EXHIBIT 8

©State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc. E.D.Pa.,2008.

United States District Court,E.D. Pennsylvania.
STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. et al., Plaintiffs,
v.
NEW HORIZONT, INC. et al., Defendants.
Civil Action No. 03-6516.

May 7, 2008.

Background: Insurer sued health-care providers, alleging fraudulent scheme to obtain payment for injuries allegedly caused by insurer's insureds, and asserting claims including common-law fraud and violations of Racketeer Influenced and Corrupt Organizations Act (RICO). Providers moved for summary judgment, to compel additional deposition testimony, and for sanctions.

Holdings: The District Court, Eduardo C. Robreno, J., held that:
(1) non-responsive deposition testimony by insurer's designee did not constitute irrebuttable admission;
(2) mere fact that insurer's counsel had been source of information sought during deposition did not render such *information attorney work product*;
(3) insurer's failure to properly prepare designee for deposition constituted sanctionable "failure to obey an order to provide or permit discovery";
(4) monetary sanctions rather than dismissal were appropriate for *insurer's failure to prepare designee for* deposition;
(5) rule governing certification of disclosures and discovery requests could not be basis for sanctioning designee's allegedly improper verification; and
(6) insurer's alleged failure to make reasonable *inquiry* into truth of responses to interrogatories was not sanctionable as complete failure to respond.

Motions granted in part and denied in part.

West Headnotes

[1] Evidence 157 ⚿210

157 Evidence
157VII Admissions
157VII(A) Nature, Form, and Incidents in General
157k206 Judicial Admissions
157k210 k. Petitions, Affidavits, and Depositions. Most Cited Cases

Federal Civil Procedure 170A ⚿1441

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)5 Suppression; Use and Effect
170Ak1441 k. Effect. Most Cited Cases
Deposition testimony by organization's designee on organization's behalf is "binding" on organization in sense that *it is admissible against organization, but is not akin to* judicial admission, i.e. statement that conclusively establishes a fact and estops organization from controverting statement with any other evidence. Fed.Rule Civ.Proc.Rule 30(b)(6), 28 U.S.C.A.

[2] Evidence 157 ⚿210

157 Evidence
157VII Admissions
157VII(A) Nature, Form, and Incidents in General
157k206 Judicial Admissions
157k210 k. Petitions, Affidavits, and Depositions. Most Cited Cases

Federal Civil Procedure 170A ⚿1441

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)5 Suppression; Use and Effect
170Ak1441 k. Effect. Most Cited Cases

Federal Civil Procedure 170A ⚿2544

170A Federal Civil Procedure
170AXVII Judgment

170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2542 Evidence
170Ak2544 k. Burden of Proof. Most Cited Cases

In insurer's action against health-care providers alleging fraudulent scheme to obtain payment for injuries, insurer's designee's deposition testimony, which was non-responsive to providers' questions seeking evidence to back up insurer's fraud claims, did not, by itself, constitute irrebuttable judicial admission that insurer was unable to prove elements of those claims, so as to warrant summary judgment for providers; rather, non-forthcoming responses shifted burden to insurer, requiring it to look beyond pleadings and set out specific facts showing genuine issue for trial. Fed.Rule Civ.Proc.Rules 30(b)(6), 56(e)(2), 28 U.S.C.A.

[3] Federal Civil Procedure 170A 1600(3)

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)3 Particular Subject Matters
170Ak1600 Privileged Matters in General
170Ak1600(3) k. Work Product of Attorney. Most Cited Cases

Mental impressions of counsel are core or opinion work product, which is discoverable only upon showing of rare and exceptional circumstances. Fed.Rule Civ.Proc.Rule 26(b)(3)(B), 28 U.S.C.A.

[4] Federal Civil Procedure 170A 1415

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)4 Scope of Examination
170Ak1414 Privileged Matters
170Ak1415 k. Results of Investigation or of Preparation for Litigation or Trial. Most Cited Cases

In insurer's action against health-care providers alleging fraudulent scheme to obtain payment for injuries, mere fact that insurer's counsel had been insurer's designee's source of information concerning insurer's fraud claims did not render such information attorney work product, so as to justify non-disclosure during designee's deposition; providers' deposition questions did not demand mental impressions, conclusions, opinions, or legal theories of insurer's attorney, but rather sought "information known or reasonably available to [insurer]," as to which designee was required to testify. Fed.Rule Civ.Proc.Rules 26(b)(3)(B), 30(b)(6), 28 U.S.C.A.

[5] Federal Civil Procedure 170A 1325

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)1 In General
170Ak1323 Persons Whose Depositions May Be Taken
170Ak1325 k. Officers and Employees of Corporations. Most Cited Cases

As corollary to corporation's duty to designate deposition witness, corporation must prepare its designee to be able to give binding answers on its behalf, and perform reasonable inquiry for information that is noticed and reasonably available to it. Fed.Rule Civ.Proc.Rule 30(b)(6), 28 U.S.C.A.

[6] Federal Civil Procedure 170A 1451

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)6 Failure to Appear or Testify; Sanctions
170Ak1451 k. In General. Most Cited Cases

In insurer's action against health-care providers alleging fraudulent scheme to obtain payment for injuries, insurer's failure to properly prepare its designee for court-ordered deposition in which providers sought information backing up fraud claims constituted "failure to obey an order to provide or permit discovery," warranting sanctions; district court had provided guidance permitting designee to respond by identifying responsive documents, but designee's entire preparation had consisted of two conversations with insurer's counsel, rendering compliance with court's guidelines impossible. Fed.Rule Civ.Proc.Rules 30(b)(6), 37(b)(2)(A), 28 U.S.C.A.

[7] Federal Civil Procedure 170A 1278

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General

170Ak1278 k. Failure to Respond; Sanctions. Most Cited Cases
Factors in whether dismissal or default judgment for failure to obey discovery order are: (1) extent of party's personal responsibility; (2) prejudice to adversary caused by failure; (3) history of dilatoriness; (4) whether conduct of party or attorney was willful or in bad faith; (5) effectiveness of sanctions other than dismissal; and (6) meritoriousness of claim or defense. Fed.Rule Civ.Proc.Rule 37(b)(2)(A)(v-vi), 28 U.S.C.A.

[8] Federal Civil Procedure 170A ⚿1451

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)6 Failure to Appear or Testify; Sanctions
170Ak1451 k. In General. Most Cited Cases
Monetary sanctions, not dismissal, were appropriate for insurer's failure to properly prepare its designee for court-ordered deposition, in insurer's action against health-care providers alleging fraudulent scheme to obtain payment for injuries; insurer bore responsibility for failure to prepare designee since it did not require him to confer with employees or review pertinent documents, and failure to prepare was willful, but prejudice to providers was addressable via monetary sanctions, all parties had demonstrated history of dilatoriness, and there was no showing of lack of merit of insurer's claims. Fed.Rule Civ.Proc.Rules 30(b)(6), 37(b)(2)(A), 28 U.S.C.A.

[9] Federal Civil Procedure 170A ⚿1451

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)6 Failure to Appear or Testify; Sanctions
170Ak1451 k. In General. Most Cited Cases
Civil procedure rule governing certification of disclosures and discovery requests could not be basis for sanctioning corporation's designee's allegedly improper verification, during deposition, of certain discovery responses; certification was distinct from verification, and furthermore certification requirements applied only to attorney of record or unrepresented party, not party's designee. Fed.Rule Civ.Proc.Rules 26(g)(3), 30(b)(6), 28 U.S.C.A.

[10] Federal Civil Procedure 170A ⚿1534

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)3 Answers; Failure to Answer
170Ak1534 k. Sufficiency. Most Cited Cases

Federal Civil Procedure 170A ⚿1537.1

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)3 Answers; Failure to Answer
170Ak1537 Failure to Answer; Sanctions
170Ak1537.1 k. In General. Most Cited Cases
Party's alleged failure to make reasonable inquiry into truth of responses to interrogatories before verifying those responses was not sanctionable as complete failure to respond to interrogatories; rather, proper course for opposing party in seeking sanctions was to move to compel further answer. Fed.Rule Civ.Proc.Rule 37(a)(3)(B)(iii), (a)(4), (d)(1)(A)(ii), 28 U.S.C.A.

[11] Federal Civil Procedure 170A ⚿1534

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)3 Answers; Failure to Answer
170Ak1534 k. Sufficiency. Most Cited Cases
Party who verifies answers to interrogatories must provide verification stating that to the best of his or her knowledge, information, and belief, answers provided are true and correct. Fed.Rule Civ.Proc.Rule 33(b)(5), 28 U.S.C.A.

[12] Federal Civil Procedure 170A ⚿1634

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)5 Compliance; Failure to Comply
170Ak1634 k. Sufficiency of Compliance. Most Cited Cases

Rule governing responses to requests for production of documents does not require party's response to be verified by party; rather, response need only be certified by attorney or unrepresented party. Fed.Rule Civ.Proc.Rule 34(b)(2)(B), 28 U.S.C.A.

*205 Cy Goldberg, Goldberg, Miller & Rubin, PC, Philadelphia, PA, for Plaintiffs.
Joel W. Todd, Dolchin Slotkin & Todd PC, Gilbert B. Abramson, Michael B. Tolcott, Dennis L. Abramson, Gilbert B. Abramson & Assoc, Bruce S. Marks, Maria Temkin, Marks & Sokolov, LLC, Philadelphia, PA, Frank H. Morgan, Jr., James L. McKenna, P.C., Wynnewood, PA, for Defendants.
Unique Healthcare, Inc. Philadelphia, PA, pro se.
Michael Voloshen, Huntingdon Valley, PA, pro se.

*206 MEMORANDUM

EDUARDO C. ROBRENO, District Judge.

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I. INTRODUCTION

State Farm Mutual Automobile Insurance Co. and State Farm Fire and Casualty Co. ("State Farm") brought suit against certain health-care providers ("Defendants"), alleging that Defendants carried out a fraudulent scheme to obtain payment for injuries allegedly caused by State Farm insureds. As ordered by the Court, Defendants conducted a deposition of State Farm's corporate designee, Austin Bowles, pursuant to Federal Rule of Civil Procedure 30(b)(6). A myriad of issues has arisen in connection with the preparation for and conduct of the deposition, as well as the witness's inability to recall certain information, including information contained in discovery responses which he had verified on behalf of the corporate Plaintiffs. These issues are now before the Court in the form of Defendants' motions for summary judgment, to compel additional Rule 30(b)(6) deposition testimony, and for sanctions. For the reasons that follow, the motions will be granted in part and denied in part.

*207 II. BACKGROUND

On December 1, 2003, State Farm brought claims against Defendants for, inter alia, common-law fraud, statutory insurance fraud, and violations of the Racketeer Influenced Corrupt Organizations Act ("RICO"). On May 14, 2007, nearing the end of a discovery period protracted by numerous discovery disputes between the parties, the Court ordered the deposition of State Farm's Rule 30(b)(6) designee to take place.

A. *The Notices of Deposition*

Defendants served four notices of deposition on State Farm pursuant to Rule 30(b)(6). The notices, which are substantially identical, name State Farm as the deponent and attach an exhibit describing the topics of examination. The exhibit first limits the scope of the notice by listing the specific patients or billing numbers to which the deposition questions will pertain. Then, with respect to the bills and records pertaining to the listed patients or billing numbers, the exhibit provides 19 topics of examination. These include the following:

> (a) The reasons State Farm believes each or all bills are fraudulent;
>
> (b) The reasons State Farm believes that each patient did not receive all treatment billed for and noted in the records;
>
> (c) The reasons State Farm believes that treatment was not prescribed by a doctor;
>
> (d) The reasons State Farm believes that durable medical equipment that was given to the patient was not necessary;
>
> (e) The reasons State Farm believes that treatments were provided by unlicensed personnel;
>
> (f) The reasons State Farm believes treatment was provided without a doctor at the office and/or without doctor supervision;
>
> (g) The date of its mailing, if mailed, for each bill or claim which is allegedly fraudulent;
>
> (h) For each bill or claim which is allegedly fraudulent, who is the company and person(s), if known, who mailed each bill or claim....

Northeast Aqua Defts.' Mot. for Summ. J. (doc. no. 338), Ex. 3.

B. *The April 2, 2007 Order*

After receiving the first two notices of deposition, State Farm moved for a protective order. The motion sought an order limiting the deposition notices, arguing that they sought information that was duplicative of written discovery already produced and that they were unduly burdensome. *See* Plfs.' Mot. for Protective Order (doc. no. 291).

After an April 2, 2007 hearing on the record, the Court denied the motion for a protective order and ordered the parties to proceed with the Rule 30(b)(6) deposition. *See* Order, Apr. 2, 2007; Hr'g Tr. 28, Apr. 2, 2007. At the hearing, the Court provided detailed guidance to the parties:

> Now, oral discovery should not simply seek to obtain orally that which a party has produced in writing. So, we are not going to validate depositions in which somebody is asked to simply regurgitate that which has already been produced in writing. However, *a party who has received written production is entitled to explanations of the information produced, including how the information was gathered, by whom, whether or not the party adopts that information, where the information came from, whether there is some additional information.* So, for example, [counsel for State Farm] gave us a number of answers which seemed to be reasonable, but [counsel] is not State Farm. He is a lawyer, and I think the parties are entitled to have those answers over record, and also to be able to determine whether there is some additional information, or to explain the information that has been provided.
>
> Now, *in a case such as this, involving thousands of documents, particularly documents which are documents that reflect their business transactions, no witness or series of witnesses can know each one of the documents, but at least a business practice can be inquired into, and to what extent is the production consistent with *208 that business practice.* For example, dates on which mailings were made, it seems to me reasonable to ascertain what is State Farm's position concerning that. Is it the date in which the check that they issue is generated, or what is ... their view as to what that particular date is about.
>
> Now, State Farm is not required to deal with the [Rule 30(b)(6) deposition] *as if* it were interrogatories. That is, they can point to documents which contain the information, as long as [the designee] does so with some particularity. *He can't simply say well, well go and look at the depositions, all of the answers are there. But, he can point to prior interrogatories. He can point to prior depositions. He can point to checks in the spirit of providing guidance where the information may be sought.*
>
> So, we're trying to strike a balance between the right of the defendants to ascertain and determine the nature of the allegations that are made against them, and on the other hand, State Farm can't do the work of the defendants themselves. So, I think that we will proceed on that basis. We will go forward with the deposition of one or more [Rule 30(b)(6)] deponents, and the defendants are entitled to test the answers that they were provided. *Some of the answers may be by way of directing them to other documents. Some of the answers may be directing them to opinions of counsel. Some of their answers may be directing them to ... previously answered interrogatories, and some of them may be directing them to the claim file for that particular case, but at least they know where to go.... [D]efendants shouldn't be just left to roam through this discovery attempting to find that. So, either answers or a road map to where the answers lie, that's the bottom line for these questions.*

Hr'g Tr. 28-30. (emphases added). In short, the Court ordered the Rule 30(b)(6) deposition to proceed, required that the deponent provide at least a "road map" to navigate the large amount of written discovery produced, and allowed the deponent to answer questions either by providing a response or by directing defense counsel to documents already produced, interrogatories already answered, and opinions of counsel.

C. *Questions About Bowles's Preparation*

State Farm designated Austin Bowles as its Rule 30(b)(6) deponent. Bowles had been a State Farm employee for forty years, and served as Claims Team Manager for ten years. As Claims Team Manager, Bowles supervised a team of eight adjusters who adjusted claims for bodily injury and property damage, and investigated claims that were suspected to be fraudulent.

The deposition took place on June 6, 2007.[FN1] At the deposition, Bowles was questioned on his preparation activities:

> FN1. Defendant Mikhael Voloshen and counsel for Defendants Ruslana Voloshen and Northeast Aqua and Physical Therapy, Inc. attended the deposition. The remaining Defendants did not.

Q. Now, what have you done to prepare yourself for today's deposition?

A. Well, I reviewed the notice[s] and the exhibits attached to them, and I got together a couple of times with our counsel.

...

Q. How many times did you get together with him?

A. Two times prior to today.

Q. Two times prior to today. When was the first time?

A. About 2 or 3 weeks ago.

Q. How long was your meeting with him?

A. About 2 hours.

Q. And when was the second time?

A. Was that Friday? It was within the past-about a week ago.

Q. How long was your meeting with him then?

A. Several hours.

Q. Did you review any documents to prepare for today's deposition?

A. No.

*209 Q. And did you review the transcripts of any depositions to prepare for today's deposition?

A. No.

Q. Did you review the complaint to prepare for today's deposition?

A. No.

Q. Did you review any of State Farm's discovery responses to prepare for this deposition?

A. The actual responses themselves, no.

Bowles Dep. 27-28, June 6, 2007; *see also id.* at 29-30 (Bowles admitting that he had not reviewed any claim files relating to the patients and billing numbers listed in the notices of deposition); *id.* at 34-35 (Bowles admitting that he had not spoken to any State Farm employees that he supervised in preparation for the deposition).

Unsurprisingly, because his preparation activities were restricted to two meetings with counsel, Bowles could not state "any facts that support" State Farm's claims, other than those learned through "discussions with counsel." *Id.* at 158:21-159:20. Moreover, as discussed below, Bowles was instructed not to answer when asked about the information learned through these discussions with counsel. *See, e.g., id.* 111-12.

D. *Questions About Verification of Discovery Responses*

Bowles was also asked what measures he took to verify the truth of certain answers to interrogatories that he had signed on behalf of State Farm: [FN2]

> FN2. Although the deposition testimony refers generally to "discovery responses," without specifying what type of response, the parties' submissions suggest that the responses in question are answers to interrogatories.

Q. Now, you know that you have been asked to verify various discovery responses in this litigation, correct?

A. Yes.

Q. Our recollection is that you verified this one, although we can't find the verification, and it's my belief or recollection that you are the only person from State Farm who has verified discovery responses. So

my question to you after that is, do you recall seeing this document before today?

