[redacted]

CHRISTIAN DOSCHER,
Plaintiff

vs.

JAMES PATRICK HOLDING,

JOHN DOE # 1,
Defendants

CASE NO. 15-2-01352-9

PLAINTIFF DOSCHER'S
REPLY BRIEF

A. ALL OF DEFENDANT'S JUSTIFICATIONS FOR THE PROTECTIVE ORDER ARE INSUFFICIENT *EVEN ASSUMING HIS FACTS ARE TRUE*

Defendant complains that Plaintiff's second set of discovery requests was 'replete with unprofessional self-serving discovery requests, punctuated by antagonistic commentary." Defendant's Opposition Brief ('Opposition') at 3, par. 6. But this fails the ER 401 relevancy test, as he never explains how this allegedly unprofessional communication demeanor toward

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non-parties/non-witnesses could possibly help him refute or justify his myriad discovery violations as documented in Plaintiff's Motion for Sanctions ('Motion').

In Opposition par. 8, Defendant alleges that Plaintiff abused the discovery process by misusing information provided in discovery answers. Defendant alleges in par. 9 that Plaintiff used information in discovery answers to send harassing emails to several non-parties and non-witnesses. Assuming arguendo that this is true, Plaintiff's contacts with non-parties and non-witnesses fail the relevancy test in ER 401 since Defendant does not allege how his own discovery violations, the subject of the Motion, are mitigated in the least by Plaintiff's contacts with non parties and non-witnesses.

In Opposition par. 11, Defendant justifies his discovery failures and his failure to file an Answer to Complaint by saying he 'intends' to file the summary judgment version of a CR 12(b) motion to dismiss for lack of personal jurisdiction at some undefined point in the future. First, anticipating the obvious, Plaintiff already refuted that contention: Binding published [redacted]uthorities require that such meritorious dismissal motions be preceded by discovery that is not only "reasonable", but "full" as well. See Plaintiff's Motion at 3-4, citing [redacted] Defendant does not contend that anything in Plaintiff's second or third discovery sets are seeking information likely to be inadmissible or irrelevant. Second, Plaintiff, anticipating the obvious once again, already made a conclusive case from binding published [redacted]horities that not even a filed (much less an intended future) motion to dismiss postpones one's obligation to timely answer discovery. Motion at 4, citing [redacted] [redacted]s repeated below since it appears to have had no effect whatsoever on Counsel[redacted]

[redacted]

Although a CR 12(b) motion extends the time for answering, it does not postpone the need to comply with requests for discovery unless a protective order is sought and granted. [1]

In Opposition par. 13, Defendant carefully avoids explaining *why* he gave up on his allegedly earlier intent to file motion for protective order. The reason Defendant doesn't dare discuss why he never timely moved for a protective order despite his alleged intent to do so is because he cannot provide a reasonable excuse for that failure, and he knows from Plaintiff's motion that failure to give reasonable excuse makes the violation "willful". Plaintiff's Motion at 5:1, citing [redacted] What could possibly have caused Counsel [redacted] decide against *timely* filing a motion for protective order?

In Opposition par. 14, Defendant "reiterates" his "objection" to providing more than 4 of his social security numbers. "Reiterate" means to repeat or restate. But Defendant did not object to that discovery request in the first place. See Plaintiff's Motion at 10, par. "J". If the objection never existed, it can hardly be "reiterated". Defendant's failure to object turns his partial answer into zero answer for purposes of determining sanctions. CR 37(a)(3).

Opposition par. 15 is the most frivolous factual assertion of all, since it admits it is seeking to show Plaintiff's animosities and underlying motivation, when, even if such things were true, neither of those contribute the least bit toward refuting his allegations of Defendant's *own* discovery violations, and they thus fail the ER 401 relevancy test. That was another "red herring" by Defendant, intended to distract attention away from his own inexcusable discovery failures documented in Plaintiff's motion.

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[1] [redacted]

Finally, Defendant in Opposition at 7:1 requests a protective order against Plaintiff's second and third sets of Interrogatories and Requests for Production, on the ground that he *plans* to file a future CR 12(b) motion. This is patently frivolous. Plaintiff, anticipating the obvious again, already showed in his motion that published binding [redacted]uthorities require that before a meritorious motion to dismiss for lack of personal jurisdiction is heard, the prior discovery must not only have been "reasonable", but "full". See Plaintiff's Motion at 3-4, citing [redacted] Finally, Defendant curiously does not express or imply anywhere in his Opposition that his served answers to discovery set 1 are sufficient to allow Plaintiff to prepare to meet the future motion to dismiss. **For all these reasons, even if Defendant could escape "sanctions" (his violations are more numerous and worse than those which the Supreme Court forced sanctions on in [redacted], his disputing the "motion to compel" is patently frivolous under the broad discovery requirement in [redacted]**

B. SANCTIONS ARE MANDATORY BECAUSE THEY ARE IN VIOLATION OF CR 26(G).

Defendant does nothing to refute the mandatory nature of the sanctions as Plaintiff argued in Motion at 12, par. "K".

C. DEFENDANT'S MOTION FOR PROTECTIVE ORDER IS UNTIMELY

When binding case law says a party cannot ignore discovery but must answer or move for a protective order (Motion at 4, citing [redacted] the obvious implication is that the party must file and serve any motion for protective order *in a timely fashion.* Plaintiff served his second discovery set on Defendant October 19, 2015, and Defendant *still* has not replied to it, which means this motion for protective Order was not filed or served until January 13, 2016, two

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months *after* the original 30-day answering deadline under CR 33 (November 21) had expired. This is not the conduct of an attorney whose discovery abuses fall under good cause or excusable neglect, this is straight up "delay tactics 101", and failure to sanction will make it happen again:

> Misconduct, once tolerated, ***will*** breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense. [2]

D. DEFENDANT FAILS TO SHOW ANY 'GOOD CAUSE'

Defendant admits he is moving for protective order under CR 26(c). Opposition at 1:18; 6:18-19. Defendant has not alleged any of the reasons that might show good cause for protective order, such as Plaintiff's discovery requests are unduly burdensome, overly invasive, or too expensive, or seeking irrelevant/inadmissible evidence, etc. Specifically, he makes no showing that the reasons provided for in 26(c) ("annoyance, embarrassment, oppression, or undue burden or expense") apply here (i.e., that his alleged annoyance, embarrassment, expense, etc, arises from unnecessary or unjustified litigation conduct). He does not express or imply that any specific interrogatories are unlikely to lead to admissible evidence, constituting a rather screaming silence.

E. DEFENDANT HAS FAILED TO MEET ITS REQUIRED 'STRONG' SHOWING AND 'HEAVY' BURDEN JUSTIFYING NON-DISCLOSURE

Our State Supreme Court has declared that the proponent who seeks to use CR 26(c) to limit discovery must meet a "heavy" burden:

> The burden of persuasion is upon the party seeking the protective order. See CR 26(c); (opponent of disclosure bore "heavy burden of showing why discovery [should be] denied"). [3]

[redacted] Corp.,

A [redacted]strict Court similarly held that this 'heavy' burden requires a showing of justification that is "strong":

> A party seeking a stay of discovery carries a "heavy burden" of making a "strong showing" why discovery should be denied. [4]

Even putting the worst possible spin on Plaintiff's communications with non-parties and non-witnesses [redacted]requires "full" discovery to take place before the Court will hear a motion to dismiss for lack of personal jurisdiction. Once again, Defendant curiously never complains that anything in Plaintiff's discovery set 2 and 3 is overly broad, unduly burdensome or seeks information unlikely to lead to relevant/admissible evidence. Defendant is just angry that he was caught red-handed, and so apparently thinks the best reply is to engage in the red-herring distraction fallacy and get the Court to dislike Plaintiff. Even if these fallacies constituted "good cause", they can hardly constituted "strong showing" or meeting of "heavy" burden.

F. DEFENDANT'S WISH TO POSTPONE DISCOVERY UNTIL THE COURT RULES ON ITS MOTION FOR SUMMARY JUDGMENT, IS DIRECTLY CONTRARY TO CR 56

CR 56(c) presupposes that the summary judgment motion will *make use of discovery materials*, such as 'depositions' and 'answers to interrogatories'. Defendant's wish to avoid deposition of his client and answering further relevant interrogatories until the court rules on his motion for summary judgment, turns CR 56 on its head. Defendant may argue that summary judgment can be appropriate if any type of admissible evidence conclusively shows lack of

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genuine issue of material fact, but while that is technically true, [redacted] is still binding authority, and still requires that not just "reasonable" but "full" discovery precede a motion to dismiss for lack of personal jurisdiction.

G. DEFENDANT REFUSED TO ANSWER A PRIOR DISCOVERY REQUEST SEEKING THE AFFIRMATIVE DEFENSE FACTS HE NOW WISHES TO USE IN HIS FUTURE MOTION TO DISMISS.

Plaintiff had made a discovery request for evidentiary facts supporting any affirmative defense of Defendant. Plaintiff's Motion ('Motion') at 6-7. Defendant answered with no facts, but only the *titles* of various affirmative defenses. Id at 7:1 ff.

H. CURIOUSLY, DEFENDANT ADMITS THAT THE ALLEGATIONS OF HIS DISCOVERY ABUSE ARE TRUE

Defendant admitted during a discovery conference that his primary motive in failing to answer Plaintiff's Discovery set 2 is Defendant's belief that the Court should first hear his not-yet-filed motion to dismiss. Plaintiff's Motion ('Motion') at 3, par. C; Id at 8, par. I. Plaintiff also alleged that Defendant failed to cooperate with him in supplying dates Defendant could be deposed. Motion at 13, par. "L". Defendant nowhere expresses or implies in his Opposition Brief ('Opposition') that these accusations are false. So the question is whether he can provide reasonable excuse, and it is a foregone conclusion that Plaintiff's emails to non-parties and non-witnesses are utterly irrelevant to whether Defendant can reasonably excuse his own discovery violations documented in Plaintiff's motion.

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I. DEFENDANT'S MOTION FOR PROTECTIVE ORDER IS FRIVOLOUS; HE NEVER OBJECTED TO DISCOVERY ON DEFENDANT'S SOCIAL SECURITY NUMBER.

Plaintiff argued that Defendant never objected to disclosure of his social security number. Motion at 10, par. "J". **There is no objection within his answer to that specific Interrogatory**. Id. Defendant lies to this Court and says he now "reiterates" his "objection" to full disclosure of said social security number. Opposition at 5, par. 14. The objection never *existed*, and it is logically impossible to 'reiterate' what never existed.

J. EVEN IF RELEVANT, PLAINTIFF'S COMMUNICATIONS WITH NON-PARTIES AND NON-WITNESSES ARE MORE PREJUDICIAL THAN PROBATIVE

Plaintiff's motion accuses Defendant of violating discovery rules. Defendant does not express or imply how something Plaintiff said to a non-witnesses or non-parties is the least probative of the truthfulness of any fact relevant to supporting or refuting Plaintiff's allegations that Defendant violated the discovery rules. Plaintiff's contacts with those persons are thus more prejudicial than probative and should be struck under ER 403.

K. CONCLUSION

The Court should grant all relief requested in Plaintiff's Motion.

Dated this 14th day of January 2016.

Christian Doscher

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