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Vaughn v. LA Fitness International: Shifting Costs to Seek Fairness in Discovery

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On August 16, 2012, United States District Judge Michael Baylson granted in part and denied in part plaintiffs' motion to compel in *Vaughn v. LA Fitness*, a putative class action brought against LA Fitness International, LLC ("LA Fitness") for breach of contract, violations of the Florida Deceptive and Unfair Trade Practices Act, and violations of the Washington Consumer Protection Act. *Vaughn v. LA Fitness International, LLC*, Civil Action No. 11-2644 (E.D. Pa. August 16, 2012). This decision was no ordinary ruling on a motion to compel, however, as the court granted plaintiffs' request for additional discovery, but ordered plaintiffs to pay the internal costs specified by LA Fitness of searching for and providing the requested information. As noted by the court, this decision appears to be the first documented case specifically addressing the allocation of costs as part of a discovery dispute prior to class certification. *Vaughn*, August 16, 2012 Memorandum, 10.

In deciding to shift the costs of the relevant discovery to plaintiffs, Judge Baylson advised that "[d]iscovery need not be perfect, but discovery must be fair." *Id*. at 4. Judge Baylson focused on the economic aspects of discovery in a putative class action, noting that "the concept of treating a civil action as a class action dramatically changes the strategies and economic considerations of the parties and their counsel." *Id*. at 5. Indeed, a class action "dramatically increases the economic pressure on the defendant." *Id*.

Judge Baylson further described the discovery in class actions as "asymmetrical" because plaintiff individuals often have very few relevant documents while defendants, in this case LA Fitness, often have millions of documents and electronically stored information ("ESI"). *Id*. at 6. The cost of production of those documents therefore becomes a significant factor in the defense of the litigation. *Id*.

In *Vaughn*, because of the asymmetrical discovery and the significant cost of producing documents for LA Fitness, Judge Baylson concluded that the court had "the power to allocate the cost of discovery, and doing so [was] fair." *Id*. at 8. In reaching this conclusion, the court also

took into consideration the fact that plaintiffs were represented by a "very successful and well regarded Philadelphia firm." *Id*. "If Plaintiffs' counsel has confidence in the merits of its case, they should not object to making an investment in the cost of securing documents from Defendant and sharing costs with Defendant." *Id*.

Relying on the United States Supreme Court case *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978), Judge Baylson recognized that the rules of discovery also support his decision and allow a trial judge to shift the cost of pretrial discovery. *Id*. at 8-9. He further highlighted that the number of cases in which courts have shifted the costs of discovery has increased since the advent of ESI. *Id*. at 9.

Taking into consideration the seven-factor test for cost allocation set forth in *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309 (S.D.N.Y. 2003), and the parties' positions, the court decided that it was fair and appropriate to mandate cost allocation prior to the class-certification decision. *Id*. at 21. The court relied heavily on the fact that class certification remained pending and the plaintiffs had asked for extremely extensive discovery, compliance with which would be very expensive. *Id*. "Where the burden of discovery expense is almost entirely on the defendant, principally because the plaintiffs seek class certification, then the plaintiffs should share the costs." *Id*.

Moreover, the court concluded that, given the large amount of information LA Fitness had already provided at its own expense, plaintiffs needed to assess the value of additional discovery for their class action motion. *Id*. If plaintiffs decided that additional discovery would not only be relevant but also important to proving that a class should be certified, then plaintiffs should pay for that additional discovery. *Id*. at 21-22.

Judge Baylson therefore ordered plaintiffs to detail to LA Fitness the additional documents requested before filing their class action motion. Upon receiving such information, LA Fitness must then respond to plaintiffs' request with a summary of its internal costs for providing the information (which costs had been estimated at more than $400,000), and plaintiffs must subsequently advise if they are willing to make the payment requested by LA Fitness. If plaintiffs are so willing, then they must pay the requisite amount to LA Fitness before LA Fitness initiates production. *Id*. at 22.

The *Vaughn* case further underscores the propriety of cost shifting in cases of asymmetrical discovery disputes where a party is forced to incur significant discovery costs. Although Judge Baylson limited his conclusion that cost allocation was fair and appropriate to the circumstances in *Vaughn*, where class certification was pending and plaintiffs asked for very extensive and expensive discovery, Judge Baylson's opinion highlights the increasing willingness of some courts to shift costs in an attempt to get closer to fairness in discovery.