

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

AMICA MUTUAL INSURANCE COMPANY, :
Plaintiff, :
v. : CA 11-70 L
WHOIS PRIVACY PROTECTION SERVICE, :
INC., INSURANCE-WEBSITE.COM, and :
DARRIN BAGNUOLO d/b/a DARBA ONLINE, :
DARBA DOMAINS and DARBA ENTERPRISES, :
INC.,¹ :
Defendants. :

MEMORANDUM AND ORDER
GRANTING AMICA'S MOTION FOR SANCTIONS

Before the Court is Amica Mutual Insurance Company's Motion for Sanctions against Defendant Darrin Bagnuolo, d/b/a Darba Online, Darba Domains and Darba Enterprises, Inc. (Docket ("Dkt.") #44) ("Motion for Sanctions" or "Motion"). The Motion seeks to have default judgment entered against Defendant Darrin Bagnuolo ("Mr. Bagnuolo") for his failure to comply with a discovery order. See Motion at 1. Alternatively, Plaintiff Amica Mutual Insurance Company ("Amica") asks that the Court deny Mr. Bagnuolo's pending motion to dismiss.² See id. Amica further seeks an order

¹ On October 12, 2011, the Court ruled that Darba Enterprises, Inc., ("Darba") is not a party to this action. See Order Granting Motion to Strike and Ruling That Darba Enterprises, Inc., Is Not a Party (Dkt. #34) at 1.

² See Darrin Bagnuolo's Motion to Dismiss Plaintiff's Complaint Based on (1) Improper Venue; (2) Lack of Personal Jurisdiction; (3) Insufficient Process; (4) Insufficient Service of Process. Request [sic] to Alternatively Transfer this Matter to the District of Nev[a]da for Convenience of Parties, Witnesses and Interest of Justice (Dkt. #17)

requiring Mr. Bagnuolo to pay its reasonable expenses, including attorneys' fees. See id.

Mr. Bagnuolo has filed an objection to the Motion. See Darrin Bagnuolo's Objection of [sic] Amica Mutual Insurance Company's Motion for Sanctions (Dkt. #46) ("Objection #46"). A hearing was held on April 24, 2012.³ For the reasons stated herein, the Motion is granted to the extent that (1) this Magistrate Judge will recommend that Mr. Bagnuolo's pending motion to dismiss be denied⁴ and (2) Mr. Bagnuolo will be required to pay Amica's reasonable attorneys' fees incurred in connection with bringing the Motion.

I. Facts and Travel

Amica filed this action for trademark infringement, dilution, and unfair competition on February 24, 2011. See Complaint (Dkt. #1) at 1; see also First Amended Complaint (Dkt. #5) ("Amended Complaint") at 1. The original Complaint did not name Mr. Bagnuolo as a defendant, see Complaint at 1, but the Amended Complaint which was filed on March 28, 2011, did, see Amended Complaint at 1.

Mr. Bagnuolo was served on April 21, 2011, see Affidavit of Service (Dkt. #11), and he filed *pro se* the motion to dismiss the

("Motion to Dismiss").

³ Defendant Darrin Bagnuolo ("Mr. Bagnuolo") appeared at the hearing via telephone.

⁴ A report and recommendation recommending that Mr. Bagnuolo's Motion to Dismiss be denied is being issued with this Memorandum and Order.

First Amended Complaint on May 13, 2011, see Darrin Bagnuolo's Motion to Dismiss Plaintiff's Complaint Based on (1) Improper Venue; (2) Lack of Personal Jurisdiction; (3) Insufficient Process; (4) Insufficient Service of Process. Request [sic] to Alternatively Transfer this Matter to the District of Nev[a]da for Convenience of Parties, Witnesses and Interest of Justice (Dkt. #17) ("Motion to Dismiss"). Amica responded to the Motion to Dismiss with an objection. See Plaintiff's Objection to Darrin Bagnuolo's Motion to Dismiss or, in the Alternative, to Transfer (Dkt. #19) ("Amica's Objection"). In the objection, Amica asserted that the Court could properly exercise personal jurisdiction over Mr. Bagnuolo but also indicated that, if the Court found that Amica had not proffered sufficient evidence to demonstrate this, the Court should order limited jurisdictional discovery. See Memorandum of Law in Support of Plaintiff's Objection to Darrin Bagnuolo's Motion to Dismiss or, in the Alternative, to Transfer ("Amica's Objection Mem.") at 11 n.5. On June 15, 2011, Mr. Bagnuolo filed a reply memorandum in support of the Motion to Dismiss. See Darrin Bagnuolo's Reply in Support of his Motion to Dismiss and Response to the Plaintiff's Objection; Request for Evidentiary Hearing (Dkt. #22) ("Bagnuolo's Dismissal Reply").

On August 30, 2011, the Motion to Dismiss was referred to this Magistrate Judge, and a hearing on it was scheduled for September 21, 2011. See Notice of Hearing and Order (Dkt. #29). The hearing

was subsequently rescheduled to October 12, 2011. See Order Continuing Hearing (Dkt. #31). On October 7, 2011, Attorney Robert Clark Corrente ("Attorney Corrente") and Burns & Levinson LLP ("Burns & Levinson") entered their appearance for "Darrin Bagnuolo d/b/a Darba Online Darba Domains and Darba Enterprises, Inc." Entry of Appearance (Dkt. #32). Attorney Corrente represented Mr. Bagnuolo at the October 12th hearing. Following the hearing, the Court took the Motion to Dismiss under advisement.

In a written order issued on October 25, 2011, the Court granted Amica's request for jurisdictional discovery and allowed sixty days for this purpose. See Order Granting Plaintiff's Request for Limited Jurisdictional Discovery (Dkt. #35) ("Order of 10/25/11") at 2 (noting this alternative request by Amica); id. at 4. On November 8, 2011, Amica served a request for production of documents on Mr. Bagnuolo and also propounded a notice of deposition setting his deposition for December 13, 2011.⁵ See Amica Mutual Insurance Company's Motion to Compel Darrin Bagnuolo, d/b/a Darba Online, Darba Domains and Darba Enterprises, Inc.'s, Production of Documents and Attendance at Deposition (Dkt. #37)

⁵ Copies of the request for production and the notice of deposition are attached as exhibits to Amica Mutual Insurance Company's Motion to Compel Darrin Bagnuolo, d/b/a Darba Online, Darba Domains and Darba Enterprises, Inc.'s, Production of Documents and Attendance at Deposition (Dkt. #37) ("Motion to Compel"). See Motion to Compel, Exhibit ("Ex.") 1 (Plaintiff's First Set of Requests for Production to Darrin Bagnuolo d/b/a Darba Online, Darba Domains and Darba Enterprises, Inc. ("First Request for Production")); id., Ex. 2 (Notice of Deposition of Darrin Bagnuolo ("Notice of Deposition")).

("Motion to Compel") at 2; Amica Mutual Insurance Company's Motion for Extension of Time to Take Jurisdictional Discovery (Dkt. #38) ("Motion for Extension") at 2. Mr. Bagnuolo did not provide responses to the request for production of documents and did not appear for his deposition. See id. As a result, Amica filed the Motion to Compel which asked the Court to order Mr. Bagnuolo to provide written responses and responsive documents to the request for production of documents within five days. See Motion to Compel at 2. The Motion to Compel also sought to have the Court order Mr. Bagnuolo to appear for a deposition in Rhode Island within forty-five days. See id. at 3. Along with the Motion to Compel, Amica moved to extend the deadline for completion of jurisdictional discovery by forty-five days (through February 10, 2012). See Motion for Extension at 1. Among other grounds for the requested extension, Amica cited the fact that Mr. Bagnuolo had not produced any responsive documents and had failed to appear for his scheduled December 13, 2011, deposition. See id. at 2.

On January 4, 2012, Attorney Corrente moved to withdraw as attorney for Mr. Bagnuolo, stating "that there has been a breakdown in communications with the Client,^[6] and the Client has requested that the Firm^[7] cease all work on the case and withdraw as

⁶ The "Client" is defined in the Motion to Withdraw (Dkt. #39) as "Darrin Bagnuolo d/b/a Darba Online, Darba Domains and Darba Enterprises, Inc. ('the Client')." Motion to Withdraw at 1.

