

Pretrial Practice & Discovery

American Bar Association Litigation Section

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No Reason to Cheer—Case Dismissed Due to Severe Discovery Violations

A proposed antitrust class action was recently dismissed because of the plaintiffs’ serious failures to comply with the court’s orders regarding discovery.

By Jessica Barnes

Interpretations of the extent of a responding party’s obligations to certain discovery requests likely vary by lawyer. One thing that most if not all lawyers would agree with, however, is that a party producing more than 99 percent of its documents *after* the close of fact discovery is improper, which is what occurred this week in a case out of the U.S. District Court for the Western District of Tennessee.

In *American Spirit and Cheer Essentials Inc, et al. v. Varsity Brands, LLC, et al.*, No. 2:20-cv-02782-SHL-tmp (W.D. Tenn. Mar. 21, 2023), there were numerous discovery disputes among the parties. Between seeking documents excluded from discovery via protective order, producing documents in a form that was in violation of the mutually agreed upon electronically stored information (ESI) protocol, outright lack of production and responses, failing to maintain and provide lists of search terms used in collecting documents, attempts to serve hundreds of subpoenas, and producing documents either immediately before or after the deposition of a relevant witness, the court described the history of discovery in this matter as “long, complex, and tortured[.]”

The court faced a first round of motions to dismiss in this case, which were granted in part and denied in part. The most critical aspect in the court’s actions here is that it specifically warned the plaintiffs that “willful failure to cooperate in discovery could lead to dismissal of plaintiffs’ case under Rules 37(b) and 41(b).”

Then later came another round of motions to dismiss. The plaintiffs responded, not contesting the defendants’ factual allegations of discovery violations, but arguing that the alleged discovery failures did not meet the legal standard to justify dismissing the case. In evaluating the arguments, the court highlighted that under Federal Rule of Civil Procedure 37, the court may impose sanctions on a party who fails to obey a court order to provide discovery, and such sanctions may include dismissal of the action. In addition, Federal Rule

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of Civil Procedure 41 permits involuntary dismissal of a case if the plaintiff fails to comply with the federal rules or a court order.

Accordingly, the court went through the four factors to consider when a party moves to dismiss a case under these two rules. First, the court found that while the defendants did not show an intent to thwart judicial proceedings from the plaintiffs, they did show that the plaintiffs' conduct did amount to reckless disregard. Second, the court found that the plaintiffs' actions prejudiced the defendants, who expended significant time, money, and effort to obtain plaintiffs' documents. Furthermore, the defendants conducted depositions that were largely unusable because they were unable to inquire into important topic sources from the documents. Third, the court found that its previous explicit warning, that their behavior in discovery could lead to dismissal of the plaintiffs' case, weighed in favor of dismissal. Lastly, the court found that lesser sanctions were insufficient to protect the integrity of the judicial process. Thus, the court dismissed the plaintiffs' claims with prejudice.

Overall, this case is an example of how discovery misconduct, if severe enough, can cost the client its entire case. While disputes over the burden and proportionality of specific discovery requests will continue across the board, let this case be a lesson that neglecting discovery obligations can result in a plaintiff's worst-case scenario: dismissal.

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