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PRELIMINARY STATEMENT

On 3/22/02 Defendant filed a letter application with Magistrate Judge Donald Haneke seeking to undo the 8/13/01 Order of Judge Greenaway which permitted plaintiff to pursue a claim under the New Jersey Consumer Fraud Act. Defendant sought to dismissing plaintiff's Consumer Fraud Act claim, or alternatively, to compel plaintiff to provide "fully responsive certified answers" in narrative form to 17 contention interrogatories as to Consumer Fraud, despite the fact that defendant has failed and refused to comply with any Consumer Fraud discovery, much of which was served nearly eight months ago.

Defendant's application was granted immediately upon receipt by the Court and before defendant gave plaintiff notice the application was being made. The order in question, which was drafted by defendant, required the following: 1) that plaintiff provide "fully responsive certified answers" in narrative form to 17 contention interrogatories as to Consumer Fraud; 2) that plaintiff do the impossible, i.e., provide these answers one day before learning of the Judge's ruling and; 3) that plaintiff's objections to these interrogatories are overruled.

The March 22, 2002 Order of the Magistrate was substantively and procedurally incorrect and should be vacated.

STATEMENT OF FACTS

This case involves severe and permanent facial lacerations, facial disfigurement and other injuries sustained by plaintiff Peter Formato because defendant Black & Decker placed profits over consumer safety by knowingly marketing a known defective product which was later taken off the market.

On or about February 27, 2002, defendant filed a letter application with Magistrate Haneke with regard to certain outstanding discovery issues. On March 1, 2002, plaintiff responded to this letter application and also "cross applied" with respect to certain discovery issues. Defendant responded to that application on March 5, 2002. (*Exhibit 4,* Clark Affidavit)

Both parties submitted draft forms of Order with respect to this discovery application. There were about twelve discovery questions at issue with respect to this application. On March 11, 2002, Judge Haneke signed defendant's form of order without making any changes to it. Plaintiff's order was not signed and nothing from plaintiff's order was incorporated into defendant's. Thus, the Magistrate more or less found in favor of the defendant on every single issue and summarily signed the defendant's proposed form of Order. Plaintiff filed an appeal with respect to two of the 12 issues decided in favor of defendant.[1] (*Exhibit 4,* Clark Affidavit)

Among the 12 or so issues was defendant's request that plaintiff be required to respond to 17 interrogatories in excess of those allotted under the Federal Rules of Civil Procedure which limits parties to serving 25 interrogatories. It was therefore plaintiff's position he should not be compelled to provide any response to these excess interrogatories. At no time was the propriety of the substance of those interrogatories at issue- the only issue addressed was whether or not plaintiff had

[1]This appeal is currently pending.

to provide any response. At no time was it requested, nor decided, that plaintiff was somehow striped of his basic right to interpose objections in its response. Indeed, were this issue ever presented to the Court, plaintiff would have strenuously objected. (*Exhibit 4,* Clark Affidavit)

On March 22, 2002, defendant filed a letter application with the Magistrate seeking to dismiss plaintiff's Consumer Fraud Act claim, or alternatively, to compel plaintiff to provide "fully responsive certified answers" in narrative form to 17 contention interrogatories as to Consumer Fraud, despite the fact that defendant has failed and refused to comply with any Consumer Fraud discovery which was served nearly eight months ago. (*Exhibit 1,* Defendant's 3/22/02 letter application) (*Exhibit 4,* Clark Affidavit).

From the paperwork it appears defendant hand delivered its application to the Court on Friday- 3/22 (presumably in the morning or early afternoon). However, defendant did not give plaintiff notice of this application until much later that same day- Friday afternoon at 5:00 p.m. when it received a fax copy of same. Plaintiff was later served a hard copy of the application on 3/25. (*Exhibit 4,* Clark Affidavit).

