

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

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|---------------------------|---|------------------------|
| BRITTANY BARNES, |) | |
| |) | |
| Plaintiff, |) | |
| |) | Case No. 3:09-cv-00764 |
| v. |) | Judge Nixon/Brown |
| |) | |
| CUS NASHVILLE, LLC |) | Jury Demand |
| d/b/a COYOTE UGLY SALOON, |) | |
| |) | |
| Defendant. |) | |
| |) | |

ORDER

Presently pending before the Magistrate Judge is Defendant’s Motion to Compel ESI and for Continuance of Trial (Docket Entry 52), to which Plaintiff has filed a Response. (Docket Entry 58). The parties also participated in telephone conferences with the Magistrate Judge on May 25, 2010 and June 1, 2010 to discuss these issues. For the reasons set forth below, Defendant’s Motion is **GRANTED in part** and **DENIED in part**. The trial will be **CONTINUED** until August 17, 2010. The final pre-trial conference with Judge Nixon is scheduled for Wednesday, August 4, 2010 at 10:00 am. Judge Nixon will issue a separate order setting forth his requirements for the pre-trial conference. Limited Discovery is available to both parties as set forth below. Also pending before the Magistrate Judge is Plaintiff’s Motion for Leave to File Sur-reply to Defendant’s Motion to Continue Trial (Docket Entry 69). Plaintiff’s Motion is **GRANTED**.

In light of the protracted arguments about Plaintiff’s and other witnesses’ Facebook

photos and emails, which are only now being resolved, the Magistrate Judge believes it is necessary to grant Defendant's motion to continue. The Magistrate Judge does not find a delay of ninety (90) days necessary, however. Discovery is reopened to both parties until Friday, July 16, 2010, with the exception that expert discovery is not reopened absent a showing that the Facebook controversy impaired that process.

Cooperation on the part of both parties could have prevented this delay. The Defendant's mishandling of the Facebook subpoena was the cause of a major delay. Plaintiff's counsel could have helped resolve the matter by clearing up the issue of the various witnesses, who are friends of the Plaintiff, to produce the various photos on Facebook. Their resistance does raise the specter with the defendant that there is something there they want to hide. Clearly the issue of who took the pictures of the Plaintiff and her friends dancing on the bar is highly relevant, and Plaintiff is in the best position to quickly resolve this. The failure to cooperate by both counsel has led to this unfortunate delay. The Magistrate Judge strongly suggests that the parties avoid additional prolonged disputes over Facebook materials. In addition, the Magistrate Judge strongly suggests that telephone depositions be considered on non-party witnesses. If additional depositions of the Plaintiff are needed, they will likely need to take place in Nashville.

In order to try to expedite further discovery regarding the photographs, their captions, and comments, the Magistrate Judge is willing to create a Facebook account. If Julie Knudsen and Michael Vann will accept the Magistrate Judge as a "friend" on Facebook for the sole purpose of reviewing photographs and related comments *in camera*, he will promptly review and disseminate any relevant information to the parties. The Magistrate Judge will then close this Facebook account. If this option is chosen, Plaintiff is required to notify the Magistrate Judge's

law clerk within fourteen (14) days of this order to set this up and provide the email addresses of Ms. Knudsen and Mr. Vann in order to locate their accounts on Facebook.

The Magistrate Judge believes this court has no jurisdiction over Defendant's subpoena *duces tecum* to non-party Julie Knudsen, as it was issued from the United States District Court for the District of Colorado. If Defendant wishes to enforce its subpoena, it should seek relief from that district court. The same would apply to Mr. Vann in Kentucky. Therefore, Defendant's Motion to Compel ESI is **DENIED**.

As a final matter, the undersigned has reviewed the materials submitted under seal from Plaintiff's Facebook account, as contemplated in the February 16, 2010 Order. (Docket Entry 33). The Magistrate Judge has located one relevant message in the materials, from Plaintiff to non-party Julie Knudsen, dated October 29, 2008 with a time stamp of 15:50:29. The Magistrate Judge has already discussed the contents of this message with the parties during the May 25 telephone conference. It reads, "can you please take the pictures of me on the stretcher off . . . its not okay with me." Furthermore, attached are seven pictures with all metadata provided by Facebook that the Magistrate Judge deems relevant to this case. The seven pictures and metadata will remain under seal pending their use at trial.

It is so **ORDERED**.

Entered this 3rd day of June, 2010.

/S/ Joe B. Brown

JOE B. BROWN
United States Magistrate Judge