

**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' MOTION TO COMPEL DEFENDANTS TO CONDUCT DISCOVERY
OF ELECTRONICALLY-STORED INFORMATION IN RESPONSE TO PLAINTIFFS'
REQUESTS FOR PRODUCTION OF DOCUMENTS AND REQUEST FOR AN
EXPEDITED RULING**

Pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, the Plaintiffs, 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., by and through their undersigned counsel, hereby move this Court to compel Defendants, V.Ships Leisure SAM and V.Ships Leisure UK, Ltd.'s (the "Defendants") to apply the Plaintiffs' search terms to the Defendants' electronically-stored information ("ESI") in order to locate and produce to the Plaintiffs documents responsive to the Plaintiffs' Requests for Production of Documents and request an expedited ruling ("Motion to Compel"), and in support state the following:

1. On August 2, 2010, the Plaintiffs served their Requests for Production of Documents upon the Defendants ("Requests for Production"). Responses to these Requests for Production were due on or before September 1, 2010. On September 1, 2010, Defendants'

counsel for the first time informed undersigned counsel that their responses would not be ready, and sought an additional thirty (30) days to respond. The Plaintiffs agreed to the requested enlargement of time, provided the Defendants agreed to join in a motion that sought to enlarge certain pre-trial deadlines that would be affected by the delayed responses to discovery.

2. Due to the volume of ESI belonging to the Plaintiffs and to limit the discovery burden on the Defendants, the parties agreed to employ the use of search terms to gather relevant, non-privileged ESI to respond to the Requests for Production (this same method was also used by the Plaintiffs to search their ESI to produce to the Defendants). On August 24, 2010, the Plaintiffs provided the Defendants with a set of Boolean search terms to be used to cut down the Defendants' ESI and to yield a more narrow set of documents responsive to the Plaintiffs' Requests for Production. A true and correct copy of these search terms is attached hereto as **Exhibit A**.¹

3. The Defendants did not object to the application of this set of search terms to its ESI.

4. On October 7, 2010, the Defendants produced to the Plaintiffs, in response to the Request for Production, one DVD-Rom.² The Defendants represented on multiple occasions that this DVD-Rom contained the results of the agreed-to ESI searches:

¹ The Plaintiffs subsequently clarified to the Defendants, with no objection, that “!” was to be used in place of whichever root expander their system recognized.

² The DVD-Rom sent by the Defendants on October 7, 2010 contained four .pdf files bates labels. Assuming the names of these files represents the initials of the custodians, Defendants produced one set of documents from each of the following custodians: Alessandro Garbarino, Antonio Favuzzi, Brian Hernaman, and Kelvin McIlldoon. On the following day, October 8, 2010, Defendants subsequently sent another DVD-Rom, advising the Plaintiffs that the first was sent in error because it had not been bates stamped. The supplemental DVD-Rom also included four additional .pdf files from Pantaleo Murolo from the M/V Seven Seas Navigator. Each page produced in this production is bates numbered with the prefix “First Search Term Response.”

- (a) On October 1, 2010, Clay Naughton, Esq., counsel for the Defendants, represented to Elisa Jaclyn, Esq., counsel for the Plaintiffs, that “[d]ue to the *quantity of records returned by your search requests* as related to the Rule 26 Disclosures the *items are only now on disk* and in route to Miami....” (emphasis added).
- (b) On October 6, 2010, Mr. Naughton represented to Christina M. Paul, Esq., counsel for Plaintiffs, “We have the document results from your search terms ready to go...” (emphasis added).
- (c) On October 7, 2010, Mr. Naughton represented to Ms. Paul, “Our courier dropped the search results CD off at your offices yesterday” (emphasis added).
- (d) On October 8, 2010, Mr. Naughton represented to Ms. Paul that the production of V.Ships Leisure UK, Ltd. Documents contained a “CD with approximately 30,000 pages of Search Terms results after searching the VSLUK email Vault” (emphasis added).

5. The Plaintiffs subsequently reviewed the ESI contained on this DVD-Rom in preparation for their depositions of the Defendants’ corporate witnesses with the belief that it represented the entire universe of ESI resulting from the processing of the Plaintiffs’ search terms.

6. During the week of November 1, 2010, Plaintiffs’ counsel traveled to Monaco and conducted depositions of several of the Defendants’ corporate witnesses. Among the witnesses deposed during this trip was Richard Evenhand, Managing Director of V.Ships Leisure UK Ltd., who was involved with collection and production of documents responsive to the Requests for Production.³

7. During Mr. Evenhand’s deposition, he testified that, while the Defendants collected ESI from the various custodians with potentially responsive documents, they did *not* process the agreed-upon search terms through the entire universe of the Defendants’ ESI

³ Note that, since Mr. Evenhand’s deposition took place overseas, a transcript is not yet available.

