

## **2. An order from the U.S. District Court for the Eastern District of North Carolina overruling the Defendants’ objections based on the “apex doctrine” and ordering Plaintiffs to add their former president as an ESI custodian.**

In *Page v. Bragg Communities, LLC*, No. 5:20-CV-336-D, 2022 WL 17724407 (E.D.N.C. Dec. 15, 2022), U.S. Magistrate Judge Robert B. Jones Jr. addressed a motion to compel the Defendants to make their former president an ESI custodian in the face of Defendants’ objections based on the “apex doctrine.”

In this case, Plaintiffs who were military personnel and with their families were living in privatized military housing at Fort Bragg, North Carolina, brought claims against Defendants related to the quality and maintenance of that housing. *Id.* at \*1.

During discovery, Plaintiffs brought a motion to compel Defendants’ past president, John Picerne, as an additional custodian for search-term-based discovery. *Id.* at \*2. Defendants argued that Picerne was an “apex custodian,” and Plaintiffs had not made a compelling showing that all of the lower-level designated custodians were insufficient to capture the necessary information. Defendants also argued that Fort Bragg is only one of 28 installations operated by Defendants and pointed to deposition testimony showing that Picerne was not directly involved with Fort Bragg housing or intimately involved in setting company policy regarding the issues in this case. *Id.* at \*3. Defendants noted that there were 150 individuals with day-to-day responsibilities at Fort Bragg, many of whom were already custodians, and that Picerne’s communications would necessarily be captured in the documents produced by those other custodians. Finally, Defendants claimed that seeking ESI from Picerne would be unduly burdensome, cost prohibitive, and harassing when balanced against the scope of Plaintiffs’ claims.

Plaintiffs argued that Picerne founded certain of the Defendant companies and that he made public statements through interviews and congressional testimony regarding the housing issue at Fort Bragg and other installations on their behalf, showing that Picerne had independent involvement and communications going to relevant issues that may not be captured by searches of other custodians. *Id.* at \*2. Plaintiffs also questioned whether the apex custodian doctrine has been adopted in the Fourth Circuit and argued that Defendants failed to demonstrate that adding Picerne as a custodian would be an undue burden.

Magistrate Judge Jones began his analysis with the general standards applicable to discovery disputes, noting that relevancy under Rule 26(b)(1) “has been broadly construed to encompass any possibility that the information sought may be relevant to the claim or defense of any party.” He further explained that the court has “substantial discretion” to grant or deny motions to compel discovery and that the party seeking the

court's protection from responding to discovery "must make a particularized showing of why discovery should be denied, and conclusory or generalized statements fail to satisfy this burden as a matter of law."

Magistrate Judge Jones stated that he was "not convinced that the apex custodian doctrine has been adopted in the Fourth Circuit or, in any event, that it is necessary to the resolution of this matter." He quoted from a prior decision explaining that the Fourth Circuit has not adopted the doctrine, which typically applies only to protect senior executives from attending costly and distracting depositions rather than from merely collecting and producing documents. *Id.* (quoting *Blankenship v. Fox News Network, LLC*, No. 2:19-CV-00236, 2021 WL 2345972, at \*3 n.5 (S.D.W. Va. June 8, 2021).

Using the standard set forth in Fed. R. Civ. P. 26(b), Magistrate Judge Jones found that Defendants had not sufficiently demonstrated that Picerne is unlikely to possess information relevant to Plaintiffs' claims or that including Picerne as a custodian would be unduly burdensome or otherwise improper. *Id.* at \*3. Magistrate Judge Jones noted that Defendants' senior vice president of operations testified he was responsible for oversight and management of 13 installations but did not report directly to Picerne, and there was no testimony about Picerne's being responsible for the day-to-day property management at Fort Bragg. But Magistrate Judge Jones stated that Plaintiffs did not merely speculate that Picerne was likely to have relevant information but rather cited evidence that Picerne made public statements, including in congressional testimony, specific to Fort Bragg and the types of issues raised in Plaintiffs' claims. Accordingly, Magistrate Judge Jones found that adding Picerne to the ESI custodian list likely would render relevant information.

Magistrate Judge Jones also rejected Defendants' argument that the discovery would be unduly burdensome, cost prohibitive, and harassing, finding that Defendants "presented nothing to support these assertions." Under Rule 26(b)(2)(B), "the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost," and the party objecting to discovery has the burden of showing inaccessibility. *Id.* at \*4. Magistrate Judge Jones noted that in prior cases parties had submitted evidence in the form of affidavits describing the cost of a requested search and that he had, in other cases, rejected unsubstantiated claims that discovery would pose an undue burden and was not proportional to the needs of the case.

Accordingly, because Plaintiffs had shown that Picerne may have relevant information and Defendants had not substantiated their claims of burdens, Magistrate Judge Jones granted Plaintiffs' motion to compel the designation of Picerne as an ESI custodian.