



CONFIDENTIAL

**BEFORE THE CHIEF JUDGE
OF THE ELEVENTH JUDICIAL CIRCUIT**

Judicial Complaint No. 11-15-90169

IN THE MATTER OF A COMPLAINT FILED BY _____

IN RE: The Complaint of _____ against _____, U.S. Magistrate Judge for the U.S. District Court for the _____ District of _____, under the Judicial Conduct and Disability Act of 1980, Chapter 16 of Title 28 U.S.C. §§ 351-364.

ORDER

_____ (“Complainant”) has filed this Complaint against United States Magistrate Judge _____ (the “Subject Judge”), pursuant to Chapter 16 of Title 28 U.S.C. § 351(a) and the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States (“JCDR”).

Background

The record shows that in November 2014 two companies filed a lawsuit against Complainant, raising claims of patent infringement, trademark infringement, unfair competition, and fraud, and seeking damages and injunctive relief. The plaintiffs also filed a motion for a temporary restraining order and an application for a preliminary injunction, seeking to enjoin Complainant from infringing their trademarks, trade dress, and patent. After a hearing, in January 2015 the Subject Judge issued a report recommending that the plaintiffs’ application for a preliminary injunction be granted, generally finding that they had met their burden of establishing the necessary elements. Over Complainant’s objections, the district judge adopted the report and recommendation and issued a preliminary injunction.

In July 2015 Complainant filed an amended answer in which he raised various affirmative defenses and asserted counterclaims against the plaintiffs. After that, the plaintiffs filed a revised motion for a protective order permitting them to withhold from discovery their customer lists, vendor lists, and financial information. The plaintiffs also filed a motion to dismiss Complainant’s counterclaims and to strike certain affirmative defenses. In September 2015 the Subject Judge entered an order granting the motion for a protective order, finding that the customer lists, vendor lists, and financial information were not relevant to the plaintiffs’ claims and, even if they were, Complainant could

misuse the information. In October 2015 the district judge granted the motion to dismiss Complainant's counterclaims and to strike the affirmative defenses.

In late October 2015 the plaintiffs filed a third motion for a protective order, noting that Complainant sought to take 10 depositions on over 200 topics with less than 2 weeks remaining in discovery, and seeking to reduce the number of depositions and topics that he was allowed. At a November 5, 2015 telephone conference on the motion, the Subject Judge and Complainant discussed the number of depositions, the number of topics, and the timing of the deposition notices. At one point, Complainant stated that he issued a notice of deposition for one individual in part to discover what "irreparable damage" a plaintiff had incurred from Complainant's sales. The Subject Judge then asked counsel for the plaintiffs, "what is your claim of irreparable harm?" and counsel responded that Complainant was "passing himself off" to be one of the plaintiffs, such that any harmful conduct he engaged in would be imputed to the plaintiff. The following exchange then took place:

[The Subject Judge]: Okay. So what I'm trying to focus you a little bit differently is, you might -- somebody might prove irreparable harm by saying, I've lost so many dollars, or you might prove irreparable harm by saying, a product is so inferior and confusingly similar that it will injury [sic] our good will and our reputation and cause us to lose customers, and not necessarily proving dollars lost but showing an impact on the business.

So that's what's I'm asking you is what is the kind of proof of irreparable harm that you intend to put forward?

[Plaintiffs' Counsel]: The majority . . . of it would be the harm to the good will reputation as evidenced by director (inaudible) testimony, as well as the declarations that were provided to the court that people who purchased from [Complainant] thought they were purchasing from [one of the plaintiffs], and when the machines didn't work they came to us saying, wow, you got a crappy machine.

[The Subject Judge]: Right. Right. And I recall that from the preliminary injunction hearing. And that was my understanding is that you were looking to put forward proof about the difference qualitatively between the products as you allege it, the confusion that causes, and the

undermining of, you know, good will or reputation. So I remember that back in January.

But, you know, who knows, your theory could have changed between then and now and that's why I wanted to check in with you on that.

[Plaintiffs' Counsel]: That is exactly part of our irreparable harm.

[The Subject Judge]: Because some of this discovery that [Complainant] is raising I think he's trying to go into dollars -- you know, the notion that dollars have been lost and quantifying those dollars lost by plaintiff. And it's not clear to me that that's exactly what you are trying to prove and that's what I'm trying to understand a little bit better.

[Plaintiffs' Counsel]: No, your honor. I don't think it's a matter that's necessarily of losing a couple of sales to [Complainant] as much as it is our reputation being harmed by somebody pretending to be [one of the plaintiffs].

[The Subject Judge]: Right. Right. So that was my recollection.

The Subject Judge then found that it was reasonable to limit Complainant to the depositions of the corporate representatives of the two plaintiffs and three other individuals, finding that he did not have a basis to think that deposing other named individuals would produce any meaningful evidence. The Subject Judge also limited the number of topics to 20 for the deposition of each corporate representative. On November 6, 2015, the Subject Judge entered an order granting in part the plaintiffs' third motion for a protective order for the reasons stated at the November 5 hearing, which the Subject Judge incorporated into the order. The order set out that Complainant was limited to 5 depositions and 20 topics for the deposition of each corporate representative.

In December 2015 the parties filed cross-motions for summary judgment. Complainant also filed a motion to recuse the Subject Judge, alleging that she was not impartial because she: (1) "circumvented" the requirement of Salter v. Upjohn Co., 593 F. 2d 649 (5th Cir. 1979), by failing to discuss in her November 6, 2015 order that she limited the number of depositions; and (2) at the November 5, 2015 hearing, provided advice to the plaintiffs and "guid[ed]" them on how to argue the case so that they did not have to show Complainant their financial statements. The Subject Judge denied the motion to recuse, finding that it did not support her recusal under 28 U.S.C. § 455.

Complaint

In his Complaint of Judicial Misconduct or Disability, Complainant first alleges that the Subject Judge had “improper discussions with counsel for one side in a case.” He alleges that the Subject Judge “provided advice to counsel . . . on how to improve their arguments in order to better their chances of winning a Permanent Injunction,” and he states that he “would argue” that the Subject Judge “had an improper motive when she provided the counsel for one side of the case with her advice.”

Complainant then states that at the hearing on November 5, 2015, he argued that he “had a right to ask questions about the Plaintiffs’ lost profits” due to his alleged infringement, “[e]specially because the Plaintiffs were going to pursue a Permanent Injunction, which requires the demonstration of ‘irreparable harm.’” He states that a “large part” of the plaintiffs’ argument for irreparable harm was focused on the issue of Complainant’s lower-priced product eroding the market for the plaintiffs’ devices, which was an argument that would permit him to gain access to the plaintiffs’ financial records. He asserts that “[i]n order to prevent this outcome, [the Subject Judge] told the Plaintiffs that they should sim[p]ly ‘focus’ the issue of ‘irreparable harm’ on the supposed low quality of [Complainant’s] products.”

Complainant cites what he states is “the critical exchange” at the hearing, which included the Subject Judge’s statement: “‘So what I’m trying to focus you a little bit differently is, you might – somebody might prove irreparable harm by saying’” He asserts that the Subject Judge “was clearly guiding the Plaintiffs on how to improve their argument so as to not have to show [Complainant] any of their financial or profit statements.” He alleges that the Subject Judge “left the role of being a neutral judge and entered the realm of advocacy,” and he states that the Subject Judge did not give him any advice on how to improve his chances of winning the case.

Complainant takes issue with the Subject Judge’s decision to reduce from 10 to 5 the number of depositions that he could take. He states that the Subject Judge “decided not to include this decision in her written order” entered on November 6, 2015. He notes that the court in Salter stated, “It is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error.” 593 F.2d at 651. Complainant then alleges that the Subject Judge “circumvented the requirement of Salter by not discussing the fact that she limited the number of depositions in her written order.” He attached various documents to his Complaint.

Discussion

Rule 3(h)(3)(A) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States provides that cognizable

misconduct does not include “an allegation that is directly related to the merits of a decision or procedural ruling.” The Rule provides that “[a]n allegation that calls into question the correctness of a judge’s ruling, including a failure to recuse, without more, is merits-related.” Id. The “Commentary on Rule 3” states in part:

Rule 3(h)(3)(A) tracks the Act, 28 U.S.C. § 352(b)(1)(A)(ii), in excluding from the definition of misconduct allegations “[d]irectly related to the merits of a decision or procedural ruling.” This exclusion preserves the independence of judges in the exercise of judicial power by ensuring that the complaint procedure is not used to collaterally attack the substance of a judge’s ruling. Any allegation that calls into question the correctness of an official action of a judge—without more—is merits-related.

To the extent Complainant’s allegations concern the substance of the Subject Judge’s official actions, findings, rulings, and orders entered in the case, the allegations are directly related to the merits of the Subject Judge’s decisions or procedural rulings. Complainant’s remaining claims are based on allegations lacking sufficient evidence to raise an inference that the Subject Judge had improper discussions with counsel for the plaintiffs, acted with an improper motive, or otherwise engaged in misconduct. With respect to the claim of improper discussions, the record does not support Complainant’s contention that the Subject Judge gave plaintiffs’ counsel advice or guided counsel’s argument. Instead, the transcript of the November 5, 2015 hearing shows that the Subject Judge’s comments were aimed at understanding the plaintiffs’ argument as to irreparable harm and were relevant to the issue of whether certain depositions would be allowed.

The allegations of this Complaint are “directly related to the merits of a decision or procedural ruling,” JCDR 11(c)(1)(B), and the Complaint “is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists,” JCDR 11(c)(1)(D). For those reasons, pursuant to Chapter 16 of Title 28 U.S.C. § 352(b)(1)(A)(ii) and (iii), and Rule 11(c)(1)(B) and (D) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings of the Judicial Conference of the United States, this Complaint is **DISMISSED**.



Chief Judge