

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

LL B SHEET 1, LLC,
Plaintiff,

v.

MICHAEL J. LOSKUTOFF,
Defendant.

Case No.16-cv-02349-BLF (HRL)

**ORDER RE: DISCOVERY DISPUTE
JOINT REPORT #1**

Re: Dkt. No. 49

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Plaintiff LL B Sheet 1, LLC (“LLB”) sues defendant Michael Loskutoff (“Loskutoff”) for intentional misrepresentation, negligent misrepresentation, fraud by concealment, and breach of contract. Dkt. No. 1. LLB alleges that Loskutoff “made material misrepresentations of fact and concealed information about the amount of rent that was generated from a cellular tower when he assigned the rent payments to Plaintiff[,]” and seeks to recover punitive damages (among other forms of relief). Dkt. No. 49, at 5. Loskutoff asserts that there was no fraud, and that this is a case of mutual mistake in which rescission is appropriate. *Id.* at 9. Under his theory of the case, Loskutoff argues, LLB would not be entitled to recover punitive damages. *Id.* The court’s jurisdiction over this action is based on diversity of citizenship. Dkt. No. 1, at ¶ 4.

In the present discovery dispute, LLB requests that the court compel Loskutoff to disclose (1) “all Documents that identify [his] current net worth and financial condition,” (2) “Documents that refer or relate to [his] accounting of income and profit for the past five (5) years,” (3) “Documents that refer or relate to [his] accounting of expenses and losses for the past five (5) years,” and (4) Loskutoff’s “Federal tax returns for the past five (5) years.” Dkt. No. 49, Ex. A. All of these requests are for the purposes of LLB’s punitive damages calculations. Dkt. No. 49, at 3. Loskutoff objects on the grounds that (1) financial documents are protected by the right of privacy found in the California Constitution, Article 1, Section 1, (2) the request violates

1 California Civil Code Section 3295, (3) the request is overbroad, vague, and ambiguous, (4) the
2 request calls for irrelevant documents, and (5) tax returns are privileged. Dkt. No. 49, Ex. A.
3 Loskutoff further asserts that LLB would not be prejudiced if the court were to postpone the
4 determination on the disclosure of his financial documents for the purposes of punitive damages
5 until after LLB demonstrated that it was entitled to such damages. Dkt. No. 49, at 10. LLB
6 responds by arguing (1) that the balancing test related to the right of privacy under the California
7 Constitution favors disclosure, (2) that Section 3295 is not applicable to discovery in this court, (3)
8 that some of Loskutoff's objections are impermissible boilerplate objections, and that (4)
9 documents related to a defendant's financial information are relevant to the issue of punitive
10 damages.

11 For the reasons described below, the court grants LLB's requests to compel disclosure in
12 part, and denies them in part.

13 **DISCUSSION**

14 **1. Documents Regarding Current Net Worth and Financial Information.**

15 Information related to a defendant's current net worth and financial condition is "clearly
16 relevant to the issue of punitive damages." *Vieste, LLC v. Hill Redwood Dev.*, No. C-09-04024
17 JSW (DMR), 2011 WL 855831, at *1 (N.D. Cal. Mar. 9, 2011); *Charles O. Bradley Trust v.*
18 *Zenith Capital LLC*, No. C-04-2239 JSW (EMC), 2005 WL 1030218, at *1 (N.D. Cal. May 3,
19 2005). Defendant nevertheless resists the disclosure of his financial condition and net worth for
20 the reasons mentioned above.

21 As the court's jurisdiction over this action is based on diversity of citizenship, state law
22 governs claims of privilege. Fed. R. Evid. 501. But federal courts sitting in diversity apply
23 federal procedural law. *Hanna v. Plummer*, 380 U.S. 460 (1965). Defendants' claims of privilege
24 founded on California Civil Code Section 3295 thus fail because this section is procedural rather
25 than substantive. *Oakes v. Halverson Marine Ltd.*, 179 F.R.D. 281 (C.D. Cal. 1998). As the
26 *Oakes* court explains, "the statute is part of a pervasive statutory scheme for the purpose of
27 establishing procedures for pleading exemplary or punitive damages and obtaining information
28 relevant to that. . . . Section 3295(c) merely restricts when and how evidence of a defendant's

1 financial condition is obtained.” *Id.* at 284-85. Section 3295 also conflicts with federal procedural
2 rules—specifically, Fed. R. Civ. P. 26(b), which permits the discovery of financial information
3 related to punitive damages. *Id.* at 286. The court, sitting in diversity, applies the latter (federal)
4 rule.

5 Nevertheless, the court applies state law with respect to the substantive right to privacy. In
6 California, this right to privacy is stated in Article I, Section 1 of the California Constitution. The
7 state right to privacy is not absolute, but must be balanced against the countervailing public
8 interests in disclosure. *Hill v. Nat’l Collegiate Athletic Ass’n*, 7 Cal. 4th 1, 37-38 (1994). In
9 conducting this balancing test, the court must consider factors including “the purpose of the
10 information sought, the effect that disclosure will have on the affected persons and parties, the
11 nature of the objections urged by the party resisting disclosure[,] and availability of alternative,
12 less intrusive means for obtaining the requested information.” *Hooser v. Superior Court*, 84 Cal.
13 App. 4th 997, 1004 (2000).

14 Here, the court determines that the interests favoring the disclosure of defendant’s net
15 worth and financial condition—“facilitating the ascertainment of truth in connection with legal
16 proceedings,”¹ and obtaining the just resolution of claims—outweigh the countervailing interests
17 favoring privacy, especially in light of the fact that the financial information can be disclosed
18 pursuant to a protective order (to which LLB has offered to stipulate). *Vieste, LLC*, 2011 WL
19 855831, at *1; *Nicander v. Hecker*, No. C07-05838 JF (HRL), 2009 WL 5084087, at *1 (N.D. Cal.
20 Dec. 21, 2009); *Charles O. Bradley Trust v. Zenith Capital LLC*, No. C-04-2239 JSW (EMC),
21 2005 WL 1030218, at *2 (N.D. Cal. May 3, 2005). Further, LLB does not have other, less
22 intrusive means of obtaining defendant’s financial information, Dkt. No. 49, at 6, and this
23 information, in addition to being necessary for an award of punitive damages, *Adams v.*
24 *Murakami*, 54 Cal. 3d 105, 114-16 (1991), could aid the parties in settling this matter, *See Charles*
25 *O. Bradley Trust*, 2005 WL 1030218, at *3.

26 Defendant argues that, since his financial information is sought related to the issue of
27

28 ¹ *Hooser*, 84 Cal. App. at 1004 (quoting *Moskowitz v. Superior Court*, 137 Cal. App. 3d 313, 316 (1982)).

1 punitive damages, the court should postpone discovery until a later stage of the proceedings, after
2 LLB has made a showing that it is entitled to punitive damages. Dkt. No. 49. But the majority of
3 federal courts to have considered this issue have declined to postpone the disclosure of financial
4 condition and net worth information. *Vieste, LLC*, 2011 WL 855831, at *2; *Charles O. Bradley*
5 *Trust*, 2005 WL 1030218, at *3. The disclosure of punitive damages information at this stage of
6 the action may assist the parties in coming to a settlement. *Id.* Further, the case defendant cites
7 for the proposition that discovery should be postponed, *Garcia v. City of Imperial*, 270 F.R.D. 566
8 (S.D. Cal. 2010) is distinguishable, in that it involved “an additional layer of liability analysis on
9 the question of qualified immunity” of the police officer defendants that is not present here.
10 *Vieste, LLC*, 2011 WL 855831, at *2.

11 Finally, defendant objects that the request for discovery of documents related to his net
12 worth and financial condition is “overbroad, vague, [and] ambiguous” Dkt. No. 49, Ex. A.
13 The court is not persuaded by defendant’s objections regarding vagueness and ambiguity; the
14 language of the relevant requests for production should not be a barrier to identifying responsive
15 documents. The court is, however, persuaded that the requests for five years’ worth of accounting
16 of income, profit, losses, and expenses is overbroad. “Discovery of Defendants’ net worth and
17 financial condition should be limited to information about [his] *current* assets and liabilities, given
18 that ‘past earnings and net worth cannot reasonably lead to relevant information on the issue of
19 punitive damages.’” *Vieste, LLC*, 2011 WL 855831, at *3 (quoting *Hughes v. Groves*, 47 F.R.D.
20 52, 55 (W.D. Mo. 1969)).

21 The court thus grants-in-part LLB’s request to compel Loskutoff to produce documents
22 responsive to Requests for Production 1-3 (requesting information related to defendant’s financial
23 condition and net worth and documents related to accounting of profits, income, losses, and
24 expenses), subject to two conditions. First, the financial information shall be disclosed pursuant to
25 a protective order, and shall be kept confidential and used only for the purposes of prosecuting,
26 defending, or attempting to settle this litigation. Second, Loskutoff need only produce the last 2
27 years’ worth of accounting of profits, income, losses, and expenses, rather than the last 5 years’.
28 *See Vieste, LLC*, 2011 WL 855831, at *3.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

order, and Loskutoff shall have 7 days after that to complete his disclosures.³ The court denies the request to compel the production of tax returns.

IT IS SO ORDERED.

Dated: 12/28/2016



HOWARD R. LLOYD
United States Magistrate Judge

³ If the parties fail to reach agreement regarding the terms of a protective order, Loskutoff's disclosures will still be due 28 days from the date of this order, and they shall be subject to the confidentiality and use limitations set forth above.