IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

TIMOTHY W. DEEGAN,

Plaintiff, Case No. 3:14-cv-1419-J-39PDB

v.

NEXSTAR BROADCASTING, INC., d/b/a INERGIZE DIGITAL, a foreign corporation,

Defendant.
_____/

PLAINTIFF'S MOTION TO COMPEL WITHHELD DOCUMENTS CONCERNING PRESERVATION/SPOLIATION OF EVIDENCE INCLUDING DOCUMENTS DISCLOSED ON DISCOVERY CUT-OFF DEADLINE

Plaintiff, TIMOTHY W. DEEGAN, by and through undersigned counsel, moves pursuant to *Fed.R.Civ.P.* 37(a), and *M.D. Fla.Loc.R.* 3.01 and 3.04, to compel production of withheld documents concerning preservation/spoliation of evidence including documents disclosed on the discovery cut-off deadline. In support of this Motion, Plaintiff states:

SUMMARY OF ARGUMENT

Plaintiff requested all documents concerning preservation/spoliation of evidence in his First Discovery Requests in November, 2014. Nexstar represented that there were "no documents" responsive to Plaintiff's request in December, 2014. In the nine months thereafter, Plaintiff has learned that Nexstar has been engaged in a strategem of active concealment regarding its knowledge of spoliation of evidence in this case, culminating in Defendant's sudden disclosure of a privilege log concerning "preservation of evidence" on the afternoon of the discovery cut-off deadline. Nexstar has not even attempted to meet its burden of

demonstrating that the withheld non-lawyer communications are privileged work-product. But even if they were, the balance of equities favors compelling disclosure and possible sanctioning against the Defendant depending on the nature of the withheld documents.

RELEVANT DISCOVERY HISTORY

1. As far back as November 20, 2014, Plaintiff formally sought "[a]ny and all documents pertaining to preservation of evidence related to the prospective claims or defenses in this proceeding". Nexstar objected by asserting the attorney-client and work product privileges. However, no privilege log was produced under Fed.R.Civ.P. 26(b)(5)(A) and Nexstar denied possession of any responsive documents: "**Defendant has no documents responsive to this request** […]" (*emphasis added*) [*Def's Response to Plf's First Request for Production*, December 8, 2014, **Exhibit A**].

2. Seven months later on June 8, 2015, Plaintiff's counsel expressly admonished Nexstar of its Rule 26(b)(5)(A) duty to produce a privilege log if Defendant was withholding *any* documents in the case whatsoever on the basis of privilege:

> "In response to our discovery requests, we have been confronted with an avalanche of objections that has become customary from Nexstar. […]You have even asserted that Doug Ware's 6/16/14 search results are entitled to attorney-client, work-product protection. However, you have not disclosed a privilege log indicating whether or not any such documents (regardless of format and whether tangible or electronic) exist and are being withheld under the asserted privileges. You were required to do so under Rule 26(b)(5)(a).[…]
>
> You must also produce a privilege log of all the documents you are withholding under your assertion of the attorney-client, work-product privileges so we can assess it prior to moving to compel. Our request for a privilege log stands not only for the instant discovery requests, but for all of our prior discovery requests for which you are withholding *any documents at all* on the basis of privilege." [*Meet and Confer Letter Sheftall to McElroy*, June 8, 2015, **Exhibit B**]."

3. Nexstar's counsel's response to the "meet and confer" letter neglected Plaintiff's request for a privilege log. [*Letter from Shullman to Sheftall*, dated June 15, 2015, **Exhibit C**].

4. On June 16, 2015, Defendant suddenly disclosed the total destruction of Doug Ware's hard drive data, and represented that Jason Gould's web browser data was also lost. [*Def's Supplemental Response and Objections to Plf's 3rd Req. for Prod.*, June 16, 2015, **Exhibit D**].

5. On July 17, 2015, Defendant's sudden disclosures caused Plaintiff's counsel to fly to Salt Lake City, Utah to depose Defendant's IT engineer and computer forensic expert about the spoliation. On the evening before and immediately prior to the depositions, Nexstar suddenly disclosed selected emails responsive to Plaintiff's long-standing discovery request for discovery related to preservation/destruction of evidence. "The documents enclosed are being provided to you in response to Plaintiff's prior document requests. Defendant produces these documents without waiver of any claims of privilege […]". [*Def's Supp. Production, July 16, 2015*, **Exhibit E**].

6. Among the emails Nexstar produced was an email the day after the publication from Jason Gould to Doug Ware and Inergize's in-house counsel, Gogi Malik, et al., which forwarded a preservation of evidence letter from Cox Media, stating: "Team, Please make sure that we have a record of the events from yesterday preserved." [*DEF000230*, **Exhibit F**]. The emails also disclosed the identities of the following witnesses who had knowledge regarding preservation/spoliation of evidence who had not previously been disclosed as having knowledge: Michelle Metcalf, Dean Davidson, Richard Doutre'Jones, Jeremy Miner, Logan Marshall, Sue Earl, Robert Guidirini, and Anthony Haber. [*DEF000234-DEF000235*, **Exhibit G**].

7. On August 3, 2015 – less than a month before the amended discovery cut-off deadline - Nexstar's counsel disclosed *for the first time* that a privilege log was forthcoming

regarding preservation/spoliation of evidence during a telephonic scheduling conference between counsel. [*Email to Dana McElroy*, August 11, 2015, **Exhibit H**].

8. Nine days later on August 12, 2015, Defendant served its first privilege log in this matter. The privilege log asserted work-product privilege regarding fourteen (14) emails between six Defendant employees, all non-lawyers, from September 16, 2014 to September 18, 2014 regarding the "Ware computer". [*Defendant Nexstar Broadcasting, Inc.'s Privilege Log*, August 12, 2015, **Exhibit I**]. The privilege log did not contain any factual description of the contents of the emails.

9. On August 14, 2015, Plaintiff served a "Meet and Confer" letter in response to the receipt of the privilege log:

> "On its face, Nexstar cannot shield the emails on the basis that they contain privileged mental impressions, opinions, or legal theories. Neither Jason Gould, nor Richard Doutre-Jones, nor Dean Davidson, nor Ida Anderson is an attorney. […] [I]t is not even clear that the emails are privileged work-product beyond Nexstar's conclusory assertions to the contrary. […] The withheld emails undoubtedly shed light on the spoliation issue. At the heart of the matter, we are entitled to know the truth regarding the circumstances surrounding the disappearance of Doug Ware's hard drive data." [*Letter from Moore to McElroy*, August 14, 2015, **Exhibit J**].

10. In response to Plaintiff's "Meet and Confer" letter, Nexstar maintained "that the emails are rightfully withheld as fact work product" [*Letter from McElroy to Moore*, August 21, 2015, **Exhibit K**].

11. On August 24, 2015 and August 25, 2015, Plaintiff's counsel took the depositions of Doug Ware and Dean Davidson in Salt Lake City, Utah, and Michelle Metcalf, Sue Earl, Michael Tholkes, and Jason Gould St. Paul, Minnesota, respectively. The depositions were set as a direct result of the belated disclosures of emails regarding preservation/spoliation of evidence, and each witness's knowledge thereof.

12. Plaintiff served a subpoena on each deponent care of Defendant's counsel specifically requesting any additional correspondence, including emails, regarding the preservation/spoliation of evidence:

> "All communications pertaining to Doug Ware's hard drive or any aspect of the case brought by Timothy Deegan, including any correspondence, email or other documents authorized by, received by, or copies to you regarding preservation of evidence in this case." [*Notices of Taking Depositions Duces Tecum*, August 20, 2015, **Exhibit L**].

No emails were produced.

13. During the deposition of Michelle Metcalf on August 25, 2015, Defendant's counsel represented that "one" additional document would be supplemented to Defendant's privilege log regarding preservation/spoliation of evidence "between [Inergize in-house counsel] Elizabeth Ryder and the department heads":

> "MS. SHULLMAN: And I can represent there is one document that may be the e-mail exchange she was speaking of that we'll have to log for you because it is between Elizabeth Ryder and the department heads that Ms. Metcalf testified to, and so we'll have to log it as privileged. […]
> MS. SHULLMAN: We're going to log it as attorney/client and work product. She's giving you the general substance of it. I think you know Ms. Metcalf was assigned to triage it, what this e-mail does is it reports back on legal's instruction to secure the materials, and she simply then confirms that she has done so. So the subject matter is following legal's instructions with respect to preservation.
> MR. SHEFTALL: Well, let me state for the record that I don't believe that such an e-mail would be privileged. Either it's attorney/client or it's work product."
> [*Deposition of Michelle Metcalf, August 25, 2015*, pp 13-15, lns, 4-17, **Exhibit M**].

14. On August 31, 2015, having not received the amended privilege log in the intervening six days, Plaintiff's counsel emailed Defendant's counsel requesting the amended privilege log referenced during Michelle Metcalf's deposition:

> "At the deposition of Michelle Metcalf, you informed Scott that you would be amending Defendant's privilege log to include an email from Metcalf which you recently located. Will Nexstar be serving its final privilege log today or tomorrow with that email included?" [*Email from Moore to McElroy and Shullman*, August 31, 2015, 2:31 PM, **Exhibit N**].

15. Defendant's counsel responded at 6:12 PM, stating: "I believe we will serve an amended privilege log tomorrow morning." [*Email from McElroy to Moore*, August 31, 2015, 6:12 PM, **Exhibit N**].

16. Nexstar waited until the afternoon of the discovery cut-off deadline on September 1, 2015 to serve its Supplemental Privilege Log. [*Service of Court Document Email*, 12:17 PM, **Exhibit O**].

17. The Supplemental Privilege Log did not contain an email between "[in-house counsel] Elizabeth Ryder and the department heads", as Plaintiff's counsel had anticipated based on Nexstar's counsel's representation. Rather, the privilege log referenced *eleven newly disclosed emails* between eight Defendant employees, all non-lawyers, regarding "preserving documents" and "backup data". Nexstar asserted work-product privilege for the emails, some of which were from as far back as July, 17 2014 – the day after Doug Ware's hard drive was completely destroyed by Nexstar. [*Defendant's Supplemental Privilege Log*, September 1, 2015, **Exhibit P**].

17. By waiting until the afternoon of the amended discovery cut-off deadline to disclose the additional eleven emails regarding preservation/spoliation of evidence, Nexstar deprived Plaintiff's counsel of the ability to ask the witnesses questions concerning the nature of the communications – the subject of which was the sole purpose of the late-August depositions in Utah and Minnesota, respectively. Moreover, none of the witnesses identified the emails in their testimony, nor disclosed that emails regarding preservation/spoliation of evidence had been sent during the July - August, 2014 timeframe.

18. Nexstar's late disclosure also prevented the timely filing of this Motion to Compel by the September 1, 2015 deadline.

MEMORANDUM OF LAW

I. Standard

"The Federal Rules of Civil Procedure strongly favor full discovery whenever possible," *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985). Rule 26(b)(1) generally entitles a civil litigant "to discovery of any information sought if it appears reasonably calculated to lead to the discovery of admissible evidence," *Degen v. United States*, 517 U.S. 820, 825-26, (1996). There is no credible dispute that the 25 email communications between Defendant's agents and employees concerning preservation/spoliation of evidence are relevant within the meaning of Rule 26(b)(1). See, e.g., *Silvestri v. GMC*, 271 F.3d 583 (4th Cir. 2001). Plaintiff is thus entitled to discover these email communications—unless Nexstar can meet its burden of establishing that the work-product doctrine exempts these documents from discovery.

II. Nexstar Has Failed to Satisfy its Burden With Competent Evidence That the Emails Are Entitled to Work-Product Privilege

Both of Nexstar's privilege logs are skeletal in substance, and offer very little information enabling Plaintiff to evaluate whether privilege should rightfully apply. However, Nexstar, as the party claiming a privilege, has the burden of proving the applicability of the work-product doctrine, including "all of its essential elements". *Guar. Ins. Co. v. Heffernan Ins. Brokers, Inc.*, 2014 U.S. Dist. LEXIS 146843 (S.D. Fla. 2014); *see also Republic of Ecuador v. Hinchee*, 741 F.3d 1185, 1189 (11th Cir. 2013). Nexstar's burden is a "heavy" one, and mere conclusory representations of privilege are insufficient. *Palmer v. Westfield Ins. Co.*, 2006 U.S. Dist.

LEXIS 66391, 2006 WL 2612168, at *3 (M.D. Fla. June 30, 2006) (The party asserting protection bears the burden of proving that the documents are work product and the burden is considered a "heavy one", which "cannot be discharged by merely conclusory or *ipse dixit* assertions."); *Anderson v Hale*, 2001 U.S. Dist. LEXIS 4994, at *9 (N.D.Il. 2001) (Protection afforded by work product doctrine is not "self-executing").

This Court should be skeptical of Nexstar's *ipse dixit* assertions of privilege given that none of the emails are between attorneys. The emails do not contain "mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation". *Guar. Ins. Co. v. Heffernan Ins. Brokers, Inc.*, 2014 U.S. Dist. LEXIS 146843 (S.D. Fla. 2014) (The purpose of the work product doctrine is to protect materials […] *so that attorneys can freely prepare for litigation* without fear that opposing counsel may see those efforts.) (emphasis added). In fact, the emails are between material witnesses regarding the most solemn issues in the case, which should weigh heavily towards compelling disclosure.

In *Guar. Ins. Co. v. Heffernan Ins. Brokers, Inc.*, 2014 U.S. Dist. LEXIS 146843, at *4 (S.D. Fla. 2014), the court was equally skeptical of a defendant's assertion of privilege regarding documents between non-attorneys, as it admonished in its order in bold type: "**None of these persons is an attorney**, and Defendants acknowledge that the only potentially applicable basis for protection for these email chains is as fact work product." (emphasis in original). In this case, no attorney was even copied on any of the 25 emails.

As it stands, Nexstar has heretofore failed to present *any* competent evidence that the emails were created in anticipation of litigation. *Milinazzo v. State Farm Ins. Co.*, 247 F.R.D. 691 (S.D. Fla. 2007) ("the onus is thus on Defendant to provide competent evidence that the

material in question was created in anticipation of litigation."). For example, even though the Complaint was not filed until October 2014, Nexstar is withholding emails as far back as July and August, 2014. The July emails in the supplemental privilege log were sent mere days after Nexstar reformatted the Ware hard drive. The July 17, 2014 email from Jason Gould to six employees "regarding preserving documents" was sent the day after the erasure. "Documents prepared for a business purpose do not enjoy work product protection even if the preparing party is aware that the document may also be useful in the event of litigation." *Bridgewater v. Carnival Corp., 286 F.R.D. 636, at 641 (S.D. Fla. 2011).*

The burden to sustain a claim of privilege is heavy because privileges are "'not lightly created nor expansively construed, for they are in derogation of the search for the truth.'" *Bridgewater v. Carnival Corp.*, 286 F.R.D. 636, 639 (S.D. Fl. 2011) (*quoting United States v. Nixon*, 418 U.S. 683, 710, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)). At the heart of the matter, Plaintiff is seeking to know the truth about the disappearance of crucial evidence, the extent of Defendant's knowledge of same, and when it knew it. All of the foregoing is essential to evaluate the credibility of each witness and to cross-examine each witness effectively at trial. Without knowing all the facts regarding preservation/spoliation of evidence, Nexstar is, in effect, profiting from the withheld evidence at the expense of Plaintiff and at the expense of a fair trial.

III. Plaintiff Has a Substantial Need for the Withheld Emails and Cannot Obtain Their Equivalent By Other Means

Rule 26(b)(3) states documents prepared in anticipation of litigation may be discovered if the party shows that it has a substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. Assuming,

arguendo, that the emails are work-product, Plaintiff has both a substantial need to obtain the withheld emails and an undue hardship in obtaining substantially equivalent information. Production is therefore warranted.

The fact that the emails concern the spoliation of Ware's hard drive constitutes a "substantial need" under applicable law. *See Galvin v. Pepe*, 2010 U.S. Dist. LEXIS 82119 (D.C.N.H. 2010) (Case in which the court, applying the same federal law applicable here, ordered production of various documents over the defendants' work-product objection by finding that the documents were "relevant to the extent that they may cast doubt on defendants' spoliation defense."). Similarly, the 25 withheld emails may also cast doubt on Nexstar's spoliation defense. For example, Nexstar has never made a substantive distinction why it selectively chose to disclose a few emails between the same key players regarding this same issue (i.e. the emails suddenly disclosed on the eve of the depositions of the IT engineer and forensic expert on July 16-17, 2015), while withholding the 25 emails in the privilege logs. It is reasonable to question whether the withheld 25 emails contain highly material information or evidence regarding Defendant's awareness of the spoliation at issue. Plaintiff has a substantial need to explore fully Nexstar's knowledge thereof.

Further, Nexstar has made it impossible to obtain "substantially equivalent information" by disclosing the emails on the afternoon of the discovery cut-off *after* Plaintiff's counsel returned from the trip to Utah and Minnesota *specifically* to depose the witnesses about the subject spoliation. In *National Union Fire Ins. V. Murray Sheet Metal*, 967 F.2d , 980, 985 (4th Cir. 1992), the court ruled that a party may be required to take a deposition of a witness before seeking privileged documents. However, in this case, that is not possible. The emails in the

supplemental privilege log should have been disclosed pursuant to the witness subpoenas specifically requesting all communications regarding preservation/spoliation of evidence. Nexstar has not offered any explanation why they were not disclosed at that time (or in response to Plaintiff's First Discovery Requests). Given Nexstar's eleventh hour disclosures, Nexstar cannot dispute that Plaintiff "cannot, without undue hardship, obtain their substantial equivalent by other means". The only other means to obtain "substantially equivalent information" would have been at the depositions in Utah and Minnesota, respectively.

IV. Nexstar's Late Disclosures, Especially the Emails Disclosed on the Discovery Cut-Off Deadline, Should Result in a Waiver of Protection

The failure to make a timely and effective showing of entitlement to the privilege is deemed to be a waiver. *St. Paul Reinsurance Company, Ltd., CNA v. Commercial Financial Corp.*, 197 F.R.D. 620, 640-641 (N.D. Iowa 2000); *see also Advisory Committee Notes to Rule 26.* It does not make a difference if the privilege is subsequently established. *Id.* Rule 26(b)(5)(A) establishes that once a party asserts privilege, the party must timely accompany the objection with a privilege log describing the nature of the withheld documents:

> "When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party **must**: (i) **expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim**." (emphasis added).

Further, Nexstar's duty to disclose documents concerning preservation/spoliation of evidence is *continuing* under Rule 26:

> "A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—**must supplement or correct its disclosure or response in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has**

> **not otherwise been made known to the other parties during the discovery process or in writing**". *Fed.R.Civ.P. 26(e)(1)(A).*

Regarding Nexstar's first privilege log, it waited almost nine months after representing that "no responsive documents exists" before disclosing fourteen emails regarding preservation/spoliation of evidence. Regarding Nexstar's supplemental privilege log, Defendant's attorneys waited until the afternoon of the discovery cut-off with knowledge that this Court's Amended Case Management Order [DE#34] states "[s]pecifically, motions to compel brought pursuant to Rule 37 must be filed no later than the close of discovery [September 1, 2015]". Nexstar had ample time to supplement its disclosures, and had a duty to do so, well before August and the September 1, 2015 deadline.

This Court should find waiver just as the following courts have done. *Ruran v. Beth El Temple of W. Hartford, Inc.*, 226 F.R.D. 165, 168-69 (D. Conn. 2005) (holding where the defendant did not provide privilege log, the defendant's failure to follow the Rule 26(b)(5) procedure precluded it from withholding from production documents it claimed to be privileged); *Banks v. Office of Senate Sergeant-at-Arms*, 222 F.R.D. 7, 20 (D. D.C. 2004) (holding that withholding of privilege log may be viewed as a waiver of any privilege); *Robinson v. Tex. Auto. Dealers Ass'n*, 214 F.R.D. 432, 456 (E.D. Tex.) (holding that the defendants waived privilege by failing to list materials claimed to be privileged in their privilege log), vacated in part, No. 03-40860, 2003 WL 21911333 (5th Cir. Jul 25, 2003); *see also Nordock Inc. v. Sys.*, 2012 U.S. Dist. LEXIS 144443, at *19 (E.D. Wisc. 2012) ("By not including the [documents] in its privilege log, Systems has waived the privilege. Systems made a general, conclusory assertion that some documents were privileged, which is insufficient under Rule 26(b)(5)".

V. Sanctions May Be Warranted Depending on the Extent of Spoliation or Other Discovery Abuses

The Advisory Committee contemplates sanctioning for a party's failure to comply with the requirements of Rule 26(b)(5)(A): "[t]o withhold materials without [providing notice as described in Rule 26(b)(5)] is contrary to the rule, [and] subjects the party to sanctions under Rule 37(b)(2) " *Advisory Committee Notes to Rule 26.*

Depending on the nature of the withheld emails, sanctioning may be warranted in this case. For example, the withheld emails might show an intention to conceal damaging evidence, awareness of intentional spoliation, or a myriad of other disclosures exposing perjured testimony. Similarly, in *Infinite Energy, Inc. v. Chang*, 2008 U.S. Dist. LEXIS 88084 (N.D. Fla. 2008), a plaintiff moved to compel and for sanctions due to the defendant wrongfully withholding emails crucial to the issues in the case under the assertion of work-product privilege. The plaintiff contended that the emails should have been disclosed in responses to the plaintiff's initial discovery requests. The court agreed, and found that the defendant's belated privilege log did not comply with Rule 26(b)(5)(a)'s requirement that the log describe the nature of the documents sufficient for the other party to assess the claim. *Id.* at *6. The court granted the motion to compel and for sanctions, while reserving the precise sanctions awarded at a later date depending on the extent of the spoliation of evidence that would be uncovered:

> "[T]he Court agrees that sanctions are warranted, but that the particular sanctions awarded should depend on the outcome of Defendant's efforts to obtain the documents, and what is revealed by these efforts as to Defendant's actions, if any, that resulted in spoliation of evidence or other more serious discovery violations." *Id.* at *4.

CONCLUSION

The Plaintiff respectfully submits that the foregoing grounds constitute good cause to compel production of both Nexstar's privilege logs and/or for an in camera inspection pursuant to which the Court can make a determination whether the emails were rightfully withheld and/or for monetary sanctions under Rule 37 depending on the nature of the documents being withheld.

CERTIFICATION OF COMPLIANCE WITH *Fed. R. Civ. P.* 37(a)(1) and *M.D. Fla. Loc. R.* 3.01(g)

Pursuant to Local Rule 7.1(a)(3)(B), undersigned counsel hereby certifies that both parties have conferred and Defendant opposes the relief sought herein.

Dated: September 3, 2015

SHEFTALL & TORRES, P.A.
Counsel for the Plaintiff
One Independent Drive, Suite 3201
Jacksonville, FL 32202
(904) 647-4066 – Telephone
(904) 379-6871– Fax

By: */s/ Brian F. Moore*
BRIAN F. MOORE
Florida Bar No. 86167
Email: sheftall@sheftalltorres.com
Secondary Emails:
bmoore@sheftalltorres.com
lweeden@sheftalltorres.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of September, 2015, that the foregoing document was served by electronic and regular mail upon counsel for Defendant: Gregg D. Thomas, Esquire, Dana J. McElroy, Esquire, and Deanna Shullman, Esquire, Thomas & LoCicero, PL, 401 SE 12th Street, Suite 300, Ft. Lauderdale, FL 33316; gthomas@tlolawfirm.com; dmcelroy@tlolawfirm.com; dshullman@tlolawfirm.com; and bbrennan@tlolawfirm.com.

/s/ Brian F. Moore
BRIAN F. MOORE