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UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF FLORIDA

WHITNEY INFORMATION NETWORK, INC.; a Colorado corporation, Plaintiffs, v. XCENTRIC VENTURES, LLC, an Arizona limited liability company; BADBUSINESSBUREAU.ORG, an Arizona limited liability company; and ED MAGEDSON, an individual, Defendants.	Case No: 2:04-CV-47-ftm-29 **DEFENDANTS' RESPONSE TO MOTION FOR SANCTIONS FOR IMPROPER DEPOSITION CONDUCT**

Defendant, through undersigned Defense Counsel, responds in opposition to Plaintiff's Motion for Sanctions. (Defendant will oppose Plaintiff's Supplement to Plaintiff's Motion for Sanctions in a separate response.) Undersigned Defense Counsel's conduct was proper and not disruptive. There has been no prejudice to the Plaintiff. The discovery dispute is not material to any substantive issue in the case. Plaintiff's Motion is tactical, not substantive. Plaintiff requests sanctions calculated to disrupt the case. The motion distracts from the merits, and inappropriately increases the cost of litigation.

I. INTRODUCTION

At the deposition, Plaintiff's Counsel's used tactics to create unnecessary and irrelevant disputes. First, Plaintiff's counsel demanded that privileged communication be read into the record at deposition, and argued the point excessively on the record, after Plaintiff's counsel passed a note to her client during an informal break, *while no question was pending*. Second, Plaintiff's counsel asked harassing questions, exceeding the scope of discovery, to invade the privacy of undersigned counsel's client. Plaintiff's counsel appropriately defended her client's right to refuse to answer. That defense was necessary and appropriate, especially in light of Plaintiff's counsel's manifest intention to publish the contents of the deposition to the world. Plaintiff's Motion is an extension of inappropriate and wasteful tactics.

II. IT WAS PROPER FOR UNDERSIGNED DEFENSE COUNSEL TO CONSULT WITH HER CLIENT WHEN NO QUESTION WAS PENDING DURING THE DEPOSITION

Plaintiff's Motion regarding passing a note to undersigned counsel's client consists of exaggerated rhetoric, and less-than-candid citation of the law. Undersigned Defense Counsel's actions were NOT akin to approaching a witness on the stand at trial and whispering in the witness's ear. Undersigned counsel's conduct did NOT obstruct the deposition. On the contrary, Plaintiff's Counsel, Mr. Lippman, employed deliberate tactics to interfere with the deposition.

A. The law allows an attorney to consult with her client during deposition when no question is pending.

The correct rule of law about attorney's consulting with clients during deposition is that

> [T]he truth finding function is adequately protected if ***deponents are prohibited from conferring with their counsel while a question is pending***; other consultations, during periodic deposition breaks, luncheon and overnight recesses, and more prolonged recesses ordinarily are appropriate.

McKinley Infuser, Inc. v. ZDEB, 200 F.R.D. 648, 650 (D.Colo. 2001) (emphasis added).

B. Plaintiff cites disfavored authority, not law.

Plaintiff inappropriately cites Hall v. Clifton Precision, 150 F.R.D. 525, 527 (E.D. Pa. 1993) as if it were controlling authority, asserting that no consultations are appropriate except for consultations about privileges. However, Hall is not the law, and, as observed by other Federal Courts

> The Hall case has met with substantial, and I believe justified, criticism. Most notably, in In Re Stratosphere Corp. Securities Litigation, 182 F.R.D. 614, 621 9D.Nev. 1998), the court rejected the approach taken in Hall, finding that 'Hall goes too far in its solution.' . . . ' . . . The right to prepare a witness [which the Hall court recognized] is not different before the questions begin than it is during (or after, since a witness may be recalled for rebuttal, etc., during trial.) . . .'

