STATE OF MICHIGAN

SAGINAW COUNTY CIRCUIT COURT

MBAF, LLC,

Plaintiff,

v.

MICHIGAN MEDICAL HEMP, LLC,

Defendant.

Case No. 21-044416-CB

Judge: M. Randall Jurrens (P27637)

OPINION RE: PLAINTIFF'S COMBINED MOTION FOR SPOLIATION AND DISCOVERY SANCTIONS

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This case involves the sale of allegedly defective hemp seed.

Beginning last fall, plaintiff attempted to discover several matters, including whether defendant overstated the quality of its seed stock. From plaintiff's perspective, its efforts have been frustrated by lack of responsiveness, both in time and substance. With prior court orders compelling discovery having failed to achieve desired results, plaintiff now seeks sanctions, particularly entry of default against defendant.

For reasons indicated below, although the court is not persuaded to presently default defendant, less severe sanctions are justified.

Background

On May 3, 2021, plaintiff filed a complaint asserting claims against defendant related to a Hemp Seed Supply Agreement and a Seed Production Agreement, including breach of express and implied warranties, fraudulent inducement, and breach of contract.

Following an unsuccessful detour through mediation, plaintiff sent defendant interrogatories and requests for production of documents on September 30, 2021.

Although defendant eventually responded, plaintiff challenged their completeness and obtained an order directing defendant to supplement, including, particularly, its answer to an interrogatory seeking the identity of dissatisfied customers and production of its communications sent or received.[1]

Still not satisfied upon receipt of defendant's supplemental responses, plaintiff procured another court order, again requiring defendant to provide more complete responses including, particularly, documents relating to analysis of its hemp seed stock, customers' contact information, third-party supplier information, and online marketing materials.[2]

Still unsatisfied by defendant's twice supplemented responses, plaintiff now requests the court impose sanctions, including entry of default against defendant.

Discovery Sanction Standards

Plaintiff's motion is brought, in part, under MCR 2.313(B)(2), which authorizes courts to "order such sanctions as are just", including, but not limited to:

> (a) an order that the matters regarding which the order was entered or other designated facts may be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

[1] See April 4, 2022 Order Granting Plaintiff's Motion to Compel.

[2] See June 1, 2022 Order Granting Plaintiff's Motion to Compel.

(b) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the party from introducing designated matters into evidence;
(c) an order striking pleadings or parts of pleadings, staying further proceedings until the order is obeyed, dismissing the action or proceeding or a part of it, or rendering a judgment by default against the disobedient party;
(d) in lieu of or in addition to the foregoing orders, an order treating as a contempt of court the failure to obey an order, except an order to submit to a physical or mental examination;
(e) where a party has failed to comply with an order under MCR 2.311(A) requiring the party to produce another for examination, such orders as are listed in subrules (B)(2)(a), (b), and (c), unless the party failing to comply shows that he or she is unable to produce such person for examination.

In lieu of or in addition to the foregoing orders, the court may require the party failing to obey the order or the attorney advising the party, or both, to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Here, at least as an initial position, plaintiff requests the court enter default against defendant. Such a sanction is, however, "a drastic measure and should be used with caution." *Frankenmuth Mut Ins Co v ACO, Inc*, 193 Mich App 389, 396; 484 NW2d 718 (1992). When determining whether a discovery violation merits defaulting the disobedient party, a trial court should consider –

> (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Vicencio v Ramirez*, 211 Mich App 501, 506-507; 536 NW2d 280 (1995)]

Analysis

Plaintiff argues entry of default against defendant is justified for several reasons.

Seed Testing Records

Notwithstanding prior court order, defendant did not produce all documents relating to testing of its Cherry Wine seed stock. Rather, only through a third-party subpoena on Colorado

Seed Laboratory did plaintiff learn of an adverse report that defendant failed to produce and had even denied existing (Plaintiff's Brief, pp 2-4; Plaintiff's Brief, Exs F and G)

Defendant counters that it "did not produce the Colorado Seed Laboratory report with [a] 49% germination as it is a grain report from a non-feminized grain crop tested for the sole purpose of obtaining results from combine cleaning and the seed cleaner on grain" (Defendant's Brief, p 2).

