UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SARAH SWEENEY,	)	
	)	
Plaintiff/Counterclaim Defendant,	)	
v.	)	Case Number 4:22-cv-01265-RLW
	)	
BEST FOOT FORWARD CORPORATION PODIATRIC SPECIALISTS, ET AL.,	)	
	)	
Defendants/Counterclaim Plaintiffs.	)	

DEFENDANTS/COUNTERCLAIM PLAINTIFFS' MEMORADUM IN OPPPOSITION TO EXPEDITED MOTION TO QUASH SUBPOENA

COME NOW defendants/counterclaim plaintiffs Best Foot Forward Corporation Podiatric Specialists ("BFF") and Franklin W. Harry ("Harry") and for its memorandum in opposition to the Expedited Motion to Quash Subpoena [Dkt. 30] and the accompanying Declaration of Danielle Mankunas [Dkt. 31] respectfully submits the following to the Court:

Factual Background

Following the provision on August 2, 2023, of BFF's and Harry's Notice of Intent to Issue Subpoenas Pursuant to Fed.R.Civ.P. 45 which was served on counsel for plaintiff/counterclaim defendant Sarah Sweeney ("Sweeney"), to which no response was made, BFF and Harry caused a subpoena to be served on Danielle Mankunas ("Mankunas"), a former employee of BFF. On August 16, 2023, the subpoena was served on Mankunas, a copy of which is attached hereto as ***Exhibit 1*** (also showing the return of service). Pursuant to the Subpoena, Mankunas was ordered to produce the described information on or before 9 a.m. on August 31, 2023, to the undersigned counsel, at BFF's office address.

No contact was made with the undersigned until August 28, 2023, when Sweeney's counsel sent an email to the undersigned, asserting that the subpoenas were overly broad and asked that they be limited. A copy of this email is attached as ***Exhibit 2***. Sweeney's counsel again emailed the undersigned on August 29, 2023, attempting to negotiate the response of Ms. Galati (another former employee of BFF that had been subpoenaed), whom Sweeney's counsel did not represent. The undersigned responded that same day, stating that Ms. Galati's response had been appropriately addressed directly with her, and pointed out that she did not represent Ms. Galati nor Mankunas and, as such, had no standing to negotiate for either of those persons, nor object to the subpoenas on their behalf. A copy of this email string is attached as ***Exhibit 3***.

The undersigned next received an email from Mankunas on August 30, 2023 regarding her compliance with the subpoena served upon her. The day before the production was due, though she was served over two weeks previously. Following a series of back-and-forth which ended on August 31st, in which the undersigned explained that she was not required to personally appear to produce the information, and agreeing to extend the time for production to accommodate her Labor Day holiday plans, she agreed to produce the information by 5 p.m. on Tuesday, September 5, 2023. A copy of this email string is attached as ***Exhibit 4***.

Surprisingly, just a bit later on August 31, 2023, the undersigned received two forwards emails which Mankunas sent to the Court, seeking to file a "Declaration of Subpoena and Motion to Quash Subpoena." Copies of these two emails are attached as ***Exhibit 5*** and ***Exhibit 6***, respectively. On September 6, 2023, the undersigned received copies of two filings for Mankunas, the first being her Motion to Quash Subpoena [Dkt. 30] and the second being her Declaration [Dkt. 31].

Argument and Authorities

I. The Expedited Motion to Quash Does Not Set Forth Good Cause to Quash the Subject Subpoena.

The subject subpoena required Mankunas to produce "All electronically stored communications between You and plaintiff Sarah Sweeney." In her motion, Mankunas states several reasons why she should not be required to produce the information ordered by the subpoena. However, as shown herein, none of those reasons constitute good cause to quash or limit the subject subpoena.

A. Mankunas Did not Receive An Attendance Fee or Mileage Check with the Subpoena – Because None Were Required.

The first reason stated by Mankunas why she should not have to comply with the subpoena is that she was not given an attendance fee or mileage check when served with the subpoena. This argument has no merit.

First, the undersigned explained that very thing to Mankunas in his reply to her initial email on August 30th. It was further explained that all she needed to do was electronically send the requested information to the undersigned.

Second, as set forth in the information page attached to the subpoena which recites portions of Fed.R.Civ.P. 45, it clearly states that "A person commanded to produce documents, electronically stored information or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing or trial." Fed.R.Civ.P. 45(d)(2)(A).

The subject subpoena only ordered the production – there was no order for an appearance at a deposition, hearing or trial. As such, there is no attendance fee or mileage required to be paid to Mankunas. ***See French v. Cent. Credit Servs.***, 2017 U.S.Dist. LEXIS, *3 (E.D.Mo. July 28, 2017).