McKinley Infuser, Inc. v. ZDEB, 200 F.R.D. 648, 650 (D.Colo. 2001) (additional citations omitted). Even the Eastern District of Pennsylvania, where Judge Gawthrop issued the Hall decision, has disavowed the Hall case, finding:

> (a) Plaintiff relies on Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. 1993)(Gawthrop, J.), a thoughtful and instructive opinion suggesting most collegial and efficient procedures for conducting depositions;
>
> (b) With all regard for our late colleague, however, we believe that Hall goes too far in forbidding an attorney who defends a deposition . . . from making most objections and from instructing a witness not to answer an objectionable question; . . .
>
> (d) When an objection arises in the course of a deposition, the questioning attorney should explain to the defending attorney that insistence on the objection will require the questioning attorney to file a motion to compel with the Court;
>
> (e) If the defending attorney does not withdraw the objection, the questioning attorney should then begin another line of questioning and file a motion to compel as soon as possible after the deposition has ended.

Birdine v. City of Coatesville, 225 F.R.D. 157, 158 – 159 (E.D. Pa. 2004). Westlaw's Keycite to the Hall case shows that subsequent cases have *Disagreed With*, *Declined to Follow*, *Declined to Extend*, *Distinguished*, and *Recognized the Rejection of* the Hall case, but shows no opinions that follow it.

Plaintiff similarly abuses the Reynolds v. Alabama Dept. of Trasp. case citation. 4 F.Supp.2d 1055 (M.D. Ala. 1998). In that case the judge issued a very restrictive order prohibiting attorneys from talking to trial witnesses during breaks from their trial testimony. The order was prospective only, it did not pretend to state law that applied to all testimony everywhere. The Reynolds case had nothing to do with deposition testimony. The order in the case was tailored to the trial in that case. The Defense attorneys in that case did not challenge the order until long after-the-fact, and were found to have waived their arguments against the restrictive order.

C. Plaintiff's Counsel, Mr. Lippman, disrupted the deposition by pressing his inquiry into the content of privileged communication, which was an attempt to unreasonably annoy and oppress the deponent party.

The deposition transcript shows how events unfolded. As shown in Exhibit A to Plaintiff's Motion, during the deposition, Plaintiff's counsel, Mr. Lippman, asked the witness a question and then interrupted the answer.

Q. And yet [. . .] in order to remain a CAP member I've got to make that person happy?

A. Umm, and I'm – I'm going to say within – within reason. It is –

Q. Okay. Okay. But now –

(Plaintiff's Motion, Exhibit A, Deposition Transcript p. 173 ll. 17 – 25.) After Mr. Lippman interrupted the witness, undersigned Defense Counsel interrupted the interruption.

Ms. Speth: Wait, wait. Before you ask the next question, are you done with your answer?

The Witness: I'm not sure.

Ms. Speth: Okay. Both of you, I'm telling you right now you are killing this court reporter. Slow down.

The Witness: She told us to give her us – a run for her money.

(Plaintiff's Motion, Exhibit A, Deposition Transcript p. 174 ll. 1 – 8.)

At that point, *there was no question pending to the witness*. Undersigned Counsel passed a note to her client and instructed him "*You read that.*" Her client replied "*Okay*." and read the note to himself. (Plaintiff's Motion, Exhibit A, Deposition Transcript p. 174 ll. 9 – 10.)

The contents of the note were privileged attorney-client communication[1].

> There is no recognized exception to the privilege for a communication between an attorney and client which occurs during a break in deposition. [. . .] We also recognize a trial court's authority to supervise the conduct of parties at depositions, but that authority may not encroach upon the attorney-client privilege.

The Haskell Company v. Georgia Pacific Corporation, 684 So.2d 297, 298 (Fla.App. 1996.)

After the witness read the privileged note to himself, Mr. Lippman disrupted the deposition, not undersigned Defense Counsel. Exhibit A to Plaintiff's Motion, shows that Mr. Lippman wrongly and repetitively demanded to have the witness read the privileged note into the record. He also wrongly insisted and argued that undersigned Counsel could not confer with her client, even during formal breaks in the deposition, and inquired into the content of Undersigned Counsel's previous communication with her client during breaks in the deposition. Mr. Lippman's conduct not only disrupted the deposition, his made inaccurate claims about the law and local rules in Florida, which sent several lawyers scrambling to research and refute his incorrect claims.

[1] The note was preserved. The content is privileged. It does not matter what the note said, and its contents should not be disclosed. Plaintiff's Motion admits that the contents of note are not raised as the issue in this motion. Nevertheless, without waiving privilege, Defendant is willing to lodge the original note with the Court for in-camera review. If the Court chooses to review the note it will demonstrate that the contents of the note were both proper and trivial. Defendant awaits the instructions from the Court regarding lodging the note.

III. TACTICS THAT UNREASONABLY ANNOY OR OPPRESS THE DEPONENT PARTY, AND LIMITATIONS ON DISCOVERY, JUSTIFY THE UNDERSIGNED DEFENSE COUNSEL IN ADVISING HER CLIENT NOT TO ANSWER IRRELEVANT QUESTIONS

Rule 26 (b)(1), Federal Rule of Civil Procedure limits Plaintiff's right to discovery: "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party" and that "appears reasonably calculated to lead to the discovery of admissible evidence."

Plaintiff cites Gober v. City of Leesburg, 197 F.R.D. 519 (M.D.Florida 2000). Grober states that it is appropriate for an attorney to direct a witness not to answer a deposition question "to protect a witness from an examination 'being conducted in bad faith or in such a manner as *unreasonably to annoy, embarrass, or oppress the deponent or party*.'" Id. 97 F.R.D. at 520, citing Rule 30(d)(1), (3), Fed.R.Civ.P. (other citations omitted)(emphasis added).

Gober also explains that, generally, the burden is on the party resisting production of information to show lack of relevancy, and upon that showing the burden shifts to the party seeking disclosure to show that the information sought is relevant and necessary. Id., 197 F.R.D. 519, 521 (M.D.Florida 2000). In this case Defendants put the reasons for objections on the record. For example, Defendant's personal financial information was not properly at issue. For another example, questions about old investigations performed by Defendant that did not relate to the alleged defamations at issue in this case were irrelevant.

The moving parties in Grober, did "provide enough explanation in the Motion to Compel to suggest the relevancy of the Plaintiff's social security number." Id. Plaitniff's motion does not meet that minimum. Indeed, Plaintiff's Motion says nothing at all to suggest that the refused questions had anything to do with the case.

Mr. Lippman's deposition technique was to push the witness to answer irrelevant questions and even inappropriate personal questions, which was unreasonably annoying and oppressive. Undersigned Defense Counsel resisted Mr. Lippman's aggressive tactics.

Although Mr. Lippman did not like it when undersigned Defense Counsel contradicted him, her conduct made the deposition more fair, and was not *conduct frustrating a fair deposition*, and does not warrant any sanctions.

IV. UNDERSIGNED DEFENSE COUNSEL PROTECTED HER CLIENT'S PRIVACY FROM PLAINTIFF'S COUNSEL MR. LIPPMAN'S THREAT OF PUBLIC DISCLOSURE, WHICH WAS UNREASONABLE ANNOYANCE AND OPPRESSION

A. Mr. Lippman used tactics, such as the implied threat of disclosing sensitive information, to draw objections, and to unreasonably annoy and oppress,.

The Court is aware that undersigned Defense Counsel's client fears for his personal safety due to harassment and death threats, and fears that his detractors will use deposition records out-of-context to publicize distorted information about him and about Xcentric Ventures LLC., or will use information discovered through deposition to harass him in other ways. The Rip-off Report website makes enemies because it provides a forum for consumers to publically complain about companies and people who treat consumers unfairly.

Minutes before the deposition began, in argument over the application of the Court's protective order, undersigned Defense Counsel argued:

> ". . . my client has been the subject of many, many death threats because he runs a website that is very popular and controversial.
>
> We have paid an off-duty police officer to guard this deposition. My client takes this very, very seriously. I have been the subject of death threats myself. And we need to keep this information confidential as to when this deposition is happening and what is being said. . . ."

Deposition p. 7, ll. 10 – 19. Plaintiff's counsel was very well aware that undersigned Defense counsel works very hard to protect her client, and her client's private information.

