IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BENJAMIN AUSLANDER Plaintiff, v. TREDYFFRIN/EASTTOWN SCHOOL DISTRICT, ET. AL. Defendants	:	No: 2:22-cv-01425-HB

ORDER

AND NOW, this _____ day of August 2022, upon consideration of plaintiff's motion to compel the depositions of Wendy Towle and Oscar Torres, and any response in opposition, it is hereby ordered that the motion is **GRANTED**. Towle and Torres shall appear for deposition testimony within ten (10) days of the date of this Order. **IT IS FURTHER ORDERED** that under Fed. R. Civ. P. 37(d)(3) sanctions are entered against counsel for defendant, Brian Elias, Esquire, and the Court orders him to pay reasonable attorneys fees in the amount of $5000 to counsel for plaintiff for the costs incurred in preparing and filing this motion.

BY THE COURT:

_____
THE HONORABLE HARVEY BARTLE III

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BENJAMIN AUSLANDER Plaintiff, v. TREDYFFRIN/EASTTOWN SCHOOL DISTRICT, ET. AL. Defendants	:	No: 2:22-cv-01425-HB

MOTION TO COMPEL DEPOSITIONS

Under Fed. R. Civ. P. 37(a), Plaintiff, Benjamin Auslander, moves for an order compelling the depositions of Wendy Towle and Oscar Torres of defendant Tredyrffrin/Easttown School District. Plaintiff further moves for sanctions in the form of attorney's fees and costs against counsel for defendants, Brian Elias, Esquire, under Fed. R. Civ. P. 37(d).

Respectfully submitted,

Dated: July 29, 2022

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BENJAMIN AUSLANDER Plaintiff, v. TREDYFFRIN/EASTTOWN SCHOOL DISTRICT, ET. AL. Defendants	:	No: 2:22-cv-01425-HB

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL DEPOSITIONS OF WENDY TOWLE AND OSCAR TORRES

In a manner of utter contempt for the Rules of Civil Procedure, Defense counsel for Defendants Treddyfrin/Easttown School District and Mr. Arthur J. McDonnell (collectively, the "School District") has out right refused to produce two officials of defendant Treddyfrin/Easttown School District, Dr. Wendy Towle ("Towle") and Dr. Oscar Torres ("Torres"), for deposition. Remarkably, he has refused to produce either party officer for deposition despite identifying both Towle and Torres on the School District's Rule 26 initial disclosures as individuals with discoverable information. *See* School District's Rule 26 initial disclosures at Ex. 1. Defense counsel's obstinance has no support in the Federal Rules of Civil Procedure. Plaintiff respectfully requests the Court, pursuant to Fed. R. Civ. P. 37, order Towle and Torres to appear for deposition and enter sanction against Defense Counsel, Brian Elias, Esquire ("Attorney Elias").

I. THE DEPOSITIONS OF TOWLE AND TORRES EASILY FALL WITHIN THE SCOPE OF PERMISSIBLE DISCOVERY UNDER FEDERAL RULE 26.

Federal Rule of Civil Procedure 26 governs the scope of discovery in federal court. Under Rule 26, the scope of permissible discovery is a broad one. *Pacitti v. Macy's*, 193 F.3d 766, 777 (3d Cir. 1999) ("It is well recognized that the federal rules allow broad and liberal discovery.") Under the Rules, "[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable." Rule 26(b)(1). The depositions of Towle and Torres easily meet this definition. Indeed, since the School District identified Towle and Torres as individuals with discoverable information on its Rule 26 initial disclosure it is hard to see how the depositions of Towle and Torres do not meet this definition.

First, the School District can hardly dispute both have knowledge or information relevant to plaintiff's claims and the School District's defenses/crossclaim. Second, the School District identified Towle and Torres as individuals "likely to have discoverable information" in their joint Initial Disclosures. Ex. 1. Third, Towle was directly involved in communications with PEG about how to handle Right to Know Requests related to the PEG Materials disclosed in this case. Fourth, Torres was the Director of Equity and responsible for the trainings and likely has knowledge related

to the PEG Materials, trainings, and plaintiff's Right to Know Request and the School District's response.

The School District's Initial Disclosures identified Towle and Torres as having discoverable information related to their knowledge about the agreement with PEG. Ex. 1, p. 2. The School District places the relevancy of that agreement and PEG's relationship with the School District front and center in its crossclaim against PEG. In its crossclaim, the School District asserts "the conduct and/or products of Co-Defendant Pacific Educational Group, Inc. ("PEG"), gives rise to said liability, creates liability on the part of PEG and caused Plaintiff's damages." ECF No. 28, crossclaims, ¶ 2. The School District further alleges "PEG alone is liable to Plaintiff, jointly or severally (or both) liable to Plaintiff, or is liable over to District Defendants for common law or contractual (or both) contribution or indemnity (or both)." *Id.*, ¶ 3. While vaguely pleaded, the School District is essentially saying any first amendment violation was the fault of PEG and was caused by PEG's conduct, not the School District's.

