

IN THE UNITED STATES COURT
DISTRICT OF KANSAS

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Case No. 2:07-cv-02146-CM-DJW

CLERK OF DISTRICT COURT
BY *JK* DEPUTY
ATTORNEY GENERAL

SAMITEL K. LIPARI,

(Assignee of Dissolved Medical Supply Chain, Inc.)

Plaintiff,

v.

U.S. BANCORP and
U.S. BANK NATIONAL ASSOCIATION,

Defendants.

RESPONSE TO DEFENDANTS' MOTION FOR
PROTECTIVE ORDER

Prepared by

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Prose

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MEMORANDUM IN OPPOSITION TO MOTION FOR PROTECTIVE ORDER

Comes now the plaintiff Samuel K. Lipari appearing *pro se* and makes the following arguments in opposition to the defendants' motion for a protective orders:

STATEMENT OF FACTS

1. The defendants' motion sees a blanket denial or permanent stay of discovery without identifying specific records or the basis for their protection.
2. The plaintiff responded to the defendants concerned and reminded them that they have not even produced the written contracts for escrow accounts, loans on the escrow accounts, plaintiffs personal account, plaintiffs business account and the warranty or Five Star Guarantee all of which are described in the complaint and are the subject of this litigation. See Exb 1.
3. The plaintiff reminded Jay E. Heidrick KS #20770 of Shughart Thomson & Kilroy, P.C. that his professional and ethical duties of diligence required him to obtain these documents under Rule 11 before signing pleadings in this court asserting the writings did not exist. See Exb 1.
4. The second motion for dismissal filed by the defendants with the signature of Jay E. Heidrick KS #20770 asserts falsely that written documents memorializing an agreement for escrow accounts and written documents memorializing loan agreements must not exist because they were not filed as attachments to the plaintiffs Missouri State Court petition.:

"... the defendants' agents Mark A. OlthoffKS # 70339, Andrew M. Demarea KS #16141, and Jay E. Heidrick KS #20770 dishonestly state on page 5-6 of trial doc. 44 filed by Shughart Thomson & Kilroy on 12/1912007::

"Had there been a meeting of the minds between the parties, a written contract memorializing all of these terms would exist. Although plaintiff alleges that he proposed to Mr. Kabbes a written escrow contract (Complaint, ~ 87), nowhere does he allege that defendants signed this-or any other-agreement. Nor is a signed written agreement attached to the Complaint. Lipari even admits there is no written agreement between the parties. Supra, p. 4."

Defendants' memorandum at page 5-6. As shown supra the plaintiffs complaint alleges at ~99, 100, 101 and 102 describing the completion of a written memorandum as contemplated by both parties and acknowledged by parties and is stated again formally in ~201 of the plaintiff charge of breach of contract."

Plaintiffs Memorandum Opposing Second Defendants' Second Dismissal Motion atpg.11.

MEMORANDUM IN SUPPORT

The defendants by their motion have in actuality presented another request to the court to stay discovery despite the absence of any authority for a stay. The desire of the defendants to avoid disclosure and to eliminate discovery including the Kansas District court's February 2008 policy on electronic discovery is to be taken very seriously.

Litigants are required to disclose voluntarily certain categories of information without awaiting a request therefor from opposing parties. Additional matters are obtained through more formal discovery procedures. The scope of discovery is limited to matters not privileged and "relevant to the claim or defense of any party." See Fed.R.Civ.P. 26(b)(1). Evidence sought through discovery need not be admissible but the discovery request must be reasonably calculated to lead to the discovery of admissible evidence. See *Coughlin v. Lee*, 946 F.2d 1152,1158-59 (5th Cir. 1991).

First, "evidentiary privileges in litigation are not favored." *Herbert v. Lando*, 441 U.S. 153,99 S.Ct. 1635,60 L.Ed.2d 115 (1979). Second, the Supreme Court instructs that "[w]hatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

The defendants have failed to show good cause or to justify depriving the plaintiff of discovery:

"It is well-settled that the party seeking to obtain the protective order must demonstrate "good cause" for the order of protection. See *Smith v. Bic Corp.*, 869 F.2d 194, 199 (3d Cir. 1989); see also Fed.R.Civ.P. 26(c). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning," do not support a showing of "good cause." *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986), cert. denied, 484 U.S. 976 (1987)."

Van Kampen High Yield Municipal Fundv. O'Donnell & Naccarato, Civil Action No. 02-1210 at pg. I (E.D. Pa. 3/4/2003) (E.D. Pa., 2003).

The defendants have not met the requirements to protect a party or person from "annoyance, embarrassment, oppression, or undue burden or expense, including ... that the disclosure or discovery not be had." Rule 26(c)(1). As the moving party, defendants have the burden to show "good cause" exists for the entry of a protective order. *Felling v. Knight*, 211 F.R.D. 552,554 (S.D.Ind. 2003).

Allegations of general injury are insufficient to constitute good cause; the movant must show that disclosure will cause a clearly defined and serious injury. *Patt v. Family Health Sys., Inc.*, 189 F.R.D. 518, 522 (E.D.Wis. 1999).

a. Protection Against Disclosure Harms the Public Interest

Protective orders as to information disclosed pursuant to Federal Rule of Civil Procedure 26(c) should be granted only upon a showing of good cause. *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir. 1975). "A showing of Rule 26(c) good cause requires a balancing of the interests of the parties competing to open or close the civil discovery process to the public." *Hawley v. Hall*, 131 F.R.D. 578, 584 (D.Nev.1990). "[A]ccess is particularly appropriate when the subject matter of the litigation is of especial public interest.. ." *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139, 146 (2d Cir.), cert. denied sub nom., *Dow Chem. v. Ryan*, 484 U.S. 953, 108 S.Ct. 344,98 L.Ed.2d 370 (1987).

b. Defendants Failed To Provide Factual Support

The moving party must present a factual showing of a particular and specific need for the protective order. *Gray v. First Winthrop Corp.*, 133 F.R.D. 39,40 (N.D.Cal. 1990) (citations omitted); *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir.1973), cert. denied, 414 U.S. 1162,94 S.Ct. 926, 39 L.Ed.2d 116 (1974). "A demonstration of good cause embodies a showing (1) that the documents in question truly are confidential and (2) that disclosure of the documents would cause a 'clearly defined and very serious injury.'" *Traveler's Ins. Co. v. Allied-Signal Inc. Master Pension Trust*, 145 F.R.D. 17, 18 (D.Conn.1992). "[T]he harm must be significant, not a mere trifle." *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir.1986) (citation omitted). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Id.* (citations omitted). Mere embarrassment by the release of information is insufficient to constitute serious harm. "[A]n applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious." *Id.*; *Culinary Foods, Inc. v. Raychem Corp.*, 151 F.R.D. 297,301 (N.D.111.1993) ("A claim that public disclosure of information will be harmful to a defendant's reputation is not 'good cause' for a protective order.")

c. Defendants Seek An Impermissible Blanket Protective Order

The Seventh Circuit "has been sharply critical of District Courts entering blanket orders sealing proceedings or portions thereof in federal courts," citing *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943 (7th Cir.1999).

The blanket protective order sought by the defendants without identifying a particular document would be reversible because of the absence of specific findings:

"As such, the Protective Order is a "blanket" protective order, which is "inherently subject to challenge and modification, as the party resisting disclosure generally has not made a particularized showing of good cause with respect to any individual document." *San Jose Mercury News, Inc.*, 187 F.3d at 1103; *Beckman Indus., Inc.*, 966 F.2d at 476; *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1183 (9th Cir.2006) (The "confidential categorization of discovery documents under the protective order was not a guarantee of confidentiality, especially in the event of a court filing. Although the magistrate judge' expressly approved and entered the protective order,' the order contained no good cause findings as to specific documents that would justify reliance"); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122,1133 (9th Cir.2003) ("[A] party seeking the protection of the court via a blanket protective order typically does not make the 'good cause' showing required by Rule 26(c) with respect to any particular document. Thus, reliance on a blanket protective order in granting discovery and settling a case, without more, will not justify a refusal to modify.").

