

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant.

5/18/83  
Civil Action No.  
78-322 & 78-420

(Consolidated)

DEFENDANT'S MOTION PURSUANT TO RULE 37 FOR  
DISMISSAL OF THESE CONSOLIDATED ACTIONS

Defendant, by its undersigned attorneys, hereby moves this Court, pursuant to Rule 37(b)(2)(C) of the Federal Rules of Civil Procedure, to dismiss these consolidated actions as a sanction against plaintiff for his continued refusal to comply with the Court's orders directing him to answer defendant's First Set of Interrogatories and Request for Production of Document. The defendant also moves the Court to assess against plaintiff and his counsel the reasonable expenses, including attorney fees, incurred in prosecuting this motion.

In support of this motion, the Court is referred to the attached memorandum of points and authorities.

Respectfully submitted,

J. PAUL McGRATH  
Assistant Attorney General  
Civil Division

STANLEY S. HARRIS  
United States Attorney

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*Barbara L. Gordon*  
BARBARA L. GORDON

*Henry J. LaHaie*  
HENRY J. LAHAIE

Attorneys, Civil Division  
Room 3338  
Department of Justice  
10th & Pennsylvania Ave., N.W.  
Washington, D. C. 20530  
Telephone: (202) 633-4345

Attorneys for Defendant.

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DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF ITS MOTION FOR DISMISSAL OF  
THESE CONSOLIDATED ACTIONS

I. PRELIMINARY STATEMENT

In December 1982, the defendant propounded to plaintiff a set of interrogatories and a request for production of documents. Having requested a two-week extension to answer those discovery requests, plaintiff instead filed a motion for protective order. Defendant opposed that motion, and on February 4, 1983, the Court denied it and ordered plaintiff to answer defendant's discovery within 20 days. Eighteen days later, plaintiff requested another two-week extension of time to complete the formulation of his answers. Upon expiration of that two-week period, however, plaintiff's counsel filed blanket objections that merely repeated the same arguments he had advanced in support of the earlier motion for a protective order -- arguments which the Court had rejected when it denied the protective order motion.

The defendant then filed a motion under Rule 37(a), F.R.Civ.P., for an order compelling plaintiff to answer its

discovery. On April 13, 1983, the Court granted defendant's motion to compel and specifically ordered plaintiff to "serve upon defendant and file with the Court responsive answers to defendant's interrogatories and request for production of documents, providing finally his contentions concerning the adequacy of the FBI's search, within 30 days from the date of this Order." (Emphasis added). Plaintiff's answers were thus due on or before May 13, 1983. As of this date, plaintiff has not filed any answers with the Court.

On May 12, 1983, in a conversation with counsel for the defendant, plaintiff's counsel stated that Mr. Weisberg was not going to comply with the Court's Order of April 13, 1983. According to counsel, the basis for plaintiff's refusal is his position (twice rejected by this Court) that the Freedom of Information Act ("FOIA") precludes under any circumstances government agencies from conducting discovery of plaintiffs in FOIA cases. Mr. Weisberg claims that such is the case even if, as in these consolidated actions, an agency's discovery is merely designed to ascertain the facts and/or documents which a plaintiff claims exist and which allegedly demonstrate that the agency's search was not adequate.

As noted above, this Court has twice rejected plaintiff's restrictive and unsupported view of discovery in FOIA cases, and has twice ordered him to supply responsive answers to defendant's discovery requests. Given plaintiff's latest refusal to comply with the Court's orders, the defendant now moves for dismissal of

these cases under Rule 37(b)(2) of the Federal Rules of Civil Procedure.<sup>1/</sup> The defendant also moves the Court under those same provisions of Rule 37 to require plaintiff and his counsel to pay the reasonable expenses caused by the failure to obey the Court's discovery orders, including the expenses associated with the instant dismissal motion.

## II. ARGUMENT

Rule 37(b)(2) of the Federal Rules of Civil Procedure provides, in pertinent part, that:

If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

\* \* \* \*

(C) An order . . . dismissing the action. . . .

In construing that provision, appellate courts have encouraged the district courts to issue such dismissal orders when they determine that a plaintiff or his counsel have acted willfully "in failing to comply with the rules of discovery or with court orders enforcing the rules or in flagrant disregard of those rules or orders. . . ." G-K Properties v. Redevelopment Agency, 577 F.2d 645, 647 (9th Cir. 1978). See also Roadway Express v. Piper, 447 U.S. 752, 763-64 (1980); National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 642-43 (1975); Independent Investor v.

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<sup>1/</sup> Although it is clear that Mr. Weisberg's refusal to obey the Court's discovery orders amounts to contempt, defendant does not seek a contempt citation against him. See Rule 37(b)(2)(D), F.R.Civ.P. Nor does the defendant presently seek any of the other sanctions listed in subsections (A), (B) or (E) of Rule 37(b)(2). Anything less than dismissal of these actions would only encourage what one court has denoted as the "sporting chance theory" of litigating. See G-K Properties v. Redevelopment Agency, 577 F.2d 645, 647 (9th Cir. 1978).

Touche Ross, 607 F.2d 530, 533-34 (2d Cir. 1978); Mertens v. Hummell, 587 F.2d 862 (7th Cir. 1978); Rohauer v. Eastin-Phelan Corp., 499 F.2d 120 (8th Cir. 1974); Philadelphia Housing Authority v. American Radiator, 438 F.2d 1187 (3rd Cir. 1970).<sup>2/</sup> This is especially true if the failure to comply with a discovery order deprives a defendant of a full and fair opportunity to prepare its case or deprives the court of information indispensable to a proper adjudication of the issues. Von Der Heydt v. Kennedy, 299 F.2d 459, 462-63 (D.C. Cir. 1962). District courts have heeded such encouragement by the appellate courts and have dismissed suits when plaintiffs have refused to comply with discovery orders. E.g., Penthouse International v. Playboy Enterprises, Inc., 86 F.R.D. 396 (S.D. N.Y. 1980) aff'd, 663 F.2d 371 (2d Cir. 1981); Chatman v. Churchill Truck Lines, 83 F.R.D. 246 (D. Kan. 1977); Leve v. Schering Corp., 73 F.R.D. 537 (D. N.J. 1975), aff'd, 556 F.2d 567 (3d Cir. 1977).

Here, it is evident that plaintiff has willfully failed to comply with this Court's discovery orders of February 4, 1983 and April 13, 1983. As the defendant has pointed out before in this litigation,<sup>3/</sup> plaintiff's refusal to answer its discovery

<sup>2/</sup> Dismissal is not an appropriate sanction under Rule 37(b)(2) only if there is a showing that the plaintiff's failure to obey the discovery order "was due to inability fostered neither by [his] own conduct nor by circumstances within [his] control." Societe Internationale v. Rogers, 357 U.S. 197, 211 (1958). See also Link v. Wabash Railroad Co., 370 U.S. 626, 636 (1962). Such is not the case here for Mr. Weisberg's failure to obey the Court's discovery orders is premised, not on an inability to do so, but on his position that those orders are in conflict with his view of discovery in FOIA cases.

<sup>3/</sup> See, e.g., Defendant's Opposition to Plaintiff's Motion for a Protective Order, filed on January 27, 1983.

will deprive it of a meaningful opportunity to demonstrate that plaintiff's assertions about the adequacy of the FBI's search are baseless. Also, the Court will be deprived of information it needs to dispose of the outstanding issues in these cases. Accordingly, the Court should follow the above cited precedents and, after providing plaintiff with an opportunity for a hearing on this matter, should dismiss these consolidated actions with prejudice.<sup>4/</sup>

