SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **53**

Justice

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DORILTON CAPITAL MANAGEMENT LLC,WILLIAMS IP HOLDINGS LLC,

Plaintiff,

- v -

STILUS LLC,CLAUDIA SCHWARZ,

Defendant.

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INDEX NO. 652428/2023

MOTION DATE 02/29/2024, 03/04/2024, 04/03/2024, 04/16/2024

MOTION SEQ. NO. 014 015 019 020

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 014) 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 256, 262, 263, 307, 308, 309, 310, 311, 312

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 015) 254, 257, 259, 283, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 019) 285, 286, 287, 288, 301, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329

were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 020) 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 302, 305, 313, 314, 315, 316, 317, 318, 319

were read on this motion to/for MISCELLANEOUS.

Upon the foregoing documents and for the reasons set forth on the record (*tr.* 5.20.24), the motions (Mtn. Seq. Nos. 014, 015, 019, 020) are decided as follows:

I. The Plaintiffs' Motion to compel (Mtn. Seq. No. 014) is granted solely to the extent set forth below.

The plaintiffs allege a myriad of deficiencies in the defendant's production, namely that Ms. Schwarz has (i) failed to do an appropriate search and collection of documents within her custody and control, including (A) producing no emails originating from a Stilus LLC email account, despite email addresses for Stilus being listed as recipients for third-party invoices and Stylus being under her custody and control (NYSCEF Doc. No. 253, at 10); (B) producing no Instyle documents of any kind, including documents in connection with the invoices Instyle submitted and Instyle is under her custody and control; (C) conducting no search for documents in connection with the *Forbes* article relevant to this case (NYSCEF Doc. No. 248, page 244, lines 12-25); (D) producing only one document relating to the plaintiffs' audit of the "at-issue" invoices; and (E) failing to produce certain of Ms. Judith Wende's WhatsApp messages, despite her inclusion on a certain relevant group chat (*see* NYSCEF Doc. No. 253, at 22; NYSCEF Doc. No. 249, pages 103-104, lines 7-18), (ii) that the document production was not supervised in any manner by counsel, including that no search terms were discussed with plaintiffs' counsel, (iii) sandbagged plaintiffs with documents at depositions (documents which were never produced), (iv) failed to appropriately respond to post-EBT document requests for such documents, and (v) of the documents produced, failed to bates stamp the documents or otherwise identify any of the documents. Ms. Schwarz, for her part, does not dispute that (i) she did her own searches without counsel guidance, (ii) that she did not supply the plaintiffs with proposed search terms, (iii) that she did not bates stamp documents, and (iv) at oral argument could not indicate one way or another whether certain documents (which documents plaintiffs adduced as examples in their motion papers) that the plaintiffs claim they never received either before the EBT or after the EBT were in fact produced.

Thus, on suggestion of the plaintiffs' counsel (and with the defendants' consent on the record [*tr.* 5.20.24]), the plaintiffs shall be given immediate access to the defendants' custodian accountants so that the plaintiffs can perform appropriate searches that the defendants themselves should have but appear to have failed to adequately perform.

Having never turned over their search terms, the defendants shall supply the plaintiffs and upload to NYSCEF a letter describing their search and collection procedures (including what search terms were used) by end of business on Friday, May 24, 2024. If the plaintiffs are dissatisfied with the search terms and searches the defendants ran, they shall meet and confer with the defendants and attempt to resolve the differences as it relates to the searches they wish to perform. If the parties are unable to resolve any differences, the parties shall notify the court by email (sfc-part53@nycourts.gov) to request a conference. As discussed below, if the plaintiffs discover non-privileged documents that were not produced or any evidence of spoliation, they may move for appropriate relief by order to show cause. The fact that the defendants were unable to definitively answer whether they had in fact produced certain documents, even under the best reading of this, looks dilatory and raises serious issues as to how the defendants' production comports with their (and their attorneys') obligations.

The Documents held by Instyle must be produced.

The defendants are not correct that they do not have to produce documents from Instyle – Ms. Schwarz's company. The argument that Instyle is not a party and thus not subject to Ms. Schwarz's discovery obligations has already been rejected by this Court in its Decision and Order (the **Prior Decision**; NYSCEF Doc. No. 192), dated January 16, 2024, when this Court

ordered Ms. Schwarz to produce Ms. Judith Wende, an Instyle employee, for a deposition. Ms. Schwarz has access to Instyle documents, they are within her custody and control, and they must be produced (NYSCEF Doc. No. 307, pages 7-8). To the extent that documents were withheld on this basis – given the Court's prior ruling, the position is entirely frivolous. The record demonstrates that the plaintiffs seek material and necessary information and that their requests are reasonably calculated such that the requests are proper (CPLR 3101; *O'Halloran v Metro. Transportation Auth*., 169 AD3d 556, 557 [1st Dept 2019]). Inasmuch as the plaintiffs are to be given access to run searches per the above, they shall be permitted to also run searches of the Instyle server together with the other custodians (incuding Instyle), their electronic devices, email accounts etc. in accordance with this decision and order.

The Defendants must produce Documents relating to the Pricing Estimate of Quote 1299.

There are a number of factual disputes in this case including, among other things, whether Quote 1299 was a fixed price contract, whether it was a good faith estimate (as it appears to facially indicate) of costs (based on going rates for certain types of professionals to be billed out), and whether Quote 1299 was a contract that represented the entire agreement among the parties; there is no integration clause, and Quote 1299 appears to otherwise be missing material terms one would expect in this type of engagement. The plaintiffs seek documents to understand whether Quote 1299 reflected appropriate pricing or whether the pricing reflected in Quote 1299 was fraudulently inflated and the product of a relationship which the plaintiffs claim (and the defendants dispute) was inappropriate. It does not matter that the plaintiffs' expert has not yet opined as to information that he has not been provided. The defendants can not withhold information and then claim lack of relevance because of the plaintiffs' experts' lack of opinion as

to information that the expert has not yet been given. Thus, the defendants shall produce three examples of unit pricing on an attorneys eyes and expert eyes only basis by the close of business on May 24, 2024. To the extent that the defendants do not have any examples of the unit pricing, the defendants shall produce a Jackson affidavit indicating as such and otherwise indicating where the unit pricing came from in Quote 1299.

II. The Defendants' Motion (Mtn. Seq. No. 015) to compel the Deposition Testimony of Mr. Andrew Udin is granted solely to the extent that he shall sit for a time-limited Deposition only on Topics of his personal, non-privileged Knowledge.

In the Prior Decision, this court granted the plaintiffs' motion for a protective order to shield its general counsel, General Counsel Andrew Udin (the **General Counsel**), from sitting for a deposition when the plaintiffs offered Chairman Matthew Savage as a corporate representative (unusual as typically parties claim Apex rule to avoid such testimony):

> The Plaintiffs' motion (Mtn. Seq. No. 009) seeking a protective order of Andrew Udin, is granted solely to the extent that they may produce Matthew Savage, their chairman, who they indicate has all relevant knowledge as an appropriate 11(f) witness on the topics that the Defendants seek. Inasmuch as they are producing Mr. Savage who they say has all relevant knowledge (such that deposing Mr. Udin, the General Counsel is not necessary), and they are not seeking to shield the Chairman based on the apex rule, this may well be sufficient. However, if Mr. Savage does not have personal knowledge to answer the topics noticed, the Defendants are granted leave to move by order to show cause for appropriate relief, including seeking Mr. Udin's deposition and the costs associated with such deposition.

(*id.*, at 2). The defendants are simply not correct that they may ask the General Counsel about what amounts to be privileged communications or about what Mr. Savage adequately addressed in his deposition – e.g., the "bullying" set forth in the General Counsel's letter that reflected the information in the plaintiffs' corporate files, which information has already been turned over in

discovery. However, the defendants may ask the General Counsel about (i) his own factual observations of Ms. Schwarz' conduct that the defendants say occurred outside the presence of any other potential witness in the case and (ii) the nature of his personal interactions with Ms. Schwarz, which interactions the defendants say were the same as those she also had with a number of other individuals (including the person the plaintiffs allege Ms. Schwarz had an inappropriate relationship with). Thus, the General Counsel shall sit for a deposition not to exceed three hours and limited in scope to those within his actual personal knowledge based on his personal interactions with Ms. Schwarz or his other personal observations of Ms. Schwarz' conduct. The defendants are not however entitled to an award of costs because (i) Mr. Savage adequately answered the questions about the letter that the General Counsel sent on behalf of the company, (ii) the topics that the General Counsel may be asked about are not identical to those that were presented to the court in connection with the Prior Decision, and (iii) given the defendants' discovery issues in this case, it would be inappropriate to award the defendants fees at this time.

III. The Defendants' Motion to Compel (Mtn. Seq. No. 019) is granted solely to the Extent set forth Below.

The defendants served a Request for Production of Plaintiffs' Documents and Things for Inspection and Copying on August 15, 2023. Among those Requests, No. 1 is for "[c]opies of any and all written correspondence including electronic mail, text messages, memoranda and/or any other form of written communications between the Plaintiffs and the Defendants from January 1, 2020 through May 1, 2023" (*see* NYSCEF Doc. No. 288, at 7). The plaintiffs

responded several weeks later with "Responses and Objections to Defendants Stilus LLC and Claudia Schwarz's Request for Production of Documents" (the **Response**), objecting to the broad request (*id.*) but indicated that they provided relevant documents responsive to all of the Requests that specify any subject matter parameters.

The defendants indicate that Mr. Aiden Lyons, the WIPH representative designated for deposition in this case, conceded at deposition that he had WhatsApp messages between himself and Ms. Judith Wende currently in his possession (on his personal phone), but he was never asked to produce them (NYSCEF Doc. No. 287, ¶¶ 7-9). The defendants now seek production of these messages. This branch of the motion is granted in that the plaintiffs must produce the messages held by Mr. Aiden Lyons, who it is undisputed is an employee under the plaintiffs' control; to the extent Mr. Lyons used his personal phone for corporate communications, the plaintiffs must turn over these corporate communications. If the plaintiffs fail to turn over these corporate messages of one of its employees, the court shall consider whether an inference is appropriate.

The defendants also argue that the plaintiffs have intentionally failed to properly respond to Request No. 16, which requested "[c]opies of any and all written approvals provided by either of the Plaintiffs to the Defendants for any costs, including those costs that the Plaintiffs claim were unauthorized and/or lacked documentation in the Complaint" (NYSCEF Doc. No. 288, at 16). In their Response, the plaintiffs indicated (subject to numerous objections) that they would produce documents relating to costs that the plaintiffs claim were unauthorized/lacked documentation but would not produce documents relating to costs that the plaintiffs did not challenge as improper

(*id.*, at 16-17). Despite their objection, the plaintiffs have indicated that they have produced all expense approval documentation not only documentation relating to the challenged expenses (NYSCEF Doc. No. 320, ¶¶ 24-25; *tr*. 5.20.24). As such, this branch of the motion is denied as moot.

Inasmuch as the plaintiffs have indicated that they too did not turn over their search terms, they will also supply to the defendants and upload to NYSCEF a letter describing their search and collection procedures (including what search terms were used) by end of business on Friday, May 24, 2024. If the defendants are dissatisfied with the search terms the plaintiffs ran, they shall meet and confer with the plaintiffs and attempt to resolve the differences. If the parties are unable to resolve any differences, the parties shall notify the court by email (sfc-part53@nycourts.gov) to request a conference.

Finally, the defendants request additional documents in connection with Request No. 29, for "[c]opies of any and all documents evidencing any damages incurred by the Plaintiffs" (NYSCEF Doc. No. 288, at 23). Specifically, the defendants argue that they are entitled to the copies of the plaintiffs' financial statements, profit and loss statements, and income tax returns for years 2020 through 2024 so they can assess the various types of damages the plaintiffs allege, (i) actual costs disbursed, including identifying which plaintiff entity paid the "at-issue" expenses, (ii) loss of reputation, and (iii) loss of brand value (NYSCEF Doc. No. 286, at 13-14). Though CPLR 3101 instructs that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action," this does not entitle a defendant to unfettered access to the opposing party's tax returns and bank records (*Gitlin v Chirinkin*, 71

AD3d 728, 729 [2d Dept 2010]) or other financial documents (*Aalco Transp. & Stor., Inc. v DeGuara*, 140 AD3d 807, 808 [2d Dept 2016]), unless they can demonstrate that the information sought is indispensable to their defense or counterclaim and could not be obtained from other sources (*id.*). The defendants have decidedly not met their burden as to the financial statements and tax documents. They make no argument that this information is indispensable and offer no explanation as to why other possible sources of the information sought are inaccessible or likely to be unproductive (*Nanbar Realty Corp. v Pater Realty Co.*, 242 AD2d 208, 209-10 [1st Dept 1997]). Further, this information appears not to be relevant – the plaintiffs have not based their theory of damages on any of these documents, and the fact they have not produced them during discovery means that they would be precluded from offering these as evidence at trial. This branch of the motion is granted, however, to the extent that the plaintiffs must produce documents demonstrating which of the plaintiffs' entities paid the "at-issue" expenses.

