

In *Glass Egg Digital Media v. Gameloft, Inc.*, 2020 WL 906714 (N.D. Cal. Feb. 25, 2020), Magistrate Judge Robert M. Illman after noting the contentious nature of discovery between the parties granted in part but significantly reduced the fees awarded defendant as sanctions for plaintiff's conduct in connection with various discovery disputes.

Plaintiff Glass Egg Digital Media (Glass Egg), a British Virgin Islands producer of digital care models for the gaming industry, sued Gameloft SE (GLSE) and Gameloft Inc. (GLI and, collectively, the defendants), a French electronic game producer, for copyright infringement, conversion, and unfair competition. *Id.* at *1. Early in the litigation, GLSE filed a motion to dismiss for lack of personal jurisdiction. The district court granted in part and deferred ruling in part on GLSE's motion and allowed the plaintiff to conduct jurisdictional discovery on the extent of GLSE's business in California and the identity of the entity or entities that operate(s) the Gameloft website accessible to users within California (the Jurisdictional Discovery Order).

During the following year, the parties briefed three discovery disputes. *Id.* at *2. The first dispute involved defendants' request for an order extending the response dates for the plaintiff's third-party subpoenas until after resolution of the parties' second and third discovery disputes, one regarding the scope of jurisdictional discovery and the other regarding the propriety of the subpoenas. On April 15, 2019, after considering the parties' briefing, Magistrate Judge Illman issued an order addressing the parties' scope of discovery and subpoena disputes. *Id.* at *3. As to the scope of discovery dispute, the magistrate judge ordered the parties to file separate briefs describing each rejected discovery request and explaining why that request did or did not fall within the two categories permitted by the Jurisdictional Discovery Order. Magistrate Judge Illman deferred ruling on the third-party subpoena dispute until after resolution of the scope of discovery dispute, and stayed compliance with the subpoenas in the meantime.

Following the magistrate judge's order, the parties submitted separate briefing on the scope of discovery issues, but based in part on the volume of their submissions, this additional briefing "rendered disposition unnecessarily difficult." According to Magistrate Judge Illman, the parties had "worked themselves into such depths of disagreement that they disputed the very nature of the issues presented in the letter brief" and failed to provide "an enumeration of exactly which items of discovery had been sought and declined, and for what reason." For this reason, the magistrate judge ordered the parties to file an additional, joint brief "that would strictly adhere to a prescribed format that was calculated to avoid the obfuscation of the matters actually in dispute."

With the filing of the joint brief, the magistrate judge was finally in a position to turn to the merits of the dispute. *Id.* at *4. The central issue in dispute — which the magistrate judge viewed as a motion to compel discovery from GLSE — was the definition of the word "size," as it appeared in the district court's order permitting jurisdictional discovery. In GLSE's view, "size" referred only to the sales that gave rise to Glass Egg's infringement claim. In plaintiff's view, however, "size" included all details relating to nearly every facet of GLSE's existence, including the extent and commercial value of its the market and the viewer base, GLSE's commercial partners, and its promotional efforts. In the end, Magistrate Judge Illman charted a middle ground, concluding that as used in the Jurisdictional Discovery Order, "size" was neither limited to sales revenue, nor was it "so broad as to include virtually every characteristic of the entirety of a company's operations." Thus the magistrate judge granted in part and denied in part the plaintiff's "motion to compel several-hundred individual discovery requests for various reasons, such as finding that some of the

requests fell under the business model rubric, or that some requests sought to ascertain GLSE's global size, or, in other cases, that they were rationally related to determining GLSE's size in California." Both parties appealed to the district judge, seeking relief from the magistrate judge's order. In response to the appeals, the district court further narrowed the scope of discovery requests falling within the scope of its Jurisdictional Discovery Order.

With respect to the subpoena dispute, GLSE argued that the plaintiff's proposed third-party subpoenas "operated as an end-run around the limits of jurisdictional discovery established in this case because Plaintiff's subpoenas sought essentially all information in the possession of various third parties ... relating to 'Gameloft,' while defining that terms as including GLSE as well as GLI." *Id.* at *5. The plaintiff attempted to justify the broad sweep of its subpoenas, arguing that "[t]he persistent conflation of the corporate separateness of GLI and GLSE is integral to the scope of third-party discovery." *Id.* (internal quotation marks omitted). The magistrate judge concluded that the district court had effectively rejected this same argument nearly two years prior. *Id.* at *6. Accordingly, the magistrate judge found that "because the subpoenas were not in any way limited to seeking information within the scope of permitted jurisdictional discovery, and because they were overly broad and needlessly burdensome and costly to third parties," he granted GLSE's motion to quash. Also, because the vast majority of discovery the plaintiff sought from third parties could be obtained directly from a defendant, GLI, Magistrate Judge Illman independently granted GLI's motion to quash the subpoenas as unnecessarily burdensome and overly broad. *Id.* The plaintiff again appealed to the district court, which summarily denied its request for relief from the magistrate judge's order.

On October 9, 2019, GLSE moved for sanctions and fees, seeking \$69,839.62 in connection with its opposition to Glass Egg's motion to compel and \$127,033.75 for its motion to quash the third-party subpoenas. The magistrate judge swiftly denied the motion (without prejudice) because it "fail[ed] to set forth a particularized itemization of the allegedly unnecessary expenses it has incurred, or a statement of the hourly rate(s) claimed, or an appropriate justification for such rate(s).]" On December 2, 2019, GLSE refiled its motion for sanctions and fees pursuant to Fed. R. Civ. P. 37 and 45, this time including more detail and seeking \$76,675 for its opposition to the motion to compel and \$81,748.40 in attorney's fees its motion to quash the third-party subpoenas and \$20,000 incurred in preparing and filing the revised motion for sanctions and fees.

Before weighing the merits of the pending motion, Magistrate Judge Illman again noted the adversarial nature of the parties' submissions throughout the proceedings and, in particular, in connection with the instant motion for fees and sanctions: "[T]he Parties in this case have descended into such acrimony that a simple pair of disputes about discovery and subpoena practice have ballooned into a protracted back-and-forth that has lasted for nearly a full year, that has impeded the progression of the case, and that has brought the Parties to the point of attacking each other in ways that would be unbecoming for attorneys in any setting, let alone in court filings." *Id.* at *8. The magistrate judge thus reminded the parties of "their obligations to avoid unnecessarily strident language in pleadings, to avoid discourtesies directed at one another, to avoid unfairly attacking one another, and, to otherwise maintain an appropriate level of decorum in their filings."

Turning to the motion's merits, Magistrate Judge Illman considered each of GLSE's requested fees and sanctions in turn. First, with respect to the requested \$76,675.20 for having to oppose the

plaintiff's motion to compel discovery, the magistrate judge began by examining Fed. R. Civ. P. 37(a)(5): "[The Rule] governs the payment of expenses when motions to compel discovery are granted or denied; and, in cases where the motion is granted in part and denied in part, the court may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion." *Id.* (internal quotations and ellipses omitted). In the magistrate judge's view, the language in Rule 37(a)(5) was generally discretionary, but "Rule 37(a)(5)(A) provides that a court must not award expenses if, among other things, 'the opposing party's nondisclosure, response, or objection was substantially justified; or ... [if] other circumstances make an award of expenses unjust.'" *Id.* (quoting Fed. R. Civ. P. 37(a)(5)(A)). After considering the parties' arguments, Magistrate Judge Illman concluded that it would be unjust to grant this portion of GLSE's motion because GLSE failed to submit a motion for clarification of the Jurisdictional Discovery Order, it added to the difficulties in connection with resolving the jurisdictional discovery dispute, and neither party's interpretation of the word "size" was fully vindicated by the district court. *Id.* at *9.

Second, in connection with GLSE's request, pursuant to Fed. R. Civ. P. 45(d)(1), for an order requiring the plaintiff to pay \$81,748.40 for moving to quash the third-party subpoenas, the magistrate judge clarified that despite GLSE's argument to the contrary, "the provision of [Rule 45] pertaining to the determination of an appropriate sanction, including an award of attorneys' fees, is in fact discretionary." Ultimately, Magistrate Judge Illman found that the plaintiff's repeated argument regarding the purported lack of corporate separation between GLI and GLSE, even after the district court rejected such argument, left "little room for doubt that Plaintiff's subpoenas were purposefully crafted to avoid the limits of jurisdictional discovery applicable to GLSE." *Id.* at *11.

While the magistrate judge concluded that a fee award in connection with the subpoena dispute was appropriate, he also determined that GLSE's requested amount, \$81,748.40, was unreasonable under the circumstances. He concluded that the motion to quash was premised on only one argument of any substance — "that Plaintiff's use of the term 'Gameloft' in the subpoenas failed to distinguish between GLI and GLSE and that this failure to distinguish between the two was improper and in derogation of [the] Jurisdictional Discovery Order." For this reason, the magistrate judge stated that it was unclear why the motion required anything more than 25 hours of attorney time fees and reduced the subpoena dispute award to \$13,750 (25 hours multiplied by \$550 – the hourly rate of GLSE's lead counsel). Finally, turning to GLSE's request for \$20,000 in connection with refiling the instant motion, Magistrate Judge Illman summarily denied this request because, as before, GLSE failed to provide an itemized bill or to otherwise justify its request for that sum. *Id.* at *12.