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MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

LAWRENCE E. JAFFE PENSION PLAN, ON)
BEHALF OF ITSELF AND ALL OTHERS SIMILARLY)
SITUATED.)

Plaintiff,)

- against -)

HOUSEHOLD INTERNATIONAL, INC., ET AL.,)

Defendants.)

Lead Case No. 02-C-5893
(Consolidated)

Judge Ronald A. Guzman
Magistrate Judge Nan R. Nolan

APPENDIX OF UNPUBLISHED AUTHORITIES

APPENDIX OF UNPUBLISHED AUTHORITIES

1. *Conopco v. Warner-Lambert Co.*, No. Civ.A. 99-101(KSH), 2000 WL 342872 (D.N.J. Jan. 26, 2000)
2. *In re Domestic Air Transportation Antitrust Litigation*, No. 1:90-CV-2485-MHS, 1992 WL 120351 (N.D. Ga. Apr. 8, 1992)
3. *Trustmark Insurance Co., v. Schuchman*, No. 99-1081 C T/K, 2003 WL 21277200 (S.D. Ind. June 2, 2003)
4. *In re Vosen v. Warren*, No. 04-C-064-C, 2004 WL 1946396 (W.D. Wis. Aug. 31, 2004)
5. *Williams v. Board of County Commissioners*, No. 98-2485-JTM, 2000 WL 823909 (D. Kan. June 21, 2000)
6. *Ziemack v. Centel Corp.*, No. 92 C 3551, 1995 WL 729295 (N.D. Ill. Dec. 7, 1995)

Tab 1

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Not Reported in F.Supp.2d, 2000 WL 342872 (D.N.J.)
(Cite as: 2000 WL 342872 (D.N.J.))

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Only the Westlaw citation is currently available.

United States District Court, D. New Jersey,
CONOPCO, INC. d b a Unipath Diagnostic Co.

v.
WARNER-LAMBERT CO.
No. Civ.A. 99-101(KSH).

Jan. 26, 2000.

INTRODUCTION

HEDGES, Magistrate J.

*1 This matter comes to me on defendant Warner-Lambert Company's ("Warner-Lambert") motion to compel discovery. I have considered the papers submitted in support of and in opposition to the motion. There was no oral argument. Rule 78.

DISCUSSION

The history of this action is summarized in a separate ruling and will not be repeated. Here, Warner-Lambert moves to compel discovery from plaintiff Conopco, Inc., d b a Unipath Diagnostics Company ("Unipath"). Warner-Lambert contends that Unipath refused to respond to Interrogatories Nos. 2, 4, 17, and 18, which relate to the issues of claim interpretation and patent infringement, to which discovery has been limited. Warner-Lambert also claims that Unipath is withholding relevant information relating to the licensing of the patents-in-suit by refusing to respond to Document Requests Nos. 33 and 51 and to Interrogatory No. 7.

INTERROGATORY NO. 2: FOR EACH CLAIM OF THE PATENTS-IN-SUIT ALLEGED TO BE INFRINGED, DESCRIBE IN DETAIL HOW CONOPCO [UNIPATH] CONTENDS THAT EACH WARNER-LAMBERT PRODUCT AND METHOD PRACTICED ALLEGEDLY INFRINGES SUCH CLAIM, INCLUDINGGGG A STATEMENT AS TO WHETHER THE ALLEGED INFRINGEMENT IS LITERAL OR UNDER THE DOCTRINE OF EQUIVALENTS, AND, FOR LITERAL INFRINGEMENT, PROVIDE A CLEAR IDENTIFICATION AND EXPLANATION OF THE STRUCTURE FOR EACH WARNER-LAMBERT PRODUCT, OR STEP FOR EACH METHOD

PRACTICED OR INDUCED, WHICH CORRESPONDS TO EACH LIMITATION OF EACH CLAIM ALLEGED TO BE INFRINGED, OR, FOR THE DOCTRINE OF EQUIVALENTS, DESCRIBE THE FUNCTION, WAY AND RESULT FOR EACH ELEMENT OR STEP OF THE CLAIM FOR WHICH CONOPCO CONTENDS THAT WARNER-LAMBERT'S PRODUCT OR METHOD PRACTICED CONTAINS AN EQUIVALENT, AND IDENTIFY THE CORRESPONDING FUNCTION, WAY AND RESULT FOR THAT ELEMENT OR STEP.

Unipath objects to this interrogatory as prematurely calling for its contentions. Unipath claims that it answered the interrogatory as fully as it can without meaningful discovery from Warner-Lambert. Unipath argues that on August 10, 1999, the Court heard Warner-Lambert's argument that Unipath should provide a claim chart in response to this interrogatory. Unipath contends that contrary to Warner-Lambert's assertion, the Court ruled that Unipath did not have to provide a claim chart. Unipath also argues that Warner-Lambert does not dispute that its test device reads onto every element of the claims other than the "material comprising sugar" limitation.

Warner-Lambert argues that Unipath's response is insufficient and that Unipath must provide a claim chart. Warner-Lambert contends that the first part of the two-part determination of whether a patent claim is infringed--construing the language of the claim--does not require discovery. *See Athletic Alternatives, Inc. v. Prince Mfg., Inc.* 73 F.3d 1573, 1578 (Fed.Cir.1996); *Murkman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed.Cir.1995), *aff'd*, 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577 (1996). Warner-Lambert also demands that Unipath identify which elements of the claims are infringed literally or under the doctrine of equivalents. Warner-Lambert argues that Unipath's response must identify which element or elements of the e.p.t.® product are deemed by Unipath to constitute the claimed "test strip." Furthermore, Warner-Lambert does not agree that the "only" disputed claim term is the "material comprising sugar" limitation. Warner-Lambert also argues that Unipath has had two years to hone its contentions in that it filed suit against Princeton Biomeditech Corporation in December 1997 for infringement under the exact same three patents-in-

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suit. A summary judgment motion is currently pending in the Princeton Biomeditech action.

In patent infringement proceedings, a party may demand that its opposition state exactly what its claims are. Babcock & Wilson Co. v. Foster Wheeler Corp., 54 F.R.D. 474, 478 (D.N.J.1971). Parties may be required to provide legal conclusions or opinions if to do so would "serve any substantial purpose." Carrier Mfg. Co. v. Rex Chainbelt, Inc., 281 F.Supp. 717, 718 (E.D.Wis.1968). It is important to one's opposition to know the differences between each party's patent applications, and the answers may serve to narrow the issues before the court. 281 F.Supp. at 718. A plaintiff may be questioned as to which patent claims it contends are infringed. Liquidometer Corp. v. Capital Airlines, Inc., 24 F.R.D. 319, 324 (D.Del.1959).

*2 Based on the foregoing, the Court concludes that although Unipath has provided detailed answers to Warner-Lambert's questions, it has not fully disclosed its claims. Moreover, Warner-Lambert contends that more than one claim is at issue in this action. Therefore, after Unipath receives the discovery that it is awaiting from Warner-Lambert, Unipath must submit a preliminary claim chart, showing how Unipath is applying the limitations in its patent claims to the accused e.p.t. 8 products on an element-by-element basis and whether there is literal infringement or infringement under the doctrine of equivalents. As requested in Interrogatory No. 2, "for literal infringement, provide a clear identification and explanation of the structure for each Warner-Lambert product, or step for each method practiced or induced, which corresponds to each limitation of each claim alleged to be infringed, or, for the doctrine of equivalents, describe the function, way and result for each element or step of the claim for which Conopco contends that Warner-Lambert's product or method practiced contains an equivalent, and identify the corresponding function, way and result for that element or step." The parties will proceed with the discovery covered by this Order, and when Unipath receives the information it has requested, it will timely forward a claim chart to Warner-Lambert. If Unipath does not fully disclose its infringement contentions, it may be precluded from asserting them at trial. Nike, Inc. v. Wolverine World Wide, 43 F.3d 644, 648 (Fed.Cir.1994).

Regarding the *Biomeditech* action, as the Court ordered in its Order of September 30, 1999, Warner-Lambert may obtain copies of the summary judgment papers filed in the action after Judge Hayden has

decided the motion. Moreover, the Court will not utilize evidence from that case here to expedite matters. A trial judge should exclude "evidence concerning other litigation involving the same patents." Texas Instruments, Inc. v. Cypress Semiconductor Corp., 90 F.3d 1558, 1570 n. 11 (Fed.Cir.1996).

Interrogatory No. 4: State what Conopco [Unipath] contends is the percentage or range of sugar which comes within the "material comprising a sugar, in an amount effective to reduce interaction between said test strip and said labeled reagent" limitation of the claims of the Patents-in-Suit, and identify all intrinsic evidence and extrinsic evidence which supports such contention.

*3 Unipath responded to this interrogatory in some detail, describing the structure and operation of its '871 patent and the operation of sugar within the process. Warner-Lambert advised that the response was inadequate, and at a conference on August 10, 1999, the Court ordered Unipath to "specifically" answer Interrogatory No. 4. On August 20th, Unipath served a supplemental response and argued that functional claim language such as that at issue here need not be restricted to a particular amount. W.R. Grace v. Intercat, Inc., 7 F.Supp.2d 425, 439 (D.Del.1997), *aff'd*, 155 F.3d 572 (Fed.Cir.1998). In *Grace*, the court found infringement because the "claim element is met as long as there is a sufficient amount of the discrete entities to reduce SOx emissions. No particular amount is mandated by the patentees. If there is a sufficient amount of the discrete entities to reduce SOx emissions in the flue gas, there is enough to satisfy this claim." 7 F.Supp.2d at 439. Unipath argues that this action is similar to *Grace* in that Warner-Lambert seeks to have this Court direct Unipath to set out precisely "the amount needed to infringe." Defendant's Motion to Compel, at 3. This is the same argument set forth in *Grace*, which the *Grace* court rejected.

The Court concludes that at this time Unipath need not provide additional information regarding the amount of sugar needed to infringe the patent. The appropriate time for claim construction may be at a *Markman* hearing, the purpose of which is to analyze patent infringement and construe disputed claims. Gallant v. Telebrands Corp., 35 F.Supp.2d 378, 401 (D.N.J.1998).

Interrogatories Nos. 17 and 18:

Interrogatory No. 17: State precisely how Unipath

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contends one can objectively determine and measure whether a test product does or does not meet the limitation of the patents-in-suit of "wherein mobility of said labeled reagent within the test strip is facilitated ... in an amount effective to reduce interaction between said test strip and said labeled reagent", including, but not limited to, identifying:

all tests (including the test parameters and procedures) that can be performed on the test product to determine whether sugar is used in an amount by which "mobility of said labeled reagent within the test strip is facilitated" and an amount "effective to reduce interaction between said test strip and said labeled reagent"; the physical amount and parameters by which mobility of the labeled reagent must be "facilitated" and the test (including the test parameters and procedures) for measuring same; and the physical amount and parameters by which interaction between the test strip and labeled reagent must be "reduced" and the tests (including the test parameters and procedures) for measuring same.

Interrogatory No. 18: Identify all tests (including the test parameters and procedures) known to Unipath that can be performed on test products to determine whether sugar is used in an amount, as explained in the prosecution history of the patents-in-suit, that is "traditionally used in immunoassays as stabilizers for antibodies" or that is used in "buffer solutions which contain the assay and/or sucrose" that are "conventional for antibodies to be stored [in] and used in the manufacture of assay devices".

*4 Unipath originally did not respond to these interrogatories, objecting that they were premature and that they improperly attempted to control and limit Unipath's contentions. Warner-Lambert's counsel sent a letter to Unipath on October 7, 1999 explaining that Unipath's "premature" objection was not valid since no discovery is needed to respond to these interrogatories. Unipath's counsel subsequently indicated that Unipath was maintaining its objections.

Unipath claims it responded to interrogatories nos. 17 and 18 and, in so doing, referred Warner-Lambert to its response to interrogatory No. 19, to which Warner-Lambert had no objection. Unipath contends that the three interrogatories are related. Interrogatory 17 asks Unipath to: "State precisely how [it] contends ... whether sugar is used in an amount by which 'mobility of said labeled reagent within the test strip is facilitated' and an amount 'effective to reduce interaction between said test strip and said labeled reagent' ". Interrogatory 18 asks Unipath to "Identify all tests ... that can be performed ... to determine

whether sugar is used in an amount ... that is 'traditionally used in immunoassays as stabilizers for antibodies ...' Interrogatory 19 asks "Identify all tests ... that can be used to measure ... the interaction between the test strip and the labeled reagent...."

Unipath argues that its response to interrogatory No. 19 states in detail how it presently believes one can measure the manner in which sugar or sugar and protein can be utilized to improve test strip performance. Unipath claims it also provided unredacted copies of the testing protocol used to perform its pre-litigation testing of defendant's and third parties' test devices, including the results from these prelitigation issues. Unipath claims that although Warner-Lambert's accused test device can be purchased at almost any drug store, Unipath provided complete answers based on Warner-Lambert's commercially available product and will supplement its answer once it receives discovery on the development of defendants' test devices. Unipath requests the Court to permit it to supplement these interrogatories after defendants provide the discovery that it is withholding, e.g., lab notebooks, development records, etc.

Unipath also argues that Warner-Lambert errs when it states that contention interrogatories must be answered at the beginning of the discovery process. Unipath argues that discovery has just commenced and no critical research and development documents were produced, and that such should provide the information needed to make contention discovery more focused and informative. Unipath argues that in *B. Braun Med. Inc. v. Abbott Lab.*, 155 F.R.D. 525 (E.D.Pa.1994), *aff'd in part, vacated in part, and remanded on other grounds*, 124 F.3d 1419 (Fed.Cir.1997), a patent case, plaintiff moved to compel responses to its interrogatories including a contention interrogatory, which sought an admission on all facts supporting defendant's contention as to why defendant did not infringe its patents. Using the standard that "[t]he party serving contentions bears the burden of proving how an earlier response assists the goals of discovery" and finding that such burden had not been met, defendant was not forced to respond, so as not to "have [them] articulate theories of their case not yet fully developed." 155 F.R.D. at 527. Also, courts have held that *Markman* hearings to determine proper claim construction are inappropriate prior to completion of discovery. *Toter, Inc. v. Visalia*, 44 U.S.P.Q.2d 1312 (E.D.Cal.1997).

Contention interrogatories are permissible to ask a party "to state what it contends; to state whether it

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makes a specified contention; to state all the facts upon which it bases a contention; to take a position, and explain or defend that position, with respect to how the law applies to facts; or to state the legal or theoretical basis for a contention." A court may defer such interrogatories until the end of discovery. The party serving the interrogatories must prove how discovery is benefited by an earlier answer. It must show that early answers "will contribute meaningfully to clarifying the issues in the case, narrowing the scope of the dispute, or setting up early settlement discussions, or that such answers are likely to expose a substantial basis for a motion under Rule 11 or Rule 56." However, if the Court forces plaintiff to respond, it may have to set forth theories of its case that have not yet been developed. *B. Braun Medical, Inc. v. Abbott Labs.*, supra, 155 F.R.D. at 527.

*5 Based on the foregoing, the Court concludes that contention interrogatories should be answered after further discovery has been completed. *Nestle Foods Corp. v. Aetna Cas. and Sur. Co.*, 135 F.R.D. 101, 110 (D.N.J.1990); see *B. Braun Medical, Inc.*, 155 F.R.D. at 527. We are still at the early stages of discovery, although many documents have been produced. Although Warner-Lambert is attempting to encourage Unipath to set forth its construction of its claims and set limitations now, the Court will construe the claims in a *Markman* hearing and resolve disputes regarding the contentions of the parties at that time. See, e.g., *LNP Eng'g Plastics, Inc. v. Miller Waste Mills, Inc.*, 1999 WL 1211694, 7 (D.Del.1999).

Regarding product testing, Unipath has provided Warner-Lambert with information regarding tests that it has performed. Unipath should update its answers as discovery proceeds. Moreover, during the *Markman* hearing, the Court may need to decide which test is the optimum method by which to determine whether a claim limitation has been infringed. *LNP Eng'g*, 1999 WL 1211694 at 33.

LICENSING

Warner-Lambert requested documents relating to licensing by way of Document Requests 33 and 51 and Interrogatory No. 7:

DOCUMENT REQUEST 33: ALL DOCUMENTS AND THINGS WHICH CONSTITUTE, REFER OR RELATE TO LICENSING, OR ATTEMPTS TO LICENSE, THE PATENTS-IN-SUIT AND RELATED PATENTS, INCLUDING ALL CORRESPONDENCE

BETWEEN CONOPCO (OR ITS ATTORNEYS) AND OTHER PERSONS OR ENTITIES CONCERNING SUCH LICENSING.

DOCUMENT REQUEST 51: ALL DOCUMENTS, WHICH CONSTITUTE, REFER OR RELATE TO LICENSE AGREEMENTS FOR TEST PRODUCTS OR TECHNOLOGY RELATED TO TEST PRODUCTS TO WHICH CONOPCO IS A PARTY.

INTERROGATORY NO. 7: IDENTIFY EACH PERSON AND ENTITY WHO HAS OBTAINED, HAS SOUGHT TO OBTAIN OR HAS BEEN CONTACTED BY CONOPCO TO OBTAIN, A LICENSE, IMMUNITY, RELEASE, RIGHT TO SUE FOR INFRINGEMENT, OR OTHER RIGHT OR INTEREST IN, TO, OR UNDER THE PATENTS-IN-SUIT OR RELATED PATENTS.

Warner-Lambert argues that, with respect to licensing efforts, the products that Unipath has or has not licensed (or attempted to license) under its patents-in-suit are relevant to show what Unipath contends the patent claims mean and what products it believes infringe the patents. Unipath argues that the issue of Unipath's licensing documents is not properly before the Court. Unipath notes that Warner-Lambert raised this issue at the September 23, 1999 conference. Unipath argues that the Order drafted by Warner-Lambert following the conference did not direct Unipath to produce licensing documents and Warner-Lambert did not engage in a Rule 26 "meet and confer" prior to seeking the Court's intervention. Unipath argues that Warner-Lambert is inconsistent in that it argues that Unipath's patent claims does not require discovery, but extrinsic evidence such as licensing information is necessary for claim contradiction. Unipath submits that licensing documents have nothing to do with the issue of patent infringement and requests that Warner-Lambert's demands be denied.

*6 A similar issue was decided in *Components, Inc. v. Western Elec. Co.*, 52 F.R.D. 379 (D.Me.1971), in which that court held that documents relating to the patentee's licensing efforts were relevant to infringement as possibly containing admissions against interest as to the patentee's interpretation of the claims. Actions and statements against interest of the owner of a patent or inventor may be considered by a court when construing the scope of a patent and are relevant to the issues of infringement and validity. 52 F.R.D. at 382. The Court will direct production of the licensing documents to the extent that this does not infringe the attorney-client privilege or work

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product. While some documents may be protected because these contain confidential communications or advice that is privileged, facts incorporated in the documents might not be protected. Phillips Elec. N. American Corp. v. Universal Elec., Inc., 892 F.Supp. 108, 109 (D.Del.1995); see Components, Inc., 52 F.R.D. at 382 (holding that "the actions and statements against interest of the inventor or owner of a patent may properly be considered by the Court ..." and "documents relating to [a party's] licensing or attempted licensing may contain admissions against interest as to [its] own interpretation of the claims of the patents in suit"); Schenectady Chemicals, Inc. v. General Electric Co., 185 U.S.P.Q. 276, 277 (N.D.N.Y.1975) (holding that "negotiations on licensing agreements are also relevant and thus discoverable in assessing the limits of the patent claims"); Kearney & Trecker Corp. v. Giddings & Lewis, 296 F.Supp. 979, 983 (E.D.Wisc.1969).

CONCLUSION

Based on the foregoing, Warner-Lambert's motion to compel is GRANTED IN PART and DENIED IN PART

SO ORDERED.

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Tab 2

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Motions, Pleadings and Filings

United States District Court, N.D. Georgia, Atlanta
Division.

In re DOMESTIC AIR TRANSPORTATION
ANTITRUST LITIGATION (This Document Relates

To: All Actions).

No. 1:90-CV-2485-MHS.

MDL No. 861.

April 8, 1992.

Order

SHOOB, District Judge:

*1 Presently before the Court is Defendants' Motion to Compel Discovery Requests. Defendants seek an order compelling plaintiffs to provided [*sic*] complete responses to Defendants' Second Set of Interrogatories and Second Request for Production of Documents. Also before the Court is Defendants' Motion to Modify the Discovery Schedule. For the reasons stated briefly below, the Court will grant in part and deny in part both the motion to compel and the motion to modify the discovery schedule.

1. Motion to Compel

On December 15, 1991, defendants served plaintiffs with 25 interrogatories and 3 related requests for the production of documents. For the most part, the interrogatories track each allegation in the Second Amended Complaint and request the complete factual basis of each of plaintiffs' claims, the identity of any persons with knowledge concerning the factual basis, and the identity of documents that support the claims. [FN1]

Plaintiffs object to the interrogatories on the grounds that they are burdensome and premature. Plaintiffs insist that these types of "contention" interrogatories are improper prior to substantial completion of documentary and deposition discovery. As a compromise, plaintiffs suggest that they file responses to the interrogatories within 30 days of the conclusion of the first round of depositions in this matter, on May 15, 1992. Defendants argue that

plaintiffs must respond to the interrogatories now to enable defendants to adequately defend this action. Should the Court accept plaintiffs' compromise, defendants argue that they are entitled to 60 additional days of fact discovery, to which plaintiffs are not entitled.

For the purposes of this order, contention interrogatories "are broadly defined as questions that ask an opposing party to state the facts, evidence, or legal theories upon which it bases its specified contention(s) or that asks [*sic*] an opponent to explain his or her contention(s)." *McCaugherty v. Siffermann*, 132 F.R.D. 234, 249 (N.D.Cal.1990). This definition does not include questions that ask a party to identify other people with knowledge of the alleged events or documents which support plaintiffs' claims. *Id.*; *In Re Convergent Technologies Securities Litigation*, 108 F.R.D. 328, 333 (N.D.Cal.1985).

