
Superior Court of New Jersey

Appellate Division

Docket No. A-002031-23 (AM-000056-23)

ATLANTIC ER PHYSICIANS	:	CIVIL ACTION
TEAM PEDIATRIC	:	
ASSOCIATES, PA,	:	ON APPEAL FROM AN
EMERGENCY CARE SERVICES	:	ORDER OF THE SUPERIOR
OF NJ, PA, EMERGENCY	:	COURT OF NEW JERSEY,
PHYSICIAN ASSOCIATES OF	:	LAW DIVISION,
NORTH JERSEY, PC,	:	GLOUCESTER COUNTY,
EMERGENCY PHYSICIAN	:	COMPLEX BUSINESS
ASSOCIATES OF SOUTH	:	LITIGATION PART
JERSEY, PC,	:	DOCKET NO.: GLO-L-1196-20
<i>(For Continuation of Caption See</i>	:	Sat Below:
<i>Inside Cover)</i>	:	HON. JAMES R. SWIFT,
	:	J.S.C.

BRIEF FOR DEFENDANTS-APPELLANTS UNITEDHEALTH GROUP, INC., UNITEDHEALTHCARE INSURANCE COMPANY, OXFORD HEALTH PLANS (NJ), INC., UMR, INC., AND MULTIPLAN, INC.

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Date Submitted: May 10, 2024

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SERVICES OF NEW JERSEY,
PA, MIDDLESEX EMERGENCY
PHYSICIANS, PA and
PLAINFIELD EMERGENCY
PHYSICIANS, PA,

Plaintiffs-Respondent,

vs.

UNITEDHEALTH GROUP, INC.,
UNITEDHEALTHCARE
INSURANCE COMPANY,
OXFORD HEALTH PLANS (NJ),
INC., MULTIPLAN, INC., and
UMR, INC.,

Defendants-Appellants.

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PRELIMINARY STATEMENT

New Jersey’s Rules of Court, like the federal rules and those of other states, permit discovery only of documents relevant to the case and responsive to valid discovery requests. And courts nationwide recognize that an electronic search term does not, by itself, establish that every document collected through use of the term is relevant and responsive. For that reason, courts and practitioners widely recognize that running search terms is only the *first* step in discovery involving electronically stored information (“ESI”)—further review of the documents collected is necessary to ensure that only relevant and responsive documents are actually disclosed to the requesting party.

The trial court in this case broke from that established understanding and discarded the “relevance” requirement inscribed in New Jersey discovery rules because, according to the court, “ESI is different.” Based on that premise, the trial court ordered the production of tens of thousands of electronically stored documents that the court itself acknowledged will be “wholly non-responsive” to any discovery requests and will contain “only irrelevant information,” merely because those documents hit on ESI search terms (the “ESI Order”).

The ESI Order sets a dangerous precedent, and the New Jersey Supreme Court has taken the rare step of authorizing an immediate appeal. Defendants United Health Group Inc., United Healthcare Insurance Company, Oxford

Health Plan (NJ) Inc., and UMR, Inc. (collectively “United Defendants”) and MultiPlan, Inc. (“MultiPlan”) (collectively “Defendants”) urge its reversal.

First, the ESI Order plainly exceeds the bounds of Rule 4:10-2(a), which authorizes a court to compel production only of documents relevant to the claims or defenses involved in the pending action. As this Court has repeatedly emphasized, relevancy is the touchstone of discovery, and Rule 4:10-2(a) expressly applies the relevancy standard to paper documents *and ESI* alike. Yet the trial court declined to apply the relevancy limitation, adopting the ESI Order even though it would admittedly require production of a “significant number” of irrelevant documents. The court cited no legal authority justifying an order compelling a party to produce concededly irrelevant documents.

Second, and independently, the trial court abused its discretion by imposing enormous burdens on Defendants with no countervailing justification. There is never good reason to compel production of irrelevant documents, but Defendants have particular reason for concern here: in a related case, Plaintiffs’ affiliate breached a confidentiality order by disclosing Defendants’ sensitive business information. And beyond those case-specific concerns, mandating production of irrelevant document is especially unreasonable where readily-available alternative procedures would minimize burdens on the parties and the

court, including the appointment of a special discovery master—a standard mechanism the trial court itself had already invoked in this case.

The implications of the trial court’s no-relevancy-review approach are startling. As courts, commentators, and even Plaintiffs agree, there is no way to design ESI search terms that will wholly exclude irrelevant documents. Forgoing relevancy review thus leaves parties with an untenable choice: use search terms to screen ESI while producing vast quantities of irrelevant information, or forgo the potential efficiencies of ESI screening altogether. That outcome would harm everyone, not just the party forced to produce legally irrelevant—but still highly sensitive—documents. It would compound discovery costs, as producing parties would need to conduct laborious privilege reviews for thousands of irrelevant documents, while requesting parties would waste time wading through the same stack of irrelevant documents in which they have no legitimate interest. It would force courts to police unnecessary disputes—resolving claims of privilege for irrelevant documents and enforcing confidentiality orders for documents that never should have been produced in the first place. And it would do nothing to advance the purpose of discovery, which is to enable litigants to obtain non-privileged information *relevant* to the “subject matter involved in the pending action.” R. 4:10-2(a).

For these reasons, the ESI Order should be reversed.

PROCEDURAL HISTORY

This discovery dispute arises as part of ongoing, nationwide litigation between the United Defendants and Plaintiffs’ affiliates. The United Defendants are insurers or administrators of employer-sponsored health benefit plans. Da60 ¶ 17. Plaintiffs are physician practice groups who provide staffing for hospital emergency rooms. Da2 ¶ 5. Plaintiffs allege that between May 15, 2020, and December 31, 2021, Defendants underpaid thousands of claims for out-of-network emergency medical services. Da6-7 ¶¶ 24-29. Plaintiffs further allege that MultiPlan, a third-party cost-containment vendor, conspired with the United Defendants to underpay claims by offering an allegedly fraudulent health claim pricing service. Da8-11 ¶¶ 35-49. Plaintiffs brought suit raising several causes of action, including counts for quantum meruit and violations of New Jersey’s Health Claims Authorization, Processing and Payment Act (“HCAPPA”) against the United Defendants, as well as counts under New Jersey’s Racketeer Influenced and Corrupt Organizations Act (“RICO”) against all Defendants. Da11-22 ¶¶ 51-116.¹

In April 2023, the trial court entered an Electronic Discovery Stipulation and Order (“ESI Stipulation”). Da79-86 ¶¶ 1-13. The ESI Stipulation required

¹ The trial court dismissed Plaintiff’s cause of action for breach of implied-in-fact contract. Da77-78.

the parties to collaborate in identifying “custodians whose email is reasonably believed to contain relevant ESI for collection, *review* and production” and in developing “search parameters” to use in searching the agreed-upon custodians’ ESI. Da79 ¶ 3 (emphasis added). The trial court subsequently entered an Amended Discovery Confidentiality Order allowing the parties to designate documents “Confidential” or “Attorney’s Eyes Only.” Da89-96 ¶¶ 1-2. On May 1, 2023, the court also appointed a Special Discovery Master pursuant to Rule 4:41-1 “to hear and recommend resolution of all discovery disputes between the parties.” Da97.

On July 6, 2023, during an unrecorded case management conference, the trial court directed the parties (the “July 6 Directive”) to produce *all* documents returned by the ESI search terms, regardless whether they were responsive or relevant. Da123 ¶ 17. Defendants subsequently requested a pre-motion conference pursuant to Rule 4:105-4 to address the trial court’s July 6 Directive. Da102-06. The court held the Rule 4:105-4 pre-motion conference on August 24, 2023. T3:1-T38:9.² On September 13, 2023, the trial court entered the ESI Order that formalized its July 6 Directive. Da166-68.

² “T” refers to the transcript of the August 24, 2023 pre-motion conference.

This appeal followed. On October 2, 2023, Defendants filed a motion for leave to appeal the ESI Order to this Court. Da184-86. After this Court denied the motion, *id.*, Defendants filed a motion for leave to appeal the ESI Order to the Supreme Court of New Jersey. Da187-88. On March 8, 2024, the New Jersey Supreme Court granted the motion for leave to appeal and remanded the matter to this Court for consideration on the merits. Da189.

STATEMENT OF FACTS

A. Plaintiffs' Allegations

The dispute underlying this appeal concerns the United Defendants' reimbursement rates for certain claims for out-of-network emergency medical services provided by Plaintiffs between May 15, 2020 and December 31, 2021. Da6 ¶ 24. Despite the fact that there was no network agreement or other contract between the parties that required payment at a particular rate, Plaintiffs allege that the United Defendants failed to pay the "reasonable value" for Plaintiffs' services because the payments were less than 100% of the amount Plaintiffs unilaterally charged. Da6-8; Da57-58, Da61 ¶¶ 1-4, 26-29. Plaintiffs also brought New Jersey RICO racketeering and conspiracy claims against the United Defendants and MultiPlan, alleging that the two parties conspired to make false representations about their rates of reimbursement, thus fraudulently

inducing Plaintiffs to provide medical services. Da8-11; Da15-20 ¶¶ 35-43, 73-100. Defendants deny all allegations. Da26-43 ¶¶ 1-116; Da56-68 ¶¶ 1-116.

B. Related Litigation

Affiliates of Plaintiffs and the United Defendants have been engaged in litigation in at least 10 related matters since 2017. Da119 ¶ 3. In each case involving a stipulation for conducting ESI discovery, the parties have acknowledged that the search terms would result in a large amount of false hits, and that each party would review their own documents for responsiveness and relevance before making a production. Da120-21 ¶ 5.

C. ESI Negotiations in this Case

Pursuant to the trial court’s ESI Stipulation, the parties spent approximately three months discussing proposed search terms and lists of custodians “whose email is reasonably believed to contain relevant ESI for collection, review and production.” Da79 ¶ 3; Da121-22 ¶¶ 9-10; Da111-17. At all times during these negotiations, the parties understood that the search terms were just an initial step in their document-production obligations. Da122 ¶ 11. Consistent with past practice, once a document “hit” on any of the search terms, the parties understood that they would then conduct a review for responsiveness to discovery requests and relevancy under New Jersey’s Rules of Court. Id.

D. July 6, 2023 Case Management Conference

The parties participated in an unrecorded conference on July 6, 2023 to discuss the status of discovery. Da123 ¶ 14. During that conference, the parties reported that they had reached agreement on custodians and search terms, *id.* ¶ 16, and were in the process of reviewing the “hits” with a goal to complete productions within 90 days, *see* Da155 ¶ 6. The trial court, however, directed the parties to produce *all* documents that “hit[]” any of the terms, *regardless* whether the documents were responsive or relevant. Da123 ¶ 15. The court’s July 6 Directive authorized the parties to withhold documents *only* for privilege. Da123-24 ¶ 17.

Shortly thereafter, the United Defendants requested by letter that the trial court modify its July 6 Directive. Da102-06. The United Defendants’ letter explained that the Directive would at that time have required them to produce approximately 68,000 irrelevant documents—a more than 2-to-1 over-production of non-responsive documents to responsive ones. Da125-26 ¶ 22. They also attested that a substantial percentage of these non-responsive and irrelevant documents would likely contain highly confidential, sensitive, and proprietary business information. Da124 ¶ 18.

The Defendants also detailed their well-founded concerns that Plaintiffs would weaponize the production of such documents. In a related litigation in

Nevada, Plaintiff's affiliates posted documents designated as "Attorneys Eyes Only" and "Confidential" on a public, anti-United website. Da124-25 ¶ 19; see also Da143 ¶¶ 3-6. Because of how damaging these actions were, a court in Arizona presiding over another related case ordered *extra* confidentiality protections for productions, Da128-41, allowing defendants to redact sensitive but irrelevant information from otherwise responsive documents. Da132-35.

In addition, Defendants set forth the significant expense associated with the ESI Order. The United Defendants estimated that conducting the additional privilege review at that time would have cost over \$750,000. Da126 ¶ 23. MultiPlan, meanwhile, had already completed its entire ESI production in the case, applying the parties' past practice and understanding that the parties would review the search term "hits" for responsiveness and relevance before production. T35:9-37:12. MultiPlan advised that the July 6 Directive would impose a "substantial cost" by necessitating an additional privilege review, and would similarly force production of tens of thousands of irrelevant documents. Id.

E. Rule 4:105-4 Pre-Motion Conference And The ESI Order

During the August 24 pre-motion conference, the trial court recognized that its directive would result in the production of "some significant number of documents that [plaintiffs] haven't requested, a significant number of documents

that are not relevant.” T6:11-14. The court said it understood “that there’s going to be a large number, and it’s argued that maybe sixty to seventy percent of the documents aren’t going to be relevant.” T6:14-17. It nevertheless ordered the production of all documents because it believed that “ESI is fundamentally different than just paper documents” and thus requires different discovery treatment. T20:21-21:2.

In particular, the trial court cited three reasons for requiring the production of irrelevant documents. First, the court insisted that “the relevance gatekeeper shouldn’t be the producers of the documents” on the ground that it was not “fair” for “the party producing the documents [to] decide what is relevant and what’s not.” T5:19-6:1. Second, although the trial court had previously appointed a special discovery master, Da97, the court expressed reluctance “to review thousands of pages of documents” to resolve any relevancy disputes, which the court disclaimed as “not my function” and a task the court was “not equipped to do.” T6:2-7, T22:10. Third, the court did not “see the harm” in the ESI Order because “appropriate confidentiality orders” and “clawback provisions” would protect against foul play, and a new order would allow Defendants to withhold a “very small subset” of proprietary documents. T6:8-21, 27:4-12.

On September 13, 2023, the trial court formalized its July 6 Directive through the ESI Order, which specified that all documents identified and

returned by application of the ESI search terms “must be produced to all parties” and that the parties “may not withhold or redact non-privileged ESI documents, even if the producing party believes the document is wholly non-responsive or that it contains only irrelevant information.” Da167 ¶ 1. The Order permits the parties to withhold or redact ESI based on an applicable privilege or immunity under New Jersey law, requiring that each such document be identified on a privilege log. *Id.* at ¶ 2. Otherwise, the parties may withhold or redact only the “small subset of ESI documents that contain information so proprietary that their production could result in business losses or disruption,” with each document identified on a “‘business proprietary’ document log.” *Id.* at ¶ 3.

LEGAL ARGUMENT

The New Jersey Supreme Court has taken the unusual step of granting interlocutory review of the ESI Order, a power that it “exercise[s] only sparingly.” *State v. Reldan*, 100 N.J. 187, 205 (1985). This Court now has the opportunity to review and reverse the ESI Order before it irreparably injures not just Defendants, but other New Jersey litigants as well. While this Court generally affords discretion to a trial court’s discovery rulings, it will reverse any order that rests on a “mistaken understanding of the applicable law” or otherwise reflects an abuse of discretion. *Rivers v. LSC P’ship*, 378 N.J. Super. 68, 80 (App. Div.), *certif. denied*, 185 N.J. 296 (2005); *see* *Pressler & Verniero*,

Current N.J. Court Rules, cmt. 1 on R. 4:10-2(a) (2024) (“[T]he appellate court will not defer to a determination based on an incorrect view of the law.”). Reversal here is warranted on both grounds.

First, the ESI Order misconstrues or disregards the applicable law, i.e., Rule 4:10-2(a). That Rule explicitly limits the “scope of discovery” to documents that are “relevant to the subject matter involved in the pending action.” Id. The Rule also explicitly treats ESI the same as paper documents; accordingly, as this Court has observed, “relevancy remains the touchstone” for e-discovery the same as paper discovery. Estate of Lasiw v. Pereira, 475 N.J. Super. 378, 404 (App. Div. 2023). Thus, even if a search term hits a document, a party may still withhold the document if it is not relevant to the subject matter at issue, just as it could withhold physical documents stored in a “filing cabinet.” Lipsky v. N.J. Ass’n of Health Plans, Inc., 474 N.J. Super. 447, 468 (App. Div. 2023). That simple principle—affirmed by courts across the country—decides this case.

Second, and in any event, the trial court abused its discretion by ordering the production of tens of thousands of irrelevant documents without “good reason[.]” Customers Bank v. Reitnour Inv. Properties, LP, 453 N.J. Super. 338, 348 (App. Div. 2018) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). The ESI Order is deeply “invasive and burdensome,” while

forgoing “clear alternative[s]” that were “less intrusive” and better protected the parties’ “privacy rights.” Lipsky, 474 N.J. Super. at 473. The trial court “clearly erred in ordering more invasive measures without any showing of substantial need,” id. at 474, and without proffering any real explanation as to how the “likely benefits” of irrelevant documents outweighed “the burden or expense” of that discovery, Rule 4:10-2(g). This Court should reverse on that basis as well.

I. THE ESI ORDER MISCONSTRUES THE APPLICATION OF RULE 4:10-2(a) TO ELECTRONICALLY STORED INFORMATION (RAISED BELOW: DA166-68; T3-38)

This appeal involves a straightforward application of an unambiguous discovery rule: Rule 4:10-2(a), which explicitly defines the scope of discovery—including of ESI—by reference to relevancy. The trial court’s failure to apply that relevancy standard to ESI reflects a clear misunderstanding of controlling law.

A. Under Rule 4:10-2(a), A Court Has No Authority To Compel The Production Of Irrelevant Documents, Including ESI (Raised Below: Da166-68; T3-38)

Rule 4:10-2(a) defines the “scope of discovery” as follows:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, *including . . . electronically stored information . . .* It is not ground for

objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

R. 4:10-2(a) (emphasis added).

The Rule thus “limit[s]” discovery “to information that is ‘relevant to the subject matter involved in the pending action.’” K.S. v. ABC Pro. Corp., 330 N.J. Super. 288, 291 (App. Div. 2000), certif. denied, 174 N.J. 411 (2000) (quoting R. 4:10-2(a)). More specifically, Rule 4:10-2 contains two independent requirements—to be even potentially discoverable, a document must be both “relevant” and not “privileged.” R. 4:10-2. While a trial court may, by order, further “*limit[]*” the “scope of discovery,” Rule 4:10-2 grants trial courts no authority to *expand* discovery beyond the Rule’s specified bounds. See id. (emphasis added).

Consistent with the Rule’s plain text, the New Jersey Supreme Court has instructed that “potential relevance is the initial inquiry” to “determine whether the materials sought . . . are discoverable.” In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 82 (2000). In other words, “the first question to be answered” in a discoverability inquiry is whether the document sought is “relevant” to the claim or defense. Morley v. Contarino Bros., 2006 WL 2009046, at *4 (N.J. Super. Ct. App. Div. July 20, 2006). For purposes of this inquiry, the concept of relevancy is “congruent” with the same concept under New Jersey Rule of

Evidence 401, i.e., “a tendency in reason to prove or disprove any fact of consequence to the determination of the action.” R.L. v. Voytac, 402 N.J. Super. 392, 408 (App. Div. 2008), rev’d on other grounds 199 N.J. 285 (2009); see Payton v. N.J. Turnpike Auth., 148 N.J. 524, 535 (1997).

To be clear, relevancy alone does not make a document conclusively discoverable—it only “creates a presumption of discoverability.” In re Liquidation, 165 N.J. at 83. But if a document is “not relevant” to the action at issue, then the requesting party has *no right to obtain it at all*, and a trial court necessarily abuses its discretion in compelling its production. K.S., 330 N.J. Super. at 294 (reversing trial court order to produce information that was “not relevant” to plaintiff’s case); see Pressler & Verniero, cmt. 1 on R. 4:10-2(a) (collecting cases applying the “relevancy standard [to] bar[] pretrial discovery”). Applying that settled rule, this Court has repeatedly affirmed orders denying discovery where the information sought was irrelevant to the claims or defenses at issue. See, e.g., Canlar by Canlar v. Est. of Yacoub, 2018 WL 3543157, at *3 (N.J. Super. Ct. App. Div. July 24, 2018); Carbis Sales, Inc. v. Eisenberg, 397 N.J. Super. 64, 81 (App. Div. 2007).

The same rule governs discovery involving ESI. As shown in the italicized passage in the Rule quoted above, Rule 4:10-2(a) explicitly includes “electronically stored information” within the information subject to the Rule’s

basic relevancy standard. That inclusion does not result from ignorance or oversight. As this Court explained in Pereira, when the New Jersey Supreme Court “first addressed [ESI] in 2006,” it specifically “add[ed] the term ‘electronically stored information’ to subsection (a)” of Rule 4:10-2, which had previously covered only “books,” “documents,” and “other tangible things.” 475 N.J. Super. at 396 (quoting R. 4:10-2(a)). And the Supreme Court did so on the express understanding that “ESI is voluminous and expensive to review.” Id. at 392 (quoting Committee Report, Report of the Discovery Subcommittee on Proposed Rule Changes Regarding Electronically Stored Information (Nov. 2005), at 3). But its solution was not to mandate *more* production of ESI, but *less*. To “discourage costly, speculative, duplicative, or unduly burdensome discovery of computer data and systems,” the Court “adopt[ed] subsection (f) of Rule 4:10-2,” Pereira, 475 N.J. Super. at 392-93 (quotation omitted), which provides that even for *relevant* information, a “party need not provide discovery of [ESI] from sources that the party identifies as not reasonably accessible because of undue burden or cost,” R. 4:10-2(f). The Supreme Court otherwise reaffirmed that relevancy remains the floor for discoverability by writing “electronically stored information” into the text of Rule 4:10-2(a).

Through that change, the Court explicitly subjected ESI to traditional discovery rules, ensuring that the “privilege and relevance limitations provided

under Rule[] 4:10-2(a)” would apply equally to ESI and paper discovery alike. Pereira, 475 N.J. Super. at 396 (quotation omitted).³ After reviewing that history in Pereira, this Court observed that in the context of ESI, “[r]elevancy remains the touchstone of permissible discovery.” 475 N.J. Super. at 404.

This Court recently reaffirmed the point in Lipsky. There, the Court considered an interlocutory appeal from a trial court order requiring a non-party to produce entire cell phones for forensic examination, despite the fact the devices had already been searched for relevant and responsive information. Lipsky, 474 N.J. Super. at 451-52. This Court reversed, concluding that New Jersey’s civil discovery rules do not anticipate that a requesting party “be permitted to search through their opponents’ electronic devices for responsive documents, any more than [they] anticipate[] that the requesting party would be permitted to search through their opponent’s filing cabinets for responsive documents.” Id. at 468. Instead, the producing party must conduct its own threshold search of its ESI, identifying only “responsive information” and “data responsive to the records requests.” Id. at 472, 474. The Court thus applied the

³ The Subcommittee charged with developing New Jersey’s amended rules likewise expressly intended to “parallel the Federal Rules regarding discovery of ESI.” Committee Report, at 1. And the Federal Rules of Civil Procedure were amended the same year “to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents.” 2006 Advisory Comm. Note to Rule 34.

ordinary discovery rules—including the “relevance limitation[] provided under Rule[] 4:10-2(a)”—to ESI, the same as it would to paper documents. Id. at 464.

B. To Ensure Compliance With Rule 4:10-(2)(a) In The ESI Context, A Producing Party Must Be Permitted To Conduct A Physical Relevance Review After The Initial Screening Search (Raised Below: Da166-68; T3-38)

To implement the Rule 4:10-2(a) relevancy standard in the ESI context, it is standard practice for a party first to conduct an initial screening search for potentially relevant documents, then to conduct a physical relevancy review before actually producing any of the collected documents. The reason is simple: large businesses store an exceptionally voluminous amount of information electronically—word processing documents, emails, spreadsheets, presentations, and more, which collectively may add up to millions of typewritten pages—and it is infeasible to manually page through each of those documents individually. Parties thus often negotiate search terms “as a means to simplify and limit the scope of production.” BancPass, Inc. v. Highway Toll Admin., LLC, 2016 WL 4031417, at *3 (W.D. Tex. July 26, 2016).

But identifying search terms is not the *end* of the discovery process—it is just the *beginning*. As explained in the “Sedona Principles”—one of “the leading authorities on electronic document retrieval and production,” Ford Motor Co. v. Edgewood Properties, Inc., 257 F.R.D. 418, 424 (D.N.J. 2009)—

search terms help collect documents that are “*potentially* responsive,” The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 19 Sedona Conf. J. 1, 97 (2018) (emphasis added), but the terms themselves do not and cannot determine whether a given document is actually relevant to the subject matter at issue. That determination requires further inquiry into whether the document itself has a “tendency in reason to prove or disprove any fact of consequence to determination of the action.” Payton, 148 N.J. at 535 (quoting N.J.R.E. 401).

“As every law school student and law school graduate knows, when performing a computer search on WESTLAW and/or LEXIS, not every case responsive to a search command will prove to be relevant to the legal issues for which the research was performed. Searching tens of thousands, and hundreds of thousands, of electronic documents is no different.” Gardner v. Cont’l Cas. Co., 2016 WL 155002, at *3 (D. Conn. Jan. 13, 2016). As a result, search terms “often are over-inclusive”—“they find responsive documents but also large numbers of irrelevant documents.” Moore v. Publicis Groupe, 287 F.R.D. 182, 191 (S.D.N.Y. 2012), adopted, 2012 WL 1446534 (S.D.N.Y. Apr. 26, 2012).

For that reason, courts that have considered the issue “have almost uniformly found that a relevance review, and the withholding of irrelevant documents, is appropriate” even after the use of search terms.

O'Donnell/Salvatori Inc. v. Microsoft Corp., 339 F.R.D. 275, 276 (W.D. Wash. 2021). In O'Donnell, for instance, a federal magistrate judge held that a party had a “right to review the resulting documents for relevance,” notwithstanding its “agreement to run search terms.” Id. at 277. The alternative, it explained, would require it to hold that “the relevance standard from the civil rules does not apply to document productions that are the result of the execution of search terms.” Id. at 276. Likewise, in SinglePoint Direct Solar LLC v. Solar Integrated Roofing Corp., 2023 WL 2585296 (D. Ariz. Mar. 21, 2023), the court recognized that “the fact that a search term is relevant does not eliminate the possibility that it will produce irrelevant documents.” Id. at *3. Thus, even where the search terms are properly negotiated, the producing party “may nonetheless review all documents that are ‘hits’ on a search term for relevance and withhold irrelevant documents.” Id.

These decisions are grounded in the plain language of the applicable discovery rules, which—like Rule 4:10-2(a)—limit “the scope of discovery” to documents that are “relevant.” Compare Fed. R. Civ. P. 26(b)(1), with R. 4-10-2(a); see also Hammock by Hammock v. Hoffmann-LaRoche, Inc., 142 N.J. 356, 369 (1995) (“The purpose and scope of our discovery rules . . . are substantially the same as Federal Rule of Civil Procedure 26.”). Because the “scope of discovery” under the rules “begins with relevance,” a requesting party “is not

entitled to discovery that is not relevant,” and a party “cannot simply bypass relevance review by requesting that [defendant] run broad search terms and produce all documents that hit on those terms.” Wilmore v. Savvas Learning Co., 2023 WL 6124045, at *9 (D. Kan. Sept. 19, 2023). Courts therefore regularly hold that relevancy review is required—not as a matter of discretion, but as a matter of law. See, e.g., id.; Palmer v. Cognizant Tech. Sols. Corp., 2021 WL 3145982, at *9 (C.D. Cal. July 9, 2021) (“The Court will not compel defendants to produce any document simply because it contains a search term whether or not it is responsive to the discovery request, or, by extension, whether or not it is relevant and proportional to the needs of the action.”); BancPass, 2016 WL 4031417, at *3 (holding parties’ agreement to run search terms did not obligate them to produce non-responsive documents, and denying motion to compel because there was “no reason to believe that [the defendant] ha[d] withheld documents it was obligated to produce”); Chen-Oster v. Goldman, Sachs & Co., 2014 WL 716521, at *1 (S.D.N.Y. Feb. 18, 2014) (declining to hold that “documents identified by the search tool [must] be produced without regard to whether they were relevant as defined by the earlier discovery demands and responses”).⁴

⁴ In an unpublished divided order, a Third Circuit panel declined to issue a writ of mandamus to correct a district court order refusing to allow a relevancy

The same principles apply here. Even though the parties negotiated search terms, Defendants still needed to review and cull the documents that hit on those terms for relevancy and responsiveness *before production*, lest they turn over tens of thousands of legally irrelevant documents. The search terms here were broad—capturing, for instance, any document that included proximate appearances of common terms like “New Jersey,” “out of network,” “reimbursement,” “review,” and “overview”—and necessarily swept in documents with no “tendency in reason to prove or disprove any fact of consequence to determination of the action.” Payton, 148 N.J. at 535 (quoting N.J.R.E. 401). Indeed, as Defendants explained to the trial court, their “experiences in the related litigations demonstrate that even agreed-to search terms result in a significant volume of irrelevant documents that the United Defendants had then removed from their production pool.” Da105. Based on that experience, the United Defendants estimated shortly after the trial court issued its July 6 Directive that the ESI Order would require it to produce

review after the parties ran search terms. In re Actavis Holdco U.S., Inc., 2019 WL 8437021, at *1 (3d Cir. Dec. 6, 2019). But that court expressly did *not* decide whether “the District Court’s order constituted an abuse of discretion,” because “such an error would not support mandamus relief.” Id. And even in the mandamus posture, a dissenting judge would have granted the petition because “nothing in the civil rules permits a court to compel production of non-responsive and irrelevant documents at any time, much less before the producing party has had an opportunity to screen those documents.” Id. at *1 n.1.

“approximately 68,000 irrelevant documents” while producing only “30,500 responsive documents”—a “more than 2-to-1 over-production of non-responsive documents to responsive ones.” Id.⁵

Notably, no one disputed below the foundational premise that the ESI Order would require the production of legally irrelevant documents. As the trial court put it, “we all recognize that there are going to be a lot of irrelevant documents” with “these particular searches.” T20:24-21:1. The trial court thus accepted that “plaintiffs would end up getting some significant number of documents that they haven’t requested,” and “a significant number of documents that are not relevant.” T6:11-17. By “doing it in this fashion,” the court admitted, “yes, there are going to be a lot of irrelevant documents being produced,” as well as “nonresponsive documents, I understand that.” T27:15-19.

The ESI Order requiring Defendants to produce documents that are not “relevant to the subject matter involved in the pending action” plainly falls outside the scope of discovery authorized by Rule 4:10-2(a). The Rule grants a court no authority to compel the production of documents that are “not relevant.”

⁵ To prove the point, Defendants also cited several examples of irrelevant documents that would nevertheless hit the search terms. See, e.g., Da 158; see also Da125 ¶ 21.

K.S., 330 N.J. Super. at 294. Because the ESI Order exceeds the bounds of permissible discovery, it should be reversed. See Rivers, 378 N.J. Super. at 80.

C. The Trial Court’s Justifications For The ESI Order Lack Merit (Raised Below: Da166-68; T3-38)

The trial court offered no sound justification for requiring the production of legally irrelevant documents. The court adopted the ESI Order mainly on the premise that ESI is “fundamentally different than just paper documents” and involves “voluminous” productions, thereby requiring departure from the ordinary rules governing paper discovery. T20:21-22. The trial court also asserted that for an e-discovery production, the *requesting* party should be entitled to decide what is relevant, rather than following the ordinary sequence of discovery that requires the *producing* party to play that gatekeeping role. T5:20-6:1. Both rationales seriously misconstrue controlling law.

1. *Rule 4:10-2(a)’s Text And History Preclude Treating ESI Discovery Differently For Relevancy Purposes Based On Its “Voluminous” Nature (Raised Below: Da166-68; T3-38)*

The trial court justified the ESI Order principally on the ground that “ESI is just fundamentally different than paper documents.” T20:21-22; see T21:3-4 (“ESI is fundamentally different than, you know, just going through a case file”); T21:7 (“ESI is fundamentally different”); T24:18 (“ESI is different”). Thus, while the trial court recognized the “point that the rules say that relevancy

is the touchstone,” the court treated e-discovery as “something different,” T24:15-17, warranting abandonment of Rule 4:10-2(a)’s normal relevancy touchstone, T20:18-21:2. Rather than apply Rule 4:10-2(a), the trial court ruled that vast amounts of concededly irrelevant ESI must be produced because of the “voluminous” nature of the documents involved. Id.

That ruling is squarely contrary to the text and history of Rule 4:10-2(a). Policy concerns about “voluminous” ESI are *already* addressed in the text of the Rule itself, which was written with those concerns squarely in mind. See supra at 16. And rather than address such concerns by requiring *more* production of ESI, as the trial court did here, the New Jersey Supreme Court chose to impose various *limitations* on ESI discovery, and otherwise to subject ESI to the *same* relevancy standard that applies to discovery of paper documents. See id. The trial court had no warrant to override the policy determinations embedded in the plain text of Rule 4:10-2(a). As this Court has long recognized, lower courts have “no authority to . . . abrogate or modify the rules promulgated by the Supreme Court.” Shambry v. N.J. Transit Bus Operations, Inc., 307 N.J. Super. 390, 395 (App. Div. 1998) (quoting Cunningham v. Rummel, 223 N.J. Super. 15, 18 (App. Div. 1988)).

2. *There Is No Basis For Applying A Different Relevancy “Gatekeeping” Rule To ESI (Raised Below: Da166-68; T3-38)*

The trial court’s other reason for mandating more production of ESI—including vast swathes of irrelevant material—was that in the context of ESI, the “gatekeepers” who apply the relevancy standard “shouldn’t be the ones producing the documents.” T6:8-21. Rather, “the ones receiving the documents” should be entitled to conduct their own relevancy review. Id. According to the trial court, the overriding “goal” of discovery is “to make sure that every relevant document gets produced,” so even “if [the] process makes us produce irrelevant documents,” the objective is fulfilled so long as “relevant ones get produced,” too. T25:10-14.

That position misunderstands the basic sequence of discovery. “It is axiomatic that a party from whom discovery is sought must determine whether it possesses relevant documents that are responsive to a particular discovery request.” Unishippers Glob. Logistics, LLC v. DHL Express (USA) Inc., 2009 WL 3297817, at *2 (D. Utah Oct. 12, 2009). That threshold responsibility applies under the “traditional approach to discovery,” which “involves the review of all potentially relevant data to determine whether any particular document is relevant to the request for production.” 1 eDiscovery & Digital Evidence § 7:21. And the same responsibility applies fully to e-discovery,

where “[p]roducing parties [must] review documents . . . for relevance and responsiveness before they are produced.” The Sedona Conference: Commentary on Achieving Quality in the E-Discovery Process, 15 Sedona Conf. J. 265, 290 (2014). After all, the “relevance limitation” on discovery under Rule 4:10-2 would have little meaning if parties were required to produce all of their documents en masse, letting the opposing party review relevant and irrelevant documents alike. Lipsky, 474 N.J. Super. at 464.

Once again, Lipsky proves the point. There, too, the trial court had allowed a requesting party to search through a party’s ESI to determine for itself what was relevant and responsive. Id. As explained above, this Court reversed, holding that parties have no right to “search through their opponents’ electronic devices for responsive data.” Id. at 468. The trial court’s order, it explained, contravened “the traditional protocol of discovery, in which one party requests specific information and the other party searches its own files (and computers) to identify and produce responsive information.” Id. at 468-69 (quoting Carlson v. Jerousek, 68 N.E.3d 520, 534 (Ill. Ct. App. 2016)). The “clear alternative” to the trial court’s wholesale production order was “that the employees undertake searches of their own devices and produce certifications relating to their searches and their search results.” Id. at 473-74.

Lipsky and the authorities it cites entirely answer the trial court’s gatekeeping concern. If, as the trial court asserted, the only “goal” of discovery was to “make[] sure that every relevant document gets produced”—without regard to whether the “process makes us produce irrelevant documents,” T25:10-14—that objective would be best served by simply requiring producing parties to turn over entire filing cabinets or electronic devices housing the documents. But this Court rejected exactly that approach. “Requests for production,” the Court recognized, *always* require the producing party to play a gatekeeping role, as they ask “the party to produce copies of the relevant information in [its] filing cabinets for the adversary.” Lipsky, 474 N.J. Super. at 468 (quoting Menke v. Broward Cnty. Sch. Bd., 916 So.2d 8, 10 (Fla. Ct. App. 2005)). Just as a requesting party has no right to rifle through its adversary’s physical filing cabinets or to scour its electronic devices, the requesting party has no right to “search through” tens of thousands of documents just because they are stored electronically. See id. In short, the discovery rules “allow[] the responding party to search his records to produce the required, relevant data”; requesting parties have no “right to conduct the actual search themselves.” In re Ford Motor Co., 345 F.3d 1315, 1316-17 (11th Cir. 2003).

Indeed, the case for gatekeeping is even stronger here than in Lipsky. There, the producing entity had conceded that it had discovered “responsive

documents on their devices,” such that producing those devices would have entailed the production of at least *some* relevant documents. Lipsky, 474 N.J. Super. at 471. The problem was that a cell phone is not divisible, so providing access to relevant documents would necessarily entail providing access to irrelevant documents as well—a tradeoff this Court declined to bless. See id. at 473-75. Here, by contrast, no tradeoff is required at all—Defendants can perform the normal task of reviewing and segregating relevant documents from irrelevant documents, producing only those documents actually relevant to the case and responsive to plaintiff’s requests. That gatekeeping function is the familiar, perfectly workable mechanism for enforcing the “relevance limitations” in Rule 4:10-2(a). Id. at 464.

None of this is to say, of course, that a producing party’s gatekeeping duties are always discharged without checks or oversight. “[A]t times—perhaps due to improper conduct on the part of the responding party—the requesting party itself may need to check the data compilation.” Ford Motor, 345 F.3d at 1317. And the trial court may always “consider the completeness” of discovery and order additional discovery should evidence emerge that a party “withheld responsive documents.” Lipsky, 474 N.J. Super. at 474. But absent such a showing of “malfeasance,” there is no basis for imposing more “intrusive methods” to supervise a party’s relevancy reviews. Id. at 474-75. Courts instead

recognize that as “a general matter,” the “responding party is best situated to preserve, search, and produce its own [ESI],” and a court can rely “on each party fulfilling its discovery obligations without direction from the court or opposing counsel.” VeroBlue Farms USA Inc. v. Wulf, 345 F.R.D. 406, 420 (N.D. Tex. 2021) (quotation omitted).

The trial court here offered no reason to doubt that Defendants would conduct a proper relevancy review. The court certainly made no finding that Defendants had committed “malfeasance” of any kind warranting extra scrutiny or more intrusive discovery measures. The trial court therefore erred as a matter of law in denying Defendants the right to review for, and withhold, documents with no relevance to the case. See Lipsky, 474 N.J. Super. at 474.

D. Plaintiffs’ Distinct Justifications For The ESI Order Also Lack Merit (Not Raised Below)

When Plaintiffs opposed Defendants’ motion for leave to appeal, they disclaimed any argument that a trial court may order production of “admittedly irrelevant documents just because they hit search terms.” Opp. at 1 (quotation omitted). Plaintiffs thus did not even attempt to defend the ESI Order on its own terms, i.e., as imposing a special rule for ESI requiring production of irrelevant

documents. Plaintiffs instead proffered two independent arguments to justify the Order. Neither has merit.

1. *The ESI Order Is Not Premised On Any Understanding That Search Terms Alone Would Determine Relevancy (Not Raised Below)*

Plaintiffs' first "argument" was, in fact, an attempt to simply rewrite the ESI Order as consistent with Rule 4:10-2(a). The same day that Plaintiffs filed their opposition to Defendants' motion for leave to appeal, Plaintiffs submitted an affidavit asserting that the parties "negotiate[d]" search terms on the understanding that the terms, in and of themselves, would only produce documents relevant under Rule 4:10-2(a). Da182 ¶ 6. Plaintiff then relied on that affidavit to argue that the parties specifically "negotiated search terms and custodians" that, in and of themselves, "would lead to relevant hits," thereby in turn ensuring that all "documents generated from the search terms" would necessarily be relevant. See Opp. At 1.

Plaintiffs' characterization of the parties' understanding underlying the ESI Order is categorically false. In fact, when the trial court issued the ESI Order on September 13, 2023, the trial court had before it Defendants' declaration attesting to exactly the *opposite* understanding: "The United Defendants (and, presumably, TeamHealth Plaintiffs) always understood the purpose of the search terms was to capture a broader university of potentially

responsive documents that each party would review to identify documents responsive to the actual requests for production that had been served pursuant to New Jersey Rule 4:18-1.” Da122 ¶ 11. That protocol was consistent with the parties’ practice in ten other related cases, Da120-21 ¶ 5, and it is reflected in the parties’ ESI Stipulation, which expressly provided for a “review” *after* conducting the initial ESI screening search, Da79. Plaintiffs’ false post hoc claim about a contrary understanding cannot alter the unambiguous record actually before the trial court when it issued the ESI Order.

The trial court itself certainly did not construe the record before it as reflecting any agreement that the search terms would produce only relevant documents. To the contrary, the trial court expressly found that with “these particular searches,” “we all recognize that there are going to be a lot of irrelevant documents.” T20:24-21:1. In the court’s own words, under the ESI Order, “plaintiffs would end up getting some significant number of documents that they haven’t requested, a significant number of documents that are not relevant.” T6:11-17. Indeed, the trial court expected that “maybe sixty to seventy percent of the documents aren’t going to be relevant.” *Id.* The court simply had no concerns: “[I]f in producing all the relevant documents there are fifty percent of them which are irrelevant, I don’t see the harm.” T24:11-14. In short, the trial court issued the ESI Order *not* because the “search terms

themselves identified the relevant documents,” as Plaintiffs now assert Da183 ¶ 9, but because the court deemed it *permissible* to require production of irrelevant documents, so long as they are electronically stored. See supra at 23-25. Plaintiffs have proffered no justification for that ruling, and none exists.

2. *Plaintiffs’ Focus On Admissibility Is Misplaced (Not Raised Below)*

Plaintiffs also tried to defend the ESI Order on the separate ground that even if a document is not “relevant” under Rule 4:10-2(a), it is still discoverable if the document could reasonably “lead to the discovery of admissible evidence” Opp. at 1. That argument misstates the plain language of Rule 4:10-2(a). The Rule explicitly restricts the “scope of discovery” to documents that are “relevant” to the claims or defenses at issue. R. 4:10-2(a) The Rule then addresses a *separate* evidentiary issue about *admissibility*, requiring the production of documents that are not themselves admissible (for example, because they are hearsay), so long as the production is “reasonably calculated to lead to the discovery of admissible evidence.” Id. The Rule thus makes clear that “the relevance standard does not refer only to matters which would necessarily be admissible into evidence, but includes information reasonably calculated to lead to admissible evidence.” R.L., 402 N.J. Super. at 408. But that provision does not displace the “general standard of discoverability as prescribed by paragraph (a)”—i.e., “relevance.” Pressler & Verniero, cmt. 1 on

R. 4:10-2(a). The relevance standard, as explained above, is “congruent” with N.J.R.E. 401, and refers only to evidence having “a tendency in reason to prove or disprove any fact of consequence to the determination of the action.” R.L., 402 N.J. Super. at 408. Plaintiffs do not and cannot meaningfully argue that all documents that hit ESI search terms necessarily satisfy that standard.

In any event, even assuming *arguendo* that Rule 4:10-2(a) also requires Defendants to turn over irrelevant documents so long as they might lead to discovery of admissible evidence, the ESI Order was not so cabined. Plaintiffs below never suggested that all documents that hit on search terms would “lead to the discovery of admissible evidence,” and the trial court never mentioned that clause of Rule 4:10-2(a). Instead, as explained above, the trial court consciously required Defendants to turn over vast swaths of documents that would be entirely non-responsive and irrelevant to the claims and defenses at issue. There is no legal basis for that mandate.

II. THE TRIAL COURT ALSO ABUSED ITS DISCRETION BY ORDERING PRODUCTION THAT WAS UNDULY INVASIVE AND BURDENSOME WITH NO COUNTERVAILING JUSTIFICATION (RAISED BELOW: DA166-68; T3-38)

Even if a trial court has discretion to override Rule 4:10-2(a) and order production of irrelevant ESI, the ESI Order abuses that discretion because it is overly and unnecessarily burdensome.

A court abuses its discretion when its “decision is made without a rational explanation, inexplicably depart[s] from established policies, or rest[s] on an impermissible basis.” Customers Bank, 453 N.J. Super. at 348 (quoting Flagg, 171 N.J. at 571). This Court takes a “functional approach” to determining whether a trial court has abused its discretion, and asks “whether there are good reasons for an appellate court to defer to the particular decision at issue.” Id.

The ESI Order fails under that standard. It contravenes the “established” practice of the parties in more than 10 related cases nationwide, see supra at 7, as well as the near-uniform policy of courts nationwide, see supra at 19-24. And in doing so, it imposes substantial burdens without considering the “clear alternative[s]” available to the parties and the trial court, Lipsky, 474 N.J. Super. at 473, including appointment of a special master, which in fact had already occurred. The ESI Order also contravenes Rule 4:10-2(g), which requires a court to limit otherwise-permitted discovery if “the burden or expense of the proposed discovery outweighs its likely benefit,” taking into account factors such as “the importance of the proposed discovery in resolving the issues.” Pereira, 475 N.J. Super. at 393 (quoting R. 4:10-2(g)). Because the ESI Order imposes significant burdens while compelling production of documents that are definitionally not important to resolving the issues disputed in the case, the Order is an abuse of discretion and should be reversed.

**A. The ESI Order Imposes Significant Burdens On Defendants
(Raised Below: Da166-68; T3-38)**

This Court will reverse discovery orders that are “unduly invasive and burdensome.” Lipsky, 474 N.J. Super. at 470. The ESI Order cannot survive that test.

First, the ESI Order is “unduly invasive” of Defendants’ privacy rights. Id. Parties in litigation have a well-founded interest in preventing sensitive information from falling into the hands of their adversaries. As leading discovery experts have recognized, “[e]lectronic information systems contain significant amounts of ESI that may be subject to trade secret, confidentiality, or privacy considerations,” including not just “proprietary business information” but also “customer and employee personal data (e.g., social security and credit card numbers, employee and patient health data, and customer financial records).” Sedona Principles, 19 Sedona Conf. J. at 162 cmt. 10.j.

The United Defendants have good reason for concern that Plaintiffs in this case could weaponize confidential documents they gain access to during discovery—even with a confidentiality order or clawback agreements in place. Da124-25; see also Da143-52. There is an established record showing the threat of grave damage to Defendants from a whole-cloth production of all non-

privileged documents that “hit” on ESI search terms, regardless of relevancy. In a related litigation in Nevada, Plaintiffs’ affiliates were admonished by the court after they posted to a public website documents that had been designated “Attorneys Eyes Only” or “Confidential” under the applicable protective order. Da124-25; Da143-52. The harm arising from the public posting was immediate and significant: as one stark example, MultiPlan’s stock price and bond rating dropped when the investors learned from the disseminated documents how the United Defendants’ and MultiPlan’s business relationship might possibly evolve. Da170-72.

Following the damage caused by that breach, a court in Arizona presiding over another related case granted defendants extra discovery protections, beyond the applicable Arizona protective order. Da132-35; T13:8-12. The Arizona court recognized that the United Defendants and MultiPlan had incurred substantial harm resulting from the publicly disseminated documents. Da133. It accordingly approved a redaction protocol permitting the defendants in that case to redact “confidential and highly sensitive information such as financials, innovations, business plans, and information about United’s affiliated companies not involved in this litigation” out of documents that were otherwise responsive, relevant, and subject to production. Da132-35; T13:8-12.

The trial court below effectively took the opposite approach. Not only did it deny Defendants the opportunity to redact irrelevant information from documents with *some* relevant material, it ordered the production of *entirely* irrelevant documents. And while the trial court did allow Defendants to withhold “a very small subset” of these irrelevant documents, T27:4-12, that ruling only underscores the error. To invoke the narrow exception, Defendants must conduct a burdensome review of tens of thousands of wholly irrelevant documents to determine which contain information that “could result in business losses or disruption.” Da167-68. And Defendants then must demonstrate “good cause” for withholding documents that are *concededly irrelevant*, which is the opposite of what the Rules require. See Cap. Health Sys., Inc. v. Horizon Healthcare Servs., Inc., 230 N.J. 73, 80 (2017) (recognizing that a party must show “good cause” for “withholding *relevant* discovery” (emphasis added)). And the exception does not even adequately protect Defendants’ interests: given Plaintiffs’ prior conduct, Defendants remain concerned that Plaintiffs will disclose documents that do not fall within this small subset of highly proprietary documents but that are nonetheless confidential and sensitive. See supra at 8-9, 36-37.

Second, the ESI Order imposes unnecessary and significant “expense” on Defendants. See Rule 4:10-2(g). The privilege review is expected to cost the

United Defendants and MultiPlan hundreds of thousands of dollars in additional costs, because the parties would need to conduct this labor intensive review not just for the estimated 30,500 responsive documents, but also the approximately 68,000 non-responsive documents for privilege. Da125-26; T35-37. The costs are compounded in this case because the parties have already litigated extensively similar matters in cases across the country, and this action involves many of the same search terms for many of the same custodians. T28:20-29:21. While the parties might have benefited from the previous relevancy reviews conducted in those cases—a “more convenient, less burdensome, and less expensive” source for discovery, Rule 4:10-2(g)—now they must conduct additional privilege reviews for non-responsive documents, T28:20-29:21.

B. No Countervailing Benefits Justify The Sweeping ESI Order (Raised Below: Da166-68; T3-38)

The trial court offered no “good reason[]” for imposing such a burdensome order or departing from established discovery practice. Customers Bank, 453 N.J. Super. at 348 (quoting Flagg, 171 N.J. at 571). Under Rule 4:10-2(g), a trial court must consider whether the “the burden or expense of the proposed discovery outweighs its likely benefit, taking into account . . . the importance of the proposed discovery in resolving the issues.” Rule 4:10-2(g).

Here, the trial court identified no countervailing benefits to justify the burdens imposed.

To start, Plaintiffs have no legitimate interest in obtaining irrelevant documents that—by definition—will not assist the Plaintiffs in litigating the case and are not “important[t]” in “resolving the issues” at stake. See id. To be sure, New Jersey courts recognize that “essential justice is better achieved when there has been full disclosure so that the parties are conversant with all the available facts” necessary to litigate effectively. Lipsky, 474 N.J. Super. at 463 (quoting Jenkins v. Rainer, 69 N.J. 50, 57 (1976)). But “full disclosure” does not mean *unlimited* disclosure. Id. at 464. Information irrelevant to the case is inherently *not* information needed to be “conversant with all the available facts.” Id. at 463; see K.S., 330 N.J. Super. at 291. Directing the production of legally irrelevant documents therefore does nothing to advance “the purpose and spirit of the discovery practice, namely the pretrial opportunity of litigants to explore every avenue of inquiry in their search for the *relevant* facts and circumstances.” Pressler & Verniero, cmt. 1 on R. 4:10-2(a) (emphasis added).

The trial court ruled otherwise on the ground that ordering production of irrelevant documents would maximize the likelihood that all relevant documents would be produced. T25:10-14. As explained above, however, this Court has already rejected similar concerns as a matter of law. See supra at 26-30. As the

Court held in Lipsky, there is a “clear alternative” to mandating production of irrelevant documents—allow Defendants to “undertake searches of their own [] and produce certifications relating to their searches and their search results.” 474 N.J. Super. at 473-74. Just as in Lipsky, Plaintiffs have made no showing—and the trial court has made no finding—that Defendants have “withheld responsive documents.” Id. at 474. Indeed, the trial court never gave Defendants the *chance* to conduct their own relevancy review. “On the record presented,” then, “there is nothing suggesting any nefarious behavior on the part of [Defendants] that might warrant more intrusive methods.” Id. at 475. The trial court therefore abused its discretion in nevertheless compelling such sweeping production. See also Rule 4:10-2(g).

Nor do the trial court’s case-management concerns provide a basis for dispensing with the “relevance limitation[] provided under Rule[] 4:10-2(a).” Lipsky, 474 N.J. Super. at 464. According to the trial court, in “big cases such as this,” the parties’ relevancy arguments compel the court “to review thousands of pages of documents, which I’m not going to do.” T6:2-7. The court also believed itself not “equipped” to make relevancy rulings, because “I don’t know what’s relevant, not relevant.” Id. In short, the court said, “I don’t want to do it and I refuse to do it because it’s not my function.” T22:9-10.

But applying Rule 4:10-2(a)'s relevancy standard to resolve disputes between the parties is *precisely* a trial court's function. This Court has clearly delineated the standard's bounds, which are "congruent" with the standards a court must apply under New Jersey Rule of Evidence 401. Payton, 148 N.J. at 535; see supra at 14-15. And resolving evidentiary disputes is "an exercise that trial judges perform every day," Schaefer v. Cedar Fair, 348 N.J. Super. 223, 239-40 (App. Div. 2002); see State v. Ramseur, 106 N.J. 123, 266 (1987) ("[t]he trial court, because of its intimate knowledge of the case, is in the best position" to resolve evidentiary disputes). There is no basis for abjuring that duty in the context of discovery.

If anything, the discovery posture should make it easier to apply relevancy standards, because a court has additional tools not always available in the trial context. Most prominently, a court can appoint a special master to review documents and resolve disputes in the first instance. Indeed, the trial court here had already invoked that mechanism, appointing a Special Discovery Master pursuant to Rule 4:41-1 "to hear and recommend resolution of all discovery disputed between the parties." Da97. What is more, as Defendants observed, in this case "the relevance fights were already fully litigated in generating [] productions" in related cases, which would minimize the discovery disputes remaining between the parties. T33:14-18.

* * * *

The ESI Order is not just wrong for this case. It rests on a legally unsound premise that would create serious problems in any case. The Order would permit litigants to insist on search terms intended to “hit” irrelevant but potentially embarrassing, highly confidential, or sensitive information. And even keywords negotiated in good faith “often are over-inclusive”—“they find responsive documents but also large numbers of irrelevant documents.” Moore, 287 F.R.D. at 191. Because there is no legal basis for compelling production of irrelevant documents—whether ESI or not—the ESI Order should be reversed. The case should be remanded to the trial court with instructions to apply Rule 4:10-2(a)’s relevancy standard to the parties’ ESI, consistent with the Rule’s plain language.

CONCLUSION

For the foregoing reasons, the ESI Order should be reversed.

Dated: May 10, 2024

Respectfully submitted,

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OF NEW JERSEY PA, MIDDLESEX
EMERGENCY PHYSICIANS, PA, and
PLAINFIELD EMERGENCY
PHYSICIANS, PA,

Plaintiffs-Respondents,

-against-

UNITEDHEALTH GROUP, INC.,
UNITEDHEALTHCARE INSURANCE
COMPANY, OXFORD HEALTH PLANS
(NJ), INC., MULTIPLAN, INC., and UMR,
INC.,

Defendants-Appellants.

SUPERIOR COURT OF NEW
JERSEY APPELLATE
DIVISION

DOCKET NO. A-002031-23
(AM 000056-23)

CIVIL ACTION

ON APPEAL FROM AN
ORDER OF THE SUPERIOR
COURT OF NEW JERSEY,
LAW DIVISION,
GLOUCESTER COUNTY,
COMPLEX BUSINESS
LITIGATION PROGRAM

DOCKET NO. GLO-L-1196-20

SAT BELOW:
HON. JAMES R. SWIFT, J.S.C.

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PRELIMINARY STATEMENT

This appeal involves a challenge to the trial court's well-reasoned discovery order, which is intended to promote the unobstructed production of relevant discovery in an even-handed manner to the parties to this litigation.

Plaintiffs Atlantic ER Physicians Team Pediatric Associates, PA, et al. ("ER Physicians") are emergency room physicians who are mandated by law to treat all patients who appear in their emergency departments. Defendants United Health Group Inc., et al. ("United") have leveraged this legal obligation to enrich themselves by engaging in a systematic scheme to underpay countless insurance claims for medical services provided by ER Physicians to United's insureds. That is the nub of the present lawsuit. ER Physicians are affiliated with "TeamHealth," a practice management organization with other affiliated emergency medical service corporations that are engaged in similar lawsuits against United.

The issue before this Court relates to discovery of massive amounts of electronically stored information ("ESI") in the possession of both ER Physicians and United. In litigating cases in other jurisdictions, the parties' affiliates have accused each other of withholding discoverable evidence by falsely classifying requested evidence as irrelevant. In light of these mutual

recriminations, the trial court decided on an objective approach to secure for all parties the discoverable evidence they sought.

The court instructed the parties to agree on a well-defined and well-crafted set of targeted ESI search terms to secure, as best as possible, only relevant documents from their IT systems -- and to minimize the netting of irrelevant ones. It also told the parties that there would be no further relevance review. With that understanding, the parties negotiated and agreed on search terms.

After that process, United still requested the opportunity to conduct a further relevance review before turning over documents to ER Physicians. The trial court rejected United's request, acknowledging that while the objective search-term approach would lead to the production of a certain number of irrelevant documents, a subjective relevance review approach would likely lead to the non-production of relevant documents. The court provided, however, that the parties could withhold documents that were privileged or contained highly sensitive information.

As often occurs in resolving discovery disputes, trial courts are presented with more than one reasonable solution -- particularly when no perfect solution is available. Managing discovery in every case requires the exercise of discretion and judgment. For that reason, appellate courts afford substantial

deference to a trial court's discovery ruling that is not so wide of the mark that it constitutes a manifest injustice.

Here, the trial court weighed the benefits and drawbacks of the alternative discovery approaches. The court emphasized that the goal was to maximize the production of relevant evidence. Importantly, even outside the realm of ESI, our civil system of justice recognizes that the production of a certain amount of irrelevant information is a necessary byproduct of the search for relevant evidence -- and ultimately the search for truth. For instance, our court rules permit the discovery of information that will not be admissible at trial so long as "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." Similarly, our court rules forbid a party from raising at a deposition an objection on the ground of relevance, although the party's right to object on the ground of relevance is preserved at trial. Thus, within the sweep of discoverable evidence will be some evidence that does not satisfy the trial definition of relevance.

The trial court chose a discovery protocol that balanced the tradeoffs between competing, imperfect alternatives. In doing so, the court made a reasoned decision to eliminate the potential for gamesmanship that might thwart the discovery process. There is no reason to disturb the trial court's exercise of its sound discretion. This Court should affirm.

PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

A. The Complaint

ER Physicians are emergency medical practices that treat patients in New Jersey hospital emergency departments for medical conditions that include “cardiac arrest, broken bones, burns, shock, gunshots, stabbings, and distress.”² (Da2-3, 6.) In compliance with federal and state law, ER Physicians care for all patients who arrive at a hospital emergency department, regardless of their ability to pay or insurance status. (Da5 ¶ 21); see also Emergency Medical Treatment and Active Labor Act (EMTALA), 42 U.S.C. § 1395dd. In doing so, ER Physicians render emergency medical care to patients with insurance coverage issued, administered, and/or underwritten by Defendants United Health Group, Inc., et al., the nation’s largest health insurer and its wholly

¹ The Procedural History and Statement of Facts are so intertwined that, for the convenience of the reader, the two are combined to avoid duplication.

“T” refers to the transcript of the August 24, 2023 pre-motion conference.

² Plaintiff-Appellees Atlantic ER Physicians Team Pediatric Associates, PA, Emergency Care Services of NJ, PA, Emergency Physician Associates of North Jersey, PC, and Emergency Physician Associates of South Jersey, PC, are referred to herein collectively as the “ER Physicians.”

The ER Physicians are affiliated with a company commonly referred to as “TeamHealth,” a practice management organization with over 400 affiliated physician corporations that provide emergency medical services throughout the United States. (See Da103.)

owned subsidiaries.³ (Da3-5.) United provides health coverage to its members and serves as a third-party administrator for self-funded, employer-sponsored health plans.⁴ (Da3-4.)

The origins of this case are set forth in ER Physicians’ 2022 Second Amended Complaint filed in the Gloucester County, Superior Court, Law Division. (Da1-26.) The Complaint alleges that United conspired to leverage the ER Physicians’ legal obligation to care for emergency patients to enrich itself by forcing the ER Physicians out of network and reimbursing them for their services at shockingly low rates, in breach of an implied-in-fact contract and quantum meruit and in violation of certain statutory laws. (Da11-22.)

Before May 2020, ER Physicians and United had written agreements governing the rates that United would pay for emergency services. (Da7 ¶ 28.) However, sometime in late 2017 or early 2018, United began to implement a profit-driven scheme to drastically reduce its reimbursement rates to emergency

³ Defendant-Appellants United Health Group, Inc., United Healthcare Insurance Company, Oxford Health Plan (NJ) Inc., and UMR, Inc., are referred to herein collectively as “United.” (Da1.) Defendant-Appellant Multiplan, Inc., is referred to as “Multiplan.” (Da1.) Because United and Multiplan have taken a joint appeal, submitted a joint appellate brief, and apparently hold identical positions, (see Db1), for simplicity, this brief refers only to United. Yet the arguments and authorities presented herein apply equally to Multiplan.

⁴ United’s members are individuals holding health insurance underwritten and/or administered by United. (Da3 ¶ 17.)

medical providers like ER Physicians. (Da7 ¶ 29.) United acted, in part, through a collusive scheme with Multiplan, a vendor of claims-pricing services. (Da8-Da9 ¶¶ 32-36.)

Knowing that federal and state law require emergency medical care to be provided regardless of insurance status, United terminated ER Physicians' network agreements and those of other TeamHealth-affiliated medical practices, thus forcing the practices out of network.⁵ (Da6-8 ¶¶ 28-31.) Following the contract terminations, United dramatically reduced the rates it would pay, often to amounts less than half of what it had paid in-network. (Da7 ¶ 29.) As required by law, however, ER Physicians continue to provide medical care to United's members in emergency departments on an out-of-network basis. (Da6 ¶¶ 23-25.)

The trial court denied United's motion to dismiss all claims except the claim for breach of an implied-in-fact contract. (Da77-78.)

B. The Related Litigations

In response to these unilateral reimbursement reductions, TeamHealth-affiliated practices have sued United in several jurisdictions throughout the

⁵ When a medical provider is "out of network" or "non-participating" with a health insurer, there is no express, written agreement governing the reimbursement amounts that the insurer must pay to the provider for medical care delivered to the insurer's members. (Da5 ¶ 22.)

United States, seeking fair reimbursement amounts under various state laws. (See Da136.)⁶ While these lawsuits have differed slightly in terms of the asserted causes of action and governing state law, they are factually similar and have involved many of the same witnesses and same counsel. (See n.6.) In these lawsuits, TeamHealth-affiliated practices and United have been embroiled in discovery disputes. (T13-8 to -15.) In these disputes, TeamHealth affiliates and United have traded back-and-forth accusations that the other party has improperly used relevancy as the justification for not supplying legitimate and discoverable document productions. (E.g., Da182 ¶ 4.)

C. Discovery

The Honorable James R. Swift, J.S.C., assigned to the Gloucester County Complex Business Litigation Program, has presided over the proceedings in this case. (T1-1 to 38-9; see also Da89.) The history of discovery disputes between TeamHealth-affiliated practices and United in other cases informed Judge Swift’s approach to discovery here. (T18-19 to 19-2.)

On April 3, 2023, the trial court entered an Electronic Discovery Stipulation and Order (“eDiscovery Order”) to “govern discovery of

⁶ See, e.g., Case No. A-19-792978-B in the Eighth Judicial District Court for Clark County, NV; Case No. 20-CA-008606 in the Thirteenth Judicial Circuit Court for Hillsborough County, FL; Case No. 1:20-cv-09183 in the United States District Court for the Southern District of NY. (Da125 n.4; Da136.)

Electronically Stored Information (‘ESI’).” (Da79.) In addition, on April 21, 2023, the court issued an Amended Discovery Confidentiality Order (“Protective Order”) featuring extensive protections for materials marked Confidential or Attorneys’ Eyes Only. (Da89.)

The eDiscovery Order provided that privileged documents “may be withheld from production, provided each privileged email is identified on a Privilege Log.” (Da84.) That order also directed the parties to label highly sensitive materials “Confidential” or “Attorneys’ Eyes Only” before production. (Da84.) The Protective Order described Confidential Information as including “trade secrets, competitively sensitive technical, marketing, financial, sales or other confidential business information” or “private or confidential personal information.” (Da89.) It described “Attorneys’ Eyes Only” information as including “highly sensitive business or personal information, the disclosure of which is highly likely to cause significant harm to an individual or to the business or competitive position of the Producing Party.” (Da89.)

On April 25, 2023, the trial court conducted a discovery hearing with counsel for all parties. (Da181 ¶ 2.) Counsel for ER Physicians raised the concern that in other related litigation “United was producing documents but making selective redactions based on purported ‘relevance’ of information.” (Da182 ¶ 4.) In response, the trial court stated that redactions or withholding of

documents on the basis of “relevance” would not be permitted. (Da182 ¶¶ 4-5.) The “parties indicated they understood Judge Swift’s direction and would negotiate ESI terms accordingly.” (Da182 ¶ 6.)⁷

For a number of months, and with the understanding that there would be no further relevance review, the parties carefully negotiated and ultimately agreed on a set of ESI search terms. (Da122 ¶ 10; Da154.)

On July 6, 2023, the trial court held an unrecorded Case Management Conference (“July 6 Conference”). (Da182 ¶ 8.) The Conference devolved into a dispute between United and ER Physicians, with each expressing concern that the other would withhold relevant discovery based on the history between United and TeamHealth affiliates. (Da182 ¶ 8.) The day before the Conference, United’s counsel sent a letter to the trial court indicating suspicion about the good faith of ER Physicians’ compliance with discovery. (Da154.) United’s counsel stated that:

[ER Physicians] have already indicated that they intend to engage in further motion practice to compel additional ESI discovery. Based on past experience, it is likely that after reviewing [ER Physicians’] ESI production the United Defendants will need to raise deficiencies with the Court (for example,

⁷ United asserts that it was unaware while negotiating search terms that it would be required to produce all of its search results. (Da122 ¶¶ 11-12.) Although ER Physicians and United disagree on this point, Judge Swift was in the best position to know the protocols in place while the parties negotiated search terms and to ensure that no party was placed at an unfair advantage. (See Da79-96.)

[TeamHealth’s] affiliates initially produced just 0.6% of documents reviewed in the New York litigation, with significant gaps in production).

[(Da155-56 (emphasis added).)]

United’s counsel expressed those concerns again at the Conference, stating that in related litigation matters, TeamHealth affiliates “produced a small number of documents as a result of ESI discovery,” attributing TeamHealth’s use of technology-assisted review (“TAR”)⁸ for the stunted production of documents. (Da182 ¶ 8.)

In response, the trial court directed the parties -- consistent with its prior instructions and in direct response to United’s own complaints -- to produce all non-privileged documents based on mutually agreed search terms, with no withholding based on relevance. (Da123-24 ¶ 17; Da18 ¶ 9.)

On July 31, 2023, United’s counsel sent a letter to the trial court requesting clarification or reconsideration of the protocol it put in place at the July 6 Conference. (Da102.) United essentially expressed two concerns in objecting to the protocol. (Da103-04.) First, the court’s order would result in the production of a large number of irrelevant but potentially sensitive documents, which ER Physicians might publicize. (Da103.) Second, the court’s

⁸ TAR is machine-learning A.I. utilized to determine which documents returned by the electronic search terms are relevant and responsive, without the need for human review of all documents. (See T9-24 to 10-8.)

directive would require it to review all of the ESI search hits for privilege, which would be overly burdensome. (Da104.)

The next day, in an email response, the trial court stated its reasons for compelling discovery of non-privileged search hits, based on the parties' agreed to search terms, without the parties performing a pre-production relevance review. (Da159.) First, the court explained that "'relevance' and 'responsiveness' are subjective by their very nature. Someone doing a relevance/responsiveness review from one side will very likely disagree with someone doing the same review from the opposing side." (Da159.) The court questioned the fairness of allowing one party to withhold documents "for relevance when someone from the opposing side would find the same document relevant or responsive." (Da159.) The court also noted that, in its experience, "in most cases the reviewer is a paralegal or young associate that really does not completely understand all the intricacy of the issues in the underlying litigation [and] [t]hat person's review is not always reliable." (Da159.) The court added that it was not equipped to review tens of thousands of documents for relevance. (Da159.) Last, the court stated the following:

As long as there is a confidentiality order in place, there is very little risk to the producing party. . . . I would certainly agree to review and reconsider on a case by case basis the production of several documents that may be so proprietary that their production could result in

business losses or disruption. However, those documents should be the exception.

[(Da159.)]

On August 24, 2023, the court conducted a hearing on United's challenge to the July 6 discovery directive. (T1-1 to 38-9.) At the hearing, United repeated the concerns expressed in its July 31 letter. (T7-10 to 11-15.) United argued that, as the owner of the documents, it is the gatekeeper for the purpose of determining relevancy. (T7-10 to -15). It stated that only documents deemed relevant should be subject to a review for privilege and that, under the court's protocol, it would be required to conduct a privilege review of an estimated 68,000 documents, two-thirds of which it surmised would be irrelevant. (T8-18 to 9-1.) United contended that the "search terms were negotiated without an understanding of the Court's directive" and that, had it known better, it would have narrowed the search terms. (T11-8 to -15.)

The court questioned the truth of that last assertion, stating that the parties agreed to search terms with the intent of capturing all relevant documents and that more restrictive search terms would have eliminated potentially relevant documents. (T11-22 to 12-3.) The court bluntly stated, "I don't buy [counsel's] argument at all that they would have negotiated for other search terms because that means they're negotiating to try to hide relevant documents and that's not the purpose here." (T24-8 to -11.)

In expressing their support for the court’s earlier directive, ER Physicians once again stated their concern, based on past experience, that allowing United to perform a relevancy review would result in excessive redactions. (E.g., T12-21 to 13-5, T20-6 to -17.) One counsel for ER Physicians noted that in other cases United had “redacted about sixty percent of what they’ve produced,” so that counsel did not “know what’s in [United’s documents].” (T12-21 to 13-5.) Another counsel for ER Physicians noted that in a Pennsylvania case, United’s redactions left the documents produced “in large part . . . in virtually unusable form because there’s page after page that has been blacked out and it’s [impossible] for us to even present an argument about whether it’s relevant or not because no one can see what it is.” (T20-6 to -17.)

The trial court reaffirmed its earlier ruling that the search terms agreed to by the parties would be the basis for the discovery of the ESI in their possession. (E.g., T4-7-12.) The court stated, “What I’m trying to avoid here by all accounts is this contentious litigation. It’s going on throughout the country and I do not think it’s fair for” the producing parties “to decide which documents are relevant and which documents are not.” (T18-18 to -25.)

The court noted that some parties use logs to withhold “relevant and admissible documents” that “a lot of time” are “hurtful to their case.” (T21-18 to -25.) The court stressed that “[t]he purpose is to produce all the relevant

documents” and that “if this process makes us produce irrelevant documents but all the relevant ones get produced, I think that is the goal to make sure that every relevant document gets produced.” (T24-11 to -12, T25-11 to -14.) The court assured the parties that the producing party would be protected by the confidentiality and clawback provisions in the Protective Order. (T6-8 to -21, T23-20 to 24-4.)

Last, the trial court expressed its “hope that the goal here is to produce all the relevant documents” and noted that the protocol in place would not allow the withholding of “the most central documents to the case because one side wants to hide them.” (T26-10 to 27-3.)

On September 12, 2023, the trial court entered an order (“Order”) formalizing its directive and findings from the July 6 Conference, August 1, 2023 email, and August 24, 2023 hearing. (Da166.) It directed the parties to produce all non-privileged ESI search hits without a further relevancy review. (Da167 ¶¶ 1-2.) But it permitted the parties to “withhold or redact a small subset of ESI documents that contain information so proprietary that their production could result in business losses or disruption, with each such document separately identified on a ‘business proprietary’ log.” (Da167 ¶ 3.) This appeal followed. (Da187-90.)

LEGAL ARGUMENT

I. THE TRIAL COURT APPROPRIATELY EXERCISED ITS BROAD DISCRETION TO MANAGE DISCOVERY (DA166-68)

The trial court’s discovery Order addressed fact-specific circumstances -- the troubled history between the parties in exchanging ESI discovery in similar cases in other jurisdictions -- to ensure the production of all relevant information. This Order was well within the court’s wide discretion.

“New Jersey’s discovery rules are to be construed liberally in favor of broad pretrial discovery.” Payton v. N.J. Tpk. Auth., 148 N.J. 524, 535 (1997) (citations omitted). “Our court system has long been committed to the view that essential justice is better achieved when there has been full disclosure so that the parties are conversant with all the available facts.” Jenkins v. Rainer, 69 N.J. 50, 56 (1976).

For this reason, “[a] trial court’s resolution of a discovery issue is entitled to substantial deference and will not be overturned absent an abuse of discretion.” DiFiore v. Pezic, 254 N.J. 212, 228 (2023) (alteration in original) (quoting State v. Stein, 225 N.J. 582, 593 (2016)). An abuse of discretion occurs if “a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.” US Bank Nat’l Ass’n v. Guillaume, 209 N.J. 449, 468 (2012) (citation omitted); see also Del. River

Joint Bridge Comm’n v. George Harms Constr. Co., Inc., 475 N.J. Super. 317, 361 (App. Div.), certif. granted, 254 N.J. 523 (2023) (holding that trial court, which “painstakingly examined records and gave detailed analyses of its determinations,” did not abuse its discretion in issuing discovery orders).

Accordingly, appellate courts are cautioned to “defer to the trial court’s decision so long as it is not so wide [of] the mark that a manifest denial of justice resulted, or is not based on a mistaken understanding of the applicable law.” DiFiore, 254 N.J. at 228 (alteration in original) (citations omitted).

New Jersey’s judicial policy of encouraging broad pretrial discovery is embodied in Rule 4:10-2(a). It is understood that “[t]he question of relevancy is to be more loosely construed at the discovery stage than at the trial” and that “it is important to distinguish the right to obtain information by discovery from the right to use it at trial.” Nestle Foods Corp. v. Aetna Cas. & Sur. Co., 135 F.R.D. 101, 104 (D.N.J. 1990) (citations omitted) (addressing corollary federal discovery rule). For that reason, Rule 4:10-2(a) provides that “[i]t is not a ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence”

Clearly, the ultimate goal of the discovery process is the securing of relevant evidence. Nevertheless, the underlying premise of Rule 4:10-2(a) is

that information that may be irrelevant and inadmissible at trial is still discoverable, provided that the information “appears reasonably calculated to lead to the discovery of admissible evidence.” See State v. Hernandez, 225 N.J. 451, 462 (2016) (finding “discovery in civil cases extends to information that ‘appears reasonably calculated to lead to the discovery of admissible evidence,’” whereas discovery in criminal cases “‘is appropriate if it will lead to relevant’ information.”) (emphasis in original). The Rule contemplates that a byproduct of the search for relevant evidence during the discovery process will be the disclosure of some amount of irrelevant evidence.

Indeed, documents that contain both irrelevant and relevant information are commonly produced in discovery, and a party generally may not redact the irrelevant portions of those documents. See, e.g., Target Corp. v. ACE Am. Ins. Co., 576 F. Supp. 3d 609, 620 (D. Minn. 2021) (“Redaction is an inappropriate tool for excluding alleged irrelevant information from documents that are otherwise responsive to a discovery request.”); Coe v. Cross-Lines Ret. Ctr., Inc., 342 F.R.D. 539, 548 (D. Kan. 2022) (holding same “because parties are not ordinarily harmed by producing irrelevant or sensitive information that is already subject to a protective order restricting its dissemination and use”).

That recognition is built into the rule governing depositions. An objection on the ground of relevance is not permissible during a deposition. R. 4:14-3(c).⁹ The right to object on the basis of relevance “is preserved and may be asserted at the time the deposition testimony is proffered at trial.” Ibid.

These Rules clearly establish that broad discovery serves the truth-seeking purpose of the civil justice system and that to ensure that parties can obtain all relevant, admissible evidence, the discovery process must tolerate the production of some irrelevant evidence as well. As detailed below, the trial court applied these principles in light of this case’s particular and perhaps unusual record, taking an approach that was reasonable, pragmatic, and supported by caselaw in other jurisdictions. The court acted well within the scope of its discretion, and thus its Order should be affirmed.

A. To Ensure That All Relevant Discovery Is Produced, The Inherent Tradeoff Is That Some Irrelevant Materials Will Be Produced As Well

The rise of eDiscovery presents new challenges for courts and litigants. See The Sedona Conference: Commentary on Achieving Quality in the E-Discovery Process, 15 Sedona Conf. J. 265, 268 (2014). One of those challenges is ensuring that the parties receive all relevant discovery. Different approaches

⁹ The only permissible objections at a deposition are “to the form of a question or to assert a privilege, a right to confidentiality or a limitation pursuant to a previously entered court order.” R. 4:14-3(c).

to discovery involve inherent tradeoffs between overinclusive and underinclusive productions, and trial courts must have flexibility to fashion solutions based on the unique facts presented.

Modern discovery can easily involve hundreds of thousands of documents buried in complex IT systems, with no simple, foolproof means of identifying and segregating relevant documents from irrelevant ones. Id. at 270, 286. Today, a common approach in cases involving voluminous ESI is for the parties to agree to a set of electronic search terms that are intended to capture relevant documents and to minimize the netting of irrelevant ones. Id. at 285.

The next steps are at the heart of the controversy in this case. Often, the parties agree that the producing party will perform a pre-production review of the search results (already narrowed by the parties' search terms and selected custodians) for privilege and relevance. Id. at 285, 288, 293-94. Documents tagged as privileged are withheld and noted on a privilege log, allowing the requesting party to analyze and challenge that designation.

Documents withheld as irrelevant are a different story. Those documents typically are neither produced nor logged. As a result, the requesting party has no way of knowing whether these documents exist and has no way to challenge the other party's unilateral relevancy determination. Cf. id. at 290-98. This approach can have the benefit of screening out irrelevant documents, but it is

also subject to abuse and human error. A party operating in bad faith can hide harmful documents simply by designating them as irrelevant. A party acting in good faith may have a different view of the scope of relevant issues, or may not grasp all of the nuances of the requesting party's factual position. Id. at 293-94. Larger relevancy-review projects are often performed by junior associates, paralegals, and/or contract attorneys who may not fully understand the issues in the case. Ibid. And even when reviewers fully understand the case and strive for accuracy, human error will inevitably come into play. See ibid.

In many cases, the benefits of pre-production review for relevancy may outweigh the downsides. But in other cases, an ESI production performed without a pre-production review for relevancy will provide distinct advantages, particularly where the parties harbor deep distrust and suspicions about the other side's good faith, as in this case. The approach that requires the production of documents solely based on negotiated search terms and selected custodians removes subjectivity and gamesmanship from the equation, ensuring that the maximum number of relevant documents will be produced. However, the unavoidable by-product will be the netting of some number of irrelevant documents.

This approach has been used by courts in other jurisdictions. See, e.g., In re Actavis Holdco U.S., Inc., No. 19-3549, 2019 WL 8437021, at *1 (3d Cir.

Dec. 6, 2019) (collecting cases).¹⁰ And it is entirely consistent with the policy underlying the discovery rules, which “were designed to eliminate, as far as possible, concealment and surprise” to ensure “that judgments rest upon real merits of the causes and not upon the skill and maneuvering of counsel.” Abtrax Pharms., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 512 (1995) (citation omitted).

In short, there is no one-size-fits-all solution for these issues. Whether to err on the side of being overinclusive or underinclusive in setting the right protocol for discovery is a matter entrusted to the sound discretion of our trial courts. As set forth below, the trial court did not abuse that discretion.¹¹

B. The Trial Court Reasonably Sought To Ensure That The Parties Could Not Withhold Relevant Discovery Materials (Da159; Da183 ¶ 9; T26-10 to -13)

Judge Swift ordered the parties to produce all relevant non-privileged, non-trade secret documents. The protocol that he chose to achieve that end directed the parties to agree on ESI search terms and custodians, and to run the search terms through their IT systems. This approach, he concluded, would

¹⁰ In accordance with Rule 1:36-3, ER Physicians have included copies of all unpublished opinions in their appendix. ER Physicians are not aware of any contrary unpublished opinions other than those in United’s appendix.

¹¹ Although the trial court made some general statements about ESI, as discussed in this brief, its ultimate decision was based on the combative history between the parties in which each side had accused the other of hiding relevant evidence. In short, the court’s decision rests on the specific circumstances presented in this case.

yield the greatest amount of legitimate discoverable materials. He did not -- as United wrongly asserts -- issue a directive “to compel production of irrelevant documents.” (Db2.) The court acknowledged, however, that the byproduct of its decision to prioritize comprehensive production of relevant materials would be the inevitable effect of netting some number of irrelevant documents. (T24-11 to 25-14.)

The court had to select between two less-than-perfect discovery schemes in light of the contentious history between the TeamHealth affiliates and United. The parties have accused each other of using the pre-production relevancy review to withhold relevant documents or render them incomprehensible by redactions. Both sides appear to admit that pre-production relevancy review has led to the non-production of relevant evidence. The trial court’s discovery Order maximizes the production of relevant evidence with the tradeoff being the production of some number of irrelevant documents.

The tradeoff at issue in this case is not new to our civil justice system. Every day, during a deposition, a lawyer may want to object to a question that will -- in the lawyer’s mind -- elicit irrelevant information but is prohibited from doing so by Rule 4:14-3(c). The drafters of that Rule understood that allowing objections on the ground of relevancy would undermine the efficiency and efficacy of a deposition -- and the securing of relevant evidence. The relevance

issue is preserved for the court if there is a challenge to the admissibility of the evidence at trial. Ibid.

The question here is not whether a party should be arbitrarily compelled to produce irrelevant materials -- United and the ER Physicians (and the trial court) all agree that it should not. Instead, the critical questions are whether this Court should impose an ironclad rule that producing parties always get to decide which documents are relevant and responsive by means of a pre-production relevancy review. Or whether this Court should allow trial courts to exercise their sound discretion and decide whether, in a particular set of circumstances, the parties should be directed to agree on search terms for the culling of relevant ESI information so that neither party has the final word in designating evidence as relevant or irrelevant.

Stated differently, the issue is whether trial courts must always adopt discovery protocols geared towards minimizing the production of irrelevant documents (and, by doing so, empower the parties to withhold relevant evidence). Or whether, at times, it is permissible for trial courts to prioritize the fulsome production of relevant materials (resulting in the production of some irrelevant evidence).

The trial court considered these options and chose the one best suited to achieve the truth-seeking function of the discovery process in this case. The

court decided, in this instance, that neither party should be the judge of its own cause in making relevancy determinations. (T5-20 to 6-21, T18-19 to 19-2, T24-11 to -25, T25-4 to -14.) Given the court’s knowledge of the nation-wide discovery disputes between United and TeamHealth affiliates, that was an appropriate exercise of discretion. For the following reasons, this Court should affirm.

First, the trial court fully grasped the mechanics of eDiscovery and the inherent tradeoffs of the available options when it selected a discovery protocol. (T5-19 to 6-21, T20-18 to 25-14.) Moreover, the court offered a carefully considered rationale for its decision. See Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (noting that abuse of discretion “arises when a decision is made without a rational explanation. . . .”) (citation omitted). The court explained that pre-production relevance review is “subjective by [its] very nature” and that an attorney “from one side will very likely disagree with [the attorney] doing the same review from the opposing side.” (Da159.) That raised the question in the court’s mind whether the gatekeeper of the documents should be the final arbiter of their relevance, particularly when the reviewers may be young associates or paralegals who “do not completely understand all the intricacy of the issues.” (Da159.)

Second, the trial court clearly understood the potential harm associated with broad production of ESI search hits absent pre-production relevance review: potential disclosure of sensitive information. To that end, it took steps to mitigate that concern. It noted that “[a]s long as there is a confidentiality order in place, there is very little risk to the producing party.” (Da159; Da124 ¶ 18; T6-8 to -10, T22-9 to -18.) And it warned the parties that there would be meaningful consequences if any party were to violate the protective order. (Da103; Da124 ¶ 19; T23-20 to 24-4.)

Third, the trial court allowed the parties to “withhold or redact a small subset of ESI documents that contain information so proprietary that their production could result in business losses or disruption, with each such document separately identified on a ‘business proprietary’ document log.” (Da167 ¶ 3; T27-4 to -12.) In so doing, the trial court struck a careful and appropriate balance between the competing interests at stake.¹²

¹² United expressed that the trial court’s discovery protocol would impose undue burden and expense because the parties would be required to perform a privilege review of irrelevant documents that would not otherwise be produced or logged. (Da126 ¶ 23.) But the trial court’s response was that it could discern no reason that a privilege review of all documents returned by the ESI search terms would be any more burdensome or expensive than a relevance review of those same documents. (Da159.)

Fourth, the trial court’s discovery protocol was tailored to the needs of this specific case, given the parties’ contentious disputes in related litigations. Each side accused the other of withholding relevant documents in the past.

In an April 25, 2023 hearing before the trial court, and later, counsel for ER Physicians noted that United had in other cases made selective redactions to documents based on its unilateral determination that certain portions of the documents were not relevant. (Da182 ¶ 4; T12-21 to 13-5, T20-6 to -17.)

In the same vein, United’s counsel sent a letter to the trial court stating that “[b]ased on past experience, it is likely that after reviewing [ER Physicians’] ESI production the United Defendants will need to raise deficiencies with the [trial court].” (Da155-56.)¹³ United’s counsel contended that “[TeamHealth] affiliates initially produced just 0.6% of documents reviewed in the New York litigation, with significant gaps in production.” United’s counsel repeated their concern about the non-production of relevant evidence at the July 6 Conference. (Da156.) United claimed that the ER Physicians’ affiliates’ use of TAR in other litigations had resulted in those affiliates designating as relevant an unduly small subset of the ESI search results. (Da182 ¶ 8.)

¹³ Judge Swift did not consider the prospect of having a trial court (or even a special discovery master) review tens of thousands of documents for relevancy to be a reasonable alternative.

Thus, the trial court was confronted with a situation where both parties had expressed concerns -- borne of historical experience -- that the other side would use a pre-production relevancy review to withhold discoverable materials. In light of those problematic circumstances, the court stated its aim: “What I’m trying to avoid here by all accounts is this contentious litigation [that is] going on throughout the country” over the parties pre-production relevancy determinations. (T18-18 to -25.) The trial court implemented a protocol intended to resolve those concerns by ensuring (as best as possible) the production of all relevant documents by mandating production of all non-privileged search results, thereby allowing both parties to make the initial relevancy determination, with the court acting as the final arbiter at trial. (T5-19 to 6-1, T6-17 to -21, T18-19 to 19-2.)

Finally, the trial court’s discovery protocol was equally and fairly applied to both sides. The trial court ordered all parties to produce their search hits without a relevancy review. (T18-19 to 19-2.) Ultimately, the parties exercised significant control over the volume of search hits -- they mutually negotiated and agreed on the search terms after the trial court told them that there would be no further relevance review. (Da122 ¶ 10; Da182 ¶¶ 4-6.)

Of course, none of this is to say that the trial court’s protocol was the only appropriate or reasonable approach to discovery in this case. Rather, it was, at

the very least, one of several permissible alternatives -- and certainly was “not so wide [of] the mark that a manifest denial of justice resulted.” DiFiore, 254 N.J. at 228 (alteration in original) (citation omitted). The trial court’s decision to impose a discovery protocol precluding the parties from withholding ESI search hits for relevance was well within the bounds of its discretion. See generally Cap. Health Sys. Inc. v. Horizon Healthcare Servs., Inc., 230 N.J. 73, 83 (2017) (“The chancery judges’ determinations were soundly and logically reached and should not have been second-guessed because the Appellate Division harbored a different view of the merits.”); Hurwitz v. AHS Hosp. Corp., 438 N.J. Super. 269, 306 (App. Div. 2014) (“Such a case-specific approach is consistent with the important role that our civil trial judges routinely perform in balancing the needs of litigants to obtain relevant information against the often significant burdens and costs of the discovery process.”).

Indeed, the Third Circuit recently held that a district court order that refused to allow a relevancy review was not a “clear abuse of discretion” or a “clear error of law.”¹⁴ In re Actavis, 2019 WL 8437021, at *1 (citation omitted). It recognized that federal district courts, like New Jersey trial courts, enjoy

¹⁴ A decision that is a “clear abuse of discretion” or a “clear error of law” under federal law is not any different than a state law decision that is “so wide [of] the mark that a manifest denial of justice resulted.” See DiFiore, 254 N.J. at 228 (alteration in original) (citation omitted).

“wide latitude in controlling discovery.” Ibid. Like the New Jersey Court Rules, “the Federal Rules of Civil Procedure permit a district court to compel the production of documents within broad parameters.” Ibid. Like the parties here, the parties in Actavis were to produce documents “from custodians identified as possessing potentially relevant information, and search terms aimed at identifying relevant information.” Ibid. And, like the trial court here, “the District Court provided reasons for its approach” and permitted the parties to shield privileged documents and protect sensitive information. Ibid.

