UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

LAWRENCE E. JAFFE PENSION PLAN, On Behalf of Itself and All Others Similarly Situated, Plaintiff, vs. HOUSEHOLD INTERNATIONAL, INC., et al., Defendants.	Lead Case No. 02-C-5893 (Consolidated) CLASS ACTION Judge Ronald A. Guzman Magistrate Judge Nan R. Nolan

APPENDIX OF ELECTRONIC CASES IN SUPPORT OF LEAD PLAINTIFFS' MOTION TO COMPEL THE HOUSEHOLD DEFENDANTS TO PRODUCE SOURCE LOGS FOR DOCUMENTS PRODUCED IN THIS LITIGATION

CASE **TAB**

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TAB 1

LEXSEE 1993 US DIST LEXIS 9565

GEORGE AND BEVERLY AMON, on behalf of DEBRA AMON, Plaintiffs, v. ANITA HARRISON d/b/a GOLF-A-RAMA HOT SPOT, et al., Defendants.

Case No. 91 C 980

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1993 U.S. Dist. LEXIS 9565

July 14, 1993, Decided
July 15, 1993, Docketed

LexisNexis(R) Headnotes

JUDGES: [*1] Williams

OPINIONBY: ANN CLAIRE WILLIAMS

OPINION:

MEMORANDUM OPINION AND ORDER

Plaintiffs George and Beverly Amon ("the Amons") brought this action against Michael Schiessle ("Schiessle") and other defendants, alleging negligence in the operation of Golf-A-Rama Hot Spot ("Hot Spot"), a go-cart track on which the Amon's minor daughter was injured. The Amons claimed that Schiessle and other defendants have an ownership interest in Hot Spot or the underlying real estate. Subsequently, the court granted plaintiffs' motion to compel Schiessle's deposition testimony and denied Schiessle's motion for summary judgment on the grounds that it was premature. This matter is before the court on Schiessle's motion to dismiss plaintiffs' amended complaint pursuant to *Federal Rule of Civil Procedure 37(d)* ("Rule 37(d)") for plaintiffs' alleged failure to comply with discovery requests. For the reasons stated below, the motion is denied.

Background

Schiessle was informed that plaintiffs had served subpoenas to produce documents and depose witnesses without providing notice to his attorney. On November 25, 1992, defendant wrote plaintiffs a letter informing them of the failure to provide notice, and requested [*2] production of certain documents. Specifically, defendant requested discovery of all subpoenas issued by plaintiffs and documents produced pursuant to subpoenas; an exhibit marked during defendant's deposition; all documents reflecting ownership of Hot Spot by Schiessle or defendants Anita Harrison and Troy Heavner; any supplemental documents; and an affidavit swearing that the production was complete. (Memorandum in Support of Defendant Schiessle's Motion to Dismiss Amended Complaint ("Def. Memo"), Defendant's Request for Production of Documents, p. 3).

On November 30, 1992, plaintiffs sent defendant a response with a copy of one document which had been turned over pursuant to the subpoena. Plaintiffs also apologized for the alleged lack of notice. (Response, Ex. B). This insurance document lists Anita Harrison ("Harrison") as a named insured of Hot Spot. (Exhibit to Def. Memo). The parties dispute whether plaintiffs produced all of the documents which were subject to the production request. (Cf. Plaintiffs' Response to Defendant Schiessle's Motion to Dismiss ("Response"), pp. 1-2; Defendant Schiessle's Reply to Plaintiffs' Response to Motion to Dismiss ("Reply"), p. 1).

Plaintiffs [*3] did not send an affidavit verifying completion of discovery. On December 7, 1992, defendant sent another letter reiterating the request for an affidavit verifying completion. Plaintiffs' attorney did not respond to this second letter.

