IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LIAFAIL, INC.,	)	
	)	
Plaintiff and Counterclaim Defendant	)	CONSOLIDATED
	)	
v.	)	C.A. No. 01-599 GMS and
	)	C.A. No. 01-678 GMS
LEARNING 2000, INC., JAMES RICHARD STORY, III, individually, ANTONIO SANTINI, individually, ILC, INC., SFD, INC,. and S & S ENTERPRISES,	)	
	)	
Defendants and Counterclaim Plaintiffs and Third-Party Plaintiffs,	)	
	)	
v.	)	
	)	
FRANK STUCKI,	)	
	)	
Third-Party Defendant.	)	

MEMORANDUM AND ORDER

I. INTRODUCTION

On June 5, 2001, the plaintiff and counter-claim defendant, Liafail, Inc. ("Liafail") filed a complaint in the United States District Court for the Western District of Kentucky, setting forth various contractual theories of liability. The United States District Court for the Western District of Kentucky transferred this case to the United States District Court for the District of Delaware on August 29, 2001. This case became Civil Action Number 01-599-GMS.

On October 9, 2001, Learning 2000, Inc ("L2K") commenced Civil Action Number 01-678-GMS in the United States District Court for the District of Delaware. In that complaint, L2K alleges that Liafail violated, *inter alia*, Section 43 of the Lanham Act, 15 U.S.C. § 1125(a); Section 2532 of the Delaware Uniform Deceptive Trade Practices Act, and the Anti-Cybersquatting Consumer

Protection Act, 15 U.S.C. § 1125(d).

By stipulation of the parties, the court consolidated Civil Actions 01-599-GMS and 01-678-GMS on November 2, 2001.

Presently before the court is L2K's motion to test the sufficiency of answers and objections to requests for admission, as well as for attorneys' fees. For the following reasons, the court will grant this motion in part and deny it in part.

II. DISCUSSION

Federal Rule of Civil Procedure 36 governs requests for admissions. Rule 36(a) states, in pertinent part:

> A party may serve upon any other party a written request for the admission . . . of the truth of any matters within the scope of Rule 26(b)(1) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents, described in the request . . . .
>
> The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order that the matter is admitted or that an amended answer be served . . . .

In the present case, L2K alleges that Liafail failed to comply with its obligations under Rule 36(a) by: (1) refusing to admit or deny requests based upon a claimed lack of knowledge when the information was readily available to it; (2) failing to set forth in detail the reasons why it could not truthfully admit or deny the matters requested; (3) providing evasive, argumentative denials that did not fairly meet the substance of the requests; and (4) failing to admit known facts. The court will now address each of the allegedly improper responses.

A. The '678 Requests

The majority of L2K's complaints with regard to the '678 action concern L2K's requests for admission that, "[on] or after July 1, 2001" the named Liafail sales representatives "promoted the Lifetime Library by using L2K marketing materials." *See* L2K's Request for Admissions, Request No. 11 (as to Steven Sborov); Request No. 12 (as to Tim and Diane Stevens); Request No. 13 (as to Doug Sharp); Request No. 15 (as to R.J. and Susan Simms); Request No. 16 (as to Karen Muir); and Request No. 17 (as to Geri Michaelson). In response to each of these requests, Liafail responded "[d]efendants are unable to truthfully admit or deny this request." L2K then requested that Liafail confirm that it had conducted a "reasonable inquiry" and that it "set forth in detail the reasons" why it could not admit or deny the requests in accordance with Rule 36(a). Liafail subsequently filed supplemental responses. L2K now alleges that the supplemental responses compound, rather than cure, the initial defaults.

1. Request No. 11

Request number 11 states that "[o]n or after July 1, 2001, Steve Sborov promoted the Lifetime Library by using L2K marketing materials." In its supplemental response, Liafail answers, "[d]efendants refer to the deposition testimony of Steve Sborov at the deposition conducted by plaintiff as the most accurate reflection of Sborov's response in this regard. Liafail has no basis for admitting or denying the truth of this request apart from the testimony of Sborov." Additionally, in its Answering Brief on the present motion, Liafail states that, "counsel for Liafail further inquired of Sborov as to the subject matter of this Request. Sborov denied promoting the Lifetime Library by using L2K materials. Therefore, Liafail denies Request No. 11." Liafail's Answering Brief (D.I. 274) at 6.