Nevertheless, at deposition Plaintiff's counsel Mr. Lippman used hardball tactics aimed at pressuring Defendant with the implied threat that Mr. Lippman would disclose confidential or private information to all the world. For example, Mr. Lippman's very

first substantive question to the witness was ***"Now, Mr. Magedson, what is your home address?"*** (Deposition, p. 19, l. 9) Mr. Lippman knows that undersigned counsel's client keeps his home address private for safety reasons. The witness was already a named party, and had already accepted service of the Complaint. Subsequent pleadings can be served on counsel. From the beginning of the deposition it was clear that Mr. Lippman would push for irrelevant information, for the purpose of disclosing it publically, so that anyone could use it for any nefarious purpose. Mr. Lippman's tactics should be understood in the context of Plaintiff's recent request to publish the entire deposition of Mr. Magedson to the Court in a public record available on PACER, although very little of the transcript has anything to do with matters before the Court.

In response to the first question about her client's address, undersigned Defense Counsel objected. "I'm going to object to that question as not relevant to this case. If you need to reach Mr. Magedson, you can reach him through my office." (Deposition, p. 19, ll. 11 – 14.)

B. Mr. Lippman pressed the witness for personal information that was outside the scope of discovery.

Mr. Lippman asked undersigned Counsel's client whether he used his personal finances to support the expenses of Xcentric Ventures LLC. That information has nothing to do with claims or defenses in this case. Although normally the burden is on the party being deposed to move for a protective order to protect from annoyance, embarrassment, or oppression, "the nature of discovery of financial information requires a broader basis for protection." Larriva v. Montiel, 691 P.2d 735, 737 (Ariz.Ct.App. 1984), citing Leidholt v. District Court, 619 P.2d 768, 770-771 (Colo. 1980). In Larriva, the Arizona Court of Appeals held that personal financial information was not subject to discovery until the plaintiff made a prima facia case for punitive damages with "a factual foundation establishing that it is reasonably likely that a triable issue as to defendant's liability for punitive damages exists." Id. "Otherwise, the possibilities of harassment and

misuse of civil process are obvious ." Id., 691 P.2d at 738. The witness, an Arizona resident operating an Arizona business under Arizona law, is entitled to the protection of that case law.

Undersigned Counsel objected based on relevance and stated on the record "I don't believe he needs to answer irrelevant stuff, so he doesn't need to answer that." Mr. Lippman instructed the witness "You still need to answer the question." Exhibit 3 to Plaintiff's Motion, p. 231, ll. 21-22. Undersigned counsel disagreed, asserting that the witness could decide whether or not to answer irrelevant questions. Mr. Lippman and undersigned counsel then agreed that the Court would ultimately decide whether the question had to be answered, and Mr. Lippman moved on to other questions for a time. Id. p. 232.

Mr. Lippman asked again, a short time later, whether undersigned Counsel's client personally contributed money to the expenses of Xcentric Ventures LLC. Undersigned Counsel again objected. Mr. Lippman asked *again*, and undersigned Counsel objected and advised her client "Once again, you are not required to answer irrelevant questions about your own personal finances." Exhibit 4 to Plaintiff's Motion, p. 237, ll. 8 – 12. The witness stated:

A. I'm going to hold off on that question.

Q. You're going to refuse to answer that question?

A. At this time yes.

Exhibit 4 to Plaintiff's Motion, p. 238, ll. 14 – 17. Nevertheless, Mr. Lippman asked the same question again, and demanded of undersigned counsel, "If you're going to instruct him not to answer, just instruct him not to answer." Undersigned Counsel explained again

> I don't think I can instruct him not to answer. I'm telling you your question isn't relevant. And I'm also telling you that at some point a court can rule on this. But until a court rules on it, I don't believe a witness has to answer personal questions about their own personal finances that are not relevant to the case.

Exhibit 4 to Plaintiff's Motion, p. 239, ll. 1 – 7. Nevertheless, five more times in succession, Mr. Lippman asked the same question about personal finances. He asked the question a total of eight times *after* he agreed that the relevance of the question must be decided by the Court.

Mr. Lippman badgered and harassed the witness with repetitive, irrelevant personal questions. Now, inappropriately, Plaintiff requests sanctions against undersigned Defense Counsel for objecting. It was Mr. Lippman who prolonged or delayed the deposition with his tactics.

V. UNDERSIGNED COUNSEL RAISED A PROPER RELEVANCE OBJECTION TO PROTECT HER CLIENT FROM UNREASONABLE ANNOYANCE AND OPPRESSION, HER CLIENT REFUSED TO ANSWER, AND OPPOSING COUNSEL PUT THE QUESTION ASIDE

Plaintiff complains of one other instance in which Undersigned Counsel objected to the relevance of the questions and advised Mr. Magedson that he did not have to answer those questions. Mr. Magedson chose not answer. That is not improper conduct. Mr. Lippman asked Mr. Magedson about investigations conducted by Xcentric Ventures that did NOT pertain to any reports about Plaintiff posted on the Rip-off Report Webpage about Plaintiff. See Exhibit 2 to Plaintiffs Motion, p. 119. Also, Mr. Lippman and undersigned Defense Counsel disagreed about whether the investigations occurred outside the applicable statute of limitations. The questions sought irrelevant information and were outside the scope of discovery.

Plaintiff's claims assert that Mr. Magedson or Xcentric Ventures created defamatory reports about Plaintiff that are posted on the webpage www.ripoffreport.com. Defendants claim immunity under the Communications Decency Act because they did not create the reports about the Plaintiff, and assert that Plaintiff will fail to prove that posted statements were false or otherwise defamatory. Mr. Lippman's question did not address relevant allegedly defamatory reports.

Undersigned Defense Counsel stated on the record "I'm going to object on relevance and I'm going to tell the witness he doesn't have to answer it if he doesn't want to." Exhibit 2 to Plaintiff's Motion, p. 120, ll. 5 – 6. After discussing and disagreeing about the statute of limitations, undersigned Defense Counsel asked for a break to research the limitations period, and Mr. Lippman stated "I'll put this question off to the side. We can do it whenever. We've taken enough breaks already." Exhibit 2 to Plaintiff's Motion, p. 123 - 124.

VI. THE SANCTIONS SUGGESTED BY PLAINTIFF REGARDING THE NOTE ARE ABSURD, AND REQUESTING TO RECONVENE THE DEPOSITION AT DEFENDANTS' COST IS OPPRESSIVE

Rule 30(d)(3), Fed.R.Civ.P. suggests only "appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof. . . ." and not disbarring the attorney when the court finds *conduct frustrating a fair deposition*. In this instance, passing that note did not frustrate a fair deposition. The Court should not revoke undersigned Defense Counsel's *pro hac vice* admission because she passed a note to her client during his deposition when no question was pending. That sanction would deprive the Defendant of lead trial counsel over a meritless manufactured controversy.

Plaintiff's Motion also seeks the sanction of "paying the fees and costs for WIN's counsel to return to Phoenix to complete their inquiry of Mr. Magedson into the areas which he improperly refused to testify." In Gober, the court refused to reconvene a deposition to force Mr. Gober to merely disclose his social security number, but ordered him to disclose it in writing within 10 days, indicating that compelled discovery should be reasonably calculated to prevent oppression. Also, in considering sanctions, the Gober court noted that the cost of a motion is warranted "unless the court finds that . . . the opposing party's nondisclosure, response, or objection was substantially justified." 197 F.R.D. at 522.

Because there is no showing that the questions that the witness refused to answer were proper questions that should be answered, there is no indication that Mr. Lippman

should return to Phoenix to continue irrelevant inquiries. It should be noted that Plaintiff's Motion does not seek to compel answers to the refused questions. The Motion makes no attempt to show that the questions were relevant to the case, or that matters were within the statute of limitations, or that the questions would lead to discovery of admissible evidence. Plaintiff's Motion does not seek to compel, it only seeks drastic sanctions against undersigned Defense Counsel for raising objections. Under the circumstances, no sanctions are warranted.

VII. CONCLUSION

Because the conduct of undersigned Defense Counsel did not frustrate the conduct of a fair deposition, and conduct of undersigned Defense Counsel in defending her client from unreasonable annoyance and oppression was justified, no sanctions are appropriate. The sanctions requested by Plaintiff are a tactic to disrupt the case.

DATED this _5th_ day of November, 2007.

JABURG & WILK, P.C.

s/Maria Crimi Speth
Maria Crimi Speth, Esq.
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of November, 2007, I caused the attached document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF Registrants:

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