

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

BRAY & GILLESPIE
MANAGEMENT LLC, et al.,

CASE NO.: 6:07-cv-222-Orl-19KRS

Plaintiffs,

v.

LEXINGTON INSURANCE
COMPANY, et al.,

Defendants.

**PLAINTIFFS' OPPOSITION TO DEFENDANT LEXINGTON INSURANCE
COMPANY'S MOTION FOR DISCOVERY SANCTIONS AGAINST PLAINTIFFS AND
TO COMPEL PROPER PRODUCTION BY PLAINTIFFS**

Plaintiffs Bray & Gillespie Management, LLC, Bray & Gillespie, Delaware I, L.P., Bray & Gillespie X, LLC, Bray & Gillespie Plaza, LLC, Bray & Gillespie V, LLC, Bray & Gillespie VIII, LLC, and Bray & Gillespie LaPlaya (collectively, "B&G") respectfully request that this Court deny the relief sought by Defendant Lexington Insurance Company ("Lexington") in its Motion for Discovery Sanctions Against Plaintiffs and to Compel Proper Production by Plaintiffs ("Lexington's Motion"). The basis for this Opposition is fully supported by a memorandum of law and accompanying documents set forth below.

MEMORANDUM OF LAW

I. INTRODUCTION

Lexington's Motion seeks to compel the reproduction of nearly one-million pages of documents already produced by B&G on March 14, 2008 and April 30, 2008. B&G produced these documents in tiff format.¹ Lexington believes that it is entitled to electronically stored information in these productions in a different form, native format,² which would require B&G to re-review and reproduce all of the documents. This Court should rule that Lexington has waived its right to seek documents in native format, or is estopped from enforcing its right. Indeed, Lexington failed to include its views or proposals on the form of electronic discovery in the discovery plan, as required by the Federal Rules of Civil Procedure. Additionally, Lexington failed to voice objections to B&G's form of production until after the production was complete, over six months after B&G effectively objected to Lexington's specified form by stating that it was producing documents in a different form and two months after Lexington received email documents in tiff format.

This Court should also deny Lexington's request for reproduction of documents because the burdens of reproduction far outweigh any benefit to Lexington. B&G has already expended hundreds of thousands of dollars and several months reviewing and producing the documents. A similar amount would have to be incurred in reproducing the documents, and would delay discovery in this case. On the other hand, Lexington does not claim that the

¹ "Tiff" is an acronym for "tagged image file format" and refers to an image format that is supported on most computer systems. In Re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. MD 05-1720 (JG) (JO), 2007 WL 121426, at *1 n.2 (E.D. N.Y. January 12, 2007).

² A request for documents in native format seeks documents in their original file format, such as the Word, Excel or Outlook.

documents in native format would have any increased evidentiary value, and it admits that the documents are capable of being searched. The only benefit that Lexington identifies is increased “sorting” capabilities. This Court should rule that requiring B&G to reproduce the documents only to increase Lexington’s sorting capabilities is an undue burden.

Finally, despite Lexington’s contentions, the documents that B&G produced on April 30, 2008 were provided “as they are kept in the usual course of business.” This phase of production was entirely emails, which are maintained by B&G in individual’s email folders. B&G produced the documents in this manner and provided Lexington with an appropriate index.

II. FACTS

On August 1, 2008, the parties filed a Case Management Report [Doc. 78]. In this Report, it is stated that the parties “recognize that discovery of electronic stored information is likely to be an issue.” See Case Management Report at 9. “The parties agreed to meet and confer on this matter within the next thirty (30) days and will file a supplemental Case Management Report on all issues as to which the parties can come to an agreement.” Id. A meet and confer to discuss the form of electronic discovery was never held, and a Supplemental Case Management Report was not filed.

Lexington served its First Request for Production of Documents to B&G (“Lexington’s RFP 1”) on August 17, 2008. See Lexington RFP 1 (attached as Appendix A to Lexington’s Motion). One month later, Lexington’s Second Request for Production to B&G (“Lexington’s RFP 2”) was served.³ See Lexington’s RFP 2 (attached as Appendix B to Lexington’s Motion). Lexington’s Requests contained one-hundred and thirty requests for production and inspection. The Requests also contained five pages of boilerplate definitions and

³ RFP 1 and RFP 2 are collectively referred to as “Lexington’s Requests.”

instructions. Despite not including its views or proposals on the form of electronic discovery in the discovery plan, in the definition of “electronically stored information,” Lexington stated that “a request for ‘electronically stored information’ calls upon you to produce such information, without deletion or alteration of meta-data, in its native form” See Lexington’s Reqs. at 3.

