

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

CASE NO. 2:14-cv-14337 RLR

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.

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

Defendant Steven Salyer ("Salyer") hereby opposes Plaintiff's Motion To Compel Forensic Examination of Defendant Steven Salyer's Personal Devices and Email Account [D.E. 71] ("Plaintiff's Motion"), and states:

INTRODUCTION AND BACKGROUND

This Court should deny Plaintiff's Motion because Salyer has already produced all of the retrievable, responsive, non-privileged documents contained in his personal laptop computers, mobile phone, thumb drive and Yahoo email account. Notwithstanding Plaintiff's unfounded skepticism as to Salyer's credibility and tactical attempts to poison the proverbial well, Plaintiff has failed to show specific, concrete evidence that Salyer is not capable of, or not willing to, produce information on his personal devices and email account, and Plaintiff has failed to identify

specific information that has not already been produced. See *Calyon v. Mizuho Sec. USA Inc.*, 2007 WL 1468889, at *5 (S.D.N.Y. May 18, 2007); *Balfour Beatty Rail, Inc. v. Vaccarello*, 2007 WL 169628, at *3 (M.D. Fla. Jan. 18, 2007). There is no basis for Plaintiff to compel a forensic examination.

Steven Salyer is currently employed as Senior Vice President and Chief Operating Officer (“COO”) of co-Defendant, Indian River Memorial Hospital, Inc. d/b/a Indian River Medical Center (“IRMC”), where he works under co-Defendant, President/CEO, Jeffrey L. Susi (“Susi”).¹ IRMC is a public hospital not affiliated with a chain. HMA is the majority owner and controller of a private hospital, Sebastian Hospital, LLC d/b/a Sebastian River Medical Center (“SRMC”), located in Sebastian, Florida, where Steven Salyer was formerly employed as Chief Executive Officer (“CEO”).² HMA owns and controls approximately 75 hospitals across the United States. HMA is owned by Community Health Systems, Inc. (“CHS”), which acquired HMA by merger, completing the merger on January 27, 2014.³ CHS is a corporate megalith which owns or controls approximately 225 hospitals across the United States.

Salyer resigned from SRMC in mid-March 2014 for a few interrelated reasons:

1) Salyer’s father had recently passed away and his mother, who lived in Tennessee, was battling Leukemia. Salyer believed he could not continue to perform the around-the-clock, all-consuming duties of a CEO and also be responsible for relocating his mother to Florida and caring for his ailing mother at the same time;⁴

2) Salyer had developed resentment toward CHS (a humongous national hospital chain) in part because he believed his father’s death was attributed to substandard care he received at a CHS hospital, where he had just recently died;⁵

¹ See Amended Complaint, attached hereto as Exhibit “A”, ¶¶ 11, 48.

² See Am. Compl., ¶ 9.

³ See Am. Compl., ¶ 8.

⁴ See Am. Compl., ¶ 44; see also Salyer Dep. (7/7/2015) attached hereto as Exhibit “B”, 55:18-56:2

⁵ See *Id.*, 49:10-15

3) After HMA merged into CHS as a result of the January, 29, 2014 closing, Salyer and all HMA CEOs were summoned to a mid-February Orientation meeting in Nashville, where CHS is located. Salyer's experiences at the meeting were horrendous and devastating. Wayne Smith, CEO of CHS publically berated the former CEO of HMA, Bill Schoen, who was a mentor to Salyer and a fellow former Marine. Smith disparaged the Marines in general and, Salyer, personally by implication, by declaring that Marines could not run hospitals.⁶ Smith also humiliated two CEOs publicly by forcing them to stand up at the meeting so he could berate them for not following orders to go to a hotel shelter when a storm had approached and threatened them if they didn't follow his orders again.

4) Salyer was informed that, because of the merger, his cash bonus and stock option would be discontinued, thereby reducing his total compensation by half;⁷

5) Salyer was seriously concerned that he would likely be terminated or that he had no future in the CHS system, especially as a mentee of Bill Schoen, the former HMA CEO whom Wayne Smith had ridiculed and because Salyer was a Marine too.

6) Salyer was also concerned about the aftermath of the CHS acquisition (e.g., brand new CEO, board of directors and new policies, for instance);⁸

7) Salyer was concerned that senior CHS executives made light of the fact and scoffed that CHS had been required by the government to pay 120 million dollars in fines for alleged improprieties;

8) Salyer heard CEO Wayne Smith state at the meeting that HMA non-competes are unenforceable and that Smith laughed when relating an event that had occurred pre-merger when

⁶ See *id.*, 47:21-49:23

⁷ See *Id.*, 29:5-20, 51:1-11

⁸ See *Id.*, 41:25-42:4

HMA attempted to enforce a non-compete against CHS which had hired a senior executive away from HMA despite the existence of a non-compete and CHS prevailed over HMA.

9) Salyer decided at the Orientation meeting, he did not care to work in the CHS system and decided to respond to a posted opening at Indian River Medical Center and apply for the different and less demanding position of Chief Operating Officer (“COO”). Salyer was an at-will employee (CHS could have fired him without any notice or severance for any or no reason) and when he submitted his resignation email on March 22, 2014 he did not think it would serve any purpose to delineate all of the reasons for his departure; instead he decided to focus on the death of his father and the need to focus on the relocated and care of his mother.

10) It appears CHS took great umbrage at the fact that Salyer resigned abruptly and started a new job at IRMC about a month later and has engaged in a scorched earth, war of attrition, campaign of punishment and intimidation by filing an injunction action against him and dragging his current employer into the mix. HMA has used tactics of innuendo and character assassination. It has uncovered no real evidence of substantive violations of the non-compete, non-solicitation and non-disclosure features of the restrictive covenants to which Salyer is alleged to be bound. This Motion to Compel is a continuation of the campaign being waged against Salyer by this multi-billion dollar brute.

About a month after Salyer resigned from SRMC, he went to work as COO of IRMC HMA learned of that fact in April 2014. It inexplicably waited over **FOUR** months before it filed suit. HMA did **NOT** present a motion for preliminary injunction. Trial was set for October, 2015, 14 months later. HMA served its first request for production and interrogatories in March, about 7 months after suit was filed. Mediation was set by agreement for February, 2014 and cancelled the day before because HMA decided to add IRMC as a defendant and continue the campaign.

The gist of the Complaint and Amended Complaint (which added Count V for tortious interference against IRMC) is that Salyer solicited SRMC’s Director of Surgery Chris Booth to

join IRMC, and an independent non-employee physician, Dr. Omar Hussamy, to switch back again to join IRMC's medical staff to obtain privileges to conduct surgeries there in addition to SRMC. The allegations are blatantly and irrefutably FALSE. The deposition testimony of Chris Booth and the Declaration of Dr. Hussamy reveal that HMA had no basis to make such scurrilous allegations and that HMA did little if anything to determine if there was a modicum of evidence to support the charges. The deposition and Declaration laid bare the not-so-thinly veiled purpose of this action to bully and punish Salyer and to intimidate IRMC to stifle competition.⁹ With the substantial makeover of the SRMC hospital from an HMA system hospital into a CHS system hospital run by CEO Wayne Smith, there no longer exist legitimate business interests worthy of protection AND it is abundantly clear that the restraints sought by HMA are not reasonably necessary to protect business interests justifying the restrictions.

This is especially true because HMA has suffered no actual harm. This was made crystal clear from Booth's deposition. After HMA served answers to interrogatories swearing that Salyer and IRMC solicited Chris Booth and offered him a job, he leveraged that into a \$30,000 salary increase at SRMC, hence HMA's supposed "damages." In truth, Chris Booth swore that his supervisor introduced the subject of a raise and obtained it for him—having NOTHING to do with Salyer. So much for HMA having incurred damages. Furthermore, there is no evidence SRMC left and joined IRMC having anything to do with Salyer.

Salyer has nothing to hide that could give rise to liability for breach of a purported restrictive covenant. Salyer, therefore, has always sought in good faith to comply with all discovery requests by producing responsive, non-objectionable documents or responding to interrogatories, or, if compelled to produce documents or to answer interrogatories over a reasonable objection, has produced such documents or answered such interrogatories. Salyer has to date responded to

⁹ See Am. Compl., D.E. 16.

Plaintiff's First Set of Interrogatories and First Request for Production. HMA also deposed Salyer on July 7, 2015 for approximately 6 hours in which he answered hundreds of questions.

Yet after having engaged in extensive discovery directed by the parties, HMA has not been able to identify any legally cognizable damages or develop any evidence in support of a cognizable claim. Its allegations are nothing more than mere puffery. In fact, the only legally cognizable damages that HMA identified originally in its response to Salyer's First Set of Interrogatories were as to alleged solicitation of Dr. Hussamy, Booth, and one former SRMC employee, Mr. Devon Bloom; those damages have proven to be bogus: Dr. Hussamy and Booth and Bloom have sworn that Salyer never solicited them in any way or at any time.¹⁰ Dr. Hussamy and Booth have sworn that, not only did Steven Salyer never solicit them at any time in any way, but also that HMA never even asked them prior to their deposition months and months into the case whether Salyer had solicited them.¹¹ HMA apparently never undertook any reasonable inquiry into these alleged acts of solicitation.¹² HMA subsequently supplemented its response to Salyer's First Set of Interrogatories in a vain attempt to identify other types of damages – but has failed to develop any evidence in support.

First, Booth's deposition testimony specifically refutes Plaintiff's allegations of solicitation. In deposition, Booth stated:

1 Q Has Steven Salyer ever talked to you about
2 your going to work for Indian River Medical Center?

3 A Yes. Indirectly, yes.

4 Q How many times has Mr. Salyer talked with
5 you about that subject?

6 A The only time I spoke to Steven...

¹⁰ See Hussamy Dec. (7/7/2015) attached hereto as Exhibit "C", ¶ 10; Booth Dep. attached hereto as Exhibit "D", 6:1-6:25 (7/9/2015); Bloom Dec. (8/11/2015) attached hereto as Exhibit "E", ¶ 9-11; see generally Salyer Dep.

¹¹ See Hussamy Dec., ¶¶ 16-18; Booth Dep., 37:18-38:20.

¹² See Hussamy Dec., ¶¶ 10, 11, 13, 15-18; Booth Dep., 37:18-38:20.

9 ... we were in the parking lot of Walmart. I was
10 going in, he was coming out. I said to him, you
11 know, hi -- it was a brief encounter -- I said, a
12 lot of people coming up to see me right now. And he
13 said, you might want to talk to some of those
14 people. That's it. That's our encounter.

15 The only other encounter we've had since
16 then was actually coming out of a meeting at
17 Butcher's Restaurant and he was outside in the
18 restaurant area whenever we were leaving and we just
19 shook hands and said, hello, good bye. That was it.
20 No other conversations really occurred...

It is clear that Salyer did not solicit, induce, entice, employ, or attempt to employ Booth to work at IRMC in breach of the alleged non-solicitation covenants. To the contrary, Salyer and Booth had one "brief encounter" that involved a minimal exchange of words, lasting about ten seconds, an exchange which could never be construed by any reasonable trier of fact as an act of "solicitation." They were separated by rows of cars in a parking lot walking in opposite directions. Chris Booth initiated the brief 2-sentence exchange. No one could reasonably find that the brief exchange between Salyer and Booth constituted an act or instance in which Salyer was requesting or seeking to obtain something from Booth in connection with work at IRMC or otherwise.

Second, Dr. Hussamy's statement in his declaration refutes Plaintiff's allegations that Salyer solicited Dr. Hussamy to leave SRMC to work for IRMC.¹³ Dr. Hussamy swears in pertinent part:

10. ***I have never been solicited by Steven Salyer*** to leave SRMC or give up my staff privileges at SRMC or stop admitting patients to SRMC.

11. In March of 2015, I requested IRMC once again to provide me with staff privileges and my request was approved in June of 2015. My decision to reinstate my staff privileges at IRMC was made by me and was motivated by my desire to practice IRMC reducing my travel time when possible. Steven Salyer was not involved in any fashion with this decision. Steven Salyer never contacted me about seeking privileges at IRMC.

...

¹³ See Am. Compl., ¶ 52.

13. At no time was I ever solicited by Steven Salyer to practice at IRMC or apply for staff privileges or to admit patients. **Steven Salyer never said anything to me to encourage me to leave SRMC or to entice me to practice at IRMC.**

14. I have retained my medical staff privileges at SRMC.

15. I am not aware of any facts which could suggest Steven Salyer had any direct or indirect involvement in my dealings with IRMC.

(emphasis added).

Dr. Hussamy also explains in his sworn declaration that he has had staff privileges at IRMC (on and off) since 1994 and that Salyer had nothing to do with his choice to seek staff privileges again with IRMC in 2014. Dr. Hussamy explains, in no uncertain terms, that Salyer has **NEVER** solicited, induced, enticed or attempted to employ him to work for IRMC.

Third, Bloom's statement in his declaration refutes Plaintiff's allegations that Salyer solicited Bloom for the position of Associate Vice President of Ancillary Services at IRMC.

Bloom swears:

10. Steven Salyer never contacted me, let alone encouraged me, to apply for the position of Associate Vice President of Ancillary Services at IRMC, or for any other position at IRMC. No one from IRMC contacted me or solicited me to apply for the position.

11. Steven Salyer never asked me or encouraged me to contact or solicit any employee, physician, or service provider affiliated with SRMC, Health Management Associates, Inc., or Community Health Services, Inc. to work for or become affiliated with IRMC. No one at IRMC ever asked me or encouraged me to do that, and I never have.

Throughout this litigation, HMA has harassed and sought to intimidate Salyer: by contacting Salyer's wife's divorce attorney, by seeking to subpoena the builder of Salyer's private residence – a subpoena which was quashed (D.E 42) – and by indiscriminately requesting that Salyer produce all of his personal cellular telephone and landline telephone records since January 1, 2014 to the present as well as intrusive interrogatories to the same effect, which were limited in scope by order of this Court.¹⁴ HMA just served requests for admissions to force Salyer to admit

¹⁴ See D.E. 57.

he sent many text messages to two individuals who are personal friends having nothing to do with this matter, implying that HMA may drag them into this witch hunt also.

After litigating this case for almost a year in search of evidence to support baseless allegations, Plaintiff now desperately leaps to seek a forensic examination of Salyer's personal laptop computers, mobile phone, thumb drive and Yahoo email account.¹⁵

HMA has no basis to compel a forensic examination of any of these personal devices or his email account. HMA argues that because HMA believes Salyer is generally not credible, HMA is not entitled to this drastic remedy. Rank character assassination and spiteful innuendo, however, are not evidence to provide the basis for the forensic examination requested.

This Court should deny Plaintiff's Motion because Salyer has not withheld requested information, Salyer has not been unable or unwilling to search for the requested information, Salyer has already complied with discovery requests and has produced all retrievable, responsive, non-privileged documents, and the requested forensic examination of his personal devices and email account is intrusive and invades Salyer's privacy.¹⁶

ARGUMENT

Although the Federal Rules of Civil Procedure generally permit broad discovery, "there are limits to what a party may discover." *Teledyne Instruments, Inc. v. Cairns*, 2013 WL 5781274, at *3 (M.D. Fla. Oct. 25, 2013) (denying motion to compel forensic examination). A Court

must limit the frequency or extent of discovery upon determining that what is sought is unreasonably cumulative or duplicative or more reasonably obtainable from another source; that the requesting party has had ample opportunity to obtain information; or that the burden of the proposed discovery outweighs the likely benefits, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

¹⁵ See Plaintiff's Motion, at 1.

¹⁶ See generally FL Const., Art. 1, § 23.

Id. (internal quotation marks omitted) (citing Fed.R.Civ.P. 26(b)(2)(C)). The Southern District of Florida noted in *Wynmoor Cmty. Council, Inc. v. QBE Ins. Corp.*, 280 F.R.D. 681, 687 (S.D. Fla. 2012) that:

A Court must be mindful of the potential intrusiveness of ordering forensic imaging...Before compelling such imaging the court must weigh inherent privacy concerns against its utility. The Court should consider whether the responding party has withheld requested information, whether the responding party is unable or unwilling to search for the requested information, and the extent to which the responding party has complied with discovery requests.

(internal citations and quotation marks omitted).¹⁷

Typically, a party will explore through depositions the manner in which a party has identified and preserved information prior to seeking a forensic examination. *See Piccone v. Town of Webster*, 2010 WL 3516581, at *9 (W.D.N.Y. Sept. 3, 2010) (denying in part motion to compel forensic examination in part on grounds that record was not developed through depositions to establish basis for spoliation of evidence). Absent “specific, concrete evidence of concealment or destruction of evidence,” courts are generally cautious about granting a request for a forensic examination of an adversary’s computer. *Advante Int’l Corp. v. Intel Learning Tech.*, 05–01022 JW (RS), 2006 WL 1806151, at *1 (N.D. Cal. June 29, 2006); *John B. v. Goetz*, 531 F.3d 448, 460 (6th Cir.2008). A party need not produce, and cannot be compelled to produce, documents in response to discovery requests, where the requests themselves are properly objectionable. *See Klayman v. City Pages*, 2014 WL 5426515, at *4 (M.D. Fla. Oct. 22, 2014).

Plaintiff must establish a factual predicate to compel a forensic examination of a personal device or email account based upon proper discovery requests. *See Id.* (“Plaintiff’s mere speculation that more documents must exist is ***not*** a sufficient basis for the Court to order an

¹⁷ In *Wynmoor*, the Court ordered a forensic examination, where a party failed to “produce a single piece of electronically stored information” and had and was continuing to shred documents. *Id.*, at 683. The forensic examination might have revealed evidence of the purged documents, so the examination was ordered. *Id.*, at 686. Here, Salyer has produced ESI and there is no evidence that he is destroying documents or that the devices that have been inadvertently destroyed contained confidential SRMC documents or documents that were otherwise responsive or that Salyer’s new devices contain any transferred information from his old devices.

invasive search of Defendants computers and telephone records.”) (emphasis added). “[M]ere skepticism that an opposing party has not produced all relevant information is not sufficient to warrant drastic electronic discovery measures.” *John B.*, 531 F.3d at 460 (citing *McCurdy Group, LLC v. Am. Biomedical Group, Inc.*, 9 Fed. Appx. 822, 831 (10th Cir.2001)).

The party seeking to mirror image the contents of a private hard drive must “identif[y] any specific information that it seeks to recover from the mirror images, and show[] that the Individual...would not be capable of, or willing to, produce that particular information. *Calyon v. Mizuho Sec. USA Inc.*, 2007 WL 1468889, at *5 (S.D.N.Y. May 18, 2007); *Balfour Beatty Rail, Inc. v. Vaccarello*, 2007 WL 169628, at *3 (M.D. Fla. Jan. 18, 2007) (denying forensic examination, where “Plaintiff does not provide any information regarding what it seeks to discover from the hard drives nor does it make any contention that Defendants have failed to provide requested information contained on these hard drives.”). “Conclusory assertions” of concealment are unpersuasive. *Klayman*, 2014 WL 5426515, at *4.

Even where a party meets its burden of showing that the opposition has not produced all relevant communications (which they have not here), a Court may still deny a motion for a forensic examination where “[t]he defendants have not established through declaration or exhibit... that such an examination is likely to yield emails that have been deleted or purged” *Brady v. Grendene USA, Inc.*, 2015 WL 4523220, at *9 (S.D. Cal. July 24, 2015).

HMA HAS NOT ESTABLISHED A BASIS TO COMPEL A FORENSIC EXAMINATION

HMA bases its motion to compel forensic examination in part on improper discovery requests that would prematurely require this Court to decide the merits of the case. Plaintiff’s Requests for Production 13 and 16 and Interrogatories 8, 9, and 10 all presuppose that Salyer “solicited” someone at SRMC, which Salyer denies. HMA has not been able to develop any

evidence to date of the alleged acts of solicitation, nor will it be able to do so.¹⁸ Nevertheless, this Court should not decide the merits of HMA's allegations as to "solicitation" on this Motion to Compel. For that reason, among others, Salyer properly responded to those requests that there are no documents or other information in his possession, custody, or control that are responsive, and HMA cannot seek to compel a forensic examination to seek documents or information responsive to those discovery requests.¹⁹

As to Plaintiff's Requests for Production 12 and 22 and Interrogatory 16, there is no basis to compel a forensic examination as it relates to Salyer's personal laptop computers, mobile phone, thumb drive and Yahoo email account.²⁰ HMA has not established a factual predicate for seeking the drastic remedy to compel a forensic examination of a personal device or email account. All of HMA's conclusory assertions amount to mere skepticism that documents or information may have been withheld (when they have not). HMA has not identified a single bit of evidence in deposition testimony or interrogatory responses or documents produced by any party or non-party that would establish that documents exist that are central to its prosecution of this case that are retrievable, non-objectionable, but have not yet been produced in Salyer's personal devices or email account. See *Brady*, 2015 WL 4523220, at *9.

A. PERSONAL LAPTOP COMPUTERS

Old HP Laptop. Salyer's personal HP laptop stopped working and did not have "work stuff" on it.²¹ Originally, Salyer believed his personal HP laptop was gone after he searched for it diligently. Salyer then represented in good faith to Plaintiff that the old HP laptop was gone.

¹⁸ See *supra*, at 4 fns. 12, 13, and 14.

¹⁹ See Plaintiff's Motion, at 3-4.

²⁰ See *Id.*

²¹ See Salyer Dep., 68:17-20; see also Salyer Declaration (August 12, 2015) attached hereto as Exhibit "F", ¶¶ 7-8.

Salyer's wife subsequently found the old HP laptop, and Salyer agreed to permit Plaintiff to search the lost-then-found HP laptop.²²

New Laptop. Salyer has had a new laptop for about a year.²³ The time when Salyer worked at SRMC does not overlap with the time that he has had his new laptop. There were no SRMC confidential documents on Salyer's old HP laptop and, in any event, no documents were transferred from the old laptop to the new laptop.²⁴ HMA has not identified any documents IRMC produced that Salyer sent from his new laptop.

B. MOBILE PHONE

Old iPhone. Salyer inadvertently jumped in the water in the Sebastian River with his old iPhone in his pocket.²⁵ It was destroyed and is gone. Salyer could not have transferred any documents from his old iPhone to his new phone, as he could not, and did not, anticipate that his old iPhone would be destroyed inadvertently in the Sebastian River.

New Phone. Salyer's new phone does not have information relating to the issues in this lawsuit.²⁶ He's changed phone numbers since he lost his old phone.²⁷

C. THUMB DRIVE

Old Thumb Drive. Salyer's old thumb drive was lost around May or June 2014.²⁸ The old thumb drive did not contain SRMC confidential information.²⁹ The information on the old thumb drive was not uploaded to any of Salyer's new devices.³⁰ Salyer could not have transferred any

²² This Court need not compel production of what Salyer has agreed to produce. Salyer does not oppose production of his old HP laptop that was recently found.

²³ See Salyer Dep. 31:9-13.

²⁴ If, after Plaintiff searches Salyer's old HP laptop and the search reveals that there were confidential SRMC documents on it and those documents were transferred to Salyer's new laptop, then Plaintiff might have a basis to conduct a forensic examination of Salyer's new laptop. Until that time, Plaintiff does not have a basis to believe that confidential SRMC documents are on Salyer's new laptop. Indeed, IRMC has produced responsive documents and there is no evidence that Salyer has sent to IRMC confidential information from his new laptop.

²⁵ See Salyer Dep., 70:16 – 21; see also Salyer Dec., ¶¶ 2-5.

²⁶ See *Id.*, 73:18-22.

²⁷ See *Id.*, 177:2-7.

²⁸ See *Id.*, 69:5-11.

²⁹ See *Id.*, 69:20-70:3.

³⁰ See *Id.*, 70:4-10.

documents from his old thumb drive to a new device, as he could not, and did not, anticipate that he would lose his old thumb drive when he did.

New Thumb Drive. Salyer has had the new thumb drive since around May 2014.³¹ There is no reason to believe his new thumb drive has information relating to SRMC.³² Salyer has not deleted any information pertaining to SRMC.³³

D. YAHOO EMAIL ACCOUNT

Prior to Salyer's deposition, Salyer did not produce responsive documents contained in his Yahoo email account because he was under the mistaken belief that IRMC and Waverly Partners ("Waverly"), an independent IRMC headhunter, would produce all such documents and any documents that he might have on his personal Yahoo account would be duplicative of the documents that IRMC or Waverly would produce.³⁴ In March 2014, Salyer reviewed his Yahoo account for responsive documents.³⁵ HMA is concerned that Salyer has not produced all responsive, non-privileged documents from his Yahoo account because prior to Salyer's deposition, IRMC and Waverly produced certain emails that were sent from Salyer's Yahoo account to IRMC or Waverly personnel that relate to issues in this lawsuit.³⁶ Upon realizing his mistake after Salyer's deposition, Salyer searched his Yahoo email account for all responsive, non-privileged documents.³⁷ Salyer searched for all responsive documents, including those retrieved

³¹ See Salyer Dep. 33:6-9

³² See *Id.*, 33:10-18.

³³ See *Id.*, 33:19-22.

³⁴ Salyer searched his Yahoo email account for responsive documents prior to his deposition. In his deposition testimony, Salyer states that he did not search his emails for all communications with Mr. Skip Fiordalis, an IRMC headhunter, relating to Salyer's employment with IRMC. See Salyer Dep. 89:5-8. Salyer misunderstood this deposition question. Salyer did search for documents such as this prior to his deposition. Salyer thought that he was being asked whether he reviewed the contents in the body of all of the thousands of unread messages in his inbox, in addition to the ones that were read. Salyer had not reviewed the contents in the body all of his unread messages at the time of his deposition, instead he reviewed the subject line, but he had searched through his emails that were most likely to contain responsive documents. See Salyer Dec., ¶¶ 9-14; see also Errata Sheet to Salyer Dep., attached hereto as Exhibit "G", In. 22 (Salyer clarified his deposition testimony that he searched the account, but did not print the documents. "I assume I did not have to print duplicates of what IRMC and Waverly produced.").

³⁵ See Salyer Dec., ¶ 9.

³⁶ See Plaintiff's Motion, at 8-9; Salyer Dep. 160:5-20

³⁷ See Salyer Dec., ¶ 11.

with the search terms “.irmc” “Devon Bloom” “Bloom” “Lisa Licitra” “Licitra” “Jeff Susi” “Susi” “Rick Van Lith” “Van Lith” “Skip” “Kelly Enriquez” “Enriquez” and “SRMC”.³⁸ He has produced all of responsive documents he was able to find.³⁹

HMA takes issue with the fact that “most” of the documents that Salyer produced from his Yahoo account “are the same as documents IRMC or non-party Waverly Partners produced in discovery.” Plaintiff’s Motion, at 9. Naturally, documents evidencing communications between IRMC personnel or Waverly personnel and Salyer would substantially duplicate the documents that IRMC and Waverly produced. Rather than take issue with Salyer’s production, HMA should have confidence in Salyer’s production because it substantially mirrors IRMC’s and Waverly’s production with which HMA has not quibbled.⁴⁰ In addition, Salyer produced some documents from his personal Yahoo account that had not been produced by either IRMC and Waverly, indicating that Salyer’s search was comprehensive and not limited by any “road map” (Plaintiff’s Motion, at 9), other than Plaintiff’s non-objectionable discovery requests.

Plaintiff relies in part upon *Bank of Mongolia v. M & P Global Fin. Servs., Inc.*, 258 F.R.D. 514 (S.D. Fla. 2009) (Rosenberg, J.) for the proposition this Court should grant the relief request. The facts of *Bank of Mongolia*, however, are readily distinguishable from the case at bar, and the differences are instructive in that they indicate that this Court should not order a forensic examination of Salyer’s Yahoo email account. In *Bank of Mongolia*, the Court found significant evidence that a foreign party was not complying with the rules of the discovery process: there (unlike here), Plaintiff served Defendants with a Request for Documents to which Defendants did not timely respond. *Id.*, at 516. Plaintiff moved to compel. Defendants failed to file a timely

³⁸ See Salyer Dec., ¶ 9.

³⁹ See Salyer Dec., ¶ 14.

⁴⁰ Plaintiff has not asserted that the emails that IRMC produced suggested that the emails were part of a larger communication string that had not been produced.

response to Plaintiff's Motion to Compel. The Court then ordered Defendants to show cause why they did not timely respond and Defendants failed to provide a valid excuse. At oral argument, Defendants' counsel "conceded that they had not performed a search of all deleted and unsaved electronic documents" and advised the Court that Defendants were "not in a position at that time to set forth Defendants' search methodology." *Id.*, at 518. Plaintiff advised the Court that "it had received documents from other entities that appeared should have been produced by the M & P Defendants but were not..." *id.*, at 517. The documents obtained from the third parties also suggested that other responsive documents might exist. Defendants conceded that more responsive documents might exist. *Id.*, at 519.

In contrast to the operative facts in *Bank of Mongolia*, Salyer has responded to discovery requests in a timely manner and is engaging in the discovery process in good faith. Salyer has now searched all of his unread records in his Yahoo email account, has advised the Court of the methodology by which he used to search his Yahoo email account, and has advised the Court that other retrievable, responsive, non-objectionable emails do not exist. None of the IRMC or Waverly documents obtained by HMA indicate that other responsive documents in Salyer's Yahoo account exist. The IRMC and Waverly documents indicate the opposite – that all retrievable, responsive, and non-objectionable documents from Salyer's Yahoo account have already been produced. There is no discrepancy between the IRMC and Waverly productions and Salyer's production.

* * *

HMA has not established a basis for a forensic examination through the deposition of Salyer. To the contrary, Salyer's deposition testimony demonstrates that a forensic examination is not substantially likely to produce any non-duplicative, responsive, non-privileged documents. Salyer has worked diligently and in good faith to produce all responsive, non-privileged documents that he could retrieve and has, in fact, produced all such documents. The documents, themselves, already produced do not indicate that any confidential information or new information central to

the prosecution of this case would be retrieved from Salyer's personal devices and email account. If the forensic examination is ordered, Salyer will be forced to produce the same ESI in more than one form. The forensic examination will only serve to delay the resolution of this matter and increase the expense. HMA has not established a factual predicate for a forensic examination. Mere skepticism that Salyer may have withheld documents (which he has not) is insufficient to warrant this extraordinary remedy.

The burden of the proposed discovery substantially outweighs the likely benefits of disabusing HMA of the baseless notion that documents may have been withheld. IRMC is a single hospital being sued to exact revenge in a suit filed in a fit of pique by a corporate megalith with unlimited resources. HMA has not identified or quantified real or actual damages (nor can it since the supposed acts giving rise to liability are a chimera); therefore, it is impossible to say whether the amount-in-controversy would support such an expensive examination.⁴¹ The forensic examination is highly intrusive because in the course of unrestrained fishing for some evidence of a purported breach on Salyer's personal devices and email account, the examiner will be able to review all of Salyer's personal information and the personal information of his friends, family, and all those he is in contact with. This private, and potentially embarrassing, information should not be broadcast to any would-be examiner.⁴²

CONCLUSION

Because Plaintiff has not established the basis for ordering a forensic examination, Plaintiff's Motion should be **DENIED**.

⁴¹ Even where the party requesting discovery offers to pay the expense, the Court may still find that the requested production unfairly prejudices the producing party. *Teledyne*, 2013 WL 5781274, at *8.

⁴² Should this Court order a forensic examination of any or all of Salyer's personal devices and email accounts discussed herein, Salyer assumes the Court would direct that the procedure described in *Wynmoor* would be utilized at HMA's expense.

WHEREFORE, Defendant, Steven Salyer, respectfully requests that this Honorable Court deny Plaintiff's Motion, and grant any such other and further relief that this Honorable Court deems just and proper against the Plaintiff.

CERTIFICATE OF SERVICE

WE DO HEREBY CERTIFY that 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 as identified on the service list, and all others who appear in this action on this 14th day of August, 2015.

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