IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: CREDA SOFTWARE, INC., Debtor.	Chapter 7 Case No. 20-10919 (KBO)
ALLEN PULSIFER, Plaintiff, GEORGE L. MILLER, as Chapter 7 Trustee for the Debtor, Defendant.	Adv. Pro. No. 21-51160 (KBO) **Related to Docket No. 41**

MEMORANDUM ORDER REGARDING PLAINTIFF'S
MOTION TO DEEM REQUESTS ADMITTED

Before the Court is the *Plaintiff's Motion to Deem Requests Admitted* [Adv. D.I. 41] (the "Motion"). For the reasons set forth, the Court will order the Trustee to amend his answers to certain of Mr. Pulsifer's requests for admission because the Trustee's answers do not comply with Rule 36 of the Federal Rules of Civil Procedure. All other relief requested in the Motion will be denied.

I. BACKGROUND

Mr. Pulsifer, a pro se plaintiff, commenced this adversary proceeding to obtain a declaratory judgment to quiet title and resolve claims concerning 900 million units of CredaCash cryptocurrency that were transferred prepetition by Creda Software, Inc. (the "Debtor") to Mr. Pulsifer. It is Mr. Pulsifer's position that the allocation and receipt of the at-issue cryptocurrency was fair and reasonable and agreed to by the Debtor's sole outside creditor, FinDyne LLC ("FinDyne"). Mr. Pulsifer's *First Amended Complaint for Declaratory Relief Pursuant to Fed. R. Bankr. P. Rule 7001 and 11 U.S. Code 105 and/or if Necessary or Appropriate 28 U.S.C. 2201* [Adv. D.I. 7] ("First Amended Complaint") withstood dismissal under Rule 12.[1] Thereafter, defendant, George L. Miller, the chapter 7 trustee for the Debtor, answered the First Amended Complaint and asserted his counterclaim against Mr. Pulsifer related to the cryptocurrency transfer.[2] The Trustee asserted six counts against Mr. Pulsifer. Five counts sought the avoidance

[1] *See* Adv. D.I. 18 & 19 (letter ruling and order denying defendant's motion to dismiss).

[2] *See* Adv. D.I. 20.

and recovery of an alleged fraudulent transfer under 11 U.S.C. §§ 548, 544, and 550 and 6 DEL. C. §§ 1304, 1305, and 1307. One count sought damages for breach of fiduciary duty. Mr. Pulsifer answered the counterclaim,[3] and the parties agreed on a Scheduling Order setting forth the timeline for discovery.[4] Mr. Pulsifer then proceeded to serve written discovery on the Trustee in the form of requests for admission, interrogatories, and requests for the production of documents.[5]

A series of motions were thereafter filed by Mr. Pulsifer, including a motion for judgment on the pleadings requesting dismissal of the counterclaim and a motion to compel the Trustee to answer certain interrogatories.[6] The Court granted the request for judgment on the pleadings after concluding that the Trustee failed to plead sufficient facts to support his claims but authorized the Trustee to file an amended counterclaim on or before May 20, 2022.[7] The Court also granted the motion to compel.[8] To date, the Trustee has not filed an amended counterclaim.

In addition to the foregoing motions, Mr. Pulsifer filed the Motion. It relates to Mr. Pulsifer's *Requests for Admission and Interrogatories* served on the Trustee.[9] In particular, Mr. Pulsifer served 20 requests to admit various facts related to the parties' disputes in this proceeding and one request to admit to the genuineness of a document. The subject document is a purported note issued by the Debtor to FinDyne, attached to FinDyne's proof of claim. *See* Request 5. The facts subject to the Requests relate to the date of and parties to the FinDyne note, *see* Requests 4, 6, 7, the substance of several e-mails purportedly sent between Mr. Pulsifer and a representative of FinDyne related to FinDyne's investment in the Debtor and its efforts to develop CredaCash cryptocurrency, *see* Requests 8, 9, 10, 11, 12, 13, 16, 17, 18, 19, and the effect of those e-mails on the rights of Mr. Pulsifer to the at-issue cryptocurrency, *see* Requests 14, 15, 20, 21.

With the requests for admission, Mr. Pulsifer served his first set of interrogatories,[10] requesting that the Trustee identify any request to which the Trustee does not admit, state all facts on which he based any part of his response, and identify all documents concerning each such fact and all persons with knowledge of each such fact. *See* Interrogatory No. 1. Mr. Pulsifer also requested that the Trustee state any information concerning the now-dismissed counterclaim that was provided to him by FinDyne and to state various other details regarding such information. *See* Interrogatory No. 2.

[3] *See* Adv. D.I. 22.

[4] *See* Adv. D.I. 35.

[5] *See* Adv. D.I. 30, 40.

[6] *See* Adv. D.I. 42, 55.

[7] *See* Adv. D.I. 64. Mr. Pulsifer also filed a motion for a protective order but the Court denied the motion. *See* Adv. D.I. 53, 64.

[8] *See* Adv. D.I. 64.

[9] *See* Adv. D.I. 30.

[10] *See* Adv. D.I. 40.

Except for three, the Trustee did not admit or deny the requests.[11] Rather, the Trustee responded:

> "The Trustee was not a party to the Note and cannot admit or deny [ ]."[12]
>
> "The Trustee was neither a sender nor a recipient of any e-mails referenced in Request for Admission Nos. [__] and [___] and cannot admit or deny the timing or contents thereof."[13]
>
> "The Trustee cannot admit or deny. Discovery is ongoing."[14]

In response to Interrogatory No. 1, the Trustee "incorporate[d] the responses to Request for Admission Nos. 4 through 21[.]"[15] In response to Interrogatory No. 2, the Trustee explained that he "has not been provided information by FinDyne, or any of its agents concerning the Counterclaims" and that "Discovery is ongoing."[16]

Mr. Pulsifer argues that the Trustee's responses to Requests 4 through 21 (the "Requests at Issue") failed to comply with Rule 36.[17] It is his contention that while the Trustee possesses the relevant note and e-mails, is in contact with FinDyne, and acknowledges that FinDyne has discoverable information, he failed to make reasonable inquiry as required by Rule 36 in answering the Requests at Issue by contacting FinDyne. This, Mr. Pulsifer explains, is just another example of the Trustee's repeated failure to investigate Mr. Pulsifer's entitlement to the cryptocurrency at issue, set forth his position with respect to Mr. Pulsifer's claims, and narrow the issues in dispute.

By the Motion, Mr. Pulsifer requests that the Court deem the Requests at Issue admitted or, alternatively, that the Court require the Trustee to file a motion for leave to withdraw or amend his answers. If the Court allows the Trustee to so move, Mr. Pulsifer requests that the Court require the Trustee to "[p]rovide actual admissible evidence sufficient to overcome the contemporaneous emails and demonstrate there is a genuine issue for trial" and "[i]nclude his proposed amended responses to the Requests for Admission and the associated Interrogatories."[18] Mr. Pulsifer argues that these conditions are appropriate to ensure that the Trustee performs a reasonable inquiry, the issues are narrowed, the time for resolution of claims is shortened, and the need for further relief

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[11] *See generally* Adv. D.I. 44.

[12] *See id.* (answers to Requests 4, 5, 6, 7).

[13] *See id.* (answers to Requests 8, 9, 10, 11, 12, 13, 17, 18, 19).

[14] *See id.* (answers to Requests 14, 15, 16, 20, 21).

[15] *See* Adv. D.I. 37.

[16] *Id.*

[17] Mr. Pulsifer did not specify the responses alleged to be inadequate. The Court identified them based on a review of the briefing and the Trustee's responses to Mr. Pulsifer's requests for admission.

[18] Motion at 16.

is obviated. Finally, Mr. Pulsifer requests that the Court sanction the Trustee and award him $9,500 for his time incurred in making the Motion.

The Trustee objects to the relief sought, arguing that Mr. Pulsifer is attempting to impute discovery obligations on the Trustee that do not exist under Rule 36. Namely, the Trustee contends that he is not required to make inquiry of FinDyne in responding to the Requests at Issue because FinDyne is not a party to the current adversary proceeding, there is no past or present relationship between the Trustee and FinDyne, and FinDyne has not been active in this case. The Trustee also argues that sanctions are not appropriate because the Motion was admittedly filed without any meet and confer[19] and because the Trustee has timely met all discovery obligations and attempted to resolve the Motion in good faith.

Argument on the Motion was held on April 20, 2022, and the Court took the matter under advisement.

II. ANALYSIS

A. The Trustee Failed to Comply with Rule 36 When Answering the Requests at Issue

Rule 36(a)(1) provides that parties "may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to: (A) facts, the application of law to fact, or opinions about either; and (B) the genuineness of any described documents." FED. R. CIV. P. 36(a)(1). The rule "serves two vital purposes, both of which are designed to reduce trial time. Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be." FED. R. CIV. P. 36 (1970 Amend., Advisory Comm. Note); *see also United Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 967 (3d Cir. 1988) ("The purpose of Rule 36(a) is to narrow the issues for trial to those which are genuinely contested.").

Rule 36(a)(4) sets forth requirements for answers to requests for admission. "If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it." FED. R. CIV. P. 36(a)(4). The rule further specifies that an "answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny." *Id.*

The Trustee has not complied with Rule 36(a)(4) in answering the Requests at Issue. His responses rely on his lack of knowledge and information, but he fails to make the required statement that he made reasonable inquiry and that the information he knows or can readily obtain is insufficient to enable him to admit or deny the Requests at Issue. Accordingly, the responses are deficient. *See, e.g.*, *Lightstyles, Ltd. v. Marvin Lumber & Cedar Co.*, No. 1:13-CV-1510, 2014 WL 6982918, at *1 (M.D. Pa. Dec. 9, 2014) ("[A] response that fails to include the language that a 'reasonable inquiry' was made is deficient."). Rule 36(a)(6) provides that when a court finds

[19] Adv. D.I. 65 (Apr. 20, 2022 Hr'g Tr. at 35:8-14).

that an answer does not comply with Rule 36, it may "order either that the matter is admitted or that an amended answer be served." FED. R. CIV. P. 36(a)(6). The choice of the two remedies is a matter left to the sound discretion of the court but "[o]rdinarily, a . . . court should first order an amended answer, and deem the matter admitted only if a sufficient answer is not timely filed . . . ." *Louis v. Martinez*, No. 5:08:CV-151, 2011 WL 1832808, at *2 (N.D. W. Va. May 13, 2011).

The Court will order the Trustee to amend his answers to the Requests at Issue. After the Motion was filed, the parties met and conferred for the first time. The Trustee then offered to admit to the authenticity of the documents identified in the Requests at Issue.[20] Because the Trustee is willing to admit to the authenticity of the underlying documents, the Court believes that the Trustee can also admit the several Requests at Issue that ask the Trustee to admit to certain quoted contents of the documents.[21] Moreover, given that discovery has progressed further and the Trustee has not filed an amended counterclaim, the Trustee may be able to admit or deny other Requests at Issue and further streamline these proceedings. *See* FED. R. CIV. P. 26(e)(1) (requiring supplemental and corrected responses to requests for admission if a party learns that in some material respect the response is incomplete or incorrect); *see also Solotar v. Northland Hearing Ctrs., Inc.*, No. 17-1919, 2017 WL 6520538, at *2 (E.D. Pa. Dec. 20, 2017) (citing Rules 36(a)(4), 26(e), and 37(c) and stating that "[t]aking these rules together, while a party may, under the proper circumstances, validly respond to a discovery request by saying, "I don't know," that party must disclose the information if he subsequently acquires it, or else suffer possible sanctions . . . ."). Mr. Pulsifer's rights to seek an extension of the deadlines in the Scheduling Order or further relief from this Court under Rule 36, Rule 37, or otherwise are preserved.[22]

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[20] *See* Adv. D.I. 44 at 2; Adv. D.I. 65 (Apr. 20, 2022 Hr'g Tr. at 37:13-15).

