2. An order from the U.S. District Court for the Eastern District of Louisiana declining to compel Defendant to re-produce its PDF format production in native form, finding that the parties had never discussed production in native format and that the PDF production was sufficiently usable.

In *Metro Service Group, Inc. v. Waste Connections Bayou, Inc.*, No. 21-1136, 2022 WL 2255203 (E.D. La. May 31, 2022), U.S. Magistrate Judge Dana M. Douglas denied Plaintiff's request to compel Defendant to re-produce its PDF format production in native form, finding that the parties had never discussed production in native format and that the PDF production was sufficiently usable.

This action arose from an alleged breach of contract. During discovery, Plaintiff claimed that Defendant took ordinary email files and deleted all the electronic data, rendering the files much more difficult and burdensome for Plaintiff to use efficiently in the litigation. *Id*. at *1. Plaintiff also complained that Defendant produced 534 pages marked as placeholders for the production of responsive native files but refused to produce the files. Plaintiff moved to compel Defendant to produce the files as properly separated individual documents with the ordinary metadata attached or included in appropriate load files and to produce the "placeholder" native files in their native digital format.

In response to the motion, Defendant argued that Plaintiff never specified the form of production of the ESI and did not request metadata or native emails associated therewith until after Defendant produced the initial tranche of emails. *Id*. at *2. Defendant claimed that it had recovered and searched 14,000 emails and 24 gigabytes of data, which counsel reviewed to narrow to relevant emails, and converted to PDF to review and redact privileged information. Defendant argued that the PDF files it produced were "text searchable," rendering them reasonably usable.

Plaintiff claimed that it was never informed of any issues presented with the ESI requiring conversion and was not allowed input or early objection to the ESI plan. Plaintiff argued that Defendant took the ESI and "converted that information into a minimally useful form that made the material dramatically more difficult for [Plaintiff] to use."

Magistrate Judge Douglas began her analysis by surveying the applicable Federal Rules of Civil Procedure, starting with Rule 26(b)(1), which provides that "parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." In assessing the proportionality of discovery, courts consider "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties'

resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

Magistrate Judge Douglas also explained that Rule 34 provides that responses to requests for production of documents may state an objection to a requested form for producing ESI. *Id*. at *3. "If the responding party objects to a requested form — or if no form was specified in the request — the party *must* state the form or forms it intends to use." *Id*. (quoting Fed. R. Civ. P. 34(b)(2)(D)). In addition, Federal Rule of Civil Procedure 34(b)(2)(E) provides that "(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily *maintained or in a reasonably usable form or forms*; and (iii) a party need not produce the same electronically stored information in more than one form." *Id*. (quoting Fed. R. Civ. P. 34(b)(2)(E)(ii)-(iii)).

Applying these rules to Plaintiff's discovery requests in this case, Magistrate Judge Douglas noted that the instructions provided with the requests asked that the documents be produced as they are kept in the usual course of business or organized and labeled to correspond with the categories and the document request. Magistrate Judge Douglas stated that these instructions do not clearly state a form of production and that there was no evidence that Defendant informed Plaintiff that it intended to produce ESI in a PDF format. She therefore found that Defendant violated the rules because Defendant was required to inform Plaintiff of the form it intended to use where none was stipulated.

Magistrate Judge Douglas next addressed whether Defendant's production in PDF form was reasonable. She explained that Rule 26(b)(2)(B) provides that "[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost." She further explained that if the producing party shows that an undue burden or cost would be required to produce the information as requested, the requesting party must show "good cause" for the production of the requested information in an alternative format.

Magistrate Judge Douglas found that despite the failure to inform Plaintiff of the form it intended to produce the ESI, Defendant made a strong showing that producing the documents in native format would have created the undue burden of waiving certain privileges and that the shift to PDF documents was intended to make it possible to review and redact privileged information from the 14,000 emails and 24 gigabytes of data without inadvertently waiving those privileges. She found that this showing, coupled with the failure of Plaintiff to file its motion in time to be set before the end of the discovery deadline, detracted from any "good cause" required by Rule 26(b)(2)(B) to require the production of the requested information in another format. *Id*. at *4.

Magistrate Judge Douglas further found that the PDF documents, while certainly not ideal, did constitute a reasonably usable format. She noted that Plaintiff was able to review and search the documents (although they were "less searchable" than native formats) and had been able to build chronologies of the documents.

Magistrate Judge Douglas noted that production in native format would allow Plaintiff to digitally search the documents and that metadata would reflect when the files were changed and by whom. Here, Plaintiff failed to originally request production in native format, and Defendant showed that production in native format would be unduly burdensome. According to Defendant, there were 534 native files representing 103,000 pages of documents. Defendant declined to produce these documents in bulk but stated that it would produce the native format of any emails Plaintiff specifically asked for.

Magistrate Judge Douglas declined to order Defendant to review 103,000 pages for privilege because Plaintiff had not made a clear showing that the production was relevant and proportional to the needs of the case, particularly given the late stage in the proceeding. She noted that if Plaintiff had raised the issue prior to or soon after the production was made, there would have been time to review the documents. Moreover, "had Plaintiff initially requested native files or metadata, or specified the form in which they wished to receive ESI, it is feasible that Defendant could have prepared its document production in a manner more pleasing to Plaintiff." But Plaintiff did not specify a form until four months after Defendant responded to the requests.