# I Fought the Law… The Government's Discovery Obligations in Civil Litigation



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"Like any ordinary litigant, the Government must abide by the Federal Rules of Civil Procedure. It is not entitled to special consideration concerning the scope of discovery, especially when it voluntarily initiates an action."

Judge Scheindlin once again delivered a powerful opinion with *SEC v Collins & Aikman Corporation* 2009 U.S. Dist. LEXIS 3367; Fed. Sec. L. Rep. (CCH) P95,045 (S.D.N.Y., Jan. 13, 2009). In *Collins & Aikman,* the SEC produced 1.7 million documents (10.6 million pages) in multiple Concordance databases with different metadata protocols. The SEC in effect claimed they did not need to identify specific documents responsive to the discovery requests based on the work product doctrine. The Court found this an expansion of the work product doctrine and the SEC was required to produce documents responsive to the discovery requests.

The Court addressed whether the identification of responsive documents that the producing party organized violated the work product doctrine and how government agencies acting in their investigative capacities must respond to a Federal Rule of Civil Procedure Rule 34 request for production. *Collins & Aikman*, 6.

The Defendant propounded a Rule 34 request for the SEC to produce 54 separate categories for inspection and copying. The SEC produced 1.7 million documents (10.6 million pages) in 36 separate Concordance databases with different metadata protocols. The databases did not match the Defendant's individual requests. *Collins & Aikman*, 5-6.

The Defendant-Requesting Party understandably had a few objections to what could be viewed as a digital 10.6 million page document dump. These objections included:

- The SEC failed to identify documents responsive to requests for documents supporting particular factual allegations in the Complaint and instead "produced" 1.7 million potentially responsive documents, requiring the Defendant to search for the relevant needles in the haystack. *Collins & Aikman*, 8.
- The SEC failed to perform a reasonable search for documents relating to the document request. Instead, the SEC unilaterally limited its search to three of its divisions. *Collins & Aikman*, 8.

The SEC responded to the document requests supporting factual allegations with the response, "[the SEC] does not maintain a document collection relating specifically to the subject addressed." *Collins & Aikman*, 9. The SEC produced the Concordance databases and an omnibus of investigative documents claiming the production complied with how the SEC kept the documents in the "usual course of business." *Id.*

Judge Scheindlin's analysis focused on the SEC's claimed attorney work product. The Defendant-Propounding party argued that the SEC had created 175 file folders that corresponded to the claims against him. As such, the Defendant wanted those file folders. The SEC countered that production of the 175 file folders would violate the work product doctrine because those folders were legal

theories and other protected analysis. *Collins & Aikman*, 10.

The work product doctrine is classic hornbook law that prevents a propounding party from learning the opposing party's strategy. The doctrine is to protect "core work product" from being disclosed to the part-opponent, which includes "mental impressions, conclusions, opinions, or legal theories." *Collins & Aikman*, 14.

The Court rejected the SEC position that anything an attorney reviewed was "core" work product. *Collins & Aikman*, 17. The Court equated this as claiming merely determining relevance during document review is all that is required to be protected by the work product doctrine. *Id.*

The Court found "undue hardship" from the production of the litigation database. The Court stated, "It is patently inequitable to require a party to search ten million pages to find documents already identified by its adversary as supporting the allegations of a complaint." *Collins & Aikman*, 21.

The Court found the production of the litigation support databases ineffective and that the 175 file folders were not protected by the work product doctrine. The SEC had to respond to the Defendant's discovery requests with the responsive documents. Additionally, any of the 175 file folders that were created by the SEC that could be responsive to any of the Defendant's requests had to be produced as well. *Collins & Aikman*, 41-42.

What can we learn from this? First, producing multiple litigation support databases is probably not a good idea. A response to a Federal Rule of Civil Procedure 34 Request must be specific and not a "document dump." Second, merely determining where ESI is relevant is a tough argument for protection by the work product doctrine.

Judge Scheindlin's opinion is another for lawyers to add to their reading lists. The Judge covered many issues in detail and is worthy of review.