IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MELONIE BRATCHER, Plaintiff, v. NAVIENT SOLUTIONS, INC., Defendant.	No. 3:16-cv-00519-HES-JBT

DEFENDANT NAVIENT SOLUTIONS, LLC'S MOTION TO COMPEL DOCUMENTS FROM PLAINTIFF MELONIE BRATCHER

Defendant, Navient Solutions, LLC (NSL), through counsel and under Fed. R. Civ. P. 37, moves the Court to compel plaintiff, Melonie Bratcher ("plaintiff" or "Bratcher"), to produce documents requested by NSL's Notice of Deposition Duces Tecum of Plaintiff, and the document requests contained therein pursuant to Fed. R. Civ. P. 30(b)(2) and 34, originally served on February 15, 2017, and states:

I. INTRODUCTION AND BACKGROUND

On April 28, 2016, plaintiff filed this lawsuit alleging NSL violated the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, et seq., the Florida Consumer Collection Practices Act ("FCCPA"), Fla. Stat. § 559.55, et seq., and the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, et seq., in connection with servicing her federal student loans. In her Complaint, plaintiff challenges telephone calls that NSL made to her in an effort to collect outstanding amounts on her federal student loans.

Plaintiff failed to adequately respond to the only discovery served upon her in this action. On February 15, 2017, NSL served its Notice of Deposition Duces Tecum of Plaintiff (the "Notice") containing document requests pursuant to Fed. R. Civ. P. 30(b)(2) and 34 (the "Requests"). *See* **Exhibit A**, Notice of Deposition Duces Tecum of Plaintiff. Requests 1, 3, 4, 5, and 6 sought documents in plaintiff's possession related to the student loans at issue, and Request 31 sought any written or recorded documentation of NSL's calls made to her. *See id.* The Notice set plaintiff's deposition for March 17, 2017, and plaintiff's responses to the Requests were due on or before that day. On March 8, 2017, plaintiff served baseless, boilerplate objections. *See* **Exhibit B**, Plaintiff's Objections to Defendant, Navient Solutions, LLC'S Notice Of Deposition Duces Tecum. Moreover, plaintiff's only attempt to respond to NSL's valid Requests was with her subpoenaed T-Mobile cell phone records previously provided to NSL.

On March 16, 2017, NSL took plaintiff's deposition.[1] During the deposition, plaintiff testified she is in possession of numerous documents responsive to the Requests, but made ***no effort*** to collect or produce such documents prior to that day. Specifically, plaintiff testified she is in possession of (1) a 6 by 8-inch plastic bin of documents related to the student loans at issue, and (2) the cell phone at issue containing a call-block app named Metro Block-It (the "call-block app"). Plaintiff testified she used the call-block app to block NSL's calls from going through to her cell phone, and that the app, which is still

[1] On February 23, 2017, at plaintiff's request, NSL issued an Amended Notice changing the date of the deposition from March 17, 2017 to March 16, 2017. *See* **Exhibit C**, Amended Notice of Deposition Duces Tecum of Plaintiff. Subsequent to the Amended Notice of Deposition, NSL issued a Second Amended Notice of Deposition as to location only. *See* **Exhibit D**, Second Amended notice of Deposition Duces Tecum of Plaintiff Melonie Bratcher.

on her cell phone, lists the blocked calls, and that she maintained a log of the calls through the app.

During the deposition, NSL's counsel asked plaintiff's counsel why these documents, which were clearly responsive to the Requests, were not produced by plaintiff. In response, plaintiff's counsel objected to the Requests as "improper." On March 17, 2017, NSL promptly contacted plaintiff's counsel at 9:50 am on his cell phone and via email in an attempt to meet and confer regarding this Motion. However, plaintiff's counsel's office failed to respond until 4:22 pm and would not make counsel available for a meet and confer until Monday, March 20, 2017—after the March 17, 2017 discovery deadline. Under the circumstances, and given plaintiff's counsel's objection to producing the documents the day prior, NSL could not postpone the meet and confer.

II. ARGUMENT

"Rule 37 of the Federal Rules of Civil Procedure authorizes a motion to compel discovery when a party fails to provide proper response to requests for production of documents under Rule 34." Local Access, LLC v. Peerless Network, Inc., 2015 WL 5687867, at *2 (M.D. Fla. Sept. 25, 2015). Further, "a party may request production of documents through a notice of deposition, as long as the request is made in compliance with Rule 34, Federal Rules of Civil Procedure, and thus may later move to compel production of the requested documents if they are not produced." Blitz Telecom Consulting, LLC v. Peerless Network, Inc., 2015 WL 12843839, at *5 (M.D. Fla. Nov. 20., 2015). See, e.g., RAJ Enters. of Central FL LLC v. Select Lab. Partners Inc., 2015 WL 4602550 (M.D. Fla. July 29, 2015) (order granting motion to compel production of

documents requested in notice of deposition *duces tecum*); Roseman v. Sports and Recreation, 165 F.R.D. 108, 110–113 (M.D. Fla. 1996) (order granting in part a motion to compel seeking production of documents requested in notice of deposition *duces tecum*).

