

3. A decision from the U.S. District Court for the Southern District of Indiana compelling one Defendant to review all text messages for two custodians for a certain period regardless of whether the text messages hit a search term and to produce all text messages related to the case and requiring Defendants' counsel to provide a certification regarding the review.

In *Advanced Magnesium Alloys Corporation v. Dery*, 2022 WL 3139391 (S.D. Ind. Aug. 5, 2022), U.S. Magistrate Judge Mark J. Dinsmore addressed a request that one Defendant produce all text messages between two of its executives for a particular month to provide context for certain other text messages that had already been produced, denying the request for blanket production, but requiring Defendants' counsel to review all text messages and produce any related to the case and provide a certification regarding the review.

Plaintiff, a magnesium recycling company, sued defendant Alain Dery, its former vice president, alleging that he conspired with defendant Alliance Magnesium, Inc., to “jump start” Alliance’s entry into the magnesium recycling market. *Id.* at *1. Among other things, Plaintiff alleged that Dery assisted Alliance in securing an investment from Marubeni Corporation.

In discovery, Alliance produced some text messages, including certain text messages between Alliance’s CEO, Michel Gagnon, and Alliance’s President, Joel Fournier, about a July 26, 2019 meeting in Tokyo with the president of Marubeni. The text messages Alliance produced in response to Plaintiff’s document requests included “cryptic” messages suggesting that Fournier and Gagnon were coordinating a noon meeting with Dery at the same time that Gagnon was meeting with Marubeni for lunch. However, Plaintiff claimed that Alliance did not produce any communications showing whether Dery participated in the July 26 meeting with Marubeni, whether Dery was helping prepare Gagnon for the meeting, and what, if anything, Dery contributed to these initial efforts to secure Marubeni’s investment. Plaintiff questioned Gagnon and Dery in their depositions about any participation Dery may have had in the Tokyo meeting or the preparation for it, but both testified that they did not recall. They also could not recall with any specificity what the “cryptic” text messages referred to.

Plaintiff moved to compel all text messages exchanged between Gagnon and Fournier in July 2019, hoping to give context to the text messages that were produced, and determine whether the two exchanged any other text messages that would shed light on Dery’s involvement in the Tokyo meeting. *Id.* at *2.

In response to Plaintiff’s motion to compel, Alliance argued that Plaintiff’s request was not proportional to the discovery needs in the case and was “nothing more than a fishing expedition” to get around what Alliance characterized as “the established fact that Dery

was not at or involved in the Tokyo Meeting.” However, Magistrate Judge Dinsmore noted that the record did not foreclose the possibility that Dery’s input was solicited in preparation for the Tokyo meeting or that Dery had no involvement in the Tokyo meeting in any capacity. In this context, Magistrate Judge Dinsmore concluded that Plaintiff’s desire to know whether any further evidence existed could not be characterized as a baseless fishing expedition.

Alliance also took issue with the fact that Plaintiff sought *all* text messages between Fournier and Gagnon during the month of July 2019 and not just messages related to the Tokyo meeting. Magistrate Judge Dinsmore agreed that the request was overbroad because it “undoubtedly encompasses text messages that are not responsive to Plaintiff’s discovery requests.” Finally, Alliance argued that it fulfilled its production obligation by producing documents found by searching for the 159 search terms agreed to by the parties.

In addressing Plaintiff’s motion to compel production of the text messages, Magistrate Judge Dinsmore first discussed the use of search terms in discovery. He explained that using negotiated search terms as a way of finding documents that are responsive to broad document requests among a vast number of electronic documents is an agreement that those searches will fulfill the producing party’s obligation with regard to those document requests. He noted that keyword searches “have long been recognized as appropriate and helpful for ESI search and retrieval,” but “there are well-known limitations and risks associated with them.” *Id.* at *3 (quoting *Venturedyne, Ltd. v. Carboonyx, Inc.*, 2016 WL 6694946, at *1 (N.D. Ind. Nov. 15, 2016)). “Chief among those limitations is that such a search necessarily results in false positives (irrelevant documents flagged because they contain a search term) and false negatives (relevant documents not flagged since they do not contain a search term).” *Id.* As a result, “electronic discovery requires cooperation between opposing counsel and transparency in all aspects of preservation and production of ESI.”

Magistrate Judge Dinsmore further explained that parties must cooperate to search additional keywords when the need to do so becomes apparent — when, for example, it was learned that Dery is sometimes referred to as “Mr. X” in relevant documents — and to search for and produce certain relevant and responsive documents that, for whatever reason, would not be revealed by keyword searches.

Applying these principles, Magistrate Judge Dinsmore concluded that Plaintiff was entitled to receive any additional text messages between Gagnon and Fournier that relate to the Tokyo meeting, including any role Dery played in preparing for, participating in, or reacting to that meeting. He noted that “[i]n a perfect world, Alliance would have acceded to Plaintiff’s request ... that it produce the entire ‘text string’ between Gagnon and Fournier.” Or Plaintiff would have tendered a narrowly tailored

discovery request to obtain any additional relevant text messages, and Alliance would have responded to that request without objection.

But Magistrate Judge Dinsmore found that the parties had not acted ideally, and it was therefore left to him “to fashion a resolution to this dispute that would have been far more efficiently resolved by cooperation between counsel.”

Magistrate Judge Dinsmore noted that “[d]istrict court judges are accorded broad discretion in discovery matters,” and in that discretion he ordered Alliance to review all text messages between Gagnon and Fournier during the month of July 2019 and produce all of them, except (1) communications that were purely personal in nature; or (2) communications that clearly and unequivocally related to business matters other than those at issue in this case. He further ordered that an attorney of record for Alliance file a certification that he or she personally reviewed all of the text messages and that all redactions unambiguously fell into one of the two categories set forth above. Finally, Magistrate Judge Dinsmore ordered that Alliance provide him for *in camera* review a complete copy of the redacted and unredacted text messages produced pursuant to his order.