[21] *See, e.g.*, *Tomaszewski v. Allstate Ins. Co.*, No. 19-cv-0080, 2021 WL 1238894, at *5 (E.D. Pa. Apr. 2, 2021) ("It is also permissible to request that a party admit or deny the accuracy of quoted textual material from a particular document relevant to the action, and the request may not be ignored on the ground that it seeks an interpretation of the text. If the request for admission quotes a document[] and asks the other party to admit that the document contains the material quoted, it should be admitted if the quotation is accurate and denied if it is not." (internal quotations and citations omitted)).

[22] Mr. Pulsifer's request that the Trustee provide admissible evidence to overcome the authenticity of the e-mails referenced in the Requests at Issue is not appropriate at this stage of the proceeding and is a matter better left for summary judgment. Moreover, the Court understands Mr. Pulsifer's desire, by requesting that the Trustee's amended answers be previewed with him and the Court, to streamline the discovery process and ensure that the Trustee makes reasonable inquiry. However, Rule 36 only requires that answering parties make the required statements regarding reasonable inquiry. Notwithstanding, the Trustee must act in good faith when answering the Requests at Issue and otherwise responding to discovery requests. *See, e.g.*, *Inventio AG v. Thyssenkrupp Elevator Americas Corp.*, No. 08-874-RGA, 2013 WL 12133902, at *2 (D. Del. July 29, 2013) ("[I]nherent in Rule 36 is the requirement that the responding party 'made a good faith effort to obtain information so he can admit or deny the request.'" (quoting *Doe v. Mercy Health Corp.*, No. No. 92-6712, 1993 WL 377064, at *10 (E.D. Pa. Sept. 15, 1993)). If the Court determines in the future that the form of the Trustee's amended answers remains insufficient, the Court can admit the requests and award appropriate expenses. In addition, Rule 37(c) exists to sanction parties for, among other things, failing to inform themselves before they answer the substance of requests, but that analysis occurs after trial. *See* FED. R. CIV. P. 37(c)(2) ("If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter to be true, the

B. The Trustee Need Not Make Inquiry of FinDyne

In amending his answers to the Requests at Issue and making the required statement, the Trustee need not make inquiry of FinDyne. Rule 36(a)(4) requires answering parties to make reasonable inquiry into a requested admission before asserting lack of knowledge or information. "Generally, a 'reasonable inquiry' is limited to review and inquiry of those persons and documents that are within the responding party's control[,] and includes investigation of the party's 'officers, administrators, agents, employees, servants, enlisted or other personnel, who conceivably, but in realistic terms, may have information which may lead to or furnish the necessary and appropriate response." *CX Reinsurance Co. v. Johnson*, No. RWT-15-3132, 2018 WL 10075929, at *2 (D. Md. Jan. 24, 2018) (quoting *T. Rowe Price Small-Cap Fund, Inc. v. Oppenheimer & Co., Inc.*, 174 F.R.D. 38, 43 (S.D.N.Y. 1997) (internal quotation marks omitted)); *accord Inventio AG v. Thyssenkrupp Elevator Ams. Corp.*, No. 08-874-RGA, 2013 WL 12133902, at *2 (D. Del. July 29, 2013); *Tomaszewski v. Allstate Ins. Co.*, No. 19-cv-0080, 2021 WL 1238894, at *4 (E.D. Pa. Apr. 2, 2021); *Kutner Buick, Inc. v. Crum & Foster Corp.*, No. 95-1268, 1995 WL 508175, at *3 n.2 (E.D. Pa. Aug. 24, 1995). There is no evidence that FinDyne is within the Trustee's control.