Schiessle contends that plaintiffs wilfully failed to comply with discovery procedures and that their actions manifest flagrant bad faith. Defendant requests that plaintiffs' amended complaint be dismissed under Rule 37(d). Alternatively, defendant requests that the

produced document be deemed prima facie proof that Harrison, rather than Schiessle, is the owner of Hot Spot. (Memorandum in Support of Defendant Schiessle's Motion to Dismiss Amended Complaint ("Def. Memo"), pp. 4-5)

Motion to Dismiss Pursuant to Rule 37(d)

Rule 37(d) permits an immediate sanction against a party for a complete failure to respond to a notice of deposition, interrogatories, or a production request. n1 It is well settled that the decision whether to impose sanctions under Rule 37(d) is soundly within the discretion of the trial court. See *National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 642, 49 L. Ed. 2d 747, 96 S. Ct. 2778 (1975).* See generally [*4] 8 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil § 2284 (1970 & Supp. 1993) (discussing the flexibility of the rule and the wide discretion entrusted to the court). Moreover, the Seventh Circuit has recommended that courts apply less drastic sanctions before imposing a severe sanction such as dismissal or default. See e.g., *Poulos v. Naas Foods, Inc., 959 F.2d 69, 75 (7th Cir. 1992);* but see 8 Wright & Miller, § 2284 at 362 (Supp. 1993) (noting that several courts are increasingly imposing more severe sanctions).

n1 Rule 37(d) provides in pertinent part:

> If a party . . . fails (1) to appear before the officer who is to take the deposition, . . . or (2) to serve answers or objections to interrogatories submitted under Rule 33, . . . or (3) to serve a written response to a request for inspection submitted under Rule 34, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule.

Fed. R. Civ. P. 37(d).

[*5]

The court denies the motion to dismiss this complaint for several reasons. First, it is not clear that plaintiffs have failed to comply with the production request because plaintiffs claim that they produced all of the documents in their possession. (Response, p. 2). Second, the court does not view the failure to provide an affidavit as a violation of Rule 37(d) -- despite the fact that plaintiffs could have easily provided such an affidavit to verify their compliance with the production request. n2 Moreover, the dismissal of a complaint is a severe sanction which is usually imposed upon a finding that the party's failure to comply with discovery procedures was wilful or in bad faith. See *National Hockey League, 427 U.S. at 643.* In the instant case, there is no indication that plaintiffs' failure to provide notice of subpoena was due to anything more than inadvertence.

n2 The Federal Rules of Civil Procedure do not require the filing of an affidavit with a response to a production request. See *Fed. R. Civ. P. 34(b).*

[*6]

Nor do the facts suggest that this failure, or any other, prejudiced the defendant's position in his motion for summary judgment. Despite Schiessle's allegations to the contrary, the motion for summary judgment was denied as premature because no meaningful discovery had taken place in the case. (Reply, p. 3). Furthermore, the produced document only states that Harrison is a named insured of Hot Spot, it does not conclusively show that Schiessle had no ownership interest in the go-cart track or underlying real estate. For that same reason, the court denies defendant's invitation to deem that this document is prima facie proof that Schiessle lacks an ownership interest in Hot Spot. In sum, defendant has presented no basis for the imposition of Rule 37(d) discovery sanctions.

Conclusion

For the foregoing reasons, defendant's motion to dismiss the amended complaint is denied. However, plaintiffs are directed to tender an affidavit verifying their compliance with Schiessle's production request by July 26, 1993.

ENTER:

Ann Claire Williams, Judge

United States District Court

Dated: JUL 14 1993

TAB 2

LEXSEE 2004 US DIST LEXIS 12640

RONALD PORTIS, MADRIC LANCE, and EMMETT LYNCH, individually and on behalf of a class, Plaintiffs, v. CITY OF CHICAGO, et al., Defendants.

No. 02 C 3139

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

2004 U.S. Dist. LEXIS 12640

July 6, 2004, Decided
July 7, 2004, Docketed

SUBSEQUENT HISTORY: Supplemental opinion at *Portis v. City of Chicago, 2004 U.S. Dist. LEXIS 24737 (N.D. Ill., Dec. 6, 2004)*

PRIOR HISTORY: *Portis v. City of Chicago, 2004 U.S. Dist. LEXIS 10609 (N.D. Ill., June 10, 2004)*

DISPOSITION: [*1] Defendant city's motion to compel granted in part and denied in part. Defendants' motion to strike plaintiffs' surreply denied.

LexisNexis(R) Headnotes

COUNSEL: For RONALD PORTIS, individually and on behalf of a class, plaintiff: Judson H. Miner, Miner Barnhill & Galland, Chicago, IL. Robert Hugh Farley, Jr., Robert H. Farley, Jr., Ltd., Naperville, IL. Thomas Gerard Morrissey, Thomas G. Morrissey, Chicago, IL. Mark G. Weinberg, Attorney at Law, Chicago, IL.

For MARDRIC E LANCE, EMMETT LYNCH, individually and on behalf of a class., plaintiffs: Judson H. Miner, Miner Barnhill & Galland, Chicago, IL. Robert Hugh Farley, Jr., Robert H. Farley, Jr., Ltd., Naperville, IL.

For CITY OF CHICAGO, a Municipal corporation, TERRY G HILLARD, Superintendent of the Chicago Police Department, FRANCIS KEHOE, EVERT JOHNSON, ROBERT JOHNSON, defendants: Michael P. Manly, Neal, Gerber & Eisenberg, Chicago, IL. June K. Ghezzi, Susan Lynn Winders, Morgan Reid Hirst, Jones Day, Chicago, IL. Amy Renee Skaggs, City of Chicago, Department of Law, Chicago, IL. Mara Stacy Georges, Corporation Counsel, City of Chicago, Chicago, IL.

For JOSEPH GRIFFIN, defendant: Michael P. Manly, [*2] Neal, Gerber & Eisenberg, Chicago, IL. June K. Ghezzi, Susan Lynn Winders, Jones Day, Chicago, IL. Amy Renee Skaggs, City of Chicago, Department of Law, Chicago, IL. Mara Stacy Georges, Corporation Counsel, City of Chicago, Chicago, IL.

For JOAN RISKEY, defendant: Michael P. Manly, Neal, Gerber & Eisenberg, Chicago, IL. June K. Ghezzi, Susan Lynn Winders, Morgan Reid Hirst, Jones Day, Chicago, IL.

JUDGES: NAN R. NOLAN, United States Magistrate Judge. Judge Robert W. Gettleman.

OPINIONBY: NAN R. NOLAN

OPINION:

MEMORANDUM OPINION & ORDER

Plaintiffs Ronald Portis, Mardric Lance and Emmett Lynch have brought this class action lawsuit against defendants City of Chicago, Terry Hillard, Joseph Griffin, John Risley, Francis Kehoe, Evert Johnson and Robert Johnson asserting claims under *42 U.S.C. § 1983* for violations of their federal civil rights. Specifically, plaintiffs were arrested for nonviolent ordinance violations which impose only a fine, not jail time. Plaintiffs allege they were "unlawfully detained for prolonged periods of time after completion of all

administrative steps incident to their arrests for non-custodial ordinance violations," in violation of [*3] their civil rights. *Portis v. City of Chicago, 2004 U.S. Dist. LEXIS 10609,* No. 02 C 3139, *2004 WL 1284010,* at *1 (N.D. Ill. June 10, 2004). n1 Before the court is defendant City of Chicago's motion to compel discovery.

n1 The district court has certified a class defined as "all persons who, during the class period, were arrested on ordinance violations which carry no jail time in the City of Chicago and who were detained for more than two hours after all administrative steps incident to the arrest, except non-discretionary ministerial acts, were completed." *Id.*.

The target of the City's motion to compel is a database that was compiled at the direction of plaintiffs' attorneys. The information in the database was gathered from computer databases and hard copies of arrest reports produced by the City in response to plaintiffs' discovery requests. As described by plaintiffs, the database is a "compilation of selected data from [the City's] arrest reports that plaintiffs' counsel have judged to be relevant to proving their [*4] case or responding to anticipated defenses." (Pls.' Opp. at 5.) The fields of information collected in the database may include n2 (1) the name and address of arrestee, (b) the arrestee's central booking number, (c) date and time of arrest, (d) race and sex of the arrestee, (e) the ordinance that was the basis for the arrest, (f) district of arrest, (g) names of arresting officers, (h), booking date, (i) time received in lockup, (j) fax transmission time, (k) time the charges were approved, (l) bond date and time, and (m) the existence of an outstanding warrant. Some time ago, plaintiffs proposed that the parties undertake this time-consuming and expensive project together. Defendants declined to do so, but now the City asks the court to compel plaintiffs to turn over the fruits of their labor, which to date has cost plaintiffs in excess of $ 90,000 to compile. Plaintiffs oppose the motion to compel, asserting that the database constitutes attorney work product.

n2 These are the types of fields the City believes are in the database, based on communications with plaintiffs' counsel. Some of these fields may not be in the database, and there may be additional fields not mentioned here--plaintiffs have not disclosed the specific fields. For purposes of resolving this motion, however, such disclosure was not necessary.

[*5]

To resolve the City's motion to compel, the court must determine (i) whether the database constitutes opinion work product or fact work product, (iii) if the database is fact work product, whether the City has demonstrated a substantial need for the information and an inability to obtain equivalent information without undue hardship, and (iv) whether the City should be required to pay a share of the expenses incurred to compile the database. As explained further below, the court finds that although the database constitutes fact work product, the City has demonstrated a substantial need for the information. Further, the amount of time and money the City would have to expend to compile a similar database from scratch warrants a finding of undue hardship. The court therefore grants the City's motion to compel on the condition that the City contribute its fair share toward the expenses incurred in compiling the database.

Discussion

Attorney Work Product Doctrine: Opinion v. Fact Work Product

Attorney work product is material "prepared in anticipation of litigation or for trial" by or for a party or its representative, including but not limited to that party's [*6] attorney. *Fed. R. Civ. P. 26(b)(3).* The attorney work product doctrine is a qualified privilege that "exists because 'it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.'" *Eagle Compressors, Inc. v. HEC Liquidating Corp., 206 F.R.D. 474, 478 (N.D. Ill. 2002)* (quoting *Hickman v. Taylor, 329 U.S. 495, 510, 91 L. Ed. 451, 67 S. Ct. 385 (1947)).* The doctrine, now codified in *Rule 26(b)(3) of the Federal Rules of Civil Procedure,* draws a distinction between "opinion" work product--which reflects the "mental impressions, conclusions, opinions, or legal theories of an attorney"--and ordinary "fact" work product. *Id.* (quoting *Fed. R. Civ. P. 26(b)(3));* *Caremark, Inc. v. Affiliated Computer Servs., Inc., 195 F.R.D. 610, 616 (N.D. Ill. 2000).* If the materials at issue constitute fact work product, the materials are discoverable, but only if the party seeking discovery demonstrates "a substantial need for the material and an inability to obtain the substantial [*7] equivalent of the information without undue hardship." *Eagle Compressors, 206 F.R.D. at 478.* Opinion work product, on the other hand, "is protected even when undue hardship exists" and thus, for all intents and purposes, receives absolute protection. *Id.*

Here, the database was compiled at the direction of plaintiffs' counsel in anticipation of litigation, and thus constitutes attorney work product. (Indeed, the City

makes no argument to the contrary.) The question is whether the database is opinion or fact work product. The court finds *Sporck v. Peil, 759 F.2d 312, 316 (3d Cir. 1985)* and *Washington Bancorporation v. Said, 145 F.R.D. 274, 276 (D.C. 1992)* instructive on this issue. In *Sporck,* the issue was whether an attorney's selection and compilation of documents for the client to review in preparation for his deposition constituted opinion work product. *759 F.2d at 316.* The Third Circuit answered affirmatively, concluding that "in selecting and ordering a few documents out of thousands counsel could not help but reveal important aspects of his understanding of the case," *Id.* (citation and internal quotation [*8] marks omitted). *Washington Bancorporation* also involved an attorney's compilation of facts. There the issue was whether an attorney-created index cataloguing 2400 boxes of documents constituted fact or opinion work product. The court recognized that the index was a hybrid of fact and opinion work product because although the index was a compilation of factual information, the index "also arranged that information in a way that could reveal the preparing attorney's opinions about the information indexed and how it relates to the underlying case." *Washington Bancorp., 145 F.R.D. at 276.* To determine whether the index should receive the absolute protection accorded to opinion work product, or the qualified protection given to fact work product, the court then considered the extent to which producing the index to the other party would reveal attorney opinion. *Id.* The court concluded that unlike the attorney's compilation of documents in *Sporck,* which involved singling out a few documents out of thousands, the index compiling facts about 2400 documents was "not selective enough to qualify for 'opinion' status under *Sporck." Id. at 277.*

