UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 1:17-CV-62100-MORENO/SELTZER

KATIRIA RAMOS,
individually and on behalf of all
others similarly situated,

Plaintiff,

v.

HOPELE OF FORT LAUDERDALE, LLC
d/b/a PANDORA @ GALLERIA,
a Florida limited liability company, and
PANDORA JEWELRY, LLC, a Maryland
limited liability company,

Defendants.
_____/

CLASS ACTION

JURY TRIAL DEMANDED

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT, HOPELE OF FOR LAUDERDALE, LLC'S, MOTION TO COMPEL

Plaintiff, Katiria Ramos, by and through undersigned counsel files this Response in Opposition to Defendant, Hopele of Fort Lauderdale, LLC's ("Defendant") Motion to Compel Forensic Examination of Plaintiff's Cell Phone (the "Motion"), [DE #44], and as grounds therefore, states as follows:

I. INTRODUCTION

Plaintiff filed her class action Complaint [DE #1], against Defendants, Hopele of Fort Lauderdale, LLC ("Hopele"), and Pandora, on October 26, 2017. Plaintiff's Complaint alleges that Defendants, using an automated text-messaging platform, caused a text message to be sent to her cellular telephone on October 19, 2017 at 10:03 a.m., through software provided by a non-party vendor, Ez Texting. *Id*. at ¶¶ 27-29. Discovery showed that Defendants sent her a total of 8 text

messages between 2016 and 2017. Defendant now moves this Court for an order compelling Plaintiff to submit her cellular telephone to a broad forensic emanation unlimited in time and scope and without regard for Plaintiff's privacy because Plaintiff does not possess an "original" copy of the October 19 text message. In so moving, Defendant fails to acknowledge that a screenshot of the "original" text message was produced, that its own documents and 30b6 witness confirm that the text message was sent, and that "original" copies of the other 7 text messages have been produced. Defendant's Motion is based on unfounded speculation that it may find some relevant evidence on Plaintiff's phone despite the fact that the material evidence that could be located on Plaintiff's phone is not in dispute. In essence, Defendant wants to invade Defendant's personal privacy for a fishing expedition.

Defendant's entire motion is premised on the idea that an unlimited forensic examination *may* uncover relevant information. However, Defendant's request to embark on an unconditional and unsupervised journey through Plaintiff's cellular telephone, including photographs, internet browsing history, text and email communications with family members, loved ones, and doctors is unsupported by the facts and law, and amounts to an egregious abuse of the discovery process. *See Riley v. California*, 134 S. Ct. 2473, 2490, 2491 (2014) ("[I]t is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate" and "a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form"). In support its request to invade Plaintiff's privacy, Defendant relies on fabricated legal defense theories, ignores the

undisputed facts that clearly demonstrate Defendant's culpability, and inappropriately accuses Plaintiff of engaging in nefarious conduct. Defendant's Motion should be denied in its entirety.

II. UNDISPUTED FACTS

It is undisputed that Defendant caused marketing text messages to be sent to Plaintiff's cellular telephone on June 16, July 7, September 14, October 12, November 23, December 2, December 28, 2016 and July 7, October 19, and March 23, 2017. Proof that these text messages were sent and received by Plaintiff is independently verifiable in five different ways:[1]

1. Exhibit A, Defendant's Response to Plaintiff's Interrogatory Number 8 (Hopele stating under oath that it sent text messages to Plaintiff "through the www.eztexting.com platform" on "June 16, 2016, July 7, 2017, and October 19, 2017.") (emphasis supplied);
2. Exhibit B, Plaintiff's telephone records (identifying receipt of the October 19, 2017 text message);
3. Exhibit C, Screenshot of the October 19, 2017 text message;
4. Exhibit D, Call logs produced by Defendant demonstrating transmission and delivery of multiple text messages to Plaintiff's telephone, including the October 19, 2017 text message. The call logs also identify whether Plaintiff clicked on the supplied link;[2] and

[1] Defendant's 30b6 witness also testified that the text messages at issue, including the October 19, 2017 text message, were sent to Plaintiff. However, Defendant's 30b6 witness sat for his deposition on March 9, 2018, and a transcript of that deposition has not been provided by the court reporter. To the extent necessary, Plaintiff will provide the Court with relevant pin cites after the transcript is made available.

[2] Defendant is in the process of acquiring the rest of the call logs which will identify the transmission and delivery of every text message to Plaintiff and members of the putative class. *See* Exhibit I (Defendant's counsel confirming in email correspondence that he is "working on" obtaining the remaining call logs); Exhibit J, ¶8 (declaration provided by Ez-Texting confirming that it "can and will produce Call Detail Records—essentially a call-log identifying every text message transmitted" by Defendant).

5. Exhibit E, Screenshot produced by Plaintiff identifying text messages received from Defendant on June 16, July 7, September 14, October 12, November 23, December 2, December 28, 2016 and March 23, 2017.

Despite the record evidence, Defendant seeks to compel Plaintiff to produce her cellular telephone for forensic examination without limitation so that it can find out "what happened" to the October 19, 2017 text message. In other words, Defendant is asking that Plaintiff, who filed this case citing privacy concerns, produce *every photograph* stored on her cellular telephone, *every email* plaintiff sent or received, *every voicemail* she received, *every phone call* plaintiff sent or received, *every text message* plaintiff sent or received, grant Defendant access to her *complete* browsing history and *every software application* plaintiff downloaded on her cellular telephone, without limitation as to sender, recipient, time, or scope. Defendant's request for unfettered accesses to Plaintiff's cellular telephone is intrusive, harassing, and founded on a skewed analysis of the applicable legal standards and the record evidence.

III. DEFENDANT'S DEMAND IS UNREASONABLE, UNNECESSARY AND UNSUPPORTABLE

a. LEGAL STANDARD

For a party to obtain a forensic analysis of its adversary's computer system, the Court must make a "factual finding of some non-compliance with discovery rules," and requiring a forensic analysis of ESI is an unusual and "drastic" remedy and is therefore the "exception and not the rule." *See Downs v. Va. Health Sys.*, No. 5:13cv00083, 2014 U.S. Dist. LEXIS 74415, 2014 WL 3604002, at *1 (W.D. Va. June 2, 2014); *In re Ford Motor Co.*, 345 F.3d 1315, 1317 (11th Cir. 2003) (reversing order requiring forensic analysis). "Generally speaking, courts do not require a forensic analysis in the absence of consent unless there has been significant non-compliance with discovery obligations." *Procaps S.A. v. Patheon Inc.*, No. 12-24356-CIV-GOODMAN, 2014 U.S. Dist. LEXIS 187185, at *9 (S.D. Fla. Dec. 30, 2014). Accordingly, courts compel a party to submit to a forensic ESI analysis only where there is

a strong showing that the party (1) intentionally destroyed evidence, or (2) intentionally thwarted discovery. *Id.*

a. PLAINTIFF DID NOT INTENTIONALLY DESTROY EVIDENCE

Plaintiff saved an image of the October 19 text message by taking a screenshot of it and forwarding it to her counsel. Defendant is in possession of that image, and Plaintiff authenticated both the image and the fact that she sent the image to her counsel. *See* Exhibit C and Exhibit F, Plaintiff's Deposition Transcript, 147:11-149-1. Despite having an image of the text message and acknowledging that it sent that text message, Defendant argues that Plaintiff, for some unknown reason, intentionally deleted the "original message." This cannot be further from the truth. A setting on Plaintiff's cellular telephone, which was set "a couple years back" to conserve space on her outdated iPhone, caused the text message, along with every other text message she received that day, to be automatically deleted 30 days after receipt. *See* Plaintiff's Deposition Transcript, 80:2-81:18. Accordingly, Plaintiff did not purposefully or in bad faith remove the text message, but saved a copy and proof of the message by sending an image of it to her attorney. *See* Plaintiff's Deposition Transcript, 81:2-5.

b. PLAINTIFF DID NOT INTENTIONALLY THWART DISCOVERY

Defendant does not even attempt to argue that Plaintiff thwarted her discovery obligations related to her receipt of the October 19 marketing text message. Plaintiff produced an image of the October 19 text message she received (Exhibit C), produced telephone records identifying that the October 19 text message was sent to cellular telephone (Exhibit B), and testified under oath that she received the text message and sent a copy of it to her attorney. Further, Plaintiff sought the appropriate documents from Defendant to confirm that the October 19 message was sent and received. *See* Exhibit A (Hopele stating under oath that it sent text messages to Plaintiff "through the www.eztexting.com platform" on "June 16, 2016, July 7, 2017, and October 19, 2017") and Exhibit D (call logs produced

by Defendant demonstrating transmission and delivery of multiple text messages to Plaintiff's telephone, including the October 19, 2017 text message). As such, a forensic examination of Plaintiff's cellular telephone is unwarranted because Plaintiff diligently and thoroughly completed her discovery obligations. *See Bratcher v. Navient Sols., Inc.*, 249 F. Supp. 3d 1283, 1286 (M.D. Fla. 2017) (refusing to allow a forensic examination of a cellular telephone in a TCPA case because there was no proof of non-compliance with the discovery rules).

c. A FORENSIC EMANATION WILL NOT ADDRESS ANY CLAIMS OR DEFENSES RAISED BY THE PARTIES

Realizing that there is no legal basis to compel a forensic examination of Plaintiff's cellular telephone, Defendant ignores the standard governing forensic examinations of electronically stored information, and argues that a forensic examination "may" recover evidence related to (1) spoliation, (2) a potentially incomplete document production, (3) Plaintiff's credibility regarding consent and damages, and (4) class certification issues. These arguments are at best a request to conduct a fishing expedition, and at worst, meritless.

SPOLIATION IS NOT AN ISSUE

"[T]he party seeking [spoliation] sanctions must prove . . . first, that the missing evidence existed at one time; second, that the alleged spoliator had a duty to preserve the evidence; and third, that the evidence was crucial to the movant being able to prove its prima facie case or defense." *Wandner v. Am. Airlines*, 79 F. Supp. 3d 1285, 1297 (S.D. Fla. 2015) (internal citations omitted). Defendant is unable to meet this standard. Here, since an image of the text message has been produced and Defendant's own internal documents confirm that the text message was sent to Plaintiff there is no "missing evidence." Further, Plaintiff does not dispute the fact that she had a duty to preserve the text message, but maintains that she preserved the text message by taking a picture of it and sending it to her attorney. Finally, Defendant's position that the "original" image of the text message will provide

information different or more useful than what can be taken from the images in its possession is baseless. For example, the argument that the original text message *may* allow Defendant to determine if the text message was received and if Plaintiff clicked the link in the text message (aside from being irrelevant) can be determined by looking at Defendant's own records. *See* Exhibit D. In other words, an alleged "original" copy of the text message will not help Defendant prove its prima facie defense. *See Carolina Bedding Direct, LLC v. Downen*, No. 3:13-cv-336-J-32MCR, 2013 U.S. Dist. LEXIS 78254, at *4 (M.D. Fla. June 4, 2013) (denying request for forensic examination when it sought to discover evidence of a fact not in dispute). Accordingly, spoliation is not an issue because the fact that the text messages were sent to Plaintiff is not in dispute.

PLAINTIFF'S DOCUMENT PRODUCTION IS COMPLETE

Defendant's contention that a forensic examination is necessary because "there may be other documents responsive to Hopele's Request for Production that also were deleted from her cellular phone" is an unfounded shot in the dark. *See* Motion at p. 8. Defendant does not even attempt to identify a single document or category of documents that have not been produced, and fails to identify any perceived flaws in Plaintiff's production. Instead, Defendant baldly concludes that a forensic examination *may* "uncover relevant information." *See* Motion at p. 7. Again, Defendant petitions the Court for unfettered access to Plaintiff's personal cellular telephone without factual support, but based on the mere possibility that there may be evidence that may not have been produced. As explained by this Court, a party's "mere desire to check" on another party's production is not a good enough reason to allow a forensic inspection. *Procaps S.A.*, 2014 U.S. Dist. LEXIS 187185, *11); *accord Memry Corp. v. Kentucky Oil Tech, N.V.*, No. C04-03843 RMW, 2007 U.S. Dist. LEXIS 22488, at *4 (N.D. Cal. March 19, 2007) (denying requested forensic inspection and noting that the requesting party had not demonstrated sufficient flaws in production and noting that less-than-perfect document production does

not "necessarily rise to the level of necessitating production of hard drives"). Defendant's request to "check" Plaintiff's production without any evidence that the production was incomplete, is not a good enough reason to allow a forensic inspection.

CONSENT AND DAMAGES ARE NOT AT ISSUE

Defendant also contends that Plaintiff's "fuzzy" recollection related to a text message she received five months ago is sufficient grounds to compel a forensic examination of her cellular telephone. In support of this theory, Defendant argues that facts surrounding her receipt and review of the text messages *may* prove that she did not suffer actual injury and therefore lacks standing under Article III, and it *may* prove that she consented to receiving marketing text messages from Plaintiff. Both arguments are equally unpersuasive and borderline frivolous.

