UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

HAROLD WEISBERG,

Plaintiff,

v.

FEDERAL BUREAU OF INVESTIGATION,

Defendant.

Civil Action Nos. 78-322 and 78-420 (Consolidated)

/

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR A PROTECTIVE ORDER

I. PRELIMINARY STATEMENT

On December 6, 1982, the defendant served plaintiff with discovery requests in an attempt to ascertain the factual bases for his assertions that the FBI's search in these consolidated FOIA cases was inadequate. Having obtained a two week extension of time to respond to those requests, plaintiff filed a motion for a protective order on January 17, 1983, which seeks to have defendant's discovery "vacated and set aside." Plaintiff premises this motion on arguments that: (1) the defendant undertook discovery "to further retaliate against plaintiff for prosecuting Freedom of Informaton Act cases and to drive up the costs of FOIA litigation;"[1/] (2) there is no need for the FBI to seek discovery from plaintiff on the search issues;[2/] and

1/ Plaintiff's Memorandum of Points and Authorities in Support of the Motion for a Protective Order at 1.

2/ Id. at 2.

(3) the discovery sought by the defendant "would be extraordinarily burdensome for plaintiff to provide."[3/] However, when considered in the context of both the substance of defendant's discovery requests and the procedural history of the instant actions, it is evident that those arguments are disingenuous. Indeed, as will be demonstrated below, the history of these cases demonstrates that the defendant has consistently endeavored to get plaintiff to articulate precisely the bases for his complaints about the adequacy of the FBI's search so that it could resolve those complaints. Plaintiff, on the other hand, has consistently tried to avoid such an articulation. The instant motion is but another attempt by plaintiff to keep his complaints obscure and thus irresolvable. The defendant thus requests the Court to deny plaintiff's motion for a protective order and to direct him to specify, in response to defendant's discovery requests, each and every fact upon which he bases his fourteen assertions about the adequacy of the FBI's search. Moreover, because plaintiff's motion lacks any (much less substantial) justification, the defendant requests the Court -- pursuant to Rules 26(c) and 37(a)(4) of the Federal Rules of Civil Procedure -- to require both plaintiff and his attorney to pay defendant the reasonable expenses incurred in opposing this motion.

3/ Id. at 3.

II. PROCEDURAL HISTORY OF THESE CONSOLIDATED FOIA ACTIONS

On December 25, 1977, plaintiff's attorney submitted similar FOIA requests to the FBI's Dallas and New Orleans Field Offices. Those requests stated that plaintiff wanted copies of all records on or pertaining to the assassination of President John F. Kennedy. Subsequently, plaintiff filed suit on his Dallas request on February 24, 1978, and on his New Orleans request on March 10, 1978. Upon consolidation of these two suits, the litigation was stayed pending the FBI's administrative processing of plaintiff's requests. Because of the massive number of documents involved,[4/] including 40 linear feet of index cards, the initial processing was not completed until May, 1979. Plaintiff then administratively appealed the FBI's processing to the Justice Department's Office of Privacy and Information Appeals (OPIA).[5/]

By letter dated June 16, 1980, the former Director of OPIA, Quinlan J. Shea, informed plaintiff's counsel that his office had completed the preliminary work with respect to the administrative appeals and solicited input from plaintiff concerning the scope of

4/ The massive quantity of records which were located as a result of the FBI's initial search is reflected in the documents attached to Defendant's Response to Plaintiff's Request for Production of Documents, filed on January 20, 1983. Those documents indicate that the Dallas records filled 41 boxes and weighed approximately 1600 pounds and the New Orleans records filled 12 boxes and weighed approximately 360 pounds.

