UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

COUNTY OF COOK, Plaintiff,	)	Case No. 14-cv-2280
v.	)	Hon. Elaine E. Bucklo
BANK OF AMERICA CORPORATION, et al., Defendants.	)	Magistrate Judge Sunil R. Harjani

PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL THE ADDITION OF CUSTODIANS

ARGUMENT

I. PLAINTIFF FULFILLED ITS OBLIGATIONS TO MEET AND CONFER PURSUANT TO RULE 37.2.

Defendants concede that Plaintiff raised the addition of ESI custodians during the parties' telephonic meet and confer discussions on September 13, 2019. [1] Defs.' Opp.[2] at 2. As Defendants also concede, during that meet and confer, Defendants summarily denied Plaintiff's request, making it abundantly clear that Defendants would not agree to add *any* custodians to the list of custodians approved by Judge Rowland on May 18, 2016. *See* Sept. 13, 2019 email from J. Evangelista to M. Sheldon (confirming Plaintiff's understanding of Defendants' position as stated during the meet and confer that "Defendants will not agree to search for ESI from any additional custodians."), attached hereto as Exhibit A. That meet and confer sufficiently satisfied Rule 37.2 and, given that Defendants were so adamant about not compromising on this issue, any subsequent meet and confers on this issue would have been futile. Nonetheless, in the September 13 email, Plaintiff continued to provide Defendants with the opportunity to reconsider their position and agree to add any of the custodians that Plaintiff identified in the email. Exhibit A.[3] Defendants did not respond. Accordingly, Plaintiff met its obligation to meet and confer with Defendants prior to filing its motion to compel.

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[1] To clarify and correct a statement made in the introduction of Plaintiff's opening motion regarding the dates of meet and confers held on the issue of additional custodians, although the parties met and conferred on September 10, 11, 12, and 13, 2019 on a multitude of outstanding discovery issues, Defendants are correct that Plaintiff raised, and the parties conferred about, the specific issue of additional custodians only on September 13. Moreover, as noted in Plaintiff's opening motion and elsewhere in this reply, the issue has been raised with the Court on several occasions and Defendants cannot claim ignorance of it.

[2] "Defs.' Opp." refers to Defendants' Opposition to Plaintiff's Motion to Compel the Addition of Custodians, Dkt. No. 348.

[3] In light of Defendants refusal to consider the addition of ***any*** custodians, and given the Court's instruction that all outstanding issues must be raised, Plaintiff believed it prudent to list all of the disputed custodians that Plaintiff firmly believes are likely to have the critical evidence in this case.

Defendants' arguments about the meet and confer process falls especially flat given that Defendants included additional custodians in their motion to compel ESI that the parties had not met and conferred about, providing no notice to Plaintiff until approximately 9:30 pm, just before they filed their motion to compel ESI from the County. *See* Sept. 16, 2019 email from L. Swank to K. McGregor, attached hereto as Exhibit B. And, Defendants *just requested* that the County add *another custodian* to its ESI searches, *see* Sept. 26, 2019 email from L. Straus to K. McGregor, attached hereto as Exhibit C, long after the time to raise, let alone meet and confer about, such issues.

In the scramble to identify, try to meet and confer, and move to compel on all outstanding issues -- as the Court ordered the parties to do within a very short time frame – a large number of issues were raised and resolved between the parties. But the unexpected and expedited timing resulted in several issues being raised by both parties at the last minute, including ESI custodians.[4] Plaintiff believes the important issue for the Court to focus on here is to make sure each party gets the discovery they are entitled to under the Federal Rules.

II. JUDGE ROWLAND DID NOT HAVE THE BENEFIT OF ADDITIONAL INFORMATION LEARNED SINCE HER RULING ON THE CUSTODIANS TO BE INCLUDED IN DEFENDANTS' ESI SEARCHES

At the time Judge Rowland issued her ruling on May 18, 2016 regarding which custodians should be included in Defendants' ESI searches, she did not have the benefit of additional

[4] In the rush, Plaintiff mistakenly included in its motion custodians who were already included in Defendants' ESI searches (John Murray, Eric Wrobel, Larry Washington, Lenny McNeill, Lilia Villasenor, and Miguel Bassail). However, Defendants have not yet produced *any* e-mails for Lilia Villasenor, John Murray or Miguel Bassail. Defendants have not produced any e-mails authored by Lenny McNeill and Larry Washington, but, rather, only a minimal amount of e-mails on which they were either copied or recipients. Defendants have only produced 178 original documents for Eric Wrobel, 36 of which are near duplicates and 56 exact duplicates of other e-mails produced.

