IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Lina Dou, *et al*,	)	
	)	
Plaintiffs,	)	Case No. 18-CV-07865
	)	
v.	)	Judge Charles P. Kocoras
	)	Magistrate Judge Young B. Kim
Carillon Tower/ Chicago LP, *et al.*,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' RESPONSE TO MOTION FOR ADVERSE INFERENCE

Defendants Carillon Tower/Chicago L.P., Forefront EB-5 Fund (ICT) LLC, Symmetry Property Development II LLC, and Jeffrey Laytin hereby respond to plaintiffs' Motion for Adverse Inference. Defendants acknowledge that they failed to produce a chronology of receipt and use of investor funds by the Court-imposed deadline of April 3, 2020. They acknowledged this in a filing on April 3, 2020, and did not ask the Court for an extension because the Court had stated it would not grant one. Defendants understood that it would be up to the Court to decide what sanction was warranted for missing that deadline.

As of the date of this filing, defendants are still working on completing and verifying the Court-ordered chronology. Under the totality of circumstances, however, no sanction is warranted. The chronology the defendants are completing will validate that plaintiffs' claims are meritless and there has been no misuse of investor funds. It has been prepared in the midst of a near total business shut-down in the New York area, where defendants' small staff and outside accountants are located, and where its bankers at TD Bank are furloughed, and defendants cannot contact them to answer and verify questions about their own bank statements. The chronology will be supportive of a motion for summary judgment in favor of defendants.

Under these circumstances, and given that the Court-ordered chronology requires defendants to in essence disprove the merits of plaintiffs' entire case, defendants should be entitled to reasonable additional time to complete a documented chronology that proves their innocence. The most sanction the Court should impose at this juncture, if any, is a modest monetary sanction for delay. Defendants will file a report to the Court and plaintiffs on May 1, 2020, with either a completed chronology, or a firm date on which it will be completed.

LEGAL STANDARD

Where a delay in responding to discovery obligations is reasonable and a party has not been generally uncooperative, no sanctions are warranted, and defendants would contend that is the posture of the record here. *Central States v. Neurobehavioral Assocs., P.A., Defendant*, 1997 U.S. Dist. LEXIS 19188, *8-9 (N.D. Ill. Nov. 25, 1997). Even in cases with a pattern of repeated serious delays – not present here – the Court should refrain from imposing an adverse inference and limit itself to monetary sanctions in the nature of attorney's fees. *Mortgage Recruiters, Inc. v. 1st Metro. Mortg. Co*., 2003 U.S. Dist. LEXIS 10145, *11-13 (N.D. Ill. June 16, 2003) (finding that despite taking over two years since service of plaintiff's first discovery requests, four motions to compel, and an order granting motion to compel to secure compliance with discovery, court sanctioned defendant only with attorneys' fees, finding that a sanction of default or evidence preclusion would be out of proportion to defendants' dilatory conduct). The standard for entry of an adverse inference is limited to egregious circumstances, wholly absent here, such as where a party willfully destroys evidence. *Faas v. Sears, Roebuck & Co*., 532 F.3d 633, 644-45 (7th Cir. 2008) (showing of bad faith in destruction of documents required to support adverse inference).

ARGUMENT

The Covid Pandemic and Stay-at-Home Orders Have Constrained Working Conditions

Starting with the most compelling reason why sanctions are not warranted, since late March 2020, defendants have been subject to stay-at-home orders which delayed and impacted their ability to review the underlying bank records in this matter, and slowed their productivity in general. The Covid crisis has produced stress and strain on working conditions as people worry about the pandemic's impact on their businesses and families. Recognizing this, the Northern District of Illinois entered a series of General Orders which automatically extended deadlines, first by 21 days, then by an additional 28 days, and most recently by yet another 28 days.

Defendants recognize that this Court determined (in advance) that such orders would *not* delay defendants' obligation to prepare the use of investor funds chronology. But defendants also ask the Court to consider that, when it first entered its order depriving defendants of any Covid-related extensions, the scope, scale and impact of the crisis were not fully apparent. In general, defendants were not yet subject to the stress and inefficiencies of "stay at home" orders. Defendants also were not yet under the burden of assessing Covid-related legislative packages and assessing whether they could be used to support defendants' financial condition.

