

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

M3 GIRL DESIGNS, LLC
Plaintiff,

v.

BLUE BROWNIES, LLC
KRISTA DUDTE,
ROBERT DUDTE,
and SHANNON DUNN
Defendants.

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CIVIL ACTION NO. 3-09CV2390-F

**DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO
SECOND MOTION TO COMPEL AND
SECOND MOTION FOR SANCTIONS UNDER RULE 37**

Introduction

Plaintiff has once again produced responsive discovery documents only after the Defendants were forced to file a motion to compel. However, even with this latest round of production, and Plaintiff's response brief,¹ Plaintiff's past due belated production is incomplete.² It has been seven months since Defendants' initial discovery was served and Plaintiff has still failed to properly answer basic interrogatory questions or produce documents. Accordingly, the Motion to Compel is still extant and should be granted and expenses should be awarded under Rule 37(a)(4). In particular, sanctions are still appropriate as Plaintiff's tactics continue to delay and drive up the time and expense of this litigation.³

"No Rush."

¹ Defendants note that at 24 pages, the Response Brief far exceeds the 10-page limit under Local Rule 7.2. Defendants further note that there is no genuine confidential information in the Response Brief itself and it should not have been filed under seal. Plaintiff merely wishes to conceal its embarrassing litigation tactics.

² The extent of Plaintiff's recalcitrance is unknown. Defendants can only point out the glaring gaps in the discovery that it has established.

³ See, e.g., Dkt. 42, Order Granting Defendants' Motion to Dismiss Plaintiff's State Law Claims; Dkt. 81, Defendant's Motion for Summary Judgment on Plaintiff's Trade Dress Claims (pending).

To clarify, Defendants' counsel, Charles Hanor, has never made a statement that there was "no rush" as Plaintiff continually claims and emphasizes. Nor did Mr. Hanor ever concede to making this statement, as Plaintiff boldly and inaccurately claims. *See* Plaintiff's Response at 2 (stating that "Defendants' counsel "admitted" to making the 'no rush' statement" while citing to a July 11 Letter that says no such thing); see also Ex A, July 11, 2011 Letter from Charles Hanor to Scott Hemingway. This continuous mischaracterization of the facts is endemic in Plaintiff's Response. Furthermore the "no rush" is not an excuse for the continued stonewalling.

The discovery was due six months ago. Asking for timely responses to discovery requests, when they are significantly past due is not a "rush" request. Plaintiff tries to give the impression that the motion to compel and the requests are "expedited" requests. *See* Response at 4. Because of this, Defendants point out that it has been seven months since the initial requests were served on Plaintiff. There is nothing "expedited" about Defendants' six months of repeated requests for Plaintiffs to comply with discovery. Plaintiff persists in dragging this case out, knowing full well that discovery of the facts will cause it to lose. Defendants believe that Plaintiff's business model includes a common practice of baseless suits against small mom and pop competitors for copyright and trademark infringement in an effort to push them out of the bottle cap jewelry market Defendant has dominated. Likewise, Defendants believe that this discovery abuse is a part of Plaintiff's strategy to protect its dominant market position by burdening them with massive legal costs.

It is incredible that Plaintiff's counsel misunderstood the June 13 conversation to mean that there was no hurry for the six months past-due discovery. Plaintiff still had not provided the requested documents over 30 days after the June 13 conversation. *See* Ex. B (noting on July 14,

2011 that “we are in the process of applying bates labels and confidentiality designations to the Plaintiff’s responsive and relevant emails.”).

