

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 9:20-cv-80148-AHS

MEASURED WEALTH PRIVATE CLIENT
GROUP, LLC, a New Hampshire limited liability
company,

Plaintiff,

vs.

LEE ANNE FOSTER, an individual, RICHARD
KESNER, an individual, STOEVER, GLASS &
CO., INC., a New York Corporation, and STOEVER
GLASS WEALTH MANAGEMENT, INC., a New
York corporation,

Defendants.

**PLAINTIFF’S REPLY IN SUPPORT OF ITS MOTION TO COMPEL
FORENSIC EXAMINATION OF DEFENDANT LEE ANN FOSTER’S MOBILE PHONE**

Plaintiff Measured Wealth Private Client Group, LLC (“Measured Wealth”) files its Reply in support of its Motion to Compel Forensic Examination of Defendant Lee Anne Foster’s Mobile Phone (the “Motion”) [DE 154], and states:

A. A forensic examination is warranted because Foster failed to comply with her discovery obligations.

Foster’s Response to the Motion (the “Response”) [DE 156] does not contain any basis for denning the Motion. The logs Measured Wealth acquired from Foster’s wireless carrier (the “Phone Logs”) demonstrate Foster possesses relevant communications responsive to Measured Wealth’s requests for production. Foster does not dispute this fact in her Response. *See* DE 156 at p. 5. Notwithstanding, Foster refuses to provide responsive text messages. This refusal is consistent with a pattern of discovery obfuscation and coincides with Kesner’s and Stoever Glass¹

¹ “Stoever Glass” collectively refers to Defendants Stoever, Glass & Co, Inc. and Stoever Glass Wealth Management, Inc.

obstructionist discovery conduct that has plagued this proceeding. *See* DE 122²; DE 144. As a result, Measured Wealth cannot rely on Foster's discovery responses to prepare for trial because Foster failed to provide forthcoming discovery responses volitionally. A forensic examination is therefore the only remedy that will ensure Measured Wealth possess all material needed to prepare for trial.

Measured Wealth obtained Foster's Phone Logs from her wireless carrier because Foster's discovery responses were consistently inconsistent. *See supra*, n.2. The Phone Logs are attached as **Exhibit A** (filed under seal) and confirm Foster possesses relevant text messages that were not produced in discovery. *See also* DE 154 at pp. 1-3. This is alarming because Foster admits to possessing the cell phone used to transmit these messages and simultaneously contends, she produced all responsive documents in her control. DE 156 at p. 3 ("The device Plaintiff requests to inspect is the same mobile phone Foster continues to use today."), p. 5 ("In any event, Foster produced all responsive documents, including messages and communications, in her possession, custody, and control."). Foster's assertions are belied by the Phone Logs. *See* Exhibit A. Consequently, a forensic examination is needed to procure the information from Foster because she is unwilling to conduct an adequate records search or unwilling to produce all responsive documents.

B. The forensic examination can exceed the scope of Measured Wealth's request to inspect Foster's phone for communications transmitted between April 2019 and July 2019 because the forensic examination is needed to obtain documents responsive to many requests Foster refused to comply with in discovery.

The forensic examiner must examine Foster's mobile phone for relevant text messages transmitted during 2019 because these records are probative and responsive to Measured Wealth's discovery requests. Foster argues she is not required to submit her cell phone for a forensic examination spanning the entire year of 2019 because Measured Wealth limited its inspection request to the period of April 1, 2019 through July 31, 2019. DE 156. This argument fails because

² Measured Wealth moved to compel Foster to produce text message logs from her wireless carrier because Foster refused to produce the logs and the underlying messages. Foster opposed the motion claiming she submitted a written demand to her wireless carrier for the records. After the Court ordered Foster to file a sworn affidavit documenting her efforts to obtain the text logs, Foster admitted she never requested her logs until January 5, 2021. This is the same day the Court ordered Foster to produce text message logs. However, to date, Foster never produced these logs.

Foster refused to provide text messages responsive to many Measured Wealth requests for production encapsulating a period broader than April 1, 2019 through July 31, 2019. *See, e.g.*, DE 154-2, Response to Requests 3-5, 7-11, 18-26; DE 154-4, Response to Requests 1-2, 7. For example, Measured Wealth requested “[a]ll Communications between You and any person or entity which was both a Measured Wealth Client and a Stoever Glass Client *in the year 2019*.” DE 154-1 Request 4. This request encompassed all text messages and iMessages Foster sent and received between January 1, 2019 and December 31, 2019. Foster agreed to provide communications “sent or received prior to the former Measured Wealth client becoming a Stoever Glass client” within her control, but failed produce responsive text messages and iMessages on her own phone. DE 154-2, Response to Request 4. Foster failed to provide at least eighteen text messages with former Measured Wealth clients transmitted before they became Stoever Glass clients. The relevant Phone Logs confirm this fact. *See also* DE 154 at pp. 1-3. Foster also possesses at least an additional sixty-eight text messages with former Measured Wealth clients transmitted after they became Stoever Glass clients. *See* Exhibit A. Both sets of text messages are relevant to the facts and circumstances of this case because they will likely demonstrate the misappropriation of Measured Wealth’s trade secrets. Therefore, Measured Wealth is not limited to a forensic examination for the period of April 1, 2019 through July 31, 2019 because its requests are broader and cover the entire 2019 calendar year.

The forensic examination should not be limited to the text messages identified in the Phone Logs because Foster may possess additional messages that were not captured by the log. Foster’s mobile phone is an iPhone and therefore capable of sending and receiving iMessages over Wi-Fi that are not captured by the Phone Logs. These messages may exist on Foster’s phone even though they are not identified on the Phone Logs. Therefore, the Court should permit the parties to designate certain search terms the forensic examiner can use to determine whether Foster’s mobile phone contains additional messages not captured by the Phone Logs. The Court previously approved this process for the forensic examination of Kesner’s mobile phone and there is no reason for deviation as it relates to Foster. In fact, the parties already agreed to search terms for Kesner and many (if not all) of these terms could be used for Foster’s examination.

C. Measured Wealth requires a forensic examination of Foster's mobile phone to obtain information needed to prosecute its claims in this case.

Measured Wealth propounded discovery on Foster to determine the extent Foster misappropriated Measured Wealth's trade secrets. These discovery requests are narrowly tailored to the pleadings and the Court found these requests proper by overruling many objections interposed by Foster. Nevertheless, Foster refuses to respond. For instance, Foster was ordered to turn-over her phone records and still has not done so. *See* DE 122. Measured Wealth therefore seeks to forensically examine Foster's cell phone as a last resort because she refuses to produce responsive documents volitionally. This is the anthesis of harassment.

Measured Wealth could not bring this motion sooner because it did not receive complete Phone Log records from Foster's wireless carrier until January 11, 2021. Although Measured Wealth received some phone logs from Foster's wireless carrier in late 2020, the logs were incomplete because they only identified four text messages with co-defendant Richard Kesner. Measured Wealth met and conferred with Foster's wireless carrier to obtain complete records on January 6, 2021, and five days later, Measured Wealth received the complete Phone Logs. A copy of the correspondence corroborating these facts is attached as composite **Exhibit B**. Measured Wealth examined these records and determined Foster transmitted at least ninety relevant text messages. Measured Wealth then reviewed the documents Foster produced to determine whether these messages were turned-over during discovery and concluded they were not. This sequence of events combined with Foster's transparent desire to frustrate discovery procedures requires Measured Wealth to seek the forensic examination hereunder because her discovery responses are untrustworthy.

D. The forensic examination of Foster's mobile phone is the only reasonable method to obtain the documents Foster is intentionally withholding from Measured Wealth.

It is not practical for Measured Wealth to subpoena every former Measured Wealth client when Foster possess the necessary information in a single device. Foster suggests the least obtrusive method for obtaining the relevant text messages on her own mobile phone is to subpoena the records from Measured Wealth former clients. DE 156 p. 5. Compliance with this dubious suggestion would require Measured Wealth to subpoena the records of at least fifty-three non-parties. It is difficult to envision a scenario in which this practice is less cumbersome or intrusive than being provided access to one phone owned by a party to this lawsuit. This is especially true under the facts and circumstances of this case because Foster could have voluntarily provided the

information in due course thereby alleviating the need for a forensic examination. Foster cannot therefore shift her discovery obligations onto non-parties and cannot complain about the intrusiveness of a forensic examination when she is the reason such an examination is necessary.

E. A forensic examination will not infringe upon Foster's privacy interests because the exam will be subject to the same strict confidentiality protocols previously adopted by this Court.

Foster's privacy concerns are unfounded because the Court will impose confidentiality safeguards and review protocols. Measured Wealth suggested these safeguards and protocols in its Motion and the Court previously adopted these safeguards and protocols when compelling Kesner to a forensic examination. DE 144. Foster does not argue that the suggested safeguards and protocols are deficient and there is no reason the Court would reject these safeguards and protocols for Foster. Thus, Foster's privacy will be protected.

F. Conclusion

The undisputed evidence demonstrates Measured Wealth requested certain relevant communications from Foster, Foster refused to produce the communications, and Foster still possess the device containing these communications. As a result, Measured Wealth must forensically examine Foster's mobile phone subject to specific safeguards and protocols to obtain the information needed to prosecute this lawsuit and prepare for trial. Foster's perpetual noncompliance leaves Measured Wealth and the Court without a pragmatic alternative.

CERTIFICATE OF SERVICE

I certify that on February 26, 2021 the foregoing document was served via email through the Court's ECF system on all counsel of record at the email addresses enumerated on the Service List below.

Respectfully submitted,

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