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Dan Schiavetta, Jr. for LexVid

Supplemental Materials

2017 WL 1900287
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United States District Court, E.D. Wisconsin.

Charles COLLINS, Tracy Adams, ON BEHALF OF her minor child, D.A., Caleb Roberts, Stephen Jansen, Gregory Chamabers, and Alicia Silvestre, Plaintiffs,

v.

The CITY OF MILWAUKEE, The Milwaukee Fire and Police Commission, and Chief Edward Flynn, Defendants.

Case No. 17–CV–234–JPS

|

Signed 05/09/2017

Attorneys and Law Firms

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David A. Frank, Joseph M. Russell, Randall D. Crocker, von Briesen & Roper SC, Jan A. Smokowicz, La Keisha W. Butler, Milwaukee City Attorney's Office, Milwaukee, WI, for Defendants.

ORDER

J.P. Stadtmueller U.S. District Judge

***1** On May 5, 2017, Defendants filed an unopposed motion for the entry of an order regarding the production of documents and electronic data. (Docket #15). The proposed order sets forth the parties' agreed-upon terms for the production of such materials. In light of the parties' agreement, and in order to expedite the production of discovery materials in this case, the Court will grant the motion.

Accordingly,

IT IS ORDERED that Defendants' unopposed motion for the entry of an order regarding the production of documents and electronic data (Docket #15) be and the same is hereby **GRANTED**;

IT IS FURTHER ORDERED that the following procedures and formats, including those contained in Appendix 1 of this Order, shall govern the production of documents and electronic data in this matter unless otherwise ordered by the Court:

1. **General Format of Production**. The parties agree to produce documents either (i) as electronic images with associated text files and metadata or (ii) in native format, as further described herein.

2. **ESI Production**. The parties agree to produce Electronically Stored Information ("ESI") with the exception of inaccessible storage media as described below. ESI will be searched on a custodian and search term basis, with appropriate Boolean and proximity operators, as well as date/time limitations, as described in Paragraph 13. With respect to production of ESI, the parties agree upon the following:

a. E-mail will be produced as image files with related searchable text and metadata (to the extent it exists).

b. Other electronic documents including word-processing documents, spreadsheets, presentations and all other electronic documents not specifically discussed elsewhere will be produced as image files with related searchable text and metadata (to the extent it exists) except for:

1. Excel files will be produced in native format with related searchable text and metadata (to the extent it exists). Where a party redacts a portion of an Excel spreadsheet, the parties will meet and confer regarding production of the document in Tagged Image File Format ("TIFFs" or ".tiff format");

2. The parties will discuss any specialized databases that are responsive to the parties' requests and reach agreement on production before any such production;

3. The parties will discuss reasonable requests for production in native format on a document-by-document or category-by-category basis; and

4. The parties shall meet and confer on a production protocol for native files.

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3. **Hard Copy (or Paper) Documents**. The parties agree to produce hard-copy documents as image files with related OCR text to the extent such documents are converted into electronic format. At this time each party contemplates converting all hard-copy documents into electronic images for production purposes and agrees to address any exceptions with the other parties. The parties shall meet and confer to discuss documents that present imaging or formatting problems. To the extent exceptions to the foregoing are required, the parties will meet and confer to discuss alternative production requirements, concerns, or formats.

***2** 4. **Form and Manner of Production**. All production document images will be provided as single-page Tagged Image File Format ("TIFFs" or ".tiff format") compatible with commercially available document management software, such as Relativity or Concordance. All images generated from hard copy documents shall be scanned as black and white images at 300 d.p.i. resolution and shall be saved and produced in a Group 4 compression single-page "TIFF" format and reflect, without visual degradation, the full and complete information contained on the original document. All images generated from native electronic documents with the exception of source code, dynamic web pages, and web content, shall be saved electronically (or "printed") in a Group 4 compression single-page "TIFF" image that reflects the full and complete information contained on the original document. The parties shall produce a "load file" that is compatible with a commercially available document management software, such as Relativity or Concordance, to accompany the images, which load file shall include information about where each document begins and ends to facilitate the use of the produced images through a document management or litigation support database system. The parties shall meet and confer to the extent reasonably necessary to facilitate the import and use of the produced materials with commercially available document management or litigation support software.

5. **Document Unitization**. To the extent possible and on a going-forward basis, the parties will endeavor to apply unitization practices consistent with the following description. Each page of a hard copy document shall be scanned into an image and if a document is more than one page, the unitization of the document and any attachments shall be maintained as it existed in the original when creating the image file. For documents that contain fixed notes, the pages will be scanned both with and without the notes and those pages will be treated as part of the same document. The relationship of documents in a document collection (e.g., cover letter and enclosures, email and attachments, binder containing multiple documents, or other documents where a parent-child relationship exists between the documents) shall be maintained through the scanning or conversion process. If more than one level of parent-child relationship exists, documents will be kept in order, but all will be treated as children of the initial parent document. Such information shall be produced in the load file, as hereafter defined, in a manner to enable the parent-child relationship among documents in a document collection to be reconstituted by the receiving party in commercially available document management software, such as Relativity or Concordance.

6. **Color**. Unless a specific request is made, documents shall be produced in gray scale.

7. **Duplicates**. Where a single document has more than one identical copy of a document (i.e., the documents are visually the same and contain the same electronic text), the parties need only produce a single copy of that document.

8. **Bates Numbering**. The parties agree to produce imaged documents with a legible, unique page identifier ("Bates Number") electronically "burned" onto the image at a location that does not obliterate, conceal, or interfere with any information from the source document. No other legend or stamp will be placed on the document image other than a confidentiality legend (where applicable) and redactions (consistent with the Protective Order in this matter, or any other protective orders agreed to in the future), and the Bates Number identified above. The confidential legend shall be "burned" onto the document's image at a location that does not obliterate or obscure any information from the source document. With respect to the identification of files produced in their native format, the parties shall confer on an appropriate method for applying a unique identifier to each file produced.

9. **File Naming Conventions**. Each page image file shall be named with the unique Bates Number of the page of document, followed by the extension ".TIF". In the event the Bates Number contains a symbol and/or character that cannot be included in a file name, the symbol and/or character will be omitted from the file name.

10. **Production Media**. The parties agree to produce documents on CD–ROM, DVD, external hard drive, or such

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other readily accessible computer or electronic media as the parties may hereafter agree upon (the "Production Media"). The type of materials on the media (e.g., "Documents", "OCR Text", etc.) and the Bates Number range(s) of the materials on the Production Media shall also be contained on the Production Media, and where not practicable to do so may be provided in an accompanying letter.

*3 11. **Meta–Data Fields and Processing**. Each of the metadata and coding fields set forth in Appendix 1 that can be extracted shall be produced for that document. The parties are not obligated to manually populate any of the fields in Appendix 1 if such fields cannot be extracted from a document, with the exception of the following: BEGBATES, ENDBATES, BEGATTACH, ENDATTACH, CUSTODIAN, CONFIDENTIALITY, REDACTED, OTHER_CUSTODIAN, and CDVOLUME. The parties agree that the OTHER_CUSTODIAN field should be populated by the party or the party's vendor to identify other custodians in possession of the document before deduplication was applied to the data set. The parties will make reasonable efforts to ensure that metadata fields automatically extracted from the documents are correct.

12. **OCR/Extracted Text**. The parties will produce corresponding Optical Character Recognition ("OCR") text files for all hard-copy documents and any electronic documents that require redaction prior to production. For documents that exist natively in electronic format that have not been redacted and that are produced as images, the parties shall produce extracted text files reflecting the full text that has been electronically extracted from the original, native electronic files. The OCR and extracted text files shall be produced in ASCII text format and shall be labeled and produced on Production Media in accordance with the provisions of paragraph 10. These text files will be named with the unique Bates Number of the first page of the corresponding document followed by the extension ".txt." The OCR and extracted text files shall be produced in a manner suitable for importing the information into commercially available document management or litigation support software such as Concordance.

13. **Use of Search Terms**. Plaintiffs shall first provide Defendants with an initial listing of search terms they propose Defendants use to search for documents and relevant ESI, and Defendants shall have the opportunity to propose modifications to those search terms, including the use of appropriate Boolean and proximity operators. Either party may also propose custodians and date limitations for searches. After the parties agree on an initial set of search terms, the parties shall conduct a further meet and confer to determine whether modifications should be made to those search terms, including the use of appropriate Boolean and proximity operators. The parties will produce potentially-relevant ESI in their possession according to the agreed search terms, custodians, and date ranges.

a. Each party shall be provided with an opportunity to propose additions or amendments to the search procedures and terms;

b. The parties acknowledge that the agreement to the use of such search procedures and terms shall not be construed as a waiver of any party's right to request subsequent searches and productions; particularly where there is a showing that the agreed-to search terms and procedures have resulted in inadequate productions or failed to identify relevant materials. The parties reserve their right to object to any additional requests or subsequent searches;

c. The parties will produce ESI on a rolling basis so as to provide each other with documents as expediently as possible; and

d. Documents identified by search terms may be reviewed for privilege, confidentiality, redactions and relevance or responsiveness prior to production.

14. **Original Documents**. The parties will retain the original hard-copy and ESI documents. Subject to preservation of appropriate privileges and other protections, the parties will consider reasonable requests, after any necessary meet and confer, to produce the original copy and ESI documents of specific documents or groups of documents, or where a document existed originally in only hard copy format, make originals of any produced document available for inspection by the requesting party in the form in which such documents are kept in the ordinary course of business.

*4 15. **Inaccessible or Not Reasonably Accessible Storage Media**. The parties will take reasonable steps to collect potentially relevant ESI stored on servers, work stations, and readily accessible drives and databases. The parties shall discuss sources of potentially relevant information deemed "not reasonably accessible." Where a party seeks production of information from sources designated by another party as "not reasonably accessible," the parties shall meet and confer

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in an effort to resolve any disagreements before seeking relief from the Court.

16. **Incorporation by Reference of Protective Order**. The provisions of the any Protective Orders entered in the above-captioned case shall be incorporated by reference into this Order, including but not limited to the provisions relating to the identification, use, and restrictions on Confidential and Attorneys Eyes Only information and information subject to a claim of privilege.

17. **Costs of Production**. Each party shall bear its own costs of production.

Appendix 1: Metadata and Coding Fields

The Parties agree to produce a metadata database load file with following fields in the order displayed below. The Parties agree that all fields with an asterisk* will not be required to be produced if the files require redaction.

All Citations

Not Reported in Fed. Supp., 2017 WL 1900287

End of Document

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United States District Court, S.D. California.

Robert CLEVELAND, Plaintiff,

v.

The BEHEMOTH, Defendant.

Case No.: 19-cv-0672-GPC-BGS

Signed 05/27/2021

Filed 05/28/2021

ORDER DENYING PLAINTIFFS MOTION FOR SANCTIONS

[ECF 37]

Bernard G. Skomal, United States Magistrate Judge

***1** Plaintiff Robert Cleveland has filed a Motion for Evidence Preclusion and Monetary Sanctions for an allegedly untimely production of discovery. (Doc. 37). Defendant The Behemoth has filed an Opposition. (Doc. 40). For the reasons set forth below, the Motion is **DENIED**.

I. Timeliness of Defendant's Supplemental Production

A. Legal Standard

Federal Rule of Civil Procedure 26(e) governs supplementing discovery disclosures and responses. Subsection (1) of that Rule states:

> A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—*must* supplement or correct its disclosure or response:
>
> (A) in a timely manner *if* the party learns that in some material respect the disclosure or response is incomplete or incorrect, *and if* the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or
>
> (B) as ordered by the court. Fed. R. Civ. P. 26(e)(1) (emphasis added).

"[T]he duty to supplement arises when counsel becomes aware that a previous response has become incomplete or inaccurate, not that it was so at the time the response was signed." *Smiley v. Hologic, Inc.*, No. 16-CV-0158-WQH-MDD, 2017 WL 4244861, at *2 (S.D. Cal. Sept. 25, 2017) (citing *Harper v. City of Dallas,* No. 3:14-cv-2647-M, 2017 WL 3674830 *16, (N.D. Tex. Aug. 25, 2017)). "Under Rule 26(e), parties have an ongoing obligation to continuously supplement their discovery responses. That obligation is in no way limited by the discovery deadlines imposed by the Court's Scheduling Order pursuant to Rule 16." *Harper*, 2017 WL 3674830, at *16 (quoting *United States v. State of La.*, No. CV 11-470-JWD-RLB, 2015 WL 5595630, at *1 (M.D. La. Sept. 21, 2015)); *see also* Fed. R. Civ. P. 26(e) advisory committee's note to 1993 amendment.

"Supplemental responses or disclosures are a one-way street: the burden is placed upon the producing party to supplement responses or disclosures in a timely manner upon finding that their initial responses or disclosures are materially incomplete or inaccurate." *Smiley*, 2017 WL 4244861, at *1 (quoting court's prior decision) (citing Rule 26(e)(1)(A)). "The producing party carries the burden of convincing the Court that the supplemental disclosures or responses are timely and, if not, the untimeliness is substantially justified or harmless." *Id.*

"[T]imeliness under Rule 26(e)(1)(A) is measured from 'the date when the facts are discovered, not some nebulous date when counsel first realized that there was some significance to them.' " *Longlois v. Stratasys, Inc.*, 88 F. Supp. 3d 1058, 1077 (D. Minn. 2015) (quoting *Havenfield Corp. v. H & R Block, Inc.*, 509 F.2d 1263, 1272 (8th Cir. 1975)). Timeliness is not measured by a particular date or event; rather, timeliness means without undue delay upon discovering the information that is to be provided. *See id.*

"A supplemental disclosure under Rule 26(e)(1)(A) is timely if it is made as soon as possible." *Hypertherm, Inc. v. American Torch Tip Co.*, Civil No. 05–cv–373–JD, 2009 WL 703271, at *1 (D. N.H. Mar. 16, 2009); *see also, e.g., Malozienc v. Pac. Rail Servs.*, 572 F. Supp.2d 939, 943 (N.D. Ill. 2008) (holding supplementation was made in a timely manner "by supplementing discovery production as soon as possible"); *Walls v. Paulson*, 250 F.R.D. 48, 53 (D.C. C. 2008) (finding supplemental responses untimely when made months

after learning of information); *Hummer v. BNSF Ry. Co.*, No. 06-CV-1218, 2006 WL 3523752, at *2 (C.D. Ill. Dec. 6, 2006) (finding supplemental disclosure made nine days after party became aware of evidence was timely). *Smiley,* 2017 WL 4244861, at *2 (Plaintiff did nothing to explain why counsel waited nine months after the close of discovery to provide supplements); *Bruhn Farms Joint Venture v. Fireman's Fund Ins. Co.*, No. 13-CV-4106-CJW, 2017 WL 632105, at *4 (N.D. Iowa Feb. 13, 2017)

B. Analysis

***2** In order for the requirements of Rule 26(e) to apply, the supplemental discovery must be in response to one or more of the RFPs identified by the Plaintiff or a required supplement to an initial disclosure under Rule 26(a). Rule 26(e)(1)(A). Therefore, the Court first determines whether the documents in the Supplemental Production are responsive to the RFPs Plaintiff relies on and then considers whether they qualify as supplements to initial disclosures.

1. Responsive to RFPs

The duty to supplement arises when counsel becomes aware that a previous response has become incomplete or inaccurate, not that it was so at the time the response was signed. *See Harper*, 2017 WL 3674830 *16. The Plaintiff contends that of the 582 pages of the discovery turned over on December 23, 2020 "[c]ertain (if not all) of the documents are responsive to the RFPs propounded by Plaintiff in August of 2019." (Doc. 37-1 at 5).[1] In support of this contention, Plaintiff identifies the RFPs he claims the 582 pages are responsive to. They are:

> • Request for Production No. 23: Produce all Documents Concerning the Employee file of Plaintiff, including his hiring, discipline, termination, and job performance.
>
> • Request for Production No. 24: Produce all Documents Concerning Employee or contractor complaints made against or about Stamper to The Behemoth.
>
> • Request for Production No. 27: Produce all Documents Concerning sexual harassment and/or discrimination complained of by Plaintiff during his employment/contract with The Behemoth, as set forth in Plaintiff's operative Complaint, including all Documents Concerning any actions taken by or at the bequest of The Behemoth in response thereto.
>
> • Request for Production No. 30: Produce all Documents Concerning posts, "likes," comments, Tweets, or other social media actions/content taken or created by Stamper, including all discussion threads, fan complaints, fan commentary, internal Communications through any messaging systems utilized or formerly utilized by The Behemoth and/or websites, blogs, or social media accounts controlled or accessible to The Behemoth.

