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

USAMA JAMIL HAMAMA, et al.,

Petitioners and Plaintiffs,

v.

REBECCA ADDUCCI, et al.,

Respondents and Defendants.

Case No. 2:17-cv-11910

Hon. Mark A. Goldsmith
Mag. David R. Grand

Class Action

PLAINTIFFS/PETITIONERS' MOTION FOR EXPEDITED DISCOVERY OF CLASS MEMBER INFORMATION

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Local Rule 7.1(a)(1) requires petitioners to ascertain whether this motion is opposed. Petitioners' counsel Margo Schlanger communicated personally, via email, with Jennifer L. Newby, Assistant United States Attorney, Eastern District of Michigan, Defendant/Respondent Rebecca Adducci's counsel, explaining the nature of the relief sought and seeking concurrence. (No counsel has yet entered an appearance for Respondent/Defendant Thomas Homan or Defendant John Kelly, and Ms. Newby declined to state whether she would be counsel for these additional parties.) Ms. Newby denied concurrence, also by email.

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1. Due to the urgency of the circumstances in this matter, we request that the Court order an expedited briefing schedule on this motion.

2. Plaintiffs/Petitioners move for an order requiring Defendants/Respondents to provide, on an expedited basis, class member information that is (a) directly relevant to Plaintiffs/Petitioners' forthcoming motion for a preliminary injunction and (b) necessary for counsel to effectively represent the putative class. Specifically Plaintiffs/Petitioners request that this Court order Defendants/Respondents:

a. to respond **by Monday, July 5, 2017** (or within 48 hours of the Court's decision on this motion, whichever is later), to Interrogatories #1 and #2 (Ex. A), which seek basic information

about how many Iraqi nationals have been detained and the locations of their detentions, as well as basic information about the detained individuals;

b. to respond by **Wednesday, July 10, 2017**, to Interrogatory #3 (Ex. A), which seeks basic information about non-detained Iraqi nationals with final orders of removal; and

c. to provide, on a weekly basis, complete, updated responses to Interrogatories # 1-3.

3. Because some of the information Plaintiffs/Petitioners seek is of a confidential nature, and may be subject to protections under the Privacy Act, 5 U.S.C. § 552a, Plaintiffs/Petitioners recognize that the Court may believe a Protective Order should be entered. Plaintiffs therefore provide a proposed order for the Court's consideration, attached as Exhibit B.

In support of their Motion, Plaintiffs/Petitioners rely upon the accompanying Brief in Support.

Respectfully submitted,

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Attorneys for All Petitioners and Plaintiffs

* Application for admission forthcoming.

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Class Action

PLAINTIFFS/PETITIONERS' MEMORANDUM OF LAW IN SUPPORT OF MOTION EXPEDITED DISCOVERY OF CLASS MEMBER INFORMATION

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STATEMENT OF ISSUES PRESENTED

Should Defendants/Respondents be required to provide basic class member information on an expedited basis so that Plaintiffs/Petitioners can prepare their forthcoming motion for a preliminary injunction and effectively represent the proposed class?

Plaintiffs/Petitioners' Answer: Yes.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Fed. R. Civ. P. 26(d) 1993 Advisory Committee Notes

North Atlantic Operating Co. v. Huang, 194 F. Supp. 3d 634 (E.D. Mich. 2016)

INTRODUCTION

As this Court has noted, this case is extraordinary because Plaintiffs/Petitioners have credibly alleged that they "face extraordinarily grave consequences: death, persecution, and torture," if the government is allowed to deport them to Iraq. Opinion, ECF #43, Pg.ID# 674. The situation remains extremely time-sensitive, as the stay entered by this Court is due to expire July 10, 2017 and the government's continued detention of Plaintiffs/Petitioners bespeaks its apparent continuing intent to deport them imminently.

Counsel for Plaintiffs/Petitioners are preparing a motion for a preliminary injunction, while simultaneously working to allow class members the opportunity to obtain immigration counsel so that they can file individual motions for relief in immigration court. The lack of basic information about the class makes both extremely difficult. Counsel does not know exactly how many Iraqi nationals are detained or where they are being held. In order to provide this Court with the information that it will need to evaluate the forthcoming motion for a preliminary injunction and to fashion appropriate relief, counsel urgently needs information about the class.

Accordingly, Plaintiffs/Petitioners ask this Court for an order requiring Defendants/Respondents to respond on an expedited basis to narrowly tailored discovery requests that provide basic information about the Iraqi nationals who

have been arrested and detained, because that information is necessary for Defendants/Respondents to represent the putative class and to prepare their forthcoming motion and preliminary injunction. Counsel also provide proposed language for a protective order, should the Court wish to enter one before ordering production of the requested information.

I. Defendants/Respondents Should Be Required to Provide Class Member Information on an Expedited Basis.

Plaintiffs/Petitioners seek expedited access to information about the putative class. Under the extraordinary circumstances of this case, class member information is needed for Plaintiffs/Petitioners' forthcoming motion for a preliminary injunction and in order for counsel to effectively represent the proposed class. *See* Plaintiffs/Petitioners' First Set of Interrogatories to Defendants/Respondents (Ex. A).

A. Plaintiffs/Petitioners Seek Only Basic, Limited Information about the Class that is Necessary for Representation at this Stage of the Litigation.

Plaintiffs/Petitioners ask that this Court order that **by Wednesday, July 5, 2017** Defendants/Respondents answer Interrogatories #1 and #2, which read:

> Interrogatory #1: For each ICE Field Office and within each ICE Field Office for each state, territory or District of Columbia, state how many Iraqi nationals with a final order of removal have been arrested there by ICE on or after March 6, 2017 as a result of Iraq's recent decision to issue travel documents to facilitate U.S. removal, and how many such Iraqi nationals are being held in each immigration detention facility in each field office's area of responsibility.

Interrogatory #2: For every Iraqi national with a final order of removal who has been arrested or detained by ICE on or after March 6, 2017 as a result of Iraq's recent decision to issue travel documents to facilitate U.S. removal, provide the following information:

A. Full name;
B. Date of Birth;
C. Alien Number;
D. Date of final order of removal;
E. Criminal history, if any;
F. Whether an attorney or representative has filed an appearance with the Department of Homeland Security, and if so the name and contact information of that attorney or representative and the date on which he or she filed an appearance;
G. Whether a motion to reopen has been filed and/or a stay has been granted, and the court(s) and date(s) of any such motion and/or stay;
H. Current detention location;
I. All detention locations in which the person has been held on or after March 6, 2017, and the dates the person was detained in those locations; and
J. The detainee's emergency contact information (next of kin).

At the June 26, 2017 hearing on Plaintiffs/Petitioners' Emergency Motion to Expand Order Staying Removal to Protect Nationwide Class of Iraqi Nationals Facing Imminent Removal to Iraq, government counsel was unable to provide critical information about how many individuals have been arrested or where they are being held.[1] Interrogatory #1 seeks that information.

[1] THE COURT: How many detainees are there if I --
MS. NEWBY: Nationwide?
THE COURT: -- I were to extend this to all the Iraqi Nationals as the plaintiff's petitioners are asking, how many people would be affected by that?

Interrogatory #2 seeks basic information about the individuals who are being detained, many of whom, upon information and belief, still lack counsel. The government's position is that class members can seek relief in immigration court. The Plaintiffs/Petitioners' claims before *this* Court turn on the need for adequate time to access immigration court and the illegality of removal to Iraq without meaningful consideration of whether, given current country conditions in Iraq and changes to immigration law, such removal violates the Constitution, the Immigration and National Act (*see, e.g.,* 8 U.S.C. § 1158(b)(1)(A); 8 U.S.C. § 1231(b)(3)), and the Convention Against Torture (*see* 8 U.S.C. § 1231 note, 8 C.F.R. § 208.16(c)(2)). Plaintiffs/Petitioners believe that the administrative

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> MS. NEWBY: My understanding is that there are 1,400, I think it was 1,444 Iraqi Nationals in the United States that are subject to orders of removal. Not all of them have been detained. I believe in the field office director that Ms. Adducci covers, there's over about 100 that have been detained and 79 of those, umm, as mentioned in our response have already filed motions to reopen. 27 of them have already received stays from the Immigration Court. I don't have a number for you as to exactly how many nationwide have been detained although if the agency released something that said it was 85, I don't have information that that's changed significantly. So that's about the number that we're talking about.
>
> THE COURT: Do you know how many districts we're talking about?
>
> MS. NEWBY: There are 24 field office directors, 24 districts if you will in the United States.
>
> THE COURT: And are the 85 or so who have been detained, are those scattered throughout all those field offices?
>
> MS. NEWBY: I don't have the concentrations for you. I, I don't know that all of the Districts have someone who is an Iraqi detainee, but I'm sure that there are a number districts that do outside of this one.

June 26, 2017 Transcript, ECF #44, Pg.ID# 693-94.

immigration system, with its provision for Court of Appeals review, can provide adequate due process, **but only if class members have a meaningful opportunity to access those courts,** which requires both sufficient time and access to counsel.

This Court's current stay of removal expires on July 10, 2017, and it is therefore urgent that class members, particularly unrepresented class members, are apprised of the ability to seek immigration relief in immigration court, the need to obtain counsel, and the need to seek immediate individual stays of removal. Individuals who do not yet have counsel need to be connected with counsel. Attorneys taking on such representation need to know where their clients are located, how to contact them, when the final order of removal issued, whether the client has any criminal convictions, etc., in order to assess their clients' cases and file for the appropriate relief. Counsel in this case cannot know whether the putative class members have immigration counsel and are filing for appropriate relief in immigration court without knowing who the class members are, where they are located, and the other requested information.

The relief that Petitioners/Plaintiffs will seek from this Court in their forthcoming motion for a preliminary injunction depends in large part on what is happening on the ground with the potential class members (e.g., how many have very old orders of removal, how many have been able to file motions to reopen, etc.). The length of time that a stay is needed – an issue about which this Court has

had questions that counsel has been unable to definitively answer[2] – cannot be determined without knowing more about the current situation of the proposed class.

In addition, the information sought may affect the merits of certain claims. For example, the frequency and rapidity of transfers is relevant to Count III, which alleges that such transfers interfere with class members' statutory right to counsel and due process right to a fair hearing. Basic class information will, of course, also be important for Plaintiffs/Petitioners' ability to prove they meet the requirements for class certification.

Because the information responsive to these interrogatories is likely to change rapidly, and current information is critical for the Court's ability to resolve this dispute, Plaintiffs/Petitioners further request that the information provided be kept up-to-date. To minimize the burden on Defendants/Respondents, Plaintiffs/Petitioners are willing to agree to production of updated class information on a weekly basis.

Plaintiffs/Petitioners also request that this Court order Defendants/Respondents to respond by **Wednesday, July 10, 2017** (four days prior to the date on which Plaintiffs/Petitioners propose to file their preliminary injunction motion), to Interrogatory #3, which reads.

[2] Ex. I, Transcript of June 21, 2017 Hearing, at 7-11.

1. Interrogatory #3: For every Iraqi national with a final order of removal who has not yet been arrested by ICE but who could be arrested, detained, and removed as a result of Iraq's recent decision to issue travel documents to facilitate U.S. removal, provide the following information:
   A. Full name;
   B. Date of Birth;
   C. Alien Number;
   D. Date of final order of removal;
   E. Criminal history, if any;
   F. Whether an attorney or representative has filed an appearance with the Department of Homeland Security, and if so the name and contact information of that attorney or representative and the date on which he or she filed an appearance;
   G. Whether a motion to reopen has been filed and/or a stay has been granted, and the date(s) of any such motion and/or stay; and
   H. Last known contact information.

Interrogatory #3 seeks information for non-detained class members that is similar to the information sought in Interrogatory #2 for detained class members, and is needed for the same reasons. Again, in order to be useful, this information needs to be regularly updated, and again Plaintiffs/Petitioners are willing to accept updating on a weekly basis.

In sum, the information that Plaintiffs/Petitioners seek here is urgently needed in order for counsel to effectively seek a preliminary injunction and effectively represent the putative class. The Court's ability to assess that motion and to fashion relief that is appropriate to the ever-changing circumstances on the ground likewise depends on the government's providing the information requested here.

B. Good Cause Exists To Grant Expedited Discovery of Class Member Information.

The Court may, for good cause, authorize discovery prior to the Rule 26(f) meeting of the parties. *See* Fed. R. Civ. P. 26(d) 1993 Advisory Committee Notes ("Discovery can begin earlier [than the limitation established by Rule 26(d)(1)] . . . by local rule, order, or stipulation. This will be appropriate in some cases, such as those involving requests for a preliminary injunction."). Litigants are entitled to expedited discovery "upon a showing of good cause," *North Atlantic Operating Co. v. Huang*, 194 F. Supp. 3d 634, 637 (E.D. Mich. 2016), which exists "where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." *Fabreeka Int'l Holdings, Inc. v. Haley*, No. 15-cv-12958, 2015 WL 5139606, at *5 (E.D. Mich. Sept. 1, 2015) (Ex. C) (internal citations and quotation marks omitted).

Good cause for expedited discovery exists here given the highly time-sensitive nature of these proceedings. Plaintiffs/Petitioners have been arrested, jailed, and face imminent deportation to Iraq, a country where they are likely to be persecuted, tortured, or killed. Time is of the essence. This Court has already entered two orders staying removal, and Plaintiffs/Petitioners will be filing a motion for a preliminary injunction forthwith.

"The courts within the Sixth Circuit have endorsed the view, expressed in the Committee Notes, that expedited discovery is generally appropriate in cases

requesting preliminary injunctive relief." *RadioSys. Corp. v. Sunbeam Prod., Inc.*, No. 3:12-CV-648, 2013 WL 416295, at *2 (E.D. Tenn. Jan. 30, 2013) (Ex. D); *see SEC v. Wilson*, No. 12-cv-15062, 2012 WL 5874456, at *4 (E.D. Mich. Nov. 20, 2012) (Ex. E) (authorizing discovery prior to preliminary injunction hearing, including depositions, subpoenas, interrogatories, document requests, and requests for admissions, and requiring responses to discovery within seven days); *see also Oglala Sioux Tribe v. Van Hunnik*, 298 F.R.D. 453, 456 (D.S.D. 2014) (permitting "expedited discovery in order to prepare a motion for preliminary injunction"); *O M G Fid., Inc. v. Sirius Techs., Inc.*, 239 F.R.D. 300, 305-06 (N.D.N.Y. 2006) (permitting expedited discovery, where "plaintiff contemplate[d] a motion for a preliminary injunction," to permit plaintiff "to develop evidence for use in support of such a motion").

C. Plaintiffs/Petitioners' Requests Are Narrowly Tailored and Will Not Unduly Burden Defendants.

Courts have found that expedited discovery is particularly appropriate where the requests are "narrowly tailored to only seek the discovery that is warranted at this early stage of the litigation." *Psychopathic Records Inc. v. Anderson*, No. 08-cv-13407-DT, 2008 WL 4852915, at *2 (E.D. Mich. Nov. 7, 2008) (Ex. F) (ordering third-party discovery of the defendant's email correspondence).

Here Plaintiffs/Petitioners' requests are carefully crafted to seek only basic information, much of which the government has likely already compiled, either

routinely in its case management system or for this group of foreign nationals in particular. Counsel for the government has argued that "there are a lot of resources that have already been invested in this operation."[3] It seems highly likely that planning for the operation – which targeted Iraqi nationals around the country during a short period of time – involved putting together lists with much of the same information sought here. The information ICE necessarily compiled on the Iraqis targeted for removal is largely the same as the information Plaintiffs/Petitioners seek for the putative class. While Plaintiffs/Petitioners obviously do not know whether the operational lists that ICE compiled before its coordinated efforts to arrest Iraqis nationwide contained exactly the same information as is sought here, the requested information should, in any event, be readily available in ICE's case management systems.

D. The Court Can Order Production of Otherwise Confidential Class Member Information Prior to Class Certification.

Plaintiffs/Petitioners anticipate that the Defendants/Respondents may object to disclosure of class member information on the grounds that the class has yet to be certified, and some of the information sought is of a confidential nature. Such an objection would be meritless, as courts routinely grant pre-certification discovery of confidential class member information. *See, e.g., N.O. v. Callahan*, 110 F.R.D. 637, 646–47 (D. Mass. 1986) (compelling production of medical

[3] Ex. I, Transcript of June 21, 2017 Hearing, at 35.

records of putative class members before ruling on motion for class certification, despite defendants' privilege objections); *Garrity v. Thomson* , 81 F.R.D. 633, 636 (D.N.H. 1979) (finding that "benefits of broad discovery" in a case that contends constitutional violations outweighs concerns for privacy, thus granting plaintiffs access to individual school records to support motion for class certification); *Wallman v. Tower Air, Inc.* , 189 F.R.D. 566, 568-69 (N.D. Cal. 1999) (holding flight passenger list as relevant to possible future class certification and compelling production, despite statute that makes passenger lists confidential); *Kane v. National Action Finance Services, Inc.* , No. 11-11505, 2012 WL 1658643, at *6–7 (E.D. Mich. May 11, 2012) (Ex. G) (granting precertification discovery on names, addresses, and telephone numbers of individuals defendant called to collect debts, rejecting defendant's arguments that the information is confidential or proprietary). Moreover, the Privacy Act, 5 U.S.C. § 552a, contains a specific exception for documents produced "pursuant to the order of a court of competent jurisdiction." 5 U.S.C. § 552a(b)(11). *See also In re Insurance Premium Local Tax Litigation* , No. 06-141-DLB, 2008 WL 544474 at *8 (E.D. Ky. Feb. 25, 2008) (Ex. H) (dismissing defendant's argument that compelling production of nonpublic policyholder information would violate state and federal privacy laws, citing "near-universal reasoning" that 5 U.S.C. 552a(b)(11) would apply).

Here, counsel for Plaintiffs/Petitioners seek information about current or potential Iraqi detainees in order to protect the constitutional and statutory rights of class members. *See Doe v. Meachum*, 126 F.R.D. 44, 450 (D. Conn. 1989) ("Given that disclosure is sought by professionals whose purpose it is to protect the constitutional rights of the plaintiff class, the court finds that it is more important to the interests of justice that the communications be disclosed" than that private information be protected); *Lora v. Bd. of Ed. of City of N.Y.* , 74 F.R.D. 565, 579 (E.D.N.Y. 1977) ("[O]nly strong countervailing public policies should be permitted to prevent disclosure when, as here, a suit is brought to redress a claim for violation of civil rights under the Constitution.").

II. The Court May Enter a Protective Order To Address Any Confidentiality Issues.

Plaintiffs/Petitioners are well aware that some (though certainly not all[4]) of the information they seek involves confidential information, and that future discovery in this litigation may likewise involve confidential information. Concerns about disclosure of that information can be addressed through a protective order.

Plaintiffs/Petitioners have drafted a proposed Protective Order, attached hereto as Exhibit B, which contains standard Protective Order provisions, for the

[4] For example, the information sought in Interrogatory #1 (general de-identified information about where class members were arrested and detained) is not confidential.

Court's consideration should it wish to enter such an order. As with most protective orders, the proposed order restricts dissemination of information that is designated as confidential to certain persons (e.g., counsel of record and their staff, court personnel, court reporters, etc.). The proposed order also allows dissemination of Confidential Information relating to particular putative class members to institutions and individuals, to be designated by counsel of record from the American Civil Liberties Union Fund of Michigan, who will coordinate access for the proposed or actual class members to independent legal representation, provided that those institutions and individuals are first provided with a copy of the Protective Order and agree in writing to be bound by its terms; and to counsel who represent individual class members (or who will represent individual class members once a formal engagement is executed), who shall only be provided information about the class member who is represented or is to be represented by such counsel.

The purpose of these provisions is to facilitate independent legal representation of class members in immigration court. The scope of the relief that should be ordered by this Court will depend on how quickly representation can occur in immigration court. Making basic information about class members available to a small number of individuals who are coordinating access to independent legal services, and to independent immigration counsel (for their

clients only), will allow for more rapid representation and assignment of counsel to occur.

If the Court wishes to enter a Protective Order, Plaintiffs/Petitioners respectfully request that Court enter the proposed order, or whatever order the Court deems necessary, now. Plaintiffs/Petitioners have shared a copy of the proposed Protective Order with Defendants/Respondents, and are prepared to negotiate in good faith with Defendants/Respondents over any amendments that the parties believe are necessary to a protective order entered by the Court, and to return to the Court with a proposed modified protective order, or, if agreement cannot be reached, the parties' respective statements on their positions.

CONCLUSION

For these reasons set forth about, this Court should order Defendants/Respondents to respond by Monday, July 5, 2017 (or within 48 hours of the Court's decision on this motion, whichever is later)**,** to Interrogatories #1 and #2; and to Interrogatory #3 by Wednesday, July 10, 2017; and to provide updated responses on a weekly basis. The Court, if it deems a protective order necessary, should enter the proposed order attached as Exhibit B, and provide that the parties may return to the Court with proposed revisions to that order.

Dated: June 29, 2017

Respectfully submitted,

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* Application for admission forthcoming.

CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2017, I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to all ECF filers of record. I hereby certify that I have mailed by United States Postal Service the paper to the following non-ECF participants:

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

USAMA JAMIL HAMAMA, et al.,

Petitioners and Plaintiffs,

v.

REBECCA ADDUCCI, et al.,

Respondents and Defendants.

Case No. 2:17-cv-11910

Hon. Mark A. Goldsmith
Mag. David R. Grand

Class Action

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Exhibit A

IN THE UNITED STATES DISTRICT COURT
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PLAINTIFFS/PETITIONER'S FIRST SET OF INTERROGATORIES TO DEFENDANTS/RESPONDENTS

Plaintiffs/Petitioners hereby propound the following First Set of Interrogatories to Defendants/Respondents, to be answered separately and under oath under Rule 33 of the Federal Rules of Civil Procedure.

DEFINITIONS AND INSTRUCTIONS

A. Definitions

As used herein, the identified terms or abbreviations have the following meanings:

1. "**LOCATION**" shall mean the present or last known street name and number, city or town, state and zip code and name of the detention facility where the person or entity in question is or has been held.

2. "**DATE** " means the exact day, month and year, if ascertainable, or if not, the best approximation thereof (including by relationship to other events).

3. "**ICE** " means the U.S. Immigration and Customs Enforcement Agency.

4. **"INTER R O GATO R Y"** refers to Plaintiffs/Petitioners' First Set of Interrogatories to Defendants/Respondents in this action.

5. **"PER SO N"** means any natural person, firm, corporation, partnership, proprietorship, cooperative, association, joint venture, organization, governmental body, committee, commission, group, or other entity, and any agent or employee of any of those individual entities. Provide his or her full name, last known business address and telephone number, and last known business position or title and affiliation

6. "**YO U**" and "**YO UR** " refer to the Defendants/Respondents in this action, including all of their departments, agencies, employees and agents, and any other person or entity acting or purporting to act on their behalf, at their direction, or under their supervision.

B. Instructions

1. Use of the singular tense shall be deemed to include the plural and vice versa, and use of the masculine pronoun shall be deemed to include both genders.

2. "And" as well as "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the requests any information which might otherwise be construed to be outside their scope.

3. Answer each Interrogatory set forth below separately and completely in writing under oath. Your response hereto is to be signed and verified by the person making it, and the objections signed by the attorney making them, as required by Federal Rule of Civil Procedure 33(b).

4. In responding to these Interrogatories, furnish all information that is available to you, including information that is available to you or your counsel, or in the possession, custody or control of you or any agent of yours.

5. Each Interrogatory shall be answered fully unless it is objected to in good faith, in which event the reasons for your objection shall be stated in detail.

6. If an objection pertains to only a portion of an Interrogatory, or a word, phrase, or clause contained within it, you are required to state your objection to that portion only and to respond to the remainder of the Interrogatory, using your best efforts to do so.

7. If any Interrogatory cannot be responded to in full after exercising due diligence to secure the information, respond to the extent possible, specifying your inability to respond to the remainder and stating whatever information you have concerning the unanswered portions. If you do not know the answer to an

interrogatory, identify the person or persons who would be expected to know the answer.

8. If any information is withheld by you under a claim of privilege, please set forth in your written response for each document or information for which a claim of privilege is made:

(a) Principals. The name and title of the author(s), sender(s), addressee(s), and recipient(s) of the information.

(b) Date. The date the document or information was created or transmitted.

(c) Publications. The date and title of each person to whom the contents of the information has been disclosed by copy, exhibition, reading, summarization, or otherwise.

(d) Descriptions. A description of the nature and subject matter of the information.

(e) Privilege. A statement of the privilege(s) and the basis or bases upon which the privilege(s) is or are asserted.

9. These Interrogatories are continuing in nature. Therefore, you are obligated to provide, by way of supplemental responses and documents, whatever information may hereafter be obtained by you, or by anyone on your behalf, that will supplement this request. To minimize the burden on Defendants/Respondents,

Plaintiffs/Petitioners request that updated responses can be provided on a weekly basis.

10. All responses to these Interrogatories should be produced in Microsoft Word or Excel native format. If Defendants/Respondents opt to produce records in accordance with Fed. R. Civ. P. 33(d), records should be produced in the format set forth in Exhibit A.

INTERROGATORIES

1. For each ICE Field Office and within each ICE Field Office for each state, territory or District of Columbia, state how many Iraqi nationals with a final order of removal have been arrested there by ICE on or after March 6, 2017 as a result of Iraq's recent decision to issue travel documents to facilitate U.S. removal, and how many such Iraqi nationals are being held in each immigration detention facility in each field office's area of responsibility.

RESPONSE:

2. For every Iraqi national with a final order of removal who has been arrested or detained by ICE on or after March 6, 2017 as a result of Iraq's recent decision to issue travel documents to facilitate U.S. removal, provide the following information:

A. Full name;

B. Date of Birth;

C. Alien Number;

D. Date of final order of removal;

E. Criminal history, if any;

F. Whether an attorney or representative has filed an appearance with the Department of Homeland Security, and if so the name and contact information of that attorney or representative and the date on which he or she filed an appearance;

G. Whether a motion to reopen has been filed and/or a stay has been granted, and the court(s) and date(s) of any such motion and/or stay;

H. Current detention location;

I. All detention locations in which the person has been held on or after March 6, 2017, and the dates the person was detained in those locations; and

J. The detainee's emergency contact information (next of kin).

R ESPO NSE:

3. For every Iraqi national with a final order of removal who has not yet been arrested by ICE but who could be arrested, detained, and removed as a result of Iraq's recent decision to issue travel documents to facilitate U.S. removal, provide the following information:

A. Full name;

B. Date of Birth;

C. Alien Number;

D. Date of final order of removal;

E. Criminal history, if any;

F. Whether an attorney or representative has filed an appearance with the Department of Homeland Security, and if so the name and contact information of that attorney or representative and the date on which he or she filed an appearance;

G. Whether a motion to reopen has been filed and/or a stay has been granted, and the date(s) of any such motion and/or stay; and

H. Last known contact information.

R ESPO NSE:

Dated: June 29, 2017

Respectfully submitted,

By: /s/Kimberly L. Scott
Kimberly L. Scott (P69706)
Cooperating Attorneys, ACLU Fund of Michigan
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Counse lforPlaintiffs/Pe tition

EXHIBIT A
Electronic and Hard Copy Production Specifications for Producing Party

- Mixed production format (images for hard copy and electronic documents, except spreadsheets, presentations, audio and video files, which are to be provided in native file format)
- Black and white images as single-page, Group IV TIFFs, 300 dpi, 1 bit depth
- Color images as JPEG images, 150-300 dpi
- Concordance/Relativity image load file format (.OPT)
- Native files to include corresponding field identifying file path to the native (NATIVE FILE)
- OCR / Extracted Text at the document level and provided as a separate text file with the same naming convention as the TIFF/native, and relative file path identified in the load file (EXTRACTED TEXT)
- Metadata load file (.DAT) with the following delimiters and fields:
    - Column Delimiter: ¶
    - Quote Delimiter: þ
    - New Line Delimiter: ®
    - Multi-Entry Delimiter: ;

Field Name	Description	Electronic/ Native Files	Paper/Hard Copy
Prod Beg	Bates number of the first page of a document (imaged) or the identifying number of an electronic document (native)	X	X
Prod End	Bates number of the last page of a document (imaged)		X
Prod Beg Attach	Bates range of document family - first page of parent (imaged) or identifying number of parent (native)	X	X
Prod End Attach	Bates range of document family - last page of last attachment (imaged) or identifying number of last attachment (native)	X	X
Page Count	Total number of pages in an imaged document	X	X
Custodian	Document custodian in format Last Name, First Name	X	X
Author	Author of an e-doc extracted from metadata	X	
Email From	Author of an email message	X	
Email To	Main recipient(s) of an email message	X	
Email CC	Recipient(s) of “carbon copies” of an email message	X	
Email BCC	Recipient(s) of “blind copies” of an email message	X	
Date Created	Creation date of a native e-doc	X	
Date Last Modified	Date an e-doc was last modified	X	
Date Received	Received date of an email message	X	
Date Sent	Sent date of an email message	X	
Email Subject	Subject of the email message	X	
Document Extension	File extension of native file	X	
Original Folder Path	Full path to source files (if e-doc or loose email) or folder path contained within a mailstore (if NSF or PST)	X	
Filename	Original filename of native file	X	
File Description	Description of native file program or application	X	
MD5 Hash	Unique identifier (“fingerprint”)	X	
Extracted Text	Relative file path to text file containing OCR / extracted text	X	X
Native File	Relative file path created during processing to link native files to database for review	X	

Exhibit B

IN THE UNITED STATES DISTRICT COURT
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Petitioners and Plaintiffs,

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REBECCA ADDUCCI, et al.,

Respondents and Defendants.

Case No. 2:17-cv-11910
Hon. Mark A. Goldsmith
Mag. David R. Grand
Class Action

[PROPOSED] ORDER FOR THE PROTECTION OF CONFIDENTIAL INFORMATION

I. Except as otherwise ordered by this Court, this Order for the Protection of Confidential Information ("Order") shall apply to all documents and information produced and all discovery responses given or filed in this action by the parties and any non-party that produces discovery in this case pursuant to a discovery demand, subpoena, agreement or order of the Court. For purposes of this Order, "documents, information and discovery responses" shall include, but not be limited to, documents and tangible things, responses to requests for production of documents or other things, responses to interrogatories, responses to requests for admissions, deposition testimony and exhibits, and all copies, extracts, summaries or compilations.

II. Any party or non-party from whom production is sought may designate any document, information and discovery response as CONFIDENTIAL that the designating party or non-party reasonably believes not to be in the public domain or that is personal information covered by the Privacy Act, 5 U.S.C. § 552a.

A. Any document, information and discovery response given or filed in this action may be designated by stamping or otherwise marking (in such manner as will not interfere with the legibility of the document) each page of a document containing confidential information with the notation "CONFIDENTIAL."

B. Any copies or reproductions, excerpts, summaries or other documents or media that paraphrase, excerpt or contain CONFIDENTIAL information shall also be treated as CONFIDENTIAL information pursuant to this Order.

1. This Order does not preclude Counsel of Record for Plaintiffs/Petitioners and Defendants/Respondents from disclosing non-personal identifying aspects of CONFIDENTIAL information, such as the fact that certain CONFIDENTIAL information exists or aggregated data and information about the proposed class or members of the class if the class is certified (such as, but not limited to, the number of proposed or actual class members, composition of the proposed or actual class, analysis or summaries about the experiences of proposed or actual class members) that are derived from the CONFIDENTIAL documents, information and discovery responses. Any disclosure of aggregated CONFIDENTIAL documents, information and discovery responses shall not contain any personally identifying information (such as an individual's name, Alien Number or birthdate) that would allow the public to associate any aspect of the aggregated data with an individual.

C. In the event deposition testimony concerns matters that a party or non-party deems CONFIDENTIAL, the entity seeking such protection may designate that portion of the transcript as such (a) during the course of the

deposition (in which case participation in that portion of the deposition may be limited to those persons who are authorized to receive such information pursuant to this Order) or (b) by written designation made within fifteen (15) days of receipt of the relevant transcript. The 15-day period is subject to enlargement or shortening either by consent of all interested entities, such consent not to be unreasonably withheld, or by order of the Court. The parties shall treat each deposition transcript as if designated CONFIDENTIAL until the period for the confidentiality designation of such transcript has expired, after which time the parties shall honor all confidentiality designations in such transcript as provided in this Order.

1. Regardless of the manner in which deposition designation as CONFIDENTIAL is initially made, such written designation shall be accomplished by clearly marking on a copy of that transcript each portion of the transcript containing CONFIDENTIAL information by placing the legend on the page of each portion of the transcript to be so designated.

2. At any deposition session, when counsel for a party or the deponent deems that the answer to a question will result in the disclosure of CONFIDENTIAL information, counsel shall have the option, in lieu of taking other steps available under the Federal Rules of Civil Procedure, to request that all persons other than the reporter, counsel and those who have access to the appropriate category of information, leave the deposition room during that portion

of the deposition. The failure of such other persons to comply with such a request shall constitute substantial justification for counsel to advise the witness that he or she need not answer the question pending.

III. It is the responsibility of counsel for each party to this action to take reasonable precautions to prevent the unauthorized or inadvertent disclosure of any materials containing CONFIDENTIAL information obtained from any party or non-party by maintaining the information in a secure and appropriate manner so as to allow access to the information only to such persons as are permitted pursuant to this Order.

IV. To the extent that CONFIDENTIAL information is contained in or attached to materials filed with the Court in this action, such materials will be filed under seal. No one other than the Court, its agents and employees, and persons authorized by this Order, or any subsequent order of the Court or agreement of the parties, shall have access to such sealed materials.

V. Except with the prior written consent of the party asserting confidential treatment or prior order of the Court, any CONFIDENTIAL document or discovery response, and the information contained therein, may not be disclosed other than in accordance with this Order. All persons to whom CONFIDENTIAL information is disclosed shall be required to abide by the terms of this Order.

VI. CONFIDENTIAL information may also be disclosed to the following individuals:

A. Counsel of Record for Plaintiffs/Petitioners and Defendants/Respondents, and employees and students working under the supervision of such counsel;

B. The Court and its personnel;

C. Court reporters and other personnel engaged to record depositions;

D. Persons engaged by Counsel of Record for the limited purpose of making copies of documents or organizing or processing documents, including outside vendors hired to process electronically stored documents;

E. Consultants, investigators, or experts employed by the parties or Counsel of Record for the parties to assist in the preparation and trial of this action, including locating individuals on the list, but only after such persons have completed the certification contained in Exhibit A, Acknowledgment Regarding the Order;

F. The author or recipient of the document (not including a person who received the document in the course of litigation);

G. Other persons upon order of the Court;

H. For confidential information relating to proposed members of the class or members of the class if the class is certified, the institutions and individuals, to be designated by Counsel of Record from the American Civil Liberties Union Fund of Michigan, who will coordinate access for the proposed or actual class members to independent legal representation, but only after such persons have completed the certification contained in Exhibit A, Acknowledgment Regarding the Order; and

I. For confidential information relating to proposed members of the class or members of the class if the class is certified, counsel who represent individual class members (or who will represent individual class members once a formal engagement is executed). Counsel shall only be provided information relating to the class member who is represented or is to be represented by such counsel.

VII. Nothing in this Order shall preclude any party to this lawsuit or its counsel: (a) from showing any CONFIDENTIAL document or discovery response to an individual who either prepared, authored, or received the document or discovery response prior to the filing of this action; (b) from disclosing or using, in any manner or for any purpose, any information or documents from the party's own files that that party itself has designated as CONFIDENTIAL; or (c) from

disclosing or using, in any manner or for any purpose, any information or documents obtained legally from a source not governed by this Order.

VIII. A party disclosing CONFIDENTIAL information to a person described in paragraph VI.E and H must first: (i) advise the recipient that the information has been designated CONFIDENTIAL pursuant to this Order, and may only be used in connection with this action; (ii) provide the recipient with a copy of this Order; and (iii) have that person execute Exhibit A, the Acknowledgment Regarding the Order.

IX. In the event that a party receiving CONFIDENTIAL documents or information, receives a subpoena, a request for the production of documents in connection with another litigation, or other compulsory process for any such CONFIDENTIAL documents or information from any court or local, state, or federal government entity, the receiving party shall provide notice of the subpoena in writing to the party that produced the information within two (2) business days of receipt of such subpoena, request for production, or other process. The notice will set forth the information subpoenaed or requested, the person requesting the information, and attach a copy of the subpoena or other process. The purpose of the notice is to provide an opportunity for the party that had produced and designated the CONFIDENTIAL information to challenge the subpoena, request, or other process. The receiving party shall not produce any CONFIDENTIAL

information in response to such subpoena, request, or other compulsory process without the prior written consent of the party that produced such information, unless in response to an order of a court or an administrative tribunal of competent jurisdiction.

X. All documents, information and discovery responses designated as CONFIDENTIAL subject to this Order shall be used solely and exclusively for purposes of this action in accordance with the provisions of this Order. No documents, information and discovery response shall be used in or for other cases, proceedings, or disputes, or for any commercial, business, competitive, or other purpose whatsoever, without further order of this Court.

XI. Use by the parties of any CONFIDENTIAL information at pre-trial hearings and at trial shall be governed as follows:

A. In the event that any CONFIDENTIAL information is used in any pre-trial hearing or proceeding in this action, and there is any dispute as to whether such information continues to be CONFIDENTIAL, the parties will meet and confer in an effort to resolve such dispute. If the CONFIDENTIAL information at issue was produced by a non-party, and/or designated by a non-party, the party intending to use the information shall give such non-party ten (10) business days' written notice and an opportunity to participate in the meet and confer. If the dispute cannot be resolved by agreement, the party producing the

information bears the burden of proving the information at issue is CONFIDENTIAL within the definition(s) of those term(s) set forth above.