This Court should defer to the trial court’s thoughtful and careful balancing of the various interests and reasonable resolution of the issue -- even if it might have chosen a different protocol had it been the court in the first instance.¹⁵

II. UNITED’S OBJECTIONS DO NOT PROVIDE A BASIS TO REVERSE THE TRIAL COURT’S DISCOVERY ORDER (Da166-68)

United offers several reasons that the trial court’s discovery order amounts to an abuse of discretion. In general, it contends that the trial court misapplied

¹⁵ Of course, had the trial court selected the approach favored by United -- full relevancy review prior to production -- that would have been permissible as well, and there would be no basis for the ER Physicians to seek reversal of the determination.

Rule 4:10-2(a) and imposed an undue burden on United with no countervailing justification. United's arguments should be rejected.

A. The Trial Court Did Not Misapply Rule 4:10-2(a) (Da159; Da183 ¶ 9; T26-10 to -13)

United contends that Rule 4:10-2(a) limits discovery to “any matter, not privileged, which is relevant to the subject matter involved in the pending action.” But it seemingly ignores the other part of the Rule, which explicitly provides that information is discoverable, even though it will “be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” The latter provision of Rule 4:10-2(a) is an acknowledgment that information is discoverable even if irrelevant and therefore inadmissible at trial, so long as that information may lead to the discovery of admissible evidence.

United is wrong that the trial court specifically ordered the parties to produce materials that are not relevant because it determined that mandatory production of irrelevant materials is permitted in the ESI context. (Db13-17, Db23-24.) Not only does United mischaracterize the trial court's thoughtful order, but it erroneously compares the present case to the extreme set of circumstances presented in Lipsky v. New Jersey Association of Health Plans, Inc., 474 N.J. Super. 447, 451-52 (App. Div. 2023), on which it principally relies.

As explained above, the trial court's clearly expressed reason for ordering its discovery protocol was to ensure that all relevant documents are produced. (Da159; Da183 ¶ 9; T26-10 to -13.) The court was concerned that a relevancy review would result in the non-production of discoverable documents, and it implemented a protocol designed to prevent that outcome. (Da159.) The production of irrelevant documents was an inherent and inevitable byproduct of the court's effort to ensure production of relevant materials; it was not the object of the court's order.

Moreover, Lipsky does not remotely resemble the case before this Court. In that case, the trial court had entered a discovery order compelling a state agency, subject to a third-party subpoena, to surrender its employees' state-issued cell phones and personal cell phones to a litigant's eDiscovery vendor, which would then copy the phones' entire contents -- including privileged materials and, presumably, the employees' most sensitive personal, health, and financial information -- before searching the contents for materials responsive to the subpoena. 474 N.J. Super. at 456-62.

This Court reversed the Lipsky trial court's shocking discovery order for several reasons. First, it noted that Rule 4:18-1 -- the document production Rule -- does not "anticipate that the requesting party will be permitted to search through [its] opponents' electronic devices for responsive data." Id. at 467-68.

Second, it recognized that the subpoena recipient was not a party to the litigation, and that the “plaintiffs’ primary source of discovery regarding these allegations should be from defendants, and only secondarily from the [subpoena recipient,]” and that “[d]iscovery from defendants could have narrowed the scope of any requests made to the [subpoena recipient]. . . .” Id. at 470. Third, the Court observed that the requirement for the subpoena recipient to surrender electronic devices without conducting a privilege review “had the potential to violate privilege or confidentiality attaching to responsive documents, contrary to Rule 4:10-2(a).” Ibid. Finally, the Court noted the obvious:

[T]he trial court in this case clearly erred in failing to adequately consider and protect the strong privacy interests associated with the contents of individuals’ personal electronic devices. . . . The requirement that individual Department employees produce their personal devices for forensic evaluation was unduly invasive and burdensome, and beyond what should generally be required in civil litigation.

[Id. at 473.]

None of the concerns that animated Lipsky are present here. First, the trial court did not grant the parties direct access to each side’s IT systems. Instead, the court ordered the parties to perform searches of their own systems using mutually agreed to search terms -- negotiated after the parties knew that there would be no further relevance review -- and to produce the resulting information to the requesting parties in a usable format. (Da167-68.) That is

entirely consistent with Rule 4:18-1. Next, the producing parties in this case are all parties to the litigation, rather than third-party subpoena recipients. Third, unlike Lipsky, the trial court here permitted the parties to review their own documents prior to production and to withhold privileged information and highly sensitive “business proprietary” information. (Da167-68.) Finally, this dispute does not involve any individuals’ personal electronic devices, with their attendant privacy concerns. As such, Lipsky is wholly inapposite.

Next, United contends that the trial court erred because it held that “ESI is different,” whereas Rule 4:10-2 specifically encompasses ESI discovery. (Db15-17, Db24-25.) United fundamentally misunderstands the trial court’s ruling. The trial court did not hold that entirely different rules should govern eDiscovery. Rather, it merely recognized the obvious: the discovery rules are flexible by design, and they often must be applied differently to discovery of ESI. (E.g., T20-18 to 21-7.) The court’s observation is simply a reflection of the enormously greater volume of documents typical with eDiscovery. Indeed, the same principle would also apply to paper discovery. A very different protocol might apply to potentially relevant information housed exclusively within a single filing cabinet than to potentially relevant information spread throughout tens of thousands of boxes in multiple warehouses. Ultimately, a

trial court's task is to fashion a protocol tailored to the needs of a given case. That is precisely what occurred here.¹⁶

United also contends that in cases involving ESI, courts “regularly hold that relevancy review is required -- not as a matter of discretion, but as a matter of law.” (Db21 (collecting cases).) While some (non-New Jersey) courts have held as much, others have held the opposite. In Consumer Financial Protection Bureau v. Navient Corporation, for instance, the District Court found it “appropriate to utilize its discretion to grant Navient’s request to order the [Consumer Financial Protection Bureau (‘CFPB’)] to turn over all non-privileged documents that mention ‘Navient’ or ‘Pioneer.’” 3:17-CV-101, 2018 WL 6729794, at *2 (M.D. Pa. Dec. 21, 2018). In particular, the court recognized that “the CFPB has essentially made relevance determinations on Navient’s behalf, instead of treating as presumptively relevant all the search results found utilizing search terms to which Navient has no objection.” Ibid. It held:

This is improper given the broad scope of discovery and relevance at this stage; the important and expansive nature of this matter; the lack of insight that Navient has into the documents retained by the CFPB; and as Navient noted at the December 10 hearing, the

¹⁶ United notes that Rule 4:10-2(f) specifically addresses ESI, which demonstrates that eDiscovery is subject to Rule 4:10-2. That is true but beside the point. Indeed, Rule 4:10-2(f)(2), by its plain terms, precludes discovery of ESI that would impose an undue burden on the producing party. Here, the trial court selected a protocol intended to minimize the burden on producing parties.

existence of a protective order that mitigates the potential harm of the CFPB turning over irrelevant materials to Navient.

[Ibid.]

In short, like the trial court here, the Navient court ordered full production of non-privileged search hits without the parties performing a pre-production relevancy review, and it did so for many of the same reasons. See also Williams v. Taser Int'l, Inc., 1:06-CV-0051-RWS, 2007 WL 1630875, *6 (N.D. Ga. June 4, 2007) (“Taser shall not refuse to produce any document returned by the searches stated above on the basis of relevancy, undue burden, or any other ground not provided herein without first obtaining a protective order from this Court.”); In re Actavis, 2019 WL 8437021, at *1.

Of course, that is not to say that production without relevancy review is the only way to conduct a discovery process. But that courts at times have utilized this procedure demonstrates the ultimate point: the trial court’s protocol was one of several permissible alternatives.

Additionally, the trial court believed that the arbiter of whether documents are relevant should not be the producers of the documents. (T5-20 to -23.) United contends that this was error. (Db26-30.) It was not. Although producing parties often make unilateral relevancy determinations prior to production, the ER Physicians are aware of no rule commanding that procedure in all instances.

Nor has United identified one. In fact, the only New Jersey authority that United cites in support of its categorical position is Lipsky. (Db27-28.) But, as explained above, Lipsky's holding that Rule 4:18-1 does not allow opposing parties direct access to each other's electronic devices is not implicated here, because the trial court did not grant the parties such access. Instead, it merely compelled the parties to copy and produce the non-privileged documents based on hits from mutually agreed to search terms. (Da167-68.) That was entirely consistent with Lipsky.

Finally, United's entire position is premised on an unduly narrow understanding of the scope of permissible discovery. See Nestle Foods Corp., 135 F.R.D. at 104 (“[T]he question of relevancy is to be more loosely construed at the discovery stage than at the trial.”). United does not acknowledge that “[i]t is important to distinguish the right to obtain information by discovery from the right to use it at trial.” See ibid. Although United contends that discovery is limited exclusively to “relevant” evidence as that term is understood under the Rules of Evidence, (Db13-15), Rule 4:10-2(a) explicitly allows the discovery of evidence that is irrelevant and therefore inadmissible at trial so long as “the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” The discovery rules have a broad scope, and they are

intended to ensure that parties can obtain all relevant, admissible evidence, even if that requires the production of some irrelevant evidence as well.

Accordingly, the trial court's discovery protocol was consistent with the Rules and not an abuse of that court's broad discretion.

B. The Trial Court Did Not Unduly Burden United Without Justification (T5-1 to -8, T21-8 to 23-7, T24-11 to 25-14)

United maintains that even if the trial court's discovery protocol is consistent with the Rules (it is), the court nonetheless abused its discretion because the protocol is unduly invasive and burdensome, without any countervailing benefits. (Db34-39.) That position should be rejected.

First, United contends that the trial court's discovery protocol is unduly invasive of its "privacy rights," because the ER Physicians "could weaponize confidential documents they gain access to during discovery." (Db36.) Not so. As the trial court emphasized, there is a stringent protective order in place that allows the parties to designate produced materials as Confidential or Attorneys' Eyes Only and precludes receiving parties from "weaponiz[ing]" those materials. (Da89-90; Da159; T6-8 to -10.) In addition, the court threatened to impose "extreme" sanctions on any party that violates the protective order. (T23-23 to 24-4.) Finally, the trial court permitted the parties to withhold from production any materials "that contain information so proprietary that their production could result in business losses or disruption." (Da167-68 ¶ 3.) In

short, United cannot show that the trial court’s discovery protocol is so “invasive” as to constitute an abuse of the court’s discretion.¹⁷

Second, United contends that the trial court’s protocol “imposes unnecessary and significant expense,” because it would require United to review the full set of ESI search results for privilege. (Db38-39.) But United never adequately explains why a privilege review would be any more expensive than a relevancy review. Indeed, the trial court stated, “I really don’t understand that argument. They’re going to have to review the documents anyway for privilege; I think it would cost them less money if they didn’t have to review the documents for relevance because they can just eliminate that review.” (T5-1 to -8.)

And if United’s belief is that “the parties might have benefited from the previous relevancy reviews conducted in [related] cases,” (Db39), that is

¹⁷ United states that its reluctance to produce confidential information is a product of its experience in the Nevada litigation, where the TeamHealth affiliates “posted documents designated as ‘Attorneys Eyes Only’ and ‘Confidential’ on a public anti-United website.” (Db9, Db36-37.) That is a grossly misleading portrayal of what occurred in Nevada. In fact, the only documents that were posted on the website had already been entered into evidence and been the subject of extensive witness testimony (at a public trial, that was livestreamed over the internet, with media present in the gallery). (Da144-45; Da149-50.) As such, the documents were a matter of public record at the time they were posted, and it was not improper or inappropriate for the TeamHealth affiliates to draw attention to them. Nonetheless, United raised an objection to the website, and the Nevada court instructed the TeamHealth affiliates to remove the documents (which they promptly did). (Da145; Da149-50.)

entirely at odds with the record below. Indeed, both ER Physicians and United had complained extensively to the trial court about the inadequacies of their adversaries' productions in the related cases.¹⁸ (Da182 ¶¶ 4, 8; Da155-56; T13-8 to -22, T20-6 to -17.)

Finally, United is wrong that the trial court "offered no good reason" for its discovery Order. (Db39.) The trial court noted "the contentious litigation . . . going on throughout the country" where each side claims the other is withholding relevant evidence. (T18-19 to -24.) The court disclaimed its intention to compel the production of "a mass of irrelevant" documents and included in its order confidentiality and clawback provisions. (T24-18 to -21, T6-8 to -10.) The court clearly and cogently explained the benefits to be achieved by its discovery protocol: the production of all relevant materials by restricting the producing parties from making unilateral relevancy determinations. (T21-8 to 23-7, T24-11 to 25-14.)

Ultimately, the trial court's discovery order must be viewed in context. Both sides have accused each other of abusing pre-production relevancy review as a tool for withholding relevant documents. In light of this particular and

¹⁸ Notably, the trial court's discovery protocol was imposed equally on all parties. Thus, even if the protocol were unduly invasive and burdensome, United has not been targeted unfairly. Those concerns would affect ER Physicians in equal measure.

unusual record, the court selected an approach that was both reasonable and pragmatic and has been utilized in other jurisdictions. United may not like the court's explanation, and it may subjectively weigh the costs and benefits differently. That more than one discovery option may have been available does not render the one chosen by the trial court unreasonable, much less "so wide [of] the mark that a manifest denial of justice resulted." DiFiore, 254 N.J. at 228 (alteration in original). The trial court provided a straightforward, reasonable rationale for its decision, which falls easily within the bounds of its broad discretion.

Accordingly, this Court should defer to the trial court's decision and affirm.

CONCLUSION

For all the foregoing reasons, the trial court's September 12, 2023 Order should be affirmed.

Dated: July 16, 2024

Respectfully submitted,

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Appellate Division

Docket No. A-002031-23 (AM-000056-23)

ATLANTIC ER PHYSICIANS	:	CIVIL ACTION
TEAM PEDIATRIC ASSOCIATES,	:	ON APPEAL FROM AN
PA, EMERGENCY CARE	:	ORDER OF THE SUPERIOR
SERVICES OF NJ, PA,	:	COURT OF NEW JERSEY,
EMERGENCY PHYSICIAN	:	LAW DIVISION,
ASSOCIATES OF NORTH	:	GLOUCESTER COUNTY,
JERSEY, PC, EMERGENCY	:	COMPLEX BUSINESS
PHYSICIAN ASSOCIATES OF	:	LITIGATION PART
SOUTH JERSEY, PC,	:	
EMERGENCY PHYSICIAN	:	DOCKET NO.: GLO-L-1196-20
SERVICES OF NEW JERSEY, PA,	:	Sat Below:
MIDDLESEX EMERGENCY	:	
PHYSICIANS, PA and	:	HON. JAMES R. SWIFT,
PLAINFIELD EMERGENCY	:	J.S.C.
PHYSICIANS, PA,	:	
	:	
<i>Plaintiffs-Respondents,</i>	:	
vs.	:	
	:	
<i>(For Continuation of Caption</i>	:	
<i>See Inside Cover)</i>	:	

BRIEF FOR *AMICUS CURIAE* ELECTRONIC DISCOVERY INSTITUTE IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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Date Submitted: August 6, 2024



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UNITEDHEALTHCARE :
INSURANCE COMPANY, :
OXFORD HEALTH PLANS (NJ), :
INC., MULTIPLAN, INC., and :
UMR, INC., :
Defendants-Appellants. :

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STATEMENT OF INTEREST OF AMICUS CURIAE

Proposed amicus curiae, the Electronic Discovery Institute (EDI), is a 501(c)(3) entity that brings together eDiscovery practitioners, judges, and professors for purposes of education, leadership, service, advocacy and research at the intersection of law and technology, with a focus on discovery, information governance, cybersecurity, litigation, and big data management.¹

Amicus seeks to use its knowledge and background to inform this Court that the unprecedented discovery order by the trial court threatens grievous harm to third parties, while also breaking with established discovery practices and violating the established rules of New Jersey courts. The trial court improperly ordered the Defendants to produce irrelevant information collected via an overbroad keyword search methodology and then prohibited Defendants from removing irrelevant emails prior to production, a clear departure from decades of practice to the contrary.

There is a real danger that confidential and valuable commercial information of third parties will exist in the document productions of Defendants pursuant to the Order. Amicus is deeply concerned and alarmed about the effect of this ruling and respectfully urges that the Court reverse this Order.

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission. All parties have consented to the filing of this brief.

PRELIMINARY STATEMENT

Amicus respectfully submits this brief to urge the Court to reverse the trial court's Order and determine that trial courts may not order the production of concededly irrelevant documents. The issue posed by Defendants' appeal is straightforward: Can parties be ordered to produce — in violation of the plain limitations of Rule 4:10-2 — vast collections of documents without first being afforded the opportunity to remove their own — and third parties' — irrelevant personal, private, trade secret, or otherwise confidential material?

The authors of our Nation's system of full pretrial disclosure never anticipated the present reality, in which potentially disclosable materials in a civil matter comprise millions or billions of documents and contain highly personal information of nonparties who are but bystanders to the dispute.

Over time, the astronomical electronic data volumes required courts, lawyers, and parties to adapt discovery practices to the new reality. The new manner in which potentially responsive materials are gathered — typically using keywords as search terms — produce vastly overbroad collections of documents. For years, all concerned have understood this predicament and have allowed producing parties to identify and remove irrelevant documents or content from collections of materials being produced to requesting parties.

By contrast, the Order here requires Defendants to produce every single email that contains a hit on any of the keyword search terms used. This requirement ignores the reality that a significant portion, sometimes a majority, of the documents collected by keyword searches are irrelevant, despite the parties' best efforts to choose appropriate search terms.

One recent study conducted by the National Institute of Standards and Technology (NIST), an agency of the U.S. Commerce Department, found that even the most carefully designed keyword searches achieved only 44.6% precision of relevant articles, meaning 55.4% of the "hits" were nonresponsive. Kirk Roberts, et al., Overview of the TREC 2018 Precision Medicine Track, Twenty-Seventh Text REtrieval Conf., Nat'l Inst. Standards & Tech. Spec. Pub. 500-331 at <https://trec.nist.gov/pubs/trec27/trec2018.html>. While keyword searches of the modern type specified in the Order are commonly used in modern litigation, because of their imprecision as evidenced by the NIST study, they are only the first step in a methodology that also requires substantive review of the "hits" to separate relevant information from many false-positive retrievals. The Order improperly prohibits Defendants from performing this needed substantive review from the keyword methodology.

The Order thereby disregards the discovery limits of Rule 4:10-2, and requires production of documents and information concededly unnecessary for

the resolution of this dispute, undoubtedly including material in emails that the senders thought would remain forever private: e.g., trade secrets, personal health information protected by HIPAA, Social Security numbers, expert consultants' communications and reports, login and password credentials, valuable personally identifiable information, or even intensely personal communications. Unless reversed by this Court, the Order requires all of this material to be produced to Plaintiffs and exposed to innumerable persons at Plaintiffs' facilities and external document review vendors, not to mention any malevolent hacker who may gain access to their data stores. The more places this information is stored, the more likely it is to be compromised and made public.

Overbroad production is an issue that eDiscovery experts have been discouraging for years. Parties do not have a right to access information that is wholly unrelated to the litigation. Discovery Orders like the one issued by the trial court must be repudiated. This presents a severe problem for the parties, nonparty entities, and individuals whose private information will be needlessly exposed. As national conceptions of personal privacy evolve and tighten, and requests for unfiltered productions of confidential business information become more prevalent, there is an urgent need for clarity around the production of personal or otherwise confidential emails in pretrial discovery.

**PROCEDURAL HISTORY
AND STATEMENT OF FACTS**

To the extent needed for the arguments herein, EDI relies upon the procedural history and statement of facts set forth in Defendant UnitedHealth Group’s Brief.

LEGAL ARGUMENT

**I. WHY IS THE ORDER AND OTHERS LIKE IT SO
CONCERNING TO AMICUS CURIAE?**

Plaintiffs argue the trial court’s Order was “well-reasoned,” intended to promote “unobstructed production of relevant discovery,” and includes a protective order under which they can be entrusted to maintain confidentiality of irrelevant material produced. Pl. Br. 1. This is wrong. The Sedona Principles recognize that the “responding party is best situated to preserve, search, and produce its own ESI.” The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 19 Sedona Conf. J. 1, 118 (2018). Also, the entry of a protective order to govern documents turned over to the other party does not protect against harms that could arise if orders such as this one were allowed to go into effect.

When similar orders have been considered in Federal courts, most districts have found that parties have a right to review their keyword hits for

responsiveness, privacy, trade secrets, and other protected information.² The Order here is against the overwhelming majority of these cases and, if left in place, will inevitably encourage more such attempts in matters large and small. The Order is unprecedented in scope by seeking production of irrelevant material and should be decisively rebuffed.

A. Protective Orders Do Not Protect Against the Theft of Irrelevant Information in Produced ESI.

The trial court is absolutely correct when it states that “ESI is different.” Tr. Pre-Motion Hearing 24. ESI is uniquely more vulnerable to malicious actors than other types of discoverable information. The mere entry of protective orders in discovery does not protect against cybersecurity breaches or other risks of disclosure or misuse.³ Moreover, such orders do not ensure there will be no malicious actions taken by document reviewers, often third-party vendors in foreign countries given access to the documents produced. Protective orders are

² See, e.g., O’Donnel/Salvatori Inc. v. Microsoft Corp., 339 F.R.D. 275, 277 (W.D. Wash. 2021) (finding in the handful of courts that have addressed this issue, a “party’s agreement to run search terms does not waive its right to review the resulting documents for relevance”).

³ See, e.g., David Kessler, et al., Protective Orders in the Age of Hacking, *The American Lawyer*, Mar. 16, 2015 (“As discovery has become predominately digital, producing parties must now face the threat of third parties stealing highly sensitive information not just from their and their advisor's computer systems, but their opponents' data systems as well.”).

enforced by the threat of sanctions, but sanctions can be enforced only against those that are subject to the protective order — not those in foreign jurisdictions.

Further, there is a real risk the documents will be accessed by those who have not been given permission to access them. At a time when even blue chip corporate law firms — Proskauer Rose, Kirkland & Ellis, K&L Gates, Loeb & Loeb, and Orrick Herrington & Sutcliffe just to name a few⁴ — have been hacked and bad actors worldwide continue relentlessly to target major U.S. entities, the risks that a sensationalistic target like personal emails of hundreds of custodians will be vulnerable to hacking cannot be underestimated.⁵ For many cases, like this one, there are millions of documents that need to be reviewed. It is ever more important to protect irrelevant, sensitive data from being produced, lest they fall into the wrong hands. Protective orders do not protect against this risk.

⁴ See Sam Skolnik, Skye Witley, & Olivia Cohen, Law Firm Cyberattacks Grow, Putting Operations in Legal Peril, Bloomberg L., Jul. 7, 2023.

⁵ At a time when partisan political emotions are pronounced, there can be no guarantee someone given access to personal information of Defendants' custodians will honor the obligation to preserve confidentiality if the reviewer opposes the custodian's political views. See, e.g., Katherine Rosman, They Paid \$42 for a SoulCycle Ride, Not for Trump, N.Y. Times, Aug. 8, 2019 (customers boycott and fitness chains do damage control after news of stakeholder holding fundraiser for President Trump); Kevin Draper, Gruden's Emails Were Collateral Damage in Washington Football Inquiry, N.Y. Times, Oct. 12, 2021 (leaked emails discovered in a confidential investigation into workplace harassment claims led to the firing of a NFL coach).

Further, Rule 4:10-2 strictly forbids the production of irrelevant material because requesting parties and their counsel, including those here, are not entitled to even see such material, and once seen, this bell cannot be unrung.⁶ And commencing an action over a specific dispute entitles the plaintiff only to discovery of information about that dispute, nothing else. Even a clawback procedure — were one in place that applies to irrelevant materials — would not cure or mitigate this error. Clawback procedures, presuming they work perfectly, still do not protect against the risk of hacks or malicious use by third parties that are not under a protective order or subject to the clawback procedure.

B. The Order and Others Like It Threaten Real Harm to the Proprietary and Privacy Interests of Third Parties.

In the normal course of business, companies regularly exchange with other entities highly confidential and valuable information via email. Because of (i) the excessive sweep and inherent limitations of one-round keyword searching, (ii) the fact that the emails of literally hundreds of custodians will be searched, and (iii) the fact that the producing parties are forbidden from removing irrelevant emails from the productions the Order requires them to make, there is

⁶ This is all the more problematic as the larger firms bring a larger share of class actions. Their exposure to irrelevant, confidential information, which cannot be erased from their minds, cannot be waved away as inconsequential.

real danger that a nonparty's confidential and valuable commercial information will exist in the document productions of Defendants.

Thus, the procedure specified in the Order could lead to the unnecessary production of irrelevant but valuable trade secrets and other confidential information (e.g., confidential pricing, bank account credentials, and financial statements). See, e.g., MarketRx, Inc. v. Turner, 2006 WL 851930 at *13 (N.J. Super. Ct. Ch. Div. 2006) (granting confidentiality order in non-compete action to prevent disclosure of trade secrets). To make this breach of privacy worse, the third parties may never discover that their proprietary and confidential information was disclosed. In Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35 (1984), the Supreme Court recognized that incidental release of third parties' irrelevant information could damage their privacy interests, and courts' processes should be managed to prevent such abuse:

“[R]elevant information in the hands of third parties may be subject to discovery. There is an opportunity, therefore, for litigants to obtain—incidentally or purposefully—information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes.”

Moreover, parties do not have standing to protect proprietary or confidential business information of third parties. See Borough of Seaside Park v. Comm'r of New Jersey Dep't of Educ., 74 A.3d. 80, 107 (N.J. Super. 2013)

("[O]rdinarily, litigants may not claim standing to assert rights of third parties").

So, it is up to the Court to protect those privacy interests.

Beyond harming the privacy interests of businesses, the Order harms the privacy interests of individuals. It is undeniable that individuals routinely use their business email accounts to send personal material to others, with one study finding that over 59% of all workers using their corporate email for personal use.⁷ There is an endless list of sensitive information that can be found in business email repositories, including Social Security numbers, logins and passwords, protected health information, and deeply personal communications. There is a new era of electronic communication and the blurring of lines between personal and business communication such that "many employers expect or at least tolerate personal use of [electronic communication] equipment by employees because it often increases worker efficiency." City of Ontario, Cal. v. Quon, 560 U.S. 746, 759 (2010).

Producing any and all "hits" resulting from even the most narrowly tailored search terms applied to hundreds of custodian email accounts ensures that there will be production of the custodians' highly personal, sensitive, and

⁷ New SailPoint Survey Exposes Concerning Generational Differences Regarding Corporate Email Use and Cybersecurity Posture, SailPoint Tech., at <https://www.sailpoint.com/press-releases/new-sailpoint-survey-exposes-concerning-generational-differences-regarding-corporate-email-use-and-cybersecurity-posture/>.

revealing emails to strangers they will never know.⁸ The more copies of this valuable or private data that is distributed widely, the more chances there are for it to be accessed without authorization, or in the present age of hacking, simply stolen. Keyword hits and relevance “are not synonymous.” Youngevity Int’l Corp. v. Smith, No. 16CV00704, 2017 WL 6541106 at *10 (S.D. Cal. Dec. 21, 2017). “Search terms are an important tool parties may use to identify potentially responsive documents in cases involving substantial amounts of ESI. Search terms do not, however, replace a party’s requests for production.” Id. (citing In re Lithium Ion Batteries Antitrust Litig., No. 13MD02420, 2015 WL 833681 at *3 (N.D. Cal. Feb. 24, 2015) (keyword searches “often are over-inclusive,” producing large numbers of “irrelevant documents”).

Protecting the privacy of employee data is increasingly important for companies and others. In this state, the importance of data privacy is reflected by the recent signing into law of the New Jersey Privacy Act (NJPA), a comprehensive data privacy law that will go into effect on January 15, 2025. The NJPA regulates companies’ use of personal data and recognizes that consumers have certain rights as to their data privacy, like the right to obtain a

⁸ Keyword searching like that at issue here is designed to assemble an over-inclusive set of data from which responsive material can be pulled and produced, but it is not designed to prevent nonresponsive or private material from appearing in the tagged data set.

portable copy of personal data. New Jersey is just one of 18 states that have enacted comprehensive laws intended to protect the personal and private data of individuals, and that number is growing. Broad discovery orders, like the Order here, contravene the purpose of regulations such as the NJPA and the growing trend of protecting privacy rights, hamper companies' compliance with state statutes, like the NJPA, and subject them to penalties.

Discovery is a serious intrusion into the privacy rights of the parties as well as others having nothing to do with the dispute at issue. As a society, we allow it because it is necessary for the truth-seeking needs of the judicial system, but it necessarily has its carefully crafted limits and they should be respected. The Order does not do so.

II. THE ORDER CONTRAVENES EXISTING RULES.

There has been an explosion in data volume in case files in recent decades. Rule 4:10-2 of the New Jersey Rules of Court defines the permissible scope of discovery as “unless otherwise limited by order of the court . . . [p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action” N.J. Ct. R. 4:10-2. As the first clause makes clear, Courts have the express power to “limit” discovery further, but the Rule does not grant trial courts the power to *expand* the scope of what must be produced to a requesting party.

Not only are parties not entitled to irrelevant documents, they are not even entitled to all relevant documents as discovery is further limited by privilege and proportionality. In requiring production of innumerable irrelevant documents, which inevitably increases the costs of managing the larger resulting data set, the Order also mandates the production of disproportionate volumes of data, and thereby imposes significant unnecessary costs on the Defendants. In 2006, the Rules of the Court adopted 4:10-2(g) which placed a proportionality limitation on discovery (“burden or expense of the proposed discovery outweighs its likely benefit”), emphasizing anew the need to restrain disproportionate discovery. These changes were made explicitly to “address the discovery of ESI [in a way] that paralleled proposed changes to the Federal Rules of Civil Procedure.” Estate of Lasiw by Lasiw v. Pereira, 293 A.3d. 510, 519 (N.J. Super. 2023).

As Chief Justice Roberts states, the adoption of the rule for the Federal Courts “crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality.” Chief Justice John Roberts, 2015 Year-End Report on the Federal Judiciary, at 6.⁹ In requiring the production of innumerable irrelevant documents, which inevitably increases the costs of managing the larger resulting data set, the Order also

⁹ <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>.

mandates the production of disproportionate volumes of data, and thereby imposes significant unnecessary costs on Defendants.

Discovery is not an end in itself, but merely a means of obtaining facts so that all parties have reasonably sufficient information to advocate their case and resolve disputes. Discovery is costly, not just in money, time and resources, but in its invasion of the privacy of parties and third-parties. We accept these costs and invasions because they help uncover truth and resolve disputes on their merits, but these costs inherently rein in the scope of discovery. It may seem that the most obvious example of these limits is proportionality, where the court weighs the expected value of the discovery against its expected costs, but the bright-line rule against the compelled production of irrelevant documents is the most important. By not allowing a review for the relevance of the documents, the Court would disregard the rule in its entirety. As irrelevant documents add nothing to resolving disputes, the costs to privacy, confidentiality and resources are balanced by nothing, and should never be required.

The Order is impermissible under these provisions of Rule 4:10-2, as are others like it. Attempts to erode the bright line rule against compelled production of irrelevant documents should be decisively rejected.

III. THE COURT’S REVERSAL OF THE ORDER IS URGENTLY NECESSARY.

Plaintiffs attempt to portray this order as a “reasoned decision” that is unworthy of reversal but the Order’s extraordinary implications transcend the issues in the instant matter and go to the heart of our system for resolving civil disputes. Pl. Br. 3.

The Order transgresses what had been a bright line: absent discovery misconduct, which is not shown here, Rule 4:10-2 does not authorize orders to produce material outside that rule’s scope of discovery.

Appeals to a trial court’s discretion to enter such orders must remain unavailing. Just as a trial court has no discretion to compel discovery on claims that fail as a matter of law, it also lacks discretion to order the production of irrelevant information.

CONCLUSION

For the foregoing reasons, the trial court’s September 12, 2023 Order should be reversed.

Dated: August 6, 2024

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-002031-23 (AM-000056-23)**

ATLANTIC ER PHYSICIANS TEAM
PEDIATRIC ASSOCIATES, PA,
EMERGENCY CARE SERVICES OF
NJ, PA, EMERGENCY PHYSICIAN
ASSOCIATES OF NORTH JERSEY,
PC, EMERGENCY PHYSICIAN
ASSOCIATES OF SOUTH JERSEY,
PC, EMERGENCY PHYSICIAN
SERVICES OF NEW JERSEY, PA,
MIDDLESEX EMERGENCY
PHYSICIANS, PA, and PLAINFIELD
EMERGENCY PHYSICIANS, PA,

Plaintiffs,

v.

UNITEDHEALTH GROUP, INC.,
UNITEDHEALTHCARE
INSURANCE COMPANY, OXFORD
HEALTH PLANS (NJ), INC.,
MULTIPLAN, INC., and UMR, INC.

Defendants.

Civil Action

On Appeal from an Order of
the Superior Court of New Jersey,
Law Division, Gloucester County,
Complex Business Litigation Part,
Docket No. GLO-L-1196-20

Sat Below: Hon. James R. Swift, J.S.C.

**MEMORANDUM OF LAW OF
AMICUS CURIAE
THE CHAMBER OF COMMERCE OF
THE UNITED STATES OF AMERICA
AND
THE NEW JERSEY CIVIL JUSTICE
INSTITUTE**

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INTRODUCTION

This brief is respectfully submitted on behalf of *amici curiae*, the Chamber of Commerce of the United States of America (the “Chamber”), the world’s largest business federation, and the New Jersey Civil Justice Institute (“NJCJI”), a bipartisan, statewide group of businesses, individuals, not-for-profit groups, and professional organizations. These *amici* regularly participate in cases before this Court in order to address matters of concern to the business community, including issues of civil procedure that impact the professionals and businesses in this State.

The ESI Order at the heart of this appeal requires the parties to produce mountains of what all parties (and the trial court) agree are *irrelevant* electronic business records. Further, the trial court explicitly refused to permit the parties to screen their ESI productions for relevance, and failed to substantively address Defendants’ objection to producing irrelevant documents, asserting instead that it was not the trial court’s job to do so. And the trial court failed to weigh the purported benefits of producing the irrelevant documents against the burden of producing the irrelevant documents, especially Defendants’ pre-production review of those documents to determine whether any are privileged or proprietary. This constellation of decisions ignores what is the cornerstone inquiry for production under our Court Rules: relevancy.

The ESI Order presents a new and dangerously broad approach to e-discovery, with the potential to significantly escalate litigants' discovery costs while providing no aid toward resolution of the litigation. *Amici* therefore urge this Court to vacate the ESI Order and reaffirm that litigants are required to produce only discovery "which is relevant to the subject matter involved in the pending action." N.J. Ct. R. 4:10-2(a).

PROCEDURAL HISTORY

On September 23, 2023, the Hon. James R. Swift, J.S.C., entered an order (the "ESI Order"), which directed the parties to produce all documents identified as "hits" in response to ESI search terms agreed upon by the parties. Da167. Over Defendants' objections, the ESI Order provided that the parties "may not withhold or redact non-privileged ESI documents even if the producing party believes the document is wholly non-responsive or that it contains only irrelevant information." *Id.* Although the ESI Order permitted the parties to withhold or redact ESI on grounds of privilege, the only other review permitted under the ESI Order was for a "small subset of ESI documents that contain information so proprietary that their production could result in business loss or disruption." *Id.*

The ESI Order, therefore, directs the parties to produce all ESI containing any of the agreed upon search terms, ***without the ability to review the material for relevancy or responsiveness.*** The scope of the ESI Order represents a sea change in the operation of the Court Rules and scope of discovery – indeed, a complete inversion

of the American discovery system in which each party searches its own documents for discoverable material. The economic cost of expanding e-discovery to include the wholesale production of irrelevant documents is not hypothetical; in this case, compliance with the ESI Order will add \$750,000 to discovery costs and create an additional 68,000 documents for review. These costs would spread to all parties who litigate in New Jersey if this type of ESI Order becomes standard practice, further driving up the costs of litigation.

ARGUMENT

THE ESI ORDER IS OVERLY BROAD AND DISREGARDS THE SCOPE OF DISCOVERY CODIFIED IN THE COURT RULES.

The breadth of the ESI Order is breathtaking, compelling the production of 68,000 admittedly irrelevant documents. Da126 ¶ 23. The problem is not just that the subject documents *might* not be relevant. Rather, the trial court expressly recognized that it was ordering the production of “a significant number of documents that are not relevant ... there’s going to be a large number, and it’s argued that maybe sixty to seventy percent of the documents aren’t going to be relevant.” T6:11-17. *See also* T24:11-14 (“if in producing all the relevant documents there are fifty percent of them which are irrelevant, I don’t see the harm.”).

To be clear, the trial court did not *wrongly* determine the scope of relevancy. Rather, the court refused to engage in *any* relevancy analysis at all and dismissed such

relevancy concerns entirely, precluding Defendants from asserting that objection, even though it essential to *Rule 4:10-2*. See Pressler & Verniero, Current New Jersey Court Rules, Comment 1 to Rule 4:10-2 (Gann 2024) (“The general standard of discoverability [] is relevance”). The order is thus an abuse of discretion several times over and should be vacated.

A. The New Jersey Court Rules Promote Efficiency in ESI Discovery by Requiring Courts to Assess Relevance and Burden.

Relevance is the “touchstone” of discovery. *Estate of Lasiw v. Pereira*, 475 N.J. Super, 378 (App. Div. 2023).

Rule 4:10-2 accordingly limits the scope of discovery – both paper and electronic – to “any matter, not privileged, which is relevant to the subject matter involved in the pending action.” *Rule 4:10-2(a)*. On its face, therefore, the Rule excludes from the scope of discovery those documents which are not relevant to the case.

Further, the Court Rules recognize many circumstances in which even *relevant* discovery should be shielded from production: undue burden or expense, annoyance, embarrassment, oppression, that the requests are cumulative, duplicative, and that the burden outweighs the benefit. *Rule 4:10-3, Rule 4:10-2(g)*. Under these circumstances, a court may grant the person from whom discovery is sought various forms of relief, including: “[t]hat the discovery not be had,” “the discovery ... be had only on specified terms and conditions,” or “the scope of the discovery be limited to certain matters.”

Rule 4:10-3(a), (b), and (d). See Canlar v. Estate of Yacoub, 2018 N.J. Super. Unpub. LEXIS 1764 (App. Div. July 24, 2018). These guardrails are in place “to avoid placing undue burdens upon litigants.” *In re Pelvic Mesh/Gynecare Litigation*, 426 N.J. Super. 167, 196 (App. Div. 2012). Courts thus deny discovery when, “[a]fter assessing the needs of the case ... there exists a likelihood that the resulting benefits would be outweighed by the burden or expenses imposed as a consequence of the proposed discovery.” *Deibler v. Sanmedica Int’l, LLC*, 2021 U.S. Dist. LEXIS 247974, at *10 (D.N.J. Dec. 30, 2021) (citations omitted) (explaining “the goal of all parties should be to conduct discovery in the most efficient and cost-effective way possible”).

Resting on these foundational principles, and given the burden that discovery of voluminous electronically stored records often present, the 2006 Report of the Supreme Court Committee on Civil Practice (“Committee Report”) recommended that any rule “should be used to discourage costly, speculative, duplicative, or unduly burdensome discovery of computer data and systems.” Committee Report at 6.¹ The concern for

¹ New Jersey’s policy concerns surrounding the potential for ESI discovery to present enormous burdens on litigants, if ungoverned by sound rules of court, are generally shared by other states and the federal court system. *See The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 Sedona Conf. J. 1, 65 (2018) (“When balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(1) and its state equivalents, which requires consideration of the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and

burdensomeness was then memorialized in Rule 4:10-2(g), which limits the scope of discovery if “the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.” *Rule 4:10-2(g)(3)*. That Rule provides a trial court with “express authority to limit discovery in the circumstances enumerated by the rule in an effort to curb the proliferating discovery abuses attending modern litigation practice.” Pressler & Verniero, *Current N.J. Court Rules*, cmt. 8 on R. 4:10-2 (Gann 2007).

Thus, at its broadest, *Rule 4:10-2* provides for ESI discovery into any matters “relevant” to the subject matter of the action, but makes no allowance for discovery into “irrelevant” matters. Further, even to the extent matters may be “relevant,” ESI discovery is to be limited if the burden of production outweighs the benefit of the exchange. As this Court has explained, “when the burdens outweigh the benefits[,] the tools of discovery become, intentionally or unintentionally, weapons of oppression.” *Trenton Renewable Power, LLC v. Denali Water Sols., LLC*, 470 N.J. Super. 218, 228 (App. Div. 2022) (quotations and citation omitted).

whether the burden or expense of the proposed discovery outweighs its likely benefit.”).

This Court recently affirmed that *Rule* 4:10-2's standard applies with equal force to paper and ESI discovery. *Estate of Lasiw v. Pereira*, 475 N.J. Super, 378 (App. Div. 2023). As with paper discovery, relevance is the "touchstone" for e-discovery. *Id.* at 405. The Court also examined the requirement that trial courts assess burden, which arises to some degree in responding to any discovery request, in its *Rule* 4:10-2 analysis: "[D]iscovery otherwise permitted may be limited by the court if it determines that the discovery sought is unreasonably cumulative or duplicative, or the burden or expense of the proposed discovery outweighs its likely benefit." *Id.* at 383 (quotations and citations omitted). The analysis requires trial courts to "strive to avoid placing undue burdens upon litigants[.]" *Id.* (citation omitted).

This requirement exists for good reason. Left unchecked by the gatekeeping function of courts, ESI discovery costs will overwhelm litigants and prevent cases from being resolved on their merits. The costs of e-discovery are *already* astronomical and comprise the largest component of litigation spending. "By some estimates, discovery costs now comprise between 50 and 90 percent of the total litigation costs in a case." Beisner, "*Discovering A Better Way: The Need For Effective Civil Litigation Reform*," 60 Duke L.J. 547, 549 (2010). As of 2010, "according to experts, 99 percent of the world's information is now generated electronically. Approximately 36.5 trillion emails are sent worldwide every year, with the average employee sending or receiving 135 emails each day." *Id.* at 564 (citations omitted). By way of example – and nearly

twenty years ago – “in 2005, ExxonMobil reported to the Federal Rules Advisory Committee that it was storing 500 terabytes of electronic information in the United States alone. This amounts to 250 billion typewritten pages.” *Id. See, e.g.,* 8 Pace & Zakaras, RAND Institute for Civil Justice, *Where the Money Goes: Understanding Litigant Expenditures for Producing Electronic Discovery*, at 17 (2012) (finding that median e-discovery cost is \$1.8 million); Lawyers for Civil Justice, Civil Justice Reform Grp. & U.S. Chamber Inst. for Legal Reform, *Litigation Cost Survey of Major Companies at 3-4 (2010)*² (between 2006 and 2008, high-end discovery costs were reported to be between \$2.3 million and \$9.7 million); Linzey Erickson, *Give us a Break: The (IN)Equity of Courts Imposing Severe Sanctions for Spoliation without a Finding of Bad Faith*, 60 Drake L. Rev. 887, 925 (2012) (“In many instances, the cost of litigation may be so high that companies are unwilling to try the case on the merits.”).

The amount of ESI businesses generate will only continue to grow as more and more information is generated and retained electronically. It is thus of increasing concern to New Jersey’s business community that trial courts adhere closely to *Rule* 4:10-2, and perform the gatekeeping analysis for relevance and burden that this Court outlined in *Pereira*. Conceptually, the narrower the search terms are, the more efficient

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https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf.

the discovery process will be, keeping costs down. No matter how precise the search term is, however, there is no guarantee that all the returns – the search “hits” – will be relevant to the pending dispute. *Rule* 4:10-2’s “relevancy” standard applies to those irrelevant “hits” just as it applies to any discovery. The trial court erred in holding that *Rule* 4:10-2’s relevancy standard does not apply to Defendants’ production of ESI.

B. The Trial Court Abused its Discretion by Failing to Consider Burden and Relevance in the ESI Order.

The trial court disregarded the burden of producing 68,000 irrelevant documents at a cost of \$750,000 and failed to weigh that burden against any purported benefit of producing these irrelevant documents. Da105. The trial court expressed its reluctance “to review thousands of pages of documents” to resolve any relevancy disputes, which the court disclaimed as “not my function” and a task the court was “not equipped to do.” T6:2-7, T22:10. The trial court also stated that it was not “equipped” to make relevancy rulings, because “I don’t know what’s relevant, not relevant.” T6:2-7. In short, the court said, “I don’t want to do it and I refuse to do it because it’s not my function.” T22:9-10.

But applying *Rule* 4:10-2(a)’s relevancy and burden standard to resolve discovery disputes is *precisely* a trial court’s function. Here, the trial court did not need to review each document with an ESI term to resolve the dispute and determine if the overwhelming burden of production was justified; instead, it needed only to limit the parties’ discovery productions to relevant material. A trial court abuses its discretion

when it fails to do so. *See Madlinger v. New Jersey Transit Corp.*, 2017 N.J. Super. Unpub. LEXIS 2726, *9 (App. Div. Oct. 30, 2017) (vacating trial court’s order denying request for *in camera* review and remanding for producing party to have opportunity to assert particularized objections to specific documents before production, and for the judge to assess those objections *in camera*); *Royzenshteyn v. Pathak*, 2020 N.J. Super. Unpub. LEXIS 1562, at *22 (App. Div. Aug. 6, 2020) (ordering trial court to engage in an “arduous *in camera* review” of 1,276 communications); *compare Bayer v. Township of Union*, 414 N.J. Super. 238 (App. Div. 2010) (finding no error in trial court’s denial of motion to compel where “the court undertook an *in camera* review of all of the files and documents requested by plaintiff. The court concluded that nothing in the materials reviewed was relevant to plaintiff’s claims”).

In this case, the trial court failed to engage in any meaningful analysis and simply swept away concerns about relevancy, cost, and confidentiality. The harm to litigants from such a decision is immense, and the economic costs to a producing party are unjustifiable in the absence of a direct finding that the ESI at issue is “irrelevant.” The cost is all the more indefensible where “sixty to seventy percent of the documents aren’t going to be relevant.” T6:14-17. The court’s abdication of its role as a gatekeeper was an abuse of its discretion.

The trial court’s responsibilities flow directly from the policies underlying the Rules. Unnecessarily burdening litigants with additional layers of review for privilege

and confidentiality to produce tens of thousands of irrelevant documents is anathematic to the cornerstone “relevancy” inquiry imposed by *Rule* 4:10-2. Here, the trial court ignored the burden of additional review for privilege and confidentiality placed on Defendants in the face of the court’s own acknowledgment that the ESI contained a large percentage of irrelevant documents. Had the Court simply limited the discovery production to “relevant” records, Defendants could avoid the time and \$750,000 expense of reviewing 68,000 irrelevant documents for privilege and confidentiality.

Rather than weigh the burdens of review and production against any perceived benefits of production, the trial court simply acknowledged the costly burden, acknowledged the documents were irrelevant, and ordered them to be produced. This abuse of discretion disregards the underlying construct of *Rule* 4:10-2 and its federal analogues – that relevancy is the cornerstone inquiry. *See, e.g., Dryer v. NFL*, 2012 U.S. Dist. LEXIS 194684, at *19 (D. Minn. May 21, 2012) (weighing burden against benefit for each of the five custodians from whom ESI was sought and denying request for ESI where “the burden of production for the Defendant to produce ESI of four of the five custodians outweighs the likely benefit”); *Lewis v. Bd. of Supervisors of La. State Univ.*, 2023 U.S. Dist. LEXIS 214628, at *12 (M.D. La. Dec. 2, 2023) (“mere skepticism that an opposing party has not produced all relevant information” and “a mere desire to check that the opposition has been forthright in its discovery responses” do not suffice to “warrant drastic discovery measures”).

The trial court’s refusal to consider relevancy concerns here—including its complete disregard for Defendants’ relevancy objection—was particularly puzzling given that a Special Discovery Adjudicator had *already* been appointed to assist the court in resolving such disputes. Da97-101 (Hon. Georgia Curio, J.S.C. (Ret.) vested with authority to “consider, hear, and recommend resolution of all discovery disputes between the parties”). The trial court’s refusal to permit Defendants to screen their ESI production for relevancy, or, at a minimum, to review a sampling of the “irrelevant” documents *in camera* to weigh Defendants’ relevancy and burden concerns, and instead to order the production of “a significant number of documents that are not relevant” (T6:11-14) was a clear-cut abuse of discretion. Pressler & Verniero, Comment 4.6 to Rule 4:10-2 (abuse of discretion when “trial court allows a party to rummage through irrelevant evidence”).

The policy considerations underlying the trial court’s obligations protect individual and business litigants by ensuring discovery proceeds efficiently and in aid of dispute resolution instead of ballooning into a boundless and costly fishing expedition. Were courts statewide to simply refuse to address the issue of relevancy, the most basic of objections and most efficient filtering process would be removed from discovery exchanges. Parties would be left – as they are in this case – to search through troves and troves of irrelevant material, overburdening both the producing party and the receiving party, each of whom must now spent time and money analyzing

records that are irrelevant to the proceedings. The producing party must not only disclose irrelevant records, but review each record to determine if it is privileged or contains confidential/proprietary information subject to withholding. Conversely, the receiving party will be forced to review each of the documents produced and waste its time looking at records that have no connection to the dispute. This Court should vacate the ESI Order to ensure that *Rule* 4:10-2 fulfills the Committee's purpose of discouraging "costly, speculative, duplicative, or unduly burdensome discovery" instead of making such discovery the norm.

C. The Trial Court Abused its Discretion by Equating Search Terms with Relevance.

The trial court's blunt "refus[al]" to "do [its] function" (T22:9-10) by assessing relevance and burden prior to issuing the ESI Order should resolve this appeal. However, the substance of the ESI Order also constitutes an abuse of discretion because it fundamentally misunderstands the role that search terms play in ESI discovery. The ESI Order requires United to produce all documents that hit on a search term, without permitting United to conduct a relevance review and withhold from production documents that are irrelevant to any claim in this action and not responsive to any request. But this Court recently explained that the Rules contemplate the producing party determining relevance *before* the documents are produced:

[*Rule* 4:18-1] does not anticipate that the requesting party will be permitted to search through their opponents' electronic devices for responsive data, any more than it

anticipates that the requesting party would be permitted to search through their opponent's filing cabinets for responsive documents.

Lipsky v. N.J. Ass'n of Health Plans, Inc., 474 N.J. Super. 447, 468 (App. Div. 2023).

Lipsky did not break new ground. It is well-settled law, within and outside New Jersey, that a party producing ESI (as with paper discovery) determines relevance in the first instance, using their best efforts to cull responsive documents from a larger group of existing data. *See Enslin v. Coca-Cola Co.*, 2016 U.S. Dist. LEXIS 193556, at *8 (E.D. Pa. June 8, 2016) (“There is no obligation on the part of a responding party to examine every scrap of paper in its potentially voluminous files, and in an era where vast amounts of electronic information is available for review, courts cannot and do not expect that any party can meet a standard of perfection.”). This is fundamental to the basic structure of the American discovery system: Each party searches its own documents for discoverable material.

The facts of *Lipsky* are illustrative of the trial court's error in equating search with relevance. There, this Court found that a trial court abused its discretion by ordering the production of personal cell phones *after* the producing party had already searched the devices and produced relevant and responsive material. *Lipsky*, 474 N.J. Super. at 451. There, as here, the trial court had given *no* justification in ordering an overly broad production. “At most, there were disputes regarding the thoroughness of the searches.... However, those are run-of-the-mill concerns that could be raised with

respect to any document production.” *Id.* at 469. Accordingly, this Court concluded that the “relevance” limitation on discovery would have little meaning if parties were required to produce their documents *en masse*, letting the opposing party review relevant and irrelevant documents alike. *Id.* at 464. The *Lipsky* order, like the ESI Order here, was therefore “unduly invasive and burdensome” and contravened *Rule* 4:10-2(g). *Id.* at 470.³

The trial court’s error blurs the lines between documents containing agreed-upon search terms and the smaller universe of documents that are actually relevant to the case. If repeated, this error would make New Jersey a uniquely inefficient forum for litigation. An agreement between parties upon search terms represents a consensus on how to first cull a voluminous set of ESI records, and is *not* an agreement to produce every electronic record containing the terms. Litigants’ agreement on search terms (prior to assessing relevance) is essential to controlling discovery costs; the search terms allow the parties to efficiently exclude all documents that do not contain a responsive word or phrase, without the need for an attorney to run up billable hours by

³ Courts in other states have similarly denied requests for large-scale productions of irrelevant material. *E.g. Carlson v. Jerousek*, 68 N.E.3d 520, 537-38 (Ill. App. Ct. 2016) (“The low probative value of the information being sought does not justify a broad and intrusive method of obtaining that information that is likely to sweep in substantial amounts of irrelevant information. A party may not dredge an ocean of electronically stored information and records in an effort to capture a few elusive, perhaps non-existent, fish”) (citation omitted).

reading each of these records. The attorney can then review the documents responsive to the search terms to determine whether they are in fact relevant, while withholding from production documents that contain search terms but bear no relevance to the case.

It's little wonder that trial courts throughout the country recognize this critical distinction between agreement on search terms and agreement on the universe of relevant documents. *See FlowRider Surf, Ltd. v. Pac. Surf Designs, Inc.*, 2016 U.S. Dist. LEXIS 153563, at *27-28 (S.D. Cal. Nov. 3, 2016) (“Plaintiffs’ agreement to run a search using the parties’ agreed-upon terms does not constitute Plaintiffs’ acquiescence to produce all resulting documents.”); *Willmore v. Savvas Learning Co. LLC*, 2023 U.S. Dist. LEXIS 166813, at *28 (D. Kan. Sep. 19, 2023) (rejecting an argument that “all hits are presumptively relevant and responsive” and holding that the plaintiff could not demand that the defendant “bypass a relevance review”). This Court should adhere to its relevance precedent and to the policy interests underlying *Rule 4:10-2* in reaching the same conclusion.

The ESI Order further turns the *Rules* on their head by eliminating relevancy objections—an essential component of discovery. Parties’ discovery obligations would be expanded to include every document under the sun that contains a search term, regardless of the context in which that term arises. It would become impossible for companies to craft reasonable preservation orders, as *all documents* would be required for production, not just relevant documents; deleting any document would thus lead to

a spoliation claim, because relevancy would no longer be the appropriate inquiry. This rule could be extended to require corporations to retain all documents they create, for all time, and then to produce enormous quantities of irrelevant records each time they become involved in a lawsuit.

Discovery orders that are “unduly invasive and burdensome” are subject to reversal. *Lipsky*, 474 N.J. Super. at 470. Here, the ESI Order is unduly invasive and burdensome because it will require Defendants to expend hundreds of thousands of dollars on additional rounds of privilege and confidentiality review for 68,000 irrelevant documents and will also force Defendants to produce this irrelevant material that is not just unrelated to the subject matter of the litigation, but may also contain proprietary business information which Plaintiffs have no business reviewing.

The numbers speak for themselves. The ESI Order requires Defendants to produce 30,500 responsive documents, and 68,000 non-responsive documents. Da125-126; T35-37. Nothing in the ESI Order or the Protective Order (Da89) eliminates the harms caused by this overbroad directive. Defendants estimate an additional \$750,000 in costs to comply with the ESI Order, *i.e.*, to review the 68,000 irrelevant documents for privilege and confidentiality (which would not be necessary if those documents were screened for relevance). Da126 ¶ 23. That number is astonishing, particularly where the trial court undertook no effort to utilize a “convenient, less burdensome, and less expensive” means of acquiring relevant data. *See Horizon Blue Cross Blue Shield*

of *N.J. v. State*, 425 N.J. Super. 1, 29, (App. Div. 2012) (citing *Rule 4:10-2(g)*); *see also Rule 4:10-2(f)(2)* (“party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost.”).

Moreover, no justification was proffered by the trial court (or by Plaintiffs) as to the purpose of producing 68,000 irrelevant documents. “Broad as modern discovery may be, it is not unbridled and not unlimited.” *Berrie v. Berrie*, 188 N.J. Super. 274, 282 (Ch. Div. 1983) (quashing subpoena for financial information). “Parties’ discovery rights are not unlimited, and claims of privilege or confidentiality are not the only reasons supporting good cause justifying non-production.” *Trenton*, 470 N.J. Super. at 226 (quotation and citation omitted); *Hammock v. Hoffmann-LaRoche, Inc.*, 142 N.J. 356, 383 (1995) (“Confidential and proprietary information, while not privileged, is also entitled to protection from disclosure.”).

D. The Cases Plaintiffs Cite Do Not Support the Trial Court’s Decision.

The federal appellate court’s decision in *In re Actavis*, 2019 U.S. App. LEXIS 39254 (3d. Cir. Dec, 6, 2019) provides no support for the ESI Order. The *Actavis* court did not address the merits of whether the federal district court’s discovery order in that case constituted an abuse of discretion. *Actavis* at *8. There, without deciding if the trial court abused its discretion, the Third Circuit found that petitioner had failed to satisfy the rigorous standard for extraordinary mandamus relief. *Actavis* at *8. *See also*

Hollingsworth v. Perry, 558 U.S. 183, 190, 130 S. Ct. 705, 175 L. Ed. 2d 657 (2010) (“Before a writ of mandamus may issue, a party must establish that (1) no other adequate means [exist] to attain the relief he desires, (2) the party’s right to issuance of the writ is clear and indisputable, and (3) the writ is appropriate under the circumstances.”) (citation and internal quotations omitted); *see also In re Diet Drugs Prods. Liab. Litig.*, 418 F.3d 372, 378 (3d Cir. 2005) (mandamus is a drastic remedy available only in extraordinary circumstances).

The *Actavis* trial court, however, unlike the trial court in this case, had better addressed the producing parties’ relevancy objection by imposing safeguards, including a 120-day period for claw back of “unrelated business information and unrelated personal or embarrassing information.” *Id.* Thus, the court there had at least partially addressed its obligation to consider relevance in its discovery order in a way the trial court here simply declined to.

Notably, Circuit Judge Peter J. Phipps dissented from the *Actavis* court’s denial of mandamus relief and would have held that the district court clearly erred, observing:

[N]othing in the civil rules permits a court to compel production of non-responsive and irrelevant documents at any time, much less before the producing party has had an opportunity to screen those documents.... A court does not spontaneously gain authority to compel production of non-responsive, irrelevant documents simply by establishing a period of time afterwards for the review and potential return of the documents produced.

Actavis at *8, n.1. As Judge Phipps explained, “the sequence of events in discovery is important, and the rules of civil procedure allow for a review for responsiveness and relevance *before* production.” *Id.*, citing Fed. R. Civ. P. 26(b)(1), 34(b)(2)(C). *See also In re Zostavax Litigation ESI Protocol*, MCL No. 629, MID-L-4999-18 (Mar. 22, 2019) (“Nothing contained herein is intended to or shall serve to limit a Party’s right to conduct a review of ESI, documents, or information (including metadata) for responsiveness, relevance and/or segregation of privileged and/or protected information before production”). The principles Judge Phipps cites in dissent align with those expressed by the Committee, which underpin *Rule* 4:10-2. That the *Actavis* court declined to grant extraordinary relief where a trial court had paid substantially greater care to relevance than the court here did should not dissuade this Court from concluding that the ESI Order is an abuse of discretion.

Further, the cases cited in *Actavis* that Plaintiffs now rely upon are not persuasive and in no way displace the New Jersey precedent that compels reversal. In *Consumer Fin. Pro. Bureau v. Navient Corp.*, 2018 U.S. Dist. LEXIS 215146 (M.D. Pa. Dec. 21, 2018) (cited in *Actavis* at *8), the court ordered the CFPB to produce all documents that mentioned the terms “Navient” or “Pioneer.”⁴ But this directive was not given in a vacuum; rather, the Court limited the time period for production, and out of a total of 336,000 documents, roughly 15% were to be produced – 32,000 containing the word

⁴ Pioneer refers to codefendant Pioneer Credit Recovery, Inc.

“Navient” and 23,000 containing the word “Pioneer.” *Id.* at *8. Further, Navient had claimed that in prior productions, “CFPB has defined relevance in such a narrow way, so that issues that relate to [Navient’s] defenses were not produced.” *Id.* at *9. As such, the court found it appropriate to order CFPB to produce those documents containing the defendants’ names. *Id.*

There are no analogous facts in this matter. To the contrary, the trial court ordered the production of 68,000 irrelevant documents (recognizing that the irrelevant documents outnumbered the relevant documents by two-to-one), many of which were known to contain highly sensitive and proprietary business information. Da125-26 ¶ 22. *See also Purdue Pharm. Products v. Actavis Elizabeth*, 2015 U.S. Dist. Lexis 111363, at *2 (D.N.J. Aug. 24, 2015) (recognizing party’s interest in protecting information where “revealing the confidential business information to the public and competitors to the parties to this action would injure the parties’ business interests”); *In re Gabapentin Patent Litig.*, 312 F. Supp. 2d 653, 658 (D.N.J. 2004) (“[t]he presence of trade secrets or other confidential information weighs against public access and, accordingly, documents containing such information may be protected from disclosure.”). By way of example, in this case, unlike in *Navient*, United has identified specific additional expenses – namely, more than \$750,000 in additional costs associated with the review of 68,000 irrelevant documents – in complying with the ESI Order. Da126 ¶ 23.

In *UPMC v. Highmark*, 2013 U.S. Dist. LEXIS 196362 (W.D. Pa. Jan. 22, 2013) (cited in *Actavis* at *8), a Special Adjudicator addressed two disputed discovery demands. As to the first demand, the Special Adjudicator noted that not only had the requesting party “provided a reasonable explanation as to why *all of the requested material* is relevant,” *id.* at *10 (emphasis added), but the producing party had neither claimed that there were “any concrete subject areas that are not relevant” nor “suggested any feasible way of separating arguably irrelevant material from relevant material.” *Id.* at *11.

This case is not remotely analogous; United has explained that the ESI Order would require the production of approximately 68,000 irrelevant documents, representing “sixty to seventy percent of the documents” to be produced. Da105; T6:14-17. Indeed, the concern in this case is concrete and Defendants cited several examples of irrelevant documents that hit the search terms and would need to be produced despite being entirely irrelevant. Da 158; *see also* Da125 ¶ 21. Plaintiffs did not dispute this calculation, and the trial court simply accepted that there would be an overproduction of irrelevant documents. T20:24-21:1 (“we all recognize that there are going to be a lot of irrelevant documents” with “these particular searches”). The broad terms encompassed by the ESI Order include phrases such as “New Jersey,” “out of network,” “reimbursement,” “review,” and “overview” – words that simply do not

target relevant facts – and all parties agree that much of the material subject to the ESI Order is not relevant.

As to the second *Highmark* demand, for all documents concerning the termination of certain employees, the Special Adjudicator found the requested documents to be *relevant* to the pending dispute before compelling production. *Id.* at *14. Thus, the Special Adjudicator conducted precisely the analysis that the trial court here disclaimed as “not my function.” *Highmark*, therefore, provides no support for the argument that the ESI Order’s exclusion of relevancy as a consideration was appropriate. To the contrary, the *Highmark* Special Adjudicator built into his ruling a relevancy objection, and took on the role of reviewing any individual documents to which there was a relevancy objection (*Highmark* at *17)—precisely the process this Court should compel here.

CONCLUSION

Pretrial discovery “is not limitless.” *HD Supply Waterworks Grp., Inc. v. Dir., Div. of Taxation*, 29 N.J. Tax 573, 583 (2017). Relevancy is a fundamental prerequisite and has been codified in our Court Rules to eliminate overly burdensome and costly discovery exercises. Imposing unlimited discovery burdens on parties would not only increase the already high cost of litigation, but it would also chill parties’ willingness to participate in the legal system.

Our Court Rules limit the production of discovery to relevant materials. Amici curiae therefore urge this Court to vacate the ESI Order.

Respectfully submitted,

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Dated: August 6, 2024

Superior Court of New Jersey
Appellate Division

Docket No. A-002031-23 (AM-000056-23)

ATLANTIC ER PHYSICIANS	:	CIVIL ACTION
TEAM PEDIATRIC ASSOCIATES,	:	ON APPEAL FROM AN
PA, EMERGENCY CARE	:	ORDER OF THE SUPERIOR
SERVICES OF NJ, PA,	:	COURT OF NEW JERSEY,
EMERGENCY PHYSICIAN	:	LAW DIVISION,
ASSOCIATES OF NORTH	:	GLOUCESTER COUNTY,
JERSEY, PC, EMERGENCY	:	COMPLEX BUSINESS
PHYSICIAN ASSOCIATES OF	:	LITIGATION PART
SOUTH JERSEY, PC,	:	
	:	DOCKET NO.: GLO-L-1196-20
<i>(For Continuation of Caption See</i>	:	Sat Below:
<i>Inside Cover)</i>	:	
	:	HON. JAMES R. SWIFT,
	:	J.S.C.

**REPLY BRIEF AND APPENDIX FOR DEFENDANTS-
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UNITEDHEALTHCARE INSURANCE COMPANY, OXFORD
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Date Submitted: August 6, 2024



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PRELIMINARY STATEMENT

The New Jersey Supreme Court has taken the rare step of mandating leave to appeal in this matter, yet according to Plaintiffs, this Court should ignore the trial court’s legal error and simply defer to its sweeping discovery order (the “ESI Order”). In their view, the conceded fact that the Order requires Defendants to produce tens of thousands of entirely irrelevant documents is a “tradeoff” “inherent” to all civil discovery—one this Court cannot question.

Plaintiffs are wrong. This Court owes no deference to discovery orders based on an incorrect legal premise, as a trial court has no discretion to order discovery unauthorized by the rules promulgated by the Supreme Court. And the ESI Order here is demonstrably contrary to Rule 4:10-2, which explicitly limits the scope of discovery—including e-discovery—to documents that are relevant to the subject matter involved in the pending action. Plaintiffs falsely portray the Order as a narrow exercise of discretion unique to this specific case. But the trial court itself described its procedure as its “usual” practice in all cases involving e-discovery, which the court pronounced to be “fundamentally different” than traditional paper discovery. The Order thus rests on a clear misunderstanding of New Jersey law, which—consistent with the broad nationwide consensus—applies the same relevance standard to e-discovery that applies to all other forms of discovery. The trial court had many tools to ensure

Plaintiffs received the relevant documents to which they were entitled, but simply overriding Rule 4:10-2(a)'s relevancy limitation was not among them. That foundational legal error alone compels reversal of the ESI Order.

But there is more. Even if the Rules could be construed as granting trial courts discretion to permit discovery of irrelevant information, the ESI Order reflects a serious abuse of any such discretion. Far from being narrowly tailored to any unique circumstances here, the Order unnecessarily and unreasonably compels a deeply invasive and burdensome production of tens of thousands of irrelevant documents, forgoing clear alternatives that are less intrusive and more protective of the parties' privacy rights. The ESI Order is insupportable and should be reversed.

LEGAL ARGUMENT

I. **THE ESI ORDER RESTS ON A MISINTERPRETATION OF RULE 4:10-2(a) (RAISED BELOW: DA166-68; T3-38)**

There is no dispute that to comply with the ESI Order, Defendants must produce a slew of irrelevant documents. Pb22; T20:23-21:2. The only question is whether that Order is legally permissible, which the Court considers de novo. DiFiore v. Pezic, 254 N.J. 212, 228 (2023). And under Rule 4:10-2, the answer is simple: the "scope of discovery" is limited to documents—including "electronically stored information"—that are "relevant." R. 4:10-2.

The trial court disregarded Rule 4:10-2(a)'s relevancy limitation because, as it stated repeatedly, it believed that "ESI is different." T24:18; see T20:23-21:2. Contrary to Plaintiffs' assertion, these comments were not merely "some general statements about ESI." Pb21 n.11. That rationale was essential to the trial court's ruling. To quote the trial court in more detail:

[J]ust to go back and address [Defendants'] argument about relevance and the old days of going through the documents, ESI is different. Okay. ESI is fundamentally different than just paper documents because ESI is voluminous. . . . I mean, these particular searches that are understandably and we all recognize that there are going to be a lot of irrelevant documents [B]ut ESI is just fundamentally different.

T20:18-21:3. And a few pages later: "I understand [Defendants'] point that the rules say that relevancy is the touchstone but . . . this is something different. ESI is different." T24:14-18. That ruling is indefensible, Db25, as Plaintiffs admit, Pb33 (disclaiming position that "different rules" govern e-discovery).

Plaintiffs instead resort to an even more novel argument, manufactured for this appeal: they say even "information that may be irrelevant"—whether in paper or electronic form—"is still discoverable." Pb17. No, it is not.

A. Under Rule 4:10-2(a), A Court Cannot Compel The Production Of Irrelevant Documents (Raised Below: Da166-68; T3-38)

Under Rule 4:10-2(a), a litigant cannot obtain discovery of documents that are not relevant. That prohibition is clear from the "plain language of the rule,"

DiFiore, 254 N.J. at 228, which limits the “scope of discovery” to materials that are “relevant,” R. 4:10-2. It is clear from this Court’s precedent, which has repeatedly recognized the “relevance limitation” under Rule 4:10-2(a), Estate of Lasiw v. Pereira, 475 N.J. Super. 378, 396 (App. Div. 2023) (quotation omitted), and squarely held that Rule 4:10-2(a) “limit[s]” discovery “to information that is ‘relevant to the subject matter involved,’” K.S. v. ABC Pro. Corp., 330 N.J. Super. 288, 291 (App. Div. 2000), certif. denied, 174 N.J. 411 (2000) (quoting R. 4:10-2(a)). And it is clear from the host of cases that apply the “relevancy standard” to “bar[] pretrial discovery.” Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 4:10-2(a) (2024); see Db15 (collecting cases).

Plaintiffs have no answer to that authority. Indeed, they do not so much as mention Pereira, K.S., or the other New Jersey cases applying Rule 4:10-2(a). Plaintiffs instead rely mainly on one unpublished, decades-old federal district court decision for the proposition that the “question of relevancy is to be more loosely construed at the discovery stage than at the trial.” Pb16 (quoting Nestle Foods Corp. v. Aetna Cas. & Sur. Co., 135 F.R.D. 101, 104 (D.N.J. 1990)). That statement is not the law in New Jersey, which treats relevance under Rule 4:10-2(a) as “congruent” with the standard under Rule of Evidence 401, i.e., “a tendency in reason to prove or disprove any fact of consequence to the

determination of the action.” R.L. v. Voytac, 402 N.J. Super. 392, 408 (App. Div. 2008), rev’d on other grounds 199 N.J. 285 (2009); see Db14-15.

Plaintiffs’ proposition is not even the law in federal courts. After the Nestle decision they cite issued, Federal Rule of Civil Procedure 26(b)(1) was amended to repudiate the misinterpretation of the Rule endorsed in that case. Fed. R. Civ. P. 26 Advisory Committee’s Notes (2015). In 2015, the Advisory Committee removed the phrase “reasonably calculated to lead to the discovery of admissible evidence” from the federal rules because the phrase had “been used by some, incorrectly, to define the scope of discovery.” Id. (emphasis added). The Committee observed that given this “misuse” of the “reasonably calculated” phrase “to define the scope of discovery,” the phrase could “swallow any other limitation on the scope of discovery.” Id. To avoid the “problems” created by such misinterpretations, the Committee removed the phrase. Id.; see also Fed. R. Civ. P. 26 Advisory Committee’s Notes (2000) (directing “the parties and the court [to] focus on the actual claims and defenses involved”).

Plaintiffs seek to introduce into New Jersey’s court rules the same mischief and misuse that once plagued federal practice, replacing Rule 4:10-2(a)’s clear-cut “relevance limitations,” Pereira, 475 N.J. Super. at 396, with an indeterminate standard that permits “the disclosure of some amount of irrelevant

evidence,” Pb17. Following their anachronistic Nestle case, Plaintiffs argue that Rule 4:10-2(a) permits such disclosure because it also limits the circumstances under which parties can object to discovery on admissibility grounds. Pb17, 36. But as Defendants explained (Db33-34), that provision does not displace “relevance” as the “general standard of discoverability.” Pressler & Verniero, supra, cmt. 1 on R. 4:10-2(a). It means only that if a document is relevant, it must be produced even if not itself admissible—because, for instance, it involves hearsay—so long as the production is “reasonably calculated to lead to the discovery of admissible evidence.” R. 4:10-2(a). But if the document itself is not even relevant—that is, if it has no “tendency in reason to prove or disprove any fact of consequence”—a plaintiff has no grounds to obtain it in discovery. R.L., 402 N.J. Super. at 408.¹

Plaintiffs’ remaining authorities are even further afield. Plaintiffs cite a pair of federal cases holding that when a particular document is “otherwise responsive to a discovery request,” a defendant cannot unilaterally redact

¹ In addition, Plaintiffs cite a parenthetical to a “But cf.” citation in a criminal case, State v. Hernandez, 225 N.J. 451 (2016), which states that “discovery in civil cases extends to information that ‘appears to be reasonably calculated to lead to the discovery of admissible evidence.’” Id. at 462 (quoting R. 4:10-2(a)). But Hernandez also affirms that “[r]elevancy is the hallmark of admissibility in evidence.” Id. (quotation omitted). Passing dicta in a parenthetical in an attenuated “but cf.” citation in criminal case cannot alter the civil discovery rules.

irrelevant information from within the document. Pb17 (quoting Target Corp. v. ACE Am. Ins. Co., 576 F. Supp. 3d 609, 620 (D. Minn. 2021)). Other federal courts disagree and allow such internal redactions. See, e.g., Spano v. Boeing Co., 2008 WL 1774460 (S.D. Ill. Apr. 16, 2008); In re Takata Airbag Prods. Liab. Litig., 2016 WL 1460143, at *2 (S.D. Fla. Mar. 1, 2016). But that dispute in any event has no bearing on the ESI Order, which does not merely deny Defendants authority to redact relevant documents, but requires Defendants to turn over documents with no relevance at all to the underlying dispute. Neither of Plaintiffs' cited cases remotely endorses such an extreme approach.²

In any event, even if Plaintiffs were correct that Rule 4:10-2(a) allowed discovery of documents that were either relevant or “reasonably calculated to lead to the discovery of admissible evidence,” that construction would not salvage the ESI Order. See Db33. Below, neither the Court nor Plaintiffs suggested that all of the 60,000+ irrelevant documents swept in by the ESI Order are “reasonably calculated” to lead to admissible evidence. Even in their briefing, Plaintiffs make

² Plaintiffs also cite Rule 4:14-3(c), which makes clear that there is no right to object on relevancy grounds during a deposition. Pb18. But Rule 4:14-3(c) only proves Defendants' point: it shows that when the New Jersey Supreme Court means to limit objections during discovery to privilege or related grounds, it does so expressly. And while it makes good sense not to disrupt real-time depositions with relevancy objections, there is no similar rationale for requiring parties to turn over irrelevant documents that can be screened through a pre-production review.

no such claim, and it defies logic that each of those irrelevant documents—which by definition have no “tendency in reason to prove or disprove any fact of consequence”—would nevertheless lead to admissible evidence. R.L., 402 N.J. Super. at 408 (emphasis added). After all, as Defendants explained, Db19-23, search terms “often are over-inclusive,” leading to “large numbers of irrelevant documents” that simply have no bearing on the case at hand and thus little or no possibility of leading to admissible evidence, Moore v. Publicis Groupe, 287 F.R.D. 182, 191 (S.D.N.Y. 2012). Thus, regardless of how this Court interprets Rule 4:10-2(a), the ESI Order captures tens of thousands of documents outside the scope of discovery.

B. Plaintiffs’ Remaining Arguments Cannot Salvage the ESI Order (Raised Below: Da166-68; T3-38)

Once it is established that the ESI Order requires production of documents outside Rule 4:10-2(a)’s scope, Plaintiffs’ remaining arguments fall apart.

First, Plaintiffs reprise the trial court’s gatekeeping theory, viz., that discovery orders must “maximize the production of relevant evidence,” even if thousands of irrelevant documents are swept up in the process. Pb3, 21-27. Defendants have explained why that theory contravenes Rule 4:10-2(a)’s relevancy limitation. Db26-30. As this Court has held, parties have no right to “search through their opponents’ electronic devices for responsive data,” Lipsky v. N.J. Ass’n of Health Plans, Inc., 474 N.J. Super. 447, 468 (App. Div. 2023),

even though doing so would surely “yield the greatest number of legitimate discoverable materials,” Pb22. By extension, a requesting party cannot search through thousands of irrelevant documents stored on electronic devices just to ensure they find relevant ones. Rather, Lipsky endorsed “the traditional protocol of discovery” that Plaintiffs criticize—i.e., a process in which one party requests specific information and the other party searches its own files (and computers) “to identify and produce responsive information,” just as “Rule 4:18-1 anticipates.” 474 N.J. Super. at 467-69 (quotation omitted). Plaintiffs may find that approach to discovery “less-than-perfect,” Pb22, but it is the process the Supreme Court prescribed in Rule 4:10-2(a), and the trial court had no authority to disregard it, Shambry v. N.J. Transit Bus Operations, Inc., 307 N.J. Super. 390, 395 (App. Div. 1998).

In response, Plaintiffs attack a strawman. They frame the question as “whether this Court should impose an ironclad rule that producing parties always get to decide which documents are relevant and responsive.” Pb23. But Defendants have expressly disclaimed any such rigid rule. Db29-30. A trial court may always “consider the completeness” of a production and has numerous tools to ensure the production of relevant documents. Lipsky, 474 N.J. Super. at 474. A court can require “certifications” from attorneys as to the

completeness of discovery. Id. It can order additional discovery should evidence emerge that a party “withheld responsive documents,” id., and it can impose sanctions if a party wrongfully did so, Montana v. Cnty. of Cape May Bd. of Freeholders, 2013 WL 11233748, at *11 (D.N.J. Sept. 20, 2013). But what a court cannot do under Rule 4:10-2(a) is mandate the wholesale production of all documents, without any threshold relevance review. See supra Part I.A.³

Second, Plaintiffs offer a handful of federal cases adopting an approach similar to the trial court’s. They primarily rely on In re Actavis Holdco U.S., Inc., 2019 WL 8437021, at *1 (3d Cir. Dec. 6, 2019) (Da210), but that case does Plaintiffs more harm than good. In Actavis, the Third Circuit expressly reserved the question at issue here—i.e., whether a district court’s order requiring the production of all documents that hit on search terms “constituted an abuse of discretion”—because “such an error would not support mandamus relief.” Id. And even in the mandamus posture, the dissenting judge—the only one to reach the question here—would have granted the petition because “nothing in the civil

³ At times, Plaintiffs question whether the trial court actually did “compel production of irrelevant documents.” Pb22. But Plaintiffs themselves acknowledge that to comply with the ESI Order, Defendants will necessarily need to produce “irrelevant documents.” Id. Even if the trial court’s objective was only to maximize production of relevant documents, its selected process indisputably and impermissibly compels production of many thousands of irrelevant documents.

rules permits a court to compel production of non-responsive and irrelevant documents at any time.” Id. at *1 n.1.⁴

In all events, the fact that a few other judges have repeated the trial court’s error is no reason to excuse it, particularly given that their decisions are lonely outliers among an “almost uniform[.]” consensus among federal courts. O’Donnell/Salvatori Inc. v. Microsoft Corp., 339 F.R.D. 275, 276 (W.D. Wash. 2021); see Db19-21 (collecting cases). The cases in the overwhelming majority do not show merely that pre-production relevancy review is a “permissible” approach to e-discovery, as Plaintiffs suggest. Pb28. Rather, the decisions adopt the same interpretation of the discovery rules that Defendants advance here—viz. that pre-production relevance reviews are necessary to enforce “the relevance standard from the civil rules.” O’Donnell, 339 F.R.D. at 276.

Last and not least, Plaintiffs resort to severely mischaracterizing the record below. They repeatedly assert that “the parties negotiated and agreed on search terms” after the Court “told the parties that there would be no further relevance

⁴ Plaintiffs suggest in a footnote that New Jersey’s abuse of discretion standard is identical to the standard required to afford mandamus relief in federal court. Pb28 n.14. Not so. Federal mandamus requires a “clear error of law” or a “clear abuse of discretion.” Actavis, 2019 WL 8437021, at *1 (emphases added). By contrast, a discovery order may be reversed for an “mistaken understanding of the applicable law” or an “abuse of discretion,” and an appellate court “review[s] the meaning or scope of a court rule de novo.” DiFiore, 254 N.J. at 228 (quotation omitted).

review.” Pb2, 27. That statement is categorically wrong. See Db31-33. The court made clear that its ESI Order was issued during the “July 6th” case management conference, which did not occur until after the parties had negotiated search terms. T4; see Db5, 8-9. If the parties had known that search terms alone would determine relevancy, negotiating the terms would have been vastly more complicated, if not impossible—a problem that would plague all New Jersey litigation if the ESI Order here is affirmed.

To show the parties’ supposed understanding that search terms would obviate any relevancy review, Plaintiffs cite a July 2023 declaration from Defendants observing uncontroversially that the parties negotiated search terms. Pb9 (citing Da122 ¶ 10). But the very next paragraph states that the “United Defendants (and, presumably, TeamHealth Plaintiffs) always understood the purpose of the search terms was to capture a broader universe of potentially responsive documents that each party would review to identify documents responsive to the actual requests for production.” Da122 ¶ 11 (emphasis added). Plaintiffs also rely on a declaration they submitted the same day they filed their opposition to Defendants’ leave to appeal. Pb8-9 (citing Da182). That post hoc declaration obviously cannot alter the unambiguous record before the trial court

when it issued the ESI Order. And that record showed that, as the court itself put it, the search terms would identify “a lot of irrelevant documents.” T20-21.

As a result, it is beside the point whether the parties attempted to negotiate search terms that were “well-defined.” Pb2. What matters is that the agreed-upon terms will indisputably require production of thousands of irrelevant documents. Pb22. Because Rule 4:10-2(a) does not permit discovery of irrelevant documents, it is of no moment when the trial court announced its intention to order discovery contravening that rule. The important point is that it did so, and Plaintiffs cannot defend that legally flawed Order.

II. THE ESI ORDER REFLECTS AN ABUSE OF DISCRETION (RAISED BELOW: DA166-68; T3-38)

This Court should reverse the ESI Order for an independent reason: it reflects an abuse of discretion. Under Rule 4:10-2(g), a court must limit even otherwise-permissible discovery if “the burden or expense of the proposed discovery outweighs its likely benefit,” taking into account “the importance of the proposed discovery in resolving the issues.” Pereira, 475 N.J. Super. at 393 (quoting R. 4:10-2(g)). Like the trial court, Plaintiffs entirely ignore Rule 4:10-2(g)’s balancing command, which forecloses the grossly overbroad ESI Order.

First, the trial court’s order is unduly invasive and burdensome. Not only does it impose monetary costs, Db38-39, but it violates Defendants’ privacy

rights, Db36-38, as well as the privacy rights of nonparties whose information might be swept within a production. Plaintiffs counter that the trial court imposed a discovery confidentiality order, but even if that order successfully prevents Plaintiffs from broadcasting documents publicly—and there is good reason to assume it will not, Db36-37—Defendants are entitled to withhold from an adversary sensitive business documents that have no relevance to the litigation at hand. Indeed, Plaintiffs seem to recognize the “privacy concerns” involved with allowing parties to search an individual’s electronic devices. Pb33; see Lipsky, 474 N.J. Super. at 470. But those same privacy concerns exist when the Defendant must turn over the contents of its electronic devices—that is, the information stored on them—without any relevancy screen.

Second, the trial court identified no countervailing justifications that warrant such intrusive discovery; indeed, it wholly failed to consider “the importance of the proposed discovery in resolving the issues.” Pereira, 475 N.J. Super. at 393 (quoting R. 4:10-2(g)). Neither Plaintiffs nor the trial court suggested that the tens of thousands of irrelevant documents were themselves important to “resolving the issues.” Id. Instead, Plaintiffs view these documents as “unavoidable” collateral damage in their quest to obtain all relevant documents. Pb20. But as explained above, this Court has rejected this type of

discovery-at-all-costs approach, supra at 8-10, and the trial court was required to try first the “clear alternative[s]” available to the parties and the trial court to maximize the production of relevant documents, Lipsky, 474 N.J. Super. at 473.

Finally, Plaintiffs assert that the ESI Order was imposed merely to address the “particular” and “unusual” record of this case. Pb18. But the trial court in fact made clear that its “usual stance in these cases” is to preclude “a relevance type of review.” T4:7-12 (emphasis added). The trial court thus imposed the Order not based on any particularized finding that the parties could not be trusted to produce relevant documents in this matter, but because the Order’s approach is just “the way” the court “do[es] things in these cases.” T21:8-9.

Perhaps so, but it is not the way discovery is to proceed under New Jersey law. Rule 4:10-2(a) explicitly requires a relevance review in e-discovery cases the trial court here did not allow, and Rule 4:10-2(g) explicitly requires a balancing of costs and benefits the court did not conduct. The ESI Order is thus plainly contrary to law and just as plainly an abuse of any discretion the law may allow. Unless New Jersey law and practice deviates from the broad national consensus governing modern e-discovery, the ESI Order cannot stand.

CONCLUSION

For the foregoing reasons, the ESI Order should be reversed.

Dated: August 6, 2024

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APPENDIX

Spano v. Boeing Co., Not Reported in F.Supp.2d (2008)

2008 WL 1774460



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Declined to Follow by [Delaware Display Group LLC v. Lenovo Group Ltd.,](#)
[Lenovo Holding Co., Inc.](#), D.Del., February 23, 2016

2008 WL 1774460

Only the Westlaw citation is currently available.

United States District Court,
S.D. Illinois.

Gary SPANO, et. al., Plaintiffs,

v.

The BOEING COMPANY, et. al., Defendants.

No. 3:06-cv-00743-DRH-DGW.

|

April 16, 2008.

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ORDER

[DONALD G. WILKERSON](#), United States Magistrate Judge.

*1 Currently pending before the Court is Plaintiffs' Motion to Compel Defendants to provide complete, unredacted answers to Plaintiffs' first set of interrogatories and first set of requests for production (Doc. 85), Defendants have responded (Doc. 90), and Plaintiffs have filed a reply (Doc. 92). For the reasons set forth below, this motion is **DENIED**.

FACTUAL BACKGROUND

The Plaintiffs in this case, Gary Spano, John Bunk, and James White, Jr. ("Plaintiffs"), filed their complaint against the Defendants, The Boeing Company, the Employee Benefits Plans Committee, and Scott Buchanan ("Defendants"), on September 28, 2006 (Doc. 2). This action is brought under the Employee Retirement Income Security Act of

1974, [29 U.S.C. § 1001 et. seq.](#) ("ERISA"), alleging that the Defendants breached their fiduciary duties as defined contribution plan administrators under the Act.

Plaintiffs are participants in Boeing's VIP Plan, a defined contribution plan, popularly known as a 401(k) plan. In addition to the VIP plan, Boeing offered other defined contribution plans, as well as traditional pension plans. As the amended complaint makes clear (Doc. 109), this lawsuit concerns *only* the VIP defined contribution plan. All of Boeing's defined contribution retirement plans, however, were included together into a Master Trust, and the combined plans were managed together. The VIP plan was by far the largest of the defined contribution plans, making up 94% of the Master Trust.

At the time the motion to compel was filed, Defendants had produced over 50,000 documents in the case. This production was undertaken pursuant to a Confidentiality Agreement to which all parties agreed (Doc. 86, Exh. E). During the course of production, Defendants produced a number of documents, portions of which had been redacted. Plaintiffs requested that Defendants provide all of the documents free of any redaction. Defendants refused. The production of these redacted documents is the basis of the pending motion to compel.

The Court heard argument regarding this discovery dispute on October 2, 2007, and thereafter ordered the parties to file motions to compel.

In the memorandum in support of the motion to compel, Plaintiffs make a number of arguments as to why they are entitled to the unredacted documents (Doc. 86). First, they argue that their initial discovery requests, which sought information on the Master Trust, encompass the information and passages redacted by Defendants. Second, they argue that their requests for information about the other plans are calculated to lead to the discovery of admissible evidence, and that they are relevant in determining (1) whether the "leverage" of the VIP plan was used to benefit other Boeing plans, and (2) how the combined plans were used in negotiating fees for the VIP plan. Third, they argue that redactions for relevance are not appropriate under the federal rules.

In response, the Defendants argue that the information sought by the Plaintiffs is not relevant to the issues in the case at bar (Doc. 90). Defendants contend that the complaint

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2008 WL 1774460

is limited to the VIP plan, and therefore, that information regarding other Boeing benefit plans is not relevant to that complaint. Further, they argue that redaction of irrelevant material is an acceptable means of producing documents. Finally, Defendants maintain that objections to relevance should be remedied by *in camera* inspection of the documents at issue.

DISCUSSION

*2 Federal Rule of Civil Procedure 26 contemplates expansive discovery of “any nonprivileged matter that is relevant to any party's claim or defense.” Fed.R.Civ.P. 26(b)(1). Rule 26 further states: “Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.*

There are limits to discovery, however. The Supreme Court has held that there are “ultimate and necessary boundaries” to discovery. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978). In *Oppenheimer*, the Court held that “discovery of a matter not ‘reasonably calculated to lead to the discovery of admissible evidence’ is not within the scope of Rule 26(b)(1).” *Id.* at 352.

Courts frequently restrict discovery based on relevance. See *Balderston v. Fairbanks Morse Engine Div. Of Coltec Indus.*, 328 F.3d 309, 320 (7th Cir.2003) (upholding district court's limitations on discovery based upon relevance); *Kinkead v. Southwestern Bell Telephone Co.*, 49 F.3d 454, 457 (8th Cir.1995) (affirming district court's denial of motion to compel discovery based in part on irrelevance of documents in question); *Diak v. Dwyer, Costello, and Knox, P.C.*, 33 F.3d 809, 813 (7th Cir.1994) (upholding district court's denial of request for discovery regarding redacted tax returns); and *Detweiler Bros., Inc. v. John Graham & Co.*, 412 F.Supp. 416, 422 (E.D.Wash.1976) (requests for production of documents regarding building project were too broad and therefore not relevant where issues in case were limited to steam piping).

As to the Court's power to regulate discovery, the Rule states, “For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.” *Id.* The Seventh Circuit has recognized a trial court's “broad discretion over discovery matters.” *Spiegla v. Hull*, 371 F.3d 928, 944 (7th Cir.2004).

The Court finds that Plaintiffs requests seeking discovery of documents regarding non-VIP plans are simply not relevant to the subject matter of the complaint, which deals only with the VIP 401(k) plan. The Court rejects Plaintiffs' argument that discovery of the non-VIP plans is relevant to finding out how Boeing used the plans in the master trust as a whole to obtain services for each of the plans. The VIP plan is by far the largest plan in the Master Trust. More importantly, the VIP plan is the only plan at issue in this case.

The Court also rejects Plaintiffs' argument that redaction is an improper method of challenging the relevance of a document. Although not specifically addressed in the Rule, other courts have found redaction appropriate where the information redacted was not relevant to the issues in the case. See *Beauchem v. Rockford Products Corp.*, 2002 WL 1870050 at *2 (N.D. Illinois Aug. 13, 2002) (finding good cause existed to support redaction based on relevance); *Schiller v. City of New York*, 2006 WL 3592547 at *7 (S.D.N.Y. Dec.7, 2006) (upholding redaction of portions of meeting minutes not relevant to issues in case). To their credit, the Defendants produced the documents containing irrelevant information with redacted portions instead of not producing the documents at all.

*3 Thus, the Court concludes that the redaction of information on plans other than the VIP plan was acceptable because that information is not relevant to the issues in this case and not reasonably calculated to lead to the discovery of admissible evidence. If Plaintiffs have a reason to believe that other redactions not brought to the Court's attention in this motion to compel were not based upon relevance regarding the VIP plans, they may move the court, on a document by document basis, for *in camera* review.

CONCLUSION

Based on all the foregoing, the Court finds that the information sought in Plaintiffs' Motion to Compel is not relevant to the VIP plan that is the subject of the present lawsuit. Accordingly, Plaintiffs' Motion to Compel (Doc. 85) is **DENIED**.

IT IS SO ORDERED.**All Citations**

Not Reported in F.Supp.2d, 2008 WL 1774460

Spano v. Boeing Co., Not Reported in F.Supp.2d (2008)

2008 WL 1774460

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Distinguished by [Jazz Pharmaceuticals, Inc. v. Synchrony Group, LLC](#),
E.D.Pa., May 23, 2019

2016 WL 1460143

Only the Westlaw citation is currently available.

United States District Court, S.D. Florida,
Miami Division.

IN RE: TAKATA AIRBAG
PRODUCTS LIABILITY LITIGATION.

This Document Relates to All Cases.

MDL No. 2599

|

Master File No. 15-2599-MD-MORENO

|

14-24009-CV-MORENO, 15-20664-CV-MORENO

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Signed February 24, 2016

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Filed 03/01/2016

**ORDER ADOPTING IN PART
REPORT AND RECOMMENDATION**

FEDERICO A. MORENO, UNITED STATES DISTRICT
JUDGE

*1 THIS CAUSE comes before the Court pursuant to the Special Master's Report and Recommendation Regarding Disputed Provision of Proposed Stipulated Order Regarding the Protocol Governing Production of Document and Electronically Stored Information ("Report") [D.E. 873]. The Court has reviewed the Report, Plaintiffs' Objections, Defendants' Response, and Plaintiffs' Reply. The Court held oral argument on this matter on February 16, 2016 and is duly advised.

I. BACKGROUND

The parties disagree on two issues concerning the protocol governing production of documents and electronically stored information: 1) the procedure for redacting irrelevant information from responsive documents, and 2) whether irrelevant parent documents and other documents that are

not attachments, from responsive document families can be withheld entirely.¹

¹ Regarding the second issue, the parties have agreed to allow a producing party to withhold irrelevant attachments from within responsive document families, pursuant to certain conditions.

The Special Master approved of Defendants' proposal for both matters. Specifically, as to the first issue, the Special Master recommended that a producing party be allowed to redact information pertaining to seven categories of information deemed irrelevant: 1) pricing, profits, non-public financial information; 2) parts, suppliers, or costs; 3) design, development, and engineering; 4) marketing and business strategy; 5) other makes and models; 6) non-U.S. products; and 7) service and quality issues. As to the second issue, the Special Master recommended that a producing party be allowed to withhold irrelevant parent documents.

II. LEGAL STANDARD

The Parties disagree about which standard of review should apply to the Court's review of the Special Master's Report.

Rule 53 of the Federal Rules of Civil Procedure governs matters related to Special Masters. The Court must decide *de novo* all objections to findings of fact, unless otherwise stipulated by the parties and approved by the Court. Fed.R.Civ.P. 53(f)(3). Similarly, the Court must decide *de novo* all objections to conclusions of law. Fed.R.Civ.P. 53(f)(4). The Court may set aside a master's ruling on procedural matters only for an abuse of discretion, unless otherwise stated in the appointment order. Fed.R.Civ.P. 53(f)(5). The Appointment Order here expressly states the Court "will apply the standard of review indicated in Rule 53 in deciding whether to adopt the Special Master's Report and Recommendation." (D.E. 453, at 1).

Plaintiffs contend the Court should review the Report *de novo* because the report contains legal conclusions and findings of fact. Plaintiffs argue the Special Master's conclusion that the Federal Rules permit redaction of irrelevant information from responsive documents is a legal conclusion and the conclusion that Defendants' proposed redaction categories appear to be irrelevant is a mixed question of law and fact. (D.E. 878, at 10). Defendants argue that this Report concerns the process for the production of documents, redaction of

irrelevant information from responsive documents, and the identification of redacted information to the receiving party, and because these are procedural matters, the Court should review the Report for abuse of discretion. (D.E. 893, at 7–8). Plaintiffs respond that even if the Court reviews the Report for abuse of discretion, legal determinations are reviewed *de novo*. (D.E. 896, at 2–3).

*2 Because Rule 26(b)(1) of the Federal Rules of Civil Procedure, governing the scope of discovery, has been amended since the Special Master issued the Report, the Court reviews the Report *de novo*.

III. ANALYSIS

A. Irrelevance Redactions

Plaintiffs object to the redaction of information pertaining to the seven proposed categories and argue that the Report: is based on an inaccurate premise that Plaintiffs consented to irrelevance redactions in responsive documents; is inconsistent with the Federal Rules of Civil Procedure in allowing irrelevance redactions that will potentially allow redaction of highly relevant information from responsive documents; will impair Plaintiffs' discovery efforts; and will lead to unnecessary litigation over the redactions.

Defendants raise the concern that without irrelevance redactions, they would have to produce copious amounts of information, potentially disclosing competitively sensitive information with no bearing on this case. Despite the protective orders in this case, Defendants worry that this competitively sensitive information will be disclosed, perhaps to their competitors, perhaps to the media.

The recently amended Rule 26(b)(1) of the Federal Rules of Civil Procedure “crystalizes the concept of reasonable limits on discovery through increased reliance on the common-sense concept of proportionality.” Chief Justice John Roberts, *2015 Year-End Report on the Federal Judiciary* 6 (2015). Specifically, Rule 26(b)(1) states:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action,

the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed.R.Civ.P. 26(b)(1). As the Chief Justice's comments highlight, a party is not entitled to receive every piece of relevant information. It is only logical, then, that a party is similarly not entitled to receive every piece of irrelevant information in responsive documents if the producing party has a persuasive reason for why such information should be withheld.

Here, the Court finds Defendants have provided a persuasive reason for allowing them to redact certain irrelevant information: that disclosing such information could provide its competitors with competitively sensitive information to the ultimate detriment of each Defendant.

However, the Court finds that the seven categories proposed by the Special Master could contain highly relevant information. For instance, one of these categories is “non-U.S. products.” Yet information pertaining to the decision to use, or not use, ammonium-nitrate airbags in those vehicles could be highly relevant to the case. Similarly, the same decisions made in the context of “other makes and models” not at issue in this case—another of the seven categories—could also be highly relevant.

Because the seven categories proposed by the Special Master could contain highly relevant information, the Court modifies the Report's seven categories as follows, the producing party may redact information pertaining to the seven categories proposed by the Special Master—1) pricing, profits, non-public financial information; 2) parts, suppliers, or costs; 3) design, development, and engineering; 4) marketing and business strategy; 5) other makes and models; 6) non-U.S. products; and 7) service and quality issues—*so long as that information does not concern airbags*. This decision balances the producing parties' desire to protect their competitively sensitive information, with the importance of the issues at stake in this action and the importance of the discovery in resolving the issues at hand.

*3 As the Special Master recommended, the producing party shall stamp the redacted document in substance “irrelevant material redacted” and indicate the category/type of irrelevant information redacted.

2

An irrelevant document is a document falling within one of the seven categories listed above, so long as it contains no information related to airbags.

B. Withholding Irrelevant Documents From Responsive Families

As noted by the Special Master, the ruling allowing certain irrelevance redactions largely moots the second issue: whether the producing party can withhold irrelevant parent documents from responsive families. Indeed, it would make little difference if the producing party provides a fully redacted document or does not provide the document at all.

Thus, the Court adopts the Report as it pertains to allowing the producing party to withhold irrelevant documents² from responsive families. The parties shall follow the Bates-numbering procedure set forth in the Report and shall produce a list or slip sheet for the removed documents, as set forth in the Report. Further, the producing party shall provide contextual information for any withheld parent document, as provided in the Report.

IV. CONCLUSION

Accordingly, the Court **ADOPTS IN PART** the Report [D.E. 873], as to the withholding of irrelevant documents from responsive families, as discussed above. The Court modifies the Report's recommendation as to irrelevance redactions, such that a producing party may redact only information pertaining to the above-mentioned seven categories, so long as that information does not concern airbags.

DONE AND ORDERED in Chambers, Miami, Florida, this 24th day of February, 2016.

All Citations

Not Reported in Fed. Supp., 2016 WL 1460143

2013 WL 11233748

Only the Westlaw citation is currently available.
United States District Court, D. New Jersey,
Camden Vicinage.

Arthur MONTANA, Plaintiff,

v.

COUNTY OF CAPE MAY BOARD
OF FREEHOLDERS, et al., Defendants.

Civil No. 09-755 (NLH/JS)

|

Signed 09/20/2013

OPINION

JOEL SCHNEIDER, United States Magistrate Judge

*1 This Opinion addresses plaintiff's three (3) motions for discovery sanctions directed to defendants County of Cape May Board of Freeholders ("Cape May"), Diane Lanzetta ("Lanzetta") and Barbara Bakley-Marino ("Marino").^{1 2} As will be discussed, the motions are GRANTED in part and DENIED in part. In order to put the Court's rulings in context a detailed summary of the procedural and factual background of the case will be provided.

¹ Much of the relief requested in plaintiff's motions is moot because of events that occurred subsequent to the filing of the motions. Plaintiff stated at oral argument that he is withdrawing his motions as to Lanzetta. For purposes of this Opinion, Cape May and Marino will be collectively referred to as "Cape May" or "defendant." Cape May had primary possession and control over the documents at issue.

² Plaintiff's motions to be addressed in this Opinion are: (1) Motion for Entry of Default or Adjournment of Trial Date [Doc. No. 140], (2) Motion for Discovery and Sanctions [Doc. No. 141], and (3) Supplemental Motion for Sanctions [Doc. No. 187]. Plaintiffs' Motion for Extension of Time to Complete Discovery with Expert Reports [Doc. No. 191] was addressed in a separate Order. See February 8, 2013 Order, Doc. No. 205. The Court acknowledges the significant delay between

when plaintiff filed his motions and this decision. This was done purposely. The resources of the parties and the Court were better spent getting ready for trial rather than focusing on requests for sanctions. Further, the Court wanted to assure that any taint of prejudice to plaintiff was cured before addressing plaintiff's multiple requests for sanctions.

Background

1. Plaintiff's Allegations

Plaintiff started working for Cape May in 1999. When plaintiff filed his complaint on February 19, 2009, he was employed as a Juvenile Family Crisis Counselor. Cape May created the Juvenile Family Crisis Intervention Unit ("JFCIU") which operates as part of the Cape May County Youth Services. Complaint ¶ 2. Lanzetta was formerly the Director of the Youth Services Department. In that position she directed the actions of the JFCIU and was the Administrator for Cape May's Youth Shelter, which provided youth housing in crisis situations. Complaint ¶ 3. Marino was the Director of the Department of Human Services for the County. *Id.* ¶ 4. Marino is an attorney and as of January 26, 2010, she was also employed as Cape May's County Counsel.

Plaintiff alleges that in January and February 2007 Lanzetta inappropriately interfered with recommendations he made regarding two placements to family court judge, The Honorable Kyran Connor, J.S.C. Plaintiff alleges that Lanzetta had *ex parte* conversations with Judge Connor regarding his recommendations. Plaintiff "expressed his concerns and objections to Lanzetta ... and indicated he would continue to seek relief as he saw fit based upon his education, training, experience and understanding of applicable statutes and his public duties and responsibilities." *Id.* ¶ 13. Plaintiff "also complained about the *ex parte* communication he believed Lanzetta had undertaken with the Family Court as pertaining to his previous client." *Id.* ¶ 14. Plaintiff also alleges that on February 26, 2007, he complained to Lanzetta that she did not have the minimum educational requirements for juvenile-family crisis counselors in the State of New Jersey, and that her directives to plaintiff were contrary to public policy and state laws. *Id.* ¶ 17. Similar complaints were made on March 26, 2007. *Id.* ¶ 18.³ When no action was taken by Lanzetta in response to plaintiff's complaints, plaintiff complained to Cape May's Manager/Administrator and the entire Freeholder Board. *Id.* ¶ 21. Plaintiff alleges that instead of responding to his complaints

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the defendants retaliated against him with “spurious and unwarranted discipline.” *Id.* ¶ 22. Plaintiff alleges the adverse action and discipline imposed against him was pretextual and the true motivation “was to retaliate against [him] in retribution for his complaints and objections and [to] coerce his submission to the unlawful and inappropriate conduct of the JFCIU.”⁴ *Id.* ¶ 23. On February 15, 2008, plaintiff filed a civil action against Cape May and Lanzetta in New Jersey state court. *Id.* ¶ 26. Plaintiff alleges he was subject to additional retaliatory adverse employment action due to this filing, including a ninety (90) day suspension starting on January 26, 2009. *Id.* ¶ 27. Plaintiff was laid off as of December 1, 2011. Plaintiff claims Cape May's alleged budget crisis was a “subterfuge” to eliminate his work unit.

³ Plaintiff made a litany of other complaints about Lanzetta. *See id.* ¶ 19.

⁴ Only a summary of plaintiff's allegations are listed. By no means is this a complete recitation of plaintiff's claims.

*2 Plaintiff filed his complaint in Federal District Court on February 19, 2009. Plaintiff's complaint asserts, *inter alia*, causes of action pursuant to 42 U.S.C. § 1983 and the New Jersey Conscientious Employee Protection Act. Plaintiff alleges his First Amendment rights were violated, he was retaliated against, and defendants created a hostile work environment. Plaintiff wrote in a brief that the “gravamen of this case alleges complaints about ex parte communications between Lanzetta and Judge Connor, and the retaliation that resulted from those complaints.” *See* November 8, 2012 Letter Brief at 1, Doc. No. 127. Not unexpectedly defendants deny liability. Defendants claim plaintiff failed to follow workplace rules and regulations, that he was a disruptive and distracting influence, that they imposed appropriate discipline, and that plaintiff was laid off due to economic problems.

On July 19, 2010, plaintiff filed a separate civil action against Judge Connor (C.A. No. 10–3635 (JBS/JS)). Plaintiff averred that Judge Connor retaliated against him because of his complaints about the alleged *ex parte* communications with Lanzetta. The Honorable Chief Judge Jerome B. Simandle granted Judge Connor's motion to dismiss the complaint on September 16, 2011. Doc. Nos. 26, 27.

On June 20, 2012, the Court granted in part and denied in part plaintiff's motion to amend and supplement his complaint. Doc. No. 82. The amended complaint, filed on June 22,

2012 [Doc. No. 85], (1) updated plaintiff's factual allegations to include information learned in discovery, (2) alleged Marino “acting in concert with Lanzetta and Judge Connor unleashed an unrelenting campaign of retaliation against Plaintiff” (Amended Complaint ¶ 62), (3) alleged defendants retaliated against him by promoting a less qualified person to the position of the Director of the JFCIU, and (4) alleged the County “orchestrated the elimination of Lanzetta's position as Director of Youth Services in such a way that Plaintiff was precluded from competing for Lanzetta's job.” *Id.* at ¶ 78. In addition, plaintiff alleged that on August 23, 2011, the Board passed a resolution which “set the stage for the outsourcing of the ... Youth Service Program...” *Id.* at ¶ 79. Plaintiff further alleged that Marino and the County “presented a deceptive and misleading layoff plan to The Commissioner of Civil Service in order to rid itself of Plaintiff through an illegally motivated layoff action.” *Id.* at ¶ 87.

On December 21, 2012, the Court granted plaintiff's motion for leave to file his second amended complaint [Doc. No. 165], which was filed on December 31, 2012. Doc. No. 171. The amendment added additional cumulative allegations and averred that plaintiff ended his employment with the County on December 1, 2011. Second Amended and Supplemental Complaint ¶ 92. The amendment specifically alleged that the defendants' conduct “constituted a wrongful and constructive discharge of [his] employment on December 1, 2011.” *Id.* ¶ 93.

2. Discovery Disputes

Since the outset of the litigation the case has been plagued with discovery disputes. However, the “floodgates were opened” after Cape May produced 4000 pages of documents on September 19, 2012, the day before the then existing discovery deadline expired.⁵ Cape May's production included the so-called “Barnett reports” which plaintiff characterizes as a “bombshell.”⁶ These reports concern investigations Marino undertook in May and June 2010. Although the investigation was initially focused on plaintiff's interim supervisor, Louis Ginsberg, the reports contain summaries of statements made by plaintiff's co-employees complaining about plaintiff.

⁵ The term “documents” as used herein includes responsive electronically stored information.

⁶ The “Barnett Reports” comprise Marino's July 2, 2010 memo which attached and summarized

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investigative reports dated May 19, 2010 and June 29, 2010. *See* Louis P. McFadden, Jr., Esquire, Certification ¶ 15, Doc. No. 141–1.

*3 A short summary of the Barnett reports is helpful. In April, 2010, plaintiff's union presented grievances to Marino from four employees regarding a hostile work environment, discriminating practices, harassment, and conduct unbecoming a county employee. The grievances concerned the interim supervisor Louis Ginsberg. Marino directed A. Barnett to interview the four complaining employees. After the interviews were completed Barnett prepared a May 19, 2010 summary report. The summary revealed that to a large extent the employees' grievances emanated from complaints about plaintiff. Marino then requested Barnett to interview the employees regarding plaintiff. The interviews were highly critical of plaintiff and various individuals described him as, *inter alia*, "intimidating and unstable," "aggressive," "disruptive," "disagreeable," and "confrontational." Some comments attributed plaintiff's undesirous behavior to this lawsuit and his "crusade."

As noted, Cape May did not produce the Barnett reports until September 19, 2012. The production led to a barrage of complaints by plaintiff about Cape May's document production. At a hearing held on October 22, 2012, the Court found that Cape May's September 9, 2012 document production included documents responsive to discovery requests served in 2009 and 2010, and that the documents should have been produced "substantially earlier." *See* October 24, 2012 Order, Doc. No. 119.⁷ In the same Order the Court granted substantial relief to cure the potential prejudice resulting from Cape May's late production, including an *in camera* review of Cape May's alleged privileged documents.⁸

⁷ A clerical error in the Order was corrected on November 29, 2012. Doc. No. 138.

⁸ Cape May was Ordered, *inter alia*, to categorize and supplement its answers to plaintiff's written discovery by October 29, 2012, the fact discovery deadline was extended to November 21, 2012, plaintiff was granted leave to depose the witnesses referenced in the Barnett Reports, plaintiff was granted leave to re-depose Marino with regard to the late produced documents, and Cape May was ordered to pay for the Marino deposition transcript. Cape May was also Ordered to produce a privilege

log and a copy of the alleged privileged documents at issue for the Court's *in camera* review. The Court denied plaintiff's requests to strike Cape May's late produced documents and for sanctions and attorney's fees. *See* Doc. No. 119.

Cape May produced its privilege log on October 12, 2012. On October 29, 2012, and before the Court ruled regarding Cape May's *in camera* review, Cape May produced 26 e-mails between Lanzetta and Judge Connor that it originally claimed were privileged. The Court addressed these issues in a November 8, 2012 phone conference, followed by its November 13, 2012 Order. Doc. No. 129. Concerned about the adequacy and thoroughness of Cape May's production, the Court Ordered:

that by no later than November 19, 2012 defendant County of Cape May Board of Freeholders ("Cape May") shall produce an affidavit describing in detail the search it has done for documents responsive to plaintiff's discovery requests and Fed. R. Civ. P. 26(a)(1)(A). The term "documents" shall include electronically stored information. The affidavit shall include a representation that Cape May has produced all responsive discovery requested by plaintiff. The affidavit shall include a representation that if any responsive documents are being withheld on the ground of privilege that the document is identified on a privilege log that has been produced to plaintiff. The affidavit shall also explain why Cape May's recently produced e-mails were not identified on a privilege log produced to plaintiff before October 12, 2012.

In response to the Order Cape May produced the affidavit of James B. Arsenault, Jr., Esquire. Doc. No. 131. On November 19, 2012, plaintiff produced an additional 36 e-mails between Lanzetta and Judge Connor that referred to plaintiff. *See* plaintiff's November 20, 2012 Letter, Doc. No. 132. On December 4, 2012, the Court held a hearing on plaintiff's discovery complaints at which Arsenault appeared and was

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heard. The hearing left the Court far from confident that all relevant and responsive electronic discovery was produced. Therefore, in an effort to “put the issue to bed” once and for all the Court's December 10, 2012 Order [Doc. No. 149] provided as follows:

*4 1. Cape May shall produce for the Court's *in camera* inspection copies of all e-mails exchanged between Ms. Lanzetta and Judge Connor with a designation of which e-mails have already been produced in discovery; and

2. Cape May shall produce for the Court's *in camera* inspection copies of all e-mails exchanged between Ms. Bakley–Marino and Judge Connor and all e-mails exchanged between Mr. Stephen O'Connor and Judge Connor for the time period of January 1, 2007 to December 31, 2011; and

3. Cape May shall conduct a search of its electronically stored information for all e-mails exchanged between (1) Ms. Lanzetta and Ms. Bakley–Marino, (2) Mr. O'Connor and Ms. Lanzetta, and (3) Mr. O'Connor and Ms. Bakley–Marino, that mention “Art” “Arthur” and “Montana.” Cape May shall produce the responsive e-mails in discovery. To the extent Cape May claims that the e-mails are privileged, Cape May shall inform the parties and the Court of the volume of e-mails at issue before a privilege log is prepared; and

4. By December 19, 2012, Cape May shall produce an affidavit from Ms. Bakley–Marino confirming that she searched for and produced all relevant and responsive documents and electronically stored information; and

5. By December 19, 2012, Ms. Lanzetta's counsel shall serve a letter confirming that Ms. Lanzetta was asked to search for and produce all personal electronically stored information responsive to discovery requests directed to her in the case; and

IT IS FURTHER ORDERED that the deadlines for Cape May to produce the discovery listed in this Order are set forth in Cape May's December 7, 2012 letter [Doc. No. 146].⁹

Another hearing to address Cape May's document production was held on December 20, 2012. At the hearing the Court Ordered additional documents to be produced. The Court's January 3, 2013 Order [Doc. No. 175] stated:

1. To the extent not already done, Cape May shall promptly produce copies of the e-mails exchanged between defendant Lanzetta and Judge Connor that the Court reviewed *in camera* and Ordered to be produced on December 20, 2012. Cape May shall also produce all Lanzetta/Judge Connor e-mails that reference the two files referred to in plaintiff's complaint. Counsel shall confer to agree upon the names of the files. The produced documents are designated Confidential pursuant to the Discovery Confidentiality Order entered in the case; and

2. Plaintiff is granted leave to re-depose defendant Lanzetta on January 2, 2013, defendant Bakley–Marino on January 4, 2013, and Mr. Arsenault on January 13, 2013. Plaintiff is also granted leave to take the deposition of Mr. Grant, Treasurer, on January 4, 2013, if the parties do not agree on the production of documents in lieu of his testimony. These depositions shall be deemed Court Ordered and shall not be postponed absent good cause and leave of court. The deposition of Mr. Arsenault is limited to his role as a Custodian of Records of Cape May to attest to the search and production Cape May did for responsive electronically stored information. This Order shall not be read to waive Mr. Arsenault's attorney-client and work product objections; and

3. The Court shall be advised of the agreed-upon date for Judge Connor's second deposition as soon as it is scheduled. This Order shall not be read to Order Judge Connor to appear. If the parties and Judge Connor do not agree with regard to taking a second deposition the Court will address the issue if a motion for protective order and/or motion to compel is filed; and

*5 4. Plaintiff is granted leave to file a motion for leave to serve new and/or supplemental expert reports. The motion shall be filed no later than January 22, 2013; and

5. Plaintiff's application for leave to serve additional interrogatories is DENIED.

⁹ On January 9, 2013, the Order was updated to require Cape May to produce Lanzetta/Judge Connor's e-mails regarding four (not two) files referred to in plaintiff's complaint. Doc. No. 178.

On December 3, 2012, plaintiff filed his Motion for Entry of Default [for discovery violations] [Doc. No. 140] and Motion for Discovery and Sanctions [Doc. No. 141] now before the Court. Plaintiff filed his Supplemental Motion for Sanctions

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[Doc. No. 187] on January 19, 2013. Plaintiff's motion for default asked the Court to strike and suppress Cape May's answers because of its discovery transgressions.¹⁰ Plaintiff's December 3, 2012 Motion for Sanctions requests different forms of relief: (1) leave to serve special interrogatory questions; (2) a request that the Court order that plaintiff's consultant be permitted to review and search Cape May's computers and/or e-mail archives "to be certain that Plaintiff is able to obtain all relevant discovery, and all documents, writings and other material that may lead to relevant evidence"¹¹; (3) an order for the *in camera* inspection of all CD's and DVD's referred to in Mr. Arsenault's affidavit, and (4) an award of costs and fees in connection with plaintiff's motion and "Plaintiff's search of the Defendant's computer and e-mail archives."

¹⁰ Plaintiff also asked for leave to amend his complaint in six months to include defamation claims against the County and certain of its employees.

¹¹ Certification of Louis P. McFadden, Jr., Esquire, ¶ 33, Doc. No. 141-1.

Since the filing of the present discovery motions substantial additional discovery and motion practice has taken place. All fact depositions have been completed, expert reports have been produced, and all parties filed extensive motions for summary judgment. *See* Doc. Nos. 229, 232, 234. In addition, several drafts of the Joint Final Pretrial Order have been served. The Court expects the final Order to be entered soon. Trial is scheduled to start on October 28, 2013.¹²

¹² Trial was previously scheduled to start on December 17, 2012, February 4, 2013, and July 15, 2013.

Oral argument on plaintiff's motions was held on February 7, 2013. At oral argument the only monetary relief plaintiff pressed was his request for attorney's fees and costs for the incremental work he had to do that was caused by Cape May's late production. Tr. 73:11-14, Doc. No. 224.

Discussion

Before it separately addresses plaintiff's motions the Court will briefly summarize the applicable black letter law and discuss its findings regarding whether Cape May's document search and production was deficient.

The Federal Rules of Civil Procedure "allow broad and liberal discovery." *Pacitti v. Macy's*, 193 F.3d 766, 777 (3d Cir.1999). Pursuant to Fed.R.Civ.P. 26(b)(1), "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense.... For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Courts have interpreted the federal rules to mean that discovery encompasses "any matter that bears on or reasonably could lead to other matters that could bear on any issue that is or may be in the case." *Kopacz v. Del. River and Bay Auth.*, 225 F.R.D. 494, 496 (D.N.J.2004). The discoverability of information is not determinative of its admissibility as evidence at trial. *See Nestle Foods Corp. v. Aetna Cas. & Sur. Co.*, Civ. No. 89-1701 (CSF), 1990 WL 191922, at *4 (D.N.J. Nov. 19, 1990). However, "[t]he fact that the information sought will be admissible at trial is a strong argument in favor of discovery." 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2008, at 111 (2d ed.1994). But the converse is not true. *Id.* "Admissibility at the trial is not the limit of discovery, and discovery may properly be had of inadmissible matter." *Id.* Thus, making a determination on the issue of admissibility is premature at the discovery phase. *See Nestle Foods Corp.*, 1990 WL 191922, at *4.

*6 Given the broad scope of discovery, and the content of the documents at issue, there is no question that Cape May produced relevant documents late. Not only were the Barnett reports produced late, but after the "floodgates were opened" on September 19, 2012, additional Cape May documents continued to "trickle in." Many of these included e-mail communications between Lanzetta and Judge Connor that go to the heart of plaintiff's complaint, *e.g.*, the alleged improper "ex-parte" communications between Lanzetta and Judge Connor about plaintiff, plaintiff's juvenile cases, and plaintiff's work for Cape May.¹³

¹³ Although Cape May cannot be heard to deny that its late produced documents were relevant for discovery purposes, the Court acknowledges Cape May disputes plaintiff's characterization of the documents. For example, Cape May does not agree that the Barnett reports are a "bombshell."

In its October 24, 2012 Order, the Court determined that plaintiff's documents should have been produced

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substantially earlier. The Court made this finding after determining that documents produced on September 19, 2012 were responsive to document requests served in 2009 and 2010. For similar reasons, the Court finds that the documents Cape May produced after September 19, 2012 were also responsive to plaintiff's 2009 and 2010 document requests. As noted, many of the documents concerned communications by or between Lanzetta, Marino and/or Judge Connor that specifically addressed plaintiff. These documents are directly related to plaintiff's claim that defendants conspired against him because he complained about the alleged *ex parte* communications with Judge Connor. In short, Cape May cannot seriously dispute that it produced relevant documents late. The Court also finds that Cape May cannot seriously dispute that plaintiff incurred substantial incremental costs because of its late production. For example, plaintiff not only participated in numerous in-person and telephone conferences to address Cape May's late production, and he filed numerous related letters and briefs, but he also had to depose or re-depose key witnesses about the new documents. These depositions include Lanzetta, Marino and Judge Connor.

Although the Court finds that Cape May produced relevant documents late, the Court does not find that Cape May acted willfully or in bad faith. Although the thoroughness and accuracy of Cape May's document production leaves much to be desired, the Court has not seen evidence that Cape May purposely neglected to produce relevant documents. Further, based on the extensive record submitted by Cape May and the substantial searches it did after November 19, 2012, the Court finds that Cape May has satisfied its duty to produce its relevant requested documents.

James Arsenault, Esquire, Cape May's Assistant County Counsel, and the person who spearheaded Cape May's document production, addressed Cape May's document search in his affidavit and statements made at court hearings held on December 4 and 20, 2012. The following colloquy took place on December 20, 2012:

THE COURT: In your best judgment, have all reasonable efforts been taken to identify and produce the responsive electronically stored information?

MR. ARSENSULT: Yes, sir, I can make that assertion.

THE COURT: Are you aware of any reasonably accessible sources of information relevant to the issues in this case that have not been searched for responsive information?

MR. ARSENAULT: No, sir.

Tr. 41:25–42:8, Doc. No. 168.

With this background the Court will separately address plaintiff's motions.

1. *Motion for Default and Adjournment of Trial Date [Doc. No. 140]*

*7 Due to the discovery problems discussed herein, plaintiff requests that Cape May's answer be stricken, its separate defenses suppressed, and it should be defaulted. The request is denied.

Pursuant to Rule 37(b)(2)(A)(vi), a default may be rendered against a party for not complying with a discovery order. The same sanction may be granted if a party fails to provide information or identify a witness as required by Rule 26(a) or (e). *See also Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 918–19 (3d Cir.1992) (a court may impose a default as a permissible sanction for violating a discovery order); Fed.R.Civ.P. 16(f) (providing for sanctions if a party fails to obey a scheduling or pretrial order). The Third Circuit has cautioned, however, that this sort of drastic relief should be a sanction of “last, not first, resort.” *Id.* at 922 (quoting *Carter v. Albert Einstein Med. Ctr.*, 804 F.2d 805, 807 (3d Cir.1986)). All doubts should be resolved in favor of reaching a decision on the merits of the case. *Liggon–Redding v. Willingboro Tp.*, 351 Fed. Appx. 674, 678 (3d Cir.2009). In light of the Third Circuit's reluctance to authorize the drastic relief of a default “absent the most egregious circumstances” (*see United States v. \$8,221,877.16 in U.S. Currency*, 330 F.3d 141, 161 (3d Cir.2003) (citation omitted)), plaintiff's request for a default will not be granted.

In *Poulis v. State Farm & Casualty Co.*, 747 F.2d 863, 868 (3d Cir.1984), the court identified six (6) factors to evaluate when deciding whether the sanction of dismissal, or its substantial equivalent a default, is appropriate. The *Poulis* factors are: (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary; (3) whether there has been a history of dilatoriness; (4) whether the conduct of the party or attorney was willful or in bad faith; (5) the effectiveness of alternative sanctions; and (6) the meritoriousness of the claim or defense. *Id.* at 868. The decision whether to default is left to the court's discretion. *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 221 (3d Cir.2003). No particular *Poulis* factor is controlling and dismissal or default can be granted even when

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some of the factors are not met. *Hicks v. Feeney*, 850 F.2d 152, 156 (3d Cir.1988).

As noted, the Court does not find that defendant acted egregiously, willfully, vexatiously or in bad faith. It is true that defendant's initial and other document productions were deficient. In addition, the Court is satisfied that defendant cured its initial deficiencies and produced all of its relevant and requested documents. The Court has gone to great lengths to assure this occurred. The Court Ordered defendant to produce all relevant communications between and amongst the key "players" in the case (Lanzetta, Marino, Judge Connor and plaintiff), it personally reviewed all of the communications to assure that all relevant documents were produced, it reviewed *in camera* all relevant allegedly privileged documents, it required defendant to produce affidavits attesting to the completeness of its search, it required the production of complete up-to-date privilege logs, and it obtained on the record representations from defendant that its search was complete. Because of all of this the Court finds that Cape May has now exhausted reasonable efforts to produce its relevant requested documents.

*8 Further, despite plaintiff's protests to the contrary, the Court finds that any prejudice to the plaintiff from defendant's late production has been cured. At plaintiff's request scheduling deadlines have been extended on numerous occasions to permit additional discovery. In addition, plaintiff was granted leave to depose the individuals who criticized him in the late produced Barnett reports. The Court also granted plaintiff leave to re-depose witnesses regarding documents produced late, including key witnesses such as defendant Lanzetta and Judge Connor. Accordingly, recognizing the Third Circuit's reluctance to grant the drastic sanction of default, and since the defendant did not act willfully or vexatiously, and any prejudice from defendant's late document production has been cured, plaintiff's request for a default is denied.

Plaintiff's request for a six month postponement of the trial date is denied as moot. When plaintiff filed his motion trial was scheduled to start on February 4, 2013. Trial is now scheduled for October 28, 2013. Accordingly, since the relief plaintiff requested has been granted, plaintiff's request for a six month postponement of the trial date is denied as moot.

2. Plaintiff's Motion for Additional Discovery and Sanctions [Doc. No. 141]

This motion requests additional discovery and sanctions. Specifically, plaintiff requests (1) leave to serve a set of "special interrogatories" addressing defendant's electronic discovery, (2) that plaintiff's consultants be permitted to review and search defendant's computers and/or e-mail archives to be certain that all relevant evidence was produced, and (3) the Court order the *in camera* inspection of every CD and DVD referred to in Arsenault's November 19, 2012 affidavit. Plaintiff's request for this additional discovery is denied.

As to the proposed new interrogatories, they are cumulative and unnecessary. After plaintiff filed this motion he deposed or re-deposed Lanzetta, Marino and Judge Connor. Plaintiff also deposed Arsenault in his capacity as Cape May's document custodian. Therefore, all of the information plaintiff is requesting in his new interrogatories was or could have been asked about at the depositions he took. In addition, the subject matter of the proposed special interrogatories was addressed by Arsenault in his November 19, 2012 affidavit [Doc. No. 131] and at the December 4 and 20, 2012 hearings. As to plaintiff's request that his consultant personally inspect defendant's computers, the Court also finds this unnecessary. The Court is satisfied that defendant has completed a reasonable good faith search for its relevant and responsive electronic discovery. Plaintiff's personal inspection of defendant's computers is unnecessarily intrusive. As to plaintiff's request for an *in camera* review of defendant's CD's and DVD's, this is also unnecessary. The Court accepts defendant's representation that it has now produced all relevant and responsive e-mails and documents. In addition, the Court has personally reviewed all communications amongst the key "players" to determine what documents should and should not be produced.

Plaintiff's request for sanctions will be addressed *infra*.

3. Supplemental Motion for Sanctions [Doc. No. 191]

The Court will address plaintiff's multiple requests for sanctions collectively. Plaintiff's request is premised on his belief that defendant "[intentionally withheld] critical evidence that struck at the core" of his case." Reply Brief to Motion to Compel at 1, Doc. No. 159. Plaintiff argues: (1) the Barnett reports were "hidden" within 4,000 pages of documents produced the day before the discovery deadline (*id.*); (2) defendant discovered relevant e-mails in August 2012 that it did not produce until October 2012(*id.*); (3) defendant's claim that it inadvertently failed to produce relevant documents is incredulous (*id.* at 3–5) and spurious

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(*id.* at 16–18); (4) defendant withheld the Barnett reports to poison his future wage loss claim (*id.* at 6); (5) the exclusion of the Barnett reports from plaintiff's personnel file was “a bald attempt to hide the reports from the plaintiff until the last possible moment” (*id.* at 7); (6) defendant not only acted in bad faith but it fraudulently concealed relevant evidence (*id.*); (7) counsel made a knowing false statement to the Court (*id.* at 810); (8) defendant misused the attorney-client privilege to withhold relevant documents and to avoid Court oversight of its discovery obligations (*id.* at 10–15); and (9) “defendants have presented a pattern of intentionally evasive discovery practices” (*id.* at 17)(emphasis omitted).

*9 As the Court has noted throughout this Opinion, although it does not find that defendant acted in bad faith, willfully or vexatiously, defendant's document production was deficient. The deficiencies upset the orderly progression of the case, delayed trial, resulted in duplicative and unnecessary discovery, and caused plaintiff to incur substantial unnecessary transaction costs. Since the outset of the case defendant knew the communications (including e-mails) between and amongst Lanzetta, Judge Connor and Marino regarding plaintiff were clearly relevant. Defendant also knew that because of plaintiff's complaints about the alleged *ex parte* communications between Lanzetta and Judge Connor that their e-mails were not only relevant, but could possibly be the most important evidence in the case. Nevertheless, although the case was filed on February 19, 2009, and the Fed.R.Civ.P. 16 conference was held on May 20, 2009, many key e-mails were not produced until they trickled in from September—January, 2013. Defendant produced key e-mails and documents, including the Barnett reports, on September 19, 2012, and produced additional relevant documents and e-mails on October 29, 2012, November 18 or 19, 2012, December 23, 2012, January 17, 2013, and possibly other dates.

Defendant's excuses for why it did not produce its relevant documents earlier are far from convincing, and they do not “substantially justify” its tardy document production. Much of defendant's explanation focuses on its contention that plaintiff did not identify the correct search terms for defendant's ESI search. Defendant argues that it searched for the terms plaintiff identified, which included the term “Arthur Montana.” Therefore, defendant argues, it is not to blame if its search did not identify documents that merely mention “Art” or “Art Montana.”

Defendant's excuse is unacceptable and is rejected. The purpose of the court system is to resolve civil disputes in a civil way; litigation is not a “gotcha” game. *Inferreza v. Wal-Mart Stores, Inc.*, C.A. No. 11–5675 (RMB/JS), 2011 WL 6372340, at * 2 (D.N.J. Dec. 20, 2011). See also *Carr v. Spherion*, No. 08–0326, 2009 WL 3064721, at *7 (W.D.La. August 17, 2009)(“[T]he law has ... evolved beyond a transparent game of ‘gotcha.’”); *Compaq Computer Corp. v. Ergonome, Inc.*, No. H–97–1026, 2000 WL 345903, at *3 (S.D. Tex.2000)(“The law and this Court abhor a ‘gotcha.’”). The federal rules do not require that plaintiff identify the exact “magic words” to obtain clearly relevant discovery. The “obligation on parties and counsel to come forward with relevant documents not produced during discovery is ‘absolute.’” *Tracinda Corporation v. DaimlerChrysler AG*, 502 F.3d 212, 243 (3d Cir.2007). Defendant had an independent duty to produce key relevant requested discovery even if plaintiff did not specifically list the precise ESI wording or spelling in its list of search terms. Defendant may not delegate to plaintiff the duty to identify its relevant requested documents. As noted in *Poole ex rel. Elliott v. Textron, Inc.*, 192 F.R.D. 494, 507 (D.Md.2000), “[t]he rules of discovery must necessarily be largely self-enforcing. The integrity of the discovery process rests on the faithfulness of parties and counsel to the rules—both the spirit and the letter.” Moreover, “the discovery provisions of the Federal Rules are meant to function without the need for constant judicial intervention, and ... those Rules rely on the honesty and good faith of counsel in dealing with adversaries.” *Hopei Garments (Hong Kong), Ltd. v. Oslo Trading Co., Inc.*, No. 87 CIV. 0932(MBM), 1988 WL 25139 (S.D.N.Y. March 8, 1988).¹⁴

14 The Court makes it clear that it is not impinging the honesty and integrity of defense counsel.

It is absurd to posit that because defendant's e-mails mention “Art” or “Art Montana,” instead of “Arthur Montana,” that defendant did not have a duty to produce relevant e-mails between Lanzetta and Judge Connor that mentioned plaintiff. Defendant should have undertaken a search for e-mails mentioning “Art” or “Art Montana” even if plaintiff did not specifically identify these precise terms. If the search term “Arthur Montana” was not sufficient to pick up references to “Art” or “Art Montana,” defendant should have known this and taken steps to expand its search. It is stupefying that in December 2012, the Court had to Order defendant to conduct an ESI search for documents mentioning “Art” and “Art Montana,” and that the search identified relevant documents

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at that late date that were not already produced. The Court would be flabbergasted if plaintiff did not rightfully assume that his designation of the search term “Arthur Montana” did not also subsume a search for “Art”, “Art Montana” and “Montana.” Defendant protests that “[e]lectronic discovery is not easy. It is like looking for a needle in the haystack.” Brief in Opposition at 16, Doc. No. 153. This argument is meritless. The e-mails defendant produced late are amongst the most relevant documents in the case. Their late production was inexcusable.

*10 Another troubling aspect of defendant's argument is that it insists on complaining about plaintiff's alleged discovery deficiencies as if this explains or justifies its discovery deficiencies. Nothing could be further from the truth. Plaintiff's complaints about defendant's discovery rise or fall on their own merits and are not dependent on the merits of defendant's complaints about plaintiff. *See Ramada Franchise Systems, Inc. v. Patel*, No. 03-3494, 2004 WL 1246566, at *3 (3d Cir. June 8, 2004); *see also Rule 26(a)(1)(E)* (“A party is not excused from making its disclosures because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.”). If defendant had problems with plaintiff's discovery it should have raised them, which it continually did. Defendant's problems with plaintiff's discovery do not justify or excuse its late document production.

Another reason defendant gives for not producing the Barnett reports earlier is the fact that the reports were not physically located in plaintiff's personnel file. This is another unacceptable excuse. Defendant could have and should have produced all documents regarding plaintiff's work performance, no matter where they were physically located. The Barnett reports and critiques are plainly relevant to important issues in the case, including but not limited to plaintiff's retaliation claim.¹⁵ Again, the Court would be flabbergasted if plaintiff did not rightfully assume that all documents critiquing his work performance would be produced, even if the documents were not physically present in plaintiff's personnel file. Defendant, not plaintiff, is in the best position to know how it files and stores its documents. Plaintiff does not have to identify the specific files and locations defendant should search. This is part and parcel of defendant's duty to conduct a thorough and complete search for responsive documents.

¹⁵ The Court rejects defendant's argument that the Barnett reports only became relevant after plaintiff

amended his pleading in June 2012 to include a failure to promote claim. To be sure, the Court is only concluding that the Barnett reports are relevant for discovery purposes. The Court is not weighing in on whether the reports are admissible at trial. Further, although plaintiff (not the Court) characterizes the reports as a “bombshell,” plaintiff has a right to pursue his trial strategy and arguments as he deems fit.

Defendant also argues that Marino did not remember the grievances involving plaintiff until August 2012. Most certainly, however, if defendant had conducted a thorough document search it would have identified and produced the documents earlier.

Although the Court declines to default defendant for its discovery transgressions, sanctions are nevertheless appropriate. Sanctions may be awarded even in the absence of bad faith. *Tracinda, supra*, 502 F.3d at 242. The Third Circuit has also noted that even if the failure to produce has been inadvertent, sanctions may be called for if the impact is severe on the party who was due the discovery. *Id.* The Court finds that the impact on plaintiff has been substantial enough to warrant sanctions. As is evident from the docket and the history discussed herein, plaintiff had to spend substantial resources to finally track down defendant's documents that should have been produced years earlier. In addition, the late production unnecessarily delayed the final resolution of the case.

The Court rejects defendant's argument that it already denied plaintiff's request for sanctions and the ruling is binding with respect to the instant motions. When defendant's discovery problems first came to light soon after September 19, 2012, the Court denied plaintiff's request for fees but Ordered defendant to pay the cost of Marino's deposition transcript. *See* October 24, 2012 Order ¶¶ 7–8, Doc. No. 119. However, that Order was entered before the extent and importance of the late produced documents became apparent. Subsequent developments justify an evaluation of the complete record that has now been developed.

*11 As to the proper relief to award, sanctions must be tailored to address the harm identified. *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 73 (3d Cir.1995); *In re Neurontin Antitrust Litigation*, MDL No. 1479, 2011 WL 2357793, at *9 (D.N.J. June 9, 2011). For the reasons discussed herein, the Court does not find the more drastic forms of relief authorized by Rule 37(b)(2)(A)(i-vii)

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to be appropriate. Defendant did not act in bad faith and any prejudice to plaintiff has been cured. Nevertheless, plaintiff has undoubtedly incurred incremental attorney's fees and costs that would not have been necessary absent defendant's late document production. Defendant will be ordered to reimburse these fees and costs. These fees may be awarded pursuant to Rule 37(c)(1)(A), which provides that an award of fees and costs may be granted if a party fails to provide information required by Rule 26(a) or (e).¹⁶

¹⁶ See also Rule 37(b)(2)(C), providing that instead of or in addition to the orders in Rule 37(b)(2)(A)(i-vii), the Court must order the disobedient party to pay the reasonable expenses, including attorney's fees, caused by the failure to comply with discovery, unless the failure was substantially justified or other circumstances make an award of expenses unjust. For the reasons discussed, the later two circumstances do not exist.

Due to the overlap in plaintiff's motions, and his numerous requests, the Court is quite frankly confused as to what plaintiff seeks reimbursement for and how much. At oral argument plaintiff focused on deposition expenses but in his motions he also refers to time spent on attending telephone and in-person court conferences¹⁷, preparing and filing briefs and motions, etc. In order to "nail down" plaintiff's position, and to give defendant an opportunity to object, the Court will Order plaintiff to submit an affidavit specifically identifying all fees and costs he is claiming, what the time was spent on and his hourly rate. In this regard plaintiff shall comply with the requirements of L. Civ. R. 54.2 which sets

forth what must be contained in an affidavit seeking fees. Defendant will be given a reasonable opportunity to respond and object. Defendant should rest assured that plaintiff is only entitled to reimbursement of the transaction costs reasonably incurred to respond to its late production. *Martin v. Brown*, 63 F.3d 1252, 1263–65 (3d Cir.1995)(monetary sanctions should be reasonable and relate directly to the expenses incurred due to the non-complying party's violation). The Court is not giving plaintiff a "blank check" for all the work he did, some of which was repetitive, unnecessary and excessive.¹⁸

¹⁷ By way of example, and not intending to be a complete list, the telephone conference on November 8, 2012 and the in-person conferences on December 4 and 20, 2012, fall into the category of conferences directly related to Cape May's late production.

¹⁸ For example, plaintiff knew or should have known that the applicable case law made it unlikely his request for a default would be granted.

Conclusion

Accordingly, for all the foregoing reasons, plaintiff's outstanding discovery motions will be granted in part and denied in part. A contemporaneous Order memorializing the Court's rulings will be separately entered.

All Citations

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-002031-23 (AM-000056-23)**

ATLANTIC ER PHYSICIANS : Submission Date: August 6, 2024
TEAM PEDIATRIC :
ASSOCIATES, PA, : On Appeal from an Interlocutory Order
EMERGENCY CARE SERVICES : of the Superior Court Law Division,
OF NJ, PA, EMERGENCY : Complex Business Litigation Part,
PHYSICIAN ASSOCIATES OF : Gloucester County dated September 12,
NORTH JERSEY, PC, : 2023
EMERGENCY PHYSICIAN :
ASSOCIATES OF SOUTH : Sat Below: Hon. James R. Swift, J.S.C.
JERSEY, PC, : Trial Court Docket No. GLO-L-1196-
: 20
(For Continuation of Caption See :
Inside Cover) :

**BRIEF OF *AMICUS CURIAE* LAWYERS FOR CIVIL JUSTICE IN
SUPPORT OF DEFENDANTS-APPELLANTS**

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Lawyers for Civil Justice (“LCJ”) is a national coalition of corporations, law firms, and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy, and inexpensive determination of civil cases. Since 1987, LCJ has been closely engaged with the Federal Civil Rules Advisory Committee and various state rules committees to: (1) promote balance in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation. LCJ’s members are frequent litigants, often seeking discovery as well as responding to discovery requests. LCJ advocates for procedural rules that are fair and efficient for everyone, regardless of their position in any particular lawsuit.

Of particular relevance to this case, LCJ was closely involved in the rulemaking process that developed the 2015 amendments to the Federal Rules of Civil Procedure. LCJ participated in the 2010 Duke Conference,¹ submitted empirical evidence in support of changes to the discovery rules and other material such as White Papers, and participated in all public hearings and Rule

¹ See <https://www.uscourts.gov/rules-policies/records-and-archives-rules-committees/special-projects-rules-committees/2010-civil> (describing 2010 Duke Conference).

Advisory Committee meetings related to the formation, drafting, and vetting of the 2015 rule amendments. That includes the amendment to Federal Rule of Civil Procedure 26(b)(1), which defines the scope of discovery as being limited to information that is “relevant to any party’s claim or defense” and that is “proportional to the needs of the case.” The issue in this case—the centrality of relevance to the scope of discovery under the New Jersey Court Rules—strikes directly at the heart of LCJ’s work on the Federal Rule amendments.

LCJ has an interest in this case because the trial court’s order is inconsistent with the New Jersey Civil Rules and long-established principles in civil discovery, puts the privacy of parties and nonparties at risk, and vastly increases costs to the judicial system and parties, including many of LCJ’s members.

PRELIMINARY STATEMENT

The trial court’s order in this case violates New Jersey Civil Rules and could set a new and dangerous precedent for civil discovery throughout New Jersey. By precluding the parties from conducting any review for responsiveness or relevance before turning over documents that hit on search terms, the trial court has dispensed with the rules and two core principles of

civil discovery that have guided New Jersey courts and courts around the country.

First, the trial court's order eviscerates the touchstone of the rules of civil discovery: relevance. Although the New Jersey rules give courts ample discretion to determine what is relevant to claims and defenses, they do not allow courts to order the production of information that is not relevant. The trial court recognized that the search terms in this case will turn up vast amounts of irrelevant and nonresponsive documents. Precluding the responding party from conducting a relevance and responsiveness review exceeds the court's authority because it will force troves of irrelevant documents to be turned over to the other side. While search terms no doubt have some role to play in helping a responding party locate relevant and responsive documents, the choice of this method does not obviate the fundamental requirement of relevance.

Second, the trial court's order violates the foundational discovery principle that "[a] responding party should determine how to meet its own preservation and production obligations." The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production: A Project of the*

Sedona Conference Working Group on Electronic Document Retention and Production, 19 Sedona Conf. J. 1, 118-26 (2018) (“Principle 6”).² Thus, the discovery process should be handled by the parties, not micro-managed by the courts, especially where there is no indication that a party has improperly withheld any evidence in the case. The trial court’s order explicitly turns that on its head, removing the responding party’s role in reviewing documents for responsiveness and relevance.

The trial court’s order, if followed in other cases, could have profound negative consequences in New Jersey courts. The re-writing of the rules to allow courts to force production of vast amounts of irrelevant and nonresponsive documents raises core privacy and cybersecurity concerns for both parties and nonparties. Document discovery often turns up the private

² The Sedona Conference, “a nonprofit legal policy research and education organization, has a working group comprised of judges, attorneys, and electronic discovery experts dedicated to resolving electronic document production issues.” *Aguilar v. Immigr. & Customs Enf’t Div. of U.S. Dep’t of Homeland Sec.*, 255 F.R.D. 350, 355 (S.D.N.Y. 2008). Courts around the country have turned to the Sedona Conference for guidance when confronting issues surrounding discovery of electronic evidence. *E.g., Ford Motor Co. v. Edgewood Props., Inc.*, 257 F.R.D. 418, 424 (D.N.J. 2009) (calling it one of “the leading authorities on electronic document retrieval and production”); *accord Estate of Lasiw by Lasiw v. Pereira*, 475 N.J. Super. 378, 398 n.7 (App. Div. 2023) (citing the Sedona Conference); *In re Actos Antitrust Litig.*, 340 F.R.D. 549, 552 n.2 (S.D.N.Y. 2022) (same); *Aguilar*, 255 F.R.D. at 355 (same).

correspondence of employees, customers, users, patients, suppliers, contractors, and other members of the public. Those individuals receive no notice that their correspondence is about to be produced in a lawsuit.

Moreover, whatever cybersecurity protections a party might have in place to protect its documents go out the window when those documents are turned over to the other side. Expanding the scope of discovery far beyond the relevance standard established by the rules only magnifies those concerns.

The discovery process itself will also become less efficient if courts begin to force parties to turn over every document that hits on a search term regardless of relevance or responsiveness. Precluding a relevance and responsiveness review will make it almost impossible for parties to agree on search terms—a crucial and necessary step in almost every civil case involving electronic discovery. If a responding party knows that the court might order every single document that hits on a search term to be turned over, it will fight extremely hard to make the search terms as narrow as possible. And, a requesting party will push for extremely broad search terms in the hopes of gaining access to a private look into its adversary's business. The fight over search terms will swallow judicial and party resources, leading to court intervention early on in almost every case. Conversely, if the parties know that

they will be able to conduct a review for relevance and responsiveness, the stakes of the search term fight will be much lower, and agreement therefore much more likely.

The trial court's order does all this with no countervailing rationale for expanding the discovery process in this way. There was no allegation or indication that either party had withheld relevant documents. And the trial court offered no particularized rationale for why, in this case, it was throwing relevancy and responsiveness out the window.

At a time when the federal rules have been amended to focus the scope of discovery on information related to claims and defenses, to avoid "the problem of overdiscovery," and to "encourage judges to be more aggressive in identifying and discouraging discovery overuse," Fed. R. Civ. P. 26 committee's note to 2015 amendment, the trial court's order moves in the opposite direction, vastly expanding the scope of discovery beyond what is allowed by the rules for no good reason. The trial court's order in this case has the potential to reverberate far beyond the dispute between these two parties. It threatens to re-write the rules and upset the discovery process in almost every complex civil action. This Court should reverse.

PROCEDURAL HISTORY

This appeal concerns a discovery order entered by the trial court on September 12, 2023. In the order, the court required the parties in this case to produce “[a]ll documents identified/returned by application of the ESI search terms that the parties negotiated.” Da167 ¶ 1. While the court allowed the parties to withhold documents based on an applicable privilege or immunity under New Jersey law, Da167 ¶ 2, and a “small subset of ESI documents that contain information so proprietary that their production could result in losses or disruption,” Da167 ¶ 2, the court did not permit the parties to review any of the “identified/returned” documents for relevance to the case or responsiveness to a particular discovery request. Indeed, at a conference prior to issuing its order, the court recognized that its order would result in production of huge numbers of irrelevant documents. Aug. 24, 2023, Tr. at 6:14-17.

The order made no finding that any party had improperly withheld relevant evidence, spoliated evidence, or engaged in any other improper conduct during discovery in this case.

ARGUMENT

I. The Trial Court’s Order Is Inconsistent with the New Jersey Rules of Court Because It Requires Production of Irrelevant Documents.

Under New Jersey law “[p]arties may obtain discovery regarding any matter, not privileged *which is relevant to the subject matter involved in the pending action.*” R. 4:10-2 (emphasis added). This is not controversial. *See, e.g., Arena v. Saphier*, 201 N.J. Super. 79, 83 (App. Div. 1985) (noting that “irrelevant” evidence was “not discoverable”). Rule 4:10-2, like all New Jersey Rules of Court, was promulgated under Article VI, section 2, paragraph 3 of the New Jersey Constitution, which provides the Supreme Court with “exclusive and plenary power to promulgate rules governing practice and procedure.” *George Siegler Co. v. Norton*, 8 N.J. 374, 381-82 (1952); *accord In re Protest of Cont. for Retail Pharmacy Design*, 257 N.J. 425, 435-36 (2024). While this rule provides courts discretion to determine what discovery is “relevant,” *see Lipsky v. N.J. Assoc. of Health Plans, Inc.*, 474 N.J. Super. 447, 463-64 (App. Div. 2023) (reviewing trial court’s discovery order for abuse of discretion), the rule does not give courts authority to order the production of information that is irrelevant to the case—in other words, the relevance limit is binding on trial courts. *See Estate of Lasiw by Lasiw v. Pereira*, 475 N.J. Super. 378, 404 (App. Div. 2023) (finding trial court’s order

to be “overly broad and result[ing] from the judge’s mistaken exercise of discretion” because order would result in the production of irrelevant information); *Arena*, 201 N.J. Super at 83; *Cunningham v. N.J. Mfrs. Ins. Co.*, No. A-1406-05T2, 2006 WL 709059, at *2 (N.J. Super. Ct. App. Div. Mar. 22, 2006) (“We conclude that the trial judge mistakenly exercised his discretion over the management of the discovery proceedings by permitting this unwarranted and irrelevant excursion into the question of whether defendant asserted its defenses in subjective bad faith.”).³

³ While Rule 4:10-2 includes language permitting the discovery of evidence that “appears reasonably calculated to lead to the discovery of admissible evidence,” that language was meant only to clarify that discovery should not be precluded simply because a piece of evidence will be inadmissible at trial, and is not meant to expand the scope of discovery beyond relevant evidence. *See HD Supply Waterworks Grp., Inc. v. Dir., Div. of Taxation*, 29 N.J. Tax 573, 583 (2017) (discussing the “reasonably calculated” language and explaining that “the relevancy of documents and materials is not predicated on their admissibility at trial....”). Indeed, the full context for that language in the rule is, “[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.” R. 4:10-2. Likewise, the Committee Notes to the 2015 Amendment to Federal Rule of Civil Procedure, which eliminated similar language in the federal rule, made clear that that language was only meant to indicate that evidence need not be admissible to be discoverable. *See Fed. R. Civ. P. 26*, committee’s note to 2015 amendment (explaining why “reasonably calculated” phrase was deleted in favor of “[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable”).

The reason for this sensible rule is that a party to a lawsuit is not entitled to embark on a “fishing expedition” into the other party’s business unrelated to the issues in the lawsuit. *D’Agostino v. Domino’s Pizza Inc.*, No. 3:17-cv-11603 (PGS) (TJB), 2020 WL 1189307, at *3 (D.N.J. March 12, 2020). Thus, “[r]elevancy remains the touchstone of permissible discovery.” *Estate of Lasiw*, 475 N.J. Super. at 404.

Forcing a party to produce documents that hit on search terms without any relevance review would violate this rule and the core principle behind it. While search terms are a useful tool that a party can use to help locate responsive documents, “simple keyword searching ... has well-documented deficiencies.” The Sedona Conference, *Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*, 15 Sedona Conf. J. 217, 223 (2014) (“*Search & Retrieval*”).⁴ “[S]imple keyword searches are both over- and under-inclusive in light of the inherent malleability and ambiguity of spoken and written English.” *Id.* at 233. This is a common problem that courts have long recognized. *E.g.*, *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260 (D. Md. 2008) (recognizing “well-known

⁴ Available at https://thesedonaconference.org/sites/default/files/publications/217-264%20Search%20and%20Information_0.pdf.

limitations and risks associated with [keyword searches]”); *Moore v. Publicis Groupe*, 287 F.R.D. 182, 190-91 (S.D.N.Y. 2012) (“Another problem with keywords is that they often are over-inclusive, that is, they find responsive documents but also large numbers of irrelevant documents.”); *Singleton v. Mazhari*, No. 22-CV-2554-GLR, 2024 WL 1140691, at *3 (D. Md. Mar. 14, 2024) (“[T]he Court notes that hits on a given search term in a given document for a particular custodian, including during the time frames above, does not necessarily mean the document is discoverable.”).⁵

Because of this, the nation’s preeminent authority on eDiscovery best practices—the Sedona Conference—has written that

the use of automated search methods is not intended to entirely eliminate the need for manual review; indeed, in many cases, both automated and manual searches will be conducted, with initial automated searches used for culling down a universe of material to more manageable size (or prioritizing documents), followed by a secondary manual review process.

Search & Retrieval, 15 Sedona Conf. J. at 244.

⁵ See also *Search & Retrieval*, 15 Sedona Conf. J. at 233 (“The problem of the relative percentage of ‘false positives’ or noise in the data is potentially huge, amounting in some cases to enormous numbers of files which must be searched to find responsive documents.”).

Upholding the trial court’s order in this case would throw relevance—the “touchstone” for discovery—out the window. It would all but guarantee that a large number of irrelevant and nonresponsive documents would be produced, in direct violation of New Jersey law. This harms the producing party, as well as many nonparties, by forcing the production of private, sensitive documents that are not otherwise discoverable. And it could harm the requesting party by inundating it with thousands of irrelevant documents to sift through.

It is for these reasons that the overwhelming majority of courts around the country, when confronted with a request to require a party to turn over all documents that hit on search terms without a subsequent relevance review have rejected such requests. *E.g.*, *Royal Park Invs. SA/NA v. HSBC Bank USA Nat’l Ass’n*, No. 14-CV-08175 (LGS) (SN), 2016 WL 11805202, at *1 (S.D.N.Y. July 15, 2016) (“[T]he receiving party is not entitled to non-responsive documents, and thus failing to conduct a subsequent manual review gives that party more than it is entitled to.”).⁶

⁶ *See also, e.g.*, *United States for Use & Benefit of M. Frank Higgins & Co. v. Dobco Inc.*, No. 22-CV-9599 (CS) (VR), 2023 WL 5302371, at *4 (S.D.N.Y. Aug. 17, 2023) (“Although there is nothing improper about parties agreeing to produce all documents generated from an ESI search protocol . . . , the Court will not order an unwilling party to do so.”); *SinglePoint Direct Solar LLC v. Solar Integrated Roofing Corp.*, No. CV-21-01076-PHX-JAT, 2023 WL 2585296, at *3 (D. Ariz. Mar. 21, 2023) (“Plaintiff may nonetheless review all documents that are ‘hits’ on a

search term for relevance and withhold irrelevant documents.”); *Willmore v. Savvas Learning Co. LLC*, No. 22-2352-TC-ADM, 2023 WL 6124045, at *9 (D. Kan. Sept. 19, 2023) (rejecting the “demand that [responding party] produce all resulting hits” because “the scope of discovery ... begins with relevance”); *FlowRider Surf, Ltd. v. Pac. Surf Designs, Inc.*, No. 15CV1879-BEN (BLM), 2016 WL 6522807, at *8 (S.D. Cal. Nov. 3, 2016) (“Plaintiffs may review the documents that ‘hit’ on the parties’ agreed-upon search terms for relevance before producing them to Defendant.”); *Venturedyne, Ltd. v. Carbonyx, Inc.*, No. 2:14-CV-351-RL-JEM, 2016 WL 6694946, at *3 (N.D. Ind. Nov. 15, 2016) (“Carbonyx is free to review the results of the keyword searches and to withhold documents that are truly irrelevant to this case.”); *BancPass, Inc. v. Highway Toll Admin., LLC*, No. A-14-CV-1062-SS, 2016 WL 4031417, at *2-3 (W.D. Tex. July 26, 2016) (denying motion to compel production of all documents that hit on search terms prior to review for relevance); *Palmer v. Cognizant Tech. Sols. Corp.*, No. CV 17-6848 DMG (PLAx), 2021 WL 3145982, at *9 (C.D. Cal. July 9, 2021) (“The Court will not compel defendants to produce any document simply because it contains a search term whether or not it is responsive to the discovery request, or, by extension, whether or not it is relevant and proportional to the needs of the action.”); *O’Donnell/Salvatori Inc. v. Microsoft Corp.*, 339 F.R.D. 275, 276-77 (W.D. Wash. 2021) (“[A] party’s agreement to run search terms does not waive its right to review the resulting documents for relevance so long as the review can be done in a reasonably timely manner.”); *Strauch v. Computer Scis. Corp.*, No. 3:14 CV 956 (JBA), 2015 WL 7458506, at *3 (D. Conn. Nov. 24, 2015) (“[D]efendant is correct that it should not be obligated to disclose clearly irrelevant documents.”); *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 CIV. 6950 (AT) (JCF), 2014 WL 716521, at *1 (S.D.N.Y. Feb. 18, 2014) (holding that a party’s agreement to search terms “did not override the discovery demands and responses”); *Ala. Aircraft Indus., Inc. v. Boeing Co.*, No. 2:11-CV-03577-RDP, 2017 WL 9565521, at *3 (N.D. Ala. Oct. 25, 2017) (“Although the parties agreed to certain search terms while collecting documents, those search terms do not override the scope of Boeing’s actual discovery requests.”); *but see, e.g., Total Safety U.S., Inc. v. Rowland*, No. CIV. A. 13-6109, 2014 WL 1691551, at *8 (E.D. La. Apr. 29, 2014) (foreclosing relevance review upon finding that party had agreed to produce all documents that hit on search terms); *Consumer Fin. Prot. Bureau v. Navient Corp.*, No. 3:17-CV-101, 2018 WL 6729794, at *2 (M.D. Pa. Dec. 21, 2018) (requiring production of all documents hitting on two specific search terms).

II. The Trial Court’s Order Infringes on the Core Role of a Responding Party to Determine How to Meet Its Own Preservation and Production Obligations.

The New Jersey discovery rules, like the federal rules, require each party to fulfill its discovery obligations without the court or opposing counsel dictating the methodology it uses. *See* R. 4:18-1(b) (providing procedure by which a responding party shall respond to document requests); *accord* Fed. R. Civ. P. 34(b)(2). Rule 4:18-1 does not specify the methodology by which the responding party shall produce the requested information. *See* R. 4:18-1(b)(2) (“Procedure for Response”). Rather, the responding party must either object to the request or produce “the requested documents,” along with a certification that such production “is complete and accurate.” *Id.* “Thus, Rule 4:18-1 anticipates that in civil discovery the responding party will produce responsive electronic data....” *Lipsky*, 474 N.J. Super. at 467-68 (collecting cases from around the country placing the burden on the responding party to produce electronic data).

This is in keeping with what commentators have generally found to be the best practice in civil discovery. In an effort to help courts navigate eDiscovery issues, the Sedona Conference has published *Recommendations & Principles for Addressing Electronic Document Production* (“*The Sedona*

Principles”).⁷ Principle 6 states, “Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.” *The Sedona Principles*, 19 Sedona Conf. J. at 118. “Those discovery obligations also include the duty to use reasonable efforts to locate and produce ESI responsive to the opposing party’s requests and within the scope of discovery.” *Id.* at 119. The reason for this is straightforward:

Because of the dynamic nature of litigation, the analysis cannot be reduced to a generalized checklist of reasonable steps for every party to take in every action. Instead, the responding party must make decisions on what is required to meet its preservation and production obligations based on direct input from those inside the organization who create, receive, and store their own information (i.e., individual custodians), and those who implement and maintain the organization’s information systems (e.g., applications administrators). Rarely will a court or opposing party have direct access to the specific knowledge required to make those decisions. Moreover, some of these decisions, especially those relating to preservation, often must be made before a responding party can confer with the opposing party or seek court guidance. Thus, a responding party, not the court or requesting party, is generally best situated to determine and

⁷ See The Sedona Conference, *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production A Project of the Sedona Conference Working Group on Electronic Document Retention and Production*, 19 Sedona Conf. J. 1 (2018), available at <https://thesedonaconference.org/sites/default/files/publications/The%20Sedona%20Principles%20Third%20Edition.19TSCJ1.pdf>. (“*The Sedona Principles*”)

implement appropriate procedures, methodologies, and technologies.

Id. Courts around the country take seriously this reasoning, often citing to Principle 6 when declining to “micromanage the parties’ internal review procedures.” *Edwards v. McDermott Int’l, Inc.*, No. 4:18-CV-04330, 2021 WL 5121853, at *3 (S.D. Tex. Nov. 4, 2021); *accord Livingston v. City of Chicago*, No. 16 CV 10156, 2020 WL 5253848, at *3 (N.D. Ill. Sept. 3, 2020); *Hastings v. Ford Motor Co.*, No. 19-CV-2217-BAS-MDD, 2021 WL 1238870, at *3 (S.D. Cal. Apr. 2, 2021); *In re Facebook, Inc. Consumer Priv. User Profile Litig.*, No. 3:18-MD-02843-VC-JSC, 2021 WL 10282213, at *14 (N.D. Cal. Nov. 14, 2021); *Royal Park Invs. SA/NA v. HSBC Bank USA Nat’l Ass’n*, No. 14CV08175LGSSN, 2016 WL 11805202, at *1 (S.D.N.Y. July 15, 2016).⁸

The trial court’s order here turns that on its head. During the August 24, 2023, hearing, the trial court stated, “the relevance gatekeeper shouldn’t be the producers of the documents. The relevance gatekeepers in my view should be the ones receiving the documents.” Aug. 24, 2023, Tr. at 5:19-6:1. Without

⁸ While many of these cases were decided under Rule 26 of the Federal Rules of Civil Procedure, the New Jersey Supreme Court has noted that “[t]he purpose and scope of our discovery rules ... are substantially the same as Federal Rule of Civil Procedure 26.” *Hammock by Hammock v. Hoffman-LaRoche, Inc.*, 142 N.J. 356, 369 (1995).

any finding that the responding parties had failed to meet their discovery obligations, the trial court took control of the responding parties' methodologies and procedures for finding and reviewing relevant evidence. *Cf. BancPass*, 2016 WL 4031417, at *3 (declining to order production of all documents that hit on search terms without relevance review upon finding that "there is no reason to believe that [responding party] has withheld documents it was obligated to produce"). As discussed above, in so doing, it will lead to parties' potentially producing wholly irrelevant (but yet potentially sensitive and private) documents to business rivals and adversaries. This is precisely the outcome that Principle 6 aims to avoid, and that this Court rejected in *Lipsky*, when it refused to allow a forensic inspection of a party's computer system absent a showing that "the responding entity defaulted on its obligations to search its records and produce the requested data." 474 N.J. Super. at 469.

III. The Trial Court's Order Raises Profound Privacy and Cybersecurity Issues.

Civil discovery always involves privacy considerations and accompanying data security risks. *See generally* Babette Boliek, *Prioritizing Privacy in the Courts and Beyond*, 103 Cornell L. Rev. 1011 (2018)

(discussing privacy and cybersecurity risks in civil discovery).⁹ This goes not just for the privacy of the parties themselves, but numerous nonparty individuals, such as employees, customers, suppliers, contractors, patients, users, and others. *See* Allyson Haynes Stuart, *A Right to Privacy for Modern Discovery*, 29 Geo. Mason L. Rev. 675, 719 (2022) (discussing protection of privacy of third parties in civil discovery).¹⁰ The process of discovery—locating troves of documents containing the sensitive, private information of those individuals, copying them, and delivering them to the requesting party, which may or may not have even rudimentary cybersecurity practices—leaves private information vulnerable to cybersecurity threats. Boliek, *supra*, 103 Cornell L. Rev. at 1133-34 (“Furthermore, any entity that houses large electronic sets of sensitive data is a target for hackers. Several law firms have recently been victims of cyberattacks because of their collections of personal identifying information, trade secrets, and insider knowledge for advantageous stock market trades.” (Footnote omitted)).¹¹

⁹ Available at <https://scholarship.law.cornell.edu/clr/vol103/iss5/2/>.

¹⁰ Available at https://lawreview.gmu.edu/print__issues/a-right-to-privacy-for-modern-discovery/.

¹¹ For this reason, LCJ recently proposed amendments on privacy protection and cybersecurity risk to the Federal Rules of Civil Procedure. *See* Lawyers for Civil

Those concerns are serious enough when document productions are limited to relevant, responsive documents. But the trial court's order, by opening up civil discovery to every document that hits on a search term, would exponentially increase the amount of sensitive information that was produced in litigation. And the nonparty individuals whose data is contained in a production would have no way of knowing that their information was being turned over, with no guarantees of the measures in place to keep it secure.

Consider an example. In a hypothetical environmental cleanup case, the parties might agree on a search term of "remedial /2 program," in an effort to capture documents relating to a party's remedial efforts relating to cleanup. However, that term might hit on an email from the school of an employee's child discussing the child's behavioral issues. Such an email has no business being produced in a lawsuit unrelated to the child or the school. Yet an order such as the trial court's order here would have that email copied and turned over to the other party.

Contrary to the trial court's and Plaintiffs-Respondents' contention, the existence of a protective order does not sufficiently mitigate these privacy and

Justice, *Rules Suggestion to the Advisory Committee on Civil Rules*, Sept. 19, 2023, available at <https://www.lfcj.com/lcj-proposes-amendments-on-privacy-protection-cyber-risk>.

cybersecurity concerns. Protective orders are not designed to protect the privacy of third parties such as employees, customers, suppliers, etc., who often unaware of the potential risk to their privacy rights and, therefore, not in a position to seek the court's protection. Boliek, *supra*, 103 Cornell L. Rev. at 1137-38 (“[T]hird-party interests are difficult to defend in a court of law because of the cost of intervening in a court case”). Moreover, protective orders do nothing to mitigate cybersecurity risks because they rarely, if ever, dictate specific cybersecurity protections and procedures that must be followed by the requesting party.¹² *Id.* at 1132, 1145 (“[P]rotective orders are effective only when the signatories comply with their parameters, and even then information can be misplaced or disclosed inadvertently.”).

IV. The Trial Court's Order Will Lead to Chaos and Waste When Parties Try to Agree on Search Terms.

Rule 4:10-2(e), which concerns the discovery of electronic information, specifically instructs party to “consult and seek agreement regarding the scope of the request....” This is in keeping with the preference of almost courts and commentators to address the issue: The parties should try to agree on search terms to limit unnecessary and wasteful discovery litigation. *E.g., In re*

¹² Indeed, the protective order in this case, Da84-91, does not require any party to take any measures to mitigate cybersecurity risks.

Mercedes-Benz Emissions Litig., No. 2:16-CV-881 (KM) (ESK), 2020 WL 103975, at *3 (D.N.J. Jan. 9, 2020) (“The Special Master encourages the parties to work together to develop a reasonable procedure for the validation of Plaintiffs’ search terms...”); *Search & Retrieval*, 15 Sedona Conf. J. at 232 (“[I]t makes sense in appropriate cases for producing parties to negotiate with requesting parties in advance to define the scope of discoverable information.... They may negotiate and agree to a set of key words relevant to the case.”).¹³ Indeed, the New Jersey Superior Court, Law Division, Civil Part, has issued a Model Stipulation and Order that specifically calls on the parties to “agree[] upon the following search terms.” Model Electronic Discovery Stipulation and Order, N.J. Super. Ct.¹⁴

Unfortunately, by locking the parties into the results of the search terms that they negotiate, the trial court’s order has dramatically raised the stakes of the initial search term negotiation. If a party knows that a court could issue a

¹³ See also Robert Douglas Brownstone, *Collaborative Navigation of the Stormy E-Discovery Seas*, 10 Rich. J.L. & Tech. 53, 54 (2004), available at <https://scholarship.richmond.edu/jolt/vol10/iss5/6/> (“Litigants are advised to cooperate early and often in the battle against the common enemy, a huge fluid body of electronic information.”).

¹⁴ Available at https://www.njcourts.gov/sites/default/files/forms/12371_cblp_ediscover_order.docx.

ruling later on mandating production of “[a]ll documents identified/returned by application of the ESI search terms that the parties negotiated,” Da167 ¶ 1, without any opportunity to review the search results for relevance, it will be much more difficult for the parties to successfully negotiate those terms in the first place. The responding party will fight extremely hard for very narrow, specific search terms, and the requesting party will fight hard for broad, vague, and general terms. This will inevitably lead to unnecessary litigation at the outset of the discovery process. That litigation will be especially unproductive, because the parties will be arguing about search terms that they have not even used yet.

It is for this reason that federal courts have repeatedly held that “a party’s agreement to run search terms does not waive its right to review the resulting documents for relevance.” *O’Donnell*, 339 F.R.D. at 277; *accord SinglePoint*, 2023 WL 2585296, at *3 (“Several courts have held that by running a relevant search term, the responding party does not waive relevance objections to the documents responsive to the search term.”); *FlowRider*, 2016 WL 6522807, at *8 (“Plaintiffs’ agreement to run a search using the parties’ agreed-upon terms does not constitute Plaintiffs’ acquiescence to produce all resulting documents.”). If agreeing to use certain search terms constituted a

waiver of the right to object to the production of documents based on relevance, no party would ever agree to search terms willingly.

CONCLUSION

For the foregoing reasons, this Court should reverse the trial court's order.

Dated: August 6, 2024

Respectfully Submitted,

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-002031-23 (AM-000056-23)**

ATLANTIC ER PHYSICIANS : Submission Date: August 6, 2024
TEAM PEDIATRIC :
ASSOCIATES, PA, : On Appeal from an Interlocutory Order
EMERGENCY CARE SERVICES : of the Superior Court Law Division,
OF NJ, PA, EMERGENCY : Complex Business Litigation Part,
PHYSICIAN ASSOCIATES OF : Gloucester County dated September 12,
NORTH JERSEY, PC, : 2023
EMERGENCY PHYSICIAN :
ASSOCIATES OF SOUTH : Sat Below: Hon. James R. Swift, J.S.C.
JERSEY, PC, : Trial Court Docket No. GLO-L-1196-
: 20
(For Continuation of Caption See :
Inside Cover) :

**APPENDIX OF UNPUBLISHED CASES AND WEB PAGES TO BRIEF
OF *AMICUS CURIAE* LAWYERS FOR CIVIL JUSTICE IN SUPPORT
OF DEFENDANTS-APPELLANTS**

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H KeyCite history available

2017 WL 9565521

Only the Westlaw citation is currently available.
United States District Court, N.D. Alabama.

ALABAMA AIRCRAFT INDUSTRIES,
INC., Alabama Aircraft Industries,
Inc.—Birmingham, and [Pemco Aircraft
Engineering Services, Inc.](#), Plaintiff,

v.

The BOEING COMPANY, Boeing
Aerospace Operations, Inc. and Boeing
Aerospace Support Center, Defendant.

The Boeing Company, Plaintiff,

v.

[Tennenbaum Capital Partners, LLC](#),
Defendant.

CIVIL ACTION NUMBER: 2:11-cv-03577-RDP

Case No.: 2:16-mc-01216-RDP

Filed 10/25/2017

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REPORT AND RECOMMENDATION

R. David Proctor, District Judge

*1 Before the Special Master is Boeing's July 10, 2017, Motion to Compel AAI to explain the deficiencies in its production and privilege logs and to identify all documents that were improperly not produced or logged. The Motion has since been fully briefed, with AAI submitting a Response on July 24, 2017 and Boeing submitting a Reply on July 31, 2017. For the reasons explained below, it is the recommendation of the Special Master that Boeing's Motion be **denied**.

I. FINDINGS OF FACT

1. TCP produced its first privilege log to Boeing on January 19, 2016 and supplemental privilege logs on January 13, 2017 and May 11, 2017.

2. On February 29, 2016, AAI completed its document production to Boeing. AAI submitted its supplemental privilege logs to Boeing on March 21, 2016 and June 3, 2016.

3. Subsequently, Boeing compared TCP's privilege logs against AAI's production and privilege logs. Boeing found that some documents on TCP's privilege log that were withheld from production based on AAI's privilege were either not identified on AAI's privilege logs or not included in AAI's document production.

4. On June 6, 2016, Boeing notified AAI that it believed certain documents from TPC's privilege log were absent from AAI's privilege log or production. Boeing requested that AAI produce the documents or identify them on its privilege log.

5. The parties exchanged lengthy correspondence back and forth regarding the issue. Throughout their correspondence, AAI informed Boeing that AAI's collection, search, review and production procedures and methods were proper and complete. AAI also took the position that Boeing's separate document requests to TCP and AAI were not identical and the search terms agreed-upon were not identical; therefore, TCP and AAI's document production would not be identical. Last, AAI informed Boeing that the omitted documents were not responsive to Boeing's document requests.

6. Overtime the parties reduced the documents at issue to approximately 39 documents. Subsequently, on May 11,

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2017, AAI produced 13 out of the 39 at-issue documents.

7. On July 10, 2017, Boeing filed the instant Motion to Compel requesting that the Special Master compel AAI to “answer straightforward questions regarding why several responsive documents were missing from AAI’s production or otherwise not identified and logged as privileged.” Boeing alleges that after comparing AAI’s privilege log and production to that of TCP, to whom it sent “overlap[ing]” discovery requests, it found several deficiencies with AAI’s representations that it searched for and identified all responsive documents. Boeing further contends that there are approximately 39 documents that AAI has failed to produce or include on its privilege log that Boeing believes are responsive to its discovery requests. Boeing also alleges that these omissions and AAI’s lack of cooperation call into question AAI’s entire document collection, search and review procedures.

8. More specifically, Boeing contends that the 13 documents AAI produced in May 2017 are responsive to numerous documents requests and should have been produced earlier. Boeing further alleges that the remaining 26 documents that AAI has withheld also appear to be responsive to Boeing’s document requests. Boeing believes that 11 of the 26 documents, which AAI characterized as “communications with counsel regarding bid protests” are responsive to several document requests that collectively seek:

*2 documents relating to the contractual relationship between AAI and Boeing, AAI and Boeing’s independent September 2006, FPR, and FPR2 bid submissions; and documents submitted at all levels of the bid protest proceedings, and communications between AAI and U.S. Air Force regarding the FY08 recompetit bid.

Boeing further contends that these documents include at least one of AAI’s search terms.

Boeing contends that 9 other documents, which AAI has described as “draft complaints and/or counsel’s executive summaries for what became this lawsuit” are responsive to other document requests that seek:

Documents regarding the contractual relationship between AAI and Boeing, the performance, administration and termination of the Recompetit MOA, and allegations that Boeing improperly used AAI proprietary information.

Boeing similarly alleges these documents likely include one or more search terms.

9. Last, Boeing contends the remaining 6 documents in

the omitted 26 documents are responsive to Boeing’s requests for documents concerning the present lawsuit. Boeing believes these documents pertain to communications involving Boeing and therefore likely also include at least one search term.

10. On July 24, 2017, AAI submitted its Response and Opposition to Boeing’s Motion to Compel. AAI explains the 26 documents at issue are non-responsive and therefore not subject to production or identification. AAI further explains that Boeing did not issue AAI and TCP identical document requests and the requests to TCP were in fact much broader and sought different documents. AAI also denies Boeing’s contention that if documents contain search terms, they would be responsive. AAI argues that even if these documents contain a search term, that inclusion does not mean the document is also responsive to Boeing’s specific discovery requests and must be produced. Additionally, AAI argues that Boeing’s allegations that there is some issue with AAI’s complete collective, review, and production methods is without merit and cites its previously submitted detailed accounting regarding its document handling and production procedures pursuant to the Special Master’s Report and Recommendation.¹

¹ AAI is correct that it previously submitted a detailed account of its procedures, which the Special Master determined was in full compliance with the guidelines established for handling and production. (*See* Doc. 214; Doc. 222). AAI is also correct that Boeing failed to raise any objections to the Special Master’s finding regarding AAI’s accounting.

11. More specifically, AAI contends that the 13 documents it produced to Boeing were an attempted compromise and are not responsive to Boeing’s requests. AAI focused on 3 of the 13 documents for illustration purposes. For example, AAI explains that AAI_1063883 is not responsive to RFP 22 because it is a draft quarterly financial statement and RFP 22 requested actual financial statements for AAI, all of which AAI produced.

12. AAI contends that the remaining 26 documents at issue are also similarly non-responsive to Boeing’s RFPs. With regard to 11 of the 26 documents, AAI explains that they are non-responsive because they are AAI’s communications with counsel, which was not requested. With regard to the other group of 9 documents, AAI contends that these documents are communications with counsel regarding draft complaints and executive summaries regarding this lawsuit, which Boeing never requested. With regard to the remaining 6 miscellaneous documents, AAI explains that they are all non-responsive.

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With regard to all 26 documents, AAI points out that simply containing a search term does not mean they are responsive to Boeing's RFPs as Boeing and AAI never agreed that their broad search terms would designate all responsive documents.

*3 13. On July 31, 2017, Boeing filed a Reply wherein it echoed the same arguments contained in its Motion to Compel.

II. CONCLUSIONS OF LAW

A party may request that the court to compel another party to produce documents requested under *Federal Rule of Civil Procedure, Rule 34*. See *Fed. R. Civ. P. 37*. However, when the documents requested are not responsive to a party's Requests for Production, then there is simply nothing to compel.

Although the parties agreed to certain search terms while collecting documents, those search terms do not override the scope of Boeing's actual discovery requests. See *Chen-Oster v. Goldman, Sachs & Co.*, No. 10-6950, 2014 WL 716521, at *1 (S.D.N.Y. Feb. 18, 2014). As such, a plain reading of the discovery requests controls whether a document is responsive. See *Cache La Poudre Feeds, LLC v. Land O'Lakes, Inc.*, 244 F.R.D. 614, 618 (D. Colo. 2007); *Adolph Coors Co., Am. Ins. Co.*, 164 F.R.D. 507, 518 (D. Colo. 1993); *Reinsdorf v. Sketchers U.S.A., Inc.*, 296 F.R.D. 604, 615 (C.D. Cal. 2013).

The Special Master has reviewed the 26 outstanding documents *in camera* to determine (1) if they are responsive to Boeing's RFPs and (2) if there is any indication AAI improperly withheld or failed to identify these documents in a way which would require some further explanation regarding their review and production procedures.

