

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO, EASTERN DISTRICT

DAVID ALLISON DBA CHEAT CODE
CENTRAL,

Plaintiff,

v.

JEREMY N. WISE, and
WISE BUY NOW, LLC,

Defendants.

Case No. 2:08-cv-00157

Judge Watson

Magistrate Judge Abel

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S
MOTION FOR SANCTIONS

Defendants Jeremy N. Wise and Wise Buy Now, LLC, by and through their counsel of record, file this Response in Opposition to Plaintiff's Motion for Sanctions. For the reasons that follow, this Court must deny the Plaintiff's Motion for Sanctions ("Plaintiff's Motion").

OPENING STATEMENT

On June 24, 2009, Defendant Jeremy Wise discovered for the first time that the cheat codes Plaintiff claims to have authored, and which form the basis of this lawsuit, appear nearly identical to those on a third-party website, www.gamewinners.com. For the remainder of June and throughout the month of July, the Defendants and their counsel rushed to contact the authors of these cheat codes to confirm that they were indeed the original authors and to confirm that they were in possession of credible, discoverable information in time to supplement Defendants' 26(a)(1) disclosures prior to the close of fact discovery on July 31, 2009. After having informed Plaintiff's counsel that Defendants intended to supplement their disclosures required under Rule 26(a)(1) of the Federal Rules of Civil Procedure ("Rules") on July 24, 2009, the Defendants fulfilled their duties under Rule 26(e) by supplementing their 26(a)(1) disclosures on July 29,

2009 and providing the Plaintiff with all available information regarding the actual authors of the alleged copyrighted/infringed cheat codes. On July 31, 2009, the Defendants supplemented document production by providing witness statements from two of the actual authors of the alleged copyrighted/infringed cheat codes. In addition, the Defendants produced a list of several hundred uniform resources locators (“urls”) to webpages containing cheat codes similar – if not identical – to those the Plaintiff alleged Defendants infringed.¹

Defendants diligently supplemented their discovery disclosures and responses with this newly found information within the period of fact discovery. In fact, the Defendants were the only parties to notice a deposition prior to the close of fact discovery. Although fact discovery is now technically closed, and the Plaintiff did not notice any depositions, the Parties reached an informal agreement to notice and complete fact depositions (apart from those at issue in Plaintiff’s Motion) subsequent to the close of fact discovery at times and locations convenient to the parties, deponents, and counsel.² The Parties also recently filed an agreed motion to extend all existing deadlines (except that for fact discovery), which the Court granted. Expert reports and related discovery will now take place prior to the end of October. Trial is set for next year. Given the state of the litigation and discovery, the Defendants have not violated Rule 26(e) or 26(a), and should not be subject to sanctions under Rule 37. They supplemented their discovery disclosures and responses in a timely manner and were under a duty to do so.

Despite Defendants’ diligence and properly amended disclosures, the Plaintiff objects. To be fair, it comes as no surprise that the Plaintiff opposes the inclusion of Defendants’ newly found potential witnesses and evidence. The evidence obtained and to be obtained from these

¹ At the time Plaintiff filed his Motion for Sanction, he had not reviewed the July 31 documents produced by the Defendants. See Pl.’s Mot. to Amend Mot. for Sanctions (Doc. #44).

² Despite reaching this informal agreement as to some deponents and witnesses, the Plaintiff refused and continues to refuse the opportunity to contact and depose the newly-discovered authors of cheat codes at issue in this litigation.

witnesses demonstrates that the Plaintiff did not author the very cheat codes to which he has claimed authorship and injury through Defendants' alleged infringement. Given this, the Plaintiff can hardly claim to be the party prejudiced by the use of such evidence; he knew he did not author the cheat codes and he knew from where he obtained the cheat codes – www.gamewinners.com. Thus, to the Plaintiff, such evidence is nothing new. As for prejudice, the Defendants and all other third-parties sued by the Plaintiff for alleged infringement (based again on Plaintiff's false claims of copyright in the cheat codes) have been the parties actually prejudiced.

It has become alarmingly clear from Defendants' recent findings that Plaintiff Allison has committed a fraud upon the Court, upon Defendants, upon the United States Copyright Office, and upon all of the other third-parties Plaintiff sued for infringement in recent years. In short, Plaintiff Allison is not the author or owner of the alleged copyrighted cheat codes. Instead, he scraped the content from third-party websites such as www.gamewinners.com and registered the content with the United States Copyright office as his own. Plaintiff's Motion represents nothing more than a last-ditch effort to cover up his sham.

I. BACKGROUND

Plaintiff claims that the Court should sanction the Defendants for allegedly having violated their duties of disclosure and supplementation under Rules 26(a) and 26(e). The Defendants have not violated any disclosure and supplementation duties. Moreover, Plaintiff has been extremely remiss in revealing his infringement contentions. Though, as noted by the Plaintiff, this matter has been ongoing since early 2007, Plaintiff first disclosed documents related to his infringement contentions in March 2009 wherein he cited and produced twelve

examples of what he now contends to be infringements of his alleged copyrighted works.³ See Pl.’s Mot. for Sanctions at 2. Further, Defense counsel has repeatedly requested disclosure of all alleged instances of infringement. See Affidavit of Charles Lee Mudd, Jr. (“Mudd Aff.”) ¶ 7.⁴ Indeed, Defense counsel sought such disclosures and provided the Plaintiff ample opportunity to produce such disclosures over a significant period of time. At the June 22, 2009 telephonic status conference, Plaintiff’s counsel revealed for the first time that Plaintiff intended to rely only on the twelve examples produced in response to written discovery in March. Mudd Aff. ¶ 8; see also Examples of Alleged Infringement Produced by Plaintiff Allison.⁵ At the time of the status conference, Defendants and their legal team had no reason to believe that the newly discovered evidence even existed. Mudd Aff. ¶ 26. Indeed, the Defendants and their counsel never

³ In the event that Plaintiff waffles on his representation to rely on these twelve examples and chooses to expand his infringement contentions, the only other documents produced in response to interrogatories calling for Plaintiff’s infringement contentions represent two CDs constituting the Parties’ respective websites (at a particular point in time) that, in turn, contain thousands of webpages of cheat codes from each of the Parties’ websites. The Defendants have not been accused of copying Plaintiff’s site wholesale but have been accused of taking discreet sections of cheat codes. Mudd Aff. ¶ 8; see also Examples of Alleged Infringement Produced by Plaintiff Allison, attached hereto as Exhibit C. It would be impossible for Defendants to anticipate Plaintiff’s infringement contentions from the mere production of two CDs containing voluminous documents representing copies of the Parties’ entire websites at a particular point in time and, as such, the CDs fall short of Plaintiff’s burden to set forth his infringement case. See, e.g., General Universal Sys. v. Lee, 379 F.3d 131, 147 (5th Cir. 2004) (finding summary judgment in favor of defendant appropriate where plaintiff produced only a copy of the alleged infringing source code and provided no comparison with the copyrighted work). Further, Plaintiff has failed to produce evidence responsive to this interrogatory which would show that any protectable elements of his work have been copied by Defendants. See, e.g., Tiseo Architects, Inc. v. B & B Pools Serv. & Supply Co., 495 F.3d 344, 348 (6th Cir. 2007) (“the substantial similarity analysis of a copyright infringement claim is divided into two steps: the first step requires identifying which aspects of the artist’s work, if any, are protectable by copyright; the second involves determining whether the allegedly infringing work is ‘substantially similar’ to protectable elements of the artist’s work.”) (citations omitted). The Defendants will move to exclude any additional allegations of infringement, as they were never disclosed during fact discovery. See Roberts v. Galen of Va., Inc., 325 F.3d 776, 782 (6th Cir. 2003); Cummins-Allison Corp. v. SBM Co., Ltd., Civil Action No. 9:07-CV-196, 2009 U.S. Dist. LEXIS 22114 (E.D. Tex. Mar. 19, 2009) (citing Roberts and excluding invalidity contentions in a patent infringement case where contentions were not disclosed in accordance with the local patent rules); Computer Acceleration Corp. v. Microsoft Corp., 503 F. Supp. 2d 819, 825 (E.D. Tex. 2007) (citing Roberts and striking infringement contentions stating “Allowing such a scanty and inadequate infringement contention disclosure to stand would deter neither game-playing nor actual violation of the rules - to the contrary it would actually discourage the voluntary exchange of information.”).

⁴ The Affidavit of Charles Lee Mudd, Jr. is attached as “Exhibit A.”

⁵ Examples of Alleged Infringement Produced by Plaintiff Allison is attached as “Exhibit C.”

expected to learn that Plaintiff had not actually authored the cheat codes he alleged the Defendants infringed.

Up until the telephonic status conference of June 22, 2009, the Defendants had been building their defense against Plaintiff's claims of damages that centered on an alleged decrease in traffic and increase in advertising expenses alleged to be attributable to the existence of portions of Plaintiff's "Copyrighted Website" on Defendants' websites. However, due to the Plaintiff's own history of litigation against third-parties for similar conduct and the exact same claim of damages, the Defendants suspected that the cheat codes at issue most likely appeared on numerous third-party websites. Id. ¶ 15. If the same cheat codes existed on numerous websites, the Defendants believed (and continue to believe) that it would be impossible for the Plaintiff to attribute his damages solely to the Defendants' alleged infringing activity.

