

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

VICKI L. PINERO, individually and on behalf of all others similarly situated,)	Civil Action No. 08-03535
)	
)	Sec. R
Plaintiffs,)	JUDGE SARAH S. VANCE
)	
v.)	Mag. 3
)	MAGISTRATE JUDGE DANIEL E.
JACKSON HEWITT TAX SERVICE)	KNOWLES, III
INC.; JACKSON HEWITT INC.; and,)	
CRESCENT CITY TAX SERVICE,)	
INC. d/b/a JACKSON HEWITT TAX)	
SERVICE,)	
)	
Defendants.)	

MEMORANDUM IN SUPPORT OF MOTION TO COMPEL

Plaintiff, Vicki L. Pinero, submits this memorandum in support of her Motion to Compel against defendants Jackson Hewitt Tax Service Inc. and Jackson Hewitt Inc. (jointly referred to as “Defendants”).

I. INTRODUCTION

In an attempt to induce Plaintiff to obtain tax preparation services through Jackson Hewitt, Defendants made certain knowingly false statements. The statements were

contained in Defendants' "Privacy Policy" and were false when made. Defendants fraudulently represented, *inter alia*, that they were complying with federal regulations regarding safeguarding customer information, including the Federal Trade Commission's Safeguards Rule, 16 C.F.R. § 314.1, *et seq.* Defendants allege they made no false representations to Plaintiff and that they have always complied with applicable federal regulations.

In light of the disputed facts, Plaintiff issued a *single document request* to Defendants, requesting that Defendants produce documents they contend evidence their compliance with the Safeguards Rule. Defendants have objected to Plaintiff's single Request, arguing that production of the requested documents would reveal "attorney mental impressions." Defendants' objection is illogical and improper.

Plaintiff is *not* asking Defendants to produce any documents setting forth attorney advice, opinions, or strategy. Instead, Plaintiff is seeking production of documents that Defendants contend support their position that they were in compliance with an applicable federal regulation, *i.e.*, the Safeguards Rule. Plaintiff's Request goes to the "heart" of Plaintiff's fraud claim. Simply put, Plaintiff has a right to inspect the documents Defendants contend support their representation that they complied with the Safeguards Rule. Indeed, the requested documents must be identified by Defendants in their Initial Disclosures, a fact that reveals the disingenuousness of Defendants' current position.

Defendants' objections to Plaintiff's Request are improper. The Court should grant Plaintiff's Motion to Compel; compel Defendants to produce the requested

documents, if any such documents exist; and, award Plaintiff all costs and attorneys' fees incurred in bringing this motion.

II. BACKGROUND

1. **Allegations in Complaint** – As stated in Plaintiff's complaint,

Defendants represented to Plaintiff and the class members that protecting the privacy of their customers' personal and financial information is a "core value" and that they have state-of-the-art policies, practices, and procedures to prevent improper disclosures of such information and sensitive documents. Further, at the time Plaintiff and the class members contracted with Defendants to obtain tax preparation services, Defendants represented that (a) they "maintain policies and procedures designed to restrict access to nonpublic personal information about you to those persons who need to know that information to fulfill your request for products or services" and that (b) **"[t]hese policies and procedures include physical, electronic, and procedural safeguards that comply with federal regulations to guard your information."** These representations were contained in, *inter alia*, Defendants' "Privacy Policy" issued to Plaintiff and the class members. These representations were false when made.

Docket No. 119, at ¶ 2 (emphasis added).

2. **Defendants' Answer and Affirmative Defenses** – In their answer,

Defendants deny the quoted allegations. *See* Docket No. 150, at pp. 1-2, ¶ 2.

3. **Plaintiff's Single Request for Production of Documents** – On June 8,

2009, Plaintiff served the following Request for Production of Documents on Defendants:

Produce all documents that you believe evidence [your] attempt(s) to comply with the Federal Trade Commission's Safeguards Rule, 16 C.F.R. §§ 314.3-314.4, from January 1, 2005 until June 8, 2009. Include in your response all written policies and procedures designed to (1) insure the security and confidentiality of customer information; (2) protect against any anticipated threats or hazards to the security or integrity of such information; and (3) protect against unauthorized access to or use of such information that could result in substantial harm or inconvenience to any customer.

Exhibit A, Pl. Reqs. for Prod.

