

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

2020 OCT 30 AM 9:32

DAVID E. HARRIS, CLERK
KANAWHA COUNTY CIRCUIT COURT

KEN SKILES, on behalf of himself
and on behalf of a class of West Virginia
residents similarly situated;

Plaintiff,

v.

Civil Action No. 19-C-159
The Honorable Carrie L. Webster

PARTNERS TOO, INC. d/b/a STANLEY
STEEMER and STANLEY STEEMER
INTERNATIONAL, INC.;

Defendants.

ORDER ON PLAINTIFF'S MOTION TO COMPEL AND PLAINTIFF'S MOTION TO
EXTEND DISCOVERY

Pending before the Court are "Plaintiff's Motion to Compel" and "Plaintiff's Motion to Extend." Plaintiff's Motion to Compel moves the Court to direct Defendants to fully respond to *Plaintiff's First Set of Requests for Production, Interrogatories, and Requests for Admissions*. Plaintiff asserts that Defendants' responses to its written discovery are evasive and incomplete under Rules 26, 33-34, and 36 of the *West Virginia Rules of Civil Procedure*, and assert improper general objections limiting discovery in violation of this Court's August 15, 2019 Order. Defendants have responded to both Motions. The Court has considered the legal briefs and arguments contained therein, as well as oral argument on March 2, 2020. Accordingly, the Court **ORDERS** as follows:

1. As an initial matter, due to disagreement among the parties over interpretation of this Court's August 15, 2019 Order, this Court **HEREBY** clarifies and specifically **ORDERS** the parties to engage in limited discovery regarding the fuel surcharge Defendants charge their West Virginia customers, as well as Defendants' fuel costs, from the inception of the fuel surcharge in

2012 to the present. To be clear, such discovery is not limited to the fuel surcharge charged to Plaintiff Skiles only and should not be interpreted as such. Under the *West Virginia Rules of Civil Procedure*, Plaintiff may obtain

discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

W. Va. R. Civ. P. 26. Furthermore, under W. Va. R. Civ. P. 37 “an evasive or incomplete answer or response is to be treated as a failure to answer or respond.” Plaintiff’s written discovery requests regarding the fuel surcharge are proper under the *West Virginia Rules of Civil Procedure*, narrowly tailored to discovery of relevant and admissible information concerning the fuel surcharge, and necessary for Plaintiff to establish its claims and to defend against Defendants’ anticipated defenses and dispositive motions. Plaintiff’s written discovery seeks specific information and documents regarding how Defendants created, calculated, and implemented the fuel surcharge fee, information related to Defendants’ fuel costs, including how such fuel costs are tracked and accounted for and whether the fuel surcharge is, in fact, charged to recover such fuel costs, and any disclosures Defendants made to their West Virginia customers regarding the fuel surcharge fee. Such discovery is directly relevant to Plaintiff’s allegations that the fuel surcharge is not calculated, designed or used to offset Defendants’ actual fuel costs, instead amounting solely to additional profit in breach of the parties contractual agreements¹, and that Plaintiff and Defendants’ West Virginia customers could not have possessed the requisite full knowledge of the facts to contest the fuel surcharge or know of its illegitimate nature.

¹ Plaintiff has also alleged separate Counts for unjust enrichment against Defendant Partners Too, Inc. and Defendant Stanley Steamer International, Inc.

West Virginia law is clear that “[d]iscovery orders lie within the sound discretion of a trial court.” *Bariles v. Hinkle*, 472 S.E.2d 827, 835 (1996).² In the present case, it is clear based on the evidence presented through the parties’ motions and during oral argument that the fuel surcharge is charged in the same uniform manner and amount for each of Defendants’ West Virginia customers.³ Therefore, even though Plaintiff is not seeking open-ended class discovery at this