⁷ The "Firm" is defined in the Motion to Withdraw as "Burns & Levinson LLP" Id.

counsel.” Motion to Withdraw (Dkt. #39) at 1. A week later, on January 11, 2012, Mr. Bagnuolo filed a *pro se* objection to Amica’s Motion to Compel and Motion for Extension. See Darrin Bagnuolo’s Pro Se Objection to the [sic] Amica’s Motion to Compel and Request for Extension of Time (Dkt. #40) (“Objection #40”). In this objection, Mr. Bagnuolo repeatedly asserted that Attorney Corrente and his firm (on whom the previously mentioned request for production and notice of deposition had been served) had never been his attorney of record. See Objection #40 at 3-5. Mr. Bagnuolo also claimed that he “had no notice of the discovery and deposition prior to their deadlines” Id. at 4. He posited that “[i]f the Court believes_[] Mr. Corrente and Burns & Levinson LLP were Mr. Bagnuolo’s attorney of record, then granting Mr. Bagnuolo an extension to answer under Fed. R. Civ. P. 6 is proper.” Id. at 5.

A hearing on the Motion to Compel and the Motion for Extension was held on February 3, 2012. See Dkt. Mr. Bagnuolo was permitted to appear at the hearing by telephone. The same day the Court issued an order granting the motions. See Order Granting Amica’s Motions to Compel and to Extend (Dkt. #43) (“Order of 2/3/12” or “Order”).

In granting the motions, the Court rejected Mr. Bagnuolo’s claim that Attorney Corrente and the law firm of Burns & Levinson had not been his attorney of record in the case, see id. at 2, and found that the request for production and notice of deposition had

been properly served on Mr. Bagnuolo's then counsel, see id. at 2-3. Accordingly, the Court ruled that "any objection to the request and notice has been waived." Id. at 3 (citing Fed. R. Civ. P. 34(b)(2) and Willard v. Constellation Fishing Corp., 136 F.R.D. 28, 31 (D. Mass. 1991) ("Failure to file a timely objection to a request for production of documents constitutes a waiver of any objections which a party might have to the requests.")). The Court ordered Mr. Bagnuolo "to produce the documents and to submit to deposition." Id. In deference to his *pro se* status, the Court allowed Mr. Bagnuolo fifteen days (not the five days requested by Amica) to produce the documents. See id. The Court, citing case law, also directed that Mr. Bagnuolo be deposed in Las Vegas, Nevada, where he resides. See id. at 3-4.⁸ The fifteen days decreed in the Order of 2/3/12 passed without Amica receiving any documents or other response relative to the request for production. See Memorandum of Law in Support of Amica Mutual Insurance

⁸ The case law cited by the Court is reproduced below.

See Sloniger v. Deja, No. 09CV858S, 2010 WL 5343184, at *9 (W.D.N.Y. Dec. 20, 2010) ("The general rule is the non resident party need not be required to come to the forum (or any other place) for his or her deposition."); id. at *8 (citing case where court "found that the preference for a deposition at defendant's place of residence (Malta) was strongest because defendant was challenging personal jurisdiction of the court"); Gilliland v. Hurley, Civil Action No. 09 1621, 2010 WL 830968, at *4 (W.D. Pa. Mar. 4, 2010) (allowing plaintiff to conduct jurisdictional discovery, including deposing defendants by telephone and, if this proved inadequate, deposing defendants in California).

Order of 2/3/12 at 3 4.

Company's Motion for Sanctions against Defendant Darrin Bagnuolo, d/b/a Darba Online, Darba Domains and Darba Enterprises, Inc. ("Amica's Mem."), at 3 (stating that Mr. Bagnuolo "has not produced any responsive documents or, in the alternative, a sworn statement that he does not have any responsive documents").⁹

On March 5, 2012, Amica filed the instant Motion for Sanctions, and on March 26, 2012, Mr. Bagnuolo filed his objection to it. See Dkt. As an exhibit to the objection, Mr. Bagnuolo attached a copy of his response to the request for the production of documents. See Objection #46, Exhibit ("Ex.") B (Darrin Bagnuolo's Response to Amica's Request for Documents). The response does not bear a certification date, is unsworn, asserts that Mr. Bagnuolo has no responsive documents, and attempts to raise objections to the request for production. See id.

