

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
FT. PIERCE DIVISION

CASE NO. 2:14-14337-CIV-ROSENBERG/LYNCH

HEALTH MANAGEMENT ASSOCIATES, INC.  
d/b/a HEALTH MANAGEMENT ASSOCIATES, INC.  
OF DELAWARE, a foreign corporation,

Plaintiff,

v.

STEVEN SALYER, JEFFREY L. SUSI, AND  
INDIAN RIVER MEMORIAL HOSPITAL, INC. d/b/a  
INDIAN RIVER MEDICAL CENTER

Defendants.

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**PLAINTIFF'S MOTION TO COMPEL FORENSIC EXAMINATION OF DEFENDANT  
STEVEN SALYER'S PERSONAL DEVICES AND EMAIL ACCOUNT**

Plaintiff, Health Management Associates, Inc. d/b/a Health Management Associates, Inc. of Delaware ("Plaintiff" or "HMA"), through counsel and pursuant to Federal Rule of Civil Procedure 37(a) and Local Rule 26.1(i), hereby files its Motion to Compel Forensic Examination of Defendant Steven Salyer's Personal Devices and Email Account for imaging, copying and inspection (the "Motion"). Specifically, Plaintiff requests that this Court enter an order appointing a computer forensic expert to image, copy and inspect Defendant Steven Salyer's ("Salyer") personal laptop computers, mobile phone, thumb drive and Yahoo email account. As grounds for this Motion, Plaintiff submits the following memorandum of law.

**MEMORANDUM OF LAW**

**I. Background Facts**

On February 24, 2015, Plaintiff filed its Amended Complaint in this matter. [D.E. 16].

The Amended Complaint alleges that Salyer breached his restrictive covenants with Plaintiff by: (a) accepting employment with Plaintiff's competitor within the proscribed radius; (b) soliciting Plaintiff's employees and doctors on behalf of Plaintiff's competitor, Indian River Memorial Hospital, Inc. d/b/a Indian River Medical Center ("IRMC"); and (c) retaining, disclosing and utilizing Plaintiff's confidential information in the course of his employment with IRMC. Other than admitting that he is employed with IRMC, Salyer denied that he breached his restrictive covenants with Plaintiff. [D.E. 24, Salyer's Answer and Affirmative Defenses to Amended Complaint].

In discovery, Plaintiff served Salyer with a First Request for Production of Documents and First Set of Interrogatories. Plaintiff's discovery requested documents and answers that, if answered accurately, would have shown Salyer's solicitations of its employees and sharing of Plaintiff's information with IRMC. Specifically, Plaintiff submitted to Salyer the following document requests that are pertinent to this Motion and Salyer submitted the following responses:

12. Produce all documents that relate to or constitute any communication between you and any IRMC Representative regarding the identity, contact information, value or performance of any HMA or SRMC Representative.

**RESPONSE:**

Based on the definition provided for the term "Representative" and the inclusion of "HMA" in the question), objection, vague, ambiguous, overly broad unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence and presupposes matters not in evidence. Plaintiff defines Representative as:

"...any and all of its past or present officer, directors, employees, agents, physicians, referral sources, recruiter, investigators, attorneys and/or independent contractors."

I was the CEO of SRMC, not HMA. HMA is a hospital chain with approximately 75 or so hospitals, of which SRMC was only one. Without waiving any objection, as it relates to the substance of

any of the allegations of the Amended Complaint, none.

13. Produce all documents which relate to or constitute evidence of you directly or indirectly soliciting or assisting in the solicitation of any HMA or SRMC Representative for the benefit of IRMC.

**RESPONSE:**

Based on the definition provided for the term “Representative” and the inclusion of “HMA” in the question), objection, vague, ambiguous, overly broad unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence and presupposes matters not in evidence. Plaintiff defines Representative as:

“...any and all of its past or present officer, directors, employees, agents, physicians, referral sources, recruiter, investigators, attorneys and/or independent contractors.”

I was the CEO of SRMC, not HMA. HMA is a hospital chain with approximately 75 or so hospitals, of which SRMC was only one. Without waiving any objection, as it relates to the substance of any of the allegations of the Amended Complaint, none.

16. Produce all documents which relate to or constitute any communication between you and any IRMC Representative regarding the solicitation of HMA or SRMC Representatives.

**RESPONSE:**

Objection, vague, ambiguous, overly broad unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence (including but not limited to based on the definition provided for the term “Representative” and the inclusion of “HMA” in the question), and presupposes matters not in evidence. Plaintiff defines Representative as:

“...any and all of its past or present officer, directors, employees, agents, physicians, referral sources, recruiter, investigators, attorneys and/or independent contractors.”

I was the CEO of SRMC, not HMA. HMA is a hospital chain with approximately 75 or so hospitals, of which SRMC was only one. The question fails to indicate whether it is directed to supposed solicitation by Defendant Salyer or solicitation by any IRMC

Representative directed to the incredibly overbroad reference to “HMA or SRMC Representatives.”

22. Produce all documents that you retained following your separation from HMA or SRMC that relate to or were obtained through your employment with HMA or SRMC.

**RESPONSE:**

Defendant Salyer had a thumb drive that he used since the Marine Corps that contained various miscellaneous files, pictures, evaluations, speeches, awards, college classes, MBA classes, and etc. Defendant Salyer has disclosed no confidential information to anyone regarding any files that were on the thumb drive. Defendant Salyer lost the thumb drive shortly after leaving SRMC and he has not recovered the drive. The cell phone Defendant Salyer had at SRMC is no longer in service. Defendant Salyer dropped the phone in the Sebastian River shortly leaving SRMC and lost all information. Defendant Salyer used his insurance policy to have a new phone shipped and replaced last year.

Salyer’s response to Plaintiff’s first request for production of documents is attached hereto as **Exhibit A**.

Plaintiff also submitted to Salyer the following interrogatories that are pertinent to this motion and Salyer submitted the following responses:

8. Identify every Representative of HMA or SRMC who you:
  - (a) identified to any IRMC Representative as a potential favorable relationship with, referral source for or candidate for employment with IRMC,
  - (b) personally solicited to work with or for IRMC,
  - (c) personally solicited to discuss a potential relationship with IRMC, or
  - (d) directly or indirectly assisted IRMC in soliciting to work with IRMC, for IRMC or to discuss a potential relationship with IRMC.

**ANSWER:**

**As to 8 (a-d), none.**

9. For each individual identified in Interrogatory Number 8 above, describe in detail the following:

- (a) The nature and extent of your involvement in any such identification, solicitation and/or assistance,
- (b) The dates of any such identification, solicitation and/or assistance, and
- (c) The identity of all IRMC Representatives involved in or aware of any such identification, solicitation and/or assistance.

**ANSWER:**

**See Response to 8, N/A.**

10. Identify any IRMC Representative who solicited any Representative of HMA or SRMC for employment, referrals, or a business relationship since the date you applied for employment with IRMC.

**ANSWER:**

**Based on the definition provided for the term “Representative” and the inclusion of “HMA” in the question), objection, vague, ambiguous, overly broad unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence and presupposes matters not in evidence. Plaintiff defines Representative as:**

**“...any and all of its past or present officer, directors, employees, agents, physicians, referral sources, recruiter, investigators, attorneys and/or independent contractors.”**

**I was the CEO of SRMC, not HMA. HMA is a hospital chain with approximately 75 or so hospitals, of which SRMC was only one. Without waiving any objection, if there was any solicitation of any Representative of HMA or SRMC, I was not involved directly or indirectly. I do not recall any such solicitations and am unable to identify IRMC Representatives.**

16. Identify all documents that you retained following your separation from HMA or SRMC that relate to or were obtained through your employment with HMA or SRMC. For each, identify where the documents were kept since your separation from HMA or SRMC.

**ANSWER:**

I had a thumb drive that I used since the Marine Corps that contained various miscellaneous files, pictures, evaluations, speeches, awards, college classes, MBA classes, and etc. I've disclosed no confidential information to anyone regarding any files that were on the thumb drive. I lost the thumb drive shortly after leaving SRMC and have not recovered the drive. The cell phone I had at SRMC is no longer in service. I dropped the phone in the Sebastian River shortly leaving SRMC and lost all my information. I used my insurance policy to have a new phone shipped and replaced last year.

Salyer's answers to Plaintiff's first set of interrogatories are attached hereto as **Exhibit B**.<sup>1</sup>

Salyer has never amended his interrogatory answers.