² As recognized in *GMS Mine Repair & Maint., Inc. v. Miklos*, 798 S.E.2d 833 (W. Va. 2017), discussed *supra*, “whether to stay discovery is subject to a trial court’s discretion.” *Id.* at 840 (citing *True Health Chiropractic Inc. v. McKesson Corp.*, No. 13-cv-02219-JST, 2015 WL 273188, *1, *3 (N.D. Cal. Jan. 20, 2015) (observing that “[t]he decision to bifurcate discovery in putative class actions prior to certification is committed to the discretion of the trial court” and finding that “bifurcation of discovery at this time is not warranted.”); *Adams v. AllianceOne, Inc.*, No. 08-CV-248-JAH (WVG), 2011 WL 2066617, *2 (S.D. Ca. May 25, 2011) (“Defendant resisted further class discovery on grounds that a grant of its summary judgment motion would vitiate the need for the discovery. After consideration, the Court denied Defendant’s motion to stay discovery, *again* ordered Defendant to produce documents, and warned Defendant of the consequence of not complying.”); *Donnelly v. NCO Fin. Sys., Inc.*, 263 F.R.D. 500, 502 (N.D. Ill. 2009) (granting, in part, plaintiff’s motion to compel discovery and denying defendant’s motion to stay class discovery pending resolution of “to-be-filed” motion for summary judgment); *Wike v. Vertrue, Inc.*, No. 3:06-0204, 2007 WL 869724, at *11 (M.D. Tenn. Mar. 20, 2007) (overruling as moot defendant’s challenge to magistrate judge’s decision not to stay class discovery pending district court’s decision on dispositive motion)).

³ Indeed, the limited information produced by Defendants confirms that decisions about their fuel surcharge were made on a corporate level and applied in the same uniform manner for each of their West Virginia customers. (See Defendant Partners Too, Inc.’s response to Interrogatory No. 4, Exhibit F to Plaintiff’s Motion to Compel). For example, Defendant Partners Too, Inc.’s response to Plaintiff’s Interrogatory No. 4 states that: (1) “Defendant began applying the fuel surcharge in September 2012” and that “the decision to apply a fuel surcharge was prompted by a loss of money”, (2) that “Defendant decided to implement a fuel surcharge in the liquidated amount of \$8.00 per job”, (3) that the fuel surcharge is not calculated or charged “on a customer-by-customer basis”, and (4) that in setting the amounts of the fuel surcharge “Defendant calculated what would be approximately 3%-4% of the total charge for its average residential job and rounded to \$8.00.” *Id.* Furthermore, Defendants verified that the fuel surcharge has always been charged in the standard, uniform amount of \$8.00 since September 2012. *Id.* Therefore, evidence as to when, how, and why Defendants charged the fuel surcharge will be the same for Plaintiff as it is for any other West Virginia customer. That the evidence necessary to establish Plaintiff’s claims happens to be the same as that needed to establish the claims of Defendants’ other West Virginia customers, does not provide Defendants with any justifiable objection to producing such evidence or preclude Plaintiff from obtaining such information and documents.

time, discovery as to the fuel surcharge charged to Plaintiff Skiles will necessarily overlap with discovery as to the fuel surcharge charged to each of Defendants' West Virginia customers. *See GMS Mine Repair & Maint., Inc. v. Miklos*, 798 S.E.2d 833, 836 n. 3 (W. Va. 2017) (recognizing that "certification-related discovery may overlap with merit-based discovery.").

However, while Defendants are ordered to supplement their responses to Plaintiff's First Set of Requests for Production and Interrogatories by producing responsive documents and information as to the fuel surcharge in general, specifically identified in more detail below, Defendants are not required at this time to produce discovery as to the scope and membership of the purported class, or to the identification of Defendants' West Virginia customers who were charged the fuel surcharge during the class period.

The Court finds Defendants' argument that the discovery sought in Plaintiff's Motion to Compel amounts to improper class discovery, relying on *GMS Mine Repair & Maint., Inc. v. Miklos*, 798 S.E.2d 833 (W. Va. 2017), is misguided. This Order is not permitting open-ended class discovery. Rather, it directs specific, limited discovery pertinent to the fuel surcharge issue only, which discovery is expressly permitted under the *West Virginia Rules of Civil Procedure* and this Court's inherent authority. *See GMS*, 798 S.E.2d at 844-45 ("a trial court *may* defer ruling on class certification until it first decides a dispositive motion directed to the named plaintiff's claim, and [] the decision as to how best to proceed is dependent upon the facts and circumstances of a given case.") (emphasis added).

Furthermore, no potentially dispositive issue of statutory construction related to Plaintiff's individual claim exists and the Court has complied with Rule 26(f) by differing and holding in abeyance Defendants' Motion to Dismiss and granting in part Defendants' Motion to Stay Discovery, whereby the Court established a plan and schedule for discovery, set limitations on

discovery, and now enters this order which it deems necessary for the proper management of discovery in the action.

SPECIFIC DISCOVERY TO BE PRODUCED

2. This Court hereby **ORDERS** each Defendant to produce full and complete information and documents responsive to each of the specific *Requests for Production* and *Interrogatories* identified below within thirty (30) days of entry of this Order.