Additionally, plaintiff maintains a claim under 42 U.S.C. 1985(c) and alleges that the School District and PEG "conspired, either directly or indirectly, to deprive Mr. Auslander of his privileges and immunities under the laws of the United States and to deprive him of his First Amendments rights." ECF No. 21, ¶ 29 Towle is the School District's Director of Curriculum, Instruction, Staff Development and Planning. ECF No. 16, ¶ 45. Torres is the Director of Equity and worked with PEG related to trainings. Both were identified as having discoverable information related to the

School District's agreement with PEG which is directly related to Plaintiff's conspiracy claim.

Finally, the School District claims that Towle and Torres only have knowledge of the contract with PEG, thereby suggesting that Towle and Torres could not possibly have relevant information related to Plaintiff's first amendment claim. *See* letter from Brian Elias to Hon. Harvey Bartle III, 7/28/22 at Ex. 2. This is simply incorrect. As already discussed, Plaintiff maintains a conspiracy claim making the contract and relationship relevant. However, beyond that, plaintiff has already obtained emails that Towle was directly involved in decision making and communications with PEG regarding Right to Know Requests and the PEG Materials.

Throughout the summer of 2021, Towle communicated regularly by email with PEG concerning various right to know requests that were submitted concerning the PEG materials that Plaintiff sought. ECF No. 16, Joint Stipulation of Facts for Expedited Trial, ¶¶ 46-49. Those emails indicate that Towle had telephone conversations with PEG to discuss how to respond to right to know requests the School District was receiving for the PEG materials. ECF No. 16-22. Indeed, in August 2021 Towle wrote to PEG stating:

> Hi, Luis – I just got off the phone with Chris Lim and I now have to attend a meeting here in the district to discuss our response to the numerous Right to Know Requests we have received regarding PEG's training materials. I will try to give you a call after that if it doesn't go too long. Otherwise, may I try tomorrow?

Id.[1] These emails also make the School District's claim that Towle's knowledge is limited to the PEG contract disingenuous. Her knowledge plainly goes beyond mere

[1] Chris Lim was the Chief of Staff for PEG.

knowledge of the contract. Towle wrote and spoke to PEG about the subject matter of this lawsuit. Towle clearly has discoverable information relevant to Plaintiff's first amendment violation claim, his conspiracy claim, and the School District's defense/crossclaim against PEG.

As for Torres, his communications and interactions with PEG are less developed. That is because the School District has not yet responded to Plaintiff's requests for production and interrogatories. Still, plaintiff has obtained emails that Torres was involved in coordinating and implementing the PEG training in the School District. *See* Exhibit 3. Surely, he must know something more than other School District officials, otherwise the School District would not have included him on its initial disclosures. Plaintiff has already demonstrated why the School District's relationship is relevant to the claims and defenses in this litigation. If the School District has identified Torres as someone who has knowledge of that relationship, plaintiff is entitled to discover the depth of his knowledge by taking his deposition.

Finally, the depositions of Towle and Torres are relevant to plaintiff's first amendment retaliation claim. Attorney Elias claimed that plaintiff is part of a "problem" group of parents that are antagonistic to the school board.[2] He claimed that plaintiff's goal was to undermine the school board and to see other members elected. He stated the School District was concerned that Plaintiff might publish the documents he obtained to embarrass the current board. He implied that the School District conformed its conduct towards plaintiff because he was part of this "problem"

[2] Attorney Elias also alleged that undersigned counsel was part of this group until it was explained that no attorney for plaintiff lives in the school district let alone has children in the school district.

group of parents that was making it difficult for the School District to implement its policies. But these complaints relate to conduct firmly protected by the first amendment. There could not be a more classic case of first amendment retaliation if the School District treated plaintiff differently because he exercised his first amendment rights. Thus, any information Towle and Torres have concerning plaintiff's membership in some "problem" group is also relevant to this litigation.

Requiring two officers at the School District who were directly involved with the facts of this case to appear for deposition is a small burden on the School District. However, plaintiff's vindication of a violation of his constitutional rights is of significant importance. As the 2015 Amendment Advisory Committee Note to Rule 26(b) highlights:

> It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized "the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved.

This is such a case with importance far beyond any monetary amount involved. Plaintiff has limited access to information contained within the School District. These depositions are essential for him to obtain discoverable information related to his constitutional claims.

In sum, plaintiff requests the depositions of Towle and Torres for completely legitimate reasons and on matters relevant to this litigation. This is far from the "MAGA" conspiracy that the School District describes. It is the School District that

raised its contract with PEG as a defense, in part, to Auslander's claims. It is the School District that identified Towle and Torres as individuals with discoverable knowledge. And it is the School District that needs to produce both Towle and Torres for deposition testimony.

II. THE COURT SHOULD SANCTION ATTORNEY ELIAS FOR HIS ABSOLUTE REFUSAL TO PRODUCE TOWLE AND TORRES.

Under Fed. R. Civ. P. 37(d)(1)(A)(i), the Court, on motion, may enter sanctions against a party when that party or its officers refuse to appear for a deposition.[3] "Rule 37(d) provides for the imposition of reasonable expenses, including attorney fees, for even simple negligence in failing to appear for a deposition." *Miles v. Elliot*, 2011 WL 857320, at *8 (E.D. Pa. Mar. 10, 2011) (quoting *Resolution Trust Corp. v. Fussel-baugh*, 1990 WL 124937, at *6 (E.D.Pa. Aug.23, 1990). The Third Circuit interprets Rule 37(d) broadly as it applies when a witness literally fails to appear and when a witness appears but is unprepared to testify. *Black Horse Lane Assoc., L.P. v. Dow Chem. Corp.*, 228 F.3d 275, 304 (3d Cir. 2000) ("we hold that when a witness is designated by a corporate party to speak on its behalf pursuant to Rule 30(b)(6), [p]roducing an unprepared witness is tantamount to a failure to appear that is sanctionable under Rule 37(d).") Moreover, under Fed. R. Civ. P. 37(d)(3) in addition to or in lieu of specific sanctions, "the court ***must require*** the party failing to act, ***the attorney advising that party***, or both to pay the reasonable expenses, including attorney's fees,

[3] Rule 37(d) includes the phrase "after being served with proper notice, to appear for that person's deposition." It is true that plaintiff did not formally notice Towle and Torres deposition before they refused to appear. But to treat that as a prohibition on sanctions against Attorney Elias would be exalting form over substance. Attorney Elias flatly claimed that neither Torres nor Towle would be produced making formal notice to both futile.

caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Attorney Elias' absolute refusal to produce Towle and Torres for deposition is inexcusable.

Attorney Elias justifies his refusal to produce Towle and Torres because he does not believe Towle and Torres have information relevant to the action and because of the perceived malevolent agenda of counsel for Plaintiff. His actions receive no quarter in the Rules of Civil Procedure.

First, Plaintiff has already debunked the claim that Towle and Torres' testimony is beyond the broad scope of discovery under the Rules. The other problem with Attorney Elias' relevancy claim is that this Court, not Attorney Elias, decides what is discoverable and what is not.

Second, Attorney Elias' agenda argument is also unavailing. The agenda of opposing counsel is irrelevant.[4] A "bad agenda" is not a basis recognized by the Rules to shield a party from appropriate discovery. If a party could escape discovery by claiming that opposing counsel had some "agenda," then there never could be discovery. Indeed, every attorney has some agenda in every litigation. Permitting a perceived agenda of opposing counsel to thwart discovery would wreak havoc on the Federal Rules of Civil Procedure and the discovery process. This would be particularly pronounced in public interest litigation, like this one, and where plaintiffs are represented by public interest law firms.

[4] It should be noted that Counsel's "agenda" is to represent Ben Auslander zealously and diligently within the bounds of the law.

Still, Attorney Elias never moved for a protective order shielding Towle and Torres from deposition. Federal Rule 37(d)(1)(A) could not be clearer. It states:

> "*Unacceptable Excuse for Failing to Act.* A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c)."

So, whatever the reason for bluntly stating "[w]e are not agreeing to produce those two witnesses. Thanks,"[5] the Rules required Attorney Elias to first move for a protective order. Further, Rule 37(d)(1)(A) makes plain that his perceived objections do not excuse his conduct. Here, Attorney Elias has never moved for a protective order. In fact, in his July 28, 2022 email, he never even suggests that he was refusing to produce Towle and Torres because he intended to seek a protective order. Instead, he thumbed his nose at the request, and required counsel to involve the Court.

If the Court compels the depositions of Towle and Torres, the Rules mandate an award of attorney fees to Plaintiff for filing this motion. *Given v. Love's Travel Stops & Country Stores, Inc.*, 1:17-CV-1266, 2018 WL 2322015, at *4 (M.D. Pa. May 22, 2018) ("when a court decides to impose sanctions pursuant to Rule 37(d)(1)(A)(i), Rule 37(d)(3) requires the court to order the offending party or its attorney to pay reasonable expenses, including attorney's fees, caused by the offending party's conduct.") Attorney Elias is an experienced litigator. Surely, he is familiar with the Federal Rules of Civil Procedure and what they require. Worse, it is part of a pattern of conduct characterized by a contempt for the Federal Rules of Civil Procedure. Previously, Attorney Elias forced plaintiff to involve the Court on a routine discovery

[5] *See* email from Brian Elias, Esquire to undersigned counsel dated 7/28/22 at Ex. 4.

matter when he refused to supply Rule 26 initial disclosures. Accordingly, his conduct is simply inexcusable.

CONCLUSION

Based on the foregoing, plaintiff respectfully requests that the Court grant its motion to compel and for sanctions.

Respectfully submitted,

Dated: July 29, 2022

/s/ Walter S. Zimolong
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CERTIFICATE OF SERVICE

I hereby certify the foregoing has been filed electronically and is available for viewing and downloading from the Electronic Case Filing System of the United States District Court for the Eastern District of Pennsylvania. I further hereby certify that, in accordance with Fed. R. Civ. P. 5, service has been made upon counsel of record via ECF.

Date: July 29, 2022 */s/ Walter S. Zimolong, Esquire*