

3. A ruling from the U.S. District Court for the Northern District of California applying proportionality standards and declining to compel a law firm to produce native time entry data and associated metadata in connection with a fee application.

In *United States v. Academy Mortgage Corporation*, 2023 WL 8851618 (N.D. Cal. Dec. 21, 2023), U.S. District Judge Edward M. Chen applied the proportionality standard under Rule 26 to a request for contemporaneous law firm time entries and associated metadata.

The Defendant in this False Claims Act case sought relief from an order of U.S. Magistrate Judge Sallie Kim denying Defendant's request to compel production of documents from counsel to the Relator. *Id.* at *1. In particular, in connection with a fee application by Relator's counsel, Defendant had requested "all contemporaneously entered time entries" and the "metadata associated with each of the time entries" including the time, date, and person who made the entry.

Magistrate Judge Kim had denied the request for the raw time entries and metadata, finding that Defendant had provided "no valid reason for this additional data, as Relator has already spent time providing nonprivileged information regarding the fees." After balancing the burden to Relator to further collect and review the materials against the failure by Defendant to provide a compelling reason for the need for the additional information, Magistrate Judge Kim concluded that the burden on Relator and its counsel outweighed Defendant's need for the discovery.

Judge Chen began his analysis by noting that Rule 72 requires a magistrate judge's order to be set aside if it "is clearly erroneous or is contrary to law," meaning that "a mistake has been committed" or that the order is "contrary to law."

Judge Chen then explained that the parties' dispute ultimately was a question of proportionality, "i.e., balancing burden of production against the needs of the case." *Id.* at *2 (citing Rule 26(b)(1)). Although the magistrate's order was "succinct," Judge Chen concluded that it was not "clearly erroneous or contrary to law to find that the balance weighed against production."

Defendant argued that the raw time entries and associated metadata were necessary because the billing records supporting the motion for fees reflected reconstructed billing rather than contemporaneous billing. This would be relevant because courts have been willing to reduce the amount of fees awarded to attorneys when the request is based on reconstructed time as opposed to contemporaneous time records. Defendant also believed that Relator's counsel may have been billing for time spent reconstructing the records in connection with fee motion, which would also be relevant to the court's consideration of the fee motion. In response, Relator argued

that production of raw time entries and associated metadata would impose a heavy burden and was not necessary because of the time entries already submitted.

Judge Chen noted that Defendant had not provided evidence supporting that the time entries from Relator's counsel were reconstructed. In this regard, he noted testimony from the founding partner of Relator's counsel attesting that "[t]imekeepers at our firm are required to make a record of the work they do at or near the time the work is done either by personally entering that information into the firm's timekeeping software or by directing a staff member to do so." Judge Chen explained that while the time records were reviewed *post hoc* for accuracy, to ensure that work billed was not duplicative and or unnecessary, and for privilege, the underlying reports were represented to have been created in the first instance contemporaneously.

In response to Defendant's argument that the time records submitted were indicative of reconstructed time because of the "large number of hours" spent reviewing and preparing the time records for submission, Judge Chen found that the number of hours was consistent with Relator's counsel's explanation that the time was spent reviewing over 9,000 time entries, spanning seven years of litigation, and engaging in substantial vetting of those entries, including cross-checking the entries against emails for accuracy, determining whether there were inefficiencies or duplication of efforts, reviewing entries and making judgment calls as to whether reductions of time were appropriate to ensure that all compensation sought was appropriate, and conducting a privilege review of the time entries.

Judge Chen next found that requiring Relator's counsel to re-review all of the entries to prepare for production in raw form would impose a substantial burden. Specifically, he noted that there were over 9,000 entries that may, at a minimum, contain privileged information, and the privilege was not waived just because the time records were submitted in connection with a fee motion. Judge Chen noted that Relator's counsel did not put the records "at issue" by submitting them. He also held that requiring further production would incur additional delay in adjudicating the motion for fees that had been pending for some time.

In conclusion, Judge Chen found that Relator's counsel had submitted a legitimate basis to find that the documents requested were not proportional to the needs of the case, and therefore that Magistrate Judge Kim's decision declining to compel production was not "clearly erroneous or contrary to law." *Id.* at *3.