IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

MAURICE JAMES SJOBLOM,
on behalf of himself and a class of employees
and/or former employees similarly situated,

ORDER

Plaintiff,

07-cv-451-bbc

v.

CHARTER COMMUNICATIONS, LLC and
CHARTER COMMUNICATIONS, INC.,

Defendants.

- -

Before the court is plaintiff's Rule 37(b) motion for sanctions against defendant Charter Communications, LLC for noncompliance with this Court's January 4, 2008 order compelling discovery. Plaintiff contends that his ability to submit supplemental information in support of his motion for conditional certification of a collective action was hindered by defendant's untimely and incomplete responses to the first set of discovery requests. As relief, plaintiff seeks 1) an order granting conditional certification of a federal collective action or, in the alternative, precluding defendant from opposing conditional certification; 2) a monetary sanction of $5,000 a day between January 11, 2008 and February 10, 2008 (30 days) and $10,000 a day thereafter until all discovery has been produced; and 3)

reasonable attorneys' fees and costs associated with bringing the motion. Defendant disputes the specific deficiencies identified by plaintiff, asserts that it has worked diligently and in good faith to respond to plaintiff's discovery requests and argues that plaintiff has not suffered prejudice as a result of any misunderstandings or delays in the discovery process.

I agree that defendant violated the discovery order and had not fully complied with plaintiff's first set of discovery requests as of February 11, 2008. Accordingly, defendant shall pay plaintiff $1,000 a day from January 11, 2008 to February 11, 2008 and reasonable attorneys' fees and costs associated with bringing the motion. If defendant was in violation of the discovery order after February 11, 2008, I will consider additional, more severe sanctions after hearing from the parties. Because the court conditionally certified a federal collective action on March 4, 2008, dkt. #239, plaintiff's request for a peremptory grant of his motion for conditional certification is moot. In any event, summarily granting plaintiff's motion and certifying a nationwide collective action would be an overly extreme sanction for defendant's violation of the discovery order.

Before I address the parties' arguments, I will summarize the relevant allegations contained in the affidavits and documents submitted by the parties.

ALLEGATIONS OF FACT

On December 21, 2007, plaintiff filed a motion to compel defendant Charter Communications, LLC to respond to plaintiff's first set of interrogatories, first request for production of documents and first request for admissions. Among other things, plaintiff asked defendant to identify and produce documents related to putative federal class members and individuals with the most knowledge of the compensation and time-keeping policies regarding putative class members. In an order entered on January 4, 2008, this court granted the motion and ordered defendant to serve full and complete responses to plaintiff's discovery requests no later than noon on January 10, 2008. Dkt. #166. In a letter dated January 8, 2008, plaintiff's attorney Timothy Edwards agreed to extend the deadline for response until close of business on January 10, 2008. Dkt. #187, Exh. #1. Defendant filed supplemental answers to plaintiff's first set of discovery requests on January 10, 2008. Dkt. #187, Exh. #2.

Interrogatory No. 2 asked for the identity of all individuals whom defendant has authorized to drive their assigned vehicles home at the conclusion of their shifts and whether defendant paid those employees wages or overtime for certain activities identified in the amended complaint. Dkt. #187, Exh. #2 at 3. Defendant produced a number of documents in response to Interrogatory No. 2 that identified employees who "have or may have taken" a company vehicle home overnight. Request for Production No. 12 asked for

documents related to motor vehicle accidents involving employees who took their vehicle home; Request for Production No. 13 asked for documents related to payment or reimbursement of expenses incurred by putative class members for vehicle cleaning, maintenance or repair; and Request for Production No. 14 asked for documents relating to physical injuries suffered by employees who take their vehicle home. Dkt. #187, Exh. #2. Defendant objected to Requests for Production Nos. 12-14 and indicated that it would respond to the requests at a time mutually agreeable to the parties. Id. Defendant also indicated that it would be supplementing its responses to Interrogatory Nos. 4, 5, 12 and 13 with the names of its fulfilment and system engineer supervisors and managers. Id.