Prior to the telephonic status conference of June 22, 2009, and before Defendants became aware that Plaintiff's contentions were limited to only twelve examples, the Defendants had conducted investigations comparing cheat code content from Plaintiff's website to other third-party websites. Id. ¶ 11. However, Defendants' counsel intentionally controlled and limited the investigations in an effort to mitigate the Defendants' costs in anticipation of future settlement discussions that had been addressed at status conferences with Magistrate Judge Abel in February, April, and, again, in June 2009. Id. ¶¶ 9-14. Indeed, the Defendants and Defendants' counsel had cooperated with the Plaintiff in producing documents and other discovery in an effort to position Plaintiff to be able to discuss settlement and resolution of the litigation. Id. ¶¶ 9-10.

After the telephonic status conference of June 22, 2009, Defendants' counsel realized that, despite the efforts of Magistrate Judge Abel, settlement discussions would not likely occur

prior to the conclusion of fact discovery on July 31, 2009. Id. ¶¶ 13-14. Consequently, Defendants' counsel invigorated the investigation and compilation of websites and webpages containing cheat codes similar, if not identical, to those identified by the Plaintiff. Id. ¶¶ 12, 15. This included enlisting the assistance of office staff and associates to gather as much information as possible during the remaining weeks of the discovery period which, at that point, was still open. Id. ¶¶ 14-25. As Defendants' counsel did not anticipate needing any additional time beyond July 31, 2009, to merely compile copies of webpages, they indicated to the Court that the existing deadline for fact discovery would be sufficient. Id. ¶ 14.

Subsequent to the revelations of Plaintiff's counsel at the teleconference of June 22, 2009 that Plaintiff intended to rely on the twelve (12) examples of alleged infringement cited and produced in his discovery responses, Defendant Wise personally began narrowing his efforts in the Defendants' investigation to concentrate on the cheat codes contained in the twelve (12) examples. Id. ¶ 12. Days after the status conference, between June 24 and June 26, Defendant Wise found cheat codes contained in the Plaintiff's twelve (12) examples to be nearly identical to those on the third-party site www.gamewinners.com. Id. ¶ 16. Defendants' counsel then began to preserve the webpages associated with such cheat codes on www.gamewinners.com.⁶

⁶ For a comparison of the webpages from www.gamewinners.com to the applicable and current webpages on the Plaintiff's website www.cheatcc.com, please review the relevant pages at www.cheatcc.com: Gears of War (<http://www.cheatcc.com/xbox360/gearsowarcheatscodes.html>); Grand Theft Auto (<http://www.cheatcc.com/ps3/grandtheftautolibertycitystoriescheatscodes.html>); Halo 2 (<http://www.cheatcc.com/xb/halo2mmp.html>); Marvel (<http://www.cheatcc.com/ps3/marvelultimatealliancecheatscodes.html>); Need for Speed (<http://www.cheatcc.com/xbox360/needforspeedmostwantedcheatscodes.html>); Resistance (<http://www.cheatcc.com/ps3/resistancefallofmancheatscodes.html>); Scarface (<http://www.cheatcc.com/ps2/scarfacetheworldisyourcheatscodes.html>); Superman Returns (<http://www.cheatcc.com/xbox360/supermanreturnscheatscodes.html>); X Men 2 (<http://www.cheatcc.com/ps3/xmenlegends2riseofapocalypsecheatscodes.html>); Sega Smash Pack (<http://www.cheatcc.com/dc/segaspv1.html>); Elder Scrolls IV: Oblivion (<http://www.cheatcc.com/xbox360/elderscrolls4oblivioncheatscodes.html>); Legend of Zelda (<http://www.cheatcc.com/wii/legendofzeldatwilightprincesscheatscodes.html>).