(Doc. 37-1 at 7).

Although Plaintiff identifies these RFPs and asserts the supplemental discovery responses are responsive to them, Plaintiff does not specify which of the 582 pages is responsive to which RFP. Instead, in summary fashion he lists categories of responsive documents as,

> 1) Slack chats responsive to Plaintiff's RFPs (despite Ms. Chung's repeat representations in 2019 that all Slack data had been searched for and produced); 2) photographs; 3) records purportedly relating to Plaintiff's performance reviews and directly responsive to Plaintiff's RFPs; 4) emails between Ms. Chung's clients, Mr. Fernandes and Mr. Baez (despite earlier productions of emails between them and The Behemoth's unfettered access to their emails); and 5) a purported YouTube watch list.

(Doc. 37-1 at 10).

The Defendant states that it produced 18 documents on December 23, 2020 as the supplemental discovery ("Supplemental Production"). (Doc. 40-1 at 2). The YouTube Watch History comprised 414 pages of the 582 pages, approximately 70% of the Supplemental Production. (Doc. 40 at 10). The Defendant claims that most of the documents are not responsive to Plaintiff's discovery requests. (Doc. 40 at 4). It provides a table addressing which of the supplemental documents are responsive to Plaintiff's RFPs and whether the document(s) had been previously produced. (*Id.* at 5). In that table, the Defendant identifies only 10 slack conversations (TRC_007797-7836) between Plaintiff and former co-workers as being responsive to the parties' agreed upon search terms. (*Id.*) As regards Plaintiff's RFP No. 23, the Defendant objected to performance reviews and agreed to only produce Plaintiff's personnel file. (Doc. 40 at 7).

***3** "A party...who has responded to an interrogatory, request for production, or request for admission – must supplement or correct its...response...in a timely manner if the party learns that in some material respect the...response is incomplete

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or incorrect." Rule 26(a)(1). Therefore, the Court must first ascertain which of the documents respond to Plaintiff's listed RFPs in order to determine whether the alleged belated discovery relates to an incomplete response to that RFP.[2] The Court has attempted to follow the categories of the supplemental discovery listed by the Parties.

a) Slack Messages

Regarding the slack messages, Defendant concedes they were responsive to Plaintiff's RFP(s).

b) Emails

Defendant claims five additional emails are not responsive to Plaintiff's RFPs. Email from Jay Fernandes (TRC_008266) ("Core Tester email") was not responsive and was produced previously by Plaintiff. (Doc. 40 at 5). Email from Jay Fernandes regarding use of company property (TRC_008299) ("Company Property email") also is not responsive and otherwise previously produced by Plaintiff. Two emails from Jay Fernandes to John Baez regarding various workers' attendance and bonuses (TRC_008295-8298) are not responsive to RFP 23 and were not previously turned over. (*Id.* at 6). Bobby temp agency email (TRC_008327-8330) is not responsive and already previously produced by Plaintiff. (*Id.*)

Plaintiff's Motion indicates that the Defendant had, during the course of discovery, produced emails to/from Jay Fernandes, Plaintiff's former supervisor, and John Baez, a The Behemoth owner. (Doc. 37-1 at 8, 10). However, Plaintiff does not identify which RFPs these emails were responsive to.

The numerous RFPs listed by Plaintiff do not specifically request emails between Jay Fernandez and John Baez. (*Id.* at 7). They seek documents concerning complaints against Stamper; concerning sexual harassment or discrimination complained of by Plaintiff; and documents concerning social media created by Stamper. (*Id.*) The Defendant's summary of the five emails do not involve the topics listed in these RFPs. (*See* Doc. 40 at 16). The Plaintiff does not explain how these emails would be responsive to the topics covered in the RFPs Plaintiff has identified.

Out of an abundance of caution the Court reviewed those emails produced by the Defendant in its supplemental discovery. (*See* Defendant's Exhibits I and J). Exhibit I regards the two emails between Fernandes and Baez. These emails are consistent with Defendant's description (Doc. 40-1 at 8). They are not responsive to Plaintiff's identified RFPs and the topics covered therein.

Exhibit J concerns the Jay Fernandes email of April 27, 2017 which regarded use of company property. It does not relate to the RFPs identified by the Plaintiff. Additionally, according to Defendant, this email as well as the other two, were already produced in discovery. Defendant cites to the excel sheet which contained these three emails that were already produced. In any event, according to Defendant's undisputed description of the remaining two emails, the Court finds they would not be responsive to Plaintiff's specified RFPs.

c) Photographs

Defendant's table identifies the following and indicates they are not responsive to Plaintiff's RFPs: photos of December 13, 2016 holiday party ("Holiday Photographs"); photos of Plaintiff and co-workers at work ("Misc. Photographs"); photos of a magazine ("Magazine Photographs"); photos of TRC ("TRC Photograph"); and photo of door ("Photograph of Door"). (Doc. 40 at 5-6). Plaintiff, apart from indicating that photos were part of the supplemental documents, makes no mention of how they are responsive to the listed RFPs. Plaintiff simply contends that he has no ability to determine the source and origin of the photos. (Doc. 37-1 at 17). The Defendant's description of the photos does not concern any of these RFPs. Again, the Court has reviewed the produced photos, provided by the Defendant in its Exhibits C, E, F, G, and H, and they appear as described by the Defendant and to the Court they do not concern RFPs 24, 27, 30. The Court finds that the photos are not responsive to the RFPs identified by the Plaintiff.

d) Records Relating to Plaintiff's Performance Reviews

***4** Plaintiff claims that records pertaining to performance reviews are directly responsive to his RFPs. (Doc. 37-1 at 10). However, he does not identify which records from the Supplemental Production he is referring to. The Court notes that RFP No. 23 covers production of all Documents concerning the Employee file of Plaintiff, including his hiring, discipline, termination, and job performance. However, the Defendant disputes this. (Doc. 40 at 6). "Plaintiff contends

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that 'performance reviews and [sic] directly responsive to Plaintiff's RFPs,' but Defendant objected to RFP No. 23 and agreed to produce only Plaintiff's personnel file, which it did produce, and Plaintiff never conferred over this response or moved to compel." (Doc. 40 at 8 (citing Decl. of Lisa Chung ("Chung Decl.") ¶ 3 and quoting Plaintiff's brief, Doc. 37-1 at 10)).

The Plaintiff has not addressed this contention by Defendant, but regardless the Court notes that the parties did not raise any discovery dispute concerning RFP 23. As such, the Court finds that the only responsive documents would have to pertain to Plaintiff's personnel file. Since Plaintiff fails to identify which documents in the Supplemental Production relate to Plaintiff's personnel file, the Court turns to Defendant's table which summarizes the documents. These documents are identified:

- Documents with handwriting of Jay Fernandes (TRC_008267–8291);
- Two emails from Jay Fernandes to John Baez re: various workers' attendance, bonuses (TRC_008295–8298);
- One on One Excel Spreadsheet Notes 9/26/17(TRC_008331) ("One on One Notes");
- 2016 Glorious Workers Information Distillation ("GWID 2016") (TRC_008367– 8379);
- 2017 Glorious Workers Information Distillation ("GWID 2017") (TRC_008302– 8326).

(Doc. 40 at 5-7).

As to all of these documents, the Defendant contends "Not responsive as not a part of, concerning, or found in "Employee file" (*See* Pl.'s RFP No. 23)." (*Id.*) And, Plaintiff's Motion offers no explanation as to how these documents relate to Plaintiff's personnel file.

The document of handwritten comments of Jay Fernandes was not provided in the exhibits for the Court to review. Plaintiff did not provide a description of this document or identify which RFP this document was responsive to. Defendant claims this half-page document relates solely to the impressions of Mr. Fernandes and Mr. Baez regarding Plaintiff (Doc. 40 at 17) and this document was not included in Plaintiff's personnel file. (Doc. 40 at 11, 17; Chung Decl. ¶ 13; Decl. of John Baez ("Baez Decl.") ¶¶ 33, 34). The Court therefore finds this document is not part of the personnel file and is therefore not responsive to RFP 23.

The two emails from Jay Fernandes to John Baez were addressed in the previous section. The Court reviewed these two emails and finds they do not concern RFP 23 and Plaintiff's personnel file.

As to the One on One Notes, it was not provided for Court review. The Defendant claims it was not found in the Plaintiff's personnel file, and Plaintiff does not address it. The Court, relying on Defendant's representation and the Plaintiff's lack of explanation, finds it was not part of the Plaintiff's personnel file.

The Court has also reviewed the 2016 and 2017 Glorious Workers Information Distillation documents. (*See* Defendant's Exhibits K and L). Both documents are a general survey of the entire company which Plaintiff filled out. The Plaintiff does not address them. The Defendant claims they were not part of Plaintiff's personnel file. After reviewing these documents, the Court finds they were not part of Plaintiff's personnel file.

e) YouTube Watch History

Other than contending that the YouTube Watch History was responsive to his RFPs, the Plaintiff does not identify which RFP(s) relate to this supplemental discovery nor does he explain how Defendant's response was incomplete. Defendant alleges it is not responsive to the RFPs identified by Plaintiff but offers no explanation as to why. The Court notes that none of these RFPs asks for Plaintiff's YouTube watch history or list. Without more guidance from the Plaintiff as to which RFP this discovery is responsive to, the Court finds that the YouTube Watch History was not responsive to any of these RFPs.

f) Other Documents

***5** Three additional documents are identified by Defendant as not being responsive to Plaintiff's RFPs, not identified by Defendant as a trial exhibit and not previously produced in this matter: (1) Calendar entries (TRC_008332-8334); (2) Plaintiff's work task spreadsheet (TRC_008342-8379); and (3) TRC's Path to Design...ness Document (TRC 008338-8341). (Doc. 40 at 6-7). Other than Defendant's explanation how the task spreadsheet and Path to Design document are harmless because neither party is relying on them at trial, neither party addresses these documents and they have not been provided to the Court. Given the minimal information provided, the Court finds these documents would

not be responsive to Plaintiff's RFPs. However, even if they were, the Court would agree that their production is harmless given neither party is planning to rely on them for trial.

In summary, the Court finds the 10 slack messages were responsive to Plaintiff's RFPs. The emails (TRC-008266, TRC_008299, TRC_008295-8298, TRC_008327-8330), photographs, records relating to performance reviews (as detailed above), YouTube Watch History, and other documents are not responsive to Plaintiff's RFPs.

2. Responsive to Initial Disclosures

Plaintiff also contends that Defendant flouted its duty to make complete initial disclosures or [timely] supplement those disclosures. *See* Fed. R. Civ. P. 26(e)(1)(A). He submitted Defendant's initial disclosures. (Exhibit A) but Plaintiff does not identify which documents in the Supplemental Production constitute a supplement to Defendant's initial disclosures. Defendant's summary table only addresses whether a document is responsive to an RFP. It does not address whether the supplemental discovery constituted initial disclosure. But Defendant's table/chart does identify those documents from the Supplemental Production that Defendant has identified as trial exhibits. (*See* Doc. 40 at 5-7).

Notwithstanding Plaintiff's failure to identify which of documents produced would be considered a supplement to the initial disclosures, the Court on its own considers whether those trial exhibits constitute supplements to Defendant's initial disclosures, thereby requiring the Defendant to have timely disclosed them to Plaintiff. The Court limits this inquiry to those trial exhibits that were not previously produced to the Plaintiff.

Defendant has conceded that the 10 slack messages are responsive to Plaintiff's RFPs, so the Court will not address whether they also qualify as initial disclosure.

Plaintiff's YouTube Watch History, all photographs identified as trial exhibits not previously produced (Holiday Photographs, Misc. Photographs, Magazine Photographs, Photograph of TRC, and Door Photograph), the two emails from Fernandes to John Baez, and One on One Notes all appear to qualify as supplements to initial disclosures under Rule 26(a)(1)(ii) in that they were documents in Defendant's possession that the Defendant may use to support its claims or defenses, unless the use would be solely for impeachment. The Defendant has not specified if its intended use is solely for impeachment. As such the Court finds they were supplements to initial disclosures.

The handwritten notes found in a manila folder pertaining to the Plaintiff appear to be those of Plaintiff's supervisor Jay Fernandes. (Doc. 40-1 at 7). The Defendant has not marked them as a trial exhibit. The Plaintiff does not proffer how this document would be considered an initial disclosure. Neither party has provided the document for Court review. Therefore, the Court finds without prejudice that it is not a responsive document under Rule 26(a)(1)(A)(ii).

In summary, the Court finds the YouTube Watch History, photographs identified as trial exhibits and not previously produced, the two emails from Fernandez to John Baez, and the One on One Notes all appear to qualify as supplements to initial disclosures.

3. Timeliness of Defendant's Disclosure of Responsive Supplemental Discovery

a) Time Frame

***6** In his Motion, Plaintiff stressed that the Supplemental Production was belated for more than a year after discovery closed. Discovery closed December 21, 2019 and the supplemental discovery was provided December 23, 2020. Indeed, approximately a year passed. However, the Plaintiff fails to point out that both counsel filed a Joint Motion to temporarily stay the case from May 13, 2020 to November 1, 2020 due to both being on overlapping leaves of absence. (Doc. 15 at 1, 3). Both attorneys proffered that they each led the litigation in the case and that no other attorneys at their respective firms were available to take over the case while they were on leave. (*Id.* at 2). The Court granted their Joint Motion. (Doc. 17). Given their Joint Motion, the Court finds that the time frame during which Defendant had a duty to timely supplement the RFP responses and initial disclosures extended from December 21, 2019 to May 13, 2020 and from November 1, 2020 to December 23, 2020. This in effect cuts the alleged late discovery to about 6 months, not over a year. The issue then is whether, during that 6 months or even before the termination of fact discovery, the Defendant timely produced the responsive supplemental documents.

b) When Did Defendant's Duty to Supplement Arise

Supplemental responses or disclosures are a one-way street: the burden is placed upon the producing party to supplement responses or disclosures in a timely manner

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upon finding that their initial responses or disclosures are materially incomplete or inaccurate. *See* Rule 26(e)(1)(A). The producing party carries the burden of convincing the Court that the supplemental disclosures or responses are timely and, if not, as discussed further below, that the untimeliness is substantially justified or harmless. *Smiley*, 2017 WL 4244861, at *1.

The first inquiry is whether or not the supplemental discovery was in the possession of the Defendant at the time of its responses to the RFPs and the production of their initial disclosures. After reviewing the Baez Declaration (Doc. 40-1 at 1-10) along with Defendant's Opposition (Doc. 40), all the responsive supplemental discovery was in Defendant's possession at that time except for the Magazine Photographs.[3]

Further, the Court finds that the Defendant had a duty to disclose it prior to December 23, 2020, which was just prior to the deadline to submit Pretrial Disclosures which were due on December 28, 2020. (*See* Doc. 37-1 at 9). Disclosure six months after the close of discovery, excluding time stayed, was not timely. *See* 8A Charles Alan Wright & Aruther R. Miller, *Fed. Prac. & Proc.* § 2049.1 (3d ed), 1993 Expansion of Duty to Supplement or Correct ("[T]here is no excuse under the restyled [Rule 26(e) 2007 amendments] for failure to supplement where the information was in the responding party's possession at the time the incomplete response was made."); *see also Steady State Imaging, LLC v. Gen. Elec. Co.*, Case No. 17-cv-01048-JRT-KMM, 2018 WL 2047578, at *9-10 (D. Minn. May 2, 2018)(quoting the same and finding supplementations were not timely for purposes of Rule 26(e)(1).).

The Ninth Circuit in *Bauer Bros. LLC v. Nike, Inc.*, found "no error in the district court's exclusion of Bauer Bros.' untimely-disclosed silkscreen evidence on the ground that the evidence fell within the ambit of Bauer Bros.' disclosure obligations pursuant to Federal Rule of Civil Procedure 26." 598 Fed. Appx 506 (9th Cir. March 17, 2015). The court found the district court did not abuse its discretion in finding that the untimely disclosure was not "substantially justified" or "harmless" and affirmed the district court's exclusion. *Id.* (citing Fed. R. Civ. P. 37(c)(1)).

