

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI**

Derrick Thomas,

*On behalf of himself and those
similarly situated,*

Plaintiff,

v.

Papa John's International, Inc., *et al.*,

Defendants.

Case No. 1:17-cv-411

Judge Michael R. Barrett

**DEFENDANTS' JOINT MOTION TO STRIKE PLAINTIFF'S RESPONSE
IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL**

Defendants, It's Only Downtown Pizza, Inc., It's Only Pizza, Inc., It's Only Downtown Pizza II, Inc., It's Only Papa's Pizza, LLC, Michael Hutmier, and Papa John's International, Inc., jointly move the Court for an order striking Plaintiff's 69-page *Response in Opposition to Defendants' Motion to Compel Discovery and Cross-Motion for Protective Order* (Doc. 91) (the "Response").

As explained in the attached Memorandum in Support, the Court should strike the Response because:

- (i) it was untimely;
- (ii) at 69 pages in length, it is more than three-times the length of the 20-page limit contained in both Local Rule 7.2(a)(3) and this Court's Standing Order On Civil Procedures (the "Standing Order") Section (I)(G); and

(iii) it contains 2,457 words in 31 separate footnotes in violation of Standing Order Section (I)(G).

In the alternative, the Court should allow Defendants a commensurate page increase and to file their Replies on February 4, 2021.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

Defendants are loath to clutter this Court's docket with yet another motion, particularly one that concerns a matter of procedure. But Plaintiff's Response (Doc. 91) so flagrantly violates the Local Rules and this Court's Standing Order, and prejudices Defendants, that it must be stricken.

I. THE COURT SHOULD STRIKE PLAINTIFF'S UNTIMELY RESPONSE AND TREAT DEFENDANTS' MOTION TO COMPEL AS UNOPPOSED

In direct contravention of this Court's Local Rules and Standing Order, Plaintiff filed his Response to Defendants' Motion to Compel a week past the deadline. The Motion to which it responds (Doc. 85) was filed on November 10, 2020. Accordingly, pursuant to Local Rule 7.2(a)(2), any response was due on or before December 1, 2020. Plaintiff intentionally delayed and filed his 69-page response on December 8, 2020 – a week late. On this threshold basis alone, the Court should strike the Response and grant Defendants' Motion to Compel as unopposed.

This Court is not obligated to consider Plaintiff's untimely opposition. *See U.S. v. Pleasant*, 12 F. App'x 262, 269 (6th Cir. 2001) (“[W]e are not obligated to consider the issues raised by defendant's untimely brief”); *Miller v. Food Concepts Int'l, LP*, No. 2:13-CV-124, 2016 WL 1671001, at *2 (S.D. Ohio Apr. 27, 2016) (striking late exhibits filed less than one hour after the filing deadline). Indeed, in similar circumstances, courts have treated pleadings as unopposed when a party fails to comply with court-imposed filing deadlines. *See, e.g., Castleberry v. Neumann Law P.C.*, No. 1:07-CV-856, 2008 WL 5744179, at *5 (W.D. Mich. July 9, 2008) (“the court will treat the defendants' motion as unopposed”); *Hayes v. Konteh*, 2008 WL 596097, *2 (N.D. Ohio Mar. 4, 2008) (“[T]he Court need not consider this untimely objection”).

Plaintiff has offered no sufficient justification for his untimeliness. It is true that at 5:36pm on the twentieth day after the motion to compel was filed (and therefore only one day before

Plaintiff's filing deadline), Plaintiff did seek leave of Court to extend his deadline by one week so that he could finish his 69-page brief. (*See* Motion, Doc. 88). But the Court did not grant the leave requested, nor did the Defendants consent to the extension.¹ And rather than pare down his brief and file it on time, Plaintiff instead intentionally disregarded his deadline and pressed forward drafting a 69-page brief. As discussed in Defendants' opposition to Plaintiff's Motion for Extension of Pages (Doc. 89), Plaintiff's basis for requesting additional time was not "[d]ue to the intervening Thanksgiving holiday, and the complex nature of Defendants' Motion" – which is what he represented to the Court. Instead, Plaintiff told Defendants that he preferred a time extension because "[they] do not yet have a ruling on the Motion for Extension of Pages." (Doc. 89, PageID 1520). Hence, far from a case of excusable neglect, Plaintiff's tardiness was deliberate and strategic. Plaintiff acknowledged the deadline was arising, knew that he did not have leave of Court to ignore it, knew that the Defendants had not consented to the extension, but still failed to meet his deadline.

II. THE COURT SHOULD ALSO STRIKE PLAINTIFF'S RESPONSE BECAUSE IT IS MORE THAN THREE TIMES THIS COURT'S PAGE LIMITATIONS

The issue here is not just a week-late filing. The Response should also be stricken because it flagrantly violates this Court's Standing Order concerning page limitations and footnotes. Section (I)(G) of the Standing Order provides:

BRIEFS AND/OR MEMORANDA IN SUPPORT OF OR IN OPPOSITION TO ANY MOTION IN THIS COURT SHALL NOT EXCEED TWENTY PAGES WITHOUT FIRST OBTAINING LEAVE OF COURT.

(Bold and all capital letters in original).

That Section of the Standing Order also requires that "all briefs and memoranda shall comport

¹ PJI responded that it would agree to the requested extension on the condition that (1) Plaintiff agrees to extend Defendants' deadline for their opposition to class certification by 30 days; and (2) if the Court grants Plaintiff's page increase, Plaintiff agrees to extend Defendants' deadline to file a reply in support of their motion to compel until January 15, 2021 and also agrees to a commensurate page increase. (Doc. 89, PageID 1520.)

with the following: . . . (3) Citations to be in main body of text and not in footnotes.”

Here, Plaintiff’s Memorandum (Doc. 91) is 69 pages in length, exclusive of the table of contents and certificate of service. If that were not bad enough, it contains 31 separate footnotes which, according to the undersigned’s word processor, contain a total of 2,457 words not in the body of the brief. If those footnotes were formatted in twelve-point, double-spaced font like the rest of the brief, they alone would amount to ten additional pages of text.

It is fundamentally unfair to Defendants for Plaintiff to simply disregard Local Rules at his choosing. Defendants are now forced to reply to a 69-page (effectively 79-page) brief with a two-week turnaround, due three days before Christmas. This leaves Defendants with no choice but to either move to strike the procedurally improper brief, or to themselves move for additional time and additional pages to brief a discovery issue – all because Plaintiff chose to flout the Local Rules and this Court’s Standing Order.

Authority is clear that parties cannot disregard rules when it suits their strategic needs. *See Cacevic v. City of Hazel Park*, 226 F.3d 483, 492 (6th Cir. 2000) (district court properly disregarded evidence proffered after grant of summary judgment; “Although it may seem harsh to turn a blind eye to the ... belated proffer of evidence, that is the price to be paid by litigants who do not comply with the rules”); *see also Mendez v. Banco Popular de Puerto Rico*, 900 F.2d 4, 7 (1st Cir. 1990) (“Rules are rules – and the parties must play by them. In the final analysis, the judicial process depends heavily on the judge’s credibility. To ensure such credibility, a district court must often be firm in managing crowded dockets and demanding adherence to announced deadlines. If he or she sets a reasonable due date, parties should not be allowed casually to flout it or painlessly to escape the foreseeable consequences of noncompliance.”). Because the Plaintiff’s violations were numerous and deliberate, the Court should strike the Response.

III. ALTERNATIVELY, DEFENDANTS REQUEST ADDITIONAL TIME AND PAGES

Defendants maintain that Plaintiff's Response should be stricken. However, if the Court is inclined to accept Plaintiff's Response, Defendants respectfully request the opportunity to submit Replies that are commensurate in page number and to file them on February 4, 2021. Plaintiff's Response is effectively 79 pages and addresses a fundamental issue in this case (i.e., the reimbursement standard). Additional pages are necessary to enable Defendants to adequately, but still succinctly, address the host of legal issues raised by Plaintiff in his Response. Without the additional pages, Defendants will likely be forced to abandon important grounds for rejecting Plaintiff's arguments. Defendants make this request in good faith and not to delay.

IV. CONCLUSION

For all of the foregoing reasons, the Court should strike Plaintiff's Response (Doc. 91) and deem Defendants' Motion to Compel unopposed, or alternatively allow Defendants a commensurate page increase and to file their Replies on February 4, 2021.

Respectfully submitted,

/s/ Brian P. O'Connor

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been served upon all attorneys of record via the Court's CM/ECF system on December 14, 2020.

/s/ Brian P. O'Connor

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