Affidavit of Kevin Brett (“Brett Aff.”) ¶¶ 3-6.⁷ The cheat codes on www.gamewinners.com (“Game Winners Codes”) attributed many of the cheat codes to particular authors. Mudd Aff. ¶ 17; Ex. B to Brett Aff. Each author’s screen name was associated with his or her profile. In some instances, the screen name corresponded to the author’s proper name. With this information, Defendant Wise began emailing the putative authors via their profile information listed on www.gamewinners.com. Mudd Aff. ¶ 19. Some members did not respond, and some responded but thought that Mr. Wise’s emails may be a hoax. Id. ¶ 20. Several responded immediately stating that they were the authors of the cheat codes. Id. ¶ 21. Upon learning of responses from such authors, Defendants’ counsel began communicating with such individuals. Throughout the month of July, Defendants’ counsel continued their communications with the authors of the cheat codes, confirmed whether the individuals actually had relevant knowledge and were authors, and obtained some sworn statements. Mudd Aff. ¶¶ 22, 24; see also Affidavit of Kevin Merrill and Affidavit of Brandon Mizera.⁸

It should be clearly stated that the Defendants and Defendants’ counsel never expected to learn and obtain evidence supporting the fact that the Plaintiff did not author the cheat codes he contends the Defendants infringed. The Defendants and Defendants’ counsel did not even begin to look for fraud; it found them. Given the serious nature of this discovery, the Defendants and their counsel continue their investigation regarding these revelations as they address the very heart of Plaintiff’s infringement allegations. Mudd Aff. ¶ 25. And, contrary to Plaintiff’s allegations, nothing exists in the applicable Discovery Rules that states an investigation and search for the truthfulness of infringement allegations must cease late in the discovery period or after the relevant discovery period has ended. As such, the Defendants intend to supplement

⁷ The Affidavit of Kevin Brett is attached as “Exhibit B.”

⁸ The Affidavits of Kevin Merrill and Brandon Mizera are attached as “Exhibit D.”

when they learn new information on these significant and serious issues in accordance with their duties under Rule 26(e).

II. ARGUMENT

Under Federal Rule of Civil Procedure 26(e), a party is under a duty to supplement discovery responses and disclosures “in a timely manner” once he learns that “in some material respect the disclosure or response is incomplete or incorrect.” Fed. R. Civ. P. 26(e)(1)(A). The Defendants timely made their supplementations under Rule 26(e) as the disclosures came immediately after the Defendants uncovered the newly discovered witnesses. As discussed below, even if it could be said that the disclosures were untimely, no exclusion is warranted under Rule 37(c)(1). Information possessed by these late disclosed witnesses is pertinent to the very foundation of this case, and the newly discovered evidence should not be excluded.

A. Defendants’ Disclosure of Newly Discovered Witnesses Was Not Untimely

Defendants’ disclosures represent their compliance with a duty that a party should not be sanctioned for fulfilling, especially where, as here, there exists absolutely no evidence of gamesmanship or of withholding available relevant information until the last minute. As noted by the District of D.C. in Novak v. Capital Mgmt. & Dev. Corp.:

There is no basis to move to strike a supplementation of an initial disclosure of potential witnesses under the Federal Rules of Civil Procedure that occurs during the discovery period, provided there is no evidence of “gamesmanship,” such as having the information earlier but waiting until the day discovery ends to reveal it. Indeed, the Federal Rules of Civil Procedure *require* such supplementation if potential witnesses were identified in the initial disclosures made under Rule 26(a)(1) or in response to an interrogatory that demanded that information. Fed. R. Civ. P. 26(e).

Novak v. Capital Mgmt. & Dev. Corp., 241 F.R.D. 389, 391 (D.D.C. 2007). No gamesmanship on the part of Defendants exists here. The Defendants disclosed the information as soon as they confirmed that it was relevant to the initial disclosures and that the witnesses actually were likely

to possess relevant information. Consequently, the Plaintiff should not benefit from having the statements and testimony of these witnesses stricken when he himself has constructively withheld their identities for years by claiming to be the author of cheat codes at issue in this litigation and when, in fact, these recently identified individuals are, in actuality, the authors of cheat codes at issue in this litigation. Clearly Plaintiff's Motion should be denied on these grounds as the Defendants have not violated Rule 26(e) and merely fulfilled their duties to supplement. See Fed. R. Civ. P. 26(e); Novak, 241 F.R.D. at 389.

B. Exclusion of Newly Discovered Witnesses is not Warranted Under Rule 37(c)(1)

Even if the disclosures were untimely made, which they were not, and Defendants had breached their duties under Rule 26(e), which they have not, such circumstances would not warrant sanctions under Rule 37. Admittedly, the Sixth Circuit is very strict regarding adherence to the automatic supplementation of discovery under Rule 26(e). Roberts v. Galen of Va., Inc., 325 F.3d 776, 782 (6th Cir. 2003) (stating that Rule 37(c)(1) “mandates that a trial court punish a party for discovery violations in connection with Rule 26 unless the violation was harmless or is substantially justified.”) (citations omitted, emphasis added). The qualification identified in Roberts appears within the text of Rule 37(c)(1):

If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), 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.

Fed. R. Civ. P. 37(c)(1) (emphasis added). Indeed, the qualification is not without substance. As stated by the Western District of Michigan in El Camino Res., Ltd. v. Huntington Nat'l Bank:

Rule 37(c)(1), which has been part of the Federal Rules of Civil Procedure for over fifteen years, squints Janus-like in two opposite directions. The rule appears to establish a mandatory and automatic preclusion of a party's use of information or witnesses that the party did not disclose as required by Rule 26(a). This has led courts, including the Sixth Circuit, to observe that preclusion is automatic under Rule 37. See, e.g., Caudell v. City of Loveland, 226 F. App'x 479, 481 n.1 (6th Cir. 2007). The mandatory language of Rule 37(c)(1), however, is followed by a very important subordinate clause that is introduced with the conjunction "unless." Under the rule, exclusion is mandatory "unless" the court finds that the failure was substantially justified or is harmless. Furthermore, the rule provides for additional or alternative sanctions, including the payment of expenses or any of the sanctions listed in Rule 37(b)(2)(A)(i)-(vi). Consequently, what begins as a mandatory sanctions [sic] ends as a sanction that must be imposed unless the court finds that the failure was substantially justified or was harmless or unless the court chooses to impose an alternative sanction.

El Camino Res., Ltd. v. Huntington Nat'l Bank, Case No. 1:07-cv-598, 2009 U.S. Dist. LEXIS 36704 at *5-6 (W.D. Mich. Apr. 30, 2009).⁹ Thus, contrary to Plaintiff's argument, sanctions are not automatic or mandatory under Rule 37(c) in a matter such as this. See id. Rather, a court must determine whether harmlessness or substantial justification exists. Id.

Here, substantial justification exists. Clearly, any alleged delay in the disclosure of Defendants' witnesses was substantially justified as the Defendants only recently discovered their involvement in the authorship of the cheat codes cited and produced by Plaintiff. See, e.g., Orgler Homes, Inc. v. Chi. Reg'l Council of Carpenters, Case No. 06 C 50097, 2008 U.S. Dist. LEXIS 42878 at *6-7 (N.D. Ill. May 30, 2008) (finding substantial justification and harmlessness after immediate disclosure of newly revealed evidence stating "The court finds that the prejudice allegedly inflicted upon plaintiffs has been greatly exaggerated and was capable of being cured [by requesting discovery regarding the 26(e) supplementation].").

Additionally, the disclosures at issue here are harmless. To determine whether a party's late disclosure can be considered harmless, the Sixth Circuit employs a test obtained from the

⁹ Copies of unreported cases are attached as "Exhibit G."

comments to Rule 37. Specifically, “harmless” involves an innocent mistake on the part of the non-disclosing party and sufficient knowledge on the part of the other party. See Roberts, 325 F.3d at 783. Additionally, in the Sixth Circuit, the party seeking to introduce evidence bears the burden of proving harmlessness. Id. In this case, the Roberts test is difficult to apply because the timing of Defendants’ disclosure did not arise from a mistake, innocent or otherwise, but rather from circumstances beyond Defendants’ control - late discovered evidence and witnesses. As for the Plaintiff’s knowledge, he should have had actual or constructive knowledge of the existence and identity of the potential witnesses—the true authors of material for which the Plaintiff obtained a copyright—as the Plaintiff has suppressed for years the fact that he did not author cheat codes for which he claimed authorship, obtained a copyright, and sued for infringement thereof. As such, there should be a finding of harmlessness using the Sixth Circuit’s Roberts test.

The same result is obtained when employing a more thorough analysis utilized in the Fourth Circuit. Specifically, five factors guide courts in the Fourth Circuit in determining whether a delay in disclosure of evidence is substantially justified or harmless. The factors are: (1) surprise to party against whom evidence would be offered; (2) ability of that party to cure surprise; (3) extent to which allowing evidence would disrupt trial; (4) importance of evidence; and (5) nondisclosing party's explanation for its failure to disclose evidence. Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co., 318 F.3d 592, 597 (4th Cir. 2003).

