

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

A.J. AMER AGENCY, INC.,	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 12-351S
	:	
ASTONISH RESULTS, LLC,	:	
Defendant.	:	

**MEMORANDUM AND ORDER**

Despite a reflexive certification that the parties had conferred, this Motion to Compel Discovery (ECF No. 18) founders on the failure of Plaintiff to discharge its duty to engage in a meaningful meet and confer before haling the opposing party into Court.<sup>1</sup> Fed. R. Civ. P. 37(a)(1). Plaintiff A.J. Amer Agency, Inc., is one of several insurance agencies that have sued Defendant Astonish Results, LLC (“Astonish”), alleging breach of contract, fraud in the inducement, breach of fiduciary duty and breach of its obligations of good faith and fair dealing, all claims arising from a Marketing Agreement between Astonish and the various agencies to supply websites, digital marketing, training and consulting services. All plaintiffs have the same counsel, who maintains a website that seeks to attract new plaintiffs to engage him to sue Astonish through such representations as “Mr. Sparks has also reviewed thousands of pages of documents obtained during the course of litigation against Astonish Results.”<sup>2</sup> Such tactics have made Defendant understandably wary that this discovery is aimed not at Plaintiff’s claims, but rather to assist in the prosecution of other cases or to recruit new clients.

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<sup>1</sup> The Court observes that this is not the first time that this Plaintiff’s failure to meet and confer has been an issue. See Mem. & Order, at 4 n.3 (December 12, 2012) (ECF No. 16). See also In re Lernout & Hauspie Sec. Litig., 218 F.R.D. 348, 354 (D. Mass. 2003) (when discharging duty to meet and confer on discovery disputes, movant should take note of prior orders and assume court will follow same principles).

<sup>2</sup> Home page, <http://astonishresultslawsuit.com> (last visited Feb. 25, 2013).

This Motion, which is currently before the Court for determination, 28 U.S.C. § 636(b)(1)(A), DRI LR Cv 72(a), was addressed at a hearing held on February 19, 2013. It seeks to compel production of everything covered by twenty-one vague, overbroad and overlapping requests for production from a set that had eighty-six items. The instructions to the requests stipulate that all documents are required to be produced electronically in native format, with metadata. Defendant's objections are also troublesome; many are boilerplate and unfocused on the parties' claims and defenses. See Fed. R. Civ. P. 26(b)(1). Further, many of the responses vaguely proffer the production of documents, yet they have not yet been provided.

To illustrate, Plaintiff contends that it was promised a unique website, yet alleges that Defendant provided one that is similar to the websites sold to other customers. The crux of this claim is the appearance of the public face of comparable sites. Despite the specificity of the claim, Plaintiff's requests ask for native versions of the template used to create websites for every one of Astonish's insurance agency customers. In the face of such a variance between the requests and Plaintiff's claim, the Court inquired, but Plaintiff was unable to clearly describe what it already has and why it needs what it seeks for the actual claims in this case.

At the hearing, Plaintiff attempted to focus on the four categories of specific documents and digital files it believes it really needs to prosecute its case. Unfortunately, this level of specificity was missing from its Motion and clearly had not been the subject of a productive conference with opposing counsel. See Velazquez-Perez v. Developers Diversified Realty Corp., 272 F.R.D. 310, 312 (D.P.R. 2011) (movant's failure to comply with meet and confer requirements constitutes sufficient reason to deny motion to compel). Moreover, given the inherently unstable nature of native format, the Court is disinclined to order wholesale native production, yet Plaintiff's counsel was unable to explain why his instructions mandated native

format for all documents and what format realistically addresses the needs of this case in light of what Defendant is able realistically to provide.

Given this state of affairs, the best approach to facilitate a speedy resolution is for the parties to engage in a substantive good faith conferral. See Fed. R. Civ. P. 37(a)(1) (movant must certify it has in good faith conferred or attempted to confer with other party in an attempt to obtain discovery without court action). The purpose of good faith conferral is to enable the parties to narrow, if not resolve, their dispute, and thereby obviate the need to file wide-ranging motions to compel. See Hasbro, Inc. v. Serafino, 168 F.R.D. 99, 101 (D. Mass. 1996); Stornaiuolo v. N.H. Boat Builders, Inc., 113 F.R.D. 655, 657 (D. Mass. 1987).

It is not up to the Court to expend its own energies when the parties have not sufficiently expended their own. Hasbro, Inc., 168 F.R.D. at 101. The costs of litigation are too high and there are too many demands on the Court's time to adjudicate needless motions to compel that might not have been filed if counsel put forth a good faith effort. See Midland-Ross Corp. v. Ztel, Inc., 113 F.R.D. 664, 666 (D. Mass. 1987) (interpreting similar local rule). "Rule 37(a)(5) exists to discourage counsel from creating the expense of getting the court involved in resolving discovery disputes that, with a good faith effort, they could have resolved on their own." Saalfrank v. Town of Alton, No. 08-cv-46, 2010 WL 839884, at \*7 n.10 (D.N.H. Mar. 5, 2010).

The meet and confer requirement in Rule 37(a)(1) is not an empty formality and cannot be satisfied merely by including copies of correspondence that discuss the discovery at issue, particularly when the correspondence only shows the movant threatening a motion to compel if all the requested discovery is not produced. Velazquez-Perez, 272 F.R.D. at 312. Nor do hostile e-mails back and forth that reiterate discovery demands satisfy the meet and confer requirement. Id.; Aponte-Navedo v. Nalco Chem. Co., 268 F.R.D. 31, 41 (D.P.R. 2010) (e-mails that show

movant's point of view instead of good faith effort to reach agreement do not satisfy meet and conferral requirement). A history of confrontational discovery disputes may make a discovery conference unpleasant or unlikely to succeed, but the movant's obligation to confer remains nonetheless. Jalbert v. Grautski, No. 06-40040, 2009 WL 3754698, at \*3 (D. Mass. Feb. 12, 2009). The movant must do what Rule 37(a)(1) says: attempt to engage in substantive communication and resolve the discovery dispute in good faith.

In this case, the conferral between the parties should be guided by the above-stated principles and the following five directives. See TG Plastics Trading Co. v. Toray Plastics, No. 09-336S, 2010 WL 936221, at \*3 (D.R.I. Mar. 12, 2010) (court's ruling on motion to compel invokes Rule 26 case management powers to order parties to confer in good faith on appropriate scope of discovery). First, Plaintiff's requests for material in electronic format should be based on what it has already, what it needs for this case, as well as what is reasonably accessible, mindful of the cost-shifting provisions in Fed. R. Civ. P. 26(b)(2)(B). Second, the public website that is the crux of Plaintiff's claim is publicly available. In light of this, the parties should consider what approach is the least costly and burdensome to Defendant that provides Plaintiff with the evidence it needs to present proof at trial. Obviously, Defendant should not produce all websites nationwide that use similar graphics; rather the parties should work to agree on a reasonable limiting convention. Third, while Defendant's sales training materials are relevant to Plaintiff's fraud claim, this does not unlock the door to all sales materials without regard to the connection to this case; only those materials actually reviewed by the sales team that presented to Plaintiff are discoverable. Fourth, Plaintiff should explore what material is already accessible to it using a password that it already has before exploring with Defendant what needs to be produced with respect to the "Virtual Profit Center" software. If Plaintiff has lost the password,

Defendant should make sure it gets one that works. Finally, once the scope of appropriate discovery is clear, Defendant should supplement its responses to specify whether documents or files exist or not.

Based on the foregoing, Plaintiff's Motion to Compel Discovery (ECF No. 18) is denied (without prejudice) in part, but granted to the extent that Defendant is ordered to produce the documents proffered in its responses. In light of the imminency of the close of discovery, the Court orders as follows:

1. By February 22, 2013, Plaintiff and Defendant shall initiate a substantive meet and confer to discuss the documents that Plaintiff needs for the claims and defenses in this case and the format in which such documents shall be produced.
2. By February 25, 2013, Defendant shall begin to produce such documents as its response indicated would be forthcoming.
3. To the extent that the meet-and-confer process does not resolve disputes as to documents that are relevant to the claims and defenses in this case, Plaintiff may return to this Court with an amended version of this motion.

So ordered.

ENTER:

/s/ Patricia A. Sullivan  
PATRICIA A. SULLIVAN  
United States Magistrate Judge  
February 25, 2013