UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

CAPITAL CITY MORTGAGE CORP., *et al.*,

Defendants.

Civil Action No. 98-00237 (GK) (AK)

CLYDE HARGRAVES, *et al.*,

Plaintiffs,

v.

CAPITAL CITY MORTGAGE CORP., *et al.*,

Defendants.

Civil Action No. 98-1021 (GK) (AK)

Filed in

FILED

AUG 16 2001

NANCY MAYER WHITTINGTON, CLERK
U.S DISTRICT COURT

MEMORANDUM ORDER

This matter is before the Court on Plaintiff Federal Trade Commission's ("FTC's") Motion to Compel Supplementation of Disclosures and Responses [456], and the Opposition [459] and Reply [461] thereto. Upon careful consideration of the arguments advanced by the parties, as well as the entire record in this case, plaintiff's motion will be granted in part and denied in part.

BACKGROUND

For the purposes of the instant dispute, the Court need not reiterate the long and complex

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history of this case. Very briefly, plaintiff FTC brings this action alleging, *inter alia,* that defendants Capital City Mortgage Corporation ("Capital City"), its president, Thomas K. Nash ("Nash"), and its former general counsel, Eric J. Sanne ("Sanne"), engaged in unfair and deceptive practices in connection with extending consumer and business credit. Discovery in this case closed on December 20, 1999. Nearly 14 months later, on February 12, 2001, plaintiff filed the instant motion. The motion to compel requests that defendants be ordered to provide (1) 1999 and 2000 financial statements for Capital City and Nash; (2) a list of Capital City's currently open loans; and (3) updated LoanLedger account information and documentation for 68 loans previously analyzed by plaintiff's expert Steven Butler. *See* Motion to Compel at 2. According to the FTC, this information is responsive to discovery requests propounded by plaintiffs during the discovery period, and defendants have a continuing duty to update their responses pursuant to Federal Rule of Civil Procedure 26(e). *See* Id. at 6-10.

In their Opposition, defendants argue that Rule 26(e) does not obligate them to produce the requested documents. *See* Opposition at 6. First, they claim that Rule 26(e) only requires supplementation of responses which were incomplete or incorrect *at the time they were initially provided.* Because plaintiff does not make that argument, defendants assert, no duty to supplement arises under the Federal Rules. *See* Id. at 6-7. In addition, defendants argue that one of the categories of documents plaintiff requests in its Motion to Compel – information regarding details of Capital City's currently open loans – was never the subject of an FTC discovery request. Thus, defendants argue, they never were and are not now required to produce information on the open loans. *See* Id. at 8.

ANALYSIS

Federal Rule of Civil Procedure 26(e) provides, in pertinent part,

> A party who has...responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if... the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made to the other parties during the discovery process or in writing.

The duty to supplement continues past the close of discovery. *See, e.g.,* Marianjoy Rehabilitaion Hosp. v. Williams Electronics Games, Inc., 1996 WL 411395, *2 (N.D.Ill., Jul 19, 1996).

The current version of Rule 26(e) was adopted in 1993, and represents a significant departure from the prior Rule. That version read, in relevant part:

> A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows...A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

Fed. R. Civ. P. 26(e) (1970)(repealed 1993). It appears to the Court that it is this outdated version of the Rule upon which defendants erroneously rely. *See* Opposition at 6 (citing AmJur 2d). The current version of Rule 26(e) clearly contemplates a continuing duty to disclose new information if that information meets two criteria. First, it must be responsive to an original discovery request. Second, it must materially complete or correct prior responses. The Court addresses the two factors in turn.

There is no dispute that two of the three categories of information sought by plaintiff were the subject of original discovery requests propounded by the FTC. These two categories of information: the financial statements for Capital City and Nash and the LoanLedger account information for 68 loans analyzed by plaintiff's expert Steven Butler therefore clearly meet the first requirement for supplementation. However, defendants claim they are not required to produce the remaining category of information requested by plaintiff - detailed information regarding Capital City's currently open loans - because "plaintiff has never propounded a discovery request to which this information is responsive." Opposition at 8. In its proposed order to compel, the FTC requests that defendants be ordered to produce substantial information about Capital City's open loan accounts, including the loan numbers and amounts, borrower names and addresses, addresses of properties securing the loans, dates that the loans were originated or acquired by defendants, present balances, and whether the loans are commercial or consumer. *See* Proposed Order to Compel at 2. Defendants argue that the only information about open loans originally requested by the FTC was the number of currently open loans made by defendants. *See* Opposition at 8 (citing FTC's Second Set of Interrogatories to Capital City, interrogatory #22). Plaintiff does not directly respond to this argument, instead asserting that defendants never responded adequately to earlier discovery requests for detailed loan information in the first instance. *See* Reply at 5 ("In response to Interrogatory 22 [and others], defendants essentially refused to answer."). Plaintiff urges the Court to order production of this category of information now because "defendants should not be permitted to make only the most general reference to documents in response to specific interrogatories and then to argue that the

interrogatory did not seek the information that would allow plaintiff to discover responsive documents." Id..

The Court is unpersuaded that defendants have a duty to supplement anything more than the number of open loans at this time. It appears that during discovery the only information specifically sought about open loans was their number. Plaintiff may not, 14 months after the close of discovery, first raise the argument that defendants failed to adequately respond to its original requests – plaintiff had every reason to know whether defendants' responses to the interrogatories at issue were adequate when it first received them. Therefore, the Court will grant plaintiff's request for supplementation on the issue of how many loans made by defendants are currently open, but will deny the remainder of plaintiff's request as phrased in its Proposed Order to Compel at page two, paragraph (2).

The second factor which triggers a duty to supplement is whether the new information would materially complete or correct the original response. Plaintiff has not represented that new information is necessary to correct defendants' original responses; rather, the FTC argues that the passage of time since close of discovery has rendered updates necessary for the sake of completeness. "Without the information sought, plaintiff's estimates of the injury resulting from defendants' practices is outdated and could possibly be incomplete." Motion to Compel at 3. In their opposition, defendants assert that nothing that has occurred since discovery was completed would "render incomplete or inaccurate the [information] provided to FTC during the discovery period." Opposition at 9-10.

As noted above, the duty to supplement continues past the close of discovery. This case is somewhat unusual in that, almost 20 months after the close of discovery, no trial date has been

set. It is incontrovertible that, during those 20 months, defendants have amassed more financial data and that the status of some of the loans at issue have changed - thus, the defendants' submissions are necessarily incomplete. Although the Court does not have reason to believe that any updated information provided by defendants would change the posture of plaintiff's case, or that defendants have been in any way less than forthcoming throughout the discovery period and its aftermath, it seems contrary to the spirit of full and continuing disclosure evidenced by Rule 26(e) to deny plaintiff this newer information simply because the wheels of justice grind slowly in this particular case.

Accordingly, it is this 16th day of August, 2001 hereby **ORDERED** that Plaintiff's Motion to Compel is **GRANTED IN PART** and **DENIED IN PART.** It is **GRANTED** in that defendants shall provide 1999 and 2000 financial statements, the number of defendants' open loans as of June 30, 2001, and updated (through June 30, 2001) LoanLedger information and documentation for the 68 loans analyzed by plaintiff's expert Steven Butler. Plaintiff's request for information about defendants' open loans in addition to the number of open loans is **DENIED**.

ALAN KAY
UNITED STATES MAGISTRATE JUDGE