SO ORDERED.

SIGNED this 04 day of April, 2011.

JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

OPINION NOT DESIGNATED FOR PRINT PUBLICATION

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:
BRYAN CURTIS BOLDRIDGE
KELLY JOE BOLDRIDGE,

Case No. 09-40044
Chapter 7

Debtors.

PATRICIA E. HAMILTON, Trustee of the Bankruptcy Estate of Bryan Curtis Boldridge and Kelly Joe Boldridge,

Plaintiff,

vs.

Adversary No. 11-7001

US BANK NATIONAL ASSOCIATION, As Trustee for the Structured Asset Investment Loan Trust, 2005-9,

Defendant.

ORDER DENYING MOTION TO COMPEL AND FOR SANCTIONS, BUT AMENDING SCHEDULING ORDER TO REQUIRE DISCLOSURE OF INFORMATION WITHOUT A FORMAL DISCOVERY REQUEST

On March 31, 2010, six days after the initial deadline for making the disclosures required by Rule 26(a)(1) of the Federal Rules of Civil Procedure,[1] Plaintiff filed a Motion to Compel, and for Sanctions,[2] alleging the disclosures made by Defendant were inadequate. Plaintiff's counsel sought to shorten the deadline for responding to that Motion to Compel, and for an expedited hearing.[3] It is the policy of this judge to hear such discovery disputes at the earliest reasonable opportunity, without awaiting the 14 days allowed for reply to non-dispositive motions (and another 14 days for a reply), as a result of repeated experience that such delays inevitably result in other deadlines contained in the Scheduling Order being jeopardized. Therefore, the matter was set for telephonic hearing on April 1, 2011.

After a full argument from both counsel, Defendant's counsel requested time to file a response to the Motion to Compel to supplement her oral argument. She advised she could have that response on file, as well as a supplement to her Rule 26(a)(1) disclosures, by April 8—which is earlier than the date Plaintiff's counsel even prayed for such response in her Motion to Shorten Notice. The Court agreed to that date, and indicated the matter would be taken under advisement after review of that response since Plaintiff's counsel indicated she would not file a reply.

This judge also articulated, at the conclusion of the hearing, that sanctions were likely unwarranted under the circumstances, including a relatively quick trigger by the Plaintiff in bringing the motion, which caused this Court to call the hearing earlier than it now appears was really necessary. In addition, Defendant's counsel articulated during the hearing that because of deadlines

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[1]This rule is incorporated into adversary proceedings by Fed. Rule Bankr. P. 7026.

[2]Doc. 18.

[3]Doc. 19. Plaintiff's motion sought a response to the Motion to Compel by April 11, 2011, and a hearing on April 13, 2011.

and hearings in other cases, that the week was a particularly bad week for her to quickly react to a threat of a motion to compel. She indicated she had conveyed that problem to Plaintiff's counsel, which was undisputed.

Upon further reflection, the Court believes that had Defendant's counsel simply asked for an extension of time to April 8 to provide the disclosures required by Rule 26(a)(1), and acknowledged that the disclosure would be more substantive in light of the known issues in the case, Plaintiff's counsel may well have consented.[4] The speed with which this dispute accelerated, coupled with Defendant's counsel's work schedule, did not allow for this kind of reasonable resolution.[5] In the scheme of the amount of time this Court has allowed for discovery in this case, eight calendar days would not have been an excessive request.

The Court clearly understands the context in which Plaintiff's counsel assessed what does appear to be a deficient initial attempt to comply with Rule 26(a)(1).[6] Plaintiff's counsel has endured

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[4]Contrary to Defendant's argument at the hearing, the context of the case does impact what should be disclosed under Rule 26(a)(1). *See, e.g., Hirpa v. IHC Hospitals, Inc.*, 50 Fed. Appx. 928 (10th Cir. 2002) (holding that "the requirements of Rule 26(a)(1) must be analyzed in the specific context of this case). Although the Court recognizes that Rule 26(a) does not require a party to automatically disclose witnesses and documents it does not intend to use, and that Ms. Hamilton can obtain discovery of this information through depositions or interrogatories, the Court specifically requests Defendant, because it clearly knows what the Plaintiff's counsel is seeking to learn, be as forthcoming as possible in the spirit of cooperation. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947). Defendant is also reminded of the restrictions on its use of any non-disclosed information, pursuant to Rule 37(c)(1). *See* 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2053 (3d ed. 2010).

[5]The Court reminds counsel that D. Kan. LBR 7026.1(l) requires movant to confer or make a reasonable effort to confer, and defines "reasonable effort" to mean "more than mailing or faxing a letter to the opposing party. It requires that the parties in good faith converse, confer, compare views, consult, and deliberate, or in good faith attempt to do so." This Court has found that this rule will almost always require live conversation, rather than an exchange of emails.

[6]Doc. 20 is Defendant's Initial Disclosure, which Plaintiff's counsel filed at the request of the Court upon receipt of the Motion to Compel. As Plaintiff notes, it is completely generic, and provides almost nothing of substance. Defendant's counsel was apparently confused about how complete Defendant's initial Rule 26(a)(1) disclosure needed to be in light of the subsequent agreement (as reflected in the Supplemental Report of Parties' Planning Meeting, Doc. 13) that Defendant would have until April 8 to add the additional disclosures reflected in that Report.

considerable "run around" in similar cases, and in fact, in this case from this very Defendant in the context of Defendant's Motion for Relief from Stay[7] filed in the main case.[8] This Court has witnessed this first-hand in this and similar recent "standing" cases.[9]

But this case provides this judge her first opportunity to adjudicate a matter with Defendant's counsel of record, and it has no basis for concluding that this counsel will not endeavor to meet her requirements under the federal rules, going forward.[10] Similarly, Plaintiff's counsel admitted she had not dealt with this counsel before, and under all these circumstances, the better approach would have been to wait to see whether Defendant's April 8 effort was compliant.

Accordingly, rather than requiring a brief on the Motion to Compel, which will not really progress this case, the Court denies the Motion to Compel and for Sanctions for the reasons set forth above. Instead, the Court continues Defendant's deadline to April 8, 2011 for making a Rule 26(a)(1) disclosure that is consistent with the amount of time this Defendant has been aware of what issues, and thus what documents and witnesses, will undoubtedly be core to this dispute.[11] Although

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[7]Doc. 84 in main case.

[8]Rather than providing the requested documents, this Defendant elected to withdraw its Motion for Relief from Stay approximately two months after it was filed rather than face discovery on the issue of its standing.

[9]*See, e.g., In re Campoverde*, Case No. 10-41685, Doc. 45, n.5 and n.8 (March 24, 2011).

[10]This Defendant was represented by a different law firm in prosecuting the Motion for Relief from Stay in the main case. That does not excuse the Defendant, itself, from explaining this entire history to its new counsel, and from fully understanding that the information the Plaintiff has requested since November, 2011, to the extent it exists, should have been gathered and turned over to its new counsel so she could have been put in a position to better represent her client.

[11]In the Plaintiff's objection to the Defendant's Motion for Relief from Stay, filed November 5, 2010 (almost a full five months ago), she clearly articulated what she needed to see/know in order to assess Defendant's standing. Essentially she requested, at paragraph 14, evidence of all assignments, sales, transfers, agency authority, trust agreements or any other type of documents or agreements that have been used to transfer, sell, assign or negotiate an interest or right in the Note or Mortgage (the "Transfer Records"). She also requested Defendant provide complete contact information for all parties who executed any of the Transfer Records. Finally, she requested production of any other documents, records, ledgers or statements related to the Transfer Records or the transactions, transfers,

Rule 26(a)(1) clearly allows for supplementation when issues a party is unaware of arise after the initial deadline, the fact of the matter is that Defendant knows what the issues are in this case, and has known those issues for five months. There are no surprises, and it needs to file its Rule 26(a)(1) disclosures in recognition of this known history so that the Plaintiff does not have to waste interrogatories (and the time associated with responding to discovery) discovering this core information. That is the main purpose of Rule 26(a)(1).[12]

To the extent there could be any confusion that in the context of this case, the Court expects more cooperation, the Court also will modify the Scheduling Order, pursuant to its powers under Rule 16(b)(3)(vi) and Rule 26(a)(1),[13] to require Defendant to provide, by **April 25, 2011**, additional information without a formal discovery request(s). Plaintiff has sought this information since at least November 5, 2010.[14] The purpose of ordering this additional information is to prevent any argument over whether the Rule 26(a)(1) disclosures now due April 8, 2011 should include some, all, or any of this information. Further, the Court will not look with favor on blanket objections (layered

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assignments, sales or negotiations of the Note and/or Mortgage and be required to identify the party or parties who are claiming to be the owner and holder of the Note and/or Mortgage.

The Trustee, at this stage of this case, is entitled to know at least who the beneficial owner of the note and mortgage is, and how it came to be the owner.

[12] A major purpose of the revision to Rule 26 in 1993 was "to accelerate the exchange of basic information about the case and to eliminate the paper work involved in requesting such information, and the rule should be applied in a manner to achieve those objectives." *See* Fed. R. Civ. P. 26 advisory committee notes referencing adoption of paragraphs (1)-(4) of Rule 26(a) and 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice and Procedure § 2053 (noting that "A central goal of all versions of initial discovery has been to get out the basic information at an early point" as a result of a concern about "the cost and delay involved in discovery and the belief that a substantial amount of 'core information' could be identified and exchanged at the outset to avoid much delay and cost.")

[13] The Advisory Committee Notes for the 2000 amendments to Rule 26(a)(1) also make it clear that "[c]ase specific orders remain proper . . . ." *See* Fed. R. Civ. P. 26 advisory committee notes. Similarly, the notes regarding the 1993 amendments indicate that "[t]he enumeration in Rule 26(a) of items to be disclosed does not prevent a court from requiring by order . . . that the parties disclose additional information without a discovery request." *Id*.

[14] *See* note 9 and its source, Doc. 90 at paragraph 14 in the main case, Case No. 09-40044.

through complex definitions) to relevance, privilege, and the like, that it has routinely seen in connection with discovery requests in similar "standing" cases. The Court orders counsel to confer with opposing counsel to the extent there is any real question about what is sought.

IT IS, THEREFORE, ORDERED that Plaintiff's Motion to Compel and for Sanctions is denied.

IT IS FURTHER ORDERED that Defendant shall have until April 8, 2011 to supplement its Rule 26(a)(1)(A) disclosures. Because of this Order, the Plaintiff's Motion to Shorten Notice Period and for a hearing is denied, as moot.

IT IS FURTHER ORDERED that its March 16, 2011 Scheduling Order[15] is modified to require Defendant to fully and completely respond to the information requests contained in Plaintiff's Doc. 90 filed on November 5, 2010 in the main case (specifically at paragraph 14) by April 25, 2011.

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[15] Doc. 14.