8-11-2008

Order Clarifying Previous Discovery Orders Dated April 29, 2008; May 29, 2008; and June 30, 2008 (AMANA I SA)

Alice D. Bonner
Superior Court of Fulton County

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

AMANA I SA and
SHEIK MOHAMMED AL-AMOUDI

Plaintiff,

v.

CAIRNWOOD GROUP, LLC,
CAIRNWOOD CAPITAL MANAGEMENT, LLC,
LANE P. PENDLETON, LAIRD P. PENDLETON,
KIRK P. PENDLETON, and THAYER B.
PENDLETON.

Defendants,

Civil Action File No. 2006-CV-114931
(Business One—ADB)

ORDER CLARIFYING PREVIOUS DISCOVERY ORDERS DATED APRIL 29, 2008; MAY 29, 2008; AND June 30, 2008

This case is before the Court on a protracted discovery dispute regarding Plaintiffs' requests for Defendants to produce the native format of certain documents. Defendants object to such production on the grounds that (1) they are not required to provide the native format of the documents, and (2) certain of the requested documents contain privileged communications, which would be revealed to Plaintiffs if native format production was ordered by the Court.

This case involves a dispute arising out Plaintiffs' investment in Cairnwood Global Technology Fund ("CGTF"), a Cayman Islands company, which was managed and/or invested in by the remaining Defendants.

In an Order dated April 29, 2008, this Court granted Plaintiffs' Motion to Compel and ordered Defendants to produce the native format of the following documents: (i) annual reports, (ii) share certificates, (iii) certain letters, and (iv) word document(s) created by Tim Lundberg[1] containing a history of and the contents of various email

1. Tim Lundberg is an employee of the corporate Defendants and works closely with the individual Defendants. Mr. Lundberg is not a named party to this suit, but allegations regarding whether or not he communicated certain information to Plaintiffs is at the heart

correspondences concerning CGTF, the Defendants, and other business activities (hereinafter, the "Tim Lundberg Documents").[2] The Court also granted the Defendants additional time to raise privilege issues.[3]

Thereafter, Defendants objected to the production of the native format of the Tim Lundberg Documents because they claimed that many of the copied emails contained privileged attorney-client communications. In an Order dated May 29, 2008, the Court ordered Defendants to produce the Tim Lundberg Documents to the Court for an *in camera* review in order to assess the privilege claims raised by Defendants. Defendants produced an unredacted and redacted set of the Tim Lundberg Documents.

Upon Order of the Court dated June 30, 2008, the Court denied Defendants privilege objection to the native format production because Defendants did not provide the

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of the allegations in this case.

2. The Tim Lundberg Documents have been a source of much discussion, and at times, confusion by the Court. The Tim Lundberg Documents contain ***copies*** of emails originally sent by or to Mr. Lundberg. Mr. Lundberg had the personal practice of creating word documents, organized by month and year, into which he copied relevant emails and correspondences. The original emails no longer exist and were destroyed in the ordinary course of business before the start of this litigation. All that remains of these emails are the Tim Lundberg Documents. Plaintiffs' request for Defendants to produce the native format of the Tim Lundberg Documents is a request to produce the Tim Lundberg Documents in an electronic format with the metadata intact, as opposed to the static image/.tiff file which the Defendants already produced. Plaintiffs are **not** requesting that Defendants produce the original email communications as all parties are in agreement that those emails no longer exist. This distinction was lost on the Court when writing the June 20, 2008 Discovery Order in this case and thus, it misstated Plaintiffs' request in that Order.

3. The privilege issues in this discovery dispute are complicated as they raise questions concerning the scope of a corporate client's privilege, who holds the privilege for a company now in bankruptcy/receivership, and how to verify that the communications in question were not communicated outside of the privilege.

Court with the information necessary to establish their claims of attorney corporate-client privilege. See, e.g., Marriott Corp., v. American Academy of Psychotherapists, Inc., 157 Ga. App. 497 (1981). The Court, however, allowed Defendants additional time to supplement the privilege information (i.e., identity of attorneys, etc.) submitted to the Court.

Thereafter, Defendants submitted a detailed privilege log[4] of the redacted communications in the Tim Lundberg Documents along with a lengthy letter brief outlining with specificity their attorney client privilege claims. Defendants' letter brief once again objected to the production of the Tim Lundberg Documents in native format because to do so would require (1) release of the privileged communications, or (2) undertaking considerable time and expense to obtain and operate specific software or the employment of a computer forensics expert to facilitate the review.

After carefully reviewing the relevant briefs (including the unfiled letter briefs), the Tim Lundberg Documents, and Defendants' privilege log, the Court finds as follows:

With the submission of the privilege log and the supplemental letter brief dated July 14, 2008, Defendants demonstrated that the redacted communications are subject to attorney-client privilege[5] because they were (1) made for legal advice, (2) done at the direction of the employee's corporate superior, (3) intended to secure legal advice, (4)

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4. The privilege log is Exhibit C to Defendants' letter brief dated July 14, 2008.

5. In addition to the attorney client privilege, the Court counted approximately fifty (50) redactions which Defendants allege are privileged under O.C.G.A. § 43-3-32, accountant-client privilege. For example, see Exhibit C, Nos. 64, 65, 152, 228, 229, 538, and 618. The Court finds that these communications are privileged.

addressed issues within the employee's corporate duties, and (5) not disseminated beyond those persons who had a need to know.[6] Marriott Corp., 157 Ga. App. at 505; O.C.G.A. §§ 24-9-21, 24, 25, & 27.

The Court still must weigh Plaintiffs' request to produce the Tim Lundberg Documents in native format against Defendants' objection on the grounds that doing so without revealing privileged communications would be a "burdensome, unnecessary and wasteful exercise."

Native format production in Georgia is a question of first impression that this Court has wrestled with since its original Order on this matter, dated April 29, 2008. In the absence of clear guidance from Georgia case law, the Court looks to the federal courts to guidance on interpreting substantially similar discovery statutes. See, e.g., EarthLink, Inc. v. Eaves, 2008 WL 2699582, at *4 (Ga. App. 2008) (looking to "federal authority" when construing similar state statutes). The issue of native format, specifically of access to metadata has been addressed in Williams v. Sprint/United Management Co., 230 F.R.D. 640 (2005), where the court ordered the defendants to produce the document in the format in which it was stored (its "native" format) which included access to metadata.[7] Id.

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6. The Court finds persuasive Defendants representations that the privileged communications were not disclosed to third parties outside of the privilege scope. See McKesson HBOC, Inc. v. Adler, 254 Ga. App. 500, 504 (2002). Without the original emails, the Court must rely upon the information submitted to it including the privilege log, the Tim Lundberg Documents, and the briefs.

7. Metadata, commonly described as "data about data," is defined as "information describing the history, tracking, or management of an electronic document." Appendix F to *The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age* defines metadata as "information about a particular data set which describes

at 652; cf., Ky. Speedway, LLC v. Nat'l Assoc. of Stock Car Auto Racing, Inc., 2006 WL 5097354, at **8-9 (E.D. Ky. 2006) (declining to order production of metadata for all discoverable documents, and requiring plaintiffs to submit interrogatories to verify authorship, creation date, etc.) Since the decisions in these cases, the Federal Rules of Civil Procedure were amended to specifically address electronically stored information; see also, In re ATM Fee Antitrust Litig., 2007 WL 1827635, at * 7 (N.D. Cal. 2007) (declining to compel compliance with the Federal Rules of Evidence amendments for future document productions).

In both Williams and Kentucky Speedway, the federal courts emphasized the importance of the facts of the case in making the careful determination regarding the format of document production. Here, the central issues in this case are what information did Plaintiffs receive, and when did they receive it, from Defendants regarding CGTF. Thus, the verification information that can be provided in metadata may be of particular relevance to the central issues in this case. Additionally, unlike the plaintiffs in Kentucky

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how, when and by whom it was collected, created, accessed, or modified and how it is formatted (including data demographics such as size, location, storage requirements and media information.)" Technical Appendix E to the *Sedona Guidelines* provides an extended description of metadata. It further defines metadata to include "all of the contextual, processing, and use information needed to identify and certify the scope, authenticity, and integrity of active or archival electronic information or records." Some examples of metadata for electronic documents include: a file's name, a file's location (e.g., directory structure or pathname), file format or file type, file size, file dates (e.g., creation date, date of last data modification, date of last data access, and date of last metadata modification), and file permissions (e.g., who can read the data, who can write to it, who can run it). Some metadata, such as file dates and sizes, can easily be seen by users; other metadata can be hidden or embedded and unavailable to computer users who are not technically adept.

Speedway and In re ATM Fee Antitrust Litigation, Plaintiffs in this case seek only specific documents in native format/metadata. Therefore, the Court concludes that its April 29, 2008 Order properly required Defendants to produce annual reports, share certificates, certain letters, and the Tim Lundberg Documents in native format.

The Court has broad discretion in the oversight of discovery and may order that the requesting party pay the costs of discovery. See, e.g. Zubulake v. UBS Warburg LLC, 216 F.R.D. 280, 283 (S.D.N.Y 2003); Peskoff v. Faber, 2008 WL 2649506, at 2-3 (D.D.C. 2008). Shifting the cost of production protects the responding party from undue burden or expense. Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978). Cost shifting is typically utilized only when the discovery sought is inaccessible or overly burdensome to produce, such as with backup tapes. Here the burden of producing the Tim Lundberg Documents is not in retrieving the data, but the burden originates from how to produce the documents in the required format without waiving privilege claims or incurring the expense of a forensic expert. A final factor in contemplating cost shifting is the level of culpability, if any, of defendants in creating the burden. Here, the complications arising from the Tim Lundberg Documents are not the result of actions or inactions by the Defendants, but the result of routinely deleted information coupled with personal record keeping practices. Cf. Peskoff, 2008 WL 2649506, at 3-4 (declining to shift the cost of producing electronically stored information where the defendant's search for responsive documents was "at best...inadequate").

Williams v. Sprint/United Management Co., 230 F.R.D. 640, 646 (citations omitted).

Thus, the Court concludes that Defendants would be unnecessarily burdened if ordered to produce the Tim Lundberg Documents in native format without shifting the cost of this discovery to Plaintiffs. Therefore, Defendants are hereby **ORDERED** to produce the Tim Lundberg Documents to a computer forensic expert[8] within fifteen (15) days of the date of this Order. Such expert shall retrieve the requested metadata, but shall not reveal to Plaintiffs the contents of the redacted communications as listed on Defendants' privilege log. Plaintiffs shall supply the expert with their metadata search parameters within fifteen (15) days of the date of this Order and pay the costs of such expert.

SO ORDERED this 11 day of Aug., 2008.

Alice D. Bonner

ALICE D. BONNER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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8. The forensic expert is to be agreed upon the by the parties within seven (7) days of the date of this Order. The Court is to be notified immediately thereafter if the parties are unable to agree.

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