

1. A decision from the Southern District of New York denying a motion to compel the production of a hard drive and all of its contents because the motion was premature and overbroad prior to the completion of document production.

In *Aviles v. S&P Global, Inc.*, 2021 WL 2077932 (S.D.N.Y. May 24, 2021), U.S. Magistrate Judge Katharine H. Parker ruled that a motion to compel was premature and overbroad where it sought the production of an entire computer hard drive prior to the completion of document production.

Investors in certain funds sued the funds and several associated entities and individuals alleging that Defendants induced Plaintiffs to invest in the funds while secretly funneling Plaintiffs' investments into other enterprises. *Id.* at \*1. During discovery, a dispute arose over the discoverability of a computer hard drive that held electronically stored information (ESI) for the funds, as well as associated entities and individuals (referred to by the court as the Server). In particular, Plaintiffs requested that the Server be turned over to them in its entirety.

Roy G. Smith, a co-defendant named in the lawsuit, was the previous owner of the manager of the funds and the individual most knowledgeable about the Server. *Id.* at \*2. Smith had recently died, and, despite an investigation undertaken by Smith's estate (the Estate), it had not been able to fully determine which individuals and entities had made use of the Server since its creation. It was clear that the Server had been owned initially and operated by the manager of the funds, but when the funds lost their assets and the manager closed, Smith had instructed an associated company to maintain the Server. This company did not access the data; it only ensured that it was preserved. More recently, this company's lease at the facility housing the Server expired, and the Estate retained a third-party service provider to store the Server for the duration of the lawsuit. *Id.* at \*1–\*2.

Before Smith died, he had also instructed an IT employee from one of his ventures to provide his counsel with a copy of the Server in order to respond to discovery requests. The IT employee had provided counsel with an external hard drive containing a copy of the portion of the Server where information relevant to the lawsuit resided. During discovery, the parties hired a neutral third-party consultant to extract information from the Server to ensure it was properly preserved. The extracted information, which consisted of only a portion of the data that related to Plaintiffs' investments and insurance policies, was provided to all parties. The Estate was still in the process of reviewing other ESI on the Server for responsive information. After this was completed, the Estate planned to prepare a privilege log to provide to Plaintiffs. *Id.* at \*2. Although the Estate's review was incomplete, the Estate disclosed that the Server contained information about the funds as well as information about the manager's employees, other of the Smith's business ventures, and Smith's personal financial information.

Plaintiffs brought a motion to compel the Estate to provide them with the Server, or a copy thereof, to allow Plaintiffs to review its contents in their entirety. The Estate opposed, arguing that the Server contained "substantial irrelevant, personal, and confidential material" and that Plaintiffs' request was contrary to the Federal Rules of Civil Procedure. Plaintiffs contended that the Estate had no ownership interest in the Server and thus lacked standing to object. *Id.* at \*2–\*3.

Magistrate Judge Parker summarized the relevant standards under Federal Rule of Civil Procedure 34(a), which allows a party to serve on another party requests to produce ESI in the responding

party's "possession, custody, or control" to the extent consistent with Rule 26(b). *Id.* at \*3. Rule 26(b)(1) limits ESI that can be obtained to information that is relevant to the claims and defenses of the case and that is proportional to the needs of the case.

Magistrate Judge Parker first addressed whether the Estate had standing to object to the discovery request in light of a dispute as to the ownership of the information on the Server. She noted that Plaintiffs requested information within the Estate's possession, giving the Estate standing to object. *Id.* at \*4. It was therefore undisputed that the Estate must review and respond to Rule 34 document requests as to this information.

Magistrate Judge Parker also found that Plaintiffs sought information "having nothing to do with the claims and defenses in this matter," making their request for the Server "clearly overbroad." She also found the request to be premature, given that the Estate had not completed its review and production of documents on the Server. She noted that Requests to inspect the physical hard drives of another party should be granted only "where the producing party's discovery responses contain discrepancies or inconsistencies." *Id.* (internal quotation omitted). "Mere skepticism that an adversary will not produce all relevant information from its electronic files does not warrant Court intervention." Thus, she found that until the Estate's production had been completed and was found to be lacking, Plaintiffs could not compel production of the Server.

Magistrate Judge Parker next addressed "Plaintiffs' concern that the Estate will 'cherry pick' ESI for production and withhold crucial documents that support Plaintiffs' claims," noting that this is a typical concern for litigants in civil litigation. For this reason, the Federal Rules provide safeguards to ensure that parties acquire the information they need. These safeguards include (1) a duty of attorneys to conduct reasonable searches and certify that disclosures are complete and correct under Rule 26(g); (2) the ability of the court to impose Rule 37 sanctions if parties fail to comply with discovery obligations; and (3) a mechanism for parties to request an inspection of another party's ESI repositories under Rule 34. Magistrate Judge Parker stated that after the Estate has finished its production, if Plaintiffs uncover inconsistencies or discrepancies, counsel for the parties should meet and confer in an attempt to resolve any issues. Only after such attempts fail may Plaintiffs submit a motion to compel. Therefore, Magistrate Judge Parker denied Plaintiffs' motion. *Id.* at \*4–\*5.