It is telling that only now does Liafail explicitly deny the information sought in Request 11

based on a conversation Liafail's counsel had with Sborov. It is clear, however, that it had the information to do so at the time the Request was served, yet it did not provide an answer. Instead, it chose to engage in word games.

The response is further defective because it does not explain why Liafail gives credence to Sborov's denial when it is directly contradicted by Sborov's own testimony and pleadings. *See e.g.* Answer of Steven Sborov in *L2K v. Sborov*, Civil Action No. 02-571, pending in the United States District Court for the District of Minnesota, at ¶ 33 (admitting that he continued to use his Learning2000.com e-mail address after June 30, 2001 for communications with a potential customer); Sborov Tr. at 187, 192-93 (admitting he used the Learning2000.com e-mail address while he was working for Liafail, and further admitting that this might make potential customers think that he was working for L2K). The court will, therefore, deem Request No. 11 to be admitted.

2. Request No. 12

Request number 12 states that "[o]n or about July 1, 2001, Tim and Diane Stevens promoted the Lifetime Library by using L2K marketing materials." Liafail's supplemental response states that, "[a]fter discussions with the Stevens failed to produce any information, Defendants are unable to truthfully admit or deny this request." In its Answering Brief, Liafail allows that, "[s]ubsequent to providing this response, the Stevens were deposed on or around May 2, 2002 in this matter. During that deposition, the Stevens indicated that they may have used L2K promotional materials in one instance to promote sales on behalf of Liafail. Nevertheless, at the time Liafail provided its supplementary responses to Request No. 12, the denial was completely accurate and given as a result of a reasonable inquiry." Liafail's Answering Brief (D.I. 274) at 7.

Thus, Liafail now acknowledges that the Stevens have indicated a possible use of L2K

promotions materials. However, Liafail has not suggested that it sought to correct or amend its response in any way. Rather, its entire argument rests on the assertion that, at the time it responded, its information was correct. Such an argument is clearly specious. *See* FED. R. CIV. P. 26(e)(2) (discussing obligation of a party to correct known inaccuracies to requests for admissions). Therefore, the court will deem Request No. 12 to be admitted.

3. Request No. 13

Request number 13 states that, "[o]n or after July 1, 2001, Doug Sharp promoted the Lifetime Library by using L2K marketing materials." Liafail's supplemental response states that, "Defendants have attempted to reach Mr. Sharp, but as of this time are unable to truthfully admit or deny this request." Liafail further explains in its brief that "[d]espite repeated telephone calls, neither [counsel for Mr. Sharp] not Mr. Sharp ever responded with information sufficient for Liafail to admit or deny Request No. 13."

Importantly, however, Liafail has not suggested that it reviewed its own documents to obtain the necessary information. Nor has it come forward with a reasonable explanation as to why it did not do so. Thus, because it is apparent that Liafail has not in good faith made a reasonable inquiry into this request, the court will deem it admitted. *See e.g. Diederich v. Department of Army*, 132 F.RD. 614, 619-620 (S.D.N.H. 1990) (noting that the requisite "reasonable inquiry" may require review of relevant documents.).

4. Request No. 15

Request number 15 states that, "[o]n or after July 1, 2001, R.J. and Susan Simms promoted the Lifetime Library by using L2K marketing materials." Liafail's supplemental response states that "[d]efendants are unable to truthfully admit or deny this request. To the best of Defendants'

knowledge, R.J. and Susan Sims have never acted as distributors for Liafail's products, and Liafail has no existing relationship with these parties which would enable it to evaluate their conduct on their own behalf or on the behalf of other parties. Defendants' review of Liafail's records has not revealed any information that such promotion occurred."

However, Frank Stucki admitted at his deposition that Liafail's response is inaccurate:

> Q. Your reference in Response to Admit Number 15, that's Defendant's review of Liafail's records, has not revealed any information that such promotion occurred; is that still accurate?
>
> A. Hm? No.
>
> Q. That is not accurate?
>
> A. No.
>
> Q. And why do you think it is not accurate?
>
> A. We provided a document that we processed one order through R.J. and Susan Simms . . . .

F. Stucki Tr. at 981. Notwithstanding Stucki's statements under oath that the response to Request number 15 was inaccurate, however, Liafail has not sought to supplement or withdraw its response. Nor does it offer any justification for its failure to do so. Accordingly, the court will deem this request admitted.

5. Request No. 16

Request number 16 states that, "[o]n or after July 1, 2001, Karen Muir promoted the Lifetime Library by using L2K marketing materials. Liafail responded by denying that it "directed any individual to promote the Lifetime Library by using L2K marketing materials, and based on a conversation with Ms. Muir, den[ies] this request."

Again, after providing this response, deposition testimony demonstrated that Karen Muir's website did indeed contain "a small number of references to Learning 2000." Muir Tr. at 201-02. In light of this subsequent information, Liafail's supplemental response can hardly be said to be accurate. While Liafail's position may be that it did not direct Muir to promote the Lifetime Library in this manner, request number 16 is not so narrowly tailored as to warrant Liafail's categorical denial based on this fact alone. Accordingly, as Liafail has failed to appropriately supplement or withdraw its response, the court will deem this request admitted.

6. Request No. 17

Request number 17 states that, "[o]n or after July 1, 2001, Geri Michaelson promoted the Lifetime Library by using L2K marketing materials." In response, Liafail "den[ies] that they directed any individual to promote the Lifetime Library by using L2K marketing materials, and based on a conversation with Geri Michelson, den[ies] this request."

Liafail identified Frank Stucki ("Stucki") as its Rule 30(b)(6) witness on this topic. At his deposition, L2K elicited the following testimony:

> Q. Whose conversation with [G]eri Michelson does this [supplemental response] refer to?
>
> A. This refers to my phone conversation.
>
> Q. . . . what did you ask Ms. Michelson in this conversation on which you base your denial of the Request to Admit Number 17?
>
> (Objection)
>
> A. I talked to [G]eri Michelson on the phone. I have known [G]eri for a lot of years, and she told me she wasn't using L2K's marketing materials.
>
> Q. Well, what about the past? Did you ask her about whether in

the past, or after July 1, 2001, she had promoted the Lifetime Library by using L2K marketing materials?

A. No.

Q. You did not ask her that?

A. No.

Q. And she did not tell you that, in fact, in the past she had not used Learning 2000 marketing materials to promote the Lifetime Library; is that right?

A. Yes.

F. Stucki Tr. at 982-83. Thus, it is apparent that, not only did Liafail fail to conduct a "reasonable inquiry," it attempted through its evasive and ambiguous response to create the impression that it had made such an inquiry, and based on that inquiry, had a good faith basis to deny the request.

Moreover, Liafail's bad faith tactics continue in its Answering Brief. There, in an affidavit, counsel for Liafail states that *he* actually talked to Michelson and that conversation is what Liafail's answer is based upon. He provides no explanation, however, as to why he is explicitly contradicting his own 30(b)(6) witness in this regard. In light of these developments, it is clear to the court that Liafail fell far short of meeting its obligations in answering request number 17. The court will, therefore, deem this request to be admitted.

7. Request No. 21

Two of the issues in the '678 action concern whether L2K was the original registrant of the Learning2000.com domain name and whether Frank Stucki improperly changed the registrant from L2K to Liafail. It is with regard to these issues that L2K submitted request number 21. That request states that, "[o]n or about October 31, 2000, Frank Stucki submitted a request to Network Solutions that the registrant for <Learning2000.com> be changed from L2K to Liafail." Liafail responded that

it "object[s] to this Request to the extent that it presumes L2K was ever the "registrant" of the domain name in question. Without waiving that objection, Defendants admit that Stucki asked Network Solutions to change the address of the registrant, but denies that it asked the actual registrant be changed."

Liafail again identified Frank Stucki as its 30(b)(6) witness in this regard. During his deposition, Stucki testified as follows:

> Q. I'm not asking you about the address [be]cause I think we've established that the address did not change. Right?
>
> A. Yes.
>
> Q. I'm asking you: You asked for the name of the registrant to be changed from Learning 2000 to Liafail. Is that right?
>
> A. Yes.

F. Stucki Tr. at 1084. Thus, because Request number 21 asked Liafail to admit a fact that Stucki has conceded is true, that fact should have been - and is now deemed - admitted.

B. The '599 Requests

1. Request No. 7

Request number 7 states that, "[b]y entering into the Original Agreement, Liafail intended to grant SFD an exclusive license of infinite duration to sell, distribute, and reproduce the Lifetime Library. Liafail responded:

> Deny. Plaintiffs state that Liafail did not intend to grant SFD a license to distribute the Lifetime Library even in the face of SFD's breach of the terms of the Original Agreement, which required SFD to meet certain performance benchmarks and to perform certain obligations with regard to the payments of royalties, and that the Original Agreement contemplated Liafail's distribution of the software for a period of time.

In its Answering Brief, Liafail concedes that it understood what information L2K sought in request number 7. It argues, however, that "[d]evoid of context, Liafail cannot truthfully admit that it intended an indefinite license; it intended a license to last infinitely provided no cause for termination existed. Therefore, Liafail had to deny request No. 7 as written." Liafail's Answering Brief at 14. At the time of its response, however, Liafail did not object to the request as being vague, ambiguous, or calling for a legal conclusion. Accordingly it cannot do so now. *See e.g. Rhone-Poulenc Rorer, Inc. v. Casualty & Surety Co.*, 1992 U.S. Dist. LEXIS 20249, at *14 (E.D. Pa. Dec. 29, 1992). Moreover, as Liafail itself recognizes, a qualified denial or admission is certainly proper. Yet, despite its clear ability to do so in its Answering Brief, Liafail chose instead to play a word game rather than adhere to its obligations under Rule 36. Unfortunately, the court must conclude that Liafail has lost its gamble. Request number 7 shall be deemed admitted.

2. Requests 8 and 9

Request number 8 states that, "[a]t least as of July 1998, Liafail was aware that SFD had assigned its rights under the Original Agreement to L2K." Request number 9 states that, "Liafail accepted benefits under the Original Agreement to L2K after it became aware that SFD had assigned its rights under the Original Agreement to L2K." In response to both, Liafail replied:

> Deny. Liafail became aware that SFD was using a new name, Learning 2000, but Liafail was not certain whether L2K was a "d/b/a," an operating division of SFD, or a separate legal entity until in or about August 1999, when, after repeated requests from Liafail to clarify the situation, L2K's counsel indicated that L2K was a separate corporation. Liafail did not grant permission for the assignment as required under the terms of the Original Agreement, as Liafail was never asked for that permission by SFD, and Liafail did not receive documentation for the purported assignment until after the commencement of the present litigation.

At his deposition, Stucki testified that Liafail first became aware of the assignment

"somewhere in the very beginning of the contract in '97." F. Stucki Tr. 398-99. He further testified as follows:

> Q. And isn't it a fact that whatever the date was that you actually became aware of the assignment, subsequent to that date, Liafail accepted benefits under the original agreement from Learning 2000?
>
> A. Yes.
>
> Q. So you admit that Liafail accepted benefits under the original agreement to Learning 2000 after it became aware that SFD had assigned its rights under the original agreement to Learning 2000?
>
> A. Yes.

F. Stucki Tr. at 605. Based on this deposition testimony, the court will deem requests 8 and 9 admitted.

3. Request No. 10

Request number 10 states that "[b]y entering into the Second Agreement, Liafail intended to terminate the Original Agreement." In response, Liafail stated:

> Plaintiffs object to this Request on the grounds that the terms of the Second Agreement speak for themselves. Plaintiffs further state that they intended to terminate those parts of the Original Agreement encompassed by the Second Agreement, and deny intending to terminate those parts not so encompassed by the Second Agreement, and deny intending to terminate those parts not so encompassed and further state that regardless of their intent, said Agreement is vitiated by Defendants' fraud.

The court concludes that Liafail's response, although admittedly inartfully crafted, is sufficient to withstand the present motion. Specifically, Liafail has admitted that it intended to terminate the Original Agreement. It denied having terminated various side agreements arising out of earlier disputes over the Original Agreement which were not included in the Second Agreement.

Because Liafail has appropriately responded to the request, L2K is entitled to no more.

4. Request Nos. 11 and 12

Request number 11 states that, "[w]hen it executed the Second Agreement, Liafail intended to acknowledge without objection that SFD assigned all of its right in the Original Agreement to L2K." Likewise, Request number 12 states that, "[w]hen it executed the Purchase Agreement, Liafail intended to acknowledge without objection that SFD assigned all of its rights in the Original Agreement to L2K." Liafail responded to both requests with the following statement: "Deny. Liafail had been informed by L2K that L2K had received an assignment of all rights from SFD, although Liafail had not received confirmation of such assignment, and had no specific intent regarding same."

However, at his deposition, Frank Stucki, Liafail's 30(b)(6) witness, testified as follows:

> Q. And when it executed the second agreement, Liafail intended to acknowledge without objection that SFD assigned all of its rights in the original agreement to Learning 2000.
>
> A. Yes.
>
> Q. And likewise, when it executed the purchase agreement, Liafail intended to acknowledge without objection that SFD assigned all of its rights in the original agreement?
>
> A. Yes.

F. Stucki Tr. at 606.

Thus, because request numbers 11 and 12 asked Liafail to admit facts that it knew to be true, the court will deem both requests admitted.

5. Request Nos. 14, 15, 16, 17, 18, and 19

Request number 14 states that, "[b]y entering into the Second Agreement, Liafail intended

to fully and forever compromise and settle any difference existing between Liafail and L2K as of the date of the Second Agreement." Liafail responded that: "[it] objects to this Request on the grounds that the terms of the Second Agreement speak for themselves. Plaintiffs further state that they intended to settle those matters set forth in the Second Agreement, having entered into the Agreement as a result of L2K's promises to cure prior defaults, and deny intending to terminate those parts not so encompassed and further state that regardless of their intent, said Agreement is vitiated by Defendant's fraud." The remainder of the requests currently in dispute generally track the language of Request 14 and Liafail's response thereto.

With regard to Request 14, Liafail conceded that it "intended to settle those matters set forth in the Second Agreement . . . ." It gives similar answers to the remaining requests at issue. Thus, while these responses may again be inartfully drafted and may not be exactly the answer L2K was seeking, the court will deem the responses sufficient to withstand the present motion.

C. Attorneys' Fees

Federal Rule of Civil Procedure 37 governs the imposition of sanctions when a court grants a motion to test the sufficiency of the answers and objections to requests for admission. Rule 37 states, in relevant part:

> The Court shall . . . require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay the moving party the reasonable expenses incurred in making the motion, including attorneys' fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's non-disclosure, response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

In its four-sentence argument on why sanctions would be unjust in this case, Liafail states

that its denials were "entirely reasonable" and made after it had provided L2K with a "complete accounting of the reasonable inquiry it made into those [r]equests for which Liafail had insufficient knowledge to either admit or to deny." As the court discussed at length above, Liafail's responses were not always "entirely reasonable," nor did it always provide the requisite accounting of reasonable inquiry. As a result, L2K's costs were significantly increased, to say nothing of the substantial burden Liafail's actions have placed upon the court. In such a situation, Rule 37 sanctions are mandatory. *See e.g. Doe v. Mercy Health Corp.*, 1993 U.S. Dist. LEXIS 13347, *46 (E.D. Pa. Sept. 13, 1993) (ordering attorneys' fees after granting a motion to compel in part). The court will thus grant L2K's motion for reasonable attorneys' fees and costs.

III. CONCLUSION

After considering the parties' submissions on the issues before it, the court deems requests 11, 12, 13, 15, 16, 17, and 21 in the '678 action and requests 7-9, and 11-12 in the '599 action to be admitted. The court will further award L2K reasonable attorneys' fees with respect to the requests upon which it has prevailed.

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. L2K's Motion to Test the Sufficiency of Answers (D.I. 269) is GRANTED in part and DENIED in part.

2. L2K shall submit a reasonable fee petition, with supporting documentation, within thirty (30) days of the date of this order.

Dated: March 3, 2003

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE