UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

:

v.

Civil Action No. 78-0322

WILLIAM H. WEBSTER, ET AL.,

Defendants

HAROLD WEISBERG,

Plaintiff.

v.

Civil Action No. 78-0420

FEDERAL BUREAU OF INVESTIGATION, :

ET AL.,

Defendants

PLAINTIFF'S OPPOSITION TO DEFENDANT'S APPLICATION FOR EXPENSES IN PROSECUTING ITS DISMISSAL UNDER RULE 37(b)(2)

Defendants have applied under Rule 37(b)(2) for an award of expenses in prosecuting their motion for dismissal. Plaintiff opposes any award of expenses. The expenses which defendants have incurred were not incurred by reason of plaintiff's failure to comply with the court's discovery orders. See Armour & Co.

v. Enenco, 17 FR Serv.2d 514 (W.D.Tenn. 1973) (The rule provides for expenses incurred by reason of the failure, so when the action was dismissed and a default judgment entered on the counterclaim, expenses would not be imposed in addition, since there was no reason to suppose that had plaintiff complied with the rules and

orders of the court and defendant had proceeded to a successful ent to the litigation his exepnses would have been any less.)

In addition, it is well recognized that dismissal for failure to comply with orders compelling discovery is a drastic sanction. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 643 (1976) (per curiam) ("most severe in the spectrum of sanctions"); Corchado v. Puerto Rico Marine Management, Inc., 665 F.2d 410, 413 (1st Cir. 1981). Defendants had other available sanctions to them but just dismissal, notwithstanding their previous insistence on performing an expensive Vaughn sampling index rather than settling the case along the lines proposed by plaintiff. Plaintiff clearly had a justifiable legal basis for contending that other sanctions were more appropriate than dismissal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of December, 1983, mailed a copy of the foregoing Opposition to Mr. Henry LaHaie, Civil Division, U.S. Department of Justice, Washington, D.C. 20530.

JAMES H. LESAR