

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No 5:07-CV-426 (U.S.D.C., E.D.N.C.)

ADVANCED INTERNET)	
TECHNOLOGIES, INC.)	
)	MEMORANDUM I IN SUPPORT OF
Plaintiff,)	PLAINTIFF’S SECOND MOTION FOR
)	SANCTIONS AGAINST DEFENDANT
v.)	DELL, INC. FOR FAILURE TO COMPLY
)	WITH A COURT ORDER
DELL, INC. and DELL FINANCIAL)	
SERVICES LLC,)	<i>Fed. R. Civ. P. 37(b)(2)(A)</i>
)	
Defendants.)	
_____)	

INTRODUCTION

On December 17, 2009, Plaintiff Advanced Internet Technologies, Inc. (“AIT”) filed a first motion for sanctions and renewed motion to compel against Defendant Dell, Inc. (“Dell”). [DE-124]. On December 23, 2009 AIT filed a second motion to compel Dell to respond to its discovery requests. [DE-129]. Dell filed opposition to both motions. [DE-143 & 152]. On April 30, 2010, this Court issued an Order granting in part and denying in part AIT’s motions. [DE-199]. Relevant to this motion is the portion of the Order requiring Dell to produce, “[d]ocuments in Dell’s possession regarding withholding, withdrawing, or purging of Dell OptiPlex computers because of problematic capacitors that were the subject of the study at issue” as well as “communication from Dell to [redacted] referring to or disclosing Dell’s analysis or understanding of the causes for the failure or failures of any [redacted] capacitor used as a capacitor on a Dell OptiPlex computer or to damages or losses, including the dollar amounts thereof, that such failure or failures causes [sic] Dell (for the years 2003 to 2006).” (Order pp.

20-21). On June 4, 2010, Dell served AIT with supplemental responses which purported to respond to that Order. However, it is apparent that Dell's response was incomplete and that Dell has deliberately violated this Court's Order by failing to provide responsive documents from its senior executives warranting sanctions pursuant to Fed. R. Civ. P. 37(b)(2)(A).

It is virtually certain that Dell senior executives would have been involved in the decision to, "withhold, withdraw, or purge Dell OptiPlex computers because of problematic capacitors" and therefore should have authored or received documents responsive to the Court's Order because AIT is in possession of at least one document showing that Dell senior executives were involved in the development of "talking points" designed to minimize to Dell's customers and shareholders the full extent of capacitor failures in the OptiPlex computers. (*See*, DELL 0132739-0132740 annexed to the Declaration of Darren T. Kaplan (the "Kaplan Decl.") as Exhibit "A").

BACKGROUND

This action arises from defective computers that Dell supplied to AIT, an information technology business, under multiple "finance leasing" agreements with Dell's lease financing affiliate, Defendant Dell Financial Services LLC ("DFS"). AIT alleges that Dell knowingly supplied defective computers under leasing arrangements crafted to shield Dell from warranty claims or otherwise limit Plaintiff's recourse. Further, Dell knew the computers would fail, and breached the warranty terms once they inevitably failed.

In 2004, AIT's OptiPlex computers began experiencing failure rates approaching 100% as a result of defective components incorporated into the OptiPlex computers. In fact, Dell has

acknowledged that its OptiPlex computers experienced elevated failure rates due to problems with defective capacitors provided to Dell by one of its suppliers, Nichicon.

Thus, one of the fundamental issues in this case is self-evident—what did Dell do to protect customers such as AIT from receiving OptiPlex computers that Dell knew were likely to have defective capacitors? AIT has sought documents on this issue from the outset of discovery, but Dell has consistently resisted providing documents relating to its decision to withhold, withdraw, or purge OptiPlex computer containing defective capacitors or whether it even, in fact, made such a decision or carried through with it. Accordingly, AIT was forced to move to compel Dell to respond to its discovery requests.

