UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-23358-civ-MOORE/SIMONTON

MARISSA FEIG,

Plaintiff,

vs.

THE APPLE ORGANIZATION INC.,

Defendant.
_____/

DEFENDANT THE APPLE ORGANIZATION INC.'S RESPONSE TO PLAINTIFF'S MOTION TO COMPEL MORE COMPLETE DISCOVERY RESPONSES AND DOCUMENTS AND SUPPORTING MEMORANDUM OF LAW

Defendant, THE APPLE ORGANIZATION INC.'S (hereinafter, "Apple"), by and through the undersigned counsel, files this Response to Plaintiff, Marissa Feig's ("Feig"), Motion to Compel More Complete Discovery Responses and Documents and Supporting Memorandum of Law, and in support thereof, states as follows.

INTRODUCTION

1. On January 9, 2009, Plaintiff propounded her first Request for Production on Defendant, Apple.

2. On March 2, 2009, Defendant served its written responses to Plaintiff's first Request for Production.

3. On March 2, 2009, Defendant sent correspondence to Counsel for Plaintiff's regarding the confidentiality of the documents relative to this matter, as well as a proposed confidentiality order.

4. On March 26, 2009, Counsel for Plaintiff sent correspondence to Counsel for Defendant enclosing the executed Stipulated Protective Order on Confidentiality, same being filed and Ordered on April 1, 2009. (D.E. 14, 15).

5. On or about March 26, 2009, Defendant served the documents responsive to Plaintiff's First Request for Production.

6. On April 21, 2009 at 8:25 p.m., Plaintiff's Counsel sent correspondence to Counsel for Defendant in good faith setting forth the alleged deficiencies in the production.

7. On May 1, 2009, Defendant provided a response to the April 21, 2009 correspondence and has subsequently supplemented certain responses. However, Defendant has renewed and maintained its objections to Plaintiff's Requests 39, 49 and 50.

MEMORANDUM OF LAW

A. Plaintiff's Requests for Production

In Plaintiff's Requests numbers 39, 49 and 50 Plaintiff seeks and Defendant responded:

> 39. All documents relating to any meetings, discussions, encounters, and/or conversations whether public or private, that Defendant or any agents or employees of the Defendant had with Plaintiff for the last three years.
>
> **RESPONSE: Defendant objects to this request as overbroad and unduly burdensome.**
>
> 49. All documents relating to Defendant's[1] communications, including correspondence, emails, faxes, etc. to and from the Plaintiff.
>
> **RESPONSE: Defendant objects to this request as overbroad in time and scope and unduly burdensome.**
>
> 50. All documents relating to Defendant's communications, including correspondence, emails, faxes, etc. regarding the Plaintiff.

[1] Of note, the requests ask for "All documents relating to *Defendant's* communications." However, because Defendant is a company, this request is also vague in that it is not clear as to whose communications are in fact being requested, in essence making it even more overbroad and unduly burdensome.

RESPONSE: Defendant objects to this request as overbroad in time and scope, unduly burdensome, and to the extent that this Request seeks disclosure of information protected under the attorney/client and work product privileges.

Defendant maintains that its objections to these requests are self explanatory. Plaintiff's request seeks an extremely broad and voluminous amount of documents not specifically directed at any one claim or allegation in this matter. Plaintiff's overly broad and overly inclusive requests seek any and all documents which may or may not be fruitful to her claim. *See e.g.*, *Porter v. Ray*, 461 F.3d 1345, 1324 (11th Cir. 2006). As to requests No. 49 and 50, these requests seek "all documents" that are "to and from Plaintiff" and "regarding Plaintiff." And, request No. 39 seeks all documents relating to every meeting, discussion *and encounter* that the Plaintiff had with any employee of Defendant. The Plaintiff worked for the Defendant back in 2001 and then again in 2007. Thus, to essentially request all documents to, from and regarding Plaintiff and all of the Plaintiff's encounters encompasses an enormous amount of documents, most of which will not even be relevant to this claim. This is the classic example of a fishing expedition. Thus, Plaintiff's requests are overbroad, and to provide responsive documents to same would be unduly burdensome on Defendant.

In *Sadofsky v. Fiesta Products, LLC*, plaintiff sought the production of "all correspondence, faxes, emails or other documents between Fiesta, Dua, Bloom and any distributors, licensees, wholesalers or retailers concerning the silicone rolling pins." The defendant objected that the requests were "vague, ambiguous, overbroad and unduly burdensome." *Sadofsky v. Fiesta Products, LLC*, 252 F.R.D 143, 152 (E.D.N.Y. 2008). Defendant stated in its opposition to the motion to compel that "it is a small company with one employee, and that it has 'received thousands of emails and written correspondence… over that last four years.'" *Id*. In denying plaintiff's motion to compel the court held that "while the

documents requested ***may*** reveal information" relevant to plaintiff's claim, "the production of such information would cause an undue burden or expense to" defendants. *Id* (emphasis added).

In this matter Apple had approximately twenty-seven (27) employees who worked at the same time as the Plaintiff, rather than just one employee. Plaintiff's request No. 50 seeks "all documents," including emails, "regarding the Plaintiff." To even begin to respond to this request would impose the undue burden of requiring Defendant to search through 27 employees' emails for over a year period, as well as "all [other] documents" that may reference the Plaintiff. Such a request is patently overbroad and the motion to compel for this request should be denied.

It is also important to note that in March 2009, Apple closed it doors, and no longer operates its business. Regarding any potentially responsive e-mails to this request, Defendant's email back-up, which contains the email accounts of the approximately twenty-seven (27) employees who overlapped employment with the Plaintiff, is over eighteen (18) gigabytes. By information and belief, eighteen (18) gigabytes equates to nine (9) million pages of documents, wherein every one (1) gigabyte equates to five-hundred thousand (500,000) pages. Certainly, to review over 9 million pages of emails is overbroad and unduly burdensome. And, these documents would certainly primarily contain information on a variety of subject matters, most of which have nothing to do with the Plaintiff, including but not limited to information which is not relevant, confidential and proprietary to Apple. Further, the request is not even limited to just emails, but "all documents," and as such, the request could certainly encompass even more.

Moreover, in Plaintiff's Motion to Compel, Plaintiff's misrepresents the testimony of Joe Powell, in that he is not in possession of software capable of filtering out certain emails, as Plaintiff contends. Mr. Powell's testimony states that he has a program to filter out spam email, and software to track instant messages. *See* Deposition of Joe Powell as Corporate

Representative at 78, 84 and 97 attached hereto as Exhibit "A." Further, because the e-mail accounts of the former employees of Apple are no longer active, to obtain the e-mails would require all eighteen (18) gigabytes from the back-up to be imported into one common computer, which would then need to be converted into a readable format, and which we are advised would cause a substantial expense . Thus, pursuant to Local Rule 26.6 Defendant should not be required to produce the requested electronically stored documents.

B. Defendant Reserves the Right to Shift Costs

To the extent this Court requires Defendant to incur costs involved in producing the underlying documents set forth in Plaintiff's Motion to Compel, Defendant reserves the right to shift those costs upon Plaintiff. Under appropriate circumstances, a district court may require a defendant's cooperation in responding to discovery requests. *Oppenheimer*, 437 U.S. at 355; *R.D. Mortimer v. Baca*, 2005 WL 3497817 at *2 (C.D.Cal. 2005). Specifically, if the defendant is able to perform the task with less difficulty or expense than could the plaintiff, the court may exercise its discretion under Federal Rule of Civil Procedure 23(d) to order the defendant to perform the task in question. *Oppenheimer*, 437 U.S. at 356; *R.D. Mortimer*, 2005 WL 3497817 at *2. In such cases, the United States Supreme Court has already opined that the district courts should be ready to place the cost of the defendant's performing the ordered task on the plaintiff, who derives the benefit. *Oppenheimer*, 437 U.S. at 358.

The test for determining which party should bear the costs of the task is whether the expense is substantial, not whether it is "undue," as under Federal Rule of Civil Procedure 26(c). *Id.* at 359. If the expense is extremely insubstantial, or if the task ordered is one that the defendant must perform in any event in the ordinary course of its business, it may be appropriate to leave the cost on the defendant. *Oppenheimer*, 437 U.S. at 359; *R.D. Mortimer*, 2005 WL

3497817 at *2. Here, should the Court require Defendant to produce any of the above mentioned documents, the costs associated with same should be shifted to Plaintiff.

CONCLUSION

For the foregoing reasons, Defendant, The Apple Organization, respectfully requests this Court to deny Plaintiff, Marissa Feig's Motion to Compel More Complete Discovery Responses and Documents and Supporting Memorandum of Law.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was filed with the Clerk of the Court using the CM/ECF system, which will in turn, send a notice of electronic filing to: Shawn Birken, Esq., Rothstein Rosenfeldt Adler, Las Olas City Centre, Suite 1650, 401 East Las Olas Boulevard, Fort Lauderdale, Florida 33301, this 28th day of May 2009.

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