First, Plaintiff sufficiently alleged, and Defendants never challenged at the motion to dismiss stage, that she suffered an injury-in-fact sufficient to confer Article III standing. "Unsolicited telemarketing phone calls or text messages, by their nature, invade the privacy and disturb the solitude of their recipients. A plaintiff alleging a violation under the TCPA 'need not allege any *additional* harm beyond the one Congress has identified.'" *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016), as revised (May 24, 2016)) (emphasis in original). Similarly, to "have standing to pursue her TCPA claim, Plaintiff must allege that Defendant violated her 'legally protected interest.'" *De Los Santos v. Millward Brown, Inc.*, No. 13-80670-CV, 2014 U.S. Dist. LEXIS 88711, at *6 (S.D. Fla. June 29, 2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Recently, Judge Marcia G. Cooke held that "[f]ar from a 'bare procedural violation,'" a violation of the TCPA "directly involves the substantive privacy rights the TCPA was enacted to protect." *Mohamed v. Off Lease Only, Inc.*, No. 15-23352-Civ-COOKE/TORRES, 2017 U.S. Dist. LEXIS 41023, at *6 (S.D. Fla. Mar. 22, 2017).

Here, Plaintiff alleged that the marketing text messages sent by Defendants caused her injury because they invaded her privacy, intruded and occupied her cellular telephone, and interrupted her. Complaint ¶ 41; *See Tillman v. Ally Fin., Inc.*, No. 2:16-cv-313- 2017 U.S. Dist. LEXIS 71919, at *16 (M.D. Fla. May 11, 2017) (calls made in violation of the statute is an injury that Congress has elevated to the status of a legally cognizable injury through the TCPA). The alleged violations of Plaintiff's substantive rights under the TCPA are sufficient in and of themselves to constitute a concrete injury. As such, Defendant's position that a forensic examination *may* shed light on "the alleged invasion of privacy and interruption of her day" and Plaintiff's standing under Article III is contrary to the current state of the law.

Second, Defendant's argument that a forensic examination may shed light on whether Plaintiff "consented" to receive the text messages at issue is illogical. Defendant knows *exactly* when and how it obtained Plaintiff's number and already confirmed that Plaintiff never gave express written consent to be contacted through the use of ATDS. *See* Exhibit A, Defendant's Response to Plaintiff's Interrogatory Number 5 (Defendant explaining that it obtained Plaintiff's telephone number, name, and address when she made a purchase at a Pandora store on May 9, 2014); *See* Exhibit G, Defendant's Response to Plaintiff's Request for Production Number 26 (Defendant acknowledging that it has no documents, other than a customer information card, pertaining to Plaintiff's consent to receive text messages). Even more telling, Defendant does not (because it cannot) even attempt to provide an example of how a forensic examination of Plaintiff's cellular telephone will potentially change the consent analysis. As such a representation to this Court that a forensic examination may affect the issue of consent is misleading, factually inaccurate, and should be rejected.

A FORENSIC EXAMINATION WILL NOT ADDRESS CLASS CERTIFICATION ISSUES

Defendant claims that a forensic examination "*may* be crucial to class certification issues

because it is likely to yield evidence regarding whether Plaintiff is similarly situated to other putative class members and whether her alleged damages would be the same (and therefore, whether the class is ascertainable)." In support of this flawed argument, Defendant mischaracterizes the class certification process and the evidence needed to defend a class certification motion. This Court and others throughout the country regularly certify TCPA class actions in situations such as this, where the defendant obtained all the class members' numbers in the same manner and all class members are sent the same violative communications using the same software, and the central issue is whether the defendant obtained consent to send the texts. *See e.g. Mohamed v. Am. Motor Co., Ltd. Liab. Co.*, 320 F.R.D. 301 (S.D. Fla. 2017) (granting certification of a TCPA case and holding that, "[t]he issue of consent … can be determined without the need to engage in 'mini-trials,' as the resolution of the issue will apply to all members of the modified class."; *Palm Beach Golf Ctr.-Boca, Inc. v. Sarris*, 311 F.R.D. 688, 699 (S.D. Fla. 2015) ("The facts necessary to establish liability relate to Defendant's common course of conduct and the transmissions of the faxes, and not to issues with individual class members.").

Whether Plaintiff "actually received the message," "opened or viewed the Text Message," or "clicked the link" and what time she took the "original screenshot" is irrelevant to class certification and the merits of Plaintiff's allegations. *See* Motion at 10; *see Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1252 (11th Cir. 2015) (holding that receipt is not a prerequisite to confer standing in lawsuits alleging violations of the TCPA)*; Mohamed v. Off Lease Only, Inc.*, 320 F.R.D. 301, 312 (S.D. Fla. 2017) *(*noting that several cases, including the 11th Circuit, hold that receipt is not a prerequisite to confer standing in lawsuits alleging violations of the TCPA); *Fillichio v. M.R.S. Assocs.*, 2010 U.S. Dist. LEXIS 112780, *9-10 (S.D. Fla. 2010) ("the prohibition in the TCPA applies to phone calls placed to cellular telephone numbers even if the intended recipient does not answer the calls. It is the mere act of placing the call that triggers the statute."). Accordingly, Defendant's request

to perform a forensic examination to explore fabricated class certification issues and irrelevant factual issues should be denied.

THE CASES CITED BY DEFENDANT ARE DISTINGUISHABLE

In support of its Motion, Defendant cites several easily distinguishable TCPA cases grating a forensic examination of the plaintiff's cellular telephone. The cases cited by Defendant all compel forensic examinations for the same reason: the issue of whether proper consent was obtained could undeniably be resolved by a limited and impartial review of the plaintiff's cellular telephone. For example, in *Thielen v. Buongiorno USA, Inc.*, 2007 U.S. Dist. LEXIS 8998, (W.D. Mich. 2007), the defendant contended that the plaintiff provided consent to receive the text messages at issue because plaintiff sent his cell phone number to the defendant via a website. As such, the defendant sought to examine the computer to determine how and when the plaintiff visited the website and what information was provide to the website. 2007 U.S. Dist. LEXIS 8998, at *1. The court restricted the defendant's forensic examination to evidence of whether during a five-day period the plaintiff accessed the defendant's website or a website advertising the defendant's products. 2007 U.S. Dist. LEXIS 8998, at *3. Her, unlike in *Thielen*, Defendant knows how it got Plaintiff's number, confessed that it failed to obtain the requisite consent, and is unable to provide the Court with any concrete and specific information related to how a forensic examination will shed light on consent (because it will not). Further, contrary to the court's limited and focused order in *Thielen*, Defendant here seeks to allow its expert to perform a broad search for unspecific information such as "evidence of the text message," "consent" and "communications related to the text message."

Similarly, in *Benzion v. Vivint, Inc.*, No. 12-61826-CIV, 2013 U.S. Dist. LEXIS 191052, at *8 (S.D. Fla. Sept. 20, 2013), another case cited by Defendant, the court expressly limited the scope of the inspection to a single relevant issue – whether plaintiff had consented to defendant's calls. Like

the defendant in *Thielen*, the defendant in *Benzion* was able to explain to the court exactly how a forensic examination would impact the consent issue—if the plaintiff provided consent through a specific website, consent was likely given. As such, the court ordered that the inspection should search only "for websites directly related to Defendant . . . on which plaintiff may have expressly consented to receive calls on his cellular telephone." Here, Defendant does not even attempt to argue that Plaintiff provided consent through the use of her cellular telephone, and fails to provide the court with any concrete information that it anticipates will be gleaned from a forensic examination of Plaintiff's cellular telephone. Thus, the cases cited by Defendant do not warrant an unfettered forensic examination of Plaintiff's cellular telephone. *See Tillman v. Ally Fin. Inc.*, No. 2:16-cv-313-FtM-99CM, 2017 U.S. Dist. LEXIS 185900, at *8 (M.D. Fla. Nov. 9, 2017) (rejecting a defendant's request for a forensic examination of a cellular telephone in a TCPA case because the defendant failed to demonstrate that the circumstances amounted to 'exceptional circumstances' which warrant the burden and the cost); *Bratcher v. Navient Solutions, Inc.*, 2017 U.S. Dist. LEXIS 60113 (M.D. Fla. 2017) (rejecting a request to conduct a forensic examination in a TCPA case noting that inspection of an opponent's computer system is the exception, not the rule, and such a request should include a proposal for the protection of privacy rights, protection of privileged information, and the need to separate out and ignore non-relevant information).

