Order Form (01/2005)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Mary M. Rowland	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	08 CV 6910	**DATE**	December 21, 2012
CASE TITLE	In re Potash Antitrust Litigation (II)		

DOCKET ENTRY TEXT:

As more fully set forth below, Plaintiffs' Motion for Discovery Order Instituting Electronically Stored Information Search Protocol [443] is GRANTED IN PART AND DENIED IN PART. A status hearing is set for January 7, 2013 at 10:00 AM.

[For further details see text below.] Docketing to mail notice.

STATEMENT

Plaintiffs request that Defendants be ordered to comply with Plaintiffs' proposed ESI Search Protocol, which, among other provisions, would require Defendants to conduct server-wide searches for responsive information. Defendants contend that Plaintiffs' proposal would "impose tremendous burdens on Defendants, especially given the nature of their computer systems." (Dkt. 461 at 2). After carefully reviewing the parties' papers, the transcripts of Defendants' Rule 30(b)(6) witnesses, and hearing oral argument on the issues, the Court rules as follows.

In antitrust cases, courts generally take an expansive view of relevance and permit broad discovery. *Kleen Prods. LLC v. Packaging Corp. of Am.*, No. 10 C 5711, 2012 WL 4498465, at *13 (N.D. Ill. Sept. 28, 2012). Discovery in antitrust litigation is "broadly permitted and the burden or cost of providing the information sought is less weighty a consideration than in other cases." *U.S. v. Int'l Bus. Machs. Corp.*, 66 F.R.D. 186, 189 (S.D.N.Y. 1974) (citation omitted). "Broad discovery is permitted because direct evidence of an anticompetitive conspiracy is often difficult to obtain, and the existence of a conspiracy frequently can be established only through circumstantial evidence, such as business documents and other records." *In re Auto. Refinishing Paint Antitrust Litig.*, MDL No. 1426, 2004 U.S. Dist. LEXIS 21960, at *8 (E.D. Penn. Oct. 29, 2004); *see Callahan v. A.E.V. Inc.*, 947 F. Supp. 175, 179 (W.D. Penn. 1996) ("Discovery in an antitrust case is necessarily broad because allegations involve improper business conduct. Such conduct is generally covert and must be gleaned from records, conduct, and business relationships.") (citation omitted). Courts also note "the public importance of the decision, the need of large corporate defendants to know which of their many activities are attacked, [and] the issue narrowing function of discovery." *Bass v. Gulf Oil Corp.*, 304 F. Supp. 1041, 1046 (S.D. Miss. 1969). These factors create a predisposition among courts to allow broad discovery of

antitrust defendants.

However, "[a]ll discovery, even if otherwise permitted by the Federal Rules of Civil Procedure because it is likely to yield relevant evidence, is subject to the court's obligation to balance its utility against its cost." *U.S. ex rel. McBride v. Halliburton Co.*, 272 F.R.D. 235, 240 (D.D.C. 2011) (Facciola, M.J.); *see* Fed. R. Civ. P. 26(b)(2)(C). In employing the proportionality standard of Rule 26(b)(2)(C) . . . , the Court balances [the requesting party's] interest in the documents requested, against the not-inconsequential burden of searching for and producing documents." *Willnerd v. Sybase, Inc.*, No. 09 C 500, 2010 WL 4736295, at *3 (D. Idaho Nov. 16, 2010). Nevertheless, "[t]he party opposing a motion to compel carries a 'heavy' burden of persuasion." *U.S. v. AT&T Inc.*, No. 11-1560, 2011 WL 534178, at *5 (D.D.C. Nov. 6, 2011).

Here, Defendants do not contest that a server-wide search would yield responsive, relevant information. Instead, they assert that "running blanket searches across entire servers and networks would be exceptionally difficult for large, multi-location corporations like Defendants." (Dkt. 461 at 12). In order to lessen this burden, Plaintiffs offered to restrict their proposal to specific email servers and only for those employees who have potash involvement during the relevant time period. (Tr. 106). Defendants declined this proposal. (*Id.* 106–10, 114–15). The Agrium Defendants asserted that they have no way to search the seven terabytes of compressed emails on their servers. (*Id.* 25–26, 114; Dkt. 461 at 13 n. 12). The Mosaic Defendants and the PCS Defendants, on the other hand, acknowledge that, although time consuming, it could be possible to conduct the proposed compromise search. (Tr. 107, 114).

