

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

TECHSAVIES, LLC,)
)
Plaintiff(s),)
v.)
WDFa MARKETING INC.,)
)
Defendant(s).)
_____)

No. C10-1213 BZ

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR SANCTIONS**

19 Before this Court is plaintiff Techsavies' motion for
20 sanctions against defendant WDFa Marketing. Docket No. 62.
21 For the reasons set forth below, Techsavies' motion is **GRANTED**
22 **IN PART AND DENIED IN PART.**

23 The material facts are as follows. On July 12, 2010,
24 Techsavies served its first set of interrogatories, document
25 requests, and requests for admissions on WDFa. Along with
26 objections, WDFa produced approximately 32,000 documents in
27 response on August 20. Five days later, WDFa sent Techsavies
28 a supplemental production of 1,100 documents, and notified

1 Techsavies by letter that its document production was
2 complete. Motion, Lin Decl. Ex. 7.

3 Over the next three months, Techsavies informed WDF
4 multiple times that there were problems with WDF
5 responses. The first notice came on September 2 during the
6 deposition of Abhishek Baherjee, where Techsavies specifically
7 questioned Baherjee regarding the lack of e-mails produced by
8 WDF. Motion, Lin Decl. Ex. 8. The parties then participated
9 in an Early Neutral Evaluation (ENE) on October 19, after
10 which Techsavies complained that WDF was relying on
11 information it had not disclosed to Techsavies. Following
12 these discussions, the parties stipulated to a 30-day
13 extension of fact discovery, which I approved. Id.
14 December 1 became the new deadline for fact discovery. Docket
15 No. 31.

16 On November 1, Techsavies served a second document
17 request on WDF.¹ Five days later, during a phone conference
18 on a discovery dispute regarding Techsavies' subpoena to
19 MetroPCS, Techsavies again complained about WDF's incomplete
20 production.² On November 8, Techsavies wrote a detailed
21 letter to WDF specifically addressing the failure to produce
22 MetroPCS contracts and WDF's financial information, documents

24 ¹ Techsavies claims that the purpose of serving this
25 second request was "to obviate any allegation by WDF that WDF
26 did not know what documents Techsavies was seeking." Motion at
4.

27 ² WDF's letter brief to the Court in connection with
28 this conference asserted that "[s]eparate and apart from the
ENE, WDF has produced all documents and financial information
requested by Techsavies." Docket No. 32.

1 that were encompassed by Techsavies' earlier requests.

2 Although WDFa received multiple complaints about its
3 potentially incomplete production, the record does not show
4 that WDFa initiated an investigation regarding these concerns.

5 On November 29, two days before the close of fact
6 discovery, WDFa produced roughly 87,000 documents in response
7 to Techsavies' second request. Techsavies realized once again
8 that requested documents were still missing and notified WDFa.
9 At this stage, WDFa investigated why relevant documents had
10 not been produced. Motion, Lin Decl. Ex. 14. WDFa's counsel
11 learned that several data back-up files from WDFa's computers
12 were never provided to and consequently never searched by its
13 e-discovery vendor. Id. These files were subsequently
14 provided to the vendor, and ten days after fact discovery was
15 closed, WDFa produced approximately 120,000 documents that it
16 conceded were in response to Techsavies' first request.

17 Opposition, Kuykendall Decl. Ex. 8 at 3. On December 17,
18 Techsavies also produced a "4-6 inch stack of papers" that may
19 not have been previously produced. Opposition, Kuykendall
20 Decl. ¶ 21. These documents came from five boxes of documents
21 that were found in the basement of WDFa's former office
22 building. Opposition, Prasad Decl. ¶ 17. WDFa claims that
23 the documents were not previously produced because WDFa had
24 moved offices and simply forgot about them. Opposition at 9.

25 Besides the untimely document productions, WDFa also
26 failed to properly respond to Techsavies' Interrogatory No.

27 ///

28 ///

1 2.³ On August 20, W DFA responded to this interrogatory
2 pursuant to FRCP 33(d). In early November, Techsavies wrote
3 to W DFA regarding W DFA's deficient interrogatory response and
4 failure to identify any documents despite its earlier reliance
5 on FRCP 33(d). W DFA did not substantively respond to the
6 interrogatory until December 17.⁴

7 On December 17, I held a phone conference to address
8 Techsavies' concerns about W DFA's untimely discovery
9 responses. Docket No. 43. I allowed Techsavies to choose
10 whether it wanted a three-week discovery extension or leave to
11 file a motion for sanctions. Techsavies elected to seek
12 sanctions. It now seeks the following sanctions in its
13 motion:

14 (1) establishing that the minimum gross revenues
15 attributable to Project632 are twice the credit card
16 transactions through the site since its inception,
given W DFA's failure to produce complete information
regarding the co-payments received from MetroPCS;

17 (2) barring W DFA from offering any evidence of
18 deduction or offset from that figure, given W DFA's
19 failure to produce supporting documentation for
those deductions; and

20
21 ³ Interrogatory No. 2 asked: "Identify every End User
22 that has used the Project 632 website and provide on a monthly
23 basis all revenue received from each End User for the use of
the Project 632 website, and Your gross and net profits derived
from said revenue."