Salyer produced no documents or information in response to these discovery requests that showed either his solicitation of Plaintiff's employees or his disclosure of Plaintiff's information to IRMC. Salyer essentially claimed that he had no responsive documents, was not directly or indirectly involved in soliciting Plaintiff's employees and did not retain or disclose any of Plaintiff's information after resigning from Plaintiff's employ.

Plaintiff also served a request for production of documents upon IRMC. On July 7, 2015, Plaintiff deposed Salyer. In the two to three days leading up to Salyer's deposition, IRMC produced documents and emails in response to Plaintiff's request for production of documents. The documents that IRMC produced show that Salyer not only disclosed to IRMC via email Plaintiff's confidential information, but that Salyer was actively involved, both directly and indirectly, in attempting to recruit several of Plaintiff's employees to IRMC. (Depo. of Salyer, p. 61, l. 23-25; pp. 62-63, p. 64, l. 1-3; 65, l. 2-25; p. 66, l. 1-25; p. 67, l. 1-25; p. 68, l. 1-12; p. 75, l. 22-25; pp. 76-82; p. 83, 1-3; p. 147, l. 11-25; pp. 148-151; p. 152, l. 1-10; Exhibits 9, 10, and 26

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<sup>1</sup> Although Salyer's answers to Plaintiff's first set of interrogatories are unverified, Salyer verified the accuracy of his interrogatory answers at his deposition and Salyer's counsel represented that he has Salyer's verified interrogatory answers at his office.

thereto).<sup>2</sup> Several of the emails appear to have originated from Salyer's personal Yahoo email account, none of which Salyer produced prior to his deposition. Indeed, Salyer's responses to the relevant document requests reflect that he has "[n]one" in his possession. Salyer's interrogatory answers likewise deny any solicitation either directly or indirectly of Plaintiff's employees or retention or disclosure of Plaintiff's information.

Prior to IRMC's document production, Salyer consistently denied in his Initial Disclosures, Answer and Affirmative Defenses, and Interrogatory Answers that he ever disclosed to IRMC Plaintiff's confidential information or solicited Plaintiff's employees to join IRMC. Only after IRMC produced documents showing that Salyer disclosed Plaintiff's information to IRMC did Salyer admit for the first time that he retained, disclosed and used Plaintiff's information in the course of his employment with IRMC. (Depo. p. 71, l. 5-25; p. 72-75). Salyer, however, claims not to know whether he provided this information from his Yahoo or IRMC email account (Depo. p. 73, l. 2-7), nor does he know whether the information he provided to IRMC regarding Plaintiff was on his lost thumb drive, lost cell phone or elsewhere. (Depo. p. 75, l. 10-17).

Salyer has admitted to losing multiple electronic storage devices after leaving Plaintiff's employ. For instance, Salyer lost a thumb drive that contained information pertaining to his employment with Plaintiff. (Depo. of Salyer, p. 69, l. 5-22). Salyer also purportedly dropped his cell phone in the Sebastian River shortly after leaving Plaintiff's employ. (Depo. of Salyer, p. 70, l. 14-24 and Exhibit 31 to Salyer's deposition; see also **Exhibit A** hereto, Salyer's Answer to Plaintiff's Interrogatory No. 16). In addition to losing these two items, Salyer (or his wife) threw

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<sup>2</sup> Attached hereto as **Composite Exhibit C** are the pages and exhibits from Salyer's deposition that are referenced in this Motion. Because the testimony and exhibits contain confidential information, Plaintiff provides them in redacted form.

out a laptop that allegedly stopped working and then purchased a new laptop.<sup>3</sup> (Depo. p. 185, l. 18-25; p. 186, l. 1-9).

Thus, since leaving Plaintiff's employ, Salyer testified to losing three devices - his thumb drive, mobile phone and laptop computer (which laptop Salyer has now located). Importantly, Salyer could not recall which device contained Plaintiff's information that he provided to IRMC. (Depo. p. 75, l. 10-17). Salyer now has a new lap top, new mobile phone and new thumb drive. Salyer also still has his Yahoo email account and stated that he rarely deletes emails from this account. (Depo. p. 33, l. 10-22). Salyer, however, as of the date of his deposition, had not searched his personal Yahoo email account for relevant emails. (Depo. of Salyer, p. 89, l. 5-19). As discussed above, Salyer did not produce any of the emails that IRMC produced in discovery, despite the fact that many of these emails were sent or received from his Yahoo email account. Indeed, at least one email reflects that Salyer emailed information from his email account with Plaintiff to his personal Yahoo email account to Rick Van Lith of IRMC. (Depo. of Salyer, p. 160, l. 13-25; p. 161, l. 1-20, Exhibit 28 thereto).

In addition to losing and/or disposing of his personal devices, Salyer refused in written discovery to produce his phone records, including his phone numbers, the phone numbers with which he had communications or even the identity of his service provider(s). Salyer also refused at his deposition (pursuant to his counsel's instruction) to answer questions regarding the identity of his mobile phone numbers and service providers. (Depo. p. 176, l. 25, p. 177, l. 1-25; p. 178, l. 1-10). Just a few days after the deposition, by order dated July 10, 2015, the Court compelled Salyer to produce this information. [D.E. 57].

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<sup>3</sup> As discussed below, following Salyer's deposition, Salyer was suddenly able to locate the old laptop computer.

Following Salyer's deposition and given what Plaintiff learned during the deposition, Plaintiff requested that Salyer make available for copying and inspection his Yahoo account and current personal devices (*i.e.* his mobile phone, laptop, and thumb drive). **Composite Exhibit D** hereto contains various emails showing some of the conferral communications between counsel on these issues. Almost immediately after Plaintiff made this request, Salyer advised that his old laptop would not start. Composite Exhibit D. When Plaintiff reiterated its request to copy and inspect Salyer's email account and devices, Salyer then claimed he was able to start the old laptop, but that there was nothing relevant on it. Composite Exhibit D.

Salyer has now advised that he will agree to produce only the old laptop for copying and inspection, but only if the parties agree upon protocols for same. Salyer has refused to produce his Yahoo email account, thumb drive, mobile phone or new laptop for copying and inspection. Salyer also now claims to have searched the entirety of his Yahoo email account for responsive documents and produced a paltry 58 pages of documents, most of which are the same as documents IRMC or non-party Waverly Partners produced in discovery. It appears Salyer used the documents produced in discovery as a road map of which responsive documents to produce to Plaintiff. However, the documents Salyer produced from his Yahoo email account do not include the emails Salyer sent to IRMC containing Plaintiff's information and, based upon Salyer's discovery efforts to date as well as his multiple lost devices, Plaintiff has no confidence that Salyer conducted an exhaustive, fair search of his Yahoo email account or current devices for responsive documents.

## **II. Legal Argument**

### **A. Electronically Stored Information Is Discoverable and the Producing Party Must Search Available Systems for Responsive Information**

It is well settled that electronically stored information ("ESI") is discoverable under the Federal Rule of Civil Procedure 34(a). *Devries v. Morgan Stanley & Co. LLC*, No. 12-81223-

CIV, 2015 WL 1623928, at \*1 (S.D. Fla. Apr. 7, 2015); *Wynmoor Cmty. Council, Inc. v. QBE Ins. Corp.*, 280 F.R.D. 681, 685 (S.D. Fla. 2012). During discovery, the producing party has an obligation to search available electronic systems for such discoverable, responsive information. *Wynmoor*, 280 F.R.D. at 685. The same obligation extends to deleted computer files—emails or otherwise. *Id.* (“Deleted computer files, whether e-mails or otherwise, are likewise discoverable.”); *Bank of Mongolia v. M & P Global Fin. Servs., Inc.*, 258 F.R.D. 514, 519 (S.D. Fla. 2009) (stating same); *Wells v. Xpedx*, No. 8:05-CV-2193TEAJ, 2007 WL 1200955, at \*1 (M.D. Fla. Apr. 23, 2007) (“The producing party has the obligation to search available electronic systems for deleted emails and files”).

**i. Court May Compel Production of ESI Where the Likely Benefit to Requesting Party Outweighs the Burden or Expense to Responding Party**

If a party fails to answer a request for production, the party seeking the discovery may move for an order compelling a response under Federal Rule of Civil Procedure 37(a)(2). *Wynmoor*, 280 F.R.D. at 685. Motions to compel are within the sound discretion of the court. *Id.* (citing *Commercial Union Ins. Co. v. Westrope*, 730 F.2d 729, 731 (11th Cir.1984)). On a motion to compel the production of ESI, a responding party need not provide information from sources identified as not reasonably accessible because of undue burden or cost, but it does have the burden to make such showing. *Id.* Even if the responding party meets its heavy burden, the court may nonetheless order the production, given the needs of the case, importance of the issues at stake, the amount in controversy, or the importance of the proposed discovery in resolving issues. *Id.* In other words, in deciding whether to permit discovery of ESI, the court will consider whether the burden or expense of the proposed discovery outweighs the likely benefit. *U & I Corp. v. Advanced Med. Design, Inc.*, 251 F.R.D. 667, 674 (M.D. Fla. 2008).

**ii. Forensic Investigation Is Appropriate Where Responding Party Failed to Produce Responsive ESI and There Is a Sufficient Basis to Suggest that Responsive ESI Exists**

Compelling a forensic examination, or forensic imaging,<sup>4</sup> is appropriate in certain circumstances. *Klayman v. City Pages*, No. 5:13-CV-143-OC-22PRL, 2014 WL 5426515, at \*5 (M.D. Fla. Oct. 22, 2014). Before such examination is ordered, the court must weigh privacy concerns against the utility of an inspection. *Klayman*, 2014 WL 5426515, at \*5; *Bradfield v. Mid-Continent Cas. Co.*, No. 5:13-CV-222-OC-10PRL, 2014 WL 4626864, at \*4 (M.D. Fla. Sept. 15, 2014). Mere speculation that documents *may* exist is not a sufficient basis for the court to order an invasive search of the party’s personal devices—computers, telephone records, etc. *Klayman*, 2014 WL 5426515, at \*4. However, once the requesting party demonstrates the responding party’s failure to produce requested information, “the scales tip in favor of compelling forensic imaging.” *Wynmoor*, 280 F.R.D. at 687. Especially where there is evidence that the responding party has withheld information, is unable or unwilling to search for the requested information, and has otherwise dragged its feet with respect to discovery requests, a forensic examination is warranted. *See, e.g., Procaps S.A.*, 2014 WL 800468, at \*3 (stating that “a scenario which strongly suggests that some (and perhaps even a significant amount of) responsive discovery . . . has not yet been

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<sup>4</sup> Forensic investigation is a mechanism by which data may be retrieved from personal computers—even from failed computers. *Dorchester Fin. Holdings Corp. v. Banco BRJ S.A.*, 304 F.R.D. 178, 183 (S.D.N.Y. 2014). During a forensic investigation, a forensic image, also known as a “mirror image,” will “replicate bit for bit sector for sector, all allocated and unallocated space, including slack space, on a computer hard drive,” thereby retrieving all the information in the computer, including embedded, residual, or deleted data. *Wynmoor*, 280 F.R.D. at 686–87. The ability of computer specialists to recover such data has been widely known in the recent years. For that reason, courts routinely order forensic examination of computer hard drives, working or failed, during discovery. *See, e.g., Procaps S.A. v. Patheon Inc.*, No. 12-24356-CIV, 2014 WL 800468, at \*3 (S.D. Fla. Feb. 28, 2014) (ordering a comprehensive forensic search of electronically stored information and other sources of relevant documents where there existed a strong suggestion that some responsive documents had not been located); *Wynmoor*, 280 F.R.D. at 687 (compelling a forensic examination to determine if electronic files that a party described as “unrecoverable” could in fact be retrieved); *Preferred Care Partners Holding Corp. v. Humana, Inc.*, No. 08-20424-CIV-UNGARO, 2009 WL 982460, at \*17 (S.D. Fla. Apr. 9, 2009) (allowing a forensic examination of defendant’s electronic data backup system for the purpose of verifying that the backup system maintained complete copies of relevant emails); *U & I Corp.*, 251 F.R.D. at 676 (granting motion to compel a forensic inspection of hard drives).

located . . . mandates a comprehensive forensic search”); *Klayman*, 2014 WL 5426515, at \*5 (listing factors to consider in ordering a forensic investigation); *Wynmoor*, 280 F.R.D. at 687 (same).

In *Wynmoor*, the Southern District of Florida had before it Defendant’s Motion to Compel Production and Forensic Examination. *Id.* at 682. Defendant sought a forensic examination of plaintiffs’ computer files because plaintiffs had failed to produce a single piece of ESI. *Id.* at 683. In fact, plaintiffs had undertaken no effort to identify responsive ESI, despite an extension of time to respond to discovery. *Id.* at 682–83. Instead, plaintiffs claimed that the information had been unrecoverable or otherwise unavailable. *Id.* at 686. The court was unmoved. Because the court found, based on the pertinent testimony, that plaintiffs had been “either unwilling or unable” to conduct a search of their computer for potentially retrievable responsive documents, it compelled a forensic investigation. *Id.* at 687.

In *Bank of Mongolia v. M & P Global Fin. Servs., Inc.*, 258 F.R.D. 514 (S.D. Fla. 2009), a case that is factually similar to the instant case, the court dealt with a discovery dispute and an ensuing motion to compel production of documents. *Id.* at 516–18. Plaintiff was dissatisfied with defendants’ production and believed it was missing responsive documents. *Id.* at 517. Plaintiff’s believe was supported by the fact that plaintiff had received documents from *other entities* that should have been produced by defendants, but were not. *Id.* For example, the third-party entities provided documents reflecting transactions to which defendants were a party. *Id.* The court opined that “the identification by [p]laintiff of third-party documents that appear to be responsive to some of [p]laintiff’s document requests but were not produced to [p]laintiff by [d]efendants . . . support[ed] the possibility of the existence of additional responsive documents that [had] not been

produced.” *Id.* at 520. Consequently, the court ordered the review of defendants’ computer records. *Id.*

**iii. Salyer’s Actions Warrant a Forensic Examination**

Here, as discussed in the factual background, Salyer hid both documents and testimonial evidence of his solicitations and wrongful disclosure of Plaintiff’s information until IRMC produced documents demonstrating Salyer’s wrongful conduct in this regard. Salyer has also demonstrated that he is unwilling to comply with his discovery obligations. At the time of his deposition in July 2015, he had not even searched his own Yahoo email account for relevant, responsive documents. Salyer has also shown a remarkable, if not convenient, ability to lose devices. As of the date of his deposition, Salyer admitted to losing both a thumb drive and mobile phone, both of which contained Plaintiff’s information. Specifically, Salyer lost the thumb drive and ruined his mobile phone when he allegedly dropped it in the Sebastian River. Salyer also testified to throwing away an old laptop, only to find it several weeks after his deposition. Salyer has never been able to identify which device contained Plaintiff’s information that he shared with IRMC, nor can he identify the email account from which he sent this information. Salyer only searched his Yahoo email account for the first time after Plaintiff requested to copy and inspect all of his devices and accounts, following which Salyer produced only 58 pages of documents.

Put simply, Salyer’s refusal to produce responsive documents and failure to accurately answer Plaintiff’s interrogatories until confronted with the documents IRMC produced shows the lengths to which Salyer is willing to go to bury information detrimental to his case. Under such circumstances and consistent with the case law cited herein, the Court’s appointment of a computer forensic expert to copy and search Salyer’s devices and email account in accordance with the protocols set forth herein is appropriate. The protocols set forth herein will protect any privileged

materials that may exist on these devices and will cause minimal burden to Salyer. Additionally, since Plaintiff is bearing the initial cost of the imaging/copying and inspection, there is no cost to Salyer unless Plaintiff uncovers further improper conduct by Salyer. Plaintiff respectfully requests that this Court, using the protocols set forth below, order Salyer to make available for copying, inspection and search his Yahoo email account, thumb drive, old laptop computer, current laptop computer and mobile phone.

**B. Proposed Protocol to Follow During Forensic Investigation**

A court may specify conditions for the discovery of ESI. *See U & I Corp.*, 251 F.R.D. at 674. With respect to the use of a forensic investigation to retrieve computer files, the court may set a “protocol,” or a “procedure,” to follow during such potentially intrusive inquiry. *See Rivera v. Ore Seafood, Inc.*, No. 10-10053-CIV, 2010 WL 4676164, at \*2 (S.D. Fla. Nov. 9, 2010) (setting terms of a forensic review); *Bank of Mongolia*, 258 F.R.D. at 520–21 (setting forth procedure for an independent expert to review defendant’s computer records); *see also Antioch Co. v. Scrapbook Borders, Inc.*, 210 F.R.D. 645, 652–53 (D. Minn. 2002) (setting forth procedure for an independent expert to “mirror image” party’s hard drive to retrieve deleted files). Plaintiff requests that this Court adopt the “collection and review protocol” set forth in *Wynmoor*, which establishes the following protocols for forensic imaging:

1. The Court shall appoint an independent computer expert who shall mirror image or copy Salyer’s devices and email account and shall conduct his/her investigation, to the extent possible, in a manner that minimizes disruption to the operation of Salyer’s business or affairs.

2. The parties shall meet and confer regarding their designation of an independent computer expert. If the parties cannot agree, by the deadline set by the Court, each party shall submit its recommendation to the Court, which will then select the expert.

3. The appointed expert shall serve as an officer of the court. Thus, to the extent that the computer expert has direct or indirect access to information

protected by the attorney-client privilege, such disclosure will not result in any waiver of such privilege.

4. The independent expert shall sign a confidentiality order. Additionally, the expert shall be allowed to hire other outside support if necessary in order to mirror image or copy the devices or email account. Any outside support shall be required to sign the same confidentiality order.

5. The expert shall mirror image or copy Salyer's thumb drive, old laptop, new laptop, mobile phone and Yahoo email account.

6. Plaintiff shall provide a list of search terms to the Court to identify responsive documents by a set deadline. After Plaintiff has submitted the search terms to the Court, Salyer shall have 5 days to submit his objections to the Court regarding any of the search terms, which the Court will rule upon. The Court will provide the search terms to the independent expert.

7. Once the expert has mirror imaged or copied Salyer's devices and account, the expert shall search the mirror image or copies using the search terms. The results of the search terms and an electronic copy of all responsive documents shall be provided to Salyer and to the Court.

8. Salyer shall review the search term results provided by the independent expert and identify all responsive documents. Salyer shall either produce all responsive documents to Plaintiff or identify those responsive documents not produced on a privilege log to Plaintiff within 10 days of the date that Salyer receives the search term results from the independent expert. Any privilege log produced shall comply strictly with the Local Rules for the Southern District of Florida.

9. Plaintiff shall initially pay for all fees and costs of hiring the independent expert. However, if at a later time there is evidence of Salyer's improper deletion of electronic documents or any other associated improper conduct, the Court will revisit this issue and consider charging Salyer for the fees and costs of the independent expert or imposing the fees and costs on the parties in a duly appropriate apportioned manner.

10. The independent expert shall provide a signed affidavit detailing the steps he or she took in mirror imaging or copying Salyer's devices and account and searching the mirror image or copies for the search terms within 5 days of providing Salyer and the Court with the results of the search for search terms in the mirror image or copies.

280 F.R.D. at 687–88. Plaintiff respectfully requests that this Court, using the protocols set forth herein, order Salyer to make available for imaging, copying, inspection and searching his Yahoo email account, old laptop computer, current laptop computer, thumb drive and mobile phone.

### **III. Conclusion**

For the foregoing reasons, Plaintiff respectfully requests that this Court, using the protocols set forth herein, order Salyer to make available for imaging, copying, inspection and searching his Yahoo email account, old laptop computer, current laptop computer, thumb drive and his mobile phone.

#### **CERTIFICATE PURSUANT TO LOCAL RULE 7.1(A)(3)**

Pursuant to S.D. Fla. L.R. 7.1(a)(3), Plaintiff’s counsel has conferred with Salyer’s counsel regarding the relief requested herein. Salyer’s counsel is unwilling to make available for imaging, copying, inspection and searching Salyer’s Yahoo email account, new laptop computer, mobile phone or thumb drive. Salyer’s counsel may be willing to make available for copying and inspection Salyer’s old laptop, but only if the parties can agree on the protocols for same. If Plaintiff and Salyer can agree on the protocols for imaging and search of Salyer’s old laptop computer, the parties will notify the Court immediately.

Respectfully submitted,

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Attorneys for Plaintiff

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**CERTIFICATE OF SERVICE**

WE DO HEREBY CERTIFY that, on July 29, 2015, a true and correct copy of the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will automatically send notice of such filing to all counsel of record.

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