Federal Rule of Civil Procedure 33(b) provides:

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference at other later time.

In addition, the Manual of Complex Litigation Second ("the Manual") notes with regard to contention interrogatories that "other productive means for clarifying and narrowing the issues and the contentions of the parties" are available, particularly when served before substantial completion of discovery. Manual at § 21.463. "Without such controls, substantial time, money, and energy may be wasted on contention interrogatories that are either premature or overinclusive." *Id.*

*2 The Court recently granted in part substantial motions to compel filed by plaintiffs, and documents responsive to the order have not yet been produced. See Pretrial Order No. 7, dated February 7, 1992. In addition, the first round of depositions in this matter began the week of February 24, 1992, and is scheduled to end in mid-April, 1992. Defendants are correct in noting that merits discovery has been

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available since the inception of this action. However, instead of diligently pursuing merits discovery, *all* parties have conducted their discovery on whatever limited issues were presently pending before the Court, such as class certification and notice requirements. It has only been in the last three months that the parties have indicated that they are proceeding with fact discovery.

The Court does not find, as defendants urge, that substantial discovery has been completed. Plaintiffs' responses to the contention interrogatories at this point without the benefit of more discovery would do little to further the defense. Accordingly, the Court will not require plaintiffs to respond to defendants' contention interrogatories before meaningful discovery has been completed. The Court will require, however, that to the extent plaintiffs are presently aware and the interrogatories so request, they must identify individuals with knowledge of the alleged events or other documents which support

plaintiffs' claims. All other responses to the interrogatories must be submitted by May 15, 1992. The Court will not allow defendants an additional 60 days of exclusive discovery but will extend the close of mutual discovery an additional 14 days to allow defendants an opportunity to digest plaintiffs' responses.

II. Motion to Modify Discovery Schedule

Defendants have also moved for modification of the Court's discovery schedule contained in Pretrial No. 7. All parties agree that it would be beneficial for the Court to provide for a distinct period of expert witness discovery and have submitted a suggested schedule for the remainder of the discovery period. The Court will adopt the proposed schedule with minor alterations. Absent compelling circumstances, the final discovery schedule will be as follows:

April 15	Tentative completion of 1st round of depositions
May 15	Plaintiffs respond to contention interrogatories
June 15	Close of mutual fact discovery
June 22	Plaintiffs furnish defendants interrogatory answers and/or reports disclosing the identity of their experts and the substance of their opinions
July 13	Defendants furnish plaintiffs interrogatory answers and/or reports disclosing the identity of their experts and the substance of their opinions
August 3	Defendants complete depositions of plaintiffs' experts
August 24	Plaintiffs complete depositions of defendants' experts
September 23	Motions for Summary Judgment to be filed
October 23	Response to Motions for Summary Judgment filed
November 6	All replies to be filed

Preclusion of Experts' "New Conclusions"

*3 The parties were unable to agree on the effect of conclusions reached by an expert that go beyond the scope of conclusions contained in the interrogatory answers, reports, and depositions of the expert. Defendants' proposal precludes any new conclusions by experts unless directly responsive to the other side's experts' opinions and requires that an expert be made available for deposition on any new conclusions no later than 14 days prior to the date of filing for motions for summary judgment or trial. Plaintiffs' proposal provides that an expert's new conclusions will not be considered at trial or on motions for summary judgment unless disclosed to the other side by deposition or in writing at least 10 days before the testimony is proffered.

The Court finds a combination of the two proposals to be the most reasonable. Accordingly, absent extraordinary circumstances, no expert will be permitted to testify at trial, and no expert testimony will be considered on motions for summary judgment as to any conclusions that have not been disclosed to the other side with specificity by deposition or in writing at least 14 days before the expert is proffered for testimony at trial or in support of a motion for summary judgment. Should the side opposing the expert's new conclusions feel that an additional deposition of the expert is necessary, the Court will consider the matter in an expedited manner.

III. Conclusion

For the reasons stated above, the Court Grants in Part and

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(Cite as: 1992 WL 120351 (N.D.Ga.))

Denies in Part defendants' motion to compel [# 207] and defendants' motion to modify the discovery schedule [# 211].

It Is So Ordered.

FN1. For example, Interrogatory No. 3 requests: "With regard to the allegations contained in paragraph 25 of the Second Amended Complaint, describe in complete detail the factual basis of your claim that the defendant airlines have engaged in a combination and conspiracy in restrain[t] of trade, identify all persons whom you allege participated in the alleged conspiracy, identify all persons with knowledge or information concerning the factual basis of your claim, and identify all documents that support, relate to or refer in any way to your claim."

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Motions, Pleadings and Filings ([Back to top](#))

• 1:90cv02485 (Docket)
(Nov. 06, 1990)

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Tab 3

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(Cite as: 2003 WL 21277200 (S.D.Ind.))

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Only the Westlaw citation is currently available.

United States District Court,
S.D. Indiana,
Indianapolis Division.
TRUSTMARK INSURANCE COMPANY (Mutual),
Plaintiff,
v.
Sandra Blaine SCHUCHMAN, Defendant.
Barry Schuchman, individually and as personal
representative of the Estate of
Sandra Schuchman and Sandra Schuchman,
Plaintiffs,
v.
Trustmark Insurance Company, Defendant.
No. 99-1081 C T/K.

June 2, 2003.

Gary J. Dankert, Ice Miller, W. Scott Montross,
Townsend & Montross, Indianapolis, IN, Cynthia A
Leiferman, Austin, TX, for plaintiffs defendants.

**ENTRY ON SCHUCHMAN'S MOTION TO
COMPEL DISCOVERY AND TRUSTMARK
INSURANCE
COMPANY'S CROSS MOTION TO COMPEL
DISCOVERY**

TIM A. BAKER, Magistrate District Judge.

*1 This case involves an alleged wrongful denial of benefits under a group health insurance policy covered under ERISA. At issue is the proper scope of discovery that governs an ERISA case. Defendant Counter-Plaintiff Barry Schuchman ("Schuchman") claims that the denial of benefits by the plan administrator should be reviewed by the District Court de novo, permitting him to conduct discovery outside of the administrative record. Plaintiff Cross-Defendant Trustmark Insurance Company claims that the decision to deny benefits should be reviewed under the deferential arbitrary and capricious standard, limiting discovery to the administrative record. The parties' cross motions to compel discovery are fully briefed and before the Court for a ruling.

I. Background

Schuchman is an employee of SARCO, an Indianapolis company specializing in recycling. As a SARCO employee, Schuchman, his wife Defendant/Counter-Plaintiff Sandra Schuchman ("S.Schuchman"), and their children were covered under a group health insurance policy issued by Trustmark. [Countercl., ¶ 1]. The terms and conditions of the health insurance policy were set forth in Trustmark's Group Insurance Contract ("Plan"). [Compl., ¶ 2].

According to the Plan's terms, the "benefit payment is subject to the determination by us [Trustmark] that the service, drug or supply is Medically Necessary." [Def.'s Ex. 5, p. 4]. The Plan further provides that Trustmark "has full, exclusive and discretionary authority to determine all questions arising in connection with this Contract including its interpretation." [*Id.* at p. 39]. Trustmark contends that it has final decision-making authority on all claims submitted by payment. [Trustmark Opp., p. 2].

In August 1997, S. Schuchman was diagnosed with advanced-stage ovarian cancer. Trustmark covered S. Schuchman's claims for conventional chemotherapy and surgery. [Countercl., ¶ 2]. In early 1998, S. Schuchman's physicians requested that Trustmark pre-certify her availability of benefits for participation in a clinical research trial testing in ovarian cancer. This treatment is known as high dose chemotherapy with peripheral stem cell or bone marrow transplant ("HDC/PSCR"). In denying the request for pre-certification, Trustmark determined that the proposed treatment was not "medically necessary" as defined by the Plan. [Trustmark Opp., p. 2; Countercl., ¶ 3]. In making this determination, Trustmark claims it forwarded case materials to "three independent medical oncologist for review, who concluded the treatment was investigational and experimental in nature." [Trustmark's Opp., p. 2]. Trustmark subsequently denied Schuchman's appeal.

Trustmark filed suit seeking a declaratory judgment against Schuchman, individually and in his capacity as the personal representative for the estate of his deceased wife, [FN1] alleging that it properly denied the requested benefits under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 et. seq. [Compl., ¶¶ 1-2, 12]. Schuchman filed a counterclaim asserting ERISA violations for denying the disputed claim, a federal estoppel claim,

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a myriad of claims arising under Texas state law, and also sought a declaratory judgment. [Countercl., ¶¶ 14-59].

EN1. S. Schuchman eventually died of complications due to ovarian cancer. [Docket No. 118].

*2 The parties filed cross motions for summary judgment. On August 7, 2001, the Court denied Schuchman's motion for summary judgment and concluded that the Plan was an "employee welfare plan" governed under ERISA, and that Trustmark has standing to pursue its declaratory judgment. In addition, the Court granted in part and denied in part Trustmark's partial motion for summary judgment, holding that all of Schuchman's state law claims were preempted by ERISA, and that Schuchman's federal estoppel claim and request for a declaratory judgment were not preempted and may proceed. [See Docket No. 118]. In addition, Schuchman's ERISA claims are still viable.

The focus of the discovery dispute concerns Schuchman's interrogatories, requests for production, and a Rule 30(b)(6) notice of deposition seeking a deponent to testify about the Plan, including the review and appeals process, the facts relied upon in rendering a decision, and other related issues. [Def.'s Exs. 1-3]. Trustmark objected to this discovery, claiming that the Court's analysis is limited to the administrative record, and thus the discovery was over broad. [Trustmark Opp., p. 3]. Schuchman filed a motion to compel in order to obtain responses to this discovery. [Docket No. 130].

Trustmark also served interrogatories on Schuchman seeking information on his federal estoppel claim. Schuchman asserted several objections, including that the interrogatories were overly broad and invaded the attorney-client privilege and work product doctrine. [Trustmark Mot., Ex. A]. As a result, Trustmark filed a cross motion to compel discovery.

For the reasons set forth below, Schuchman's motion to compel discovery is DENIED. Likewise, Trustmark's motion to compel discovery is DENIED.

II. Discussion

A. Schuchman's Motion to Compel Discovery

1. Discovery on the Parties' ERISA claims

Schuchman served interrogatories, requests for production, and notice of deposition seeking information regarding his ERISA claim and the denial of benefits. Trustmark objected to this discovery, claiming that the Court's decision was limited to the administrative record, and thus no further discovery was permitted under ERISA. [See Pl.'s Exs. 1-4]. In determining whether Trustmark has properly asserted objections to Schuchman's discovery requests, the Court must ascertain the proper standard of review of the parties' ERISA claims. Schuchman seeks a de novo review, allowing him to discover and review items beyond the administrative record to determine whether benefits were wrongfully denied. [Defs.' Br., p. 3]. On the other hand, Trustmark urges the Court to adopt the deferential arbitrary and capricious standard, limiting the Court's review to the administrative record and prohibiting any further discovery. [Trustmark Opp., p. 3].

A court reviews a plan administrator's denial of benefits de novo unless the plan gives the administrator discretionary authority to determine eligibility for benefits. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) (denial of benefits must be reviewed de novo unless "the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan"); *Hackett v. Xerox Corp. Long-Term Disability Income Plan*, 315 F.3d 771, 773 (7th Cir.2003) (same). Where the plan grants discretionary authority to the plan administrator, a court reviews the decision under the deferential arbitrary and capricious standard. See *Hess v. Hartford Life & Accident Ins. Co.*, 274 F.3d 456, 461 (7th Cir.2001). An arbitrary and capricious standard of review of a discretionary ERISA administrative decision "is specifically limited to an examination of the administrative record generated by the plan administrator." *Hughes v. Life Ins. Co. of North America*, 112 F.Supp.2d 780, 782 (S.D.Ind.2000), citing *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*, 195 F.3d 975, 982 (7th Cir.1999) (where an ERISA plan provides the plan administrator with discretion to decide claims, courts should review such decisions under a deferential standard and the parties should not take additional discovery). See also *Trombetta v. Cragin Fed. Bank for Sav. Employee Stock Ownership Plan*, 102 F.3d 1435, 1438 n. 1 (7th Cir.1996) ("The only relevant materials at the time [a district court rules on summary judgment are] the materials that were before the [plan administrator] when it reached its decision."). The burden is on the

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plan administrator to prove that a grant of discretionary authority exists. See Neurological Resources, P.C. v. Anthem Ins. Companies, 61 F.Supp.2d 840, 848 (S.D.Ind.1999), citing Kinstler v. First Reliance Standard Life Insurance Co., 181 F.3d 243 (2d Cir.1999).

*3 The Seventh Circuit clarified the *Firestone* standard in Herzberger v. Standard Insurance Co., 205 F.3d 327 (7th Cir.2000). In that case, the court upheld the presumption of plenary review, except where the language of the policy "indicates with the requisite if minimum clarity that a discretionary determination is envisaged" or where the "nature of the benefits or the conditions upon it will make reasonably clear that the plan administrator is to exercise discretion." *Id.* at 331. The *Herzberger* court suggested the following "safe harbor" language to ensure discretionary review of a policy: "Benefits under this plan will be paid only if the plan administrator decides in his discretion that the applicant is entitled to them." *Id.* An ERISA plan "that contains such language will not be open to being characterized as entitling the applicant for benefits to plenary judicial review of a decision turning him down." *Id.*, citing Cozzie v. Metropolitan Life Ins. Co., 140 F.3d 1104, 1107 (7th Cir.1998).

In the case at bar, Trustmark states that the Plan contains two provisions that resemble the "safe harbor" language recommended in *Herzberger* and result in a discretionary review. First, under the "Medically Necessary" section, the Plan provides that the "Benefit payment is subject to the determination by us that the service, drug, or supply is Medically Necessary." [Pl's Ex. 5, p. 4]. Second, under the "Miscellaneous Provisions" section, the Plan states that "The Company has full, exclusive and discretionary authority to determine all questions arising in connection with this Contract including its interpretation." [*Id.*, p. 39]. In response, Schuchman claims that this language does not vest Trustmark with discretionary review since it does not give the plan administrator any discretion to decide benefits. [Def.'s Br., p. 4].

The Court finds that the two provisions in the Policy confer the plan administrator (here Trustmark) sufficient discretion to invoke the arbitrary and capricious standard of review. [FN2] Participants of the Policy are given adequate notice that it is within the discretion of the plan administrators to approve or deny benefits based on a medical necessity. Although the Plan did not set forth the verbatim "safe harbor" language suggested in *Herzberger*, that court "did not

mandate the use of [the safe harbor] language, instead finding it sufficient for the plan to contain language that ... indicates with the requisite if minimum clarity that a discretionary determination is envisaged." Quinn v. Non-Contributory Nat. Long Term Disability Program, 113 F.Supp.2d 1216, 1220 (N.D.Ill.2000), quoting in part Herzberger, 205 F.3d at 331. (Internal quotations omitted). See also Deal v. Prudential Ins. Co. of America, 222 F.Supp.2d 1067, 1069 (N.D.Ill.2002) ("an absence of the 'safe harbor' language does not require plenary review if the plan indicates with the requisite clarity that a discretionary determination is envisaged.").

FN2. In his reply brief, Schuchman questions the identity of the Plan administrator. [Reply, p. 3]. The Trustmark Insurance Company Plan documents define "Company" and "us" as being Trustmark itself. [Def.'s Ex. 5]. For purposes of these motions, the Court assumes, without holding, that Trustmark itself is the Plan administrator.

*4 In any event, the Plan clearly reserves the right to determine what treatment is "medically necessary" and the benefit afforded (if any) distributed. Trustmark also reserves the "full, exclusive and discretionary authority" to interpret the Plan's provisions. [Def.'s Ex. 5]. In a similar instance, the Seventh Circuit found discretionary review appropriate where the plan granted the administrator "the right to interpret the terms and provisions of the Benefit Plan and to determine any and all questions arising under the Benefit Plan..." Ross v. Indiana State Teacher's Ass'n Ins. Trust, 159 F.3d 1001, 1008 (7th Cir.1998). See also Dreiman v. PSI Energy, Inc., 2002 WL 31427445, *1 (S.D.Ind.2002) (clause reserving "the right to interpret and regulate the Plan with discretionary authority" sufficient to invoke deferential standard); Parker v. Nyhart Co., Inc., 2000 WL 33281118, *7 (S.D.Ind.2000) (arbitrary and capricious standard applied where administrator had "the power and duty to do all things necessary or convenient to effect the intent and purposes of the Plan, including construing the Plan, which construction shall be final and binding; correcting any defect, supplying any omission, or reconciling any inconsistency in the Plan in such manner and to such extent as it shall deem expedient to effectuate the Plan; and determining all questions that may arise under the Plan, including questions of eligibility to participate in the Plan and the benefits provided by the Plan."); White v. Employee Retirement Plan of Amoco Corp., 2000 WL 1221635, *3 (N.D.Ill.2000)

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(plan giving administrators the authority to "interpret the Plan, to determine applicable facts, and to decide all matters arising under the Plan, including the right to exercise discretion to remedy possible ambiguities, inconsistencies, and omissions" resulted in discretionary review): Neurological Resources, P.C. v. Anthem Insurance Companies, 61 F.Supp.2d 840, 852 (S.D.Ind.1999) (applying arbitrary and capricious standard of review where Plan stated that administrator "has the responsibility to interpret and construe the provisions of the Plan" and "to determine eligibility to participate in the Plan"); Chojnacki v. Georgiu-Pacific Corp., 108 F.3d 810, 815 (7th Cir.1997) (arbitrary and capricious review appropriate where a plan specified that the administrator was "responsible for interpretations of this plan."); Gallo v. Amoco Corp., 102 F.3d 918, 921 (7th Cir.1996), cert. denied, 521 U.S. 1129 (1997) (concluding that decisions of administrator who possessed "the discretion to interpret" a plan were entitled to deferential review).

In support of his position that a de novo review is appropriate, and thus discovery outside of the administrative record is permitted, Schuchman states that "there are complex medical issues present, there is a potential conflict of interest in the decision-making process, an issue exists regarding the application of the proper standard of review, the decision to deny benefits involves interpretation of a plan term or procedural irregularities exist with respect to interpretation of [a] term or with respect to irregularities in compliance with ERISA regulations." [Defs.' Br., p. 5]. Schuchman also alleges that Trustmark failed to comply with the Plan's provisions, that other insurance carriers paid for the same procedure sought by Schuchman, and that a bone marrow transplant is not an "experimental" treatment. [*Id.* at pp. 8- 10]. However, Schuchman fails to provide persuasive authority for these propositions. Many of the cases Schuchman cites as persuasive authority predate *Herzberger*. Schuchman also relies on cases arising from courts outside of the Seventh Circuit. Perhaps most important, as noted above, the fact of the matter remains that Trustmark retained the right to interpret these Plan provisions.

*5 Since the Plan administrator here has authority to determine whether a treatment is "medically necessary," and that review of this decision is subject to the arbitrary and capricious standard, the discovery Schuchman seeks outside the administrative record is inappropriate. See, e.g., Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan, 195 F.3d 975, 981-82 (7th Cir.1999) (court found that the

standard of review was deferential, therefore "[t]here should not have been any inquiry into the thought processes of [the insurance company's] staff, the training of those who considered [plaintiff's] claim, and in general who said what to whom within [the insurance company]").

Accordingly, with regard to Schuchman's discovery on the parties' ERISA claims, Schuchman's motion to compel discovery is DENIED.

2. Discovery on Schuchman's non-ERISA claims

Schuchman states "there is no legal basis to deny [him] the right to conduct discovery" on the federal estoppel claim. [Def.'s Br., p. 11]. Indeed, this Court's August 7, 2001 entry denied Trustmark's motion for summary judgment on this claim. [Docket No. 118]. However, Schuchman fails to articulate which discovery requests he contends relate to this claim. The Court will not scour the record when ruling on motions for summary judgment. Nor will the Court do so when addressing discovery issues. See, e.g., Hall v. Bodine Elec. Co., 276 F.3d 345, 354 n. 4 (7th Cir.2002) ("court is not required to scour the record in search of evidence to defeat a motion for summary judgment"); Peters v. Renaissance Hotel Operating Co., 307 F.3d 535, 547 n. 10 (7th Cir.2002) ("it is not the responsibility of this court to ferret through the record for support for [plaintiff's] arguments"). As a result of this deficiency, the Court must deny Schuchman's motion to compel discovery.

Finally, Schuchman may not conduct discovery on the state law claims because they were dismissed via Trustmark's partial motion for summary judgment in the Court's August 7, 2001 entry. The Court found these claims were preempted by ERISA. Thus, any discovery conducted on these claims is irrelevant. See, e.g., Yurman Design, Inc. v. Chaindom Enterprises, Inc., 2000 WL 1871715, *3 (S.D.N.Y.2000), citing Rule 26(b) (court found plaintiff's discovery requests were no longer relevant since its claims of fraud and copyright infringement had been dismissed).

Accordingly, with regard to discovery on Schuchman's non-ERISA claims, Schuchman's motion to compel discovery is DENIED.

