UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GAIL HINTERBERGER, BEVERLY WEISBECKER, CYNTHIA WILLIAMS and MARCIA CARROLL, ***on behalf of themselves and all other employees similarly situated,***

Plaintiffs,

v.

CATHOLIC HEALTH SYSTEMS, INC., et al.,

Defendants.

Civil Action
No. 08-CV-0380 (WMS)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION TO COMPEL

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PRELIMINARY STATEMENT

Defendants have no excuse for refusing to engage in meaningful meet and confer discussions with plaintiffs and plaintiffs' ESI consultant regarding ESI issues, and their refusal to do so is a violation of this Court's Local Rules. It is patently false for defendants to claim that they "have long voiced their objections to Plaintiffs using D4 as an expert consultant in this litigation" when the exact opposite is true. Defendants knowingly and willingly engaged in ESI conferrals with plaintiffs' ESI consultant, D4, for the past year without raising any objection to plaintiffs or the Court until approximately one month ago. Defendants have therefore waived any right to object at the last minute, just prior to the deadline for ESI discovery, to plaintiffs' use of D4 as their ESI consultant in this case.[1] Furthermore, plaintiffs' motion is hardly premature, as the parties had reached an impasse due to defendants' refusal to meet and confer with plaintiffs on ESI issues as long as plaintiffs continued to use the same ESI consultant, D4, whom plaintiffs had been using all along in this case, without objection from defendants. Plaintiffs' motion was filed in compliance with the Court-ordered October 5, 2012 deadline for motions to compel regarding ESI discovery issues. Defendants have clearly failed to fulfill their discovery and conferral obligations regarding ESI issues, and plaintiffs' motion is therefore both meritorious and timely.

ARGUMENT

I. DEFENDANTS ARE IN BREACH OF THEIR DUTY TO ENGAGE IN MEANINGFUL, GOOD FAITH CONFERRALS WITH PLAINTIFFS REGARDING THEIR ESI SEARCH METHODOLOGY

Although it is apparent from defendants' response papers that they believe they have

[1] Plaintiffs refer the Court to their papers filed in opposition to defedants' motion to disqualify for a more detailed discussion of this issue. *See* Dkt. Nos. 373-375.

no obligation to cooperate with plaintiffs regarding ESI, the Local Rules of this Court provide otherwise. Specifically, Local Rule 26(f)(3), pertaining to the discovery of electronically stored information provides as follows:

> **Search Methodology**. If a party intends to employ an electronic search to locate relevant ESI, the parties shall discuss and attempt to reach agreement as to the method of searching, and the words, terms, and phrases to be searched and any restrictions as to scope and method which might affect their ability to conduct a complete electronic search of the ESI. The parties shall also attempt to reach agreement as to the timing and conditions of any additional searches which may become necessary in the normal course of discovery. To minimize undue expense, the parties may consider limiting the scope of the electronic search (e.g., time frames, fields, document types).

Defendants here have made no attempt to even discuss their intended search methodology—predictive coding—with plaintiffs, and they cite to no authority which holds that they can by-pass this step and just unilaterally implement whatever search protocol they deem appropriate. Contrary to defendants' assertion, *Treppel v. Biovail Corp.*, 233 F.R.D. 363 (S.D.N.Y. 2006), a case defendants rely upon, does not stand for this proposition. The Court's direction in *Treppel* to defendant to proceed unilaterally with its ESI production in the absence of an agreement with the plaintiffs regarding a search methodology was merely an interim step subject to revision after defendant responded to plaintiff's discovery requests regarding defendant's ESI and plaintiff articulated concerns about the scope of the search. 233 F.R.D. at 374-75. The Court also stated that its ruling was not an endorsement of defendant's methodology. *Id*.

Defendants want this Court to endorse an approach whereby they should be allowed to proceed unilaterally after little or no effort to reach agreement with plaintiffs on their search methodology and then sort out afterwards whether their methodology was proper.

This is hardly an efficient way to proceed and could end up being more costly to defendants if plaintiffs successfully challenge their search methodology and they have to go back and do additional searches. Should the Court endorse defendants' suggested approach here, thereby subjecting defendants to additional discovery regarding their ESI search methodology and production and costly, additional ESI searches, as in *Treppel*, defendants should not be heard to complain later on about the additional costs associated with this approach or be allowed to seek cost-shifting from plaintiffs. It is for this very reason that parties are directed attempt to reach agreement on a search methodology beforehand. Defendants have hardly complied with their obligation to do so here.

Defendants readily admit here and in their papers submitted to this Court addressing related ESI issues[2] that they have only sought to confer with plaintiffs regarding which custodians should be searched and only intend to confer with plaintiffs on this single issue. *See e.g.,* Declaration of Joseph A. Carello in Support of Motion to Extend Deadline for ESI Discovery at ¶¶ 10-13 (Dkt. No. 366-1) ("Carello Decl."). Simply forwarding plaintiffs their proposed predictive coding protocol, without more, does not fulfill defendants' conferral obligations.[3] Furthermore, defendants only provided a proposed protocol after numerous requests from plaintiffs more than a month after first announcing their intention to utilize

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[2] *See* Motion to Disqualify Consulting Expert (Dkt. No. 351); Motion to Extend Deadline for ESI Discovery (Dkt. No. 366).

[3] Notably, for example, the parties have not discussed the issue of plaintiffs' access to the seed set documents defendants are using to train the predictive coding software, and defendants' assertion that this issue was discussed is false. *See* defendants' brief at p.5 (Dkt. No. 369). Plaintiffs noted the absence of any such provision in defendants' proposed protocol (along with the absence of many other details about defendants' search methodology) in their October 4, 2012 letter to defendants, but defendants have not responded to plaintiffs' letter, and have refused to discuss this issue or any other issues regarding predictive coding with plaintiffs.

predictive coding. *See* Cressman Aff. at ¶¶ 3-8 (Dkt. No. 361). Due to defendants' refusal to confer with plaintiffs regarding their proposed protocol, plaintiffs responded in writing via letter dated October 4, 2012 with their concerns and questions regarding the protocol. *Id*. at ¶¶ 9, 10. Plaintiffs believe these issues can most efficiently be resolved through a conferral with the parties' respective ESI consultants who have expertise regarding predictive coding, including a representative from Ricoh, the consultant defendants have retained to assist them with predictive coding.

If defendants really believe they have no obligation to reach agreement with plaintiffs on a search methodology for ESI and that they can just proceed unilaterally to fulfill their ESI discovery obligations, as they state in their response papers, then it is baffling as to why they have not already done so and produced responsive ESI. At the same time defendants are claiming, in response to the instant motion, that they have no obligation to confer and reach agreement with plaintiffs on their ESI production, they are relying on their inability to reach agreement with plaintiffs on the custodians for their ESI search as a justification for their request for an extension of the October 23, 2012 deadline for ESI production. *See* Carello Decl. at ¶¶ 10, 13 (Dkt. No. 366-1). Defendants cannot have it both ways, and they should not be allowed to pick and choose as to which ESI issues they want to confer on.

Given defendants' shifting positions and their refusal to cooperate with plaintiffs on ESI issues, plaintiffs maintain that the most efficient way to resolve this dispute is to issue an order setting a deadline for the parties to either reach agreement on an ESI protocol or submit separate proposed ESI protocols to the Court for a ruling as to which protocol should be adopted in this case.

II. PLAINTIFFS' MOTION IS NOT PREMATURE

Plaintiffs' motion to compel was filed in compliance with the Court-ordered deadlines for ESI discovery, which provide for a deadline of October 5, 2012 for motions to compel. *See* Dkt. No. 329. Defendants' refusal to confer with plaintiffs regarding their proposed ESI protocol in light of the imminent October 23, 2012 deadline for the completion of ESI discovery left plaintiffs with little choice but to file a motion in order to preserve their rights. As detailed in the Cressman Affirmation filed in support of the instant motion, plaintiffs made numerous efforts to resolve this dispute, but it was clear that the parties had reached an impasse, and this issue would not be resolved absent Court intervention.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request the entry of an Order compelling defendants to engage in meaningful meet and confer discussions with the parties' respective ESI consultants for the purpose of reaching agreement on an ESI protocol, and that in the event the parties are unable to reach an agreement by a deadline set by the Court, each side submit its own proposed ESI protocol to the Court for a ruling as to which protocol should be adopted in this case. Alternatively, should the Court endorse defendants' suggested approach of allowing defendants to proceed unilaterally to complete their ESI production on the condition that defendants provide plaintiffs with a detailed explanation of their search methodology and plaintiffs are allowed to subsequently challenge defendants' methodology and production, then defendants should not be heard to complain later on about the additional costs associated with this approach or be allowed to seek cost-shifting from plaintiffs.

Dated: October 19, 2012

THOMAS & SOLOMON LLP

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2012, I caused to be served the following document: Reply Memorandum of Law in Further Support of Plaintiffs' Motion to Compel, upon the following:

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by causing the same to be served via electronic means through electronic filing with the Clerk of the District Court using the CM/ECF system.

Dated: October 19, 2012

s/ Sarah E. Cressman
Sarah E. Cressman