IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

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UNIEK, INC.,

Plaintiff,

ORDER

v.

06-C-311-C

DOLLAR GENERAL CORPORATION,

Defendant.

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As I observed to the attorneys in this case during a recent telephonic status conference, if this court had its own lunar calendar, we would be in the year of the dysfunctional civil lawsuit. This court expects some bickering in some cases, but the amount and intensity of the bickering has undergone a noticeable upsurge in the past twelve months, with this case at the head of the pack. Before the court is an accumulated set of discovery disputes that have been presented to the court with ire and umbrage. For the reasons stated below, I am denying all pending discovery-related motions to the extent I have authority to do so and I am shifting costs onto Uniek for its motion for sanctions.[1]

**Docket 39: Dollar General's Motion To Compel**

Way back on December 20, 2006, defendant (DG) moved to compel more thorough interrogatory responses from plaintiff (Uniek). DG asked for more complete answers to Ints.

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[1] I cannot rule on Uniek's request for judgment against DG and dismissal of DG's counterclaims as sanctions for alleged discovery abuse, *see* dkt. 50. I will pass the file to the district judge for her review of these requests for relief based on the documents already filed.

3-15 (except No. 6); Ints. 8-15 are contention interrogatories.[2] This motion prompted a motion for protection from Uniek. *See* dkts 39-41, 4-49 and 53. Other motions followed; on February 26, 2007, this court held a telephonic status conference to begin clearing out the underbrush. Two days later, on February 28, Uniek unexpectedly (at least to the court) provided DG with amended interrogatory responses, asserting in a cover letter to the court that the amended responses "should rectify most of [DG's] discovery concerns." *See* dkt. 97. Uniek continues to seek protection for customer information it deems irrelevant to this lawsuit.

I had hoped finally to put the various discovery disputes to rest without causing additional work for the already-overworked parties, but there is no way for the court to determine whether DG's concerns have been rectified without hearing DG's side of the story. Uniek's February 28 amended responses provide additional specific information in response to each of these interrogatories, including citations to specific documents and identification of additional witnesses.[3]

On March 1, this court contacted DG's attorneys to inquire whether they wished to respond to Uniek's amended interrogatory responses; they responded that they did. To neaten up the process, I am denying the pending motion to compel without prejudice. The parties

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[2] At the time DG filed its motion, it was too early in discovery for the court to compel final answers to broad contention interrogatories of the sort propounded on Uniek. Had the court ruled on the motion then, almost certainly I would have denied it without prejudice as premature. This observation is substantively irrelevant at this juncture, but it influences the court's decision not to shift costs on this motion.

[3] Interestingly, Uniek provides new information to DG in response to contention Int. 10 regarding Uniek's § 100.18 claim, which this court tossed out a week earlier in its February 21, 2007 ruling on DG's motion for partial summary judgment. I surmise that Uniek had been working on this document for some time but then hurried to serve it without a careful edit, perhaps to beat issuance of this order.

promptly should contact the court to schedule a telephonic motion hearing at which DG may specify which part(s) of Uniek's amended responses it deems insufficient. Uniek may respond and the court will rule orally. Both sides may rely on their previously-submitted documents in presenting their positions to the court. In the interests of efficiency, before the hearing DG must advise Uniek what DG's remaining objections are.

**Docket 47: Uniek's Cross-Motion for Protection**

This segues to Uniek's cross-motion for a protective order, which it briefed along with its response to DG's motion to compel. Uniek starts by reporting that it supplemented its responses prior to DG filing its motion, accuses DG of misrepresenting the scope of Uniek's compliance with its discovery obligations, then claims that DG timed its disclosures and motion to . Perhaps predictably, DG disagrees with each of these claims. Without intending to sound unsympathetic, given that Uniek now has provided its "final" answers to DG's contention interrogatories, we are past the phase of who provided what when, at least with regard to the motions to compel/for protection; frankly, even at the time these motions were filed this court was not overly concerned about the apportionment of discovery burden and costs of the magnitude proffered here in a multimillion dollar lawsuit between two large corporations both with high-powered representation. This court rarely is inclined to shift discovery costs in cases of this nature, nor is it likely to order a producing party to cull thousands of documents for the benefit of a requesting party that just as easily can perform its own Rule 33(d) search.

This leaves Part III of Uniek's motion, defending its decision not to provide any more information about its picture frame customers from 2004 forward. *See* dkt. 48 at 8-10. Uniek proffers that it has disclosed to DG customer information relevant to its efforts to mitigate damages, but that it will not disclose its remaining customers, claiming that it sees no possible relevance to this information.

DG responds that evidence establishing how Uniek interacted with its other customers is directly relevant to Uniek's promissory estoppel claim. Uniek claims that it manufactured millions of dollars of picture frames in reasonable reliance on e-mails from DG that Uniek deems to be promises to purchase. Uniek will have to establish the reasonableness of its belief that these communications were a sufficient basis to move forward; DG contends that the requested evidence will establish the contrary: that with its other customers, Uniek required and received purchase orders, security, *etc.,* before starting massive production runs.

DG is correct. Regardless whether Uniek handles all its business with a handshake or with a ten-page purchase order, evidence demonstrating how Uniek interacted with its other customers provides a useful context for the jury to decide how reasonable it was for Uniek to do what it did in response to its communications with DG. Indeed, if Uniek wished to offer this evidence to *support* its claim of promissory estoppel, it could do so; the converse also is true: DG is entitled to discover this evidence to determine whether it undermines Uniek's claim. Obviously, the trial judge will make the final decision on the admissibility of this evidence at trial.

Uniek's concern about the confidentiality of its information is well-taken as an initial matter, but we have a protective order in place that prevents the improper use of this information prior to trial. Of course, if this evidence is admitted at trial, then all bets are off, but that is true for all the discovery exchanged by both sides pursuant to the protective order.

The bottom line is that so long as Uniek is claiming promissory estoppel as a ground for relief, it not entitled to protect the requested information from discovery by DG. I am denying Uniek's motion for protection.

**Docket 50: Uniek's Motion for Sanctions**

*"Folly and ignorance be thine in great revenue"*

The History of Troilus and Cressida, 2.3.25-27

On December 29, 2006, Uniek filed a motion for sanctions based on its claims that DG lied to the court and Uniek during a December 1, 2006 telephonic motion hearing, then engaged in a malicious series of document dumps over the holidays with the intent to thwart Uniek's ability to file a timely summary judgment motion, to respond properly to DG's summary judgment motion, and to prepare its experts. DG takes indignant exception to Uniek's characterization of what occurred, claiming that it did not mislead the court, its post-hearing document productions complied with the court's orders, it did not vexatiously time its document disclosures, and in any event, Uniek has not been prejudiced and Uniek has engaged in large, late document dumps that dwarf DG's conduct.

Perhaps not surprisingly, there is even a dispute within the dispute, with DG attempting to file an unbidden surreply to which Uniek, naturally, objects. Normally, the court will not consider an unrequested brief, but here I have chosen to do so because Uniek's interpretation of what this court ordered is so skewed that DG's surreply and accompanying documents are a necessary reality check.

As noted at the outset, this is a multimillion dollar business dispute between two large companies represented by sophisticated law firms. As usually is the case in litigation of this nature, there are thousands of documents to exchange and digest. As often is the case, both sides produced their documents in fits and starts, honoring in the breach the 30 day disclosure deadline. As occasionally is the case, suspicion, anger and accusations quickly saturated the discovery process and discovery motions followed.

The first set of discovery disputes caused me to convene a telephonic motion hearing on December 1, 2006 that lasted about an hour. During the hearing both sides explained their version of events and made representations to the court about what had happened and what was going to happen with discovery. The discussion ranged from very general to very specific, with the court attempting to provide guidance to the parties so as to complete the exchange of information and to allow the case to move forward.

One part of this conversation involved Uniek's interrogatories 3 through 7, which DG contended sought information that could be better adduced at depositions. Hearing Transcript, dkt. 61, at 25-34. My questions to DG's lawyer were intended to assure that before Uniek noticed up these witnesses for depositions, Uniek had received all available foundational

information about the salient set of meetings and conversations. That was the limit of my question to DG's lawyer and his response:

> THE COURT: Okay. So you're not withholding any information here that would give Uniek a better sense as to what happened, when it happened, who was there and what they said?
>
> MR. MORGAN: That's absolutely correct. We've produced everything we have.

*Id.* at 31.

In the end, I told Uniek's attorney that so long as DG discovered and provided the existing foundational information about these meetings and conversations, DG had met its discovery obligations on this point, and it would be up to Uniek to depose the participants in order to ascertain more specifically what actually was said and done. *Id.* at 33. I also warned DG to be diligent in uncovering this foundational information so as to prevent sandbagging later. *Id.* at 34-35.

This was the court's understanding of the limits of this exchange, and apparently it was DG's. Uniek, however, suggests that I was asking a broader question and that DG was providing a broader response. This suggestion completely misapprehends what happened. So, unless DG withheld foundational information regarding the meetings and conversations that were the subjects of Uniek's interrogatories 3 through 7, then DG did not mislead the court or Uniek on this point.

Also discussed at the hearing was whether Uniek was entitled to see the personnel files of four former DG employees who had been Uniek's contacts with DG. *Id*. at 20-23. I directed

DG to disclose the employee files to Uniek under "Attorneys' Eyes Only" (AEO), but allowed it to withhold irrelevant personal documents such as medical records and the like. *Id*. at 20. Referring explicitly to these four personnel files, I directed DG

> I want that information turned over on an AEO basis. Any documents it withheld I want submitted ex parte to the court so that I can double-check and make sure that there hasn't been a document withheld that should have gone over.

*Id.* at 23.

These were the only documents I wanted to review ex parte and the only documents that I directed DG to present to the court for ex parte review. To the extent that Uniek contends otherwise, Uniek misunderstands what actually happened.

Another topic of the hearing was whether and how the parties would have to exchange commercially sensitive documents and other information about their vendors. The court ordered that both sides would have to exchange this information under AEO protection. *Id.* at 17-19. Clearly these disclosures were going to occur in the future. Later in the hearing, Uniek expressed its concern that upon review of these subsequently disclosed AEO documents, Uniek might ask again for deadline extensions that the court had denied earlier in the hearing. While standing on its original ruling, *id*. at 3-4, the court said that it would "never say never" to a deadline extension. The court repeated its view, however, that it was not going to grant deadline extensions based on existing disputes about vendor information and the scope of AEO protection that could have been brought to the court's attention earlier but was not. *Id.* at 38-42.

Compared to what DG's lawyer represented at the December telephonic hearing and what I actually ordered, Uniek's motion for sanctions and brief in support materially misrepresent what occurred. I cannot fathom how Uniek could offer this interpretation in good faith. The only possible toehold for sanctions proffered by Uniek is its claim in its reply brief that after the telephonic hearing DG provided additional documents responsive to Interrogatories 4-7. DG, however, in the surreply that I have accepted and considered, explains these away. Even if these documents were responsive, they are virtually inconsequential, given the limited utility that these documents had in the scheme of things: my point at the hearing was that the anticipated *depositions* were the key, but that DG should be sure to provide all available foundational documents first, so that Uniek could depose the right people and have the necessary background information at their disposal so as to focus their questioning efficiently. Uniek has not claimed that it was unable to do this; rather, it appears to be indulging in a game of "gotcha" that has not impressed the court.

DG did not disobey any court order or directive. DG did not mislead the court. To the extent that documents got dumped in large quantities after the hearing, this was not and is not the court's concern and in any event, it appears that both sides engaged in this conduct. Uniek completely misinterpreted what happened, misrepresented it to the court and wasted everybody's time as a result. To the extent of my authority to do so, I am denying Uniek's motions for sanctions.

ORDER

For the reasons and in the manner stated above, it is ORDERED that:

(1) Dollar General's motion to compel (dkt. 39) is DENIED without prejudice.

(2) Uniek's motion for a protective order (dkt. 47) is DENIED.

(3) Uniek's motion for sanctions (dkt. 50) is denied in all parts susceptible to resolution under 28 U.S.C. § 636(b)(1)(A); the district judge will rule on Uniek's request for judgment in its favor and for dismissal of Dollar General's counterclaims.

(4) Each side will bear its own costs on the motions to compel and for protection.

(5) Pursuant to rule 37(a)(4)(B), Uniek shall pay Dollar General's reasonable costs in opposing the motion for sanctions. Dollar General may have until March 7, 2007 within which to file and serve its itemized expenses. Uniek may have until March 12 within which to object to the reasonableness of the amount requested.

Entered this 2nd day of March, 2007.

BY THE COURT:
/s/
STEPHEN L. CROCKER
Magistrate Judge