

ECF TRANSCRIPTION SHEET



ANDREW J. PECK
UNITED STATES MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT
Southern District of New York
United States Courthouse
500 Pearl Street, Room 1370
New York, N.Y. 10007-1312

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Dated: March 25, 2014

Total Number of Pages: 5

MEMO ENDORSED:

1. Speaking objections are prohibited. If there is an "objection to forms," state it as such, in those words.
2. Application for costs denied w/o prejudice to renewal if there are speaking objections at any future deposition.

Copies by ECF to: All Counsel
Judge Gardephe

McKool Smith

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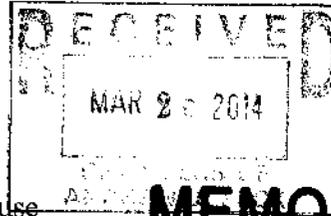
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BY HAND DELIVERY

The Honorable Andrew J. Peck
United States Magistrate Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, New York 10007

MEMO ENDORSED - 14

RE: *Lexos Media, Inc. v. Zynga, Inc.*, 1:12-cv-07994-PGG-AJP

Dear Judge Peck:

On behalf of Plaintiff Lexos Media, Inc. ("Lexos"), we submit this letter to follow up on the letter motion filed by counsel for Zynga, Inc. ("Zynga") on March 21, in which an adjournment was requested on behalf of both parties so that discovery issues can be resolved without the Court's involvement. In anticipation of additional depositions in the next three weeks, there is one troubling issue that requires the Court's immediate assistance relating to the conduct of Zynga's counsel.

On March 7, 2014, Lexos took its first deposition of a Zynga corporate representative. During the deposition, Zynga's counsel engaged in numerous speaking objections and repeatedly and blatantly coached the witness, even interrupting the witness in the middle of his testimony to instruct him on what to say and what not to say, and literally whispering answers into the witness's ear. Thus, Lexos respectfully requests an order:

- (1) Prohibiting speaking objections in all future depositions;
- (2) Requiring counsel to limit their objections to form; and
- (3) Ordering that Zynga pay Lexos's fees and costs for the March 7 deposition transcript.

Almost as soon as the deposition began, Zynga's counsel, Sonali Maitra, interrupted the deposition with speaking objections and, when asked to refrain from continuing in such conduct, Zynga's counsel refused to do so, stating (incorrectly) that the federal rules did not preclude speaking objections (Bajwa Tr. at 12):

6 Q. And who are the design managers that report to
7 you?
8 MS. MAITRA: Objection. Vague as to which

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9 game.

10 MR. DEHONEY: And I just ask, Sonali, that you
11 limit your objections to form as opposed to having
12 speaking objections which are not permitted by the
13 federal rules.

14 **MS. MAITRA: What provision of the federal**
15 **rules precludes speaking objections?**

16 MR. DEHONEY: My experience with depositions
17 under federal rules has always been that speaking
18 objections are not permitted.

The law is clear under Rule 30(c)(2) of the Federal Rules provides that “[a]n objection must be stated concisely in a nonargumentative and nonsuggestive manner.” Accordingly, this Court and others have held that “‘speaking objections’ that cue a witness how to answer (or avoid answering) a question are prohibited.” *Fort Worth Emples. Ret. Fund v. J.P. Morgan Chase & Co.*, 2013 U.S. Dist. LEXIS 173006, at *15 (S.D.N.Y. Dec. 9, 2013) (quoting *Meyer Corp. U.S. v. Alfay Designs, Inc.*, 2012 U.S. Dist. LEXIS 113819, at *11 (E.D.N.Y. Aug. 13, 2012)). Thus, counsel “must refrain, when making an objection, from stating that a question is vague, ambiguous or calls for speculation. Counsel should simply state, ‘Objection as to form.’” *Meyer*, 2012 U.S. Dist. LEXIS 113819, at *11.

When the witness was asked a basic question about his LinkedIn profile, Zynga’s counsel posed five successive objections to one simple (and non-controversial) question, engaged in lengthy colloquy and interrupted the witness before allowing him to answer (Bajwa Tr. at 34-35):

8 Q. What are the key metrics in the context of this
9 sentence?

10 A. You know, there are a lot of metrics. We have
11 games with millions and millions of players, and we
12 measure a lot of different metrics. At a high level,
13 the metrics that I am referring to here are metrics
14 related to our growth and revenue.

15 Q. Are there any specific examples of those
16 metrics that you can think of right now?

17 **MS. MAITRA: Objection. David, I feel like we**
18 **are focusing no longer on Hidden Chronicles. As I**
19 **understand, you need to establish the basis of his**
20 **knowledge, but right now it feels like you're asking**
21 **questions about games that do not necessarily pertain to**
22 **Hidden Chronicles; so I would request at this point that**
23 **you confine your questions to Hidden Chronicles.**

24 MR. DEHONEY: You can answer the question.

25 MS. MAITRA: Okay. Then I object on the basis
1 that it is outside the scope of the 30(b)(6) deposition.

2 MR. DEHONEY: Are you instructing the witness
3 not to answer?

4 MS. MAITRA: No. I said I object.

5 MR. DEHONEY: Okay.

6 MS. MAITRA: Outside the scope. And if it
7 continues, I will argue that this is a violation of the
8 court order and in violation of the parties' agreement
9 as to the scope of this deposition.

When the witness was asked a question about what features might be included in a "monetization road map," Zynga's counsel continued her speaking objections in an effort to preclude discovery (Bajwa Tr. at 37-38):

6 BY MR. DEHONEY: Q. What any of those features
7 might be based on your experience.

8 **MS. MAITRA: Objection. Wildly overbroad.**

9 THE WITNESS: It varies by game. It varies by
10 time. It's -- like I said, it's a set of revenue
11 features which can be anything that relates to revenue.

12 BY MR. DEHONEY: Q. Can you give me any
13 examples of those revenue features?

14 **MS. MAITRA: Objection. Vague as to "those**
15 **revenue features."**

16 THE WITNESS: Do you want me to just say any
17 revenue feature?

18 BY MR. DEHONEY: Q. I believe you said that
19 monetization road map refers to revenue features.

20 Is that correct, or did I misunderstand you?

21 A. Yes, yes.

22 Q. Can you give me any examples of what those
23 revenue features would be?

24 **MS. MAITRA: Same objection. Wildly overbroad**
25 **and outside the scope.**

While the witness was answering a question about consumer surveys, Zynga's counsel literally whispered in the witness's ear -- but loud enough for the court reporter to transcribe (Bajwa Tr. at 66) -- a specific instruction to the witness on what to say:

14 BY MR. DEHONEY: Q. And you mentioned consumer
15 surveys.

16 Are those consumer surveys conducted by Zynga
17 or a third party?

18 A. Each game is different. The service that I am
19 aware of were done by our team, but they would be hosted
20 on something like SurveyMonkey which is an external
21 vendor.

22 MS. MAITRA: Just to be clear, you're talking
23 about Hidden Chronicles.

24 THE WITNESS: For Hidden Chronicles.

25 MR. DEHONEY: And Counsel, I would just ask
1 that you not coach the witness

Zynga made over 120 speaking objections during the deposition (the transcript of which spans just 103 pages), a copy of the transcript is enclosed herewith so the Court can fully review Zynga's conduct during the examination. In circumstances like this, this Court has found that sanctions are appropriate. *See Morales v. Zondo*, 204 F.R.D. 50, 54 (S.D.N.Y. 2001) (granting sanctions where counsel "appears on more than 85 percent of the pages of the deposition transcript . . . with statements other than an objection as to form"); *Unique Concepts, Inc. v. Brown*, 115 F.R.D. 292, 293 (S.D.N.Y. 1987) (imposing sanctions where counsel appeared on 91 percent of the pages of the transcript with statements other than an objection as to form).

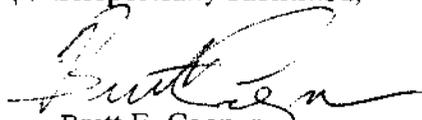
In light of the above, we respectfully request an order from the Court:

- (1) Prohibiting speaking objections in all future depositions;
- (2) Requiring counsel to limit their objections to form; and
- (3) Ordering that Zynga pay Lexos's fees and costs for the March 7 deposition transcript.¹

MEMO ENDORSED

3/24/14 Respectfully submitted,

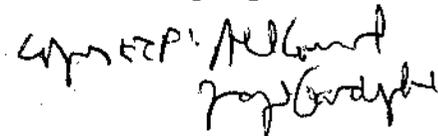
1. Speaking objections are prohibited. If there is an objection to form's state it as such, in these words


Brett E. Cooper

cc: Counsel of Record

2. Appellate for costs denied also payable to counsel if there are any objections at any future deposition.

¹ The cost for the transcript is \$1,426.66 and Mr. Dehoney's normal hourly rate multiplied by the time he actually took the deposition is \$1,425.00, for a total of \$2,851.66 – other fees and costs associated with the deposition are not included in this total and are not being sought at this time. *See Morales*, 204 F.R.D. at 54; *Unique Concepts*, 115 F.R.D. at 293.



SO ORDERED:


Hon. Andrew J. Peck
United States Magistrate Judge