II. Law

The Federal Rules of Civil Procedure authorize the district court where an action is pending to sanction a party for disobeying an order to provide discovery, including orders under Rules 26 and

⁹ Amica intended to depose Mr. Bagnuolo after receiving the response to request for production. See Memorandum of Law in Support of Amica Mutual Insurance Company's Motion for Sanctions against Defendant Darrin Bagnuolo, d/b/a Darba Online, Darba Domains and Darba Enterprises, Inc. ("Amica's Mem."), at 3 n.2 ("The deposition is to follow [Mr. Bagnuolo]'s production of documents, and has again been delayed by his refusal to meet discovery obligations."). Although the Court had not ordered that the deposition follow the production of documents, Amica's desire to have the documents prior to deposing Mr. Bagnuolo is understandable.

37. See Fed. R. Civ. P. 37(b)(2).¹⁰ Among the listed sanctions are orders "dismissing the action or proceeding in whole or in part; [or] rendering a default judgment against the disobedient party" Fed. R. Civ. P. 37(b)(2)(A); see also United States v.

¹⁰ Fed. R. Civ. P. 37(b) provides in relevant part:

(b) Failure to Comply with a Court Order.

....

(2) Sanctions in the District Where the Action Is Pending.

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent or a witness designated under Rule 30(b)(6) or 31(a)(4) fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party; or
- (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

....

Fed. R. Civ. P. 37(b).

Palmer, 956 F.2d 3, 6-7 (1st Cir. 1992) (“[I]n the ordinary case, where sanctions for noncompliance with discovery orders are imposed on a plaintiff, the standard judgment is dismissal of the complaint, with or without prejudice, while a judgment of default typically is used for a noncomplying defendant.”).

A default judgment, however, is “a drastic sanction that should be employed only in an extreme situation.” Affanato v. Merrill Bros., 547 F.2d 138, 140 (1st Cir. 1977); see also Companion Health Servs. v. Kurtz, 675 F.3d 75, 85 (1st Cir. 2012) (“Our precedent makes clear that a severe sanction, such as default or dismissal, is inappropriate in most cases when based on one incident.”). “The essential reason for the traditional reluctance of the courts to default a party is the ‘policy of the law favoring the disposition of cases on their merits.’” Affanato, 547 F.2d at 140 (quoting Richman v. Gen. Motors Corp., 437 F.2d 196, 199 (1st Cir. 1971)); cf. Marx v. Kelly, Hart & Hallman, P.C., 929 F.2d 8, 10 (1st Cir. 1991) (“[D]ismissal with prejudice ‘is a harsh sanction’ which runs counter to our ‘strong policy favoring the disposition of cases on the merits.’”) (quoting Figueroa Ruiz v. Alegria, 896 F.2d 645, 647 (1st Cir. 1990)). “Discovery abuse, while sanctionable, does not require as a matter of law imposition of [the] most severe sanctions available.” Coyante v. Puerto Rico Ports Auth., 105 F.3d 17, 23 (1st Cir. 1997) (citing Anderson v. Beatrice Foods Co., 900 F.2d 388, 396 (1st Cir. 1990)); Affanato,

547 F.2d at 141 (“isolated oversights should not be penalized by a default judgment”).

Nevertheless, “[t]he law is well established in this circuit that where a noncompliant litigant has manifested a disregard for orders of the court and been suitably forewarned of the consequences of continued intransigence, a trial judge need not first exhaust milder sanctions before resorting to dismissal.” Marcello v. DeSano, No. CA 05-004 ML, 2006 WL 1582404, at *9 (D.R.I. Mar. 23, 2006) (alteration in original). The Supreme Court has stated that “the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.” Nat’l Hockey League v. Metro. Hockey Club, Inc., 427 U.S. 639, 643, 96 S.Ct. 2778 (1976); see also Communispond, Inc. v. Kelley, No. 96 CIV. 1487(DC), 1998 WL 473951, at *4 (S.D.N.Y. Aug. 11, 1998) (“Sanctions under Rule 37 are intended to ensure that a party does not benefit from its failure to comply, and to deter those who might be tempted to such conduct in the absence of such a deterrent.”) (internal quotation marks omitted).

“[A] party’s disregard of a court order is a paradigmatic example of extreme misconduct.” Torres-Vargas v. Pereira, 431 F.3d 389, 393 (1st Cir. 2005); see also Malot v. Dorado Beach Cottages

Assocs., 478 F.3d 40, 44 (1st Cir. 2007) (“Without a doubt, the disregard of court orders qualifies as extreme behavior”); Young v. Gordon, 330 F.3d 76, 81 (1st Cir. 2003) (“[D]isobedience of court orders is inimical to the orderly administration of justice and, in and of itself, can constitute extreme misconduct.”) (citing Tower Ventures, Inc. v. City of Westfield, 296 F.3d 43, 46 (1st Cir. 2002); Cosme Nieves v. Deshler, 826 F.2d 1, 2 (1st Cir. 1987)). Thus, “a party flouts a court order at his peril.” Torres-Vargas, 431 F.3d at 393; accord Young v. Gordon, 330 F.3d at 82 (“it is axiomatic that ‘a litigant who ignores a case-management deadline does so at his peril.’”) (quoting Rosario-Diaz v. Gonzalez, 140 F.3d 312, 315 (1st Cir. 1998)).

When noncompliance with an order occurs, “the ordering court should consider the totality of events and then choose from the broad universe of available sanctions in an effort to fit the punishment to the severity and circumstances of the violation.” Young v. Gordon, 330 F.3d at 81 (citing Tower Ventures, Inc. v. City of Westfield, 296 F.3d at 46). The appropriateness of an available sanction depends upon the facts of the particular case. Torres-Vargas v. Pereira, 431 F.3d at 392; see also Marcello, 2006 WL 1582404, at *10 (citing Torres-Vargas, 431 F.3d at 392).

III. Discussion

A. Mr. Bagnuolo’s Arguments

Mr. Bagnuolo offers a three-fold explanation for his failure

to comply with the Order of 2/3/12. First, he cites a sentence in Footnote 4 of the Order which referenced his statement at the February 3, 2012, hearing that he had no documents which were responsive to the request for production. See Objection #46 at 3 (citing Order of 2/3/12 at 3 n.4). Mr. Bagnuolo states that he interpreted the sentence, "Thus, the fifteen days may be not necessary," Order of 2/3/12 at 3 n.4, "along with other aspects of the Court's Order to obviate or negate any need to also send a written response," Objection #46 at 3.

Footnote 4 is reproduced below in its entirety:

At the February 3, 2012, hearing, Mr. Bagnuolo indicated that he does not have any of the materials sought by the requests for production. **Thus, the fifteen days may be not necessary.** Nevertheless, the Court deems it advisable to give Mr. Bagnuolo time to verify that he does not have any documents which are responsive to the requests. Cf. Poole v. Textron, Inc., 192 F.R.D. 494, 501 (D. Md. 2000) ("It is well established that 'control' under Fed. R. Civ. P. 34 is to be broadly construed so that a party may be obligated to produce documents requested even though it may not actually possess the documents. As long as the party has the legal right or ability to obtain the documents from another source on demand, that party is deemed to have 'control.'") (internal citation omitted); Schwartz v. Marketing Publishing Co., 153 F.R.D. 16, 21 (D. Conn. 1994) ("While the defendants quite correctly observe that they have no obligation to produce documents that do not exist, they have overlooked the requirement that the absence of possession, custody, and/or control of documents that have been requested pursuant to Fed. R. Civ. P. 34 must be sworn to by the responding party.") (internal citation omitted).

Order of 2/3/12 at 3 n.4 (bold added).

The footnote appears immediately after the following two

sentences in the body of the Order:

Mr. Bagnuolo is ordered to produce the documents and to submit to deposition.

In deference to his *pro se* status, however, the Court will allow Mr. Bagnuolo fifteen days from the date of this Order to produce the requested materials.⁴

Order of 2/3/12 at 3.