24 ⁴ W DFA's "supplemental" response to the interrogatory
25 consisted of an incomplete spreadsheet of revenue, cost, and
26 profit information for sales through the Project632 website.
27 Motion, Lin Decl. Ex. 19. W DFA explains that this was a
28 complex interrogatory that required it to work for more than
four weeks in preparing a response. Opposition, Kuykendall
Decl. ¶ 6. That complexity simply underscores that W DFA's
earlier Rule 33(d) response was not well founded. However,
Techsavies never moved to compel.

1 (3) precluding WDFa and its experts from offering or
2 relying on any of the late produced information

3 The flow of discoverable information in this case was
4 first disrupted at the time of WDFa's initial disclosures. At
5 this time, WDFa was required to provide Techsavies with "a
6 description, by category and location — of all documents,
7 electronically stored information, and tangible things that
8 the disclosing party has in its possession, custody, or
9 control and may use to support its claims or defenses. . ."
10 FRCP 26(a)(1)(A)(ii). WDFa failed to comply with this
11 provision since it did not inspect or identify its data back-
12 up files as a source of electronically stored information.⁵
13 Had WDFa complied with its initial disclosure obligations,
14 WDFa would have realized, even prior to the initiation of
15 discovery, that many relevant documents were saved as data
16 back-up files. At the same time, Techsavies admitted that it
17 chose not to inspect what WDFa did identify, and is not
18 seeking sanctions for a violation of the initial disclosure
19 rules.

20 FRCP 26(e)(1)(A) requires WDFa to supplement or correct
21 its disclosures and discovery responses in a timely manner if
22 it "learns that in some material respect the disclosure or
23

24 ⁵ It is not clear from this record whether the fault
25 lies with counsel or WDFa. See e.g. Zubulake v. UBS Warburg
26 LLC, 229 F.R.D. 422, 431-33 (S.D.N.Y. 2004); see also The
27 Sedona Conference Working Group, The Sedona Principles: Best
28 Practices Recommendations & Principles for Addressing
Electronic Document Production, 125-29 (Jonathan M. Redgrave et
al. eds., 2d ed. 2007) (discussing the role of and risks to
counsel in preserving and producing electronically stored
information).

1 response is incomplete or incorrect. . .” The Pretrial
2 Scheduling Order (Docket No. 20) warns the parties that a
3 failure to “supplement disclosures or discovery responses
4 pursuant to Rule 26(e) may result in exclusionary sanctions.”
5 Techsavies placed W DFA on notice multiple times before fact
6 discovery closed that its responses were inadequate. This
7 notice raised an affirmative duty on the part of W DFA to
8 investigate. Yet W DFA, who learned about its incomplete
9 production in September, October, and November, did not
10 investigate and correct its production until after fact
11 discovery closed in December. This violated W DFA’s duty to
12 correct pursuant to FRCP 26(e).

13 Under FRCP 37(c)(1)(C), the Court may apply the sanctions
14 listed in FRCP 37(b)(2)(A) against W DFA.⁶ Sanctions would
15 only be inappropriate if W DFA established that its conduct was
16 substantially justified or harmless, which I find is not the
17 case. See Torres v. City of Los Angeles, 548 F.3d 1197, 1213
18 (9th Cir. 2008). W DFA has not offered any substantial
19 justification for its many failures and receiving about 75% of
20 the documents produced, at the close of or after the close of
21 discovery, is certainly not harmless. Nor would W DFA agree to
22 allow Techsavies to conduct late discovery; it would only
23 agree to “discuss specific requests to reopen discovery if

24
25 ⁶ W DFA argues that FRCP 37(c)(1) cannot be the source
26 of sanctions for these alleged discovery violations because
27 W DFA never violated a court order. The Court disagrees.
28 Putting aside the Court’s inherent authority, Chambers v.
NASCO, Inc., 501 U.S. 32 (1991), FRCP 37(c)(1) and 26(e)
specifically provide that if a party fails to correct its
discovery responses such sanctions are available without a
prior court order.

