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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

MICHAEL MOORE; RONALD P. GENTRY, Plaintiffs, v. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS; ENOM, INC.; and REGISTERFLY.COM, INC., Defendants.	CIVIL ACTION NO. 7:07-cv-01153-RDP ENOM'S RESPONSE TO MOTION FOR LEAVE TO CONDUCT DISCOVERY AND ENOM'S CROSS-MOTION TO STAY DISCOVERY

I. Introduction

Plaintiffs agreed to file their response to defendants' motions to dismiss by September 13, 2007. Plaintiffs also agreed that all parties' initial disclosures would not be served until one month after the Court decides the motions to dismiss. After the Court entered an order confirming the briefing schedule to which plaintiffs agreed, plaintiffs asked the Court to permit plaintiffs to conduct discovery regarding defendants' motions. Plaintiffs' motion should be denied for three reasons.

First, the only documents eNom relies upon in its motion to dismiss are those plaintiffs cited in their Amended Complaint. Plaintiffs have no need to conduct discovery regarding the very documents they rely upon to support their claims.

Second, plaintiffs' counsel agreed at the Fed. R. Civ. P. 26(f) conference that all parties would produce their initial disclosures one month after the Court rules on the motions to dismiss. Conducting discovery before the initial disclosures are provided would contradict the purpose of the schedule that all counsel agreed to follow, which was to permit defendants to postpone and potentially avoid costly discovery on claims that defendants contend are legally insufficient.

Third, settled principles establish that, where motions to dismiss may eliminate the need for parties to engage in extensive discovery, the Court should stay discovery until the motions are decided. Because plaintiffs have changed their position regarding discovery, eNom hereby asks the Court to stay discovery until after the Court decides defendants' pending motions to dismiss.

II. Statement of Facts

eNom filed its motion to dismiss for failure to state a claim (Document No. 19), its brief in support of that motion ("eNom's Brief") (Doc. No. 20), and a declaration providing copies of documents cited by plaintiffs in their Amended Complaint (Doc. No. 21) on August 30, 2007. The documents provided with eNom's declaration were copies of the emails, contracts, and an ICANN agreement cited by plaintiffs. *See* eNom's Brief, 2-3, 19.

The parties held the conference required by Rule 26(f) on August 27 and filed the Rule 26(f) report on September 10 (Doc. No. 28). In paragraph 3 of the report, the parties agreed that, "[i]n light of the issues raised in defendants' motions to dismiss, and the possibility that some or all of the claims or defendants in the case may be dismissed, the parties agree that they will defer the exchange of information required by Fed. R. Civ. P. 26(a)(1) until one month after the Court has issued its ruling on the pending motions."

The parties filed a joint motion to set the briefing schedule for the defendants' motions to dismiss on September 5 (Doc. No. 24). The final paragraph of that motion asked the Court to order that plaintiffs' response to defendants' motion must be filed by September 13. The Court entered an order on September 7 that, among other things, directed plaintiffs to file their response no later than the September 13 deadline the parties had jointly requested (Doc. No. 27). Plaintiffs' motion for leave to conduct discovery does not explicitly ask the Court to postpone the date plaintiffs' response to the defendants' motion is due.

III. Argument

A. Plaintiffs' Implicit Request to Extend the Due Date for their Response Should Be Denied.

Plaintiffs have provided no rationale for their purported need to conduct discovery before they can respond to defendants' motions. eNom did not interject new evidence in support of its motion to dismiss; it simply relied on documents that plaintiffs themselves cited in their Amended Complaint. To analyze the sufficiency of the Amended Complaint, the Court may consider those documents. *La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004). To the extent that the Amended Complaint's allegations conflict with documents central to or referenced in the complaint, the documents control. *See Nishimatsu Constr. Co., Ltd. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206-07 (5th Cir. 1975). *See also Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) ("court may consider a document attached to a motion to dismiss ... if the attached document is (1) central to the plaintiff's claim and (2) undisputed"). Plaintiffs' Amended Complaint directly relies on the documents eNom filed with the Court and plaintiffs do not contest the authenticity of those documents. There is no need for plaintiffs to conduct discovery regarding documents they relied upon when they filed their Amended Complaint.

Further, by the date that plaintiffs' counsel agreed to the joint motion for a briefing schedule and by the date he approved the Rule 26(f) report, the defendants' motions to dismiss had been on file for almost a week and plaintiffs' counsel had been notified by the Court's CM/ECF system that the motion papers were available to be downloaded. If plaintiffs' counsel believed he needed more time to respond to the motions, including time to conduct discovery, he should have made those requests in the joint motion and in the Rule 26(f) report.

B. Discovery Should Be Stayed.

Under "Rule 26(c) of the Federal Rules of Civil Procedure, a district court may stay discovery upon a showing of 'good cause.'" *Johnson v. New York Univ. School of Educ.*, 205 F.R.D. 433, 434 (S.D.N.Y. 2002) (Ellis, Magistrate J.). District courts may control "the timing and sequence of discovery pursuant to Federal Rule of Civil Procedure 26(d)." *Id.* Based on

these provisions it is well established that "a stay of discovery is appropriate pending resolution of a potentially dispositive motion where the motion appears to have substantial grounds or, stated another way, does not appear to be without foundation in law." *Id.* eNom respectfully submits that its pending motion to dismiss is based on "substantial grounds" and is not without legal foundation. This Court, therefore, has discretion to impose a stay of discovery pending the determination of dispositive motions. *See, e.g., Orchid Biosciences, Inc. v. St. Louis Univ.*, 198 F.R.D. 670, 672 (S.D. Cal. 2001).

Such an order is warranted because "[f]acial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on a failure to state a claim for relief, should . . . be resolved before discovery begins. Such a dispute always presents a purely legal question; there are no issues of fact because the allegations contained in the pleadings are presumed to be true." *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) (footnote omitted). Thus, "neither the parties nor the court have any need for discovery before the court rules on the motion." *Id.* Discovery should only follow "the filing of a well-pleaded complaint," as it is "not a device to enable a plaintiff to make a case when his complaint has failed to state a claim." *Kaylor v. Fields*, 661 F.2d 1177, 1184 (8th Cir. 1981).

If the Court dismisses the plaintiffs' claims "before discovery has begun, unnecessary costs to the litigants and to the court system can be avoided." *Chudasama*, 123 F.3d at 1368; *see also Bell Atl. Co. v. Twombly*, 127 S. Ct. 1955, 1967 (2007) (noting the "potentially enormous expense of discovery" in antitrust cases and that a motion to dismiss may avoid those expenses). The lack of a ruling on a dispositive motion dramatically affects discovery because it "clouds the parties' ability to certify" that "all discovery requests, responses, or objections are not unreasonably or unduly burdensome or expensive," and therefore "hinders their ability to

conduct appropriate discovery." *Chudasama*, 123 F.3d at 1368 n.36. This hindrance, in turn, "prevents discovery from proceeding smoothly and efficiently." *Id.* Where discovery proceeds in such a manner, it "imposes burdens on the judicial system; scarce judicial resources must be diverted from other cases to resolve discovery disputes." *Id.* at 1367-68 (footnote omitted). This burden is precisely what all parties sought to avoid by postponing initial disclosures until after the Court rules on defendants' motions to dismiss and is what eNom seeks to avoid by its cross-motion for a stay.

IV. Conclusion

eNom respectfully requests that plaintiffs' motion for leave to conduct discovery be denied and that eNom's cross-motion to stay discovery be granted.

Respectfully submitted this 11th day of September, 2007,

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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