Dell opposed the motion and indicated for the first time that its production of responsive documents in the litigation was confined to only sixteen “custodians,” whom Dell unilaterally determined had information related to the case. [DE-153]. Not coincidentally, no senior Dell executives were determined by Dell’s attorneys to have information related to the case.¹ This Court then entered an order on AIT’s motions which provide *inter alia*, that Dell was required to produce, “[d]ocuments in Dell’s possession regarding withholding, withdrawing, or purging of Dell OptiPlex computers because of problematic capacitors that were the subject of the study at issue” as well as “communication from Dell to [redacted] referring to or disclosing Dell’s analysis or understanding of the causes for the failure or failures of any [redacted] capacitor used as a capacitor on a Dell OptiPlex computer or to damages or losses, including the dollar amounts

¹ AIT reserves its right to seek to compel the production of documents from *all* other Dell employees but is declining to do so now out of concern that reopening discovery at this late date will prevent trial from commencing on the currently scheduled October 18, 2010 trial date. On the other hand, AIT believes that documents Dell was specifically ordered to produce by this Court on April 30, 2010 can and should be produced from Dell’s senior executives without formally reopening discovery.

thereof, that such failure or failures causes [sic] Dell (for the years 2003 to 2006).” (Order pp. 20-21). (Order p. 20). [DE-199].

In response, Dell provided a total of sixteen additional documents on June 4, 2010 which were purportedly responsive to the requests to which the Court had ordered Dell to respond. (See Dell Supplement Responses dated June 4, 2010 (Exhibit “B” to the Kaplan Decl.)). None of these documents are authored by or addressed to any senior executive at Dell who would have to have been involved in a decision of such significance as Dell’s “withholding, withdrawing, or purging of Dell OptiPlex computers because of problematic capacitors.”²

It is inconceivable that Dell senior executives were not authors and/or recipients of documents relating to Dell’s “withholding, withdrawing, or purging of Dell OptiPlex computers because of problematic capacitors” because AIT is in possession of at least one document showing that Dell senior executives were involved in the development of “talking points” designed to minimize to Dell’s customers and shareholders the full extent of capacitor failures in the OptiPlex computers. (See, DELL 0132739-0132740 annexed to the Kaplan Decl. as Exhibit “A”). This document is an August 30, 2005 e-mail from Dell’s Director of Communications, David Kersten, with what appears to be a “cut and paste” of another e-mail from Lynn Tyson, Dell’s Vice President of Investor Relations (http://www.dell.com/downloads/global/corporate/inv_history/q4_fy09_earnings_transcript.pdf), with Dell’s senior-most executives as recipients including Dell’s current chairman and CEO,

² That Dell would locate a total of sixteen new documents from sixteen “custodians” in response to this Court’s Order seems an improbable coincidence. Rather, it seems likely that Dell simply produced one additional document from each custodian’s files without any further review of Dell’s records not withstanding this Court’s unqualified instruction that “documents in Dell’s possession” be produced.

Michael Dell, and Dell's then-president and CEO, Kevin Rollins.³ The subject of the e-mail is "Talking Points" and states as follows:

All,

Communications has met with the relevant teams from PG and ABU. Since this is not a safety issue and we are still scoping remediation plans as well as how to communicate with the sales teams -we recommend that we continue our reactive posture with the media (which includes blogs) using the following talking points:

- We are aware of a quality issue related to capacitor failure in some Optiplex 270 models.
- The problem poses no risk of safety or data loss for our customers.
- We have been working with our customers to resolve problems in the most effective manner possible (which will vary depending on our customers' needs).
- We're committed to fixing any systems that fail.

We will work with the teams each day to reassess our external strategy and messaging.

Best,

Lynn⁴

The first e-mail in the chain (DELL 0132739) states that Dell is "taking the approach supported below by Kevin" which obviously refers to Dell's then-president and CEO, Kevin Rollins who is a recipient of the pasted e-mail. Put simply, if Dell's Chairman and then-president and CEO were approving the messaging over the capacitor failures, it strains credulity that they would not

³ Because the e-mail from Lynn Tyson appears literally "out of the blue" among the hundreds of thousands of other documents Dell has produced in this case, AIT suspected the document in question might have been altered in some way and even went so far as to retain a digital forensic consultant to examine the document. (See Affidavit of Larry E. Daniel annexed to the Kaplan Decl. as Exhibit "C.").

⁴ Although the document in question is designated "Highly Confidential," Dell agreed to its de-designation by letter on July 16, 2010.

have also been involved in the more important question of withholding, withdrawing, or purging of Dell OptiPlex computers from the marketplace because of those same problematic capacitors.

On August 4, 2010, counsel for AIT wrote to counsel for Dell demanding that all documents responsive to the Court's April 30, 2010 Order be produced without regard to whether or not those documents were purportedly in the possession of certain "document custodians" at Dell. (*See* Letter of Darren Kaplan to Scott Elder annexed to Kaplan Decl. as Exhibit "D."). As of this date, Dell has not responded to that letter.

ARGUMENT

Rule 37 permits a court to impose sanctions, including dismissal of a case with prejudice, if a party fails to comply with a discovery order. *Hatchcock v. Navistar Int'l Transp. Corp.*, 53 F.3d 36, 40 (4th Cir.1995). Here, Dell was ordered to produce "documents in Dell's possession" but chose instead only to produce documents from certain "document custodians." Despite the fact that documents authored by Dell senior executives responsive to the Court's Order doubtless exist, Dell has deliberately chosen not to produce them.

Dell's noncompliance prejudices AIT in this litigation. The evidence sought to be produced is material to both treble damages, punitive damages, and the persuasiveness and "weight" of the evidence plaintiff could present to the jury. *See First Union Rail Corp. v. Springfield Terminal Ry. Co.*, 2009 WL 1469632 (W.D.N.C. 2009). By refusing to produce the ordered, responsive and relevant discovery, Dell has interfered with AIT's ability to show the jury that Dell's senior executives were involved in the decision to sell computers it knew to be defective to businesses and consumers World-wide as well as failing to withdraw those defective computers from the market after they began to fail. The discovery sought is, therefore, material

especially on a claim that has as an element “unfair or deceptive act[s] or practice[s].” *Food Lion, Inc. v. Capital Cities/ABC Inc.*, 951 F.Supp. 1224, 1230 (M.D.N.C.1996).

In addition to ordering Dell to produce immediately the previously ordered documents so that AIT can continue preparing for trial, there is an array of sanctions available to the Court, including:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) rendering a default judgment against the disobedient party; or

(vi) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Fed.R.Civ.P. 37(b)(2).

We leave to this Court’s discretion the appropriate sanction for Dell’s violation of this Court’s prior Discovery Order, drawing the Court’s attention to the fact this is not the first time in this action that Dell’s refusal to provide discovery has necessitated an Order to compel.

CONCLUSION

As set forth above, Dell has violated this Court’s Order directing it to produce documents “in Dell’s possession.” AIT respectfully requests that, in accordance with Fed. R. Civ. P. 37(b)(2)(A) this Court sanction Dell as it deems appropriate.

Respectfully submitted on the 12th day of August 2010.

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**Attorneys for Plaintiff Advanced Internet
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed or caused to be filed **MEMORANDUM IN SUPPORT OF PLAINTIFF'S SECOND MOTION FOR SANCTIONS AGAINST DEFENDANT DELL, INC. FOR FAILURE TO COMPLY WITH A COURT ORDER** with the Clerk of Court using the CM/ECF system which will send notice to Pressly M. Millen, pmillen@wcsr.com; dbarrett@wcsr.com; Byron L. Saintsing, bsaintsing@smithdebnamlaw.com; dkinlaw@smithdebnamlaw.com; jcotten@smithdebnamlaw.com; Scott A. Elder, scott.elder@alston.com; victoria.lockard@alston.com.

This is the 12th day of August, 2010.

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