The Defendant claims it only became aware of this supplemental discovery around or about December 20, 2020 and promptly turned it over to the Plaintiff. (Doc. 40 at 10, 15-16.) The Defendant proffers several good faith reasons for these otherwise late productions; however, these reasons are best addressed in considering whether "the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

***7** In summary, the Court finds the slack messages responsive to Plaintiff's RFPs were not timely produced and the YouTube Watch History, photographs identified at trial exhibits not previously produced, the two emails from Fernandez to John Baez, and the One on One Notes were not timely identified as supplements to initial disclosures.

II. Sanctions

Having found some of the Supplemental Production untimely, the Court now considers whether the failure was substantially justified or harmless.

A. Legal Standards

"If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or harmless." Rule 37(c)(1);[4] *see also Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). "The Advisory Committee Notes describe it as a 'self-executing,' automatic' sanction to 'provide[ ] a strong inducement for disclosure of material." *Yeti by Molly*, 259 F.3d at 1106 (citing Fed. R. Civ. P. 37 advisory committee's note (1993)). A finding of bad faith is not required for Rule 37 sanctions, however, "good or bad faith may be a consideration in determining whether imposition of sanctions would be unjust." *Hyde & Drath v. Baker*, 24 F.3d 1162, 1171 (1994). Rule 37(c)(1) itself also provides alternatives to exclusion of evidence. "In addition to or instead of this sanction," the Court "may order payment of the reasonable expenses, including attorneys' fees, caused by the failure" or "may impose other appropriate sanctions." Rule 37(c)(1).[5]

***8** "Two express exceptions ameliorate the harshness of Rule 37(c)(1): The information may be introduced if the parties' failure to disclose the required information is substantially justified or harmless." *Yeti by Molly*, 259 F.3d at 1106; *see also* Rule 37, advisory committee's note to 1993 amendment ("Limiting the automatic sanction to violations 'without substantial justification,' coupled with the exception for violations that are 'harmless,' is needed to avoid unduly harsh penalties in a variety of situations.")

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The party trying to avoid Rule 37 sanctions, here Defendant, bears the burden of proving substantial justification or harmlessness. *Goodman v. Staples The Office Superstore*, LLC, 644 F.3d 817, 827 (9th Cir. 2011) (citing *Yeti by Molly Ltd.*, 259 F.3d at 1107) ("The burden to prove harmlessness is on the party seeking to avoid Rule 37's exclusionary sanction."); *see Liew v. Breen*, 640 F.2d 1046, 1050 (9th Cir. 1981) ("[P]arty against whom an award of expenses is sought has the burden of showing the special circumstances that make his failure to comply 'substantially justified.' "); *see also Yeoman v. Ikea U.S. West, Inc.*, Case No. 11cv701 WQH (BGS), 2013 WL 12069024, at *3 (S.D. Cal. Feb. 27, 2013) ("The burden to show substantial justification or harmlessness lies with the party facing Rule 37(c) sanctions.") (citing Fed. R. Civ. P. 37(c) and *Yeti by Molly Ltd.*, 259 F.3d at 1107).

The Court has broad discretion in issuing sanctions under Rule 37. *Yeti by Molly*, 259 F.3d at 1106; *see also Margo G. v. Bloomfield*, Case No. 05CV2242 JM (AJB), 2008 WL 5431182, at *1 (S.D. Cal. April 23, 2008) (The Court has "wide latitude...to issue sanctions under Rule 37(c)(1) for a party's failure to comply with the requirements set forth in Rule 26(a).").

"Among the factors that may properly guide a district court in determining whether a violation of a discovery deadline is justified or harmless are: (1) prejudice or surprise to the party against whom the evidence is offered; (2) the ability of that party to cure the prejudice; (3) the likelihood of disruption of the trial; and (4) bad faith or willfulness involved in not timely disclosing the evidence." *Lanard Toys Ltd. v. Novelty, Inc.*, 375 Fed. Appx. 705, at *713 (9th Cir. April 13, 2010) (affirming district court decision under Rule 37(c)(1) allowing testimony at trial by an expert whose full report was not timely disclosed) (citing *David v. Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003)).

B. Analysis

The Court will address the third and fourth factors and then consider the first and second factors regarding prejudice in analyzing Defendant's specific arguments for harmlessness and substantial justification.

As to the third factor, there was not and is not a date set for trial in this case. In this respect, the untimely production and disclosure of some of these documents was not likely to disrupt the trial date. The pretrial conference was approximately a month away and was continued on the court's own motion by the assigned district judge shortly after the parties' briefing on this dispute was filed. (Doc. 17 (January 29, 2021 Pretrial Conference),[6] Doc. 41). As discussed below, it does not appear Plaintiff is entitled to any additional discovery related to the Supplemental Production, but even if he were, it is likely that the parties could have sought leave from the Court to conduct it prior to the pretrial conference and certainly before trial. The likelihood of disrupting the trial was not great. The Court also finds no bad faith or willfulness in not timely disclosing these documents. As reflected in the Court's analysis below, Defendant did not intentionally disclose these documents late. Defendant simply did not, despite great effort and to some and less effort as to others, locate these documents sooner.

***9** Defendant primarily categorizes its arguments as to harmlessness and substantial justification by category of document, although the first two categories are based on the documents having been previously produced and not being identified as trial exhibits. (Doc. 40 at 13-17). Before analyzing the specific categories to determine whether Defendant has shown substantial justification or harmlessness the Court notes that most of Plaintiff's arguments as to prejudice are not specific. Plaintiff has argued generally that he has been prejudiced by the late production of these and other documents because he will not be able to conduct additional discovery as to them. For example, Plaintiff argues Defendant's late disclosure "totally foreclosed [Plaintiff] from conducting any discovery related [to the late production]" and "forecloses Plaintiff from examining any witnesses about the Belated Production." (Doc. 37-1 at 15-16). However, other than generally asserting that Plaintiff will not be able to ascertain underlying information about these documents, there is little explanation what discovery Plaintiff has been denied or who he would need to examine and about what. Additionally, as noted below, Plaintiff also does not address why the information that is provided by declaration regarding these documents in insufficient.

For the reasons detailed below, the Court finds Defendant has shown substantial justification or harmlessness as to the documents that were produced late.[7]

1. Documents Already Produced

Defendant argues the Holiday Photograph, Door Photograph, and Photograph of TRC are the same as photographs, or video as to the Door, already produced by Plaintiff. (*Id.* at 14 (citing Baez Decl. ¶¶ 23, 28, 31)). The Court found these were not

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responsive to Plaintiff's RFPs, but qualified as supplements to initial disclosures that should have been produced earlier. (*See* I.B).

The only distinction is that the Door video is taken from the opposite direction in Plaintiff's previously produced version. (*Id.* (citing Baez Decl. ¶ 31)). Given Plaintiff already had these photographs there can be little to no prejudice from their identification now. Defendant has established the late disclosure of these documents, previously produced or very similar to those previously produced, was harmless. *Escobedo-Gonzalez*, Case No. 2:15-CV-1687 JCM (PAL), 2018 WL 4778031, *3(D. Nev. Oct. 3, 2018) (Finding indisputably late disclosures that were substantially similar to documents previously produced were harmless under Rule 37).[8]

2. Slack Messages

***10** Defendant argues the late production of the ten slack messages was substantially justified and not unfairly prejudicial to Plaintiff. (Doc. 40 at 15). Defendant conceded these messages are responsive to Plaintiff's RFPs.

As to substantial justification Defendant explains that Defendant spent thousands engaging Logikcull as a vendor to search more than 21,000 pages of Slack files, agreed on search terms with Plaintiff, ran the searches, and produced almost 3,000 pages of Slack messages. (*Id.* (citing Baez Dec. ¶ 7)). However, these ten Slack messages were missed because of a flaw in Logikcull's algorithm. (*Id.* (citing Baez Decl. ¶¶ 12, 14). Defendant explains in some detail how the deficiency was identified, raising it with the vendor, rerunning the agreed upon search terms after discovering the flaw, and producing the ten additional messages discovered. (Baez Decl. ¶¶ 14-15).

Defendant also argues Plaintiff has not been unfairly prejudiced by the ten additional Slack messages because Defendant has only identified three of the messages as trial exhibits and they are all between Plaintiff, who can provide his own insight regarding them, and Matt Banes. (Doc. 40 at 15). As to the Slack messages, Plaintiff argues he "cannot question witnesses who are purported parties to the Slack conversations to understand context and relevance before trial." (Doc. 37-1 at 16). However, Defendant notes that it produced hundreds of pages of Slack messages between Plaintiff and Mr. Banes, but Plaintiff never took his deposition. (Doc. 40 at 15).

The Court finds the late production of the Slack messages is harmless and substantially justified. Based on the parties' arguments, the Court is not convinced these messages between Plaintiff and Mr. Banes are distinguishable in any important respect from those messages between Plaintiff and Mr. Banes that were already produced. Additionally, having not elected to depose Mr. Banes about the Slack messages previously produced, the Court is left to wonder why a deposition would be necessary for these messages and not for those. And, Plaintiff has not identified anything about these messages that would distinguish them from the other messages with Mr. Banes or necessarily require further discovery regarding them. Collectively, this suggest little "prejudice or surprise" to Plaintiff. *Lanard Toys Ltd.*, 375 Fed. Appx. 705 at *713 (citing *David*, 324 F.3d at 857) (First factor among those courts may consider in determining whether a violation is justified or harmless is "prejudice or surprise to the party against whom the evidence is offered"). And, given this minimal or no prejudice, deposing Mr. Banes is not a necessary "cure." *Id.* (Second factor that may guide court's analysis is "the ability of that party to cure the prejudice"). It appears to the Court that no cure is required.

Neither party identifies authority in addressing particular categories of documents, but the Court has considered some of the cases Plaintiff relies on in general and finds them distinguishable. For example, *Yeti by Molly* is distinguishable. 259 F.3d at 1107. There, the only justification offered for the late disclosure of an expert report was the party's mistaken belief the report was being supplemented later. *Id.* In affirming the district court's exclusion of the damage's expert under an abuse of discretion standard, the Court relied on the availability of providing a preliminary version of the report and supplementing later or seeking an extension of the discovery deadline and the party doing neither. *Id.* at 1106-7. Here, these options were not available prior to the Supplemental Production because Defendant did not know about the additional ten messages. Defendant could not produce them on a preliminary basis or seek modification of the schedule to accommodate producing them prior to production because Defendant did not know about them until the flaw in the searches was identified.

***11** The Court is also persuaded that the messages being missed was the result of a flaw with the vendor. This is not to say that parties are not responsible for their vendors mistakes, but taking into account all the steps that Defendant took to provide a complete production, that Defendant reran

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the searches once the flaw was identified, and that Defendant promptly produced the newly found messages, the Court finds Defendant has shown substantial justification.

3. YouTube Watch History

Defendant argues its late production of Plaintiff's YouTube Watch History from his work computer is substantially justified and harmless. As discussed above, the Court found the Watch History was not responsive to the RFPs identified by Plaintiff, but qualify as supplements to initial disclosures. (*See* I.B)

Defendant argues the YouTube Watch History was not discovered because Plaintiff attempted to wipe or clear all data from his work computer. (Doc. 40 at 10, 15-16.) The Baez Declaration explains that in April 2019, Defendant preserved the Google Suite account associated with Plaintiff's work email using a feature called Takeout. (Baez Decl. ¶ 16). The feature allows a user to export Google Suite data into a downloadable file. (*Id.*) When Mr. Baez searched the account in mid-2019, including bookmarks and internet history, he found "several" of the twenty electronic folders were empty. (*Id.* ¶ 17). Mr. Baez did not find the YouTube Watch History and Defendant later learned from Plaintiff's Slack messages that Plaintiff had attempted to delete all data from his work computer. (*Id.*) The Watch History was only located in December 2020 when Baez went back and reviewed the Google Takeout file again and discovered the file labeled YouTube was not empty; it contained the YouTube Watch History at issue here. (*Id.* ¶ 18).

Defendant asserts that it did not check all the files because it made "the reasonable assumption that, like the first several folders...Plaintiff had successfully deleted the rest of the data." (*Id.* ¶ 19). The Court is not persuaded this is substantial justification. Mr. Baez only needed to open less than 20 electronic folders to see if they contained anything. Instead, he assumed they were empty because "several" were empty without checking.[9] It is also not clear how Slack messages reviewed later that indicated Plaintiff had in fact attempted to wipe his computer impacted the initial assumption that the files were empty. At best, these messages supported not looking again sooner, but they do not justify the initial incomplete search.

The Court is more persuaded that the YouTube Watch History's late identification is not prejudicial or is minimally prejudicial to Plaintiff. As Defendant notes and the Court found above, the YouTube Watch History is not responsive to any of the RFPs identified by Plaintiff. (Doc. 40 at 15-16). Additionally, as Defendant points out, Plaintiff himself is in the best position to evaluate his own Watch History addressing whether he did or did not watch the videos on it. (*Id.* at 16). It is not clear what other discovery Plaintiff would have sought had Defendant identified this as a supplement to initial disclosures earlier. Plaintiff argues he "has no ability to ascertain how the purported YouTube 'viewing history' was generated, by whom, on which device, and/or who has custody of that device at all relevant times," but offers no explanation of the Watch History or why this information would be needed to address Defendant's use of it. Based on the information provided about the Watch History and how it was located and produced, the Court find the prejudice of its late disclosure is minimal, if any. *Lanard Toys Ltd.*, 375 Fed. Appx. 705 at *713 (citing *David*, 324 F.3d at 857) (First factor – prejudice or surprise). As to the only issues Plaintiff identifies as needed discovery, the origins of the files, it is not clear why more information than that provided in the Baez Declaration is needed. *Lanard Toys Ltd.*, 375 Fed. Appx. 705 at *713 (citing *David*, 324 F.3d at 857) (Second factor – ability to cure prejudice). While the Court disagrees with Defendant's rationale for not searching all twenty folders initially, the Baez Declaration details how the account was preserved, how and when it was searched, what was found, when it was found, and when it was produced. (Baez Decl. ¶¶ 16-19). The Court finds the late disclosure of the YouTube Watch History harmless.

4. Emails from Fernandes to Baez

***12** Defendant argues the late production of the two emails from Fernandes to Baez, discussed above, is both substantially justified and harmless. The Court found these emails were not responsive to the RFPs identified by Plaintiff, but would qualify as supplements to initial disclosures. (*See* I.B)

As to substantial justification, Defendant asserts that the documents were not discovered during Defendant's prior email search because only a small portion mentions Plaintiff and neither is responsive to Plaintiff's RFPs. (Doc. 40 at 16). Mr. Baez's explains in his declaration that he previously searched through the sent and received email of himself, Mr. Fernandes, Plaintiff, and other workers and believed they had located all relevant email correspondence. (Baez Decl. ¶ 36). However, on December 15, 2020, when reviewing documents in Logikcull in preparation for trial, he discovered the two emails at issue. (*Id.* ¶ 38). Mr. Baez goes on to explain that they were not discovered in earlier searches because there is

no reference to the alleged harasser, William Stamper, only a small portion of each email mentions Plaintiff, and they do not fit within the categories of Plaintiff's RFPs. (*Id.*)

As the Court determined above, these emails are not responsive to any RFPs identified by Plaintiff. However, the Court is not persuaded that simply saying we looked before missed them is substantial justification. Unlike the issue encountered with the ten newly found Slack messages, here there is no indication why they were ultimately located, *i.e.,* a flaw in the technology being used was identified and overcome. Here, Defendant explains why they were not initially found, minimal or no reference to the things he was searching for, but there is no explanation why they were found later. (Doc. 40 at 16 ("Mr. Baez came across these emails in Logikcull recently when preparing for trial")). Defendant has not shown substantial justification.

As to harmlessness, Defendant argues "Plaintiff will suffer no harm due to the timing because he has personal knowledge of his work hours, and Plaintiff already deposed Defendant on his impressions of Plaintiff as a worker." (Doc. 40 at 16). Plaintiff points out that he "cannot examine Mr. Fernandes or Mr. Baez in connection with the belated emails (to which they were party), more than a year after Mr. Fernandes and Mr. Baez were deposed. Plaintiff must critique and challenge exhibits he has never had a fair opportunity to scrutinize, and must construct a response to testimony and evidence he was never on notice of." (Doc. 37-1 at 17).

Unlike the Slack messages where there was no indication that a deposition would be necessary given the same person had not been deposed about other Slack messages, here Plaintiff did depose both of these individuals. However, the Court is not convinced Plaintiff would need to depose Mr. Baez or Mr. Fernandes about these two emails. The Court has reviewed them and it is not readily apparent why further deposition would be necessary. In this respect, the Court agrees with Defendant that references to Plaintiff's work hours would not require a deposition and Mr. Baez's impressions have already been addressed. These emails are no more than minimally prejudicial and no cure is required. *Lanard Toys Ltd.*, 375 Fed. Appx. 705 at *713 (citing *David*, 324 F.3d at 857). The Court finds Defendant has established harmlessness as to these emails.