IV. The Plaintiffs' Motion (Mtn. Seq. No. 020) for Spoliation Sanctions is denied without prejudice.

A party seeking sanctions based on the spoliation of evidence bears the burden of demonstrating (i) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed, (ii) that the records were destroyed with a culpable state of mind, and (iii) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense (*VOOM HD Holdings LLC v EchoStar Satellite LLC*, 93 AD3d 33, 45 [1st Dept 2012]). The intentional or willful destruction of evidence is sufficient to presume relevance, as is destruction that is the result of gross

negligence – if the destruction of evidence is merely negligent, relevance must be proven by the party seeking spoliation sanctions (*id.*). When facing litigation, a party's duty to preserve relevant evidence includes taking active steps to halt automatic deletion features that periodically purge electronic documents such as e-mails (*id.*, at 41-42). Lack of concrete evidence that the allegedly spoliated evidence even existed in the first place or the ability of a complaining party to still pursue its claim through the deposition testimony of a non-party witness are reasonable grounds to deny spoliation sanctions (*Cuevas v 1738 Assoc., LLC*, 96 AD3d 637, 638 [1st Dept 2012]).

As discussed on the record (*tr.* 5.20.24), the record before the court at this time does not warrant awarding spoliation sanctions. Although a much closer call, it also does not yet warrant a forensic examination of Ms. Schwarz's electronic devices and cell phone. The messages adduced clearly indicate a change in Ms. Schwarz's retention procedure after a litigation hold was in place. To wit: during discovery, Mr. Fultz produced certain messages exchanged between himself and Ms. Schwartz, dated from December 20, 2023, and January 25, 2024 (NYSCEF Doc. No. 291, ¶ 6). In this exchange, Ms. Schwarz discusses with Mr. Fultz why his "disappearing messages" feature is not activated; Ms. Schwarz indicated that she did, at that time, have the "disappearing messages" feature activated (NYSCEF Doc. No. 293, at 3). However, inasmuch as the plaintiffs are conducting a search pursuant to the above, the record can be more fulsomely developed and the plaintiffs can renew their request for either sanctions or a forensic examination, whichever is appropriate after the document discovery searches are completed.

As a final matter, the court notes that the discovery issues plaguing this case appear only to be escalating. In the face of a multitude of discovery issues both current and expected in this complex commercial litigation, this court has the authority under CPLR 3104 to designate a Special Master "to supervise all or part of any disclosure procedure" (*see* CPLR 4212; *Luppino v Mosey*, 103 AD3d 1117, 1119 [4th Dept 2013]; The Chief Judge's Task Force on Commercial Litigation in the 21st Century, *Report and Recommendations to the Chief Judge of the State of New York June 2012*, at 11). Counsel are hereby directed to meet and confer to agree on a neutral party or submit up to 3 names to the court by June 3, 2024, by 5:00 pm as a potential Special Master should the Court choose to designate a special master to hear and determine the ongoing and future discovery disputes in this case.

The court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED that the defendants shall produce the requested relevant documents held by Instyle in accordance with this decision and order; and it is further

ORDERED that the defendants shall produce three examples of unit pricing on an attorneys' and experts' eyes only basis by 5:00 pm on May 24, 2024; and it is further

ORDERED that General Counsel Udin must sit for a deposition not to exceed three hours in accordance with the above; and it is further

ORDERED that the plaintiffs must produce the corporate communications currently on Mr. Aiden Lyons' personal phone, *i.e.*, the at-issue WhatsApp messages; and it is further

ORDERED that the parties shall, by end of business on Friday, May 24, 2024, describe by letter to the opposing parties their search and collection procedures, including search terms; and it is further

ORDERED that the motion for spoliation sanctions (Mtn. Seq. No. 020) is denied without prejudice; and it is further

ORDERED that the parties shall appear for a remote conference via the Microsoft Teams platform on June 4, 2024, at 12:00 PM as the court may appoint a special master.

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5/21/2024
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE