

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

PAUL D. CEGLIA,

Civil Action No. : 1:10-cv-00569-RJA

v.

Plaintiff,

MEMORANDUM IN
OPPOSITION TO DEFENDANTS
REQUEST FOR DELAY

MARK ELLIOT ZUCKERBERG, Individually, and
FACEBOOK, INC.

Defendants.

INTRODUCTORY STATEMENT

Defendants cite five reasons they claim justify delaying their reply on Defendants' motion to dismiss. Doc. No. 318. None of the reasons are compelling enough to necessitate delaying the resolution of the motion to dismiss. The court has been consistent in requiring Plaintiff to adhere strictly to the schedule that was developed at the April 2012 hearing and should remain consistent by denying Defendants' request.

The court's ruling on the 8th and 9th motions to compel will have no impact on Defendants' ability to reply to Plaintiff's response. The opinion expressed in letters from an attorney at the Kasowitz law firm is merely the opinion of a lawyer after learning of the existence of the Street Fax digital images. The filing of the two Motions to Compel were done for the sole purpose of attempting to justify a delay in replying to the motion to dismiss.

Defendants argue that “[I]t would be premature to require the Defendants to submit their Reply without giving Defendants an opportunity to depose Mr. Speckin”, Doc. No. 525 at 9. Mr. Speckin has not prepared or filed a report in this case, nor has he done any scientific testing. Argentieri Declaration at ¶19. He is not covered by this court’s order, Doc. No. 348, in which the court permitted both sides to depose experts who had submitted reports in the case. Speckin is a consulting expert who is not referenced in Plaintiff’s reply. Id. Defendants last minute desire to freelance a deposition of a non-expert in this case is not a basis for a delay of the court’s carefully crafted discovery orders.

Defendants argue that, “The sheer volume of material that must be reviewed for purposes of drafting the Reply demands a reasonable time-frame that exceeds the five weeks”, Doc. No. 525 at 10. Defendants have multiple law firms engaged to represent them with multiple partner level lawyers and countless associates working full time on their defense. Plaintiff’s request for an extension to file its expert reports on this basis was denied. The court should be consistent in demanding adherence to its carefully crafted discovery schedule.

Defendants argue that, “[T]he Court deserves the fullest possible record on which to base its determination.” Doc. No. 525 at 11. Because of one-sided discovery, there will be no full record in this case at the time this court decides the motion to dismiss. The claim of a need for the full record also undermines any claim of clear and convincing evidence. This is an insufficient basis to disrupt this court’s carefully crafted discovery schedule.

Defendants argue that Orin Snyder will not be able to “[C]ontribute to the drafting of the reply” (Doc. No. 525 at 11) because of the current schedule because of his engagement in another trial in state court during the requested extension period. The absence of Mr. Snyder does not deprive Defendants of legal competence. Defendants have not submitted a declaration indicating that any of the other ten active lawyers representing Defendants are not available to fully commit to preparing and submitting their reply.

The Defendants are asking for a deadline that is two weeks after Plaintiff becomes compliant with the two outstanding discovery disputes. This is a ruse. More importantly, it is a mechanism to usurp the court’s power to control its own deadlines. By setting a reply date “when Plaintiff is in full compliance” Defendants will simply deny his compliance endlessly to create a mobile deadline that can never stop moving. Meanwhile, the court will be left to await Defendants’ consent to Plaintiff’s “full compliance” before expecting Defendants’ reply.

Defendants seek an open-ended deadline that hinges on a Defendant-determined “compliance” that this court has seen first hand will never be satisfied.

FALSE CLAIM OF NO FACTUAL DISPUTES

Defendants now falsely claim that “[t]o be clear, the information is not complicated in that it suggests factual disputes (of which there remain none of any consequence)...” Doc. No. 525 at 10. They repeat a similar notion in their September 10, 2012 letter to the court requesting a page limit extension. The repetition of this false statement does not make it any less false. There are factual

disputes at every turn in this case, and others that Defendants have failed to counter from Plaintiff. The main factual dispute that the Defendants seem to be overlooking is that Plaintiff's experts have objectively, indisputably, scientifically determined that the Facebook contract is authentic. Plaintiff and his experts have also rebutted all claims of fraud relating to the emails exchanged between the parties. The dispute over these facts remains unresolved and is the central issue of the case as this court has repeatedly stated.

Defendants spuriously claim they need time to assimilate information while simultaneously claiming there are no significant facts in dispute. It is an illogical position. It is impossible their assimilation is incomplete if they have concluded the farcical notion of there being no disputed facts in this case. Defendants speak to this court hoping the obvious will be overlooked.

All of Defendants five cited reasons justifying a delay in this court's carefully crafted discovery schedule are meritless and should be rejected.

I. TWO RECENT MOTIONS TO COMPEL

8th Motion to Compel:

On September 5, 2012, Defendants filed their 8th motion to compel (Doc. No. 512) in an attempt to gain access to three privileged documents. This request emanates from Defendants false descriptions, adopted by this court, of Item 379, its contents and the lie that any email with a Kasowitz letter attached was ever disclosed to Jason Holmberg or any third party. In Plaintiff's objection to this court's order following Defendants' Seventh Motion to Compel, he openly challenged

Defendants to supply a declaration from their expert disputing Plaintiff's charge that Defendants falsely described Item 379 and items within it. Defendants response to that objection was filed on September 11, 2012 and was without any declaration from any expert disputing Plaintiff and Plaintiff's experts' statements calling Defendants' description a lie. That omission is proof of Defendants' malfeasance.

Plaintiff's seek these additional Kasowitz letters claiming "there has been a general subject-matter waiver on the subject of the Kasowitz firm's withdrawal." See Doc. Nos. 361 at 4-5, 480 at 4-5.", Doc. No. 512 at 12. This argument presupposes Defendants' know their contents which they do not.

The court's ruling on the 8th motion to compel will not impact Defendants' ability to challenge the authenticity of the Facebook Contract or related emails. Even if each of these three privileged letters were deemed not privileged by this court, the speculation of non-expert lawyers about the authenticity of the street fax digital images is irrelevant and inadmissible as expert or lay opinion. Plaintiffs' experts have thoroughly refuted the validity of the minute and illegible Street Fax digital images with expert testimony from Defendants' experts and Plaintiffs, both of which were unavailable to any Kasowitz lawyer. He has done so with his own declaration and with that of eminently qualified experts. Finally, Paul Argentieri confirms in his declaration that the content of the three privileged documents does not contain any expert reports or discussion about expert's opinions. Argentieri Decl. at ¶20-21.

9th Motion to Compel:

In Defendants Ninth Motion to Compel (Doc. No. 522), filed September 7, 2012, Defendants seek an order requiring “Ceglia to produce the Argentieri Hard-Copies for inspection at a mutually-agreeable location within ten days and to provide a sworn declaration attesting to their production or the circumstances of their destruction at least two days prior to the inspection.” This motion was filed in bad faith.

Defendants communicated with Plaintiff about their wishful thinking that there were still some undisclosed copies of the Facebook Contract that were in Plaintiff or his counsel’s possession, custody or control. In response to that inquiry, Plaintiff clearly informed Defendants by email on September 6, 2012 that no such copies were in Plaintiff or Plaintiff’s counsel’s possession, custody or control. Exhibit A.

Plaintiff and Paul Argentieri have submitted declarations confirming their responses previously communicated to Defendants by email, thereby satisfying Defendants’ inquiry, for a second time, without the need for a court order. See Declaration of Paul Ceglia and Paul Argentieri at ¶14-15. There are no open issues. The filing of the 9th Motion to Compel was done for the sole purpose of attempting to justify a delay in replying to the motion to dismiss.

Defendants’ bad faith in this request alone reveals their flurry of motions is designed to delay this court’s ruling on their motion to dismiss. It is not truly to review information needed for their reply. If the court is somehow persuaded that

the information sought in this motion is critical to Defendants' reply, this acknowledges that Defendants cannot and do not meet the "clear and convincing" standard necessary to obtain the dismissal they seek.

II. DEPOSITION OF ERICH SPECKIN

Defendants argue that "it would be premature to require the Defendants to submit their Reply without giving Defendants an opportunity to depose Mr. Speckin", Doc. No. 525 at 9. Speckin has not prepared or filed a report in this case. Argentieri Decl. at ¶19. He is not covered by this court's order, Doc. No. 348, in which the court permitted both sides to depose experts who had submitted reports in the case. Speckin is a consulting expert who is not referenced in Plaintiff's reply. Somehow Defendants want the court to believe that Mr. Speckin may influence their ability to reply to Plaintiff's response to Defendant's motion to dismiss, even though Mr. Speckin has never submitted a report in the case, has never produced an expert report and has never conducted even one scientific test on the contract. Defendants did not even identify Mr. Speckin as someone they wished to depose until well into the deposition period. Given all of the above, the Defendants last minute desire to freelance a deposition of a non-expert in this case is not a basis for a delay of the court's carefully crafted discovery orders.

III. A LARGE VOLUME OF WORK

Defendants argue that, "[t]he sheer volume of material that must be reviewed for purposes of drafting the Reply demands a reasonable time-frame that exceeds the five weeks", Doc. No. 525 at 10. Defendants obviously now assert that this

court's carefully crafted discovery schedule, providing them 30 days to reply to Plaintiff's response, was an unreasonable time frame. However, they knew about this "unreasonable" time frame as of this court's order following the April 4, 2012 hearing. They knew about it when they twice opposed Plaintiff's requests for extensions of the time period to submit his expert reports and obtain discovery. They waited nearly four months to now insincerely object to this court's "unreasonable" time frame. This claim is meritless and should be rejected.

Defendants claim that the data they must evaluate "was not only immense, but also complicated" (Id.) and feign an inability to complete their work timely. Here again, if the data is so immense and complicated, it is not possible it presents a "clear and convincing" case for fraud as Plaintiff has objectively, scientifically and conclusively shown already. Defendants offer no reason to believe they did not anticipate that this volume of work was present in the court's carefully crafted discovery schedule.

Plaintiff and his two sole practitioner lawyers had sufficient time to assimilate the facts necessary to conclusively demonstrate that Defendants lack the ability to satisfy the "clear and convincing" standard. Certainly the army of lawyers representing Defendants can parcel out the work left to assimilate whatever it is they think will erase from the court's memory the obvious lack of "clear and convincing" evidence. Defendants had fifteen weeks to review Plaintiff's expert reports.

Defendants have multiple prestigious law firms engaged to represent them

with multiple partner level lawyers and countless associates working full time on their defense. Plaintiff has two sole practitioners representing him. When Plaintiff asked the court for a seven day extension to file his expert reports, the Defendants vehemently opposed that extension even though Defendants were well aware of the enormous amount of work that had to be completed by Plaintiff's limited legal resources. They were well aware of how important those expert reports were to rebutting each of Defendants' now decimated claims. The court should be consistent in demanding adherence to its carefully crafted discovery schedule. Defendants' claims that more time is needed to rebut Plaintiff's "half truths" acknowledges there are significant facts in dispute. If there were no significant facts in dispute, Defendants would not even need to file a reply, much less need more time to file that reply.

IV. FULL RECORD

Defendants argue that, "the Court deserves the fullest possible record on which to base its determination." Doc. No. 525 at 11. This statement is distorted reality. Defendants themselves have argued against providing a full record to this court. The court has acknowledged that we are engaged in one-sided discovery, Hearing Transcript, 12-13-11 at 86, which necessarily means that something other than a full record is currently available to this court. No matter what page limit or delay is argued by Defendants there cannot possibly be a full record presented at this stage. There is a wealth of relevant information that has not been examined including depositions of the parties, examination of Defendants' computers and

other devices and so forth.

The expedited discovery is not a full record. It was intended to specifically address a narrow point of whether the Defendants could dispute by “clear and convincing” evidence the authenticity of the Facebook contract. Plaintiff has not been granted full discovery to present the full record of the truth. Defendants have not provided requested testing results and instructed their experts to hide their testing notes in their hotel rooms during depositions. “I was instructed by the Gibson, Dunn attorneys that there was an ongoing dispute and to leave my notes back at my hotel.” Doc. No. 497 at 145, deposition of Gerald LaPorte.

The facetious claim of a need for the “full record” also undermines any claim of clear and convincing evidence. This is an insufficient basis to disrupt this court’s carefully crafted discovery schedule.

V. ORIN SNYDER’S SCHEDULE

This represents the second time Defendants’ counsel Orin Snyder has asked everyone involved in this case to adjust their personal and professional schedules to accommodate him. Defendants argue that Orin Snyder will not be able to “contribute to the drafting of the reply” (Doc. No. 525 at 11) because of a conflict with a trial set in a New York state case. *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, Index No. 600292/08 (Hon. Richard B. Lowe III).

Snyder was informed on May 15, 2012 by the state court in the *Voom* case that this trial date would fall within the reply period in this court’s carefully crafted discovery order. Argentieri Decl. at ¶17-18. Defendants had months to make this

motion, but waited until the eleventh hour to demand a delay on this basis. Id.

There are plenty of defense attorneys sufficient to draft Defendants' reply. Alex Southwell is the partner at Gibson Dunn who has been leading the case. Thomas Dupree, Jr. is also a partner at Gibson Dunn involved in the case. Terrance Flynn is a partner at Harris Beach, PLLC working on the case. Matthew Benjamin is an attorney at Gibson Dunn actively involved in every deposition and every oral argument in the case for the past year. Amanda Aycock is an attorney at Gibson Dunn involved in every oral argument for more than a year in the case and was present at every deposition. The Orrick law firm also represents the Defendants.

Mr. Snyder has not been leading the defense. Mr. Snyder was present for one half of one deposition. Alex Southwell, Matthew Benjamin and Amanda Aycock were present for all of the depositions. Alex Southwell conducted the majority of the depositions with Matt Benjamin and Amanda Aycock conducting the rest. The absence of Mr. Snyder does not deprive Defendants of legal competence sufficient to submit a reply. Defendants have not submitted a declaration indicating that any of the other ten active lawyers representing Defendants are not available to fully commit to timely preparing and submitting their reply. Proof of this fact is that in the last few days, Plaintiff has received emails from at least three different lawyers on behalf of Defendants showing they are actively working on this matter.

UNLIMITED TIME REQUESTED

The Defendants are asking for a floating deadline that is two weeks after Plaintiff becomes compliant with the two outstanding discovery disputes. This is a ruse. More importantly, it is a mechanism to usurp the court's power to control its own deadlines. By setting a reply date "when Plaintiff is in full compliance" Defendants will simply deny his compliance creating an endlessly mobile deadline. Meanwhile, the court will be left to await Defendants' consent to Plaintiff's "full compliance" before expecting Defendants' reply.

Defendants have never agreed that Plaintiff was in compliance with this court's expedited discovery order. Yet, this court has found that Plaintiff is in compliance. "I find that the plaintiff is substantially in compliance with its obligation under the August 18th order." Hearing Transcript, April 4, 2012 at 211. As another example, Plaintiff has specifically sought Defendants confirmation that Plaintiff is in compliance with this court's order following Defendants seventh motion to compel. Exhibit B. Defendants refuse to this day to acknowledge plaintiff's compliance with that order. Defendants will never acknowledge Plaintiff is in compliance with any of the court's orders and drag this matter out into 2013 and beyond.

CONCLUSION

The reply in this case is optional. Defendants are not required by rule to even file a reply before having their motion to dismiss heard. If their expert reports contained indisputable and "clear and convincing" evidence, no reply would be necessary. The reply is not available for Defendants as a platform to raise new

issues before the court outside of Plaintiff's ability to respond. The thirty day period in the court's carefully crafted discovery schedule, ordered months ago, provides Defendants ten lawyers ample time to reply. This Court should deny Defendants request for extension.

Respectfully submitted,

/s/Dean Boland

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