5. Misc. Photographs

***13** Defendant argues the late production of the Misc. Photographs is harmless and substantially justified. The Court found these photos were not responsive to Plaintiff's RFPs, but qualified as supplements to initial disclosures. (*See* I.B)

Defendant argues the Misc. Photographs are harmless because they are not responsive to Plaintiff's RFPs and the substance of the photographs is not a surprise (picture of office area and picture of Plaintiff). (Doc. 40 at 16 (citing Baez Decl. ¶ 25)). As to substantial justification for the late production, Defendant explains that these photographs were only recently discovered because they were misfiled in a folder on Defendant's server labeled "marketing." (*Id.* (citing Baez Decl. ¶ 24). Because Plaintiff was not involved in marketing, Defendant had not searched the marketing folder for matters pertaining to Plaintiff. (Baez Decl. ¶¶ 21, 24). As to photographs in general, Plaintiff argues "[h]e has no ability to determine the source and origin of the photographs." (Doc 37-1 at 17). However, Plaintiff does not address these specific photographs. The Court finds no prejudice in the late identification of these photographs that are not responsive to Plaintiff's RFPs. They consist of a photograph of Plaintiff's office and him. The Court will require Mr. Baez or other appropriate source to provide Plaintiff with a declaration addressing the source of the photographs, including at least when they were taken and by whom.

6. One on One Notes

Defendant describes this document as "relat[ing] solely to the impressions of Mr. Fernandes and Mr. Baez regarding Plaintiff." Defendant argues it is not responsive to Plaintiff's RFP 23 because it was not in Plaintiff's personnel file and that it is harmless because Plaintiff has already deposed Defendant on its impressions of him as a worker.

The Court found this document was not responsive to Plaintiff's RFP 23, but would qualify as a supplement to initial disclosures because Defendant plans to rely on it at trial. While Defendant does not explain why it was not identified sooner, Plaintiff has not addressed it at all. In the few paragraphs of Plaintiff's motion that address the categories of documents, there is not even a vague reference to this document. Based on the only representation of it, Defendant's description of it as "One on One Excel Spreadsheet Notes 9/26/17" (Doc. 40 at 7) that relates solely to impressions of Mr. Baez and Mr. Fernandes regarding Plaintiff" and Defendant's representation that Defendant has already provided deposition testimony as to impressions of Plaintiff, the Court finds Defendant has established harmlessness.

7. Magazine Photographs

Defendant argues its production of these photographs was timely because Defendant only received them from a third party on December 23, 2020. (Doc. 40 at 17). Defendant represents that they were produced to Plaintiff the same day Defendant received them. Defendant also notes that the images should be familiar to Plaintiff because they depict what he described in his deposition. (*Id.* (citing Chung Decl. ¶ 15); Ex. P (excerpt of deposition testimony regarding magazines on exposed pipes in the ceiling). As noted above, Plaintiff only addressed photographs in general, arguing Plaintiff "has no ability to determine the source and origin of the photographs." (Doc 37-1 at 17). However, the Chung Declaration indicates that the Magazine Photographs were taken on March 12, 2019 at The Behemoth's State Street office by Dr. Michelle Taylor, a third-party professional. (Chung Decl. ¶ 8). Given Defendant produced them the same day it received them and has identified the source of them , the Court is persuaded that Defendant has shown substantial justification and harmlessness. *See Hypertherm, Inc.*, 2009 WL 703271, at *1 ("A supplemental disclosure under Rule 26(e)(1)(A) is timely if it is made as soon as possible.").

III. CONCLUSION

***14** Plaintiff's Motion for Sanctions is **DENIED**.

Dated: May 27, 2021

All Citations

Slip Copy, 2021 WL 2184852

Footnotes

1 The Court cites the CM/ECF electronic pagination throughout except when referencing declarations or as otherwise noted.

2 The Court only addresses whether or not any part of the Supplemental Production is responsive to these RFPs. Since the Plaintiff did not identify any other relevant RFPs as part of his dispute, the Court is limited to the RFPs Plaintiff proposed as being responsive.

3 As addressed further below, Defendant explains that it did not have the Magazine Photograph until December 23, 2020 when it received them from a third party. (Doc. 40 at 17 (citing Chung Decl. ¶ 8). Defendant indicates that they were produced to Plaintiff the same day they were received. (*Id.*)

4 Rule 37(c)(1) in full provides:

> If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, *unless the failure was substantially justified or is harmless*. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard: (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
>
> (B) may inform the jury of the party's failure; and
>
> (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

5 Plaintiff's Motion also includes citation of authority regarding Federal Rule of Civil Procedure 26(g). (Doc. 37-1 at 13-14). However, Plaintiff's motion does not identify what disclosure or discovery response it is that Plaintiff is claiming Defendant has certified in violation of Rule 26(g) to warrant sanctions. The Rule requires counsel's certification on disclosures and discovery requests, responses, and objections. Fed. R. Civ. P. 26(g)(1). Counsel's signature "certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry: (A) with respect to disclosure, it is complete and correct as of the time it is made" and as to discovery requests, responses, or objections, "it is consistent with these rules," not interposed for any improper purpose," and neither unreasonable not unduly burdensome or expensive." Rule 26(g)(1)(A)-(B). Certifications without substantial justification warrant sanctions. Rule 26(g)(3). The Court cannot find Defendant violated these requirements or consider whether the violation was substantially justified, without Plaintiff even identifying what disclosure or discovery response was allegedly certified in violation of this Rule.

6 The parties sought and were granted four more extensions of deadlines set in the Scheduling Order after this one, however none of those extensions sought continuance of the pretrial conference. (Docs. 15, 17-21, 24-25, and 28-29).

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7 Defendant's briefing addressed additional documents in this category. The Court's analysis focuses primarily on the portions of the Supplemental Production the Court has found were responsive to Plaintiff's RFPs or supplements to initial disclosures. However, the Court has briefly addressed below whether Defendant has established substantial justification or harmlessness as to the others as well. (*See* n.8 below).

8 Defendant also argues other emails (Core Tester, Company Property, GWID 2016, GWID 2017) are harmless for the same reason—same or nearly same documents had previously been produced. (*Id.* at 13-14) (citing Baez Decl. ¶¶ 23, 28, 41-43)). Defendant explains that the Core Tester and Company Property emails had already been produced by Plaintiff in a different format, Excel. (*Id.* at 13 (citing Baez Decl. ¶ 41)). The only difference is that Defendant's version is in an email format rather than Excel. (*Id.*) Similarly, GWID 2016 and 2017 were also previously produced by Plaintiff. (*Id.* at 13-14 (citing Baez Decl. ¶¶ 42-43)). Defendant's vary only in that they include the cover emails. (*Id.*) As to GWID 2017, it is different from the version previously produced by Plaintiff in that it does not include the handwriting in the margins that Plaintiff's contained. (*Id.* at 14 (citing Baez Decl. ¶ 43)). Defendant also argues the Core Tester Email and Company Property Email, as well as Documents with Handwritten Notes, Task Spreadsheet, and Path to Design...ness, are harmless because the documents are not responsive to Plaintiff's RFPs and neither party has identified them as exhibits for trial. (Doc. Id. at 14 (citing Chung Decl. ¶ 12)). As discussed above, the Court has already found these documents are not responsive to the RFPs Plaintiff has identified in his brief. Additionally, it appears based on the Chung Declaration that neither party has identified them as exhibits for trial. Based on the foregoing, even if the Court found they were untimely produced, the Court would find no prejudice or harm to Plaintiff in receiving these documents late.

9 The Court recognizes he was ultimately almost correct. All the folders were empty except the YouTube Watch History.

End of Document

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United States District Court, W.D. Pennsylvania.

PROFIT POINT TAX TECHNOLOGIES, INC., Plaintiff,

v.

DPAD GROUP, LLP; John Manning; and Daniel Steele, Defendants

Civil Action No. 2:19-cv-698
|
Filed 09/24/2020

Attorneys and Law Firms

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REPORT AND RECOMMENDATION

Michael J. Betts, Special Master

I. RECOMMENDATION

***1** This Report and Recommendation addresses Plaintiff's Motion to Compel, filed on August 19, 2020 (ECF No. 102, referred to herein as "PPTT's Motion").[1] Based on a thorough review of PPTT's Motion, Defendants/Counter-Plaintiffs DPAD Group, LLP, John Manning and Daniel Steele's Brief in Opposition to Motion to Compel, filed on August 20, 2020 (ECF No. 104, referred to herein as "Defendants' Brief in Opposition") and Plaintiff's Reply Brief in Support of Motion to Compel, filed on August 21, 2020 (ECF No. 108, referred to herein as "PPTT's Reply Brief"), including all exhibits attached to the above-referenced documents and the authorities cited therein, it is respectfully recommended that PPTT's Motion be denied without prejudice.

II. REPORT

A. Background

Plaintiff, Profit Point Tax Technologies, Inc. ("PPTT"), is pursuing claims against Defendants for alleged breach of contract (Count I), breach of fiduciary duty (Count II), unjust enrichment (Count III) (against defendant DPAD Group, LLP only), intentional misrepresentation (Count VI), and negligent misrepresentation (Count VII). Amended Complaint (ECF No. 27).[2] As alleged, PPTT's claims arise from Defendants' usurpation of PPTT's business through the use of PPTT's confidential information and other resources in soliciting PPTT's clients. Defendants, in turn, are asserting counterclaims against PPTT for alleged breach of contract (Counterclaims, Count I), breach of a release (Counterclaims, Count II), breach of contract in the alternative (Counterclaims, Count III), and unjust enrichment (Counterclaims, Count IV). Defendants/Counter-Plaintiffs DPAD Group, LLP, John Manning and Daniel Steele's Answer Affirmative Defenses, and Counterclaims to the First Amended Complaint filed on August 11, 2020 (ECF No. 101).

PPTT's Motion challenges the sufficiency of Defendants' Responses to Plaintiff's First Set of Requests for Production of Documents and Things (PPTT's Motion, Ex. A – ECF No. 102-2), which was served by Defendants on July 20, 2020 along with an accompanying link to an FTP site containing Defendants' document production in electronic form. Through its Motion, PPTT requests an order "compelling Defendants to amend their discovery responses to comply with Fed.R.Civ.P. 34(b)(2)(E) by organizing and labeling their document production to correspond to the categories of documents requested in ... PPTT's individual Requests for Production of Documents." PPTT's Motion (ECF No. 102), at 1.[3] Defendant opposes PPTT's Motion based on Rule 34(b)(2)(E)(i)'s disjunctive requirements that parties do one of the following when making a document production: either produce document as they are kept in the usual course of business; or organize and label the documents. Defendants contend that the documents they produced on July 20, 2020 were produced as they are kept in the usual course of business and that Defendants therefore have no duty under Rule 34(b)(2)(E)(i) to organize and label the documents. Accordingly, the narrow issue presented by PPTT's Motion is whether Defendants have complied with the first prong of the Rule (producing documents as they are kept in the usual course of business) so as to excuse compliance with the second prong of the rule (organizing and labeling their production).

B. Legal Standards Applicable to PPTT's Motion

***2** Rule 34(b)(2)(E) of the Federal Rules of Civil Procedure provides:

> *Producing the Documents or Electronically Stored Information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:
>
> (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
>
> (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and
>
> (iii) A party need not produce the same electronically stored information in more than one form.

Fed.R.Civ.P. 34(b)(2)(E).

Rule 34(b)(2)(E)(i) reflects an amendment to Rule 34 that was made to put an end to the "apparently not rare" practice of "deliberately ... mix[ing] critical documents with others in the hope of obscuring significance." Fed.R.Civ.P. 34 Notes of Advisory Committee on Rules – 1980 Amendment, *quoting* Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation of the American Bar Association (1977). *See United States v. O'Keefe,* 537 F. Supp. 2d 14, 19 (D.D.C. 2008) (Facciola, M.J.) (Rule 34(b) "was amended in 1980 to prevent the juvenile practice whereby the producing party purposely rearranged the documents prior to production in order to prevent the requesting party's efficient use of them.").

Rule 34 does not explain what is meant by producing documents "as they are kept in the usual course of business" and the cases cited by the parties do not provide clear guidance concerning the steps a producing party must take in order to comply with this prong of Rule 34(b)(2)(E)(i). PPTT cites non-controlling cases for the proposition that the producing party has the burden of establishing through evidentiary support that the documents were produced as they are maintained in the usual course of business. *See* PPTT's Motion (ECF No. 102), ¶ 13. Defendants, on the other hand, cite other non-controlling cases suggesting that a representation by counsel for the producing party that the responsive documents were produced as the documents are kept in the usual course of business can be sufficient to invoke the first prong of Rule 34(b)(2)(E)(i). *See* Defendants' Brief in Opposition, at 5-8.

Moreover, the courts have used varying approaches in evaluating whether documents were produced "as they are kept in the usual course of business" when the documents are in the form of electronically stored information ("ESI"). Some courts have even ruled that Rule 34(b)(2)(E)(i) does not even apply to ESI. *E.g.*, *Anderson Living Trust v. WPX Energy Production, LLC*, 298 F.R.D. 514, 526 (D.N.M. 2014) ("Rule 34(b)(2)(E)(i) governs hard copy documents, and (E)(ii) governs ESI, with no overlap between.")[4]; *see also, e.g.*, *TetraVue, Inc. v. St. Paul Fire & Marine Ins. Co.*, No. 14cv2021-W (BLM), 2017 WL 1008788 at *——, 2017 U.S. Dist. LEXIS 37373 at *19-21 (S.D. Cal. Mar. 15, 2017) (Major, M.J.) (following *Anderson Living Trust* regarding the application of Rule 34(b)(2)(E)(i) and (ii) to ESI); *McKinney/Pearl Restaurant Partners, L.P. v. Metropolitan Life Ins. Co.*, 322 F.R.D. 235, 248 (N.D. Tex. 2016) (Horan, M.J.) (noting that "[c]ourts are split on whether both Rule 34(b)(2)(E)(i) and Rule 34(b)(2)(E)(ii) apply to ESI productions or whether an ESI production must comply with only Rule 34(b)(2)(E)(ii)" and collecting cases).

***3** Most of the more recent decisions have regarded the provisions of subparagraphs (i) and (ii) of Rule 34(b)(2)(E) as supplementary rather than alternative with respect to productions of ESI, with Rule 34(b)(2)(E)(i) applying to the manner in which a production is organized and Rule 34(b)(2)(E)(ii) applying to the format in which ESI is produced. *E.g.*, *Ronaldson v. National Ass'n of Home Builders*, No. 19-01034, 2020 WL 3259226 at *——, 2020 U.S. Dist. LEXIS 107436 at *24-25 (D.D.C. June 3, 2020) (Robinson, M.J.); *Lamar Advertising Co. v. Zurich American Ins. Co.*, No. 18-1060-JWD-RLB, 2020 U.S. Dist. LEXIS 13891, at *11-12 (M.D. La. Jan. 28, 2020) (Burgeois, Jr., M.J.); *Wilson v. Washington*, No. C16-5366 BHS, 2017 WL 518615 at *——, 2017 U.S. Dist. LEXIS 18038 at *5-6 (W.D. Wash. Feb. 8, 2017); *Quality Manufacturing Systems, Inc. v. R/X Automation Solutions, Inc.*, No. 3:13-cv-00260, 2016 WL 1244697 at *——, 2016 U.S. Dist. LEXIS 42303 at *16-17 (M.D. Tenn. Mar. 30, 2016) (Bryant, M.J.); *McKinney/Pearl Restaurant Partners,* 322 F.R.D. at 249.

The courts that have applied Rule 34(b)(2)(E)(i) to productions of ESI have formulated the standards for determining whether ESI was produced as it was kept in the usual course of business in different ways, depending on the

nature of the ESI produced (*e.g.*, email or non-email), the volume of ESI produced and other factors. *Compare, e.g.*, *Lamar Advertising*, 2020 U.S. Dist. LEXIS 13891, at *12 (requiring re-production of ESI as kept in the usual course of business, meaning in native format); *Adria MM Productions, Ltd. v. Worldwide Entertainment Group, Inc.*, No. 17-21603-CIV-MORENO, 2018 U.S. Dist. LEXIS 56791, at *4-5 (S.D. Fla. April 3, 2018) (requiring that emails be arranged by custodian, in chronological order and with attachments); *McKinney/Pearl*, 322 F.R.D. at 250 (referring to "Rule 34(b)(2)(E)(i)'s requirement to produce documents as they are kept in the usual course of business by producing ESI in the format in which it is kept or stored on the user's system or storage device"); *Spilker v. Medtronic, Inc.*, No. 4:13-CV-76-H, 2015 WL 1643258 at *5, 2015 U.S. Dist. LEXIS 48244 at *11 (E.D.N.C. April 13, 2015) (Jones, Jr., M.J.) (production that consisted of "fully searchable documents, sortable by metadata fields, in a folder structure organized by custodian" complied with Rule 34); *Teledyne Instruments, Inc. v. Cairns*, No. 6:12-cv-854-Orl-28TBS, 2013 WL 5781274, at *——, 2013 U.S. Dist. LEXIS 153497, at *32-34 (M.D. Fla. Oct. 25, 2013) (Smith, M.J.) (to be produced as kept in the usual course of business, ESI should be produced in the format in which it is maintained on a hard drive or other storage device and the producing party should provide system metadata organized in a manner that permits systemized retrieval of files); *Valeo Electrical Systems, Inc. v. Cleveland Die & Mfg. Co.*, No. 08-cv-12486, 2009 WL 1803216 at *——, 2009 U.S. Dist. LEXIS 51421 at *6 (E.D. Mich. June 17, 2009) (Pepe, M.J.) (emails are produced as they are kept in the usual course of business when they are arranged by custodian, in chronological order and with attachments; for non-email ESI, a party must produce the files by custodian and by the file's location on the hard drive directory, subdirectory and file name).

The overarching standard, consistent with the amendment to Rule 34(b)(2)(E)(i) discussed above, is that "parties are entitled under the Federal Rules to rationally organized productions so that they may readily identify documents, including ESI, that are responsive to their document requests." *City of Colton v. American Promotional Events, Inc.*, 277 F.R.D. 578, 582 (C.D. Cal. 2011) (Segal, M.J.); *accord, Hanwha Azdel, Inc. v. C&D Zodiac, Inc.*, No. 6:12-cv-00023, 2012 WL 6726412 at *2, 2012 U.S. Dist. LEXIS 182046 at *6 (W.D. Va. Dec. 27, 2012) (Ballou, M.J.).

C. Discussion

***4** According to PPTT's Motion, Defendants' July 20, 2020 production consisted of "approximately 1,467 pages of documents ... haphazardly dumped into four 'IMAGES' folders and three 'NATIVE' folders for downloading by PPTT's counsel." PPTT's Motion (ECF No. 102), ¶ 3. The Motion further states that most of the production was in the form of "unorganized, random assortments of TIF files," *id.*, ¶ 4, and refers to Defendants' production as a "data dump," *id.*, ¶¶ 19, 21, 23.

Defendants dispute that their production was a "data dump" and clarify that their production consisted of only 552 documents and a total of 1,466 pages. Defendants' Brief in Opposition (ECF No. 104), at 2. Defendants contend that they produced documents "in a commonly accepted manner that, along with accompanying 'load' and 'metadata' files, permits import into the document database platform Relativity," which according to Defendants is the platform used by PPTT's counsel. *Id.*

The record does not contain any further specific information about the composition of Defendants' July 20, 2020 production, such as the extent to which the production consisted of emails or non-email ESI or the extent to which the approximately 1,450 TIF files in the "IMAGES" folders produced by Defendants (*see* PPTT's Motion, ECF No. 102, ¶¶ 3, 4) consisted of original electronic files or, on the other hand, documents existing in paper or "hard copy" format that were converted to electronic files for purposes of Defendants' document production. In addition, the record is undeveloped concerning the specific metadata and file source information available to PPTT through a review of Defendants' production.

In sum, the record before the Court does not support a determination that Defendants failed to comply with Rule 34(b)(2)(E)(i) in making their July 20, 2020 document production. In particular, there are insufficient facts in the record to support a finding that the ESI produced by Defendants was not produced as it is kept in the usual course of business under the legal standards discussed above.[5] Defendants have asserted in response to PPTT's Motion that their production included load and metadata files that may be imported into PPTT's counsel's document database platform, which suggests that the ESI produced by Defendants may well have included information that allows the ESI to be organized by PPTT's counsel in a manner that permits systemized retrieval of files. *See* cases cited above at pages 5-7. This is especially the case, given that the electronic files produced

by Defendants are manageable in number, particularly with the utilization of document management software. In terms of overall volume, Defendants' production would likely fall at the low end of the range of document productions in commercial litigation generally.

In its Motion and its Reply Brief (ECF No. 108), PPTT expresses concerns about its inability to perform searches that would allow PPTT's counsel to determine which specific documents within Defendants' production are responsive to specific requests within PPTT's Request for Production of Documents. *See* PPTT's Motion (ECF No. 102), ¶ 24; PPTT's Reply Brief, at 5. Although that is information that a requesting party would be entitled to receive if the second prong of Rule 34(b)(2)(E)(i) were triggered, the Rule does not guarantee that a requesting party who receives ESI as it is kept in the usual course of business pursuant to the first prong of the Rule will be able to perform searches yielding such information.

***5** The Special Master recommends that the denial of PPTT's Motion be without prejudice, such that PPTT would have the opportunity, if it chooses to do so, to renew its motion and supplement the record in an effort to show that the ESI produced by Defendants was not as it is kept in the usual course of business, under the standards discussed in the cases cited above. The parties through their counsel are encouraged to resolve any remaining differences about Defendants' July 20, 2020 document production on their own, with the benefit of the guidance provided in this Report and Recommendation. For example, to the extent that PPTT has encountered any technical difficulties with the metadata and load files produced by Defendants, or believes that it is entitled to additional metadata or information about the ESI produced based on the legal standards discussed above, counsel are encouraged to confer and work cooperatively to address those issues.

D. Conclusion

For the reasons set forth above, it is respectfully recommended that PPTT's Motion to Compel (ECF No. 102) be denied without prejudice. In addition, it is respectfully recommended that Defendants' request for an award of attorneys' fees and costs incurred in opposing PPTT's Motion (*see* Defendants' Brief in Opposition, ECF No. 104, at 8-9) be denied, as the Special Master regards PPTT's Motion as involving a genuine dispute about which reasonable people could differ.

All Citations

Slip Copy, 2020 WL 12604755

Footnotes

1 By Order Appointing Special Master filed on September 16, 2020 (ECF No. 112), Judge Stickman appointed the undersigned as Special Master and directed the Special Master to review all motions relating to discovery and to submit reports and recommendations concerning the disposition of such motions to the Court.

2 By Order of Court filed on July 28, 2020 (ECF No. 100), Judge Stickman adopted Magistrate Judge Kelly's Report and Recommendation filed on June 2, 2020 (ECF No. 70) as his opinion and dismissed PPTT's claims for tortious interference with prospective contractual relations (Count IV) and conversion (Count V). In the July 28, 2020 Order, the Court also dismissed the claim for unjust enrichment (Count III) with respect to defendants John Manning and Daniel Steele.

3 PPTT complied with its obligation under Fed.R.Civ.P. 37(a)(1) to confer in good faith with Defendants' counsel prior to filing the present motion. *See* PPTT's Motion (ECF No. 102), ¶¶ 5-11, Exs. B through F and Certificate of Conferral.

4 The court's opinion in *Anderson Living Trust* includes a detailed analysis of Rule 34(b)(2)(E) and its evolution. *Anderson Living Trust*, 298 F.R.D. at 518-26. The court observed:

> [I]t is unclear whether hard copy document production even could be produced as ESI and still be "in the usual course of business." If the quintessential example of producing hard copy documents in the usual course of business involves handing over the keys to the filing room, then it is hard to see how an ESI production could ever provide a comparably true-to-life picture of the business' hard copy document organization.

Id. at 526 (emphasis in original).

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5 The Special Master recognizes PPTT's position that it is Defendants' burden to establish that the documents produced by Defendants were as they are kept in the usual course of business. Without expressing a view concerning whether that position is correct, the Special Master regards it as appropriate to deny PPTT's Motion without prejudice, with PPTT having the opportunity to decide whether to renew its motion based on its knowledge of additional facts that might be used to supplement the record and based on the legal standards discussed above.

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United States Code Annotated
Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)
Title V. Disclosures and Discovery (Refs & Annos)

Federal Rules of Civil Procedure Rule 34

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering Onto Land, for Inspection and Other Purposes

Currentness

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information--including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations--stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) ***Contents of the Request.*** The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) ***Responses and Objections.***

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(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or -- if the request was delivered under Rule 26(d)(2) -- within 30 days after the parties' first Rule 26(f) conference. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* 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. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response.

(C) *Objections.* An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

(D) *Responding to a Request for Production of Electronically Stored Information.* The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form--or if no form was specified in the request--the party must state the form or forms it intends to use.

(E) *Producing the Documents or Electronically Stored Information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

(c) Nonparties. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; March 30, 1970, effective July 1, 1970; April 29, 1980, effective August 1, 1980; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; April 22, 1993, effective December 1, 1993; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007; April 29, 2015, effective December 1, 2015.)

Fed. Rules Civ. Proc. Rule 34, 28 U.S.C.A., FRCP Rule 34
Including Amendments Received Through 9-1-22

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In re Morgan Stanley Data Sec. Litig.

United States District Court for the Southern District of New York

December 9, 2020, Decided; December 9, 2020, Filed

20 Civ. 5914 (AT)

Reporter
2020 U.S. Dist. LEXIS 231432 *

In re Morgan Stanley Data Security Litigation

Counsel: **[*1]** For Sylvia Tillman, on behalf of themselves and all others similarly situated, Amresh Jaijee, on behalf of themselves and all others similarly situated, Vivian Yates, on behalf of themselves and all others similarly situated, Richard Gamen, on behalf of themselves and all others similarly situated, Cheryl Gamen, on behalf of themselves and all others similarly situated, Plaintiffs: Amanda Peterson, Morgan & Morgan, New York, NY.

Judges: ANALISA TORRES, United States District Judge.

Opinion by: ANALISA TORRES

Opinion

ORDER REGARDING PRODUCTION OF DOCUMENTS AND ELECTRONICALLY STORED INFORMATION

Pursuant to the agreement reached between Plaintiffs and Defendant herein, this Court adopts and orders the following protocol (the "ESI Order") for the production of electronically stored information ("ESI") which binds all parties and their counsel of record in all cases consolidated or coordinated in the above-captioned matter (the "Litigation"), whether they currently are involved or become so in the future.

I. SCOPE AND LIMITATIONS

A. **Scope**. This ESI Order will govern the discovery and use of electronically stored information and Hard Copy Documents in the Actions and will complement and supplement the Federal Rules of Civil **[*2]** Procedure governing discovery. Any disclosures made pursuant to the ESI Order are subject to any other orders entered in the Actions.

> B. **Non-Waiver**. The Parties and their attorneys do not intend by this ESI Order to waive their rights to any applicable protection, privilege or immunity including but not limited to the attorney-client privilege and the work product doctrine. All Parties preserve their respective attorney-client privileges, work product protection, and any other applicable privileges or protections. Further, nothing in this ESI Order shall be construed to affect the discoverability or admissibility of any Documents. All objections to the discoverability or admissibility of any Documents are preserved and may be asserted at any time. All Parties preserve their respective attorney-client privileges, work product protection, and any other applicable privilege, protection, or immunity.

C. **Confidentiality**. All disclosures and productions—including but not limited to all ESI productions—shall be subject to the Protective Order when entered by the Court in the Litigation, the terms of which are expressly incorporated herein by reference. If a particular document or ESI item qualifies **[*3]** for confidential treatment pursuant to the terms of a Court-ordered

protective order entered in this case, or has been redacted in accordance with applicable law or Court order, the confidentiality designation pursuant to the applicable Court order will be added by the Producing Party prior to its production on the face of the document and in the file data field.

D. **Modification by Agreement**. Any Party added or joined to any complaint in the Litigation and any Party to actions that may be consolidated into or coordinated with the above-captioned matters after the date of this ESI Order that seeks to deviate from the ESI Order set forth herein must obtain leave of Court to do so unless all affected Parties otherwise consent in writing. Before seeking Court intervention, Plaintiffs and Defendant shall meet and confer in good faith regarding any modification.

In light of the disparate data systems and architectures that may be employed by the Parties, variations from this ESI Order may be required. In the event that any Party identifies a circumstance where application of this ESI Order is not technologically possible, would be unduly burdensome or impractical, or when another process would **[*4]** satisfy the objective and reach the same result with less burden, the Party will notify the Requesting Party of the exception and before implementing an alternative, specify an alternative procedure that is not unduly burdensome or impractical that will be employed, if one exists. Upon request by the Requesting Party, those Parties will meet and confer regarding the circumstances and proposed alternative approaches.

E. **Modification by Court Order**. Nothing in this ESI Order waives the right of any Party to petition the Court for an Order modifying its terms upon sufficient demonstration that compliance with such terms is either (1) unexpectedly and unreasonably burdensome, or (2) impossible, provided, however, that counsel for such party must first meet and confer with counsel for the opposing party and the parties shall use reasonable best efforts to negotiate an exception from or modification to this ESI Order prior to seeking relief from the Court.

II. DEFINITIONS

A. Capitalized terms not defined herein shall have the meaning set forth in the Proposed Stipulated Protective Order.

B. "Backup Media" refers to magnetic tapes, CDs, DVDs, hard drives or other storage onto which Backup Systems **[*5]** store electronic information.

C. "Backup systems" refers to computer systems used to store copies of active electronic information on Backup Media to permit recovery of the information in the event of loss or damage to the original data.

D. "Custodian" shall mean any individual, department, business unit, or division of a party that has possession, custody, or control of information, documents, or data sources, or has access to Shared Storage Systems that may contain information potentially relevant to the Litigation. For purposes of clarity, Custodian also includes those individuals that control or maintain Shared Storage Systems or other shared information sources that may contain information potentially relevant to the Litigation, such as information technology personnel that maintain electronic mail systems, backup systems or backup media, or archival systems or storage.

E. "Custodial Data Source" means any data source in which a Custodian may store ESI or Hard Copy Documents, whether or not created or generated by a Custodian, including but not limited to personal computers, laptops, tablets, email whether stored locally or centrally, mobile devices, shared network servers, shared **[*6]** or individual network folders, cloud storage systems, structured data systems, or social media.

F. In accordance with Local Civil Rule 26.3(c)(2), "Document" is defined to be synonymous in meaning and equal in scope to the usage of the term "documents or electronically stored information" in Federal Rule of Civil Procedure 34(a)(1)(A).

G. "Extracted Text" means the text extracted from a Native Document, and includes all header, footer and document body information when available. A "Text File" is a file containing the full text of native files extracted directly from the native file, or, in the case of paper/hard copy documents subject to OCR, a file containing the text resulting from the OCR.

H. "Hard Copy Document" means a document that was maintained in paper form at the time the Litigation commenced.

I. "Load File" means an electronic file containing information identifying a set of paper-scanned images or processed ESI and indicating where individual pages or files belong together as documents, including attachments, and where each document begins and ends. A Load File will also contain data relevant to the individual Documents, including extracted and user created Metadata, as well as OCR or Extracted Text, should such data be available.

J. "Metadata" **[*7]** means (i) information associated with or about a file that is not ordinarily viewable or printable from the application that generated, edited, or modified such native file which describes the characteristics, origins, usage or validity of the electronic file; and (ii) information generated automatically by the operation of a computer or other information technology system when a native file is created, modified, transmitted, deleted, saved, or otherwise manipulated by a user of such system.

K. "Native format" means and refers to the file structure of a document created by the original creating application (in contrast to a Static Image, which is a representation of ESI produced by converting a native file into a standard image format capable of being viewed and printed on standard computer systems, such as .tiff or .pdf).

L. "Network" or "Shared Storage Systems" shall mean any data storage device accessible to multiple users remotely over a computer network."

M. "Non-Custodial Data Source" means any data source that is not kept or maintained by any particular Custodian but which may contain documents or data relevant to this action.

N. "OCR file" means optical character recognition file **[*8]** which is created by software used in conjunction with a scanner that is capable of reading text-based paper/hard copy documents and making such documents searchable using appropriate software ("OCR software")

O. "Parties" collectively shall mean all named parties to this Litigation, including any Party added or joined to the Litigation, as well as named parties to actions that may consolidated into or coordinated with the above-captioned Action.

P. "Production" or "Produced" includes any exchange of documents or electronically stored information or hard copy documents between the parties, whether voluntarily or in response to a formal or informal request.

Q. "Producing Party" means the party to the Litigation producing documents in response to a formal or informal request for the production of documents or information from a Party in this Litigation.

R. "Receiving Party" means the party to the Litigation receiving, formally or informally, the production of documents or information from a Party or non-party.

S. "Requesting Party" means the party to the Litigation requesting, formally or informally, the production of documents or information from a Party or non-party.

T. "Search Term" means **[*9]** a combination of words (including synonyms) and phrases designed to capture potentially relevant ESI, and includes strings of words and phrases joined by proximity and Boolean connectors or other syntax.

U. "Static Image" means or refers to a representation of ESI produced by converting a native file into a standard image format capable of being viewed and printed on standard computer systems.

V. Tagged Image File Format image is a graphic file format for storing bit-mapped images and bears the file name suffix ".tiff" or ".tif." It is an example of a Static Image. A Group IV TIFF is a two-dimensional compression format for storing black and white images that typically compresses at a 20-to-1 ratio for standard business documents.

W. "Structured data" means data that resides in a fixed field within a record or file, or stored in a structured format, such as databases (such as Oracle, SQL, Access) or data sets, according to specific form and content rules as defined by each field of the database.

III. COOPERATION

A. To facilitate the efficient and effective management of the Litigation and to minimize unnecessary discovery disputes and motion practice, the Parties agree to cooperate in good **[*10]** faith to attempt to reach

agreement on cost effective search methodologies and quality assurance/quality control measures to be employed by the Parties, and to make the disclosures regarding such methodologies, date ranges, custodians, and noncustodial data sources, in order to facilitate such agreement and advance the Parties' negotiations.

B. If a Producing Party cannot comply in a particular circumstance with this ESI Order, such Party shall promptly inform the Receiving Party in writing why compliance with the ESI Order is not reasonable or feasible. No Party may seek relief from the Court concerning compliance or non-compliance with the Order until it has met and conferred with the other Party in a good faith effort to resolve or narrow the area of disagreement.

IV. PRESERVATION

This ESI Order shall not abrogate any duties of the parties under the Federal Rules of Civil Procedure to properly preserve evidence.

V. PRIMARY CUSTODIANS AND SEARCH TERMS

A. Prior to collecting and processing any ESI, each Party will investigate in good faith to identity the custodians and non-custodial sources, within each Party's possession, custody or control, who are most likely to have ESI relevant to **[*11]** the Litigation, hereafter referred to as "Primary Custodians." The Primary Custodians shall be identified by name, title, connection to this matter, and the type of information under his/her control. Following such disclosure, the parties shall meet and confer and use reasonable best efforts to reach agreement on the search methodology, including any search terms, if any, to be used, and the categories of document requests to which such search methodology(ies) shall and shall not be applied.

B. The Parties agree to meet and confer about the methods to search ESI in order to identify ESI that is subject to production in discovery and filter out ESI that is not subject to discovery. The process to validate the particular search terms and methodologies deployed by the Parties will be an iterative process. The Parties also agree that certain documents do not require search terms or methodologies, and that the Parties shall identify and produce those documents that are readily available without the use of search terms and methodologies.

C. Nothing in this section shall limit a Party's right to reasonably seek agreement from the Parties or a Court ruling to modify previously agreed-upon search **[*12]** terms or other search parameters at any time prior to completion of discovery. If, during discovery, the Requesting Party has a reasonable good-faith basis to request discovery from additional custodians or using additional search parameters, the Parties shall meet and confer concerning the appropriateness of such discovery.

D. The Parties shall meet and confer according to the provisions that follow. If the parties cannot reach agreement following negotiations, they shall bring their disputes to the Court for resolution in a timely manner.

VI. PRODUCTION FORMAT AND PROCESSING SPECIFICATIONS

With the exception of spreadsheets, presentation files, multi-media files and other native files that cannot be converted to image files, the Parties shall produce all relevant, responsive, and non-privileged ESI as Bates-stamped single-page 1-bit TIFF images with a DAT load file that enables the document to be uploaded and viewed using standard litigation support software in accordance with the provisions below. Unless excepted below, single page, 1-bit, black and white Group IV TIFFs should be provided, at least 300 dots per inch (dpi) for all documents. Original document orientation should be maintained **[*13]** (i.e., portrait to portrait and landscape to landscape). Where the TIFF image is unreadable or has materially degraded the quality of the original, the Producing Party shall provide a higher quality TIFF image or the native or original file. Parties reserve the right to request specific documents in another form if an image is not reviewable or additional relevant information can be obtained in a different form. To the extent reasonably practicable, ESI items shall be process using a consistent time zone by all of the Parties: (e.g., GMT), and the time zone shall be disclosed to the Requesting Party.

A. **Production of Documents Not Reasonably Comprehensible in TIFF format**. Spreadsheet files

(e.g., Microsoft Excel files), database files, and any other file types that reasonably require viewing in their native format for a full understanding of their content must be produced in their native file format with a TIFF image placeholder. Any files not easily converted to or reviewable in image format must be produced in their native file format, including but not limited to audio/video files. Documents produced natively shall be represented in the set of imaged documents by a slip sheet indicating **[*14]** the production identification number and confidentiality designation for the native file that is being produced.

B. **Optical Character Recognition**. To the extent that documents have been run through optical character recognition ("OCR") software, the full text shall be provided on a document-level basis in an appropriately formatted text file (.txt) that is named to match the first bates number of the document. Text files shall be provided in a "Text" folder. To the extent that a document is redacted, the text files shall not contain the text of the redacted portions, but shall indicate where the redactions were made, *e.g.* with the notation "REDACTED."

C. **Technology Assisted Review ("TAR") and Similar Advanced Analytics**. If a Producing Party elects to use TAR or similar advanced analytics as a means of including or excluding Documents to be reviewed for responsiveness or of culling or otherwise limiting the volume of information to be reviewed for responsiveness, prior to use of such tool the Requesting Party and Producing Party shall meet and confer as to (1) the custodial data sources and non-custodial data sources against which TAR will be run; (2) the TAR or advanced analytics vendor **[*15]** and methodology being deployed; (3) the quality control measures used to validate the results of the TAR methodology or similar advanced analytics, (4) any Documents, Document types, file types or other categories that the Producing Party proposes to exclude from the TAR process and the method of identifying such Documents to be excluded, (5) other disclosures that are reasonably necessary for the Requesting Party to evaluate the proposed TAR process. To the extent a Producing Party proposes to use search terms to pre-cull ESI prior to application of TAR and/or advanced analytics, prior to doing so, they shall meet-and-confer with the Requesting Party regarding whether pre-culling is appropriate and if so, how it is to be applied. If the Requesting Party and Producing Party are unable to agree on the TAR and/or advanced analytics technology and methods being proposed after meeting and conferring in good faith, the Requesting Party and Producing Party shall notify the Court of their unresolved dispute(s) and seek resolution by the Court or an appointed discovery master.

D. **Electronic Production of Physical/Hard Copy Documents**. Nothing herein shall relieve the Parties of any obligations **[*16]** they may have to search for responsive Documents in physical or hard copy form. Whenever practicable, documents that are located solely in physical hardcopy format are to be scanned and produced as text-searchable TIFFs imaged at 300 dpi in lieu of photocopy production in their physical form. If the Producing Party determines that it is not reasonably possible, the Producing Party shall notify the Requesting Party. Bates numbers, confidentiality designations (in accordance with any protective order governing the case), and redactions (to the extent they are necessary) shall be burned into the image. The metadata shall indicate document breaks and identify the custodian or non-person custodial source from whom/where the document was collected. The documents should be logically unitized (i.e., distinct documents should not be merged into a single record, and a single document should not be split into multiple records) and should be produced in the order in which they are kept in the usual course of business. The ".tiff" files shall be subject to an OCR process. The OCR software should maximize text quality over process speed. Settings such as "auto-skewing" and "auto-rotation" should **[*17]** be turned on during the OCR process. The Parties will meet and confer to address instances of undue burden and will work to negotiate an appropriate solution.

E. **Production Media**. The Parties shall produce documents in an encrypted format through electronic means, such as external hard drives, secure file sharing methods (*e.g.*, FTP), or readily accessible computer or electronic media (*e.g.*, CDs, DVDs) (collectively, "Production Media"), with explicit decryption instructions. Productions shall have the following four directories: (1) IMAGES for the images; (2) DATA for the .dat and .opt files; (3) TEXT for the extracted text/OCR files; and (4) NATIVES for any native Excel or other files that cannot be understood reasonably unless displayed in native format. The Producing Party

shall identify: (i) the Responding Party's name; (ii) the production date; and (iii) the Bates Number range of the materials contained on the Production Media.

F. **Color**. If a Receiving Party finds the black and white version of a document insufficient, the Receiving Party may request that the Producing Party provide a color image or native file of such document. The Producing Party will not unreasonably deny a request **[*18]** to provide a color image and shall reproduce the document(s) in color, if reasonably accessible, within 5 business days of receiving the request. Color images should be produced as single page JPG files at 300dpi with JPG compression and a high-quality setting as to not degrade the original image.

G. **Unique IDs**. Each TIFF image shall be produced using a unique file name that will be the Bates number of that page (*e.g.*, ABC000001.TIFF). The Bates number must appear on the face of the image and not obliterate, conceal, or interfere with any information from the source document.

H. **Parent-Child Relationships**. Parent-child relationships (association between an attachment and its parent document) shall be preserved. The attachment(s) shall be produced adjacent to the parent document, in terms of Bates numbers, with the first attachment being named with the next sequential number after the parent, and any additional attachment(s) sequentially numbered after that first attachment.

I. **Redactions**. If the Parties are redacting information from a page, they shall electronically "burn" the word "Redacted" onto the page or otherwise clearly indicate a redaction at or reasonably near to the location **[*19]** of the redaction(s). If documents that Parties have agreed to produce in native format need to be redacted, the Parties agree to meet and confer in good faith on how to best produce the documents so that proper formatting and usability are maintained.

J. **Confidentiality Designation**. Responsive documents in TIFF format shall be stamped with the appropriate confidentiality designations in accordance with any protective order entered in the Litigation. Each responsive document produced in native format shall have its confidentiality designation indicated on its corresponding TIFF placeholder.

K. **Metadata Fields**. To the extent reasonably possible, the Parties shall provide the system generated metadata fields (the "Production Fields") as set forth in **Appendix A**. If the Producing Party believes the Production Fields are not reasonably possible to produce, the Producing Party shall notify the Requesting Party within five business days of learning such information.

L. **Text Files**. For each produced document, a document-level text file shall be provided in addition to the image files (TIFFs). The text of documents originating in native format should be extracted directly from the native file and **[*20]** each text file will be named using its corresponding beginning bates number (*e.g.*, ABC000001.TXT). For ESI with redacted text, a commercially acceptable technology for Optical Character Recognition ("OCR") shall be used for all scanned, hard copy documents with redactions.

M. **Databases and Other Structured Data**. The parties shall meet and confer regarding the production format and scope of data contained in enterprise database or database management system (e.g., Oracle, SQL server, DB2), including the types of information stored in the database(s), the types of reports that can be generated from or for the data, whether there are existing and reasonably available reports that include the information, and whether the Receiving Party will need any information in native form in order to ensure that any information produced is reasonably usable by the Receiving Party and that its production does not impose an undue burden. To avoid doubt, information will be considered reasonably usable when produced in CSV format (assuming proper text qualifiers), tab-delimited text format, Microsoft Excel format, or Microsoft Access format. Subject to reasonable requests by the Requesting Party, the **[*21]** Producing Party shall provide a description of each field produced, as well as database schema, codes, values and abbreviations used to populate a data field, and other information necessary for the Requesting Party to understand the nature and function of the structured data source and the meaning of structured data produced. The Parties reserve all rights to object, including but not limited to objections for relevance, undue burden, and/or inaccessibility.

Should the meet and confer result in production of information from a database in an alternate, static format, such as a report or data table, any report/data table that is produced will be deemed authentic and an

accurate representation of information included in the counterpart database. Moreover, a Party that withholds any part of a database as non-responsive may not later rely on such withheld information unless the Party produces such information to the other Party within a reasonable time.

N. **Password Protected Files**. The Producing Party shall produce passwords for any password-protected files to the extent the passwords are reasonably available.

O. **Embedded Documents**. Embedded ESI documents (e.g. a spreadsheet embedded within **[*22]** a word processing document) will be extracted, produced as independent document records and related back to the respective top level parent document (e.g., standalone file, email message, etc.) via the BegAttach and EndAttach fields referenced in Appendix A. Related embedded documents will be produced within a continuous Bates range. The Parties agree that certain embedded documents (such as embedded logos, signatures, OLEObjects, images or pictures, and systems and/or container files (*e.g.*, OLE2, .bin, and similar files that hold embedded files but which do not contain user data)) need not be extracted. If the Producing Party determines that other embedded documents should not or cannot be extracted, the Producing Party shall notify the Requesting Party and the Parties will meet and confer to address any issues within three business days or as soon as reasonably possible thereafter.

P. **Compressed Files**. Compression file types (e.g., .CAB, .GZ, .RAR. .ZIP), shall be decompressed to ensure that a compressed file within a compressed file are decompressed into the lowest possible compression resulting in individual folders and/or files.

Q. **Email and Attachments**. Each email and its attachment(s) **[*23]** must be produced as separate documents, sequentially Bates stamped with the family relationship intact.

R. **Replacement Productions**. Any replacement production will be transmitted with a cover letter or email to identify the production as a replacement and cross-reference the BegBates and EndBates of the documents being replaced. If the replacement production is being transmitted by physical media, the media shall include the phrase "Replacement Production."

VII. THIRD-PARTY ESI

A. A Party that issues a non-party subpoena (the "Issuing Party") shall include a copy of this ESI Order and the order concerning confidentiality agreed and/or entered in this litigation with the subpoena and state that the Parties in the litigation have requested that third-Parties produce documents in accordance with the specifications set forth herein.

B. The Issuing Party shall produce a copy to all other Parties of any documents and ESI (including any metadata) obtained under subpoena to a non-party.

C. If the non-party production is not Bates-stamped, the Issuing Party will endorse the non-party production with unique Bates prefixes and numbering scheme prior to reproducing them to all other Parties.

D. Parties **[*24]** shall identify any third parties to which they have given notice of preservation and the date of that notice.

VIII. DEDUPLICATION

A. A Party is only required to produce a single copy of a responsive document. To the extent exact duplicate documents reside within a Party's ESI data set, the Party shall produce only a single, deduplicated copy of a responsive document. "Exact duplicate" shall mean bit-forbit identity of the document content with exact hash value matches; so-called "near duplicates" will not be included within this definition.

B. **Vertical Deduplication**. A Producing Party may de-duplicate ESI vertically by Custodian, provided however, that an email that includes content in the BCC or other blind copy field shall not be treated as a duplicate of an email that does not include content in the BCC or other blind copy field, even if all remaining content in the email is identical.

C. **Horizontal Deduplication**. A Producing Party may de-duplicate ESI horizontally (globally) across the population of records, if the Producing Party discloses to the Requesting Party that it has deduplicated

horizontally, and provided further that: (a) an email that includes content in the BCC or other **[*25]** blind copy field shall not be treated as a duplicate of an email that does not include content in the BCC or other blind copy field, even if all remaining content in the email is identical; and (b) all Custodians who were in possession of a de-duplicated Document and the directory structure where the Custodian stored the de-duplicated Document must be identified in the Custodian, CustodianOther and CustodianOtherDirectory Metadata fields specified in **Appendix A**. To ensure accuracy, the Custodian, CustodianOther and CustodianOtherDirectory Metadata fields must be captured by an automated process and cannot be populated using a manual process. The aforementioned Metadata must be produced to the extent it exists. In the event of a rolling production of documents or ESI items, the Producing Party shall provide an overlay load file with updated Custodian, CustodianOther and CustodianOtherDirectory Metadata fields along with each production. The Metadata overlay may contain a full refresh of data for the Custodian, CustodianOther and CustodianOtherDirectory fields or be a supplement to the information previously provided for the fields. At the time of production, the Producing Party shall **[*26]** identify the overlay as a full refresh or a supplement. A Metadata overlay file shall be either a full refresh overlay or a supplemental overlay but shall not contain a full refresh for one Metadata field and a supplement for the other Metadata field.

D. The Parties recognize that a Producing Party using a centralized system (or "journaling") as a preservation and backup system for email may not possess certain Metadata, such as "CustodianOtherDirectory" and "Importance." Where documents are produced from such a centralized system, in the production cover letter the Parties shall, to the extent practicable, identify the centralized system in the "Source" Metadata field for the documents produced from such system, or identify by Bates rage which Documents are being produced from a centralized system.

E. To the extent a Party de-duplicates its documents, it shall de-duplicate stand-alone documents or entire document families in their ESI sources by the use of MD5, SHA-1, or SHA256 hash values. Where any such documents have attachments, hash values must be identical for both the document plus-attachment (including associated metadata) as well as for any attachment (including associated **[*27]** metadata) standing alone. The resulting hash value for each item shall be reflected in the HashValue field specified in **Appendix A**.

F. Removal of duplicate documents should only be done on exact duplicate documents (based on MD5 or SHA-1 hash values, at the family level only). Attachments should not be eliminated as duplicates for purposes of production, unless the parent email and all attachments are also duplicates.

G. No Party shall identify and/or eliminate duplicates by manual review or some method other than by use of the technical comparison using MD5 or SHA-1 hash values outlined above.

H. Email threads are email communications that contain prior or lesser-included email communications. A most inclusive email thread is one that contains all of the prior or lesser-included emails and attachments, including each branch of the email thread. A Producing Party may not use e-mail threading to suppress prior-in-time emails from production; however, the Producing Party may use email threading as a review efficiency tool.

I. Hard-Copy Documents shall not be eliminated as duplicates of ESI.

IX. ASSERTIONS OF PRIVILEGE

Pursuant to Rule 26(b)(5) of the Federal Rules of Civil Procedure, the parties agree that a Producing Party may withhold a document **[*28]** or redact portions of a document only if the document withheld or the portions redacted are protected by attorney-client privilege, the work-product doctrine or other applicable privilege, protection or immunity.

A. **Privilege Logs:** Privilege logs shall be provided in Excel format and shall contain the following information**:**

1. a sequential number associated with each privilege log record;
2. the date of the document;
3. the Bates numbers of documents redacted;
4. the identity of all persons who sent, authored, signed or otherwise prepared the document, to the extent reasonably ascertainable, and identification

of which, if any, of them are attorneys;
5. the identity of all persons designated as addressees or copyees, including identification of which, if any of them, are attorneys;
6. the title or subject of a document, to the extent the title does not reveal privileged or protected information;
7. a description of the contents of the document that, without revealing information itself privileged or protected, is sufficient to understand the subject matter of the document and the basis of the claim of privilege or immunity;

8. the type or nature of the privilege asserted (i.e., attorney-client **[*29]** privilege; work product doctrine, etc.).

B. **Logging of Document Families**: Each member of a document "family" (e.g., an email attaching a memorandum or other document) that is withheld or redacted on the grounds of privilege, immunity or any similar claim shall be individually logged on the privilege log in succession following the redacted or withheld parent document. For document families in which fewer than all of the documents are withheld or redacted as privileged or protected, the privilege log entry for the withheld document(s) shall identify the Bates number of the produced family member along with a general description of the produced family member(s).

C. **Timely Production**: Privilege logs shall be produced within 30 days following production of the Producing Party's first production volume and shall be supplemented within 30 days following each subsequent production where production occurs on a rolling basis, or by another date upon agreement of the Producing and Requesting Parties. For documents produced prior to entry of this ESI Order, a privilege log for such productions shall be provided to the Requesting Party within thirty (30) days of entry of this ESI Order.

X. COST SHIFTING [*30]

The costs of production pursuant to this ESI Order shall be borne by the Producing Party. However, in agreeing to this ESI Order, no Party waives or relinquishes any right or interest it may have under the Federal Rules of Civil Procedure to seek cost shifting or apportionment for the costs of electronic discovery.

SO ORDERED.

Dated: December 9, 2020

New York, New York

/s/ Analisa Torres

ANALISA TORRES

United States District Judge

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256 F.R.D. 134
United States District Court, S.D. New York.

WILLIAM A. GROSS CONSTRUCTION ASSOCIATES, INC., Plaintiff,

v.

AMERICAN MANUFACTURERS MUTUAL INSURANCE COMPANY, Defendant.

No. 07 Civ. 10639(LAK)(AJP)
|
March 19, 2009.

Synopsis

Background: In action regarding alleged defects and delay in construction project, parties sought production of non-party construction manager's project related documents and emails.

The District Court, Andrew J. Peck, United States Magistrate Judge, held that parties' attorneys had to cooperate and carefully craft appropriate keywords for non-party to use in searching for emails.

Ordered accordingly.

Attorneys and Law Firms

***134** Carol A. Sigmond, Dunnington, Bartholow & Miller, LLP, New York, NY, for Plaintiff.

Vincent J. Zichello, Zichello & McIntyre, LLP, New York, NY, for Defendant.

OPINION AND ORDER

ANDREW J. PECK, United States Magistrate Judge:

This Opinion should serve as a wake-up call to the Bar in this District about the need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or "keywords" to be used to produce emails or other electronically stored information ("ESI"). While this message has appeared in several cases from outside this Circuit, it appears that the message has not reached many members of our Bar.

FACTS

This case involves a multi-million dollar dispute over alleged defects and delay in the construction of the Bronx County Hall of Justice, also known as the Bronx Criminal Court Complex. *See William A. Gross Constr. Assocs., Inc. v. American Mfrs. Mut. Ins. Co.*, 07 Civ. 10639, 2009 WL 427280 (S.D.N.Y. Feb. 23, 2009) (Peck, M.J.). The Dormitory Authority of the State of New York ("DASNY") was the "owner" of the project. Non-party Hill International is DASNY's current construction manager, and DASNY has agreed to produce Hill's project-related documents and ESI to the other parties to this suit. The issue before the Court is the production of Hill's emails, stored on its server at its New Jersey office, and how to separate project-related emails from Hill's unrelated emails.

DASNY's proposed search terms included "DASNY," "Dormitory Authority," and "Authority,"[1] and the names of the other parties to the action. DASNY also added "Court! in connection with Bronx," "Hall of Justice," and "Bronx but not Zoo" (since Hill worked on an unrelated project involving the Bronx Zoo). The other parties requested the use of thousands of additional search terms, emphasizing the construction issues they were involved in, such as "sidewalk," "change order," "driveway," "access," "alarm," "budget," "build," "claim," "delay," "elevator," "electrical"—you get the picture. DASNY ***135** correctly pointed out that use of such extensive keywords would require production of the entire Hill email database, since Hill's business is construction management, and those terms would be used for any construction project.

Hill's only contribution to the discussion was to agree that DASNY's search terms were probably too narrow but the other parties' terms were overbroad, and that Hill did not want to produce emails that did not relate to the Bronx Courthouse project. This problem would have been avoided, of course, if Hill used a standard "Re" line in its Bronx Courthouse emails to distinguish that project from its other work. It did not do so, however. Moreover, while Hill was in the best position to explain to the parties and the Court what nomenclature its employees used in emails, Hill did not do so—perhaps because, as a non-party, it wanted to have as little involvement in the case as possible.

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That left the Court in the uncomfortable position of having to craft a keyword search methodology for the parties, without adequate information from the parties (and Hill). The Court ruled at yesterday's conference that in addition to DASNY's proposed terms (including variations on and abbreviations of party names), the search should also include the names of the parties' personnel involved in the Bronx Courthouse construction.[2]

DISCUSSION

This case is just the latest example of lawyers designing keyword searches in the dark, by the seat of the pants, without adequate (indeed, here, apparently without any) discussion with those who wrote the emails. Prior decisions from Magistrate Judges in the Baltimore–Washington Beltway have warned counsel of this problem, but the message has not gotten through to the Bar in this District. As Magistrate Judge Paul Grimm has stated:

> While keyword searches have long been recognized as appropriate and helpful for ESI search and retrieval, there are well-know limitations and risks associated with them, and proper selection and implementation obviously involves technical, if not scientific knowledge.

* * *

> Selection of the appropriate search and information retrieval technique requires careful advance planning by persons qualified to design effective search methodology. The implementation of the methodology selected should be tested for quality assurance; and the party selecting the methodology must be prepared to explain the rationale for the method chosen to the court, demonstrate that it is appropriate for the task, and show that it was properly implemented.

Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 260, 262 (D.Md. May 29, 2008) (Grimm, M.J.).

Magistrate Judge Facciola has taken the warning even further:

> Whether search terms or "keywords" will yield the information sought is a complicated question involving the interplay, at least, of the sciences of computer technology, statistics and linguistics. Given this complexity, for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread. This topic is clearly beyond the ken of a layman and requires that any such conclusion be based on evidence that, for example, meets the criteria of Rule 702 of the Federal Rules of Evidence.

United States v. O'Keefe, 537 F.Supp.2d 14, 24 (D.D.C.2008) (Facciola, M.J.); *accord, Equity Analytics, LLC v. Lundin,* 248 F.R.D. 331, 333 (D.D.C.2008) (Facciola, M.J.);[3] *see also, e.g.,* ***136** *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."); Jay Grenig, Browning Marean & Mary Pat Poteet, *Electronic Discovery & Records Management Guide: Rules, Checklists & Forms* (2009 ed.), § 15:15 ("[K]eyword searches do not reflect context. They can also miss documents containing a word that has the same meaning as the term used in the query but is not specified. Misspelled words may be missed in a keyword search.").

Of course, the best solution in the entire area of electronic discovery is cooperation among counsel. This Court strongly endorses *The Sedona Conference Cooperation Proclamation* (available at www.TheSedonaConference.org).

CONCLUSION

Electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI. Moreover, where counsel are using keyword searches for retrieval of ESI, they at a minimum must carefully craft the appropriate keywords, with input from the ESI's custodians as to the words and abbreviations they use, and the proposed methodology must be quality control tested to assure accuracy in retrieval and elimination of "false positives." It is time that the Bar—even those lawyers who did not come of age in the computer era—understand this.

SO ORDERED.

All Citations

256 F.R.D. 134

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Footnotes

1 The Court is no keyword expert, but if one is searching for "Authority," to also search for "Dormitory Authority" is clearly redundant.

2 The Court acknowledges that this result is less than perfect, and that there is a risk that as information later comes out at depositions of the Hill employees, another search may have to be done.

3 This Court need not now decide whether expert testimony is required; what is required is something other than a lawyer's guesses, without client input, and without any quality control testing to see if the search terms produce reasonably all the responsive ESI and limited "false positives."

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2020 WL 5441230
Only the Westlaw citation is currently available.
United States District Court, M.D. Louisiana.

Shawn DREWERY OBO Shaqualia FELDER

v.

Sid J. GAUTREAUX, III, in his Official Capacity as Sheriff of East Baton Rouge Parish, et al.

CIVIL ACTION NO. 18-376-JWD-RLB

|

Signed 09/10/2020

Attorneys and Law Firms

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Mary G. Erlingson, Tara Lynn Johnston, Catherine S. St. Pierre, Erlingson Banks, PLLC, Baton Rouge, LA, for Sid J. Gautreaux, III, Leroy Griffin.

RULING AND ORDER

JOHN W. deGRAVELLES, JUDGE

***1** This matter comes before the Court on the *Motion to Vacate Judgment* (Doc. 56) filed by Plaintiff Shawn Drewery, on behalf of Shaqualia Felder ("Plaintiff"). Defendants, Sid J. Gautreaux, III, Sheriff of East Baton Rouge Parish, and Deputy Leroy Griffin, in his individual capacity as a Deputy Sheriff for East Baton Rouge Parish (collectively, "Defendants"), oppose the motion. (Doc. 50.) The Court has carefully considered the law, the facts in the record, and the arguments and submissions of the parties and is prepared to rule. For the following reasons, Plaintiff's motion is denied.

I. Relevant Factual and Procedural Background

Plaintiff filed a *Petition for Damages* in the 19th Judicial Court of the Parish of East Baton Rouge against Defendants regarding an incident which occurred on February 7, 2018. (Doc. 1-3 at 2–6.) Defendants removed the matter to the Middle District of Louisiana. (Doc. 1.) Defendants subsequently filed a *Motion to Dismiss* (Doc. 4) pursuant to Federal Rule of Civil Procedure 12(b)(6). (Doc. 4-1 at 1.) The Court granted the motion in part and denied it in part. (Doc. 31.) All of Plaintiff's § 1983 claims were dismissed except for his claims against Deputy Griffin in his individual capacity for compensatory and punitive damages for false arrest and excessive force. (*Id.* at 29.) Plaintiff's state law claims survived as well. (*Id.* at 27.)

On March 3, 2020, Defendants filed a *Motion for Summary Judgment* (Doc. 44) ("*MSJ*") to dismiss Plaintiff's remaining claims. Notice of the *MSJ* was electronically filed with the Clerk of Court using the CM/ECF system stating: "Opposition to the motion shall be filed within 21 days from the filing of the motion...." (Doc. 45.) Under the Federal Rules of Civil Procedure and the Local Rules of Court, Plaintiff was required to file an opposition no later than March 23, 2020. (Doc. 46 at 1.)

Plaintiff failed to timely oppose the *MSJ*. In a *Ruling* dated May 4, 2020, the Court granted the Defendants' *MSJ* and dismissed Plaintiff's claims with prejudice. (Doc. 46 at 2.) The *Ruling* explained that Plaintiff must respond within 14 days, that the response should explain his Plaintiff's failure to comply with the Court's deadline, and that the response must be accompanied by an opposition memorandum to the *MSJ*. (Doc. 46 at 2.) Thus, Plaintiff's deadline was May 18, 2020. (*See id.*)

As of May 22, 2020, Plaintiff failed to respond to the *Ruling* within the Court's deadline. (*See* Doc. 47 at 1.) On May 22, 2020, the Court entered judgment in favor of Defendants and against Plaintiff and dismissed all claims by Plaintiff against Defendants with prejudice. (Doc. 47 at 1.)

On June 9, 2020, Plaintiff filed a *Motion for Leave to File Plaintiff's Motion to Vacate Judgment and Memorandum in Opposition of Defendants' Motion for Summary Judgment* (Doc. 49) ("*Motion for Leave*"). In the memorandum in support of this motion, Plaintiff contends that "because of malfunction or failure of the electronic filing system, PACER, the plaintiff failed to get any notice of the *MSJ* (Doc. 44), Notice of Briefing Schedule on the *MSJ* (Doc. 45), the *Ruling* granting the *MSJ* (Doc. 46), or the Judgment (Doc. 47)." (Doc. 49-1 at 1.)

***2** Plaintiff offers evidence that on April 13, 2020 Plaintiff's counsel emailed PACER that he did "not get notices of court decisions or notes on [his] email anymore" and he did "not get Orders nor any notification from the court." (Ex. B, Doc. 49-6

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at 2.) The email response by PACER is also included which explains "[t]he courts email ECF notifications, not PACER" and provides instruction on updating email addresses for troubleshooting. (Ex. C, Doc. 49-6 at 3.) Following this response from PACER, counsel for Plaintiff "believed that the problem was solved until this present moment when he found the Court's Order and Judgment in his Spam mail which was never the case before." (Doc. 49-3 at 3.)

"[T]he first time counsel learnt about the proceeding was May 21, 2020 when he saw the Order in his spam folder." (*Adebamiji Aff.* ¶ 9, Doc. 49-5 at 2.) Counsel for Plaintiff claims "[t]hat such lack of service and proper notice did not allow him to file a response on behalf of Plaintiff." (*Adebamiji Aff.* ¶ 6, Doc. 49-5 at 1.) He further states that the electronic filing system "was defective as Counsel failed to get service and notice until after the Order was signed by the Judge." (*Adebamiji Aff.* ¶ 7, Doc. 49-5 at 1.) Finally, Plaintiff's counsel states that "he has always used the Court's electronic filing system through PACER" and "he ... complained to both the District Court and PACER about the problems." (*Adembamiji Aff.* ¶¶ 3, 8, Doc. 49-5 at 1.) Plaintiff also offers as evidence the email notice of the order granting the *MSJ* received on May 4, 2020 marked as "spam" (Ex. A, Doc. 49-6 at 1) in her counsel's email account.

Defendants opposed the *Motion for Leave* on June 23, 2020. (Doc. 52.) The Court granted the *Motion for Leave* on June 26, 2020 (Doc. 54), and the instant *Motion to Vacate Judgment* was entered on the docket on June 26, 2020 (Doc. 56). Defendants opposed the *Motion to Vacate Judgment.* (Doc. 50.)

