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BY CM/ECF
The Honorable Douglas E. Arpert, U.S.M.J.
United States District Court
Clarkson S. Fisher Federal Building
& U.S. Courthouse
402 East State Street
Trenton, New Jersey 08608

Re: ***Oanda Corporation v. Gain Capital Holdings, Inc., et al.***
Civil Action No. 20-05784-BRM-DEA

Dear Judge Arpert:

We, along with our co-counsel, Wilson Sonsini Goodrich & Rosati P.C., represent Defendants GAIN Capital Holdings, Inc. and GAIN Capital Group, LLC (collectively, "GAIN"), in the above matter. We are compelled to respond to Plaintiff's letter dated June 24, 2020 (ECF No. 26), resurrecting Plaintiff's premature requests to conduct a meeting of the parties pursuant to Rule 26(f), Fed. R. Civ. P.

For the following reasons, and consistent with practice before this Court (which Plaintiff repeatedly avoids), Plaintiff's request should be deferred until Your Honor has set a Rule 16 Conference date and the scheduling for submission of a Joint Discovery Plan ("JDP"), and considers GAIN's pending Motion to Dismiss (ECF No. 24) as well as the impact thereof.

Plaintiff's History of Questionable Practices and Failures to Disclose

Plaintiff's letter provides half the story, misstates the facts and fails to disclose relevant facts to Your Honor. Plaintiff boldly asserts that GAIN "steadfastly refuse[d] to participate in a Rule 26(f) conference or otherwise engage in discovery," and "simply ignor[ed] the requests." (ECF No. 26 at 1). Those assertions are ***indisputably wrong***, as we will demonstrate.

Ordinarily, we would simply respond to Plaintiff's wrongful assertions and happily rely upon Your Honor's resolution of this issue, but this is not the first time that Plaintiff has relied upon self-created arguments and misstatements of fact. Thus, a more fulsome response for this Court's consideration of Plaintiff's latest improper efforts in context is warranted:

From the commencement of this action, Plaintiff has acted questionably. Shortly after being served, GAIN's in-house counsel sought Plaintiff's consent for a 30-day extension of time to respond to the Complaint. As in nearly all of our cases in the patent and intellectual property field, indeed in nearly all cases of any type, an adversary ordinarily provides the courtesy of such an

extension. Here, however, Plaintiff's counsel attempted to manipulate the situation and take unfair advantage of GAIN's in-house counsel's unfamiliarity with the Local Civil Rules. Plaintiff attempted to make it appear that it was being somewhat cooperative and *generous* by seemingly agreeing it **"will consent to a 14 day extension of time, but will not agree to further extensions."** (Emphasis added). (*See* Email from A. Calmann to E. Dykema dated 5/26/20, Ex. A). That response was pretextual with Plaintiff offering the proverbial "hole in the donut." Unbeknownst to GAIN's in-house counsel, Plaintiff's counsel was attempting to extract something by offering nothing as GAIN could have easily *obtained for itself* a 14 day extension through the standard procedures of the Clerk's Office. L. Civ. R. 6.1(b).

Such conduct is not consistent with practice before this Court, and lacks fundamental fairness. Plaintiff failed to report those events to Your Honor in its effort to dissuade Your Honor from granting GAIN's request for a second modest extension of time to respond. Ultimately, Your Honor rejected Plaintiff's objections, and granted the requested extension. (ECF No. 18).

Plaintiff's Misstatements of Facts and Continued Failures to Disclose to the Court

Plaintiff's questionable practices continued with respect to its efforts to prematurely meet and confer regarding development of a JDP. On June 12, well ***before*** GAIN was able to complete its investigation ***or*** develop its defenses ***or*** reach a decision whether a motion rather than an answer would be an appropriate response to the Complaint, and critically ***before*** issue was even joined, Plaintiff's counsel requested an *immediate* "meet and confer" to negotiate the JDP. But what would be the point of holding a meet and confer to discuss only one side of the case? The entire idea was not only premature, but inconsistent with practice in our experience.

In counsel's experience, we have *never* been in a case where a party insisted upon a meet and confer to prepare a JDP before issue was joined. The reasons for that are plain—after the pleadings are closed, the parties are on equal footing in evaluating respective claims, positions, counterclaims if any, and defenses, and can respond to the issues requiring attention in a JDP, *e.g.*, what type of discovery is needed, and whether motions are contemplated, or whether any of the Local Patent Rules will need to be adjusted. In light of those practical imperatives, we *repeatedly* informed Plaintiff that "[o]nce the Court issues its Rule 16 Scheduling Order, and [GAIN has] the benefit of that Order, [GAIN] of course will meet and confer with [Plaintiff] regarding a Joint Discovery Plan." (ECF No. 27 at 6; *see also* ECF No. 27 at 2-4).

At no time has GAIN "ignored" Plaintiff's untimely pressing for a meeting. At no time has GAIN "steadfastly refuse[d]" to have such a meeting. The written communications between the parties reveal ***exactly the opposite***—GAIN expressly stated it would be willing to meet and confer with Plaintiff at the appropriate time consistent with the Rules of this Court, the setting of the Rule 16 conference and joinder of issue, all standard steps to conduct a meaningful meet and confer. Plaintiff's present application completely fails to disclose to Your Honor the multiple communications that directly belie Plaintiff's representations to the Court.

Although GAIN reasonably explained multiple times to Plaintiff why the parties should await Your Honor's Order scheduling the Rule 16 Conference, and GAIN's filing of a response to the Complaint, Plaintiff persisted in its efforts to prematurely conduct a meet and confer on a JDP

and thereby undercut GAIN's ability to complete its investigation, develop its defenses, and consider a potential motion.

Plaintiff's Application is Contrary to the Local Civil Rules, and GAIN is Prepared to Timely Meet and Confer Consistent with the Status of the Case

First, Plaintiff fails to recognize that L. Civ. R. 26.1(b)(2) states that the parties must confer "at least 21 days before the initial scheduling conference," and L. Civ. R. 16.1(a)(1) states "[t]he initial conference shall be scheduled within 60 days of filing of an initial answer, ***unless deferred by the Magistrate Judge due to the pendency of a dispositive or other motion***." (Emphasis added). Taken together, there is no rule or procedure in our District that requires a meet and confer for the purposes of developing a JDP take place as early as Plaintiff is asserting. It is within the Court's discretion to defer a Rule 16 Conference "due to the pendency of a dispositive or other motion." L. Civ. R. 16.1(a)(1); *Estate of Richard Bard & Dan German-Bunton v. City of Vineland*, Case No. 1:17-cv-01452-NLH-AMD, 2018 U.S. Dist. LEXIS 121528, at *12 (D.N.J. July 20, 2018) (relying on Rule 16.1(a)(1) in declining to set a Rule 16 Conference "because the unidentified John Doe officers have not filed an Answer.").

Here, GAIN filed a Motion to Dismiss Plaintiff's Complaint for failure to state a claim in lieu of filing an Answer. Plaintiff has not responded to GAIN's Motion as yet, and once the briefing has concluded, the parties will be awaiting Judge Martinotti's decision on the Motion. We submit that deferring the initial meeting of the parties regarding a JDP is appropriate because Judge Martinotti's decision on Defendant's Motion to Dismiss could materially affect the need for or scope of discovery.

If Judge Martinotti grants Defendant's Motion in whole, then this matter will be dismissed and no discovery will be necessary. If the motion is granted, in part, or if Plaintiff is permitted to amend its Complaint to cure the many deficiencies, then discovery will be limited to Plaintiff's surviving and/or amended claims, none of which is (or can be) known at this time. Indeed, GAIN has contended in its Motion to Dismiss that Plaintiff has failed to identify by product name any accused products, and Plaintiff has yet to respond to GAIN's arguments. Thus, having a proper identification of the accused products actually at issue is necessary to develop a JDP.

Second, assuming the Court denies GAIN's motion, then GAIN will file its Answer, and discovery pertaining to any defenses or counterclaims is indiscernible at this point. Awaiting until issue is joined to meet and confer makes sound practical sense because otherwise, as we noted to Plaintiff, the parties would be meeting and conferring in a vacuum with only Plaintiff's vague allegations at issue, and as set forth in the Motion to Dismiss, such allegations are insufficient as they fail to even identify by product name any accused products.

An answer to properly pleaded claims and the assertion of defenses to the same would inform the issues for a meet and confer, and the nature of discovery in the case – exactly why having such a meeting prior to issue being joined would be premature, of little assistance and a wasteful expenditure of time and effort. *See Conway v. Davis*, Case No. 1:16-cv-04511-NLH-AMD, 2018 U.S. Dist. LEXIS 47866, at *9 n.5 (D.N.J. Mar. 23, 2018) (finding defendant had no obligation to participate in formal discovery process during the pendency of his Rule 12(b)(1)

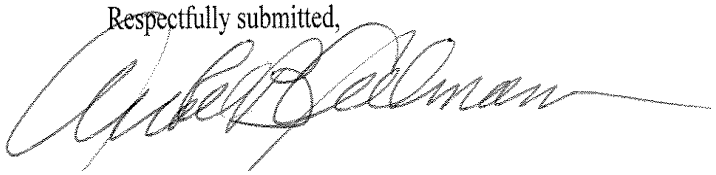
motion because such motion does not constitute an answer, stating "the discovery process does not begin until after the initial scheduling conference, which is triggered by a defendant filing his answer to plaintiff's complaint."). Meet and confers prior to joinder of issue have never been held in our experience, *not even once* in all the years that counsel herein has practiced before this Court, which we submit is because parties ordinarily recognize the need to have joinder of issue so that those issues can be fairly discussed at the meet and confer instead of one party trying desperately to get the jump on the other, as Plaintiff is attempting here.[1]

In sum, based on the potential effect Judge Martinotti's pending decision will have on discovery and the case generally, and the fact that there is no pending record upon which to evaluate the issues encompassed in a JDP (*e.g.*, with no Answer having been filed as yet, there are no defenses or counterclaims to evaluate for discovery purposes), the prospect of the parties attempting to map out and agree on a discovery plan is premature, and would result in a discovery plan conceived in speculation and conjecture. Moreover, any discovery plan entered at this time will invariably be subject to revision once a decision on GAIN's Motion is rendered and, if necessary, GAIN has answered the Complaint.

Therefore, we respectfully submit that it is in the best interest of the parties and the Court that the initial meeting of the parties be deferred until the Court has decided GAIN's Motion to Dismiss, and Your Honor has entered an Order setting the Rule 16 conference. Accordingly, we request that Your Honor deny Plaintiff's application.

We thank the Court for its consideration and assistance in this matter.

Respectfully submitted,



Arnold B. Calmann

ABC/kae
cc: Counsel of record (by CM/ECF)

[1] Plaintiff conveniently argues delay and prejudice when it suits itself. ECF No. 26 at 2. As explained in GAIN's Motion to Dismiss (Br., ECF No. 24-1 at 3), it was Plaintiff who dragged its feet with respect to this action. One of Plaintiff's asserted patents issued in 2006, but yet it waited until October 2018 to notify GAIN of alleged infringement of the patents. After GAIN initially engaged in discussions with Plaintiff in late 2018, Plaintiff was silent for more than a year before bringing this action in May 2020. Plaintiff is not seeking any preliminary injunctive relief in this case that would warrant any emergency relief. There is no delay by GAIN or prejudice here.