While the record does not afford a precise calculation, the Court can presume, given the nature of the antitrust claims and the size of the companies involved, that the amount in controversy is very large and that Defendants' resources are greater than Plaintiffs'. *See* Fed. R. Civ. P. 26(b)(2)(C); *Kleen*, 2012 WL 4498465, at *14. Further, claims of collusion in the international potash industry raise important, vital issues of public importance. *See id.* The Court finds that Defendants Mosaic and PCS have not met their burden to establish that searching specific email servers "is not reasonably accessible because of undue burden or cost." Fed. R. Civ. P. 26(b)(2)(B).

Accordingly, the Court orders:

1. For Defendants Mosaic and PCS, the parties' agreed-upon search terms[1] shall be run on a server-wide basis for emails for those employees who were involved with potash and only for those time periods when such employees were involved in potash. The parties shall meet and confer regarding whether other employees can be excluded from this search. For example, the parties should consider whether non-supervisory, plant-level employees need be included.

2. For Defendants Mosaic's and PCS's non-email discovery, the parties' agreed-upon search terms shall be run on a custodian-based approach.

3. For Defendant Agrium, Plaintiffs' Motion is denied, without prejudice. The agreed-upon search terms shall be run on a custodian-based approach. The custodians shall include all

[1] The parties have agreed on an initial 25,000 search strings. Recently, Plaintiffs proposed new search terms that have resulted in over 200,000 new search strings. The parties are under Court order to exchange information about these search strings, and plaintiffs are required to narrow the newly requested search terms by December 28, 2012. (Dkt. 478).

persons (approximately 90) on Agrium's litigation-hold list. Agrium shall, by December 28, 2012, set forth a full list of the agreed 41 custodians, including names and job titles, and the persons identified as subject to a litigation hold, including names and job titles, in this cause of action. *See Cannata v. Wyndham Worldwide Corp.*, No. 10 CV 0068, 2011 WL 3495987, at *2–3 (D. Nev. Aug. 10, 2011) (finding that while litigation hold letters are protected by the attorney-client privilege, the names of litigation hold recipients are not). All of these persons shall be considered custodians whose documents and ESI will be searched using the agreed-upon search terms for information responsive to the Plaintiffs' document requests in this case. To the extent the 116 persons who Plaintiffs proposed as custodians do not appear on Agrium's litigation hold list, the parties are ordered to meet and confer to reach agreement.

4. To implement this Order, the parties shall continue to meet and confer regarding the proposed ESI Search Protocols and shall prepare two protocols for the Court's review—one protocol for server-wide emails and the other for custodian-based searches. By January 4, 2013, the parties shall submit joint proposed ESI Search Protocols, or red-lined documents that highlights their differences, to Proposed_Order_Rowland@ilnd.uscourts.gov.

The ESI Search Protocols shall include the following provisions:

a. Transparency. The responding party shall:

i. Disclose the data sets against which searches were run;
ii. Disclose which search terms/strings were run;
iii. Disclose the number of responsive documents ("hits") identified by the searches;
iv. Disclose the number, type or origin of the documents identified by the searches;
v. Identify the universe of document they checked for privilege after running the searches; and
vi. Promptly produce a privilege log.

b. Search Terms and Search Strings. The parties must agree on search terms and search strings before they are implemented.

c. Iterative Process. The parties are encouraged to use sampling in their search protocols. If sampling is used, it shall be done formally, by means of a random number generator that will generate a statistically valid number of ordinal positions of the responsive documents.

d. Claims of Privilege. Consistent with Rule 26(b)(5), the responding party is entitled to run a full privilege check, withhold information otherwise discoverable on the basis of privilege, and seek to claw back privileged information inadvertently produced.