

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BARBOUR RACING)
INTERNATIONAL, LLC, and)
DICK BARBOUR,)
)
Plaintiffs,)
) CIVIL ACTION
vs.)
) FILE NO. 1:10-CV-2825-CAP
EXOTO, INC.,)
)
Defendant.)

**SECOND REPORT AND RECOMMENDATION RELATING TO
PLAINTIFFS’ MOTION FOR SANCTIONS**

This Court previously issued its First Report and Recommendations relating to Plaintiffs’ Motions to Compel. [Dckt. No. 44] The background to these discovery disputes is set forth largely in that report, and need not be restated herein.

All federal courts have the power to impose sanctions against recalcitrant lawyers and parties. *Carlucci v. Piper Aircraft Corp., Inc.*, 775 F.2d 1440, 1446 (11th Cir. 1985). “It is settled law that the imposition of sanctions for failure to provide discovery rests with the sound discretion of the district court”

Properties International Ltd. v. Turner, 706 F.2d 308, 310 (11th Cir. 1983). A court “must” impose attorney's fees and expenses when compelling discovery, unless (a) the party was substantially justified in resisting discovery, or (b) other circumstances make an award of expenses unjust. Fed. R. Civ. P. 37(a)(5)(A)(ii). “Substantially justified means that reasonable people could differ as to the appropriateness of the contested action.” *Maddow v. Procter & Gamble Co., Inc.*, 107 F.3d 846, 853 (11th Cir. 1997). Additionally, Fed. R. Civ. P. 37(a)(5)(C) states that where as here, a motion to compel is granted in part and denied in part, “the Court may ... after giving reasonable opportunity to be heard, apportion the reasonable expenses for the motion.”

The Special Master is aware of this Court’s stated position that it does not normally award attorney’s fees in discovery disputes. *See Forman v. Welding Serv., Inc. et al.*, Case No. 04-CV-2838-TCB, Docket No. 92 at 14 (order imposing attorney’s fees for deposition discovery conduct, but denying sanctions as to other discovery conduct). Thus, the question is whether in this case, the conduct is egregious enough to justify the imposition of attorney’s fees or costs, such as the costs of the Special Master.

Indeed, not all discovery disputes are the same. The instant discovery dispute is characterized by several factors, including conduct by Exoto, that make it a candidate for an award of sanctions. Other than the sheer paucity of responsive documents which were produced in response to the requests¹, they include:

- (a) Invocation of confidentiality as a basis for withholding discoverable information, without moving for a protective order²;
- (b) Conferring about discovery disputes in August 2011³, and waiting until December 6, 2011 – the day before the scheduled hearing on the motion to compel and for sanctions – to supplement production of documents and interrogatories;
- (c) Using arbitrary (and inexplicable) date restrictions on the printouts of financial documents so that the documents did not provide Plaintiff with an accurate accounting of sales activities involving the products accused of infringement⁴; and
- (d) The pattern use of a set of largely improper “boilerplate” objections to each of well over 100 separate requests for written discovery,

¹ For example, “[Exoto’s] production relating to manner of usage, advertising and promotion of the relevant product models is bordering on nonexistent.” First Report and Recommendation at 10-11.

² *See, e.g.*, First Report and Recommendation at 16.

³ “Exoto claims that it had ‘no meaningful notice’ . . . [but] later admits, however, that it received just that” First Report and Recommendation at 2-3.

⁴ First Report and Recommendation at 2-4. “Exoto’s counsel did not have an explanation for Exoto’s choice of date restriction.” *Id.* at 4.

combined with a failure to withdraw the objections when Plaintiff's counsel threatened to bring the instant motions to compel.⁵

The parties were each given an opportunity to supplement the record in this case to focus on these factors, as well as other issues potentially bearing on whether and to what extent a sanctions order may be appropriate. The Special Master attaches these submissions as Exhibits to this Report so that they will be a part of the record in this case. The Special Master notes that no party requested oral argument or a hearing in this matter, making it appropriate for the Special Master to set forth this second report and recommendation with dispatch.

A. On the whole, Plaintiff prevailed on the Motions to Compel.

Much of the briefing of the parties has focused on the question of whether and to what extent the Plaintiff actually prevailed in its motions. The First Report shows exactly what the Plaintiff prevailed upon, and it includes a measure of success as to each of the written discovery requests at issue. [Dckt. No. 44 at 27-29]. Plaintiff has characterized its degree of success as warranting "95-100%" of its fees. Defendant conversely asserts that Plaintiff "lost as much of their motion as they won" and states that "the Special Master found for Exoto on a number of important issues." Exhibit 3 (Def. Brief at 3-4).

⁵ "Exoto interposed a stock set of objections to Plaintiffs' documents requests." First Report and Recommendation at 10. "In response to Plaintiffs' interrogatories, Exoto consistently raised the same set of objections . . . [which] can be and should be overruled consistent with prior portions of this Report." *Id.* at 20.

The First Report, read in its entirety, was intended by the Special Master to leave a definite impression that the Plaintiff prevailed on the whole. However, the Special Master did, on occasion, rule in favor of Exoto. For this reason, the Special Master recommends apportioning the expenses of the motions to compel, including attorney's fees. *See* Fed. R. Civ. P. 37(a)(5)(C).

B. Timing of the Motion.

Exoto argues that the timing of notice regarding the discovery disputes which ripened into the existing motions to compel deprived it of an opportunity to respond prior to the motions being filed. *See* Exhibit 3 (Def. Brief at 5). Of course, the First Report previously found that there was no flaw in the timing of the Plaintiffs' notice, conference or filing of the instant motions. [Dckt. No. 44 at 2-5]. Defendant has not objected to the First Report.

Fed. R. Civ. P. 53(f)(2) provides that a party "may file objections to--or a motion to adopt or modify--the master's order, report, or recommendations no later than 21 days after a copy is served." Objections to a Special Master's findings of fact are reviewed *de novo* by the District Court. Fed.R.Civ.P. 53(f)(3).

The Special Master's First Report and Recommendation was filed on January 20, 2012. [Dckt. No. 44]. The Report made specific factual findings regarding the parties' discovery dispute, and requested supplemental briefs and supporting evidence directed to the sanctions issue. *Id.* at 2-5, 26-27. The First

Report was adopted by the District Court on February 14, 2012 [Dckt. No. 49], thereby becoming the findings of the Court.

Neither party objected to the First Report within 21 days, as required by Rule 53(f)(2), nor did either party object to the Court's adoption of the Report. As such, the findings contained in the Report are binding in the case. *See United States v. Escobar-Urrego*, 110 F.3d 1556, 1560 (11th Cir. 1997) (noting that under the law of the case doctrine, "an issue decided at one stage of a case is binding at later stages of the same case"); *United States v. Amedeo*, 487 F.3d 823, 829-30 (11th Cir. 2007) (noting the "mandate rule", which is "simply an application of the law of the case doctrine to a specific set of facts").

In keeping with the foregoing authorities, because Exoto did not file any objections to the First Report in regards to the facts found and conclusions drawn, the findings of the First Report stand, including the finding as to good faith and timeliness of these motions. Repeating the adopted findings of the First Report, the Plaintiffs complied substantively and procedurally in terms of the dates of service of the discovery, a good faith conference over sufficiency of discovery and waited until the last day permissible within the local rules before filing the instant motions.

Moreover, Exoto's position sidesteps a few basic facts which were pointed out in the First Report. First, recognizing that the discovery requests were served

towards the end of the court-sanctioned time period for discovery, Exoto could and should have done more to collect and produce documents within the discovery period itself. Exoto made a lightweight production of documents (fewer than fifteen pages in total), and then supplemented its production shortly thereafter to produce an additional five (heavily redacted) pages prior to these motions being filed. In light of the nature of the documents requested and the ease with which many of them, particularly the financial documents, could have been formatted, collected and produced prior to the motion being filed, there is simply no justifiable excuse for Exoto's delay in producing the responsive, relevant documents.

Second, Exoto's argument fails to account for a second supplementary production served the day immediately prior to the hearing on the instant motions. Had Exoto made that production – and there is no reason why it could not have done so – in August or September 2011 rather than early December 2011, then it would likely have significantly curtailed the need for the instant motion practice.

Third, Exoto did not agree to withdraw any of its objections to discovery during the conference period. Plainly, it could have done so. Moreover, if Exoto intended to do more, or wanted to do more Exoto could have offered to extend Plaintiffs date for needing to file any motion to compel. However, Exoto did not take even this step.

When Exoto's conduct is taken on the whole, it creates an impression upon the Special Master that Exoto hoped to run out the discovery clock (including the discovery motion clock) with pattern objections and foot-dragging. This type of conduct is nowhere near akin to the level of cooperation envisioned by the discovery rules. In fact, the Special Master is convinced that this is the kind of conduct that merits an award of some of Barbour's expenses and fees under Rule 37.

C. Recommended Apportionment

The imposition of sanctions under Rule 37 is reviewed for an abuse of discretion. *Serra Chevrolet, Inc. v. Gen. Motors Corp.*, 446 F.3d 1137, 1146--47 (11th Cir. 2006). Likewise, an award of attorney's fees is reviewed for abuse of discretion. *Bivins v. Wrap It Up, Inc.*, 548 F.3d 1348, 1351 (11th Cir. 2008). It is reasonable to calculate attorney's fees using the lodestar method, multiplying counsel's reasonable hours by a reasonable hourly rate. In determining the reasonable rate, one should consider "the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Norman v. Housing Authority*, 836 F.2d 1292, 1299 (11th Cir. 1988). It is also within the court's power to subtract from any fee calculation "hours that were not reasonably expended," *Hensley v. Eckerhart*, 461 U.S. 424, 434, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983) (citation and quotation

marks omitted). There is a "strong presumption that the lodestar figure . . . represents a 'reasonable' fee," *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 565, 106 S. Ct. 3088, 92 L. Ed. 2d 439 (1986).

The Eleventh Circuit has held that district courts may, but are not required to consider the *Johnson* factors since many "usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *ADA v. Neptune Designs, Inc.*, 469 F.3d 1357, 1359 n.1 (11th Cir. 2006).

The party seeking attorney's fees must produce more than an affidavit from the attorney performing the work. *Norman v. Hous. Auth.*, 836 F.2d 1292, 1299 (11th Cir. 1988). "Where documentation is inadequate, the district court is not relieved of its obligation to award a reasonable fee . . . the district court traditionally has had the power to make such an award without the need of further pleadings or an evidentiary hearing." *Aetna Group USA, Inc. v. AIDCO Int'l, Inc.*, 432 Fed. Appx. 842, 842-43 (11th Cir. 2011). In one case, the Eleventh Circuit stated that the court "is itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value." *Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1994) (internal citations omitted).

The Special Master has considered the hourly rates in question based upon his own knowledge and experience relating to partner and associate rates in the Atlanta legal community, and finds that it is at least reasonable for Mr. Graham to bill at \$295 per hour⁶ (these days, some would no doubt call this partner rate a bargain for business litigation of this ilk) and for Mr. Zoss to bill at \$195 per hour.⁷ The Special Master further notes that Exoto's brief in opposition did not assail either of these billing rates, and instead merely pointed out the absence of any corroborating evidence to Mr. Graham's declaration attesting to the reasonableness of the rates being charged. Here, the Special Master has determined that it is unnecessary to conduct a further hearing on the reasonableness of the rates charged in light of his own experience relating to the reasonableness of rates.

The Plaintiffs' legal fees which they claim have been incurred as a result of these discovery disputes which have now been resolved are \$21,377.50. (Graham Decl. ¶ 10). The Special Master has reviewed the attorney's fees submission and finds that the following time entries are reasonable, related to the instant motions,

⁶ The Special Master is aware from his own knowledge and independent investigation of reasonableness that Mr. Graham has been repeatedly identified as a "Rising Star" in business litigation by Atlanta Magazine. *See* <http://www.superlawyers.com/georgia/lawyer/Jason-W-Graham/19891dde-9849-4d13-b7fc-0b0d9ea5dc1c.html>.

⁷ Mr. Zoss is an associate at Graham & Penman, LLP, and a graduate of Emory University School of Law. In the Special Master's experience, it is now common in business litigation in Georgia courts to encounter new associates with billing rates in excess of Mr. Zoss' rate of \$195 per hour.

and, even after considerations of apportionment, should be imposed pursuant to Rule 37(a)(5)(C) in this case:

Attorney	Task	Hours (Time Frame)	Rate	\$ Total
LZ	Drafting motion to compel and reply	15 (Sept-Oct)	195	2925
JG	Working on special master appointment and opening status with special master	2.2 (Oct -Nov)	295	649
JG	Preparing for and arguing at hearing before special master	6 (Dec)	295	1770
LZ	Preparing for hearing with JG	0.5 (Dec)	195	97.5
JG	Reviewing first report and conferring with client	1.6 (Jan)	295	472
JG	Working on supplemental brief and affidavit re: imposition of sanctions	7.2 (Jan-Feb)	295	2124
LZ	Working on supplemental brief and affidavit re: imposition of sanctions	14 (Jan-Feb)	195	2730

Some of the other time requested, for example, relates to conferencing about discovery issues in an effort to resolve the disputes, consistent with the local rules of this Court. The Special Master declines to award recovery for fees relating to conferral because it is mandatory, regardless of whether these motions were necessary or not.

The Special Master also finds that certain other time entries are not sufficiently related to the resolution of the motions to compel and for sanctions, or are duplicative of other time which the Special Master has already determined to be reasonable.

Lastly, in view of the need to apportion in this case, the Special Master eliminated and/or reduced certain time entries out of respect for the fact that the Defendants did prevail on a limited number of issues.

The Special Master has carefully considered these issues, and hereby recommends that the Court award to Plaintiffs \$10,767.50 in attorney's fees as sanctions against Exoto (but not against Mr. Mohajerian).⁸

Furthermore, the Special Master recommends that Exoto be taxed with 65% of the Special Master's fees and expenses associated with this appointment, pursuant to Rule 37, Rule 53 and this Court's inherent power. As of February 29, 2011, the Special Master's time and expenses in this matter total to \$18,978.58. Of this, the Plaintiffs have paid \$3,471.76. Exoto has paid \$0 to date. Consistent with the foregoing, the Special Master recommends that Plaintiffs be ordered to pay the Special Master an additional \$3,170.74 within thirty days, and that Defendant Exoto be ordered to pay the Special Master \$12,336.07 within thirty days. These

⁸ The Special Master is persuaded by Exhibit 4, the Declaration of Tony Kuesseyan, par. 9, that Mr. Mohajerian did not instruct Exoto to behave in an intentionally obstructive manner in discovery.

payments, if ordered, will enforce the allocation of costs as determined by the Special Master herein. Furthermore, the Special Master recommends that Exoto be assessed with responsibility for 65% of the Special Master's fees and expenses going forward.

D. Report on Status of Discovery

The Special Master hosted a status conference on March 27, 2012, after Exoto's additional discovery production pursuant to this Court's order granting (in part) Plaintiffs' motions to compel. In view of the representations and general consensus of the parties during the conference, the parties have agreed to put together an agreed-upon schedule for remaining discovery, including experts, to be submitted to the Special Master by no later than April 13, 2012. If there are disputes relating to the schedule, the Special Master will hear those disputes on April 13, and propose resolution to the Court promptly thereafter. Therefore, the Special Master further recommends that the Court provide the Special Master up to and including April 16, 2012 to provide the Court a recommendation regarding the schedule to the close of discovery in this matter.

E. Conclusion and Recommendations

In sum, the Special Master recommends that the Court order Exoto within thirty (30) days:

- (1) to pay Plaintiffs the sum of \$10,767.50; and

(2) to pay the Special Master \$12,336.07.

The Special Master also recommends that the Court order Plaintiffs within thirty (30) days to pay the Special Master \$3,170.74.

Lastly, the Special Master recommends that Exoto be assessed with responsibility for 65% of the Special Master's fees and expenses going forward.

This 30th day of March, 2012.

/s/Steven G. Hill
Steven G. Hill
Special Master