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 REPLY IN SUPPORT OF 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 files its reply in support of its Motion for Sanctions [D.E. 200] against Defendant DANIEL LEYDEN ("Leyden") and states:

I. The Motion is not based on inaccurate presumptions.

a. Leyden's phone replacements are a red herring.

Leyden first attempts to argue that his phone replacements are not a red herring and suggest that the information was only included because the Court required the information to be in the Affidavit. As Leyden points out, there was confusion at the hearing regarding the true reason Leyden was unable to preserve this evidence as a result of inconsistent statements made by Leyden during the conferral process [D.E. 188-5]. Initially, Leyden admitted to deleting the messages but then rescinded that statement blaming phone malfunction and that "[t]ext messages were not deleted" [D.E. 188-5 at 2]. The Affidavit makes clear that messages *were* deleted and whether the phones were replaced was a bogus reason provided to Plaintiff and the Court for

Leyden's failure to preserve the evidence. In this respect, the issue is a red herring and was nothing more than a short-lived attempt to conceal the fact that Leyden has been deleting relevant documents throughout this litigation.

b. Leyden has no legal excuse for his failure to preserve relevant documents.

Leyden next attempts to downplay his destruction of evidence by pointing out that "[t]here is a standard feature on cellular phones that allows the user to manage storage space and operational efficiency by auto-deleting text messages after a selected time period." This point is not included in the Affidavit and is outside the record. In any event, the point remains the same that Leyden was required to preserve this evidence while this case is pending. What is especially alarming about this disclosure is that Leyden apparently was aware of this feature and did not turn it off even after his deposition on November 10, 2015 in which his text messages became an issue for the first time [D.E. 146] or after November 12, 2015, when a document request was served upon him expressly requesting copies of text messages [D.E. 162-1]. As pointed out by the Affidavit, Leyden's phone was last replaced in July 2015 but he was only able to recover text messages between January 16, 2016 and the present [D.E. 194 at ¶¶ 10, 14].[1] There is simply no legal excuse for Leyden's failure to maintain and/or backup his text messages whatsoever much less *after* they became a clear issue in this case.

c. Aqua Tech's production does not alleviate Leyden's destruction of relevant evidence.

Leyden attempts to skirt liability for spoliation by relying on Aqua Tech's production of text messages between itself and Leyden. The fallacy in this logic is that Aqua Tech only has possession of its communications with Leyden and not Leyden's communications with anyone else. Despite Leyden's rationalization of the exchange between "Peter" and "Paul" and his criticism of Living Color's inability to properly speculate on the identity of these persons, said exchange is relevant for two reasons. First, the communication was only discovered because it was forwarded to Aqua Tech which, alone, connotes its relevancy. Second, what Leyden conveniently fails to advise the Court is that Red Sea is (or was) Defendant, NEW ERA AQUACULTURE's partner in England (Cabage Depo. at 15:12-25, 16:1-2, a true and correct

[1] It should be noted that, to date, these messages have not yet been provided to Plaintiff.

copy of which is attached hereto as **Exhibit "1"**). Further, Aqua Tech itself contacted Red Sea during its due diligence review before entering into a distribution agreement with New Era (Aqua Tech Depo. at 69:2-20), a true and correct copy of which is attached hereto as **Exhibit "2"**). Accordingly, Leyden's point that this message or others like it are superfluous is not grounded on the facts of this case. Leyden has contacts throughout the industry and has made it virtually impossible to recover any communications with those contacts that may be relevant to Living Color's claims against Leyden.

d. <u>The attachment to the Response does not adequately explain Leyden's use of dual email addresses.</u>

Leyden asserts that Living Color made "another leap" in presuming that Leyden's email addresses at the @me.com and @mac.com domains are different email accounts. Again relying on facts outside the Affidavit and, thus, outside the record, Leyden states that the email addresses are the same email account and the search he performed of the @me.com account included a search of the @mac.com account. As support, Leyden attaches a printout from the Apple Computer website. The printout is admittedly unclear but does not seem to suggest that @me.com and @mac.com are aliases for each other. Rather, the second bullet states that @me.com and @icloud.com may be interchangeable but the third bullet simply states that users with an @mac.com domain may log in to their iCloud account with that email address. In any event, the printout does not state that it would not be possible to have *different* accounts at the separate domains. All of the foregoing could have been avoided had Leyden simply been forthright in his Affidavit about having multiple email addresses and/or aliases. As it stands, Leyden still has not sworn to performing any search with his account ending with @mac.com.

II. <u>Sanctions are warranted for Leyden's spoliation of evidence</u>

Leyden has taken extreme efforts to make Living Color believe he was a "pawn" in this case [D.E. 188-5] attempting to ensure that Living Color "ha[s] nothing" because he "just wan[ts] to win" [D.E. 176-2]. To this end, Leyden, per his usual practice and as admitted in his Affidavit, has destroyed every one of his text messages through January 16, 2016. Sanctions are warranted for Leyden's knowing destruction of evidence. In his Response, Leyden admits that he had a duty to but failed to preserve relevant evidence yet argues that sanctions should not be granted because Living Color cannot prove that the evidence would be crucial to the case, again suggesting that the evidence would be duplicative and cumulative to the evidence produced by

Aqua Tech. As pointed out above, even assuming arguendo that the text messages produced by Aqua Tech are complete, such production simply would not include Leyden's text messages to anyone else such as "Paul" about events at Red Sea, a partner of New Era UK. The present case concerns the Defendants' collusive efforts in misappropriating Living Color's trademark, employees, and customers—for all intents and purposes, its entire marine animal food business. The evidence supporting such claims is necessarily in the hands of Defendants, putting Living Color at their mercy. A defendant in a case such as this that actively and unapologetically destroys evidence necessarily hampers the plaintiff's ability to prove that certain defendant's culpability in the scheme.

In his response, Leyden wants this Court to take his word that he did not exchange text messages with any of the witnesses in this case except for Aqua Tech and Tom Noble. With respect to text messages exchanged with Tom Noble, a principal of New Era, Leyden does not understand why or how such messages "would be the crux of any of [Living Color's] claims". For his part, other than writing off same as attempts to "locate him", Leyden fails to explain why his communications with Tom Noble, a primary, but conveniently, unavailable witness for an insolvent defendant would *not* be crucial to Living Color's claims. Of course, as pointed out above, Leyden fails to appreciate the relevance of *any* messages he may have sent to any party or third parties about this case. By way of further example, at the hearing of Living Color's Motion to Compel, it was argued that the messages exchanged between Leyden and Aqua Tech were minimal and consisted mostly of holiday wishes. Yet, Aqua Tech thereafter produced 114 pages of text messages, the volume of which compared to Leyden's email production demonstrates that text messaging is Leyden's primary form of written communication, a point that Leyden does not dispute in his Response despite accusing Living Color of making other unfounded presumptions. This Court should not be required to rely on Leyden's superficial summary and analysis of the breadth and relevance of his text messages. The destroyed evidence consisting of Leyden's communications with Tom Noble and other third parties is crucial to proving Living Color's claims and negative inferences should be drawn for Leyden's failure to produce same.

Further, Leyden attempts to persuade this Court that the messages were not destroyed as a result of any bad faith on his part and that he was only negligent in failing to turn off the "auto-delete" feature on his cellular phone. It should be pointed out again that Leyden makes no mention of an "auto-delete" feature in his Affidavit. Rather, Leyden states: "It is **my** usual

practice to periodically remove text message exchanges from my phone to maintain the operational speed and efficiency of my phone" (emphasis added). Leyden cannot now attempt to discredit his own sworn statement by making it seem as though the messages were deleted as a result of some latent feature on his phone, which is exactly what he attempts to do to negate the second and fourth criteria for a finding of bad faith (Response at 8). Specifically, rather than relying on his own Affidavit, Leyden now informs the Court that he "neglected to deactivate or 'turn off' this feature when the lawsuit was served in October 2014" which "was not an affirmative act intended to destroy or lose evidence" (Response at 8). Not only is this at odds with the Affidavit, it is at odds with the procedural background and facts of this case.

As pointed out above, during his deposition, Leyden and Aqua Tech reveled in the fact that Living Color "ha[s] nothing" because Leyden "just wan[ts] to win" [D.E. 176-2]. Also, in one of the text messages, Leyden appears concerned that some of his emails may be on Living Color's server and hopes that none of what he knew about the deal "will stick on Aquatech or me" at which Aqua Tech attempts to refresh Leyden's memory about when they met [D.E. 200-2 at 2]. In his deposition, Leyden refused to acknowledge the veracity of his own testimony on whether Aqua Tech approached Leyden for a job or vice versa, ultimately testifying that he could not recall (Leyden Depo. at 159:1-25, 160:1-25, 161:1-25, 162:1-9, a true and correct copy of which is attached hereto as **Exhibit "3"**) Finally, Leyden's attempt to misdirect Living Color and this Court on the issue by pointing out the fact that his phone had been replaced resulting in a loss of data is further indicative of Leyden's bad faith. Simply, Leyden has a penchant for misleading Living Color and this Court about the facts of this case and the reasons why he is unable to produce relevant communications. That fact coupled with his text message exchanges with Aqua Tech in which the two attempt to reconcile their stories, leads to the inevitable conclusion that Leyden has been acting in bad faith. Sanctions are warranted on this record.

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.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th 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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