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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

JOYCE WALKER, KIM BRUCE HOWLETT, and MURIEL SPOONER on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

LIFE INSURANCE COMPANY OF THE SOUTHWEST, a Texas corporation, and DOES 1-50,

Defendant.

Case No.: 10-09198 JVS(RNBx)

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES ON LSW'S MOTION FOR PROTECTIVE ORDER AND TO COMPEL PRODUCTION OF DOCUMENTS

Magistrate Judge Robert N. Block

Date: August 30, 2011
Time: 9:30 a.m.
Courtroom: 6D

Discovery Cut-off Date: July 4, 2012
Pretrial Conference Date: Sept. 19, 2012
Trial Date: Sept. 27, 2012

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INTRODUCTION

Plaintiffs' objections to LSW's request for a protective order miss the point. Plaintiffs rely mainly on boilerplate about the "good cause" standard in Rule 26 of the Federal Rules of Civil Procedure—as if that were the only source of the Court's power to set the terms of discovery. It is not. Plaintiffs ignore this Court's "broad discretion" to enter protective orders tailored to the particulars of each individual case. They also overlook that this power stems not just from the Federal Rules of Civil Procedure but also from long-recognized equitable powers of trial courts.

Perhaps most surprising, Plaintiffs ignore what the law says about their proposed uses of documents obtained in discovery. Courts have repeatedly suggested that lobbying legislators and feeding information to journalists are illegitimate uses of a process designed to help parties prepare for trial. In short, not only does the law authorize entry of the protective order LSW seeks; Plaintiffs' threats necessitate it.

Just as Plaintiffs' unconstrained fantasy of discovery uses is clearly wrong, so too is their constricted approach to the relevance of the tax return documents that Plaintiffs themselves have put at issue. After alleging that, if each Plaintiff's policy were to lapse with a loan outstanding, each "would" suffer detrimental tax consequences, Plaintiffs cannot now shield their tax returns from production.

This Court should thus: (1) order that "all documents and information produced in this action shall be used only for the purpose of litigating this action (and any appeal taken therefrom) and shall not be used for any other purpose whatsoever"; and (2) compel Plaintiffs to produce the tax returns they have withheld for frivolous reasons.

ARGUMENT

I. This Court Should Enter a Protective Order Limiting the Use of Information Obtained in This Action to Litigating This Action.

The Court plainly has the power to enter a protective order precluding Plaintiffs from advertising to the world what they learn in discovery. Plaintiffs do not deny that

this Court has already done exactly that, in the related (and now concluded) *Krall* class action.[1] *See Krall v. Life Ins. Co. of the Southwest*, ECF No. 62 at 3, 09-1043 (C.D. Cal.).[2] In fact, the Court entered that order even ***before*** Plaintiffs threatened to turn discovery in this case into newspaper fodder. Now that Plaintiffs have made their true intentions known, an order containing the same limitations as *Krall*'s is doubly justified.

A. The Court Has the Power To Enter Such an Order.

Trial courts have "great flexibility in devising appropriate terms or conditions for discovery in a given case." Wright & Miller, 8A Fed. Prac. & Proc. Civ. § 2038 (3d ed.). Rule 26, of course, gives them such flexibility, *see generally* Fed. R. Civ. P. 26, but so too do the inherent equitable powers all trial courts possess. All courts "manage their own affairs so as to achieve the orderly and expeditious disposition of cases," *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962); all may issue orders to "prevent abuses, oppression, and injustices," *Gumbel v. Pitkin*, 124 U.S. 131, 144 (1888).

Plaintiffs' response to the motion for a protective order completely ignores these robust powers. Plaintiffs' citations (to cases about the Rule 26 "good cause" standard generally) are beside the point.[3] The question is not what Rule 26 by itself permits in the abstract. Rather, it is how a court should exercise its (extremely broad) powers in a specific case or controversy in which one party has threatened to do that which the law

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[1] Oddly, Plaintiffs cite a portion of the Court's standing order on "Recurring Mistakes in Stipulated Protective Orders" that describes the standard for designating documents as confidential—as if that is LSW's problem with Plaintiffs' position. (Joint Stip. at 16-17.) This is misleading; LSW does not take issue with the protective order's definition of confidentiality. LSW simply requests a protective order with the same terms as *Krall*'s.

[2] *See* Declaration of Jonathan A. Shapiro, Ex. H, filed together with the parties' Joint Stipulation of Points and Authorities on LSW's Motion for Protective Order and to Compel Production of Documents ("Joint Stip."), ECF No. 76, 10-9198 (C.D. Cal.).

[3] *See Humboldt Baykeeper v. Union Pac. R.R. Co.*, 244 F.R.D. 560, 562-63 (N.D. Cal. 2007) (not discussing scope of inherent discovery powers); *Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (same); *Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D. 281, 283 (C.D. Cal. 1998) (same).

proscribes. *See, e.g.*, *United States v. Meyer*, 398 F.2d 66, 75 (9th Cir. 1968) ("The court has broad power to control the timing and order of discovery, limit its scope, . . . and take other steps which justice requires to protect the party or witness from annoyance, embarrassment, or oppression"). On this point Plaintiffs say nothing.

Plaintiffs' only other response is that LSW's proposed order violates the First Amendment. (Joint Stip. at 21-22.) That is incorrect. Indeed, even a case Plaintiffs cite, *Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999), collects authority for issuing "blanket protective orders" because "there is no tradition of public access to discovery materials." In any event, even courts that have held the fruits of pretrial discovery are "presumptively public" have certainly not held that they are "at the core of the First Amendment," as Plaintiffs claim. (Joint Stip. at 21.) Presumptions are rebuttable—and Plaintiffs' aggressive suggestions that, *e.g.*, they may use discovery to slam LSW in print thoroughly rebuts any presumption in favor of public access.

B. Plaintiffs' Behavior Warrants Entry of Such an Order.

Ignoring the sources and scope of the Court's inherent powers, Plaintiffs approach LSW's proposed order under the misplaced rubric of individualized, document-by-document "good cause." That ignores the "substantial latitude" courts have in entering protective orders, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-35 (1984).

Plaintiffs' own comments suggest that they misunderstand the discovery process or intend to abuse it. That is the only reasonable reading of Plaintiffs' counsel's e-mail that IULs might be used in a "submission to state legislators" or "to a newspaper that may wish to run a story about IULs." (*See* Joint Stip. at 15.) Plaintiffs cite no cases in which parties were allowed to make such threats, much less follow through with them.

Plaintiffs' attempts to justify their threats come up short. Even after reading 12 pages of authority for precluding such action (*see* Joint Stip. at 1-12), they still want the option to flood newspapers and legislatures with material they get from LSW in this

lawsuit. Using even non-confidential documents for such purposes would be improper. *See Boughton v. Cotter Corp.*, 65 F.3d 823, 829-30 (10th Cir. 1995) (Rule 26(c) is "designed to prevent discovery from causing annoyance, embarrassment, oppression, undue burden or expense, ***not just to protect confidential communications***") (emphasis added); *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) (discovery is "to facilitate orderly preparation for trial, not to educate or titillate the public").

In short, Plaintiffs' unjustifiable threats require this Court's action. Plaintiffs should be precluded from using discovery for goals far removed from those it was intended to fulfill, and be permitted to use discovery solely to litigate this case.

II. The Court Should Order Plaintiffs To Produce Their Federal Tax Returns for the Years 2006 to 2010.

Plaintiffs' tax returns are plainly relevant to this case. Plaintiffs have alleged that they would face "severe tax consequences" if their policies were to lapse at some point in the future. (FAC ¶¶ 50, 55, 60.) Plaintiffs now seem to backpedal, saying they only allege "***potential*** detrimental tax consequences." (Joint Stip. at 26 (emphasis added).) But that is not true. *See, e.g.*, FAC ¶ 50 ("Ms. Walker . . . did not understand that policy lapse with a loan outstanding ***would*** expose her to severe tax consequences . . . .").

LSW cannot verify or refute the complaint's specific allegations about tax consequences without understanding each Plaintiff's individualized tax situation—which includes not just reported income or capital gains, but also exemptions, deductions, and the like. Tax returns would furnish all of this information. Other documents that LSW has sought from Plaintiffs will not. While Plaintiffs disagree, referring vaguely to LSW's ability to get this information elsewhere, they never actually identify any alternative sources of the information that they are willing to provide.

Without a plausible argument that these documents are not relevant, Plaintiffs retreat to one founded on privacy. But (as Plaintiffs concede), their privacy with respect

to tax returns is "qualified," *Barrous v. BP P.L.C.*, 2011 WL 1431826, at *2 (N.D. Cal. Apr. 14, 2011), and must be "set aside" in various circumstances—including where "the gravamen of the lawsuit is inconsistent with the privilege." *Id.*[4] If the documents "may verify or contradict" one of Plaintiffs' claims, they should be produced. This is ***particularly*** true "where, as here, the party resisting production has failed to identify other financial documents or records that it had produced that would supply the relevant information." *Barrous*, 2011 WL 1431826, at *4.[5]

CONCLUSION

For these reasons, LSW respectfully asks this Court to: (1) order that "all documents and information produced in this action shall be used only for the purpose of litigating this action (and any appeal taken therefrom) and shall not be used for any other purpose whatsoever"; and (2) order Plaintiffs to produce the requested tax returns.

Respectfully submitted,

WILMER CUTLER PICKERING HALE AND DORR LLP

By: */s/ Jonathan A. Shapiro*
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Andrea J. Robinson (*pro hac vice*)
Timothy J. Perla (*pro hac vice*)

Attorneys for Defendant Life Insurance Company of the Southwest

[4] Citing only two cases from other jurisdictions, Plaintiffs suggest that LSW could only overcome their privacy interest by showing a "compelling need for production." (Joint Stip. at 28.) The California federal decisions LSW cites contain no such requirement.

[5] A stipulation that Plaintiffs "did not suffer any income tax consequences from the tax defect in their policies" (Joint Stip. at 29) is inadequate. Plaintiffs still allege a tax defect specific to their policies. To determine whether these allegations are inconsistent with Plaintiffs' financial information, LSW must review Plaintiffs' tax returns—or documents that contain exactly the same information.

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Wilmer Cutler Pickering Hale and Dorr LLP, 950 Page Mill Road, Palo Alto, CA 94304. On August 16, 2011 I served the within document(s):

NOTICE OF MOTION AND MOTION FOR PROTECTIVE ORDER AND TO COMPEL PRODUCTION OF DOCUMENTS; JOINT STIPULATION OF POINTS AND AUTHORITY

I placed the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Palo Alto, CA addressed as set forth below.

I personally caused to be emailed the document(s) listed above to the person(s) at the address(es) set forth below.

☒ I electronically filed the document(s) listed above via the CM/ECF system.

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