B. The parties shall confer and attempt to agree, before trial or other hearing, on the procedures under which CONFIDENTIAL information may be introduced into evidence or otherwise used at such trial or hearing.

C. Absent agreement, the Court shall be asked to issue an order governing the use of CONFIDENTIAL information at trial or other hearing upon reasonable notice to all parties and non-parties who have produced such CONFIDENTIAL information.

D. Notice of the potential use at trial or other hearing of any CONFIDENTIAL information produced or designated by non-parties shall be provided to such non-parties by the party intending the use information, along with the terms of any agreement or Court order issued pursuant to paragraph XI.B and C of this Order, if and when any such materials are listed as potential exhibits in the required filings prior to commencement of trial. The party intending to use the information shall give notice as soon as practicable after any CONFIDENTIAL information which is not listed on an exhibit list is determined to be likely to be used by counsel for a party in the course of trial or other hearing subject to an agreement or Court order issued pursuant to paragraph XI.B and C of this Order.

XII. Any party who wishes to challenge another party's designation of information as CONFIDENTIAL may proceed as follows:

A. Any party receiving any information or documents that have been designated as CONFIDENTIAL may object in writing to such designation providing notice to all parties (and to a non-party if that is the designating entity), and identify the desired de-designation by specifying the information or material that the challenging party contends was improperly designated. The designating party (or any other interested party or non-party) shall then have ten (10) days to reject the desired de-designation by so informing the challenging party, in writing, on notice to all parties. (The 10-day period in which to respond is subject to enlargement or shortening by either consent of all interested entities, such consent not to be unreasonably withheld, or the Court.) Absent a timely rejection of the desired de-designation, the information shall be deemed to be de-designated in accordance with the challenging party's notice of de-designation. If such objection cannot be resolved, in good faith, by agreement, the objecting party may file a motion with the Court to determine the propriety of the designation.

B. The objecting party's motion shall: (a) certify that he or she has sought in good faith to confer with opposing counsel and has been unable to resolve the dispute by agreement; and (b) list by document number, deposition page and line number, or other appropriate designation of material lacking bates

numbers, the information that the party claims was improperly designated CONFIDENTIAL.

C. Within ten (10) days after service of such motion, the other party may file a response opposing the motion of up to twenty (20) pages in length. The party seeking the de-designation shall have leave to submit a twenty (20) page reply. The burden of establishing the factual and legal basis for confidential treatment of any information rests with the party requesting such confidentiality.

D. If such motion is timely made as provided in paragraph XII, until the motion is ruled upon by the Court, the designation of confidentiality shall remain in full force and effect and the information shall continue to be accorded the treatment required by this Order.

XIII. Disclosure by the producing party or non-party of CONFIDENTIAL information without proper designation at the time of disclosure shall not be deemed a waiver, in whole or in part, of any party's or non-party's claim to confidentiality, either as to the specific information disclosed or as to any other information relating to the subject matter of the information disclosed. Upon learning of the disclosure of CONFIDENTIAL information without proper designation, the party or non-party seeking protection of the information shall, within ten (10) days, properly designate such information; provided, however, that no party shall be deemed to be in breach of this Order by reason of any use or

disclosure of such information, inconsistent with such later designation, that occurred prior to notification of such later designation.

XIV. Nothing contained in this Order shall affect the right of any party or producing entity to make any objection, claim privilege, or otherwise contest any request for production of documents, subpoena, interrogatory, request for admission, or question at a deposition as permitted by the Federal Rules of Civil Procedure. Nothing in this Order shall constitute an admission or waiver, in whole or in part, of any claim, privilege, or defense by any party or producing entity.

A. If a producing party or non-party inadvertently produces privileged material, upon learning of the inadvertent disclosure, it shall promptly so notify in writing those persons to whom it produced that material. Upon receipt of such notification, the receiving persons shall immediately return to the producing party or non-party all copies of such material in its possession and shall immediately delete all electronic copies of such material. The receiving persons shall also immediately inform any person to whom disclosure of such material was made of the inadvertent disclosure, and shall request that each such person immediately destroy and/or delete all copies of such material within its possession and shall expunge from any other document or material information solely derived from the inadvertently produced information except where the document or

information has been made part of the record or a filing in the action in which case the burden of seeking removal or expungement shall be on the designating party.

XV. If a person who receives CONFIDENTIAL information realizes that any of that information is subject to the attorney-client, work-product, or other privilege, that person shall promptly notify the producing party, return the privileged information, delete all electronic copies of such information, and shall expunge from any other document or material the information solely derived from the inadvertently produced privileged information except where the document or information has been made part of the record or a filing in the action in which case the burden of seeking removal or expungement shall be on the designating party. Those persons shall also immediately inform any other person to whom disclosure of such material was made, and shall request that each such person immediately destroy and/or delete all copies of such material within its possession.

XVI. Any party shall be free to move to modify this Order.

XVII. A failure to challenge the propriety of a designation of confidentiality at the time the designation is made shall not preclude or detract from a subsequent challenge thereto.

XVIII. All materials containing CONFIDENTIAL information that are submitted to the Court or used in any pretrial proceeding before this Court shall continue to be entitled to the protection provided by this Order.

XIX. Each person who receives CONFIDENTIAL information agrees to subject himself or herself to the jurisdiction of this Court for the purpose of any proceedings relating to the performance under, compliance with, or violation of, this Order.

XX. Not later than 120 calendar days after conclusion of this action and any appeal related to it, all CONFIDENTIAL information of any type, all copies thereof, and all excerpts therefrom shall be returned to counsel for the party or non-party producing the documents, or destroyed, at the producing entity's option, except that outside counsel for each of Plaintiff and Defendants may retain one copy of all CONFIDENTIAL information, and except as this Court may otherwise order or to the extent such information has been used as evidence at any trial or hearing. Notwithstanding this obligation to return or destroy information, counsel may retain any attorney work product.

XXI. After termination of this action, the provisions of this Order shall continue to be binding, except with respect to those documents and information that become a matter of public record. This Court retains and shall have jurisdiction over the parties and recipients of CONFIDENTIAL information of any type for enforcement of the provisions of this Order following termination of this litigation.

XXII. A breach of the provisions of this Order shall be subject to sanctions, in the discretion of the Court as within or authorized by any statute, rule or inherent power of the Court, or as otherwise provided by law.

XXIII. This Order shall have no effect on whether a document or information is discoverable. This Order shall not be used as a basis to expand the scope of discovery permitted by applicable law. Any agreement of the parties embodied in this Order does not constitute an admission or agreement that any document or information designated CONFIDENTIAL by a party or non-party: (a) is entitled to any confidentiality; (b) is competent, relevant, or material; (c) is subject to discovery; or (d) is admissible as evidence in this case. Designation of any information subject to this Order shall have no meaning or effect with respect to the substantive issues in this proceeding for the claims or defenses of any party hereto.

XXIV. This Order does not require production of (a) work product material or information or (b) materials or information covered by the attorney-client or other applicable, state or other, privileges. Such material may continue to be withheld from discovery by any party, unless the Court orders otherwise.

Dated:_____ SO ORDERED

_____
MARK A. GOLDSMITH
UNITED STATES DISTRICT JUDGE

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

USAMA JAMIL HAMAMA, et al.,

Petitioners and Plaintiffs,

v.

REBECCA ADDUCCI, et al.,

Respondents and Defendants.

Case No. 2:17-cv-11910
Hon. Mark A. Goldsmith
Mag. David R. Grand
Class Action

EXHIBIT A

ACKNOWLEDGMENT REGARDING THE ORDER FOR THE PROTECTION OF CONFIDENTIAL INFORMATION

I,_____, have read and understand the Order for the Protection of Confidential Information ("Order") entered by the Court in this case and agree to be bound by the provisions of that Order. I agree to subject myself to the jurisdiction of this Court for purposes of any proceedings relating to performance under, compliance with or violation of the Order.

_____
Signature

_____
Print Name

Dated: _____

Exhibit C

2015 WL 5139606
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan, Southern Division.

Fabreeka International Holdings, Inc., Plaintiff,
v.
Robert Haley, and Armadillo Noise & Vibration LLC, Defendants.

Case No. 15–cv–12958
|
Signed 09/01/2015

Attorneys and Law Firms

James F. Hermon, Dykema Gossett Detroit, MI James F. Hermon, Dykema Gossett, Detroit, MI, for Plaintiff.

OPINION AND ORDER DENYING MOTION FOR TEMPORARY RESTRAINING ORDER [4], AND ORDERING DEFENDANTS TO SHOW CAUSE WHY THE COURT SHOULD NOT GRANT PLAINTIFF'S MOTION FOR EXPEDITED DISCOVERY [6] AND/OR ISSUE A PRELIMINARY INJUNCTION

GERSHWIN A. DRAIN, United States District Court Judge

I. INTRODUCTION

***1** Fabreeka International Holdings, Inc. ("Fabreeka" or "Plaintiff") commenced the instant action against its former employee, Robert Haley, and his new employer, Armadillo Noise & Vibration ("Armadillo"), (collectively "Defendants") on August 20, 2015. *See* Dkt. No. 1. In the Complaint, Fabreeka alleges that Haley unlawfully accessed its computers to obtain confidential information in violation of the Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030. Additionally, Fabreeka brings claims against Haley under Michigan law for Breach of Contract, Conversion, and violating the Michigan Uniform Trade Secrets Act ("MUTSA"), MICH. COMP. LAWS § 445.1901 *et seq*. *Id.* Fabreeka brings a claim against Armadillo for Tortious Interference with Contractual Relations. *Id.*

Presently before the Court are Fabreeka's Motions for a Temporary Restraining Order [4], and Expedited Discovery [6]. The Court held a hearing on these Motions with Fabreeka present on August 24, 2015. After considering the parties briefing and argument during the hearing, the Court will **DENY** Fabreeka's Motion for Temporary Restraining Order [4]. The Court will continue to take Fabreeka's Motion for Expedited Discovery [6] under advisement. Moreover, the Court will order Defendants to Show Cause why the Court should not grant Plaintiff's motion for Expedited Discovery [6] or issue a preliminary injunction. The Court's Opinion and Order is set forth in detail below.

II. BACKGROUND

Fabreeka International Holdings, Inc. ("Fabreeka" or "Plaintiff") is a Massachusetts corporation with a principle place of business at 1023 Turnpike Street, Stoughton, Massachusetts 02072. *See* Dkt. No. 1 at ¶ 1. Fabreeka designs, manufactures, installs and services shock control, vibration isolation and thermal break equipment for manufactures. *See id.* at ¶ 2. Fabreeka is owned by Fabreeka Group Holdings, Inc., which is a wholly-owned subsidiary of Kaydon Corporation ("Kaydon"), a Delaware Corporation with a principle place of business at 2723 South State Street, Suite 300, Ann Arbor, Michigan 48104. *See id.* at ¶ 3.

Robert Haley is believed to be a Massachusetts resident who was employed by Fabreeka in a variety of sales, marketing and engineering positions from 1986 until he resigned on July 24, 2014. *See* Dkt. No. 1 at ¶¶ 4–5. On August 5, 2015, Haley accepted a position as President of Armadillo Noise & Vibration LLC ("Armadillo"), which is a Massachusetts limited liability company that is managed by Jonathan Shaw and affiliated with Armadillo Noise & Vibration Ltd., based in West Yorkshire, United Kingdom. *See id.* at ¶ 6.

Fabreeka commenced this action alleging that Haley stole files from the computer system of Fabreeka and used those files and the trade secrets they contained to improperly solicit business with his new employer. *See* Dkt. No. 1 at ¶ 11. Fabreeka contends that Haley's actions were in violation of federal and state laws and the confidentiality, non-compete, non-solicitation, assignment of inventions and return of corporate property provisions set forth in

his Employment Agreement (the "Agreement"). *See* Dkt. No. 1 at ¶ 11.

***2** Upon learning of Haley's alleged transgressions, Fabreeka states that it sent correspondence to both Haley and Armadillo demanding that the parties refrain from using confidential and proprietary information in violation of the law. *See* Dkt. No. 1 at ¶ 44. Fabreeka states that this outreach was unsuccessful leading Fabreeka to commence this action, and seek the Temporary Restraining Order and Expedited Discovery to protect its confidential information and legitimate business interests. *See id.* at ¶¶ 45–46

III. DISCUSSION

As mentioned previously, the Court held a hearing on August 24, 2015 in order to allow Fabreeka to make its case for a temporary restraining order. After listening to Fabreeka's argument, the Court indicated that it was not swayed that a temporary restraining order was appropriate at this stage. However, the Court was amenable to expedited discovery and did not foreclose a preliminary injunction in the future once there was more information, as the Court has yet to hear from the Defendants. Accordingly, the Court set a hearing for September 10, 2015 at 10:00 a.m. to hear from Defendants. This Order will serve as official notice to the Defendants to Show Cause why this Court should not permit expedited discovery and why this Court should not permit expedited discovery and/or issue a preliminary injunction. A brief analysis for the Court's reasoning is below.

A. Temporary Restraining Order will be Denied

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, a temporary restraining order may be issued "without written or oral notice to the adverse party or its attorney only if: (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and (B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required." FED. R. CIV. P. 65(b)(1).

Temporary restraining orders and preliminary injunctions are extraordinary remedies designed to preserve the relative positions of the parties until further proceedings on the merits can be held. *See Bonnell v. Lorenzo,* 241 F.3d 800, 808 (6th Cir.2001). Whether to grant such relief is a matter within the discretion of the district court. *See Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.,* 511 F.3d 535, 540 (6th Cir.2007). The same factors are considered in determining whether to grant a request for either a temporary restraining order or a preliminary injunction. *See Ohio Republican Party v. Brunner,* 543 F.3d 357, 361 (6th Cir.2008). Those factors are (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by the issuance of the injunction. *Certified Restoration,* 511 F.3d at 542.

"Although no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal." *Gonzales v. National Bd. of Medical Examiners,* 225 F.3d 620, 625 (6th Cir.2000). "None of these factors, standing alone, is a prerequisite to relief; rather, the court should balance them." *Golden v. Kelsey–Hayes Co.,* 73 F.3d 648, 653 (6th Cir.1996). The Court reiterates that preliminary injunctive relief is an extraordinary remedy that should be granted only if the movant carries his burden of proving that the circumstances clearly demand it. *Overstreet v. Lexington–Fayette Urban County Gov't,* 305 F.3d 566, 573 (6th Cir.2002). Applying the factors, the Court does not find that injunctive relief is appropriate at this juncture.

1. It is not clear that Fabreeka has a strong likelihood of success on the merits.

***3** Fabreeka is adamant that it has a strong likelihood of success on the merits. *See* Dkt. No. 5 at 20–25. However, Fabreeka only focuses on its state law claims and does not focus on its only claim pursuant to federal law, which was brought under the CFAA. In *American Furukawa, Inc. v. Hossain,* another case before this Court, the Court conducted a comprehensive analysis of the CFAA. —— F.Supp.3d. ——, 2015 WL 2124794, at *5 (E.D.Mich. May 6, 2015). In *Furukawa,* this Court found that the following standards must be met to set forth claims under the CFAA:

> [T]o set forth a proper civil claim under the CFAA based on a violation of Subsection (a)(2), Furukawa must show that Hossain: (1) intentionally accessed a computer, (2) without authorization or exceeding authorized access, and that he (3) thereby obtained information (4) from any protected computer (if the conduct involved an interstate or foreign communication), and that (5) there was loss to one or more persons during any one-year period aggregating at least $5,000 in value. *See LVRC Holdings LLC v. Brekka,* 581 F.3d 1127, 1132 (9th Cir.2009).
>
> To successfully bring an action under the CFAA based on a violation of Subsection (a)(4), Furukawa must show that Hossain: (1) accessed a "protected computer," (2) without authorization or exceeding such authorization that was granted, (3) "knowingly" and with "intent to defraud," and thereby (4) "further [ed] the intended fraud and obtain[ed] anything of value," causing (5) a loss to one or more persons during any one-year period aggregating at least $5,000 in value. *See id.* (citing *P.C. Yonkers, Inc. v. Celebrations the Party and Seasonal Superstore, LLC,* 428 F.3d 504, 508 (3d Cir.2005)).

Furukawa, 2015 WL 2124794, at *5. In *Furukawa*, the Court adopted a narrow definition of the CFAA's "without authorization" language, finding that the Sixth Circuit has adopted the Ninth Circuit's approach to find that "[n]othing in the CFAA suggests that a defendant's liability for accessing a computer without authorization turns on whether the defendant breached a state law duty of loyalty to an employer." *Id.* at *9 (citing *Brekka*, 581 F.3d at 1135); *see also id.* (referencing the Sixth Circuit decision in *Pulte Homes, Inc. v. Laborers' International Union of North America,* 648 F.3d 295 (6th Cir.2011)). However, the Court did not adopt a narrow definition of the CFAA's "exceeds authorization" language, and relied on the unambiguous definition provided by Congress to find that " 'an individual who is authorized to use a computer for certain purposes *but goes beyond those limitations* ... has 'exceed [ed] authorized access.' " *Id.* (quoting *Pulte Homes,* 648 F.3d at 304, which quotes *Brekka,* 581 F.3d at 1133)).

Keeping these standards in mind, the Court finds that it is not immediately clear that Fabreeka has a strong likelihood of success on the merits after reading its briefs and listening to its argument. The CFAA is briefly mentioned once in Plaintiff's Motion for Temporary Restraining Order, and the analysis is conflated with Fabreeka's MUTSA argument. *See generally* Dkt. No. 5 at 15. For the most part, Fabreeka exclusively focuses on Haley's breach of the confidentiality agreement and state law claims under the MUTSA. *See generally* Dkt. Nos. 4, 5; *cf. Furukawa,* 2015 WL 2124794, at *9 (quoting *Brekka,* 581 F.3d at 1135 and referencing *Pulte Homes,* 648 F.3d at 304 to note that "[n]othing in the CFAA suggests that a defendant's liability for accessing a computer without authorization turns on whether the defendant breached a state law duty of loyalty to an employer."). Similarly, at the hearing Plaintiff only spoke broadly about the claim under the CFAA after being pressed by the Court. *Cf.* Dkt. No. 1 at ¶¶ 47–53 (merely laying out the elements of the CFAA). In light of these facts, the Court finds that this factor does not support the issuance of preliminary injunctive relief at this time.

2. Fabreeka may suffer irreparable injury without injunctive relief.

***4** To satisfy the second factor, a party must demonstrate that unless the injunction is granted, it will suffer " 'actual and imminent harm' rather than harm that is speculative or unsubstantiated." *Abney v. Amgen, Inc.*, 443 F.3d 540, 552 (6th Cir.2006). "Loss of customer goodwill and fair competition can support a finding of irreparable harm. Such losses often amount to irreparable injury because the resulting damages are difficult to calculate." *Superior Consulting Co. v. Walling,* 851 F.Supp. 839, 847 (E.D.Mich.1994) *appeal dismissed and remanded sub nom. Superior Consultant Co. v. Walling,* 48 F.3d 1219 (6th Cir.1995) (concluding that the use of confidential information concerning the "specific needs and service provided to the plaintiff's clients" would enable the defendant "effectively to solicit [the plaintiff's] clients, and to undercut [the plaintiff]'s rates while providing the same services provided by [the plaintiff]."). In light of this standard, the Court is persuaded that Fabreeka may suffer irreparable injury without the injunction. *See* Dkt. No. 5 at 25–27; *Cf. Lowry Computer Products, Inc. v. Head,* 984 F.Supp. 1111, 1116 (E.D.Mich.1997) ("If [Defendant] is working for a direct competitor in a similar area, her knowledge is bound to have a significant adverse impact on [Plaintiff's] business. The injury will be irreparable if [Plaintiff] loses customers it has spent years and significant resources obtaining.").

3. The final two factors generally support injunctive relief in this situation.

The final two factors "depend mainly on the amount of confidential information that defendant possesses and might be reasonably expected to divulge [.]" *Lowry,* 984 F.Supp. at 1116. Whether injunctive relief would cause substantial harm to others centers on the balance of hardship between the parties. *See Walling,* 851 F.Supp. at 847. Obviously, precluding Mr. Haley from his current employment is likely to cause substantial harm to Mr. Haley. However, he would not be precluded from working altogether. *Cf. Lowry,* 984 F.Supp. at 1116 ("[D]efendant is not precluded from selling other computer products, and appears to be a well-qualified sales person."). Moreover, this court has determined that the enforcement of non-compete agreements is in the public interest. *Walling,* 851 F.Supp. at 848. Accordingly, the Court finds that these two factors generally support injunctive relief in this situation.

4. The balancing of the factors weighs against the injunctive relief at this time.

The Court reiterates that "[n]one of these factors, standing alone, is a prerequisite to relief; rather, the court should balance them." *Golden v. Kelsey–Hayes Co.,* 73 F.3d 648, 653 (6th Cir.1996). However, the Court emphasizes that "[a]lthough no one factor is controlling, a finding that there is simply no likelihood of success on the merits is usually fatal." *Gonzales v. National Bd. of Medical Examiners,* 225 F.3d 620, 625 (6th Cir.2000).

Here, the Court emphasizes that Fabreeka's CFAA claim is the only federal claim before the Court. If Fabreeka does not demonstrate a likelihood of success on this claim, this Court would dismiss the case and avoid a needless decision of state law. *See Gaines v. Blue Cross Blue Shield of Michigan,* 261 F.Supp.2d 900, 905 (E.D.Mich.2003) (citations omitted) (noting that in determining whether to exercise its supplemental jurisdiction, this Court must consider "judicial economy, convenience, fairness and comity, and also avoid needless decisions of state law."); *see also Widgren v. Maple Grove Tp.,* 429 F.3d 575, 586 (6th Cir.2005) (quoting *Musson Theatrical, Inc. v. Fed. Express Corp.,* 89 F.3d 1244, 1254–55 (6th Cir.1996) to state: "When all federal claims are dismissed before trial, the balance of considerations will usually point to dismissing the state law claims[.]").

Although the other three factors weigh in favor of issuing injunctive relief, the Court will deny Plaintiff's Motion for Temporary Restraining Order [4], because Fabreeka has not sufficiently explained the basis for its CFAA claim. Because the other factors have been shown, the Court is not foreclosing future injunctive relief at a later date. The Court will wait to hear from the Defendants and hear a full argument before deciding to grant future injunctive relief.

B. Expedited Discovery Will be Taken Under Advisement

***5** With respect to expedited discovery, the Court notes that Rule 26 of the Federal Rules of Civil Procedure authorizes the Court to permit discovery prior to the Rule 26(f) conference of the parties. *See Arista Records, LLC v. Does 1–15,* No. 2:07–CV–450, 2007 WL 5254326, at *2 (S.D.Ohio May 17, 2007). Expedited discovery may be granted upon a showing of good cause. *Id.* Plaintiff, as the party seeking expedited discovery, bears the burden of demonstrating good cause. *See Qwest Communications Int'l Inc. v. Worldquest Networks, Inc.,* 213 F.R.D. 418, 419 (D.Colo.2003) (citing relevant authoirty).

"Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party." *Arista Records, LLC,* 2007 WL 5254326, at *2 (quoting *Semitool, Inc. v. Tokyo Electron Am., Inc.,* 208 F.R.D. 273, 276 (N.D.Cal.2002)). In determining whether good cause exists, the Court may also consider whether evidence may be lost or destroyed with time and whether the scope of the proposed discovery is narrowly tailored. *See Caston v. Hoaglin,* Civ. No. 2:08–cv–200, 2009 WL 1687927, at * 2 (S.D.Ohio June12, 2009).

Throughout its briefs and at the hearing, Fabreeka has put forth a convincing argument that good cause exists for expedited discovery. Indeed, as mentioned previously, the majority of factors supporting injunctive relief have been shown, such that the Court is not foreclosing future injunctive relief. If Fabreeka sufficiently explains its CFAA claim, Fabreeka will likely need expedited discovery in order to make its argument for a preliminary injunction. Accordingly, the Court will Order Defendants to show cause in writing why this Court should not grant

Plaintiff's motion for Expedited Discovery [6] and/or issue a preliminary injunction. The Court will cover both of these topics at the September 10, 2015 hearing.

IV. CONCLUSION

For the reasons discussed, the Court **HEREBY DENIES** Plaintiff's Motion for Temporary Restraining Order [4]. Additionally, the Court **HEREBY ORDERS** Defendants to Show Cause why this Court Should not Grant Plaintiff's Motion for Expedited Discovery [6] and/or Issue a Preliminary Injunction. Defendants shall show cause ***in writing no later than September 8, 2015***.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2015 WL 5139606

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Exhibit D

2013 WL 416295
Only the Westlaw citation is currently available.
United States District Court, E.D. Tennessee.

RADIO SYSTEMS CORPORATION, Plaintiff,
v.
SUNBEAM PRODUCTS, INC., d/b/
a Jarden Consumer Solutions, Defendant.

No. 3:12–CV–648.
|
Jan. 30, 2013.

Attorneys and Law Firms

Maia T. Woodhouse, Samuel F. Miller, Baker, Donelson, Bearman, Caldwell & Berkowitz (Nashville), Nashville, TN, for Plaintiffs.

Thor Y. Urness, Bradley Arant Boult Cummings LLP (Nashville), Nashville, TN, for Defendant.

MEMORANDUM AND ORDER

H. BRUCE GUYTON, United States Magistrate Judge.

***1** This case is before the undersigned pursuant to 28 U.S.C. § 636, the Rules of this Court, and the order of the District Judge [Doc. 13] referring Plaintiff's Combined Motion for Expedited Discovery and Memorandum of Law in Support [Doc. 12] to the undersigned for disposition or report and recommendation as appropriate.

In its Motion for Expedited Discovery, the Plaintiff moves the Court to permit the parties to engage in expedited discovery prior to conducting a conference under Rule 26(f) so that the parties will have discovery before a hearing on the Plaintiff's Motion for Preliminary Injunction [Doc. 4]. Plaintiff alleges that Defendant is infringing upon United States Patent No. 5,927,233, which is a patent assigned to a control system for training pet dogs not to bark. The Plaintiff argues that it must obtain discovery prior to arguing for the injunctive relief required to protect its intellectual property. The Plaintiff cites the Court to cases from the Eastern District of Tennessee and other courts endorsing the view that good cause for expedited discovery is generally found in cases involving requests for injunctive relief, claims of infringement, and unfair competition. [Doc. 12 at 3–4].

Defendant has responded in opposition to the Plaintiff's request for expedited discovery. [Doc. 20]. Defendant argues that the Plaintiff has failed to demonstrate good cause to support its requested relief. Defendant maintains that the Plaintiff will not suffer irreparable harm because: (1) the Plaintiff has filed a complaint with the International Trade Commission ("ITC"); (2) the Defendant is not infringing on the Plaintiff's patent; (3) if the preliminary injunction were granted, any damages from infringement up to the issuance of the injunction are fully compensable by monetary damages; and (4) irreparable harm in connection with a denial of preliminary injunction is not the same as irreparable harm in connection with a denial of expedited discovery. [Doc. 20 at 9]. The Defendant further argues that the scope of the discovery is excessive and will impose an undue burden on the Defendant.

In its reply [Doc. 21], the Plaintiff argues that the ITC action does not automatically stay the instant proceeding and is not a basis for denying the request for expedited discovery. Plaintiff reiterates that the injunctive relief and claims for infringement alleged are commonly recognized as demonstrating good cause. Plaintiff argues that Sunbeam may be in possession of relevant, non-public documents that bear directly on Plaintiff's claims, and Plaintiff maintains that the discovery requested is not unduly burdensome.

Rule 26 of the Federal Rules of Civil Procedure provides, in pertinent part, that "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order." Fed.R.Civ.P. 26(d)(1). The Advisory Committee Notes to Rule 26 further indicate that:

> ***2** Discovery can begin earlier [than the limitation established by Rule 26(d)(1)] if authorized under Rule 30(a)(2)(C) (deposition of person about to leave the country) or by local rule, order, or stipulation. This will be appropriate in some cases, such as those **involving requests for a preliminary injunction**

> or motions challenging personal jurisdiction.

Fed.R.Civ.P. 26(d) 1993 Advisory Committee Notes (emphasis added).

The courts within the Sixth Circuit have endorsed the view, expressed in the Committee Notes, that expedited discovery is generally appropriate in cases requesting preliminary injunctive relief. *See, e.g., S.E.C. v. Wilson,* 2012 WL 5874456 (E.D.Mich. Nov.20, 2012) (granting leave to immediately schedule depositions and issue written discovery requests where a preliminary injunction request was pending); *Tenn. Guardrail, Inc. v. Tenn. Dept. of Transp.,* 2011 WL 5153086, at *4–5 (M.D.Tenn. Oct.28, 2011) (setting a preliminary injunction hearing and ordering expedited discovery to take place in advance of the hearing); *USEC Inc. v. Everitt,* 2009 WL 152479 (E.D.Tenn. Jan.22, 2009).

In their briefing, the parties acknowledge that a Rule 26(f) conference has not taken place in this case. Therefore, discovery cannot commence absence a showing of good cause supporting expedited discovery. The Court finds that Plaintiff has shown good cause for allowing expedited discovery based upon the allegations of patent infringement and request for preliminary injunction in this case. The Court, however, finds that good cause has not been shown for the extremely expedited schedule for responses proposed by the Plaintiff. Moreover, the Court has modified the proposed perameters for the expedited discovery to conform with the Local Rules and practices of the Eastern District of Tennessee.

Accordingly, the Motion for Expedited Discovery **[Doc. 12]** is **GRANTED IN PART** and **DENIED IN PART,** as follows:

1. The parties shall make their initial disclosures pursuant to Rule 26(a) of the Federal Rules of Civil Procedure on or before **February 14, 2013.**

2. The parties shall submit a joint protective order on or before **February 14, 2013.**

3. Plaintiff shall immediately serve the Plaintiff's First Set of Limited Interrogatories and Requests for the Production of Documents and Things to Defendant Sunbeam Products Inc. d/b/a Jarden Consumer Solutions on the Defendant. The Defendant shall respond to and produce the documents responsive to this written discovery on or before **February 21, 2013.**

4. This Memorandum and Order does not address the merits of any claim of privilege or objection to responding to the written discovery made pursuant to the Federal Rules of Civil Procedure.

5. Any objection to responding to the written discovery shall be included in the written response provided to the Plaintiff. An objection to a discrete point of inquiry or production **shall not** be cited as a basis for withholding other responses to different inquiries or requests for production. If Plaintiff seeks to compel a response following receipt of a written objection from Defendant, the parties **shall:** (1) confer amongst themselves within **three (3) days** of service of the written objection, and (2) if the issue cannot be resolved amongst the parties, contact the chambers of the undersigned to schedule a telephone conference to address the issue. Only after employing this process and receiving court approval may the parties engage in motion practice on any response or production issue or other discovery dispute.

***3** 6. The parties may take no more than **five (5)** depositions per side during this period of preliminary discovery. The parties shall provide a list of Rule 30(b)(6) topics to opposing counsel by no later than **seven (7) days** prior to the deposition of Rule 30(b)(6) deponent.

7. If any party determines that additional discovery beyond the limitations of this Memorandum and Order is required, they shall comply with the conferral process outlined in ¶ 5 to request leave to undertake additional discovery.

8. The parties shall disclose any expert witness that they intend to have testify at any hearing on the request for preliminary injunction on or before **February 22, 2013,** and shall supply an expert report on the date of disclosure.

9. Consistent with the Federal Rules of Civil Procedure, the parties are prohibited from destroying documents relating to allegations and potential defenses in this case.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 416295

End of Document

Exhibit E

2012 WL 5874456
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Northern Division.

U.S. SECURITIES and EXCHANGE COMMISSION, Plaintiff,
v.
Joel WILSON et al., Defendants.

No. 12–cv–15062.
|
Nov. 20, 2012.

OPINION AND ORDER GRANTING IN PART AND HOLDING IN ABEYANCE IN PART PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION, ASSET FREEZE, AND OTHER EMERGENCY RELIEF

THOMAS L. LUDINGTON, District Judge.

***1** "The mission of the U.S. Securities and Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation." [1] The principal way that the SEC fulfills its mission is by enforcing federal securities laws, including by bringing civil lawsuits.

This is such a case. On November 15, 2012, Plaintiff Securities and Exchange Commission filed suit in this Court against Defendant Joel Wilson and two of his companies, Defendants Diversified Group Partnership Management, LLC, and American Realty. Plaintiff alleges that Defendants violated several federal securities laws, including making an unregistered offer and sale of securities in violation of 15 U.S.C. § 77e, and committing fraud in the offer and sale of securities in violation of 15 U.S.C. § 77q.

The same day as Plaintiff filed its complaint, it filed a motion for a preliminary injunction, asset freeze, and other emergency relief. For reasons detailed below, the motion will be granted in part and held in abeyance in part. The request for expedited discovery will be granted. The request for a preliminary injunction and an asset freeze will be held in abeyance pending a hearing, which will be scheduled for December 10, 2012, at 10 am.

I

The following allegations are taken from the complaint and are recounted here by way of background. No presumption of truth should be inferred from their inclusion here.

A

Wilson is in the business of flipping houses in Bay City, Michigan. Compl. ¶ 2. His business model is straightforward. Buy a property. Fix it up. Resell it via land contract for a profit. Simple enough. The manner that he organizes and funds his business, however, is far less simple.

Wilson conducts his business through at least four companies—W R Rice; Diversified Group Advisory Firm; Defendant Diversified Group Partnership Management, LLC; and Defendant American Realty Funds Corporation—and as many as 17 limited partnerships. *Id.* ¶¶ 2, 10.

W R Rice is a registered broker-dealer. *Id.* ¶ 10. Diversified Group Advisory Firm is a registered investment advisor. *Id.* Diversified Group Partnership Management, a Michigan limited liability company, serves as the general partner of each of the 17 limited partnerships. *Id.*

Wilson funds his business through soliciting investments. Compl. ¶ 3. It is this public involvement that has brought the scrutiny of Plaintiff and the Financial Industry Regulatory Authority (FINRA).

B

Since 2009, Wilson has obtained about $6.7 million from 120 investors. Compl. ¶ 3. Diversified Group Partnership Management has raised about $900,000; American Realty, $5.8 million. *Id.*

Diversified Group Partnership Management raised the funds by selling debentures, a type of unsecured

promissory note. Compl. ¶ 3. Prospective investors were told that the debentures would carry a ten year term and offer a 10 percent interest payment disbursed semi-annually. *Id.* ¶ 27. They were also told "that their money would be used for the purchase, renovation, and sale of Michigan real estate, and that the proceeds from the sale of these properties would be used to pay investors their interest payments." *Id.* ¶ 32.

***2** American Realty raised the funds by selling limited partnership interests. Prospective investors were given an "offering document" claiming to describe both "the use to be made of investor funds" and "the Diversified Group's financial condition." Compl. ¶ 35. The investor funds would be used, the offering document explained, to facilitate land contracts on the refurbished houses. Specifically, the funds would be given by the limited partnerships to Diversified Group Partnership Management. *Id.* ¶ 38. In return, the limited partnerships would receive "(1) a secured interest in the underlying property in the event of a default through a repurchase agreement executed by Diversified Group, and (2) the monthly payment stream received from the homebuyers." *Id* . Thus, the investment promised a steady, secured revenue stream.

The offering document went on, however, to caution that the funds could be put to another use "if no suitable land contracts were available." Compl. ¶ 44. The offering document specified: "Diversified Group may loan the proceeds to American Realty via a nine month note at an annual interest rate of 9.9% amortized over 30 years in order to mimic the return on a land contract." *Id.* (brackets and quotation marks omitted). Rather than a backup plan, however, Wilson soon made this the primary use of the investors' funds. *Id.* ¶ 45.

C

The first three limited partnerships, as promised in the offering document, invested in land contracts. Compl. ¶ 45. These partnerships were dissolved in 2011. *Id.* The next fourteen limited partnerships "did not purchase any land contract servicing rights but instead entered into promissory notes under which the investors' money was loaned to either Diversified Group or American Realty." *Id.* ¶ 46. For limited partnerships 4 through 17, that is, "unsecured loans to Wilson's companies had become the exclusive use of investor money." *Id.* ¶ 47. Wilson has since "admitted that he decided in April or May 2011 to change the structure of the LP investments from purchasing land contract revenue for the LPs to making unsecured loans to [Diversified Group Partnership Management and American Realty] via promissory notes." *Id.* ¶ 83.

D

Despite this repurposing, however, Wilson was not able "generate enough income to make the monthly payments owed to investors." Compl. ¶ 52. Presently, the principal and accrued interest due to Wilson's investors is $6.7 million. *Id.* ¶ 56. Wilson does not have it. "As of October 31, 2012, the known bank accounts for Wilson's companies, Diversified Group, American Realty and W R Rice, held only $42,528." *Id.* ¶ 57.

A challenging market and unsuccessful business model is only partly to blame for the shortfall. Compl. ¶ 60. Wilson has also diverted at least $582,000 of investor money to his own personal benefit. To take three examples, "Wilson spent approximately $352,653 from an account containing investor money to pay bonuses to himself and his Diversified Group co-owner." *Id.* ¶ 61. "Wilson spent approximately $46,780 from an account containing investor money on personal travel, including $4,472 he paid for a birthday trip to Las Vegas in May 2012." *Id.* ¶ 63. And "Wilson spent approximately $7,914 from an account containing investor money to buy tickets to Red Wings games." *Id.* ¶ 68.

***3** To conceal the shortfall, Wilson tried to convince the limited partnership investors "to roll over their accrued monthly income and to use that income to acquire additional units in the LPs." Compl. ¶ 50. Most agreed. He then sent them monthly account statements that "misrepresented that the real estate business had earned sufficient income to make the payments." *Id.* 54.

In the fall 2011, Wilson realized that even this was not going to be sufficient to conceal the shortfall. Compl. ¶ 74. So he unilaterally changed the terms of the promissory notes, deferring repayment to the investors. Specifically, Diversified Group Partnership Management, acting as the general partner for each of the 17 limited partnerships, extended the maturity of the promissory notes that Diversified Group and American Realty had executed

in favor of the limited partnerships (which, in turn, would repay the investors). *Id.* ¶¶ 76–80. Wilson has since "admitted that he extended the maturity dates on some of the promissory notes held by the LPs because the business had insufficient funds to repay the principal on the notes." *Id.* ¶ 89. Investors were not told of the change until Plaintiff and FINRA commenced their investigations. *Id.* ¶ 78.

E

American Realty is a publically traded corporation, and it is therefore required to file quarterly reports with Plaintiff (SEC Form 10–Q reports). Compl. ¶ 93. On its Form 10–Q for the first quarter of 2012, American Realty reported that it "had entered into promissory notes with Diversified LPs 5 through 11 and that American Realty is obligated to make interest payments to the LPs on a monthly basis." *Id.* ¶ 100. The report was filed on March 31, 2012. *Id.* Bank records reveal that American Realty missed making its monthly interest payment in March 2012. *Id.* This missed payment was not disclosed on the Form 10–Q. *Id.* ¶ 102.

American Realty's finances experienced continued strain in the months that followed. April 2012, another missed interest payment. Compl. ¶ 101. *Id.* May, June, July, August, and September 2012, more missed payments. *Id.* Collectively, American Realty missed making payments of about $140,000.

F

Still searching for capital, Wilson hit upon a stock offering. In August 2012, he filed with Plaintiff a notice of intent to offer 2.5 million shares of American Realty stock. Compl. ¶ 103. The notice (filed on SEC Form S–11) specifies that "the proceeds from its stock offering would not be used to pay off ... any of American Realty's existing promissory notes." *Id.* ¶ 104. Wilson has since "admitted under oath that contrary to the statement in the Form S–11, he actually intended to use the offering proceeds to pay down or buy out the promissory notes his companies issued to the Diversified LPs." *Id.* ¶ 105.

G

After Plaintiff and FINRA began investigating his activities, Wilson sent a packet to his investors notifying them of changes he was going to make to their investments. Compl. ¶ 111. Effective October 1, 2012, Wilson informed them, the promissory notes that Diversified Group Partnership Management and American Realty had executed in their favor would be "forgiven." *Id.* In exchange, Wilson explained, "investors were going to receive shares in American Realty stock plus a promissory note that would make quarterly interest payments at an annual rate of 8.5% with a termination date in 30 years." *Id.* Investors were not given the opportunity to opt out of this modification. *Id.* ¶ 113. The practical effect of this change was an investment haircut —it shaved 30 to 40 percent off the investment's value. *Id.*

H

***4** On November 15, 2012, Plaintiff filed suit against Defendants in this Court alleging violations of federal securities laws. The complaint alleges that Defendants: (l) made an unregistered offer and sale of securities in violation of 15 U.S.C. § 77e; (2) committed fraud in the offer and sale of securities in violation of 15 U.S.C. § 77q; (3) committed fraud in the purchase and sale of securities in violation of 15 U.S.C. § 78j; (4) filed false and misleading reports with Plaintiff in violation of 15 U.S.C. § 78m; (5) filed false certifications with Plaintiff in violation of 15 U.S . C. § 78m; and (6) committed investment advisor fraud in violation of 15 U.S.C. § 80b–6.

The same day, Plaintiff filed a motion for a preliminary injunction, asset freeze, and other emergency relief (ECF No. 2) and a motion for the appointment of a receiver (ECF No. 6). No proof of service on Defendants has yet been filed.

II

The motion for a preliminary injunction, asset freeze, and other emergency relief seeks five types of relief in two stages. The five types of relief sought are: (1) a preliminary injunction and temporary restraining order; (2) a freeze of Defendants' assets; (3) an accounting; (4) a prohibition on the alteration or destruction of documents; and (5) expedited discovery.

Plaintiff does not, however, request that the relief all be granted immediately. Rather, Plaintiff explains that it "seeks to depose witnesses, subpoena bank and brokerage records and other documents, and take other discovery on an expedited basis prior to a preliminary injunction hearing." Pl.'s Br. Supp. Preliminary Inj. Mot. 15, ECF No. 3. Similarly, regarding the preservation of documents, Plaintiff explains: "Several courts have entered document preservation directives at the inception of SEC enforcement actions." *Id.* at 15 (collecting cases). Plaintiff thus seeks a stepped remedial approach—some types of relief immediately, others after the hearing.

A

Federal Rule of Civil Procedure 26 provides: "A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except ... when authorized by these rules, by stipulation, or by court order." Fed.R.Civ.P. 26(d) (1). The advisory committee notes explain that orders authorizing expedited discovery "will be appropriate in some cases, such as those involving requests for a preliminary injunction." Fed.R.Civ.P. 26 advisory committee notes (1993).

This is such a case. Accordingly, following the filing of proof of service on Defendants, the parties will be granted leave to immediately schedule depositions, issue subpoenas, and serve interrogatories, requests for documents, and requests for admissions. The time to respond to such discovery requests will be shortened to seven calendar days after a request is served. Service of all discovery, including subpoenas, may be effected via overnight mail, facsimile, or electronic means. Additionally, Defendants will be prohibited from the alteration or destruction of documents or other information relating to Plaintiff's allegations in the complaint.

B

***5** Plaintiff's motion does not expressly specify whether it seeks an asset freeze prior to the preliminary injunction hearing. But Plaintiff does specify what it would like frozen. In a proposed order submitted by Plaintiff with its motion, Plaintiff proposes that this Court order

> that until otherwise ordered by this Court any and all assets of defendants Joel I. Wilson, Diversified Group Partnership Management, LLC, and American Realty Funds Corporation (referred to below as "Defendants"), in whatever form such assets may presently exist and wherever located (including funds, accounts, insurance policies, real estate, automobiles, marine vessels, contents of safe deposit boxes, precious metals, other personal property, cash, securities, free credit balances, fully paid-for securities, and/or property pledged or hypothecated as collateral for loans, and all other assets), held in the name of the Defendants, and/or held for the Defendants' benefit or on their behalf, including through corporations, companies, trusts, partnerships, agents, nominees, friends or relatives; and all other funds, accounts, and other assets to which proceeds from the Defendants' violations can be traced or which were acquired with proceeds of the Defendants' violations are hereby frozen.

One condition precedent to depriving Defendants of their property in this manner, however, is Defendants having notice and an opportunity to be heard. *See Warren v. City of Athens,* 411 F.3d 697, 708 (6th Cir.2005) ("Procedural due process generally requires that the state provide a person with notice and an opportunity to be heard before depriving that person of a property or liberty interest."); *Elliott v. Kiesewetter,* 98 F.3d 47, 60 (3d Cir.1996) (discussing due process in asset freeze context). Moreover, the Second Circuit cautions, "the decision to order a temporary freeze on defendants' assets as ancillary relief in an SEC enforcement action requires particularly careful consideration by the district court." *SEC v. Manor Nursing Ctrs., Inc.,* 458 F.2d 1082, 1105 (2d Cir.1972).

Here, Plaintiff has not demonstrated that it has provided Defendants notice of Plaintiff's demands. Likewise,

Defendants have not yet been afforded an opportunity to be heard on those demands. Thus, any demand for an asset freeze is premature. Accordingly, the request for an asset freeze, like the request for a preliminary injunction and accounting, will be held in abeyance pending a hearing on the motion.

III

Accordingly, it is **ORDERED** that Plaintiff's motion for a temporary injunction, asset freeze, and other emergency relief is **GRANTED IN PART AND HELD IN ABEYANCE IN PART.**

It is further **ORDERED** that Plaintiff is directed to serve a copy of this opinion and order on Defendants and file proof of service on this Court's docket.

It is further **ORDERED** that following the filing of proof of service on Defendants, the parties are granted leave to immediately schedule depositions, issue subpoenas, and serve interrogatories, requests for documents, and requests for admissions. The time to respond to such discovery requests is shortened to seven calendar days after a request is served. Service of all discovery, including subpoenas, may be effected via overnight mail, facsimile, or electronic means.

***6** It is further **ORDERED** that Defendants are prohibited from altering or destroying documents or other information regarding Plaintiff's allegations in the complaint.

It is further **ORDERED** that Plaintiff's request for a preliminary injunction, asset freeze, and accounting are **HELD IN ABEYANCE** pending a hearing on the motion.

It is further **ORDERED** that a hearing will be held on the motion on **Monday, December 10, 2012, at 10 am.**

All Citations

Not Reported in F.Supp.2d, 2012 WL 5874456

Footnotes

1 Securities and Exchange Commission, *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation,* http://www.sec.gov/about/whatwedo.shtml (last visited November 20, 2012).

Exhibit F

2008 WL 4852915
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

PSYCHOPATHIC RECORDS INC., et al., Plaintiffs,
v.
Jeffery S. ANDERSON, Defendant.

Civil Action No. 08-13407-DT.
|
Nov. 7, 2008.

West KeySummary

1 **Federal Civil Procedure**
Depositions and Discovery

Expedited discovery of an email address to obtain email correspondence in connection with alleged copyright infringement and unfair competition was warranted. Claimants showed good cause to grant leave for them to conduct the requested expedited discovery for the email address by alleging that there was a very real danger that the internet service providers would not preserve the information that claimants sought for an indefinite period of time or even any known amount of time. Claimants also alleged that their request was narrowly tailored to only seek discovery that was warranted at the early stage of the litigation. Fed.Rules Civ.Proc.Rule 26(d)(1), 28 U.S.C.A.

Cases that cite this headnote

Attorneys and Law Firms

Jeffrey P. Thennisch, Dobrusin and Thennisch, Pontiac, MI, for Plaintiffs.

OPINION AND ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR LEAVE TO TAKE IMMEDIATE DISCOVERY

MONA K. MAJZOUB, United States Magistrate Judge.

***1** This matter comes before the Court on Plaintiffs' Motion for Leave to Take Immediate Discovery filed on October 9, 2008. (Docket no. 8). Defendant has not filed a Response, and the time for responding has now expired. [1] (Docket no. 13). This motion was referred to the undersigned for decision. (Docket no. 11). The Court dispenses with oral argument pursuant to E.D. Mich. LR 7.1(e). This motion is now ready for ruling.

1. Facts and Claims

Plaintiffs, copyright owner and licensee, claim that Defendant improperly obtained at least six U.S. copyright registrations which are derivative and infringing works of the Plaintiffs' previously registered HATCHETMAN design and copyright. (Docket no. 1). Plaintiffs also claim that Defendant has engaged in copyright infringement by selling merchandise bearing the infringing works on the internet. (*Id.;* docket no. 8). Plaintiffs further allege that Defendant has used three email addresses to facilitate communications, representations, and sales of his infringing goods in interstate commerce to third parties, as well as having others manufacture the infringing goods to then be resold by Defendant. (Docket no. 8 at 2). The three email addresses at issue are: drama669@yahoo.com, ebayninja4@yahoo.com, and drama669 @hotmail.com. (*Id.*).

By this Motion, Plaintiffs seek leave to serve subpoenas under Fed.R.Civ.P. 45 upon two third party internet service providers, Yahoo! and Hotmail, to obtain and preserve the Defendant's email correspondence to third parties relating to this action so that Plaintiffs may assess the amount of Defendant's third party contacts and sales of infringing products. (*Id.*). Plaintiffs allege that exhibit A to their motion shows that Defendant is currently selling infringing goods through at least one website, strictlyunderground.bigcartel.com, in which the Defendant's drama669@yahoo.com email address is given as a point of contact pertaining to the sale and payment of infringing goods. (*Id.* at 2-3). This discovery will likely allow Plaintiffs to identify any other necessary co-

defendants or the extent of Defendant's alleged infringing activity, according to Plaintiffs. (*Id.* at 3).

2. Standard

Under Fed.R.Civ.P. 26(d)(1) a party may not normally seek discovery from any source before the parties have conferred as required by Rule 26(f). [2] An exception is made for those instances where a court orders such discovery. Courts in this circuit require the party seeking such expedited discovery to show good cause. *Diplomat Pharmacy, Inc. v. Humana Health Plan, Inc.*, 2008 WL 2923426 (W.D.Mich. July 24, 2008); *Arista Records, LLC v. Does 1-4*, 2007 WL 4178641 (W.D.Mich. Nov.20, 2007); *Quest Commc'ns Int'l, Inc. v. Worldquest Networks, Inc.*, 213 F.R.D. 418, 419 (D.Colo.2003). The good cause standard may be satisfied where a party asserts claims of infringement and unfair competition. *Quest Commc'ns*, 213 F.R.D. at 419. Courts retain the broad discretion to supervise such discovery. (*Id.*).

3. Analysis

***2** Plaintiffs allege copyright infringement and unfair competition in their Complaint. (Docket no. 1). This is therefore the type of case recognized as appropriate for expedited discovery. Exhibit A of Plaintiffs' Motion shows that the email address drama669@yahoo.com is connected to the sale of the allegedly infringing goods. (Docket no. 8 ex. A). This same email address is the one used by Defendant in his correspondence with GSI Hosting, Plaintiffs' website hosting company. (Docket no. 1 ex. D). Therefore, Defendant is connected to this email address and that address is connected with the allegedly infringing activity.

Plaintiffs allege that they require expedited discovery because there is a very real danger that the internet service providers, Yahoo! and Hotmail, will not preserve the information that Plaintiffs seek for an indefinite period of time or even any known amount of time. (Docket no. 8 at 5). Courts have recognized the possibility of evidence being destroyed with the passage of time as a factor which may show good cause for granting expedited discovery. *Qwest Commc'ns*, 213 F.R.D. at 419. Plaintiffs also allege that their request is narrowly tailored to only seek the discovery that is warranted at this early stage of the litigation. (Docket no. 8 at 5). The Court finds these arguments to be convincing.

Plaintiffs have shown good cause to grant leave for them to conduct the requested expedited discovery for the email address drama669@yahoo.com. This address is directly connected to the allegedly infringing activity and to the named Defendant. However, Plaintiffs have not made any showing that the other two email addresses, drama669@hotmail.com and ebayninja4@yahoo.com, have any connection to Defendant or to the allegedly infringing activity. Therefore, Plaintiffs' motion will be denied as to those two addresses.

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Leave to Take Immediate Discovery (docket no. 8) is **GRANTED** for the email address drama669@yahoo.com, but is otherwise **DENIED.**

NOTICE TO THE PARTIES

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

All Citations

Not Reported in F.Supp.2d, 2008 WL 4852915

Footnotes

1 Plaintiffs filed this motion as an ex parte motion. This designation apparently refers to the fact that Plaintiffs seek to discover the identity of third parties with whom it is alleged the named Defendant corresponded regarding the named Defendant's copyright infringement by selling merchandise and products bearing the infringing works. As to the named Defendant, the Motion should not be considered ex parte because Plaintiffs' motion was served on him according to Plaintiff's certificate of service, Plaintiffs certify that they unsuccessfully sought concurrence from the named Defendant for the relief sought in this motion, and because this Court's Order filed on October 28, 2008 notified Defendant of this motion. (Docket no. 13).

2 The docket sheet shows that the Rule 26(f) conference has not yet occurred. In addition, the Clerk has entered the default of Defendant (docket no. 10), and Plaintiffs' have moved for a default judgment against Defendant. (Docket no. 12). That motion is pending at this time.

End of Document

Exhibit G

2012 WL 1658643
Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.

Michael KANE, Plaintiff,
v.
NATIONAL ACTION FINANCE SERVICES, INC., Defendant.

Civil Action No. 11–11505.
|
May 11, 2012.

Attorneys and Law Firms

Julie A. Petrik, Ian B. Lyngklip, Southfield, MI, Melissa A. Gould, Troy, MI, for Plaintiff.

Chiara Mattieson, Robert G. Kamenec, Thomas P. Vincent, Plunkett & Cooney Bloomfield Hills, MI, for Defendant.

ORDER AND OPINION GRANTING PLAINTIFF'S MOTION TO COMPEL INTERROGATORY RESPONSES [19] AND MOTION TO COMPEL RESPONSES TO REQUESTS FOR PRODUCTION [20]

MONA K. MAJZOUB, United States Magistrate Judge.

***1** Plaintiff Michael Kane has filed this putative class action against Defendant National Action Finance Services, Inc., alleging that NAFS violated two federal acts, the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq., and the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq., when it called Plaintiff's cell phone "several hundred" times in an attempt to contact the unrelated Ms. Seana Barlett to collect a debt she owed to Blockbuster Video.

After an initial motion to dismiss, Plaintiff's FDCPA § 1692(d) and TCPA claims are still at issue. (See Dkt. 12, Order Denying in Part and Granting in Part NAFS's Mot. to Dismiss.)

Now before the Court are Plaintiff's motion to compel interrogatory responses and motion to compel responses to requests for production. (Dkt.19, 20.) The Court has been referred these motions for determination pursuant to 28 U.S.C. § 636(b)(1)(A). (Dkt.21, 22.) The Court has reviewed the pleadings, including the joint statement of unresolved and resolved issues regarding Plaintiff's motions. The Court dispenses with a hearing and issues this order. [1]

I. Discovery standards

The scope of discovery under the Federal Rules of Civil Procedure is traditionally quite broad. *Lewis v. ACB Bus. Servs.*, 135 F.3d 389, 402 (6th Cir.1998). Parties may obtain discovery on any matter that is not privileged and is relevant to any party's claim or defense if it is reasonably calculated to lead to the discovery of admissible evidence. Fed.R.Civ.P. 26(b)(1). "Relevant evidence" is "evidence having 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." Fed.R.Evid. 401. But the scope of discovery is not unlimited. "District courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce." *Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 305 (6th Cir.2007).

Rules 33 and 34 allow a party to serve interrogatories and requests for production of documents on an opposing party. Fed.R.Civ.P. 33, 34. A party receiving these types of discovery requests has thirty days to respond with answers or objections. Fed .R.Civ.P. 33(b)(2), 34(b)(2)(A).

If the receiving party fails to respond to interrogatories or RFPs, Rule 37 provides the party who sent the discovery the means to file a motion to compel. Fed.R.Civ.P. 37(a)(3)(B)(iii) and (iv). If a court grants a Rule 37 motion to compel, then the court must award reasonable expenses and attorney's fees to the successful party, unless the successful party did not confer in good faith before the motion, the opposing party's position was substantially justified, or other circumstances would make an award unjust. Fed.R.Civ.P. 37(A)(5)(a).