More specifically, defendants and their bank, TD Bank, are based in New York City, which has been subject to one of the country's most stringent Covid shut-down orders. Since defendants' last filing on April 3, 2020, defendants have not had access to their bankers at TD Bank to assist and answer questions. Defendants' day-to-day bankers are furloughed. They are not receiving or answering email. All but one TD branch is closed, and lines there are prohibitive. Defendants' own small staff, as well as most of its outside lawyers and accountants, are also based in and around New York and subject to similar restrictions and constraints on their work.

Many of the bank statements clearly document the recipient of expenditures. But some do so with shortened notations that are not sufficient to identify the recipient with precision. As of April 3, 2020, defendants believed that their verification of all expenditures could be completed soon, but it has not proven so. Defendants have had to rely on their own records, accessed remotely, without the benefit and backstop of consultations and verifications with their bankers.

As a result, while defendants have substantially completed the chronology, it still is not done. Defendants ask the Court to be mindful that this exercise it imposed is in essence defendants' defense of the entire case. Defendants cannot make mistakes, and they intend to continue working on the chronology as long as it takes until it is verified to their satisfaction. It seems fair to ask that defendants be afforded additional latitude based on the Covid crisis, beyond their first and sole extension, when that has been the default for litigants in the Northern District of Illinois generally, who have obtained automatic extensions of 77 days, or eleven weeks.

Defendants' Overall Discovery Record Demonstrates Substantial Effort and Compliance

A second reason why further sanctions are not warranted is simply that, to date, defendants have done virtually *all* the discovery work in this case, while plaintiffs have yet to provide any affirmative document production or interrogatory answers.

Defendants have worked hard and diligently responding to plaintiffs' discovery requests, and do not deserve the opprobrium heaped on them. Defendants produced an exhaustive record of their development efforts, as well as partnership tax returns detailing assets and expenditures of the project. TD Bank produced a complete set of bank statements. These documents rebut plaintiffs' repeated false allegations. Defendants also prepared several iterations of answers to interrogatories, the last of which were sustained by Judge Korcoras, who rejected plaintiffs' arguments that defendants' answers were untimely and substantively deficient.

Undeterred, plaintiffs then filed a motion for *default*, which misled this Court about the actual discovery record and ignored the timing and contents of defendants' production and written answers. Plaintiffs' strategy from the beginning has been to repeat the same invective – that the project is dead and defendants have breached court orders – when in fact it is plaintiffs who are ignoring the facts and the record. Defendants acknowledge that they failed to fully comply with Judge Kocoras's order to produce certain limited documents by his deadline – but they paid in full the resulting sanction. Apart from missing this Court's April 3, 2020 deadline, these are their only failures. They ask this Court to consider the overall picture that they have otherwise complied with their discovery obligations. Meanwhile plaintiffs have yet to produce any documents or interrogatory answers, and are being allowed to take full advantage of the Northern District's Covid extensions. To defendants, that seems unfairly one-sided, and they respectfully ask the Court to consider the totality of the parties' discovery work in assessing plaintiffs' motion.

The Court's Order Was Not a Conventional Discovery Order

Defendants appreciate the reasons and practical wisdom of the Court's order requiring them to prepare a chronology detailing the use of investor funds in this matter, citing to the TD Bank statements. However, defendants also wish to remind the Court of the opposition they posed upon entry of the order. The Court's order is an unfamiliar sort of discovery order. It does not require supplementing an interrogatory answer, or producing additional documents. Instead, it imposes a Court-devised affirmative analysis project: prepare a chronology that accounts for the use of investor funds in this matter. This is the sort of work that defendants expected to undertake in preparation for filing their own motion for summary judgment, but it is not something that they expected to be ordered to do as part of their discovery obligations.

This Court's order relieved plaintiffs of the burden of assessing the bank statements, and shifted that burden to defendants – when it is plaintiffs, not defendants, who bear the burden of proof.[1] For this reason, defendants would ask the Court to be open to the perspective that its prior order was already in the nature of a sanction. Having been ordered to perform a time-consuming task that goes to proving merits of the entire case, rather than to discovery, defendants believe it would be unfair and unwarranted to punish them further because they did not complete the task as quickly as the Court wanted. The bank statements span years of expenditures. The chronology of defendants' development work – as defendants have already documented in their response plaintiffs' motion for preliminary injunction – has been tortuous. Respectfully, defendants ask the Court to grant them, retrospectively, the time they need to complete the project to their satisfaction, and not hold them to the strict time frame imposed by the Court.

Plaintiffs' Motion for Adverse Inference Argues Both Irrelevant and Sanctionable Points

Like previous filings before this Court, plaintiffs' motion for adverse inference advances arguments that ignore the record or are non-sequiturs. Defendants have explained, over and over, that they cannot locate the complete original signed copy of the Loan Agreement, but have produced their best understanding of the final draft, as well as a signature page affirming that it is binding. This attack is a red herring – defendants do not dispute that the Loan Agreement exists. Its terms are described in the Offering Memorandum (as well as the draft agreement already produced). Defendants likewise acknowledge that Carillon Tower is entitled to a return of the investor funds loaned to the project, subject to those terms and conditions.

[1] Defendants also feel discomfort with the Court's ordering requiring preparation of a chronology on use of funds because plaintiffs have pled a cause of action for accounting. The practical effect of the Court's chronology order is to grant at least partial equitable relief on plaintiffs' claim for accounting under the guise of an order supervising discovery, but under circumstances where defendants have not consented to the magistrate hearing that claim.

Plaintiffs' argument about the "Project Owner" entity not having a bank account is also a red herring and non-sequitur. Defendants have consistently stated that defendant Symmetry Property Development II operates as the project's developer who hires architects, contractors and the like on behalf of the Project Owner. It makes no difference that the "Owner" entity holding title to the parcels (the project's most valuable assets) is not same as the developer managing the bank account. Defendants disclosed this structure in the Offering Memorandum. Moreover, the developer's expenditures on behalf of the Owner are substantially documented in the partnership tax returns produced to plaintiffs, as well as the TD Bank statements. Plaintiffs' so-called confusion is an admission they have not carefully reviewed the documents in this matter.

Plaintiffs' final argument crosses the line from "non-sequitur" to sanctionable. Plaintiffs make the spurious argument that Mr. Ding lied under oath about a prospective loan related to a different development project in Hawaii. (He did not). Defendants asked questions about this project in Mr. Ding's deposition because of concerns about cross-default provisions in the Chicago and Hawaii loan documents. More recently, however, plaintiffs became interested in learning more about the Hawaii project because of circumstances that defendants are not free to explain, in that they figured extensively in the parties' settlement discussions last month.

As part of a confidential settlement dialogue, in response to plaintiffs' questions about defendants' rights to the Hawaii project, defendants provided plaintiffs' counsels Mr. Dunn and Mr. Litowitz with a *confidential* copy of a hotel management agreement to manage the prospective development in Hawaii. This was done not in the course of any discovery exchange, but in the course of a *confidential settlement negotiation*. Yet, when those negotiations broke down, plaintiffs' counsel turned around and tried to use the Hawaii hotel management agreement against defendants in a filing. To make matters worse, plaintiffs' counsel apparently lacked the

basic competence to file documents under seal, and lodged the confidential hotel management agreement on the public docket. This was a gross breach of plaintiffs' counsel's ethical duties. At the very least, plaintiffs' filings throughout this matter have displayed a cavalier attitude toward the record and the rules. Defendants respectfully ask that the Court take these factors into consideration as well as it considers plaintiffs' latest request for sanctions.

WHEREFORE, defendants shall report to the Court with either the completed chronology or a date to provide it on May 1, 2020. Defendants otherwise respectfully request that plaintiffs' motion for adverse inference be denied, or in the alternative that the Court withhold any ruling until it can review the substance of the chronology, and that any relief be limited to a modest monetary sanction for the weeks after defendants missed the Court's April 3, 2020 deadline.

Dated: April 28, 2020

Respectfully submitted,

/s/ *Daniel Hildebrand*

Daniel Hildebrand
GREENBERG TRAURIG, LLP
77 West Wacker Drive
Suite 3100
Chicago, IL 60601
Tel: 312.456.8100
Fax: 312.456.8435
hildebrandd@gtlaw.com

CERTIFICATE OF SERVICE

I, Daniel Hildebrand, certify that on April 28, 2020, a true and correct copy of the foregoing was served electronically through the Northern District of Illinois CM/ECF electronic filing on all counsel of record. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ *Daniel Hildebrand*
Daniel Hildebrand