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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Jose Parra and Gonzalo Estrada,)	
)	
Plaintiff,)	No. CIV 02-591-PHX RCB
)	
Vs.)	O R D E R
)	
Bashas', Inc.,)	
)	
Defendant.)	

Various motions are currently pending before the court in this case. On December 4, 2003, Plaintiffs Jose Parra and Gonzalo Estrada ("Plaintiffs") filed a motion for leave to file a first amended complaint. Motion (doc. 73). On December 16, 2003, Plaintiffs filed a motion to compel. Doc. 85-1. In addition to its motion to compel, Plaintiffs have moved the court for an award of attorney's fees and costs incurred in bringing their motion to compel. Doc. 85-2. On January 7, 2004, Defendant Bashas', Inc., ("Bashas'") filed a response to Plaintiffs' motion to compel, as well as a motion for a protective order as to certain of the information Plaintiffs seek for the court to compel. Doc. 107.

(119)

1 Finally, on December 22, 2003, Plaintiffs filed a motion for an
2 extension of the scheduling order in this case. Doc. 89.

3 The foregoing motions have been fully briefed and were argued
4 orally on February 9, 2004. The court, having taken these matters
5 under advisement at that time, now rules.

6 **I. Motion to Compel and Cross-Motion for a Protective Order**

7 The court first considers Plaintiffs' motion to compel and
8 Bashas' cross-motion for a protective order. The matters at issue
9 in these motions include (1) Bashas' personnel database (the
10 "Infinium" database), and (2) various financial records. The court
11 will address the more contentious issue first: the financial
12 records.

13 **a. Financial Records**

14 Plaintiffs have moved the court to compel certain financial
15 records which Bashas' considers to be highly confidential.¹
16 Plaintiffs argue that these financial records must be produced in

17
18 ¹ At pages 2-3 of Bashas' response, it sets forth the various
19 specific financial records sought by Plaintiffs. Response (doc.
20 107). These include:

21 (1) profit-and-loss statements for the three Bashas' store
22 formats (Food City, Bashas', and AJ's) from the time of the
23 store's opening (or, for Food City stores acquired by
24 Bashas', from the time of the store's acquisition) to the
25 present;

26 (2) labor budgets for the three formats for the time period
27 January 1998 - December 2002;

28 (3) documents related to comparisons of department-specific
and/or store-wide profits and losses of the three formats;
and,

(4) documents in the nature of wholesale/retail price books
for produce, bakery and meat department products, as well
as any other departments, used in the three formats between
January 1998 through December 2002.

Id.

1 order for them to test the validity of Bashas' defense to their
2 claims that the predominantly Hispanic workers, who worked at Food
3 City stores, were² paid less than their predominantly Caucasian
4 counterparts who worked at Bashas' and AJ's stores. Motion (doc.
5 85) at 4.

6 Specifically, Plaintiffs claim that various Bashas' executives
7 testified in their depositions that Food City employees were paid
8 less than Bashas' and AJ's employees "due to [the] comparative
9 profit and sales performance of each store format." Id. In
10 addition, they claim that Bashas' executives have testified that a
11 particular store's labor budget is tied directly to the sales
12 performance of that store. Id. at 5.

13 In other words, Plaintiffs contend that, as they interpret the
14 deposition testimony of Bashas' executives, the Food City employees
15 were paid less than Bashas' and AJ's employees due to the lower
16 profitability of those stores. Id. As a result, Plaintiffs claim
17 that they need discovery of Bashas' financial records in order to
18 test the validity of its defense to their charge of discrimination.
19 In this regard, Plaintiffs cite various portions of Bashas'
20 executives' testimony, including a statement of Thomas Swanson,
21 Vice President and Director of Operations for Food City, which
22 states:

23 _____
24 ² The court purposely uses the past tense in reference to the
25 fact that Food City employees "were" paid less than their
26 counterparts at Bashas' other formats because Plaintiffs recognize
27 that, at some point after Bashas' acquisition of 22 Southwest
28 Supermarkets in November 2001, it equalized the pay scales of Food
City workers with those of the other Bashas' formats. Apparently,
the discrimination claims related to an unequal pay span from the
point that Bashas' acquired the Food City stores, up to the time the
pay scales were equalized.

1 Q. Why would the Bashas' cashier, given the same
2 seniority, be making more than the Food City cashier?

3 A. Once again, as I said before, Food City is a
4 different format. Its got different margins. If you
5 look back over the last - since the inception of Food
6 City, we've bought a couple different little stores here
7 and there, and then we bought a couple of decent-sized
8 chains that, basically, were bought out of bankruptcy.
9 Chains that could no longer financially operate. When
10 you do that, it takes time for a store to turn around. It
11 takes time for stores to get back on their feet. It
12 takes money to upgrade stores. So that's one factor.
13 The other factor is, at Food City all throughout, and
14 even today, there is still lower margins in a Food City
15 than there is in a conventional supermarket.

16 Id. at 5. Plaintiffs focus on other similar language, referring to
17 "margins," in order to argue that store profits were considered
18 when deciding employee wages. Id.

19 Bashas' is adamant, however, that profitability is not at the
20 heart of its defense to Plaintiffs' wage-discrimination claims.
21 Response (doc. 107) at 3. Bashas' claims that it has never been
22 its position that Food City employees were paid less than other
23 Bashas' employees due to lower profitability at Food City stores.

24 Id. at 3-4. Rather, Bashas' insists that Plaintiffs have
25 misconstrued its executives' deposition testimony in order to make
26 it look as though the financial records are a necessary part of its
27 defense, when in fact, Plaintiffs seek these records for purposes
28 unrelated to this litigation³. Id. at 11. Bashas' expresses

29 ³ In this regard, Bashas' argues:

30 The financial records plaintiffs seek are highly
31 confidential. Bashas' competitors in the Phoenix grocery
32 market would undoubtedly benefit from knowledge of these
33 precise financials, as would the Union. . . . Indeed, the
34 information sought is so irrelevant and, so beside the
35 point, the only purpose in seeking the financial
36 underpinnings of the company is something other than the

1 vehement opposition to the disclosure of these financial records,
2 which it considers to be highly sensitive. Id.

3 Bashas' argues that its executives did not assert that Food
4 City employees were paid less due to the lower profitability of
5 those stores. Id. at 4. Rather, it claims that these executives
6 "testified similarly that wage scales at Food City were set
7 according to market demand, to compete for employees with similar
8 grocers, including smaller independent neighborhood grocers and
9 warehouse format chains. . . . Id. at 4. In other words, they
10 claim that since Food City was a small, independent grocer when it
11 was first acquired, it did not compete with the larger chain
12 grocery stores, which paid more, for employees. Id.

13 Bashas' further argues that Food City has misconstrued
14 testimony related to "margins." Bashas' claims that such testimony
15 does not refer to profit margins at all. Id. at 6. Rather, it
16 contends that Food City wages were put in line with other "price
17 impact formats" - meaning stores that strive to offer the lowest
18 prices on every item every day. Id. Margins, they argue, refer to
19 the cost at which the store acquires a particular product
20 subtracted from the amount that product is sold for. At oral
21 argument, the example was suggested that a six pack of Coke would
22 cost more at AJ's than at Food City even though (since both as
23 Bashas' chains) they cost the same for Bashas' to acquire. Since
24 Food City strives to offer the lowest price on every product (as
25 opposed to offering multiple services, such as the wine steward
26

27
28 Id. at 11. thus unstated basis for need for the information.

1 provided by an AJ's store), their "margins" are lower - but this
2 does not necessarily mean that their overall profitability is
3 lower.

4 The court recognizes the distinction between the "margins"
5 argued by both parties; furthermore, the court recognizes that
6 Bashas' is adamant that profitability is not at the heart of its
7 defense. Nevertheless, while Bashas' certainly has made its point
8 with regard to this issue, the court does not believe that
9 distinction resolves the issue.

10 The court's analysis must be governed by the standard of Rule
11 26(b), FED.R.CIV.P., which provides:

12 (1) Parties may obtain discovery regarding any matter,
13 not privileged, that is relevant to the claim or defense
14 of any party . . . Relevant information need not be
15 admissible at trial if the discovery appears reasonably
16 calculated to lead to the discovery of admissible
17 evidence.

18 Id. In other words, the information sought need not be admissible
19 in order to be discoverable; the discovery request need only be
20 reasonably calculated to lead to the discovery of admissible
21 evidence. Id. In this regard, the court finds that - though a
22 distinction has been made with regard to the precise defense raised
23 by Bashas' - it has nevertheless raised a defense to Plaintiffs'
24 claims which is integrally related to the finances of the company.
25 It has argued that wage scales at Food City stores were influenced
26 by the purchase price of products compared to their sales prices.
27 The court cannot escape the conclusion that an examination of the
28 financial records sought appears reasonably calculated to lead to
the discovery of admissible evidence in this case.

Furthermore, the court notes that the primary objection to the

1 production of the information sought is due to its sensitive
2 nature, and the concern that it will be used for purposes unrelated
3 to the present litigation. At oral argument, Bashas' argued that
4 the information could be intentionally, or even negligently,
5 conveyed to persons or groups which could use it, at worst, in a
6 nefarious manner, or at best, for purposes unrelated to this case.
7 While this concern is legitimate for such sensitive information, it
8 is one which the court believes can be successfully resolved
9 without withholding the information from Plaintiffs altogether. As
10 a result, the court will order that the documents sought be
11 produced; however, it will do so under very strict confines.

12 The court will order that Bashas' produce the financial
13 records sought (as reviewed in footnote 1, supra) subject to the
14 existing confidentiality order in this case (doc. 71), as well as
15 the following additional conditions. First, in order to ensure
16 that the risk of erroneous dissemination of the information remain
17 *de minimus*, the documents must be produced only to Plaintiffs'
18 counsel of record in this case. No other attorneys in their firm,
19 or support staff of any kind, including paralegals, clerical or
20 secretarial staff or assistants may obtain access to the documents
21 without further order of the court.

22 Further, with regard to experts, the court will allow that the
23 documents be provided to Plaintiffs' designated expert witness(es)
24 with a need to have the information; however, such expert(s) shall
25 not be permitted to allow any of their support staff, including
26 administrative, clerical or secretarial assistants, to access the
27 information without further order of the court. In addition, such
28 expert(s) shall be required to execute Exhibit A to the

1 confidentiality order, entitled "Agreement to be Bound by
2 Confidentiality Order." Doc. 71, at p. 8.

3 **b. Infinium Database**

4 On February 4, 2003, Plaintiffs served their First Request for
5 Production of Documents, which included five requests to which
6 Bashas' "Infinium" personnel database would be responsive. Motion
7 (doc. 85) at 7. This database purportedly contains wage, job
8 classification, date of hire, and racial classification data for
9 all of Defendants Food City, Bashas', and AJ's employees. Id. at
10 8. Plaintiffs argue that, upon receipt of the information in the
11 database, their experts can evaluate the historical experience of
12 employees, comparing the wages of Mexican and Mexican-American
13 employees with those of Caucasian employees throughout the class
14 period. Id. at 8. They further argue that, without this database,
15 they would be forced to rely on other documents which they claim
16 are not adequate. Id.

17 While Bashas' has apparently resisted the disclosure of this
18 database for the ten months prior to the filing of the present
19 motion, the parties appear to have narrowed their dispute on this
20 point. In its response (doc. 107, at 16), as well as at oral
21 argument, Bashas' offered to provide an electronic copy of its
22 Infinium database to Plaintiffs; however, it would remove all
23 employee social security numbers and addresses from the version
24 provided to Plaintiffs.

25 In its response, Bashas' argues that it must delete the social
26 security and address information from the electronic copy provided
27 to Plaintiffs for two reasons. Response (doc. 107) at 16.
28 Specifically, it argues that erasing this information will (1)

1 protect the employees' privacy, and (2) avoid providing the same
2 law firm which also represents certain unions in their attempts to
3 unionize Bashas' employees with employee names and addresses that
4 can be used as contact information in their ongoing efforts to
5 unionize Bashas'. Id.

6 The court agrees that there is no basis for providing the
7 employee's social security information; indeed, Plaintiffs do not
8 object to the deletion of this information. Social security
9 numbers, therefore, may be deleted from the electronic copy
10 provided.

11 The employees' addresses issue is a closer call. Plaintiffs
12 complain that without the addresses, they will be unable to contact
13 employees who they would seek to contact in connection with this
14 litigation. At oral argument, Bashas' indicated that it would
15 provide contact information for any specific Bashas' employee(s)
16 which Plaintiffs indicate they would like to contact. Plaintiffs
17 have objected to Bashas' offer, arguing that it would be burdensome
18 for them to request information of Bashas' counsel with regard to
19 every employee they might wish to contact.

20 The court is persuaded that Bashas' compromise offer presents
21 an unworkable scenario. As a result, it will require that the
22 database be provided with only the social security numbers removed.
23 However, the court is also aware of Bashas' concerns about employee
24 address information being used for purposes outside the scope of
25 this litigation. As a result, the court will require that the
26 database contain data relevant only to those employees who are
27 potential class members, but that any data related to employees who
28 serve in managerial or supervisory roles may be removed.

1 In addition to the foregoing, the court will order that
2 Plaintiffs may not, at any time either during or after this
3 litigation, use the information contained in this database for any
4 purpose other than as may be necessary in connection with this
5 lawsuit, without further order of the court. Finally, the court
6 will order that (as with the financial records discussed above),
7 the database may be provided only to Plaintiffs' counsel of record
8 in this case. Plaintiffs' counsel may provide the information to
9 its designated expert(s) with a need to access such information.
10 No other individuals, including Plaintiffs' or their expert(s')
11 support staff, may access this database. Plaintiffs' expert(s)
12 shall access the database only after it has executed Exhibit A to
13 the confidentiality order. Doc. 71, at p. 8.

14 **c. Costs and Attorney's Fees**

15 Plaintiffs have moved the court for an award of costs and
16 attorney's fees in the amount of \$6,077.50 for its efforts in
17 bringing the present motion to compel. Motion (doc. 85) at 10.
18 Specifically, Plaintiffs argue that under Rule 37, FED.R.CIV.P.,
19 where a motion to compel is granted, the court shall award fees in
20 connection with bringing the motion. Id.

21 The court will deny Plaintiffs' motion to compel summarily.
22 As is obvious from the foregoing discussion, Bashas' has responded
23 to the motion to compel by filing a motion (for a protective order,
24 doc. 101) of its own. The court finds that the motion for a
25 protective order was filed in good faith, and that there was a
26 reasonable basis for objecting to the production of the information
27 the court is compelling in this order. In addition, the court has
28 provided strict regulations on the productions it has ordered. As

1 a result, the court has not granted the motion to compel outright;
2 it has placed significant conditions on the production of the
3 documents it is compelling. There is no basis for sanctions in
4 connection with this order.

5 II. Motion to Amend Complaint

6 Plaintiffs have filed a motion to amend their complaint in
7 order to add a new Plaintiff (and proposed class representative)
8 named Aurelia Martinez. Motion (doc. 73) at 3. If the court so
9 permits, Martinez would become a third Plaintiff in this case,
10 together with Jose Parra and Gonzalo Estrada. Plaintiffs cite Rule
11 15(a), FED.R.CIV.P., which states that where a party seeks leave of
12 court to amend its complaint, "leave shall be freely given when
13 justice to requires." Id. With regard to this standard, the
14 United States Supreme Court has stated:

15 If the underlying facts or circumstances relied upon by a
16 plaintiff may be a proper subject of relief, he ought to
17 be afforded an opportunity to test his claim on the
18 merits. In the absence of any apparent or declared
19 reason - such as undue delay, bad faith or dilatory
20 motive on the part of the movant, repeated failure to
cure deficiencies by amendments previously allowed, undue
prejudice to the opposing party by virtue of allowance of
the amendment, futility of amendment, etc. - the leave
sought should, as the rules require, be 'freely given.'

21 Foman v. Davis, 371 U.S. 178, 182 (1962). Plaintiffs urge that in
22 the present case, justice requires that amendment of the complaint
23 be permitted.

24 Bashas' argues that it will be unfairly prejudiced by the
25 proposed amendment as it is filed "with undue delay, in bad faith,
26 and Defendant will be unfairly prejudiced" by the amendment.
27 Response (doc. 99) at 1. They further argue that the proposed
28 amendment will be futile. Id. at 1-2. Specifically, Bashas' notes

1 that Plaintiffs only now, two years after this case commenced, seek
2 to amend their complaint out of fear that Bashas' will launch a
3 personal attack on Jose Parra, using his criminal record, as well
4 as prior testimony he gave before the National Labor Relations
5 Board, to undermine his credibility. Id. at 2.

6 Bashas' contends that Plaintiffs should have anticipated
7 scrutiny of Parra's suitability as a named class representative in
8 this action, and that it (Bashas') would be unfairly prejudiced by
9 the addition of a new Plaintiff which would have to be scrutinized
10 as well. Id. at pp. 2, 10. Bashas' is particularly concerned that
11 discovery in this case will be significantly extended if a new
12 plaintiff is permitted to be added at this time. Id. at 10.

13 In addition to the foregoing, Bashas' contends that
14 Plaintiffs' proposed amendment would be futile in light of the fact
15 that Martinez works in the "tortilleria" department of Food City, a
16 department which has no counterpart in Bashas' or AJ's store
17 formats. Id. at 10-11. As a result, because of her unique
18 position in Food City, Martinez allegedly would not be able to
19 adequately represent all Hispanic Food City employees in this Title
20 VII action. Id. As a result, she cannot be considered an adequate
21 class representative even if she is added as a plaintiff in this
22 case.

23 The court finds the latter argument, as to futility, to be an
24 issue which goes to the substantive merits of the class
25 certification motion and is not properly raised at this time. With
26 regard to Bashas' concerns about the need to engage in additional
27 discovery at this time, and the significant delays that could cause
28 in this litigation, these issues present a closer call.

1 The court notes that Rule 15(a) is interpreted with
2 significant liberality, and that Bashas' has not met its burden to
3 show undue prejudice by the amendment in this case. This finding
4 warrants permission to amend the complaint. Nevertheless, the
5 court finds that, in fairness, measures should be taken to reduce
6 the burden and/or prejudice that may result (even though it is not
7 sufficient to deny the motion to amend) to Bashas' as a result of
8 this order.

9 The court will order that Plaintiffs may amend their complaint
10 to add Aurelia Martinez as a new plaintiff in this case. The court
11 will further order, however, that only Bashas' will be permitted to
12 depose Martinez, and that it (Bashas') will be permitted to take
13 such additional discovery as may be necessary due to Martinez'
14 inclusion as a proposed class representative. Furthermore, in
15 order to reduce the potential that this order will unduly delay the
16 present litigation, the foregoing additional discovery must be
17 completed within ninety (90) days of the date of this order, on
18 condition that if either party believes this time period to be
19 insufficient, it may move for an extension of this time within
20 thirty (30) days of the date of this order.

21 **III. Motion for Extension of Discovery**

22 The court finds that the discovery deadlines in this case must
23 be extended in light of the foregoing orders. As a result, the
24 court will modify the current scheduling order in the following
25 manner:

- 26 1. Defendants shall produce the documents which this court
27 has compelled above (in section I) within ten (10)
judicial days of the date of this order.
- 28 2. Both parties shall notice all remaining non-expert

- 1 depositions within thirty (30) calendar days of
2 Defendant's production pursuant to this order.
- 3 3. All non-expert depositions shall be complete within
4 twenty-five (25) calendar days of the date by which such
5 depositions must be noticed.
- 6 4. Plaintiffs will identify their expert(s) by name and
7 shall also provide the report, pursuant to Rule 26(a)(2),
8 FED.R.CIV.P., of such expert(s) within forty-five (45)
9 days of the date by which all non-expert depositions must
10 be complete.
- 11 5. Defendants will identify their expert(s) by name and shall
12 also provide the report, pursuant to Rule 26(a)(2), of such
13 expert(s) within forty-five (45) days of the completion of the
14 time by which Plaintiff's must identify and provide the
15 reports of their expert(s).
- 16 6. At this time, the parties' may only designate experts who will
17 testify relative to the class certification issue.
- 18 7. No rebuttal experts shall be named without leave of the court.
- 19 8. Plaintiffs' identified expert(s) shall be made available for
20 deposition beginning seven calendar days after the date by
21 which Plaintiff must provide to Defendant the report of its
22 expert(s).
- 23 9. Defendant's identified expert(s) shall be made available for
24 deposition beginning seven calendar days after the date by
25 which Defendant must provide to Plaintiffs the report of its
26 expert(s).
- 27 10. All depositions of both parties' identified expert witnesses
28 shall be completed no later than thirty (30) calendar days
after the date by which each party shall have identified (and
provided the report of) their respective expert(s).
11. Plaintiffs shall file their motion for class certification
within thirty (30) calendar days of the date by which the
depositions of both parties' expert witnesses must be
completed.
12. The delivery of all documents pursuant to this order shall be
by hand-delivery or fax so as to avoid the time extension of
Rule 6, FED.R.CIV.P.

IT IS ORDERED that Plaintiffs' motion for leave to file their
first amended complaint (doc. 73) is GRANTED.

IT IS FURTHER ORDERED that Plaintiffs' motion to compel (doc.
85-1) is GRANTED subject to the restrictions outlined in this

1 order.

2 IT IS FURTHER ORDERED that Bashas' motion for a protective
3 order (doc. 101) is DENIED.

4 IT IS FURTHER ORDERED that Plaintiffs' motion for sanctions
5 (doc. 85-2) is DENIED.

6 IT IS FURTHER ORDERED that Plaintiffs' motion for an extension
7 of the scheduling order in this case (doc. 89) is GRANTED in
8 accordance with the terms of this order.


9 DATED this 20 day of February, 2004.

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Robert C. Broomfield
Senior United States District Judge

14 Copies to counsel of record.

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