Regarding the first factor, trial is more than three months away. Given this and the fact that the Plaintiff knew he did not author cheat codes, Plaintiff could and would not be surprised if Defendants relied upon these witnesses at trial. Regarding the second factor, Plaintiff can cure any surprise by conducting discovery of Defendants’ potential cheat code witnesses. Indeed,

Defendants offered to extend the discovery period so that these witnesses and their information could be explored. However, Plaintiff refused to accept that invitation. Mudd Aff. ¶¶ 30-34; see also Email from Sabrina Haurin to Thomas Howard (July 24, 2009) and Email from Sabrina Haurin to Wendi Temkin (July 28, 2009).¹⁰ Regarding the third and fourth factors, trial is more than four months away. As such, allowing the information and witnesses to be used would not disrupt trial. And, the evidence happens to be extremely important as it goes to the very heart of Plaintiff's case - his ownership of valid copyrights. The evidence is also of utmost importance as it determines whether Plaintiff has standing to sue for copyright infringement. See Silvers v. Sony Pictures Entertainment, Inc., 402 F.3d 881, 885 (9th Cir. 2005) (holding that only parties holding ownership of a copyright have standing to sue under 17 U.S.C. § 501(b)). The fifth factor, the Defendants' reason for the alleged late disclosure of these witnesses, also weighs against exclusion. The Defendants' overarching reason for any alleged delayed disclosure of these potential witnesses arises from the fact that the Defendants only recently discovered them. Further, Plaintiff has for years been withholding the fact that he had not authored disputed cheat codes, but had actually copied them from these potential witnesses. As such, even under the Fourth Circuit analysis, there would be substantial justification and/or harmlessness in including the witnesses and evidence. See Southern States Rack & Fixture, Inc., 318 F.3d at 597.

In other courts, "the principal factor is whether the opponent will be prejudiced or surprised." Orgler Homes, Inc., 2008 U.S. Dist. LEXIS 42878 at *6 (citing David v. Caterpillar, Inc., 324 F.3d 851, 857 (7th Cir. 2003)). Here, the Plaintiff will not be prejudiced or surprised by these newly discovered witnesses. As he copied the alleged copyrighted cheat codes from the witnesses' postings on www.gamewinners.com, he knew or should have known of their

¹⁰ Email from Sabrina Haurin to Thomas Howard (July 24, 2009) and Email from Sabrina Haurin to Wendi Temkin (July 28, 2009) are attached as "Exhibit E."

identities. Mudd Aff. ¶¶ 16-23; see also Exs. B and C. Further, no depositions have been taken in this case; expert discovery has not yet concluded; dispositive motions have not been filed; and, prior to the recent amendment to the scheduling order, trial was three months away and was four months away when Defendants disclosed these potential witnesses. Moreover, Plaintiff has been given the option to seek an extension of fact discovery and learn the information possessed by these potential witnesses in advance of trial, but has refused. Mudd Aff. ¶¶ 33-34. Indeed, prior to reviewing the actual content of the disclosures, the Plaintiff's counsel discussed the possibility of needing an extension of fact discovery. Id. ¶¶ 30-34; see also Ex. E.

Finally, late disclosure under Rule 26(a) is excusable where Plaintiff waited years to disclose his infringement contentions. See, e.g., Hines v. Dean, CIVIL ACTION 1:02-cv-3390-MHS, 2005 U.S. Dist. LEXIS 44792 at *8-9 (N.D. Ga. Mar. 10, 2005) (refusing to exclude defendant's expert report where it "could not have been prepared earlier because plaintiff failed to timely disclose his infringement contentions, waiting until just three weeks before liability discovery closed to provide defendants this crucial information.").

Clearly Plaintiff's motion should be denied on the foregoing grounds as any "delay" in disclosure was substantially justified and harmless. See Fed. R. Civ. P. 37(c)(1).

C. Third-Party Witness Thomas Carroll Should Not be Stricken¹¹

Plaintiff argues that Third-Party Witness Thomas Carroll (identified as Tom Carroll in Defendants' Amended Disclosures) should be stricken from Defendants' witness list if only for the reason that Mr. Carroll is bound by a confidential settlement agreement with the Plaintiff and,

¹¹ The Plaintiff has admitted that he had notice that his own staff might be identified. Pl.'s Mot. for Sanctions at 4. And, the Parties have agreed that the Defendants may depose the individuals (C)-(F) identified in Defendants' Amended 26(a)(1) disclosures.

therefore, his testimony may reveal confidential information.¹² Pl.'s Mot. for Sanctions at 5. This constitutes an insufficient reason to strike Mr. Carroll from the Defendants' list of potential witnesses. Settlement agreements are discoverable. Thomas & Marker Constr., Co. v. Wal-Mart Stores, Inc., Case No. 3:06-cv-406, 2008 U.S. Dist. LEXIS 93717 at *10 (S.D. Ohio Aug. 6, 2008) (citing Am. Guar. & Liab. Ins. Co. v. CTA Acoustics, Inc., CIVIL ACTION NO. 05-80-KKC, 2007 U.S. Dist. LEXIS 26485 at *10-11 (E.D. Ky. Apr. 9, 2007)). Although the Sixth Circuit has recognized that a "settlement privilege" exists, Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 979 (6th Cir. 2003), this privilege applies to negotiations and does not apply to the actual settlement agreement. Am. Guar. & Liab. Ins. Co., 2007 U.S. Dist. LEXIS 26485 at *11 (citing Qsi-Fostoria, D.C., LLC v. BACM 2001-1 Cent. Park W., LLC, Case No. 3:02CV07466, 2006 U.S. Dist. LEXIS 48245 at *4-5 (N.D. Ohio July 17, 2006) (Goodyear "settlement privilege" protects settlement negotiations from discovery but does not extend to the terms of the final agreement); Grupo Condumex, S.A. de C. V. v. SPX Corp., 331 F.Supp.2d 623, 629 (N.D. Ohio 2004) (stating that settlement agreement is unprotected under Goodyear)).

Moreover, the protective order entered into between the Plaintiff and Defendants would cover any confidential information revealed by Mr. Carroll regarding his settlement with the Plaintiff. And, if necessary, any information that Mr. Carroll deems confidential can be protected from disclosure to Defendants by appropriate amendments to the existing protective order.¹³ Indeed, any risk in exposing confidential information to Mr. Carroll's competitors could be cured by maintaining the information as attorney's eyes only – as the Parties have done within the existing protective order. This is sufficient protection. Thomas & Marker Constr., Co., 2008

¹² The Plaintiff identified Mr. Thomas Carroll as a defendant in similar litigation filed by the Plaintiff.

¹³ It would seem that Mr. Carroll should be the party raising the objection as to his own confidential information.

U.S. Dist. LEXIS 93717 at *10. Therefore, Mr. Thomas Carroll should not be stricken from the Defendants' 26(a)(1) disclosures as a potential witness.

D. Notwithstanding Any Alleged Delay, The Newly Discovered Witnesses Should Not be Stricken

It is Plaintiff who is culpable in any delay caused by the disclosure of the Defendants' cheat code witnesses toward the end of the discovery period. The Plaintiff hid the fact that he did not author alleged infringed cheat codes and misrepresented this primary element to the Court and to the Defendants. Despite having copied cheat codes within the twelve cited examples from www.gamewinners.com, Plaintiff alleged in his first complaint against Defendant Jeremy Wise filed in Colorado that he "wrote the text contained on each cheat code web page located at www.cheatcc.com, and solely created the compilation and arrangement of the cheat code information on each of those pages." *Allison v. Wise, et al.*, Case No. 1:07-cv-00143-REB-PAC, Amended Complaint (Doc. #26) ¶ 11. Additionally, he claimed that he is the "sole author of all commentary regarding video game strategies, tips, hints, tricks, and cheat codes published on the www.cheatcc.com website." *Id.* ¶ 13. He later claimed that he "created the Copyrighted Web Pages listed above and fixed them in a tangible medium, with the exception of any third party banner ads contained on the pages." *Id.* ¶ 15.¹⁴

Plaintiff reinforced these misrepresentations in his response to Defendants' discovery requests. In response to Defendant Jeremy Wise's request to identify how Allison could recognize any allegedly infringed cheat code came from Plaintiff's website, "Allison states that

5 Plaintiff makes the same allegations in the pleadings filed in this Court. *See* First Amended Complaint and Jury Demand (Doc. #35). He states "David Allison wrote the text contained on each cheat code web page located at www.cheatcc.com, and solely created the compilation and arrangement of the cheat code information on each of those pages." *Id.* ¶ 14. He then goes on to state that "David Allison is the sole author of all original descriptions of video game strategies, tips, hints, tricks, and cheat codes published on the www.cheatcc.com website." *Id.* ¶ 14. He again states "David Allison created the Copyrighted Web Pages listed above and fixed them in tangible medium, with the exception of any third party banner ads contained on the pages." *Id.* ¶ 18.

he is the sole author of the Copyrighted Web Pages located at www.cheatcc.com and has developed a unique and recognizable style of writing, organization and structure for his website.” Pl.’s Objections and Responses to Def. Jeremy Wise’s First Set of Interrogatories at Response No. 7.¹⁵ In response to Defendant Jeremy Wise’s request to identify those individuals and/or entities used by Plaintiff Allison to edit cheat codes, “Allison further represented that he “is the sole author/editor of the descriptions of electronic and/or video game strategies, tips, hints, tricks and/or cheat codes published on his Web sites.” Id. at Response No. 13. Throughout the last two and one-half years, Allison has continually represented himself as the author of the cheat codes at issue in this litigation.