In addition to providing sanctions for non-compliance with discovery orders, Rule 37(b)(2) provides that:

the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(Emphasis added.) The principal purpose of this provision "is punitive, not compensatory." Hamilton v. Ford Motor Co., 636 F.2d 745, 747 (D.C. Cir. 1980). Moreover, as noted by Professors Wright and Miller, this provision is mandatory unless the delinquent party can show either substantial justification for his failure to obey a discovery order or other circumstances making

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<sup>4/</sup> Before dismissing a complaint as a sanction under Rule 37(b)(2), most courts have afforded the plaintiff an opportunity for a hearing. See, e.g., Independent Investor v. Touche Ross, 607 F.2d at 533; Chatman v. Churchill Truck Lines, 83 F.R.D. at 247. But see, e.g., Grace v. Fisher, 355 F.2d 21 (2d Cir. 1966); Leve v. Schering Corp., 73 F.R.D. at 539. The Supreme Court appeared to indicate in dicta in Societe Internationale v. Rogers, 357 U.S. at 210-211, that a plaintiff should be afforded such an opportunity before his complaint is dismissed under Rule 37(b)(2).

such an award unjust. Wright & Miller, Federal Practice and Procedure: Civil § 2289 at 792. Given plaintiff's conduct with respect to defendant's discovery, neither element can be established here by Mr. Weisberg. The defendant is thus entitled to the reasonable expenses, including attorney fees, which were incurred in prosecuting this motion. The defendant requests an opportunity to submit such expenses to the Court after it has made a determination on this matter.

CONCLUSION

For the reasons set forth above, the defendant's motion for dismissal under Rule 37(b)(2)(C), F.R.Civ.P., should be granted, and plaintiff and his counsel should be assessed the reasonable expenses, including attorney fees, which were incurred by the defendant in prosecuting this motion.

Respectfully submitted,

J. PAUL McGRATH  
Assistant Attorney General  
Civil Division

STANLEY S. HARRIS  
United States Attorney

  
BARBARA L. GORDON

  
HENRY E. LAHAIE

Attorneys, Civil Division  
Room 3338  
Department of Justice  
10th & Pennsylvania Ave., N.W.  
Washington, D. C. 20530  
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ORDER

Upon consideration of defendant's motion for dismissal of these consolidated actions under Rule 37(b)(2)(C) of the Federal Rules of Civil Procedure, plaintiff's opposition thereto and the entire record herein, and after conducting a hearing on defendant's dismissal motion, the Court finds that plaintiff has willfully refused to comply with the discovery orders entered in these actions on February 4, 1983 and April 13, 1983; accordingly, the Court finds that defendant's motion should be granted. The Court also finds that plaintiff and his attorney should pay defendant the reasonable expenses incurred in prosecuting this motion. It is therefore,

ORDERED and ADJUDGED that defendant's motion for an order dismissing these actions be, and the same is hereby, GRANTED.

It is further ORDERED that these consolidated actions are hereby dismissed with prejudice.

It is further ORDERED that the defendant shall submit an affidavit or other documentation within fifteen (15) days from the

date of this order, detailing the expenses, including attorney fees, which were incurred in prosecuting the dismissal motion. Plaintiff shall have ten (10) days to respond to that documentation at which point the Court will assess against plaintiff and his counsel what it determines to be reasonable expenses.

It is so ordered. Dated this \_\_\_\_ day of \_\_\_\_\_, 1983.

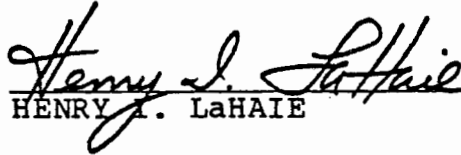
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UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 18<sup>th</sup> day of May, 1983, I have served the foregoing Defendant's Motion for Dismissal of These Consolidated Actions, Memorandum of Points and Authorities In Support Thereof, and a proposed Order, by first class mail to:

James H. Lesar, Esq.  
Suite 900  
1000 Wilson Boulevard  
Arlington, Virginia 22209

  
HENRY I. LAHAIE