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United States District Court,
E.D. New York.

Bryon GRENION, Plaintiff,
v.
FARMERS INSURANCE EXCHANGE, Defendant.

No. CV 12–3219(JS)(GRB).
|
Signed March 14, 2014.

Attorneys and Law Firms

Gregory Scot Lisi, Susan J. Deith, Forchelli Curto Deegan Schwartz Mineo & Terrana, LLP, Uniondale, NY, for Plaintiff.

David W. Garland, Jill Barbarino, Epstein Becker and Green, P.C., New York, NY, for Defendant.

ORDER

GARY R. BROWN, United States Magistrate Judge.

***1** Most cases settle. [1] The juncture at which voluntary resolution is reached has a significant impact upon the parties and the public: prolonged litigation processes impose significant litigation expense, disruption and, in some cases, distress on litigants and increase the cost to the public of managing congested dockets. In response, courts have created mechanisms-including streamlined discovery and court-supervised settlement discussions-designed to facilitate early settlement.

Before the Court is an application by Bryon Grenion ("plaintiff" or "Grenion") for the imposition of costs and sanctions upon Farmers Insurance Exchange ("defendant" or "Farmers" or "FIE") based upon its purported failure to participate in a court-mandated settlement conference in good faith. *See* Pl.'s Motion for Attorney's Fees and Costs ("Mot."), Nov. 5, 2013, Docket Entry ("DE") [25]; *see also* Def.'s Opposition to Mot. ("Opp'n"), Nov. 13, 2013, DE [26]. The specific question presented is whether defendant satisfied its obligation to participate in good faith by dispatching a representative with settlement authority of "zero," and who acknowledged that, irrespective of anything that might occur at the settlement conference, he lacked authority to alter that position. Because I find that this did not satisfy Farmers' obligation, and that defendant's actions rendered the settlement procedures—implemented by rules and orders of this Court-futile, Farmers is ordered to pay expenses incurred as a result of this conduct, and to pay an additional monetary sanction as detailed herein.

BACKGROUND

On June 28, 2012, plaintiff filed a complaint asserting claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., Article 15 of the New York State Human Rights Law § 290 et seq., the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., and the Family and Medical Leave Act of 1993 (the "FMLA"), 29 U.S.C. § 2615. *See generally* Complaint ("Compl."), DE [1]. Following the grant of a partial motion to dismiss, on July 29, 2013, plaintiff filed an amended complaint. *See generally* Amended Complaint ("Am.Compl."), DE [16]. According to the amended complaint, plaintiff, who is African–American and afflicted with a kidney ailment known as Wegener's disease, had been employed by defendant as a "senior support specialist" for 14 years. Am. Compl. ¶¶ 4, 12. Among other allegations, plaintiff claims that he applied, and received approval for, a period of FMLA leave beginning on June 22, 2009. *Id.* ¶ 14, Ex. A. Effective July 8, 2009, which was either during or immediately following his FMLA leave, defendant terminated plaintiff's employment. *Compare id.* ¶ 15 (alleging that plaintiff had been granted a 12–week leave period) *with id.,* Ex. A (post-termination written approval granting FLMA leave through July 7, 2009).

At an initial conference held on September 25, 2013, the undersigned entered a Scheduling Order, setting forth stipulated deadlines for discovery and motion practice in this action, adopting those deadlines proposed by the parties. Scheduling Order, DE [20]. Among other deadlines, as part of that Scheduling Order, the parties were directed to complete "Phase I" discovery—designed to prepare the parties to engage in reasoned settlement discussions. *Id.* Though afforded the opportunity at the conference to identify the discovery required prior to engaging in a settlement

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conference, defendant did not seek a pre-conference deposition of plaintiff. *See* Tr. of Initial Conference 17:22–19:3, Oct. 21, 2013, DE [22].

***2** The Scheduling Order established a settlement conference for October 30, 2013, and directed that "clients or other persons with full settlement authority must be present at this conference." This directive echoes a requirement contained in the undersigned's Individual Rules—which are publicly available and were also provided to counsel with the Initial Conference Order, Aug. 21, 2013, DE [18]—that states the following:

> 3. **Attendance of Parties Required. Parties with full and complete settlement authority are required to personally attend the conference.** An insured party shall appear with a representative of the insurer(s) authorized to negotiate, and who has *full authority to settle the matter* ....
>
> Having a client with authority available by telephone is *not* an acceptable alternative, except under the most extenuating circumstances, which does not include ordinary travel expenses and inconvenience. Because the Court generally sets aside significant time for each conference, it is impossible for a party who is not present to appreciate the process and the reasons which may justify a change in one's perspective towards settlement. In that regard, and because the Court and the parties invest significant resources in these conferences, the failure of an authorized representative to appear may result in sanctions.

