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Occidental Life Ins. Co. v. Johnny
20 FSM R. 420 (App. 2016)

insurer. Appellants' counsel assured us that if the trial court judgment is affirmed, the judgment would be paid and that it was an internal matter that would be worked out between the two insurance companies. Having received this assurance, we need go no further.

V. CONCLUSION

Accordingly, we affirm the trial court judgment on the ground that Karlynn Johnny proved that she detrimentally relied on a negligent misrepresentation and was thus entitled to relief.

* * * *

FSM SUPREME COURT TRIAL DIVISION

FSM DEVELOPMENT BANK,)	CIVIL ACTION NO. 2014-021
)	Consolidated with
Plaintiff,)	Civil Action No. 2014-023
)	
vs.)	
)	
BERYSIN SALOMON and NANCY SALOMON,)	
)	
Defendants.)	
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BERYSIN SALOMON and NANCY SALOMON,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
ANNA MENDIOLA, in her capacity as President)	
and Chief Executive Officer of FSM Development)	
Bank; BRANDON TARA, in his capacity as Chief)	
Financial Officer of the FSM Development Bank;)	
JOHN SOHL, in his official capacity as Chairman)	
of the FSM Development Bank Board of)	
Directors; and FSM DEVELOPMENT BANK,)	
)	
Defendants.)	
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ORDER IMPOSING SANCTIONS, COMPELLING RESPONSES, AND SUBSTITUTING PARTY

Ready E. Johnny
Associate Justice

Decided: May 25, 2016

APPEARANCES:

For the Plaintiff and Defendants: (Bank, Mendiola, Tara, & Sohl)	Nora E. Sigrah, Esq. P.O. Box M Kolonía, Pohnpei FM 96941
For the Defendants and Plaintiffs: (Salomons)	Yoslyn G. Sigrah, Esq. P.O. Box 3018 Kolonía, Pohnpei FM 96941

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HEADNOTES

Civil Procedure – Discovery

Discovery is designed to prevent litigation by ambush. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 437 (Pon. 2016).

Civil Procedure – Discovery

The three major purposes for conducting pretrial discovery are: 1) to preserve relevant information that might not be available at trial, 2) to ascertain the issues that are actually in dispute between the parties, and 3) to allow a party to obtain information that will lead to admissible evidence on the issues that are in fact disputed. Failure to provide discovery frustrates these purposes. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 437 (Pon. 2016).

Civil Procedure – Depositions

An assertion that the pleadings and discovery responses contain sufficient information is not a valid ground for a party to avoid being deposed. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 437 (Pon. 2016).

Civil Procedure – Depositions

A party has the right to depose opposing parties to learn the extent of their knowledge. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 437 (Pon. 2016).

Civil Procedure – Depositions

It would be an extraordinary case where other sources of information would take the place of deposing a party. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 437 (Pon. 2016).

Civil Procedure – Depositions; Civil Procedure – Discovery

It is expected that a party in civil litigation will be deposed during the course of discovery. This is particularly true of a plaintiff. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 437 (Pon. 2016).

Civil Procedure – Depositions; Civil Procedure – Discovery

Pretrial depositions are an expected and normal part of pretrial discovery. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 437 (Pon. 2016).

Civil Procedure – Depositions

A party's illness does not preclude taking her deposition. Rather than being a reason not to take a deposition, ill health is often a ground to take a deposition in order to preserve testimony for trial in case the witness is unavailable at that time. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 438 (Pon. 2016).

Civil Procedure – Depositions; Evidence – Witnesses

Under FSM Evidence Rule 601, every person is competent to testify, and, if challenged on the basis of impairment, the general rule is that competency is presumed. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 438 (Pon. 2016).

Civil Procedure – Depositions; Civil Procedure – Sanctions

Generally, a party is entitled to its expenses in bringing a motion to compel depositions if the motion is granted. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 438 (Pon. 2016).

Civil Procedure – Interrogatories

A party must respond to interrogatories directed to her. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 438 (Pon. 2016).

Civil Procedure – Interrogatories

Interrogatories addressed to an individual party must be answered by that party. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 438 (Pon. 2016).

