IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al., Plaintiffs, v. KISLING, NESTICO & REDICK, LLC, et al., Defendant.	Case No.: 2016-09-3928 Judge: James Brogan **DEFENDANT SAM GHOUBRIAL, M.D.'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL DISCOVERY ON DEFENDANTS' ASSETS AND NET WORTH**

Now comes Defendant, Sam Ghoubrial, M.D. ("Dr. Ghoubrial"), by and through undersigned counsel, and respectfully requests this Court deny Plaintiffs' Motion to Compel Discovery on Defendants' Assets and Net Worth ("Plaintiffs' Motion to Compel").[1] Once again Plaintiffs, and particularly Plaintiffs' counsel, rely upon blatant misrepresentations of the both the facts and the law in an effort to obtain information that is wholly irrelevant to class certification. Once again Plaintiffs' counsel is trying to inject irrelevant and unnecessary information into this matter for the express purposes of embarrassing the Defendants and improperly biasing this Court. Because there is no legitimate reason for any discovery regarding Dr. Ghoubrial's assets and net worth at this time, Plaintiffs' Motion must be denied.

Plaintiffs' justify their premature and harassing request for Dr. Ghoubrial's asset and net worth information at this early stage of the proceedings because they maintain "[d]iscovery in this case has uncovered substantial evidence that the Defendants have engaged in a calculated and widespread scheme to defraud socioeconomically disadvantaged car-accident victims of millions of

[1] Defendant Ghoubrial has filed a Motion to Strike Plaintiffs' Motion to Compel Discovery on Defendants' Assets and Net Worth due to Plaintiffs' violations of the Protective Order in place in the case. Defendant Ghoubrial is filing this Opposition as an alternative to the Motion to Strike and to ensure his rights are protected.

dollars..." *See* Plaintiffs' Motion to Compel, pg. 1. However, in typical fashion, Plaintiffs ignore the fact Dr. Ghoubrial has written off millions of dollars in fees for care he provided to motor vehicle accident victims for free. Ultimately, Plaintiffs do not offer any of their supposed evidence in support of their request. The reason for this is simple, there is no such evidence because there never was a scheme to defraud anyone.

What discovery has determined is that all of Plaintiffs' baseless allegations are nothing more than the wishful thinking of Plaintiffs' counsel, Peter Pattakos. One only need read the deposition transcripts of the putative class representatives to see their "evidence" is nothing more than what Plaintiffs' counsel has told them.[2] There is no evidence. There is only baseless speculation and innuendo levied by a bitter and shameless attorney seeking to make a name for himself in a market dominated by Co-Defendant KNR, who he sees as his main competitor in the area. Plaintiffs' counsel's desire for self-promotion does not warrant exposing Dr. Ghoubrial's personal assets and net worth information to public scrutiny. This is especially true considering Plaintiffs are seeking this information before they have even moved for class certification.[3]

The grounds Plaintiffs cite in support of their Motion to Compel are wholly lacking in merit. Likewise, the cases cited by Plaintiffs are self-evidently distinguishable and Plaintiffs' misrepresentations of those case are patently disingenuous. It is as if Plaintiffs' counsel believes he can cite a case for a false premise believing the Court and defense counsel will take his

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[2] The transcripts of the putative class representatives have now been filed under seal with leave of Court. Dr. Ghoubrial implores this Court to read those transcripts at its earliest convenience so the Court can see for itself how all the putative class representative respond under oath when asked for the evidence support their claims.

[3] Dr. Ghoubrial is not saying Plaintiffs would never be entitled to net worth discovery. However, any such discovery is premature at this point considering no classes have been certified. Information regarding Dr. Ghoubrial's net worth would ever become relevant after class certification and then only after dispositive motions were denied relative to the punitive claims.

representations at face value rather than actually reading the cases cited. For example, Plaintiffs cite *Martin v. Redline Recovery Serv. LLC,* 2009 U.S. Dist. LEXIS 35468 (April 1, 2009)for the proposition courts "generally" hold net worth of class action defendants is "discoverable before class certification," *in part* "to assist the plaintiff in determining whether he should pursue class certification because if a defendant has zero or a negative net worth the class would get nothing and certification would not be in the best interest of the class." *Martin*, surpa, at *3-5; see Plaintiffs' Motion to Compel, pp. 6-7. Plaintiffs' representation of the holding in *Martin,* a case from the Northern District of Illinois, is misleading for two reasons.

First, the holding in *Martin* was specifically limited to a proposed class action under the Fair Debt Collection Practices Act, 15 U.S.C.S. § 1692 et seq. A plain reading of *Martin* demonstrates it has no application to the issues in this case. Second, and more importantly, the *only reason* the *Martin* Court permitted the net worth discovery of the defendant before class certification was to assist the plaintiff is determining whether the defendant was solvent as it made no sense to certify a class if the defendant had a zero or negative net worth. The *Martin* Court did not say "in part" as indicated in Plaintiffs' Motion to Compel. Plaintiffs' counsel intentionally added the "in part" language to make it appear there were other reasons the Court permitted the net worth discovery prior to class certification. At best, this was a curious mistake made by Plaintiffs' counsel. At worse, it was a deliberate fraud upon this Court. *See Martin v. Redline Recovery Serv. LLC*, attached as Exhibit "A" Either way, and giving Plaintiffs' counsel the benefit of the doubt he does not

deserve, Plaintiffs are not entitled to net worth discovery at this early stage of the case as Plaintiffs have not even suggested Dr. Ghoubrial is insolvent.[4]