Individual Rules, II.B.3.

By letter dated October 16, 2013, defendant filed an application seeking to adjourn the settlement conference "to a date after the plaintiff's deposition," which it expected "in or about the end of December or early January." October 16 Letter at 1, DE [21]. Farmers' counsel went on to caution that "[i]ndeed, without such a deposition, FIE is not prepared to make a settlement offer." *Id.* Plaintiff's counsel filed an opposition to the request, and the undersigned ultimately denied the adjournment, directing instead that "the parties shall hold plaintiff's deposition prior to the conference." Electronic Order dated 10/17/13. That deposition was held on October 29, 2013. Opp'n 2.

At the settlement conference, counsel for defendant presented Mr. George O'Brien, who was introduced as "in-house counsel with Farmers." Settlement Conference Tr. ("Settlement Tr.") 2:11–16, Nov. 4, 2013, DE [24]. The parties consented to go off the record and, after a brief discussion with defendant's counsel and representative, the settlement effort was abandoned as defendant had no interest in settling the case. *Id.* 3:24–4:9. After going back on the record, the Court raised the issue of the authority of Mr. O'Brien to engage in settlement discussions. Defendant's counsel, Ms. Jill Barbarino, represented as follows:

> MS. BARBARINO: Mr. O'Brien has authority to make the decision as to whether the—we should make an offer on the case and the decision has been made that we don't want to make an offer to settle.
>
> THE COURT: But if facts and circumstances here today changed in such a way either because of the position of the case, evidence of the matters covered so forth, he's not in a position to change that decision. Is that right?
>
> ***3** MS. BARBARINO: I mean it's my understanding that there is—that Farmers has a process on any case and there are no exceptions and that there is a process and they're very analytical about the issues and that they make the decision in advance as to what the ceiling is and in this case the decision has been made that the ceiling is zero.

Id. 4:12–25. At the request of defendant's counsel, Mr. O'Brien was given the opportunity to address the Court on this subject, leading to the following colloquy:

> MR. O'BRIEN: Your Honor, we have a process at the company. The process involves lawyers and the process involves clients. We took your order seriously, Your Honor. We are taking it seriously today. We reviewed the facts and the law carefully and that was the basis for the decision that was made and that I have conveyed today. If there were new facts that developed we would certainly give them a consideration they deserved. They would be reviewed analytically both by attorneys and clients and a decision would be made.
>
> THE COURT: So I ask you a question that I asked you off the record. I'm going to ask you on the record now. Who is the person with settlement authority?

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> MR. O'BRIEN: Your Honor, I've answered it as well as I can answer it. It is a process, Your Honor, that involves attorneys and clients and beyond that respectfully, Your Honor, I don't think it is fair or appropriate to ask me to name names about who participates in that process. I view that as privileged respectfully, Your Honor, and I-
>
> THE COURT: But, Mr. O'Brien, you're not in a position today to change the decision of the company that they will not pay any money on the case. Is that fair?
>
> MR. O'BRIEN: That is correct, Your Honor.

Settlement Tr. 5:13–6:10. This application followed.

DISCUSSION

Legal Standard

Federal Rule of Civil Procedure ("Rule") 16 authorizes a federal court to "order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as ... expediting disposition of the action [or] facilitating settlement." Rule 16(a)(1), (a)(5). Mandatory attendance at such conferences is not, however, limited to attorneys and *pro se* litigants, as the Rule further provides that, where appropriate, "the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement." Rule 16(c)(1); *see also* 28 U.S.C. § 473(b)(5) (discussing mandatory appearance of representative with binding authority at settlement conferences). Even before this Rule was amended to specify that a district court had the authority to direct a party to be present, at least one Circuit decision held that a magistrate judge had the authority to order corporate representatives to attend a settlement conference. *See* *G. Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648, 656 (7th Cir.1989) ("the court properly sanctioned Oat Corporation pursuant to Rule 16(f) for failing to send a corporate representative to the settlement conference.").