Civil Procedure – Interrogatories

Although it must look first to FSM sources of law rather than start by reviewing other courts' cases, the court may look to U.S. sources for guidance when an FSM court has not previously construed an aspect of an FSM civil procedure rule that is identical or similar to a U.S. counterpart, such as Civil Procedure Rule 33 on interrogatories since the court has seldom needed to construe it because litigants' use of that discovery tool has generally not been problematic. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 438 n.1 (Pon. 2016).

Civil Procedure – Interrogatories

A responding party must answer interrogatories in writing and sign the answers under oath. The answers to interrogatories must be responsive, full, complete, and unevasive. The answering party cannot limit his or her answers to matters within his or her own knowledge and ignore information immediately available to him or her or under his or her control. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 438-39 (Pon. 2016).

Civil Procedure – Interrogatories

If an appropriate interrogatory is propounded, the answering party will be required to give the information available to him or her, if any, through his or her attorney, investigators employed by him or her or on his or her behalf or other agents or representatives, whether personally known to the answering party or not. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 439 (Pon. 2016).

Civil Procedure – Interrogatories

If the answering party lacks necessary information to make a full, fair and specific answer to an interrogatory, it should state under oath and should set forth in detail the efforts made to obtain the information. Allegations made in pleadings do not meet this standard. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 439 (Pon. 2016).

Civil Procedure – Discovery

That a document can also be obtained elsewhere is not a ground for a party to refuse produce a document requested by another party. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 439, 441 (Pon. 2016).

Civil Procedure – Sanctions

Rule 37 provides, in part, that if a party fails to obey an order to provide or permit discovery, the

court in which the action is pending may make an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 439 (Pon. 2016).

Civil Procedure – Discovery; Civil Procedure – Sanctions

Traditionally, the courts have administered justice with mercy. They have allowed a party a second opportunity to comply with the discovery rules and orders made under them. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 439 (Pon. 2016).

Civil Procedure – Discovery; Civil Procedure – Interrogatories; Civil Procedure – Sanctions

Since, in discovery matters, courts often make conditional orders intended to encourage compliance rather than punish a failure, the court, instead of striking a party's answer and dismissing that party's other claims, may order that party to file and serve under oath the party's appropriate responses to interrogatories and produce the documents requested of the party by a date certain and grant the opposing party's motion if discovery is not provided by then, and the court may also order that the movant is entitled to its expenses in bringing the motion to strike the pleadings. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 439 (Pon. 2016).

Civil Procedure – Interrogatories

An interrogatory response asserting that detailed explanations were already provided in the complaint's factual statements, is an inadequate and unacceptable response to an interrogatory. Incorporation of a pleading's allegations by reference is not a responsive and sufficient answer to an interrogatory. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 440 (Pon. 2016).

Civil Procedure – Interrogatories

Interrogatory answers must be responsive, full, complete and unevasive. Insofar as practical they should be complete within themselves. Material outside the answers and their addendum ordinarily should not be incorporated by reference. If information from other answers is incorporated in a particular answer to avoid repetition, references should be specific rather than general. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 440 (Pon. 2016).

Civil Procedure – Interrogatories

Interrogatories should be answered directly and without evasion in accordance with information that the answering party possesses after due inquiry. As a general rule, a party in answering interrogatories must furnish information that is available to it and that can be given without undue labor and expense, and if a party is unable to give a complete answer to an interrogatory, it should furnish any relevant information that is available. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 440 (Pon. 2016).

Civil Procedure – Interrogatories

If some of the interrogatories are objected to, the reasons for objection must be stated, an answer provided to the unobjectionable parts, and the objections signed by the attorney raising them. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 440-41 (Pon. 2016).

Civil Procedure – Interrogatories

If the answer to an interrogatory involves the use of extensive business records, then it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. A specification must be in sufficient detail to permit the interrogating party to locate and to identify, as

readily as can the party served, the records from which the answer may be ascertained. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 441 (Pon. 2016).

Civil Procedure – Interrogatories

A clearly relevant interrogatory should be answered with the information requested. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 441 (Pon. 2016).

Civil Procedure – Interrogatories; Civil Procedure – Sanctions

A response to the bank's interrogatory that sought information about a specific named person (who apparently had endorsed at least one of the bank's refund checks), that that was a document that the party had received from the bank so the party did not know anything about it, is completely non-responsive to the question, which asked who the named person was and where he could be found, and was evasive and inadequate and thus a sanctionable response. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 441 (Pon. 2016).

Civil Procedure – Discovery

If documents are available from a party, it has been thought preferable to have them obtained from that party pursuant to Rule 34 rather than subpoenaing them from a nonparty witness. This is because witnesses who are not parties to the action should not be burdened with the annoyance and expense of producing the documents sought unless the plaintiff is unable to discover them from the defendant. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 441-42 (Pon. 2016).

Civil Procedure – Discovery

The mere fact that producing documents would be burdensome and expensive and would interfere with a party's normal operations is not inherently a reason to refuse an otherwise legitimate discovery request. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 442 (Pon. 2016).

Civil Procedure – Discovery

While requests for the production of documents are generally complied with by providing the requestor with copies of the documents requested, that is not the only method to comply with a request. The requested party may permit the requesting party to inspect and copy the documents. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 442 (Pon. 2016).

Civil Procedure – Discovery

A party may serve on another party a request to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy any designated documents which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 442 (Pon. 2016).

Civil Procedure – Discovery; Evidence – Privileges

Any confidential patient-doctor's information can be redacted from documents provided in discovery. The fact that a medical clinic received certain sums as payments for medical services should be discoverable, but what those medical services were and for which patients, need not be provided. That the clinic received an aggregate total payment of some amount for a particular type of service may be provided without violating doctor-patient privilege. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 442 (Pon. 2016).

Civil Procedure – Discovery

The proper procedure for the inspection of documents is that the party upon whom the request is served must state, with respect to each item or category, that inspection and related activities will

be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated, and the party who produces documents for inspection must produce them as they are kept in the usual course of business or may organize and label them to correspond with the categories in the request. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 442 (Pon. 2016).

Civil Procedure – Discovery; Evidence – Privileges

The mere allegation that the work product doctrine applies, is insufficient to claim the privilege. The party who asserts the work product privilege must demonstrate that the doctrine applies. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 443 (Pon. 2016).

Civil Procedure – Discovery; Evidence – Privileges

Because the work product doctrine is intended only to guard against divulging the attorney's strategies and legal impressions, it does not protect facts concerning the creation of work product or facts contained within work product. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 443 (Pon. 2016).

Civil Procedure – Discovery

When the matters requested are either facts concerning the creation of work product or facts contained within work product and are thus discoverable, the responding party should not have objected to the request but produced his documents. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 443 (Pon. 2016).

Civil Procedure – Discovery; Civil Procedure – Sanctions

Even when a party is entitled to the relief it has requested – dismissal of certain claims and defenses – as discovery sanctions, the court, under Rule 37(a)(3) practice, has discretion in determining whether to instead order further answers. FSM Dev. Bank v. Salomon, 20 FSM R. 431, 443 (Pon. 2016).

* * * *

COURT'S OPINION

READY E. JOHNNY, Associate Justice:

This comes before the court on 1) the FSM Development Bank's Motion to Compel Depositions of Berysin Salomon and Nancy Salomon, filed February 5, 2016; 2) Opposition to Plaintiff's Motion to Compel Depositions of Berysin Salomon and Nancy Salomon, filed on February 15, 2016; 3) FSMDB's Reply to Salomons' Opposition to Compel Depositions of Berysin Salomon and Nancy Salomon, filed February 18, 2016; 4) Motion to Substitute Party, filed March 10, 2016; 5) Motion for an Order Striking Answer and All Defenses of Nancy Salomon in 2014-021; and Striking Complaint Filed in 2014-023; and an Order Establishing Liability Against Defendant Nancy Salomon for Non-compliance with Court Orders, filed March 14, 2016; 6) Motion for an Order Striking Certain Defenses of Berysin Salomon in 2014-021; Striking Certain Claims Filed in 2014-023; for Non-compliance with Court Orders, filed March 16, 2016; 7) Opposition to Motion to Substitute Party, filed March 21, 2016; 8) the Salomons' motion to enlarge time to oppose all the above motions, filed March 28, 2016; 9) Notice of Supplemental Authority, filed March 28, 2016; 10) Reply to Opposition Filed March 21, 2016, filed March 29, 2016; 11) the Salomons' second motion to enlarge time, filed April 7, 2016; 12) Opposition to Salomons' Second Motion to Enlarge Dated April 9, 2016, filed April 18, 2016; 13) Oppositions to Motion for an Order Striking Certain Defenses of Berysin Salomon in 2014-021; Striking Certain Claims Filed in 2014-023; for Non-compliance with Court Order, filed April 19, 2016; 14) Oppositions to Motion for an Order Striking Answer and All Defenses of Nancy Salomon in 2014-021; and Striking Complaint Filed in 2014-023; and an Order Establishing Liability Against Defendant Nancy Salomon for