Assuming that Mr. Bagnuolo interpreted Footnote 4 as he claims, such interpretation was plainly unreasonable. The Order of 2/3/12 twice explicitly states that he is ordered to produce the documents. See id. at 3, 5. Indeed, the final paragraph of the Order clearly recites the Court's ruling. It begins by stating:

For the reasons stated above, the Motions are **GRANTED**. With respect to the Motion to Compel, Mr. Bagnuolo is ordered to:

1. produce within fifteen days of the date of this Order the documents requested (or a sworn statement that he does not have possession, custody, and/or control of documents that have been requested); and

2. submit to being deposed by Plaintiff in Las Vegas, Nevada.

Id. at 4-5. The contention that Footnote 4 can be read as relieving Mr. Bagnuolo of the obligation to provide a response to Amica within fifteen days is simply untenable. Indeed, Footnote 4 explains that even if Mr. Bagnuolo has no responsive documents, he must provide a sworn response so stating.

Turning to the second part of Mr. Bagnuolo's explanation for his noncompliance, he asserts that "other aspects of the Court's

Order . . . ,” Objection #46 at 3, contributed to his misunderstanding of what was required of him, see id. However, he does not clearly identify these “other aspects.” Id. The only other part of the Order which he cites is Footnote 1. With respect to Footnote 1, he claims that he interpreted it to require Amica to “resend its written discovery request” Id.

Footnote 1 states that “On October 12, 2011, the Court ruled that Darba Enterprises, Inc. (“Darba”), is not a party to this action.” Order of 2/3/12 at 1 n.1. There is no reasonable basis for Mr. Bagnuolo’s conclusion that this footnote somehow imposed an obligation on Amica to resend its discovery request. Such an interpretation ignores the Order’s explicit ruling that “Mr. Bagnuolo is ordered to . . . produce within fifteen days of the date of this Order the documents requested (or a sworn statement” Id. at 5. The Order does not say that this production is to occur within fifteen days of Mr. Bagnuolo receiving a renewed discovery request from Amica. Indeed, if Mr. Bagnuolo thought that Footnote 1 required Amica to resend its discovery request and that he was not obliged to respond until fifteen days thereafter, he should have immediately sought a clarification of the Order because such an interpretation is, at best, strained.

The third reason advanced by Mr. Bagnuolo to excuse his non-compliance with the Order of 2/3/12 is a variation of the second reason. He asserts that “the discovery sent was confusing[;]

therefore Mr. Bagnuolo believe[d] that the Court required the Plaintiff to [send] him [an] amended request before he answered." Objection #46 at 8. This assertion is even more baseless than the contention that Footnote 1 imposed this obligation on Amica. Not only is there no suggestion in the Order that Amica's discovery requests are confusing and that they must be resent in a different form, the Order specifically states that "any objection to the request and notice has been waived." Order of 2/3/12 at 3. Indeed, immediately after making this finding, the Court ruled "to the extent that Mr. Bagnuolo seeks leave to file an objection to either the requests for production or his notice of deposition, such leave is denied." Id. Given this explicit finding and ruling, Mr. Bagnuolo's claimed belief that Amica was required to resend its discovery request before he was required to respond is implausible in the extreme. His contention that he "simply interpreted an order as any lay person would," Objection #46 at 15, is at odds with the plain language of the Order. Accordingly, it is rejected.

In sum, Mr. Bagnuolo's interpretation of the Order of 2/3/12 as not requiring him to file a written response to Amica's First Request for Production is patently unreasonable. To the extent that he seeks to avoid being sanctioned because of this interpretation, such arguments are rejected. His related argument that Amica's discovery requests are allegedly confusing or

objectionable and that this excuses his noncompliance is also rejected because all such objections have previously been waived. See Order of 2/3/12 at 3.