Plaintiffs also blatantly misrepresent the holding in *United States v. Matusoff Rental Co.*, 204 F.R.D. 396, 399 (S.D. Ohio 2001), seemingly arguing a defendant's net worth is always discoverable without regard to the viability of the plaintiff's punitive damage claim. *See* Plaintiffs' Motion to Compel, pg. 4. However, once again Plaintiffs omit critical language from the holding of a case they cite in an effort to mislead this Court. Plaintiffs suggest *United States v. Matusoff Rental Co.* stands for the blanket proposition a plaintiff alleging punitive damages can discover a defendant's net worth at any time. *Id.* Once again, Plaintiffs are wrong. Not surprisingly, Plaintiffs omit the words "in advance of trial" from the Court's actual holding. *Id.* at HN3. *See United States v. Matusoff Rental Co.*, attached as Exhibit "B".

The Court in *United States v. Matusoff Rental Co.* permitted the net worth discovery because trial was imminent. Although the Court bifurcated the liability and punitive damages phases of the trial, the Court permitted the net worth discovery prior to the start of the liability phase because it ordered the punitive phase would begin within two days of the liability verdict in front of the same jury. Ultimately the Court permitted the net worth discovery prior to the liability phase to avoid any delays in starting the punitive phase. The Court held:

> Discovery on Defendants' finances will be ordered provided within thirty (30) days, subject to a properly worded protective order, in order that there will be no delay in the commencement of the second trial, if same be necessary.
> *Id.* at 340.

[4] Quite the opposite is true. Plaintiffs have alleged Dr. Ghoubrial has enriched himself by way of some fraudulent scheme. Plaintiffs cannot be permitted to continue to speak out of both sides of their mouths when it suits them.

Here, Plaintiffs have yet to move for class certification and there is no trial scheduled. As such, there is no legitimate reason for Plaintiffs to be conducting discovery relative to the net worth of the Defendants. The suggestions of Plaintiffs' counsel that asserts could be dissipated is baseless and offensive, and unfortunately is par for the course. Plaintiffs' counsel goes as far as to reference and attach a motion filed by Julie Ghoubrial in the Ghoubrials' divorce case suggesting the allegations raised in that motion somehow justify the extraordinary relief requested. Of course, Plaintiffs' counsel fails to mention that motion was never addressed or ruled upon in the divorce case.[5] It is just the latest baseless allegation he portrays as established fact.

Finally, it bears noting that the prior conduct of Plaintiffs' counsel demonstrates he cannot be trusted with confidential information, even when it is subject to a protective order or other order of the Court. Plaintiffs' counsel has repeatedly violated Court Orders, including citing to confidential deposition testimony in his Motion to Compel, and he has knowingly published material on social media about the case this Court has found to be misleading.[6] Because Plaintiffs' counsel has no respect for confidential information or for the authority of this Court, the Motion to Compel the Net Worth Information must be denied.

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[5] Seeing as Plaintiffs' counsel was able to obtain the motion from the docket in the divorce case he must have been aware the motion was never addressed or ruled upon. Based on Plaintiffs' counsel conduct to date, it stands to reason if there was a ruling on that motion in the divorce he would have included it in his motion.

[6] Plaintiffs' counsel's violations of the Protective Order are addressed in Dr. Ghoubrial's Motion to Strike and for a Finding of Contempt which was previously filed and is pending before the Court.

Respectfully Submitted,

By: /s/ *Bradley J. Barmen*

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CERTIFICATE OF SERVICE

The foregoing Defendant Sam Ghoubrial, M.D.'s Motion to Strike has been filed this 10th day of May, 2019 using the Court's electronic filing system. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system.

/s/ Bradley J. Barmen
Bradley J. Barmen (0076515)

Counsel for Defendant
Sam N. Ghoubrial, M.D.

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User Name: Brad Barmen
Date and Time: Friday, May 10, 2019 2:17:00 PM EDT
Job Number: 88670926

Document (1)

1. *Martin v. Redline Recovery Serv. LLC, 2009 U.S. Dist. LEXIS 35468*

Client/Matter: 000000.000000
Search Terms: Martin v. Redline Recovery Serv. LLC, 2009 U.S. Dist. LEXIS 35468
Search Type: Natural Language
Narrowed by:

Content Type	Narrowed by
Cases	-None-

Martin v. Redline Recovery Serv. LLC

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

April 1, 2009, Decided; April 1, 2009, Filed

Case No. 08-CV-6153

Reporter
2009 U.S. Dist. LEXIS 35468 *; 2009 WL 959635

NICHOLAS MARTIN, Plaintiff, v. REDLINE RECOVERY SERVICE LLC, Defendant.

Core Terms

documents, materials, net worth, recordings, responsive, interrogatory, messages, class member, telephone, motion to compel, discoverable, discovery, requests, parties

Case Summary

Procedural Posture

Plaintiff consumer filed a motion to compel discovery as to aspects of discovery requests plaintiff had made to defendant, a debt collection company, in connection with plaintiff's proposed class action suit under the Fair Debt Collection Practices Act, *15 U.S.C.S. § 1692 et seq.*, in which plaintiff charged violations of § 1692e(11) and § 1692d(6). The motion was considered by the Magistrate Judge (MJ).

Overview

Plaintiff claimed that defendant's employee's voice mail messages violated identification criteria in § 1692e(11) and § 1692d(6). Though defendant had complied with some discovery requests while represented by prior counsel, others remained unfulfilled and formed the basis of the motion. First, as recordings of the employee's calls during the relevant period were discoverable, defendant was to try to locate and produce them and related logs. Second, given the case's putative class action status, defendant had to provide data relative to net worth, though the court limited the scope thereof. Third, noting that defendant had committed to revisit certain requests for admission, plaintiff's motion relative thereto was denied as moot. Fourth, plaintiff's electronic discovery requests were reasonable, and defendant was required to respond appropriately. Fifth, a request for defendant's records concerning plaintiff was also granted. The MJ also directed defendant to take a position relative to attorney-client privilege issues implicated by its previously asserted bona fide error defense. Finally, given the change in counsel, *Fed. R. Civ. P. 37* fees were not appropriately awarded.

Outcome

The MJ granted the motion in part and denied it in part. It declined to award *Rule 37* fees.

LexisNexis® Headnotes

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Banking Law > Consumer Protection > Fair Debt Collection > Liability for Violations

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN1[] **Consumer Protection, Fair Debt Collection**

In a proposed class action under the Fair Debt Collection Practices Act, *15 U.S.C.S. § 1692 et seq.*, a defendant's net worth is discoverable before class certification in order to assist the plaintiff in determining whether he should pursue certification because if a defendant has zero or a negative net worth the class would get nothing and certification would not be in the best interests of the class.

Banking Law > Consumer Protection > Fair Debt Collection > General Overview

Governments > Legislation > Statutory Remedies & Rights

Banking Law > Consumer Protection > Fair Debt Collection > Liability for Violations

HN2[] Consumer Protection, Fair Debt Collection

Under the Fair Debt Collection Practices Act 15 U.S.C.S. § 1692k(c), a defendant may choose to assert a defense to liability.

Civil Procedure > ... > Discovery > Misconduct During Discovery > Motions to Compel

Civil Procedure > ... > Costs & Attorney Fees > Attorney Fees & Expenses > Reasonable Fees

HN3[] Misconduct During Discovery, Motions to Compel

In general, a prevailing party in a discovery dispute is entitled to attorney's fees and costs. Fed. R. Civ. P. 37.

Counsel: **[*1]** For Nicholas Martin, Plaintiff: Curtis Charles Warner, LEAD ATTORNEY, Warner Law Firm, LLC, Chicago, IL; Alexander Holmes Burke, Burke Law Offices, LLC, Chicago, IL.

For Redline Recovery Services, LLC, Defendant: David M Schultz, LEAD ATTORNEY, Hinshaw & Culbertson, Chicago, IL; Nabil G. Foster, Hinshaw & Culbertson LLP, Chicago, IL.

Judges: JEFFREY COLE, UNITED STATES MAGISTRATE JUDGE.

Opinion by: JEFFREY COLE

Opinion

ORDER ON PLAINTIFF'S MOTION TO COMPEL

Plaintiff Nicholas Martin ("Plaintiff") has brought a class action under the Fair Debt Collection Practices Act 15 U.S.C. §1692 et seq. against Defendant Redline Recovery Services, LLC ("Redline") alleging that that one of its employees, Ms. Edmonds, systematically violated the FDCPA by leaving voice mail messages to consumers that did not comport with sections d(6) and e(11) of the Act. Specifically, plaintiff alleges that the collector violated 15 U.S.C. §1692e(11) because she allegedly did not identify itself as a "debt collector" in these messages, and that the collector violated 15 U.S.C. § 1692d(6) because she did not identify her employer, "Redline Recovery Services, LLC" in these messages. The employee/collector is not a defendant in the case; plaintiff's **[*2]** theory is that Redline is liable for its employee's actions.

Plaintiff issued discovery requests on January 8, 2009, and Redline responded, after a change of counsel and several agreed extensions, on March 4, 2009. The parties met and conferred telephonically several times, and in writing, and were unable to resolve these issues. The Court held a lengthy motion hearing on March 25, 2009, and made the following rulings on the motion.

I. Discovery Rulings.

A. Policies, Practices and Procedures relating to telephone messages and telephone calls to consumers.

Plaintiff issued Document Request 5 which requests: All manuals, memoranda, instructions and other documents which discuss, describe or set forth Redline's standards, criteria, guidelines, policies or practices relating to leaving a voice message for a consumer.

During the hearing, Plaintiff's counsel limited this request in scope to materials that were created or used during the proposed class period, October 27, 2007, through October 27, 2008. Redline does not dispute that this request asks for discoverable materials and the Court agrees. Redline has produced some materials responsive to this request, including its telephone scripts, **[*3]** an employee manual, its training manual and six recorded voice messages, and has agreed to search for other documents responsive to this request, such as earlier versions of such documents that were operative or created between October 27, 2007 and October 27, 2008.

The Court finds that recordings Redline made of telephone calls Ms. Edmonds made during the class period are clearly discoverable, and orders that Redline

make efforts to find those recordings. Redline shall produce the materials that it finds. If it cannot find the recordings, Redline shall state in an affidavit what efforts it has undertaken to obtain the recordings, and if it is unable to locate them explain why. Plaintiff's motion to compel document request five, including the 188 voice message recordings relating to the class members, is granted.

Redline is further ordered to produce the "Phone Log Records" as described by its counsel which has been stated where used to determine that during the putative class period 188 messages where left by Ms. Edmonds.

B. The Net Worth of the Defendant and Supporting Documents.

Plaintiff has requested materials regarding Redline's "net worth," and argues that these materials are discoverable **[*4]** because damages to the class members are determined by the defendant's net worth. *15 U.S.C. § 1692k(a)(2)(B)*. Toward that end, plaintiff issued interrogatory 9 and document request 15:

Interrogatory 9: Please state Redline's current net worth describing Redline's assets and their value and Redlines liabilities and their amounts and the date its financial statements were last audited. Document Request 15: Redline's financials for the past year that states its net worth.

Defendant does not contest that its net worth is relevant to damages, and has produced two pages, numbered 2 and 6 of a "draft" financial statement for 2008, which includes a balance sheet.

Plaintiff's motion to compel additional information regarding Redline's net worth is granted in part and denied in part. The Court agrees that *HN1*[↑] a defendant's net worth in an FDCPA class action is discoverable before class certification in order to assist the plaintiff in determining whether he should pursue certification because if a defendant has zero or a negative net worth the class would get nothing and certification would not be in the best interests of the class. However, the plaintiff has asked for too much; the universe of documents **[*5]** responsive to document request 15 as explained in open court is too broad and could encompass a vast amount of documents and would essentially amount to an audit of the company's financials.

Defendant is ordered to respond to interrogatory 9 with a statement of its net worth for 2008 along with a complete explanation of how it came to its conclusion. Defendant is also ordered to provide a description of its corporate structure and other relevant information, to help explain the disclosed net worth, including whether the two corporate entities mentioned on the documents produced, "Redline Recovery Services, Inc." and "ULQ, LLC" file consolidated tax returns. Defendant is also ordered to produce additional documentation of its net worth for 2008, but the Court declines to specifically identify what those additional documents should be. The Court suggests such documentation may include tax returns, applications for credit, complete audited financial statements or other financial records. The parties are instructed to meet and confer thoroughly as to the sufficiency of Redline's production in advance of bringing this issue back to the Court.

C. Identities of the Class Members.

Plaintiff propounded **[*6]** interrogatories 6, 7 and 8 to determine the number of class members and the identities of the class members. Defendant agrees that the number of class members is discoverable, and has produced the number: 188. The Court finds that, at this point in the case, the number of class members is sufficient, and denies the motion to compel without prejudice.

D. Responses to Requests for Admission.

The parties have agreed that Redline will revisit the request for admission responses that were prepared by previous counsel, and revise them as necessary. This portion of the motion to compel is therefore denied as moot.

E. Electronic Discovery

Plaintiff has requested that certain specific materials responsive to other document requests be produced in "native" format so that he may try to determine from metadata that may be contained in the documents, for example, what date telephone scripts were created and/or modified and what date any recordings were made. Plaintiff has requested that documents containing information concerning voice "scripts" and those recordings already produced by Redline be produced in their native format.

The Court finds that these requests are reasonable and

compels their production. [*7] Redline has agreed to search for and if found, produce the telephone scripts and any recordings in the electronic file native format.

F. Other Materials.

1. Information regarding plaintiff.

Plaintiff issued document request one, which asked for:

> Document Request 1: All documents relating to Plaintiff, or which are index, filed or retrievable under Plaintiff's name or any number, symbol, designation or code (such as an account number or Social Security number) assigned to Plaintiff.

Redline has produced some documents responsive to this request, including Redline's account notes. The Court finds that to the extent that other responsive materials exist and Redline discovers those other materials, Redline should produce any additional responsive materials. Plaintiff's motion to compel document request 1 is granted.

2. Bona Fide Error Defense

Plaintiff propounded discovery as to defendant's "bona fide error" defense in this case, too. See Interrogatory 3 and document request 3, 5, 6, 7, 8, 9 and 11. *HN2*[↑] Under the FDCPA, *15 U.S.C. § 1692k(c)*, a defendant may choose to bring a defense to liability. Redline has chosen to assert such a defense.

The Court finds that Redline's response to interrogatory [*8] 3 is sufficient and Plaintiff's motion to compel with respect to interrogatory 3 is denied.

With respect to document requests 3, 5, 6, 7, 8, 9 and 11 the Court makes no finding as Redline intends to supplement its document disclosures with any additionally located materials relevant to the class period October 27, 2007, through October 27, 2008.

Plaintiff points out that Redline has indicated that it relied upon the advice of counsel in formulating its policies, practices and procedures designed to avoid the violations of the FDCPA alleged in this case. Plaintiff complains that none of the documents produced mention any attorney, and that Redline has not produced a privilege log.

The Court reserves ruling on this issue, and advises Defendant to take a position as to attorney-client privilege and its bona fide error defense as Redline at this juncture has not asserted it though its answer or in its interrogatory response. If reliance upon the advice of an attorney is part of the defense in this case, there may be a waiver of the attorney-client privilege. If Redline contends that these materials are privileged, and has properly preserved the privilege, then it must provide the plaintiff [*9] with a privilege log. See, *Ner-Tamid Congregation of North Town v. Krivoruchko, 2009 U.S. Dist. LEXIS 4213, 2009 WL 152587, 08 C 1261 (N.D.Ill. Jan. 22, 2009)*; *Mosley v. City of Chicago, 252 F.R.D. 445 (N.D.Ill. 2008)* and other decisions discussing privilege waiver.

