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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

BB Online UK Limited,
Plaintiff,
v.
101domain, Inc.,
Defendant.

Case No. 14-CV-885-WQH (JLB)
**ORDER DENYING EX PARTE
MOTION**
[ECF No. 26]

The parties in this action have a discovery dispute. The Court issued an order that the parties meet and confer and then file a Joint Statement for Determination of Discovery Dispute. Plaintiff BB Online UK Limited objects to this order and has filed an Ex Parte Application for the Court to Vacate, Modify and/or Clarify the Court's Minute Order of November 24, 2014. (ECF No. 26.) For the reasons set forth below, this application is DENIED.

I. Procedural Background

On Monday, November 24, 2014 counsel for defendant 101 Domain, Inc. called chambers and left a voicemail message. This message was listened to by chambers staff, who report that the short message notified the Court that the parties had a discovery dispute related to requests for production, the parties had met and

1 conferred over the course of a number of weeks, and defendant was seeking an
2 informal discovery conference. Although defendant indicates in its opposition to
3 this application that two calls were placed to chambers, the Court is only aware of
4 the single message that was left on November 24.

5 On Tuesday, November 25, 2014, the Court issued a minute order, which
6 first addressed the *ex parte* nature of the call from defense counsel:

7 On November 24, 2014, counsel for Defendant contacted Magistrate
8 Judge Burkhardt's chambers to schedule a discovery conference to
9 resolve discovery disputes concerning responses to Defendant's first
10 set of requests for production. Defense counsel represented that the
parties satisfied their meet and confer obligations.

11 The Court reminds counsel that its Civil Chambers Rules contemplate
12 that discovery disputes be raised by placing a joint call with opposing
13 counsel to chambers to either schedule a discovery conference, or
14 notify the Court of an anticipated *ex parte* motion (when the urgency
15 of the matter requires such a motion). Thus, counsel are cautioned that
future telephone calls should be placed in compliance with the Court's
Local and Chambers Rules.

16 (ECF No. 25.) The order then directed: "The parties are to meet and confer and file
17 a Joint Statement for Determination of Discovery Dispute on or before December 3,
18 2014 at 5:00 p.m. addressing any outstanding disputes." (*Id.*) Although the Court's
19 Chambers Rules contemplate that the parties will engage in an informal dispute
20 resolution process before filing discovery motions, the Court, *sua sponte*,
21 determined that proceeding directly to motion filing in the form of a joint statement,
22 after meeting and conferring, was the most appropriate and expeditious course of
23 action in this matter.

24 On Tuesday, December 2, 2014, and Wednesday, December 3, 2014, Joel
25 Weinstein, counsel for plaintiff BB Online UK Limited, left two extended
26 voicemail messages with chambers, objecting to the November 25 order, asserting
27 that the parties had not concluded their meet and confer process, demanding his
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1 “right” to engage in the Court’s informal discovery dispute resolution process, and
2 (ironically) complaining about defense counsel’s allegedly improper *ex parte*
3 communication with the Court that resulted in the order. In the second call, Mr.
4 Weinstein also advised the Court that plaintiff would be filing an *ex parte*
5 application regarding the order.

6 On Wednesday, December 3, 2014, plaintiff filed the instant *ex parte*
7 Application for the Court to Vacate, Modify and/or Clarify the Court’s Minute
8 Order Dated November 24, 2014. (ECF No. 26.) Also on December 3, 2014, the
9 parties filed a Joint Statement for Determination of Discovery Dispute, but
10 plaintiff’s portions of the joint statement were almost exclusively limited to
11 objections to the process, and did little to address the substance of the discovery
12 dispute. (ECF No. 27.) On Thursday, December 4, plaintiff filed a supplemental
13 declaration by Joel Weinstein. (ECF No. 30). Also on December 4, defendant filed
14 its opposition to plaintiff’s *ex parte* application. (ECF No. 31.)

15 **II. Analysis**

16 Plaintiff complains about issuance of the November 24 order on multiple
17 bases, none of which have merit.

18 **Ex parte communication.** Plaintiff objects to the order on the basis that
19 defendant’s call to the Court seeking the Court’s involvement in this discovery
20 dispute was an improper *ex parte* communication, and plaintiff was not given an
21 opportunity to be on the call. Plaintiff insists that the Court’s Chamber Rules
22 require that both parties be on the call, and further suggests that the *ex parte*
23 communication constitutes a violation of the Rules of Professional Responsibility
24 by defense counsel and an “unintentional” violation of the Canons of Ethics by the
25 Court. (ECF No. 26, p. 3.)

26 It is apparent to the Court that defense counsel gave plaintiff’s counsel a full
27 and fair opportunity to participate in her call to the Court in an effort to comply
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1 with the directive of the Court's Chambers Rules that all parties "should" be
2 included on such calls. On Friday, November 21, defense counsel advised Mr.
3 Weinstein:

4 [P]lease provide a time on Monday [November 24] that you are
5 available to jointly call the court clerk to reserve a time for a pre-
6 motion conference call with the Court. If you do not provide a time,
7 we will have no choice but to call the clerk on our own.

8 (ECF No. 31-1, pp. 3-4.) Mr. Weinstein did not respond to this request. On
9 Sunday, November 23, defense counsel again sought to coordinate with Mr.
10 Weinstein to place a joint call to the Court:

11 To that end, we, again, ask that you provide a time on Monday for us
12 to jointly call the court clerk to reserve a pre-motion hearing date. If
13 we do not receive a response from you by 1:00 p.m. PST, we will call
14 the court on our own.

15 (ECF No. 31-1, p. 4.) Finally, on Monday, November 24, defense counsel again
16 tried to get Mr. Weinstein to agree to participate in a joint call to the Court:

17 As I said, we have no choice but to call the court clerk today to arrange
18 for a pre-motion hearing. You are welcome to join me in that call.
19 Please let me know what time you are available. If I do not hear from
20 you by 1:00 PST, I will make the call without you.

21 (ECF No. 31-1, p. 5.) Having still not heard from Mr. Weinstein with respect to
22 coordinating a joint call, defense counsel, at 1:11 p.m. on Monday, November 24,
23 left the non-substantive, scheduling-related message discussed above.

24 The Court's Chamber's Rule, using the word "should," strongly encourages
25 parties to have all affected parties participate in calls to the Court, even non-
26 substantive scheduling calls. It was after careful consideration of the alternatives
27 that this Court decided on the word "should" over "shall." The Court was
28 concerned that if the Court mandated that only jointly-placed calls would be
accepted or entertained by the Court, then an obstreperous party could be in a

1 position to hold another party hostage--preventing that party from bringing a
2 dispute to the Court simply by refusing to participate in a joint call. This would not
3 serve the ends of justice and could interfere with the Court's obligations to fulfill its
4 judicial duties.

5 Plaintiff's counsel suggests that the Court violated Canon 3 of the Code of
6 Judicial Ethics by listening to defense counsel's voicemail message (though "not
7 intentionally") and that defense counsel "arguably" violated the Rules of
8 Professional Responsibility by aiding and abetting the Court in that violation. (ECF
9 No. 26, p. 3.) Canon 3(A)(4)(b) of the Code of Conduct for United States Judges
10 states:

11 (4) A judge should accord to every person who has a legal interest in a
12 proceeding, and that person's lawyer, the full right to be heard
13 according to law. Except as set out below, a judge should not initiate,
14 permit, or consider ex parte communications or consider other
15 communication concerning a pending or impending matter that are
16 made outside the presence of the parties or their lawyers. If a judge
17 receives an unauthorized ex parte communication bearing on the
18 substance of a matter, the judge should promptly notify the parties of
19 the subject matter of the communication and allow the parties an
20 opportunity to respond, if requested. A judge may:

21 * * * * *

22 (b) when circumstances require it, permit ex parte communication for
23 scheduling, administrative, or emergency purposes, but only if the ex
24 parte communication does not address substantive matters and the
25 judge reasonably believes that no party will gain a procedural,
26 substantive, or tactical advantage as a result of the ex parte
27 communication.

28 As its language makes clear, under Canon 3(A)(4)(b), "an ex parte communication
is permissible for scheduling purposes that do not address substantive matters
where the judge reasonably believes no party will gain a procedural, substantive, or
tactical advantage." *See Eleanora J. Dietlein Trust v. Am. Home Mortg. Inv. Corp.*,
No. 11cv719, 2014 WL 911121, at *2 (D. Nev. Mar. 7, 2014). Contacting the

1 Court for non-substantive scheduling purposes, as defendant did here, does not
2 constitute improper *ex parte* communication.

3 **Failure to meet and confer.** Plaintiff complains that the parties had not
4 exhausted the meet and confer process and therefore a request for Court
5 intervention with the discovery dispute was premature under both this District's
6 Local Rule's and the Court's Chambers Rules. Furthermore, according to plaintiff,
7 defense counsel made affirmative misrepresentations to the Court when indicating,
8 in the voicemail message, that the parties had met and conferred. (ECF No. 26-1,
9 pp. 3-4.)

10 Defendant summarizes the substantial meet and confer efforts made by the
11 parties in support of its position that it complied with its meet and confer
12 obligations. (ECF No. 31, pp. 6-12.)

13 The Court recognizes plaintiff's frustration that defendant involved the Court
14 when, in its opinion, the meet and confer process was continuing, and the Court
15 recognizes defendant's frustration at its sense that plaintiff was dragging out the
16 meet and confer process for strategic advantage. The Court further notes that the
17 Court's Chambers Rules require that the parties meet and confer on discovery
18 disputes before seeking Court involvement, and the Chamber's Rules also set a
19 deadline of 30 calendar days after a dispute arises to bring it to the attention of the
20 Court. Defendant's call was placed on the last possible day under the Rules.¹

21 The Court finds that defendant satisfied its meet and confer obligations.

22 **Plaintiff's Claim of Detriment and Prejudice.** Plaintiff makes repeated
23 assertions that it has been disadvantaged, suffering prejudice and detriment, as a
24 result of the Court's order. (ECF No. 26, pp. 4 and 5; ECF No. 26-1, pp. 7 and 8;
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26 ¹ The dispute arose when plaintiff served its discovery responses on October 23, 2014.
27 The 30th day fell on November 22, a Saturday. Pursuant to Fed. R. Civ. P. 6, which addresses the
28 calculation of filing deadlines, the deadline then became Monday, November 24.

1 ECF No. 30, p. 5.) Plaintiff alleges that defendant has realized a complementary
2 unfair tactical advantage. (ECF No. 26, p. 3, ECF No. 26-1, p 7; ECF No. 30, p. 3.)
3 Plaintiff specifically alleges that “it was relying on the Court to act in its informal
4 capacity.” (ECF No. 26, p. 4.)

5 The Court is hard-pressed to understand in what way plaintiff acted, to its
6 detriment, in reliance on its belief that the Court would afford the parties the
7 opportunity to engage in an informal dispute resolution process with the Court.
8 Logically, the only conceivable way plaintiff could have adjusted its conduct in
9 reliance on its expectation of what manner of dispute resolution lay ahead would
10 have been in adjusting the degree of cooperation it extended in the meet and confer
11 process. The Court is loath to reach such a cynical conclusion.

12 As a remedy to correct this alleged disadvantage, plaintiff asks for “what it
13 believes it was entitled to all along, an opportunity to be heard, and to be provided
14 due process.” (ECF No. 26, p. 5.) But the action plaintiff complains about is that
15 the Court ordered the parties to brief their dispute to the Court in a joint statement.
16 By definition, that is an opportunity to be heard, and it is due process.

17 The Court finds that plaintiff had no due process entitlement to engage in the
18 Court’s informal dispute resolution process before being ordered to participate in a
19 more formal process involving the parties submitting a joint statement.²
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21 ² Separate from his complaint that his client was denied access to the Court’s informal
22 dispute resolution proceedings, plaintiff’s counsel complains that he was given an unfairly limited
23 opportunity to participate meaningfully in the joint statement process, because the Court issued its
24 order “after 4:00 PM PST and after 7:00 PM ET on November 25, 2014 on the day before a
25 holiday weekend” (ECF No. 30, p. 4) and counsel did not access and read in its entirety the
26 Court’s order until the evening of [Monday] December 1, 2014. (*Id.* at 9.) The Court notes that
27 Tuesday, November 25 was not “the day before a holiday weekend.” It was, rather, two days
28 before a one-day holiday. The Court gave the parties eight calendar days—five non-holiday
business days—to prepare a short joint statement. The Court does not begrudge plaintiff’s
counsel, or any attorney, vacation days. But an attorney who is engaged in active, contested
litigation who does not make arrangements from someone to monitor CM/ECF notices for Court
orders for seven days—four days of which are business days—does so at his own peril. *See also*
CM/ECF Administrative Policies and Procedures Manual, Section 2.d.2 (“Each registered user of
the CM/ECF system is responsible for assuring that the user’s e-mail account is monitored

(Footnote continues on next page.)
13-CV-1257

1 **III. Conclusion**

2 For the reasons stated above, Plaintiff's motion to Vacate, Modify and/or
3 Clarify the Court's Minute Order of November 24, 2014 (ECF No. 26) is **DENIED**.

4 As the Joint Statement was due while the instant motion was pending, and as
5 the Court has now ruled that the order will stand, the Court will, *sua sponte*, grant
6 plaintiff the opportunity to supplement the joint statement with an opposition to the
7 motion to compel/motion for sanctions. Plaintiff is granted leave to file a
8 supplemental opposition, not to exceed 5 pages (exclusive of exhibits), on or before
9 **December 12, 2014** at **5:00 p.m.** Defendant may file a reply, not to exceed 2 pages
10 (exclusive of exhibits), on or before **December 16, 2014** at **5:00 p.m.**

11 **IT IS SO ORDERED.**

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13 DATED: December 9, 2014

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16 JILL L. BURKHARDT
17 United States Magistrate Judge

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26 (Footnote continued from previous page.)

27 regularly, and that e-mail notices are opened in a timely manner.”). The Court further notes that
28 plaintiff did not file an *ex parte* application to extend the time in which to file the joint statement.