information now available.[5] District courts have the inherent authority and broad discretion to reconsider interlocutory orders. *See Wimberly v. GMC*, 1997 U.S. Dist. LEXIS 699, *4; (N.D. Ill). ("The court may grant a motion to reconsider an interlocutory order 'as justice requires.'") (collecting cases). In particular, the "court has inherent and discretionary authority to reconsider its discovery rulings and modify them in light of the circumstances of the case." *Petit v. City of Chicago*, 1999 U.S. Dist. LEXIS 1362, at *10 (N.D. Ill. Feb. 8, 1999); *see also Dietz v. Bouldin*, 136 S. Ct. 1885, 1992 (2016) ("[T]the Court has recognized that a district court ordinarily has the power to modify or rescind its orders at any point prior to final judgment in a civil case.").[6]

The changed circumstances of this case, including the amendment of the complaint and information learned during Plaintiffs' investigation of its claims, warrants modification of Judge Rowland's May 18, 2016 order to add additional custodians to Defendants ESI searches.

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[5] Defendants' assertion that Judge Rowland's ruling is law of the case is erroneous. The law of the case doctrine provides that, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." *Redfield v. Continental Cas. Corp.*, 818 F.2d 596, 605 (7th Cir. 1987) (emphasis added). Judge Rowland never articulated a "rule of law" to deny the County's request. The law of the case doctrine is, therefore, inapplicable. Even if it were applicable, the law of the case doctrine is "discretionary" and "will not be enforced where it is clearly erroneous or where doing so would produce an injustice." *Id.*

[6] Defendants' citations to *Cheese Depot Inc. v. Sirob Imports, Inc.*, 2019 WL 1505399, at *1 (N.D. Ill. Apr. 5, 2019) (Harjani, J), and *Bullock v. Dart*, 599 F. Supp. 2d 947, 964 (N.D. Ill. 2009) (Bucklo, J.), in support of their argument that this Court cannot modify Judge Rowland's order are inapposite. First, Defendants misstate the standard for a district court to reconsider an interlocutory order, particularly a discovery minute order. Defendant improperly cites Judge Harjani's opinion in *Cheese Depot Inc. v. Sirob Imports, Inc.*, 2019 WL 1505399, at *1 (N.D. Ill. Apr. 5, 2019) (Harjani, J), for the proposition that the County must demonstrate "manifest error of law or fact" or "newly discovered evidence" to have an interlocutory discovery minute order reconsidered. That is simply not the rule (it is the policy objective of the rule, at least according to the *Cheese Depot* court, but not the rule). In *Cheese Depot*, after the case was transferred to Judge Harjani, the Defendant sought reconsideration of the prior judge' denial of its summary judgment. Likewise in *Bullock v. Dart*, the defendant sought the reconsideration of the denial of a motion for summary judgment. In the cases cited by Defendants, granting the motions for reconsideration would have terminated parts of the case. Here, Plaintiff is only requesting reconsideration of a magistrate's initial minute order limiting discovery based on newly discovered evidence produced by BOA. Plaintiff's request does not involve a final order, as was the case in *Cheese Depot*, and it cannot be considered a "second bite at the apple" because it is based on newly discovered evidence.

A. Judge Rowland's Prior Ruling Was Based on a Prior Complaint with Different Allegations

Judge Rowland made her May 2016 ruling based on what she believed was relevant to Plaintiff's prior complaint in this action. On July 7, 2017, Plaintiff filed its Second Amended Complaint ("SAC"). Dkt. No. 177. Importantly, the SAC added a stand-alone claim under the Fair Housing Act for discriminatory mortgage servicing and foreclosure practices. *See* SAC ¶¶ 428-442 (Count II); Dkt. No. 351, Yenouskas Decl., Exh. 6 at 296-304. Nine of the additional custodians are relevant to those allegations and Plaintiff's need for these custodians is *greater* now due to these additional allegations, thereby tipping proportionality in favor of including these custodians. *See* Pls.' Motion at 5-6 (Anne Cardozo, Tammy Spriggs, Sylvia Kawakami, George Ellison, Jennifer Eisenberg, Laura France, Patrick Carey, Kelly Kent, Rene Giacalone).

Defendants' argument that Plaintiff does not need these additional custodians because Defendants have purportedly produced an "extensive amount" of documents concerning FHA compliance, Defs.' Opp. at 14, is disingenuous, at best. The only compliance documents Defendants have produced are policy documents. Defendants have refused to produce any compliance reports or other documents that would indicate failure to comply with its policies and these documents are the subject of a motion to compel by Plaintiff. *See* Dkt. No. 350, at 1-3 (Fair Lending Compliance Documents).

Similarly, Defendants' claim that is has already collected documents that include documents from some of the proposed custodians and custodians whose documents are purportedly duplicative of the proposed custodians is misleading, because Defendants cite the number of documents *collected*, not those that are likely relevant and that have been or will

ultimately be produced.[7] For example, Defendants claim that 85,000+ documents involving Jim Buchanan are "already part of the current document population." Defs' Opp. at 14. Again, this is misleading because this is the number of documents collected, not the number of relevant documents. Defendants have not produced a single document authored by Jim Buchanan and have only produced 377 original documents even referencing Jim Buchanan. Defendants also claim that their collection already includes tens of thousands of e-mails for the "major players" (Gissinger, Lumsden, Bielanski, and Desoer), Defs.' Opp. at 11 and Dkt. No. 351, Yenouskas Decl., Exh. 7, but do not say how many of those actually hit on search terms and may be relevant.

B. Judge Rowland Did Not Have Additional Information Learned Through Plaintiff's Investigation

In deciding which custodians to allow, Judge Roland stated: "I am not going to allow the custodians to include the major players at CW [Countrywide] and Bank of America, Gissinger, Bielanksi, Desoer and Lumsden." Dkt. No. 143 (May 18, 2016 Hr'g. Tr.) at 3:5-8. However, through its independent investigation, Plaintiff has learned from a former Countrywide employee that Countrywide's scheme was *orchestrated* by the "major players," not by rogue employees. Evangelista Dec. ¶5, attached hereto as Exhibit D. Plaintiff's investigation has uncovered that Countrywide's operations were highly siloed, meaning that only top personnel were privy to their group's respective role within the greater equity stripping scheme. *Id*. ¶6. Lower level employees only performed their given tasks and cannot speak to the overall scheme carried out by the requested custodians. *Id*. ¶8.

The critical, potentially game-changing, information Plaintiff has learned through its investigation justifies increasing the number of custodians to include those who orchestrated the

[7] As explained below, Defendants have collected the entire universe of documents for custodians, not just those that result from running the search terms to find potentially relevant documents.

predatory and discriminatory equity stripping scheme. *See* Motion at 6-7 (Gissinger, Lumsden, Bielanski, Desoer, O'Donnell, Winston, and Foster). Excluding these "major players" and "national whistle-blower[s]" from Plaintiff's requested custodians cuts at the heart of Plaintiff's case.

C. The Whistleblowers' ESI Includes Relevant Information

Judge Rowland excluded the whistleblower custodians based on her belief that the whistleblowers were not likely to have information that is relevant to this case. Dkt. No. 143 (May 18, 2016 Hr'g. Tr.) at 2:23-3:4 ("I think that I am not going to allow custodian -- I am not going to allow the -- what I would call the national whistle-blower, the -- Mr. O'Donnell, Miss Foster and Miss Winston, to be included in the custodians. I am sure they are -- I am sure they have very interesting e-mails that would be interesting to read about, but I don't see the relevance to this case"). However, Defendants *agreed* to include O'Donnell in its custodians. *See* Dkt. No. 120 at 3-6. Indeed, Defendants note that 200,000 of O'Donnell's ESI documents are included in the documents subject to its searches. Defs.' Opp. at 12. Accordingly, there is no dispute that O'Donnell's ESI includes information relevant to Plaintiff's claims.

Moreover, O'Donnell can speak to many of the core elements of Plaintiff's SAC such as Countrywide's "new "streamlined" loan origination model [] called the "Hustle," which "eliminated every significant checkpoint on loan quality and compensated its employees solely based on the volume of loans originated, leading to rampant instances of fraud and other serious loan defects, all while Countrywide was informing the GSEs that it had tightened its underwriting guidelines" and Countrywide's "revamped [] compensation structure of those involved in loan origination, basing performance bonuses solely on volume. Whereas loan processors and others previously received bonuses based on a combination of the quality and volume of loans they

processed, the Hustle removed any quality factor in compensation, making clear that employees should prioritize production."[8]

Eileen Foster "exposed systemic fraud at Countrywide Financial and the corrupt activities of company officials, both pre- and post-purchase."[9] "Foster oversaw an investigation in the summer of 2007 of multiple branches in the Boston area of the subprime division that revealed "massive evidence that employees had … manipulated the company's automated underwriting and property valuation systems.' 'Foster had found equally shocking activities in investigations in Miami, *Chicago*, Cincinnati, San Diego, Las Vegas and Los Angeles.'"[10] (emphasis added). Foster dispelled the false belief that it was borrowers lying on their applications – rather than fraud on the part of commission-hungry loan officers – that fueled the growth of the toxic loans that gave rise to the mortgage foreclosure crises.