The Magistrate ruled in favor of the defendant on this application on the same day it received it. (*Exhibit 3,* 3/22/02 Order). Thus it appears defendant's application was granted before plaintiff was even provided notice the application was made and 3 days before plaintiff was served a hard copy of same.

Almost immediately upon receiving the application- at the close of business on a Friday afternoon (and long after the Court was provided a hard copy of same)- plaintiff prepared a detailed opposition to the application. The opposition was completed and prepared for delivery on Monday, 3/25 and served on the Court and adversary simultaneously via New Jersey Lawyer's Service on

3/26.[2] (*Exhibit 2,* plaintiff's 3/25/02 opposition) (*Exhibit 4,* Clark Affidavit).

However, since the Court granted defendant's application before plaintiff was provided notice the application was being made, plaintiff's opposition was futile and not considered by the Court. Plaintiff had also requested the Court entertain oral argument of the application prior to ruling. (*Exhibit 2,* plaintiff's 3/25/02 opposition)

On August 13, 2001, Judge Greenaway specifically permitted plaintiff to file an amended complaint to bring a claim under the New Jersey Consumer Fraud Act ("CFA") based on new evidence learned in discovery. (*Exhibit 5,* 8/13/01 Greenaway Order). Nevertheless, defendant sought to undue this Order by way of its letter application to the Magistrate wherein it sought to dismiss the CFA claim with prejudice. (*Exhibit 1,* Defendant's 3/22/02 letter application)

Defendant alternatively sought an Order compelling plaintiff to provide "fully responsive certified answers" in narrative form to 17 contention interrogatories as to Consumer Fraud. This application was granted and defendant's alternative order was signed. It required the following: 1) that plaintiff provide "fully responsive certified answers" in narrative form to 17 contention interrogatories as to Consumer Fraud; 2) that plaintiff do the impossible, i.e., provide these answers one day before learning of the Judge's ruling and; 3) that plaintiff's objection to these interrogatories are overruled. (*Exhibit 3,* 3/22/02 Magistrate Order)

In addition, the Order, which was drafted by defendant, contains factually and substantively incorrect preamble verbiage which should further be stricken. (*Exhibit 3,* 3/22/02 Magistrate Order)

As stated, among other things, the Order at issue requires plaintiff to do the impossible-

[2]Plaintiff was denied permission to serve the opposition via fax on Monday, 3/25. At no time was plaintiff informed the application had already been granted.

provide these answers one day before learning of the Judge's ruling. That is, the Order was signed on 3/22. Plaintiff was provided a fax copy on 3/27. As drafted by defendant, the Order states that "within five days hereof" (that is, within 5 days of 3/22- or by 3/26) plaintiff is supposed to provide these answers. (*Exhibit 3,* 3/22/02 Magistrate Order). However, plaintiff was not even served a copy of the order (and then by fax) until 3/27- one day after it was supposed to comply. (*Exhibit 4,* Clark Affidavit).

On or about September 21, 2001 plaintiff served a supplemental notice to produce on defendant as to consumer fraud. (*Exhibit 2A*, 9/21/01 CFA discovery). To date defendant has failed to provide any response to or comply with this discovery. (*Exhibit 4,* Clark Affidavit).

On or about May 4, 2001, plaintiffs served a Rule 30(b)(6) deposition notice. Defendant failed and refused to comply with the notice and has not produced anyone responsive. (*Exhibit 2B*, 30(b)(6) deposition notice) (*Exhibit 4,* Clark Affidavit).

In addition, plaintiff has sought the depositions of defendants three experts, Mr. Montague, Mr. Otterbein and Mr. Mitchell. Thus far these depositions have not taken place despite plaintiff's attempts. (*Exhibit 4,* Clark Affidavit).

On or about 2/28/02 defendant was served with a supplemental set of interrogatories as to defendant's affirmative defenses to the Consumer Fraud Act claims. (*Exhibit 2C*, supplemental CFA Interrogatories). These interrogatories are the equivalent of, and indeed mirror, defendant's supplemental contention interrogatories as to the Consumer Fraud Act claims which are at issue here. Thus far, despite vigorously seeking to compel plaintiff to provide even more "fully responsive certified answers" to its premature contention interrogatories, defendant has failed and apparently refused to provide any response to the same ones directed at them. (*Exhibit 4,* Clark Affidavit).

LEGAL DISCUSSION

I. THE COURT SHOULD REVIEW THIS MATTER DE NOVO, AMONG OTHER THINGS, BECAUSE DEFENDANT'S APPLICATION WAS GRANTED BEFORE PLAINTIFF WAS EVEN PROVIDED NOTICE THE APPLICATION HAD BEEN MADE

The district court may refer pretrial matters to magistrate judges pursuant to the Federal Magistrate Act 28 U.S.C. § 636(b)(1)(A) ("FMA") and (B), Fed.R.Civ.P. 72 and Local Rule 7(1)(c) and (d). These authorities differentiate the scope of the magistrate judge's powers with regard to pretrial matters based upon whether the matter involved is categorized as dispositive or non-dispositive. Rule 72(a) defines non-dispositive pretrial motions as those which are not dispositive of a claim or defense of a party. Therefore, dispositive pretrial matters would include those which are dispositive of a claim or defense of a party. See Rule 72(b). Under 28 U.S.C. § 636(b)(1)(A), magistrate judges may "hear and determine any pretrial matter pending before the court," unless the motion is included on the list of exceptions found therein. This list is not exclusive as courts will look into the nature of the matter referred to a magistrate judge and not merely scan the list of exceptions. Wright & Miller, *Federal Practice and Procedure*: Civil § 3076.5. (emphasis added).

The FMA requires a District Court to review a Magistrate Judge's report and recommendation *de novo.* 28 U.S.C. § 636(b)(1)(B); *accord* Fed.R.Civ.P. 72(b); Local Civ. R. 72.1(c)(2). Regarding non-dispositive motions, the FMA provides that a District Court may reverse a Magistrate Judge's determination only if it is "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); *accord* Fed.R.Civ.P. 72(a); Local Civ. R. 72.1(c)(1). Where a Magistrate Judge is authorized to exercise his or her discretion in determining a non-dispositive motion, the decision will be reversed

only for an abuse of that discretion. *Lithuanian Commerce Corp.,* 177 F.R.D. at 214; *see also Kresefky v. Panasonic Communications and Sys. Co.,* 169 F.R.D. 54, 64 (D.N.J.1996). However, the Court should conduct a *de novo* review of a Magistrate Judge's legal conclusions and dispositive elements. *Thomas v. Ford Motor Corp.*, 137 F.Supp.2d 575 (D.N.J. 2001), *citing*, *Lithuanian Commerce Corp.,* 177 F.R.D. at 214; *see also Haines,* 975 F.2d at 91 ("the phrase 'contrary to law' indicates plenary review as to matters of law").

As explained above, defendant's application was granted almost immediately upon receiving it and before plaintiff was even provided notice the application had been made. The timing of defendant's application is quite peculiar. That is, it appears defendant hand delivered its application to the Court on Friday morning or early afternoon. However, it waited until the close of business on a Friday afternoon to fax plaintiff a copy. In any event, plaintiff was denied its basic right to be given proper notice of the application, and to provide a response, prior to the Court ruling on the application. This was clearly incorrect and the Court should review this matter *de novo*.