4. **Defendants' Combined Response to Plaintiff's Request** – On July 8, 2009, Defendants served their combined response to Plaintiff's Request. *See* Exhibit B, Defs. Resp. to Pl. Reqs. for Prod. Defendants did *not* produce any documents. Nor did Defendants identify any allegedly privileged document on a Privilege Log. Instead, Defendants objected to Plaintiff's single Request as follows:

JACKSON HEWITT'S COMBINED RESPONSE TO REQUEST FOR PRODUCTION NUMBER 1:

Jackson Hewitt objects to Plaintiff's Request to the extent that:

1. The Request does not properly identify the documents sought, but instead impermissibly seeks documents that may support certain legal contentions, and accordingly is premature, overbroad, unduly burdensome, and calls for legal conclusions, mental impressions of counsel, and other privileged attorney work product and attorney-client communications.
2. The Request seeks information and materials protected by the attorney work product doctrine and attorney-client privilege, as well as the joint defense and common interest doctrines.
3. The Request is overbroad and unduly burdensome, and seeks irrelevant information including information that is beyond the temporal and geographic scope of this case, and therefore is not reasonably calculated to lead to admissible evidence.
4. The Request is overly vague, using undefined terms which are argumentative and require speculation.
5. The Request seeks information that is neither relevant to Plaintiff's claims nor reasonably calculated to lead to the discovery of admissible evidence.
6. The Request states allegations of facts and presumes conclusions of law that are in dispute in this Action. Jackson Hewitt further objects to this Request to the extent that it purports to define or characterize the Federal Trade Commission's Safeguards Rule. Any response to the Request should

not be construed as an admission or concession with respect to any such facts, conclusions, or characterizations.

7. The Request calls for information readily available in the public domain or public record (including but not limited to public filings, articles, or court decisions), within Plaintiff's own knowledge or control, or otherwise easily accessible to Plaintiff. Jackson Hewitt's provision of such information to Plaintiff would be unduly burdensome and would cause Jackson Hewitt to incur unnecessary expense.

Subject to and without waiving these objections, Jackson Hewitt invites Plaintiff to clarify and reasonably tailor her Request to seek relevant materials in a manner that does not call for attorney mental impressions or work product and is consistent with the Federal Rules of Civil Procedure, such as would allow Jackson Hewitt to amend and/or supplement its response.

Id.

5. **Undersigned Counsel's Meet and Confer with Opposing Counsel** – On July 10, 2009, undersigned counsel spoke with Andrew S. Wein, Defendants' counsel, by telephone regarding Defendants' response to Plaintiff's Request for Production of Documents. During the call, undersigned counsel requested that Mr. Wein properly respond to Plaintiff's Request by producing the requested documents, or identifying the allegedly privileged documents in a Privilege Log, as required by Fed. R. Civ. P. 26(b)(5)(A). Mr. Wein stated that Defendants intended to do neither.

6. During the call, Mr. Wein stated that production of the requested documents would reveal "attorney mental impressions." Undersigned counsel explained to Mr. Wein that Plaintiff is *not* asking for any documents setting forth attorney advice, opinions, or strategy. Instead, Plaintiff is seeking production of documents *from Defendants* that Defendants contend support their position that they were in compliance

“with the Federal Trade Commission’s Safeguards Rule, 16 C.F.R. §§ 314.3-314.4, from January 1, 2005 until June 8, 2009.” Exhibit A, Pl. Reqs. for Prod.

7. During the call, Mr. Wein advised that Defendants would *not* produce any responsive documents because production of a responsive document would reveal an “attorney mental impression” as to whether the produced document evidenced Defendants’ compliance with the Safeguards Rule. In other words, Defendants apparently now acknowledge that the requested documents are *not* privileged, despite the “privilege” objections set forth in their response. *See* Exhibit B, Defs. Resp. to Pl. Reqs. for Prod. Defendants are now refusing to produce the requested documents because production of the requested documents would allegedly reveal an “attorney mental impression” as to whether the produced documents evidence Defendants’ compliance with the Safeguards Rule.

8. On July 15, 2009, undersigned counsel sent a letter to Mr. Wein, again asking Defendants to properly respond to Plaintiff’s Request. In the letter, undersigned counsel advised Mr. Wein that Plaintiff would be filing a Motion to Compel on July 22, 2009 if Defendants refused to properly respond to Plaintiff’s Request by producing the requested documents, or identifying any privileged documents in a Privilege Log, as required by Fed. R. Civ. P. 26(b)(5)(A).

9. Despite undersigned counsel’s telephone conversation with Mr. Wein, and undersigned counsel’s letter to Mr. Wein, Defendants have refused to properly respond to Plaintiff’s Request.

10. As noted, Plaintiff has a right to know what documents Defendants contend

support their representation that they were in compliance with the Safeguards Rule. Indeed, Rule 26(a) requires that Defendants at a minimum identify such documents in their Initial Disclosures. The requested documents go to the “heart” of the case. The Court should grant Plaintiff’s Motion to Compel.

III. LAW AND ARGUMENT

As this Court has repeatedly stated, “[c]ivil discovery is *not* a game of ambush.” *Vinet v. F & L Marine Management, Inc.*, 2004 WL 3312007, *3 (E.D. La. 2004) (emphasis added); *Karr v. Four Seasons Maritime, Ltd.*, 2004 WL 797728, *3 (E.D. La. 2004). Fed. R. Civ. P. 26(b)(1) allows “discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things[.]” The Rule provides “[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1). “The Federal Rules of Civil Procedure therefore permit broad discovery, allowing inquiry into any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue related to the claim or defense of any party.” *Reine v. Honeywell Intern., Inc.*, 2008 WL 1901398, *1 (M.D. La. 2008). “The discovery rules are accorded a broad and liberal treatment to achieve their purpose of adequately informing litigants in civil trials.” *Crosby v. Blue Cross/Blue Shield of Louisiana*, 2009 WL 1870245, *2 (E.D. La. 2009).

Pursuant to Fed. R. Civ. P. 34(b)(2)(A), “[t]he party to whom [a] request [for production of documents] is directed must respond in writing within 30 days after being

served.” “For each item or category, 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). “[T]he party resisting discovery by asserting any privilege bears the burden of proof sufficient to substantiate its privilege claims and cannot rely merely on a blanket assertion of privilege.” *BG Real Estate Services v. American Equity Ins. Co.*, 2005 WL 1309048, *3 (E.D. La. 2005). “Pursuant to Rule 26(b)(5), when a party withholds information that is otherwise discoverable under a claim of privilege or work-product protection, the party must make the claim expressly and describe the nature of the documents, communications, or things not produced or disclosed, in a manner that will enable other parties to assess the applicability of the privilege or protection without revealing the information itself.” *Elloie v. Allstate Ins. Co.*, 2008 WL 4747214, *5 (E.D. La. 2008); *see also* Fed. R. Civ. P. 26(b)(5)(A).

“[W]here the Rule 26(b)(5) [privilege] log has not been provided, all assertions of privilege or other protections against the requested discovery have been deemed waived.” *Stevens v. Omega Protein, Inc.*, 2002 WL 1022507, *3 (E.D. La. 2002); *see also Bordonaro v. Union Carbide Corp.*, 1995 WL 234545, *2 (E.D. La. 1995) (“Any objections based on work-product or attorney-client privilege has been waived by virtue of plaintiff’s non-compliance with [Fed. R. Civ. P. 26(b)(5)(A).]”); *Coldwell Banker Real Estate Corp. v. Danette O’Neal*, 2006 WL 3845011, *1 (E.D. La. 2006) (“In other contexts in which a privilege log is required, failure to provide the log has resulted in a finding that any privilege has been waived.”).

A. The Court Should Compel Defendants to Properly Respond to Plaintiff's Single Document Request

The Court should grant Plaintiff's Motion to Compel and order Defendants to produce the requested documents, if any such documents exist. As noted, Plaintiff alleges Defendants misrepresented that they were in compliance with applicable federal regulations, including the Safeguards Rule, and has asserted a fraud claim against Defendants based upon the false statements they made knowingly. *See* Docket No. 119, at ¶¶ 2-3, 24, 26-27, 40, 43, and 54-58. Defendants contend they were in compliance with applicable federal regulations, including the Safeguards Rule. *See* Docket No. 150, at pp. 1-2, ¶ 2. Obviously, the requested documents—documents Defendants contend evidence their compliance with the Safeguards Rule—are relevant and discoverable.

Although Defendants initially objected to production of the requested documents based upon several privileges in their combined response, apparently Defendants now concede that *none* of the documents *themselves* are privileged.¹ Instead, Defendants now refuse to produce the admittedly non-privileged documents based upon the argument that production of the documents would reveal an “attorney mental impression.” Specifically, Defendants now argue that production of the documents would reveal an “attorney mental impression” as to whether the produced documents evidenced Defendants’ compliance with the Safeguards Rule. Defendants misunderstand the discovery rules.

Contrary to Defendants’ argument, Plaintiff does *not* have to guess at what documents Defendants contend support their defenses. *See Southern Scrap Material Co.*

¹ To the extent Defendants have refused to produce any document because the document itself is allegedly privileged, Defendants have waived the privilege by failing to produce a Privilege Log, as required by Fed. R. Civ. P. 26(b)(5)(A). *See Bordonaro*, 1995 WL 234545 at *2.

v. Fleming, 2003 WL 21920899, *5 (E.D. La. 2003). Indeed, the Federal Rules of Civil Procedure require parties to at least identify documents supporting their defenses in their Initial Disclosures.²

Further, Plaintiff's Request is similar to a "contention interrogatory," which the Federal Rules of Civil Procedure expressly allow. *See* Fed. R. Civ. P. 33(a)(2) ("An interrogatory is *not* objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact[.]") (emphasis added).³ "Basically, contention interrogatories require the answering party to commit to a position and give factual specifics supporting its claims." *Ziemack v. Centel Corp.*, 1995 WL 729295, *2 (N.D. Ill. 1995). "One of the main purposes of contention interrogatories is to narrow the issues for trial." *Fellowes, Inc. v. Aurora Corp. of America*, 2009 WL 1097063, *1 (N.D. Ill. 2009). And a party *cannot* refuse to answer "contention discovery" based upon an allegation that such discovery improperly discloses "mental impressions." *See* 7 Moore's Fed. Prac. § 33.62 ("Despite the work product doctrine's ostensibly unqualified protection for 'mental impressions,' Rule 33 permits an interrogatory to inquire into 'an opinion or contention that relates to fact or the application of law to fact.'").

Defendants contend they were in compliance with the Safeguards Rule. *See*

² *See* Fed. R. Civ. P. 26(a)(1)(A) ("[A] party must, without awaiting a discovery request, provide to the other parties . . . a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment[.]").

³ *See also Newpark Environ. Ser. v. Admiral Ins. Co.*, 2000 WL 136006, *5 (E.D. La. 2000) ("The objection that these interrogatories 'call for a legal conclusion' is without merit under these circumstances. These are contention interrogatories of precisely the type contemplated by [the Federal Rules of Civil Procedure.]"); *Associations of Community Organizations For Reform Now v. Fowler*, 1997 WL 781280, *3 (E.D. La. 1997).

Docket No. 150, at pp. 1-2, ¶ 2. If this is true, Defendants will have documents evidencing their compliance, such as a written information security program. See 16 C.F.R. § 314.3. Plaintiff is entitled to copies of these documents, if they exist, and Defendants should know what documents support their contention of compliance with the Safeguards Rule.⁴

B. The Court Should Award Plaintiff Costs and Attorneys' Fees

Pursuant to Rule 37(a)(5)(A), if a Motion to Compel is granted, “the court *must*, after giving an opportunity to be heard, require the party . . . 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) (emphasis added). The Court may refuse to enter such an order only if “(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party’s nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust.” *Id.*

⁴ See *DIRECTV, Inc. v. Pallesen*, 2005 WL 1176124, *4 (D. Kan. 2005) (“Defendant answered both Interrogatory Nos. 19 and 20 with ‘unknown.’ Defendant should know what he intends to assert as explanations or defenses, based on the facts as he believes them to be. The purpose of contention interrogatories is to ‘narrow and define issue for trial and to enable the propounding party to determine the proof required to rebut the respondent’s position.’ As Plaintiff is entitled to know what Defendant is contending in his defense so that it may be prepared to respond, the Court will compel Defendant to answer ‘yes’ or ‘no’ to Interrogatory Nos. 19 and 20, and to elaborate accordingly on any ‘yes’ responses.”).

Plaintiff requests an award for all costs and attorneys' fees incurred in bringing her Motion to Compel. If requested, Plaintiff will submit an affidavit to set such costs and attorneys' fees.⁵

IV. CONCLUSION

Defendants' objections to Plaintiff's single Request for Production of Documents are improper. Defendants' "attorney mental impressions" argument is baseless. The Court should grant Plaintiff's Motion to Compel; compel Defendants to properly respond to Plaintiff's Request and produce the requested documents, if any such documents exist; and, award Plaintiff all costs and attorneys' fees incurred in bringing this motion.

⁵ See *Teles v. Liberty Mut. Fire Ins. Co.*, 2007 WL 2460963, *2 (E.D. La. 2007) ("Hallmark shall file a motion to fix attorney fees into the record by September 5, 2007 along with: (1) an affidavit attesting to its attorney's education, background, skills and experience; (2) sufficient evidence of rates charged in similar cases by other local attorneys with similar experience, skill and reputation and; (3) the documentation required by Local Rule 54.2.").

Respectfully Submitted,

/s/ Bryan C. Shartle

David Israel (LSBA No. 7174) (T.A.)

Bryan C. Shartle (LSBA No. 27640)

Justin H. Homes (LSBA No. 24460)

SESSIONS, FISHMAN, NATHAN & ISRAEL, L.L.P.

3850 N. Causeway Blvd.

Lakeway II, Suite 200

Metairie, Louisiana 70002

Telephone: (504) 828-3700

Facsimile: (504) 828-3737

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been forwarded to all counsel of record by ECF; by email; by hand; by fax; by FedEx; by placing a copy of same in the U.S. Mail, postage prepaid this 23rd day of July 2009.

/s/ Bryan C. Shartle

Bryan C. Shartle

Attorneys for Plaintiff,

Vicki L. Pinero