

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID ALLISON, doing business as)
CHEAT CODE CENTRAL, a sole)
proprietorship,)
)
Plaintiff,)
)
vs.)
)
)
JEREMY N. WISE, an individual, and)
WISE BUY NOW LLC, an Ohio Corporation)
)
Defendant.)

Case No. 2:08-cv-00157-MHW-MRA

REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SANCTIONS

Plaintiff David Allison, d/b/a Cheat Code Central ("Plaintiff"), through his undersigned counsel, hereby files this reply to Defendants' Response to Plaintiff's Motion for Sanctions.

INTRODUCTION

This case began because Defendant Jeremy Wise copied, verbatim, substantial portions of Plaintiff's 25,000-page copyrighted website – over 12,000 pages of which are devoted to cheat codes – and incorporated them into his directly competing web sites. Defendants do not deny this deed. On the contrary, subsequent to the filing of this case Wise removed the content in question, only to later repost significant portions of the same. *See*, Affidavit of David Allison, ¶ 5 ("Allison Affidavit").

In "Defendants' Response in Opposition to Plaintiff's Motion for Sanctions," ("Response"), Defendants Jeremy Wise and Wise Buy Now LLC respond to Plaintiff's discovery motion with an exercise in hyperbole that borders on slander, based solely upon the affidavits of

two teen-aged boys—unsupported by any corroborating documentation—who claim to be the original authors of two or three paragraphs of content that appear on Plaintiff’s extensive website.¹ Defendants ask this Court to extrapolate from this unreliable evidence about a few paragraphs of text (constituting less than .004 percent of Plaintiff’s total content) that Plaintiff must have copied every word on all 25,000 pages of his site, and that he cannot possibly have a legitimate copyright claim to *any* of the material contained within the pages of the website he has been creating and updating since 1997.

Defendants attempt to justify their last minute disclosures of thirteen witnesses by categorizing them as “evidence” supporting their alleged affirmative defense of invalidity.² Defendant’s affirmative defense of invalidity is not before this Court, however. Plaintiffs respectfully request that the Court look to what is actually at stake in Plaintiff’s Motion: how to appropriately contain the discovery process with respect to 13 witnesses disclosed for the first time upon the close of fact discovery.

FACTUAL CORRECTIONS

In their Response, Defendants misstate the Court-ordered discovery deadline and seek to deflect their culpability by alleging that fact discovery is “technically closed.” *See*, Response, P. 2. Fact discovery is not “technically” closed,—it *is* closed. *See*, Order Amending Scheduling Order, Document 40 (Lay Witness Discovery Cut-Off is July 31, 2009.) As the only exception to this closure, the parties stipulated to allow a specifically designated set of depositions to go forward at a mutually agreeable time and place. *See*, Affidavit of Wendi S. Temkin, ¶ 3

¹ The other evidence offered by Defendants is a series of url’s that allegedly contain content similar to that of Plaintiff’s website. This proves nothing about who took what from whom. At most, it might go to the issue of actual damages. No such issue is relevant to the Motion at hand.

² Defendants raised the affirmative defense of invalidity in this lawsuit when filing answers in response to the Complaint filed for Copyright Infringement in 2007, and yet again in 2008. Defendants do not explain why they chose to wait until the end of July 2009 to research and disclose witnesses allegedly supporting this affirmative defense.

("Temkin Affidavit"). Plaintiff's counsel expressly stated that such agreement did not encompass the thirteen late-disclosed witnesses that form the basis of the present Motion for Sanctions. *Id.*

Contrary to Defendants' misleading implications in its Response, the *sole* reason that Plaintiff stipulated to limited extensions of specified deadlines at the close of discovery was to accommodate Defense Counsel's personal health issues. Plaintiff explicitly limited those extensions as set forth above. Plaintiff will be highly prejudiced if the *fact discovery* deadline is now extended in order to allow depositions of these thirteen new witnesses, many of whom live out-of-state, at least five of whom live in foreign countries, and any number of whom will be unavailable for deposition due to lack of Court jurisdiction and other reasons.

LEGAL STANDARD

Fed. R. Civ. P. 26(a)(1)(A)(i) requires that a party, without awaiting a discovery request, must provide "[T]he name and, if known, the address and telephone number of each individual likely to have discoverable information -- along with the subjects of the information -- that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." Fed. R. Civ. P. 26(e) requires that "a party who has made a disclosure under Rule 26(a) -- or who has responded to an interrogatory, request for production, or request for admission -- must supplement or correct its disclosure or response in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect." Rules 26(a) and 26(e) were drafted and published to protect parties from precisely the type of last minute disclosure that occurred here. Fed. R. Civ. P. 37(c)(1) mandates that a trial court punish a party for discovery violations in connection with Rule 26 unless the violation was "harmless or substantially justified." *Roberts v. Galen of Virginia, Inc.*, 325 F.3d 776, 782 (6th Cir. 2003).

Rule 37(c) directs the exclusion of witnesses as a sanction for a Rule 26 violation. *Smith v. Botsford General Hosp.* 419 F.3d 513, 517 (6th Cir. 2005).

Here, Defendants have provided thirteen previously undisclosed witnesses pursuant to C.R.C.P. 26(a)(1) at the very close of discovery. As the facts and case law demonstrate, these late disclosures were far from “harmless or substantially justified.” Twelve of these thirteen undisclosed witnesses are completely unknown to Plaintiff. The witnesses are scattered both nationwide and worldwide, and several have no address information whatsoever. The witnesses could have been located and disclosed by Defendants at any time during the two plus years that this matter was litigated, but for Defendants’ own strategic choices. For each of these reasons, and for the reasons set forth below, this Court must exclude the thirteen belatedly disclosed witnesses in order to appropriately contain the already extended fact discovery in this matter, and in order to correct the severe prejudice that Defendants’ belated actions would otherwise cause to Plaintiff.

LEGAL ARGUMENT

A. Plaintiff Will Be Highly Prejudiced if the Newly Disclosed Witnesses are not Stricken Because He Has Been Provided No Viable Way to Interview Them.

Fed. R. Civ. P. 26(a)(1)(A)(i) requires that, if known, the disclosing party must provide a telephone number and address for each witness. The obvious purpose behind this requirement is to allow the opposing party a reasonable opportunity to contact and interview the witness. Absent a way to get in touch with the person, the opposing party has no way to conduct an appropriate investigation for cross examination purposes.

On July 31, 2009, the final day of lay discovery, Defendants’ produced their “Additional Contact Information For Individuals Identified In Defendants’ Amended 26(a)(1) Disclosures.”

(“Defendants’ Additional Contact Information”). A copy of Defendants’ Additional Contact Information is attached as *Exhibit A*. Not one of the 13 witnesses on this list has the requisite address and telephone number. Only one witness (Tom Carroll) has an address, and only one witness (Shayne Colton) has a telephone number. Eight include nothing more than email addresses, even though that form of contact information is not even contemplated under the Rule.³ Three witnesses have no contact information of any kind. No further supplementation has been produced.

The production of Defendants’ Additional Contact Information dramatically underlines the severe prejudice to Plaintiffs should these witnesses be allowed. These newly disclosed witnesses – those that have addresses provided -- hale from all over the world. At least three allegedly live in Canada, one in Brazil, and one in Finland. Another apparently lives in Illinois and another in Utah. Six witnesses disclosed at the close of discovery have no geographic information at all. *See, Exhibit A*.

If in fact these witnesses were to be allowed to testify, either at trial or through deposition, Plaintiff would need to be able to have some reasonable way to speak with them for cross examination purposes. It is already clear that Plaintiff will be unable to depose those witnesses that live out of the country due to lack of Court jurisdiction. Further, counsel for Plaintiff has already attempted to contact the nine witnesses with email addresses, but only three responded. Temkin Affidavit, ¶¶ 5-10. Of those that did respond, Brandon Mizera allowed Plaintiff’s counsel to call, but placed a time limit of 10 minutes on the call; James Stretch and

³ Of these eight, five also include a reference to their country or county and state, but no cities or actual addresses are provided.

Arman Brown refused to provide telephone contact information so that they can be reached. *Id.* The remaining six witnesses listed did not reply at all.⁴

B. Defendants' Delay in Conducting its Investigation Must not be Excused Because Plaintiff Timely Provided Evidence of His Infringement Contentions.

Defendants assert that Plaintiff revealed his infringement contentions belatedly, and that such delay justified Defendants' last-minute witness disclosures. Response, p.3. This constitutes yet another factually inaccurate representation. In fact, Plaintiff provided copies of his entire web site (the "Copyrighted Work") along with a copy of Defendants' primary website (the "Infringing Work") from the same timeframe to Defendants at the time that the case was originally filed.⁵ The identical comparative evidence of infringement was produced yet again earlier this year in response to discovery requests by Defendant Wise Buy Now.

As the two CDs clearly demonstrate, the scope of the infringement is massive, as Defendants copied large portions of the Copyrighted Work verbatim and placed them on the Infringing Work. Defendants conceded as much during 2007 when they temporarily removed the majority of their web site content. Allison Affidavit, ¶ 5. Plaintiff is not required or expected to delineate every specific instance of infringement for Defendants in order to maintain his right to damages. To the contrary, the Sixth and other circuits have held that a comparative analysis of the works in their entirety is required, as "the final step [in a substantial similarity analysis] is to determine whether the allegedly infringing work is substantially similar *by comparing the two works.*" *Stromback v. New Line Cinema*, 384 F.3d 283, 297 (6th Cir. 2004) (Emphasis added). The Court went on to state that substantial similarity exists where "the

⁴ It should be noted that all email addresses provided were either hotmail or yahoo addresses, which can be obtained by anyone for free over the Internet. Plaintiff has no way of knowing at this time if these email addresses are in fact owned and used by the individuals in question.

⁵ This case was originally filed in U.S. District Court in Colorado in January 2007.

accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectable expression by taking material of substance and value." *Id.* Here, a substantial similarity analysis arising from the evidence twice produced through discovery in this matter will demonstrate that large portions of the two works are virtually identical.

Defendants have attempted to ignore the facts of this case by citing *General Universal Systems v. Lee*, 379 F.3d 131 (5th Cir. 2004), a case from outside the Sixth Circuit which is completely inapposite to these facts. In *Lee*, the plaintiff did not provide copies of both works for comparison purposes, but rather only provided the court with a copy of a single work. *Id.* at p. 147 ("GUS, however, fails to provide the copy from LOPEZ COBOL's source code for comparison."). By so doing, the plaintiff failed to provide the foundational basis for conducting a substantial similarity analysis. Here, Plaintiff has intentionally and repeatedly produced copies of both the Copyright Work and the Infringing Work during this case.

Hines v. Dean, 2005 WL 589803, 2 (N.D.Ga.,2005), also cited by Defendants, is equally irrelevant. In that suit plaintiff claimed copyright infringement of some of his music, and attempted to exclude the testimony of defendant's expert who found no substantial similarity between the works because the expert was untimely disclosed. The court rejected this request because it found the untimely disclosure was a result of plaintiff's own actions in waiting until just three weeks before liability discovery closed to provide defendants with evidence of his infringement contentions. The alleged similarities between the works in *Hines* were subtle at best: "Plaintiff offers no explanation of how an average listener would conclude that 'Guilty' was copied from 'One on One.' He admits that his brief rhythm pattern is not melodic, that the

pitch of the drum beats in the two works is different, and that the key recognizable parts of the work-the melody and the 'hooks'-are different.” *Id.*, at *3.

In contrast to the facts of *Hines*, significant portions of Defendants’ websites are word-for-word copies of large portions of Plaintiff’s site. No expert will be required to demonstrate the substantial similarity here. It is obvious to even the most casual observer. As noted, Defendants had access to both works for comparison purposes and could have found countless examples of infringement for themselves at any time *over the last two years* without Plaintiff’s assistance. Plaintiff has taken absolutely no belated action in this case that would excuse Defendants’ late and highly prejudicial disclosure of some 13 new witnesses spread throughout the world.

Defendants now allege without basis that Plaintiff did not author the infringed cheat codes, and failed to disclose the same, (Response, p. 15) in an effort to somehow justify their belated disclosure of 13 additional witnesses on the final day of discovery. First, as stated above, Defendants have set forth no factual evidence to support their defense of invalidity, other than unsupported affidavits pertaining to .004 percent of Plaintiff’s web site signed by two teenagers unwilling to provide addresses. Second, Defendants’ last-minute attempt to argue an invalidity defense does not justify its grossly belated investigation, which should have been performed at the outset – as opposed to at the close – of this lawsuit.

Defendants also attempt to argue that their late disclosure was substantially justified because the late discovered evidence and witnesses were circumstances “beyond Defendants’ control.” Response, p. 11. There is absolutely no reason why Defendants could not have conducted this research sometime in the previous two-plus years since this case was first filed. Indeed, according to Defendants it took only an Internet search by Defendant Wise to uncover

the alleged need for further inquiry. *See*, Response, p. 6. Given that reality, Defendants have absolutely no excuse for providing severely inadequate disclosures at the precise termination of discovery. The witnesses in question should be stricken.

C. Defendants' Have Not Met Their Burden of Proving that Their Late Disclosure of Witnesses was Harmless.

Fed. R. Civ. P. 37(c)(1) mandates that a trial court punish a party for discovery violations in connection with Rule 26 unless the violation was "harmless or substantially justified." *Roberts v. Galen of Virginia, Inc.*, 325 F.3d 776, 782 (6th Cir. 2003). Rule 37 is written in mandatory terms, and 'is designed to provide a strong inducement for disclosure of Rule 26(a) material.' " *Newman v. GHS Osteopathic, Inc.*, 60 F.3d 153, 156 (3d Cir.1995). Indeed, "Rule 37 authorizes--indeed, directs-- exclusion of the witness as a sanction for a Rule 26 violation." *Smith v. Botsford General Hosp.* 419 F.3d 513, 517 (6th Cir. 2005). The burden is placed on the potentially sanctioned party to prove harmlessness. *Roberts*, 325 F.3d at 782. Commentary to Rule 37(c)(1) "strongly suggests that [a] 'harmless' [violation] involves an honest mistake on the part of the party coupled with sufficient knowledge on the part of the other party." *Id.*, at 783, citing *Vaughn v. City of Lebanon*, 18 Fed.Appx. 252, 264 (6th Cir. 2001). The Rule's advisory committee notes list as an example of a harmless violation the "inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness known to all parties." *Roberts*, at 783, citing to Fed.R.Civ.P. 37(c)(1) advisory committee notes (1993).

Here, Plaintiff had sufficient knowledge of the people listed at C through F of Defendants' Amended Rule 26(a)(1) Disclosures filed on July 29, 2009 ("Amended Disclosures"), because these are contract employees of Plaintiff's. For that reason, these witnesses do not constitute a part of this Motion. With the exception of Thomas Carroll (witness G), however, who Plaintiff sued in a prior copyright infringement case, Plaintiff has never even

heard of the other 13 witnesses in the Amended Disclosures. These witnesses *do not* fall under the rubric of “inadvertent omission.” Plaintiff had *no* knowledge of these people whatsoever, let alone “sufficient knowledge.”

Further, although Plaintiff has heard of witness Thomas Carroll, he had no reason to believe he would be relevant in any way to this proceeding, and therefore did not have sufficient knowledge that he would likely be listed either. Plaintiff is willing to withdraw his prior objection to witness Thomas Carroll on confidentiality grounds, but continues to assert that this witness and all those who followed on Defendants’ Amended Disclosures were declared too late in the discovery process and should be stricken on that basis.⁶

Defendants determinedly try to distract the Court from the “sufficient knowledge” requirement by claiming, without setting forth any evidence, that Plaintiff had “constructive knowledge” of the last-minute disclosures (other than Carroll) because Plaintiff is allegedly using cheat codes which these recently disclosed parties authored. Defendants’ produced absolutely no copyright, assignment of copyright, license agreement, documented evidence of intellectual property rights or documented evidence of authorship to support such a claim. The sole claim to authorship produced by Defendants was the previously mentioned unsupported affidavits of two teenage boys relating to .004 percent of the tens of thousands of pages contained on Plaintiff’s site. In short, Defendants produced *absolutely no evidence* that Plaintiff had sufficient knowledge that these recently disclosed witnesses existed, until receiving belated disclosures from Defendants. In fact, Plaintiff to this date continues to lack sufficient knowledge regarding the majority of these recently disclosed witnesses.

⁶ The settlement agreement reached with Mr. Carroll in a previous lawsuit lacks the confidentiality provision which Plaintiff believed to exist, for which reason it will be produced as supplemental discovery production.

As a result, were fact discovery to be extended, this extensive new laundry list of witnesses would be extremely prejudicial to Plaintiff. The list includes multiple parties from outside of the United States, none of whom are bound by Title 17 or the jurisdiction of this Court. Those parties include three people who live in Canada, one person who lives in Brazil and one person who lives in Finland. Furthermore, there is someone from Utah and someone from Illinois. Finally, it is unknown where the six witnesses disclosed with no addresses live, and no telephone numbers were provided, but presumably they are also spread throughout the world at large. In short, within days of the close of discovery Defendants abruptly and knowingly turned this matter into one of international proportions with substantial discovery burdens placed upon Plaintiff, attempted to move many of their allegedly key witnesses outside of the scope of this Court's jurisdiction, dramatically increased the cost of this case, and plainly threatened to substantially delay Plaintiff's right to relief.

Defendants have not and cannot meet their burden of showing that the late disclosures were justified, that they are anything close to harmless, or that Plaintiff had or has – even after “disclosure” -- anything resembling sufficient knowledge of the identities of the witnesses in question. Plaintiff respectfully requests that, based on the law and the facts at hand, the 13 undisclosed and witnesses G through S be stricken.

D. Defendants' Discussion on Standing is Irrelevant to this Pending Motion.

Defendants' discussion on standing constitutes yet another red herring. This argument is not before the Court on this discovery motion. Nevertheless, Plaintiff notes that he has two valid copyrights issued by the U.S. Copyright Office at issue in this case: TX 6-162-180 and TX 6-516-4-7. Such filings are presumed valid. “Registration by the Copyright Office is *prima facie* evidence of a copyright's validity.” *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 387

F.3d 522, 533-534 (6th Cir.2004). “The burden is on the party challenging the copyright to rebut the presumption.” *Hi-Tech Video Productions, Inc. v. Capital Cities/ABC Inc.*, 58 F.3d 1093, 1095 (6th Cir.1995). In this instance Defendants provided nothing resembling the type of analytical determination necessary to rebut a copyright presumption, nor is a response to a discovery motion the time to set forth such a claim.

E. Defendants’ Request for Attorney’s Fees Must Be Denied

Defendants initially alleged invalidity of copyright as an affirmative defense in this matter in 2007, in the Complaint filed in the United States Federal Court for the District of Colorado. Defendants restated that defense in their Answer as Affirmative Defense No. 21 subsequent to this Complaint being re-filed in Ohio in 2008. Defendants nonetheless chose to delay the preparation of any invalidity defense in this case until the close of discovery, and are now attempting to transfer the significant burden and prejudice arising from that delay on to Plaintiff. As Defendants own affirmative defenses demonstrate, Defendants could have conducted the analysis of the type which they conducted in five short weeks starting in late June and early July 2009 at any point within the two years prior to that time. Defendants chose to pick this point in time to conduct an invalidity analysis based upon their own trial strategy. Plaintiff will be extremely prejudiced if he is subjected to a virtually undeterminable discovery and cost determination to appropriately respond to all of these new potential witnesses, most of whom Plaintiff has no way of contacting, and many of whom are beyond the subpoena powers of this Court due to age, location, lack of required disclosure information, or all three. For each of these reasons, Defendants’ request for fees must be denied.

CONCLUSION

This Court must not be distracted by the factually and legally unsupported claims propounded by Defendants in their Response. Contrary to what Defendants espouse, the evidence demonstrates that Defendants have had access to the production of Plaintiff's Copyrighted Work and Defendants' Infringing Work for the purpose of conducting a substantial similarity analysis for more than two years, and to specific examples derived from the same since last March. Despite that fact, Defendants made a tactical decision not to invest time or money into conducting an investigation until late June 2009, which has absolutely no bearing on Plaintiff. Plaintiff cannot be penalized by Defendants' poor strategic choices, particularly if such costs mean Plaintiff being burdened with the prospect of conducting world-wide witness interviews, many of which will be functionally impossible due to cost and jurisdictional and legal conflicts. Even extending the lay discovery deadline yet again will not cure the cost and jurisdictional prejudice to Plaintiff inflicted by these late disclosures. There must be a rational end to this process, as explicitly contemplated by the strict compliance requirements of Rules 26(a) and 37(c)(1).

Plaintiff respectfully requests that the Court enter an Order pursuant to Rule 37 striking Defendants' Amended Disclosures with respect to witnesses G through S. Defendants have not demonstrated anything resembling substantial justification or harmlessness for their failure to provide this information in a timely manner, nor can they establish that their failure has not and would not severely prejudice Plaintiff. In addition, Plaintiff requests that he be awarded his attorney's fees and costs associated with the filing and this motion and reply, as provided under Rule 37(c), and that Defendants' unsupported request for fees be denied.

Dated this 28th day of September, 2009.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September, 2009, I electronically filed the foregoing **REPLY TO MOTION FOR SANCTIONS** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record in this matter.

/s/ Thomas P. Howard
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