Biovail Laboratories v. Anchen Pharmaceuticals, 463 F.Supp.2d 1073 at 1079-1980 (C.D. Cal., 2006).

Even the Gramm-Leach-Bliley Act ("GLBA") does not prevent the records from being disclosed in discovery:

"The court FINDS that 15 U.S.C. § 6802(e)(8) permits a financial institution to disclose the non-public personal financial information of its customers to comply with a discovery request. The phrase "to respond to judicial process" is syntactically separate and distinct from the phrase "to respond to ... government regulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law." See § 6802(e)(8). Thus, the "judicial process" exception is independent from, and in addition to, the exception permitting disclosure to comply with a government regulatory investigation. Furthermore, the legislative history indicates that the House Bill, which added the privacy protections to the GLBA, envisaged an independent judicial process exception. See H.R. 74, 106th Congo 93, 108-09, 124 (1999) (discussing a judicial process exception without reference to "government r.egulatory authorities having jurisdiction over the financial institution for examination, compliance, or other purposes as authorized by law"). When a party must disclose information pursuant to a discovery request, the party is responding to judicial process. Thus, under the judicial process exception, the defendant may disclose its customers' nonpublic personal information in response to the plaintiffs' discovery request.

Marks v. Global Mortgage Group, Inc., CIVIL ACTION No. 6:02-0911 (S.D. W.Va. 11121/2003) (S.D. W. Va., 2003).

No Criminal Jeopardy

The defendants through extrinsic fraud have caused the plaintiffs cause to be repeatedly delayed. No known criminal violation of US Bank and US Bancorp employees can now be enforced as a result of statutes of limitation. Jerry Grundhofer is outside the range of federal enforcement now. Also the discovery does not touch on the felony antitrust violations in the hospital supply market that Richard K. Davis has elected to continue participating in with the Novation LLC cartel as Chief Executive Officer of US Bancorp, NA. Therefore no injury or embarrassment interests are harmed by the defendant corporations' disclosures which are not protected by the Fifth Amendment:

"At best, the letter demonstrated defendants' attorneys profound misunderstanding of the law regarding the Fifth Amendment and its application to collective entities such as corporations. In all probability, the letter was nothing less than a deliberate attempt by defendants' counsel to continue to ignore this court's orders regarding discovery. Given the fact that Tyler was the only defendant being prosecuted and the Supreme Court's clear pronouncements that corporations do not have a Fifth Amendment privilege, see, e.g., *Braswell v. United States*, 487 U.S. 99, 105, 108 S.Ct. 2284, 2288, 101 L.Ed.2d 98 (1988) (stating that *Hale v. Henkel*, 201 U.S. 43,26 S.Ct. 370, 50 L.Ed. 652 (1906) settled long ago that "a corporation has no Fifth Amendment privilege"), the court found the defendants' attorneys' continued representations concerning the defendants' Fifth Amendment privileges to be frivolous and malicious."

Thomas v. Tyler, 841 F.Supp. 1119 at 1123-1124 (D. Kan., 1993).

Braswell v. United States: "[A] corporate custodian is not entitled to resist a subpoena on the ground that his act of production will be personally incriminating" 487 U.S. 99, 117, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988). It has long been settled law that lithe privilege against self-incrimination is a purely personal one, [thus] it cannot be used by or on behalf of any organization, such as a corporation. " *United States v. White*, 322 U.S. 694,699,64 S.Ct. 1248,88 L.Ed. 1542 (1944). Moreover, corporate officers cannot refuse to produce corporate records by invoking personal Fifth Amendment rights. *Wilson v. United States*, 221 U.S. 361, 377, 31 S.Ct. 538, 55 L.Ed. 771 (1911); *United States v. Maxey & Co.*, 956 F.Supp. 823,827 (N.D.Ind.1997) (lithe law is clear that an individual cannot rely on a personal privilege of self-incrimination to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if those records might incriminate him personally").

e. Records Required to Be Kept By Law Cannot be Protected

In *Shapiro v. United States*, 335 U.S. 1,33,68 S.Ct. 1375,1392,92 L.Ed. 1787 (1948), the Supreme Court held that Fifth Amendment protection does not extend to records that are required to be kept by law. This principal should transfer to exclude a protective order against production of documents of banking, securities and email records requested by the plaintiff on the defendants' personal embarrassment theory when those required to be maintained for production by law.

f. Records related to Employee Conduct Against Bank and Plaintiff's Interest Discoverable

The plaintiffs complaint describes the subject contracts and breaches in the unusual circumstances of US Bancorp employees, control person and agents conduct contrary to the interests of US Bank and US Bancorp shareholders and to further an unlawful hospital supply cartel with Novation LLC. In *Thomas v. Tyler* the Kansas District Court used a bank and bank chairman similar to the current circumstances as an example of the effects of the collective doctrine:

"For example, *In re Grand Jury Subpoena Dated Nov. 12, 1991*, 957 F.2d 807 (11th Cir.1992), a federal grand jury issued a subpoena requiring a former bank chairman to produce certain records he had removed from the bank's premises while still an employee of the bank. The former chairman claimed that he held the records in a personal rather than representative capacity at the time he was served with the subpoena and that his Fifth Amendment privilege against self-incrimination therefore encompassed his act of producing the documents. *Id.* at 808. The district court disagreed, finding that "[n]either the documents' corporate character, nor the fact that they came into Paul's possession in a representative capacity, has changed simply because Paul left the bank at a later time." *In re Grand Jury Subpoena Dated Nov. 12, 1991*, 792 F.Supp. 1423, 1428 (S.D.Fla.1992), *aff'd*, 957 F.2d 807 (11th Cir. 1992). On appeal to the Eleventh Circuit, the former bank chairman argued that an exception to the *Braswell* collective entity rule should be crafted for former employees who no longer stand in a representative capacity with respect to the corporation and have taken corporate documents as their own personal property for personal reasons. 957 F.2d at 810, 812-13. The Government countered by arguing that such an exception would "directly undermine *Braswell*" and "create a haven for those who seek to frustrate the legitimate demands for the production of relevant corporate records." *Id.* at 810. The Eleventh Circuit agreed, holding that "a custodian of corporate records continues to hold them in a representative capacity even after his employment is terminated" and rejecting the argument that "documents originally corporate in nature become protected from disclosure when a corporate officer absconds with them for 'personal reasons.'" *Id.* at 812-13."

Thomas v. Tyler, 841 F.Supp. 1119 at 1129-1130 (D. Kan., 1993).

g. Personnel Files

The plaintiff is needing to determine whether conduct committed by US Bancorp employees that facially violated the interests of US Bank as a regulated financial institution is properly imputed to the

control group of US Bancorp. The plaintiff specifies which employees' files are required. "Questions of privilege that arise in the course of the adjudication of federal rights are 'governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.'" *United States v. Zolin*, 491 U.S. 554, 562, 109 S.Ct. 2619,2625, 105 L.Ed.2d 469 (1989) (quoting Federal Rule of Evidence 501). Despite claims of privilege, personnel files are discoverable in federal question cases, including Title VII actions. *Garrett v. City and County of San Francisco*, 818 F.2d 1515, 1519 n. 6 (9th Cir.1987) (citations omitted).

h. Official Misconduct

The defendants complain some Kansas District Court officials are witnesses to conduct described in the complaint. Also that the plaintiff is seeking records of *ex parte* communications.

