2020 Mont. B.R. 279

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re **BELLE FRANCIA DAILEY** **HARLEY JOSEPH DAILEY**, Debtors.	Case No. **15-61088-BPH**
CAROL BETH EMERSON, Debtor.	Case No. **16-60056-BPH**

O R D E R

At Butte in said District this 30th day of July, 2020.

In the above-captioned Chapter 7 cases[1], a hearing was held July 28, 2020, on the United States Trustee's ("UST") Motion to Reopen Discovery and for Leave to Take Additional Depositions ("Motion") filed January 9, 2020, in the above-referenced cases at ECF No. 210.[2] The Motion was opposed by Deighan Law LLC, previously known as Law Solutions Chicago LLC authorized to conduct business in Montana as UpRight Law LLC ("Upright") at ECF No. 214. Appearances were noted on the record. The UST's exhibits at ECF No. 254 were admitted for demonstrative purposes only. After hearing the arguments of counsel, the Court overruled Upright's objection and granted the Motion, explaining that its Order and rationale would follow.

[1] Unless specified otherwise, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all "Rule" references are to the Federal Rules of Bankruptcy Procedure.

[2] References to ECF Nos. in this Order refer to the docket entry in the Emerson case.

The relief in the Motion includes the following:

1. Discovery shall be reopened so the UST may to take at least twenty-five (25) additional depositions in these contested matters.

2. Discovery shall be reopened so the UST may obtain emails and other written communications between Upright and Montana consumers regarding the fifteen depositions of Montana consumers the UST seeks to depose.

3. Awarding the United States Trustee his fees and costs in prosecuting this motion; and,

4. Whatever other relief the court deems and just proper under the circumstances.

ECF No. 210. At the beginning of the hearing, the parties advised the Court the issues had been resolved, except item 1, reopening discovery and taking additional depositions.[3]

I. Background.

The underlying dispute between the UST and Upright relates to Upright's business model and its interactions with individuals in Montana. According to Upright's website, "We bring the law office to the living room." ECF No. 166-1. It explains, "our online platform allows you to communicate with a lawyer, create a personalized action plan, and even file bankruptcy from the convenience of your home. *Id*. Next, it provides basic information regarding bankruptcy, anecdotal success stories, and a map of the United States preceded by the phrase, "access to justice coast to coast." *Id*. Upright's phone number is provided under the phrase, "local offices nationwide." *Id*. Finally, the website explicitly states that Upright is a law firm, not a lawyer referral service or prepaid legal services plan. *Id*. This portion of the website is directed to consumers. *Id*.

Along with the consumer information, the website also provides information for attorneys interested in expanding their practice without any investment. *Id*. Here, the website

[3] The parties outlined their agreement resolving certain issues on the record.

invites attorneys to "be part of America's premier virtual law firm." *Id*. It explains that Upright is on a mission to increase consumer access to justice through the use of cutting-edge technology, world class customer service and proven legal strategies never attempted at scale. *Id*. Its goal is to be America's premier virtual consumer law firm. *Id*. According to an internal document, Upright generates clients, uses its staff to screen clients, and evaluates and discusses alternatives with the prospective client. ECF No. 166-2. If the client elects to pursue bankruptcy, Upright will arrange a payment plan for fees and have the client verbally agree to begin representation. *Id*. Next, an onboarding attorney reviews the payment plan and terms of retention with the client. *Id*. Assuming the client is clear on the terms and agrees, the onboarding attorney advises the client that the "partner" will call them in 48 hours to introduce themselves and review the case. *Id*.

Lawyers that express interest in joining Upright are provided with a partnership agreement that deems the attorney a non-equity, non-voting, Partner/Member of the Firm. ECF No. 166-3. According to the partnership agreement, after the client has fulfilled all prepetition payment obligations, the partner is primarily responsible for all work related to collecting documents, preparing, filing and handling the case through entry of discharge. *Id*. The partnership agreement further sets out certain fee percentages that the partner "earns" after certain benchmarks are achieved. *Id*. For example, 20% at filing, and an additional 13% if the partner attends the §341 Meeting, and a discharge is entered. *Id*. If the process works as intended, the partnership agreement indicates the partner will receive 33% of the earned fees, and 100% of the post-petition earned fees. *Id*.