B. Trustmark's Cross Motion to Compel Discovery

Trustmark filed a cross motion to compel discovery seeking responses to its interrogatories regarding

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Schuchman's federal estoppel claim. The interrogatories Trustmark served amount to "contention" interrogatories in that they quote specific allegations in Schuchman's counterclaim and asked Schuchman to identify representations made by Trustmark that support each allegation. [Trustmark Ex. A]. Trustmark contends that Schuchman's responses are deficient in that, among other things, Schuchman "refused to identify the facts and circumstances supporting his claims of estoppel..." [Trustmark's Mot. ¶ 7]. Schuchman objected to these interrogatories, claiming they are overly broad, unreasonably cumulative, burdensome, and invaded the attorney-client privilege and work product doctrine. [Trustmark's Ex. A]

*6 As Schuchman correctly notes, Trustmark's motion to compel fails to specifically state the particular deficiency of any of Schuchman's responses to the eight interrogatories. Rather, without citing to any particular interrogatory, Trustmark simply states that Schuchman's objections to the interrogatories are "meritless," and that its interrogatories "are insufficient for [it] to determine the alleged basis of Schuchman's estoppel claim..." [Trustmark's Mot. ¶ 8; Trustmark's Br., pp. 3, 5]. As a result, the Court is faced with the rather difficult task of sifting through Trustmark's interrogatories and Schuchman's responses thereto and trying to determine which interrogatory and sub-part Trustmark claims is deficient. While discovery into a party's allegations made in a pleading is certainly within the scope of Rule 26(b), Trustmark's failure to specify which interrogatory response and sub-part thereto is deficient results in a summary denial of its motion to compel. The Court simply will not engage in this subjective task or craft Trustmark's argument in this respect. See, e.g., *Harris v. New York City Police Dept.*, 2002 WL 442120, *1 (S.D.N.Y.2002) (court denied motion to compel "because plaintiff has not submitted the discovery requests and responses in issue and has not explained with any kind of specificity why, in his view, the responses are defective."); *Preston v. Settle Down Enterprises, Inc.*, 90 F.Supp.2d 1267, 1282-83 (N.D.Ga.2000) (motion to compel discovery which was phrased in general terms was denied for lack of specificity); *Glaxo, Inc. v. Torphram, Inc.*, 1996 WL 411487, *3 (N.D.Ill.1996) (denying Defendant's motion to compel based upon "lack of specificity"); *Arons v. Lalime*, 167 F.R.D. 364, 368 (W.D.N.Y.1996) ("motion to compel further discovery was denied primarily because ... it failed to identify with specificity the discovery requests and responses at issue").

Accordingly, Trustmark's motion to compel discovery is DENIED. [FN3]

FN3. As a practical matter, Trustmark should inform Schuchman which interrogatory responses are deficient. The parties are encouraged to informally resolve their discovery disputes without Court intervention. This is precisely the type of dispute that should be resolved informally. In this regard, Schuchman's objections that these relatively standard interrogatories are overly broad, unreasonably cumulative, and burdensome are not likely to be well received by the Court if this discovery dispute resurfaces. Moreover, any objections based on the attorney-client privilege or the work product doctrine must be accompanied by a proper privilege log.

III. Conclusion

Schuchman's motion to compel discovery is DENIED. Likewise, Trustmark's cross motion to compel discovery is DENIED.

So ordered.

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END OF DOCUMENT

Tab 4

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Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court, D. Kansas
Robin Tamera WILLIAMS, Plaintiff,

v.

BOARD OF COUNTY COMMISSIONERS of the
Unified Government of Wyandotte County and
Kansas City, Kansas, et al., Defendants.
No. 98-2485-JTM.

June 21, 2000.

Peter A. Jouras, Jr., [COR LD NTC], Law Offices of
Peter A. Jouras, Fairway, KS, 913-677-1999, FTS
677-1001, Michael G. Holcomb, [term 04/26/00],
[COR LD NTC], Roeland Park, KS, 816-254-2400,
for Plaintiff Robin Tamera Williams.

Daniel B. Denk, [COR LD NTC], Ryan B. Denk,
[COR LD NTC], McAnany, Van Cleave & Phillips,
P.A., Kansas City, KS, 913-371-3838, FTS 371-
4722, for defendant Board Of County Commissioners
of the Unified Government of Wyandotte
County Kansas City, Kansas, A Government Entity.

Daniel B. Denk, [COR LD NTC], Ryan B. Denk,
[COR LD NTC], for Defendant Kansas City, Kansas,
City of, A Government Entity.

Daniel B. Denk, [COR LD NTC], Ryan B. Denk,
[COR LD NTC], for Defendant Kansas City, Kansas
Police Department, A Public Entity.

John L. Peterson, [COR LD NTC], Williamson &
Cubbison, Kansas City, KS, 913-371-1930, FTS 371-
0147, Daniel B. Denk, [COR LD NTC], Ryan B.
Denk, [COR LD NTC], for Defendant Jeffery Jacks,
Individually, and as a Police Officer of the Kansas
City, Kansas Police Department, in his official
capacity.

MEMORANDUM AND ORDER

WAXSE.

*1 This matter comes before the Court on Plaintiff's
Motion to Compel Discovery (doc. 82).

I. The Duty to Confer

On July 1, 1999, Plaintiff served the following
discovery upon Defendants:

- (1) Plaintiff's Initial Request for Production of Documents from Defendant Jeffery Jacks;
- (2) Plaintiff's Initial Request for Production of Documents from Defendant City of Kansas City, Kansas;
- (3) Plaintiff's Initial Request for Production of Documents from Defendant Kansas City, Kansas Police Department;
- (4) Plaintiff's Initial Request for Production of Documents from Defendant Board of County Commissioners;
- (5) Plaintiff's First Set of Interrogatories to Defendant Jeffery Jacks;
- (6) Plaintiff's First Set of Interrogatories to Defendant City of Kansas City, Kansas;
- (7) Plaintiff's First Set of Interrogatories to Defendant Kansas City, Kansas Police Department; and
- (8) Plaintiff's First Set of Interrogatories to Defendant Board of County Commissioners.

After receiving Defendants' responses to these discovery requests, Plaintiff sent a letter to Defendants challenging Defendant Jacks' response to Interrogatory 17 and Defendant Board of County Commissioners' responses to Requests 30, 32, 33 and 36. Subsequent correspondence between the parties establishes they resolved the prospective dispute with regard to Defendant Board of County Commissioners' responses to Requests 30, 32, 33 and 36. This correspondence also reflects, however, that Plaintiff's challenge to Defendant Jacks' response to Interrogatory 17 remained unresolved.

On February 3, 2000, Plaintiff filed this motion to compel discovery seeking to compel the following discovery from the following defendants:

- Kansas City, Kansas Police Department:*
Interrogatories 14, 16
- Jacks:* Interrogatories 10, 16, 17
- Board of Commissioners:* Requests 1, 2, 3, 4, 5, 6, 17, 21, 30, 40, 47, 48
- City of Kansas City, Kansas:* Interrogatory 2

In response to Plaintiff's motion to compel, Defendants allege that, with the exception of defendant Jacks' answer to Interrogatory 17, Plaintiff failed to confer in good faith regarding any of the

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issues raised in Plaintiff's motion. Plaintiff denies Defendants' allegation regarding failure to confer and certifies that counsel for Plaintiff did confer in good faith regarding the issues raised in her motion. In support of her certification, Plaintiff cites to the "volume of correspondence attached" to both Plaintiff's Motion and Defendants' Response.

*2 Fed.R.Civ.P. 37(a)(2)(B) directs movants to include with a motion to compel a certification that they have "in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action." D.Kan.Rule 37.2 states in pertinent part that "[e]very certification required by Fed.R.Civ.P. 26(c) and 37 ... related to the efforts of the parties to resolve discovery or disclosure disputes shall describe the steps taken by all counsel to resolve the issues in dispute." These requirements "encourage resolving discovery disputes without judicial involvement." Cotracom Commodity Trading Co. v. Seaboard Corp., 189 F.R.D. 456, 459 (D.Kan.1999). "Failure to confer or attempt to confer may result in unnecessary motions. When the court must resolve a dispute that the parties themselves could have resolved, it must needlessly expend resources that it could better utilize elsewhere." Pulsecard, Inc. v. Discover Card Servs., Inc., 168 F.R.D. 295, 302 (D.Kan.1996).

Although the motion currently pending before the Court includes the required declaration stating Plaintiff conferred in good faith in an attempt to resolve the discovery disputes at issue, the Court is not persuaded Plaintiff did so before filing her motion. The Court has reviewed the referenced correspondence attached to both Plaintiff's and Defendants' briefs and, with the exception of defendant Jacks' answer to Interrogatory 17, the Court fails to find evidence of any attempt to confer by Plaintiff with respect to the discovery requests at issue in Plaintiff's motion. Because Plaintiff has not satisfied her duty to confer, this Court has discretion to summarily deny her motion to compel without reaching any substantive issue. Notwithstanding this fact, the Court will consider the substantive issues raised by Plaintiff in her motion. Counsel strongly are advised, however, to "reasonably confer" as defined herein before filing future motions.

II. Discussion

A. Defendant Kansas City, Kansas Police Department's Answers to Plaintiff's First Set of Interrogatories

1. Interrogatory 14

Interrogatory 14 requests identification of all officers on staff with the Kansas City, Kansas Police Department in October 1996. Defendants objected to the interrogatory on the grounds that it was vague and ambiguous with respect to the term "staff." Defendants also objected to this interrogatory on the grounds that it was unduly burdensome and oppressive. Without waiving these objections, Defendants went on to state they would produce a list of sworn officers as of September 9, 1996 upon entry of a protective order in the case. In their brief filed in response to Plaintiff's motion to compel, Defendants state the parties conferred regarding this matter at a meeting after Plaintiff's motion was filed, and Defendants agreed to produce the specific information requested upon entry of a protective order in this case. Given Defendants' response, and the fact that the referenced Protective Order was entered by the Court on May 26, 2000 (doc. 229), the Court will treat this aspect of Plaintiff's motion as uncontested. Thus, Defendants will be ordered to produce the requested information within ten days from the date of this Order.

2. Interrogatory 16

*3 Interrogatory 16 requests identification of all dispatchers on duty on October 26 or October 27, 1996. Defendant objected to this interrogatory on the grounds that it was vague and ambiguous with respect to the term "dispatchers" and provided only the name of the individual in charge of the dispatchers on the days in question. Notwithstanding their original objections, Defendants state in their response brief that the parties conferred regarding this matter at a meeting after Plaintiff's motion was filed, and Defendants agreed to produce the information requested. Given Defendants' response, the Court will treat this aspect of Plaintiff's motion as uncontested. Thus, Defendants will be ordered to produce the requested information within ten days from the date of this Order.

B. Defendant Jeffery Jacks' Answers to Plaintiff's First Set of Interrogatories

1. Interrogatory 10

Interrogatory 10 requests identification of all Kansas City, Kansas Police Department employees with whom defendant Jacks had been partnered, including all reasons for any changes of partners. Defendant objected to this interrogatory on the grounds that it was vague and ambiguous with respect to the term "partners," but went on to state that "Defendant Jacks has typically worked as a district patrol officer in a

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single officer unit." Notwithstanding their original objections, Defendants state in their response brief that after Plaintiff filed her motion, counsel for Defendants "verified with Officer Jacks that he has never had a partner during his tenure with the Kansas City, Kansas Police Department." Given Defendants' response, the Court will treat this aspect of Plaintiff's motion as uncontested. Thus, Defendants will be ordered to provide the requested information to Plaintiff in the form required by Fed.R.Civ.P. 33 within ten days from the date of this Order.

