

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 22-CV-61407-SMITH

SHENZHEN HAPPY VAPING
TECHNOLOGY LTD.,

Plaintiff,

v.

LOGIC TECHNOLOGY
DEVELOPMENT LLC, and
JAPAN TOBACCO INTERNATIONAL
U.S.A., INC.,

Defendants.

**PLAINTIFF'S RESPONSE TO DEFENDANTS' RENEWED
MOTION TO STAY DISCOVERY AND OTHER DEADLINES**

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Plaintiff Shenzhen Happy Vaping Technology Ltd. (“SHV”), through counsel, responds to Defendants’ Renewed Motion to Stay Discovery and Other Deadlines (“Motion to Stay”) and respectfully requests the Court to deny Defendants’ Motion to Stay and award any other relief this Court deems warranted.

I. INTRODUCTION

Almost seven (7) months after this Court entered its Scheduling Order (Dkt. 16), Defendants have not provided any discovery. Only about four (4) months remain until fact discovery ends. Defendants’ refusal to cooperate has prejudiced Plaintiff’s right to discover information relevant to this action.

Defendants have failed to respond to the First Amended Complaint (the operative complaint), the deadline having passed on January 19, 2023, without either an answer or an actual Rule 12 motion from Defendants. Instead, Defendants filed a “Notice to Reassert” their Motion to Dismiss the original complaint, which Defendants now (after having their Motion to Dismiss denied) want this Court and Plaintiff to treat as a substantive motion to dismiss the First Amended Complaint. A notice is not a motion. Even if it were treated as such, Defendants’ Notice does not direct arguments to the allegations in the First Amended Complaint.

This Court has already denied Defendants’ Motion to Stay this case. Dkt. 45. This Court has already denied Defendants’ Motion to Dismiss or Transfer this case. Dkt. 44 (“The Complaint to which Defendants’ Motion is directed is no longer operative as Plaintiff subsequently filed its [21] First Amended Complaint.”). This Court has already denied Defendants’ Motion for a Hearing. Dkt. 46.

II. BACKGROUND

On December 22, 2022, this Court set specific discovery deadlines, including a deadline for fact discovery, a deadline for expert discovery, a deadline for witness lists, and a deadline for

expert reports, among other deadlines. Dkt. 16. Plaintiff submitted its First Set of Requests for Production (“RFPs”) on February 6, 2023, (Dkt. 30-1) and followed up with repeated requests for discovery. *See, e.g.*, Dkt. 30-2. The overwhelming majority of these requests go to the merits (e.g., infringement, willfulness, damages). Defendants have not provided any discovery.

On December 15, 2022, Defendants filed a Motion to Dismiss or Transfer for Improper Venue (“Motion to Dismiss”), arguing that venue alleged in the Original Complaint was improper. Dkt. 13. On January 5, 2023, Plaintiff filed its First Amended Complaint (Dkt. 21) after informing both this Court and Defendants that Plaintiff intended to do so (Dkt. 17 at 1). Amendments specifically included additions to the venue section.

On January 17, 2023, Defendants filed a one-page Notice to Reassert Motion to Dismiss (“Notice”), expressing Defendants’ desire to reassert the arguments they made in its Motion to Dismiss the Original Complaint against the First Amended Complaint. On January 19, 2023, Defendants’ deadline to respond to the First Amended Complaint expired without Defendants having either answered or filed an actual, substantive Rule 12 motion against the First Amended Complaint.

On June 15, 2023, this Court denied Defendants’ Motion to Stay this case (Dkt. 45), denied Defendants’ Motion to Dismiss or Transfer this case (Dkt. 44), and denied Defendants’ Motion for a Hearing (Dkt. 46).

Fact discovery ends on November 23, 2023. Dkt. 16.

III. LEGAL STANDARD

“Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or **within 14 days after service of the amended pleading**, whichever is later.” Fed. R. Civ. P. 15(a)(3) (“Rule 15”) (emphasis

added).

“[W]hen discovery is delayed or prolonged it can create case management problems which impede the Court’s responsibility to expedite discovery and cause unnecessary litigation expenses and problems.” *Caterpillar Fin. Servs. Corp. v. Venequip Mach. Sales Corp.*, No. 22-23002, 2023 WL 1927309, at *3 (S.D. Fla. Feb. 9, 2023) (quoting *Cuhaci v. Kouri Grp., LP*, 540 F. Supp. 3d 1184, 1186 (S.D. Fla. 2021)).

IV. ARGUMENT

A. DEFENDANTS FAILED TO RESPOND TO THE FIRST AMENDED COMPLAINT

Under Rule 15, Defendants were required to respond to the First Amended Complaint “within the time remaining to respond to the original pleading or **within 14 days after service of the amended pleading**, whichever is later.”

Plaintiff filed its First Amended Complaint on January 5, 2023. Under Rule 15, the 14-day deadline fell on January 19, 2023. The time to respond to the original pleading (21 days after service of the original complaint) had already passed. Defendants’ response was, therefore, due on the later date—January 19, 2023. Defendants did not respond (and have yet to respond) to the First Amended Complaint. Because Defendants failed to file a Rule 12 motion to dismiss the First Amended Complaint within the time to respond, Defendants have waived their venue argument. Fed. R. Civ. P. 12.

B. DEFENDANTS’ NOTICE IS NOT A RULE 12 MOTION AGAINST THE FIRST AMENDED COMPLAINT

Defendants’ Notice is not a motion. Even if it were treated as such, the Notice does not direct its arguments against the allegations in the First Amended Complaint.

In its Renewed Motion to Stay, Defendants rely on *Ct.-Appointed Receiver for Lancer Mgmt. Grp. LLC v. Cable Rd. Invs. Ltd.*, No. 05-60145-CIV, 2007 WL 9698235 (S.D. Fla. Jan.

17, 2007) as their single source of authority. Defendants appear to cite *Lancer* for the idea that “any defendant” can file a notice in lieu of a motion. *See* Dkt. 24 at 1, Dkt. 49 at 2. The Court, in *Lancer*, did not establish such a rule, but instead, provided specific instructions that **any defendant in *Lancer*** could file a notice or a motion in response to a Third Amended Complaint. *Lancer*, 2007 WL 9698235 at *3. The issue of whether a notice is sufficient in lieu of a motion was not before the Court. The Court analyzed whether jurisdictional discovery should be granted (and it ruled that it should be granted in that case). *Id.* It is no surprise that Plaintiff could not find a single case that cited *Lancer* for the idea that any defendant can file a notice in lieu of a motion.

Rather than seek authorization from the Court, Defendants unilaterally decided that a one-page notice was sufficient. Even if this Court finds that Defendants’ Notice was a sufficient motion (it is not), Defendants’ Notice was not directed at the allegations in the First Amended Complaint. In the Notice, Defendants purported to “incorporate” its arguments against the Original Complaint and somehow assert them against the First Amended Complaint. This creates logical, substantive, procedural, and practical problems.

First, Plaintiff’s First Amended Complaint did not exist at the time when Defendants filed their Motion to Dismiss the Original Complaint. Logically, Defendants’ Motion to Dismiss (filed on December 15, 2022) cannot apply to the First Amended Complaint (filed on January 5, 2023).

Second, in its First Amended Complaint, Plaintiff added allegations that specifically go to venue. If Defendants wanted to dispute those allegations, then they should have done so in a motion, rather than in a one-page notice. At a minimum, Defendants have waived any challenge to these new allegations because Defendants did not address them in a motion.

Third, the paragraph numbers and corresponding allegations in the First Amended Complaint are different than those in the Original Complaint. If this Court were to allow

Defendants to “reassert” their arguments via a one-page notice, then both this Court and Plaintiff would be required to sift through Defendants’ filings and the two complaints and guess as to exactly what Defendants dispute. This is not the proper way to brief this Court and no party should be expected to perform such a task. These problematic hypotheticals would not exist if Defendants would have simply filed a motion according to the Local Rules and the Federal Rules of Civil Procedure. Plaintiff is not aware of any rule that allows a party to file a notice in lieu of a motion without getting either authorization from the Court or an agreement from an opposing party.

C. DEFENDANTS’ REFUSAL TO COOPERATE HAS PREJUDICED PLAINTIFF’S RIGHTS TO DISCOVERY

The reality is that Defendants’ Renewed Motion to Stay is part of Defendants’ well-established attempts to delay this case and deprive Plaintiff of its right to discovery of relevant information. It is also a brazen disregard of this Court’s Scheduling Order and recent Order Denying Defendants’ Motion to Stay, the Local Rules, and the Federal Rules of Civil Procedure.

Only about four (4) months remain until fact discovery ends. Dkt. 16. Plaintiff has repeatedly asked Defendants to cooperate in discovery. Defendants filed an unwarranted Motion to Stay this case, which this Court denied. Dkt. 45. Defendants have now filed a Renewed Motion to Stay, relying on even shakier grounds—a one-page notice.

No Court should expect a party (here, the Plaintiff) to complete fact discovery in a patent case with less than four months (assuming Defendants immediately began to cooperate, and there’s no sign they will). This is especially true when Plaintiff has been required to respond to Defendants’ filings that have wasted everyone’s time and resources. Instead of filing unnecessary motions, Defendants should have cooperated with discovery. At a minimum, Defendants should have cooperated with discovery unless and until this Court grants a stay on discovery.

Critical deadlines are approaching and Plaintiff has not yet received a single document as

part of discovery. Infringement, awareness of the patent in suit, willfulness, and damages are all issues that remain unaddressed in discovery. And it would be unfair to expect Plaintiff to conduct depositions of value without first receiving some discovery. The prejudice to Plaintiff's right to discovery of relevant information in this case is exceptional and it continues with each day Defendants refuse to cooperate.

V. CONCLUSION

For all the reasons discussed above, Plaintiff respectfully requests the Court to deny Defendants' Renewed Motion to Stay and award any other relief this Court deems warranted.

Dated: July 14, 2023

Respectfully submitted,

By: /s/ Jeff Pearson

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