

Hon. David G. Estudillo

UNITED STATES DISTRICT COURT
IN AND FOR THE WESTERN DISTRICT OF WASHINGTON

NATHEN BARTON,

Plaintiff,

vs.

JOE DELFGAUW, XANADU
MARKETING INC., STARTER HOME
INVESTING INC., & JOHN DOE 1-10,

Defendants.

) Case No. 3:21-cv-05610-DGE

) **MOTION TO WITHDRAW
ADMISSIONS**

) **Noted for: January 19, 2024**

AND RELATED COUNTERCLAIMS)

COME NOW Defendants/Counterclaimants JOE DELFGAUW, XANADU MARKETING INC., and STARTER HOME INVESTING, INC. hereby move this Court for an order withdrawing certain alleged admissions pursuant to *Federal Rule of Civil Procedure 36(b)* on the grounds that the Court may withdraw or amend a Request for Admission response if such action by the Court will promote the presentation of the merits of the action and will not unreasonably prejudice the Plaintiff/Counterdefendant. Defendants/Counterclaimants contend that such action by this Court will promote the presentation of the merits of the action and will not unreasonably prejudice the Plaintiff.

This motion is made pursuant to Federal Rule of Civil Procedure 36(b) (“Rule 36(b)”) and is based

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1 upon the subjoined argument, the declaration of Edward Winkler, and the complete files and records of this
2 action, and such other and further oral and documentary evidence as may be presented at the hearing on this
3 Motion.

4
5 Dated: Jan. 2, 2024 _____
6 _____

_____ s/ Donna Gibson
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11
12 **MOTION TO WITHDRAW CERTAIN ADMISSIONS**

13 **I. STATEMENT OF FACTS**

14 This case arises from alleged telemarketing actions that Plaintiff claims were perpetrated by
15 Defendants without his consent. Defendants have filed a counterclaim alleging that Plaintiff, a repeat TCPA
16 litigator, has fraudulently induced communication between the parties and now seeks to profit from such
17 fraudulent activities. See Dkt 83 and 105.
18

19 During the months of November, December and January of 2021, various requests for admission were
20 served upon Defendants.

21 Now two years after the fact, and Plaintiff, having received Defendants responses, wishes to have this
22 Court declare certain individual requests for admissions to be deemed admitted due to Defendant's failure to
23 timely serve such responses. However, Plaintiff by his own admission has admitted receiving the delinquent
24 responses over a year ago, in or around the spring of 2022. See Dkt 299, 300 and 301.
25

26 Any delinquency that may have occurred in the timely service of discovery request were due to the
27 fact that Plaintiff and Defendant are located on opposite ends of the country (Washington and Michigan) and
28 the logistic of receiving, responding to and returning over

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1 400 discovery requests, combined with the fact that the country was coming out of the Covid Pandemic, and a
2 majority of the persons having the knowledge needed to respond to the request were working remotely, created
3 a hardship on the Defendants. See the Declaration of Edward Winkler attached thereto filed and served
4 concurrently and incorporated herein by reference.

5 **II. ARGUMENT**

6 Defendants/Counterclaimants contend that this motion should be granted as that will promote the
7 presentation of the merits of the action and will not unreasonably prejudice the adverse party.

8 **A. DEFENDANTS'/COUNTERCLAIMANTS' MOTION SHOULD BE GRANTED**
9 **SINCE THE FIRST PRONG OF THE 36(b) TWO-PRONG TEST IS MET**

10 Rule 36(b) sets forth a two pronged test to determine whether it is reasonable and appropriate for the
11 court to grant relief to a party requesting to withdraw or amend discovery admissions, including admissions
12 that are deemed admissions due to the late response of the party responding to the discovery request. The first
13 of the two prongs calls for a determination by the court as to whether "the presentation of the merits" will be
14 encouraged by allowing a withdrawal or amendment of the admissions. This "emphasizes the importance of
15 having the action resolved on the merits." *Smith v. First Nat. Bank of Atlanta*, 837 F.2D 1575, 1577 (11th Cir.
16 1988) ("Smith").

17
18 "The first half of the test in Rule 36(b) is satisfied when upholding the admissions would practically
19 eliminate any presentation of the merits of the case." *Hadley v. United States*, 45 F.3d 1345, 1348 (9th
20 Cir.1995). Upholding the admissions in this case would essentially eliminate any presentation of the merits of
21 this case in that Defendant would be forced to admit evidence, opinions and legal theories, previously denied
22 over a year ago. Both parties have proceeded in this matter and have each filed pleading based on the
23 responses given and accepted. If this Court were to allow the Plaintiff/Counter defendant to force admissions
24 on particular responses of his choosing, the truth would not be served and the case would not be decided on its
25 merits, but rather on a carefully manipulated set of evidence manufactured by and for the Plaintiff's benefit.

26
27 In *Smith*, the court held that granting the motion to withdraw the admissions would encourage the
28 "ascertainment of the truth and the development of the

1 merits." *Smith*, supra, 837 F.2d at 1577. In another case decided by the Eighth Circuit Court of Appeals, the
2 court concluded "the prospect of deeming the controverted fact as having been admitted seems to be anathema
3 to the ascertainment of the truth." *Manatt v. Union Pac. R.R. Co.*, 122 F.3d 514, 517 (8th Cir.1997).

4 The court has determined that in a case in which the failure to grant such relief results in great harm to
5 one side and the undoing of that side's case, "[t]he first prong of the two-part test is therefore easily met."
6 *Perez v. Miami-Dade County*, 297 F.3d 1255, 1266 (Fed. 11th Cir. 2002) ("Perez").

7 In the instant case, the responses were made and received over a year ago, if the admissions are not
8 allowed to be withdrawn, Defendants/Counterclaimants' case will suffer irretrievable harm. Thus, according to
9 well established case law as set forth above, the first prong of the Rule 36(b) test is easily met.

10
11 **A. DEFENDANTS/COUNTERCLAIMANTS' MOTION SHOULD BE GRANTED SINCE
12 THE SECOND PRONG OF THE 36(b) TWO-PRONG TEST IS MET**

13 The second prong of the Rule 36(b) two-part test requires the court to determine whether the non-
14 moving party would be prejudiced by granting the withdrawal or amendment of admissions. "The prejudice
15 contemplated by the Rule is not simply that the party who initially obtained the admission will now have to
16 convince the fact finder of its truth. Rather, it relates to the difficulty a party may face in proving its case, e.g.,
17 caused by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to
18 the questions previously answered by the admissions." *Smith*, supra, 837 F.2d at 1578 (quoting *Brook Village
19 N. Assoc. v. Gen. Elec. Co.*, 686 F.2d 66, 70 (1st Cir.1982).

20 Cases in which prejudice occur generally contemplate situations in which a trial has already begun or
21 witnesses have been dismissed in reliance upon the deemed admissions. No such factors are present in this
22 case.

23 The party relying on the deemed admission has the burden of proving prejudice. *Conlon v. U.S.*, 474
24 F.3d 616, 622 (9th Cir. 2007).

25 In the instant case, the Plaintiff/Counter defendant will not be prejudiced by the granting of the
26 withdrawal or amendment of admissions but rather forced to try the case based on its merits and the truth. As
27

1 mentioned earlier, Plaintiff/Counter defendant has used the responses previously provided by
2 Defendants/Counterclaimants in his own pleadings. However, such pleadings failed and now a year later, with
3 a different Judge hearing the case, Plaintiff/Counter defendant seeks to manipulate the record and this Court.
4 Any argument by Plaintiff/Counter defendant that they would be prejudiced under these circumstances is not
5 compelling. Accordingly, the second prong of Rule 36(b) is also readily met.

6 **B. DEFENDANTS/COUNTERCLAIMANTS' MOTION SHOULD BE GRANTED SINCE**
7 **THE COURT HAS BROAD DISCRETION TO PROMOTE THE PRESENTATION OF**
8 **THE MERITS OF THIS ACTION**

9 The Court is empowered with the authority to permit any prior admission to be withdrawn or
10 amended. "The Court may permit withdrawal or amendment if it would promote the presentation of the merits
11 of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or
12 defending the action on the merits." *Federal Rule of Civil Procedure* 36(b).

13 "District courts are entitled to broad discretion in managing pretrial discovery matters." *Perez, supra*,
14 297 F. 3d at 1263.

15 In this case, the Defendants/Counterclaimants have responded to Plaintiff's/Counter defendant's
16 discovery request. The discovery requests were not ignored or disregarded. Based on various factors in the
17 instant case, including logistics and the overall changes at that time to business and society as a whole and that
18 the fact that the responses were returned over a year ago, it is reasonable for the court to grant
19 Defendants/Counterclaimants' motion and the court has broad discretion to do so.

20 **D. DEFENDANTS/COUNTERCLAIMANTS REQUEST THAT THE COURT**
21 **WITHDRAW ALL DEEMED ADMISSIONS**

22 Defendants/Counterclaimants specifically request that the court allow each deemed response to be
23 withdrawn and allow each response as set forth in the Requests for Admissions to remain as they were
24 answered and as they have stood for over a year.

25 **E. IT IS WELL SETTLED THAT THE FEDERAL RULES OF CIVIL PROCEDURE**
26 **ARE TO BE LIBERALLY CONSTRUED SO THAT CASES ARE TRIED ON THEIR**
27 **MERITS**

1 In discussing the Federal Rules of Civil Procedure, the Ninth Circuit Court of Appeal has stated that
2 the Federal Rules of Civil Procedure are, “to be liberally construed to effectuate the general purpose of seeing
3 that cases are tried on the merits.” *Rodgers v. Watt*, 722 F.2d 456, 459 (9th Cir. 1983) (internal citations
4 omitted.) See also Federal Rule of Civil Procedure 1. “The Federal Rules should be construed and
5 administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”

6 When all of the relevant circumstances of this case are taken into account the only clearly
7 equitable determination is that the motion of Defendants under Rule 36(b) should be granted.

8 **III.**

9 **CONCLUSION**

10 Based on the above, Defendants/Counterclaimants respectfully requests that the Court grant this
11 motion and withdraw all deemed admissions and allow each response as set forth in the Requests for
12 Admissions to remain as they were answered and as they have stood for over a year so that this case may be
13 heard on its merits, as the law favors.

14 Respectfully submitted this 2nd day of January, 2024

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