Financial and Email Documents in Native Electronic Form

In its July 2011 Response, Plaintiff claimed that it has produced the email records (first requested on January 13, 2011) in “native electronic format.” Plaintiff incredibly asserts that it produced “over 15,000 M3 Girls emails and 3 CDs of M3 Girl Quicken financial records – both of which were produced in their native electronic format.”⁴ As proof of this, Plaintiff cites to a letter sent on July 26, 2011, also attached herein as Ex. C, in which Plaintiff referred to email records “in its native electronic format as maintained by our client,” citing to Bates numbered documents M3G-7277-15502. The documents referred to are PDF format documents of emails and QUICKBOOKS records, not documents that are in the form in which is it ordinarily maintained (as a PST or Outlook format file and QUICKBOOKS database file) as specifically requested by Defendants. See. E.g., Exhibit D M3G-7277 (CONFIDENTIAL). It is apparent that Plaintiff uses Microsoft Outlook in view of the format of the emails. Plaintiff is simply continuing to withhold the discovery in the most usable and inexpensive form. Defendants find it difficult to believe that Plaintiff doesn’t understand the difference between searchable and sortable native electronic format and non-searchable by field and non-sortable PDF print-outs. As explained in Defendant’s Second Motion to Compel, the native electronic format requested allows Defendants to search custom fields to determine profits and expenses as well as searching more easily for strings of communications between relevant potential witnesses, such as Plaintiff’s public relations representative. This is why Defendants requested the production in native format, as they were entitled to do under Federal Rules. This is also why Plaintiff went out of its way and incurred additional expense and effort to produce Plaintiff’s business records in a

⁴ P Response at 4.

PDF format that will make it more difficult and expensive for Defendants to search and analyze them.

Financial Records.

Plaintiff asserts in its Response that it has provided “several thousand electronic financial records in their native electronic format.” Plaintiff cites to the July 14 letter sent to Defendants’. See Response at 8-9. This letter identifies M3G-4527 through M3G 7276 as being documents in native electronic format. As with the emails, the documents referred to in the letter are simply PDF format printouts of the QUICKBOOKS database, not the database itself. See, e.g., Ex. E, Bates number M3G-4527 - 4556 (CONFIDENTIAL). Plaintiff now asserts that because some of the QUICKBOOKS database is maintained online, Defendants would be unable to access it without also accessing the private files of Plaintiff’s accountant. See Response at 10-11 n.3, Defendants do not believe that any accountant mixes client’s files in QUICKBOOKS databases and uses QUICKBOOKS online because of its reduced functionality. Defendants’ attorney uses QUICKBOOKS PRO and passed on the online version because it cannot be converted back to a local database and has significantly reduced functionality. But in the unlikely event that Plaintiff is correct in its representation it uses an online version, all it needs to do is to give Defendants a logon or a separate copy of the database online.⁵ Defendants wonder what sort of financial accounting system provides an accountant’s client with online access and that would also grant broad access to all other clients of the same accountant. It is also unbelievable that there is an online version that only Plaintiff’s accountant can access. Attached is a printout of the various

⁵ QUICKBOOKS PRO costs about \$200 and the online version is similarly inexpensive. Only a small unsophisticated business would use the online version which lacks a payroll module among other things. An online version is also usually slower because of the internet connection. A large QUICKBOOKS database does not work well online, if at all.

versions of QUICKBOOKS that are available, see Ex. F. All would use a different database for each client.

Interrogatories

The supplemental interrogatory responses from July 27, 2011, provided after the filing of the Second Motion to Compel, are not verified as required. Answers to interrogatories must be made under oath, with a sworn affidavit. *See* Fed. R. Civ. P. 33(b). Plaintiff's attorney knows this because he failed to verify his initial Interrogatory Responses in March, doing so only when requested to by Defendant. See Ex. G, March 24, 2011 Letter from Scott Hemingway to Charles Hanor; Ex. H, March 22 Letter from Charles Hanor to Scott Hemingway. Defendants should not be burdened with the expense of repeatedly spending their attorney's time reminding Plaintiff's attorney on the Rules of Federal Civil Procedure. Based on the Responses, Defendants are left to believe that the reason the interrogatories are not sworn to is related to the non-responsive responses.

Plaintiff's responses to Interrogatories Nos. 1, 2 and 3 are woefully inadequate. At the beginning of this case, Plaintiff originally brought untenable copyright claims against Defendants in bad faith. Defendants are the prevailing party to this claim after spending tens of thousands of dollars in legal fees. As the prevailing party, Defendants are seeking an award of attorney's fees.