The Court should also review the matter de novo because it is clear under the Rules that the "clearly erroneous or contrary to law" standard only applies to non-dispositive *motions* referred to the Magistrate. 28 U.S.C. § 636(b)(1)(A); *accord* Fed.R.Civ.P. 72(a); Local Civ. R. 72.1(c)(1). In this case there was no motion referred to the Magistrate that was decided. Rather, there was an informal letter application made directly to the Magistrate. Therefore, the Order at issue should be reviewed *de novo*. *Id.*

II. THE 3/22/02 ORDER OF THE MAGISTRATE SHOULD BE VACATED, AMONG OTHER THINGS, BECAUSE DEFENDANT'S CONTENTION INTERROGATORIES AS TO CONSUMER FRAUD ARE INAPPROPRIATE WHERE DEFENDANT HAS FAILED AND REFUSED TO COMPLY WITH ANY CONSUMER FRAUD ACT DISCOVERY

On or about September 21, 2001 plaintiff served a supplemental notice to produce on defendant as to consumer fraud. (*Exhibit A*, 9/21/01 CFA discovery). To date defendant has failed and refused to provide any response to this discovery. On or about May 4, 2001, plaintiffs served a deposition notice on defendant pursuant to Federal Rules Civil Procedure, 30(b)(6). Defendant failed and refused to comply with the notice and has not produced anyone responsive. (*Exhibit B*, 30(b)(6) deposition notice). In addition, plaintiff has sought the depositions of defendants three experts, Mr. Montague, Mr. Otterbein and Mr. Mitchell. Thus far these depositions have not taken place despite plaintiff's attempts. (*Exhibit 4,* Clark Affidavit).

Contention interrogatories ask a party: to state what it contends; to state whether it makes a specified contention; to state all the facts upon which it bases a contention; to take a position, and explain or defend that position, with respect to how the law applies to facts; or to state the legal or theoretical basis for a contention. *Fischer and Porter Co. v. Tolson*, 143 F.R.D. 93, 95 (E.D.Pa.1992); *In re Convergent Technologies Securities Litigation*, 108 F.R.D. 328, 332 (N.D.Cal.1985). The interests of judicial economy and efficiency for the litigants dictate that "contention interrogatories are more appropriate after a substantial amount of discovery has been conducted," despite that under Fed.R.Civ.P. 33(c) interrogatories are "not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact." *Nestle Foods Corp. v. Aetna Casualty and Surety Co.*, 135 F.R.D. 101, 110-111 (D.N.J.1990); *In re Convergent Technologies Securities Litigation*, 108 F.R.D. 328,

338 (N.D.Cal.1985); *Fischer and Porter Co. v. Tolson*, 143 F.R.D. 93, 95 (EDPA 1992).

The party serving contention interrogatories bears the burden of proving how an earlier response assists the goals of discovery. *Fischer*, 143 F.R.D. at 96. In this case where defendant has failed and refused to comply with the very Consumer Fraud Act discovery from which it wants a narrative as to the Consumer Fraud Act claim, defendant has not and can not meet its burden. It has not shown that early answers "will contribute meaningfully to clarifying the issues in the case, narrowing the scope of the dispute, or setting up early settlement discussions, or that such answers are likely to expose a substantial basis for a motion under Rule 11 or Rule 56." *Fischer*, 143 F.R.D. at 96; *In re Convergent*, 108 F.R.D. at 339.

In Re Convergent Technologies is generally viewed as the seminal case on the appropriateness of contention interrogatories. *See, e.g., Id.* This case instructs that a party filing contention interrogatories early in the pretrial period, before substantial documentary or testimonial discovery has been completed, has the burden of justification. *In re Convergent*, 108 F.R.D. at 338. It must present "specific, plausible grounds for believing that securing early answers to its contention questions will materially advance the goals of the Federal Rules of Civil Procedure." *Id.* at 339. The burden cannot be met by "vague or speculative statements about what might happen if the interrogatories were answered." *Id.* To meet the burden, states the court in Convergent Technologies, a party must show:

> [T]hat there is good reason to believe that answers to its well-tailored questions will contribute meaningfully to clarifying the issues in the case, narrowing the scope of the dispute, or setting up early settlement discussion, or that such answers are likely to expose a substantial basis for a motion under Rule 11 or Rule 56.

Id. Moreover, the court emphasized that special vigilance in the evaluation of the proffered

justification is required when "a complaint is not facially infirm and when defendants appear to have control over or adequate access to much of the evidence to their alleged misconduct." *Id.*

The *Convergent Technologies* Court stated, ***"... there is substantial reason to believe that the early ... filing of sets of contention interrogatories that systematically track all of the allegations in an opposing party's pleadings is a serious form of discovery abuse."*** *Id.* at 337 (emphasis added). A review of the interrogatories at issue here show they meet this description because this is exactly what defendant has done. The contention interrogatories at issue are grossly abusive because defendant's seek the factual basis of plaintiff's Consumer Fraud Act claim when defendant's themselves have failed and refused to comply with plaintiff's Consumer Fraud discovery which was served eons ago.

Furthermore, despite the fact that the Consumer Fraud Act contention interrogatories are clearly inappropriate at this time, plaintiff has provided defendant with the documents which contain the information defendants are looking for and clear statements of the Consumer Fraud Act claims- statements which the District Judge clearly found sufficient in connection with the motion to amend the complaint, rejecting defendant's arguments to the contrary. Defendant's request to have plaintiff set forth all its facts in minute and hyper technical detail is clearly over burdensome and inappropriate- especially since the District Court already rejected defendant's arguments in this regard. Defendant's rehashing its same rejected arguments from the motion to amend to bring in Consumer Fraud should be rejected again.

Defendant's complaints that the Consumer Fraud Act claims are "serious" and defendant's implication that somehow plaintiff does not have "some basis for the serious allegations" is nothing more than a feigned attempt to reargue its opposition to plaintiff's motion to amend the complaint

to bring in Consumer Fraud. Defendant's histrionic pleas are furthermore an attempt to distract the Court from the fact that defendant has engaged in a number of discovery abuses in this case, including failing to comply with any CFA discovery.

III. PLAINTIFF'S SUPPLEMENTAL CFA INTERROGATORIES ARE THE EQUIVALENT OF AND MIRROR DEFENDANT'S CONTENTION INTERROGATORIES AT ISSUE HERE AND THE MAGISTRATE SHOULD HAVE CONSIDERED DEFENDANT'S RESPONSES BEFORE RULING ON THE PROPRIETY OF PLAINTIFF'S RESPONSES

On or about 2/28/02 defendant was served with a number of interrogatories as to defendant's affirmative defenses to the Consumer Fraud Act claims. These interrogatories are the equivalent of, and indeed mirror, defendant's supplemental contention interrogatories as to the Consumer Fraud Act claims which are at issue here. (*Exhibit 2C*, supplemental CFA Interrogatories). Thus far, despite vigorously seeking to compel plaintiff to provide even more "fully responsive certified answers" to its premature contention interrogatories, defendant has failed and apparently refused to provide any response to the same ones directed at them which are now overdue. (*Exhibit 4,* Clark Affidavit).

Since plaintiff was required to answer these additional interrogatories, so should defendant. Accordingly, before the Court rules on the propriety of plaintiff's responses and objections to these contention interrogatories, the Court should have the benefit of defendant's responses to these same interrogatories. Indeed, given defendant's track record of discovery abuse in this case, it is expected they will launch vigorous objections to these same interrogatories. So that there is uniformity in the way the this issue is decided, it should have had the benefit of defendant's overdue responses prior to ruling on the propriety of plaintiff's. Indeed, it would be patently incongruous to overrule plaintiff's objections to these contention interrogatories while allowing defendant's to stand on virtually the same interrogatories.

CONCLUSION

Accordingly, it is respectfully requested the District Judge vacate the 3/22/02 Order of the Magistrate, compel defendant to provide responses to plaintiff's 2/28/02 Supplemental Interrogatories and declare that contention interrogatories need not be answered until the conclusion of discovery.

Lynch ♦ Martin
Attorneys for Plaintiff Peter Formato

BY:_____
GERALD H. CLARK

Dated: March 31, 2002

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