In a final attempt to avoid being sanctioned, Mr. Bagnuolo argues that the Court should grant him an extension of time pursuant to Fed. R. Civ. P. 6(b)(1)(B) to make his March 8, 2012, response to Amica's request timely. See Objection #46 at 9. As the Court has already determined that Mr. Bagnuolo's claimed interpretation of the Order of 2/3/12 was patently unreasonable and that he had previously waived any objections to Amica's discovery requests, his failure to provide timely responses cannot be considered to be attributable to "excusable neglect." Fed. R. Civ. P. 6(b)(1)(B); see also Mirpuri v. Act Mfg., Inc., 212 F.3d 624, 631 (1st Cir. 2000) (rejecting claim of excusable neglect where "plaintiffs' professed reading of the dismissal order was wholly implausible"); id. ("A misunderstanding that occurs because a party (or his counsel) elects to read the clear, unambiguous terms of a judicial decree through rose-colored glasses cannot constitute excusable neglect."); cf. Bennett v. City of Holyoke, 362 F.3d 1, 5 (1st Cir. 2004) ("'a plausible misconstruction' of a court order sometimes may satisfy the requirements for excusable neglect").

Thus, the Court finds that Mr. Bagnuolo failed to comply with the Order of 2/3/12 and that his explanations for such noncompliance are unavailing. Accordingly, he should be

sanctioned.

B. Choice of Sanction

As the Court has found that Mr. Bagnuolo has disobeyed the Order, the next step is to determine the appropriate sanction. Mr. Bagnuolo argues that the default judgment sought by Amica is too severe. See Objection #46 at 10-15. In support of this argument, he notes that he "is a lay person," id. at 11, and asserts that he "simply interpreted an order as any lay person would," id. at 15. However, the Court has rejected this assertion. Mr. Bagnuolo's claimed interpretation of the Order of 2/3/12 was, even for a lay person, wholly implausible.

Mr. Bagnuolo also appears to argue that default judgment is only appropriate "where a party has been **previously warned** by the Court and then intentionally flouts the Court's warnings that [default judgment] would be a consequence." Id. at 13. This is not the law in the First Circuit. While the absence of an explicit prior warning warrants consideration in determining the appropriate sanction for violation of a court order, the absence of such a warning does not preclude the entry of default judgment as a sanction. See Vallejo v. Santini-Padilla, 607 F.3d 1, 9 (1st Cir. 2010) ("Although notice is not required before imposing dismissal as a sanction, 'counsel's disregard of a prior warning from the court exacerbates the offense, and the lack of warning sometimes mitigates it.") (quoting Robson v. Hallenvbeck, 81 F.3d 1, 3 (1st

Cir. 1996)); see also id. at 8 ("Although courts should not be too quick to resort to dismissal, disobedience to court orders, in and of itself, constitutes extreme misconduct (and thus, warrants dismissal).") (internal quotation marks and citations omitted). Thus, this argument is also rejected.

Mr. Bagnuolo next posits that:

At worst the Plaintiff might be able to tangentially request that the Court draw an adverse inference concerning Personal Jurisdiction on any documents the Court believes should have been produced concerning Jurisdictional issues, but even this request should be denied because the Court must look at what was not provided and why it was not provided within the time set forth in an Order, which in this case was and still remains nothing; as Mr. Bagnuolo has no responsive documents to Amica[']s Requests for the Production of Documents and has indicated so both orally on the record in the February 3, 2012 Hearing and again in his written March 8, 2012 Responses.

Objection #46 at 10-11.

In short, Mr. Bagnuolo contends that because he has nothing to produce, his failure to comply with the Order of 2/3/12 within the fifteen days specified has caused little or no prejudice to Amica, and, therefore, only the most minor of sanctions is warranted. The Court is not so persuaded.

In the Order of 2/3/12 the Court noted that any objection to the request for production had been waived, see Order of 2/3/12 at 3, and that as long as a party has the legal right or ability to obtain requested documents from another source on demand, that party is deemed to have control, see id. at 4 n.4. Notwithstanding

this ruling and advisement, in his belated response to Amica's First Request for Production Mr. Bagnuolo continues to raise objections to the requests and avoid responding to those requests as drafted. See Objection #46, Ex. B (Darrin Bagnuolo's Response to Amica's Request for Documents) at 2 (Response to Question One) (attempting to assert objections and/or qualify responses to Amica's request for production). Similarly, in Objection #46, Mr. Bagnuolo complains that Amica drafted its discovery "as if Darba Enterprises, Inc. and I were the same, when we are not." Objection #46 at 2. Mr. Bagnuolo's claim that he has no responsive documents to produce appears to rest on these claimed objections and distinctions.

