UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CENTENNIAL BANK,
an Arkansas state chartered bank,

Plaintiff,

v. Case No.: 8:16-cv-088-T-36JSS

SERVISFIRST BANK INC., an Alabama state chartered bank; GREGORY W. BRYANT, an individual; PATRICK MURRIN, an individual; GWYNN DAVEY, and individual; and JONATHAN ZUNZ, and individual,

Defendants.
_____/

GWYNN DAVEY'S OPPOSITION
TO CENTENNIAL BANK'S MOTION FOR ORDER TO SHOW CAUSE WHY DAVEY SHOULD NOT BE FOUND IN CONTEMPT OF COURT FOR FAILURE TO COMPLY WITH COURT'S ESI ORDERS (DOC. 697)

Gwynn Davey ("**Davey**") opposes the Motion for Order to Show Cause Why Davey Should Not Be Found in Contempt of Court for Failure to Comply with the Court's ESI Orders (Doc. 697) (the "**Show Cause Motion**")[1] filed by Centennial Bank ("**Centennial**").

I. PRELIMINARY STATEMENT

On several occasions during the pendency of this case, the Court has recognized and admonished Centennial's overly aggressive approach to litigation and its tendency to seek relief that is unwarranted and disproportionate to the matters at issue. *See* Doc. 667 at 9 ("**Compel Order**")("Centennial's expansive requests for relief amount to an overreach that is, in substantial measure, disproportionate and unsupported given the circumstances present in this case."); *see also* Doc. 413 at 5:17-19 (noting Centennial's "kitchen sink" approach to litigation and its "173-page Complaint, which is extraordinarily long"). Once again, Centennial has overreached with the Show Cause Motion by requesting an order to show cause and sanctions against Davey in a filing supported by incorrect assumptions about the data Denny provided Davey for review and the data Davey purportedly withheld from Centennial. This pattern is all the more disturbing because Centennial has failed to confer pursuant to Local Rule 3.01(g), on many of the issues it raised in the Show Cause Motion, most notably in its request for sanctions. On this point alone, Centennial's Show Cause Motion should be denied.

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[1] The issues addressed in the Show Cause Motion as well as in this filing relate to many of the issues addressed in Murrin and Davey's Motion for Clarification Regarding the Court's Order on Centennial's Motion to Compel Discovery from Murrin and Davey [as well as] for Sanctions ("**Motion for Clarification**") (Doc. 699). Davey respectfully requests that the Court consider these filings simultaneously in ruling on the Show Cause Motion.

II. BACKGROUND

Centennial filed its initial complaint on January 14, 2016. Doc. 1. That complaint only named Greg Bryant ("**Bryant**") and ServisFirst Bank ("**ServisFirst**") as defendants – not Murrin or Davey. *Id.*

On March 28, 2016, Centennial issued subpoenas duces tecum without deposition to nonparties, Murrin and Davey, seeking a broad range of documents (many over an unlimited time frame) purportedly relevant to its dispute with ServisFirst and Bryant. The nonparty subpoenas to Murrin and Davey included broad requests such as communications with certain prior Centennial customers "at any time." After months of conferrals and motion practice arising from Centennial's desire to recover ESI from nonparties Murrin and Davey, which included the possibility of appointing a neutral forensic examiner to conduct the data collection[2], the Court entered an order on September 24, 2016, ("**ESI Order**") allowing the forensic examination of Murrin's and Davey's personal computers, iPhones, iPads, and Gmail and iCloud accounts. *See* Doc. 192.

A. The ESI Order

At Centennial's insistence, Murrin and Davey agreed to the appointment of Dwayne Denny ("**Denny**") as a neutral forensic examiner. The ESI Order directed him to "recover from the forensic images [of those devices and accounts] all available Relevant Records, including but not limited to word-processing documents, incoming and outgoing email

[2] For the sake of brevity and due to the limited scope of this motion, Davey has omitted a detailed background of the communications between the parties and substantial motion practice before entry of the ESI Order.

messages, PowerPoint or similar presentations, spreadsheets, and other files that were 'deleted.'" *Id.* at 4. It is important to note that the ESI Order did not allow Centennial unfettered access to all data on the devices or digital accounts. Rather, the ESI Order defined Relevant Records as "records responsive to search terms established by the [p]arties … and metadata associated with those records." *Id.* fn. 1. After the recovery of any Relevant Records, the ESI Order allowed Murrin's and Davey's counsel to "review the records for privilege and responsiveness, supplement the ServisFirst Employees' responses to Centennial's subpoenas, if necessary, and send to Centennial's counsel all previously-unproduced non-privileged responsive documents and information, as well as a privilege log…." *Id.* at 5.