A. The 13 Previously Produced Documents.

These 13 documents have been already produced to Boeing. At this point, and based on a review of RFPs and documents at issue here, arguing and adjudicating their responsiveness is frankly a waste of judicial resources. There is room for different interpretations regarding the documents' responsiveness to Boeing's RFPs; however, based on a review of some of the documents at issue, there appears to be no issue here. For example, both

parties utilize documents AAI_1063883 and AAI_1063905 as illustrative of their arguments. The Special Master agrees with AAI regarding these documents. Boeing argues these documents are responsive to RFP 22, which requests "all financial statements, financial projections, financial analyses, and financial audits for Plaintiffs between 2005 and 2010." Based on a plain reading of the request, it does not appear to request *draft* financial statements or draft letters that may contain statements regarding some financial analysis. The record also shows that AAI has produced its actual, final, complete financial statements and other financial data to Boeing in response to this request. The Special Master agrees that this document is not within the specific reach of this request. Because these documents have already been produced, and there is no evidence of intentional or sinister mishandling or withholding of documents on behalf of AAI, which will be further explained in Section C, there is simply nothing to compel here.

Additionally, the Special Master rejects Boeing's argument that because these 13 documents may contain a search term that they are automatically responsive to its RFPs and must be produced.

B. The Outstanding 26 Documents.

With regard to the outstanding 26 documents at issue, the Special Master will address them in their respective "categories" through the below tables. The tables are divided to show the document number and the Special Master's finding regarding each document at issue.

1. The 11 Documents.

*4 These 11 documents are communications with counsel regarding AAI's bid protests. Boeing contends all of these documents are generally responsive to RFPs 2, 12-15, and 18. Boeing's applicable RFPs are produced verbatim as follows:

- RFP 2: "All Documents containing or relating to any communications between Plaintiffs and their auditors, accountants, consultants, and boards of directors (or committees thereof) relating to any actual or potential contractual relationship between you and Defendants regarding any KC-135 PDM work (including but not limited to the negotiation,

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execution, performance, and/or alleged breach of any such actual or potential contracts).” See Boeing’s Ex. L.

- RFP 12: “All documents relating to Plaintiffs’ proposal, submitted on or about September 18, 2006, to serve as prime contractor on the FY08 Recompete KC-135 PDM program, and all documents relating to Plaintiff’s Final Proposal Revisions (submitted in or around February 2007) and Second Final Proposal Revisions (submitted in or around June 2007) for the FY08 Recompete KC-135 PDM program.”

- RFP 13: “All documents relating to the pricing and pricing-related assumptions that Plaintiffs used or considered in any way in connection with Plaintiffs’ proposal, Final Proposal Revisions, and Second Final Proposal Revisions.”

- RFP 14: “All documents relating to Defendants’ proposal, submitted in or around September 2006, in response to RFP # FA08105-05-R0014 for the FY08 Recompete KC-135 PDM Contract, and all documents relating to Defendants’ Final Proposal Revisions (submitted in or around February 2007) and Second Final Proposal Revisions (submitted in or around June 2007) for the FY08 Recompete KC-135 PDM program.”

- RFP 15: “All pleadings, submissions, administrative records, documents that Plaintiffs (or their representative) obtained or produced through discovery or subpoena, expert reports, orders, and decisions relating to any proceeding in which Plaintiffs (or anyone acting by, though, or on behalf of Plaintiffs) protested or otherwise challenged in any manner RFP # FA08105-05-R0014 for the FY08 Recompete KC-135 PDM Contract, or the award of the FY08 Recompete KC-135 PDM Contract. This request includes, but is not limited to, Plaintiffs’ protests, challenges, or other proceedings before the United States Air Force, the Government Accountability Office, the Court of Federal Claims and the Federal Circuit relating to RFP # FA08105-05-R0014 for the FY08 Recompete KC-135 PDM Contract, or the award of the FY08 Recompete KC-135 PDM Contract.”

- RFP 18: “All communications, and all documents relating to communications, between you and any person employed by or acting on behalf of the United States (including but not limited to the United States Air Force) relating to RFP # FA08105-05-R0014 for the FY08 Recompete KC-135 PDM Contract, or the award of the FY08

Recompete KC-135 PDM Contract. This request includes, but is not limited to, any notes or presentations relating to the conversations or meetings alleged in Paragraphs 90, 91, 92, and 98 of the Complaint.”

The Special Master has reviewed *in camera* the 11 documents that Boeing believes are responsive to these requests and finds accordingly:

Document Number	Finding
13029-13029	Communication between AAI outside counsel and AAI regarding draft motion related to bid protest. RFP 2 requests communications other than those with counsel regarding contracts between Boeing and AAI. RFP 12-14 seek documents regarding AAI’s solo bid proposals and Boeing’s initial solo bids. RFP 18 seeks communications between AAI and USAF. As such, RFP 2, 12-14, and 18 are not relevant with regard to this document. RFP 15 is the only RFP that relates to AAI’s bid protest; however, the specific list of documents included does not include communications with counsel. The Special Master agrees that RFP

	15 cannot be extended to include communications with counsel when such documents were specifically omitted from the list of requested documents. This document is not responsive to Boeing RFP 2, 12-15 or 18.
14207-14207	Email between in house counsels regarding outside counsel’s chronology and assessment of lawsuit against Air Force. RFP 2 requests communications, other than those with counsel, regarding contracts between Boeing and AAI. RFP 12-14 seek documents regarding AAI’s solo bid proposals and Boeing’s initial solo bids. RFP 18 seeks communications between AAI and USAF. As such, RFP 2, 12-14, and 18 are not relevant with regard to this document. RFP 15 is the only RFP that relates to AAI’s bid protest; however, the specific list of documents included does not include communications with counsel. The Special Master agrees that RFP 15 cannot be extended to include communications with counsel when such documents were specifically omitted from the list of requested documents. This document is not responsive to Boeing RFP 2, 12-15 or 18.
14207-19731	Chronology and assessment of issues regarding protest, attached to 14207-14207. RFP 2 requests communications other than those with counsel regarding contracts between Boeing and AAI. RFP 12-14 seek documents regarding AAI’s solo bid proposals and Boeing’s initial solo bids. RFP 18 seeks communications between AAI and USAF. As such, RFP 2, 12-14, and 18 are not relevant with regard to this document. RFP 15 is the only RFP that relates to AAI’s bid protest; however, the specific list of documents requested does not include counsel’s work product. The Special Master agrees that RFP 15 cannot be extended to include counsel’s work product when such documents were specifically omitted from the list of requested documents. This document is not responsive to Boeing RFP 2, 12-15 or 18.
15719-15719	Email between AAI officers and outside counsel regarding bid protest. RFP 2 requests communications, other than those with counsel, regarding contracts between Boeing and AAI. RFP 12-14 seek documents regarding AAI’s solo bid proposals and Boeing’s initial solo bids. RFP 18 seeks communications between AAI and USAF. As such, RFP 2, 12-14, and 18 are not relevant with regard to this document. RFP 15 is the only RFP that relates to AAI’s bid protest; however, the specific list of documents included does not include communications with counsel. The Special Master agrees that RFP 15 cannot be extended to include communications with counsel when such documents were specifically omitted from the list of requested documents. This document is not responsive to Boeing RFP 2, 12-15 or 18.
15786-15786	Email between AAI in house counsel and outside counsel regarding bid protest.

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	<p>RFP 2 requests communications, other than those with counsel, regarding contracts between Boeing and AAI. RFP 12-14 seek documents regarding AAI's solo bid proposals and Boeing's initial solo bids. RFP 18 seeks communications between AAI and USAF. As such, RFP 2, 12-14, and 18 are not relevant with regard to this document. RFP 15 is the only RFP that relates to AAI's bid protest; however, the specific list of documents included does not include communications with counsel. The Special Master agrees that RFP 15 cannot be extended to include communications with counsel when such documents were specifically omitted from the list of requested documents.</p> <p>This document is not responsive to Boeing RFP 2, 12-15 or 18.</p>
13404-13404	<p>Email between AAI in house counsel and AAI officers regarding petition for rehearing related to bid protest.</p> <p>RFP 2 requests communications, other than those with counsel, regarding contracts between Boeing and AAI. RFP 12-14 seek documents regarding AAI's solo bid proposals and Boeing's initial solo bids. RFP 18 seeks communications between AAI and USAF. As such, RFP 2, 12-14, and 18 are not relevant with regard to this document. RFP 15 is the only RFP that relates to AAI's bid protest; however, the specific list of documents included does not include communications with counsel. The Special Master agrees that RFP 15 cannot be extended to include communications with counsel when such documents were specifically omitted from the list of requested documents.</p> <p>This document is not responsive to Boeing RFP 2, 12-15 or 18.</p>
15712-15712	<p>Email between AAI and outside counsel regarding bid protest.</p> <p>RFP 2 requests communications, other than those with counsel, regarding contracts between Boeing and AAI. RFP 12-14 seek documents regarding AAI's solo bid proposals and Boeing's initial solo bids. RFP 18 seeks communications between AAI and USAF. As such, RFP 2, 12-14, and 18 are not relevant with regard to this document. RFP 15 is the only RFP that relates to AAI's bid protest; however, the specific list of documents included does not include communications with counsel. The Special Master agrees that RFP 15 cannot be extended to include communications with counsel when such documents were specifically omitted from the list of requested documents.</p> <p>This document is not responsive to Boeing RFP 2, 12-15 or 18.</p>
14070-14070	<p>Email between AAI in house counsel and AAI officers regarding information from outside counsel related to bid protest.</p> <p>RFP 2 requests communications, other than those with counsel, regarding contracts between Boeing and AAI. RFP 12-14 seek documents regarding AAI's solo bid proposals and Boeing's initial solo bids. RFP 18 seeks communications between AAI and USAF. As such, RFP 2, 12-14, and 18 are not relevant with regard to this document. RFP 15 is the only RFP that relates to AAI's bid protest; however, the specific list of documents included does not</p>
	<p>include communications with counsel. The Special Master agrees that RFP 15 cannot be extended to include communications with counsel when such documents were specifically omitted from the list of requested documents.</p> <p>This document is not responsive to Boeing RFP 2, 12-15 or 18.</p>
15715-15715	<p>Email between AAI officers and outside counsel regarding bid protest.</p> <p>RFP 2 requests communications, other than those with counsel, regarding contracts between Boeing and AAI. RFP 12-14 seek documents regarding AAI's solo bid proposals and Boeing's initial solo bids. RFP 18 seeks communications between AAI and USAF. As such, RFP 2, 12-14, and 18 are not relevant with regard to this document. RFP 15 is the only RFP that relates to AAI's bid protest; however, the specific list of documents included does not include communications with counsel. The Special Master agrees that RFP 15 cannot be extended to include communications with counsel when such documents were specifically omitted from the list of requested documents.</p> <p>This document is not responsive to Boeing RFP 2, 12-15 or 18.</p>
14056-14056	<p>Email between AAI in house counsel and AAI officers regarding information from outside counsel related to bid protest.</p> <p>RFP 2 requests communications, other than those with counsel, regarding contracts between Boeing and AAI. RFP 12-14 seek documents regarding AAI's solo bid proposals and Boeing's initial solo bids. RFP 18 seeks communications between AAI and USAF. As such, RFP 2, 12-14, and 18 are not relevant with regard to this document. RFP 15 is the only RFP that relates to AAI's bid protest; however, the specific list of documents included does not include communications with counsel. The Special Master agrees that RFP 15 cannot be extended to include communications with counsel when such documents were specifically omitted from the list of requested documents.</p> <p>This document is not responsive to Boeing RFP 2, 12-15 or 18.</p>
14540-14540	<p>Email between AAI officers and in house counsel regarding communications with outside counsel regarding bid protest.</p> <p>RFP 2 requests communications, other than those with counsel, regarding contracts between Boeing and AAI. RFP 12-14 seek documents regarding AAI's solo bid proposals and Boeing's initial solo bids. RFP 18 seeks communications between AAI and USAF. As such, RFP 2, 12-14, and 18 are not relevant with regard to this document. RFP 15 is the only RFP that relates to AAI's bid protest; however, the specific list of documents included does not include communications with counsel. The Special Master agrees that RFP 15 cannot be extended to include communications with counsel when such documents were specifically omitted from the list of requested documents.</p> <p>This document is not responsive to Boeing RFP 2, 12-15 or 18.</p>

2. The 9 Documents.

*5 These 9 documents are communications with counsel regarding draft complaints and executive summaries related to this lawsuit. Boeing contends all of these documents are generally responsive to RFPs 2, 4, 11, 17, 23, 24 and 25. Boeing's applicable RFPs are produced verbatim as follows:

- RFP 2: "All Documents containing or relating to any communications between Plaintiffs and their auditors, accountants, consultants, and boards of directors (or committees thereof) relating to any actual or potential contractual relationship between you and Defendants regarding any KC-135 PDM work (including but not limited to the negotiation, execution, performance, and/or alleged breach of any such actual or potential contracts)." See Boeing's Ex. L.
- RFP 4: "All documents and communications relating to the performance, administration, and termination of the 6/2005 Recompete MOA and the 9/2005 Recompete MOA (including exhibits thereto)." See Boeing's Ex. L.
- RFP 11: "All documents and communications relating to the termination of 2005 Recompete MOA."
- RFP 17: "All documents relating to your allegation in the complaint that Defendants improperly used or disclosed any of Plaintiffs' trade secrets or confidential or proprietary information, including but not limited to documents relating to your allegation that Defendants did not properly implement a 'firewall.'"
- RFP 23: "All documents supporting or relating to the factual allegations in Paragraph 281 (and its subparts) of the complaint, including but not limited to documents showing the date on which Plaintiffs first learned the information alleged in that paragraph."
- RFP 24: "All documents containing, memorializing, mentioning, referring to, or otherwise relating to Plaintiffs' requests for information from Defendants alleged in Paragraphs 270 and 285 of the complaint."
- RFP 25: "All documents relating to any alleged harm or damages you alleged to have incurred as a result of the alleged actions or inactions of Defendants, including but not limited to all documents relating to the damages listed in section 3 of the Plaintiffs' Initial Rule 26 Disclosures."

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The Special Master has reviewed *in camera* the 9 documents that Boeing believes are responsive to these requests and finds accordingly:

Document Number	Finding
4021-4021	Communication between AAI outside counsel and AAI in house counsel and officers regarding and attaching draft complaint against Boeing. RFP 2 seeks specific communications between Plaintiffs and certain third parties, none of which are counsel. RFP 4 seeks documents relating to the performance, administration, and termination of the Recompete MOA. RFP 11 appears to seek communications sent to and from Boeing and internal communications regarding the termination of the 2005 Recompete MOA. These requests do not seek communications with counsel regarding draft complaints related to this lawsuit. Moreover, RFPS 17-25 request documents regarding specific allegations in the Complaint and not communications regarding the draft complaint in its entirety. This document is not responsive to Boeing's RFPs 2, 4, 11, 17, 23, 24 or 25.
4021-12401	Draft Complaint prepared by AAI outside counsel attached to 4021-4021. RFP 2 seeks specific communications between Plaintiffs and certain third parties, none of which are counsel. RFP 4 seeks documents relating to the performance, administration, and termination of the Recompete MOA. RFP 11 appears to seek communications sent to and from Boeing and internal communications regarding the termination of the 2005 Recompete MOA. These requests do not seek draft complaints related to this lawsuit. Moreover, RFPS 17-25 request documents regarding specific allegations in the Complaint and not draft complaints in their entirety. This document is not responsive to Boeing's RFPs 2, 4, 11, 17, 23, 24 or 25.
4021-12404	Draft Requests for Production of Documents to Boeing prepared by AAI outside counsel attached to 4021-4021. RFP 2 seeks specific communications between Plaintiffs and certain third parties, none of which are counsel. RFP 4 seeks documents relating to the performance, administration, and termination of the Recompete MOA. RFP 11 appears to seek communications sent to and from Boeing and internal communications regarding the termination of the 2005 Recompete MOA. These requests do not seek draft discovery related to this lawsuit. Moreover, RFPS 17-25 request documents regarding specific allegations in the Complaint and not draft discovery.

	This document is not responsive to Boeing's RFPs 2, 4, 11, 17, 23, 24 or 25.
11044-19059	Draft Complaint with redlined changes and comments. RFP 2 seeks specific communications between Plaintiffs and certain third parties, none of which are counsel. RFP 4 seeks documents relating to the performance, administration, and termination of the Recompete MOA. RFP 11 appears to seek communications sent to and from Boeing and internal communications regarding the termination of the 2005 Recompete MOA. These requests do not seek draft complaints related to this lawsuit. Moreover, RFPS 17-25 request documents regarding specific allegations in the Complaint and not the draft complaints in its entirety. This document is not responsive to Boeing's RFPs 2, 4, 11, 17, 23, 24 or 25.
11044-19060	Draft Executive Summary from outside counsel to AAI regarding potential litigation against Boeing. RFP 2 seeks specific communications between Plaintiffs and certain third parties, none of which are counsel. RFP 4 seeks documents relating to the performance, administration, and termination of the Recompete MOA. RFP 11 appears to seek communications sent to and from Boeing and internal communications regarding the termination of the 2005 Recompete MOA. These requests do not seek executive summaries by counsel related to this lawsuit. Moreover, RFPS 17-25 request documents regarding specific allegations in the Complaint and not the executive summaries regarding this litigation in its entirety. This document is not responsive to Boeing's RFPs 2, 4, 11, 17, 23, 24 or 25.
11044-11104	Communication between AAI in house counsel to former board members regarding draft complaint against Boeing. RFP 2 seeks specific communications between Plaintiffs and certain third parties, none of which are counsel. RFP 4 seeks documents relating to the performance, administration, and termination of the Recompete MOA. RFP 11 appears to seek communications sent to and from Boeing and internal communications regarding the termination of the 2005 Recompete MOA. These requests do not seek communications with counsel regarding draft complaints related to this lawsuit. Moreover, RFPS 17-25 request documents regarding specific allegations in the Complaint and not communications regarding the draft complaint in its entirety. This document is not responsive to Boeing's RFPs 2, 4, 11, 17, 23, 24 or 25.
11044-11100	Emails between AAI in house counsels regarding draft Complaints against Boeing.

	RFP 2 seeks specific communications between Plaintiffs and certain third parties, none of which are counsel. RFP 4 seeks documents relating to the performance, administration, and termination of the Recompete MOA. RFP 11 appears to seek communications sent to and from Boeing and internal communications regarding the termination of the 2005 Recompete MOA. These requests do not seek communications with counsel regarding draft complaints related to this lawsuit. Moreover, RFPS 17-25 request documents regarding specific allegations in the Complaint and not communications regarding the draft complaint in its entirety. This document is not responsive to Boeing's RFPs 2, 4, 11, 17, 23, 24 or 25.
9895-9895	Email between AAI officer and in house counsel regarding debt restructuring slide for presentation. AAI represents that this document is not responsive to any Requests for Production and that it previously produced a redacted version of this document and its attached slide (9895-11022) to Boeing. AAI has provided the Special Master with the unredacted and redacted versions of the document. The Special Master agrees that this document does not appear to be responsive to any Request for Production. Additionally, it is likely that it contains attorney-client privileged information, which AAI already redacted from the version produced to Boeing. As such, the Special Master finds no reason for an unredacted version of this document to be produced to Boeing. AAI can continue to withhold this document from production.
14010-14010	Email between in house counsel and AAI officers regarding outside counsel's Executive Summary regarding Complaint against Boeing. RFP 2 seeks specific communications between Plaintiffs and certain third parties, none of which are counsel. RFP 4 seeks documents relating to the performance, administration, and termination of the Recompete MOA. RFP 11 appears to seek communications sent to and from Boeing and internal communications regarding the termination of the 2005 Recompete MOA. These requests do not seek executive summaries by counsel related to this lawsuit. Moreover, RFPS 17-25 request documents regarding specific allegations in the Complaint and not the executive summaries regarding this litigation in its entirety. This document is not responsive to Boeing's RFPs 2, 4, 11, 17, 23, 24 or 25.

3. 6 Documents.

*6 The Special Master has reviewed *in camera* the last 6 documents that Boeing believes are generally responsive to its requests and finds accordingly:

12470-12470	Email between AAI officers and in house counsel regarding draft letter to Boeing. (regarding response to proposal for the FY2009 bridge extension) The Special Master finds that this document is likely responsive to Boeing's RFP 2, which requests: "All Documents containing or relating to any communications between Plaintiffs and their auditors, accountants, consultants, and boards of directors (or committees thereof) relating to any actual or potential contractual relationship between you and Defendants regarding any KC-135 PDM work (including but not limited to the negotiation, execution, performance, and/or alleged breach of any such actual or potential contracts)." However, it appears to be privileged and work product and protected from disclosure. As such, this document should be identified on AAI's Privilege Log. While it was not previously identified on AAI's privilege log, that omission does not appear to be intentional or done to deceive. The Special Master agrees with AAI that reasonable minds would differ on the responsiveness of this document. Moreover, based on the <i>in camera</i> review, the omission of the document on the privilege log creates no harm to Boeing as it is a small omission compared to the extensive disclosure by AAI.
12587-12587	Email between AAI in house counsels regarding draft letter to Boeing. (regarding response to proposal for the FY2009 bridge extension) The Special Master finds that this document is likely responsive to Boeing's RFP 2, which requests: "All Documents containing or relating to any communications between Plaintiffs and their auditors, accountants, consultants, and boards of directors (or committees thereof) relating to any actual or potential contractual relationship between you and Defendants regarding any KC-135 PDM work (including but not limited to the negotiation, execution, performance, and/or alleged breach of any such actual or potential contracts)." However, it appears to be privileged and work product and protected from disclosure. As such, this document should be identified on AAI's Privilege Log. While it was not previously identified on AAI's privilege log, that omission does not appear to be intentional or done to deceive. The Special Master agrees with AAI that reasonable minds would differ on the responsiveness of this document. Moreover, based on the <i>in camera</i> review, the omission of the document on the privilege log creates no harm to Boeing as it is a small omission compared to the extensive disclosure by AAI.
12587-19343	Draft letter to Boeing's Procurement Manager regarding response to proposal for the FY2009 bridge extension. Contains redline changes of counsel. The Special Master finds that this document is likely responsive to

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	<p>Boeing's RFP 2, which requests: "All Documents containing or relating to any communications between Plaintiffs and their auditors, accountants, consultants, and boards of directors (or committees thereof) relating to any actual or potential contractual relationship between you and Defendants regarding any KC-135 PDM work (including but not limited to the negotiation, execution, performance, and/or alleged breach of any such actual or potential contracts)."</p> <p>However, it appears to be privileged and work product and protected from disclosure. As such, this document should be identified on AAI's Privilege Log. While it was not previously identified on AAI's privilege log, that omission does not appear to be intentional or done to deceive. The Special Master agrees with AAI that reasonable minds would differ on the responsiveness of this document. Moreover, based on the <i>in camera</i> review, the omission of the document on the privilege log creates no harm to Boeing as it is a small omission compared to the extensive disclosure by AAI.</p>
15927-15927	<p>Email between AAI officers regarding and forwarding communication from AAI in house counsel regarding issues related to bid protest and potential issue relating to Boeing getting a "last look" at procurement bid.</p> <p>The Special Master finds that this document is likely responsive to Boeing's RFP 2, which requests: "All Documents containing or relating to any communications between Plaintiffs and their auditors, accountants, consultants, and boards of directors (or committees thereof) relating to any actual or potential contractual relationship between you and Defendants regarding any KC-135 PDM work (including but not limited to the negotiation, execution, performance, and/or alleged breach of any such actual or potential contracts)."</p> <p>However, portions of this document appear to be privileged and work product and protected from disclosure. More specifically, it appears the emails contained in the document between AAI and outside counsel are protected from disclosure under the attorney-client privilege and work product. The original email in the chain is from a third-party not within the attorney-client scope; however, that email appears to contain attorney work product. As such, this document in its entirety should be identified on AAI's Privilege Log. While it was not previously identified on AAI's privilege log, that omission does not appear to be intentional or done to deceive. The Special Master agrees with AAI that reasonable minds would differ on the responsiveness of this document. Moreover, based on the <i>in camera</i> review, the omission of the document on the privilege log creates no harm to Boeing as it is a small omission compared to the extensive disclosure by AAI.</p>
15839-15839	<p>Email between AAI in house counsels regarding whether a draft letter to Boeing was sent. The Special Master has received and reviewed <i>in camera</i> the draft letter attached to the email.</p> <p>The email communication at issue does not appear to be clearly responsive to any Request for Production on its face. However, based on an <i>in camera</i> review of the attached draft letter, it is likely that it is responsive</p>

	<p>to at least one Requests for Production. Nevertheless, the communication itself and the attach draft letter therein appear to be privileged. The email correspondence is between AAI counsels and the draft letter attached to the email appears to be drafted by counsel and contains a 'Privileged and Confidential' designation. As such, this document is protected from disclosure based on the attorney-client privilege.</p>
16078-16078	<p>Emails between AAI in house counsel and outside counsel regarding negotiations with Boeing related to bridge subcontract forwarding emails exchanged with counsel for Boeing, counsel for the United States Air Force and the Pentagon.</p> <p>The first two emails in this chain (October 9, 2008 at 12:50 pm and 10:01 am) are exclusively between AAI officers and board members and AAI internal and external counsel. Those communications are privileged.</p> <p>However, the forwarded emails that are included in the email chain (October 8, 2008 at 4:32 pm, October 7, 2008 at 6:17 pm, 5:57 pm, 5:40 pm, and 4:27 pm) are not attorney-client privileged or work product. They also appear to be responsive to RFP 18 as they contain communications with individuals representing the United States.</p> <p>As such, this document is partially responsive to RFP 18 and is partially privileged. AAI should redact the privileged communications and produce in 16078-16078 to Boeing.</p>

C. AAI's Alleged Intentional Withholding.

*7 Boeing appears to contend that AAI's entire document production has been called into question based on slight variations between its document production and that of TCP. Additionally, Boeing cites slight differences between AAI's explanations made more than a year ago. These contentions are without merit. There are numerous facts that outweigh Boeing's allegations.

First, AAI has already submitted a very detailed accounting explanation its document collective, identification, review and production procedures,

including the various individuals involved, each step taken in the process and the overall amount of documents involved. The Special Master found this accounting to be in compliance with the Special Master's previous requests for information regarding AAI's document production. Boeing did not make any objections to this accounting or AAI's procedures. *See Docs. 214, 219, 222.*

Second, Boeing was offered the opportunity to restore AAI's email server in November 2016. Boeing has not made any attempt to restore the server to date. The Special Master agrees with AAI that if Boeing had real, serious issues with AAI's document production, it would have made an attempt to restore this server. *See Doc. 222.*

Third, upon reviewing the exhibits attached to Boeing's Motion and AAI's Response, it is clear that AAI took the general position that some of the outstanding documents were not responsive to Boeing's RFPs from the beginning of the parties' discovery dispute. *See Letter from P. Tepley to T. Richie of November 28, 2016; Letter from P. Tepley to T. Richie of December 12, 2016.* The parties' previous communications do not support Boeing's argument that AAI has intentionally avoiding explanation as to why it has no identified or produced these documents.

Fourth, the variations between AAI and TCP's privilege log and production do not appear to be significant. Upon review of Boeing's document requests to both TCP and AAI, it is clear the requests are not identical. In light of the different document requests, it follows that AAI and TCP would have some variation in their privilege logs and productions. *See AAI's Response, App. 1.*

Fifth, upon an *in camera* review of the 26 outstanding documents, AAI's withholding appears to have been warranted. The Special Master could not find any nefarious, questionable reason as to why AAI would have withheld these documents. The Special Master can only conclude AAI withheld the documents based on the reasons it has provided and that are evident from an *in camera* review. As such, AAI's withholding in this regard fails to amount to evidence that there might be some additional unwarranted withholding of responsive documents.

At this point, there is no indication that AAI has improperly withheld any documents from Boeing. The cases cited by Boeing, which resulted in one party providing an explanation to the Court regarding facts and circumstances as to how and why documents were lost or not produced, do not appear to be applicable in this situation. Those cases involved clear facts of intentional

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withholding or destruction and/or missing or unavailable documents that were responsive to discovery requests. There is no indication those facts are at issue here. *See EEOC v. Sizzler USA Restaurants, Inc.*, No 06-142, 2007 WL 1994157, at 1 (N.D. Cal. July 5, 2007); *Dr. Greens, Inc. v. Stephens*, No. 11-0638, No. 110, at *9 (S.D. Cal. May 6, 2014); *Apple Inc. v. Samsung Elec. Co.*, No. 11-01846, at *2 (N.D. Cal. Nov. 16, 2011).

III. RECOMMENDATIONS

*8 For the reasons outlined above, the undersigned recommends to the Court that Boeing's Motion to Compel

be **denied**. The undersigned further recommends that (1) AAI update its privilege log as indicated herein and (2) redact and subsequently produce Document 16078-16078 to Boeing, pursuant to the undersigned's findings in this Report and Recommendation.

In the event either party files an objection to this Report and Recommendation, the undersigned will provide the Court with a copy of any documents made subject of an object for *in camera* review.

All Citations

Not Reported in Fed. Supp., 2017 WL 9565521

End of Document

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H KeyCite history available

2016 WL 4031417

Only the Westlaw citation is currently available.
United States District Court, W.D. Texas, Austin
Division.

BANCPASS, INC.
v.
HIGHWAY TOLL ADMINISTRATION,
LLC.

A-14-CV-1062-SS

|
Signed 07/26/2016

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ORDER

ANDREW W. AUSTIN, UNITED STATES
MAGISTRATE JUDGE

*1 Before the Court are Plaintiff BancPass Inc.'s Motion for Leave to File Discovery Motion, and Subject to Same, Motion to Enforce Discovery Agreements and Motion to Compel, Dkt. No. 60, and Defendant Highway Toll Administration, LLC's Motion to Compel or, Alternatively, Exclude, Dkt. No. 81, and their attendant responses and replies. The District Court referred the above motions to the undersigned Magistrate Judge for

resolution pursuant to 28 U.S.C. § 636(b)(1)(A), Fed. R. Civ. P. 72, and Rule 1(c) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges. The Court held a hearing on July 6, 2016 and now enters the following order.

I. BACKGROUND

This dispute is between two companies that both provide mechanisms for motorists to pay highway tolls while driving in rental cars. Highway Toll Administration, LLC, ("HTA") has contracts with two major rental car companies, Avis and Enterprise, to be the exclusive provider of automated tolling services. BancPass, Inc. produces a smartphone application called PToll, which is designed to allow rental car customers to pay highway tolls without going through the rental car companies. In its Second Amended Complaint, BancPass alleges that HTA sent letters to Apple, Google, the Texas Department of Transportation, and possibly others, that contained statements that HTA knew to be false about the legality of BancPass's PToll app, which caused both Apple and Google to remove the PToll app from their online stores. Dkt. No. 50 at 9-10. BancPass believes that this was per se defamation and seeks damages. *Id.* It also seeks a declaratory judgment "that car rental customers' use of PToll is neither illegal nor tortious." *Id.* at 12. BancPass's request likely stems from HTA's counterclaims, which include a request for a "declaratory judgment that the PToll application tortiously interferes with HTA's current and prospective contracts or contracts to which HTA is a third party beneficiary." Dkt. No. 47 at 9.

II. ANALYSIS

Each party has filed a motion to compel. By its motion, BancPass wants to force HTA to produce all non-privileged documents responsive to certain previously agreed upon electronic search terms, and produce monthly revenue and customer service reports that HTA provided to the two rental car companies with which it contracts, Avis and Enterprise. For its part, HTA wants BancPass to identify every person to whom BancPass claims HTA spread false rumors, as well as the basis for BancPass's belief that HTA made these statements, and produce financial documents regarding

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the sales and revenue figures from the PToll app, divided by month.

A. Documents responsive to the agreed search terms

In order to simplify and expedite electronic discovery in this case, BancPass and HTA negotiated certain search terms that HTA would use in order to produce documents responsive to BancPass's requests for production 6, 11, 29, 38, 39, and 45. The search terms at issue here are:

***2 • Smartphone /50 toll!**

- Smartphone /50 threat
- Smartphone /10 app!
- Phone! /10 app!
- Double /10 bill
- Geotoll

BancPass states that the "Smartphone" terms are intended to produce documents responsive to requests for production 6 and 29. The terms are designed to identify internal discussions about the type of competitive threat that PToll represents to HTA. They also are designed to help BancPass determine whether BancPass was beating HTA to market for a toll paying app, which it believes could provide evidence of HTA's motive or intent in writing its letters to Google and Apple. BancPass argues that such searches could produce evidence of malice on the part of HTA, which it argues it needs to prove in order to recover punitive damages. The "Double /10 bill" term is designed to produce documents responsive to request for production 45, 38, and 39. BancPass is interested in learning whether rental car customers encountered problems with the toll process because of PToll, as HTA's letters alleged. They are also designed to discover whether BancPass had a protectable reputation that could have been damaged by such problems. The "Geotoll" term is designed to produce documents responsive to requests for production 10 and 11. BancPass wants to know whether HTA was concerned about other apps, and therefore wrote its letter out of an altruistic concern for consumer protection, or was only concerned with BancPass's app, and therefore wrote the letters in order to damage BancPass. Again, BancPass argues that this will provide evidence of HTA's motives in sending its letters.

The essence of BancPass's argument is that it and HTA's email negotiations over these specific search terms—which are memorialized in a series of

emails—constituted a binding and enforceable agreement between the parties. BancPass states that it believes the parties agreed that "all non-privileged documents responsive to the additional search terms will be produced," which it understood to mean that every non-privileged document the search turned up would be produced, regardless of whether it had anything to do with the parties' dispute. Dkt. No. 60-7 at 2. Accordingly, BancPass states that it ran the search terms and produced all non-privileged documents responsive to the searches it agreed to run. HTA, on the other hand, produced only those documents that it determined were relevant to the case and withheld the rest. BancPass argues that this is a violation of the agreement. It notes that if HTA were concerned about confidentiality it was permitted to mark any documents appropriately. BancPass further notes that the agreement included language about revising a search string to limit the number of hits. HTA could have sought a refinement of the terms in order to make the searches and production more manageable, but never did. Finally, BancPass argues that an agreement by the parties to run search terms and produce all non-privileged results prevents a producing party from later attempting to withhold documents based on relevance. *Total Safety U.S., Inc. v. Rowland*, No:13-6109, 2014 WL 1691551 (E.D. La April 29, 2014).

*3 In response, HTA states that it ran the searches as requested, but that the search terms turned up over 20,000 non-privileged but also non-responsive documents. Dkt. No. 62 at 4. It then de-duplicated the search results against previous production, performed various searches to exclude irrelevant documents, such as spam or newsletters, and then independently reviewed the remaining 3,489 documents for responsiveness and privilege, ultimately producing 34 documents captured by the agreed search terms that were both responsive to BancPass's discovery requests and were non-privileged. Dkt. No. 62-4 at 2-4. HTA states that it believed that its email exchanges with BancPass did not amount to a binding agreement. Rather it understood the parties' agreement to produce "all non-privileged documents responsive to the additional searches" to mean the parties would use the search terms "to capture a universe of potentially responsive documents, and then, subject to stated relevancy objection, the parties would produce non-privileged documents that were responsive to actual discovery requests." Dkt. No. 62-1 at 4. HTA argues that this interpretation is "consistent with our previous negotiations and the general industry practice of using e-discovery each terms." *Id.* It notes that courts have held that "costs can be saved by allowing [the producing party] to produce the e-mail generated by the agreed upon search terms without screening out irrelevant e-mail," as

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BancPass did, or, if a producing party “wishes to review the data [captured by the agreed search terms] to produce only responsive and un-privileged emails, Defendant will bear the cost of the search and the needed software,” which is what HTA claims to have done. *Stambler v. Amazon*, No. 2:09-CV-310, 2011 WL 10538668 at *10 (E.D. Tex. May 23, 2011); *Hudson v. AIH Receivable Mgmt. Servs.*, No. 10-2287-JAR-KGG, 2011 WL 1402224, at *2 (D. Kan. April 13, 2011). Finally, it argues that *Total Safety* is not applicable to this case because it never conceded on the record that the parties’ agreed protocol “limited the [exclusion of] production of documents to only those which are based on privilege.” *Total Safety*, 2014 WL 1691551 at *8.

If the Court were to construe the parties’ email correspondence on this topic to constitute a contract, it is likely that HTA’s actions would amount to a breach. The Court’s reading of the e-mail chain is that the parties agreed to produce all of the results of the searches save privileged documents. But the parties’ e-mail exchange is not a contract. Rather, it was a means to simplify and limit the scope of production responsive to BancPass’s requests for production 6, 11, 29, 38, 39, and 45. Having reviewed the attached affidavits detailing HTA’s search and review process there is no reason to believe that HTA has withheld documents it was obligated to produce. Nor is it clear that additional searches with the identified search terms would produce more documents responsive to BancPass’s requests for production. Accordingly, as to the search terms, BancPass’s motion is denied.

B. HTA’s monthly revenue and customer service reports.

BancPass next moves the court to compel HTA to produce monthly revenue and customer service reports that HTA provided to the two rental car companies with which it contracts, Avis and Enterprise. It argues that these earnings reports will show the size of the market for rental car toll collection and therefore help to prove the loss BancPass may have incurred as a result of HTA’s letters to Google and Apple. It also argues that such reports are evidence of HTA’s net worth, which it argues is discoverable due to BancPass’s claim for punitive damages. Requesting that a potential competitor—albeit one that operates in the marketplace in a wholly different way—turn over its revenue and customer service reports is an unusual way to determine the size of the market for a given service. It is an even more unusual way to determine a company’s net worth. HTA’s revenue and customer service reports are not relevant to any claim,

affirmative defense, or damages in this case. As such, BancPass’s motion is denied.

C. HTA’s Motion

HTA has also brought a motion to compel or, alternatively, to exclude certain documents. Dkt. No. 81. HTA first moves the Court to compel BancPass to identify every person BancPass claims HTA spread false rumors to, as well as the basis for BancPass’s belief that HTA made these statements. In the Second Amended Complaint BancPass alleges that HTA wrote letters to “Apple, Google, and TxDOT, and possibly others” that “contained false statements of fact that were published to third parties.” Dkt. No. 50 at 8. HTA therefore asked in its interrogatories that BancPass identify every person to whom BancPass claims HTA spread false rumors, as well as the basis for BancPass’s belief that HTA made these statements. In its response, BancPass stated that HTA had made false statements to, among others, “IBTTA members (at multiple conferences and among multiple industry attendants)” and that “HTA’s CEO David Centner is the source of these false statements and rumors.” Dkt. No. 81-2 at 5. The IBTTA is a trade organization with many members. Without knowing what false statements or rumors BancPass alleges HTA made, to whom those rumors were spread, when they were made, and the basis for BancPass’s assertions, HTA cannot determine the subject matter or scope of BancPass’s defamation claim. It therefore brought its motion. However, at the hearing held July 6, 2016, BancPass agreed that it would revise its interrogatory responses to clarify which entities it alleges received defamatory statements and remove any alleged statements which it no longer seeks to pursue at trial. Accordingly, BancPass is **ORDERED** to revise its responses to HTA’s Second Set of Interrogatories Numbers 1 and 2 accordingly.

*4 Next, HTA moves to compel BancPass to produce financial documents regarding the sales and revenue from the PToll app, divided by month. It argues that such documents are directly relevant to BancPass’s claimed defamation damages. Such documents are clearly relevant to the issue of lost profit damages. At the July 6, 2016 hearing, though, it became clear that BancPass had not yet formulated a damage model for this case. BancPass is therefore **ORDERED** to either produce documents responsive to HTA’s Second Set of Requests for Production Nos. 15 through 17 or certify that it is not seeking any lost profits damages.

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III. CONCLUSION

Based on the forgoing, Plaintiff BancPass Inc.'s Motion for Leave to File Discovery Motion, and Subject to Same, Motion to Enforce Discovery Agreements and Motion to Compel, Dkt. No. 60, is **HEREBY DENIED**. Defendant Highway Toll Administration, LLC's Motion to Compel or, Alternatively, Exclude, Dkt. No. 81, is **HEREBY GRANTED**. BancPass is **ORDERED** to revise its responses to HTA's Second Set of Interrogatories

Numbers 1 and 2, and either produce documents responsive to HTA's Second Set of Requests for Production Nos. 15 through 17 or certify that it is not seeking any lost profits damages by **August 2, 2016**.

SIGNED this 26 day of July, 2016.

All Citations

Not Reported in Fed. Supp., 2016 WL 4031417

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Chen-Oster v. Goldman, Sachs & Co., Not Reported in F.Supp.3d (2014)

H KeyCite history available

2014 WL 716521

Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

H. Cristina CHEN–OSTER; Lisa Parisi;
and Shanna Orlich, Plaintiffs,
v.
GOLDMAN, SACHS & CO. and the
Goldman Sachs Group, Inc., Defendants.

No. 10 Civ. 6950(AT)(JCF).

Feb. 18, 2014.

MEMORANDUM AND ORDER

JAMES C. FRANCIS IV, United States Magistrate Judge.

*1 The plaintiffs in this employment discrimination case, brought as a class action, have submitted a letter dated February 6, 2014, seeking to compel the defendants to produce all documents identified by a computerized search tool that utilized a series of search terms agreed to by the parties. The defendants respond that they have produced all such documents that are non-privileged and responsive to the discovery requests propounded by the plaintiffs, as limited by the defendants' objections. The plaintiffs contend that the defendants are obligated to produce all documents returned by the search without exercising further judgment with respect to responsiveness.

Traditionally, parties to a litigation have engaged in discovery by means of requests and responses: the

requesting party defines those documents it considers relevant, and the responding party searches for them by whatever means it chooses and then produces those responsive to the request, subject to any objections. In light of the availability of technology-assisted review, another model is possible. The parties can simply agree on the search methodology, for example by stipulating to search terms, with the understanding that all documents (except those containing privileged information) shall be produced. This approach essentially elides the search process with the substantive determination of relevance, and it has the advantage of saving resources for the producing party, which need not conduct a further review for responsiveness.

Here, the parties engaged in a hybrid approach. The plaintiffs propounded document requests and the defendants responded, in some cases objecting to the scope of the request but indicating that they would produce a more narrowly-defined set of documents. Counsel then discussed and eventually agreed on search terms to be applied to the documents maintained in electronic form by identified custodians. There is no evidence that the parties agreed-and I did not order-that documents identified by the search tool would be produced without regard to whether they were relevant as defined by the earlier discovery demands and responses. This is not to say that the plaintiffs did not derive some benefit from negotiating the search protocol to be applied to the defendants' documents: they were able to assure themselves that the resulting search would be broad enough to capture the vast majority of responsive documents. But agreement to the protocol did not override the discovery demands and responses, and it is too late in the day for the plaintiffs to contest the scope defined by the defendants' objections, which were served in January 2011.

Accordingly, the plaintiffs' application is denied.

SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 716521

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Consumer Financial Protection Bureau v. Navient Corporation, Not Reported in Fed....

H KeyCite history available

2018 WL 6729794

Only the Westlaw citation is currently available.
United States District Court, M.D. Pennsylvania.

CONSUMER FINANCIAL PROTECTION
BUREAU, Plaintiff,

v.

NAVIENT CORPORATION, et al.,
Defendants.

3:17-CV-101

|
Filed 12/21/2018

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MEMORANDUM OPINION

Robert D. Mariani, United States District Judge

I. Background

*1 Through this lawsuit, the Consumer Financial Protection Bureau (“Plaintiff” or “CFPB”) seeks to prove

that Navient Corporation, Navient Solutions, Inc., and Pioneer Credit Recovery, Inc., (collectively, “Defendants” or “Navient”), committed various violations of the Consumer Financial Protection Act, 12 U.S.C. §§ 5531, 5536, the Fair Debt Collection Practices Act, 15 U.S.C. § 1692e, and Regulation V of the Fair Credit Reporting Act, 12 C.F.R. § 1022.42. (Doc. 1). Presently before the Court are several new disputes that have arisen during the course of discovery.

On October 10, 2018, Navient, pursuant to the procedure of the Court, filed a letter with the Court (Doc. 107) seeking: (1) the production of “all documents related to Defendants so that Defendants can review them and determine whether they are relevant to the issues of the case,” as Navient asserts the CFPB has improperly withheld thousands of documents from production (*id.* at 1-3); (2) remedies related to alleged deficient privilege logs provided by the CFPB, such as *in camera* review of the purportedly privileged documents (*id.* at 3-7); and (3) the appointment of a special master to handle these and other issues arising from the complex nature of the case and the entailing discovery (*id.* at 7-8). Pursuant to an order by the Court (Doc. 109), the CFPB submitted a letter on November 2, 2018, attempting to justify its document productions made thus far and the sufficiency of its privilege logs and discounting the necessity of the appointment of a special master. (Doc. 110). The Court ordered the parties to appear before the Court at a hearing on December 10, 2018 to present argument on their respective positions. (Doc. 111).

The hearing agenda quickly expanded. On November 14, 2018, Navient submitted another letter to the Court requesting that discussion regarding another dispute be added to the hearing agenda: Navient’s claim that the CFPB improperly invoked work-product protection during Navient’s deposition of a CFPB investigator, Theresa Ridder, and Navient’s request to reopen her deposition. (Doc. 112). The Court ordered the CFPB to respond to Navient’s letter (Doc. 113), and the CFPB filed a reply with the Court on November 20, 2018, asserting that it properly objected to the questions posed by Navient during Ms. Riddel’s deposition. (Doc. 114). Subsequently, on November 29, 2018, the CFPB filed a Motion for an Enlargement of Time to Complete Discovery (Doc. 117), seeking a three-month extension of the discovery period. The Court requested that the parties to be ready to discuss this issue at the hearing (Doc. 122), and Navient filed a Brief in Opposition to the Motion for an Enlargement of Time on December 6, 2018. (Doc. 126). The CFPB filed a Reply Brief in support of its Motion for an Enlargement of Time on December 7,

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2018. (Doc. 129).

At the December 10 hearing, the Court attempted to clarify and crystallize the numerous disputes. After extensive presentation by counsel for Navient and the CFPB, the Court understands that the first issue is “whether [the Court] ought to order CFPB to turn over those documents that mention Navient and mention Pioneer[.]” (Doc. 134 at 45:20-23). The second issue is the sufficiency of the CFPB privilege logs and the propriety of appointing a special master to sort through the CFPB’s claims of privilege. Here, the Court noted that, based on its own review of the privilege logs, the Court had “reservations about the sufficiency of the descriptions” in many of the listed categories. (*Id.* at 82:19-22). Accordingly, the Court directed Navient, to the extent possible based on the summary nature of many of the challenged document categories, to provide a “statement of what [Navient] think[s] the relevance would be of the documents that are made reference to in each of these categories.” (*Id.* at 82:9-16). Additionally, the Court noted that it was inclined to appoint a special master to review the purportedly privileged documents *in camera* as necessary, and the parties agreed to such an appointment for that purpose.¹ (*Id.* at 76:7-77:14). On the third issue, the CFPB’s pervasive invocation of privilege during Navient’s deposition of Ms. Ridder, the Court noted that relevant Third Circuit authority, *In re Hughes*, 633 F.2d 282 (3d Cir. 1980), appeared to extend work product privilege to Ms. Ridder, and “that the only question here would really be whether all of the questions were properly objected to, and that Ms. Ridder was properly instructed not to answer them.” (Doc. 134 at 84:23-25). Finally, on the fourth issue, the request by the CFPB to extend the discovery period, the Court noted that it was not realistic to end discovery on the scheduled date in December 2018 and that the parties needed a “substantial extension of time,” especially given that both sides still need to conduct additional depositions and that the instant discovery disputes portended future disputes. (*Id.* at 99:1-17). The Court issued an order after the hearing that directed the parties to follow up with the Court on several of the above disputes, (Doc. 132), and the parties have complied by filing supplemental documents with the Court.² (Doc. 136, Doc. 137, Doc. 139).

¹ The CFPB noted at the hearing that it would have to get official approval from CFPB leadership to agree to the appointment of a special master, but that such approval was likely. On December 17, 2018, the CFPB filed a letter with the Court expressing its consent to the appointment of a special master. (Doc. 136).

² The Court understands that the CFPB has until

December 24, 2018 to submit a reply to Navient’s statement regarding its views on the possible relevance of the documents listed in the CFPB’s privilege logs. (Doc. 132 ¶ 2). Although the Court is issuing this Memorandum Opinion and accompanying Order before receipt of the CFPB’s reply, the Court notes that Navient’s statement and the CFPB’s reply are immaterial to the reasoning and findings of the Court on the matters discussed herein, and that the putative special master will be able to utilize the statement and reply in fulfilling duties related to the evaluation of the assertions of privilege, as discussed *infra*.

*2 After further consideration of the arguments of the parties contained in their submissions to the Court and delivered at the December 10 hearing, and for the reasons that follow, the Court will resolve the discovery disputes as follows: (1) order the CFPB to produce all non-privileged documents that mention “Navient” or “Pioneer,” (2) seek input from the parties on the appointment of a special master to sort through claims of privilege asserted by the CFPB, (3) sustain the vast majority of the CFPB’s objections lodged at Ms. Ridder’s deposition, and (4) extend the discovery period by six months.

II. Discovery Dispute Rulings

A. The CFPB Must Produce All Non-Privileged Documents that Mention “Navient” or “Pioneer.”

At the December 10 hearing, the parties made varying claims as to what the CFPB had identified in its records as responsive to Navient’s discovery requests. For example, Navient asserted that there were 478,000 documents flagged as potentially responsive by the CFPB, with 130,000 of these documents mentioning “Navient” and another 90,000 documents mentioning “Pioneer.” (Doc. 134 at 15:11-25). The CFPB responded that the Court’s May 2, 2018 Order (Doc. 89) limited the time period for discovery, and that after applying this time period filter to the original universe of 478,000 documents, the CFPB was left with 336,000 documents, with 32,000 documents mentioning “Navient” and 23,000 documents mentioning “Pioneer.” (Doc. 134 at 37:5-12). Regardless of the exact number of documents at issue, the Court agrees with Navient that the CFPB should turn over all documents that mention “Navient” or “Pioneer.”

The Federal Rules of Civil Procedure establish a broad

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scope for discovery:

Unless otherwise limited by court order, the scope of discovery is as follows: *Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense* and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. *Information within this scope of discovery need not be admissible in evidence to be discoverable.*

Fed. R. Civ. P. 26(b)(1) (emphasis added); *see also, e.g., Pacitti v. Macy's*, 193 F.3d 766, 777-78 (3d Cir. 1999) ("It is well recognized that the federal rules allow broad and liberal discovery.") (citing *In re Madden*, 151 F.3d 125, 128 (3d Cir. 1998)). "At the discovery stage, the discovery requested may be wide-ranging because under Rule 26(b)(1), 'relevance is a broader inquiry at the discovery stage than at the trial stage.'" *Pollock v. Energy Corp. of Am.*, No. 10-cv-1553, 2014 WL 562726, at *1 (W.D. Pa. Feb. 11, 2014) (quoting *In re Gateway Engineers, Inc.*, No. 09-mc-209, 2009 WL 3296625, at *2 (W.D. Pa. Oct. 9, 2009)). "[D]istrict courts have broad discretion to manage discovery." *Sempier v. Johnson & Higgins*, 45 F.3d 724, 734 (3d Cir. 1995) (citations omitted).

Here, the Court is presented with a situation where the CFPB has essentially made relevance determinations on Navient's behalf, instead of treating as presumptively relevant all of the search results found utilizing search terms to which Navient has no objection. (See Doc. 134 at 7:22-8:4 (the CFPB arguing that certain documents "are unrelated to the issues in this case"), 22:22-24 (Navient's dispute is with the CFPB's culling of documents)). This is improper given the broad scope of discovery and relevance at this stage; the important and expansive nature of this matter; the lack of insight that Navient has into the documents retained by the CFPB; and as Navient noted at the December 10 hearing, the existence of a protective order that mitigates the potential harm of the CFPB turning over irrelevant materials to Navient. (*Id.* at 26:13-15). Navient is entitled to documents relevant to the CFPB's claims and its own defenses. (See *id.* at 34:14-18 (Navient arguing that the CFPB has "defined relevance in such a narrow way, so that issues that relate to our defenses" were not produced)). While the Court does not want to micro-manage discovery, the Court finds it appropriate to utilize its discretion to grant Navient's request to order the CFPB to turn over all non-privileged documents that mention "Navient" or "Pioneer." The CFPB should provide an appropriate and detailed

privilege log in the event it withholds any documents based on privilege.

B. The Court Will Appoint a Special Master.

*3 Navient challenges 35 categories of documents listed on the CFPB's privilege logs as insufficiently asserting a claim of privilege: 1-2, 11, 22, 27-31, 33, 35-50, 71-75, 79-81, and 85. (Doc. 134 at 81:20-22). The Court agrees that many of the categories listed on the privilege logs, appear, on their face, to insufficiently state a claim of privilege. (*Id.* at 48:22-49:4). Pursuant to the agreement of the parties, the Court will appoint a special master to sort through the CFPB's claims of privilege, most likely through *in camera* review of the purportedly privileged documents. (*Id.* at 76:7-77:14, Doc. 136). **Federal Rule of Civil Procedure 53** grants the Court the authority to appoint a special master to "perform duties consented to by the parties," and, before appointing such a master, requires the Court to "give the parties' notice and an opportunity to be heard [and that] [a]ny party may suggest candidates for appointment." Fed. R. Civ. P. 53(a)(1)(A), (b)(1). The Court invites suggestions from the parties and will defer to their choice if they are able to agree on a suitable candidate. Upon selection of a special master, the Court will separately issue an order that specifically defines the special master's authority and duties.³ *See Fed. R. Civ. P. 53(b)*.

³ The Court notes that an additional October 2018 privilege log was not before the Court at the hearing. (*see* Doc. 134 at 64-65). The CFPB expressed optimism that the documents listed on that privilege log are covered by the Court's May 4, 2018 Order (Doc. 89), and will not require the intervention of the Court to resolve privilege disputes. (Doc. 134 at 64:21-65:1). However, to the extent appropriate and necessary, disputes regarding this privilege log can also be within the ambit of the putative special master.

C. The CFPB Properly Objected to the Vast Majority of the Questions Posed to Ms. Ridder During Her Deposition.

With respect to the third dispute, Navient argues that the CFPB improperly instructed its investigator, Theresa Ridder, to refuse to answer many or most of the questions posed to her by Navient at her deposition on the basis of work product. Navient contends that Ms. Ridder was listed as a witness by the CFPB on its initial disclosures,

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and that Navient is entitled to discover information about Ms. Ridder’s contact with borrowers and how she conducted her investigation; thus, Navient seeks to reopen her deposition. (Doc. 112). The CFPB responds that all relevant authority indicates that it was within its rights to assert work product as to the questions asked of Ms. Ridder, arguing that it constitutes “opinion work product,” and that it informed Navient several weeks before her deposition that she will not be offered by the CFPB as a witness at trial. (Doc. 114).

The Court agrees with the CFPB with respect to the vast majority of the questions Ms. Ridder refused to answer. (See Doc. 112-1 (list of questions provided by Navient)). As noted at the December 10 hearing, the most relevant authority on this type of situation in this circuit is *In re Hughes*, 633 F.2d 282 (3d Cir. 1980). In *Hughes*, the Third Circuit found that work product protection extends to investigators employed on behalf of attorneys, and that recollections of investigators regarding witness interviews can improperly reveal the mental processes of the investigator and the directing attorney. *Hughes*, 633 F.2d at 290 (noting that this is the “core of the work product of an agent of an attorney”). This type of work product is “generally afforded near absolute protection from discovery.” *In re Cendant Corp. Secs. Litig.*, 343 F.3d 658, 663 (3d Cir. 2003) (citations omitted). After review of the questions that the CFPB instructed Ms. Ridder to refuse to answer, the Court finds that most would improperly reveal the “mental impressions, conclusions, opinions, or legal theories” of the CFPB.⁴ See *Fed. R. Civ. P. 26(b)(3)(B)*.

⁴ At the December 10 hearing, Navient argued that it was entitled to ask Ms. Ridder about witnesses that had become unavailable, specifically, a borrower witness who, during his deposition by Navient, pled the Fifth Amendment in refusing to answer certain questions about his financial status. (Doc. 134 at 89-92). The CFPB responded that the case law indicates that it would likely only be appropriate to consider overriding work product protection in that instance if the borrower witness that Ms. Ridder interviewed had died and that, here, Navient could go through its own records to get the answers to its questions about the borrower’s financial status. (*Id.* at 93:14-25). The Court notes that unavailability of a witness in federal litigation typically has a broader meaning than death. See *Fed. R. Evid. 804(a)(2)*. However, the Court agrees that Navient would be able to find the answers to the specific borrower-related questions it highlighted at the December 10 hearing by reviewing its own records. Thus, it will not permit Navient to ask these questions of Ms. Ridder.

by Navient could be properly asked of Ms. Ridder: “How many borrowers have you interviewed for the Navient investigation?” and “For how many borrowers have you served as a point of contact?” (Doc. 112-1 at 243:14-18). To the extent the answers to these questions would reveal work product, the Court notes that they would not constitute core, opinion work product, and that Navient has a need for the materials and would not be able to obtain this information by other means. See *Cendant*, 343 F.3d at 663 (“noting that there are two “tiers of protection” for work product”); *Fed. R. Civ. P. 26(b)(A)(ii)*. Navient will be permitted to reopen its deposition of Ms. Ridder to ask these questions, or if the parties find it more efficient, Navient can seek these answers through written discovery.

D. The Court Will Extend the Discovery Period by Six Months.

Finally, the Court will extend the discovery period in this matter by six months. As noted at the hearing, the complexity of this case and the numerous, multifaceted discovery disputes that have plagued the parties and the Court mean that it is not realistic to assume that discovery can be rapidly concluded. While the Court, in its previous orders, had held out hope that no further extensions to discovery would be necessary, that was, in hindsight, an assertion of undue optimism. As the parties have been unable to agree on an appropriate extension of time, the Court will order a six month extension. This length of extension is especially appropriate given that additional documents must be produced by the CFPB, the appointment of a special master and privilege review will take time, and the parties still have additional depositions to conduct.

III. Conclusion

For the reasons outlined above, the Court will order the CFPB to produce all nonprivileged documents that mention “Navient” or “Pioneer,” seek input from the parties on the appointment of a special master to sort through claims of privilege asserted by the CFPB, sustain the vast majority of the CFPB’s objections lodged at Ms. Ridder’s deposition, and extend the discovery period by six months. A separate Order follows.

All Citations

*4 However, the Court does find that two questions posed

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C KeyCite citing references available

2006 WL 709059

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES
BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.

Zoraida CUNNINGHAM,
Plaintiff-Respondent,

v.

NEW JERSEY MANUFACTURERS
INSURANCE COMPANY,
Defendant-Appellant.

Argued March 13, 2006.

Decided March 22, 2006.

Synopsis

Background: Insured brought action against insurer to recover personal injury protection (PIP) benefits she claimed were due as the result of an automobile accident. Insured moved to depose insurer's in-house attorney and for production of training materials regarding claims handling policies. The Superior Court, Law Division, Mercer County, granted motion. Insurer sought leave to appeal interlocutory orders.

Holding: The Superior Court, Appellate Division, held that subjective purpose for insurer's assertion of a defense to payment of PIP benefits was not relevant for purposes of awarding statutory interest penalties.

Reversed.

West Headnotes (1)

[1] [Pretrial Procedure](#) Parties' Agents or Employees

[Pretrial Procedure](#) Insurance Policies and Related Documents

[307A](#) Pretrial Procedure
[307AII](#) Depositions and Discovery
[307AII\(C\)](#) Discovery Depositions
[307AII\(C\)1](#) In General
[307Ak96](#) Persons Who May Be Examined
[307Ak100](#) Parties' Agents or Employees
[307A](#) Pretrial Procedure
[307AII](#) Depositions and Discovery
[307AII\(E\)](#) Production of Documents and Things and Entry on Land
[307AII\(E\)3](#) Particular Documents or Things
[307Ak381](#) Insurance Policies and Related Documents

In determining whether a personal injury protection (PIP) benefit was overdue for purposes of awarding statutory interest penalties, the subjective purpose for insurer's assertion of a defense to payment of benefits was not relevant, and thus, trial court abused its discretion over the management of the discovery proceedings in insured's action for PIP benefits when it allowed insured to depose insurer's in-house counsel and compelled the production of PIP aid and training materials so that insured could examine insurer's motive in denying her claim.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket No. MER-L-0288-04.

Attorneys and Law Firms

[Patricia Hart McGlone](#) argued the cause for appellant (Law Offices of Patricia McGlone, attorneys; Ms. McGlone, on the brief).

[Mark W. Davis](#) argued the cause for respondent (Stark & Stark, attorneys; Mr. Davis, of counsel, Mr. Davis and [Nehal Modi](#), on the brief).

Before Judges [FALL](#) and C.S. FISHER.

Opinion

PER CURIAM.

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*1 In this appeal, we consider whether the trial judge mistakenly exercised his discretion when he compelled both the deposition of defendant's in-house attorney and defendant's production of training materials regarding its claims handling policies. We granted leave to appeal the interlocutory orders which granted plaintiff the right to pursue such discovery¹ and now reverse.

¹ Specifically, our order of November 7, 2005 granted defendant leave to appeal (1) the trial court's May 13, 2005 order, which compelled the deposition of an in-house attorney and which denied defendant's motion for a protective order; (2) a second May 13, 2005 order, which denied defendant's motion to quash a subpoena that called for the production of defendant's training materials; and (3) the August 23, 2005 order, which denied reconsideration of both May 13, 2005 orders. At the same time, we denied defendant's motion for leave to appeal regarding other discovery that the trial judge had ordered at or about the same time.

Plaintiff Zoraida Cunningham commenced this action in order to recover personal injury protection (PIP) coverage benefits she claims are due from defendant New Jersey Manufacturers Insurance Company as the result of an automobile accident that allegedly occurred on May 28, 2002. It appears that plaintiff and the other driver disputed whether their vehicles made contact.

In her complaint, plaintiff seeks not only the payment of her medical bills, which payments she claims to be overdue, but also statutory interest penalties and attorneys' fees. In seeking interest penalties, plaintiff relies on *N.J.S.A. 39:6A-5(b)*, which states that PIP benefits "shall be overdue if not paid within 30 days after the insurer is furnished written notice," and *N.J.S.A. 39:6A-5(c)*, which states that "[a]ll overdue payments shall bear simple interest at the rate of 10% per annum." On the other hand, defendant asserts that it is not obligated to pay interest because PIP payments "shall not be deemed overdue where the insurer has reasonable proof to establish that the insurer is not responsible for the payment." *N.J.S.A. 39:6A-5(b)*. In addition, the benefits defendant would be obligated to pay, if plaintiff sustained bodily injuries "as a result of an accident while occupying ... an automobile," are those which were "reasonable, necessary and appropriate." *N.J.S.A. 39:6A-4*.

In responding to the complaint, defendant took the position, based upon the sworn statement of the other driver, that no accident occurred and that, as a result, PIP benefits were not due because plaintiff had not sustained any bodily injury as the result of an automobile accident. In attempting to refute defendant's position, plaintiff

sought to depose defendant's adjuster and in-house attorney in order to examine defendant's motive in denying her claim. In the trial court, defendant asserted that the information sought was not relevant nor likely to lead to the discovery of relevant information and, also, with regard to the deposition of the in-house attorney, that requiring the attorney to divulge what was said in discussions with defendant's adjusters would violate the attorney-client privilege. We did not intervene with regard to the deposition of the adjuster in ruling upon defendant's motion for leave to appeal despite its questionable relevance. In now reversing the order which compelled the deposition of the in-house attorney and the turnover of what has been referred to as PIP aid and training materials, we agree with defendant that the information sought is not relevant nor likely to lead to the discovery of relevant information and we, thus, need not determine whether the testimony of the attorney may be shielded through application of the attorney-client privilege.

*2 In *Milcarek v. Nationwide Ins. Co.*, 190 *N.J.Super.* 358, 366, 463 A.2d 950 (App.Div.1983), we held that, in determining whether a PIP payment is overdue, "the objective merit" of the insurer's defense is relevant. In so ruling, we quoted from *Hopkins v. Liberty Mut. Ins. Co.*, 158 *N.J.Super.* 176, 178-79, 385 A.2d 922 (App.Div.1978), where it was stated:

[T]he subjective good faith of the carrier in interposing a defense to payment is immaterial. Rather, the determining factor is the objective merit of the defense, whatever way it is ultimately decided—not the good or bad faith of the carrier asserting it. Hence, a frivolous defense tendered in complete good faith as to its validity will not be held to excuse payment of statutory interest.

As a result, when it is determined that an interposed defense is of sufficient merit as to warrant judicial resolution, the payment of interest at the statutory rate, which is in excess of the legal rate, is excused. *Milcarek, supra*, 190 *N.J.Super.* at 366, 463 A.2d 950.

We discern the basis for plaintiff's arguments in support of her claimed right to seek the discovery in question, as well as the basis for the trial judge's ruling, which permitted the divulging of this information, was plaintiff's contention that defendant asserted its defenses to plaintiff's claim in bad faith. As we held in *Milcarek*, the subjective purpose for the assertion of a defense to PIP benefits is not relevant. All that is relevant in this regard is whether there is "objective merit" in the defenses interposed, a question which will not be illuminated by the discovery in question. Considering that the statutory scheme was intended to provide for the prompt payment

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of medical expenses “without having to await the outcome of protracted litigation,” *Milcarek, supra*, 190 *N.J.Super.* at 366, 463 A.2d 950, we find it ironic that it is plaintiff’s pursuit of irrelevant discovery-including, perhaps, some of the discovery that has already occurred-which is protracting this litigation. We conclude that the trial judge mistakenly exercised his discretion over the management of the discovery proceedings by permitting this unwarranted and irrelevant excursion into the question of whether defendant asserted its defenses in subjective bad faith.

As a result, we reverse the orders of May 13, 2005 insofar as they required that the in-house attorney submit to a deposition and insofar as they required the turnover of PIP aid and training materials, and we reverse also the order of August 23, 2005, which denied reconsideration. We do not retain jurisdiction.

All Citations

Not Reported in A.2d, 2006 WL 709059

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D'Agostino v. Domino's Pizza Inc., Not Reported in Fed. Supp. (2020)

H KeyCite history available

2020 WL 1189307

Only the Westlaw citation is currently available.
United States District Court, D. New Jersey.

Steven D'AGOSTINO, Plaintiff,
v.
DOMINO'S PIZZA INC., et al.,
Defendants.

Civil Action No. 3:17-cv-11603 (PGS) (TJB)
|
Signed March 12, 2020

Attorneys and Law Firms

Steven D'Agostino, pro se.

Steven K. Parness, Methfessel & Werbel, Edison, NJ, for
Defendants.

MEMORANDUM AND ORDER

PETER G. SHERIDAN, U.S.D.J.

*1 This matter comes before the Court *on pro se* Plaintiff Steven D'Agostino's ("Plaintiff" or "D'Agostino") appeal of Magistrate Judge Bongiovanni's November 15, 2019 Letter Order regarding discovery issues (ECF No. 60) (the "Letter Order") pursuant to Local Rule 72.1(c)(1) (ECF No. 61); Plaintiff's motion for Judge Bongiovanni's recusal (*id.*); a cross-motion to dismiss the complaint pursuant to Fed. R. Civ. P. 41(b) filed by Defendants Domino's Pizza Inc., J & J Pizza, Inc., John Palmer,¹ and Jason Palmer (and collectively, "Defendants") (ECF No. 62); and requests for sanctions (*see id.*). For the reasons stated in this Memorandum, the Letter Order is affirmed; Plaintiff's motion for Judge Bongiovanni's recusal is denied; Defendants' motion to dismiss the complaint is denied; and any motions for sanctions are denied.

¹ Unfortunately, the Court received a suggestion of death for John Palmer on January 6, 2020. (ECF No. 63).

I.

The underlying facts in this matter are not set forth at length herein because they were adequately set forth in a prior memorandum. (*See* ECF No. 22). For context, Plaintiff worked for Defendants as a pizza delivery driver and, on March 25, 2015, was terminated after not having worked the prior three weeks. (Amended Complaint ¶ 29, ECF No. 1-2). Throughout his employ with Defendants, Plaintiff claims that he was paid below minimum wage, and that he worked 12 to 14-hour shifts without receiving a break or being paid overtime. (*Id.* ¶¶ 10-11, 14). In addition, Plaintiff avers that Defendant John Parmer regularly "accused" Plaintiff of being a homosexual and directed homophobic epithets towards him. (*Id.* ¶ 15). Based on the foregoing allegations, among others, Plaintiff interposes claims under the New Jersey Law Against Discrimination N.J.S.A. § 10:5-1, *et. seq.*, the Fair Labor Standards Act, 29 U.S.C. §§ 201-219; New Jersey's Minimum Wage Law, N.J.S.A. § 34:11-56, *et. seq.*, and for negligence.

II.

Motion For Recusal

As a preliminary matter, Plaintiff moves for Judge Bongiovanni's recusal. (Plaintiff's Letter Brief, ECF No. 61-1). Plaintiff alleges that recusal is warranted because the Letter Order was purportedly designed to punish Plaintiff for not agreeing to a settlement offer at an April 2019 settlement conference, which Judge Bongiovanni allegedly conducted in an unfair manner. (*Id.* at 1-3).

Under 28 U.S.C. § 455(a), "any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Id.* In particular, "Section 455(a) requires judicial recusal 'if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge' of his interest or bias in a case." *Avila v. New Jersey*, No. CIV.A. 13-0779 JAP, 2013 WL 4597096, at *3 (D.N.J. Aug. 29, 2013) (quoting *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988)).

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Plaintiff's "motion for the recusal of Judge [Bongiovanni] addressed to this Court is ... invalid." *Huertas v. City of Camden*, No. CIV. 06-CV-4676NLHAM, 2009 WL 3151312, at *4 (D.N.J. Sept. 24, 2009) (citation omitted). "A magistrate judge cannot be removed by another judge using a recusal standard." *Id.* Rather, "[t]he proper procedure would be to bring a motion to recuse before the magistrate judge [herself]." *Id.* Accordingly, Plaintiff's request for Judge Bongiovanni's recusal is denied.²

² Despite Plaintiff's contention, Judge Bongiovanni is a professional, considerate and civil judge.

III.

Merits of Appeal

*2 On May 17, 2019, Judge Bongiovanni issued a letter order directing the parties to exchange discovery letters and to subsequently submit an outline of any remaining discovery issues by June 21, 2019. As such, on June 20, 2019 and June 21, 2019, Defendants and Plaintiff, respectively, submitted to Judge Bongiovanni letters setting forth their perceived discovery issues. The Letter Order on appeal substantially addressed those issues. (Letter Order at 1). The Letter Order adjudicates, both, Plaintiff's issues regarding the scope of discovery and Defendants' more narrowly tailored issues concerning what they believed to be interrogatory deficiencies and categories of documents that Plaintiff had failed to produce. (*Id.*). In the present appeal, Plaintiff seeks this Court's review of each of Judge Bongiovanni's discovery findings in her Letter Order. (*See generally* Appeal, ECF No. 61).

It is well-established that "[a] United States Magistrate Judge may hear and determine any non-dispositive pretrial matter pending before the Court pursuant to 28 U.S.C. § 636(b)(1)(A)." *Altana Pharma AG v. Teva Pharm. USA, Inc.*, No. CIV.A 04-2355 JLL, 2010 WL 451168, at *1 (D.N.J. Feb. 5, 2010). Generally, a district court will only reverse a magistrate judge's finding if it is "clearly erroneous or contrary to law." *Id.* (citing 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); L. Civ. R. 72.1(c)(1)(A)). The movant bears the burden of demonstrating that the magistrate judge's decision was clearly erroneous or contrary to law. *Marks v. Struble*, 347 F. Supp. 2d 136, 149 (D.N.J. 2004).

However, where, as here, "an appeal seeks review of a matter within the purview of the Magistrate Judge, such as a discovery dispute, an even more deferential standard, the 'abuse of discretion standard' must be applied." *Salamone v. Carter's Retail, Inc.*, No. CIV.A. 09-5856 FLW, 2012 WL 821494, at *3 (D.N.J. Mar. 9, 2012) (collecting cases). "An abuse of discretion occurs 'when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.'" *Id.* (quoting *Lindy Bros. Builders of Philadelphia v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 115 (3d Cir. 1976)).

To be sure, "[t]here is particularly broad deference given to a magistrate judge's discovery rulings." *Farmers & Merchants Nat. Bank v. San Clemente Fin. Grp. Sec., Inc.*, 174 F.R.D. 572, 585 (D.N.J. 1997); *Halsey v. Pfeiffer*, No. CIV.A. 09-1138, 2010 WL 3735702, at *1 (D.N.J. Sept. 17, 2010). As Judge Bongiovanni noted in her Letter Order, it is "well-settled that Magistrate Judges have broad discretion to manage their docket and to decide discovery issues." *Gerald Chamales Corp. v. Oki Data Americas, Inc.*, 247 F.R.D. 453, 454 (D.N.J. 2007); *see also In re Fine Paper Antitrust Litig.*, 685 F.2d 810, 817 (3d Cir. 1982).

With Fed. R. Civ. P. 26(b) and Judge Bongiovanni's Letter Order in mind, the Court will proceed to the disputed issues. The discovery issues on appeal are reviewed in the same bullet-point order presented in the Letter Order and Plaintiff's appeal.

- Judge Bongiovanni did not abuse her discretion in denying Plaintiff's request for a copy of the weekly working schedules that were posted on the wall of J & J Pizza's restaurant for each week of Plaintiff's employment. The Magistrate appropriately concluded that even though this information was generally discoverable, it was nevertheless appropriate to deny Plaintiff's request on Defendant J & J Pizza's statement that the requested information no longer exists or was in its possession. (Letter Order at 2). The Magistrate directed Defendants to submit a certification to this effect. (*Id.*). On November 25, 2019, Defendants timely submitted same attesting that the requested work schedules no longer existed. (Cross-Motion to Dismiss, Affidavit of Counsel, Ex. G ¶ 2, ECF No. 62-3). Accordingly, for these reasons, Judge Bongiovanni's ruling is affirmed. Moreover, the Court agrees with the Magistrate's findings that the

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“Clock In/Clock Out Summaries” during the months in which Plaintiff worked at J & J Pizza may reasonably lead to relevant evidence regarding Plaintiff’s alleged harassment and therefore should be produced without redactions. (Letter Order at 2). Thus, her decision is affirmed in this respect, as well.

*3 • Judge Bongiovanni did not abuse her discretion in denying Plaintiff’s request for the last known addresses of current and former employees so that Plaintiff may contact them for oral depositions. In reaching her decision, the Magistrate correctly balanced the privacy interests of Plaintiff’s former coworkers against the relevance and need for the information, in accordance with *Fed. R. Civ. P. 26(b)*. Ultimately, Judge Bongiovanni rebuked Plaintiff’s request as a “fishing expedition,” as Plaintiff failed to identify which, if any, of his former co-workers may have relevant information. Moreover, since Plaintiff could not identify same, the Magistrate found that oral depositions were not “the most effective way to discover the information he seeks” (Letter Order at 2); but still afforded Plaintiff an opportunity to issue written deposition questions to current employees who worked the same shifts as Plaintiff to detect discoverable information. (*Id.*). Specifically, Judge Bongiovanni directed Plaintiff to serve upon Defendant J & J Pizza no more than 10 interrogatory questions to be provided by Defendant to current employees who had been employed during Plaintiff’s tenure, that is, J & J Pizza employees who worked during the months of September 2014—February 2015. (*Id.*). Then, based on the responses to Plaintiff’s interrogatories, Plaintiff was afforded an opportunity to proffer an argument as to the relevance of deposing specific employees—current or former. (*Id.*). Moreover, the court further provided Plaintiff an opportunity to renew his request for depositions, after Plaintiff receives responses to the interrogatories, by providing Defendant J & J Pizza with an explanation of relevant information the employee has and why a deposition is warranted. (*Id.*). In sum, there is no abuse of discretion under this reasonable and balanced discovery approach outlined above; and same is affirmed.

• Judge Bongiovanni did not abuse her discretion in denying Plaintiff’s request for the names of the subsidiaries and/or affiliates that developed “the various software [Domino’s] uses” “to monitor and control various aspect of the business practices of [its] franchises.” (Letter Order at 3; *see also* Appeal, Ex. 2). Plaintiff purports that discovery of same will “reveal the truth; namely, that [Domino’s Pizza Inc.]

controls virtually all aspects of the daily operations of each of its franchisees.” (Appeal at 2). The Court agrees with the Magistrate that, generally, “Plaintiff is entitled to explore this relationship to determine liability” (Letter Order at 3); but, the Court shares the Magistrate’s skepticism regarding whether the computer and software information Plaintiff seeks is the best method for probing the business relationship between Domino’s Pizza Inc. and its franchisees. Rather, the Court finds reasonable Judge Bongiovanni’s order directing Domino’s Pizza and J & J Pizza to produce a copy of the franchise agreement, as well as any other information that would demonstrate which entity was in control of paying Plaintiff’s wages and other benefits. (*See id.*). Thus, Judge Bongiovanni’s decision is affirmed.

• Oddly, Plaintiff appeals Judge Bongiovanni’s decision to deny Defendants’ request to file a motion to dismiss at this time, without prejudice. Plaintiff’s argument is not clearly stated. (*See* Appeal at 3). Plaintiff fails to set forth any reasonable basis for his request. (*See id.*). Accordingly, Judge Bongiovanni’s decision is affirmed.

• Judge Bongiovanni did not abuse her discretion in granting Defendants’ request for the caption and docket numbers for all lawsuits to which Plaintiff has been a party since 2007 (Interrogatory No. 40). Generally, “litigation history is discoverable and not particularly burdensome for Plaintiff to produce.” (Letter Order at 3). Thus, the Court affirms the Magistrate’s decision. *See Fed. R. Civ. P. 26(b)*. Moreover, Plaintiff sets forth no cognizable reason as to why Judge Bongiovanni’s decision to deny Defendants’ request for copies of Plaintiff’s previously answered interrogatories (Interrogatory No. 16), without prejudice, was an abuse of discretion. (Appeal at 3). Accordingly, the Magistrate’s findings are affirmed.

• Judge Bongiovanni did not abuse her discretion in granting Defendants’ request for Plaintiff’s calculations of any loss of income, profits or earnings (Interrogatory Nos. 18 and 19), based on her finding that this “information is directly relevant to Defendants’ stated defenses.” (Letter Order at 3). On appeal, Plaintiff does not dispute the Magistrate’s relevancy determination. (Appeal at 3). Rather, Plaintiff seems to argue that the scope of the information sought would be unreasonably burdensome, particularly in view of the time allowed to produce such information. (*Id.*). Specifically, Plaintiff estimates that he would “need at least a month and half, if not 2 months, in order to get [the

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request] completed.” (*Id.*). Accordingly, Judge Bongiovanni’s decision to grant Defendants’ request for the calculations of any loss of income, profits, or earnings is affirmed. Plaintiff may move before Judge Bongiovanni for an order seeking an enlargement of time to complete the production.

*4 • Similarly, Judge Bongiovanni did not abuse her discretion in granting Defendants’ request for Plaintiff’s tax returns from the period of time Plaintiff claims “lost wages, profit, earning and/or income” (Interrogatory No. 15). (Letter Order at 3). This Court agrees that same is discoverable information pursuant to [Fed. R. Civ. P. 26](#). To the extent that Plaintiff argues on appeal that he did not file a tax return for 2014 and does not have access to 2015 tax return (Appeal at 3), Plaintiff must submit a certification to Judge Bongiovanni to that effect, in accordance with the Letter Order (Letter Order at 3).

- Judge Bongiovanni did not abuse her discretion in ordering Plaintiff to respond to the “Medicare Interrogatories.” (Letter Order at 3). These are standard interrogatories that can be easily answered.

- Judge Bongiovanni did not abuse her discretion in granting Defendants’ request for additional information in response to Interrogatory Nos. 25, 26, 28, 29, 30. (Letter Order at 3). In her broad discretion, the Magistrate found that the Interrogatories requested specific, relevant information that Plaintiff failed to adequately provide. (*See id.*). With respect to Interrogatory No. 25, Plaintiff may not rest on the alleged typographical error (Appeal at 4), and is directed to respond to the Interrogatory as clarified by Defendant, which seeks “specific information as to your allegations of discrimination (in this case meaning your alleged perceived sexual orientation claim).” (Appeal, Ex. 5). Moreover, the Court affirms Judge Bongiovanni’s order to extent that she determined that Plaintiff’s response to Interrogatory No. 26 failed to provide specific, relevant information sought by Defendants.

- Finally, Judge Bongiovanni did not abuse her discretion in finding that Defendant may take a discovery deposition of Plaintiff regarding Defendants’ request for wage and hour information (a listing of Plaintiff’s job responsibilities with Defendants (Interrogatory No. 24)), factual information supporting the claim that Plaintiff was asked to perform tasks beyond his role (Interrogatory No. 36); and a factual basis for Plaintiff’s claim that he is entitled to overtime pay (Interrogatory No. 44).

Magistrate judges maintain broad discretion in determining whether depositions are warranted. [Net2phone, Inc. v. Ebay, Inc.](#), No. CIV.A. 06-2469 (KSH), 2008 WL 4755612, at *1 (D.N.J. Oct. 27, 2008) (“[M]agistrate judge has wide-ranging authority to conduct discovery in the manner he or she deems fit.”). Accordingly, Judge Bongiovanni’s decision is affirmed, and a deposition shall follow as directed.

In sum, for all of the foregoing reasons, the Letter Order is affirmed as provided above.

IV.

Motion to Dismiss the Complaint

Defendants move to dismiss this action with prejudice because Plaintiff failed to “comply with ... Magistrate Judge Bongiovanni’s November 15, 2019 Letter Order” and has been generally dilatory throughout the discovery process. (Defendants’ Opp. and Cross-Motion at 21-25, ECF No. 62-4). Pursuant to [Fed. R. Civ. P. 41\(b\)](#), “[i]f the plaintiff fails to prosecute ... or to comply with ... a court order, a defendant may move to dismiss the action or any claim against it.” *Id.*; *see generally Poulis v. State Farm Fire & Cas. Co.*, 747 F.2d 863 (3d Cir. 1984).

Since Plaintiff is proceeding *pro se*, the Court reviews Plaintiff’s conduct more liberally than that of an attorney. *See Greene v. Perez*, No. CV 2:13-5493 (WJM), 2019 WL 1275079, at *2 (D.N.J. Mar. 20, 2019). Defendants’ motion is premature. Plaintiff should be allowed thirty (30) days to respond to any outstanding discovery requests as specified by Judge Bongiovanni in her Letter Order.

V.

Sanctions

*5 In their opposition to Plaintiff’s appeal, Defendants also urged that Plaintiff should be sanctioned in connection with his allegedly baseless accusations that counsel has defended this matter in an unethical manner and defense counsel is a liar. (Defendants’ Opp. and

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Cross-Motion at 18-21). In reply, Plaintiff asserts his own arguments for why sanctions should be imposed against defense counsel. (See Pl. Reply at 11-14).

Among other things, a motion for sanctions under Rule 11 must be made separately from other motions or requests. Fed.R.Civ.P. 11(c)(2). Here, neither party properly seeks sanctions by separate motion; and, as such, the requests are denied. See *Lai v. Wei*, No. CIV.07 179 DRD, 2007 WL 1456200, at *4 (D.N.J. May 15, 2007) (collecting cases); *Int'l Ass'n of Firefighters, Local 1197 v. Twp. of Edison*, No. 2:12-CV-00260 WJM, 2013 WL 396152, at *7 (D.N.J. Jan. 31, 2013).

Moreover, Plaintiff is proceeding *pro se*, and the Court will liberally construe his conduct, despite the offensive nature of Plaintiff's remarks about defense counsel who, from my experience, has always been professional and civil. For these reasons, the Court will not award sanctions at this time, and any such motions are denied.

Order

THIS MATTER having come before the Court on *pro se* Plaintiff Steven D'Agostino's ("Plaintiff") appeal of Magistrate Judge Bongiovanni's November 15, 2019 Letter Order (ECF No. 60) pursuant to Local Rule 72.1(c)(1) (ECF No. 61); a motion for Judge

Bongiovanni's recusal (*id.*); a cross-motion to dismiss the complaint pursuant to Fed. R. Civ. P. 41(b) filed by Defendants Domino's Pizza Inc., J & J Pizza, Inc., John Palmer, and Jason Palmer (and collectively, "Defendants") (ECF No. 62); and sanctions (*id.*); and the Court having carefully reviewed and taken into consideration the submissions of the parties, as well as the arguments presented therein; and for the reasons stated on the record; and for good cause shown; and for all of the foregoing reasons,

IT IS on this 12th day of March, 2020,

ORDERED that Magistrate Judge Bongiovanni's November 15, 2019 Letter Order (ECF No. 61) is **AFFIRMED** as provided in the accompanying Memorandum; and it is further **ORDERED** that Defendants' cross-motion to dismiss is **DENIED** (ECF No. 62); and it is further

ORDERED that Plaintiff's request for Magistrate Judge Bongiovanni's recusal is **DENIED**; and it is further

ORDERED that any requests and/or motions for sanctions are **DENIED**.

All Citations

Not Reported in Fed. Supp., 2020 WL 1189307

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Edwards v. McDermott International, Inc., Not Reported in Fed. Supp. (2021)

H KeyCite history available

2021 WL 5121853

Only the Westlaw citation is currently available.
United States District Court, S.D. Texas, Houston
Division.

Miriam EDWARDS, et al., Plaintiffs.

v.

MCDERMOTT INTERNATIONAL, INC.,
et al., Defendants.

Civil Action No. 4:18-cv-04330

|
Signed 11/04/2021

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ORDER AND OPINION

ANDREW M. EDISON, UNITED STATES
MAGISTRATE JUDGE

*1 In this securities fraud case, the parties have filed lengthy letters detailing their respective positions concerning five outstanding discovery disputes. *See* Dkts. 210, 212. The parties have also filed shorter letters responding to the other side's arguments. *See* Dkts. 214, 215. To further aid my consideration of the issues, I held an extensive oral hearing on November 1, 2021. After considering the written and oral arguments from the parties, I issue the following rulings:

A. Stay of the New § 10(b) Claims

The Private Securities Litigation Reform Act of 1995 ("PSLRA") contains an automatic discovery stay. It provides as follows:

In any private action arising under this [chapter], all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party.

15 U.S.C. § 78u-4(b)(3)(B). "The legislative history of the PSLRA indicates that Congress enacted the discovery stay to prevent plaintiffs from filing securities class actions with the intent of using the discovery process to force a coercive settlement." *In re LaBranche Sec. Litig.*, 333 F. Supp. 2d 178, 181 (S.D.N.Y. 2004). *See also In re WorldCom, Inc. Sec. Litig.*, 234 F. Supp. 2d 301, 305 (S.D.N.Y. 2002) (noting the purpose of the PSLRA discovery stay is to prevent plaintiffs from filing a complaint to initiate a "fishing expedition" in search of sustainable claims). Only when "particularized discovery is necessary to preserve evidence or to prevent undue prejudice" may discovery proceed before a decision is issued on a motion to dismiss. 15 U.S.C. § 78u-4(b)(3)(B). "The party seeking expedited discovery bears the burden of demonstrating that the PSLRA's mandatory stay should be lifted." *Davis v. Duncan Energy Partners L.P.*, 801 F. Supp. 2d 589, 592 (S.D. Tex. 2011).

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In accordance with the terms of the PSLRA's discovery stay, no discovery took place while this Court considered Defendants' motions to dismiss the claims brought under §§ 10(b) and 14(a) of the Securities Exchange Act of 1934. When those motions were denied earlier this year, discovery began. From reviewing the parties' submissions, it is clear that the parties have already expended much time and energy working through various discovery-related issues.

A few weeks ago, the § 10(b) Plaintiffs requested the opportunity to file a supplemental complaint that concerns alleged misstatements beginning September 20, 2019. The Supplemental Complaint also seeks to extend the alleged § 10(b) class period from December 18, 2017—September 17, 2019 (as originally proposed by Plaintiffs) to December 18, 2017—January 23, 2020. By separate order, I have granted Plaintiffs leave to file the Supplemental Complaint. *See* Dkt. 216. Defendants have indicated their intention to file a motion to dismiss the Supplemental Complaint, and I have put into place a schedule to govern the briefing on that motion to dismiss. *See id.*

*2 Now, Defendants seek to enforce the PSLRA's discovery stay for the new § 10(b) claims asserted in the Supplemental Complaint. As noted, the PSLRA discovery stay is mandatory unless Plaintiffs demonstrate that specific discovery is needed to preserve evidence or to prevent undue prejudice. *See* 15 U.S.C. § 78u-4(b)(3)(B). In my view, Plaintiffs have failed to meet their burden. Although Plaintiffs claim that the proposed class faces "real prejudice" as a result of wasting insurance if this action is "even partly stalled," that argument can be made in every pending securities fraud case. Dkt. 215 at 1. There is nothing particularly unique about this case that suggests to me that lifting the PSLRA discovery stay is appropriate.

Accordingly, I hold that the PSLRA discovery stay applies to the supplemental claims added to the § 10(b) action and the time period they cover: September 20, 2019—January 23, 2020. Discovery may proceed on the original § 10(b) claims that have already survived a motion to dismiss.

B. Relevant Time Frame for Document Production

The next issue I need to tackle is the proper time period for Defendants' document collection and production efforts. Plaintiffs have served document requests, seeking documents created from January 1, 2017 through June 30,

2020, the date McDermott exited its bankruptcy proceedings. Defendants maintain that the proposed time span is too broad, suggesting that I impose a July 1, 2017 through September 18, 2019 search period. The parties explain their respective reasoning in great detail in their written submissions. There is no need for me to rehash those arguments again here. Suffice it to say that reasonable minds can disagree.

Although the scope of discovery is broad, it is not unlimited. *See Crosby v. La. Health Serv. & Indem. Co.*, 647 F.3d 258, 262 (5th Cir. 2011). Federal Rule of Civil Procedure 26(b)(1) specifies that discovery must be "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). Determining the appropriate time period for discovery requests is more of an art than a science, requiring district judges to use their experience and judgment to arrive at what they consider an appropriate time range. As I noted at the oral hearing, it is my view that any date ranges I put in place are always subject to be expanded at a later date, based on how the discovery process unfolds.

After carefully considering the Rule 26(b)(1) factors, I have determined that the appropriate starting date for the document production is March 15, 2017. Given the PSLRA discovery stay in effect for the new § 10(b) claims, the ending date for the document production is, for the time being, September 18, 2019, the day after the class period set forth in the Complaints that survived motions to dismiss. I will revisit the appropriate ending date after a ruling is issued on Defendants' motion to dismiss the new § 10(b) claims.

C. Document Custodians

The parties agree that email searches will need to be conducted on a certain number of custodians. The dispute centers on how many custodian's email accounts will be searched. Plaintiffs request that 72 so-called "Tier 1 custodians" be searched. Defendants counter that it would be more appropriate to select 40 custodians.

I am well aware of the costs associated with email pulls. I am also mindful of how important email searches can be to unlocking the truth in securities fraud cases. Unfortunately, there is no definitive right or wrong

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answer when it comes to the proper number of custodians to be selected in every securities fraud case. A myriad of factors impact the analysis, including the size of the company, the number of business units involved, and the scope of the alleged fraud. In my mind, it is simply too difficult at the outset of a case to make a definitive assessment on the number of custodians that should be searched. Any number I select might turn out, once discovery advances, to be too expansive or too limiting. All I can do is pick a number of custodians that I firmly believe gives Plaintiffs the opportunity to conduct meaningful, in-depth discovery given the size and scope of the case, and, at the same time, recognizes the inherent expenses associated with wide-scale email searches. For this case, I will initially give Plaintiffs the opportunity to select 50 custodians whose email accounts they want searched. I am always willing to revisit the issue if, once the email discovery commences, it becomes readily apparent that additional custodians possess information critical to the issues at stake in this litigation. The parties should promptly confer on the appropriate search terms to be utilized for the 50 custodians selected by Plaintiffs. In the event the parties cannot come to an agreement on a set of search terms, I am available to assist the parties in this effort.

*3 There is one additional issue I want to address concerning the search for electronically stored information. Plaintiffs ask me to order Defendants to conduct custodial interviews aimed at determining the existence, status, and contents of various document repositories, and produce a report to Plaintiffs identifying “their size and scope, and when they can be collected and ready to search.” Dkt. 212 at 6. I am reluctant to do so. I simply do not think that district court judges should micro-manage the parties’ internal review procedures. As Defendants noted at oral argument, Sedona Principle 6 instructs that “[r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.” *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 Sedona Conf. J. 1, 118 (2018).¹ The commentary to Principle 6 further explains:

[A]s a general matter, neither a requesting party nor the court should prescribe or detail the steps that a responding party must take to meet its discovery obligations, and there should be no discovery on discovery, absent an agreement between the parties, or specific, tangible, evidence-based indicia (versus general allegations of deficiencies or mere “speculation”) of a material failure by the responding party to meet its obligations.

Id. at 123.

- ¹ Created by a leading group of judges, lawyers, and academics, the Sedona Principles are recognized as a foundational guide for courts and lawyers confronting the challenges of e-discovery.

All that said, I want the parties to work together in a cooperative fashion to conduct the needed discovery, which all parties recognize will be time consuming and expensive. As I stated at the oral hearing, I am available to help the parties navigate the choppy discovery waters if need be, although I certainly do not relish the opportunity to do so. Please promptly let me know of any discovery disputes by a joint, two-page letter, and I assure you that we will get to the bottom of all discovery-related issues sooner rather than later.

D. Confidential Witnesses/former Employees

Plaintiffs’ § 10(b) Complaint includes statements by 24 confidential witnesses (“CWs”), five of whom are also former employees (“FEs”) identified in the § 14(a) Complaint. Defendants’ interrogatories ask Plaintiffs to disclose the identities of the CWs/FEs. Defendants have also requested production of all documents provided by the CWs/FEs to Plaintiffs’ counsel. Relying on the work-product privilege, Plaintiffs refuse to comply with both requests.

In resolving this discovery fight, I first note that the predominant view of district courts across this great nation is that the names of CWs/FEs referenced in a complaint are not protected work product. *See, e.g., In re Bofi Holding, Inc. Sec. Litig.*, No. 15-CV-2324-GPC-KSC, 2021 WL 3700749, at *5 (S.D. Cal. July 27, 2021); *Schueneman v. Arena Pharm., Inc.*, No. 10CV1959-CAB (BLM), 2017 WL 3118738, at *6–7 (S.D. Cal. July 21, 2017); *Fort Worth Emps.’ Ret. Fund v. J.P. Morgan Chase & Co.*, No. 09 CIV. 3701 JPO JCF, 2013 WL 1896934, at *1 (S.D.N.Y. May 7, 2013); *Plumbers & Pipefitters Local Union No. 630 Pension-Annuity Tr. Fund v. Arbitron, Inc.*, 278 F.R.D. 335, 339–44 (S.D.N.Y. 2011). In this case, the names of those CWs/FEs identified in the Complaints do not “reveal any more of the mental impressions, conclusions, opinions and legal theories of Plaintiffs’ attorneys than Plaintiffs’ attorneys have already chosen to reveal in the Complaint.” *Hubbard v. Bankatlantic Bancorp, Inc.*, No. 07-61542-CIV, 2009 WL 3856458, at *3 (S.D. Fla. Nov. 17, 2009). Requiring Plaintiffs to identify the names of

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individuals whose statements they “found significant enough to include in their Complaint is the very essence of the discovery process.” *In re Amgen Inc. Sec. Litig.*, No. CV072536PSGPLAX, 2013 WL 12139088, at *3 (C.D. Cal. Dec. 2, 2013). Because the names of those individuals identified in the Complaints as confidential witnesses are not entitled to any work-product protection, Plaintiff must fully respond to Interrogatory No. 6 by November 12, 2021.²

² Interrogatory No. 6 ask Plaintiffs to “[i]dentify Plaintiffs’ Confidential Witnesses [or Former Employees], including full name, last known phone number, job title(s) at McDermott or CB&I, duties at McDermott or CB&I, name of immediate supervisor(s) at McDermott or CB&I, last known business address, last known home address (if applicable), last known business, profession or occupation, last known job title, duties and name of immediate supervisor.” Dkt. 210 at 8 n.4.

*4 I now turn to Defendants’ request that Plaintiffs produce all documents the CWs/FEs have provided to Plaintiffs’ counsel. In resolving this issue, I must first carefully define the contours of the work-product privilege. “[T]he work product doctrine insulates a lawyer’s research, analysis of legal theories, mental impressions, notes, and memoranda of witnesses’ statements from an opposing counsel’s inquiries.” *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 875 (5th Cir. 1991). Importantly, the work-product doctrine does not protect from disclosure documents that a third-party witness or former company employees voluntarily hands over to Plaintiffs’ counsel during the course of litigation. Simply put, there is nothing about those documents—many of which were probably Defendants’ business records—that reflects the mental processes of Plaintiffs’ counsel. If the work-product doctrine did apply in such a situation, Plaintiffs could insulate from production any and all documents it obtained from any witnesses or sources in a case. That would, to say the very least, be an odd result. Not surprisingly, Plaintiffs cannot cite a single case adopting the construction of the work-product privilege it advocates here. As such, I order Plaintiffs to produce documents received from non-parties by November 12, 2021.

E. Class Certification Discovery

Finally, Defendants raise two issues concerning discovery that they allegedly need to address Plaintiffs’ class certification motions.

CB&I Trading Records: First, Defendants have requested Plaintiffs’ trading records for CB&I stock. The § 14(a) Plaintiffs have indicated that they have no such documents. The § 10(b) Plaintiffs, on the other hand, have objected to the production of such records, arguing that information concerning CB&I trades is wholly irrelevant to the class certification issue. Defendants strongly disagree, claiming that CB&I trades are highly relevant to the class certification inquiry:

Plaintiff’s CB&I trades are relevant to issues like whether the § 10(b) Lead Plaintiff faces unique defenses that make it unsuitable to represent the class, and the calculation of the putative § 10(b) class’s alleged damages. The CB&I–McDermott combination was an all-stock transaction. Whether and how much of the § 10(b) Lead Plaintiff’s McDermott stock was acquired in exchange for CB&I stock as a result of the combination factors into the computation of alleged damages, as Defendants are entitled to offset any alleged McDermott damages against any gains Lead Plaintiffs received by exchanging CB&I stock for McDermott stock in the combination.

Dkt. 210 at 9–10.

As the parties are well aware, **Rule 26(b)(1)** allows parties to “obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” *Fed. R. Civ. P. 26(b)(1)*. The scope of discovery is broad, and district courts are given wide latitude in determining what discovery is permissible in a given case. *See JP Morgan Chase Bank, N.A. v. DataTreasury Corp.*, 936 F.3d 251, 255 (5th Cir. 2019). Keeping in mind this liberal discovery standard, as well as the relative ease in which the trading records can be obtained, I see no reason to preclude this line of inquiry at this stage. The § 10(b) Plaintiffs must produce their CB&I trading records by November 12, 2021.

***5 Agreements Between Plaintiffs’ Counsel:** Second, Defendants seek “all documents concerning any arrangements, agreements, or understandings (whether oral or written) involving any of the firms representing investors in connection with this Action.” Dkt. 210 at 10. It is Defendants’ stance that they “are entitled to conduct discovery into the arrangements between and among proposed class counsel to test the adequacy of proposed class counsel at the class certification stage.” *Id.* I disagree. Separate law firms have been appointed as lead counsel to pursue § 10(b) and § 14(a) claims on behalf of a purported class. Lead counsel is obligated to work for the class’s benefit. That can include, in certain limited circumstances, enlisting other law firms to assist them in

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the prosecution of claims. Although I generally have found that the involvement of multiple law firms often unnecessarily inflates attorney's fees, it is not my role at the class certification stage to delve into the relationship between lead counsel and other firms they have enlisted to work on the case.³ At the class certification stage, the focus is on whether the Rule 23 prerequisites have been satisfied. In conducting this inquiry, the Fifth Circuit has held that "the zeal and competence of the representatives' counsel" are relevant to determining whether the adequacy prong has been met. *Berger v. Compaq Comput. Corp.*, 257 F.3d 475, 479 (5th Cir. 2001) (cleaned up). I do not, however, believe that the discovery of fee arrangements between lead counsel and other firms has any bearing on whether lead counsel is qualified, experienced, and able to actively pursue the litigation.

Because I conclude that fee agreements between Plaintiffs' counsel are not relevant to the issue of class certification, I deny Defendants' request to obtain such documentation.

³ If this case eventually settles or Plaintiffs obtain a favorable jury verdict, there will be plenty of time to address the appropriateness of attorney's fees sought by Plaintiffs.

All Citations

Not Reported in Fed. Supp., 2021 WL 5121853

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H KeyCite history available

2021 WL 10282213

Only the Westlaw citation is currently available.
United States District Court, N.D. California,
San Francisco Division.

IN RE: **FACEBOOK, INC.** CONSUMER
PRIVACY USER PROFILE LITIGATION,

This document relates to: All Actions

MDL No. 2843

CASE NO. 3:18-MD-02843-VC-JSC

Signed October 21, 2021

Filed November 14, 2021

**ORDER REGARDING MOTION TO COMPEL
MARK ZUCKERBERG AND SHERYL SANDBERG
AS DOCUMENT CUSTODIANS**

JAMS REF. NO: 1200058674

Daniel Garrie, Discovery Special Master

BACKGROUND

1. In September of 2021, Special Master Daniel Garrie (“Special Master Garrie”) and Judge Gail Andler declared impasse on the issue of whether Facebook should be compelled to add Mark Zuckerberg (“Zuckerberg”) and Sheryl Sandberg (“Sandberg”) as document custodians.

2. Plaintiffs submitted their opening brief on this issue on September 23, 2021. Plaintiffs argue that Zuckerberg and Sandberg should be added as document custodians because (a) as the key decision maker on issues related to

user privacy, Zuckerberg’s documents are uniquely relevant to plaintiffs’ claims; (b) Sandberg’s documents are critical as she oversees Facebook’s monetization of user data and Facebook’s messaging regarding user data misuse; (c) adding Zuckerberg and Sandberg as document custodians is proportional to the needs of the case and will not cause undue burden; (d) Facebook should commence with searching the Zuckerberg and Sandberg files in time to meet the January 31, 2022 deadline for substantial completion of document production; and (e) the Apex Doctrine does not apply. See Exhibit A (Motion to Compel Mark Zuckerberg and Sheryl Sandberg as Document Custodians).

3. Facebook submitted their opposition on October 4, 2021. Facebook argues that (a) Plaintiffs fail to show that Zuckerberg and Sandberg are likely to have documents that fill substantial gaps in Facebook’s comprehensive document production; and (b) to the extent that any collections from Zuckerberg and Sandberg are deemed necessary, performing targeted collections after the January 31, 2022 deadline for substantial completion of document production would be appropriate and would not delay discovery as discovery does not close until June 2022. See Exhibit B (Opposition to Plaintiffs’ Motion to Compel Mark Zuckerberg and Sheryl Sandberg as Document Custodians).

4. Plaintiffs submitted their reply on October 13, 2021. Plaintiffs argue that (a) Zuckerberg and Sandberg are likely to possess unique and relevant information because their knowledge and statements are at the heart of Plaintiffs’ allegations, including their detailed and intimate knowledge of friend sharing, whitelisting, business partners, and third party misuse of information; and (b) a targeted search of Zuckerberg’s and Sandberg’s files is appropriate. See Exhibit C (Reply in Support of Motion to Compel Mark Zuckerberg and Sheryl Sandberg as Document Custodians).

FINDINGS

5. Special Master Garrie finds that requiring a party to compel the designation of additional custodians requires a showing that the disputed custodians possess uniquely relevant information that is not available from the sources already designated. See Handloser v. HCL America, Inc., No. 19-cv-01242-LHK (VKD), 2020 WL 7405686, at *2 (N.D. Cal. December 17, 2020) (refusing to order designation of additional custodians where plaintiffs failed to show why they “expect to discover information

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from these custodians that differs from discovery they have already obtained from the others”); see also [In re EpiPen Mktg., Sales Practices and Antitrust Litigation](#) No. 17-md-2785-DDC-TJJ, 2018 WL 1440923, at *2 (D. Kans. March 15, 2018) (“party moving to compel additional proposed custodians ‘must demonstrate that the additional requested custodians would provide unique relevant information not already obtained’ ” (quoting *Fort Worth Employees’ Ret. Fund v. J.P. Morgan Chase & Co.*, 297 F.R.D. 99, 107 (S.D.N.Y. 2013))).¹

¹ This requirement flows from the prescriptions in Rule 26 that discovery must be proportional to the needs of the case and that “the frequency or extent of discovery” must be limited if it is “is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.” Fed. R. Civ. P. 26(b).

*2 6. Special Master Garrie finds that it is likely that Zuckerberg and Sandberg possess information relevant to the Plaintiffs’ allegations and differs from discovery already obtained from other custodians.²

² As Facebook does not contend that Zuckerberg and Sandberg are likely to possess relevant documents, the findings herein will address only Facebook’s argument that Zuckerberg and Sandberg do not possess information not available from other data sources.

7. Special Master Garrie finds that Zuckerberg and Sandberg are likely to possess unique, relevant information because they were key decision-makers related to issues at the heart of Plaintiffs’ allegations, including friend sharing, whitelisting, business partners, and third-party misuse of information. For instance, in a 2012 email, Zuckerberg indicates that he was involved in both the high-level decision making and execution of a plan [Redacted] See Exhibit 10 to Plaintiffs’ Motion to Compel Zuckerberg and Sandberg as Custodians; see also Exhibit 12 to Plaintiffs’ Motion to Compel Zuckerberg and Sandberg as Custodians [Redacted]. Sandberg also indicated her involvement as a key decision maker in her communications related to the above. See Exhibit 12 to Plaintiffs’ Motion to Compel Zuckerberg and Sandberg as Custodians [Redacted].

8. Special Master Garrie finds that Zuckerberg and Sandberg, as key decision makers related to the issues of this case, are likely to possess at least some of the following categories of relevant information not available through other data sources:³

- i. Communications between Zuckerberg and

Sandberg. It is possible that Zuckerberg and Sandberg communicated with each other directly regarding issues relevant to Plaintiffs’ allegations and did not include any of the other custodians in the communications.

- ii. Communications between Zuckerberg and/or Sandberg and the board of directors. Given Zuckerberg’s and Sandberg’s roles as key decision makers regarding issues relevant to Plaintiffs’ allegations, it is possible that one or both of them communicated directly with members of the board of directors regarding these issues without including other custodians in the communications.

- iii. Communications between Zuckerberg and/or Sandberg and third parties. Given Zuckerberg’s and Sandberg’s roles as key decision makers regarding issues relevant to Plaintiffs’ allegations, it is possible that one or both of them communicated directly with relevant third parties, such as business partners, vendors, etc., regarding these issues without including other custodians in the communications.

- iv. Communications between Zuckerberg and/or Sandberg and non-custodian subordinates. It is possible that Zuckerberg and/or Sandberg communicated with non-custodian subordinates regarding issues relevant to Plaintiffs’ allegations and Zuckerberg and Sandberg without including other custodians in the communications.

³ Special Master Garrie notes that it is not certain that any of the information listed below exists and Zuckerberg and Sandberg may possess other categories of relevant information not available through other sources. The parties are to meet confer regarding potential additional categories of relevant information not available through other sources as discussed in ¶ 8 below.

*3 9. Special Master Garrie finds that the benefit of collecting, reviewing, producing the above information prior to the January 31, 2022 deadline for substantial document production outweighs the burden imposed on Facebook because Facebook has represented that over two-thirds of its review is complete, and there remains ample time for Facebook to complete this targeted collection and review with an appropriate protocol. See Williams v. Apple, Inc., No. 19-cv-04700-LHK (VKD), 2020 WL 5107639, at *2 (N.D. Cal. August 31, 2020) (“[Defendant’s] burden can be substantially mitigated by application of appropriately narrow search terms and de-duplication of ESI across custodians.”).

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ORDER

10. No later than November 19, 2021 the parties are to meet and confer and submit a joint proposed protocol for performing a search and collection targeting, at a minimum, the categories of communications identified above. The targeted search and collection of Zuckerberg's and Sandberg's files are to be completed prior to the January 31, 2022 deadline for substantial completion of document production. The parties may propose additional categories of relevant documents that are likely to be in Zuckerberg's or Sandberg's possession and not available through other data sources. The joint proposed protocol is to identify any areas of disagreement between the parties.

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11. Special Master Garrie may modify the proposed protocol at his discretion and hold a hearing to resolve any disputes related to the proposed protocol. Special Master Garrie will then issue an order with the final protocol.

IT IS SO ORDERED.

EXHIBIT A

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In re Facebook, Inc. Consumer Privacy User Profile Litigation, Not Reported in Fed...

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: FACEBOOK, INC. CONSUMER PRIVACY
USER PROFILE LITIGATION

This document relates to:

ALL ACTIONS

MDL No. 2843

Case No. 18-md-02843-VC-JSC

**PLAINTIFFS' MOTION TO COMPEL MARK
ZUCKERBERG AND SHERYL SANDBERG AS
DOCUMENT CUSTODIANS**

Judge: Hon. Vince Chhabria

Hon. Jacqueline Scott Corley

Special Master Daniel Garrie

Courtroom: 4, 17th Floor

JAMS Ref. No.: 1200058674

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MariCal, Inc. v. Cooke Aquaculture, Inc., No.
1:14-CV-00366-JDL, 2016 WL 9459260 (D. Me. Aug. 9,
2016)...—

Oracle Am., Inc. v. Google Inc., No.
10-CV-03561-WHA-DMR, 2015 WL 7775243 (N.D. Cal.
Dec. 3, 2015)...—

Rosinbaum v. Flowers Foods, Inc., 238 F. Supp. 3d 738
(E.D.N.C. 2017) ...—

In re Facebook, Inc. Consumer Privacy User Profile Litigation, Not Reported in Fed....

Shenwick v. Twitter, No. 16-CV-05314-JST (SK), 2018 WL 833085 (N.D. Cal. Feb. 7, 2018) ...——

Statutes

Fed. R. Civ. P. 26(b)(1)...——

I. PLAINTIFFS' SEPARATE STATEMENT

*4 Pursuant to ¶ 6 of the Protocol for Resolving Discovery Disputes—Order No. 1, Dkt. No. 733, Plaintiffs' Separate Statement Regarding Mark Zuckerberg and Sheryl Sandberg as Document Custodians is provided at Attachment A.

II. INTRODUCTION

Mark Zuckerberg (Facebook's Chairman, Chief Executive Officer, and controlling stakeholder) and Sheryl Sandberg (Facebook's Chief Operating Officer and a director) shaped Facebook's business decisions regarding the ways Facebook shared user information with and collected user information from third parties, devised and executed the plan for monetizing user information, and led the internal and external response to the Cambridge Analytica scandal. They each currently play and have played key roles as the public face of Facebook in response to repeated crises about privacy violations that are at the heart of Plaintiffs' allegations. Thus, they possess unique and critical information directly relevant to Plaintiffs' claims and Facebook's defenses. Under [Federal Rule of Civil Procedure 26](#), they are proper custodians and their relevant custodial files should be produced.

Facebook does not contest that Zuckerberg's and Sandberg's custodial files contain relevant information. Nor could they credibly do so. Zuckerberg crafted the design of the open platform, through which Facebook first made users' content and information available to third party developers. He led the "Platform Simplification" transition in response to the FTC's 2012 Consent Order, whereby Facebook determined it would restrict the sharing of some aspects of user content and information, but would "whitelist" certain business partners and developers that reciprocated by providing content and information back to Facebook. The evidence shows that Zuckerberg was in the weeds, participating in decisions [Redacted]. And Zuckerberg initiated the ADI, Facebook's response to the Cambridge Analytica scandal that resulted in the suspension of tens of thousands of

other apps. He, thus, has detailed, specific and unique knowledge about critical facts in this case.

Sandberg also is directly involved in issues at the core of the case. She led Facebook's effort to monetize user data by making it available to developers and advertisers. She made numerous public statements about the importance of user privacy. And she was at the forefront of Facebook's response to the Cambridge Analytica scandal, sending internal emails [Redacted].

It is Plaintiffs' understanding that Facebook does not refuse to *ever* search Zuckerberg's and Sandberg's custodial files, but rather objects to doing so *now*, for two reasons. First, Facebook has raised the "apex doctrine." That doctrine, however, is inapt. The doctrine does not apply to whether high-ranking executives should be added as document custodians. Even if the doctrine were applicable, it would not shield Zuckerberg and Sandberg because of their direct involvement and unique knowledge regarding key events and facts at issue in this case. *See* Order Following April 14, 2021 Discovery Conference, *In re Juul Labs, Inc., Mktg. Sales Practices*, No. 19-md-02913-WHO (JSC) (N.D. Cal.), Dkt. No. 1704 (ordering deposition of Altria CEO), Ex. 1.¹ Second, Facebook has said Plaintiffs should wait. But Judge Chhabria has ordered substantial completion of document production in four months, and the parties continue to be at loggerheads regarding numerous core aspects of production (including, for example, the definition of relevance, the production of Plaintiffs' data and non-custodial ESI, and other issues not yet briefed to the Special Master). Delaying resolution of this issue will make meeting the substantial completion deadline all-but-impossible. In the end, this is likely Facebook's goal. If it is able to delay this issue long enough, it will run out the clock, preventing Plaintiffs from timely securing relevant custodial documents. But given their intimate involvement in the issues giving rise to Plaintiffs' allegations, it is already past time Zuckerberg and Sandberg were added as custodians and their relevant custodial files produced.

¹ Unless specified otherwise, all exhibit citations refer to the Declaration of Lesley Weaver filed herewith.

III. RELEVANT BACKGROUND

*5 On February 21, 2020, in their first communication to Facebook about the custodians whose files should be collected, reviewed, and produced, Plaintiffs identified

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Zuckerberg and Sandberg. Ex. 2 at 5-6. The parties ultimately agreed on a set of 72 initial custodians, and the Court ordered the addition of nine others on May 15, 2020. Dkt No. 436, Ex. 3.

On November 2020, Plaintiffs again requested that Facebook add Zuckerberg and Sandberg as document custodians. Plaintiffs raised the issue to Judge Corley, who ordered that the “addition of further custodians for discovery purposes is premature at this time.” Dkt. No. 588, Ex. 4 at 2.

On July 19, 2021, Judge Chhabria issued an Order Setting Case Schedule, with depositions set to begin on November 1, 2021 and document production to be substantially completed by January 2022. Dkt. No. 706, Ex. 5. Thus, there is now less than four months remaining for Facebook to complete production from the agreed custodians, non-custodial sources, and new custodians, such as Zuckerberg and Sandberg.

IV. LEGAL STANDARD

A party “may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case[.]” Fed. R. Civ. P. 26(b)(1). In determining whether discovery is “proportional to the needs of the case,” a Court must assess “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” *Id.* This assessment applies to whether to add a document custodian. *Oracle Am., Inc. v. Google Inc.*, No. 10-CV-03561-WHA-DMR, 2015 WL 7775243, at *2 (N.D. Cal. Dec. 3, 2015).

V. ARGUMENT

A. Mark Zuckerberg and Sheryl Sandberg Possess Relevant Information

Zuckerberg and Sandberg possess unique information that is core to the claims at issue. As head of global policy management Monica Bickert publicly stated: “With anything that is very big that a lot of people are talking

about, we will absolutely loop them in Any time that we’re dealing with something that is close to the line or it’s something where it’s not really clear how the policies apply or it’s something that’s particularly important, we will, at the very least, send an email up to Mark and Sheryl so that they know what’s going on[.]” Sissi Cao, *Inside Facebook: What’s It Really Like to Work With Zuckerberg, Sandberg?*, Observer (Sept. 10, 2019), <https://observer.com/2019/09/facebook-execs-reveal-working-with-mark-zuckerbergshteryl-sandberg/>, Ex. 6. She continued: “Very often, we will end up having a back-and-forth with them about why we’re making the decision we’re making, and make sure they’re OK with it.” *Id.* Evidence gathered to date from Facebook and public sources shows that Zuckerberg and Sandberg drove the decisions that gave rise to Plaintiffs’ allegations.

Courts regularly add high-ranking executives as custodians where their files are likely to contain relevant information. This is particularly true where, as here, the executive is intimately involved in the business decisions at issue in the litigation. In *Shenwick v. Twitter*, for example, the Court ordered Twitter CEO Jack Dorsey be added as a document custodian given his involvement as Chair and CEO during the relevant class period, and because he—like Zuckerberg and Sandberg with respect to the Cambridge Analytica scandal—was the person who “came clean” to the public about the true state of affairs of Twitter’s user metrics. No. 16-CV-05314-JST (SK), 2018 WL 833085, at *1 (N.D. Cal. Feb. 7, 2018). Other courts have done the same. *See, e.g., In re Envision Healthcare Corp. Sec. Litig.*, No. 3:17-CV-01112, 2020 WL 6750397, at *4 (M.D. Tenn. Nov. 16, 2020) (adding senior executives as custodians where they were likely to possess relevant information); *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices and Antitrust Litig.*, No. 17-md-2785-DDC-TJJ, 2018 WL 1440923, at *3-4 (D. Kan. Mar. 15, 2018) (adding two former CEOs as custodians who were “actively involved,” provided “guidance,” and were part of the team making decisions regarding the defendant’s operations); *MariCal, Inc. v. Cooke Aquaculture, Inc.*, No. 1:14-CV-00366-JDL, 2016 WL 9459260, at *2 (D. Me. Aug. 9, 2016) (adding the CEO as a custodian because he “likely was involved in discussions” regarding the patents at issue).

*6 Zuckerberg and Sandberg were intimately involved in Facebook’s conduct at issue in this litigation and should be added as document custodians.

1. As the Key Decision Maker on Issues Related to User Privacy, Zuckerberg’s Documents Are Uniquely

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Relevant to Plaintiffs' Claims

News articles and produced documents offer glimpses of Zuckerberg's core role in the issues central to this litigation: privacy, consent, friend sharing, whitelisting, business partner access, and enforcement. His custodial files, including emails sent and received, are certain to be probative of Plaintiffs' claims.

For example, Zuckerberg decided whether to enforce Facebook's policies against apps taking users data. According to former Platform Operations Manager Sandy Parakilas, who led privacy and policy compliance in 2011-12, "any decision to ban an app" for violating Facebook's policies related to user information "required the personal approval of the chief executive." Paul Lewis, *'Utterly horrifying': ex-Facebook insider says covert data harvesting was routine*, *The Guardian* (Mar. 20, 2018) <https://www.theguardian.com/news/2018/mar/20/facebook-data-cambridge-analytica-sandy-parakilas>, Ex. 7.

Internal documents demonstrate other instances of Zuckerberg's day to day involvement. For instance, Zuckerberg [Redacted]. See FB-CA-MDL-00185348, Ex. 8 at 5348 [Redacted] Zuckerberg also [Redacted]. FB-CA-MDL-00172723, Ex. 9 at 2723-2729.

Zuckerberg was also [Redacted] FB-CA-MDL-00174292, Ex. 10 at 4293. His decision enabled Facebook to build substantially more robust user profiles.

More generally, Zuckerberg [Redacted] FB-CA-MDL-00183209, Ex. 11 at 3210. The same month, [Redacted] FB-CA-MDL-01681584, Ex. 12 at 1584. [Redacted] *Id.*

Later internal documents show that Zuckerberg played a major role in Facebook's investigation and response to the 2018 Cambridge Analytica scandal—[Redacted]. In [Redacted]. FB-CA-MDL-01136583, Ex. 13 at 6588-6589. On March 21, 2018, Zuckerberg "share[d] an update on the Cambridge Analytica situation." <https://www.facebook.com/zuck/posts/10104712037900071>, Ex. 14. He proclaimed Facebook's duty to protect users' data from misuse by third-party developers, which is at the heart of this case: "We have a responsibility to protect your data, and if we can't then we don't deserve to serve you." *Id.* He also announced that Facebook "will investigate all apps that had access to large amounts of information before we changed our platform" in 2014, "will ban any developer from our platform that does not agree to a thorough audit," and banning "developers that misused personally identifiable information[.]" *Id.* This statement initiated the App Developer Investigation. Notably, Judge Corley recently ordered production of

documents from the ADI, relying heavily on Zuckerberg's public statements in her order. Dkt. No. 736, Ex. 15.

Zuckerberg's role in Facebook's response to Cambridge Analytica was widely publicized. The Wall Street Journal has reported that Zuckerberg "in 2018 took on the role of a wartime leader who needed to act quickly and, sometimes, unilaterally." Deepa Seetharaman and Emily Glazer, *Mark Zuckerberg Asserts Control of Facebook, Pushing Aside Dissenters*, *The Wall Street Journal* (Apr. 28, 2020) <https://www.wsj.com/articles/mark-zuckerberg-asserts-control-of-facebook-pushing-aside-dissenters-11588106984>, Ex. 16. Other reporting confirmed that in the immediate aftermath Zuckerberg and Sandberg took charge of communications: Zuckerberg "ordered staff to shut down external communications until he had a grasp of the situation [and] directed Sandberg and the legal and security teams to scour emails, memos, and messages among Facebook employees, Kogan, and Cambridge Analytica" Sheera Frenkel and Cecilia Kang, *An Ugly Truth*, at 155 (Harper Collins 2021). The actions consolidated in this MDL initially arose out of the Cambridge Analytica scandal; documents relating to Zuckerberg's leadership of and involvement in Facebook's response are highly relevant to Plaintiffs' claims.

*7 Finally, Zuckerberg personally made numerous public commitments about Facebook's privacy practices that go directly to the heart of the claims and defenses in this case. For example: in a 2010 interview, he stated that "applications have to ask for permission for anything you've set to be private"; in a November 2011 post, he explained that "everyone needs complete control over who they share with [via Facebook] at all times"; he told shareholders that "giving people control over what they share is a fundamental principle" of the social graph; and he promised users Facebook had created "the kind of privacy that no one had ever seen before." See *Anita Balakrishnan et al., Mark Zuckerberg has been talking about privacy for 15 years—here's almost everything he's said*, *CNBC* (Apr. 9, 2018), <https://www.cnbc.com/2018/03/21/facebook-ceo-mark-zuckerbergs-statements-on-privacy-2003-2018.html>, Ex. 17.

Zuckerberg's documents will shed light on the consistency, or lack thereof, of Facebook's external representations with its internal practices. He knows what Facebook says and what Facebook does, and his files will shed light on Facebook's knowledge and intent in relation to its representations. Facebook's misrepresentations, and Zuckerberg's knowledge are central to Plaintiffs' privacy, contract, and negligence claims, as well as the punitive

damages.

2. Sandberg's Documents Are Critical as She Oversees Facebook's Monetization of User Data and Facebook's Messaging Regarding User Data Misuse

Around the same time Zuckerberg was exploring ways to ensure that users perceived Facebook as protective of their information while transitioning to a platform that allowed all app developers to access users' and friends' information, he hired Sandberg to figure out how to monetize the content and information Facebook collected. In a 2009 article, Zuckerberg is quoted as explaining that “[Sandberg] handles monetization and works on different efforts with the ad products; I spend more time on product and technical strategy.” *Facebook's Sheryl Sandberg*, *Forbes* (Aug. 20, 2009) <https://www.forbes.com/forbes/2009/0907/power-women-09-facebook-sheryl-sandberg.html?sh=5f37159f3873>, Ex. 18. As the article explained, Zuckerberg's “efforts to exploit user information provoked outrage among members, who felt their privacy was being violated.... This is where Sandberg comes in—helping to put a more palatable façade on the touchy business of selling user data.” *Id.*

As former FTC technologist Ashkan Soltani testified before the U.K. Parliament, Facebook's business model and priority is the “monetization of data” and “[Sandberg] is the one who makes the monetisation calls and makes the priorities[.]” Ashkan Soltani Testimony to U.K. House of Commons Digital, Culture, Media and Sport Committee (Nov. 27, 2018) <http://data.parliament.uk/writtenevidence/committeeevidence.nvc/evidencedocument/digital-culture-media-and-sport-committee/disinformation-and-fake-news/oral/92924.html>, Ex. 19. Soltani further testified that “[Sandberg] is who I would want to see [testify] on these business decisions, and specifically on the monetisations and the decisions of what to prioritise.” *Id.* at Q4348. To state the obvious, the “touchy business of selling user data” is also at the heart of this case. Users did not consent to the selling and unauthorized disclosure of their content and information.

Sandberg will also have unique information about Facebook's decision to exempt certain developers and strategic partners from its implementing restrictions on third parties' access to users' private information. Facebook accomplished this through a process called “whitelisting” after it told users that Facebook would cut off such access. *See, e.g.* FB-CA-MDL-00183225, Ex. 20

at 3225 [Redacted]. For example, [Redacted], Ex. 21 at 6-7. [Redacted] *Id.* at 2.

*8 In addition, Sandberg will have information about Facebook's violation of its duty to take reasonable steps to protect users' information. For instance, [Redacted] FB-CA-MDL-00161290, Ex. 22 at 1291. [Redacted] *Id.* [Redacted] *Id.* at 1290. [Redacted] *See also* FB-CA-MDL-00165325, Ex. 23 at 5326 [Redacted].

Moreover, Sandberg's documents will shed considerable additional light on the Cambridge Analytica scandal. Indeed, [Redacted] FB-CA-MDL-01184406, Ex. 24 at 1045. Documents from Sandberg's custodial files [Redacted] should be produced given their relevance to Plaintiffs' claims.

Sandberg's core involvement in Facebook's response to the Cambridge Analytica scandal [Redacted]. Shortly after the scandal became public, [Redacted] FB-CA-MDL-01191045, Ex. 25 at Slide 1. [Redacted] *Id.* at Slides 4-5. [Redacted] *Id.* at Slide 6.

Like Zuckerberg, Sandberg was personally involved in crafting and delivering Facebook's message about users' privacy and their ability to control access to their content and information on Facebook. She stated publicly that users' “trust is sacred, that privacy is the most important thing we do,” and that Facebook is “the most privacy-focused place for anyone to share anything.” Erick Schonfeld, *Zuckerberg Talks to Charlie Rose About Steve Jobs, IPOs, And Google's “Little Version of Facebook”*, *TechCrunch* (Nov. 7, 2011) <https://techcrunch.com/2011/11/07/zuckerberg-talks-to-charlie-rose-about-war-ipos-and-googles-little-version-of-facebook/>, Ex. 26. [Redacted] *See* FB-CA-MDL-01815330, Ex. 27 at 5330 [Redacted]; FB-CA-MDL-01681668, Ex. 28 at 1670 [Redacted]; FB-CA-MDL-01152648, Ex. 29 at 2648-2649 [Redacted].

Given Sandberg led Facebook's efforts to monetize users' information while at the same time shaping Facebook's public façade of respecting users' privacy, her custodial files are all but certain to contain core information relevant Plaintiffs' claims.

B. Adding Mark Zuckerberg and Sheryl Sandberg as Document Custodians Is Proportional to the Needs of the Case and Will Not Cause Undue Burden

Facebook cannot credibly claim that collecting, searching

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and producing Zuckerberg and Sandberg custodian files would be unduly burdensome, duplicative or disproportionate to the needs of the case. Their texts, chats, and ephemeral communications should have been preserved, as Plaintiffs discussed with Facebook in 2018 in the first 26(f) meet and confer.

Rule 26(b)(1) requires consideration of the following factors as part of the proportionality analysis: “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Each of these factors weigh in Plaintiffs’ favor.

First, the issues at stake are of paramount importance. This case concerns a proposed class period of over 13 years, affecting millions of Facebook users, concerning Facebook’s core promise to its users—that *users* control who can see their information. More acutely, the case concerns the revelation that Facebook did nothing to prevent the user data it shared with third parties from being misused, and that a few hundred thousand users could unknowingly expose the content and information of more than 80 million users to a developer who sold the data collection to a political advertising outfit that targeted users with voter-suppression messaging and may have swung a U.S. presidential election. The stakes are high.

*9 Second, Facebook has control of Zuckerberg’s and Sandberg’s custodial files. Plaintiffs do not.

Third, Facebook has nearly unparalleled resources. For 2020, it reported revenues of \$86 billion and cash, cash equivalents, and marketable securities of \$61.95 billion in 2020.

Fourth, discovery from Zuckerberg and Sandberg will substantially advance the resolution of this case. The evidence shows that they have documents uniquely relevant to the intentional creation of the perception that Facebook was and is committed to privacy and user control, as well as the reality of how users’ content and information was shared and monetized. Zuckerberg and Sandberg also have unique knowledge of the way Facebook responded to the investigations and outcomes of the FTC investigations that led to the 2012 and 2019 Consent Decrees, the Cambridge Analytica scandal, the revelation of Facebook’s business partnerships, and other issues.

Fifth, the benefit of this discovery far outweighs its

burden. As set forth above, Zuckerberg and Sandberg possess information that goes to the very heart of Plaintiffs’ claims. No one else is better able to discuss the user content and information Facebook made available and monetized, the privacy promises it made, and what happened with Cambridge Analytica. Plaintiffs only seek the collection, review, and production of two critical custodial files. Facebook has already collected, reviewed, and is producing the files of 81 custodians. As Judge Chhabria instructed, this is not the kind of case where it is enough to assert that adding Zuckerberg and Sandberg as custodians will be expensive or overly burdensome. Tr. of the Mar. 5, 2020 Case Mgmt. Conference, Ex. 30 at 29:3-12. The burdens are substantially outweighed by the benefits.

C. Given the Case Schedule, Facebook Should Commence with Searching These Custodial Files

Facebook does not contest that Zuckerberg and Sandberg possess relevant information, and do not necessarily contest that they should be added as document custodians in this litigation. Rather, Facebook argues that Plaintiffs’ request (and this impasse) is premature. Plaintiffs disagree for three reasons.

First, the production of documents from existing custodians does not eliminate the need for the addition of Zuckerberg and Sandberg, as the latter likely contain unique communications directly relevant to the case. *See e.g.* Ex. 9 at 2723, Ex. 23 at 5326, and Ex. 29 at 2652. Their communications should not be shielded merely because a search of their documents did not take place with other custodians. Thus, the completion of document production from existing custodians will not obviate the need to include Zuckerberg’s and Sandberg’s custodial files in this action. Regardless, Facebook recently told the Special Master that its custodial production was almost complete. As it wrote in its opposition to Plaintiffs’ motion regarding TAR, “Facebook has now completed the majority of its review process.” Facebook’s Opp. to Mot. To Compel TAR at 10. Thus, the time is ripe.

Second, adding Zuckerberg and Sandberg as document custodians now should allow Facebook to collect, search, review and produce documents from their custodial files in time to meet the January 31, 2022 deadline for substantial completion of document production. Since custodial document production commenced in December 2020, Facebook’s production has averaged fewer than 10,000 documents per month. Given the glacial pace of Facebook’s production, this dispute should be resolved

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now.

*10 Third, Facebook should not benefit from its glacial pace of production by tying completion of production from existing custodians to the addition of new custodians. Plaintiffs have no reason to believe Facebook will ever consent to the addition of Zuckerberg’s and Sandberg’s custodial files. Facebook should not be permitted to run out the clock by promising to consider at a later date what it should be compelled to do now.

D. The Apex Doctrine Does Not Apply

Facebook has also raised the “apex doctrine” as a reason to hold off on or refuse production of Zuckerberg’s and Sandberg’s custodial files, but it is inapt. The apex doctrine does not apply to this dispute, which concerns whether senior executives Zuckerberg and Sandberg should be added as document custodians. *See e.g. Alta Devices, Inc. v. LG Elecs., Inc.*, No. 18-cv-00404-LHK-VKD, 2019 WL 8757255, at *1 (N.D. Cal. Feb. 20, 2019) (disagreeing “that simply because a prospective custodian happens to be a senior executive, such custodian is not subject to collection of responsive ESI.”); *Blankenship v. Fox News Network, LLC*, No. 2:19-CV-00236, 2021 WL 2345972, at *3, n. 5 (S.D.W. Va. June 8, 2021) (the apex doctrine “typically applies only to protect senior executives from attending costly and distracting depositions rather than from merely

Dated: September 22, 2021

KELLER ROHRBACK L.L.P.

By: /s/ Derek W. Loeser

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collecting and producing documents.”) (citation omitted); *Rosinbaum v. Flowers Foods, Inc.*, 238 F. Supp. 3d 738, 749 (E.D.N.C. 2017) (“In no case of which the court is aware has the apex doctrine successfully been invoked to shield an executive from a request for production of documents.”) (citation omitted); *Dyson, Inc. v. Sharkninja Operating LLC*, No. 1:14-CV-0779, 2016 WL 1613489, at *1 (N.D. Ill. Apr. 22, 2016) (declining to apply the apex doctrine to quash a request for production of documents). In any event, Zuckerberg and Sandberg clearly meet the standard. Judge Corley explained earlier this year that “usually when [the Apex Doctrine is] employed, it’s because you will have an employment discrimination case and the plaintiff’s lawyer wants to take the CEO or something where they are not involved at all.” Tr. of Apr. 14, 2021 Discovery Conference at 6:22-7:1, *In re Juul Labs, Inc., Mktg. Sales Practices*, Ex. 31. It does not apply where the person “was involved” in the conduct at issue in a “big” MDL. *Id.* at 7:2-3.

VI. CONCLUSION

Mark Zuckerberg and Sheryl Sandberg possess unique and critical information relevant to this action. Facebook should be ordered to add them as custodians and produce their relevant custodial files.

Respectfully submitted,

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**MOTION TO COMPEL MARK ZUCKERBERG
AND SHERYL SANDBERG AS DOCUMENT
CUSTODIANS**

ATTACHMENT A

PLAINTIFFS' SEPARATE STATEMENT	ISO	Opposition	Executive Summary
<i>Written Discovery</i>	<i>Discovery Response</i>		
N/A (The Special Master defined the dispute as: "Adding Mark Zuckerberg and Sheryl Sandberg as custodians and producing their relevant custodial files.")	N/A 02/21/20: Plaintiffs request Zuckerberg and Sandberg on their initial list of proposed custodians. 5/12/2020: The parties agree to a set of 72 initial document custodians. ECF No. 431 at 10. 5/15/2020: Judge Corley ordered the addition of nine other document custodians. ECF No. 436. 11/16/2020:	It is Plaintiffs' understanding that Facebook does not argue that Zuckerberg and Sandberg do not possess relevant information, or that production of their relevant custodial files will cause undue burden. Rather, it is Plaintiffs' understanding that Facebook's position is that the determination of whether to add them as document custodians and to produce their	Mark Zuckerberg's and Sheryl Sandberg's custodial files contain information relevant to Plaintiffs' claims that cannot be obtained from any other sources. Given the importance of the information they possess and the stakes of this litigation, their addition is proportional to the needs of the case. Zuckerberg and Sandberg should be added as

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Plaintiffs write Facebook to propose four additional document custodians, including Mark Zuckerberg and Sheiyl Sandberg.

12/11/2020: Judge Corley issues a written order stating “The addition of further custodians for discovery purposes is premature at this time.” ECF No. 588.

7/19/2021: Judge Chhabria issued an Order Setting Case Schedule, with deposition set to begin on 11/1/2021, and document production to be substantially completed by 1/31/2022. ECF No. 706.

7/26/2021: Judge Corley issued an order stating that “Facebook should be required to meet certain metrics by certain dates to avoid a disproportionate number of documents being produced toward the end of the document production period.” ECF No. 712.

9/9/2021: Facebook states that it “has now completed the majority of its review process.”

relevant custodial files is premature.

Facebook also raises the “apex doctrine” as a reason to delay or refuse to add Zuckerberg and Sandberg as custodians.

custodians now. Facebook must substantially complete document production in four months. Adding them now will permit Facebook sufficient time to collect, review, and produce documents from then custodial files before that deadline. Continued delay will only allow Facebook to run out the clock, by promising consideration at a later date with no intent of agreement.

The “apex doctrine” does not apply to custodial selection for the purpose of document production.

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Facebook's Opp.
to Mot. To
Compel TAR at
10.

EXHIBIT B

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE: FACEBOOK, INC. CONSUMER PRIVACY
USER PROFILE LITIGATION,

This document relates to:

ALL ACTIONS

CASE NO. 3:18-MD-02843-VC

**FACEBOOK'S OPPOSITION TO PLAINTIFFS'
MOTION TO COMPEL MARK ZUCKERBERG
AND SHERYL SANDBERG AS DOCUMENT
CUSTODIANS**

Discovery Special Master: Daniel Garrie, Esq.

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I. INTRODUCTION

*12 More than eighteen months into Facebook's rolling document production—which so far has included more than 500,000 documents from the files of 81 custodians and various non-custodial sources—Plaintiffs attempt to open a new front in discovery by moving to compel designation of Facebook's Chief Executive Officer, Mark Zuckerberg, and Chief Operating Officer, Sheryl Sandberg, as document custodians. Mr. Zuckerberg and Ms. Sandberg are the two pinnacle executives responsible for operating a global company serving nearly 3 billion Facebook users. Plaintiffs' motion does not satisfy the essential prerequisites for a request to compel Facebook to add two new document custodians.

As Sedona Principle 6 codifies and district courts across the country have recognized, where a requesting party seeks to compel modification of a producing party's strategy for conducting a reasonably diligent collection of documents and ESI—including its selection of custodians—the requesting party must demonstrate *both* that the additional custodians are likely to possess relevant documents *and also* that those documents are likely to be unique and unavailable from other sources. Plaintiffs devote most of their motion to arguing that Mr. Zuckerberg and Ms. Sandberg are likely to possess relevant documents. But they make no serious effort to show that any such documents are unlikely to be captured by the current, broad scope of Facebook's collection and production.

Plaintiffs cannot possibly make that showing. Facebook has collected documents and data from—in addition to various non-custodial sources—81 custodians and run more than 140 search strings against those custodial documents. And it is not just that Facebook is collecting millions of documents from dozens of custodians—those 81 custodians include numerous high-ranking executives and managers who report directly to and work closely with Mr. Zuckerberg and Ms. Sandberg. Given the identities of those custodians and the nature of their roles inside the company, there is no reason to expect that Facebook's production from their files has gaps that must be filled by adding Mr. Zuckerberg and Ms. Sandberg as custodians. Just the opposite, in fact: the myriad documents Plaintiffs cite in their motion underscore the extent to which the documents that have already been produced from the 81 existing custodians are more than adequate to capture a full range of responsive materials.

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Tellingly, Plaintiffs do not argue that they have identified any gaps or deficiencies in the documents Facebook has produced to date. To the contrary, the Facebook documents Plaintiffs rely on demonstrate that, as expected for the apex leaders of one of the world's largest public companies, Mr. Zuckerberg and Ms. Sandberg provide high-level guidance and final approvals and rely on others (teams of other senior executives, managers, and engineers) to implement the policies they approve. 81 of those executives, managers, and engineers are already custodians. Facebook's productions from their files plus various non-custodial sources, is more than sufficient to constitute a reasonably diligent search for relevant documents.

Plaintiffs' argument that Facebook is "running out the clock" on producing documents from Mr. Zuckerberg and Ms. Sandberg assumes the point at issue—that Mr. Zuckerberg and Ms. Sandberg should be added as custodians. In reality, there is no need to search or collect from their custodial files—and certainly not with the overbroad scope of collection Plaintiffs demand. In any event, time is not nearly as short as Plaintiffs suggest. Discovery does not close until June 2022, and Facebook is on pace to meet the January 31, 2022 substantial completion deadline. So Plaintiffs will have five months to review Facebook's production and identify any gaps that could justify a "very targeted" (Ex. 3 at 48:11) collection from Mr. Zuckerberg's and Ms. Sandberg's files.

II. PROCEDURAL BACKGROUND

*13 Plaintiffs sought to compel the designation of Mr. Zuckerberg and Ms. Sandberg as document custodians on three occasions before the present motion, and each time Judge Corley correctly denied those requests. *See* Facebook's Sep. State. Judge Corley first rejected Plaintiffs' request to add Mr. Zuckerberg and Ms. Sandberg as custodians at a May 1, 2020 hearing. Plaintiffs argued that they would be "seeking to have CEO Mark Zuckerberg and COO Sheryl Sandberg on a custodial list, particularly in this case where they have been so involved in making public statements and promises about what Facebook is doing to protect privacy." Swanson Decl., Ex. 1 at 33:11-18. Judge Corley denied their request, stating "[t]hat seems a dispute that's premature because ... there [are] reams and reams and reams of unresponsive things." *Id.* at 34:2-5.

On May 15, 2020, Plaintiffs again requested to add Mr. Zuckerberg and Ms. Sandberg as custodians, stating "we

... think that they are integral to this" and pointing to an email in which "Mr. Zuckerberg is e-mailing directly with one of these custodians." *Id.*, Ex. 2 at 13:10-16. Judge Corley again rejected the request, instructing Plaintiffs to "wait." *Id.* at 13:18. That same day Judge Corley followed up with an order instructing Facebook to search the custodial files of 81 custodians. Dkt. 436. Facebook's 81 custodians include C-level senior executives including its Chief Privacy Officer and Chief Product Officer, as well as the Chief Operating Officer of Instagram who also serves as Facebook's Vice President of Global Operations, more than twenty Vice Presidents, twenty-two Directors, and six department heads among others. These custodians were involved in third party data access issues, third party enforcement, Facebook's response to the Cambridge Analytica events, platform and development issues, and user privacy.

Plaintiffs raised the issue of adding Mr. Zuckerberg and Ms. Sandberg for a third time during a December 2020 status conference. Judge Corley again rejected their request, instructing them on the record to "wait until all the documents are produced" and adding that any collections from Mr. Zuckerberg and Ms. Sandberg "will be very targeted." Swanson Decl., Ex. 3 (Dec. 9, 2020 Hr'g Tr.) at 48:8-11. Afterwards, Judge Corley entered an order that "memorializes the decisions made at the hearing." Dkt. 588 at 1:10-11. As to Plaintiffs' request for "[a]dditional [p]roposed [c]ustodians," the order recounts Judge Corley's ruling during the status conference that "[t]he addition of further custodians for discovery purposes is premature at this time." *Id.* ¶ E. Under this ruling, which is consistent with Sedona Principle 6 discussed below, if any documents need to be collected from Mr. Zuckerberg and Ms. Sandberg and reviewed for potential production, it will be only after Facebook substantially completes its document production, and only for the limited purpose of filling any specific, narrow gaps Plaintiffs identify in Facebook's productions.

Plaintiffs then inserted their demand to designate Mr. Zuckerberg and Ms. Sandberg as document custodians into their list of issues for discovery mediation in July 2021. Facebook's Sep. State. Plaintiffs' mediation demands bore no resemblance to the "very targeted" discovery contemplated by the Court. Instead, Plaintiffs insisted that addition of Mr. Zuckerberg and Ms. Sandberg as custodians "[c]oncerns *substantially all of* Plaintiffs' Requests for Production," listing 34 RFPs as being related to Mr. Zuckerberg and Ms. Sandberg. Swanson Decl., Ex. 4 (emphasis added).

III. ARGUMENT

Nothing has changed since the last time Judge Corley denied Plaintiffs' request to add Mr. Zuckerberg and Ms. Sandberg as custodians. The case law makes clear that a producing party can be compelled to add additional custodians to an already-reasonable collection effort only if the requesting party establishes that the new custodians are likely possess information that is both relevant and unique. That approach makes sense—especially in the context of apex custodians, where the burden of collection, the cumulative nature of their files, and the risk of harassment are elevated. After all, if the information is not unique—if there is no gap in the existing production—the request is unreasonably cumulative and duplicative and therefore improper under Rule 26(b). Judge Corley recognized as much when she instructed that a “very targeted” collection was the outer limit of what might be appropriate from Mr. Zuckerberg and Ms. Sandberg. And Plaintiffs' motion fails to make the showing required to justify even a very targeted collection. Their motion identifies no gap in Facebook's production that could only be filled by documents from Mr. Zuckerberg and Ms. Sandberg's files. Given the breadth (81 custodians plus various non-custodial sources), depth (more than 140 search strings), and quality (numerous custodians who work closely with Mr. Zuckerberg and Ms. Sandberg) of Facebook's collection in this case, there is no reason to expect that any such gap exists.

A. Plaintiffs fail to demonstrate good cause for compelling designation of Mr. Zuckerberg and Ms. Sandberg at this stage of discovery.

*14 Plaintiffs apply the wrong standard in their attempt to derail the current Court-approved collection, production, and review process and fail to carry their burden to meet the correct standard. According to Plaintiffs, the fact that a handful of produced documents purportedly show Mr. Zuckerberg and Ms. Sandberg's involvement in issues related to this case is enough to justify sweeping, intrusive discovery of their files. This claim ignores that Facebook has produced hundreds of thousands of documents on the same issues from the files of 81 other custodians who had direct managerial and day-to-day involvement in the specific, long-defunct data-sharing practices at issue in this case. And Plaintiffs' demand that Facebook search Mr. Zuckerberg's and Ms. Sandberg's files for documents responsive to at least 34 different RFPs (Swanson Decl., Ex. 4) is a far cry from the narrow, gap-filling potential discovery that Judge Corley ordered would be the limit of

what *might* be permissible *after* Facebook had completed its production from other sources.

1. Plaintiffs must show that Mr. Zuckerberg and Ms. Sandberg possess relevant *and* unique information unlikely to be found in the files of the 81 existing custodians.

Facebook is entitled to deference in formulating its collection strategy, including in selecting custodians it deems most likely to possess responsive information, and it is Plaintiffs' burden to demonstrate that Facebook's selections are deficient. *The Sedona Principles, 19 Sedona Conf. J. 1*, Principle 6 (“Sedona Principle 6”), 118–124 (3d ed. 2018) (“A requesting party has the burden of proving a specific discovery deficiency in the responding party's production.”); *accord Hastings v. Ford Motor Co.*, No. 19-cv-2217-BAS-MDD, 2021 WL 1238870, at *3 (S.D. Cal. Apr. 2, 2021). Litigants are not required to examine every last document in their files to comply with their discovery obligations. *Lauris v. Novartis AG*, No. 116CV00393LJOSAB, 2016 WL 7178602, at *4 (E.D. Cal. Dec. 8, 2016). They simply must “conduct a diligent search” based on “a reasonably comprehensive search strategy.” *Id.* If Plaintiffs believe Facebook's document search and production are deficient, they have the burden to demonstrate good cause for imposing additional requirements, especially where, as here, Plaintiffs' demand would upset a carefully crafted, court-approved process. *See Handloser v. HCL America, Inc.*, No. 19-cv-01242-LHK (VKD), 2020 WL 7405686, at *1–2 (N.D. Cal. Dec. 17, 2020); Sedona Principle 6 at 123–124.

Good cause to compel designation of additional document custodians generally requires a showing that the disputed custodians possess uniquely relevant information that is not available from the sources already designated. *See Handloser*, 2020 WL 7405686, at *2 (refusing to order designation of additional custodians where plaintiffs failed to show why they “expect to discover information from these custodians that differs from discovery they have already obtained from the others”); *Lauris v. Novartis AG*, No. 1:16-cv-00393-LJO-SAB, 2016 WL 7178602, at *4 (E.D. Cal. Dec. 8, 2016) (denying motion to compel additional custodians where plaintiff failed to show “that the discovery plan proposed by Defendants would not produce responsive documents,” and requiring “more than mere speculation to order Defendants to include the apex custodians in its search protocol”). This good-cause requirement flows from the prescriptions in Rule 26 that discovery must be proportional to the needs

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of the case and that “the frequency or extent of discovery” must be limited if it is “is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.” Fed. R. Civ. P. 26(b).

Deference to the responding party’s document search strategy is especially important where the requesting party attempts to force apex personnel to participate in document discovery, given the much higher risk that the discovery is improperly sought “to annoy, embarrass, or oppress the person subject to the inquiry.” *Hickman v. Taylor*, 329 U.S. 495, 507–08 (1947); Fed. R. Civ. P. 26(c)(1). That risk is particularly acute in this case. Mr. Zuckerberg and Ms. Sandberg run one of the largest, most prominent companies in the world. Their responsibilities are enormous, and their time is precious. Designating them as custodians would trigger custodial interviews and the other burdens of document identification, search, and collection that impose on that time and trade off with their focus on running Facebook’s business, all in service of an impermissible fishing expedition. See *Haggarty v. Wells Fargo Bank, N.A.*, No. 10-2416 CRB (JSC), 2012 WL 3939321, at *1 (N.D. Cal. Sept. 4, 2012) (“[D]iscovery may not be used as a fishing expedition.”) (cleaned up).

*15 Judge Corley’s decisions to deny Plaintiffs’ repeated demands to designate Mr. Zuckerberg and Ms. Sandberg as custodians show that the Court appreciates and respects these considerations. Other courts, too, have refused to make apex personnel custodians in the absence of a showing that they possess relevant documents that cannot be obtained from other sources. See, e.g., *Lutzeier v. Citigroup Inc.*, No. 4:14-cv-00183-RLW, 2015 WL 430196, at *6–7 (E.D. Mo. Feb. 2, 2015) (denying request to add high-level executives to a custodial list because “Plaintiff has not satisfied his burden to show that these high level executives have unique or personal knowledge of the subject matter that warrants their information”); *Harris v. Union Pacific Railroad Co.*, 2018 WL 2729131, at *1 (D. Neb. June 6, 2018) (denying motion to compel production of CEO’s documents, finding there was not “a sufficient showing that this information is necessary and not cumulative of other materials”).

Plaintiffs rely on cases that embrace the same principles. See Mot. at 4. Plaintiffs cite *In re EpiPen Mktg., Sales Practices and Antitrust Litigation*, which expressly adopts Sedona Principle 6 in holding that “unless the party’s choice is ‘manifestly unreasonable or the requesting party demonstrates that the resulting production is deficient,’ the court should not dictate the designation of ESI custodians.” No. 17-md-2785-DDC-TJJ, 2018 WL 1440923, at *2 (D. Kans. March 15, 2018). The court

only ordered designation of a “senior executive” as an additional custodian where the requesting party met its burden to show that the custodian was “likely to have unique information and ESI, not available through other [] custodians” where no other executive-level employees were designated as custodians. *Id.* at *3; see also *id.* at *2 n.17 (“party moving to compel additional proposed custodians ‘must demonstrate that the additional requested custodians would provide unique relevant information *not already obtained*’” (quoting *Fort Worth Employees’ Ret. Fund v. J.P. Morgan Chase & Co.*, 297 F.R.D. 99, 107 (S.D.N.Y. 2013) (emphasis added))). Likewise, in *MariCal, Inc. v. Cooke Aquaculture, Inc.*, the court found good cause to designate an additional custodian because the requesting party showed that the disputed custodian’s relevant information would not be accessible from the other designated custodians. No. 1:14-cv-00366-JDL, 2016 WL 9459260, at *2 (D. Me. Aug. 9, 2016). Here, Plaintiffs have not met their burden to show that Mr. Zuckerberg and Ms. Sandberg’s custodial files are likely to contain substantial relevant information that does not appear in the files of one or more current custodians, including two dozen executive-level custodians.

Plaintiffs cite *Shenwick v. Twitter* as an example of a court ordering a CEO to be designated as a document custodian where the CEO was involved in events at issue in the litigation. No. 16-CV-05314-JST (SK), 2018 WL 833085 (N.D. Cal. Feb 7, 2018). But there, the parties had yet to begin document collection and there were just 25 custodians. *Id.* at *1. Here, by contrast, Facebook’s document collection efforts are far more mature and comprehensive, with 81 custodians designated and hundreds of thousands of documents produced. As a result (and as discussed below), the possibility that Mr. Zuckerberg’s or Ms. Sandberg’s files could contain a very small number of relevant documents that are not also available in the files of one of the 81 existing custodians is vanishingly low, and insufficient to justify the intrusion of the broad, largely indiscriminate search Plaintiffs demand, especially given Plaintiffs’ inability to identify any gaps in Facebook’s production or demonstrate that Mr. Zuckerberg and Ms. Sandberg have unique documents. Moreover, Judge Corley’s prior orders already account for the possibility that Mr. Zuckerberg or Ms. Sandberg might have some unique documents, which was the rationale for the court’s decision in *Shenwick*. *Id.* (“It is always possible that one custodian will have a document or documents that other custodians have not retained.”)

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2. Plaintiffs fail to show that Mr. Zuckerberg and Ms. Sandberg are likely to possess information that is both unique and relevant.

*16 Plaintiffs ignore Judge Corley's direction that any collection from Mr. Zuckerberg and Ms. Sandberg's custodial files should be narrowly tailored to fill any gaps identified in Facebook's already-substantial document production. Instead, they take a blunderbuss approach that would require full-blown collection, search, and review of Zuckerberg and Sandberg's files (not merely targeted collections) on at least 34 separate RFPs. But their motion makes no effort to identify specific gaps in Facebook's production, and it fails to show that Mr. Zuckerberg's and Ms. Sandberg's files are likely to contain a substantial volume of unique relevant information.

a. Facebook has been more than reasonably diligent in searching for relevant, responsive documents.

Even though Facebook has already produced more than 500,000 documents in this action, Swanson Decl., ¶ 3, Plaintiffs' motion does not even attempt to identify any deficiency or gap in Facebook's production that can only be filled by making Mr. Zuckerberg and Ms. Sandberg custodians.

And there is no reason to expect that any such gap exists. Facebook has agreed to collect documents from the files of 81 document custodians who were carefully selected based on their involvement with the live issues in this case, such as Facebook's relationships with third-party app developers and so-called "business partners," data sharing, and Cambridge Analytica. Many of these custodians are high-level executives in their own right who report directly to, or otherwise work closely with, Mr. Zuckerberg and Ms. Sandberg. To name a few:

- Chris Cox, Facebook's Chief Product Officer, reports directly to Mr. Zuckerberg and was selected as a custodian in part because of his involvement in designing the Facebook Platform, which enables app development by third-parties.
- Justin Osofsky, Facebook's Chief Operations Officer of Instagram and Vice President of Global Operations, reports directly to Ms. Sandberg.
- Francisco Varela, Facebook's Vice President for Mobile Partnerships, works on third party integrations and private application programming interfaces (APIs).

- Erin Egan, Facebook's Vice President of Public Policy and Chief Privacy Officer, works on a wide range of privacy issues, including relating to data sharing.

- Mike Vernal worked at Facebook for eight years, eventually reporting directly to Mr. Zuckerberg as Vice President of Engineering. Mr. Vernal was involved in the design and implementation of changes to Facebook's infrastructure, including with respect to availability of user data to third party app developers.

- Dan Rose, at Facebook from 2006 to 2019, reported directly to Ms. Sandberg as Facebook's Vice President of Partnerships. Mr. Rose was selected as a custodian for his involvement in Facebook's relationships with integration partners.

As these examples illustrate, Facebook's long list of custodians contains a number of high-level management personnel who worked closely with Mr. Zuckerberg and Ms. Sandberg and were directly involved in the events Plaintiffs' claims are based on. It is therefore highly unlikely that adding Mr. Zuckerberg and Ms. Sandberg as custodians will lead to discovery of non-duplicative information, much less any unique relevant documents or information that would be important to resolving the issues in this case.

b. Plaintiffs do not show that Mr. Zuckerberg and Ms. Sandberg are likely to have documents that fill substantial gaps in Facebook's comprehensive document production.

Most of Plaintiffs' motion is devoted to showing that Mr. Zuckerberg and Ms. Sandberg sometimes appear on responsive documents. Plaintiffs' heavy reliance on documents Facebook has already produced from current custodians undermines any notion that Mr. Zuckerberg and Ms. Sandberg are likely to have a substantive volume of unique documents. Plaintiffs' documents do not reveal a CEO and COO with an unusually extensive level of personal involvement in the company's decision making and operations. Rather, they show Zuckerberg and Sandberg in supervisory roles, providing high-level guidance and final approval on a small number of discrete issues, while trusting the details of execution to other personnel—personnel whose inclusion as custodians is more than enough to ensure that sufficient relevant documents will be produced in discovery.

*17 For example, Plaintiffs quote Monika

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Bickert—Facebook’s former Lead Security Counsel and Head of Global Policy Management now Vice President of Content Policy and a designated custodian in this case—explaining that Facebook employees “will absolutely loop in” Mr. Zuckerberg and Ms. Sandberg on important issues, by, for instance, “send[ing] an email to Mark and Sheryl so that they know what’s going on.” Weaver Decl., Ex. 6. Ms. Bickert’s remarks do not show that Mr. Zuckerberg and Ms. Sandberg are likely to have unique information. To the contrary, they indicate that Mr. Zuckerberg and Ms. Sandberg become involved when personnel *who are already custodians* provide updates on important issues or affirmatively solicit and receive their input.

Plaintiffs also focus on the claim of Sandy Parakilas—another designated custodian—that Mr. Zuckerberg had to approve “ ‘any decision to ban an app’ for violating Facebook’s policies related to user information,” such as [Redacted] Mot. at 5, citing Weaver Decl., Exs. 7-8. But Mr. Zuckerberg’s final signoff for such actions hardly demonstrates that he has unique documents or information reflecting Facebook’s enforcement of its policies governing relationships with third party apps. Indeed, the email [Redacted]—all of whom are designated custodians. Weaver Decl., Ex. 8; *see also id.*, Ex. 9 [Redacted].

Plaintiffs point to communications showing Mr. Zuckerberg’s involvement in Facebook’s efforts to [Redacted]. Weaver Decl., Exs. 10-12. But these documents all show Mr. Zuckerberg working as a member of teams that included multiple designated custodians, such as Mike Vernal, Justin Osofsky, Dan Rose, Sam Lessin, Javier Oliván, Chris Cox, and Vladimir Fedorov. Far from suggesting the existence of unique, relevant information that only Mr. Zuckerberg has access to, these documents establish that relevant information, even high level strategic planning, was widely distributed to key personnel within Facebook (many of whom are already custodians) for them to work out the details.

Plaintiffs claim Ms. Sandberg’s participation in an email chain [Redacted] Mot. at 9 (citing Weaver Decl., Ex. 22). But Ms. Sandberg’s *influence* at Facebook is not at issue here. The issue is whether Plaintiffs have shown that Ms. Sandberg should be made a document custodian because she likely has a significant quantity of unique, relevant documents likely to be of importance to Plaintiffs’ claims. The documents Plaintiffs cite here suggest she does not. Instead, they again show that Ms. Sandberg wields her influence through collaboration with teams of management personnel, many of whom, such as Dan Rose, Sam Lessin, and Justin Osofsky, are already

custodians. *See* Weaver Decl., Ex. 22.

Plaintiffs argue that Ms. Sandberg’s files are needed to [Redacted] Mot. at 10 (quoting Weaver Decl., Ex. 25). This argument reflects Plaintiffs’ general strategy of trying to shamelessly stuff every third-party relationship imaginable into the so-called “business partner” allegations that Judge Chhabria allowed to move forward. Having found no gaps in Facebook’s productions that collections from Ms. Sandberg could possibly fill, Plaintiffs are attempting to manufacture a gap by arguing that Ms. Sandberg may have documents relating to allegations that Judge Chhabria expressly said would not move forward.

One of the four categories of allegations Judge Chhabria allowed to move forward concerns Facebook’s alleged unauthorized sharing of user data with certain “business partners.” Dkt. 298 at 8. This category does not encompass every interaction between Facebook and another business involving some transfer of data; there is no way to read Plaintiffs’ “business partner” allegations to be about anything other than what Plaintiffs described as entities with whom Facebook partnered to “develop and integrate Facebook’s User Platform on multiple devices and operating systems” through the use of “private APIs.” *See* SACC ¶¶ 430-440. In allowing this category of allegations to move forward, Judge Chhabria repeated that it concerned partnerships designed to “outsource[] to business partners ‘the time, labor, and money required to build Facebook’s Platform on different devices and operating systems.’ ” Dkt. 298 at 8 (quoting Dkt. 491 at ¶ 433).

*18 Plaintiffs’ Exhibit 25, refers to something completely different—[Redacted]. Swanson Decl., Ex. 5 (Dep. of A. Lee), 194:13-18; *see also Integritymessageboards.com v. Facebook, Inc.*, No. 18-cv-05286-PJH, 2021 WL 3771785 at *2-3 (describing “Partner Categories” as part of Facebook’s “Ads Manager website interface.”) As Facebook’s 30(b)(6) deponent testified, [Redacted], and Exhibit 25 does not show otherwise. Swanson Decl., Ex. 5 at 200:4-16. In fact, Plaintiffs’ complaint expressly distinguishes “data brokers” from “business partners,” describing “data brokers” as parties with which Facebook worked to collect data about users for “psychographic marketing” and “targeted advertising.” Compare Dkt. 491 at ¶ 433, with *id.* at ¶¶ 16, 263–69, 718, 800. Consistent with those allegations, [Redacted], and Judge Chhabria made clear that Plaintiffs’ targeted advertising and “psychographic marketing” allegations would not move forward. *See* Dkt. 298 at 6. The parties are separately litigating Plaintiffs’ overbroad view of the “business partner” theory; if the Special Master is inclined to find

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the portions of Exhibit 25 that Plaintiffs cite relevant, Facebook respectfully requests the Special Master to refrain from doing so without the benefit of Facebook's full briefing on this issue, which it will submit on October 13. But the Special Master need not reach this issue in connection with the current dispute. Even if the details about targeted advertising in Exhibit 25 were relevant to data sharing—and again they are not—nothing about the document suggests that Ms. Sandberg has unique information about targeted advertising.

Plaintiffs' argument that Ms. Sandberg should be made a document custodian because media reports claim she leads Facebook's "monetization of data" fails for similar reasons. Mot. at 7-8. Facebook's general business model of selling the opportunity to show advertisements to Facebook users is not at issue in this action. *See* Dkt. 298 at 6. Plaintiffs do not explain how "monetization" in general is relevant, much less that Ms. Sandberg's files on "monetization" would be relevant *and* not duplicative of documents held by, for example, designated custodians Deborah Liu, who worked as Director of Product Management for Platform Monetization, and Chemath Palihapitiya, a former Vice President for Platform Monetization.

Plaintiffs claim that Exhibit 20 to the Weaver Declaration (virtually identical to Exhibit 12) shows that Ms. Sandberg has unique information about "whitelisting." Mot. at 8, but that document simply shows Ms. Sandberg [Redacted]. So here again, Exhibit 20 does not merely fail to indicate that there is a gap in Facebook's existing production—it shows the opposite.

Plaintiffs further contend that Ms. Sandberg will have unique information about whitelisting because she [Redacted] Mot. at 8 (citing Weaver Decl., Ex. 21). In fact, Ms. Sandberg [Redacted]

Plaintiffs' exhibits showing Mr. Zuckerberg and Ms. Sandberg's role in Facebook's response to the Cambridge Analytica events also do not meet their burden to prove that there are gaps in Facebook's productions that would be filled by adding Mr. Zuckerberg and Ms. Sandberg as custodians. Plaintiffs' litigation choices have reduced the Cambridge Analytica event to a mere sliver of this case. And the documents Plaintiffs cite merely show Facebook's leaders providing high level guidance to large teams and show that discovery from the existing custodians is sufficient. Mr. Zuckerberg and Ms. Sandberg's role as company spokespersons do not give rise to a presumption that either is likely to be the sole source of unique relevant documents on the Cambridge Analytica events.

Plaintiffs also note that Mr. Zuckerberg announced the launch of an investigation into app developers' use of the platform (the ADI), but Mr. Zuckerberg was not personally involved in conducting ADI, and, as Plaintiffs acknowledge, the Court has already ordered that certain ADI materials should be produced separately. That order obviates any need to add Mr. Zuckerberg as a custodian on ADI issues. Mot. at 6, 9.

Plaintiffs contend that Ms. Sandberg has unique information because shortly after the Cambridge Analytica events, [Redacted] Mot. at 9-10 (citing Weaver Decl., Ex. 24). This argument is a red herring. There has been no [Redacted], and the ADI materials Judge Corley ordered Facebook to produce will show no data misuse akin to the Cambridge Analytica events. Plaintiffs have made no showing that documents [Redacted] will be found among Ms. Sandberg's custodial files. Mot. at 10. In any event, Ms. Sandberg was not involved in ADI, so there is no reason to believe relevant documents would be uniquely located in her files. Plaintiffs cannot support their speculation that, contrary to her typical approach to management, Ms. Sandberg [Redacted].

***19** Plaintiffs cite documents related to Mr. Zuckerberg and Ms. Sandberg's role regarding Facebook's position on privacy issues in an attempt to argue that their files will reveal whether Facebook's internal policies diverged from their public messaging. *See* Weaver Decl., Exs. 17, 27-29. But this case is not about privacy writ large. It is about specific, long-defunct data-sharing practices, and the documents Plaintiffs cite contain nothing to suggest that Mr. Zuckerberg and Ms. Sandberg are likely to have unique materials about those practices. To the contrary, the documents cited by Plaintiffs show that, while Mr. Zuckerberg and Ms. Sandberg may approve a general course developed and proposed by others, they depend on others—including many of the custodians in this case—to put Facebook's internal policies into practice. The information held by those custodians is more than sufficient to illuminate the consistency between Facebook's external representations and internal practices, even if such consistency were relevant to Plaintiffs' claims (which it is not).

Plaintiffs fail to show that Mr. Zuckerberg's and Ms. Sandberg's files constitute the only, or even the best, sources of evidence of the Facebook conduct and policies that are at issue in this case.

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B. Following the Court-ordered document production process will not delay completion of discovery.

Plaintiffs put the cart before the horse when they urge the Special Master to scrap Judge Corley's Order on the timing and scope of document collection from custodians beyond the current list of 81 because they are afraid Facebook will deliberately run out the clock on discovery, leaving no time to collect documents from Mr. Zuckerberg and Ms. Sandberg. For the reasons explained above, there is no need to collect and produce documents from Mr. Zuckerberg and Ms. Sandberg, so Plaintiffs' concern about the timing of that collection and production is misplaced.

But Plaintiffs' concern would be misplaced in any event. The substantial-completion deadline is January 31, 2022, and discovery does not close until *June* 2022. Dkt. 706. So there would be several months to conduct targeted collections and make small productions from Mr. Zuckerberg's and Ms. Sandberg's files if Plaintiffs were able to make a compelling and particularized showing that doing so is necessary to fill gaps in Facebook's production. Nor is Facebook's production proceeding at a "glacial" pace, as Plaintiffs contend. Facebook has produced more than 100,000 documents in the last three months. Swanson Decl., ¶ 3. More to the point, the type of highly targeted gap-filling production Judge Corley's Order contemplates could typically be completed without significant delay.

Finally, while Plaintiffs' motion does not demand the depositions of Mr. Zuckerberg and Ms. Sandberg,¹ there is likewise no risk that a targeted collection of documents from Mr. Zuckerberg's and Ms. Sandberg's files after January 2022 would delay depositions. Collection from their files need not occur before the depositions of other custodians commence; another custodian's interactions with Zuckerberg or Sandberg would be captured by the collection and production from that custodian's files. And if Zuckerberg and Sandberg's depositions are required over Facebook's objections, they will be the last of Facebook's witnesses to be deposed, since there is no

Dated: October 4, 2021

question that they are apex personnel. See *Icon-IP Pty Ltd. v. Specialized Bicycle Components, Inc.*, No. 12CV03844JST (MEJ), 2014 WL 5387936, at *1 (N.D. Cal. Oct. 21, 2014) (explaining that the party seeking apex deposition bears the burden to show, *inter alia*, that the deponent has unique first-hand knowledge).

¹ It is Facebook's position that depositions of Mr. Zuckerberg or Ms. Sandberg are not warranted in this case.

There is thus no reason to depart from Judge Corley's Order that Mr. Zuckerberg and Ms. Sandberg shall not be made custodians, certainly not before Facebook's document production is substantially complete, and certainly not for anything more than "very targeted" collections. Swanson Decl., Ex. 3 at 48:8-11; Dkt 588. If the Special Master nevertheless determines that Mr. Zuckerberg and Ms. Sandberg may possess unique relevant documents, Judge Corley's determination that searches of their files would be "very targeted," should still be respected. The parties should then meet and confer regarding the specific and narrow subject matter of any such search based on any true gaps identified by Plaintiffs.

IV. CONCLUSION

*20 Having already failed three times to convince the Court to designate Mr. Zuckerberg and Ms. Sandberg as document custodians, Plaintiffs seek a fourth bite at the apple. But they have failed to make the required showing that Mr. Zuckerberg and Ms. Sandberg are likely to possess documents that are both relevant and unique. Facebook respectfully asks the Special Master to deny Plaintiffs' motion.

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By: */s/ Orin Snyder*

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UNITED STATES DISTRICT COURT

MDL No. 2843

Case No. 18-md-02843-VC-JSC

NORTHERN DISTRICT OF CALIFORNIA

**REPLY IN SUPPORT OF PLAINTIFFS' MOTION
TO COMPEL MARK ZUCKERBERG AND
SHERYL SANDBERG AS DOCUMENT
CUSTODIANS**

SAN FRANCISCO DIVISION

Judge: Hon. Vince Chhabra

Hon. Jacqueline Scott Corley

IN RE: FACEBOOK, INC. CONSUMER PRIVACY
USER PROFILE LITIGATION

Special Master Daniel Garrie

This document relates to:

Courtroom: 4, 17th Floor

ALL ACTIONS

JAMS Ref. No.: 1200058674

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

Facebook asserts that “[n]othing has changed” since December 11, 2020, when Judge Corley deferred Plaintiffs’ request to add Mr. Zuckerberg and Ms. Sandberg as custodians, saying it was “premature at this time.” Opp. at 4; Dkt. No. 588. Not so. Ten months have passed and Judge Chhabria has imposed a substantial completion deadline that is less than four months away. According to Facebook, initial custodial production is almost complete. And Plaintiffs have adduced substantial evidence demonstrating that Zuckerberg and Sandberg should be added as custodians. Adding them is certainly not premature now.

*21 Notably, Facebook does not contend that Zuckerberg’s or Sandberg’s custodial files are irrelevant. And Facebook only gestures at Rule 26(b)(1)’s requirement that discovery be proportional to the needs of the case, asserting that it somehow gives rise to a “good cause” requirement to add executive custodians. Opp. at 5. That is not a Rule 26(b)(1) requirement and it contradicts Judge Chhabria’s admonishment that this is not the type of case where Facebook can successfully argue that, though an “effort might end up uncovering some relevant information ... it is just too expensive or difficult, and so we are not going to make Facebook do it.” Ex. 30 at 29.¹

¹ All exhibit references are to the Declaration of Lesley E. Weaver in Support of Plaintiffs’ Motion to Compel Mark Zuckerberg and Sheryl Sandberg as Document Custodians or the Declaration of Lesley E. Weaver in Support of Reply Regarding Plaintiffs’ Motion to Compel Mark Zuckerberg and Sheryl Sandberg as Document Custodians.

Rather, Facebook insists Plaintiffs must meet a contrived standard that none of Zuckerberg’s and Sandberg’s custodial documents will be collected and produced through other custodians. But even if this were the proper

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standard, given their unique roles and direct involvement in formulating and implementing the privacy and data sharing practices at the heart of this litigation, and Facebook’s effort to investigate and manage the Cambridge Analytica crisis, it cannot credibly be denied that Zuckerberg and Sandberg do have unique custodial documents.

Further, Plaintiffs have shown far “ ‘more than mere speculation’ ” that Zuckerberg’s and Sandberg’s custodial files will contain information “ ‘that differs from discovery they have already obtained from the other[]’ ” custodians. Opp. at 5 (citations omitted). Plaintiffs’ allegations draw extensively from statements made by Zuckerberg and Sandberg themselves, as well as from evidence showing that Facebook employees informed Zuckerberg and Sandberg about risks regarding third party access to users’ information—risks they decided were appropriate to bear in pursuit of profit. And Plaintiffs’ opening brief identifies documents Zuckerberg or Sandberg sent or received that indicate their intimate involvement in discussions and decisions about the core issue in this case—access to and misuse of users’ information—and, thus, provide support that other relevant documents exist on these topics in Zuckerberg’s and Sandberg’s files. This showing is more than sufficient to justify Zuckerberg’s and Sandberg’s addition as custodians.

II. FACEBOOK MISREPRESENTS THE RELEVANT HISTORY AND RECORD

Contrary to Facebook’s implication, Judge Corley has not ever substantively denied Plaintiffs’ request to add Zuckerberg and Sandberg as custodians. Rather, she merely delayed ruling on the issue, twice instructing Plaintiffs to wait and once calling the request “premature at this time.” Dkt. No. 588 at ¶ E. Notably, Judge Corley recently relied on Zuckerberg’s public statements about ADI in ordering production of those documents. Dkt. No. 742. Zuckerberg’s statements regarding privacy and Facebook’s failure to prevent data misuse by app developers are core to Plaintiffs’ case, and Plaintiffs should be allowed to access discovery related to these statements.

Facebook also substantially overstates its production. While literally true that Facebook has produced more than 500,000 documents (515,092 to be exact), approximately 252,000 of the documents comprise information about the activity of current and former named plaintiffs on the platform that was already directly available to plaintiffs;

approximately 113,000 lack meaningful content, including .bmp or embedded images spun off from other documents and “document[s] that cannot be converted”; and approximately 74,000 comprise documents previously produced to governmental investigators. Relatedly, Facebook states that it has produced more than 100,000 documents in the last three months. Opp. at 15. The exact number is 120,258—but approximately 96,000 lack any meaningful content for the same reasons identified above (e.g. .bmp or embedded images). In total, Facebook’s custodial production resulting from the application of search strings total *only 166,000 documents with any substantive content*.

*22 It has taken Facebook almost a year and a half to produce these documents. After the 81 initial custodians were finalized on May 15, 2020, Facebook insisted on negotiating specific search strings to apply to each custodian. This process significantly delayed production, causing a years-long negotiation over the search strings to apply to the 81 custodians that was completed on June 7, 2021. Yet, Facebook still has not completed production from their files.

Past being prologue, and contrary to Facebook’s suggestion, it is unlikely Facebook would be able to quickly complete production from Zuckerberg’s and Sandberg’s custodial files. Thus, the suggestion that Zuckerberg and Sandberg be further deferred as custodians is impractical, as it is highly unlikely that Facebook would be able to produce, and Plaintiffs would have the opportunity to take further discovery based on information generated from this production, within Judge Chhabria’s discovery deadlines.

III. ARGUMENT

Facebook should be compelled to add Zuckerberg and Sandberg as document custodians because of their intimate involvement in the issues and exchanges at the heart of Plaintiffs’ claims. Courts routinely order the addition of custodians who, like here, are “involved in discussions and decisions regarding” the facts at issue. *In re EpiPen (Epinephrine Injection, USP) Mktg., Sales Practices and Antitrust Litig.*, No. 17-md-2785-DDC-TJJ, 2018 WL 1440923, at *3-4 (D. Kan. Mar. 15, 2018) (adding former CEOs as document custodians); *see also Shenwick v. Twitter*, No. 16-CV-05314-JST (SK), 2018 WL 833085, at *1 (N.D. Cal. Feb 7, 2018) (granting request to add Jack Dorsey given his involvement in the allegations); *MariCal, Inc. v. Cooke Aquaculture, Inc.*, No. 1:14-cv-00366-JDL, 2016 WL 9459260, at *2 (D.

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Me. Aug. 9, 2016) (granting request to add custodian who were likely “involved in discussions regarding” the patents at issue).

Styleform IT v. Facebook, Inc. et al.—a case alleging that Facebook and Zuckerberg duped app developers to build apps that relied on users’ and friends’ data from Facebook’s platform but then limited access to that data to only whitelisted apps—serves as a prescient example. There, the court recently granted plaintiff’s motion to compel Zuckerberg, Sandberg, and other executives as document custodians, finding they were likely to have unique and non-cumulative information relevant to plaintiff’s allegations regarding Facebook’s misrepresentations about API access. Order re Three Discovery Motions, No. CGC-18-571075 (S.F. Super. Ct. Sept. 14, 2021), Ex. 32 at 8.

Even more so than in *Styleform*, Zuckerberg and Sandberg are involved in the matters at issue in this litigation. Zuckerberg and Sandberg have made no secret of the critical roles they played in the practices at the heart of this case. They are both appropriate and necessary custodians.

A. Zuckerberg’s and Sandberg’s Knowledge and Statements Are At the Heart of Plaintiffs’ Allegations

Facebook asserts that Zuckerberg’s and Sandberg’s relevant involvement was limited to “high-level guidance and final approvals,” contending they weren’t really involved in decisions at the heart of this case. Opp. at 2. That assertion is contradicted by Zuckerberg’s own public statements and ignores Plaintiffs’ allegations, which are based substantially on the specific statements and actions of Zuckerberg and Sandberg.

Zuckerberg himself promised that Facebook provided users with “‘complete control over who they share with at all times’ ” by “‘giving you tools to control who can see your information and then making sure only those people you intend can see it.’ ” SACC at ¶ 18 (citation omitted). And Zuckerberg himself said it was “ ‘my mistake’ ” that Facebook didn’t “ ‘take a broad enough view of what our responsibility is’ ” to “ ‘preven[t] abuse and think[] through how people could use these tools to do harm’ ” in the context of “ ‘data privacy.’ ” *Id.* at ¶ 19 (citation omitted). Zuckerberg’s promise and “ ‘mistake’ ” are core to Plaintiffs’ case, among other things animating the claims for breach of contract, breach of the implied covenant of good faith and fair dealing, privacy, and

negligence.

