

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MJS JANITORIAL,)
)
 Plaintiff,)
)
 vs.) No. 03-2102MaV
)
 KIMCO CORPORATION,)
)
 Defendant.)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO
COMPEL AND TO AWARD FEES

Before the court is the March 12, 2004 motion of the defendant, Kimco Corporation ("Kimco"), pursuant to Rules 26(b)(5) and 37(a) of the Federal Rules of Civil Procedure, to compel the plaintiff, MJS Janitorial ("MJS"), to respond to Interrogatories Nos. 5, 9, and 15 of its first set of interrogatories and Requests Nos. 4, 7, 8, 9, 15, 17, and 18 of its first set of requests for production of documents and to provide a privilege log for Requests Nos. 23, 24, 25, 26, and 27. Kimco also seeks expenses and fees pursuant to Rule 37(a)(4)(A) for bringing the motion to compel. The motion was referred to the United States Magistrate Judge for determination. For the reasons stated below, Kimco's motion to compel is granted in part and denied in part, and its motion for reasonable expenses, including attorney fees, is denied.

FACTUAL BACKGROUND

MJS is a contract janitorial service that provides cleaning services to various customers. Kimco, the defendant, is also in the business of providing janitorial services. On April 27, 2001, MJS entered into a contract entitled "Supplier Agreement" to provide janitorial services as a subcontractor for Kimco. During the pendency of the Supplier Agreement, Kmart Corporation contracted with a company called Facility Service Alliance ("FSA") to provide janitorial services to Kmart on a nation-wide basis. In turn, FSA subcontracted with Kimco to provide janitorial services in approximately 200 Kmart stores. As a result of Kimco's subcontractor status with FSA, the primary service that MJS ultimately performed for Kimco under the Supplier Agreement was cleaning Kmart stores.

On February 19, 2003, MJS filed suit against Kimco seeking to recover money for services MJS performed under the Supplier Agreement, as well as a declaratory judgment regarding a purported non-competition agreement that Kimco asserts MJS entered into by way of a contract addendum. On March 17, 2003, Kimco answered the complaint and filed a counterclaim against MJS alleging a breach of a covenant not to compete and intentional interference with a contract between Kimco and Kmart. After obtaining new information through discovery, MJS later amended its complaint to allege fraud

on the part of Kimco in violation of Tennessee law. The deadline for discovery in this case is April 30, 2004, and a non-jury trial is set for August 16, 2004.

On December 4, 2003, Kimco served its first set of interrogatories and requests for production of documents on MJS. Although MJS responded and provided some of the answers and documents sought by Kimco, it also objected to a number of the requests on the basis that they are overbroad, unduly burdensome, irrelevant, and not reasonably calculated to lead to the discovery of relevant and admissible information. MJS also claimed that Kimco's requests sought confidential and proprietary information and that a portion of the requests sought documents protected by the attorney-client and work product privilege.

The motion presently before the court involves MJS's alleged failure to provide Kimco with answers to interrogatories and documents responsive to Kimco's requests for production regarding: (1) the identities of employees and subcontractors employed by MJS; (2) correspondence between MJS and its subcontractors; (3) copies of contracts entered into by MJS with subcontractors; (4) MJS's profits from its janitorial services; (5) drafts of contracts entered into by MJS with Kmart and other "primes;"¹ (6) MJS's phone

¹ The "primes" to which Kimco refers in its requests for production of documents are the other partners of Kimco under the

records reflecting communication between MJS and Kmart; and (7) copies of invoices sent to Kmart and others and payment received by MJS for janitorial services. (See Def.'s Mem. of Law in Supp. of Its Mot. to Compel Answers to Interrogs., to Compel Produc. Of Docs., and for Sanctions at 1-12.) Furthermore, Kimco contends that MJS has failed to supply a privilege log listing internal memoranda that MJS has refused to produce on the basis of privilege. (*Id.* at 13-17.)

ANALYSIS

As a general rule, information is discoverable if it is "relevant to the claim or defense of any party," "appears reasonably calculated to lead to the discovery of admissible evidence," and is not privileged. FED. R. CIV. P. 26(b)(1); *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998). The scope of discovery is broad under the Federal Rules; however, the trial court has the "sound discretion" to limit its scope. *Coleman v. Am. Red Cross*, 23 F.3d 1091, 1096 (6th Cir. 1994) (quoting *United States v. Guy*, 978 F.2d 934, 938 (6th Cir. 1992)); see also *Lewis*, 135 F.3d at 402.