5/ Because the FBI is a component of the Department of Justice, administrative appeals of the Bureau's processing of FOIA requests are lodged with OPIA and are ruled upon by the Associate Attorney General.

those appeals.[6/] Having obtained such input from Mr. Weisberg, the defendant, through former Associate Attorney General John Shenefield, issued its decision on plaintiff's administrative appeals.[7/] With respect to the scope of the FBI's initial search, Mr. Shenefield stated that the Dallas Field Office would "conduct an all-reference search on the assassination itself, on Lee Harvey and Marina Oswald, on Jack Ruby and the Warren Commission," whereas the New Orleans Field Office would "undertake a further search for a possible main file on David Ferrie and [would] forward to Headquarters for screening and possible processing those portions of another file which pertain to Ferrie, Jim Garrison and Jack Ruby."[8/] In addition, Mr. Shenefield granted, "as a matter of agency discretion," plaintiff's wishes that the FBI search for records on several tangential subjects and thus directed the Bureau (1) to "conduct all-reference searches on George DeMohrenshildt and former Special Agent James P. Hosty," and (2) to "attempt to determine whether there are any official or

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6/ Mr. Shea's letter is attached as Exhibit A(2) to defendant's Reply to Plaintiff's Opposition to the Motion Concerning the Adjudication of Certain Exemption Claims, filed on March 22, 1982.

7/ Mr. Shenefield's decision is attached as Exhibit A(3) to the Defendant's Reply to Plaintiff's Opposition to the Motion Concerning the Adjudication of Certain Exemption Claims, filed on March 22, 1982.

8/ Id. at 3.

unofficial administrative files which pertain to the Kennedy case, with particular emphasis on seeking files on 'critics' or 'criticism' of the FBI's assassination investigation."[9/] Mr. Shenefield specifically refused, however, to grant Mr. Weisberg's wish that the agency conduct a search for records on Gordon Novel, an individual who plaintiff thought figured in the Bureau's investigation of the assassination. More significantly, no mention was made that the FBI's additional search should include such individuals as Carlos Marcello, Dean Andrews or Perry Russo, or such things as "tickler" or "June" files.[10/]

Pursuant to Mr. Shenefield's decision, the FBI conducted an all-reference search on all the topics listed in that decision. That search, as well as the reprocessing of other documents, was completed in December, 1981.[11/]

During a status call on December 10, 1981, defendant's counsel informed the Court of the completion of the latest search and administrative reprocessing and indicated that the Government was prepared to submit the case to the Court for resolution.

9/ Id.

10/ As will be shown below, plaintiff would subsequently assert that the FBI's search was inadequate because such individuals and files, among others, were not specifically included in the search.

11/ As has been noted by Richard L. Huff, former Acting Director of OPIA, the search and reprocessing by the FBI was coordinated and approved by OPIA. See Exhibit A attached to Defendants' Reply to Plaintiff's Opposition to the Motion Concerning the Adjudication of Certain Exemption Claims, filed on March 22, 1983.

Plaintiff's counsel, on the other hand, requested 120 days to review the released documents and consult with plaintiff concerning the FBI's search and reprocessing and to discuss with defense counsel any complaints that plaintiff had in this regard. The Court granted him 90 days and set another status conference for March 10, 1982. During that 90-day period, plaintiff's counsel never contacted government counsel concerning any complaints of plaintiff.

Having not received any complaints about the scope of the search, the defendant moved the Court on March 2, 1982, to resolve these cases by way of a sample "Vaughn Index." Plaintiff opposed this motion on the ground that the defendant had failed to act on his administrative appeals which had questioned, inter alia, the adequacy of the FBI's search. However, plaintiff failed to detail in that opposition all his complaints about the search; instead, he merely cited what he termed were "examples" of the deficiencies in the agency's search. Those examples, in turn, dealt solely with the FBI's alleged failure to search for records on "former Special Agent James P. Hosty, Warren Commission critics and former New Orleans District Attorney Jim Garrison," as well as unspecified films and tapes supposedly in the Dallas and New Orleans files on the Kennedy assassination. (Again, plaintiff made no mention of the FBI's failure to search for "tickler" or "June" files or for records on such individuals as Carlos Marcello, Dean Andrews, Perry Russo, etc.). Finally, and in the alternative, plaintiff requested the Court, if it granted

defendant's motion for a sample Vaughn, to allow him to select documents for insertion in the sample index.

