UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID ALLISON, doing business as CHEAT CODE CENTRAL, a sole proprietorship,	)	
Plaintiff,	)	Case No. 2:08-cv-00157-MHW-MRA
vs.	)	
JEREMY N. WISE, an individual, and **WISE BUY NOW LLC**, an Ohio Corporation	)	
Defendant.	)	

MOTION FOR SANCTIONS

Plaintiff David Allison, d/b/a Cheat Code Central ("Plaintiff") through his undersigned counsel, upon good cause shown, hereby moves this Court for sanctions pursuant to Fed. Rules Civ. Proc. Rule 37(c) arising from Defendants' filing of their untimely supplemental disclosures in this matter pursuant to Rule 26(a)(1) and 26(e), and in support thereof states as follows:

CERTIFICATE OF CONSULTATION

Pursuant to Local Rule 7.3, counsel for Plaintiff conferred by telephone with counsel for Defendants before filing this motion. Defendants do not consent to the relief requested.

FACTUAL BACKGROUND

Plaintiff David Allison, doing business as Cheat Code Central, a sole proprietorship ("Allison"), operates a premier website at www.cheatcc.com that caters to the video-game playing community, offering tips, hints and cheat codes for getting to progressively higher levels in a variety of games and video-gaming formats. He has been operating this website since 1998. He registered the content of his website with the U.S. Copyright Office in May 2005 (TX-6-162-

180). He filed a revised copyright for the updated content of the site in January 2007 (TX-6-516-407).

Defendants Jeremy Wise and Wise Buy Now, LLC operate a series of competing websites, including their most heavily trafficked website at www.cheatmasters.com. This matter arose when Defendants unlawfully infringed Allison's copyrights by copying and posting, virtually identical significant portions of Allison's website onto their own sites.

Defendants have had knowledge of the allegations of infringement since January of 2007, when a prior attorney for Allison sent a "cease and desist" letter. Although Defendants initially removed the infringing content, the then reposted it for a period of several months. Allison filed suit in U.S. District Court, Southern District of Ohio, Eastern Division, in February 2008.

On March 5, 2009, Allison served Defendants with "Plaintiff's Objections and Responses to Defendant's Amended First Requests for Production of Documents," "Plaintiff's Objections and Responses to Defendant's Interrogatories," and "Plaintiff's Objections and Responses to Defendant's Requests for Admission."

The trial in this case has been set for November 23, 2009. The parties amended the Scheduling Order twice, first extending the close of lay discovery from its original date of March 13, 2009 to May 29, 2009 (See, Court Documents 20 and 27, respectively), and then extending it again to July 31, 2009 (See, Court Document 40). In a conference call with Magistrate Abel on June 22, 2009, the Court inquired as to the status of discovery and asked whether any further changes to the Scheduling Order were anticipated. Counsel for both parties agreed the current timeline could stand. Defense counsel gave absolutely no indication that he intended to amend his Rule 26 disclosures to add a long list of additional witnesses, or that he was conducting an investigation that might result in the need to amend yet again the Scheduling Order.

Defendants subsequently issued three third-party subpoenas and Defendant Wise Buy Now, LLC served written discovery requests. Then, on July 29, 2009—two days before the close of lay discovery, after the close of all written discovery, and less than 120 days before trial—Defendants filed their "Amended Rule 26(a) Initial Disclosures to Plaintiff" ("Amended Disclosure"). This Amended Disclosure is attached as ***Exhibit A***.[1] The Amended Disclosure includes a list of some *17 potential witnesses whose names have never before been disclosed.* Twelve of these new witnesses have no contact information whatsoever. The last minute addition of these witnesses, if allowed, would dramatically increase the cost and complexity of this lawsuit, would require months to research, could result in significant numbers of additional depositions potentially all around the country, and would require the continuance of both discovery and the trial date. Without such a continuance Plaintiff would be left with literally no way to follow up on the potential scope, content, or credibility of these parties' testimony. Such an eleventh-hour tactic cannot be allowed, and would significantly prejudice Plaintiff's ability to prepare for trial and litigate this matter at this advanced stage in the litigation.

LEGAL ARGUMENT

Fed. R. Civ. Proc. 26(a)(1)(A)(i) requires that a party, without awaiting a discovery request, provide the name and, if known, telephone number and address of each individual likely to have discoverable information. Rule 26(e)(1)(A) requires parties to supplement their disclosures in a "timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect." *Id.*

The Rule requires "timely" supplementation so that the other party has time to conduct whatever discovery is needed to explore the newly disclosed information or witness. Absent a

[1] Defense counsel did indicate by email a few days prior to serving its Amended Disclosures that it would be filing supplemental disclosures, but provided no indication of the scope or content of such changes.

timely disclosure, the other party would be unduly prejudiced. The very purpose of the discovery process is to ensure no last-minute surprises at trial, and to enable both sides to develop their cases in an appropriate and orderly fashion.

If a party fails to provide information or identify a witness under Rule 26(a) or 26(e), that party "is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or was harmless." Fed.R. Civ. Proc. 37(c)(1). In addition to a preclusion order, a court may impose another appropriate sanction, including the payment of reasonable attorney's fees caused by the failure to disclose or to supplement. Rule 37(c)(1)(A).

The burden of establishing harmlessness falls on the non-disclosing party. *Roberts ex rel. Johnson v. Galen of Virginia, Inc.*, 325 F.3d 776, 782 (6th Cir. 2003). Moreover, the comments of the Advisory Committee to Rule 37 "strongly suggest that 'harmless' involves an honest mistake on the part of a party coupled with sufficient knowledge on the part of the other party." *Id.*, at 783. Defendants have had Allison's discovery responses since the beginning of March. At the end of June their attorney stated to the Court that he did not foresee any reason to extend the lay discovery deadline of July 31, 2009. Under these circumstances, it can hardly be said that the failure to provide a list of some 17 new witnesses—most of whom include no contact information at all—two days before the close of lay discovery is an "honest mistake" or one of which the other party had "sufficient knowledge." *Id.*

It is at least arguable that Allison had knowledge that newly declared witnesses C, D, E and F exist, as these are contract employees of Allison's business. The same cannot be said for newly declared witnesses H through S, which are literally names pulled directly out of a hat at the last minute, to Plaintiff's prejudice. Allison could not have anticipated these witnesses. The

Amended Disclosure makes vague reference to documents and statements obtained from some of these witnesses, and although Allison has requested copies of these documents, any such copies cannot be provided before the close of lay discovery because that date has already passed. This leaves Allison with absolutely no ability to conduct the detailed discovery necessary to research these parties from here forward.

In addition to being untimely and lacking any contact information, declared witness G has other flaws. The party named, Tom Carroll, is someone Allison previously sued over similar infringement issues. That matter was resolved through a confidential settlement. As such, neither Allison nor Carroll are at liberty to discuss its terms. Carroll's right to confidentiality is particularly acute where, as is the case here, the parties seeking to question him about the details are direct competitors. Carroll's designation must be stricken both as untimely and because he is not at liberty to discuss his prior case.

At the time they filed the Amended Disclosure, Defendants offered to yet again extend the discovery deadlines as if this would be the cure-all. This is not acceptable. "If Courts are lax in enforcing scheduling deadlines, and allow a party to obtain an unfair advantage by sneaking in evidence not obtained in compliance with the court's orders, it will erode the force and effect of the court's orders, and impede the efficient administration of justice." *Henry v. Quicken Loans Inc.*, 2008 WL 4735228 *5 (E.D. Mich., 2008). It would be both inappropriate and highly prejudicial to abruptly and at the last minute yet again extend the discovery deadlines when Defendants indicated just weeks ago that there was no need to do so. This is especially the case here, as the time simply does not exist for the amount of discovery required.

WHEREFORE, Allison respectfully requests that the Court enter an Order pursuant to Rule 37 striking Defendants' Amended Disclosures with respect to witnesses G through S.

Defendants cannot demonstrate 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 Allison. In addition, Allison requests that he be awarded his attorney's fees and costs associated with this motion, as provided under Rule 37(c).

Dated this 5th day of August, 2009.

Respectfully submitted,
ATTORNEYS FOR PLAINTIFF:

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August, 2009, I electronically filed the foregoing **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/ Wendi S. Temkin
Wendi S. Temkin, admitted *pro hac vice* (CO reg. 36337)