Given the numerous document and inspection requests propounded by Lexington, B&G sought and received extensions of time to respond to Lexington’s Requests. B&G filed Plaintiffs’ Objections and Responses to Defendant Lexington Insurance Company’s First and Second Request for Production of Documents and Request for Inspection and Sampling of Real Property and Tangible Personal Property (“B&G’s Responses”) on November 9, 2008. See B&G’s Responses (attached as Appendix C-1 to Lexington’s Motion). In the Preliminary Statement of B&G’s Responses, B&G stated that “[p]er our agreement, all documents will be provided by sending discs containing scanned copies of the documents” Id. at 2 (emphasis added). Scanned copies of documents are not in native format and would not contain the metadata from the native documents. See Martinez Aff., ¶ 4.⁴

On January 14, 2008, Lexington filed a Motion to Compel Production of Documents and Better Responses to Lexington’s First and Second Requests for Production of Documents to Plaintiff (“Lexington’s Motion to Compel”) [Doc. 142]. In this Motion, Lexington did not take issue with B&G’s statement that only scanned documents would be produced. See e.g., Lexington’s Mot. to Compel.

⁴ The “Martinez Aff.” refers to the affidavit of Frank Martinez, dated June 10, 2008, and is attached as Ex. “A” hereto. Mr. Martinez is employed by Reed Smith LLP as a Litigation Support Analyst in the Practice Technology Services Group.

Lexington produced documents responsive to B&G First Request for Production of Documents on January 15, 2008. These documents were produced in tiff format and without metadata from the native documents. See Martinez Aff., Ex. A., ¶ 5.

On March 14, 2008, B&G sent a set of discs to Lexington which contained documents responsive to Lexington's Requests. The discs contained documents in tiff format and did not contain metadata from the native documents. See Moree Aff., ¶ 9 (attached as Appendix G to Lexington's Motion). This phase of production contained emails and attachments. An index of these documents was provided to Lexington. See 3/14/2008 Letter from Pillsbury to Defendant's Counsel (attached as Ex. "B" hereto). As indicated in the index, the documents were organized by email custodian. See id.

Despite having the documents produced by B&G, Lexington did not raise any issues with the form that B&G produced its electronic documents at the March 18, 2008 discovery conference before this Court. See 3/18/2008 Hearing Tr. Two days later, Lexington filed a Renewed Motion to Compel Production of Documents and Better Responses to Lexington's First and Second Requests for Production of Documents to Plaintiff ("Lexington's Renewed Motion to Compel") [Doc. 178]. Once again, the form of production of the electronic documents was not addressed.

On April 8, 2008 and April 30, 2008, B&G produced all of the remaining documents responsive to Lexington's Requests. The April 30, 2008 production consisted of emails and attachments. Once again, an index was sent to Lexington for the April 30, 2008 production, wherein it showed that the documents in this production were organized by email custodian. See May 19, 2008 Letter from Norway to Brown (attached as Ex. "C" hereto).

Late in May 2008, over six months after B&G informed Lexington that it was producing scanned copies of the documents, Lexington first raised its objection to the form of production of electronic documents in two letters. See 5/19/2008 Letter from Brown to Dyer (attached as Ex. “D” hereto) & 5/20/2008 Letter from Brown to Dyer (attached as Ex. “E” hereto). In these letters, Lexington requested that B&G reproduce the documents from the March 14, 2008 and April 30, 2008 production in native format, a request that would render B&G’s months of work reviewing and producing documents worthless. Moreover, such a request would force B&G to essentially start over with its document production and review. See Martinez Aff., Ex. A., ¶ 6-7.

Lexington’s Motion was filed on May 27, 2008. Lexington is seeking to compel B&G to reproduce all of the documents produced on March 14, 2008 and April 30, 2008 in native format, and for sanctions for failing to produce the documents in this format.

III. ARGUMENT

A. **This Court Should Determine That Lexington Waived Any Right To Seek Document Production In Native Format, Or Is Estopped From Asserting Any Right.**

The foundation of Lexington’s Motion is essentially that B&G waived any objection to the request for production in native format. On the contrary, due to Lexington’s conduct, this Court should determine that it is Lexington that has waived any right to seek documents in native format, or that Lexington is estopped from enforcing any right.

Lexington notes that the 2006 amendments to the Federal Rules of Civil Procedure made important changes to address Electronically Stored Information or “ESI.” See Lexington’s Mot. at 5. Although this is true, Lexington has ignored the amendments to Rule 26⁵

⁵ Unless otherwise indicated, “Rule” or “Rules” refers the Federal Rules of Civil Procedure.

which address the proper procedure for seeking documents in native format. Under the amended Rules, the issue of whether documents should be produced in native format with metadata must be addressed by the parties in a Rule 26(f) conference. Fed. R. Civ. Pro. 26(f); see also Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, No. 05-138-WOB, 2006 WL 5097354, at *8 (E.D. Ky. Dec. 18, 2006).⁶ Rule 26 requires that the parties confer to discuss and develop a proposed discovery plan. See Fed. R. Civ. P. 26(f)(2). The discovery plan must state the parties views and proposals on any issues about the discovery of electronically stored information, including the form or forms in which it should be produced. Id. at (f)(3)(C) (emphasis added). Accordingly, a party seeking discovery of electronically stored information in a specific format must state its views during the discovery planning stage.

Lexington failed to raise this issue at the discovery planning stage. In the Case Management Report submitted by the parties, it is stated that “[t]he parties agreed to meet and confer on [discovery of electronic stored information] within the next thirty (30) days and will file a supplemental Case Management Report on all issues as to which the parties can come to an agreement.” See Case Management Report [Doc. 78] at 9. This meet and confer never occurred, and a supplemental Case Management Report was not filed. Instead of stating its views or proposals on the form of electronic discovery in the discovery plan, Lexington buried its request in five pages of boilerplate definitions and instructions in its RFP 1 and RFP 2. By failing to raise this issue in the discovery plan, this Court should rule that Lexington waived any right to request that all documents should be produced in native format or is estopped for asserting any right. This is reasonable considering other courts have held that when the parties are not able to reach an agreement regarding the form of production of discovery of electronic documents, a

⁶ A copy of this opinion is attached as Ex. “F” hereto.

party should not be required to produce documents in native format. See Wyeth v. Impax Labs., 248 F.R.D. 169, 171 (D. Del. 2006).

This Court should also rule that Lexington's failure to object to the form of B&G's document production until after the production was completed bars it from seeking the documents in native format. See In Re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig., No. MD 05-1720 (JG) (JO), 2007 WL 121426, at *3 (E.D. N.Y. Jan. 12, 2007).⁷ The court in In Re Payment Card refused to require reproduction of documents in similar circumstances, where the requesting party delayed objecting to the form of production until after discovery was produced. Id. at *4. In that case, the plaintiffs had provided a significant amount of discovery to the defendants, in several installments, in a form that was not acceptable to the defendants. Id. However, despite having access to the documents, the defendants did not object to the plaintiffs form of production for several months. Id. The court determined that it was unfair to make the plaintiffs pay for the reproduction of the documents that were produced before the defendants voiced their objections. Id.

Similar to In Re Payment Card, Lexington knew that B&G was producing documents in a form that it considered objectionable, but it said nothing until all of the documents were produced. Indeed, despite Lexington's contentions, B&G did effectively object to Lexington's specified form of production. In B&G's Responses, which were served on November 9, 2007, it is specifically stated that "[p]er our agreement, all documents will be provided by sending discs containing scanned copies of the documents . . ." B&G's Resps., Appendix C-1 to Lexington's Mot., at 2. Scanned copies of the documents are not in native format and do not contain metadata from the native documents. See Martinez Aff., Ex. A., ¶ 4.

⁷ A copy of this opinion is attached as Ex. "G" hereto.

Even if this Court determines that B&G did not properly assert its objection to Lexington's form of production, Lexington was at least on notice that B&G was not going to produce documents in native format on November 9, 2007.

Subsequent to being put on notice of B&G's objection and the form that B&G intended to produce documents, Lexington filed two Motions to Compel regarding B&G's Responses and attended three discovery conferences before this Court. However, Lexington never mentioned that it objected to the form of electronic production by B&G. See Lexington's Mot. to Compel [Doc. 142]; Lexington's Renewed Mot. to Compel [Doc. 178]; 1/24/2008 Discovery Hearing Tr.; 3/18/2008 Discovery Hearing Tr.; 4/22/2008 Discovery Hearing Tr. Moreover, Lexington received discovery documents from B&G on March 14, 2008, which contained email documents in tiff format and without the metadata from the native files. Had Lexington raised an objection at this point, B&G could have saved the time and money that it expended producing the largest phase of production, the April 30, 2008 production, which contained over 700,000 pages of documents. Based on Lexington's dilatory conduct, it is unfair for B&G to bear the costs of reproducing documents in native format. This Court should rule that Lexington has waived any right to seek documents in native format or is estopped from seeking this form of production.

B. The Burden Of Reproducing The Documents In Native Format Far Outweighs Any Perceived Benefit To Lexington.

This Court should also deny Lexington's request because the burden of reproducing all of the documents from the March 14, 2008 and April 30, 2008 production in native format outweighs any benefit. "The general requirements of the amended Rule 34, like any discovery rule, are subject to alteration in specific circumstances that make strict adherence

unduly burdensome or expensive.” In Re Payment Card, 2007 WL 121426, at *3. Under Rule 26, the Court is required to limit discovery if:

(iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2)(C) (emphasis added). The Rules also contain a specific limitation on electronically stored information that is not accessible because of undue burden and cost:

Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost

Id. at (b)(2)(B).

Requiring B&G to reproduce the March 14, 2008 and April 30, 2008 productions in native format would be a substantial burden upon B&G. B&G has already expended hundreds of thousands of dollars and invested several months of work reviewing and producing the documents. Lexington estimates the costs of reviewing the documents from the April 30, 2008 production alone at over one-million dollars. See Lexington’s Mot. at 5 n.5. If this Court granted Lexington’s Motion and required that B&G reproduce the documents in native format, B&G’s previous efforts would be wasted. Moreover, B&G would have to re-review the documents for privilege, which is no small task considering that more than one-million pages of documents would have to be reviewed (which would cost at least another one million dollars according to Lexington’s estimates). See Martinez Aff., ¶ 6. In addition to the costs to review the documents, B&G would have to incur expenses for producing the documents in native format which would be several thousands dollars. See Martinez Aff., ¶ 7. B&G would essentially have

to put all of its resources into this review, instead of preparing for depositions which are set to begin in August. Moreover, the needs of this case would suffer as this reproduction would delay the completion of written discovery.

Lexington has not indentified any benefit which would outweigh the burdens involved in reproducing the documents in native format. Lexington does make a number of conclusory allegations including that “these documents are practically useless for discovery purposes.” See e.g., Lexington’s Mot. at 17. These allegations are suspect considering that Lexington has produced its discovery documents in the same format as B&G. See Martinez Aff., Ex. A., ¶ 5.

Lexington does not claim that the documents in native format would reveal any additional relevant or admissible information. Courts have held that reproducing documents in native format when there is no corresponding evidentiary value is overly burdensome. See Mich. First Credit Union v. Cumis Ins. Soc’y, Inc., No. 05-74423, 2007 WL 4098213, at *2-3 (E.D. Mich. Nov. 16, 2007).⁸ In Michigan First Credit Union, the plaintiff requested that the defendant produce documents in their “‘native format’ along with the intact metadata.” Id. at *2. The defendant produced documents, including email files, in readable pdf form, without metadata. Id. at *1. The court determined that the pdf copies contained all of the relevant information that the plaintiff would otherwise glean from the metadata. Id. at *2. Thus, the court agreed with the defendants that producing metadata for the emails would be unduly burdensome. Id. at *2. Likewise, in this case the metadata parameters identified by Lexington (author, recipient, date, subject, and assigned level of importance) are visible on the tiff images produced by B&G.