Non-compliance with Court Order, filed April 19, 2016; 15) Reply to Berysin Salomon's Opposition Filed April 19, 2016, filed May 5, 2016; and 16) Reply to Nancy Salomon's Opposition Filed April 19, 2016, filed May 5, 2016.

I. ENLARGEMENTS OF TIME

In the interests of giving full consideration to the other motions before the court, NOW THEREFORE IT IS HEREBY ORDERED that the Salomons' motions to enlarge time to oppose the bank's various motions is granted. Their oppositions are deemed timely filed.

II. SUBSTITUTION OF PARTY

The Salomons' opposition having raised no valid reason why she should not be substituted, IT IS FURTHER ORDERED that the bank's motion to substitute Brandon Tara, in his official capacity as Chief Financial Officer of the FSM Development Bank for Sihna Lawrence, who formerly held that position, is granted, FSM Civ. R. 25(d)(1), and that this substitution shall henceforth be reflected in the case caption.

III. DISCOVERY MOTIONS

The bank complains that the Salomons' failure to provide the discovery responses to which it is entitled hinders the preparation of its case and subjects it to uncertainty. "Discovery is designed to prevent litigation by ambush." FSM v. GMP Hawaii, Inc., 17 FSM R. 555, 575 (Pon. 2011). The three major purposes for conducting pretrial discovery are: "1) to preserve relevant information that might not be available at trial, 2) to ascertain the issues that are actually in dispute between the parties, and 3) to allow a party to obtain information that will lead to admissible evidence on the issues that are in fact disputed." People of Tomil ex rel. Mar v. M/C Jumbo Rock Carrier III, 17 FSM R. 64, 68 (Yap 2010). Failure to provide discovery frustrates these purposes. The bank has filed several motions because the Salomons have not provided it the discovery it has sought.

A. *Motion to Compel the Salomons' Depositions*

The bank seeks an order to compel the depositions of both Berysin Salomon and Nancy Salomon, and it seeks its expenses in bringing the motion. The Salomons have not appeared at any of the depositions that the bank has noticed. They oppose the taking of any depositions because Nancy Salomon has been ill for some time and has needed off-island medical referral. She was accompanied by her husband, Dr. Berysin Salomon, on those referrals. The Salomons contend that their answers and Berysin Salomon's earlier discovery responses provide enough information and add that Nancy Salomon is "not medically competent" to testify.

An assertion that the pleadings and discovery responses contain sufficient information is not a valid ground for a party to avoid being deposed. A party has the right to depose opposing parties to learn the extent of their knowledge. Berysin Salomon and Nancy Salomon are both parties, and it would be an extraordinary case where other sources of information would take the place of deposing a party. See FSM Dev. Bank v. Adams, 14 FSM R. 234, 254 (App. 2006). Berysin Salomon and Nancy Salomon were both plaintiffs in Civil Action No. 2014-023, which was consolidated into this case, in which they are defendants. "It is expected that a party in civil litigation will be deposed during the course of discovery. This is particularly true of a plaintiff." Mori v. Hasiouchi, 18 FSM R. 188, 190 (Chk. 2012) (citation omitted). "Pretrial depositions are an expected and normal part of pretrial discovery." M/C Jumbo Rock Carrier III, 17 FSM R. at 68. The Salomons should thus expect to be deposed.