A. Plaintiff's Objections Should Be Overruled.

Plaintiff's objections are baseless. NSL discusses the requests at issue below, in accordance with Local Rule 3.04(a).

> **Request No. 1**: Produce all documents pertaining to the debt made the basis of this lawsuit, including any and all monthly statements, documents evidencing the names on the account, and documents evidencing payments made towards the account.
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> **Request No. 3**: Produce any and all documents that NSL sent to you.
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> **Request No. 4**: Produce any and all documents you sent to NSL.
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> **Request No. 5**: Produce any and all documents that the original creditor sent to you regarding the account made the basis of this lawsuit.
>
> **Request No. 6**: Produce any and all documents that you sent to original creditor regarding the debt made the basis of this lawsuit.
>
> **Request No. 31**: Produce all calendars, diaries, logs, notes, journals, or any other written or recorded summary of events maintained by you in any way relating to this lawsuit.
>
> Plaintiff's Objections to Requests 1, 3, 4, 5, 6, and 31 are identical, and state:
>
> **RESPONSE:** Plaintiff objects to this request to the extent it is seeking to impose burdens and time constraints outside of those provided by the Federal Rules of Civil Procedure, the Local Rules, Court orders, and case law. *See Tara Productions, Inc. v. Hollywood Gadgets, Inc.*, , No. 09-61436-CIV, 2014 WL 1047411, at *3 (S.D. Fla. Mar. 18, 2014) ("[…]a subpoena may not be used to circumvent or do an "end-run" around the discovery rules that apply to a party."); *see also, Agsouth Genetics, LLC v. Georgia Farm Servs., LLC*, No. 1:09–CV–186 (WLS), 2013 WL 5603231, at *1 (M.D. Ga. Oct.11, 2013) ("A subpoena duces tecum should not be used to circumvent the ordinary strictures of discovery. Instead, a subpoena duces tecum issued to a

party should be treated as a discovery device and all rules of discovery should likewise apply thereto.") (internal citation omitted); *Neel v. Mid-Atlantic of Fairfield, LLC*, No. SAG-10-CV-405, 2012 WL 98558, at *1 (D. Md. Jan. 11, 2012) ("To allow a party to use Rule 45 to circumvent the requirements of a court-mandated discovery deadline would clearly be contrary to the traditional interpretation of the Federal Rules of Civil Procedure, which dictates that the rules must be construed in a manner that is internally consistent. Put another way, it is unthinkable that the effect of Rule 34 can be emasculated by the use of Rule 45.") (quotation marks and citations omitted); *Homes & Land Affiliates, LLC v. Homes & Loans Magazine, LLC*, No. 6:07–cv–1051–Orl–28DBA, 2008 WL 4186989, at *2 (M.D. Fla. Sept. 8, 2008) ("Rule 45 subpoenas [directed to a party] are not to be used as an 'end-run' around the regular discovery rules that apply to parties, i.e., notices of depositions in Rule 30, or for the production of documents in Rule 34."); *Peyton*, No. 07-CV-0453 LJO TAG, 2008 WL 880573, at *1 (E.D. Cal. Mar. 31, 2008) ("A majority of courts hold that the use of a FRCP subpoena constitutes discovery, thus a party employing a FRCP 45 subpoena to obtain discovery from a party to an action must also comply with the time constraints and other requirements applicable to other methods of formal discovery").

Plaintiff further objects to this request seeking the production of documents from Plaintiff through a subpoena duces tecum, rather than through a Rule 34 request for production, as Defendant has done precisely what the courts prohibit. *See Tara Productions, Inc.*, 2014 WL 1047411 at *5 (had the Judgment Creditor afforded Lakewood the obligatory 30 days to produce documents pursuant to the subpoena, it would have violated Local Rule 26.1(f).

That Local Rule provides:

Discovery must be completed in accordance with the court ordered discovery cutoff date. Written discovery requests and subpoenas seeking the production of documents must be served in sufficient time that the response is due on or before the discovery cut-off date. Depositions, including any nonparty depositions, must be scheduled to occur on or before the discovery cutoff date. Failure by the party seeking discovery to comply with this paragraph obviates the need to respond or object to the discovery, appear at the deposition, or move for a protective order. S.D. Fla. L. R 26(1)(f).