3. It is further **ORDERED** that such responsive information and documents are to be produced by Defendants notwithstanding Defendants' "General Objections"⁴ to (1) disclosing internal business information regarding how either Defendant sets prices or accounts for income and expenses (regarding the fuel surcharge); answering discovery requests that are premised on Plaintiff's purported "inaccurate suppositions regarding the fuel surcharge at issue in this case"; and to producing documents regarding Defendants' fuel surcharge and asserting that "[d]iscovery is limited to the fuel surcharge charged to Mr. Skiles only." See Exhibit F to Plaintiff's Motion to Compel.

4. Additionally, to the extent Defendants withhold documents or information on the basis that such documents or information are subject to protection under the attorney client privilege, work product doctrine, or any other applicable privilege recognized by law or rule, Defendants are hereby **ORDERED** to provide a privilege log in accordance with W. VA. R. CIV.

⁴ Under the functionally identical federal rule, "[i]t is well established in this jurisdiction that general objections are impermissible. *Hager v. Graham*, 267 F.R.D. 486, 492 (N.D. W. Va. 2010); *Fisher v. Baltimore Life Ins. Co.*, 235 F.R.D. 617, 622 (N.D. W. Va. 2006). This is because "[g]eneral objections to discovery, without more, do not satisfy the burden of the responding party under the Federal Rules of Civil Procedure to justify objections to discovery because they cannot be applied with sufficient specificity to enable courts to evaluate their merits. *Hager*, 267 F.R.D. at 492. "Because the West Virginia Rules of Civil Procedure are practically identical to the Federal Rules, we give substantial weight to federal cases ... in determining the meaning and scope of our rules." *Painter v. Peavy*, 451 S.E.2d 755, 758 n.6 (1994).

P. 26 and 34 supported by a description of the nature of the documents, communications, or things not produced sufficient to enable Plaintiff to contest the claim within the next thirty (30) days. See *State ex rel. HCR Manorcare, LLC v. Stucky*, 776 S.E.2d 271, 283 (W. Va. 2015).

5. To the extent any documents ordered to be produced below contain confidential information, Defendants may submit such documents pursuant to an agreed upon Protective Order, to be agreed on by both parties and submitted to the Court within seven (7) days of entry of this Order. If the parties cannot agree on a joint Protective Order, each party is to submit competing Protective Orders within ten (10) days of entry of this Order.

6. Defendants' are **ORDERED** to produce Jason Fender for deposition within 30 days after production of the documents and information identified herein.

7. Defendants are further **ORDERED** to make available any witnesses previously deposed by Plaintiff available for deposition on the fuel surcharge in general in accordance with this Order, should such additional depositions be noticed by Plaintiff.

8. Discovery on the fuel surcharge is **HEREBY** extended ninety (90) days from entry of this order. *Depositions should be scheduled now and not delayed with production of add'l discovery documents. (u)*

9. Defendants are hereby **ORDERED** to supplement their response to Plaintiff's First Set of Requests for Production of Documents within thirty (30) days of entry of this order by producing the following:

REQUEST NO. 1: Defendants are ordered to produce any and all documents referring or relating to Plaintiff Ken Skiles, for any services performed, including, but not limited to, correspondence, invoices, executed contracts, unexecuted contracts, telephone recordings, and/or memoranda, including such information contained in Defendants' computer systems and/or databases. This request is not limited as to time period.

REQUEST NO. 3 & 7: Defendants are ordered to produce a sample or representative copy of any form documents, letters or communications sent to customers in West Virginia regarding the fuel surcharge Fee, including any letters or communications regarding the purpose, calculation, justification, or methodology for calculating the fuel surcharge, from

January 2012 to the present.

REQUEST NO. 5: Defendants are ordered to produce their complete monthly and annual consolidated profit and loss statements (and/or financial statements), including a list of total revenue received from the fuel surcharge Fee, for each year from January 2012 to the present.

REQUEST NO. 6: Defendants are ordered to produce a copy of Defendant's franchise agreement with Defendant Stanley Steemer International, Inc.

REQUEST NO. 9: Defendants are ordered to produce any documents or directives from Defendant Stanley Steemer International, Inc. regarding the fuel surcharge fee. This includes any manuals, correspondence, training guides, billing practices, and/or other documents relating to the fuel surcharge Fee or in which the fuel surcharge Fee was mentioned. Defendants are further ordered to produce any and all documents, emails, communications, memoranda, directives or requirements from Defendant Stanley Steemer International to its franchisees regarding how franchisors are to report the fuel surcharge on its financial statements or on any accounting provided to Stanley Steemer International, and any contractual obligations a franchisor has to Stanley Steemer International regarding the fuel surcharge fee revenue.

REQUEST NO. 12: Defendants are ordered to produce any and all documents referring or relating to the fuel surcharge Fee from Defendant's website. This request is not limited as to time period.

REQUEST NO. 16: Defendants are ordered to produce any and all documents referring or relating to any decision to implement, increase or change the amount or character of the fuel surcharge Fee, including a list of anyone (by full name, address, and telephone number) who had any role in such decisions, from January 2012 to the present. This request specifically includes all documents provided to Defendant Partners Too, Inc. by Defendant Stanley Steemer International, Inc.

REQUEST NO. 17: Defendants are ordered to produce any and all documents referring or relating to the revenue stream and/or revenue flow (i.e. where the money goes), for the proceeds of the fuel surcharge Fee, to include any portion of the fuel surcharge Fee revenue remitted to Defendant Stanley Steemer International, as well as what account and/or accounts in which such funds ultimately are kept, from 2012 to the present.

REQUEST NO. 18: Defendants are ordered to produce any and all documents referring or relating to the method of calculation for the fuel surcharge Fee, or the amount of the fuel surcharge Fee, from January 2012 to the present, to include any schedules, charts, formulas, indexes or computer software or databases used to determine the amount of the fuel surcharge Fee. This request includes, but is not limited to, all internal formula for such determinations.

REQUEST NO. 19: Defendants are ordered to produce any and all scripts, manuals,

and/or other written material provided to any customer service representatives and/or people answering customer calls for Defendant which pertain to the fuel surcharge.

REQUEST NO. 21: Defendants are ordered to produce all documents referring or relating to how the fuel surcharge Fee was accounted for internally by Defendant, to include whether the fuel surcharge Fee was listed as expense or revenue and/or the associated costs that are related to the fuel surcharge Fee.

REQUEST NO. 23: Defendants are ordered to produce any and all documents referring or relating to whether Defendant makes a profit from the fuel surcharge Fee.

REQUEST NO. 24: Defendants are ordered to produce any and all documents upon which either Defendant contends it has authorization to charge the fuel surcharge Fee.

REQUEST NO. 29: Defendants are ordered to produce all documents referring or relating to Defendant's cost of fuel, including all documents related to or referencing any change in such costs, from 2012 to the present.

REQUEST NO. 34: Defendants are ordered to produce all documents reflecting, referencing, or used to determine, Defendant's internal fuel costs used for internal budgeting purposes, from 2012 to the present.

REQUEST NO. 38: Defendants are ordered to produce all electronic communications sent to, sent by, or received by any management level employee who is or was employed by Defendant -including e-mails and SMS or text messages- which reference, mention, or concern the fuel surcharge Fee from January 2012 to the present. This request applies to all communications, regardless of where they are currently stored, and includes, but is not limited to, communications stored on personal computers, handheld devices, servers, and/or in any archived median. Please provide this information in native format, and produce all related metadata.

10. Defendants are hereby **ORDERED** to supplement their response to Plaintiff's First Set of Interrogatories within thirty (30) days of entry of this order by providing the following information:

INTERROGATORY NO. 9: Defendants are ordered to identify in detail each cost which is considered and/or used in the calculation of the fuel surcharge Fee, to include the weight provided to each cost at any given time from the inception of the fuel surcharge to the present.

INTERROGATORY NO. 10: Defendants are ordered to identify the total amount of monies received for payment or charging of the fuel surcharge Fee in West Virginia for each year, from January 2012 to the present, including a separate annual listing of revenues for the fuel surcharge Fee for each year.

INTERROGATORY NO. 13: Defendants are ordered to explain in detail the revenue stream and/or where the revenue from the fuel surcharge flows, to include any fuel surcharge revenue amounts received by Defendant Stanley Steamer International, and the portion of the fuel surcharge Fee Defendant Stanley Steamer International receives for each year from 2012 to the present.

INTERROGATORY NO. 16: Defendants are ordered to identify or list the price per gallon of fuel used for internal budgeting or estimating purposes for every time such a budgeting or estimating process was completed from, from January 2012 to the present, and include how such price per gallon affects the fuel surcharge Fee, and/or any other amounts charged to Your customers. Please include the date ranges for which each such price per gallon was used.

The Clerk is directed to transmit certified copies of this Order to all counsel of record.

Entered this _____ day of October, 2020.

Further discovery disputes will be handled by a discovery commissioner. If one has not been appointed, the court appoints Jay Arceneaux Esquire.

The Honorable *[Signature]*

10/28/20

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT,
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 30
DAY OF October 2020
[Signature]
CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA