

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HEALTHCARE ADVOCATES, INC.,

Plaintiff,

v.

HARDING, EARLEY, FOLLMER &
FRAILEY; et al,

Defendants.

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No. 05-03524

ORDER

AND NOW, this _____ day of _____, 2006, upon consideration of plaintiff's Motion to Compel Production and defendant's Response thereto, it is hereby ORDERED and DECREED that plaintiff's Motion to Compel Production is denied in its entirety.

HONORABLE ROBERT F. KELLY
Senior United States District Judge

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HEALTHCARE ADVOCATES, INC.,	:	
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Plaintiff,	:	
	:	
v.	:	No. 05-03524
	:	
HARDING, EARLEY, FOLLMER &	:	
FRAILEY; et al,	:	
	:	
Defendants.	:	
	:	

**RESPONSE OF DEFENDANT HARDING, EARLEY, FOLLMER & FRAILEY TO
PLAINTIFF'S MOTION TO COMPEL DOCUMENT PRODUCTION**

Defendant Harding, Earley, Follmer & Frailey, by and through the undersigned counsel, hereby responds to plaintiff's Motion to Compel Document Production, and in support thereof states as follows:

1. Admitted in part, denied in part. It is admitted that answering defendant provided responses to plaintiff's first set of interrogatories and requests for production of documents on June 5, 2006. It is admitted that plaintiff correctly quotes Request No. 14, which seeks the hard drives of any and all computers through which defendant accessed the websites www.healthcareadvocates.com and www.archive.org. To the extent plaintiff characterizes defendant's response to its request, or purports to narrow the import of the response to objections based upon attorney-client and attorney work product privileges, this averment is denied on the ground that defendant's response is a writing and speaks for itself. Defendant's response to Request No. 14 states objections grounded in relevancy, vagueness and ambiguity, objections to the fact that compliance with the request would require defendant to produce documents in violation of its contractual and professional obligations of non-disclosure to third parties and

would be unduly burdensome, as well as objections to the extent the Request seeks information not reasonably calculated to lead to the discovery of admissible evidence.

2. Admitted in part, denied in part. It is admitted only that a conversation between counsel for plaintiff and defendant took place on July 26, 2006, wherein the attorneys discussed production pursuant to plaintiff's Request No. 14. To the extent this averment characterizes defense counsel's position on the issue, it is denied. Moreover, to the extent this averment asserts that defense counsel confirmed plaintiff's entitlement to any documents, it is denied.

3. Denied. Counsel for defendant did not propose during the July 26, 2006 conversation production of relevant, non-privileged materials generated or altered during July 6, 2003 through July 15, 2003. Rather, by way of e-mail correspondence dated July 27, 2006, counsel for defendant offered to generate copies of relevant and non-privileged portions of those files, as well as a privilege log and/or redacted hard copies of files containing privileged information. A true and correct copy of the July 27, 2006 e-mail correspondence is attached to plaintiff's motion as Exhibit "B".

4. Denied to the extent this averment characterizes plaintiff's counsel's proposal, as the proposal is in writing and speaks for itself. *See* plaintiff's Exhibit "B". Moreover, defendant denies that its counsel advised that he would consider and respond to plaintiff's proposal in any conversation that took place on July 26, 2006. Rather, in an e-mail dated August 2, 2006, counsel for defendant informed plaintiff's counsel that he had considered the terms of the proposal and, after careful consideration, responded that the proposal was inadequate on two grounds: 1) that he could not allow privileged materials to be reviewed by a third party; and 2) the magnitude of the proposed file review rendered the request unduly burdensome. *See* true and correct copies of the relevant e-mails attached to plaintiff's motion as Exhibits "C" and "F",

respectively.

5. Defendant denies that counsel for plaintiff sought a response to his proposal on August 1, 2006. Rather, counsel for plaintiff stated, “[i]f you are unwilling to agree to a procedure based upon my proposal set forth above, I will need to seek the intervention of the Court.” *See* Exhibit “B” attached to plaintiff’s motion. Furthermore, plaintiff’s averments that he unsuccessfully sought responses to his proposed plan for production on August 4, 2006, August 7, 2006 and August 10, 2006, are denied to the extent that counsel’s communications are in writing and speak for themselves.

6. To the extent the averments in this paragraph characterize the content of the August 11, 2006, e-mail message from counsel for Harding Earley to plaintiff’s counsel, the averments are denied. The e-mail message is in writing and speaks for itself. Furthermore, to the extent the averments in this paragraph assert that defendant’s proposal was inadequate, they are denied. It is admitted only that defense counsel proposed in the August 11, 2006, e-mail that all electronic files on the hard drives in question from June 1, 2003, through July 18, 2003, be copied by defendant’s expert, and subsequently reviewed by defendants and counsel to determine both their relevancy and whether the individual files were privileged.

7. Admitted.

8. Admitted.

9. To the extent the averments in this paragraph characterize the content of the e-mail dated August 23, 2006, they are denied. The e-mail is in writing and speaks for itself. Furthermore, plaintiff’s averment regarding his understanding that key word searching obviated privilege issues fails to consider that key word searching merely whittles away the total number of files defendants and counsel would have to review to determine both their relevancy and

privilege implications prior to producing them. To the extent plaintiff's averment regarding his understanding suggests that the mere act of key word searching addresses the privilege issue is patently incorrect. Moreover, plaintiff's assertion that defense counsel never disputed the accuracy of his understanding regarding the privilege issue is denied, as defense counsel related to plaintiff's counsel that defendant was preparing a privilege log of all relevant documents retrieved through the key word search that were privileged, and were parsing out those documents that were irrelevant to this action. *See* e-mail from defense counsel to plaintiff's counsel dated September 6, 2006, attached to plaintiff's motion to compel as Exhibit "K".

10. Denied to the extent the averments in this paragraph characterize the statements in an August 31, 2006, e-mail message, which are in writing and speak for themselves. *See* Exhibit "J" attached to plaintiff's Motion to Compel. In addition, plaintiff's assertion that the "time period in question" was "unspecified" is inaccurate, as defense counsel had defined the term in previous communications as June 1, 2003, through July 18, 2003. *See* Exhibit "F" attached to plaintiff's Motion to Compel.

11. Denied to the extent the averments in this paragraph characterize the statements in a September 6, 2006, e-mail, which are in writing and speak for themselves. To the extent a response is necessary, admitted.

12. Denied to the extent the averments in this paragraph characterize the statements in a September 18, 2006, e-mail, which are in writing and speak for themselves. To the extent a response is necessary, admitted.

13. Denied to the extent the averments in this paragraph characterize the statements in September 19, 2006, and September 21, 2006, e-mails, which are in writing and speak for themselves. In addition, the September 19, 2006, e-mail to which plaintiff refers, and which is

attached to his motion as Exhibit “M”, is an e-mail from defense counsel to plaintiff’s counsel stating that he would address plaintiff’s contentions, not an unsuccessful attempt by plaintiff’s counsel to obtain computer files. *See* Exhibit “M” attached to plaintiff’s motion to compel. Moreover, plaintiff’s Exhibit “N”, which he suggests is another unsuccessful attempt to obtain computer files, is merely a demand by plaintiff’s counsel that defense counsel call him to discuss the outstanding issues, and defense counsel’s response stating that the two could discuss outstanding issues the next day.

14. Denied to the extent the averments contained in this paragraph characterize the statements in defense counsel’s August 26, 2006, correspondence and its enclosures, which are in writing and speak for themselves. Furthermore, the chart enclosed with the August 26, 2006, correspondence is the same chart plaintiff claimed was never provided to him in paragraph 10 of his Motion to Compel.

15. Admitted.

16. It is denied that defendant’s response to request number 14 of plaintiff’s request for production of documents and accompanying privilege log is “woefully inadequate,” or in any way fails to fulfill plaintiff’s request for all relevant and non-privileged documents, as well as a privilege log, produced after a keyword search of the original 14 keywords.

WHEREFORE, defendant Harding, Earley, Follmer & Frailey respectfully requests that this Honorable Court enter an order in the form proposed, thereby denying plaintiff's Motion to Compel in its entirety.

Respectfully submitted,

McKissock & Hoffman, P.C.

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**BRIEF IN SUPPORT OF THE RESPONSE OF DEFENDANT HARDING,
EARLEY, FOLLMER & FRAILEY TO PLAINTIFF'S MOTION TO COMPEL
DOCUMENT PRODUCTION**

Defendant Harding, Earley, Follmer & Frailey, by and through the undersigned counsel, McKissock & Hoffman, P.C., hereby submits this Brief in support of its response to plaintiff's motion to compel document production.

I. HISTORY OF THE CASE

The claims in this matter allege various violations by defendant Harding, Earley, Follmer & Frailey [Harding Earley] of the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.*, the Digital Millennium Copyright Act, 17 U.S.C. §§ 1201 *et seq.*, and the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, under federal law, as well as claims for civil conspiracy, trespass to chattels, conversion, intrusion upon seclusion and attorneys fees under Pennsylvania law.

On or about May 5, 2006, plaintiff served defendant Harding Earley with its first request for production of documents, in which Request No. 14 seeks "[t]he hard drives of any and all computers through which [Harding Earley] accessed the Internet websites www.healthcareadvocates.com and www.archive.org. Harding Earley timely objected to

plaintiff's request primarily on the grounds that the request was unduly burdensome, and that the information requested may be irrelevant and/or protected from discovery by the attorney-client privilege. *See* a true and correct copy of defendant's responses to plaintiff's first request for production of documents attached to plaintiff's motion to compel as Exhibit "A" at 11.

The hard drives of the three computers used to access www.healthcareadvocates.com and www.archive.org contain a total of more than 350,000 files. *See* a true and correct copy of e-mail correspondence dated August 11, 2006, attached to plaintiff's motion as Exhibit "F". Counsel for the parties then agreed to filter the contents of the three hard drives with fourteen (14) keywords in order to designate the number of files that would be reviewed for relevancy and privilege. *See* a true and correct copy of e-mail correspondence identifying the designated keywords attached to plaintiff's motion as Exhibits "G" and "H". That proposal limited the number of files to be reviewed for relevancy and privilege to 2,871. *Id.*

Defendant's counsel suggested that plaintiff limit its request to relevant and non-privileged files from the relevant time period, June 1, 2003 through July 18, 2003. *See id.* The rationale behind this proposed limitation was that this adequately surrounds the two dates that the purported liability producing conduct occurred: July 9 and 14, 2003. By this means, the keyword search revealed 179 files to be reviewed for relevancy and privilege. *See* a true and correct copy of the chart indicating the number of resulting files attached to plaintiff's motion as Exhibit "O"; *see also*, a true and correct copy of e-mail correspondence dated August 31, 2006 attached to plaintiff's motion as Exhibit "J".

Defendants conducted a review of these 179 files and determined that most were irrelevant and that all of those that were relevant were all subject to privilege, which facts counsel for defendants informed plaintiff's counsel. *See* a true and correct copy of the

correspondence explaining defense counsel's rationale attached to plaintiff's motion as Exhibit "O". As a result, defendant law firm produced a privilege log for those files deemed privileged that were also deemed relevant and also produced a written narrative explanation as to the nature of the files deemed irrelevant. *Id.*

Plaintiff then filed a motion to compel document production relating to its request for the hard drives of computers through which defendant accessed one or both of the websites, www.healthcareadvocates.com and www.archive.org. Plaintiff's motion asserts that neither proposal made by defendant to resolve the outstanding issues is adequate. Plaintiff now seeks all non-privileged relevant documents and a privilege log of all computer files containing the key words "healthcareadvocates", "Flynn" and "archive.org", **without limitation as to the time period at issue in this matter**. *See* plaintiff's motion to compel.

Plaintiff's request would require defense counsel and/or his clients to review for relevancy and privilege an additional 1,820 files prior to production. *See* a true and correct copy of the chart designating the number of files identified with the keywords "healthcareadvocates", "Flynn" and "archive.org" attached hereto as Exhibit "A".

II. LEGAL ARGUMENT

Defendant's proposals for resolution of the privilege and relevancy issues have been adequate, for they sufficiently address plaintiff's need for discovery of information in light of the burden to defendant, and defendant's need to protect its clients uninvolved in this litigation.

There is no question that plaintiff is entitled to discovery regarding any matter, not privileged, which is relevant to the subject matter of any claim or defense in the action. *See* F.R.C.P 26(b)(1). Moreover, requests "may be deemed relevant if there is any possibility that the information [requested] may be relevant to the subject matter of the action." *Caruso v.*

Coleman, Co., 157 F.R.D. 344, 347 (E.D. Pa. 1994). Certainly the scope of discovery is broad, but it is not without limitations. See e.g., *Stabilus v. Haynsworth, Baldwin, Johnson & Greaves, P.A.*, 144 F.R.D. 258, 265 (E.D. Pa. 1992). A court will not permit discovery where a request is made in bad faith, unduly burdensome, irrelevant to the general subject matter of the action or relates to confidential or privileged information. *S.S. Fretz, Jr., Inc. v. White Consol. Indus., Inc.*, 1991 WL 21655 at 2 (E.D. Pa. Feb. 15, 1991). Plaintiff's request No. 14 is unduly burdensome, seeks information which is irrelevant to the subject matter of this action and which is protected from discovery by the attorney-client privilege.

The premise of plaintiff's motion to compel is that plaintiff is entitled to each and every document or file existing on the hard drives of three computers used by Harding Earley to access www.healthcareadvocates.com and/or www.archive.org, which contain one or more of the keywords "healthcareadvocates", "Flynn" and/or "archive.org", without regard to the time period relevant to this matter. Plaintiff's position fails to consider the overwhelming number of files subject to review for relevancy and privilege contained on the hard drives or the discrete time period to which any of the documents or files may be relevant. Moreover, it cannot show what relevance any files created during any time other than the relevant time period would have.

In further efforts to meet plaintiff's need for information, defendant's expert¹ parsed from the vast electronic files any and all files containing the fourteen (14) proposed keywords, filtered those files by the dates relevant to this action, and provided a copy of the 179 identified computer files to the defendant law firm for review. See a true and correct copy of e-mail correspondence dated August 31, 2006 attached to plaintiff's motion as Exhibit "J". Thereafter, other defendants reviewed each of these remaining files for relevance and privilege. Defendant

¹ The identity of defendant's expert was disclosed to plaintiff's counsel in advance of the process and he approved of defendant's expert to perform the key word search and provide copies of the computer files responsive to that search to the defendant law firm for review.

prepared and provided a privilege log to plaintiff identifying each of the privileged files. *See* a true and correct copy of the privilege log attached to plaintiff's motion as Exhibit "O". Defense counsel explained that the majority of those files relate to a lawsuit concerning California Health Advocates, trademark prosecution for Harding Earley's clients in the underlying matter, matters for other Harding Earley clients, and various other software files. *See* defense counsel's correspondence explaining the rationale for non-production of those files attached to plaintiff's motion as Exhibit "O". Defense counsel also noted that the remainder of those files were of a privileged nature, and provided a privilege log. *Id.*

Essentially, defendant's expert, in conjunction with defense counsel and the individual lawyer defendants, have conducted an electronic survey of the files and documents that they would have had to review manually if it were not possible to do an electronic search of those same files. That defendant's production has failed to reveal to plaintiff incriminating information or the "smoking gun", so to speak, is insufficient grounds for granting a motion to compel.

Defendant has produced more than one thousand pages of documents related to this matter, although none of those was identified through the process of scouring the hard drives of the three computers that may have accessed www.healthcareadvocates.com and/or www.archive.org. Defendant has reviewed the computer files responsive to the key word search to determine whether any were relevant and/or privileged. Defendant has fulfilled its obligation to provide plaintiff with any and all discoverable information. Granting plaintiff's motion would require defendant to review an additional 1,820 electronic files for relevancy and privilege, and would impose an undue burden on defendant. This court must deny plaintiff's motion to compel.

III. CONCLUSION

For the reasons set forth above, this Honorable Court must enter an order in the form proposed, thereby denying plaintiff's Motion to Compel Document Production in its entirety.

Respectfully submitted,

McKissock & Hoffman, P.C.

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	:	

CERTIFICATE OF SERVICE

JEFFREY P. LEWIS, ESQUIRE, attorney for defendant Harding, Earley, Follmer & Frailey, certifies that a true and correct copy of the foregoing Response of Harding, Earley, Follmer & Frailey to Plaintiff's Motion to Compel Document Production has been forwarded to all parties listed below, as indicated, on October 11, 2006 as follows:

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