In its reply of March 22, 1982, the defendant first refuted plaintiff's claims that it had not acted upon his administrative appeals and had failed to search for records on James P. Hosty, Jim Garrison and Warren Commission critics as well as the films and tapes on the Kennedy assassination. The defendant also indicated that it was amenable to the plaintiff's alternative proposal so long as there was a 300 page limitation placed on plaintiff's selection.

During the March 25, 1982, hearing on defendant's motion to proceed by way of a sample "Vaughn," the Court suggested that the parties attempt to reach an agreement on a method of disposition for this case. After lengthy discussion, counsel for both sides tentatively agreed to submit the case to the Court on the basis of a sample Vaughn index, with plaintiff being able to select 500 pages of documents for inclusion in the sample. However, upon calling his client about this agreement, counsel for plaintiff came back with a whole new set of "counterproposals" which would have required the FBI to conduct additional searches on several subjects. After another lengthy discussion during which defense counsel explained why those counterproposals were unworkable, counsel for plaintiff called his client again. Notwithstanding the earlier discussions, counsel merely returned with a so called refinement of plaintiff's counterproposals. These "refinements" were then set forth in plaintiff's submission of April 5, 1982.

In this submission, plaintiff made no mention of the need to search for "tickler" or "June" files or for records on such individuals as Carlos Marcello, Dean Andrews or Perry Russo. However, plaintiff did indicate, for the first time, that by "Warren Commission critics" he (and, allegedly, former Associate Attorney General John Shenefield) actually meant a list of some 31 organizations and individuals who had never before been identified.

In its response of April 15, 1982, the defendant demonstrated, inter alia, that plaintiff's counterproposals for disposing of this litigation were indeed unworkable. Given this fact, defendant proposed that the Court bifurcate these actions, determining first the adequacy of the search and then deciding the validity of the FBI's exemption claims. In this regard, the defendant stated:

> the [FBI] will submit . . . a motion for partial summary judgment on the search issue which will be supported with a detailed affidavit on how the search was conducted. If plaintiff opposes this motion, he can respond by listing all of his complaints with the FBI's search. The defendant's reply to these complaints should, in turn, narrow the issue so that the Court can make a determination on the adequacy of the search.

See Defendant's Response to Plaintiff's Settlement Proposal at 5. (Emphasis in the original).

On May 3, 1982, the defendant filed its motion for partial summary judgment. This motion was supported by a declaration of Special Agent John Phillips, which detailed the multi-tiered search that the FBI had conducted in response to plaintiff's FOIA

requests and identified the individuals under whose directions those searches were conducted. The defendant also appended to its motion, pursuant to Local Rule 1-9(h), a statement of 29 material facts as to which it contended there was no genuine issue and included therein references to the parts of the record relied on to support such statement.

On June 7, 1982, the plaintiff opposed the defendant's motion for partial summary judgment. In his brief in support of the opposition, plaintiff specified only five reasons why he believed that the defendant's search was inadequate;[12/] however, plaintiff made clear that, although his brief had "pointed out major deficiencies in the search conducted to date, [it did] not pretend to have covered them all."[13/] To support these five assertions, plaintiff submitted a rambling 97 page affidavit of his own, a 5 page affidavit of his attorney, and a one sentence "statement of genuine issues." Because those supporting papers failed to meet the requirements of Rule 56(e) of the Federal Rules of Civil Procedure, as well as Local Rule 1-9(h), the defendant moved, on June 17, 1982, to have the affidavits striken and to have its "statement of material facts not in dispute" deemed

12/ One of these five reasons was the FBI's failure to search for "tickler" files. This was the first time that plaintiff had ever mentioned this as an issue with respect to the adequacy of the FBI search. Still not mentioned, however, were issues which plaintiff would later raise, such as the FBI's alleged failure to search for "June" files or for records on Carlos Marcello, etc.