The UST alleges the process did not work as intended resulting in significant problems in

Montana.[4] According to the UST:

> Between January 2015 and July 2018, Upright Law accepted money from approximately 521 prospective assisted persons residing in the District of Montana ("Montana Clients(s)") totaling more than $575,000. Of those 521 Montana Clients, Upright Law filed only 109 cases. Over 400 Montana residents paid Upright Law and received no bankruptcy relief in return.
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> Significant delays were commonplace in the 109 cases that Upright Law did file. In those cases, on average 102 days passed from the date a Montana Assisted Person paid all fees due ("PIF") to filing. The Emerson case far exceeded this high average, having been filed 309 days after the PIF date. At least 11 of the 109 cases were filed more than 200 days from PIF date, and in one instance, the delay in filing from the PIF date was 503 days.

ECF No. 166. Based on these allegations, the UST seeks injunctive relief under § 526(c)(5), which states:

> Notwithstanding any other provision of Federal law and in addition to any other remedy provided under Federal or State law, if the court, on its own motion or on the motion of the United States trustee or the debtor, finds that a person intentionally violated this section, or engaged in a clear and consistent pattern or practice of violating this section, the court may--
>
> (A) enjoin the violation of such section; or
>
> (B) impose an appropriate civil penalty against such person.

According to the UST, Upright is a debt relief agency that misrepresented to its clients and prospective clients the services it would provide, which is a violation of § 526(a)(3)(A).

In connection with these alleged violations the UST requests Upright be required to: (1) disgorge its fees under 11 U.S.C. §§ 329, 105(a); (2) further find that the fees collected were unreasonable because at a minimum, unethical conduct is implicated (with reference to Mont. R. Pro. Conduct 1.1, 1.3, 1.4, 1.5, 3.3, 4.1, 7.1, and 7.5; and, (3) injunctive and civil penalties under

[4] While this Court is focused on issues involving clients in this District, the UST is pursuing similar claims in no less than 34 other districts. For the benefit of this Court, the UST prepared a demonstrative exhibit that identifies each case, by case number, debtor's name, and provides a synopsis of the status of the litigation. This court has taken judicial notice of the proceedings in the other courts, particularly those involving § 526 issues. *U.S. ex rel Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir.1992).

11 U.S.C. § 526(c)(5)(A). ECF No. 166. Upright argues that since the motions seeking this relief were filed, it has voluntarily disgorged fees not only for the debtors in these cases, Emerson and Dailey, but also in other cases involving Montana consumers.[5] While there may remain issues regarding the amount and timing of fees disgorged, the parties' trial preparation and the immediate Motion focus on the injunctive relief requested under § 526(c)(5)(A).

This Motion follows 3 Motions to Compel by the UST[6], a Motion to Compel by Upright[7], and 3 Motions for Protective Orders by Upright.[8] In conjunction with the discovery fights, Upright has consistently argued explicitly and implicitly that the UST has only filed motions in the Emerson and Dailey cases, so broad discovery of its conduct with its other clients, or in other districts exceeds the bounds of permissible discovery. These arguments have taken different forms and have met with mixed success. For example, the Court denied a motion by the UST to compel Upright to provide discovery responses for its clients or prospective clients outside this district, and limited discovery to affected individuals residing in Montana at the time Upright had contact with them. ECF No. 93.[9]

[5] Upright previously filed with the Court an explanation that it had disgorged in excess of $300,000 fees.

[6] ECF Nos. 84, 110, and 173.

[7] ECF No. 145.

[8] ECF Nos. 65, 83, 201.

[9] At the hearing in September 2017, the Court explained:

> So now, I want to go back to my sort of overarching comment that I made moments ago that this court is concerned with what's happened in Montana and Montana consumers. So, I'm going to ask you, Mr. York, can we as an initial starting point agree that whether it be in the form of an interrogatory or a request for production, that the scope of those requests be limited to consumers residing in Montana and the cases filed in Montana?

