

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

CASE NO. 07-60077-CIV-ZLOCH

JORGE G.Z. CALIXTO,
a resident and citizen of Brazil,

Calixto,

v.

WATSON BOWMAN ACME CORP.,
a Delaware corporation,

Defendant.

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**WATSON BOWMAN'S RESPONSE TO CALIXTO'S MOTION TO COMPEL
WATSON BOWMAN TO "REMEDY ITS SPOILATION OF DOCUMENTS"**

Defendant Watson Bowman Acme Corporation (“Watson Bowman”) responds to Calixto, Jorge Calixto’s (“Calixto”) Motion to Compel Watson Bowman to remedy its “spoliation of documents” as follows.

I.
INTRODUCTION

Calixto’s motion to compel the restoration of backup tapes of the email system is predicated on his mistaken belief, derived from an imprecise exchange at the 30(b)(6) deposition of Watson Bowman, that Defendants routinely “purged” Watson Bowman’s email system, and retained the email from that system only on disaster recovery backup tapes. To that end, Calixto cites Mr. Patterson’s testimony that “I believe its six months which is available to us before” because “BASF put [an email automatic deletion process] in effect when they acquired the business.” Patterson Dep. (Ex. 1), 16:5-7. Calixto filed this motion without learning whether his

“belief” is correct or what it actually means with respect to Watson Bowman’s document production.

The facts, however, are as follows. On March 15, 2005, Calixto filed suit against Watson Bowman, CORTE, and Degussa Construction Chemicals, LLC for breach of the Asset Purchase Agreement, in Florida state court. At the time of that first lawsuit Watson Bowman’s email system was maintained on a local server, and employees, including Richard Patterson and Michael Turchiarelli, believed to have email relevant to the facts alleged in that lawsuit were advised to preserve those files.

Watson Bowman did not utilize automatic deletion for email before Watson Bowman became a subsidiary of BASF Construction Chemicals, LLC (“BASF”) in July 2007. Young Aff. (Ex. 2), at ¶2. In or about October 2008, after BASF acquired Watson Bowman, Watson Bowman’s email system was integrated into BASF Corporation’s email system. Id., at ¶3. BASF Corporation does utilize automatic deletion for many email users, a feature that can be manually overridden by the subject employees. Id., at ¶4. All of the integrated Watson Bowman email was exempted from that automatic deletion until March 2008. Id., at ¶5. After March 2008 some Watson Bowman employees’ email did become subject to automatic deletion, but the email of employees who were placed on legal hold because of pending or current litigation, including Mr. Patterson and Mr. Turchiarelli, continued to be exempt from automatic deletion. Id. That is, email with possible relevancy to this lawsuit was subject to some form of hold beginning with Calixto’s first state lawsuit in March 2005, a hold which remains in place today. Calixto’s accusations of spoliation are, thus, clearly mistaken.

Calixto also appears to believe that Markus Burri’s email was automatically “purged” when automatic deletion was introduced after Watson Bowman was acquired by BASF in 2008. Again, this is incorrect. Markus Burri ceased being employed by Watson Bowman

almost four years earlier, as of August 1, 2004, when he took a position at an entity in Switzerland. Burri Dep. (Ex. 3), at 8:17-21. None of Mr. Burri's email from Watson Bowman was transferred to his new email account at the Swiss entity. Id., at 30:12-24. As a matter of course, Mr. Burri's Watson Bowman email was deleted shortly after his departure and before the earliest of the available backup tapes, which begin in December 2004. Young Aff. (Ex. 2), at ¶7. There is no reason to believe his email account will be found on the disaster recovery backup tapes, which do not begin until December 2004. Moreover, Mr. Burri's email was deleted long before March 2005, the date that Calixto alleges Watson Bowman first came under a legal hold obligation. Calixto's Mot., at 3. In the case of Mr. Burri's email, spoliation is also obviously not an issue. FED. R. CIV. P. 37(e) ("Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system."); *Arthur Anderson LLP v. United States*, 544 U.S. 696, 704 (2005) (permitting destruction pursuant to data retention policies absent corrupt persuasion).

In July 2008, Watson Bowman conducted a preliminary search of its files for information related to this lawsuit for the explicit purpose of producing to Calixto any and all invoices found for sales of products bearing the JEENE name into the Asia/Pacific Territory. On August 20, 2008, Watson Bowman produced all such invoices to Calixto. Ex. 5. As can be seen from these invoices, Watson Bowman only sold products bearing the JEENE name to the Asia/Pacific Territory five times after November 2004, for small amounts. Because the back-up tapes do not begin until the end of December 2004, it is unlikely that there will be much, if any, email regarding these five lone sales in the backup tapes that Calixto now seeks to restore. Nor would such email have substantial additional relevance beyond the fact of the sales, which Watson Bowman has openly admitted.

Subsequent to this Court's Order on discovery, Watson Bowman made a thorough search of all its records, and all employees who were identified as possibly having had some contact with the litigation searched their files. On October 17, 2008, everything that was found that was relevant, and not privileged, was then produced to Calixto; on October 23, 2008, a privilege log followed. In the October 17, 2008, transmittal letter to Calixto, in accord with Rule 26(c), Watson Bowman informed Calixto that it was not restoring back-up tapes, which were kept solely for disaster recovery purposes, and which it did not deem to be reasonably accessible.

Even if there were a reasonable likelihood that the backup tapes contain relevant email that has not been produced from other sources (and there is not), Calixto's proposed discovery would be unwarranted because the backup tapes are not reasonably accessible and any marginal benefit achieved by restoration would be far outweighed by the costs. There are thirty-three DLT4 backup tapes, each of which is a month-end tape from December 2004 through July 2007 and October 2007. Young Aff. (Ex. 2), at ¶6. It is well established that these tapes "are sequential-access devices, which means that to read any particular block of data, you need to read all the preceding blocks," and that such backup tapes "sacrifice accessibility for storage capacity." *Hagemeyer North America v. Gateway Data Sciences*, 222 F.R.D. 594, 600-601 (E.D.Wis. 2004). Restoring these tapes, to the extent that it may be possible,¹ and searching for the email of a handful of employees filtered for key words is expected to cost approximately \$40,000. Kroll Quote (Ex. 4). Kroll Ontrack, based on its experience in document production, has estimated that this might result in approximately 280,000 pages (or about 140 boxes) of

¹ Unless and until restoration is attempted, it cannot be determined whether the tapes are readable and whether, and to what extent, the necessary encryption keys may be available for historical users of this email system.

documents.² Id. Assuming reviewers can complete three boxes worth of email per day (an aggressive assumption) the project would take over forty-five days of full time work. At an average rate of \$350 per hour the review cost would be \$126,000. Together with the Kroll charges then, Calixto is proposing a \$166,000 exercise in probable futility.³

Unlike the case that Calixto relies on, *Disability Rights Council of Greater Washington v. Washington Metropolitan Area Transit Authority*, 242 F.R.D. 139 (D.D.C. 2007), here, there is no basis for Calixto's mistaken accusation of spoliation, or degradation of accessible data to a less accessible form. Calixto offers no reason to believe that responsive email that has not been produced already from the active email system will be found on the disaster recovery backup tapes. Watson Bowman should not be forced to incur the high costs of restoring and searching backup tapes that are not reasonably accessible. Calixto's motion should be denied.

II. ARGUMENT

Discovery may only be taken if it "appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b). The discovery rules protect parties from being subjected to cumulative or duplicative discovery requests. Here, the back-up tapes are not likely to have information in addition to that which has already been discovered. The discovery rules further limit discovery of information that is not reasonably accessible, a calculation that is determined by weighing the burdens of finding, searching, and producing the requested discovery against the possible benefit of the information. Here, again, that burden

² The actual page count that results will obviously depend on how narrowly the search terms are tailored and the extent to which the email in the dataset contains the terms that are selected.

³ As a point of reference, this amount exceeds the amount of total sales by Watson Bowman of products bearing the JEENE Trademark to the Asia/Pacific Territory.

entails large costs, both in time and expense, offset by only a small possibility of discovering relevant information.

A. Discovery From The Backup Tapes Should Not Be Required Because There Is No Reason To Expect To Find Additional Relevant Email.

Before any discussion of accessibility and burden under Rule 26(b)(2)(B), the threshold question is whether the email backup tapes are a likely source of additional evidence at all. The email backup tapes in question are not appropriate sources of discovery for the simple reason that there is little or no reason to believe that they contain any relevant evidence that is not available from other, more accessible sources that Watson Bowman has already searched. As established in *Zubulake v. UBS Warburg*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003), the duty to preserve evidence – let alone produce it – does not extend to “multiple identical copies” of electronically stored information (ESI), including “backup tapes” unless, among other limiting factors, the information contained on those tapes “is not otherwise available.” This principle is incorporated into Fed. R. Civ. P., Rule 26(b)(2)(C), which provides that—accessibility considerations aside—the “court must limit the frequency or extent of discovery” where the discovery sought is “unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.” Watson Bowman has searched its email system and its documents for information responsive to Calixto’s discovery requests and has produced what it found.⁴ Searching backup tapes for additional copies of email that there is every reason to believe have already been produced serves no purpose and is inappropriate under Rule 26(b)(2)(C). For this reason alone Calixto’s motion should be denied.

⁴ Watson Bowman produced some 1300 pages of responsive discovery.

B. In Addition To Their Redundancy, The Backup Tapes Are Not Reasonably Accessible And The Costs Of Discovery Are Unjustified.

Calixto's inability to show that additional evidence is likely to be found on the backup tapes should end the inquiry, but discovery into the backup tapes is also inappropriate because the tapes are not reasonably accessible and the burden and expense of restoring and reviewing them is not justified. Young Aff. (Ex. 2), at ¶6; *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 319-20 (S.D.N.Y. 2003) (finding similar backup tapes not reasonably accessible); *Hagemeyer*, 222 F.R.D. at 600 (same). The expense to restore, search, and review the data on these backup tapes will be well into six figures (see page 3 above), which plainly shows that they are not reasonably accessible. *Best Buy Stores, L.P. v. Developers Diversified Realty Corp.*, 247 F.R.D. 567, 570 (D. Minn. 2007) (deeming backup tapes not reasonably accessible where their restoration would cost \$124,000).

When seeking production from backup tapes “[t]he requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information.” Fed. R. Civ. P., Rule 26, Advisory Committee Notes (2006 Amendments). Calixto cannot make the requisite showing of need to warrant restoring these backup tapes. The Federal Rules outline a seven (7) factor test for a requesting party to show that its need outweighs the burden: “(1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties’ resources.” Id.

Under these factors, the improbability of finding additional evidence on these backup tapes is fatal to Calixto's motion. Calixto offers no evidence of a failure to produce some particular email that Defendant should have been expected to produce that might be on the backup tapes (factor 3).⁵ Nor does Calixto offer any evidence that relevant or important email was deleted, automatically or otherwise, during the time period of the backup tapes (factors 4 and 5). The lack of any utility in restoring and reviewing the email on these backup tapes renders the remaining factors inapplicable. No level of specificity in Calixto's request (factor 1), no alleged deficiency in the amount of email already produced (factor 2), no imagined public importance of this case (factor 6), and no abundance of resources of either party (factor 7) would overcome the simple fact that the tapes are not likely to contain additional evidence.

C. If Calixto's Motion Is Granted, Even In Part, Calixto Should Bear The Expense.

For the same reasons that Calixto's motion should be denied outright, any ordered restoration should at least begin with a small sample and the expense should be born by Calixto. Of course, an apparently unnecessary restoration should not be ordered simply because the requesting party will pay for it:

Shifting the costs of extraordinary electronically stored information discovery efforts should not be used as an alternative to sustaining a responding party's objection to undertaking such efforts in the first place. Instead, such efforts should only be required where the requesting party demonstrates substantial need or justification. The courts should discourage burdensome requests that have no reasonable prospect, given the size of the case, of significantly contributing to the discovery effort, even if the requesting party is willing to pay.

⁵ Calixto, instead, routinely cites to the fact that he has produced more e-mail from earlier time frames than Watson Bowman has. The e-mail he produced, however, is primarily from the 2004 period, prior to the beginning of this lawsuit, when Watson Bowman was neither under a litigation hold, nor had any indication that a lawsuit would be forthcoming.

The Sedona Principles, Second Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, Cmt. 13.b (The Sedona Conference Working Group Series, 2007). When, however, a requesting party has made the requisite showing for restoration, the Court may nevertheless condition that discovery on the requesting party bearing the producing party's expenses, and on the restoration of a small sample to ensure that relevant documents exist. Fed. R. Civ. P., Rule 26 Advisory Committee Notes (2006 amendments) ("The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible."); *Hagemeyer North America v. Gateway Data Sciences*, 222 F.R.D. 594, 600 (E.D.Wis. 2004) (ordering restoration of small sample of backup tapes before determining whether to order more of the requested discovery and which party should bear the expense); *Medtronic Sofamor Danek v. Michelson*, 229 F.R.D. 550, 561-52 (W.D.Tenn. 2003) (shifting to requesting party 40% of costs for restoring and searching two sets of backup tapes, and 100% of the expenses for any further tape to be restored including paying the producing party's review costs); *Wiginton v. CB Richard Ellis*, 2004 WL 1895122, *4 (N.D.Ill. Sept. 25) (75% of costs shifted to requesting party).

The relevant factors set out by Rule 26(b)(2)(C) are whether "the burden or expense of the proposed discovery outweighs its likely benefit, 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." As discussed, Calixto flunks each of these factors. The burden and expense (six figures) outweighs the likely benefit of searching redundant sources of data (none) and the amount in controversy (a few thousand dollars). There is no public importance in this purely commercial issue between the two parties. And the importance of the requested discovery to resolving those commercial issues is near zero, as it is cumulative and duplicative and the evidence needed to resolve this case is available from

other sources, including more accessible copies of the email and Watson Bowman's sales database (where any allegedly actionable sales would be recoded and retained, and which were produced).

Some courts have tinkered with the factors set out in Rule 26(b)(2)(C). According to them the relevant factors, in descending order of importance, include: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total cost of production, compared to the amount in controversy; (4) the total cost of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits to the parties of obtaining the information. *Zubulake*, 217 F.R.D. at 322; *Hagemeyer*, 222 F.R.D. at 600. The first two factors are the "most important," *Hagemeyer*, 222 F.R.D. at 600, and they weigh heavily in favor of cost shifting (and still more heavily in favor of denial of the request). Calixto has not tailored his request to seek relevant evidence but rather seeks expensive searches of redundant data sources. If the other factors need be reached at all, the six figure cost of this exercise dwarfs the damages that Calixto can potentially show (just a few thousand dollars at most). Calixto has not argued any lack of financial resources; nor can he, having sold his patent and license for millions of dollars. Only Calixto can control the costs of this pointless exercise by dropping it or narrowing its scope. The issues at stake in this case do not concern any public interest. And, finally, even Calixto does not stand to gain from this exercise since the backup tapes are not likely to contain additional evidence that has not already been produced.

In sum, under either test, if these tapes are to be restored, Calixto should bear all of the costs of restoration, searching, reviewing, and production. Moreover, the exercise should begin, and probably end, with a small sample. The sampling approach was adopted in *McPeek v.*

Ashcroft, 202 F.R.D. 31 (D.D.C. 2001), and *Zubulake*, 217 F.R.D. 309, and the Advisory Committee's notes to the 2006 amendment to Rule 26 now recommend the same thing:

The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation. In such cases, the parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.

In such a situation, it would make the most sense to start by sampling the oldest backup tape. If, contrary to expectations, some additional email is found on that tape the parties and, if necessary, the Court can further evaluate the next steps. If, however, no additional email is found, the inquiry should be at an end.

III. **CONCLUSION**

Calixto's accusations of spoliation are clearly unfounded, and there is no substantial reason to believe that responsive email will be found on the disaster recovery backup tapes that has not been produced already from the active email system. These backup tapes are not reasonably accessible, and Watson Bowman should not be forced to incur the high costs of restoring and searching them. Watson Bowman, therefore, respectfully asks this Court to deny Calixto's motion, or at the very least to limit the restoration to a small test sample, with Calixto bearing the cost of the restoration.

Respectfully submitted,

s/Robert M. Brochin

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CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2009, I electronically filed the foregoing *Watson Bowman's Response to Calixto's Motion to Compel Watson Bowman to "Remedy Its Spoliation of Documents"* with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to:

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