In a letter dated January 14, 2008 to Edwards, defendant's attorney Bradley Strawn indicated that the last known home addresses of some putative class members were omitted inadvertently from the response to Interrogatory No. 2 and enclosed a disk with some of the missing information. Dkt. #187, Exh. #3. Strawn sent Edwards documents in response to Request for Production No. 12 on January 15, 2008. Dkt. #212, Exh. #13. On January 17, 2008, Strawn sent Edwards two more disks further supplementing defendant's responses with the work cities of putative class members (Interrogatory No. 2), a list of fulfilment and system engineer supervisors and managers (Interrogatory Nos. 4, 5, 12 and 13) and documents related to payment or reimbursement of expenses incurred by putative class

members for vehicle cleaning, maintenance or repair (Request for Production No. 13). Dkt. #187, Exh. ## 4 and 15.

On January 23, 2008, Strawn sent Edwards a disk containing further information in response to Requests for Production Nos. 13 and 14. Dkt. #212, Exh. #12. In a January 24, 2008 teleconference, Strawn told Edwards that defendant could not definitively state whether employees had been paid for the activities identified in Interrogatory No. 2 without speaking to putative class members, something defendant was barred from doing. Dkt. #212, Exh. #6 at ¶ 10. In a February 4, 2008 letter to Edwards, Strawn stated that he had enclosed the remaining missing addresses for the putative class members. Dkt. #212, Exh. #5. However, as of February 11, 2008, Charter had not produced 327 telephone numbers for putative class members. Dkt. #221, ¶ 12.

On February 6, 2008, defendant further supplemented its response to Interrogatory No. 2, explaining that the previously submitted spreadsheets contained one of the following in an extra column: "yes," "no," "unknown," "?" or blank. Defendant explained that these terms designate whether the individual was a potential class member, not a potential class member or their status was unknown. Defendant indicated that a blank meant that the individual was a potential class member. Dkt. #220, Exh. #3. As of February 11, 2008, plaintiff had not yet received defendant's response to Interrogatory No. 2 as to whether putative class members received compensation for loading and unloading equipment, travel

to and from work and other off-the-clock work activities. Dkt. #220, ¶ 20. Charter supervisors must approve overtime in advance. Id. at ¶ 21.

In creating job postings for open technician positions, defendant uses a computer program that imports information on job duties directly from the job description for the position and this data cannot be modified by local human resources or recruiting personnel. Dkt. #212, Exh. #8 at 1.

DISCUSSION

Plaintiff identifies a number of alleged deficiencies in defendant's responses to the first set of discovery requests. First, plaintiff asserts that in response to Interrogatory No. 2, defendant failed to provide information on whether 2900 putative class members in the following market areas were authorized to take and keep a Charter vehicle overnight: Louisiana; New England; West Virginia; Inland Empire, California; Los Angeles, California; North Central California; other California areas; and Nevada. Defendant argues that in its response to Interrogatory No. 2, it explained that it provided plaintiff with the names of individuals who might be potential class members in these markets. Defendant asserts that confusion arose because it had included an extra column on some spreadsheets that contained one of the following: "yes," "no," "unknown," "?" or nothing. Defendant explains that these terms designate whether the individual was a potential class member, not a

potential class member or their status is unknown. According to defendant, the parties have since resolved the misunderstanding. Defendant also argues that plaintiff was not prejudiced by the misunderstanding because he has obtained an affidavit in support of conditional certification from an individual who was designated "unknown." See dkt. #202. Apparently the parties apparently resolved this issue after plaintiff filed his motion. Even so, defendant failed to properly clarify in a timely manner whether 2900 putative class members were authorized to take and keep a Charter vehicle overnight.

Plaintiff alleges that defendant did not provide the identity of putative class members in the time ordered by the court and has yet to provide telephone numbers for 327 putative class members. Defendant argues that it has worked in good faith to provide addresses and phone numbers, pointing out that it supplemented its response with missing information on January 14, 2008, January 17, 2008 and February 4, 2008. Defendant argues that plaintiff had the addresses and phone numbers for more than 5,000 potential class members. It also claims that it attempted to minimize the prejudice to plaintiff by offering him a 19-day extension on the deadline for filing additional evidence related to his motion for conditional certification. Although I agree that defendant conscientiously supplemented its response, it did not become diligent until mid-January 2008, well after the discovery deadline and more than a month after the original response was due in December 2007. Further, as of February 11, 2008, information was still missing from defendant's response. Defendant

cannot escape its obligation to respond to discovery requests by providing plaintiff with partial information or offering extensions to court ordered deadlines. The court will not tolerate a litigation strategy that depends on waiting until the last minute to respond to a discovery order and then sporadically supplementing that response when the party chooses.

