

The Motion filed by the Frishbergs' counsel (referred to herein as "Attorney Frishberg") invoking Rule 37(a) of the Federal Rules of Civil Procedure (the "Rules"), and which also seeks relief for costs sanctions thereunder, borders on harassment and is inconsistent with practice in the Southern District of Texas and United States Districts Courts generally. Most significantly is Attorney Frishberg's failure to meet and confer with the Receiver or his counsel prior to filing the Motion in a good faith attempt to resolve the issues raised without involving the Court, notwithstanding the ambiguously worded certification that misrepresents the extent of communication between counsel on the matter. Additionally, the Frishbergs seek to compel disclosures under Rule 26(a)(3)(A), which clearly has no bearing on initial disclosures required by Rule 26(a)(1)(A), and which are not required per Rule 26(a)(3)(B) until a month before trial. Furthermore, the Motion is replete with nonspecific, general citations to cases which do not indicate the location within the case cited of the purported authority being cited. Attorney Frishberg's approach in the use of unnecessary litigation tactics such as the Motion is clearly a means by which to inappropriately burden the Receivership Estate and is a waste of the Court's time and resources. Accordingly, the Receiver requests Attorney Frishberg be required to appear in person at the hearing set for this Motion on September 4, 2012 and objects to his appearance at the hearing by telephone.

THE RECEIVER'S MOTION TO STRIKE

The Receiver moves to strike the Motion in its entirety due to Attorney Frishberg's failure to attempt in good faith to resolve the purported deficiencies in the Receiver's initial disclosures (the "Initial Disclosures")² prior to seeking Court intervention.

² The Initial Disclosures are attached to the Motion as Exhibit A [Doc. #8-1].

Rule 37(a)(1) states that a “motion [to compel] must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure ... in an effort to obtain it without court action.” Attorney Frishberg made his initial and only contact regarding the Initial Disclosures by email on Saturday June 30, 2012 (the “Frishberg Email,” attached hereto as Exhibit A). In the Frishberg Email, Attorney Frishberg propounded two issues with the Initial Disclosures: (1) that the “disclosure of documents which the Receiver intends to rely on at trial needs to describe the ‘category’ with more specificity than ‘DFFS investment advisory client files’”; and (2) that the “computation of categories of damages” did not “assign a numerical value” to the damages. *See* Exhibit A. Counsel for Receiver responded by email on July 11, 2012 (the “Response Email,” attached hereto as Exhibit B) to the contentions raised by Attorney Frishberg asserting the Receiver’s position on those issues, namely (1) that Rule 26(a)(1) did not require a higher level of specificity in categorizing the document disclosure, particularly in light of the fact that the documents were last in the Frishbergs’ possession, and (2) that “a computation of the damages sought by the Receiver is subject to expert testimony, as was disclosed.” *See* Exhibit B.

In the ensuing six weeks, Attorney Frishberg did not contact the Receiver or in any way attempt to resolve the purported issues that were raised in the Frishberg Email. The Response Email was the last contact Receiver’s counsel had with Attorney Frishberg on the matter of the Initial Disclosures prior to the Motion being filed on August 20, 2012.

Furthermore, the Motion also seeks relief in regard to additional issues which were not raised in the Frishberg Email or at all with the Receiver or his counsel. Alleged deficiencies with the Initial Disclosures regarding the disclosure of former DFFS client identities were not identified to the Receiver’s counsel at any time prior to the filing of the Motion. *See* Exhibit A.

Furthermore, the Frishberg Email contained no allegations regarding the purported failure of the Receiver to make documents available for inspection and copying. *Id.*

The Receiver respectfully requests that the Court strike the Motion in its entirety because Attorney Frishberg did not attempt in good faith, if at all, to meet and confer regarding these issues prior to seeking the intervention of the Court through the Motion, as is required by Rule 37(a).

