UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

SPIRAL DIRECT, INC. and SPIRAL DIRECT, LTD. Plaintiffs, v. BASIC SPORTS APPAREL, INC. Defendant.	Civ. Action No. 6:15-cv-0641-JA-TBS

PLAINTIFFS' SUR-REPLY
IN SUPPORT OF ITS OPPOSITION TO THE MOTION TO QUASH

Plaintiffs Spiral Direct, Inc. ("Spiral U.S.") and Spiral Direct LTD ("Spiral U.K.") (collectively, "Plaintiffs") submit this Sur-Reply in support of their Opposition to the Motion to Quash Subpoenas ("Motion")(Doc. 42) pursuant to this Court's Order directing Plaintiffs' counsel to file a Sur-Reply ("Sur-Reply Order")(Doc. 56) to the Reply of Simon Property Group, Inc. ("Simon") ("Reply")(Doc. 55).

The Court noted in its Sur-Reply Order that the "Reply makes serious allegations of wrongdoing by counsel for Plaintiffs." Indeed, the Reply asserts that, in addition to the impropriety of the subpoenas themselves, Plaintiffs' Opposition contains "half-truths" and a "long list of misstatements." (Reply, at p. 2 and p. 3, n. 8). Plaintiffs will address these accusations here.

Respectfully, however, Plaintiffs suggest that the Court is not required to delve into witness credibility issues in order to determine the issues before it on the Motion. Local Rule 3.01(g) requires a substantive discussion prior to the filing of motions such as Simon's for the very reasons that have manifested themselves here. The Court can conclude from the record

before it that the parties did not engage in a substantive discussion regarding the scope and limitations of the Simon Subpoenas during the course of a 3 minute conversation on May 26, 2016 that concerned Simon's request for an enlargement of time to respond to subpoenas from May 31, 2016 to June 21, 2016. The result is true regardless of whether the Court believes Plaintiffs' account of the May 26, 2016 call or Simon's account.

The May 26 call was plainly not a substantive discussion. Moreover, there were no discussions or communications whatsoever between Simon's counsel and Plaintiffs' counsel between May 26 and June 22, 2016. The substantive discussion required by the Local Rule 3.01(g) did not occur until *after* the Motion was filed. This is reason alone for the Court to deny the Motion.

I. THE SUBPOENAS WERE ISSUED IN GOOD FAITH

Plaintiffs incorporate by reference the argument made in the Opposition (Doc. 47) from pages 6-14 and 19-20 describing the efforts to get information from Defendant and the reasons why the original subpoenas complied with Rule 45. Plaintiffs also submit the Affidavit of David E. Cannella, which is attached hereto as Exhibit A.[1]

As set forth in the Cannella Affidavit, prior to the issuance of any subpoenas on any non-party mall owner or operator, Plaintiffs determined that Defendant was unable to provide leases from, the malls it identified in responses to written discovery.[2] Plaintiffs did not file a Motion to Compel against the Defendant because Defendant's counsel advised Plaintiffs' counsel that Defendant had produced all of the documents it had.[3] Defendants' inability to produce the leases or other relevant information regarding specific dates Defendant did business at the malls in

[1] Given the content of the Reply and directive of the Court in the Sur-Reply Order, Plaintiffs submit Mr. Cannella's Affidavit here to address points that Plaintiffs believe the Court wants addressed.
[2] Cannella Affidavit, at ¶ ¶ 4-5.
[3] Cannella Affidavit, at ¶ 5.

question was confirmed by the deposition testimony of the President of Defendant, who suggested that Plaintiffs could obtain the information from the malls themselves.[4] Overall, twelve malls were issued subpoenas.[5] Six of the malls identified were owned or operated by Simon.[6] On May 5, 2016, the subpoenas ("Simon Subpoenas") were issued to Simon.[7] The Simon subpoenas were served May 18, 2016.[8]

The basis for the Simon Subpoenas, and the framing of same, is set forth in great detail in both the Opposition[9] and the Cannella Affidavit.[10]

II. THERE WAS NO LOCAL RULE 3.01(G) CONFERRAL PRIOR TO THE FILING OF THE MOTION TO QUASH

Given the volume of paper already before the Court, Plaintiffs are cautious about re-plowing well-trodden ground. That said, at this point, the following points should be clear:

- There were no communications between Simon's counsel and Plaintiffs' counsel between May 26, 2016 and June 22, 2016.
- Simon's counsel did not call or otherwise contact Plaintiffs' counsel at any time to advise that Simon would file a Motion to Quash the Simon Subpoenas.
- Simon's Reply fails to set forth when Simon's counsel became aware of the burdens described in the June 21, 2016 Affidavit of Melissa Whybrew, but it is undisputed that there was no discussion of these issues raised in the Whybrew Affidavit during a 3 minute phone call that occurred on May 26, 2016, nor could there have been based on the many detailed facts set forth in the Whybrew Affidavit.

The Middle District Discovery Handbook provides:

> The term "confer" in Rule 3.01(g) ***means a substantive discussion.*** . . . Many potential discovery disputes are resolved (or the differences narrowed or clarified) when counsel confer in good

[4] Opposition, at p. 10.
[5] Cannella Affidavit, at ¶¶ 8-10.
[6] Opposition, at p. 11.
[7] Cannella Affidavit, at ¶ 13.
[8] *Id.*
[9] Opposition, at p .6-14, 19-20.
[10] Cannella Affidavit, at ¶¶ 4-12

> faith. Rule 3.01(g) is strictly enforced. A motion that does not comply with the rule may be summarily denied.
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> Middle District Discovery (2015) at 3. (emphasis added).

As such, Local Rule 3.01(g) either means what it is intended to mean—a substantive discussion must take place between counsel before the filing of a motion such as the Simon Motion —or it cannot fulfill its purpose of avoiding unnecessary motions and expense.

Even if the Court were to accept Simon counsel's version of the May 26 phone call, which Plaintiffs vigorously dispute, the conversation Simon described in its papers is not a substantive discussion and can, in no way, be construed as the type of discussion required by Local Rule 3.01(g). Simon would have this Court believe that a throwaway statement equivalent to "by the way, do you really need everything you ask for?" at the end of a three minute conversation is a substantive discussion.[11] To the contrary, a ***substantive discussion*** would include, at a minimum, the specific items requested, the construction of the request, the burden on a party to respond, whether that burden can be lessened by a specific modification or limitation of the request, and the need to file a motion with the Court.[12] When Simon and its counsel learned more about the purported burden of the Simon Subpoenas, which it plainly did *after* the morning of May 26 since Simon claims it was served the day before, May 25, then Local Rule 3.01(g) would require that Simon call again and have a substantive discussion. It did not.

[11] To be clear, the May 26 call consisted of: (i) Simon's counsel advising Plaintiffs' counsel that he had just been retained to respond to subpoenas with a May 31, 2016 response date; (ii) counsel discussing in general the purpose of the subpoenas and (iii) Simon's requests for enlargement of time to respond.

[12] Neither of Simon's counsel have asserted that Ms. Riola was told during the May 26 call Simon intended to file a motion to quash. This makes common sense if Simon's counsel was only hired on May 25, the day before the call, and plainly did not possess the information, including the detained information contained in the Whybrew Affidavit, to allow him to have a substantive call.

III. PLAINTIFFS' RESPONSE TO ACCUSATIONS OF "MISSTATEMENTS"

In its Reply, Simon claims that the Plaintiffs' Opposition both made misstatements and contained other arguments in bad faith. Plaintiffs dispute these charges and respond to the alleged wrongs as follows:

"Misstatement" Alleged in Reply	**Spiral's Actual Statement in Opposition**	**Conclusion**
(1) "Plaintiffs' claimed "agreement" is, in reality, their withdrawing of 99% of the Subpoenas and a concession that their drastically revised parameters will only result in a very limited production consisting of, at most, leases for Defendant, Basic Sports Apparel Inc. ("BSA"), and five or six related individuals and entities (the "BSA-Affiliated Parties") at the Malls for a two-year period as to most of the Malls." -Reply, at p. 2.	"Given the time and expense that Plaintiffs have incurred since Simon filed the Motion, Plaintiffs offered to withdraw the subpoenas entirely if Simon would withdraw the Motion and the demand for entitlement and payment for attorney's fees. Simon rejected this offer. This offer by Plaintiffs should not be viewed by the Court as a concession as to Plaintiffs' good faith in seeking discoverable information, but rather a good faith effort to resolve a protracted dispute that was not brought to Plaintiffs' attention until the June 21, 2016 filing of the Motion." -Opposition, at p. 15, n. 24. -See also the Opposition, from pages 6-14 and 19-20 describing the efforts to get information from Defendant and the reasons why the original subpoenas complied with Rule 45.	Plaintiffs have not conceded that the original subpoenas violated Rule 45. Plaintiffs agreed to limit the subpoenas by having Simon either show the BSA Affiliated Parties' presence in the subject Malls by either printing the leases from an existing database or printing a tenant directory from an existing database. Plaintiffs also agreed to withdraw the subpoenas entirely because the expenses incurred by the filing of this Motion have already exceeded the benefit of the information that Simon claims it can produce without a box-by-box search.
(2) "Plaintiffs do not even mention in their Opposition that the Subpoenas also contained a request for ***all documents "relating or pertaining" to each of the BSA-Affiliated Parties for a 21-year timeframe."*** -Reply, at p. 8 (emphasis in original)	"The general instructions to the subpoenas provided that the "Time Frame" was: "*Unless otherwise indicated*, these requests for production cover the time period from January 1, 1995 up to and including the date of your response thereto." (emphasis added). As set forth herein, the requests at issue "otherwise provided" specific dates for tenant identification that were narrowly tailored to the response dates provided by BSA with a short cushion	Plaintiffs addressed timeframe in the Opposition. The time frame for tenant directories or listings was never 21 years.

"Misstatement" Alleged in Reply	**Spiral's Actual Statement in Opposition**	**Conclusion**
	to accommodate the fact that BSA was uncertain about precise dates. If there were signed leases or correspondence with BSA Affiliated Parties outside of the dates otherwise provided, then the general instruction would apply." --Opposition, at p. 13, n. 16.	
(3) "Among the long list of misstatements told by Plaintiffs and their counsel is Ms. Riola's representation that if Mr. Blair had requested to limit the Subpoenas on the May 26 call she "would have advised him to speak with [Mr. Cannella], *who is responsible for handling the discovery in the underlying litigation . . .*" *See* Riola Declaration ¶ 7; which is attached as Ex. 1 to the Opposition. Notably, Ms. Riola signed Plaintiffs' First Requests for Production of Documents to BSA." -Reply at p. 3, n. 8.	The Subpoenas at issue were signed by David E. Cannella -Opposition, Exhibit B. -Motion to Quash, Exhibit A. See also, Opposition, Exhibit F, the post motion conferral which demonstrates that the post motion conferral about the scope of the subpoenas was handled by Mr. Cannella on behalf of the Plaintiffs.	Mr. Cannella handled the subpoenas of the non-party malls. The subpoenas were served on May 18, 2016, not May 25, 2016 as stated by Simon in its Motion to Quash, Reply and Affidavit of Brian Blair. Ms. Riola's Declaration that if there was discussion about limiting the scope, she would have referred Mr. Blair to discuss the matter with Mr. Cannella is consistent with the issuance of the subpoenas and the *post motion conferral* in this case.
(4) "Simon did not, and could not, agree to [produce tenant directories] and Plaintiffs' counsel knows it. Simon notified Plaintiffs' counsel via the Whybrew Affidavit and a June 29 email that it cannot simply print a list of tenants for a specific mall on a year-by-	The agreement is: "1. Production of unsigned short term and permanent tenant leases of BSA Affiliated Parties that are readily available on databases kept by Simon without the necessity of Simon undertaking a "box by box" search; 2. Tenant directories or listings for the	Plaintiffs stated, repeatedly, that they would accept either leases or a tenant directory that would show whether the BSA Affiliated Parties were operating at the malls during the reduced time frame. Other than the response failing to use the word "***or***" between paragraphs 1 and 2, the Response set forth the agreement as it was understood by Plaintiffs' counsel and reflected by the prior June 29 email

"Misstatement" Alleged in Reply	**Spiral's Actual Statement in Opposition**	**Conclusion**
year basis."	adjusted production times set forth below provided such information is readily accessible from the existing database kept by Simon without the necessity of a undertaking a "box by box" search:" a. Cielo Vista:1997-98 b. Woodfield: 2000-01 c. Galleria: 2002-04. d. Grapevine: 2002-03. e. Sunland Park:2001-02 f. Colorado Mills: 2005-07, 2009-13. ….To resolve the issues identified in the Motion and subsequent conferral, Plaintiffs have agreed not to seek the production of documents that would require a "box by box" or physical search… -Opposition, at p. 14 Exhibit F to Opposition (Same as Exhibit C to Reply), the post motion filing conferral email chain, included the following email from Brian Blair dated June 29, 2016 [12:24 p.m.]: **As I understand our conversation the <u>leases and the list of tenants in the malls are essentially seeking the same thing – something showing if and when the individuals/entities in the subpoenas were tenants at the six malls, if at all. In other words, my client can produce either of them to satisfy the subpoenas</u>.** (emphasis added)	from Mr. Blair and the discussion on July 22.

