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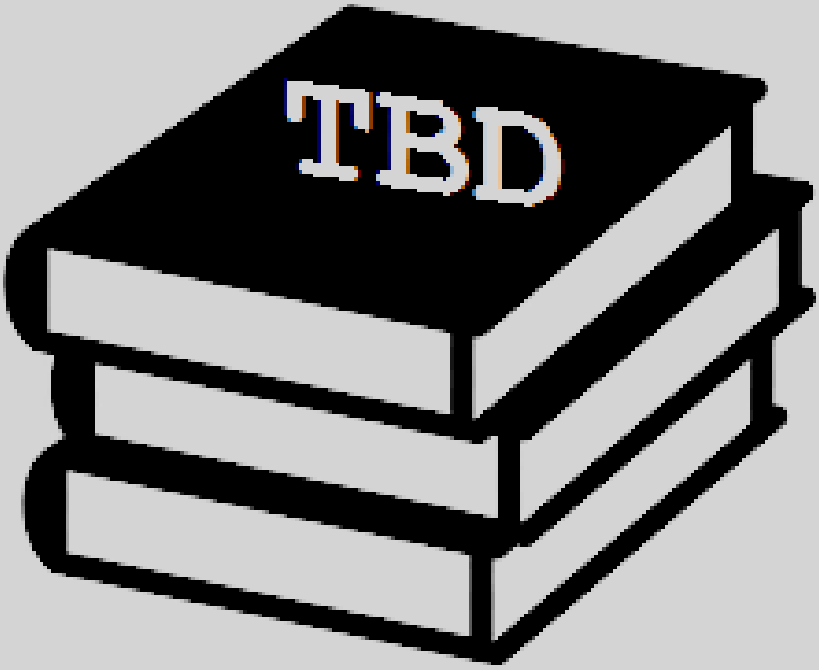

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JEANNE M. HERMAN,

Plaintiff,

vs. Civil Action No. 07-CV-0337

NATIONAL ENTERPRISE SYSTEMS, INC., MICHAEL DOE, and RAYMOND DOE,

Defendants.

PLAINTIFF JEANNE M. HERMAN'S RESPONSE IN OPPOSITION TO THE DEFENDANT NATIONAL ENTERPRISE SYSTEMS, INC.'S MOTION FOR PROTECTIVE ORDER AND CROSS-MOTION TO COMPEL

Upon the annexed affirmation of Amanda R. Jordan dated March 11, 2008, Plaintiff, by her counsel, hereby responds to the Defendant National Enterprise Systems, Inc.'s January 25, 2008 Motion for Protective Order and makes her Cross-Motion to Compel production of such documents.

WHEREFORE, Plaintiff moves the Court for an Order (i) denying the Defendant's Motion for Protective Order of the Defendant's tax returns; (ii) granting Plaintiff's Cross-Motion to Compel production of such tax returns; (iii) granting Plaintiff's costs and attorneys' incurred by reason of this Cross-Motion to Compel and (iv) for such other relief which to the Court may seem proper.

Dated: March 11, 2008

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JEANNE M. HERMAN,

Plaintiff,

vs. Civil Action No. 07-CV-0337

NATIONAL ENTERPRISE SYSTEMS, INC., MICHAEL DOE, and RAYMOND DOE,

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFF'S OPPOSITION TO THE DEFENDANT'S MOTION FOR PROTECTIVE ORDER AND PLAINTIFF'S CROSS-MOTION TO COMPEL PRODUCTION OF DEFENDANT'S TAX RETURNS

Plaintiff Jeanne M. Herman submits this Memorandum of Law in Opposition to Defendant National Enterprise Systems, Inc.'s February 29, 2008 Motion for a Protective Order for its tax returns. National Enterprise Systems, Inc. (hereinafter "NES") has failed to meet is burden of showing that the documents in question, which NES seeks to deem confidential in their entirety, are not relevant to the Plaintiff's claim for punitive damages, as alleged in her Complaint. Thus, NES has failed to show good cause for its proposed protective order, and its Motion should be denied in its entirety. Likewise, the Plaintiff's Cross-Motion to Compel Defendant's production of such documents and for costs and attorneys' fees associated with this Cross-Motion should be granted.

BACKGROUND

The facts of this case will not be repeated herein, as they have been more fully detailed in the Defendant's Motion dated February 29, 2008.

On January 30. 2008, Plaintiff served NES with a Request for Production of Documents requesting "any and all corporate tax forms submitted and tax returned received by National Enterprise Systems, Inc. to/from any governmental agency, dating back to January 1, 2003." *See Defendant's Exhibit C.* NES served the Plaintiff with its objections on February 5, 2008. *See Defendant's Exhibit D.* Specifically, Defendant's objections included that the request was overbroad and unduly burdensome, seeking information and materials not relevant to Plaintiff's claims, and not reasonably calculated to lead to the discovery of information and material relevant to Plaintiff's claims. NES has now moved for a Protective Order that would designate as confidential all NES tax returns from January 1, 2003 to the present.

ARGUMENT

I. DEFENDANT MUST COMPLY WITH PROPER DISCOVERY REQUESTS.

Pursuant to Rule 26 of the Federal Rules of Civil Procedure, parties are expected to conduct discovery between themselves to narrow the issues. In federal civil cases, pretrial discovery, including interrogatories pursuant to Fed.R.Civ.P. 33 and document requests pursuant to Rule 34, may be obtained for information relevant to any claim or defense. Fed.R.Civ.P. 26(b)(1); *American Rock Salt Company, LLC,* 228 F.R.D. 426 (W.D.N.Y. 2004); See *Land Ocean Logistics, Inc. v. Aqua Gulf Corp.*, 181 F.R.D. 229, 236 (W.D.N.Y.1998) (information is relevant provided it is reasonably calculated to lead to the discovery of admissible evidence); *Burns v. Imagine Films Entertainment, Inc.*, 164 F.R.D. 589, 591 (W.D.N.Y.1996) (citing *Daval Steel Prods. v. M/V Fakredine,* 951 F.2d 1357, 1367 (2d Cir.1991)). Moreover, it is well-established that generalized objections that discovery requests are vague, overly broad, or unduly burdensome are not acceptable, and will be overruled. *Athridge v. Aetna Casualty and Surety*

Co., 184 F.R.D. 181, 190- 91 (D.D.C.1998) (general boilerplate objections are ineffective); *Burns, supra,* at 593.

The Defendant has failed to show good cause for its proposed protective order. "To show good cause, particular and specific facts must be established rather than conclusory assertions...If the movant establishes good cause for protection, the court may balance the countervailing interest to determine whether to exercise discretion and grant the order." *Rofail v. United States, 227 F.RD. 53,* 54-55 (E.D.N.Y. 2005). Defendant has failed to demonstrate with particularity or specificity that this is an exceptional case warranting deviation from the well-established rule favoring open discovery. *See Giladi v. Albert Einstein College of Medicine,* 1998 U.S. Dist. LEXIS 14783 (S.D.N.Y. April 15, 1998) at *3.

The range of discovery is broad and litigants are to be provided access to information that might be useful even if their use is only in cross-examination. *See Haney v. Woodward & Lothrop, Inc.,* 330 F.2d 940 (4th Cir. 1964). The validity of an objection to discovery is determined by a motion filed with the Court. *See Pan-Islamic Trade Corp. v. Exxon Corp.,* 632 F.2d 539, 552-53 (5th Cir. 1980).

Further, it is well established that the fruits of discovery are presumptively public. *See In re Agent Orange Product Liability Litig.,* 821 F.2d 139, 145-46 (2d Cir. 1987)). Federal Courts of Appeals have explained, "[T]he public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding." *Citizens First Nat'l Bank v. Cincinnati Ins. Co.,* 178 F.3d 943, 944-45 (7th Cir. 1999). Therefore, protective orders should not be granted without review or carte blanche. *Id.*

The party seeking a protective order has the burden of showing good cause by demonstrating that disclosure would be harmful. To determine whether to exercise this authority,

courts engage in a three-step analysis. First, the party resisting discovery must demonstrate that the information sought is a trade secret or is otherwise confidential in nature and that its disclosure would be harmful. If this standard is met, the burden shifts to the requesting party to show that the information is relevant to the subject matter of the case and necessary for trial preparation. Finally, if relevance and necessity are demonstrated, the court must weigh the need for the information against the injury potentially caused by disclosure. *See In re Remington Arms, Co., 952 F.2d 1029, 1032 (8th Cir*.1991); *American Standard, Inc. v. Pfizer, Inc.*, 828 F.2d 734, 740-43 (Fed.Cir.1987); *Heublein, Inc. v. E & J Gallo Winery, Inc.*, No. 94 Civ. 9155, 1995 WL 168846, at *2 (S.D .N.Y. April 7, 1995); *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 107 F.R.D. 288, 292-93 (D.Del.1985); *Madanes v. Madanes*, 186 F.R.D. 279, 288 (S.D.N.Y.1999) (citing *In re Remington Arms, Co. 952 F.2d 1029, 1032 (8th Cir*.1991); *Rywkin v. New York Blood Center*, No. 95 Civ. 10008, 1998 WL 556158, at *3 (S.D.N.Y. Aug. 31, 1998)).

Therefore, for the reasons stated below, the Defendant's Motion should be denied in its entirety and that the Plaintiff's Cross-Motion should be granted, thereby compelling immediate production of NES's tax returns.

II. THE PLAINTIFF'S REQUEST FOR PRODUCTION OF THE TAX RETURNS IS NOT OVERBROAD OR UNDULY BURDENSOME.

Although the Defendant objects to the Plaintiff's request on the grounds that it is overbroad and unduly burdensome, the Plaintiff's requests are anything but. The Plaintiff did not make a blanket request for "financial information," nor did she request decades worth of tax returns. Rather, she requested, very simply, "any and all corporate tax forms submitted and tax returned received by National Enterprise Systems, Inc. to/from any governmental agency from 2003 to the present." Such a request is not overbroad, nor it is unduly burdensome. The Defendant has also failed to allege in its motion that these documents are not readily available,

nor is it convincing to believe that copies these documents are not stored, safely and accessibly, in the Defendant's corporate offices in Solon, Ohio. *See American Rock Salt Company, LLC,* 228 F.R.D. 426 (W.D.N.Y. 2004) (holding that nothing in the [Defendants'] affidavit negated the existence or accessibility of documents requested by the Plaintiff; therefore, such documents had to be produced to the Plaintiff). As such, the Defendant's Motion for Protective Order should be denied and immediate production of the tax returns should be ordered.

III. DEFENDANT'S MOTION FOR A PROTECTIVE ORDER SHOULD BE DENIED BECAUSE DEFENDANT HAS FAILED TO SHOW THAT SUCH TAX RETURNS ARE NOT RELEVANT TO THE PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES

Information is discoverable on matters that are relevant to the subject matter of the litigation, so long as such information is designed to lead to admissible evidence. As Federal Rule of Civil Procedure 26(b)(1) provides:

> "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.... The information sought need not be admissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

The phrase "relevant to the subject matter involved in the pending action" has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. *Oppenheimer Fund, Inc. v. Sanders,* 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978).

A. Plaintiff has alleged a prima facie case of intentional infliction of emotional distress, therefore, punitive damages are properly sought.

The Plaintiff alleges that the Defendant violated multiple provisions of the FDCPA, as well intentional infliction of emotional distress under the common law of the state of New York. The Plaintiff likewise prays for punitive damages under the common law claim, in addition to other relief. *See Defendant's Exhibit A.*

The facts in this case, as alleged in the Plaintiff's complaint, show a pattern of harassment, with scores of phone calls to the Plaintiff over the course of several months, unauthorized withdrawals from the Plaintiff's son's bank account and repeated statements and verbal threats meant to harass, threaten and annoy the Plaintiff.

In *Fischer v. Maloney*, 43 N.Y.2d 553, 557 (1978), the New York Court of Appeals set the legal standard for a common law claim for intentional infliction of severe emotional distress:

> An action may lie for intentional infliction of severe emotional distress "for conduct exceeding all bounds usually tolerated by decent society" (Prosser, Torts [4th ed], § 12, p 56). The rule is stated in the Restatement, Torts 2d, as follows: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress" (§ 46, subd [1]; see for one aspect Comment *d:* "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community"). *Id.*

The *Fischer* Court declined to delineate the boundaries of this tort. However, the Court did cite with approval two prior appellate division cases which had found that a claim had been stated. One of them, *Long v. Beneficial Fin. Co.*, 330 N.Y.S.2d 664 (4th Dept. 1972), coincidentally involved a case of telephone harassment by a creditor. The Defendant engaged in a planned program of telephone harassment designed to distress Plaintiff so much, that she would pay her alleged debt despite her inability to afford such payments. In finding that the Plaintiff had stated a cause of action, the Court noted that a plaintiff need not plead or prove

malice on the part of the defendant, nor would the fact that defendant had a legitimate motive defeat the claim.

Cases decided since *Fischer* have confirmed that "a campaign of harassing telephone calls may state a cause of action for intentional infliction of emotional distress." *Gil Farms, Inc. v. Darrow*, 682 N.Y.S.2d 306, 308-309 (1998); *Flatley v. Hartmann*, 525 N.Y.S.2d 637 (3rd Dept. 1988); *Cavallaro v. Pozzi*, ---N.Y.S.2d---, 2006 WL1119216 (4th Dept. 4/28/06).

Because Plaintiff has alleged a prima facie case under New York State common law, seeking punitive damages are appropriate and any materials relevant to those damages should be produced in pre-trial discovery. The Defendant's tax returns are directly relevant to the Plaintiff's claim for punitive damages.

B. Because the Defendant's tax returns are relevant to the Plaintiff's claim for punitive damages, they should be produced.

It has been generally held that where punitive damages are claimed, the Defendant's financial condition is a proper subject of pretrial discovery, as such information is relevant to the subject matter of the action. Further, tax returns in the possession of the tax payer are not immune to civil discovery. *St. Regis Paper Co. v. United States,* 368 U.S. 208, 82 S.Ct. 289 (1961) Such disclosure is proper upon satisfaction of a two-prong test: (1) relevance and (2) compelling need because the information is not otherwise readily available. *See, e.g., St. Regis Paper Co. v. United States,* 368 U.S. at 218-19, 82 S.Ct. 289, 295, 96 (1961); *Hamm v. Potamkin,* No. 98 Civ. 7425(RWS), 1999 WL 249721 at *2 (S.D.N.Y. April 28, 1995) (citing *SEC v. Cymaticolor Corp.*, 106 F.R .D. 545, 547 (S.D.N.Y.1985) (additional citations omitted)). Because this Court "may take a defendant's financial circumstances, wealth, or net worth into consideration when determining the exemplary damages to be awarded against that defendant,"

NES's financial information is relevant to Plaintiff's claim for punitive damages. *See Hazeldine v. Beverage Media, Ltd.*, No. 94 Civ. 3466, 1997 WL 362229 at *3 (S.D.N.Y. June 27, 1997).

It is clear under New York State common law that in claims for punitive damages, the financial status of the defendant must be taken into account. *Chilvers v. New York Magazine Co., Inc*., 114 Misc.2d 996, 453 N.Y.S.2d, 153 N.Y.Sup.,1982. *See also, Rupert v. Sellers*, 48 A.D.2d 265, 368 N.Y.S.2d 904 (4th Dept. 1975); *Klauber v. S.K.E. Operating Co., Ltd.*, 163 Misc. 418, 295 N.Y.S. 701 (Sup.Ct., Onondaga Co. 1937). When dealing with the question of punitive damages in any jurisdiction, the purpose of which is to deter wrongful acts, there are strong policy reasons why the Plaintiff should be entitled to present evidence of the financial condition of the offender. The relevance of Defendants' financial status to Plaintiff's claim for punitive damages is therefore equally clear, and such information is reasonably calculated to lead to evidence admissible at trial. *Christy v. Ashkin*, 972 F. Supp. 253 (D.Vt. 1997); *Morris v. Swank Educational Enterprises, Inc.*, 2004 WL 1899987 (N.D.Ill); *See also Luris Bros. & Co. v. Allen*, 469 F. Supp. 575 (W.D.Pa. 1979); *Krenning v. Hunter Health Clinic*, 166 F.R.D. 33 (D.C.Kan. 1996).

The vast majority of federal district courts which have addressed the discoverability of financial information before a claim for punitive damages has been clearly established have held that such information is discoverable. *See, e.g., EEOC v. Klockner H & K Machs., Inc.*, 168 F.R.D. 233, 235 (E.D.Wis.1996); *Krenning v. Hunter Health Clinic, Inc.*, 166 F.R.D. 33, 34 (D.Kan.1996); *Hall v. Harleysville Ins. Co.*, 164 F.R.D. 172, 173 (E.D.Pa.1995); *CEH, Inc. v. FV "Seafarer"*, 153 F.R.D. 491, 497-99 (D.R.I.1994) (citing additional cases); *but see Johnson v. Con-Vey/Keystone. Inc.*, 1995 WL 82271 (D.Or.1995) (requiring proof of prima facie claim

for punitive damages before defendant's financial information discoverable). Therefore, the information and documents sought by Plaintiff must be produced immediately.

Even where information sought by a Plaintiff is “secret,” "[o]rders forbidding any disclosure of trade secrets or confidential information are rare." *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 363 n. 24, 99 S.Ct. 2800, 61 L.Ed.2d 587 (1979). Once relevance and necessity have been demonstrated, the balance test very often tilts in favor of disclosure. *Coca-Cola Bottling Co. v. Coca-Cola Co.,* 107 F.R.D. 288, 293 (D.Del.1985). Indeed, discovery is virtually always ordered once the party seeking such discovery has established that the secret information is relevant and necessary. *Id.* This is true, in part, because the potential damage to the party resisting disclosure that should be considered at this stage “is not the injury that would be caused by public disclosure, but the injury that would result from disclosure under an appropriate protective order.” *Coca-Cola Bottling Co.*, 107 F.R.D. at 293; *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 362, 99 S.Ct. 2800, 2813 (1979); *Centurion Industries,* 665 F.2d 323, 325 (C.A.N.M. 1981).

Other circuits have similarly held that the party seeking the protective order must make a particular and specific demonstration that failure to issue the order will cause a clearly defined, serious injury. *See In re Remington Arms Co., Inc.*, 952 F.2d 1029, 1032 (8th Cir. 1991) (citing Fed. R. Civ. P. 26(c)(7)); *Coca-Cola Bottling Co.*, 107 F.R.D. at 293. Even if a party satisfies this burden, if the other party can show that the information is relevant and necessary, it still must be produced. *Remington Arms Co., Inc.*, 952 F.2d at 1032-33; *Madanes v. Madanes,* 186 F.R.D. 279, 288 (S.D.N.Y.1999) (citing *In re Remington Arms, Co. 952 F.2d 1029, 1032 (8th Cir*.1991); *Rywkin v. New York Blood Center*, No. 95 Civ. 10008, 1998 WL 556158, at *3

(S.D.N.Y. Aug. 31, 1998)). NES has not met its burden of showing that disclosure would cause a particular, specific, clearly defined, serious injury.

Moreover, NES's broad proposed protective order would be greater than is necessary or essential, because it would encompass *all* "Defendant's financial information," (T. Flascher Affidavit, paragraph 8), not just those in the narrowly worded Document Request. *Seattle Times Co.*, 467 U.S. 20, 32 (1984) Thus, even if some portions of NES's "financial information" were entitled to protection, NES's proposed protective order goes too far in that it would shield from the light of day even those tax returns requested by the Plaintiff that are relevant to the Plaintiff's claims. In short, NES's argument for protection of the tax returns requested by the Plaintiff is consistent neither with case law in this Circuit and District, nor with the much broader scope of NES's proposed protective order.

CONCLUSION

NES has not met its burden of showing that the tax returns in question are not relevant to the Plaintiff's claim for punitive damages. Therefore, NES's Motion for a Protective Order should therefore be denied in its entirety and Plaintiff's Cross-Motion to Compel Production of such documents should be granted in its entirety. The Plaintiff should also be granted her costs and attorneys' incurred by reason of the subject Cross-Motion to Compel.

Dated: March 11, 2008

/s/Amanda R. Jordan
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

JEANNE M. HERMAN,

Plaintiff,

vs. Civil Action No. 07-CV-0337

NATIONAL ENTERPRISE SYSTEMS, MICHAEL DOE, and RAYMOND DOE,

Defendants.

CERTIFICATE OF SERVICE

I, Amanda R. Jordan, certify that I am an attorney of record for the Plaintiff. I further certify that on March 11, 2008, I electronically filed the Plaintiff's Response to the Defendant's Motion for Protective Order and Plaintiff's Cross-Motion to Compel using the CM/ECF system, which sent notification of such filing to:

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at the email address designated by them for that purpose.

Under penalty of perjury, I declare that the foregoing is true and correct.

Dated: March 11, 2008

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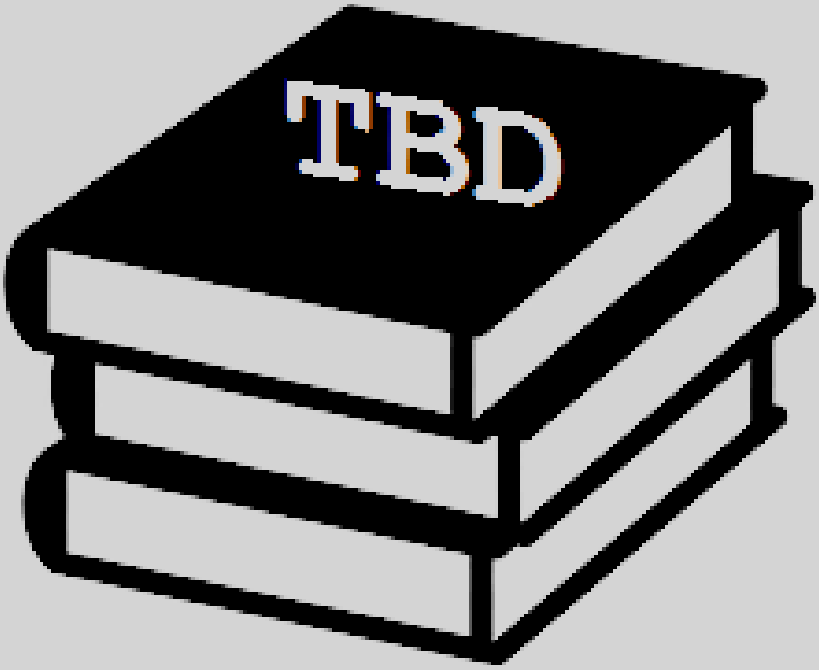

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