

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

DISH NETWORK L.L.C. et al.,)	Case No. 8:08-cv-590-T-30TBM
)	
Plaintiffs,)	
)	
v.)	
)	
ROBERT WARD,)	
)	
Defendant.)	
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PLAINTIFFS' MOTION TO COMPEL DISCOVERY

Plaintiffs DISH Network L.L.C., EchoStar Technologies L.L.C., and NagraStar L.L.C. (collectively, "Plaintiffs"), through their undersigned counsel and pursuant to Federal Rule of Civil Procedure 37 and Local Rule 3.04, respectfully move to compel Defendant Robert Ward to fully respond to outstanding discovery, and further request that Defendant be ordered to pay Plaintiffs' reasonable attorney fees and costs incurred in bringing this motion.

I. Introduction

Defendant has employed a mix of improper stonewalling and "cat and mouse" tactics to resist much of Plaintiffs' discovery efforts in this case. In response to fifty-four requests for production, Defendant has not produced a single document. Additional written discovery was met with evasive and contradictory responses, and in some instances no response whatsoever. Defendant's approach to the entire discovery process is aptly summarized in a communication where, after reciting one of his discovery responses verbatim, it was stated "DENY DENY DENY prove it dickheads."

The discovery disputes underlying this motion are of two varieties: requests to which Defendant completely failed to respond; and requests to which Defendant provided evasive or

contradictory responses in an apparent effort to conceal his own wrongdoing or defenses that he intends to raise at the trial of this action. Plaintiffs have made several attempts to contact Defendant prior to the filing of this motion, all of which went unanswered. Through this motion to compel Plaintiffs seek to obtain discovery to which they are clearly entitled.

II. Defendant Should Be Compelled To Respond To Plaintiffs' Discovery Requests That Were Served In December And Remain Unanswered

Nearly four months ago, on December 23, 2008, Defendant was served interrogatories and requests for production pursuant to Rules 33 and 34, Fed. R. Civ. P.¹ Plaintiffs were told these discovery requests were overlooked by mistake after Defendant failed to respond in late January as required. Fed. R. Civ. P. 33, 34 (requiring response within thirty days of service). Giving Defendant more than ample time to answer the discovery, and still nothing, Plaintiffs wrote opposing counsel on March 25, 2009 asking for a date certain when Defendant would respond. (Frank Decl. ¶ 4, Ex. C.) That correspondence and a second letter again advising of Plaintiffs' willingness to resolve these issues without a motion to compel were not answered. (*Id.* ¶ 5, Ex. D.) Voice messages left April 8, April 10, and April 13 have not been returned. (*Id.* ¶ 4.) Defendant should now be compelled to answer Plaintiffs' interrogatories and requests for production without objection or further delay. Fed. R. Civ. P. 37(a); *see Reliance Ins. Co. v. Core Carriers, Inc.*, No. 3:06-CV-585-J-20MCR, 2008 WL 2414041, at *2 (M.D. Fla. Jan 18, 2008) (objections waived by untimely response).

In addition to compelling compliance, the Court should order Defendant to pay the

¹ The discovery requests are respectively titled "DISH Network L.L.C.'s First Set of Interrogatories to Defendant Robert Ward" and "Plaintiffs' Second Set of Requests for Production to Defendant Robert Ward," copies of which are attached to the Declaration of Timothy Frank ("Frank Decl.") as Exhibits A and B.

reasonable attorney fees and costs incurred by Plaintiffs in bringing this motion. Rule 37(d), which applies where a party wholly refuses to answer discovery, provides that a "court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(d)(3) (emphasis added). Defendant has not provided justification why Plaintiffs' discovery requests remain unanswered over four months past the due date. And having received several letters and phone calls on these discovery issues, Defendant certainly had the opportunity to do so. Accordingly, an award of reasonable attorney fees and costs should be entered.

III. Defendant Should Be Compelled To Provide More Complete Responses To Plaintiffs' Interrogatories

The second discovery issue concerns interrogatories served by Plaintiffs on December 30, 2008.² Defendant responded, albeit late, on February 3, 2009. (Frank Decl. ¶ 8, Ex. G.) The interrogatories are straightforward and call for Defendant to identify any person believed to have used certain aliases. It is Plaintiffs' position, as spelled out in the amended complaint, that Defendant was behind the aliases and used them when publicly releasing piracy software on websites in violation of the Digital Millennium Copyright Act and Communications Act of 1934. (Am. Compl. ¶¶ 36-37, 41, 48.) The interrogatories, therefore, are targeted at flushing out an anticipated defense, namely any attempt by Defendant to point the finger and attribute use of the alias to another person. Indeed, Defendant professes to have knowledge of persons using the aliases in question, but refuses to identify them.

In accordance with Local Rule 3.04, the interrogatories and responses at issue are:

² The discovery request is titled "NagraStar L.L.C.'s Second Set of Interrogatories to Defendant Robert Ward," a copy of which is attached to the Frank Declaration as Exhibit F.

Interrogatory No. 7

To the extent Defendant's response to Plaintiffs' Request for Admission No. 11 is anything other than an unqualified "admit," identify all facts supporting Defendant's claim that some other person made use of the alias "thedssguy," including the name of each person believed or known by Defendant to use the alias "thedssguy."

Response

To the extent WARD understands the question, WARD is not currently aware of whether another person is using the alias "thedssguy". Given the broad scope and breadth of the Internet, WARD cannot know whether someone is or is not.

Interrogatory No. 13

To the extent Defendant's response to Plaintiffs' Request for Admission No. 35 is anything other than an unqualified "admit," identify all facts supporting Defendant's claim that some other person made use of the alias "Veracity," including the name of each person believed or known by Defendant to use the alias "Veracity."

Response

To the extent WARD understands the question, WARD is not currently aware of whether another person is using the alias "Veracity". Given the broad scope and breadth of the Internet, WARD cannot know whether someone is or is not.

Interrogatory No. 14

To the extent Defendant's response to Plaintiffs' Request for Admission No. 39 is anything other than an unqualified "admit," identify all facts supporting Defendant's claim that some other person made use of the alias "TDG," including the name of each person believed or known by Defendant to use the alias "TDG."

Response

To the extent WARD understands the question, WARD is not currently aware of whether another person is using the alias "TDG". Given the broad scope and breadth of the Internet, WARD cannot know whether someone is or is not.

Standing alone Defendant's interrogatory responses are not all that troubling. Each of the responses, however, must be read in connection with the request for admission referenced in the interrogatory, which asked that Defendant admit or deny the following: "Defendant is not aware of any other persons using the [alias in question]."³ Defendant denied each of these

³ The discovery request is titled "Plaintiffs' First Set of Requests for Admission to Defendant Robert Ward," a copy of which is attached to the Frank Declaration as Exhibit H.

requests for admission, implying that he was in fact aware of other persons using the aliases inquired about. (*Id.* ¶ 10, Ex. I.) Yet in response to the corresponding interrogatories, above, Defendant states the opposite by disclaiming such knowledge. (*Id.* ¶ 8, Ex. G.) Defendant's responses are clearly contradictory. The concern here is that Defendant may attempt to use this inconsistency to later introduce evidence that some other person is responsible for the aliases, thereby unfairly prejudicing Plaintiffs' ability to investigate and rebut any such claim.

Defendant should be compelled to identify all persons that he believes made use of the aliases identified in these interrogatories, or otherwise amend his responses to the requests for admission and admit having no knowledge of such persons. Notably, this same proposal was put forth in the March 25 meet and confer letter in an effort to clear up Defendant's apparent misunderstanding, but Defendant did not respond. (*Id.* ¶ 4, Ex. C.) As Defendant's dilatory discovery tactics necessitated the filing of this motion, Defendant should be ordered to pay Plaintiffs' reasonable attorney fees and costs incurred as a result. Fed. R. Civ. P. 37(a)(5)(A).

IV. Defendant Should Be Ordered To Provide Verification That All Responsive, Non-Privileged Documents Have Been Produced

Defendant has not produced a single document in response to Plaintiffs' fifty-four requests for production and appears to be willfully withholding evidence. Plaintiffs' initial requests for production were served June 27, 2008.⁴ Defendant responded late on September 16, 2008. (Frank Decl. ¶ 12, Ex. K.) Between mid-October and January 2009, the parties exchanged multiple letters and held a teleconference concerning these requests. (*Id.* ¶ 13, Ex. L.) Defendant provided a "supplemental" response on January 15, 2009, but again did not

⁴ The discovery is titled "Plaintiffs' First Set of Requests for Production to Defendant Robert Ward," a copy of which is attached to the Frank Declaration as Exhibit J.

produce any documents. (*Id.* ¶ 14, Ex. M.)

About the same time Plaintiffs obtained a declaration from an informant that had been communicating with Defendant at the email address "thedssguy@hotmail.com." Defendant admitted this is his email address in response to written discovery. (*Id.*, Ex. I at No. 5, 7.) Many of the communications talk about Defendant's direct involvement in satellite piracy, including his distribution of software used with free-to-air receivers to steal DISH Network programming – one of the key theories behind Plaintiffs' claims under the Digital Millennium Copyright Act and Communications Act of 1934. (*Id.* ¶ 15, Ex. N ["First Informant Decl."] ¶¶ 32-40, Ex. 14 at 23, Ex. 15 at 5, 13, 20, 31; Ex. O ["Second Informant Decl."] ¶¶ 5-7, Ex. 1 at 2, 5, 14, 21.) In fact, Defendant purports to transfer two piracy software files to the informant during the communications, both for the Viewsat branded receivers sold by California-based Viewtech, Inc. (First Informant Decl. ¶ 36, Ex. 14 at 29, Ex. 15 at 14.) Defendant discusses his relationship with Viewtech, Inc. and their collective efforts to circumvent Plaintiffs' more current security technology. (First Informant Decl. ¶¶ 35, 37-39, 42-49, Ex. 14 at 22, Ex. 15 at 19, 21-22, Ex. 16 at 13; Second Informant Decl. ¶¶ 7, 11, Ex. 1 at 5, 7, 18, 21.)⁵

There are also statements in this communication with Plaintiffs' informant that raise concern regarding the candidness of Defendant's discovery responses. For starters, Defendant states "my response [sic] is here," followed immediately by the statement "43 denials" and Defendant's exact responses to a number of Plaintiffs' initial forty-three document requests. (Second Informant Decl. ¶ 10, Ex. 1 at 17.) Defendant then provides a colorful summary of the responses stating "DENY DENY DENY prove it dickheads." (*Id.*, emphasis added).

⁵ Plaintiffs have a case pending against Viewtech in the United States District Court for the Southern District of California styled *EchoStar Satellite L.L.C. et al. v. Viewtech, Inc. et al.*, No. 07-CV-1273.

Later in the chat log, which spans a couple of months, Defendant reproduces the content of a discovery-related letter from his counsel to Plaintiffs, this time commenting "chewin their dumbass out ... he basically told them to produce anything they think they have on me, cause I aint givn em shit." (*Id.*, Ex. 1 at 20, emphasis added.) True to his word, Defendant has not produced one document, not even his communication with the informant which occurred after the filing of this case and is responsive to several of Plaintiffs' requests for production.

Defendant should be ordered to provide a verification under penalty of perjury that all responsive documents have been produced. In the event responsive documents have not been preserved, for instance the above chat log, Defendant should be ordered to provide a written verification identifying the documents that have been destroyed and an explanation why.

V. Conclusion

Plaintiffs respectfully request that the Court enter an order compelling Defendant to respond to the unanswered interrogatories and requests for production in Part II *supra*. In addition, Defendant should be ordered to identify all persons that he contends made use of the aliases listed in the interrogatories in Part III *supra*, or admit lacking knowledge of any such persons. Defendant should also be ordered to verify the accuracy of his document production for the reasons set forth in Part IV. The reasonable fees and costs incurred by Plaintiffs in bringing this motion should be borne by Defendant.

RULE 3.01(g) CERTIFICATE

In accordance with Local Rule 3.01(g), the undersigned certifies that he contacted Defendant's counsel by letters dated March 25, 2009 and April 13, 2009, an email sent April 21, 2009, and voice messages left for counsel on April 8, 2009, April 10, 2009 and April 13, 2009, to resolve these discovery issues, but no response has been received. Therefore, this

motion is submitted to the Court for consideration.

DATED: May 4, 2009

Respectfully submitted,

s/ Timothy M. Frank

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 4, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send a notice of electronic filing to the following: Albert A. Zakarian, Fredrick H.L. McClure, Laura E. Ward, Chad M. Hagan, and Timothy M. Frank.

s/ Timothy M. Frank

Attorney