IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DVCOMM, LLC	:	**CIVIL ACTION**
	:	
v.	:	
	:	**NO: 14-5543**
HOTWIRE COMMUNICATIONS, LLC, ***et al.***	:	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

KEARNEY, J. **February 16, 2016**

Under Rule 1 of the Federal Rules of Civil Procedure as most recently strengthened as of December 1, 2015, courts and the parties secure the just, speedy and inexpensive determination of every case. Our Policies, binding on parties and counsel, require voluntary, complete and cooperative discovery in a timely manner with counsel expected to act in accordance with both the letter and spirit of the Federal Rules. Parties should not be forced to spend money to overcome their opponent's efforts to frustrate Rule 1. Hiding the identity of material witnesses and destroying electronic data grossly distorts the parties' obligations requiring courts to recalibrate the balance to ensure a just and inexpensive litigation. Under Rule 37, we evaluate the sanctions necessary to restore this balance.

Following pre-hearing briefing, Defendants' uncontested post-hearing certifications of reasonable fees and costs, evaluating credibility of witness testimony at our January 22, 2016 hearing and consistent with our January 25, 2016 Order granting Defendants' Motion for Sanctions and our February 3, 2016 Order and Findings of Facts and Conclusions of Law, we enter facts and conclusions of law supporting our accompanying Order requiring DVComm, LLC and Steven C. Sizemore pay $110,262.95 to reimburse Defendants' reasonable fees and

costs directly caused by concealment of material information including destroying the first rough electronic draft of the business plan sent by Plaintiff to Kolten Kowalsky on April 21, 2010 ("Business Plan"):

Findings of Fact

1. As detailed in our February 3, 2016 Findings of Fact and Conclusions of Law,[1] Plaintiff DVComm, LLC ("DVComm") and its owner, Steven C. Sizemore, sued Defendants Hotwire Communications, LLC and Hotwire Communications, Ltd. (together, "Hotwire") on September 26, 2014, claiming Hotwire breached a non-disclosure agreement ("NDA") by using DVComm's April 2010 Business Plan prepared for Hotwire to create a fiber optics network in the Atlanta area without using DVComm and then not paying DVComm for its net profits allegedly generated by Hotwire based on DVComm's Business Plan.

2. A key factual issue in this case includes, under the NDA's language, whether DVComm's Business Plan "was in the public domain at the time it was disclosed" to Hotwire, or subsequently entered the public domain through no fault of Hotwire, excusing its obligation under the NDA.

3. DVComm and Sizemore proffered an expert report calculating the value of its Business Plan, and claimed damages for both of them, of approximately $82 million.[2]

4. On June 1, 2015, Senior Judge Yohn set the discovery close for October 12, 2015. Upon random reassignment, we continued the discovery close date of October 12, 2015. On September 22, 2015, we granted DVComm's motion for an extension of time to complete discovery to no later than October 21, 2015.[3]

5. To address its potential liability and answer an $82 million damage demand, Hotwire issued discovery on the origin of DVComm's Business Plan.

6. On October 2, 2015, DVComm, through Sizemore, responded to Hotwire's First Set of Interrogatories.[4] Sizemore failed to identify or disclose Kolten Kowalsky or Jackson Land in response to the question "Identify all third parties with whom you discussed the Business Plan, Hotwire's entry to the telecommunications market in Georgia, or Hotwire."[5]

7. Sizemore swore he searched his computers for responsive information but only found approximately two hundred pages of data, including an email he sent to Hotwire on April 22, 2010 attaching the first draft of his Business Plan. He did not disclose emails earlier sent to Kolten Kowalsky and Jackson Land regarding the Business Plan.

8. At his October 6, 2015 deposition, Sizemore testified he drafted the Business Plan himself and his employer AT&T had no knowledge of his Business Plan. He also identified only two copies of the Business Plan already produced in discovery and he gave the plan to no one other than Hotwire.

9. Sizemore also testified concerning his ongoing AT&T employment.

10. Hotwire then sought documents from AT&T and DVComm moved to quash the subpoena upon AT&T. We denied DVComm's motion to quash on October 19, 2015 and Hotwire served its subpoena upon AT&T.

11. On October 30, 2015, AT&T suspended Sizemore and required the return of its laptop used by Sizemore.

12. Sometime after November 4 and November 12, 2015, as more fully detailed in our February 3, 2016 Findings of Fact, Sizemore "double deleted" emails and attachments from his personal computers relating to his first rough draft of the Business Plan created with at least some help from Kolten Kowalsky, a third party concealed by Sizemore.

13. On November 20, 2015, AT&T produced approximately 1,000 pages in response to Hotwire's subpoena. AT&T swore it gathered these documents from a word search of the active files on Sizemore's AT&T laptop.

14. The AT&T production revealed, for the first time, Sizemore communicated with two individuals, "M. Kolten" and Jackson Land, around the April 21-22, 2010 time period regarding DVComm's Business Plan.[6]

15. Based on AT&T's document production, Hotwire moved for additional discovery and sanctions.[7] On November 30, 2015, we granted Hotwire's motion for additional discovery,[8] allowing the parties leave to depose Sizemore for a second time and depose "M. Kolten" and Jackson Land.[9]

16. AT&T declared its search of the active files on Sizemore's computer captured emails available to Sizemore throughout discovery. AT&T did not search backup tapes or unallocated space on the laptop.

17. On November 30, 2015, we also ordered DVComm and Sizemore to produce a sworn affidavit describing the location, history and present status of any version of the Business Plan.

18. In his responsive December 9, 2015 declaration, Sizemore swore "all drafts and final versions of the Business Plan, and all requested documents, that I am aware ever existed have been provided to the defendants."[10]

19. On December 15, 2015, Sizemore swore the documents produced by AT&T were "of course" in his possession when he failed to earlier disclose them. He also disclosed AT&T suspended his employment on October 30, 2015 and he did not have his AT&T laptop thereafter.

20. On December 30, 2015, Hotwire moved for sanctions under Fed.R.Civ.P. 37 seeking an order (i) awarding its expenses "chasing late discovery;" (ii) permitting Hotwire to image and search Sizemore's hard drive; and (iii) for an adverse inference Sizemore is not the author of the Business Plan, and the Business Plan is in the public domain.[11]

21. On January 5, 2016, we ordered DVComm and Sizemore to allow Hotwire's computer forensic experts to image and analyze data on DVComm's and Sizemore's devices and report back to the parties before the scheduled January 22, 2016 hearing on Hotwire's motion for sanctions.[12]

22. Under our January 5, 2016 Order, Hotwire sought to compel an image and employ the agreed search term protocol upon the unallocated space on AT&T's laptop used by Sizemore and now held by AT&T since October 30, 2015. AT&T retained outside counsel who filed motions to ensure protection for its confidential information possibly on the laptop's unallocated space.

23. On January 22, 2016, the parties presented witnesses and exhibits regarding Hotwire's motion for sanctions, including testimony from DVComm's sole member, Steven C. Sizemore. We evaluated the credibility of witnesses and analyzed forensic reports produced by Hotwire's forensic consultant on an expedited basis.

24. On January 25, 2016, we granted Hotwire's Motion for Sanctions, finding DVComm, through Sizemore, deleted electronic information from his computer devices during discovery. We ordered Hotwire to file certifications by its counsel and forensic computer consultant identifying "lost" electronic evidence, ordered DVComm to file a responsive certification, and permitted Hotwire to file a petition for reasonable attorneys' fees and costs relating to its effort in obtaining documents, testimony and electronically stored information not

produced by DVComm during discovery, including the forensic computer steps undertaken to investigate and discovery information on DVComm's or Sizemore's computer devices.[13]

25. In our January 25, 2016 Order, we deferred ruling on additional monetary sanctions under Fed.R.Civ.P. 37 and our inherent power arising from DVComm's alleged obstruction of discovery.

26. Upon review of Hotwire's Certification by its counsel and forensic computer consultant regarding deleted and unrecoverable documents[14] and DVComm's and its counsel's responsive certification,[15] we found Hotwire entitled to an adverse inference sanction under Fed.R.Civ.P. 37(e)(2) in our February 3, 2016 Order and Findings and Fact and Conclusions of Law.[16]

27. Under our January 25, 2016 Order, Hotwire's counsel at Blank Rome LLP timely filed a sworn petition for reasonable attorneys' fees and costs, including the forensic costs, incurred and paid solely in connection with their December 30, 2015 Motion for Sanctions, including declarations:

a. Hotwire's lead trial counsel, with approximately eighteen (18) years' experience, charged $625 an hour, while associate counsel with approximately three (3) years' experience charged $395 an hour in 2015 and $430 an hour in 2016 and a younger associate charged $275 an hour in 2015 and $300 an hour in 2016 and with a paralegal charging $200 an hour;

b. As sworn in the required comparator affidavit of George J. Krueger, Esq. of Fox Rothschild LLP, the hourly rates normally charged by Hotwire's counsel at Blank Rome LLP fall within the range of reasonable hourly rates for attorneys of similar experience in commercial litigation in this District, although we find his comparison based on published

reports fails to distinguish between rates charged by trial lawyers as opposed to transactional attorneys in large multi-state comparator law firms;

c. Hotwire sought reimbursement of $92,447 in attorneys' fees and costs paid, or soon to be paid to Blank Rome LLP, arising from, in a general sense:

i. Analyzing documents, and then compelling production, from third party AT&T;

ii. Moving for Sanctions, including briefing, oral arguments, January 22, 2016 hearing and preparing the fee petition and comparator affidavit;

iii. Conducting post-discovery follow-up depositions of Sizemore, Kowalsky and Jackson Land; and,

iv. Working with the computer forensic consultant following our January 5, 2016 Order to prepare for the January 22, 2016 hearing;

d. Hotwire paid $34,319.95 to the computer forensic consultant for services provided in January 2016; and,

e. Hotwire did not seek reimbursement for expenses in connection with the Motion, such as airfare to Atlanta and computer research and reduced or removed almost all of the block time entries which may have included time relating to the upcoming trial rather than issues related solely to the motion for sanctions.

28. DVComm and Sizemore decided not to oppose or respond to Hotwire's petition for reasonable fees and costs.

Conclusions of Law

29. Our February 3, 2016 Findings of Fact and Conclusions of Law address Hotwire's bases for sanctions: (a) Sizemore falsely represented he did not have access to the emails

produced by AT&T; (b) Sizemore's failure to produce an affidavit "describing the location, history and present status of any version of the Business Plan provided to Defendants which Plaintiffs no longer retain" as required by our November 30, 2015 Order; and (c) DVComm's and Sizemore's ongoing failure to produce documents.

30. For the reasons in our February 3, 2016 Findings of Fact and Conclusions of Law, as well as Hotwire's need to take reasonable proportional step when facing an $82 million demand through an expert report, we find sanctions are also appropriate to compensate Hotwire for its costs in connection with its discovery efforts of the source and origin of DVComm's Business Plan. [17]

31. The decision to sanction a party for discovery misconduct is within our discretion.[18]

32. " 'A showing of spoliation may give rise to a variety of sanctions,' including '(1) dismissal of a claim or granting judgment in favor of a prejudiced party; (2) suppression of evidence; (3) an adverse inference, referred to as the spoliation inference; (4) fines; [and] (5) attorneys' fees and costs.' "[19]

33. Potential sanctions include: "dismissal of a claim or the entry of judgment in favor of a prejudiced party; the suppression of evidence; an adverse evidentiary inference, such as the 'spoliation inference'; fines; and attorney fees and costs."[20]

34. Where spoliation is found, monetary sanctions are appropriate to "'compensate a party for the time and effort it was forced to expend in an effort to obtain discovery' to which it was otherwise entitled."[21]

35. Based in part on the facts also described in our February 3, 2016 Findings of Fact and Conclusions of Law, we award Hotwire its attorneys' fees and costs, including forensic

costs, to compensate it for the time and effort expended to determine "lost" electronically stored documents and compel their production.

36. Rule 37(c)(1) provides:

> Failure to Disclose, to Supplement an Earlier Response, or to Admit.
>
> (1) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e),[22] the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
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> (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
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> (B) may inform the jury of the party's failure; and
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> (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

37. By its terms, Rule 37(c)(1) is mandatory and "is designed to provide a strong inducement for disclosure of Rule 26(a) material."[23] However, the rule "expressly provides that sanctions should not be imposed if substantial justification exists for the failure to disclose, or if the failure to disclose was harmless."[24]

38. Our Court of Appeals recognizes an analysis of "substantial justification" or "harmlessness" leaves the imposition of sanctions under Rule 37(c)(1) within the discretion of the district courts.[25]

39. Applying Rule 37(c)(1) to determine whether DVComm's conduct warrants sanctions, we must determine if its failure to comply with discovery obligations "was substantially justified or is harmless." DVComm bears the burden of establishing substantial justification and harmlessness.[26]

40. " 'Substantial justification' for the failure to make a required disclosure has been regarded as justification to a degree that could satisfy a reasonable person that parties could differ as to whether the party was required to comply with the disclosure requires. The test of substantial justification is satisfied if there exists a genuine dispute concerning compliance."[27]

41. Conduct is "harmless" "if it involves an honest mistake, coupled with sufficient knowledge by the other party of the material that has not been produced."[28]

42. DVComm and Sizemore offered no substantial justification for concealing facts regarding the development of the first rough draft of the Business Plan and, when caught by AT&T's anticipated compliance with subpoena after we denied their motion to quash, "double deleting" the April 21, 2010 communications with Kolten Kowalsky, including the attached first rough draft of the Business Plan.

43. DVComm and Sizemore's conduct does not amount to "an honest mistake," and Hotwire did not have "sufficient knowledge" of Kolten Kowalsky and Jackson Land until it received information from AT&T. By the time AT&T produced documents to Hotwire, DVComm and Sizemore already "double deleted" emails to Kowalsky and Land, including the earliest rough draft of the Business Plan.

44. DVComm concealed Kolten Kowalsky and Jackson Land. Sizemore claims he did not remember Kowalsky's role. At his later court-ordered deposition outside Atlanta, Kowalsky immediately referred to Sizemore by his nickname "Stever" and explained his interest in the progress of his Business Plan. Sizemore's forgetfulness is not credible. He lacks a reasonable basis in law or fact.

45. DVComm concealed documents on Sizemore's AT&T laptop during the discovery period.

46. Rule 37 permits "reasonable expenses" resulting from the failure to comply with discovery.[29]

47. The amount of any sanction must be specifically related to expenses incurred by the violations.[30]

48. We find Hotwire is entitled to reimbursement of reasonable fees and costs incurred and paid in filing and presenting evidence in support of its multiple motions including for sanctions to determine facts relating to the origin of the Business Plan; preparing and deposing the previously concealed Kowalsky and Land; preparing and deposing Sizemore for a second time after he concealed the documents on his AT&T laptop; and the costs charged by the forensic consultant and lawyer efforts in working with the consultant in the expedited period from January 5, 2016 until our January 22, 2016 hearing as we prepared for the February 5, 2016 trial.

49. DVComm and Sizemore did not, and cannot, claim prejudice by costs necessary to meet the expedited nature of this investigation caused by their concealing and destroying material information hoping we would get to trial before Hotwire could find this evidence.

50. Hotwire is entitled to reimbursement from DVComm and Sizemore jointly and severally. Sizemore remained a party-plaintiff in this case during his conduct. He individually sought approximately $82 million in damages. He is the sole owner of DVComm and personally owns the computer devices. He answered the discovery. He cannot hide behind the corporate shell in these limited circumstances as he is the direct cause of the harm.

51. Mindful we narrow any reimbursement to conduct leading to the discovery violation, we deny Hotwire's request for reimbursement to the extent the work effort is not directly related to DVComm's and Sizemore's violative conduct, including:

a. It could have sought and would have received, after resolving appropriate protections, documents from AT&T regardless of Sizemore's efforts at any time in the litigation. Merely because Sizemore denied AT&T's involvement does not excuse Hotwire from seeking documents from AT&T especially when Sizemore's emails sent to Hotwire described his data, including his April 2010 email produced by Sizemore, as AT&T's property. We do not find a basis for awarding Hotwire its fees and costs for pursuing the AT&T document production;

b. We also do not award reimbursement for investigating Kowalsky's alleged concealments. Hotwire has not adduced evidence of Kowalsky's and Sizemore's collusion to defeat or frustrate discovery;

c. We do not award reimbursement for protecting its officer Kristin Johnson from further discovery; and,

d. We do not award reimbursement in full for block time billing for matters under this Order and otherwise related to the case but not the sanctionable conduct, such as conferences with Hotwire's internal counsel on December 15, 2015 on strategy and December 16, 2015 drafting of jury instructions, consulting with internal counsel and strategy on a *Daubert* hearing.

52. As limited above based on scope of work effort reimbursable under Rule 37, we find the remainder of fees charged by Blank Rome LLP for its diligent expedited efforts are reasonable and necessary to discover information concealed and destroyed by DVComm and Sizemore. Compliant with our Order, Hotwire presented a comparator declaration detailing the reasonableness of the hourly rates in the Eastern District marketplace.

53. DVComm and Sizemore do not challenge the reasonableness of the fees.

54. Notwithstanding their lack of challenge, we independently find the amount of time incurred and hourly rates charged to Hotwire, and then paid by Hotwire, are reasonable and necessary.

55. We also find, again without a challenge, the fees charged by Hotwire's computer forensic consultants with RVM Enterprises, Inc. are reasonable and most necessary for the parties and this Court to determine the scope of DVComm's and Hotwire's concealment violative of their obligations under the Federal Rules of Civil Procedure. Sizemore, self-described in social media as the "Godfather of Technology", took steps to conceal core information regarding the origin of his touted Business Plan. Hotwire needed to retain appropriately qualified professionals, available on an expedited basis, to investigate and explain the extent of permanently lost information under Fed.R.Civ.P. 37(e).

56. Counsel, fulfilling their duties to its client Hotwire, cannot now be penalized for pursuing facts when DVComm and Sizemore's conduct is not substantially justified.

57. The reimbursement awarded in the accompanying Order is narrowly tailored to the expenses related to and arising solely from DVComm's and Sizemore's concealment violative of the Federal Rules.

58. DVComm and Sizemore thought they, rather than the Federal Rules and this Court, could unilaterally define the scope of discovery. They underestimated both Hotwire's diligence when faced with an $82 million damages demand and this Court's obligation to uphold full discovery.

59. DVComm and Sizemore shall timely pay $110,262.95 under our accompanying Order to reimburse Hotwire for its out of pocket expense for reasonable fees and costs consistent with these Findings of Fact and Conclusions of Law.

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[1] ECF Doc. Nos. 128, 129.

[2] ECF Doc. No. 62-1.

[3] ECF Doc. No. 41.

[4] ECF Doc. No. 91-2.

[5] *Id.* at No. 4.

[6] *See* Exhibits D, E, F, and G to Hotwire's Motion for Sanctions (ECF Doc. No. 91-4, 91-5, 91-6, 91-7).

[7] ECF Doc. Nos. 63, 64.

[8] ECF Doc. No. 69.

[9] *Id.*

[10] *See* Sizemore's Declaration at ECF Doc. No. 91-9.

[11] ECF Doc. No. 91.

[12] ECF Doc. No. 97.

[13] ECF Doc. No. 124.

[14] ECF Doc. No. 126.

[15] ECF Doc. No. 127.

[16] We incorporate our February 3, 2016 Findings of Fact and Conclusions on Law finding DVComm, through Sizemore, deleted crucial information concerning the rough first draft of the Business Plan.

[17] *See Clientron Corp. v. Devon IT, Inc.*, 310 F.R.D. 262 (E.D. Pa. 2015) (imposing monetary sanction to compensate plaintiff for extra costs created by defendants' conduct and excluding defendants' evidence relating to their defenses).

[18] *AMG Nat'l Trust Bank v. Ries*, Nos. 06-4337, 09-3061, 2011 WL 3099629, at *4 (E.D.Pa. July 22, 2011) (citing *Paramount Pictures Corp. v. Davis*, 234 F.R.D. 102, 111 (E.D.Pa.2005) ("There is no rule of law mandating a particular sanction upon a finding of improper destruction or loss of evidence; rather, such a decision is left to the discretion of the Court.")); *see also Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 78 (3d Cir. 1994) (sanctions are within the inherent power of a district court); *Miles v. Elliot*, No. 94-4669, 2011 WL 857320, *6 (E.D. Pa. Mar. 10, 2011) (decision of whether to sanction a party found liable for spoliation is left to court's discretion).

[19] *AMG Nat'l Trust Bank*, at *4 (citing *Paramount Pictures*, at 110–11).

[20] *Id.*

[21] *Stream Co. Inc. v. Windward Advertising*, No. 12-4549, 2013 WL 37612851, at * 6 (E.D. Pa. July 17, 2013) (quoting *Mosaid Tech. Inc., v. Samsung Elec. Co.*, 348 F.Supp. 2d 332, 339 (D.N.J. 2004)).

[22] Rule 26(e)(1) provides: "A party who has made a disclosure under Rule 26(a)--or who has responded to an interrogatory, request for production, or request for admission--must supplement or correct its disclosure or response: (A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or (B) as ordered by the court."

[23] *Newman v. GHS Osteopathic*, 60 F.3d 153, 156 (3d Cir. 1995) (citation omitted).

[24] *Id.*

[25] *Id.*

[26] *Nippo Corp./Intern. Bride Corp. v. AMEC Earth & Environmental, Inc.*, No. 09-956, 2011 WL 1196922, at *4 (E.D. Pa. Mar. 30, 2011) (citation omitted).

[27] *Grider v. Keystone Health Plan Central, Inc.*, 580 F.3d 119, 140 n.23 (quoting *Tolerico v. Home Depot*, 205 F.R.D. 169, 175-76 (M.D. Pa. 2002) (internal citation and quotations omitted); *see also Selzer v. Dunkin' Donuts, Inc.*, No. 09-5484, 2015 WL 3668647, at *3 (E.D. Pa. June

15, 2015) (quoting *Kinney v. Trustees of Princeton Univ.*, No. 04-5252, 2007 WL 700874, at *5 (D.N.J. Mar. 1, 2007) (citations omitted))

[28] *Tolerico*, 205 F.R.D. at 176 (quoting *Stallworth v. E-Z Convenience Stores*, 199 F.R.D. 366, 369 (M.D. Ala. 2001)). In *Tolerico*, the court cited the Committee Note to the 1993 amendments to Rule 37(c) providing examples of "harmless" as "the inadvertent omission from a Rule 26(a)(1)(A) disclosure of the name of a potential witness known to all parties; the failure to list as a trial witness a person so listed by another party; or the lack of knowledge of a pro se litigant of the requirement to make disclosures." *Id.*

[29] *Martin v. Brown*, 63 F.3d 1252, 1263 (3d Cir. 1995).

[30] *Id.* at n.15.