

Federal Magistrate Judge Tells Cautionary Tale About How Not to Conduct Discovery in Federal Court

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by Benjamin Greenberg



Earlier this month, a federal magistrate judge in the Eastern District of New York, Judge Lois Bloom, issued a report and recommendation ("R&R") that the ultimate sanction of default judgment be entered against certain defendants that had engaged in wide-scale discovery misconduct, that Judge Bloom found ultimately amounted to fraud on the Court. While federal courts strongly prefer to resolve cases on the merits rather than issuing case-ending discovery sanctions, Judge Bloom found the defendants' pervasive and egregious discovery conduct

to constitute an extreme case that warranted such action.

The underlying lawsuit was brought by Abbott Laboratories, Abbott Diabetes Care Inc., and Abbott Diabetes Care Sales Corp. (collectively "Abbott") against hundreds of distributors and pharmacies for, among other claims, trademark and trade dress infringement, unfair competition, and trademark dilution. The lawsuit seeks to stop the sale of Abbott's FreeStyle blood glucose test strips in the United States that are intended to be used in other countries, and which are illegal to sell in the United States. Abbott contends that the defendants in the case are conspiring to import diverted FreeStyle test strips whose labeling has not been cleared by regulators for sale in the United States, and are passing these unapproved strips off to unsuspecting U.S. consumers in order to receive undeserved reimbursement payments from insurance companies. In November 2015, Abbott won a preliminary injunction barring the sale of the strips, which the Second Circuit upheld a year later.

The defendants that are the subject of Judge Bloom's recommended sanctions are

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distributor H&H Wholesale Services, Inc., its principal, Howard Goldman, and its marketing manager and Mr. Goldman's wife, Lori Goldman (collectively the "H&H Defendants"). In her R&R, Judge Bloom found that the H&H Defendants had engaged in continuous bad faith discovery misconduct, which began with the H&H Defendants formulating search terms to run against their documents that were designed to fail (namely failing to include well-known shorthand used by the H&H Defendants in relation to relevant transactions) in deliberate disregard of Judge Bloom's discovery orders compelling certain specific discovery from the parties. Judge Bloom also found that the H&H Defendants deliberately withheld responsive documents, including all communications with its largest supplier of the Freestyle test strips, and any documents referencing H&H's owner or his wife (the Goldmans).

The withholding of these responsive documents was only discovered when the Court entered a seizure order in a separate counterfeiting action, authorizing Abbott to seize, among other things, H&H's e-mail server. Abbott, who had previously raised concerns with the H&H Defendants' initial production before receiving the e-mail server, voiced new concerns that the H&H Defendants had failed to produce documents responsive to the Court's discovery orders. The Court then ordered the H&H Defendants to re-run the document search outlined in its previous orders, which resulted in the H&H Defendants producing significantly more responsive documents.

Judge Bloom also found that the number of responsive documents produced later did not comport with the H&H Defendants' earlier representations to the Court regarding the number of responsive documents, and the accompanying burden of producing those documents. Based on these earlier representations, the Court narrowed the scope of the H&H Defendants' required production. The H&H Defendants submitted numerous explanations throughout the course of the proceeding attempting to explain the diverging document count numbers. The Court found that the varying explanations were inconsistent. In fact, the H&H Defendants had five different law firms represent them throughout the course of the proceeding, and Judge Bloom found that the explanation given by the H&H Defendants' current counsel for the withheld documents – which largely attempted to lay the blame at the feet of H&H's original counsel – was inconsistent with the positions taken by the other law firms previously representing the H&H Defendants.

To add significant fuel onto the proverbial fire, Judge Bloom waded through the deposition testimony of several key representatives of the H&H Defendants concerning issues surrounding the withheld documents. The Magistrate found portions of the testimony to be inconsistent and evasive, at best, and other testimony to have been perjured.

As one might expect from the severe sanction recommended by Judge Bloom, this was not the first time that the H&H Defendants had been reprimanded for discovery misconduct during the litigation. In 2017, the H&H Defendants were found to have violated a protective order based on having Mr. Goldman surreptitiously listen to remote 30(b)(6) depositions, for which H&H's former counsel took responsibility and agreed to

pay reasonable expenses incurred by the other parties relating to the violation. Also, based on the same above-discussed document withholding issues, Judge Bloom previously ruled in 2018 that the crime-fraud exception to the attorney-client privilege prevented the H&H Defendants from claiming privilege with respect to communications with counsel about its earlier production.

Based on the full record in the case, Judge Bloom found that there was clear and convincing evidence that the H&H Defendants had perpetrated a fraud on the Court. Clearly concerning to Judge Bloom was the fact that “had [Abbott] never seized H&H’s server . . . H&H would have gotten away with their fraud upon this Court. H&H only complied with the Court’s orders and their discovery obligations when their backs were against the wall.”

The Court went on to analyze certain factors that must be considered when determining what sanction should be imposed. The Court reasoned that several factors weighed in favor of imposing a case-ending sanction, including the bad faith that can be inferred from the H&H Defendants’ deliberate and strategic non-compliance with discovery, selective withholding of documents, and perjured and deceptive deposition testimony. The discovery misconduct was calculated and pervasive and started early on, and continued even after the H&H Defendants were “caught red handed.” Judge Bloom also found that Abbott’s progress in the litigation was significantly impeded by the H&H Defendants’ discovery fraud. Further, Judge Bloom determined that this discovery misconduct must be appropriately punished to deter such abuse of the Court’s process by other litigants. Thus, the Court found that the H&H Defendants committed fraud upon the Court, and that the harshest sanction of a default judgment against the H&H Defendants was warranted.

As Judge Bloom warned in her R&R, the H&H Defendants’ conduct presents “a cautionary tale about how not to conduct discovery in federal court.” For starters, while it should be obvious, misrepresentations to the court, or perjured testimony, should never be countenanced. It appears, however, that these later misrepresentations were an attempt to cover up earlier discovery misconduct regarding insufficient document searches and withholding documents relating to, among others, key decision-makers at the company. To avoid these early pitfalls, litigants should ensure that they are transparent in discussions with opposing counsel from very early on in the litigation about the appropriate scope of discovery, search terms, custodians, and foreseeable discovery issues. Taking a proactive approach to discovery at the outset of a litigation, as opposed to when the litigant’s back is up “against the wall,” is not only a recommended practice, but is required under the federal rules. For example, litigants should spend appropriate time and diligence in providing initial disclosures as well as in formulating a discovery plan with opposing counsel. Otherwise, litigants, such as the H&H Defendants, often find themselves continually crawling out of a discovery hole of their own making. This too often results in incurring unnecessary expense to respond to discovery motions and to produce discovery that the litigant initially attempted to evade. As seen in the case of the H&H Defendants, discovery misconduct can also lead to discovery sanctions; these can range from monetary sanctions, to adverse inferences or evidence preclusion at trial, to

the most drastic result of a case-ending sanction.

The H&H Defendants have until later this month to lodge objections to Judge Bloom's R&R. The TMCA will be monitoring this case and will keep you posted with any key developments.