UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-62216-CIV-MARRA/MATTHEWMAN

LIVING COLOR ENTERPRISES, INC., a Florida corporation,

Plaintiff,

vs.

NEW ERA AQUACULTURE, LTD., a United Kingdom Private limited company; AQUA-TECH CO., an Illinois corporation; JOHN T. O'ROURKE, an individual; DANIEL LEYDEN, an individual; and WORLD FEEDS, LTD, a United Kingdom Private limited company,

Defendants.
_____/

PLAINTIFF'S MOTION FOR SANCTIONS AGAINST DEFENDANT, DANIEL LEYDEN

Plaintiff, LIVING COLOR ENTERPRISES, INC., ("Living Color"), by and through its undersigned counsel, and pursuant to Federal Rule of Civil Procedure 37(b), hereby moves for sanctions against Defendant DANIEL LEYDEN ("Leyden") for spoliation of evidence and in support thereof states as follows:

Sanctions are warranted for Leyden's knowing destruction of evidence. On January 28, 2016, this Court conducted a hearing on Plaintiff's Motion to Compel Leyden to Respond to Plaintiff's Second Request for Production of Documents to Leyden [D.E. 190]. Thereafter, the Court entered its Omnibus Order on Discovery Motions [D.E. 191] (hereinafter, the "Order") granting Plaintiff's Motion to Compel and requiring Leyden to file an affidavit with the Court regarding, among other things, the whereabouts of specific communications, including text

messages, exchanged between Leyden and Mark Vera of AQUA-TECH CO., ("Aqua-Tech"), Peter Kersh, Tom Noble, and JOHN T. O'ROURKE ("JT").

The Order required Leyden, under oath, to state whether he possesses additional emails or text messages between himself and Mark Vera, himself and Peter Kersh and/or between himself and Tom Noble from the time period of January 1, 2013 to the present. If Leyden did not possess any additional emails or text messages, he was required to explain why he does not possess them **and** what efforts he undertook in order to recover any such emails or text messages. On February 3, 2016, Leyden filed his Affidavit [D.E. 194].

Even though he had an obligation to preserve, in his Affidavit, Leyden explains that he destroyed any text messages he may have had between himself and Mark Vera, Peter Kersh, and/or Tom Noble [D.E. 194 at ¶ 10, 14, 15]. While the Affidavit indicates Leyden was able to recover text messages between himself and Mark Vera from January 16, 2016 to the present, he was not able to recover any other text messages other than the exchange from November 10, 2015, which was the date of Leyden's deposition and the messages he exchanged with Aqua-Tech during the course of that legal proceeding. Leyden attempts to explain his failure to retain evidence due to having to replace his cellular phone in September 2014 and again in late July 2015 [D.E. 194 at ¶ 14]. However, the alleged phone replacements are a red herring insofar as Leyden admits that he does "not archive or otherwise save the text messages on [his] phones" [D.E. 194 at ¶ 14] and "[i]t is his usual practice to periodically remove text message exchanges from [his] phone" [D.E. 194 at ¶ 15]. Accordingly, even had Leyden's phones not been replaced, as evidenced by his complete failure to produce any text messages since the last replacement over six months ago, Leyden would not have any documents to produce since it is his policy to routinely destroy such evidence.

It is clear that Leyden's main form of communication is text messaging. During the course of discovery in this matter, Leyden has only produced approximately 16 pages of emails. Yet, in response to the Order, which also required Aqua-Tech to produce text messages between Aqua-Tech and Leyden from January 2013 to the present, Aqua-Tech produced 114 pages of text messages.[1] For whatever reason, Leyden chose to delete these messages and likely others he exchanged with the other defendants in this case and third parties, notwithstanding his obligation to preserve them.

Further, the Affidavit specifies that Leyden uses the personal e-mail account of djleyden@me.com and performed searches on said account [D.E. 194 at ¶ 4]. However, as part of Aqua-Tech's production of text messages, it has been discovered that Leyden also maintains an e-mail address account at djleyden@mac.com. A true and correct copy of an email received by Leyden at the latter account is attached hereto as **Exhibit "1"**. The Affidavit makes no mention of the latter email address, much less whether any searches were performed on same.

Spoliation sanctions require that the party seeking same prove: (1) that the missing evidence existed at one time; (2) that the alleged spoliator had a duty to preserve the evidence; and (3) that the evidence was crucial to the movant being able to prove its prima facie case or defense. See Managed Care Solutions, Inc., v. Essent Healthcare, Inc., 735 F. Supp. 2d 1317, 1322 (S.D. Fla. 2010) (hereinafter, "Managed Care Solutions"), citing Walter v. Carnival Corp., No. 09-20962-CIV, 2010 WL 2927962 at *2 (S.D. Fla. July 23, 2010). The law imposes a duty upon litigants to keep documents they know, or reasonably should know, are relevant to the

[1] Even this production by Aqua-Tech appears to be incomplete. As such, there may be more text messages that were exchanged between Aqua-Tech and Leyden that were not produced by Aqua-Tech, which may be the subject of a separate motion. The parties are currently in the process of conferring on these issues.

matter. See id. at 1322 (S.D. Fla. 2010). A party's failure to preserve evidence rises to the level of sanctionable spoliation only where the absence of that evidence is predicated on bad faith such as where a party purposely loses or destroys relevant evidence. See id. at 1322.

The Affidavit establishes the first element - that the missing evidence existed at one time, as Leyden admits to having exchanged text messages with Aqua-Tech, and Aqua-Tech produced some of these messages. With respect to the second element, Leyden, as a litigant in this matter, had an ongoing duty to preserve the text messages, especially those exchanged with co-defendant, Aqua-Tech, after this lawsuit was filed in 2014. As to the third element, Leyden's participation in the scheme outlined in the Second Amended Complaint [D.E. 118] is crucial to Plaintiff's claims against Leyden and the evidence would have established he was involved in the scheme to misappropriate Plaintiff's business and customers. Lastly, the Affidavit establishes that Leyden purposely destroyed the evidence by routinely deleting the messages from his phone. And, again, Leyden entirely fails to account for his djleyden@mac.com email address.

That Leyden's co-Defendant, Aqua-Tech has produced some of its own archived messages with Leyden is unavailing and does not cure Leyden's misconduct. First, Leyden does not confirm that the set of text messages produced by Aqua-Tech is complete, stating only that he "believe[s]" such to be the case. Second, the Aqua-Tech production does not and cannot account for text messages that Leyden may have exchanged with other witnesses, which have been destroyed. For example, as part of the Aqua-Tech production, Leyden forwards a screenshot of a text message conversation he had with someone named "Paul" stating that "Peter is no longer with Red Sea". A true and correct copy of said communication is attached hereto as **Exhibit "2"**. Living Color surmises that "Peter" might refer to Peter Kersh of New Era. However, Defendants have not identified any "Paul" as a witness to this case although it appears

that Leyden communicated with "Paul". Additionally, although the Affidavit attempts to downplay same, it does confirm that Leyden exchanged text messages with Tom Noble of New Era but no longer has those messages. Given that Leyden appears to primarily communicate via text message, his destruction of messages of this type is especially alarming.

Therefore, Plaintiff is entitled to spoliation sanctions against Leyden, including the striking of Leyden's pleadings, the entry of a default judgment against Leyden, or, alternatively, an instruction to the jury raising a negative inference that Leyden colluded with Defendants as set forth in the Second Amended Complaint.

WHEREFORE, Plaintiff, LIVING COLOR ENTERPRISES, INC., respectfully requests the entry of an Order: (1) striking Defendant, Leyden's pleadings and the entry of a default judgment in Plaintiff's favor due to Leyden's conduct in this case; (2) requiring an adverse inference instruction against Leyden; (3) an award of its reasonable attorneys' fees and costs caused by Leyden's failure to comply with the Court's Order; and (4) awarding such further and other relief as this Court deems just and proper.

CERTIFICATE OF GOOD FAITH CONFERENCE

Pursuant to Local Rule 7.1(a)(3)(A), I hereby certify that counsel for the Plaintiff has made a good faith attempt to confer with counsel for Defendant but that the issues raised in this Motion remain in dispute.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of February, 2016, the foregoing is being served this day upon all counsel of record or *pro se* parties identified in the following Service List in the manner specified.

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