

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

OLIVER LUCK

Plaintiff

v.

VINCENT K. MCMAHON and
ALPHA ENTERTAINMENT LLC

Defendants.

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CIVIL NO. 3:20-cv-516 (VAB)

December 10, 2020

**PLAINTIFF OLIVER LUCK’S BRIEF POSITION STATEMENT
FOR DECEMBER 17, 2020 DISCOVERY CONFERENCE**

Preliminary Statement

Plaintiff Oliver Luck respectfully urges the Court to deny Defendants’ request for an order compelling him to provide the passcode to the iPhone issued to him by defendant Alpha Entertainment LLC (“Alpha” or “XFL”).

As set forth below, Defendants’ request for the passcode appears to be nothing more than a fishing expedition in an attempt to identify a justification for Alpha’s improper termination of Mr. Luck on April 9, 2020, right before Alpha shut down operations and filed for bankruptcy. Mr. Luck has offered to stipulate that he regularly and routinely used his iPhone for both XFL and personal purposes; such a stipulation obviates the need for Defendants to inspect the contents of the iPhone for any purpose related to the litigation. Further, and despite Defendants’ arguments to the contrary, neither Defendant has any statutory right to the passcode, as they are not employers of Mr. Luck nor is he their employee. Moreover, Defendants’ request for this conference is premature. The information at the center of this dispute has been requested in an interrogatory the response to which is not due until January 8, 2021, and Mr. Luck’s counsel has informed

Defendants' counsel that they will continue to consider the interrogatory in good faith and provide a response or objection no later than the parties' agreed-upon deadline.

Defendants' Request Should Be Denied

First, Defendants have no legitimate legal basis that entitles them to Mr. Luck's passcode and personal information. As to Alpha, its reliance on Conn. Gen. Stat. § 31-40x(c)(1) is misplaced because, under the statute's definitions, Mr. Luck is not an "employee", and Alpha is not his "employer." Section 31-40x's purpose is to "prohibit employers from requesting or requiring an *employee* or *job applicant*" to provide access to the employee's or job applicant's personal online accounts. Mar. 31, 2015, Connecticut Bill Analysis, 2015 Senate Bill 426, CT B. An., 2015 S.B. 426 (emphasis added). An exception allows an *employer* to "request or require that an *employee* or applicant provide such employer with a user name and password, password or any other authentication means for accessing . . . any electronic communications device supplied or paid for, in whole or in part, by such employer." Conn. Gen. Stat. § 31-40x(c)(1) (emphasis added); *see also* CT B. An., 2015 S.B. 426 (emphasis added). "Employee" means "any person *engaged in service* to an employer in the business of his or her employer"; "employer" means "any person engaged in business who has employees, including the state and any political subdivision thereof." Conn. Gen. Stat. § 31-40x(a)(2)-(3) (emphasis added). These narrowly defined terms are used throughout the statute's text, but neither the statute nor the bill's analysis mentions *former* employees or *former* employers nor is their definition ever expanded. *See id.* § 31-40x; CT B. An., 2015 S.B. 426.¹ Here, Mr. Luck is not "engaged in service to" Alpha. Accordingly, the

¹ Under the "plain meaning rule," the "meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered." Conn. Gen. Stat. § 1-2z.

statute and its exceptions do not apply to Mr. Luck, a former employee, or Alpha, a former employer.

Moreover, not only have the status of Alpha as employer and Mr. Luck as the employee expired, but it is noteworthy that the statute expressly prohibits employers from engaging in intrusive behavior, provides very explicit remedies for the employee's violation of very specific and limited terms (transfer of proprietary, confidential and financial information), Conn. Gen. Stat. § 31-40x(c)(2), and allows for investigation to ensure compliance with applicable laws, regulatory requirements or prohibitions against work-related employee misconduct under very circumscribed instances (receipt of specific information about activity on employee's or applicant's personal online account, or receipt of specific information about employee's or applicant's unauthorized transfer of employer's proprietary, confidential or financial data). Conn. Gen. Stat. § 31-40x(d)(1). The limitations restricting employer behavior and remedies reflect the legislature's intent that the statutory scheme on which Alpha relies is to be strictly construed. Any relief afforded Alpha does not extend beyond the statutory parameters nor live in perpetuity.

