DOCKET NO. X07 HHD-CV-14-5037565-S

CONNECTICUT COALITION FOR JUSTICE IN EDUCATION FUNDING, INC., et al.	:	SUPERIOR COURT
Plaintiffs	:	COMPLEX LITIGATION DOCKET
v.	:	AT HARTFORD
RELL, M. JODI et al.	:	
Defendants	:	MARCH 6, 2014

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL AND/OR PRECLUDE

Some two years after school districts objected to Defendants' subpoenas for teacher evaluations, Defendants have filed a motion to compel production of these evaluations. Defendants assert that the request is not burdensome because Plaintiffs' legal team should assist the school districts in redacting what is estimated to be upwards of 100,000 pages of evaluations. At the same time, Defendants' seek to preclude Plaintiffs' claims relating to teacher quality should the districts not comply. Defendants' motion as it affects Plaintiffs has no basis in law, is unfair, is premature, and should be denied.

This memorandum of law addresses two issues in Defendants' motion that directly affect Plaintiffs: (1) Defendants' meritless argument that Plaintiffs should suffer preclusion of a claim because of the Defendants' discovery dispute with third parties, *see* Defendants' Memorandum of Law, Doc No. 103.00 ("Def. Mem."), at 2; and (2) Defendants' assertion that the Plaintiffs should be obliged to alleviate the burden that Defendants' third party subpoena has placed on non-parties, *see* Def. Mem. at 2.

I. The State's Motion to Preclude has No Basis in Law, is Unfair and is Premature

The State cites no support – either in the Practice Book or the case law – for its bizarre theory that a party (Plaintiffs) should suffer a sanction, let alone the extreme sanction of the preclusion of a claim, because of an adverse party's (Defendants') discovery dispute with a third party (the school districts). The only rule cited by Defendants in their Motion to Compel and/or Motion to Preclude is Practice Book § 13-14. However, this rule says nothing whatsoever about sanctioning parties for the non-compliance of *others* with discovery orders:

> *"(a) If any party has … failed to respond to requests for production … the judicial authority may, on motion, make such order as the ends of justice require. (b) Such orders may include the following: … (1) The entry of an order prohibiting the party who has failed to comply from introducing designated matters in evidence"*. (P.B. § 13-14, emphasis added)

Simply put, there is no basis under the rules for the Court to order preclusion of Plaintiffs' claims. Indeed, the Supreme Court has been hesitant to sanction even a party under P.B. § 13-14 for the misconduct of that party's own employees in certain circumstances. *See Evans v. Gen. Motors Corp.*, 277 Conn. 496, 520, 522 (2006) (declining to award default judgment against corporation for intentionally false testimony given by corporate employees because the "chiefs" of the company were not implicated). This approach is unsurprising given the Supreme Court's requirement that sanctions be proportionate to the *sanctioned entity's* misconduct. *Millbrook Owners Ass'n, Inc. v. Hamilton Standard*, 257 Conn. 1, 17 (2001). Sanctioning a party for the non-compliance of a third party flies in the face of this principle, and is grossly unfair.

In addition, the State's motion to preclude is premature. It calls for this Court to decide the appropriate sanction for a hypothetical breach of a hypothetical order that this Court may or may not issue. *Millbrook* sets out a clear test for the order of discovery sanctions: "First, the order to

be complied with must be reasonably clear. . . . Second, the record must establish that the order was in fact violated. . . . Third, the sanction imposed must be proportional to the violation." *Millbrook*, 257 Conn. at 17-18. None of these factors is present here. After all, "subpoenas issued by lawyers without any review by a judicial authority are not 'judicial orders' unless and until their validity and enforceability have been approved by an order of the court." *Pike v. Anderson*, X01CV010165364S, 2002 WL 31304235 at *3 (Conn. Super. Ct. Sept. 18, 2002). Here, there is no "order to be complied with"; the State is currently asking that one be issued and the school districts (and Plaintiffs) object to such an order. Accordingly, an order cannot have been "in fact violated"; there is nothing to violate. That being the case, the Court lacks the predicates necessary to determine what sanction would be "proportional."

In short, Defendants' motion to preclude has no basis in law, is unfair, is premature, and accordingly must be denied.

II. Plaintiffs' Counsel Cannot "Alleviate the Burden" the State's Subpoena Imposes On The Districts, and There Is No Basis for Such An Order

Defendants' assertion that the burdensome nature of their discovery requests to school districts should, and can, be alleviated by Plaintiffs (Def. Mem. at 2), is equally meritless.

First, Plaintiffs do not have "more than adequate resources," to assist the non-party districts in complying with third-party discovery. As outlined in the school districts brief, the scale of the redactions needed would be enormous, estimated to be conservatively upwards of 100,000 pages. Plaintiffs are individual school children and their parents, as well as a non-profit organization. Plaintiffs' pro bono Connecticut counsel—but not Plaintiffs' lead counsel— agreed, with the consent of all concerned (including Defendants), to represent pro bono the school districts in

connection with the State's discovery demands. But that assistance does not cure what is an incredibly burdensome, and unreasonable, request.

Second, to the extent Defendants' suggestion extends to all of Plaintiffs' counsel, Districts' concerns about confidentiality would not be addressed by having lawyers that do not represent them receiving teacher evaluations and redacting them. Nor is there any reason to believe that the Districts would consent to have lawyers that do not represent them making decisions about what to redact – redacting the teacher evaluations would not simply involve redacting names, but also redacting any other identifying information. The notion that Plaintiffs' entire legal team should be responsible for redacting 100,000 pages of documents held by third parties is entirely unworkable.

Third, Defendants are unable to cite even one example of a court ever ordering that a party alleviate the burden on a non-party responding to a third party subpoena. Accordingly, there is no basis for the Court to make such an order.

CONCLUSION

For the foregoing reasons, Defendants' motion to compel and/or motion to preclude should be **DENIED.**

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