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E-FILED 6/13/08

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

MANUEL G. FAUSTO et al.,

NO. C07-05658 JW (RS)

Plaintiffs,

**ORDER GRANTING
PLAINTIFFS' MOTION TO
COMPEL AND DENYING
DEFENDANTS' MOTION FOR
A PROTECTIVE ORDER**

v.

CREDIGY SERVICES CORP.,

Defendant.

_____ /

I. INTRODUCTION

Plaintiffs Manuel and Luz Fausto bring suit under federal and California debt collection laws prohibiting debt collectors from engaging in abusive, deceptive, or unfair collection practices. The Faustos allege that Defendants Credigy Services Corporation, Credigy Receivables Inc., and Credigy Solutions Inc. (collectively "Credigy") and five Credigy employees engaged in an unlawful letter-writing and telephone campaign in an effort to collect payment on a disputed debt.

Pursuant to Rules 26, 33, and 34 of the Federal Rules of Civil Procedure, the Faustos move to compel initial disclosures and discovery. As the discovery is relevant, non-privileged, and overdue, the motion to compel will be granted.

Defendant Credigy, in turn, moves for a protective order excusing four individual defendants from appearing at deposition in Atlanta, Georgia. The date noticed for the deposition having passed, the motion seeks primarily to protect these four defendants – all of whom are believed to reside in Brazil - from being required to appear for future deposition in the United States. As the Faustos have shown good cause to require the depositions be held in

1 the United States rather than Brazil, Credigy's motion for a protective order will be denied.

2 II. BACKGROUND

3 The Faustos allege violations of the Fair Debt Collection Practices Act of 1978 and the
4 California Rosenthal Act. While Credigy primarily operates in Georgia and Nevada, it also has
5 an office in Sao Paulo, Brazil. The Faustos allege that four of the named defendants, Luis Silva
6 Renato Nunez, Paulo Peres, Ricardo Ventura, and Rita De Cassia Goncalves, are Brazilian
7 nationals, who engaged in illegal collection practices against them from Credigy's Brazil office.

8 The international aspects of this suit create logistical challenges and some
9 understandable delays in discovery. Credigy has yet been unable to locate, individually serve,
10 or provide contact information for defendants Goncalves and Ventura, who are no longer
11 employed by Credigy in Brazil.¹ Additionally, defendants Nunez and Goncalves initially were
12 misidentified as Ryan Miller and "Thompson," a mistake that has only recently been corrected.
13 Finally, counsel have been unable to agree where depositions should take place, as it appears
14 that Brazilian law generally prohibits the taking of deposition testimony in Brazil for foreign
15 trials.

16 Parties nevertheless are bound to a strict scheduling order and must continue to advance
17 the discovery process. Accordingly, the Faustos have moved to compel unfulfilled discovery,
18 including: (1) initial disclosures of the full legal names, last known home addresses, and
19 telephone numbers of those individuals likely to have discoverable information relevant to the
20 dispute, including the four Brazilian defendants and Brett Boyde, a U.S.-based Credigy
21 employee; (2) response to interrogatories requesting the same for the five individual defendants
22 and two additional Credigy employees, Moises Moteli and Ralph Phillips; (3) production of
23 personnel files for the five individual defendants, Moteli, and Phillips; (4) production of a broad
24 array of Credigy's financial records dating back to 2005; and (5) production of any available

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26 ¹ Anticipating service difficulties, Credigy's attorneys stipulated to accept service on
27 behalf of the Brazilian defendants but then moved to withdraw from that stipulation after
28 having been unable to locate these defendants. In reliance on Credigy's stipulation to
receive service and file an answer on the Brazilian defendants' behalf, Judge Ware
denied a motion to extend time for service. Credigy's motion to withdraw from the
stipulation is pending before Judge Ware and set for hearing on September 22, 2008.

1 documentation showing Credigy submitted the Faustos's alleged debt to a credit reporting
2 agency.

3 The Faustos also scheduled depositions of the Brazilian defendants (including the two
4 not yet located or served) in Atlanta, Georgia in May 2008, following a brief and - Credigy
5 asserts - unconcluded meet and confer process. The day before the scheduled depositions,
6 Credigy moved for a protective order to excuse the Brazilian employees from appearing.
7 Credigy argues that the call-center employees could not practically be expected to appear, since
8 they were given less than a month's notice to obtain visas and travel to the United States.
9 Credigy also argues the Faustos have not shown required good cause to hold the depositions in
10 the United States rather than Brazil.

11 III. STANDARDS

12 A. Motion to Compel

13 Rules 26, 33, 34, and 37 of the Federal Rules of Civil Procedure govern discovery
14 requirements, motions to compel, and the resolution of discovery disputes. Significantly, FRCP
15 37 grants judicial authority to compel disclosure and discovery where a party has failed to do so
16 in a timely fashion. A judge may grant such a motion upon certification by the moving party
17 that he attempted in good faith to obtain the discovery without court action. Fed. R. Civ. P
18 37(a)(1).