Plaintiff also contends that defendant's response to Interrogatory No. 2 was deficient in that it did not identify whether putative class members were paid wages or overtime for certain activities identified in the amended complaint. Defendant asserts that it omitted this information from its initial response inadvertently and that it would not have been able to respond to the request in any event. Defendant argues that it would have had to interview potential class members about whether they recorded their time spent engaging in these activities and such communications are prohibited by the court order. I question the validity of these excuses.

Even if defendant initially forgot to respond to the second half of Interrogatory No. 2, defendant supplemented its response three times. Defendant maintains that the best source of information regarding compensation is the employee. However, as plaintiff argues, defendant had other likely sources for this information, including employee pay records and its supervisors, who are responsible for approving overtime requests. Defendant asserts that timesheets and payroll records would not have provided the information sought by plaintiff and that it understood that it did not have to produce these type of documents under its oral

agreement with plaintiff's attorneys, see dkt. #212, Exh. #6 ¶¶ 4-9. Plaintiff's attorneys deny reaching any such agreement. Even if pay records would not have provided this information, defendant failed to make other efforts to identify other sources. Moreover, if defendant believed that the protective order would prohibit it from properly responding to a discovery request, it should have presented its dilemma to the court and asked for clarification, an approach that defendant has used on two other occasions in this lawsuit.

Plaintiff alleges that defendant did not produce all of the documents in its possession that describe the specific job duties and performance expectations for individuals interviewed for or hired in the positions covered by the proposed class definition (Request for Production No. 1). In support of its argument, plaintiff submitted a number of different national job postings that he found for Broadband Technicians but that defendant did not produce in response to the production request. Dkt. #187, Exh. #13. Defendant contends that it produced the job descriptions for all of the putative class positions except Broadband Technician I, the description for which plaintiff already had in his possession. It claims that it did not provide plaintiff with every job posting for the putative class positions because the postings are created by incorporating information from the job descriptions. However, as plaintiff points out, defendant may not avoid its duty to respond to discovery requests because the information should be otherwise available.

Finally, plaintiff points out that defendant made an untimely and incomplete response to Request for Production No. 13 (payment or reimbursement for maintenance of

assigned Charter vehicles) and an untimely response to Request for Production 14 (physical injuries suffered by Charter employees who take vehicles home). Both parties state in their briefs that they had agreed that defendant would respond to Requests for Production Nos. 12 and 14 on or before January 15, 2008 and to Request for Production No. 13 on a rolling basis with all documents being produced on or before January 21, 2008. Dkt. #184 at 4-5 and #212 at 13. Given this agreement, defendant missed the deadline by a few days.

Some of defendant's excuses could be considered reasonable under certain circumstances. However, considering that defendant had more than two months to compile information in response to plaintiff's requests before being ordered to do so by the court, the number of deficiencies and the fact that its responses still were not complete as of February 11, 2008, I believe that a monetary sanction is appropriate. Defendants shall pay plaintiff $1,000 a day from January 11, 2008 to February 11, 2008 and reasonable attorneys' fees and costs associated with bringing the motion. If defendant was in violation of the discovery order any time after February 11, 2008, I will consider additional, more severe sanctions after hearing from the parties. Although plaintiff's request for a peremptory grant of the motion for conditional certification is moot, see March 4, 2008 order granting conditional certification, dkt. #239, I would deny it in any event. Summarily granting plaintiff's motion and certifying a nationwide collective action would be an overly extreme sanction for defendant's violation of the discovery order.

ORDER

IT IS ORDERED that plaintiff's motion for sanctions is GRANTED. Pursuant to Fed. R. Civ. P. 37(b)(2), defendant Charter Communications, LLC shall pay plaintiff $1,000 per day between January 11, 2008 and February 11, 2008 and reasonable attorneys' fees and costs associated with bringing the motion. Plaintiff has until April 7, 2008 to pay plaintiff the monetary sanction and to submit an itemization of expenses incurred in presenting his motion. Defendant has until April 14, 2008 by which to object to the reasonableness of the claimed expenses.

Entered this 28th day of March, 2008.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge