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November 21, 2018

The Honorable Roanne L. Mann
United States District Court for the
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *LPD New York v. adidas America, Inc. and adidas AG*,
Civil Action No. 15-Civ-6360-MKB-RLM

Dear Judge Mann:

LPD's motion to compel (DE 93) should be denied because (a) LPD failed to confer with adidas in good faith prior to filing, in violation of the Local Rules and Your Honor's Individual Rules; (b) LPD has identified no authority to support its position that it can "compel" the production of Rule 26 documents absent a timely document request under Rule 34 (indeed, the authority is to the contrary); and (c) LPD's allegations regarding adidas's privilege log are entirely unsupported and can be mooted by adidas's withdrawal of its log.

*First*, LPD failed to meet and confer with adidas, in violation of Local Rule 37.3(a) and Your Honor's Individual Rule III.A, and its motion to compel should be denied on this ground alone. *Tri-Star Pictures, Inc. v. Unger*, 171 F.R.D. 94, 100 (S.D.N.Y. 1997) ("Because this Court finds that Leisure Time's motion to compel Columbia's production of documents violates the meet-and-confer requirements of the Federal Rules of Civil Procedure, the Local Rules, and this Court's Individual Rules, this Court finds that Leisure Time's motion should be denied."). Indeed, LPD did not even alert adidas to the issues in its November 16 motion until November 13, and did not attempt to meet and confer until November 15. That same day, adidas advised by email that it was available to confer the following Monday or Tuesday (i.e., in either two or three business days), and asked LPD to provide in advance any authority to support its position. LPD did not even reply to this email and instead filed its Motion the next day. Had LPD conferred in good faith, this entire motion may have been rendered unnecessary.

*Second*, there is no obligation to produce documents identified under Rule 26(a)(1)(A)(ii) absent a timely document request. LPD did not serve any timely discovery requests at all, and therefore has no basis to compel the production of anything. Rule 26(a)(1)(A) requires that each party "provide to the other parties: (ii) a copy—***or*** a description by category or location—of all documents . . . that the disclosing party . . . may use to support its claims or defenses." (emphasis added). In its disclosures in this case, adidas described one such category and identified

locations for the same ("Emails with and/or about Plaintiff." DE 93-1 at 3), and thus fulfilled its obligations under Fed. R. Civ. P. 26(a)(1)(A)(ii).

This notwithstanding, upon receiving a request from LPD on October 18, 2018 to produce the documents identified in its disclosures—i.e, the emails with and/or about Plaintiff on which adidas may rely to support its claims or defenses—adidas made a 915-page production just eight days later.[1] Nonetheless, LPD now contends that adidas "failed to produce its Rule 26 materials" and seeks to "compel" the production of additional emails. DE 93 at 1. But the authority is plainly to the contrary. As this Court explained under nearly identical facts:

> [T]he City was under no obligation to *produce* the document under Rule 26; rather, it merely had to describe all documents in its possession, "by category and location," that it intended to use to support its claims or defenses. . . . Silverman, however, could have—and, indeed, *should* have—requested this document long ago. Silverman's "undue delay" in seeking production of this document . . . will not be countenanced . . . .

*Silverman v. City of New York*, 2001 WL 1776157, at *6 (E.D.N.Y. Nov. 19, 2001) (Glasser, J.) (emphasis in original). The advisory committee's notes to Rule 26 are equally unambiguous: "Unlike subparagraphs [iii] and [iv], subparagraph [ii] ***does not require production of any documents***." Note to 1993 Amend. to Former Rule 26(a)(1)(B) (emphasis added).[2]

adidas produced its Rule 26 documents upon request, in good faith, and without obligation. LPD's eleventh-hour argument that its own egregious discovery misconduct was somehow caused by the timing of this production is not based in the law and is belied by the facts. LPD did not mention adidas's initial disclosures during the June 7, 2018 conference or qualify its statement that "discovery will go out this week" on that ground, *see* DE 87 at 14, nor did it ever serve a discovery request seeking the identified documents. Rather, and as Your Honor noted, LPD is seeking to use this meritless argument in an effort to create a false equivalency with its own misconduct. adidas's initial disclosures ultimately have nothing to do with LPD's abject failure to participate in discovery, and they certainly do not provide "good

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[1] adidas was careful when making its October 26, 2018 production to avoid any possibility that documents in its possession and on which it may wish to rely might be excluded because they were not produced during discovery (especially since LPD had not made any discovery requests of its own). Accordingly, the production was the result of an extensive and time-consuming investigation that began early in discovery and included, *inter alia*: (1) full interviews with at least nine potential witnesses; (2) document collections from at least five custodians believed most likely to have relevant information; and (3) review of more than 13,000 potentially relevant documents by counsel.

[2] The notes further confirm that the description of relevant documents under Rule 26, far from creating any associated obligation to produce, is instead intended to allow the other party to decide how to frame its document requests: "[T]he disclosure should describe and categorize . . . the nature and location of potentially relevant documents. . . sufficiently to enable opposing parties (1) to make an informed decision concerning which documents might need to be examined, at least initially, and (2) to frame their document requests in a manner likely to avoid squabbles resulting from the wording of the requests." Note to 1993 Amend. to Former Rule 26(a)(1)(B).

cause" to extend LPD's discovery period.[3] LPD's motion to compel has no legal basis and should be denied.

*Third*, there is no obligation to produce any privilege log in connection with Rule 26, as the limited law on this point confirms. *See, e.g.*, *SEC v. Blackburn*, 2015 WL 10911438, at *4 (E.D. La. Oct. 26, 2015) ("Because the initial disclosures are limited to documents that the party may use to support its claims or defenses, a privilege log is not required to be produced."); *Rand v. Town of Exeter, N.H.*, 2014 WL 4922977, at *7 (D.N.H. Sept. 30, 2014) ("[T]he court has been unable to locate any authority for the proposition that privilege logs are a required part of a Rule 26(a)(1) initial disclosure."); *Sommer v. United States*, 2011 WL 4592788, at *10 (S.D. Cal. Oct. 3, 2011) ("Plaintiff . . . did not have an obligation to produce a privilege log at the time she served her initial disclosures because Defendants had yet to propound document requests [and] [Rule] 26(a)(1)(A)(ii) does not require production of any documents."). That adidas nonetheless produced a log in good faith and an abundance of caution cannot now form the basis for any discovery motion. Accordingly, and because adidas's creation of a privilege log was unnecessary in the first instance, the relevant portion of LPD's motion may be mooted by adidas's confirmation that it will not rely upon any documents (or redacted portions of documents) identified in its privilege log, thus removing them entirely from the ambit of Rule 26(a)(1)(A)(ii).[4] To the extent the Court does not find items 2–5 of LPD's motion moot, adidas respectfully requests that the Court deny these portions of LPD's motion as unsupported by the law.

*Finally*, adidas is entitled to its reasonable expenses and fees incurred in opposing this motion. Rule 37(a)(5)(B) provides that, if a motion to compel is denied, the Court "must" award the non-moving party "its reasonable expenses incurred in opposing the motion, including attorney's fees," unless "the motion was substantially justified or other circumstances make an award of expenses unjust."[5] LPD's motion is not substantially justified. To the contrary, the motion is legally meritless and, perhaps more importantly, could have been mooted entirely had LPD met its obligation to confer with adidas in good faith. In these circumstances, an award of adidas's reasonable expenses is just.

We thank the Court for its attention to this matter.

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[3] Because LPD cannot show "good cause," the "Court need not determine whether the requested modification would have any prejudicial effect on defendants." *Gotlin v. Lederman*, 2007 WL 1429431, at *3 n.2 (E.D.N.Y. May 7, 2007) (Mann, J.). Even so, adidas "would obviously be prejudiced in having to conduct [nine] months of discovery in [the time period] proposed by plaintiff[]." *Id.*

[4] adidas offers this confirmation solely for the purpose of judicial economy and to make a ruling unnecessary on LPD's motion to compel. adidas further notes that "in camera review of a document still represents a significant intrusion" into the attorney-client privilege, *Sekisui Am. Corp. v. Hart*, 2013 WL 2951924, at *7 (S.D.N.Y. June 10, 2013), but is nonetheless, in a separate filing, complying with the Court's November 20, 2018 order to submit the challenged documents under seal for the Court's review.

[5] adidas's time entries associated with this request are being submitted in a separate filing, as are adidas's time entries associated with its own motion to compel (DE 88), which the Court explicitly requested. *See* DE 97.

Respectfully submitted,

Robert N. Potter

cc: Plaintiff's Counsel