1. An order from the U.S. District Court for the District of Maryland denying a motion *in limine* to exclude from trial all evidence relating to an email that was produced only as a forwarded copy (as well as an alleged attachment to that email) finding that Plaintiff had satisfied the prima facie showing required under Fed. R. Evid. 901 to submit the issue of the document's authenticity to the jury.

In *Boshea v. Compass Marketing, Inc.*, No. ELH-21-309, 2023 WL 2743333 (D. Md. Mar. 31, 2023), U.S. District Judge Ellen L. Hollander addressed the authenticity and admissibility of evidence related to an email and attachment where only a forwarded copy of the original email without the attachment was produced in discovery.

In this action by an individual against his former employer seeking severance pay pursuant to an alleged employment agreement, the parties "vigorously contested" whether the employment agreement was ever executed. *Id*. at *1-2. Although Plaintiff contended that the agreement was signed by Defendant's chief executive officer, John White, Defendant disputed that White ever signed the agreement. *Id*. at *2.

In response to a subpoena to John White's brother, Daniel White, Daniel produced an email that Daniel had forwarded to another brother, Michael White, on May 22, 2007, at 2:08 a.m., which included an original email from John White to Plaintiff at 1:24 a.m. on May 22, 2007, attaching an unsigned draft of the employment agreement at issue. *Id.* at *3. Daniel White testified that he received the original email from John White to Plaintiff by blind copy, but had "no specific recollection [of] receiving the email." Daniel White also testified that the original email did not appear in his inbox by itself, only as part of the thread that he forwarded to Michael White.

Defendant filed a motion *in limine* to exclude from trial all evidence relating to the forwarded email and the purported employment agreement attached to it. Defendant argued that "no one has ever been able to produce the 1:24 am email" allegedly sent by John White to Plaintiff, or the draft agreement allegedly attached, and that "no person who purports to be a party to the alleged email is able to authenticate the alleged email." *Id.* at *5. Plaintiff responded that Daniel White and Michael White could authenticate the email and the attachment, and that they both "still maintain the email through their online providers."

Judge Hollander began her analysis by explaining that the purpose of a motion *in limine* is "to aid the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence" and to "rule in advance on the admissibility of documentary or testimonial evidence and thus expedite and render efficient a subsequent trial." *Id.* at *4. She further noted that the court may defer an issue for trial or make a definitive or final ruling on the merits, but that "courts should grant a motion in limine only when the evidence is clearly inadmissible on all potential grounds." Judge Hollander further explained that she had "wide discretion in determining the admissibility of evidence" under the Federal Rules of Evidence. *Id.* at *5.

Judge Hollander next addressed the rules relating to authentication under Fed. R. Evid. 901, which governs authentication of documentary or tangible evidence and provides that "the proponent of an item of evidence ... must authenticate the item by producing evidence sufficient to support a finding that the item is what the proponent claims it is." She noted that "the burden

to authenticate under Rule 901 is not high" and that a proponent need only present "evidence sufficient to support a finding that the matter in question is what the proponent claims." A document may be authenticated under Rule 901(b)(1) through testimony of a witness with knowledge, or under 901(b)(4) by its "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken together with all the circumstances."

Judge Hollander referred to a prior case, *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 546 (D. Md. 2007), to explain that determining whether electronically stored information (ESI) is authentic "is a two-step process," involving first determining whether its proponent has offered a satisfactory foundation from which the jury could reasonably find that the evidence is authentic, and second, "because authentication is essentially a question of conditional relevancy, the jury ultimately resolves whether evidence admitted for its consideration is that which the proponent claims." *Id.* at *5-6 (quoting *Lorraine*). She further explained that "the question for the court under Rule 901 is whether the proponent of the evidence has offered a foundation from which the jury could reasonably find that the evidence is what the proponent says it is." In other words, the court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the jury ultimately might do so. *Id.* at *6 (quoting *Lorraine*).

Judge Hollander found that Plaintiff had satisfied the prima facie showing required under Fed. R. Evid. 901 and denied Defendant's motion to exclude the forwarded email and attachment. She found that Daniel White, a witness with knowledge, stated that he helped Plaintiff find the email, that he was blind copied on the original email, and that he denied making any alterations in the email. *Id.* at *6. She also found that there was "no evidence to suggest that the email is not authentic."

Judge Hollander declined to find that the email was inadmissible because Daniel White has no specific recollection of receiving it, explaining that "given that the email was allegedly disseminated over a decade ago, it would be surprising if Daniel [White] had remembered receiving it." She noted that at best, this raised a question about the weight the jury should place on the email and attachment. Ultimately, she concluded that "[i]t is not the Court's obligation to determine whether the [email] is what plaintiff says it is, but rather whether there is sufficient evidence for a jury to decide that issue."