

eData lawflash

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High Noon for Discovery Cooperation

“New Sheriff in Town” Judge Facciola orders plaintiffs to show cause why they should not be sanctioned for frivolous discovery motions and orders party cooperation.

As the party with greater resources, a corporation engaged in a “David vs. Goliath” discovery dispute often receives little sympathy or relief. However, in *Tadayon v. Greyhound Lines, Inc.*,¹ eDiscovery “superstar” Magistrate Judge John M. Facciola of the U.S. District Court for the District of Columbia found that the corporate defendant’s efforts did not demonstrate a bad-faith effort to delay resolution. In his decision, Judge Facciola not only denied the two individual plaintiffs’ multiple discovery motions but also ordered them to show cause why they should not be sanctioned for filing a frivolous motion. He then laid out a plan for cooperation in devising a discovery plan and resolving future disputes.

Background

Discovery in this wireless technology patent infringement matter was referred to Judge Facciola. Proceeding pro se,² the two individual plaintiffs moved to compel further discovery responses to determine a privilege claim, and for sanctions, while defendant Greyhound sought a protective order and interrogatory answers.

Greyhound had initially failed to respond fully to the plaintiffs’ discovery requests by the agreed-upon date and sought a stay after discovery was due. The trial court ordered Greyhound to comply with its discovery obligations. In addition, defendant’s initial paper-format production was later replaced by electronic format production. However, since the court order was issued, Greyhound had promptly produced more than 45,000 pages of responsive documents and had continued to amend its responses.

Judge Facciola’s Findings

Judge Facciola briefly disposed of several requests. Because the plaintiffs already had access to electronic versions of Greyhound’s production, Judge Facciola found that any coercive relief was now moot. Noting that the parties were ready to enter the next phase of discovery where, under Federal Rule of Civil Procedure (FRCP) 30(b)(6), any deficiencies may be addressed through depositions, Judge Facciola denied both parties’ motions to compel supplemental interrogatory responses. Regarding the plaintiffs’ assertion that Greyhound’s “hurried negligence” caused privilege to be waived over certain produced records that Greyhound sought to claw back, Judge Facciola noted that parties’ FRCP Rule 26(b)(5)(B) claw back agreement contained no such condition and found that Greyhound could indeed claw back the records, regardless of whether or not the production was negligent.

Both parties then moved for sanctions. The plaintiffs alleged that Greyhound’s “delay tactics,” as supported by the conclusions in the trial court order, demonstrated bad-faith behavior meriting an award of attorney’s fees pursuant

1. *Tadayon v. Greyhound Lines, Inc.*, No. 10-1326 (ABJ/JMF), 2012 U.S. Dist. Lexis 78288 (D.D.C. June 6, 2012), available at http://www.gpo.gov/fdsys/pkg/USCOURTS-dcd-1_10-cv-01326/pdf/USCOURTS-dcd-1_10-cv-01326-0.pdf.

2. Although appearing pro se, the plaintiffs in their filings indicate that they have legal training: both indicate in their signature blocks on the complaint that they have J.D. degrees. One is licensed to practice in the District of Columbia; the other, a former U.S. Patent and Trademark Office examiner, appears to have prosecuted the patent-in-suit. The plaintiffs have asserted the patent against several other transportation companies in other litigations.

to FRCP Rule 37(b)(2)(C) for disobedience to the court and under the court's inherent authority.

Judge Facciola disagreed, finding that the trial court's order, which stated that Greyhound had failed to comply with its discovery obligations, referred to the mandates of FRCP Rule 26 and not to a failure to comply with a court order. Furthermore, even if Greyhound had violated a court order, or if the plaintiffs had instead sought reimbursement under FRCP Rule 37(a)(5)(A) of expenses incurred in connection with a discovery motion, attorney's fees are not available to a party appearing pro se. Judge Facciola also declined to exercise the court's inherent discretion to award sanctions, finding that the record did not reflect a bad-faith attempt to delay resolution of the case. This was especially true where fact discovery was open for another five months and any delay that might have occurred caused no prejudice to the plaintiffs.

Turning to Greyhound's motion for sanctions under FRCP Rule 37, Judge Facciola found that it had merit. Greyhound argued the plaintiffs' motion was "riddled with frivolous arguments and discussions of issues long resolved"; further, the plaintiffs had not complied with their meet-and-confer obligations. Under FRCP Rule 37(a)(5)(B), where a motion is denied, a court may order the moving party to pay the opposing party's expenses, including attorney's fees, unless the motion was "substantially justified." Using a chart, Judge Facciola tracked the course of events leading up to the plaintiffs' motion and found that it was "clear" that the motion was not substantially justified. Consequently, he ordered the plaintiffs to show cause why they should not be sanctioned with an award of attorney's fees against them for filing their 45-page motion with thousands of pages of exhibits.

In a final section titled "High Noon," Judge Facciola, referring to himself as the "new sheriff in town," provided a roadmap for the discovery process. Without surrendering their rights, the parties are required to "make genuine efforts to engage in the cooperative discovery regimen contemplated by The Sedona Conference Cooperation Proclamation." This includes the following:

- In-person meet-and-confer exchanges in a genuine, good-faith effort to plan the rest of discovery
- Discussions and attempted agreement upon:
 - The format of any additional productions
 - The timing and staging of all depositions
 - The submission to each other of discovery reports
 - The scope and timing of any FRCP Rule 30(b)(6) depositions
- Joint submission of their discovery plan to Judge Facciola for approval
- Judge Facciola working with the parties in resolving any disagreements arising initially or during the discovery process
- Biweekly teleconferences with Judge Facciola to discuss the parties' progress or lack thereof, trying to resolve any potential disagreements

Implications

As this case shows, corporations engaged in unequal discovery battles may win the court over by being prepared to illustrate their good-faith efforts to comply with discovery obligations and willingness to move the case along. Decisions from courts across the country make it clear that judges will not tolerate grandstanding in discovery disputes. Being cooperative and acting in good faith positions a party to resist when the other side makes unreasonable demands without coming to the table.

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