

2. An order from the Northern District of Indiana granting in part a plaintiff's motion to compel production of documents and metadata where the defendant's production evidenced inconsistencies and raised questions as to what emails and documents it maintained in the regular course of business and whether it conducted a reasonable search for responsive documents.

In *Axis Ins. Co. v. American Specialty Ins. & Risk Servs., Inc.*, 2021 WL 2910814 (N.D. Ind. July 12, 2021), U.S. Magistrate Judge Susan Collins granted in part with the Plaintiff's motion to compel production of documents and metadata where the Defendant's production evidenced inconsistencies and raised questions as to what emails and documents it maintained in the regular course of business, and whether it conducted a reasonable search for responsive documents.

Plaintiff brought this matter asserting a single claim for breach of contract with respect to its agreement with Defendant to promote, underwrite, bind, and deliver its insurance policies to customers. *Id.* at *1. During discovery, Plaintiff claimed that Defendant's responses omitted or included incorrect metadata, including missing "family" data and emails with altered subject lines and message content, and that responsive documents were omitted. *Id.* at *2. After unsuccessful attempts to meet and confer, Plaintiff filed a motion to compel.

Magistrate Judge Collins first addressed Plaintiff's contention that Defendant failed to produce a number of internal documents and communications. *Id.* at *4. Defendant responded that the discovery sought was overly burdensome or duplicative and that Plaintiff had "unfettered access" to certain of the documents outside of the discovery process. But Magistrate Judge Collins found that Defendant failed to raise these objections in its initial responses to the discovery, and Defendant had therefore waived them under Federal Rule of Civil Procedure 34. *Id.* at *5. She also rejected the argument that the discovery would be duplicative or overly burdensome and found the claim that Plaintiff had "unfettered access" to these documents undercut by a cease-and-desist letter to Plaintiff asking it to stop efforts to obtain documents or evidence from Defendant outside of the discovery process. On that basis, Magistrate Judge Collins granted Plaintiff's motion to compel with respect to these document requests and ordered Defendant to produce all responsive documents and file an affidavit detailing its steps to identify responsive documents and certifying that all responsive nonprivileged documents were produced.

Magistrate Judge Collins next addressed Plaintiff's contention that Defendant wrongfully refused to produce certain documents, including communications between the parties and internal documents relevant to the dispute. *Id.* at *6. Defendant claimed to have produced all responsive, nonprivileged emails, but Plaintiff argued that Defendant failed to produce certain emails and attachments referenced by later emails and produced emails that appeared to have their subjects or text edited and that the subject line of certain emails were either changed when the email was forwarded and Defendant failed to produce any other emails in the chain or that the emails' metadata was altered at a later point. In response, Defendant asserted that it had produced all responsive documents it identified, save for unnecessary duplicates, and that any changes to subject lines resulted only from employees forwarding or responding to the emails. *Id.* at *7. Defendant also asserted that it saved only certain threads rather than individual emails, so emails with edited texts or subjects were the only responsive documents in its possession.

Magistrate Judge Collins noted that Federal Rule of Civil Procedure 34(b)(2)(E) requires a party to produce documents as they are kept in the usual course of business, but if a document does not

exist, “[i]t is sufficient that the discovered party respond by saying that a document ... is not in existence.” *Id.* (quoting *Hagemeyer N. Am., Inc. v. Gateway Data Scis. Corp.*, 222 F.R.D. 594, 598 (E.D. Wis. 2004)). Magistrate Judge Collins also noted, however, that the producing party has the obligation to search available electronic systems for the information demanded and, if it is not reasonably accessible because of undue burden or cost, it is the responding party’s burden to identify and articulate the burden of production. *Id.* (quoting Federal Rule of Civil Procedure 26(b)(2)(C)).

Here, Magistrate Judge Collins found that the “inconsistencies in [Defendant’s] production raise[d] questions as to what emails and documents it maintained in the regular course of business.” She found unpersuasive Defendant’s claims as to why certain inclusive emails, but not earlier individual emails and attachments, were saved. Magistrate Judge Collins also was unconvinced that Defendant took “reasonable” and “diligent” steps to identify responsive emails and raised concern that Defendant did not use a sufficiently broad research methodology to encompass all responsive documents. *Id.* at *8. Granting Plaintiff’s motion to compel, she ordered Defendant to “conduct a search of all depositories of electronic information in which one may reasonably expect to find” responsive documents. Defendant was again ordered to file an affidavit detailing the steps it took to identify the responsive documents and certifying that all responsive, nonprivileged documents had been produced.

Magistrate Judge Collins next addressed Plaintiff’s contention that Defendant improperly failed to include metadata requested in conjunction with its requests. Although it eventually produced a .cvs overlay file containing metadata, Defendant initially objected to the requested metadata field, arguing it had agreed only to produce responsive documents as PDFs and the parties had not agreed to a protocol for ESI. *Id.* at *9. Plaintiff alleged that Defendant still omitted basic metadata such as custodian information, produced ESI with errant or altered family metadata that linked unrelated documents as family members while failing to link related documents, and produced documents modified from their original form without explanation or metadata enabling Plaintiff to ascertain information regarding the modifications. Plaintiff supported its claim with communications with members of Defendant’s “technology team” confirming issues with the production of metadata. Defendant maintained that it produced documents in the format they were maintained in the ordinary course of business and that Plaintiff had failed to show particular need for the ESI.

Magistrate Judge Collins rejected Defendant’s argument relating to the lack of an agreed-on ESI protocol, as this was not a requirement under Rule 34. She emphasized that Plaintiff specifically requested the metadata at issue and that once the request was made, Defendant was not free to simply ignore it. *Id.* at *10. Defendant’s objection that Plaintiff sought irrelevant information was considered waived as Defendant failed to raise it in a timely manner. Magistrate Judge Collins additionally found the metadata relevant, both in assisting Plaintiff in properly linking family members and to Plaintiff’s substantive claim, and stated that producing the requested metadata was not unduly burdensome or disproportionate to the needs of the case. As a result, Magistrate Judge Collins granted Plaintiff’s motion to compel ESI metadata and ordered Defendant to file an affidavit detailing the steps it took to ensure that the metadata was produced as it was maintained in the ordinary course of business and not purposefully altered, and if it was altered, an explanation as to how.

Magistrate Judge Collins found that awarding Plaintiff its fees and expenses associated with its motion to compel was appropriate. But because Plaintiff was not successful on the entirety of its motion, she required Plaintiff to submit an affidavit setting forth the fees relating to the successful portions of its motion. She determined that Plaintiff attempted to resolve the discovery disputes in good faith and noted that it had prevailed in its position with respect to certain requests and metadata. She further determined that there was little to suggest that Defendant's position was substantially justified or that an award of fees would be unjust, and its objections to the requests were "largely undeveloped." She stated that Defendant's position as to the allegedly missing documents was not substantially justified because Plaintiff had raised legitimate concerns regarding the completeness of Defendant's production.