Michael Winston was terminated after refusing to misrepresent Countrywide's actual policy to fund every loan, regardless of income, to Moody's Investors Service. Mr. Winston painted a vivid picture of Countrywide's equity stripping scheme in a June 8, 2016 New York Times interview[11] and again during a recorded July 17, 2016 panel talk featuring whistleblowers.[12]

All of these whistleblowers have information of Defendants' predatory mortgage practices, which resulted in a disparate impact on minority neighborhoods, including in Cook County.

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[8] *See United States of America ex rel. Edward O'Donnell*, v. *Bank of America Corp*., 2012 WL 5235021 (S.D.N.Y.)

[9] *See* "BofA/Countrywide Whistleblower Eileen Foster Wins Ridenhour Award: Former Employee Awarded Highest Whistleblower Honor," The Government Accountability Project, available at https://www.whistleblower.org/press/bofacountrywide-whistleblower-eileen-foster-wins-ridenhour-award/

[10] *Id.*

[11] *Available at* https://www.facebook.com/nytimes/videos/the-whistleblowers-michael-winston-part-2/10150823782224999/

[12] *Available at* http://frtv.org/2016/07/whistleblowers-who-they-are-and-why-you-should-care/

III. INCLUDING ADDITIONAL CUSTODIANS IN DISCOVERY IS NOT OVERLY BURDENSOME FOR DEFENDANTS

Defendants' claim that it would take more than six months for it to collect, search, and review the ESI of the proposed additional custodians (Defs' Opp. at 8) is directly at odds with their counsel's prior representation to the Court in 2016:

> I would propose that you do the same thing and keep that list to something manageable like 20 or 30 as opposed to -- because I can tell you what it will cost us to review 80, and I can tell you that ***we estimate that it would take 40 reviewers 7 1/2 weeks*** based on what we have. And that's based on -- that's based on actual evidence -- I mean actual estimates that we did in order to respond to the 80 custodians issues.

Dkt. No. 113 (Mar. 24, 2016 Hr'g. Tr.) 55:16-23 (emphasis added). Defendants' counsel also previously represented to the Court that the ESI for many of the custodians had already been collected for other litigation (which would include the whistleblowers' cases). *Id.* at 54:15-20 ("depending on whether or not you order us to search e-mail for pre-2004 -- from pre-2009 -- and to be clear, what we have there is only things that were being held for random people who were custodians in other litigation, not because we have massive amounts of emails.").

Moreover, Defendants' claim of burden is self-induced. Defendants have intentionally multiplied the amount of time the production will take along with its costs.

First, Defendants' decision to broadly collect an extraordinary large amount of total available data for each custodian, on average nearly 81 gigabytes of information per custodian, significantly increases Defendant's own costs and time for discovery, skewing Defendants' projections for how long it will take to complete production. *See* Mandal Dec. ¶¶ 8-13, attached hereto as Exhibit E. This is evidenced by the fact that, while Defendants collected over 9.5 million documents, only a little more than 800,000 e-mails, plus attachments, etc. totaling a little over 2

million documents, remained for review after running key word searches and standard bulk culling. *Id*. ¶ 14. [13]