B. Centennial Requests Relief From the ESI Order

On September 25, 2017, Centennial filed a Motion for Partial Relief from ESI Protocol Order (Doc. 255) ("**ESI Protocol Motion**"). Although the ESI Protocol Motion focused on Centennial's desire to communicate with Denny about his "findings," the hearing on the ESI Protocol Motion largely centered around technical issues. After the hearing, the Court directed the parties to confer. Centennial filed a notice (Doc. 378) reflecting those efforts on January 11, 2019. On January 16, 2019, the Court entered an order (Doc. 381) ("**Relief Order**") based on that notice, requiring that:

- All forensic reports created by Dwayne Denny or his firm, Data Specialist Group (together, "DSG"), are to be produced by the Relevant Defendants with original format, names, metadata and subfolders intact;

- Files and reports are to be produced by the Relevant Defendants stored in their original folder structure;

- DSG and Mr. Sharp are to work together to create redacted forensic images of the Electronic Devices in order to permit full access to system files and software related data; and

- To the extent any privileged information or other information is withheld, the Relevant Defendants are to produce logs for all items withheld, redacted, or excluded, indicating the date, subject matter, and where the withheld item was located.

Doc. 381.

C. Centennial's Motion to Compel

On October 21, 2019, Centennial filed its Motion to Compel Discovery from Murrin and Davey, for Sanctions, and Request for Oral Argument (Doc. 600) ("**Compel Motion**") seeking numerous forms of relief against Davey and Murrin. For the purposes of this motion, the relevant relief sought against Davey included an order:

> compelling Gwynn Davey ("Davey") to provide Denny with access to the iCloud account associated with the email address GwynnDavey@gmail.com (the "Davey iCloud") and any other undisclosed backup account that Davey used in connection with her Apple mobile devices;

Doc. 600. The Court held a hearing on several motions, including the Compel Motion, on December 17, 2019. On March 4, 2020, the Court entered the Compel Order holding in relevant part that within ten days of the date of the Compel Order:

> Davey shall provide Denny with access to the iCloud account associated with the email address gwynndavey@gmail.com and any other undisclosed backup account that Davey used in connection with her Apple mobile devices;

Doc. 667 at 20-21.

D. Undertakings by Davey to Comply with the Compel Order's Directive Regarding Davey's iCloud Account

On March 16, 2020, in accordance with the Compel Order, Davey's counsel provided Denny with Davey's login information for her iCloud account. Accessing an iCloud account is relatively simple and only requires the user to go to "icloud.com" and enter the appropriate credentials. In this case, this is the process Denny was expected to use to access Davey's iCloud. However, since Apple uses a two-factor authentication process, Davey had to be available to confirm and authenticate that Denny's request was valid and that Denny was allowed access to her iCloud account.

As intended, Denny gained access to Davey's iCloud account after Davey authenticated Denny's request. Denny also gained the ability to request additional private information from Apple, that was not accessible through icloud.com, and which neither she, nor her counsel, knowingly permitted. Denny chose to take advantage of this opportunity to request a "privacy download" from Apple so he could obtain private information collected by Apple about Davey. Some of this private information is not readily accessible by logging into Davey's iCloud account and Denny was not directed to collect this private information.

To obtain a privacy download from Apple, Denny had to access a specific website: privacy.apple.com. Denny then used Davey's credentials to request the private information. When he did that, Apple notified Davey via email. Not appreciating that Denny was going beyond the scope of the Compel Order, Davey and her counsel fully cooperated with all of Denny's requests including participating in a group text message exchange to facilitate the required two-factor authentication. During the text message exchange, Denny stated: "I made

a request to download a portion of your data via Apple. You will receive a notification shortly to your Gmail account. This is similar to the Google Takeout we did in 2016. Please forward the same to Dwayne.D@DSGTampa.com [o]nce you receive it."