II. Discussion

A. Parties' Arguments

Plaintiff moves to vacate the Court's judgment dismissing all claims against Defendants (Doc. 56.) Plaintiff, through her counsel, claims her failure to respond to the *MSJ* (Doc. 44) and the *Ruling* (Doc. 46) was a result of failure to receive electronic copies from the court. (Doc. 56-1 at 1.) Plaintiff relies on Federal Rules of Civil Procedure 55 and 60 as justifications for relief under these circumstances. (*See* Doc. 56-1 at 3.)

Plaintiff relies on Fed. R. Civ. P. 55(c) as the applicable standard to justify vacating the judgment which states "[t]he court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b) as well as cases regarding setting aside a default judgment." (Doc. 56-1 at 3–4.) Courts apply a less rigorous "good cause" standard in setting aside default judgments under Rule 55 than the more difficult standard set forth in Rule 60(b). (Doc. 56-1 at 3.) Plaintiff notes that courts "should consider whether the default was willful, whether setting it aside would prejudice the adversary, and whether a meritorious defense is presented." (Doc. 56-1 at 5) (citing *Meehan v. Snow*, 652 F.2d 274, 277 (2d Cir. 1981).) Plaintiff asserts that the Court's email being diverted into Counsel's spam folder meets the "good cause" standard under Federal Rule of Civil Procedure 55. (Doc. 56-1 at 5.)

In addition to Rule 55, Plaintiff also argues that the Court should grant the *Motion to Vacate* based on Rule 60(b)(4) because "the judgment is void." (Doc. 56-1 at 4.) In support, Plaintiff cites *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 979 F.2d 60 (5th Cir. 1992), a case in which the court refused to set aside default judgment after defendants received notice of and failed to answer the complaint. (Doc. 56-1 at 4.) Plaintiff asserts that he did not receive service due to the failure of the electronic mailing system when Plaintiff was "entitled to service ... as stated in Rule 5." (Doc. 56-1 at 4*; Fehlhaber v. Fehlhaber*, 681 F.2d 1015, 1027 (5th Cir. 1982) ("[O]rdinarily all that due process requires in a civil case is proper notice and service of process and a court of competent jurisdiction; procedural irregularities during the course of a civil case, even serious ones, will not subject the judgment to collateral attack.").)

***3** Finally, Plaintiff asserts that Fed. R. Civ. P. 60(b)(6) "allows the District Court to set aside even default judgment for any other reason that justifies relief as stated herein." (Doc. 56-1 at 4.) "A Defendant's default does not in itself warrant the Court in entering a default judgment. There must be a sufficient basis in the pleadings for the judgment entered." (Doc. 56-1 at 4) (quoting *Wooten v. McDonald Transit Assocs., Inc.* 775 F.3d 689 (5th Cir. 2015).) Based on the "equitable principals encompassed within Rule 60(b)", Plaintiff concludes that the Court should grant relief and vacate the judgment. (Doc. 56-1 at 5.)

Defendants reject the contention that the Court should grant Plaintiff's *Motion to Vacate* based on either Rule 55 or Rule 60(b). (Doc. 50.) Defendants argue that the Plaintiff "continuously and mistakenly cited Fed. R. Civ. P. 55 as the guiding standard for vacating the Court's judgment." (Doc. 50

at 2.) Defendants sought relief on the grounds of summary judgment pursuant to Fed. R. Civ. P. 56, not default judgment pursuant to Fed. R. Civ. P. 55. (Doc. 50 at 2.) Defendants state the numerous cases cited by Plaintiff regarding default judgment relief are distinguishable to this case, so the good cause standard for default judgment is inapplicable. (Doc. 50 at 6.) Rather, the proper standard is excusable neglect under Rule 60(b). (*Id.*) Assuming *arguendo* the Court finds the good cause standard appropriate in this case, Defendants maintain that Plaintiff failed to prove good cause. (Doc. 50 at 2 ("The three factors are '(1) whether the default was willful, (2) whether setting it aside would prejudice the adversary, and (3) whether a meritorious defense is presented.' ").)

Defendants reject the notion that Plaintiff is entitled to relief based on Rule 60(b)(4). (Doc. 50 at 4.) Defendants argue that the correct standard for relief from the *Ruling* granting the *MSJ* is Fed. R. Civ. P 60(b)(1). (Doc. 50 at 4.) Defendants assert that the electronic mailing system notice being diverted to the spam folder does not constitute lack of service under Local Civil Rule 5(f). ("As provided by Fed. R. Civ. P. 5(b)(2)(E), if a recipient is a registered filer in the Court's Electronic CM/ECF Filing System, service is complete when the document is electronically filed or uploaded to the Court's system.") Defendants do not dispute that due process is necessary, but rather argue that Plaintiff did properly receive service and notice "even if the e-mail notification went to his spam folder." (Doc. 56 at 5.) Although Counsel for Plaintiff states that he took corrective measures on April 13, 2020 to receive notifications from the Court, "[h]e did not indicate that he took any affirmative measures to determine if he missed any notices from the case at hand prior to April 13th, including reviewing his spam folder notices of electronic filing or receiving the docket on Pacer." (Doc. 50 at 5.) Thus, Plaintiff did not prove a violation of due process sufficient to justify relief under Rule 60(b)(4). (Doc. 50 at 6.)

Defendants also reject Plaintiff's argument that he is entitled to relief under Rule 60(b)(6) because "a court may vacate a judgment for any other reason that justifies relief, but a court exercise[s] this power sparingly, granting relief only in extraordinary circumstances." (Doc. 50 at 6 (internal quotations omitted).) Since Plaintiff failed to prove both excusable neglect or good cause, "Plaintiff's counsel is not entitled to relief under Fed. R. Civ. P. 60(b), or even Fed. R. Civ. P. 55." (Doc. 50 at 6.) Thus, Defendants conclude, the Court should deny Plaintiff's *Motion to Vacate Judgment.* (Doc. 50 at 6.)

B. Relevant Standard

***4** A court may provide relief from a final judgment on the following grounds: "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which could not have been discovered earlier with reasonable diligence; (3) fraud, misrepresentation, or other misconduct of an opposing party; (4) a void judgment; (5) a judgment that has been satisfied, release, discharged, reversed, or vacated; or (6) any other reason justifying relief...." Fed. R. Civ. P. 60(b).

Rule 60(b)(1) permits a district court to "relieve a party from ... a final judgment" because of "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). "The Supreme Court has explained that the determination of what sorts of neglect will be considered excusable is 'an equitable one, taking account of all relevant circumstances surrounding the party's omission.' " *Trevino v. City of Fort Worth*, 944 F.3d 567, 571 (5th Cir. 2019) (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395, 113 S. Ct. 1489, 1498, 123 L. Ed. 2d 74 (1993)). Courts should consider "the danger of prejudice to the [opposing party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Pioneer*, 507 U.S. at 395. "A party has a 'duty of diligence to inquire about the status of the case.' " *Trevino*, 944 F.3d at 571 (quoting *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 357 (5th Cir. 1993)). "Gross carelessness" is an "insufficient bas[i]s for 60(b)(1) relief." *Id.* (quoting *Edward H. Bohlin Co.*, 6 F.3d at 357). "In fact, a court would abuse its discretion if it were to reopen a case under Rule 60(b)(1) when the reason asserted as justifying relief is one attributable solely to counsel's carelessness with or misapprehension of the law or the applicable rules of court." *Id.* (quoting *Edward H. Bolin Co.*, 6 F.3d at 357).

Other relevant grounds for justifying relief from final judgment are subsections (4) and (6). A court may provide relief from judgment under Rule 60(b)(4) in only two circumstances: "1) if the initial court lacked subject matter or personal jurisdiction; and 2) if the district court acted in a manner inconsistent with due process of law." *Callon Petroleum Co. v. Frontier Ins. Co.*, 351 F.3d 204, 208 (5th Cir. 2003) (citing *Carter v. Fenner*, 136 F.3d 1000, 1006 (5th Cir. 1998)). "To justify relief under subsection (6), a party must show extraordinary circumstances suggesting that the party is

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faultless in the delay." *Pioneer*, 507 U.S. at 393, 113 S. Ct. at 1497.

C. Analysis

In short, the Court will deny the *Motion to Vacate Judgment.* Neither Rule 55 on default judgment nor Rule 60(b) of the Federal Rules of Civil Procedure justify granting relief to the Plaintiff for her counsel's failure to timely respond to Defendants' *MSJ.*

Preliminarily, Plaintiff erroneously relies on Federal Rule of Civil Procedure 55 as the standard for vacating the Court's judgment. Rule 55(c) permits the court to "set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b)." Fed. R. Civ. P. 55(c). While Plaintiff correctly states the good cause standard of Rule 55(c) as less rigorous than the excusable neglect standard under Rule 60(b)(1), the good cause standard does not apply to this case because Court did not grant a motion for default judgment. Rather, the Court granted the Defendants' *MSJ* pursuant to Rule 56. Rule 55 is therefore inapplicable to this case, and Plaintiff's reliance on the good cause standard for setting aside default judgments is erroneous. Rather, the Court must look to the excusable neglect standard pursuant to Rule 60(b)(1).

***5** The Fifth Circuit has applied Federal Rule of Civil Procedure 60(b)(1) to analogous cases in which counsel filed for relief from judgment based on court's electronic notice being unknowingly diverted to a spam or other non-inbox folder resulting in counsel's failure to timely respond. In *Onwechekwe*, counsel filed for relief from a dismissal of a case based on excusable neglect claiming that the court's email of opposing counsel's motion to dismiss was sent to spam and went unseen. *Onwechekwe v. Okeke*, 404 F. App'x 911 (5th Cir. 2010). The Fifth Circuit affirmed the district court's decision to deny relief under FRCP 60(b)(1) on grounds of mistake when notice did not reach counsel for appellants "because there were issues related to their counsel computer set up of emails receipt." *Id.* at 911-12. Although the lower court doubted whether counsel was truthful in claiming it never received the email because counsel had no difficulty receiving other emails from the court, counsel's potential untruthfulness was not determinative of the lower court's decision to deny relief under Rule 60(b)(1). *Id.* at 912. The Fifth Circuit held that "it was not an abuse of discretion [for the district court] to conclude that sending court communications to the spam folder is inexcusable neglect" even when an email setting deflects notice away from counsel's inbox. *Id.*

The Fifth Circuit also spoke to this issue in *Trevino v. City of Fort Worth*, 944 F.3d 567 (5th Cir. 2019). In *Trevino*, Plaintiffs alleged excusable neglect under FRCP 60(b)(1) when counsel failed to register with CM/ECF and "defective antivirus software diverted court emails to a spam folder." *Id.* at 571. Plaintiffs claimed it was a mistake in part because the case was no longer on their list of active cases. *Id.* The court cited *Onwuchekwe* starting "we held that the district court did not abuse its discretion in concluding that sending court communications to the spam folder does not constitute excusable neglect under Rule 60(b)." *Id.* at 572 (internal quotations omitted). The court concluded that "[e]mails mistakenly going to a spam folder do not merit Rule 60(b) relief" even when emails were diverted due to alleged antivirus software instead of faulty email settings as in *Onwuchekwe. Id.* Thus, the Fifth Circuit has ruled that emails mistakenly diverted to a spam folder are insufficient to justify the relief requested by the Plaintiff. Many circuits have ruled similarly. *See* Jay M. Zitter, *Relief From Judgment due to Attorney Neglect or Error Concerning Judicial Electronic Filing (E-filing) Procedures*, 27 A.L.R. 7, § 28. The facts of *Onwuchekwe* and *Trevino* are nearly identical to those of the case at hand, so the Court will similarly deny Plaintiff's *Motion to Vacate Judgment.*

Few courts have ruled that notice diverted to a spam folder qualifies as excusable neglect sufficient to support relief pursuant to Rule 60(b)(1). *See* Zitter, *supra*, at § 27. Courts have only granted relief in similar circumstances when counsel was completely unaware of computer problems, the delay caused by counsel's mistake was very slight, the case was in early stages of the proceeding, and there was no indication of bad faith by counsel. *See id.* For example, in *Fernandes v. Craine*, 538 F. App'x 274 (4th Cir. 2013), Plaintiff was entitled to move for attorney's fees within 14 days of judgment, but counsel did not learn until a day past the deadline because notice of the judgment was diverted into the "junk mail" folder of the email. There was nothing to suggest that counsel was aware of any computer problems or willful blindness, especially since the verdict was favorable to the plaintiff. *Id.* at 276. Absent evidence to the contrary, counsel's failure to file timely for attorney's fees was excusable neglect. *Id.* at 274.

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Counsel for Plaintiff in the case at issue realized the CM/ECF notification issue on April 13, 2020, and, despite his contentions, failed to present any evidence that he attempted to resolve the issue apart from sending one email to PACER. (*See* Ex. B, Doc. 49-6 at 2; *see also Adebamiji's Aff.*, Doc. 49-5 at 1.) Further, April 13 was six weeks after the *MSJ* was filed. Plaintiff, who admits to having "always used the Court's electronic filing through PACER" (*Adebamiji's Aff.* ¶ 3, Doc. 49-5 at 1), could have taken affirmative efforts to check the status of the case online since he was aware he was not receiving court notice and since he was fully aware of his technical difficulty in regards to receiving emails from the Court. The mistake affects the case in late stages of its proceeding, and the length of the delay and burden placed on Defendants caused by Counsel for Plaintiff's neglect and failure to inquire about the status of the case are not insignificant. Counsel had a "duty of diligence to inquire about the status of the case." *Trevino*, 944 F.3d at 571. The lack of corrective measures to ensure the email notification issue was resolved or to check the status of the pending case directly online suggest this duty was not met. In sum, the failure to realize the court's notifications were diverted into Counsel's spam folder and subsequent failure to respond to Defendant's *MSJ* or the Court's *Ruling* does not constitute excusable neglect under Rule 60(b)(1).

***6** Additionally, the Court does not have sufficient evidence to grant relief based on Rules 60(b)(4) or 60(b)(6). For the Court to grant relief to the plaintiff under Rule 60(b)(4), Plaintiff would need to put on evidence that due process was violated. However, Local Civil Rule 5(f) indicates that service was completed the moment the documents were filed or uploaded onto CM/ECF. Therefore, there was no violation of due process. Finally, the Court cannot grant the *Motion to Vacate* under Rule 60(b)(6) because "extraordinary circumstances" are not present to justify granting relief to the plaintiff. Since Plaintiff failed to prove both excusable neglect or good cause, "Plaintiff's counsel is not entitled to relief under Fed. R. Civ. P. Rule 60(b), or even Fed. R. Civ. P. 55." (Doc. 50 at 6.)

III. Conclusion

Accordingly,

IT IS ORDERED that the *Motion to Vacate Judgment* (Doc. 56) filed by Plaintiff Shawn Drewery, on behalf of Shaqualia Felder, is **DENIED.**

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United States Code Annotated
Federal Rules of Evidence (Refs & Annos)
Article V. Privileges

Federal Rules of Evidence Rule 502, 28 U.S.C.A.

Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver

Currentness

The following provisions apply, in the circumstances set out, to disclosure of a communication or information covered by the attorney-client privilege or work-product protection.

(a) Disclosure Made in a Federal Proceeding or to a Federal Office or Agency; Scope of a Waiver. When the disclosure is made in a federal proceeding or to a federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:

(1) the waiver is intentional;

(2) the disclosed and undisclosed communications or information concern the same subject matter; and

(3) they ought in fairness to be considered together.

(b) Inadvertent Disclosure. When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:

(1) the disclosure is inadvertent;

(2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

(c) Disclosure Made in a State Proceeding. When the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure:

(1) would not be a waiver under this rule if it had been made in a federal proceeding; or

(2) is not a waiver under the law of the state where the disclosure occurred.

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(d) Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court--in which event the disclosure is also not a waiver in any other federal or state proceeding.

(e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

(f) Controlling Effect of This Rule. Notwithstanding Rules 101 and 1101, this rule applies to state proceedings and to federal court-annexed and federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if state law provides the rule of decision.

(g) Definitions. In this rule:

(1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and

(2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

CREDIT(S)
(Pub.L. 110-322, § 1(a), Sept. 19, 2008, 122 Stat. 3537; Apr. 26, 2011, eff. Dec. 1, 2011.)

Fed. Rules Evid. Rule 502, 28 U.S.C.A., FRE Rule 502
Including Amendments Received Through 9-1-22

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