IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

GARY SCHUBERT,	:	
	:	
Plaintiff,	:	CASE NO. 4:09-cv-00167-RP-CFB
	:	
vs.	:	
	:	
PFIZER INC., PAUL PLOFCHAN, and MIKE LYNCH,	:	ORDER
	:	
Defendants.	:	

This matter came before the Court for hearing on May 10, 2010, and May 20, 2010, based upon ongoing discovery disputes between the parties. Appearing were Wade Kricken of Dallas, Texas, for Plaintiff; Jane McFetridge and Abraham Saiger of Chicago, Illinois, for Defendants. If this case is going to progress toward the trial date as presently set for February 14, 2011, a plan for discovery needs to be established and followed, and dispositive motions need to be submitted. Counsel need help in getting this accomplished. The next hearing on discovery will be held at 9:00 a.m. on June 25, 2010, by telephone call placed by counsel for Plaintiff. By June 4, 2010, a joint status report as to uncompleted discovery shall be submitted; a response to Plaintiff's Motion to Compel shall be filed by June 11, 2010.

At the hearing on May 20, 2010, I ordered Plaintiff to supplement discovery responses by June 1, 2010, and we worked through each discovery request from Defendants that was in dispute; I ruled upon any remaining objections, and assisted

counsel in narrowing discovery requests that were overbroad.[1] At the hearing on May 20, 2010, I ordered counsel to meet and confer to devise a numbering system for the documents produced by Plaintiff. Further, I granted an oral protective order, prohibiting the use of any information produced based upon Plaintiff's botched attempt to conduct a deposition on written testimony of Robert LaMont, and ordered that this deposition be conducted orally after proper notice pursuant to Federal Rule of Civil Procedure 27.

Background of the Case

Plaintiff, Gary Schubert, asserts claims against his former employer, Pfizer, Inc., and two managers, for damages based on alleged age discrimination, wrongful termination, harassment and retaliation. He also asks for punitive damages. The original Complaint was filed April 29, 2009, and was amended three times by June 25, 2009; Answers were filed by July 2, 2009. Defendants deny any age

[1] Specifically, by June 1, 2010, Plaintiff was ordered to supplement information relating to the following: 1) tax returns and related materials for tax years 2005, 2008 and 2009, clarifying whether there is material available for 2010, and if so, stating where it is located (in Plaintiff's possession or in the hands of a third-party; if material is in possession of Plaintiff's accountant, it is in the control of Plaintiff, and he is expected to produce it); 2) information about Plaintiff's mitigation of damage efforts, specifically, his relationship to the six corporations or holding companies that either have employed Plaintiff, or have some relationship with him; Plaintiff has not provided organizational or financial documents for the companies he has spent time trying to start-up since his termination, or for other companies that are controlled by his family; he shall produce audited or unaudited financial statements for all of the companies for the time frame 2005 to present; 3) Plaintiff produced a copy of a 2010 desk calendar, with some entries redacted or illegible; Plaintiff is to produce a legible copy to Defendants; if material implicates attorney-client privilege, that shall be submitted to the Court for *in camera* inspection; 4) Plaintiff shall identify any life or career coach consulted, relating to his efforts to mitigate damages by obtaining other employment or income; and 5) Plaintiff shall supplement Interrogatories 4, 12, 13, 14, 15, 16, 17, 18, 20, 21 and Request for Production 7.

discrimination, harassment or retaliation of Plaintiff, and assert that he was terminated from his employment for just cause. Defendants also note that when Plaintiff was terminated in February 2008, his supervisor was Paul Plotchen, and that Plaintiff had not been supervised by Defendant Mike Lynch since March 2007. Plaintiff was employed at Pfizer, Inc., as a sales representative from 1982 to 2008.

A Protective Order was entered September 1, 2009 (Clerk's No. 33). When the Defendant's Motion to Compel was granted on March 12, 2010, the deadline for completion of discovery was extended to July 1, 2010, and the deadline for filing dispositive motions was extended to August 31, 2010.

Discovery Motion History

Defendants' original Motion to Compel (Clerk's Nos. 41, 43) was unresisted, and granted on March 12, 2010 (Clerk's No. 44). Plaintiff acknowledged that the discovery responses were incomplete. Pursuant to Federal Rule of Civil Procedure 37, the Defendants requested the award of fees and costs associated with the Motion to Compel, and were given until March 22, 2010, to submit their statement. In the Order granting the Motion to Compel, Plaintiff was required to file supplemental answers to pending discovery by April 5, 2010. Defendants have filed their Statement of Fees and Costs (Clerk's No. 46), and supplemented it (Clerk's No. 54). Plaintiff resists imposition of fees and costs related to the Motion to Compel. Argument on this issue was heard May 20, 2010.

Discovery issues still seethe. Both counsel have provided me with copies of letters they exchanged outlining their efforts to complete discovery (Plaintiff's on April 5, 2010; Defendant's on May 18, 2010; and Plaintiff's supplemental discovery

answers sent to Defendants on May 13, 2010). On April 9, 2010, Defendants filed a Motion for the Sanction of Dismissal (Clerk's No. 49), alleging that Plaintiff had failed to comply with the Court's order to supplement discovery; Plaintiff has resisted (Clerk's No. 52), and Defendants replied to the Resistance (Clerk's Nos. 56, 58). In the past month, over 500 pages of material has been filed relating to the discovery from Plaintiff. If even 50% of the effort expended to argue about discovery had been expended in cooperation to complete discovery, the case would have an efficient discovery plan, and be well on its way to motion practice, settlement discussions or trial preparation.

Without meeting and conferring with Defendants' counsel, Plaintiff filed his Motion to Compel (Clerk's No. 62) on May 18, 2010, ostensibly so that it could be discussed at the May 20, 2010, hearing. Although at the May 10, 2010, hearing I suggested that any other discovery motions be filed promptly, so that a discovery plan could be fashioned, I did not relieve Plaintiff from the requirement to hold a "meet and confer" conference with counsel for Defendants. Defendants move to strike this Motion to Compel (Clerk's No. 63), although they note that because they have provided answers to much of the information sought, the matter is moot. Although Defendants claim that it is Plaintiff's approach that has wasted the Court's time and resources, rather than spending time drafting a Motion to Strike, perhaps defense counsel could have picked up the phone, talked to counsel for Plaintiff, and then represented at the May 20, 2010, hearing that this matter has been resolved. Instead, we have now included in the schedule additional time for the meet and confer conference on Plaintiff's Motion to Compel. The Defendants are granted to

June 11, 2010, to submit yet more paper as to why Plaintiff's Motion to Compel should be denied.

At the May 20, 2010, hearing I denied the Motion to Strike, not to reward Plaintiff for ignoring the Rules of Civil Procedure, but to cut to the chase, and save everyone's time and money. I also briefly reviewed the categories of discovery sought by Plaintiff in his discovery requests, and discussed how the requests could be more narrowly tailored. Counsel shall meet and confer to resolve or narrow these discovery disputes. Any remaining issues will be discussed at the next discovery conference on June 25, 2010.

<u>Defendants' Statement of Fees and Costs</u>

Defendants request the sum of $7,884.50 for fees and costs associated with the Motion to Compel. According to Defendants' counsels' affidavits of attorneys fees (Exhibit B, Clerk's No. 46-2 and Exhibit B, Clerk's No. 54-2), the time spent on the Motion to Compel, and the requested fees and costs break down as follows:

a. Requested fees for time spent drafting the Motion to Compel total $4,284.50 based on:

Saiger: 13.3 hours @$255/hr = $3,391.50

Naylor: 3.8 hours @235.00/hr = $893.00

b. Requested fees for time spent discussing Motion to Compel with co-counsel and clients total $3,600.00 based on:

Saiger: 3.6 hours @$255/hr = $918

McFetridge: 3.6 hours @$495.00/hr = $1,782

Naylor: 4.0 hours @$235.00/hr = $889.00
(includes .5 hr for attorney billing at $155/hr)

Plaintiff resists any award of fees and costs, noting that multiple attorneys worked on the Motion, with a result that the fee request is unreasonably high. Plaintiff suggests that a fee of $1,000 would be appropriate for the level of complexity of the Motion. Plaintiff also argues that other circumstances make an award of fees unjust, because of disparate resources between the parties, and because of the hostile and demeaning treatment by opposing counsel, who have been critical of his efforts to conduct discovery. Plaintiff acknowledges, however, that his discovery responses were inadequate and required supplementation, which is still a work in progress.