***4** Rule 16 provides enforcement mechanisms to help ensure compliance with these procedures. For example, the court is empowered to issue "any just orders," including the full range of remedies specified under Rule 37(b)(2)(A)(ii)-(vii), "if a party or its attorney ... fails to appear at a scheduling or other pretrial conference [or] is substantially unprepared to participate—or does not participate in good faith—in the conference[.]" Rule 16(f)(1); *see also, e.g.*, *Uretsky v. Acme Am. Repairs*, 2011 WL 1131326, at *1 (E.D.N.Y. Mar.28, 2011) (awarding sanctions where "[o]ne of [defendant's principals] failed to appear, undermining the purpose of the conference and the orderly progress of the case"). Under Rule 16, the specified remedies include significant sanctions, including striking pleadings, dismissal, entry of a default judgment and contempt of court. *See* Rule 37(b)(2)(A)(ii)-(vii). In addition to authorizing these discretionary remedies, Rule 16 requires that a district court

> must order the party, its attorney, or both to pay the reasonable expenses—including attorney's fees—incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

Rule 16(f)(2) (emphasis added).

Section 636(b)(1)(A) of Title 28, United States Code empowers magistrate judges "to hear and determine any pretrial matter pending before the court," with the exception of eight specifically enumerated types of motion which are not relevant here. Because sanctions pursuant to Rule 16(f) fall within the scope of pretrial matters, magistrate judges are well within their authority to impose such sanctions. *See* *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir.1990) ("Monetary sanctions pursuant to Rule 37 for noncompliance with discovery orders usually are committed to the discretion of the magistrate, reviewable by the district court under the 'clearly erroneous or contrary to law' standard.").

The Imposition of Expenses and Sanctions

The principal question on this motion is whether Farmers' provision of a corporate representative who came to the settlement conference with authority of "zero" and was unauthorized to change that position on behalf of Farmers

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(and, apparently, had no ability to contact anyone with such authority) constituted good-faith compliance with this Court's rules and orders in this matter. In its papers, responding to an argument made by plaintiff,[2] defendant argues that it should not be sanctioned for "declining to make a settlement offer at the October 30 conference." Opp'n 3. This is, of course, quite correct. It is axiomatic that a court may not try to coerce parties into settlement, and the imposition of a sanction upon a party for failing to make or accept a settlement offer is impermissible. *Kothe v. Smith,* 771 F.2d 667, 669 (2d Cir.1985) (reversing sanction, noting that "[Rule 16] was not designed as a means for clubbing the parties ... into an involuntary compromise").

***5** However, defendant's contention also misses the point. The issue is not whether costs and sanctions should be imposed because defendant failed to make an offer—rather, the issue is whether defendant failed to participate in good faith in a mandatory settlement conference. *See* Mot. 2 (defendant "never intended to attend the Settlement Conference in good faith and wasted the Court's and Plaintiff's resources"). Farmers should be well aware of this distinction, having obtained the reversal of a trial court's sanction issued after Farmers failed to make a settlement offer. *Triplett v. Farmers Ins. Exchange,* 24 Cal.App.4th 1415, 1424, 29 Cal.Rptr.2d 741 (Cal.Ct.App.1994) (sanction may not be imposed for "defendant's decision to choose trial, rather than settlement"). In that previous case—unlike here—Farmers did, in good faith, "attend [and] participate" in a court-ordered settlement conference. *Id.*

In this matter, unambiguous court rules and orders directed defendant to produce "a representative of the insurer(s) authorized to negotiate, and who has full authority to settle the matter." Individual Rules II.B.3. "Full settlement authority" has been interpreted to mean that

> the 'corporate representative' attending the pretrial conference was required to hold a position within the corporate entity allowing him to speak definitively and to commit the corporation to a particular position in the litigation. We do not view 'authority to settle' as a requirement that corporate representatives must come to court willing to settle on someone else's terms, but only that they come to court in order to consider the possibility of settlement.

Heileman Brewing, 871 F.2d at 653; *see also Johnson v. Garren,* 2013 WL 499869, at *3 n. 4 (S.D.Cal. Feb.8, 2013) ("the individuals at the settlement conference must be authorized to explore settlement options fully and to agree at that time to any settlement terms acceptable to the parties."); *Pitman v. Brinker Int'l, Inc.,* 216 F.R.D. 481, 485 (D.Ariz.2003), *amended on reconsideration in part sub nom.,* 2003 WL 23353478 (D.Ariz.2003) (representative must "arrive at a settlement conference with an open mind and a genuine willingness to meaningfully discuss the strengths and weaknesses of each party's case"). As one court observed:

> There are several reasons for requiring the presence of authorized representatives as a settlement conference. During the conference, counsel for both sides are given an opportunity to argue their clients' respective positions to the court, including pointing out strengths and weaknesses of each party's case. In this discussion, it is often true that client representatives and insurers learn, for the first time, the difficulties they may have in prevailing at a trial. They must, during the conference, weigh their own positions in light of the statements and arguments made by counsel for the opposing parties. It is often true that as a result of such presentations, the clients' positions soften to the extent that meaningful negotiation, previously not seriously entertained, becomes possible. This dynamic is not possible if the only person with authority to negotiate is

> located away from the courthouse and can be reached only by telephone, if at all. The absent decision-maker learns only what his or her attorney conveys by phone, which can be expected to be largely a recitation of what has been conveyed in previous discussions. At best, even if the attorney attempts to convey the weaknesses of that client's position as they have been presented by opposing counsel at the settlement conference, the message, not unlike those in the children's game of "telephone," loses its impact through repetition, and it is simply too easy for that person to reject, out of hand, even a sincere desire on the part of counsel to negotiate further. At worst, a refusal to have an authorized representative in attendance may become a weapon by which parties with comparatively greater financial flexibility may feign a good faith settlement posture by those in attendance at the conference, relying on the absent decision-maker to refuse to agree, thereby unfairly raising the stakes in the case, to the unfair disadvantage of a less wealthy opponent. In either case, the whole purpose of the settlement conference is lost, and the result is an even greater expenditure of the parties' resources, both time and money, for naught.

***6** *Dvorak v. Shibata,* 123 F.R.D. 608, 609–10 (D.Neb.1988) (awarding costs and expenses where attorneys with limited settlement authority appeared for settlement conference). Where, as here, a corporation produces a representative who lacks authority to change the settlement position of the corporation, sanctions may be imposed. *Nick v. Morgan's Foods, Inc.,* 270 F.3d 590, 596 (8th Cir.2001) (imposing sanctions upon entity for "deciding to send a corporate representative with limited [$500] authority to the ADR conference," even though fully authorized party was available by telephone); *Pitman,* 216 F.R.D. at 485–86 (finding production of "a corporate representative ... with limited or capped settlement authority" constituted bad faith, warranting costs).

The circumstances preceding the settlement conference provide important context here. Based on the record, Farmers made a decision in advance of the conference that "the ceiling is zero," and endeavored to derail the Court's effort to facilitate reasoned settlement discussion among the parties. *See* Settlement Tr. 4:20–25. As part of this effort, Farmers filed a request for a four-month adjournment of the settlement conference predicated on the fact that it had not, as yet, deposed plaintiff. *See* October 16 Letter. The Court responded by directing the deposition to go forward before the settlement conference, effectively providing the information that Farmers claimed to be missing. Notwithstanding that defendant obtained a deposition of plaintiff, defendant maintained its "no pay" position. In making that determination, Farmers was within its rights. Unfortunately, its decision to engage in the chicanery that followed was entirely out-of-bounds.

For the settlement conference, apparently having decided that it would not meaningfully participate, Farmers dispatched a representative, Mr. O'Brien, with illusory "settlement authority." When first questioned by the Court as to the nature of the representative's authority, Farmers' counsel stated, "Mr. O'Brien has authority to make the decision as to whether the-we should make an offer on the case...." Settlement Tr. 4:12–15. Upon further inquiry by the Court, though, this turned out to be untrue. Mr. O'Brien acknowledged that he was "not in a position today to change the decision of the company that they will not pay any money on the case." *Id.* 6:7–10. No matter what facts, evidence, or issues arose during the conference, defendant's representative lacked the authority to change Farmers' position or settle the case for so much as ten cents. And when asked by the Court to identify who at the Company had such authority, Mr. O'Brien refused to provide an answer. *Id.* 6:1–6.

Tellingly, defense counsel stated that "Farmers has a process on any case and there are no exceptions." *Id.* 4:20–25. And while that appears to have been Farmers' approach to this matter, a corporation cannot implement an internal process or policy that excuses it from compliance with court orders. In other words, despite what defendant might believe, a court order must prove an exception to its process.

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***7** Based on this record, I find that Farmers did not act in good faith in connection with the court-mandated settlement conference. In fact, the opposite was true, as defendant, through its unilateral actions, rendered the conference superfluous. Farmers opted to proceed with a costly litigation process, attempting to circumvent the early mediation implemented by the Court. This course offers Farmers a distinct tactical advantage, as the burdens of litigation would have far greater impact on plaintiff-an individual former employee—than on defendant—an institutional litigant. Defendant's efforts undermined the Court's process, imposing unnecessary costs upon its adversary and wasting the resources of the Court. As such, I find that defendant acted in bad faith, and an award of expenses and sanctions is appropriate under Rule 16(f).

Fees and Costs

As noted, upon a finding that a party failed to participate in a settlement in good faith, Rule 16(f)(2) requires the imposition of fees and costs upon "the party, its attorney, or both." Here, there is little question that Farmers itself, rather than its outside counsel, should be held responsible. In resolving this question, I believe it fair to consider the fact that Farmers is a sophisticated litigant with internal counsel and significant resources. Moreover, the settlement efforts were frustrated by a corporate "process" created by Farmers, and its refusal to deviate from that process. Thus, the costs are hereby imposed upon defendant, not its outside counsel.

Importantly, an award under Rule 16(f)(2) may be made "only for reasonable expenses incurred because of noncompliance with this rule ." *Mahoney v. Yamaha Motor Corp. U.S.A.,* 290 F.R.D. 363, 371 (E.D.N.Y.2013). On its motion, counsel for plaintiff provided detailed billing records, specifying hourly rates, time expended, and services provided, which appear to be limited to those tasks associated with preparing for and attending the settlement conference and submitting the instant motion. [3] Defendant has not challenged the proposed amount of fees in any way. *See generally* Opp'n. In general, I find the hours spent and rates sought reasonable. At $400 per hour, Mr. Gregory Lisi, counsel for plaintiff, is well within normal limits for a partner with some experience. *Hugee v. Kimso Apartments, LLC,* 852 F.Supp.2d 281, 298–99 (E.D.N.Y.2012) (rates awarded for partners in this district generally range from $300–450); *see also* *Konits v. Karahalis,* 409 F. App'x 418, 422–23 (2d Cir.2011) (adopting the view that the prevailing rates for experienced attorneys in the Eastern District range from $300–$400 per hour). At the same time, I find that the rate sought for Ms. Susan Deith ($350 per hour) somewhat higher than that usually awarded in this district for a senior associate, which is generally $200–300 per hour. *See Hugee,* 852 F.Supp.2d at 299 (rates for senior associates generally range from $200–300). Thus, though the total sought is $4,695, by reducing Ms. Deith's hourly rate to $250, the appropriate amount to be awarded is $4,185.

***8** The Court retains the discretion to award a portion of these fees, rather than their entirety. *Uretsky v. Acme Am. Repairs,* 2011 WL 1131326, at * 1 (E.D.N.Y.2011) ("While the rule permits fee shifting, it does not create an entitlement to full compensation" (internal quotation marks omitted)). I decline to do so here, though, as partial awards are generally reserved for "sanctions for reasons other than acting in bad faith." *Mahoney,* 290 F.R.D. at 372. Moreover, though the Court is required to consider the financial situation of a party against which costs are being assessed, *Sassower v. Field,* 973 F.2d 75, 81 (2d Cir.1992), Farmers has not, and likely could not, claim pecuniary hardship. In sum, I find that defendant's noncompliance was not substantially justified and that no other circumstances make an award of expenses unjust.

Additional Sanctions

Having determined that defendant must pay plaintiff's expenses, the remaining question is whether additional sanctions should be imposed. The Second Circuit has observed:

> We are cognizant of the unique dilemma that sanctions present. On the one hand, a court should discipline those who harass their opponents and waste judicial resources by abusing the legal process. On the other hand, in our adversarial system, we expect a litigant and his or her attorney to pursue a claim zealously within the boundaries

> of the law and ethical rules. Given these interests, determining whether a case or conduct falls beyond the pale is perhaps one of the most difficult and unenviable tasks for a court.

Schlaifer Nance & Co., Inc. v. Estate of Warhol, 194 F.3d 323, 341 (2d Cir.1999).

At the same time, the Supreme Court has directed that, upon a finding of bad faith, sanctions should be imposed "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *Nat'l Hockey League v. Metro. Hockey Club, Inc.,* 427 U.S. 639, 643, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976) (per curiam) (upholding dismissal of an antitrust action as a sanction for discovery violations). The Second Circuit has held that disciplinary sanctions pursuant to Rule 37—which are plainly analogous to Rule 16(f) sanctions—serve three functions:

> First, they ensure that a party will not benefit from its own failure to comply. Second, they are specific deterrents and seek to obtain compliance with the particular order issued. Third, they are intended to serve a general deterrent effect on the case at hand and on other litigation, provided that the party against whom they are imposed was in some sense at fault.

Update Art, Inc. V. Modiin Publ'g, Inc., 843 F.2d 67, 71 (2d Cir.1988) (upholding magistrate judge's imposition of substantive damages as a sanction for discovery violations).

In the context of Rule 37 sanctions, district courts must consider several factors when deciding whether to impose sanctions, such as " '(1) the willfulness of the non-compliant party or the reason for noncompliance; (2) the efficacy of lesser sanctions; (3) the duration of the period of noncompliance, and (4) whether the non-compliant party had been warned of the consequences of noncompliance.' " *S. New England Tel. Co. v. Global NAPs Inc.,* 624 F.3d 123, 144 (2d Cir.2010) (quoting *Agiwal v. Mid Island Mortg. Corp.,* 555 F.3d 298, 302 (2d Cir.2009)). " 'Because the text of the rule requires only that the district judge's orders be just, however, and because the district court has wide discretion in imposing sanctions under Rule 37, these factors are not exclusive, and they need not each be resolved against the party' against whom sanctions are imposed in order to be within the district court's discretion." *Ceglia v. Zuckerberg,* No.2012 WL 95362, at *8 (W .D.N.Y. Jan. 10, 2012) (quoting *S. New England Tel.,* 624 F.3d at 144 (further internal citation omitted)).

***9** Several of the factors set forth in *Southern New England Telephone* weigh in favor of the imposing sanctions. The conduct here was willful, and the acts of defendant in attempting to frustrate the settlement process extended over weeks—beginning some time before its request for a four-month adjournment through the date of the settlement conference itself. Defendant had been expressly and specifically cautioned that "the failure of an authorized representative to appear may result in sanctions." Individual Rules II.B.3. The issue of "lesser sanctions" militates against the imposition of dismissal or default judgment before the consideration of less severe alternatives. *S. New England Tel.,* 624 F.3d at 144. Notably, though, Farmers has been sanctioned previously for violating court orders. *See, e.g., Farmers Ins. Exch. V. Kurzman,* 257 Mich.App. 412, 424, 668 N.W.2d 199 (Mich.Ct.App.2003) (upholding "sanctions for Farmers' failure to comply with discovery orders").

The question then is whether any of the sanctions specified in Rule 37(b)(2)(A)(ii)-(vii), which include a panoply of remedies that would have a substantive effect on the case —such as striking defendant's answer—are appropriate here. Given the early stage of the proceedings and given the fact that this episode represents the first transgression by defendant in this case, I find that these sanctions are too severe and inappropriate at this juncture. *S. New England Tel.,* 624 F.3d at 144 ("dismissal or default imposed pursuant to Rule 37 is a drastic remedy generally to be used only when the district judge has considered lesser alternatives" (internal

quotation marks omitted)). Of course, that is not the end of the inquiry.

Because Rule 16(f) authorizes the Court to issue "any just orders," the notion of an additional monetary sanction, payable to the Clerk of the Court, provides an obvious alternative to these draconian sanctions. As the Eighth Circuit held:

> Rule 16(f) expressly permits a judge to impose any other sanction the judge deems appropriate in addition to, or in lieu of, reasonable expenses. Here, the district court judge acted well within his discretion by imposing a monetary fine payable to the Clerk of the District Court as a sanction for failing to prepare the required memorandum, deciding to send a corporate representative with limited authority to the ADR conference, and for vexatiously increasing the costs of litigation by filing a frivolous motion for reconsideration.

Nick, 270 F.3d at 595–96 (citation omitted). A monetary penalty paid to the court has the added benefits of avoiding a windfall to the adversary and helping to offset the costs imposed on public institutions by dilatory conduct.

Fixing an amount is somewhat more difficult. The interests that need to be served include the factors identified by the Supreme Court in the *National Hockey League* case—punishment and specific and general deterrence, as well as an additional factor discussed by the Second Circuit in *Update Art*—ensuring a party does not profit by misconduct. *See generally* 427 U.S. at 643, 843 F.2d at 71. As noted, courts are required to consider the financial wherewithal of the party subject to be sanctioned in fixing the amount of the penalty. However, given that Farmers financial metrics are measured in the hundreds of millions and, in certain instances, billions of dollars, it is difficult, if not impossible, to calculate a fair penalty that will truly act as a deterrent to an entity with such substantial resources. Nor is it possible to quantify the "profit" gained by defendant, though circumstance and logic dictate that there was some value for Farmers in delaying the proceedings. And, of course, any penalty assessed will almost certainly pale in comparison to the staggering costs of litigation, further weakening the deterrent effect. [4]

***10** Thus, fixing the amount largely turns on the issue of punishment. In evaluating a punitive-damages award, the Supreme Court has stated that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct," noting that "trickery and deceit are more reprehensible than negligence." *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 575–76, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) (internal quotation marks omitted). The Court observed that "[t]he principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree," cataloging scores of enactments providing for double, treble, and quadruple damages dating back to as early as 1275. *Id.* at 580–81. Though an imperfect solution, this approach must do. [5] As such, in addition to the sum to be paid to plaintiff's counsel to compensate it for the costs expended by defendant's actions, I direct that Farmers shall pay an additional equal amount, *i.e.,* $4,185, to the Clerk of the Court as an additional sanction pursuant to Rule 16(f)(1) for failing to comply with the orders and rules of this Court.

CONCLUSION

Based on the foregoing, it is hereby ORDERED that Farmers is sanctioned under Rule 16(f) and shall pay, within thirty days of the date of this Order:

1. The sum of $4,185 to plaintiff's counsel, representing the expenses incurred as a result of defendant's dilatory conduct pursuant to Rule 16(f)(2); and

2. An equal amount—$4,185—to the Clerk of the Court as an additional monetary sanction pursuant to Rule 16(f)(1).

All Citations

Not Reported in F.Supp.3d, 2014 WL 1284635

Footnotes

1 While the precise figures are difficult to ascertain, according to the Administrative Office of the United States Courts, during 2009 through 2012, approximately 1% of civil cases filed in the U.S. District Courts reached trial. Administrative Office of the United States Courts, *Civil Cases Terminated, by Action Taken Table 4.10,* http:// www.uscourts.gov/uscourts/Statistics/ JudicialFactsAndFigures/2012/Table410.pdf (last visited Mar. 14, 2014); *see also generally* Administrative Office of the United States Courts, *Judicial Facts and Figures of 2012,* http:// www.uscourts.gov/Statistics/JudicialFactsAndFigures/ judicial–facts–figures–2012.aspx (last visited Mar. 14, 2014). While pretrial termination may be due to a number of factors, settlement is undoubtedly the largest. *McDermott, Inc. v. AmClyde,* 511 U.S. 202, 215 n. 22, 114 S.Ct. 1461, 128 L.Ed.2d 148 (1994) ("the bulk of the nontrial terminations reflect settlements.").

2 Plaintiff also argues that defendant "surreptitiously used the Court's order to obtain expedited discovery." Mot. 2. I reject this argument because defendant did not request an expedited deposition, but rather was seeking a lengthy adjournment.

3 Although plaintiff's counsel did not submit information about the experience of the two attorneys (which is generally required), the firm's website provided sufficient information about these counsel for the Court to assess the billing rates. I opted to rely on this publicly available information rather than further increase the legal fees generated by this matter.

4 Of course, the mere fact of being subjected to sanction may serve as a disincentive against future misconduct.

5 The willful disregard of this Court's directives and defendant's misguided attempt to conceal its actions could well justify a more significant sanction. On balance, though, I believe the sanction set forth herein is sufficient for present purposes.

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