

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

PAUL E. LUCAS, SR. and)	
RUBY M. LUCAS,)	
)	
Plaintiffs)	
)	
v.)	Case No. 2:03 cv 498
)	
GC SERVICES L.P.; DLS)	
ENTERPRISES, INC.; and GC)	
FINANCIAL CORPORATION,)	
)	
Defendants)	

ORDER

This matter is before the court on the Renewed Motion to Compel filed by the plaintiffs, Paul and Ruby Lucas, on September 22, 2004; the Cross-Motion to Stay Discovery filed by the defendants, GC Services, DLS Enterprises, and GC Financial Corporation, on October 5, 2004; the Motion to Add Supplemental Authority to Motion to Dismiss filed by the defendants on September 17, 2004; the Motion to Add Supplemental Authority to Certain Motions Pending filed by the defendants on October 19, 2004; and the Motion for Leave to File Additional Authority in Support of Opposition to Dismiss and Opposition to Strike the Expert Opinion of Dr. Timothy Shanahan filed by the plaintiffs on October 25, 2004. For the reasons set forth below, the motion to compel is **GRANTED**, the motion to stay is **DENIED**, the motion to add supplemental authority filed on September 17, 2004 is **GRANTED**, the motion to add supplemental authority filed on October 19, 2004 is

DENIED, and the motion to add additional authority filed on October 25, 2004 is **GRANTED**.

Background

This discovery dispute arises from a suit filed by Paul and Ruby Lucas on November 19, 2003, alleging that a dunning letter sent to them by the defendant, GC Services, violated the Fair Debt Collection Practices Act ("FDCPA"). Defendants DLS Enterprises and GC Financial Corporation are the general partners of GC Services (collectively called "GCS").

On January 30, 2004, the plaintiffs filed their first motion for Class Certification, which the plaintiffs renewed by permission of the court on August 20, 2004. On February 25, 2004, the plaintiffs served discovery on the defendants in the form of requests for admissions, interrogatories, and requests for production of documents. The majority of this discovery was relevant to the issue of class certification. On April 21, 2004, the defendants responded to the plaintiffs' discovery. These responses are the subject of the current motion to compel.

On June 10, 2004, the plaintiffs filed their first motion to compel seeking to compel the defendants to answer their discovery more completely. On June 24, 2004, the defendants filed a cross-motion to compel because the plaintiffs did not sign their responses to the discovery propounded by the defendants. On August 6, 2004, this court denied both motions to compel without prejudice because neither party filed a certification pursuant to Local Rule 37.1.

On September 2, 2004, the defendants filed a motion to dismiss the plaintiffs' amended complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). On September 22, 2004, the plaintiffs renewed their June motion to compel because the defendants still had not corrected their deficient discovery responses. The renewed motion contained an affidavit from the plaintiffs' attorney, Alexander H. Burke, stating that the parties attempted to confer on September 20, 2004. Attorney Burke stated that the defendants' position was that the plaintiffs' original discovery was rendered moot by this court's Order of August 6, 2004, and that the plaintiffs must propound new discovery requests. Finally, on October 5, 2004, the defendants filed a motion to stay discovery until after the court ruled on the defendants' motion to dismiss. The discovery deadline for this case is January 31, 2005.

Discussion

Federal Rule of Civil Procedure 37(a)(2)(A) states that "[i]f a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions," provided that the movant certifies that it first attempted to confer with the side not making disclosure. Rule 37(a)(3) states that "an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond." Finally, Rule 37(c)(1) states that a party who fails to disclose, provides false or misleading disclosure, or refuses to admit information required by Rule 26(a) without

"substantial justification" may be sanctioned unless such failure was "harmless." See *Musser v. Gentiva Health Services*, 356 F.3d 751, 755 (7th Cir. 2004); *Salgado v. General Motors Corp.*, 150 F.3d 735, 742 (7th Cir. 1998). The trial court has broad discretion to determine whether a violation is justified or harmless. See *David v. Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003).

Under Rule 37(c), the trial court may impose sanctions which include the payment of attorney's fees, designating certain facts as established, preventing the disobedient party from supporting or opposing designated claims or defenses or "introducing designated matters in evidence," and striking pleadings. See Federal Rule of Civil Procedure 37(b)(2)(A)-(C); Federal Rule of Civil Procedure 37(c)(1). However, the sanctions chosen by the court must be such that "a reasonable jurist, apprised of all the circumstances, would have chosen as proportionate to the infraction." *Salgado*, 150 F.3d at 640; *In re Golant*, 239 F.3d 931, 937 (7th Cir. 2001). Although the court "need not make explicit findings concerning the existence of a substantial justification or the harmlessness of a failure to disclose," the court may consider the "bad faith or willfulness involved in not disclosing the evidence at an earlier date." *David*, 324 F.3d at 857.

In this instance, the GCS's discovery responses were egregiously evasive and incomplete. Within their responses to the plaintiffs' requests for admissions, GCS objected to Request No. 2 to admit the designation "867-01" was a "form number" because

the term "form number" was vague and ambiguous. Despite the plaintiffs attaching photocopies of the letters GCS sent to the plaintiffs and inviting GCS to review the originals at its convenience, GCS denied Requests Nos. 3-8 to admit the number of persons to whom those form letters were sent on the grounds that the exhibits did not "accurately reflect the font print on the letters sent by GCS." GCS refused to answer Requests No. 9-11 regarding the "defendant's" net worth on the basis that the term "defendant" was vague and ambiguous, and then stated that it would be willing to provide this information if a class is certified.

Turning to the defendants' answers to interrogatories, the defendants stated that they could not determine who authorized, approved, or was aware of the form letter sent to the plaintiffs because it was developed over a substantial period of time. Defendants refused to describe the process by which GCS transmitted the letters on the grounds that the interrogatory was vague and overbroad and that the exhibits attached "are not originals and do not adequately represent the letters to the plaintiffs." Defendants refused to answer interrogatories directed at steps GCS takes to collect a debt or describing document destruction and retention policies because these requests were vague, overbroad, and not reasonably calculated to lead to discoverable evidence. GCS categorically refused to answer interrogatories regarding Indiana residents who received the form letter at issue and the defendants' net worth on the grounds that this informa-

tion is only relevant if a class is certified, and then further stated that because the photocopies letters did not "adequately represent the form letters sent by GCS, there are no people sent said letter."

Finally, with respect to the defendants' responses to requests for production of documents, the defendants claimed that virtually every document requested by the plaintiffs, from the technical specifications for paper, ink, and, manuals, and other memoranda setting forth instructions for compliance with the FDCA to pre-existing organizational charts for GCS, are protected by the attorney-client and work-product privileges. Defendants have refused to provide information regarding who, other than the defendants, printed or mailed the form letters on the same grounds.

In short, GCS has responded to the discovery propounded by the plaintiffs by providing no responses at all. Aside from numerous other illogical objections, defendants have taken the preposterous position that they do not have to answer much of the plaintiffs' discovery because the photocopies of the original letters are not "adequately representative" of the originals themselves, despite invitations by the plaintiffs to review the actual documents. Moreover, the defendants have cited the attorney-client and work-product privileges as a basis for refusing to provide information that so obviously falls outside these privileges that it does not merit discussion. Finally, the defendants have refused to respond to discovery largely on the

grounds that it is only relevant in the event a class is certified, even though the defendants did not file a motion to stay discovery on these grounds until after the plaintiffs filed their second motion to compel and over one month following the plaintiffs' motion to dismiss.

The defendants do not get to determine unilaterally the scope and timing of discovery. The plaintiffs filed their first motion for class certification on January 30, 2004, one month before propounding discovery regarding the class issues on the defendants. Yet the defendants did not raise the scope or relevancy of this discovery to the court in the six months preceding the defendants' June 24, 2004 response to the first motion to compel, in the response itself, or in the motion to dismiss filed by the defendants on September 2, 2004. Nevertheless, since April 21, 2004, the defendants have determined that they do not need to respond to the plaintiffs' discovery until after the court has ruled on the motion for class certification. While there may be merit in staying discovery of class issues pending a motion to dismiss, the defendants have lost this privilege by waiting until after their discovery responses were due to raise this issue.

In light of the blatant and willful bad faith the defendants have displayed throughout this discovery dispute, the court finds the defendants' conduct to be without substantial justification and harmful to the litigation of this case. Furthermore, the plaintiffs do not need to propound new discovery upon the defend-

ants. The court denied the plaintiffs' first motion to compel on procedural grounds, not on the substantive merit of the plaintiffs' discovery.

For the foregoing reasons, the Renewed Motion to Compel filed by the plaintiffs, Paul and Ruby Lucas, on September 22, 2004 is **GRANTED**; the Cross-Motion to Stay Discovery filed by the defendants, GC Services, DLS Enterprises, and GC Financial Corporation, on October 5, 2004 is **DENIED**; the Motion to Add Supplemental Authority to Motion to Dismiss filed by the defendants on September 17, 2004 is **GRANTED**; the Motion to Add Supplemental Authority to Certain Motions Pending filed by the defendants on October 19, 2004 is **DENIED**; and the Motion for Leave to File Additional Authority in Support of Opposition to Dismiss and Opposition to Strike the Expert Opinion of Dr. Timothy Shanahan filed by the plaintiffs on October 25, 2004 is **GRANTED**. Pursuant to Federal Rule of Civil Procedure 37(c), the court further **ORDERS** the following sanctions against the defendants:

- 1) Requests for Admissions No. 1 and 2 are deemed admitted;
- 2) The defendants are deemed to admit that the photocopies of the letters sent to the plaintiffs, referenced as "Exhibits A-B" throughout the discovery, do accurately reflect the font print of the letters sent by GCS;
- 3) The defendants shall respond to all outstanding interrogatories and requests for production within ten (10) days of the date of this order; and
- 3) The defendants shall pay the plaintiffs' attorney's fees related to both the first motion to

compel filed by the plaintiffs on June 10, 2004 and the renewed motion to compel filed by the plaintiffs on September 22, 2004. Counsel for the plaintiffs shall file an affidavit with the court attesting to fees incurred in litigating these motions by November 23, 2004.

ENTERED this 3rd day of November, 2004

s/ ANDREW P. RODOVICH
United States Magistrate Judge