Nancy Salomon's illness does not preclude taking her deposition. Rather than being a reason not to take a deposition, "ill health is often a ground to take a deposition in order to preserve testimony for trial in case the witness is unavailable at that time." *Adams*, 14 FSM R. at 254. Moreover, under FSM Evidence Rule 601, "[e]very person is competent" to testify, and, if challenged on the basis of impairment, the general rule is that competency is presumed.

For all the above reasons, NOW THEREFORE IT IS HEREBY ORDERED that the motion to compel Berysin Salomon and Nancy Salomon to appear at their depositions is granted. IT IS FURTHER ORDERED that, unless the parties agree otherwise, the Salomons shall appear at depositions to be taken no later than June 30, 2016, at a time and place agreed to by the parties, or if no agreement can be made, chosen by the bank. The parties shall make such arrangements as may be needed to accommodate a deponent's medical condition.

AND IT IS FURTHER ORDERED that the bank is entitled to its expenses in bringing the motion to compel depositions. FSM Civ. R. 37(a)(4). It shall file and serve its expense request no later than June 3, 2016. The Salomons may file a response thereto by June 14, 2016.

B. *Motions to Strike*

1. *Nancy Salomon*

The bank asks that Rule 37(b)(2)(C) sanctions be imposed on Nancy Salomon because she failed to comply with the court order that she respond to the bank's discovery requests. The bank moves to strike her answer and all her defenses in Civil Action No. 2014-021 and her complaint filed in Civil Action No. 2014-023, thereby establishing her liability. The bank also moves for its expenses in bringing the motion.

Nancy Salomon did not respond to any of the bank's discovery requests directed to her even though the court's January 13, 2016 order compelling discovery expressly required both her and Berysin Salomon to do so. She neither answered the interrogatories directed to her nor produced any of the documents requested of her. She asserts that Berysin Salomon's discovery responses should be accepted as her own and that her allegations in the 2014-023 complaint and its supporting exhibits provide the bank with sufficient information as to her claims.

These contentions must be rejected. She did not, as a party must, respond to interrogatories directed to her. FSM Civ. R. 33(a). "Interrogatories addressed to an individual party must be answered by that party." 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2172, at 282 (2d ed. 1994).¹ Moreover, a number of the interrogatories addressed to Nancy Salomon do not duplicate those addressed to Berysin Salomon.

A responding party must answer interrogatories in writing and sign the answers under oath. *Helgenberger v. Mai Xiong Pacific Int'l. Inc.*, 17 FSM R. 326, 332 (Pon. 2011). When responding,

¹ Although it must look first to FSM sources of law rather than start by reviewing other courts' cases, the court may look to U.S. sources for guidance when an FSM court has not previously construed an aspect of an FSM civil procedure rule that is identical or similar to a U.S. counterpart. *See, e.g.,* *Berman v. College of Micronesia-FSM*, 15 FSM R. 582, 589 n.1 (App. 2008); *Arthur v. FSM Dev. Bank*, 14 FSM R. 390, 394 n.1 (App. 2006). The court has seldom needed to construe Civil Procedure Rule 33 on interrogatories since litigants' use of that discovery tool has generally not been problematic.

[t]he answers to interrogatories must be responsive, full, complete, and unevasive. The answering party cannot limit his [or her] answers to matters within his [or her] own knowledge and ignore information immediately available to him [or her] or under his [or her] control. If an appropriate interrogatory is propounded, the answering party will be required to give the information available to him [or her], if any, through his [or her] attorney, investigators employed by him [or her] or on his [or her] behalf or other agents or representatives, whether personally known to the answering party or not. If the answering party lacks necessary information to make a full, fair and specific answer to an interrogatory, it should state under oath and should set forth in detail the efforts made to obtain the information.

Miller v. Doctor's Gen. Hosp., 76 F.R.D. 136, 140 (W.D. Okla. 1977) (citations omitted). Allegations made in pleadings do not meet this standard.

Nancy Salomon also has not produced any of the documents requested of her. She contends that those documents can be subpoenaed from other sources. That a document can also be obtained elsewhere is not a ground for a party to refuse produce a document requested by another party. See Adams v. Island Homes Constr., Inc., 10 FSM R. 430, 432 (Pon. 2001) (if a party has any of the documents asked for in a discovery request, it should produce them).