Pursuant to Rule 37(a), a prevailing party to a motion to compel may recover, with certain exceptions, the movant's reasonable expenses incurred in making the motion, including attorney's fees. Fed. R. Civ. P. 37(a)(5)(A). Here, however, Defendants have requested more than their expenses incurred in making the Motion to Compel. Defendants are claiming time for reviewing Plaintiff's inadequate discovery responses, conferring with Plaintiff's counsel about the discovery issues, and developing a strategy regarding Plaintiff's objections to discovery requests. The time spent on these tasks is not compensable under Rule 37(a)(5)(A). *See Foxley Cattle Co. v. Grain Dealers Mutual Ins. Co.*, 142 F.R.D. 677, 681 (S.D. Ia. 1992)(holding that defendants prevailing on a motion to compel were not entitled to expenses for various communications with their clients or opposing counsel about the underlying discovery request predating the motion to compel, stating "[t]he time claimed for tasks unrelated to the actual preparation of the motion to compel is not compensable"). A movant may recover only fees and expenses incurred in making

the motion to compel, and the tasks cited above do not meet this requirement. Additionally, spending at least 17 hours on drafting the four-page Motion to Compel (with 140 pages of exhibits), even ignoring the additional 11 hours of conferences about the Motion to Compel, is excessive. Defendants are not entitled to the full amount of $7,884.50 claimed for fees and costs associated with the Motion to Compel. I find that the amount of $3,000 is reasonable for time spent by local and out-of-state counsel in the preparation of the Motion to Compel. *See id*.

Motion for Sanction of Dismissal

Defendants move to dismiss the Plaintiff's case as a sanction for failure to comply with the March 12, 2010, order to supplement discovery responses (Clerk's No. 49). Although Plaintiff provided supplemental interrogatory answers on April 5, 2010, and further supplemental discovery responses on May 13, 2010, Plaintiff is still in the process of providing discovery material.

Defendants want additional sanctions, specifically dismissal of the action, because of the delay in producing discovery material, and due to other instances where Plaintiff's counsel has misread, misunderstood, or failed to comply with the Federal Rules of Civil Procedure relating to how to conduct discovery. Defendants point to earlier discovery difficulties and claims of abuse of the litigation process, for example: 1) Plaintiff subpoenaed documents from a third party before the Federal Rule of Civil Procedure 26 discovery conference was held; this was remedied by a Protective Order; 2) Plaintiff produced his Rule 26 disclosures twelve days late; 3) Plaintiff identified expert witnesses, but failed to provide the requisite Rule 26 reports; 4) Plaintiff contacted current and former Pfizer employees, some of whom

are bound by confidentiality agreements not to discuss certain topics; when asked to stop, Plaintiff's counsel did so; 5) Plaintiff included Laura Plofchan, the spouse of Paul Plofchan, as a defendant, in spite of her lack of connections to employment decisions or her lack of employment by Pfizer, Inc.; Plaintiff dismissed claims against Laura Plofchan at the request of Defendants; 6) in September 2009, Plaintiff supplemented discovery answers with the names of 35 people who have relevant knowledge of facts or issues; Defendants claim that this is an overbroad discovery response; 7) Plaintiff delayed production of an affidavit of Patricia Hardt, referenced in the Rule 26 initial disclosures, but not produced until March 2010 (Hardt has been identified as a witness from the outset of this case); 8) Plaintiff attempted to conduct a deposition upon written questions of Robert LaMont, pursuant to Federal Rule of Civil Procedure 31, and got the procedure wrong; Defendants met and conferred with Plaintiff's counsel to explain the defects; at the May 20, 2010, hearing, I granted Defendants' request for a Protective Order prohibiting use of any material gathered from LaMont, and required that the deposition proceed orally after appropriate notice; 9) Plaintiff's counsel expressed surprise to Defendants' counsel that their document production was complete, from which Defendants' counsel infer that Plaintiff's counsel believes incomplete responses to discovery would be acceptable; 10) Plaintiff produced a medical release form, but not the names of medical providers until later, causing delay in securing his records; 11) Plaintiff has not completed the discovery production ordered in the March 12, 2010, ruling on the Motion to Compel; and 12) Defendants' requests for information about companies with which Plaintiff is affiliated, specifically Bond Therapeutic

Instruments and Empire Self Storage, have not yet been answered by Plaintiff. When Defendants subpoenaed records from these companies, they were advised that the onsite manager of Empire did not have access to the documents, and that according to Richard Fleming, a joint-venturer in Bond Therapeutic, this company does not have any records, even though it is an Iowa corporation listed as active with the Iowa Secretary of State. Defendants report that responses to subpoenas to both companies were handled by counsel for Plaintiff, thus unnecessary delay and expense was incurred.

Plaintiff responds to the Motion for the Sanction of Dismissal by pointing out that some of the issues complained of have been remedied by Plaintiff, or by earlier rulings by the Court; and that although there have been delays in discovery, neither side has completed discovery responses, so any delay has not been prejudicial to the progress toward the February 2011 trial date. Plaintiff's counsel points to difficulties in communication among counsel, and to Defendants' refusal to believe that some information simply does not exist.

