The Buckley Sandler *eDiscovery Update* is a quarterly publication that highlights key cases and other developments bearing on electronic discovery issues. Buckley Sandler's eDiscovery group has extensive knowledge and experience in electronic discovery in compliance, enforcement, and complex litigation matters. If you would like to discuss any electronic discovery matters with our team, do not hesitate to contact us.

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Court applies proportionality factors both to compel production of documents and to deny request for cost-shifting

On September 11, 2017, Magistrate Judge G. Michael Harvey of the District Court for the District of Columbia granted a defendant's motion to compel documents in the custody of the plaintiff's CEO.

In its motion, the defendant sought to compel the plaintiff to add its CEO to a list of custodians whose documents would be collected, searched for certain keyword terms, and potentially produced.

The plaintiff argued that production of the CEO's documents would be too burdensome and provided an initial, detailed projection that predicted an additional cost of $250,000 to collect, review, and produce the documents. The court ordered the plaintiff to collect a random sample of the CEO's documents, apply the parties' agreed-upon search terms, and refine its cost and burden estimates. After conducting that exercise, the plaintiff revised its cost projection to $142,000, but still argued that the low responsiveness rate of the CEO's documents created an "unnecessary burden and expense."

The court observed that the plaintiff presented arguments about just one Rule 26 factor—the burden and cost of production as weighed against the benefit—among the many factors that enter into a Rule 26 assessment, including the importance of the issues at stake, the amount in controversy, the parties' relative access to information, and the parties' resources. The court found that every factor favored granting the defendant's motion to compel.

The plaintiff also argued that should the court compel production of the CEO's documents, the defendant should be required to pay for a portion of the production costs under a cost-shifting analysis. The court noted that the proportionality factors of Rule 26 are "essentially identical" to the factors other courts have considered when deciding whether to shift costs. Under the same proportionality factors, it found that the defendant's proposed discovery did not impose an undue burden that warranted a reallocation of expenses.

The court granted the defendant's motion to compel and denied the plaintiff's motion for cost-shifting.

The case is *Oxbow Carbon & Minerals LLC v. Union Pacific Railroad Co.*, No. 11-CV-1049 (PFL/GMH), (D.D.C. Sept. 11, 2017). A copy of the opinion can be found here.

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Court sanctions party for destruction of handwritten journal despite availability of partially scanned version

On September 20, 2017, Magistrate Judge Nina Y. Wang of the District of Colorado sanctioned a plaintiff for destroying her original, handwritten journal containing notes relevant to her employment discrimination claim, despite retaining and producing a partially scanned version.

The plaintiff initially contended that she had produced all relevant documents, but the existence of her journal came to light in her deposition. The plaintiff conceded that she previously scanned parts of the journal, provided the digital version to her attorney, then shredded the original. The court found it was "clear" that the plaintiff had intentionally destroyed the original journal because she believed it contained sensitive information about other individuals not associated with the lawsuit.

The court held that spoliation had occurred. First, the court found that the plaintiff had a duty to preserve the original notebook. The plaintiff hired an attorney within a day after being fired, and before shredding the original journal and sending a scanned copy to her lawyer. The court observed that "it should have been clear that [the plaintiff] needed to preserve the original, or counsel for Plaintiff should have specifically advised her of such" because the duty to preserve evidence attaches not when litigation commences but when a party is on notice that documents "might be relevant to a reasonably-defined future litigation."

Second, the court found that the defendant had been prejudiced. With access to only a scanned version, the Court reasoned, the defendant could not be sure whether pages were removed or ascertain differences in ink colors or impressions that may be probative of the timing of, or other information about, the journal entries.

The court awarded the defendant fees and costs associated with its motion and the re-opening of the plaintiff's deposition. The court did deny the defendant's motion for an adverse inference instruction, because while it had found defendant had been prejudiced, it also found there was insufficient evidence to determine the "scope and extent" of the prejudice as to warrant this greater sanction.

The case is *Mitcham v. Americold Logistics, LLC*, No. 17-cv-808-WJM-NYW (D. Colo. Sept. 20, 2017). A copy of the opinion can be found here.

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Court crafts its own ESI search strategies and orders defendant to employ them

On September 29, 2017, Magistrate Judge Laura Fashing of the District of New Mexico denied a defendant's motion for a protective order and ordered the defendant to employ certain search strategies outlined in her order.

The discovery dispute arose in the context of a pay discrimination lawsuit brought by the United States. The government had already succeeded in compelling a list of search terms used by the defendant, but then argued that there were continued deficiencies in the search terms provided by the defendant. Before the court had an opportunity to respond to the parties' informal request for court intervention, the defendant filed a motion for a protective order, arguing that additional searches were not proportional to the needs of the case.

The court stated that the defendant's motion was "not well taken" and denied it, stressing that cooperation among counsel is the key to electronic discovery. The court held that the defendant "did not adequately confer with the United States before performing the searches, which resulted in searches that were inadequate to reveal all responsive documents." As a result, the court found it had to determine "which searches will be conducted" and it crafted three search strategies to be applied by the defendant to three specific data source sets.

The court ordered the defendant to perform searches in accordance with the detailed instructions of its order. The court also ordered that, if the parties needed additional time to complete discovery, they were required to confer and submit a joint motion and proposed order.

The case is *United States v. New Mexico State Univ.,* No. 1:16-cv-911-JAP-LF (D.N.M. Sept. 29, 2017). A copy of the opinion can be found here.

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Overburdened court refuses to conduct in-camera reviews, grants plaintiff's motion to compel "quick peek"

On October 4, 2017, Court of Federal Claims Judge Margaret M. Sweeney granted the plaintiffs' motion to compel a "quick peek" of 1,500 documents despite the government's objection that the documents were privileged.

Under Federal Rule of Evidence 502(d), a "quick peek" allows the parties to produce documents for review and return without engaging in a privilege review, but without waiver of privilege or work product protection, as a way to avoid the excessive costs of full privilege review and disclosure when large numbers of documents are involved.

The government had withheld 1,538 documents on the basis of privilege, but subsequently produced 22 of those documents after the plaintiffs challenged 38 of those claims of privilege. In seeking a "quick peek" of the remaining 1,500 withheld documents, the plaintiffs argued that the government's concession regarding the documents previously withheld as privileged cast doubt on the validity of the government's privilege assertions generally.

The United States argued that a "quick peek" was inappropriate because, *inter alia,* the government could find only one case in which a court ordered a "quick peek" over the producing party's objection.

In granting the plaintiffs' motion, the court predicted that if it had denied plaintiffs' request, then the plaintiffs would file another motion seeking the court's in camera review of all of the remaining 1,500 documents. Citing its "heavy caseload and limited resources", the court noted that "even though defendant has already reviewed the subject material multiple times, plaintiffs will continue to seek production of these materials, which will, in turn, continue to place a burden on the court—one which could be alleviated through the parties' use of the quick peek procedure."

The case is *Fairholme Funds, Inc. v. United States*, No. 13-465 (Ct. Fed. Cl. Oct. 4, 2017). A copy of the opinion can be found here.

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Court rejects "unilaterally redacted" production, compels production of unredacted documents

On October 26, 2017, District Judge Pamela Pepper of the Eastern District of Wisconsin granted a plaintiff's motion to compel production of unredacted documents.

The plaintiff's motion to compel related to over 600 documents that had been "unilaterally redacted" by the defendants. The defendants argued that they had redacted only the non-responsive portions, and that the redactions were necessary to protect confidential contractual and financial relationships and other business information irrelevant to the litigation.

In its motion, the plaintiff observed that large swaths of responsive documents were redacted, including in one instance 30 pages of a 37-page document. They noted that there was no question that the documents themselves were within the scope of discovery, and argued that the defendants could have objected to the introduction of the allegedly irrelevant portions of the documents into evidence rather than redacting the documents.

The court agreed with the plaintiff, and also observed that the defendants had not argued that they were inadequately protected by a protective order issued earlier that provided that documents marked as "CONFIDENTIAL INFORMATION" could not be disclosed to outside parties. The court saw no "compelling reason" to alter the "traditionally broad discovery allowed by the rules."

The court granted the plaintiff's motion and ordered production of unredacted documents.

The case is *IDC Fin'l Publishing, Inc. v. Bonddesk Group, LLC,* No. 15-cv-1085-pp (E.D. Wisc. Oct. 26, 2017). A copy of the opinion can be found here.

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Court rejects boilerplate objections in ordering production of documents

On November 29, 2017, District Judge Jeffrey Cole of the Northern District of Illinois ordered a defendant to produce documents in response to three of the plaintiff's discovery requests.

The defendant had responded by objecting to each request "as seeking documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence" and further objected "to the extent that [the request] seeks records protected by the attorney client privilege, the work product doctrine, or any other applicable privilege."

Judge Cole cited extensive authority for the court's conclusion that "boilerplate objections like those advanced here will not be condoned or honored" and that parties cannot effectuate objections "by the invocation of routinized boilerplate objections rather than actually showing why a discovery request is improper." The court noted that generalized objections are akin to "not making any objection at all."

In his analysis of one of the plaintiff's responses to a document request, Judge Cole inserted this telling footnote: "To the limited extent that the response went slightly beyond these rote objections, they could easily have been resolved with a phone call. They weren't."

The court continued: "Long and bitter experience has taught that only a refusal to accept unedifying and improperly uninformative responses to discovery requests will lessen their continued utilization and help to achieve those ends for which the discovery provisions of the Federal Rules of Civil Procedure were enacted."

The court ordered the plaintiff to produce the documents.

The case is *Bankdirect Capital Finance, LLC v. Capital Premium Financing, Inc.*, No. 15-C-10340 (N.D. Ill. Nov. 29, 2017). A copy of the opinion can be found here.

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Court cites burden of probable "judicial intervention" under Rule 26(b) to affirm order denying motion to compel production

On December 26, 2017, District Judge John A. Woodcock, Jr. denied respondents' objection to the magistrate judge's discovery order, holding that the respondents failed to demonstrate that the order was either clearly erroneous or contrary to law.

The Federal Energy Regulatory Commission ("FERC" or "Commission") had investigated the respondents for allegedly artificially inflating the demand for electricity consumed from the grid during peak hours, and profiting from their misrepresentations in seeking financial incentives under an energy rebate program. FERC reviewed documents and conducted depositions of all the parties who signed the application seeking financial incentives from the energy program, including the consulting firm and its managing member ("respondents"), one of its clients, and that client's energy broker. The Commission concluded from its investigation that respondents had committed fraud and instituted administrative proceedings against the respondents. It also sought a court order affirming the assessment of civil penalties for violations of the Federal Power Act and the Commission's Anti-Manipulation Rule.

The magistrate judge issued an order on discovery, and the respondents objected to parts of the order that denied its request for documents related to FERC's decision not to pursue an enforcement action against (among other entities) the broker. The magistrate judge had reasoned that the documents sought were likely marginally relevant and likely protected under claims of work product and multiple privileges.

The respondents appealed, arguing that the broker was more culpable for the alleged violations, and if FERC had legitimate reasons for dropping its investigation against the broker, than those reasons should apply as well to themselves.

The court found that the requested information was at best marginally relevant to whether the respondents had committed the violations alleged. The court also found that the requested information was likely privileged, and the burden to identify and assert privileges to all potentially relevant documents was "manifestly burdensome." Notably, the court also claimed the respondents' position would "require judicial intervention into the validity of FERC's privilege assertions for each document [and] devolve this discovery dispute into a Freedom of Information Act case, which are

notoriously dense and characterized by delay." The court held that the respondents failed to carry their burden to demonstrate that their request was proportional under Rule 26(b).

The court denied the respondents' partial objection to the magistrate judge's discovery order.

The case is *Federal Energy Regulatory Commission v. Richard Silkman*, No. 1:16-cv-00205-JAW (D. Maine Dec. 27, 2017). A copy of the opinion can be found here.

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Our mailing address is:
Buckley Sandler LLP
1250 24th Street NW, Suite 700
Washington, DC 20037
Add us to your address book