

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

**ADACEL, INC.,
a Canadian corporation, and
ADACEL SYSTEMS, INC.,
a Texas corporation,**

Plaintiffs,

v.

Case No. 6:18-cv-1176-Orl-40TBS

**ADSYNC TECHNOLOGIES, INC.,
a Florida corporation,**

Defendant.

_____ /

**DEFENDANT’S MOTION TO COMPEL APPROPRIATE
E-DISCOVERY PROTOCOL**

Defendant, Adsync Technologies, Inc. (“Adsync”), moves, pursuant to Federal Rule of Civil Procedure 37 and Local Rule 3.04 for an order implementing an appropriate framework for discovery of electronically stored information (“ESI”). Specifically, Adsync requests an order (1) requiring the parties to engage third-party e-discovery vendors for document collection and processing, and (2) setting a date certain for the parties to reach agreement as to appropriate document custodians and search terms. In the alternative, Adsync requests the Court appoint a special master to address the parties’ discovery disputes regarding the collection and production of relevant ESI. In support, Adsync states as follows.

INTRODUCTION

This is a trade secret misappropriation case, arising from a business relationship between the parties dating back to 2008 and a series of contracts with the Federal Aviation Authority (“FAA”) throughout the same period. The parties are highly sophisticated technology companies,

whose relationship and course of dealing can be reasonably anticipated to have generated extensive ESI relevant to the claims and defenses at issue in this litigation.

A number of pressing discovery issues have gone unresolved for a period of at least one month, despite Adsync's best efforts to facilitate their timely resolution. Such discovery issues include the selection of appropriate document custodians and search terms, Adacel's waiver of objections through its service of untimely written discovery responses, and Adacel's deficient responses to a number of Adsync's discovery requests. After significant delay, on March 12, 2019, Adacel provided feedback regarding several outstanding discovery issues. Adsync remains committed to a negotiated resolution of the parties' discovery disputes to the fullest extent possible. However, the parties have reached an impasse regarding fundamental e-discovery protocol, which has necessitated this Motion.

The operative Case Management Order sets deadlines in May-June 2019 for the exchange of initial expert reports, and August 2019 for the closure of discovery. [D.E. 26.] To date, however, no documents have been exchanged. Mindful of such impending deadlines, Adsync has attempted on a consistent basis to negotiate efficient ESI protocols such that each party can immediately initiate appropriate document collection, review, and production. At every turn, however, Adacel has declined Adsync's invitation to cooperate and advance discovery in a timely fashion. Accordingly, Adsync requests the Court enter an order to establish an efficient and appropriate process for the parties' collection and production of ESI. Alternatively, Adsync requests the Court appoint a special master to address and resolve the parties' ESI discovery disputes to allow this case to progress in accordance with the deadlines set forth in the Case Management Order.

BACKGROUND

1. On November 30, 2018, Adsync served its First Requests for Production upon Adacel. On the same date, Adsync also served upon Adacel its First Set of Interrogatories and First Request for Admissions.

2. Adacel's written discovery responses were due Monday, December 31, 2018. However, the parties agreed to several mutual extensions of time to exchange responses to pending discovery requests.

3. Pursuant to such agreed to extensions, Adacel timely served its Response to Adsync's First Request for Admissions on January 28, 2019.

4. With respect to Adacel's Answers to Adsync's First Set of Interrogatories and Responses to Adsync's First Requests for Production, the parties' final mutually agreed discovery extension expired on February 4, 2019, at which time the parties were to exchange outstanding discovery responses.

5. Adacel, however, failed to serve its Answers to Adsync's First Set of Interrogatories or Responses to Adsync's First Requests for Production in accordance with the parties' mutually agreed extension. Rather, Adacel simply informed Adsync after close of business on February 4, 2019, that it would not comply with the parties' agreement. Adacel did not request a further extension from Adsync or the Court.

6. Adacel served its Responses to Adsync's First Requests for Production on February 5, 2019, and served its Answers to Adsync's First Set of Interrogatories on February 8, 2019.

7. In light of the number of discovery requests exchanged by the parties, the ten-year period at issue, and the anticipated volume of ESI, counsel for Adsync contacted counsel for Adacel on January 25, 2019, in order to arrange a conference call to discuss protocol for the

mutually anticipated exchange of ESI, including protocol for the identification of document custodians and search terms.

8. The parties held such conference call on January 31, 2019. As a result, the parties agreed to a mutual exchange of preliminary search terms, custodians, and data fields.

9. Thereafter, on February 12, 2019, Adacel provided a list of its own document custodians and search terms it proposed to apply to its own data. *See* correspondence attached as Composite **Exhibit A**. On the same date, Adsync provided a list of the Adacel custodians from whom it requested Adacel collect ESI, and the terms that Adsync proposed that Adacel apply to its data. *Id.*

10. On February 15, 2019, in light of the fact that Adacel failed to provide a list of proposed Adsync custodians or search terms to apply to Adsync's ESI, Adsync also supplied a preliminary list of its own document custodians and search terms to apply to its own data. *Id.*

11. To date, Adacel has failed to supply any Adsync document custodians that Adacel contends may maintain responsive ESI, nor any search terms that Adacel proposes Adsync apply to its data in compiling potentially responsive ESI.

12. For nearly one month, Adsync has requested that Adacel identify the Adsync document custodians that Adacel contends may maintain responsive ESI, or any additional search terms that Adacel proposes Adync apply to its data. To date, however, Adacel has failed to provide any input regarding Adsync's proposed document custodians and search terms, in spite of serving Adsync with more than 40 document requests at the parties' case management conference on October 3, 2018. Adsync timely served its responses to Adacel's document requests, but collection has not yet begun due to Adacel's failure to provide document custodians or search terms.

13. Adsync has advised Adacel on at least two occasions that Adsync has engaged a third-party e-discovery vendor and is prepared to initiate document collection. However, for cost

and efficiency purposes, Adsync cannot initiate the collection process until Adacel participates in the selection of appropriate document custodians. Nonetheless, Adacel has declined to cooperate in the selection of Adsync's document custodians and search terms to apply to Adsync's data.

14. Exactly one month from the date that Adsync provided its proposed list of Adacel document custodians and search terms to be applied to Adacel's data, on March 12, 2019, Adacel finally provided its feedback regarding the search terms. *See* email correspondence attached as **Exhibit B**.

15. Adacel's March 12, 2019 correspondence outright rejects 40 of the 51 terms proposed by Adsync, and seeks to limit significantly the scope of the few terms to which Adacel might be willing to agree. *Id.* Although Adsync intends to continue its efforts to reach an agreement with Adacel as to search terms, it remains clear that the parties have significant work to do despite initiating the search term discussion over one month ago.

16. Adacel's March 12, 2019 correspondence also confirmed counsel's prior representation that Adacel intends to engage in a self-collection of responsive documents unless its internal collection expands to "many thousands of pages of documents." *Id.*

17. Alarmingly, in Adacel's written responses to requests for production, Adacel indicated that it would only produce "illustrative" or "sufficient" documents in response to the several of Adsync's requests. *See* Adacel's Response to Adsync's First Request for Production attached hereto as **Exhibit C** at Requests 1, 12, 26, and 42.

18. Adacel's intention to cherry-pick those documents it seems "sufficient" was further confirmed by Adacel's counsel on a conference call held February 22, 2019.

19. Adsync has significant concerns regarding Adacel's proposed self-collection, which concerns were discussed at length during the parties' 2 ½ hour discovery conference call on February 22, 2019.

20. Ultimately, despite negotiations dating back to January 2019, the parties have reached an impasse regarding critical ESI discovery protocol, and Adacel's participation in the negotiations of search terms and custodians has been significantly tardy or wholly absent.

ARGUMENT

I. Adacel Should be Compelled to Engage in an Appropriate Collection and Production of Relevant ESI Though a Third-Party Discovery Vendor.

Even before the parties exchanged their responses to initial discovery requests, Adsync attempted to negotiate appropriate ESI protocols with Adacel. Cognizant of fast-approaching expert report and discovery deadlines, Adsync is also mindful of litigants' obligations with respect to the discovery of ESI, recently summarized as follows:

Courts expect that counsel will endeavor to cooperate and reach agreements early in litigation regarding the scope of preservation; the scope of search efforts (custodians, date ranges, sources); the method of search (keyword, TAR, combination); the form (or forms) of production (including what metadata will be produced and how ESI from structured databases may be produced); and privilege and privacy issues, etc., and to revisit issues, if necessary, as more facts are discovered or legal theories are refined.

UnitedHealthcare of Fla., Inc. v. Am. Renal Assocs. LLC, 2017 WL 4785457, at *4 (S.D. Fla. Oct. 20, 2017), *Federal Judges' Guide to Discovery*, Edition 3.0, The Electronic Discovery Institute (2017), at 50.

Indeed, "where ... parties in a large civil case do not cooperatively engage in the e-discovery process, the collection and indexing of documents and the production of relevant documents, become much more difficult." *Id.* at *3.

Here, Adacel should not be permitted to engage in a self-collection of ESI, particularly where it has already indicated its intention to produce only a hand-selected subset of documents in response to various of Adsync's requests for production. In light of the broad scope of discovery, such an approach is inappropriate and prejudicial to Adsync's ability to defend this litigation. Rather, Adacel should be required to cooperate in the negotiation of appropriate search terms

directed to such requests, as further discussed below, such that the parties can obtain and review all documents relevant to the claims and defenses at issue in this litigation.

Adacel's proffered discovery procedure is also concerning in that it proposes to generate a potential production of up to "many thousands" of pages of production in a format that may be unsearchable or otherwise difficult for Adsync to navigate and use in a reasonable manner. Although Adacel objects to producing documents natively, it will, of course, maintain native copies for itself to search and use, as needed. Adsync, by contrast, may be left to sift through thousands of pages of ESI converted to PDF by Adacel before production.

In this case, the parties should each be required to retain a third-party e-discovery vendor to collect, process, and make available for production all documents relevant to the claims and defenses in this litigation. Given the decade-long business relationship among these highly sophisticated parties and the FAA, there will be a significant volume of responsive ESI generated which can be gathered most effectively through the collection of data from agreed-upon custodians and the application of agreed-upon terms to those custodians' collected data. A procedure in which parties' self-collect ESI may be appropriate in small, temporally limited cases, wherein the parties engaged in only a limited manner through electronic means. This is not such a case.

As such, Adsync respectfully requests the Court enter an order requiring the use of third-party e-discovery vendors for document collection and processing.

II. The Parties Should be Required to Reach Agreement on Document Custodians or Search Terms by a Date Certain or, in the Alternative, a Special Master Should be Appointed.

Despite Adsync's continued efforts to negotiate search terms and custodians, Adacel has failed to provide any feedback regarding Adsync's proposed document custodians and search terms. Moreover, Adacel delayed for a period of one-month before providing feedback regarding Adsync's proposed list of Adacel document custodians and search terms to be applied to Adacel's

data. Although Adsync remains committed to negotiating an agreed list of custodians and search terms, it is clear from Adacel's March 12, 2019 correspondence that there remains significant work to be done. *See Ex. C.* In light of Adacel's ongoing delay and/or lack of real negotiation, Adsync requests the Court provide a date certain by which the parties must establish an agreed list of custodians and search terms.

