

4. An opinion from the U.S. District Court for the Southern District of Florida granting a plaintiff's motion to compel forensic examination of a defendant's mobile phone and ordering that the parties follow certain protocols to ensure protection of the defendant's privacy.

In *Measured Wealth Private Client Group, LLC v. Foster*, 2021 WL 1215218 (S.D. Fla. Mar. 31, 2021), Magistrate Judge William Matthewman granted plaintiff's motion to compel forensic examination of a defendant's mobile phone and ordered that the parties follow certain protocols to ensure protection of that defendant's privacy. *Id.* at *2.

In its motion to compel, plaintiff had requested an order allowing it to conduct a forensic examination of one defendant's mobile phone to recover certain text messages and iMessages dated between January 1 and December 31, 2019. *Id.* at *1. In response to the motion, defendant argued that the "temporal scope" of the discovery sought was "too broad and would result in the production of irrelevant text messages and iMessages, that the discovery sought could be obtained from other individuals," and that plaintiff's request constituted "a mere fishing expedition."

In granting plaintiff's motion, Magistrate Judge Matthewman made five findings. First, he noted that before filing its motion to compel, plaintiff had "properly propounded written discovery requests" seeking the same materials at issue in the motion to compel. Second, he determined that the text messages and iMessages that plaintiff sought were "relevant and proportional to the claims and defenses in the case." Third, he observed that defendant had not changed her phone since the relevant time period. *Id.* at *2. Fourth, defendant had been "obstructionist with regard to her production of text messages and iMessages during the discovery process." Indeed, although defendant had initially agreed to produce certain responsive text messages and iMessages, she ultimately failed to do so. Fifth and finally, Magistrate Judge Matthewman concluded that based on his review of the materials plaintiff filed under seal along with the motion to compel, "Plaintiff [was] not engaging in an improper fishing expedition" but "ha[d] made a legitimate discovery request."

In light of these findings, Magistrate Judge Matthewman concluded that because plaintiff had made a sufficient showing of need for the discovery sought, forensic analysis was appropriate in this case. In reaching this conclusion, he rejected defendant's argument that plaintiff could obtain the requested text messages and iMessages from other individuals, noting that defendant is a party in the case whereas the "other individuals," plaintiff's former clients, were not. *Id.* at *2 n.4. And he found that "it is much more efficient for Plaintiff to conduct a forensic examination than to subpoena multiple non-parties."

However, in determining that forensic analysis was appropriate, Magistrate Judge Matthewson also emphasized the importance of "protecting Defendant's privacy as to the personal matters on her phone." *Id.* at *2. To protect defendant's privacy interests, Magistrate Judge Matthewman ordered defendant to submit the mobile phone she used for an independent examination subject to certain protocols he borrowed from another case, *Wynmoor Cmty. Council Inc. v. QBE Ins. Corp.*, 280 F.R.D. 681 (S.D. Fla. 2012), modifying them "as necessary." *Id.* at *2-3.

First, Magistrate Judge Matthewson ordered the parties to meet and confer within seven days regarding the designation of an independent forensic computer expert to serve as an "officer of the court." *Id.* at *3. If the parties could not agree on the selection of an expert, Magistrate Judge

Matthewman ordered that they submit their recommendations to him, and he would select the expert. Second, after signing a confidential undertaking statement pursuant to the parties' agreed protective order, the expert (and any needed outside support) would then "mirror image Defendant's cell phone." And if "security measures" prevented the expert from taking a mirror image of the cell phone, the expert would "acquire as much data as possible from the device." Third, he ordered the parties to meet and confer within 10 days to discuss search terms. If the parties could not agree, they were to each submit recommendations, and he would select the search terms. However, in setting forth this protocol, Magistrate Judge Matthewson stressed that the parties' counsel "should confer with the expert to the extent possible to arrive at reasonable and necessary search terms," that this process should be "a collaborative effort," and that he would "only determine search terms as a last resort." Fourth, after search terms were selected and the expert "mirror imaged or otherwise acquired the data from Defendant's cell phone," the expert would search the acquired data using the search terms. The results of that search and an electronic copy of all responsive documents would then be provided to defendant's counsel. Fifth, within 10 days of receiving the search results from the expert, defendant was ordered to produce all nonprivileged responsive documents to plaintiff and identify those responsive documents not produced on a privilege log. If defendant had any doubts about whether certain messages should be produced, Magistrate Judge Matthewman noted that she could seek leave to submit any such messages for *in camera* review. Finally, within five days of sending defendant the results of his or her search, the independent expert would provide "a signed affidavit detailing the steps he or she took to mirror image or acquire data from Defendant's phone and search the data for the search terms."

In terms of costs, Magistrate Judge Matthewson required plaintiff to pay for all fees and costs of hiring the independent expert in the first instance but indicated that he would "determine at a later date whether costs and expenses should be apportioned or otherwise paid by Defendant." For example, "if the data recovered . . . contains data or documents responsive to Plaintiff's prior requests for production which Defendant reasonably could have provided in the regular course of discovery without a forensic examination," he would "revisit t[he] issue of costs and consider charging Defendant for fees and costs of the independent expert or imposing the fees and costs on the parties in a duly appropriate and apportioned manner." In closing, Magistrate Judge Matthewman ordered defendant "to maintain the phone at issue" in anticipation of the forensic analysis, stating that she "shall not delete any texts or iMessages."