II. Plaintiff's motions to compel responses to interrogatories and requests for production

***2** On May 25, 2011 Plaintiff served his first set of interrogatories on NAFS. (Pl.'s Mot. to Compel Interrog. at 3.) After Judge Murphy granted in part and denied in part NAFS's motion to dismiss, Plaintiff served his second set of interrogatories, on November 11, 2011. (*Id.*) Plaintiff states that, as of the ruling on the motion to dismiss, more than three months had passed and NAFS still had not answered the interrogatories. (*Id.*) Plaintiff adds that, on January 31, 2012, his attorneys contacted NAFS to stipulate to an order compelling the discovery requests. (*Id.* at 4.) Plaintiff states that he did not receive a response either to the outstanding interrogatories or the request for concurrence. (*Id.*)

As to the RFPs, Plaintiff states that he served his first set of RFPs on May 26, 2011 and then, on November 11, 2011, he served his second set of RFPs. (Pl.'s Mot. to Compel RFPs at 2.) Plaintiff states that NAFS did not respond to the RFPs, and that, as of the ruling on the motion to dismiss, three months had passed. (*Id.* at 2.)

In an effort to keep discovery moving, Plaintiff states that he gave a proposed protective order to NAFS to review on November 22, 2011. (Dkt. 33, Joint Statement of Unresolved Issues at 1.) Plaintiff adds that NAFS would not stipulate to the order, provide any specific objections, or suggest an alternative. (*Id.*) Plaintiff also adds that he submitted the order to NAFS on January 22, and February 29, 2012. (*Id.*)

A. The outstanding discovery requests

The following is a summary of the interrogatories and RFPs that Plaintiff states NAFS has failed to answer.

- Interrogatory # 1–1 seeks information about any phone numbers NAFS may have removed from its collection calling system because the phone number had no relationship to the person from whom NAFS was attempting to collect the debt.
- Interrogatory # 1–2 generally asks NAFS to identify those individuals who have knowledge or facts or opinions about the events or allegations related to the lawsuit.
- Interrogatory # 1–3 requests NAFS to identify the origin of the documents NAFS will produce and the means by which NAFS produced the document. The interrogatory also requests NAFS to identify the system administrator responsible for maintaining the document storage systems and those persons who retrieved the documents.
- Interrogatory # 1–4 asks NAFS to identify manuals, memoranda, bulletins, and publications that NAFS used to formulate, maintain, or enforce NAFS's policies, procedures, and practices concerning TCPA compliance.
- Interrogatory # 1–5 asks NAFS to identify any lawsuits, judgments, and settlements that it has been involved in regarding violations of the TCPA and/or the Michigan Consumer Protection Act.
- Interrogatory # 1–6 asks NAFS to identify any third parties to which it may have outsourced services relating to the telephone system, artificial recording, or pre recorded messaging services NAFS used.

***3** • Interrogatory # 1–7 asks NAFS to describe the business rules it used to initiate calls from its autodialer system.

- Interrogatory # 1–8 asks NAFS to identify each person responsible for formulating, supervising, or enforcing NAFS's policies, procedures, and practices concerning TCPA compliance.
- Interrogatory # 2–1 asks NAFS to identify and describe each and every communication from it to Plaintiff.
- Interrogatory # 2–2 requests more information regarding NAFS's contact with Plaintiff.
- Interrogatory # 2–3 requests the source of information about Plaintiff's phone number.
- • Interrogatory # 2–4 asks NAFS to identify information about the underlying account holder about which Plaintiff was contacted and the information about the original creditor for the account.

Plaintiff's first RFPs generally request information about NAFS's TCPA related policies, phone calling programs and systems, and any former law suits, settlements, or complaints related to TCPA violations. (NAFS's Resp. to Pl.'s Mot. to Compel RFPs, Ex. 1.) Plaintiff's second

RFPs generally request information related to Plaintiff, his account, and the circumstances surrounding the calls made to Plaintiff's cell phone. (*Id.,* Ex. 2.) The second RFPs also seek policies and manuals related to the circumstances of the complaint, and information generally related to the FDCPA and any violation thereof. (*Id.*)

NAFS states that it received Plaintiff's interrogatories when Plaintiff sent them. (Dkt. 26, NAFS's Resp. to Pl.'s Mot. to Compel Interrog. ¶ 1.) NAFS also acknowledges that it did not respond to the interrogatories. (*Id.*) NAFS states that its "non-response to said interrogatories ... is not designed to obstruct discovery." (*Id.*) NAFS states that it has not responded because it has two issues with Plaintiff's request.[2] (*Id.* ¶ 2.) NAFS's issues:

- NAFS's responses should be limited to information and materials regarding NAFS's Blockbuster collection program and operation, as it is the only program pursuant to which the number Plaintiff alleges is his cell phone number was called by NAFS, and the Blockbuster Program was and is significantly distinct form the rest of NAFS's collection programs and operations, and the distinction makes provision of information and material not related to the Blockbuster program an obligation upon NAFS beyond those contained in the Federal Rules, unduly burdensome, overly broad and not reasonably calculated to lead to discovery of relevant or admissible evidence; and
    - the interrogatories seek to require NAFS to produce information or documents that contain information deemed proprietary or confidential in nature, subject to nondisclosure or disclosure limitations pursuant to any applicable state or federal law. This is especially the case as it relates to personal and financial information held by NAFS that regards private individuals who are not presently party to this case.

***4** NAFS ultimately requests that it only have to provide responses that include information and materials that are relevant to the Blockbuster Program and that it also not have to provide responses to any of the outstanding interrogatories absent entry of a blanket protective order that adequately protects the privacy rights of present non-party individuals according to applicable law and the proprietary business information and materials of NAFS.

NAFS states that, during the times relevant to Plaintiff's allegations, it was "running a collections program on Blockbuster accounts that was absolutely singular and unique as compared to the remainder of [NAFS's] collection operations[.]" (Dkt. 26, NAFS's Resp. to Pl.'s Mot. to Compel Interrog. at 2.) NAFS first states that that collections program was different because that program was run through a collection system that was different from its other collections systems. (*Id.*) NAFS also states that the "policies and procedures applicable [to the program,] and the third party vendors utilized in relation to it, were necessarily different and distinct from any other NAFS program due to the use of different software and the particulars of the accounts sought to be collected through the program. (*Id.* at 3.) NAFS explains that "[p]hone scripting and message content, account and operations management were all absolutely independently determined and distinct from any other NAFS collection program[.]" (*Id.*)

NAFS argues that it if disclosed the information requested by the interrogatories voluntarily, that it would violate several federal laws. (*Id.* at 5.) NAFS adds,

> [t]herefore, at this time[,] Blockbuster [sic] should not be compelled to provide any materials or information to NAFS programs *other* than the Blockbuster Program, as it would result in undue burden and expense for NAFS which would be incurred to provide information that had absolutely no relevance to the matters at issue in this case and would, in essence, constitute compelling NAFS to make itself beholden to a fishing expedition.

(*Id.* at 5–6.)

NAFS posits that Interrogatories1–3, 1–4, 1–6, 1–7, 2–1, and 2–2 seek trade secret information and other information confidential to NAFS, "which would necessarily require disclosure of information as to [NAFS's] equipment and operations that NAFS has developed specifically with the intent to successfully compete for business in the collection industry." (*Id.* at 6.) NAFS requests that the Court enter an order that NAFS "not be required to produce any information or materials deemed [t]rade [s]ecrets or confidential commercial

information except subject to a protective [o]rder that will adequately protect its confidentiality." (*Id.* at 6.)

1. Analysis

The Court disagrees with NAFS and its position in several respects. The Court first finds that there is no reason why NAFS could not have answered the interrogatories or objected to them. On this failure alone, the Court bases its decision to grant the motions to compel and award costs and fees. Next, the Court disagrees with NAFS's characterization of the scope of Plaintiff's complaint.

***5** The Court also disagrees with NAFS over the protective order issue. While the Court finds that a protective order is warranted in this case, the Court finds that NAFS should have been more proactive about the protective order. NAFS cannot do nothing and expect the case to progress. The Court also does not look favorably on NAFS's request for the Court's assistance with a protective order in the responses to Plaintiff's motions to compel. As Plaintiff points out, NAFS has not moved for a protective order pursuant to Rule 26(c), which permits a court to issue a protective order for "good cause" to protect a party from annoyance, embarrassment, oppression, or undue burden or expense. Fed.R.Civ.P. 26(c)(1). "To show good cause, a movant for a protective order must articulate specific facts showing 'clearly defined and serious injury' resulting from the discovery sought and cannot rely on mere conclusory statements." *Nix v. Sword,* 11 F.App'x 498, 500 (6th Cir.2001) (citation omitted).

Despite NAFS's failures, the Court will address the discovery and protective order issues.

a. NAFS should have responded to Plaintiff's discovery requests

NAFS should have objected to the requests and then should have moved for a protective order pursuant to Rule 26. NAFS's failure to do so has delayed this litigation and was improper. Even if NAFS felt as if it could not have responded to the discovery requests without violating law, NAFS should have stated so and then moved for a protective order. Instead, NAFS did nothing. The Court will not condone such inactivity.

b. NAFS has improperly attempted to limit the scope of Plaintiff's complaint and the discovery requests

As set forth above, NAFS argues that its responses should be limited to information and materials regarding NAFS's Blockbuster collection program and operation. NAFS states that that program was the only one pursuant to which the number Plaintiff alleges is his cell phone number was called by NAFS. NAFS adds that the Blockbuster collection program was, and is, significantly distinct from the rest of its collection programs and operations, and the distinction makes providing information and material not related to the Blockbuster program an obligation upon NAFS beyond those contained in the Federal Rules, unduly burdensome, overly broad, and not reasonably calculated to lead to discovery of relevant or admissible evidence.

The Court finds that Plaintiff has crafted a much broader complaint than the position NAFS advances. The Court will not limit the scope of the complaint at this time. Plaintiff is entitled to seek discovery that is related to his complaint. Plaintiff states that he proposes to represent the following classes:

- All persons within the United States who, on or after March 22, 2007, received a non-emergency telephone call from NAFS to a cellular telephone through the use of an automatic telephone dialing system or an artificial or prerecorded voice and who did not provide prior express consent for such calls during the transaction that resulted in the debt owed.

***6** • All natural persons within the United States who, on or after March 22, 2010, received a voice mail message from NAFS, concerning a consumer debt, where that message failed to notify the person member that the call was from a debt collector.

(Compl.¶ 48.) Plaintiff states that he found "dozens" of complaints against NAFS on the internet. (*Id.* ¶ 49.) Plaintiff estimates that the class would be around "several hundred" members. (*Id.* ¶ 50.)

Plaintiff articulates that the common questions of law and fact concern whether:

- NAFS uses an autodialer to collects its debts;

- NAFS uses prerecorded voice messages to collects its debts;

- the prerecorded messages used by NAFS properly comply with the FDCPA requirement that the collector identify that it is an debt collector;
- NAFS made nonemergency calls to Plaintiff and the class members' cellular telephones using an automatic telephone dialing system or an artificial or prerecorded voice;
- NAFS had the prior express consent to make calls to Plaintiff and the class members' cellular phones using an automated dialer or prerecorded voice; and
- NAFS's conduct was knowing and/or willful.

(Compl.¶ 53.)

Given Plaintiff's complaint, the Court finds that NAFS is improperly trying to limit the scope of discovery at this time. Plaintiff seeks to represent a class whose members received phone calls from NAFS that violated the TCPA. [3] The Court therefore denies NAFS's request to limit discovery to information solely about the Blockbuster program.

c. The Court will allow Plaintiff's pre-certification discovery, but also will order the parties to submit a stipulated proposed protective order that the Court will then enter

NAFS argues that the interrogatories seek to require NAFS to produce information or documents that contain information deemed proprietary or confidential in nature. NAFS continues that it cannot release personal and financial information held by NAF S without violating federal law. NAFS also argues that several of responses to the interrogatories and productions request trade secret or confidential information

The Court will permit Plaintiff his precertification discovery. "Prior to certification of a class action, discovery is generally limited and in the discretion of the court." *Del Campo v. Kennedy,* 236 F.R.D. 454, 459 (N.D.Cal.2006) (citation omitted). "Generally, a plaintiff bears the burden of advancing a prima facie showing that the class action requirements of [Rule 23] are satisfied, or that discovery is likely to produce substantiation of the class allegations." *Id.* (quotation marks and citations omitted). "[D]iscovery often has been used to illuminate issues upon which a district court must pass in deciding whether a suit should proceed as a class action under Rule 23, such as numerosity, common questions, and adequacy of representation." *Id.* (insertion in *Del Campo,* citation omitted.)

***7** Here, the Court exercises its discretion and allows Plaintiff his precertification discovery. The Court will allow Plaintiff to flesh out both his class claims and his individual claims. *See Artis v. Deere & Co.,* 276 F.R.D. 348, 351 (N.D.Cal.2011) (citation omitted) ("[D]iscovery is likely warranted where it will resolve factual issues necessary for the determination of whether the action may be maintained as a class action, such as whether a class or set of subclasses exist.). While NAFS argues that Plaintiff only received calls from the Blockbuster program, Plaintiff's complaint alleges violations on a company-wide basis. At this juncture, the Court finds that discovery on a company-wide basis is appropriate, even if a later motion for certification fails, requires multiple subclassses, or outright succeeds. *See Id.* (citing Ninth Circuit precedent) (Holding that, "[t]o deny discovery where it is necessary to determine the existence of a class or set of subclasses would be an abuse of discretion.").

The Court therefore grants Plaintiff's motions to compel answers and production to Plaintiff's discovery requests. The Court permits the discovery because it is "sufficiently broad that the plaintiff[ ] [will] have a fair and realistic opportunity to obtain evidence which will meet the requirements of Rule 23, yet not so broad that the discovery efforts present an undue burden to [NAFS]." *In re Bank of Am. Wage and Hour Emp't Practices Litigation,* 275 F.R.D. 534, 540 (D.Kan.2011) (citation omitted). The Court orders NAFS to provide answers and production of documents, without objections, to Plaintiff's first and second sets of interrogatories and his first and second requests for production.

The Court is aware that the parties need a protective order for some of the discovery. The parties need a protective order both for the names and contact information of potential plaintiffs. The Court therefore orders the parties to agree upon a proposed protective order within 10 days of this order. After the Court enters the protective order, the Court orders NAFS to answer the interrogatories and documents requests, without objection within 21 days of the protective order's entry.

Here, NAFS must disclose the names, addresses, and telephone numbers of those people that the interrogatories request. This information is both relevant to Plaintiff's class action claims—to determine those other individuals whom NAFS may have contacted improperly-and such disclosure is "a common practice in the class action context." *Artis,* 276 F.R.D. at 352. In *Artis,* the court allowed Plaintiff precertification discovery so that he could substantiate the class allegations and to meet the certification requirements under Rule 23. *Id.* The court held that the "contact information and subsequent contact with potential class members is necessary to determine whether [the plaintiff's] claims are typical of the class, and ultimately whether the action may be maintained as a class action." *Id.* The *Artis* court further held that "the privacy interests at stake in the names, addresses, and phone numbers must be distinguished from those more intimate privacy interests such compelled disclosure of medical records and personal histories." *Id.* at 353. The *Artis* court noted, that "the parties can craft a protective order that limits the use of any contact information to the parties in this litigation and protects it from disclosure." *Id.* The court stated, "[t]he discovery is to be produced to Plaintiff's counsel only and to be used only in this litigation. Under these circumstances, the potential privacy interests of putative class members are adequately balanced." *Id.* (citation omitted).

***8** The parties here, too, can craft a protective order to protect the disclosure of contact information and any information that would be a "trade secret or other confidential research, development, or commercial information" pursuant to Rule 26(c)(1)(G).

The Court therefore orders the parties to craft an order to protect potential plaintiffs' identifies and information and any information subject to Rule 26(c)(1)(G) protection. As stated above, the Court orders the parties to submit an agreed upon proposed order within 10 days of this order.

d. Pursuant to Rule 37, the Court finds that an award of attorney's fees and costs appropriate

Because the Court grants Plaintiff's motions to compel, Rule 37 requires an award of costs and fees related to bringing the motions. Despite any protestations that NAFS makes, the Court finds that NAFS acted unreasonably in the course of discovery. NAFS did not answer the discovery requests, did not make any objections to the discovery requests, and did not file a motion for a protective order. A party cannot just sit and wait. The Court therefore awards Plaintiff $2500.00 for each motion-$5000.00 total. Payment should be made within 10 days. Given this Court's experience with these types of motions in this district, the Court finds that the award is reasonable.

IV. Conclusion

For the above-stated reasons, the Court grants Plaintiff's motions to compel interrogatory responses and responses to requests for production. The Court orders the parties to submit an agreed upon proposed protective order within 10 days of this order. After entry of the protective order, the Court orders NAFS to answer the interrogatories, in full, without objection, and fulfill the requests for production within 21 days of the protective order's entry. The Court further awards $5000.00 in attorney's fees and costs for NAFS's dilatory and prejudicial behavior.

NOTICE TO THE PARTIES

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

All Citations

Not Reported in F.Supp.2d, 2012 WL 1658643

Footnotes

1 The Court dispenses with a hearing pursuant to Eastern District of Michigan Local Rule 7.1(f)(2).

2 NAFS also acknowledges that it received Plaintiff's first and second requests for production and that it did not respond to them. (Dkt. 27, Resp. to Pl.'s Mot. to Compel Req. for Produc. ¶ 1.) NAFS's response to Plaintiff's motion to compel requests for production mirrors NAFS's response to Plaintiff's motion to compel answers to interrogatories.

3 In the parties' Joint Status Report Prepared Under Rule 26(f), Plaintiff states that he will seek to certify the TCPA claims. (Joint Status Report at 2.)

Exhibit I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

USAMA J. HAMAMA, et al,

Petitioners,

-v- Case No. 17-cv-11910

REBECCA ADDUCCI,

Respondent.
_____/

PETITIONERS' MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR A STAY OF REMOVAL

BEFORE THE HONORABLE MARK A. GOLDSMITH

Detroit, Michigan, Wednesday, June 21st, 2017.

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Official Court Reporter
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WITNESSES:

EXHIBITS

NONE

Detroit, Michigan.

Wednesday, June 21st, 2017.

At or about 2:11 p.m.

-- --- --

THE CLERK OF THE COURT: Please rise. The United States District Court for the Eastern District of Michigan is now in session, the Honorable Mark Goldsmith presiding. You may be seated.

The Court calls case number 17-11910, Hamama versus Adducci. Counsel, please state your appearances for the record.

MS. SCHLANGER: Margo Schlanger for petitioners.

MR. GELERNT: Good afternoon, your Honor. Lee Gelernt for petitioners.

MR. STEINBERG: Michael J. Steinberg for the petitioners.

MS. RABINOVITZ: Judy Rabinovitz for the petitioners.

MR. BALAKRISHNAN: Anand Balakrishnan for the petitioners.

MS. RICHARDS: Wendolyn Richards for the petitioners.