19 FRCP 26, 33, and 34 articulate the bounds of authorized disclosures and discovery as
20 relevant to this motion to compel. FRCP 26 requires that each party automatically disclose "the
21 name and, if known, the address and telephone number of each individual likely to have
22 discoverable information . . . that the disclosing party may use to support its claims or
23 defenses," Fed. R. Civ. Pro. 26(a)(1)(A)(i), "based on the information then reasonably available
24 to it." Fed. R. Civ. Pro. 26(a)(2)(A). In discovery, parties similarly are required to inform
25 opposing counsel of "the identity and location of persons who know of any discoverable
26 matter." Fed. R. Civ. Pro. 26(b)(1). A disclosing party "may not satisfy this obligation by
27 disclosing its business address and phone number *unless it knows of no other address and*
28

1 number.” *Dixon v. Certaineed Corp.*, 164 F.R.D. 685, 689 (D. Kan. 1996) (emphasis added).
2 FRCP 26, therefore, requires each party to make a good faith effort to obtain particularized
3 address and telephone information for individuals relevant to the litigation.

4 FRCP 33 and 34 govern the use of special interrogatories and requests for the
5 production of documents in discovery. Answering parties must provide a written response to
6 each item requested within 30 days of service that includes either a specific objection or a full
7 answer or agreement to produce. Fed. R. Civ. P. 33(b)(3), (4); Fed. R. Civ. P. 34(b)(2)(A), (B).
8 The answering party may object on the grounds of relevance or privilege.

9 B. Protective Order

10 Ordinarily, “the deposition of a party may be noticed wherever the deposing party
11 designates, subject to the Court’s power to grant a protective order.” *Turner v. Prudential Ins.*
12 *Co. of America*, 119 F.R.D. 381, 383 (M.D. NC 1988)). However, “[t]here is a general
13 presumption that the deposition of a defendant should be conducted in the district of his
14 residence [because while] plaintiffs bring the lawsuit and . . . exercise the first choice as to the
15 forum, [t]he defendants, on the other hand, are not before the court by choice.” *Doe v.*
16 *Karadzic*, 1997 U.S. Dist. LEXIS 1073, 8-9 (S.D.N.Y. 1997). An exception to this general rule
17 is made for corporate designees, who are normally deposed at the corporation’s principal place
18 of business. *See Dwelly v. Yamaha Motor Corp.*, 214 FRD 537, 541 (D. Minn. 2002) (declining
19 to deviate from this general rule and holding that depositions should be held at corporate
20 headquarters in Japan, rather than in the United States).

21 Once their protection is sought, district courts have wide discretion to establish the time
22 and place of depositions. *Hyde & Drath v. Baker*, 24 F.3d 1162, 1166 (9th Cir. 1994). Courts
23 consider the relative convenience of and hardships to the parties when determining whether
24 there is good cause to grant a protective order. *Id.* at 1166 (finding no abuse of discretion
25 where Hong Kong-based corporate representatives were ordered to appear for deposition in San
26 Francisco, since they previously had violated an order to appear in Hong Kong.)

27 IV. DISCUSSION
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1 There may be some unavoidable delay in this action, as parties span two continents and
2 some defendants have yet to be located. Nevertheless, the parties are bound to a strict
3 scheduling order and must continue to advance discovery.

4 A. Motion to Compel

5 Subject to the requirements of FRCP 26, 33, and 34, Credigy must provide all relevant
6 and non-privileged discovery to the extent possible. Credigy's filings demonstrate that it has
7 produced some, but not all, of the materials and information responsive to the Faustos's
8 requests. As required by Rule 26 initial disclosures and in response to the Faustos's properly
9 served interrogatories, Credigy must disclose the full names and complete contact information
10 of all Credigy employees that worked on the Faustos's file, including Phillips and Moteli, to the
11 extent that this information is available to Credigy, within 20 days of this order.

12 Since the filing of this motion, parties have met and conferred and Credigy has agreed to
13 produce personnel files for each of the individual defendants and copies of any documents
14 relating to referral of the Faustos's case to a credit reporting agency. **Credigy is ordered to**
15 **abide by the terms of that agreement and produce the requested documents within 20 days of**
16 **this order.** Should Moteli and Phillips prove to be Credigy employees who worked on the
17 Faustos's account, Credigy is also ordered to produce their personnel records on the same
18 schedule.

19 Finally, Credigy has raised a legitimate concern that the request for financial
20 documentation is unduly broad to accomplish the Faustos's stated purpose: assessment of their
21 punitive damage claim. Credigy is ordered to produce copies of its unaudited financial
22 statements and tax returns for 2005, 2006, and 2007. This order is without prejudice to a
23 subsequent showing that production of additional financial information has become warranted.

24 B. Motion for Protective Order

25 The Faustos correctly argue that this motion for a protective order was not timely filed.²

26 ² The Ninth Circuit holds:

27 Rule 30(b) places the burden on the proposed deponent to get an order, not just to
28 make a motion [for a protective order prior to the date of the deposition]. And if
 there is not time to have his motion heard, the least that he can be expected to do is
 to get an order postponing the time of the deposition until his motion can be heard.