Nancy Salomon has not raised a valid reason why she should not have obeyed the court's January 13, 2016 order compelling her to provide discovery to the bank. The bank, relying on Rule 37(b)(2)(C), therefore asks that the pleadings filed on her behalf – the answer in Civil Action No. 2014-021 and the complaint in Civil Action No. 2014-023 – be struck out and her liability thereby established. Rule 37 provides, in part, that:

If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make . . .

(C) [a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

FSM Civ. R. 37(b)(2). The bank is thus entitled to the relief it seeks. However, in an abundance of caution and with more than a little mercy, Nancy Salomon will be given one more opportunity to cure her disobedience before that relief takes effect. "Traditionally, the courts have administered justice with mercy. They have allowed a party a second opportunity to comply with the discovery rules and orders made under them." 8A WRIGHT, MILLER & MARCUS, *supra*, §2284, at 633. Since, in discovery matters, courts often make "conditional orders intended to encourage compliance rather than punish a failure," *id.* at 635, the court makes the following order:

NOW THEREFORE IT IS HEREBY ORDERED that UNLESS Nancy Salomon files and serves under oath appropriate responses to the bank's interrogatories and produces the documents it requested on or before June 24, 2016, the bank's motion to strike Nancy Salomon's answer and all her defenses in 2014-021 and to strike her Complaint filed in 2014-023 is granted and a default will be entered against her.

AND IT IS FURTHER ORDERED that the bank is entitled to its expenses in bringing the motion to strike Nancy Salomon's pleadings, FSM Civ. R. 37(a)(4), and it shall file and serve its expense request no later than June 3, 2016. Nancy Salomon may file and serve a response thereto by June 14, 2016.

2. *Dr. Berysin Salomon*

The bank moves to strike, as a sanction for his non-compliance with court orders, Berysin Salomon's Civil Action No. 2014-021 defenses of misrepresentation, unconscionability, fraud and estoppel, payment, release, accord and satisfaction, violation of usury laws, and failure to join an indispensable party, and his Civil Action No. 2014-023 claims of 1) [Count I] misrepresentation, unconscionability, and fraud, as it relates to interest accrual, credit life insurance premiums and refund, and Small Business Guaranty and Financial Corporation guaranty; 2) [Count IV] conduct not authorized by law relating to credit life insurance premium refund; 3) [Count VI] breach of the duty of good faith and fair dealing; and 4) [Count VII] negligence, vicarious liability, and respondeat superior. The bank therefore also asks that the court bar Berysin Salomon from presenting any claims and evidence of financial harm to him or his clinic and of the credit life insurance premium refund. The bank seeks these sanctions because Berysin Salomon, after the court ordered him to respond to the bank's discovery requests, only provided one of the documents requested and many of his interrogatory answers were not in compliance with the court's discovery rules and order. The bank also asks for its expenses in bringing the motion.

a. *Interrogatories*

The bank contends that Berysin Salomon's responses to interrogatories violated the court order because they were vague, evasive, and non-responsive and thus made in violation of the court's January 13, 2016 order compelling discovery. Berysin Salomon contends that his allegations in the 2014-023 complaint and its supporting exhibits provide the bank with sufficient information as to his claims.

Virtually every interrogatory response contains the statement that "[d]etailed explanations are already provided in the Factual Statements contained in the Complaint in Civil Action No. 2014-023, filed June 19, 2014, specifically pages 2 thru 27 [or 17]." This is an inadequate and unacceptable response to an interrogatory. "[I]ncorporation by reference of the allegations of a pleading is not a responsive and sufficient answer to an interrogatory." Atlanta Coca-Cola Bottling Co. v. Transamerica Ins. Co., 61 F.R.D. 115, 120 (N.D. Ga. 1972). Interrogatory

[a]nswers must be responsive, full, complete and unevasive. Insofar as practical they should be complete within themselves. Material outside the answers and their addendum ordinarily should not be incorporated by reference. If information from other answers is incorporated in a particular answer to avoid repetition, references should be specific rather than general.