The public has a strong interest in assessing the truthfulness of allegations of official misconduct, and whether agencies that are responsible for investigating and adjudicating complaints of misconduct have acted properly and wisely. "{A}ccess to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." *Braun v. City of Taft* (Polston), 154 Cal.App.3d 332, 341, 201 Cal.Rptr. 654 (1984) (quoting Cal.Gov't Code § 6250). The federal government also has "an interest in maintaining the integrity of state and federal law enforcement institutions. Misconduct by individual officers, incompetent internal investigations, or questionable supervisory practices must be exposed if they exist." *Skibo v. City of New York*, 109 F.R.D. 58,61 (E.D.N.Y.1985).

No one has taken the initiative to simply undo the egregious and indefensible actions that have taken place extrinsic to this action for the purposes of denying the plaintiff counsel and placing his replacement counsel in jeopardy. The defendants have not even sought to undo their sanction orders. The plaintiff has not been contacted to be a witness to any investigation regarding what went on here in the Kansas District court. This civil suit and the opportunity to present evidence to a jury is the only vehicle for obtaining justice over this misconduct.

I, Banking Records

The "All documents" request for records related to the plaintiff's bank accounts are relevant:

"Plaintiffs also seek to compel Defendants to produce all documents requested by Plaintiffs in their July 2002 document requests. Specifically, the Plaintiffs seek (1) documents concerning the bank accounts of the individual Defendants, (2) documents reflecting transfers between Holt entities and the Defendants, (3) corporate structure, ownership, accounting, banking, and tax documents of the specified Defendants, (4) all documents related to bonds on other Holt related construction or renovation projects, and (6) all documents relating to the Kaighn Point project including documents concerning the termination of construction on the Kaighn Point project.

Defendant Thomas Holt, Sr. objects to the production of his personal financial records as he contends there is no evidence that demonstrates funds from the Kaighn Point project went to him. A party, however, "may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Fed.R.Civ.P. 26(b)(1). Relevancy is construed broadly to "encompass any matter that bears on or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). The Plaintiffs have alleged that Thomas Holt Sr. fraudulently transferred funds from the Kaighn Point project and converted those funds for his own use. As such, his personal financial records are relevant to the Plaintiffs' claims and therefore discoverable. The Court will grant Plaintiffs' motion to compel the personal financial records of Thomas Holt, Sr." [Emphasis added]

Van Kampen High Yield Municipal Fundv. O'Donnell & Naccarato, Civil Action No. 02-1210 at pg. I (E.D. Pa. 3/4/2003) (E.D. Pa., 2003).

j. Particularity Requirement of Rule 34

The defendants assert the plaintiff has not met the particularity requirement of Rule 34 for document production requests, citing *Aikens v. Deluxe Financial Services, Inc.*, 217 F.R.D. 533 (D.Kan., 2003) overly generalized requests. The defendants are under a misconception over the reasonable particularity requirement of Rule 34. The *Aikens* overly generalized request form was avoided by the plaintiffs production requests which use "all documents related" and "all records related" as a modifier to sufficiently particularized events or occurrences and the persons and time frame involved where known.

A US District Court in this circuit has resolved this misconception. See footnote II of *Clearone Communications, Inc. v. Chiang et al* Utah Dist. Court Case No: 2:07cv00037TC which also discusses *Aikens*:

"The use of terms such as "relating to", "pertaining to", or "concerning" does not necessarily make a request overly broad or unduly burdensome as long as these phrases modify a "sufficiently specific type of information." *Cardenas v. Dorel Juvenile Group, Inc.*, 232 F.R.D. 377, 381-82 (D.Kan. 2005). Though ClearOne's requests could have been clearer, ClearOne's use of the terms "reflecting" and "relating" did not modify a "very general categor[y] of documents," *Aikens v. Deluxe Financial Services, Inc.*, 217 F.R.D. 533, 538 (D.Kan. 2003), but instead modified a reasonably particularized type of information. To support its next argument, that Rule 34 requires that a request for documents be made with "reasonable particularity" (and therefore ClearOne's requests should be denied as overly broad and burdensome), *Biamp cites Bruggeman ex rei. Bruggeman v. Blagojevich*, 219 F.R.D. 430, 436 (N.D.III. 2004). Biamp's Opposition to ClearOne's Motion to Compel at 7-8, docket no. 494, Oct. 4, 2007. In *Bruggeman*, the court found that the following request did not meet the standard of reasonable particularity: "all documents that