The Apple Privacy Download is not instantaneous. After authentication is successful, the user selects the categories of private information they wish to obtain from Apple. The request is then submitted to Apple. Once received, Apple prepares files with the categories of personal information collected by Apple through various apps and services. Apple prepares the information then advises the user, by email, when the files with the private information are available for download. Denny emailed counsel for Davey and stated: "Please also have your client forward me the emails relating to the Apple data download request made earlier today once she receives them so that I can preserve that data." Believing that Denny's request was necessary to access Davey's iCloud account and not realizing that he was conducting an unauthorized privacy download, counsel for Davey complied with Denny's request and forwarded the emails from Apple. Clearly, the multi-step process of requesting, obtaining and then downloading the private information from privacy.apple.com goes well beyond simply accessing an iCloud account.

On March 16 Denny also informed counsel for Davey that he would need to obtain certain donor devices in order to complete the collection of her iCloud account.[3] Denny

[3] The Show Cause Motion states that "Davey provided access to her iCloud account" on March 24, 2020. Doc. 697 at 5. This statement is misleading, because Davey provided Denny her credentials on March 16, 2020 in compliance with the Compel Order and believed that her data would be downloaded that day, but was informed that Denny did not have the necessary "donor devices" to download her iCloud data. Davey then made herself available on a second occasion on March 24, 2020 after Denny had obtained the necessary donor devices.

notified Davey's counsel on March 23 that he had obtained the donor devices and on March 24, Davey made herself available again to respond to the Apple emails that are part of the two-factor authentication process and to allow Denny access once again.

On April 9, Denny completed an upload of 125 MB of data from Davey's iCloud account to his own platform for review by Davey's counsel. Pursuant to the ESI Order, Davey's counsel reviewed the data Denny collected for privilege and responsiveness. Upon reviewing the data Denny had collected, it became readily apparent that a large portion of the data included text messages, calendar items, and contacts dated *after* December 31, 2016, with many 2020 items. Davey's counsel contacted Centennial's counsel to confirm that the relevant period ended on December 31, 2016.[4] On April 29, counsel for Davey produced approximately 44 MB of non-privileged, responsive documents from the January 1, 2015 through December 31, 2016 timeframe.

Although some of the issues (such as the "relevant" timeframe of the documents in Davey's iCloud) had been raised previously by Davey's counsel, on April 29, the undersigned informed Centennial's counsel of Murrin's and Davey's intent to file a motion for clarification of four issues presented by the Compel Order, including three specifically pertaining to Davey's production of data from her iCloud account. A copy of the exchange is attached as **Exhibit A**. On the last exchange, counsel for Davey asked counsel for Centennial whether any additional conversation would be fruitful. *See* Ex. A at 1. Centennial's counsel chose not to respond to that request and instead elected to file the Show Cause Motion in an

[4] Murrin and Davey resigned from their positions at Centennial on December 31, 2015. Doc. 199 at 6. Murrin and Davey were subject to non-compete agreements with Centennial which expired on December 31, 2016. *See* Doc. 395 at 2.

effort to preempt a motion for clarification by Davey and Murrin which was ultimately filed on May 5, 2020. The Motion for Clarification raises many issues pertinent to the Show Cause Motion.

III. ARGUMENT

A. Centennial's Failure to Comply with Local Rule 3.01(g)

Centennial has previously failed to comply with the requirement for counsel to confer prior to filing motions pursuant to Local Rule 3.01(g). *See* Doc. 667 at 19 ("Centennial's counsel could not confirm that such a conference had, in fact, occurred, even though a 3.01(g) certification had been appended to its motion"). Despite this failure, Centennial has nonetheless sought relief from this Court in its Show Cause Motion which includes sanctions against Davey.

Centennial attached to the Show Cause Motion certain email exchanges relating to the Motion for Clarification presumably intending to demonstrate that Centennial satisfied the Local Rule 3.01(g) obligation. *See* Doc. 697, Ex. F. The email exchange reveals, however, that Centennial never raised the issue of the perceived deficiencies in Davey's April 29 production. Even on April 30, 2020, Davey's counsel sent an email stating "[p]lease let me know if you believe it would be fruitful to have additional discussion on this issue," and Centennial's counsel chose not to respond. At no time thereafter, has Centennial sought to discuss the information Denny provided to Davey for review or the information Davey purportedly withheld. Moreover, Centennial never informed Davey it would seek sanctions against Davey for her alleged failure to comply with the ESI Order. *See* Exhibit A at 1. Instead, Centennial evidently concluded that the strategic benefit of filing the Show Cause

Motion before Davey could seek clarification, as she disclosed she would, was more important. The result is a filing replete with incorrect assumptions about Davey's production that could have been avoided if Centennial had simply followed the meet and confer requirements. On this basis alone, the Show Cause Motion should be denied.[5]

B. Centennial's Inaccurate Assumptions About Davey's Production

Had Centennial conferred, in good faith, about what Centennial believed Davey had withheld, it would have learned that the majority of the assumptions upon which the Show Cause Motion is based are simply incorrect, as are the conclusions they have drawn from them. At least one of those inaccurate conclusions is based on the assumption that Denny provided all reports that were included in a document named tables of content ("**TOC**"). Also, Centennial assumes that Denny provided Davey with all files and data included in the extraction reports created by the forensic tool Denny used. On the contrary, just because Denny extracted a file, does not mean it was provided to Davey's counsel for review. In this case, it was not.

