

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

ROBERT BERG,

Plaintiff,

v.

M & F WESTERN PRODUCTS, INC.,

Defendant.

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Case No. 6:19-CV-418-JDK

ORDER

Before the Court is Defendant M&F Western Products, Inc.’s Motion to Compel (Docket No. 26) and Plaintiff Robert Berg’s Motion to Appear Telephonically at Mediation Conference (Docket No. 36). On July 23, 2020, the Court held a telephonic hearing on these motions. As explained below, the Court **GRANTS IN PART and DENIES IN PART** M&F Western’s motion and **DENIES** Berg’s motion **AS MOOT**.

First, M&F Western moves to compel Berg’s personal attendance at mediation, and Berg moves to appear telephonically at mediation. In light of the discussion at the hearing on these motions, the Court finds that the mediation scheduled for July 27, 2020 should not be held. Judge Love has entered a notice canceling the mediation. The Parties are not required to mediate in this case. Accordingly, M&F Western’s motion to compel Berg’s personal attendance at mediation and Berg’s motion to appear telephonically at mediation conference are **DENIED AS MOOT**.

Second, M&F Western moves to compel Berg to appear in-person for his deposition and his testimony at trial. Berg’s deposition is scheduled for August 7, 2020. Berg currently resides in Vietnam and is unable to travel to the United States because of “visa issues” and the COVID-19 pandemic. Docket No. 28 at 2. The Court finds that it is not practicable or safe for Berg to travel

to the United States for his deposition at this time. The Court therefore **DENIES** M&F Western's motion to require Berg to appear in-person for his deposition. The Court also **DENIES** without prejudice M&F Western's motion to require Berg to appear in-person for his testimony at trial. The trial is six months away, and the circumstances currently precluding Berg from traveling to the United States may change dramatically. The Parties may raise this issue at a later date if it becomes necessary.

Third, during the hearing on these motions, Berg requested that the Court extend the discovery deadline because he needs additional time to take depositions. M&F Western agreed to an extension until mid to late September. The Court **GRANTS** this request and extends the discovery deadline until **September 21, 2020**. No further extensions will be granted absent good cause.

Finally, M&F Western moves to compel Berg to comply with mandatory disclosures and produce all relevant documents. Docket No. 26 at 7–8. M&F Western states that it “tried multiple times to solve the issue without court intervention but has received painfully few documents and inconsistent and contradictory statements as to whether Plaintiff has conducted a search.” *Id.* at 1. M&F Western therefore asks the Court to order Berg to:

- (a) complete a full search of his system, that of his company, those of his current and prior lawyers, and any other potential sources within his custody and control by a date certain; (b) report to the Court the investigation he undertook with regard to each category of documents; (c) what documents were located in each location; and (d) produce all relevant documents identified.

Id. at 7–8. Berg responds that he has produced all the relevant documents in his possession. Docket No. 28 at 3–5. Berg's counsel attested that he has “repeatedly asked Plaintiff to search for and produce any documents in his possession responsive to Defendant's requests. Plaintiff has . .

. repeatedly indicated that . . . he does not have any further documents in his possession responsive to Defendant’s requests.” Docket No. 29 at ¶ 2.

Under Federal Rule of Civil Procedure 26(b)(1):

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.¹

“A discovery request is relevant when the request seeks admissible evidence or ‘is reasonably calculated to lead to the discovery of admissible evidence.’” *Crosby v. La. Health Serv. & Indem. Co.*, 647 F.3d 258, 262 (5th Cir. 2011) (quoting *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 820 (5th Cir. 2004)). “Relevancy is broadly construed, and a request for discovery should be considered relevant if there is ‘any possibility’ that the information sought may be relevant to the claim or defense of any party.” *Torrey v. Infectious Diseases Soc’y of Am.*, 334 F.R.D. 79, 83 (E.D. Tex. 2019) (quoting *Merrill v. Waffle House, Inc.*, 227 F.R.D. 467, 470 (N.D. Tex. 2005)).

M&F Western argues that Berg has not complied with his Rule 26(b) obligations. In support, M&F Western states that on March 2, 2020, Berg filed a letter with the Court stating that “Plaintiff has produced relevant documents in his custody, possession and control, including copyright registration materials and copies of the designs. The remaining facts will be attested to via live testimony.” Docket No. 16 at 1. But on May 22, 2020, Berg admits that he produced an

¹ Local Rule CV-26 provides guidance on whether a particular piece of information is “relevant to any party’s claim or defense”:

(1) it includes information that would not support the disclosing parties’ contentions; (2) it includes those persons who, if their potential testimony were known, might reasonably be expected to be deposed or called as a witness by any of the parties; (3) it is information that is likely to have an influence on or affect the outcome of a claim or defense; (4) it is information that deserves to be considered in the preparation, evaluation, or trial of a claim or defense; and (5) it is information that reasonable and competent counsel would consider reasonably necessary to prepare, evaluate, or try a claim or defense.

additional “68 pages of documents related to copyright deposit materials.” Docket No. 28 at 3. Further, M&F Western states that after this lawsuit began, Berg “sent demand letters to numerous companies claiming copyright infringement, identifying Mr. Liebowitz as his lawyer, demanding settlement, referencing this litigation to ‘show’ he was serious, and implying that recipients could face prison time.” Docket No. 26 at 4–5. Berg did not produce these demand letters, and M&F Western only learned of them because third parties sent the demand letters to M&F Western. *Id.* at 1. Additionally, M&F Western found a Facebook post from Berg dated after this lawsuit began, which stated: “ive got it beat just waiting trial more than likly settle out of court.got 27 others lined up for litigation.with registered copyrite 95%win in federal court.” *Id.* at 6. Berg did not produce this Facebook post either. *Id.*

Based on the above, it appears that Berg has not complied with his Rule 26(b) obligations. The Court therefore **GRANTS** Defendant’s motion to compel and **ORDERS** Berg to complete the following by **August 13, 2020**: (a) conduct a full search of all documents and materials in hard copy and electronic format in Berg’s custody and control, including but not limited to all data on social media platforms in Berg’s custody and control, demand letters issued by Berg or his counsel to third parties referencing this case, documents and materials of Berg’s company, and documents and materials related to this case that are in the custody and control of Berg’s current or prior lawyers; (b) report to the Court the investigation Berg and his counsel undertook with regard to each category of documents and materials; (c) report what documents and materials were found in each location; and (d) produce to M&F Western all relevant, nonprivileged documents and materials identified. This production shall also include any documents related to Berg’s “visa issues.”² *See Murillo Modular Grp., Ltd. v. Sullivan*, No. 3:13-cv-3020-M, 2016 WL 6139096, at

² At the hearing, Berg’s counsel did not object to the production of these materials.

*9 (N.D. Tex. Oct. 20, 2016) (“Impeachment evidence is thus discoverable when relevant – in other words, when ‘disclosure may reveal information affecting the credence afforded to a witness’ trial testimony.”) (quoting *Davidson Pipe Co. v. Laventhol & Horwath*, 120 F.R.D. 455, 462 (S.D.N.Y. 1988)); see also 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2015 (3d ed. 2020) (“Inconsistent statements, criminal convictions, proof of bias, and similar material, being themselves admissible evidence, cannot be excluded from the scope of discovery.”).

Berg and his counsel are admonished that failure to comply with this Order, failure to comply with Rule 26(b), or the spoliation of evidence may result in sanctions, including the dismissal of this lawsuit and the payment of M&F Western’s costs and fees.

Accordingly,

IT IS ORDERED that Defendant M&F Western’s Motion to Compel (Docket No. 26) is **GRANTED IN PART and DENIED IN PART**. It is further

ORDERED that Berg’s Motion to Appear Telephonically at Mediation Conference (Docket No. 36) is **DENIED AS MOOT**.

So **ORDERED** and **SIGNED** this **23rd** day of **July, 2020**.



JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE