Discovery is Not a Video Game: There are No Cheat Codes around Discovery Deadlines

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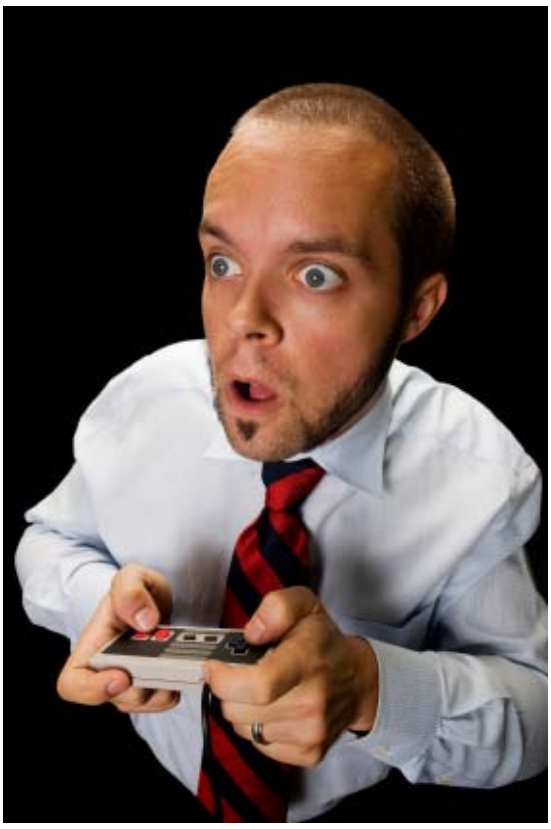


Hochstein v. Microsoft Corp., involves litigation over the Xbox video game system. The Court issued an Order for discovery to close on October 31, 2008. *Hochstein v. Microsoft Corp.,* 2009 U.S. Dist. LEXIS 44879, 3 (E.D. Mich. May 21, 2009). This obviously required production of any documents or ESI the parties intended to use at trial by the discovery cutoff date.

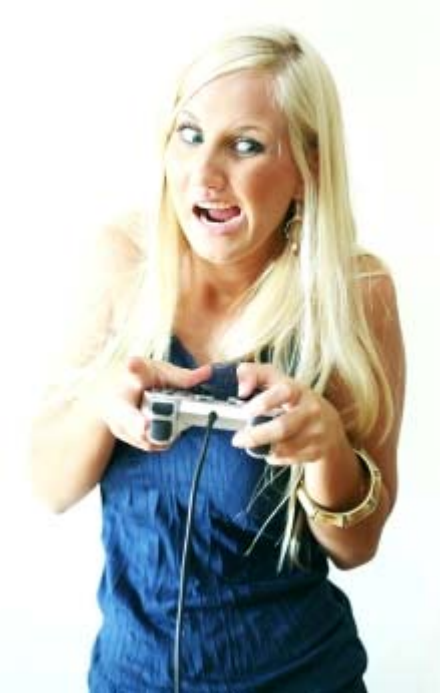
Microsoft tried a "cheat code" around the discovery deadline by producing additional documents through the deposition of their expert witness and related reports. Microsoft also produced over 140,000 marketing documents, two months before trial, without an index. *Hochstein*, 4.

Federal Rule of Civil Procedure Rule 26 does not allow gamesmanship. The Court cited a Court of Appeals decision, which stated:

This case aptly demonstrates the pitfalls of playing fast and loose with rules of discovery. Conclusory expert reports, eleventh hour disclosures, and attempts to proffer expert testimony without compliance with Rule 26 violate both the rules and principles of discovery, and the obligations lawyers have to the court. Exclusion and forfeiture are appropriate consequences to avoid repeated occurrences of such manipulation of the litigation process. *Hochstein*, 3-4, citing *Innogenetics v. Abbot Laboratories*, 512 F.3d 1363, 1376 n.4 (Fed. Cir. 2008).

The Court held admitting the late discovery production would be prejudicial to the Plaintiffs. Pursuant to Federal Rule of Civil Procedure 37(c), the Court excluded the late production, specifically barring Microsoft from "introducing the late-produced discovery into evidence either directly or through their expert's report or deposition." *Hochstein*, 5. The expert's report and deposition were to be redacted to remove any reference to the late produced discovery. *Id.*

Microsoft also produced over 140,000 marketing documents to the Plaintiff, effectively two months before trial. *Hochstein*, 9. Adding insult to the 5 week late production, the Defendants did not produce an index with the 143,733 documents. *Hochstein*, 9.



The Defendants were ordered to produce an index for the document production. Additionally, Microsoft was barred from using the marketing documents against the Plaintiff or contesting admissibility. Microsoft could use responsive documents in the event the Plaintiffs used marketing documents in their case-in-chief. *Hochstein*, 9-10.

Game Over

Federal Rule of Civil Procedure Rule 26 does not have a "cheat code" of "Up-Up-Down-Down-A-B-A-B."

Cases that go on for years with a soon approaching trial date will not have judges who willingly allow late productions that prejudice opposing parties. Additionally, those producing discovery without an index are not fully using litigation support software or processing applications.