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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JAMES BUSEY,

Plaintiff,

v.

WELLS FARGO BANK NA,

Defendant.

CASE NO. 3:19-cv-05880-RJB-BAT

**ORDER GRANTING MOTION TO  
COMPEL**

Defendant Wells Fargo Bank NA (“Wells Fargo”) seeks an order compelling Plaintiff James Busey to provide a privilege log and his Rule 26 Initial Disclosures. Wells Fargo also seeks its costs in bringing this motion. Dkt. 25.

The court finds that the motion to compel shall be granted and that Defendant is entitled to recover attorney’s fees and costs incurred in bringing of this motion.

BACKGROUND

This case arises from Wells Fargo’s alleged improper handling of bank accounts for two trust funds, the Busey Family Lopez Property Trust (“BFLIPT”) and the Ann Busey Revocable Living Trust (“ABRLT”) of which the Plaintiff, James Busey, was the co-trustee and successor trustee, respectively. Dkt. 1-1. Plaintiff alleges that due to Wells Fargo’s improper handling of the accounts, he incurred damages in connection with a San Juan County Superior Court lawsuit

1 (*Mavin v. Busey*, No. 16-4-05055-5, the “State Case”), including fees and costs he incurred  
2 defending himself against allegations of embezzlement, fraud, and co-mingling of trust assets.  
3 *Id.*, ¶ IX. Plaintiff successfully defended the State Case, (*id.*, ¶¶ XI-XIII), and recovered his fees  
4 and costs in the State Case.

5 On September 26, 2019, Wells Fargo moved to dismiss the Complaint on collateral  
6 estoppel (and other) grounds. Dkt. 11. The Court granted Wells Fargo’s motion in part, ruling  
7 “Plaintiff’s claim in this case, for attorneys’ fees and statutorily allowed costs (under state law)  
8 for defending the State Case, is barred by collateral estoppel.” Dkt. 18, p. 14. The Court clarified,  
9 “To the extent that there are other fees or costs, those damages claims are not precluded”. *Id.*

10 To determine the extent of such “other fees or costs”, if any, Wells Fargo served its First  
11 Interrogatories and Requests for Production to Plaintiff on November 6, 2019. Dkt. 26,  
12 Declaration of Al Roundtree (“Roundtree Decl.”) ¶ 2, Ex. A. Wells Fargo propounded only four  
13 foundational interrogatories, asking Plaintiff to identify and describe (1) the basis and nature of  
14 Plaintiff’s damages, (2) what contract Wells Fargo allegedly breached, (3) the factual basis for  
15 plaintiff’s negligent banking claim, and (4) potential witnesses. *See id.* Ex. A. Wells Fargo also  
16 propounded eight requests for production seeking documents related to Plaintiff’s claimed  
17 damages, the factual basis for his claims, and the State Case. *Id.*

18 Plaintiff’s answers, any objections, and document production were due on or around  
19 December 6, 2019. Plaintiff did not serve answers, objections, produce documents, or request an  
20 extension of time or otherwise contact defense counsel. *Id.* ¶ 2. In addition, Plaintiff’s Rule 26  
21 Initial Disclosures were due on December 18, 2019 and Plaintiff was directed to initiate a Rule  
22 26 conference with Wells Fargo before December 11, 2019. Dkt. 10. Plaintiff did neither,  
23 although Wells Fargo served its initial disclosures on December 18, 2019. Dkt. 26, Roundtree

1 Decl. ¶¶ 3,4. To date, the parties have not participated in a discovery conference and to date,  
2 Plaintiff has not served his Rule 26 Initial Disclosures. *Id.*

3 On December 26, 2019, Wells Fargo filed a non-joint Status Report due to Plaintiff's  
4 failure to (i) schedule (or communicate in any way about) the Rule 26(f) conference, (ii) submit  
5 Rule 26(a)(1) initial disclosures, or (iii) seek an extension of any of the deadlines in the Court's  
6 September 26, 2019 Order (Dkt. 10), including the December 26 deadline for submission of the  
7 joint status report. Dkt. 20. After the court issued an Order to Show Cause, ordering Plaintiff to  
8 submit a joint status report by January 13, 2020, a Combined Joint Status Report was filed on  
9 January 13, 2020. Dkt. 22. In the Joint Report, Plaintiff states "Plaintiff anticipates submitting its  
10 [sic] initial disclosures on or before January 15, 2020." *Id.* at p. 2. In his response to the court's  
11 Order to Show Cause, Plaintiff stated: "Plaintiff is in the process of answering" Wells Fargo's  
12 First Interrogatories and Requests for Production and also repeated that "Plaintiff ... will also be  
13 providing its [sic] Initial Disclosures on or before January 15, 2020." Dkt. 23, p. 1. *Id.* at p. 2.

14 At the time of filing the motion to compel, Plaintiff had done neither, despite efforts by  
15 Mr. Roundtree to confer with Plaintiff's counsel, Stuart Morgan. On December 20, 2019, Mr.  
16 Roundtree inquired about Plaintiff's missing Initial Disclosures and the Rule 26 conference. Dkt.  
17 26, Roundtree Decl. Ex. C. On February 10, 2020, about a month after Plaintiff said he would  
18 provide his Initial Disclosures, Mr. Roundtree followed up again by email. *Id.* Ex. D. Mr.  
19 Morgan did not respond. *Id.* ¶ 7. On March 18, 2020, Wells Fargo's counsel again followed up  
20 by email. *Id.* Ex. E. Mr. Morgan did not respond. *Id.* ¶ 8. On April 28, 2020, Mr. Roundtree  
21 called Mr. Morgan's office line and left a voicemail. *Id.* ¶ 9. Mr. Roundtree received a text  
22 message in response from Mr. Morgan stating that he would call Mr. Roundtree to discuss  
23 Plaintiff's missing discovery, but he never did. *Id.* ¶ 9, Ex. F.

1 In response to the motion to compel, Plaintiff contends that Mr. Morgan’s practice has  
2 been disrupted by the coronavirus pandemic, Plaintiff is “contemporaneously providing  
3 discovery responses,” and Plaintiff desires to resolve the matter between counsel or through  
4 mediation. Dkt. 27, pp. 1, 5. In his declaration, Mr. Morgan states that Plaintiff’s theories of  
5 liability were “laid bare” “in previous motion practice”. Dkt. 28, ¶ 2.

6 On June 18, 2020, Plaintiff sent responses, discovery, and objections to Wells Fargo’s  
7 first discovery and limited production of documents. Dkt. 30, Ex. A. Plaintiff did not include a  
8 privilege log or his Rule 26 Initial Disclosures. *Id.*

9 DISCUSSION

10 “A party seeking discovery may move for an order compelling an answer, ... production,  
11 or inspection.” Fed. R. Civ. P. 37(a)(3)(B)(iii), (iv). “[A]n evasive or incomplete disclosure,  
12 answer, or response must be treated as a failure to disclose, answer or respond.” Fed. R. Civ. P.  
13 37(a)(4).

14 The court is mindful of the effects the coronavirus pandemic has had on businesses in  
15 Washington, including law firms. However, Plaintiff’s discovery responses and Rule 26 Initial  
16 Disclosures, along with Mr. Roundtree’s repeated attempts to confer with Mr. Morgan, all  
17 occurred prior to Governor Inslee’s “Stay Home, Stay Healthy” Order of March 24, 2020.  
18 Plaintiff provides no explanation for why his discovery was late or why he ignored  
19 communications from Wells Fargo, either before or after the pandemic. Had he properly  
20 conferred with defendant’s counsel, perhaps the court could have been spared this motion.

21 Plaintiff also did not “contemporaneously” provide his responses to the outstanding  
22 discovery requests. Instead, he provided interrogatory answers and some documents three later,  
23 without a privilege log and to date, has still not served his Rule 26 Initial Disclosures.

1 Although Plaintiff states that he “desires to ultimately resolve this dispute between  
2 counsel [or] proceed to mediation” (Dkt. 27 p. 1), Wells Fargo informs the court that it has never  
3 received a demand or any other communication regarding settlement, despite Plaintiff stating  
4 such a demand would issue “shortly” over 5 months ago. Dkt. 22, ¶ 4(A). Plaintiff also does not  
5 explain to the court why a desire for settlement or theories stated in a prior briefing should  
6 abrogate his obligation to provide timely discovery.

7 “It is well established that a failure to object to discovery requests within the time  
8 required constitutes a waiver of any objection”, including, “an objection that the information  
9 sought is privileged.” *Arch Ins. Co. v. Safeco Ins. Co. of Am.*, No. C18-1591-JCC, 2019 WL  
10 6617500, at \*2 (W.D. Wash. Dec. 5, 2019) (quoting *Richmark Corp. v. Timber Falling*  
11 *Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992) and *Davis v. Fendler*, 650 F.2d 1154, 1160  
12 (9th Cir. 1981)). By failing to timely respond, Plaintiff has waived any objection he may have  
13 had to the discovery requests. Fed. R. Civ. P. 33(b)(4) and 34(b)(2). In addition, Rule 37  
14 specifically grants fees to the moving party “if the disclosure or requested discovery is provided  
15 after the motion was filed.” Fed. R. Civ. P. 37(a)(5) (emphasis added).

16 Accordingly, it is **ORDERED**:

- 17 1) Wells Fargo’s motion to compel (Dkt. 25) is **GRANTED**; Plaintiff shall serve  
18 Wells Fargo with a privilege log and his Rule 26 Initial Disclosures **by July 14,**  
19 **2020.**
- 20 2) Plaintiff’s objections to Wells Fargo’s First Interrogatories and Requests for  
21 Production are **waived**;
- 22 3) Pursuant Fed. R. Civ. P. 37(a)(5), Plaintiff shall pay Wells Fargo its attorneys’  
23 fees and expenses incurred in bringing this motion to compel. Wells Fargo shall

1 submit a motion and affidavit detailing its fees and expenses within ten (10) days  
2 of the date of this Order for the Court to approve.

3 **DATED** this 7th day of July, 2020.

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6 BRIAN A. TSUCHIDA  
7 Chief United States Magistrate Judge