As to Mr. McMahon, he did not provide the iPhone to Mr. Luck, and he is not and never has been Mr. Luck's employer (likewise Mr. Luck is not and never has been "engaged in service to" Mr. McMahon). Therefore, he cannot rely on Conn. Gen. Stat. §31-40x(c)(1) and he is not entitled to the passcode.

Second, Defendants' request for the passcode is no more than a fishing expedition² designed to harass and embarrass Mr. Luck and invade his privacy. Mr. Luck offered to stipulate

² There can be no serious doubt that Defendants' desire to inspect the iPhone is a fishing expedition. The termination notice issued to Mr. Luck on April 9, 2020, practically on the eve of the XFL's announcement that it was shutting down operations and its bankruptcy filing, fails to mention Mr. Luck's supposed improper use of his iPhone as a basis for his termination, and Defendants are now apparently trying to come up with a post hoc justification for the termination.

that he *regularly and routinely* used the iPhone for both work and non-work purposes. Defendants rejected this proposal while offering no credible explanation as to why it is insufficient or why they need access to all of Mr. Luck's personal communications. Instead, Defendants simply make the conclusory claim that they are entitled to the "*full contents* of the iPhone" to establish "the nature and extent of Luck's violation of applicable XFL policies, Luck's breach of his Employment Contract with Alpha, and Luck's proper termination for cause under that contract." Such reasons ring hollow. Mr. Luck's proposed stipulation establishes both the nature and extent (regular and routine) of his use of the iPhone for work and non-work purposes, and arguably establishes a technical violation of XFL policy.³ In light of that proffer, Defendants simply provide no credible explanation as to why they require unfettered access to Mr. Luck's iPhone for purposes of the issues in this case, nor why the privacy of Mr. Luck -- who is no longer an employee of Alpha -- should be disturbed. Thus, neither Mr. McMahon nor Alpha should be granted unrestricted access to the contents of Mr. Luck's iPhone.

Third, Defendants' request for a discovery conference is premature. Defendants have sought this conference to compel the production of the iPhone passcode (as requested in an interrogatory served by Mr. McMahon) notwithstanding the fact that Mr. Luck's responses and objections to Defendants' discovery requests are not due to be served until January 8, 2020, per agreement of counsel. [Ex. 1, e-mail dated November 24, 2020]. Noticeably absent from Defendants' request for this conference is a reference to any outstanding discovery request to which Plaintiff has not timely replied or with which Plaintiff has not timely complied. Defendants are improperly seeking to shorten the time to which Mr. Luck is entitled to serve his response to Interrogatory No. 1. Further, as recently as December 7, 2020, Mr. Luck's counsel informed

³ Mr. Luck, of course, does not concede that regular and routine use of the XFL-issued iPhone constituted "cause" to terminate his employment.

Defendants' counsel that they would continue to consider that Interrogatory in good faith, and advise of Mr. Luck's position by the agreed-upon January 8 deadline. While Defendants now seek to shorten Mr. Luck's time to answer Interrogatory No. 1, in seeking an order requiring an immediate response, Defendants fail to inform the Court that they previously rejected Mr. Luck's proposal that the parties serve discovery responses and objections *earlier* than January 8, 2021.

Further, it would serve the interests of efficiency and judicial economy to resolve all discovery issues at one time rather than raise issues with the Court piecemeal; once the parties serve their responses and objections to each other's discovery requests, they may have disagreements on other discovery issues. If so, it would be more efficient for the Court to address all discovery issues at the same time.

WHEREFORE, Plaintiff Oliver Luck respectfully requests that the Court deny Defendants' request to require unfettered access to the full contents of Mr. Luck's iPhone and deny Defendants' request for Mr. Luck's passcode to the iPhone.

Signature of counsel on following page.

PLAINTIFF OLIVER LUCK

/s/ Paul J. Dobrowski

Paul J. Dobrowski (phv10563)
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Jared A. McHazlett (phv10650)
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AND

/s/ Andrew M. Zeitlin

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HIS ATTORNEYS

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2020, a copy of the foregoing was filed electronically and served on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system, or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Paul J. Dobrowski

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EXHIBIT A

From: [Vanessa Lee Pierce](#)
To: [Mueller, Jeff](#); [Krasik, Curtis B.](#); [McDevitt, Jerry](#)
Cc: [Paul Dobrowski](#); [Katz, Joette](#); [Jared McHazlett](#); [Gleason, Sarah E.](#); ["Zeitlin, Andrew"](#)
Subject: RE: Oliver Luck v. Vincent K. McMahon- Pending and Proposed Discovery Deadlines
Date: Tuesday, November 24, 2020 3:09:00 PM
Attachments: [image003.png](#)
[image005.png](#)

Hi Jeff and Curt,

To confirm our phone call and make sure we're all on the same page, the parties have agreed to serve written responses to pending discovery by January 8. Luck may serve discovery on Alpha before it appears, and you have agreed to accept service of such discovery. No written discovery responses or objections are due this week from either McMahon or Luck. Let me know if you disagree with any of the foregoing. Additionally, you are confirming whether January 15 is doable for a mutual production of documents deadline for all parties and will let us know within a week from today. Please also let us know at that time about the proposed deadlines Andy provided in response to your proposed deadlines below.

To All – Happy Thanksgiving. I hope it's as normal as it can be this year.

Best,

Vanessa L. Pierce

main: 713.659.2900 | direct: 713.800.0416

From: Mueller, Jeff <jmueller@daypitney.com>
Sent: Friday, November 20, 2020 3:19 PM
To: 'Zeitlin, Andrew' <AZeitlin@goodwin.com>; Krasik, Curtis B. <Curtis.Krasik@klgates.com>; McDevitt, Jerry <Jerry.McDevitt@klgates.com>
Cc: Paul Dobrowski <pjd@doblaw.com>; Vanessa Lee Pierce <vpierce@doblaw.com>; Katz, Joette <JKatz@goodwin.com>; Jared McHazlett <jmchazlett@doblaw.com>; Gleason, Sarah E. <SeGleason@goodwin.com>
Subject: RE: Oliver Luck v. Vincent K. McMahon- Pending and Proposed Discovery Deadlines

Andy:

Thank you for your email below.

We have inserted our proposal for the dates for the new Rule 26(f) report below in **bold**. As you will see, we propose extending the dates in the current Rule 26(f) report by approximately 6 months to account for the approximately 4 month stay (6/26/20-10/20/20) and the over 2 month period for Alpha to join the case and assert its answer and counterclaims (10/20/20-1/8/20). We believe that these proposed dates more accurately reflect the time frames on which the parties agreed in the

current Rule 26(f) report.

We also have inserted our proposal for unified deadlines for discovery responses and document production for all parties. As we indicated in the call yesterday, in light of Alpha's recent addition to the case, we believe that such unified deadlines best provide an orderly and even-handed process for moving the case forward without unnecessary delay.

In order to proceed with a reciprocal production of documents in accordance with these deadlines, however, we will need to promptly resolve the dispute concerning the passcode for Alpha's iPhone that was issued to Mr. Luck. Since you have made clear that Mr. Luck will not provide the passcode during our conference on that issue, we know that critical electronically-stored information will not be made available to us on the date of the ostensibly reciprocal production. We, therefore, intend to raise that issue with the judge promptly so that it can be resolved well in advance of any deadline for reciprocal document production.

Please let us know if you have any questions regarding the dates we have proposed or would like to discuss further.

Jeff

Jeffrey P. (Jeff) Mueller | Attorney at Law | [Attorney Bio](#)



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From: Zeitlin, Andrew <AZeitlin@goodwin.com>

Sent: Thursday, November 19, 2020 2:31 PM

To: Krasik, Curtis B. <Curtis.Krasik@klgates.com>; Mueller, Jeff <jmueller@daypitney.com>;
McDevitt, Jerry <Jerry.McDevitt@klgates.com>

Cc: Paul Dobrowski <pjd@doblaw.com>; Vanessa Lee Pierce <vpierce@doblaw.com>; Katz,
Joette <JKatz@goodwin.com>; 'Jared McHazlett' <jmchazlett@doblaw.com>; Gleason, Sarah
E. <SeGleason@goodwin.com>

Subject: RE: Oliver Luck v. Vincent K. McMahon- Pending and Proposed Discovery Deadlines

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Curt and Jeff - Thank you for speaking with us yesterday. To recap our proposal, we suggest the schedule listed below. Would you please let us know in the next couple of days if you agree with those dates or have different dates you wish to propose? Thanks.