Discovery does have "ultimate and necessary boundaries."

Kmart national contract with FSA. (See See Def.'s Mem. of Law in Supp. of Its Mot. to Compel Answers to Interrogs., to Compel Produc. Of Docs., and for Sanctions at 9.)

Oppenheimer fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)). The court need not compel discovery if it determines that the request is “unreasonably cumulative . . . [or] obtainable from some other source that is more convenient, less burdensome, or less expensive . . . [or] the party seeking discovery has had ample opportunity by discovery in the action to obtain the information . . . [or] the burden or expense of the proposed discovery outweighs its likely benefit.” FED. R. CIV. P. 26(b)(2)(i)-(iii). With these principles in mind, the court analyzes each of Kimco’s requests.

A. Interrogatory No. 5

In Interrogatory No. 5, Kimco seeks identifying information for every subcontractor utilized by MJS in the course of cleaning Kmart stores before MJS entered into the Supplier Agreement with Kimco in April, 2001. MJS contends that the interrogatory is overbroad and unduly burdensome because MJS began cleaning Kmart stores as early as 1986, and Kimco’s interrogatory would require MJS to identify the subcontractors used in 164 Kmart stores during a fifteen year time period. Additionally, MJS contends that the information is irrelevant as to the billing practices of Kimco after the Supplier Agreement went into effect between the parties.²

² In its initial responses to Kimco’s first set of discovery requests, MJS also objected to answering the disputed

The only objection the court considers as having any merit is MJS's relevance objection. "Once an objection to the relevance of the information sought is raised, the burden shifts to the party seeking the information to demonstrate that the requests are relevant to the subject matter involved in the pending action." *Allen v. Howmedica Leibinger*, 190 F.R.D. 518, 522 (W.D. Tenn. 1999) (citing *Andritz-Sprout-Bauer, Inc. v. Beazer East, Inc.*, 174 F.R.D. 609, 631 (M.D. Pa. 1997)).

Kimco contends that the identifying information of MJS's subcontractors is relevant because it will identify potential witnesses that may have knowledge about MJS or Roman Satur's³ relationships with Kmart managers, communications by Mr. Satur relative to the advent of Kmart's national janitorial services program, and any communications by Mr. Satur with either

interrogatories and requests for production on the basis that they called for confidential and proprietary information, which included trade secret information. Shortly thereafter, Kimco filed an agreed upon motion for protective order that was granted by the court on February 7, 2004. In light of that ruling, MJS has expressed its willingness to "proceed under the terms of the agreed Protective Order entered by the Court if [its] other objections are overruled." (Pl.'s Resp. to Def.'s Mot. to Compel Ans. to Interrogs., to Compel Produc. of Docs., and for Sanctions at 3 n.1.) Accordingly, MJS's objections on the basis of confidentiality and privilege are moot and denied as such.

³ Roman Satur is the president of MJS Janitorial, Inc. Mary Satur is the corporate secretary for MJS and also serves as its designated corporate representative.

subcontractors or Kmart managers about MJS's role in the national janitorial services program. (Def.'s Mem. of Law in Supp. of Its Mot. to Compel Answers to Interrogs., to Compel Produc. Of Docs., and for Sanctions at 2.) Furthermore, Kimco asserts that the subcontractors used by MJS prior to its contractual relationship with Kimco may have knowledge of communications between Kimco and MJS about the new specifications under the national janitorial services program and knowledge as to MJS's awareness of the invoicing procedures under the contract between MJS and Kimco. (*Id.* at 2-3.)

In response, MJS asserts that subcontractors "used by MJS in 1988, 1993, 1998, or 2000" would have no knowledge of the matters addressed in Kimco's argument and would have no knowledge of billing procedures implemented by Kimco at the time of or after Kimco contracted with MJS in April 2001. (Pl.'s Resp. to Def.'s Mot. to Compel Answers to Interrogs., to Compel Produc. of Docs., and for Sanctions at 2.) The court also finds it hard to see how subcontractors who worked for MJS at a time as remote as 1988 could have any information that is relevant to a contractual relationship between MJS and Kimco that did not even come into existence until 2001. That being said, the court is willing to allow Kimco to narrow its discovery request to a more relevant time frame in the event that the identities of subcontractors who worked for MJS

reasonably could lead to the discovery of relevant, admissible information. Accordingly, Kimco's motion is granted in part and denied in part. Kimco is entitled to the information requested in Interrogatory No. 5 only as to the extent it seeks the identifying information of subcontractors that worked for MJS during the six months proceeding the date of the Supplier Agreement.

B. Interrogatory No. 9

Kimco's request in Interrogatory No. 9 is similar to that of Interrogatory No. 5 because it also seeks to discover the identity and contact information for subcontractors. The primary difference, however, is that Interrogatory No. 9 requests the identifying information for the subcontractors and employees of MJS that cleaned the Kmart stores for MJS after MJS entered into the Supplier Agreement with Kimco. Kimco asserts that MJS's subcontractors are "likely" to have discoverable knowledge about business dealings between MJS and Kimco. (Def.'s Mem. of Law in Supp. of Its Mot. to Compel Answers to Interrogs., to Compel Produc. Of Docs., and for Sanctions at 2.)

MJS objected to this interrogatory citing the same reasons for objecting to Interrogatory No. 5. In addition to those objections, MJS claims that the subcontractors used during the 2001 to 2003 contract period with Kimco "are not likely to have any information relating to MJS's business dealings with Kimco." (Pl.'s Resp. to

Def.'s Mot. to Compel Answers to Interrogs., to Compel Produc. of Docs., and for Sanctions at 4.) MJS also contends, among other things, that Interrogatory No. 9 should not have to be answered because MJS does not plan to use subcontractors to support its claims or defenses, which MJS asserts is all that is required for disclosure under Rule 26(a) of the Federal Rules of Civil Procedure. (*Id.*)

The identities of MJS's subcontractors are relevant. Although the remote and lengthy time frame of Interrogatory No. 5 made that request somewhat irrelevant, the time frame of information requested under Interrogatory No. 9 is very pertinent to this action for breach of contract. MJS's subcontractors may or may not have information regarding MJS's business relationship with Kimco during the 2001 to 2003 contract period. The only way for Kimco to find out is to ask. The fact that MJS did not disclose the subcontractor's identities in its initial Rule 26(a) disclosures as persons "likely to have discoverable information that the disclosing party may use to support its claims or defenses" does not eliminate the possibility that the subcontractors may have information relevant to *Kimco's* claims or defenses in this action. Kimco is entitled to the information sought in Interrogatory No. 9 if the request is "reasonably calculated to lead to the discovery of admissible evidence," and

the court is satisfied that Kimco's request is "reasonably calculated" to do so. FED. R. CIV. P. 26(b)(1). Furthermore, the court is not persuaded that the names and contact information of MJS's subcontractors would be unduly burdensome for MJS to produce. If it is MJS's ordinary practice to hire others to complete janitorial services on its behalf, MJS should maintain records of where and when its employees and subcontractors perform that work. Accordingly, Kimco's motion to compel as to Interrogatory No. 9 is granted.

C. Interrogatory No. 15

In Interrogatory No. 15, Kimco seeks the gross and net profits accrued by MJS in providing janitorial services to Kmart stores since January 1, 2003. Kimco asserts that MJS's gross and net profits are relevant and reasonably likely to lead to the discovery of admissible evidence because Kimco is "entitled to recover MJS's profits for its breach of the non-competition provision of the Addendum." (Def.'s Mem. of Law in Supp. of Its Mot. to Compel Answers to Interrogs., to Compel Produc. Of Docs., and for Sanctions at 7.) Because a cause of action for breach of covenant not to compete lies in tort, Tennessee law applies. In support of its argument, Kimco cites the Tennessee Supreme Court case of *Dorsett Carpet Mills, Inc. v. Whitt Tile & Marble Distr. Co.*, 734 S.W.2d 322, 324-25 (Tenn. 1987), and contends that two measures of

damages exist to remedy a breach of a covenant not to compete. Although it admits that the primary measure is the injured party's lost profits, Kimco argues that based on *Dorsett*, courts may consider the profits of the breaching party resulting from the breach of the covenant not to compete as an alternate measure of damages.

In addition to the standard objections that MJS listed in response to all of Kimco's requests, MJS argues that Kimco misstates the holding of *Dorsett* because that case involved "a cause of action predicated on an intentional commercial tort arising from a kickback scheme" and not a breach of a covenant not to compete. (Pl.'s Resp. to Def.'s Mot. to Compel Answers to Interrogs., to Compel Produc. of Docs., and for Sanctions at 5.) Furthermore, MJS notes that the *Dorsett* court specifically stated that it was of the opinion that "generally the lost profit element of damage must be measured by the loss sustained by the plaintiff's business and not by its effect upon defendant's business," even though the court did not rule out the possibility of using the profits realized by the defendant in "some factual situations." (*Id.* at 6 (quoting *Dorsett*, 734 S.W.2d at 325).) MJS represents to the court that it has been unable to find any Tennessee authority for the proposition that the defendant's profits form a basis for calculating the damages to be awarded to a plaintiff who prevailed

on a breach of a covenant not to compete. Kimco also fails to identify any such authority.

MJS is correct that the *Dorsett* case is not directly on point as authority on how to determine the proper measure of damages for a contractual breach of a covenant not to compete because it dealt with a tort claim. The court will nevertheless allow the discovery of MJS's net profits because it may lead to admissible evidence of damages in regard to Kimco's counterclaim for MJS's alleged intentional interference with a contract between Kimco and Kmart. At this time, the court will not and is not required to determine what is the proper measure of damages for a claim for intentional interference with contract. That decision is for the trial judge to make. Meanwhile, MJS is required to produce its net profits and only net profits. In any event, gross profits are not a relevant measure of damages because there are many outside factors that affect their calculation, such as overhead, market forces, variable expenses, and competition. See *Grantham & Mann, Inc. v. Am. Safety Prods., Inc.*, 831 F.2d 596, 601 (6th Cir. 1986); *Joy Floral Co. V. South Cent. Bell Tel.*, 563 S.W.2d 190, 191 (Tenn. Ct. App. 1977). Accordingly, Kimco's motion to compel is granted in part and denied in part as to Interrogatory No. 15, and MJS is directed to produce its net profits from January 1, 2003 to present.

D. Request No. 4

Request No. 4 is related to the subcontractor information sought by Kimco in Interrogatories Nos. 5 and 9. In this request, Kimco seeks the production of "all documents relating to correspondence between MJS and its subcontractors at any time between January 1, 2000, and the present, related to the provision of services at Kmart stores or related in any way to Kimco or FSA." (Def.'s Mem. of Law in Supp. of Its Mot. to Compel Answers to Interrogs., to Compel Produc. Of Docs., and for Sanctions at 7.) MJS argues that Request No. 4 is nothing other than a broad fishing expedition that is not tailored to the discovery of documents related to a particular subject matter. Other than its assertion that Kimco's request is nothing other than a broad fishing expedition, MJS relies primarily on the burdensome aspect of producing all the documents relating to communications between it and its subcontractors as well as an overbreadth argument as to time frame of materials requested.

If the discovery sought appears relevant on its face, "the party resisting discovery bears the burden of demonstrating that the requested discovery . . . does not come within the broad scope of relevance as defined under Fed. R. Civ. P. 26(b)(1). . . ." *Etienne v. Wolverine Tube, Inc.*, 185 F.R.D. 653, 656-657 (D. Kan. 1999) (citations omitted); 6 James Wm. Moore et al., Moore's

Federal Practice ¶ 26.41 n.7 (3d ed. 1999) (noting "the burden of showing that the discovery sought is irrelevant is generally on the party resisting discovery"). Although MJS correctly states that Request No. 4 is not narrowly tailored to seek specific correspondence relating to a specific subject matter, the request still comes within the "broad scope of relevance" recognized in the Federal Rules. As Kimco notes, the identity and existence of any subcontractors of MJS is or may be relevant to whether MJS breached its contract with Kimco. Furthermore, communications between MJS and its subcontractors could be relevant or reasonably calculated to lead to admissible evidence "relevant to the issues of MJS's knowledge of invoicing procedures, its agreement with Kimco regarding bankruptcy invoices and its execution of a non-competition provision; and whether MJS hired and paid subcontractors in January - March 2003 based upon alleged misrepresentations of Kimco." (Def.'s Mem. of Law in Supp. of Its Mot. to Compel Answers to Interrogs., to Compel Produc. Of Docs., and for Sanctions at 8.) The court, however, will narrow the time frame of the documents that must be produced to coincide with the time frame provided in the court's analysis of Interrogatories 5 and 9. Accordingly, MJS is directed to produce all documents responsive to Request No. 4 from the date of October 27, 2000, which is six months prior to the parties entry into the Supplier

Agreement, to present.

E. Requests Nos. 7 and 8

Requests Nos. 7 and 8 seek copies of any contracts or drafts of contracts between MJS and Kmart or MJS and any of the other "primes" under Kmart's national contract with FSA. With regards to Request No. 7, Kimco claims that it needs copies of the contracts or drafts of contracts between MJS and Kmart because one of the "critical issues in this case concerns when negotiations began between MJS and Kmart for MJS to provide Kmart with janitorial services after April 1, 2003." (Def.'s Mem. of Law in Supp. of Its Mot. to Compel Answers to Interrogs., to Compel Produc. Of Docs., and for Sanctions at 8.) MJS asserts that Kimco's argument is disingenuous because Request No. 7 is not limited in time to contracts entered into by MJS with Kmart in early 2003. This court agrees. Request No. 7 is overbroad in that it seeks all contracts MJS ever entered into during the twenty years MJS has done business with Kmart. As such, a majority of the contracts and drafts sought by Kimco are irrelevant to this case. Therefore, MJS will only be required to produce documents responsive to Request No. 7 from the beginning of 2003 to present.

As for Request No. 8, Kimco asserts that the contracts and drafts of contracts MJS entered into with the other "primes" under Kmart's national contract with FSA are needed to assess Mary Lynn

Satur's credibility with regard to MJS's insertion of a Texas choice of law provision in the contract addendum between MJS and Kimco. Kimco, however, fails to explain how MJS's other contracts with the primes would be relevant to the choice of law provision in its contract addendum with MJS or why Ms. Satur's credibility is in issue in this case. Without some explanation as to how the contracts are relevant to the contentions made by Kimco in this case or reasonably calculated to lead to the discovery of admissible evidence, the court must deny Kimco's motion to compel as to Request No. 8.

F. Request No. 9

In Request No. 9, Kimco seeks a copy of "all contracts or drafts of contracts between MJS and any of its subcontractors that were in effect at any time after April 27, 2001." MJS's objections to Request No. 9 echo its previous objections to Interrogatories 5 and 9, as well as Request No. 4. For the reasons stated above in the court's analysis of those discovery requests, Kimco's motion to compel is granted as to Request No. 9.

G. Request No. 15

Request No. 15 seeks the production of all of MJS's phone records and cell phone bills that would reflect phone calls made between MJS and any Kmart store or Kmart official between January 1, 2000, and the present. Kimco claims that the phone records are

needed to "better enable Kimco to prove that MJS solicited Kmart store managers and will show the date and time of phone calls and their length." (Def.'s Mem. of Law in Supp. of Its Mot. to Compel Answers to Interrogs., to Compel Produc. Of Docs., and for Sanctions at 11.) Kimco has informed the court that MJS has already agreed to produce credit card receipts and the documentation evidencing Mr. Satur's travels to Kmart stores from January 2003. (*Id.* at 11 n.3.) According to MJS, from the period of January 2000 through today, MJS has placed "numerous calls to approximately 100 Kmart stores and managers daily . . . to provide its services at the stores." (Pl.'s Resp. to Def.'s Mot. to Compel Answers to Interrogs., to Compel Produc. of Docs., and for Sanctions at 9.) Therefore, MJS asserts that Kimco's request is overly broad and unduly burdensome.

This court agrees that Kimco's request is overbroad. It is difficult to fathom how mere phone records alone dating back to January 1, 2000 are relevant to Kimco's argument that MJS solicited business from Kmart in 2003. Neither party disputes that MJS was cleaning Kmart stores prior to 2003 or the April 27, 2001 Supplier Agreement. Moreover, MJS has already agreed to produce more relevant documentation concerning Mr. Satur's travels to Kmart stores starting in January of 2003. Accordingly, Kimco's motion to compel as to Request No. 15 is denied.

H. Requests Nos. 17 and 18

In Request No. 17, Kimco seeks the production of copies of "all invoices sent to Kmart or any corporation, person or entity other than Kimco or FSA for the provision of janitorial services at a Kmart store from January 1, 2000, to the present." Request No. 18 seeks copies of records of payment received for the invoices produced in response to Request No. 17. Kimco claims that it needs the invoices sent to Kmart and records of the payment received by MJS to determine what MJS's profits were for the purpose of calculating damages. Kimco's argument mirrors the argument it made in support of Interrogatory No. 15, and MJS's objections also mirror the objections made to that interrogatory.

As the court has already stated above, a request for gross profits is not reasonably calculated to lead to the discovery of admissible evidence and is irrelevant to a determination of lost profits and damages in this breach of contract case. Accordingly, Kimco's motion to compel is denied as to Requests Nos. 17 and 18 because the invoices and payments sought in these requests relate to gross profits.

I. Requests Nos. 23, 24, 25, 26, and 27

Requests Nos. 24, 25, and 26 of Kimco's first set of requests for the production of documents seek a variety of internal memoranda or notes regarding MJS and its management's decision

making process on whether to enter into or make changes to the contract addendum containing a restrictive covenant.⁴ Requests Nos. 23 and 27 also seek internal memoranda, notes, journals, or notebooks that contain references to Kimco, FSA, or Kmart and the provision of services to Kmart.⁵ In its response, MJS asserted that it had already produced all responsive documents that were not protected by the attorney-client privilege or work product

⁴ Specifically, Requests Nos. 24 through 26 seek the production of the following:

Request No. 24: Produce a copy of all internal memoranda or notes concerning MJS's evaluation of whether to enter into the contract addendum which Kimco sent to MJS and which contained a restrictive covenant.

Request No. 25: Produce a copy of all internal memoranda or notes that reflect MJS. Roman Satur or Mary Lynn Satur's mental impressions or thoughts concerning the proposed contract addendum.

Request No. 26: Produce a copy of all internal memoranda or notes that reflect why MJS interlineated changes to the addendum and sent the addendum with changes back to Kimco.

⁵ Requests Nos. 23 and 27 are as follows:

Request No. 23: Produce a copy of all internal memoranda or notes concerning Kimco, FSA, and/or the provision of services to Kmart.

Request No. 27: Produce a copy of any journals or other notebooks of thoughts which Roman Satur or Mary Lynn Satur may keep in their possession and which contain any reference to Kimco, FSA, Kmart or any employee of Kimco, FSA or Kmart.

doctrine. Kimco does not argue in its motion that the items withheld are not privileged; however, Kimco does request that the court instruct MJS to produce a privilege log as required by Rule 26(b)(5) of the Federal Rules of Civil Procedure.

Rule 26(b)(5) instructs that when information is withheld on a claim of privilege or as protected trial preparation materials, then the claim must be "made expressly and shall be supported by a description of the nature of the documents . . . sufficient to enable the demanding party to contest the claim." FED. R. CIV. P. 26(b)(5). The burden is on whoever asserts the privilege. MJS objects to the production of a privilege log because it claims that the identifying material required under Rule 26(b)(5) has already been provided to Kimco in a letter dated March 18, 2004. (Pl.'s Resp. to Def.'s Mot. to Compel Answers to Interrogs., to Compel Produc. of Docs., and for Sanctions at 10.)

After a careful review of MJS's letter to Kimco regarding the privilege log, the court finds that MJS's March 18, 2004 letter does not sufficiently describe the nature of the documents withheld. The letter merely states MJS's position that the scope of Kimco's request for a privilege log was so broad as to include communications between MJS and its attorneys and the work product of MJS's attorneys. (See *id.*, Ex. A at 1.) Essentially, the letter begs the question of which documents are protected and which

are not. The letter, therefore, does not comport with the requirements of Rule 26(b)(5), and Kimco's request for a privilege log is granted.

J. Sanctions

Kimco also requests reasonable expenses including attorney fees pursuant to Rule 37 of the Federal Rules of Civil Procedure.

Rule 37 provides that if a motion to compel is granted:

"the court shall . . . require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorneys fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's non-disclosure, response or objection was substantially justified, or that other circumstances make an award of expenses unjust."

Fed. R. Civ. P. 37(a)(4)(A). MJS was substantially justified in interposing certain objections to the requests for production and interrogatories and sanctions therefore would be improper. While defendants have been successful in part of this motion, it appears that MJS acted in good faith in attempting to negotiate a narrowing of the scope of discovery with defendants. Accordingly, no sanctions are ordered at this time.

CONCLUSION

For the reasons stated above, defendant's motion to compel is granted in full as to Interrogatory No. 9 and Request No. 9, granted in part as to Interrogatories Nos. 5 and 15 and Request Nos. 4 and 7, and denied as to Requests Nos. 8, 15, 17, and 18.

Furthermore, the plaintiffs are directed to provide responses to Interrogatories Nos. 5, 9, and 15, and Requests Nos. 4, 7, and 9, in accordance with this order, and a privilege log for Requests Nos. 23, 24, 25, 26, and 27 within eleven days of the date of this order. The defendant's motion for sanctions is denied.

IT IS SO ORDERED this 19th day of April, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE