

**UNITED STATES DISTRICT COURT
District of Maryland**

**William Connelly
United States Magistrate Judge**

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July 13, 2007

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Commission
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***Re: Equal Employment Opportunity Comm'n v. RRR Bowie, LLC*
Civil Action No.: RWT-05-2697**

Dear Counsel:

Pending before the Court and ready for resolution is Plaintiff's Motion to Compel (Document No. 62). This dispute was initiated by Plaintiff's Notice of Service of Motion to Compel (Document No. 56), which Defendant opposed in its Notice of Service of Response to Motion to Compel (Document No. 60) and Plaintiff supported in its Notice of Service of Reply (Document No. 61). A motions hearing was held on July 6, 2007 and the matter was taken under advisement. The Court now resolves this discovery dispute.

In its Second Request for Production of Documents, Plaintiff sought, among other things, a response to Request No. 3 which states:

For the period August 1, 2004 through September 30, 2004, all files from each and every customer, including all documents which set forth the identity of each F&I¹ Manager to whom the file/customer was assigned and all documents which set forth the nature of the work to be performed and/or actually was performed by the F&I

¹ Finance and Insurance.

Manager pertaining to such customer.

On July 6, 2006, Defendant provided the following response:

Defendant objects and will not produce for copying all files from each and every customer, including all documents which set forth the identity of each F&I Manager to whom the file/customer was assigned and all documents which set forth the nature of the work to be performed and/or actually was performed by the F&I Manager pertaining to each customer for the period August 1, 2004 through September 30, 2004 on the grounds that (1) the request is irrelevant nor is it reasonably calculated to lead to the discovery of any admissible evidence; (2) the request is unduly burdensome and overly broad; (3) the request involves confidential and proprietary customer information who are not involved in this litigation and the disclosure of such confidential financial information may violate the customers['] privacy rights and the Gramm-Leach-Bliley Act, 15 U.S.C.A. § 6809.

Also, on July 6, 2006, by separate correspondence, Defendant's counsel prepared a cover letter for transmitting documents responsive to Plaintiff's Second Request for Production of Documents. *See* Document No. 60, Def.'s Ex. 2. In this correspondence, Defendant's counsel expounded upon Defendant's response to Request No. 3.

For the two month period of August 1, 2004 through September 30, 2004, there were 462 deals. To pull all of those files and to produce all of those documents would be incredibly burdensome and in any event, not relevant to the issues in this case. In an effort to resolve this matter, my client can produce finance summary reports² for August and September, 2004. They can also produce electronic records that support these figures, including the amounts of the various categories for finance deals. For privacy concerns the names of the customers would be redacted. This should give you the information you seek.

Document No. 60, Def.'s Ex. 2 (Letter from Noble to Lawrence of 7/6/06, at 3).

In her letter of July 25, 2006, Ms. Lawrence, Plaintiff's counsel, reminded Defendant's counsel that "you were going to examine these customer files to see if the information I was seeking can be obtained from those files." *Id.*, Def.'s Ex. 3. Ms. Lawrence raised the issue of documents responsive to Request No. 3 in her letter of August 3, 2006. *See id.*, Def.'s Ex. 4. In his letter of

² The Finance Survey Reports are also called F&I Recaps.

August 4, 2006, Defendant's counsel, Mr. Noble, responded, "[c]oncerning Request No. 3, I am still conferring with my client and will get back to you on this." Document No. 56, Pl.'s Ex. 2 at 1; Document No. 60, Def.'s Ex. 5, at 1.

In her letter of November 13, 2006, Ms. Lawrence asked whether Defendant will provide documents responsive to Request No. 3. Ms. Lawrence offered to enter into a Protective Order to preserve confidentiality of customer information. Document No. 56, Pl.'s Ex. 3; Document No. 60, Def.'s Ex. 6. In his January 19, 2007 letter, Mr. Noble provided the following response:

I apologize for not getting back to you sooner on Plaintiff's Request No. 3 of its Second Request for Production of Documents. The position of the Defendant was set forth in my letter of July 6, 2006. However, I am still attempting to see if there is any kind of middle ground that would be available to try to satisfy your Request. . . . I hope to conference this [matter] in with my client and give you a definitive answer thereafter.

Document No. 56, Pl.'s Ex. 4; Document No. 60, Def.'s Ex. 7.

Ms. Lawrence replied to Mr. Noble in her January 23, 2007 letter.

I also am in receipt of your letter of January 19, 2007 regarding Plaintiff's Request No. 3. Though you rely on your initial position set forth in your letter of July 6, 2006, I was focusing on your representation to confer with your client, contained in your letter of August 4, 2006, my suggestion of a Protective Order in my letter of November 13, 2006, and our telephone conversations. I believe you would agree that this source information is relevant; I have addressed confidentiality concerns. Whatever other concerns you have, please bring them to my attention and we can address them.

Document No. 56, Pl.'s Ex. 5; Document No. 60, Def.'s Ex. 8.

Mr. Noble responded on February 2, 2007 as follows:

This letter will serve to follow up our communications concerning Plaintiff's Second Request for Production of Documents and Defendant's Response to Request No. 3. As you know, we have objected to this Request on the grounds set forth in my letter of July 6, 2006. Without waiving our objection, and without prejudice to our position, we are submitting the following documentation and/or information, which I believe is not only responsive to Plaintiff's Request, but will give you all of the information that you need or seek by this Request.

Enclosed please find Excel spreadsheets for August and September, 2004 listing the deals for new and used vehicles; a breakdown of the number of warranties sold; GAP³ policies sold; and life, accident, and health insurance sold. This is further broken down by Finance Managers. I believe that you already have copies of these documents.

Attached to each Excel spreadsheet is statistical information by each deal, which backs up the figures in the Excel spreadsheets. We have deleted the customer names for consumer rights privacy concerns and consistent with the Gramm-Leach-Bliley Act. However, the deal number assigned to each deal is listed. The statistical backup is broken down by new and used vehicles.

* * *

I had Toyota of Bowie randomly pull a number of deal files and have personally verified the accuracy of the statistical information on these deal files. Each of the 462 deal files has a substantial amount of paper, none of which is relevant to the issues in this case, nor designed to lead to the discovery of admissible evidence, nor does this paper set forth the work performed by F & I Managers for each customer as requested in Request No. 3. Pulling of all of these deal files and letting you inspect them would be so unduly burdensome that we cannot reasonably allow you to inspect each file. Since you have all of the information that you need in the statistical printouts related to your Request, it would be a total waste of time, incredibly burdensome, and a great imposition on my clients (and counsel), to allow such a mass inspection. If you would like to review one or two files to review the accuracy of the information, I can probably arrange to have one or two files (redacted as to customer names) copied and sent to you.

Document No. 56, Pl.'s Ex. 6; Document No. 60, Def.'s Ex. 9.

Ms. Lawrence sent another letter on February 5, 2007 requesting the raw data used in creating the spreadsheets. Document No. 56, Pl.'s Ex. 7; Document No. 60, Def.'s Ex. 10. Ten days later, Mr. Noble responded by advising Ms. Noble that the documents produced were not simply spreadsheets but contain Defendant's F&I back up data for the transactions. Document No. 56, Pl.'s Ex. 8; Document No. 60, Def.'s Ex. 11. On February 27, 2007, Mr. Noble provided Ms. Lawrence two randomly selected customer files and asked that these documents be accepted as Defendant's

³ Guaranteed Auto Protection.

Supplemental Response to Request No. 3. Document No. 60, Def.'s Ex. 12.

The next communication between the parties regarding Request No. 3 occurred on May 3, 2007. In her letter Ms. Lawrence renewed her request for all customer files. She offered her staff to perform or arrange for copying to minimize the burden on Defendant and also offered to pay for the copying. Ms. Lawrence asked Defendant to respond by May 11, 2007. Document No. 56, Pl.'s Ex. 9; Document No. 60, Def.'s Ex. 13. Defendant did not respond as requested and Plaintiff filed its Notice of Service of Motion to Compel three days later.

Before addressing the substantive issue, the Court must first resolve a procedural issue — whether Plaintiff's Motion to Compel is untimely. Defendant contends, in accordance with Local Rule 104.8.a, Plaintiff should have moved to compel within 30 days of receiving Defendant's July 6, 2006 response to Request No. 3. Plaintiff did not file its motion until May 14, 2007, more than ten months after Plaintiff received Defendant's response. Alternatively, Defendant claims, under the most liberal interpretation of the Local Rule, Plaintiff should have moved to compel within 30 days of February 27, 2007 when Defendant supplemented its response to Request No. 3.

In reviewing the correspondence quoted above, although Defendant objected to Request No. 3 on July 6, 2006, by separate correspondence, Defendant offered to produce finance summary reports and electronic records to support these figures in an effort to resolve this matter. Moreover, on August 4, 2006, in response to Ms. Lawrence's inquiry about the status of Request No. 3, Mr. Noble responded, "I am still conferring with my client and will get back to you on this." Document No. 56, Pl.'s Ex. 2, at 1; Document No. 60, Def.'s Ex. 5, at 1. Mr. Noble indicated a willingness to continue efforts to resolve the dispute regarding Request No. 3. The Court thus does not find July 6, 2006 was the date the "within 30 days" clock began ticking. It is readily apparent from the quoted correspondence that from July 6, 2006 through February 27, 2007, the parties continued, on an informal basis, to attempt to resolve this dispute.

After Defendant supplemented its response to Request No. 3 on February 27, 2007, no additional response was received from Plaintiff *until May 3, 2007*. Defendant had every reason to assume its supplemental response was satisfactory. If dissatisfied with this supplemental response, in accordance with Local Rule 104.8.a, Plaintiff should have moved to compel within 30 days of February 27, 2007. Plaintiff's failure to do so is problematic.

Plaintiff explains the reason for its delay.

Once the Commission received and reviewed these sample files, in March 2007, oral argument on Defendant's Motion for Summary Judgment was just weeks away. At that point, out of consideration for the parties and for the Court, the Commission reserved filing its Motion until it survived summary judgment. Almost immediately after the Court denied Defendant's Motion for Summary Judgment, the Commission resumed its pursuit of the files, at which point Defendant no longer engaged in dialogue regarding the customer

files. Only then did the Commission need the Court's intervention.

Document No. 61, at 1-2 (footnote omitted).

At the July 6, 2007 motions hearing, the Court inquired further about Plaintiff's decision not to move to compel until after "surviving" summary judgment. When the Court asked Ms. Lawrence — would you not want the evidence you now seek before Judge Titus when he was deciding the summary judgment motion — Ms. Lawrence responded that Plaintiff wanted to but Plaintiff had a lot of other information, enough information to survive summary judgment. Ms. Lawrence acknowledged that there is always the likelihood that a case will not make it beyond summary judgment. Ms. Lawrence noted her speciality in this area of law and commented that she did not want to have this "battle" unless the case was going forward.

The Court finds Plaintiff gambled that the case would survive summary judgment and that thereafter Plaintiff presumed it could pursue its motion to compel. If Judge Titus had ruled in Defendant's favor, Plaintiff's case would have been dismissed. The filing of a motion to compel should not be deferred pending resolution of a summary judgment motion. There is no authority for such a procedure in the Local Rules. Motions to compel must be timely filed.

While this Court has the grounds to deny Plaintiff's motion as untimely, considering that this case is not scheduled for trial until April 2008 and considering what relief the Court shall grant, the Court declines to deny Plaintiff's motion to compel on that basis. Plaintiff's Request No. 3 seeks (1) the identity of each F&I Manager to whom the file/customer was assigned and (2) documents listing the nature of the work to be performed and/or actually performed by the F&I Manager pertaining to such customer.

Plaintiff deposed Jerry Goldfeder, Defendant's Comptroller. The following exchange occurred between Plaintiff's counsel and Mr. Goldfeder:

Q: Are there documents set forth in the files of the customers that reflect the actual work done by the F and I Manager which generated the income?

A: No.

Document No. 60, Ex. 11, at 3 (Goldfeder Dep. 51:8 - 12). Mr. Goldfeder's testimony is undisputed.

In reviewing Defendant's opposition, reviewing Mr. Goldfeder's testimony and considering the arguments of counsel at the motions hearing, the Court finds the customer files, with the exception of the F&I Recap, do not contain the information Plaintiff specifically sought in its

Request No. 3. The information Plaintiff seeks is contained in the F&I Recap⁴ which Defendant offered to produce to Plaintiff on July 6, 2006. *See* Document No. 60, Def.'s Ex. 2, at 3.

The Court thus ORDERS Defendant to produce the 462 F&I Recaps for the two month period of August 1, 2004 through September 30, 2004. Defendant must redact customer privacy information such as names, telephone numbers and social security numbers. Defendant must produce these documents not later than *August 10, 2007*.

For the above reasons, Plaintiff's Motion to Compel (Document No. 62) is hereby **GRANTED IN PART & DENIED IN PART**.

Although informal, this letter constitutes an Order of the Court and will be docketed accordingly.

Sincerely,

/s/

William Connelly
United States Magistrate Judge

⁴ The F&I Recap identifies the F&I Manager for each sale and provides a detailed breakdown of the amount financed, loan APR (annual percentage rate), cost of the loan, warranties and insurance sold for each transaction. *See* Document No. 61, Pl.'s Exs. 16-17.