Interrogatory No. 1 asks Plaintiffs to identify each copyrighted bottle cap design which they asserted to be an infringement and to identify each corresponding bottle cap design that is the basis of an infringement claim. Plaintiffs list their alleged copyright registrations, which do not identify which works are copyrighted, and fail to identify which corresponding bottle cap design of Defendants was alleged to be infringing, only naming documents which purportedly cover dozens of Plaintiff's potential copyrights and Defendants dozens of designs.

In Interrogatory No. 2 Defendants asked Plaintiff to identify each pre-existing work that was used as all or part of Plaintiff's design. This is a direct question asking for a specific response of pre-existing works. In the July 27 Response, Plaintiff failed to adequately respond to this, failing to identify any of the pre-existing works, stating disingenuously that "Because it is the entire combination of Plaintiff's copyrighted bottle cap jewelry that is subject to the copyrights-at-issue...there was no completed pre-existing bottlecap jewelry or design... prior to [Plaintiff's] preparation, creation and fabrication of the bottlecap jewelry and design..." Plaintiff further states that "the source of these works was Madeline Bradshaw," referring to a list in the response that includes "Peace Fingers," "Soccer Ball," "Volleyball," "Horses (2 versions)," and "Butterfly". See Ex. I, Supplemental Interrogatory Responses. Defendants have discovered that numerous designs listed (for example, Peace Fingers, Soccer Ball, Volleyball, both versions of Horses, and Butterfly) were misappropriated from pre-existing works, and in several cases are outright plagiarism, if not a copyright infringement. See Ex. J, Tabberone's Hall of Shame M3 Girl Designs Copied Artwork Comparisons; Ex. K, Letter regarding infringement of Karyn Lewis Bonfiglio's Copyrighted Material.

While Defendants can determine that some of Plaintiff's claimed copyrights were based on pre-existing works, it has no way of knowing all of the instances which involves pre-existing works, which is why it asked this question in the Interrogatory.

Plaintiff states that it has supplied the design files and it believes that Defendant can inspect and identify "each pre-existing work" on its own. This is not the same as Plaintiff stating it under oath in an interrogatory answer. However, the digital files produced by Defendant have no metadata that would enable Defendants to determine the original source of the designs. Furthermore, there are apparently no pre-existing designs identifiable in the business records.

Accordingly, the only way that Defendants can determine which designs contain pre-existing work is by the Plaintiff's interrogatory response. Defendants are entitled to have this interrogatory answered under oath. That the response will be devastating to Plaintiff's lawsuit and constitute a damaging and possibly humiliating admission, is not a basis to stonewall on the answer.

Finally, the Response to Interrogatory No. 4 is incomplete as it still does not identify Margot Bradshaw, an alleged co-founder, and a Director of M3 Girl Designs⁶, as a person having knowledge of relevant facts. Plaintiff also fails to identify their advertising and public relations representatives, despite the fact that they are being countersued for False Advertising and it is apparent that Plaintiff's prestigious (and very expensive) New York advertising and marketing agent was a key player in Plaintiff's take no prisoners, multi-million dollar a year company that was supposedly established and run by 10-year-old and 14-year-old sisters that attend the academically challenging Hockaday school in Dallas.⁷

In Interrogatory Responses 6, and 7 Plaintiff refers to "3 CD's with Quicken Financial Records in Quicken native electronic format" and "3 CDs with electronic mail messages in Outlook native electronic format." As noted above, the only financial records and email records received by Defendants are in PDF format and as such have limited usefulness in the search for and sorting of admissible evidence. Plaintiff still have not produced the Quicken Financial database record or email database record in native electronic form despite claiming such production in the response to interrogatories.

Response to Interrogatory No 9, a request for the fee arrangement, Plaintiff again states that it has retained counsel on a non-contingency basis for \$425/hour, but outright refuses to

⁶ See Ex. O, Texas Secretary of State Management Listing for M3 Girl Designs, LLC.

⁷ Defendants have sued Plaintiff for falsely advertising this fiction.

disclose any further information “unless ordered to do so by this Court.” Plaintiff complains that Defendants have refused to provide an explanation of why this is relevant. Defendant explained in its Motion to Compel why this is relevant to this case and admissible, as Plaintiff’s are requesting attorney’s fees. *See* Defendants’ Memorandum in Support of Motion to Compel at 10-11. A vague response about an hourly rate, that isn’t even sworn under oath, is not acceptable as evidence of the fee arrangement, particularly when Plaintiff has apparently stretched the truth if not outright mischaracterized the facts.

Meet and Confer Satisfied

Defendants conferred with Plaintiff’s counsel repeatedly before filing their Second Motion to Compel.⁸ Plaintiffs admit in the Response that there was a “face-to-face” meeting, discussing the meeting at length. *See* Response at 2-4. Defendants also communicated via letter and email on the issue multiple times. *See* Ex. L, June 1, 2011 Letter from Scott Hemingway to Charles Hanor (promising production but not providing a date and stating “I am reviewing electronic mail messages for the Plaintiff’s business for a future production”); Ex. M, June 3, 2011 Letter from Charles Hanor to Scott Hemingway. Furthermore, Defendant’s Counsel spoke to Plaintiff’s counsel multiple times prior to filing the Motion to Compel. Defendants even continued their attempts to confer with counsel to encourage discovery after the filing of the motion to compel, when the duty to confer had passed. Ex. N, July 11, 2011 letter from Charles Hanor to Scott Hemingway.

Sanctions

Plaintiff correctly states that Fed. R. Civ. P. Rule 37 requires a good faith attempt to confer. As noted directly above, Defendants have made every effort to resolve this discovery violation outside of using this Court’s valuable time. The only thing preventing a full resolution

⁸ Defendants also conferred with Plaintiff regarding the first motion to compel.

is Plaintiff's repeated failures to comply with discovery requests. Plaintiff also asserts that sanctions are not available unless an actual order requiring discovery has been violated. This is not the law.

Under Rule 37, If a motion to compel is granted, and upon notice and opportunity to be heard, the court "*must* require the party...whose conduct necessitated the motion... to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees," unless there was a failure to confer, the non-response was justified or the award would be unjust.

This requirement of the Court to award expenses to the movant applies in two circumstances, 1) if the motion is granted, or 2) if the disclosure or requested discovery is provided after the motion was filed. *See* Fed. R. Civ. P. Rule 37(a)(4)(A). The partial production that Plaintiff did provide was only after the filing of this motion to compel and it was incomplete. As this is the second time that Plaintiff has delayed production until after the filing of a motion to compel, attorney's fees dating back to the First motion to compel (which Plaintiff defeated only by claiming it would produce documents that it failed to produce) are appropriate.

In considering whether Plaintiff has complied with the discovery requests, "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond." Fed. R. Civ. P. 37(a)(3).

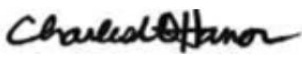
Conclusion

Plaintiff's tactics of piece meal providing partial discovery only after a motion to compel was filed does not defeat the award of sanctions under the Federal Rules. Seven months after being served with the discovery requests, Plaintiff still has not answered them completely or

non-evasively.⁹ Seven months after being served with requests to produce financial and email records in their native Quicken and email formats, Plaintiff still has not produces the documents in the requested format. Plaintiff has exacerbated this discovery abuse by outright claiming to this Court that it has provided documents in the requested format when it has done no such thing. Accordingly, nothing short of a motion to compel is likely to permit Defendants to move forward with their efforts to defend this untenable lawsuit.¹⁰

Dated August 11, 2011

Respectfully submitted,
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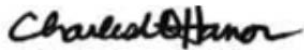
⁹ This is not the usual case where a party inadvertently failed to produce some discovery. Plaintiff has not merely overlooked some business records or inadvertently failed to respond. Plaintiff has deliberately and intentionally refused to provide discovery.

¹⁰ Defendants have filed a motion for summary judgment on the frivolous trade dress claims that asserts that Plaintiff is entitled to a perpetual monopoly on bottle cap magnets that have been marketed for many years (actually many decades) before Plaintiff copied them and incredibly claimed to be the first inventor of bottle cap magnets.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on all counsel of record who are deemed to have consented to electronic service via the Court' s CM/ECF system on August 11, 2011:

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