UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CAMPMOR, INC., *Plaintiff,* - *vs.* - BRULANT, LLC, *Defendant*.	CIVIL ACTION NO. 09-CV-5465 (WHW)
BRULANT, LLC, *Counterclaim Plaintiff,* - *vs.* - CAMPMOR, INC., *Counterclaim Defendant*.	

PLAINTIFF'S MEMORANDUM IN FURTHER SUPPORT OF ITS MOTION IN LIMINE TO EXCLUDE TESTIMONY AND ARGUMENT CONCERNING CAMPMOR'S SERVICE OF PROCESS FROM TRIAL

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PRELIMINARY STATEMENT

For all its bluster, Rosetta's opposition to Campmor's motion in limine falls unsurprisingly short on substance – and never comes close to demonstrating why the jury in this complex technological and commercial case should be burdened with, and arguably prejudiced by, a distracting detour into the niceties of civil procedure concerning the filing and serving of a complaint.

By all indications Rosetta would very much like to find some way to "balance" the record of misrepresentations and bad faith on its part that will be presented to the jury in this case – after all, it has sought via its own motions in limine to find every possible way to rationalize preventing the jury from hearing about its actions, which are at the core of Campmor's claims, at all. So on this motion Rosetta has devoted pages of its brief recounting the mean content of emails sent by Daniel Jarashow, Campmor's CEO, to Rosetta as its promises and performance unraveled, along with Campmor's e-commerce website. Irrelevant as it is, even on its terms Rosetta's offering is hardly a smoking gun proving sharp practice, much less misrepresentation, by Campmor. The emails do evince frustration, dissatisfaction and disappointment. Perhaps Rosetta will proffer them in their own right, notwithstanding that they constitute damning evidence against Rosetta, as proof of something relevant to the issues being tried. But abuse of the litigation process is not being tried. Nor has Rosetta come forward with any affirmative and false representation by Campmor concerning the initiation of litigation.

The emails that are the centerpiece of Rosetta's opposition have nothing to do with this motion, which is based on the evidentiary rules concerning relevance and prejudice. This argument Rosetta ignores, because there is no authority to support its position. Instead, Rosetta urges that these emails prove that (1) Campmor was obligated to inform Rosetta that it had filed

a complaint prior to attempting to resolve Campmor's issues with Rosetta's performance and that (2) by not doing so, Campmor engaged in some sort of continuous material misrepresentation that extended until the amended complaint was served. But the first proposition is a pure invention; Rosetta adduces no authority to back it up. And the second step in Rosetta's hypothesis suffers from an even more serious defect. For while Rosetta claims they constitute misrepresentations by Campmor concerning the "controversial" period between filing and service, these emails were all sent **before** Campmor filed its initial complaint. (*See*, Drasco Cert. Exs. B, C, D, E, F, G, H, I, J, K, L, M and N). They are merely proof of why Campmor saw fit to file it in the first place.

If anything, the record is awash with proof of Campmor's good faith in attempting to reach a resolution with Rosetta before it "pulled the trigger" and finally served its amended complaint, an act that it knew would make further cooperation essentially impossible. And in fact, the timing of the filing and service of Campmor's complaint were based on procedural and technical considerations that have nothing to do with the substantive allegations or defenses of either side in this litigation. Rosetta's second line of argument – its attempt to find some legal significance in a juxtaposition of the contents of a party's pleading and the timing of the service of that pleading that somehow bears on what issues are preserved in the pretrial order – is equally unavailing, and similarly based on wishful thinking, there being no case, statute or procedural rule that could possibly justify it.

Campmor's motion in limine should be granted so that the jury can focus on what is really at issue in this case instead of getting enmeshed in a tempest in a teapot on fine points of civil procedure that are, if anything, the sole province of the Court.

STATEMENT OF FACTS[1]

While it takes the position on this motion that it was "shocked, shocked" when served with Campmor's papers in this action, the record demonstrates unsurprisingly that Rosetta anticipated litigation between the parties as early as May 7, 2009. (Coleman Cert., Ex. D). At a subsequent meeting in June 2009, Campmor's Dan Jarashow attempted to resolve the issues between the parties and attempted to reach a financial resolution with Rosetta, but according to Jarashow, Rosetta refused to discuss any financial accommodation. (Drasco Cert., Ex. P at T. 272:8-23).