IV. PLAINTIFF'S PRIVACY IS A CONCERN

There is no dispute that Plaintiff's cellular telephone contains private and confidential information, despite Defendant's myopic reading of her testimony. Plaintiff testified that aside from recently returning from her honeymoon she uses her cellular telephone's email capabilities to communicate with her doctor and her mother's doctor, that information regarding her recent trip to the urgent care can be found on her cellular telephone, and that she does not feel comfortable with

Defendant's "skimming" through her cellular telephone. Plaintiff's Deposition Testimony, 87:6-90:5. Likewise, Court's uniformly recognize that "a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form." *See Riley,* 134 S. Ct. 2473, 2490, 2491 (2014); *Bratcher v. Navient Sols., Inc.*, 249 F. Supp. 3d 1283, 1286 (M.D. Fla. 2017) (denying search of smart phone which the court explained are more akin to computers).

In downplaying these serious privacy concerns, Defendant contends that Plaintiff's "privacy concerns is a non-issue and should be rejected out of hand" because Defendant will keep Plaintiff's personal information "confidential" pursuant to the Stipulated Confidentiality and Protective Order ("Confidentiality Order"). [DE #36]. Motion p. 13. Defendant grossly mischaracterizes the intention and nature of the Confidentiality Order and fails to appreciate the sensitive nature of a cellular telephone. The stated purpose of the Confidentiality Order is to protect the "names and personal information of [Defendant's] customers, or other sensitive and/or financial information confidential consumer information, commercial, proprietary, or trade secret information, customer lists, or other information that is non-public and sensitive in nature." *See* Confidentiality Order, DE #36, p. 1. The Confidentiality Order does not, nor was it ever intended, to protect against Plaintiff's disclosure of potentially compromising photographs, intimate communications, medical issues, or other private information and communications maintained on Plaintiff's cellular telephone, which Defendants have absolutely no need for in defending this action. "Although the risk of improperly exposing such information, standing alone, might not preclude the employment of forensic imaging in all cases, the forensic imaging must be premised on an interest significant enough to override that risk." *John B. v. Goetz*, 531 F.3d 448, 460 (6th

Cir. 2008). Clearly, an unfounded fishing expedition cannot outweigh Plaintiff's privacy concerns especially when Defendant has all the evidence it needs in multiple other forms. Accordingly, Plaintiff's privacy concerns are valid, well-recognized by courts, and the Confidentiality Order in no way trumps these concerns.

V. DEFENDANT REJECTED PLAINTIFF'S REASONABLE COMPROMISE

In an attempt to conserve judicial and the Parties' resources, Plaintiff offered Defendant the following proposal, which was based on orders from the cases cited by Defendant:

1. The parties shall jointly select a qualified independent third-party forensic examiner;
2. The examination and imaging of the phone shall be limited to text messages sent by Hopele to Plaintiff's telephone, and any text messages received from the short-code 313-131;
3. Upon completion of the examination, the results will be sent by the independent forensic examiner to Plaintiff's counsel for review, and redaction of any privileged information;
4. The results will then be provided to Defendant's counsel, along with a privilege log if applicable;
5. The results of the examination shall be deemed confidential pursuant to the parties' confidentiality stipulation; and
6. Costs for the examination will be paid by Defendant.

Defendant rejected Plaintiff's proposal and demanded that they have access "to a full forensic image of the phone, the only exclusion being privileged communications" and "simultaneous" access to the results of the examination. *See* Exhibit H, Email Correspondence. Defendant's proposed "compromise" is, in fact, a request for a Defense-controlled expert to be given *carte blanche* access to Plaintiff's arguably most confidential possession to search for anything he or she thinks is relevant or might be relevant. This is not a compromise allowed by the law or the facts here, and Defendant's refusal to entertain a reasonable compromise further justifies the denial of its Motion.

VI. CONCLUSION

The facts and discovery to date demonstrate that Defendant's request for a forensic examination of Plaintiff's cellular telephone is unwarranted. Defendant's Motion should be denied in its entirety. In the event the Court orders a forensic examination of Plaintiff's cellular telephone, it should be limited to the single October 19, 2017 text message, it should specifically exclude all personal information and communications unrelated to the October 19, 2017 text message, and all costs related to the forensic examination should be borne by Defendant.

Date: March 13, 2018

Respectfully submitted,

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