

IN THE DISTRICT COURT OF IOWA IN AND FOR POLK COUNTY

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| GOLDEN CIRCLE REAL ESTATE | : | |
| GROUP, LLC d/b/a KELLER WILLIAMS | : | |
| REALTY, GREATER DES MOINES, | : | CASE NO. CL 125527 |
| | : | |
| Plaintiff | : | |
| | : | |
| v. | : | RULING ON OUTSTANDING |
| | : | DISCOVERY MOTIONS AND |
| | : | ISSUES |
| IOWA REALTY COMPANY, INC., | : | |
| | : | |
| Defendant. | : | |
| | : | |

On July 9, 2013 the above-captioned matter came before the Court on outstanding discovery issues between the parties and for a discovery conference. Both parties appeared by their respective attorneys. After hearing the statements and arguments of counsel, reviewing the court file and being fully advised in the premises, the Court now enters the following ruling. The Court will address the various outstanding motions in the order they were discussed during the hearing, and the order of discussion does not necessarily relate to the order in which motions were filed or the importance attached to such motions by the parties.

1. Plaintiff’s Motion for Extension of Time to Respond to Defendant’s Second Request for Production of Documents.

Defendant served its Second Request for Production of Documents on May 16, 2013. According to plaintiff, its attorneys requested a two-week extension of time to respond to the request, but defendant’s attorney refused to grant such an extension. Under any circumstances, plaintiff’s responses are now due and shall be produced on or before July 23, 2013. Responses made by July 23, 2013 will be deemed timely made.

2. Plaintiff's Motion for Protective Order.

Plaintiff filed its motion for protective order on June 27, 2013. It does not specify which of defendant's discovery requests are implicated by the motion, but rather requests the Court generally to order that plaintiff not be required to produce information that it claims is trade secret information. As best the Court can determine, defendant sought in its Interrogatory No. 4 and in the corporate deposition defendant attempted to take of plaintiff to determine the basis of plaintiff's claims of tortious interference. Plaintiff stated during the corporate deposition that it claimed \$11,000,000 in damages as a result of Iowa Realty's interference with real estate agents who had considered joining Golden Circle but then failed to do so due to defendant's actions. Plaintiff has steadfastly refused to identify these claimed lost agents, both in its three responses to Interrogatory No. 4 and during the corporate deposition. The motion for protective order of June 27, 2013 is the first effort of plaintiff to seek protection from the Court for this requested information.

Plaintiff has failed to establish that the identities of the claimed lost agents constitute trade secrets. *See Farnum v. G.D. Searle & Co.*, 339 N.W.2d 384, 389-90 (Iowa 1983). Plaintiff may have signed confidentiality agreements with these prospective agents. However, plaintiff cannot have it both ways. Plaintiff wants to claim \$11,000,000 in lost profits as a result of not having these agents associated with Golden Circle, allegedly as a result of defendant's actions, while refusing to identify the prospective agents and allowing defendant the opportunity to determine whether the prospective agents would have joined Golden Circle but for the actions of Iowa Realty. Neither defendant nor the fact finder in this case can be so limited, such that they simply have to rely on plaintiff's bare allegations. Plaintiff now has a choice: it can either

disclose the identities of the purportedly lost agents, or it can forego any claim related to those agents. Plaintiff's motion for protective order is denied.

3. Plaintiff's Motion to Compel Discovery.

Plaintiff filed its motion to compel discovery on July 3, 2013. It raised numerous claimed deficiencies in defendant's responses to discovery requests, which will be discussed in turn.

A. Interrogatory No. 4.

Plaintiff's initial Interrogatory No. 4 asked defendant to identify each and every document defendant intended to offer as an exhibit at trial. After communications back and forth between the attorneys, plaintiff recast its interrogatory on May 14, 2013, asking defendant to "identify each and every document relevant to this lawsuit, including the custodian and location of the document and a summary of the contents of the document." Defendant's objection to the original interrogatory was that it was premature; its objection to the recast interrogatory is that it is overbroad and unduly burdensome, and requires defendant to guess at what plaintiff deems to be "relevant." Plaintiff is particularly incensed that at the time the corporate deposition of Golden Circle was taken defendant's attorneys utilized documents that had not been previously identified or produced. Defendant responds that all of the documents used at the corporate deposition were not documents in defendant's possession, but rather came from public documents or websites or were in the possession of plaintiff from the outset.

The Court agrees with defendant that the interrogatory as refined is overbroad and unduly burdensome and forces defendant to speculate as to what plaintiff may deem relevant. The interrogatory as originally phrased can be answered at this time, although it

may have to be supplemented in accordance with the Iowa Rules of Civil Procedure as discovery concludes and trial approaches. The motion to compel is sustained to the extent that defendant shall by August 8, 2013 identify all documents that it knows at that point that it intends to use at trial. If additional documents are subsequently identified by defendant as intended to be used as exhibits at trial, defendant shall timely supplement its answer. The Court is not troubled by defendant's use of documents at deposition that were equally available to plaintiff, particularly in light of plaintiff's failure to prepare its witness for the corporate deposition as discussed below.³

B. Interrogatory No. 5.

In Interrogatory No. 5 plaintiff asked defendant to specify its policy regarding the sharing of commissions with competing brokerages over the past 10 years and to specify the reason for such policy. The interrogatory further asked defendant to "explain Iowa Realty's statement that its policy of not sharing commissions with Keller Williams is in the best interest of the consumer."

Defendant has provided an answer specifying all of the real estate brokers with whom it does not currently share commissions. It objected to the last subparagraph of the interrogatory, asking for clarification of the "statement of policy" to which plaintiff referred in the interrogatory. Plaintiff seeks to compel discovery regarding 10 years of history regarding any brokers with which Iowa Realty has not shared commissions with brokers, and the reasons for any change of policy with regard to particular brokers. Defendant responds that the requested information is not relevant to any issue in the case, and that it has maintained no file regarding changes in its policy on sharing commissions.

In order to successfully prosecute its claim of tortious interference against defendant, plaintiff must prove that defendant has acted against it with an improper purpose. *See* Ruling February 25, 2013 on defendant's motion for partial summary judgment. The essential basis of plaintiff's complaint regarding tortious interference is defendant's refusal to share commissions with Golden Circle. Discovery as to the extent to which Iowa Realty shares commissions with some brokers and not others could lead to admissible evidence regarding defendant's improper motive, or lack thereof, in refusing to share commissions with plaintiff. Therefore defendant must specify its reasons for refusing to share commissions with particular brokers, including Golden Circle.

Plaintiff seeks discovery regarding any changes in policy on the sharing of commissions for the past 10 years. The Court concludes such request is overbroad. The dispute between Iowa Realty and Keller Williams goes back approximately six years. Defendant must identify any change in policy regarding the sharing of commissions with any brokers over the past six years. Defendant is not required to create any new file regarding such changes, but only to answer the interrogatory to the best of its ability. Plaintiff's motion to compel an answer to Interrogatory No. 5 is granted in the limited manner specified above.

C. Interrogatory No. 8.

Plaintiff asked defendant in Interrogatory No. 8 to state whether defendant disclosed to its own agents its policy on sharing commissions with other brokers and, if so, how such disclosure was made. The interrogatory further inquired whether such disclosure was made to customers, and whether any change in policy regarding disclosure had been made over the past five years. Plaintiff now moves to compel defendant to

specify what disclosure was made to each manager. The interrogatory did not call for the contents of the disclosure. Defendant has answered the interrogatory which was propounded. The motion to compel answer to Interrogatory No. 8 is denied.

D. Interrogatories Nos. 9 and 10 and Request for Production No. 4.

In its motion to compel, plaintiff states that it desires the Court to order Iowa Realty to explain how it develops individualized formulas for the commissions of its agents, how the formulas are different based upon whether the agents involved in the transaction are from Keller Williams or from different competing brokers, and to detail the distribution of each commission paid for each Iowa Realty listing where an agent appointed with Keller Williams was involved in the transaction.

Defendant has answered the interrogatory that individual agents are not compensated differently on the basis of whether competing brokers, whether or not Keller Williams, are involved. Defendant agreed to provide its contracts with sellers it believes ultimately sold to buyers represented by Keller Williams' agents. Plaintiff is apparently unsatisfied with this response, and wants the Court to order defendant to disclose the individual compensation formulas it has with each of its agents. Plaintiff has failed to explain how such information would lead to admissible evidence. The fact defendant may have different compensation with individual agents has no bearing on the case unless the formula is tied to the involvement of Keller Williams, or conceivably to the involvement of another competing broker. Defendant has repeatedly attested to the fact the involvement of a competing broker does not affect an agent's individual compensation. Plaintiff's motion to compel as to Interrogatories Nos. 9 and 10 and Document Production Request No. 4 is denied.

E. Interrogatories Nos. 13 and 14 and Request for Production No. 7.

Plaintiff asserts as part of its defamation claim that Iowa Realty has referred to Keller Williams as a “pyramid scheme” and that it has made statements to the effect that plaintiff has engaged in “subversive, disruptive and distracting tactics.” Golden Circle now moves the Court to compel defendant to explain what Iowa Realty means by “pyramid scheme” and by “subversive, disruptive and distracting tactics,” and to identify all evidence upon which Iowa Realty relies to support such statements. Plaintiff further moves the Court to require defendant to produce all emails sent from any email address containing “@iowarealty.com” that contain the words “pyramid” or “subversive.”

The Court finds that defendant has adequately responded to the initial discovery requests propounded by plaintiff, despite plaintiff’s dissatisfaction with the response. Defendant has offered to perform the electronic discovery request now made by plaintiff, as specified above, even though it was not called for by plaintiff’s initial interrogatories or document production request, if plaintiff is willing to pay for it. Plaintiff’s motion to compel regarding Interrogatories Nos. 13 and 14 and Request for Production No. 7 is denied, provided that if plaintiff wishes to have defendant perform the requested electronic search at plaintiff’s expense, defendant shall do so.

F. Interrogatory No. 15 and Request for Production No. 13.

In these two discovery requests, plaintiff seeks to force defendant to specify what its market share is in the Des Moines area, how it calculated such market share and any data or documents relied upon by Iowa Realty in its response. In support of its motion to compel, plaintiff states: “Among other things, Iowa Realty has boasted it is ‘Iowa’s

Largest and its desire to remain so is a direct motive for its activities that led to Plaintiff Keller Williams filing its claims.” Defendant has objected to the discovery requests as ill-defined and not calculated to lead to the discovery of admissible evidence.

As the Court has previously ruled and stated above, plaintiff must prove at trial that Iowa Rule has interfered in plaintiff’s business for an *improper* purpose. Plaintiff has cited no authority in support of the proposition that a realty company wishing to maximize its market share in a given community is an improper purpose, and the Court is aware of none. Assuming plaintiff’s premise is correct, the discovery requests are not calculated to lead to admissible evidence as the extent of Iowa Realty’s market share in the Des Moines area is not relevant to any of plaintiff’s remaining claims. The motion to compel as to Interrogatory No. 15 and Document Production Request No. 13 is denied.

4. Plaintiff’s Motion to Overrule

The focus of plaintiff’s motion to overrule concerns its desire to depose Robert Moline, who is the president and COO of Home Services, a related affiliate but wholly separate entity from Iowa Realty. Counsel for defendant has advised plaintiff’s attorneys that he does not represent Home Services, cannot direct Mr. Moline to attend a deposition and would object to any such deposition as Home Services has no part in the present litigation.

Assuming plaintiff follows the requirements for obtaining a deposition from a non-party and non-resident witness, the Court concludes plaintiff is entitled to take a deposition from Mr. Moline. On the record made, the Court cannot find that there is no possibility that Mr. Moline has no information calculated to lead to admissible evidence. Defendant’s objection to the deposition of Mr. Moline is overruled.

5. Defendant's Motion for Protective Order re John Stark

Plaintiff has noticed the deposition of John Stark, whom plaintiff listed in its answers to interrogatories as an expert witness it intended to call at trial. Plaintiff has now stated that Mr. Stark is not an expert whom Golden Circle has retained; rather plaintiff sought to elicit testimony from him as an expert witness independent of either party. As of the date of hearing, both defendant and Mr. Stark had objected to him being forced to testify as an expert witness.