B. **Mankunas States that She Lacks Finances to Hire an Attorney to Represent Her in Responding to the Subpoena, Which Is and Was Unnecessary**.

Next, Mankunas argues that she lacks finances to hire an attorney to represent her with regard to responding to the subpoena served upon her. Aside from the fact that a person may certainly represent oneself in a legal proceeding – as Mankunas is superficially doing now – there is no right to an attorney in any event in a civil matter such as this. Mankunas clearly had assistance in preparing her Expedited Motion to Quash Subpoena and Declaration. It is the good faith belief of the undersigned that Sweeney's counsel either provided Mankunas with forms to use or more likely ghost wrote her filings for her. The symmetry between the filings made by Mankunas [Dkts. 30 and 31] with the Memorandum in Support filed by Sweeney's counsel [Dkt. 29] is obvious. Both make the same misplaced argument regarding attendance fees. Both argue privacy issues – despite the Protective Order [Dkt. 34] that Sweeney's counsel just stewarded through the Court.

Further, the information to be produced is limited to electronic communications between Mankunas and Sweeney, emails and texts, and such information is clearly a matter of common sense not requiring legal analysis or special skills of any sort.

Lastly in this regard, both Mankunas and Sweeney's counsel argue that relevant texts were already produced by Sweeney. Sweeney's counsel even goes on to state that Mankunas purchased "software to allow her to access and sort her old texts." Interestingly, Mankunas did

not bring up that fact. If Mankunas did in fact purchase such software, there is truly no burden in producing all texts between she and Sweeney, as it would take an action likely as simple as a few keystrokes. In fact, in her August 30th email to the undersigned, Mankunas stated that she would 'have to screen shot all the texts" that she is required to produce. That stark inconsistency gives BFF and Harry significant concern as to the veracity of Mankunas and Sweeney.

Sweeney did produce truncated texts between Mankunas and Sweeney with her initial disclosures, clearly redacted. An example of those texts is attached hereto as ***Exhibit 7***[1]. Due to redactions, and the further actions of Sweeney in this case – such as her deficient and extremely evasive discovery responses received to date – not producing a thing though the due date has come and gone, a copy of which are attached hereto as ***Exhibit 8 and 9, respectively***, BFF and Harry justifiably have no confidence in the candor of the disclosures and that the texts produced are really all of the texts that have relevance to this case.

It is the undersigned's good faith belief that the redactions were made by Sweeney's counsel, not Mankunas. Attached hereto as ***Exhibit 10*** is a text produced by Sweeney that states in pertinent part " Sherrie has seen all of our texts.[2]"

C. **Mankunas States that Does Not Still Possess all of the Requested Information, But What She Still Admits to Possessing Is Relevant and Should be Produced**.

Both Mankunas and Sweeney's memorandum in support argue that the subpoena is overly broad. BFF and Harry have no desire to view communications that are not relevant or material – or that are unlikely to lead to the discovery of evidence that will be admissible at trial.

[1] Personal information has been redacted by the undersigned from the text bubble, but not elsewhere. All other redactions are by Sweeney's counsel.

[2] Personal information has been redacted by the undersigned from the text bubble, but not elsewhere. All other redactions are by Sweeney's counsel.

However, as Sweeney's memorandum in support concedes, Sweeney's health – both physical and mental – are key issues in this case. As such, any communications that bear on Sweeney's physical or mental health are directly relevant.

For example, during Sweeney's employment with BFF, she was in a relationship with a person upon whom BFF and Harry have been attempting to serve with a subpoena, Rob Daubs, who was according to Sweeney abusive and was suspected of murdering a previous girlfriend. Again BFF and Harry have no desire to get into Mankunas' sex life or health, it is entirely reasonable that Sweeney would relate her mental and/or physical health in such matters pertaining to Mr. Daus in a conversation regarding Mankunas.

A further example would be any communications which touch on Sweeney's work after leaving BFF is relevant to the claims in this case. It is highly likely that such work was a subject of communications between Mankunas and Sweeney.

Mankunas also notes that the undersigned "slightly extended my time for producing the communications (Mankunas Declaration at ¶14). When considering that the subpoena was served on Mankunas on August 16, 2023 and at that time she had 15 days until the deadline in the subpoena for production, that Mankunas did not contact the undersigned until the day before the production was due, that the undersigned agreed to each extension of time that Mankunas requested, and to cap it off, if the representation made by Sweeney's counsel is true that Mankunas had software already purchased some time ago that would allow her to make the production, her statement is disingenuous at best.

II. **The Motion Filed by Mankunas Appears to Have Been Ghost Written For Her**.

As stated above, it appears that the filings made by Mankunas were ghost written for her. Based upon the form and arguments made in the Mankunas filings, as mirrored in Sweeney's

memorandum in support, it is reasonable to deduce that the Mankunas filings were drafted by Sweeney's counsel. Further, it appears from texts that Sweeney did produce that Mankunas has or at least had an attorney/client relationship with Mankunas. Attached hereto as ***Exhibit 11*** are some texts between Sweeney and Mankunas that discuss Mankunas consulting with Sweeney's counsel and getting advice regarding her own dealings with BFF[3].

Pro se litigants are offered more leeway in courts to provide a fair opportunity for individuals to represent themselves and as a way to award pro se litigants for their lack of legal experience. ***Williams v. Carter***, 10 F.3d 563, 567 (8th Cir. 1993). By having an attorney draft or "ghost-write" legal documents for a pro se litigant, it defeats the purpose for the "extra" leeway courts give pro se litigants with their drafted legal documents. Furthermore, courts caution the practice of attorneys "ghost-writing" on behalf of pro se litigants because it "raises serious issues of professional misconduct, and have been condemned by several other courts." ***Chriswell v. Big Score Entm't, LLC***, 2013 U.S. Dist. LEXIS 10819, at *11 (N.D. Ill. Jan. 28, 2013) (citing to ***Ricotta v. California***, 4 F. Supp. 2d 961, 987 (S.D. Cal. 1998)).

In this matter, it reasonably appears that a pro se party is actually represented by an attorney behind the curtain. As such:

> the court may be reading a document liberally that was actually drafted by an attorney. Allowing pro se parties to obtain legal fees for the assistance of an undeclared attorney behind the scenes raises a host of policy concerns. Such an action would provide the benefits of the court's liberal construction of pro se pleadings, while the party so benefited actually had the advice from counsel. Such an action would give the benefitted party an unfair advantage as well as potentially shield the ghost counsel from accountability for any of their actions. ***See Laremont-Lopez v. Southeastern Tidewater Opportunity Ctr.***, 968 F.Supp. 1075, 1077 (E.D.Va.1997) (finding it "improper for lawyers to draft or assist in drafting complaints or other documents submitted to the Court on behalf of litigants designated as pro se").

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[3] Personal information has been redacted by the undersigned from the text bubble, but not elsewhere. All other redactions are by Sweeney's counsel.

Tyler v. Salazar, 2012 U.S. Dist. LEXIS 108510, *30 (Mn. June 27, 2012).

These issues with professional misconduct generally deal with Fed. R. Civ. P 11. Rule 11(a) states that "every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented." When attorneys ghost-write legal documents for pro se litigants, they are willfully taking action providing misrepresented documents in front of the court. Since any document drafted by an attorney must be signed, failing to sign a document written for a pro se litigant is a clear violation of this rule.

When this issue has been brought in front of a court, courts commonly have "ordered the pro se plaintiff to disclose the identity of the person who had been assisting with the drafting of the pleadings." ***Johnson v . City of Joliet***, 2007 U.S. Dist. LEXIS 10111, at *3 (N.D. Ill. Feb. 13, 2007). ***See also Henning v. Cooper***, 2009 U.S. Dist. LEXIS 146212, at *4 (D.N.M. Dec. 2, 2009)(Tenth Circuit requires that an attorney cannot ethically participate in ghostwriting legal pleadings unless the client specifically commits herself to disclosing the attorney's assistance to the court upon filing).

This Court should order Mankunas to make such a disclosure. This Court should also order Sweeney's counsel to confirm if she was the scrivener of those filings.

CONCLUSION

In conclusion, for the reasons and upon the authority cited herein, BFF and Harry respectfully request that this Honorable Court enter its order enforcing the subject subpoena served on Mankunas, requiring her to produce the information within three (3) days of the Court's order; order Mankunas to disclosure who was the drafter of her filings; order Sweeney's counsel to confirm if she was the scrivener of those filings; order Mankunas and Sweeney's

counsel to pay the reasonable attorney fees and expenses incurred by BFF and Harry with regard hereto; and for such other and further relief as to this Court seems meet and just.

Respectfully submitted,

MURPHY LAW

By_s/ Mark D. Murphy__________________

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of September 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

Sherrie A. Hall
Workers Rights Law Firm LLC
2258 Grissom Drive
St. Louis, Missouri. 63146

Attorney for Plaintiff/Counterclaim Defendant

I further certify that I emailed and/or mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

Danielle Mankunas
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_s/ Mark D. Murphy__________________________
Attorney for Defendants/Counterclaim Plaintiffs

Best Foot Forward Corporation Podiatric Specialists
and Franklin W. Harry