1 Nevertheless, the interests of justice are best served by considering the merits of Credigy's
2 motion, since neither party was unduly prejudiced by the deponents' non-appearance.

3 The Faustos argue persuasively that there is good cause to hold these depositions in the
4 United States rather than Brazil: according to the U.S. Department of State, it apparently is
5 illegal for American lawyers to take depositions in Brazil and they do so at risk of
6 imprisonment.³ Additionally, Credigy's corporate representative has testified that Credigy
7 regularly hosts Brazilian employees in Atlanta, illustrating that Credigy is familiar with the
8 logistical process of bringing Brazilian employees to the United States and has successfully
9 navigated the U.S. visa procurement process in the past.

11 _____
12 He might also appear and seek to adjourn the deposition until an order can be
13 obtained. Rule 30(d). But unless he has obtained a court order that postpones or
14 dispenses with his duty to appear, that duty remains. Otherwise, as this case shows,
15 a proposed deponent, by merely filing motions under Rule 30(b), could evade
16 giving his deposition indefinitely. Under the Rules, it is for the court, not the
17 deponent or his counsel, to relieve him of the duty to appear.
18 *Pioche Mines Consol., Inc. v. Dolman*, 333 F.2d 257, 269 (9th Cir. 1964); *see also F.A.A. v.*
19 *Landy*, 705 F.2d 624, 634 (2d Cir. 1983) ("It is clear, however, that it is not the filing of such a
20 motion that stays the deposition, but rather a court order.").

21 ³ *See* Declaration of Edward A. Betancourt, Director of the Office of Policy Review and Inter-
22 Agency Liaison in the Directorate of Overseas Citizens Services ("OCS") of the Bureau of
23 Consular Affairs, U.S. Department of State, *Wheaton v. Porreca* and *United States v. Porreca*,
24 filed in the District of New Jersey on May 24, 2001, available at
25 <http://www.state.gov/s/1/16146.htm>. ("The United States has endeavored to obtain authoritative
26 guidance from the Government of Brazil regarding the procedures it considers acceptable under
27 Brazilian law and practice, and under its interpretation of the Vienna Convention on Consular
28 Relations concerning obtaining evidence in Brazil. Despite extensive consultations for many
years, the United States has not received clear written guidance from the Government of Brazil
on this subject. Ministry of External Relations officials have advised the U.S. Embassy
verbally that Brazilian authorities do not recognize the authority or ability of foreign persons,
such as American attorneys, to take depositions before a U.S. consular officer, with the
assistance of a Brazilian attorney, or in any other manner. Ministry officials explained that the
taking of depositions for use in foreign courts constitutes an act of procedural law and that, as
such, must be undertaken in Brazil only by Brazilian judicial authorities. The Ministry also
cited as an implicit principle of Brazilian Constitutional Law that only Brazilian judicial
authorities are competent to perform acts of a judicial nature in Brazil. In view of this position,
Brazil has advised it would deem taking depositions in Brazil by foreign persons to be a
violation of Brazil's judicial sovereignty. Such action could result in the arrest, detention,
expulsion, or deportation of the American attorney or other American participants. Subsequent
attempts by the U.S. Embassy to clarify the issue with Brazilian authorities proved
unsuccessful.") (Decl. Betancourt ¶ 5-6.); *see also* Supplemental Declaration of Edward A.
Betancourt, *Wheaton v. Porreca* and *United States v. Porreca*, filed in the District of New
Jersey on October 29, 2001, <http://www.state.gov/s/1/16147.htm> (declaring that the prohibition
against deposition testimony extends to telephonic and video conference depositions).

1 Provided that the four named defendants (Nunez, Peres, Ventura, and Goncalves) are
2 located and are able to obtain visas for international travel, the Court orders that they be
3 deposed in Atlanta, Georgia. The Faustos are ordered to schedule these depositions with
4 reasonable notice, allowing for reasonably foreseeable complications of U.S. visa procurement
5 and international travel. The motion for a protective order with respect to these four Credigy
6 defendants is DENIED.

7 V. CONCLUSION

8 The Faustos's motion to compel is GRANTED and Credigy is ordered to produce the
9 required discovery within 20 days of the date of this order. The motion for a protective order
10 with respect to the depositions of Nunez, Peres, Ventura, and Goncalves is DENIED.

11 IT IS SO ORDERED.

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13 Dated: June 12, 2008



14 RICHARD SEEBORG

15 United States Magistrate Judge
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THIS IS TO CERTIFY THAT NOTICE OF THIS ORDER HAS BEEN GIVEN TO:

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Counsel are responsible for distributing copies of this document to co-counsel who have not registered for e-filing under the Court's CM/ECF program.

Dated: 6/13/08

Richard W. Wieking, Clerk

By: Chambers