Second, Defendants claim that it would take 6 months to review documents for responsiveness and privilege if the additional custodians Plaintiff requests are added should not be seriously given credence. *See* Defs' Opp. at 8. Defendants' contention that adding additional documents will result in the need to conduct "significant additional document review" is based on a misunderstanding of TAR 2.0. *See* Defs.' Opp. at 10; McDonald Dec. 13, 16. TAR 1.0 may be impacted by this issue, but TAR 2.0 is designed to overcome low richness and raise the documents predicted by the machine to be relevant to the top for reviewers to see. Mandal Dec. ¶17. This fact is accurately noted by Mr. McDonald in paragraph 11 of his declaration. One of the benefits of TAR 2.0 is that adding additional documents to an existing review requires less effort than when starting a new review. Mandal Dec. ¶21. Once the algorithm is trained and stabilizes, which it certainly should be after over 400,00 documents have been coded, newly added documents will be immediately scored by the system with probable relevant documents receiving high scores and probable non-relevant documents receiving low scores. *See Id*. Indeed, Defendants represented to the Court in the parties Initial Joint Status Report dated September 3, 2019, that they "are continuing to review and produce ESI documents, and anticipate completion of their review process in September 2019." Dkt. No. 331, at 9. Therefore, given that Defendants have only reviewed 400,000 of the over 2 million total documents and Defendants believed they would complete the review by the end of September, it must be the case that Defendants had reached, or

[13] Defendants assertion that the collected data from their servers encompassed 9,541,679 documents (Defs' Opp at 8) is duplicitous and serves to distract the Court from the true fact that, to date, Defendants have only produced 45,973 documents. Swerdloff Dec. ¶4, attached hereto as Exhibit F.

were close to reaching, the point at which the algorithm is trained and stabilizes such that "further review is not warranted." *See* Defs.' Opp. at 10.

Moreover, Defendants' estimated review time is not based on the actual amount of data from these custodians, but an estimate that is predicated on the data from the custodians whose ESI has been collected. *See* MacDonald Dec. ¶ 16; Mandal Dec. ¶19. This assumption applies a straight-line "proportional" assumption; however, the additional custodians are not likely to have the same amount of data as the original custodians. Mandal Dec. ¶20. It is possible that the additional custodians will have less data than Defendants estimate. Defendants previously represented to the Court that they may not even have any ESI for some custodians. Dkt. No. 113(March. 24, 2016 Hr'g. Tr.) 56:22-57:4. Thus, it appears that Defendants' claim of burden and time is purely conjectural as they have not indicated whether any of the additional custodians have data that are still being kept pursuant to prior litigation holds or the amount of data any of these additional custodians actually have.

IV. GRANTING PLAINTIFF'S REQUEST WILL NOT VIOLATE THE COURT'S SCHEDULING ORDER.

When the parties made proposals for the recently revised scheduling order, Defendants proposed that Plaintiff be required to complete its entire ESI collection, search, review and production in less than two months even though the parties had not yet agreed on custodians and search terms. Dkt. No. 331, at 6. Now, Defendants claim that "[i]t will not be logistically possible for Defendants to collect, review, and produce" the ESI for the custodians Plaintiff seeks to add within the two months remaining in fact discovery. Defs.' Opp. at 7. Contrary to Defendants' assertion (Defs' Opp. fn. 4), Plaintiff has not yet been able to begin its ESI searches because the parties have not agreed upon the exact final search terms to be run (or custodians for separately-elected offices). Yet, Plaintiff is expected to compete production of its ESI by the end of November

with substantially less resources than Defendants.[14] Accordingly, the burden on Defendants to include the proposed additional custodians within the deadlines set in the Court's scheduling order is certainly not greater than the burden on Plaintiff to complete its ESI production.[15]

CONCLUSION

Based on the foregoing, Plaintiff respectfully requests that the Court grant Plaintiff's motion to include additional custodians in Defendants' ESI searches.

Dated: October 1, 2019

Respectfully Submitted,

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[14] Unlike Defendants, Plaintiff does not have the resources to outsource the collection and running of search terms to an outside e-discovery vendor. Rather, Plaintiff will be running search terms in-house and then exporting the resulting e-mails to the e-discovery vendor for review. Defendants, on the other hand, are utilizing an outside e-discovery vendor to collect and search its custodians' ESI. Plaintiff also does not have the resources to utilize TAR or hire substantial numbers of contract attorneys to review its ESI. Accordingly, it will take substantially longer for Plaintiff to complete its production of ESI than Defendants.

[15] To speed the review process, the Court could also consider issuing an order pursuant to Fed. R. Evid. 502 that accidental production of privileged documents in the case will not waive any applicable privileges or protection pursuant to the work-product doctrine and order the parties to enter into a "clawback" agreement.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I served the above and foregoing PLAINTIFF'S REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL THE ADDITION OF CUSTODIANS on all parties by causing a true and correct copy to be filed with the court's electronic filing system, which should automatically send a copy to all counsel of record.

Dated: October 1, 2019

/s/ *James M. Evangelista*
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