December 4, 2020 – Alpha to serve discovery requests

Jan. 8, 2021 - Alpha to serve Answer and Counterclaim

January 8, 2021 – All written responses and objections to all discovery requests

Jan. 15, 2021 - Initial disclosures to be served, pursuant to FRCP 26(a)(1)

January 29, 2021 – Documents to be produced in response to RFPs

Jan. 29, 2021 - Luck to answer, move or otherwise respond to Counterclaim

March 5, 2021 – Amendment of pleadings

April 16, 2021 Feb. 12, 2021 - Damages analysis will be provided by any party who has a claim or counterclaim for damages

April 16, 2021 Feb. 12, 2021 - Parties to designate trial experts and provide opposing counsel with reports from retained experts pursuant to Fed. R. Civ. P. 26(a)(2) ~~on any issues on which they bear the burden of proof~~

May 14, 2021 March 12, 2021 - Depositions of above experts to be completed

June 18, 2021 April 16, 2021 - Parties to designate all **rebuttal** trial experts and provide opposing counsel with reports from retained **rebuttal** experts pursuant to Fed. R. Civ. P. 26(a)(2) ~~on any issues on which they do not bear the burden of proof~~

July 16, 2021 May 14, 2021 - Depositions of above experts to be completed

July 16, 2021 May 14, 2021 - All fact and expert discovery to be completed (not propounded)

August 20, 2021 June 11, 2021 - Summary judgment motions to be filed

September 3, 2021 June 25, 2021 - Joint trial memorandum to be filed (if no summary judgment motions are filed; if summary judgment motion filed, deadline to file joint trial memorandum is 30 days after court's ruling)

October 8, 2021 Aug. 6, 2021 - Case ready for trial (if no summary judgment motion filed; if summary judgment motion filed, case ready for trial within 30 days of filing joint trial memorandum)

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From: Mueller, Jeff <jmueller@daypitney.com>
Sent: Friday, November 13, 2020 9:47 AM
To: 'Jared McHazlett' <jmchazlett@doblaw.com>; McDevitt, Jerry <Jerry.McDevitt@klgates.com>; Krasik, Curtis B. <Curtis.Krasik@klgates.com>
Cc: Paul Dobrowski <pjd@doblaw.com>; Vanessa Lee Pierce <vpierce@doblaw.com>; Zeitlin, Andrew <AZeitlin@goodwin.com>; Goldstein, Eric <EGoldstein@goodwin.com>; Katz, Joette <JKatz@goodwin.com>; Gleason, Sarah E. <SeGleason@goodwin.com>
Subject: RE: Oliver Luck v. Vincent K. McMahon- Pending and Proposed Discovery Deadlines

EXTERNAL EMAIL

Jared: We are available to discuss these issues with you next Wednesday after 10:30 if that works for you. Jeff

From: Jared McHazlett <jmchazlett@doblaw.com>
Sent: Thursday, November 12, 2020 2:47 PM
To: Mueller, Jeff <jmueller@daypitney.com>; McDevitt, Jerry <Jerry.McDevitt@klgates.com>; Krasik, Curtis B. <Curtis.Krasik@klgates.com>
Cc: Paul Dobrowski <pjd@doblaw.com>; Vanessa Lee Pierce <vpierce@doblaw.com>; Zeitlin, Andrew <AZeitlin@goodwin.com>; Goldstein, Eric <EGoldstein@goodwin.com>; Katz, Joette <JKatz@goodwin.com>; Gleason, Sarah E. <SeGleason@goodwin.com>
Subject: Oliver Luck v. Vincent K. McMahon- Pending and Proposed Discovery Deadlines

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Good Afternoon Jeff,

Now that the stay has been lifted, when can we discuss a potential agreement regarding the response deadlines for the outstanding discovery requests from both Mr. McMahon and Mr. Luck, which would have been due in early July had the Court not issued its stay order?

Also, when can we confer to discuss proposing a new scheduling order for the court as the court did not rule on the prior proposed scheduling order before the case was stayed, and many of the dates in the prior proposed scheduling order have passed?

Thank you,

Jared McHazlett



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