Like [*9] the index in *Washington Bancorporation,* the database here is a hybrid of fact and opinion work product. Although the database is a factual compilation, plaintiffs correctly argue that the categories of information in the database reveal what data plaintiffs' lawyers deemed relevant to select and code. It does not follow, however, that disclosing the database to defendants will reveal plaintiffs' counsel's mental impressions, opinions and legal strategy. The database is a compilation of arrest data from more than 20,000 arrest records, collecting, among other basic information, the arrestee's name, address, ordinance violated, booking number, bond time, etc. The vast number of documents catalogued "virtually eliminates the possibility" that defendants could discern plaintiffs' litigation strategy from the database. *Id. at 278.* Moreover, to the court's knowledge, the database does not include attorneys' evaluations of the data, or analysis of the strengths and weaknesses of the case in light of the data. Additionally, during the course of creating this database, plaintiffs' counsel revealed to defendants' counsel the types of information they intended to collect. [*10] Plaintiffs' counsel even suggested that the parties undertake the project as a joint collaboration. Until now, plaintiffs' counsel has never shown any concern that revealing the types of information they were compiling from the arrest records could reveal their legal strategies and mental impressions assessing how the facts relate to the issues in the case. Their concerns raised in opposition to the motion to compel thus ring hollow.

The court concludes that the database, like the index in *Washington Bancorporation,* is neither selective nor revealing enough to constitute opinion work product. Accordingly, the database is entitled to the protection given to ordinary fact work product, not the absolute protection given to opinion work product.

Substantial Need and Undue Hardship

Because the database is attorney work product, under *Rule 26(b)(3)* the court can compel plaintiffs to produce the database only if the City establishes that it has a substantial need for the database and that it is unable to obtain the substantial equivalent of the information compiled in the database without undue hardship. *Eagle Compressors, 206 F.R.D. at 478.* Despite plaintiffs' [*11] argument to the contrary, the court finds that the City has established both a substantial need and undue hardship.

Plaintiffs have brought a *Monell* claim against the City, the nature of which demonstrates that the City has a substantial need for the information in the database. n3 The basis for plaintiffs' *Monell* claim is that there is a "widespread and systemic practice in the City of Chicago of detaining individuals arrested on minor ordinance offenses for an extended period of time after all administrative steps have been completed." (City's' Mot. P10, quoting Pls.' Sec. Am. Compl. P58.) Plaintiffs' database, which shows the period of time each potential class member was detained, is highly relevant to that claim.

n3 In *Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 690-91, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978),* the Supreme Court held that municipalities face liability under *42 U.S.C. § 1983* if a plaintiff can show that a municipal employee violated the plaintiff's constitutional rights and the employee's unconstitutional action was an implementation of a municipal policy, custom or practice. Such policy-custom-and-practice claims are commonly referred to as *Monell* claims.

[*12]

Plaintiffs counter that, at this point in the litigation, the database is nothing more than a research project it is not the basis of expert testimony or a statistical analysis, and has not otherwise been used in the litigation. Until the database is put into play, plaintiffs argue, the court should not compel its production. In a different case, the court likely would agree with plaintiffs' position--but not in this case. For one thing, the court is hard pressed to believe that plaintiffs will not use the database--which was compiled at great expense--as part of proving their case, whether through a statistical analysis, expert testimony or otherwise. While the court would be justified in delaying production until it is clear that plaintiffs will use the database, the court disagrees with plaintiffs' contention that the court must delay production. Moreover, the information in the database is clearly relevant to whether the City has a constitutionally unlawful practice. In a case in which the number of potential class members exceeds 20,000, such a consolidated compilation of relevant data is an invaluable tool for both sides to assess the merits of the litigation.

Additionally, [*13] the City contends that it needs the database to ensure that the class notice is not overly inclusive. In other words, the City wants the database to double check plaintiffs' proposed class list. The City argues that defendants "need to ascertain and confirm the criteria and methodology plaintiffs used to determine who will get notice" and that without the database, they will be unable do so. (City's Reply at 5.) This argument overreaches--the City has all the information it needs to double check whether each proposed class member meets the proper criteria. Nevertheless, having plaintiffs' database will certainly make it easier for the City to confirm the proposed class list. Given the large number of potential class members, giving the City access to the database should expedite the class-notice process considerably.

Accordingly, it is the court's opinion that giving the City access to the database has tremendous potential to move this case forward. And again, given that plaintiffs originally wanted the City to collaborate with them in creating the database, the court finds that plaintiffs will not be unduly prejudiced by sharing it with the City now, provided they are fairly compensated [*14] for their extensive work. The court thus concludes that compelling production of the database at this time has the potential to "materially advance the litigation without seriously prejudicing the [plaintiffs]." *Fauteck v. Montgomery Ward & Co., Inc., 91 F.R.D. 393, 398 (N.D. Ill. 1980)* (compelling production of database that would eventually be discoverable, even if arguably not presently discoverable, on grounds that doing so would advance litigation without prejudice to defendants).

Further, there is no question that it would be an undue hardship for the City to recreate the database from scratch. The City has all the information it needs to create a similar database--plaintiffs created their database from computer data and documents provided by the City during discovery. But creating another database would require an extensive investment of time and money. Plaintiffs have spent more than $ 90,000 to compile their database, and it is not yet complete. Requiring defendants to duplicate that effort would be a complete waste of time and money. *Washington Bancorporation, 145 F.R.D. at 279.* The resources it would take for defendants to recreate the [*15] database easily satisfy the "undue hardship" element. *Id.*

Because the court finds that the City has a substantial need for access to the database and that the City could not obtain the substantial equivalent of the database without the undue hardship of expending extensive, duplicative resources, the court compels production of the database.

The City Must Contribute Its Fair Share of the Expenses Incurred in Producing the Database

In order to avoid seriously prejudicing plaintiffs, however, the City must contribute its fair share of the expenses plaintiffs incurred to produce the database. *Fauteck, 91 F.R.D. at 399* ("as to the element of unfairness that would result from a forced disclosure of a compilation made at great expense to defendant, this problem can be offset by requiring plaintiffs to share defendant's costs"); *Williams v. E.I. duPont de Nemours & Co., 119 F.R.D. 648, 651 (W.D. Ky. 1987)* (defendant ordered to pay "to the [plaintiff] a 'fair portion of the fees and expenses incurred' in the past by the [plaintiff] for the work of the [plaintiff's] expert in encoding the requested data and formulating the database"). [*16] The City's arguments against contribution do not persuade the court otherwise.

The City contends that contribution should not be required because the City incurred fees in excess of $ 10,000 to produce the information that plaintiffs used to create the database. (City's Mot. P13.) Considering the fact that plaintiffs have spent more than $ 90,000 to compile the database, it is ludicrous for the City to argue that "plaintiffs have received far more value from the work expended by and paid for by the City . . . than they themselves have incurred." (*Id.*)

Moreover, the City's production of discovery is categorically distinct from plaintiffs' production of attorney work product converting that discovery into something useful. These types of discovery are not

treated the same. When a party expends significant resources creating attorney work product like the database at issue here, it would be unreasonable and prejudicial to require the party to disclose its work product to the opponent without requiring sharing of costs. n4 *See Fauteck, 91 F.R.D. at 399; Williams, 119 F.R.D. at 651.* With respect to the expenses the City incurred, on the other hand, [*17] the general rule is that "the responding party must bear the cost of complying with discovery requests[.]" *Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358, 57 L. Ed. 2d 253, 98 S. Ct. 2380 (1978).* There are exceptions to this general rule, of course, *id.*, including an exception for cases in which the plaintiff seeks computer data that cannot be retrieved without special programming. *Anti-Monopoly Inc. v. Hasbro, Inc., 1996 U.S. Dist. LEXIS 563, No 94 Civ. 2120, 1996 WL 22976, at *2 (S.D.N.Y. Jan. 23, 1996).* Part of the City's argument against contribution is that it incurred expenses for special programming, yet was not reimbursed. But this argument, addressed below, relates to *how much* the City should have to contribute, not *whether* the City should have to contribute.

n4 There may be exceptions to cost sharing, such as where the party seeking discovery of attorney work product lacks resources, but that is not the case here.

In an argument first raised in its reply brief, the City further argues that [*18] "the financial obligation associated with creation of this database, which was necessary for plaintiffs' [sic] to ascertain the members of the class they purport to represent, was *plaintiffs' obligation* and not one to be foisted onto Defendants." (City's Reply at 7.) The court disagrees. The City is correct that, as a general rule, the representative plaintiffs should bear all costs relating to sending notice to the class, including the costs of identifying class members. *Oppenheimer, 437 U.S. at 359.* The flaw in the City's argument is that it was not necessary for plaintiffs to compile the database in order to identify the class and send notice. *Oppenheimer* teaches that class plaintiffs (absent special circumstances) bear the financial burden of identifying class members and sending notice. *Id. Oppenheimer* in no way suggests that plaintiffs are obligated to provide defendants with anything beyond a proposed class list--*i.e,* names and addresses --and the reason they were included in the list. Plaintiffs can provide a class list and the criteria for including them without ever disclosing their database. The City's contention that requiring defendants [*19] to pay any portion of plaintiffs' costs would violate *Oppenheimer,* quite simply, lacks merit. Plaintiffs had no obligation to create the database, and what is more, the database is a collection of information that goes well beyond identification of class members.

The only issue left to decide is the amount the City must contribute toward the plaintiffs' expenses. As referenced earlier, the City contends that plaintiffs should have contributed toward the expenses the City incurred ($ 10,000+) in responding to plaintiffs' discovery requests because special computer programming was necessary to obtain the information requested. *See Anti-Monopoly Inc., 1996 U.S. Dist. LEXIS 563, 1996 WL 22976, at *2.* The court notes that if the City felt that responding to the plaintiffs' discovery imposed "undue burden or expense," the City could have sought a protective order under *Rule 26(c).* The court also notes that, in plaintiffs' view, it is too late for the City to raise this issue, and further, that a significant portion of the expenses the City incurred are attributable to poor decisions and mistakes made by the City. Finally, it is worth noting that at one point, plaintiffs offered to credit the [*20] City for the expenses it incurred in responding to discovery if defendants would otherwise split the expenses associated with creating the database. Defendants would have been wise to accept that reasonable offer, but they chose not to. It is time to move this case along. The parties are each ordered to pay half of the total expenses plaintiffs have incurred to date to compile the database; the defendants' half shall be reduced by $ 5,000.00 as compensation toward special programming expenses defendants may have incurred. n5 As for any future expenses incurred to complete the database, those expenses shall be split evenly. Such future expenses shall include not only plaintiffs' expenses, but any special programming expenses incurred by defendants to provide the necessary data to plaintiffs.

n5 The court, in its discretion, finds that this amount constitutes a fair compromise. The City did not submit any documentation regarding what portion of its expenses incurred to respond to plaintiffs' discovery requests were attributable to special programming, but it is logical to conclude that not all of the City's expenses were due to special programming.

[*21]

Defendants' Motion to Strike Plaintiffs' Surreply in Opposition to the City's Motion to Compel Production

Defendants recently filed a motion to strike plaintiffs' surreply in opposition to the City's motion to compel, arguing that plaintiffs' surreply does not address newly discovered facts, new case law, or new arguments

and merely constitutes an attempt to have the last word. This motion is denied. The court gave plaintiffs' leave to file the surreply at the last hearing. Further, the surreply addresses, at least in part, an argument raised for the first time in the City's reply brief--namely, that plaintiffs must bear the cost of creating the database because the database was necessary for purposes of identifying the class members and sending class notice. Finding no basis to strike plaintiffs' surreply, the court denies defendants' motion; instead, the court has treated defendants' motion as a sur-surreply.

Conclusion

The City's motion to compel is granted in part and denied in part. The court compels the production of plaintiffs' database, but orders defendants to split the expenses incurred to create the database as delineated above. Further, defendants' [*22] motion to strike plaintiffs' surreply in opposition to the City's motion to compel production is denied.

NAN R. NOLAN

United States Magistrate Judge

Dated: July 6, 2004