RESPONSE TO THE MOTION

Alternatively the Receiver responds to the Motion on substantive grounds. Rule 26(a)(1)(A) requires the disclosure of:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment; (ii) 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; (iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and (iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(a) Disclosure of Former DFFS Client Information

The Frishbergs allege in the Motion that the Initial Disclosures fail to identify specific persons identified by the categories of “DFFS investment advisory clients” and “DFFS Financial

Services investment advisory clients whose assets under management were transferred to Barrington.” Mot. at pp. 3, 4, 5. However, as stated by the parties in their Joint Discovery / Case Management Plan (the “Joint Plan”) [Doc. # 7] at p. 7, “[t]he parties anticipate the need for court intervention relating to the disclosure of DFFS and Barrington customer disclosures” due to the “continuing obligation to respect the privacy ... to protect the security and confidentiality of ... customers' nonpublic personal information,” as stated in the Gramm-Leach Bliley Act, 15 U.S.C. § 6801(a).

Prior to the Motion being filed, counsel for Receiver and counsel for Defendants Barrington Financial Advisors, Inc. and William Heath commenced to draft a confidentiality agreement for execution by all parties -- including the Frishbergs -- related to the disclosure of non-public information of DFFS and Barrington customers, in order to avoid the need for the Court intervention mentioned in the Joint Plan. Attorney Frishberg has been provided the draft agreement subsequent to his filing of the Motion. Following the execution of the confidentiality agreement by all parties, discovery related to DFFS and Barrington customers' non-public information will be supplemented. Had Attorney Frishberg attempted at all to resolve this issue prior to filing the Motion, it would be a moot point.

(b) Particularity in Identified Categories of Documents

Rule 26(a)(1)(A)(ii) requires that documents “the disclosing party has in its possession, custody, or control and may use to support its claims” be “descri[bed] by category and location.” The Initial Disclosures identify -- “by category and location” -- that, “to the extent they were not taken by or on behalf of any of the Defendants” the “DFFS investment advisory client files” in

the Receiver's possession "are located in boxes in a storage unit maintained by the Receiver." Initial Disclosures at p. 2.

The Frishbergs contend that compliance with Rule 26(a)(1)(A) also requires compliance with Rule 26(a)(3)(A)(iii), Mot., Part 1(b), at pp. 4-6, even though Rule 26(a)(3)(A) by its very terms governs pretrial disclosures required "[i]n addition to the disclosures required by Rule 26(a)(1)... ." Furthermore, these additional disclosures are to "be made at least 30 days before trial" unless otherwise ordered by the Court. FED. R. CIV. P. 26(a)(3)(B). To claim in a motion to compel Rule 26(a)(1)(A) disclosures -- in which cost sanctions are sought -- that the Receiver is required to make Rule 26(a)(3)(A) disclosures at the start of formal discovery defies reason and borders on harassment.

(c) Calculation of Damages

As stated in the Initial Disclosures and the Response Email to Attorney Frishberg, the damages sought by the Receiver are subject to expert testimony. Furthermore, documents which are disclosed in the Initial Disclosures were offered for inspection and copying in the Response Email to Attorney Frishberg. *See* Exhibit B. Attorney Frishberg did not reply to the Response Email prior to filing the Motion six weeks later seeking to compel the inspection of the very documents previously offered.

Moreover, *Design Strategies v. Davis*, 469 F.3d 284 (2nd Cir. 2006) is distinguishable from the case at bar. In *Davis*, software company Design Strategies, Inc. ("Design") sued a former employee and his current employer for, *inter alia*, diversion of a corporate opportunity. "Well after the close of discovery," Design disclosed an expert witness who was to testify in regard to "lost profits," a category of damages which had not been explicitly disclosed in

Designs' initial disclosures (and therefore for which no computation of damages had been provided). This expert disclosure took place more than a year after the close of discovery. *Id.* at 293-4. The District Court found that discovery could not be reopened and excluded the recovery of "lost profit" damages, and the Second Circuit found such a ruling within the District Court's discretion. *Id.* at 295.

Here, the Receiver has disclosed the categories of damages sought and that the calculation of those damages is subject to expert analysis and testimony. When the Receiver's expert(s) have evaluated the damages sustained -- an evaluation which will require the review of documents obtained from Defendants in discovery -- the Initial Disclosures will be supplemented to disclose those calculations. Indeed in *Davis*, the 2nd Circuit cited *City & County of San Francisco v. Tutor-Saliba Corp.*, 218 F.R.D. 219 (N.D. Cal. 2003) as "recognizing that Rule 26(a)(1)(C) anticipates supplemental disclosures with ever-greater level of detail as discovery progresses." *Id.*, 469 F.3d at 295.

(d) Costs

The Frishbergs seek the costs of the Motion, including attorney's fees, pursuant to Rule 37. Rule 37(a)(5)(A) states that "the court must not order this payment [of costs] 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."

As an initial matter, Attorney Frishberg "filed the motion before attempting in good faith to obtain the disclosure ... without court action." Attorney Frishberg filed the Motion approximately six weeks following the Receiver's counsel's Response Email to his initial and

sole communication on the matter of the Initial Disclosures. He made no attempt to settle the dispute with Receiver's counsel over the demands made in the Frishberg Email and the Response Email contesting those demands. His position that a single email sent over six weeks prior was a "good faith" effort to resolve the dispute without Court action is unfounded. Furthermore, the Motion raises issues which Attorney Frishberg has never raised to the Receiver, namely (1) the disclosure of the identities of former DFFS clients; and (2) the availability of documents for inspection and copying. Nor did Attorney Frishberg attempt to schedule the inspection or copying of documents with the Receiver following the Response Email to his demands.

Furthermore, the nondisclosure of the identities of former DFFS clients is substantially justified given the privacy concerns raised in the Joint Plan and in the Gramm-Leach Bliley Act, 15 U.S.C. § 6801(a). When the confidentiality of those former clients is preserved by agreement, the required supplemental disclosures will be made.

PRAYER

The Receiver respectfully prays that the Court strike the Motion in its entirety for Attorney Frishberg's failure to attempt in good faith to meet and confer with counsel for the Receiver prior to his filing of the Motion in order to resolve the dispute without Court intervention or, alternatively, to deny the Motion, and further to grant to the Receiver the reasonable expenses incurred in opposing the Motion, including attorney's fees, pursuant to Rule 37(a)(5)(B).

August 29, 2012

Respectfully submitted,

THE TAYLOR LAW OFFICES, P.C.



By: _____

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COUNSEL FOR RECEIVER

CERTIFICATE OF SERVICE

On August 29, 2012, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Southern District of Texas, using the CM/ECF electronic filing system. I hereby certify that I have provided copies to all counsel of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Thomas L. Taylor III

Thomas L. Taylor III

Exhibit A

From: Frishberga@aol.com
To: goforth@tltaylorlaw.com; stanton@pstantonlaw.com
Subject: Re: Rule 26(a) Disclosures
Date: Saturday, June 30, 2012 12:12:24 PM

Andrew:

I received the 26(a) disclosure yesterday. Upon reviewing them, I find that the disclosures as to documents and damages are totally inadequate. I would like to resolve this without court intervention, but in order to adhere to the discovery schedule, that needs to happen within the coming week. I can give you a longer time period to actually provide a reasonably satisfactory initial disclosure if there is agreement in principle to do so.

The disclosure of documents which the Receiver intends to rely on at trial needs to describe the "category" with more specificity than "DFFS investment advisory client files."

DFFS was in the business of advising clients concerning investments. All that this statement says is that the Receiver intends to rely on some of the documents that it took from Daniel Frishberg. At a bare minimum, the names of the clients whose files will be relied on should be included, along with the categories of the documents, e.g., correspondence, contracts, etc.

There is no computation of categories of damages. A calculation assigns a numerical value to the actual damages. Providing a multiplier of an unspecified number tells us nothing.