2. Interrogatory 16

Interrogatory 16 requests defendant Jacks describe in detail all events, conversations and actions which led to sexual intercourse with the plaintiff Robin Williams. Defendants responded to this interrogatory by referring Plaintiff to a written statement made by defendant Jacks to the Internal Affairs Unit. Defendants went on to state that they would produce this written statement upon entry of a protective order in this case. Given Defendants' response, and the fact that the referenced Protective Order was entered by the Court on May 26, 2000 (doc. 229), the Court will treat this aspect of Plaintiff's motion as uncontested. Thus, Defendants will be ordered to produce the requested information within ten days from the date of this Order.

3. Interrogatory 17

Interrogatory 17 requests defendant Jacks identify and list any and all persons with whom he has had consensual and non-consensual sexual relations since 1986. Defendants objected to this interrogatory on the grounds that it was vague and ambiguous with regard to the term "sexual relations" but, without waiving these objections, went on to answer the interrogatory. After the parties conferred regarding Defendants' objection, Defendants supplemented their original answer. [FN1] In their response brief, Defendants argue the supplemental pleading renders Plaintiff's motion moot with regard to Interrogatory 17. Because Plaintiff failed to respond to Defendants' "mootness" argument in her reply brief, and because the supplemental pleading appears to completely answer the interrogatory at issue, the Court will deny this portion of Plaintiff's motion to compel as moot.

[FN1] Plaintiff failed in her brief to inform the Court that Defendants had supplemented their original answer here. The supplemental pleading was filed and served on November 17, 1999--over 2 1 2 months before Plaintiff filed this motion to compel.

C. Defendant Board of Commissioners' Responses to Plaintiff's Initial Request for Production of Documents

1. Request 1

*4 Request 1 seeks complete employment files and/or personnel files for defendant Jacks and officers Buehler and Bower, the other two officers who responded to the call at the American Eagle Inn on October 26 and 27, 1996. Defendants objected to the request on the grounds that all three of the files at issue are confidential and proprietary information. Defendants further objected on grounds that neither Buehler and Bower are parties to this litigation and have not consented to having their confidential employment files released. Notwithstanding these objections, Defendants did agree to produce the personnel file of defendant Jacks upon entry of a protective order in this case. Given Defendants' response, and the fact that the referenced Protective Order was entered by the Court on May 26, 2000 (doc. 229), the Court will treat this aspect of Plaintiff's motion as uncontested. For this reason, Defendants will be ordered to produce Jacks' personnel file within ten days from the date of this Order.

In their response brief, Defendants, however, reiterate their objections to producing the personnel files of officers Buehler and Bower because the information requested is confidential and proprietary information and because neither Buehler nor Bower have consented to production of their files. In addition, Defendants also raise a new argument in support of their contention that the files should not be produced by asserting that the documents are "wholly irrelevant to this litigation."

The Court first will address Defendants' objections as to relevancy. [FN2] Relevancy is broadly construed, and a request for discovery should be considered relevant if "there is any possibility that the information sought may be relevant to the subject matter to the action." *Etienne v. Wolverine Tube, Inc.*, 185 F.R.D. 653, 656 (D.Kan.1999) (quoting *Smith v. MCI Telecomm. Corp.*, 137 F.R.D. 25, 27 (D.Kan.1991)). "A request for discovery ... should ordinarily be allowed unless *it is clear* that the information sought can have *no possible bearing* on the subject matter of the action." *Snowden v. Connaught Lab.*, 137 F.R.D. 336, 341 (D.Kan.1991) (emphasis added). When the discovery sought appears relevant, the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery "either

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does not come within the broad scope of relevance as defined under Fed.R.Civ.P. 26(b)(1) or is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure." Etiene, 185 F.R.D. at 656 (quoting Arunburu v. Boeing Co., No. 93-4064-SAC, 1994 WL 810246, at *1 (D.Kan. Sept.22, 1994)).

FN2. Although the Court finds Defendants likely waived their right to a relevancy objection because they failed to lodge a timely objection on this ground in their original response, the Court will address the objection.

The Court is not persuaded by Defendants' argument that the requested documents are irrelevant. As noted in the argument section of Plaintiff's brief, there may be information within the personnel files at issue bearing on the veracity of the witnesses in question. The Court cannot say that Buehler and Bower's personnel files have "no possible bearing" on Plaintiff's claims for relief. For these reasons, the Court concludes Defendants have failed to meet their burden to show that the requested documents are irrelevant.

*5 The Court will now turn to Defendants' arguments relating to the confidentiality of the requested documents. Defendants argue that Buehler and Bower's personnel files should not be produced because they contain confidential information about non-party employees. Although the Court was unable to locate any case law addressing this issue in this context, it finds helpful those cases decided in an employment discrimination context. Such cases hold that merely because a person may be called as a witness at trial does not justify disclosure of his/her personnel file. See, e.g., Hicks v. Kansas Masonic Home, No. 97-1307-MLB, 1998 WL 173197, at *2 (D.Kan. March 5, 1998); Haselhorst v. Wal-Mart Stores, Inc., 163 F.R.D. 10, 11 (D.Kan.1995). If, however, the individual is alleged to have engaged in the discrimination or harassment at issue or played an important role in the employment decision or incident that gives rise to the lawsuit, the personnel file will be considered relevant and/or reasonably calculated to lead to the discovery of admissible evidence, and therefore discoverable. See, e.g., Daneshvar v. Graphic Technology, Inc., No. 97-23044-JWL, 1998 WL 726091, at *5 (D.Kan. Oct.9, 1998) (compelling production of personnel files of three "key witnesses" who "played important roles in the employment decisions affecting plaintiff"); Krenning v. Hunter

Health Clinic, Inc., 166 F.R.D. 33, 35 (D.Kan.1996) (compelling production of personnel files of alleged harasser and employer's chief executive officer); Hoskins v. Sears, Roebuck and Co., No. 96-1357-MLB, 1997 WL 557327, at *2 (D.Kan. Sept. 2, 1997) (compelling production of personnel files of "eight individuals who are alleged to have been involved in, witnessed, or failed to report" the claimed harassment). See also Leighr v. Beverly Enterprises-Kansas Inc., No. 94-2474-GTV, 1996 WL 63501, at *2 (D.Kan. Feb.7, 1996) (noting that the "personnel file of an allegedly discriminatory defendant would appear to contain relevant information," but declining to compel production of the file after reviewing defendant's itemization of the files contents and finding nothing relevant to plaintiff's discrimination claims).

Applying these standards, the Court finds Plaintiff is entitled to discover the personnel files of Buehler and Bower because these individuals were involved, to a certain extent, in the specific events giving rise to this lawsuit. Thus, Plaintiff's motion will be granted with respect to these documents.

2. Requests 2, 3, 4, 5 and 6

*6 Requests 2, 3, 4, 5 and 6 seek investigation records, documents and reports regarding the incident at the American Eagle Inn on October 26 and 27, 1996. Defendants objected to production of these documents on the grounds that they are confidential and proprietary information and on grounds of privilege. [FN3] Without waiving these objections, Defendants state they will produce the following documents responsive to Plaintiff's request upon entry of a protective order: The District Attorney's review, the statement of Robin Williams, the statement of Jeffery Jacks, the statement of Mark Klein, the statement of Donald Pointer, the statement of Bobby Mallicote, the statements of Officer James Bauer, Officer Dennis Buehler, Officer Clinton Swan, and Sergeant Richard Asten, the transcript of the communications tape of October 27, and photographs taken in connection with investigation of the Robin Williams case.

FN3. Defendants assert the documents are privileged because they were prepared in anticipation of litigation.

Given Defendants' response, and the fact that the referenced Protective Order was entered by the Court on May 26, 2000 (doc. 229), the Court will treat this aspect of Plaintiff's motion as uncontested. Thus, Defendants will be ordered to produce the referenced

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documents within ten days from the date of this Order.

Notwithstanding Defendants offer to produce designated documents responsive to Plaintiff's request, the Court is uncertain as to whether Defendants are withholding documents responsive to this request based on confidentiality and proprietary objections. As such, the Court finds it necessary to address Defendants' objections based on the confidential and proprietary nature of the information.

As a preliminary matter, confidentiality does not equate to privilege. *Folsom v. Heartland Bank*, No. Civ. A. 98-2308-GTV, 1999 WL 322691, *2 (May 14, 1999) (citing *Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 362, 99 S.Ct. 2800, 61 L.Ed.2d 587 (1979)). As such, information is not shielded from discovery on the sole basis that such information is confidential. *Id.* Defendants, however, seem to argue that the information requested is so confidential and proprietary that disclosure of the documents at issue will cause great harm.

Although relevancy is broadly construed at the discovery stage of the litigation, *Smith v. MCI Telecommunications Corp.*, 137 F.R.D. 25, 27 (D.Kan.1991), the party resisting discovery may establish lack of relevance by demonstrating that the requested discovery is of such marginal relevance that the potential harm occasioned by it would outweigh the ordinary presumption in favor of broad disclosure. *Scott v. Leavenworth Unified School District No. 453*, 190 F.R.D. 583, 585 (D.Kan.1999); *Etienne v. Wolverine Tube, Inc.*, 185 F.R.D. 653, 656 (D.Kan.1999). Under the circumstances presented in this case, however, the Court finds the confidential and proprietary interests of Defendants are outweighed by Plaintiff's need to obtain documents regarding the incident giving rise to this lawsuit--especially given the terms of the Protective Order entered by the Court on May 26, 2000 (doc. 229). Accordingly, Defendants' objections based on confidential and proprietary information are overruled and Defendants shall produce within ten days from the date of this Order any documents held back based on this objection. As with the documents responsive to this request that Defendants voluntarily offered to produce, these documents shall be produced pursuant to the Protective Order entered by the Court on May 26, 2000 (doc. 229). [FN4]

FN4. Defendants state that a report titled "Commander's Review" is being withheld

on grounds of privilege pursuant to the work-product doctrine because it was prepared in anticipation of litigation. Plaintiff does not challenge the privileged status of this report; thus, the Court will permit Defendants' claim of privilege to stand.

3. Requests 17

*7 Request 17 seeks documents evidencing any disciplinary actions, reprimands and sanctions taken against Officer Jacks. In their brief filed in response to Plaintiff's motion to compel, Defendants state the parties conferred regarding this matter at a meeting after Plaintiff's motion was filed, and Defendants agreed to produce defendant Jacks' personnel file upon entry of a protective order in this case. Given Defendants' response, and the fact that the referenced Protective Order was entered by the Court on May 26, 2000 (doc. 229), the Court will treat this aspect of Plaintiff's motion as uncontested. Thus, Defendants will be ordered to produce the requested information within ten days from the date of this Order.

4. Request 21

Request 21 seeks time logs sent and received by police dispatch on October 26 and 27, 1996. In their response, Defendants responded that the documents sought had been requested from ALERT, Kansas City, Missouri Police Department and, upon receipt of such documents from ALERT and entry of a protective order, the documents would be produced. Given Defendants' response, and the fact that the referenced Protective Order was entered by the Court on May 26, 2000 (doc. 229), Defendants will be ordered to produce the requested information, if they have not done so already, within ten days from the date of this Order.

5. Request 30

Request 30 seeks documents pertaining to the financial status of the Unified Government. Defendants objected to this request on the grounds that it was unduly burdensome, oppressive and seeks documents and information unlikely to lead to discoverable information. After the parties conferred regarding Defendants' objections, however, Defendants state they produced the requested documents. Defendants now argue the supplemental production renders Plaintiff's motion moot with regard to Request 30. Because Plaintiff failed to respond to Defendants' "mootness" argument in her reply brief, and because the supplemental disclosure appears to completely respond to the request at issue, the Court will deny this portion of Plaintiff's motion

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to compel as moot.

6. *Requests 40, 47 and 48*

Requests 40, 47 and 48 seek policy reports involving any investigation of defendant Jacks, any recordings between defendant Jacks and the Internal Affairs Unit and documents or other evidence used by the Internal Affairs Unit to assess the culpability of defendant Jacks with regard to any Internal Affairs investigation or questioning. [FN5] Defendants objected to production of these documents on the grounds stated in their objections to Request 2. For the reasons discussed in Section II(C)(2) above, and keeping in mind that these requests seek documents and information regarding *any* investigation of defendant Jacks by the Internal Affairs Unit or other department during the course of defendant Jacks' employment, Defendants will be ordered to produce the documents requested within ten days from the date of this Order.

[FN5] In their response brief, Defendants state that Requests 40, 47 and 48 seek the same information sought in Requests 2, 3, 4, 5 and 6. The Court disagrees. Requests 2, 3, 4, 5 and 6 seek information regarding the specific events giving rise to this lawsuit. Requests 40, 47 and 48 seek information regarding *any* investigation of defendant Jacks by the Internal Affairs Unit or other department during the course of defendant Jacks' employment.

D. Defendant City of Kansas City, Kansas' Answers to Plaintiff's First Set of Interrogatories

1. *Interrogatory 2*

*8 Interrogatory 2 seeks information regarding the regulations and standards for hiring and training of city employees and police officers. Defendants objected to this interrogatory on grounds it is vague and ambiguous and asks for a legal conclusion. Without waiving these objections, however, Defendants stated they would produce documents in response to the request. Plaintiff does not take issue with the objections raised, but instead argues that they have not received the documents Defendants promised to produce. In their response brief, Defendants assert they have produced the requested documents.

Rule 33 of the Federal Rules of Civil Procedure provides, in pertinent part, that

where an answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been

served ... and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained.... A specification *shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.*

Fed.R.Civ.P. 33(d) (emphasis added).

Based on this rule, and the fact that Defendants state they already have produced documents from which the information requested in Interrogatory 2 can be derived, Defendants will be ordered to designate for Plaintiffs within ten days from the date of this Order which documents contain the information requested. The designation should be in sufficient detail to permit Plaintiff to locate and to identify the documents from which the answer may be ascertained. [FN6]

[FN6] For example, providing the bates number of a document containing the information requested would permit Plaintiff to locate and identify the documents from which the answer may be ascertained.

E. Plaintiff's Request for Sanctions

Plaintiff seeks to recover fees and expenses incurred in connection with this motion to compel. Fed.R.Civ.P. 37(a)(4)(C) provides that "the court may ... apportion reasonable expenses incurred in relation to the motion among the parties and persons in a just manner." Given Plaintiff's failure to confer regarding most of the requests propounded and Defendants' prompt offer to produce information once the parties did confer, justice requires that each party be responsible for their own costs and expenses incurred. [FN7]

[FN7] The Court finds both parties accountable for what the Court believes was an unnecessary briefing process and a needless expenditure of judicial resources: Plaintiff to the extent that she failed to confer with Defendants before filing the motion and Defendants to the extent that some of the information requested should have been produced without objection in the original discovery responses.

III. *Conclusion*

Based on the discussion above, it is hereby

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ORDERED that Plaintiff's Motion to Compel Discovery (doc. 82) is *granted in part and denied in part*:

(1) The motion to compel is denied as moot with respect to Plaintiff's request to compel defendant Jeffery Jacks to fully respond to Interrogatory 17 and with respect to Plaintiff's request to compel defendant Board of Commissioners to fully respond to Request 30;

(2) The motion to compel is granted with respect to Plaintiff's request to compel defendant City of Kansas City, Kansas to fully answer Interrogatory 2, and Defendants are hereby ORDERED to designate for Plaintiffs within ten days from the date of this Order which documents contain the information requested. The designation should be in sufficient detail to permit Plaintiff to locate and to identify the documents from which the answer may be ascertained;

(3) The motion to compel is granted as to the balance of Plaintiff's requests to compel and Defendants shall provide the information and documents requested, if they have not already done so, within ten (10) days from the date of this Order; and

*9 (4) Plaintiff's motion for sanctions *is denied*.

IT IS SO ORDERED.

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Westlaw.

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Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
W.D. Wisconsin.
Steven M. VOSEN and Loretta Vosen, Plaintiffs,
v.
Larry WARREN, Kenneth F. Bitsky, Brent York,
County of Adams and Wisconsin
County Mutual Insurance Corporation, Defendants,
and
UNITY HEALTH PLANS and Blue Cross Blue
Shield of Massachusetts, Subrogated
Parties.
No. 04-C-064-C.

Aug. 31, 2004.

Charles H. Bohl, Whyte Hirschboeck Dudek, S.C.,
Milwaukee, WI, for Defendant.

ORDER

CROCKER, Magistrate J.

*1 The heart of this lawsuit is plaintiff Steven Vosen's claim that Adams County Undersheriff Kenneth Bitsky and Deputy Sheriff Brent York assaulted him in 2001 while Vosen was in their custody at the county jail, then engaged in a cover-up along with Sheriff Larry Warren. Vosen's wife Loretta has added a claim for loss of society and companionship under state law. This case is the civil sequel to state and federal prosecutions in 2002-03 against Bitsky for his conduct during and after the incident. Bitsky ultimately was convicted in federal court of witness intimidation and in state court of disorderly conduct.

Before the court is defendant York's motion to compel plaintiffs to provide more complete responses to his contention interrogatories (namely Nos. 11, 12 and 14-19 of York's First Set of Interrogatories and Request for Production of Documents). No. 12 is a representative sample:

Please state the basis of your contention and all facts upon which you rely to support thereof that Deputy York used more force than was reasonably necessary on February 11, 2001; identify all

documents in your possession, custody and control which you contend support this contention, and identify by name and address all witnesses with knowledge or information which you contend support this contention.

Plaintiffs objected to this interrogatory and others like it on the ground that it calls for a legal conclusion, invades the work product or attorney-client privileges, and calls for responding counsel to speculate about the subject of the request. Notwithstanding their objections, plaintiffs responded by directing defendant to the complaint and the two sets of materials they had previously provided to defendant. (As part of their initial pretrial disclosures, plaintiffs provided defendants with a copy of the records generated by the Wisconsin Department of Justice from its investigation of the incident. They also provided copies of medical records and bills relating to injuries allegedly sustained by Steven Vosen as a result of the assault).

Unsatisfied, York wants this court to order plaintiffs to provide more complete answers. York argues that contention interrogatories are authorized specifically by Fed.R.Civ.P. 33 and have to be answered just like any other interrogatory. He asserts that obtaining the requested information through contention interrogatories is cheaper than through deposition questioning; in the next breath, however, York asserts that he needs answers to these interrogatories in order to prepare for the plaintiffs' depositions on September 14 and 15, 2004.

In response, plaintiffs acknowledge that contention interrogatories are a proper form of discovery but object to responding to them before they obtain certain discovery from defendants. Plaintiffs ask this court to enter a protective order delaying their obligation to respond to the contention interrogatories until specified discovery is complete: plaintiffs assert that they will supplement their answers after the depositions of the named individual defendants have been taken, transcripts of those depositions are available, and the personnel files and citizen complaint files regarding all named individual defendants have been produced by defendant Adams County.

*2 Plaintiffs' responses are sufficient for the time being. York has received a fairly detailed complaint

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along with investigative reports from law enforcement agencies. York can obtain interstitial detail when he deposes the plaintiffs. Furthermore, plaintiffs have not yet obtained discovery from the defendants. Although plaintiffs likely possess most of the information they would need to answer completely York's contention interrogatories, it is too early in the case to lock parties tightly into theories that might change a bit with the discovery of additional facts. See Fed.R.Civ.P. 33, Advisory Committee Note (expressly authorizing court to defer answers to contention interrogatories until after discovery complete).

Put another way, granting York's motion to compel at this juncture would not advance the ball. Ordering supplemental answers this early would not reveal any salient information, and plaintiffs likely would move to supplement these supplemental answers after conducting more discovery of their own. The defendants already possess ample information with which to prepare for plaintiffs' depositions. The events underlying this lawsuit have been prosecuted twice, so defendant cannot claim to have no idea what plaintiffs are going to say when deposed.

So for now plaintiffs's responses are sufficient, but plaintiffs must promptly supplement them and provide the requested information after obtaining the information they have specified.

ORDER

Accordingly, it is ORDERED that defendant York's motion to compel plaintiffs to provide more complete responses to Interrogatory Nos. 11, 12, 14-19 of Defendant's First Set of Interrogatories and Request for Production of Documents is denied in part and granted in part as explained above.

Each side shall bear its own costs on this motion.

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Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern
Division.

Janet ZIEMACK, Kenneth Z. Slater, and Ellen Z.
Slater, Herbert Eisenstadt,
Joseph Meyer, Harvey Meyer, and Brenda Drucker,
Plaintiffs,

v.

CENTEL CORPORATION, John P. Frazee, Jr., and
J. Stephen Vanderwoude,
Defendants.

No. 92 C 3551.

Dec. 7, 1995.

Michael David Craig, Schiffrin & Craig, Ltd.,
Buffalo Grove, IL, for Plaintiffs.

Susan Getzendanner, Skadden, Arps, Slate, Meagher
& Flom, Chicago, IL, Marvin A. Miller, Miller
Faucher Chertow Cafferty and Wexler, Chicago, IL,
Patricia M. Hynes, Milberg Weiss Bershad Hynes &
Lerach, New York City, Judith L. Spanier, Abbey &
Ellis, New York City, Michael Freed, Much Shelist
Freed Denenberg & Ament, Chicago, IL, for
Defendants.

MEMORANDUM OPINION AND ORDER

KEYS, District Judge.

*1 This matter comes before the Court on
Defendants' Motion to Compel Plaintiffs to Answer
Interrogatories and Document Requests. For the
following reasons, Defendants' motion is granted in
part, and denied in part.

