

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

JIM SISNEY, an individual,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 09-CV-253-TCK-PJC
)	
INDEPENDENT SCHOOL DISTRICT)	
NO. 3 OF TULSA COUNTY, a Political)	
Subdivision; and the BROKEN ARROW)	
SCHOOL BOARD,)	
)	
Defendants.)	

**DEFENDANT’S MOTION TO COMPEL DISCLOSURE
AND BRIEF IN SUPPORT**

Defendant Independent School District No. 3 of Tulsa County, Oklahoma a/k/a Broken Arrow Public Schools (the “District”)¹ moves for an order compelling the plaintiff to produce a computation of each category of damages as required by Federal Rule of Civil Procedure 26.

Pursuant to LCvR 37.1, the District’s counsel and plaintiff’s counsel have in good faith conferred in writing regarding this discovery dispute and the District’s counsel has attempted to confer in good faith by phone. Despite this effort, the parties have been unable to resolve the dispute. In support hereof, the District would refer the Court as follows:

¹ The Board of Education of the Broken Arrow School District (the “School Board”) is the governing body of the Broken Arrow School District. OKLA. STAT. tit. 70, § 5-106 (2008 Supp.). It has no independent legal existence apart from the Broken Arrow School District and is not an entity capable of being sued separately from the School District. OKLA. STAT. tit. 70, § 5-105 (2001).

1. On August 18, 2009, the plaintiff served his initial discovery disclosures pursuant to Federal Rule of Civil Procedure 26. Pursuant to Rule 26, a disclosing party must provide “a computation of each category of damages claimed by the disclosing party[.]” In his initial disclosures, the plaintiff failed to comply with Rule 26 and, instead, remarked, “Pursuant to Rule 26(a)(1)(A)(iii), Plaintiff is unable to calculate or provide Plaintiff’s damages at this time.” (See Exhibit 1).

2. Counsel for the District contacted plaintiff’s counsel by email on August 26, 2009, to remind counsel of their affirmative duty to comply with the mandatory disclosure requirements of the Federal Rules and to request that the plaintiff provide a computation of each category of damages by the close of business on August 31, 2009. Counsel for the District also enclosed with this email an unpublished opinion by Judge White of the Eastern District of Oklahoma addressing the computation of damages issue and the duty of adequate disclosure. (See Exhibit 2).

3. On August 27, 2009, plaintiff’s counsel, by email, responded to the August 26, 2009 email, agreeing to supplement the disclosure and stating that she could not “guarantee” compliance by the close of business on August 31, 2009 because the request required “some fairly specific calculations.” (See Exhibit 3).

4. Between August 27, 2009 and September 10, 2009, counsel for the District left three phone messages for plaintiff’s counsel. Plaintiff’s counsel failed to return any of the phone messages. On September 10, 2009, counsel for the District contacted plaintiff’s counsel by email, informing plaintiff’s counsel that the District had still not received any supplement to the computation of damages disclosure and that the District

would be forced to file a motion with this Court to compel compliance if the plaintiff continued to refuse to cooperate.

Shortly thereafter, plaintiff's counsel responded to the District's counsel's email and announced her intentions to supplement the disclosure but explained that she was waiting on the "appropriate supplementation" in order to do so. In response, counsel for the District sent an email contesting plaintiff's delay and invited plaintiff's counsel to a phone conference to discuss the matter. (See Exhibit 4).

5. Counsel for plaintiff subsequently agreed by e-mail that plaintiff would provide the supplement by the close of business on September 21, 2009. (See Exhibit 5).

6. On September 21, 2009, plaintiff served the District with a supplemental disclosure for the computation of damages. However, the plaintiff, again, failed to comply with Federal Rule of Civil Procedure 26, stating simply that "A complete computation of any category of Plaintiffs' [sic] damages has not been formulated at this point in time" and that "Plaintiff asserts that he is seeking the recovery of compensatory damages in the amount of \$2,500,000.00" and "seeking the recovery of punitive damages in the amount of \$2,500,000.00." Plaintiff failed to provide the necessary computation, simply providing a lump sum and listing categories of damages without any specific allocations or documentation in support. (See Exhibit 6).

7. On September 28, 2009, counsel for the District made another attempt to resolve this matter by leaving a phone message with plaintiff's counsel. This same day, the counsel for the District sent an email asking the plaintiff's counsel to call him by the

end of the day and informing plaintiff's counsel that the District would be filing a motion to compel.

On October 5, 2009, counsel for the District made a final attempt to contact plaintiff's counsel by telephone and e-mail to inform them that the District would be filing its motion to compel that afternoon if plaintiff's counsel failed to contact the District's counsel. (See Exhibit 7).

8. None of the attempts to resolve this matter informally through phone calls, emails and other correspondence has been successful.

LEGAL ARGUMENT AND AUTHORITIES

Federal Rule of Civil Procedure 26(a)(1)(A)(iii) mandates a party, without awaiting a discovery request, to provide to the other parties:

a computation of each category of damages claimed by the disclosing party— who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered[.]

Federal Rule of Civil Procedure 37(a)(4) further provides that “an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond. Upon noncompliance, Rule 37 additionally allows an affected party to move for an order to compel disclosure as mandated by Rule 26(a).

The Rule 26(a)(i)(A)(iii) computation of each category of damages requires “more than a lump sum statement of the damages allegedly sustained” and “contemplates some analysis.” *McKinney v. Reassure America Life Insurance*, 2006 WL 3228791 at *2 (E.D. Okla. Nov. 2, 2006) (quoting *City and County of San Francisco v. Tutor-Saliba Corp.*,

218 F.R.D. 219, 221 (N.D. Cal. 2003)). Furthermore, although the meaning of “category” in Rule 26 is unclear, “it requires more than merely the broad types of damages (‘wrongful death,’ ‘property damage,’ ‘bodily injury,’ etc.). To make the disclosure obligation meaningful, a more detailed specification of damages is apparently required.” *Id.* (quoting *Rutter Group, Fed. Civ. Proc. Before Trial* § 11:166 (2001)); *Ponca Tribe of Indians of Oklahoma v. Continental Carbon Company*, 2008 WL 5122988 at *3 (W.D. Okla. Dec. 4, 2008) (computation of damages sufficient where the disclosing party explained that it sought damages in the amount spent in remedying the damage caused and provided in support a 25-page analysis table); *City and County of San Francisco*, 218 F.R.D. at 221 (“The Court concludes that Plaintiff should provide its assessment of damages in light of the information currently available to it in sufficient detail so as to enable each of the multiple Defendants in this case to understand the contours of its potential exposure and make informed decisions as to settlement and discovery.”).

In *McKinney*, the district court determined the plaintiff’s supplemental disclosure insufficient to satisfy the requirements of Rule 26. 2006 WL 3228791 at *1 (“Counsel who make the mistake of treating Rule 26(a)(1) disclosures as a technical formality, rather than as an efficient start to relevant discovery, do their clients no service and necessarily risk the imposition of sanctions.” (quoting *Sender v. Mann*, 225 F.R.D. 645, 650 (D. Colo. 2004))). Specifically, the plaintiff in *McKinney* merely stated that he was “entitled to ‘emotional distress’ types of damages based on his claims for negligence,

common law fraud, breach of fiduciary duty and/or bad faith, and conversion” and anticipated requesting damages in the range of \$500,000 to \$2,000,000. *Id.*

As set forth above, the District has made multiple efforts to contact the plaintiff in an effort to persuade the plaintiff to properly comply with Rule 26. However, the plaintiff has failed to provide an adequate computation of damages. After more than a month of negotiation, the plaintiff has only provided a lump statement of damages, has failed to provide any documentation in support of such amount, and has failed to provide any guidance whatsoever as to what portion of the anticipated monetary award relates to what type of damage (*e.g.*, loss of earnings, diminished earning capacity, mental pain and suffering, etc.). Accordingly, the District requests an Order from the Court compelling a computation of each category of damages and the evidentiary support for each category.

WHEREFORE, the District moves the Court for an Order:

1. Compelling plaintiff to fully comply with Federal Rule of Civil Procedure 26(a)(i)(A)(iii) and provide an adequate computation of damages and evidentiary support as mandated.
2. Awarding the District its attorney fees and costs associated with this matter, pursuant to Federal Rule of Civil Procedure 37(a)(5), together with such other relief as the Court deems just and proper.

Respectfully submitted,

s/ Kent B. Rainey

Kent B. Rainey

Oklahoma Bar Number: 14619

Attorney for Defendant

Rosenstein, Fist & Ringold

525 South Main, Suite 700

Tulsa, OK 74103

(918) 585-9211

Fax: (918) 583-5617

borainey@rflaw.com

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of October, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

Gary L. Richardson
Charles L. Richardson
Denise P. James
6450 S. Lewis, Suite 300
Tulsa, OK 74136

Attorneys for the Plaintiff

s/ Kent B. Rainey

Kent B. Rainey