The State of New Hampshire

MERRIMACK, SS **SUPERIOR COURT**

W. Anthony Mason

v.

OSR Open Systems, Inc., Daniel D. Root and Peter J. Viscarola

No. 218-CR-2016-CV-1294

ORDER

Plaintiff W. Anthony Mason ("Mason") has brought an action against OSR Open System Resources, Inc. ("OSR"), Daniel D. Root ("Root") and Peter G. Viscarola ("Viscarola") alleging that he was been an owner-employee of OSR for 22 years of the Company's 23 years of existence, and that he was wrongfully terminated by the Defendants.[1] Discovery has begun, and both parties believe that much of the discovery will be produced as electronically stored information ("ESI"). Plaintiff has filed a Motion requiring production of all ESI in Native Format[2]. Defendants have objected, and moved for a protective order under Superior Court Rule 29 (a), alleging that production in Native

[1] The Complaint contains 6 Counts. Count I is a contract claim, alleging breach of the employment agreement against OSR. Count II is a wage claim, alleging failure to pay wages due against all Defendants. Count III is a breach of contract claim for severance benefits against OSR. Count IV is a claim for unjust enrichment against OSR. Count V is a claim of breach of fiduciary duty against the other 2 shareholders, Viscarola and Root, alleging that Mason was a minority shareholder and that the other 2 shareholders, as majority shareholders, owed him fiduciary duties which they breached. Count VI seeks declaratory judgment that certain restrictive covenants running in favor of OSR are invalid.

[2] "Native Format" documents have an associated file structure defined by the original creating application. The file structure is referred to as the native format of the document. See the Sedona Conference Glossary:

Format is unduly burdensome and seeking that they be permitted to produce all electronic discovery in TIFF[3] or TIFF+[4] format. The Court held evidentiary hearings at which experts for both parties testified as to the need for a Native Format production and whether such a production is unduly burdensome. After considering the evidence and briefing, the Court orders that the Defendants shall produce all ESI in TIFF+ format, and need not produce the ESI requested in Native Format.

I

The principles governing production of ESI are set forth in Superior Court Rule 25. Under the Rule, parties have a duty to meet and confer about preservation of ESI promptly after litigation begins. Superior Court Rule 25 (a). A request for ESI must describe with reasonable particularity each item or category of items to be produced, and state the format in which the production is to be made. Superior Court Rule 25 (e). Requests for ESI must be made in proportion to the significance of the issues in dispute. Superior Court Rule 25(c) provides that if the request for ESI is considered to be out of proportion to the issues in the dispute, at the request of the responding party, the court may determine the responsibility for the reasonable cost of producing such ESI. The Comments to the Rule note that it is similar to Federal Rule of Civil Procedure 34.

The Defendants believe they should produce the ESI requested in a TIFF+ format. They assert that production in Native Format will require twice the expense of a TIFF+ production, because of the necessity of reviewing metadata for privileged documents.

E-discovery & Digital Information Management, 15 Sedona Conf. J. 305, 341 (2014).

[3] TIFF is an abbreviation for "Tagged Image File Format").

[4] TIFF+ files consist of images folder containing Bates stamped TIFF images, a "TEXT" folder containing full body text files for each document and two separate "load files". One "load file" is referred to as an .opt file, which is a pointer to the "IMAGES" folder and the other is a "dat. file" which includes the data that corresponds to each image.

Defendants also argue that production of documents in Native Format could result in manipulation, because the documents are "live documents" and therefore subject to modification.

Plaintiffs insist that Native Format is the usual manner of production, and that their review of ESI will be limited unless such a production is made. They deny that production in Native Format will result in an increased expense to Defendants, and that the issue of document modification is not an issue, because they propose that the Defendants make a separate TIFF production, which cannot be altered. The law concerning production of ESI is growing rapidly throughout the United States, and is still relatively undeveloped in this State. Because there is little State law governing production of ESI, the parties cite federal cases and texts extensively. Both sides refer to federal law and to the Sedona Principles, Best Practices Recommendations and Principles for Electronic Document Production, (2nd ed. 2007) (Public Comment Version March, 2017) (Hereafter "Sedona Principles 2nd or 3rdEdition") to support their positions.

