Olivarez v. Rebel Oil Company, et al., Discovery Commissioner Opinion #11 (April, 2003)

RESPONDING TO DISCOVERY AND DEPOSITION CONDUCT

I. Background

This litigation arises out of a pair of vehicle collisions on the night of November 28, 1999. Two vehicles crashed, then sometime later Defendant Rebel Oil's gasoline tanker came along and crashed into the first vehicle mishap. Six people were killed as a result of the events. There are factual disputes about causation and damages.

A. Written Discovery

The usual discovery motion concerns arguments over specific discovery requests, e.g., interrogatories 7, 22 and 49 out of fifty or one or two contentious moments in a deposition or a conflict over scheduling the deposition of a witness. In contrast the instant motion deals with a set of requests for production where defendant/counsel object to 62 out of 63 requests, 13 out of 17 interrogatories and have engaged in a myriad of other bad faith discovery tactics.

In most instances Plaintiff's counsel tried to reason with defense counsel in obtaining a resolution of differences in major areas without court assistance, but defense counsel never made one meaningful concession in any matter. It is

because of this conduct by defense counsel, that my recommendation be that all of defendants objections be overruled and that most of the relief Plaintiffs seek be granted. When counsel does virtually nothing but object, obstruct, evade and then deny any wrongdoing, it is then they are no longer entitled to benefit from what may have been viewed as a few well taken objections. I choose not to assist a party/counsel to uphold a reasonable objection to discovery, when that party/counsel has shotgunned objections to all inquiries (reasonable or not) by the opposing party. The law would not be served by approving such conduct. Examples of the defendant's actions are in order.

In response to request #13, when asked about "The driver's log of Ray Cosby for the trip underway at the time of the incident in question," Defendant claimed the phrase "driver's log" was "vague." Defendant further responded that discovery was continuing, but the answer (without waiving objections) was "none." However, in response to request #14, when asked for "The driver's logs of Ray Cosby for the week proceeding the incident in question," this request was not "vague" and Defendant attached responsive documents. (Defendant did make other objections, however).

It was only several months later at the deposition of a

key Rebel employee that the driver's log for the day of the incident was produced, well after the deposition of Defendant Rebel Oil's truck driver. It is clear the discovery responses quoted above were more than lazy; they were deliberately and artfully drafted to be deceptive in nature.

Another example of Defendant's game playing is found in its lack of understanding of words in Plaintiffs' requests such as "Diagrams," "inspected," "movies" and "briefly describe" among others. Defendant in many responses tried to cover up its willful bad faith by gratuitously throwing out the phrase "without waiving said objections and in the spirit of discovery"; Defendant then gave an answer that may or may not have been complete or responsive. This evasive conduct cannot be tolerated.

It must be remembered that discovery requests, responses and objections are all subject to the obligations of N.R.C.P. 26(g) which says in part as follows:

> Signing of discovery requests, responses, and objections... The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass, obscure, equivocate or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly

> burdensome or expensive, given the needs of the case, the discovery already had in the case, and the amount in controversy, and the importance of the issues at stake in the litigation....
>
> If a certification is made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection was made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

The rule of common sense dictates a responding party has a duty to answer to the extent a discovery inquiry is not objectionable. For instance, a party has a duty to answer interrogatories with whatever information the party has. N.R.C.P. 33(a). A party cannot avoid answering because some information is no longer available and, indeed, must use reasonable efforts to obtain responsive information. Martin v. Brown, 151 F.R.D. 580 (W.D.Pa. 1993). Answers must be complete and unevasive. If the answering party lacks the necessary information to make a full, fair and specific answer to an interrogatory, it should so state under oath and should set forth in detail the efforts made to obtain the information. Miller v. Doctor's General Hospital, 76 F.R.D. 136 (W.D.Okla. 1997); Zanowic v. Reno, 2000 U.S. Dist. Lexis 13845 (S.D.N.Y. 2000). Here, Defendant made no attempt to

make good faith responses.

A poor alternative to answering discovery inquiries is to simply refer the inquiring party to prior discovery previously provided or allegedly to have been provided. This method of response is disfavored, as it fails to provide the necessary specific response to the discovery request. See, e.g., Omega Engineering, Inc. v. Omega, S.A., 2001 U.S. Dist. Lexis 2016 (D.Conn. 2001). Responses which merely say "previously provided" or "provided at 16.1 conference" or "see deposition testimony" or even "Plaintiffs already have in their possession" are simply non-answers, especially when they are coupled with blanket objections, as done by Defendant. Legitimate discovery is thwarted.

