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DECISION RE MOTIONS FOR TERMINATING SANCTIONS AND FOR COMPLIANCE WITH ELECTRONIC DISCOVERY ORDER
LOS ANGELES SUPERIOR COURT

Robin Singh Educational Services, Inc. v. Blueprint Test Preparation LLC
BC330098

Summary. The Court finds that plaintiff as moving party on the motion for terminating sanctions has made a sufficient showing that defendants have intentionally and seriously misused the discovery process and did not timely comply in good faith with prior discovery requests for disclosure of pre-separation and post-separation communications and writings, electronic and otherwise. The Court also finds that plaintiff has shown its entitlement to the further electronic discovery listed in its motion for compliance with electronic discovery.

The Court does not exercise its discretion at this time to impose terminating sanctions and instead will adopt various of the lesser sanctions requested, specifically Requests Nos. 4-6, 8, 10, 12, and 49-50. In lieu of imposing terminating sanctions, the Court also intends to exercise its broad general discretion over the conduct and cost of discovery to:

- (a) allow plaintiff appropriate follow up discovery, electronic and otherwise;
- (b) impose the costs of the computer forensic, past and future, onto defendants (motion Request Nos. 5 and 50) subject to certain limitations;
- (c) require defendants to pay for the cost of court reporters and videographers for the needed follow up deposition sessions subject to certain limitations;
- (d) require defendants to reimburse plaintiff for its full actual cost for the bringing of these two motions (motion Request Nos. 4 and 49); and
- (e) to continue the trial approximately six weeks beyond February 4, 2008, if plaintiff desires additional time to conduct follow up discovery. As these are discovery-related costs, the imposition will be made without regard to who may be the prevailing party at trial, and these orders once made (by separate motion as to the issue of the reasonable amounts sought only, not as to whether to impose such expenses) shall be separately enforceable as a judgment jointly and severally as against all defendants. Weil & Brown, CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 8:1228.

Factual Basis For Finding A Violation Of Defendants' Discovery Obligations.

For these purposes, as for proof at trial on the ultimate issues in a case, a party can proceed on direct evidence, circumstantial evidence, or a combination of the two. Here, plaintiff's primary proof is largely circumstantial in nature, but that does not take away from its general persuasiveness. Facts which support the Court's conclusion that defendants have misused the discovery process and breached their duties of honest and reasonable cooperation in discovery include, but are not limited to:

- (a) defendants' disposal of several relevant computers and related electronic storage devices which contained key information after they were aware of actual or threatened litigation against them,

(b) defendant Capuano's leaving of a computer at his old apartment during the pendency of this litigation,

(c) their dissembling or outright prevarication in various statements of sworn testimony given in this case by deposition and otherwise, including their failure to comply with disclosures required by C.C.P. § 2031.230 regarding lost documents,

(d) their failure to provide any handwritten or other seminal drafts of their extensive, allegedly independently created student course material, and the shredding of Scantron sheets during the pendency of the litigation,

(e) their failure to provide sworn testimony of any individual or corporate defendant in response to the motion for terminating sanctions [see CACI 203 and 205 and authorities cited in Sources and Authority thereunder], and

(f) the contents of the electronic documents (as attached to the moving papers on the motion for terminating sanctions and without consideration of additional documents later identified by moving party) which have been obtained after great expense and effort by the plaintiff from such computers and electronic storage devices as were eventually made available to the court-appointed computer forensic, KPMG.

While the electronic documents obtained by KPMG and attached to the motion papers do not absolutely confirm a breach of the duty of loyalty or other tortuous conduct by defendants or any one of them, they do form a reasonable basis for plaintiff to argue to the jury that such documents support a reasonable inference of the commission of one or more torts by one or more of the defendants, and thus they are highly relevant. Further, some of the documents more recently obtained via KPMG by plaintiff from defendants' computers do appear to be direct evidence of wrongful conduct by one or more defendant.

Determination Not To Impose Terminating Sanctions. The Court intends to grant this motion in part and without prejudice to plaintiff making a renewed motion for terminating sanctions if further discovery, as authorized herein, appears to support this request for relief. While the Court does not, in the exercise of its discretion, find that the noncompliance was so egregious and incurable as to require the imposition of terminating sanctions, plaintiff's request for such relief on this record is not a frivolous request.

The Court is not yet certain that plaintiff has been demonstrably denied an opportunity for a fair trial as the electronic discovery obtained so far was highly limited in breadth (given the limited time available before the now vacated November 6, 2007 trial date) and is based on a very limited opportunity for plaintiff to seek obvious "follow on" electronic discovery and other discovery informed by the fruits of what it has finally obtained. The Court believes that a further six-week trial continuance (if desired by plaintiff) beyond the current target date of February 4 or 11, 2008 (for the obtaining of a pre-screened panel of jurors), combined with an opportunity for further discovery during the extra time available may provide a more accurate record of defendants' actual conduct in the key period of August 2004 to June 2005.

Reasons For Allowing Additional Discovery. Since the Court is firmly persuaded that these defendants have individually and collectively proceeded in bad faith

in responding to discovery demands and in discarding key evidence when they reasonably anticipated this litigation, the Court does believe that serious measures, as an alternative to terminating sanctions, are warranted. As noted in the Summary, these include the striking of defendants' equitable affirmative defenses, broad follow on discovery for plaintiff, and substantial cost-shifting onto defendants of the excessive costs imposed on plaintiff by defendants' bad faith conduct. Once the reasonable amounts of such costs are shown to the satisfaction of the Court by further noticed motion on shortened time, certain of these costs will be immediately collectible by plaintiff through levy. In particular, plaintiff will be allowed to collect:

(1) the actual sums incurred (whether paid, billed or merely incurred) to date (i.e. as of December 12, 2007 5 p.m. PST) for the services (including reasonable disbursement expenses included in such vendors' billings) of (a) KPMG, (b) the previous court-appointed computer forensic(s) and (c) for the services of the Hon. John Zebrowski;

(2) the costs for future services by KPMG (including reasonable disbursement expenses included in such vendor's billings) not to exceed \$200,000.00; and

(3) the costs of future services of court reporters and videographers (including reasonable incidental expenses included in such vendor's billings) not to exceed \$100,000.00.

The costs covered by the previous paragraph will be final and a separate obligation which will not depend upon the ultimate outcome of this case insofar as they are the subject of a court order; for the same reason any costs actually sought in connection with a court order made in furtherance of this ruling will not be an allowable cost to the prevailing party. Future expenses for the computer forensic, court reporters and videographers which exceed the dollar limits stated herein will be advanced pursuant to applicable prior orders of this Court, if any, and the relevant rules of civil procedure.

The costs imposed on defendants by this order will not fully reimburse plaintiff for its excessive costs since the cost of legal services incurred by plaintiff in working with KMPG, with the prior computer forensic, and with former Discovery Referee the Hon. John Zebrowski are not included in the sums to be reimbursed to plaintiff although the Court could reasonably have added this to the charge.

While the future costs of the computer forensic and of court reporters and videographers (as more fully specified above) will become an immediate obligation of defendants, plaintiff may chose, as a practical matter, to advance such sums so that such services will be provided in a timely fashion, and then apply to this Court for a further Order or Orders awarding such expenses as further sanctions pursuant to the granting of this motion.

Selection Of Issue-Preclusion Sanctions. The Court has determined that the only issue preclusion sanctions which should be awarded at this time based on defendants' abuse of their discovery obligations are the several equitable affirmative

defenses. The Court is satisfied that on this record defendants have lost their right to interpose equitable affirmative defenses and accordingly grants motion Request Nos. 6, 8, 10 and 12 striking affirmative defenses of "Plaintiff's Unclean Hands," "Estoppel," "Laches," and "Bad Faith of Plaintiff." The Court does not presently understand the affirmative defenses of "Waiver" or "Unjust Enrichment" (motion Request Nos. 9 and 11) to be equitable affirmative defenses though it is concededly not entirely clear what factual contentions are encompassed within those affirmative defenses.

The affirmative defenses relating to the proof of plaintiff's own damages do not appear to be undercut by defendants' failure to cooperate with discovery for which reason motion Request Nos. 7 and 17 are denied. Finally, the factual affirmative defenses based on theories such as "Truthful Information and Honest Advice," "No Improper or Unlawful Conduct," "Privilege," and "Fair Competition" involve legal and factual issues (as opposed to equitable defenses) which should be preserved for the jury's consideration for which reason motion Request Nos. 13-16 are denied without prejudice.

Determination Not To Order Jury Instructions. While the Court believes that it could reasonably order the giving of the several instructions encompassed in moving party's Request Nos. 41-46 and without any due process need to afford an evidentiary hearing, the Court exercises its discretion to decline to impose such a sanction at this time without prejudice to plaintiff renewing its request for such instructions hereafter in the context of a renewed motion for discovery sanctions, at trial or as otherwise justified.

Ruling On Motion For Compliance With Electronic Discovery. Everything that plaintiff desires is reasonable and should be allowed forthwith. In particular, plaintiff is allowed prompt access to all attachments to emails previously produced via KPMG after defendants have had 48 hours (excluding weekends and public holidays) to conduct a privilege review via the KPMG Discovery Radar software protocol. Plaintiff is also allowed to have KPMG do a further search for emails in defendants' electronic files as now held in the custody of KPMG based on all email addresses (or fragments thereof) believed to have been used by defendants or other relevant persons. Plaintiff can also direct KPMG to search generally for documents and files of any type based on search parameters established by plaintiff with concurrent notice to defendants of the requests being made to KPMG. Plaintiff can unilaterally direct search criteria to KPMG and triage apparent net results so as to use privilege review as efficiently as possible as long as only counts of hits for search parameters are disclosed to plaintiff by KPMG before a privilege review has been allowed (e.g. this search produces 50 hits) and plaintiff can then direct that all or some of the documents and files so identified be posted on Discovery Radar for privilege review.

Responsive emails and documents, once so identified by plaintiff, can then be included in a further compendium of up to 5,000 documents which will be made available to defendants for privilege review through KPMG's Discovery Radar, and defendants will be given 5 (five) calendar days (including weekends but not including Christmas Day or New Year's Day) from the posting of any given document in which to complete a privilege review of such document. If a document or other file is responsive

to more than two searches, the count of 5,000 documents maximum privilege review shall omit any such duplications. (This Order supersedes the preliminary order which was set forth in this Court's email order of 9:14 p.m. December 3, 2007, which preliminary order was thereafter suspended in its efficacy pursuant to the Court's email of 1:22 p.m. December 4, 2007, and suspended further in its effectiveness as reflected in this Court's proceedings in open court on December 10, 2007.)

The electronic discovery obtained so far, in highly constrained circumstances dictated by the previous trial date, supports the conclusion that additional electronic discovery is appropriate. While the Court has heretofore highly limited the extent of documents which are submitted to defendants for privilege review, the Court believes that the combination of the finding of noncompliance with discovery obligations by defendants and the utility of the electronic discovery obtained to date justify a much more extensive and thorough disclosure to plaintiff of the contents of the defendants' computers and electronic storage devices for relevant information.

While the possibility that privileged information (particularly attorney-client communications) warrants affording defendants a continuing opportunity for pre-disclosure review for privilege, the existence of a protective order makes time-consuming "privilege" review for the interposition of privacy privileges less justified so the review process should now proceed much faster than it has previously. Defendants also now have substantial experience with conducting privilege review through KPMG's Discovery Radar software protocol which should make the future review more time efficient. The parties are also encouraged to make a modification to the Protective Order in this case to give each side what is commonly known as a "claw back" opportunity to take back documents released in error which are subject of a bona fide privilege. This should allow for more expedited privilege review as the consequences of an inadvertent oversight are not so grave.

Conclusion. Defendants' demonstrated bad faith conduct warrants appropriate sanctions. The Court is not yet persuaded that terminating sanctions or broad case-dispositive issue-preclusion sanctions are warranted at this time, for which reason the relief awarded now is without prejudice to plaintiff relying on this same record – as supplemented by a further showing if facts come to its attention which appear to justify such renewed request – in making a renewed motion for terminating sanctions in the future. While the Court believes that this record would support the giving of some of the jury instructions sought, the Court is exercising its discretion to deny that request without prejudice (and more generally to deny the request for all jury instructions without prejudice) so as to avoid any due process issue resulting from the Court's determination not to hold an evidentiary hearing. The Court expects that affording plaintiff additional discovery, electronic and otherwise, may substantially cure the consequences of defendants' misconduct though the Court cannot be certain that this will bear out. Defendants have an obligation to mitigate the increased discovery expense to which plaintiff has been subjected by their misconduct. The Court's purpose is to allow both

sides a reasonable opportunity to have a fair trial, but not a “perfect” trial, once defendants have been denied the fruits of their obstructionism during discovery.

December 12, 2007

Hon. William F. Highberger