

ARGUMENT

Plaintiff Incentive missed the deadline that Plaintiff Incentive had itself petitioned the Court to set for its opposition to Defendant Ted Baer's Motion to Dismiss. [Docket Entry No. 65] Under the Court's July 1, 2011 Order, Plaintiff Incentive was required to timely file its opposition five days after July 27, 2011 deadline for the Atwell Defendants to file their answer to Plaintiff Incentive's complaint. The Atwell Defendants filed their answer and triggered the 5-day deadline for Plaintiff's opposition to be filed on July 27, 2011. Properly calculated, the five-day period expired on August 1, 2011. Even if the weekend is excluded in calculating the 5-day period, the time for Plaintiff Incentive to respond to Defendant Ted Baer's Motion to Dismiss expired at the very latest on August 3, 2011. Only after the deadline had passed by either count did Plaintiff Incentive file, on August 5, 2011, its opposition memorandum. Because it is untimely, the Court should not consider the memorandum and it should be stricken.

Plaintiff Incentive cannot show any basis that would allow Incentive to file its opposition memorandum after the deadline has passed. Plaintiff Incentive has been on notice of the five-day deadline that was triggered by the Atwell Defendant's answer to the complaint but nevertheless failed to file its opposition in time. Plaintiff Incentive requested the deadline, and in the opposition memorandum Plaintiff Incentive filed on July 19, 2011 to Defendant Ted Baer's Motion to Reconsider, Plaintiff Incentive argued that reconsideration of the Court's July 1, 2011 Order was unnecessary because the July 27, 2011 deadline for the Atwell Defendants to answer Plaintiff Incentive's complaint was already approaching and that Plaintiff's response to Defendant Ted Baer's Motion to Dismiss would be due just five days after the July 27, 2011 deadline.

[Docket Entry 71]. Consequently, it was not reasonable for Plaintiff Incentive to ignore the Court's deadline for filing its opposition memorandum and file its opposition memorandum late.

Allowing Plaintiff Incentive's late-filed opposition memorandum will only continue to delay decision on Defendant Ted Baer's Motion to Dismiss—which has already been delayed by several extensions that Plaintiff Incentive has previously sought. The delay keeps Defendant Ted Baer personally involved in litigation that is improper for lack of jurisdiction, which means additional and unnecessary time and expense being spent while waiting for a ruling on his motion. Defendant Ted Baer accordingly requests that the Court Strike Plaintiff Incentive's Memorandum in Opposition to Ted Baer's Motion to Dismiss for Lack of Personal Jurisdiction and decide his Motion to Dismiss.

DATED this 10th day of August, 2011.

MORGAN, MINNOCK, RICE & JAMES, L.C.

/s/ Dennis R. James
Dennis R. James
Brian H. Hess
Counsel for Defendant Ted Baer

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2011, I electronically filed a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANT TED BAER'S MOTION TO STRIKE PLAINTIFF INCENTIVE'S MEMORANDUM IN OPPOSITION TO TED BAER'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION** with the Clerk of Court using the CM/ECF system which sent notification of such filing to the following:

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