

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 4:09-CV-10095 MOORE/SIMONTON

JOHN DOLAN-HEITLINGER

Plaintiff,

v.

NATIONAL CREDIT UNION  
ADMINISTRATION as Conservator for  
Keys Federal Credit Union,

Defendant.

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**PLAINTIFF'S MOTION TO COMPEL DEFENDANT TO COMPLY WITH  
SECTIONS B and D OF THE STATE COURT'S ORDER OF JULY 29, 2009  
AND INCORPORATED MEMORANDUM OF LAW<sup>1</sup>**

Plaintiff, by and through undersigned counsel, and pursuant to Federal Rules of Civil Procedure 26, 34, 37, S.D. Fla. L.R. 7.2, and this Court's Orders of October 29, 2009 [D.E. 7] and December 14, 2009 [D.E. 9] moves this Court for an Order Compelling Defendant to Comply with Sections B and D of the Florida Circuit Court's Order of July 29, 2009 and in support thereof states:

1. This is an action for breach of contract. Plaintiff JOHN DOLAN-HEITLINGER alleges that KEYS FEDERAL CREDIT UNION ("KFCU"),<sup>2</sup> after renewing Plaintiff's

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<sup>1</sup> ] Plaintiff filed a motion seeking the same relief in Circuit Court for the 16th Judicial Circuit of Florida on or about September 15, 2009. The motion is being refiled pursuant to this Court's Order of October 29, 2009 [D.E. 7] and December 14, 2009 [D.E. 9]. A copy of Plaintiff's state court motion is attached hereto as Appendix "A."

employment contract on or about September 1, 2007 terminated his employment without cause on or about November 9, 2007. Plaintiff does not challenge KFCU's authority to terminate his employment without cause but claims that, pursuant to the "no cause" termination provision of the employment contract between the parties, he is entitled to six months' earnings and accrued benefits. DOLAN-HEITLINGER also seeks compensation owed and payable to him in the event of a "no cause" termination under his Deferred Compensation Plan with KFCU. Defendant asserts that it terminated DOLAN-HEITLINGER's employment for cause and does not owe him any monies.

2. Plaintiff filed and served the Complaint in this action for breach of contract on or about February 12, 2008.

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<sup>2</sup> ] On October 5, 2009, the NATIONAL CREDIT UNION ADMINISTRATION as Conservator for Keys Federal Credit Union was substituted in the state court as the proper defendant in this action. Defendant then removed the action to Federal Court on October 6, 2009. The action was stayed. [D.E. 6.] On October 29, 2009, the Court entered an order pursuant to Local Rule 7.2 providing that Plaintiff may re-file his discovery motions pending from state court 10 days after the lifting of the stay and after consulting with opposing counsel regarding the issues raised in the motions. [D.E. 7.] Subsequently, following a Joint Motion for Extension [D.E. 8.], the Court, on December 14, 2009, extended the time for Plaintiff to file the pending motions until January 11, 2010. [D.E. 9]

3. On March 3, 2008, Defendant served its Answer and Affirmative Defenses on Plaintiff on March 3, 2008. The First Affirmative Defense purportedly sets forth the reasons asserted by Defendant for terminating Plaintiff's employment.

4. On February 29, 2008 Plaintiff served his First Set of Requests for Production on Defendant. On March 24, 2008, Plaintiff served his Second Set of Requests for Production on Defendant. Plaintiff's first and second sets of document requests focus on the production of documents which tend to support or disprove factual assertions raised by Defendant in its Affirmative Defenses.

5. After several extensions, Defendant served its Responses to Plaintiff's First and Second Set of Requests for Production of Documents on June 12, 2008.<sup>3</sup>

6. KFCU's responses to both sets of requests assert the same four "general objections." Its responses to the individual requests for production were often, but not always, prefaced by the mantra, "subject to the aforementioned objections . . . ," and sometimes repeat one or more of the of the "general objections" within the individual response, rendering it impossible for the reader to ascertain which objection KFCU was attempting to assert for each response, or whether the objection applied to some or all of the requested items.

7. Although Defendant asserted the attorney-client and work product privilege in its second general objection, Defendant failed to provide a privilege log as required by Fed. R. Civ. P. 26(5)(A) and 26(5)(B).<sup>4</sup>

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<sup>3</sup> ] Copies of Defendant's Responses to Plaintiff's First and Second Requests for Production are attached hereto as Appendix "B" and Appendix "C."

<sup>4</sup> ] Fed. R. Civ. P. 26(5)(A) and (B) provide as follows:

8. On or about July 31, 2008, Plaintiff filed a Motion to Strike or Overrule Defendant's First and Fourth General Objections to Plaintiff's Requests for Production (First Second, and Third Sets), to Compel Defendant to Indicate with Specificity which

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**(5) Claiming Privilege or Protecting Trial- Preparation Materials.**

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) *Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

General Objection it Contends Applies to Each Individual Request, and to Compel Production of Documents. In the motion, Plaintiff argues that Defendant's first and fourth "general objections" are inapplicable to the present litigation and should be struck, and that Defendant should be compelled to produce a privilege log for all responsive documents for which it wishes to assert a privilege, and that Defendant should be compelled to produce documents responsive to Plaintiff's Requests. A copy of the motion is attached<sup>5</sup> hereto as Appendix "D."

9. Plaintiff's motion was heard before Judge William Reagan Ptomey of Florida's 16th Circuit on July 16, 2009.<sup>6</sup> On July 29, 2009, Judge Ptomey entered an Order providing for the following:

A. Plaintiff's Motion to Compel Production of Documents is GRANTED.

B. Defendant shall prepare a privilege log for all documents for which a privilege or an exemption is claimed in conformity with the requirements set forth in Florida Rule of Civil Procedure 1.280(5).

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<sup>5</sup> ] Attached Without exhibits.

<sup>6</sup> ] Plaintiff's motion had been argued previously before Judge David Audlin of Florida's 16th Circuit on August 28, 2008. Judge Audlin issued a ruling from the bench striking Defendant's First and Fourth General Objections and granting Plaintiff other relief sought. However, following the hearing, Judge Audlin recused himself from the case and vacated the ruling he had made from the bench. Subsequently, Circuit Court Judges Mark Jones and Luis Garcia recused themselves from the case *sua sponte* and Judge Wayne Miller recused himself pursuant to Defendant's Motion to Recuse.

C. Defendant shall prepare an estimate of costs of production of the documents requested by Plaintiff within 5 days from the date of this Order. Plaintiff and Defendant shall confer regarding the proposed costs and attempt to reach agreement on said costs. If the parties are unable to reach agreement on the costs of production of the requested documents within 10 days from the date of this Order, the parties shall notify the Court and request an evidentiary hearing on this issue.

D. Defendant shall submit Amended Responses to Plaintiff's Requests for Production, indicating with specificity its objections, if any, to each of Plaintiff's individual requests.

Order on Plaintiff's Motion, July 29, 2009. A copy of the Order is attached and incorporated hereto as Appendix "E."

10. The present motion asks this Court to compel Defendant to comply with Section B and Section D of Judge Ptomey's Order. After removal, orders issued by the state court are considered orders of the federal district court. Jackson v. American Sav. Mortgage Corp., 924 F.2d 195, 198 (11th Cir. 1998). Whenever any action is removed from a state court to a district court . . . [a]ll injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court." 28 U.S.C. §1450. However, the enforcement of state court orders in cases that have been removed is governed by the Federal Rules of Civil Procedure. Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, 415 U.S. 423, 437 (1974). Accordingly, this Court should apply relevant federal procedural law in the enforcement of the state court Order.

11. On July 30, 2009, Plaintiff, pursuant to Judge Ptomey's suggestions from the bench at the July 16 hearing, modified or deferred production of the requests which Defendant contended were overbroad or unduly burdensome. A copy of Plaintiff's correspondence to Defendant incorporating revisions to Plaintiff's Requests for Production is attached hereto as Appendix "F." Accordingly, the requests for production for which Plaintiff seeks Amended Responses and detailed privilege logs from Defendant in compliance with Judge Ptomey's July 29, 2009 Order are the First and Second Requests for Production incorporating Plaintiff's modifications of July 30, 2009.

12. Fed. R. Civ. Pro. 34(a)(2)(A) provides that the party responding to a request for production shall serve a written response within 30 days after being served, unless the court allows a shorter or longer time, or unless the parties stipulate otherwise.<sup>7</sup> The Order does not

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<sup>7</sup> ] Rule 34(a)(2)(A) reads as follows:

The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

Likewise, Florida Rule of Civil Procedure 1.350 (b) provides in relevant part that "the party to whom the request is directed shall serve a written response within 30 days after service of the request, except that a defendant may serve a response within 45 days after service of the process and initial pleading on that defendant. The court may allow a shorter or longer time. . . . When producing documents, the producing party shall either produce them as they are kept in the usual course of business or shall identify them to correspond with the categories in the request."

specify a date certain for compliance with Sections B and D. Accordingly, pursuant to either Rule 34 or the corresponding state court rule, Defendant should have complied with the Court's Order no later than September 2, 2009.

12. On September 3, 2009, Plaintiff's counsel asked Defendant to agree to submit its Amended Responses and Privilege Log required by the Order. 13. On September 11, 2009, Defendant's counsel responded to Plaintiff's proposal as follows:

Mr. Torres.....In response to your September 3, 2009 letter, please be advised that we do not agree with your suggested deadline for providing amended responses, including a privilege log....Thank you.

e-mail, 9/11/09, Alan Rosenthal, Esq. to Jose F. Torres. Copies of Plaintiff's correspondence of September 3, 2009 to Defendant requesting Defendant's compliance with the Court's Order and Defendant's e-mail reply of September 11, 2009 are attached hereto as Appendix "G."

14. Defendant's continuing delay in complying with the State Court's Order is especially troubling in that the discovery requests in question, which focus on Defendant's purported reasons for terminating Plaintiff as asserted in Defendant's Affirmative Defenses, were served on Defendant on February 12, 2008 and March 24, 2008. In essence, the State Court's Order requires Defendant only to comply with basic state and federal rules governing discovery, something which Defendant should have done over a year ago without need for Court intervention.

15. Federal Rule of Civil Procedure 26 (5)(b) and S.D.Fla. L.R.26.1G-3 set out with clarity, Defendant's duty to provide detailed privilege logs if it wishes to withhold responsive documents from production on the basis of privilege:

(a) Where an objection is made to any interrogatory or sub-part thereof or to any document request under Fed.R.Civ.P. 34, the objection shall state with specificity all grounds. Any ground not stated in an objection within the time provided by the Federal Rules of Civil Procedure, or any extensions thereof, shall be waived.

(b) Where a claim of privilege is asserted in objecting to any interrogatory or document demand, or sub-part thereof, and an answer is not provided on the basis of such assertion:

(i) The attorney asserting the privilege shall in the objection to the interrogatory or document demand, or sub-part thereof, identify the nature of the privilege (including work product) which is being claimed and if the privilege is being asserted in connection with a claim or defense governed by state law, indicate the state's privilege rule being invoked; and

(ii) The following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information:

(A) For documents:

(1)the type of document;

(2)general subject matter of the document;

(3) the date of the document;

(4) such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author of the document, the addressee of the document, and, where not apparent, the relationship of the author and addressee to each other;

(B) For oral communications:

(1) the name of the person making the communication and the names of persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication;

(2) the date and the place of communication;

(3) the general subject matter of the communication.

(c) This rule requires preparation of a privilege log with respect to all documents and oral communications withheld on the basis of a claim of privilege or work product protection except the following: written and oral communications between a party and its counsel after commencement of the action and work product material created after commencement of the action.

S.D.Fla. L.R.26.1G-3.

16. Pursuant to this Court's Orders of October 29, 2009 [D.E. 7] and December 14, 2009 [D.E. 9], Plaintiff's counsel have consulted with opposing counsel in an attempt to

resolve the issues raised in this motion but the Parties have not been able to resolve the issues.

WHEREFORE, based on the above and foregoing, Plaintiff requests that this Court enter an Order to Compel Defendant to Comply with Sections B and D of the State Court's Order of July 29, 2009 by amending its Answers to Plaintiff's Requests for Production to provide specific responses and objections to each individual request, to identify which privilege (if any) it asserts as to each individual request, and to provide a detailed privilege log in conformity with Federal Rule of Civil Procedure 26 (5)(b) and S.D.Fla. L.R.26.1G-3 for each individual request and any such further relief as the Court deems just and proper.

Certificate of Service

We hereby certify that a true and correct copy of the above was served on counsel of record on the attached service list via electronic filing with the United States District Court for the Southern District of Florida on this 11th day of January, 2010.

s/ Robert E. Weisberg

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