

United States District Court,
D. Utah, Northern Division.

THE PROCTER & GAMBLE COMPANY and the Procter
& Gamble Distributing Company,
Plaintiffs,
v.

Randy L. HAUGEN et al., Defendants.

No. 1:95CV94 DAK.

Aug. 19, 2003.

Robert S. Campbell, Jr., Van, Cott, Bagley, Cornwall & McCarthy, Tracy Fowler, Alan L. Sullivan, David N. Wolf, Snell & Wilmer LLP, William H. Christensen, Callister, Nebeker & McCullough, Elizabeth King Burgess, Clawson Burgess LLC, Sean N. Egan, Salt Lake City, UT, Gail L. Wurtzler, Davis, Graham & Stubbs LLC, Neil Peck, Snell & Wilmer, Denver, CO, Thomas S. Calder, John E. Jevicky, Robert Heuck, II, Frederick N. Hamilton, Kate Moriarty, Robert Hueck, Kimberly Ellen Eliot, Steven H. Ray, Frances L. Figetakakis, Carl J. Stich, Mark C. Gaylo, Dinsmore & Shohl, Stanley M. Chesley, Theresa L. Groh, Fay E. Stiliz, Paul M. De Marco, Waite, Schneider, Bayless & Chesley LPA, Cincinnati, OH, for Plaintiffs/Counter-Defendants.

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ORDER

KIMBALL, J.

***1** Defendants' Motion for Sanctions was heard by the Court on July 15, 2003. Plaintiffs were represented by Mr. Stan Chesley, Mr. Tracy Fowler, and Mr. Joseph Suarez. Defendants were represented by Mr. Joseph Joyce and Mr. Jim Franckowiak. The Court has reviewed the file, considered the arguments of counsel, reviewed the memoranda supporting and opposing the motion, and has reviewed governing authority. After due consideration of the foregoing, the Court grants Defendants' Motion and dismisses this case with prejudice for each of the following three reasons (in other words, each reason standing alone would be sufficient for the Court's ruling in this matter):

1. Based on the reasons and arguments set forth by Defendants in support of their motion, the Court is convinced that Plaintiffs have failed to preserve relevant electronic data that Plaintiffs knew was critical to their case and to the defense. The Court is also persuaded that Plaintiffs have violated four (4) separate discovery orders requiring production of said data.

2. Based on the reasons and arguments set forth in Defendants' motion and supporting memoranda, the Court finds that it would be basically impossible for Defendants to defend this case without the electronic data that has not been produced and apparently is no longer available. Defendants would need access to all relevant IRI data to determine whether the Satanism message produced lost sales with respect to all of the products included in said Satanism message.

3. The Court finds that damages testimony and studies based on five or fewer of the more than forty products at issue here would not be admitted in evidence under **Rule 702 of the Federal Rules of Evidence** and the *Daubert* line of cases regarding the admissibility of expert testimony. Such testimony clearly would not be based upon sufficient facts or data to be admissible in this Court. Since Plaintiffs' damages evidence would not be admissible, Plaintiffs' claims must fail. Defendants' Motion to Dismiss this case with prejudice is granted for each of the foregoing three reasons discussed. All other outstanding motions in this case are moot. Each party shall bear its own costs.

* * CERTIFICATE OF SERVICE OF CLERK * *

Re: 1:95-cv-00094

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Motions, Pleadings and Filings

1:95CV00094 (Docket) (Aug. 28, 1995)

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