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Re: *Visbal Salgado v. Mobile Services International, LLC*
C.A. No. 5268-VCN
Date Submitted: August 11, 2011

Dear Counsel:

Our system of discovery depends upon the parties' compliance with the Court's Rules and the Court's discovery orders. The Plaintiff failed in that regard, and it appears that documents which should have been produced have not been produced. As the Plaintiff's counsel concedes, "[c]ertainly, [the Plaintiff] had the duty to comply with the Court's order, and he did not."[1] The perplexing question is what to do about the Plaintiff's failures.

[1] Tr. of Oral Arg., Aug. 11, 2011, at 22.

Plaintiff initially resisted some of the Defendants' discovery efforts. After the Court rejected that resistance, a series of unfortunate events came to pass. The focus is on the Plaintiff's email (defined to include associated electronically stored information) communications. While in Wilmington, Delaware for his deposition, the Plaintiff, a resident of Colombia, was served a subpoena for his laptop, which (presumably) would have provided access to those emails. For unpersuasive reasons, he left the country, after his deposition, with the laptop. According to the Plaintiff, he was later mugged and his laptop was stolen, thus making an order to produce the laptop apparently futile. Emails, which were within the system of Plaintiff's employer, Morson International, were available to him and (presumably) subject to the Court's discovery orders. At some point, Morson chose to deny Plaintiff access to the emails.[2] Thus, he now claims to be unable to provide them fully. Although some emails have been provided from various sources, there can be no confidence that the full range of their contents has been made available to the Defendants.

[2] It appears that some access to this information was subsequently authorized by the employer.

Defendants seek sanctions against the Plaintiff. The proposed sanctions include entry of a default in favor of Defendants on their counterclaim against the Plaintiff, granting Defendants an adverse inference as to certain facts relative to the likely contents of the emails, and an award of their fees and expenses incurred in dealing with the Plaintiff's recalcitrance.

The sanction of default is harsh and should not be imposed lightly.[3] Had the Plaintiff left his laptop in Wilmington in response to the subpoena, these problems would largely have been avoided. But, if the laptop had not been stolen, remedying that shortcoming would have been relatively simple. An award of fees would have reasonably assuaged the Defendants, and an entry of an order of default would not have seriously been considered. If the Plaintiff was, in fact, mugged and his laptop stolen, imposing draconian sanctions on a victim of crime would not be warranted. The Defendants, however, are—understandably—skeptical about the Plaintiff's story about the mugging and laptop disappearance. That broaches a question of fact that cannot be resolved on the current paper

[3] *See TR Investors, LLC v. Genger*, 2009 WL 4696062, at *19 (Del. Ch. Dec. 9, 2009) (calling default judgment an "extreme remedy" that "is not appropriate to remedy any unfairness . . . [when] lesser available sanctions provide an adequate remedy").

record. In short, until the Court can make the necessary findings of fact in an appropriate fact-finding context, the complete and proper scope of relief for the loss of the laptop (and the earlier failure to produce) cannot be determined.[4] At least some, if not most, of the emails which the Defendants seek are in the possession of Morson, an entity in the United Kingdom. The Defendants have not sought discovery from Morson under the appropriate international discovery convention. As they point out, that would impose unnecessary costs and time-consuming burdens on them. Yet, the "missing" documents may well be available.

Resolving discovery disputes requires a balancing effort. For now, the appropriate remedy is to require the Plaintiff to pay the expenses reasonably incurred by Defendants as they pursue their discovery options to obtain the emails from Morson.[5] This is a not-insignificant expense that the Plaintiff can avoid if he is able to prevail upon his employer to make the emails available.

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[4] The scope of relief imposed because of this conduct may also be reduced if the "missing" information is obtained from other sources.

[5] The Court is given broad discretion to craft a proper remedy for discovery shortcomings. *See Monier, Inc. v. Boral Lifetile, Inc.*, 2010 WL 2285022, at *3 (Del. Ch. June 3, 2010) (citation omitted). This remedy may include an award of costs incurred to obtain international discovery that would be unnecessary but for the offending party's failure. *See id.*

This motion was necessitated by Plaintiff's conduct, inconsistent with the Rules, process, and orders of this Court. No reasonable explanation for the failures has been forthcoming, and sanctions in the form of an award of fees and costs to the Defendants in pursuing this motion are appropriate.[6] The Court recognizes that it may be that Plaintiff has produced much of what is needed by Defendants to "try their case."[7] Defendants' counsel should submit an appropriate statement of those fees and expenses.[8]

All requested documents relating to the Plaintiff's wife's employment with Morson should be produced. Those records appear to be relevant to the convoluted dispute between the parties and no sufficient reason for non-production has been offered.

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[6] Under Court of Chancery Rule 37(b)(2), the Court "shall" require the party failing to obey a discovery order or his attorney (or both) "to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Court finds that the failure was substantially justified or that other circumstances made an award of expenses unjust."

[7] The extent of that compliance cannot fairly be determined and the uncertainty is largely attributable to the Plaintiff's conduct.

[8] This award is limited to the sanctions potion of Defendants' Motion for Discovery Sanctions and Protective Order. It does not reach earlier discovery disagreements.

It appears that the "flash drive" has been produced. Whether its information is accessible or whether there are other issues with it will require further submissions by the parties.

The Defendants have also sought a protective order precluding further discovery by the Plaintiff in the form of Plaintiff's Supplemental Request for Production of Documents. The request was served after the discovery cutoff set forth in the Court's order of January 3, 2011, but, as Defendants' counsel stated earlier, "this round of motions [has] caused that schedule to be tossed out the window."[9] This is not a matter of treating counsel's comments as a waiver; instead, it simply reflects the fact—apparently recognized both by Defendants' counsel and the Court—that the timelines for this matter have not functioned appropriately. There is some element here that the Plaintiff may be able to obtain later discovery because of his own conduct that adversely affected scheduling, but to deny Plaintiff discovery because of that would be an unwarranted additional sanction under these unusual facts.

[9] Tr. of Oral Arg., Mar. 24, 2011, at 81.

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K