The parties have not discussed these issues sufficiently for the Court to decide them. The court reserves ruling, and orders the parties to meet and confer further.

G. Attorney's Fees for Prevailing Party

The Court is mindful that, *HN3*[↑] in general, the prevailing party in discovery disputes is entitled to attorney's fees and costs. *Rickels v. City of South Bend, Indiana, 33 F.3d 785, 786-87 (7th Cir. 1994)*. However, because Redline's counsel has only recently appeared in this case, the Court finds that the fee-shifting provisions of *Fed.R.Civ.P. 37* are not appropriate, and declines to award either party attorney's fees or costs at this time. This issue will be revisited and reassessed again, later in the case with respect to any other motions that come before the Court, if necessary.

April 1, 2009

Date

/s/ Jeffrey Cole

UNITED STATES MAGISTRATE JUDGE

JEFFREY COLE

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User Name: Brad Barmen
Date and Time: Friday, May 10, 2019 2:18:00 PM EDT
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Document (1)

1. *United States v. Matusoff Rental Co., 204 F.R.D. 396*
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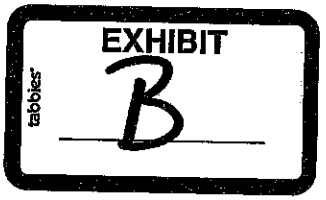
Content Type	Narrowed by
Cases	-None-



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United States v. Matusoff Rental Co.

United States District Court for the Southern District of Ohio, Western Division

September 24, 2001, Decided ; September 24, 2001, Filed

Case No. C-3-99-626

Reporter
204 F.R.D. 396 *; 2001 U.S. Dist. LEXIS 22905 **

UNITED STATES OF AMERICA, Plaintiff, vs. MATUSOFF RENTAL COMPANY, et al., Defendants.

Disposition: [**1] Plaintiff's motion for expenses was overruled; plaintiff's motion for a single trial and to compel discovery of defendants' finances was overruled.

Core Terms

discovery, bifurcation, finances, damages, expenses, separate trial, financial condition, punitive damages, exam, single trial, pre-judgment, aggrieved, parties, disclose information, protective order, disclosure, overrules, records

Case Summary

Procedural Posture

The United States (U.S.) brought suit under the Fair Housing Act, *42 U.S.C.S. § 3601 et seq.*, alleging that defendants rental company, owner, and employees discriminated against prospective tenants on the basis of their race and familial status, and requested, among other forms of relief, compensatory and punitive damages to aggrieved persons. The U.S. moved for expenses, for a single trial, and to compel discovery on defendants' finances.

Overview

Because the owner did not disobey an order of the court that he provide discovery, the court could not award expenses to the U.S. in accordance with *Fed. R. Civ. P. 37(b)(2)*, as the U.S. requested. The U.S. was entitled to discover evidence concerning the financial condition of defendants, without making a prima facie showing that it was entitled to recover punitive damages on behalf of the aggrieved persons. The court declined to bifurcate the litigation in the manner suggested by defendants (i.e., a liability trial followed by discovery concerning defendants' finances, if the U.S. prevailed on liability, and, then, a damages trial); however, it ordered separate trials on liability and damages. The two trials were to be heard by the same jury, and the damages trial was to begin within a day or two of the completion of the liability trial, if one or more or all of defendants were found to be liable. Discovery on defendants' finances was ordered to be provided within 30 days, subject to a properly worded protective order, in order that there would have been no delay in the commencement of the second trial, if it was necessary.

Outcome

The motion for expenses was overruled. The portion of the motion for a single trial and to compel discovery in which the U.S. requested a single trial was overruled, however defendants' proposed manner of bifurcation was not adopted. The portion of that motion seeking an order compelling discovery on defendants' finances was overruled since the U.S. had not submitted actual discovery requests for which it needed any such order.

LexisNexis® Headnotes

Civil Procedure > Discovery & Disclosure > Discovery > Misconduct During Discovery

HN1[] **Discovery, Misconduct During Discovery**

See *Fed. R. Civ. P. 37(b)(2)*.

Civil Procedure > ... > Discovery > Methods of Discovery > General Overview

Civil Procedure > Discovery & Disclosure > General Overview

Civil Procedure > Discovery & Disclosure > Discovery > Misconduct During Discovery

HN2[] Discovery, Methods of Discovery

Fed. R. Civ. P. 37(b)(2) permits a district court to order a party, who has failed to obey an order to provide discovery, to pay the expenses, including reasonable attorney's fees, his opponent has incurred as a result of the failure.

Civil Procedure > Discovery & Disclosure > General Overview

Torts > ... > Punitive Damages > Availability > Governmental Entities

Civil Procedure > Remedies > Damages > General Overview

Civil Procedure > Remedies > Damages > Punitive Damages

HN3[] Civil Procedure, Discovery & Disclosure

Under federal law, evidence of a defendant's financial worth is traditionally admissible for the purpose of evaluating the amount of punitive damages that should be awarded. The overwhelming majority of federal courts to have considered the question conclude that a plaintiff seeking punitive damages is entitled to discover information relating to the defendant's financial condition in advance of trial and without making a prima facie showing that he is entitled to recover such damages.

Civil Procedure > ... > Pleadings > Counterclaims > General Overview

Civil Procedure > Trials > Separate Trials

HN4[] Pleadings, Counterclaims

See Fed. R. Civ. P. 42(b).

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN5[] Standards of Review, Abuse of Discretion

Bifurcation orders are reviewed for abuse of discretion, with the court required to consider the potential prejudice to the parties, the possible confusion of the jurors, and the resulting convenience and economy.

Counsel: For USA, plaintiff: Dale Ann Goldberg, United States Attorney's Office, Dayton, OH.

For USA, plaintiff: Joan A Magagna, Department of Justice, Isabelle M Thabault, Donald Walker Tunnage, Bill Lann Lee, Ellen M Bowden, US Department of Justice, Washington, DC.

For USA, plaintiff: Sharon Janine Zealey, United States Attorney's Office, Atrium II, Cincinnati, OH.

For BANK ONE NA, intervenor: Martin A Beyer, Sebaly Shillito & Dyer, Dayton, OH.

For ROGER ROGER MATUSOFF, RENTAL COMPANY, defendant: Roger John Makley, Coolidge Wall Wonsley & Lombard, Dayton, OH.

For ROGER MATUSOFF, REBECCA MCCORD, PEGGY PENWEL, LONNIE PENWELL, defendants: Thomas Patrick Whelley, II, Chernesky Heyman & Kress, Dayton, OH.

For PEGGY PENWELL, LONNIE PENWELL, defendants: Lynn M Reynolds, Chernesky Heyman & Kress, Dayton, OH.

Judges: WALTER HERBERT RICE, CHIEF JUDGE, UNITED STATES DISTRICT COURT.

Opinion by: WALTER HERBERT RICE

Opinion

[*397] DECISION AND ENTRY OVERRULING PLAINTIFF'S MOTION FOR EXPENSES (DOC. # 42); DECISION AND ENTRY OVERRULING **[**2]** PLAINTIFF'S MOTION FOR A SINGLE TRIAL AND TO COMPEL DISCOVERY OF DEFENDANTS' FINANCES (DOC. # 44); CAPTIONED CAUSE ORDERED BIFURCATED, ALTHOUGH NOT IN MANNER SUGGESTED BY DEFENDANTS

The Government brings this litigation under the Fair Housing Act, *42 U.S.C. § 3601, et seq.*, alleging that the

Defendants have discriminated against prospective tenants at the Villa de Marquis apartment complex, located in Xenia, Ohio, on the basis of their race and familial status. In its Amended Complaint (Doc. # 12), the Plaintiff requests that, among other forms of relief, the Court award compensatory and punitive damages to persons who have been aggrieved by the Defendants' alleged discriminatory practices, i.e., the prospective tenants. Defendant Matusoff Rental Company is alleged to be the owner of the complex. Defendant Roger Matusoff ("Matusoff") is alleged to be the managing agent and owner of Matusoff Rental Company. Defendants Rebecca McCord, Peggy Penwell and Lonnie Penwell are alleged to be current or former employees of Matusoff Rental Company.

This case is now before the Court on Plaintiff's Motion for Expenses (Doc. # 42), and its Motion for a Single Trial **[**3]** and to Compel Discovery on Defendants' Finances (Doc. # 44), which the Court rules upon in the above order.

[*398] *I. Plaintiff's Motion for Expenses (Doc. # 44)*

The parties participated in Court supervised mediation in an effort to resolve this litigation. Although they were able to agree on many provisions of a proposed settlement agreement, they could not agree on the amount of compensation the Defendants would pay to the aggrieved parties. As a manner of resolving this impasse, it was agreed that the Plaintiff would take a pre-judgment debtor's exam of Matusoff, in order to ascertain whether he had the financial ability to pay the amount of compensation being demanded by the Plaintiff to settle this lawsuit. *See* Doc. # 40. That proceeding was to take place in Las Vegas, Nevada, on January 3, 2001. *Id.* Although the pre-judgment debtor's exam commenced as scheduled, Matusoff refused to provide complete answers to all of the Plaintiff's questions. When the Court was contacted during that proceeding, it told Matusoff that he was required to answer all questions regarding his financial condition, or that he could refuse to answer those questions, a course of action which **[**4]** would result in the termination of both that proceeding and the Court supervised mediation efforts. Ultimately, Matusoff refused to answer all questions put to him by Plaintiff's counsel, which resulted in the pre-judgment debtor's exam and the mediation being terminated.

With its Motion for Expenses, the Plaintiff requests that the Court award it the sum of $ 3000.03, pursuant to *Rule 37 of the Federal Rules of Civil Procedure*, to compensate it for the expenses incurred to participate in the fruitless pre- judgment debtor's exam. [1] **[**6]** The Plaintiff relies upon *Rule 37(b)(2)*, which provides, in pertinent part:

> *HN1*[↑] (2) *Sanctions by Court in Which Action is Pending.* If a party ... fails to obey an order to provide ... discovery ..., the court in which the action is pending may ... require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

As can be seen, *HN2*[↑] *Rule 37(b)(2)* permits a District Court to order a party, *who has failed to obey* **[**5]** *an order to provide discovery*, to pay the expenses, including reasonable attorney's fees, his opponent has incurred as a result of the failure. *See Bass v. Jostens, Inc., 71 F.3d 237 (6th Cir. 1995)* (discussing sanctions District Court may impose pursuant to *Rule 37(b)(2) for failure to provide discovery*). Herein, Matusoff did not disobey an order of this Court that he provide *discovery*. [2] The pre-judgment debtor's exam was most decidedly not part of the Plaintiff's discovery of information from Matusoff; rather, it was an instrument of settlement. That point is vividly demonstrated by the telephone conference call which the Court and counsel conducted on November 27, 2000. *See* Doc. # 60. During that call, the Court indicated that Plaintiff could not use the financial information it obtained as a result of the pre-judgment debtor's exam in the event that the case was not settled. The Court told Plaintiff's counsel that, "if settlement falls through, you simply have to garner the information by standard discovery means." *Id.* at 10-11. *See also*, Doc. # 40.

Since no order, issued by the Court in connection with the pre-judgment debtor's exam, directed Matusoff to provide discovery, the Court cannot award expenses to Plaintiff in accordance with *Rule 37(b)(2)*, as requested. Accordingly, the Court overrules Plaintiff's Motion for

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[1] That figure is comprised of $ 2547.30, for attorney's fees (35 hours at $ 72.78 per hour), and $ 452.73, for travel expenses.

[2] For purposes of ruling on the Plaintiff's Motion for Expenses (Doc. # 42), the Court assumes that Matusoff disobeyed an order from the Court regarding his pre-judgment debtor's exam.

Expenses (Doc. # 42).

II. Plaintiff's Motion for a Single Trial and to Compel Discovery on Defendants' Finances (Doc. # 44)

The genesis of this motion is the desire of Defendant Roger Matusoff to maintain the privacy of his personal finances. [3] Plaintiff **[*399]** contends that information relating to Matusoff's and the other Defendants' finances is relevant, because it is seeking to recover punitive damages on behalf of the prospective tenants who were aggrieved by the Defendants' alleged discriminatory practices. In order to avoid the possibility that the Defendants would be required to disclose information concerning their personal **[**7]** finances unnecessarily, bifurcating the trial of this litigation has been discussed. Under such an order of bifurcation, as contemplated by Defendants, the first trial would be devoted solely to liability. If the Plaintiff prevailed at that trial, discovery pertaining to the Defendants' personal finances would be permitted, following which a second trial would be held to resolve the issues of compensatory and punitive damages. The Plaintiff has opposed bifurcating this litigation by filing its Motion for a Single Trial and to Compel Discovery on Defendants' Finances (Doc. # 44).

As an initial matter, since the Plaintiff seeks to recover punitive damages on behalf of the aggrieved persons, evidence of the financial condition of the Defendants is highly relevant in this litigation. *See, e.g.,* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 270, 69 L. Ed. 2d 616, 101 S. Ct. 2748 (1981) (noting **[**8]** that, HN3[↑] under federal law, evidence of a defendant's financial worth is traditionally admissible for the purpose of evaluating the amount of punitive damages that should be awarded); United States v. Big D Enterprises, Inc., 184 F.3d 924, 932 (8th Cir. 1999) (same). The overwhelming majority of federal courts to have considered the question have concluded that a plaintiff seeking punitive damages is entitled to discover information relating to the defendant's financial condition in advance of trial and without making a *prima facie* showing that he is entitled to recover such damages. *See e.g.,* Christy v. Ashkin, 972 F. Supp. 253 (D.Vt. 1997); Caruso v. The Coleman Co., 157 F.R.D. 344 (E.D.Pa. 1994); *CEH, Inc. v. FV "Seafarer"*, 153 F.R.D. 491 (D.R.I. 1994), *affirmed, 70 F.3d 694 (1st Cir. 1995)*; Wauchop v. Domino's Pizza, Inc., 138 F.R.D. 539 (N.D.Ind. 1991); Mid Continent Cabinetry, Inc. v. George Koch Sons, Inc., 130 F.R.D. 149 (D.Kan. 1990). This Court finds those decisions to be persuasive and will follow them. Therefore, the Plaintiff is entitled to discover evidence **[**9]** concerning the financial condition of the Defendants, without making a *prima facie* showing that it is entitled to recover punitive damages on behalf of the aggrieved persons. Of course, the Court could delay the disclosure of such information until absolutely necessary, by bifurcating this litigation. For reasons which follow, the Court declines to bifurcate this litigation in the manner suggested by Defendants (i.e., a liability trial followed by discovery concerning the Defendants' finances, if the Plaintiff prevails on liability, and, then, a damages trial); however, it will order separate trials on liability and damages, in a fashion it deems proper. The two trials will be heard by the same jury, and the damages trial will begin within a day or two of the completion of the liability trial, if one or more or all of the Defendants are found to be liable. Discovery on Defendants' finances will be ordered provided within thirty (30) days, subject to a properly worded protective order, in order that there will be no delay in the commencement of the second trial, if same be necessary.

The Court begins by setting forth the standards which must be applied in order to decide whether **[**10]** to order separate trials on liability and damages. Bifurcation is governed by Rule 42(b) of the Federal Rules of Civil Procedure, which provides:

> HN4[↑] (b) *Separate Trials.* The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

In Martin v. Heideman, 106 F.3d 1308 (6th Cir. 1997), the Sixth Circuit reiterated that "HN5[↑] bifurcation orders are reviewed for abuse of discretion, with the court required to consider **[*400]** the potential prejudice to the parties, the possible confusion of the jurors, and the resulting convenience and economy." Id. at 1311. *See also, In re Beverly Hills Fire Litigation, 695 F.2d 207 (6th Cir. 1982), cert. denied, 461 U.S. 929 (1983).*

The Plaintiff argues **[**11]** that the Court should decline

[3] That desire also led to the termination of the pre-judgment debtor's exam and mediation efforts.

to order separate trials on liability and damages, because such trials would prejudice it and be inconvenient. Plaintiff also asserts that resolving this lawsuit with a single trial will not cause confusion to the jurors. According to Defendants, bifurcation is necessary in order to prevent the Defendants from suffering prejudice in the form of premature and, perhaps, unnecessary disclosure of information concerning their personal finances. In addition, Defendants contend that a single trial will confuse the jurors and that separate trials will promote judicial economy.

In *Brad Ragan, Inc. v. Shrader's, Inc., 89 F.R.D. 548 (S.D. Ohio 1981)*, this Court addressed and rejected the defendant's argument that liability and damages should be resolved in separate trials, in the manner suggested by Defendants, in order to avoid the prejudice which would flow from the premature and possibly unnecessary disclosure, through discovery, of its confidential business records which would be used to establish the plaintiff's remedy:

> Although the possibility of premature and unnecessary disclosure of Defendant's confidential business records is a serious **[**12]** problem, the Court does not understand how it may be reasonably resolved or avoided by Defendant's request for "serial" trials to the same jury unless (1) Defendant would have this Court absolutely preclude discovery of the subject records until after a liability verdict is rendered, and (2) then proceed to order a continuance of the damage trial for an extended and indeterminate period of time, while the parties exchange discoverable documents, examine same, perhaps conduct necessary depositions concerning them, and otherwise commence and complete preparation of a damage case and defense, (3) all while the same jury sits idly by and forgets relevant "overlapping" damage evidence presented at the liability trial. Without any understanding of the degree of confidentiality of the subject records, or the degree of protection which such records deserve, this Court is reluctant to refer to them as justification for adopting the preceding scenario as a "convenient and nonprejudicial" procedure to be followed in this case.

Id. 550-51. Based upon that reasoning, the Court concludes that separate trials in this litigation on liability and damages, in the manner suggested **[**13]** by Defendants, would be prejudicial to the Plaintiff. Bifurcating this litigation in the manner suggested by Defendants could result in the Plaintiff being required either to prove punitive damages to a different jury than the one which had found the Defendants liable, or to seek such damages from the same jury, after it had been away from the trial for a number of weeks (or months), while the parties conducted discovery on the financial condition of the Defendants.

Unless the trial of this litigation is bifurcated, Defendants would have unnecessarily disclosed their personal financial information, if the jury finds them not liable. However, any harm to the Defendants, which would flow from the unnecessary disclosure of information concerning their finances, [4] can be minimized through a protective order which limits the disclosure of that information to Plaintiff's counsel and support staff actually assisting in the preparation of this litigation. In addition, such a protective order could require that the Plaintiff return all documents concerning Defendants' financial condition, at the conclusion of this lawsuit.

[14]** Should the Defendants be found not liable to any one or more of the 41 allegedly aggrieved persons, bifurcation will allow the jury in the second trial to concentrate on a more limited universe of aggrieved persons **[*401]** when awarding damages and, thus, to avoid possible confusion.

In sum, it is possible that Defendants will be required to disclose information concerning their financial condition unnecessarily, if this lawsuit is not resolved in the manner they suggest. However, any prejudice which would result from such disclosure is outweighed by the prejudice to the Plaintiff, the inconvenience to the witnesses and the waste of judicial resources which would flow from bifurcating this litigation in that manner. The Court believes that its suggested method of bifurcation will reduce all of the above consequences to a minimum.

A different manner of bifurcation than that proposed by Defendants will help prevent jury confusion, while not inconveniencing and prejudicing the parties or wasting scarce judicial resources. In addition, resolving liability and damages in separate trials, in the manner as ordered by the Court, will avoid the possibility of

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[4] The Defendants also suggest that they want to avoid premature disclosure of such information. This Court cannot discern how the Defendants would suffer prejudice if they were required to disclose information regarding their finances a number of months early. Therefore, the Court limits its discussion to unnecessary disclosure.

prejudice that could result from the **[**15]** introduction of evidence (such as the financial condition of the Defendants) which, although relevant on the issue of punitive damages, is irrelevant on liability. In addition, scheduling the damages trial to commence immediately following the completion of the liability phase, with the same jury, will avoid the alternative pitfalls presented by Defendants' proposed method of bifurcation, to wit: either empaneling a second jury to hear the damages trial, or risking that the original jury would forget some of the evidence presented at the liability phase, during the hiatus between the two trials.

Accordingly, the Court overrules the branch of the Plaintiff's Motion for a Single Trial and to Compel Discovery on Defendants' Finances (Doc. # 44), with which it requests a single trial, although the Court has not adopted Defendants' proposed manner of bifurcation. The Court also overrules the branch of that motion, seeking an order from the Court compelling discovery on the Defendants' finances, since the Plaintiff has not submitted actual discovery requests for which it needs any such order from the Court. That said, the Plaintiff is entitled to reasonable discovery regarding the Defendants' **[**16]** financial condition. However, that discovery should be conducted only in accordance with a protective order which limits the disclosure of such information to Plaintiff's counsel and necessary support staff, and which requires the return of documents and other financial information at the conclusion of this litigation. Defendants' counsel will submit a draft of a suggested protective order to Plaintiff within ten (10) days from date.

September 24, 2001

WALTER HERBERT RICE, CHIEF JUDGE

UNITED STATES DISTRICT COURT

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