Plaintiff has failed take any of the necessary steps or to make any of the necessary showings to force Mr. Stark to testify involuntarily as an expert witness. At the time of hearing, plaintiff stated that it was withdrawing its request to depose Mr. Stark as an expert witness, and wished to depose him only as a fact witness. The Court has no way of knowing whether Mr. Stark may have factual knowledge which will either be admissible evidence itself or lead to admissible evidence. Plaintiff shall be permitted to take Mr. Stark's deposition as a fact witness. However, plaintiff is prohibited from attempting to elicit any expert opinions from Mr. Stark unless further record is made before the Court that would justify such effort.

6. Defendant's Motion to Extend Time to Designate an Expert Witness

Plaintiff has designated Bob Kilinski as an expert witness for trial. However, despite discovery requests propounded by defendant to ascertain the substance of Mr. Kilinski's opinions, and the basis for those opinions, the requirements of the Iowa Rules of Civil Procedure and repeated efforts by defendant to obtain the requested information, plaintiff has failed to supplement the very basic information it provided regarding Mr. Kilinski.

Defendant is granted an extension of time to designate its own expert(s) until 30 days after plaintiff complies with the discovery requests regarding the testimony and opinions of Mr. Kilinski.

7. Defendant's First Motion to Compel Discover

Defendant filed its first motion to compel discovery on June 17, 2013. The motion relates entirely to defendant's efforts in discovery, through interrogatories, document production requests and a corporate deposition of plaintiff, to ascertain the identities of either customers or agents with whom plaintiff claims defendant has improperly interfered. In its motion Iowa Realty seeks to have the Court either order plaintiff to produce the requested information, including a second corporate deposition, or to limit plaintiff to the information previously produced. *See Lawson v. Kurtzhals*, 792 N.W.2d 251 (Iowa 2010).

At the time of hearing, plaintiff objected to a second deposition of its corporate representative. It claims that the corporate representative was adequately prepared for the deposition. After the Court indicated that in light of plaintiff's arguments, no second corporate deposition would be ordered but that plaintiff would be limited at trial to the information provided at the first corporate deposition, plaintiff changed its position and offered a second corporate deposition. Plaintiff further filed a motion for a protective order, asserting that it should not be required to disclose the identities of the agents with whom defendant is claimed to have interfered. The Court has denied that motion above. No request for a protective order was made as to customers claimed to have been interfered with.

Despite plaintiff's protestations to the contrary, it is clear from the record that plaintiff made no real effort to prepare its corporate representative for deposition. Plaintiff will now live with that choice, and will be prohibited at trial from offering any evidence in support of its claims beyond the information given at the corporate deposition, or provided to defendant by the time of the hearing on July 9, 2013, regarding the interference claims. The only exception is as discussed above regarding plaintiff's choice to produce the identities of the agents it claims were interfered with by Iowa Realty. If plaintiff elects to produce those names, defendant will be permitted to take additional depositions regarding the agents for whom plaintiff claims losses. Defendant's motion to compel discovery is granted as set forth above.

8. Defendant's Third Motion to Compel Discovery

To summarize defendant's third motion to compel discovery, it contends that plaintiff has provided a minimal amount of information in response to defendant's discovery requests, whether through answers to interrogatories, responses to document production requests or depositions. To summarize plaintiff's response to the motion, it asserts that it has provided all of the requested information as required, or has properly objected to defendant's request, or defendant has failed to make a good faith effort to resolve discovery disputes.

From reviewing the discovery requests from defendant and plaintiff's responses, two things are clear to the Court. The first is that although plaintiff has provided some names and documents in response to defendant's discovery requests, Golden Circle has in large measure attempted to obfuscate the information sought by Iowa Realty either through general responses or inappropriate objections. For an example of the former, see

plaintiff's supplemental answer to interrogatory number one, which inquired as to persons with knowledge and the nature of that knowledge. Plaintiff did list some individuals and entities. However, the answer also listed all agents with Keller Williams Des Moines, all agents with Iowa Realty, all agents in the Des Moines Area Association of Realtors, all managers and assistant managers of Iowa Realty, and all consumers who have listed real estate for sale since April 2012. That is not a meaningful response.

The second thing which is clear is that plaintiff has failed to refuse to respond to defendant's discovery requests until defendant complied with plaintiff's discovery requests to plaintiff's satisfaction. For example, see plaintiff's initial response to Interrogatories Nos. 4 and 5. There is no legal basis for such an objection. Plaintiff was obligated to provide the information in its possession at the time, with the ability to supplement that information later.

For the most part, the Court has previously addressed defendant's requests for information, and especially concerning plaintiff's claims regarding tortious interference and defendant's request for the opinions of plaintiff's expert witness (Kilinski). Except as the Court has permitted plaintiff to supplement its discovery responses above, or orders certain responses to be supplemented below, plaintiff will be prohibited at trial from offering evidence not produced on or before July 9, 2013 or disclosed during the depositions now scheduled by the parties. *See Larson, supra.*

Defendant's Interrogatory No. 9 requested plaintiff to specify how Golden Circle came into possession of the Valley West Side Story Newsletters. Plaintiff initially objected to the interrogatory as a whole, but later answered the interrogatory as to the April newsletter. Plaintiff has not answered how it obtained the January newsletter. The

objection is overruled and plaintiff shall provide the requested information on or before August 1, 2013.

Defendant's Interrogatory No. 12 requested information concerning Golden Circle's marketing practices. Plaintiff initially provided a general and largely meaningless response. Later it filed an untimely objection to the interrogatory, claiming that it called for trade secret material. The objection is overruled and the motion to compel regarding Interrogatory No. 12 is granted. Plaintiff shall provide the requested information on or before August 1, 2013.

Defendant's Interrogatory No. 19 requested plaintiff to identify and describe all of its communications with the press concerning the lawsuit. Plaintiff has produced documents only after the lawsuit was filed. The interrogatory fairly calls for all communications regarding the lawsuit whether made before or after the suit was filed. Plaintiff shall provide the requested information regarding all communications with the press, and such production shall be on or before August 1, 2013.

Finally, Iowa Realty complains that plaintiff failed to put a litigation hold on documents once it filed suit, and further that plaintiff has filed baseless objections based upon trade secret and attorney-client privilege during the course of discovery. Given the experience of plaintiff's attorneys, the failure to put in place a litigation hold is inexplicable. As of the date of the discovery conference, plaintiff's attorneys had not created a privilege log regarding the many documents plaintiff was refusing to produce. That failure is also inexplicable. There is no way for the Court to rule upon a claim of attorney-client privilege in the absence of such a log. The Court reserves the ability to give a spoliation instruction at trial if it concludes that plaintiff purposefully destroyed or

failed to maintain documents that would be relevant to plaintiff's claims and Iowa Realty's defenses. It further reserves the ability to impose sanctions in the event it determines that a meritless attorney-client privilege was asserted in order to avoid producing relevant information.

9. Defendant's Application for a Commission for Issuance of an Out-of-State Subpoena Duces Tecum

Defendant has made application for issuance of an out-of-state subpoena duces tecum in order to take a corporate deposition of Keller Williams. Plaintiff objects on both procedural and substantive grounds, urging that defendant has made no showing that information obtained from Keller Williams would be relevant at trial.

The authority of the courts of Iowa to authorize the issuance of subpoenas for the discovery of non-residents is well established. Plaintiff asserts an extraordinary position in arguing that the Court cannot authorize subpoenas to non-residents, where the discovery would take place in the locale of the non-resident. Furthermore, it is difficult to take plaintiff's argument that Keller Williams does not have relevant information seriously. It is clear that Keller Williams not only has a significant stake in the outcome of the pending action, but that it has been actively involved—if not directing—the above-entitled action. At a minimum, Keller Williams has discoverable information concerning plaintiff's claim that defendant defamed Golden Circle d/b/a Keller Williams Realty by describing it as a pyramid scheme. Golden Circle is a franchise of Keller Williams. There is every reason to believe that its marketing plan is created and even mandated by Keller Williams. Defendant's application is granted.

10. Attorney Fees and Costs

Both parties have made application for attorney fees, costs and sanctions in their motions, applications and resistances. The Court has made a conscious decision not to make any award of attorney fees or costs. The Court has imposed sanctions as set forth above. The parties should take little comfort in the Court's declination of awarding fees and costs. Instead they should be assured that if any further motions to compel are filed an award of fees and costs will follow, given to the prevailing party. The Court has little patience for the petty bickering which has marred much of the discovery process in this case.

Dated this 22nd day of July 2013.

Robert A. Hutchison, Judge-
Fifth Judicial District of Iowa

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