

Order re Discovery in re Omnitrition International Inc.

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Order re Discovery in re Omnitrition International Inc.

Case: Order re Discovery in re Omnitrition International Inc (1993)

Subject Category: Court Order

Agency Involved: Private Civil Suit

Court: Federal District Court, N.D. California

Case Synopsis: The District Court was asked to order the production of certain documents relating to the operation of Omnitrition International, which the company was resisting.

Legal Issue: Under what circumstances may a defendant in a suit resist production of documents?

Court Ruling: The District Court held that documents that are not unduly burdensome to produce and respond to appropriately tailored document requests must be produced. Omnitrition had responded to the plaintiff's document requests with general complaints that compliance would be unduly burdensome. The District Court responded by ordering the production of documents, unless a specific showing could be made as to why the production of the specific documents in question could not be efficiently produced.

Practical Importance to Business of MLM/Direct Sales/Direct Selling/Network Marketing/Party Plan/Multilevel Marketing: In any court case, discovery requests will be a vital part of the process. Even

if an MLM company has complex and voluminous information, that alone will not prevent that opposing party from requesting access to the documents.

Order re Discovery in re Omnitrition International Inc. , No. C-92-4133 JPV (FSL) (1993) :

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No. C-92-4133 JPV (FSL)

In re OMNITRITION INTERNATIONAL, INC.

No. C-92-4133 JPV (FSL).

United States District Court, N.D. California.

June 2, 1993.

ORDER RE DISCOVERY

LANGFORD, Chief United States Magistrate Judge.

*1 Plaintiffs' Motion to Compel Discovery and the Parties' Dispute Concerning a Proposed Confidentiality Order came on for hearing on May 26, 1993. Appearing for plaintiff was Daniel Girard, Esq., of LIEFF, CABRASER & HEIMANN. Appearing for defendants was Kevin Muck, Esq. of BROBECK, PHLEGER & HARRISON. The moving and opposing papers and oral argument of counsel having been fully considered, and good cause appearing,

IT IS HEREBY ORDERED that the parties shall meet and confer in a further attempt to negotiate a mutually satisfactory Confidentiality Order. Should their efforts fail, each party shall, within ten days of the date of this order, submit to the court a proposed draft of a Confidentiality Order for the court's review and decision.

IT IS FURTHER ORDERED that plaintiffs' motion to compel discovery is GRANTED, with the following exceptions, which are DENIED: Document Request No. 3 to Defendants Fobair and Daley (Omnitrition-related correspondence); Document Request No. 8 to Fobair and Daley (Diaries, Calendars, Telephone

Logs); Interrogatory 15 to Omnirition (Names of Banks and Financial Institutions). This last request is denied without prejudice to renewal later in this lawsuit.

BACKGROUND

Plaintiff Shaun Webster was a dealer/distributor for Omnirition International. He filed this lawsuit October 14, 1992, alleging that Omnirition and individual defendants Jim Fobair and Roger Daley operate a nationwide pyramid scheme. Omnirition purports to sell nutritional supplements and "smart drugs." In reality, say Webster and other plaintiffs, Omnirition sells distributorships in an endless chain of recruitment. Through slick advertising and personal sales solicitations, Omnirition misrepresents the likelihood of achieving financial security through selling Omnirition products and recruiting new distributors. The fees and investments of later investors are used to pay off earlier investors.

Plaintiffs allege that Omnirition and the individual defendants committed various violations of federal and state securities laws under the 1933 and 1934 Securities and Exchange Acts, civil RICO under 18 U.S.C. § 1962(c) and (d), the California Business and Professions Code, false advertising and common law fraud.

PROCEDURAL BACKGROUND

Shaun Webster's lawsuit has been consolidated with that of Martha Mintzer and with two cases filed in Houston, Texas, which were referred by the Multi-District Litigation Panel. The plaintiffs seek rescission of class members' purchases of Omnirition "securities", as well as recovery of money spent on purchases of Omnirition products, plus interest. Plaintiffs also seek treble damages pursuant to 18 U.S.C. § 1964(c) for civil RICO.

Plaintiffs will also request that the court enjoin defendants to cease and desist their promotional activities for the Omnirition pyramid scheme.

Plaintiff Webster estimates he lost \$2800. An estimated 50,000 other class members may have lost as much as \$50 million.

*2 The case has been set for a 15-day jury trial on February 28, 1994. A hearing on the Motion for Class Certification is set for June 10, 1993.

DISCOVERY DISPUTE

The parties have been trying to negotiate certain discovery requests and the drafting of a confidentiality order to protect Omnirition proprietary information.

Plaintiffs seek interrogatory answers and documents from defendants. Defendants respond with objections of overbreadth, burden, harassment and invasion of privacy. Defendants also want a confidentiality order.

DISCOVERY REQUESTS

Document Requests to Omnitrition

Letters of Complaint

Defendants object to this request as vague and overbroad, saying it could mean complaints about anything, including shipping the wrong product. Defendants offer to produce letters from distributors complaining that they lost money selling Omnitrition products.

Plaintiffs respond that an important feature of a pyramid scheme is that recruitment of new distributors is emphasized over sale of retail products. Complaints to Omnitrition might show a lack of attention to retail sales, including incorrect filing of orders or poor product quality.

Defendants also object on the basis of burden. The Declaration of Antonio Duque, Vice-President of Business Ethics and Rules Compliance says that responding to all the discovery requests would require review of hundreds of thousands of documents in three locations, Texas, Nevada and West Virginia. He does not relate the burden of production to any particular request, but to all of them generally.

This request is GRANTED. Defendants have failed to show specifically how this request would burden them and plaintiffs have shown how the information would be relevant to show that Omnitrition's real business is selling distributorships, not products.

Request Nos. 4 and 5--Check Registers and General Ledgers

Defendants object to this request as overbroad: "such information can be gleaned from sources other than Omnitrition's general ledger entries or its check registers."

Defendants object to what they call a "fishing expedition.", saying that plaintiffs want to "drain the ponds and collect the fish from the bottom." In re IBM Peripheral EDP Devices Antitrust Litigation, 77 F.R.D. 39, 42 (N.D.Cal.1977)

The IBM case dealt with a party's objections to discovery from its designated expert.

Plaintiffs respond that defendants make no showing that the records are voluminous, but make a "boilerplate" objection. Plaintiffs agree that the information could be gleaned from other sources, such as Omnitrition's actual checks, wire transfer records, etc. The most efficient source is the requested records, which constitute a convenient summary of the information. Plaintiffs seek confirmation of their theory that the money flows from the bottom of the pyramid to the top, in a "trickle-up" pattern.

This request is GRANTED. The requested records contain a summary of the information, which would be relevant to who was receiving money from Omnitrition and how much. This would be the most efficient and economical way to provide the information.

Request Nos. 6 & 7--Omnitrition Internal Board Records and Documents, including minutes, presentations and documents received by Omnitrition directors in connection with Board meetings.

*3 Defendants object to the request as irrelevant, overly broad, burdensome and harassing. Defendants want the request limited to the subject matter of the lawsuit. Defendants cite *Wauchop v. Domino's Pizza, Inc.*, 138 F.R.D. 539 (N.D.Ind.1991). In that case plaintiff sued Domino's Pizza and its president for the death of plaintiff's decedent, alleging that the company's thirty-minute delivery time guarantee caused the fatal collision between the decedent and a delivery driver for a Domino's franchisee. The court did not allow plaintiff to obtain from Domino's all minutes of shareholders and directors meetings, but ordered the production of only those portions of the minutes relating to the thirty-minute guarantee and relating to the control that Domino's and its president exercised over Domino's franchisees, issues critical to plaintiff's case.

Plaintiffs distinguish their case from *Wauchop*. They say that Omnitrition is a pyramid scheme "through and through." There are no significant features of its operation other than its pyramid aspects--all Board minutes and other Board documents reflecting its operations are relevant.

It is ironic that the *Wauchop* case is also frequently cited for the proposition that an objecting party must specifically establish the nature of any alleged burden, usually by affidavit or other reliable evidence. Defendants' affidavit by Mr. Duque is not really reliable, since it does not address any specific discovery request, but seems to say that responding to any of the plaintiffs' requests would be burdensome.

This request is GRANTED. Board documents restricted to the relevant time period would show what the directors were paying time and attention to: selling distributorships or selling products.

Interrogatory 3--money paid to Omnitrition distributors, including 'retailer bonus', 'builder bonus,' 'group bonus', 'royalty bonus' or other cash or commissions

Defendants object that this interrogatory is compound, in violation of Local Rule 230-1, that it seeks confidential information, that it is overly broad, irrelevant and burdensome.

As for relevance, plaintiffs say that the pattern of payments to the various levels of the Omnitrition distributor pyramid will tend to show, for example, whether defendants misrepresented the compensation one could reasonably expect as a distributor.

This request is GRANTED. This interrogatory is not compound, the categories merely explain what might be included in 'money paid'. Defendants never say how the information would be confidential. Defendants never explain how it is burdensome, other than 'obviously.' Plaintiffs have shown relevance to their claim that the defendants misrepresented the compensation a distributor might expect.

Interrogatory 8--Lawsuits against Omnitrition

Defendant objects that this is irrelevant; the interrogatory should be limited to lawsuits alleging similar circumstances. *Miller v. Pancucci*, 141 F.R.D. 292, 296 (C.D.Cal.1992) (request for documents relating to other tort claims irrelevant where not limited to claims raised in suit.) *Miller* was a civil rights action, alleging excessive use of force in making an arrest. Plaintiff sought all government tort claims against the defendant city in which the individual defendants had been identified as the responsible employees. Plaintiff limited his request to claims for false arrest, civil rights violations, assault and battery, brutality, intentional infliction of emotional distress, dishonesty, corruption, perjury, fabricated probable cause and bigotry. The court excluded claims related to bigotry because plaintiff had not raised a claim of bigotry.

*4 Plaintiffs allege that this is a securities case--that distributorships are actually securities. Defendants are obligated under securities laws to disclose accurately all material facts about itself and the securities it sells. An issuer's failure to disclose its litigation history can be an actionable omission and therefore defendants' record of lawsuits is relevant. The very existence of lawsuits is relevant, not just the allegations of the claims.

This request is GRANTED--this information is relevant to plaintiffs' claim that defendants' distributorships were actually securities. If so, then the information could lead to the discovery of admissible evidence of the company's failure to disclose its litigation history.

Document Requests to Jim Fobair and Roger Daley Request 1--Agreements with Omnitrition

Defendants object to this interrogatory as overly broad, irrelevant and unduly burdensome. They would be willing to produce agreements akin to those executed by plaintiffs and other distributors.

Plaintiffs allege that Fobair and Daley have played essential roles in the fraud perpetrated under the name of Omnitrition. Agreements under which Fobair and Daley were employed by, rendered services to, and/or received compensation from Omnitrition, along with other agreements, would show the relationship between these individuals and Omnitrition.

This request is GRANTED. Defendants fail to back up their objections. If Fobair and Daley receive preferential treatment from Omnitrition it would tend to support plaintiffs' claim that the pyramid scheme exists to benefit those at the top at the expense of those at the bottom.

Request 3--Omnitrition-related correspondence

Defendants object to the request as vague, irrelevant, overbroad and burdensome. Defendants would be willing to produce correspondence with downline distributors related to recruitment.

Plaintiffs believe other Omnitrition correspondence could reveal misrepresentations made by Fobair or Daley to investors, for example regarding the levels of compensation. This could reveal that defendants knew Omnitrition was an illegal pyramid.

Plaintiffs have made only a vague showing of relevance, insufficient to support production of what could be a large batch of documents.

This request is DENIED.

Request Nos. 4, 5 and 7--Documents showing payments from Omnitrition to Fobair and Daley

Defendants object to the request as irrelevant, unduly burdensome, harassing, invasive of privacy. Production of documents related to all payments would include reimbursement for travel, expenses, etc.

Plaintiffs say these documents are relevant to their pyramid scheme theory-- those at the top siphon off the investments of those below--the amount of money received by Fobair and Daley from Omnitrition would be relevant, when compared with compensation of lower echelon distributors. Also relevant would be problems over compensation. (e.g. problems with Herbalife)

*5 This request is GRANTED. Even expense reimbursements could tend to support plaintiffs' claims, if, for example, defendants were reimbursed for expenses that other distributors were not reimbursed for, or if expense reimbursements were just disguised income.

Request 8--Diaries, Calendars, Telephone Logs for relevant time period (October, 1989 to the present).

Defendants object to the request as overbroad, irrelevant, burdensome and harassing. They say it imposes on defendants the burden of redacting information where others' privacy rights are involved. Some meetings and phone calls might mention Omnitrition but not be business-related.

Plaintiffs want a clearer picture of defendants' activities with Omnitrition, including other distributors, officers and directors of the company, and including related travel. Such activities form the basis of plaintiffs' claims against Fobair and Daley, that they were recruiting new distributors with fraudulent inducements.

This request is DENIED. The relevance of the information sought does not outweigh the burden on defendants of reviewing and redacting irrelevant or private information.

Request 13--Omnitrition Promotional Materials

Defendants agree to produce these, subject to a confidentiality order.

Plaintiffs say it is unnecessary for the promotional materials to be protected by the confidentiality order. By their very nature and purpose, the promotional materials and press releases have already been widely and publicly disseminated. Why should they now suddenly be hidden?

This request is GRANTED. These materials should be produced, but not subject to any confidentiality order. It would be absurd to sequester documents which have been widely promoted by defendants themselves.

Request 14--Fobair and Daley Investment in Omnitrition

Defendant objects to the request as overbroad, unduly burdensome and harassing, and an invasion of privacy. Plaintiffs have made no showing that this request could produce admissible evidence related to "who controls Omnitrition," or "relevant to proof of a 'pattern' or 'predicate acts,' as part of their RICO claim.

Alternatively, defendants agree to produce the requested documents, under their confidentiality order.

Plaintiffs argue that the extent of Fobair and Daley's investment would be evidence of their control and direction of Omnitrition. Control of a corporation commonly is exercised through ownership of significant portions of the company's stock. Plaintiffs allege violation of securities laws. A controlling stockholder is held liable for acts of the corporation under 15 U.S.C. § 77o; see also 15 U.S.C. § 78t(a).

"Control" is defined as "[t]he possession, direct or indirect, of the power to cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 230.405.

Plaintiffs say that information regarding the extent of Fobair and Daley's control of the corporation would be relevant to their liability for its acts.

*6 This request is GRANTED. Defendants have given no reason why this information should be subject to a confidentiality order.

Interrogatories to Fobair and Daley

Interrogatory 2--Compensation to Fobair and Daley

Defendants object in the same way they did to the related document requests, in the alternative, will answer subject to their confidentiality order.

Plaintiffs say this information is relevant to their theory that defendants are siphoning off the investments of lower distributors.

This request is GRANTED, subject to a confidentiality order. This information is relevant but private, and should be produced for purposes of this litigation only.

Interrogatory Nos. 3 and 4--Agreements with Omnitrition and Business Affiliations

Defendants object that the interrogatory is overbroad, irrelevant, burdensome, harassing and an invasion of privacy.

Plaintiffs say 3 would reveal relationships between the individual defendants and Omnitrition, 4 could reveal previously undisclosed affiliations with companies through which Fobair and Daley controlled and/or profited from Omnitrition operations.

This request is GRANTED. The information would be relevant to past and present relationships between defendants, Omnitrition and other multilevel marketing companies. This might show a patterns of behavior or interrelationships which would benefit defendants at the expense of plaintiffs.

Interrogatory 11--Legal or Beneficial Owners of Omnitrition

Defendants are willing to provide information regarding stockholders.

Plaintiffs are concerned that defendants will define "stockholders" in such a way as to exclude those who own an interest in Omnitrition indirectly through another entity, or who benefit from another's ownership interest in Omnitrition.

This request is GRANTED. This information would reveal the existence of "silent partners" or others who benefit from or control the business practices of Omnitrition.

Interrogatory 15--Names of Omnitrition's Banks and Financial Institutions

Defendants object to this as having no possible relevance to the lawsuit. They claim plaintiffs are attempting to do post-judgment discovery.

Plaintiffs respond that they are only trying to trace the disposition of misappropriated investors' funds. They believe such discovery is common in fraud cases.

This request is DENIED, without prejudice to renewal later in this lawsuit. This type of discovery is premature now, but could become appropriate later.

CONCLUSION AND ORDER

Defendants shall produce to plaintiffs, within thirty days of the date of this order, the following documents of defendants responsive to plaintiffs' interrogatories and requests for production of documents:

Letters of Complaint

Check Registers and General Ledgers

Omnitrition internal Board records and documents

Money paid to Omnitrition distributors

Lawsuits against Omnitrition

Fobair and Daley Agreements with Omnitrition

*7 Documents showing payments from Omnitrition to Fobair and Daley

Fobair and Daley investment in Omnitrition

Compensation to Fobair and Daley

Fobair and Daley agreements with Omnitrition and business affiliations

Legal or beneficial owners of Omnitrition

SO ORDERED.

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