BACKGROUND

On January 23, 1992, Centel Corporation ("Centel")
announced that it was considering a number of
alternatives in order to enhance its shareholders'
value. These considerations comprised a formal
program known as the Strategic Alternatives Process.
The Strategic Alternatives Process culminated in
Centel's merger with Sprint Corporation. The
merger was publicly announced on May 27, 1992 and

finalized by shareholder vote on March 8, 1993.

Plaintiffs are individuals who purchased Centel's
common stock between January 23, 1992 and May
27, 1992. On May 29, 1992, Plaintiffs filed this
securities fraud class action against Centel and the
individuals who were Centel's principal senior
officers when Plaintiffs bought the stock.

The matter currently before this Court involves a
discovery dispute. On November 21, 1994,
Defendants served their first set of interrogatories and
first requests for production of documents on
Plaintiffs. Plaintiffs [FN1] objected to many of the
interrogatories and document requests. The parties
attempted to resolve Plaintiffs' objections, pursuant to
Local Rule 12(k), but were unsuccessful. Defendants
then filed the instant motion seeking to compel
answers to Interrogatories No. 1, 2, 3, 4, 5, 6,
8, 9, 10, and 16, and responses to Document Requests
No. 2, 7, 8, and 18.

DISCUSSION

The scope of discovery should be broad in order to
aid the search for the truth. See *Hickman v. Taylor*,
329 U.S. 495, 500-501 (1964); Cf. *United States v.*
White, 950 F.2d 426, 430 (7th Cir.1991); *Allendale*
Mut. Ins. Co. v. Bull Data Sys. Inc., 152 F.R.D. 132,
135 (N.D.Ill.1993). The Federal Rules of Civil
Procedure allow discovery regarding any non-
privileged matter that is relevant to the subject matter
of the action. 8 WRIGHT, MILLER & KANE,
FEDERAL PRACTICE AND PROCEDURE, CIVIL
2d § 2007 at 95 (1994). The term "relevant" is
much more liberally construed during the discovery
stage, under the Federal Rules of Civil Procedure,
than at trial, where the Federal Rules of Evidence
govern. *Id.* § 2008 at 99-100. Therefore, a party
objecting to discovery bears the burden of sustaining
its objections. 8A Wright, Miller & Kane, *supra* §
2174 at 293; *In re Folding Carton Antitrust Litig.*, 83
F.R.D. 251, 254 (N.D.Ill.1978).

Here, Plaintiffs object to Defendants' discovery on
the basis that: (1) contention interrogatories are
premature; (2) damage theory interrogatories and
document requests are premature and implicate work
product doctrine; [FN2] and (3) securities trading
and litigation history of named plaintiffs is irrelevant.

I. Objections to Contention Interrogatories

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Plaintiffs argue that Interrogatories No. 1-6 and 8 are "contention" interrogatories, and are, therefore, premature. Plaintiffs do not dispute whether these interrogatories should be answered, only *when* they should be answered.

*2 "[T]he phrase 'contention interrogatory' is used imprecisely to refer to many different kinds of questions." In re Convergent Technologies Sec. Litig., 108 F.R.D. 328, 332 (N.D.Cal.1985). Some people classify as contention interrogatories questions asking the opposing party to indicate what it contends or whether it makes some specified contention. *Id.* Other people classify as contention interrogatories questions asking an opposing party to: state all facts or evidence upon which it bases some specific contention; take a position and apply law and facts in defense of that position; or explain the theory behind some specified contention. *Id.*; see also Fischer and Porter Co. v. Tolson, 143 F.R.D. 93, 95-96 (E.D.Pa.1992).

Basically, contention interrogatories require the answering party to commit to a position and give factual specifics supporting its claims. The general policy is to defer contention interrogatories until discovery is near an end, in order to promote efficiency and fairness. [FN3] However, courts have the discretion to allow use of contention interrogatories before discovery is complete. Rusty Jones, Inc. v. Beatrice Co., No. 89 C 7381, 1990 WL 139145 *2, 1990 U.S. Dist. LEXIS 12116, at *4 (N.D.Ill. Sept. 11, 1990); In re Arlington Heights Funds Consol. Pretrial, No. 89 C 701, 1989 WL 81965 *1, 1989 U.S. Dist. LEXIS 8177, at *1 (N.D.Ill. July 7, 1989) (generalizations about proper timing of contention interrogatories cannot substitute for specific analysis of their propriety on a case by case basis).

In light of the twin purposes of efficiency and fairness, the Court must consider, as part of its criteria in deciding whether to compel answers to early contention interrogatories, whether those early answers are likely to require multiple supplemental answers or prematurely commit Plaintiffs to positions and artificially narrow the issues.

Although discovery has not yet ended, a significant amount of discovery has already taken place in this three and one half year old case. This Court finds that Interrogatories No. 4, 5, 8, and the first portion of Interrogatory No. 2 [FN4] are timely in this particular case, and will not impede the aims of

fairness and efficiency. Thus, Plaintiffs are ordered to answer Interrogatories No. 4, 5, 8, and the first part of Interrogatory No. 2.

Because no ending date for discovery has been set at this time, the Court denies without prejudice Defendant's motion as to Interrogatories No. 1, 3, 6, and the second part of Interrogatory No. 2. Defendants, if necessary, may file a motion to compel answers to these interrogatories near the close of discovery.

II. Objections to Damage Theory Interrogatories and Document Request

Plaintiffs contend that Interrogatories No. 3, 9, and 10 and Document Request No. 2 seek information which requires the testimony of experts. [FN5] Defendants' motion to compel Interrogatory No. 3 has already been denied as premature, thus, no further discussion is necessary. Since experts have not been either retained or deposed, much of the remaining discovery is also premature.

*3 In a securities action, where the securities may be easily liquidated, damages can be generally ascertained by looking at the market price. See Goldberg v. Household Bank, F.S.B., 890 F.2d 965, 966-67 (7th Cir.1989) ("When markets are liquid and respond quickly to news, the [price] drop when the truth appears is ... the appropriate measure of damages). The more difficult part of the analysis involves ascertaining the *extent* to which the drop in stock price was caused by any actionable information disseminated by Defendants into the marketplace. Such detailed analysis is found chiefly through third-party information, such as research and surveys; hence, the discovery thereof is more appropriately within the experts' domain.

Nonetheless, Plaintiffs are ordered to answer Interrogatories No. 9 and 10 with the information that they do have, limited though it might be, bearing in mind that this Court does not expect Plaintiffs to address the issues that will be more appropriately dealt with by experts, at a later date. Rather, Plaintiffs' provision of information regarding the *fact* of their damages will suffice, even if the only such underlying facts are the raw data on stock prices. See King v. E.F. Hutton & Co., Inc., 117 F.R.D. 2, 5-6 (D.D.C.1987) (although expert may be necessary to refine evidence of losses, plaintiffs must have had some factual basis for concluding that they sustained losses at the time they filed complaint).

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Document Requests No. 2 and 18 are premature, and the Defendants' motion to compel these documents is dismissed without prejudice. *See supra* at 3, n. 2. Additionally, Plaintiffs' concerns about work-product doctrine are superfluous, given the discussion above, since providing the factual basis of damages does not implicate attorney work-product.

III. *Objections to Securities Trading and Litigation History Interrogatories and Document Requests*

Plaintiffs maintain that Interrogatory No. 16 and Document Requests No. 7 and 8 are irrelevant. However, Count II of Plaintiffs' Consolidated Second Amended Complaint concerns common law fraud and alleges Plaintiffs' reliance on misstatements, material misrepresentations and/or omissions of Defendants. *See In re AES Corp. Sec. Litig.*, 849 F.Supp. 907, 910 (S.D.N.Y.1994). Plaintiffs' sophistication in the marketplace is certainly relevant towards rebutting their allegations of reliance. *See Feldman v. Motorola, Inc.*, No. 90 C 5887, 1992 WL 137163 *1, 1992 U.S. Dist. LEXIS 8157, at *3 (N.D.Ill. June 9, 1992). Clearly with respect to named plaintiffs, trading histories are relevant to show their sophistication, therefore Plaintiffs are ordered to respond to Document Requests No. 7 and 8.

This Court also finds that the previous securities litigation history of the named plaintiffs, excluding the Slaters, [FN6] is relevant to their adequate representation of the class, as well as to their sophistication. Plaintiffs' argument, that Defendants never challenged the adequacy of class representation for prior involvement in securities litigation, begs the question--Defendants currently seek the information that would form the basis of such a motion. Nevertheless, Defendants' request for the named plaintiffs' litigation is somewhat overbroad. *See In re Harcourt Bruce Jovanovich, Inc. Sec. Litig.*, 838 F.Supp. 109 (S.D.N.Y.1993); *Epstein v. Reserve Corp.*, Nos. 79 C 477, 80 C 6251, 81 C 1475, 1985 WL 2598, at *3-4 (N.D.Ill. Sept. 18, 1985). Thus, named plaintiffs are ordered to answer Interrogatory No. 16, with the modification that they identify all securities related litigation, [FN7] filed in the last five years, in which they were named plaintiffs seeking monetary damages.

CONCLUSION

*4 Defendants' Motion to Compel Plaintiffs to Answer Interrogatories and Document Requests is GRANTED IN PART, AND DENIED IN PART, consistent with this Opinion.

FN1. One response to Defendants' document requests, Class Plaintiffs' Responses to Defendants' first Requests for Production of Documents, was submitted on behalf of all plaintiffs.

Although each plaintiff submitted individual responses to Defendants' interrogatories, the responses were identical, except for objections submitted on behalf of plaintiffs Kenneth A. Slater and Ellen Z. Slater. Thus, except as otherwise specifically noted, the named plaintiffs are collectively referred to herein as Plaintiffs.

FN2. The Court includes in this section Document Request No. 18, even though Plaintiffs did not discuss it in their memorandum in opposition to this motion to compel.

FN3. Efficiency prescribes that the parties should not be obliged to answer contention interrogatories repeatedly. Further, because one of the chief purposes of contention interrogatories is to narrow the issues for trial, fairness dictates that parties not be forced to prematurely take a position, which would produce an artificial narrowing of the issues, instead of an informed paring down.

FN4. Interrogatory No. 2 requests Plaintiffs to: (1) "[i]dentify in full ... each and every of the individual statements contained in the alleged 'series of false and misleading statements,' referenced in Paragraphs 30 and 54 of the Complaint" and (2) "for each such statement, provide the complete factual basis for your allegation that the statement is false and misleading."

The second part, which asks Plaintiffs to "provide the complete factual basis," is premature.

FN5. Plaintiffs also objected on the ground that responding to this discovery would require disclosure of attorney work-product.

FN6. Defendants did not seek to compel an answer on Interrogatory 16 from plaintiffs Kenneth A. Slater and Ellen Z. Slater, since they have already answered by stating that neither has been involved in such a lawsuit.

FN7. This means claims filed under the

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Securities Exchange Act of 1934, claims filed under the Williams Act, state law Blue Sky actions, and any common law fraud claim brought *in connection with* one of the foregoing actions.

Not Reported in F.Supp., 1995 WL 729295 (N.D.Ill.)

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