"Misstatement" Alleged in Reply	**Spiral's Actual Statement in Opposition**	**Conclusion**
(5) "Plaintiffs' make yet another misstatement by stating they sought documents identifying tenants because they anticipated that the shopping malls may not have retained signed leases involving the BSA-Affiliated Parties for more than a few years, and that Simon confirmed same. [Opp. at 13.]" Reply at p. 7, n. 14.	"The reason why Plaintiffs sought tenant identification was because Plaintiffs anticipated, confirmed to be correct in some instances, that the shopping malls may not have retained signed leases involving the BSA Affiliated Parties for more than a few years." -Opposition at p. 13.	Plaintiffs never stated in the Opposition that ***Simon confirmed*** that it could not produce leases. The reference to "some instances" referred to other recipients of the subpoenas, which what occurred with the response by 900 North Michigan to the subpoena. -Cannella Affidavit, ¶ ¶ 9, 11.

Of the foregoing alleged "misstatements," the only incorrect statement made by Plaintiffs in the Opposition concerned the agreement to modify the Simon Subpoenas, addressed below, because it did not use the word ***or*** between the alternative of production of the leases from an existing database ***or*** production of a tenant directory or listing from an existing database.

IV. THE AGREEMENT

Throughout the *post* Motion conferral, Plaintiffs advised Simon that they did not seek nor would they require Simon to engage in a so called "box by box" search in order to provide executed leases. Plaintiffs did not seek or require that Simon produce leases involving other tenants. As set forth above, and in the Exhibit F to the Opposition and Exhibit C to the Reply, the parties discussed the production of documents from an existing database.

On June 29, 2016, Simon's counsel wrote, in pertinent part, the following with respect to the production of a tenant directory or listing:

> **As I understand our conversation the leases and the list of tenants in the malls are essentially seeking the same thing – something showing if and when the individuals/entities in the**

> **subpoenas were tenants at the six malls, if at all. In other words, my client can produce either of them to satisfy the subpoenas.**
>
> Exhibit F to Opposition, June 29, 2016, 12:24 PM email from Simon Counsel (emphasis added).

The same email requested a clarification as to the time frame for tenant listings, which Plaintiffs' counsel provided. Simon's counsel concluded the June 29 correspondence with a request for confirmation that unsigned leases are acceptable, which Plaintiffs provided by email,[13] and Simon's counsel previously said on June 29 "Aside from that we allow the court to decide the entitlement to fees and the amount."

Based on the foregoing, Plaintiffs' counsel believed that Simon offered to produce the leases from the database ***or*** a tenant listing. Plaintiffs' counsel believed that the July 19 email from Simon's counsel only modified this offer with respect to malls acquired after the relevant timeframe. Plaintiffs regret that the Opposition created this misimpression that Simon would produce both the leases and the tenant listing from an existing database. Although this was a mistake, it was not intentional, and the only error was the failure to include the word "or" between points 1 and 2 of the agreement set forth on page 14 of the Opposition.[14]

Based on the email communications and the July 22 phone call, Plaintiffs' understanding of the agreed modification of the Simon Subpoenas was, and Plaintiffs would still agree, to the following:

1. Simon will produce leases regarding the subject malls from its existing database; ***OR***

2. Simon will produce a tenant directory or listing for the reduced time frames from an existing data base;

[13] Attached as Exhibit B. This particular June 29 confirmation email sent at 5:10 p.m. was not included in the chain attached as Exhibit F to the Opposition and Exhibit C to the Reply.

[14] Cannella Affidavit, at ¶¶ 25-26.

3. Plaintiffs do not require Simon to undertake a box by box search in order to produce either the leases ***OR*** the tenant listings or directory;

4. If Simon cannot not produce either leases ***OR*** a tenant listing or directory from an existing directory for a particular mall because it was a mall acquired by Simon after the relevant time frame, then Plaintiffs will accept as true Simon's representation that such information is not readily available from the existing database and will not insist on production of any documents with respect to such malls;

5. Plaintiffs understand that a likely consequence of this concession is that they will not receive responsive documents from Simon for several or most of the malls at issue; and

6. The Court will determine the entitlement to the fees and the amount.

As set forth above, Plaintiffs do not agree that Simon is entitled to any fees incurred with respect to the Motion, and reserve the right to oppose any fee amount sought, should the Court find such entitlement.

V. CONCLUSION

For the foregoing reasons, and those set forth in the Opposition, Plaintiffs request that the Court deny the Motion and find that Simon is not entitled to recovery its fees and cost in connection with either the Motion or the Simon Subpoenas.

/s/David E. Cannella

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 30, 2016, a true and correct copy of the foregoing was electronically filed with the Clerk of Court using CM/ECF, which will send notification to the registered attorney(s) of record that the documents have been filed and are available for viewing and downloading.

/s/ *David E. Cannella*
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