

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

BRYAN J. DOYLE,)	
)	
<i>Plaintiff</i>)	
)	
v.)	No. 2:11-cv-10-JAW
)	
COLLEGE PRO PAINTERS)	
U.S. (LTD.), et al.,)	
)	
Defendants)	

**MEMORANDUM DECISION AND ORDER ON
MOTION TO COMPEL**

Plaintiff Bryan J. Doyle moves pursuant to Federal Rule of Civil Procedure 37(a)(3)(B)(i) to compel Timothy Rhoades, Ph.D., an expert witness designated by defendant College Pro Painters U.S. (Ltd.) (“College Pro”), to answer deposition questions regarding his income from work as a testifying expert. *See* Plaintiff’s Motion To Compel (“Motion”) (ECF No. 60) at 1. College Pro opposes the Motion and cross-moves for protection from the requested discovery. *See* Defendant College Pro Painters (U.S.) Ltd.’s Opposition to Plaintiff’s Motion To Compel and Defendant’s Motion for Protection (“Opposition”) (ECF No. 62) at 1. For the reasons that follow, I grant the plaintiff’s motion to compel, but only to the extent of compelling the disclosure in written form, not of permitting a continued deposition, and deny College Pro’s cross-motion for protection.

I. Applicable Legal Standards

In this district, no written discovery motion may be filed without the prior approval of a judicial officer. *See* Local Rule 26(b). During an April 6, 2012, teleconference with counsel, I granted leave to file the motion to compel. *See* ECF No. 58 at 3. I also extended the parties’

discovery deadline from March 30, 2012, to May 2, 2012, for the limited purpose of permitting U.S. Compliance Systems to complete its Rule 30(b)(6) deposition of College Pro. *See id.* at 2.

Federal Rule of Civil Procedure 37 provides, *inter alia*, that, “[a] party seeking discovery may move for an order compelling an answer . . . if . . . a deponent fails to answer a question asked under Rule 30 or 31[.]” Fed. R. Civ. P. 37(a)(3)(B)(i). “If the motion is denied, the court may issue any protective order authorized under Rule 26(c)[.]” Fed. R. Civ. P. 37(a)(5)(B). Federal Rule of Civil Procedure 30, which bears on depositions by oral examination, provides, *inter alia*, “A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).” Fed. R. Civ. P. 30(c)(2). Pursuant to Rule 30(d)(3), “[a]t any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party.” Fed. R. Civ. P. 30(d)(3)(A). “The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c).” Fed. R. Civ. P. 30(d)(3)(B).

Federal Rule of Civil Procedure 26 provides, in relevant part:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Fed. R. Civ. P. 26(b)(1). Such discovery is subject to the following limitations:

On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2)(C).

II. Background

The plaintiff sues, *inter alia*, College Pro, a business that recruits college-age workers to set up and manage house-painting businesses, to recover for injuries suffered in a fall from a ladder on August 4, 2009, while he was working painting a home pursuant to a contract with College Pro. *See* First Amended Complaint and Demand for Jury Trial (“Complaint”) (ECF No. 24) ¶¶ 4, 26, 29-34.

On March 30, 2012, the last day of discovery, the plaintiff deposed Dr. Rhoades, whom College Pro had designated as its liability expert. *See* Motion at 1; Opposition at 1. The plaintiff elicited testimony from Dr. Rhoades that (i) he spends between 50 and 75 percent of his time on litigation work, *see* Deposition of Timothy P. Rhoades, Ph.D., P.E., CPE (“Rhoades Dep.”) (ECF No. 62-1), Exh. 1 to Opposition, at 12, (ii) his litigation work is predominantly for defendants, *see id.* at 68, (iii) one-half of the revenue earned by his company, Applied Safety and Ergonomics (“ASE”), comes from litigation work, *see id.* at 11, 13, and (iv) ASE has marketed its services at meetings for the defense bar, *see id.* at 15-16. The plaintiff also elicited testimony concerning the number of cases in the past four years in which Dr. Rhoades has done litigation work for defendants *versus* for plaintiffs (with two possible exceptions, all for defendants), the identity of those defendants, and the nature of Dr. Rhoades' opinions. *See id.* at 26-69. The plaintiff also knows Dr. Rhoades' hourly rate in this case and the total amount that he has billed. *See* Rhoades Dep. (ECF No. 62-2), Exh. 2 to Opposition, at 208-09, 240-41; Letter dated April

19, 2012, from Erik Peters, Esq. to Benjamin R. Gideon, Esq. (ECF No. 62-3), Exh. 3 to Opposition.

Dr. Rhoades was also asked the following two questions concerning his income:

Q: Can you tell me, sir, what your annual income is from ASE?

Q: Can you tell me how much income in the past year you've received personally from work on litigation in which you've been asked to give testimony on behalf of large corporations?

Rhoades Dep. (ECF No. 62-1) at 69. Dr. Rhoades refused to answer those questions, and College Pro's attorney directed him not to answer, stating, "I'm not going to let you ask him any questions about his income or anything related to that." *Id.* at 69-70. The plaintiff's counsel accordingly discontinued that line of questioning and requested a discovery conference with the court, which was held on April 6, 2012. *See id.* at 70; ECF No. 58 at 1, 3.

III. Discussion

My review of the multiple cases cited by the parties, together with my own research, persuades me that (i) neither the First Circuit nor this court has had occasion to consider the question of whether an expert's income is discoverable, and (ii) the leading and most persuasive authority from another jurisdiction is *Behler v. Hanlon*, 199 F.R.D. 553 (D. Md. 2001).

The defendant in *Behler*, a personal injury action, sought a protective order with respect to the plaintiff's request for the production of a number of documents relating to the defendant's medical expert, including tax returns, documents relating to income earned during the prior five years from defense attorneys and insurance companies in connection with the performance of independent medical examinations ("IMEs"), documents relating to the amount of time that the expert had spent doing such activities, a list of cases in which he had been retained for such

services, and attorneys and insurers on whose behalf he had provided forensic services. *See Behler*, 199 F.R.D. at 554-55.

The *Behler* court recognized that “the fact that an expert witness may have a 20 year history of earning significant income testifying primarily as a witness for defendants, and an ongoing economic relationship with certain insurance companies, certainly fits within recognized examples of bias/prejudice impeachment, making such facts relevant both to the subject matter of the litigation, and the claims and defenses raised, and placing it squarely within the scope of discovery authorized by Rule 26(b)(1)[.]” *Id.* at 557 (footnote omitted). Yet, the court observed:

[A] determination that facts which a party seeks to discover fall within the scope of discovery set out by Rule 26(b)(1) is but the first step in the analysis. Even if discoverable, the court may, upon a Rule 26(c) motion for protective order, or on its own initiative, restrict or prevent requested discovery if, following an evaluation of the Rule 26(b)(2) factors, it determines that the discovery would be burdensome, duplicative, unnecessarily costly, or insufficiently probative to the issues in the litigation to warrant the expense of production.

Id. at 561 (citations omitted). The court went on to rule that, while the requested discovery was relevant, discovery of the total income earned by the expert for the prior five years, the amount thereof earned providing IMEs, records relating to the hours spent by the expert in that capacity, copies of his tax returns, and a listing of all insurance companies with which he was affiliated and all cases in which he had provided expert services was “overkill.” *Id.* It required the defendant to produce, pursuant to a protective order, only (i) the percentage of his gross income earned for each of the preceding five years attributable to performing expert witness services on behalf of insurance companies or attorneys and (ii) a list of cases for which he had provided such services. *See id.* at 562. It reasoned:

While there may be cases in which an expert’s gross income, and the specific amounts thereof earned by providing services as an expert witness, may be discoverable, this should not be ordered routinely, without a showing, absent here, why less intrusive financial information would not suffice. Most people are

sensitive about their income, and who knows the details about it. By their very nature, expert witnesses are knowledgeable of information that is scientific, technical, or specialized, generally acquired by long, hard study and experience. When asked to provide expert testimony, they are in a position to request compensation that matches their qualifications, which can seem shockingly high to those not familiar with the costs of modern litigation. . . . [P]ermitting routine disclosure of the expert's gross compensation, from all sources – including those unrelated to litigation activities – would provide the jury with little information relevant to a fair assessment of the expert's credibility, while concomitantly introducing the real possibility of creating confusion, distraction and even prejudice.

[T]he jury readily should be able to assess possible bias on the part of an expert witness if they are made aware of the total percentage of his or her gross income that is earned from providing expert witness services.

Id. at 561-62.

In this case, the plaintiff clarifies that he does not seek an answer to the first question that Dr. Rhoades refused to answer (his income from all sources) but rather to the second (his income only for work as a testifying expert, and solely for the one-year period preceding the date of his deposition). *See* Motion at 5-6; Reply in Support of Motion To Compel (“Reply”) (ECF No. 63) at 4. He supplies two reasons for seeking this additional information:

1. “[A]lthough the evidence elicited at the deposition demonstrates that Dr. Rhoades routinely testifies for corporate defendants, the *extent* of his financial remuneration and dependency on such work will be relevant to a jury’s determination of bias, motive and credibility.” Motion at 6 (emphasis in original).

2. “[T]he extent of Dr. Rhoades’ income from expert witness work is critical to the jury’s ability to assess the relative credibility of both parties’ liability experts.” *Id.* “Based upon extensive questioning at the deposition of Plaintiff’s liability expert concerning his billing on this case, it is anticipated that College Pro will seek to use such billing information to impeach the

credibility of Plaintiff's liability expert at trial." *Id.* "In order to respond, Plaintiff anticipates the need to elicit testimony from Dr. Rhoades concerning not only his billing on this case, but also his work as a testifying expert, generally." *Id.* "This is because, in this case, Plaintiff's liability expert is a university professor who has earned income from only one case in his entire lifetime (this case), while College Pro's liability expert, Dr. Rhoades, is a professional expert who earns hundreds of thousands of dollars a year (or whatever the figure may be) testifying on behalf of large corporations." *Id.* "Given the stark difference, it would be misleading and prejudicial to Plaintiff to permit Defendant to impeach Plaintiff's expert using evidence of his income derived from this case, without affording Plaintiff the opportunity to point out that, although this seems to be a large amount of money, it is quite small in comparison to what Dr. Rhoades earns on an annual basis testifying for corporate defendants." *Id.*

College Pro does not dispute that the requested deposition testimony is relevant. *See* Opposition at 2. However, it contends that further discovery is unnecessary and unreasonably cumulative and duplicative, the plaintiff having fallen short of making any showing that the requested information adds appreciably or meaningfully to the information already garnered. *See id.* at 3-4. College Pro adds that "[i]t is transparent why Plaintiff wants to make this an 'income' argument; he is hoping that Dr. Rhoades' income, which he speculates is hundreds of thousands of dollars a year, will be large enough to shock and prejudice the jury." *Id.* at 4. College Pro concludes that, because the plaintiff already has sufficient discovery to make a relative credibility argument based on the fact that his expert is an academic and first-time expert and College Pro's expert is allegedly a "professional" defense witness, the plaintiff "is obdurately pursuing this sensitive and private information solely for its potential prejudicial

impact and to attempt to embarrass Dr. Rhoades, not to argue bias, motive, or credibility.” *Id.* at 5.

This is a close question; however, I am persuaded that the plaintiff makes a sufficient showing pursuant to the *Behler* test to warrant the grant of his motion to compel Dr. Rhoades to disclose his income derived from his work as a professional expert for the one year preceding the date of his deposition. The plaintiff represents that College Pro extensively questioned his expert at deposition regarding his billing on this case. *See* Motion at 6; Reply at 2 n.1. The plaintiff reasonably seeks to defend against an anticipated line of questioning seeking to challenge his expert’s credibility on account of those billings with data concerning Dr. Rhoades’ billings for expert testimony. Because the plaintiff’s expert is a first-time expert and Dr. Rhoades is allegedly a “professional expert,” the plaintiff plausibly suggests that this is not an apples-to-apples comparison of fees charged by each expert solely in this case. Rather, he explains, to the extent that the receipt of fees is thought to impugn either expert’s credibility, the proper comparison is between his expert’s one-time fees and Dr. Rhoades’ fees generated from expert consulting. Regardless of whether this information ultimately is ruled admissible, a decision that may hinge on whether College Pro “opens the door” to it, the plaintiff has adequately justified its discovery, subject to the protections of the confidentiality order already in place. *See* ECF No. 10.¹ That said, I deny the motion to compel to the extent that it can be construed to request the

¹ Cases that College Pro cites in which courts denied bids to discover an expert witness’s income derived from litigation work, *see* Opposition at 6 n.3, are distinguishable in that no argument was made concerning a need to defend against anticipated fee-related impeachment of a first-time expert, *see Young v. Pleasant Valley Sch. Dist.*, No. 3:07-CV-854, 2011 WL 3678691, at *1 (M.D. Pa. Aug. 20, 2011) (denying plaintiffs’ request for discovery of defendants’ expert’s annual earnings for testifying as an expert when plaintiffs merely argued that they were entitled to all information showing expert bias or interest, and expert had testified equally on behalf of plaintiffs and defendants and, thus, had no economic incentive to show bias in a particular case); *Reed v. Cline*, No. 1:08-cv-00473-SEB-TAB, 2010 WL 3829459, at *1-*2 (S.D. Ind. Sept. 24, 2010) (denying defendant’s request for discovery of plaintiff’s expert’s gross income or consulting income when defendant had not explained why the considerable information already provided was insufficient to contest plaintiff’s expert’s impartiality, and (continued on next page)

reopening of Dr. Rhoades' deposition. Dr. Rhoades, who was deposed on the last day of discovery, already has been extensively questioned regarding his work as an expert witness. No further questioning is warranted.

IV. Conclusion and Order

For the reasons set forth above, I **GRANT** the plaintiff's motion, to the extent that I compel Dr. Rhoades to disclose in writing, pursuant to the existing Confidentiality Order (ECF No. 10), his income derived from his work as a professional expert for the one year preceding the date of his March 30, 2012, deposition, and **DENY** College Pro's cross-motion for protection regarding that discovery. No reopening of Dr. Rhoades' deposition is permitted.²

NOTICE

In accordance with Federal Rule of Civil Procedure 72(a), a party may serve and file an objection to this order within fourteen (14) days after being served with a copy thereof.

Failure to file a timely objection shall constitute a waiver of the right to review by the district court and to any further appeal of this order.

Dated this 15th day of May, 2012.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge

Plaintiff

BRYAN J DOYLE

represented by **ALICIA F. CURTIS**

defendant's best argument was that its experts had disclosed their gross earnings); *Campos v. MTD Prods., Inc.*, No. 2-07-0029, 2009 WL 920337, at *1, *5 (M.D. Tenn. Apr. 1, 2009) (denying plaintiff's request for discovery of defendant's expert's private financial and tax records when the defendant had already agreed to disclose financial information relating to the expert's work in the case, his work on behalf of the defendant in other cases, and his work for the defendant's counsel in other cases, and the defendant had not shown that the exact amount of income the expert made, from work as an expert or otherwise, would substantially add meaningful information).

² Because College Pro's position in this matter was substantially justified, I decline to order it to pay the plaintiff's reasonable expenses of bringing the instant motion. *See* Fed. R. Civ. P. 37(a)(5)(A)(ii).

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