⁸ A copy of this opinion is attached as Ex. “H” hereto.

Thus, this Court should determine that the reproduction of the documents in native format would be unduly burdensome.

The only benefit that Lexington has identified in possessing the documents in native format is increased “sorting” capabilities. Although Lexington asserts in its Motion that the documents produced by B&G have no search capabilities, Lexington’s technology specialist admits that the documents produced by B&G are searchable if processed by optical character recognition (“OCR”).⁹ See *Moree Aff.*, Appendix G to Lexington’s Mot., at ¶ 7. Lexington only claims that if it had the documents in native format, it would be able to “sort by parameters such as date range, author, recipient, or subject.” See *id.* A similar rationale for reproducing documents was rejected in *In Re Payment Card*. See 2007 WL 121426, at *4. In that case, the plaintiffs produced documents in tiff format and degraded some of the searching capabilities of the documents. *Id.* at *1. The court held that it was satisfied that “requiring the Individual Plaintiffs to re-produce data that they have already produced in searchable form (albeit possibly not searchable in every way that the defendants would like), or that they have already substantially processed for production, would impose an undue burden on them.” *Id.* at *4 (emphasis added). Likewise, this Court should rule that requiring B&G to reproduce the documents only to increase Lexington’s sorting capabilities is an undue burden.

C. B&G Produced The Emails In The April 30, 2008 Document Production “As They Are Kept In The Usual Course Of Business.”

Lexington claims the documents produced in the April 30, 2008 production were not produced “as they are kept in the usual course of business.” This assertion is not true. As explained at the March 18, 2008 discovery conference, B&G produced the documents by

⁹ Optical Character Recognition software programs translate images of text (such as tiff files) into a format that can be searched or read electronically. *In Re Payment Card*, 2007 WL 121426, at *1 n.2.

individual's email inbox or email folder. See March 18, 2008 Hearing Tr., Appendix D to Lexington's Mot., at 26-28. This is the manner in which B&G maintains its email documents. On May 19, 2008, Robert Norway sent a letter to Lexington's counsel with an index of the documents produced on April 30, 2008. See May 19, 2008 Letter from Norway to Brown, Ex. C. This index sets forth bates ranges for each individual's email documents. See id.

D. Lexington's Proposed Sanctions And Requests For Fees Are Unwarranted.

Lexington claims that B&G's April 30, 2008 production violated this Court's April 11, 2008 Order [Doc. 181]. Lexington has requested that the Court strike the allegations and claims of the Amended Complaint which paragraphs 2, 3, 5, 64, 88, 97, 103, and 122 of Lexington's Requests address, and that B&G be precluded from offering evidence relating to several allegations and claims. This severe sanction is completely unwarranted. B&G complied with this Court's April 11, 2008 Order and produced documents by April 30, 2008 in a manner that it had previously produced documents without objection from Lexington. As explained fully above, Lexington first voiced its objection to the form of B&G's production late in May 2008, after the April 30, 2008 production. B&G did not willfully disregard the Court's Order; instead, it made substantial good faith efforts to comply.

Additionally, Lexington requests expenses and fees for bringing its Motion. However, Rule 37 states that a court should not order payment if the opposing party's nondisclosure, response, or objection was substantially justified or other circumstances make award of expenses unjust. Fed. R. Civ. P. 37(a)(5)(ii) & (iii). B&G's production of documents on April 30, 2008 in tiff format was substantially justified because Lexington had not objected to this form of producing documents until after the April 30, 2008 production.

CONCLUSION

For the reasons set forth above, Plaintiffs Bray & Gillespie Management, LLC, Bray & Gillespie, Delaware I, L.P., Bray & Gillespie X, LLC, Bray & Gillespie Plaza, LLC, Bray & Gillespie V, LLC, Bray & Gillespie VIII, LLC, and Bray & Gillespie LaPlaya respectfully request that this Court deny Lexington Insurance Company's Motion for Discovery Sanctions Against Plaintiffs and to Compel Proper Production by Plaintiffs.

Respectfully submitted,

June 10, 2008

s/ John N. Ellison

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

s/ John N. Ellison

John N. Ellison, Esquire