

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 09-23411-CIV-UNGARO/SIMONTON

SEVEN SEAS CRUISES S. DE R. L.,
f/k/a CLASSIC CRUISE HOLDINGS, S. DE
R.L., LLC, d/b/a REGENT SEVEN SEAS
CRUISES, INC., *et al.*,

Plaintiffs,

v.

V.SHIPS LEISURE SAM, *et al.*,

Defendants.

**PLAINTIFFS' AMENDED REPLY IN SUPPORT OF MOTION
TO COMPEL DISCOVERY OF ELECTRONICALLY-STORED INFORMATION**

Plaintiffs, Celtic Pacific UK, Ltd., *et al.*, by and through their undersigned counsel, hereby submit this reply in support of their Motion to Compel Discovery of Electronically-Stored Information [DE 150], and in support, state as follows:

I. BRIEF STATEMENT OF THE FACTS

The Defendants attempt to convince this Court that they have delivered to the Plaintiffs, in a “reasonably usable format,” more electronically-stored information (“ESI”) than the Plaintiffs requested, and that because of this purported overage of production, the Defendants’ production is adequate. However, the Defendants’ claims are deceptive and are based on their admitted lack of technological know-how with respect to ESI, which is no excuse for their failure to abide by either the parties’ agreements regarding ESI processing and production or what is required by law. The Court should hold the Defendants responsible for the prejudice they have caused the Plaintiffs to suffer.

Defendants claim that the Plaintiffs’ motion to compel is without basis and yet Defendants admit that, although they agreed to run the Plaintiffs’ selected search terms through

all of the requisite ESI, they ran a pared-down set of single-word search terms (the term “Navigator” and possibly several others that nobody can recall) selected by the Defendants rather than the Plaintiffs. The Defendants also admit that they did not produce the ESI in the format requested by the Plaintiffs. Nowhere in the response do the Defendants present evidence beyond their conclusory supposition that the requested ESI is not reasonably accessible because of undue burden or cost.

At this point in the litigation, three (3) months before trial is set to begin, after navigating the Defendants’ production of through several-thousand-page documents with hyperlinked attachments, and only after the Plaintiffs’ counsel traveled to Monaco to conduct 30(b)(6) depositions did the Plaintiffs learn, and the Defendants confirm, that (1) the Defendants did not run the Plaintiffs’ Boolean¹ search terms through all ESI; and (2) the Defendants’ ESI production did not include non-email ESI. Based on the foregoing, there is a clear need for this Court to appoint, at the Defendants’ expense, a third-party E-Discovery expert, to conduct adequate searches of the Defendants’ ESI, including all emails *and attachments*, and non-email ESI. If, thereafter, the Plaintiffs require additional depositions of the corporate representatives based on the newly discovered ESI, the Plaintiffs respectfully requests this Court to permit the Plaintiffs to conduct those depositions, in person, with the Defendants to be responsible for all costs.

II. THE COURT-ORDERED DEADLINE TO EXCHANGE DOCUMENTS WAS NOVEMBER 12, AND DEFENDANTS UNILATERALLY EXTENDED SAME

In their response to the Plaintiffs’ motion to compel, the Defendants allege that the parties had agreed to extend the deadline to exchange documents past the court-ordered November 12 deadline [DE 119] to November 16. The Defendants also maintain that they produced their final “tranche” of documents on November 16, 2010 due to a slight delay in processing the documents for work product of which they had informed the Plaintiffs. These

¹ Boolean searches string together single-word search terms by terms such as “or,” “and,” “not” or by limiting the proximity between words or phrases.

statements are not true. On November 16, a paralegal from counsel for Defendants contacted counsel for the Plaintiffs and advised the Plaintiffs' of the following:

We have a runner on the way to your offices to drop off a CD containing documents bates stamped VLSAM 009490 – VLSAM 017834. Still remaining are documents bates stamped VSLUK 011931 – VSLUK 014470 which we will produce tomorrow.

