IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

MARCY A. JOHNSON, individually and on behalf of all others similarly situated, Plaintiff, v. WEST PUBLISHING CORP., a Minnesota Corporation, Defendant.	Case No: 10-04027-CV-C-NKL Honorable Nanette K. Laughrey Jury Trial Demanded

JOINT PROPOSED SCHEDULING ORDER/DISCOVERY PLAN

On April 16, 2010, the parties, by and through their respective counsel of record, met and conferred pursuant to Rule 26(f) to discuss the nature and bases of their claims and defenses; the possibilities for a prompt settlement or resolution of this case; to make the disclosures required under Rule 26(a)(1); and to develop a proposed scheduling order and discovery plan. The parties have agreed on the proposed following schedule and discovery plan:

A. Trial:

1. The parties respectfully suggest a trial date of September 15, 2011.

2. The parties anticipate that it will take approximately 3–5 days to try this action, with witnesses and experts being presented by both parties.

B. Pleadings: Any amendments to pleadings or actions to join other parties shall be filed on or before August 13, 2010.

C. Discovery

The parties agree that the cutoff of discovery shall be May 31, 2011, but disagree as to other aspects of the discovery schedule.

Plaintiff proposes the following discovery schedule:

1. All motions, with the exception of dispositive motions, shall be filed on or before March 25, 2011.

2. Plaintiffs shall disclose expert testimony pursuant to Rule 26(a)(2) on or before November 19, 2010.

3. Defendant shall disclose expert testimony pursuant to Rule 26(a)(2) on or before December 17, 2010.

4. The parties may depose the other side's expert at any time prior to January 21, 2011.

5. The parties shall disclose any rebuttal expert pursuant to Rule 26(a)(2)(c) at any time prior to February 25, 2011.

6. The parties shall have until March 25, 2011 to depose the opposing party's rebuttal expert.

Given the nature of the causes of action before the Court, Plaintiff believes that the bifurcation of discovery is neither appropriate nor necessary, and object to Defendant's position outlined below that discovery in this case should be bifurcated. Additionally, Class certification-related discovery and merits discovery are generally closely intertwined, which counsels against the bifurcation of discovery. *See Cima v. Wellpoint Health Networks, Inc.*, 2008 WL 746916, at *4 (S.D. Ill. 2008) (citing *Coopers v. Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978); *Nelson v. U.S. Steel Corp.*, 709 F.2d 675, 679 (11th Cir 1983)). And, as a general rule, the party requesting bifurcation has the burden of proving it is warranted in that particular case. *Spectra-Physics Lasers, Inc. v. Uniphase Corp*., 144 F.R.D. 99, 101 (N.D. Cal. 1992). Bifurcation of discovery would delay the litigation and prevent the Court from being fully informed on the

issues when deciding class certification. *See* Manual for Complex Litigation (Fourth) § 21.14 ("[I]nformation about the nature of the claims on the merits and the proof that they require is important to deciding certification. Arbitrary insistence on the merits/class discovery distinction sometimes thwarts the informed judicial assessment that current class certification practice emphasizes."); *see also In re Plastics Additives Antitrust Litig*., 2004 WL 2743591, at *3-4 (E.D. Pa. 2004) (denying defendants' motion to bifurcate discovery due to the overlap between merits and class discovery and recognizing that bifurcation would cause delay and inhibit plaintiffs from receiving an expeditious resolution of their claims as provided by Fed. R. Civ. P. 1); *Gonzalez v. Pepsico, Inc*., 2007 WL 1100204, at *3 (D. Kan. 2007) (denying defendants' motion to bifurcate discovery and noting that "the key question in class certification is often the similarity or dissimilarity of the claims of the representative parties to those of the class members—an inquiry that may require some discovery on the 'merits' and development of the basic issues").

Defendant proposes the following discovery schedule:

Class Discovery

1. All discovery motions related to class discovery will be filed on or before October 29, 2010.

2. Expert designations and depositions will be as follows:

a. Plaintiff will designate any expert witnesses as to class certification it intends to call at trial on or before September 30, 2010.

b. Defendant will designate any expert witnesses as to class certification it intends to call at trial on or before October 29, 2010.

c. All expert depositions as to class certification will be completed on or before November 30, 2010.

3. All pretrial discovery as to class certification will be completed on or before December 31, 2010.

Discovery on the Merits

1. All discovery motions will be filed on or before April 29, 2011

2. Expert designations and depositions will be as follows:

3. Plaintiffs shall disclose expert testimony pursuant to Rule 26(a)(2) on or before March 31, 2011.

4. Defendant shall disclose expert testimony pursuant to Rule 26(a)(2) on or before April 29, 2011.

5. The parties may depose the other side's expert at any time prior to May 31, 2011.

Defendant believes that bifurcation of discovery is warranted here. Issues related to class certification do not necessarily overlap with merits discovery. Merits discovery of a class will be substantially greater than if a class is not certified. If the class is not certified, merits discovery will be substantially diminished because issues related only to the named plaintiff will be discoverable. For example, Defendant will not have to produce evidence in its defense regarding whether any number of the class members gave consent for the use and/or re-disclosure of their personal information, and whether any of the many class members actually conferred a benefit upon Defendant (for the unjust enrichment claim). The additional burden on Defendant of having to respond to merits

discovery before class discovery is completed and has established whether a class action can be maintained is unwarranted here.

D. Motion for Class Certification: Any motion for class certification will be filed on or before January 31, 2011. Any brief in response to class certification will be filed within forty (40) days after the filing of any motion for class certification. Any reply brief will be filed within twenty-one (21) days of the filing of the response brief.

F. Dispositive Motions: Dispositive Motions are to be filed on or before June 30, 2011.

Matters Related to the Discovery Plan

1. The Date by Which All Discovery Will be Completed.

The parties anticipate that all discovery in this case will be completed by May 31, 2011.

Plaintiff alleges that Defendant improperly obtained, acquired, disclosed, sold, and/or disseminated Plaintiff's and Class members' personal information for commercial purposes and profit. Defendant offers certain personal information from motor vehicle records for sale from multiple states and the District of Columbia. The DPPA defines personal information as "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address..." 18 USCS § 2725. Plaintiff alleges that Defendant obtained and sold Plaintiff's name, address, VIN number, vehicle type, make, model, body style of her car, and license plate number. Plaintiff contends that this is prohibited by the DPPA. The DPPA provides that an award may be made for actual damages, but not less than $2,500 in liquidated damages per violation of the DPPA. Plaintiff has also asserted claims for unjust enrichment and injunctive relief.

Defendant has answered and denied the allegations in Count I of the Complaint (alleging a violation of the DPPA) and has filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) with respect to Count II. Defendant contends that Plaintiff has failed to state a claim for unjust enrichment because she does not have a contract like relationship with Defendant and because Plaintiff did not confer any benefit upon Defendant, two essential elements of an unjust enrichment claim.

There are mixed issues of fact and law present here, including whether Defendant obtained or disclosed Plaintiff's and other Class members' personal information for a use not permitted by the DPPA. If so, then the other factual issues are (a) whether Plaintiff has suffered an actual injury and the amount thereof; (b) whether Defendant has been unjustly enriched and, if so, the monetary amount by which Defendant has been unjustly enriched; and (c) what type of injunctive relief should be fashioned, if any.

2. The Subjects on Which Discovery May be Needed, the Status of Discovery to Date, and the Manner in Which Discovery Should Proceed.

Plaintiff anticipates needing discovery relating to the, *inter alia*, following: the size and scope of the Class; revenues obtained from the alleged misconduct; Defendant's knowledge and understanding of the DPPA as it pertains to obtaining the data at issue; the number of violations of the DPPA Defendant has made; and contracts or agreements with any state agencies or third parties related to the obtainment of Plaintiff's and Class members' personal information.

Defendant anticipates discovery relating to the following: whether Plaintiff and any putative Class members have suffered any actual damages; the amount of actual damages that Plaintiff and putative Class members suffered, if any; whether Plaintiff granted permission to

disclose her personal information; and the identity of each putative Class member who has granted permission to disclose their personal information.

To date, aside from the exchange of Rule 26(a)(1) Initial Disclosures, no further discovery has been conducted.

The parties are of the position that discovery should not be conducted in phases or be limited to or focused on any particular issues.

3. Rule 26(a)(1) Initial Disclosures.

The parties exchanged Rule 26(a)(1) Initial Disclosures on April 16, 2010.

4. Changes to the Limitations on Discovery.

Due to the complex, multi-state nature of this class action litigation, Plaintiff proposes that the limits on the number of written discovery and depositions imposed by the Federal Rules of Civil Procedure and Local Rules shall not apply in this matter, subject to the limitations set forth by the Court. The Manual for Complex Litigation, Fourth, (2004), devotes a section exclusively to class actions. *See Id.* at Part II, Ch. 21, pp. 242–341. Plaintiff believes that discovery in this matter may be needed on class certification issues, in addition to merits issues.

Defendant does not agree that the nature of this matter is complex. Therefore, Defendant believes that the limitations in Fed. R. Civ. 33(a)(1) of 25 interrogatories and Fed. R. Civ. P. 30(a)(2)(A)(i) of 10 depositions is more than sufficient. The parties will strive to comply with the page limitations set forth in section 4 of this Court's Standing Order on Motion Practice, Briefs and Protective Orders in Civil Cases. Should the need arise to file a pleading in excess of those limits, Defendant is of the view that the parties should seek leave as required.

5. Other Orders.

The parties believe there are some unusual issues relating to privilege or protection or trial-preparation materials, because this case deals with personal and highly personal

information. The parties anticipate agreement on a Protective Order that will apply to confidential information and personal and highly personal information in documents or otherwise produced in discovery. The parties intend to submit a proposed order to the Court.

6. Jury Trial.

Plaintiff requests a jury trial in this matter.

Dated: April 30, 2010

/s/ Matthew D. Meyerkord
Attorney for Plaintiff

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CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing was served electronically via the Court's electronic filing system this 30th day of April, 2010 to the attorneys of record herein.

/s/ Matthew D. Meyerkord