It is apparent that Plaintiff's counsel is not fluent in the Federal Rules of Civil Procedure, and that Plaintiff or his counsel have not completed production of documents in a prompt fashion. The ongoing delay and confusion in the completion of discovery has got to stop. Whether the delay has been caused by Plaintiff's counsel, or Plaintiff himself, they are both advised that further unnecessary delay, or any obstruction of the discovery process, will result in the imposition of sanctions, which can include dismissal of the action. *See* Fed. R. Civ. P. 37(d).

However, in light of the time available to complete discovery before the February 2011 trial date, and the fact that at the May 20th hearing we all worked through the discovery requests that are in dispute, and clarified exactly what Plaintiff was expected to produce by June 1, 2010, I find that the Motion for the Sanction of Dismissal is denied (Clerk's No. 49).

I will continue to have regular discovery conferences with counsel to assure the timely completion of discovery, with the goal of maintaining the February 14, 2011, trial date. If necessary, the deadline for submission of dispositive motions will be extended after our next discovery conference.

Need for Cooperation in Discovery

The painful process of discovery in this case demonstrates the need for counsel to cooperate. It is the clients who suffer when the "meet and confer" requirements are bypassed, when hundreds of pages of motions are filed to resolve what could be addressed in a single phone call, when the Federal Rules of Civil Procedure are used as a sword rather than a mechanism to ensure the just, speedy and inexpensive determination of the action.

Stop the madness. Use cooperation and proportionality to save the clients both time and money. Federal Rule of Civil Procedure 26(g) requires counsel to certify that discovery answers -- or objections -- are complete and correct, based upon information and belief formed after a reasonable inquiry. Counsel are further required by this rule to certify that the discovery request, response or objection is consistent with the Federal Rules of Civil Procedure, not interposed for improper purpose, such as to needlessly increase the cost of litigation, and is neither

unreasonable nor unduly burdensome, considering the needs of the case, and the amount or issues at stake.

It is in the client's best interests, and absolutely necessary to avoid excessive or abusive discovery, for counsel to cooperate. It is not unrealistic for the court to expect "cooperative, collaborative, transparent discovery." *The Sedona Conference Cooperation Proclamation* 1 (The Sedona Conference 2008).[2]

It is apparent that left unattended, counsel have chosen to take hard lines and have confused aggression with zealous advocacy. In order to ensure a more temperate approach to discovery, and more complete and timely discovery responses, an increased role for local counsel will be required for all future pleadings and hearings in this case.

<u>The Role of Local Counsel</u>

Lead counsel for both sides have been admitted *pro hac vice* and have local counsel affiliated. Typically, in this district we do not require local counsel to appear at scheduling or discovery conferences, trusting in the skills of the lead counsel to direct the course of litigation.

Local Rule 83.1(d)(4) provides for the affiliation of local counsel not only to ensure that the Federal Rules of Procedure and Local Rules are followed, but also to temper aggressive litigation tactics, and to aid in bringing out-of-state counsel into compliance with the requirements of the Rules.

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[2] The Sedona Conference, is a non-profit educational research institute. *See* The Sedona Conference, http://www.thesedonaconference.org/ (last visited June 2, 2010). It has launched a national effort to increase dialog among all stakeholders in the litigation process on use of a framework for cooperation and collaboration so that discovery proceeds with reduced expense and delay.

Local counsel add value to the litigation process by advising out-of-state counsel on the limitations to zealous advocacy and on responsibility to the justice system, including the requirement for collegiality and cooperation. It appears that this case would benefit from more direct input by local counsel.

In the future, all discovery Motions and Requests shall be signed by local counsel in addition to lead counsel. Additionally, local counsel shall attend all future discovery status conferences, and any “meet and confer” conferences among counsel that the Rules require. It is my expectation that rather than adding to the complexity and expense of the litigation process, local counsel will help mediate and reduce the need for constant court intervention to get even basic discovery issues resolved.

Local counsel are equally responsible, and subject to sanctions, for decisions represented in the pleadings, the direction of the course of litigation, and how it is resolved. Local counsel are not merely “bag carriers” and are sentient members of the team. They are expected to aid in the just, speedy and inexpensive determination of this case.

IT IS SO ORDERED.

Dated this 4th day of June, 2010.

CELESTE F. BREMER
UNITED STATES MAGISTRATE JUDGE