reflect in any manner noncompliance with the ADA or the RA." 219 F.R.D. at 436. An equivalent request in this case might be if ClearOne had asked for all documents that reflect in any manner the misappropriation of ClearOne's trade secrets. Though ClearOne could have been clearer with its requests, none of its requests were as broad as the one in *Bruggeman* and thus they are not deemed to lack reasonable particularity. (Note: Although the *Bruggeman* court said the request was beyond the scope of Rule 34, it still held that "to the extent that Defendants' documents directly state that the Illinois Medicaid Plan and/or Illinois Medicaid Waiver Plan which services the developmentally disabled is not in compliance with ADA or the RA, those documents should be produced." *Id.*) "

The Utah court is following the Kansas District Court determination requests for specific kinds of information are not overly broad in *Cardenas v. Dore! Juvenile Group, Inc.*, 232 F.R.D. 377, 381-82 (D.Kan 2005).

k. Mistake Over Relevancy of Discovery

The 2000 Amendments to federal discovery did not deprive the plaintiff of sufficient discovery to prevail on each of his claims against US Bank and US Bancorp. Rule 26(b)(1) was amended to narrow the scope of discovery to compel the parties to focus on discovering information that is relevant to their case's claims and defenses. The rule now permits discovery into "any matter, not privileged, that is relevant to the claim or defense of any party." *Davenport v. Indiana Masonic Home Foundation, Inc.*, 2003 WL 1888986, *3 (S.D.Ind. Mar. 27, 2003), quoting Rule 26(b)(1). Previously, discovery was broadly defined in that information was generally discoverable if it was relevant to the subject matter involved in the pending action. See, e.g., *Tax Track Systems Corp. v. New Investor World, Inc.*, 2002 WL 31473818, *13 n. 11 (N.D.III. 2002) (prior to December 1, 2000, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party "); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (liThe key phrase in this definition- 'relevant to the subject matter involved in the pending action' - has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. ").

Under the revised rule, parties are still able to obtain discovery that is relevant to the subject matter involved in the pending action if good cause is shown. *White v. Kenneth Warren & Son, Ltd.*, 203 F.R.D. 364,366 (N.D.III. 2001) ("For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. "); Advisory Committee's Note to 2000 Amendments to Fed.R.Civ.P. 26 (liThe court, however, retains authority to order discovery of any matter relevant to the

subject matter involved in the action for good cause."). The "good cause" concept is meant to be flexible. See, e.g., *Hill v. Motel 6*, 205 F.R.D. 490, 492 (S.D.Ohio 2001) ("The good cause standard is meant to be flexible, but the party seeking such discovery should ordinarily be able to articulate a reason for believing it is warranted"). Under the relevancy standard, "information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Martin Properties, Inc. v. Florida Industries Investment Corp.*, 2003 WL 1877963, *2 (N.D.Ill. Apr. 14,2003), quoting Rule 26(b)(1).