MR. GOLDBERG [counsel for State Farm]: If he recalls seeing this which is under cover April 17th, 2006? The discovery responses.

MR. MARKS [defense counsel]: The discovery responses with the spreadsheet attached.

MR. GOLDBERG: Do you remember one way or the other whether you ever saw this?

A. I don't remember.

Q. In the April of 2006 time frame, did you do anything yourself to determine whether this response was correct?

A. I don't even know if I saw it.

....

Q. Have you yourself ever done anything to determine whether that spreadsheet is correct?

A. No.

Id. at 75:4-76:21.

E. *Questions About Facts Supporting State Farm's Claims*

Defense counsel asked Bowles numerous questions seeking testimony regarding the facts underlying each of the essential elements of State Farm's claims. The answer to the vast majority of these questions, however, was that Bowles did not have knowledge of such facts, or that Bowles's knowledge of such facts was limited to discussions with counsel.

For example, allegations underlying State Farm's fraud claims include that Defendants made misrepresentations to State Farm by submitting bills for medical treatment that was never actually provided, that was provided by unlicensed personnel, that was not necessary, or that was provided without doctor supervision. *See* Third Am. Compl.¶¶ 28-31, 36, 40, 46. At the deposition, defense counsel sought testimony to support these alleged misrepresentations from Bowles as to the individual insureds named ***210** in the complaint and listed in Defendants' notices of deposition. At first, defense counsel attempted to proceed insured-by-insured:

Q. [I]n the Notice of Deposition, we asked the reasons State Farm believes that each patient did not receive all treatment billed for and noted in the records. What facts can you tell me that Sabir Abdoullaev did not receive all treatment billed for and noted in the records?

A. Other than discussion with counsel, none.

....

Q. [T]he third topic in this Notice of Deposition is the reasons State Farm believes that treatment was not prescribed by a doctor. Can you tell me what facts you have that treatments for Sabir Abdoullaev were not prescribed by a doctor?

A. Other than discussion with counsel, none.

....

Q. The fourth topic of our deposition, on this notice, is the reason State Farm believes that durable medical equipment that was given to the patient was not necessary. Tell me all the facts that you have that durable medical equipment that was given to Sabir Abdoullaev was not necessary.

A. Other than discussing with counsel, none.

Q. Nothing. Okay. Now, it says, the next topic is the reasons State Farm believes the treatments were provided by unlicensed personnel?

A. Other than discussion with counsel, none.

....

Q. None. The next topic in this notice is the reason State Farm believes treatment was provided without a doctor at the office and/or without doctor supervision. Tell me all facts that you have that treatment was provided to Sabir Abdoullaev without a doctor at the office and/or without doctor supervision?

A. Other than discussion with counsel, none.

Bowles Dep. 143:14-146:1.

Noticing the obvious pattern of responses, defense counsel eventually cut to the chase and sought testimony as to all of the patients named in the complaint:

> Q. [In] regard to all 13 of these people, can you tell me any facts that support your assertion that they didn't receive all treatment billed for and noted in the records?
>
> A. Other than discussion with counsel, no.
>
> Q. [For] all 13 people, can you tell me any facts that you have that such treatment was not prescribed by a doctor?
>
> A. Other than discussion with counsel, no.
>
> Q. [For] all 13 patients, can you tell me the facts that support the assertion that durable medical equipment that was given to the patient was not necessary?
>
> A. Other than discussion with counsel, no.
>
> Q. [For] all 13 claimants, can you tell me any facts that State Farm believes that treatment was provided by unlicensed personnel?
>
> A. Other than discussion with counsel, no.
>
> Q. [For] all 13 claims, can you tell me the reasons that State Farm believes treatment was provided ... without doctor supervision?
>
> A. Aside from discussion with counsel, no.

Id. at 158:21-159:20.

F. *Instructions Not to Answer*

The pattern of questions and responses continued. Bowles repeatedly testified that he knew no facts in support of State Farm's claims other than those learned through discussions with counsel. When asked about these facts learned from counsel, however, counsel for State Farm instructed Bowles not to answer:

> Q. Can you tell me any facts that support the assertion that treatment was not provided by licensed personnel?
>
> *211 A. Only discussion with counsel.
>
> Q. And who would that counsel be?
>
> A. Mr. Goldberg or one of his associates.
>
> Q. But as we sit here today, you can't tell me any facts that support the assertion that treatment was provided by an unlicensed personnel, can you?
>
> A. Only through discussion with our counsel.
>
> Q. Do you have a recollection that you were actually told facts that treatment was provided by unlicensed personnel?
>
> A. By counsel.
>
> MR. GOLDBERG: Told that by counsel? I'm going to direct him not to answer concerning any discussions he had with counsel beyond what he's told you.

Id. at 111-12. This exchange characterized the bulk of Bowles's deposition. Throughout, defense counsel attempted to learn from Bowles the "information known or reasonably available to [State Farm]" supporting State Farm's claims in this litigation. Fed.R.Civ.P. 30(b)(6). The only thing Bowles did in preparation for the deposition was consult with counsel for State Farm. Predictably, therefore, Bowles's response to nearly all of defense counsel's questions was that he had no information supporting State Farm's claims, other than information learned through discussions with counsel, which he was instructed by counsel not to reveal. In short, Bowles revealed almost no information during his deposition.

G. *Procedural Posture*

Based on Bowles's testimony, Defendants have moved for summary judgment.[FN3] Defendants argue that Bowles has admitted that State Farm has no knowledge of facts to support the essential elements of its claims, and because Bowles's testimony is binding on State Farm under Rule 30(b)(6), State Farm therefore has admitted that it cannot prove the essential elements of its claims.

FN3. Defendants Ruslana Voloshen and Northeast Aqua and Physical Therapy, Inc. have filed a motion for summary judgment, to compel additional deposition testimony, and for sanctions (doc. no. 338). Defendants Guennadi Lioubavine and Roman Lubavin (doc. no. 337), and Defendant Mikhael Voloshen (doc. no. 340) have joined in the motion.

To the extent that summary judgment is not granted as to all claims, Defendants also seek to compel additional Rule 30(b)(6) deposition testimony, pursuant to Federal Rule of Civil Procedure 37(a)(1), arguing that Bowles was improperly instructed not to answer questions seeking information learned through discussions with counsel.

Finally, Defendants request that sanctions be imposed upon State Farm, pursuant to Federal Rules of Civil Procedure 26(g), 37(b), and 37(d), arguing that State Farm inadequately prepared Bowles for the deposition and that Bowles improperly verified certain discovery responses.[FN4]

FN4. The Federal Rules of Civil Procedure were amended, effective December 1, 2007. *See* United States Courts: Federal Rulemaking, http:// www. uscourts. gov/ rules/ index 2. html (last accessed Feb. 28, 2008). The conduct at issue here occurred before the effective date of the amended rules. As relevant here, however, the amendment to the rules is limited to the restyling and renumbering of certain rules. Therefore, the Court will cite to the amended rules.

III. MOTIONS FOR SUMMARY JUDGMENT

A. *Legal Standard*

A court must grant summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). A fact is "material" if its existence or non-existence would affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue of fact is "genuine" when there is sufficient evidence from which a reasonable jury could find in favor of the non-moving party regarding the existence of that fact. *Id.* at 248-49, 106 S.Ct. 2505. "In considering the evidence, the court should draw all reasonable inferences against the moving party." *212 *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 238 (3d Cir.2007).

The party seeking summary judgment bears the initial burden of identifying "the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the movant has done so, the burden shifts to the non-movant, who "may not rely merely on allegations or denials in its own pleading," but must "by affidavits or as otherwise provided in this rule ... set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party." Fed.R.Civ.P. 56(e)(2).

B. *Discussion*

Defendants contend that summary judgment is warranted because Bowles's Rule 30(b)(6) deposition testimony constitutes a binding and irrebuttable admission by State Farm that it has no evidence with which to support the essential elements of its claims. This argument fundamentally misapprehends Rule 30(b)(6).

1. *The "binding" effect of Rule 30(b)(6) testimony*

[1] Rule 30(b)(6) provides, in relevant part:

> In its notice or subpoena, a party may name as the deponent a ... corporation ... and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more ... persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify.... The persons designated must testify about information known or reasonably available to the organization.

Fed.R.Civ.P. 30(b)(6). In other words, the testimony of the Rule 30(b)(6) designee is deemed to be the testimony of the corporation itself.

In prior decisions, judges of this Court have elaborated on this concept by stating that "[t]he purpose behind Rule 30(b)(6) is to create testimony that will bind the corporation." *Resolution Tr. Corp. v. Farmer*, No. 92-3310, 1994 WL 317458, at *1 (E.D.Pa. June 24, 1994);

Ierardi v. Lorillard, Inc., No. 90-7049, 1991 WL 158911, at *2 (E.D.Pa. Aug.13, 1991) ("Admissions made by the [Rule 30(b)(6)] deponent will be binding on his principal."). However, the use of the word "binding" in the opinions has caused some confusion, prompting litigants to argue, as Defendants do here, that Rule 30(b)(6) testimony is something akin to a judicial admission-a statement that conclusively establishes a fact and estops an opponent from controverting the statement with any other evidence.

This is not quite the case. Although the Third Circuit has yet to address the issue, the better rule is that "the testimony of a Rule 30(b)(6) representative, although admissible against the party that designates the representative, is not a judicial admission absolutely binding on that party." 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2103 (Supp.2007); *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir.2001) ("[T]estimony given at a Rule 30(b)(6) deposition is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes."(quotation omitted)); *R & B Appliance Parts, Inc. v. Amana Co.*, 258 F.3d 783, 786 (8th Cir.2001); *Diamond Triumph Auto Glass, Inc. v. Safelite Glass Corp.*, 441 F.Supp.2d 695, 723 n. 17 (M.D.Pa.2006); *Indus. Hard Chrome, Ltd. v. Hetran, Inc.*, 92 F.Supp.2d 786, 791 (N.D.Ill.2000); *A & E Prods. Group, L.P. v. Mainetti USA Inc.*, No. 01-10820, 2004 WL 345841, at *7 (S.D.N.Y. Feb.25, 2004); *Media Servs. Group, Inc. v. Lesso, Inc.*, 45 F.Supp.2d 1237, 1254 (D.Kan.1999); *W.R. Grace & Co. v. Viskase Corp.*, No. 90-5383, 1991 WL 211647, at *2 (N.D.Ill. Oct.15, 1991).

This does not mean, however, that the party may retract prior testimony with impunity. In some cases "where the nonmovant in a motion for summary judgment submits an affidavit which directly contradicts an earlier [Rule 30(b)(6)] deposition and the movant relied upon and based its motion on the prior ***213** deposition, courts [have] disregard[ed] the later affidavit." *Hyde v. Stanley Tools*, 107 F.Supp.2d 992, 993 (E.D.La.2000); *see, e.g., Rainey v. Am. Forest & Paper Ass'n, Inc.*, 26 F.Supp.2d 82, 95 (D.D.C.1998) ("[T]he Kurtz affidavit's quantitative assertion works a substantial revision of defendant's legal and factual positions. This eleventh hour alteration is inconsistent with Rule 30(b)(6), and is precluded by it."); *Carausta Indus., Inc. v. N. Ga. Converting, Inc.*, No. 04-187, 2006 WL 3751453, at *7 (W.D.N.C. Dec.19, 2006); *Ierardi*, 1991 WL 158911, at *3; *see also Joseph v. Hess Oil*, 867 F.2d 179, 183 (3d Cir.1989) (non-30(b)(6) context) ("In cases where a party has filed an affidavit which contradicts earlier deposition testimony, summary judgment has been granted where the court found that the contradictory affidavit was filed in order to defeat the summary judgment motion."). Yet, where the affidavit "is accompanied by a reasonable explanation" of why it was not offered earlier, courts have "allowed a contradictory or inconsistent affidavit to nonetheless be admitted" to supplement the earlier-submitted Rule 30(b)(6) testimony. *Hyde*, 107 F.Supp.2d at 993.

2. *Bowles's Rule 30(b)(6) testimony*

[2] In this case, State Farm's allegations of fraud are premised on a series of alleged misrepresentations by Defendants: Defendants billed State Farm for treatment that was not rendered, not necessary, or administered by unlicensed personnel without doctor supervision. At the Rule 30(b)(6) deposition, defense counsel repeatedly asked Bowles (on behalf of State Farm) whether he could state "any facts that support [these] assertion[s]." Bowles Dep. 158:21-159:20. In response to each question, Bowles (on behalf of State Farm) stated: "Other than discussion with counsel, no." *Id.*

Relying on cases where a later-filed explanatory affidavit contradicting Rule 30(b)(6) deposition testimony has been disallowed, Defendants ask the Court to disregard *all* evidence contradicting Bowles's testimony, regardless of when acquired, how weighty, and how meritorious the explanation of why it was not offered earlier. In effect, Defendants seek judgment as a matter of law based on Bowles's testimony. Such a judgment is unwarranted, however, as it would elevate Rule 30(b)(6) deposition testimony into an irrebuttable judicial admission.[FN5]

> FN5. Had Bowles's responses been admissions under Federal Rule of Civil Procedure 36, they may well have been fatal to State Farm's claims. *See*Fed.R.Civ.P. 36(b) ("A matter admitted under this rule is conclusively established...."). Even under Rule 36, however, "the court may permit withdrawal or amendment [of a judicial admission] if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits." Fed.R.Civ.P. 36(b).

At best, Defendants' identification of Bowles's testimony

shifts the burden onto State Farm, requiring it to look beyond the pleadings and "set out specific facts showing a genuine issue for trial." Fed.R.Civ.P. 56(e)(2). State Farm has done so by pointing to thousands of documents, identified in its answers to interrogatories, that support the allegations in its complaint. Defendants do not dispute the validity of these documents; rather, Defendants' motions for summary judgment are based solely on the theory that Bowles's Rule 30(b)(6) testimony constitutes a judicial admission that is dispositive, *regardless* of any other admissible evidence. Accordingly, because genuine issues of material fact exist, and, in any event, Defendants have not shown that they are entitled to judgment as a matter of law, the motions must be denied.[FN6]

> FN6. The testimony of Bowles (on behalf of State Farm) might nonetheless be damaging to State Farm's position at trial. *See United States v. Taylor*, 166 F.R.D. 356, 362 (M.D.N.C.1996) ("[I]f a party states it has no knowledge or position as to a set of alleged facts or area of inquiry at a Rule 30(b)(6) deposition, it cannot argue for a contrary position at trial without introducing evidence explaining the reasons for the change."); *Ierardi*, 1991 WL 158911, at *3 ("If the designee testifies that H & V does not know the answer to plaintiffs' questions, H & V will not be allowed effectively to change its answer by introducing evidence at trial. The very purpose of discovery is to avoid trial by ambush."(quotations omitted)). For example, if State Farm seeks to contradict its Rule 30(b)(6) testimony at trial with new evidence, and it offers no valid explanation why the earlier testimony should be amended, the Court may preclude State Farm from presenting such new evidence, or permit the new evidence and allow State Farm's explanation to be submitted to the jury along with the earlier testimony. *See*Fed.R.Evid. 403 (providing for exclusion of evidence if "its probative value is substantially outweighed by the danger of unfair prejudice ... or by considerations of undue delay").

*214 IV. MOTION TO COMPEL DEPOSITION TESTIMONY

In the event that summary judgment as to all claims is not granted, Defendants move to compel State Farm to provide additional Rule 30(b)(6) deposition testimony, arguing that Bowles was improperly instructed not to answer questions seeking information that he learned through discussions with counsel. State Farm argues that all information learned by Bowles through discussions with counsel constitutes attorney work product and was thus properly not disclosed.

A. *Legal Standard*

1. *Rule 37(a) motions to compel*

If "a deponent fails to answer a question asked under Rule 30," or provides an answer that is "evasive or incomplete," then a motion to compel the deposition testimony may be filed. Fed.R.Civ.P. 37(a)(3)(B)(i), (a)(4). "If the motion is granted ... the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed.R.Civ.P. 37(a)(5)(A).

2. *Rule 26(b)(3)(A) and protection of attorney work product*

Attorney work product protection extends to materials that are "prepared in anticipation of litigation or for trial." Fed.R.Civ.P. 26(b)(3)(A). The Court may order disclosure of such materials if a party shows "that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed.R.Civ.P. 26(b)(3)(A)(ii). However, even when disclosure of work product is ordered, the Court must "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney ... concerning the litigation." Fed.R.Civ.P. 26(b)(3)(B).

B. *Discussion*

[3] This case exemplifies the tension between the obligations of Rule 30(b)(6) and the protections of the work product doctrine as codified in Rule 26(b)(3). On one hand, Rule 30(b)(6) requires a corporate party to prepare a witness to testify to "information known or reasonably available to" the corporation; a common means of such preparation is for the witness to engage in discussions with counsel. On the other hand, the work product doctrine protects the "mental impressions, conclusions, opinions, or legal theories" of counsel from

disclosure. In fact, the mental impressions of counsel are "core" or "opinion" work product, which "is discoverable only upon a showing of rare and exceptional circumstances." *In re Cendant Corp. Secs. Litig.*, 343 F.3d 658, 663 (3d Cir.2003).

[4] State Farm argues that counsel properly instructed Bowles not to disclose *any* facts learned from discussions with counsel in preparation for the Rule 30(b)(6) deposition because such facts constitute attorney work product and are thus protected from disclosure. State Farm is incorrect:

> [T]he courts have consistently held that the work product concept furnishes no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party's lawyer has learned, or the person from whom he has learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery.

8 Wright et al., *supra*, § 2023; *In re Linerboard Antitrust Litig.*, 237 F.R.D. 373, 384 (E.D.Pa.2006) (" '[T]here is simply nothing wrong with asking for facts from a deponent even though those facts may have been communicated to the deponent by the deponent's counsel.' " (quoting *Protective Nat'l Ins. Co. v. Commonwealth Ins. Co.*, 137 F.R.D. 267, 280 (D.Neb.1989))).

The *Protective* case cited with approval by Judge DuBois in *Linerboard* is on all fours *215 with the instant case. In *Protective*, as here, a Rule 30(b)(6) witness was prepared for deposition through discussions with counsel. 137 F.R.D. at 271-72. When asked whether she had knowledge of the facts underlying the corporate party's claim, the witness replied that she had no knowledge other than facts learned through her discussions with counsel. *Id.* The deposing attorney then specifically asked for those facts: "I'm not asking you to relate the opinion that your counsel gave you. I am asking you for the facts that support this allegation." *Id.* at 273. The defending attorney instructed the witness not to answer and sought "clarification" from the Court. *Id.* The Court's clarification is worth quoting in full:

> It is important to distinguish between facts learned by a lawyer, a memorandum or document containing those facts prepared by the lawyer, and the lawyer's mental impressions of the facts. The facts are discoverable if relevant. The document prepared by the lawyer stating the facts is not discoverable absent a showing required by Federal Rule of Civil Procedure 26(b)(3). Mental impressions of the lawyer regarding the facts enjoy nearly absolute immunity.... The problem in this type of situation is determining the degree to which a particular deposition question elicits the mental impressions of the attorney who communicated a fact to the deponent. In a sense, any fact that a witness learns from his or her attorney presumably reveals in some degree the attorney's mental impressions of the case, or, presuming rationality, the attorney would not have communicated the fact to the client. As I have pointed out previously, it is clearly not the law that a fact is not discoverable because a lawyer communicated the fact to the client.

Id. at 278 n. 1, 281.

Therefore, the vast majority of State Farm's instructions to Bowles not to respond were improper. For the most part, the questions asked by defense counsel did not demand the "mental impressions, conclusions, opinions, or legal theories of [State Farm's] attorney" protected by Rule 26(b)(3), but rather sought the "information known or reasonably available to [State Farm]," as to which Bowles was *required* to testify by Rule 30(b)(6). Contrary to State Farm's contention, the mere fact that counsel for State Farm may have provided such information to the witness in preparation for the Rule 30(b)(6) deposition does not convert the information into attorney work product.[FN7] Were State Farm's logic followed to its full extent, anytime an attorney is involved in preparing a Rule 30(b)(6) witness, such preparation would be futile because the witness would inevitably be precluded from testifying to anything learned from the attorney. Were this the rule, every Rule 30(b)(6) deposition in which an attorney was involved in preparing the witness would be doomed from the start.

> FN7. State Farm puzzlingly relies on *Linerboard* for this proposition. However, as noted above, the *Linerboard* court quoted *Protective* with approval when it stated: " '[T]here is simply nothing wrong with asking for facts from a deponent even though those facts may have been communicated to the deponent by the deponent's counsel.' " 237 F.R.D. at 384 (quoting 137 F.R.D. at 280). Moreover, the facts of *Linerboard* are markedly different from the facts here. The Court considered whether a Rule 30(b)(6) witness should be required to speak with in-house counsel in order to glean the in-house counsel's recollections, which were not

> memorialized anywhere, of an internal investigation. *See id.* at 379. The Court did not require such consultation, holding that "any facts learned during [the in-house counsel's] internal investigation [are] so intertwined with mental impressions that [they] amount to opinion work product." *Id.* The Court made sure to note, however, that it was "not rul[ing] that facts within counsel's knowledge are never discoverable. To the contrary, *the Court's holding is limited to the circumstances of this case in which there has been extensive discovery of the evidence accumulated in the internal investigation.*" *Id.* (emphasis added). Because no internal investigation has occurred here and because the facts of this case are nearly identical to those in *Protective,Linerboard* is inapposite here.

Therefore, the motion to compel will be granted. The Rule 30(b)(6) deposition of Bowles, or another suitable witness, shall resume in accordance with the order of this Court.[FN8] To the extent that defense counsel's **216* questions seek relevant, non-privileged facts learned from discussions with counsel, and do not seek counsel for State Farm's "mental impressions, conclusions, opinions, or legal theories," those questions must be answered. The topics in Defendants' notices of deposition provide examples of proper and improper questions. For example, a question seeking the "reasons State Farm believes each or all bills are fraudulent" likely seeks counsel's "legal theories," and thus is improper. In contrast, a question seeking the "reasons State Farm believes that each patient did not receive all treatment billed for and noted in the records" is likely proper, as it seeks only facts reasonably available to State Farm, and not counsel's mental impressions.[FN9]

> FN8. Because the Court will impose sanctions pursuant to Rule 37(b), including attorney's fees, the Court need not impose sanctions pursuant to Rule 37(a)(5)(A) here.

> FN9. The parties can benefit from the guidance offered by the Court in *Protective:*
>
> > I wish to make the following observation to guide counsel. First, as I have said, Ms. Murphy has an obligation to be prepared as a Rule 30(b)(6) spokesperson. Second, Ms. Murphy, to the extent that she is able, must recite the facts upon which Commonwealth relied to support the allegations of its answer and counterclaim which are not purely legal, even though those facts may have been provided to her or her employer by Commonwealth's lawyers. Third, Protective is directed, when formulating questions to Ms. Murphy, to avoid asking questions of Ms. Murphy which are intended to elicit Commonwealth's counsel's advice, Commonwealth's counsel's view as to the significance or lack thereof of particular facts, or any other matter that reveals Commonwealth's counsel's mental impressions concerning this case.
>
> 137 F.R.D. at 283.

V. SANCTIONS: FAILURE TO PREPARE RULE 30(B)(6) WITNESS

Defendants seek sanctions under Federal Rule of Civil Procedure 37, arguing that Bowles was so unprepared for the Rule 30(b)(6) deposition that his testimony was tantamount to a failure to appear for a deposition under Rule 37(d). In addition, because the Rule 30(b)(6) deposition was ordered by the Court, Defendants seek sanctions for disobedience of a court order under Rule 37(b) as well.

A. *Legal standard*

1. *Duty to prepare under Rule 30(b)(6)*

As discussed above, Federal Rule of Civil Procedure 30(b)(6) sets forth the manner in which a corporation may be deposed. First, the party seeking to depose the corporation must "[i]n its notice or subpoena ... describe with reasonable particularity the matters for examination." Fed.R.Civ.P. 30(b)(6). Once the corporation receives such particularized notice, it must "designate one or more ... persons who ... must testify about information known or reasonably available to the organization." *Id.*

[5] A Rule 30(b)(6) designee "is not simply testifying about matters within his or her personal knowledge, but rather is speaking for the corporation about matters to which the corporation has reasonable access." *Linerboard,* 237 F.R.D. at 382 (quotation omitted).

Therefore, a corollary to the corporation's duty to designate a Rule 30(b)(6) witness is that the corporation must "prepare its designee to be able to give binding answers on its behalf ... [and] perform a reasonable inquiry for information" that is noticed and reasonably available to it. *Id.* (quotation omitted).

Therefore, if a Rule 30(b)(6) witness is asked a question concerning a subject that was not noticed for deposition or that seeks information not reasonably available to the corporation, the witness need not answer the question. Moreover, certain questions may seek details so minute that a witness could not reasonably be expected to answer them. *See, e.g., United States ex. rel. Fago v. M & T Mortgage Corp.*, 235 F.R.D. 11, 25 (D.D.C.2006) ("Without a photographic memory, [the witness] could not reasonably be expected to testify as to the loan numbers ... for sixty-three different loans."). However, if a Rule 30(b)(6) witness is asked a question concerning a subject that was noticed with particularity, is seeking information that is reasonably available to the corporation, and is not unreasonably obscure, and the witness is unprepared to answer the question, the purpose of the deposition is completely undermined. *See Constellation NewEnergy, Inc. v. Powerweb, Inc.*, No. 02-2733, 2004 WL 1784373, at *5 (E.D.Pa. Aug.10, 2004) ("In reality if a Rule 30(b)(6) witness is unable to give useful *217 information he is no more present for the deposition than would be a deponent who physically appears for the deposition but sleeps through it.").

2. *Sanctions pursuant to Rule 37(b) and (d)*

Because the Rule 30(b)(6) deposition in this case was ordered by the Court, both section (b) and section (d) of Rule 37 of the Federal Rules of Civil Procedure apply.

Rule 37(b) permits the imposition of sanctions upon a person who disobeys an order of the Court: "If a party or ... a witness designated under Rule 30(b)(6)... fails to obey an order to provide or permit discovery ... the court where the action is pending may issue further just orders." Fed.R.Civ.P. 37(b)(2)(A). The rule also provides a non-exhaustive list of available sanctions, such as precluding a party from introducing certain matters into evidence, staying proceedings until the order is obeyed, dismissing the action in whole or in part, rendering a default judgment, and treating the failure to obey an order as contempt of court. Fed.R.Civ.P. 37(b)(2)(A)(i)-(vi). The Court also "must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure," unless "circumstances make an award of expenses unjust." Fed.R.Civ.P. 37(b)(2)(C).

Rule 37(d) allows the Court to "order sanctions" if "a party or ... a person designated under Rule 30(b)(6)... fails, after being served with proper notice, to appear for that person's deposition." Fed.R.Civ.P. 37(d)(1)(A)(i). A failure to appear "is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c)." Fed.R.Civ.P. 37(d)(2). Available sanctions include "any of the orders listed in Rule 37(b)(2)(A)(i)-(vi)," and, as above, the Court "must" require "the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure," unless "circumstances make an award of expenses unjust." Fed.R.Civ.P. 37(d)(3).

Although the application of Rule 37(d) is usually limited to an actual failure to appear for a deposition-rather than an appearance by an unprepared deponent-the Third Circuit has made an exception in the context of Rule 30(b)(6) depositions. *See Black Horse Lane Assocs., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 302-03 (3d Cir.2000). In other words, "when a witness is designated by a corporate party to speak on its behalf pursuant to Rule 30(b)(6), producing an unprepared witness is tantamount to a failure to appear that is sanctionable under Rule 37(d)." *Id.* at 304.

B. *Discussion*

At the core of this dispute is State Farm's failure to adequately prepare its Rule 30(b)(6) witness for deposition. There is no question that State Farm's limited efforts to prepare Bowles for the deposition fell far short of the requirements of Rule 30(b)(6).

1. *Violation of Rule 37(b)(2)(A)*

[6] The Court provided State Farm with clear guidelines at the April 2, 2007 hearing as to the level of preparation required in this case. The Court noted that this case involves "thousands of documents," and that no witness could be expected to know all of the documents. Instead of memorizing the contents of thousands of documents, the Court allowed the Rule 30(b)(6) witness to respond to questions by "point[ing] to documents which contain the information, as long as he does so with some

particularity." Specifically:

> He can't simply say well, well go and look at the depositions, all of the answers are there. But, he can point to prior interrogatories. He can point to prior depositions. He can point to checks in the spirit of providing guidance where the information may be sought.... Some of the answers may be by way of directing them to other documents. Some of the answers may be directing them to opinions of counsel. Some of their answers may be directing them to ... previously answered interrogatories, and some of them may be directing them to the claim file for that particular *218 case, but at least they know where to go.... [D]efendants shouldn't be just left to roam through this discovery attempting to find that.

Hr'g Tr. 28-30.

State Farm failed to heed the Court's guidance, and as a result, its preparation of Bowles was grossly inadequate, especially in light of the document-intensive nature of this litigation. Bowles's preparation was limited to two meetings with counsel, together lasting only several hours. Bowles reviewed *no* documents other than the notices of deposition and spoke to no other State Farm employees concerning the litigation other than asking a single employee if he recognized an exhibit to one of the notices of deposition. *Id.* at 34:19-35:24. Even if Bowles was relying on a necessarily brief summary given by counsel, it is unclear how he could testify as to State Farm's business practices having failed to confer with any State Farm employees. It is also unclear how Bowles could point to answers to interrogatories, claim files, checks, or prior depositions if he did not review any of these materials. State Farm's assertion that two meetings with counsel effectively prepared Bowles to answer questions as to thousands of documents strains credulity. The Court is left with the impression that State Farm took neither this Court's order nor the requirements of Rule 30(b)(6) seriously. Accordingly, sanctions are warranted.[FN10]

> FN10. State Farm continues to argue that Defendants' notices of deposition are overbroad, vague, and unduly burdensome. The Court has already ruled on this issue by denying State Farm's motion for protective order and providing guidance at the April 2, 2007 hearing in order to focus the Rule 30(b)(6) deposition. Therefore, as to Rule 37(b), the scope of the deposition notices is not relevant to whether State Farm disobeyed the Court's April 2, 2007 order. Additionally, as to Rule 37(d), a failure to appear "is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c)."Fed.R.Civ.P. 37(d)(2), and State Farm's motion for protective order was denied well before the Rule 30(b)(6) deposition took place.

In failing to prepare Bowles for the Rule 30(b)(6) deposition, State Farm "fail[ed] to obey an order to provide or permit discovery," in violation of Rule 37(b)(2)(A). The Court may thus issue further "just orders" and must order State Farm to pay the reasonable expenses, including attorney's fees, caused by the failure, unless "circumstances make an award of expenses unjust." Fed.R.Civ.P. 37(b)(2)(C).

2. *Determination of an appropriate sanction*

[7] Defendants argue that dismissal of State Farm's claims is a proper sanction in this case. Although the Court is authorized by Rule 37(b) to dismiss State Farm's claims, it must first apply the factors set forth in *Poulis v. State Farm Fire and Casualty Co.*, 747 F.2d 863 (3d Cir.1984):

> (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused ...; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of alternative sanctions; and (6) the meritoriousness of the claim or defense.

Id. at 868.

Defendants point to *Hoxworth v. Blinder, Robinson and Co.*, 980 F.2d 912 (3d Cir.1992), where the Third Circuit applied the *Poulis* factors to uphold a district court's issuance of a default judgment as a sanction. *Hoxworth* is instructive, although distinguishable because the failure to adequately prepare a Rule 30(b)(6) witness was only one of many discovery abuses in that case, including the failure to file a pretrial memorandum, failure to appear at trial, and lying to the Court about the reasons for failing to appear. *Id.* at 917-18. As relevant here, the *Hoxworth* Court found that the corporate defendant was personally responsible for the failure to select an informed Rule 30(b)(6) witness, as it had four days before designating a witness "fired the only other person who could have shed

some light on the facts." *Id.* at 920. The remaining discussion of the *Poulis* factors concerned unrelated discovery abuses which are not pertinent here. *Id.* at 920-22.

*219 [8] In this case, State Farm bears responsibility for the failure to prepare Bowles as required by Rule 30(b)(6), in that it did not require him to confer with employees, review pertinent documents, or at least have more extensive meetings with counsel. In addition, as discussed above, State Farm's failure to prepare Bowles was willful. *See supra* Part V.B.1. Nonetheless, the remaining *Poulis* factors suggest that dismissal of State Farm's claims is too harsh a sanction here. Defendants have incurred prejudice in that they have expended time and resources in attempting to complete this deposition, but such prejudice is properly addressed with monetary sanctions. Any substantive prejudice that Defendants may have suffered can be cured by ordering another Rule 30(b)(6) deposition. Moreover, as discussed above, State Farm may yet be precluded at trial from introducing eleventh-hour evidence in an attempt to contradict its Rule 30(b)(6) deposition testimony. *See supra* note 4. As to the remaining factors, all parties have demonstrated a history of dilatoriness in this case, and no showing has been made that State Farm's claims lack merit.

Accordingly, monetary sanctions will be imposed on State Farm pursuant to Rule 37(b)(2)(C) because no circumstances exist that would make such an award unjust.[FN11]

> FN11. The amount of the sanctions and the timing of payment will be decided after a hearing to be scheduled at a later date. In addition, because the Court has found that State Farm violated Rule 37(b)(2)(A), consideration of whether State Farm failed to appear for the deposition in violation of Rule 37(d) is not necessary, as the two subsections provide for identical sanctions. *See*Fed.R.Civ.P. 37(d)(3).

VI. SANCTIONS: VERIFICATION OF DISCOVERY RESPONSES

Based on Bowles's allegedly improper verification of certain discovery responses, Defendants move for sanctions pursuant to Federal Rules of Civil Procedure 26(g) and 37(d). The parties' confusion as to the obligations of a corporate party under Rules 26, 33, 34, and 37, and the sanctions flowing from each begs some clarification. Therefore, in addressing the instant motion, the Court will also address the applicability of each of the above-mentioned rules.

A. *Rule 26(g)*

Federal Rule of Civil Procedure 26(g) requires all discovery responses to be "signed by at least one attorney of record in the attorney's own name-or by the party personally, if unrepresented." Fed.R.Civ.P. 26(g)(1). By signing the discovery response, the attorney or unrepresented party "certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry," the discovery response is not frivolous, not interposed for an improper purpose, not unreasonable or unduly burdensome, and consistent with the Federal Rules of Civil Procedure. *Id.*

In addition, the rule provides for sanctions in the event of an improper certification. *See*Fed.R.Civ.P. 26(g)(3); *see also Project 74 Allentown, Inc. v. Frost,* 143 F.R.D. 77, 84 (E.D.Pa.1992) (holding that sanctions may be imposed "when the signing of the response was objectively unreasonable under the circumstances").

[9] Here, Defendants argue that Rule 26(g) sanctions must be imposed because Bowles allegedly did not conduct a reasonable inquiry before "verif[ying] [certain] discovery responses under penalty of perjury."Northeast Aqua Defts.' Mot. for Summ. J. 19. Specifically, Bowles testified at the Rule 30(b)(6) deposition that he was asked to "verify various discovery responses in this litigation," and when asked whether he could recall "doing anything [him]self to determine whether [the] response[s] [were] correct," Bowles said: "I don't remember." Bowles Dep. 75-76.[FN12] Defendants confuse two distinct*220 concepts under the Federal Rules of Civil Procedure: certification and verification. Rule 26(g) governs only the certification of discovery responses:

> FN12. Defendants have not attached to their motions these "discovery responses" in their entirety, attaching instead a ten-page excerpt of one of the responses. Therefore, as discussed above, the Court cannot say with certainty what type of discovery responses are at issue, although the parties' submissions suggest that they are answers to interrogatories. *See supra* note 2. Moreover, none of the attached excerpts includes a signature page, and thus the Court cannot confirm whether and in what manner Bowles

> "verified" the responses or whether the responses were certified by counsel.

Rule 26(g) does not require the signing attorney to certify the truthfulness of the client's factual responses to a discovery request. Rather, the signature certifies that the lawyer has made a reasonable effort to assure that the client has provided all the information and documents available to him that are responsive to the discovery demand. Thus, the lawyer's certification under Rule 26(g) should be distinguished from other signature requirements in the rules, such as those in Rules 30(e) and 33.
Fed.R.Civ.P. 26 committee's note (amended 1983). Therefore, Rule 26(g) only governs certification, and cannot be the basis for sanctioning an allegedly improper verification. Moreover, the certification requirements of Rule 26(g) apply only to an "attorney of record" or a "party ... if unrepresented." *Id.* Bowles is neither: he is an employee and corporate designee of a represented party in this litigation, State Farm.[FN13]

> FN13. Although the Third Circuit has not yet interpreted Rule 26(g)(1), reading Rule 26(g)(1) to apply only to attorneys and unrepresented parties accords with both the plain language of the rule and the limited case law on point in this circuit. *See Project 74*, 143 F.R.D. at 84 (applying Rule 26(g) to attorney's conduct); *Leonard v. Univ. of Del.*, No. 96-360, 1997 WL 158280, at *6 (D.Del. Mar.20, 1997) (same). Defendants point to no case in this circuit applying Rule 26(g) to the conduct of a *represented* party or an employee or corporate designee thereof, and this Court finds none. Defendants rely on *United Missouri Bank of Kansas City, N.A. v. Bank of New York*, 723 F.Supp. 408 (W.D.Mo.1989), *abrogated on other grounds by Lakin v. Prudential Secs., Inc.*, 348 F.3d 704 (8th Cir.2003). In *United Missouri Bank*, the court applied Rule 26(g) directly to a party:
>
> > The Court notes that defendant's counsel did not certify defendant's responses to plaintiff's interrogatories as required by Rule 26(g). However, this does not prevent the Court from imposing sanctions upon defendant, The Bank of New York, because it certified its initial responses to plaintiff's interrogatories when no objective basis existed for believing in the truth and accuracy of those responses.
>
> *Id.* at 416. The Court in *United Missouri Bank* appears to have misapplied Rule 26(g) in the same manner as Defendants have here. The Court confuses a certification with a verification, and it applies the certification requirement to a represented party, contravening the plain terms of Rule 26(g).

Accordingly, because Rule 26(g)(1) does not apply to Bowles's verification, whether proper or improper, of discovery responses, sanctions under Rule 26(g)(3) are not warranted.

B. *Rule 37(d)*

[10] Defendants have additionally moved for sanctions under Rule 37(d). If "a party, after being properly served with interrogatories under Rule 33... fails to serve its answers [or] objections," then that party "may" be subject to sanctions. Fed.R.Civ.P. 37(d)(1)(A)(ii).

Here, Defendants argue that sanctions are warranted under Rule 37(d) because Bowles, who verified the "discovery responses," [FN14] did not make a reasonable inquiry into the truth of the responses before verifying them. Defendants base this assertion on Bowles's testimony at the Rule 30(b)(6) deposition that he did not "remember" and did not "even know whether [he] saw" certain discovery responses. Bowles Dep. 75:4-76:21. Defendants argue that Bowles's failure to make a reasonable inquiry before verifying responses to interrogatories is tantamount to "fail[ing] to serve [ ] answers [or] objections" to interrogatories, under Rule 37(d)(1)(A)(ii).

> FN14. Presumably, the "discovery responses" in question, which are not attached to Defendants' motions, were answers to interrogatories, as suggested by Defendants' citation to Rules 37(d) and 33(b). *See supra* note 12.

Defendants are incorrect. Defendants do not argue that State Farm actually failed to serve answers or objections to interrogatories. In fact, Defendants acknowledge that State Farm *did* submit detailed responses to the interrogatories. However,

> [t]he provisions of Rule 37(d) with regard to

> interrogatories do not apply for anything less than a serious or total failure to respond to interrogatories. Only if a party wholly fails to respond to an entire set of interrogatories are sanctions under this *221 rule appropriate.... Subdivision (d) of the rule also is inapplicable if the party has served answers to interrogatories but the answers are thought to be incomplete or evasive. That situation is covered by Rule 37(a)(3) [37(a)(4) as amended in November 2007], which makes such responses a failure to answer for that subdivision of Rule 37, and a motion to compel a further answer will lie.

8A Wright et al., *supra,* § 2291. In other words, the proper course of action here would have been for Defendants to file a motion to compel under Rule 37(a), which applies when a party fails to answer particular interrogatories or provides evasive or incomplete answers to interrogatories.[FN15] Fed.R.Civ.P. 37(a)(3)(B)(iii), (4). Thus, because Defendants have confused Rule 37(a) and Rule 37(d), two provisions authorizing sanctions intended to remedy two distinct discovery violations, the request for sanctions under Rule 37(d) will be denied.[FN16]

> FN15. Defendant relies on *Airtex Corp. v. Shelley Radiant Ceiling Co.*, 536 F.2d 145 (7th Cir.1976), to argue that Rule 37(d) should be applied notwithstanding its limitation to instances where a party "fails to serve" answers or objections to interrogatories. In *Airtex*, the Seventh Circuit acknowledged that Rule 37(d)"does not specifically cover giving answers that are evasive and incomplete, as distinguished from failing to answer at all," but nonetheless applied Rule 37(d) to an evasive and incomplete disclosure because of the unique circumstances of the case. Specifically, "[t]he evasive and incomplete character of Airtex's answers was not immediately apparent to [the movant] and did not become so until [the movant] conducted further discovery." *Id.* at 155. Such further discovery was obtained too late for the movant to file a motion to compel under Rule 37(a) before trial, and thus the Court allowed the movant to invoke Rule 37(d), which it had raised by post-trial motion, on appeal. *Id.* No such unique circumstances exist here. The alleged impropriety of State Farm's responses to interrogatories was revealed on June 6, 2007, the date of Bowles's Rule 30(b)(6) deposition. Discovery was not set to conclude until June 29, 2007. *See* Fifth Scheduling Order (doc. no. 312). Therefore, Defendants had ample time in which to file a motion to compel pursuant to Rule 37(a), but simply failed to do so, instead choosing to wait and attempt to invoke Rule 37(d).
>
> FN16. The Court will not construe Defendants' motion for sanctions as a motion to compel answers to interrogatories and for sanctions under Rule 37(a) for two reasons. First, Defendants have not indicated which interrogatories State Farm failed to answer, and thus State Farm does not have specific notice of the relief sought. Second, although Rule 37(a)(5)(A) provides for sanctions, the Court may not impose sanctions without providing State Farm "an opportunity to be heard" as to whether its failure to answer certain interrogatories was "substantially justified" or whether "other circumstances make an award of expenses unjust." Fed.R.Civ.P. 37(a)(5)(A).

C. *Rules 33(b) and 34(b)*

Although neither party has raised the applicability of Rules 33(b) and 34(b), the Court writes here to provide additional guidance to the parties. Specifically, certain issues raised by Defendants in the instant motion for sanctions are better analyzed under Rules 33(b) and 34(b).

1. *Rule 33(b)*

Federal Rule of Civil Procedure 33(b) governs answers and objections to interrogatories. The rule provides that interrogatories served upon a corporate party must be answered "by any officer or agent, who must furnish the information available to the party." Fed.R.Civ.P. 33(b)(1)(B). "Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath." Fed.R.Civ.P. 33(b)(3). To verify the truthfulness of the answers, "[t]he person who makes the answers must sign them." Fed.R.Civ.P. 33(b)(5).

[11] This Court recently explained the obligations of a party who verifies answers to interrogatories. *See State Farm Mut. Auto. Ins. Co. v. Lincow*, No. 05-5368, 2008 WL 697252 (E.D.Pa. Mar.10, 2008). Specifically, the Court required the defendants in *Lincow* to provide "a verification stating that to the best of his or her knowledge, information, and belief, the answers provided

are true and correct." *Id.* at *5. State Farm was not only a party in the *Lincow* case, but *it proposed the language of the verifications* and requested that the defendants be sanctioned for providing verifications that did not contain its proposed language. *See id.* at *6.

Here, State Farm has fallen upon its own sword. Its answers to interrogatories were signed by Bowles, a person who, according to his own deposition testimony, cannot remember*222 *whether he has even seen* the answers that he signed.[FN17] It is incomprehensible how Bowles could have verified under oath the truth of the answers to interrogatories if he had never previously seen them. *See* Bowles Dep. 75:4-76:21.[FN18]

> FN17. "The fact that years later the representative may not recall the process she used to ascertain the truthfulness of the corporation's responses ... does not necessarily undermine the veracity of the original interrogatory answers." *Shepherd v. ABC*, 62 F.3d 1469, 1482 (D.C.Cir.1995). At the same time, however, "the representative must have a basis for signing the responses and for thereby stating on behalf of the corporation that the responses are accurate." *Id.*

> FN18. The question thus arises of whether State Farm's responses to interrogatories fail to comply with Rule 33(b), in that Bowles, as evidenced by his total inability to recall the answers or his verification of them, may have had no basis for verifying them under oath. As explained above, *see supra* Part V.B, if Bowles had no basis for verifying certain answers to interrogatories, then Defendants may be entitled to file a motion to compel responses to specific interrogatories that State Farm "fail[ed] to answer" or answered in an "evasive or incomplete" manner, pursuant to Rule 37(a)(1) and (a)(4), and possibly for sanctions pursuant to Rule 37(a)(5). Because Defendants have not raised these issues, and thus State Farm had no notice of such relief being sought, the Court does not decide these issues now. If a motion is filed raising these issues, the Court will address them at that time.

2. *Rule 34(b)*

Federal Rule of Civil Procedure 34 governs requests for the production of documents. To the extent that Defendants' request for sanctions is based on Bowles's purported verification of responses to document requests, it is without merit.

[12] Rule 34 permits a party to serve on another party a request "to produce and permit the requesting party or its representative to inspect, copy, test, or sample ... items in the responding party's possession, custody, or control." Fed.R.Civ.P. 34(a)(1). The party receiving the request must respond to it: "the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons." Fed.R.Civ.P. 34(b)(2)(B). As relevant here, and unlike Rule 33(b), Rule 34(b) does *not* require a party's response to a document request to be verified by the party. Rather, responses to document requests need only be certified by an attorney or unrepresented party. *See*Fed.R.Civ.P. 26(g).[FN19] Therefore, because Bowles was not required to "verify" any responses to document requests, State Farm has not violated Rule 34(b).[FN20]

> FN19. This disparity between Rules 33 and 34 is not expressly addressed by the committee's notes, the leading commentators, or any cases known to this Court. The disparity may, however, be explained by the differing functions of Rules 33 and 34. Rule 33 requires a party to provide under oath a substantive answer to a question and requires the person giving that answer to verify the truth of the answer with his or her signature. In contrast, a response under Rule 34 need only indicate whether the party will comply with the document request, and if it will not, state any objections to the document request. Indicating compliance does not require a substantive answer, but rather is a ministerial task, and thus does not require a verification. Additionally, objections to the requests are governed by Rule 26(g). See Fed.R.Civ.P. 26(g) (providing that "[e]very ... discovery request, response, or *objection* must be signed by at least one attorney of record in the attorney's own name-or by the party personally, if unrepresented" (emphasis added)).

> FN20. It is a separate question, however, whether Bowles's failure to recall at the Rule 30(b)(6) deposition any information in connection with the documents produced in this case, and his resultant inability to provide Defendants with a "road map" to the voluminous

discovery in this case, warrants additional *sanctions under* Rule 37(b) or 37(d). Because Defendants have not raised these issues, and thus State Farm had no notice of such relief being sought, the Court does not decide these issues now. If the issues remain outstanding, *see*Fed.R.Civ.P. 26(f)(1), 37(d)(1)(B), and a motion is filed raising these issues, the Court will address them at that time.

VII. *CONCLUSION*

Defendants' motions (doc. nos. 337, 338, and 340) will be granted in part and denied in part. The motions for summary judgment will be denied. The motion to compel additional Rule 30(b)(6) deposition testimony will be granted. The motion for sanctions will be granted as to the request for sanctions under Rule 37(b)(2)(A), and will otherwise be denied. The amount of the sanctions and the timing of payment will be decided after a hearing to be scheduled at a later date.

An appropriate order follows.

**223 ORDER*

AND NOW, this **7th** day of **May, 2008,** for the reasons stated in the accompanying Memorandum, it is hereby **ORDERED** that Defendants' motions for summary judgment, to compel additional deposition testimony, and for sanctions (doc. nos. 337, 338, and 340) are **GRANTED in part and DENIED in part.** The motion for summary judgment is denied. The motion to compel additional Rule 30(b)(6) deposition testimony is granted. The motion for sanctions is granted as to the request made under Federal Rule of Civil Procedure 37(b)(2), and is otherwise denied.

IT IS FURTHER ORDERED that an additional Rule 30(b)(6) deposition of Mr. Austin Bowles, and/or another appropriately prepared designee, shall take place no later than **June 9, 2008.**

IT IS FURTHER ORDERED that sanctions are imposed against Plaintiffs State Farm Mutual Automobile Insurance Company and State Farm Fire and Casualty Company. The amount of the sanctions and the timing of payment will be decided after a hearing to be scheduled at a later date.

IT IS FURTHER ORDERED that the parties shall confer and submit to the Court a status update in the nature of a Rule 26(f) report by **June 16, 2008.**

AND IT IS SO ORDERED.

E.D.Pa.,2008.
State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc.
250 F.R.D. 203, 70 Fed.R.Serv.3d 764

END OF DOCUMENT

EXHIBIT 9

HColeman v. Blockbuster, Inc.
E.D.Pa.,2006.

United States District Court,E.D. Pennsylvania.
Tyra COLEMAN, et al., Plaintiffs,
v.
BLOCKBUSTER, INC., Defendant.
Civil Action No. 05-4506.

Oct. 11, 2006.

Background: Former employees brought action against their former employer, alleging that employer racially discriminated against them through various employment actions including the failure to promote, unequal payment, disparate treatment in training opportunities, and ultimately the termination of employment. Employees filed motion to compel discovery and for costs and motion for extension of discovery deadline.

Holdings: The District Court, Eduardo C. Robreno, J., held that:
(1) employees were not entitled to compel a response to their interrogatories, and
(2) extension of discovery deadline was warranted to allow plaintiffs to fine-tune their discovery requests and for the parties to resolve their outstanding disputes so that employment discrimination case could ultimately be decided on its merits.

Order in accordance with opinion.

West Headnotes

[1] Federal Civil Procedure 170A 1538

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(D) Written Interrogatories to Parties
170AX(D)3 Answers; Failure to Answer
170Ak1537 Failure to Answer; Sanctions
170Ak1538 k. Order Compelling Answer. Most Cited Cases

In employment discrimination case, employees were not entitled to compel a response to their interrogatories where they had not called to the court's attention any particular interrogatories to which they wished to compel employer's response. U.S.Dist.Ct.Rules E.D.Pa., Civil Rule 26.1(b).

[2] Federal Civil Procedure 170A 1325

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(C) Depositions of Parties and Others Pending Action
170AX(C)1 In General
170Ak1323 Persons Whose Depositions May Be Taken
170Ak1325 k. Officers and Employees of Corporations. Most Cited Cases
A corporation must prepare its selected deponent to adequately testify not only on matters known by the deponent, but also on subjects that the entity should reasonably know. Fed.Rules Civ.Proc.Rule 30(b)(6), 28 U.S.C.A.

[3] Federal Civil Procedure 170A 1636.1

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(E) Discovery and Production of Documents and Other Tangible Things
170AX(E)5 Compliance; Failure to Comply
170Ak1636 Failure to Comply; Sanctions
170Ak1636.1 k. In General. Most Cited Cases
While statistics regarding racial disparities in company's employment practices were relevant and discoverable in employment discrimination case, plaintiff employees were not entitled to compel a response to their request for company's statistics related to other employees since they had left it to the court to guess which of their requests were relevant to such statistics. U.S.Dist.Ct.Rules E.D.Pa., Civil Rule 26.1(b).

[4] Federal Civil Procedure 170A 1261

170A Federal Civil Procedure
170AX Depositions and Discovery
170AX(A) In General
170Ak1261 k. In General. Most Cited Cases
Extension of discovery deadline was warranted to allow plaintiffs to fine-tune their discovery requests and for the parties to resolve their outstanding disputes so that employment discrimination case could ultimately be decided on its merits.

*167 Carmen L. Rivera Matos, Stewart Wood & Matos, Norristown, PA, John W. Hermina, Laurel Lakes Executive Park, Laurel, MD, for Plaintiffs.
Michael Jonathan Puma, Sarah Elise Pontoski, Morgan Lewis & Bockius LLP, Philadelphia, PA, for Defendant.

MEMORANDUM

EDUARDO C. ROBRENO, District Judge.
Before the Court are Plaintiffs' Third Motion to Compel Discovery and for Costs and Plaintiffs' Motion for Extension of Discovery Deadline.

I. BACKGROUND

Plaintiffs bring this action against Defendant Blockbuster, Inc. ("Blockbuster") alleging that their former employer Blockbuster racially discriminated against them through various employment actions including the failure to promote, unequal payment, disparate treatment in training opportunities, and ultimately the termination of employment.

This case has a tortuous history of discovery disputes. The Court had already cut *168 these disputes down to size in an Order issued on June 15, 2006, in which the Court decided a total of five discovery motions brought by the parties (the "June 15 Order") (doc. no. 52).[FN1] As detailed below, many of these disputes have now reared their ugly heads again.

> FN1. Those motions included Plaintiffs' Motion to Compel Discovery (doc. no. 25), Defendant's Third Motion to Compel Discovery (doc. no. 30), Plaintiffs' Motion to Strike Defendant's Response (doc. no. 39), Plaintiffs' Motion to Strike Defendant's Motion to Compel (doc. no. 40), and Plaintiffs' Motion for Extension of Time to Complete Discovery (doc. no. 47).

II. PLAINTIFFS' MOTION TO COMPEL

A. Document Requests

This Court's June 15 Order provided specific instructions as to how the parties should handle disputes over Plaintiffs' document requests. It first provided that "Defendant shall produce all documents withheld on the basis of confidentiality, by June 29, 2006."If Plaintiffs doubted the integrity of Blockbuster's production, the Court instructed that the parties "shall meet and confer" by July 28, 2006. Finally, if the parties could not resolve any outstanding disputes at the meet and confer, the Court allowed Plaintiffs to file "additional requests for production, identifying the items requested and the rationale under which the requested items should be produced, by August 11, 2006."

Plaintiffs again raised the issue of their document requests before the Court. They complained because Blockbuster produced "thousands of duplicative unresponsive preprinted documents that purports to respond to Plaintiffs' requests" and "request[ed] a hearing where they may bring to the Court, all of the documents provided for the Court's examination [so that] this Honorable Court may see for itself what Defendant has failed to produce and how it has provided repetitive, rather than appropriately responsive, documents." [FN2] Plaintiffs indeed arrived at the hearing regarding their two motions armed with what they represented was Blockbuster's entire document production. However, as in their briefing, they failed to identify for the Court a single item which they requested but did not receive from Blockbuster.

> FN2. Plaintiffs reiterated later in their briefing that they "would like an opportunity to provide the documents to the Court for its review and determination of Defendant's responsiveness."

More importantly, Plaintiffs did not follow the Court's clear instructions on how to resolve disputes over Plaintiffs' document requests. This Court was explicit at the previous discovery hearing on June 14,

2006, when it told Plaintiffs they would have to "pinpoint the [documents] you really need here." 6/14/06 Hr'g Tr. at 47. While Blockbuster claims that it produced an additional 6,736 pages of documents previously withheld on the basis of confidentiality, Dft's Brf. at 6, Plaintiffs never met and conferred with Blockbuster to pinpoint which documents they still needed that Blockbuster had not produced.[FN3] Nor did Plaintiffs file additional requests for production by the August 11, 2006 deadline that the Court established.

> FN3. The parties dispute who is to blame for their failure to meet and confer, as ordered by the Court, by July 28, 2006.

B. The Amended Privilege Log

The Court also laid out a detailed roadmap to follow in resolving disputes regarding Blockbuster's privilege log. The June 15 Order mandated that Blockbuster "shall provide plaintiffs with an amended privilege log, including the titles of any senders and receivers of each document included as privileged, by June 29, 2006." To the extent that Plaintiffs found problems with the amended privilege log, the Court ordered that the parties meet and confer on "any specific requests as to documents listed in defendant's privilege log, by July 28, 2006." Plaintiffs could file specific requests for documents from the amended privilege log by August 11, 2006. As a final safeguard, the Court ordered that "Defendant's response to any requests for documents in the privilege log shall include a submission of the document for the Court's in camera review."

***169** Plaintiffs allege in their Third Motion to Compel that Blockbuster's second amended privilege log [FN4] is deficient because:

> FN4. Blockbuster actually amended its privilege log twice. Blockbuster's first amended privilege log, which it produced pursuant to the Court's order on June 29, 2006, contains only the titles of legal personnel. In a letter dated July 6, 2006, Blockbuster informed Plaintiffs that all individuals whose titles were not included were Blockbuster employees not employed in Blockbuster's Legal Department. Blockbuster then produced a second amended privilege on July 25, 2006 that included the titles of all personnel.

(1) it claims the privilege without providing any explanation as to why the information is privileged; (2) many of the individuals listed on the log are not attorneys; (3) there is little or no information as to what the document contains; and (4) Blockbuster is yet to provide a single document listed in the privilege log or to comply with the Court's order for in-camera review.

As to Plaintiffs' first three allegations, there has been no dispute that each and every document on the amended privilege log relates to Blockbuster's investigation of the Charges of Discrimination filed with the EEOC by Plaintiffs Coleman and Terry. The amended privilege log indicates that either the senders and recipients of most documents it contains are attorneys or other legal personnel whose communications would be privileged.[FN5] Each document is described in sufficient detail for Plaintiffs to be able to challenge every instance of the claim of privilege.

> FN5. Some documents that appear on the privilege log appear to be non-privileged documents on which handwritten notes have been made by Blockbuster's Legal Department. Plaintiffs never specifically challenged these documents.

Again, Plaintiffs did not follow the Court's clear instructions as to how to challenge the amended privilege log. They never met and conferred. They never made specific requests for documents on the amended privileged log. Thus, unsurprisingly, because Plaintiffs never submitted specific challenges of privilege calls to which Blockbuster could respond, Blockbuster never filed any documents in camera with the Court.

C. Interrogatories

In its June 15 Order, the Court granted Plaintiffs leave to "serve [up to 200] reconsidered and amended interrogatories on defendant by August 11, 2006."

Plaintiffs claim that Blockbuster's "failure" to respond to their untimely [FN6] interrogatories is so

"massive" that its motion could be "several hundred pages without shedding light on the real problem." Pl.'s Mot. to Compel at 7. Instead of describing with particularity the deficiencies of Blockbuster's responses, Plaintiffs attached to their briefing a forty-four page deficiency letter dated September 13, 2006, which they sent to Blockbuster's counsel. This Court cannot do Plaintiffs' work for them by sifting through all forty-four pages to determine which, if any, of the Blockbuster's responses are truly deficient.

> FN6. Blockbuster points out that Plaintiffs did not serve their 118 reconsidered and amended interrogatories until August 14, 2006. Blockbuster also makes much ado about having been served the interrogatories by fax instead of being "properly served." Dft's Brf. at 9.

The only specific interrogatories that Plaintiffs bring to this Court's attention are Interrogatories 29 and 30. Plaintiffs maintain that Blockbuster's responses to these two interrogatories are "[p]erhaps, the most blatant violation of the spirit and intent of this Court's Order."

Interrogatory 29 requests Blockbuster to provide the job title, department, race, date of hire, and current employment status of seventeen (17) individuals who are listed on Blockbuster's privilege log. However, the June 15 Order required only that Blockbuster provide the "titles of any senders and receivers" of the documents, and Blockbuster included such titles on its amended privilege log. Interrogatory 30 asks Blockbuster to provide a description of each individual's knowledge of Plaintiffs' claims. Blockbuster responds that two of the individuals have no such information and the rest have general information regarding Blockbuster's investigation of Plaintiffs' charges of discrimination. Blockbuster's responses are not blatant violations of the Court's June 15 Order.

***170** The controversy related to Plaintiffs' remaining interrogatories, and indeed all the still-festering discovery disputes in this case, appears to revolve around a memorandum dated April 16, 2004, and purportedly authored by Cari-Ann Urbanek, that references an "African-American Stores" module that Blockbuster claims to employ for marketing purposes (the "April 16 Memo").[FN7] Plaintiffs have interpreted the April 16 Memo to mean that Blockbuster has an explicit policy of "classification of stores along racial lines." *See* Pl.'s Interrogatory No. 2. Thus, Interrogatory 1 asks Blockbuster to "indicate whether Defendant labels or has ever labeled stores in predominantly white areas as 'white' or 'regular' stores, African American areas as 'African American' or 'Black' stores, Hispanic, etc."

> FN7. Although neither party attaches a copy of the April 16 Memo to their briefing, Blockbuster's discovery responses indicate that the April 16 Memo pertained to the promotion of the movie "You Got Served."

Blockbuster responds to such interrogatories that "it does not have a policy to label stores by race based on the location or areas of the store," but many of Plaintiffs' subsequent interrogatories assume such a policy to exist.[FN8] When Blockbuster then claims that Plaintiffs' subsequent interrogatories are irrelevant, Plaintiffs believe that Blockbuster is playing "games of evasion."

> FN8. Thus, for example, Interrogatory 2 asks for "the reason(s) supporting [Blockbuster's] decision for the classification of stores along racial lines," and Interrogatory 3 asks for "any studies or research that support dividing stores and employees based on race."

It is not the proper juncture for the Court to make any determination as to the substance of the Blockbuster policy embodied in the April 16 Memo. However, as discussed further below, the Court has already cautioned Plaintiffs that the most appropriate way to obtain information about the "African-American Stores" referenced in the August 16 Memo is likely through a 30(b)(6) deposition or a deposition of the author of the August 16 Memo herself, rather than though hundreds of written interrogatories.

[1] In any case, Plaintiffs have not called to the Court's attention any particular interrogatories, other than Interrogatories 29 and 30, to which they wish to compel Blockbuster's response. Local Rule of Civil Procedure 26.1(b) requires that "[e]very motion pursuant to the Federal Rules of Civil Procedure governing discovery shall identify and set forth, verbatim, the relevant parts of the interrogatory."

Plaintiffs have run afoul of both the technical requirements of this rule as well as its underlying policy. Local rule 26.1(b) is clearly designed to force parties to bring into sharp focus the particular discovery disputes that they want a court to resolve. *See, e.g.,* Grider v. Keystone Health Plan Cent., 2004 WL 902367, at *4, 2004 U.S. Dist. LEXIS 9014, at *16-17 (E.D.Pa.2004) ("[I]t is incumbent on plaintiffs to provide the court with the exact language of each interrogatory and request for production of documents so that we are able to assess defendants' compliance with each request."). Otherwise, courts are left to wade through a morass of paperwork that bogs down judicial resources. *See* AT & T Corp. v. Universal Communs. Network, Inc., 1999 WL 239077, at *1, 1999 U.S. Dist. LEXIS 5651, at *2-3 (E.D.Pa.1999) ("Plaintiff has failed to comply with the Court's Local Rule 26.1(b), with the result that it is necessary to examine numerous documents, including a lengthy affidavit, in order to obtain at least some vague idea as to what the discovery dispute is all about.")

D. The 30(b)(6) Deposition

In its June 15 Order, the Court granted Plaintiffs "leave to take the deposition of the author of the April 16, 2004 Memorandum from the Product and Marketing Department of Blockbuster to 'African-American Stores,' and/or a Rule 30(b)(6) deponent."

Plaintiffs have not yet taken such a deposition because they appear to believe they are entitled to learn everything about the April 16 Memo through interrogatories before taking it. This Court made clear to Plaintiffs at the June 14, 2006 hearing that "you can't get all that information through interrogatories [because] the system isn't really ready for that." 6/14/06 Hr'g Tr. at 47.

*171 Plaintiffs also fear that "by requiring Plaintiff to obtain the information [about the April 16 Memo] through a 30(b)(6)" deposition, "Defendant is hoping to avoid answering the interrogatories and differing [sic] to a corporate representative who is unlikely to have the requested information at the deposition." This fear is unfounded. Indeed, the very purpose of the rule's forcing a corporation to designate a deponent to testify regarding particular matters is to "curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organization and thereby to it." Fed. R.C.P. § 30(b)(6), cmt.

[2] The Third Circuit has held that "when a witness is designated by a corporate party to speak on its behalf pursuant to Rule 30(b)(6), 'producing an unprepared witness is tantamount to a failure to appear' that is sanctionable under Rule 37(d)." Black Horse Lane Assoc., L.P. v. Dow Chem. Corp., 228 F.3d 275, 304 (3d Cir.2000). Thus, the designated deponent has a "duty of being knowledgeable on the subject matter identified as the area of inquiry." Jurimex Kommerz Transit G.M.B.H. v. Case Corp., 2005 WL 440621 at *3, 2005 U.S. Dist. LEXIS 2827 at *8 (D.Del.2005). A corporation must "prepare its selected deponent to adequately testify not only on matters known by the deponent, but also on subjects that the entity should reasonably know." SmithKline Beecham Corp. v. Apotex Corp., 2004 WL 739959 at *2, 2004 U.S. Dist. LEXIS 8990 at *5 (E.D.Pa.2004).

Blockbuster clearly offered to produce Ms. Urbanek, the author of the April 16 Memo. Such a deposition offered Plaintiffs an excellent opportunity to learn additional information about the April 16 Memo and advance the Plaintiffs' case. Plaintiffs squandered this opportunity.

Blockbuster also offered to produce a 30(b)(6) deponent with knowledge of Blockbuster's module-based marketing scheme. However, Blockbuster did not provide the name or position of the 30(b)(6) deponent it had offered to produce. Rule 30(b)(6) clearly contemplates that a corporation "designate" a person who consents to testify on its behalf. Blockbuster's failure to designate a particular deponent made it difficult for Plaintiffs to prepare for such a deposition.

E. Company Statistics

Plaintiffs also claim that Blockbuster has "refused to provide any documents, information, or statistics related to any other employees of the Company." Pl.'s Mot. to Compel at 15. They cite the case of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-5, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), in support of their argument that Blockbuster must provide such discovery.

In *McDonnell*, the United States Supreme Court held that "statistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's [adverse employment action] conformed to a general pattern of discrimination against blacks." 411 U.S. at 805, 93 S.Ct. 1817. While the Supreme Court cautioned that "such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire," *id.* at 805 n. 19, 93 S.Ct. 1817, in a later case the Supreme Court held that "gross statistical disparities" alone may, in certain cases, constitute prima facie proof of discrimination. *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977).

[3] Statistics regarding racial disparities in Blockbuster's employment practices are clearly relevant and discoverable. Here, however, Plaintiffs have left it to the Court to guess which of their requests are relevant to such "statistics." Because they have not specified which of their hundreds of discovery requests seek such "statistics," they have made it impossible for the Court to decide the merits of any particular discovery request.[FN9] *See* Local Rule 26.1(b).

> FN9. Interrogatory 14 presumably seeks such statistical discovery when it asks for "the Defendant's employee profile, specifying name, date of hire, date of termination or resignation and race of each employee, at any of the stores in which the Plaintiffs were employed from January 2003 until store closing or the present if store is currently in operation." Similarly, Interrogatory 17 asks for "the present number of African American employees and the number of white or Caucasian employees in each job category at each facility operated by the Defendant in Eastern Pennsylvania."

*172 As discussed above, even if the Court could on its own identify which requests seek the relevant "statistics," Plaintiffs failure to abide by the Court's June 15 Order is alone sufficient reason to deny Plaintiffs' motion to compel a response to such requests.

F. Conclusion

Thus, for the reasons set forth above, the Court will deny Plaintiffs' Third Motion to Compel Discovery and for Costs.

III. MOTION FOR DISCOVERY EXTENSION

[4] Plaintiffs have also brought their second Motion for Extension of Discovery Deadline. In it, they argue essentially that while Blockbuster "has been able to obtain all of the information necessary for their defense" through discovery that was "extensive and covered every aspect of Plaintiffs' lives," Plaintiffs "have yet to obtain any substantial discovery as a result of Defendant's defiance." Defendants respond that "Plaintiffs have had ample opportunity to pursue discovery" and "have demonstrated that extensions of discovery are fruitless."

At this juncture, the Court finds that an extension of the discovery deadline in this case is warranted to allow Plaintiffs to fine-tune their discovery requests and for the parties to resolve their outstanding disputes, so that the case can ultimately be decided on its merits. The Court will grant Plaintiffs' Motion for Extension of Discovery Deadline.

An appropriate order will be entered.

ORDER

AND NOW, this **11th** day of **October, 2006,** upon consideration of Plaintiffs' Third Motion to Compel Discovery (doc. no. 65), Plaintiffs' Second Motion for Extension of Time to Complete Discovery (doc. no. 66), and Defendant's Response in Opposition thereto (doc. no. 68), and upon hearing oral argument from the parties, it is hereby **ORDERED** that Plaintiffs' Third Motion to Compel Discovery (doc. no. 65) is **DENIED** and Plaintiffs' Second Motion for Extension of Time to Complete Discovery (doc. no. 68) is **GRANTED.**

IT IS FURTHER ORDERED that:

1. Plaintiffs are granted leave to resubmit specific discovery requests in the form of interrogatories and/or requests for the production of documents by

November 10, 2006;

2. Defendant shall respond to plaintiffs' discovery requests by **November 27, 2006;**

3. Thereafter, the parties shall meet and confer, at a time and place agreed to by the parties, as to any outstanding discovery requests of plaintiffs and as to any specific requests as to documents listed in defendant's second amended privilege log by **December 11, 2006;**

3. Plaintiffs may then request that the Court rule on specific discovery items in dispute.[FN10] The Court will at that time also determine whether appointment of a special discovery master is appropriate in this case. *See*Fed.R.C.P. § 53;

> FN10. No such motion regarding discovery shall be entertained unless it is certified that the parties have met and conferred in person and discussed each of the specific items that plaintiffs have requested and that remain in dispute.

4. At any time, Plaintiffs may notice the deposition of Cari-Ann Urbanek and/or a Rule 30(b)(6) deponent in conformity with the requirements of Rule 30(b)(6). Defendant's designation in response to any Rule 30(b)(6) notice of deposition shall also comply with Rule 30(b)(6), including the identification of the name and position each designee;

5. Once discovery is completed, the Court shall provide a briefing schedule for ***173** the filing of motions of summary judgment.

IT IS FURTHER ORDERED that all requests for sanctions are **DENIED** without prejudice but may be reasserted at the completion of discovery.

AND IT IS SO ORDERED.

E.D.Pa.,2006.
Coleman v. Blockbuster, Inc.
238 F.R.D. 167

END OF DOCUMENT

EXHIBIT 10

Federal Practice & Procedure
Current through the 2008 Update

Federal Rules Of Civil Procedure
The Late Charles Alan Wright[a35], Arthur R. Miller[a36], Richard L. Marcus[a37]

Chapter 6. Depositions And Discovery
Rule 26. Duty to Disclose; General Provisions Governing Discovery
D. Protective Orders

Link to Monthly Supplemental Service

§ 2037 Order That Discovery Not Be Had

Primary Authority

Fed. R. Civ. P. 26

Forms

West's Federal Forms §§ 3251 to 3290.5

Rule 26(c)(1) permits a court to order that the discovery requested not be had. Such orders are not exceptional with regard to interrogatories[1] and requests to produce,[2] since when those discovery devices are used the court can readily determine whether there is a need for protection against a particular interrogatory or production of a particular document or category of documents. Even with regard to these devices the comments of Judge John W. Oliver are pertinent:

> Experience has further established that counsel of the competence of counsel engaged in this case rarely find it necessary to resort to motions for protective orders because both sides recognize that the question presented is not whether documentary data is going to be ordered produced, but when, how, and in what form, such production will be ordered.[3]

Of course, counsel are expected to take account of principles of proportionality,[4] and to confer in good faith about the proper scope of discovery pursuant to Rule 26(f).[5]

It is even more difficult to show grounds for ordering that discovery not be had when it is a deposition that is sought, and most requests of this kind are denied.[6] Since the notice for taking a deposition is not required to specify the subject matter of the examination, the need for protection usually cannot be determined before the examination begins, and the moving party can be adequately protected by making a motion under Rule 30(d) if any need for protection appears during the course of the examination.[7] Of course, if the side noticing the deposition has already taken or noticed ten depositions,[8] that could be a ground for precluding further depositions without stipulation or leave of court.

Reasons that have been advanced for an order that a deposition not be taken, and that have been disposed of by the court—and usually denied—on the facts of the particular case, are: that the information sought has already been obtained by prior depositions or other means of discovery,[9] or by proceedings in another action;[10] that the examining party has been offered stipulations;[11] that the party seeking the examination failed to disclose the existence of the proposed deponents in its answers to interrogatories;[12] that the examination would take too long;[13] that the person to be examined was too busy to spare the time;[14] that the examination would be premature;[15] that the person seeking the examination has insufficient interest in the action;[16] and that the examination would cause undue labor, expense, and delay.[17]

In addition, frail health of the witness may serve as a reason for refusing leave to take a deposition.[17.1] And on occasion the pendency of a motion to dismiss may warrant deferring discovery until the motion is resolved.[17.2]

In a few cases an order has been granted providing that a deposition shall not be taken when it clearly appeared that the information sought was wholly irrelevant and could have no possible bearing on the issue,[18] but in view of the broad test of relevancy, at the discovery stage such a motion will ordinarily be denied.[19] A witness cannot escape examination by claiming that he has no knowledge of any relevant facts, since the party seeking to take the deposition is entitled to test his lack of knowledge,[20] but a different result is sometimes reached when the proposed deponent is a busy government official,[21] or a very high corporate officer unlikely to have personal familiarity with the facts of the case.[22]

An area of particular difficulty has arisen in litigation brought by victims of AIDS who claim they acquired the disease due to tainted blood and that the Red Cross failed adequately to screen blood donors. The Red Cross has resisted discovery on the ground that information about blood donors is protected by the donors' rights to privacy, and on the ground that allowing discovery about donors would deter people from donating blood. Although discovery has in some cases been denied,[23] the Fourth Circuit has ruled that it should be allowed subject to stringent protection against disclosure of the donor's identity.[24]

The right to discovery is not dependent on disclosure by the party seeking it of facts it knows. Thus, a party may have discovery even though it has refused to disclose facts known to it on the ground of privilege.[25]

[FNa35] Charles Alan Wright Chair in Federal Courts, The University of Texas.

[FNa36] Bruce Bromley Professor of Law, Harvard University.

[FNa37] Horace O. Coil ('57) Chair in Litigation, University of California, Hastings College of the Law.

[FN1]

Interrogatories

A party having voluntarily given specifications may not be required again to give them by interrogatories. U.S. v. General Motors Corp., D.C.Ill.1942, 2 F.R.D. 528.

In government's antitrust civil case, in which government had already furnished defendants with all its documents, properly keyed to general topics discussed on certain occasions, and government would shortly furnish defendants with all names of all those having knowledge of such facts, government would not be required to answer interrogatories requesting government to furnish in specific detail the exact nature and limits of topics discussed on such occasions or portions of topics discussed by each individual participant.

U.S. v. Procter & Gamble Co., D.C.N.J.1960, 25 F.R.D. 252.

In antitrust action alleging that manufacturer had illegally restricted access to replacement parts for its equipment, plaintiffs were not required to disclose the identities of confidential suppliers. Plaintiffs demonstrated potential harm which could result from inadvertent discovery of its confidential suppliers. Plaintiffs argued that defendant would use the information to cut off plaintiffs' source of supply. Plaintiffs had disclosed all other nonidentifying information relative to their purchases of parts from the confidential sources. In re Independent Service Organizations Antitrust Litigation, D.C.Kan.1995, 162 F.R.D. 355.

Cf.

Plaintiff could not show cause for issuance of protective order in antitrust litigation unless it was able to demonstrate that defendants, by reason of voluntary discovery already afforded them, did in fact possess all documentary evidence from which answers to particular interrogatories might be conveniently obtained. Apco Oil Corp. v. Certified Transp. Inc., D.C.Mo.1969, 46 F.R.D. 428.

[FN2]

Requests to produce

Accounting firm would be granted protective order against request that it produce internal audit manuals; firm's manuals were highly confidential and proprietary trade secrets, and disclosure could damage the firm's competitive standing in accounting industry, and plaintiffs did not demonstrate any need for manuals nor convince court of their relevance. Tonnemacher v. Sasak, D.C.Ariz.1994, 155 F.R.D. 193.

Protective order would issue to prevent law school professor challenging his lack of tenure from compelling production of documents from tenure review files of another professor; none of identified documents were relevant to first professor's free speech claims, and disclosure or use of documents would cause annoyance, embarrassment, oppression and undue burden and expense to other professor. Blum v. Schlegel, D.C.N.Y.1993, 150 F.R.D. 38.

When bulk of documents covered by subpoenas duces tecum had been previously produced by defendants at considerable expense and inconvenience and plaintiff had copied great number of documents so furnished by means of microfilms, second request to produce documents for marking as exhibits at trial on discovery depositions was unreasonable and oppressive. Jack Loeks Enterprises, Inc. v. W. S. Butterfield Theatres, Inc., D.C.Mich.1957, 20 F.R.D. 303.

Because of monumental difficulties that would necessarily be imposed upon defendants, particularly in production of foreign documents, most feasible course was to order minimum discovery that was likely to provide sufficient information for a preliminary narrowing of issues and so that after such preliminary narrowing balance of discovery could be measured against frame of reference of issues, in civil antitrust action involving alleged conspiracy to monopolize international commerce in oil, as so narrowed, rather than against broad frame of reference of complaint, which Government could not reasonably be expected to make more specific until it had obtained further information peculiarly within knowledge of defendants. U.S. v. Standard Oil Co. (N.J.), D.C.N.Y.1958, 23 F.R.D. 1.

Nonparty competitors would not be compelled to disclose trade secret information in a breach of contract suit. Plaintiff failed to demonstrate a substantial need for the information, which was of marginal relevancy, and the suspicion existed that the plaintiff was actually investigating the nonparties for possible antitrust litigation. Echostar Communications Corp. v. News Corp. Ltd., D.C.Colo. 1998, 180 F.R.D. 391.

Petitioner's privacy interest in letters he wrote to his daughter while in prison outweighed the state's need for discovery in habeas proceeding, and protective order would issue denying discovery. Although the letters were likely to contain material relevant to petitioner's claim of ineffective assistance of counsel, they were only marginally relevant and the information they might contain was likely obtainable from other sources. Cockrum v. Johnson, D.C.Tex.1996, 917 F.Supp. 479.

The disclosure of defendant-market makers' audiotapes filed under seal with the court was not warranted in a class action alleging improper manipulation of spreads on the NASDAQ exchange. The danger of impairing judicial efficiency was substantial, and the tapes contained internal telephone calls which, if revealed, could disclose the defendants' trade secrets. In re NASDAQ Market-Makers Antitrust Litig., D.C.N.Y.1996, 164 F.R.D. 346.

[FN3]

Not whether but when and how

Apco Oil Corp. v. Certified Transp., Inc., D.C.Mo.1969, 46 F.R.D. 428, 431.

See also

"[A]pplication of the protective device of Rule 30(b) has been, and will continue to be, the exceptional situation in this Court." U.S. v. Purdome, D.C.Mo.1962, 30 F.R.D. 338, 340 (per Oliver, J.).

Compare

In action by taxpayers seeking a tax refund, the court would stay discovery until ruling on the government's motion to dismiss. If the taxpayers' claims failed as a matter of law, there was no reason to undertake discovery. Tilley v. U.S., D.C.N.C.2003, 270 F.Supp.2d 731.

[FN4]

Proportionality

See § 2008.1.

[FN5]

Rule 26(f) conference

See § 2051.1.

[FN6]

Deposition requests denied

It is very unusual for trial court to prohibit the taking of a deposition altogether, and absent extraordinary circumstances, such order would likely be in error. Salter v. Upjohn Co., C.A.5th, 1979, 593 F.2d 649, 651,

citing Wright & Miller.

District court abused its discretion in refusing to allow a deposition to be taken of a particular witness, even despite a prior stipulation by the parties and the witness that he would produce documents and there would be no deposition, since circumstances had changed since the stipulation was entered into, in that sealed documents had been produced dealing with potentially important events on which the deposition of the witness might be valuable. In re Westinghouse Elec. Corp., C.A.10th, 1978, 570 F.2d 899.

Mandamus issued to vacate order quashing notices of taking depositions, the court saying that "an order to vacate a notice of taking is generally regarded as both unusual and unfavorable ...." Investment Properties Intl., Ltd. v. IOS, Ltd., C.A.2d, 1972, 459 F.2d 705, 708, **citing Wright & Miller.**

"Absent a strong showing of good cause and extraordinary circumstances, a court should not prohibit altogether the taking of a deposition." Motsinger v. Flynt, D.C.N.C.1988, 119 F.R.D. 373, 378.

Plaintiff failed to demonstrate in what respect taking a second deposition of him would be an "annoyance" or an "undue burden". Perry v. Kelly-Springfield Tire Co., D.C.Ind.1987, 117 F.R.D. 425, 426, **quoting Wright & Miller**. Note that under the 1993 amendments, Rule 30(a)(2)(B) would preclude a second deposition of a person without leave of court or stipulation.

Alex v. Jasper Wyman & Son, D.C.Me.1986, 115 F.R.D. 156, 158, **citing Wright & Miller.**

It was not in the interest of justice, due to the unavailability of funds from the government to permit plaintiffs' counsel to attend out-of-town deposition which the United States proposed to take of a physician in tort claims action based on alleged medical malpractice, to stay or vacate notice of deposition, where physician had been specifically named by plaintiffs in their complaint as one of individuals alleged to have been guilty of malpractice. Norman v. U.S., D.C.Del.1977, 74 F.R.D. 637.

"A prohibition against the taking of an oral deposition is a very unusual procedure and a party who seeks a protective order prohibiting such a deposition bears a heavy burden of demonstrating good cause for such an order." In re McCorhill Publishing, Inc., Br.Ct.N.Y.1988, 91 B.R. 223, 225.

Although plaintiffs should have attempted to depose defendant's expert witness earlier, the district court abused its discretion in granting defendant's motion for a protective order preventing the deposition of the expert. Defendant had contributed to delay in the deposition of defendant, which had to precede the deposition of the expert, and defendant failed to file the expert's required reports. Defendant should not have been rewarded for delay which he in part caused. Freeland v. Amigo, C.A.6th, 1997, 103 F.3d 1271.

A complete prohibition of a deposition is an extraordinary measure which should be resorted to only in rare occasions. In this case, there was no justification for prohibiting the deposition of plaintiff, who was claiming fraud in connection with her contract with a health care services provider. Jennings v. Family Management, D.C.D.C.2001, 201 F.R.D. 272.

The fact that the witness had incurred expenses in connection with matters in dispute provided no grounds for issuing a protective order against taking a deposition. Prohibiting the taking of a deposition is an extraordinary matter; to limit discovery on the ground that the side from which it is sought has incurred damages would be bizarre and lead to reduced discovery in cases with larger claims. Prozina Shipping Co. v. Thirty-Four Automobiles, D.C.Mass.1998, 179 F.R.D. 41.

An order by a magistrate judge compelling the deposition of a defendant whose physical health had

continued to deteriorate was neither clearly erroneous nor contrary to law, absent evidence that the witnesses' cognitive abilities were impaired. Grand Oaks, Inc. v. Anderson, D.C.Miss. 1997, 175 F.R.D. 247.

Plaintiff failed to make showing justifying protective order against the taking of deposition. Plaintiff alleged sexual abuse of a fifteen year old patient who was hospitalized for prior abuse. Although plaintiff offered treating psychologist's testimony that patient's psychological problems could be aggravated by questioning in adversarial setting, and that she might even become suicidal, these did not satisfy extraordinary circumstances test. Patient's allegations were central to the claim, and patient had talked about the events surrounding the alleged abuse to others. Objective medical evidence did not establish that patient would be irreparably harmed by deposition process. Bucher v. Richardson Hospital Auth., D.C.Tex.1994, 160 F.R.D. 88.

Compare

Court would grant a protective order against deposition of witness, who was sister of plaintiff suing her parents and brothers for sexual abuse that allegedly occurred while plaintiff was a child. The witness had presented letters and affidavits from doctors indicating that the stress of a deposition could prove fatal to her. The court conditioned the order on an opportunity for plaintiff to take the depositions of the doctors and on the witness' execution of a waiver of the doctor-patient privilege for access to her medical records. Frideres v. Schlitz, D.C.Iowa 1993, 150 F.R.D. 153.

Court would forbid deposition of witness whose life might be endangered by the deposition process. "The court is not prepared to assume the responsibility of subjecting Mr. Kraus to a life-threatening deposition simply on the statement of McCorhill's attorney that he has no intention of pressuring Mr. Kraus with questions if it appears that Mr. Kraus is incapable of furnishing any information. ... Mr. Kraus is in constant pain and has reached a vegetative state of senile dementia. Dr. Athos testified that during such a deposition Mr. Kraus' borderline compensation may be catapulted into heart failure as a result of the pain and aggravated state which Mr. Kraus achieves when he cannot remember incidents in his life. At this point in Mr. Kraus' life, the issue for the court is not his competency to testify but his ability to survive an oral deposition." In re McCorhill Publishing, Inc., Br.Ct.N.Y.1988, 91 B.R. 223, 225.

The deposition testimony that a minor nonparty could give was relevant in an action alleging molestation at a resort. Prior testimony of this potential witness in her lawsuit against the resort for sexual assault was not duplicative of the deposition testimony sought here concerning her interaction with the members of other families. Flanagan v. Wyndham Intern. Co., D.C.D.C.2005, 231 F.R.D. 98.

Plaintiff who sued the Republic of Iran seeking compensation for expropriated equity was entitled to a protective order prohibiting defendant from conducting depositions in iran because conducting them would impose an undue personal risk, expense, and burden on plaintiff. McKesson HBOC, Inc. v. Islamic Republic of Iran, D.C.D.C.2004, 226 F.R.D. 56.

See also

The court would place some limitations on the deposition of plaintiff, who claimed to be suffering from Post Traumatic Stress Disorder, because a deposition without any limitations might be dangerous to plaintiff's health. But the court would not disqualify defendant's counsel from taking the deposition despite plaintiff's claim that the sound of counsel's voice would unnerve her and cause her psychological harm. Schorr v. Briarwood Estates Ltd. Partnership, D.C.Ohio 1998, 178 F.R.D. 488.

[FN7]

Adequately protected later

Wyatt v. Kaplan, C.A.5th, 1982, 686 F.2d 276, 283, **citing Wright & Miller.**

In suit by verdict winner against loser's insurer to recover so much of judgment as exceeded insurance coverage, protective order barring plaintiff from all interrogation of attorney of insurer was improper in scope. Jamison v. Miracle Mile Rambler, Inc., C.A.3d, 1976, 536 F.2d 560.

Medlin v. Andrew, M.D.N.C.1987, 113 F.R.D. 650, 653, **citing Wright & Miller.**

An order to vacate a notice of taking a deposition is generally regarded by the court as both unusual and unfavorable; most requests of such kind are denied. Grinnell Corp. v. Hackett, D.C.R.I.1976, 70 F.R.D. 326, 334, **citing Wright & Miller.**

Existence of attorney-client privilege is not one of those circumstances that would justify an order that a deposition of plaintiff's in-house counsel not be taken at all, and at the noticed depositions plaintiff could object to questions it considered improper and advise the in-house counsel not to answer. Scovill Mfg. Co. v. Sunbeam Corp., D.C.Del.1973, 61 F.R.D. 598.

Under circumstances, defendant's motion for protective order would be denied, but defendant might refuse to answer at taking of deposition if questions asked were clearly above and beyond scope of proper inquiry, and matter might then be referred to court for appropriate order. AMP Inc. v. Aksu, D.C.Pa.1964, 237 F.Supp. 601.

Protective order sought on grounds that party might put some improper questions to a witness denied when there could be no doubt that some lines of interrogation to be pursued were material and relevant. Independent Productions Corp. v. Loew's, Inc., D.C.N.Y.1961, 28 F.R.D. 19.

In pretrial examination in private, treble damage antitrust action, corporate plaintiffs' motion to limit scope of defendants' examination of corporate plaintiffs' president was premature, and any claim of privilege or irrelevancy should be raised by plaintiffs' objection to the specific questions when asked, and the district court would not, in advance pass upon anticipated questions. Independent Productions Corp. v. Loew's Inc., D.C.N.Y.1958, 22 F.R.D. 266.

Since court has other powers to protect against abuse, it would be a very unusual case in which it would be proper to forbid altogether the taking of a deposition. Cook v. Cook, 1966, 146 N.W.2d 273, 279, 259 Iowa 825.

[FN8]

Ten depositions

See Rule 30(a)(2)(A); § 2104.

[FN9]

Discovery by other means—order granted

In the absence of some substantial showing of probable benefits to be obtained, court would not allow deposition of examining physician to be taken when party seeking deposition had already received under Rule 35 a report of the physician's examination. Cox v. Fennelly, D.C.N.Y.1966, 40 F.R.D. 1. See § 2031.

Witness had already testified at trial. Knox v. Anderson, D.C.Haw.1957, 21 F.R.D. 97.

Deposition of defendant's accountant should not be taken when plaintiff had his own accountant who had examined the books in question. Dipson Theatres, Inc. v. Buffalo Theatres, Inc., D.C.N.Y.1948, 8 F.R.D. 313.

Deposition had already been taken. Welty v. Clute, D.C.N.Y.1941, 1 F.R.D. 446.

McNally v. Simons, D.C.N.Y.1940, 1 F.R.D. 254.

—order denied

Objection that deposition of publisher of newspaper, against which distributor brought antitrust action, would be repetitious with what distributor had learned from other sources was not sufficient to support protective order against taking deposition of the publisher where distributor suggested that the publisher was one of the active leaders of the newspaper and might have had knowledge of certain facts in the case. Blankenship v. Hearst Corp., C.A.9th, 1975, 519 F.2d 418.

Officer of products liability defendant was subject to second deposition despite opinion of his treating physician that officer should not be deposed because he would become frustrated and anxious if required to testify and recall past events; officer played important role in design and manufacture of product in question, and defendant failed to provide specific and documented factual showing of medical reasons that explained why officer could not again be deposed. Deines v. Vermeer Mfg. Co., D.C.Kan.1990, 133 F.R.D. 46.

Perry v. Kelly-Springfield Tire Co., D.C.Ind.1987, 117 F.R.D. 425, 426.

Protective order against taking of depositions would not be entered on ground that information sought was discoverable from other sources. Wright v. Patrolmen's Benev. Ass'n., D.C.N.Y.1976, 72 F.R.D. 161.

Submission by insured to an examination under oath as required by policy when making a claim thereunder did not deprive insurer of right to take insured's deposition. Kamin v. Central States Fire Ins. Co., D.C.N.Y.1958, 22 F.R.D. 220.

Fact that decedent's employer had already given a deposition would not per se entitle plaintiff to vacatur of defendant's notice of examination of employer on defendant's alleged alcoholism, a subject that was previously unhinted at and not the subject of employer's cross-examination. St. Clair v. Eastern Airlines, Inc., D.C.N.Y.1958, 21 F.R.D. 330.

Fact that plaintiff had had complete examination of other witnesses was not ground for barring him from examining defendant. Gill v. Stolow, D.C.N.Y.1955, 18 F.R.D. 323.

That plaintiff had availed himself of every discovery device available under the rules was not ground to vacate notice of deposition. Kulich v. Murray, D.C.N.Y.1939, 28 F.Supp. 675.

[FN10]

Proceedings in another action—order granted

When party had already fully examined witnesses in a criminal case, sole purpose of taking depositions would be to vex and harass opponent, and this was not allowed. New Sanitary Towel Supply, Inc. v. Consolidated Laundries Corp., D.C.N.Y.1959, 24 F.R.D. 186.

In minority stockholder's action, taking of depositions was stayed pending prosecution of examinations in progress in similar state court action by other stockholders and the state court action itself, but defendants were required to allow plaintiff an adequate inspection of all depositions taken in the state court. Finkelstein v. Boylan, D.C.N.Y.1940, 33 F.Supp. 657.

When plaintiff, which had taken no steps in a proceeding for four years, had instituted action in a state court involving substantially same issues, and had taken about 700 pages of depositions for production and inspection of documents and the taking of deposition was denied without prejudice. Cumberland Corp. v. McLellan Stores Co., D.C.N.Y.1939, 27 F.Supp. 994.

—order denied

Defendant corporation in an in personam federal action was not entitled to stay of taking of deposition of its officer because of the taking of extensive discovery proceedings in prior state action allegedly for same cause. O'Donnell v. Richardson-Allen Corp., D.C.N.Y.1964, 34 F.R.D. 214.

[FN11]

Offered stipulations—order denied

In a products liability case in which punitive damages were sought, discovery of financial records of the defendant was proper despite defendant's admission that its net worth was in excess of $335,000,000. Vollert v. Summa Corp., D.C.Haw.1975, 389 F.Supp. 1348.

The fact that plaintiff offered defendants certain stipulations that in plaintiff's judgment, obviated necessity for further depositions to be taken by defendants, should not foreclose defendants' right to prepare their defense in accordance with provisions of this rule. Alfred Bell & Co. v. Catalda Fine Arts, Inc., D.C.N.Y.1946, 5 F.R.D. 327.

—order granted

Defendant's concession, although belated, that patent examiner was aware of particular item of prior art when design patent was issued to plaintiff provided good cause to preclude plaintiff's proposed deposition of Patent Office examiner as to his consideration of the particular item of prior art. Quaker Chair Corp. v. Litton Business Systems, Inc., D.C.N.Y.1976, 71 F.R.D. 527.

[FN12]

Failed to disclose—order granted

Smith v. Acadia Overseas Freighters, Ltd., D.C.Pa.1953, 120 F.Supp. 192.

[FN13]

Take too long—order denied

A motion to limit the oral examination of defendant on the ground that the proposed examination would require eight or nine days, would be denied without prejudice, since the court could not assume in the absence of proof that the examination was sought in bad faith, or would be conducted with any intention to annoy, embarrass, or oppress the defendant. Michels v. Ripley, D.C.N.Y.1940, 1 F.R.D. 332.

[FN14]

Too busy

The fact that proposed deponent was a very busy executive should not bar his examination. Less v. Taber Instrument Corp., D.C.N.Y.1971, 53 F.R.D. 645.

As long as witnesses knew facts material to issues in suit or which would lead to discovery of material facts their interrogation was proper, notwithstanding fact that they were busy men in industry. Frasier v. Twentieth Century-Fox Film Corp., D.C.Neb.1958, 22 F.R.D. 194.

In action by Price Administrator to enjoin defendants from selling clothing at prices in excess of maximum price established by regulations, an examination of enforcement attorney, associated with plaintiff's attorney, regarding evidence procured from defendants and on which administrator relied as foundation for action could not be denied on ground that enforcement staff was too busy to spare time involved in such examinations. Bowles v. Ackerman, D.C.N.Y.1945, 4 F.R.D. 260.

Compare the cases cited in notes 21–22 below.

Deposition postponed

In wrongful-death action brought against corporate drug manufacturer, trial court did not err in issuing protective order vacating plaintiff's first notice to take deposition of corporate defendant's president, since such protective order merely required plaintiff to depose other employees that defendant had indicated had more knowledge of facts before deposing corporate president; trial court's attempt to postpone or prevent necessity of taking corporate president's deposition was within its discretion, in view of defendant's reasonable assertions that corporate president was extremely busy and did not have any direct knowledge of facts in dispute. Salter v. Upjohn Co., C.A.5th, 1979, 593 F.2d 649.

[FN15]

Premature—order denied

A stay of discovery was not warranted on the ground of international comity to avoid a possible dispute with a foreign sovereign. The representative of the only agency of the Chinese government that expressed an interest in the litigation stated expressly at the initial conference that the agency had no position on whether discovery should go forward. In re Vitamin C Antitrust Litigation, D.C.N.Y.2006, 237 F.R.D. 35.

Plaintiff was entitled, under the circumstances of the case, to proceed immediately to depose officers and employees of the defendants even prior to service of process and resolution of challenges to jurisdiction. Noerr Motor Freight, Inc. v. Eastern R. Presidents Conference, D.C.Pa.1953, 14 F.R.D. 189.

[FN16]

Insufficient interest—order denied

The facts that plaintiff in derivative suit held only 110 voting trust certificates out of 2,015,565 outstanding, and that no other certificate holders had joined in the suit, though perhaps indicating such lack of merit in the suit as to hold plaintiff to a strict application of the rules, do not justify order that deposition upon oral examination should not be taken. Piccard v. Sperry Corp., D.C.N.Y.1940, 30 F.Supp. 171.

[FN17]

Undue labor—order granted

Court did not err in refusing to permit taking of a deposition when the case was to come to trial shortly and the place of taking was far distant from the place of trial. Allen v. First Nat. Bank of Atlanta, C.A.5th, 1948, 169 F.2d 221.

Taking of depositions barred where it would harass the proposed witnesses rather than lead to relevant evidence. Balistrieri v. Holtzman, D.C.Wis.1971, 52 F.R.D. 23.

Notice of deposition vacated that would have required moving all the books and records of a corporation to the office of defendant's attorney. Rosanna Knitted Sportswear, Inc. v. Lass O'Scotland, Ltd., D.C.N.Y.1952, 13 F.R.D. 325.

Spangler v. Southeastern Greyhound Lines, D.C.Tenn.1950, 10 F.R.D. 591.

Defendant railroad in wartime not required to produce for depositions employees who lived far across the county where their testimony would be of minor importance. Ginsberg v. Railway Express Agency, Inc., D.C.N.Y.1945, 6 F.R.D. 371.

In proceeding by debtor's trustee to vacate order approving purchase of debtor's mine by association on ground of conspiracy to defraud debtor, trustee would not be permitted to take depositions of employees of corporation that though approving purchase, was not a member of association and received nothing but expectation of hauling coal from mine. In re Pittsburgh Terminal Coal Corp., D.C.Pa.1942, 2 F.R.D. 568.

[FN17.1]

Frail health of witness

The district court did not abuse its discretion in granting a protective order preventing deposition of mentally retarded resident of county group home. Guardian ad litem's report about proposed deponent reported that deponent was emotionally fragile and that his opinions could be changed by the suggestions of others. His psychologist stated that a deposition would cause him to be emotionally overwhelmed and traumatized. Fonner v. Fairfax County, C.A.4th, 2005, 415 F.3d 325.

One of those rare circumstances that may preclude the taking of a deposition altogether is the medical incapacity of a witness to attend and sit through a deposition. In this case, a sufficient showing was made with regard to a nonparty witness. A neurologist attested that the witness "suffers from a potentially life-threatening and severely disabling brain disorder" and affidavits of the daughter of the witness attested to extended hospitalization of the witness for a blood clot on the brain. Dunford v. Rolly Marine Serv. Co., D.C.Fla.2005, 233 F.R.D. 635.

The trial court's discretion to quash a discovery request due to the witness' failing health is well established, especially where the information is believed to be obtainable from another source. Accordingly, the district court did not abuse its discretion in excusing two witnesses from giving their depositions due to their age and health conditions. Ahrens v. Ford Motor Co., C.A.10th, 2003, 340 F.3d 1142.

The frail health of a witness warranted an order forbidding the taking of a further deposition of the witness. In re Tutu Water Wells Contamination CERCLA Litig., D.C.V.I., 1999, 189 F.R.D. 153.

[FN17.2]

Motion to dismiss

The factors to be considered when determining whether to stay discovery pending the outcome of a motion to dismiss include (1) whether defendant has made a strong showing that plaintiff's claim is unmeritorious, (2) the breadth of discovery and burden of responding to it, and (3) the risk of unfair prejudice to the party opposing the stay. In this employment discrimination suit, a stay was appropriate considering the substantial issues raised by defendants. Several of the defendants were municipal entities, and compliance with the proposed discovery would result in a substantial diversion of public resources which might not ultimately be necessary. Chesney v. Valley Stream Union Free School Dist. No. 24, D.C.N.Y.2006, 236 F.R.D. 113.

See also

For discussion of the automatic stay of discovery pending resolution of a motion to dismiss in cases governed by the Private Securities Litigation Reform Act, see § 2008 at nn. 16.1 16.2.

[FN18]

Irrelevant—order granted

Where plaintiffs sought discovery after district court had entered its memorandum opinion and order in one action and had indicated that it intended to dispose of other actions in similar fashion, and no depositions of Securities and Exchange Commission or of defendants could alter the few material facts necessary to decision, plaintiff was not entitled to discovery. Rosin v. New York Stock Exchange, Inc., C.A.7th, 1973, 484 F.2d 179, certiorari denied 94 S.Ct. 1564, 415 U.S. 977, 39 L.Ed.2d 873.

Where lessee of property that was destroyed during riot could prove no set of facts in support of its claim against District of Columbia that would entitle it to judicial relief, lessee was not entitled to take depositions of District officials nor to complete the process of discovery. Westminster Investing Corp. v. G. C. Murphy Co., 1970, 434 F.2d 521, 140 U.S.App.D.C. 247.

Fann v. Giant Food, Inc., D.C.D.C.1987, 115 F.R.D. 593, 597, **citing Wright & Miller.**

Discovery related to insubstantial claim may be refused. Apel v. Murphy, D.C.R.I.1976, 70 F.R.D. 651.

Depositions not allowed where evidence would be wholly irrelevant and incompetent. O'Brien v. Equitable Life Assur. Soc., D.C.Mo.1953, 14 F.R.D. 141.

[FN19]

Ordinarily denied

Fann v. Giant Food, Inc., D.C.D.C.1987, 115 F.R.D. 593, 597, **citing Wright & Miller.**

A showing that likelihood of harassment is "more probable than not" is not sufficient to warrant a protective order absent a concomitant showing that information sought is fully irrelevant and could have no possible bearing on the issues. Grinnell Corp. v. Hackett, D.C.R.I.1976, 70 F.R.D. 326, 334, **citing Wright & Miller.**

Less v. Taber Instrument Corp., D.C.N.Y.1971, 53 F.R.D. 645.

Teplitzky v. Boston Ins. Co., D.C.Pa.1971, 52 F.R.D. 160.

[FN20]

Test lack of knowledge

Evidence in shareholders' action sustained finding that individual cross-defendant probably had some knowledge of corporate acquisition which was the subject of litigation, and thus, district court properly denied individual cross defendant's motion for protective order to relieve him from appearing for his deposition. Anderson v. Air West, Inc., C.A.9th, 1976, 542 F.2d 1090.

Fact that defendants mayor and police commissioner had not received any prior complaints against officers involved in incident of alleged police brutality that gave rise to the present complaint did not establish that they were innocent of any negligence so as to be entitled to protective order on ground that taking their depositions would be burdensome and useless, where plaintiff's theory was that such defendants were negligent in failing to devise proper programs in light of knowledge that other officers had committed acts of police brutality and in making public and private statements concerning police conduct that encouraged police brutality. Culp v. Devlin, D.C.Pa.1978, 78 F.R.D. 136.

Plaintiff could not properly seek to prohibit defendant from deposing plaintiff's employee via a protective order on ground that employee had no knowledge of matters at issue and that employee was out of state on vacation, but plaintiff could properly seek to control time and place of conducting deposition via protective order. Detweiler Bros., Inc. v. John Graham & Co., D.C.Wash.1976, 412 F.Supp. 416.

It was not ground for quashing the taking of a deposition that the deponent had no access to books of the corporation of which he was an officer. Truxes v. Rolan Elec. Corp., D.C.Puerto Rico 1970, 314 F.Supp. 752, 759.

But see

This principle is recognized by the court, but under the particular circumstances of the case the court found that taking the deposition of a person who was seriously ill with cancer and who had already stated, under penalties of perjury, that he had no personal knowledge of the incident was more likely to be burdensome and oppressive on the deponent than to provide any meaningful challenge to his motion for summary judgment. Davis v. Frapolly, D.C.Ill.1991, 756 F.Supp. 1065, 1068, **citing Wright & Miller.**

[FN21]

Busy government official

Close control of discovery in suits against executive officials is essential to the preservation of meaningful official immunity; where a showing of need prevails over a broad claim of privilege, a district court might be well advised to require that inquiries first be made of subordinate officials before sanctioning discovery that imposes on the time of high level officials. Halperin v. Kissinger, C.A.D.C., 1979, 606 F.2d 1192.

Protective order issued in favor of governor, who did answer interrogatories, in action by inmates of various Oklahoma state penal institutions seeking declaratory and injunctive relief in connection with denial of parole release was within the discretion of the district court. Shirley v. Chestnut, C.A.10th, 1979, 603 F.2d 805.

Heads of government agencies are not normally subject to deposition. Kyle Engineering Co. v. Kleppe, C.A.9th, 1979, 600 F.2d 226.

United States Board of Parole members and the members of the youth division of the Board should be subjected to depositions only under exceptional circumstances. U.S. Bd. of Parole v. Merhige, C.A.4th, 1973, 487 F.2d 25, certiorari denied 94 S.Ct. 2625, 417 U.S. 918, 41 L.Ed.2d 224.

Subjecting a cabinet officer to oral deposition is not normally countenanced. Peoples v. U.S. Dept. of Agriculture, 1970, 427 F.2d 561, 138 U.S.App.D.C. 291.

Before involuntary depositions of high ranking government officials will be permitted, party seeking depositions must demonstrate that particular official's testimony will likely lead to discovery of admissible evidence, is essential to that party's case, and is not available through alternative source or via less burdensome means. Warzon v. Drew, D.C.Wis.1994, 155 F.R.D. 183.

District court's decision to exercise discretion to permit discovery of government officials in action challenging government action must be circumspect and supported by showing that such an examination is necessary and not unduly burdensome. Pension Benefit Guar. Corp. v. LTV Steel Corp., D.C.N.Y.1988, 119 F.R.D. 339.

High government officials enjoy limited immunity from being deposed in matters about which they have no personal knowledge; before party may take deposition of such individual, party must show that this particular official's testimony is likely to lead to discovery of admissible evidence or is pertinent to material issues in lawsuit and that evidence is not available through some other less burdensome or obtrusive sources. U.S. v. Miracle Recreation Equipment Co., D.C.Iowa 1987, 118 F.R.D. 100.

A deposition of a cabinet official or head of an executive department cannot be taken except on a clear showing of needs to prevent injustice to the party seeking the deposition. U.S. v. Northside Realty Associates, D.C.Ga.1971, 324 F.Supp. 287.

In absence of showing that administrator of National Aeronautics and Space Administration had any knowledge of any matters that where germane to litigation in which he was not a party, he would not be required to appear for taking of his deposition that might last for several hours and would disturb government business, but, if plaintiff thought he might elicit some definite information that was germane, he should be allowed to proceed by written interrogatories. Capitol Vending Co. v. Baker, D.C.D.C.1964, 36 F.R.D. 45.

There was no need to take deposition of Secretary of Labor, and notice of his depositions was vacated. Wirtz v. Local 30, Int'l Union of Operating Engineers, D.C.N.Y.1963, 34 F.R.D. 13.

Deposition discovery regarding county commissioners' motives for placing restrictions on operation of road paving contractor's temporary asphalt plant was not required in contractor's action. The county provided transcripts of the relevant board meetings, and the contractor's unsupported allegations of personal animus did not warrant burdensome depositions. Bituminous Materials, Inc. v. Rice County, C.A.8th, 1997, 126 F.3d 1068.

The district court did not abuse its discretion in refusing to permit a discharged police officer to depose a police superintendent until the officer submitted written interrogatories. The answers to these written interrogatories would indicate whether deposing the superintendent would serve a useful purpose. Olivieri v. Rodriguez, C.A.7th, 1997, 122 F.3d 406, certiorari denied 118 S.Ct. 1040, 522 U.S. 1110, 140 L.Ed.2d 106.

Purchaser of property, which bank had acquired from failed thrift, failed to show exceptional circumstances required to justify deposition of directors of FDIC in connection with its disapproval of sale. In re Federal Deposit Ins. Corp., C.A.5th, 1995, 58 F.3d 1055.

Former President Clinton was entitled to quashing of subpoena served by Paula Jones seeking information about settlement of another case. There was no personal communication with the former President that was relevant, so that the testimony was unwarranted even though the heightened standard for deposing a high-ranking government official did not apply to former President. Jones v. Hirschfeld, D.C.N.Y.2003, 219 F.R.D. 71.

"The United States Supreme Court has recognized the authority of agency heads to restrict testimony of their subordinates in private litigation matters." Robbins v. Wilkie, D.C.Wyo.2003, 289 F.Supp.2d 1307.

The United States was entitled to a protective order in an income tax refund suit barring the deposition of the appeals officer from the IRS who reviewed deficiency examination of IRS tax auditor and evaluated the case for settlement purposes. The government stated that neither her testimony nor her report would be relied on as evidence in the case, and it therefore did not appear that the deposition was reasonably calculated to lead to discovery of admissible evidence. Mullins v. U.S., D.C.Tenn.2002, 210 F.R.D. 629.

A county police commissioner would not be required to give a deposition in an action claiming sexual misconduct on the part of police officers. The commissioner had no personal knowledge of the incident giving rise to the claim, and there were lower ranking officials who could provide evidence regarding the government policy or procedures for dealing with such issues. Murray v. County of Suffolk, D.C.N.Y.2002, 212 F.R.D. 108.

An employer was not entitled to depose the regional director of the NLRB, who was not a witness to the events underlying the NLRB's action to enjoin the employer from future unfair labor practices. Any

information within the director's knowledge and control would have been privileged work product, and the employer failed to show substantial need or inability to obtain the information by other means. Ahearn v. Rescare West Virginia, D.C.W.Va.2002, 208 F.R.D. 565.

The EPA was entitled to a protective order in an employment discrimination suit preventing plaintiff from taking the deposition of the Deputy Chief of Staff of the EPA. The Deputy Chief was a high ranking official who did not participate in the employment decision at issue, and the only relevant testimony he could give had been explored thoroughly in other depositions. Low v. Whitman, D.C.D.C.2002, 207 F.R.D. 9.

Cf.

Plaintiff who sought to invalidate action of Governor of Virgin Islands in allocating 240,000 of 300,000 reserve watch units to watch company pursuant to watch quota law was not precluded from inquiring by deposition into Governor's objective standards or criteria employed, factors taken into account, and circumstances surrounding allocation, but could not inquire into mental process of Governor in making allocation. Virgo Corp. v. Paiewonsky, D.C. Virgin Islands 1966, 39 F.R.D. 9.

See also

The district court erred in ordering the oral depositions of Greek cabinet ministers to determine if one of the exceptions to the Foreign Sovereign Immunities Act applied. The court did not require a showing of need for the depositions, or consider possible non-merits routes to dismissal, such as standing. In re Papandreou, C.A.D.C., 1998, 139 F.3d 247, on remand D.C.D.C.1999, 33 F.Supp.2d 17.

Compare

The Governor of Illinois was likely to possess relevant information, and therefore could be deposed in a suit by former correctional captains whose positions were eliminated. Plaintiffs claimed that they were terminated for exercising their First Amendment rights. Defendants did not dispute that the Governor had a role in the decision to eliminate the correctional captain position. Bagley v. Blagojevich, D.C.Ill.2007, 486 F.Supp.2d 786.

A children's museum was entitled to depose the Governor of Puerto Rico before the court ruled on a motion to dismiss on 11th Amendment grounds. Limited discovery was required to determine whether a reasonable official would have understood that specific conduct violated clearly established constitutional rights. Prisma Zona Exploratoria v. Calderon, D.C.P.R.2001, 154 F.Supp.2d 245.

Protective order that would delay the deposition of a federal district judge until after resolution of a qualified immunity defense raised by the State Department was not warranted. The deposition would be relevant to the claims before the court regardless of the resolution of the qualified immunity issue. Egervary v. Young, D.C.Pa.2001, 152 F.Supp.2d 737.

The mayor of a major city would be required to appear for his deposition in newspapers' constitutional challenge to the city's plan for airport newsracks. The mayor was likely to possess pertinent information that only could be obtained from him, in light of the city's relationship with a well known corporation that was allowed to advertise in the newsracks. Atlanta Journal and Constitution v. City of Atlanta Dep't of Aviation, D.C.Ga.1997, 175 F.R.D. 347.

[FN22]

High corporate officer

In suit claiming fatal injury due to ingestion of drug manufacturer, plaintiff would not be allowed to depose defendant's president in the first instance, given defendant's assertion that president had no direct knowledge of the facts. Salter v. Upjohn Co., C.A.5th, 1979, 593 F.2d 649.

Where plaintiff sought to depose high officer of defendant company, court would not allow deposition to go forward absent showing the officer has "superior or unique personal knowledge." Baine v. General Motors Corp., D.C.Ala.1991, 141 F.R.D. 332, 335.

Deposition of Lee Iacocca, chairman of defendant Chrysler Corp., would not be allowed to go forward in a products liability suit. The court noted that Mr. Iacocca is a "singularly unique and important individual," raising risks of "unwarranted harassment and abuse," and ordered that interrogatories be propounded instead, without prejudice to plaintiff's later effort to depose Mr. Iacocca. Mulvey v. Chrysler Corp., D.C.R.I.1985, 106 F.R.D. 364, 366.

Deposition of president of insurance company that allegedly failed to pay for worker's care would not be allowed. President submitted affidavit stating he had no knowledge of this particular case. "It would seem sensible to prevent a plaintiff from leap-frogging to the apex of the corporate hierarchy without the intermediate steps of seeking discovery from lower level employees more involved in everyday corporate operations." Liberty Mut. Ins. Co. v. Superior Court, 1992, 13 Cal.Rptr.2d 363, 10 Cal.App.4th 1282.

The district court acted properly in refusing to compel the deposition of defendant's corporate vice president. The deposition would have been a costly and burdensome means for determining whether he had information bearing on the plaintiff's termination because the vice president was more than 1,000 miles from the facility where the plaintiff had been employed. Patterson v. Avery Dennison Corp., C.A.7th, 2002, 281 F.3d 676, **citing Wright, Miller & Marcus.**

In age discrimination in employment action, district court did not abuse its discretion in issuing a protective order blocking plaintiff from deposing defendant's chairman. Defendant submitted an affidavit from the chairman asserting that he lacked personal knowledge of plaintiff and was unaware of her age, her performance ranking, or any work evaluations she might have received, or that she even worked for defendant. Plaintiff also violated various local rules in manner of noticing deposition. Thomas v. International Business Mach. Corp., C.A.10th, 1995, 48 F.3d 478.

The oral deposition of a high level corporate executive should not be freely granted when the subject of the deposition will be only remotely relevant to the issues of the case. Even when the executive does have personal knowledge of the case, the court may still fashion a remedy which reduces the burden on the executive. Thus, although the court would allow the deposition of an executive, it would be limited to topics on which the officer had unique information. Folwell v. Hernandez, D.C.N.C.2002, 210 F.R.D. 169.

Plaintiff in a patent infringement suit would not be allowed unlimited delving in its deposition of defendant's chief executive officer. Rather, plaintiff would be limited to exploring with the CEO the extent of his involvement and his knowledge regarding defendant's method and strategy of developing the technology in issue in the case. Tulip Computers Int'l, B.V. v. Dell Computer Corp, D.C.Del.2002, 210 F.R.D. 100.

The court would not grant a protective order against the deposition of the dean of defendant university medical center. The dean asserted that he had not spoken with the plaintiff, a professor alleging

discrimination, but he did not assert he had not spoken with others about the plaintiff. He asserted that he had not made decisions about plaintiff's situation, but not that he knew nothing about them, or that he lacked any information pertinent to the lawsuit. Naftchi v. New York University Medical Center, D.C.N.Y.1997, 172 F.R.D. 130.

Plaintiff could not take the deposition of a corporate officer without first showing compliance with Rule 30(b)(6) or other discovery methods in the reasonable exhaustion of relevant subject matter. The officer currently resided in Germany and claimed that he had no direct knowledge about the elimination of the position held by the plaintiff. Stone v. Morton Intern., Inc., D.C.Utah 1997, 170 F.R.D. 498.

Compare

Plaintiffs were entitled to conduct limited deposition of CEO of defendant manufacturer in product liability action where it was possible that the CEO had personal knowledge regarding the defendant's policies, authorization or ratification of actions of its director of engineering, and of defendant's record keeping. Morales v. E.D. Etnyre & Co., D.C.N.M.2005, 229 F.R.D. 661.

An insurance company was not entitled to a protective order precluding the deposition of two high-level executives of its parent corporation concerning corporate policy towards managing general agents. The fact that a subordinate stated in his affidavit that he was the most knowledgeable person about this topic was insufficient ground for granting the protective order. In his deposition, the subordinate stated that he did not have knowledge of the reason behind the issuance of the policy. General Star Indem. Co. v. Platinum Indem. Ltd., D.C.N.Y.2002, 210 F.R.D. 80.

Deposition of chairman of the board of automobile manufacturer was warranted in products liability class action. The evidence showed that the chairman referred to his personal knowledge and involvement relevant the tire recall at issue. The chairman's knowledge was relevant to hundreds of pending claims in the class action, and the order allowing the deposition would adequately protect the chairman's need to be guarded against abusive deposition tactics. In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation, D.C.Ind.2002, 205 F.R.D. 535.

Plaintiff's deposition of the CEO of a corporate defendant was justified. Plaintiff's antitrust claims raised questions related to corporate policies, and plaintiff presented evidence that the CEO had unique knowledge with respect to some of the questions. Six West Retail Acquisition v. Sony Theatre Management Corp., D.C.N.Y.2001, 203 F.R.D. 98.

Defendants in wrongful discharge suit were not entitled to a protective order prohibiting the deposition of the CEO on the ground that the plaintiff's general allegations of the CEO's involvement were insufficient. The CEO was a named defendant, and he did not make an averment of lack of knowledge, but asserted instead that there was a different motivation for the transfer that led to plaintiff's discharge from the one asserted by plaintiff. Nyfield v. Virgin Islands Telephone Corp., D.C.V.I.2001, 202 F.R.D. 192.

Protective order would not issue to prevent the taking of the deposition of a dean in an action claiming that a professor was discriminated against on grounds of national origin. Although the dean asserted that he had no recollection of communicating with the professor in the past ten years, it appeared that the dean had spoken to others about the professor and had information pertinent to the lawsuit. Naftchi v. New York University Medical Center, D.C.N.Y.1997, 172 F.R.D. 130.

[FN23]

AIDS discovery refused

In action against blood bank brought by estate of donee who received blood transfusion which resulted in her infection with human immunodeficiency virus (HIV), magistrate judge did not abuse his discretion in denying discovery of identity of donor of blood used in transfusion, in view of public interest in protecting nation's blood supply. Ellison v. American National Red Cross, D.C.N.H.1993, 151 F.R.D. 8.

Estate of patient infected with AIDS during transfusion with blood collected by defendant was not entitled to discover identity of blood donor. This information might prove useful in evaluating defendant's donor-screening procedures, but donor's right to privacy outweighed interest of plaintiff in obtaining name. Estate of Hoyle v. American Red Cross, D.C.Utah 1993, 149 F.R.D. 215.

"There is no question that court ordered disclosure of donors' identities will have a serious impact on volunteer blood donations. ... The specter of becoming involved in litigation, whether as a party or a witness, along with the potential for probing questions concerning a person's private life would certainly serve to dampen any charitable disposition toward donating blood." Coleman v. American Red Cross, D.C.Mich.1990, 130 F.R.D. 360, 362.

Doe v. American Red Cross Blood Services, D.C.S.C.1989, 125 F.R.D. 646, 652 (noting "hysteria" with which public has reacted to AIDS).

[FN24]

AIDS discovery allowed

"Acceptance of the Red Cross's arguments would amount to a grant of virtual blanket immunity from donation-related liability. The plaintiff is seeking information about events that occurred more than six years ago, from the only person who might remember. There can be no question that what happened during the donor screening process is crucial to the plaintiff's claim that the Red Cross was negligent in failing to defer the implicated donor. Whatever privacy interests that are involved are protected by the district court's order." Watson v. Low County Red Cross, C.A.4th, 1992, 974 F.2d 482, 489.

In suit against blood bank brought by transfusion recipient, plaintiff was entitled to disclosure of name and full medical history of deceased donor and could contact and depose any of donor's health care providers. Doe v. American National Red Cross, D.C.W.Va.1993, 151 F.R.D. 71.

Where blood donor had died, interest in disclosure of identity outweighed privacy interest of donor. Long v. American Red Cross, D.C.Ohio 1993, 145 F.R.D. 658.

Trial court did not abuse its discretion in ordering revelation of identity of blood donor in suit against blood center by plaintiff allegedly infected with AIDS due to transfusion. The donor had already died (of AIDS), and defendant's showing regarding risk to the blood supply did not override plaintiff's need to know. Doe v. Puget Sound Blood Center, 1991, 819 P.2d 370, 117 Wn.2d 772.

Compare

Trial court did not abuse its discretion in finding that interests asserted by Red Cross outweighed plaintiffs' interest in obtaining blood donor's identity. But once plaintiff had violated order, court could not forbid plaintiff's suit against donor. Coleman v. American Red Cross, C.A.6th, 1992, 979 F.2d 1135, 1139–1140.

Estate of decedent who received blood transfusion allegedly tainted by HIV virus was entitled to limited discovery in suit alleging negligence in supplier's acceptance of blood donation. Anonymous deposition through court-approved written questions would be used. Diabo v. Baystate Medical Center, D.C.Mass.1993, 147 F.R.D. 6, order withdrawn and vacated as moot due to death of blood donor. 1993 WL 379563 (D.Mass.1993).

See also

Note, Transfusion-Related AIDS Litigation: Permitting Limited Discovery From Blood Donors in Single Donor Cases, 1991, 76 Cornell L.Rev. 927.

[FN25]

Not dependent on own disclosure

The right of one party to obtain discovery under federal rules is not dependent upon the obligation of that party to make discovery to his adversary under the same rules, and government was not entitled to strike interrogatories propounded by claimant in proceedings upon a libel of information charging misbranding of an article of drug because claimant had declined to answer interrogatories propounded by United States on ground that matters inquired into were privileged under Fifth Amendment. U.S. v. 47 Bottles, More or Less, Each Containing 30 Capsules of Jenasol R.J. Formula "60", D.C.N.J.1960, 26 F.R.D. 4.

See Miller v. N.V. Cacao-En Chocoladefabrieken Boon, D.C.N.Y.1964, 35 F.R.D. 213, 215.

But cf.

In Campbell v. Eastland, C.A.5th, 1962, 307 F.2d 478, 490, certiorari denied 83 S.Ct. 502, 371 U.S. 955, 9 L.Ed.2d 502, the fact that the taxpayer intended to rely on his privilege against self-incrimination if his deposition were taken was one of the factors that induced the court to find that he had failed to show good cause to require production of documents by the United States.

8 FPP § 2037

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