It is baffling that Plaintiff filed this motion for sanctions three months prior to trial in the face of his culpability. This newly discovered evidence calls into question the Court’s subject-matter jurisdiction, as well as the standing of the Plaintiff to bring suit against the Defendants. These issues can be raised at any time and constitute matters that should not be ignored. See U.S. v. Hays, 515 U.S. 737, 742-744, 115 S. Ct. 2431, 2435 (1995) (court may address issue of standing at any time, not subject to waiver); Community Health Plan of Ohio v. Mosser, 347 F.3d 619, 622 (6th Cir. 2003); see also Midfirst Bank v. Davenport, Case No. 3:07-CV-405, 2007 U.S. Dist. LEXIS 87741 at *4-5 (S.D. Ohio November 29, 2007) (“In addition to standing, a court may address the issue of subject matter jurisdiction at any time, with or without the issue being raised by a party to the action.”). Additionally, Plaintiff’s alleged copyrights are likely invalid due to fraud on the Copyright Office.¹⁶ Further, his claims are likely barred by the affirmative

¹⁵ Pl.’s Objections and Responses to Def. Jeremy Wise’s First Set of Interrogatories is attached as “Exhibit F.”

¹⁶ See, e.g., R. Ready Prods., Inc. v. Cantrell, 85 F. Supp. 2d 672, 692 (S.D. Tex. 2000) (finding fraud on the Copyright Office where Plaintiff knowingly failed to disclose that his works largely consisted of pre-existing works that he did not own); see also Russ Berrie & Co v. Jerry Elsner Co., 482 F. Supp. 980 (SDNY 1980); Masquerade

defenses of copyright misuse and unclean hands.¹⁷ Consequently, the Defendants' potential witnesses should not be stricken and the newly discovered evidence should be reviewed in earnest to determine, at the very minimum, whether the case should move forward.

III. DEFENDANTS REQUEST ATTORNEY'S FEES, COSTS, AND EXPENSES INCURRED IN RESPONDING TO PLAINTIFF'S MOTION FOR SANCTIONS

As Defendants' supplemental discovery disclosures fell well within the ambit of Rule 26(e), and considering the Plaintiff filed his Motion for Sanctions despite being aware of his own deceptive tactics in failing to disclose his lack of authorship and ownership over the alleged copyrighted materials, Defendants respectfully request that an award of reasonable attorneys' fees, costs and expenses incurred in responding to the Plaintiff's Motion be levied against Plaintiff. For, the filing of a motion such as the Plaintiff's Motion is an offense subject to sanctions. 28 U.S.C. § 1927; see also Novak, 241 F.R.D. at 391-392 (because plaintiff individuals' supplementation of potential witness disclosures occurred during discovery period, and there was no evidence of gamesmanship, defendant companies had to compensate individuals for attorneys' fees and costs associated with companies' motion to strike; supplementation was required under Fed. R. Civ. P. 26(e)).

Novelty, Inc. v. Unique Indus., Inc., 912 F.2d 663, 667 (3d Cir. 1990); Service & Training, Inc. v. Data Gen Corp., 963 F.2d 680, 688-89 (4th Cir. 1992).

17 In an analogous case, Qad, Inc. v. ALN Assocs., Inc., the court for the Northern District of Illinois stated:

Here qad's misuse was even more egregious: It used its copyright to sue ALN and to restrain it from the use of material over which qad itself had no rights. That is a misuse of both the judicial process and the copyright laws. qad sought and received an injunction, the result of which severely restrained ALN. qad's deception has misled this Court into imposing unwarranted harm on ALN -- and with the truth now having emerged, it is time to correct that grievous wrong.

Qad, Inc. v. ALN Assocs., Inc., 770 F. Supp. 1261, 1267 (N.D. Ill. 1991), aff'd, 974 F.2d 834 (7th Cir. 1992).

IV. CONCLUSION

For the foregoing reasons, Defendants Jeremy N. Wise and Wise Buy Now, LLC respectfully request that Plaintiff's Motion for Sanctions be denied and that they be awarded attorney's fees, costs, and expenses in responding to the Plaintiff's Motion for Sanctions.

Respectfully submitted,

/s/ Sabrina Haurin

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CERTIFICATE OF SERVICE

I hereby certify that, on August 27, 2009, I electronically filed the foregoing Defendants' Response in Opposition to Plaintiff's Motion for Sanctions with the Clerk of Court using the Court's CM/ECF system, which will send notification of such filing to counsel for Plaintiff in this action.

/s/ Sabrina Haurin
Sabrina Haurin (0079321)