UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Francie E. Moeller,

Plaintiff,

v.

Taco Bell Corporation, et al.,

Defendants.

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No. C 02-5849 PJH (JL)

ORDER GRANTING PLAINTIFF'S MOTION TO COMPEL ANSWERS TO INTERROGATORY 6 (Docket # 392)

Introduction

Plaintiffs' motion to compel answers to Interrogatory 6 came on for hearing. All discovery has been referred by the district court (Hon. Phyllis J. Hamilton) pursuant to 28 U.S.C. §636(b) and Civil Local Rule 72. Brad Seligman, THE IMPACT FUND, appeared for Plaintiff. Richard Hikida, GREENBERG TRAURIG, appeared for Defendant Taco Bell. The matter having been fully considered, and good cause appearing, it is hereby ordered that the motion is granted.

Background

This case is an ADA access case brought as a class action against Taco Bell, pursuant to Title III of the Americans with Disabilities Act, 42 U.S.C. §12181 *et seq.*

Taco Bell took certain measures ("Completed Measures") to remedy or remove architectural barriers in its restaurants that impeded access to people who use wheelchairs or scooters for mobility. However, it contends that the Completed Measures were not readily achievable for purposes of Title III of the Americans with Disabilities Act, 42 U.S.C. §12181 *et seq*. Plaintiffs seek an order compelling Taco Bell to disclose the reasons, documents, and witnesses supporting this contention.

Title III defines "readily achievable" as "easily accomplishable and able to be carried out without much difficulty or expense," and sets forth factors relevant to this analysis, including the cost and operational impact of barrier removal measures, and the defendant's resources. 42 U.S.C. §12181(9). Plaintiffs have identified with great specificity the precise measures that they contend Taco Bell should take to remove barriers in its California restaurants. Taco Bell has asserted as a defense in this litigation that the changes sought by Plaintiffs are not readily achievable. (Answer to Amended Complaint, filed Aug. 13, 2003, Docket # 37).

To explore the bases for this defense, on December 11, 2007, Plaintiffs served interrogatories on Taco Bell, including Interrogatory 6, which asked Taco Bell to identify for which of specific barriers, identified by Plaintiffs, Taco Bell contended removal was not readily achievable and to state, for each: (1) the basis for that contention, all documents supporting that contention, and all persons with knowledge relating to such contention. (Ex. 1 to Declaration of Timothy Fox ISO motion to compel).

In its response, and throughout the meet and confer process, Taco Bell responded that none of the measures identified by Plaintiffs, even restriping a parking space or lowering a restroom grab bar, would be readily achievable. Taco Bell objected that the interrogatory was burdensome, as it addresses "415 elements throughout 226 pages of documents." (See Ex. 2 to Fox Declaration). Taco Bell also objects that it has already produced a "mountain of evidence" supporting its contention, that Plaintiffs have failed to meet their evidentiary burden of showing that barrier removal is readily achievable, and that

Taco Bell cannot give particularized responses without expert assistance (Joint Statement at 4-6 - filed April 30, 2008, at Docket # 373).

Analysis and Conclusion

Taco Bell cannot reasonably rely solely on the document production option of FRCP 33(d) to respond to a contention interrogatory. *U.S. Securities and Exchange Commission v. Elfindepan, S.A.,* 206 F.R.D. 574 (M.D.N.C. 2002) (finding that responding to contention interrogatory with documents imposed unequal burden on party propounding the interrogatory).

In the *Elfindepan* case the court laid out the formula for deciding when to permit 33(d) to be used generally:

> [When a party files a motion to compel]. At that time, such party must make a prima facie showing that the use of Rule 33(d) is somehow inadequate to the task of answering the discovery, whether because the information is not fully contained in the documents, is too difficult to extract, or other such reasons. The burden then shifts to the producing party to justify use of Rule 33(d) instead of answering the interrogatories.
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> *U.S. S.E.C. v. Elfindepan*, S.A. 206 F.R.D. 574, 576 (M.D.N.C.,2002)(Internal citations omitted)

The court in that case found that the party which propounded the interrogatory met its burden to show that 33(d) was inappropriate by showing that the answering party was relying on a witness who gave conflicting answers, and whose testimony was spread over a number of transcripts and voluminous documents. The court found that this would make it difficult for the party which propounded the interrogatory to know upon which documents the responding party would rely as the source of its contentions. The burden then shifted to the party attempting to use Rule 33(d):

> The producing party must satisfy a number of factors in order to meet its justification burden. First, it must show that a review of the documents will actually reveal answers to the interrogatories. In other words, the producing party must show that the named documents contain all of the information requested by the interrogatories. Crucial to this inquiry is that the producing party have adequately and precisely specified for each interrogatory, the actual documents where information will be found. Document dumps or vague references to documents do not suffice. Depending on the number of documents and the number of interrogatories, indices may be required.

> A second burden imposed on the producing party is to justify the actual shifting of the perusal burden from it to the requesting party. Rule 33(d) by its nature, of course, contemplates shifting the burden, but its text also explicitly establishes the minimum threshold to be that "the burden of deriving or ascertaining the answer [must be] substantially the same for the party serving the interrogatory as for the party served ...." Fed.R.Civ.P. 33(d).
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> Id. at 574, 576- 577 (Internal citations omitted)
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> But most significantly, the court held:
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> Plaintiff fails to meet its burden for another reason. *As shown next, defendants propounded contention interrogatories. Rule 33(d) may not be used as a substitute for answering such interrogatories.* Only plaintiff can identify its own contentions and the burden on defendants to try and divine plaintiff's contentions from documents obviously imposes a greatly unequal burden on defendants.
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> *Id.* at 574, 577 (Emphasis added)

See also *Fresenius Med. Care Holding Inc. V Baxter Int'l Inc.*, 224 F.R.D. 644, 652 (N.D.Cal. 2004) ("reliance upon Rule 33(d) is misplaced" in responding to contention interrogatories). The court in *Fresenius* expressly found that the burden of extracting answers to contention interrogatories from documents was unequal and unfairly fell on the party propounding the interrogatories.

> Fresenius, however, also seeks the identity of the individual that Baxter contends had actual notice of the patents-in-suit. Baxter attempts to rely upon Rule 33(d), but its reliance upon Rule 33(d) is misplaced. Rule 33(d) was not designed to save a party the effort of extracting information from a limited universe of documents. SEC v. Elfindepan, S.A., 206 F.R.D. 574 (M.D.N.C.2002). Baxter identified only thirteen documents in which the information can be found. Additionally, Baxter is more familiar with its contentions than is Fresenius, so the burden is not equal.
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> *Fresenius, Id.* at 652

Accordingly, when a party responds to contention interrogatories by relying on FRCP 33(d) it is highly likely that this imposes an unequal burden on the party who propounded the interrogatories. Consequently, relying exclusively on document production pursuant to FRCP 33(d) to answer contention interrogatories is under most circumstances impermissible.

Plaintiffs offer a specific example which shows how hard it would be for them to guess at Taco Bell's rationale for asserting that a measure is not readily achievable. Plaintiffs attached to their Opening Brief an invoice showing that Taco Bell restriped an accessible parking space at one of its restaurants at a cost of less than $500. (Ex. 3 to Fox Decl.) Plaintiffs infer that this document supports a contention that this measure is readily achievable. Taco Bell to the contrary contends that this document is irrelevant because it "involved a contractor whose bid or work was not overseen by Taco Bell's project managers," and that Plaintiffs only "discern[] what they believe to be the precise cost estimate for line striping" at that restaurant. (Opposition at 12 n. 12)

This demonstrates why Taco Bell should not be permitted to rely exclusively on Rule 33(d) in responding to Plaintiffs' contention interrogatories: Taco Bell appears to be contesting the obvious meaning of the document it produced: that a $500 receipt for striping a parking space means that it cost $500 to stripe that parking space. In fairness to Taco Bell, the document is a bid, not a receipt, but the exchange between the parties illustrates the problem. If Taco Bell doesn't expressly answer the interrogatory, but merely produces documents, it is free to deny their obvious meaning and require Plaintiffs to attempt to read Taco Bell's mind, which is exactly the kind of "unequal burden" that the court rejected in the *Fresenius* case.

During the meet and confer process, Taco Bell's counsel offered to supplement Taco Bell's response to Interrogatory 6 by stating that the requested measures were not "readily achievable" even after Taco Bell had made the modifications, because they were not "easily accomplishable" and "able to be carried out without much difficulty or expense." Counsel offers to repeat this assertion with respect to each of the 415 measures Plaintiffs identified as necessary to remove barriers to access at Taco Bell's restaurants. (See Hikida Declaration In Opposition at ¶17) This is not an appropriate response to Interrogatory 6. Mere conclusions are not substitutes for answers stating not only Taco Bell's contentions, but on which specific facts, documents and witnesses it relies to support those contentions.

Lack of 30(b)(6) Depositions doesn't excuse Taco Bell

Taco Bell argues that Plaintiffs are maintaining their own ignorance, by failing to take 30(b)(6) depositions of persons most knowledgeable regarding 24 modifications at 13 of the "Bellwether" stores regarding the "impact of the measures" "including without limitation the cost of each such measure, the effect of each such measure on the expenses and resources of the particular restaurant at issue, the effect of each such measure on the overall financial resources of Taco Bell Corp. and Yum! Brands, Inc., and the impact on operations of each such measure." (Hikida Decl. ¶24; Opposition at 23:11-16). Taco Bell is also complaining that it shouldn't have to answer regarding its contentions until after Plaintiffs depose its witnesses. This is reverse reasoning. Plaintiffs cannot competently depose Taco Bell's witnesses without knowing what its contentions are and what it relies on to support them, including which witnesses support which contentions. If Taco Bell has enough of a basis to assert that every single measure it has already taken was not readily achievable, then it should be able to back up this contention with facts, documents, and witnesses.

Non-discovery Issues

Plaintiffs at the hearing on this motion raised the question whether Taco Bell's failure to respond as to specific remedial measures might waive a measure-by-measure defense to the claim that remedial measures are readily achievable. The parties in their pleadings also raised the issue of their respective burdens of proof to show that remedial measures are or are not readily achievable and whether an aggregate costs analysis may be used to calculate achievability or whether individual remedial measures must be evaluated for achievability. Taco Bell also complains that Plaintiffs have not commenced site inspections "immediately" as ordered by the district court.

This Court finds that these are questions outside the scope of the discovery referral, and are questions to be decided by the trial court.

Order

This Court finds that Defendant's responding to a contention interrogatory with documents, pursuant to FRCP 33(d), imposes an unequal burden on Plaintiffs to discern Defendant's contentions. Accordingly, Plaintiffs' motion to compel further responses to Interrogatory 6 is granted. This Court orders Defendant to provide a concise narrative response to Plaintiffs' Interrogatory Number 6. Defendant shall identify the specific facts, reasons and documents supporting its contention that any particular measure that it has already taken to remedy or remove an architectural barrier was not readily achievable. Compliance shall be due within twenty days of the issuance of this order.

IT IS SO ORDERED.

DATED: August 28, 2008

James Larson

JAMES LARSON
Chief Magistrate Judge

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