

Tentative Minute Order re Motion to Dismiss

Plaintiffs Trendsettah USA, Inc. *et al.* (collectively “Trendsettah”) move to dismiss the case with prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. (Docket No. 565.) Swisher International, Inc. (“Swisher”) filed an opposition (Docket No. 574-1; under seal), and Trendsettah replied (Docket No. 579). The Court invited Swisher to file a surreply (Docket No. 581), and Swisher responded (Docket No. 585). In addition, the Court invited Swisher to clarify the relief it sought in terms of conditions of dismissal (Docket No. 577), and Swisher responded (Docket No. 586). Trendsettah filed a further response. (Docket No. 587.)

Trendsettah seeks to end the trial phase of this protected litigation in order to allow the Ninth Circuit to review this Court’s rulings, including the grant of a new trial. (Motion, p. 2.) Trendsettah does not oppose the Motion, but urges the Court to impose certain conditions on any dismissal. (Opposition, p 1.)

The Court now grants the Motion with certain conditions.

I. Legal Standard.

Rule 41 of the Federal Rules of Civil Procedure provides in part:

Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper.

(Fed. R. Civ. P. 41(a)(1)(2); emphasis supplied.) A motion for voluntary dismissal should be granted unless the defendant shows it will suffer some plain legal prejudice as a result. Westlands Water Dist. v. United States, 100 F.3d 94, 96 (9th Cir.1996). In general, plain legal prejudice is shown when actual legal rights are threatened or when monetary or other burdens appear to be extreme or unreasonable. United States v. Berg, 190 F.R.D. 539, 543 (E.D.Cal.1999). Legal prejudice is prejudice to some legal interest, claim, or argument. Westland Water Dist., 100 F.3d at 96. In the present context where a plaintiff moves for dismissal,

the Court may adopt conditions of dismissal to prevent prejudice to the defendant. (Fed. R. Civ. P. 41(a)(1)(2).)

Prejudice to the recovery of attorneys' fees is a cognizable prejudice under Rule 41. Munchkin, Inc. v. Luv N' Care, Ltd., 2018 WL 7507424 at *1 (C.D. Cal. May 2, 2018); Pechke Map Technologies LLC v. Miromar Development Corp., 2016 WL 1546465 at *2 (M.D. Fla. Apr. 15, 2016). Prejudice to discovery rights is also a cognizable prejudice in some circumstances. Hyde & Drath v. Baker, 24 F.3d 1162, 1069 (9th Cir. 1994).

II. Discussion.

Swisher urges the imposition of conditions to avoid prejudice to the following rights:

- Its right to claim attorneys' fees and costs as the prevailing party.
- Its right to claim attorneys' fees and costs under two Private Label Agreements ("PLA") with Trendsettah.
- Its right to claim attorneys' fees and costs under 28 U.S.C. § 1927, Rule 37 of the Federal Rules of Civil Procedure, and the Court's inherent powers.
- Its right to certain discovery under Magistrate Judge McCormick's outstanding order to compel (Docket No. 560).
- Its right to conduct of the previously-noticed depositions of Trendsettah and its officers.

(Opposition, pp. 1-2, 23-24.)

A. Potential Fee Motions.

With respect to the first three items, Swisher has clarified its position upon invitation of the Court. Swisher does not seek to litigate prior to judgment the amount any award or indeed whether it is entitled to relief any under any of

these theories, with two exceptions. (Docket No. 586, pp. 1-2.) Swisher also urges the Court to retain jurisdiction to consider such relief. That the Court will do.

In its Supplemental Brief, Swisher concedes that “there is no dispute that Swisher will have the right to claim fees and costs as (1) the prevailing, and (2) under the PLAs.” (Docket No. 587, p. 1; internal quotation marks deleted; *id.* at 5 (“the fees would remain pending for independent adjudication”; emphasis in original; internal quotation marks deleted.) These statements are unequivocal, and the Court relies upon them.¹

Swisher urges two findings. First, Swisher invites the Court to find that the fact of Trendsettah’s voluntary dismissal may not be asserted as a bar to the possible fee motions, all other grounds being preserved to Trendsettah. (Opposition, pp. 1-2.) The Court finds that this condition appropriate and necessary to eliminate prejudice to Swisher. Second, Swisher invites the Court to enter a finding that it has not been judicially determined that Swisher is in default of its obligations under the plan. (*Id.*, p. 2.) The Court finds that this condition is appropriate. If the Ninth Circuit affirms, Trendsettah will not be allowed to relitigate an issue which on a record of dismissal has been decided against it. Of course, if the Ninth Circuit reverses in some fashion, say by reinstatement of the original verdict, there would be no predicate for Swisher to seek relief under the PLAs.

B. Discovery.

The cases which Swisher cites for the proposition that it is entitled to discovery now seem to deal with situations where there is ongoing collateral litigation between the parties or related third-party litigation where the discovery

¹“Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position.” *Whaley v. Belleque*, 520 F.3d 997, 1002 (9th Cir. 2008) (quoting *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996)). “Judicial estoppel is an equitable doctrine that is intended to protect the integrity of the judicial process by preventing a litigant from playing fast and loose with the courts.” *Whaley*, 520 F.3d at 1002 (quoting *Wagner v. Prof’l Eng’rs in Cal. Gov’t*, 354 F.3d 1036, 1044 (9th Cir. 2004)).

would be relevant and somewhat time critical. See Hyde & Drath, 24 F.3d at 1165; In re Exxon Valdez, 102 F.3d 429, 432 (9th Cir. 1996). That is not the present situation. The Court declines to condition dismissal on any further discovery. In that regard, the Court vacates without prejudice Swisher's Motion for Contempt. (See Docket No. 572.) The Court also stays without prejudice the pending depositions.

Depending on the Ninth Circuit's disposition, the discovery now sought may well be relevant. The Court finds that much of the discovery which Swisher now seeks would be relevant to post-trial motions for sanctions of various types. Any motion pursuant to 28 U.S.C. § 1927, and perhaps others, would be informed by probing in greater detail conduct amounting to fraud on Court. Should the Ninth Circuit affirm, the Court is likely to entertain post-judgment discovery in support of the various motions that might be brought. Should the Ninth Circuit remand for a new trial, Swisher would have an opportunity renew its discovery requests. Of course, if the Ninth Circuit reinstated the original verdict, the issue would be moot. In no event, however, is further discovery warranted now.

III. Conclusion.

The Court grants the Motion to Dismiss with prejudice and includes the findings noted above. As the prevailing party, Swisher is directed to submit a proposed form of judgment within seven days. If the judgment is endorsed by Trendsettah as to form, the Court will enter the judgment promptly. Otherwise, the Court will wait seven days for objections. Swisher is cautioned to hew to the meets and bounds of this Order.

The Court **VACATES** the September 14, 2020, hearing. Any party may file a request for hearing of no more than five pages no later than 5:00 p.m. on Tuesday, September 15, 2020, stating why oral argument is necessary. If no request is submitted, the matter will be deemed submitted on the papers and the tentative will become the order of the Court. If the request is granted, the Court will advise the parties when and how the hearing will be conducted.