

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF )  
)  
HEARTLAND PROMOTIONS, INC., ) CASE NO. BK94-81541  
) A94-8134  
\_\_\_\_\_  
DEBTOR(S) )  
) Filing No. 64  
HEARTLAND PROMOTIONS, INC. and )  
THE OFFICIAL UNSECURED )  
CREDITORS' COMMITTEE, )  
)  
Plaintiff(s) )  
vs. ) **MEMORANDUM OPINION**  
)  
BOBLEY-HARMANN PUBLISHING AND )  
MARKETING COMPANY, a New York )  
General Partnership )  
\_\_\_\_\_  
Defendant(s) )

Hearing was held on June 15, 1995, on Motion by Defendant for Sanctions for Failure to Disclose Pursuant to Court Order and Fed. R. Civ. P. 26(a). Appearances: Jeff Wegner and Robert Slovek for Debtor; Matt McGrory for Creditors' Committee; and Terrence Michael and William Dittrick for Bobley-Harmann. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a related proceeding as defined by 28 U.S.C. § 1334(b). The parties have agreed that the bankruptcy court may enter final orders and judgment.

**Background**

The plaintiff, Heartland Promotions, Inc., filed a petition to reorganize under Chapter 11 of the Bankruptcy Code on October 6, 1994. The plaintiff is a Nebraska corporation which is engaged in the business of marketing merchandise to holders of Mastercard, Visa and other private label credit cards and which, in addition, operates as a licensed direct mail vendor of pharmaceutical products. In 1989, the plaintiff and the defendant, Bobley-Harmann, a New York general partnership, entered into a joint venture agreement whose purpose was to sell appointment books and personal diaries through credit card billing statements [hereinafter "books" shall refer to both appointment books and personal diaries]. After a customer

ordered a book, the joint venture automatically renewed the order for subsequent years, unless the customer returned a negative option card. The revenues earned by the joint venture came from two different sources -- renewals and new orders.

The relationship between the plaintiff and the defendant deteriorated by 1993. The plaintiff claimed that the joint venture agreement terminated on May 31, 1993 and marketed 1994 new book orders without the defendant. Apparently, the defendant also marketed its own new books for 1994.

The defendant filed an action in New York to determine the rights of the debtor and Bobley-Harmann in and to the joint venture assets. The New York court ordered all of the revenues from the 1994 book renewals (the 1994 renewals) and the revenues from the new orders placed for 1994 books (the 1994 books) to be placed in segregated accounts in New York and Omaha. The New York proceeding was stayed by the filing of a Chapter 11 petition.

The debtor/plaintiff filed this adversary proceeding on November 7, 1994 to allege that Bobley-Harmann wrongfully retained the debtor's property by not properly accounting for expenses and profits of the joint venture and by not turning funds over to the segregated accounts. The defendant denied these allegations and counterclaimed that the plaintiff breached its fiduciary duties and misappropriated funds and assets of the joint venture. The parties have settled the original complaint and are now proceeding on the counterclaim only.

The issue presently before the Court is whether the plaintiff should be sanctioned for failing to properly comply with the discovery requirements under Rule 26(a) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 26(a)(1995). The defendant moved for sanctions based on three allegations: (1) that the plaintiff's counsel failed to turnover a file that is relevant to the production and marketing of the 1994 Appointment Book (a/k/a the "Fisher file") before the depositions of Cyndi Fisher and employees and officers of plaintiff; (2) that plaintiff's counsel failed to identify plaintiff's corporate counsel as persons with knowledge of the matters in dispute and the actions taken by plaintiff during the year preceding May 31, 1993; (3) that plaintiff has not turned over all of the documents relating to "proposals."

This is not the first time the parties have appeared before this Judge because of disagreements over discovery and the meaning of Rule 26(a). Previously, the defendant filed a Motion to Compel Compliance with Fed. R. Civ. P. 26(a), which requested

that the Court order the plaintiff to turnover the documents subject to disclosure under Rule 26(a). Filing no. 32. The documents which had been requested by the defendant were categorized in the following manner:

(1) Copies of all appointment book contracts between Heartland and any banks and/or other financial institutions during the period from June 21, 1989 through December 31, 1993;

(2) All correspondence from Heartland to banks and/or other financial institutions regarding appointment book promotion of any type since June 1, 1992;

(3) All internal notes, memorandums, salesperson log books, or other documents regarding the appointment book promotions from June 1, 1992, through December 31, 1993;

(4) Copies of all documents, including without limitation memos outlining any internal incentive programs and/or bonus programs, relating to sales of the appointment book promotion to financial institutions;

(5) Copies of all documents, signature cards, and bank statements relating to the "joint account owned equally by Bobley and Heartland" described in Paragraph 6 of the Joint Venture Agreement;

(6) All calculations and documents which support the position that Heartland is entitled to approximately \$375,000.00 of the money currently being held at First National Bank of Omaha and EAB New York; and

(7) All correspondence and documents between Heartland and any entity other than Bobley regarding creation, development, production and/or manufacture of calendar year 1994 appointment books and/or pocket diaries.

Filing no. 34, Schedule A.

In the amended Motion to Request that the Court Establish a Discovery Timeline under Rule 26(f), which accompanied the Motion

to Compel, the defendant alleged that the plaintiff subpoenaed the defendant's witnesses for depositions scheduled on April 4 and 5, 1995, but that the plaintiff refused to turnover any documents requested by the defendant prior to those depositions taking place. Filing no. 34. This Court held an expedited hearing on the motions on March 30, 1995.

The plaintiff was ordered to "[D]isclose materials required by Fed. R. Civ. P. 26(a) and requested in writing at the hearing [by the defendant] within seven days." Filing no. 41, ¶ 2 (Ex. 12). The depositions scheduled for April 4 and 5, 1995 were cancelled and the Court directed that the depositions of the defendant's witnesses should not go forward before the defendant had the opportunity to review the documents. Ex. 2, p. 34, ln. 16-19; see also Filing no. 41, ¶ 1 (Ex. 12).

The plaintiff and the defendant were cautioned that Rule 26(a) should be read to require that disclosures be made voluntarily and that discovery should not be treated as a game:

As this Court mentioned on the record during the hearing, with some vehemence, the letter and the spirit of Fed. R. Civ. P. 26 require extensive disclosure and cooperation between the litigants with a minimum of involvement by the Court. The litigants in this case are expected to take both the letter and the spirit of the rule seriously and move this case relatively quickly to a point where a trial can be scheduled.

Filing no. 41, ¶ 6 (Ex. 12).

After finding that the parties should voluntarily turnover documents and finding that the documents had to be turned over before the depositions of the relevant witnesses took place, the Court ordered both parties to work together to set up a discovery schedule without the Court's interference. Filing no. 41, ¶ 5 (Ex. 12).

On April 5, 1995, the parties met and exchanged documents, and the plaintiff's attorneys represented to the defendant's attorneys that they had provided "all responsive documents Heartland and [plaintiff's attorneys] could locate after searching our files." Ex. 1, Attach. Ex. 2, p. 1. Based upon this representation, the parties agreed to hold the depositions of Steven Dean, Elaine Long, Rod Dahl and Patrick Mueller, all of whom are officers and employees of plaintiff, on May 17 through May 19, 1995.

On May 23, 1995, the deposition of Cyndi Fischer, a former employee of Heartland, was taken by the plaintiffs. Ms. Fischer was listed as a potential witness for the defendant, and therefore, she was subpoenaed to testify. At the deposition, plaintiff introduced ten exhibits, which were:

Exhibit 32: Affidavit of Cyndi Fischer dated 11/09/94.

Exhibit 33: Original 1994 Appointment Book.

Exhibit 34: 01/06/03 letter from Ms. Fischer to State Printing regarding prices for book printing.

Exhibit 35: Handwritten notes of Ms. Fischer regarding book specifications.

Exhibit 36: Portion of brochure for seminar entitled "Copyright/Copywrong."

Exhibit 37: Document prepared by Ms. Fischer regarding features of various publisher's appointment books.

Exhibit 38: Facsimile dated 06/03/93 from Holigraphics to Ms. Fischer.

Exhibit 39: Holigraphics invoice dated 07/03/93.

Exhibit 40: Affidavit of Ms. Fischer dated 11/18/93.

Exhibit 41: Letter and enclosure dated 06/16/93 from Peter Bobley to Steven Dean.

Ex. 1, p. 3.

Exhibits 34, 35, 36, 37, 38 and 40 were not produced prior to the May 23, 1995 deposition of Ms. Fischer. The plaintiff informed the defendant that the deposition exhibits which were not disclosed were not discovered by plaintiff's attorneys until May 19, 1995, because an officer of plaintiff had only discovered the file that the exhibits were located in while gathering information for Ms. Fischer's deposition a few days earlier [hereinafter this file shall be referred to as the "Fischer File"]. Ex. 13. The plaintiff was apparently not aware until early May 1995 that Ms. Fischer had spoken with the

defendants and therefore, did not begin searching for information pertaining to her employment until May of 1995, and the Fischer File had apparently not been filed in accordance with office procedures. Ex. 13, ¶¶ 9-10. The entire Fischer File was turned over to defendants on June 1, 1995. See Ex. 18.

The defendant requests the following relief: (1) entry of default judgment against plaintiff and in favor of defendant in the adversary proceeding; or if default judgment is not granted (2) require plaintiff to produce all items responsive to the list submitted to defendant at the March 29, 1995 hearing and verification under oath from plaintiff and plaintiff's attorneys setting forth the steps undertaken by plaintiff and its counsel to locate such items; (3) allowing defendant to redepose, at plaintiff's expense, the following individuals: Steven Dean, Pat Mueller, Rod Dahl, Elaine Long, and Cyndi Fischer; (4) requiring plaintiff to produce all documents identified in defendant's First Request for Production of Documents and answer Boley's First Set of Interrogatories which have been served upon the plaintiff concurrently herewith within fifteen (15) days; (5) prohibit plaintiff from introducing any evidence from the following sources at the trial of this action or at any other hearing held in this matter, including documents or testamentary evidence from the law offices of Abraham, Kaslow & Cassman, or from any officer of plaintiff regarding the same and testimony and/or exhibits from the depositions of Steve Dean, Patrick Mueller, Elaine Long, Rod Dahl, Brian Mattox, and Cyndi Fischer; (6) require plaintiff to pay all reasonable expenses, including attorney's fees, caused by the failure of plaintiff to provide meaningful disclosure under Rule 26. Defendant's total expenditures in bringing the sanctions motion, including the Fischer deposition, are \$1,763.20. Ex. 1, ¶ 15, p. 6.

### **Decision**

The plaintiff and/or counsel for the plaintiff have violated Rule 26 and, pursuant to FRCP 37(a)(2)(A) and (a)(4)(A), sanctions shall be imposed.

### **Discussion**

#### **1. Failure to Disclose Documents**

A representative of plaintiff, plaintiff's counsel and defendant's counsel were all present at the hearing on March 30, 1995 when the Court explicitly ordered that the depositions of defendant's witnesses could not take place until the plaintiff turned over all of the documents related to the issues in this case. The plaintiff's failure to provide defendant with all

documents related to the issues in this case, after being directed to do so, is a willful violation of Rule 26(a).

The plaintiff's defense is that it did not know that defendant spoke to Cyndi Fischer and intended to use her as a witness until May 2, 1995. Ex. 13, ¶ 7. Therefore, the Fischer File was not discovered by the plaintiff until May 17, 1995. Ex. 13, ¶ 10. This, on its face, seems to be a reasonable explanation as to why the documents were discovered late. However, the plaintiff should have provided to defendant before the depositions all of the documents in the Fischer file, or at a minimum, those which were to be used by plaintiff in the deposition of Ms. Fischer. Alternatively, plaintiff's counsel should have discussed with the defendant the possibility of rescheduling the depositions so the plaintiff would have ample time to provide the defendant with a copy of the documents prior to the deposition. It was a violation of the discovery rules and the order of this court to fail to disclose the existence of the Fischer file and to use documents from that undisclosed file during the Fischer deposition.

The plaintiff appears to have withheld these documents from the defendant in an attempt to confuse Ms. Fischer regarding the exact dates and facts surrounding the 1994 books. Plaintiff's attorney questioned Ms. Fischer concerning the dates that preliminary decisions for the 1994 books were made. Then, after she answered, the attorney provided the exhibits to the witness to compare her recollection of these events to the dates recorded on the documents. Such a procedure may have been appropriate if the documents had been previously provided to counsel for defendant. Such a procedure is inappropriate here because the documents were wrongfully withheld.

The exhibits which were not disclosed to defendant appear to be relevant to establish a time line for plaintiff's activities prior to the termination of the joint venture agreement. Exhibit 34 is a letter prepared by Ms. Fisher requesting a price quote to print the 1994 Books. Exhibit 35 is a one page note made by Ms. Fischer documenting proposed options in the 1994 Books. Exhibit 36 is a copy of a pamphlet for a seminar on copyright laws. Exhibit 37 compares the 1993 joint venture appointment book produced by the defendant with the features offered by other appointment books, and apparently the comparison was made to consider which items were subject to a copyright and which items plaintiff could freely use in their own 1994 book. Exhibit 38 is a faxed copy of a response to a request for a price quote for 1994 appointment books. Exhibit 40 consists of copies of purchase orders for print runs.

These documents correspond to two categories that the defendant listed on the discovery request which was handed to the plaintiff at the March 30, 1995 hearing. Exhibits 34, 38, and 40 correspond to category 7 as correspondence between the plaintiff and another entity regarding the development, creation, production and manufacture of 1994 books. Exhibits 35, 36, and 37 correspond to category 3 as internal notes regarding the appointment book promotions from June 1, 1992, through December 31, 1993.

## 2. Failure to Disclose Person with Knowledge

The second issue raised by defendant concerns the fact that plaintiff failed to disclose members of the law firm of Abraham Kaslow as potential witnesses. During the deposition of Mr. Mueller, an employee of plaintiff, it was apparently disclosed that the law firm of Abraham Kaslow had given the plaintiff legal advice with respect to the allegations contained in the defendant's counterclaim, and plaintiff waived the attorney/client privilege regarding disclosure of said information. Since plaintiff was obligated to inform defendant of all persons with knowledge of the matters in issue, had defendant been informed of the many contacts plaintiff employees had with the lawyers about the joint venture issue, defendant may have prepared quite differently for the deposition. The defendant requests further depositions of the officers of plaintiff based upon this new disclosure. The failure to inform defendants of the Abraham Kaslow law firm involvement prior to the depositions of plaintiff's officers is a violation of Rule 26.

## 3. Proposals to Prospects

Although employees of plaintiff admit that plaintiff corresponded with many prospective customer institutions by the use of proposals, only two such proposals have been disclosed. Mr. Dahl, an employee of plaintiff, testified that no others have been retained. Employees testified that records are not centrally located. The defendant's experience with plaintiff has been that records which were not believed to have been retained, or even ever having existed, continue to dribble out of the "non central filing system" at times convenient only to plaintiff.

For this reason, plaintiff will be required to explain, to defendant, under penalty of perjury, just exactly what efforts have been undertaken since January 1995 to find documents and what efforts are continuing. In addition, if it is plaintiff's position that certain documents or categories of documents are

not in existence, an officer of plaintiff must make such representation under penalty of perjury.

4. Sanctions

1. Plaintiff shall produce all items responsive to the list submitted to the defendant at the March 30, 1995, hearing and verify, under penalty of perjury, the steps undertaken by plaintiff and its counsel to locate such items;

2. Defendant shall be allowed to redepose, at plaintiff's expense, Steven Dean, Pat Mueller, Rod Dahl, Elaine Long, and Cyndi Fischer. Defendant is not limited in its examination of these witnesses to inquire only into new issues which may have arisen as a result of a review of documents not timely disclosed or which have arisen because of the late disclosure of the involvement of the Abrahams Kaslow law firm. Had plaintiff properly disclosed all of the information required of it, none of these "extra" depositions would be necessary;

3. Plaintiff shall produce all documents identified in Defendant's First Requests for Production of Documents and answer Bobley's First Set of Interrogatories within 15 days;

4. Plaintiff shall pay the reasonable expenses incurred by the defendant, including attorney fees, caused by the failure of plaintiff to provide meaningful disclosure under Rule 26. Defendant's total expenditures in bringing the sanctions motion, including the Fischer deposition, are \$1,763.20. That amount shall be paid to the defendant on or before October 31, 1995.

DATED: August 15, 1995

BY THE COURT:

/s/ Timothy J. Mahoney  
Chief Judge

Copies faxed by the Court to:

\*Terrence Michael/William Dittrick -- 344-0588  
Matt McGrory/Robert Bothe -- 341-0216

Copies mailed by the Court to:

Jeffrey Wegner/Robert Slovek, The Omaha Bldg.,  
1650 Farnam St., Omaha, NE 68102  
United States Trustee

Movant (\*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.