1 necessary to address facts raised by recently-produced
2 documents." (Doc. 41, p.2).

3 The Pretrial Scheduling Order (Docket No. 20) also
4 requires that "[t]hirty days prior to the close of non-expert
5 discovery, lead counsel for each party shall serve and file a
6 certification that all supplementation has been completed."
7 WDFFA did not file such a certification.⁷ Instead, WDFFA
8 improperly produced its late documents⁸ as well as its
9 interrogatory response after fact discovery closed and without
10 obtaining leave from the Court. Local Rule 37-3 explicitly
11 requires that "[u]nless otherwise ordered, as used in any
12 order of this Court or in these Local Rules, a 'discovery cut-
13 off' is the date by which all responses to written discovery
14 are due. . ." FRCP 16(b)(4) similarly only allows a party to
15 obtain relief from a "cut-off" date "for good cause and with
16 the judge's consent." Prior to the close of discovery, WDFFA's
17 duty to correct was self-effectuating. However, it appears to
18 be an issue of first impression whether a party can correct
19 its discovery responses after the close of discovery without
20 seeking leave of Court. In my opinion, absent an approved
21 stipulation, allowing one party to correct prior discovery
22 responses without seeking leave of Court undermines the
23 Court's ability to control the timely production of documents
24 and assure that discovery issues are resolved in a timely

25
26 ⁷ Techsavies did not file a certification either.

27 ⁸ This includes the "4-6 inch stack of documents" from
28 the five boxes WDFFA found in its previous office and produced
to Techsavies on December 17.

1 fashion so as not to interfere with the impending trial. See
2 Local Rule 37-3; FRCP 16(b)(4). Moreover, substantial
3 document production after the close of discovery frequently
4 requires the adjustment of the pretrial and trial schedule to
5 allow the receiving party an opportunity to address the late
6 production. It would be unfair to allow the party which has
7 failed to make discovery to shift to the innocent party the
8 burden to file a motion to adjust the schedule. W DFA never
9 sought leave of court, and instead produced 120,000 documents
10 and a substantial interrogatory response after fact discovery
11 was closed, leaving it to Techsavies to deal with the problems
12 W DFA had created in violation of the rules and orders cited
13 above.

14 Nevertheless, the sanctions Techsavies seeks are too
15 broad. Granting them would be tantamount to giving Techsavies
16 a directed verdict on many if not all of the damages issues in
17 the case and Techsavies did contribute to these problems. For
18 example, it admits that it was aware when it received W DFA's
19 initial interrogatory and document responses in August of
20 2010, that it had not received adequate responses to its
21 request for financial data. Motion at 3, lines 16-19. Yet
22 these shortcomings were not brought to my attention until W DFA
23 sought a protective order on Techsavies subpoena to MetroPCS
24 in late October. Techsavies never moved to compel any
25 discovery. Discovery disputes should be resolved soon after
26 the problem appears, rather than by exclusionary and sanctions
27 motions filed after discovery has terminated. Techsavies
28 chose to file this motion for sanctions rather than take

1 advantage of the discovery extension the Court offered.

2 I therefore find that WDFa violated several of its
3 discovery obligations. However, Techsavies' proposed
4 sanctions go too far, especially in view of its conduct, and
5 the sanctions ordered are more appropriate. **IT IS THEREFORE**
6 **ORDERED** that Techsavies' motion is **GRANTED IN PART AND DENIED**
7 **IN PART** as follows:

8 1. WDFa is barred from introducing, either in defense of
9 plaintiff's claims or in support of its counterclaims, any
10 document which it should have produced in response to
11 plaintiff's first set of document requests and which was not
12 produced until after plaintiff filed its second set of
13 document requests. In connection with their pretrial
14 preparation, the parties are **ORDERED** to meet and confer about
15 this issue. WDFa shall identify all documents it wishes to
16 introduce. If Techsavies objects to any document it thinks is
17 barred by this Order, the parties shall try to resolve the
18 objection. If they cannot, they shall submit their respective
19 positions to the Court as part of the pretrial filings and I
20 will make final rulings at the pretrial conference.

21 2. WDFa's expert witnesses cannot rely on any document,
22 or information contained in any document, that is precluded by
23 this Order unless WDFa can show that the information on which
24 the witness relied was provided timely to Techsavies in some

25 ///

26 ///

27 ///

28 ///

1 other form of discovery.

2 Dated: February 23, 2011

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

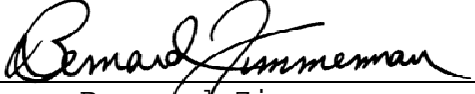
24

25

26

27

28


Bernard Zimmerman
United States Magistrate Judge