

2. In *Delta T, LLC v. Williams*, 337 F.R.D. 395 (S.D. Ohio Jan. 12, 2021), District Judge Matthew W. McFarland granted in part and denied in part Plaintiff's motion to direct Defendants to submit electronic devices for forensic inspection. *Id.* at \*1.

Plaintiff, a designer and seller of residential and commercial ceiling fans, sued the former highest-ranking officer of its Singapore-based subsidiary and a company the officer started after leaving plaintiff, alleging breaches of fiduciary, contractual, and other duties. The parties conducted limited expedited discovery, which included the deposition of the individual defendant and at least two rounds of interrogatories and requests for production. Defendants objected to some of plaintiff's discovery requests, and, after the parties tried unsuccessfully to resolve their disagreements, Plaintiff filed a motion seeking, among other things, to "submit [defendants'] electronic devices to a limited forensic inspection, along with relevant information from their mobile phone and internet providers." *Id.* at \*2.

Plaintiff proposed a protocol for a limited third-party forensic inspection of defendants' electronic devices: "(1) an independent forensic examiner, either agreed upon by the parties or appointed by the Court, would perform the examination of the devices; (2) the search would be limited to specific search terms designed solely to generate communications between Defendants and former [ ] employees [of Plaintiff's Singapore-based subsidiary] and between Defendants and commercial parties involved in the fan business; and (3) the examiner would first provide the documents generated by the search to Defendants' counsel, who may review it before producing it to [Plaintiff's] counsel and assert legitimate objections, presenting to this Court with a copy of the objected-to document for an in camera inspection." *Id.* at 4. Defendants rejected plaintiff's proposal, arguing that there was "no good cause for such invasive tactics."

Judge McFarland began his analysis by summarizing the Sixth Circuit's guidance for district courts determining whether to compel forensic imaging. *Id.* (citing *John B. v. Goetz*, 531 F.3d 448 (6th Cir. 2008)). "First, courts should tread lightly before compelling mirror imaging in computers when the request is 'extremely broad in nature' and the connection between the devices and the legal claims is unduly vague and unsubstantiated. ... Second, mere skepticism that an opposing party has not produced all the relevant material does not justify 'drastic electronic discovery measures.' ... [T]hird, even if forensic imaging is acceptable in a given case, a district court must still consider the significant interests at stake before ordering such a procedure."

Applying this guidance, Judge McFarland concluded that forensic imaging was appropriate in this case for three reasons. *Id.* at \*5. First, plaintiff's proposed search was "tailored and constrained" because it would "generate relevant discovery and prevent the production of privileged material," and it made financial sense because it might "help the parties avoid the front-end expense of manually reviewing documents for privilege." *Id.* at \*5-6. However, Judge McFarland declined plaintiff's additional request, related to scope, for an order requiring defendants to ask "their mobile phone and internet carriers to provide the independent forensic examiner with access to the stored records of Defendants' communications, to search them under the same limited protocol." *Id.* at \*6. Plaintiff's basis for this request was the individual defendant's deposition testimony that he no longer had access to WhatsApp or one or two laptops. But Judge McFarland concluded that plaintiff's "single sentence in support of its request, with no legal citation" was insufficient to show that the request was proper under Fed. R. Civ. P. 26(b)(1).

Judge McFarland further found, based on evidence presented by plaintiff from its independent efforts and defendants' representations during discovery, that defendants had discoverable information they had not yet produced. *Id.* at \*6-7. Third, "the utility and necessity of forensic imaging here outweigh[ed] the privacy and confidentiality concerns inherent in such imaging." *Id.* at \*7. He noted that plaintiff on the one hand had an interest, and a right under Rule 26, in obtaining relevant information, while defendants, on the other hand, failed to produce certain relevant discovery and "failed to explain why, or why doing so would cause a burden" that would exceed its benefit.