As noted by Mr. Pulsifer, courts have held that answering parties must make inquiry of unrelated third parties "when there is some identity of interest manifested, such as by both being parties to the litigation, a present or prior relationship of mutual concerns, or their active cooperation in the litigation, and when there is no manifest or potential conflict between the party and the third party." *Uniden Am. Corp. v. Ericsson Inc.*, 181 F.R.D. 302, 304 (M.D.N.C. 1998); *see also Inventio AG*, No. 08-874-RGA, 2013 WL 12133902, at *3 (holding that the scope of "reasonable inquiry" includes agents and other third-parties within the party's control who have (or had in the past) identical interests); *Rhone-Poulenc Rorer Inc. v. Home Indemnity Co.*, No. 88-9752, 1992 WL 394425, at *2 (E.D. Pa. Dec. 28, 1992) (stating that reasonable inquiry "entails at least a limited obligation to inquire of co-defendants, but not non-parties.").

FinDyne is the sole outside creditor of the Debtor, and it commenced the Debtor's involuntary bankruptcy case. A review of the docket reveals that, after the Court entered the Order for Relief and Mr. Miller was appointed, FinDyne has not been active in the case. Mr. Pulsifer provided the Court with an email string between counsel for FinDyne and counsel to the Trustee, allegedly produced by the Trustee, indicating that counsel are in communication and that Trustee's counsel shared with FinDyne documents produced by Mr. Pulsifer.[23] Notwithstanding, FinDyne is not a party to this adversary proceeding, the nature and extent of the Trustee's communications and relationship with FinDyne is unknown, and there is insufficient evidence that the Trustee is materially cooperating or aligned with FinDyne. Accordingly, the Trustee is not required to make reasonable inquiries of FinDyne to respond to the Requests at Issue. Nonetheless, if the Trustee obtains discovery from FinDyne (or informally learns information from FinDyne) that requires his

requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof.").

[23] *See* Adv. D.I. 65 (Apr. 20, 2022 Hr'g Tr. at 29: 3-16).

answers to Mr. Pulsifer's Requests at Issue be supplemented or corrected under Rule 26(e)(1), he must do so.[24]

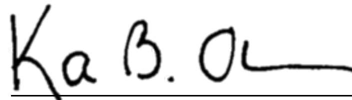
C. Mr. Pulsifer Is Not Entitled To An Award of Expenses

Mr. Pulsifer requests that the Court sanction the Trustee for his failure to comply with Rule 36 in responding to the Requests at Issue. If a party successfully challenges the sufficiency of an answer under Rule 36(a)(6), Rule 37(a)(5) "require[s] the party . . . whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses in occurred in making the motion, including attorney's fees." FED. R. CIV. P. 37(a)(5)(A). Notwithstanding, the rule precludes an award of reasonable expenses if, among other things, "the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action[.]" FED. R. CIV. P. 37(a)(5)(A)(i). Mr. Pulsifer did not meet and confer with the Trustee prior to filing the Motion. Accordingly, an award of expenses is precluded.[25]

III. CONCLUSION

The Trustee is hereby ordered to amend his answers to the Requests at Issue in accordance with Rule 36 within 14 days. The Trustee should also amend as necessary his answer to Interrogatory No. 1 within that timeframe.[26] All other relief requested in the Motion is denied.

May 25, 2022



Karen B. Owens
United States Bankruptcy Judge

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[24] Mr. Pulsifer argues that the Trustee's duty to investigate the affairs of the Debtor under 11 U.S.C. § 704 imposes upon him the duty to make inquiry of FinDyne. For purposes of responding to a Rule 36 request for admission, the Court does not agree. Mr. Pulsifer also contends that the Trustee violated the Scheduling Order by implying that he may respond to the Requests at Issue following the close of fact discovery. Fact discovery has not yet expired. No violation of the Scheduling Order has thus occurred. The ripe question before the Court is whether the Trustee violated the requirements of Rule 36 in responding to the Requests at Issue.

[25] Mr. Pulsifer moves in the alternative for an award of expenses under Rules 16(f)(2) and 26(g)(2). Rule 16(f)(2) does not apply to the dispute before the Court. Rule 26(g)(2) may apply given that the form of some of the Trustee's responses were inconsistent with Rule 36 but the facts and circumstances do not support an award of expenses in light of the Court's conclusion that Trustee need not consult with FinDyne.

[26] Because there is no pending counterclaim, Interrogatory No. 2 is moot.