

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

Case No. 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 MOTION TO COMPEL FORENSIC EXAMINATION
OF DEFENDANT LEE ANNE FOSTER'S MOBILE PHONE**

Plaintiff Measured Wealth Private Client Group, LLC (“Measured Wealth”), pursuant to Federal Rule of Civil Procedure 37 and Local Rule 26.1, moves this Court to compel the forensic examination of Defendant Lee Anne Foster’s (“Foster”) mobile phone for the time period of January 1, 2019 through December 31, 2019.

A. Introduction and Relevant Background

It is undisputed that Foster sent text messages to Measured Wealth’s former clients and Defendant Richard Kesner (“Kesner”) shortly before and after she left Measured Wealth. It is also undisputed that Foster failed to produce these text messages in response to Measured Wealth’s specific discovery requests. Foster’s refusal to provide her text messages leaves no reasonable alternative outside a forensic examination to obtain the communications needed to prosecute this action given the Court’s recent finding that the text messages are relevant and probative of the issues in this case. *See* Court’s Order Granting Motion to Compel [DE 122]; Order Granting Plaintiff’s Motion to Compel Forensic Examination [DE 144].

Foster’s wireless carrier produced logs of Foster’s calls and text messages from January 1, 2019 through December 31, 2019 in response to a subpoena for documents issued by Measured Wealth in connection with this litigation (the “Phone Logs”). The Phone Logs demonstrate Foster sent SMS text messages to Measured Wealth’s clients after she left Measured Wealth and joined Stoever Glass.¹ However, the Phone Logs do not contain the substantive messages because they only identify the transmission date, sender, and recipient.² The substance of the messages are essential to this case because they prove Foster misappropriated Measured Wealth’s trade secrets. The messages enumerated on the Phone Logs (and other undiscovered iMessages) were sent *shortly before and after Foster resigned from Measured Wealth in July 2019* and *shortly before the message recipients left Measured Wealth to join Stoever Glass*.

The Phone Logs demonstrate Foster communicated with Measured Wealth’s clients during critical time periods immediately before Measured Wealth’s clients transitioned to Stoever Glass.

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

² Foster’s wireless carrier also confirmed that Foster’s mobile phone is an iPhone capable of sending iMessages to other iPhone users. iMessages are not listed on the Phone Logs, therefore it is possible Foster’s phone contains relevant iMessages, but Measured Wealth cannot confirm this fact unless this Court permits a forensic examination of Foster mobile phone.

However, Foster failed to produce these communications despite their responsive nature to twenty document requests propounded by Measured Wealth.³ This Court recently granted Measured Wealth's request to conduct an independent forensic examination of Kesner's mobile phone because Kesner haphazardly and incompletely responded to discovery. *See* Order Granting Motion to Compel Forensic Examination [DE 144]. The same relief is warranted here because Foster failed or refused to provide responsive documents within her control. The Court should therefore compel Foster to produce her mobile phone for forensic examination because Foster withheld discoverable information stored on her mobile device that is probative on the issue of trade secret misappropriation.

B. Foster withheld highly relevant information stored on her mobile phone.

This Court already determined Foster's text message are relevant. *See* Order Granting Motion to Compel [DE 122] at 2-3 ("The phone records at issue are within the [Foster's] control The Court finds the documents are relevant.") (emphasis added). These messages will prove Foster misappropriated Measured Wealth's trade secrets by using Measured Wealth's trade secret information to solicit Measured Wealth's clients. All text messages and iMessages between Foster and Measured Wealth's former clients in 2019 could potentially reveal Foster's misappropriation because Foster plotted her scheme as late as the spring of 2019 and executed her scheme during the summer, fall and winter of 2019. Indeed, Measured Wealth already procured records establishing that Foster provided her personal cell phone number to Measured Wealth's clients before and after she left Measured Wealth, contacted Measured Wealth's clients less than one hour before terminating her employment with Measured Wealth, and guided Measured Wealth's clients through the transfer process to Stoever Glass. *See* **Exhibit E** (filed under seal) at Bates Nos. MW 545; **Exhibit F** (filed under seal) DEF 0000134-142; **Exhibit G** ¶¶ 3-6. However, Foster failed to produce these communications.

Foster similarly sent text messages to Kesner and his wife, Jean Kesner, at various times

³ *See* Measured Wealth's First Request for Production of Documents to Foster attached as **Exhibit A**, Request Nos. 3-5, 7-11, 18-26; Foster's Responses to Measured Wealth's First Request for Production of Documents attached as **Exhibit B**; Measured Wealth's Second Request for Production of Documents to Foster attached as **Exhibit C**, Request Nos. 1-2, 7; Foster's Responses to Measured Wealth's Second Requests for Production and Inspection of Documents attached as **Exhibit D**.

before and after resigning from Measured Wealth. Foster messaged Kesner shortly before Kesner retired from Measured Wealth and once shortly after Foster resigned from Measured Wealth. These messages likely contain evidence of Kesner's and Foster's scheme to misappropriate Measured Wealth's trade secrets. For example, Kesner texted Foster on August 19, 2019 and one day later, a client informed Measured Wealth they were leaving to join Stoeber Glass. *See Exhibit G. Foster did not however produce her text messages and iMessages with Kesner.*

The Phone Logs demonstrate a forensic examination of Foster's mobile device is needed because Foster possesses text messages germane to this case. Foster sent text messages to Measured Wealth's former clients and Kesner before and after her resignation. The Phone Logs confirm at least messages to two Measured Wealth's clients before she left Measured Wealth. *See Exhibit G ¶¶ 3-6.* The substance of these text messages and others transmitted during the relevant period are unknown at this time but will likely reveal Foster's misappropriation through solicitation. Therefore, a neutral forensic examiner must be appointed to search Foster's personal mobile device for the relevant material.

Additional documents obtained during discovery support the need to forensically examine Foster's mobile phone because they confirm Foster regularly used her cellphone to conduct Measured Wealth business and liaise with Measured Wealth's clients. Foster acknowledged she used her personal mobile phone to conduct business on behalf of Measured Wealth during her employment.⁴ Kyle Powers, a former Director of Operations at Measured Wealth, confirmed Foster used her personal mobile phone often to conduct Measured Wealth business.⁵ A forensic examination of Foster's mobile phone will therefore lead to the discovery of admissible evidence regarding Foster's and Kesner's misappropriation of Measured Wealth's trade secrets. *See Benzion v. Vivint, Inc.*, No. 12-cv-61826, 2013 WL 12304563, at *3-4 (S.D. Fla. 2013) (granting motion to compel forensic examination of plaintiff's mobile phone where such device was intimately connected to claims and defenses in TCPA action).

⁴ Foster's Compliance Manual Code of Ethics Acknowledgment Form is attached hereto as **Exhibit H** (governing "text message/SMS message, instant messaging, personal emails, and personal or private message").

⁵ The Declaration of Kyle Powers, dated November 20, 2020 is attached hereto as **Exhibit I**.

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

Measured Wealth cannot obtain the substantive text messages identified in the Phone Logs and the other relevant iMessages through less intrusive means because Foster has thwarted her discovery obligations in this lawsuit. Measured Wealth propounded twenty document requests seeking text messages, iMessages, and other communications with Measured Wealth's clients, the defendants, and other relevant parties. Foster objected to these requests and refused to produce substantive communications claiming they were not within her control. The court rejected this argument, found Foster's text message logs relevant, and granted Measured Wealth's Motion to Compel on January 5, 2021. *See* Court's Order [DE 122]. Notwithstanding, Foster refuses to produce text messages and iMessages contained on her own phone. Foster's repeated refusal to provide these messages despite court orders requiring her to do so demonstrates unwillingness to comply with mandatory discovery obligations. Foster's verifiably incomplete discovery responses therefore require a forensic examination of her phone, which contains these messages. *See Health Mgm't Assocs., Inc. v. Salyer*, No. 14-cv-14337, 2015 U.S. Dist. LEXIS 187916, at *3-4 (S.D. Fla. Aug. 19, 2015) (granting motion to compel forensic exam when there was a "persuasive showing of non-cooperation by the responding party."").

D. Strict confidentiality protocols will be used to protect Foster's private information during the forensic examination.

This Court should adopt the same protocols it implemented to forensically examine Kesner's smartphone to alleviate any privacy or confidentiality issues. These protocols were modeled after those prescribed in *Wynmoor Cmty. Council, Inc. v. QBE Ins. Corp.*, and require certain privacy safeguards before, during, and after the forensic examination. 280 F.R.D. 681, 687-88 (S.D. Fla. 2012) (ordering the independent examination protocol when the responding party was either "unwilling or unable to conduct a search of their computer systems for documents responsive to [the discovery request]").

E. Conclusion

Measured Wealth respectfully requests that Foster be required to submit her personal cellphone for a forensic examination and provide the forensic examiner to the password to enable the examination. Measured Wealth also respectfully requests that the Court institute the safeguards and protocols set forth in *Wynmoor* and in the Court's order compelling a forensic examination of Kesner's mobile phone [DE 144]. The attached proposed order contains a comprehensive list of these protocols ensuring privacy and permitting Measured Wealth to finally obtain highly relevant information it needs from Foster to prosecute its claims.

CERTIFICATION OF CONFERENCE WITH OPPOSING COUNSEL

I hereby certify that, in accordance with Rule 7.1 of the Local Rules of the United States District Court for the Southern District of Florida, the undersigned conferred with Defendants' Counsel to resolve the issues contained within this motion. However, the parties did not agree because Foster objects to the relief requested in this Motion.

/s/ Jacob M. Resnick
Jacob M. Resnick

CERTIFICATE OF SERVICE

I certify that on February 10, 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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