
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

**HORNADY MANUFACTURING
COMPANY, a Nebraska corporation,**

Plaintiff,

v.

**DOUBLE TAP AMMUNITION, INC., a
Utah corporation,**

Defendant.

**MEMORANDUM DECISION
AND ORDER**

Case No. 2:11cv18

Chief District Judge Ted Stewart

Magistrate Judge Paul M. Warner

This matter was referred to Magistrate Judge Paul M. Warner by Chief District Judge Ted Stewart pursuant to 28 U.S.C. § 636(b)(1)(A).¹ Before the court are (1) Double Tap Ammunition, Inc.’s (“Double Tap”) motion to compel discovery and for an extension of time to complete discovery;² (2) Double Tap’s motion to stay;³ (3) Double Tap’s motion to expedite;⁴ and (4) Hornady Manufacturing Company’s (“Hornady”) motion to strike untimely designation of expert witnesses.⁵ The court has carefully reviewed the memoranda submitted by the parties.

¹ See docket no. 42.

² See docket no. 43.

³ See docket no. 59.

⁴ See docket no. 61.

⁵ See docket no. 67.

While Double Tap asserts that the information it now seeks “is at least a subset of Doubletap’s discovery requests,”¹⁰ the court is not persuaded by this argument. The original requests were very narrow seeking only the identification of individuals who may have been involved with the 2006 Email and any related documents. Double Tap could have requested that specific information prior to the expiration of the fact discovery deadline but chose not to do so. As such, Double Tap’s motion to compel and enlarge the discovery period is **DENIED**.

Furthermore, the court cannot compel a party to produce evidence it does not have. In its memorandum in opposition to Double Tap’s motion to compel, Hornady indicates that it “diligently investigated its records and the recollection of its employees on the matter and could not identify a single person with the specific knowledge requested[,] . . . [n]or could Hornady locate any responsive documents.”¹¹ However, Hornady has not explained the methods it used to diligently investigate its records and question those employees about the 2006 Email. Accordingly, within twenty (20) days of the date of this order, Hornady shall provide an affidavit to Double Tap describing its method of investigating the events surrounding the 2006 Email.

Motion to Stay and Motion to Expedite

On May 14, 2012, Double Tap filed a motion to stay (“Motion to Stay”) the proceedings pending a ruling on its motion to compel and request to extend the discovery period by forty-five

¹⁰ Docket no. 44 at 1.

¹¹ Docket no. 45 at 7.

days.¹² Double Tap also filed a motion to expedite consideration of its Motion to Stay.¹³ Because the court has now denied Double Tap's motion to compel, the Motion to Stay is **DENIED** and the motion to expedite has been rendered **MOOT**.

Motion to Strike Untimely Designation of Expert Witnesses

Hornady moves the court to strike Double Tap's designation of two expert witnesses. Hornady asserts that the designation was untimely as the additional experts were disclosed after the February 15, 2012 deadline and that this untimely designation is prejudicial.

In response, Double Tap argues that its designation is not untimely because the court extended the deadline for initial expert reports until thirty days after Double Tap produced supplemental financial data to Hornady, with responsive reports due thirty days after service of the initial expert reports.¹⁴ Double Tap asserts that because footnote ii in the original scheduling order provides that "[a] party shall disclose the identity of each testifying expert and the subject of each such expert's testimony at least 60 days before the deadline for expert reports from that party,"¹⁵ it was not required to identify its experts until May 31, 2012, notwithstanding the original scheduling order's expert disclosure deadline of February 15, 2012. Double Tap concludes that because it disclosed its additional experts on May 15 and May 16, it was well in advance of the deadline.

¹² See docket no. 59.

¹³ See docket no. 61.

¹⁴ See docket no. 55.

¹⁵ Docket no. 11.

Hornady contends that the deadline for identifying experts was not automatically extended by the footnote in the initial scheduling order. Further, Hornady argues that it would be prejudiced because it is not prepared to pursue expert discovery regarding likelihood of confusion as Double Tap originally designated a damages expert only. Hornady asserts that Double Tap's untimely designations will force it to revise its trial strategy and jeopardize the trial date of February 11, 2013.

The court concludes that, given a narrow reading of the scheduling order, Double Tap's additional expert designations were untimely. However, because the trial is nearly five months from now and Double Tap has a pending motion to extend the dispositive motion deadline (which, if granted, would necessitate moving the trial date as well), Hornady has not demonstrated undue prejudice if Double Tap is allowed to designate and submit additional expert reports. This is consistent with a search for the truth. As such, Hornady's motion to strike is **DENIED**. The parties may conduct any additional expert discovery related to Double Tap's designations until December 3, 2012.

CONCLUSION

In summary, **IT IS HEREBY ORDERED** that:

(1) Double Tap's motion to compel discovery and enlarge the discovery period¹⁶ is **DENIED**;

(2) Double Tap's motion to stay¹⁷ is **DENIED**;

¹⁶ See docket no. 43.

¹⁷ See docket no. 59.

(3) Double Tap's motion to expedite¹⁸ has been rendered **MOOT**; and

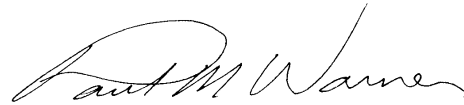
(4) Hornady's motion to strike untimely designation of expert witnesses¹⁹ is **DENIED**.

The parties may have until December 3, 2012, to conduct expert discovery related to Double Tap's expert designations.

IT IS SO ORDERED.

DATED this 19th day of September, 2012.

BY THE COURT:



PAUL M. WARNER
United States Magistrate Judge

¹⁸ See docket no. 61.

¹⁹ See docket no. 67.