13/ Plaintiff's Opposition to defendant's Motion for Partial Summary Judgment at 15.

admitted.[14/] This motion was premised in part on numerous cases strictly applying the requirement of Local Rule 1-9(h) that a party opposing a summary judgment motion must file "a concise 'statement of genuine issues' setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated" and must "include therein references to the parts of the record relied on to support such statement." It was thus made clear to plaintiff that to avoid default on defendant's summary judgment motion he had to come forward, once and for all, with an exhaustive list of his complaints with respect to the FBI's search.

Plaintiff appeared to have gotten the message.[15/] On July 23, 1982, he filed a response to defendant's motion to strike, in which he acknowledged that "the first part of his affidavit" did not address the search issues raised by defendant's motion for partial summary and thus he had executed and was filing

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14/ The defendant also filed a reply to plaintiff's opposition brief on July 2, 1982, wherein it demonstrated that the five reasons specified by plaintiff for the inadequacy of the FBI search were devoid of merit.

15/ This impression was subsequently undercut, however, by the fact that plaintiff's amended "statement of genuine issues" contained an issue that the FBI had not searched for records on a non-inclusive list of eleven organizations and persons who supposedly figured in Jim Garrison's investigation of the JFK assassination. Moreover, during oral argument on defendant's summary judgment motion, plaintiff came up with names of films never before alleged to be a part of this litigation.

"a new affidavit which focuses more exclusively on the search issue raised by defendant's motion for summary judgment."[16/] Plaintiff also indicated that he was going to file an amended Statement of Genuine Issues of Material Fact in Dispute which would moot defendant's motion to have its statement of material facts deemed admitted.[17/] On July 26, 1982, plaintiff filed his amended "statement of genuine issues" which enumerated fourteen points he contends are the material facts in dispute with respect to the FBI's search. Significantly, all or parts of ten of those fourteen points had never before been raised by plaintiff as disputed issues as to the adequacy of the search.

The defendant subsequently replied to plaintiff's response and amended "statement of genuine issues." With respect to the amended statement, the defendant argued that each point raised therein was either not in dispute, not material or not supported by significant probative evidence. However, in its memorandum opinion of October 26, 1982 (hereafter "Mem. Op."), the Court indicated that it did not agree with defendant's arguments and thus denied defendant's motion for partial summary judgment. The Court also listed in that memorandum twelve potential issues of fact (all of which were derived from the fourteen points in plaintiff's amended statement) in an effort to provide "some

16/ Plaintiff's Opposition to Defendant's Motion to Strike and to Have Its Statement of Material Fact Deemed Admitted at 3.

17/ Id. at 4.

guidance for the discovery which may be necessary in this case." Mem. Op. at 3.

Given that guidance by the Court, the defendant propounded a set of fourteen interrogatories to plaintiff on December 6, 1982, that were designed to ascertain the factual bases for the fourteen issues which plaintiff claims are in dispute. The defendant also propounded a request for production of document which merely required the plaintiff to produce for copying any documents identified in his answers to defendant's interrogatories. Shortly thereafter, the defendant received from plaintiff a set of forty interrogatories, a request for production of documents and a request for admission. Having moved for a two week extension, the defendant, on January 19, 1983, served upon plaintiff its responses to those discovery requests which dealt with the fourteen points listed in his amended "statement of genuine issues." That same day,[18/] the defendant received plaintiff's motion for a protective order with respect to its discovery requests.

III. ARGUMENT

A. Plaintiff Has Advanced No Legitimate Basis For The Grant Of His Motion For A Protective Order

As demonstrated above, plaintiff has repeatedly avoided articulating precisely the bases for his claims that the FBI's

18/ As noted earlier, plaintiff also applied for an extension of time to answer defendant's discovery requests.

search was inadequate. Given this history of avoidance, it is clear that plaintiff's motion for a protective order is simply an attempt to prevent the defendant from being able to demonstrate that those claims are without merit. In short, plaintiff's motion is disingenous.