As Centennial acknowledges, Denny uploaded only 125 MB of data for review. *See* Doc. 697 at 8. Davey's counsel produced approximately 44 MB of that data. In fact, Denny uploaded 131 items for counsel's review. Of those 131 items, Davey produced 100 to

[5] Centennial also makes several references in the Show Cause Motion (*see* Doc. 697 at 6, 7, 12, 14) to Davey's declaration regarding her iPhone 6 (Doc. 696). It is unclear whether Centennial is specifically requesting relief with respect to this device, however, Centennial's counsel have never attempted to confer with Davey's counsel on this issue.

Centennial.[6] This, in itself, shows that Centennial's motion is overly aggressive and that its requested relief is disproportionate to the matters in issue.

Despite acknowledging the total amount of data uploaded by Denny and produced by Davey, Centennial's request for sanctions against Davey is largely supported by a number of assumptions that are not only incorrect, but even difficult to justify given the total amount of data at issue. For example, Centennial claims Denny extracted, among other things, 568 video files and then assumes that if Denny extracted the files, he must have uploaded them for counsel's review. He did not. If Centennial had conferred on the issue before filing its motion, the issue could have been resolved. Even from a purely technical perspective, it is highly unlikely that 568 video files would use only 125 MB of storage.[7] Perhaps more importantly, the Denny upload did not include *any* video files for counsel's review. Some of Centennial's other assumptions about the data Denny provided for review are addressed in more detail in the chart below.

[6] On April 29, Davey produced 100 items. In reviewing and analyzing the issues raised by Centennial in the Show Cause Motion, Davey's counsel realized that four additional items intended for production on April 29 were not provided to Centennial on that day due to an error in the process of zipping the production file. Counsel for Davey provided those items to Centennial on May 13, 2020.

[7] There are many factors to consider, but a 30 second video file could use a couple MB to several GB. https://www.digitalrebellion.com/webapps/videocalc (last accessed May 8, 2020)

Page	Allegation	Docs Davey Rec'd from DSG	Withheld	Reason
10	iPad TOC Report identifies 315 separate reports – Davey produced only 37 reports	46 items including 43 reports, iPad TOC and two data extraction logs	006_Contacts 007_Messages 072_com.apple.mobilesafari 113_Google 114_Google_Chrome 130_Messenger 134_Pages 179_Documents	Withheld reports that only contained data after 2016; the 130_Messenger report contained some items that appear to be dated 2015 or 2016 but did not appear to have been filtered by Denny using search terms
10-11	iPhone TOC Report identifies 397 separate reports – Davey produced only 38 reports	47 items including 44 reports, iPhone TOC and two data extraction logs	004_Deleted_Data 007_Messages 009_Calls 083_com.apple.mobilesafari 129_Google 130_Google_Chrome 131_Google_Duo 216_Documents	Withheld reports that only contained data after 2016
11	Davey withheld iPhone 004_Deleted data.pdf report	5 pages	Full report	Withheld because only contained data after 2016
11	Davey withheld iPhone 007_Messages.pdf	715 pages	Full	Withheld because only contained data after 2016
12	Davey withheld iPhone 009_Calls.pdf	4 pages	Full	Withheld because only contained data after 2016
12	iPhone 006_Contacts.pdf - 15 of 60 pages produced with redactions	60 pages	45 pages	Produced responsive data before 2017
12-13	iPhone 010_Organizer.pdf - 37 of 384 pages produced	384 pages	347 pages	Produced responsive data before 2017
13	Davey withheld 216_Documents.pdf	6 pages	Full	Withheld because only contained data after 2016

13	Data Extraction Log identifies the following items extracted by MOBILedit: iPad - 27 archive files, 40 documents, 3 certificates, 98 audio files, 4,937 images, 218 JSON files, 907 plist files, 257 sqlite database files, 10 realm database files, 163 video files, 2 XML files, 70 binary cookies files, 5,255 other files, and 161 applications	None	N/A	N/A
13	Data Extraction Log identifies the following items extracted by MOBILedit: iPhone - iPhone: 26 archive files, 199 documents, 3 certificates, 187 audio files, 7,646 image files, 391 JSON files, 1,522 plist files, 422 sqlite database files, 12 realm database files, 405 video files, 5 XML files, 98 binary cookies files, 5,355 other files, and 198 applications	None	N/A	N/A

As reflected in the chart above, Denny did not provide many of the items Centennial claims he did. It is not clear whether Denny made a mistake or whether the TOC and reports

are incorrect. Of the 131 items Denny provided to counsel for review, the majority of those withheld or redacted[8] were dated after 2016. The only exceptions were: (1) items that Denny acquired through the unauthorized Apple Privacy Download, and (2) two files which Denny apparently requested without following the ESI Order requirement that the data first be filtered by the agreed upon search terms. One of the two unfiltered files appears to be a list of contacts from Facebook with photos and dates presumably reflecting the day the contacts were added (the majority of the contacts have an "add date" after 2016 and are Davey's family or friends.) and "chats" with Davey's Facebook friends. The other unfiltered file is an.xml file that contains strings of data, dates, email addresses, and other information from unknown sources. Here is an excerpt from the.xml file that had to be converted to.xls so the information could be reviewed:

version	key	key2	string	integer	date	key3	string4
1	MR_90BFFC06236DB52E79B8AFD6A95C2C1F	encoding version					
1	MR_90BFFC06236DB52E79B8AFD6A95C2C1F	display name					
1	MR_90BFFC06236DB52E79B8AFD6A95C2C1F	sending address					

Davey's counsel and e-discovery consultant could not decipher the information in the.xml file, where the information came from, or what Denny used to extract it. It is not evident why the Facebook and.xml files were included in the data Denny uploaded for counsel's review. The most troubling aspect is that Davey's counsel cannot vet these issues with Denny

[8] Centennial argues that Davey's redactions are improper on the grounds that the Compel Order directed Bryant to produce a string of unredacted text messages with Kirk Eicholtz. Doc. 697 at 12. However, the redactions at issue here are entirely distinguishable. While the Kirk Eicholtz communication involved exchanges over a period of time with one individual, the redactions here are of personal contacts unrelated to this litigation, including her children and other family members. In fact, out of an abundance of caution, Davey left many names/calendar entries reflecting business contacts and events unredacted even if they did not relate to this litigation.

because Denny decided to retain his own counsel who has cut-off any direct communications with Denny.[9]

While Centennial has haphazardly included a number of other assumptions in the Show Cause Motion about what Davey received from Denny and what she allegedly withheld from Centennial, it is clear that most of those conclusions are wrong and could have been avoided altogether by a valid 3.01(g) conference.

C. Centennial's Request for Sanctions Fails

"A district court has the inherent power and authority to punish a party for disobeying or resisting its orders." *Delta Sigma Theta Sorority, Inc. v. Bivins*, 2015 WL 1400435, at *2 (M.D. Fla. Mar. 26, 2015) (denying motion for order to show cause why defendants should not be held in civil contempt because "[d]efendants have made a good-faith effort to comply with the [c]ourt's orders"). "In a civil contempt proceeding, the moving party must present 'clear and convincing' evidence that the court's order was violated." *Id.* "This clear and convincing proof must also demonstrate that 1) the allegedly violated order was valid and lawful; 2) the order was clear, definite and unambiguous; and 3) the alleged violator had the ability to comply with the order." *Id.* (quotation omitted).

"Generally, conduct that evinces substantial but not complete compliance with a court's order may be excused in a contempt proceeding if it was made as part of a good-faith effort at compliance." *Id.* (quoting *Smith Barney, Inc. v. Hyland*, 969 F. Supp. 719, 723

[9] On April 22, 2020, attorney Jonathan Stidham ("**Stidham**") filed a notice of appearance (Doc. 693) on behalf of Denny. Counsel for Murrin and Davey reached out to Stidham shortly thereafter and were informed that they should no longer communicate directly with Denny.

(M.D. Fla. 1997), *aff'd* 148 F.3d 1070 (11th Cir. 1998)); *see also United Student Aid Funds, Inc. v. Gary's Grading & Landscaping*, 2009 WL 161711, at *4 (M.D. Fla. Jan. 21, 2009). "A 'person who attempts with reasonable diligence to comply with a court order should not be held in contempt.'" *Delta Sigma Theta*, 2015 WL 1400435 at *2 (quoting *Newman v. Graddick*, 740 F.2d 1513, 1525 (11th Cir. 1984)). As explained below, the Court should deny the Motion for Sanctions for three reasons.

First, Centennial has not set forth clear and convincing evidence that the Compel Order was violated. *See Delta Sigma Theta*, 2015 WL 1400435 at *2. As described herein, many of the allegations Centennial makes in the Show Cause Motion are unfounded and simply wrong. The remainder of the allegations are based on Centennial's interpretation of the Compel Order and Davey has sought clarification on those issues.

Second, Centennial has not established that the Compel Order was "clear, definite and unambiguous." *Id.* at *2. "Any ambiguities in the order are to be construed in favor of the alleged contemnor." *United Student Aid Funds, Inc. v. Gary's Grading & Landscaping*, 2008 WL 5539825, at *3 (M.D. Fla. Sept. 22, 2008). The Compel Order instructed Davey to "provide Denny access to the iCloud account associated with the email address gwynndavey@gmail.com and any other undisclosed backup account that Davey used in connection with her mobile devices." Doc. 667 at 20-21. As detailed in the Motion for Clarification, the Compel Order did not address the following points: (1) whether Davey should produce documents beyond 2016 from her iCloud account; (2) whether Denny was permitted to conduct an Apple Privacy Download of Davey's data; and (3) whether the Relief Order would apply to Davey's production. *See* Doc. 699 at 9-15. The very purpose of

the Motion for Clarification was to eliminate any ambiguity in the Compel Order and ensure that Davey fully complied with the Court's intent. Even if the Court finds that Davey's interpretation of the issues raised in the Motion for Clarification are incorrect, neither a contempt order nor sanctions against Davey are warranted.

Last, Davey substantially complied with the Compel Order in good faith. *See Delta Sigma Theta*, 2015 WL 1400435 at *2. Davey allowed Denny access to her iCloud account in a timely manner and produced to Centennial the relevant responsive documents which comprised approximately one-third of the total data Denny uploaded from her iCloud account (the 125 MB total data that Denny uploaded incudes approximately 9.73 MB of data that he wrongfully acquired from Davey's Apple Privacy Download, so in reality the portion of data Davey produced from Denny's imaging is even higher). Davey also made a good faith effort to resolve legitimate questions about her obligations vis-à-vis the ESI Order and the Compel Order, first with opposing counsel and then with the Court. She has also undertaken all reasonable efforts to ensure her compliance with this Court's orders and will continue to do so.

Because Davey has made substantial, good-faith efforts to comply with the Compel Order, the Court should deny Centennial's request for a show cause order and for sanctions. *See, e.g., Commodores Entm't Corp. v. McClary*, 2014 WL 6610140, at *1 (M.D. Fla. Oct. 27, 2014) (discharging order to show cause where the court found "[d]efendant's efforts to be substantial and in good faith").

D. CONCLUSION

WHEREFORE, Davey respectfully requests that the Court deny the Show Cause Motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 15, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

/s/ Robert A. Stines
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Counsel for Defendants Bryant, Murrin, and Davey

EXHIBIT A

From: Ailen Cruz
To: Eddie Suarez; John Anthony
Cc: George Guerra; Stines, Robert A.; Peter King; Larry Dougherty; Andrew Ghekas
Subject: RE: 3.01(g) Meet and Confer Regarding Judge Tuite"s March 4th Order
Date: Thursday, April 30, 2020 1:59:00 PM
Attachments: image001.png
image002.png
image004.png
image005.png
image006.png
image007.png
image009.png
image010.png
image011.png

Eddie,

Thank you for confirming your position. With respect to your point on Doc. 381, Judge Tuite's order does not provide direction regarding Ms. Davey's iCloud beyond giving Mr. Denny access within ten days. We have operated with the understanding that Doc. 192 applies to this process. However, Doc. 381 sets forth a number of parameters which do not seem feasible with respect to producing Ms. Davey's iCloud data to Centennial. Some of those parameters include producing forensic reports with original format, names, metadata and subfolders intact and stored in their original folder structure and production of logs for all items withheld, redacted, or excluded, indicating the date, subject matter, and where the withheld item was located. The data that Mr. Denny uploaded for our review includes files such as PDFs and .ics. As we have explained, there are many items dated after December 31, 2016, and as a result, we redacted or excluded those items from our production. Additionally, there are many items of a purely personal nature, such as communications with Ms. Davey's children, family members and friends, which we also redacted or excluded. It does not seem that we can comply with Doc. 381 while making these necessary redactions/exclusions. In addition, it is unclear whether Ms. Davey would need to provide a log referencing *any* items withheld or redacted (for example, we are unclear whether Ms. Davey would be required to list personal communications).

Please let me know if you believe it would be fruitful to have additional discussion on this issue.

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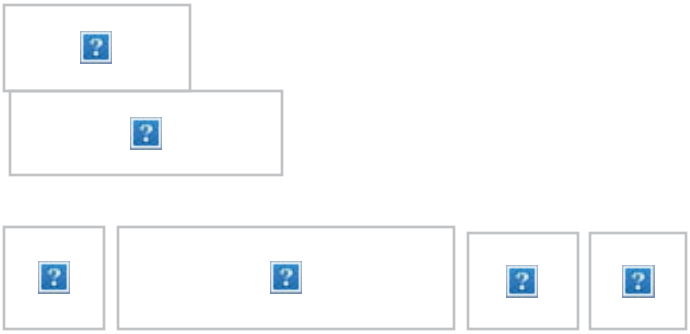
W|G|K
WIAND GUERRA KING

From: Eddie Suarez [mailto:esuarez@suarezlawfirm.com]
Sent: Thursday, April 30, 2020 11:44 AM
To: Ailen Cruz <acruz@wiandlaw.com>; John Anthony <janthony@anthonyandpartners.com>
Cc: George Guerra <gguerra@wiandlaw.com>; Stines, Robert A. <rstines@freeborn.com>; Peter King <pking@wiandlaw.com>; Larry Dougherty <ldougherty@wiandlaw.com>; Andrew Ghekas <aghekas@anthonyandpartners.com>
Subject: RE: 3.01(g) Meet and Confer Regarding Judge Tuite's March 4th Order

Hi Ailen,

For purposes of meet and confer you can accept my email of April 29, 2020 at 9:18 PM (shown below) as Centennial's position on the four points raised in your original email at the bottom of this email string. Having said that, I would point out, once again, that regarding number four in your original email, no explanation whatsoever has been offered for Davey's unilateral position that ESI Order 381 does not apply to her iCloud data production.

Regards,



From: Ailen Cruz <acruz@wiandlaw.com>
Sent: Thursday, April 30, 2020 9:21 AM
To: Eddie Suarez <esuarez@suarezlawfirm.com>; John Anthony <janthony@anthonyandpartners.com>
Cc: George Guerra <gguerra@wiandlaw.com>; Stines, Robert A. <rstines@freeborn.com>; Peter King <pking@wiandlaw.com>; Larry Dougherty <ldougherty@wiandlaw.com>; Andrew Ghekas <aghekas@anthonyandpartners.com>
Subject: RE: 3.01(g) Meet and Confer Regarding Judge Tuite's March 4th Order

Eddie,

Thank you for your email. It is apparent from your comments that you agree that we are at an impasse and that we have satisfied our obligation to meet and confer regarding the 3.01(g) requirement. Notwithstanding John's prior email, we will assume that you are speaking for plaintiff. As always, we remain open to further discussion but it does not appear from the tone and substance of your email that any such discussion will lead to a resolution. Thank you for your courtesy and prompt response.

Ailen Cruz
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W|G|K
WIAND GUERRA KING

From: Eddie Suarez [mailto:esuarez@suarezlawfirm.com]
Sent: Wednesday, April 29, 2020 9:18 PM
To: Ailen Cruz <acruz@wiandlaw.com>; John Anthony <janthony@anthonyandpartners.com>
Cc: George Guerra <gguerra@wiandlaw.com>; Stines, Robert A. <rstines@freeborn.com>; Peter King <pking@wiandlaw.com>; Larry Dougherty <ldougherty@wiandlaw.com>; Andrew Ghekas <aghekas@anthonyandpartners.com>
Subject: RE: 3.01(g) Meet and Confer Regarding Judge Tuite's March 4th Order

Dear Ailen,

Regarding your email below, I think you are correct that we have exhausted our efforts to resolve items one and two, although, I must admit that with regard to item one, I am particularly confused as to why Ms. Davey thinks that her failure to produce her iCloud information in 2016, means the timeframe should be limited. As I am sure you would agree, spoliation could have occurred five minutes before she gave Mr. Denny access to her iCloud data, but, regardless, we have made our position clear.

Regarding item number three, we are not experts in the preservation of iCloud data. We understand that Apple now makes more data available for an expert to examine than was available in 2016. If Mr. Denny is of the opinion that in order to fulfill his obligations to the Court and fully preserve and recover the relevant records in Ms. Davey's iCloud, using "the tools and methodology deemed appropriate by him," then we defer to his expertise and point out that that such deference is precisely what the Court outlined in the ESI order (Doc. 192).

Regarding item number four, I think it is accurate to say that we have all collectively operated under

the understanding that the protocol established under the original ESI order (Doc. 192) and the subsequent orders relating to the production of ESI (Doc. 381) are applicable to all ESI productions. In fact, the impetus of these orders was largely to protect the defendants' privileged information. If those orders are not applicable, then Ms. Davey's obligation under Judge Tuite's Order was to simply provide access to her iCloud data, without further review. You cannot have it both ways. Either the ESI orders apply, as we contend, or Ms. Davey was obligated to give us all her iCloud data without any filtering or review. I would also point out that this is not the first time that one of your clients has been required to produce ESI that was not disclosed timely. As you know, in 2016 when Mr. Denny's original ESI collection was done, Mr. Murrin failed to disclose and make available for imaging several external hard drives and a Windows-based computer. In 2019, when Mr. Murrin, for the first time, disclosed the existence of those devices, your client produced them for imaging and examination under the ESI orders. In fact, George filed a notice of delivery of devices (Doc. 453), in which he stated, "[O]n that same day, Murrin permitted Denny to take the devices rather than wait 10 days for Murrin's data recovery expert, Adam Sharp ('Sharp') to turn them over, as contemplated by the ESI Order." (See Doc. 192.) The bottom line is both sides have always operated under the understanding that the ESI orders control all production of ESI. It is baffling as to why Ms. Davey thinks that her late disclosure merits different treatment. I would also point out that no explanation has been provided as to why Ms. Davey thinks that her late production is not subject to the requirements the ESI orders, including Document 381. While it is doubtful that a reasonable argument can be advanced as to why that is, none has been provided.

Regards,

From: Ailen Cruz <acruz@wiandlaw.com>
Sent: Wednesday, April 29, 2020 6:22 PM
To: Eddie Suarez <esuarez@suarezlawfirm.com>; John Anthony <janthony@anthonyandpartners.com>
Cc: George Guerra <gguerra@wiandlaw.com>; Stines, Robert A. <rstines@freeborn.com>; Peter King

<pking@wiandlaw.com>; Larry Dougherty <ldougherty@wiandlaw.com>; Andrew Ghekas <aghekas@anthonyandpartners.com>
Subject: 3.01(g) Meet and Confer Regarding Judge Tuite's March 4th Order

Eddie and John,

We have exchanged a number of emails in the past few weeks relating to our respective interpretations of Judge Tuite's March 4th order. Although we have been able to resolve many issues, it appears that we have come to an impasse about certain others and will need guidance from the Court on those. We have already discussed points 1 and 2 directly with Centennial and I believe exhausted our efforts to resolve them. Items 3 and 4 however have not directly been addressed so we would like to do so:

1. Whether Judge Tuite's order directs Ms. Davey to produce documents dated beyond December 31, 2016 – our position is it does not;
2. Whether Mr. Murrin and Ms. Davey are obligated to provide every plist file on their devices (including plist files for apps and plug-ins) – our position is that the plist logs Mr. Murrin and Ms. Davey have already provided are the ones required by Judge Tuite's order;
3. It has also come to our attention that Mr. Denny conducted an Apple Privacy Download from Ms. Davey's iCloud account. Our position is Mr. Denny went beyond the scope of Judge Tuite's order in requesting the privacy download and Ms. Davey should not be required to produce those documents to Centennial. Please let us know if you agree;
4. Whether Judge Sneed's January 16, 2019 order (Doc. 381) applies to the production of Ms. Davey's iCloud data – our position is it does not.

We anticipate that Centennial will oppose Mr. Murrin and Ms. Davey's position on these issues, but to the extent you feel additional discussion would be fruitful on any of them, we are - as always - open to doing so. We would like to file the motion for clarification as soon as possible so we can get these issues resolved. Of course, Ms. Davey will make a production today of data from her iCloud account that is not in dispute.

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