Yet, Amica, in its opposition to Mr. Bagnuolo's motion to correct references to Darba Enterprises, Inc.,¹¹ has submitted a document from the Nevada Secretary of State which indicates that Mr. Bagnuolo is the president, director, treasurer, and secretary of Darba Enterprises, Inc. See Memorandum of Law in Support of Amica Mutual Insurance Company's Opposition to Plaintiff's Motion Request ("Amica's Opp. Mem."), Ex. A. Mr. Bagnuolo has not disputed Amica's observation that he "appears to be the sole officer and sole shareholder." Amica's Opp. Mem. at 3. Most

¹¹ See Darrin Bagnuolo's Motion Requesting that the Plaintiff be Compelled to Correct Misleading or Confusing References to Darba Enterprises, Inc. and to Cease Using Darba Enterprises, Inc.'s Name within its Pleadings, Subpoenas, Discovery in this Matter and Other Essential Court Related Documents (Dkt. #45). The Court has addressed this motion in a separate order issued today.

significantly, Amica notes that "on March 19, 2012,¹¹ in response to a motion to dismiss filed in the District of Nevada, Darrin Bagnuolo claimed in a sworn 'declaration' that 'as Darba's president I am the person most knowledgeable' about Darba Enterprises, Inc.'s claims against Amica."¹² Id. at 3-4 (quoting Ex. B (Plaintiff's, Darba Enterprises, Inc., Opposition to the Defendants' Motion to Dismiss in Darba Enterprises, Inc. v. Amica Mutual Insurance Co., et al., No. 2:12-cv-00043-LRH-GWF (D. Nev. Jan. 11, 2012), ECF No. 19 at 2). These facts cast considerable doubt on Mr. Bagnuolo's claim that he does not have "the legal right or ability to obtain the documents from [Darba Enterprises, Inc.] ...," Order of 2/3/12 at 4 n.4; see also Poole v. Textron, Inc., 192 F.R.D. at 501 (holding that "[a]s long as the party has the legal right or ability to obtain the documents from another source on demand, that party is deemed to have 'control'").

The Court, therefore, rejects Mr. Bagnuolo's argument that only the mildest of sanctions is warranted. On the other hand, the Court agrees with him that default judgment is too severe a sanction at this juncture. Accordingly, the Court will impose an intermediate sanction by recommending that Mr. Bagnuolo's Motion to Dismiss be denied and imposing attorneys' fees related to the

¹² Amica reports that on January 11, 2012, Darba Enterprises, Inc., filed an anti trust lawsuit against Amica in the District of Nevada. (Darba Enterprises, Inc. v. Amica Mutual Insurance Co., et al., No. 2:12 cv 00043 LRH GWF (D. Nev. Jan. 11, 2012)). See Amica's Opp. Mem. at 3 n.1.

bringing of the instant Motion. As his failure to produce documents has frustrated Amica's attempt to conduct jurisdictional discovery, denial of the Motion to Dismiss is an appropriate penalty for Mr. Bagnuolo's violation of the Order of 2/3/12. The award of attorneys' fees is also warranted as Amica was compelled to bring the instant Motion as a result of Mr. Bagnuolo's failure to comply with the same order.

IV. Conclusion

For the reasons stated above, the Motion for Sanctions is granted to the extent that (1) this Magistrate Judge will recommend that Mr. Bagnuolo's pending Motion to Dismiss be denied and (2) Mr. Bagnuolo will be required to pay Amica's reasonable attorneys' fees incurred in connection with bringing the instant Motion.¹³ To the extent that it seeks the entry of default judgment, the Motion is denied. Counsel for Amica shall submit an itemized statement within fourteen days of the attorneys' fees sought in connection with the instant Motion.

/s/ David L. Martin
DAVID L. MARTIN
United States Magistrate Judge
May 10, 2012

¹³ See n.4.