

4. An opinion from the New York Supreme Court denying a motion to compel text, social media, and LinkedIn messages where the parties had waived their right to request such information in a discovery stipulation.

In *Latin Markets Brazil, LLC v. McArdle*, Index No. 654374/2020, 79 Misc.3d 1224(A), 191 N.Y.S.3d 615 (Sup. Ct N.Y. Co. July 14, 2023), New York Supreme Court Justice Robert R. Reed addressed whether a waiver of the right to request certain types of materials in an ESI stipulation was binding on the parties.

In this action for violation of certain noncompete agreements and for tortious interference with business relationships against two individual Defendants, Plaintiff filed a motion to compel the individual Defendants to produce text, social media, and LinkedIn messages that Plaintiff alleged would show the formation of a competing company while they were still employed by Plaintiff and the theft of Plaintiff's confidential business information. *Id.* at *1.

Plaintiff argued that the requested communications were relevant to the prosecution of its case and narrowly tailored to the needs of the case because the communications would likely reveal which of Plaintiff's clients Defendants contacted and attempted to solicit as well as any other discussions of improperly removing and using Plaintiff's confidential materials. Defendants opposed the motion, arguing that the terms of the ESI stipulation the parties entered into prohibited the disclosure. *Id.* at *2. In particular, Defendants argued that Plaintiff stipulated to not request text messages in the ESI stipulation and that the ESI stipulation should be enforced according to its terms.

Justice Reed began his analysis with a brief recitation of the relevant discovery rules, including Rule 3101(a) of the Civil Practice Law and Rules (CPLR) providing for the "full disclosure of all matter material and necessary in the prosecution or defense of an action." He noted that this rule requires disclosure "of any facts which will assist preparation for trial by sharpening the issues and reducing delay and prolixity" and that "a party moving to compel discovery must establish that the discovery it seeks is material and necessary and meets the test of usefulness and reason." *Id.* (quoting CPLR 3124).

But Justice Reed concluded that Defendants were correct that the ESI stipulation prohibited disclosure. He reasoned that Plaintiff was represented by counsel and consented to a voluntary waiver of discoverable materials when it stipulated that "the following sources of ESI information do not warrant collection, search, review or production: (a) Voicemail, text messages, personal phones or tablets and instant messages." He further noted that Plaintiff had made no showing of fraud, duress, coercion, or mistake that would warrant overturning the stipulation. As a result, Justice Reed denied Plaintiff's motion to compel.