Philling v. General Motors Corp., 45 F.R.D. 366, 369 (D. Utah 1968). "[I]nterrogatories should be answered directly and without evasion in accordance with information that the answering party possesses after due inquiry." 8A WRIGHT, MILLER & MARCUS, *supra*, § 2177, at 315. "As a general rule, a party in answering interrogatories must furnish information that is available to it and that can be given without undue labor and expense." *Id.* § 2174, at 302. "If a party is unable to give a complete answer to an interrogatory, it should furnish any relevant information that is available." *Id.* § 2177, at 320-21.

Berysin Salomon objected to several interrogatories (#12-15) as irrelevant but did not state why he believes the interrogatory is irrelevant and then added the further statement about detailed explanations being provided "in the Factual Statements in the Civil Action No. 2014-023 Complaint." The bank contends that these interrogatories are relevant because Berysin Salomon raised his and his clinic's financial status as a cause of action in 2014-023 and a defense in 2014-021. "If some of the interrogatories are objected to, the reasons for objection must be stated, an answer provided to the

unobjectionable parts, and the objections signed by the attorney raising them." 8A WRIGHT, MILLER & MARCUS, *supra*, § 2177, at 315. That was not done.

Interrogatories #12-14 ask about Berysin Salomon's and Berysin Community Health Center's income, income sources, and bank accounts held from July 2003 on. The bank contends that these requests are relevant because the Salomons alleged that the bank's loan policy adversely affected their and their clinic's financial health starting in 2003. The court realizes that answers to these interrogatories may involve the use of extensive business records. If this is true, then

it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

FSM Civ. R. 33(c). Thus, instead of providing all of the information himself by answering directly, Berysin Salomon may make his business records that answer these interrogatories available for the bank's inspection and copying.

Interrogatory #15 asks about other loans made to Berysin Salomon or his clinic. This interrogatory is clearly relevant since the loan agreement that Berysin Salomon signed with the bank prohibited further borrowing from any other source without the bank's permission. Berysin Salomon should have answered Interrogatory #15 with the information requested.

Interrogatory #3 in the bank's Second Set of Interrogatories sought information (relationship to the Salomons, current address and contact information) about a person named Berney Salomon, who apparently endorsed at least one of the two credit life insurance premium refund checks, copies of which were attached to the Salomons' complaint in 2014-23, but which the Salomons allege that they never received. Berysin Salomon's response was that that was a document that they had received from the bank so they did not know anything about it. That answer is completely non-responsive to the question, which asked who Berney Salomon was and where he could be found. It was also evasive. The answer should have stated who Berney Salomon was, what his relationship to Berysin Salomon was, and where and how Berney Salomon can currently be found.

Accordingly, Berysin Salomon's interrogatory answers were inadequate and evasive and thus sanctionable.

b. Production of Documents

The bank also asserts that Berysin Salomon violated the court order by failing to provide any of the many documents requested except for one. Berysin Salomon asserts that the bank can and should obtain elsewhere the requested documents other than the one he provided.

As stated above, that a document can also be obtained elsewhere is not a ground for a party to refuse produce a document requested by another party. See *Adams*, 10 FSM R. at 432 (if a party has any of the documents asked for in a discovery request, it should produce them). "If documents are available from a party, it has been thought preferable to have them obtained [from a party] pursuant to Rule 34 rather than subpoenaing them from a nonparty witness." 8A WRIGHT, MILLER & MARCUS,

supra, § 2204, at 365.² This is because "witnesses [who] are not parties to the action . . . should not be burdened with the annoyance and expense of producing the documents sought unless the plaintiff is unable to discover them from the defendant." Bada Co. v. Montgomery Ward & Co., 32 F.R.D. 208, 209-10 (S.D. Cal. 1963).

The bank requested, and Dr. Berysin Salomon did not provide, the clinic's FSM business gross revenue tax returns, the social security returns, the income sheets, the MiCare insurance payments and records, and the clinic payment records for Berysin's Community Health Clinic from 2004 to date. Berysin Salomon having placed his medical clinic's financial status at issue must produce the documents requested of him that relate to that issue. Berysin Salomon objects to producing these documents because he contends that the requests are "overly broad, cumulative, unduly burdensome, expensive, harassing, confidential patient-doctor's information, [and] exceed the scope of discovery" because they cover twelve years from January 2004 to date.

Berysin Salomon, other than stating that the documents sought cover twelve years, thus hinting that there are many documents that fell within the categories requested, does not give specific reasons why the requests are thus objectionable. "The mere fact that producing documents would be burdensome and expensive and would interfere with a party's normal operations is not inherently a reason to refuse an otherwise legitimate discovery request." Baine v. General Motors Corp., 141 F.R.D. 328, 331 (M.D. Ala. 1991).

The requests, while not overly broad or cumulative, are extensive. This is because the Salomons have put at issue the financial status of their clinic, the bank is entitled to discover about that status. While requests for the production of documents are generally complied with by providing the requestor with copies of the documents requested, that is not the only method of compliance with a request. As noted above in the discussion on Rule 33 interrogatories, the requested party may permit the requesting party to inspect and copy the documents. A similar procedure is available under Rule 34. A party may serve on another party a request

to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect and copy any designated documents . . . which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served.

FSM Civ. R. 34(a)(1). Thus, the bank's requests need not be unduly burdensome or expensive. Any confidential patient-doctor's information can be redacted from the documents. The fact that the Salomons or their clinic received certain sums as payments for medical services should be discoverable, but what those medical services were and for which patients, need not be provided. That the clinic received an aggregate total payment of some amount for a particular type of service may be provided without violating doctor-patient privilege. The proper procedure is that:

The party upon whom the request is served . . . shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. . . .

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

² FSM courts have also not often needed to construe Rule 34, concerning the production of documents.

FSM Civ. R. 34(b).

Berysin Salomon objected to one request on the ground of "work-product privilege" without stating more, when the bank asked for "[a]ll spreadsheets, calculations, amortizations, and other documents which support your calculation of the annual interest rate charged by FSMDB on principal balance of the subject FSMDB loan." The mere allegation that the work product doctrine applies, is insufficient to claim the privilege. *Sigrah v. Microlife Plus*, 13 FSM R. 375, 378 (Kos. 2005). "The party who asserts the work product privilege must demonstrate that the doctrine applies." *Id.* "Because the work product doctrine is intended only to guard against divulging the attorney's strategies and legal impressions, it does not protect facts concerning the creation of work product or facts contained within work product." *Id.*

The matters requested are either "facts concerning the creation of work product" or "facts contained within work product" and are thus discoverable. Berysin Salomon should not have objected to this request but produced his documents.

c. Summary and Remedy

The bank was thus entitled to discovery responses as outlined above. Although the bank is thus entitled to the relief it has requested, in an abundance of caution, Berysin Salomon will be given one last opportunity to cure his deficiencies. Under Rule 37(a)(3) practice, "the court has discretion in determining whether to order further answers." 8A WRIGHT, MILLER & MARCUS, *supra*, § 2285, at 646.

IT IS THEREFORE FURTHER ORDERED that UNLESS Berysin Salomon files and serves supplementary responses to interrogatories, as outlined above, and permits the inspection of documents requested, as outlined above, on or before June 30, 2016, the bank's motion to strike certain defenses of Berysin Salomon in 2014-021 and certain claims of his filed in 2014-023 is granted. AND IT IS FURTHER ORDERED that the bank's requests for its expenses in bringing its motion for sanctions against Berysin Salomon is denied.

IV. CONCLUSION

Accordingly, Brandon Tara is substituted for Sihna Lawrence; the depositions of Berysin Salomon and Nancy Salomon shall be taken by June 30, 2016; Nancy Salomon shall file and serve her discovery responses by June 24, 2016, or otherwise her complaint filed in Civil Action No. 2014-023 shall be dismissed and her answer in Civil Action No. 2014-021 shall be stricken; Dr. Berysin Salomon shall file and serve his supplementary discovery responses and permit the inspection of documents requested by June 30, 2016 or otherwise the bank's motion to strike certain defenses of Berysin Salomon in 2014-021 and certain claims of his filed in 2014-023 is granted; and the bank's expense requests are due June 3, 2016 with any responses thereto due June 14, 2016.

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