Counsel for Plaintiff did not agree to this late production. And nowhere in this email did the Defendants notify the Plaintiffs that there was any delay due to work product processing. That same day, counsel for the Plaintiffs responded as follows:

Pursuant to the Court's Order on Motions for Extension [DE 119], the "Deadline to Respond to Discovery Requests and Produce Documents" was last Friday, November 12, 2010.

Also, just FYI, the last bates no. we have for VLSAM is 017310 and for VSLUK it's 011933, so it appears that your bates numbering is overlapping with your prior production.

Contrary to the Defendants' statement to this Court, there was no agreement to extend the production deadline past November 12. In fact, shortly after the Defendants proceeded to produce documents from "VLSAM" with corrected bates numbers and the documents bates stamped "VSLUK 011931 – VSLUK 014470" after the close of business on November 17, on November 19, counsel for the Plaintiffs faxed and mailed a letter to counsel for the Defendants advising them of several objections to the production, including a reminder of the November 12 deadline and "reserve[ing] our right to move to exclude any of these documents produced after the court's deadline." The Defendants have misstated facts relating to the parties' agreement to this Court.

III. THE DEFENDANTS DID NOT RUN THE PLAINTIFFS' SEARCH TERMS THROUGH THEIR ESI AS AGREED AND DID NOT SEARCH ALL ESI

A. Despite Agreeing to Run the Plaintiffs' Search Terms, the Defendants Did Not Run These Terms Through All ESI as They Had Represented to the Plaintiffs

On November 1, 2010, Mark Andrew Sizer Upton, the Defendants' corporate representative on the topic of "the preservation, collection and production of documents by V.Ships in this case." Specifically, Mr. Upton testified about the process by which the Defendants searched for ESI, in part on their Enterprise Vault system and in part on individual laptops. (Upton Tr. 82:20-94:4, 95:6-117:23). Mr. Upton testified about having been asked to

gather ESI for Defendants' production to the Plaintiffs, but admitted that he never saw a copy of the Plaintiffs' document requests. (Upton Tr. 78:12-79:5, 83:23-84:4). He testified that he gathered information from between five (5) to ten (10) people, but does not recall the custodians from whom he collected information. (*Id.*, at 82:20-86:9). Mr. Upton testified that with respect to the V.Ships Leisure UK collection, Richard Evenhand "searched individually through ... each one of those volted (sic) mailboxes. He then took – whatever that search find was through the various search strings that he used, he then took a copy of that, put them into a separate folder, and then produced that as a file with all the collated information." (*Id.*, at 92:6-13). For V.Ships Leisure SAM, the same process was used, and it was done through a combination of the local Monaco IT and Lorenzo Malvarosa. (*Id.*, at 92:22-25).

Mr. Evenhand gave testimony about his involvement in the collection and processing of the Defendants' ESI. (Evenhand Tr. 247:20-256:9). Although he initially testified that the Defendants "went through the volts [sic] and applied [the Plaintiffs' search terms]" to the data, (*id.*, at 251:14-15), Mr. Evenhand quickly recanted that testimony and explained that the Defendants were unable to "put the search terms all together" so he ran the search term "Navigator" and a few other names he was unable to recall. (*Id.*, at 251:17-256:9). Had the Defendants notified the Plaintiffs that they would only be running **a single search term or a handful of terms**, the Plaintiffs would have been able to seek relief with this Court earlier or may have abandoned the search-term method and opted to have the Defendants respond to the specific discovery requests. Now, the Plaintiffs have spent a great deal of time and money and have inured great prejudice because of the Defendants' failure to adhere to their agreement and to perform a reasonably accurate search of all email and non-email ESI.

B. *Because the Defendants Did Not Search All ESI, Their Production to the Plaintiffs is Incomplete*

The Plaintiffs searched through ESI via Enterprise Vault, but that search of that source was not complete. Using the standard Enterprise Vault software, which relies on the limited search technology of Microsoft Outlook, the Defendants' searches of "Navigator" or any other

term would have been run through the text of emails along with attachments created with Microsoft Office (MS Word, MS Excel, MS PowerPoint).² However, without the Enterprise Vault “add-on” that allows for enhanced searching, **search terms are only run through emails and MS Office attachments but not most .PDF attachments and .zip files.** (Hirschfeld Decl. ¶ 9). Relying only on Enterprise Vault without any additional E-Discovery software and without using external E-Discovery technology, the Defendants have not performed a comprehensive search of all materials belonging to the relevant custodians, including *all emails and attachments, and all non-email ESI.* (Hirschfeld Decl. ¶ 9).

In addition, the Defendants did not search the other sources of ESI. The Defendants had the managing director of V.Ships Leisure UK Ltd. and the CEO of V.Ships Leisure SAM manually search through Enterprise Vault emails and MS Word attachments thereto. They also searched the “My Documents” folders of local laptops at the V.Ships Leisure UK office, but the Defendants claim that “absolutely nothing was found on those local machines.” (Upton Aff. ¶ 93:22-25). Counsel for the Defendants tried to explain the “shortage of electronic documents other than email,” but their explanations hold no water, especially where the Plaintiffs have confirmed that, upon V.Ships Leisure UK departing from the Celtic Pacific office in Southampton in 2009, **the Defendants removed the V.Ships hard drives from their server at the CPOK office.** As such, the Defendants possess significant non-email ESI relating to the Defendants’ services as the technical managers of the Regent Fleet to which the Plaintiffs are entitled. That the Defendants have withheld these documents through the close of discovery while representing they have searched and produced to the Plaintiffs all documents responsive to the Plaintiffs search terms leaves the Plaintiffs in a precarious position, suffering great prejudice.

IV. THE DEFENDANTS FAILED TO PRODUCE ESI IN THE AGREED UPON, REASONABLE MANNER

² See the Declaration of Marc Hirschfeld, Esq., the Plaintiffs’ third-party E-Discovery specialist, filed in support hereof and attached hereto as **Exhibit 1.**

A. *The Defendants' Production Violates the Agreement Between the Parties With Respect to ESI Because They Did Not Use Their Best Efforts to Produce ESI in the Form in Which it is Stored*

In their Joint Scheduling and Status Report, the parties agreed that they would “endeavor to do their best to produce all electronic documents or [ESI] in the form in which such information is stored, except that the metadata may be extracted and need not be produced.” [DE 55]. Because of the importance of electronic data to this case, and because the Plaintiffs’ initial request was reasonable, possible, and agreed-to, the Defendants have failed to act reasonably. The Plaintiffs did not ask the Defendants to produce ESI in a format different from how the information is normally kept. The Plaintiffs have simply asked (and are still asking) for the production of relevant documents in their raw, native format and responsive to limited search terms. Fundamentally important, the Defendants agreed to “do their best” and have failed to come close.

B. *The Defendants Never Advised the Plaintiffs that the Requested Production Format was Not Feasible*

On August 19th, the Plaintiffs advised the Defendants of the ESI load file specifications that they were requesting:

Second, we prefer electronically stored information (“ESI”) in native format. Specifically, here are the load file specifications for ESI that are preferable to us:

- i. Group IV single page tiff, 300 dpi;
- ii. Extract text . Text files should be in the same folder as the tiff images ; text file name matches first image file name for each document.
- iii. Maintain document composition within output folders (Do not split documents across output folders);
- iv. Soft control number/ tiff image name should be consecutive starting with alpha prefix;
- v. Image folder structure should follow source folder structure; and
- vi. Opticon load file for images.

Please let me know if you have any questions or would like to discuss.

That same day, counsel for the Defendants responded that “[a]s far as ESI, I have to confess that I don’t understand a single one of your preferred specifications, but **to the extent feasible, we will produce the electronic data in the formats you request.**” Counsel for the Plaintiffs had included these load file specifications after consulting with its internal E-Discovery department, in preparation to load the ESI obtained from the Defendants onto an online Ringtail database that counsel uses, in part, to house ESI in this litigation.³ After that communication, the Defendants

³ In Plaintiff’s counsel’s experience, sending and requesting load file specifications or other ESI specifications is common and these load-file specifications are standard, and easily understood by individuals that practice in the E-Discovery industry. (Hirschfeld Decl. ¶ 10). For example, various document management review tools permit users

never advised the Plaintiffs that their specifications were not being adhered to, even in the face of subsequent requests and reminders, and an offer by counsel for Plaintiffs to provide the Defendants with an external hard drive for ease of production.

C. *Producing Native Data in a “Load File” from Enterprise Vault ESI is Possible, as is Redacting and Bates Stamping*

The Defendants maintain that “searchable ‘OCR’ PDF format [is] completely acceptable under the law, and *was the only possible format available to Defendants which would allow searching for privileged information, redaction of privileged information, and bates stamping.*” This representation is incorrect—the Defendants could have produced ESI in the requested format to the Plaintiffs. (Hirschfeld Decl. ¶ 10). Indeed, without any affidavit of factual support, the Defendants point the finger at unnamed “technical personnel” who allegedly advised them that “the format requested would be nearly impossible to provide and would be impossible to bates stamp, and redact.” An E-Discovery vendor can both bates-stamp and redact ESI that is produced in accordance with the Plaintiffs’ load-file specifications, which would be **no more difficult than the bates-stamping and redacting of documents in .PDF format.** (Hirschfeld Decl. ¶ 11). Since it was possible for the Defendants to produce the ESI in the requested format, and apply both bates numbers and redactions where necessary, this Court should not accept the Defendants’ lack of technological skill as a valid excuse for their nonfeasance.

D. *The Format in Which the Defendants Produced the Documents Was Neither Reasonable, Nor was it in the Ordinary Course of Business*

- i. Defendants failed to identify which custodians’ ESI it was “searching,” accompany the production with any explanation of record-keeping, or provide the folder structure of the ESI as it was kept in the ordinary course of business**

The Plaintiffs take great issue with the format in which the Documents were produced because of the cumbersome nature of the files and the inability to easily manipulate and search

to choose an output format based on the database being used by the receiving party (e.g., Ringtail, Concordance, Summation, etc.).

the ESI to extract the necessary information. The Defendants made no effort to explain the general scheme of record-keeping or give Plaintiffs a custodian list. There was no uniform naming of files, and files were not produced in such a way that maintained or replicated the folder structure that existed in email boxes or with respect to the storage of non-email ESI. With respect to the timely-produced ESI, many pages were not produced in chronological order, which would have been the reasonable and appropriate production method, since the Defendants chose to produce files as several-thousand page .PDFs. The Plaintiffs cannot decipher whether the Defendants' production represents all relevant emails across all years but, for example, since the "af_Navigator" file consists of only 627 pages of ESI, it is quite clear that the production is lacking. Accordingly, Plaintiffs are confident that the Defendants have not produced significant emails and non-email ESI from all fact witnesses under their control and identified in the Defendants' Rule 26 Disclosures.

ii. Defendants' production consisted of thousand-page-long .PDFs, containing hyperlinks to unbates-stamped attachments

Looking beyond the naming of files, the fact that non-email ESI is missing, and the fact that the Defendants have not produced ESI from all relevant custodians within their control, the Defendants' self-proclaimed "reasonably usable format" is far from that. The Defendants did not create separate files for each separate document. Nor did they lump an email together with its attachments only such that the Plaintiffs could open up one file and scan the document family in one fell swoop. Instead, the Defendants produced its "30,480 pages of documents as its initial tranche of documents responsive to Plaintiffs search terms in fully searchable bates-stamped PDFs" as only eight (8) separate files. One file, for example, is comprised of 8,914 pages, plus hyperlinks to a plethora of pages of attachments, none of which have bates stamps as required by this Court's Local Rules. S.D. Fla. L.R. Gen. App. A.III.B.c.

As an example, one of the pages on the CD-Rom produced by the Defendants on October 8 (First Search Term Response 002296) contains a hyperlink to a Superintendent's Vessel Inspection Report for the M/V Seven Seas Navigator, and in order for the Plaintiffs to view the

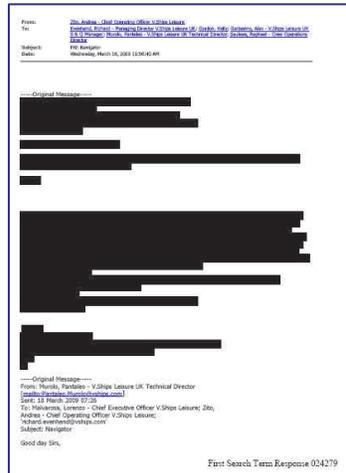
Superintendent's Vessel Inspection Report, Plaintiffs are required to double-click on the hyperlinked text, at which point the native file opens:



As the Defendants' production is not reasonably usable, the Plaintiffs must expend more resources than they should be using in order to identify and locate documents within the Defendants' production. Using the Windows Search function or "CTRL +F" (the "find" feature) in Adobe Reader would not locate the Superintendent's Vessel Inspection Report because those computer functions only scan the actual .PDF files themselves. Since Ringtail has the capability for .PDF upload, the Plaintiffs tried to upload the .PDF files to Ringtail to aid them in searching, managing and utilizing these documents. However, due to the file sizes and format, the Ringtail database is unable to house the Defendants' production. The Plaintiffs are thus left to print documents in hard-copy, being careful not to separate emails from their unbates-stamped attachments. This process renders the production highly cumbersome and not user-friendly because it removes the electronic search functionality of the ESI.

ii. The Defendants Redacted Entire Emails, But Have Not Served a Redacted Privilege Log, Rendering the Data Useless

The Plaintiffs have never sought nor do they want to receive any privileged material from the Defendants. However, where privileged communications are interspersed with non-privileged communications, and where redactions are necessary, the Plaintiffs should at least be able to view the senders and recipients, the date and time, and any non-privileged subject-line relating to those communications. This information would allow the Plaintiffs to fully understand the nature of the purported privileged communications. Currently, the Plaintiffs are unable to decipher redacted information, such as from this portion of an email:



When coupled with the Defendants’ failure to serve a redacted privilege log, these improper redactions further exemplify the deficiencies in the Defendants’ production.

V. CONCLUSION

The Defendants have made misstatements to this Court regarding the agreement between the parties and have conflated technological capabilities with technological knowledge. That the Defendants lack the knowledge to perform searches of the ESI as agreed should not excuse their cumbersome and incomplete production, part of which was produced after the Court’s November 12 deadline to produce documents [DE 119].

WHEREFORE, the Plaintiffs respectfully request this Court grant the Plaintiffs’ Motion to Compel [DE 150] and (1) compel the Defendants to use the search terms provided by the Plaintiffs [DE 150-1] to properly search its ESI and subsequently produce search results to the Plaintiffs in the requested format within ten (10) days of the Court’s order granting the motion or, in the alternative, appoint a third-party electronic discovery vendor to carry out the requested searches and production, with all costs to be borne by the Defendants; (2) if, upon reviewing the ESI, the Plaintiffs discover documents that were not initially produced before the close of discovery, permit the Plaintiffs to conduct follow-up depositions of Defendants’ corporate representatives and to supplement their expert reports as needed, with all costs to be borne by the Defendants; (3) granting the Plaintiffs the fees and costs associated with this motion; and (4) granting the Plaintiffs such other and further relief as the Court deems appropriate.

Dated: December 10, 2010

Respectfully submitted,

/s/ Daniel A. Casey

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that I electronically filed the foregoing with the Clerk of the Court this 10th day of December 2010 by using the CM/ECF system, which will send a notice of electronic filing to the following:

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