

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 03/07/2014

TIME: 01:30:00 PM

DEPT: C-72

JUDICIAL OFFICER PRESIDING: Timothy Taylor

CLERK: Andrea Taylor

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT:

CASE NO: 37-2012-00101057-CU-NP-CTL CASE INIT.DATE: 07/23/2012

CASE TITLE: Sharp vs. IDO Security Inc [IMAGED]

CASE CATEGORY: Civil - Unlimited CASE TYPE: Non-PI/PD/WD tort - Other

EVENT TYPE: Discovery Hearing

APPEARANCES

David J Harter, counsel, present for Plaintiff(s).

DIRK O JULANDER, counsel, present for Defendant(s).

The Court modifies the tentative ruling as follows:

Ruling on Motion to Compel IDO Security, Inc.'s PMK's Further Deposition Answers and Production and Monetary Sanctions

Sharp v. IDO, Case No. 2012-0101057

March 7, 2014, 1:30 p.m., Dept. 72

1. Overview and Procedural Posture.

This lawsuit arose out of plaintiff's alleged receipt of unsolicited emails at various times between October 22, 2011 and July 22, 2012 from the "spammer defendants." Plaintiff is a self-styled "crusader" against penny stock "pump and dump" schemes. The court incorporates the more detailed discussion of the background of the case set forth in the Minutes for August 2, 2013. (ROA 163.)

Plaintiff's complaint filed in July, 2012 alleges a first cause of action for violation of Business & Professions Code section 17529.5 and a second cause of action for violation of Civil Code section 1750; the complaint names several defendants, including IDO Security, Inc. (IDO.) Plaintiff dismissed the second cause of action with prejudice as to all defendants on May 22, 2013. (ROA 144.) As for IDO, plaintiff alleges the spammer defendants sent emails to plaintiff regarding IDO stock between July 18, 2012 to July 22, 2012. (Complaint, ¶ 32.) IDO answered in September of 2012. (ROA 7.)

Although plaintiff filed this action *in propria persona*, he substituted in counsel on December 30, 2013.

(ROA 240.) A trial date of March 21, 2014 was set at the CMC over a year ago. A request to continue the trial for 120 days was denied on February 4, 2014, as there was no affirmative showing of good cause justifying that relief. (ROA 272.) On February 22, 2014 after oral argument, the court denied motions for summary judgment/ adjudication by IDO, Mustang Alliances, Inc., and Leonard Sternheim. (ROA 300.)

Plaintiff noticed the deposition of IDO's PMK for December 6, 2013, which included a request that the PMK produce twenty-one (21) categories of documents specified in the deposition notice. (Plaintiff declaration, ¶ 2; Fifth Amended Notice of PMK Deposition, Exhibit 1 to motion.) IDO designated Michael Goldberg (Goldberg) as IDO's PMK; plaintiff stipulated to the designation. (Dirk O. Julander opposition declaration, ¶ 3.)

Plaintiff contends "it became clear" at the deposition that Goldberg "was no longer an officer, director, managing agent, agent, or employee of IDO". (David J. Harter supporting declaration, ¶ 2.) Plaintiff also contends Goldberg at the deposition failed to respond to questions based on financial privacy seeking the names of noteholders who would provide information about who would have or could have been part of the pump and dump scheme and withheld documents that IDO's counsel deemed irrelevant. (Supporting memorandum, pages 3:9-16, 4:27-5:1.) Plaintiff further contends the only documents IDO produced at the deposition "were two stock transfer documents (with all of the information blacked out) and the SEC filings from 2006 to the present", thus withholding documents to all requests but Request No. 17 that sought SEC filings. (Supporting memorandum, page 5:24-27.)

Presently, plaintiff brings a motion to compel further deposition answers and reasonable follow-up questions from IDO's PMK and production of records in response to the production request in the deposition notice. (ROA 286-287.) The motion includes a request for an award of monetary sanctions against IDO and/or its attorney in the sum of \$4,075.90. The motion was filed February 10, 2014 and noticed for May 15, 2014 but advanced to the present time pursuant to the court's February 25, 2014 ex parte order. (ROA 310.) IDO filed opposition March 3, 2014 in accordance with the February 25, 2014 order. (ROA 315-317.) The February 25, 2014 order provides any reply may be verbal at the hearing. The court has considered the papers.

2. Applicable Standards.

Code of Civil Procedure section 2017.010 provides, "Unless otherwise limited by order of the court in accordance with this title, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. . . ."

A party rebuffed in its effort to conduct pretrial discovery may, of course, file a motion to compel. The discovery statutes generally require a pre-motion effort to resolve the discovery dispute – referred to as "meet and confer." (See, generally, Weil & Brown et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group), § 8:1163.)

If the deponent fails to answer a deposition question or produce documents or things designated in the deposition notice or subpoena, the examiner may either complete the deposition on other matters or adjourn the deposition. (Code of Civil Procedure § 2025.480(a).) If the examiner wants an answer to the question or the documents produced, the examiner must file a motion to compel. (Code of Civil Procedure § 2025.480(b)-(k).)

3. Ruling.

The motion is granted to the following extent.

IDO shall produce a PMK for deposition who is ready to respond to the deposition questions and reasonable follow-up questions. To the extent IDO again proffers Goldberg as the PMK, Goldberg shall educate himself about the affairs of IDO before the resumed deposition. Pursuant to Code of Civil Procedure section 2025.230, IDO is charged with the responsibility of designating and producing at the PMK deposition the officers, directors, managing agents, employees, or agents who are the "most qualified" to testify on behalf of IDO as to the categories stated in plaintiff's deposition notice. (Code of Civil Procedure § 2025.230.)

Question no. 4 in plaintiff's separate statement, the only question identified by plaintiff in the motion which Goldberg was instructed not to answer based on financial privacy, does not seek financial information. Rather, the question ["Okay. Can you remember any of the noteholders?"] is concerned with whether the IDO's PMK knew who the noteholders are. Names are not private financial information. The question appears relevant to plaintiff's case since it allows plaintiff to ascertain the names of those who held notes in IDO and thus may have an incentive to promote IDO's stock through spam emails. The question also appears relevant as these persons may be witnesses who may have information about IDO's participation in sending spam emails. The question and reasonable follow-up are appropriate.

At the reconvened deposition, IDO's PMK shall produce all documents responsive to the requests in the deposition notice. IDO's PMK has the obligation to "make an inquiry of everyone who might be holding responsive documents or everyone who knows where such documents might be held." (*Maldonado v. Superior Court* (2002) 94 Cal.App.4th 1390, 1396.)

Plaintiff establishes that the documents requested in the deposition notice are proper given they are foundational in nature. For instance, the deposition notice seeks such documents as those pertaining to IDO formation; assignments and resignation of IDO officers and directors; meeting minutes; communications between IDO and its employees, shareholders, and third parties, communications about marketing and investor relations; who held stock in IDO; and IDO's business.

IDO has not established how documents in response to the deposition notice are not relevant to the subject matter of plaintiff's complaint or will not lead to the discovery of admissible evidence. IDO need not produce documents that pertain to the operations or conduct of IDO after July 2012, which is after the email transmissions. The PMK shall utilize best efforts in producing all responsive documents.

In granting the motion, the court adopts IDO's request that plaintiff "is to hold any documents produced in confidence and use them solely for the purposes of this litigation and not publicly disseminate the information contained therein." (Opposition memorandum, pages 6:26-7:3.)

The parties shall meet and confer before the hearing on the date, time, and location of the reconvened deposition, on the assumption that the foregoing tentative will be confirmed. If they cannot agree, they shall inform the court, at which time the court will make an order regarding the date, time, and location of the reconvened deposition which may or may not be convenient for one or more parties. The parties are to meet in Costa Mesa on March 14, 2014 at 9:30 a.m.

Monetary sanctions are not awarded, as the court believes they are unwarranted under the circumstances.



Judge Timothy Taylor