I. "Relevant To The Claim Or Defense Of Any Party"

Indeed, since the 2000 revisions, litigants have been faced with the dubious task of ascertaining the difference between the terms "relevant to the subject matter involved in the pending action" and "relevant to the claim or defense of any party." Only a handful of courts and commentators have squarely addressed this issue. *World Wrestling Federation Entertainment, Inc. v. William Morris Agency, Inc.*, 204 F.R.D. 263, 265 n. 1 (S.D.N.Y. 2001) ("amendments to Rule 26(b)(1) do not dramatically alter the scope of discovery"); *Richmond v. UPS Service Parts Logistics*, 2002 WL 745588, *2 (S.D.Ind. 2002) ("The implementation of amended Rule 26 did not necessarily impact the so called 'liberal discovery' standard as evidenced by cases interpreting the post-amendment rule."); *Saket v. American Airlines, Inc.*, 2003 WL 685385, *2 (N.D.Ill. Feb. 28, 2003) ("The Federal Rules of Civil Procedure contemplate liberal discovery, and 'relevancy' under Rule 26 is extremely broad."); Christine L. Childers, Keep on Pleading: The Co-existence of Notice Pleading and the New Scope of Discovery Standard of Federal Rule of Civil Procedure 26(b)(1), 36 Val. U. L. Rev. 677,691 (2002) ("Under the new Rule 26(b)(1), the scope of discovery remains as broad as it was prior to the amendment."); John S. Beckerman, Confronting Civil Discovery's Fatal Flaws, 84 Minn. L. Rev. 505, 511-12 (2000) (stating that the 2000 amendments to Rule 26(b)(1) are "basically a semantic change unlikely to have much salutary effect on the conduct of discovery "), with *Johnson v. Mundy Indus. Contractors, Inc.*, 2002 WL 31464984, *3 (E.D.N.C. 2002) (2000 amendments "mandate greater scrutiny of Plaintiffs [discovery] request."); *Surles v. Air France*, 2001 WL 1142231, *1 n.3 (S.D.N.Y. 2001) ("it is intended that the scope of discovery be narrower than it was, in some meaningful way").

One court that squarely addressed this issue concluded that the difference between the two rules could be ascertained by applying the principles in Rule 26(b)(2), thus concluding that there is no real fundamental difference between the current and previous versions. For instance, *Thompson v. Department of Housing and Urban Development*, 199 F.R.D. 168 (D.Md. 2001), the court noted:

"Lest litigants and the court become consumed with the philosophical exercise of debating the difference between discovery relevant to the "claims and defenses" as opposed to the "subject matter" of the pending action - the juridical equivalent to debating the number of angels that can dance on the head of a pin - the practical solution to implementing the new rule changes may be to focus more on whether the requested discovery makes sense in light of the Rule 26(b)(2) factors, than to attempt to divine some bright line difference between the old and new rule. Under this approach, when confronted with a difficult scope of discovery dispute, the parties themselves should confer, and discuss the Rule 26(b)(2) factors, in an effort to reach an acceptable compromise, or narrow the scope of their disagreement."

Id. at 172.

The scope of discovery has narrowed somewhat under the revised rule. The change, while meaningful, is not dramatic, and broad discovery remains the norm. The revised rule simply provides one additional justification for the Court to put the brakes on discovery that strays from the claims or defenses being asserted. In this regard, the Court agrees that the principles of Rule 26(b)(2) may be utilized to limit discovery if "the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive." *Smith v. Steinkam*, 2002 WL 1364161, *6 (S.D.Ind. 2002), quoting Rule 26(b)(2). The Seventh Circuit has also noted that "[b]efore restricting discovery, the court should consider the totality of the circumstances, weighing the value of the material sought against the burden of providing it, and taking into account society's interest in furthering the truth-seeking function in the particular case before the court." *Id.*, quoting *Patterson v. Avery Dennison Corp.*, 281 F.3d 676,681 (7th Cir. 2002) (internal quotations omitted).

Swierkiewicz v. Sorema N. A., 534 U.S. 506, 512 (2002) ("simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. "). As the court in *Thompson v. Department of Housing and Urban Development*, 199 F.R.D. 168 (D.Md. 2001) observed:

"[C]ounsel should be forewarned against taking an overly rigid view of the narrowed scope of discovery. While the pleadings will be important, it would be a mistake to argue that no fact may be discovered unless it directly correlates with a factual allegation in the complaint or answer. Such a restrictive approach would run counter to the underlying purpose of the rule changes, as explained by the commentary, run afoul of Fed.R.Civ.P. 1, and undoubtedly do disservice to the requirement of notice pleading in Rule 8, as parties would be encouraged to plead evidentiary facts, unnecessary to a "short and

plain statement of the claim showing that the pleader is entitled to relief, Rule 8(a)(2), simply to increase the likelihood of getting broader discovery."

Thompson v. Department of Housing, 199 F.R.D. 168 (D.Md. 2001)

m. Intent Relevancy

The plaintiff is entitled under Missouri contract case law to discover records related to the intent and circumstances of the defendants in forming and breaching the contracts averred in the complaint which states the defendants' charged conduct was being done to further the alleged interest of US Bancorp as a member of a cartel with Novation LLC to restrain competition in hospital supplies:

"The cardinal principle for contract interpretation is to ascertain the intention of the parties and to give effect to that intent. *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15,21 (Mo. bane 1995). In order to determine the intent of the parties, it is often necessary to consider not only the contract between the parties, but subsidiary agreements, the relationship of the parties, the subject matter of the contract, the facts and circumstances surrounding the execution of the contract, the practical construction the parties themselves have placed on the contract by their acts and deeds, and other external circumstances that cast light on the intent of the parties.Id. [Emphasis added]

Intertel v. Sedgwick Claims Management, 204 S.W.3d 183 (Mo. App., 2006).

n. Relevancy of Intent Related Records Showing Bad Faith

Evidence of other bad acts of the defendants outside of the conduct being charged by the plaintiff is admissible as proof of motive or intent. See Fed.R.Evid. 404(b). This rule applies equally to subsequent acts as it does prior, as "intent may be inferred from subsequent as well as prior acts." See *Dial v. Travelers Indem. Co.*, 780 F.2d 520,523 (5th Cir.1986) quoting *United States v. DiZenzo*, 500 F.2d 263, 265 (4th Cir.1974).

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 is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure. *Beach v. City of Olathe, Kansas*, 203 F.R.D. 489, 496 (D.Kan. 2001), citing *Scott v. Leavenworth Unified School Dist. No. 453*, 190 F.R.D. 583, 585 (D.Kan. 1999).

o. Missouri Contract Duty of Good Faith and Fair Dealing

The defendants want the court to ignore the relevance of their bad faith conduct which is part of the plaintiff's breach of contract claim under Missouri's Uniform Commercial Code. The defendants are aware of this from the proposed settlement brief prepared as part of the parties case management conference. See Exb. 2 Settlement Brief without evidentiary attachments pgs 21-49. The same is true of the plaintiff's claims of breach of fiduciary duty and fraud through misrepresentations to the court.

p. Local Electronic Discovery Rule

The defendants continue to violate the District Court's Electronic Discovery Policy which was updated in February of 2008 to address issues raised in the parties' briefing of the magistrate for the case management conference. The defendants have violated this policy by not turning over records in their original electronic form. The defendants have also not produced any of the requested emails.

q. Denial of a Full and Fair Opportunity to Litigate

Defendants Protective Order Would Deny the Plaintiff a Full and Fair Opportunity to litigate. The plaintiff would be forced to bring a new action in Missouri State Court against the defendants and their Missouri State resident coconspirators. The new action would not be collaterally estopped under Missouri State Law.

In reviewing whether the application of collateral estoppel is proper, Missouri state courts consider the following four factors: (1) whether the issue in the present case is identical to the issue decided in the prior adjudication; (2) whether there was a judgment on the merits in the prior adjudication; (3) whether the party against whom collateral estoppel is asserted is the same party or in privity with a party in the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit. *Neurological Medicine, Inc. v. General Am. Life Ins. Co.*, 921 S.W.2d 64,68 (Mo.App.1996). "Fairness is the overriding consideration." *Id.*

CONCLUSION

The plaintiff respectfully requests that the court deny the defendants' proposed protective orders and order the defendants to produce the requested records.

Respectfully Submitted,


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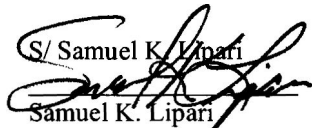
CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served via email, on this 26th day of
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