend Division

June 3, 2005, Decided

CAUSE NO. 3:04-CV-561 CAN

Reporter
2005 U.S. Dist. LEXIS 11061 *; 2005 WL 8170730

MILES DISTRIBUTORS, INC., Plaintiff, v. SPECIALITY CONSTRUCTION BRANDS, INC., d/b/a TEC SPECIALITY PRODUCTS, INC., Defendant.

Subsequent History: Summary judgment granted, in part, summary judgment denied, in part by Miles Distribs. v. Specialty Constr. Brands, Inc., 2006 U.S. Dist. LEXIS 9606 (N.D. Ind., Feb. 27, 2006)

Case Summary

Procedural Posture
Plaintiff distributor filed an action against defendant manufacturer for unfair competition. The distributor filed a motion to compel deposition testimony on two specific questions. The distributor also requested attorney's fees incurred in bringing the motion to compel and for resuming the deposition.

Overview
The manufacturer sent the distributor a letter terminating their business relationship, and an action was filed alleging illegal price fixing. The distributor took a deposition of the manufacturer's employee, and the employee was instructed not to answer questions concerning whether or not the manufacturer's legal department made any changes to the letter before it was sent. The distributor certified two questions in the deposition related to the issue and filed a motion to compel. The court held that the questions as certified were relevant under Fed. R. Civ. P. 26 and were not protected by the attorney-client privilege. The questions were not directed to the substance of the communication, which would be privileged, because the distributor did not inquire as to what either the employee or counsel might have said and the distributor did not ask to see a copy of the draft of the letter. The questions merely addressed whether or not any changes were made after the legal department reviewed the letter. The distributor was entitled to attorney's fees under Fed. R. Civ. P. 37(a)(4) associated with the costs of bringing the motion but could not recover costs for resuming the deposition.

Outcome

The court granted the distributor's motion to compel an answer to two certified questions. The court granted the distributor's motion for attorney's fees related to the cost to bringing the motion to compel. The court denied the distributor's motion as it related to the fees incurred in resuming the deposition, and the court denied the distributor's request for an order to have the deposition resumed in Indiana.

Counsel: [*1] For Miles Distributors Inc, Plaintiff: Christopher R Putt, Jeffery A Johnson, May Oberfell Lorber, South Bend, IN.

For Specialty Construction Brands Inc, doing business as TEC Specialty Products Inc, Defendant: Jeffrey J Keyes PHV, Robin Caneff Gipson PHV, Briggs and Morgan PA, Minneapolis, MN; Alison G Fox, Thomas J Brunner Jr, Baker & Daniels -- SB/IN, South Bend, IN.

For Specialty Construction Brands Inc, Counter Claimant: Jeffrey J Keyes PHV, Robin Caneff Gipson PHV, Briggs and Morgan PA, Minneapolis, MN.

For Miles Distributors Inc, Counter Defendant: Christopher R Putt, Jeffery A Johnson, May Oberfell Lorber, South Bend, IN.

Judges: Christopher A. Nuechterlein, United States Magistrate Judge.

Opinion by: Christopher A. Nuechterlein

Opinion

ORDER AND OPINION

This case arises out of an unfair competition claim filed by Plaintiff on August 27, 2004. On May 4, 2005, Plaintiff filed a motion to compel deposition testimony on two deposition questions. Plaintiff also requested its attorneys' fees incurred in bringing the motion to compel and for resuming the deposition. For the following reasons, Plaintiff's motion [Doc. No. 27] is **GRANTED IN PART** and **DENIED IN PART.**

[*2] I. RELEVANT BACKGROUND

Defendant manufactures, among other products, setting materials such as grout and mortar. Defendant sold its setting materials to Plaintiff who in turn sold the products to retail tile stores and contractors. On June 17, 2004, Defendant sent Plaintiff a letter terminating their business relationship. Plaintiff, alleging that Defendant was engaging in illegal price fixing, filed this action on August 27, 2004.

On March 23, 2005, Plaintiff took the deposition of Christopher Bailey, Defendant's employee. Plaintiff asked Bailey questions about the June 17, 2004 termination letter. Bailey responded that the letter originated from a template letter that Defendant had previously sent to some of its Florida customers. Bailey specifically stated that the letter had to be "changed to fit [the Plaintiff's] situation and approved by legal." The following transaction then occurred:

> Q: Were changes made by Legal when the draft was sent?
> (Defense Counsel): Don't answer that-I instruct you not to answer that question. It invades the attorney-client privilege.
>
> (Plaintiff's Counsel): I'm not asking about what changes were made, I think that would be **[*3]** a proper objection. But I am asking were changes made, not specifically what changes.
> Q: You had it sent for their review before it went out, you've already testified to that. My question to you is: After they reviewed it, were changes made?
> (Defense Counsel): Don't answer that. I am not going to permit him to answer that.
> (Plaintiff's Counsel): Are you going to answer that question?
> A: No I am not.
> (Plaintiff's Counsel): Would you certify that question please?
> Q: You understand that I am not asking you what changes were made or even if changes were made as a result of any discussions you had with legal counsel. I am just asking after it went to legal counsel were changes to the draft of the letter made? And you are not going to answer that question?
> (Defense Counsel): No, he is not going to answer it.
> (Plaintiff's Counsel): OK, would you certify that.

(Bailey Deposition, pgs. 231-232).

On May 6, 2005, Plaintiff filed a motion to compel Bailey's deposition testimony regarding the two certified questions. Defendant again objected and asserted the attorney-client privilege with regards to the testimony. This Court may rule on Plaintiff's motion pursuant to **[*4]** the parties' consent and 28 U.S.C. § 636(c).

II. APPLICABLE LAW

Fed. R. Civ. P. 26 (b)(1) permits discovery into "any matter, not privileged, that is relevant to the claim or defense of any party." Relevant information need not be admissible at trial so long as the discovery appears reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26 (b)(1). For the purpose of discovery, relevancy will be construed broadly to encompass "any matter that bears on, or that reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case." *Chavez v. Daimler Chrysler*, 206 F.R.D. 615, 619 (S.D. Ind. 2002) (quoting *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 57 L. Ed. 2d 253, 98 S. Ct. 2380 (1978)).

This Court has broad discretion when deciding whether to compel discovery. Fed. R. Civ. P. 26(c); *Sattar v. Motorola, Inc.*, 138 F.3d 1164, 1171 (7th Cir. 1998) ("District courts have broad discretion in matters related to discovery."); *Gile v. United Airlines, Inc.*, 95 F.3d 492, 495-96 (7th Cir. 1996) **[*5]** ("The district court exercises significant discretion in ruling on a motion to compel."). In ruling on a motion to compel, "a district court should independently determine the proper course of discovery based upon the arguments of the parties." *Gile*, 95 F.3d at 496.

An attorney-client privilege applies in the following situations:

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived.

U.S. v. Evans, 113 F.3d 1457, 1461 (7th Cir. 1997). The party invoking the privilege has the burden of proving all of the elements. *Id.* However, because the privilege has the effect of withholding relevant information, courts construe

the privilege to apply only where necessary to achieve its purpose. *U.S. v. BDO Seidman*, 337 F.3d 802, 811 (7th Cir. 2003).

III. PLAINTIFF'S MOTION TO COMPEL

Plaintiff requests that this Court order Bailey to answer the following two questions: **[*6]** 1) After legal reviewed the letter, were changes made; and 2) After the letter went to legal counsel were changes to the draft of the letter made? These two questions are essentially the same. Defendant objects on the grounds that these questions invade the attorney-client privilege. Defendant contends that Plaintiff is really asking "did your lawyer tell you to make changes to the letter and did you do it?" (Def. Resp. pgs. 3-4).

This Court does not agree with Defendant that Plaintiff's questions are directed to the substance of the communication between Bailey and legal counsel, which would be protected by the attorney-client privilege. Plaintiff does not inquire as to what either Bailey or counsel might have said or suggested regarding the letter, nor does Plaintiff ask to see a copy of the draft. Rather, Plaintiff's questions go to whether any changes were made after the legal department reviewed the letter. This inquiry does not encroach upon the attorney-client privilege because it is not addressing the substance of the communication, but addresses the fact of whether any changes were made.

Although Defendant also suggests that this information is not material or relevant to **[*7]** the case, the relevancy of particular information is to be construed broadly. It is possible that this information could reasonably lead to other information that may bear on a fact in issue. Thus, this Court **GRANTS** Plaintiff's motion as it relates to Bailey's deposition testimony. Bailey is **ORDERED** to answer Plaintiff's questions regarding whether any changes were made to the letter after the legal department reviewed it by **July 20, 2005.**

IV. ANCILLARY MATTERS

A. *Plaintiff's Request for Attorneys' Fees Associated with the Motion to Compel*

Plaintiff requests the reasonable fees incurred in bringing the motion to compel. Fed. R. Civ. P. 37(a)(4) states that if a motion to compel is granted, the court shall require the opposing party to pay the moving party the reasonable expenses incurred in making the motion unless the opposing party's objection was substantially justified. Defendant asserts that fees should not be awarded because it was substantially justified in refusing to answer Plaintiff's deposition questions. While Defendant was trying to protect the attorney-client privilege, Defendant's assertion of **[*8]** the privilege was not substantially justified as Plaintiff's deposition question clearly did not inquire as to the substance of the communication. Therefore, Plaintiff's requests for fees associated with bringing the motion to compel is **GRANTED.** Plaintiff shall file an itemized statement of the attorneys' fees associated with bringing the motion to compel by **June 17, 2005.** Defendant has until **June 24, 2005**, to file any objections to Plaintiff's itemized statement.

B. *Plaintiff's Request for Fees to Resume the Deposition*

Plaintiff also requested the fees that it will incur in resuming Bailey's deposition. While Rule 37 allows for costs associated with bringing a motion to compel, it does not explicitly require the fees for the resumption of the deposition. Fed. R. Civ. P. 30(d)(3) allows a court to impose sanctions, in the form of reasonable costs and attorney's fees, upon a finding that any impediment or other conduct has frustrated the fair examination of the deponent. Although Defendant did object to the questioning, it does not appear that the objections significantly impaired Plaintiff's ability to fairly question **[*9]** Bailey. [1] Therefore, Plaintiff's motion as it relates to the fees associated with resuming the deposition is **DENIED.**

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[1] Plaintiff's ability to fairly question Defendant is apparent in the deposition excerpts provided to this Court. These objections did not arise until page 231 of the deposition, illustrating that Plaintiff had already conducted an extensive deposition.

C. *Plaintiff's Requests for the Deposition to Resume in South Bend, Indiana*

Plaintiff's last request is that Bailey be ordered to come to South Bend to resume the deposition. Bailey lives in New Hampshire and defense counsel is located in Minnesota. Bailey's last deposition was in Chicago. Plaintiff asserts that it needs to resume the deposition and requests that the deposition be held in South Bend. Nowhere in its brief does Plaintiff allude to the fact that the deposition ended abruptly when Bailey refused to answer the questions. It is unclear on exactly how much testimony is needed to answer a yes or no question and whether it would **[*10]** be beneficial to resume a full deposition. Thus, parties should attempt to work out an amicable solution to the location of the deposition should a full deposition need to be rescheduled. As there is now an abundance of communication technologies available, it is possible that parties could reach a solution that would prevent anyone from traveling. Therefore, at this time, this Court **DENIES** Plaintiff's motion as it relates to the location of the deposition. If, after conferring with Defendant about the scope and duration of the possible deposition, Plaintiff feels that this Court's intervention is necessary to establish the appropriate location for a reconvened deposition, Plaintiff may file a renewed motion with this Court.

V. CONCLUSION

For the aforementioned reasons, Plaintiff's motion to compel [Doc. No. 27] is **GRANTED IN PART** and **DENIED IN PART.** Specifically, this Court:

. GRANTS Plaintiff's motion as it relates to compelling the deposition testimony of Christopher Bailey on the issue of whether any changes were made to the termination letter after the legal department reviewed the letter and any relevant follow-up questions;

[*11] . Bailey is **ORDERED** to answer Plaintiff's questions regarding whether any changes were made to the letter after the legal department reviewed the document by **July 20, 2005;**

. GRANTS Plaintiff's motion as it relates to attorneys' fees associated with bringing the motion to compel;

. Plaintiff shall submit an itemized statement of the reasonable attorneys' fees incurred in bringing the motion to compel by **June 17, 2005.** Defendant shall file any objections to Plaintiff's statement by **June 24, 2005;**

. DENIES Plaintiff's motion as it relates to the fees incurred in resuming Bailey's deposition; and

. DENIES Plaintiff's motion as it relates to ordering that Bailey's deposition be resumed in South Bend, Indiana.

SO ORDERED.

Dated this 3rd Day of June, 2005.

Christopher A. Nuechterlein

United States Magistrate Judge

End of Document

Nelson v. Nat'l Republic Bank

United States District Court for the Northern District of Illinois Eastern Division

March 7, 1984

No. 80 C 6401

Reporter
1984 U.S. Dist. LEXIS 18815 *; Fed. Sec. L. Rep. (CCH) P91,448

JOHANNA W. NELSON, et al., Plaintiffs, v. NATIONAL REPUBLIC BANK OF CHICAGO, et al., Defendants.

Case Summary

Procedural Posture
Before the court was the motion to compel by plaintiff investors, whereby they sought to compel answers to questions by defendant attorneys in the investors action alleging defendant bank and the attorneys defrauded investors in a public bond scheme.

Overview
The investors filed an action against the bank alleging the bank and its attorneys entered into a scheme to defraud investors in a public bond scheme. The investors sought deposition testimony from the attorneys. The attorneys refused to answer the questions, principally on grounds of attorney-client privilege. Before the court was the investors' motion to compel the attorneys' deposition testimony. The investors presented in elaborate, documented detail discovered evidence of a scheme by the bank and the attorneys to support the claim that they defrauded investors in a public bond issue. In addition, another party, who was not joined as a defendant because of a petition in bankruptcy, was implicated in the fraud. The court granted the motion to compel in its entirety. The evidence of fraud had not been controverted. The court found that it was clearly sufficient to meet the ongoing fraud exception to the attorney-client privilege. That was, the attorney-client privilege may have been pierced when the client used the attorney-client relationship to engage in ongoing fraud rather than to defendant against past misconduct.

Outcome
The motion to compel was granted in its entirety.

Opinion by: [*1] LEFKOW

Opinion

MEMORANDUM DECISION

Plaintiffs have moved to compel deposition testimony of three attorney witnesses who refused to answer questions, principally on grounds of attorney-client privilege. Applicable to each of them, plaintiffs have presented in elaborate, documented detail discovered evidence of a scheme by defendants to defraud investors in a public bond issue. In addition, Harry Mayfield, who was not joined as a defendant because of a petition in bankruptcy, is implicated in the fraud. Because the evidence of fraud has not been controverted on this motion, it will not be recited here. The evidence is certainly sufficient to meet the ongoing fraud exception to the attorney-client privilege. That is, the attorney-client privilege may be pierced "when the client uses the attorney-client relationship to engage in ongoing fraud rather than to defend against past misconduct." In Re Special September 1978 Grand Jury (II) Investigation, 640 F.2d 49, 59 (7th Cir. 1980); United States v. Aldridge, 484 F.2d 655, 658 (7th Cir. 1973), cert. denied sub nom. Goode v. United States, 415 U.S. 912 (1974); Ohio Sealy Mattress Manufacturing Co. v. Kaplan, 90 F.R.D. 21, 30 (N.D. Ill. **[*2]** 1980).

A. George Pitt

Attorney George Pitt in response to the motion states that the reason he asserted the attorney-client privilege was that at the time of the deposition the estate of Cornelius Pitt (who was George Pitt's father) had no counsel. George Pitt was concerned that questions would be asked to which the estate might wish to object based on the attorney-client privilege. The depositions indicate that Cornelius Pitt came to his son for the purpose of seeking legal advice in the spring of 1973, but "ultimately the corporation became what [George Pitt] considered to be a client of the firm." Thus the existence and scope of the attorney-client relationship with Cornelius Pitt is in doubt. But since the evidence is substantial that at the time Cornelius Pitt consulted George Pitt, Cornelius Pitt was engaged in a fraudulent scheme and was using counsel in furtherance of the scheme, this issue need not be resolved.If there was an attorney-client relationship, the attorney-client privilege is not applicable because of the ongoing fraud exception. The witness is therefore directed to answer questions to which he has asserted the attorney-client privilege on behalf of **[*3]** the estate of Cornelius Pitt.

George Pitt also refused to answer questions that asked about his opinion and knowledge of the law which applied to specific legal work he performed for McCormick Health Centers. This objection is not well taken, as should be apparent from Judge Plunkett's ruling on a similar question in this case in which he said, "[The witness] can be questioned not as an expert witness in the sense that he is brought in independently to be an expert, but only with respect to those matters about which he is an occurrence witness, and to the extent the occurrence witness brings into issue his expert knowledge about matters, you may inquire about that." June 10, 1983 Transcript of Proceedings at 8-10. Just as a police officer would testify as to his training, knowledge, experience, and ordinary procedure with reference to a particular incident, a lawyer witness is expected to do the same. The witness is directed to answer questions relating to his knowledge or opinion of the law which relate to the legal work performed.

B. John Doskocil

Attorney John Doskocil represented Harry Mayfield. Harry Mayfield was, at the time of John Doskocil's participation, head **[*4]** of the Municipal Bond Underwriting Division of Stix & Co., Inc., St. Louis, Missouri. Mayfield and Cornelius Pitt put together the "McCormick A bond issue", the proceeds of which were used to buy out private debts. Mayfield served as underwriter for the bond issue and Doskocil was underwriter's counsel. As such he wrote an opinion letter certifying that there were no misstatements or omissions of material fact in the McCormick A prospectus. Plaintiffs offer prima facie evidence that Mayfield certainly knew of and was involved in a fraudulent scheme when he consulted counsel.

Doskocil argues that the ongoing fraud exception does not apply unless the plaintiff can present a prima facie case that the client's purpose in retaining counsel was to facilitate the commission of the fraud, suggesting that there

must be direct evidence of Mayfield's intent in hiring Doskocil. The cases which Doskocil cites, as well as those which plaintiff's cite, state that the prima facie evidence must be evidence of the fraud, not of the intent of the client. Intent in this context can be inferred just as it is any other context. It is unlikely that a client would openly admit to a lawyer that he **[*5]** was retaining the lawyer with the intention of commiting a fraudulent act. In the circumstances presented, it is reasonable to infer that Mayfield sought the help of underwriter's counsel in order to accomplish the McCormick A bond issue, which was a fraudulent scheme.Under these circumstances the attorney-client privilege is removed.

Doskocil's objections to so-called hypothetical questions and questions calling for expert opinions, for the reasons stated above with respect to George Pitt, are overruled.

The witness is directed to answer questions concerning his attorney-client relationship with Mayfield.

C. John Charron

Attorney John Charron has failed to respond to the motion. John Charron represented Mayfield after Doskocil no longer represented him. A review of plaintiffs' representations indicates that Charron refused to answer questions concerning matters that had been communited to third persons and matters not involving confidential communications between attorney and client. These communications are not privileged. In addition, plaintiffs have presented evidence that Charron himself was involved in concealing Mayfield's illegal conduct. For the reasons stated **[*6]** in B above and under these additional circumstances, the attorney-client privilege should not serve to protect the wrongdoers.

The witness is directed to answer the questions.

D. Refusal to Answer

For future reference, the witnesses are reminded that in this circuit absent a claim of privilege, it is improper to refuse to answer a question propounded at deposition. Eggleston v. Chicago Journeymen Plumbers Local Union, 657 F.2d 890, 902-04 (7th Cir. 1981), cert. denied sub nom. Joint Apprenticeship v. Eggleston, 445 U.S. 1017 (1982). If counsel objects to a question, he should state his objection for the record and then allow the question to be answered. Id. at 902, citing Coates v. Johnson and Johnson, 85 F.R.D. 731, 733 (N.D. Ill. 1980).

WHEREFORE, IT IS ORDERED that the plaintiffs' motion to compel answers to questions by defendants Borge and Pitt, John Doskocil, and John Charron is granted in its entirety.

End of Document

Patterson v. Burge

United States District Court for the Northern District of Illinois, Eastern Division

May 4, 2007, Decided ; May 4, 2007, Filed

Case No. 03 C 4433

Reporter
2007 U.S. Dist. LEXIS 33102 *; 2007 WL 1317128

AARON PATTERSON, Plaintiff, v. JON BURGE, et al., Defendants.

Prior History: Patterson v. Burge, 2007 U.S. Dist. LEXIS 8336 (N.D. Ill., Feb. 6, 2007)

Counsel: [*1] For Aaron Patterson, Plaintiff: Frank B Avila, LEAD ATTORNEY, Frank B. Avila, Avila and Tomic LLC, Chicago, IL; Adam J. Loewy, Carl R. Barry, Barry & Loewy LLP, Austin, TX; Ivan Tomic, Avila & Tomic LLC, Chicago, IL.

For Jon Burge, Former Chicago Police Lt., # 338, John Byrne, former CPD Sgt., # 1453, James Pienta, former CPD Detectives, # 10063, William Marley, # 9886, Raymond Madigan, # 1471, Daniel F McWeeny, # 14367, Joseph Danzl, # 12568, Assistant Cook County State's Attorney, Defendants: Jennifer Louise Hamilton, LEAD ATTORNEY, Lane & Waterman LLP, Rock Island, IL; Michael Paul Kornak, LEAD ATTORNEY, Richard Thomas Sikes, Jr., LEAD ATTORNEY, Richard Bruce Levy, Terrence J. Sheahan, Freeborn & Peters, Chicago, IL; Oran Fresno Whiting, Much Shelist Freed Denenberg, Ament & Rubenstein, PC, Chicago, IL.

For William Pedersen, # 8553, Defendant: Jennifer Louise Hamilton, LEAD ATTORNEY, Lane & Waterman LLP, Rock Island, IL; Richard Thomas Sikes, Jr., LEAD ATTORNEY, Michael Paul Kornak, Richard Bruce Levy, Terrence J. Sheahan, Freeborn & Peters, Chicago, IL.

For Peter Troy, former Assistant Cook County State's Attorney, Cook County State's Attorney's Office, County of **[*2]** Cook, Illinois, Defendants: Jennifer Louise Hamilton, LEAD ATTORNEY, Lane & Waterman LLP, Rock Island, IL;Patrick T. Driscoll, Jr., LEAD ATTORNEY, Stephen L. Garcia, LEAD ATTORNEY, Jeffrey S. McCutchan, Paul Anthony Castiglione, Cook County State's Attorney, Chicago, IL; Louis R. Hegeman, Cook County State's Attorney's Office, Chicago, IL.

For William Lacy, Cook County State's Attorney, Defendant: Jennifer Louise Hamilton, LEAD ATTORNEY, Lane & Waterman LLP, Rock Island, IL; Patricia Campbell Bobb, LEAD ATTORNEY, Patricia C. Bobb & Associates, Chicago, IL.

For Richard Devine, Chicago Police Superintendent, Defendant: Jennifer Louise Hamilton, LEAD ATTORNEY, Lane & Waterman LLP, Rock Island, IL; Patrick T. Driscoll, Jr., LEAD ATTORNEY, Stephen L. Garcia, LEAD ATTORNEY, Jeffrey S. McCutchan, Paul Anthony Castiglione, Cook County State's Attorney, Chicago, IL; Catherine Mary Towne, Figliulo & Silverman, PC, Chicago, IL; James R. Figliulo, Figliulo & Silverman, Chicago, IL; Louis R. Hegeman, Cook County State's Attorney's Office, Chicago, IL.

For Terry Hillard, former Chicago Police Superintendent, Defendant: Jennifer Louise Hamilton, LEAD ATTORNEY, Lane & Waterman LLP, **[*3]** Rock Island, IL; Terrence Michael Burns, LEAD ATTORNEY, Daniel Matthew Noland, Harry N. Arger, Paul A. Michalik, Dykema Gossett PLLC, Chicago, IL.

For Leroy Martin, former OPS Director, Gayle Shines, former counsel to the Superintendent, Defendants: Eileen Marie Letts, LEAD ATTORNEY, Kenya A Jenkins, LEAD ATTORNEY, Allen Price Walker, Kevin Thomas Lee, Martin Peter Greene, Greene & Letts, Chicago, IL; Jennifer Louise Hamilton, LEAD ATTORNEY, Lane & Waterman LLP, Rock Island, IL.

For Thomas Needham, Defendant: Jennifer Louise Hamilton, LEAD ATTORNEY, Lane & Waterman LLP, Rock Island, IL; Terrence Michael Burns, LEAD ATTORNEY, Daniel Matthew Noland, Harry N. Arger, Paul A. Michalik, Dykema Gossett PLLC, Chicago, IL.

For City of Chicago, Defendant: Terrence Michael Burns, LEAD ATTORNEY, Daniel Matthew Noland, Harry N. Arger, Paul A. Michalik, Dykema Gossett PLLC, Chicago, IL.

For Richard M Daley, Defendant: Terrence Michael Burns, LEAD ATTORNEY, Paul A. Michalik, Dykema Gossett Rooks Pitts PLLC, Chicago, IL; Daniel Matthew Noland, Harry N. Arger, Dykema Gossett PLLC, Chicago, IL.

For George H. Ryan, Sr., Respondent: Bradley E. Lerman, LEAD ATTORNEY, Dan K. Webb, **[*4]** LEAD ATTORNEY, Julie Anne Bauer, LEAD ATTORNEY, Winston & Strawn, LLP, Chicago, IL.

Judges: GERALDINE SOAT BROWN, United States Magistrate Judge. Judge Joan B. Gottschall.

Opinion by: GERALDINE SOAT BROWN

Opinion

MEMORANDUM OPINION AND ORDER

Geraldine Soat Brown, United States Magistrate Judge

Before the court is Certain Defendants' Motion for Sanctions and Second Motion to Compel. (Def.'s Mot. Sanctions.) [Dkt 589.] Defendants City of Chicago, Terry Hillard, and Thomas Needham also joined in the motion. [Dkt 591.] For the reasons set out below, the motion is granted.

BACKGROUND

This is the second motion filed by certain individual defendants (collectively here, "Defendants") regarding the deposition of plaintiff Aaron Patterson ("Patterson"). Defendants previously filed a motion to compel Patterson to answer questions that he had refused to answer at his deposition, and to compel production of certain documents

allegedly provided to Patterson prior to his deposition. (Defs.' Mot. Compel.) [Dkt 421.] Except for the issue regarding the documents, that motion was rendered moot by the entry of a Stipulated Protective Order governing the use and disclosure of any deposition **[*5]** testimony that Patterson in good faith believes creates a concern for his personal safety if publicly disclosed. (Order, June 14, 2006; Stip. Protective Order.) [Dkt 437, 438.] Following that order, Patterson's deposition was resumed, but apparently there were still questions that he declined to answer, and the present motion ensued. [1]

[*6] The present motion initially raised again the issue of the documents allegedly provided by Patterson's counsel. (Defs.' Mot. Sanctions at 4.) That issue was resolved when Patterson's present counsel agreed to produce a CD containing documents that Patterson had mentioned at his deposition. (*See* Order, March 16, 2007.) [Dkt 663.] Accordingly, that part of the motion is moot. The remaining disputes relate to questions that Patterson refused to answer at his continued deposition.

The scope of discovery extends to "any matter, not privileged, that is relevant to the claim or defense of any party . . . ." Fed. R. Civ. P. 26(b)(1). Discovery is not limited to evidence admissible at trial, but extends to "discovery [that] appears reasonably calculated to lead to admissible evidence." *Id.* Patterson's Third Amended Complaint alleges that Defendants "knowingly and maliciously tortured, prosecuted, imprisoned and sentenced an innocent Aaron Patterson to death." (Third Am. Compl. at 6.) [Dkt 693.] Patterson alleges that his injuries include "pain, suffering, fear, mental anguish, detention, imprisonment, humiliation, and loss of freedom and **[*7]** companionship." (*Id.* at 25.)

ANALYSIS

I. Questions regarding Patterson's investigations and conversation with the Office of Police Standards.

Patterson testified that one of the jobs he had following his release from prison after being pardoned was working for Professor David Protess "investigat[ing] cases," including this case. (Dep. at 42-43.) [2] **[*8]** Patterson testified that he was paid for that work. (*Id.*) He refused to testify about what he did to investigate this case. (*Id.* at 45-46.) His counsel asserted an objection of work product. (*Id.*) None of the lawyers at Northwestern University represent Patterson. (*Id.* at 970.) Patterson has also worked for Professor Jack Doppelt, who is a journalist, not an attorney. (*Id.* at 968.) [3] Patterson also refused to testify about his investigations for Professor Doppelt, and his counsel asserted "issues of confidentiality" and "journalistic ethics issues." (*Id.* at 970.)