A year ago, this Court reasoned:

> The UST seeks, in part, to enjoin Upright Law from violating 11 U.S.C. § 526, which allows this Court to enjoin Upright Law from violating § 526, dealing with debt relief agencies, if the Court finds that Upright Law intentionally violated § 526 or engaged in a clear and consistent pattern or practice of violating § 526. A finding of a clear and consistent pattern or practice arguably requires an examination of Upright Law's interactions with a broad cross section of Montana Consumers. Part of the UST's argument is that Montana Consumers paid Upright Law to commence bankruptcies on their behalf, that were never filed. Thus, the Court finds the request is neither disproportional nor burdensome. Indeed, the UST must explore the extent and scope of Upright Law's alleged and potential wrongdoing because the UST has an "independent obligation to execute and enforce the bankruptcy laws," H.R. REP. NO. 595, 95th Cong., 1st Sess. 96 (1977) at 110. To fulfill this obligation, it must be permitted to plumb the depths of Upright Law's contact, communication and interactions with Montana Consumers.

ECF No. 194. Although this is only a snapshot of the procedural context underlying the Motion, it highlights Upright has filed no less than 6 discovery related motions, and as early as September 2017, this Court signaled to the parties that although only 2 motions had been filed, it was more broadly concerned with "what's happened in Montana and Montana consumers," that had contact with Upright.[10]

II. The Depositions sought by the UST.

The UST seeks to conduct the deposition of 15 Montana consumers and 11 present, or, past employees, or partners of Upright. The specific individuals and alternates are identified on 1-5 at ECF No. 254. Upright broadly objects to the additional depositions arguing that the UST has not met its burden of making a particularized showing of the need for additional depositions, the additional depositions would be cumulative and duplicative, and the UST can obtain the

ECF No. 97.

[10] Notably, §526, provides that the court may on its own motion seek to determine whether violations of § 526 have occurred. At this stage of the proceedings, claims by Upright that the issues are limited to the Emerson and Dailey cases are no longer persuasive.

information through less burdensome methods.

A. The UST has met its burden of making a particularized showing of the need for additional depositions.

Absent leave of court, a party is limited to 10 depositions. Rule 7030(a)(2). The Advisory Committee Notes explains that this presumptive 10 deposition limitation serves 2 purposes: (1) "to assure judicial review under the standards stated in Rule 26(b)(2) before any side will be allowed to take more than ten depositions in a case without agreement of the other parties;" and, (2) "to emphasize that counsel have a professional obligation to develop a mutual cost-effective plan for discovery in the case." *See* Advisory Committee Notes to 1993 Amendments. The Court must permit more than ten depositions when it is "consistent with Rule 26(b)(2)." *Id*.

Rule 26 provides that additional discovery should be allowed unless the Court determines that: (1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (2) the moving party has had ample opportunity to obtain the information by discovery in the action; or (3) the burden or expense of the proposed discovery outweighs its likely benefit, in light of the factors listed in the Rule. Rule 26(b)(2)(C)(i)-(iii). Consideration of these factors weighs in favor of overruling Upright's objection.

The record demonstrates that the UST and Upright failed to develop a mutual cost-effective plan for discovery in the case at the outset.[11] Upright's initial written responses to discovery included lengthy objections that resulted in a motion to compel. Unknown to the Court at the time, this conduct signaled the beginning of a pattern of objections, motions to

[11] Counsel for the UST now, was not the UST's counsel when such a plan should have been developed.

compel and motions for protective orders by Upright. In total, Upright's discovery responses resulted in 3 motions to compel by the UST, and 3 requests for protective orders by Upright. With the benefit of hindsight, it now appears to the Court that Upright's conduct bordered on obstruction. It pushed the limits as far as it could, and only produced or agreed to produce documents or responses on the eve of hearings, resulting in extraordinary inefficiencies for the Court, UST, and Upright's own counsel. Recently, Upright has exhibited a more cooperative approach consistent with the spirit and intent of the applicable rules.

1. The additional depositions are not unreasonably cumulative or duplicative, or obtainable from some other source.

Upright's argument that the additional depositions would be cumulative or duplicative of the 19 depositions previously taken is not persuasive. First, the additional depositions are necessary in part because the UST conducted depositions without the benefit of significant discovery that Upright was ultimately compelled to produce. As the UST explained in its Motion, and argued at the hearing, as depositions were conducted it was clear that Upright's recalcitrant approach to production of audio files, and other business records greatly inhibited, if not prejudiced the UST's ability to conduct a meaningful deposition. In August 2019, this Court compelled Upright to produce: all audio recordings, including but not limited to recorded calls; call logs of communications between Upright Law and specifically identified individuals; and complete Sales Force documents for those individuals. ECF No. 194. The prior 19 depositions were conducted without the benefit of this production, so it is inconceivable to the Court that the additional depositions would be cumulative or duplicative. To the contrary, new depositions are only necessary in part because Upright withheld this production for as long as it did.

Although 19 depositions have been taken in this case, discovery has shown that Upright contacted and collected fees from in excess of 500 Montana consumers. Isolated incidences of

particular conduct limited to 15 Montanans may be insufficient for arguing, much less establishing Upright engaged in "a clear and consistent pattern or practice of violating" § 526. In this case, more than 500 Montanans are available to testify regarding their treatment and interactions with Upright. Of this group, Upright filed cases for just over 100, while it failed to file cases for more than 400. If permitted to take an additional 15 depositions of Montana consumers, the total number of Montana consumers deposed in this case will be 30, just over 5% of all those that had contact with Upright. When considered within the broader context of this case, and in particular, the "clear and consistent pattern" required under § 526, Upright's cumulative and duplicative argument is not persuasive.[12]

Turning to the additional employee or partner depositions, if permitted, the total number of Upright employees (past and present) deposed would be 13 (to date, a former employee, a partner, and a 30(b)(6) designee were deposed). Similar to the Court's analysis above, given Upright had contact with in excess of 500 Montanans, and for each Montanan there might have been multiple contacts or communications, permitting 13 employees to be deposed does not strike the Court as duplicative or cumulative, particularly when the UST must show "a clear and consistent pattern or practice" to prevail under §526.[13]

[12] The Court suggested to the parties that given the allegations and relief sought, the scope of discovery as it relates to depositions or establishing "pattern and practice," involving Montana consumers involved more than just Emerson and Dailey, but likely less than the full 109 debtors that filed cases, or taking this point further, less than all of the additional 400 Montanans. It is clear to the Court that the UST has endeavored to identify an appropriate cross-section of Montanans that is neither duplicative nor cumulative for purposes of taking depositions.

[13] Upright has imposed some arbitrary limitations on who the UST can contact and cannot contact. Upright explained that in some cases it wanted communication by the UST to third party witnesses no longer employed by Upright to go through its counsel, and its counsel would likely defend the individual's depositions. This invites mischief and places counsel in the potentially conflicted position of having to advise a witness that may intend to testify adversely against Upright. Upright's counsel should not put itself in this position. Instead, third party

Equally important to the Court's analysis is the recognition that each Montanan's experience with Upright was unique, even if that unique experience proves to be part of a larger pattern or practice. Although the internal records and documents produced by Upright provided insights, and the previous employee testimony provides one side of the story, limiting discovery to the 19 depositions conducted with only a fraction of the discovery would reward Upright's recalcitrant approach to discovery to date. Further and more importantly, there is no basis to conclude the additional depositions would be cumulative or duplicative.[14]

2. Convenience, Burden and Expense.

When the Court considers the full record in this case, Upright's concerns regarding convenience, burden and expense ring hollow. As noted at the outset, Upright's discovery responses resulted in 3 UST motions to compel, and Upright filed 3 independent requests for protective orders. Having surveyed the entirety of the record in this case in conjunction with this Order, this Court would characterize its handling of Upright's approach to discovery in this case as indulgent. Having elected to object and litigate the discovery process at length, the Court cannot credibly entertain Upright's stated concerns now regarding convenience, burden, and expense. To the extent the discovery process has been inconvenient and expensive, it appears to the Court that result flows from the approach Upright has chosen to take to the discovery process.

B. Ample opportunity to obtain the information by discovery in the action.

witnesses should have independent counsel, even if Upright agrees to pay the fees.

[14] While the existing depositions may touch on some of the issues covered in additional depositions, the record does not suggest that this overlap merits disallowing additional depositions. To the contrary, the UST's demonstrative exhibit highlights a host of issues that if established would be difficult to discount as slight aberrations.

As previously explained, prior to this Court's August 2019 Order, Upright objected to and withheld significant production undermining any suggestion that the UST had an "ample opportunity to obtain the information." To the contrary, now, only after Upright complied with this Court's Order compelling production does the UST have a fuller view of how Upright interacted with Montana consumers, the issues that Montana consumers encountered and Upright's operations.

C. The burden or expense of the proposed discovery outweighs its likely benefit.

When called upon to consider the burden or expense of proposed discovery and weigh its benefit, this Court is mindful of the following Advisory Committee Comment:

> The elements of Rule 26(b)(1)(iii) address the problem of discovery that is disproportionate to the individual lawsuit as measured by such matters as its nature and complexity, the importance of the issues at stake in a case seeking damages, the limitations on a financially weak litigant to withstand extensive opposition to a discovery program or to respond to discovery requests, and the significance of the substantive issues, as measured in philosophic, social, or institutional terms. Thus, the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved. The court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.

Federal Rule 26(b) advisory committee's note to 1983 amendment. At the hearing, the Court noted that the UST's allegations that Upright collected fees in excess of $500,000, from 521 affected Montana clients, but only filed cases for 109 clients, and in excess of 400 cases were not filed, justified additional discovery. If there exists a pattern or practice that violates § 526, and it involved in excess of 500 Montana clients and more than $500,000 in fees, that is a matter of extraordinary importance for institutional and social reasons.

If the UST prevails, this Court must consider whether to issue an injunction, or alternatively whether Upright's conduct merits this Court's exercise of its powers to regulate

attorneys appearing before it. Alternatively, if Upright prevails, standards for how a virtual law firm perform its services may be addressed. Ultimately, as technology evolves, this Court anticipates there will be further efforts to develop virtual law firms, or develop regional law firms that provide services to debtors with staff in one geographic location while attorneys are geographically dispersed in other places. As the frequency of this increases, Courts, the UST and lawyers will likely encounter issues like the ones presented in this case.[15] As a result, the benefits of a fully developed record greatly outweighs any burden or expense that is incurred.

IT IS ORDERED:

1. The UST's Motion is granted and it may proceed to schedule, conduct and complete depositions of the individuals identified in its demonstrative exhibit;
2. The UST shall provide a report to the Court regarding the status of scheduling the depositions on or before September 11, 2020;
3. The UST's request for its attorneys' fees associated with the Motion is denied; and,
4. Upright's pending motion to depose a 30(b)(6) representative of the UST is denied.[16]

BY THE COURT:

Hon. Benjamin P. Hursh
United States Bankruptcy Court
District of Montana

[15] This Court previously encountered issues involving a law firm, Synergy Law LLC ("Synergy") that advertised on the internet as assisting individuals throughout the country with a network of attorneys. In those cases, the law firm prepared petitions for debtors, but advised the debtors to file the cases as pro se litigants without any disclosure of compensation, or involvement of the firm, and then abandoned the clients after the case was filed. In those cases, this Court required disgorgement, and awarded civil penalties. The fees disgorged and civil penalties awarded totaled $54,000. The award was reduced by agreement of the parties, and the Court approved the reduction. *See* Case Nos. 18-60092, 18-60583, and 18-60713.

[16] As explained by the Bankruptcy Court in the District of South Carolina, "Upright's conduct is at issue here, not the UST. Therefore, the scope of discovery may vary depending on the party's role." Case No. 18-05693, *In re Hogan*, ECF No. 157.