

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CASE NO. 17-CV-00417-JES-CM

SERGIO VALDES,

Plaintiff,

v.

GREATER NAPLES FIRE RESCUE DISTRICT,

Defendant.

**DEFENDANT’S MOTION TO COMPEL FORENSIC
EXAMINATION OF PLAINTIFF SERGIO VALDES’ ELECTRONIC DEVICES**

Defendant, Greater Naples Fire Rescue District (hereinafter “Greater Naples” or “Defendant”), by and through its undersigned counsel and pursuant to Federal Rule of Civil Procedure 37(a) and Local Rule 26.1(i), hereby files its *Defendant’s Motion to Compel Forensic Examination of Plaintiff Sergio Valdes’ Electronic Devices* for imaging, copying and inspection (the “Motion”). Greater Naples respectfully requests that this court enter an order requiring Plaintiff to produce all electronic devices and email account information in his possession so that Defendant’s expert may conduct a forensic examination of the devices and email accounts, to include imaging, copying, and inspecting Plaintiff Sergio Valdes’ (hereinafter “Plaintiff”) electronic devices including but not limited to his cellular and/or mobile telephone, any and all iPad or iPad minis, personal computers, and email accounts. Additionally, Greater Naples respectfully requests that Plaintiff be compelled to execute the Authorization for Release of Social

Media Information attached to its second request to produce. As grounds for the Motion, Defendant submits the following memorandum of law.¹

MEMORANDUM OF LAW

I. Case Facts

On August 10, 2017, Plaintiff filed his Complaint and Demand for Jury Trial in this matter. [Doc. 1]. The Complaint alleges that Greater Naples' refusal to hire Plaintiff unlawfully interfered with his rights under the Family and Medical Leave Act of 1993 ("FMLA"), and was retaliation against Plaintiff in violation of the FMLA and Fla. Stat. § 440.205. The facts material to Greater Naples' decision not to hire Plaintiff are as follow.

Plaintiff was employed as an Ochopee Fire District firefighter with the Collier County Board of County Commissioners (Collier County) from May 2002 through December 28, 2016. On September 13, 2016, Collier County voted to approve an interlocal agreement for Greater Naples to manage on an interim basis the Ochopee Fire District pending the intended consolidation of the Ochopee Fire District into the Greater Naples Fire Rescue District. The term of the interlocal agreement is November 1, 2016, to September 30, 2019.

The interlocal agreement required Greater Naples to initiate the hiring process of Ochopee Fire District employees so they could begin employment with Greater Naples on November 1, 2016. On October 27, 2016, Plaintiff reported to work with the Ochopee Fire District after going through Greater Naples' pre-employment hiring process, which included medical and drug tests. Upon arrival at the Ochopee Fire District, Plaintiff requested to speak to his supervisor. During the conversation, Plaintiff's supervisor concluded that Plaintiff's behavior was unstable and

¹ Greater Naples certifies that it made good faith efforts to resolve this dispute without Court intervention, which included two written communications and a telephone conference with opposing counsel. Plaintiff refused to produce his electronic devises and/or allow Greater Naples' expert to perform a forensic examination of his devices.

emotional. The supervisor called the Fire Chief to advise him regarding Plaintiff's behavior, and the chief directed the supervisor to send Plaintiff home.

The supervisor directed Plaintiff to go home but he refused. The supervisor called Fire Chief Morris again to convey Plaintiff's refusal to go home and ongoing erratic behavior. The Fire Chief decided to go to the station, and upon his arrival, he approached Plaintiff's vehicle and found him on the ground. Plaintiff suddenly jumped up and entered his vehicle to drive away, but lost consciousness. The Fire Chief then directed the supervisor to call law enforcement.

Law enforcement arrived and found Plaintiff unresponsive with blood coming from his nose while sitting in the front seat of his vehicle. Medical assistance also arrived at the scene. Plaintiff began to "code" while receiving medical attention, but the first responders successfully resuscitated him. While Plaintiff was receiving medical attention law enforcement searched his vehicle to try to ascertain the reason for Plaintiff's behavior and assist with his medical treatment.

The law enforcement personnel found the following inside Plaintiff's vehicle:

- 1 empty Ziploc bag with a brownish color;
- 1 urine test kit with a positive test result for amphetamine, methamphetamine, and PCP;
- 1 green Crown Royal bag;
- 1 scale;
- 1 black bag;
- 1 grey plastic pipe;
- 1 empty pill bottle;
- 1 paper towel piece;
- 1 black plastic pipe;
- 3 glass pipes;
- 2 Ziploc bags with unknown white color residue;
- 1 pill bottle containing 57 blue pills identified as B972, amphetamine, and dextroamphetamine 10 mg;
- 1 unknown white pill;
- 1 blue bag with unknown substance;
- 1 Ziploc bag; and
- 1 plastic case with narcotics and paraphernalia.

Plaintiff was eventually transported to Physicians Regional Medical Center's emergency room. The emergency room documentation reflects Plaintiff's "[a]ssociated diagnosis" as "[s]ubstance abuse" and "[a]ltered mental state." Additionally, the emergency room's records reflect Plaintiff's "[p]sychiatric symptoms" as "depression" and "substance abuse." Lastly, the emergency room's "Impression and Plan Diagnosis" and "Discharge Diagnosis" for Plaintiff states altered mental state and substance abuse. Greater Naples decided not to hire Plaintiff because of his on duty drug overdose and possession of drugs and drug paraphernalia. This lawsuit followed. In Plaintiff's Complaint, he fails to include any of the previously cited facts relative to his illegal use of drugs that are contained in the medical and police reports Greater Naples obtained. Instead, Plaintiff alleges that the events at issue were caused by "diabetes."

II. Discovery at Issue and Relevant Facts

Greater Naples served Plaintiff with its First Set of Interrogatories and First Request for Production. Greater Naples' discovery requested information and documents which, if answered accurately, would have served to potentially discredit Plaintiff's explanation of diabetes causing him to pass out at work; and supported Greater Naples' legitimate reason for not hiring Plaintiff based upon the illegal drugs/paraphernalia found in his vehicle and his use of illegal drugs. Specifically, Greater Naples submitted to Plaintiff the following interrogatory that is pertinent to this Motion, and Plaintiff offered the following response:

2. Identify all documents, videos, voice recordings, text messages, social media comments, and/or photographs in your possession, custody, or control, which pertain in any way to the allegations contained in your lawsuit, and describe the documents, videos, voice recordings, text messages, social media comments, and/or photographs by subject, date, author, and recipient or addressee.

RESPONSE: Per Rule 33(d), please see Plaintiff's documents served in response to Defendant's Request for Production. I am unable to identify any other documents or text messages, because since my termination I have had 5 different

phones and am **unable to access any of the above** other than what I am producing in response to the Request for Production.

(Emphasis added). Plaintiff's answers to Greater Naples first set of interrogatories are attached hereto as **Exhibit A**.

Based upon Plaintiff's answer to the above referenced interrogatory, it appears that he already destroyed or failed to preserve relevant information as reflected in his answer to interrogatory 2 when he states "I am unable to identify any other documents or text messages, because . . . [he is] "unable to access any of the above." To the extent Plaintiff's claim that he is "unable to access" the requested electronically stored information is accurate, such spoliation of evidence will prejudice Greater Naples' defense in light of his denial of illegal drug use and ownership of the drugs and paraphernalia found in his vehicle. If, indeed, the requested electronically stored information is unavailable, then Plaintiff should be subject to sanctions including, but not limited to, dismissal with prejudice of the instant lawsuit. *See United States EEOC v. GMRI, Inc.*, No.: 15-20561-CIV, 2017 U.S. Dist. LEXIS 181011, at *62-63 (S.D. Fla. Nov. 1, 2017); *quoting Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 945 (11th Cir. 2005) (sanctions for spoliation of evidence in the Eleventh Circuit may include dismissal of the case).

Moreover, Plaintiff only produced portions of various text messages and e-mails sent from his mobile phone between himself and various individuals whom Plaintiff alleges have information related to his claims. These partial electronic exchanges include discussions of Plaintiff needing to enter a rehabilitation facility. Plaintiff offered no explanation of why he was "unable to access" the devices he referenced in response to Greater Naples First Set of Interrogatories, but was able to access the piecemeal text message records he produced.

As a result of Plaintiff's assertion that he has had 5 mobile phones, and Greater Naples' concern that additional discoverable information has been destroyed or lost, Defendant served

Plaintiff with its Second Request to Produce/Inspection. Greater Naples made the following requests to produce/inspection, and Plaintiff offered the following responses:

1. All electronic devices that you have owned, leased, or used from April 2016 to the present, including but not limited to smart phones, cell phones, desk top computers, lap top computers, tablets, iPads, or any other memory devices (*e.g.*, flash memory, external hard drives, USB drives and iPods).

Response: Defendant [sic] objects to this request on the basis [sic] this request is overly broad and is nothing more than a fishing expedition. The request is interposed solely to harass Defendant [sic] and is an invasion of Plaintiff's right to privacy. Furthermore, it is not reasonably calculated to lead to the discovery of admissible evidence. Plaintiff lastly objects on the bases [sic] stated in the letter from Benjamin Yormak to Reynaldo Velazquez dated May 29, 2018, attached hereto.

6. Execute and produce the Authorization for Release of Social Media Information attached hereto as Exhibit A.

Response: Not applicable. Plaintiff does not participate in any social media.

Defendant's second request to produce/inspection and Plaintiff's response to Greater Naples' second request to produce is attached hereto as **Exhibits B and C**.

Plaintiff's objection to request 1 in the second request to produce does not have merit. The request is reasonably calculated to lead to the discovery of admissible evidence and is not overly broad. In relation to the former, Plaintiff has already produced hard copies of text message communications relevant to this case and include communications about him entering a drug rehabilitation center immediately after his medically diagnosed drug overdose. Thus, it is clear from the foregoing that Plaintiff has used at least his cell phone to communicate pertaining to issues relevant to this litigation, and Greater Naples is entitled to examine his devices to ascertain whether he has produced all responsive communications. In addition, Plaintiff responded to interrogatory number 2 from the first set of interrogatories by admitting that he has had "5 different phones and am unable to access any of the above other than what I am producing." The fact that

the five cell phones allegedly came after his employment with Collier County came to an end is immaterial because communications from prior cell phones are transported to new cell phones and it is likely that after Plaintiff's employment with Collier County ended he communicated about issues that will lead to the discovery of admissible evidence. Lastly, the request is not overly broad because it is limited to electronic devices that Plaintiff owned, leased, or used from April 2016 to the present, and Greater Naples is only interested in communications that are material to this litigation.

In relation to request 6 of the second request to produce, Plaintiff did not object to the request. Instead, Plaintiff improperly refused to execute the Authorization for Release of Social Media Information on the basis that we must accept his claim that he "does not participate in any social media." Plaintiff must produce the executed release because he did not object to the request and Greater Naples is entitled to serve third-party subpoenas to social media providers in light of the previous communications produced during this litigation. Greater Naples is not obligated to accept Plaintiff's self-serving claim. In fact, if Plaintiff's claim is accurate there is no reason to refuse to sign the requested release so Greater Naples can confirm his claim about not participating in social media.

In light of Plaintiff's response to interrogatory 2 in Greater Naples' first interrogatories, and his meritless objection to request to produce 1 and failure to object to request 6 in the second request, Greater Naples respectfully submits it is entitled to perform a forensic examination of the requested electronic devices and email accounts. Accordingly, Greater Naples respectfully requests that this court enter an order requiring Plaintiff to produce all electronic devices and email account information in his possession so that Defendant's expert may conduct a forensic examination of the devices and email accounts, to include imaging, copying, and inspecting

Plaintiff's electronic devices and emails. Additionally, Greater Naples respectfully requests that Plaintiff be compelled to execute the Authorization for Release of Social Media Information attached to the second request to produce as Exhibit A.

III. Legal Argument

A. Forensic Examination Is Appropriate Where Responding Party Failed to Produce Responsive ESI and There Is a Sufficient Basis to Suggest that Responsive ESI Exists.

Compelling a forensic examination, or forensic imaging,² is appropriate in certain circumstances. *Wynmoor*, 280 F.R.D. at 687. Before such examination is ordered, the court must weigh privacy concerns against the utility of inspection. *Klayman v. City Pages*, No. 5:13-cv-143-Oc-22PRL, 2014 U.S. Dist. LEXIS 150253, at 14 (M.D. Fla. Oct. 22, 2014). Mere speculation that documents *may* exist is not a sufficient basis for the court to order an invasive search of the party's personal devices – computers, telephone records, etc. *Id.* at 4. However, once the requesting party demonstrates the responding party's failure to produce requested information, “the scales tip in favor of compelling forensic imaging.” *Wynmoor*, 280 F.R.D. at 687. Forensic examination is especially warranted where – like here – there is evidence that the responding party has withheld information, **is unable or unwilling to search for the requested information**, and has otherwise dragged its feet with respect to discovery requests. *See, e.g., Procaps S.A.*, 2014

² Forensic investigation is a mechanism by which data may be retrieved from electronic devices – even failed electronic devices. *Dorchester Fin. Holdings Corp. v. Branco BRJ S.A.*, 304 F.R.D. 178, 183 (S.D.N.Y. 2014). During a forensic investigation, a forensic image, also known as a “mirror image,” will “replicate bit for bit sector for sector, all allocated and unallocated space, including slack space, on a computer hard drive,” thereby retrieving all the information in the electronic device, including imbedded, residual, or deleted data. *Wynmoor*. 280 F.R.D. at 686-87. The ability of a electronic device specialist to recover such data has been widely known in the recent years. For that reason, courts routinely order forensic examination of electronic devices, working or failed, during discovery. *See, e.g., Procaps S.A. v. Patheon Inc.*, No. 12-24356-CIV, 2014 U.S. Dist. LEXIS 28263, 7-8 (S.D. Fla. Feb. 28, 2014) (ordering a comprehensive forensic search of electronically stored information and other sources of relevant document, despite an internal search having already been conducted, where there existed a strong suggestion that some responsive documents had not been located); *Wynmoor*, 280 F.R.D. at 687 (compelling forensic examination to determine if electronic files that a party described as “unrecoverable” could in fact be retrieved); *U & I Corp. v. Advanced Med. Design, Inc.*, 251 F.R.D. 667, 676 (M.D. Fla. 2008) (granting motion to compel a forensic inspection of hard drives).

U.S. Dist. LEXIS 28263 at 7-8 (stating that “a scenario which strongly suggests that some (and perhaps even a significant amount of) responsive discovery . . . has not yet been located . . . mandates a comprehensive forensic search”).

In *Wynmoor*, the Court had before it Defendant’s Motion to Compel Production and Forensic Examination. *Id.* at 682. Defendant sought a forensic examination of plaintiffs’ computer files because plaintiffs had failed to produce a single piece of ESI. *Id.* at 683. Instead, similar to here, plaintiffs claimed that the information had been unrecoverable or otherwise unavailable. *Id.* at 686. The court was unmoved. The court found that plaintiffs had been “either unwilling or unable” to conduct a search of their electronic devices for potentially retrievable responsive documents and, as a result, it compelled a forensic examination. *Id.* at 687.

Perhaps more illustrative is the Court’s opinion in *Health Mgmt. Assocs. v Salyer*, No. 14-14337-CIV, 2014 U.S. Dist. LEXIS 187916 (S.D. Fla. Aug. 19, 2015), a case factually similar to the instant action. In *Salyer*, the plaintiff sought forensic examination of the defendant’s personal computer and other devices, including cellular phones, as well as his personal e-mail account. *Id.* at 1. The facts showed that “[s]everal personal devices that might have stored data relevant to this lawsuit were lost or otherwise rendered inaccessible soon after the defendant left his employment,” including one mobile phone that was dropped in a river. *Id.* at 2-3. The defendant obtained new devices as replacements, but denied that he transferred any data to the replacement devices. *Id.* at 3. The court noted that “there is the obligation of a civil litigant to preserve relevant information, including electronically stored information that is anticipated to be relevant” and that “[a] civil litigant’s breach of that duty opens the possibility of discovery by way of forensic examination of data storage devices.” *Id.* at 1-2. Having found that the plaintiff had shown that the devices were likely to contain information relevant to the litigation beyond mere speculation, and the non-

cooperation of the defendant, the court granted the motion to compel forensic examination. *Id.* at 5.³

Plaintiff's Responses to Discovery and Underlying Actions Warrant a Forensic Examination. Here, as discussed in the factual background, Plaintiff has demonstrated an uncanny – if not convenient – ability to lose devices. By Plaintiff's own estimation, in the approximately fifteen (15) months between his termination from Collier County and his verification of interrogatory answers he has had approximately five (5) different cell phones. However, as of March 3, 2018, Plaintiff is "unable to access any of the[m]" except the limited text messages he produced. Of course, Plaintiff offers no explanation as to how or why he is only able to access the specific documents he produced and now asks Greater Naples to simply "take his word for it" that his devices contain no additional relevant information. However, Plaintiff's production amounts to nothing more than "cherry picked" pieces of larger conversations between Plaintiff and individuals whom he has already identified as individuals with discoverable information. Even the "cherry picked" communications produced contain discoverable information addressing Plaintiff entering a drug rehabilitation facility after his medically diagnosed drug overdose on October 27, 2016. Further, Plaintiff makes no effort to obtain any geographic or location data from his mobile devices which might serve to corroborate his explanation as to why drugs and drug paraphernalia were found in his vehicle.

Simply stated, Plaintiff has handpicked the electronically stored data that he wants to produce, despite his production evidencing more discoverable information. Plaintiff had legal

³ Notably, the court in *Salyer* balanced the concerns related to the defendant's privacy interests by permitting the defendant to be present and participate, requiring plaintiff to provide search criteria in advance, requiring such criteria to limit the scope of the search to matters directly relevant to its relief, and to otherwise treat the search as if it were plaintiff's own personal devices. *Id.* at 4-5. Such limitations would be sufficient to balance any privacy interest in this action as well.

counsel contact Greater Naples on his behalf as early as January 24, 2017, and thus had an obligation to maintain all electronic devices that could have potentially recoverable information. Contrary to that obligation, Plaintiff has “lost” approximately five (5) mobile devices that now cannot be searched for discoverable information. Given Plaintiff’s convenient “bad luck” with mobile devices, the limited production of electronic communications that contain discoverable information, and consistent with the case law cited herein, Greater Naples respectfully requests that this court enter an order requiring Plaintiff to produce all electronic devices and email account information in his possession so that Defendant’s expert may conduct a forensic examination of the devices and email accounts, to include imaging, copying, and inspecting Plaintiff’s electronic devices and emails.

B. Proposed Protocol to Follow During Forensic Investigation

To be clear, Greater Naples is not seeking an unlimited forensic examination of Plaintiff’s electronic devices. The protocols set forth herein will protect any privileged materials that may exist on these devices and will cause minimal burden to Plaintiff. Additionally, since Greater Naples is bearing the initial cost of the inspection, imaging, and copying, there is no cost to Plaintiff unless Greater Naples uncovers any further improper conduct by Plaintiff. Greater Naples respectfully requests this Court, using the protocols set forth below, order Plaintiff to make available for copying, inspection and search all of his electronic devices and emails.

A court may specify conditions for the discovery of ESI. *See U & I Corp.*, 251 F.R.D. at 674. With respect to the use of a forensic investigation to retrieve electronic files, the court may set a “protocol,” or a “procedure,” to follow during such a potentially intrusive inquiry. *See Rivera v. Ore Seafood, Inc.*, No. 10-10053-CIV, 2010 U.S. Dist. LEXIS 124140, at 6-7 (S.D. Fla. Nov. 9, 2010) (setting terms of a forensic review); *Bank of Mongolia v. M&P Global Fin. Servs.*, 258

F.R.D. 514, 520-21 (S.D. Fla. 2009) (setting forth procedure for an independent expert to review defendant's computer records). Greater Naples requests that this Court adopt the following collection and review protocol:

1. The Court appoint Greater Naples' forensic expert who shall mirror image or copy Plaintiff's devices and shall conduct his/her investigation, to the extent possible, in a manner that minimizes disruption to the operation of Plaintiff's affairs.
2. To the extent that the forensic expert has direct access to information protected by the attorney-client privilege, such disclosure will not result in any waiver of such privilege.
3. The expert shall mirror image or copy Plaintiff's current and old electronic devices that are available.
4. Greater Naples shall provide a list of search terms to the Court to identify responsive documents by a set deadline. After Greater Naples has submitted the search terms to the Court, Plaintiff shall have 5 days to submit his objections to the Court regarding any of the search terms, which the Court will rule upon. Greater Naples will then provide the search terms to the forensic expert.
5. Once the expert has mirror imaged or copied Plaintiff's devices, the expert shall search the mirror image or copies using the search terms. The results of the search terms and an electronic copy of all responsive documents shall be provided to counsel for Greater Naples and Plaintiff.
6. Greater Naples shall review the search term results provided by the forensic expert and identify all responsive documents. Greater Naples shall produce all responsive documents to Plaintiff.
7. Greater Naples shall initially pay for all fees and costs of hiring the forensic expert. However, if at a later time there is evidence of Plaintiff's improper deletion of electronic documents or any other associated improper conduct, the Court will revisit the issue and consider charging Plaintiff for the fees and costs of the forensic expert.
8. The forensic expert shall provide a signed affidavit detailing the steps he or she took in mirror imaging or copying Plaintiff's devices and searching the mirror image or copies for the search terms within 5 days of providing the parties with the results of the search.

See Wynmoor, 280 F.R.D. at 687-88.

III. Conclusion

For the foregoing reasons, Greater Naples respectfully requests that this Court, using the protocols set forth herein, order Plaintiff to produce all electronic devices and email account information in his possession so that Defendant's expert may conduct a forensic examination of the devices and email accounts, to include imaging, copying, and inspecting Plaintiff's electronic devices and emails. Additionally, Greater Naples respectfully requests that Plaintiff be compelled to execute the Authorization for Release of Social Media Information attached to the second request to produce.

Dated this 31st day of July, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 31st day of July, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the Service List below in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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