UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BROADSPRING, INC., Plaintiff, v. CONGOO, LLC, doing business as ADIANT and ADBLADE, ASHRAF NASHED, RAFAEL COSENTINO and DOES 1-10, Defendants.	13 Civ. 1866 (JMF)

PLAINTIFF'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF RE-DESIGNATION OF DEFENDANTS' DOCUMENTS AND SANCTIONS

Plaintiff Broadspring, Inc. ("Broadspring") respectfully submits this reply in further support of its application for an Order directing Defendants to re-designate and redact certain documents, and for reimbursement of Broadspring's costs and attorneys' fees.

I. Introduction

Defendants' opposition studiously ignores the actual terms of the Protective Order. This case is not, as Defendants posit, governed by some generalized "Southern District Precedent" for AEO designations (which in any event would not support Defendants' designations). Rather, this case is governed by the written confidentiality stipulation that the parties entered into and the Court so-ordered. That stipulation strikes a balance between the need to keep certain extremely sensitive documents confidential, and the need for the litigants to be able to assist their counsel in prosecuting the action. It accordingly permits AEO designations only for "extremely sensitive Confidential Information or Items whose disclosure to another Party or nonparty would create a

substantial risk of serious injury that could not be avoided by less restrictive means." (ECF No. 34, § 2.4.) None of the requested re-designations in Exhibits 1, 2 or 3 come close to meeting that demanding standard. At most, these documents simply reflect information that Defendants want to withhold from Broadspring and prevent from being filed in this action because they are embarrassing or otherwise cast Defendants in a bad light. They do not qualify for AEO status under the plain terms of the Protective Order.

Defendants continue to ignore the terms of the Protective Order when they attack Broadspring for making "arguments" that "are conclusory and amount to a characterization of Defendants' communications rather than an analytical review of whether disclosure of the documents on only a Confidential basis would harm Defendants." (Opp. at 5.) That assertion is not only demonstrably untrue (Broadspring's analyses of the documents are more thorough than Defendants' perfunctory responses), it ignores the Protective Order's mandate that the "burden of persuasion in any such challenge proceeding shall be on the Designating Party." (ECF No. 34, § 6.3.) Broadspring is not required to prove a negative by demonstrating that disclosure would *not* "create a substantial risk of serious injury that could not be avoided by less restrictive means"; rather, the Protective Order wisely places that burden squarely on the Defendants. They have utterly failed to satisfy their burden.

Finally, Defendants ignore the fact that the Protective Order expressly provides that improper designations "may expose the Designating Party to sanctions." (ECF No. 34, § 5.1.) In other words, the parties stipulated that the Court would have the power to impose sanctions for improper designations. It is therefore unnecessary to consider whether sanctions would be independently available under Rule 37 or the Court's inherent power (although they clearly would be). *See* Fed. R. Civ. P. 29 ("the parties may stipulate that … procedures governing …

discovery be modified"). Defendants' prolonged abuse of the AEO designation has imposed inordinate costs on Broadspring, for which Defendants should be held accountable.

II. The Exhibit 1 Documents

As an initial matter, Defendants are correct that two of the submitted documents were, in fact, re-designated. We have investigated this error and determined that the re-designated documents were inadvertently not uploaded into our Concordance database. (Defendants' misuse of the AEO designation has made document management a nightmare, as we have been repeatedly inundated with multiple copies of the same document.) We apologize to the Court for the mistake, but we reject Defendants' contention that it should absolve them of responsibility for their misconduct. As for the remainder of the Exhibit 1 documents:

1. C7207-08, C14396-99 and C14781-82 contain nothing more than Defendants' SEO efforts to suppress a negative internet article, and to increase the visibility of the web links that are at the center of this litigation. Their disclosure would not "create a substantial risk of serious injury that could not be avoided by less restrictive means." (ECF No. 34, § 2.4.)

2. C7052-54, C13303-05, C13436, C13447-48, C14365-66 and C14377-79 all concern Reader's Digest, one of the two publishers that are the subject of Defendants' counterclaims. These documents only show some of Defendants' general tactics for recapturing the Reader's Digest business. They are devoid of analytics or any other sort of highly sensitive information.

3. While Broadspring accepts Defendants' representation that C10997 was inadvertently excluded from the October 23 production of re-designated documents, the fact that this obviously non-AEO document was ever designated AEO in the first place further supports the imposition of sanctions.

III. The Exhibit 2 Documents

Defendants do not dispute that these documents contain significant non-AEO material, but they protest that they would have to do the work of applying "multiple redactions" to the documents. However, the non-AEO portions of these documents are important and Broadspring is entitled to know about them. For instance, C2131-43 is an e-mail string in which Defendant Cosentino sends a publisher a link to his Squidoo Lens with the outrageously false statement that "one of our publishers shared this link with me." Likewise, C6889-91 is an e-mail string in which Defendants, in an effort to defame Broadspring, have the ironic audacity to send a publisher a link to an article entitled "be-wary-of-fake-misleading-reviews." Finally, C11149-54 concerns a publisher's request to make Defendants' ad units look more like Broadspring's; this document is highly relevant to Defendants' still extent counterclaim that accuses Broadspring of falsely stating that it offers "cleaner creatives."

IV. The Exhibit 3 Documents

Defendants' offer no justification for maintaining the redactions in Exhibit 3 beyond the bald assertions that the redactions concern "client acquisition strategy," "internal strategy and analysis of competition," and/or "client descriptions." These perfunctory explanations plainly do not satisfy Defendants' burden of persuading the Court that disclosure of the redacted material "would create a substantial risk of serious injury that could not be avoided by less restrictive means." (ECF No. 34, §§ 2.4, 6.3.)

V. Defendants Should be Sanctioned

By Defendants' own admission, they were forced to re-designate "nearly 800" documents in response to the Court's Order of October 16. (Opp. at 2.) These 800 improper designations were in addition to at least eight previous occasions on which they were forced to re-designate

documents. (*See* Opp. at 2. n.1.) These remarkable statistics leave no doubt that Defendants adopted a strategy of indiscriminately designating almost everything AEO and leaving it to Broadspring to sort out the mess[1]. Indeed, although it is easy to understand why Defendants would prefer that the Court not see the outrageous history of improper AEO designations in Exhibits 4-8, these documents are plainly relevant to the issue of whether Defendants' conduct warrants sanctions. It is respectfully submitted that the massive and recidivistic abuse of the AEO designation by Defendants cries out for sanctions.

VI. Conclusion

Defendants should be ordered to re-designate the documents in Exhibits 1, 2 and 3, as indicated. Defendants should also be sanctioned and ordered to reimburse Broadspring for the costs and fees incurred as a result of their improper AEO designations. Broadspring is prepared to submit an affidavit establishing the amount of costs and fees incurred.

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[1] Defendants' suggestion that Plaintiff misused the designation process (Opp. at 6) extends nowhere. As the Court observed on October 16, 2013, "Mr. Zimmerman, you had not raised that except, basically, as a feeble attempt to respond to their complaint." *See* ECF No. 67, 11:10-13.