Whatever distinction defendant intends, the court ordered production of "all documents relating in any way to any and all testing that was completed or requested by Defendant for its Cherry Wine hemp seed stock and its Citrus Terpene hemp seed stock". "All" documents relating "in any way" to "any" testing unambiguously disallows limitations, including, particularly, limitations based on type of testing. And the withheld report identifies the variety/product tested was "MMH Citrus Terpene Snap" (Plaintiff's Brief, Ex F) which falls squarely within the class of documents defendant was ordered to produce. That the report disclosed a 49% germination rate only reinforces a perception that defendant's failure to produce was purposeful.

Customer Lists and Records

Defendant was ordered to produce a list of customers that purchased seed stock from 2018 through 2020. Defendant identified only three customers (Plaintiff's Brief, p 4; Defendant's Brief, p 3) and, importantly, indicated that no customer ever complained about the quality of defendant's hemp seed stock (Plaintiff's Brief, Ex J). However, plaintiff, on its own, identified an additional customer, Steven Kalesperis of Utopian Herbs LLC, and a dissatisfied customer at that (Plaintiff's Brief, Exs H and K). Moreover, defendant affirmatively knew Kalesperis was dissatisfied (Plaintiff's Brief, p 15, Plaintiff's Brief, Ex K).

While acknowledging that "Kalesperis initially contracted with [defendant] to purchase seed", defendant asserts that Kalesperis "did not provide funds in compliance with the contract and attempted to return the seed" (Defendant's Brief, p 3). Implicitly, defendant suggests that Kalesperis was not an actual customer and, therefore, not subject to disclosure.

But this fails for a couple of reasons.

First, defendant acknowledges supplying hemp seed to Kalesperis pursuant to a contract. This is consistent with the definition of "buyer" under the Uniform Commercial Code (" 'Buyer' means a person who buys or contracts to buy goods", *MCL 440.2103(1)(a)*. Payment is not a prerequisite.

Second, even if payment was required to achieve "buyer" status, it appears Kalesperis paid $23,200 up front (Plaintiff's Brief, Ex K).

The court's June 1, 2022 Order directed defendant to "provide a complete list of all names and contact information for all customers who purchased Cherry Wine hemp seed of Citrus Terpene Snap hemp seed [ ] in 2018 [through] 2021". That Kalesperis's purchase resulted in a dispute doesn't deprive him of "customer" status. That Kalesperis was a dissatisfied customer only compounds a perception of defendant's intentional concealment. That Kalesperis is now deceased (Plaintiff's Ex Q) only heightens the sense of prejudice to plaintiff.

Promotional Materials

In response to plaintiff's request, defendant produced a nominal amount of marketing materials. In turn, the court ordered that defendant –

> produce all marketing, promotional, and advertising materials relating to its seed stock, including but not limited to the Cherry Wine and Citrus Terpene Snap hemp seed varieties circulated or made available to any customer or potential customer, including, but not limited to, all social media posts, all materials published on Defendant's website, and all other materials prepared and made available to

customers or potential customers in 2018, 2019, or 2020. [June 1, 2022 Order Granting Plaintiff's Motion to Compel]

When no supplemental documents were produced, plaintiff independently determined defendant has been less than forthcoming, particularly with defendant's online content (e.g. website, Facebook, Instagram, LinkedIn) (Plaintiff's Brief, pp 5-6).

Defendant argues it was "unable to provide the power point (sic) as the computer it was maintained on crashed due to no ill will of Defendant" (Defendant's Brief, p 3).

As the court understands, defendant's computer crashed in approximately August/October 2021.[3] This coincidentally approximates plaintiff's September 30, 2021 discovery requests. Curiously, defendant did produce two "slides" from its website (Plaintiff's Brief, p 5) and four screen shots from its Facebook page (Plaintiff's Brief, p 6); so, presumably, defendant accessed the documents before its computer crashed or, alternatively, did not need that specific computer to access electronically stored information it did produce. Notwithstanding defendant's assertion that it has "produced all marketing, promotional, and advertising materials within its possession" (Defendant's Brief, p 3)[4], plaintiff has, on its own, discovered defendant's website and other online social media accounts marketing defendant's products (Plaintiff's Brief, p 5).

It would appear the crashing of defendant's computer – however plausible an explanation it may be for loss of defendant's PowerPoint presentation – is not itself a defense to defendant's failure to produce the remainder of its promotional materials.

[3] Defendant's principal, Beau Parmenter, testified the computer crashed approximately six to eight months prior to his April 25, 2022 deposition (Plaintiff's Brief, p 7).

[4] The court notes that requests for production of documents automatically includes data stored in any medium, including electronically stored information (ESI), regardless of format, system, or properties. MCR 2.301(A)(1) and (2).

However, it is nonetheless unclear the extent to which defendant's digital content "available to customers or potential customers in 2018, 2019, or 2020" is currently, or was when plaintiff initially requested in September 2021, available to defendant.

Seed Stock Origin

In response to initial discovery requests regarding the source of its seed stock, defendant denied any product was bought from a third party (Plaintiff's Brief, Ex B). Subsequently, defendant's principal, Beau Parmenter, testified that defendant's Cherry Wine hemp seed stock was acquired from a farm in Colorado (Plaintiff's Brief, p 7). When the court ordered defendant to provide the name of the Colorado farm, defendant responded the contact information had been lost when its computer crashed (Plaintiff's Brief, Ex D; Defendant's Brief, p 3).

But, with due respect, the computer crash alone would not appear to deny defendant's institutional knowledge (or, at least with a little effort, discovery) of its source. It's not plausible defendant doesn't actually know, or have in a retained record (tangible if not digital), or be able to ascertain (e.g. a phone call, a click of the mouse, etc.) its source of seed stock.

Expert Discovery

Defendant's witness list identifies Anna Jacobs as an expert witness (Plaintiff's Brief, Ex O). When deposed by plaintiff, Jacobs testified she had not been retained as an expert in this case, has never discussed with defendant or its attorneys about serving as an expert witness, has not received any materials to review regarding this case, has no understanding as to what the litigation is about, and doesn't believe she is qualified to opine on how to determine whether hemp seed has an adequate germination rate or how soil conditions may impact hemp seed's germination rate (Plaintiff's Brief, Ex P).

This presents, not an outright failure to provide discovery but, rather, a question of the propriety of listing a witness, particularly an expert, who, in order to properly prepare for trial, justifies opposing counsel's investment of time and money (e.g. deposition on oral examination).[5]

Although acknowledging Jacobs's disqualifying deposition testimony (Defendant's Brief, p 7), defense counsel offered at oral argument that Jacobs was simply too humble to characterize herself as an expert and, at trial, her qualifications would be persuasively presented. But, at this juncture, Jacobs knows nothing about the case and hasn't even been retained by defendant. Whatever the possibility of Jacobs being qualified at trial to provide expert testimony[6], by listing her as its expert witness, and passively sitting by when her deposition was scheduled, defendant sent plaintiff on a fool's errand.

Spoliation of Evidence

A party has a duty to preserve evidence "[e]ven when an action has not been commenced and there is only a potential for litigation." *Brenner v Kolk*, 226 Mich App 149, 162; 573NW2d 65 (1997). This duty to preserve evidence includes all evidence "that [a party] knows or reasonably should know is relevant to the action." *Id*. This obligation extends to electronically stored information. MCR 2.302(B)(5); *The Sedona Principles* (3rd ed, 2018), p 51.

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[5] "Witness lists are an element of discovery. The ultimate objective of pretrial discovery is to make available to all parties, in advance of trial, all relevant facts which might be admitted into evidence at trial. The purpose of witness lists is to avoid 'trial by surprise.' " *Grubor Enterprises, Inc v Kortidis*, 201 Mich App 625, 628; 506 NW2d 614 (1993) (cleaned up).

[6] In this regard, the court notes that MRE 702, Testimony by Experts, states:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in litigation that is pending or for reasonably foreseeable litigation. *Silvestri v Gen Motors Corp*, 271 F3d 583, 590 (CA 4, 2011).[7]

Unlike sanctions for violation of court ordered discovery authorized by MCR 2.313, authority to sanction a party for failing to preserve evidence is derived from courts' inherent power to preserve the fairness and integrity of the judicial system. *Brenner*, 226 Mich App at 159-160. In exercising this authority, defaulting a defendant is a drastic step that should be taken cautiously and only after carefully considering lesser sanctions, including evidentiary. *Id*. at 163-164.

If spoliation is intentional, and done with fraudulent intent to suppress the truth, there is a presumption[8] that the missing evidence would have been adverse to the spoliator. *Trupiano v Cully*, 349 Mich 568, 570; 84 NW2d 747 (1957).

Short of intentional destruction, a party's failure to produce material evidence under its control where there is no reasonable excuse for its nonproduction permits an inference that the evidence would have been adverse to that party. *Ward v Consol Rail Corp*, 472 Mich 77, 85-86; 693 NW2d 366 (2005); M Civ JI 6.01.

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[7] "Though not binding on this Court, federal precedent is generally considered highly persuasive when it addresses analogous issues.", *Wilcoxon v Minnesota Mining & Mfg Co,* 235 Mich App 347, 360 n 5; 597 NW2d 250 (1999).

[8] Under Michigan law, "a presumption [i]s a procedural device which regulates the burden of going forward with the evidence and is dissipated [("bursts")] when substantial evidence is submitted by the opponents to the presumption." *Widmayer v Leonard*, 422 Mich 280, 286; 373 NW2d 538 (1985). "That is, if the jury finds a basic fact, they must also find the presumed fact unless persuaded by the evidence that its nonexistence is more probable than its existence." *Id*. at 289. Importantly, however,

> [a]lmost all presumptions are made up of permissible inferences. Thus, while the presumption may be overcome by evidence introduced, the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced. [*Id*.]

Here, digital data was lost when defendant discarded the host computer following a crash (Plaintiff's Brief, pp 7-8; Defendant's Brief, p 3). Importantly, the computer's destruction occurred after this case began (i.e. after its obligation to preserve evidence attached), without meaningful effort to resurrect its data, without maintaining back-up (digital or hard-copy), and without notifying plaintiff of the computer's malfunction before disposal. But without more, plaintiff has not demonstrated that defendant intentionally destroyed the computer's data with fraudulent intent necessary to justify the extreme sanction of default. *Brenner,* 226 Mich App at 163.

On the other hand, while defendant's nonfraudulent explanation for the computer's destruction doesn't permit an adverse presumption, an underlying adverse inference against defendant for discarding evidence remains for the jury to consider. *Id*. at 164; *Ward*, 472 Mich at 89,

Conclusion

Plaintiff requests the court impose sanctions against defendant – including, particularly, entry of default – for defendant's failure to comply with prior orders compelling discovery and spoliation of evidence.

While plaintiff's request is understandable, the court concludes lesser sanctions better serve the interests of justice. Rather, as plaintiff requested in the alternative (Plaintiff's Brief, p 18; Plaintiff's Supplemental Brief, p 7)[9], the court is persuaded to:

[9] Post-hearing, plaintiff requested the court strike defendant's recently received (July 26, 2022) supplemental written discovery responses (Plaintiff's Supplemental Brief, p 6). The court declines the request: (1) the court is concerned granting relief not previously requested would violate defendant's due process rights, *Al-Maliki v LaGrant*, 286 Mich App 483, 489; 781 NW2d 853 (2009) (while the court did ask at oral argument that plaintiff provide a concise statement particularizing the alternative relief being requested, it intended plaintiff stay within the parameters of the then-existing request), (2) plaintiff does not identify what the supplemental discovery

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- instruct the jury that it may infer that data on the computer defendant discarded would be unfavorable to defendant if the jury believes that no reasonable excuse for defendant's failure to produce the evidence has been shown, M Civ JI 6.01c; and

- award plaintiff the reasonable expenses, including attorney fees, caused by defendant's failure to obey prior discovery orders.[10]

Date: August 17, 2022

/s/ (P27637)
M. Randall Jurrens, Business Court Judge

responses are that it seeks to strike, and (3) plaintiff doesn't explain how suppressing information that it labored so hard to discover, and now finally has, is an appropriate remedy.

In a similar vein, although not requested by plaintiff, the court notes MCR 2.313(B)(2)(d) authorizes contempt proceedings for failure to obey a discovery order. Here, defendant has, arguably without good cause, failed to comply with the court's order compelling it to identify its Cherry Wine hemp seed stock supplier. But assuming the application here, plaintiff would have to affirmatively pursue contempt proceedings, according defendant its due process rights, including notice and opportunity for hearing. *Porter v Porter*, 285 Mich App 450, 456-457; 776 NW2d 377 (2009).

[10] Although previously unspecified, plaintiff is now requesting $9,630 (Plaintiff's Supplemental Brief, pp 3-6, and 7). If defendant does not agree to this amount and the parties cannot otherwise resolve this issue on their own (with or without a mediator of their choosing), either attorney may schedule an evidentiary hearing to address the non-exhaustive factors for calculating a reasonable attorney fee outlined in *Pirgu v United Servs Auto Ass'n*, 499 Mich 269, 281-282; 884 NW2d 557 (2016).