MR. SWOR: William Swor for the petitioners.

MS. YOUKHANA: Nora Youkhana on behalf of the petitioners.

MS. NEWBY: Good afternoon, your Honor. Jennifer Newby on behalf of the respondents.

I want to start off by just saying that the stakes of this litigation really just can't be overstated which is why we've moved for emergency relief. The, most of the petitioners are Christian, others are members of other minority groups in Iraq and all of them if they are in Iraq are going to be identified as American affiliated. We've filed with you a set of declarations from Mark Lattimer and Rebecca Heller who are experts on a situation in Iraq and also many governmental and NGO reports explaining how this puts a bulls-eye on them and makes them at risk of persecution and torture and so what we're seeking is a stay of removal, a TRO stay of removal to slow things down enough that they get a chance to assert their claims. The --

THE COURT: And how long would it remain in effect if I were to grant that? Would it be until everyone can file a motion with the immigration courts or is it until they decide those motions or what?

MS. SCHLANGER: Right, so the TRO obviously starts off at 14 days and can be extended for good cause and what we would propose to do is to brief to you a PI on a calendar that would get it briefed by the end of July and so for right now what's at stake is from now until the end of July.

If you're asking what we're seeking overall in the case, we want enough time that due process is served and we're working very, very hard and many members of the legal community

are working very, very hard to get these folks represented and get their motions filed so we're not trying to do anything dilatory, we're trying to get those motion filed.

THE COURT: So how many motions have been filed up to this point? I understand two have been granted; is that right?

MS. SCHLANGER: Yes, I think more than two have been granted, but two out of the named petitioners have been granted. It's hard to say because we doesn't have class-wide information. We believe there are 114 or 120'ish members of the class. The government knows a little bit better than we do, but we think that motions have been filed in maybe, maybe half, maybe more of those, something in that range. We, umm, we believe that there might be somewhere between 15 and 30 who don't yet have lawyers, we're working very hard to try to find them lawyers and so it's a question of getting the lawyers and getting the motions filed.

I have to say that the government that has recently made this a good deal harder because they shipped a whole bunch of the petitioner class from, they started off in Michigan. They initially went to Youngstown, Ohio which is a four-hour drive which is hard enough. They shipped a whole bunch of them to Jena, Louisiana and we are now hearing that a bunch of those folks in Jena are being sent to Phoenix and so they've been moving around considerably. It's pretty hard for lawyers to

reach their clients and have the conversations they need to have while everybody is being shipped all over the United States, but we are working hard to get this done so that it doesn't have to be a long period of time.

THE COURT: Typically if you can give an answer to this, how long does it take typically to get a disposition of a motion to reopen?

MS. SCHLANGER: Well, the disposition on the motion to reopen can take, it can take anything, my understanding is a couple months. The stays are faster when you seek a stay from the immigration court or from the BIA. They're faster, but the immigration court and the BIA won't consider a motion for a stay usually unless there's an imminent deportation and so you can't, and that sometimes creates a little bit of a glitch. I've heard from some colleagues that they know of situations where they've filed for a stay, I don't mean in this -- I don't mean in this case. Just to be clear I'm not talking about this case, but where they filed for a stay, the immigration court has called over to ICE. ICE says no we don't have, we don't have deportation scheduled, he's in detention, but we don't have a scheduled date of deportation. The immigration judge then, you know, doesn't grant the stay. ICE then schedules deportation, nobody knows about it, there's no stay and their client gets deported. So, so there's a little bit of an iffyness around that process, but I would say that when there

is a pending deportation date scheduled, that the stays are, are quite fast and so, but the motions tend to take a couple months.

THE COURT: So your best guesstimate then for motions to reopen for all the class members would be?

MS. SCHLANGER: If, if we had, umm, two months, six weeks or two months, we think that they could all get filed. The reason that I can't say -- some of them have been filed already and that's only been in a week, so you might wonder why does it take longer and the answer is it depends on the relationship between the detainee and the attorney and if they have a preexisting relationship, if they've got a filed appointment of counsel on record, if they've talked, if they've got the records that they need. In order to file a motion to reopen and for this, I refer you to the declaration that my colleague, Susan Reed, put into the TRO reply. In order to file a motion to reopen, what you have to file is a motion to reopen if you're going to put a stay with it, you put the stay with it and an application for the underlying relief. That's required under the regulation. So you have to get, you know, a real file together and sometimes that can be quite difficult and as I say, it's rendered really considerably more difficult when you can't talk to your client and when you can't reach your client in person and to have your client sign it since ordinarily a signature is required at the end of the process.

THE COURT: This movement of the detainees to different locations, is that standard procedure or is that something unusual?

MS. SCHLANGER: Well, my understanding is that ICE will very often move people right before they're ready for deportation and so what's been going on is that these are people being put into kind of a staging area. I'm, I mean, you can ask the government and they'll be able to tell you more definitively, but it seems that what's going on is that they're being put into a staging kind of a situation to get them ready for immediate deportation. I think when people are not going to be immediately deported there's a little bit more stability, but ICE does move people around some. There is in the ICE transfer policy some little bit of an idea that one shouldn't do that when people have, umm, counsel so there's notification to counsel and maybe there's --

THE COURT: Notification that a detainee's going be to moved?

MS. SCHLANGER: Correct, correct. So I wouldn't want to say that it's totally unusual, but I would say it seems that this is preparatory to mediate deportation. We would obviously like very much for the folks who were from Michigan to be back in a location where the legal community that is actually providing them the services that they need to access due process that they're entitled to under the statute and the

until ICE has already invested a lot time and resources putting together the logistics of gathering these folks, detaining these folks and getting them removed to the appropriate country, if they're allowed to wait until removal is out the doorstep and assert rights that they've been sitting on, that really prohibits ICE from doing its function. There's nothing that would prevent that argument in a number of cases. So I think as a matter of course, ICE needs to stay its course and enforce the orders unless and until the immigration court enters an order directing it to do otherwise or the BIA or the Court of Appeals.

And as I mentioned, there are a lot of resources that have already been invested in this operation so to ask ICE to just put that off is not as simple as it sounds. There are a lot of operational needs to go into detaining these people for a length of time until they can all be accumulated and removal effectuated. So for those reasons, ICE would like to continue to, to perform its duties. Does the Court have any further questions?

THE COURT: Umm, I don't thing so at this point so we'll turn back to petitioners, see if they have any rebuttal.

MS. NEWBY: Thank you, your Honor.

MR. GELERNT: Your Honor, I just want to start, jump into the conversation you were just having with the government and just make one point along the lines that you were asking

Exhibit H

2008 WL 544474
Only the Westlaw citation is currently available.
United States District Court,
E.D. Kentucky,
Northern Division,
at Covington.

In re INSURANCE PREMIUM
LOCAL TAX LITIGATION.

Civil Action Nos. 06–141–DLB, 06–146–DLB.
|
Feb. 25, 2008.

Attorneys and Law Firms

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MEMORANDUM ORDER

W. GREGORY WEHRMAN, United States Magistrate Judge.

***1** Due to the number of parties in these two consolidated cases, the equivalent of reams of paper [1] have been electronically filed concerning just three issues: 1) whether this court should grant plaintiff's request for an extension of current deadlines; 2) whether this court should grant plaintiff's motion to compel defendants to produce certain discovery; 3) whether this court should strike exhibits attached to plaintiff's reply memorandum in support of their motion to revise the scheduling order. The three stated issues are narrowly defined by the parties and are intertwined. Having reviewed the parties' extensive memoranda, the court finds no need for oral argument on the three motions, which are most economically addressed in reverse of the order of filing.

I. Background

A review of the procedural and factual underpinnings of this litigation is necessary to provide context to the pending motions. Plaintiffs filed a class action complaint in state court in June 2006 seeking certification of both a class of similarly situated plaintiffs and a class of defendant insurers conducting business in the Commonwealth of Kentucky. Plaintiffs' amended complaint alleges that the defendants have engaged in the unlawful practice of charging and collecting insurance premium taxes at a rate in excess of that permitted by law, and/or of charging and collecting such taxes where none were permitted by law. The case was removed to this federal court by several defendants on July 14, 2006 under the Class Action Fairness Act, 28 U.S.C. § 1332(d). Plaintiffs sought to remand to state court, while multiple defendants filed motions to dismiss plaintiffs' complaint.

The district court denied both plaintiffs' and defendants' motions on March 31, 2007.

As summarized by the district court in that Memorandum Opinion and Order, the gist of plaintiffs' complaint is

> that Defendant Insurers are adding local tax charges to their insurance premium—be it city, county, charter county, consolidated local government, or urban-county government taxes—along with a fee for collection of this local tax. According to Plaintiffs, while the tax is supposed to be based on the actual premiums paid to insure a risk in a particular geographic area, Defendants have failed in various ways to correctly administer these local taxes.

Doc. 131, p. 2. In the context of current motions, plaintiffs explain that they allege "the insurers were (and still are, in many cases) taxing insured risks as though the insured risk is located within one particular municipal jurisdiction, when it is in fact located in a different municipal jurisdiction." Doc. 234 at p. 1–2.

On May 7, 2007, the district court called a case management conference, consolidating two related cases for purposes of pre-certification discovery, and setting preliminary deadlines. In relevant part, the court's order directed the parties to engage in "pretrial pre-certification fact discovery" and to complete such discovery on or before November 19, 2007. The court's order explained in detail:

> ***2** (a) This phase of pre-certification discovery is limited to **class certification issues only.** Although Plaintiffs desire to also include merits discovery at this time, efforts at this stage are more appropriately directed to class issues, particularly given the fact discovery deadline. Moreover, it is anticipated that given the experience level of counsel involved in this litigation, the present focus for discovery will not result in unreasonable and unnecessary discovery disputes. For example, the Court envisions that some discovery may arguably "overlap" as both merits and class discovery or, to the extent the parties disagree as to whether an inquiry relates to the merits or to class issues, some leeway should be afforded in order to keep the proceedings moving and provided the inquiry is a limited one (versus, for example, an extended line of questioning at deposition). Disagreement otherwise shall be directed to the attention of the Magistrate Judge via the procedure identified herein below.

Doc. 154 (emphasis original). The order further instructs plaintiffs to re-file their motion for class certification on or before March 31, 2008, having denied plaintiffs' prematurely filed state court motion.

Discovery commenced thereafter, with the exchange of some written discovery and the depositions of several plaintiffs. However, in August a number of defendants filed a joint motion to strike plaintiffs' class allegations, arguing that no further discovery was necessary regarding class certification because plaintiffs' class allegations fail as a matter of law. Several defendants also moved for summary judgment on grounds that the various named plaintiffs lacked legitimate claims and therefore could neither be plaintiffs nor class representatives. Instead of responding on the merits to defendants' motions, plaintiffs moved to stay disposition of all dispositive motions pending the completion of discovery. Plaintiffs subsequently filed a motion to compel discovery and a motion to extend discovery deadlines. A stalemate ensued. Although some defendants responded to plaintiffs' discovery motions, others moved for a stay of the motion to compel pending disposition of their earlier filed motions.

On December 14, 2007, the presiding district judge denied defendants' joint motions to strike class allegations. Doc. 259. At the hearing concerning the motion, the court reasoned that the motions to strike were premature, that the class allegations should not be struck as a matter of law without permitting discovery or amendment, and that defendants could re-present their arguments more fully in

the context of a response to plaintiffs' motion for class certification.

> I know there's been quite a bit of discussion this afternoon that under no circumstances could the Court ever certify a class, even if it were refined or modified in some way. I don't think it's as simple as that. I'm not adjudicating the class definition on the merits at this point.
>
> ***3** I have reviewed the cases within the motions to strike class allegations, and I think they are distinguishable, in essence, based upon the fact that the procedural posture of this case, vis a vis those cases cited, is quite different.

Doc. 147, TR at 79.

Attempting to break the stalemate, the presiding district judge also denied plaintiffs' motion for a stay of dispositive motions, and defendants' joint motion to stay ruling on the motion to compel. The court directed plaintiffs to respond to the pending motions for summary judgment, and set forth a briefing schedule on plaintiffs' motion to compel and motion to alter the scheduling order, referring both to the undersigned magistrate judge. The court granted only Kentucky Farm Bureau's motion to stay discovery to the extent that KFB sought an extension of its obligation to provide discovery until the court ruled on plaintiffs' pending motion to compel. However, the court denied KFB's motion to the extent that KFB sought a stay of discovery pending a ruling on its motion for summary judgment. Doc. 259 at 4.

Finally, the court granted the motion for summary judgment filed by defendant Progressive Direct Insurance Company against plaintiffs James and Anna Nichols, but permitted plaintiff James Jarboe to file an intervening complaint.

II. Analysis of Pending Motions

A. Motion To Strike (Doc. 258)

Two defendants, the Ohio Casualty Insurance Company and West American Insurance Company, have moved to strike seven exhibits attached to a reply memorandum filed in support of plaintiffs' motion to revise the scheduling order. Defendants point out that none of the seven exhibits has been authenticated, and argue that they constitute inadmissible hearsay. In a reply memorandum filed in support of the motion to strike, defendants concede that "a simple declaration signed by an appropriate representative of Group One could have authenticated most of the exhibits at issue and supported the factual assertions upon which Plaintiffs primarily based their motion to revise the scheduling order." Doc. 275 at p. 9.

In their response in opposition to the motion to strike, plaintiffs argue that "virtually every party" to this litigation has referred to unauthenticated documents throughout the extensive motion practice in this case, and that little case authority supports applying the Rules of Evidence to a procedural motion. Plaintiff accuses the defendants of filing their motion to strike in an attempt "to further burden the resources of this Court and Plaintiffs' counsel." Should this court reach the merits of the motion to strike, plaintiff argues that the documents are either self-authenticating or previously authenticated, and that they do not constitute hearsay because they are not offered "to prove the truth of the matter asserted."

I decline to strike the exhibits attached to plaintiffs' reply memorandum, even though some of the exhibits are clearly hearsay. In this preliminary stage of discovery proceedings, the Federal Rules of Evidence—while not necessarily without application—should not be rigidly applied to procedural motions. The exhibits were submitted by plaintiff in support of what is in essence a routine motion to extend discovery deadlines. Unlike trial or summary judgment proceedings, there is little case authority to support the strict application of Rules 801 and 802 in this type of preliminary proceeding, and common practice to the contrary. In many other civil and criminal contexts, hearsay is appropriate for courts to consider during preliminary proceedings, precisely because of the preliminary and non-dispositive nature of the proceedings. Although most exceptions are delineated in Rule 1101, Fed.R.Evid., others are not. *See, e.g., White v. MPW Industrial Services, Inc.*, 236 F.R.D. 363 (E.D.Tenn.2006)(hearsay permitted to support motion for conditional certification of FLSA collective action); *In re Applin* . 108 B.R. 253, 257 (E.D.Cal.1989); *see also* Memorandum Opinion and Order of March 31, 2007 (Doc. 131) at p. 6, n. 4 (noting defendants' reliance on newspaper quotation of one of plaintiffs' counsel to establish amount in controversy).

***4** My conclusion that the Rules of Evidence do not require striking plaintiffs' exhibits in the limited context of plaintiffs' preliminary procedural motion should not be viewed as *carte blanche* for plaintiffs to ignore the Rules of Evidence in future proceedings. Contrary to plaintiffs' view, I do not find defense counsel's motion to strike to have been motivated other than by zealous advocacy for their clients. Therefore, I will deny defendants' motion to strike the exhibits without prejudice to renew should plaintiffs present the same or similar evidence in a more substantive future motion.

B. Motion to Compel (Doc. 234)

1. KFB's Motion for Additional Briefing

The bulk of the parties' existing memoranda are devoted to discussion of plaintiffs' first motion to compel discovery and plaintiffs' related motion to revise the court's scheduling order. [2] Notwithstanding the volume of previously filed briefs, Kentucky Farm Bureau requests additional time to file its own response to the motion to compel. KFB argues that it is "unique" among the defendants because it concentrates 100% of its business in Kentucky and has developed municipal tax procedures that have accuracy rates "at least equal to, if not better than" the software system that plaintiffs propose to use. KFB further contends that it is in a unique procedural position because its pending motion for summary judgment, if granted, would moot the need for discovery.

KFB's request will be denied. The court's December 14 order denied both plaintiffs' motion to stay ruling on dispositive motions and defendants' joint motion to stay disposition of the motion to compel. KFB is not unique in having a pending motion for summary judgment. The trial judge previously considered this same issue and directed all parties to brief plaintiffs' discovery motion, expressly denying KFB's request to further stay discovery. The December 14 order set forth a clear briefing schedule, with which KFB could have complied. Finally, the arguments which KFB proposes to brief go to the merits of the class certification issue, and would not significantly aid the court in deciding the pending discovery motion.

2. Arguments For and Against Compelling Responses to Interrogatory 4

Plaintiffs' motion to compel seeks an order requiring each of the defendants to respond to a revised version of Plaintiff's Interrogatory # 4, as follows:

> Interrogatory No. 4:
>
> Please identify the name of each of the Kentucky *taxing* (i.e ., only where a tax was charged and/or collected) jurisdictions, cities, counties, charter counties, municipalities, consolidated local governments, or urban-county governments where risks insured by the Defendant are either currently located, or have been located, for the period of June 1, 2001 to the present, and for each such municipality, identify each individual policy (either by policy number, policy name, or other identifier that will allow the parties and the Court to meaningfully identify an individual policy/risk), and provide the precise location of the insured risk (i.e., identify location by more than just taxing jurisdiction, such as providing street address) for each individual policy.

***5** Most if not all of the defendant insurers responded to the first portion of the interrogatory by providing a list of taxing jurisdictions wherein the defendant has or has had insured risks. However, all of the defendants objected to the second portion of the interrogatory which sought identifying information for each individual policy including "the precise location of the insured risk ... such as [by] ... street address."

In their motion to compel, plaintiffs argue that the information is relevant to class certification discovery, because it will assist plaintiffs in determining numerosity, commonality, and typicality of claims, three of the essential elements of proof for class certification under Fed.R.Civ.P. 23(a). Plaintiffs also claim that the information will "provide insight into the scope of the municipal jurisdiction assignment errors" including "whether the errors were the result of a common business practice...." One of the chief uses which plaintiffs propose to put the data is a computerized analysis via software provided by Group One, [3] a third-party vendor that offers a software package using geocoding, database layering, and multiple cross-references to determine whether a street address falls within or outside a particular municipal boundary.

Defendants' multiple responses can be distilled into four central arguments: 1) plaintiffs' motion is procedurally

infirm; 2) the request is irrelevant to class certification; 3) disclosure would violate privacy rights of policyholders; and 4) disclosure would be unduly burdensome.

a. Procedural Infirmities of Plaintiffs' Motion

More than one defendant has correctly noted that plaintiffs' motion ignores the order of the presiding district judge to first meet and/or confer, and then to seek a telephonic conference with the Magistrate Judge prior to filing any discovery-related motions. Doc. 154, p. 5–6. Several defendants also point out that plaintiffs did not respond to correspondence from defense counsel indicating that, in the absence of any objection, defendants would provide no further discovery pending resolution of certain motions. Although plaintiffs did engage in some correspondence prior to filing their motion to compel, they failed to follow up with some defense counsel and did not seek a telephonic conference. In the future, plaintiffs would be well-advised to adhere to the required procedure. Future written motions which do not comply with court directives run the risk of being summarily denied. That said, the interests of justice favor resolution of the pending motions on the briefs submitted.

b. Relevancy

Many defendants argue that Interrogatory 4 is wholly irrelevant to class certification issues, and instead is relevant (if at all) only as to the merits of plaintiffs' claims. Doc. 269 at 6 (conceding information might arguably be relevant to the merits of the claims of an individual policyholder alleging a local premium tax overcharge). It is true that plaintiffs bear the burden of demonstrating that the discovery sought is relevant to *class certification* issues and not merely merit issues. It is also true that in their initial motion, plaintiffs' articulation of the purpose of their request appears to be more relevant to the merits of their claims, i.e., to determine whether an insurer "*accurately* assigned" the risk and correctly charged a municipal tax. *See also* Doc. 252, Exhibit 1 (email correspondence from plaintiffs' counsel). However, the fact that discovery may be relevant to the merits of plaintiffs' underlying claims as well as to class certification issues does not, standing alone, require denial of plaintiffs' motion. As the presiding district judge previously observed, "the Court envisions that some discovery may arguably 'overlap' as both merits and class discovery or, to the extent the parties disagree as to whether an inquiry relates to the merits or to class issues, *some leeway should be afforded in order to keep the proceedings moving* and provided the inquiry is a limited one (versus, for example, an extended line of questioning at deposition)." (emphasis added); *see also Ho v. Ernst & Young, LLP,* 2007 WL 1394007 (N.D.Cal. May 9, 2007)(holding discovery of contact information for putative class members relevant both to class certification and to the merits). In short, plaintiffs' burden to show that the information is relevant to class certification issues is not a heavy one. *See, generally* Rule 26; *United States v. Legget & Platt, Inc.,* 542 F.2d 655, 657 (6th Cir.1976).

***6** In an attempt to satisfy that burden, plaintiffs argue that the information is relevant to numerosity, since no defendant has offered to stipulate this element. *But see* Doc. 269 at 7 (noting that if plaintiffs could satisfy the other elements of class certification, it is "obvious ... that the numerosity element would also be met"). Defendants argue in response that the names and addresses of putative class members are not necessary to establish numerosity under Rule 23(a)(1). Defendants claim that plaintiffs' real motivation is to identify additional potential class members and to facilitate notice should the class be certified. As defendants correctly note, even if plaintiffs succeed on a future class certification motion, the costs of producing class-notice information must be borne by plaintiffs under Rule 23.

Plaintiffs dispute defendants' characterization of their request. Plaintiffs agree that they do not necessarily need the names of policyholders, but contend that the ability to provide notice to class members is relevant to class certification under Rule 23(b) when determining the ease of manageability of a proposed class, versus individual claims.

I conclude that the *names* of policyholders are not relevant to establish numerosity, insofar as substitute markers or policy numbers can be used. [4] However, the information plaintiffs seek is not wholly irrelevant to the issue of numerosity. Plaintiffs do need to demonstrate that the number of alleged class members favor class certification. Plaintiffs allege that the data will enable them to determine the number of instances in which taxes have ben charged at a rate different than required by the municipality in which the risk is located. While plaintiffs in general "only need to know what the claims are, not who made them, to assess the similarity of those claims and plaintiff's claims," *Brinkerhoff v.. Rockwell Int'l Corp.,* 83 F.R.D.

478 (N.D.Tex.1979), the information sought by plaintiffs is relevant to this determination because it pertains to the number of policies alleged to suffer from similar defects in premium charges. At this point, the defendants have identified for plaintiffs only the number of policies written, leaving plaintiffs to guess at the number of policies allegedly affected by tax jurisdiction issues.

Defendants similarly argue that the information is not relevant to the related elements of commonality and typicality. Commonality requires "that generalized proof will be applicable to the class as a whole." *Lumpkin v. E.I. Du Pont De Nemours & Co.,* 161 F.R.D. 480, 482 (D.Ga.1995). To determine commonality the court will review plaintiffs' allegations to see if there are "shared questions of law or fact." *Sprague v. General Motors Corp.,* 133 F.3d 388, 397 (6th Cir.), *cert. denied,* 524 U.S. 923 (1998). Because commonality may be satisfied by a single common issue, it is "often easily met." *Disability Rights Council of Greater Washington v. Washington Metropolitan Area Transit Authority (WMATA),* 239 F.R.D. 9, 25 (D.D.C.2006)(citing *In re Vitamins Antitrust Litig.,* 209 F .R.D. 251, 259 (D.D.C.2002). Similarly, "[t]ypicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature of the challenged conduct." *Sprague,* 133 F.3d at 399. Thus, "a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory ." *In re American Medical Systems, Inc.,* 75 F.3d 1069, 1082 (6th Cir.1996).

***7** Defendants assert that providing a list of policyholders and risk locations will not generate evidence either of whether shared questions of fact or law exist (commonality) or of whether plaintiffs suffered a collective harm as opposed to thousands of individualized injuries (typicality). According to defendants, plaintiffs will still be required to analyze the data of each policyholder on an individual basis to determine whether each has been overcharged (as plaintiffs allege) due to an error by the insurer in determining the taxing authority. "The process that plaintiffs propose to use would not obviate the need for an individual inquiry into the facts relating to the physical risk location of each policyholder." Doc. 269, at p 1–2. Defendants claim that this type of individualized undertaking runs contrary to the principles of typicality and commonality, and "highlights Plaintiffs' faulty class definition." Doc. 268 at p. 9. In a similar vein, defendants assert that virtually no discovery is needed because plaintiffs' class allegations are facially insufficient. See Doc. 268, at 6 (arguing that the determination of the prerequisites for class certification under Rule 23(a) and 23(b) should be made on the pleadings without discovery); Doc. 272.

The defendants' arguments present mixed questions of fact and law. The presiding district judge previously considered similar arguments made by defendants in the context of their motions to strike plaintiffs' class allegations, but ultimately rejected those arguments in favor of permitting plaintiffs to conduct some discovery, to file a formal motion for class certification, and to amend their class allegations if necessary. The undersigned will not disturb the trial court's rejection—at least at this stage—of defendants' collective arguments that no class can be certified as a matter of law.

On the other hand, the undersigned will address defendants' fact-based arguments that the information sought by plaintiffs cannot be used in any fashion to determine commonality or typicality. In their reply memorandum, plaintiffs explain that once basic information is provided which identifies the situs of other insured risks, plaintiffs can examine whether the claims of the named plaintiffs are sufficiently common with those of the putative class. According to plaintiffs, analysis of the data will permit counsel to conduct Rule 30(b)(6) depositions to compare how the named plaintiffs' allegedly excess tax charges occurred with the systematic occurrence of excess tax charges assessed against other putative class members.

By way of example, plaintiffs point out that defendant KFB has alleged in a motion to dismiss that it relies on a "systemized source of information" to accurately determine municipal tax liability. KFB implies and/or asserts that two of the named plaintiffs (the Sannings) were erroneously overcharged due to inaccuracies in data provided by the Sannings, as opposed to inaccuracies in KFB's system. Plaintiffs argue that production of the requested discovery regarding the location and assessment of other insured risks will permit the plaintiffs to make a meaningful comparison of the Sannings' claims to those of other putative class members and correspondingly, to refute defendant KFB's claim that the Sannings' tax error

was a unique factual occurrence as opposed to a common or typical systematic one.

8** Defendants also criticize plaintiffs' characterization of the capabilities of the software analysis. Defendants argue that the Group One software on which plaintiffs rely **"*will not answer the question of whether the correct municipal tax was charged, even on an individual basis." Doc. 269 at 2 (emphasis original). In support, defendants cite to the deposition testimony of a Group One Software sales representative concerning the limitations of the software. As but one example of the alleged invalidity of the proposed software analysis, defendant AIS points out that its database contains only the policyholder's mailing address, which may or may not be the same as a vehicle's garaging location for purposes of determining the risk location. Where the vehicle is garaged in a different location or where the address is a PO Box or Rural Route number, AIS argues that the software analysis would be meaningless. Defendants note that even if the software could be used to determine risk locations different from the risk locations assigned by the defendant insurers, that identification would only result in a list of alleged *differences;* it would not mean that plaintiffs' analysis is right and the insurer's assignment is wrong. Defendants also protest that because Group One has previously indicated that it will not testify as plaintiffs' expert, any software analysis conducted by plaintiffs using Group One software will never be admissible in evidence. [5]

Defendants' criticisms of the proposed software analysis stray beyond the scope of this discovery inquiry into the merits of plaintiffs' claims. Plaintiffs contend that the application of the software to the data sought by Interrogatory No. 4 will assist them in identifying the elements of numerosity, commonality, and typicality. Whether or not that list will be sufficient to prove either entitlement to class certification or the merits of plaintiffs' claims must await another day. Likewise, it would be premature at this point to rule that there is no conceivable method by which plaintiffs can admit their analysis into evidence, as that issue is more appropriately addressed by way of a motion in limine or other evidentiary motion. At this point I conclude only that the contentions made by plaintiff regarding the capabilities of the software and the use of the data sought in Interrogatory 4 are sufficient to overcome defendants' objections on the basis of relevancy. [6]

c. Privacy Issues

The third major obstacle defendants present to the motion to compel is the argument that release of personally identifying information would violate both state and federal privacy laws, including the Gramm–Leach–Bliley Act ("GLBA"), 15 U.S.C. § 6801, *et seq.* That Act requires insurers to protect the "nonpublic personal information" of their policyholders. The GBLA contains several exceptions which permit disclosure of protected information to a third party, including "judicial process" and "representative/fiduciary" exceptions. Although the Sixth Circuit has yet to interpret the "judicial process" exception, I conclude based upon the near-universal reasoning of other courts that it would apply on the facts presented. *See e.g., Marks v. Global Mortgage Group, Inc.,* 318 F.R.D. 492, 496 (S.D.W.Va.2003); *Her v.. Regions Financial Corp.,* 2007 WL 2806558 (W.D.Ark.2007)(unpublished class action certification issues, text available on Westlaw). Alternatively, I conclude that disclosure to plaintiffs as putative class representatives would fall within the representative/ fiduciary exception. 15 U.S.C.A. § 6802(e)(3)(E).

***9** Apart from the GLBA, some defendants argue that undefined state or common law privacy issues disfavor disclosure. However, a protective order has been entered in this case, and defense counsel previously conceded that privacy issues outside of the GLBA could be adequately addressed by reference to that order. Doc. 260, TR at 68–69.

Finally, assuming that the court may find disclosure to plaintiffs to be appropriate, defendants argue that plaintiffs should not be permitted to disclose the data to a third party, Group One Software. However, I find that such disclosure can be adequately protected in this instance by the absence of any use of names, and by the further precaution that plaintiffs require Group One Software to comply with the tenets of the existing protective order.

d. Undue Burden

The last significant objection posed by defendants is that the information sought by Interrogatory No. 4 would be unduly burdensome to produce. The State Farm defendants, for example, argue that producing the information would require personnel from three different areas of their Systems Department to extract

the available data necessary, and require (in man hour time) an expenditure of approximately $24,000. State Farm explains that while it can determine the current location of an insured risk (at least as reported by a given policyholder), and can further determine the location of the insured risk at a given point in time, gathering information on the location of the risk over a 6–7 year period at each point in time is a significantly more daunting inquiry. Other defendant insurers similarly note that they have tens of thousands of policyholders for which data must be compiled. See Doc. 272 at p. 3 (estimating that the multiple defendants in total would be required to review the files of over *one million* insureds to determine the taxing jurisdiction of each insured risk, including both current and former policyholders over the relevant time period). Because both the location of an insured risk, such as a vehicle, and municipal boundaries themselves can change over time, data must be collected for each day throughout the relevant period. If such cumbersome data collection is imposed by the court, State Farm and other defendants request that the court order plaintiffs to pay all or a portion of the associated costs.

In their reply, plaintiffs note that the information they seek is both in the custody and control of the defendants and used in the ordinary course of business. Defendants obviously use risk location information to assign insured risks to the appropriate risk territories, in order to determine the premium to be charged and the relevant municipal tax. Plaintiffs argue that only State Farm has quantified the expense, and even in that defendant's case, the expense of production would be but a tiny fraction of more than 19 million dollars obtained in collection fees by the State Farm defendants over the same time period.

***10** Notwithstanding the lack of monetary quantification of the discovery burden by most individual defendants, it is obvious to this court that the burden from responding to plaintiffs' request will be significant, particularly if defendants are required to produce data for each policy for each day over the span of seven years. At the same time, plaintiffs raise a valid point that the same risk location data is used by defendants in the ordinary course of business, at least when the policy is first issued and upon policy renewals.

In order to minimize the burden to defendants, the court will at this time compel only limited production of data from the defendants. The court's limitation is intended to balance the defendants' burden of production with plaintiffs' interest in gathering data relevant to class certification issues. Given the relatively light burden plaintiffs have carried to show the relevance of the information and the defendants' relatively heavy burden of production, the court will require defendants to produce only risk location data for each policy upon inception of the policy and upon each renewal for the relevant time period. This limitation should serve to greatly reduce the costs associated with production, while providing a significant amount of data to plaintiffs relevant to class certification issues. Given the lack of information on the exact costs of this more limited production by each defendant insurer (as well as the fact that those costs may differ substantially by defendant), the court will not require plaintiffs to share in the costs of production at this time. [7]

At the same time, the limitations on the production of information contained in this order are without prejudice to plaintiffs' right to seek more complete information should plaintiffs succeed in obtaining class certification and proceed to discovery on the merits of their claims (assuming without deciding the relevancy of such information). Therefore, a different outcome as to costs may result if plaintiffs seek more complete production following the class certification stage of discovery.

C. Motion to Revise Scheduling Order (Doc. 231)

In light of the court's partial grant of plaintiffs' motion to compel discovery, the court will also grant plaintiffs' motion to extend class certification discovery, which discovery was originally to have been completed on November 19, 2007. Although plaintiffs seek 120 days from the date of this order, the court concludes that 90 days should be more than adequate to complete fact discovery on preliminary class certification issues. Shorter extensions are adequate for other pre-trial deadlines related to class certification issues.

In setting the revised deadlines, the court has taken into consideration many of the defendants' responses which note that plaintiffs' counsel has failed to follow up in review of documents and in scheduling Rule 30(b)(6) depositions. While some of this delay is excusable given the stalemate regarding Interrogatory 4, plaintiffs' attribution of all delays to the defendants

does not persuade. Several defendants point to significant document production not reviewed by plaintiffs' counsel, as well as to correspondence regarding Rule 30(b)(6) depositions to which plaintiffs' counsel failed to respond. Even though the court's prior scheduling order urged the parties to "coordinate discovery to avoid or minimize the need for any party to perform duplicate file searches [or] repetitive or duplicative interviews or depositions," that language did not excuse the plaintiffs from their obligation to move forward with review of thousands of documents offered or produced by defendants simply because the insurers' responses to Interrogatory 4 were not to plaintiffs' liking.

III. Conclusion and Order

***11** For the reasons stated herein, **IT IS ORDERED:**

1. Defendant's motion to strike [Doc # 258] in Civil Action No. 06–141–DLB is **denied;**

2. Kentucky Farm Bureau's motions for temporary stay of discovery or for additional briefing time [Doc. # 160, 167] in Civil Action No. 06–146–DLB are **denied;**

3. Plaintiffs' motion to compel [DE # 234] in Civil Action NO. 06–141–DLB is **granted in part** and **denied in part.** As more fully explained herein, defendants shall supplement their responses to Interrogatory 4 within twenty (20) days of the date of this order. Using policy numbers or other numerical identifiers, defendants shall identify the street address and assigned taxing jurisdiction during the relevant time period, subject to the time constraints set forth in the body of this order and the existing protective order. Plaintiffs shall be permitted to share the data responsive to Interrogatory 4 with Group One only if that third party entity agrees to comply with the terms of the protective order;

4. Plaintiffs' motion to revise the scheduling order [Doc. # 231] in Civil Action No. 06–141–DLB is **granted** in part as follows:

a. Pre-certification fact discovery for the consolidated cases (06–141 and 06–146) shall be commenced in time to be completed on or before **May 23, 2008,** with the same limitations as otherwise noted in the court's scheduling order of May 7, 2007;

b. Plaintiffs' pre-certification expert witnesses shall be disclosed on or before **April 15, 2008,** with any corresponding disclosures from defendants to be made on or before **May 15, 2008;**

c. Pre-certification expert discovery shall be completed on or before **June 13, 2008;**

d. Plaintiffs' motion for class certification shall be filed **July 10, 2008,** with defendants' response to be filed **August 11, 2008,** and any reply to be filed **August 28, 2008;**

e. ***Both parties are strongly cautioned that future extensions of these revised class certification deadlines are unlikely to be granted.*** Notwithstanding this cautionary note, a party who decides to seek an extension **must** do so prior to the expiration of the deadline for which an extension is sought. Any motion which contains even as partial relief a request for an extension of a deadline contained herein will be deemed a motion under LR 7.1(b)(any opposing memoranda due within five days).

All Citations

Not Reported in F.Supp.2d, 2008 WL 544474

Footnotes

1 Although the records of this court are electronically maintained, the court (regretfully) often finds it necessary to print paper copies of lengthy electronic filings.

2 Not including 3 memoranda regarding the motion to strike, the court reviewed 28 separate memoranda devoted to these two motions. The court additionally reviewed the 84 page transcript of the 12/12/07 hearing before the presiding district judge, at which the same motions were discussed prior to being referred to the undersigned magistrate judge.

3 Plaintiff has at times identified Group One as its expert, a denomination opposed by Group One itself and vehemently disputed by defendants.

4 Plaintiffs have agreed that they do not require names and that an identifier for each insured risk will suffice in lieu of a name.

5 Plaintiffs argue this issue is a red herring involving only "semantics," since Group One has indicated that a representative would be available to testify as a fact witness.

6 Plaintiffs attempt to bolster their relevancy arguments by referring to the fact that several settling defendants have employed the same or similar computer software in determining the amount of settlement. However, the court agrees with defendants that the settlement positions of other defendants should have no bearing on this dispute.

7 On February 22, defendant KFB moved for a second time for leave to file a supplemental memorandum in opposition to the pending motion to compel. The court has not reviewed the tendered memorandum in detail but notes that it estimates the costs associated with responding to Interrogatory 4 as in excess of three million dollars. At the same time, KFB represents that when a KFB agent writes a policy, the address information provided is "run through address verification software" similar to the software plaintiffs intend to use. As explained herein, this order is intended to limit production to data already used by KFB, in hopes of limiting the associated costs of production.