A

Plaintiff first argues that Rule 25(e), like Federal Rule of Civil Procedure 34 (b) (1) (C) allows a plaintiff to specify the format in which production should be made. Morgan Hill Concerned Parents Association v. California Department of Education, 2017 U. S. Dist. LEXIS 14983 (E.D. Cal. Feb. 1, 2017) *9. But the fact that a requesting party may specify the format does not mean that the producing party must necessarily comply with the format request. Rule 25(f) specifically provides that a party may object to a request for ESI. As Defendants note, there is ample authority for the proposition that a court will deny

a Native Production request if a party shows that the production would be unduly burdensome. See, e.g.In re Porsche Cars of N. Am., Inc. Plastic Tubes Product Liability Litigation, 279 F.R.D. 447, 449-450 (S.D.Ohio 2012). Thus, the Court must consider the merits of the parties' positions.

B

Defendants' principal concern is that production in Native Format in this case will lead to disclosure of metadata. An electronic document or file usually includes not only the visible information but also hidden text, formatting codes, formulaic and other information associated with the file. These types of ancillary information are all called metadata; but there are important distinctions between different types of metadata. *Application metadata* is created as a function of the application software used to create the document or file. Common application metadata instructs the computer how to display the document (for example, the proper fonts, spacing, size and color). Other application metadata may reflect modifications in the document, such as prior edits or editorial comments. This information is embedded in the file it describes and moves with the file when it is moved or copied. Sedona Principles (2nd ed. 2007) p. 185.

System metadata reflects information related by the user or by the organization's information management system. Such information may track the title of the document, the user identification of the computer that created it, the assigned data owner and other document profile information. System metadata is generally not embedded within the file it describes, but stored externally elsewhere on the organizations information management system. Metadata is discoverable. Sedona Principles (2nd ed. 2007) p. 185-186. Because metadata can show changes made to a document during its drafting, as well

as comments made by various reviewers of the document, its disclosure can therefore lead to disclosure of attorney-client privileged documents. New Hampshire Bar Association Ethics Committee Advisory Opinion #2008-2009/4, *Disclosure Review and Use of Metadata in Electronic Materials*.

Defendants do not claim that metadata is beyond the pale of discovery. But according to Defendants, the cost of production would be doubled if they are required to produce in Native Format, because they would need to review the metadata embedded in the files produced for privilege.

C

Defendants challenge the proposition that review of the metadata in a Native Production format would be necessary for two reasons. First, they argue that the fact that the bulk of the ESI production is email makes the issue of analysis for privilege straightforward. According to Plaintiff, a privileged document will reflect the fact that the document was sent to or received from an attorney. However, Defendants point out that whether the document may not have been sent to or from an attorney is not the end of the issue, because the document may contain attachments which have been reviewed or commented on by an attorney. Moreover, there are metadata files which could be privileged but whose existence cannot be determined from the face of the document. As pointed out in Defendants' Response to Plaintiff's Post Hearing Motion, reviewing metadata allows someone to see that a custodian stored certain emails (which may not otherwise be privileged) in a sub folder in Microsoft Outlook entitled, for example, "for counsel review". This could be an email that was sent or received long before the "for counsel review" subfolder was created, and therefore limiting a Native Production to a

certain time frame would not eliminate the burden of reviewing the metadata produced.

Plaintiff also argues that there is relatively little privileged information which would need to be reviewed, because he was in OSR's control group until he was fired, only one year before litigation began, and therefore would have access to privileged information. The New Hampshire Supreme Court has never considered the issue of whether or not former employees who once had access to privileged information are entitled to it in subsequent litigation; however, "an evolving line of cases holds that they do not". E. Epstein, The Attorney-Client Privilege and the Work Product Doctrine, (5th Ed. ABA 2007) p. 174; see also 2012 Supp. pp. 49-52. The privilege is that of the corporation and the majority of courts hold that "the fact that a former employee had access to such privileged communications and actually saw the very disputed documents in the course of employment will not function as a waiver sufficient to give access to the privileged communications in the course of litigation". E. Epstein, The Attorney-Client Privilege and the Work Product Doctrine, (5th Ed. ABA 2007) p. 174. As the court noted in Dexia Credit Local v. Rogan, 231 F.R.D. 268, 277 (N. D. Illinois 2004) "thus, once Mr. Rogan's control group status terminated so did his right of access to privileged documents of the corporation… People may come and go within a control group, but a corporation as a litigant has a legitimate expectation that a person who leaves the control group were no longer be privy to privileged information". See also Gilday v. Kenra, 2010 U.S.Dist. LEXIS 106310 at *7 (S.D. Ind. Oct. 4, 2010); Genova v. Long Peaks Emergency Physicians, 72 P.3d 454, 462-463 (Colo. App. 2003). The LLC is the holder of the privilege, not the individual members of the LLC; therefore, the fact that Mason was once a member of the control group of the LLC does not mean that the LLC is not entitled to assert its separate

attorney-client privilege. Montgomery v. eTreppid Techs, LLC, 548 F.Supp. 1175, 1184-86 (D.Nev. 2008). The Court must therefore consider whether production is appropriate applying the standards of Superior Court Rule 25.

II

Plaintiff's principal argument is that his counsel will not be able to use the features on their discovery software unless the production is made in Native Format. He makes no claim that it is necessary to review metadata because of the potential for discovery abuse by Defendants. Compare John B. v. Goetz, 879 F.Supp.2d 787 (M.D.Tenn. 2010).

Mason's counsel, Sheehan Phinney, Bass & Green ("Sheehan") uses a ESI discovery program called Relativity which is produced by company called kCura. Sheehan's Manager of Electronic Discovery Services, Charles Stewart ("Stewart") has been certified as a Relativity Administrator by kCura. in his affidavit in support of Mason's Motion for an Order Requiring Production of Electronically Stored Information in Native Format (hereafter "Motion to Produce"), Stewart described three important features which are contained in Relativity:

1. De-duplication: ESI productions usually contain duplicate documents such as an email sent to multiple persons. If an email sent to multiple persons is selected from each person's mailbox, the production will contain several copies of the same email. Relativity identifies duplicates and marks them appropriately so the reviewing attorneys need only review the duplicated email once.
2. Email threading: Relativity identifies all emails in a chain and that allows the program to show only those emails with unique content-typically, the last email of each branch of the chain of emails that might have been split off from a main

thread or which may contain unique attachments. The software also identifies what it calls "duplicate spares" within email thread which are essentially emails with duplicate content found elsewhere.

3. Analytics: Relativity contains analytic tools which allow reviewing attorneys to recognize patterns in the ESI, identify related documents, conceptually search documents and prioritize the most important documents for review.

Pltf.'s Mot.to Prod., Ex.2, Stewart Aff., ¶ 11.

Stewart stated unequivocally in his Affidavit of February 27, 2017, filed in support of Mason's Motion to Produce that "Relativity cannot and does not use TIFF files for de-duplication, e-mail threading, or analytics". Pltf.'s Mot.to Prod., Ex.2, Stewart Aff., ¶ 12.

Defendants objected to the Motion to Produce and filed a Combined Memorandum in support of their Motion for Protective Order and Objection to Plaintiff's motion for Order Requiring Production of Electronically Stored Information in Native Format (hereafter "Memorandum in Support of Protective Order"). Appended to their Memorandum in Support of Protective Order, Defendants appended an affidavit of Brandon M. Mack, Esq. ("Mack"). Mack is a licensed attorney employed by Epiq Systems, and is the Director of Analytics and Advanced Technologies which he described in his affidavit as a global legal services provider with a primary business focus on e- discovery services. Mack's Affidavit recited that Epiq offers kCura's Relativity program as a hosted data management and review solution for its clients. He stated that he is a Relatively Certified Administrator, a Relativity Certified Expert and a certified Relativity Expert Analyst. He stated in his affidavit that the format proposed by Defendants, TIFF+ would allow for full functionality of Relativity's de-duplication, email threading and analytics

functions. Mack Aff. ¶14-15.

Because of the factual dispute,the Court held a hearing on the Motions on April 3, 2017, and Mack testified at that hearing in accordance with his affidavit. In addition, he testified that, contrary to Plaintiff's representations, Native Format production is not the industry standard, and that in his experience only about 5 % of ESI productions are in Native Format. His testimony was consistent with Sedona Principles (3rd ed. 2017) which notes that the most common way to produce ESI for more than a decade has been create a static electronic image in TIFF or PDF[5] file format. Sedona Principles (3rd ed. 2017) Comment 12. b., p. 89.

Following the evidentiary hearing on April 3, 2017, Mason filed a pleading captioned Plaintiff's Post Hearing Memorandum in Support of his Motion for Order Requiring Production of Electronically Stored Information in Native Format and his Objection to Defendants' Motion for Protective Order (hereafter "Post-Hearing Memo") with a supporting of Affidavit of Charles Stewart (hereafter "Second Affidavit of Stewart). Stewart's Affidavit stated that in 3 recent cases involving New Hampshire law firms, the parties produced ESI in native format. While the Court credits the testimony, it is not persuasive; it is simply a good example of the logical fallacy inherent in small sample inductive reasoning[6].

Stewart also stated in his Second Affidavit that after receiving the Defendant's Memorandum he conducted in additional investigations of the claims made by Defendants and their supporting affidavits by, among other things, consulting with kCura, the

[5] PDF stands for Adobe "Portable Document File".
[6] The testimony is not much different than saying "I saw 3 automobiles; they were all black; therefore all automobiles are black".

company that created and markets Relativity. His Second Affidavit stated, in relevant part, that after consulting with kCura, he agreed that Relativity's de-duplication, and analytical features will work with files produced in the TIFF format proffered by Defendant's counsel. Second Affidavit of Stewart, ¶ 3. However, he opined that Native Format files are preferable because using them allows use of a feature of Relativity called Viewer Mode. He also stated that 2 other key features of Relativity, keywords searching and persistent highlighting, features which automatically highlight words and phrases within a document, are were available in plain text mode in a TIFF production, which makes the features less efficient. Second Affidavit of Stewart, ¶ 3. He also claimed that email threading will not function in certain circumstances, primarily involving whether relevant header fields are displayed in the TIFF image. Second Affidavit of Stewart, ¶ 3 (i) (ii). The Court scheduled a further evidentiary hearing, which was held on May 18, 2017.

Stewart testified in accordance with his Second Affidavit. Plaintiff introduced several exhibits which purported to show that email threading did not function on documents produced in TIFF format by Defendants[7]. However, Mack testified credibly that email threading should work on Relativity unless there are differing versions of the email, one of which is redacted or if the file is loaded improperly. The Court is not persuaded by the few documents produced at the evidentiary hearing that Plaintiff will not be able to utilize Relativity's email threading features; it is another example of the fallacy of small sample inductive reasoning.

The Court does credit Stewart's testimony that Viewer Mode will not work unless there is a Native Production. However, the Court also credits Mack's testimony that

[7] It appears that the parties, working cooperatively agreed to exchange documents in TIFF format in

Viewer Mode is most commonly used by users of Relativity for reviewing their own ESI. Moreover, it appears that while persistent highlighting and keyword searching may not be as easy to use in a TIFF production as in a Native Format production, they are still available to Plaintiff.

III

The Court must balance the interests of the parties in this case. It is true that Defendant's concern that documents produced in Native Format could be altered would not present a significant concern if the Court accepted Plaintiff's proposal. The protocol suggested by the Plaintiff calls for production of Native Format files with simultaneous production of TIFF files, with Bates numbers appended, to be used for depositions, hearings, pleadings and trial. But Superior Court Rule 25(h) specifically provides that a party is not required to produce ESI in more than one format. Therefore, at a minimum, a Native Format production will require the expense of preparation of files with Bates numbering for use at depositions, hearings and trial.

A more significant issue is whether or not Native Format production is necessary in order for the litigation to proceed efficiently. The Court is guided by the Sedona Principles 2nd and 3rd Editions. Principle 12 of both the 2007 and 2017 Editions provide essentially that production of ESI should be made in the form or forms in which it is ordinarily maintained or that is reasonably usable given the nature of the ESI and the proportional needs of the case. But to be "reasonably usable", ESI need not necessarily be produced in Native Format. Sedona Principles, (3rd ed. 2017), Comment 12. b. i. p. 90. In considering how production should be made, a court should consider:

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advance of an upcoming scheduled mediation.

> (a)the forms most likely to produce the information needed to establish the relevant facts related to the parties claims and defenses; (b) the need to receive ESI in particular formats in order to functionally access, cull, analyze, search and display the information produced; (c) whether the information sought is reasonably accessible in the forms requested; (d) the relative value, and potential challenges created by responding with ESI requested format; and (e) the requesting party's own ability to effectively manage, reasonably use and protect the information in the forms requested.

Sedona Principles, Comment 12.b. (3rd Ed., 2017) p. 89.

Production in either Native Format or TIFF+ will produce the information needed to establish the relevant facts. Plaintiff is not entitled to privileged information; the issue here is whether or not ESI in a TIFF+ format will allow Plaintiff to "functionally access, cull, analyze search and display the information produced". Sedona Principles, Comment 12.b. (3rd Ed., 2017) p. 89. The Court finds that the critical features of Relativity, de-duplication, email threading and analytics can be used if Defendants produce in TIFF+ format. "Typically, a requesting party does not need ESI produced in Native Format in order to access, cull, analyze, search and display the ESI". Sedona Principles, (3rd Ed. 2017), Comment 12. b., p. 89.

It is true that the Viewer Mode will not be available to Plaintiff. But as Mack credibly testified, Viewer Mode is generally utilized by Relativity users to analyze their own ESI. The information sought is therefore reasonably accessible to the Plaintiff. While Native Format may be an advantage to Plaintiffs, it will result in extraordinary expense to Defendants, literally doubling the cost of production. In this case, requiring production of files in Native Format "may cause difficulties in reviewing the material for responsiveness and for privilege before production. In addition, producing information in native format presents challenges regarding making a record of what was produced "and may make the electronic data manipulable in ways that could raise issues of authenticity". Wright &

Miller 8B Fed. Prac. & Proc., § 2219 (2010).

Plaintiffs have not explained why the relative value to them of the ESI production in Native Format outweighs the cost to the Defendants. The Court notes that under Rule 25(c) the Court has authority to shift the cost of production, but Plaintiffs have not briefed the issue of whether or not, in exchange for obtaining Native Format documents, the Court should require cost shifting. Compare Convad Communications Co. v. Revnet, 254 F.R.D. 147 (D.D.C. 2008). On this record, the Plaintiff's Motion to Produce must be DENIED and Defendants' Motion for Protective Order must be GRANTED. Defendants shall produce all responsive documents in TIFF+ format.

SO ORDERED

5/24/17
DATE

s/Richard B. McNamara
Richard B. McNamara,
Presiding Justice

RBM/