(notwithstanding Defendants counsel's numerous representations to plaintiffs to the contrary). Instead, the Defendants merely searched the ESI for the word "Navigator" and several other names through a handful of the Defendants' custodians' ESI. The Plaintiffs' chosen search terms *were not searched or processed* through the Defendants' ESI.⁴ Additionally, the Defendants apparently failed to search or produce documents from all relevant custodians, including Mr. Evenhand, himself.

8. Plaintiffs' counsel, K&L Gates LLP, subsequently consulted with its external electronic discovery vendor with respect to the production of ESI by Defendants, who stated that based upon the testimony of Mr. Evenhand, combined with the file type (lengthy .PDF files with hyperlinks to native file attachments), it appears that one-word searches were run in the email program and then converted to .PDF. The "First Search Term Response" production does not appear to contain the results of the Plaintiffs' Boolean search term list dated August 24, 2010.

9. The Defendants' response to the Requests to Produce is due no later than today, Friday, November 12, 2010. *See* Order on Motion for Extension, dated September 13, 2010, [D.E. 119]. The Plaintiffs recognize that ESI discovery can be a labor intensive task—indeed, this was the genesis of the Plaintiffs' suggestion to employ the use of search terms. Accordingly, the Plaintiffs are aware that it is unrealistic to think the Defendants can or will process the Plaintiffs' search terms, as agreed, and to produce the results of its searches by the current response deadline. However, given the time sensitive nature of discovery in this matter, the Plaintiffs request that this Court give the Defendants no more than ten (10) additional days to conduct proper searches of ESI and produce the results of such searches to the Plaintiffs — tasks

⁴ The Plaintiffs note that they have now traveled to Monaco and conducted depositions of the Defendants' corporate witnesses having reviewed what was presented as the ESI responsive to their search terms, but they have subsequently learned the Defendants have misrepresented this search and production of ESI.

that the Defendants represented they had already completed and that they should already have completed. In the alternative, if the Defendants cannot carry out the requested searches in this manner, the Plaintiffs request that the Court appoint a third party electronic discovery vendor to carry out the requested searches at the cost of the Defendants.

10. With respect to the format of the Defendants' searches, the Plaintiffs request that:

- (a) The Defendants' searches include ESI from all employees listed on its Rule 26 disclosures and within their control;
- (b) The Defendants' ESI production is not limited to emails and their attachments, but includes all electronically-stored files and data; and
- (c) The Defendants' ESI is produced in the format previously requested by the Plaintiffs.⁵

11. The Plaintiffs further request that depending on the information provided as a result of a proper ESI search, this Court permit the Plaintiffs to conduct follow up depositions of the Defendants' corporate representatives and supplement their expert reports.

12. Federal Rule of Civil Procedure 37(a)(5) provides that "If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitate the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees..." except under certain

⁵ In a September 29, 2010 email from Ms. Jaclyn to Mr. Naughton, Michael T. Moore and Scott Wagner, counsel for Defendants, she stated as follows:

As we advised you on August 19 and confirmed on August 24, we prefer ESI to be produced in its native format using the following load file specifications: 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.

limited circumstances. Here, the Plaintiffs have conferred with the Defendants regarding the issues raised in this motion, Defendants were unjustified in resisting discovery, and there are no extraordinary circumstances that would make an award of fees and costs to the Defendants unjust. Accordingly, the Plaintiffs request that the Court award it the reasonable fees and costs associated with its conferral with the Defendants and with preparing and presenting this motion to the Court.

CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 7.1

Plaintiffs' undersigned counsel hereby certifies that they have, in good faith, attempted to confer with counsel for Defendants with respect to the issues covered by this motion, but such conferrals were entirely unsuccessful.

WHEREFORE, the Plaintiffs respectfully request this Court grant an order on an expedited basis (1) compelling the Defendants to use the search terms provided by the Plaintiffs on August 24, 2010 to properly search its ESI and subsequently produce results of these searches to the Plaintiffs in the requested format within ten (10) days of the Court's grant of this Motion to Compel or, in the alternative, appoint a third party electronic discovery vendor to carry out the requested searches and production; (2) depending on the information provided as a result of a proper ESI search, permitting the Plaintiffs to conduct follow up depositions of Defendants' corporate representatives and supplement their expert reports; (3) granting the Plaintiffs the fees and costs associated with this Motion to Compel; and (4) granting the Plaintiffs such other and further relief as the Court deems appropriate.

Dated: November 12, 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 12th day November, 2010 by using the CM/ECF system, which will send a notice of electronic filing to the following:

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