In July of 2009, Campmor discharged Rosetta from further SEO work. (Final Pretrial Order, Stipulated Fact ¶ 21.) After that termination, Rosetta diverted what would have been SEO resources to attempting to correct the problems it caused with Campmor's site. (See, Exhibit K of Drasco Cert. dated Dec. 5, 2012, Dkt. 88-2). The parties continued settlement negotiations and attempts to remedy the problems with Campmor's website through the summer, but to preserve its rights and as a matter of litigation strategy, Campmor filed its initial, bare-bones complaint in Bergen County Superior Court against Rosetta on July 30, 2009 (Drasco Cert., Ex. P at T. 283:2-8). Issue was not joined, however, in part because Mr. Jarashow still held out hope that a resolution could be reached (*id*. at T:281:17 - 282:13) – which was less likely if the parties were already in litigation.

Contrary to the assertions of Rosetta, Mr. Jarashow testified that even after the lawsuit was filed Campmor had not yet determined whether it would pay all or any of Rosetta's invoices,

[1] Rosetta's "Statement of Facts" is replete with misstatements of fact and outright fabrications. While Campmor has no intention of burdening this brief by addressing these issues tit for tat, the more egregious examples are addressed in the accompanying Certification of Ronald D. Coleman, dated January 25, 2013 ("Coleman Cert.").

and remained hopeful that the parties would be able to reach an agreement without litigation. (Drasco Cert., Ex. P at T. 285:5-22). As late as September, 2009, the parties continued discussions in an effort to reach a resolution, with Rosetta offering a proposal based on the current status of negotiations at the time. [*See*, Drasco Cert. Ex. W]. Only when those discussions failed and it became clear to Campmor that a resolution would not be reached did Campmor amend and serve its complaint.

LEGAL ARGUMENT

I. EVIDENCE CONCERNING THE TIMING OF SERVICE OF CAMPMOR'S COMPLAINT IS NOT ADMISSIBLE BECAUSE IT IS NOT RELEVANT AND WOULD BE UNDULY PREJUCIAL.

A. Campmor does not seek to exclude the initial complaint from evidence.

Rosetta inserts an impressive straw man into its opposition to Campmor's motion, arguing at length that Campmor cannot evade the admissions made in its initial complaint or the any "admissions" by Campmor in the initial complaint itself – even going so far as to say, scurrilously and gratuitously, "Campmor's eagerness to raise this tangential issue, and then defend its own actions, perhaps suggest that Campmor's counsel was, in fact, concerned that the Initial Complaint was undertaken in bad faith." [Rosetta Memo of Law, p. 15, n. 5]. This is an entirely inappropriate and unprofessional remark that does not even pretend to have a factual or legal basis. And it is all premised on responding to a motion that Campmor has not made, *i.e.*, to exclude the initial complaint itself from evidence.

Campmor never made such a motion. As the preliminary statement to Campmor's moving brief states, "Plaintiff Campmor, Inc. ("Campmor") submits this memorandum of law in support of its motion for an order . . . excluding from trial all testimony or other proof concerning the date of the filing and service of Campmor's initial pleading." This was not meant in any way to

exclude Campmor's initial pleading itself from evidence – even if it bears, incidentally, a "filed" stamp indicating the date. There is nothing in or on that document that Campmor needs to hide. Campmor's motion concerns only the evidence referred to in the Pretrial Order of a topic Rosetta intends to introduce at trial: The amount of time, well within the relevant procedural rules, between Campmor's filing of the initial complaint and the service of its first amended complaint. Rosetta's arguments regarding the admissions of pleadings in general are of no moment.

B. Service of Process is not a relevant matter under Fed. R. Evid. 401.

There is a reason why the few cases that address the issue of the timing of service of a complaint do so in the context of venue selection or on motions claiming invalid service, which Rosetta accurately notes are the underlying topic of the cases cited by Campmor. That is because the issue is solely procedural. No rule of procedure, judicial holding or ethical canon requires a plaintiff to inform a defendant that a complaint has been filed prior to the applicable deadline for service of process. Presumably if any did, Rosetta's opposition papers would cite them, but they do not. Campmor scoured the cases for references to how courts view the issue of the timing of a complaint, and offered the quotes it did for this Court's guidance. But in its own right, Rosetta offers no "better" or more arguably apposite authority to the case law cited by Campmor in its initial moving papers. Cases such as *U.S. v. Richardson*, CRIM.A.01-235, 2002 WL 461662 (E.D. La) and *Gilliland v. Hergert*, 2:05-CV-01059, 2008 WL 2682587 (W.D. Pa.) holding that procedural issues are properly excluded from introduction at trial because of their tendency to mislead and confuse the jury concerning immaterial matters may not be on point to the procedural posture here, but Rosetta demonstrates no reason not to apply the same reasoning here, and no citation to cases permitting such evidence. The cases that are cited by Rosetta all involved consideration of how forum shopping can result in a change of venue. But this is not a venue motion.

As to this Court's teaching that "[t]he delay of service, without more, is not indicative of bad faith," *Pai v. Reynolds Foil, Inc.*, CIVA 10-1465 (MLC), 2010 WL 1816256 (D.N.J. May 5, 2010), Rosetta's tangent – naked of citation to legal authority – into the admissibility of factual allegations within a pleading [Rosetta Memo of Law, p. 16], discussed further below, do not make the timing relating to the filing and service of the document itself a jury issue. Neither do the pre-filing emails of Dan Jarashow.[2] The crux of Rosetta's misguided argument is its contention that Campmor, by filing a complaint, "confirmed" that it had no intention of paying any amount of money to Rosetta from that point forward. But the facts of record do not support such a conclusion. For example, when asked at his deposition, "Did you have an expectation **after filing the lawsuit** as to whether or not you were ever going to pay Brulant the outstanding invoices", Mr. Jarashow testified "I didn't know where it was going to go." [Drasco Cert. Ex. P, T. 283:9-14]. (Emphasis added). The following question, and the one on which Rosetta hangs its hat, was whether in his view the "lawsuit" referred to in the previous answer – *i.e.*, the ongoing litigation between the parties, as opposed to the filing of the complaint – established as a factual matter that Campmor would not pay any invoices. Unsurprisingly, Mr. Jarashow responded "Yes." [*Id*., T. 283:15-18]. This answer is neither proof of nefarious intent nor a surprise: Once Campmor was engaged in litigation with Rosetta and seeking damages, it could hardly be expected to add to those damages by paying more money to Rosetta. This understanding probably explains why Rosetta, which in settlement talks prior to being served insisted on payment of its invoices as a condition for further remediation of the malfunctioning website it sold to Campmor, never demanded payment after being served. And as Mr. Jarashow testified,

[2] The majority of Rosetta's misrepresentations and misstatements of fact are addressed in the accompanying Coleman Reply Certification, because while they are of no consequence as to the substance of this motion, the record should not be left uncorrected.

whether or not Campmor would make additional payments was not at all a foregone conclusion until that point:

> Q: Was it your understanding at that point in time that you had no intention of paying those invoices?
> A: I'm not sure I can answer that yes or no.
> Q: Why not?
> A: Because I can't. There was still a hope that maybe things could be resolved.
> Q: After the lawsuit was filed?
> A: Yes, there was a little hope in me that maybe it could be resolved….

[Drasco Cert. Ex. P, T. 285:5-16]. Campmor's refusal to pay its invoices pending attempts to settle its serious claims with Rosetta, and after having already paid Rosetta significant amounts for a website that not only did not work, but which was worse than what Campmor started out with, is no more a presumptive indication of bad faith than Rosetta's refusal to refund Campmor's money or at least fix up its mess for free.[3] The interposition of the filing of this action before all avenues of settlement were closed does not change this fact, and testimony concerning when process in this action was filed and served sheds no light on any issue relevant to the trial of this case.

C. Evidence concerning the time between filing and service should be barred under Fed. R. Evid. 403.

Despite Rosetta's contention to the contrary, evidence is inadmissible under Fed. R. Evid. 403 in circumstances other than unfair prejudice (which also exists here, as demonstrated in Campmor's initial moving papers). Rule 403 also serves to exclude evidence where (as here) it would otherwise lead to significant litigation of collateral issues, *Sims v. Mulcahy*, 902 F.2d 524,

[3] Indeed, notwithstanding Rosetta's melodrama concerning Mr. Jarashow's emails, the only example of truly abusive behavior during the course of the parties' contractual relationship is when Joe Gut (a member of Rosetta's SEO team for the Campmor account) urged Mr. Jarashow to "fuck [him]self" during a July 2009 phone call following Campmor's termination of Rosetta's SEO – for which he felt the need to apologize to his colleagues, but apparently not Mr. Jarashow. *See* Coleman Cert., Exhibit E.

531 (7th Cir. 1990), *cited by Blakely v. Con't Airlines*, Case No. 93-2194, 1997 WL 1524797, at *12 (D.N.J. Sept. 9, 1997), a point raised in Campmor's moving papers. Even if there were some probative value in exploration of this technical matter, a trial excursion into Campor's litigation strategy and the procedural history of this case would result in a diversion of the jury's time and attention to a meaningless issue.

D. Campmor is not precluded from defending against Rosetta's counterclaims.

Rosetta's novel assertion that Campmor cannot proffer any substantive defense against Rosetta's counterclaims because, following the motion to dismiss and the delayed filing of those counterclaims Campmor did not file an answer [Rosetta Memo of Law, p. 10], is baseless, for two reasons. For one thing, there is no automatic preclusion of defenses without an order of default. And no default judgment, was sought or entered against Campmor on the counterclaims. The burden was on Rosetta to apply to the Court for such relief.[4] *See*, Fed. R. Civ. P. 55(b); *Zeviar v. Local No. 2747, Airline, Aerospace & Allied Employees, IBT*, 733 F.2d. 556, 558 (8th Cir. 1984). Even more importantly, once Rosetta signed the Final Pretrial Order without seeking a default, it waived its right to seek a default, i.e., preclusion of defenses, against Campmor, on the specific ground of a failure to answer. *See*, 64 A.L.R.5th 163 (1998). All claims, issues, defenses, or theories of damages not included in a pretrial order are waived even if they appeared in the complaint. *Wilson v. Muckala*, 303 F.3d 1207, 1215 (10th Cir. 2002). "Should a new claim or defense appear for the first time in the pretrial order, it is incumbent upon opposing counsel to meticulously examine the order, taking exception, if necessary, to the additions, and

[4] Even in the event Rosetta had timely raised the issue, the inadvertent omission would have been addressed and the Court would have permitted a late filing of the Reply, given Rosetta could not and cannot claim any resulting prejudice. The Court, of course, is free to permit such a filing even now, but Campmor does not request this relief because there is no need for it since, as demonstrated above, Campmor's defenses are preserved the Pretrial Order.

recording their objection in the pretrial order." *Id*. at 1216. Rosetta, however, did not include its "default" issue or preclusion theory in the Pretrial Order or object to any **specified** contentions.[5]

Ultimately, because of what Campmor **did** include in the Pretrial Order – its defenses to the counterclaim are found in ¶¶ 36, 37, 39, 45, 48, 49, 50, 51, 52 and 53 of its contested facts – any earlier pleading omission is of no consequence. Under Fed. R. Civ. P. 16(e) a final pretrial order supersedes all prior pleadings and "control[s] the subsequent course of the action" *Expertise Inc. v. Aetna Fin. Co.*, 810 F.2d 968, 973 (10th Cir. 1987) ("When an issue is set forth in the pretrial order, it is not necessary to amend previously filed pleadings" because "the pretrial order is the controlling document for trial"). The inclusion of any defense in the pretrial order is deemed to amend the pleadings, even if they did not include that claim. *Wilson*, *supra*, F.3d at 1215.

Indeed, separate and apart from winking at the pretrial order and its own earlier failures to raise the issue, *e.g.*, by seeking a default, Rosetta's informal and belated argument elides the central fact that it has **always** been on notice of Campmor's defenses to its counterclaims, because those defenses are simply encompassed by Campmor's lawsuit against it, all of which have been the topic of years of litigation. In such a case, the "failure to file an answer to the counterclaim has little, if any, substantive significance." *Info. Sys. & Networks Corp. v. United*

[5] Rosetta did state in the Pretrial Order that it would **move** "to strike any reference in the Joint Final Pretrial Order to Campmor's alleged new claims that 'Campmor paid [Rosetta] more than the anticipated contract price for the work done by [Rosetta] and more than [Rosetta] was entitled to receive,' as such claims were not previously raised by Campmor in this matter, Brulant will similarly move to strike reference to the newly raised defense that the Brulant's unpaid invoices represent unwarranted charges." Significantly, Rosetta's vague formulation made no mention of default, or of its theory that it was entitled to preclusion of defenses due to the lack of an answer to the counterclaims. Indeed, Rosetta has not made such a motion, but seems to be attempting to do so via its opposition to Campmor's motion. This is procedurally improper and also deprives Campmor from fully responding to the issue. Because Rosetta's mischaracterization of the record (i.e., "newly raised") is easily rebutted by reference to the record, Campmor sets forth that rebuttal – which is ample – in the Coleman Reply Certification.

States, 994 F.2d 792, 797 (Fed. Cir. 1993) (reversing entry of default on ground, *inter alia*, that one party's complaint "was essentially a defense" to the other's counterclaim). *See also*, *Hitachi Med. Sys. Am., Inc. v. Horizon Med. Group*, 5:07CV02035, 2008 WL 5723531 (N.D. Ohio Aug. 29, 2008) (rejected belated preclusion effort where issues had been litigated extensively).

Rosetta's argument that Campmor should be precluded from defending against its counterclaim is not consonant with the law or practice of the federal courts, and certainly with any concept of justice or equity.

CONCLUSION

Based on the foregoing, Campmor respectfully requests that its motion be granted in its entirety, and that this Court bar the introduction of evidence concerning the time between the filing of the initial complaint by Campmor and its service of process in this matter.

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