When timely objections are made, of course the burden is on the interrogating party to move for an order to compel pursuant to N.R.C.P. 37. The burden of going forward, however, should not be confused with the burden of persuasion of the objecting party to justify its objections. Should the relevancy of propounded discovery not be apparent, its proponent has the burden to show the discovery is relevant, when an objection is raised. Morrison v. Philadelphia Housing Authority, 203 F.R.D. 195 (E.D.Pa. 2001); Dobele v. Sprint Corp., 2002 U.S. Dist. Lexis 1007 (D.Kan. 2002); but,

when the showing of relevance has been made or is apparent on its face, the burden then shifts back to the party opposing discovery to show why the discovery should not be permitted. e.g., Burns v. Imagine Films Entertainment, 164 F.R.D. 589 (W.D.N.Y. 1996) (privilege); Schaap v. Executive Industries, 130 F.R.D. 384 (N.D.Ill. 1990) (burdensomeness of interrogatory); Redland Soccer Club v. Department of the Army, 55 F.3d 827 (3d Cir. 1995) (overly broad requests).

In response to the written discovery at issue Defendant Rebel uses the relevance objection often as a part of its boilerplate package of objections, couched in the phrase "not calculated to lead to the discovery of admissible evidence." See, e.g., when asked for "all maintenance, repair, and inspection records pertaining to the Rebel Oil vehicle's condition at the time of and immediately prior to the incident in question." [first request for production #41]. Rebel indulges in the "I'll decide what's relevant" game by asserting a relevance objection, but then producing some materials that it has determined would be relevant. Again, this deliberately evasive response serves only to obscure potentially discoverable information and attempts to prevent Plaintiffs or the court from reviewing Defendant's decisions. This is calculated discovery abuse.

Meeting the burden of asserting a proper discovery objection entails more than the ritual recital of boilerplate verbiage to each discovery request. Repeating the familiar phrase that each request is "vague, ambiguous, overly broad, unduly burdensome and oppressive, not relevant nor calculated to lead to the discovery of admissible evidence and, further, seeks material protected by the attorney/client or other privilege and the work product doctrine" is insufficient. Pleasants v. Allbaugh, 2002 U.S.Dist. Lexis 8941 (D.D.C. 2002); G-69 v. Degnan, 130 F.R.D. 326 (D.N.J. 1990);[1] Josephs v. Harris Corp., 677 F.2d 985 (3d Cir. 1982).

Because the courts need information in order to exercise their discretion in ruling on objections, it is not enough for the responding party simply to object that the discovery is burdensome. Bare assertions of undue burden do not suffice. Tucker v. Ohtsu Tire & Rubber Co., 191 F.R.D. 495 (D.Md. 2000); Jackson v. Montgomery Ward & Co., 173 F.R.D. 524 (D.Nev. 1997). The burden is on the party resisting discovery to clarify and explain precisely why its objections are proper given the broad and liberal discovery rules. The objector must submit affidavits or offer evidence that

[1]Proper assertion of privilege objection discussed in detail in Alboum v. Koe, Discovery Commissioner Opinion #10 (November, 2001).

reveals the nature of the burden imposed by an allegedly overbroad interrogatory. Chubb Integrated Sys. v. Nat'l. Bank of Washington, 103 F.R.D. 52 (D.D.C. 1984). Obiajulu v. City of Rochester, 166 F.R.D. 293 (W.D.N.Y. 1996). No information other than bare assertions have been supplied by Rebel.

If a specific burden had been demonstrated, the court could then decide whether requiring the responding party to provide the requested information was reasonable. The court could balance the need shown by the interrogator against the claims of burden by the interrogated party. 7 Moore's Federal Practice, §33.173(3)(b) (Matthew Bender 3d Ed.). No specific examples need be given here, as Defendant has provided the general non-specific panoply of objections to nearly every discovery request. No substantiation of a credible nature was ever provided, because Defendant would then demonstrate just how foolish it was to object to all legitimate requests.

When, instead of specific, particularized objections, a party asserts general objections to every interrogatory and request for production, that practice is improper. Use of such "general" objections is disfavored. Ritacca v. Abbott Labs, 203 F.R.D. 332 (E.D.Ill. 2001); Athridge v. Aetna Cas. and Sur. Co., 184 F.R.D. 181 (D.D.C. 1998). N.R.C.P. 33(a),

34(b) and E.D.C.R. 2.40 all contemplate specific objections or answers to each discovery request. F.R.C.P. 33(b)(4) now specifies in part that "all grounds for objection to an interrogatory shall be stated with specificity."

Defendant has asserted objections without explaining, much less substantiating, how any request was irrelevant, burdensome, oppressive and/or harassing. Redland Soccer Club, Inc. v. Department of the Army, supra; McLeod, Alexander, Powel and Apffel, P.C. v. Ouarles, 894 F.2d 1482 (5th Cir. 1990). Similarly Defendant fails to show how the requests were vague, ambiguous and/or unintelligible. Paulsen v. Case Corp., 168 F.R.D. 285 (C.D.Cal. 1996). Finally, no evidence was offered as to how the requests were overly broad and without reasonable limitation in scope or time. Etienne v. Wolverine Tube, Inc., 185 F.R.D. 653 (D.Kan. 1999).

Many of Defendant's objections evidence bad faith by "failing to understand" the question or by disputing the scope of the question; therefore, Defendant contends it is unable to contribute any response. The Defendant and its counsel, however, were well aware of the type of discovery sought, but simply refused to cooperate, seeking refuge within technical semantics. Objections suggesting the requested information or documents were not designated with

reasonable particularity were not well taken. The test for reasonable particularity is whether the request places the party on reasonable notice of what is called for and what is not. The responding party need only be given sufficient information to enable it to identify responsive documents. Kidwiler v. Progressive Paloverde Ins. Co., 192 F.R.D. 193 (N.D.W.Va. 2000); Parsons v. Jefferson-Pilot Corp., 141 F.R.D. 408 (M.D.N.C. 1992). Plaintiffs explained and refined their requests in subsequent letters to Defendant's counsel after receiving the first objections, but to no avail, as Defendants were clearly not interested in anything but stonewalling and delay.

The final problem with Defendant's responses to written discovery lies in its response on many occasions of "no responsive documents found." Of course this response, combined with the usual gaggle of objections, provides no information as to what the Defendant knows or has in its possession or within the knowledge of it or its counsel. The result is confusion and no discovery. This is yet another example of bad faith by Defendant in its discovery responses.

B. Deposition Discovery

The deposition conduct of defense counsel provides additional substantial grounds for significant sanctions. As pointed out by Plaintiffs, Rebel's counsel abused the

deposition process by coaching witnesses, directing a witness "not to answer" without a concomitant assertion of a privilege, testifying for the witness, preventing a witness from completing his answer on over 35 occasions, improperly invoking the Fifth Amendment privilege and improperly asserting the attorney/client privilege.

Rebel counsel's coaching of the witnesses and general interruptions in the deposition procedure cannot be tolerated; constant objections and gratuitous remarks contaminate the deposition proceeding, depriving counsel of the right to a fair examination; Morales v. Zondo, 204 F.R.D. 50 (S.D.N.Y. 2001); comments by the non-deposing attorney such as "if you remember," "if you know," "do you understand the question," "you've answered the question," "he wants to know," "if he has recollection," "don't speculate" or "don't guess" are improper; Sinclair v. KMART Corp., 1996 U.S. Dist. Lexis 19661 (D. Kan. 1996); In re Anonymous Member of S.C. Bar, 552 S.E. 2d 10 (S.C. 2001); also see other cases with examples of bad deposition behavior, such as Damaj v. Farmers Ins. Co., 164 F.R.D. 559 (N.D. Okla. 1995); Calzaturficio S.C.A.R.P.A. S.PS. v. Fabiano Shoe Co.,201 F.R.D. 33 (D. Mass. 2001); In re Stratosphere Corp., 182 F.R.D. 614 (D.Nev. 1998); Hall v. Clifton Precision, 150 F.R.D. 525 (E.D.Pa. 1993).

On numerous occasions the deposition would proceed as follows:

> Question by Plaintiffs' counsel:
> Defense counsel: "if you know"
> Witness: "not that I know of"
>
> Question by Plaintiffs' counsel:
> Defense counsel: "if you know"
> Witness: "I don't know"
>
> Question by Plaintiffs' counsel:
> Defense counsel: "Do you know that?"
> Witness: "I don't know. I'm not sure."
>
> Question by Plaintiffs' counsel:
> Defense counsel: "If you remember?"
> Witness: "I don't remember."
>
> Question by Plaintiffs' counsel:
> "Is that your handwriting?"
> Witness: "Yes."
> Plaintiffs' counsel:
> "And you drew the little smiley faces there?"
> Witness: "Yes."
> Plaintiffs' counsel: "And why is that?"
> Witness: "Because...."
> Defense counsel: "Do you remember?"
> Witness: "No I don't."

The above are just smattering of examples where defense counsel tried to coach the witness. The depositions are replete with such examples. Many more are cited in Plaintiffs' motion.

In still another deposition setting, defense counsel directed witness Pelzer (a non-employee passenger in the Rebel Oil truck, related to the driver Cosby) not to answer questions concerning the formation of Pelzer's alleged

attorney/client relationship with defense counsel. The attorney/client privilege does not encompass such non-confidential matters as the terms and conditions of an attorney's employment, the purpose for which the attorney was engaged, the identity of clients, the fee arrangement or any other of the external trappings of the relationship. See, e.g., In re Michaelson, 511 F.2d 882 (9th Cir. 1975); Provsi v. Cruisers Division of KCS Int'l., 1997 U.S. Dist Lexis 3216 (E.D.Pa. 1997); In re CTV Securities Litigation, 89 F.R.D. 595 (N.D.Tex. 1981).

C. Privilege Log

Another example of Defendant's bad faith conduct is in regard to its alleged privilege log. First, the log should have included all documents over which privilege was claimed; second, the log should have been produced with the initial objections and, further, the alleged privileged documents responsive to any specific request should have been so designated. Defendant has now provided a list of documents over which privilege was claimed, but in response to what specific requests we still do not know. Defendant goes on to feign ignorance of the requirements of a privilege log, as if Nevada courts would be demanding something unusual and fantastic if Defendant's log was considered not up to par.

There have been requirements set in the Eighth Judicial

District by the Discovery Commissioner in opinion #10 from October of 2001, which takes many of the requirements from a Nevada U.S. District Court case, Diamond State Ins. Co. v. Rebel Oil Co. Inc., 157 F.R.D. 691 (D.Nev. 1994)! Defendant Rebel Oil in this case was well aware of privilege log requirements, but obviously chose to ignore those rules from which it benefited eight years earlier. For instance, the capacity of the authors and recipients, other individuals with access to the document and their capacities, the subject matter of the document, the purpose(s) for the production of the document and a detailed, specific explanation as to why the document was privileged or otherwise immune from discovery were missing from Defendant's log. Rebel simply chose not to comply, then argued it did not know, but would submit another log. Yet another deliberate evasion/delay by Defendant. This discovery dispute is not about mistakes or laziness, but about intentional conduct by Defendant.

Only one item in the log postdated the filing of the complaint and only a half dozen others were generated less than a year prior to the filing of the complaint. In light of Ballard v. Eighth Jud. Dist. Ct., 106 Nev. 83 787 P.2d 406 (1990) and Columbia Healthcare v. Eighth Jud. Dist. Ct., 113 Nev. 521, 936 P.2d 844 (1997), most of the items on the log were immediately suspect. Hence, the reason for the paucity

of the log.

Finally, even though Defendants refused to produce other documents, such as personnel file documents of the driver, certain medical records and other records which they claimed they already produced or someone else produced or they didn't have to produce for some other frivolous reason, these documents were not even given a courtesy mention on the cursory privilege log which was submitted. Yet another reason to deem all objections waived. See, e.g., Pleasants v. Allbaugh, supra; Ritacca v. Abbott Labs, supra.

D. Miscellaneous Matters

Plaintiffs' third request for production seeks financial information from Rebel, based upon the pending claim for punitive damages. Such discovery is reasonable if Defendant is unable to have the punitive claim removed by the close of discovery. The information sought by Plaintiffs is broad and they reasonably rely upon Olivero v. Lowe, 116 Nev. 395, 995 P.2d 1023 (2000) to support their requests. If Rebel is as evasive with its financial information as it is with its other discovery responses, Plaintiffs may well be entitled to the broader discovery, but at this point there is no indication that Rebel will not provide truthful information about its current net worth. Therefore, Defendant shall respond only to requests #'d 2, 5, 9 and 11, limited to the

most recent statement for each request. This information shall be provided to Plaintiff's counsel on or before December 6, 2002, unless the punitive claim has been stricken prior to that time.

Defendant shall produced all documents in response to Plaintiffs' First Request for Production #'s 47-49, reflecting insurance coverage and any documents which reflect reduction of the aggregate coverage available for the incident.

Plaintiffs' request to compel Rebel's expert's depositions to proceed is granted, as Defendant's objection based upon Rule 26(b)(5) is bizarre and not well taken. In any event, the orders of the District Court regarding the timing of discovery supersede N.R.C.P. 26(b)(5). See, e.g., Hanson v. Universal Health Services, 115 Nev. 24, 974 P.2d 1158 (1999). Based upon Defendants recalcitrant behavior, sanctions are warranted, and unless otherwise stipulated, Plaintiffs may note the deposition of any Rebel expert on 15 days notice; Rebel shall make that expert available at that time or the expert may be excluded.

Defendant shall cooperate with Plaintiffs in providing the Rebel gasoline tanker truck in question at the incident site for inspection and testing; I do not expect to see another motion when the time comes for Rebel's response to

Plaintiffs' formal request for inspection.

Finally, in regard to the Fifth Amendment objections stemming from the Cosby deposition, there never should have been an objection to the questions asked the witness in regard to where the deposition took place or the name of Cosby's criminal attorney, as neither of these answers could have been a link in a chain which would have had a bearing on Cosby's Fifth Amendment rights. However, those questions and others are now moot, as Cosby plead guilty to certain criminal charges three days after the deposition (5/23/02) and no Fifth Amendment rights are now at issue.

E. Conclusion

This case is not about discovery, but rather hiding the ball by defense counsel. Defense counsel's actions are the epitome of bad faith. Whether it be blatant refusal to produce or respond or sly refusal to cooperate, calling black white or feigning conciliation, defense counsel has done it all in this case. This is not a strain/sprain soft tissue case, but one involving multiple deaths. Even if this recommendation is followed to the letter, it may still not be possible for the case to proceed to trial as scheduled, so the delay has worked. Defendant and its counsel should be held accountable. Ignoring the mandate of N.R.C.P. 26(g), Defendant and its counsel ridicule the opposing party, the

court and the justice system as a whole by their conduct. Sanctions must be imposed. Sanctions are warranted pursuant to N.R.C.P. 26(g), 30(d) and 3(a), as well as the inherent power of the court to prevent abuse of the discovery process. See, e.g., Young v. Ribeiro Bld'g. Inc., 106 Nev. 88, 787 P.2d 777 (1990).

II. Recommendations

IT IS HEREBY RECOMMENDED as follows:

All of Defendant Rebel Oil's objections to written discovery, except as set forth in the findings in regard to the Third Request for Production, are overruled; this ruling is based upon the finding that so many of the objections were non-specific, frivolous and in bad faith, that no parsing of the objections into good and bad is warranted;

All privileges claimed for written discovery, whether included on the aborted log or not, are overruled/waived for failing to provide the necessary information on which to make a finding as to whether or not a privilege applies;

Rebel shall make its experts available for deposition, as set forth in the findings above, or they shall be excluded from trial;

Counsel for Rebel Oil shall refrain from further use of the deposition tactics set forth in the findings above, which specifically include no coaching of the witness, no directing

the witness not to answer (unless based upon the reasonable assertion of a recognized privilege) and no other tactics designed to frustrate the legitimate aims of the deposition procedure;

Plaintiffs may reconvene the deposition of Ray Cosby, as all objections to previous questions are overruled and or are now moot; there shall be no limit on the scope of the deposition based merely on the fact it is a second deposition; Rebel Oil shall pay the court reporter appearance fee for the need to resume the Cosby deposition;

Rebel Oil shall serve its supplemental answers to written discovery, on or before October 25, 2002;

Rebel Oil shall pay $7,500.00 in attorney fees and sanctions to Plaintiffs for its gross discovery abuse in responding to written discovery, including, but not limited to, its unspecified objections to nearly every discovery request, its many frivolous objections based upon alleged failure to understand basic English and industry-known terms and its untimely submission of a known inadequate “privilege log.”

Counsel for Rebel Oil shall pay $7,500.00 in attorney fees and sanctions for its egregious deposition behavior; the sanctions are significant for Defendant and its counsel because there is a pattern of discovery misconduct, not just

one or even two isolated incidents, and the conduct is shocking;

If Rebel Oil or its counsel continue with their obstreperous discovery tactics, a future sanction may include the striking of Rebel’s Answer, as the Defendant has already nearly brought the discovery process to a halt because of its actions.