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Attorney for Defendant/Counter Plaintiff
FRYS ELECTRONICS INC.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-RIVERSIDE

Local.Com Corporation, *a Delaware Corporation*,

Plaintiff,

vs.

Frys Electronics Inc., *a California Corporation*,

Defendant

Frys Electronics Inc., *a California Corporation*,

Counter-Claimant

vs.

Local.Com Corporation, *a Delaware Corporation*

Counter-Defendant

Case No: 8:12-CV-00976-JGB-JPR

Honorable Judge Jesus G. Bernal

DEFENDANT FRY'S ELECTORNICS REPLY IN SUPPORT OF MOTION IN LIMINE No. 2 TO EXCLUDE PLAINTIFF LOCAL.COM'S EXPERT ERICK HERRING FROM TESTIFYING

Complaint Filed: June 18, 2012

Hearing:

Date: June 10, 2013

Time: 9:00 A.M.

Location: Room 260 / 1

United States Federal Courthouse
3470 Twelfth Street
Riverside, CA 92501-3801

TO THE HONORABLE JESUS G. BERNAL, UNITED STATES DISTRICT COURT JUDGE, AND TO PLAINTIFF AND THEIR ATTORNEY OF RECORD:

I. OVERVIEW

Plaintiff's Opposition affirms Defendant's position of discovery *hide and seek* and stonewalling. Defendant's Motion in Limine clearly enunciates the need for Rule 37 sanctions caused by Plaintiff Local.com's failure to mention the existence of Herrick until the 90th day before trial. *"Accordingly, Local.com provided its expert disclosures on March 12, 2013 identifying Erick Herring as one of its intended proferred experts."* [Plaintiff's Opposition Page 2, Lines 21-11]

Plaintiff' admitted HERRING worked for Plaintiff since litigation began. and knew of HERRING'S existence as the *"chief of engineering, or vice president of engineering. He's our head engineering guy."*

Surely as the *"head engineering guy"* and newly added expert, Herrick would surely have possessed "relevant information" subject to disclosure under Rule 26(a)(1)(A)(i). But for some unexplained reason his identity was forgotten until the 90th day when suddenly Herrick possessed sufficient and relevant information that he suddenly became an expert. Notably Herrick was not even mentioned in the Rule 30(b)(6) disclosures.[1]

Plaintiff simply wants to get away with their unexplained and unjustified late disclosure of a concealed expert during discovery. Rule 37 prohibits such gamesmanship and stonewalling tactics.

II. PLAINTIFF FAILS TO UNDERSTAND THE RULE OF LAW BEHIND HIS OWN AUTHORITY OF *MILLER v. WASECA.*

Plaintiff has persisted in *hide and seek* discovery, presenting Clarke as a percipient witness, but not allowing him to respond to expert questions. Then Plaintiff's counsel agreed that a separate deposition would be allowed for

[1] Defendant's Rule 30(b)(6) deposition notices are attached to the supporting declaration of H.G. Robert Fong as Exhibits A and B.

Clarke's heightened knowledge. Now in their Opposition they cite *Miller v. Waseca Med. Ctr.*, 205 F.R.D. 537, 540 (D. Minn., 2002) to justify keeping Clarke from testifying as agreed [*"The deposing party does not have "carte blanche to depose an individual for seven hours as an individual and seven hours as a 30(b)(6) witness."* Opposition Page 4, Lines 8-10] However, Plaintiff fails to address the findings of the trial judge in *Miller* who concluded that there are a number of reasons why additional time is needed, citing to refusal to answer questions, variations of stonewalling during discovery. In fact, the trial court judge in *Miller* concluded that additional time was justified due to a parties stonewalling [*Id.* at 542: *"We have reviewed the materials submitted in connection with this motion with some care. We are satisfied that Defendants have amply demonstrated that additional time is needed for a fair examination of each of the Plaintiffs."*]

III. CONCLUSION.

Based on the forgoing, Defendant's motion in limine, precluding ERIKK HERRING from testifying should be granted in response to the hide and seek discovery tactics of Plaintiff.

Dated: May 28, 2013

By: /s/ H.G. Robert Fong
H.G. Robert Fong
Attorney for DEFENDANT
FRY'S ELECTRONICS INC.

PROOF OF SERVICE