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[1] Because Patterson is currently incarcerated following his conviction in 2005 on unrelated federal charges, arrangements had to be made for taking his deposition. Defendants' counsel and Patterson's previous counsel met with the court and a representative of the security staff of the Metropolitan Correctional Center and worked out agreed procedures. For practical and security reasons, individual sessions of his deposition had to be limited to a few hours, resulting in counsel returning for a number of days of testimony. As used herein, the "first session" of Patterson's deposition refers to the deposition testimony taken between November 2005 and March 2006, the transcript of which is attached as Exhibit B to Defendants' Motion to Compel and contains pages 1-768. [Dkt 421.] The "second session" refers to the deposition testimony taken in August 2006, the transcript of which is attached as Exhibit D to the present motion and contains pages 916-1055. All references to Patterson's deposition testimony, whether from the first or second session, will be cited herein as "Dep. at __."

[2] Professor Protess teaches at the Medill School of Journalism at Northwestern University, where he has led teams of students in investigating claims of wrongful convictions, resulting in several exonerations. *See* Alex Doniach, *Protess honored with Puffin/Nation Award,* http://www.medill.northwestern.edu/medill/inside/news/protess_honored_with_puffinnation_award.html (Dec. 16, 2003) (last visited May 4, 2007).

[3] Professor Doppelt also teaches at the Medill School of Journalism. *See* Jeannie Vanasco, *Medill Professor's Supreme Court Site is One of a Kind*

Defendants seek an order compelling Patterson to testify to facts that he learned during his investigations regarding this case. (Defs.' Mot. Sanctions at 5-6.) In response, Patterson argues the general principle that an attorney's notes are protected work product, as are notes taken by an agent working on the attorney's behalf. (Pl.'s Resp. at 7.) However, that argument misses the mark; Defendants' motion does not address any documents as to which work product protection has been asserted. [4] Defendants seek to compel further deposition testimony, and the information sought is not protected attorney work product. The work product privilege protects "documents and tangible things otherwise discoverable . . . prepared in anticipation of litigation or for trial by or for another party or by **[*9]** or for that other party's representative . . . ." Fed. R. Civ. P. 26(b)(3). Defendants' motion seeks to compel Patterson to testify about factual information that he has about this case, which is not protected work product.

> [T]he work-product protection cannot be asserted to prevent disclosure of the underlying facts, which are discoverable in any adversary proceeding. A document may be protected from compelled disclosure. An attorney may not be forced to take the stand and testify as to that attorney's mental impressions. That does not, however, mean that the underlying facts thereby are absolutely protected from discovery, either by way of interrogatories or by way of depositions of other knowledgeable witnesses, discovered through interrogatories.

Edna Selan Epstein, *The Attorney-Client Privilege and the Work Product Doctrine* 488 (American Bar Association 4th ed. 2001). Additionally, the fact that Patterson obtained the information in the course of his paid investigations for the professors, who are not representing him in this case, undermines his claim that the material was prepared "in anticipation of litigation or **[*10]** for trial."

Patterson's response to this motion does not present any argument or authority regarding his assertion of any other claimed privilege, such as "journalistic ethics," and accordingly, any other argument is waived.

Defendants' motion in this respect is granted: Patterson must testify as to any factual information of which he is aware regarding this case, whether or not that information was obtained in the course of his investigations for the professors.

Likewise, Patterson refused to testify fully regarding a meeting he had in May 2004 with Lori Lightfoot, then the director of the Office of Police Standards. (Dep. at 720-25.) He did not deny that the meeting was relevant "at all" to the lawsuit (*id.* at 722), but refused to answer questions about it (*id.* at 724-25). Patterson did not give any reason for his **[*11]** refusal to answer, and his response to Defendants' motion does not present any argument justifying that refusal. Patterson must answer questions about that meeting.

II. Questions about gang involvement.

Patterson testified that he was a member of the Apache Rangers gang (Dep. at 68, 71), but he refused to answer other questions about his gang participation, for example, whether he was a gang member in high school or college. (*Id.* at 554, 556; *see also id.* at 75, 79.) His answer to the question of whether he is currently a gang member was cryptic at best: "Not that I recall if I remember or not. I am a member of a movement." (*Id.* at 931.) But then he refused to answer questions about the "movement." (*Id.*) After the first session of Patterson's deposition, the Stipulated Protective Order was entered, allowing Patterson to designate as "Confidential" and limiting disclosure of any portions of his deposition that he believes in good faith would create a concern for his personal safety. (Stip. Protective Order P 2.) The purpose of that order was to permit Patterson to respond to all of Defendants' counsel's questions regarding his participation in gangs without **[*12]** fear of jeopardizing his safety. Thus, any objections based on "safety concerns" that Patterson has raised are overruled in light of the entry of the Stipulated Protective Order.

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http://www.medill.northwestern.edu/medill/inside/news/medill_professors_supreme_court_site_is_one_of_a_kind.html (Dec. 17, 2004) (last visited May 4, 2007).

[4] Presumably, all documents, whether prepared by an attorney or anyone else, as to which protection is claimed have been identified on a privilege log, as required by Rule 26(b)(5)(A).

Patterson's response to the present motion is that the questions regarding his gang affiliation and gang activities are irrelevant and intended to annoy him. (Pl.'s Resp. at 8.) [Dkt 633.] However, Defendants argue that the Sanchez murder for which Patterson was convicted and subsequently pardoned was gang-related and involved gang member witnesses; thus, Patterson's gang affiliation and the possible gang affiliations of potential witnesses, as well as the gang-related incidents that occurred near in time to the Sanchez murders are relevant. (Defs.' Mot. Sanctions at 8, 11; Defs.' Reply at 6 [dkt 650].) That the questions relate to events as long as 20 years ago is not surprising because the murder for which Patterson was convicted took place in 1986. (Third Am. Compl. P 16.)

Importantly, a disagreement about the relevance of a question is not a basis for refusing to answer. As the Seventh Circuit recently observed, a party may not simply refuse to answer questions. *Redwood v. Dobson,* 476 F.3d 462, 467-68, 469 (7th Cir. 2007). **[*13]** Deposition questions are to be answered notwithstanding an objection, unless the objection is to preserve a privilege. Fed. R. Civ. P. 30(c). A party who believes that a deposition is being conducted in bad faith, or in such manner as to unreasonably annoy, embarrass or oppress the deponent, may halt the deposition and apply for a protective order under Rule 30(d)(4). *Redwood,* 476 F.3d at 467-68. But Patterson did not bring any motion under that Rule; he simply refused to answer. Such conduct may be grounds for sanctions. *See id.* at 470 (sanctioning attorney for advising his client not to answer questions which he believed were intended to harass, rather than applying for a protective order under Rule 30(d)(4)). Accordingly, Patterson must answer Defendants' counsel's questions regarding Patterson's gang affiliation and his knowledge of gang affiliations of potential witnesses, as well as the gang-related incidents that occurred near in time to the Sanchez murders.

III. Questions about potential witnesses.

In addition, Defendants request that Patterson be compelled to answer all questions relating to the whereabouts **[*14]** of, his relationship to, and recent conversations with Sharon Haynes, the witness who provided an alibi for Patterson at his murder trial. (Defs.' Mot. Sanctions at 8-9.) Ms. Haynes has been listed as a potential witness for Patterson in this trial, and Defendants are simultaneously moving to have her held in contempt of court for failure to appear in response to a subpoena for her deposition. [Dkt 639.] Patterson's response to the motion states that he answered all of Defendants' counsel's deposition questions regarding Ms. Haynes, and that when he answered "I don't remember" or "I don't recall," it was "probably" due to the fact that some of the conversations occurred 20 years ago. (Pl.'s Resp. at 10.)

A review of the transcript discloses that Patterson's answers to questions about Ms. Haynes--even questions about his recent contacts and conversations with her--were incomplete and evasive. He testified that he saw her "off and on" after his pardon and that he is "sure" he talked to her. (Dep. at 946-47.) But, when asked what he spoke to Ms. Haynes about after his pardon, Patterson answered "[p]ersonal matters," and then stated that he "wouldn't discuss it . . . ." (*Id.* at **[*15]** 947.) Defendants' counsel also asked Patterson where Ms. Haynes lived, to which Patterson answered, "You've got investigators. Go to 86th and Paxton and I'm sure you will locate her." (*Id.*) Defendants' counsel asked Patterson when he saw Ms. Haynes, including whether he saw her more than once or twice, and where he saw her. (*Id.* at 945-47.) Patterson responded that he did not recall how many times he saw Ms. Haynes, and was vague about where he saw her (e.g., "on the block," "in traffic," "just passing through"). (*Id.* at 946-48.) Patterson must answer Defendants' counsel's questions regarding his knowledge as to Ms. Haynes's whereabouts. To the extent Patterson can provide more specific information about when and where he saw Ms. Haynes and the subjects they discussed, he must provide such information in response to Defendants' counsel's questions.

In addition, Defendants complain that Patterson refused to disclose the identity of the boyfriend of prosecution witness Marva Hall. (Defs.' Mot. Sanctions at 9-10.) At his deposition, Patterson stated that he became friends with Ms. Hall because he "knew her boyfriend at the time." (Dep. at 103.) Patterson then testified that **[*16]** he would prefer not to discuss the boyfriend's name for safety reasons. (*Id.*) However, as discussed above, Patterson's objections based on "safety concerns" are overruled based on the entry of the Stipulated Protective Order. At the second session of his deposition, Patterson again refused to identify Ms. Hall's boyfriend, stating that Defendants' counsel should ask Ms. Hall who her boyfriend was "to be more accurate." (*Id.* at 938.) Patterson must state to whom he was referring when he stated that he knew Ms. Hall's boyfriend and answer reasonable follow-up

questions regarding that person. Also during his deposition, Patterson stated that the last time he saw Ms. Hall was "the early part of April, sometime like -- somebody['s] birthday . . . ." (*Id.* at 106.) He later testified that he was not sure whose birthday it was but he "assum[ed] it was Rederick Manning's birthday." (*Id.* at 938.) It appears, from that answer, that Patterson gave Defendants' counsel the most accurate answer he could. If Patterson can provide a more definite answer to this question, though, he must do so.

IV. Questions about damages.

Additionally, Defendants seek to compel Patterson **[*17]** to answer certain questions regarding his background, arguing that such information is relevant to the issue of damages in light of Patterson's claim that he suffered loss of income and loss of earning capacity due to the alleged misconduct of Defendants. (Defs.' Mot. Sanctions at 10-11.) Patterson refused to answer certain questions, including questions about income he received after his pardon, and the location where he leased property. (Dep. at 1025-26.) Patterson now argues that none of the information sought is relevant to the claims and factual allegations at issue. (Pl.'s Resp. at 12.) However, such questions may elicit information relevant to Patterson's claim that he suffered a loss of income and earning capacity. Thus, Patterson must answer the questions outlined in Defendants' motion on this issue. *See* Fed. R. Civ. P. 26(b)(1) (permitting the discovery of any matter relevant to the subject matter of the pending action, so long as the sought after information is not privileged, and even if inadmissible at trial, if the information sought appears reasonably calculated to lead to the discovery of admissible evidence).

V. Questions [*18] about conspiracy issues.

Count VII of Patterson's Third Amended Complaint alleges that Defendants and others including Mayor Daley, former Police Superintendent Hillard, States Attorney Devine, "along with other unsued co-conspirators" conspired to falsely imprison, maliciously prosecute and intentionally inflict severe emotional distress on Patterson. (Third Am. Comp. P 98.) Defendants request that Patterson be compelled to answer questions relating to his conspiracy claim, questions which Patterson refused to answer at his deposition. (Defs.' Mot. Sanctions at 11-13.) Patterson's answers to some questions appear to suggest that he believes that the alleged conspiracy extends to his 2005 conviction on federal charges. (*See, e.g.,* Dep. at 1001-02.) However, in response to a question regarding whether he believed that Defendants and the Mayor had a motive to "set [him] up," Patterson responded that he was "not going to discuss those details until I put them out there publicly." (*Id.* at 758.) He then stated, in response to a question regarding what details he had to support his claim, that he was not going to turn over any information at that time. (*Id.*) Similarly, **[*19]** Patterson stated that he would not disclose any facts he had to support his assumption that Mara Georges played a role in the investigation leading to the federal charges that resulted in his incarceration. (*Id.* at 1004-05.) Patterson's response to Defendants' motion does not present any argument justifying his refusal to answer those questions. Indeed, Patterson does not even address Defendants' argument in his response. Unless there is a valid objection on the basis of privilege (and none was raised), Defendants' questions relating to Patterson's claim that there was a conspiracy against him (*see* Defs.' Mot. Sanctions at 11-13) are relevant and must be answered. If Patterson has information that he believes supports his claim of conspiracy, he must testify about it to the best of his knowledge.

CONCLUSION

For the foregoing reasons, Certain Defendants' Motion for Sanctions and Second Motion to Compel [dkt 589] is granted as set out above. The court declines to order that written questions and answers be substituted for oral testimony, as suggested in Defendants' Reply (at 7). It is the Defendants' option to serve (or seek leave to serve, if necessary) additional **[*20]** interrogatories, if they believe that written questions and answers will be more efficient. Patterson is warned that if he fails to comply with this Order, *i.e.,* if he fails to respond fully and completely to Defendants' counsel's questions at his next deposition session, he may be sanctioned pursuant to Rule 37.

IT IS SO ORDERED.

GERALDINE SOAT BROWN

United States Magistrate Judge

DATED: May 4, 2007

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Ratajczak v. Beazley Sols. Ltd

United States District Court for the Eastern District of Wisconsin

August 12, 2014, Decided; August 12, 2014, Filed

Case No. 13-C-045

Reporter
2014 U.S. Dist. LEXIS 200255 *

DANIEL J. RATAJCZAK, JR., ANGELA RATAJCZAK, SCOTT A. RATAJCZAK, and ELIZABETH RATAJCZAK, Plaintiffs, v. BEAZLEY SOLUTIONS LIMITED, Defendant.

Prior History: Ratajczak v. Beazley Solutions Ltd., 2013 U.S. Dist. LEXIS 69192 (E.D. Wis., May 15, 2013)

Counsel: [*1] For Daniel J Ratajczak, JR, Scott A Ratajczak, Angela Ratajczak, Elizabeth Ratajczak, Plaintiffs: Christopher J Krawczyk, Jon E Fredrickson, LEAD ATTORNEYS, Benjamin R Prinsen, Stephen E Kravit, Kravit Hovel & Krawczyk SC, Milwaukee, WI USA; Mark M Leitner, Laffey Leitner & Goode LLC, Milwaukee, WI USA.

For Beazley Solutions Limited, Defendant: Jonathan C Medow, Michael J Gill, Mayer Brown LLP, Chicago, IL USA; Jonathan T Smies, Winston A Ostrow, Godfrey & Kahn SC, Green Bay, WI USA.

Judges: William C. Griesbach, Chief United States District Judge.

Opinion by: William C. Griesbach

Opinion

ORDER

The following motions are currently pending before the Court: (1) Beazley's Motion for Leave to Depose Representatives of Two Third Parties and for an Order Freeing Certain Materials from the Restraints of the Protective Order (ECF No. 105); (2) Beazley's Motion for Leave to Take More than Ten Fact Discovery Depositions (ECF No. 108); (3) Beazley's Motion to Compel Responses to Deposition Questions (ECF No. 115): and (4) Plaintiffs' Motion for Protective Order and to Sustain Objections (ECF No. 124). Upon consideration of the arguments raised in the parties briefs, the Court concludes that Beazley's motions will be granted and **[*2]** the Plaintiffs' denied.

Plaintiffs filed this action seeking relief for Beazley's alleged breach of an insurance policy (the Policy) covering the sale of Plaintiffs' interest in Packerland Whey. Beazley has asserted a number of defenses to payment, including that the Policy excluded coverage for fraud or fraudulent misrepresentation; the Policy excluded coverage for breach of warranty claims in which Plaintiffs had personal knowledge of the breach; and the Policy was procured through fraud and is unenforceable. (Def's Answer to Third Am. Compl., ECF No. 84.) Beazley contends that the purchasers of Packerland threatened legal action against Plaintiffs when they discovered that Plaintiffs were secretly adding urea, otherwise known as non-protein nitrogen, to product WPC-34. Adding urea may boost apparent protein levels in the whey product, and Beazley contends that this practice was illegal. Beazley seeks to depose two of Packerland's customers (Milk Specialties Global and Land O' Lakes) regarding their relationship and interactions with Plaintiffs before the sale, but Plaintiffs and Packerland seek to limit the scope of Beazley's inquiry. After considering Plaintiffs' and Packerlands' **[*3]** proposed deposition limitations, the Court concludes that they are unreasonable and impractical. Beazley has legitimate reasons for deposing Packerland's customers, and there is a substantial likelihood that the proposed limitations would unduly restrict Beazley's inquiry and prevent it from discovering information that is relevant, and perhaps critical, to its defense. The limitations Plaintiffs seek to impose would also require excessive court involvement to monitor and enforce.

For similar reasons, testimony and documents related to Plaintiffs' past use of urea should not be treated as confidential or "attorney's eyes only" under the protective order. The information is highly relevant to Beazley's defenses, and Plaintiffs' argument that their past use of urea constitutes a trade secret borders on the frivolous. A secret worthy of protection is typically a precise formula that has value and is not generally known in the industry. *See IDX Sys. Corp. v. Epic Sys. Corp.*, 285 F.3d 581, 584 (7th Cir. 2002). If Beazley is correct that Plaintiffs' use of urea was illegal, then the information is not worthy of any protection. Conversely, if the use of urea was not illegal and was a general industry practice, as Plaintiffs' lead witness has testified, then **[*4]** the use of urea is already a matter of public knowledge and not worthy of protection. Plaintiffs seek to protect not a secret formula for the addition of urea to whey to produce WPC-34, but the fact that they were adding urea at all. For the reasons stated, the fact that they added urea, if true, is not a trade secret. Moreover, Packerland contends that it does not currently use urea in its production of WPC-34 in any event.

Additionally, to maintain a document under seal, a plaintiff must show "good cause" consistent with Seventh Circuit precedent. *See Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 548 (7th Cir. 2002). Courts do not seal documents based on agreement of the parties, nor because one party seeks to conceal information that may be embarrassing or harmful to his reputation. *See Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) (". . . the tradition that litigation is open to the public is of very long standing."). Accordingly, Plaintiffs have failed to show good cause to maintain testimony and documents related to their past use of urea as confidential, limited to "attorney's eyes only," or under seal. Beazley's motion for leave to depose Packerland's customers and freeing materials from the protective order (ECF No. 105) is therefore granted. The Court confirms Beazley's right to depose **[*5]** Milk Specialties Global and Land O'Lakes without the restrictions proposed by Plaintiffs and Packerland, and the documents listed in Appendix A, ECF No. 111, are freed from the restraints of the protective order.

Beazley's request to take more than 10 fact depositions is also reasonable, and despite initially opposing the request, Plaintiffs offer little argument in response. The individuals Beazley identified in pages 6-9 of its brief, ECF No. 112, are likely to possess discoverable information, and deposing them would not be cumulative or duplicative. Beazley's motion for leave (ECF No. 108) is granted, and Beazley is granted leave to depose the individuals listed therein.

Beazley's motion seeking to compel Daniel Ratajczak to answer questions about his past business practices at Dandy Veal, LLC (ECF No. 115) is also granted. Beazley's inquiry as to whether Daniel Ratajczak knowingly or willfully violated laws prohibiting the use of growth hormones in calves is likely to lead to discoverable information, and the Court need not rule on the admissibility of evidence at this time. The only objection raised by Plaintiffs' counsel at the deposition was a relevance objection, and Plaintiffs' **[*6]** counsel did not move for a protective order under Fed. R. Civ. P. 30(d)(3) claiming harassment of the witness until Beazley filed its motion to compel weeks later. Counsel's objection on relevance grounds was improper, *see* Fed. R. Civ. P. 30(c)(2), and he failed to seek a

protective order in a timely manner, *see Redwood v. Dobson*, 476 F.3d 462, 468 (7th Cir. 2007). In any event, Beazley's deposition questions were not harassing; Beazley's counsel was merely questioning Daniel Ratajczak about a comment he was alleged to have made to the purchasers of Packerland. Daniel Ratajczak's alleged comment—not Beazley's counsel—suggested that he had done something illegal by injecting calves with growth hormones. Plaintiffs' motion for a protective order and to sustain objections is denied, and Daniel Ratajckzak is ordered to answer on the merits all questions he was directed not to answer in pages 206-210 of his deposition, along with reasonable follow-up inquiries. Pursuant to Fed. R. Civ. P. 37(a)(5)(A), Beazley is entitled to the reasonable costs and attorney's fees it incurred in bringing its motion to compel. If the parties cannot agree on the amount, Beazley may seek a determination of the amount Plaintiffs must pay from the Court.

Accordingly, and for the reasons set forth above, Beazley's Motion for Leave to **[*7]** Depose Representatives of Two Third Parties and for an Order Freeing Certain Materials from the Restraints of the Protective Order (ECF No. 105) is granted. Beazley's Motion for Leave to Take More than Ten Fact Discovery Depositions (ECF No. 108) is also granted, as is Beazley's Motion to Compel Responses to Deposition Questions (ECF No. 115). Plaintiffs' Motion for Protective Order and to Sustain Objections (ECF No. 124) is denied. The Clerk is directed to unseal the materials filed under seal in ECF Nos. 110, 111, 112, 117, 123, and 130, including all exhibits. Plaintiff still has time under the Local Rules to respond to Beazley's objections to confidentiality (ECF No. 126) filed in response to Plaintiff's motion for a protective order. The Court will withhold ruling on that issue at this time.

SO ORDERED this 12th day of August, 2014.

/s/ William C. Griesbach

William C. Griesbach, Chief Judge

United States District Court

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Sys. Dev. Integration, LLC v. Computer Scis. Corp.

United States District Court for the Northern District of Illinois, Eastern Division

August 3, 2012, Decided; August 3, 2012, Filed

No. 09-CV-4008

Reporter
2012 U.S. Dist. LEXIS 109318 *; 2012 WL 3204994

SYSTEM DEVELOPMENT INTEGRATION, LLC, Plaintiff, v. COMPUTER SCIENCES CORPORATION, Defendant.

Subsequent History: Motion granted by, in part, Motion denied by, in part Sys. Dev. Integration, LLC v. Computer Scis. Corp., 2012 U.S. Dist. LEXIS 112033 (N.D. Ill., Aug. 9, 2012)

Prior History: Sys. Dev. Integration, LLC v. Computer Scis. Corp., 2012 U.S. Dist. LEXIS 100719 (N.D. Ill., July 19, 2012)

Counsel: [*1] For System Development Integration, LLC, Plaintiff: Timothy A. Hudson, LEAD ATTORNEY, Tabet DiVito Rothstein, Chicago, IL; Caesar A. Tabet, Jon Jeffrey Patton, Tabet DiVito & Rothstein, LLC, Chicago, IL.

For Computer Sciences Corporation, Defendant: Thomas Cusack Cronin, LEAD ATTORNEY, Cronin & Co., Ltd., Chicago, IL; David H. Pace, Gayle Boone, PRO HAC VICE, Steve Sumner, Sumner, Schick & Pace, L.L.P., Dallas, TX.

Judges: AMY J. ST. EVE, United States District Court Judge.

Opinion by: AMY J. ST. EVE

Opinion

MEMORANDUM OPINION AND ORDER

AMY J. ST. EVE, District Court Judge:

Before the Court are Defendant Computer Sciences Corporation's ("CSC") motions in limine. For the following reasons, the Court grants the motions in part and denies them in part, as further explained below.

BACKGROUND

Plaintiff System Development Integration LLC ("SDI") filed suit against CSC, alleging breach of subcontract agreement, tortious interference with prospective business advantage, breach of fiduciary duty under a partnership agreement, quantum meruit, and equitable estoppel, all arising from CSC's alleged actions in replacing SDI with another company as a minority business partner under a contract with Exelon. (R. 83, First Am. Compl., **[*2]** *passim*.) On September 13, 2010, the Court granted CSC's motion for summary judgment with respect to all five claims and entered judgment in CSC's favor. *See Sys. Dev. Integration, LLC v. Computer Scis. Corp.*, 739 F. Supp. 2d 1063 (N.D. Ill. 2010). On April 1, 2011, the Court granted in part and denied in part SDI's motion to alter or amend the judgment after determining that CSC was not entitled to summary judgment on SDI's breach of subcontract agreement and quantum meruit claims. *See System Dev. Integration, LLC v. Computer Sciences Corp.*, No. 09-cv-4008, 2011 U.S. Dist. LEXIS 35404, 2011 WL 1311903 (N.D. Ill. Apr. 1, 2011). Those claims remain pending, and a jury trial is scheduled for September 10, 2012.

LEGAL STANDARD

I. Motions in Limine

"Although the Federal Rules of Evidence do not explicitly authorize in limine rulings, the practice has developed pursuant to the district court's inherent authority to manage the course of trials." *Luce v. United States*, 469 U.S. 38, 41 n.4, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984). In limine rulings avoid delay and allow the parties the opportunity to prepare themselves and witnesses for the introduction or exclusion of the applicable evidence. *See Wilson v. Williams*, 182 F.3d 562, 566 (7th Cir. 1999); **[*3]** *United States v. Connelly*, 874 F.2d 412, 416 (7th Cir. 1989). They also avoid wasting the jury's time with evidentiary fights.

Trial courts have broad discretion in ruling on evidentiary issues before trial. *See United States v. Boros*, 668 F.3d 901, 907 (7th Cir. 2012). The Court will only grant a motion in limine when the evidence is clearly inadmissable for any purpose. *See Jonasson v. Lutheran Child & Family Servs.*, 115 F.3d 436, 440 (7th Cir. 1997); *Thakore v. Universal Mach. Co. of Pottstown, Inc.*, 670 F. Supp. 2d 705, 714 (N.D. Ill. 2009). The moving party bears the burden of establishing that the evidence is not admissible for any purpose. *See Mason v. City of Chicago*, 631 F. Supp. 2d 1052, 1056 (N.D. Ill. 2009).

Regardless of the Court's initial ruling on a motion in limine, the Court may adjust its ruling during the course of trial. *See Farfaras v. Citizens Bank & Trust of Chicago*, 433 F.3d 558, 565 (7th Cir. 2006). Moreover, a "pretrial ruling denying a motion in limine 'does not necessarily mean that all evidence contested by the motion will be admitted at trial.'" *Wielgus v. Ryobi Techs., Inc.*, No. 08 CV 1597, 2012 U.S. Dist. LEXIS 83594, 2012 WL 2277851, at *1 (N.D. Ill. June 18, 2012) (quoting *Hawthorne Partners. v. AT&T Techs., Inc.*, 831 F. Supp. 1398, 1401 (N.D. Ill. 1993)).

II. [*4] Federal Rules of Evidence 401, 402, and 403

Pursuant to Federal Rule of Evidence ("Rule") 401, evidence is relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Fed. R. Evid. 401; *Boros*, 668 F.3d at 907. "Rule 402 provides the corollary that, with certain exceptions, '[r]elevant evidence is admissible' and '[i]rrelevant evidence is not admissible.'" *Boros*, 668 F.3d at 907. Under Rule 403, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Civ. P. 403; *Boros*, 668 F.3d at 909.

ANALYSIS

In advance of trial, CSC has brought fifteen motions in limine. (R. 161.) On June 26, 2012, the Court denied CSC's third and fourth motions in limine without prejudice, denied CSC's fifth and twelfth motions in limine, and granted CSC's thirteenth, fourteenth, and fifteenth motions in limine by agreement. (R. 164.) Currently pending before the Court are motion in limine **[*5]** numbers 1, 2, 6, 7, 8, 9, 10, and 11. The Court addresses each in turn.

Before addressing the substance of CSC's motions, however, the Court denies CSC's request that the Court "warn and caution all witnesses to follow" its orders regarding CSC's motions in limine. (R. 175, CSC's Mem. at 1.) "It is the job of counsel to ensure that witnesses are properly prepared so that they will not . . . volunteer information and to ask carefully framed questions" such that the witnesses' answers will not "yield otherwise inadmissible evidence or exceed the limits imposed on that testimony by prior rulings." *Thakore*, 670 F. Supp. 2d at 716. The Court fully expects counsel to properly prepare and advise their respective witnesses of the Court's orders, and to ensure that the witnesses do not violate those orders.

I. SDI's Two Remaining Claims

SDI's claims for breach of the alleged subcontract and, in the alternative, quantum meruit remain pending and will be tried before a jury. Illinois law applies to both claims. *See Sys. Dev. Integration*, 739 F. Supp. 2d at 1080. To succeed on its claim for breach of contract, SDI must prove "(1) the existence of a valid and enforceable contract; (2) substantial **[*6]** performance of the contract; (3) breach of the contract; and (4) resultant damages." *Id.* To prove its claim for quantum meruit, SDI must show "(1) it performed a service to benefit CSC; (2) it performed this service non-gratuitously; (3) CSC accepted this service; and (4) no contract existed to prescribe payment of this service." *Id.* at 1086.

II. Motion in Limine No. 1: Eliminated Claims

CSC seeks to exclude "any references to the claims or damages originally sought by SDI but which have been eliminated from this trial by the Court's Summary Judgment Orders of September 13, 2010 and April 1, 2011." (CSC's Mem. at 1.) Specifically, CSC states that "[t]his exclusion would include any references to a 'partnership' between CSC and SDI, to CSC and SDI being 'partners' and to SDI being entitled to 15% or some other portion of the Exelon contract proceeds. It additionally would bar any references to or evidence of SDI's claims of tortious interference, equitable estoppel or breach of fiduciary duty." (*Id.*) CSC argues that because the Court has already determined that the dismissed claims cannot survive, or that no genuine dispute as to any material fact exists, as applicable, "it **[*7]** would be improper" for SDI to refer to those claims and allegations in front of the jury. In support of its motion, CSC relies on Federal Rules of Evidence 402 and 403. The Court grants in part and denies in part CSC's motion.

First, the Court grants, by agreement, CSC's motion to the extent it seeks to bar SDI from presenting evidence or argument regarding its dismissed claims for breach of fiduciary duty, tortious interference, and equitable estoppel. (R. 185, SDI's Opp. at 3.) Second, the Court grants CSC's motion to the extent it seeks to preclude SDI from arguing or offering evidence that CSC agreed to pay it 15% of the Exelon contract proceeds. As the parties are aware, the Court's September 13, 2010 summary judgment order found that the evidence in the record *did not* support SDI's repeated assertions that CSC agreed to pay SDI 15% of the Exelon contract proceeds. *See Sys. Dev. Integration*, 739 F. Supp. 2d at 1071 n.3, 1072 n.7, 1073 n.9. As such, allowing SDI to argue to the jury that CSC agreed to pay SDI 15% of the Exelon contract proceeds would inappropriately circumvent this Court's ruling and the facts of this case. This Order, however, does not prohibit either party from **[*8]** referencing or introducing the portion of the subcontract that references SDI's opportunity to "provide services representing fifteen percent (15%) or more of the Services contemplated" under the Exelon contract. (R. 185-4, Excerpts of Subcontract, § 1.2(i).)

The Court further grants CSC's motion to the extent it seeks to bar SDI from referencing the existence of a partnership agreement in the legal sense, given the Court's finding on summary judgment that no partnership agreement between CSC and SDI existed. *See Sys. Dev. Integration*, 739 F. Supp. 2d at 1085-86. The Court denies CSC's motion, however, to the extent it seeks to preclude SDI from introducing evidence of the nature of the parties' relationship. Although the Court has dismissed SDI's claim for breach of fiduciary duty, evidence regarding the nature the parties' relationship is nonetheless relevant to SDI's quantum meruit claim. [1] *See, e.g., Midcoast Aviation, Inc. v. Gen. Elec. Credit Corp.*, 907 F.2d 732, 741 (7th Cir. 1990) (affirming district court's admission of evidence during trial involving quantum meruit claim under Illinois law where evidence related to the character of the relationship between the plaintiff and **[*9]** the defendant, recognizing that "the character of [the defendant's] relationship with [the plaintiff] was the key to determining the unjustness of [the defendant's] enrichment"); *cf. Lindquist Ford, Inc. v. Middleton Motors, Inc.*, 557 F.3d 469, 481-82 (7th Cir. 2009) (applying Wisconsin quantum meruit law, explaining that the district court erred in excluding evidence "relating to the parties' negotiations" because "[t]he parties' course of conduct, their actions, and their failed negotiations all bear on whether [the plaintiff] reasonably expected compensation" for the services rendered); *see also Thakore*, 670 F. Supp. 2d at 716 (explaining that even where an issue or claim has been decided at summary judgment, "if the evidence is also relevant to a claim or issue that remains in the case, the evidence is admissible for that limited purpose"). This evidence is relevant, for example, to whether SDI provided services to CSC with the expectation that it would be compensated for those services and whether CSC's retention of any such services is unjust under the circumstances. The jury will be required to determine both of those issues of fact if it reaches deliberations on SDI's quantum **[*10]** meruit claim. As such, the Court grants in part and denies in part CSC's first motion in limine. CSC is free to make appropriate objections to this evidence at trial, at which time the Court will consider them in context. *See Allstate Ins. Co. v. St. Anthony's Spine & Joint Institute*, No. 06-cv-7010, 2011 U.S. Dist. LEXIS 106524, 2011 WL 4382567, at *4 (N.D. Ill. Sept. 20, 2011) (denying portion of motion in limine, stating that the party could make objections to specific testimony at trial).

III. Motion in Limine Number 2: The Parties' Prior Agreements

CSC seeks to bar "[a]ny evidence relating to any agreement between SDI and CSC prior to the alleged oral agreement claimed by SDI in September 2008." (CSC's Mem. at 2.) In support of its motion, **[*11]** CSC argues that this evidence is irrelevant to the pending claims and that "[a]ny such references or evidence would be confusing, misleading and prejudicial to CSC where their introduction no doubt would be designed to suggest wrongdoing, artifice, and duplicity by CSC, and unfairly prejudice CSC." (*Id.*) In response, SDI argues that the history of the parties' negotiations and the scope of the parties' various agreements are relevant to CSC's affirmative defense that there was "no meeting of the minds" and to SDI's quantum meruit claim because it tends to show that "SDI performed services with the expectation that it would be compensated." (SDI's Opp. at 3.) The Court agrees with SDI.

Even if the Court rules that CSC may not assert an affirmative defense of "no meeting of the minds" in light of its failure to plead such a defense in its Answer, this evidence is nonetheless relevant to SDI's quantum meruit claim because it relates to the character of SDI's relationship with CSC and whether SDI reasonably expected compensation for its services. *See, e.g., Midcoast Aviation*, 907 F.2d at 741 (evidence related to the character of the relationship between the plaintiff and the defendant is **[*12]** relevant to quantum meruit claim); *Lindquist Ford*, 557 F.3d at 481-82 (same). [2] CSC's motion is denied.

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[1] CSC argues that SDI has pursued its quantum meruit theory as an alternative to its breach of contract claim and not its claim based on the alleged partnership agreement. SDI, however, specifically alleged in its First Amended Complaint that it brought the quantum meruit claim "in the alternative to Count I [breach of subcontract] and Count III [breach of fiduciary duty]." (First Am. Compl. ¶ 88.) Therefore, CSC has had ample notice of the basis for SDI's quantum meruit theory.

[2] CSC's reliance on the portion of the Court's September 13, 2010 summary judgment order, in which the Court determined that SDI's claim for equitable estoppel failed, is unhelpful to its argument. SDI does not seek to introduce evidence of the parties'

IV. Motion in Limine Numbers 6 and 10: Lost Opportunities and SDI's Potential Other Partner

CSC seeks to bar "[a]ny testimony or documents relating to [SDI's] 'lost opportunities.'" (CSC Mem. at 3.) It argues that SDI's "lost opportunities" are not a proper measure of damages under either of its claims and that the references would be confusing, misleading, and prejudicial. (*Id.* at 3-4.) Relatedly, CSC seeks to exclude "[a]ny testimony or documents referencing other potential companies with which SDI claims it may have entered a contract because such references are not relevant and would be based entirely on speculation." (*Id.* at 6-9.) SDI responds that this evidence is relevant to its claim for quantum **[*13]** meruit—specifically, that it is relevant to the jury's evaluation of the "cost" to SDI and the "benefit" to CSC from SDI's services. (SDI's Opp. at 8.) SDI also argues that such evidence is relevant to its breach of subcontract claim because "lost opportunity" damages are recoverable under restitution and reliance damages theories in breach of contract actions. (*Id.* at 9.)

A. The Evidence Is Not Relevant to SDI's Breach of Subcontract Claim

SDI's argument that the evidence is relevant to its breach of contract claim fails because SDI has not indicated, either in its proposed jury instructions or in its damages statement in the parties' final pretrial order, that it seeks damages based on restitution or reliance theories in this case. (*See* R. 171, Proposed Jury Instructions at SDI's Proposed Instruction No. 28 (listing direct damages, defined as "the amount of gain that SDI would have received it both of the parties had fully performed the contract," and incidental damages, defined as "the costs that were reasonably spent by SDI in responding to CSC's breach of the contract"); R. 155, Proposed Pretrial Order at 10.)

B. The Evidence Is Relevant to SDI's Quantum Meruit Claim

1. Quantum meruit [*14] recovery under Illinois law[3]

Under Illinois law, the equitable theory of quantum meruit "is founded on the implied promise of a recipient of services to pay for such valuable services, as otherwise the recipient would be unjustly enriched." *Carlton at the Lake, Inc. v. Barber*, 401 Ill. App. 3d 528, 340 Ill. Dec. 669, 928 N.E.2d 1266 (Ill. App. Ct. 2010). Quantum meruit literally means "as much as he deserves." Black's Law Dictionary (9th ed. 2009). It is a quasi-contractual theory "in which no actual agreement between the parties occurred, but a duty is imposed [by the law] to prevent injustice." *Hayes Mech., Inc. v. First Indus., L.P.*, 351 Ill. App. 3d 1, 8-9, 285 Ill. Dec. 599, 812 N.E.2d 419 (Ill. App. Ct. 2004). **[*15]** "The prevention of unjustness is the fundamental aspect of the doctrine of quasi-contracts." *Id.* (citation omitted).

SDI contends that the proper measure of recovery for a quantum meruit claim under Illinois law is either "the economic cost to plaintiff of providing a benefit or the economic enrichment of defendant in receiving it." (SDI's Opp. at 7 (citing *Midcoast Aviation*, 907 F.2d at 745).) CSC, on the other hand, argues that the measure of recovery is "the reasonable value of the plaintiff's services conferred upon the defendant." [4] (CSC's Mem. at 4.)

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prior agreements to support its equitable estoppel claim. Rather, it intends to offer such evidence in support of its quantum meruit claim.

[3] The parties' disagreement regarding the appropriate measure of recovery in quantum meruit claims under Illinois law relates not only to CSC's motions in limine numbers 6 and 10, but also to CSC's motion to exclude SDI's damages expert, Michael Mayer, and the parties' proposed jury instructions. Accordingly, the Court addresses that issue here, with the intent that it will not only resolve the parties' instant dispute, but will provide guidance to the parties in meeting and conferring with respect to their jury instruction disputes and in their other preparations for trial.

[4] CSC has proposed a jury instruction that differs slightly from this standard: "the measure of recovery is the reasonable value of the work and material, if any, that SDI provided." (CSC's Proposed Jury Instruction No. 36.)

The Seventh Circuit and the Illinois Appellate Courts have articulated somewhat different standards for the proper measure of recovery in a quantum meruit action under Illinois law. [5] *Compare Bernstein & Grazian, L.P. v. Grazian & Volpe, P.C.*, 402 Ill. App. 3d 961, 979, 341 Ill. Dec. 913, 931 N.E.2d 810 (Ill. App. Ct. 2010) (the measure of recovery for quantum meruit claim is "the reasonable value of services non-gratuitously **[*16]** rendered") (citing *K. Miller Constr. Co. v. McGinnis*, 394 Ill. App. 3d 248, 255, 332 Ill. Dec. 857, 913 N.E.2d 1147 (Ill. App. Ct. 2009)); *Hayes Mech.*, 351 Ill. App. 3d at 9 ("In a quantum meruit action, the measure of recovery is the reasonable value of work and material provided . . . ."); *Fieldcrest Builders, Inc. v. Antonucci*, 311 Ill. App. 3d 597, 606, 243 Ill. Dec. 740, 724 N.E.2d 49 (Ill. App. Ct. 1999) ("Under a theory of *quantum meruit*, the measure of recovery is the reasonable value of the plaintiff's services.") (citations omitted); *Rohter v. Passarella*, 246 Ill. App. 3d 860, 866, 186 Ill. Dec. 807, 617 N.E.2d 46 (Ill. App. Ct. 1993) ("The common law adopted the term [quantum meruit] to describe a cause of action which seeks to recover the reasonable value of services which have been nongratuitously rendered, but where no contract exists to prescribe exactly how much the renderer should have been paid."), *with Midcoast Aviation*, 907 F.2d at 745 ("[t]he proper measure of quantum meruit recovery . . . is generally the lower of these two: the economic cost to plaintiff of providing a benefit or the economic enrichment of defendant in receiving it") and *Production Process Consultants, Inc. v. Wm. R. Hubbell Steel Corp.*, 988 F.2d 794, 797 (7th Cir. 1993) **[*17]** (affirming dismissal of quantum meruit claim on the ground that the plaintiff failed to prove that the defendant received "any direct pecuniary gain" from the plaintiff's services, observing that the plaintiff's recovery must be limited to the "'amount by which [the defendant] has been benefitted.'") (quoting Restatement of Restitution, § 1, Comment e). [6]

In *Midcoast Aviation*, the defendant, on appeal, argued that the district court had erred in instructing the jury that the measure of recovery on the plaintiff's quantum meruit claim is "the reasonable value of the services and materials provided by the plaintiff." 907 F.2d at 742, 744. The defendant contended that "the measure **[*18]** of damages in quasi-contract is not the reasonable value of the services and material provided by the plaintiff, but the reasonable value of the benefit conferred on the defendant." *Id.* at 744. The Seventh Circuit explained that the defendant was, in part, correct because "[i]f a defendant is not enriched it cannot be prosecuted successfully on a theory of quasi-contract." *Id.* It further explained that:

> Unjust enrichment lies at the heart of quasi-contract; if a defendant is not enriched, it hardly can be unjustly enriched. Similarly then, if a defendant is enriched but disgorges the value of that enrichment to the plaintiff, the purpose of a suit in quasi-contract is spent. Additional damages would serve only to unjustly impoverish the defendant for a benefit never received. Thus, damages in quasi-contract cannot be more than the amount of the benefit conferred upon the defendant.

Id.

The Seventh Circuit recognized that "there are cases that state the measure of quantum meruit recovery as the reasonable value of the services performed by plaintiff." *Id.* (citing cases). It recognized "three explanations this phenomenon." *Id.* First, it explained that

> in many cases a reasonable way to value **[*19]** the benefit conferred on the defendant is to value the services and materials provided by the plaintiff. This is because the cost of the services and materials provided is roughly equivalent to the value of the benefit conferred, and the cost of the services and materials provided is susceptible to proof at trial, whereas the benefit conferred is not.

Id. The court, however, observed that under the particular facts of the case before it, "the cost or value of the services and materials provided by [the plaintiff] is an unreasonable way to value the benefit conferred on [the

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[5] CSC's reliance on *Lindquist*, 557 F.3d 469, for the appropriate measure of recovery is misplaced because in that case, the Seventh Circuit applied Wisconsin law.

[6] Notably, in *Production Process*, the plaintiff, on appeal, requested the Seventh Circuit to vacate the lower court's judgment in favor of the defendant, or, in the alternative, to "reverse with instructions to determine the reasonable value of [the plaintiff's] services." 988 F.2d at 795. The Seventh Circuit instead affirmed the lower court's decision.

defendant]" because the two were not "roughly equivalent." *Id.* There, the plaintiff had performed services that benefitted both the defendant and another entity. The Seventh Circuit recognized that making the defendant pay plaintiff for a benefit that the plaintiff did not confer on the defendant would "be unfair." *Id.*

The Seventh Circuit also explained that "some courts may have concluded that the reasonable value of the services and materials provided by the plaintiff is less than the value of the benefit conferred on the defendant." *Id.* In those circumstances, "a measure of damages based on the value of the services **[*20]** and materials provided by the plaintiff makes sense" because "[i]t is less than the value of defendant's enrichment, yet it satisfies plaintiff for the work it has done." *Id.* at 744-45.

The final explanation is that "many cases . . . confuse the doctrine of a contract implied in fact with that of a contract implied in law." *Id.* at 745. Under a contract implied in fact, "the measure of the plaintiff's recovery should be the reasonable value of the services and material it provided, i.e., 'reasonable compensation for the work done.'" *Id.* (citing *Board of Highway Comm'rs v. City of Bloomington*, 253 Ill. 164, 97 N.E. 280 (1911)). For a contract implied in law, however, "the measure of the plaintiff's recovery is, at most, the benefit retained by the defendant." *Id.* (citing *Board of Highway Comm'rs*, 97 N.E. at 284-85). "This is because the action is based not on an agreement between the defendant and the plaintiff, but on the equity of the unjust enrichment." *Midcoast Aviation*, 907 F.2d at 745. Ultimately, the Seventh Circuit concluded that

> the correct measure for quantum meruit recovery 'is expressed by the amount which the court considers defendant has been unjustly enriched at the expense **[*21]** of plaintiff.' In general, the amount of money awarded to the plaintiff should be an amount that makes the defendant's enrichment 'just.' The defendant's enrichment would be just if the plaintiff received the full value of his work. At that point, the plaintiff would have no unjustness to complain about, even if the defendant remains somewhat enriched. It would also be just if the defendant disgorged the entire amount of enrichment received. Without being enriched, the defendant cannot be unjustly enriched. The proper measure of quantum meruit recovery, then, is the lower of these two: the economic cost to plaintiff of providing a benefit or the economic enrichment of defendant in receiving it. [7]

Id. In light of its decision, the Seventh Circuit reversed and remanded the case for a new trial on damages.

Although the Illinois Supreme Court has not addressed the Seventh Circuit's holding regarding the proper measure of quantum meruit damages in *Midcoast Aviation*, it has recognized that it is appropriate to consider the benefit conferred on **[*22]** the defendant in determining damages for a quantum meruit claim. *See In re Estate of Callahan*, 144 Ill.2d 32, 41, 578 N.E.2d 985, 161 Ill. Dec. 339 (1991) (acknowledging that "[o]ne of the factors to be considered in measuring the value of the services received [under a quantum meruit theory] is the benefits that have resulted to the client from the attorney's representation" and that '[i]n some cases, it is possible for someone to receive services and yet not be enriched in a tangible way at all"). The parties have not cited, and the Court has not found, any Illinois Supreme Court case disavowing the Seventh Circuit's interpretation of Illinois law in *Midcoast Aviation*. [8] As such, the Court is bound to follow *Midcoast*. [9] As the Seventh Circuit teaches:

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[7] The Seventh Circuit appears to equate the "full value" of the plaintiff's work with the "economic cost to plaintiff of providing a benefit." *See id.*

[8] It is true that Illinois Appellate Courts have, after *Midcoast Aviation*, continued **[*24]** to express that the appropriate measure of recovery is "the reasonable value of services." *See, e.g., Bernstein & Grazian*, 402 Ill. App. 3d at 979; *Hayes Mech.*, 351 Ill. App. 3d at 9; *Fieldcrest Builders*, 311 Ill. App. 3d at 606. These cases, however, are not necessarily inconsistent with *Midcoast Aviation*, wherein the Seventh Circuit expressly recognized that, in certain cases, "a measure of damages based on the value of the services and materials provided by the plaintiff makes sense" and that a "defendant's enrichment would be just if the plaintiff received the full value of his work." 907 F.2d at 744-45.

[9] The Court recognizes that the Seventh Circuit has, since *Midcoast Aviation*, indicated that the reasonable value of services is the appropriate measure of recovery in actions for quantum meruit. *See Confold Pacific, Inc. v. Polaris Indus., Inc.*, 433 F.3d 952, 958 (7th Cir. 2006) (observing that in actions for quantum meruit, "the plaintiff is entitled to the market value of his services rather than to the benefit that he conferred on the defendant, which might be much greater . . . .") (applying Wisconsin law);

> In a hierarchical system, decisions of a superior court are authoritative on inferior courts. Just as the court of appeals must follow decisions of the Supreme Court whether or not [it] agree[s] with them, so district judges must follow the decisions of [the Seventh Circuit] whether or not they agree. A decision by a state's supreme court terminates the authoritative force of [the Seventh Circuit's] decisions interpreting state law, for **[*23]** under *Erie* [its] task in diversity litigation is to predict what the state's highest court will do. Once the state's highest court acts, the need for prediction is past. But decisions of intermediate state courts lack similar force; they, too, are just prognostications.

Reiser v. Residential Funding Corp., 380 F.3d 1027, 1029 (7th Cir. 2004); *see also Davis v. Jewish Vocational Serv.*, No. 07 C 4735, 2010 U.S. Dist. LEXIS 26789, 2010 WL 1172537, at *6 (N.D. Ill. Mar. 17, 2010) (refusing to follow Illinois Appellate Court decisions, instead determining that "[i]n the absence of a superseding decision by the Illinois Supreme Court, this Court is bound by Seventh Circuit precedent") (citing *Reiser*, 380 F.3d at 1029)). Accordingly, in this case, the "correct measure for quantum meruit recovery is the amount which the court considers defendant has been unjustly enriched at the expense of plaintiff," which is "generally the lower of these two: the economic cost to plaintiff of providing a benefit or the economic enrichment of defendant in receiving it." [10] *Midcoast Aviation*, 907 F.2d at 745 (citations and internal quotation marks omitted).

2. Relevance of "lost opportunities" to quantum meruit recovery

SDI argues that evidence of lost opportunities to "partner" with other bidders is relevant to the jury's determination of SDI's economic cost in providing services to CSC. SDI's argument is unconvincing. It does not cite to any authority indicating that it is appropriate for the finder of fact to consider SDI's "lost opportunities" as **[*26]** a component of its economic cost in providing services to CSC, and the Court has also not found any authority to support this proposition. The section of *Midcoast Aviation* that SDI cites in support of its argument does not discuss the measure of recovery under a quantum meruit theory, but rather discusses whether the plaintiff could properly assert a quantum meruit claim against the defendant under the particular facts of that case. *Midcoast Aviation*, 907 F.2d at 739 (explaining that the general rule that courts will not impose quasi-contractual liability on a third party did not apply because the third party "not only benefitted from [the plaintiff's] work, but enticed [the plaintiff] to undertake the work in the first place and then refused to see [the plaintiff] paid").

SDI also argues that such evidence is relevant to the benefit or value that CSC received from SDI's services. SDI, however, does not provide sufficient information regarding what evidence it intends to offer on this issue or how it is relevant to the jury's determination of the benefit, if any, that CSC received. Although SDI states that it intends to offer evidence demonstrating that it provided exclusive services **[*27]** to CSC at CSC's request, SDI does not explain how this evidence demonstrates what the incremental value is, if any, of its exclusive services. As such, there does not appear to be a reasonable basis from which the jury may determine the incremental value of SDI's exclusive services versus its non-exclusive services. Without such a reasonable basis, the probative value of SDI's evidence of exclusivity is minimal, and introducing that evidence risks confusing the issues at trial, misleading the jury, and wasting time. *See generally United States v. Hosseini*, 679 F.3d 544 (7th Cir. 2012) (finding that the district court did not abuse its discretion in excluding "marginally relevant" evidence where its "probative value was substantially outweighed by the risk of confusing the issues, misleading the jury, and creating myriad collateral inquiries . . . into the facts of the underlying transactions"). The Court accordingly grants CSC's motion without

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Indiana Lumbermens Mut. Ins. Co. v. Reins. Results, Inc., 513 F.3d 652, 658 (7th Cir. 2008) **[*25]** (observing that, under Indiana law, "benefit conferred" is not the "usual measure of market value, which is the value that courts use to calculate the relief due a plaintiff whose claim of quantum meruit succeeds" and that "[i]t is no surprise that when courts award quantum meruit they base the award on the market price of the good or service in question"). Those decisions, however, did not apply Illinois law and are therefore not binding on this Court.

[10] Although it relies on *Midcoast Aviation* extensively throughout its brief in opposition to CSC's motion and in support of its proposed jury instructions, SDI conspicuously fails to acknowledge that the Seventh Circuit held that the proper measure of recover is *the lower of* the plaintiff's economic cost or the defendant's economic enrichment.

prejudice. SDI may file a supplemental submission on or before August 10, 2012, setting forth the basis from which the jury may be able to determine the incremental benefit to CSC, if any, from SDI's exclusive services. [11]

V. Motion in Limine Numbers 7, 8, and 11: Value and Profits of CSC's Contract with Exelon

CSC's seventh and eighth motions in limine seek to bar all evidence referencing the "value" of the Exelon contract to CSC and CSC's "profit" from that contract pursuant to Rules 401, 402, and 403. CSC's eleventh motion in limine seeks to exclude all references to CSC's size, gross or net profits or revenues" pursuant to Rules 401 and 403. [12]

CSC argues that its revenues and profits from the Exelon contract are irrelevant because they do not relate to either of SDI's remaining claims. It further asserts that introduction of such evidence would mislead and confuse the jury. SDI argues that CSC's profit margins on the services that SDI was to provide (i.e., the difference between Exelon's payment to CSC and what CSC allegedly agreed to pay SDI) is relevant to CSC's defense that it never agreed to the rates that SDI alleges it did. (SDI's Opp. at 12.) SDI represents that it "expects that the evidence will show that the rates CSC agreed to pay SDI under the Subcontract Agreement provided CSC with a positive profit margin on SDI's services under the Exelon Contract." (*Id.*) SDI further asserts that CSC's profits under the Exelon contract are relevant to the jury's determination of the "value of the services provided by SDI and the benefits obtained by CSC." (*Id.*)

To the extent the jury will need to determine the benefit CSC received **[*30]** from SDI's bid and transition-related services, the overall value of the Exelon contract to CSC is relevant to put SDI's bid-related work into context. CSC does not sufficiently explain how evidence of its profits from the Exelon contract is confusing or unduly prejudicial under Rule 403. As such, CSC has failed to demonstrate that CSC's profits and revenues under the contract with Exelon are clearly inadmissible for any purpose, *Jonasson*, 115 F.3d at 440, and the Court therefore denies CSC's motion to exclude this evidence.

VI. Motion in Limine Number 9: Rates Exelon Paid to CSC Under the Exelon Contract

CSC's ninth motion in limine seeks to bar all evidence "referencing the comparison of the rates paid by Exelon to CSC with the rates offered to SDI by CSC" under Rules 401 and 403. (CSC's Mem. at 4.) CSC argues that such evidence is irrelevant to both of SDI's remaining claims. Specifically, it argues that in light of the Court's finding that no partnership agreement existed between SDI and CSC, SDI was never entitled to a percentage of the rates that Exelon paid to CSC and therefore those rates are irrelevant and would confuse the jury. (*Id.* at 5.) CSC asserts that the only relevant **[*31]** rates are those in the alleged subcontract between CSC and SDI. (*Id.*) Further, CSC argues that the evidence is prejudicial to CSC because SDI may attempt to use it to paint CSC as a bad actor who gained more profit than it shared with its alleged subcontractor. (*Id.* at 6.) SDI responds that this evidence is relevant to rebutting CSC's meeting of the minds defense—specifically, CSC's argument that it never agreed to the rates that SDI alleges it did, as set forth in CSC's September 10, 2008 "best and final" offer. (SDI's Opp. at 10-11.) SDI asserts that the rates are relevant to showing the jury that those rates are well within the rates that "CSC had

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[11] To the extent the **[*28]** Court allows SDI to introduce evidence related to its lost opportunities, CSC's Rule 602 objections to such evidence are more appropriately addressed at trial, particularly because the Court is not privy to, and therefore has not reviewed, SDI's proposed evidence in this regard. *See Thakore*, 670 F. Supp. 2d at 717-18 (denying motion in limine to exclude evidence that the defendant argued was based on speculation, explaining that "the defendant may make appropriate objections to any evidence that under the Rules of Evidence would permit impermissible speculation by the jury, for neither hypothesis nor speculation is a substitute for proof of damages - or anything else.") (citations omitted).

[12] SDI has agreed that it will not present evidence at trial regarding **[*29]** CSC's general, company-wide profits and revenues. (SDI's Opp. at 12.) Accordingly, the remaining portion of CSC's eleventh motion in limine is largely duplicative of its seventh and eight motion in limine.

internally acknowledged as being authorized and acceptable." (*Id.*) SDI further argues that the rates are relevant to the jury's determination of the "value of the services provided by SDI and the benefits obtained by CSC." [13] (*Id.*)

The Court agrees with CSC that the specific rates Exelon paid to CSC for the services SDI was to provide is irrelevant to SDI's quantum meruit claim. SDI does not seek to recover for services provided to Exelon, *see* First Am. Compl. ¶ 89, and indeed SDI does not contend that it performed any services reflected in Exelon's rates to CSC, i.e., desktop services. Rather, the services for which SDI seeks to recover relate to work it allegedly performed in an attempt to win the CSC bid and to prepare for delivering services to Exelon. (*Id.*) Therefore, the specific rates Exelon agreed to pay CSC for services provided to CSC has no relevance to the benefit, if any, that CSC received from SDI's bid-related and preparatory work.

The Court agrees with SDI, however, that to the extent CSC asserts its "no meeting of the minds" affirmative defense at trial, the rate information is relevant. The record indicates that CSC intends to argue to the jury that it would have been unprofitable for CSC to agree to the rates that SDI alleges it did, which it contends supports a finding that there was no meeting of **[*33]** the minds on the terms of the subcontract agreement. (R. 167-1, Expert Report of W. Davis Douglass ¶¶ 55-56.) If CSC advances this theory at trial, evidence of the rates that Exelon paid to CSC will be relevant to determining whether there is any evidentiary support for CSC's defense. [14] *See* Fed. R. Evid. 401 (evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Accordingly, CSC has not met its burden of showing that the evidence is inadmissible for any purpose. *See Jonasson*, 115 F.3d at 440.

Moreover, CSC's largely conclusory assertion that such evidence would cause the jury to view CSC as a bad actor who earned more profit than it shared with its subcontractor is unconvincing. *See Boros*, 668 F.3d 901, 907 (7th Cir. 2012) (emphasizing that because "most relevant evidence is, by its very nature, prejudicial . . . evidence must be *unfairly* prejudicial to require exclusion") **[*34]** (citations and internal quotation marks omitted; emphasis in original); *Wielgus*, 2012 U.S. Dist. LEXIS 83594, 2012 WL 2277581, at *5 (conclusory statements are insufficient to meet the high burden of excluding evidence in a motion in limine). CSC's motion is denied, without prejudice. CSC may assert objections to specific evidence at trial, when the Court will be better-equipped to determine the relevancy of the evidence in context. SDI may only introduce this evidence if CSC asserts its "no meeting of the minds" affirmative defense.

CONCLUSION

For the reasons set forth above, the Court (1) grants in part and denies in part CSC's first motion in limine; (2) denies CSC's second motion in limine; (3) grants CSC's sixth and tenth motions in limine without prejudice; and (4) denies CSC's seventh, eighth, ninth and eleventh motions in limine.

DATED: August 3, 2012

ENTERED:

/s/ Amy J. St. Eve

AMY J. ST. EVE

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[13] SDI takes issue with CSC's assertion that the subcontract negotiations "were not based upon a certain percentage of the Exelon contract." (*Id.* at 11.) The Court need not address that argument, however, as it is inconsequential to CSC's motion. As explained above, SDI is precluded from arguing at trial that **[*32]** the parties agreed that SDI would be entitled to 15% of CSC's profits from the Exelon contract.

[14] The Court has not yet determined whether CSC may assert the "no meeting of the minds" affirmative defense at trial in light of CSC's failure to plead it in its Answer.

United States District Court Judge

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Teed v. JT Packard & Assocs.

United States District Court for the Eastern District of Wisconsin

July 20, 2010, Decided; July 20, 2010, Filed

Case No. 10-MISC-23; W.D. Wis. No. 08-CV-303-bbc; W.D. Wis. No. 09-CV-313-bbc

Reporter
2010 U.S. Dist. LEXIS 86113 *; 2010 WL 2925902

BRIAN TEED et al., on behalf of himself and others similarly situated, Plaintiffs, v. JT PACKARD & ASSOCIATES, INC., and S.R. BRAY CORP., Defendants.

Subsequent History: Motion granted by Teed v. Jt Packard & Assocs., 2010 U.S. Dist. LEXIS 147469 (W.D. Wis., Nov. 22, 2010)

Motion granted by, in part, Motion denied by, in part, Dismissed by, Without prejudice, in part Teed v. Thomas & Betts Power Solutions, LLC, 2012 U.S. Dist. LEXIS 198866 (W.D. Wis., Jan. 11, 2012)

Prior History: Teed v. JT Packard & Assocs., 2010 U.S. Dist. LEXIS 8716 (W.D. Wis., Feb. 2, 2010)

Counsel: [*1] For Brian Teed, on behalf of himself and all others similarly situated, Plaintiff: Larry A Johnson, Noah Reinstein, Nola J Hitchcock Cross, Cross Law Firm SC, Milwaukee, WI.

For Thomas & Betts Power Solutions LLC, Interested Party: Andrew J Voss, Littler Mendelson PC, Minneapolis, MN.

Judges: Hon. Rudolph T. Randa, United States District Judge.

Opinion by: Rudolph T. Randa

Opinion

DECISION AND ORDER

Pursuant to Federal Rule of Civil Procedure 37, the Plaintiff, Brian Teed ("Teed"), on behalf of himself and others similarly situated, brings this motion to compel the deposition of third-party Dan Sears ("Sears"), a former employee

of Defendant JT Packard and Associates, Inc. ("JT'). Teed also seeks an award of the reasonable expenses incurred in bringing the motion. *See* Fed. R. Civ. P. 37(a)(5).

JT and Defendant S.R. Bray Corp. ("Bray") are defendants in two actions alleging denial of overtime compensation in violation of the Fair Labor Standards Act, that are are pending in the Western District of Wisconsin, *Teed v. JT Packard and Associates, Inc.*, Case No. 08-CV-303-bbc ("303 action"), and *Clay, on behalf of himself and all others similarly situated v. JT Packard and Associates*, Case No. 09-CV-313-bbc. JT's assets **[*2]** were sold to Thomas & Betts, at a January 2010 auction.

Sears is currently employed by Thomas & Betts Power Solutions, LLC, ("Power Solutions") a wholly owned subsidiary of Thomas & Betts, Corp. On April 8, 2010, Teed issued a subpoena pursuant to Rule 45 of the Federal Rules of Civil Procedure for the April 19, 2010, deposition of Sears to be taken pursuant to Rule 30 of the Federal Rules of Civil Procedure. Sears did not appear for the deposition. On April 21, 2010, Power Solutions filed a motion to quash the third-party subpoena in the 303 action. However, on May 7, 2010, PowerSolutions withdrew that motion to quash. Counsel for Teed has filed an affidavit in support of his motion to compel documenting his good faith effort to resolve the discovery dispute with counsel for Power Solutions.

Power Solutions opposes the motion to compel on behalf of itself and Sears. Power Solutions contends that, since it is not a party to an action brought by Teed, the discovery that Teed seeks is governed by Rule 27(a) of the Federal Rules of Civil Procedure. In addition, Power Solutions asserts that Thomas & Betts has a personal interest or privilege in the subpoena because Teed is taking the deposition **[*3]** in an effort to find a basis for recovery against Thomas & Betts based on successorship liability and, therefore, it has standing to challenge the subpoena.

Pertinent Federal Rules

Rule 45 allows for the issuance of subpoenas commanding attendance at a deposition. The scope of discovery obtainable by a Rule 45 subpoena is as broad as permitted under the discovery rules. *See* Fed. R. Civ. P. 45 Advisory Committee Note to the 1991 Amendment. *See also, Graham v. Casey's Gen. Stores*, 206 F.R.D. 251, 253-54 (S.D. Ind. 2002). Rule 26 of the Federal Rules of Civil Procedure provides that "[p]arties may obtain discovery regarding any nonprivileged 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." *N.W. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 930 (7th Cir. 2004) (quoting Fed. R. Civ. P. 26(b)(1)).

Despite the general breadth of discovery, the Court may limit discovery where the discovery sought can be obtained from some other source that is more convenient, less burdensome, or less expensive, or the burden or expense of the proposed discovery **[*4]** outweighs its likely benefits. *See* Fed. R. Civ. P. 26(b)(2)(C)(i) & (iii). The party opposing discovery has the burden of showing the discovery is overly broad, unduly burdensome, or not relevant. *Wauchop v. Domino's Pizza, Inc.*, 138 F.R.D. 539, 543 (N.D. Ind. 1991).

Rule 45(c)(3) provides that upon "timely motion," the court that issued the subpoena must quash or modify the subpoena, for various reasons, including that the subpoena requires disclosure of privileged or otherwise protected material and no exception or waiver applies, or it subjects a person to undue burden. Rule 27(a) provides that a person desiring to perpetuate testimony by deposition before commencing a civil suit may file a verified petition in the United States district court in the district of the residence of the expected adverse party seeking an order allowing such perpetuation.

Motion to Compel

Deposition

Power Solutions asserts that the subpoena for Sears's deposition must be considered under Rule 27, which as relevant to the motion, sets forth the criteria for depositions to perpetuate testimony before an action is filed. However, there are pending two actions in the Western District of Wisconsin relating to **[*5]** the discovery sought by Teeds. And, Teeds seeks to discover relevant evidence pertaining to the claims in those actions.

In asserting that Rule 27 applies, PowerSolutions cites a number of decisions. However, those decisions are distinguishable because each arose where an action had not yet been commenced. *See In re I-35W Bridge Collapse Site Inspection*, 243 F.R.D. 349, 351 (D. Minn. 2007) (stating "to date, [the matter] does not involve an actual lawsuit"); *In re Landry-Bell*, 232 F.R.D. 266 (W.D. La. 2005) (stating the "petitioner seeks leave under Fed. R. Civ. P. 27 to conduct pre-lawsuit discovery"); *Deiulemar Compagnia Di Navigazione S.p.A. v. M/V Allegra*, 198 F.3d 473, 478 (4th Cir. 1999) (stating the "[p]etitioner expects to be a party to an action cognizable in the Courts of the United States, either to compel arbitration, seek security or to enforce an award"); *In re Ramirez*, 241 F.R.D. 595, 596 (W.D. Tex. 2006) (stating the "[p]etitioner has not yet filed suit"); *In re Chester County Elec., Inc.*, 208 F.R.D. 545, 546 (E.D. Pa. 2002) (stating that the petitioner moved the court "to take depositions and obtain documents before filing an action"). Rule 27(a) is applicable only where **[*6]** an action has not yet been filed and, therefore, it does not apply to the Sears deposition subpoena.

With respect to the motion to compel, PowerSolutions must establish that it has standing to challenge the Sears deposition subpoena. A motion to quash or modify a subpoena duces tecum may only be made by the party to whom the subpoena is directed except where the party seeking to challenge the subpoena has a personal right or privilege with respect to the subject matter requested in the subpoena. *Minn. Sch. Boards Ass'n Ins. Trust v. Employers Ins. Co. of Wausau*, 183 F.R.D. 627, 629 (N.D. Ill. 1999); *Smith v. Midland Brake, Inc.*, 162 F.R.D. 683, 685 (D. Kan. 1995). The subpoena was issued to and served upon Sears. Therefore, he is the person entitled to challenge the subpoena under Fed. R. Civ. P. 45(c)(3)(A), unless PowerSolutions makes a showing that it has a personal right to be protected or that the discovery sought is subject to a privilege.

Although PowerSolutions asserts both a privilege and a personal right, it does not further articulate the nature of any privilege. PowerSolutions's conclusory assertion of a privilege is insufficient to establish that the information is privileged. **[*7]** *See Holifield v. United States*, 909 F.2d 201, 203-04 (7th Cir. 1990). Furthermore, PowerSolutions has not cited any authority in support of its contention that it has a personal right or interest in Sears's deposition because the deposition may lead to information supporting a successor liability claim against it. Therefore, Power Solutions has not established standing to challenge the Sears deposition subpoena. Moreover, even if PowerSolutions had standing to challenge the subpoena, its conclusory assertion that it will be prejudiced by the deposition would not provide a basis for refusing to enforce the subpoena for Sears's deposition. Therefore, Teeds's motion to compel is granted. Sears must appear for his deposition at the place and time set forth in the deposition subpoena on or before August 3, 2010.

Reasonable Expenses

Teeds's request that the Court award reasonable expenses incurred in conjunction with his motion to compel is governed by Rule 37(a)(5)(A) the Federal Rules of Civil Procedure. Generally, the Rule requires that the Court award to the prevailing party reasonable expenses incurred in filing a motion to compel discovery, unless the opposing party's position was "substantially **[*8]** justified" or "other circumstances make an award of expenses unjust." *See* Fed. R. Civ. P. 37(a)(5)(A). The parallel language in the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), and in Rule 37 indicates that the term "substantially justified" should be interpreted consistently in both provisions. *See United States v. Kemper Money Market Fund, Inc.*, 781 F.2d 1268, 1279 (7th Cir. 1986) (citing *Photo Data, Inc. v. Sawyer*, 533 F.Supp. 348, 352 n.7 (D.D.C. 1982)). A position taken by a party is substantially justified if it has a reasonable basis in fact and law, and if there is a reasonable connection between the facts and the legal theory. *See Stewart v. Astrue*, 561 F.3d 679, 683 (7th Cir. 2009) (citing *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988); *Conrad v. Barnhart*, 434 F.3d 987, 990 (7th Cir. 2006)).

Teed is the prevailing party. PowerSolutions's contentions in opposing the Sears deposition subpoena lack a reasonable legal basis — they are not justified to a degree that could satisfy a reasonable person that they have a

reasonable basis under the controlling federal case law. *See Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988). PowerSolutions's opposition to the Sears deposition **[*9]** is not substantially justified and, it has not presented any other circumstances that make an award of expenses unjust. Accordingly, the Court awards to Teeds the costs and disbursements, and reasonable actual attorney's fees incurred in bringing the motion to compel.

Teed must submit his itemized claim for such sums no later than August 2, 2010, together with supporting documentation. The request for attorney's fees must be presented in a format that includes the hourly rates of the attorneys who worked on the motion and provides a sufficient factual basis for the Court to determine the reasonableness of the hourly rates of those attorneys, and the reasonableness of the time that they devoted to the response. Additionally, Teeds must provide legal authority for the award of any claimed cost or disbursements. PowerSolutions may respond to Teeds's submissions no later than August 12, 2010. Teeds may file any reply thereto no later than August 20, 2010.

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

Teeds's motion to compel is **GRANTED** and Sears must appear for his deposition at the place and time set forth in the deposition subpoena on or before **August 3, 2010**; and,

Teeds' **[*10]** request for reasonable expenses incurred in bringing the motion to compel is **GRANTED**. Teeds must submit his claim for such sums no later than **August 2, 2010**. PowerSolutions may respond to that claim no later than **August 12, 2010**. Teeds may file any reply thereto no later than **August 20, 2010.**

Dated at Milwaukee, Wisconsin this 20th day of July, 2010.

BY THE COURT

/s/ Rudolph T. Randa

Hon. Rudolph T. Randa

U.S. District Judge

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Williams v. Ortiz

United States District Court for the Eastern District of Wisconsin

February 7, 2017, Decided; February 7, 2017, Filed

Case No. 14-cv-792-pp

Reporter
2017 U.S. Dist. LEXIS 17049 *; 2017 WL 499996

TRAVIS DELANEY WILLIAMS, Plaintiff, v. DR. ORTIZ, LT. BRADLEY FRIEND, AUSTIN ISFERDING, ROBERT HERNANDEZ, WILLIAM COE, and JAMES OLSTINSKE, Defendants.

Prior History: Williams v. Ortiz, 2015 U.S. Dist. LEXIS 126846 (E.D. Wis., Sept. 22, 2015)

Counsel: [*1] Travis Delaney Williams, Plaintiff, Pro se, Portage, WI.

For Lt Bradley Friend, Austin Isferding, Robert Hernandez, Defendants: Michael J Lanzdorf, Racine County Corporation Counsel, Racine, WI.

For William Coe, James Olstinske, Defendants: Steven T Elmer, W Patrick Sullivan, Siesennop & Sullivan, Milwaukee, WI.

Judges: HON. PAMELA PEPPER, United States District Judge.

Opinion by: PAMELA PEPPER

Opinion

ORDER DENYING PLAINTIFF'S MOTION TO COMPEL (DKT. NO. 55); DENYING PLAINTIFF'S MOTION TO COMPEL (DKT. NO. 60); DENYING PLAINTIFF'S MOTION TO STAY (DKT. NO. 63); GRANTING DEFENDANTS' MOTION FOR SANCTIONS (DKT. NO. 65); GRANTING PLAINTIFF'S MOTION FOR SERVICE UNDER RULE 4 (DKT. NO. 69); GRANTING PLAINTIFF'S MOTION FOR EXTENSION OF DISCOVERY (DKT. NO. 70); DENYING PLAINTIFF'S MOTION FOR RELIEF AND TO STRIKE THE MAY 13, 2016 DEPOSITION (DKT. NO. 71); GRANTING DEFENDANTS' MOTION FOR EXTENSION OF TIME (DKT. NO. 73); GRANTING PLAINTIFF'S MOTION TO WITHDRAW EXHIBITS (DKT. NO. 77); DENYING PLAINTIFF'S MOTION TO AMEND AND SUPPLEMENT PLEADINGS (DKT. NO. 78); DENYING AS MOOT PLAINTIFF'S MOTION FOR PRIVACY PROTECTION (DKT. NO. 79); DENYING PLAINTIFF'S MOTION FOR PROTECTIVE ORDER (DKT. NO. 81);

DENYING PLAINTIFF'S MOTION TO APPOINT COUNSEL [*2] (DKT. NO. 82); DENYING AS MOOT PLAINTIFF'S SECOND MOTION FOR SERVICE UNDER RULE 4 (DKT. NO. 90); DENYING PLAINTIFF'S THIRD MOTION TO APPOINT COUNSEL (DKT. NO. 91); DENYING PLAINTIFF'S MOTION TO CONSOLIDATE CASES (DKT. NO. 94); DENYING AS MOOT PLAINTIFF'S MOTION FOR JUDGMENT (DKT. NO. 95); DENYING PLAINTIFF'S MOTION TO FILE SUPPLEMENTAL COMPLAINT (DKT. NO. 101); DENYING AS MOOT PLAINTIFF'S MOTION FOR LEAVE TO FILE EXCESS PAGES (DKT. NO. 102); DENYING PLAINTIFF'S MOTION TO ADD PARTIES (DKT. NO. 104); AND DEFERRING RULING ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (DKT. NO. 110)

In September 2015, this court screened the plaintiff's complaint. Dkt. No. 10. The court concluded that the plaintiff could proceed against six defendants (two of whom were, at the time, Doe defendants) on Fourteenth Amendment due process claims relating to a disciplinary complaint, alleged harassment, medical care and conditions of confinement. The court also ruled that the plaintiff could proceed against two defendants on a First Amendment retaliation claim. Id.

Five of the defendants answered the complaint. Dkt. Nos. 22 (William Coe); 26 (defendants Friend, Hernandez and Isferding); 47 (James Olstinske). The marshal's service mailed the summons and **[*3]** complaint to defendant Ortiz on October 9, 2015; defendant Ortiz had not returned that waiver by November 11, 2015. Dkt. No. 36. To date, defendant Ortiz has not answered the complaint.

On February 16, 2016, the court issued a scheduling order. Dkt. No. 50. It ordered the parties to complete all discovery by May 13, 2016. Dispositive motions were due June 14, 2016 (oppositions were due within thirty days). Id.

Since the court issued its scheduling order, this case has deteriorated considerably. That deterioration is due, in no small part, to the fact that that over the last ten months, the parties have filed twenty-one motions; the court has not ruled on one of them. The court's delay in ruling on these motions has created a cascade effect—had it ruled on the plaintiff's motion asking the court to serve a missing defendant, for example, all of the parties would have been joined to the suit by now. Had the court processed the defendants' motion for sanctions, for example, its attention to that motion likely would have prevented a number of other motions from being filed. The responsibility for these delays lies with this court. While today's order does not repair the damage done in its **[*4]** entirety, the court hopes that it will assist in setting the case back on a forward path, and will prevent further damage from occurring.

1. PLAINTIFF'S MOTION TO COMPEL (DKT. NO. 55)

On April 25, 2016—not quite three weeks before discovery was scheduled to close—the plaintiff filed a motion "asking the court to order & compel the defendants & their attorney to produce" a series of documents. Dkt. No. 55. The plaintiff indicated that he had personally mailed to the defendants "and their attorney" a discovery request three times. Id. The motion is three pages long, and lists certain classes of documents: all of the disciplinary reports written about him during a certain time period; all written complaints he'd submitted during that time period; all summaries of disciplinary hearings regarding the plaintiff—no time period specified; an "exact copy" of "the CHC medical contract that was in effect at the Racine County Jail" during the relevant time; all investigation reports during the relevant time; the RCJ's intake procedures and procedures for medical screening; classification procedures for the relevant time; all separation orders relating to him. Id. at 1-2. He then asks "for readable in their **[*5]** entirety 'inmate request for medical attention request filled out by the plaintiff indicating plaintiff's medical request and medical staff or security staff responses plaintiff ask for the following request." Id. at 2. He then lists 93 dates, with notations after each date (which he indicated stood for "responded to" or "not responded to." Id. at 2-3.

Defendants Friend, Hernandez and Ortiz responded on May 10, 2016. Dkt. No. 57. They indicated that they hadn't received the plaintiff's requests until March 28, 2016, and that they'd served their response (including 598 pages of responsive documents) on April 27, 2016. Id. at 1-2. The defendants also pointed out that the plaintiff had failed to comply with the "meet-and-confer" requirements of Civil Local Rule 37, and noted that the court already had reminded the plaintiff once about this requirement. Id. at 2.

The defendants' response indicates that they have responded to the plaintiff's March 2016 discovery requests. The defendants also are correct that in its February 10, 2016 order, the court explained to the plaintiff that before he could file a motion to compel discovery, he had an obligation to meet and confer in good faith with the defendants. Dkt. No. 45 at 2. Sending the same **[*6]** discovery demand three times does not constitute meeting and conferring in good faith. While the plaintiff cannot pick up the phone and call defense counsel, he can write and ask if there is any additional information counsel needs, or whether counsel could explain to him why he had not received the documents he requested. The plaintiff presented no evidence that he had done that. The court will deny this motion.

2. PLAINTIFF'S MOTION TO COMPEL (DKT. NO. 60)

The court received the defendants' response to the first motion to compel on May 10, 2016. Dkt. No. 57. On that same day, the court received a second motion to compel from the plaintiff. Dkt. No. 60. In this one, he asked the court to order the defendants to produce a video from July 2, 2014, recording an hour that he was out of his cell. He also asked for the RCJ's employee rule book; psychological stress evaluation reports for defendants Hernandez, Isferding and Friend; employee discipline records for those three defendants and Carrie Bellows (whom the court dismissed from the lawsuit on September 22, 2015), William Coe and James Olstinske; and a print-out of the plaintiff's trust account during the relevant time. Id. at 1-3.

Friend, Hernandez **[*7]** and Isferding responded. Dkt. No. 61. While terse, the defendants' response implies that the plaintiff had not yet served these discovery demands on the defendants. Id. at 1 ("Insofar as Plaintiff actually intended to serve a request for production of documents pursuant to Fed. R. Civ. P. 34, Defendants will respond in accordance thereto.")

In this motion, the plaintiff did not indicate that he had served the defendants with these discovery requests. And again, he did not attach to the motion any certification that he had met and conferred in good faith with the defendants; in other words, he did not comply with Local Rule 37. Finally, the court received this motion on May 10, 2016—three days before the deadline for completing discovery, giving the defendants only three days to respond. The court will deny this motion.

3. PLAINTIFF'S MOTION TO STAY (DKT. NO. 63)

The court received this motion from the plaintiff almost two weeks after the deadline for completing discovery had passed. Dkt. No. 63. In the last couple of paragraphs of the motion, the plaintiff asked the court to stay all proceedings until it had ruled on the above two motions to compel. Id. But at the beginning of the motion, the plaintiff stated that the defendants **[*8]** were "slated to file a motion pertaining to a direct answer to a deposition question that was asked in bad faith." Id.

At that point, the court had not received any motions from the defendants about anything—depositions or otherwise. The court did not stay the proceedings at the time the plaintiff asked it to. The court generally does not "stay" proceedings unless there is something going on outside of the case—for example, a case pending in state court that must be resolved before the federal case can proceed—whose resolution might impact the federal case. The court *does* grant extensions of time for completing discovery and filing motions, when a party asks and there is good cause. The court will not grant the plaintiff's motion to stay proceedings, but it will address extending deadlines at the end of this order.

The court also notes that in the last sentence of his motion, the plaintiff stated that one of the motions he wanted the court to rule on was a "motion filed by plaintiff stating this case was agreed to be heard by a magistrate." Id. The plaintiff never filed such a motion. But the record does show that *he* consented to a magistrate judge hearing this case. What it does not **[*9]** show is whether all of the *defendants* have consented.

After the plaintiff filed his complaint, he filed a completed "Consent to Proceed Before a U.S. Magistrate Judge." Dkt. No. 6. At that time, the assigned magistrate judge was Judge Aaron E. Goodstein. The plaintiff refused to

consent to Judge Goodstein hearing his case. Id. For that reason, the case was assigned to a district court judge—Judge Rudolph T. Randa. The case was reassigned to Judge Pepper on December 29, 2014, after she was appointed to the district court. Months later, in September 2015, Judge Goodstein went on recall status (a sort of semi-retirement), and all of the cases to which he'd been assigned were assigned to other magistrate judges. The plaintiff's case was assigned to Judge Nancy Joseph. Under this district's policy, the clerk's office sent out new consent forms to the parties who'd appeared. Dkt. No. 11.

This time, the plaintiff consented to Judge Joseph hearing the case. Dkt. No. 13. After defendants Friend, Hernandez, and Isferding were served, they, too, consented to Judge Joseph hearing the case; their attorney, Attorney Lanzdorf, signed off on the consent. Dkt. No. 19. Despite the fact that the docket **[*10]** indicates that the clerk's office sent William Coe and James Olstinske consent forms on September 24, 2015 (dkt. no. 12), neither of those defendants (represented by Attorney Elmer) has ever filed a consent form.

The consent form instructs parties that, whether they do or don't consent, they must file the form within twenty-one days of the date that they receive it. It is not clear when Coe and Olstinske received their consent forms, but Coe must have received his before November 4, 2015 (the date he filed his answer), and Olstinske must have received his by at least February 11, 2016 (the date he filed his answer). The twenty-one-day filing deadline stated in the consent form has long passed for both of these defendants.

What happens when a defendant does not follow the directions in the consent form, and does not file the consent form on time? The clerk's office often sends a reminder to that party. Sometimes that doesn't happen—sometimes, particularly in cases involving more than one defendant, and cases involving defendants who are served later in a case, that letter does not go out. It didn't in this case. The court does not have a policy of "punishing" a defendant who fails to **[*11]** file a consent form on time, or who fails to file it at all. Instead, if a party does not file the consent form at all, the court assumes—as it must, given the requirements of Article III of the Constitution and 28 U.S.C. §636—that the party who didn't respond does not consent.

The clerk's office cannot transfer a case from a district judge to a magistrate judge without the express consent of all of the parties. See 28 U.S.C. §636(c)(1). Because Coe and Olstinske have not consented to Judge Joseph hearing the case, the case remains with Judge Pepper.

4. DEFENDANTS' MOTION FOR SANCTIONS (DKT. NO. 65)

The court received the above motion to stay on May 24, 2015—eleven days after the deadline for the close of discovery. It also appears that the court received the motion eleven days after counsel for the defendants conducted the plaintiff's deposition.

The plaintiff already had hinted, in the above motion to stay, that there had been problems with the deposition, and that he expected the defendants to file a motion. The defendants did file that motion, in the form of a motion for sanctions. Dkt. No. 65. The motion seeks dismissal of the plaintiff's case. In the alternative, it seeks money damages, an order compelling the plaintiff to answer questions, **[*12]** and an extension of the dispositive motions deadline. Id. at 1.

A. The Pleadings

i. *The Defendants' Brief*

In their supporting brief, the defendants explain that on April 27, 2016, they served notice of the deposition, scheduled for May 13, 2016. Dkt. No. 66 at 2. On that date, Attorneys Lanzdorf and Elmer, along with a court reporter, appeared at Columbia Correctional Institution for the scheduled deposition. Id. The plaintiff attended the deposition without security restraints, and there were no correctional facility staff in the deposition room. The plaintiff sat at the head of the table; counsel sat on one side, the court reporter on the other, each "approximately four feet away from Plaintiff." Id. After the plaintiff acknowledged that counsel could enquire as to "anything

reasonably calculated to lead to the discovery of relevant information," id., counsel began to ask a series of questions regarding which of the defendants actually found the plaintiff guilty of an infraction that led to his being disciplined, id. at 3. In particular, counsel asked the plaintiff whether it was defendant Isferding, or defendant Hernandez, who "actually made the finding of guilt that resulted in imposition of discipline?" **[*13]** Id. at 3. The plaintiff responded, "The answer again, the writer was Hernandez. He recommends the days. If you're found guilty, them the days you're going to get." Counsel responded, "Does the person who makes the finding of guilt—Is the person who makes the finding of guilt the same person who makes the recommendation of discipline?" At this point, the plaintiff responded that he had answered the question already, and that he objected. Counsel and the plaintiff went back and forth, with the plaintiff continuing to object to the question. Counsel finally noted the objection, but stated—contrary to the plaintiff's comment that "we can move on to something else"—that he was not going to move on until the plaintiff gave him a clear answer to the question. Id. at 3-4.

At this point, counsel indicates, the plaintiff became "hostile and confrontational." Id. at 4. Counsel states that the plaintiff leaned toward counsel "aggressively" and demanded to know what counsel meant by saying he wasn't going to move on. When counsel continued to try to frame the question, the plaintiff stated, "Mr. Lanzdorf, this is a maximum security prison. You better move on, man." Id. Counsel stated that he understood the plaintiff's remark **[*14]** to constitute a threat, and suggested a break (noting the court reporter moving away from the plaintiff). Counsel asked for a member of the institution staff to come in; when the staff member came into the room, the plaintiff stated, "I don't care who you call. If we call staff, it's over with, man." Id. Counsel indicates that at that point, he did not feel safe continuing the deposition, or even trying to call the court for a ruling. Id.

A higher-ranking security officer came into the room, and counsel explained what had happened and that he believed the plaintiff's statements were threatening. Id. at 5. The plaintiff did not deny that his statements were threatening. The institution staff was not able to locate a telephone, and so counsel eventually decided to continue with the deposition, and to try to call the court after it concluded. Id. Counsel indicates that, as the security staff left the room, the plaintiff said something to the effect of "this is a waste of time," or "this is not important." Id. The following exchange then occurred:

> COUNSEL: I'm going to ask that she read back the last pending question before we go on, but I would just state for the record that while — while we were **[*15]** on a break you stated to — to staff here at the prison here that this, referring to this deposition, is not important. Is it your position that this lawsuit is not important?
> PLAINTIFF: The lawsuit is important, but, I mean, I mean, this is a hassle man. Don't you know, I got, ooh, man, psychological issues, man. You press the wrong button, man, too, man, you really don't want to do that, man.
> COUNSEL: Why don't I want to do that?
> PLAINTIFF: I mean, I keep telling you, when I tell you to leave stuff alone, man, leave it alone. I'm not properly medicated. I won't be responsible, man. I've asked you actually the best I know how to leave it alone, man.

Id.

Concluding that continuing to try to clarify the plaintiff's answer would make matters worse, counsel moved on, and completed the deposition without getting the clarifying information. Id. Counsel indicates that he

> deliberately steered clear from certain legitimate lines of inquiry that, but for Plaintiff's threats, he would have otherwise pursued because he believed them likely to provoke further threats or violent actions from the Plaintiff, including, but not limited to, Plaintiff's full disciplinary record and history of confrontations **[*16]** with staff at the Racine County Jail.

Id. at 6. Before leaving the deposition—and with institution staff present—counsel called the court's chambers to ask the court to address the issues described above. The court's staff indicated to counsel that Judge Pepper was not available to receive the call. Id. (In fact, Judge Pepper was in Chicago on personal business on May 13, 2016, and was not available to take calls that day.) Counsel indicates that the court reporter appeared shaken, stated that she'd never seen anything like this during a prison deposition, and that if the plaintiff had made another threatening statement, she would have left. Id. Counsel indicates that he himself has conducted over thirty inmate depositions,

some at supermax facilities, and has never been threatened or made to feel that his or anyone else's safety was at risk. Id. Counsel believes that the plaintiff deliberately threatened him with violence. He indicates that he spent nine hours working on the deposition (including prep time, travel and conducting the deposition itself), and also would be receiving an invoice for the cost of obtaining the deposition transcript. Id.

The defendants ask the court to impose the sanction **[*17]** of dismissal. Id. at 7-8. They argue that such a harsh sanction is warranted by the plaintiff's litigiousness (not only in this case, but in a number of other cases he has filed); his ignoring of the court's warnings (such as its warning that he could not file a motion to compel without first meeting and conferring with counsel, or the court's warning in one of the plaintiff's other cases that responding to correspondence or motions with threats could result in sanctions); and the need to deter the kind of threatening conduct in which the plaintiff engaged at the deposition. Id. at 8-10. The defendants argue that if the court does not feel it appropriate to dismiss the case, the court should require the plaintiff to pay the costs and fees that the defendants have incurred in conducting the deposition, require the plaintiff to respond (in writing) to the questions they did not pose (or did not get clear answers to) at the deposition, and extend the deadline for filing dispositive motions. Id. at 10.

ii. *The Plaintiff's Response*

The plaintiff objected to the defendants' motion. Dkt. No. 75. He first points out that in its February 16, 2016 scheduling order, the court advised the parties that if the defendants wanted **[*18]** to depose the plaintiff, they had to serve all parties with notice at least fourteen days before the deposition. Id. at 1; see Dkt. No. 50 (scheduling order) at 1, ¶1. The plaintiff argues that counsel did not provide that fourteen-day notice, and he refers the court to an attachment to a motion he filed after the defendants filed their motion for sanctions.

At Dkt. No. 71-1, in connection with a motion to stay proceedings and strike the deposition in its entirety, the plaintiff attached a "Visitor Notification" form. The document is "from" someone named "J. Haldeman," and it's addressed to "LOBBY." In the "date notified" box, it shows the date "5/6/16." Id. at 1. It indicates that the date of the visit will be May 13, 2016, the time will be 12:45 p.m., and the purpose of the visit is "Professional Visit-Deposition for WILLIAMS, TRAVIS . . . ." Id. The form indicates that when the visitors (listed as Attorneys Lanzdorf and Elmer and court reporter Peterson) arrived, "J. Haldeman" was to be contacted. Id.

The plaintiff reads this form to indicate that counsel did not notify Columbia Correctional staff about the May 13, 2016 deposition until May 6, 2016—seven days beforehand. He argues that this meant **[*19]** he had little time to have someone help him review his complaint (and indicates that someone else wrote the complaint for him). Dkt. No. 75 at 1. He alleges that counsel's statement that counsel sent the deposition notice on April 27, 2016 was not true, and that the plaintiff wasn't notified until nine days later. Id. He takes issue with various details in the defendants' motion—he argues that the deposition room wasn't small, that there was no need for him to be in restraints for the deposition, that he was not four feet away from the lawyers and the court reporter, that he did not acknowledge that counsel could ask him questions about anything reasonably calculated to lead to discovery of relevant information. Id. at 2.

He argues that counsel asked questions designed to annoy, harass and bully him into giving answers that would favor the defendants. He indicates that the exchanges the defendants quoted in their motion came after he'd already been asked about forty questions, and that the quotes do not show his full words. Id. He expresses frustration at the fact that counsel refused to move on after the plaintiff objected to the "who determined guilt" question four times. Id. He indicates **[*20]** that counsel left out a discussion of how counsel tried to get staff attention by waving his arm at a surveillance camera, and he indicates that he—the plaintiff—asked for higher-ranking staff to come in because he'd lodged numerous complaints about the first officer to respond. Id.

The plaintiff raises many other issues, but the court particularly notes the following:

> 1.) Plaintiff further stated to Captain Keller [the officer of higher rank] that this is a court proceeding so you can't instruct me to do anything. 2.) Plaintiff further stated to Captain Keller review the camera and see the fact that this man's changed his posture and leaned forward while demanding I answer a question, Captain this attorney

> tried to intimidate me by his actions, this is a maximum security prison Captain I am surrounded by much tougher people than him that's what I'm trying to explain.

Id. at 3. The plaintiff also alleges that the excerpts of the deposition which counsel quoted are "tailored." Id. He asserted that he's never 'had a attorney just inquire away telling him he's not moving on to the next question." Id. at 4.

iii. *The Defendants' Reply*

The defendants replied. Dkt. No. 84. They reiterate that they served notice **[*21]** of the deposition on April 27, 2016, and attach the notice of deposition. Dkt. No. 85-3. That notice is dated April 27, 2016 and the certificate of service indicates that it was served by U.S. mail, postage paid, on the same date. Id. They note that even if they hadn't served the notice fourteen days prior to the deposition, the remedy for the plaintiff would have been to move for a protective order pursuant to Fed. R. Civ. P. 26(c)(1)(B). Id. at 84. In response to the plaintiff's allegation that the defendants misquoted the deposition transcript, the defendants have provided the court with the full transcript, as well as a video. Dkt. No. 84 at 1; Dkt. No. 85-4 (transcript); Dkt. No. 88 (video). Finally, the defendants argue that the plaintiff has continued to be obstreperous, pointing out that when they sent the plaintiff a video he'd requested, the plaintiff responded with a letter, saying he'd sent the entire packet back unopened. Dkt. No. 84 at 3.

B. The Court's Analysis

i. *The Rules Governing Depositions*

The court begins by looking at Fed. R. Civ. P. 30, which governs oral depositions. Rule 30(d)(2) states, "The court may impose an appropriate sanction—including the reasonable expenses and attorney's fees incurred by any party—on any person who **[*22]** impedes, delays, or frustrates the fair examination of the deponent." The question the court must answer is whether the plaintiff "impeded, delayed or frustrated" a "fair" deposition. Fed. R. Civ. P. 26(b) says that parties may obtain

> discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

So the scope of discovery is broad. This means that a lawyer conducting a deposition may ask about any issue that is relevant to a party's claim or defense. There are several ways that a party can collect that information—through oral depositions (Fed. R. Civ. P. 30), through written interrogatories (Rule 33), through requests for production of documents (Rule 34), and through requests for admissions (Rule 36).

Fed. R. Civ. P. 30(c)(2) states that if a party who is being deposed objects to a question (for example, on the ground that it isn't relevant to his claim), the court reporter must note the objection, **[*23]** "but the examination still proceeds; the testimony is taken subject to any objection." The rule also states that if a party does have an objection to a question, the objection "must be stated concisely in a nonargumentative and nonsuggestive manner." The only grounds for not answering a question in a deposition are "to preserve a privilege, to enforce a limitation ordered by the court, or" to make a motion "to terminate or limit [the deposition] on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party." Id., Fed. R. Civ. P. 30(d)(3)(A).

So a party who is being deposed may not simply refuse to answer questions. The person may note, for the record, that he objects to a question, and the court reporter has to record that objection. But he still has to answer the question, unless it falls into one of the categories in Rule 30(d)(3)(A).

ii. *The Fairness of the May 13, 2016 Deposition*

The deposition began at 12:38 p.m. on May 13. Dkt. No. 85-4 at 1. At the outset, Attorney Lanzdorf attempted to explain the standard deposition rules to the plaintiff. Id. at 3-5. The plaintiff, however, expressed impatience with

this, stating, "We can get down to business, though. **[*24]** You can save the formalities." Id. at 5. When the plaintiff indicated that he was in pain, Attorney Lanzdorf enquired whether the pain was so bad that the plaintiff couldn't participate meaningfully in the deposition. Before counsel could finish the question, however, the plaintiff interrupted, saying, "No. I'm in such degree of pain, I wish you just — let's get to the meat of this and get it over with and you can hit the highway, I can go back and do what I do best." Id. at 6.

The following exchange occurred next:

> COUNSEL: All right. I'm going to try to do this as quickly as possible. Just another background thing. I may ask you a question that you don't feel comfortable answering, that you don't think is bearing on the incidents that are the subject of this lawsuit.
>
> That said, if you feel uncomfortable answering a question you can tell me why, you can state your objection for the record, but this being a deposition, I'm giving — I've given broad leeway in the scope of questions that I can ask you.
>
> And so the rules of a deposition are very different than the rules of a court. In a court proceeding lawyers can only ask questions and expect to receive an answer to those questions if it's directly relevant **[*25]** to that proceeding. In a deposition it's a little bit broader. It's anything that's reasonably calculated to lead to the discovery of information that's relevant.
>
> So if we need to, if there's a question that you don't feel comfortable answering, you can make that record clear, but if you're refusing to answer a question, then at that stage we'll contact the Judge and the Judge can make a ruling, okay?
>
> PLAINTIFF: Yes, yes, yes.

Dkt. No. 85-4 at 6-7. At this point, Attorney Lanzdorf began to ask substantive questions.

The plaintiff refused to answer a number of questions during the deposition. When Attorney Lanzdorf inquired about how many times the plaintiff had been convicted, the plaintiff responded, "I object to that. You got Internet. You can look it up, research it. We ain't going to talk about it. Move on to the next question." Id. at 10. When Attorney Lanzdorf asked about the plaintiff's current sentence, the plaintiff responded, "I wouldn't even know. Don't care." When counsel started to ask the next question, the plaintiff did not let him finish, stating, "I don't know and don't care. That was my answer." Id. at 11. When Attorney Lanzdorf began to ask questions about one of the other cases the plaintiff **[*26]** has pending before the court, and the plaintiff refused to answer those questions. Id. at 14-15.

Although the plaintiff was refusing to answer questions (in violation of Rule 30(d), Attorney Lanzdorf behaved professionally. At one point, Attorney Lanzdorf asked a question, and the plaintiff responded that he believed counsel had mixed up some facts; Attorney Lanzdorf responded, "And that may very well be," acknowledging that he might have confused a fact. Id. at 27. At another point, when Attorney Lanzdorf attempted to determine what discovery the plaintiff had, the plaintiff responded that anything he had, he'd filed with the court. Counsel responded, "All right. Thank you." Id. at 31. On another occasion, the plaintiff was answering a question, and Attorney Lanzdorf, apparently concerned that the plaintiff may have misunderstood the date he was asking about, said, "Just to guide you, and I'm sorry to interrupt, but what I'm referring to is the June 5, 2014 incident related to the food tray." Id. at 37-38. There are extensive passages where the plaintiff gave long answers to questions, and counsel did not interrupt. Counsel waited until the plaintiff had finished his answers before going on to the next question. On the few occasions **[*27]** that Attorney Lanzdorf did interrupt to clarify an issue, he apologized each time. The transcript shows that Attorney Lanzdorf's conduct, rather than being badgering and harassing, was professional and polite.

The plaintiff, on the other hand, at times reacted to Attorney Lanzdorf's questions in an argumentative fashion (in violation of Rule 30). When Attorney Lanzdorf asked the plaintiff whether he had a particular document, the plaintiff again responded that anything he had he'd filed with the court. Counsel told the plaintiff that he hadn't seen that particular document among the ones the plaintiff had filed with the court. The plaintiff responded, "Okay then. File whatever you got to do when you go back to your hut appropriately." Id. at 35. The plaintiff appears to have become agitated at this point—in answer to the next few questions, the plaintiff said things like, "You just told me you had exhibits, right? You don't see the affidavit from Dan Burns." When counsel answered, "Okay," the plaintiff repeated,

"Do you see the affidavit from Dan Burns?" As counsel tried to explain what he was asking, the plaintiff interjected, "Come on." Id.

The exchange that gave rise to the defendants' motion for **[*28]** sanctions occurred fifty-one pages into the eight-six-page deposition transcript. It began with counsel asking the plaintiff who imposed discipline against him for the incident with the food tray. Id. at 51. Counsel specifically asked, "Who imposed the discipline against you? Who made the ultimate finding of guilt?" The plaintiff responded, "I believe it was — No, it was Noonan, Patrick Noonan, because —" Counsel asked, "Did Defendants Hernandez and/or Isferding impose discipline against you?" The plaintiff responded, "They made a recommendation and Noonan followed it." After counsel acknowledged that answer with an "okay," the plaintiff added, "They recommend what you should have. Say, for instance, you write a disciplinary report. They say well, I recommend three days, and you can either accept it or go to the hearing. If you get found guilty, you're going to get the three days plus just for having a hearing." Id. Attorney Lanzdorf attempted to clarify: "The question for you is did Isferding or Hernandez actually make the finding of guilty that resulted in imposition of discipline?" The plaintiff responded, "The answer again, the writer was Hernandez. He recommends the days. If you're found **[*29]** guilty, them the days you're going to get." Id. Counsel tried again to focus the question on the identity of the person who actually imposed the punishment: "Does the person who makes the finding of guilt — Is the person who makes the finding of guilt the same person who makes the recommendation of discipline?" Id. at 51-52.

The plaintiff began objecting, arguing that he'd already answered the question, and eventually telling counsel that he'd better move on, because "this is a maximum security prison." Id. at 51-52. Counsel stated that they needed to take a break because counsel felt threatened, and ended up stating, "I think we need to take a break here. I think we need to call in staff just to, you know, take a breather before we go on, okay?" Id. at 53. In response to this statement, the plaintiff said, "I don't care who you call. If we call staff, it's all over with, man. You can go get your court order or whatever. It's over with." Id. After a member of the security staff came in, and indicated that he was calling for a "white shirt" (a corrections officer), Attorney Lanzdorf stated, "Let me just state I'm not trying to get Mr. Williams in any sort of trouble here. What I'm trying to get is an answer to a question." **[*30]** Id. at 54.

The plaintiff then said, apparently speaking to CCI staff member:

> THE WITNESS: That I'm not going to answer. I object to it. He started pressing the issue, Captain. I asked him to leave the question alone. This is a maximum security prison, counsel. I'm here for a reason, man. Quit pressing me, man. That's all I told him. Leave me alone. Leave the question alone.
>
> I objected to it. This is a court proceeding. I objected to it. You're not going to get an answer to it, not the way you want to do it. You try to lead me into something that I'm not going to answer it the way you want me to answer. That's the bottom line.

Id. at 54.

At this point, counsel asked the staff if there was a way for him to contact the court for a ruling. Id. at 55. While the parties waited to find out if they could call the court, counsel picked up the deposition with other questions. Id. at 56. The questioning continued until page 59, at which time the parties went off the record for a discussion. When they returned to the record, they had the exchange in which counsel asked the plaintiff if he thought the lawsuit was important, and the plaintiff warned counsel not to press the wrong buttons. Id. at 59-60.

While the deposition continued from this point **[*31]** without any other major incidents, the plaintiff was, at times, disrespectful toward Attorney Lanzdorf. The plaintiff stated that Attorney Lanzdorf talked too much, id. at 70, and toward the end of the deposition, the plaintiff started asking questions of counsel. When Attorney Lanzdorf finished his portion of the questioning, the plaintiff said, "Thank God." Id. at 75. Attorney Lanzdorf then indicated that there might be some additional questions once the court had ruled on the question that caused the problem back at page 51, and the plaintiff responded, "Oh, man. Put it in interrogatories or something, man, and mail it to me." Id. at 75-76. Attorney Elmer asked some questions, and when he announced that he was finished, the plaintiff stated to Attorney Lanzdorf, "Wow. Take a hint from that guy." Id. at 83. At this point, the parties placed a call to the court. The deposition transcript indicates, "No Judge available." Id. at 84. The deposition ended at 2:36 p.m. Id.

The transcript demonstrates that Attorney Lanzdorf followed the procedures laid out in Rule 30. It also shows that he behaved professionally and courteously toward the plaintiff, even when the plaintiff refused to answer questions, or reacted in a rude or argumentative fashion. **[*32]** The only behavior to which the plaintiff can point in support of his argument that the deposition was not fair, or was conducted in bad faith, is the fact that he believes that Attorney Lanzdorf continued to repeatedly ask the plaintiff a question the plaintiff already had answered, after the plaintiff told Attorney Lanzdorf to "move on."

The court's review of the transcript leads it to believe that the plaintiff's belief that he was being repeatedly asked the same question was the result of his misunderstanding of Attorney Lanzdorf's questions.

Corrections officers (or, the court supposes, other institution staff) can write up an inmate for an alleged disciplinary infraction. It sounds, from what the plaintiff told Attorney Lanzdorf at the deposition, like the person who writes up the disciplinary ticket also may recommend, in that ticket, what the person thinks the punishment for that infraction should be. If the inmate doesn't agree with the ticket, or with the proposed punishment, the inmate may ask for a hearing. If the inmate asks for a hearing, someone else—a hearing examiner—decides whether the inmate should be punished, and whether he should receive the punishment the ticket **[*33]** writer suggested.

The plaintiff told Attorney Lanzdorf a few times that Hernandez and Isferding had written tickets against him (which he believes were false or unwarranted). After hearing that, Attorney Lanzdorf asked the plaintiff who actually decided that the plaintiff was guilty of those infractions, and who decided how much time he should serve for them. Attorney Lanzdorf's question assumed that although Hernandez and Isferding wrote the disciplinary tickets, there was someone else at RCJ who actually decided whether the plaintiff was guilty on those tickets, and who decided what his punishment should be.

The plaintiff first answered that he thought it might have been someone named Patrick Noonan. (Patrick Noonan is not a defendant in this case, although the plaintiff has sued him in Williams v. Leslie, 14-cv-452; the complaint in that case indicates that Noonan was a classification officer at RCJ.) Attorney Lanzdorf followed up by asking the plaintiff whether either Hernandez or Isferding had been the ones who actually decided the plaintiff's guilt and imposed the final, twenty-day sanction on him.

It appears from the plaintiff's response that the plaintiff was trying to explain **[*34]** that in his opinion, once a corrections officer like Hernandez writes up an inmate and recommends a sanction, the people higher up on the inmate complaint food chain—complaint examiners, hearing officers, etc.—just follow that recommendation, no matter what. In the plaintiff's opinion (the court thinks), whoever writes the ticket is the person who causes the ultimate sanction, because if the person hadn't written the ticket and recommended a punishment, the ultimate decision maker would not have found the inmate guilty and given the punishment.

Attorney Lanzdorf, however, wasn't asking the plaintiff who *caused* the plaintiff to end up being sanctioned. He was trying to ask the plaintiff the name of the person in the inmate complaint system who had actually made the finding of guilt and imposed the twenty-day sanction for the incident involving the food tray. This was a valid question for Attorney Lanzdorf to ask, given that the plaintiff argued in the complaint that someone gave him a sanction without first giving him a disciplinary hearing. The complaint indicates that Hernandez and Isferding wrote reports, and that Noonan came to the plaintiff's cell while he was sick to ask him about **[*35]** a disciplinary hearing. Dkt. No. 1 at 3-4. It also states that the next thing the plaintiff knew, he was in segregation for confusing to comply with a disciplinary hearing and was given twenty days in segregation without a hearing. Id. at 4. The complaint does not say who gave the order to send the plaintiff to segregation, or who ordered that he be in segregation for twenty days. Nor does it say who made the decision not to give the plaintiff a disciplinary hearing. That is what Attorney Lanzdorf was trying to find out, and the plaintiff—as of this date—never has answered that question (or several other questions Attorney Lanzdorf asked during the deposition).

The court believes, construing the transcript in the light most favorable to the plaintiff, that the plaintiff did not understand Attorney Lanzdorf's specific question. Because the plaintiff believed that the person who wrote the ticket was the person ultimately responsible for the sanction, and because he'd told Attorney Lanzdorf who wrote the tickets, he concluded that Attorney Lanzdorf was asking the same question (who wrote the tickets) over and over

and over, "pressing the issue," as he told the institution staff. He argues that **[*36]** because Attorney Lanzdorf continued to ask him the same question after the plaintiff told him to "move on," Attorney Lanzdorf repeated the question only to annoy the plaintiff. In fact, Attorney Lanzdorf was asking a different question than the one the plaintiff had answered, and the plaintiff refused to answer that different question.

Attorney Lanzdorf's attempts to get an answer to his question did not demonstrate bad faith, nor did they violate Rule 30. In fact, they complied with Rule 30(d)'s mandate that a party may object to a question for the record, but still must answer the question, subject to a judge's later ruling. The hearing was fair.

The deposition transcript indicates that the plaintiff was annoyed. But it indicates, as discussed above, that the plaintiff was annoyed almost from the outset of the deposition. Rule 30(d)(3)(A) does not allow a deponent to refuse to answer a question because he is annoyed. It allows a deponent to move to stop the deposition because it is being conducted in a way that "unreasonably annoys, embarrasses, or oppresses" the deponent. Attorney Lanzdorf's questions were reasonable and appropriate, and the transcript does not support the plaintiff's position that Attorney Lanzdorf **[*37]** was asking the questions only to try to annoy him.

iii. *Whether the Plaintiff Impeded, Obstructed or Delayed the Deposition*

A court may impose sanctions under Rule 30(d)(2) where a deponent "impedes, delays, or frustrates" the fair deposition. To impede something is to obstruct or hinder it. To delay something is, of course, to slow it down. And to frustrate something is to defeat its purpose. The plaintiff's behavior at the deposition did impede, delay and frustrate the deposition.

The transcript shows that from the outset of the May 13, 2016 deposition, the plaintiff was impatient. He told Attorney Lanzdorf to skip the preliminaries (although Attorney Lanzdorf was complying with the rules by going through them). He frequently refused to answer questions, in violation of Rule 30(c)(2). He made derogatory comments to Attorney Lanzdorf.

More relevant to this motion, the court finds that the plaintiff did threaten Attorney Lanzdorf. The plaintiff first told Attorney Lanzdorf that he'd "better move on." He didn't say, "Please move on," or "I think we should just move on." He said, "Man, you better move on, man." Dkt. No. 85-1 at 52. When Attorney Lanzdorf tried to explain his specific question, the plaintiff said, **[*38]** "Mr. Lanzdorf, this is a maximum security prison. You better move on, man." Id. The plaintiff was implying to Attorney Lanzdorf that Attorney Lanzdorf was in a place that housed people who had done dangerous things, and for that reason, Attorney Lanzdorf had "better" do as the plaintiff told him.

If the plaintiff's intent wasn't clear in that statement, it became clear once the security officer came into the deposition room. Attorney Lanzdorf explained to the security officer that he had been asking a question, and that the plaintiff "made a remark that he's not going to answer the question, this is a maximum security prison, I need to move on to another question, inferring that — what I took to be a threat that . . . ." Id. at 53. The security officer, without letting Attorney Lanzdorf finish, asked, "You want me to get a White Shirt up here?" Attorney Lanzdorf said that he thought someone should come up. Id. It is not clear whether the white shirt arrived before or after the next exchange, but Attorney Lanzdorf explained to someone that he wasn't trying to get the plaintiff in trouble. Id. at 54. The plaintiff then told someone whom he referred to as "Captain" that he was not going to answer Attorney **[*39]** Lanzdorf's question. He stated, "He started pressing the issue, Captain. I asked him to leave the question alone. This is a maximum security prison, counsel. I'm here for a reason, man. Quit pressing me, man. That's all I told him." Id.

Through this explanation, the plaintiff confirmed that the reason he told Attorney Lanzdorf that CCI was a maximum security prison was because he was trying to make Attorney Lanzdorf stop "pressing him." The plaintiff's statement that he was "here for a reason" implied that Attorney Lanzdorf had better do what the plaintiff said—stop pressing him—because the plaintiff had done something that had caused him to end up classified to a maximum security facility.

The plaintiff made another threat after Attorney Lanzdorf asked him about his comment that the case wasn't important. The plaintiff told Attorney Lanzdorf that he had psychological issues, and said, "You press the wrong

button, man, woo, man, you really don't want to do that, man." Id. at 59. When Attorney Lanzdorf asked why he wouldn't want to do that, the plaintiff said, "I mean, I keep telling you, when I tell you to leave stuff alone, man, leave it alone. I'm not properly medicated. I won't be responsible, **[*40]** man." Id. at 60. Again, the plaintiff was telling Attorney Lanzdorf that if Attorney Lanzdorf did not do what the plaintiff asked—leave him alone—the plaintiff would do something for which he could not be responsible.

Threatening an attorney during a deposition violates Rule 30. The plaintiff's threats impeded the deposition. They delayed the deposition—both by causing Attorney Lanzdorf to stop the deposition and consult with institution staff, and by causing him to finish the deposition without asking all of the questions he needed to ask. It frustrated the deposition by keeping Attorney Lanzdorf from obtaining all of the discovery that he had a right to seek. The plaintiff's behavior during the May 13, 2016 deposition provides grounds for the court to impose sanctions under Rule 30(d).

iv. *The Appropriate Sanction*

The defendants have asked the court to dismiss the plaintiff's case as a sanction for his behavior. They acknowledge that dismissal is a severe sanction, but argue that it is warranted by the plaintiff's extraordinary behavior of threatening Attorney Lanzdorf, by his filing of multiple cases, and by the many motions (some without basis) that he files in those cases. They argue that the court must deter **[*41]** the plaintiff from these behaviors, and that the only way to deter him is to dismiss his case.

The court understands that the plaintiff is under stress. He is in prison, a place that he does not want to be. He has numerous medical conditions (some of which are the subject of allegations in this case), which cause him to be in pain. He indicates that he has psychological health issues. In another motion in this case, he notes that he has only a sixth-grade education. He cannot afford to hire a lawyer to represent him. He filed this lawsuit because he feels that the defendants have wronged him. And this court has delayed his entire case (and his other cases), by failing to rule on his motions in a timely manner. That combination of factors can understandably cause a person to become frustrated.

These frustrations, however, are no excuse for the plaintiff to threaten Attorney Lanzdorf (or anyone else). The plaintiff chose to utilize the court system to bring his claims, as is his right. But if he wishes to continue to use the court system, he must follow the rules of that court system. He must answer questions posed to him at depositions. He must follow this court's orders. He must not, **[*42]** no matter how frustrated he may become, threaten anyone—not in letters, not at depositions, not in motions. The court sees many cases filed by inmates—a third of the court's docket consists of cases filed by inmates. The majority of those plaintiffs are not highly educated and don't have legal training. Many have serious medical issues. Many have psychological issues. Those plaintiffs are frustrated, and in pain, and under stress. But they do not threaten people.

The court is not going to dismiss the plaintiff's case, even though it agrees with the defendants that it has grounds to do so under Rule 30(d) and the case law the defendants cite. The court is going to give the plaintiff one more opportunity to show that he can conduct this litigation reasonably and appropriately. Nor is the court going to order the plaintiff to pay the costs counsel has accrued in preparing for the deposition—not because the court does not think that request is warranted (it is), but because the plaintiff does not have the funds to pay such costs. (He has filed a motion to proceed *in forma pauperis* in every case he has filed.)

The court is going to order that the plaintiff answer, in writing, the questions that he **[*43]** refused to answer at the May 13, 2016 deposition, as well as any questions that Attorney Lanzdorf did not ask as a result of the plaintiff's behavior. The plaintiff must answer Attorney Lanzdorf's written questions thoroughly and honestly. To be very clear: if the plaintiff refuses to answer any of the written questions Attorney Lanzdorf asks, or leaves any of the questions blank, or answers any of the questions rudely or disrespectfully, the court will allow the defendants to renew their motion asking the court to dismiss the plaintiff's case as a sanction. The court is leaving it up to the plaintiff; if he cooperates in answering Attorney Lanzdorf's written questions, he may proceed with this case. If he does not, the court will have no other choice but to dismiss.

