Speedy Delivery: Compelling Imaging & Searching of Everything

By Joshua C. Gilliland, Esq., D4 LLC

In a contract dispute regarding a shipping vendor, the Plaintiff brought a motion to compel the collection and processing of the entire contents of Defendants' hard drives, network drives, and user files. *Unishippers Global Logistics, LLC v. DHL Express (USA), Inc.,* 2009 U.S. Dist. LEXIS 94844 (D. Utah Oct. 12, 2009).

In not much of a surprise, the Court said "No."

Please Sign Here: Meet & Confer over Custodians

As the discovery dispute began, the parties agreed to provide each other a list of custodians to be searched for responsive documents. *Unishippers Global Logistics*, at *4. The Defendants identified 13 opposing custodians and the Plaintiff 36 custodians. *Id.*

The litigants agreed to produce "all emails between or among the custodians" and to perform searches on internal and external email networks. *Unishippers Global Logistics,* at *4.

The Dispute: Imagining Network Files, User Files & Hard Drives

The Plaintiff claimed the Defendant refused to "image and search the network files, user files, and the hard drives of its identified custodians for responsive documents." *Unishippers Global Logistics,* at *4.

One can imagine the Gigabytes very quickly expanding for ESI review with 36 custodians…

The Motion to Compel

You can sense the Court was not happy with the Plaintiff. They failed to comply with local rules on discovery disputes and brought the motion to compel **without first receiving or reviewing the Defendants' production**. *Unishippers Global Logistics,* at *6.

The Plaintiff wanted the Court to order the Defendants to "conduct relevant word searches of its custodians' user files, network drives, and individual hard drives for responsive documents." *Unishippers Global Logistics,* at *6. Moreover, the Plaintiff took issue with the Defendant collecting and reviewing email from custodians and collecting non-duplicative ESI from other sources, and then producing accordingly. *Unishippers Global Logistics,* at *6.

The Defendants opposed the motion as premature and that the Plaintiff wanted everything electronic searched. *Unishippers Global Logistics,* at *6.

The Court Order

The Court held the Plaintiff's arguments were without merit. *Unishippers Global Logistics,* at *7.

First, it is self-evidence that a producing party "must determine whether it possesses relevant documents that are responsive to a particular discovery request." *Unishippers Global Logistics,* at *7. To be blunt, that is just how document review and discovery works.

Secondly, the Court held it was unnecessary and unduly burdensome to force the Defendant to "collect and process the entire contents of the custodians' hard drives, network drives, and user files," that were known to be non-relevant. *Unishippers Global Logistics,* at *7.

Third, the Defendant explained their email discovery protocols, which the Court seemed to accept as defensible. *Unishippers Global Logistics,* at *8-9.

The Court based its ruling on Federal Rule of Civil Procedure Rule 26(b)(2)(C) which states a court "must limit the frequency or extent of discovery . . . if it determines that . . . the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." *Unishippers Global Logistics,* at *7, citing Fed. R. Civ. P. 26(b)(2)(C)(i). Moreover, a court must also limit discovery where "the burden or expense of the proposed discovery outweighs its likely benefit." *Unishippers Global Logistics,* at *7-8, citing Fed. R. Civ. P. 26(b)(2)(C)(iii).

Bow Tie Thoughts

This motion probably could have been dismissed as not ripe or for procedural defects. Additionally, the Plaintiff would have been in a much stronger position if they actually had reviewed the Defendant's production.

The Plaintiff did not make an articulable basis that the Defendant somehow failed in their discovery production, such as a Rule 26(g)(1) violation. However, if there are later production discrepancies, we may see a follow up to this case.