

2. An order from the U.S. District Court for the Western District of Washington compelling Plaintiffs to apply search terms and produce electronically stored information (ESI) with load files containing metadata, where Plaintiffs had refused to forensically collect their documents or apply Defendant’s requested search terms to locate responsive documents.

In *Benanav v. Healthy Paws Pet Ins., LLC*, 2022 WL 3587982, at *1 (W.D. Wash. Aug. 22, 2022), U.S. District Judge Lauren King compelled Plaintiffs to apply search terms and produce ESI with load files containing metadata in accordance with the court-ordered ESI protocol, where Plaintiffs had refused to forensically collect their documents or apply Defendant’s requested search terms to locate documents.

Judge King began by providing background on the discovery requests at issue. In response to being served discovery requests in October 2021, Plaintiffs searched emails and files for responsive documents and information. *Id.* at *1. In addition, Plaintiffs’ counsel met with each Plaintiff to review and discuss the requests and what responsive documents they might have.

The court entered a stipulation as to discovery of ESI (ESI Protocol) in January 2022. Defendant proposed search terms for Plaintiffs’ production of ESI the following month, to which Plaintiffs responded that they would have edits. Nonetheless, Plaintiffs made their first production a week after receiving the proposed search terms without indicating whether they had used Defendant’s search terms or complied with the ESI Protocol. On March 29, 2022, Plaintiffs told Defendant they did not agree with the proposed search terms and had self-searched and produced “all responsive documents in their possession.”

Defendant objected to Plaintiffs’ self-search and asked Plaintiffs to continue to negotiate search terms and to produce documents with metadata. In the negotiations that followed, Plaintiffs proposed an alternative set of search terms, which they described as broader than those Defendant proposed to account for limitations in the Plaintiffs’ search capabilities. Plaintiffs also described their objections to Defendant’s proposed search terms and production format and later provided information requested by Defendant about specific documents and missing family members.

Defendant objected to Plaintiffs’ proposed alternative search terms and continued failure to produce metadata or a load file, but Plaintiffs reiterated that they would not forensically collect their emails to conduct searches. Plaintiffs also acknowledged that they did not follow the ESI Protocol as to the metadata and load file requirements because of the “burden, expense, and lack of proportionality with the needs of the case.” When Defendants objected, Plaintiffs stated that they “are unable to run [Defendant’s] suggested terms because Plaintiffs did not do a collection of their entire email accounts

that would allow such searches to be r[un], and instead conducted self-searches with the assistance of counsel to find documents that each Plaintiff knew existed.” *Id.* at *2.

When Defendant did not accept Plaintiffs’ position, the parties reached an impasse and Defendant moved to compel Plaintiffs 1) to use Defendant’s proposed search terms or broader search terms encompassing what Defendant sought and 2) to comply with the ESI Protocol by producing documents with the required metadata and load files.

Turning to her analysis, Judge King first laid out the standards under Rules 26 and 37 for compelling discovery, including the rule for ESI discovery under Rule 26(b)(2)(B). Judge King next discussed the parties’ positions. Plaintiffs objected to Defendant’s requested relief on the grounds that it was unduly burdensome and disproportionate to the likely benefit because Plaintiffs had already searched for and produced all responsive documents through a manual search of their own inboxes, supervised by counsel. Further, Plaintiffs stated that because emails were not forensically collected, Defendant’s search terms could not be run and metadata and load files could not reasonably be produced. Defendant responded that Plaintiffs’ manual self-search and failure to produce metadata violated the ESI Protocol and that the self-search produced flawed and incomplete results.

Judge King had “little difficulty in concluding that Plaintiffs are required to produce documents in accordance with the ESI Protocol, including conducting a reasonable search after conferring in good faith on reasonable search terms and other parameters.” *Id.* at *3. She noted that Plaintiffs admitted that they had failed to produce documents in accordance with the ESI Protocol and that Plaintiffs’ “unilateral ‘self-search’ is inconsistent with Plaintiffs’ commitment, undertaken in the ESI Protocol, to ‘work in good faith to *agree* on the use of reasonable search terms . . . along with any other relevant search parameters.’ ” *Id.* (emphasis in original).

Judge King stated that Plaintiffs’ argument against running searches on their email accounts lacked merit, explaining that she had previously rejected the argument that it was duplicative to require two ESI searches, one to gather “low-hanging fruit” and one to “later perform a more comprehensive search based on negotiated search terms.” She noted that if Plaintiffs believed they should be excepted from this process, “they should have timely informed [Defendant] rather than making a production without any accompanying explanation of the self-imposed limits on their search.” Judge King cited the Sedona Conference Cooperation Proclamation, which stated that “[i]t is not in anyone’s interest to waste resources on unnecessary disputes, and the legal system is strained by ‘gamesmanship’ or ‘hiding the ball,’ to no practical effect.” *Id.* (citing 10 Sedona Conf. J. 331 (2009)).

Judge King described the requirements under Rule 26(b)(1) for the court to consider whether the burden of proposed discovery outweighs its likely benefit and found that Plaintiffs' self-search was clearly inadequate as demonstrated by their "repeated supplementation of their productions in response to deficiencies discovered by [Defendant]" despite having made numerous representations that additional documents did not exist, including missing attachments to emails. *Id.* at *4. Judge King also took issue with Plaintiffs' vague explanations as to how counsel supervised and directed them in searching for and identifying responsive documents. Judge King considered these defects in the self-search "sufficient to highlight the risks of such self-search processes," including "the client's failure (1) to identify all sources of responsive information, (2) to preserve evidence, (3) to find or provide to counsel all responsive documents and ESI, or (4) to fully document how they conducted their searches." *Id.* (quoting *DR Distributors, LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839, 935-37 (N.D. Ill. 2021)).

Judge King rejected Plaintiffs' argument as to the burden of the searches of approximately \$1,000 to collect each email account to store the data for a month, with at least eight email accounts to collect. Judge King reasoned that it was "way too late in the day" to raise this concern considering Plaintiffs had filed a nationwide class action. *Id.* (quoting *DR Distributors*, 513 F. Supp. 3d at 942). Additionally, Plaintiffs had already agreed to a number of custodians equal to the number of named Plaintiffs, and Plaintiffs were not disproportionately burdened in comparison to Defendant; in fact, Plaintiffs had produced only 490 pages compared with the over 105,000 pages produced by Defendant.

Judge King noted that Plaintiffs were willing to negotiate on search terms despite their arguments surrounding burden. *Id.* at *5. Defendant had also expressed willingness to accommodate Plaintiffs' concerns surrounding the limitations of running searches on email platforms as opposed to document review platforms. Judge King therefore ordered the parties to "meet and confer in good faith to negotiate search terms that are designed to capture documents that are responsive to [Defendant's] discovery request." Judge King also stated that the searches should not be limited to email accounts used to communicate with Defendant, but the parties should discuss the scope in this regard so as to stay within the requirements that discovery be proportional.

Judge King similarly ordered Plaintiffs to comply with the ESI Protocol by producing documents with a load file containing the required metadata and in single-page TIFF-image format with extracted or optical character recognition text. She stated that if Plaintiffs were unable to auto-populate metadata fields, they would have to manually populate an enumerated set of fields. Judge King further stated that metadata was available and reasonable to collect and produce despite Plaintiffs' protestations that they had not forensically collected the emails. She chastised Plaintiffs for seeking to avoid

their obligation to produce reasonably accessible metadata and shift the burden to Defendant to ask in depositions where they collected the documents.

Judge King granted Defendant's motion to compel, ordered the parties to meet in good faith surrounding the negotiation of search terms designed to capture responsive documents, and ordered Plaintiffs to produce the ESI in accordance with the ESI Protocol. *Id.* at *6.