The court also will extend the deadline for completing discovery, to allow Attorney Lanzdorf to obtain the answers to these questions, and will extend the deadline for filing dispositive motions.

5. PLAINTIFF'S MOTION FOR SERVICE UNDER RULE 4 (DKT. NO. 69)

This motion relates to Dr. Ortiz—whom, as the court has noted, has not been served with the complaint. Dkt. No. 69. The plaintiff indicates that he has become aware that Dr. **[*44]** Ortiz *was* served in another lawsuit, filed by a plaintiff named David Thomas. Thus, the plaintiff asks the court to issue an order requiring the marshal to serve Dr. Ortiz. Id.

The court has run a query in the case management and electronic case filing database, and found David Thomas v. Jacobson, *et al.*, Case No. 15-cv-633-JPS. Indeed, as the plaintiff indicates, Mr. Thomas sued Dr. Ortiz. He also sued Correctional Healthcare Companies, Inc. Attorneys Steven T. Elmer and W. Patrick Sullivan subsequently filed notices of appearance on behalf of Correctional Health Care Companies. (15-cv-633, Dkt. No. 33). They also filed notices of appearance on behalf of Dr. Simeon Ortiz. (15-cv-633, Dkt. No. 36). Dr. Ortiz answered the complaint in Mr. Thomas' case. (15-cv-633, Dkt. No. 37).

The court cannot tell, from looking at the Thomas docket and pleadings, the address at which the marshals served either Correctional Healthcare or Dr. Ortiz. The court can tell, however, from looking at the docket in *this* case, that the marshals tried to serve Dr. Ortiz at the wrong address.

On September 24, 2015, the clerk's office issued blank process and receipt forms to the marshals service for the defendants **[*45]** in this case. Dkt. No. 12. The blank form the clerk's office prepared for Dr. Ortiz listed his address as "Racine County Jail — 717 Wisconsin Avenue, Racine, WI 53403." Id. On December 10, 2015, the clerk's office transmitted to the marshals another blank process and receipt form for Dr. Ortiz. Dkt. No. 29. This new form listed Dr. Ortiz's address as "unknown, was working at the Racine County Jail, 717 Wisconsin Ave, Racine, WI 53403." Id. On December 31, 2015, the clerk's office docketed the Process Receipt and Return that the marshals filed for Dr. Ortiz. Dkt. No. 36. That form was the *first* form the clerk's office had provided—the one that listed Dr. Ortiz's address as "Racine County Jail—717 Wisconsin Ave, Racine, WI 53403." Id. The court does not know whether the marshals service did not receive the second form the clerk's office provided. Regardless, the completed form that the marshals filed on December 31, 2015 indicates that the marshals mailed the summons/complaint package to Dr. Ortiz at the Racine County Jail. The problem is that Dr. Ortiz is not an employee of the Racine County Jail.

In his (second amended) complaint, Mr. Thomas alleged that Correctional Health Care Companies **[*46]** ("CHC") provided health care to RCJ inmates, and that Dr. Ortiz was employed by CHC. Thomas v. Jacobson, *et al.*, Case No. 15-cv-633 at Dkt. No. 19, p. 2. As of April 11, 2016, Attorney Steven T. Elmer had appeared in the Thomas case on behalf of Correctional Health Care, and on May 19, 2016, he appeared on behalf of Dr. Ortiz. Case No. 15-cv-633 at Dkt. Nos. 33, 36. Attorney Elmer has appeared in this case, as well—he represents defendants William Coe and James Olstinske—and he filed his first notice of appearance in this case on November 4, 2015 (dkt. no. 21)—five months *before* he answered on behalf of Dr. Ortiz in the Thomas case.

The court cannot find, in the docket for either case, an address for Dr. Ortiz. Nor does it know whether he remains employed by CHC. The court assumes, however, that counsel for defendants Coe and Olstinske may have that information, or may know where to obtain it. The court will require counsel for those defendants to provide the court with that information by a date certain, so that it may ensure that defendant Ortiz is served with the summons and complaint in this case. The court will grant this motion.

6. PLAINTIFF'S MOTION FOR EXTENSION OF DISCOVERY [*47] (DKT. NO. 70)

This motion—which the plaintiff dated ten days after the discovery deadline expired, and which the court received ten days after that—asks the court to extend the deadline for completing discovery. Dkt. No. 70. The plaintiff lists documents that he has been "denied," or that the defendants have not disclosed. He also indicates that on May 13,

2016 (the deposition date), "defense attorney Michael J. Lanzdorf refused to discuss these records or the fact that he serves documents that's redacted but refuse to redact the plaintiffs D.O.B., and driver license number." Id. The plaintiff asked the court to extend the deadline for completing discovery until it had ruled on his motions to compel.

The court will grant this motion, for various reasons discussed throughout this order.

7. PLAINTIFF'S MOTION FOR RELIEF AND TO STRIKE THE MAY 13, 2016 DEPOSITION (DKT. NO. 71)

The same day the court received the above motion to stay from the plaintiff, it also received a document entitled "Motion for Relief Federal Rules Civil Procedure 12 & 60." Dkt. No. 71. The plaintiff asks the court to "strike" the May 13, 2016 deposition. In support of this request, the plaintiff reiterates that he did not know he was going to be deposed **[*48]** until May 9th, which didn't give him time to review the complaint. He states that Attorney Lanzdorf is financially invested in the case, and should be disqualified under Fed. R. Civ. P. 28(c). He argues that counsel conducted the deposition in bad faith, badgering him and making aggressive gestures. He argues that counsel went off the record several times and made false accusations against him, alleging that he threatened counsel. Id. at 1. He also alleges that counsel overheard a private conversation the plaintiff was having with a psychologist, and then incorporated that into a line of questioning. Id. at 2. Finally, he asks the court to rule on this motion before any others, and to stay proceedings until it rules on this motion. Id.

The court assumes that when the plaintiff asks the court to "strike" the deposition, he means that he wants the court to prohibit the defendants from using the deposition against him in any way in the case. The court will not grant this relief, and will deny the motion.

A. Notice

The court first addresses the plaintiff's notice argument. The scheduling order the court issued in February 2016 states: "The court advises the parties that, pursuant to Rule 30(a) of the Federal Rules of Civil Procedure, the defendants may depose the plaintiff **[*49]** and any other witness confined in a prison upon condition that, at least fourteen days before such a deposition, the defendants serve all parties with the notice required by the rule." Dkt. No. 50 at 1. Fed. R. Civ. P. 30(a) says that if a deponent is in prison, the person seeking to conduct a deposition must obtain leave of court; the language in the February 2016 scheduling order provides that leave. Fed. R. Civ. P. 30(b)(1) describes what the notice must contain—the time and place of the deposition, and the deponent's name and address.

The defendants provided the notice of deposition that they prepared. Dkt. No. 85-3. The notice contains, as required by Rule 30(b)(1), the date and time for the deposition (May 13, 2016 at 12:45 p.m.), the location of the deposition (Columbia Correctional Institution, 2925 Columbia Drive, P.O. Box 950, Portage, WI 53901-0950), and the name of the person being deposed (Travis Delaney Williams). Id. at 1. Attorney Lanzdorf signed the notice on April 27, 2016, and certified that he placed the notice in the mail on that same date. Id. at 2.

April 27, 2016 was sixteen days before the May 13, 2016 deposition date. The plaintiff argues, however, that the "Columbia Corr. Inst. staff" did not find out about the deposition until "on **[*50]** or about May 7," and that this did not give him time to review the complaint that someone else had prepared for him. Dkt. No. 75 at 1. In support of this argument, he provided the court with a "Visitor Notification" form. The document is "from" someone named "J. Haldeman," and it is addressed to "LOBBY." In the "date notified" box, it shows the date "5/6/16." Dkt. No. 71-1 at 1. It indicates that the date of the visit will be May 13, 2016, the time will be 12:45 p.m., and the purpose of the visit is "Professional Visit-Deposition for WILLIAMS, TRAVIS . . . ." Id. The form indicates that when the visitors (listed as Attorneys Lanzdorf and Elmer and court reporter Peterson) arrived, "J. Haldeman" was to be contacted. Id.

Based on the information in the Visitor Notification Form, the plaintiff argues that Attorney Lanzdorf did not comply with the scheduling order's requirement that Lanzdorf serve the deposition notice at least fourteen days before the deposition. This argument misunderstands the definition of the word "serve" in the scheduling order, and in the Federal Rules of Civil Procedure.

Rule 5 of the Federal Rules of Civil Procedure governs "Serving and Filing Pleadings and Other Papers." Rule 5(b) lists the acceptable ways for "serving" **[*51]** papers. Among those acceptable ways is Rule 5(b)(2)(C): "mailing [the paper] to the person's last known address—*in which event service is complete upon mailing*." (Emphasis added.) So—under Rule 5, when a party services a notice by mail, the service is complete at the time that the party puts the notice in the mail. Attorney Lanzdorf put the notice in the mail on April 27, 2016, sixteen days before the May 13, 2016 deposition. He complied with the scheduling order's requirement that he "serve" the notice at least fourteen days before the deposition.

It likely took a while for the notice to reach CCI. Attorney Lanzdorf's office is in Racine; CCI is 132 miles away, in Portage. In these days of reduced budgets for the U.S. Postal Service, mail doesn't always move as swiftly as we would like. It is also likely that, once the notice arrived in Portage, and was delivered to CCI, it took a while for the *plaintiff* to receive the notice. The plaintiff likely is more aware than anyone else that mail to and from prisons is slowed by the prison processing system and by its security requirements. CCI would have had to process the piece of mail through its security system. Then CCI would have had to route the mail to **[*52]** the various people in CCI who would need to be aware of the information in the notice—people like, apparently, "J. Haldeman," a staff member who must have had some responsibility for helping get the visitors to the deposition room.

The visitor form lists the "date notified" as May 6, 2016. It does not state that May 6, 2016 was the date on which CCI was notified that visitors would be coming. In fact, it doesn't say who was "notified" on May 6. All it indicates is that someone was "notified" on May 6, 2016 that visitors would be coming for a deposition. It is possible that the CCI staff received the deposition notice well before May 6, 2016, and that for whatever reason, they did not notify "J. Haldeman" until May 6. The plaintiff assumes that, because he didn't find out about the deposition until somewhere around May 9, the prison must not have known about it until a week before. The court does not know, one way or the other, whether that was true.

Regardless of when the plaintiff learned of the deposition, however, neither the scheduling order nor Rule 5 requires the deposing party to send the notice in time for it to be *received* at least fourteen days ahead of the deposition. The scheduling **[*53]** order requires only that the deposing party *serve* the notice at least fourteen days ahead of the deposition—and the evidence demonstrates that Attorney Lanzdorf complied with that requirement by placing the notice in the mail sixteen days ahead of the deposition.

B. Inadequate Time to Prepare

Perhaps the issue the plaintiff is more concerned about is the fact that, as he asserts several times, he didn't find out about the deposition in time to review his complaint thoroughly, and he needed to do that because someone else prepared the complaint for him. The court understands the need to prepare for a deposition. But even if the plaintiff did not find out about the deposition until May 9, he does not explain why he could not, between May 9 and May 13, 2016, read the four pages of his seven-page complaint that laid out the allegations in the case.

C. Financial Conflict of Attorney Lanzdorf

The plaintiff next alleges—with no evidence or proof or argument to support the allegation—that Attorney Lanzdorf is "financially invested" in the case and thus should be disqualified. Because the plaintiff provides nothing to support this claim, the court will not grant the motion on this basis. (The court **[*54]** also notes that Attorney Lanzdorf is an assistant corporation counsel for the County of Racine. He is, in essence, the "law firm" for the County of Racine; he works for the government. His job is to represent the county in any legal proceedings. He is paid by the county to do that job, regardless of whether he wins cases or loses cases or settles cases. He does not make less money if the county loses a case, nor does he have to pay the award if a plaintiff wins; he does not get a bonus if he wins a case. It is not clear to the court how Attorney Lanzdorf could be "financially invested" in the plaintiff's case. This is the kind of unsupported allegation that the court will not tolerate in the future.

D. Bad Faith Behavior by Attorney Lanzdorf

Finally, the plaintiff argues that the court should strike the deposition because Attorney Lanzdorf proceeded in bad faith, badgered him, went off the record to accuse him of misconduct, and asked him a question based on

something Attorney Lanzdorf had overheard him say to a psychologist. As the court discussed in detail above in ruling on the defendants' motion for sanctions, the court has reviewed the transcript of the deposition, and it does not **[*55]** support the plaintiff's contentions.

The court notes that the plaintiff has urged the court to look carefully at the deposition, because he believes that someone tampered with it. The court has reviewed the deposition transcript numerous times in writing this order. The court cannot find anything indicating that anyone has tampered with the transcript. There is nothing to indicate that pages are missing. None of the pages appear to have had lines, or words, "whited out" and replaced. The entire transcript is consistent in appearance, typeface and word flow.

E. Conclusion

Attorney Lanzdorf complied with the scheduling order in terms of giving notice of the deposition. The plaintiff has not explained why he could not prepare for the deposition. There is no evidence that Attorney Lanzdorf has a financial stake in the case. The deposition transcript shows that Attorney Lanzdorf followed the rules for conducting depositions, did not act in bad faith, and did not question the plaintiff in a manner that would unreasonably annoy the plaintiff. For these reasons, the court denies the plaintiff's motion to strike the deposition.

8. DEFENDANTS' MOTION FOR EXTENSION OF TIME (DKT. NO. 73)

As the court **[*56]** has discussed above, its original scheduling order set a deadline of June 14, 2016 by which the parties should file summary judgment motions. Dkt. No. 50.

On that day, defendants William Coe and James Olstinske filed a motion asking the court to extend the deadline for filing dispositive motions. Dkt. No. 73. They pointed out the fact that is a running theme in this order—that there were several motions pending before the court, and that the court's decision on one or more of those motions might either obviate the need for dispositive motions, or impact the substances of those motions. They asked the court to extend the deadline for them to file dispositive motions until after the court had ruled on, specifically, their motion for sanctions. Id.

The court will grant this motion. The court will, as explained at the end of the order, reset several deadlines in the case.

9. PLAINTIFF'S MOTION TO WITHDRAW EXHIBITS (DKT. NO. 77)

In this motion, the plaintiff asks the court to order the clerk's office to return to him the exhibits that he attached to a "response" he filed to one of the answers to the complaint. Dkt. No. 77. Specifically, he indicates that he responded to William Coe and James **[*57]** Olstinske's answers to the complaint, and that he attached exhibits to that response. He wants them back, because the court told him that it was too early in the litigation to file supporting evidence. Id.

The plaintiff did file a response to William Coe's answer, dkt. no. 25, and he did attach a one-page exhibit, dkt. no. 25-1. The court will grant this motion, and order the clerk's office to return that one-page document (a copy of an inmate request form dated July 3, 2014) to the plaintiff. The plaintiff did not file a response to James Olstinske's answer (the answer is docketed at Dkt. No. 47). He *did* file a response to the answer filed by Friend, Hernandez and Isferding. Dkt. No. 30. He attached forty-two pages of exhibits to that response. Dkt. No. 30-2. On the assumption that these are the exhibits that the plaintiff wants back, the court will order the clerk's office to return those forty-two pages of exhibits, as well.

10. PLAINTIFF'S MOTION TO AMEND AND SUPPLEMENT PLEADINGS (DKT. NO. 78)

This motion asks the court to allow the plaintiff to amend his motion to strike the deposition and to stay proceedings (dkt. no. 71, discussed above). Dkt. No. 78. He argues that "that motion **[*58]** should be deemed moot," because this court's staff told Attorney Lanzdorf what to do and what to file and what all other parties should do, and that "Michael Lanzdorf did not do this." Dkt. No. 78. He also states that "[i]t further stated that in light of what was instructed by telephone," the plaintiff had filed a motion "accordingly to what was instructed by Judges Pamela Peppers secretary/clerk," but that Attorney Lanzdorf had included "extra pleadings beside what was instructed that needs responding to," and therefore that the plaintiff was asking the court to "deem the motion identified within this motion as moot and accept the following attached motion and declaration." Id.

The court *believes*, although it is not certain, that the plaintiff is asking the court to deem his Motion for Relief Federal Rules Civil Procedure 12 & 60, dkt. no. 71, moot. But that motion—received by the court on June 2, 2016—makes no reference to instructions from Judge Pepper's staff, or any instructions. The court cannot find, in any of the motions the plaintiff has filed up to this point, any reference to instructions from Judge Pepper's staff; the court is not clear on what the plaintiff means by those references. Finally, the plaintiff **[*59]** did not attach to this motion a new motion and declaration, although the motion asks the court to accept "the following attached motion and declaration."

Because the court does not understand this motion or its basis, and because the court already has ruled on the motion at dkt. no. 71, the court will deny the motion without prejudice.

11. PLAINTIFF'S MOTION FOR PRIVACY PROTECTION (DKT. NO. 79)

This motion asks the court to redact the plaintiff's Social Security number, driver's license number and home street address from any documents they file in this case. Dkt. No. 79. He also asks the court to direct defense counsel to redact such information from any future filings, because it is private information. Id.

The court will deny this motion. To date, the defendants have not filed any documents with the court that contain any of the information the plaintiff describes. (The plaintiff asked Attorney Lanzdorf, during the May 13 deposition, not to send *the plaintiff* any documents containing his Social Security number or address, although he did not explain why.) If, in the future, the defendants do file documents with the court, the court presumes that defense counsel are aware of the requirements **[*60]** of the E-Government Act (reflected on the court's web site at http://www.wied.uscourts.gov/e-filing/redaction-requirements-e-government-act), mandating that they must redact the names of minors (and use only the minor's initials); Social Security numbers (although they are allowed to leave the last four digits of the number on documents filed with the court); dates of birth (although they may leave on the documents the year of birth); and financial account numbers (although again, they may leave the last four digits of the account number on the document). The E-Government Act prohibits parties from listing home addresses on electronically-filed documents only in criminal cases. This is not a criminal case; it is a civil lawsuit. Therefore, there is no prohibition on filing documents with home addresses on them.

Because the defendants are under a legal obligation to redact from electronically-filed documents the information described above, the court will deny this motion as moot.

12. PLAINTIFF'S MOTION FOR PROTECTIVE ORDER (DKT. NO. 81)

The plaintiff alleges that Columbia Correctional Institution, where is he housed, is not allowing him to have compact discs sent to him by defense counsel in this case and defense counsel in Williams v. Stauchie, 14-cv-1078. Dkt. **[*61]** No. 81. He alleges that the institution is keeping discovery from him, thus denying him access to the courts, and asks the court to issue an order preventing the CCI staff from destroying or rejecting CDs from opposing counsel in his cases. Id.

CCI is not a defendant in this lawsuit. Therefore, the court does not have jurisdiction over CCI, and cannot order staff members at CCI to do things, or to stop doing things. The court notes two things, however. First, the plaintiff

seems to be objecting to the fact that CCI staff will not let him keep the CDs with him in his cell. There is no law that the court is aware of that requires prison staff to let an inmate keep certain items with the inmate in that inmate's cell. The issue is whether the plaintiff has some access to the CDs—whether, if he asks and makes appropriate arrangements, the CCI staff will allow him to view the CDs. Second, the plaintiff has not presented the court with any proof (or arguments) that the CCI staff did, in fact, destroy the CDs he received from the opposing counsel in his cases.

Institution staff do have an obligation to allow inmates to have access to legal materials they need for cases they have filed. The court **[*62]** suggests that the plaintiff make a specific request to set up a time, date and place where he can view the CDs opposing counsel have provided. But the court cannot order the CCI staff to let the plaintiff keep the CDs with him, or order them to do anything else, because they are not parties to this case. The court will deny this motion.

13. PLAINTIFF'S MOTION TO APPOINT COUNSEL (DKT. NO. 82)

In this motion to appoint counsel (not his first), the plaintiff alleges that he needs a lawyer because the law librarian won't give him effective access to the law library. Dkt. No. 82. There are several components to his motion. First, he indicates that he is entitled to extra time in the law library, to "confer with persons knowledgeable in civil law." Id. He wants the court to order the librarians to give him an extra five hours per week in the law library until this case is over. Id. at 2. He also argues that the law librarians miscalculate "deadline dates." Id. at 1. While it is not entirely clear, it appears that the plaintiff is arguing that one of the librarians calculates dates by looking at the date on which an order was signed, while the plaintiff believes that the librarian ought to calculate due dates **[*63]** from the date the plaintiff actually receives the order. Id. at 2. Finally, he indicates that it takes fourteen days to get copies (even if he has money in his account), and he isn't allowed to use his legal loan money to buy cases. Id.at 1-2. For all of these reasons, he indicates that he cannot get access to the law library unless the court appoints counsel to represent him. Id. at 2.

Again, the court does not have the authority to issue orders to CCI staff, because CCI is not a party to this case. The court, again, notes several things for the plaintiff's benefit. The plaintiff does not allege that CCI has denied him all access to the law library. He alleges only that he doesn't have enough time in the library. The Supreme Court has indicated that federal courts should not be involved in the "day-to-day management of prisons." Sandin v. Conner, 515 U.S. 472, 482-83, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995). Rather, the Court has held, courts ought to defer to the flexibility that prisons need "in the fine-tuning of the ordinary incidents of prison life." Id. How much time an institution allows an inmate to spend in the library is one of the "ordinary incidents of prison life" which the Supreme Court has advised courts to leave to the discretion of the prison. If the plaintiff needs **[*64]** more time to respond to a court deadline because of limited library time, he can file a motion and ask the court to give him that extra time.

The same is true for the amount of time it takes for the plaintiff to obtain copies, or the institution's policy on how many cases he may order and from what accounts. These are prison policy issues. If the plaintiff needs more time because the institution has been slow in providing him copies, or because he has to look at cases in books rather than getting copies of them, he may file a motion asking for that additional time.

As to the calculation of deadlines: to the extent that this court issues orders setting deadlines, the orders usually explain how the parties should calculate the deadlines. For example, in the court's February 16, 2016 scheduling order, the court indicated that "[a] party opposing a motion for summary judgment must file a response 'within 30 days of service of the motion.'" Dkt. No. 50 at 1 (quoting Civil L.R. 56(b)(2)). As the court explained above, Fed. R. Civ. P. 5 governs service, and it indicates that if a party serves something by mail, it is "served" on the date it is mailed. So the thirty days starts to run from the date the document is put in **[*65]** the mail. Parties may always ask for additional time to respond, if the mail takes too long to arrive. Sometimes an order will require a party to take certain action "within thirty days of the date of this motion." In that case, the thirty days starts to run from the date the judge signed the order. If the librarians disagree with the plaintiff on what an order says, and because of that

disagreement, will not give him the library time he thinks he needs, the plaintiff may, as the court has already said, file a motion asking for more time.

The court will not appoint counsel for the plaintiff based on his assertion that he does not get enough library time. The plaintiff has filed many motions, and for the most part, the court has been able to understand those motions. The plaintiff has laid out his claims and arguments in a way that shows the court that he is capable of making his own case. If the time comes that the court no longer believes that to be true, the court will reconsider its decision.

14. PLAINTIFF'S SECOND MOTION FOR SERVICE UNDER RULE 4 (DKT. NO. 90)

The plaintiff repeats in this motion the request he made in his first motion for service under Rule 4 (dkt. no. 69). Dkt. No. 90. As the **[*66]** court indicated above, it is going to require counsel for defendants Coe and Olstinske to provide any information he has about an appropriate service address for Dr. Ortiz, and then will order the marshals to serve Dr. Ortiz at that address. The court will deny this second motion as moot.

15. PLAINTIFF'S THIRD MOTION TO APPOINT COUNSEL (DKT. NO. 91)

In this third motion to appoint counsel, the plaintiff states only that he seeks counsel "based on motion newly found July 2016 newly submitted motions late." Dkt. No. 91. He also relies on the arguments he presented in his second motion to appoint counsel (dkt. no. 82).

For the reasons stated in its ruling at number 13 above, the court denies this motion.

16. PLAINTIFF'S MOTION TO CONSOLIDATE CASES (DKT. NO. 94)

The plaintiff has a number of cases pending before the court. The following seven cases are open:

Williams v. Leslie, 14-cv-452-pp;

Williams v. Ortiz (the case at bar), 14-cv-792-pp;

Williams v. Stauchie, 14-cv-1078-pp;

Williams v. Swenson, 14-cv-1594-pp;

Williams v. Mikutis, 16-cv-1318-pp;

Williams v. Mikutis, 16-cv-1319-pp; and

Williams v. Becker, 16-cv-1320-pp

The plaintiff asks the court to consolidate the current case with Williams v. **[*67]** Leslie, 14-cv-452. Dkt. No. 94. He makes this request to avoid duplicative efforts in related cases and to promote judicial efficiency and economy. Id. at 1. He points out that in another case—Williams v. Stauchie, 14-cv-1078—the summary judgment motion has been fully briefed since October of 2016, and the court has not yet ruled. He also argued that that case should have been consolidated with Williams v. Swenson, 14-cv-1594. Id. at 2.

The plaintiff is correct that Fed. R. Civ. P. 42 governs consolidation. That rule specifies that if "actions before the court involve a common question of law or fact," the court may consolidate the cases (or join all matters at issue for hearing or trial, or issue other orders to avoid unnecessary cost or delay). The two cases the plaintiff asks this court to consolidate, however, do not involve common questions of law or fact, and consolidation is not appropriate.

In Williams v. Leslie, 14-cv-452, the plaintiff is proceeding against eleven defendants on claims that they provided him with inadequate medical care or accommodations (or no medical care) between his arrest on May 8, 2013 and about April 2014, and that certain of the defendants knew others failed to provide him medical care **[*68]** but did nothing about it. Case No. 14-cv-452, Dkt. No. 29. That case is at the summary judgment stage. (Again, the plaintiff has filed a number of motions in that case since September of 2016, upon which the court has not ruled.) In this case, the plaintiff is proceeding against six defendants on claims that in June and July of 2014, the defendants wrote false disciplinary tickets about him, harassed him, denied him mattresses that were medically required, and retaliated against him for an incident that occurred on July 3, 2014. Case No. 14-cv-792, Dkt. No. 10.

The only defendant named in both of these cases is defendant Friend, and the plaintiff brings different allegations against him in the two cases. The timeframes involved in the two cases are different. The claims asserted against the defendants in each case are different. The only common fact shared between the two cases is the fact that the events the plaintiff alleges took place in the same place—the RCJ. That is not a sufficiently common question of law or fact to allow for consolidation.

The court understands that the plaintiff is distressed about the time it has taken the court to rule on motions in his many cases. Hard though **[*69]** it may be to believe, consolidating unrelated cases will not speed up that process—indeed, it would slow it down, precisely because the cases are not sufficiently related to justify consolidation. The court is working hard to remedy its delays in all of the plaintiff's cases; that is the solution to the delay problem, not consolidation.

The court will deny this motion.

17. PLAINTIFF'S MOTION FOR JUDGMENT (DKT. NO. 95)

The plaintiff asks the court to reject the defendants' motion for sanction (dkt. no. 65, discussed above), and to issue judgment in his favor as a matter of law. Dkt. No. 95. In reality, this is the plaintiff's motion asking the court to rule on the motion for sanctions. Because the court is now ruling, through this order, on the motion for sanctions, it will deny this motion as moot.

18. PLAINTIFF'S MOTION TO FILE SUPPLEMENTAL COMPLAINT (DKT. NO. 101)

Almost two and a half years after he filed his original complaint, the plaintiff asks the court to allow him to supplement the complaint by adding claims against new defendants. Dkt. No. 101. Along with this motion, he filed a proposed supplemental complaint, alleging that in October 2016, another inmate discovered that two **[*70]** individuals (whom the plaintiff identifies as "sergeants," conspired to lock the plaintiff in his cell without a due process hearing on several occasions. Dkt. No. 101-1.

While the court has become somewhat familiar with the plaintiff's handwriting over the course of his cases, the court finds it difficult to read some portions of the proposed supplemental complaint. It appears, though, that the plaintiff alleges that one of the proposed defendants (a Sgt. Todd Laver) stated that the plaintiff failed to "set up a hearing," and that a June 8, 2014 hearing was "canceled and [the plaintiff] immediately found guilty because of this." Dkt. No. 101-1 at 1. The plaintiff alleges that Laver was the hearing officer at a June 15, 2014 hearing, and at that hearing, the plaintiff received nine days of disciplinary segregation. Id. The plaintiff alleges that a "disciplinary report"—by whom, or from where, he does not say—showed that Laver was the hearing officer "condoning Officer Hernandez actions of sanctioning [the plaintiff] 9 days for disciplinary infractions." Id. at 2. He then states that "the same generated disciplinary report hearing summary" stated, an hour and twelve seconds later, that "no one **[*71]** was the hearing officer for the identical report" mentioned earlier. Id. He alleges that proposed defendant Sgt. Melissa Moran "condoned" Hernandez and Isferding's "actions of taking [the plaintiff's] hour out;" that Hernandez called her "and informed her of his & Isferding actions she condones & don't give [the plaintiff] notice . . . ." Id. He alleges that both proposed defendants "condoned" other disciplinary actions by Hernandez.

The plaintiff asks the court to allow him to supplement his complaint under Fed. R. Civ. P. 15(d). Dkt. No. 101. Rule 15(d) says that "[o]n motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened *after the date of the pleading to be supplemented*." The "pleading" the plaintiff wants to "supplement" is his original complaint, filed July 8, 2014. Dkt. No. 1. The events he describes in his proposed supplemental complaint occurred in June 2014—*before* he filed his original complaint. The plaintiff cannot use Rule 15(d) to supplement his complaint with allegations of events that occurred before he filed the complaint.

Perhaps what the plaintiff meant to ask was for the court to grant him leave **[*72]** to *amend* his complaint under Rule 15(a)(2). The court may grant a plaintiff leave to file an amended complaint if "justice so requires." Here, the court does not find that justice so requires. The court is not entirely clear on what it is that the plaintiff believes that Laver and Moran did, but he uses the word "condones" a lot. He appears to be alleging that Hernandez and Isferding took actions against him, that those actions were somehow wrong, and that Laver and Moran "condoned" the wrongful actions. He appears to believe that someone tampered with a disciplinary hearing report, and that Laver "condoned" that action.

The Merriam-Webster dictionary defines "condone" as a transitive verb that means "to regard or treat (something bad or blameworthy) as acceptable, forgivable or harmless." In other words, the plaintiff alleges that Laver and Moran knew that Hernandez and Isferding did something bad, and treated it as acceptable. But he does not support that claim by anything other than the assertion that on October 14, 2016, another inmate found "evidence" in the discovery that the plaintiff has.

The plaintiff has had discovery for quite some time—since April or May of 2016. His argument that another **[*73]** person found information in that discovery some six months later, and his request to be allowed to use that as a basis for amending the complaint, is untimely. Further, the plaintiff does not clearly explain what evidence demonstrates that either Laver or Moran had any knowledge of any wrongdoing by Hernandez and Isferding (if, in fact, they did anything wrong). "In order for a hearing examiner to be constitutionally liable for adjudging an inmate guilty based on false evidence, the examiner has to know that the evidence was false. An examiner 'is not required to believe the prisoner in every instance or face liability for violating the prisoner's constitutional rights.'" Larry v. Meisner, Case No. 16-cv-1108, 2016 U.S. Dist. LEXIS 132389, 2016 WL 5390882, *4 (E.D. Wis., Sept. 27, 2016) (citing Wilson v. Greetan, 571 F. Supp. 2d 948, 955 (W.D. Wis. 2007)).

Finally, one cannot prove liability under §1983 simply by demonstrating that a proposed defendant was aware that someone else did something wrong. "[I]ndividual liability under § 1983 requires 'personal involvement in the alleged constitutional deprivation.'" Minix v. Canarecci, 597 F.3d 824, 833 (7th Cir. 2010) (quoting Palmer v. Marion Cnty, 327 F.3d 588, 594 (7th Cir. 2003). The plaintiff has not alleged any person involvement on the part of Laver or Moran in any constitutional violation.

The court will deny this motion.

19. PLAINTIFF'S MOTION FOR LEAVE TO FILE EXCESS PAGES (DKT. NO. 102)

The plaintiff **[*74]** asks the court to grant him leave to file an oversized brief, due to the large number of exhibits in this case & 80 plus pages of deposition transcripts." Dkt. No. 102. He cites Civil Local Rule 56 in support of this request, so the court assumes that he seeks leave to file an oversized summary judgment brief.

The court will deny this motion as moot. First, Civil L. R. 56(b)(8) limits a party's principal *brief*—the party's explanation of the facts, and the citations of law—to thirty pages. Thirty pages is, in all but the most complicated cases, sufficient for a party to explain why there are no genuine disputes as to issues of material facts, and why the law requires the court to grant judgment in his favor. If a party wants to file *exhibits*, those exhibits are filed separately from the thirty-page (or less) principle brief. Second, the court now has seen the plaintiff's motion for summary judgment, dkt. no. 110, and his brief, dkt. no. 111. The plaintiff did not file an oversized brief. His brief is

thirteen pages long—seventeen pages *under* the thirty-page limit prescribed by Civil L.R. 56. Because the plaintiff didn't file an oversized brief, the court will deny this motion as moot.

20. PLAINTIFF'S MOTION TO ADD PARTIES [*75] (DKT. NO. 104)

This motion asks the court to allow him to join Sgt. Todd Laver and Sgt. Melissa Moran as defendants. Dkt. No. 104. For the reasons discussed in the court's ruling on the plaintiff's motion to file a supplemental complaint (dkt. no. 101), the court will deny this motion.

21. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (DKT. NO. 110)

The plaintiff has filed a one-page motion for summary judgment (dkt. no. 110), accompanied by a thirteen-page brief (dkt. no. 111) and sixty-six pages of exhibits (dkt. no. 111-1), as well as an affidavit (dkt. no. 112) and proposed findings of fact (dkt. no. 113).

As the court has discussed above, its original scheduling order set a deadline of June 14, 2016 by which the parties should file summary judgment motions. Dkt. No. 50. That deadline has passed, and while defendants Coe and Olstinske have asked the court to extend it, the plaintiff has not. But the court has now acknowledged several times that its own inaction has caused uncertainty and confusion for all of the parties in this case, including the plaintiff. The court will not dismiss, or strike, the plaintiff's motion for summary judgment simply because he did not ask for an extension of **[*76]** the June 14, 2016 deadline.

The court has, however, issued an order suspending briefing on the plaintiff's motion. Dkt. No. 117 (order dated February 2, 2017). Under the scheduling order, the defendants' response to the plaintiff's motion (received and docketed by the court on January 23, 2017, and thus "served" on the defendants on that date) would be due February 22, 2017. But it makes no sense to require the defendants to respond to the plaintiff's motion until the parties have received the court's rulings on the above orders, until any further discovery is completed, and until the court sets new dispositive motions deadlines. Once all of these things have happened, the court will set a new deadline by which the plaintiff may either amend his motion for summary judgment or file a new one, and a new deadline by which the defendants must respond.

CONCLUSION

The court **DENIES** the plaintiff's motion to compel. Dkt. No. 55). The court **DENIES** the plaintiff's motion to compel. Dkt. No. 60.

The court **DENIES** the plaintiff's motion to stay. Dkt. No. 63.

The court **GRANTS** the defendants' motion for sanctions, to the extent that it finds that the plaintiff engaged in behavior that impeded, delayed, **[*77]** and frustrated a fair deposition. Dkt. No. 65. As a sanction, the court **ORDERS** that Attorney Lanzdorf may submit to the plaintiff, in writing, any questions that the plaintiff refused to answer during the May 13, 2016 deposition, as well as any questions that Attorney Lanzdorf did not ask due to the plaintiff's threatening behavior. The court further **ORDERS** that if the plaintiff fails to answer these questions fully and respectfully, the defendants may renew their request that the court impose the sanction of dismissal.

The court **GRANTS** the plaintiff's motion for service under Rule 4. Dkt. No. 69. The court **ORDERS** that, on or before the end of the day on **February 24, 2017**, counsel for defendants Coe and Olstinske shall notify the court, by filing a notice under seal, of the address information counsel has for Dr. Simeon Ortiz, or of the fact that he does not have, and has not been able to obtain, that information. If, in the alternative, counsel is authorized to accept service for Dr. Ortiz, counsel may notify the court of that fact, and the court will direct the marshal's service to serve counsel.

The court **GRANTS** the plaintiff's motion for extension of the March 13, 2016 discovery deadline. **[*78]** Dkt. No. 70. The court **ORDERS** that the deadline for the parties to complete all discovery is **EXTENDED** to the end of the day on **April 28, 2017**.

The court **DENIES** the plaintiff's motion for relief and to strike the May 13, 2016 deposition. Dkt. No. 71.

The court **GRANTS** the defendants' motion for an extension of time to file dispositive motions. Dkt. No. 73. The court **ORDERS** that the deadline for filing dispositive motions is **EXTENDED** to the end of the day on **June 2, 2017**. The court has noted that the plaintiff already has filed a motion for summary judgment. The plaintiff may stand on that motion, or may, by the June 2, 2017 deadline, file an amended motion for summary judgment.

The court **GRANTS** the plaintiff's motion for the return of exhibits. Dkt. No. 77. The court **ORDERS** that the clerk's office shall return to the plaintiff the documents at Dkt. Nos. 25-1 and 30-2.

The court **DENIES** the plaintiff's motion to amend and supplement pleadings. Dkt. No. 78.

The court **DENIES AS MOOT** the plaintiff's motion for privacy protection. Dkt. No. 79.

The court **DENIES** the plaintiff's motion for a protective order. Dkt. No. 81.

The court **DENIES** the plaintiff's motion to appoint counsel. Dkt. No. 82.

The court **[*79] DENIES AS MOOT** the plaintiff's second motion for service under Rule 4. Dkt. No. 90. The court **DENIES** the plaintiff's third motion to appoint counsel. Dkt. No. 91.

The court **DENIES** the plaintiff's motion to consolidate cases. Dkt. No. 94.

The court **DENIES AS MOOT** the plaintiff's motion for judgment. Dkt. No. 95.

The court **DENIES** the plaintiff's motion to file supplemental complaint. Dkt. No. 101.

The court **DENIES AS MOOT** the plaintiff's motion for leave to file excess pages. Dkt. No. 102.

The court **DENIES** the plaintiff's motion to add parties. Dkt. No. 104.

The court **DEFERS RULING** on the plaintiff's motion for summary judgment. Dkt. No. 110.

Dated in Milwaukee, Wisconsin this 7th day of February, 2017.

BY THE COURT:

/s/ Pamela Pepper

HON. PAMELA PEPPER

United States District Judge

End of Document

Whitewater West Indus. v. Pac. Surf Designs, Inc.

United States District Court for the Southern District of California

June 8, 2018, Decided; June 8, 2018, Filed

Case No.: 17CV1118-BEN(BLM)

Reporter
2018 U.S. Dist. LEXIS 96970 *

WHITEWATER WEST INDUSTRIES, LTD., Plaintiff, v. PACIFIC SURF DESIGNS, INC. AND FLOW SERVICES, INC., Defendants. AND RELATED COUNTERCLAIMS

Prior History: Whitewater West Indus. v. Pac. Surf Designs, Inc., 2017 U.S. Dist. LEXIS 122829 (S.D. Cal., Aug. 3, 2017)

Counsel: [*1] For Whitewater West Industries, LTD., a Canadian corporation, Plaintiff, Counter Defendant: Joseph R.R. Tache, LEAD ATTORNEY, Buchalter, A Professional Corporation, Irvine, CA; Erikson C Squier, Roger Leonard Scott, Buchalter, Irvine, CA.

For Pacific Surf Designs, Inc., a Delaware corporation, Flow Services, Inc, a California corporation, Defendants, Counter Claimants: Anup M. Shah, LEAD ATTORNEY, PRO HAC VICE, Troutman Sanders LLP, Charlotte, NC; Justin M Barnes, LEAD ATTORNEY, Troutman Sanders LLPO, San Diego, CA; Charanjit Brahma, Mark C. Mao, Troutman Sanders LLP, San Francisco, CA; Christopher Mark Franich, Troutman Sanders, San Diego, CA.

Judges: Hon. Barbara L. Major, United States Magistrate Judge.

Opinion by: Barbara L. Major

Opinion

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO COMPEL

[ECF No. 105]

REDACTED

Currently before the Court is Defendants' April 20, 2018 Motion to Compel [ECF No. 105 ("MTC")], Plaintiff's April 27, 2018 opposition to the motion [ECF No. Ill ("Oppo.")], Defendants' May 4, 2018 Reply [ECF No. 120 ("Reply")], Defendants' May 22, 2018 Supplemental Evidence [ECF No. 129], Plaintiff's May 29, 2018 Response to Supplemental Evidence [ECF No. 131], and Defendants' June 1, **[*2]** 2018 Reply to the Response to the Supplemental Evidence [ECF No. 132]. For the reasons set forth below, Defendants' motion is **GRANTED IN PART AND DENIED IN PART**.

BACKGROUND

This case was initiated following the dismissal of Flowrider Surf Ltd. v. Pacific Surf Designs, Inc., 15cvl879-BEN(BLM) for lack of standing. On August 3, 2017, District Judge Roger T. Benitez issued an Order Denying Plaintiff's Motion to Consolidate the instant matter with the 15cvl879-BEN(BLM) matter. ECF No. 39. In his order, Judge Benitez stated that the Court's "claim construction order in the FlowRider action (ECF No. 88) and all discovery from the FlowRider action apply to the instant case." Id. at 2. Defendants answered the complaint and filed a counterclaim on October 24, 2017. ECF No. 53. Plaintiff answered the counterclaim on November 14, 2017. ECF No. 67.

On December 7, 2017, in accordance with the Court's order, the parties filed a Joint Case Management Statement. ECF No. 80. In the statement, Plaintiff noted its position that there was no need for additional discovery beyond what was requested in the previous action while Defendants proposed limited additional discovery including five interrogatories, twenty-five **[*3]** requests for admission, and eight depositions. Id. at 7-11. On December 14, 2017, the Court held a telephonic, attorneys-only Case Management Conference ("CMC"). ECF No. 81. On December 18, 2017, the Court issued a Case Management Order Regulating Discovery and Other Pretrial Proceedings in a Patent Case. ECF No. 82. Paragraph five of the order stated that "[t]he initial date for the substantial completion of document discovery including electronically stored information ("ESI") is January 15, 2018. See Patent L.R. 2.1(a)(1)." Id. at 2. Paragraph six of the order stated that

> All fact discovery shall be completed by all parties on or before April 6, 2018. The parties disagree as to whether or not there should be additional fact discovery in this matter given that discovery that has already taken place in related case Flowrider Surf, Ltd. et al v. Pacific Surf Designs, Inc., 15cvl879-BEN(BLM). Plaintiff argues that no additional discovery is needed while Defendants propose limited additional discovery, including "5 interrogatories, 25 requests for admission (between the two actions), and 8 depositions." ECF No. 80 at 5. As discussed with counsel during the CMC, the Court will permit limited additional discovery as follows: **[*4]** 5 interrogatories, 25 requests for admission (between the two actions), and 5 depositions.

Id. (emphasis in original).

On January 12, 2018, the parties contacted the Court regarding a dispute over the interpretation of the Court's CMC Order and whether or not it permitted additional ESI discovery or if ESI was limited to discovery from the previous case. Defendants took the position that additional ESI was permitted under the CMC Order while Plaintiff argued that it was not. During that call, the Court informed the parties that ESI discovery was permitted as part of the additional discovery authorized in paragraph six of the CMC Order.

On January 25, 2018, Defendants served Requests for Production of Documents ("RFPs") on Plaintiff and noticed the deposition of Mr. Erikson Squier. MTC at 9-11, see also ECF No. 105-1, Declaration of Charanjit Brahma In Support of Defendants' Motion to Compel ("Brahma Deck") at Exhs. B-C.

On March 21, 2018, Defendants deposed Mr. Squier. Brahma Decl. at Exh. G. During Mr. Squier's deposition, when defense counsel asked questions regarding [TEXT REDACTED BY THE COURT]. Id.; see also MTC at 9-10. [TEXT REDACTED BY THE COURT]. Id.; see also MTC at 10.

On March 26, 2018, Plaintiff responded to Defendants' RFPs as follows:

> Responding Party **[*5]** objects that this request, and this entire set of requests, is served in violation of the Court's Case Management Order Regulating Discovery and Other Pretrial Proceedings in a Patent Case" which requires "substantial completion of document discovery. . . by January 15, 2018" and limits further discovery in this action to "5 interrogatories, 25 requests for admission (between the two actions), and 5 depositions." ECF No. 82 at 2:5-13, 20-22. On this basis alone, Responding Party will not respond to this request.

Brahma Decl. at Exh. A.[1]

On April 16, 2018, counsel for Defendants, Christopher Franich and Charanjit Brahma, and counsel for Plaintiff, Roger Scott, jointly contacted the Court regarding these discovery disputes. ECF No. 102. In accordance with the Court's order, the parties timely filed their motion, opposition, and reply. Id.; see also MTC, Oppo., and Reply.

On May 22, 2018, Defendants filed a Second Notice of Supplemental Evidence Regarding their Motion to Compel. ECF No. 129. On May 22, 2018, the Court issued an order setting a briefing schedule on the Supplemental Evidence. ECF No. 130. Plaintiff filed a response to the Supplemental Evidence on May 29, 2018. ECF No. 131. **[*6]** Defendants filed a reply on June 1, 2018. ECF No. 132.

LEGAL STANDARD

The scope of discovery under the Federal Rules of Civil Procedure is defined as follows:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1).

District courts have broad discretion to determine relevancy for discovery purposes. See Hallett v. Morgan, 296 F.3d 732, 751 (9th Cir. 2002). District courts also have broad discretion to limit discovery to prevent its abuse. See Fed. R. Civ. P. 26(b)(2) (instructing that courts must limit discovery where the party seeking the discovery "has had ample opportunity to obtain the information by discovery in the action" or where the proposed discovery is "unreasonably cumulative or duplicative," "obtain[able] from some other source that is more convenient, **[*7]** less burdensome, or less expensive," or where it "is outside the scope permitted by Rule 26(b)(1)").

A party may request the production of any document within the scope of Rule 26(b). Fed. R. Civ. P. 34(a). "For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons." Id. at 34(b)(2)(B). The responding party is responsible for all items in "the responding party's possession, custody, or control." Id. at 34(a)(1). Actual possession, custody or control is not required. Rather, "[a] party may be ordered to produce a document in the possession of a non-party entity if that party has a legal right to obtain the document or has control over the entity who is in possession of the document." Soto v. City of Concord, 162 F.R.D. 603, 619 (N.D. Cal. 1995).

DISCUSSION

[1] Plaintiff also objected to some of the requests as not reasonably particularized, compound, vague, ambiguous, overbroad, duplicative, and privileged. Brahma Decl. at Exh. A.

Defendants seek an order from the Court compelling Plaintiff to (1) respond to Defendants' First Set of RFPs No. 1-18, (2) provide discovery related to Defendants' inequitable conduct claims and defenses surrounding the revival of U.S. Patent No. 6,491,589 ("the '589 patent"), specifically, Defendants ask that Plaintiff be compelled to permit Mr. Erikson Squier to be deposed regarding misrepresentations made to the United States Patent Office **[*8]** "PTO") in the course of reviving the '589 patent, and (3) "provide discovery relating to the revival of the '589 patent that has been withheld on grounds of attorney-client privilege or attorney work product, as those privileges have been waived." MTC at 2. Defendants also request that (1) the discovery deadline be continued from April 27, 2018 to June 1, 2018 "so that Defendants may complete discovery after Plaintiff has produced discovery in response to those Requests," (2) Defendants be granted leave to amend their answer if the Court denies Defendants' request to compel additional deposition testimony by Mr. Squier because their sixth defense and fourth counterclaim are narrowly construed, and (3) they be awarded their expenses for the first deposition of Mr. Squier, any future deposition of Mr. Squier that is ordered, and for the costs of bringing this motion. Id. at 20-21.

Plaintiff contends that Defendants' motion is an improper attempt to conduct discovery beyond the limitations set forth in the Court's Scheduling Order and that the motion should be denied in its entirety. Oppo. at 5. Plaintiff also contends that discovery is only permitted if it is relevant to a properly pled claim or defense and that Defendants have abandoned **[*9]** their defense or counterclaim regarding Plaintiff's representation of unintentionality with respect to paying the maintenance fees for the '589 patent. Id. Plaintiff states that neither it nor its counsel has disclosed attorney-client privileged information sufficient to waive the privilege and did not place attorney-client communications at issue by implication. Id. at 5-6. Plaintiff further contends that Defendants cannot claim that discovery served after the substantial completion of discovery deadline is permissible when they have spent the entire case arguing that the deadline "acts as a bar to later-served discovery." Id. at 6. Finally, Plaintiff notes that Defendants have not (1) provided good cause for their request to modify the scheduling order, (2) provided good cause for their request to amend their answer, or (3) shown that sanctions are appropriate in this case as Plaintiff's positions are substantially justified. Id.

A. Requests for Production

Defendants argue that Plaintiff has no basis to assert that its discovery requests were served contrary to the CMC Order because the absence of limitations on written discovery in that Order means that the served requests are available to the parties in this **[*10]** case. MTC at 13. Defendants liken the situation to when Plaintiff objected to Defendants' request for additional ESI as not being permitted under the CMC Order and the Court informed the parties that additional ESI was permitted. Id. Defendants further argue that the January 15, 2018 deadline for substantial completion of discovery is not a deadline by which all requests for document discovery had to be served. Id. at 14.

Plaintiff contends that the Court's CMC Order bars Defendants' RFPs. Oppo. at 22. Plaintiff notes that the Court's CMC Order establishes a January 15, 2018 deadline for substantial completion of document discovery and calls for limited additional discovery including five interrogatories, twenty-five Requests for Admissions, and five depositions and does not mention RFPs. Id. at 23-24. Accordingly, Plaintiff contends that Defendants' request for responses to the RFPs should be denied. Id. at 24.

As an initial matter, the Court notes that there appears to have been a miscommunication between the parties and the Court. When the parties contacted the Court in January regarding their dispute over the CMC Order, the Court believed that Defendants were seeking ESI that was responsive to the discovery permitted under paragraph six of the CMC **[*11]** Order (5 interrogatories, 25 requests for admission (between the two actions), and 5 depositions). The Court's response was intended to allow both parties to obtain ESI if it was responsive to the authorized discovery. The Court did not anticipate that either party would issue RFPs seeking either ESI or other documents. The Court's understanding and intent was based, in part, on the fact that neither party requested the authority to issue RFPs. See ECF No. 80 at 7-11 (Plaintiff requested no discovery of any type and Defendants requested only interrogatories, RFAs and depositions). Both parties apparently interpreted the Court's response as authorizing unlimited RFPs and on January 15, 2018, Plaintiff served its RFPs and on January 25, 2018, Defendants served

their RFPS. Oppo. at 23; see also MTC at 9-11, Brahma Decl. at Exhs. B-C, and Reply at 4. After initially objecting, Defendants responded to Plaintiff's RFPs. Oppo. at 23. Despite receiving Defendants' substantive responses to Plaintiff's RFPs, Plaintiff now attempts to argue that RFPs are not allowed. In light of the miscommunication and given the conduct of the parties, the Court overrules Plaintiff's objection on the basis that the CMC Order does not permit RFPs.

The Court also notes **[*12]** that neither party provides any case citations or law in support of its position with respect to the substantial completion of fact discovery deadline and whether that deadline prevents additional discovery from being served once it has passed. Plaintiff cites to Merriam Webster in support of its position and both parties accuse the other side of having flip flopped on their position with respect to the meaning of the deadline for the substantial completion of fact discovery.[2] See MTC, Oppo., and Reply. The Court finds that while the CMC Order requires that the substantial completion of fact discovery occur by January 15, 2018, it does not require that all fact discovery be completed by that date which is why there is a separate deadline for the completion of fact discovery. ECF Nos. 82, 88, 107. The substantial completion of document discovery deadline was established in part to "allow[] parties to take depositions at a defined time with the assurance that substantially all document discovery has been completed." Randall E. Kay, District Amends Local Patent Rules, Los Angeles Daily Journal, February 25, 2013. It does not act as a bar to all subsequent discovery. Accordingly, Defendants' **[*13]** motion to compel a response to RFPs No. 1-18 is **GRANTED**. Plaintiff must respond to the RFPs on or before **June 22, 2018**.

B. Deposition of Mr. Erikson Squier

Defendants seek an order compelling Mr. Squier to respond to deposition questions regarding "[TEXT REDACTED BY THE COURT]." MTC at 14. Defendants also seek an order requiring Plaintiff to pay Defendants the costs and fees associated with both depositions and request that if the Court denies their motion on this issue, they be permitted to amend their answer[3] and to further pursue discovery on this issue. Id. at 14 and 17. Defendants argue that Mr. Squier submitted a declaration stating that [TEXT REDACTED BY THE COURT].[4] Id. at 14. Defendants also argue that the scope of their sixth defense and fourth counterclaim are directly related to Plaintiff's alleged inequitable conduct for improper revival. Id. at 15.

Plaintiff contends that discovery "related to the expiration and revival of, and payment of maintenance fees for the '589 Patent is wholly irrelevant because Defendants have not asserted any affirmative defense or counterclaim regarding the intentionality or unintentionality of Whitewater's failure timely to pay maintenance fees for the '589 Patent." Oppo. at 13. Plaintiff contends that Defendants failed to plead that Plaintiff intentionally failed to pay

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[2] Plaintiff contends that Defendants initially objected to Plaintiff's discovery served after January 15, 2018 while Defendants argue that Plaintiff itself served discovery after the January 15 2018 deadline and cannot now claim a different interpretation of the deadline. See Oppo. at 23 and Reply at 4.

[3] Defendants' request for permission to amend their answer is **DENIED WITHOUT PREJUDICE**. A motion to amend must be brought before District Judge Benitez in accordance with his Chambers Rules.

[4] The statement portion of the Petition to Accept Unintentionally Delayed Payment of Maintenance Fee in an Expired Patent signed by Mr. Squier reads "The undersigned certifies that the delay in payment of the maintenance fee to this patent was unintentional." ECF No. 111-1, Declaration of Roger L. Scott in Support of Plaintiff's Opposition to Defendants' Motion to Compel ("Scott Decl.") at Exh. 7. The letter from the USPTO regarding the decision to grant the petition notes that

> [i]t is not apparent whether the statement of unintentional delay was signed by a person who would have been in a position of knowing that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unintentional. Nevertheless, in accordance with 37 CFR 10.18, the statement is **[*14]** accepted as constituting a certification of unintentional delay. However, in the event that petitioner has no knowledge that the delay was unintentional, petitioner must make such an inquiry to ascertain that, in fact, the delay was unintentional. If petitioner discovers that the delay was intentional, petitioner must so notify the Office.

Exh. 8.

maintenance fees, and certainly have not done so with the required level of particularity. Id. at 13-14. Plaintiff specifically notes that Defendants "deliberately removed all allegations of false statements regarding the unintentionality of Whitewater's delay in paying maintenance fees" from their redrafted affirmative defenses and counterclaims. Id. at 16-17. Plaintiff also contends that Defendants' request to amend their answer if their motion is denied **[*15]** is improper as their request is "devoid of any good cause, analysis, or any reference to Rule 16 at all."[5] Id. at 25 (internal quotations omitted). Plaintiff further contends that Defendants have not demonstrated due diligence as they knew how to plead inequitable conduct related to the unintentionality of Plaintiff's delay, but instead intentionally removed the allegations from their pleadings. Id. at 26.

Defendants' sixth defense states:

> (Unenforceability of U.S. Patent 6,491,589 Due to Inequitable Conduct based on improper revival)
> Plaintiff's Complaint, and each purported cause of action therein alleged, is barred by inequitable conduct committed by Plaintiff and/or its agents during revival of the '589 patent, because the patentee breached its duty of candor and good faith to the Patent Office.
>
> Shortly after dismissing its first case against Defendant PSD for infringement of the '589 patent, Plaintiff and/or its related entity— Flowrider Surf Ltd.—allowed the '589 patent to expire by failing to timely pay maintenance fees. Plaintiff's counsel then sought to revive the expired '589 patent by submitting two separate petitions, a power of attorney, and statement of ownership, each swearing that the entire delay in paying maintenance fees by the patent owner was "unintentional". **[*16]** According to the Complaint, the purported owner of the '589 patent was Surf Park and each petition required a statement by the patent owner that the entirety of such delay was unintentional. The power of attorney submitted by Plaintiff must have been signed by the patent owner and Plaintiff's counsel never represented or had authority to act on behalf of purported patent owner Surf Park.
>
> Instead, Plaintiff's counsel represented to the Patent Office in four separate filings pursuant to the '589 patent revival that it was acting on behalf of Light Wave—an entity that Plaintiff and Plaintiff's counsel knew was not the owner of the '589 patent. At the time of each filing by Plaintiff and when the Patent Office revived the '589 patent, the Patent Office did not know of Plaintiff, Flowrider Surf, Ltd., or even Surf Park. Instead, Plaintiff and/or its counsel deliberately did nothing before the Patent Office and violated its duty of candor by failing to submit any evidence showing any rights Plaintiff may have had in the '589 patent. Because of these misrepresentations and deliberate concealment by Plaintiff, the Patent Office authorized Plaintiff's counsel's representation, believed its certifying statements, and revived the '589 patent. The foregoing circumstantial **[*17]** evidence shows that the only reasonable inference is that such material representations were made with specific intent to deceive the Patent Office. Because each claim of the '589 patent is unenforceable for inequitable conduct, all issued claims of the '589 patent are unenforceable.

ECF No. 53 at 10-11.

Defendants' fourth counterclaim alleges in relevant part that

> 40. Plaintiff's counsel filed a Renewed Petition to Revive Under 37 CFR 1.378 on August 11, 2015 ("Second Petition").
>
> 41. 37 CFR 1.378(a) states that "[t]he Director may accept the payment of any maintenance fee due on a patent after expiration of the patent if, upon petition, the delay in payment of the maintenance fees is shown to the satisfaction of the Director to have been unintentional." 37 CFR 1.378(b)(3) states that the Petition must include "[a] statement that the delay in payment of the maintenance fee was unintentional." Furthermore, MPEP 2590 states that "[a] person seeking reinstatement of an expired patent should not make a statement that the delay in payment of the maintenance fee was unintentional unless the entire delay was unintentional, including the period from discovery that the maintenance fee was not timely paid until payment of the maintenance fee." To that end, "a statement **[*18]** that the delay in payment of the maintenance fee was unintentional would not be proper when the patentee becomes aware of an unintentional failure to timely pay

[5] Plaintiff notes that since Defendants failed to raise this issue in their motion, they have waived the argument and are unable to raise it in their reply. Oppo. at 26.

the maintenance fee and then intentionally delays filing a petition for reinstatement of the patent under 37 CFR 1.378." *Id.*
42. According to the Complaint, the purported owner of the '589 patent at the time of each petition was Surf Park.

43. Each petition submitted by Plaintiff's counsel required a statement by the patent owner that the entirety of such delay was unintentional. **10**
44. The power of attorney submitted by Plaintiff that conferred authority on Plaintiff's counsel before the Patent Office must have been signed by the patent owner.
45. At the time of each revival filing by Plaintiff and when the Patent Office revived the '589 patent, the Patent Office did not know of Plaintiff, Flowrider Surf, Ltd., or even Surf Park.

46. On August 24, 2015, the Patent Office granted the Second Petition, the Office of Petitions at the Patent Office specifically stated that "[i]t [was] not apparent whether the statement of unintentional delay was signed by a person who would have been in a position of knowing that the entire delay in filing the required reply from the **[*19]** due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unintentional. Nevertheless, in accordance with 37 CFR 10.18, the statement is accepted as constituting a certification of unintentional delay. However, in the event that petitioner has no knowledge that the delay was unintentional, petitioner must make such an inquiry to ascertain that, in fact, the delay was unintentional. If petitioner discovers that the delay was intentional, petitioner must so notify the Office". According to the Patent Office's letter to Plaintiff's counsel, it analyzes revival petitions under §1.378 using the standard of § 1.137(a).

47. 37 C.F.R. 1.137 states that a revival petition may be filed "[i]f the delay in reply by applicant or patent owner was unintentional" and must include "[a] statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this section was unintentional." 37 C.F.R. 1.137(a) & (b)(4). MPEP 711(c) states that an applicant or patent owner "is obligated under 37 CFR 11.18 to inquire into the underlying facts and circumstances when a practitioner provides this statement to the Office" and "providing an inappropriate statement in a petition under 37 CFR 1.137(a) to revive an abandoned **[*20]** application may have an adverse effect when attempting to enforce."

Id. at 19-20.

Deposition questions related to the payment of maintenance fees for the '589 patent are relevant to the affirmative defenses and counterclaims as pled. Whether those counterclaims and affirmative defenses as pled meet the standard required for pleading inequitable conduct is not an issue being decided by this Court in this order. For purposes of Fed. R. Civ. P. 26(b)(1), the Court finds that the proposed area of deposition testimony is relevant to Defendants' defenses and counterclaims and proportional to the needs of the case as defense six and counterclaim four mention (1) Plaintiff's failure to timely pay the maintenance fee, (2) the fact that Plaintiff's counsel submitted a declaration stating that the delay in paying the maintenance fees was unintentional, (3) that the '589 patent expired due to a failure to pay maintenance fees, and (4) the Federal Regulations and Manual of Patent Examining Procedure sections addressing the acceptance of delayed payment of maintenance fees. ECF No. 53 at 10-24. Because the Court finds that the deposition topic is relevant, Defendants' request for an order compelling Mr. Squier to be re-deposed and answer questions regarding **[*21]** the intentional or unintentional failure to pay maintenance fees for the '589 patent is **GRANTED**.

During the deposition of Mr. Squier, [TEXT REDACTED BY THE COURT]. This is a proper objection, however, the Federal Rules of Civil Procedure require counsel to state his relevancy objection for the record and then direct his client to respond unless the responses were also privileged.[6] See Fed. R. Civ. P. 30(c)(2) ("An objection at the time of the examination-whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition-must be noted on the record, but the examination still

[6] Plaintiff does not allege that all of the questions related to the payment of maintenance fees would have been privileged. See Oppo. at 13-22.

proceeds; the testimony is taken subject to any objection. . . . A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3)"); see also MTC at Exh. G at 6-9 (deposition transcript of Mr. Squier with counsel for Mr. Squier stating "[TEXT REDACTED BY THE COURT]"). Because Plaintiff's [TEXT REDACTED BY THE COURT] is the reason a second deposition is needed, Plaintiff is **ORDERED** to pay the costs of Mr. Squier's follow-up deposition. Defendants' request to also have Plaintiff pay **[*22]** the costs of the first deposition is **DENIED**. The second deposition is limited to three hours and to questions relating to Mr. Squier's "[TEXT REDACTED BY THE COURT]" MTC at 14.

C. Assertion of Privilege with Respect to the Revival of the '589 Patent

Defendants argue that as a result of Mr. Squier's representations to the PTO that he "investigated the factual circumstances surrounding the submission of the petitions to revive the '589 patent," any attorney-client privilege has been waived. Id. at 17-18.

Plaintiff contends that it did not waive the attorney-client privilege or work-product doctrine on issues related to the revival of the '589 patent and that, even if it did, any discovery on the subject is irrelevant. Oppo. at 17. Plaintiff notes that Defendants cannot point to a single attorney-client communication that Mr. Squier disclosed to the PTO. Id. at 18-19. Plaintiff further contends that it did not place its attorney-client communications at issue by implication and that if Defendants' argument was to be successful, an attorney would waive the privilege every time he or she applied to the PTO to have revive an expired patent.[7] Id. at 19. Finally, Plaintiff contends that Defendants "have already discovered all non-privileged ***facts*** underlying the expiration and **[*23]** revival of the '589 Patent." Id. at 22 (emphasis in original).

Defendants reply that Plaintiff knowingly and voluntarily provided confidential attorney-client communications through Mr. Squier's declaration to the PTO certifying that he had investigated the reason for the delay in paying the maintenance fees and that the delay was unintentional. Reply at 7. Defendants also reply that Mr. Squier has only disclosed a portion of the material that he relied on in determining that Plaintiff could file a petition for revival, public assignment records, and that Plaintiff should not be able to rely on its misrepresentations to the PTO while shielding all other communications on the subject matter. Id. Defendants argue that they do not have to identify a specific attorney-client communication or piece of work product to support their position and that the issue in this matter is distinct from the attorney-client privilege issue in the previous action where the Court did not reach the issue of waiver. Id. at 8-9.

On May 22, 2018, Defendants filed a Second Notice of Supplemental Evidence Regarding their Motion to Compel.[8] ECF No. 129. In the notice, Defendants state that after reviewing Plaintiff's most recent production of **[*24]** documents, they discovered that Plaintiff's statement in their opposition that

> [N]either Whitewater nor its counsel has ever made any express disclosure of an attorney-client communication sufficient to waive the attorney client privilege. Equally important, this Court has previously rejected Defendants' efforts to discover attorney-client communications on this issue because they have already discovered the non-privileged facts relating to the expiration and revival of the '589 Patent.

is untrue as Defendants found an email string which contradicts the statement ("Exhibit K"). Id. at 2 (quoting Oppo.); see also ECF No. 128 at Exh. K. Defendants argue that in the email string, [TEXT REDACTED BY THE COURT]." Id. Defendants argue that this is an intentional waiver of privilege and request that the Court "compel Plaintiff to produce discovery being withheld on the basis of privilege that relates to the revival or ownership of the '589 Patent subsequent to the assignment to Surf Park on the basis of waiver." Id. at 3.

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[7] Plaintiff notes that Defendants did not raise this argument and that it is addressing the issue only out of an abundance of caution. Oppo. at 19, n. 4.

[8] This is actually the First Notice of Supplemental Evidence Regarding the Motion to Compel. Defendants filed another Notice of Supplemental Evidence, however, that was in support of their motion to extend the expert report deadline. ECF No. 123.

Plaintiff contends that Defendants' filing of supplemental evidence is improper, unethical, and contradicts the Court's Model ESI Order. ECF No. 131 at 3-5. Plaintiff states that counsel who inadvertently receive **[*25]** privileged documents are ethically obligated to immediately notify the holder of the privilege that they are in possession of privileged documents, before using said documents in litigation. Id. at 3-4. Plaintiff contends that due to the content and recipients of the email, and previous litigation where the content was redacted and found to be privileged by the Court after an *in camera* review, Defendants knew the email at issue contained privileged communications and chose to submit the document to the Court rather than comply with their ethical obligations. Id. at 5. Plaintiff further contends that Defendants' position is legally incorrect and notes that they do not cite any law in support of their position that an inadvertent disclosure constitutes waiver of the attorney-client privilege. Id. at 6. Plaintiff also notes that the operative Protective Order specifically considers the inadvertent disclosure of privileged material. Id. (citing ECF No. 26 in Case No. 15cv1789-BEN(BLM)). Finally, Plaintiff contends that its disclosure of the email was inadvertent and occurred despite Plaintiff's reasonable efforts to prevents disclosure and that upon discovery of the disclosure, Plaintiff immediately sought to rectify **[*26]** the error. Id. at 7-9.

Defendants reply that they properly filed the notice of supplemental evidence and provided Plaintiff with an opportunity to "explain and correct the allegedly inadvertent disclosure which would have rendered supplemental briefing unnecessary." ECF No. 132 at 4. Defendants note that they offered to destroy any copies of the privileged email if Plaintiff explained the facts surrounding the disclosure and the steps taken to avoid the disclosure, agreed to go to the Court to ask how to handle withdrawing the supplemental evidence, and produced a privilege log. Id. at 4-5. Defendants informed Plaintiff that they were not waiving their right to challenge the assertion of the privilege. Id. at 5. Defendants also reply that they were not on "clear notice" when they received the email and that it was reasonable for them to infer that the production of the email was deliberate. Id. at 5. Defendants further reply that Plaintiff (1) has not shown that its production was inadvertent, (2) did not take reasonable steps to prevent disclosure, and (3) did not take reasonable steps to rectify the error. Id. at 6-11.

"The attorney-client privilege exists where: '(1) [ ] legal advice of any kind is sought (2) from a professional **[*27]** legal adviser 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 adviser, (8) unless the protection be waived.'" United States v. Richey, 632 F.3d 559, 566 (9th Cir. 2011) (quoting United States v. Graf, 610 F.3d 1148, 1156 (9th Cir. 2010)). "Because it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed." United States v. Martin, 278 F.3d 988, 999 (9th Cir. 2002) (quotation omitted). The privilege "protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege," and applies "only when necessary to effectuate its limited purpose of encouraging complete disclosure by the client." Fisher v. United States, 425 U.S. 391, 403, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976); Griffith v. Davis, 161 F.R.D. 687, 694 (C.D. Cal. 1995) (quoting Tornay v. United States, 840 F.2d at 1428). The party asserting the attorney-client privilege bears the burden to establish that the privilege applies to the requested documents. Griffith, 161 F.R.D. at 694 (quoting Tornay, 840 F.2d at 1426).

"An implied waiver occurs when (1) [t]he party asserting the privilege acts affirmatively (2) to place the privileged communications in issue between the party seeking discovery and itself (3) such that denying access to the communication becomes manifestly unfair to the party seeking discovery." Volterra Semiconductor Corp. v. Primarion, Inc., 2013 U.S. Dist. LEXIS 48522, 2013 WL 1366037, at *2 (N.D. Cal. Apr. 3, 2013) (quoting Laser Industries, Ltd. v. Reliant Technologies, Inc., 167 F.R.D. 417, 446 (N.D. Cal., 1996) (quoting Principle Business Enterprises, Inc. v. United States, 210 U.S.P.Q. 26, 27 (Ct.Cl.1980)).

"[A] party may not discover documents and **[*28]** tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." Fed. R. Civ. P. 26(b)(3)(A). Nevertheless, those materials may be discovered if "(i) they are otherwise discoverable under Rule 26(b)(1); and (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Id. However, even when substantial need for work product has been shown, the court must still "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed. R. Civ. P. 26(b)(3)(B).

The party asserting the privilege bears the burden to prove that it has not waived the privilege. See Weil v. Inv./Indicators, Research and Mgmt., Inc., 647 F.2d 18, 25 (9th Cir. 1981).

> When the disclosure is made in a federal proceeding . . . and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:
> (1) the waiver is intentional;
>
> (2) the disclosed and undisclosed communications or information concern the **[*29]** same subject matter; and
> (3) they ought in fairness to be considered together.

Fed. R. Evid. 502(a).

As an initial matter, Plaintiff's argument that the privilege issue is moot in light of the fact that discovery on the subject is irrelevant fails as the Court has ruled that the issue is relevant pursuant to Fed. R. Civ. P. 26. See supra Section B.

1. Waiver of Attorney-Client Privilege to PTO

Defendants fail to identify a confidential communication or piece of attorney-work product that Mr. Squier disclosed to the PTO. MTC. Defendants appear to argue that Mr. Squier's statement that the failure to pay maintenance fees was unintentional is also an indirect statement that Mr. Squier conducted an inquiry into whether or not the delay was unintentional and communicated with Plaintiff which waives the privilege and puts Mr. Squier's knowledge and intent directly at issue.[9] Id. at 17-18. Defendants further argue that while Mr. Squier declared that he considered public records in gathering the information necessary to provide the PTO with his statement, Mr. Squier also must have had another basis for his declaration which was likely his previously privileged communications with Plaintiff, and he should not be able to hide that basis or contradictory **[*30]** information behind a claim of attorney-client privilege. Id.; see also Reply at 7. Defendants argue that because their theories of inequitable conduct are based in part on Mr. Squier's determination that the delay was unintentional, "all facts and circumstances surrounding his alleged inquiry and subsequent certification have been placed in issue by Plaintiff" and "this is not limited to underlying facts (such as whether Mr. Squier spoke with anyone to inquire, with whom Mr. Squier spoke, when any such discussions were held), but also includes all circumstances such as the substance of those specific discussions-circumstances that Plaintiff alleges are privileged." Reply at 6. Plaintiff contends that Defendants are not entitled to privileged communications and have already received all non-privileged facts relating to the expiration and revival of the '589 patent in the previous case[10] and, that since the discovery in the prior action applies to this action as well [see ECF No. 80, Joint Case Management Statement], and the attorney-client privilege has not been waived, Defendants' request should be denied. Oppo. at 21.

Defendants cite to Bd. of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., Inc., 237 F.R.D. 618, 620 (N.D. Cal. 2006), Starsight Telecast, Inc. v. Gemstar Dev. Corp., 158 F.R.D. 650, 654 (N.D. Cal. 1994), and

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[9] Defendants' position is based on the fact that by signing the petitions to revive the '589 patent, Mr. Squier had to certify that he had knowledge of that fact or inquired into the facts and ascertained that the delay was unintentional. MTC at 17-18; see also Reply at 6.

[10] In the previous action, there was a discovery dispute that arose after plaintiffs were ordered to produce documents regarding the maintenance fee payments and revival of the '589 patent which the Court found to be relevant to Defendants' laches and equitable estoppel defenses as to the '589 patent. See Docket in 15cv1879-BEN(BLM) at ECF No. 153. Plaintiffs produced the documents, but redacted portions of emails they felt were protected by attorney-client privilege leaving the "relevant, non-privileged, underlying facts regarding the '589 expiration and revival" unredacted. Id. at 1-2, 5. Defendant objected and argued that the unredacted portions of the emails were privileged and that the production constituted a waiver of the attorney-client privilege. Id. at 2. The Court (1) conducted an *in camera* review of the emails, (2) found that Defendants could not argue the information was privileged when it argued in its motion to compel that the facts and circumstances were non-privileged, and (3) determined that there was not subject matter waiver of the privilege and that the redacted portions of the emails constituted privileged communications and/or information that was not responsive to the discovery requests or dispute. Id. at 6-7.

Verigy US, Inc. v. Mayder, 2008 U.S. Dist. LEXIS 111512, 2008 WL 4866290 (N.D. Cal. Nov. 7, 2008) in support of its position. MTC at 18, n.3. In Bd. of **[*31]** Trustees, plaintiffs submitted declarations to the PTO regarding their need to correct the inventors named on the patent application. 237 F.R.D. at 620. Included with those declarations were detailed factual explanations of how the initial error occurred and how it was discovered and investigated. Id. Although plaintiffs argued there was no waiver of privilege, both parties agreed that the declarations contained privileged material. Id. at 624. The Court found that plaintiff waived its privilege with the declarations to correct inventorship. Id. at 628. In Starsight, defendant submitted declarations to the PTO stating that all material prior art had been disclosed to the PTO. 158 F.R.D. at 654. Defendant and his counsel also testified in their depositions as to the difference between the claims of the patent and the prior art as described by plaintiff. Id. The declarations and deposition testimony addressed two key elements of the parties' inequitable conduct claims and the court found that defendants partially waived the attorney-client privilege. Id. In Verigy, plaintiff moved to compel the production of documents supporting statements made in defendant's patent counsel's declaration in support of an opposition to a motion for preliminary **[*32]** injunction where the declaration stated that defense counsel met with defendant and a third party to discuss a new business venture and the declaration "reveal[ed] a substantive component of what apparently were privileged communications about a particular matter which is also the subject of Verigy's Request No. 67." 2008 U.S. Dist. LEXIS 111512, [WL] at *3. The court found a limited waiver of the attorney-client privilege. Id.

Plaintiff correctly notes that in each of these cases, clients or attorneys clearly disclosed the substance of attorney-client communications. Oppo. at 18. This is distinguishable from the instant matter where Mr. Squier simply declared that "the delay in payment of the maintenance fee to this ['589 patent] was unintentional." MTC at 17-18. It is unclear from Mr. Squier's statement whether he conducted an investigation, whether the investigation included attorney-client privileged communications, and whether the statement is based on such communications. As a result, Defendants have not established that Plaintiff waived the attorney-client privilege.

Defendants rely on Volterra Semiconductor Corp., 2013 U.S. Dist. LEXIS 48522, 2013 WL 1366037, at *2 to argue that they "were not required to point to a specific attorney-client communication or piece of work product supporting their waiver argument." Reply at 8. In **[*33]** Volterra Semiconductor Corp., the Court found incorrect defendant's suggestion that "a privileged communication is only put 'in issue' if its contents are specifically identified or quoted." Id. In reaching that decision, the Court cited to Claffey v. River Oaks Hyundai, 486 F. Supp. 2d 776 (N.D. Ill., 2007), which found that defendants could not create an impression that they relied on the advice of counsel and still maintain their attorney-client privilege and held that "if the defendant "actually relie[d] on any documents or other evidence that would tend to suggest that its procedures included consultation with counsel, it [would] be deemed to have waived its attorney-client privilege." Id. at 778. Here, Defendants have neither pointed to a specific privileged communication nor sufficiently shown that Mr. Squier's declaration creates the impression that his actions were guided by the results of privileged conversations. Defendants contend that Mr. Squier's declaration "*implie[s]* that he had communicated with the petitioner and investigated the cause of the delay and, based on that investigation, personally determined that the delay was, in fact, unintentional." Reply at 8 (emphasis added). The implication is not a sufficient basis for finding a waiver of **[*34]** the attorney-client privilege or that Mr. Squier placed the privileged communications at issue. Volterra Semiconductor Corp., 2013 U.S. Dist. LEXIS 48522, 2013 WL 1366037, at *2 ("An implied waiver occurs when (1) [t]he party asserting the privilege acts affirmatively (2) to place the privileged communications in issue between the party seeking discovery and itself (3) such that denying access to the communication becomes manifestly unfair to the party seeking discovery."); see also Gen. Elec. Co. v. Mitsubishi Heavy Indus. Ltd., 2013 U.S. Dist. LEXIS 201232, 2013 WL 12226037, at *3 (N.D. Tex. Apr. 5, 2013) ("[w]aiver is not likely to be found when the statements alleged to constitute waiver do not disclose the contents of a specific communication between client and attorney.") (quoting Genentech, Inc. v. Insmed Inc., 236 F.R.D. 466, 469 (N.D. Cal. 2006)).

For the reasons set forth above, the Court **DENIES WITHOUT PREJUDICE** Defendants' motion and finds that Plaintiff's attorney-client privilege has not been waived as to the revival of the '589 patent and Mr. Squier's basis for his declaration to the PTO.

2. Waiver of Attorney-Client Privilege with Production of Exhibit K

When an inadvertent disclosure is

> made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; **[*35]** and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

Fed. R. Evid. 502(b). The party claiming the privilege has the burden of proving that they satisfy the requirements of Fed. R. Evid. 502(b). AmeriPride Servs., Inc. v. Valley Indus. Serv., Inc., 2011 U.S. Dist. LEXIS 144687, 2011 WL 6328708, at *3 (E.D. Cal. Dec. 15, 2011) (citing Callan v. Christian Audigier, Inc., 263 F.R.D. 564, 565-66 (C.D. Cal. 2009)).

Plaintiff has provided evidence that the disclosure of the email in Exhibit K was inadvertent. Counsel submitted a declaration stating that Plaintiff "had no intent to produce any attorney-client communications. Any production of attorney-client communications was inadvertent." ECF No. 131-1, Supplemental Declaration of Roger L. Scott in Support of Plaintiff's Opposition to Defendants' Motion to Compel ("Supp. Scott Decl."). Counsel further explains the efforts Plaintiff engaged in to prevent the inadvertent disclosure, including creating a "presumptively privileged" set of documents that contained key words that may have indicated privilege, manually reviewing those documents for privilege, and random samplings of the documents for quality control. Id. at 2. Counsel also declares that within two hours of discovering the inadvertent disclosure, Plaintiff wrote to Defendants to inform them of the inadvertent disclosure and requested that Defendants return, delete or destroy **[*36]** the document. Id. at 3, Exh. 10. Defendants argue that Plaintiff should have been aware of the allegedly inadvertent disclosure on May 18, 2018 when they produced their expert report to Plaintiff because Defendants provided the document to their expert. ECF No. 132 at 11. However, the Court notes that in the Joint Case Management Statement, that parties stated that they "have agreed to adopt the protective order from the FSL Action" which states that

> [t]he parties agree that a party who produces any privileged document without intending to waive the claim of privilege associated with such document may, within ten (10) days after the producing party actually discovers that such inadvertent production occurred, notify the other party that such document was inadvertently produced and should have been withheld as privileged. Once the producing party provides such notice to the requesting party, the requesting party must promptly return the specified document and any copies thereof. By complying with this obligation, the requesting party does not waive any right it has to challenge the assertion of privilege and request an order of the court denying such privilege.

ECF No. 23 at 11 from 15CV1879-BEN(BLM); **[*37]** see also ECF No. 80 at 15. Therefore, even using the May 18, 2018 date, Plaintiff was well within the ten days agreed upon by the parties for reporting inadvertent disclosures.

The Court **DENIES** Defendants' request to find that the attorney-client privilege was waived by the inadvertent production of Exhibit K.

D. Modification of the Court's Scheduling Order

Defendants request that the Court continue the deadline to complete discovery from April 27, 2018 to June 1, 2018 "so that Defendants may complete discovery after Plaintiff has produced discovery in response to those Requests." MTC at 20. Plaintiff contends that Defendants have failed to provide good cause for their request and that Defendants lack the evidence of due diligence required for such a request. Oppo. at 6. Plaintiff requests that if the Court grants Defendants' motion, any extension be limited to completing the discovery deadline to conducting the discovery being compelled and nothing more. Id. at 27.

Once a Rule 16 scheduling order is issued, dates set forth therein may be modified only "for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). The Rule 16 good cause standard focuses on the "reasonable diligence" of the moving party. Noyes v. Kelly Servs., 488 F.3d 1163, 1174 n.6 (9th Cir. 2007); Coleman v. Quaker Oats Co., 232 F.3d 1271, 1294-95 (9th Cir. 2000) (stating Rule 16(b) scheduling order may be **[*38]** modified for "good cause" based primarily on diligence of moving party). Essentially, "the focus of the inquiry is upon the moving

party's reasons for seeking modification." Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992). However, a court also may consider the "existence or degree of prejudice to the party opposing the modification . . . ." Id.

As an initial matter, the Court notes that on April 26, 2018, the parties filed a Joint Motion to Modify Scheduling Order To Allow for Completion of Fact Discovery. ECF No. 106. The parties sought to continue the deadline for the limited purposes of

> (i) the production and review of ESI in response to previously propounded ESI requests, including any disputes regarding the sufficiency of the parties' respective productions, (ii) the depositions of Geoff Chutter, Farzin Ferdosi, Tim Gantz, and Arthur Berry (subject to any objections that may be raised), (iii) any discovery that Court deems permitted based on Defendants' pending motion to compel (ECF No. 105), and (iv) Defendants' efforts to obtain discovery from non-parties Tan Xu Teng and Terry Goh pursuant to the Letter of Request to the Supreme Court of Singapore (ECF No. 84).

Id. at 2. On April 27, 2018, the Court granted the parties' motion and **[*39]** continued the fact discovery deadline to May 25, 2018 for the limited purposes described above. ECF No. 107. In their reply, Defendants acknowledge this extension and request that "a further extension be triggered off the Court's order granting Defendants' motion to compel." Reply at 9, n.5.

Defendants' motion is **GRANTED IN PART**. The May 25, 2018 completion of fact discovery deadline is hereby continued to **July 20, 2018**. The **July 20, 2018** deadline only applies to discovery that has already been propounded and that is being compelled in this order. No new or additional discovery is permitted.

E. Sanctions

Defendants request "an award of attorney's fees because Plaintiff cannot show that its opposition is substantially justified." MTC at 20-21. Defendants also request that Plaintiff pay their fees and costs for the deposition of Mr. Squier and any future deposition of Mr. Squier that may be ordered. Id. at 21.

Plaintiff contends that Defendants' motion should be denied in its entirety and that if it is not, there can be no real dispute that "reasonable people could differ" about the issues at hand and the request for sanctions should be denied. Oppo. at 28.

Defendants reply that sanctions are appropriate as "this is not **[*40]** a situation where 'reasonable people could differ' about the issues at hand." Reply at 11. Defendants note that Plaintiff "completely ignor[ed] the Court's prior ruling on ESI discovery and its applicability to the instant document production dispute and that Plaintiff is not telling the whole story with respect to Defendants' production. Id. (emphasis omitted).

If a motion to compel discovery is granted in part and denied in part, Federal Rule of Civil Procedure 37(a)(5)(C) permits a court to "after giving an opportunity to be heard, apportion the reasonable expenses for the motion." "Discovery conduct is substantially justified if it is a response to a genuine dispute or if reasonable people could differ as to the appropriateness of the contested action." Izzo v. Wal-Mart Stores, Inc., 2016 U.S. Dist. LEXIS 12210, 2016 WL 409694, at *7 (D. Nev. Feb. 2, 2016) (citing Pierce v. Underwood, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988)).

Plaintiff's position is in an appropriate response to a genuine issue of dispute and, especially in light of the miscommunication between the parties and the Court, reasonable people could differ about the requested RFPs as well as the scope of the deposition topics posed to Mr. Squier. Accordingly, Defendants' request for additional monetary sanctions is **DENIED**. The Court's decision requiring Plaintiff to pay the cost of Mr. Squier's follow-up deposition reflects **[*41]** the Court's recognition of Plaintiff's failure to permit Mr. Squier to continue to be deposed on the contested subject matter after properly noting its relevancy objection on the record in accordance with Fed. R. Civ. P. 30(c)(2). No further sanctions are required.

CONCLUSION

Defendants' request to compel Plaintiff to respond to

(1) Defendants' First Set of RFPs Nos. 1-18 is **GRANTED**.

(2) deposition questions posed to Mr. Erikson Squier regarding "his investigation into whether the failure to pay maintenance fees was actually unintentional as Mr. Squier represented to the PTO" is **GRANTED**.

(3) "discovery relating to the revival of the '589 patent that has been withheld on grounds of attorney-client privilege or attorney work product, as those privileges have been waived" is **DENIED**.

Defendants' request that the discovery deadline be continued from April 27, 2018 to June 1, 2018 is **GRANTED IN PART**. The discovery deadline is continue to **July 20, 2018**.

Defendants' request for

(1) fees and expenses related to the first deposition of Mr. Squier is **DENIED**.

(2) the costs of the follow-up deposition of Mr. Squier as permitted by this Order is **GRANTED**.

(3) sanctions for the costs of bringing this motion is **DENIED**.

IT IS SO ORDERED.

Dated: **[*42]** 6/8/2018

/s/ Barbara L. Major

Hon. Barbara L. Major

United States Magistrate Judge

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