*23 And Sandberg led Facebook’s effort to monetize users’ information, including that which was shared without their knowledge or consent. She not only echoed Zuckerberg’s call for full reciprocity as a means to generate revenue (*Id.* at ¶ 657(f)), but is also widely credited as the driver of Facebook’s revenues. *See, e.g.*, Leslie Bradshaw, *The Sheryl Sandberg Effect: Rise of Female COOs*, NPR (Aug. 9, 2013) (“Zuck may have founded Facebook, but Sheryl Sandberg monetized it.”).² The monetization of users’ information that they did not consent to be shared with or made available to third parties is the basis for Plaintiffs’ contract, breach of the implied covenant of good faith and fair dealing, privacy, and unjust enrichment claims.

² Available at <https://www.npr.org/sections/alltechconsidered/2013/08/06/209483329/the-sheryl-sandberg-effect-rise-of-female-coos>.

B. The Evidence Shows Zuckerberg’s and Sandberg’s Detailed and Intimate Knowledge of Friend Sharing, Whitelisting, and Business Partners

Plaintiffs’ Motion demonstrates that Zuckerberg and Sandberg shaped Facebook’s platform around friend sharing. For instance, [Redacted] Ex. 10; *see also* Ex. 12 [Redacted]. Likewise, Sandberg [Redacted]. *See, e.g. Id.* at FB-CA-MDL-01681584 [Redacted]. Zuckerberg’s and Sandberg’s custodial files will assuredly contain additional relevant information regarding friend sharing on Facebook.

Facebook argues that Plaintiffs have not identified a gap in the production because these documents only show that Zuckerberg and Sandberg provided “high-level guidance” distributed to existing custodians, among others. Opp. at 9. To state the obvious, as Zuckerberg and Sandberg are not custodians, Plaintiffs are largely only able to view their contributions in the context of information shared with other custodians. While Facebook has produced some of Zuckerberg’s and Sandberg’s communications with existing custodians, Facebook has not provided other documents reflecting their thoughts. Indeed, despite evidence that both Zuckerberg and Sandberg communicated frequently by email and instant messages, Facebook has produced only a handful of documents reflecting their communications solely to one another or between them and the board members.

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Plaintiffs' Motion also demonstrates Zuckerberg's and Sandberg's [Redacted]. *E.g.* Ex. 21 [Redacted]. And though Sandberg [Redacted] (Ex. 25), Facebook argues this document shouldn't be considered because it relates to [Redacted]. Opp. at 11. But Facebook misrepresents the document and its relevance to Plaintiffs' business partner claims.

First, the document establishes Facebook's [Redacted]. Opp. at 11 [Redacted]. This document reveals that Facebook, [Redacted]. The document states: [Redacted] *Id.* at Slide 5. This [Redacted] fits squarely into the Court's definition of business partners. Order re Business Partners, Dkt. No 608 at 2 (defining business partner in the context of Facebook interrogatory responses to include "all companies with which Facebook agreed to exchange information about users' activities with each other.").

Second, the [Redacted]. The presentation states that [Redacted]. Ex. 25 at Slide 6. Facebook argues it "never sold its users' [PII] to 'data brokers'" (Opp. at 11), but its own 30(b)(6) witness testified that [Redacted]. Swanson Decl., Ex. 5 at 200:21-25. Regardless, information in Sandberg's possession regarding [Redacted] is relevant and should be produced.

Third, this [Redacted]. For example, Slide 8 discusses [Redacted] No matter how the Special Master resolves the pending dispute regarding the definition of business partners, the presentation clearly concerns other aspects of the case defined by Judge Chhabria.

C. The Evidence Shows Zuckerberg's and Sandberg's Detailed and Intimate Knowledge of Third-Party Misuse of User Information

*24 The evidence also shows Zuckerberg and Sandberg themselves initiated and shaped Facebook's response to the Cambridge Analytica scandal, including ADI, which will help define the true scope of Facebook's failure to monitor third party access to and use of friend information.

For example, the day of her first public interview after the Cambridge Analytica scandal broke, Sandberg [Redacted] Ex. 24 at FB-CA-MDL-01184406. While Facebook baldly asserts that this document is a "red herring" because Sandberg was not involved in ADI (Opp. at 13), newly produced evidence shows otherwise. A [Redacted] Ex. 33 at FB-CA-MDL-01950694; *see* Ex. 34 at

FB-CA-MDL-01950669 [Redacted] *See* Ex. 14. These messages do not reflect Sandberg's "high-level guidance." Opp. at 2. Rather, they reflect [Redacted].

Likewise, the evidence demonstrates Zuckerberg's intimate involvement in Facebook's enforcement against third parties, including deciding when, how, and against whom Facebook should enforce. In the wake of the Cambridge Analytica scandal, Zuckerberg himself announced that he was committed to uncovering the scope of the problem stating: "I've been working to understand exactly what happened and how to make sure this doesn't happen again." Ex. 14. Facebook asserts that Zuckerberg's "final signoff" on enforcement actions does not show he has unique information. Opp. at 10. But the evidence shows Zuckerberg [Redacted] For instance, after [Redacted] Ex. 9 at FB-CA-MDL-00172724; *see* also Ex. 7 ("[A]ny decision to ban an app" for violating Facebook's policies related to user information "required the personal approval of the chief executive, Mark Zuckerberg[.]"). Zuckerberg didn't merely grant final signoff; he was fully briefed on the facts and evaluated them before making decisions.

Documents also show that Zuckerberg "took on the role of a wartime leader" in response to the 2018 Cambridge Analytica scandal, locking down Facebook's external communications until he had a grasp of the situation. Ex. 16. Wartime leaders are not executives who merely sign off on decisions made by others; they are (as Zuckerberg was) the decision makers themselves. And another recently produced document [Redacted] Ex. 35 at FB-CA-MDL-01950915. Zuckerberg's custodial files will shed considerable new light, unavailable from other sources, on Facebook's decision-making regarding enforcement with respect to third parties' access to and misuse of user information, which are critical issues in this case. Moreover, what Zuckerberg knew about Facebook's failure to protect and keep secure user content and information, and when he learned of Facebook's failures are directly relevant to the relief Plaintiffs seek in this case.

D. Facebook's Authority is Inapt

Because the evidence demonstrates Zuckerberg's and Sandberg's intimate involvement in issues and exchanges at the heart of the allegations, the cases Facebook relies on do not support shielding Zuckerberg's and Sandberg's files from discovery.

For one, Plaintiffs aren't asking Facebook "to examine

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every last document in their files.” Opp. at 5 (citing *Lauris v. Novartis AG*, No. 116CV00393LJOSAB, 2016 WL 7178602, at *4 (E.D. Cal. Dec. 8, 2016)). Rather, Plaintiffs simply seek relevant documents in the files of two key custodians in a company that has more than 50,000 full-time employees. Plaintiffs’ purpose is not “to annoy, embarrass, or oppress” Zuckerberg and Sandberg. Opp. at 6 (citing *Hickman v. Taylor*, 329 U.S. 495, 507-08 (1947)). And Facebook’s own authority recognizes that a request to add custodians “is not the type of discovery which would create the risk of abuse or harassment.” *Lauris v. Novartis AG*, at *3.

*25 Rather, Plaintiffs’ purpose is to gain access to evidence relevant to Plaintiffs’ claims that cannot be obtained from other sources. Unlike the cases to which Facebook cites, Plaintiffs *have* identified why they “expect to discover information” from Zuckerberg and Sandberg “that differs from discovery they have already obtained from the others,” *Handloser v. HCL Am., Inc.*, No. 19-cv-01242-LHK (VKD), 2020 WL 7405686, at *2 (N.D. Cal. Dec. 17, 2020), and *have* “satisfied [their] burden to show that these high level executives have unique or personal knowledge of the subject matter that warrants their information.” *Lutzeier v. Citigroup Inc.*, No. 4:14-cv-00183-RLW, 2015 WL 430196, at *6-7 (E.D. Mo. Feb. 2, 2015) (citation omitted).

E. A Targeted Search of Zuckerberg’s and Sandberg’s Files Is Appropriate

Dated: October 12, 2021

KELLER ROHRBACK L.L.P.

By: /s/ Derek W. Loeser

Derek W. Loeser

Derek W. Loeser (admitted *pro hac vice*)

As previously stated, Facebook’s concern that Plaintiffs are requesting the wholesale production of Zuckerberg’s and Sandberg’s custodial files distorts Plaintiffs’ request. In accordance with Special Master Order No. 1, Plaintiffs identified several RFPs that this dispute concerns. Together with either the Discovery Mediators or Special Master Garrie, the parties can craft an appropriate search methodology for Zuckerberg’s and Sandberg’s custodial files. The parties can discuss, for example, the application of search terms and/or the use of TAR, as well as any other protocols suggested by the Discovery Mediators or decided by the Special Master. See *Williams v. Apple, Inc.*, No. 19-cv-04700-LHK (VKD), 2020 WL 5107639, at *2 (N.D. Cal. Aug. 31, 2020) (“[Defendant’s] burden can be substantially mitigated by application of appropriately narrow search terms and de-duplication of ESI across custodians.”).

IV. CONCLUSION

Plaintiffs ask the Special Master to compel Facebook to designate Zuckerberg and Sandberg as custodians because their knowledge, statements, and actions run to the very heart of this case. Facebook should be required to collect Zuckerberg’s and Sandberg’s custodial files, with the manner of review and production of their files subject to the parties’ agreement or the Special Master’s direction.

Respectfully submitted,

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By: /s/ Lesley E. Weaver

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declare that on October 22, 2021, I served the attached
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I declare under penalty of perjury the foregoing to be true

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FlowRider Surf, Ltd. v. Pacific Surf Designs, Inc., Not Reported in Fed. Supp. (2016)

 KeyCite Overruling Risk - Negative Treatment
Overruling Risk [SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC](#), U.S., March 21, 2017
2016 WL 6522807

Only the Westlaw citation is currently available.
United States District Court, S.D. California.

FLOWRIDER SURF, LTD., et al.,
Plaintiffs,
v.
PACIFIC SURF DESIGNS, INC.,
Defendant.
and Related Counterclaims.

Case No.: 15cv1879-BEN (BLM)
|
Signed 11/03/2016

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**ORDER GRANTING IN PART AND DENYING IN
PART DEFENDANT'S MOTION TO COMPEL
PLAINTIFFS' DISCOVERY RESPONSES**

[ECF No. 76].

Hon. [Barbara L. Major](#), United States Magistrate Judge

*1 Currently before the Court is Defendant's September 9, 2016 "Motion to Compel Discovery" [ECF No. 76-1 ("Mot.")], Plaintiffs' September 16, 2016 opposition to

the motion [ECF No. 87 ("Oppo.")], and Defendant's September 23, 2016 reply [ECF No. 91 ("Reply")]. Having considered the briefing submitted by the parties and having reviewed all of the supporting exhibits, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant's motion for the reasons set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

On August 24, 2015, Plaintiffs FlowRider Surf Ltd. ("FlowRider") and Surf Waves, Ltd. ("Surf Waves") filed this suit against Defendant Pacific Surf Designs ("PSD") for patent infringement. ECF No. 1. FlowRider is the exclusive global licensee of [U.S. Patent No. 6,491,589](#) (the "'589 Patent") entitled "Mobile Water Ride Having Sluice Slide-Over Cover," issued on December 10, 2002. *Id.* at 3. The '589 Patent is "generally directed to a simulated wave water ride attraction having one or more water covers for ensuring the safety of riders and lowering the risk of injury or interference with ride operation." *Id.* Plaintiff Surf Waves owns the [U.S. Patent No. 8,088,016](#) (the "'016 Patent"), entitled "Half-Pipe Water Ride," issued on January 3, 2012. *Id.* The '016 Patent is "generally directed to a half-pipe water ride including a substantially flat middle section, a first curved sidewall, and a second curved sidewall opposite to the first curved sidewall." *Id.*

¹ Flow Rider and Surf Waves are wholly owned subsidiaries of Whitewater West Industries, Ltd. ("Whitewater"). See ECF No. 88 at 1.

Defendant competes with Plaintiffs in the waterpark rides industry. Plaintiffs accuse Defendant of making and selling infringing waterpark rides. Specifically, Plaintiffs assert that Defendant "makes, has made, imports, uses, offers for sale and/or sells products that infringe one or more claims" of the patents-in-suit, including "ProFlow Single," "ProFlow Double," "ProFlow Triple," "ProFlow Quad," "ProFlow Mini Single," "ProFlow Mini Double," "ProFlow Quarterpipe," "ProFlow Halfpipe," "Supertube," and Defendant's unnamed refurbishment of surfing rides (the "Accused Products."). *Id.* at 4. On October 22, 2015, Defendant counter-claimed denying infringement of the '589 Patent and '016 Patent ("the Asserted Patents"), and alleging that both patents are invalid. ECF No. 13 at 8-10.

LEGAL STANDARD

The scope of discovery under the Federal Rules of Civil Procedure is defined as follows:

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Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1).

*2 District courts have broad discretion to determine relevancy for discovery purposes. See Hallett v. Morgan, 296 F.3d 732, 751 (9th Cir. 2002). District courts also have broad discretion to limit discovery to prevent its abuse. See Fed. R. Civ. P. 26(b)(2) (instructing that courts must limit discovery where the party seeking the discovery "has had ample opportunity to obtain the information by discovery in the action" or where the proposed discovery is "unreasonably cumulative or duplicative," "obtain[able] from some other source that is more convenient, less burdensome, or less expensive," or where it "is outside the scope permitted by Rule 26(b)(1)").

A party may request the production of any document within the scope of Rule 26(b). Fed. R. Civ. P. 34(a). "For each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons." Id. at 34(b)(2)(B). The responding party is responsible for all items in "the responding party's possession, custody, or control." Id. at 34(a)(1). Actual possession, custody or control is not required. Rather, "[a] party may be ordered to produce a document in the possession of a non-party entity if that party has a legal right to obtain the document or has control over the entity who is in possession of the document." Soto v. City of Concord, 162 F.R.D. 603, 619 (N.D. Cal. 1995).

An interrogatory may relate to any matter that may be inquired under Rule 26(b). Fed. R. Civ. P. 33(a)(2). "The grounds for objecting to an interrogatory must be stated with specificity," and any interrogatory not objected to must be answered fully in writing under oath. Fed. R. Civ. P. 33(b)(4).

Pursuant to Federal Rule of Civil Procedure 37, "a party may move for an order compelling disclosure or discovery." Fed. R. Civ. P. 37(a)(1). The party seeking to compel discovery has the burden of establishing that its

request satisfies the relevance requirement of Rule 26. Soto, 162 F.R.D. at 610. Thereafter, the party opposing discovery has the burden of showing that the discovery should be prohibited, and the burden of "clarifying, explaining, and supporting its objections." DIRECTV, Inc. v. Trone, 209 F.R.D. 455, 458 (C.D. Cal. 2002) (citing Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir. 1975)).

DISCUSSION

Defendant asks the Court to compel Plaintiffs' responses and document production, in response to Interrogatory No. 1 and RFP Nos. 1-3. Mot. at 2, 5-7. Defendant also seeks document production in response to its ESI requests without further culling for relevance. Id. at 2, 5, 7-9. The Court will address each category of requests below.

I. Revival Discovery Requests

Defendant seeks information and documents concerning the abandonment and expiration of Plaintiffs' Asserted Patents ("revival discovery"). Id. at 2. Defendant asserts that the revival discovery is relevant to the inequitable conduct and revival counterclaims and defenses that it seeks to add [see ECF No. 50],² and to the laches and equitable estoppel defenses asserted in its Answer and Counterclaims. Mot. at 2, 6-7; see also ECF No. 13 at 1, 7-8. Defendant alleges that Plaintiffs intentionally permitted the Asserted Patents to expire, and that the revival discovery is thus relevant to its laches defense element that "patentee does not intend to enforce its patent against the alleged infringer," and could establish that Plaintiffs' delay was "unreasonable and inexcusable," which is required to establish its equitable estoppel defense. See Mot. at 6-7 (citing A.C. Aukerman Co. v. R.L. Chaides Const. Co., 960 F.2d 1020, 1028 (Fed. Cir. 1992)). Defendant further argues that whether or not Plaintiffs intentionally allowed the Asserted Patents to expire is relevant to the "misleading conduct" showing of its defense. Id. at 7. Defendant also states that Plaintiffs refused to disclose the revival discovery on the basis of privilege, but have not produced a privilege log, thereby foreclosing Defendant's ability to challenge Plaintiffs' assertion of privilege. Id. Finally, Defendant asks the Court, in case it compels the production of the revival discovery, to also compel Plaintiffs to conduct ESI searches for the following terms: "reviv*," "abandon*," "expire*," "maintenance fee," "late fee," and "patent fee."

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Id. at 2 n.1.

² On June 22, 2016, Defendant filed a “Motion for Leave to File its First Amended Answer and Counterclaim,” which is currently pending in front of the District Judge. See ECF No. 50. Specifically, Defendant seeks to “amend its Answer and Counterclaims to add defenses and an inequitable conduct claim related to the improper revival of both [A]sserted [P]atents in this case,” and alleges that Plaintiffs “purposefully and knowingly allowed [the Asserted Patents] to expire by failing to pay the requisite maintenance fees.” Id. at 2. Defendant alleges that Plaintiffs revived the Asserted Patents, and represented that the entire period of delay in the payment of maintenance fees was unintentional. Id. at 3. Defendant argues that it “has reason to believe” that such statements were false and that, therefore, the Asserted Patents are unenforceable. Id.

*3 Plaintiffs argue in their opposition that Defendant’s discovery requests seek irrelevant and privileged documents and information. *Oppo.* at 5-6, 17-22. Plaintiffs initially claim that the revival discovery is premature and ask the Court to postpone its ruling on Defendant’s motion to compel the revival discovery until the Court’s ruling on Defendant’s pending motion to amend. Id. at 18. Plaintiffs assert that Defendant’s equitable estoppel and laches defenses are based on Plaintiffs’ dismissal of their initial infringement suits against Defendant, and not on their maintenance fee payments. Id. at 5, 18-19. Plaintiffs also contend that even if Defendant’s equitable estoppel and laches defenses could be broadly interpreted to encompass Defendant’s new allegations regarding patent revival, those defenses do not permit Defendant to investigate Plaintiffs’ and their counsel’s internal activities regarding the maintenance fee payments. Id. at 5, 19-20. In support, Plaintiffs argue that the Federal Circuit indicated that courts cannot inquire into the procedural minutiae of the PTO, including its acceptance of late maintenance fee payments. Id. at 5-6, 19-20 (citing [Aristocrat Techs. Australia PTY Ltd. v. Int’l Game Tech.](#), 543 F.3d 657, 663 (Fed. Cir. 2008) and [Network Signatures, Inc. v. State Farm Mut. Auto. Ins. Co.](#), 731 F.3d 1239, 1243-44 (Fed. Cir. 2013)). Plaintiffs further assert that equitable estoppel is assessed by looking at the prejudice to Defendant based on what Defendant knew at the time of the alleged infringing act, and claim that Plaintiffs’ intent and internal activities are therefore irrelevant. Id. at 20-21 (citing [A.C. Aukerman Co.](#), 960 F.2d at 1028). With respect to Defendant’s laches claim, Plaintiffs state that there was an eight-month delay from the time the tolling agreement expired to the time that they reinitiated suit against Defendant, and that consequently, the only relevant inquiry is whether an eight-month delay in reinitiating suit

was reasonable or excusable. Id. at 20-21. Finally, Plaintiffs assert that the revival discovery improperly seeks information protected by the attorney-client privilege and work-product doctrine. Id. at 6, 21. Plaintiffs explain that the discovery requests at issue seek not only the underlying facts regarding the patent revival, but also documents and information from Plaintiffs’ counsel regarding the investigation into the cause for the delayed maintenance fee payments, as well internal communications regarding the patent revival. Id. at 21. Plaintiffs thus ask the Court to deny Defendant’s motion to compel the revival discovery. Id. at 22.

Defendant replies that it is entitled to broad discovery under equitable estoppel, laches, or any other claim or defense. Reply at 2. Defendant acknowledges that it did not initially use revival as a basis for its equitable estoppel and laches defenses, but claims that based on the discovery conducted to date it now believes that the facts surrounding the revival of the Asserted Patents are relevant to those defenses. Id. at 3. Defendant alleges that the ’016 Patent expired after it filed its Answer and Counterclaims, that Plaintiffs produced the ’589 Patent revival application two weeks after the amended pleading deadline, and that, consequently, it could not have used the revival as a basis for its laches and equitable estoppel defenses. Id. at 3-5. Defendant reiterates its arguments that the revival discovery is relevant to its defenses. Id. at 5. Finally, Defendant argues that facts and circumstances relevant to how the Asserted Patents were abandoned, which person(s) made the realization, why maintenance fees were not paid, and when the decision to revive the patents were made, are not privileged, and that Plaintiffs’ attorney’s investigations into those facts and signing of a petition stating that the delay was unintentional do not render the underlying facts privileged. Id. at 6.

a. Applicable Law

Patent applicants have a duty to prosecute patents in the PTO with candor and good faith, including a duty to disclose information known to the applicants to be material to patentability, and patent applicant’s breach of this duty may result in a finding of inequitable conduct. See 37 C.F.R. § 1.56; [Molins PLC v. Textron, Inc.](#), 48 F.3d 1172, 1178 (Fed. Cir. 1995). “To prove inequitable conduct, the challenger must show by clear and convincing evidence that the patent applicant (1) misrepresented or omitted information material to patentability, and (2) did so with specific intent to mislead or deceive the PTO.” [Network Signatures, Inc.](#), 731 F.3d at 1242 (quoting [In re Rosuvastatin Calcium Patent Litig.](#),

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703 F.3d 511, 519 (Fed. Cir. 2012)). “Materiality and intent must be separately established.” *Id.* Materiality is established when “the PTO would not have allowed the claim but for the nondisclosure or misrepresentation.” [Network Signatures, Inc.](#), 731 F.3d at 1242 (quoting [In re Rosuvastatin Calcium Patent Litig.](#), 703 F.3d 511, 519 (Fed. Cir. 2012)). To establish intent, intent to deceive the PTO must be “the single most reasonable inference able to be drawn from the evidence.” *Id.*

Laches and equitable estoppel are cognizable under 35 U.S.C. § 282 as equitable defenses to a claim for patent infringement. [A.C. Aukerman Co.](#), 960 F.2d at 1028 (citing 35 U.S.C. § 282). The equitable defense of laches requires a showing of the following two elements: “(a) the patentee’s delay in bringing suit was unreasonable and inexcusable, and (b) the alleged infringer suffered material prejudice attributable to the delay.” *Id.* The period of delay is defined as the time from when the patentee knew or reasonably should have known of the alleged infringing acts until the date of suit. *Id.*; [Lucent Techs. Inc. v. Getaway, Inc.](#), 470 F.2d 1187, 1190 (S.D. Cal. 2007) (“[f]or laches to apply, a defendant must prove that plaintiff unreasonably delayed in filing suit from the time plaintiff knew or should have known of the infringement....”). The resulting prejudice may be evidentiary, affecting the defendant’s ability to put on a full and fair defense, or the prejudice may be economic. *Id.* (citing [A.C. Aukerman Co.](#), 960 F.2d at 1033).

*4 The equitable estoppel defense requires the showing of the following elements:

- a. The patentee, through misleading conduct, leads the alleged infringer to reasonably infer that the patentee does not intend to enforce its patent against the alleged infringer. “Conduct” may include specific statements, action, inaction, or silence where there was an obligation to speak.
- b. The alleged infringer relies on that conduct.
- c. Due to its reliance, the alleged infringer will be materially prejudiced if the patentee is allowed to proceed with its claim.

[A.C. Aukerman Co.](#), 960 F.2d at 1028. Where the alleged infringer establishes all three elements of the equitable estoppel defense, the court must consider “any other evidence and facts respecting the equities of the parties in exercising its discretion and deciding whether to allow the defense of equitable estoppel to bar suit.” *Id.* at 1043.

Acceptance of late payment of maintenance fees is authorized and implemented by statute. See 35 U.S.C. § 41(c)(1); 37 C.F.R. § 1.378(a); [Network Signatures, Inc.](#),

731 F.3d at 1242. The PTO Director

may accept the payment of any maintenance fee due on a patent after expiration of the patent if, upon petition, the delay in payment of the maintenance fee is shown to the satisfaction of the Director to have been unintentional. If the Director accepts payment of the maintenance fee upon petition, the patent shall be considered as not having expired....

37 C.F.R. § 1.378(a). The PTO provides a standard form for late payment, and “unintentional” delay is sufficient ground for acceptance of late payment. [Network Signatures, Inc.](#), 731 F.3d at 1243. “Absent proof of inequitable conduct, the examiner’s or the applicant’s absolute compliance with the internal rules of patent examination becomes irrelevant after the patent has issued.” [Aristocrat Techs. Australia PTY Ltd.](#), 543 F.3d at 663. The court reasoned that

[o]nce a patent has issued, the procedural minutia of prosecution have little relevance to the metes and bounds of the patentee’s right to exclude. If any prosecution irregularity or procedural lapse, however minor, became grist for a later assertion of invalidity, accused infringers would inundate the courts with arguments relating to every minor transgression they could comb from the file wrapper. This deluge would only detract focus from the important legal issues to be resolved—primarily, infringement and invalidity.

Id.

“The attorney-client privilege exists where: ‘(1) [] legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection be waived.’ ” [United States v. Richey](#), 632 F.3d 559, 566 (9th Cir. 2011) (quoting [United States v. Graf](#), 610 F.3d 1148, 1156 (9th Cir. 2010)). “Because it impedes full and free discovery of the truth, the attorney-client privilege is strictly construed.” [United States v. Martin](#), 278 F.3d 988, 999 (9th Cir. 2002) (quotation omitted). The privilege “protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege,” and applies “only when necessary to effectuate its limited purpose of encouraging complete disclosure by the client.” See [Fisher v. United States](#), 425 U.S. 391, 403 (1976); [Griffith v. Davis](#), 161 F.R.D. 687, 694 (C.D. Cal. 1995) (quoting [Tornay v. United States](#), 840 F.2d at 1428). The party asserting the attorney-client privilege bears the burden to establish that the privilege applies to the requested documents. [Griffith](#), 161 F.R.D. at 694 (quoting [Tornay](#), 840 F.2d at 1426). “[A]ttachments

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which do not, by their content, fall within the realm of the [attorney-client] privilege cannot become privileged by merely attaching them to a communication with the attorney.” Our Children’s Earth Found. V. Nat’l Marine Fisheries Serv., 85 F. Supp. 3d 1074, 1088 (N.D. Cal. 2015); see also Hanson v. Wells Fargo Home Mortg., Inc., 2013 WL 5674997, at *4 (W.D. Wash. Oct. 17, 2013) (“Documents attached to or included in an attorney[-]client communication are not automatically privileged, and the party asserting privilege must prove that each attachment is protected by privilege.”).

*5 “[A] party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).” Fed. R. Civ. P. 26(b)(3)(A). Nevertheless, those materials may be discovered if “(i) they are otherwise discoverable under Rule 26(b)(1); and (ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.” Id. However, even when substantial need for work product has been shown, the court must still “protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation.” Fed. R. Civ. P. 26(b)(3)(B).

b. Analysis

Defendant’s Interrogatory No. 1 requests the following:

State all facts relating to Your payment and/or failure to pay maintenance fees for the Asserted Patents including, without limitation, the dates on which all maintenance fee payments were made and the Person(s) involved in making such payments, the cause(s) of the entire delay in paying any maintenance fee, date(s) on which the failure to timely pay any maintenance fee was discovered and the Person(s) who discovered or had knowledge of such failure, the nature of any investigation into the cause of any delay in the payment of a maintenance fee and the Person(s) who conducted such investigation, the basis for any conclusion that the entire delay in paying a maintenance fee was unintentional or unavoidable, and all efforts to revive the Asserted Patents and the Person(s) involved in such efforts.

Shah Decl., Exh. A at 5. Defendant’s RFP Nos. 1-3 seek the following:

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 1:

All Documents relating to Your Petition To Revive the ’589 Patent Under 37 CFR 1.378 dated February 20, 2015 or Your Renewed Petition To Revive the ’589 Patent Under 37 CFR 1.378 dated August 11, 2015 and their preparation and submission, including any investigation into the cause of the entire delay in payment of maintenance fees for the ’589 Patent.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 2 :

All Documents relating to Your payment or failure to pay any maintenance fee for any of the Asserted Patents, including documents relating to any delay in payment, regardless of whether such delay was intentional or unintentional.

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 3 :

All Documents relating to any inquiry made by You to ascertain whether the delay in paying any maintenance fee(s) was unintentional or intentional.

Id. at 12. Plaintiffs objected, inter alia, that the discovery requests at issue sought information protected by the attorney-client privilege and/or the work product doctrine, that Defendant had not alleged inequitable conduct with respect to the Patents-in-Suit, and that circumstances regarding the expiration of and/or Plaintiffs’ revival of the ’589 Patent were not relevant to any claim or defense in this case. Id., Exh. B at 6-7, 10-12.

Plaintiffs sued Defendant for infringement of the Asserted Patents on May 1, 2014 [see FlowRider Surf., Ltd. v. Alleshouse, et al., 14cv1110-GPC (BLM); Surf Waves Ltd. v. Pacific Surf Design, Inc., et al., 14cv1108-BEN (JMA)], and dismissed the suits without prejudice on June 30, 2014, pursuant to the parties’ tolling agreement pending their settlement discussions. See id. The parties were unable to reach a settlement, the tolling agreement expired on December 31, 2014, and Plaintiffs initiated the instant action reasserting their claims against Defendant for infringement of the Asserted Patents on August 24, 2015. See Oppo. at 7; ECF No. 1.

Both Asserted Patents expired for failure to pay maintenance fees. Specifically, the ’589 Patent expired on January 2, 2015, Plaintiffs’ counsel petitioned the PTO to pay its unintentionally delayed maintenance fee payment on February 20, 2015, and the PTO granted the petition on August 24, 2015. See Declaration of Shaun Hoting (“Hoting Decl.”) at 2-3; id., Exhs. 2-3. The ’016 Patent

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expired after this suit was filed, on January 29, 2016, Plaintiffs' counsel filed a petition to pay its unintentionally delayed maintenance fee payment on February 10, 2016, and the PTO granted the petition on the same day. Hoting Decl. at 2-3; *id.*, Exh. 4.

*6 Defendant has alleged in its answer and counterclaim defenses of laches and equitable estoppel. *See* ECF No. 13 at 1, 7-8. In support of its equitable estoppel defense, Defendant alleges that “[t]hrough their affirmative statements, conduct and/or silence in the course of dismissing [the initially filed] complaints, Plaintiffs misled [Defendant] to reasonably infer that Plaintiffs did not intend to enforce the [Asserted Patents] or allege that any of [Defendant’s] actions to date have infringed those patents.” *Id.* at 7-8. In support of its laches defense, Defendant alleges that Plaintiffs knew or reasonably should have known of its alleged acts of infringement of the Asserted Patents since at least May 1, 2014, when they initially sued Defendant, and that Plaintiffs’ delay in re-filing suit was unreasonable and prejudicial because Plaintiffs gave no indication that they intended to re-file suit and Defendant continued to market and sell the allegedly infringing products in the interim. *Id.* at 7.

The Court initially notes that Plaintiffs ask the Court to defer its ruling on the instant motion to compel until the District Judge’s ruling on Defendant’s pending motion to amend. *See* Oppo. at 18. The Court **DENIES** Plaintiffs’ request and will address Defendant’s motion to compel at this time. Both parties agree that the revival discovery is relevant to Defendant’s inequitable conduct defenses and counterclaims asserted in the pending “Motion for Leave to File [Defendant’s] First Amended Answer and Counterclaims.” *See id.*; Reply at 2-3; *see also* ECF No. 50. As such, if the District Judge grants Defendant’s motion to amend, Plaintiffs will need to produce the requested revival discovery.

The remaining issue is whether the requested revival discovery is relevant to Defendant’s current laches and equitable estoppel defenses. *See* ECF No. 13. The Court finds that it is as to the ’589 Patent, but not as to the ’016 Patent. With regard to both defenses, Defendant must establish that Plaintiffs’ conduct was either “unreasonable and inexcusable” or misleading in a way that led Defendant to infer that Plaintiffs did not intend to enforce its patents against Defendant. The ’589 Patent expired on January 2, 2015, three days after the tolling agreement ended, and Plaintiffs did not petition the PTO until February 20, 2015. The requested discovery seeks to determine whether Plaintiffs intentionally allowed the patent to expire. If Plaintiffs intentionally failed to renew the patent, Defendant could use that evidence to argue

that the delay in filing this action was unreasonable and/or inexcusable. Evidence of an intentional failure to renew the patent also could be relevant to whether Plaintiffs misled Defendant regarding their intent to enforce the patent. As such, the revival discovery as to the ’589 Patent is relevant to Defendant’s current defenses and claims. On the other hand, the ’016 Patent did not expire until after Plaintiffs filed the instant case and therefore evidence relating to its expiration and renewal is not relevant to Defendant’s current defenses and claims.

Plaintiffs rely on [Network Signatures, Inc.](#), 731 F.3d at 1243, and [Aristocrat Techs. Australia PTW Ltd.](#), 543 F.3d at 663, to argue that the requested discovery is irrelevant and impermissible since the decision to accept late maintenance fee payments is given to the PTO Director and once the Director accepts the late payment and revives the patent, any rule violations are irrelevant. Oppo. at 19-20. The Court disagrees with Plaintiffs’ interpretation of the cases and finds that while they are instructive on the type and amount of evidence required to establish inequitable conduct, they do not prohibit discovery on the issues of patent expiration, late payment of maintenance fees, and revival. In fact, the [Aristocrat Techs. Australia PTW Ltd.](#) court specifically tempered its strong statement that “compliance with the internal rules of patent examination becomes irrelevant after the patent has issued” by stating that the statement was true only “absent proof of inequitable conduct.” [Aristocrat Techs. Australia PTW Ltd.](#), 543 F.3d at 663 (“[w]e wish to stress, however,...that where the procedural irregularity involves an ‘affirmative misrepresentation of a material fact, failure to disclose material information or submission of false material, coupled with an intent to deceive,’ it may rise to the level of inequitable conduct”). The court also noted the difference between “prosecution irregularities” and “prosecution laches” and opined that prosecution laches remains a viable defense. *Id.* at 663 n.4. As such, Defendant must have the opportunity to conduct discovery to determine whether there is such inequitable conduct and/or whether Plaintiffs intentionally failed to renew the ’589 Patent. The Court therefore **GRANTS** Defendant’s motion to compel responses to Interrogatory No. 1 and RFP Nos. 1-3 as to the ’589 Patent and **DENIES** Defendant’s motion as to the ’016 Patent. Plaintiffs asserted the attorney-client privilege and the work-product doctrine with respect to the revival discovery requests, but did not provide a privilege log. If Plaintiffs continue to withhold responsive documents on the basis of privilege, they must produce a privilege log to Defendant specifying which documents/communications they are withholding and the basis on which they are being withheld.

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7 Defendant also asks the Court to compel Plaintiffs to conduct ESI searches for the terms: “reviv,” “abandon*,” “expire*,” “maintenance fee,” “late fee,” and “patent fee.” Mot. at 2 n.1. Plaintiffs do not specifically address this aspect of Defendant’s motion. Oppo. The Court **DENIES** Defendant’s request as the requested search terms are overbroad, especially given the scope of this order. Rather, the Court requires Plaintiffs to produce responsive documents, including electronic documents, as directed in this order.

II. ESI Discovery Requests

Defendant seeks to compel the production of all documents that “hit” on the parties’ agreed-upon ESI search terms without further relevance review by Plaintiffs. Mot. at 2, 5, 7-9. In support, Defendant argues that each search term is narrowly-tailored to specific issues in this case and thus any resulting “hits” are presumptively relevant and responsive. Id. at 2. Defendant asserts that Plaintiffs’ culling based on relevance is not contemplated by the ESI Order, and that Plaintiffs waived any arguments that the search terms are overly broad because they agreed to those search terms. Id. at 7-8. Defendant thus expresses a “concern” that Plaintiffs’ culling for relevance would not produce the full scope of materials anticipated by Fed. R. Civ. P. 26 and the ESI protocol. See id. at 2-3, 8.

Plaintiffs argue in their opposition that Defendant’s interpretation of the parties’ ESI Order is contrary to law and the purposes of the ESI Order. Oppo. at 22-29. Plaintiffs allege that Defendant’s requests conflict with the plain language of Fed. R. Civ. P. 26(b)(1), and that the parties’ ESI Order does not require the production of irrelevant documents or documents that “hit” on a particular search term regardless of relevance. See id. Plaintiffs further contend that Defendant’s interpretation of the ESI Order as permitting discovery into irrelevant documents renders the Order in violation of the FRCP 83 and conflicts with the Federal Circuit advisory Council’s purpose in creating the ESI Order. Id. at 6-7, 24. Plaintiffs also maintain that they have not waived objections to Defendant’s search terms and assert that they have produced all documents in their possession responsive to Defendant’s requests. Id. at 7, 26-28. Finally, Plaintiffs allege that the volume of their document production is appropriate, and ask the Court to deny Defendant’s motion to compel. Id. at 28-29.

Defendant replies that each agreed-upon search term in their ESI Order is narrowly-tailored to the issues in this

case, and that any resulting hits therefore are presumptively relevant. Reply at 7-9. Defendant claims that because Plaintiffs’ production included only 1,537 pages of documents, such “limited” production is not possible “unless either Plaintiffs have been taking an overly restrictive definition of ‘relevant’ or...have not maintained any documents over the last thirty years.” Id. at 6 n.3. Defendant thus asks the Court to grant its motion to compel. Id. at 9.

Rule 26 permits “discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” Fed. R. Civ. P. 26(b)(1) (emphasis added). The parties agreed to produce “all electronically stored documents and information” in accordance with the Southern District’s Order Governing Discovery of Electronically Stored Information. See ECF No. 19 at 4. The ESI Order states that it is intended to streamline ESI production to “promote a ‘just, speedy, and inexpensive determination’ ” of the action. ESI Order ¶1. The ESI Order further provides that “[e]mail production requests will only be propounded for specific issues, rather than general discovery of a product or business.” Id. ¶ 8.

*8 Plaintiffs’ search for the term “Proslide” resulted in approximately 6,400 hits, and the search for the term “Lochtefeld” yielded approximately 38,000 hits. See Oppo. at 16, 24; Hoting Decl. at 8; id., Exh. 23. Plaintiffs claim that the above “hits” yield a substantial number of irrelevant documents and provide a supporting declaration from Mr. Myrman, a Chief Operating Officer of Plaintiff FlowRider. See ECF No. 87-8, Declaration of Marshall Myrman (“Myrman Decl.”). Mr. Myrman asserts that Mr. Lochtefeld is the named inventor of the ’589 Patent and a prolific inventor of other water-ride attraction technologies, which are unrelated to the issues in this case. Id. at 2. Mr. Myrman further declares that the history between Plaintiffs’ parent company, Whitewater, and Mr. Lochtefeld “extends more than a decade and goes well beyond issues relating to the ’589 Patent or any of the issues in this case.” Id. For example, Mr. Lochtefeld served on FlowRider’s Board of Directors from February 2014 through November 2015, and performed “operational and ministerial activities at FlowRider having nothing to do with the Asserted Patents.” Id. Mr. Myrman also asserts that Proslide Technology Inc. and Whitewater compete “across the globe for all types of projects, including bidding, designing, manufacturing, and installing countless different water attractions involving technologies not at issue in this litigation,” and they have engaged in “numerous instances of contentious confrontation,” which included multiple cease and desist letters and reexamination proceedings. Id. at 2-3.

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Mr. Myrman's declaration demonstrates that despite the parties' efforts to tailor the search terms to the issues in this case, the resulting "hits" contain many irrelevant and unresponsive documents, and the Court therefore agrees with Plaintiffs that culling for relevance is warranted. See id.; Fed. R. Civ. P. 26(b)(1). The Court finds that Plaintiffs have not waived their relevance and over breadth objections. Plaintiffs' agreement to run a search using the parties' agreed-upon terms does not constitute Plaintiffs' acquiescence to produce all resulting documents. Further, in light of the fact that Plaintiffs purchased the rights to the Asserted Patents and certain assets after the Asserted Patents had been issued and associated products had been designed [see Oppo. at 28], the Court also finds Defendant's objection based on the allegedly insufficient number of produced documents unavailing. See Mot. at 2-3; Reply at 6 n.3. The Court thus **DENIES** Defendant's motion to compel Plaintiffs to produce all documents that "hit" on the parties' ESI search terms. Plaintiffs may review the documents that "hit" on the parties' agreed-upon search terms for relevance before producing them to Defendant.

SUMMARY AND CONCLUSION

For the foregoing reasons, the Court:

(1) GRANTS IN PART and DENIES IN PART Defendant's motion compel Plaintiffs' responses and document production, in response to Interrogatory No. 1 and RFP Nos. 1-3. Plaintiffs are **ORDERED** to respond to Interrogatory No. 1 and produce responsive documents to RFP Nos. 1-3 as to the '589 Patent by **November 18, 2016**;

(2) DENIES Defendant's motion to compel Plaintiffs to produce all documents that "hit" on the parties' ESI search terms without further culling for relevance.

IT IS SO ORDERED.

Dated: 11/3/2016.

All Citations

Not Reported in Fed. Supp., 2016 WL 6522807

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HKeyCite history available

2021 WL 1238870

Only the Westlaw citation is currently available.
United States District Court, S.D. California.

David HASTINGS, Plaintiff,

v.

FORD MOTOR COMPANY, et al.,
Defendants.

Case No.: 19-cv-2217-BAS-MDD

Signed 04/02/2021

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ORDER ON PLAINTIFF'S MOTION TO COMPEL

[ECF No. 63]

Mitchell D. Dembin, United States Magistrate Judge

*1 This case involves the purchase by Plaintiff of a 2013 Ford F-350 truck in Texas. Plaintiff alleges that the vehicle contained a defective engine and that Defendants failed to repair the vehicle and refused to re-purchase the vehicle. After considerable litigation, the operative First Amended Complaint alleges a violation of the federal Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301 *et seq.*, fraud by omission, and negligent repairs (Sixth Cause of Action), Negligent Repair (Seventh Cause of Action) and Fraud by Omission (Eighth Cause of Action). (ECF No. 24). Plaintiff's claims under California's Song-Beverly Consumer Warranty Act, Cal. Civ. Code §§ 1790 *et seq.*, were dismissed without prejudice by

Plaintiff (by its terms, the Song-Beverly Act only applies to new vehicles sold to consumers in California).

Before the Court is a Motion to Compel Production regarding twelve requests for production served by Plaintiff. (ECF No. 63). Defendants responded in opposition on March 30, 2021. (ECF No. 71).

LEGAL STANDARD

The Federal Rules of Civil Procedure authorize parties to obtain discovery of "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case...." Fed. R. Civ. P. 26(b)(1). "Information within the scope of discovery need not be admissible in evidence to be discoverable." *Id.* District courts have broad discretion to limit discovery where the discovery sought is "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." Fed. R. Civ. P. 26(b)(2)(C).

A party may request the production of any document within the scope of Rule 26(b). Fed. R. Civ. P. 34(a). "For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons." Rule 34(b)(2)(B). If the responding party chooses to produce responsive information, rather than allow for inspection, the production must be completed no later than the time specified in the request or another reasonable time specified in the response. *Id.* An objection must state whether any responsive materials are being withheld based on that objection. Rule 34(b)(2)(C). An objection to part of a request must specify the part and permit inspection or production of the rest. *Id.* The responding party is responsible for all items in "the responding party's possession, custody, or control." Rule 34(a)(1). Actual possession, custody or control is not required. Rather, "[a] party may be ordered to produce a document in the possession of a non-party entity if that party has a legal right to obtain the document or has control over the entity who is in possession of the document." *Soto v. City of Concord*, 162 F.R.D. 603, 620 (N.D. Cal. 1995).

DISCUSSION

Plaintiff is seeking an order compelling Defendants to produce additional records pursuant to its requests for production ("RFP") 1, 7, 19, 21, 24, 26, 27, 61, 63, 64, 68 and 69. In support, Plaintiff argues that it is seeking information relevant to its claims, "including civil penalty

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liability under California’s [Song-Beverly Act].” (ECF No. 63-1 at 2, 15-17).¹ Plaintiff is under the impression that the remedies of the Song-Beverly Act are available to him despite the dismissal of all Song-Beverly claims. The Court disagrees.

¹ The Court will refer to pincites supplied by CM/ECF rather than original pagination throughout.

1. Discovery Relevant to Song-Beverly Act Damages

*2 The Magnuson Moss Warranty Act (“MMWA”) does not include a remedial scheme. Instead, for claims raised under the MMWA, courts look to “applicable state law” to determine damages. *See Order on Defendants’ Motion to Dismiss* (ECF No. 40 at 13). Previously, in this case, the district judge declined to address Defendants’ argument that Plaintiff is not entitled to remedies under the Song-Beverly Act. The Court ruled that because Plaintiff is entitled to remedies under the California Commercial Code, [Cal. Com. Code § 2714\(2\)](#), the Court need not address the availability of remedies under the Song-Beverly Act. ECF No. 43 at 7.

To the extent that Plaintiff is seeking discovery relevant only to damages available under the Song-Beverly Act, it behooves this Court to determine Plaintiff’s entitlement to that discovery. Plaintiff is entitled to discovery relevant to “claims and defenses” under [Rule 26](#). With the dismissal of all Song-Beverly claims, the question is whether Plaintiff’s claim under the MMWA incorporates the remedial scheme of the Song-Beverly Act. If so, Plaintiff is entitled to discovery to support his damage claim under the MMWA. If not, that is, if the MMWA does not include Song-Beverly damages in this case, Plaintiff is not entitled to Song-Beverly discovery. Recently, one of our sister courts decided that very issue adversely to Plaintiff’s position. In *Scott v. Jayco, Inc.*, 443 F. Supp. 3d 1143, 1150-51 (E.D. Cal. 2020), the court found that the relevant or applicable state law to inform the remedies available under the MMWA to a plaintiff in California who cannot assert claims under the Song-Beverly Act, but has remedies otherwise available under state law, is that other state law, and not the Song-Beverly Act.

Here, the district judge has found that Plaintiff has a remedy under the California Commercial Code, [Cal. Com. Code § 2714\(2\)](#). The remedy comports with Plaintiff’s claim under the MMWA for violation of an express warranty. Consequently, as in *Scott*, the Court finds that Plaintiff is not entitled to discovery relevant only to damages available under the Song-Beverly Act. Plaintiff argues his desire to obtain this discovery but

does not tie those desires to any specific RFPs. To the extent that Plaintiff seeks that discovery in connection with the disputed RFPs, the motion to compel is **DENIED**.

2. Custodians and Search Terms

Plaintiff addresses in detail his desire to obtain additional information about “Symptom Codes,” “Field Reports,” “Internal Service Messages,” “Warranty Information,” and “Owner Reports,” without tying those desires to specific RFPs. (ECF No. 63-1 at 2-8). Plaintiff wants Defendants to identify custodians and search databases using search terms provided by Plaintiff. To the extent Plaintiff addresses the disputed RFPs at all, it is done in the most cursory manner. (ECF No. 63-1 at 12-13). Plaintiff does not mention RFP 7 at all and addresses the other eleven disputed RFPs mostly in passing.

Nonetheless, Plaintiff suggests that he is entitled to determine the way Defendants search their records, including identifying custodians, databases and search terms. Again, this is not tied to any particular RFP so the Court is compelled to address the matter generally.

[Rule 34, Fed. R. Civ. P.](#), governs request for production of documents. It does not differentiate between information stored on paper or on an electronic medium. It requires the requesting party to request “information.” [Rule 34\(a\)\(1\)](#). The producing party must produce the requested information or object to the request. [Rule 34\(b\)\(2\)\(B\)](#). Production of electronically stored information is addressed specifically in the Rule but only regarding the form of production. [Rule 34\(b\)\(2\)\(D\)](#), (E). Nothing in [Rule 34](#) requires a requesting party to identify custodians or search terms or for a producing party to accede to demands that particular custodians’ files be searched or that particular search terms be used.

*3 This Court subscribes to the view expressed in Principle No. 6 of the Sedona Principles:

Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronically stored information.

The Sedona Principles, Third Edition, 19 SEDONA CONF. J. 1, Principle 6, 118 (2018). Moreover, the world of electronic discovery has moved well beyond search terms. While search terms have their place, they may not be suited to all productions. Technology has advanced, and software tools have developed to the point where search terms are disfavored in many cases. *See, e.g., da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 189-91

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(S.D.N.Y. 2012).

The Court will not decide whether any proposed custodians are appropriate nor on the use of the requested search terms. Instead, Plaintiff must request information, regardless of how or where it is maintained by Defendants, which Defendants must address as required by [Rule 34](#). That is discovery: A party requests information and the burden is on the producing party to locate and produce it or object legitimately to production. To the extent Plaintiff is seeking to compel Defendants to conduct discovery as directed by Plaintiff, the Court declines to issue such an order. Defendants, however, should consider that rejecting proposed custodians and search terms carries risk: If material information is not preserved or disclosed because of an unreasonable choice, there may be sanctionable consequences. *See, e.g.*, [Rule 37\(e\)](#). The parties should cooperate regarding discovery and be as transparent as possible regarding discovery.

3. Specific RFPs

Although Plaintiff did not specifically address the RFPs at issue in any substantive way, Defendants did. The Court finds it has enough information to rule on the specific RFPs subject to the general rulings made above.

RFP No. 1

Plaintiff requests Defendants produce “all documents” regarding Plaintiff’s vehicle. This RFP is overbroad on its face and unenforceable. Nonetheless, Defendants agreed to produce 24 categories of information. (ECF No. 63-6 at 4-6; ECF No. 71 at 17). This is sufficient, and no further production is required.

RFP No. 7

Plaintiff requests Defendants’ warranty and procedure manuals from 2013 onward. Defendants have agreed to produce this information pursuant to a protective order. Plaintiff did not address this RFP in his motion. The production proposed by Defendants is enough. No further production is required.

RFP No. 19

Plaintiff requests all documents relating to any field technical reports regarding suggested repair procedures for “commonly observed problems in Ford vehicles.”

Although the instructions to the RFPs define “Ford Vehicles” as “all vehicles of the same make, model and year as Plaintiff’s vehicle,” this RFP is patently overbroad, disproportional and unenforceable. This case alleges defects in a specific engine. Discovery of information about other issues in vehicles with other engines has no justification. It is not relevant to any claim or defense. No further response is required.

RFPs Nos. 21, 24, 26, 27, 61, 63 and 64

*4 These RFPs all suffer an identical flaw: They seek information from Defendants for any “Engine Defect” in “Ford Vehicles” unfettered by any time limitations. Although the definition section of the RFPs limits the term “Ford Vehicles” adequately to vehicles of the same make, model and year as Plaintiff’s vehicle, it does not save these RFPs. The term “Engine Defect” is not limited to the type of engine in Plaintiff’s vehicle. It appears to require the production of information regarding a variety of engine issues regardless of the type of engine. Consequently, it is patently overbroad, disproportional and unenforceable. The Court will not rewrite these RFPs to make them enforceable. Defendants need not respond further.

RFPs Nos. 68 and 69

These RFPs call for Defendants to produce their 10-K and 10-Q filings for the past 3 fiscal years. Plaintiff does not address these RFPs in his Motion. Defendants respond that these are public filings with the U. S. Securities and Exchange Commission. No further response is required.

CONCLUSION

Plaintiff’s Motion to Compel is **DENIED**. [Rule 37\(a\)\(5\)\(B\), Fed. R. Civ. P.](#), requires the Court to order the moving party, the attorney filing the motion, or both, to pay the opposing party its reasonable fees and expenses in opposing the motion. The Court may not order this reimbursement if the motion was substantially justified. The Court cannot say that the instant Motion to Compel was substantially justified. Accordingly, Plaintiff and his counsel are **ORDERED to SHOW CAUSE** why they should not be required to reimburse Defendants’ reasonable fees and expenses in opposing this Motion. Plaintiff must submit a brief on or before **April 16, 2021** and no longer than five pages, supporting a finding that the positions taken by Plaintiff in this motion to compel were substantially justified. Defendants may respond on or before **April 23, 2021**, limited also to five pages. No

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further reply is authorized.

All Citations

IT IS SO ORDERED.

Not Reported in Fed. Supp., 2021 WL 1238870

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Livingston v. City of Chicago, Not Reported in Fed. Supp. (2020)

H KeyCite history available

2020 WL 5253848

Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois, Eastern
Division.

Jennifer LIVINGSTON, et al., Plaintiffs,
v.
The CITY OF CHICAGO, Defendant.

No. 16 CV 10156
|
Filed 09/03/2020

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MEMORANDUM OPINION and ORDER

Young B. Kim, Magistrate Judge

*1 Before the court is Plaintiffs' motion to compel the City of Chicago (the "City") to use a particular methodology for identifying responsive ESI. For the following reasons, the motion is denied:

Background

Discovery in this 2016 case did not get underway until mid-2019 when nearly two years of settlement negotiations came to a head. (R. 89; R. 147.) While the

parties successfully resolved some issues, many issues remain in dispute. The court has since ruled on a number of discovery disputes, and the current motion picks up where the parties' most recent quarrel left off. Starting in May 2019 the parties could not agree on the method to be employed for collecting and searching the City's ESI. Plaintiffs proposed that an outside vendor first export the emails and then perform keyword searches to identify the initial universe of emails, while the City wanted to use its own Microsoft Tool to perform a simple search prior to exporting any data. Plaintiffs also wanted the City to produce all of the emails identified through keyword searches without any further review for responsiveness and for privilege. In September 2019 Plaintiffs filed a motion asking the court to adopt their protocol and the parties fully briefed the issues. (R. 209; R. 219; R. 226.)

On November 20, 2019, the court entered an order granting in part and denying in part Plaintiffs' motion. (R. 239.) As part of this order, the court required the City to retain an outside vendor to export emails dated from July 1, 2014, to September 3, 2015, and then apply an initial keyword search using Plaintiffs' search terms. (Id.) The court noted that "[d]epending on the number of hits after the initial keyword search using Plaintiffs' proposal, the parties may use more finite terms to reduce the number of hits." (Id.) The court further rejected Plaintiffs' request that once the initial universe of emails had been identified through keyword searches, the City should produce the same without any further review. (Id.)

At a status conference in April 2020, the City reported that the emails had been collected and searched, resulting in 192,000 unique emails or a total of approximately 1.3 million pages of documents. (R. 286.) The City informed the court that it intended to use technology-assisted review ("TAR") to identify relevant responsive documents to be produced from this ESI collection. (Id.) Upon hearing this, Plaintiffs expressed concern that TAR would exclude responsive documents from the review process. (Id.) In their view, the City's use of TAR to conduct its responsiveness review is inconsistent with the court's November 2019 order. Plaintiffs filed the current motion for compliance with the order or, in the alternative, for entry of their proposed TAR protocol. (R. 289.)

Analysis

In their motion for compliance, Plaintiffs seek an order directing the City to use agreed-upon search terms to

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identify responsive documents and then to perform a manual review for privilege. (R. 289, Pls.’ Mot.) According to Plaintiffs, this is the protocol authorized by the November 20, 2019 order. (Id.) Plaintiffs assert that the court should adopt their protocol for the use of TAR, which would require the City to use TAR on the entire ESI collection with an agreed-upon coding system for responsiveness. (Id.) In response, the City argues that the November 2019 order did not confine it to a particular methodology for identifying responsive or privileged ESI, and that TAR is an efficient and accurate tool for identifying both. (R. 300, Def.’s Resp.) The City also objects to Plaintiffs’ proposed TAR protocol, arguing that the federal rules governing discovery impose no obligation on the responding party to conduct its responsiveness review in a manner dictated by the requesting party. (Id.)

A. Active Learning

*2 As an initial matter, the court finds it necessary to clarify the type of TAR at issue and explain its key features. The City seeks to use Relativity’s Active Learning (“AL”), a type of TAR software that uses learning algorithms to prioritize documents for its attorneys to review manually. (R. 300, Def.’s Resp. at 5-6.) As the City describes it:

[i]n AL review, like a manual review, search parameters are used to cull down a collected data set to a review set. That review set is then put into the AL application where the algorithms use data points collected through attorney review of documents in order to reorganize the documents in the review queue in a more efficient order. With each coding decision the attorneys make, the technology continues to learn and prioritize which documents contain contextually similar content as documents which are coded as responsive. AL re-prioritizes the documents in the review queue every 20 minutes. The AL tool does not make *any coding* decisions about a document’s responsiveness, privilege, confidentiality, or issue. It merely shuffles the order of the documents being reviewed based on the coding decisions [*i.e.*, responsive or nonresponsive] made by the attorney review team. All documents marked responsive and ultimately produced are done so by human reviewers.

(Id. at 6-7 (emphasis in original) (footnote and internal citations omitted).)

According to Plaintiffs, TAR software such as Relativity’s AL allows parties to set aside and never

review large portions of an ESI collection. (R. 289, Pls.’ Mot. at 7.) There is some truth to this assertion because there comes a point when, based on the reviewers’ coding decisions, the software establishes that the remaining documents in the queue are likely to be nonresponsive. It is then incumbent upon the reviewer to conduct sampling and other quality control tests to ensure that the remaining unreviewed documents are indeed irrelevant. The reviewer may of course forge ahead with his or her review, but typically documents identified as nonresponsive are neither reviewed nor produced. In short, the reviewer has discretion to decide when no further manual review is necessary. (See generally R. 300-2, Relativity’s Assisted Review Active Learning Guide (June 8, 2020).)

The City proposes to use AL “to assist its attorneys with its responsiveness review to avoid the burden of conducting a manual attorney review” of the approximately 190,000 emails, or 1.3 million pages of documents, that hit upon Plaintiffs’ search terms. (R. 300, Def.’s Resp. at 4.) As the City describes it, it intends to review only documents that meet a particular standard of relevance as determined by AL, and to discount documents falling below that standard. (Id. at 7-8.) The City also intends to use AL’s quality control applications (such as Elusion testing), graphing results, family reconciliation, and a “cut off score,” to ensure that an attorney reviews all potentially responsive documents. (Id. at 8-9.) Significantly, the parties agree that generally TAR is a far more accurate means of producing responsive ESI than manual review or keyword searches. (R. 289, Pls.’ Mot. at 7; R. 300, Def.’s Resp. at 5.)

B. November 20, 2019 Order

Turning to the merits of the motion, Plaintiffs assert that the City’s proposed use of AL is inconsistent with the court’s November 20, 2019 order. (R. 289, Pls.’ Mot. at 5.) In particular, Plaintiffs argue that because the parties have “*always agreed* that they would identify responsive emails” through keyword searches and the City never mentioned using TAR, under the November 2019 order, the City must use agreed-upon search terms to further reduce the ESI collection and then produce all of the nonprivileged documents that hit upon the search terms—regardless of whether they are responsive. (Id. at 9-10 (emphasis in original).) The City responds that “[n]othing in the [court’s November 2019] [o]rder limits *how* the City may conduct its ESI responsiveness or privilege review or requires the City to negotiate with Plaintiffs concerning its review method.” (R. 300, Def.’s

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Resp. at 4) (emphasis in original).

*3 The court agrees with the City that the November 2019 order did not set forth the review methodology that the City must use to identify responsive ESI. The order resolved issues regarding the method to be used for collecting and identifying the initial universe of emails. While the court anticipated that the parties would need to perform multiple keyword searches in order to narrow the universe of emails, it never directed them to do so. Nor did it suggest that after the searches are performed the City would have to produce the entire batch of documents subject only to a privilege review. In fact, the court specifically rejected Plaintiffs' proposal that the City produce all of the documents that hit upon their initial search terms without further review. While the City may dump all 1.3 million pages of documents on Plaintiffs with an entry of a Rule 502(d) order, it also has the right to perform a review to produce only those documents that are responsive and relevant. In sum, the City's responsiveness review is outside the scope of the November 2019 order.

C. Review Methodology

Aside from the November 2019 order, Plaintiffs point to no binding legal authority to support their request to force the City to use refined keyword searches to identify responsive ESI. They instead make a series of claims in an apparent effort to demonstrate that TAR is not appropriate for this case. Plaintiffs claim, for example, that TAR is a culling tool rather than a method of responsiveness review, (R. 289, Pls.' Mot. at 7), but this argument has no merit given Plaintiffs' own description of the software as a tool to "predict and apply responsiveness determinations," (id. at 6).

Plaintiffs also argue that because TAR is more effective at identifying responsive documents than traditional manual review, pre-TAR culling will eliminate large amounts of potentially relevant ESI. (Id. at 7.) The problem with this argument is that it assumes that those emails removed by the keyword searches likely would have been identified using TAR at the outset instead. Indeed, the low richness of the ESI collection in this case suggests just the opposite. The City's vendor collected over nine million pages of documents, less than 15% of which hit on Plaintiffs' own search terms. (See R. 300, Def.'s Resp. at 4.) While the court does not discount the possibility that using TAR at the onset might reveal more responsive documents overall, based on the number of documents that were discarded using Plaintiffs' proposed search

terms, pre-TAR culling will achieve the best possible review in this case. In other words, it satisfies the reasonable inquiry standard and is proportional to the needs of this case under the federal rules. See generally [Fed. R. Civ. P. 26](#).

Finally, Plaintiffs express concern that the attorney reviewers will improperly train the TAR tool by making incorrect responsiveness determinations or prematurely ending the review. (Id. at 7-8.) But these concerns are present no matter which methodology is employed. In traditional manual review for example, reviewers may have different interpretations of whether a particular document is responsive. Even a single reviewer may make a different relevancy determination based on his or her knowledge about the case at the time of the determination. In short, uncertainty in determining responsiveness is not unique to TAR. In any event, AL has a variety of quality control applications that the City intends to employ with its review. (See R. 300, Def.'s Resp. at 8-9.) Those applications negate Plaintiffs' concerns.

In the absence of any compelling argument from Plaintiffs, the court agrees with the City that as the responding party it is best situated to decide how to search for and produce emails responsive to Plaintiffs' discovery requests. (R. 300, Def.'s Mem. at 13) (citing, *inter alia*, [The Sedona Principles, Third Edition, 19 SEDONA CONF. J. 1](#), Principle 6 ("Responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own [ESI].").) The City has disclosed the TAR software—Relativity's AL—it intends to use and how it intends to validate the review results, which in this case is sufficient information to make the production transparent. Plaintiffs' insistence that the City must collaborate with them to establish a review protocol and validation process has no foothold in the federal rules governing discovery. Moreover, using TAR on the entire ESI collection—when, as Plaintiffs aptly point out, the parties spent nearly a year litigating the protocol for collecting and searching the City's ESI—would be wasteful and unduly burdensome, and would further delay the resolution of this almost four-year-old case. For these reasons, the court declines to adopt Plaintiffs' alternate TAR protocol.

Conclusion

*4 For the foregoing reasons, Plaintiffs' motion to compel is denied.

Livingston v. City of Chicago, Not Reported in Fed. Supp. (2020)

Not Reported in Fed. Supp., 2020 WL 5253848

All Citations

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In re Mercedes-Benz Emissions Litigation, Not Reported in Fed. Supp. (2020)

H KeyCite history available

2020 WL 103975

Only the Westlaw citation is currently available.
United States District Court, D. New Jersey.

IN RE MERCEDES-BENZ EMISSIONS
LITIGATION.

Case No. 2:16-cv-881 (KM) (ESK)

Signed 01/08/2020

Filed 01/09/2020

ORDER & OPINION OF THE SPECIAL MASTER

DENNIS M. CAVANAUGH, U.S.D.J. (Ret.) Special Master

*1 This matter comes before the Special Master upon letter briefing submitted by Plaintiffs and Defendants (Daimler AG, Mercedes-Benz USA, LLC, and Robert Bosch LLC) related to the parties' discovery dispute involving the methodology Defendants should use to identify responsive documents and the provisions of a Search Term Protocol. After considering the submissions of the parties, based upon the following, it is the opinion of the Special Master that Defendants will not be compelled to utilize technology assisted review at this time, and that the Search Term Protocol as modified by the Special Master is adopted.

DISCUSSION

I. Methodology to Identify Responsive Documents

The parties disagree as to the methodology Defendants should use to identify responsive documents. Plaintiffs

propose that the Defendants use predictive coding or technology assisted review ("TAR"), in which human reviewers and a computer engage in an interactive process to "train" the computer how to identify responsive documents based on properties and characteristics beyond simple search terms. Plaintiffs assert that this type of computer-assisted coding process yields significantly better results than either traditional human "eyes on" review of the full data set or the use of search terms. Plaintiffs argue that if the Court declines to compel Defendants to adopt TAR, the Court should enter its proposed Search Term Protocol.

Defendants argue that there is no authority for imposing TAR on an objecting party. Defendants further argue that this case presents a number of unique issues that would make developing an appropriate and effective seed set challenging, such as language and translation issues, unique acronyms and identifiers, redacted documents, and technical documents. Defendants thus contend they should be permitted to utilize their preferred custodian-and-search term approach.

While "the case law has developed to the point that it is now black letter law that where the producing party wants to utilize TAR for document review, courts will permit it" *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125, 127 (S.D.N.Y. 2015), no court has ordered a party to engage in TAR over the objection of that party. The few courts that have considered this issue have all declined to compel predictive coding. *See, e.g., City of Rockford v. Mallinckrodt ARD Inc.*, 326 F.R.D. 489, 493, 101 Fed. R. Serv. 3d 622 (N.D. Ill. 2018) (discussing the advantages of TAR but deferring to the parties' choice to use search terms); *Hyles v. New York City*, 2016 WL 4077114, *3 (S.D.N.Y. 2016) (refusing to order a party to use TAR and stating that a party is free to decide how to search so long as its process is reasonable); *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125, 127 & n.2 (S.D. N.Y. 2015).

Despite the fact that it is widely recognized that "TAR is cheaper, more efficient and superior to keyword searching" *Hyles v. New York City*, No. 10-CIV-3119, 2016 WL 4077114, at *2 (S.D.N.Y. Aug. 1, 2016), courts also recognize that responding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for producing their own electronically stored information. *Ibid.* at *3 (citing The Sedona Principles: Second Edition, Best Practices Recommendations & Principles for Addressing Electronic Document Production, Principle 6 (available at www.TheSedonaConference.org)).

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*2 Here, Defendants object to the use of TAR, instead indicating they prefer to use the custodian-and-search term approach, which they assert is fair, efficient, and well-established. While the Special Master believes TAR would likely be a more cost effective and efficient methodology for identifying responsive documents, Defendants may evaluate and decide for themselves the appropriate technology for producing their ESI. Therefore, the Special Master will not order Defendants to utilize TAR at this time. However, Defendants are cautioned that the Special Master will not look favorably on any future arguments related to burden of discovery requests, specifically cost and proportionality, when Defendants have chosen to utilize the custodian-and-search term approach despite wide acceptance that TAR is cheaper, more efficient and superior to keyword searching. Additionally, the denial of Plaintiffs' request to compel Defendants to utilize TAR is without prejudice to revisiting this issue if Plaintiffs contend that Defendants' actual production is deficient.

II. Proposed Search Term Protocols

With respect to a proposed Search Term Protocol, the parties have conducted several meet and confers in an effort to come to an agreement. However, despite their best efforts, three provisions remain in dispute: validation; known responsive materials; and production of discrete collections.

A. Validation

Defendants explain that they have agreed to three different kinds of validation, including validation of documents that did not hit on search terms and a four-step post-production validation process. However, Defendants assert that Plaintiffs' proposal simply requires Plaintiffs to perform appropriate sampling and quality control, without providing any detail on how that sampling or quality control will be done. Moreover, Defendants take issue with the fact that Plaintiffs' proposal states that "Plaintiffs will not be obligated to collect or sample ESI that does not contain a search term." Defendants assert that in an effort to resolve the dispute, they have offered that the validation terms need not be completely reciprocal, so long as they contain some concrete and meaningful obligations that are transparent. Defendants explain that their proposal provides for the parties to meet and confer, at Defendants' request, to discuss the application of

validation procedures based on the procedures identified in paragraph 12(a) of the protocol. Defendants believe their proposal takes into account interests such as practicability, reasonableness, and proportionality while also addressing the interests of providing transparency about the validation procedures that Plaintiffs will use and ensuring that Plaintiffs' collection and validation procedures are adequate.

Plaintiffs argue that while they will of course validate their searches, the same provisions that apply to Defendants cannot feasibly apply to Plaintiffs given the highly personal nature of Plaintiffs' email collections and the relatively small size of those collections. Plaintiffs argue that they have committed to meet and confer with Defendants to discuss each individual Plaintiff's search, and Plaintiffs will perform appropriate sampling and quality control to achieve an appropriate level of validation of Plaintiffs' search terms. Plaintiffs allege that Defendants are insisting on reciprocity through the "back door" by requiring Plaintiffs to continue discussing the issue and reserving their right to later have the Court order it.

The parties have engaged in protracted discussions regarding implementation of a Search Term Protocol and the Special Master applauds their sincere efforts to substantially narrow their disagreements. As the parties well know, collection, review, and production of ESI presents special challenges and requires "cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI." *William A. Gross Const. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009).

With respect to the appropriate level of validation of Plaintiffs' search terms, after considering the arguments of the parties, the Special Master adopts Defendants' proposal as modified. The parties agree and case law dictates that appropriate validation be utilized to test search results. See e.g. *In re Seroquel Products Liability Litig.*, 244 F.R.D. 650, 662 (M.D. Fla. 2007) (Baker, M.J.) ("[W]hile key word searching is a recognized method to winnow relevant documents from large repositories, use of this technique must be a cooperative and informed process.... Common sense dictates that sampling and other quality assurance techniques must be employed to meet requirements of completeness.").

*3 While the parties have been able to reach agreement on the terms of Defendants' validation process, the parties are at an impasse regarding the level of validation of Plaintiffs' search term results. Plaintiffs explain that the discoverable ESI that an individual Plaintiff possesses

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will likely be contained in his or her email, and be intermingled with wholly irrelevant and personal private information. The Special Master agrees that the validation process described in section 12(a) may not be practicable to Plaintiffs as Plaintiffs are individuals with vastly smaller amounts of discoverable ESI than Defendants, who are large corporations. Defendants also appear to agree that the validation terms need not be completely reciprocal. However, Plaintiffs' proposal does not articulate how it will perform appropriate sampling and quality control measures to achieve the appropriate level of validation. As no articulable alternative process has been proposed by Plaintiffs, the Special Master will adopt Defendants' protocol to the extent that it will require the parties, at Defendants' request, to meet and confer concerning the application of validation procedures described in paragraph 12(a) to Plaintiffs, if the parties are unable to agree to a procedure. The Special Master encourages the parties to work together to develop a reasonable procedure for the validation of Plaintiffs' search terms, however, should the parties need to, they may seek a further order from the Court that will explicitly dictate which, if any, provisions described in paragraph 12(a) must be utilized by Plaintiffs in validating their search terms.

B. Known Responsive Documents & Discrete Collections

With respect to the parties' disagreement concerning known responsive materials, Defendants argue that Plaintiffs' protocol would require the production of all documents and ESI "known" to be responsive, regardless of how or by whom the materials are "known" to be responsive. Defendants assert that the proposal is vague, exceedingly burdensome, and provides no clear standard for the court to administer or the parties to apply. Defendants argue that their proposal provides that documents or ESI known to be responsive will not be withheld on the basis that such documents or ESI were not responsive to search methodology described in the protocol. Defendants argue that their proposal is proportional to the needs of the case, and addresses Plaintiffs' underlying concern that the use of search terms may not capture responsive documents or ESI and should not be used to withhold them.

Similarly, Defendants argue that Plaintiffs' request for "folders or collections of information that are known to contain documents likely to be responsive to a discovery request" is overly broad and flouts the requirement that discovery be proportional to the needs of the case.

Defendants argue that their network drive folders can contain terabytes of data which would be burdensome to collect and produce. Defendants assert that their compromise proposal accounts for proportionality: it provides for the production, without applying search terms, of discrete folders or collections of information of a reasonable volume that are known to predominantly contain documents likely to be responsive to discovery requests, and it allows the parties to meet and confer if the receiving party identifies any deficiency in the production. Defendants point to *Gamboa, et al., v. Ford Motor Co., et al.*, Civil Action No. 18-10106 (E.D. Mich. Filed Dec. 16, 2019), ECF No. 151 at 7, wherein the parties were required to meet and confer if a discrete document folder or collection was too big to make review of each document proportional to the needs of the case.

Plaintiffs argue that the Court has already ruled that the parties must produce without the use of search terms ESI known to be responsive to discovery requests in this case. Plaintiffs argue that Defendants' edits water-down provisions requiring the parties to produce documents or ESI known by the producing party to be responsive to a discovery request. Similarly, Plaintiffs argue that Defendants' edits to additional paragraphs are intended to dodge the parties' obligation to produce without the use of search terms "discrete folders or collections of information that are known to contain documents likely to be responsive to a discovery request." Plaintiffs argue that given the shortcomings of the search terms methodology, there is no reason why the parties should not produce ESI collections known to be responsive to a discovery request.

During the November 17, 2019 status conference, Plaintiffs raised the issue of Defendants' obligation to produce responsive materials that are known to be responsive. Defendants indicated that they agreed to produce materials that are known to be responsive. The parties are thus in agreement that Defendants will produce known materials responsive to a discovery request and will not withhold known relevant documents on the basis that they were not responsive to any search methodology described in the Search Term Protocol. The parties' disagreement comes down to the appropriate wording of the Search Term Protocol.

*4 In light of Defendants' concern, the Special Master will modify the Search Term Protocol to require production of materials that are "reasonably known" to be responsive. The Special Master notes that Defendants already agreed to produce materials that are known to be responsive at the November status conference. Nevertheless, the Special Master will modify the Search Term Protocol to require production of materials that are

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“reasonably known” to be responsive. In affording this modification, the Special Master intends to provide Defendants some flexibility should they inadvertently fail to produce documents, which Plaintiffs believe were known to be responsive. If during discovery the parties develop an issue with respect to the production or lack of production of reasonably known responsive documents, the parties may seek the appropriate remedy and order from the Court.

Finally, with respect to folders or collections of information, the Special Master will require the parties to collect this material to the extent it is reasonably known to the producing party. To the extent the folder or collections

contain an extensive volume of material, the Special Master will require the parties to meet and confer if a party believes a discrete document folder or collection of information that is relevant to a claim or defense is too voluminous to make review of each document proportional to the needs of the case. Should the parties be unable to resolve their dispute during the meet and confer process, they may seek a further order from the Court.


All Citations

Not Reported in Fed. Supp., 2020 WL 103975

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 KeyCite Yellow Flag - Negative Treatment
Distinguished by [Franck v. New York Health Care Inc.](#), S.D.N.Y.,
February 16, 2022

2021 WL 3145982

Only the Westlaw citation is currently available.
United States District Court, C.D. California.

Christy PALMER, et al.
v.
COGNIZANT TECHNOLOGY
SOLUTIONS CORPORATION, et al.

Case No.: CV 17-6848-DMG (PLAx)

Signed 07/09/2021

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**PROCEEDINGS: (IN CHAMBERS) Plaintiffs'
Motion to Compel Discovery (ECF No. 149)**

PAUL L. ABRAMS, UNITED STATES MAGISTRATE
JUDGE

*1 On June 23, 2021, the parties in this purported class
action filed a Joint Stipulation (alternatively “JS” (ECF
No. 150)) in support of their positions regarding
plaintiffs’ Motion to Compel (“Motion” or “Mot.” (ECF
No. 149)) defendants Cognizant Technology Solutions
Corporation and Cognizant Technology Solutions U.S.
Corporation (collectively “defendants” or “Cognizant”),
to produce a Rule 30(b)(6) witness on topics related to

defendants’ document retention, collection, and review
policies and practices, and to produce all non-privileged,
newly-discovered documents that hit on any agreed-upon
search term; and for the Court to review “*in camera*
privilege log exemplars identified by Plaintiffs and order
[defendants] to identify subject lines of logged emails.”
(JS at 1). Plaintiffs also submitted the declaration of their
counsel Daniel Kotchen (“Kotchen Decl.”) with exhibits;
defendants submitted the declaration of their counsel
Katherine V.A. Smith (“Smith Decl.”) with exhibits, and
Matthew T. Sessions (“Sessions Decl.”) with exhibits. On
June 30, 2021, the parties filed their Supplemental
Memoranda (alternatively “Supp’l Mem.”). (ECF Nos.
151, 152). Having considered the pleadings submitted in
connection with the Motion, the Court has concluded that
oral argument will not be of material assistance in
determining the Motion. Accordingly, the hearing
scheduled for July 14, 2021, is **ordered off calendar**. See
Local Rule 7-15.

By way of background, this is an employment
discrimination class action in which plaintiffs allege that
defendants maintain a pattern or practice of employment
discrimination in favor of individuals of South Asian race
and Indian national origin. (See ECF No. 137).

The Court will examine the issues using the same general
legal standard set forth in its June 10, 2020, discovery
Order. (ECF No. 102).

As discussed below, plaintiffs’ Motion (ECF No. 149) is
granted in part and denied in part.

Rule 30(b)(6) Deposition

On April 22, 2021, plaintiffs served defendants with a
Rule 30(b)(6) deposition notice (“Depo Notice”), seeking
testimony about defendants’ document preservation
policies and practices, the steps taken by defendants to
collect and preserve documents relevant to this litigation,
and the steps taken by defendants to review documents
for responsiveness, including the names, titles, and
locations of the people involved in collecting and
reviewing documents (“Topic No. 1”). (JS at 6). The
Depo Notice specifically stated that Topic No. 1 included
the issues identified in Exhibit A to the Depo Notice that
are at issue herein. (*Id.* (citing Kotchen Decl. ¶ 2)). **Issue
number 1** sought testimony on the following:

[C]orporate document preservation practices, including
but not limited to specific retention periods for different

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types of documents, what back-ups are made and where they are stored, corporate guidelines regarding document preservation (e.g., for Sarbanes-Oxley purposes, because of federal agency investigations like that conducted by the EEOC, for affirmative action purposes, for litigation, etc.), and any automatic document deletion that typically occurs.

(*Id.*). Issue number 3 sought testimony on the following:

[Defendants'] efforts to preserve documents for this case, including, but not limited to, what back-ups were retained, what automatic document deletion practices were altered (and how), what documents were collected and when, when steps were taken to preserve documents, who (by title and location) was involved in the document preservation, and what steps each individual took for the document preservation.

(*Id.* at 7). Issue number 4 sought testimony on the following:

The steps [defendants] took to collect documents for review, including the process by which the documents were collected, who was involved in the collection (by title and location), what repositories of responsive documents existed for each custodian, and what was collected for each custodian.

(*Id.* at 8).

Plaintiffs' Position

*2 On September 18, 2017, plaintiffs filed this case and, upon service, sent defendants a "detailed document-preservation letter." (*Id.* (citing Kotchen Decl. ¶ 4)). On August 13, 2019, plaintiffs issued a Rule 30(b)(6) deposition notice concerning, among other things, defendants' document retention and preservation policies. (*Id.* at 9 (citing Kotchen Decl. ¶ 6)). Plaintiffs state that defendants "refused to participate in the deposition," and instead "preferred ... to provide written deposition topic responses and committed to fully investigating each topic." (*Id.*). Plaintiffs further state that "[a]t the [District Judge's] encouragement during an October 18, 2019 hearing, Plaintiffs agreed to forego the deposition and accept Cognizant's written responses." (*Id.* (citing Smith Decl. Ex. 11 at 10, 16-17)). According to plaintiffs, defendants then provided "written responses with limited document preservation information," and "would not identify instances in which documents were routinely deleted and what exactly was done to preserve documents, except to acknowledge that [they] had 'issued appropriate legal holds' to specific servers." (*Id.* (citing Kotchen Decl. ¶¶ 7-8)).

1 At the hearing, the District Judge noted that "in the interest of thoroughness, I suppose the plaintiffs would want at some point to have some kind of verification that what you're providing them is accurate so it seems to me that can be happening in stages." (Smith Decl. Ex. 11 at 10). The District Judge also specifically stated that she "expect[s] discovery to be resolved in a fast and efficient fashion." (*Id.* at 14).

On July 14, 2020, the parties agreed to a "final list of search terms for ESI custodians." (Kotchen Decl. ¶ 15). As of April 22, 2021, defendants had produced "custodial ESI" from 20 of the 23 agreed-upon custodians. (*Id.* ¶ 10). On that same date, plaintiffs sent defendants a letter (along with the subject Rule 30(b)(6) Depo Notice) identifying "obvious irregularities for 18 of the 20 custodians from whom [defendants] produced [ESI] documents." (*Id.*). They "invited" defendants to "work informally with Plaintiffs to address the list of issues appended to the Rule 30(b)(6) deposition notice ... but cautioned that Plaintiffs intended to proceed with the deposition if [their] questions were not fully answered." (*Id.*).

*3 Plaintiffs identified "three types of document irregularities [that] were readily apparent" in defendants' production: (1) some custodians produced almost no documents for many of the years between 2014 and 2020; (2) some custodians had documents missing for a single year or two, "as if someone chose a discrete time period in which to conceal or delete documents"; and (3) some custodians "produced almost no documents, except for a small number in a year or two." (JS at 9-10 (citing Kotchen Decl. ¶ 13 Ex. 1; see also *id.* at 10 – "Custodian Exemplar Chart" ("Chart"))).

On May 4, 2021, defendants completed their production of electronically stored information ("ESI") for 20 of the 23 agreed-upon custodians and produced a privilege log. (*Id.* at 9 (citing Kotchen Decl. ¶ 9), 18).

On May 6, 2021, defendants served objections to the April 22, 2021, Depo Notice, but only as to issue numbers 1, 3, and 4 as identified in Exhibit A of the Depo Notice. (*Id.* (citing Kotchen Decl. ¶ 3)). They objected to each of these three issues on the same grounds: vague and ambiguous with respect to one or more of the issue's undefined terms; not relevant to the subject matter of the litigation; fails to describe with reasonable particularity the matters for examination; unreasonably broad and unduly burdensome; calls for information protected by the attorney-client information, the work product doctrine, or other applicable privileges; no good cause exists to justify inquiry into issues of document preservation; and the

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issue could be addressed in a less burdensome way, such as through written discovery. (*Id.* at 6-7).

On May 13, 2021, the parties had a telephonic meet and confer about the Depo Notice and, during that conference, defendants informed plaintiffs for the first time “that a discovery problem existed concerning Cognizant’s collection of documents from its Office 365 server.” (*Id.* at 11 (citing Kotchen Decl. ¶ 11)). Defendants also “committed to providing written responses to Plaintiffs’ list of issues appended to” the Depo Notice, which it subsequently emailed to plaintiffs on May 18, 2021. (*Id.* (citing Kotchen Decl. ¶ 12)). In their written response, defendants explained that they “maintained limited email space on [their] servers for each employee, which required employees to either routinely delete emails or to otherwise save emails on their personal hard drives as .pst files.” (*Id.* (citing Kotchen Decl. ¶ 12)). They also explained that beginning in 2017, they had “started transitioning employees to a single Office 365 server, and ... collected custodial ESI from only the 365 server, mistakenly believing that it contained all employee emails, including emails stored in .pst files on employee hard drives.” (*Id.* (citing Kotchen Decl. ¶ 12)). Plaintiffs state that defendants did not disclose “whether the Office 365 server has size limits for individual employee email accounts.” (*Id.*).

Based on defendants’ practice of using email account server size limits to encourage the deletion of documents, and “the temporal document production trends for certain custodians” that “suggests that documents were destroyed as opposed to taken off the server and organized in .pst files on hard drives,” plaintiffs “now harbor grave spoliation concerns.” (*Id.* at 11-12).

Plaintiffs state they are seeking an order compelling defendants to participate in a Rule 30(b)(6) deposition to address the following six issues, which they contend are “substantially narrower than ... the broader Rule 30(b)(6) topics” in plaintiffs’ Depo Notice:

1. Who at Cognizant, including this case’s custodians, received a litigation hold notice, when, and how was the notice transmitted?
2. What were the email account size limits that applied to each custodian, and which servers (or off-server locations) stored each custodian’s email and when?
3. What custodians were interviewed about where they stored documents, what were the custodians’ document deletion practices, and what custodian emails or .pst files were deleted from hard drives or servers prior to collection?

4. Separate from emails, what types of documents did the custodians store or access on shared servers and on personal hard drives, and how were folders organized in which files were stored (*e.g.*, did departments maintain shared folders to store documents and, if so, what was the folder organization)?

5. What are the details of Cognizant’s transition to a new server, what was lost from the old server, and what happened to the prior server(s) and backups to the prior server(s)?

6. Identify all factors that caused or contributed to the loss or deletion of potentially responsive ESI identified in Plaintiffs’ litigation hold letter from any relevant custodian or data source after Cognizant received Plaintiffs’ litigation hold letter. (*Id.* at 12-13; Pls.’ Supp’l Mem. at 1).

*4 Plaintiffs assert that their Depo Notice, including Exhibit A to the Depo Notice, “covers each of the above issues, as the notice covers Cognizant’s preservation practices, including any automatic deletion that typically occurs; efforts to preserve documents; document deletion practices; and repositories of responsive documents that existed for each custodian.” (JS at 13 (citing Kotchen Decl. ¶¶ 2-4)). They also argue that all of the above information is discoverable. (*Id.* (citing, among other cases, [Cannata v. Wyndham Worldwide Corp.](#), 2011 WL 3495987, at *3 (D. Nev. Aug. 10, 2011) (noting that “plaintiffs seek answers concerning what has actually happened in this case, *i.e.*, when and to whom the litigation hold letter was given, what kinds of categories of ESI were included in defendants’ litigation hold letter, and what specific actions defendants’ employees were instructed to take to that end,” and that although the litigation hold letters “may be privileged, the basic details surrounding the litigation hold are not”))).

Defendants respond that they have reviewed nearly 300,000 custodial documents and produced nearly 156,000 such documents. (*Id.* at 17-18 (citing Kotchen Decl. Exs. 1, 4)). They state that 20,000 pages of documents were produced on January 11, 2021, and more than 200,000 pages were produced on April 2, 2021. (*Id.* (citing Smith Decl. Exs. 1, 2)). On April 9, 2021, they produced nearly another 200,000 pages, “almost all of the remaining custodial ESI, save for documents still undergoing or related to a final privilege review and documents for three final custodians, about whom there were separate discussions between the parties.” (*Id.* at 18 (citing Smith Decl. Ex. 3)). On May 4, 2021, they produced their privilege log and the remainder of the custodial ESI, “including those [documents] partially redacted for privilege.” (*Id.* (citing Smith Decl. Ex. 4)).

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Defendants assert that when they received plaintiffs' April 22, 2021, letter and Depo Notice, they immediately began to investigate the "possible irregularities in the number of documents produced by custodian and by year." (*Id.* at 19 (citing Smith Decl. Ex. 5)). On May 18, 2021, they responded in writing to each of the nine topics in Exhibit A to the Depo Notice. (*Id.* (citing Smith Decl. Ex. 6)). In their response, defendants acknowledged the issue with the transition to Office 365, and informed plaintiffs that they "are now proceeding to collect and image the laptops of the 20 custodians from whom documents have already been produced in order to obtain any .pst files that were saved to a particular custodian's laptop rather than to Office 365." (*Id.* at 19-20 (citing Smith Decl. Ex. 6)). Defendants stated that they were "moving forward with production of custodial ESI from the remaining three custodians," and that the responsiveness review is already complete for one custodian, and production should occur within the "next week or so." (*Id.* at 20 (citing Sessions Decl. ¶ 4)). The "responsiveness and privilege review" of the remaining two custodians was "currently underway." (*Id.* (citing Sessions Decl. ¶ 4)).

*5 Defendants contend that plaintiffs' six "new" Rule 30(b)(6) deposition issues were *not* previously noticed and reiterate that they have already responded in writing to each of plaintiffs' previously-noticed topics. (*Id.* at 16 (citing Smith Decl. Exs. 6, 7)). They assert that some of the six "new" topics are "explicitly predicated upon information Defendants provided in their written responses," and because they heard nothing from plaintiffs after completing their written responses, they were surprised to receive plaintiffs' portion of the Joint Stipulation without plaintiffs having previously reached out "to request a deponent or note their dissatisfaction with the written responses." (*Id.*). Defendants state that they have not refused to provide a deponent and, in fact, on June 15, 2021, they *agreed* to produce a Rule 30(b)(6) deponent. (*Id.* (citing Smith Decl. Ex. 8)). They argue that plaintiffs nevertheless insisted on continuing with this Motion, which suggested to defendants that "Plaintiffs seek agreement to depose a Rule 30(b)(6) witness without regard for appropriate privilege objections." (*Id.* (citing Smith Decl. Ex. 9)).

Defendants further assert that if plaintiffs had raised their request "prior to serving their portion of the joint stipulation, Defendants could have worked with Plaintiffs to resolve questions related to the appropriate scope." (*Id.* at 16-17)). They submit that plaintiffs' Motion should be denied because their "request is premature, some of the topics are 'noticed' for the first time in this joint

stipulation, and some portions of the topics are protected by privilege." (*Id.*).

Defendants argue that to the extent plaintiffs were dissatisfied with defendants' response to the 2019 Rule 30(b)(6) deposition notice, "they should have promptly renewed their request for a deposition as to particular topics, issued further written discovery, or moved the Court to compel a response," and "cannot now blame Defendants for [plaintiffs'] own lack of diligence." (*Id.* at 21). They also argue that there is "nothing problematic about a company with size limitations on its email servers sending a routine email to an employee ... to inform him that he is nearly at his usage limit and will need to make space in his mailbox." (*Id.*).

Defendants also argue they "have not had the opportunity to meet and confer to discuss the [six] new topics raised for the first time in this joint stipulation." (*Id.* at 22). They state that on June 15, 2021, they offered to provide a witness on these topics and asked plaintiffs to withdraw this issue from the Joint Stipulation, but plaintiffs declined, "instead demanding that any agreement require the deponent to testify 'fully' on these topics, some of which are inextricably linked to attorney-client privileged information, including inquiries into litigation hold notices and document collection and production processes and decisions." (*Id.* at 23 (citing Smith Decl. Ex. 8)). Defendants suggest that "the appropriate course of action is for Defendants to provide written discovery into the non-objectionable scope of the noticed topics," and state that they are "concerned that providing a witness on these issues will only invite Plaintiffs to infringe on Defendants['] rights with respect to privilege." (*Id.*).

In their Supplemental Memorandum, defendants state their concern that the "breadth of the topics in the Rule 30(b)(6) notice along with serious privilege concerns suggest that written discovery as to the non-objectionable topics would be a more appropriate process" and be "similar to [the process] countenanced by Judge Gee in connection with a prior Rule 30(b)(6) notice in this case." (Def'ts' Supp'l Mem. at 2 (citations omitted)).

Plaintiffs reply that the six Rule 30(b)(6) deposition topics at issue are "clearly encompassed within" the broader Rule 30(b)(6) topics in plaintiffs' Depo Notice, and are "substantially narrower than" those topics. (Pls.' Supp'l Mem. at 1). They acknowledge that the topics are predicated upon defendants' informal response to the Depo Notice, but state "that is because Plaintiffs used the responses to narrow the deposition scope so the deposition could proceed expeditiously." (*Id.*). They argue that allowing defendants to provide written

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responses to these topics will deny plaintiffs the ability to ask “probing questions necessary to discover critical facts,” and submit that none of the six topics implicates privileged material or attorney work product. (*Id.* at 1-2).

Analysis

*6 Notwithstanding plaintiffs’ statistics regarding alleged “production irregularities,” or the length of time it has taken defendants to produce responsive ESI documents, the Court finds that the parties’ conjectures about each other’s motives and actions (*e.g.*, plaintiffs are attempting to obtain attorney-client information through the Rule 30(b)(6) deposition, or defendants are actively engaged in spoliation of evidence and deliberate delay) are little more than speculation and unwarranted finger pointing.

The Court notes that defendants have represented to the Court that they have not declined to produce a Rule 30(b)(6) witness and, indeed, on June 15, 2021, they *agreed* to produce a Rule 30(b)(6) deponent. (Smith Decl. Ex. 8).

The Court determines that the six issues on which plaintiffs seek to depose defendants’ Rule 30(b)(6) witness(es) are subsumed in the topics and issues presented in the Depo Notice and, therefore, the fact that they were not specifically brought up during the meet and confer process is not fatal to this Motion. Additionally, plaintiffs have presented enough evidence regarding defendants’ issues with collecting ESI – based largely on defendants’ transition to Office 365 – that the Court finds a Rule 30(b)(6) deposition on five of the six issues is warranted. While there typically may be “nothing problematic about a company with size limitations on its email servers sending a routine email to an employee... to inform him that he is nearly at his usage limit and will need to make space in his mailbox,” in this case, there apparently was a litigation hold in place and plaintiffs are entitled to **non-privileged** information as to “what kinds and categories of ESI [defendants’] employees were instructed to preserve and collect, and what specific actions they were instructed to take to that end,” as well as what ESI, if any, including emails, may have been missed during the document collection process, or lost as a result of defendants’ transition to Office 365. See Cannata, 2011 WL 3495987, at *2-3.

Based on the foregoing, plaintiffs’ Motion to compel the deposition of a Rule 30(b)(6) deponent knowledgeable on five of the six stated issues is **granted in part**.

Specifically, the deposition is limited to the following five narrowed issues, as modified by the Court:

1. Who at Cognizant, including this case’s custodians, received a litigation hold notice, when, and how was the notice transmitted?
2. What were the email account size limits that applied to each custodian, and which servers (or off-server locations) stored each custodian’s email and when?
3. What custodians were interviewed about where they stored documents, what were the custodians’ document deletion practices, and what custodian emails or .pst files were deleted from hard drives or servers prior to collection?
4. What are the details of Cognizant’s transition to a new server, what was lost from the old server, and what happened to the prior server(s) and backups to the prior server(s)?
5. Identify all **known** factors (other than the transition to the Office 365 server) that caused or contributed to the loss or deletion of potentially responsive ESI identified in Plaintiffs’ litigation hold letter from any relevant custodian or data source after Cognizant received Plaintiffs’ litigation hold letter.

The Court finds that plaintiffs’ topic number 4² is vague and ambiguous as worded, fails to describe with reasonable particularity the matters for examination, and is unreasonably broad and unduly burdensome. As such, it is not relevant and proportional to the needs of the case. Accordingly, plaintiffs’ Motion is **denied** as to plaintiffs’ topic number 4.

² Topic number 4 stated: “Separate from emails, what types of documents did the custodians store or access on shared servers and on personal hard drives, and how were folders organized in which files were stored (*e.g.*, did departments maintain shared folders to store documents and, if so, what was the folder organization)? (JS at 12).

*7 The Rule 30(b)(6) deposition on the above topics shall take place **no later than August 6, 2021**. The deposition shall not exceed **4 hours** exclusive of breaks and shall be limited to **nonprivileged** matters encompassed in the five topics set forth above. The Court anticipates that the parties, working together cooperatively and in good faith, will be able to resolve the issue of scheduling the Rule 30(b)(6) deposition as well as any other conditions of that deposition (*e.g.*, in-person or via videoconference), without the need for Court intervention.

Palmer v. Cognizant Technology Solutions Corporation, Not Reported in Fed. Supp. (2021)**Motion to Compel Defendants to Produce Non-Privileged Documents That Hit on a Search Term Without a Responsiveness Review**

Plaintiffs are also seeking an order compelling defendants “to produce non-privileged documents that hit on an agreed-upon search term.” (JS at 14). They explain that on July 14, 2020, the parties agreed to a list of search terms that defendants would apply to custodial ESI. (*Id.* (citing Kotchen Decl. ¶ 15 Ex. 3)). They state that defendants “then reviewed for responsiveness and privilege any document that contained at least one search term,” a process that took almost a year, and for which, at the time of the Motion, there were still three agreed-upon custodians whose ESI documents had yet to be produced. (*Id.*)

Plaintiffs assert that based on data defendants provided to plaintiffs, “reflecting, by custodian, the number of documents that contain at least one search term and, of these search term documents, the number of documents produced in discovery,” defendants’ withholding of documents based on responsiveness “also appears problematic.” (*Id.* (citing Kotchen Decl. ¶ 13 Ex. 1)). Plaintiffs note that, overall, defendants produced only 52% of the documents that hit on a search term and assert that this is a “surprisingly low production rate, considering the parties agreed to only highly relevant search terms.” (*Id.* (citing Kotchen Decl. ¶¶ 15, 16 & Exs. 3, 4)). They also deem the “variability by custodian of the percentage of documents produced to Plaintiffs” to be “particularly problematic” as a “couple custodians have a high document production rate consistent with Plaintiffs’ expectations given the relevance of the search terms used to collect documents,” but “most custodians have inexplicably low production rates considering the relevance of the search terms.” (*Id.* at 14-15 (citations omitted)).

Plaintiffs suggest that ordering defendants to “produce non-privileged documents that contain at least one search term, without first reviewing for responsiveness,” will result in speed of production and fairness. (*Id.* at 15). They point out that fact discovery closes on September 16, 2021, and plaintiffs have been waiting for defendants to complete their custodian ESI productions and will need time to review the documents before taking depositions. (*Id.*) Thus, ordering defendants to produce all non-privileged documents containing a search term is appropriate in light of the “undeniable relevance of the search terms”; the near certainty that relevant documents have already been destroyed; and defendants’ “apparent

aggressive discovery withholding practices” as reflected in plaintiffs’ Chart. (*Id.* (citing Kotchen Decl. ¶ 16 Ex. 4)).

Defendants reject plaintiffs’ proposal that would require defendants to produce all newly-discovered custodial ESI without first doing a responsiveness review. (*Id.* at 17). They state that this is the first time plaintiffs have requested this specific relief as it was not contained in plaintiffs’ Local Rule 37-1 letter. (*Id.* at 24 (citing Smith Decl. Ex. 9)). They also note that Local Rule 37-1 requires the moving party’s letter to “specify the terms of the discovery order to be sought,” and the Motion, therefore, should be denied on this basis alone. (*Id.*)

*8 Defendants also reject this proposal on the merits because “a responsiveness review occurs concurrently with a privilege review,” which must still be completed, and because the “allegedly ‘low’ responsiveness rate across all custodians and varying responsiveness rates across custodians, are not evidence of an improper responsiveness review.” (*Id.* at 17, 25).

Defendants argue that the statistics calculated by plaintiffs tend to reflect that defendants “agreed to an overly broad set of search terms to run against most custodians, and the evidence backs that up.” (*Id.* at 17, 25-26). They further contend that plaintiffs’ suggestion that a “52% responsiveness rate overall or varying rates across custodians evinces an improper review,” or “bad intent,” is “pure conjecture.” (*Id.*) They explain that there were many false positives with respect to some of the search terms (e.g., Cox, and “Equal Employment”), which yielded numerous results that were not responsive to the discovery requests. (*Id.* at 26). They also explain that differing responsiveness rates across custodians also is not evidence that defendants conducted an improper responsiveness review as those rates could be explained by things such as the individual’s particular position, or the result of a large number of false positives in an individual’s documents. (*Id.* at 26-27).

Defendants point out that “if Plaintiffs are correct and documents have in fact been lost (a proposition with which Defendants do not agree), then ordering production of all documents that hit on a search term would not remedy the issues because search terms cannot hit on documents that do not exist.” (*Id.* at 27 (emphasis in original)).

They argue that “Plaintiffs’ request for this ‘document dump’ in the name of efficiency and fairness lacks relationship to either.” (*Id.* at 3-4). That is, no time is saved because the documents must still be reviewed for

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privilege, and a production without a responsiveness review “is not more ‘fair’ to either party because the responsiveness reviews Defendants have performed to date were entirely proper and Plaintiffs have offered no evidence to the contrary.” (*Id.*). They contend that a party “only has an obligation to produce *responsive* documents,” and assert that “relying upon search terms alone will almost always result in the capture of *non-responsive* documents, which may then be reviewed and removed from any production.” (*Id.* at 5 (emphasis in original)).

Plaintiffs reply that at the time of their Local Rule 37 letter, defendants had not informed plaintiffs that additional documents existed and, therefore, plaintiffs could not have included this relief in their letter. (Pls.’ Supp’l Mem. at 2).

Plaintiffs also take issue with defendants’ argument that “the Court should not be concerned about low production rates for documents that hit on search terms.” (*Id.* at 3). They cite as an example the production rate of only 31% for an employee with “responsibility for Affirmative Action and EEO compliance” and suggest that “the vast majority of her documents that hit on search terms would likely be responsive, even taking into account the possibility of some mis-hits.” (*Id.*).

Plaintiffs also submit that defendants’ argument that a privilege review alone would not be significantly faster than a privilege and responsiveness review “belies common sense and the experience of anyone who has participated in document review.” (*Id.*). They state they are “deeply troubled by Cognizant’s vague reference to its ‘slow’ collection of laptops and refusal to share additional information with Plaintiffs, as it seems clear that – months after being alerted to the discovery problems – laptops remain outstanding, that documents likely continue to be lost, and that Cognizant’s counsel is exhibiting no urgency or forthrightness about a gravely serious discovery misconduct issue.” (*Id.*).

*9 After reviewing the parties’ positions, the Court determines that plaintiffs’ arguments that the statistics are “surprisingly low,” or that “most custodians have inexplicably low production rates considering the relevance of the search terms,” and other such statements, lack foundation. The Court further finds that defendants’ explanations for the statistical differences between and among defendants’ custodians with respect to the number of documents produced by each are reasonable and persuasive.

Additionally, plaintiffs’ argument that compelling

defendants to produce all documents that contain only one search term without a responsiveness review would speed the production and be fairer, is not the standard under Rule 26 for discovery, which provides that discovery may be obtained “regarding any nonprivileged matter that is *relevant* to any party’s claim or defense and proportional to the needs of the case.” *Fed. R. Civ. P. 26(b)(1)*. The Court will not compel defendants to produce any document simply because it contains a search term whether or not it is responsive to the discovery request, or, by extension, whether or not it is relevant and proportional to the needs of the action.

Plaintiffs’ Motion to compel defendants to produce all documents that contain a search term without a responsiveness review is **denied**.

Privilege Log

Plaintiffs generally contend that defendants’ 405-page privilege log, with over 7,500 entries, has two problems: (1) entries reflecting no or limited attorney involvement; and (2) vague descriptions. (JS at 29). Defendants respond that plaintiffs failed to meet and confer with defendants with respect to the privilege log, and this failure “is fatal to their ability to compel the production of any additional information on the log or *in camera* review.” (*Id.* at 33).

Entries Reflecting No or Limited Attorney Involvement

Plaintiffs argue that of the 3,518 communications that defendants “fully withheld as attorney-client privileged, 1,473 have no attorney on the ‘from,[]’ ‘to,’ or ‘cc’ line”; 629 of the 1,473 list only “Cognizant Legal Department” in the “Attorney Basis for Privilege” column of the log; an additional 360 “merely CC counsel”; and the “vast majority of those that do name an attorney involve in-house rather than outside counsel – only 16 of these entries list ‘Outside Counsel’ or the name of an outside law firm in the ‘Attorney Basis for Privilege’ column.” (*Id.* at 29 (citing Kotchen Decl. ¶ 17)).

Plaintiffs state that it is “hard to fathom that the primary purpose of *all* of these communications among non-attorneys was to secure legal advice, and inconsistent redactions that Plaintiffs have come across in Cognizant’s productions demonstrate the Plaintiffs are right to be suspicious.” (*Id.* (citing Kotchen Decl. ¶¶ 18-19 & Exs. 7,

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8)). They also surmise that “[g]iven the sheer volume of entries on the privilege log with limited attorney involvement, these examples likely indicate a wider trend among the fully withheld documents.” (*Id.* at 30).

Defendants describe plaintiffs’ challenges to defendants’ privilege log as meritless. (*Id.* at 38). They state that they listed “Cognizant Legal Department” as the basis for the privilege on certain documents because “that is the precise term and group referred to in the documents at issue.” (*Id.*). They assert that this is sufficient to establish privilege. (*Id.* at 39 (citations omitted)). They also recognize that simply cc’ing an attorney on a communication, “without more, does not render a communication privileged,” but state that they have not designated any document in the log to be privileged “merely because an attorney was CC’d.” (*Id.* at 40). They state that they included documents on the privilege log only “if the ‘primary purpose’ of the communication was to provide or receive legal advice.” (*Id.* (citing Sessions Decl. ¶ 18)). They explain that they included the “to,” “from,” and “cc” information on the privilege log “for the *most recent* communication in a given email chain,” and state that “[i]n many instances, the attorney initiated the conversation to provide legal advice or was the person in the initial ‘From’ line so that others on the conversation could receive legal advice.” (*Id.* (emphasis in original)). Defendants assert that because the primary purpose of these communications was the provision and receipt of legal advice, they have been properly designated as privileged. (*Id.* (citation omitted)).

*10 Defendants also argue that to the extent plaintiffs complain that documents on the log “only involve in-house, rather than outside counsel,” it is “indisputable that Defendants are allowed to seek legal advice from their in-house counsel without it being subject to immediate and unquestioned scrutiny from Plaintiffs’ counsel and/or the Court.” (*Id.* at 41 (citation omitted)).

Defendants state that they are “more than willing to meet and confer” with plaintiffs with respect to documents on the log for which an attorney is merely cc’d or appears to be missing altogether, as well as to provide further detail on a “reasonable number of documents” as to how the document is privileged. (*Id.*). They note that they “only ask that it be done on a document-by-document basis, as the law requires.” (*Id.* (citing *Phillips v. C.R. Bard, Inc.*, 290 F.R.D. 615, 631 (D. Nev. 2013))).

Plaintiffs also argue that defendants’ descriptions “are too vague for Plaintiffs to assess the claimed privilege.” (*Id.* at 30). For instance, they note that the privilege log contains descriptions such as “regarding adverse impact,” “regarding hiring,” “regarding terminations,” “regarding immigration,” “regarding contract drafting and review,” “regarding affirmative action,” “regarding personnel issues,” “regarding promotions,” and “regarding analysis of business strategy.” (*Id.*). They argue that such descriptions violate the mandate of [Rule 26\(b\)\(5\)\(A\)\(ii\)](#), which requires a party “to describe the documents in a manner sufficient to enable other parties to assess the claimed privilege.” (*Id.* (citation omitted)).

During the parties’ meet and confer conference, plaintiffs asked defendants to provide email subject lines and document titles, but defendants refused to do so. (*Id.* at 31 (citing Kotchen Decl. ¶ 22)). Defendants instead proposed meeting and conferring about a subset of entries, but plaintiffs deem that proposal to be “unworkable, given the size of the privilege log and the extent of the deficiencies.” (*Id.*). Plaintiffs submit that it “is not practical to meet and confer as to every issue and meeting and conferring as to a subset would leave a host of issues unaddressed.” (*Id.*).

Plaintiffs suggest that defendants should be “compelled to produce email subject lines and document titles for the entries on its privilege log, as requested.” (*Id.* at 32). They state that the “burden of adding this information would be minimal, as would any burden from redacting privilege information where necessary – there are 4,797 fully-withheld entries and presumably Cognizant would be able to determine from the face of the privilege log which of those have subject lines and document titles that require redactions.” (*Id.* at 32-33).

Defendants respond that their privilege log descriptions are more than sufficient and, in fact, courts (including, they note, this Court) have “endorsed privilege log entries that were equally or even less detailed than the entries here.” (*Id.* at 41-42 (citations omitted)). In their Supplemental Memorandum, defendants assert that plaintiffs have no “real evidence demonstrating that privilege or work product doctrine does not apply” to the documents on the log. (Def’ts’ Supp’l Mem. at 5).

Plaintiffs reply that they have sufficiently met and conferred about their request to include subject lines for emails on the privilege log, as the May 10, 2021, Local Rule 37 letter “explicitly challenged Cognizant’s vague privilege descriptions and Cognizant refused to provide more specific descriptions” during the parties’ May 20, 2021, meet and confer call. (Pls.’ Supp’l Mem. at 5).

Vague Descriptions

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They assert that “less than an hour after the parties’ May 20 call,” plaintiffs suggested as a compromise that defendants provide email subject lines and document titles, “an approach that would address Cognizant’s undue burden objection, but Cognizant refused that request a week later.” (*Id.* (citing JS at 31, 35)).

*11 Plaintiffs now suggest that in order to “minimiz[e] the burden to Cognizant,” this Court should “review a subset of the withheld and redacted documents identified above *in camera*, and provide guidance as to merits (or lack thereof) of Cognizant’s withholdings.” (*Id.*). To that end, plaintiffs prepared “a chart with 50 entries on Cognizant’s privilege log that exemplify the issues described above for the Court’s review.” (*Id.* (citing Kotchen Decl. ¶ 23 Ex. 11)).

Defendants argue that *in camera* review is not justified because plaintiffs “have failed to meet the Supreme Court’s standard justifying such an extreme measure,” as plaintiffs “have not presented sufficient evidence demonstrating that the attorney-client privilege or work product doctrine does not apply to the documents at issue (nor could they, given that they refused to meaningfully meet and confer about any documents).” (JS at 33, 37 (citing *United States v. Reynolds*, 345 U.S. 1, 10, 73 S. Ct. 528, 97 L. Ed. 727 (1953))). According to defendants, before *in camera* review may be permitted, “the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person’ ... that *in camera* review of the materials may reveal evidence to establish that the attorney-client privilege does not apply.” (*Id.* (citing *United States v. Zolin*, 491 U.S. 554, 572, 109 S. Ct. 2619, 105 L. Ed. 2d 469 (1989))). Defendants assert that plaintiffs failed to make such a factual showing, and it appears that they have “picked these documents seemingly at random in the hopes that the Court will find something wrong with Defendants’ privilege designations.” (*Id.*). They further assert that plaintiffs have no “real evidence demonstrating that privilege or work product doctrine does not apply.” (Def’ts’ Supp’l Mem. at 5).

Defendants state that the Rule 37 letter did not include plaintiffs’ “purported concerns regarding log entries that involve in-house rather than outside counsel,” and “most troubling, Plaintiffs never provided Defendants with the list of fifty privilege log entries (which they now ask the Court to review *in camera*).” (JS at 36). Defendants contend that “[t]his is precisely what Defendants asked Plaintiffs to provide during the meet and confer process, and which Plaintiffs refused to provide on the ground that collecting a subset of documents on which the parties could meet and confer *would be too time-consuming and*

burdensome.” (*Id.* (emphasis in original) (citing Sessions Decl. ¶ 11)). They argue that this “warrants close scrutiny as Plaintiffs have put the cart well before the horse in seeking *in camera* review without even giving Defendants the opportunity to resolve Plaintiffs’ concerns about these fifty specific documents without the need for court intervention.” (*Id.*). Defendants suggest that the Court “should order the parties to further meet and confer on the fifty documents raised for the first time in Plaintiffs’ attorney’s declaration before proceeding any further.” (*Id.*).

Plaintiffs reply that the law does not require them to provide the Court a “‘document-by-document list of objections’ before *in camera* review can proceed, ... particularly when entire categories are at issue.” (Pls.’ Supp’l Mem. at 4). They contend they have made a sufficient factual showing to support *in camera* review by identifying “a large number of non-attorney communications and documents in which an attorney was merely copied, which this Court has found warrants *in camera* inspection.” (*Id.* (citing *In re Grand Jury Invest.*, 974 F.2d 1068, 1074 (9th Cir. 1992); *Applied Med. Res. Corp. v. Ethicon, Inc.*, 2005 WL 6567355, at *2 (C.D. Cal. May 23, 2005) (noting that plaintiff “met the minimal threshold” by showing “log entries for several documents [that] fail[ed] to identify any attorney involved in the communication” and “documents in which an attorney was one of many recipients[.]”))). Plaintiffs also point to two exhibits that “contain the exact same communications involving Ann Brown and Raghunatha Guduri, as the emails include the same author/recipients with identical time stamps, meaning that the unredacted information in Exhibit 8 can be used to discern what’s contained in the redacted information in Exhibit 7.” (*Id.* (citing Pls.’ Supp’l Mem. Ex. E)).

*12 Plaintiffs observe that defendants used the Protective Order in this action to “claw-back” a document that is “clearly non-privileged ... [and] represents an effort by Cognizant to shield from discovery an entire category of information that is of particular relevance in a discrimination case” by identifying the redacted version on the privilege log as “Email requesting legal advice regarding personnel issues.” (*Id.* at 4-5 (citing *id.* Exs. F, G)). Based on “Cognizant’s use of the Protective Order’s claw back feature to prevent Plaintiffs from sharing with the Court a copy of the document that Cognizant claims was inadvertently produced, Plaintiffs respectfully request that the Court either substitute in or otherwise add to any exemplar *in camera* review the six documents identified in Exhibit H, which consist of five documents from Ms. Israel’s [the person responsible for Affirmative Action and EEO compliance] files as well as a corporate policy

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withheld as privileged.” (*Id.* at 5).

Analysis

The Court declines to shoulder what is the parties’ burden to bear in the first instance. Even if plaintiffs are correct that having the Court conduct an *in camera* review of the 50 documents listed in its Chart and the additional six documents identified in Exhibit H would “minimiz[e] the burden to Cognizant” (and the Court makes no such finding), plaintiffs have not sufficiently demonstrated a “factual basis adequate to support a good faith belief by a reasonable person” that *in camera* review of the materials may reveal evidence to establish that the attorney-client privilege does not apply. *Zolin*, 491 U.S. at 572. Accordingly, plaintiffs’ request for *in camera* review of the 50 documents listed in its chart (Kotchen Decl. Ex. 11) and the additional six documents identified in Exhibit H is **denied**.

However, with respect to privilege log entries for which no attorney has been indicated on the from, to, or cc field or, for a limited number of entries as to which plaintiffs request further clarification as to how the document is privileged, plaintiffs’ Motion is **granted in part**.

No later than July 30, 2021, defendants shall provide an amended privilege log for the 1,473 entries on the privilege log that have no attorney in the “from,” “to,” or “cc,” line, indicating how the document is attorney-client privileged or otherwise protected sufficient to enable

plaintiffs to determine the basis for the privilege. This includes, but is not limited to, providing the name of the attorney(s) involved and stating where in the email chain/document the attorney(s) was involved (e.g., “from,” “to,” or “cc”), as well as the date the attorney’s name appeared in the subject log entry, and providing any other information necessary to enable plaintiffs to determine the basis for the privilege.

No later than July 30, 2021, plaintiffs may identify up to **50** entries on the privilege log for which they request further detail as to the basis for the privilege. **No later than August 13, 2021**, defendants shall provide a Supplemental Log containing those 50 entries and an additional description as to the basis for the privilege asserted sufficient to enable plaintiffs to further assess the claimed privilege.

The parties are expected to work cooperatively and in good faith with respect to this procedure and to resolve any dispute, if any arise, resulting from this process without the need for Court intervention. The Court will not consider any motion resulting from this process unless it is convinced that the parties met and conferred in good faith, pursuant to Local Rule 37.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2021 WL 3145982

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H KeyCite history available

2016 WL 11805202

Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

ROYAL PARK INVESTMENTS SA/NA,
Plaintiff,

v.

**HSBC BANK USA NATIONAL
ASSOCIATION,** Defendant.

**Blackrock Balanced Capital Portfolio (FI),
et al.,** Plaintiffs,

v.

HSBC Bank USA, Defendant.
Phoenix Light SF Limited, et al.,
Plaintiffs,

v.

HSBC Bank USA, National Association,
Defendant.

**National Credit Union Administration
Board, et al.,** Plaintiffs,

v.

HSBC Bank US, National Association,
Defendant.

Commerzbank A.G., Plaintiff,

v.

HSBC Bank US, National Association,
Defendant.

Triaxx Prime CDO 2006-1, et al.,
Plaintiffs,

v.

HSBC Bank USA, National Association,
Defendant.

14-CV-08175 (LGS)(SN), 14-CV-09366 (LGS)(SN),
14-CV-10101 (LGS)(SN), 15-CV-02144 (LGS)(SN),
15-CV-10032 (LGS)(SN), 15-CV-10096 (LGS)(SN)

Signed July 15, 2016

ORDER

SARAH NETBURN, United States Magistrate Judge:

*1 In this ESI discovery dispute, the plaintiffs claim that HSBC has withheld documents returned in response to the parties' agreed upon search terms by conducting a subsequent manual search and producing only a percentage of the returned documents. The plaintiffs ask the Court to order HSBC to provide hit reports for its ESI searches and to disclose the criteria it used to withhold documents. HSBC counters that it has reviewed its collection of ESI only for responsiveness to the plaintiffs' document demands and not for relevance. HSBC claims that it has produced all non-privileged documents responsive to the plaintiffs' document demands except for those that it has properly withheld on the basis of an objection.

Having reviewed the parties' submissions, the Court is satisfied that HSBC has met its discovery obligations in accordance with the Federal Rules. Indeed, HSBC's protocol is consistent with Sedona Principle 6, which provides that it is "the responsibility of the producing party to determine what is responsive to discovery demands and to make arrangements to preserve and produce relevant information." The Sedona Principles 38 (2d Ed. 2007). Although there is nothing improper about agreeing to produce all documents generated from an ESI search protocol, doing so creates the risk of producing large quantities of non-responsive documents that are a burden to cull through for the receiving party. Moreover, the receiving party is not entitled to non-responsive documents, and thus failing to conduct a subsequent manual review gives that party more than it is entitled to.

Here, the parties agreed to certain search terms *after* the parties served discovery demands. Thus, application of the ESI search protocol would establish the collection of documents that would then be reviewed against the demands. It appears that at least some of the plaintiffs understood that this would be the methodology when responding to discovery demands. The Court concludes that HSBC did not violate any agreement by the party; rather it engaged in best practices.

HSBC need not provide the plaintiffs with hit reports or the criteria it used to withhold documents, the latter of which is arguably attorney work product. In accordance

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with the amended [Federal Rule of Civil Procedure 34](#), however, HSBC shall identify its objections to the plaintiffs' document demands and specify which documents have been withheld based on those objections. [Fed. R. Civ. P. 34\(b\)\(2\)\(B\), \(C\)](#). In light of the press of deadlines, such supplemental responses shall be served on plaintiffs by no later than July 25, 2016.

SO ORDERED.

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Not Reported in Fed. Supp., 2016 WL 11805202

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SinglePoint Direct Solar LLC v. Solar Integrated Roofing..., Not Reported in Fed....

H KeyCite history available

2023 WL 2585296

Only the Westlaw citation is currently available.
United States District Court, D. Arizona.

SINGLEPOINT DIRECT SOLAR LLC and
SinglePoint Incorporated, Plaintiffs,

v.

SOLAR INTEGRATED ROOFING
CORPORATION and USA Solar Network
LLC, Defendants.

No. CV-21-01076-PHX-JAT

Signed March 21, 2023

Attorneys and Law Firms

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ORDER

[James A. Teilborg](#), Senior United States District Judge

I. Summary of Issue before the Court

*1 Pending before the Court is a discovery dispute between the parties. (Doc. 186). At bottom, the issue is that Plaintiffs believe Defendants' ESI search terms are objectionable because the terms produced many responsive documents. More specifically, Plaintiffs agree that 122,607 responsive documents must be produced, but argue that the remaining 287,381 documents are so

voluminous as to be objectionable.

Other than these general statements, recounting Plaintiffs' objections to Defendants' ESI search terms defies a simple summary. Search terms were exchanged in July of 2022. On September 26, 2022, Plaintiffs objected to the majority of Defendants' search terms. In January 2023, Plaintiffs made additional objections. Then on March 3, 2023, Plaintiffs made more objections. At some point during these rolling objections, Defendants narrowed their ESI search terms but not to the satisfaction of Plaintiffs. The parties now agree that 28 of Defendants' ESI search terms remain in dispute. (A list of the in-dispute terms and the number of responsive documents to each of them is at Doc. 186-1 at 4-5). Again, Plaintiffs object to reviewing and (as necessary) producing 287,381 documents that "hit" when the search terms were run.

Defendants seek to have the Court overrule all of Plaintiffs' objections. Defendants argue that Plaintiffs have waived their objections by not timely asserting them, and that their boilerplate objections are legally insufficient and should be rejected for this alternative reason. Finally, Defendants argue that if they do not prevail on either of these procedural objections, all of Plaintiffs objections are not well taken and should be overruled on their merits.

II. Timeliness

Turning first to the timeliness of Plaintiffs' objections, the parties joint briefing does not lay out an exact chronology of when Plaintiffs first made objections, and the scope of those objections.

The best timeline the Court can put together is that in July of 2022 the parties exchanged search terms (the Court believes this exchange was the result of discovery propounded in April 2022, but that is unclear). (Doc. 186-1 at 3). On September 26, 2022, Plaintiffs made some objections to Defendants' proposed search terms. (*Id.*). On December 21, 2022, the parties "agreed" to run their respective search terms against the data base of documents. (*Id.*). The Court is unclear what "agreed" means in this sentence.

Defendants produced their responsive documents on March 4, 2023. (*Id.*). The Court does not know what agreement between the parties allowed Defendants to respond 8 months after the parties exchanged search terms and over 2 months after the terms were "agreed" to be

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run. As for Plaintiffs, on January 9, 2023, they sent “additional” objections to their September 26, 2022, objections. (*Id.*). These January-2023 objections were obviously after the December 21, 2022 “agreement”. (*Id.*). The Court has not been given an exact copy of Plaintiffs’ September 2022 or January 2023 objections. On January 25, 2023, Plaintiffs again “agreed” to run Defendants search terms. (*Id.*). The Court still does not know what the parties mean by “agreed.”¹

¹ To the extent “agreed” merely means “run the search terms in the database,” there is no excuse for the parties’ delay from July 2022 to December 2022 to complete this step.

*2 On March 3, 2023, Plaintiffs made another round of objections. (Doc. 186-1 at 4 (the objection is quoted in full in this document)). It is from this March 3, 2023, objection that the Court has summarized the objections discussed below. As stated above, Defendants claim either all or some of Plaintiffs’ objections are untimely.

The parties agreed-to ESI protocols (which the Court did not adopt or reject (*see* Doc. 145)) state the following regarding objections to ESI requests, “[the requesting party will] ... provide the Disclosing Party with a reasonable opportunity (no less than 14 days) to object to the scope of the request.” (Doc. 186-1 at 3). If the Court were asked to rule on these protocols back in July 2022, the Court would have found that the parties’ protocols are unmanageable because they do not set a specific timeframe for objections. The Court would have also found that objecting in March of 2023 to search terms that were exchanged in July of 2022 is not “reasonable”. But the protocols do not say an objection will be made “in a reasonable time”. They say that the responding party will get at least a reasonable time. The parties’ poorly crafted protocols defeat Defendants’ argument that the objections are untimely.

Moreover, Plaintiffs objected in March of 2023. Defendants responded in March of 2023. If Plaintiffs’ objections are sanctionably late, Defendants responses are equally, sanctionably late. Clearly both parties seemed to believe March 2023 “responses” to the outstanding discovery were “reasonable”. Accordingly, the Court will not find Plaintiffs’ objections to be waived on the basis of timeliness.

III. Boilerplate Objections

Next, Defendants argue Plaintiffs objections are “boilerplate” and that a boilerplate objection is inadequate to preserve an objection. Legally, Defendants are correct that boilerplate objections do not preserve an objection. *See Blemaster v. Sabo*, No. 2:16-CV-04557 JWS, 2017 WL 4843241, at *4 (D. Ariz. Oct. 25, 2017). Factually, Defendants are correct that Plaintiffs’ March-2023 objection, quoted at Doc. 186-1 at 4, as applied to 28 distinct search terms is a boilerplate objection. However, at Doc. 186-1 at 4, it states, “*By way of example*, Plaintiffs have objected to the search term ‘acquisition’ on the basis that the term is not relevant to the case.” (emphasis added). This sentence leads the Court to believe Plaintiffs made more particularized objections at some point. Thus, on this record, the Court cannot conclude that Plaintiffs’ objections, which the Court does not have all of, were only boilerplate objections. Thus, the Court rejects Defendants argument (without prejudice) that all of Plaintiffs’ objections were waived for lack of specificity.

IV. Objections

A. Proportionality

Regarding proportionality, the Court agrees that 409,988 responsive documents is voluminous. However, Plaintiffs chose to bring a wide-ranging lawsuit based on 13 claims for relief, eight of which relate to the remaining Defendants. The remaining causes of action are sophisticated and include: (1) cause of action (“COA”) No. 1, Lanham Act Violation (15 U.S.C. § 1125(a))—SDS against all Defendants; (2) COA No. 2, Misappropriation of Trade Secrets in violation of the Defend Trade Secrets Act, 18 U.S.C. § 1836 *et seq.* – SDS against all Defendants; (3) COA No. 7, Unfair Competition – SDS against all Defendants; (4) COA No. 8, Violation of Arizona Uniform Trade Secrets Act (A.R.S. § 44-401 *et seq.*) – Plaintiffs against all Defendants; (5) COA No. 9, Intentional Interference with Contract/Business Expectancy – SDS against all Defendants; (6) COA No. 10, Conversion – SDS against all Defendants; (7) COA No. 11, Unjust Enrichment – Plaintiffs against all Defendants; and, (8) COA No. 12, Copyright Infringement (17 U.S.C. § 501) – Plaintiffs against USASN. Additionally, Plaintiffs are seeking more than \$16 million in damages, plus as-yet-unquantified continuing damages, punitive damages, attorneys’ fees, and costs. The Court finds that the ESI sought is proportional to the case as a whole.

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B. Unduly Burdensome

*3 Plaintiff also makes an unduly burdensome objection. The Court has no doubt that reviewing all of the documents that are “hits” from the search terms will be burdensome, but the question is whether the burden is undue. In their objection, Plaintiff seems to argue relevance is on a sliding scale; specifically stating that the relevance of these documents is outweighed by the burden of producing the documents.

Plaintiff have admitted on multiple occasions that the ESI discovery was going to be voluminous in this case. (*See* Docs. 108, 144, 150, 155, 177; *see also* 178 (summarizing certain ESI issues)). A voluminous ESI case is always going to be burdensome. This is an unfortunate reality of ESI heavy, high-dollar commercial cases. However, the Court cannot say, given what is at stake, that the burden of document review is so high as to warrant denying Defendants relevant discovery. Thus, given that the Court has found the request to be proportional, and that the parties have known from the beginning of this case that the discovery in this case would be significant (and have represented that knowledge to the Court on multiple occasions) the Court overrules Plaintiffs’ undue burden objection.

C. Overly Broad

Plaintiffs also object arguing that the search terms are overly broad. Specifically, Plaintiffs appear to argue that the search terms are overly broad because they will produce some documents are that not relevant to this case. (*See e.g.*, Doc. 186-1 at 4) (“Plaintiffs have objected to the search term “acquisition” on the basis that the term is not relevant to the case.”). The Court has reviewed the 28 search terms at issue and, based on the Court knowledge of this case from the various hearings and prior motion practice, the Court concludes that the terms are relevant to the issues in this case.

However, the fact that a search term is relevant does not eliminate the possibility that it will produce irrelevant documents. Conversely, the fact that a search term will produce irrelevant documents does not mean the term should not be used such that the party seeking discovery will not receive relevant responsive documents merely because the term produced documents that were not relevant. Thus, the issue is what to do with the documents that are responsive to the search term but irrelevant to the case.

Several courts have held that by running a relevant search term, the responding party does not waive relevance objections to the documents responsive to the search term. *See FlowRider Surf, Ltd. v. Pacific Surf Designs, Inc.*, 2016 WL 6522807, at *7-8 (S.D. Cal. Nov. 3, 2016) (overruled on other grounds) (finding that a party did not waive its right to conduct a relevance review by agreeing to run search terms); *BancPass, Inc. v. Highway Toll Admin., LLC*, 2016 WL 4031417, at *3 (W.D. Tex. 2016) (same); *Palmer v. Cognizant Tech. Sols. Corp.*, 2021 WL 3145982, at *9 (C.D. Cal. 2021) (“The Court will not compel defendants to produce any document simply because it contains a search term whether or not it is responsive to the discovery request, or, by extension, whether or not it is relevant and proportional to the needs of the action.”); *O’Donnell/Salvatori Inc. v. Microsoft Corp.*, 339 F.R.D. 275, 277 (W.D. Wash. 2021) (same).² This Court agrees that agreeing to run search terms does not waive relevance objections to the documents that are responsive to the search terms. Thus, the Court overrules Plaintiffs’ relevance objections to the search terms themselves but finds that Plaintiff may nonetheless review all documents that are “hits” on a search term for relevance and withhold irrelevant documents.

² *But see Total Safety U.S., Inc. v. Rowland*, No:13-6109, 2014 WL 1691551 *8 (E.D. La April 29, 2014) (finding that the parties’ agree-to ESI protocols waived relevance objections if a search term was found in a document).

V. Oral Argument

*4 The Court notes that in the joint discovery dispute brief, the parties ask for supplemental briefing and oral argument. As the Court stated in the Rule 16 scheduling order (Doc. 122 at 3), the Court will resolve disputes without either argument or supplemental briefing when possible. Here, the Court did not need either to determine Plaintiffs must respond; therefore, those requests are both denied.

VI. Attorneys’ Fees**A. For Production of Documents**

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Plaintiffs argue that if this Court overrules Plaintiffs' objections, Defendants should have to pay Plaintiffs' attorneys fees for this document review. As discussed above, Plaintiffs chose to bring a multimillion-dollar lawsuit involving sophisticated commercial parties, knowing from the outset that discovery would be voluminous. The Court finds no reason why these truths would justify fees shifting; accordingly, Plaintiffs' request for fees is denied.

B. For Bringing Motion to Compel

Defendants seek attorneys' fees for having to bring this discovery dispute before the Court. In their proposed form of Order, Defendants specifically seek fees due to the unreasonableness of Plaintiffs' boilerplate objections. (Doc. 186-1 at 9). For the reasons discussed above, Defendants have not prevailed on that argument; thus, the request for fees on that basis is denied.

However, in Doc. 186 at 4, Defendants more generically ask for attorneys' fees for having to seek the Court's intervention. Thus, the Court is unclear if there are other bases on which Defendants wish to seek fees. As a result, the Court will allow Defendant to file a motion for attorneys' fees within 14 days of this Order. If a motion is filed, it must comply with L.R. Civ. 54.2 and this Court's Scheduling Order. If a motion is filed, it must show both an entitlement to fees and the reasonableness of the fees sought. The response and reply times will be those set by

the local rules. The parties are cautioned that seeking fees or responding to fee requests shall not be a basis to extend any deadlines in this case.

VII. Conclusion

The Court has not set a deadline for Plaintiffs' compliance in the hopes the parties can reach an agreement about production. However, if they cannot, no later than 14 days from the date of this Order, they must raise this issue with the Court via another joint discovery dispute brief. The discovery cut off of April 26, 2023, and the dispositive motion deadline of June 14, 2023, are confirmed.

Based on the foregoing,

IT IS ORDERED that Plaintiffs' objections are overruled; Plaintiffs must respond to Defendants' requested discovery as specified above. The joint motion for discovery dispute (Doc. 186) resolution is granted as set forth above.

IT IS FURTHER ORDERED that Defendants may move for attorneys' fees as set forth above.

All Citations

Not Reported in Fed. Supp., 2023 WL 2585296

Singleton v. Mazhari, Slip Copy (2024)

2024 WL 1140691

Only the Westlaw citation is currently available.
United States District Court, D. Maryland.

Angela SINGLETON, Plaintiff,

v.

Elizabeth MAZHARI, et al., Defendant

Civil Action No. 22-CV-2554-GLR

Signed March 14, 2024

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

[Adam B. Abelson](#), United States Magistrate Judge

*1 This matter has been referred to me pursuant to [28 U.S.C. § 636](#) and Local Rule 301(5)(a), *see* ECF No. 47, for resolution of a series of discovery disputes between Plaintiff, Angela Singleton, and the Maryland Technology Development Corporation (“TEDCO”). There is separate litigation ongoing between Plaintiff and TEDCO. *See Singleton v. Maryland Tech. Dev. Corp.*, No. 22-CV-00999-JMC, 2022 WL 4104201 (D. Md. Sept. 8, 2022) (order dismissing earlier case, “*Singleton I*”); *Singleton v. Md. Tech. & Dev. Corp.*, Case No. 22-2075 (4th Cir.) (appeal). But as to the instant case, TEDCO is a third party. Plaintiff has issued three third-party subpoenas to TEDCO, two of which are operative (one of them, ECF 52-1, having been superseded and withdrawn): a subpoena for production of documents, ECF No. 52-8 (the “Document Subpoena”), and a subpoena for a Rule

30(b)(6) deposition of TEDCO, which also contained additional requests for production of documents from TEDCO, ECF No. 52-2 (the “30(b)(6) Subpoena”).

Plaintiff and TEDCO (the “Disputants”) appeared before me yesterday, March 13, 2024, for a discovery hearing. Plaintiff and TEDCO filed several submissions in advance of the hearing. ECF Nos. 43, 46, 51, 52, 54, 55, 59; *see also* ECF Nos. 53 (order setting briefing schedule) & 54 (order setting hearing). Those submissions revealed that the Disputants were unable to resolve ten disputes arising from the two operative subpoenas: (1) the appropriate time frame for documents and testimony, (2) whether TEDCO would need to re-produce documents to Plaintiff that TEDCO had previously produced to Plaintiff in the EEOC proceeding, (3) whether and to what extent discovery from Defendants should precede or control discovery from TEDCO, (4) the impact Defendants being sued in only their personal capacities has on the scope of discovery, (5) which, if any, “performance development plans” of TEDCO employees other than Plaintiff are discoverable, (6) which custodians’ documents TEDCO should collect and review, (7) the search terms TEDCO should use to search any custodian’s documents, (8) TEDCO’s assertion of attorney-client privilege and the work product doctrine over investigations conducted by Impact HR and an outside law firm, (9) whether Plaintiff is entitled to sanctions in the form of attorneys’ fees and costs as requested, and (10) whether other case deadlines should be stayed pending completion of discovery from TEDCO.

Nearly all of those disputes either (a) were resolved between Plaintiff and TEDCO at the hearing after discussion, (b) were decided by the Court on oral ruling at the hearing, or (c) are such that counsel for Plaintiff and TEDCO will be conferring and the Court is confident that such further conferral will resolve the issues. In particular, the Court ruled that, as a general matter, January 1, 2017 is a reasonable start-date for the scope of discovery; TEDCO need not re-produce documents it previously produced; although Defendants have been sued in their personal capacities for purposes of this case, the scope of discovery is broader than what TEDCO refers to as Defendants’ “personal acts”; as to performance development plans in 2019 for individuals other than Plaintiff, TEDCO is to provide a list of which personnel were placed on performance development plans in 2019, and Disputants are to resolve which of such plans, if any, TEDCO shall produce. The Court also denied Plaintiff’s request for sanctions, finding that TEDCO’s objections, although various have now been overruled, were substantially justified, *see Fed. R. Civ. P. 37* (“the court

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must not order [payment of reasonable expenses] if ... the opposing party's nondisclosure, response, or objection was substantially justified"). Finally, Plaintiff has stated that she does not seek any information or documents protected by the attorney-client privilege or work product doctrine related to the Impact HR or law firm investigation.

*2 Remaining open after the hearing, however, was the question, as to Requests 1 and 3 in the Document Subpoena, and insofar as the 30(b)(6) Subpoena requests documents, of which custodians' documents TEDCO should collect, process, and review.¹

¹ Also remaining open was whether any modification of the case schedule is needed or appropriate in these circumstances. As the parties understand, any request for modification of the scheduling order will need to be presented by means of a motion.

Plaintiff requested that TEDCO collect, process and review documents from 12 custodians, and run 27 search terms against all of those custodians' documents, for the entire requested time period (January 1, 2017 to the present). See ECF No. 52-7 at 7-8 (letter from Plaintiff's counsel dated December 19, 2023, listing custodians and search terms). Plaintiff's demand as stated is overly broad and unduly burdensome, and not proportional to the needs of discovery in this case. See Fed. R. Civ. P. 26(b)(1) (scope of discovery); Fed. R. Civ. P. 45(d)(1) ("A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena."); *Va. Dep't of Corr. v. Jordan*, 921 F.3d 180, 189 (4th Cir. 2019) (explaining that, when considering whether to quash or narrow a third-party subpoena, "courts should consider not just the relevance of the information sought" as well as the burden on the third party of complying with the subpoena, but also "the requesting party's need for [the requested documents or information]") (emphasis added).²

² The reasoning of *Jordan* does not squarely apply to the present dispute. As the Court of Appeals explained in *Jordan*, discovery from third parties is generally more limited than discovery from parties because "nonparties are strangers to the litigation, and since they have no dog in the fight, they have a different set of expectations from the parties themselves." 921 F.3d at 189 (cleaned up, quoting *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998)). See also *id.* ("Bystanders should not be drawn into the parties' dispute without some good reason, even if they have information that falls within the scope of party discovery."). Here, TEDCO, unlike the third-party subpoena recipient in the *Jordan* case, is not a

"stranger" or "bystander"; Ms. Singleton's claims are against the Defendants for decisions they allegedly made while working for TEDCO, which Ms. Singleton contends constituted unlawful discrimination and retaliation, and created a hostile work environment. Regardless, the Court need not reach the question of whether TEDCO qualifies as a "bystander" as contemplated in *Jordan*, because the Court would reach the same conclusions as to time frame, custodians, and the other issues decided at the hearing and herein when applying the relevance, burden and proportionality analysis required by Rule 26 itself.

After weighing the factors and considering Plaintiff's claims and Defendants' defenses, and the burdens on TEDCO, a non-party with respect to this case, the Court finds the following custodian list and concomitant time frames to constitute a reasonable scope for collection of documents for purposes of Requests 1 and 3 in the Document Subpoena, and insofar as the 30(b)(6) Subpoena request documents. Although the Court found at the hearing that, as a general matter, January 1, 2017 is an appropriate starting date for discovery, as applied to some of the custodians, for document collection purposes and as specifically noted below, the Court concludes that time frame is unnecessarily long³ :

*3

Stephen Auvil – January 1, 2017 through December 31, 2020 (6 months after Plaintiff's June 19, 2020 termination)
 George Davis – January 1, 2017 through December 31, 2020
 Elizabeth Mazhari – January 1, 2017 through December 31, 2020
 McKeever Conwell – January 1, 2017 through December 31, 2020
 Angela Singleton – January 1, 2017 through December 31, 2020
 Linda Goins – January 1, 2017 through December 31, 2020
 Linda Singh – December 1, 2019 through December 31, 2020
 Jennifer Hammaker – September 1, 2019 through December 1, 2019
 Arti Santhanam – September 1, 2019 through December 1, 2019
 Tammi Thomas – September 1, 2019 through December 1, 2019
 Tim Wilson – January 1, 2020 through December 31, 2020
 John Wasilisin – January 1, 2017 through December 31, 2020

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³ Other time periods may be appropriate with respect to other requests. For example, requests 4, 5, and 6 in the Document Subpoena pertain to the termination and/or nonrenewal of contracts for Tammi Thomas, Jennifer Hamaker, and Arti Santhanam. ECF No. 52-8 at 3. The Disputants did not raise any disputes with respect to those requests. The Court does not know when those terminations/non-renewals occurred. The Court's decision to limit collection of documents for purposes of requests 1 and 3, and the 30(b)(6) subpoena, for those three custodians' documents, to the period September-December 2019 does not affect TEDCO's obligation to collect and produce documents responsive to requests 4-6, which TEDCO had already agreed to do.

That then leaves the question of which search terms TEDCO should run against the universe of documents collected from the provided custodians for those time periods. As discussed at the hearing, TEDCO (or its vendor) should run search term reports ("STRs") for the search terms Plaintiff requests. Surely, certain terms will hit on volumes of documents that will be unduly burdensome and disproportionate to the needs of the case. Accordingly, Plaintiff and TEDCO shall engage in meaningful and concrete conferral, such as modifying search terms, narrowing time frames with respect to particular search terms, applying particular search terms only to particular custodians, and the like—a process that is necessarily iterative as narrower STRs are generated, until the set of documents to review reaches a reasonable

volume, proportionate to the needs of the case. *See generally* Jason R. Baron & Edward C. Wolfe, *A Nutshell on Negotiating E-Discovery Search Protocols*, 11 *Sedona Conf. J.* 229 (2010).⁴ The Court is confident that Plaintiff and TEDCO will reach agreement on such protocol, consistent with the Fourth Circuit's instructions in *Jordan* and the proportionality principle reflected in *Rule 26*.

⁴ Available at https://thesedonaconference.org/sites/default/files/publications/229%2020236%20A%20Nutshell%20on%20Negotiating%20E-Discovery%20Search%20Protocols_0.pdf

Finally, the Court notes that hits on a given search term in a given document for a particular custodian, including during the time frames above, does not necessarily mean the document is discoverable. *See, e.g., O'Donnell/Salvatori Inc. v. Microsoft Corp.*, 339 F.R.D. 275, 277 (W.D. Wash. 2021) (“[A] party's agreement to run search terms does not waive its right to review the resulting documents for relevance so long as the review can be done in a reasonably timely manner.”).

*4 So ordered.

All Citations

Slip Copy, 2024 WL 1140691

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Strauch v. Computer Sciences Corp., Not Reported in Fed. Supp. (2015)**H** KeyCite history available

2015 WL 7458506

Only the Westlaw citation is currently available.
United States District Court, D. Connecticut.**Joseph STRAUCH, et al**
v.
COMPUTER SCIENCES CORP.3:14 CV 956 (JBA)
|
Signed 11/24/2015**Attorneys and Law Firms**

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RULING REGARDING ELECTRONICALLY STORED INFORMATION [“ESI”][Joan Glazer Margolis](#), United States Magistrate Judge

*1 The factual and procedural history behind this FLA litigation has been set forth in detail in the multiple

rulings issued by U.S. District Judge Janet Bond Arterton and by this Magistrate Judge, namely: Ruling on Plaintiffs’ Motion to Compel Production of Documents, filed January 6, 2015 (Dkt. #127), [2015 WL 75884](#); Ruling on Defendant’s Motion to Compel, filed February 10, 2015 (Dkt. #138), [2015 WL 540911](#); Order Following Telephone Conference, filed February 23, 2015 (Dkt. #143); Ruling Denying Defendant’s Motion to Transfer Venue, filed February 23, 2015 (Dkt. #145); Supplemental Ruling Following *In Camera* Review, filed May 8, 2015 (Dkt. #159); Ruling Granting Plaintiffs’ Motion for Conditional Certification, filed June 9, 2015 (Dkt. #168), [2015 WL 3727804](#); Ruling on Number of Depositions, filed June 10, 2015 (Dkt. #171); Ruling on Objections to Reminder Notice, filed August 14, 2015 (Dkt. #201), [2015 WL 4877173](#); and Scheduling Order, filed October 20, 2015 (Dkt. #256)[“October 2015 Order”].

On November 17, 2014, Judge Arterton first referred this file to this Magistrate Judge for discovery. (Dkt. #103; see also Dkt. #124). There are now 1,047 opt-in plaintiffs in this litigation. (October 2015 Order at 2, ¶ 7). As the multiple rulings and orders indicate, Judge Arterton and this Magistrate Judge have been forced into micro-managing virtually every pretrial aspect of this massive litigation, down to the smallest minutiae. (See also October 2015 Order, at 3, nn. 1-2).

Pursuant to deadlines set in the October 2015 Order (at 2, ¶ 6), on October 30, 2015, plaintiffs and defendant filed letters (Dkts. ##262-63),¹ followed by responsive letters on November 6, 2015. (Dkts. ##265-66).

¹ The following two exhibits were attached to plaintiffs’ letter (Dkt. #262): copies of correspondence between counsel, dated September 22 and October 2, 2015 (Exhs. A-B).

The following eight exhibits were attached to defendant’s letter (Dkt. #263): copies of correspondence between counsel, dated August 13, August 27 (with attachment), September 22, and October 2, 2015 (Exhs. A-B, D, F); and copies of e-mails between counsel, dated August 27, September 3, September 4 (with attachment), September 22, September 28, October 3, October 6, October 7, October 9, October 12, October 20, October 26, and October 29, 2015 (Exhs. C, E, G-H).

As set forth in plaintiffs’ letters (Dkt. #262, at 1-5; Dkt. #265, at 1-4), plaintiffs have proposed 103 search terms from the documents of five custodians, to which defendant objected on the basis of burdensomeness; plaintiffs have proposed three alternatives as a

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compromise as follows: (1) “sampling and iterative refinement[.]” under which defendant would produce “small samples of documents containing the agreed-on search terms, followed by an iterative analysis of the documents to hone the search terms;” (2) “the virtual warehouse[.]” which constitutes “a quick-peek protocol by which [defendant] provides the entire corpus of documents collected from the custodians,” followed by plaintiffs’ search “for a limited number of relevant documents, akin to an old-fashioned search through paper files in a warehouse;” or (3) “complete production[.]” described as a “straightforward production of all documents that hit on any search term with the use of a clawback agreement permitting [defendant] to retrieve any inadvertently produced documents.”

*2 More specifically, under the first option, “sampling and iterative refinement,” plaintiffs propose that if each search string “results in a purportedly unwieldy volume of hits,” then defendant can provide only a statistically significant sample of those hits (plaintiffs point to web sites that will provide guidance to counsel for the appropriate sample size), which will include all non-privileged documents, both relevant and irrelevant, so that the parties can then reevaluate and modify the search terms “to focus on the most relevant documents and weed out irrelevant documents, to the extent feasible.” (Dkt. #262, at 3 & n.3)(footnote omitted).² Plaintiffs characterize this as “a limited, reasonable proposal that will result in only a fraction of potentially responsive documents being produced in the first instance.” (Id. at 3).

² In his letter, dated October 2, 2015, plaintiffs’ counsel lists the sample size for twenty-five different search terms, with each sample size roughly 1,000 documents, plus or minus no more than 52. (Dkt. #262, Exh. B, at 3-7).

Under the second option, plaintiffs would engage in a “quick peek[.]” where “within an agreed-upon time period,” plaintiffs would conduct a “secure, initial examination of all ESI ... without any search strings being applied to cull documents[.]” plaintiffs would then designate “a limited number of documents” for defendant to formally produce, at which time defendant would have the opportunity to review the designated subset of documents for privilege. (Id. at 4)(emphasis added). Plaintiffs characterize this approach as “a modern equivalent of the old-fashioned method of lawyers going to a warehouse to inspect hard copy documents and tagging documents for production with post-it notes.” (Id.).

Lastly, plaintiffs propose “complete production (with

clawback),” with defendant producing all documents containing any search terms, along with a qualifying phrase proposed by defendant, and allowing defendant to retrieve irrelevant (and presumably privileged) documents. (Id. at 4-5).

Defendant’s letters describe in detail the failed negotiations between counsel with respect to ESI. (Dkt. #263, at 3-6 & Exhs. A-H; Dkt. #266, at 1-4). Defense counsel estimates that one attorney can review 75 to 100 documents per hour. (Dkt. #263, at 4). As represented by defense counsel, plaintiffs’ initial proposed search terms against the e-mail accounts of the five custodians³ produced 961,463 documents, or approximately 60% of the 1.5 million documents in the database. (Id. at 3 & Exh. A).⁴ Indeed, even defendant’s proposed search terms currently hit on 61,859 documents, which defendant suggested needs to be further modified to reduce the number of documents to be reviewed. (Id. at 3-4 & Exh. B).⁵

³ The five custodians are Adair Bledsoe, Robyn Burke, Robert Englemann, Robert Gans and Heidi Johnson. (Dkt. #263, at 3).

⁴ At one point, plaintiffs suggested that production be limited to those search terms that appeared in more than 10,000 individual documents, but even with that restriction, plaintiffs’ proposed search terms still hit on 356,403 documents. (Id. at 4 & Exhs. D-E).

⁵ Defendant sought another variation, in which it added a sixth custodian, Patricia Calisi, but eliminated some search terms, resulting in a total of 60,970 documents. (Id. at 4 & n.1).

After several rounds of negotiations, according to defendant, plaintiffs’ last proposal was that defendant review all documents where the search terms hit on less than 10,000 documents, as well as review a statistically significant sample of documents where the search terms hit on more than 10,000 documents, and that defendant produce all non-privileged documents, whether relevant or not. (Id. at 5 & Exh. F). According to defendant, its last counterproposal to plaintiffs was to apply plaintiffs’ proposed keywords to the e-mails of six custodians, and that for any search term that hit on fewer than 3,000 documents, defendant would review all of the documents and produce any relevant, non-privileged documents, but for any search term that hits on more than 3,000 documents, then defendant would consolidate all of the documents and pull one random sample from the pool of

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documents, which then would be reviewed and defendant would again produce all relevant, non-privileged documents. (Id. at 5 & Exh. G).

*3 Given that there are 1,047 opt-in plaintiffs, “potentially hundreds more as class members” in the four states of Connecticut, California, North Carolina and Missouri, and a possible verdict in eight or nine digits if plaintiffs are successful here (see Dkt. #265, at 2), defendant’s proportionality argument is unavailing. (See Dkt. #263, at 2-3). However, defendant is correct that it should not be obligated to disclose clearly irrelevant documents (id. at 7-8) in an attempt “to [better] hone the search terms[.]” (Dkt. #262, at 1).

In light of all these circumstances, the Magistrate Judge rules as follows: defendant’s ESI search shall consist of the search terms proposed by defendant of the files of eight custodians—the six identified in notes 3 and 5 supra, as well as Scott Creasy and Brian Fillebrown (see Dkt. #263, at 3-5 & Exh. B); because these are search terms proposed by defendant, there is a presumption of relevancy, and defendant may remove any documents only if they are clearly and undeniably irrelevant, and of course, if they are privileged; moreover, this conclusion is without prejudice to plaintiffs seeking additional documents, as approved by the court if no agreement is otherwise reached by the parties, in the event that they deem this initial production insufficient. Counsel shall confer with one another as to the date by which defendant shall disclose all relevant documents consistent with this ruling (which may also be on a rolling basis); **on or before December 14, 2015**, counsel shall notify this

Magistrate Judge’s Chambers, by letter, the date to which they agree, and if no agreement is reached, the parties’ proposed dates.

This is not a Recommended Ruling, but a ruling on a non-dispositive motion, the standard of review of which is specified in 28 U.S.C. § 636; Fed. R. Civ. P. 6(a), 6(e) & 72; and Rule 72.2 of the Local Rules for United States Magistrate Judges. As such, it is an order of the Court unless reversed or modified by the District Judge upon timely made objection.

See 28 U.S.C. § 636(b)(written objections to ruling must be filed within fourteen calendar days after service of same); Fed. R. Civ. P. 6(a), 6(e) & 72; Rule 72.2 of the Local Rules for United States Magistrate Judges, United States District Court for the District of Connecticut; Small v. Secretary, H&HS, 892 F.2d. 15, 16 (2d Cir. 1989)(failure to file timely objection to Magistrate Judge’s recommended ruling may preclude further appeal to Second Circuit).⁶

⁶ If any counsel believes that a settlement conference before this Magistrate Judge would be productive, he or she should contact this Magistrate Judge’s Chambers accordingly.

All Citations

Not Reported in Fed. Supp., 2015 WL 7458506

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H KeyCite history available

2014 WL 1691551

Only the Westlaw citation is currently available.
United States District Court,
E.D. Louisiana.

TOTAL SAFETY U.S., INC.

v.

Gary ROWLAND, et al.

Civil Action No: 13-6109.

|
Signed April 29, 2014.

Attorneys and Law Firms

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ORDER

KAREN WELLS ROBY, United States Magistrate Judge.

*1 Before the Court is Plaintiff, Total Safety U.S., Inc.'s ("Total Safety") **Plaintiff's Second Motion to Compel Compliance with the Protocol (R. Doc. 103)**. The motion is opposed. *See* R. Doc. 119 & 121. A reply was filed. *See* R. Doc. 130. A sur-opposition was also filed. *See* R. Doc. 140. The motion was filed on February 18, 2014, and referred to the undersigned on April 7, 2014. *See* R. Doc. 144. The matter was rescheduled to be heard with oral argument on April 23, 2014.

I. Background

This case arises from Defendant Gary Rowland's

("Rowland") decision to leave his employment with Plaintiff, Total Safety ("Total Safety") for that of 24 Hour Safety in October of 2013. *See* R. Doc. 1, p. 1. Rowland resigned on October 6, 2013, and Total Safety initiated this suit four days later, asserting a single claim for breach of an employment agreement and seeking injunctive relief restraining Rowland from working for 24 Hour Safety in certain regards. *Id.* at 10–13. The employment agreement was originally signed in 2005 and contained restrictive covenants under which Rowland agreed to refrain from certain competitive activities (hereinafter referred to as the "Employment Agreement") *Id.* at 2–7. Generally, those covenants provided that Rowland would neither work for Total Safety's competitors nor solicit its employees to the same within certain geographical areas, which were mostly defined in terms of Louisiana Parishes. *Id.* Calcasieu Parish was not within those geographical areas.

After a telephone hearing, the Court granted Plaintiff's TRO request on October 11, 2013. *See* R. Doc. 7. Ten days later, on Rowland's motion and with his consent, the Court extended the TRO by two weeks and continued a previously scheduled preliminary injunction hearing by roughly the same period. *See* R. Doc. 17. On October 21, 2013, just two days after the TRO was extended, Total Safety filed a First Amended Complaint, alleging that Rowland not only breached his Employment Agreement, but that he acted in concert with 24 Hour Safety to steal valuable trade secrets and confidential information before his October resignation. *See* R. Doc. 18.

The Amended Complaint added 24 Hour Safety as a defendant and asserted claims for (i) Breach of Employment Agreement, (ii) Misappropriation of Confidential Information and Trade Secrets, (iii) Unfair Trade Practices, (iv) Conversion, (v) Breach of Fiduciary Duty, (vi) Conspiracy, (vii) Violation of the Computer Fraud and Abuse Act, and (viii) Violation of the Federal Stored Communications Act. *Id.* The Amended Complaint was also accompanied by a Motion for renewed and expanded injunctive relief restricting Rowland from competing in any way with Total Safety. *See* R. Doc. 19.

Concurrent with the Amended Complaint, Total Safety also filed a Motion for Contempt, contending that Rowland violated the TRO then in place by working for 24 Hour Safety and soliciting Total Safety's customers within restricted areas. *See* R. Doc. 20. Thereafter, on October 28, 2013, after a second telephonic hearing, the Court granted the new TRO request in part and enjoined Rowland from working in geographic areas covered by the Employment Agreement and from soliciting Total

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Safety's customers within the same area, but denied it to the extent it sought injunctions on a national or company-wide level. *See* R. Docs. 30 & 33.

*2 On December 18, 2013, the Court entered a Preliminary Injunction against Rowland, limited in scope to the terms set forth in the 2005 Employment Agreement, and granted Total Safety's motion for contempt as to Rowland, but denied it as to 24 Hour Safety. *See* R. Docs. 84, 95, & 96. Thereafter, on February 12, 2014, the Court issued a "Preliminary Injunction Order" prohibiting Rowland from rendering any services to or for 24 Hour Safety or any competing business in areas the Court found to be "restricted areas" and prohibited a host of other actions on behalf of Rowland. *See* R. Doc. 95–96. Also on February 12, 2014, the Court issued an Order for Contempt and Appointing Special Master Monitor Compliance with the Preliminary Injunction Order, appointing Brian Roux, to act as a special master to monitor Rowland's compliance with this Court's preliminary injunction. *See* R. Doc. 96.

As to the instant motion, on February 18, 2014, Total Safety filed its second motion to compel compliance with the protocol, contending that on October 28, 2013, this Court granted their request for forensic examinations and ordered the parties to submit a corresponding protocol by October 29, 2013. *See* R. Doc. 103. After negotiating the terms, the parties agreed upon the protocol that Total Safety filed with the Court. *Id.*, at p. 1; citing R. Doc. 31–1, pp. 28–37.

Total Safety contends that the "Protocol" reflects the agreed-upon scope and procedures for the Court ordered forensic examinations, which identified the digital forensic company, RVM, Inc., as Total Safety's Forensic Vendor, to which both Rowland and 24 HR Safety had "no objection." *See* R. Doc. 103–1, p. 2, citing R. Doc. 31–1, p. 26 ¶ 1. Total Safety contends that Rowland and 24 HR Safety retained its own digital forensic company, Avansic, to oversee RVM's examinations and assist with Rowland's and 24 HR Safety's review/production of the forensic files. *Id.* at p. 3. Total Safety contends that the parties agreed that RVM would meet with Rowland and 24 Hour Safety on November 1, 2013, so that RVM could create forensic images of certain computers, devices, and email accounts for various custodians. Total Safety contends that the initial examinations occurred simultaneously at two different locations: one in Deer Park, Texas, ("Deer Park") and in Geismar, Louisiana ("Geismar"). *See* R. Doc. 103–1, p. 3.

However, after conducting these examinations, Total Safety argues that Defendants allegedly failed to comply

with some of their production requests. *See* R. Doc. 103, p. 1. Therefore, on February 18, 2014, after conferring in accordance with *Fed.R.Civ.P.* 37, Total Safety filed the instant motion, alleging the following deficiencies with Defendants responses:

(a) 24 HR Safety failed to provide Todd Dartez's iPhone for forensic imaging during the initial collection and has not allowed Total Safety to re-image it;

(b) 24 HR Safety has not allowed Total Safety to conduct a full examination of Amy Hains's iPhone;

*3 (c) 24 HR Safety has produced none of the files collected from Hains's external devices;

(d) 24 HR Safety withheld at least 3,600 files from the email accounts of Trent Smith, Lamoine Reyes, and Jeff Ellenberg because they pre-date July 1, 2013;

(e) 24 HR Safety withheld several thousand files based on relevance;

(f) 24 HR Safety produced no log detailing which files were withheld—and the reasons why—from its employees' computers and devices; and

(g) Rowland and 24 HR Safety produced two privilege logs relating to files from email accounts and Rowland's devices—minus his discarded iPhone—without adequate descriptions that would allow Total Safety or this Court to access the privilege claim.

As such, Total Safety requests that this Court order Defendants, 24 Hour Safety and Rowland to comply with the ESI protocol as follows:

(a) Provide a time/place for RVM, Inc., to conduct forensic examinations of Dartez's and Hains's iPhones within five days of this Court's order;

(b) Produce all non-privileged files from Hains's devices within 5 days of this Court's order;

(c) Produce all non-privileged files from the email accounts of Smith, Reyes, and Ellenberg that pre-date July 1, 2013 within five days of this Court's order;

(d) Produce all files withheld for relevance within five days of this Court's order;

(e) Produce all outstanding privilege logs within five

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days of this Court's order; and

(f) Amend the current privilege logs to provide adequate descriptions within 5 days of this Court's order and further ensure that any outstanding privilege logs contain sufficient descriptions.

II. Standard of Review

Federal Rule of Civil Procedure ("Rule") 26(b)(1) provides that "[p]arties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense." Fed.R.Civ.P. 26(b)(1). The Rule specifies that "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* The discovery rules are accorded a broad and liberal treatment to achieve their purpose of adequately informing litigants in civil trials. *Herbert v. Lando*, 441 U.S. 153, 176, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979). Nevertheless, discovery does have "ultimate and necessary boundaries." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978) (quoting *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947)). Furthermore, "it is well established that the scope of discovery is within the sound discretion of the trial court." *Coleman v. American Red Cross*, 23 F.3d 1091, 1096 (6th Cir.1994).

Under Rule 26(b)(2)(C), discovery may be limited if: (1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from another, more convenient, less burdensome, or less expensive source; (2) the party seeking discovery has had ample opportunity to obtain the discovery sought; or (3) the burden or expense of the proposed discovery outweighs its likely benefit. *Id.* In assessing whether the burden of the discovery outweighs its benefit, a court must consider: (1) the needs of the case; (2) the amount in controversy; (3) the parties' resources; (4) the importance of the issues at stake in the litigation; and (5) the importance of the proposed discovery in resolving the issues. *Id.* at 26(b)(2)(C)(iii).

*4 Rule 26(b)(3) provides that "[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party in its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." *Id.* However, such materials may be discoverable when either allowed by Rule 26(b)(1), or when a party shows a "substantial need" for the information and that

obtaining the information by another means would pose an "undue hardship." *Id.*

Rule 34 provides that a party may request another party to produce "any designated documents or electronically stored information ... stored in any medium from which information can be obtained." *Id.* at 34(a)(1)(A). This request "must describe with reasonable particularity each item or category of items to be inspected." *Id.* at 34(b)(1)(A). "The party to whom the request is directed must respond in writing within 30 days after being served." *Id.* at 34(b)(2)(A). "For each item or category, the response must either state that inspection ... will be permitted as requested or state an objection to the request, including the reasons." *Id.* at 34(b)(2)(B). Although Rule 34 does not provide that untimely objections are waived, the Fifth Circuit has found that the waiver provision applies equally to Rule 34. *See In re United States*, 864 F.2d 1153, 1156 (5th Cir.1989).

III. Analysis

Total Safety seeks this Court compel Defendants to produce (a) Todd Dartez's iPhone for forensic imaging (b) Amy Hains's iPhone; (c) files withheld based on 24 Hour Safety's objections based on relevance and privilege and (d) privilege logs as to the documents which privilege has been claimed. The Court shall address each of Total Safety's issues as set forth in its motion.

A. Todd Dartez's iPhone

Total Safety contends that the first deficiencies in production occurred in violation of paragraph 3 of the protocol, which provided that "any computer, handheld device (like BlackBerries, iPhones, and iPads), external hard drive, and any other storage device utilized by Rowland, Dartez, or Hains after July 1, 2013, (collectively, the "Computers and Devices") are subject to the Protocol. *See* R. Doc. 103-1, p. 3; citing R. Doc. 31-1, pp. 26-27, ¶ 3.

Total Safety contends however that when the Deer Park team met Rowland, Dartez, Tony Aube-24 Hour Safety's IT officer, Kindall James-Rowland's attorney, and Joel Sallee-an Avansic representative, they were only provided access to the following computers and devices: (1) Dartez's C5120 Milano flip-phone; (2) Dartez's 24 HR Safety computer; (3) Rowland's iPhone 4s, for which

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Total Safety contends was discarded on November 10; (4) Rowland's iPad; and (5) Rowland's 24 Hour Safety computer. Therefore, Total Safety contends that it did not receive access to (1) Dartez's iPhone and (2) could not collect usable images from Rowland's iPhone 4S because it was encrypted. *See* R. Doc. 103-1, p. 4.

*5 Total Safety contends that Dartez's iPhone is relevant because it was used by Dartez after the July 1, 2013 relevancy date, which was defined by the parties. Therefore, Total Safety contends that the phone is subject to the Protocol. *See* R. Doc. 103-1, p. 8. As such, Total Safety contends that on October 30, 2014, counsel for 24 Hour Safety indicated that Dartez uses two phones, one of which is his iPhone. *Id.* However, RVM was not provided the iPhone for imaging at the inspection, nor has it since been provided the iPhone for inspection. Therefore, Total Safety seeks an Order from this Court to compel the inspection and production of Dartez's iPhone 5s.¹

¹ As to Rowland's iPhone, Total Safety contends its team alerted everyone at the Deer Park site, including Rowland, James and Sallee about the encryption issue. *Id.* Total Safety filed a separate motion for sanctions on the encryption issue, which has since been denied as premature by the presiding District Judge. *See id.*, citing R. Docs. 101, 144.

In opposition, 24 Hour Safety contends that it should not have to produce Dartez's iPhone for imaging because on October 30-31, 2013, email communications between the parties evidence that Total Safety was aware of the existence of Dartez's iPhone, and its availability to be collected on November 1, 2013. *See* R. Doc. 121, p. 6. However, RVM, Total Safety's forensic imaging experts failed to image the phone on November 1, 2013. As such, 24 Hour Safety contends that it should not be required to reproduce the phone for imaging when it was the fault of Total Safety's forensic imaging expert that the phone was not properly imaged.

During oral argument counsel for the Defendants indicated that Dartez had two phones, and during the inspection, their representative only imaged one of the phones but was unable to image the iPhone. As such, Dartez's iPhone was never imaged or produced to Total Safety.

Because the parties identified Dartez as one of the owner's of 24 Hour Safety, and thus is a key player in this action, the Court found that Dartez's iPhone is relevant and encompassed by the parties agreed upon protocol as a discoverable computer device. As such, Total Safety's request to inspect the phone is granted. The inspection is

to take place at the Deer Park site. The date of this examination will be confirmed in the Court's Discovery Conference Order, which will be issued at a later date.

B. Hains's iPhone 5

Total Safety contends that at the Geismar inspection, its team met with Hains and 24 Hour Safety's counsel, Eric Miller, and an Avansic representative, where RVM was provided the following computers and devices: (1) Hains's iPhone, (2) Hains's 24 Hour Safety Computer and (3) Hains's external hard-drives. *See* R. Doc. 103-1, p. 4. However, upon inspection, Total Safety contends that its team was unable to collect usable images from Hains's iPhone because it was corrupted. *Id.* at p. 8. Total Safety contends that it also notified the Avansic representative and sent them the exact images that RVM collected from Hains's iPhone. *Id.* at 9, n. 5.

However, Total Safety contends that as of yet, neither Avansic, nor 24 Hour Safety has provided usable files for production to Total Safety for this device. *Id.* at 9. Total Safety contends that it also requested that 24 Hour Safety re-produce Hains's iPhone for imaging, but that they have failed to allow the requested imaging. *Id.* As such, Total Safety seeks an Order from this Court compelling usable images of Hains's iPhone.

*6 In opposition, 24 Hour Safety contends that it has since produced all data from Amy Hains's cell phone and computer, except for privileged communications, from July 1, 2013 to date. *See* R. Doc. 121, p. 1. It also contends that it is unsure why RVM was unable to obtain an uncorrupted image of Hains' phone, as no issue with the imaging of the phone was reported until approximately three months after the initial image collection was performed. *See* R. Doc. 121, p. 7. Thus it contends that it should not be required to produce information (1) which it has already produced and (2) which is due to an error of Total Safety's expert. *Id.*

During oral argument, counsel for Total Safety represented that its expert imaged Hains's iPhone on site, but that once he went back to the computer lab to image the files, it realized that the data was corrupted and not readable. Counsel for Total Safety indicated that neither he, his client, or the IT personnel who imaged the phone knew the underlying reason why the file was corrupted.

Counsel for Total Safety also sites to the affidavit of Evan Fuest, the forensic engineer for RVM, who imaged Hains's iPhone. *See* R. Doc. 103-3, pp. 2-3. In his

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affidavit, Fuest testified that he uploaded Hains's phone onto his forensic equipment, and the equipment indicated that the image upload had been completed without error. However, upon his arrival back in his New York office, Fuest testified that he placed all the images from the phone into a program developed by one of their forensic equipment manufacturers to analyze and report on the collected images, where it was then revealed that the image files from Hains's collection were corrupt. *Id.* at 3, ¶ 14–16. He testified that he then communicated with a forensic equipment manufacturer, but neither he nor the manufacturer were able to conclude why the files were corrupt.

Upon further questioning, Total Safety, much like Fuest's affidavit, could not attest to the specific reasoning why the imaging first seemed to have successfully uploaded but then later was corrupted. Furthermore, counsel for 24 Hour Safety indicated that he had seen the images before from those captured by his own expert, Avansic, and that there did not seem to be any corruption therein. Based on the conflicting evidence, as well as the potential that it was an error on the part of Total Safety's expert, the Court was not persuaded by the affidavit of Fuest or the argument of Total Safety as to why the corruption occurred, and deferred its ruling on this issue until Total Safety's expert could provide the Court with assurance that if the phone and / or data were reproduced for imaging, the encryption error would not reoccur.

During a discovery conference that occurred on April 24, 2014 with the undersigned, counsel for Total Safety provided the Court with an additional affidavit of Gregory Cancilla, the Director of Forensics for RVM, Inc. In his affidavit, Cancilla stated that RVM intends to change the process within which it imaged Hains's iPhone the first time, by performing the full examination on site, rather than completing the analysis at RVM's laboratory in New York. *See* attached Affidavit, at ¶¶ 4–6. Therefore, he suggests that RVM will be able to confirm on the site of the examination whether a usable image can be extracted from the iPhone. *Id.*

*7 During the discovery conference, which will be addressed in full detail in a subsequent order to be issued by the Court, 24 Hour Safety indicated to the Court that Hains's iPhone was no longer in her possession, as she allegedly lost it while aboard a boat on Folsom River, as it went overboard. Counsel for 24 Hour Safety did however represent that the device had been "backed up" as of March 2014, and that the back up information would be available for re-imaging. However the format of the back up was unable to be confirmed by counsel for 24 Hour Safety.

During the conference, Total Safety also indicated that it sought for its lawyers to be present on site when its expert re-images the phone. 24 Hour Safety expressed concerns since the previous imaging did not produce readable results. As a result, the Court suggested the use of the Special Master, Brian Roux, who had been previously agreed to by the parties and appointed by the Court. The Court also ordered Total Safety to bear the costs of the Special Master's re-imaging of Hains's iPhone. The Court further agreed to contact Special Master Brian Roux and request that he select three (3) days he would be available to conduct the re-imaging of Hains's iPhone. As such, Total Safety's request was granted.

C. 24 Hour Safety Production

Total Safety contends that Paragraphs 4–7 of the Protocol explained the process within which RVM must process the images collected during the forensic examinations, which included an agreed upon set of search terms, that RVM would use the terms to run targeted searches across all the collected forensic images. *See* R. Doc. 103–1, pp. 5–6; citing R. Doc. 31–1, p. 27, ¶¶ 4–7. Total Safety contended that RVM would then take all the files that contained a search term, run a de-duplication program to remove duplicates, and then would produce the de-duplicated files to Avansic. *Id.* Then, Rowland and 24 Hour Safety had five days to review the files for privilege and create a privilege log with descriptions for any withheld files. *Id.* citing R. Doc. 31–1, at ¶ 8. Total Safety contends that not only did 24 Hour Safety and Rowland fail to meet the five day production deadline, but that they also allegedly withheld approximately 15,000 files. *See* R. Doc. 103–1, p. 6.

In opposition, 24 Hour Safety contends that even though there was a protocol in place, it never agreed to produce irrelevant and immaterial information outside of the time of the solicitation and hiring of Rowland, or after July 1, 2013. *See* R. Doc. 121, p. 7. Furthermore, 24 Hour Safety contends that Total Safety agreed that this date was a reasonable and relevant cut off date, and that it did not agree that the production of collected data would be unlimited in time. *Id.* at 7–8. Thus, 24 Hour Safety contends that it did not waive its objection to relevancy and immaterial requests or production of files outside the relevant time period of July 1, 2013. *Id.* at 8. As such, it contends that Total Safety's requests should be denied.

*8 The Court will address the alleged production failures as set forth in Total Safety's motion:

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1. Several thousand files improperly withheld for “relevance”

Total Safety contends that 24 Hour Safety has improperly withheld thousands of files based on relevance, which is not supported by the terms set forth in the Protocol. Specifically, Total Safety contends that the Protocol, does not allow files containing the agreed-upon search terms to be withheld for “relevance,” and unambiguously states that “Rowland and 24 Hour Safety can only withhold documents based on ‘privilege.’” See R. Doc. 103–1, p. 10; citing R. Doc. 31–1, pp. 27–28, ¶¶ 5, 8. Therefore, Total Safety contends that no where in the protocol is there a provision which allows for the unilateral withholding of files containing the agreed-upon search terms based on relevancy. As such, Total Safety seeks an Order from this Court compelling 24 Hour Safety to comply with the protocol by producing all non-privileged documents being withheld for “relevance.”

During oral argument, counsel for Total Safety represented to the Court that the parties had agreed in their protocol that files would only be withheld based on a party’s assertion that these documents were privileged. As such, Total Safety contends that 24 Hour Safety now improperly asserted relevance as a basis for withholding documents.

Upon questioning by the Court, counsel for 24 Hour Safety conceded on the record that he agreed to the protocol, limiting the withholding of documents to only those which are based on privilege. See R. Doc. 31–1, pp. 27–28, ¶¶ 5–8. Therefore, the Court found that because the parties agreed to limit the withholding of documents to only files which may be considered privileged by the parties, 24 Hour Safety had to produce the documents as agreed to in the protocol. As such, Total Safety’s request as to production of documents withheld based on relevance is granted. 24 Hour Safety has until **May 8, 2014**, to produce those files.

2. Several Thousand Files Improperly Withheld Based on Date Restriction

Total Safety contends that 24 Hour Safety withheld approximately 3,600 files from the accounts of Smith, Reyes, and Ellenburg because the files pre-dated July 1, 2013, which is in violation of the protocol.

Total Safety contends that Paragraph 5 of the Protocol sets forth 24 Hour Safety’s obligation to provide access to its employees’ email accounts, which included providing their employees with temporary passwords to RVM, so that they could access the email accounts to create the forensic images. See R. Doc. 103–1, p. 4; citing R. Doc. 31–1, p. 27, ¶ 5. However, paragraph 5 contains no date restriction. *Id.* at p. 12. Paragraphs 7–8 of the protocol then set forth the procedure for producing 24 Hour Safety email account files containing the agreed-upon search terms. *Id.*

These paragraphs do not state however, that Rowland or 24 Hour Safety can withhold documents based on any date restriction. Total Safety contends that the only date restriction is contained in Paragraph 13, and concerns Rowland’s personal Yahoo! Email Account, which indicates that RVM must run the agreed-upon search terms and then apply a date restriction to the files containing those terms. *Id.* at 13. As such, Total Safety seeks an Order from this Court compelling 24 Hour Safety to comply with the protocol by producing all non-privileged documents being withheld that pre-date July 1, 2013.

*9 During oral argument, counsel for 24 Hour Safety conceded that the parties agreed upon protocol did not include a limitation date. However, upon further questioning by the Court, he indicated that during several depositions, including that of Hains as well as Dartez, it was revealed that communications between 24 Hour Safety and Rowland did not formally begin until July 1, 2013.

The Court therein questioned the parties as to when the earliest communication showing any interest, including preliminary discussions, between Rowland and 24 Hour Safety began, so as to determine a date within which to restrict the search. In response, Total Safety argued that Rowland first showed interest in 24 Hour Safety over a year before his resignation from Total Safety, on or around October 6, 2013. Counsel for Total Safety also indicated that based on some of the documents produced in response to the undersigned’s Order denying in part and granting in part Defendants’ Motion to Quash Subpoenas, as well as in some of the deposition testimony already taken, informal conversations and / or communications with Hains’ and Dartez, both owners of 24 Hour Safety began in early 2012. See R. Docs. 60, 65, 66. Counsel for Total Safety also stated that the “more serious” discussions about Rowland moving over to 24 Hour Safety began in May and June of 2013.

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Upon further questioning by the Court, however, Total Safety argued that based on the parties agreed upon protocol, counsel for 24 Hour Safety did not object to there being no date restriction, and therefore the agreement signed between the parties should be binding as to whether or not there would a date restriction on the discoverable information. Total Safety also informed the undersigned that this issue had been discussed in the presiding District Judge's hearing on the parties second temporary restraining order ("TRO"), which occurred on October 28, 2013. *See e.g.*, R. Doc. 30, 57.

Upon limited review of the transcript from the second TRO hearing, during oral argument, the undersigned noticed that the presiding District Judge Ivan B. Lemelle, also stated his concerns regarding the scope of the search of the home and business computers, as well as emails of the identified key players in this action. In the transcript, Judge Lemelle, in response to counsel for 24 Hour Safety's question regarding Total Safety's ability "to search all the emails and home and business computers of all the individuals," indicated that he believed "it should be limited ... and not something that goes over bounds for the purposes of ... the hearing." *See* R. Doc. 57, p. 31–32. Thus, the undersigned recognized that even the presiding district judge believed that there should be some date limitation so as to prevent a wide open, unlimited examination, in an effort to protect the parties from conducting discovery which would likely produce irrelevant and or immaterial information to the instant action.

*10 Furthermore, upon questioning by the Court, Total Safety could not point to any specific evidence or any specific date, other than "early 2012 " which it would have identified as the first date which Rowland and 24 Hour Safety began informal communications regarding an employment change. Instead, Total Safety contended that they did not want a date limitation as to the files identified by the search terms so that they could find all files, even those which they contend may have been altered by date by Rowland before any negotiations began. The Court however was unpersuaded by this argument.

Therefore, the Court questioned counsel for Rowland as to when any preliminary negotiations began, and he stated that the "real discussions began in June or July of 2013." However, he also indicated in response to the Court's question as to if any questions occurred before, that "nothing more than informal ..." which the Court interpreted as a concession that some communications, may have begun in 2012. Furthermore, counsel for Total Safety stated that they had seen text messages sometime in 2012 between Rowland and Dartez and / or Hains.

Neither side however could pinpoint a month or date in 2012 within which the discussions began. Therefore, the Court found that it would limit the date restriction on the discovery material. As such, Total Safety's request was granted, but the scope of the production is limited to the period of January 2012 to October 2013.

D. Privilege Logs and Descriptions

Total Safety contends that Rowland and 24 Hour Safety failed to produce logs for each production. *See* R. Doc. 103–1, p. 13. Total Safety also contends that as for the two logs that were produced by Rowland and 24 Hour Safety, the logs that were produced contain inadequate descriptions regarding the basis for the claimed privilege, and thus should be supplemented. *Id.*

1. Privilege Logs Not Provided

Total Safety contends that Paragraph 8 of the Protocol states that, "[f]or all documents withheld, the privilege log must include (at a minimum): 1) unique identification number; 2) the date of the document; 3) the parties to any communications; 4) a brief description of the subject matter of the document; and 5) the reason the document was withheld." *See* R. Doc. 103–1, p. 13–14; citing R. Doc. 31–1, pp. 27–29, ¶ 8.

As such, Total Safety contends that it requested privilege logs multiple times, but that as of yet, 24 Hour Safety has failed to produce them for the files withheld from Hains's, Dartez's, Justin's, and Bercegeay's computers and devices. *Id.* at p. 14. Thus, Total Safety contends that 24 Hour Safety has failed to comply with the Protocol. Thus, Total Safety seeks an Order from this Court compelling 24 Hour Safety to produce all outstanding privilege logs. *Id.*

During oral argument, counsel for 24 Hour Safety contended that it had not produced these files because of the previously referred to date restriction of July 1, 2013. However, he conceded that based on the Court's ruling as to the January 1, 2012 date, he would review the data and files withheld from Hains's, Dartez's, Justin's, and Bercegeay's computers and devices, and provide Total Safety with all data that is not subject to a privilege. As to any data and or files within which a privilege is claimed, the Court ordered that a privilege log, with an adequate description of the document over which the privilege is

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being claimed be provided to Total Safety in order for them to ascertain whether any privileges apply to a particular document and or file in question. As such, Total Safety's request was granted. 24 Hour Safety has ***no later than fifteen (15) days*** from oral argument, ***or by May 8, 2014***, to produce the documents and the privilege logs associated therewith.

2. Inadequate Privilege Descriptions

*11 Total Safety contends that Paragraph 8 of the protocol states that, “[i]f Plaintiff objects to a privilege designation, then the parties agree that the court can inspect the documents in camera and decide whether the document should be produced.” See R. Doc. 103–1, p. 14. However, Total Safety cannot determine whether to object based on the descriptions in the two privilege logs that Rowland and 24 Hour Safety provided, as the descriptions contain no information for Total Safety or the Court to determine whether the claimed privilege actually protects the file from disclosure. *Id.*

For example, Total Safety contends that one of Rowland and 24 Hour Safety's most recent log contains descriptions, such as “E-mail string containing attorney-client privileged communication and sent in defense of pending litigation.” *Id.* Total Safety contends that these descriptions have been routinely found by this Court to be insufficient, citing *Talyor Energy Co., LILAC v. Underwriters at Lloyd's London Subscribing*, No. 09–6383, 2010 WL 3952208, *2 (E.D.La. Oct.7, 2010) (“Here, the Court finds that the Second Amended Privilege Log does not set forth facts that suffice to establish that each element of the privilege claimed is applicable. Document descriptions such as ‘Email forwarding attorney client communication,’ ‘Email regarding attorney input and advice regarding anticipated litigation issues,’ and ‘Email forwarding attorney report’ fail to set forth adequate facts for this Court—and for plaintiff—to determine whether the claimed privilege protects the document from disclosure.”). *Id.* at p. 14–15.

Total Safety contends that it raised this issue to counsel for both Rowland and 24 Hour Safety on February 3, 2014, but that as of yet, neither counselors have indicated whether they intend on amending these logs or provide more sufficient descriptions in their outstanding logs. Therefore, Total Safety seeks an Order from this Court compelling them to amend their current logs by providing sufficient descriptions to determine whether the claimed privilege protects the files from disclosure. *Id.*

In opposition, Rowland contends that the only issue in Total Safety's motion applicable to him is the sufficiency of one of the privilege logs. See R. Doc. 119. Specifically, Rowland contends that there is no issue with the privilege logs submitted on his behalf, as the Protocol only required a “brief” description of the privileged nature of the document. See *id.*, at p. 3. Furthermore, Rowland contends that the one case that Total Safety sites in support of its argument that the privilege logs are insufficient does not apply to post-litigation documents, as does this log. *Id.* at p. 3–4.

Specifically, Rowland contends that some courts across the country have determined that the requirements for privilege logs describing post-litigation documents and communications are different than those for pre-litigation documents and communications. *Id.* In fact, Rowland contends that some courts have suggested that privilege logs are not required for post-litigation documents and communications. *Id.* citing *U.S. v. Bouchard Transp.*, 2010 U.S. Dist. LEXIS 37438, at *2 (E.D.N.Y.2010) (“Privilege logs are commonly limited to documents created before the date litigation was initiated [because] it can be assumed that all documents created after ... a lawsuit has been filed and withheld on the grounds of privilege were created because of the pending litigation.”); *Prism Technologies, LLC v. Adobe Sys., Inc.*, 2011 U.S. Dist. LEXIS 131321 (D.Neb.2011) (same); *Ryan Inv. Corp. v. Pedregal De Cabo San Lucas*, 2009 U.S. Dist. LEXIS 118337, at *9 (N.D.Cal.2009) (denying plaintiff's motion to compel “to the extent it seeks to require a log of post-litigation counsel communications and work product....”).

*12 During oral argument, the Court reviewed the privilege log, and indicated that based on the brief descriptions, the log was unsatisfactory, as the descriptions did not provide enough of an explanation as to the content of the material over which the claim is being asserted. Therefore, counsel for Rowland was required to amend the privilege log to provide a better description of those documents on which privileges are being claimed so that Total Safety may be able to ascertain whether the privilege applies. As such, Total Safety's request to amend the logs was granted.

IV. Conclusion

IT IS ORDERED that Plaintiff, Total Safety U.S., Inc.'s (“Total Safety”) **Plaintiff's Second Motion to Compel Compliance with the Protocol (R. Doc. 103)** is **GRANTED** as set forth below:

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IT IS GRANTED as to Total Safety's request to image Hains's iPhone and Dartez's iPhone.

IT IS FURTHER GRANTED as to Total Safety's request for 24 Hour Safety to produce files which were withheld based on relevance and date restriction. However, Total Safety's request as to those files is limited from January 1, 2012, to the October 2013 date already designated by the parties, no later than fifteen (15) days from the oral argument on this motion, or by May 8, 2014.

IT IS FURTHER GRANTED as to Total Safety's request for Rowland and 24 Hour Safety to amend the current privilege logs and produce logs which have yet to be produced, to provide adequate descriptions of the files over which a privilege is being claims **no later than fifteen (15) days** from the oral argument on this motion, or **by May 8, 2014**.

DECLARATION OF GREGORY CANCELLA

1. My name is Gregory Cancellia, and I am of the full age of majority, competent to testify under oath, and make the statements herein based upon my personal knowledge.
2. I am the Director of Forensics for RVM, Inc., which was hired by counsel for Total Safety U.S., Inc., to conduct forensic examination in this litigation according to a Protocol that was provided to RVM.
3. Counsel for Total Safety informed me that this court has requested assurances regarding RVM's ability to collect a usable image of Amy Hains's iPhone.
4. If allowed to conduct the examination, RVM engineers will be able to confirm, on site, whether a usable image can be extracted from the iPhone.
5. Unlike the first attempt, RVM's forensic engineers will perform the full analysis on site, rather than completing the analysis at RVM's laboratory in New York. This will allow RVM's forensic engineers to not only extract an

image from the iPhone but also confirm whether the image can be analyzed or is corrupt.

6. RVM's engineers will use a Cellubrite UFED Touch Device—a Tool that the FBI uses—to extract an image of Ms. Hains's iPhone.

7. RVM's engineers will also have a similar tool (manufactured by a different company Oxygen) to also extract an image of the iPhone in case the Cellubrite tool cannot extract a usable image.

*13 8. RVM's engineers will also bring a laptop with the software—Physical Analyzer—that RVM utilizes to analyze the image extracted by the tools. Specifically, after RVM's engineers collect an image on the tools, they will connect the tools to the laptop, using a dongle, and run the Physical Analyzer software to analyze the images collected on the tools.

9. This software will allow the RVM's engineers to confirm whether a usable image has been extracted.

10. If the software confirms that a usable image cannot be extracted, RVM's engineers will then examine the iPhone itself to analyze whether there are certain settings or applications that are prohibiting a usable image from being collected.

11. RVM's engineers will not need to re-image Ms. Hains's iPhone to determine whether a usable image can be collected or whether RVM's engineers indeed collected a usable image.

12. Pursuant to [28 U.S.C. § 1746](#), I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on April 23, 2014.

/s/

Gregory Cancellia

All Citations

Not Reported in F.Supp.3d, 2014 WL 1691551

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H KeyCite history available

2023 WL 5302371

Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

UNITED STATES of America, FOR the
USE AND BENEFIT OF M. FRANK
HIGGINS & CO., INC., M. Frank Higgins
& Co., Inc. Plaintiffs-Counter Defendants,
v.

DOBCO INC., Defendant-Third-Party
Plaintiff-Counter Claimant,
Liberty Mutual Insurance Company,
Defendant,
Merchants National Bonding, Inc.,
Third-Party Defendant.

22-cv-9599 (CS) (VR)

Signed August 17, 2023

Attorneys and Law Firms

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Greg Trif, Trif & Modugno LLC, Morristown, NJ, for Defendant-Third-Party Plaintiff-Counter Claimant/Defendant.

ORDER

VICTORIA REZNIK, United States Magistrate Judge:

*1 The parties inform the Court of three pending discovery disputes that require the Court's guidance: (1)

the assertion by M. Frank Higgins & Co., Inc. and Merchants National Bonding, Inc. that documents and communications between them are protected by the common interest doctrine; (2) the assertion by Higgins and Merchants that documents and communications exchanged by and between them and (i) Partner Engineering, (ii) J.S. Held, (iii) North S. Tarr, (iv) Niagara Research Associates, and (v) the International Masonry Institute, are protected by the consulting expert privilege; and (3) the parties' negotiation of an electronically stored information ("ESI") protocol. (ECF No. 42 (Ltr.)). The Court addresses each of these issues below.

I. Higgins' and Merchants' Invocation of the Common Interest Doctrine

Higgins and Merchants assert that their communications are subject to the common interest privilege and therefore not subject to discovery by Dobco in this case. (ECF No. 42 at 1–2). The common interest doctrine is “an extension of the attorney-client privilege,” *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989), and the work-product doctrine, *Smith v. Pergola 36 LLC*, No. 22-cv-4052, 2022 WL 17832506, at *7 (S.D.N.Y. Dec. 21, 2022). Thus, any document or communication potentially protected by the common interest doctrine must first satisfy the elements of the attorney-client privilege or work-product doctrine. *Smith*, 2022 WL 17832506, at *7. “[T]he attorney-client privilege protects communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice.” *United States v. Krug*, 868 F.3d 82, 86 (2d Cir. 2017). The work-product doctrine protects materials “prepared in anticipation of litigation or for trial by or for another party or its representative.” *Fed. R. Civ. P. 26(b)(3)(A)*. Under the common interest doctrine, those communications voluntarily made among different parties and their attorneys (which would ordinarily waive the privilege) are not waived “where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel in the course of an ongoing common enterprise and multiple clients share a common interest about a legal matter.” *Schaeffler v. United States*, 806 F.3d 34, 40 (2d Cir. 2015).

Here, Higgins and Merchants appear to be seeking a blanket application of the common interest doctrine so that all their communications are shielded from discovery. Although a common interest privilege may apply to *some*

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of the communications between Higgins and Merchants by virtue of their surety relationship, it does not automatically apply to every communication exchanged between them at every point in time and for all purposes. Indeed, the common interest privilege does not transform an otherwise non-privileged communication, or a document prepared in the ordinary course of business, into a protected one simply because it was exchanged between a principal and its surety. *See, e.g., United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998) (noting that work product protection will be withheld from “documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation”); *accord In re Grand Jury Subpoena Dated Oct. 22, 2021*, 282 F.3d 156, 161 (2d Cir. 2002) (“Broad categorical statements about the scope of the work product privilege are risky, as individual applications are highly fact specific.”). Rather, as a prerequisite, Higgins and Merchants have the burden to show how the attorney-client and work-product privileges apply. *Am. Oversight v. U.S. Dep’t of Just.*, 45 F.4th 579, 593 (2d Cir. 2022) (“[T]he party invoking work-product protection ... bears the burden of demonstrating that a withheld document qualifies as such ...”); *Krug*, 868 F.3d at 86 (“The parties asserting [attorney-client] privilege ... bear the burden of establishing its essential elements.”) (alterations omitted).

*2 To assess the applicability of the common interest privilege in this case, the Court needs additional facts about when the common interest may have been triggered and to which specific communications it may apply. To that end, the Court needs clarity on the following information:

- (1) the chronology of when and to whom Dobco sent its notice(s) of default, and the nature of those notices;
- (2) whether and when Higgins and/or Merchants retained outside counsel in response to such notices of default;
- (3) the date Merchants denied performance on the bond or otherwise agreed to stand behind its principal Higgins and deny Dobco’s claim;
- (4) the nature of, the parties to, and the dates of, the communications and documents Higgins and Merchants seek to shield under the common interest doctrine via the attorney-client privilege, including whether the communications and documents were confidentially made between an attorney and a client for the purpose of obtaining legal advice; and

(5) the nature of, the parties to, and the dates of, the communications and documents Higgins and Merchants seek to shield under the common interest doctrine via the work-product doctrine, including whether the work product was made in the ordinary course of business or in anticipation of litigation.

II. Merchants’ Investigation

The parties also appear to dispute whether documents that Merchants created during its investigation of Dobco’s claim under the performance bond are privileged. (ECF No. 42 at 2, 4–5). As an initial matter, the Court recognizes that there may be distinctions between an insurer and a surety for purposes of analyzing whether Merchants’ investigation is privileged. *See, e.g., Pearlman v. Reliance Ins. Co.*, 371 U.S. 132, 140 n.19, 83 S.Ct. 232, 9 L.Ed.2d 190 (1962) (“[S]uretyship is not insurance.”). However, the Court is inclined to believe that the application of the work-product doctrine to an insurer is analogous to the application of the doctrine to a surety. In both the insurer and surety contexts, “it is often difficult to determine when work product protection might apply.” *99 Wall Dev. Inc. v. Allied World Specialty Ins. Co.*, No. 18-cv-126, 2020 WL 2730944, at *7 (S.D.N.Y. May 26, 2020). “This is because it is routine for insurance companies to investigate claims while at the same time the potential for litigation is ever present.” *Id.* Similarly, a surety has a duty to investigate claims, *see U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, 369 F.3d 34, 80 (2d Cir. 2004),¹ and, at the same time, the potential for litigation exists. *See United States v. Seaboard Sur. Co.*, 817 F.2d 956, 959 (2d Cir. 1987) (“[A] surety has the option, when its principal is default-terminated, of either coming in and completing the project or paying the government its damages, essentially the cost of completion. A surety may, of course, also challenge the propriety of the default termination, thereby, in effect, denying liability on the bond.”) (citation omitted).

¹ *See U.S. Fid. & Guar.*, 369 F.3d at 80 (noting that a surety “arguably had a duty to protect [its] own interests ... by investigating” a project following notice that the principal had defaulted); *see also Int’l Fid. Ins. Co. v. Aulson Co.*, No. 11-cv-9240, 2012 WL 6021130, at *7 n.4 (S.D.N.Y. Dec. 4, 2012) (referring to “a surety’s duty to reasonably investigate claims brought against its principal by a third party”); AIA Risk Management, *Performance Bonds and Sureties—Infrequent Troubles*, Am. Inst. of Architects (Dec. 14, 2020), <https://www.aia.org/articles/6356995-performance-bon>

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ds-and-sureties--infrequent (discussing the surety's investigation/due diligence review).

*3 In the insurer context, “[g]enerally, courts in this District have found that documents created by the insurer after it has declined coverage are presumed, or at least more likely, to have been created in anticipation of litigation and to be work product, whereas documents that are part of the claim investigation process are not typically work product.” 99 *Wall Dev.*, 2020 WL 2730944, at *7. “Other courts, instead of employing that presumption, have adopted a more flexible case-by-case approach.” *Roc Nation LLC v. HCC Int’l Ins. Co.*, No. 19-cv-554, 2020 WL 1970697, at *3 (S.D.N.Y. Apr. 24, 2020) (internal quotation marks omitted). The Court believes it cannot make such a presumption in lieu of a case-by-case assessment of the facts. See *Adlman*, 134 F.3d at 1202–03; *U.S. Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, No. 97-cv-6124, 2000 U.S. Dist. LEXIS 7939, at *36–44, *34 n.7 (S.D.N.Y. June 7, 2000) (assessing the facts where a surety invoked the work-product doctrine as to documents prepared by a surety during its investigation).

To assess whether Merchants’ investigation may be protected by the work-product doctrine, the Court needs additional information about when the investigation was conducted and for what purpose. To that end, the Court needs clarity on the following:

- (1) whether Merchants has a statutory duty to investigate Dobco’s claim under the performance bond;
- (2) when Merchants learned of the notice(s) of default;
- (3) when Merchants conducted its investigation and for what purpose;
- (4) if and when Merchants hired outside counsel in connection with the investigation;
- (5) when Merchants denied performance on the bond or otherwise agreed to stand behind its principal Higgins and deny Dobco’s claim;
- (6) whether, and to what extent, Merchants’ investigation differed from those it performed in the ordinary course of its business; and
- (7) whether Merchants believes any meaningful distinctions exist between an insurer and a surety as to the application of the work-product doctrine to

investigation-related materials.

III. Higgins’ and Merchants’ Invocation of the Consulting Expert Privilege

Higgins and Merchants assert that documents and communications exchanged by and between them and various consulting experts are privileged and not subject to discovery. (ECF No. 42 at 2–3). Under *Fed. R. Civ. P. 26(b)(4)(D)*, “[o]rdinarily, a party may not ... discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial.” “The rule is intended to allow litigants to consult experts in order to evaluate a claim without fear that every consultation with an expert may yield grist for the adversary’s mill.” *Agron v. Trs. of Columbia Univ.*, 176 F.R.D. 445, 449 (S.D.N.Y. 1997) (internal quotation marks omitted). “In determining whether an expert was hired in anticipation of litigation, the court must examine the total factual situation in the particular case. To conclude that an expert was hired in anticipation of litigation, a lawsuit need not have been filed, but there must have existed more than a remote possibility of litigation.” *Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*, 175 F. R.D. 34, 43 (S.D.N.Y. 1997) (citation and internal quotation marks omitted).

As with the common interest privilege, it appears that Higgins and Merchants seek a blanket ruling that all documents and communications exchanged by and between them and various consulting experts are privileged and not subject to discovery. Although the consulting expert privilege may be applicable to some or all of these experts, the Court agrees with Dobco that Higgins and Merchants cannot conceal prior communications with professionals engaged in the ordinary course of business by transforming them into non-testifying experts. Instead, the Court must examine the particular facts to determine whether the experts were retained or specially employed in anticipation of litigation. To that end, the Court needs clarity on the following:

- *4 (1) when and by whom each of the experts (i.e., Partner Engineering, J.S. Held, North S. Tarr, Niagara Research Associates, and the International Masonry Institute) were retained and for what purpose;
- (2) whether any reports from the foregoing experts were provided to Dobco, and if so, which reports

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were provided and when; and

(3) whether and to what extent any of the experts' reports became discoverable based on Higgins's specific reliance upon those reports in the Complaint.

Because the Court needs additional facts and information from the parties regarding the application of the common interest doctrine, the nature of Merchants' investigation, and the consulting expert privilege, the parties are directed to respond by joint letter to the questions identified in Sections I, II, and III above by no later than **September 7, 2023**. Based on the number of issues involved, the Court waives its standard page limitations under its Individual Practices for letters and pre-motion letters.

IV. ESI Protocol

The parties disagree on how searches for electronically stored information (ESI) should be conducted and are therefore unable to agree on the terms of an ESI protocol. (ECF No. 42 at 3–4, 6). Higgins and Merchants argue that “the parties’ search terms should be crafted in a manner intended to locate relevant documents, and that the parties should be required to produce all non-privileged documents that hit on one or more search terms.” (*Id.* at 3). Dobco argues that “Higgins and Merchants’ request that Dobco produce every single electronic communication that includes at least one of the to-be-determined search words, without considering relevance or proportionality to the needs of the case, is tantamount to engaging in an impermissible fishing expedition that is well beyond the scope of permissible discovery.” (*Id.* at 6).

Although there is nothing improper about parties agreeing to produce all documents generated from an ESI search protocol (as proposed by Higgins and Merchants), the Court will not order an unwilling party to do so. *See, e.g., Royal Park Invs. SA/NA v. HSBC Bank USA Nat'l Ass'n*, No. 14-cv-08175, 2016 WL 11805202, at *1 (S.D.N.Y. July 15, 2016) (“[T]he receiving party is not entitled to non-responsive documents, and thus failing to conduct a subsequent manual review gives that party more than it is entitled to.”). ESI is not exempt from *Rules 26 and 34 of the Federal Rules of Civil Procedure*, *see Raine Grp. LLC v. Reign Cap., LLC*, No. 21-cv-1898, 2022 WL 538336, at

*1 (S.D.N.Y. Feb. 22, 2022), which only obligate a party to produce information that is relevant and responsive. *See Fed. R. Civ. P. 26(b)(1)* (limiting the scope of discovery to “any nonprivileged matter that is relevant to any party’s claim or defense”); *Fed. R. Civ. P. 34(a)* (“A party may serve on any other party a request within the scope of *Rule 26(b) ...*”); *Raine Grp., 2022 WL 538336, at *1* (“[A]n ESI protocol and search terms work in tandem with the parties’ obligations under the Federal Rules and do not replace a party’s independent obligation to produce electronic (or paper) documents that are reasonably accessible, relevant, and responsive within the meaning of *Rule 34*.”). Search terms, even when narrowly tailored, may still produce some amount of non-responsive documents. As such, Dobco is entitled to review its documents to ensure that they are responsive to the discovery demands even if they hit on one or more of the parties’ agreed-upon search terms. In doing so, the Court expects Dobco to promptly produce all non-privileged documents responsive to the parties’ document demands, except for those that it properly withholds based on an objection.

*5 Based on the parties’ filings, it appears that they have not yet engaged in any meaningful dialogue about proposed search terms, custodians, and date ranges to be applied to any searches for ESI. Without such discussions, arguments about relevance and burden are speculative at best. It is standard practice for the negotiation of search protocols to be an iterative process that allows parties to narrowly tailor search terms, custodians, and date ranges to locate responsive and non-privileged documents for production. Generally, if the search protocol is narrowly tailored and tested by both parties, they can minimize concerns about fishing expeditions and the production of large quantities of non-responsive documents.

With the general ESI protocol dispute now resolved and with the foregoing in mind, the parties are directed to meet and confer to negotiate search terms, custodians, and date ranges that are (1) narrowly tailored to achieve responsive search results, (2) proportional to the needs of the case, and (3) not unduly burdensome, costly, or voluminous. By no later than **September 7, 2023**, the parties shall submit a joint letter, providing the Court with an update on the status of these negotiations.

All Citations

Slip Copy, 2023 WL 5302371

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Venturedyne, Ltd. v. Carbonyx, Inc., Not Reported in Fed. Supp. (2016)

H KeyCite history available

2016 WL 6694946

Only the Westlaw citation is currently available.
United States District Court, N.D. Indiana,
Hammond Division.

VENTUREDYNE, LTD., d/b/a Scientific
Dust Collectors, Plaintiff,

v.

CARBONYX, INC., d/b/a Carbonyx
Carbon Technologies, and United States
Steel Corporation, Defendants.

United States Steel Corporation, Cross
Claimant,

v.

Carbonyx, Inc., Cross Defendant,
Carbonyx, Inc., Counter Claimant,

v.

United States Steel Corporation, Counter
Defendant.

CAUSE NO.: 2:14-CV-351-RL-JEM

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Signed 11/15/2016

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OPINION AND ORDER

JOHN E. MARTIN, MAGISTRATE JUDGE

*1 This matter is before the Court on Plaintiff's Motion to

Compel Production of Documents against Carbonyx Inc. [DE 48], filed by Plaintiff Venturedyne, Ltd. ("Venturedyne") on July 12, 2016. Venturedyne asks the Court to order Defendant Carbonyx, Inc. ("Carbonyx") to produce electronically stored information requested in Venturedyne's Revised Requests for Production of Documents. On July 26, 2016, Carbonyx filed a response [DE 51], and on August 2, 2016, Carbonyx filed a reply [DE 52].

I. Background

On June 8, 2015, Venturedyne served its First Request for Production of Documents to Carbonyx. On September 19, 2015, Carbonyx objected to the requests on relevancy grounds and did not turn over any documents.

On October 1, 2015, Venturedyne sent Carbonyx a letter responding to Carbonyx's objections. On October 6, 2015, counsel for Venturedyne and Carbonyx spoke over the phone. Because Carbonyx's primary objection was that the document requests were too broad, counsel for Venturedyne and Carbonyx discussed using keywords to search Carbonyx's electronically stored information. On November 9, 2015, Carbonyx turned over sample emails related to this case to help determine what keywords would be appropriate.

On January 20, 2016, Venturedyne sent Carbonyx a Revised Request for Production of Documents. On February 25, 2016, Venturedyne's counsel sent Carbonyx's counsel a list of 126 keywords. Venturedyne's counsel proposed these keywords as a method by which Carbonyx could satisfy its burden to produce material responsive to the Revised Request.

On March 10, 2016, Carbonyx's counsel sent an email to Venturedyne striking 20 search terms from the list of 126, leaving 105 terms. On April 28, 2016, Venturedyne's counsel responded by voluntarily removing 28 additional terms, leaving 78 terms. Venturedyne also objected to 7 of the 20 terms deleted by Carbonyx. In all, neither party objected to 78 of the original 126 search terms until Carbonyx responded to this Motion to Compel.

Venturedyne's counsel sent Carbonyx's counsel follow-up emails on May 6, May 24, June 3, June 13, and June 30, 2016. Carbonyx's counsel did not respond to any of these five emails. On July 12, 2016, Venturedyne filed this Motion.

Venturedyne, Ltd. v. Carbonyx, Inc., Not Reported in Fed. Supp. (2016)**II. Standard**

A party may seek an order to compel discovery when an opposing party fails to respond to discovery requests or provides evasive or incomplete responses. *See Fed. R. Civ. P. 37(a)*. “Parties may obtain discovery regarding any non-privileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” *Fed. R. Civ. P. 26(b)(1)*. Relevant evidence includes “any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

To assist in producing responsive electronically stored information, parties frequently use keyword searches. Keyword searches “have long been recognized as appropriate and helpful for ESI search and retrieval,” but “there are well-known limitations and risks associated with them.” *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 260 (D. Md. 2008). “Chief among [those limitations] is that such a search necessarily results in false positives (irrelevant documents flagged because they contain a search term) and false negatives (relevant documents *not* flagged since they do not contain a search term).” *Makowski v. SmithAmundsen LLC*, No. 08-C-6912, 2012 WL 1634832, at *1 (N.D. Ill. May 9, 2012). As a result, “[e]lectronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI.” *William A. Gross Constr. Assocs., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 256 F.R.D. 134, 136 (S.D.N.Y. 2009).

*2 A party objecting to the discovery request bears the burden of showing why the request is improper, *McGrath v. Everest Nat’l Ins. Co.*, 625 F. Supp. 2d 660, 670 (N.D. Ind. 2008), and the Court has broad discretion when deciding discovery matters. *Thermal Design, Inc. v. Am. Soc’y of Heating, Refrigerating & Air-Conditioning Eng’rs, Inc.*, 755 F.3d 832, 837 (7th Cir. 2014); *Rennie v. Dalton*, 3 F.3d 1100, 1110 (7th Cir. 1993).

III. Analysis

Venturedyne’s Complaint alleges that Venturedyne, doing business as Scientific Dust Collectors, contracted with Carbonyx “to supply dust collection systems” and various services to support Carbonyx’s contract with U.S. Steel. The equipment was to be used as part of U.S. Steel’s

Coke Improvements Project. Venturedyne alleges that it upheld its end of the bargain, but that Carbonyx failed to pay for the equipment and services.

In response to Venturedyne’s requests for production of documents, Carbonyx contends that it has produced “more than 12,000 pages of documents, consisting of emails and their attachments, as well as paper documents.” According to Carbonyx, these documents were generated using the search terms “Scientific Dust Collectors”—the name Venturedyne does business under—and “Scientific.” Carbonyx has not objected to the Revised Requests for Production. Instead, Carbonyx argues that a search using Venturedyne’s list of 126 keywords to satisfy its production obligations would be too broad and would include a significant number of non-responsive and irrelevant documents.

Carbonyx’s assertion that the documents it has already produced—retrieved by searching “Scientific Dust Collectors” and “Scientific”—are completely responsive is not convincing. Carbonyx has not told the Court that all documents relating to the Venturedyne contract contained either “Scientific Dust Collectors” or “Scientific.” It seems likely that there are documents in Carbonyx’s possession that do not contain those words but that nonetheless contain information about the contract between Venturedyne and Carbonyx.

Similarly, there are likely other documents in Carbonyx’s possession that had nothing to do with Venturedyne or its equipment but that would still be relevant to this case. For example, Carbonyx claims the equipment Venturedyne delivered under the contract was defective. Venturedyne argues that the Scientific Dust Collectors equipment was not defective, but was connected to “upstream system lime pumps and scrubbers” manufactured by third parties that damaged the Scientific equipment. Many of the proposed search terms, like “pump” and “scrubber,” might very well lead to documents detailing any problems with the third-party equipment, even though those documents might not always mention the Scientific Dust Collectors equipment. These kinds of documents are well within the broad definition of relevance in discovery contexts, which includes “any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” *Oppenheimer*, 437 U.S. at 351.

Accordingly, Carbonyx has not satisfied its burden of demonstrating the inappropriateness of Venturedyne’s discovery request. *McGrath*, 625 F. Supp. 2d at 670. Carbonyx did not object to any of the Revised Requests. Instead, Carbonyx contends that it has completed its

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discovery obligations by turning over all documents flagged by the “Scientific Dust Collectors” and “Scientific” search terms. As discussed above, that production is an incomplete response to the Revised Request, and additional search terms are appropriate.

*3 Carbonyx had the opportunity to limit the search terms at issue in this case. Before Carbonyx’s counsel cut off email contact with Venturedyne’s counsel, the parties appeared to be making progress toward an agreed list of search terms. This would have been the better solution and likely would have limited Carbonyx’s expenses in reviewing the results of the searches. But Carbonyx’s refusal to participate in that process now requires that the Court intercede.

Accordingly, Carbonyx must produce documents flagged by the 78¹ unopposed search terms contained in DE 48-7. Those terms appear “reasonably calculated to lead to discovery of admissible evidence” in that the terms were based on sample emails related to this case and the parties already eliminated many generic words like “money.” *See Fed. R. Civ. P. 26(b)(1)*.

¹ Carbonyx need not use those terms to which it has already objected. Excluding the objected-to terms and those that Venturedyne voluntarily removed, there are 78 terms remaining on the list.

This Order does not, of course, prevent Carbonyx from withholding documents that are privileged. However, in doing so, Carbonyx must follow the Federal Rules of Civil Procedure governing designating privileged documents withheld from discovery requests.

Furthermore, Carbonyx is free to review the results of the keyword searches and to withhold documents that are truly irrelevant to this case. However, Carbonyx did not object to any of the 28 requests in Venturedyne’s Revised

Requests and all 28 requests appear relevant. *See Oppenheimer*, 437 U.S. at 351. So, any documents that are returned by the 78 keywords and that are within the scope of the 28 Revised Requests must be produced.

IV. Conclusion

Consistent with the foregoing discussion, the Court **GRANTS** Plaintiff’s Motion to Compel Production of Documents against Carbonyx, Inc. [DE 48]. The Court **ORDERS** Carbonyx to produce the documents requested in Venturedyne’s Revised Requests [DE 48-4]. The Court **ORDERS** Carbonyx to use the list of 78 search terms contained in DE 48-7 in searching for and producing responsive electronic material.

Because the Motion to Compel is granted, “the court must, after giving an opportunity to be heard, require the party...whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant’s reasonable expenses incurred in making the motion, including attorney’s fees.” *Fed. R. Civ. P. 37(a)(5)(A)*. Accordingly, the Court **ORDERS** Venturedyne to **FILE**, on or before **November 21, 2016**, an itemization of its costs and fees, including attorney’s fees, incurred in making the Motion to Compel. The Court **ORDERS** Carbonyx to **FILE** a response by **December 5, 2016**, and Venturedyne to file a reply, if any, by **December 12, 2016**.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2016 WL 6694946

Willmore v. Savvas Learning Company LLC, Slip Copy (2023)

H KeyCite history available

2023 WL 6124045

Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

Brenda WILLMORE, Plaintiff,

v.

SAVVAS LEARNING COMPANY LLC,
Defendant.

Case No. 22-2352-TC-ADM

|
Signed September 19, 2023

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MEMORANDUM AND ORDER

Angel D. Mitchell, United States Magistrate Judge

*1 Plaintiff Brenda Willmore (“Willmore”) brings this action against defendant Savvas Learning Company LLC (“Savvas”) alleging employment discrimination in violation of the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964. This matter comes before the court on Plaintiff’s First Motion to Compel. (ECF 63.) By way of this motion, Willmore asks the court to order Savvas to produce documents in response to Willmore’s First Requests for Production of Documents (“RFP”) Nos. 4 and 7. Savvas opposes the motion on the grounds that Willmore’s document requests seek irrelevant information that is not proportional to the needs of the case, and the requests are overly broad. For the reasons stated below, the motion is granted as to RFP No. 4 and denied as to RFP No. 7 and as to Willmore’s request for attorneys’ fees. Savvas’s related Motion for Sanctions (ECF 72) is denied.

I. BACKGROUND

Willmore was a long-time employee of Pearson Education LLC (“Pearson”), which operated a large-scale business of selling textbooks to educational institutions and servicing those educational accounts for new and repeat textbook orders. Pearson promoted Willmore to Sales Manager for the State of Kansas in 2014. Savvas acquired Pearson in 2017, and Willmore retained the same title until Savvas terminated her employment on May 18, 2021. (ECF 63, at 5.) Savvas contends Willmore was fired for insubordination and because two large customer accounts, the Blue Valley and Derby school districts, complained about Willmore and asked for her to be removed. (ECF 65, at 1.) Willmore contends Blue Valley’s complaint was the result of the district’s new curriculum director misunderstanding the district’s earlier purchase of an electronic subscription. (ECF 63, at 5.) And Willmore says Derby’s complaint was the result of a double shipment of textbooks that was “exclusively the fault” of Savvas’s shipping department, but Derby “became frustrated” and asked that Willmore not service the account. Willmore says she was not told she was taken off the account, and Derby got upset when it “erroneously believed” that Willmore sent a meeting invite to Derby (even though Derby had asked for a different account representative) when in fact it was Savvas’s marketing and/or IT department that sent the invite. (ECF 63, at 6.) Willmore insists Savvas knew she did not send the meeting invite but fired her anyway because the reach-out to Derby was “insubordinate” to her boss Mica Lesser’s instruction not to contact Derby. (*Id.*) Willmore claims that Savvas’s alleged reasons for firing her are a pretext because Savvas wanted to replace her with a younger male employee, and the decision to replace her was made long before there was any claimed insubordination. (*See* ECF 1 ¶¶ 18-19, 33.) Willmore filed this lawsuit against Savvas, claiming discrimination based on age and sex. (ECF 1.)

The court convened a scheduling conference and issued a scheduling order in late January (ECF 12, 13), after which the parties served written discovery and ESI disclosures. (ECF 15, 17, 20.) Willmore also served subpoenas on the Blue Valley and Derby school districts. (ECF 22, 23.) At issue here are Savvas’s responses and objections to Willmore’s First Requests for Production of Documents—specifically, Savvas’s responses to RFP Nos. 4 and 7. (ECF 26.)

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A. RFP No. 4 Regarding Savvas Salesforce Records

*2 Willmore’s RFP No. 4 requests documents “related to Plaintiff’s service and business interactions -- which occurred during the last 5 years of Plaintiff’s employment at SAVVAS -- with and to the Derby School District and/or the Blue Valley School District.” (ECF 63-1, at 1.) Savvas initially objected to this request as “overly broad, unduly burdensome, not properly limited in time and scope, vague and ambiguous in the use of the phrase ‘copies of all files, statements, documents, quotes, approvals, and communications related to Plaintiff’s service and business interactions,’ requires speculation and conjecture from Defendant with respect to the documents being requested, fails to identify the documents being requested with reasonable particularity, and is not relevant and/or proportional to the needs of the case.” (*Id.*) After the parties met and conferred, Willmore’s counsel sent a follow-up email memorializing the parties’ positions on this RFP: “defendant believes this request is way too broad, plaintiff believes it can be easily responded to by producing all of the material in salesforce for these two accounts,” and “[d]efense counsel will check into getting the materials from salesforce that are responsive to the request.” Savvas’s counsel responded, “Correct.” (ECF 65-1, at 2.)¹

¹ “Salesforce” is a cloud-based software company that provides customer relationship management software and applications, among other offerings. <https://www.salesforce.com/> (last visited 9/6/2023).

On May 15, Willmore’s counsel followed up on outstanding discovery issues and, with respect to RFP No. 4, asked Savvas’s counsel to “**PLEASE CONFIRM THAT EVERYTHING IN SALES FORCE FOR THE DERBY AND BLUE VALLEY ACCOUNTS HAS BEEN PRODUCED? LESS THAN 10 PAGES SUGGESTS IT HAS NOT.**” (ECF 63-4, at 2 (emphasis in original).) The next day, Savvas’s counsel responded, “I do anticipate supplementing with additional documents.” (*Id.*)

But that supplementation never came, so Willmore requested a pre-motion discovery conference with the court to discuss this discovery dispute (as well as other discovery issues). At that discovery conference on July 7, Savvas told the court that its initial production in response to RFP No. 4 included “reports that were pulled within Salesforce regarding the plaintiff’s contacts with Derby and Blue Valley during this time period.” (ECF 66, Hr’g

Tr. at 5:1-5.) Both parties indicated they understood these documents would be found in Salesforce and that Savvas had agreed to produce the Salesforce records for the Blue Valley and Derby school district accounts for a five-year period, to the extent those records exist. (*Id.* at 4:15-9:25.) Savvas’s counsel pointed out, however, that tracking down the information had been more difficult than initially anticipated because, firstly, Savvas did not implement the Salesforce program until 2020 and, secondly, Savvas “was a division of Pearson that was spun off and then separately bought through a capital management company.” (*Id.* at 5:1-9.) But he said Savvas was working with their Salesforce representative to track down the documents he understood Willmore was seeking – including “the individual e-mails and any other attachments that would be within that data.” (*Id.* at 5:10-21.) As reflected in the court’s order following the July 7 discovery conference, Savvas agreed to supplement its production in response to RFP No. 4 by July 18. (ECF 49, at 1.)

But, again, Savvas did not produce any additional documents responsive to RFP No. 4. Instead, on July 19, Savvas served a second supplemental response to RFP No. 4 stating that Savvas had no other responsive documents in its “possession, custody, and/or control other than documents identified as A003597 – A003609 and A004076 – A004082.” (ECF 63-1, at 1-2.)

Willmore’s counsel immediately followed up on July 19, and again on July 23, asking whether Savvas produced “EVERYTHING” in Salesforce for the Derby and Blue Valley accounts. Savvas’s counsel responded on July 24 by pointing to Savvas’s Second Supplemental Response to RFP No. 4. (ECF 65-2, at 2-4.) Savvas’s counsel explained that, despite his prior representation that Savvas intended to produce all responsive documents Savvas could track down, Savvas was unable to produce anything further because “we did not have access to Plaintiff’s inbox, so we do not have the individual emails and documents themselves.” (*Id.* at 2.) Counsel also confirmed “yes, we have produced everything within Salesforce. No, we are not withholding any responsive documents.” (*Id.*)

*3 In response, Willmore’s counsel expressed disbelief at Savvas’s suggestion that it had produced everything responsive to RFP No. 4:

Documents responsive to this RFP are probably the most critical documents to this entire case! And this has nothing to do with Brenda’s emails being erased. SAVVAS is claiming there were specific mistakes made by Brenda regarding Derby and Blue Valley. SAVVAS is also claiming the company was slated to

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lose millions of dollars if a change wasn't made. Having complete documents from Sales Force for these accounts goes directly to these issues. It simply is not credible for SAVVAS to say everything connected to those two accounts is unavailable to the company. You have produced a total of 6 documents for those accounts for a 5 year period. There are more documents and they need to be produced. Those two customers are still customers of SAVVAS and, this being true, SAVVAS would need all the historical documents to continue serving the customers. As we now know, Account Reps are constantly required to go back to see what orders were made years before to determine licensing, pricing, etc. Brenda used Sales Force at Curriculum Associates and she uses Sales Force at her current job. Nothing gets erased from Sales Force. If Brenda is working on an account, she can go back for years (prior to her even working there) to see historical data in Sales Force. Same was true, and is true, at SAVVAS.

(ECF 65-2, at 1.) Willmore's motion explains that her counsel also expressed concern that Savvas had narrowed the request (from the previously-agreed upon scope of all Salesforce records related to the two school districts) to require that Willmore be directly involved or "tied" to the documents in order for them to be responsive, which allowed Savvas to claim they had no further responsive documents to produce. (ECF 63, at 4-5.)

B. RFP No. 7 Regarding Search Terms

Willmore's RFP No. 7 seeks:

Any documents, emails, texts, or other electronic communications (hereafter "RESPONSIVE HITS") possessed by or under the control of SAVVAS which are responsive to electronic searches [structured to identify anything with the terms of "Brenda" OR "Willmore" OR "Wilmore" AND "Derby" OR "usd260" OR "Blue Valley" OR "bluevalley" OR "age" OR "old" OR "retirement" OR "woman" OR "female" OR terminate OR terminated OR fired OR fire AND with a creation date during the time period of January 1, 2019 through August 20, 2021 but excluding emails that Plaintiff was a recipient of during her employment, to include group emails that had Plaintiff as part of the distribution list] to be conducted on any mobile phones, computers, hard-drives, servers, or other electronic devices used for SAVVAS' business or work purposes by Bethlam Forsa, Mica Lesser, James Lippe, Debi Debiak, and/or Sheri Jolcover (as well as any other SAVVAS employees not listed here but who

were involved in any discussions or decisions about ending Plaintiff's employment).² (ECF 63-1, at 2.) Savvas initially objected to this request on the grounds that "it is overly broad, not properly limited in time and scope, and is not relevant and/or proportional to the needs of the case." (*Id.*)

² RFP No. 7 includes two footnotes that are not reiterated here for the sake of simplicity and to avoid confusion. The first footnote asks for a meet-and-confer if Savvas believed "that using these names as search terms will result in voluminous false hits." The second footnote requests that Savvas search a person's "entire device" for responsive documents and that email searches be conducted across the email accounts and folders of all custodians described in the request.

*4 On April 21, the parties met and conferred about this request, and Savvas agreed to work with Willmore to run search terms for a set time period. (ECF 63, at 2, 11; ECF 65, at 7.) Willmore's email memorializing the parties' meet-and-confer stated that "defendant is running the search requested by this RFPD. All responsive hits will be produced, and any privilege material will be placed on a privilege log. In the event that the hits are extremely voluminous, counsel will discuss ways to narrow the search." Savvas's counsel responded, "Correct." (ECF 65-1, at 2.) Savvas then reportedly attempted to collect the Google drive and email accounts of the five agreed-upon custodians and run the search terms using the requested date parameters. As such, Savvas supplemented its response to RFP No. 7 to state that, "[s]ubject to the search terms prepared by Plaintiff's counsel on May 4, 2023, responsive documents will be produced on a rolling basis" and identified a set of documents (F000133-4340) as responsive to the request. (ECF 63-1, at 3.) On May 15, Willmore followed up on that supplement by asking Savvas whether the supplemental response meant "there were no hits that are privileged, or there were hits for which Savvas is claiming privilege." (ECF 73-6, at 2.) The next day, Savvas's counsel responded, "I intend to produce a privilege log. I also intend to roll out the remainder of the production to this RFP, which resulted in thousands of documents." (ECF 73-6, at 2.)

Savvas's productions, however, were riddled with problems—proper load files were not initially included, custodial metadata was missing, and email attachments were not associated with the parent emails. Willmore's counsel complained to Savvas that he could not efficiently review the productions. (ECF 63, at 2.) Willmore's counsel also noticed the documents showed dates outside of the search parameters and the ESI appeared to not be limited to the five custodians, thereby resulting in a large production of 130,000 pages, some of which appeared to

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be “completely unrelated to anything.” (ECF 66, at 10-13.) Willmore raised these problems with Savvas’s production with the court during the July 7 discovery conference. At the time, Savvas thought these problems could be resolved with a quick fix by having Savvas’s IT populate custodian information; Savvas blamed the breadth of the production on the broad search terms. (ECF 66, at 13-16.) The court therefore ordered Savvas “to populate the metadata fields with custodian names for documents produced in response to RFP No. 7 by July 14.” (ECF 49, at 1.)

In attempting to resolve the problems, however, Savvas learned that the prior search had not been run correctly and had therefore generated a large number of false hits. Savvas also discovered that it was missing a document collection from one of the agreed-upon custodians, Savvas’s CEO, Bethlam Forsa. Savvas agreed to re-run the search terms against all five custodians, including Forsa. (ECF 64, Hr’g Tr. at 13:24-14:12.) When Savvas did so, it discovered that the search terms hit on documents in Forsa’s collection that were irrelevant to Willmore’s claims. Savvas informed Willmore and the court of this issue during a discovery conference on July 18. (ECF 54; ECF 64, Hr’g Tr. at 14-15.) Savvas explained that, because the search terms were so broad and because the CEO is privy to a large amount of high-level, company-wide data and reports, the search terms hit on irrelevant subsets of documents that Savvas intended to withhold from its production. This included sensitive documents concerning company-wide furloughs in response to the COVID-19 pandemic, sales and/or employee bonus information not related to Willmore, reporting information regarding job openings not related to Willmore’s position, payroll documents detailing company-wide salaries, and documents relating to other employees and customers not in Kansas. (ECF 54; ECF 63-1, at 3; ECF 64, at 14-15.) The court provided the parties with feedback on Savvas’s objections to producing such documents so that Savvas could “continue to move forward with the production expeditiously.” (ECF 54.) Later that day, Willmore filed a motion for reconsideration of the court’s discovery “ruling” permitting Savvas to withhold certain documents as irrelevant, which the court denied because neither party had formally motioned the court to decide this issue and therefore the court had made no definitive “ruling” for the court to reconsider. (ECF 55, 56.)

*5 On July 19, Savvas served a second supplemental response to RFP. No. 7 that stated:

Defendant renews its prior objections to this Request: That the Request is overly broad, not properly limited in time and scope, and is not relevant and/or

proportional to the needs of the case.

Subject to and without waiving these objections, excluding documents concerning company-wide furloughs in response to the COVID-19 pandemic, sales and/or employee bonus information not related to Plaintiff, reporting information regarding job openings not related to Plaintiff’s position, payroll documents detailing company-wide salaries, documents relating to other employees and customers not in Kansas, and documents withheld by the attorney-client privilege, Defendant identifies G00000I-G010495 as responsive to this request.

(ECF 57, 63-1, at 3.) Savvas produced the identified batch of documents to Willmore that same day.

II. LEGAL STANDARDS

“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case.” *Fed. R. Civ. P. 26(b)(1)*. Relevance is “construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978); *see also Booth v. Davis*, No. 10-4010-RDR, 2011 WL 2008284, at *6 (D. Kan. May 23, 2011) (“Relevance is broadly construed, and a request for discovery should be allowed unless it is clear that the information sought can have no possible bearing on the claim or defense of a party.” (internal quotations and citation omitted)). “Courts should lean towards resolving any doubt as to relevance in favor of discovery.” *Foreclosure Mgmt. Co. v. Asset Mgmt. Holdings, LLC*, No. 07-2388-DJW, 2008 WL 3822773, at *4 (D. Kan. Aug. 13, 2008). “Control of discovery is entrusted to the sound discretion of the trial courts.” *Punt v. Kelly Servs.*, 862 F.3d 1040, 1047 (10th Cir. 2017) (internal quotation and citation omitted).

The party seeking discovery has the initial burden to establish the documents sought are relevant under Rule 26(b)(1). *See Lawson v. Spirit AeroSystems, Inc.*, No. 18-1100-EFM-ADM, 2020 WL 243598, at *3 (D. Kan. Jan. 16, 2020). When the discovery sought appears relevant on its face, or the discovering party has established relevance, the party resisting discovery bears the burden to support its objections. *See Ehrlich v. Union Pac. R.R. Co.*, 302 F.R.D. 620, 624 (D. Kan. 2014) (holding the party resisting discovery bears the burden to show why a discovery request is improper); *Martin K. Eby Const. Co. v. OneBeacon Ins. Co.*, No.

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08-1250-MLB-KGG, 2012 WL 1080801, at *3 (D. Kan. Mar. 29, 2012) (“Once this low burden of relevance is established, the legal burden regarding the defense of a motion to compel resides with the party opposing the discovery request.”). The party resisting this discovery does not carry this burden by asserting “conclusory or boilerplate objections that discovery requests are irrelevant, immaterial, unduly burdensome, or overbroad.” *Sonnino v. Univ. of Kan. Hosp. Auth.*, 221 F.R.D. 661, 670 (D. Kan. 2004). “Rather, an objecting party must specifically show in its response to the motion to compel, despite the broad and liberal construction afforded by the federal discovery rules, how each request for production or interrogatory is objectionable.” *Id.* at 670-71.

III. ANALYSIS**A. Willmore’s Motion to Compel Is Granted as to RFP No. 4.**

*6 Willmore and Savvas agree that RFP No. 4, as narrowed by the parties in meet-and-confer correspondence, seeks documents and communications in Salesforce for the Derby and Blue Valley accounts. (ECF 65-1, at 2; ECF 66, Hr’g Tr. at 8:20-9:25.) Indeed, Savvas acknowledged early on that, because Savvas wiped Willmore’s company-issued laptop and cell phone upon her termination, Willmore’s Salesforce data was being preserved—thus insinuating that Salesforce may be the main, if not the only, source of documents evidencing Willmore’s activities with the Blue Valley and Derby school districts. (ECF 63, at 9-10.) Knowing the importance of the Salesforce data, Savvas indicated in both meet-and-confer correspondence and at the July 7 discovery conference that Savvas was working with a Salesforce representative to track down the requested information and would be supplementing its initial production of six documents. (ECF 73-6; ECF 66, Hr’g Tr. at 5-9.) Despite agreeing during the July 7 discovery conference that (1) RFP No. 4 called for Savvas to produce Salesforce documents for the Blue Valley and Derby school district accounts, and (2) Savvas would work with its Salesforce representative to supplement its production, Savvas has not produced any additional documents.

Savvas does not dispute that it has produced only six documents³ from Salesforce that it contends are the only documents responsive to RFP No. 4. (ECF 63, at 3-4.)

Savvas told Willmore and the court that it was working with a Salesforce representative to track down more information and would be supplementing its production. Yet Savvas has not done so. Savvas does not explain its failure to supplement. Instead, Savvas re-raises its “vague and ambiguous” objection to RFP No. 4 and contends that Willmore’s counsel “never provided any clarity on the types of documents Plaintiff is seeking” until July 24 when he provided a laundry list of historical data that he believes resides in Salesforce. Savvas objects to this so-called “open audit of all of Defendant’s Salesforce data” as irrelevant and disproportionate to the needs of the case. (ECF 65, at 4-5.) Savvas holds firm that it has “produced all Salesforce data related to Plaintiff, including all of Plaintiff’s phone calls, e-mails, and visits with the respective school districts.” (ECF 65, at 4; *see also* ECF 65-2, at 2 (July 24 email contending Savvas “has produced all responsive documents in its possession, custody, and/or control” and it is “not withholding any responsive documents”).) Savvas does not state whether it is withholding any documents based on relevancy or other objections.

³ The motion to compel sometimes references six documents and other times references six pages of documents. The court refers herein to six documents.

Savvas’s response provides no explanation as to why the requested Salesforce data is no longer there. Based on the record currently before the court, it appears unlikely that the six documents Savvas produced is the entirety of the responsive information from Salesforce. Willmore herself submitted a declaration in support of her motion to compel in which she describes the types of data she knows are maintained within Salesforce and that Savvas should have been able to retrieve from Salesforce. (ECF 63-2.) Willmore says she used Salesforce to manage, monitor, and service the Derby and Blue Valley School District accounts, and that Salesforce files “contained numerous years’ worth of sales data, licensing information, pricing data, shipping records, backorder information, dates of shipment, contents of shipments” and “[d]ozens, if not hundreds, of notes” for these accounts. (ECF 63-2 ¶¶ 6-10.) Willmore also says that Salesforce contained information regarding issues or complaints made by the school districts, which were assigned case numbers, and detailed data (including internal communications among various departments and employees at Savvas) as to how each of the reports or complaints were resolved. (ECF 63-2 ¶ 10.) She explains that customer data kept in Salesforce “can be accessed for years into the future.” (ECF 63-2 ¶ 4.) Willmore further attests that the six Salesforce documents produced in response to RFP No. 4, which she has reviewed, “cannot

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possibly be all” responsive Salesforce documents because she “personally know[s] that the number of documents maintained” in Salesforce exceeds this number and that she “personally created” more than these six documents in Salesforce for the two school districts. (ECF 63-2 ¶¶ 11-12.) She also questions Savvas’s RFP No. 4 production because she reviewed documents produced by Savvas in response to RFP No. 7 that she says were clearly retrieved from Salesforce—thus “showing that Defendant can and has retrieved documents from Salesforce, they are just not doing it for the Derby and Blue Valley districts or, alternatively, the data for those two accounts has been lost or destroyed.” (ECF 63-2 ¶ 13.)

*7 Savvas does not explain this discrepancy between Savvas’s position that it has produced all documents responsive to RFP No. 4 and Willmore’s explanation that she knows there are more responsive documents maintained in Salesforce. The only explanation the court can muster is that Savvas limited the scope of what it deems “responsive” documents to the following:

Defendant produced all Salesforce data *related to Plaintiff*, including all of Plaintiff’s phone calls, e-mails, and visits with the respective school districts. After all, the only reason why Salesforce data is at issue in this case is Defendant concluded that Plaintiff falsified her Salesforce entries by logging meetings with Derby Public Schools in March and April 2021 that did not occur.

(ECF 65, at 4 (emphasis added).) Savvas points out that, early in the case, it “produced pertinent e-mails to Plaintiff and provided her access to the native files of these e-mails that very clearly evidenced an intent to terminate Plaintiff prior to any act of alleged insubordination at issue in this case.” (ECF 65, at 1-2.) Likewise, Savvas’s response to Willmore’s motion for leave to supplement her motion-to-compel briefing states that Savvas “has always maintained that it relied on Salesforce records to support the decision to terminate Plaintiff, which is why it already produced those records to Plaintiff.” (ECF 101, at 1.)⁴ In other words, it appears that Savvas has produced all Salesforce documents that it relies on or intends to use at trial to support its decision to terminate Willmore. Savvas has then used this unilateral, self-serving narrowing of the request’s scope to claim it has no further responsive documents to produce.

⁴ Willmore also filed a Motion for Leave to File Attached Supplement in Support of Her Motion to Compel after briefing closed. (ECF 97.) The motion asks the court to consider recent deposition testimony of Savvas’s Rule 30(b)(6) witness, which Willmore contends supports her motion to compel documents responsive to RFP No. 4. The court denies this motion as moot because the court finds this aspect of

Willmore’s motion to compel should be granted without regard to the Rule 30(b)(6) testimony.

The problem with this logic is that documents “responsive” to RFP No. 4 are not just Salesforce records related to Willmore, such as her own entries for those accounts, that support Savvas’s decision to terminate her. Rather, RFP No. 4 seeks documents “*related to Plaintiff’s service and business interactions* -- which occurred during the last 5 years of Plaintiff’s employment at SAVVAS -- with and to the Derby School District and/or the Blue Valley School District.” (ECF 63-1, at 1 (emphasis added).) Willmore became the Sales Manager for the State of Kansas in 2014, which presumably included those school districts, so she was their account representative for most of her last five years at Savvas (until Savvas removed her from servicing those accounts). As a result, anything relating to her “service and business interactions” with those school districts is responsive, not just the few select interactions that Savvas claims support its decision to terminate her. That is presumably why the parties agreed early on that the scope of RFP No. 4 was limited to Salesforce records for the Derby and Blue Valley accounts. Willmore has met her burden to establish those documents are relevant to her claims, as they may bear on Savvas’s reasons for terminating her employment and could lead to other matter that could bear on whether Savvas’s reasons were pretext for age and sex discrimination. Furthermore, as Willmore explained in pre-motion meet-and-confer correspondence, she seeks documents that she could use to counter Savvas’s claims that “there were specific mistakes made by Brenda regarding Derby and Blue Valley” and that “the company was slated to lose millions of dollars if a change wasn’t made.” (ECF 65-2, at 1.)

*8 The court rejects Savvas’s argument that Willmore is simply “casting a wide net for documents coupled with ‘gotcha’ litigation tactics ... to drive up the cost of litigation and muddy the water surrounding Plaintiff’s termination” instead of focusing on the “appropriate inquiry,” which Savvas contends is “whether it honestly believed those reasons and acted in good faith upon those beliefs.” (ECF 65, at 2.) As the cases Savvas cites demonstrate,⁵ that inquiry is appropriate for deciding whether Savvas is entitled to summary judgment, but not whether Willmore is entitled to discovery. In discovery matters, “[r]elevance is broadly construed, and a request for discovery should be allowed unless it is clear that the information sought can have no possible bearing on the claim or defense of a party.” *Booth*, 2011 WL 2008284, at *6. Here, under the liberal discovery standards, the court easily finds the documents Willmore seeks are relevant

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and Savvas has not met its burden to show that RFP No. 4 is objectionable. The request is not vague or ambiguous; it is not overbroad as narrowed by the parties to Salesforce records regarding the two school districts; and Savvas does not explain the burden of producing the documents. Willmore is therefore entitled to the documents and information she seeks in RFP No. 4.

⁵ Savvas cites *Young v. Dillon Cos.*, 468 F.3d 1243, 1250 (10th Cir. 2006), and *Rivera v. City and County of Denver*, 365 F.3d 912, 924-25 (10th Cir. 2004).

Accordingly, Willmore's motion to compel is granted as to RFP No. 4. The court orders Savvas, at its option, to do either or both of the following by **October 3, 2023**: (1) produce all information from Salesforce responsive to RFP No. 4; or (2) allow Willmore to inspect the Salesforce database. *See Fed. R. Civ. P. 34(b)(2)(B)* (allowing a responding party to either produce copies of documents or ESI or permit inspection). Furthermore, because the court is concerned about Savvas's elusive description as to the scope of what it has produced (*e.g.*, only six documents from Salesforce when Willmore says she knows there are many more), the court further orders Savvas, to the extent that it elects option (1), to file a certification that describes the steps Savvas took to search for and produce all Salesforce documents responsive to RFP No. 4. The certification must be signed by both a party representative of Savvas under penalty of perjury and by counsel of record for Savvas.

B. Willmore's Motion to Compel Is Denied as to RFP No. 7.

RFP No. 7 requests that Savvas run "electronic searches" structured to identify documents and ESI of five custodians during a certain time period using the search terms set forth in the request.⁶ (ECF 63-1, at 2.) Savvas initially objected to the request on grounds of overbreadth, relevance, and proportionality, but agreed to "supplement" its response. After meeting and conferring, Savvas agreed to run Willmore's requested searches. As explained above, Savvas produced documents resulting from the searches, but then discovered it had run the searches incorrectly, so it ran the documents through a second search (with all agreed-upon custodians) and found that the resulting hits included irrelevant and nonresponsive documents. Savvas withheld these documents from production based on relevance, overbreadth, and proportionality objections (as well as an attorney-client privilege objection). Savvas's second

supplemental response to RFP No. 7 identifies the categories of documents being withheld: "documents concerning company-wide furloughs in response to the COVID-19 pandemic, sales and/or employee bonus information not related to Plaintiff, reporting information regarding job openings not related to Plaintiff's position, payroll documents detailing company-wide salaries, [and] documents relating to other employees and customers not in Kansas." (ECF 63-1, at 3.) At the discovery conference on July 18, Savvas explained that the hits on these irrelevant documents were due largely to the breadth of the search terms and the fact that one of the custodians was Savvas's CEO. (ECF 64, at 14-15.)

⁶ The search terms are: "Brenda" OR "Willmore" OR "Wilmore" AND "Derby" OR "usd260" OR "Blue Valley" OR "bluevalley" OR "age" OR "old" OR "retirement" OR "woman" OR "female" OR terminate OR terminated OR fired OR fire. The court expresses no opinion on the propriety of this type of request for production at this procedural juncture (*i.e.*, where the propounding party specifies search parameters) because Savvas has not lodged any objection to the form of RFP No. 7.

*9 Willmore now seeks to compel the production of all documents that hit on the parties' agreed-upon search terms without further relevance review by Savvas because Willmore characterizes all resulting hits as presumptively relevant and responsive. (ECF 63, at 11-14.) Willmore argues Savvas should not be allowed to cull the resulting collection of documents for relevance, as this would defeat "the whole principle behind agreed search terms ... and invites abuse by the responding party." (ECF 63, at 13.) Willmore contends it is "fundamentally unfair" at this late stage of discovery for Savvas to "withhold[] documents based on relevance without having properly objected on the grounds of relevance and without producing a detailed log as to exactly what is being withheld." (ECF 63, at 13-14.) Willmore further argues that Savvas waived any relevance objection because the parties agreed to those search terms and Savvas's supplemental responses indicated it would be producing all non-privileged documents that hit on those terms. (ECF 63, at 13; ECF 63-1 at 3.)

Savvas disputes that it waived any relevancy objection. Savvas argues that its agreement to work with Willmore to run search terms does not waive its relevancy objections and points to federal court decisions finding no waiver in such situations. (ECF 65, at 6-7.) Savvas also rejects Willmore's request that Savvas provide a "relevancy log" describing the reason Savvas is withholding each document as irrelevant. (ECF 65, at 8.)

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The court finds that Savvas timely and properly lodged a relevancy objection, and the court rejects Willmore's demand that Savvas produce all resulting hits based on Willmore's arguments that all hits are presumptively relevant and responsive. Willmore cannot simply bypass a relevance review by requesting that Savvas run broad search terms and produce all documents that hit on those terms. After all, the scope of discovery under [Federal Rule of Civil Procedure 26\(b\)\(1\)](#) begins with relevance, so Willmore is not entitled to discovery that is not relevant. Savvas is therefore entitled to cull for relevance. See, e.g., [Palmer v. Cognizant Tech. Sols. Corp.](#), No. CV-17-6848, 2021 WL 3145982, at *9 (C.D. Cal. July 9, 2021) ("The Court will not compel defendants to produce any document simply because it contains a search term ... whether or not it is relevant and proportional to the needs of the action."); [FlowRider Surf, Ltd. v. Pac. Surf Designs, Inc.](#), No. 15CV1879, 2016 WL 6522807, at *8 (S.D. Cal. Nov. 3, 2016) (denying the defendant's motion to compel plaintiffs to produce all documents that "hit" on the parties' ESI search terms regardless of relevance) (overruled on other grounds); [BancPass, Inc. v. Highway Toll Admin., LLC](#), No. 14-CV-1062, 2016 WL 4031417, at *3 (W.D. Tex. July 26, 2016) (holding the parties' agreement to run search terms was a way to simplify and limit the scope of production, but it did not obligate the parties to produce non-responsive documents, and denying motion to compel because there was "no reason to believe that [the defendant] ha[d] withheld documents it was obligated to produce").

Furthermore, Savvas did not waive its relevance, overbreadth, and proportionality objections. Savvas lodged these objections initially, and its subsequent agreement to run a search using the parties' agreed-upon terms does not constitute acquiescence to produce all resulting documents. See, e.g., [SinglePoint Direct Solar LLC v. Solar Integrated Roofing Corp.](#), No. CV-21-01076, 2023 WL 2585296, at *3 (D. Ariz. Mar. 21, 2023) (stating that "agreeing to run search terms does not waive relevance objections to the documents that are responsive to the search terms," and finding that the plaintiff "may review all documents that are 'hits' on a search term for relevance and withhold irrelevant documents"); [FlowRider Surf](#), 2016 WL 6522807, at *8 ("The Court finds that Plaintiffs have not waived their relevance and over breadth objections. Plaintiffs' agreement to run a search using the parties' agreed-upon terms does not constitute Plaintiffs' acquiescence to produce all resulting documents."). Likewise, Savvas's agreement to re-run the searches a second time (after discovering they were run incorrectly the first time) is not an agreement to produce all resulting documents. In fact, it was this second search—which led to the second

supplemental response—that turned up the irrelevant documents from the Savvas CEO's collection. Savvas did not waive its relevancy objections under these circumstances.

*10 Having found that Savvas properly lodged a relevancy objection and did not waive it, the court finds the documents Willmore seeks to compel are not relevant under [Rule 26\(b\)\(1\)](#). These documents were the result of extremely broad search terms—including terms such as "Brenda" OR "Willmore" OR "Wilmore" within the same paragraph as terms such as "age" OR "old" OR "retirement" OR "woman" OR "female" OR terminate OR terminated OR fired OR fire—as applied to a CEO custodian who received high-level reports and company-wide information about employee salary, bonus, furlough status, job openings for positions unrelated to Willmore's position, and other documents unrelated to Savvas employees and customers in Kansas. These documents have no bearing on the claims and defenses in this case. Willmore argues these documents may be relevant to "the question of whether males and younger employees were viewed more favorably and paid more by Defendant." (ECF 73, at 3-4; see also ECF 64, Hr'g Tr. at 16.) But, as the court pointed out at a discovery conference, disparate pay is not an issue here. (ECF 64, Hr'g Tr. at 16.) Rather, Willmore claims that Savvas discriminated against her based on sex and age when it terminated her employment as the Sales Manager for the State of Kansas.

Moreover, Savvas has shown good cause for withholding the documents as irrelevant. And, consistent with [Fed. R. Civ. P. 34\(b\)\(2\)\(C\)](#), Savvas's second supplemental response to RFP No. 7 expressly notified Willmore what categories of documents it is withholding based on its objection: "documents concerning company-wide furloughs in response to the COVID-19 pandemic, sales and/or employee bonus information not related to Plaintiff, reporting information regarding job openings not related to Plaintiff's position, payroll documents detailing company-wide salaries, [and] documents relating to other employees and customers not in Kansas." (ECF 63-1, at 3.) The court is therefore unpersuaded by Willmore's "unfairness" argument.

The court also rejects Willmore's request to require Savvas to provide a relevancy log for the documents it is withholding. In support, Willmore relies on a motion hearing transcript in the case of [Russell v. Kiewit Energy Group, Inc.](#) in which U.S. District Court Judge Kathryn H. Vratil ordered the defendant to produce all documents responsive to a search that hit on the plaintiff's name and/or to provide a relevance log for otherwise responsive

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documents it was withholding as not relevant. (ECF 63-5.) Willmore misconstrues Judge Vratil’s order in *Russell* as somehow applying with equal force to this case. It does not. For one, *Russell* is a district court decision that is not binding precedent. *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (“A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.” (citation omitted)). Furthermore, the Federal Rules contain no requirement for a “relevance log,” and Judge Vratil’s decision ordering such a log in *Russell* is distinguishable from the facts here. In *Russell*, the defendant did not explain the criteria it had applied to withhold documents based on a lack of relevance. (ECF 63-5, Hr’g Tr. at 32-34.) That is presumably why she gave the defendant the opportunity to provide a “relevancy log”—essentially, to articulate its relevancy objections for withholding documents that were otherwise responsive to the search criteria. Unlike the defendant in *Russell*, Savvas has already provided that explanation here. After Savvas went back and ran the searches the second time, Savvas described the subsets of documents it is withholding—both to Willmore and to the court, and also in its second supplemental response to RFP No. 7. So, unlike in *Russell*, the court here already has what it needs from Savvas to determine (as set forth above) that the categories of documents Savvas is withholding are not relevant.

For all of these reasons, the court denies Willmore’s motion to the extent it asks the court to overrule Savvas’s relevancy objection and to compel Willmore to produce all documents that hit on the parties’ agreed-upon search terms, regardless of relevance. Accordingly, the court denies Willmore’s motion to compel Savvas to produce further documents responsive to RFP No. 7.

IV. SANCTIONS

*11 Willmore’s motion to compel also seeks attorneys’ fees incurred in making this motion. The court denies this aspect of Willmore’s motion because the court is granting Willmore’s motion to compel in part and denying it in part.

Also pending before the court is Savvas’s Motion for Sanctions. (ECF 72.) By way of this motion, Savvas asks the court to dismiss Willmore’s case. The motion is denied for multiple reasons, the most obvious of which is that dismissal is an extraordinary sanction that clearly is not warranted based on the present record. Indeed, Savvas

does not even mention (much less address) governing Tenth Circuit precedent setting the applicable legal standard for dismissal as a sanction. Second, both parties are equally culpable for any debacle concerning their shared use of the DISCO database and the resulting lack of clarity. Third, Savvas’s generalized complaints about Willmore’s “costly and abusive discovery tactics” are premised on the issues raised in Willmore’s motion to compel, which the court is granting in part and denying in part.

Savvas’s motion also seeks, in the alternative, evidentiary sanctions in the form of clawing back documents bates numbered F000133-F133198 and excluding any documents improperly obtained by Willmore from any future filing or proceeding in this case. In other words, Savvas essentially seeks to clawback its entire first production in response to RFP No. 7, which Savvas has since replaced with a corrected production. Savvas’s attempt to lay blame on Willmore for the debacle surrounding its first production is not well taken. Savvas significantly delayed in making that first production, placing Willmore’s counsel in a time crunch to prepare for then-upcoming depositions. Then, when Savvas finally made that production, it botched it so badly that it was virtually unusable and later had to be entirely redone. But before Savvas corrected the production, it first tried to rectify the botched production via the quick fix of granting Willmore’s counsel access to a shared database that Savvas did not properly ensure would function in a way that would protect its privileged material. Whether Willmore improperly accessed a handful of documents that may (or may not) have been privileged is disputed and impossible for the court to resolve based on the parties’ vague, underdeveloped, and accusatory arguments on this point. Regardless, Savvas has not met its burden to show that an appropriate remedy would involve the claw-back of the entire 130,000+ page production rather than selected documents, and it appears this issue may be obsolete since Savvas rectified the problems by re-running the searches in response to RFP No. 7 so that Willmore has had the replacement production to use. To the extent that Savvas still has concerns about Willmore retaining specific documents, Savvas is required to follow the clawback procedure set forth in Paragraph 18 of the Protective Order. (ECF 19.)

IT IS THEREFORE ORDERED that Plaintiff’s First Motion to Compel (ECF 63) is granted in part insofar as Savvas is ordered to produce documents responsive to RFP No. 4, as narrowed by the parties to all Salesforce documents regarding the Derby and Blue Valley school districts during the five years leading up to Willmore’s termination. The motion is otherwise denied.

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***12IT IS FURTHER ORDERED** that Savvas's Motion for Sanctions (ECF 72) is denied.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that Willmore's Motion for Leave to File Attached Supplement in Support of Her Motion to Compel (ECF 97) is denied.

All Citations

Slip Copy, 2023 WL 6124045

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2010 Civil Litigation Conference

Review background information about the purpose and scope of the 2010 Conference on Civil Litigation, and access to Conference documents, including scholarly papers, empirical research, and agenda materials.

2010 Conference on Civil Litigation
Duke Law School, Durham, NC
May 10-11, 2010

Purpose Statement

At the request of the Standing Committee on Rules of Practice and Procedure, the Advisory Committee on Civil Rules is sponsoring a conference at Duke University School of Law on May 10 and 11, 2010 to explore the current costs of civil litigation, particularly discovery, and to discuss possible solutions. The Conference will rely on new empirical research done by the Federal Judicial Center to assess the degree of satisfaction with the performance of the present system and the suggestions of lawyers as to how the system can be improved. This research will be supplemented by additional empirical data. A major portion of the Conference will be devoted to an assessment and discussion of the empirical research.

The Conference will draw on insights and perspectives from lawyers, judges and academics concerning improvements that could be made in the federal civil litigation process to effectuate the purposes of the Civil Rules – "to secure the just, speedy, and inexpensive determination of every action and proceeding." In addition to considering the results of the empirical research, panels of experts will consider the range of issues in the federal civil litigation process that could be used more efficiently to accomplish the purposes of the Rules, including the discovery process (particularly E-Discovery), pleadings, and dispositive motions. Other topics to be considered include judicial management and the tools available to judges to expedite the process, the process of settlement, and the experience of the states.

While the Conference will explore these issues, an important part of the Conference will be to encourage follow up on the subjects explored at the Conference. It is hoped that the papers and discussion at the Conference will frame an agenda for possible amendments to the Federal Rules of Civil Procedure, and that they will be a basis for judicial education through the Federal Judicial Center and for further action by the Bar.

[Report to the Chief Justice, Supreme Court of the United States](#)
([/file/reporttothechiefjusticepdf](#)) (pdf)

[Conference Agenda](#) ([/file/conferenceagenda-finalpdf](#)) (pdf)

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Empirical Research

[ABA Litigation Section, Committee on Pretrial Practice & Discovery - Iqbal \(2010\)](#).
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Papers Submitted by Conference Panelists

The Bar Association Proposals

[Civil Procedure in the 21st Century: Some Proposals \(/file/document/civil-procedure-21st-century-some-proposals\)](#). (pdf)

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LCJ PROPOSES AMENDMENTS ON PRIVACY PROTECTION, CYBER RISK

LCJ's new proposal for comprehensive amendments to the Federal Rules of Civil Procedure (FRCP) is aimed at helping courts and parties manage their obligation to protect privacy rights and avoid cyber security risks in civil litigation.

Because of the vast expansion in the amount of electronically stored data and growing cyber threats related to litigation, the current rules are no longer adequate to ensure that courts and parties are balancing the needs of particular cases with the burdens of protecting parties and non-parties from risks posed by unauthorized access, use, and disclosure of personal and confidential information.

LCJ's Rules Suggestion has been submitted to the Advisory Committee on Civil Rules and is an important step in advocating for necessary and transformational changes to the FRCP. The proposal is the product of many LCJ members who made significant contributions to the preparation of this substantial proposal.

LCJ welcomes feedback on this Rules Suggestion and invites you to share it with colleagues and potential allies. The Rules Suggestion is available on LCJ's document directory and [here](#).



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Superior Court of New Jersey
Law Division, Civil Part
_____ County

Docket Number: L- _____

Plaintiff(s),

v.

Defendant(s).

Electronic Discovery Stipulation and Order

1. Purpose

This Order (the “eDiscovery Order”) will govern discovery of Electronically Stored Information (“ESI”) and any electronically stored or maintained information in this case as a supplement to the Rules of Court, the Complex Business Litigation Program’s Guidelines, and any other applicable Orders and Rules.

2. Cooperation

The Parties are aware of the importance the Court places on cooperation and commit to cooperate in good faith throughout the matter consistent with this Court’s Guidelines for the discovery and production of ESI and any electronically stored or maintained documents.

3. Liaison

The Parties have designated liaisons who are and will be knowledgeable about and responsible for discussing their respective ESI and/or electronic documents (“eDiscovery Liaison”). Each eDiscovery Liaison will be, or have access to those who are, knowledgeable about the technical aspects of e-discovery, including the location, nature, accessibility, format, collection, search methodologies, and production of ESI and/or electronic documents in this matter. The Parties will rely on the eDiscovery Liaison, as needed, to confer about ESI and/or electronic documents and to help resolve disputes without court intervention. The following individuals are the designated as the eDiscovery Liaison for this litigation:

Plaintiff(s) [with contact information]:

Defendant(s) [with contact information]:

4. Preservation

By signing this eDiscovery Order, the Parties certify that they have taken reasonable steps to preserve all ESI and electronically stored documents. Additionally, the Parties have discussed their preservation obligations and needs as litigation progresses and agree that preservation of potentially relevant ESI and electronically stored documents will be reasonable and proportionate. To reduce the costs and burdens of preservation, and to ensure proper ESI and/or electronically stored information is preserved, the Parties agree that:

- a) They have exchanged a list of custodians, the types of ESI and/or electronically stored information they believe should be preserved, or general job titles or descriptions of custodians, for whom they believe ESI and/or electronically stored information should be preserved, e.g., “HR head,” “scientist,” “marketing manager,” etc...;
- b) In addition to the previously preserved ESI and/or electronically stored information, the Parties agree that any ESI created or received between (date) and (date) will be preserved for the custodians and/or for those individuals who meet the general job titles or descriptions of custodians provided by the opposing party;

- c) They have agreed/will agree on the number of custodians per party for whom ESI and/or electronically stored information will be preserved;
- d) Data sources that are not reasonably accessible because of undue burden or cost and ESI from these sources will be preserved but not searched, reviewed, or produced: [e.g., backup media of [named] system, systems no longer in use that cannot be accessed];
- e) Among the sources of data the Parties agree are not reasonably accessible, the Parties agree not to preserve the following: [e.g., backup media created before (date), digital voicemail, instant messaging, automatically saved versions of documents];
- f) Any data sources, ESI and/or electronically stored information that has or potentially could have been destroyed is listed below and has been divulged to the opposing party;

Plaintiff(s) Preservation Issues (if any):

Defendant(s) Preservation Issues (if any):

- g) In addition to the agreements above, the Parties agree data from these sources (a) could contain relevant information but (b) under the proportionality factors, should not be preserved: (enter text)

5. Custodians

The Parties agree that in providing R. 4:103-1 Initial Disclosures, or earlier if appropriate, they have met and conferred about methods to search ESI in order to identify data sources that are likely to contain relevant documents. The Parties have agreed to (number) custodians and/or data sources each for the purposes of this litigation. Those custodians and/or data sources are listed below. The Parties shall add or remove custodians as reasonably necessary.

Plaintiff(s) Custodians and/or Data Sources:

Defendant(s) Custodians and/or Data Sources:

6. Search Terms

The Parties have agreed upon the following search terms:

Plaintiff(s) Search Terms:

Defendant(s) Search Terms:

In the event that any of the search terms return (number) documents or more, the Parties agree that the search term is per se overly broad and will work to create a more tailored search term.

7. Production

The Parties agree to run the appropriate de-duplication program prior to any production to reduce the number of duplicate documents. The Parties further agree to the Production Format set forth in Exhibit "A", which is attached hereto and incorporated as part of the eDiscovery Order, for all ESI and/or electronically stored information exchanged in this litigation.

The Parties agree to electronically Bates label documents as follows:

Plaintiff(s) Bates Designation:

Defendant(s) Bates Designation:

8. Phasing (Rolling) Production

When a party propounds discovery requests pursuant to proposed R. 4:104-5, the Parties agree to phase the production of ESI (*i.e.* produce the documents on a rolling basis), and the initial production will be from the above-agreed upon custodians and data sources.

Following the initial production, the Parties will continue to prioritize the order of subsequent productions.

9. Documents Protected From Discovery

Although New Jersey has not adopted a rule of evidence similar to Federal Rule of Evidence 502 (Attorney-Client Privilege and Work Product; Limitations on Waiver), the Parties understand and stipulate that disclosure of Privileged Discovery Materials pursuant to this Stipulation and Order as well as any Clawback or other Order will not prejudice or otherwise constitute a waiver of, or estoppel as to, any claim of attorney-client, work product or other applicable privilege or immunity, under New Jersey law.

For example, the mere production of privileged or work-product-protected documents in this case as part of a mass production is not itself a waiver in this case, or in any other Federal or State proceeding.

Communications involving trial counsel that post-date the filing of the Complaint need not be placed on a privilege log. Communications may be identified on a privilege log by category, rather than individually, if appropriate.

10. Modification

This Stipulated Order may be modified by a Stipulated Order of the Parties or by the Court for good cause shown.

IT IS SO STIPULATED, through Counsel of Record

Dated: _____

Counsel for Plaintiff

Dated: _____

Counsel for Defendant

IT IS SO ORDERED that the foregoing Agreement is approved.

Dated: _____

J.S.C.

Superior Court of New Jersey
Appellate Division

Docket No. A-002031-23 (AM-000056-23)

ATLANTIC ER PHYSICIANS	:	CIVIL ACTION
TEAM PEDIATRIC	:	
ASSOCIATES, PA,	:	ON APPEAL FROM AN
EMERGENCY CARE SERVICES	:	ORDER OF THE SUPERIOR
OF NJ, PA, EMERGENCY	:	COURT OF NEW JERSEY,
PHYSICIAN ASSOCIATES OF	:	LAW DIVISION,
NORTH JERSEY, PC,	:	GLOUCESTER COUNTY,
EMERGENCY PHYSICIAN	:	COMPLEX BUSINESS
ASSOCIATES OF SOUTH	:	LITIGATION PART
JERSEY, PC, EMERGENCY	:	
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	:	HON. JAMES R. SWIFT,
	:	J.S.C.

(For Continuation of Caption See Inside Cover)

**DEFENDANTS-APPELLANTS' RESPONSE TO
PLAINTIFFS' OPPOSITION TO AMICUS BRIEFS**

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(For Continuation of Appearances See Inside Cover)

Date Submitted: November 7, 2024

MIDDLESEX EMERGENCY :
 PHYSICIANS, PA and :
 PLAINFIELD EMERGENCY :
 PHYSICIANS, PA, :
 Plaintiffs-Respondent, :
 vs. :
 :
 UNITEDHEALTH GROUP, INC., :
 UNITEDHEALTHCARE :
 INSURANCE COMPANY, :
 OXFORD HEALTH PLANS (NJ), :
 INC., MULTIPLAN, INC., and :
 UMR, INC., :
 Defendants-Appellants. :

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PROCEDURAL HISTORY AND STATEMENT OF FACTS

Defendants rely on the procedural history and statement of facts contained in their merits briefing in this appeal. (See Db4-12).

LEGAL ARGUMENT

Plaintiffs’ response to the amicus briefs sounds two basic themes. The first is to accuse Amici of not strictly addressing the particular facts of this case, but instead emphasizing broadly applicable policy reasons that New Jersey law does not and should not depart from the widely-applied rule that relevancy is the “touchstone” for all discovery, including discovery of electronically-stored information (“ESI”). Amici would no doubt plead guilty as charged. After all, the trial court in this case flatly rejected both the rule urged by Amici and the policy concerns they articulate in its defense. According to the trial court:

The purpose [of discovery] is to produce all the relevant documents and if in producing all the relevant documents there are fifty percent of them which are irrelevant, I don’t see the harm and I understand [United counsel’s] point that the rules say that relevancy is the touchstone but this is not—this is something different. ESI is different, and I’m not saying that we’re supposing to be producing, you know, a mass of irrelevant stuff but the problem is that relevancy shouldn’t be decided by the people who are producing the documents because their view of relevance and the other side’s view of relevance is different

T24:11-23. Later, the court went out of its way to revisit the point, putting it even more starkly:

[J]ust to go back and address [United counsel’s] argument about relevance and the old days of going through the documents, ESI is different. Okay. ESI is fundamentally different than just paper documents because ESI is voluminous. It’s not—it pulls in a lot of things that are—I mean, these particular searches that are understandably and we all recognize that there are going to be a lot of irrelevant documents and not a lot of nonresponsive documents.

But ESI is fundamentally different than, you know, just going through a case file, you know, let’s say it’s a construction case and everybody has, you know, the documents from the construction project and ESI is fundamentally different.

T20:18 to 21:7. For these policy reasons, the court stated explicitly, its “usual stance” in cases involving ESI discovery is to prohibit “a relevance type of review.” T4:7-12. In the court’s view, “the relevance gatekeeper shouldn’t be the producers of the documents,” but “should be the ones receiving the documents” because as a matter of policy, it simply is not “fair” for “the party producing the documents [to] decide what is relevant and what’s not.” T5:19-6:1. The trial court thus expressly confirmed that the reason not just for “this ruling,” but more broadly “the way I do things in these cases in this fashion” is that it “makes more sense,” avoids disputes over redactions, and because

“relevancy is a different thing and relevancy is in the eye of the beholder.” T21-22.

As Amici explain, virtually every point made in those passages is incorrect as a matter of law and policy. Yes, the purpose of discovery is indeed to produce relevant documents, but if fifty percent of the documents produced are *not* relevant, there certainly *is* a harm, both to the producing party and to the system more generally. (Br. of Electronic Discovery Institute at 6-12; Br. of the Chamber of Commerce of the United States of America and the New Jersey Civil Justice Institute at 13-18; Br. at 17-20). And no, as to the relevancy touchstone, ESI discovery is *not* fundamentally different from “the old days of going through the documents.” In particular, ESI discovery is not uniquely subject to a rule that only the requesting party should conduct relevance reviews because “relevancy is in the eye of the beholder.” Differing views of relevancy is not a matter unique to ESI discovery, and the rules already have multiple mechanisms for parties to identify their differences, to implement solutions, and to compel compliance. The same mechanisms apply to ESI discovery and paper discovery alike, and nothing in those rules justifies a broad mandate to produce massive amounts of irrelevant documents in the absence of any actual finding of discovery misconduct.

The absence of any discovery misconduct findings *in this case* also implicates the second theme running through Plaintiffs’ response to Amici. According to Plaintiffs, the ESI Order here does not raise Amici’s policy concerns because the ESI Order is merely a “discovery protocol tailored specifically to the needs of this particular dispute.” Prab2. No, it is not.

As just shown, the ESI Order was based fundamentally on the trial court’s erroneous perception that ESI is categorically “different” because it is “voluminous” and thus cannot be subject to the usual relevancy review before production. Ignoring the trial court’s many broad statements about why ESI discovery must be treated differently as a *rule*, Plaintiffs insist that the ESI Order is merely a case-specific *exception*—a one-off protocol carefully crafted to address the parties’ relevance disputes in other cases. In support of that assertion, they repeatedly cite a single passing comment the court made in discussing how it would handle a dispute over *unnecessary depositions*. Plaintiffs cite only a short snippet of the exchange, but the broader context makes clear that the Court was not “specifically tailoring” the ESI Order at all. It was addressing a concern expressed by United that if it were compelled to produce documents on topics deemed relevant in other cases but already held to be irrelevant here, Plaintiffs would demand depositions on those irrelevant topics. To explain why it would not tolerate such an effort by Plaintiffs, the

court posited that United would simply file a motion objecting to the deposition, and then:

THE COURT: And that will be a quick motion. That will be a quick motion because when he files the motion and I read what he says that he wants to redepose somebody over something I've already determined that is not relevant to the case, I'm going to say and that will be very quick, and I don't have a problem doing that motion.

What I'm trying to avoid here by all accounts is this contentious litigation. It's going on throughout the country and I do not think it's fair for the plaintiffs—I mean, the defendants to decide which documents are relevant and which documents are not, on both sides. I mean, this is not just limited to your productions. It includes plaintiff's productions as well. So that's what I'm trying to avoid.

T18:12 to 19:2.

The court thus was warning that it would not tolerate contentious litigation arising from the production of irrelevant documents—a problem the ESI Order itself creates. And while the court also sought to avoid the “contentious litigation” over relevance that had arisen in other cases, it is clear in context that the court was not crafting a special protocol uniquely tailored to avoid such disputes in this case. Its explicit point—repeated throughout—was that because ESI is voluminous and thus always potentially susceptible to more relevance disputes, it is *always* necessary to allow the requesting party to conduct its own

relevance review, even if the Rules provide otherwise for the “old days” of paper discovery.

The court’s policy-driven view that relevance should *not* be the touchstone of ESI discovery is wrong for the policy reasons articulated by Amici. Even more importantly, it is demonstrably contrary to the Rules themselves, and this Court “will not defer to a determination based on an incorrect view of the law.” Pressler & Verniero, Current N.J. Court Rules, cmt. 1 on R. 4:10-2(a) (2024); see Rivers v. LSC P’ship, 378 N.J. Super. 68, 80 (App. Div.), certif. denied, 185 N.J. 296 (2005).

As Defendants have always maintained, trial courts are afforded considerable discretion *within* the boundaries fixed by the Supreme Court in Rule 4:10-2(a). Courts do have authority to mandate special discovery protocols in any case (not just ESI cases) response to demonstrated “malfeasance,” Db29-30, but the court found no such malfeasance here. And Plaintiffs’ response to Amici cites no precedent suggesting that the speculative prospect of “contentious litigation” over discovery by itself justifies prohibiting relevance reviews whenever ESI discovery is involved. Amici are rightly concerned that if this Court sanctions the trial court’s view of the policies and law governing ESI discovery, it would eliminate the relevancy touchstone for ESI discovery,

to the detriment of every litigant in New Jersey's courts that conducts business electronically and produces vast amounts of ESI.

CONCLUSION

For these reasons and those set forth more fully in Defendants' merits briefs, the ESI Order should be reversed.

Dated: November 7, 2024

Respectfully submitted,

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