This conclusion is buttressed by the fact that the arguments advanced in support of the motion are baseless. For example, plaintiff asserts that defendant's discovery requests are a part of "an FBI vendetta against him" and that he has adduced evidence in these cases demonstrating such a vendetta. Yet, other than his own unsubstantiated statements contained in the numerous discursive affidavits which his counsel has filed with the Court, plaintiff has not come forward with any evidence showing that the FBI has attempted to harass or retaliate against him.[19/]

19/ In his memorandum in support of the motion for protective order, plaintiff also alleges that in other cases the FBI has resisted searching for records he has requested on the King and Kennedy assassinations, and attaches in support of this allegation an internal agency memorandum which he had earlier filed with his opposition to defendant's summary judgment motion. That memorandum, written nearly three years ago by Mr. Quinlan J. Shea, former director of OPIA, sets forth Mr. Shea's then held concerns about the FBI's processing of other FOIA requests made by the plaintiff to the Bureau. As the defendant pointed out in its reply to that opposition, Mr. Shea resolved similar concerns about the FBI processing of plaintiff's requests in these cases when he persuaded then Associate Attorney General John H. Shenefield to direct, as a matter of agency discretion, the FBI (1) to conduct an all reference search on such tangential topics as George DeMohrenshildt and former Special Agent James P. Hosty, and (2) to attempt to determine whether there are any official or unofficial administrative files which pertain to the Kennedy case, with particular emphasis on seeking files on "critics" or "criticism" of the FBI's assassination investigation. Once the Bureau had complied with those directives by Mr. Shenefield, it was Mr. Shea who informed plaintiff that the administrative processing of his FOIA requests had been completed.

[FOOTNOTE CONTINUED ON NEXT PAGE]

Equally baseless is plaintiff's argument that since the discovery requests concern matters which the defendant is itself required to know and since, in any case, there could never be a "need for the FBI or any government agency to seek discovery from an FOIA plaintiff on search issues,"[20/] the defendant must intend for its requests to be mere harassment. To the contrary, it is clear that inasmuch as the FBI was unsuccessful in its last attempt to disprove plaintiff's assertions that the its search was inadequate, it will never be able to demonstrate otherwise unless it ascertains from plaintiff all the factual bases for those assertions. For example, the FBI has now twice stated that its search encompassed the "June" files in the Dallas and New Orleans Field Offices. Plaintiff disputes those statements. Unless he lists the facts and documents upon which he bases that dispute, the defendant will be unable to adequately address the assertion that the FBI's search did not include "June" files. The same is true for plaintiff's contentions about the Bureau's alleged failure to search for records on James P. Hosty, the allegations by William Walter, "see" references, etc.

[FOOTNOTE CONTINUED FROM PREVIOUS PAGE]

In short, the concerns of Mr. Shea expressed nearly three years old and long since resolved to his satisfaction, offer no support for plaintiff's trumped-up allegations that the FBI has engaged in a vendetta against Mr. Weisberg or that "the FBI has resisted searching for records" in these cases.

20/ Plaintiff's Memorandum of Points and Authorities in Support of the Motion for a Protective Order at 2.

Nothwithstanding plaintiff's claims, defendant's discovery requests could not possibly be burdensome. All that is requested of plaintiff is that he provide the defendant with each and every fact and document upon which he bases his fourteen disputed issues of material fact regarding the adequacy of the FBI's search. Such information reposes solely with plaintiff. Indeed, it would be impossible for defendant to speculate on what facts, or upon which of the more than 200,000 pages of records involved in these cases, plaintiff relies to support his fourteen assertions.

Plaintiff's statement that he "has previously provided some of the information sought through his numerous [administrative] appeals" and his "affidavits filed during the course of this litigation"[21/] underscores the fact that, despite his capability for doing so, he has not yet provided all the information which he claims would support his fourteen assertions about the adequacy of the FBI's research. Additionally, however, a perusal of plaintiff's affidavits and so called "administrative

21/ Id. at 2-3 (emphasis added).

appeals"[22/] demonstrates that they are so vague, unfocused and discursive that they shed no light on what forms the bases of plaintiff's "search" contentions. An apt example of those shortcomings is the third point in plaintiff's amended statement of genuine issues which disputes "whether the FBI has searched 'June' files." In support of this point, plaintiff cited paragraph 9 of his affidavit of July 21, 1982, which, in turn, states:

> I note that in my March 4, 1979 [administrative] appeal (Exhibit 3), I called attention to "the existence of an undisclosed Dallas 'June' file and noncompliance with regard to those records."