In circumstances in which a party fails to cooperate regarding ESI and negotiation of search terms, courts may appropriately enter an order compelling such cooperation and the use of agreed-upon search terms to ensure that all relevant documents are produced. *Hatcher v. DeSoto Cty. Sch. Dist. Bd. of Educ.*, 2013 WL 12357529, at *2 (M.D. Fla. Nov. 6, 2013) (“The parties are required to cooperate in discovery especially as to electronically stored information. The Court is unsure as to how DeSoto knows that it has produced all relevant documents when it has not confirmed the search terms it used to obtain documents nor objected to the search terms propounded by the Plaintiff. The Court will require the parties to confer as to search terms for the electronically stored information, and the Court will require DeSoto to conduct additional searches of their electronically stored information to assure the Plaintiff that all relevant documents are produced and all documents that appears reasonably calculated to lead to the discovery of admissible evidence are produced with the exception of privileged or protected documents”); *Procaps S.A. v. Patheon Inc.*, 2014 WL 800468, at *1 (S.D. Fla. Feb. 28, 2014), amended, 2014 WL 11878435 (S.D. Fla. May 5, 2014) (finding that a self-collection conducted by plaintiff's critical executives and employees was inadequate, and ordering retention of an e-discovery vendor, and implementation of search terms and custodians).

Despite agreeing to the concept of ESI collection through the use of document custodians and search terms, Adacel has failed to timely cooperate with Adsync's efforts to identify such custodians and search terms. Without Adacel's prompt participation, the ESI collection process

has been at a standstill since mid-February. Adsync, for its part, cannot initiate the document collection process until such time that the parties reach agreement as to appropriate custodians. As such, Adsync respectfully requests the Court enter an order compelling Adacel to cooperate with Adsync in the selection of custodians and search terms, with such items to be agreed upon within 14 days.

In the alternative, Adsync respectfully requests the Court appoint a special master to address the discovery disputes raised herein and establish an appropriate schedule that will permit the parties to comply with the deadlines set forth in the Case Management Order. As indicated by the Amended Complaint, Adsync's requests for production, and the proposed search terms, this litigation involves substantially complex technological concepts and software programs. *See* D.E. 14; Ex. A-C. The appointment of a special master that can become acquainted with such information as it relates to the parties' dispute would be useful in facilitating efficient and appropriate resolution to the parties' discovery disputes. Accordingly, in the alternative, Adsync requests the appointment of a special master to address the parties' ESI discovery disputes.

CONCLUSION

For the reasons discussed above, Adsync respectfully requests the Court enter an order (1) requiring the parties to engage third-party e-discovery vendors for document collection and processing, and (2) setting a date certain for the parties to reach agreement as to appropriate document custodians and search terms. In the alternative, Adsync requests the Court appoint a special master to address the parties' discovery disputes regarding the collection and production of relevant ESI.

Dated: March 13, 2019.

/s/ David S. Wood
David S. Wood, Esq.
Florida Bar No.: 289515
Email: david.wood@akerman.com

Monica M. McNulty, Esq.
Florida Bar No.: 105382
Email: monica.mcnulty@akerman.com
AKERMAN LLP
Post Office Box 231
Orlando, Florida 32802-0231
Phone: (407) 423-4000
Fax: (407) 843-6610

and

Geoffrey Brodersen, Trial Counsel
Florida Bar Number: 0017807
Shell, Fleming, Davis & Menge
226 Palafox Place, Ninth Floor
Pensacola, FL 32502
Telephone: 850-434-2411
Facsimile: 850-435-1074
gbrodersen@shellfleming.com

Attorneys for Defendant
ADSYNC TECHNOLOGIES, INC.

CERTIFICATE OF CONFERENCE PURSUANT TO LOCAL RULE 3.01(G)

I HEREBY CERTIFY that on February 22, 2019, I conferred via telephone with counsel for Adsync, Stephen Luther, regarding the discovery issues raised herein. Counsel for Adsync also conferred with Mr. Luther regarding these issues via email on numerous occasions, as detailed herein. Despite many communications and follow-up correspondences by counsel for Adsync over a period of approximately one month, the parties have been unable to reach agreement regarding the discovery issues set forth in this Motion.

/s/ David S. Wood
David S. Wood, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 13, 2019, a true and correct copy of the foregoing was filed with the Court using the CM/ECF system, which will send an electronic notice to all counsel of record.

/s/ David S. Wood

David S. Wood, Esq.