Accordingly, had the Judgment Creditor provided Lakewood the obligatory 30–day response time, the subpoena duces tecum would have been untimely

> and, further, Lakewood would not have been under any obligation to comply therewith.").
>
> Plaintiff also objects to this request to the Plaintiff on the grounds that the information sought is obtainable from some other source, namely Defendant, that is more convenient, less burdensome, or less expensive. Defendant has within its possession documentation and recordings responsive to this request. Moreover, this request for production is not within the scope of Rule 26(b), as it is irrelevant, harassing and also not reasonably calculated to lead to admissible evidence. Plaintiff also objects on the grounds that is overly broad, unduly burdensome, and irrelevant to the case at hand. This question is also nonsensical, as no relevant time period is provided.
>
> As discovery is ongoing Plaintiff reserves her right to amend or supplement this response.[2]

Reasons to Compel Production: Plaintiff's boilerplate objections do not apply to the Requests at all. Plaintiff cites to a local rule for the S.D. Fla, not the M.D. Fla. Further, NSL's Requests were not contained in a subpoena as plaintiff claims, but in a Notice of Deposition Duces Tecum of Plaintiff that was timely served under Rule 34. NSL served the Requests on February 15, 2017 and set the deposition on March 17, 2017—30 days later.[3]

Moreover, Requests 1, 3, 4, 5 and 6 are reasonably calculated to lead to discovery of admissible evidence and narrowly tailored, namely seeking documents related to the very student loan at issue in this lawsuit, and they are not unduly burdensome. Plaintiff testified she has documents responsive to the Requests in her possession and easily accessible, specifically a 6 by 8-inch plastic bin of documents related to her student loan.

[2] This final sentence was not included in plaintiff's Objections to Request no. 31; however, the substance of the objections to all of the Requests is identical.

[3] Under Fed. R. Civ. P. 30(b)(2), "[t]he notice to a party deponent may be accompanied by a request under Rule 34 to produce documents and tangible things at the deposition." Under Fed. R. CIv. P. 34(b)(2)(A), "The party to whom the request is directed must respond in writing within 30 days after being served . . . ."

Arthrex, Inc. v. Parcus Med., LLC, 2012 U.S. Dist. LEXIS 156873, at *10–12 (M.D. Fla. Nov. 1, 2012) (overruling objections that document requests were overbroad and unduly burdensome where the requests were narrowly tailored to a specific set of documents).

Further, plaintiff testified the call-block app on her cell phone is responsive to Request 31 and reasonably calculated to lead to discovery of admissible evidence. Request 31 asks for all "written or recorded summary of events maintained by you in any way relating to this lawsuit." Plaintiff testified she used the call-block app to block NSL's calls from going through to her cell phone. Plaintiff also testified she did not recall how many calls were blocked, and that the app, which is still on her cell phone and in her possession, logs and lists the blocked calls. NSL is entitled to Plaintiff's call-block log/app, which is clearly and directly responsive to NSL's lawful requests. NSL will argue, to the extent NSL is found to have violated the TCPA, which NSL denies, plaintiff is not entitled to recovery for any blocked calls. Finally, production of the cell phone is not unduly burdensome. Plaintiff testified she has the phone in her possession.

In summary, the Court should order plaintiff to produce the 6 by 8-inch plastic bin of documents related to her student loan, and the cell phone, so NSL can examine the list of blocked calls on the call-block app.

B. The Court Should Impose Sanctions Against Plaintiff.

Plaintiff should be required to pay NSL's reasonable expenses, including attorneys' fees, for bringing this Motion. Rule 37(a)(5) provides:

> If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct

> necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:
>
> (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
> (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
> (iii) other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(a)(5); see also Middle District Discovery: A Handbook on Civil Discovery Practice in the United States District Court for the Middle District of Florida, § I.E.3 (2015).

The situation here is very simple and inarguable. Plaintiff admits she failed to timely and adequately respond to the Requests, and she has also failed to meet and confer in good faith. The fact that, as she conceded, plaintiff made ***no effort*** to collect documents responsive to the Requests is inexcusable. See Sunshine Stone Prods., LLC v. Bruton, No. 5:12-cv-293-Oc-34PRL, 2014 U.S. Dist. LEXIS 142598, at *3 (M.D. Fla. Oct. 7, 2014) (awarding reasonable expenses and attorneys' fees incurred in filing a motion to compel and explaining that "[w]here, as here, the motion to compel is granted, and is caused by the failure of a party to provide responsive answers to discovery requests, the [c]ourt is required to award the fees and expenses incurred in filing the motion").

For all of the foregoing reasons, NSL respectfully requests the Court grant the Motion in its entirety.

3.01(g) CERTIFICATE OF CONFERENCE

The parties have conferred regarding the relief requested by NSL herein in person on March 16, 2017 and by email on March 17, 2017, and we understand the plaintiff opposes the relief requested in this Motion.

WHEREFORE, Defendant, Navient Solutions, LLC respectfully requests the Court enter an order compelling plaintiff, Melonie Bratcher, to produce the documents described herein, award NSL its reasonable attorneys' fees and expenses incurred in bringing this Motion and such other relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 17th day of March, 2017, a copy of the foregoing was filed electronically in the ECF system. Notice of this filing will be sent to the parties of record by operation of the Court's electronic filing system, including Plaintiff's counsel as described below. Parties may access this filing through the Court's system.

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