This suit is in its ninth month. It was preceded by a suit in which the receiver obtained documents and depositions, which was withdrawn on the eve of trial.

I await your reply. Meanwhile, I will be composing document demands and interrogatories based on the limited disclosure obtained.

Aaron Frishberg

In a message dated 6/29/2012 10:10:13 A.M. Eastern Daylight Time, goforth@tltaylorlaw.com writes:

They were delivered RRR on June 26th.

I can resend over email if you'd wish.

-Andrew

From: Frishberga@aol.com [<mailto:Frishberga@aol.com>]
Sent: Thursday, June 28, 2012 10:20 PM
To: goforth@tltaylorlaw.com; peter@pstantonlaw.com
Subject: Re: Rule 26(a) Disclosures

Attached are Defendant Daniel and Elisea Frishberg's initial disclosures. I have not received

Plaintiff's initial disclosures. Please send them immediately, if they are not on their way by snail mail..

Aaron Frishberg

In a message dated 6/28/2012 4:31:02 P.M. Eastern Daylight Time, goforth@taylorlaw.com writes:

Please see attached.

Andrew Goforth

Associate
The Taylor Law Offices, P.C.
4550 Post Oak Place Dr., Ste. 241

Houston, TX 77027
713.626.5300 (main)

713.402.6154 (fax)

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Exhibit B

From: [Andrew Goforth](#)
To: Frishberga@aol.com
Subject: RE: Rule 26(a) Disclosures
Date: Wednesday, July 11, 2012 10:14:00 AM

Aaron,

In response to your email, I disagree that the category description of DFFS client files in the Receiver's Initial Disclosures requires more specificity. Not only were those DFFS client files previously in your clients' possession, but they are available to you for inspection and copying pursuant to FRCP Rule 34. Specifying the contents of the category of documents is not required by Rule 26.

As for our providing "a multiplier of an unspecified number," a computation of the damages sought by the Receiver is subject to expert testimony, as was disclosed. In regard to exemplary damages, that number cannot be computed until other damages are awarded by the Court. Rest assured we will be seeking the maximum amount of exemplary damages allowed by law.

Turning to your clients' Initial Disclosures, they are woefully incomplete. Without limitation, and reserving all rights of the Receiver to full and complete discovery responses from your clients, the Frishbergs' Initial Responses are deficient in the following respects:

Part A. This list of persons does not indicate the subject of the discoverable information that the listed persons are likely to possess and which your clients may use to support their defenses.

Part B. The contractual documents referenced and attached can only implicate the Receiver's causes of action with regard to BizRadio. You have not identified any categories of documents with regard to the causes of action arising from the Barrington Transfer (as defined in the Amended Complaint) or alleged breaches of duties to DFFS. Additionally, you have not identified any documents which could support your contention that Elisea Frishberg is not subject to any liability, notwithstanding her positions at BizRadio and Barrington and receipt of funds from those entities for which she is liable -- at the very minimum.

Part D. This disclosure implicates the existence of insurance policies in the possession of others. Please provide me with the names and contact information of the persons from whom your clients intend to obtain copies of pertinent insurance policies -- indeed the identity of such persons were required to be disclosed in your list in "Part A," but were not.

Andrew Goforth
The Taylor Law Offices, P.C.
(713) 626-5300

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From: Frishberga@aol.com [mailto:Frishberga@aol.com]
Sent: Monday, July 02, 2012 10:10 PM
To: goforth@ttaylorlaw.com
Subject: Re: Rule 26(a) Disclosures

Enjoy the holiday.

In a message dated 7/2/2012 6:42:26 P.M. Eastern Daylight Time, goforth@ttaylorlaw.com writes:

Aaron,

I am out of town through the July 4th holiday. I will get back to you Thursday when I am back in the office. Thanks.

Sent from my iPhone

On Jun 30, 2012, at 12:12 PM, Frishberga@aol.com wrote:

Andrew:

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