The "administrative appeal" attached to plaintiff's affidavit as Exhibit 3, however, offers no further evidence or enlightenment on

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22/ Throughout this litigation, including his memorandum in support of the motion for a protective order, plaintiff refers to his numerous "administrative appeals." Without doubt, plaintiff has, since the inception of these cases, inundated the Justice Department's Office of Privacy and Information Appeals (OPIA) with mounds of paper in which he complains about various aspects of the FBI's processing of his FOIA requests. Exhibit 3 attached to Weisberg's Affidavit of July 21, 1982, is typical of the discursive nature of those so called "appeals." Inasmuch as it was virtually impossible to decipher, much less respond to, all of plaintiff's "appeals," it was decided that those "appeals" would be subsumed into plaintiff's omnibus Dallas/New Orleans appeals which his counsel filed on June 5, 1979. See Exhibit A(1) attached to defendant's Reply to Plaintiff's Opposition to the Motion Concerning the Adjudication of Certain Exemption Claims, filed on March 22, 1982 ("Defendant's Reply"). The decision on those appeals was rendered by former Associate Attorney General John Shenefield on December 16, 1980. See Exhibit A(3) attached to Defendant's Reply. When plaintiff continued to send complaints to OPIA about the FBI's processing of his requests, Mr. Quinlan Shea, OPIA's then director, unequivocally stated to plaintiff that his appeals had been ruled on and thus his recourse was "to the court in which [his] consolidated suits concerning these records are pending." See Exhibit A(4) attached to Defendant's Reply.

this subject for the pertinent part of that exhibit simply states:

> In this connection I also call to your attention the existence of an undisclosed Dallas "June" file and non-compliance with regard to those records. While I have additional identifying information I do not now provide it for reasons stated in an enclosed appeal. ~ not found

Since defendant has no idea what other "appeal" plaintiff is referencing here, it is impossible even to respond to the reason for plaintiff's non-disclosure of the so-called "additional identifying information." Whatever that reason may be, defendant now seeks to obtain such information through answers to its interrogatories so that it can have a meaningful opportunity to address the alleged dispute about "June" files. Such is also the case for the other thirteen points enumerated by plaintiff as being in dispute.

In sum, defendant's discovery requests are designed merely to ascertain the bases for plaintiff's assertions that the FBI's search in these cases was inadequate. Inasmuch as those requests relate exclusively to the facts and/or documents which form or support the core of plaintiff's allegations, a claim of burdensomeness should not be countenanced. To the contrary, given the substance of defendant's discovery requests, it is evident that they are consistent with the long established purpose of the Federal Rules on discovery, that is:

> to focus the fundamental issues between the parties and to enable the parties to learn what the facts are and where they

> may be found before trial, to the end that the parties may prepare their case in light of all the available facts.

United States v. A.B. Dick Co., 7 F.R.D. 442, 443 (N.D. Ohio 1947). Accordingly, the Court should deny plaintiff's motion for a protective order and direct him to answer defendant's discovery requests within fifteen (15) days.

B. Since Plaintiff's Motion For A Protective Order Lacks Substantial Justification, The Court Should Award The Defendant The Expenses Incurred In Opposing The Motion.

Rule 26(c) of the Federal Rules of Civil Procedure provides in relevant part that if a "motion for a protective order is denied in whole or in part . . . [t]he provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion." Rule 37(a)(4), in turn, provides in relevant part that:

> If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(Emphasis added). This aspect of Rule 37 was the result of an amendment in 1970 which "decidedly shifted the emphasis of the rule in favor of awarding expenses." Addington v. Mid-American Lines, 77 F.R.D. 750, 751 (E.D. Mo. 1978). Indeed, as a result of the 1970 amendment,

> [t]he great operative principle of Rule 37(a)(4) is that the loser pays. If a

> motion under Rule 37(a)(4) -- or any of the other rules incorporating it or similar to it -- is . . . denied, it is the moving party who must pay to the party who opposed the motion the expenses and fees incurred in opposing the motion.
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> * * * * * * * *
>
> Thus, the burden of persuasion is now on the losing party to avoid assessment of expenses and fees rather than, as formerly, on the winning party to obtain such an award.

Wright & Miller, Federal Practice and Procedure: Civil §2288 at 787-89. As the Advisory Committee's Note to the 1970 amendment makes clear, the purpose of the amended rule is to encourage the award of expenses so as to "defer the abuse implicit in carrying or forcing an [unnecessary] discovery dispute to court." 48 F.R.D. 487, 539-40 (1970). See also 4A Moore's Federal Practice ¶37.02 [10-1] at 37-49 (1975).

In addition, Rule 37(a)(4), as did its more limited predecessor, explicitly states that a court may order the losing party's attorney to pay the expenses incurred by the other party. This aspect of the rule places "on attorneys a somewhat unique sanction to refrain from the frivolous . . . and to advise in accordance with their best judgment." Wright & Miller, supra, §2288 at 788-89, quoting Louisell, Discovery and Pre-Trial under the Minnesota Rules, 36 Minn. L. Rev. 633, 649-50 (1952). See also Paima v. Lake Waukomis Development Co., 48 F.R.D. 366, 369 (W.D. Mo. 1970).

In light of these principles, the Court should award defendant the expenses incurred in opposing plaintiff's motion for a protective order. Given the procedural history of these cases and plaintiff's repeated attempts to avoid articulating precisely the bases for his assertions that the FBI's search was inadequate, it is evident that the instant motion is yet another attempt by plaintiff to keep those assertions vague and unassailable. Moreover, as was demonstrated above, plaintiff's arguments in support of his motion are frivolous. In short, there is no justification for the motion. An award of expenses, including attorney fees, should thus be assessed against plaintiff and his attorney. Such an award would effectuate the purpose of Rule 37(a)(4) to deter the carrying of baseless discovery disputes to this Court in the future. Also, an award against plaintiff's counsel would encourage him "to refrain from the frivolous . . . and to advise [his client] in accordance with [his] best judgment." Wright & Miller, supra, §§2288 at 788-89.

CONCLUSION

For the reasons set forth above, the plaintiff's motion for a protective order should be denied and plaintiff should be directed to answer defendant's discovery requests within fifteen (15) days. In addition, the defendant respectfully requests the

Court, after affording plaintiff an opportunity for a hearing, to assess against plaintiff and his counsel the reasonable expenses, including attorney fees, incurred by defendant in opposing this motion.

Respectfully submitted,

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FEDERAL BUREAU OF INVESTIGATION,

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78-322 & 78-420

(Consolidated)

ORDER

Upon consideration of plaintiff's motion for a protective order to vacate and set aside defendant's first set of interrogatories and requests for production of documents, defendant's opposition thereto, and the entire record herein, the Court finds that the motion lacks justification and, therefore, should be denied. The Court also finds that plaintiff and his attorney should pay defendant the reasonable expenses incurred in opposing the motion since there appears to be no circumstances which would make such an award unjust. It is, therefore,

ORDERED and ADJUDGED that plaintiff's motion for a protective order be, and the same is hereby, DENIED.

It is further ORDERED that plaintiff shall answer defendant's interrogatories and requests for production of documents within fifteen (15) days from the date of this Order.

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's fees, which were incurred in opposing plaintiff's motion for a protective order. Plaintiff shall have ten (10) days to respond to that documentation at which point the Court will assess against plaintiff what it determines to be reasonable expenses.

It is so ordered. Dated this _____ day of _____, 1983.

_____
UNITED STATES DISTRICT JUDGE