

**NOT INTENDED FOR PUBLICATION**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
FORT WAYNE DIVISION

IN RE: CASE NO. 08-13079	)	
	)	
HEIDI A. RYBOLT	)	
	)	
Debtor	)	
	)	
	)	
HEIDI A. RYBOLT	)	
	)	
Plaintiff	)	
	)	
vs.	)	PROC. NO. 14-1075
	)	
CARRINGTON MORTGAGE	)	
SERVICES, LLC	)	
	)	
Defendant	)	

**DECISION AND ORDER DENYING  
MOTION TO WITHDRAW OR AMEND ADMISSIONS**

On October 21, 2015.

The defendant failed to respond to the plaintiff’s second request for admissions. It subsequently filed a motion to withdraw or amend the resulting admissions.<sup>1</sup> It is that motion,

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<sup>1</sup>Defendant’s motion was not accompanied by a separate brief in support thereof, as required by the local rules of this court. See, N.D. Ind. L.B.R. B-7007-1(a). That rule requires “any motion filed within a contested matter or an adversary proceeding (e.g. motions filed pursuant to Fed. R. Bankr. P. 5011(b), 7012, 7037, and 7056) [to] be accompanied by a separate supporting brief.” N.D. Ind. L.B.R. B-7007-1(a). When plaintiff’s counsel mentioned this in its response to the motion, defendant argued that the local rule does not apply because its motion was filed pursuant to Rule 7036 and not one of the rules listed in the local rule’s instructional parenthetical. Counsel apparently does not understand that e.g. (exempli gratia) means “for example.” Thus, the rules mentioned in B-7007(a)(1) are not offered as an exhaustive list, but simply helpful examples of commonly filed motions. The rule itself is quite clear: any motion filed within an adversary proceeding or a contested matter is to be accompanied by a separate brief. Defendant’s motion to withdraw admissions falls within the scope of “any motion” and it has been filed “within an adversary proceeding,” as distinguished from the motions that are filed to initiate contested matters. See, Fed. R. Bankr. P. Rule 9014(a). Defendant’s brief was required to be filed separately from the motion

together with the plaintiff's objection thereto, that is presently before the court. The issue is a matter committed to the court's discretion. See, Banos v. City of Chicago, 398 F.3d 889, 892 (7th Cir. 2005); Kalis v. Colgate-Palmolive Co., 231 F.3d 1049, 1059 (7th Cir. 2000).

Requests for admissions are governed by Rule 36 of the Federal Rules of Civil Procedure. That rule allows a party to serve upon any other party a written request to admit the truth of any relevant, non-privileged matter. See, Fed. R. Civ. P. Rule 36; Fed. R. Civ. P. Rule 26(b)(1). Unless the parties agree otherwise or the court establishes a different deadline, the party receiving a request for admissions must respond within thirty days. Fed. R. Civ. P. Rule 36(a)(3). If it does not, the requested matters are admitted and stand as "conclusively established." Fed. R. Civ. P. Rule 36(b).

The court does, however, have the discretion to allow admissions to be withdrawn or amended. See, Fed. R. Civ. P. Rule 36(b). A change may be permitted "if it would promote the presentation of the merits of the action and the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits." See, Fed. R. Civ. P. Rule 36(b). The rule, thus, establishes a two-step analysis. Initially, the moving party has the burden of persuading the court that a presentation of the action's merits would be served if its admissions are withdrawn or amended. If it does so, withdrawal or amendment of the admissions should be allowed unless the non-moving party persuades the court that it would be prejudiced. See, Perez v. Miami-Dade County, 297 F. 3d 1235, 1264 (11th Cir. 2002); F.D.I.C. v. Prusia, 18 F.3d 637, 640 (8th Cir.

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and not incorporated in it. Nonetheless, the purpose for the requirement is to eliminate confusion and provide clarity as to when or if the time to respond has begun to run, see, Matter of Lengacher, Case No. 12-12512, Order dated Oct. 6, 2015 (Bankr. N.D. Ind.) available at [www.innb.uscourts.gov/opinions/pdfs/3361.pdf](http://www.innb.uscourts.gov/opinions/pdfs/3361.pdf), and here the plaintiff has filed a brief responding to the movant's arguments and movant has filed a reply; so there is no need to discuss the matter further.

1994); Upchurch v. Ustnet, Inc., 160 F.R.D. 131, 132 (D. Ore. 1995).<sup>2</sup>

Whether a presentation on the merits would be served by allowing the withdrawal or amendment of admissions is a conclusion, which, like any other conclusion, should be based upon underlying facts. To allow the court to come to that conclusion, the movant must provide something more than unsupported assertions. The court should be informed about what has been admitted, why and how what has been admitted should be changed, and given some idea of the issues presented in the litigation so it can evaluate how a presentation of those issues would be fostered by allowing the withdrawal. Movant has done none of that. The court has been given little more than formulaic recitations that a presentation on the merits will be served by the withdrawal and that denying the request would practically eliminate any presentation on the merits. It remains unexplained how or why that may be so. The closest movant comes to offering the court any explanation of what has been admitted and the ramifications of the admissions comes from a single paragraph on page seven of the motion:

First, the presentation of the merits will not [sic] be subserved by the withdrawal of the admissions because the admissions attempt to establish liability. One of the key issues in this matter is whether, and to what extent, Carrington could access Plaintiff's property to protect Carrington's interest in the property. Plaintiff's Second Request for Admissions attempt to establish that Carrington did not have the authority to access Plaintiff's property. Motion to Withdraw or Amend Admissions,

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<sup>2</sup>Some decisions will also consider factors not specifically mentioned in the rule, such as why the request was not responded to within the time required. See e.g., Conlon v. U.S., 474 F.3d 616, 624-25 (9th Cir. 2007); Commodity Futures Trading v. Intern. Fin. Servs., 323 F. Supp.2d 482, 510 (S.D. N.Y. 2004); In re Skyport Global Communications, Inc., 408 B.R. 687, 697-98 (Bankr. S.D. Tex. 2009); Matthews v. Homecoming Financial Network, 2006 WL 2088194 \*3 (N.D. Ill. 2006). But see, Perez v. Miami-Dade County, 297 F. 3d 1255, 1265-66 (11th Cir. 2002); F.D.I.C. v. Prusia, 18 F.3d 637, 640 (6th Cir. 1994); Dynasty Apparel Industries, Inc. v. Rentz, 206 F.R.D. 596, 602 n. 7 (S.D. Ohio 2002). Since the movant has failed to demonstrate that a presentation on the merits would be served by withdrawing its admissions, the court has no need to consider why it failed to timely respond to the request.

filed Aug. 25, 2015, p. 7.

Such vague generality does little to help the court understand precisely what has happened and why it matters. Just what has the defendant admitted and how will changing that admission serve a presentation on the merits? You cannot tell from reading this paragraph, but that is as good as it gets when it comes to identifying the particular facts of this case and applying them to the standard governing movant's burden of proof.

Mechanically reciting that a presentation on the merits will be promoted by allowing the withdrawal of an admission is not enough to prove that it is so. See, *Matthews v. Homecoming Financial Network*, 2006 WL 2088194 \*2 (D. N.D. Ill. 2006). If it were, there would be no point to making it a separate element for the court to consider and the rule could limit the court's inquiry solely to the issue of the non-movant's prejudice. It should be a relatively simple task to tell the court what has been admitted, why it should be changed, what the movant would like to replace the admission with, and the consequences of not doing so. The motion should quote the admission or admissions in issue, explain how what has been admitted varies from the true facts of the matter (or at least movant's version of the facts), support that explanation with affidavits or other evidence from the record concerning the testimony movant would offer in place of the admission – thereby demonstrating that, absent the admission, a presentation on the merits would involve some type of factual controversy to be resolved based upon competing evidence – and place the admission into context by discussing the issues presented in the case and how the admission impacts their disposition. The court may or may not accept movant's argument, but without this type of information a decision would be based upon nothing more than unsupported assertions. See e.g., *F.D.I.C. v. Prusia*, 18 F.3d 637, 640 (8th Cir. 1994) (erroneous admission allowed to be withdrawn);

Centrifugal Acquisition Corp., Inc. v. Moon, 267 F.R.D. 240, 241 (E.D. Wis. 2010) (withdrawal did not subserve merits where admissions were consistent with the record); Security Ins. Co. of Hartford v. Trustmark Ins. Co., 217 F.R.D. 296, 298 (D. Conn. 2002) (presentation of merits promoted where discovery revealed admission not true); Ropfogel v. U.S., 138 F.R.D. 579, 583 (D. Kan. 1991) (presentation of merits not facilitated as to admissions government formally admitted where there was no showing the admissions were contrary to the record, no longer true or admitted through error); Branch Banking and Trust Co. v. Deutz-Allis Corp., 120 F.R.D. 655, 656 (E.D. N.C. 1988) (motion denied where defendant failed to explain in any detail why it sought to deny prior admission and upon what new evidence that desire was predicated); Tourmaline Partners LLC v. Monaco, 2014 WL 4810253 \*10 (D. Conn. 2014) (motion denied where movant failed to address specific responses or explain how admissions would eliminate a presentation on the merits); Kocon v. Lake County Sheriff's Dept, 2006 U.S. Dist. LEXIS 71876 \*12 (N.D. Ind. 2006) (presentation of merits subserved where movant presented affidavit constituting evidence contradicting admissions); King-Hardy v. Bloomfield Bd. of Educ., 2002 WL 32506294 \*2 (D. Conn 2002) (motion denied where plaintiff failed to articulate what admissions had been made and how merits would not be subserved by allowing them to stand); Matter of Carlen, 1991 Bankr. LEXIS 1469 \*11 (Bankr. N.D. Ind. 1991) (Lindquist, B.J.) (requirements fulfilled where affidavits submitted were inconsistent with admissions).

Movant has failed to sufficiently explain just what it has admitted; come forward with any evidence it would like to offer at trial that contradicts its admissions; give an adequate explanation of the issues presented in this matter and how the presentation of those issues would be promoted

by relieving it of its admissions.<sup>3</sup> Its motion to withdraw or amend admissions is, therefore, DENIED. Accord, Casey v. Quality Restaurants and Concepts, 2012 WL 3261367 \*4 (N.D. Miss. 2012); Matthews, 2006 WL 2088194 \*2.

SO ORDERED.

/s/ Robert E. Grant  
Chief Judge, United States Bankruptcy Court

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<sup>3</sup>Because the defendant has failed to persuade the court that the merits of this litigation will be subserved by permitting the withdrawal or amendment of its admissions, the court need not consider the parties' arguments concerning prejudice.