

The Honorable Judge Robart

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DENNIS MONTGOMERY,

Plaintiff,

v.

JAMES RISEN, HOUGHTON MIFFLIN
HARCOURT PUBLISHING CO., HOUGHTON
MIFFLIN HARCOURT CO.,

Defendants.

No. 2:15-CV-01955-JLR

REPLY IN SUPPORT OF
MOTION TO COMPEL
COMPLIANCE WITH
SUBPOENA

NOTED ON MOTION
CALENDAR: Friday, December
25, 2015

I. INTRODUCTION

Third-party Istvan Andras Burgyan did not file an opposition to Defendants’ Motion to Compel Compliance with Subpoena (“Motion to Compel”) within the time prescribed by the Local Rules. The Court should consider his failure “an admission that the motion has merit.” Local Rule, W.D. Wash. 7(b)(2). Moreover, Plaintiff Dennis Montgomery’s¹ response to Defendants’ Motion to Compel is improper because: (1) Plaintiff lacks standing to challenge a

¹ Plaintiff filed *pro se* even though he is represented by counsel, Larry Klayman, in the underlying action. Mr. Klayman has not sought to appear in this action in this court. *Daly v. Far E. Shipping Co. PLC.*, 238 F. Supp. 2d 1231, 1235-36, 1241 (W.D. Wash. 2003) (noting that other courts have revoked Mr. Klayman’s *pro hac vice* status and his “contentions regarding the conduct and demeanor of this Court are bizarre and without merit.”), *aff’d sub nom. Daly v. Fesco Agencies NA Inc.*, 108 F. App’x 476 (9th Cir. 2004).

1 subpoena issued to a third-party; (2) Plaintiff's argument about alleged untimeliness is
 2 incorrect, not credible and would result in unfairness; and (3) Plaintiff's argument that
 3 Defendants somehow harassed him ignores that the magistrate judge in the underlying action
 4 already found this assertion wholly lacked merit. Therefore, the Court should strike Plaintiff's
 5 response and grant Defendants' Motion to Compel.

6 II. ARGUMENT

7 A. The Court Should Grant the Motion to Compel Because the Non-Party 8 Failed to File an Opposition

9 Burgyan, the subject of the subpoena and motion, failed to file an opposition by
 10 December 21, 2015, the deadline to do so under the Local Rules. Local Rule, W.D. Wash.
 11 7(d)(3). When, as here, one "fails to file papers in opposition to a motion, such failure may be
 12 considered by the court as an admission that the motion has merit." Local Rule, W.D. Wash.
 13 7(b)(2). Given the meritorious arguments raised in the motion, and Burgyan's decision not to
 14 respond, the Court should grant the motion. *See, e.g., Munro v. King Broad. Co.*, No. C13-
 15 1308JLR, 2014 WL 1089347, at *2 (W.D. Wash. Mar. 18, 2014) ("[T]he court treats King's
 16 failure to respond as an admission that this motion has merit. . . . King undoubtedly had notice
 17 of this pending motion, but chose not to respond to it."); *United States v. Zabel*, No. C07-0543-
 18 JCC, 2007 WL 2572329, at *1 (W.D. Wash. Sept. 6, 2007) (holding Plaintiff's motion
 19 meritorious where defendant failed to file papers in opposition to the motion); *Wilks v.*
 20 *Leimbach*, No. C06-871-JLR, 2008 WL 1803770, at *1 (W.D. Wash. Apr. 21, 2008) ("Because
 21 plaintiff has failed to respond to this motion, it is treated as uncontested motion pursuant to
 22 Local Rule CR 7(b)(2).")

23 B. Plaintiff Lacks Standing to Oppose the Motion to Compel.

24 In addition, this Court should strike Plaintiff's response brief opposing Defendants'
 25 Motion to Compel because Plaintiff lacks standing to challenge the subpoena. "Generally, a
 26 party lacks standing to challenge a subpoena issued to a nonparty, or third party, unless the
 27 party making the challenge claims a personal right or privilege with respect to the discovery

1 sought in the subpoena.” *TMP Worldwide Advert. & Commc’ns, LLC v. LATCareers, LLC*,
 2 No. C08-5019 RBL, 2008 WL 5348180, at *1 (W.D. Wash. Dec. 16, 2008); *Channel Constr.,*
 3 *Inc. v. Northland Servs., Inc.*, No. C14-1231-JCC, 2015 WL 778090, at *4 (W.D. Wash. Feb.
 4 24, 2015); *Bite Tech, Inc. v. X2 Impact, Inc.*, No. C12-1267RSM, 2013 WL 195598, at *3
 5 (W.D. Wash. Jan. 17, 2013) (“Typically only a subpoena’s recipient has standing to challenge
 6 the subpoena in the issuing court. . . . However, a party may move to quash or modify third
 7 party subpoenas when its own privacy interests may be implicated.”) (internal citations
 8 omitted); *Erickson v. Microaire Surgical Instruments LLC*, No. C08-5745BHS, 2010 WL
 9 1881946, at *2 (W.D. Wash. May 6, 2010).

10 Here, Plaintiff does not even argue, let alone establish, that the subpoena implicates his
 11 right or privilege. Nor could he do so since Plaintiff put Burgyan on his final witness list.
 12 Defendants’ Motion to Compel Compliance with Subpoena (“Defs.’ Mot. to Compel”) at 2:25-
 13 26. Therefore, he lacks standing to challenge the subpoena. Accordingly, this Court should
 14 strike Plaintiff’s brief. *See* Local Rule, W.D. Wash. 7(g) (“Requests to strike material
 15 contained in or attached to submissions of opposing parties shall not be presented in a separate
 16 motion to strike, but shall instead be included in the responsive brief, and will be considered
 17 with the underlying motion.”).

18 **C. Defendants’ Motion to Compel Is Timely Under the Rules.**

19 Even if the Court were to consider Plaintiff’s opposition, the Court should reject it on
 20 the merits. In his opposition brief, Plaintiff suggests – without citing legal authority – that
 21 Defendants’ Motion to Compel is untimely even though it is undisputed that Defendants served
 22 the subpoena within the discovery period and the date noticed for the deposition was within the
 23 discovery period as well. *See* Plaintiff’s Response to Defendants’ Motion to Compel (“Pl.’s
 24 Resp.”) at 2:18-27. The argument is incorrect, not credible, and, if applied, would be unfair
 25 here.

26 *First*, the Local Rules of civil procedure expressly exempt miscellaneous actions, such
 27 as this one, from deadlines to move to compel under the Local Rules and discovery deadlines

1 imposed under Fed. R. Civ. P. 16(b). *See* Local Rule, W.D. Wash. 16(b)(5) (“The court
2 exempts certain types of cases from the requirements of this local rule and of Fed. R. Civ. P.
3 16(b), including . . . cases filed as miscellaneous matters before this court.”).

4 *Second*, Plaintiff cannot credibly suggest Defendants’ motions are untimely. Indeed, he
5 has asked the district court in the underlying action to extend the deadline for all discovery, and
6 has done so in part to seek to compel third parties to sit for depositions after the close of
7 discovery in the U.S. District Court for the Southern District of New York. *See* No. 15-mc-
8 00363-P1 (S.D.N.Y.); Defs.’ Mot. to Compel at n.4.

9 *Third*, as a matter of fairness, Burgyan should not be allowed to avoid complying with
10 the subpoena by simply evading service until the discovery clock runs out. *See* Defs.’ Mot. to
11 Compel at 4:14-5:24. Neither Burgyan nor Plaintiff disputes that: Defendants repeatedly tried
12 to serve the subpoena on Burgyan starting two months before the discovery deadline; Burgyan
13 and his family went to “fairly blatant dramatic” lengths to avoid being served; and Burgyan
14 waited until November 16 – a mere three days before the discovery deadline and the deposition
15 – to object and make clear he would not show up. *Id.* 4:14-7:20. Such evasion of service can
16 constitute contempt of court, *see, e.g., Tilghman v. A.P. Elec. Const., Inc.*, No. CIV. A. 88-
17 4363, 1990 WL 18697, at *1 (E.D. Pa. Feb. 26, 1990), and should not be condoned, let alone
18 rewarded.

19 For these reasons, this Court should reject Plaintiff’s argument that Defendants’ Motion
20 to Compel is untimely.

21 **D. The Magistrate Judge in the Underlying Litigation Has Already Rejected**
22 **Plaintiff’s Unfounded Argument About Alleged Harassment.**

23 Finally, Plaintiff’s opposition brief claims Defendants’ subpoena constitutes
24 harassment. *See* Pl.’s Resp. at 3:1-6. Plaintiff’s brief fails to address – or even acknowledge –
25 that the magistrate judge in the underlying action has already rejected that claim as wholly
26 unfounded. *See* Defs.’ Mot. to Compel at 5:16-24. If anything, the Court found, it was
27

1 Burgyan and his family who acted improperly by attempting to evade service. *Id.* Accordingly,
2 this Court should compel compliance with the subpoena.

3 **III. CONCLUSION**

4 Based on the foregoing and the Motion to Compel, Defendants respectfully request that
5 the Court deem the motion meritorious given Burgyan's failure to respond, strike Plaintiff's
6 opposition brief, grant Defendants' Motion to Compel Burgyan to comply with the subpoena,
7 and order Burgyan to: (1) appear at a deposition to give oral testimony and (2) provide
8 documents responsive to Defendants' subpoena.

9
10 DATED this 24th day of December, 2015.

11 Davis Wright Tremaine LLP
12 Attorneys for Defendants

13 By s/Angela Galloway
14 Angela Galloway WSBA #45330
15 1201 Third Avenue, Suite 2200
16 Seattle, WA 98101-3045
17 Telephone: (206) 757-8274
18 Fax: (206) 757-7274
19 E-mail: angelagalloway@dwt.com

DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on this day I caused a copy of the foregoing Motion to be served upon the following counsel of record:

Istvan Burgyan	(X)	By U. S. Mail
4425 Issaquah Pine Lake Road Southeast	()	By E-Mail
Apt. A31	()	By Facsimile
Sammamish, WA 98075-6255	()	By Messenger

Nonparty Respondent

Larry Klayman	(X)	By U. S. Mail
KLAYMAN LAW FIRM	(X)	By E-Mail
2520 Coral Way Suite 2027	()	By Facsimile
Miami, FL 33145	()	By Messenger
leklayman@gmail.com		

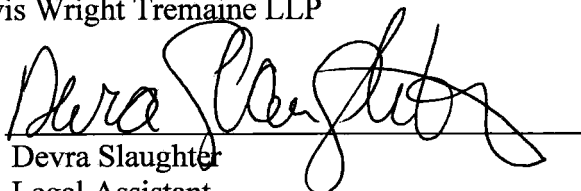
Attorney for Plaintiff

Brian Toth	(X)	By U. S. Mail
Sanford Lewis Bohrer	(X)	By E-Mail
HOLLAND & KNIGHT LLP	()	By Facsimile
701 Brickell Avenue, Suite 3300	()	By Messenger
Miami, Florida 33131		
sandy.bohrer@hklaw.com		
brian.toth@hklaw.com		

Attorney for Defendants

DATED this 24th day of December, 2015.

Davis Wright Tremaine LLP

By 

Devra Slaughter
Legal Assistant
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
Tel: 206.757.8809
Fax: 206.757.7700
Email: devraslaughter@dwt.com