UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

IN RE THE MATTER OF

THE SUBPOENA SERVED ON NETGATE INTERNET

ALWYN V.H. FAREY-JONES,

Plaintiff(s),

v.

RICHARD G. BUCKINGHAM, et al.,

Defendant(s).

/

No. 01-0181 Misc. MMC (WDB)

ORDER GRANTING MOTIONS TO QUASH AND SANCTIONS

On January 30, 2002, the court conducted a hearing in connection with defendants Motion to Quash and Motion for Sanctions. For reasons set forth at length on the record during the hearing, the court enters the following Orders:

1. The defendants' Motion to Quash the subpoena to NetGate is **GRANTED.** The subpoena is grossly overbroad and counsel's efforts to justify it (or some unclearly delineated modified version of it) fell far short of satisfying the requirements of Federal Rules of Civil Procedure 45, 26(b), and 26(g).

2. If plaintiff in the New York action elects to pursue discoverable information through NetGate by serving a second subpoena, he must craft a proposed new subpoena that is

dramatically narrower in scope and specifically tailored to the matters in dispute in the pendir litigation. Before serving NetGate, he must submit a copy of the proposed subpoen accompanied by a proposed protective order, simultaneously to the undersigned and to couns for defendants. Plaintiff also must accompany the proposed new subpoena with evidence an argument that demonstrate compliance with the relevance and proportionality requirements c the Federal Rules of Civil Procedure.

The court will permit the subpoena to issue only if it is satisfied, after giving defendant an opportunity to be heard, that issuance conforms to all the pertinent requirements of Federa Rules of Civil Procedure 45, 26(b), and 26(g).

Unless plaintiff makes a clear showing that the information sought in the revise subpoena is likely to contribute meaningfully to the truth finding process, that the informatio sought is not available from alternative sources, and that the burdens the subpoena will impos meet the applicable proportionality requirements, the court will require plaintiff not only t reimburse NetGate for all the expenses it reasonably incurs in responding, but also to pay th reasonable expenses (including attorneys fees) that defendants incur in connection with th processes that the subpoena triggers.

3. The record developed by the papers and at the hearing clearly supports a conclusior that defendants are entitled under the law to a fee shifting sanction. Considerations that suppor that conclusion include the following:

a. The subpoena as drafted and served by Ms. Kwasny (without limitations as to time, tc subject matter, or to the persons or entities who sent or received emails) violated, transparently and egregiously, Federal Rule of Civil Procedure 45(c)(1), which requires "an attorney responsible for the issuance and service of a subpoena [to] take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena." Neither Ms. Kwasny nor anyone else representing plaintiff took such steps – before or after (as will be explained below) she issued the subpoena. Nor did Ms. Kwasny offer anything approaching a substantial justification for this failure – she essentially admitted that she issued the subpoena without

substantial guidance from plaintiff's counsel in New York about the nature of the matters i issue there, without knowing pertinent circumstances, and without seeking information fror either defense counsel or NetGate. The subpoena was so broadly cast, she says, in part becaus her client knew so little about NetGate and its function and in part because plaintiff feared tha any less sweeping demand would permit NetGate (a non-party) somehow to avoid disclosin important evidence. These are wholly inadequate excuses for failing to make the simpl inquiries that would have resulted in informed, responsible, professional judgment about whethe to issue the subpoena at all and, if so, how to tailor it to comply with the law.

The second sentence of Federal Rule of Civil Procedure 45(c)(1) requires the court tha issued a subpoena to enforce the duty that is imposed in the first sentence of the Rule "and [to impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee." While thi provision was intended primarily to protect non-party targets of subpoenas, courts could no meet their responsibility to enforce this Rule if they could not, in appropriate circumstances award as a sanction fees and costs that a clear violation of this Rule caused a party to the litigation to suffer.

It appears that the issuance of this subpoena, as so broadly and thoughtlessly crafted, also violated Federal Rule of Civil Procedure 26(g), which requires a lawyer to certify, for every discovery request she makes, that "to the best of [her] knowledge, information, and belief formed after a reasonable inquiry, the request . . . is (A) consistent with these rules . . . and (C) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation."

Neither Ms. Kwasny nor any other lawyer acting on plaintiff's behalf made the "reasonable inquiry" required by Rule 26(g) before the patently overbroad subpoena was drafted. And, as served, this subpoena obviously was unreasonable -- it failed to set forth any limit at all on either the subject matters it would reach or the time period it would cover. Courts also are required to impose sanctions for a violation of Rule 26(g) – absent a showing that the violation was substantially justified. No such showing has been made here. The sanctions contemplated

contemplated expressly by Rule 26(g) "may include an order to pay the amount of the reasonab expenses incurred because of the violation, including a reasonable attorney's fee."

b. Neither Ms. Kwasny nor anyone else gave defendants (through counsel or otherwis "[p]rior notice of any commanded production of documents" as required by Rule 45(b)(1) Some courts have held that the "prior notice" required by this Rule means before the subpoer is issued. See, e.g., Biocore Medical Technologies v. Khosrowshahi, 181 F.R.D. 660, 667 (I Kansas, 1998) (discussing the rule-background against which the current version of the rule wa adopted), and Schweizer v. Mulvehill, 93 F.Supp. 2d 376, 411 (S.D. NY 2000). At a minimum prior notice must mean notice that is essentially contemporaneous with the issuance of th subpoena – as later notice would jeopardize the primary purpose of the notice requirement which is, as the Advisory Committee Note (1991) makes clear, "to afford other parties a opportunity to object to the production or inspection . . . ." (Emphasis added).

Ms. Kwasny, apparently as requested either by plaintiff himself or by plaintiff's counse in New York, Mr. Metli, issued the subpoena on September 25, 2001. It was not until Octobe 2, 2001, that a copy of the subpoena was given to defense counsel. That week delay, while by itself not a matter of great consequence in the specific circumstances here (the deadline fo compliance by NetGate was October 29, 2001), was not justified.

c. On October 2, 2001, an employee of NetGate contacted Ms. Kwasny, informed he that the material sought in the subpoena was substantial, and suggested that he send her a URL that she could use to access a sample of the material that would fall within the scope of the subpoena. Even though Ms. Kwasny knew (or clearly should have known) that the plaintiff and the defendants were competitors, and that the emails might well include information that was obviously irrelevant, and/or sensitive commercially (trade secrets) or personally, and/or privileged, she sent the URL to plaintiff, who used it to access and download the sample production – a production that included well over 300 emails (many with substantial attachments, most not involving any party to the New York action). Most unprofessionally, Ms. Kwasny did not notify defendants that this sample production had been proposed or was

completed. By failing to notify defense counsel before she agreed to the sample production, sl clearly and foreseeably defeated the purposes of the notice requirement in Rule 45(b)(1) ar facilitated an invasion of interests that could not be justified.

It was not until at least October 18, 2001, that defense counsel had any idea that th sample production had occurred and that plaintiff had had access, for more than two weeks, t communications that belonged to defendants. No justification at all has been advanced for th failure to notify defense counsel of the proposal by NetGate, for plaintiff's retrieval of th material without notice to defendants (in fact, plaintiff acquired the material on the same day tha defense counsel first learned that the subpoena had issued), and for not disclosing any of this t defense counsel until more than two weeks after the fact.

d. Between October 17 and October 23, 2001, counsel for defendants and counsel fc plaintiff conferred about the scope of the subpoena and the deadline for compliance. The recor supports a finding that counsel for the parties would have been able to reach an agreement a least to extend the deadline for compliance (so the negotiations about scope could continue) bu for the fact that plaintiff refused to extend the deadline unless defendants agreed "to refrain fron accessing data from NetGate pending resolution of the scope of the Subpoena." Farey-Jone Declaration, January 8, 2002.

As his attorneys now concede, there was no legal basis for such a demand. The email in issue belonged to the defendants – they were communications by or to the defendants an their colleagues that were merely being stored by NetGate. Moreover, the vast majority of th emails in question were quite recent – dating from August 15, 2001, through the date of th failed negotiations (October 23, 2001). It would have occurred to a reasonable person tha defendants might well need to have access to some of these recent emails just to carry on thei business.

As Ms. Kwasny reports, when defendants refused to accept this condition, plaintif instructed her to inform counsel for defendants that plaintiff would not agree even to extend th October 29, 2001, deadline for the production under the subpoena.

On Wednesday, October 24, 2001, Ms. Kwasny left a voicemail message for defen counsel that included the following: "I just spoke with Alwyn Jones and Richard Metli and v don't see any way that we can narrow the scope of the subpoena at this point so we're not goir to agree to either narrowing the scope of the subpoena or define the issues or extend the du date. I have to let you know that I'll be out of town beginning tomorrow and through th weekend so I guess you can send me [sic] by mail and I'll review the papers when I return."

To repeat, the subpoena, on its face, was massively overbroad. Why plaintiff and h counsel could see no way to narrow its scope is dumfounding. Nor have they offered anythin approaching an adequate justification for terminating the meet and confer process and fc refusing to extend the deadline for what would obviously be an overbroad and unjustifiabl production.

Defense counsel had warned plaintiff's attorneys, in writing on October 17th, and agai orally on October 23/24, that their refusal to extend the deadline for return on the subpoena pas Monday, October 29th, would leave him with no choice but to seek file a motion to quash an to seek an emergency order shortening time. When Ms. Kwasny, on orders from her clien refused to budge (then left town, making herself unavailable during the last few days before th return date), defense counsel was forced to file papers that he never would have been forced t file if plaintiff and his counsel had not insisted on imposing an obviously unreasonable an legally unsupportable condition.

The course of conduct just described supports a finding, which the court hereb makes, that plaintiff and his counsel acted in bad faith in these matters. There was at leas gross negligence in the crafting of the subpoena; there was bad faith in not disclosing th proposed (then executed) sample production; and there was bad faith in terminating the meet an confer process when defendants would not agree to the unjustifiable condition on which plaintif insisted. By this course of conduct, plaintiff and his counsel, without justification, force defendants to incur substantial legal fees (among other burdens). It is patently unfair to mak defendants bear the economic burden caused by such unprofessional and unjustified conduct And there is no question that legitimate concerns necessitated the protective actions that defens

counsel were so unreasonably forced to take: the huge number of e-mails potentially subject : the subpoena (many of very recent origin) likely contained material that was sensitive, protecte by law from disclosure, and irrelevant. The e-mails also included large numbers (presumptively private communications made by or to persons who had nothing to do with th case.

The record further supports a finding that the plaintiff, Ms. Kwasny, and Mr. Metl (lead counsel for plaintiff in the New York action – and therefore responsible, ultimately for guiding local counsel here in California) all share substantial responsibility for thi course of conduct – and therefore that each of these three persons is liable for one-thir of the monetary sanction hereby imposed.

On this record, sanctions are authorized (indeed, compelled) by Federal Rules of Civi Procedure 26(c) and (g), 37(a)(4), and 45(c)(1), as well as under the court's inherent authority

Declarations submitted by Mr. Idell and Ms. Marone, local counsel for defendants, and the many papers they have filed in this matter, serve as sufficient sources of evidence to inform a reasonable judgment by this court about the amount of time competent lawyers would have been required to spend (over the period infected by the unjustifiable conduct by plaintiff and his counsel in connection with this subpoena) to protect their clients and others from the unwarranted burdens and invasions of interests that a production of the emails covered by the subpoena would have caused. **It is this court's judgment that counsel for defendants can reasonably claim as compensable expenses in this setting:**

(A) **Seven (7) hours** between October 12 and October 24 for drafting letters, making phone calls, and engaging in negotiations (unjustifiably rendered fruitless by plaintiff and his counsel) to attempt to reduce the scope of and extend the time for the return on the subpoena (and to discuss terms of an appropriate protective order).

(B) **Twenty-five (25) hours** for researching and preparing the papers that defendar were constrained to submit in these proceedings (memoranda, declarations, and exhib filed in connection with the emergency request for an order shortening time, the moti to quash, the amended notice and supplemental motion to quash, the separate motion f sanctions, and the replies to the oppositions to the motions).

(C) **Five (5) hours** for preparing for, traveling to and from, and attending the hearing c the motions.

The court further finds, based on its expertise and knowledge of fees in this are declarations submitted, and the nature and quality of the papers filed, that $250 per hou is a reasonable blended rate for the compensable work performed by Mr. Idell and by M Marone.

On these findings, the total sanction imposed for the violations described above i $9,250.00 (the product of multiplying 37 hours by $250 per hour).

It is hereby ORDERED THAT, BY MARCH 1, 2002:

a. Iryna A. Kwasny pay defendants, through their counsel, the sum of $3,084.00.

b. Richard Metli pay defendants, through their counsel, the sum of $3, 084.00.

c. Alwyn V. H. Farey-Jones pay defendants, through their counsel, the sum of $3, 084.00.

IT IS SO ORDERED.

Dated: February 1, 2002.

Wayne D. Brazil
United States Magistrate Judge

CC: All parties
MMC
WDB