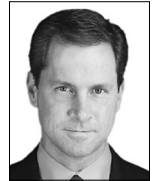


FEDERAL E-DISCOVERY

Forensic Examination Rejected As Not Proportional



By
**H. Christopher
Boehning**



And
**Daniel J.
Toal**

Discovery, though often complex in execution, is conceptually straightforward. Parties request from their adversaries materials that are within the permissible scope of discovery; responding parties may then object or proceed with efforts to collect, review and produce the materials. If the requesting parties are dissatisfied with the production, they can work directly with the responding party to address their concerns, or bring motions to the court.

A recent matter in the Northern District of Illinois, however, found this process turned on its head. Instead of submitting a request for production of certain materials, the requesting party asked to directly access the responding parties' systems through forensic examination. The court ultimately denied this

request, finding it was not proportional to the needs of the case.

'Tireboots v. Tiresocks'

The parties in the matter *Tireboots by Universal Canvas v. Tiresocks*, 2022 WL 2316228 (N.D. Ill. June 28, 2022), compete in the manufacture and sale of tire covers and other protective materials for industrial equipment. When the plaintiff sought to enter the online market in 2006 through a website at "universalcanvas.com," it found that address already taken; so, it instead registered under "universalcanvasinc.com." See *id.* at *1. The plaintiff eventually discovered that, beginning in 2011, the defendants had been controlling traffic to "universalcanvas.com" by redirecting customers to their website, "tiresocks.com." *Id.* The plaintiff sued, alleging, *inter alia*, "that Defendants misrepresented themselves to potential customers as Universal Canvas to capture Plaintiff's customers, thereby harming Plaintiff's sales." *Id.*



STEVICA MRDIA VIA ADOBE STOCK

In discovery, the plaintiff submitted a request for inspection (RFI), seeking to perform its own "forensic inspection of 'all digital data and analytical tools related to Defendants' business presence online (i.e., websites, social media, domain, etc.)." *Id.* The defendants objected to the RFI as "overly broad and unduly burdensome, as well as falling outside the permissible scope of discovery." *Id.* The plaintiff then filed a motion to compel the forensic examination of the defendants' electronically stored information (ESI) under Federal Rule of Civil Procedure 34(a).

H. CHRISTOPHER BOEHNING and DANIEL J. TOAL are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison. ROSS M. GOTLER, e-discovery counsel, and LIDIA M. KEKIS, e-discovery attorney, assisted in the preparation of this article.

The Court's Analysis

In considering the plaintiff's motion, the court highlighted that "while Rule 34(a) allows a party to request the production of ESI, it 'does not grant unrestricted, direct access to a respondent's database compilations.'" *Id.* at *2. Doing so "would 'expand the expense and burden of [the] case' at bar ... and [such direct access] is typically only permitted where there has been a showing of noncompliance with discovery rules." *Id.* The court added that "[a]s with all discovery materials, the discovery sought must also be both relevant and proportional to the needs of the case." *Id.* And looking to some circuit precedent, the court concluded that forensic examination was an "extraordinary remedy." *Id.*

With this in mind, the court proceeded with a "fact-intensive inquiry" that not only weighed "the specific allegations and circumstances of the case," but also considered three factors: "(1) the relevance of the requested information as it pertains to the heart of the case; (2) the invasiveness of the RFI, and in particular whether Plaintiff has exhausted other less intrusive means of collecting the same information; and (3) the burden the RFI places on Defendants." *Id.*

Addressing the issue of relevance, the court flagged that "Plaintiff's RFI casts too wide a net," given that "the connection between all of Defendants' electronic data and Plaintiff's claims is tenuous at best" and

"Defendants' ESI includes a substantial volume of information that does not go to the heart of this case." *Id.* As to the invasiveness factor, since the "Plaintiff has failed to exhaust other methods of collecting the information it seeks," it "must pursue the least intrusive means of obtaining the relevant data before requesting a forensic exam." *Id.* at *3. And, as to burden, noting the defendant's concerns that the plaintiff would have "unfettered access to their confidential business information," the court found that a forensic examination would "impose too great a burden on Defendants." *Id.* Even potential

Instead of submitting a request for production of certain materials, the requesting party asked to directly access the responding parties' systems through forensic examination. The court ultimately denied this request, finding it was not proportional to the needs of the case.

safeguards such as confidentiality designations would "not negate the fact that Plaintiff has framed its underlying discovery request too broadly." *Id.*

As such, the court found that "Plaintiff's request is not proportional to the needs of the case because a forensic examination would necessarily involve the examination and collection of more information than is required to support Plaintiff's claims. Simply put, '[t]he discovery

rules are not a ticket to an unlimited, never-ending exploration of every conceivable matter that captures an attorney's interest." *Id.* And, in rejecting the plaintiff's final argument that the defendants "lack the expertise to search and retrieve the relevant data on their own," *id.*, the court pointedly noted, "Plaintiff cannot claim that Defendants lack the expertise to produce responsive discovery materials when Plaintiff never even submitted a discovery request seeking such materials." *Id.* at *4. Thus, the court denied the plaintiff's motion to compel.

Conclusion

A cornerstone of cooperative, proportional discovery under the Federal Rules of Civil Procedure is the notion that deference be given to the responding party on choosing and implementing its own search and retrieval methods in discharging its discovery obligations. While situations may arise where a party's methods are revealed to be insufficient, and additional measures directed by the requesting party may be appropriate, that certainly was not yet the case in *Tireboots*. Recognizing the request as intrusive, burdensome, and beyond the scope of what was relevant in the matter, the court squarely rejected a disproportionate attempt by a party to control the discovery process.